“Inherently Bad, and Bad Only”

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

Volume 1

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

Soda Creek Sam, of Jordan, Montana—“Fer Cat’s Sake!”

Marc Linder
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Iowa City 2012
The process of legislation is influenced by so many different factors that the history of a single bill, if given in detail, might fill many volumes.¹

But if a writer should be quite consistent,
How could he possibly show things existent?²

Your correspondent has called upon him [Karl Marx] twice or thrice, and each time the Doctor was found in his library, with a book in one hand and a cigarette in the other.³

There is no doubt in my mind that in some future time a healthier group of humans will look back with horror and amazement on these three or four centuries when people voluntarily committed a slow form of suicide through smoking, and foisted a noxious environment upon the[ir] non-smoking companions. These future citizens will regard ours as a primitive, unhealthy, unintelligent era, inexplicable except for the greed of those who manufacture cigarettes and [of] the governments which derive revenue from taxation thereof.

I couldn’t say that when I was Surgeon General. But I wanted to.⁴

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¹H. H. Dodd, “Working of the Legislative Mill,” HCT, May 4, 1921 (1:5) (reprinted from an unidentified issue of the Elma New Era that is no longer extant). Horace Dodd was the chief sponsor of the bill that repealed Iowa’s quarter-century statewide ban on the sale of cigarettes, about which, unfortunately, he wrote neither volumes nor even a brief newspaper article. See below ch. 15.

²Lord Byron, Don Juan, Canto the Fifteenth, lxxvii (1824).

³“Karl Marx: Interviews with the Corner-Stone of Modern Socialism,” CT, Jan. 7, 1878 (7:1).

Contents

Illustrations xxvii
Abbreviations liii
Note on Citation lxii
Acknowledgments lxvii
Preface lxv

INTRODUCTION

1 The Cigarette Industry/Nicotine Trust in the Late Nineteenth and Early Twentieth Century: Production and Consumption Levels and Trends and Contemporaneous Views of the Impact of State Sales Bans 3

2 The Woman’s Christian Temperance Union’s Quasi-Health-Based Anti-Cigarette Strategy 21

PART I

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

3 The First Successes Fail: 1889-1892 51
The First Legislative Chamber to Pass a Sales Ban: Michigan House 1889 55
The First Southern Chamber to Pass a Sales Ban: Arkansas Senate 1891 79
The First Legislative Chamber to Pass Both a Sales Ban and a Public Smoking Ban: Pennsylvania House 1891 86
The First Two Legislative Chambers to Investigate Cigarettes, After Hearing Scientists Refute (Trivial and False) Criticisms, Initially Refuse to Ban Their Sale 105
Georgia House 1891 105
Massachusetts House 1892 127

4 1893: Annus Mirabilis 144
Alabama’s Evanescent Public Smoking Ban: The House 146
Pennsylvania: The House Again Passes a Sales Ban and the Senate
Contents

Again Does Not 164
Kentucky: The House in the Leading Tobacco State Passes a Sales and Possession Ban 169
The Cigarette Sales Ban Ordinance in the State Capital: Frankfort 1889-90 170
The House Ban on Sales and Possession 178
The First Midwestern Legislative Chamber to Pass a Public Cigarette Smoking Ban: Minnesota House 183
Arkansas: Both Chambers Pass an Anti-Sales Ban, But the Senate Reconsiders, Has the Bill Returned from the House, and Kills It with Exemptions 195
The First State to Enact a Sales Ban: Washington State 203
California: The Senate Takes the Initiative, But Time Runs Out in the Assembly 211
Nebraska: A Virtually Unanimous House Makes No Impression on the Senate 213
Georgia: The House Learns from the Defeat in 1891, But the Senate Does Not 217
Legislative Chambers That Debated But Rejected Radical Bills 224
Illinois: “a crime against humanity” 226
Wisconsin 231
Massachusetts 237
A Different Strategy: (Purportedly) Prohibitorily High Licenses for Cigarette Sales 241
Nevada 251
Ohio 264
Texas 272
5 The Only Major Tobacco-Growing and -Manufacturing State to Prohibit Cigarette Sales: Tennessee 1897 283
Scientific Temperance Instruction 285
In the Legislature 287
Extraordinarily Rare Local Cigarette Sales Data Emerge on the Eve of Prohibition 296
The Tobacco Trust Initiates Judicial Challenges 303
The Tobacco Trust Tries Bribery—Again 311
6 Sales Ban Bills in Other States Passed by One Chamber (or Both Chambers and Vetoed) in the Late 1890s 329
Arkansas 1895 and 1899: The Third and Fourth Sessions to Pass an
Contents

Anti-Cigarette Bill that Did Not Become Law 330
California 1895: The First Legislature to Pass a Sales Ban Vetoed by the Governor 335
Colorado: 1895 and 1897 348
Invalidation of Denver’s $1,000 Prohibitory License Ordinance: 1897-98 369
Nebraska 1895: “Hugging a Corpse: The Decapitated Cigarette Bill Passes the Senate” 390
Indiana: 1895 and 1897 393
Massachusetts: 1895 and 1898 408
Kentucky: The House Passes a Ban on Sales in 1896 and Is Joined by the Senate in 1898 in Banning Sales and Possession 416
But a Waffling Governor Passes the Buck to the Lieutenant Governor to Veto the Bill 427
After Further Legislative Measures Stall, the Initiative Reverts to the Local Level 432
Alabama: 1896-97 441
South Carolina 1896 and 1897: House Passage of a 25-Cent per Package Prohibitory Privilege Tax 445
Pennsylvania: 1897 454
Maine: 1897 457
Illinois: 1897 487
Chicago’s License Ordinance, 1894-1907: Did the Aldermanic Boodlers Sandbag the Tobacco Trust or Was the Vice Versa? 503

7 Even the Leading Cigarette Tobacco Producing (and the Dukes’ Home) State Had to Debate Banning the Manufacture and Sale of “that nefarious little stinker”:
North Carolina 1893-1905 598
Charlotte and Greensboro Adopt and Repeal $200 License Taxes 601
Populist-Republican Fusion in the State Legislature Fails to Overcome the Tobacco Trust 608

8 Florida: The Last of the Nineteenth-Century Cigarette Sales Bans Is Judicially Invalidated After 18 Days in 1899 644
PART II
THE RISE AND FALL OF THE STATEWIDE PROHIBITION OF SELLING CIGARETTES IN IOWA: 1880s-1921

9 National Trends in Banning Tobacco Sales to Minors, Scientific Temperance Instruction, the WCTU, the Legacy of Liquor Prohibition, and Iowa’s No-Tobacco-Sales-to-Under-16-Year-Olds Law of 1894

Nationwide Developments in Prohibiting the Sale of Tobacco to Minors 671
Iowa Enacts the WCTU’s Scientific Temperance Instruction: 1886 689
The Woman’s Christian Temperance Union of Iowa, Its Christian-Socialist President, Marion Howard Dunham, and the National Woman’s Christian Temperance Union’s Quasi-Marxist President Frances E. Willard 698

The Context of Alcohol Prohibition in Iowa Politics and the Emergence of the Mulct Tax as an Ambiguous Weapon Against and Shield of Saloons 708
The Republican Party’s Embrace of Prohibition (1879-1889) 712
Alcohol Consumers’ Increasingly Democratic Voting Unleashes Internecine Republican Struggles over Legislative Strategies to Propitiate Saloon Customers Without Alienating the Party’s Prohibitionist Base (1889-1893) 716
Origins, Interpretation, and Enactment of a Mulct Tax: The Republican Party’s Escape Route from Its Electoral Dominance-Threatening Commitment to Statewide Prohibition (1894) 746
Relaunching the Sideshow of Constitutionalizing Liquor Prohibition (1894) 781
Iowa Finally Passes a No-Sales-to-Minors Law: 1894 784

10 The Universal Prohibition of the Sale of Cigarettes: 1896 795

Dr. Joseph Emmert, the Iowa State Board of Health, and the State of Medical Understanding of the Impact of Cigarette Smoking 798
Senate File No. 7 and Its Sponsor Julian Phelps 804
Senate Debate 810
House Action 826
## Contents

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Back to the Senate</td>
<td>845</td>
</tr>
<tr>
<td>Press Reactions to Passage</td>
<td>848</td>
</tr>
<tr>
<td>Attorney General and Governor Approve</td>
<td>850</td>
</tr>
<tr>
<td>The Cigarette Trust Already Initiates Plans to Evade the New Law</td>
<td>853</td>
</tr>
<tr>
<td>Public Comment on the General Prohibition of Cigarette Sales</td>
<td>854</td>
</tr>
<tr>
<td>Why Did the Republican Legislature Pass Cigarette Sales</td>
<td>856</td>
</tr>
<tr>
<td>Prohibition at the Same Time that It Was Perforating Its Liquor Prohibitory Law?</td>
<td></td>
</tr>
</tbody>
</table>

### 11 The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court: McGregor v. Cone (I)

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Tobacco Trade’s Business Response to Iowa’s General Cigarette Sales Ban</td>
<td>859</td>
</tr>
<tr>
<td>The Tobacco Trust’s General Counsel—Williamson Whitehead Fuller</td>
<td>862</td>
</tr>
<tr>
<td>Tantalizing Data on Cigarette Sales for Des Moines Compared with Other Fragmentary City- and State-Level Data</td>
<td>866</td>
</tr>
<tr>
<td>The Tobacco Trust’s Litigation Strategy: Relying on Recently Choreographed Litigation in Washington State, West Virginia, and Montana and the Original Package Doctrine</td>
<td>876</td>
</tr>
<tr>
<td>Washington State</td>
<td>877</td>
</tr>
<tr>
<td>West Virginia</td>
<td>907</td>
</tr>
<tr>
<td>Montana</td>
<td>914</td>
</tr>
<tr>
<td>Modified Choreography for Iowa</td>
<td>915</td>
</tr>
</tbody>
</table>

#### Conflicting Decisions in Federal and State Court

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Unsuccessful Initiative to Eliminate the Courts’ Original Package Doctrine Obstacle to State Anti-Cigarette Legislation by Passing a Federal Wilson Law for Cigarettes</td>
<td>917</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### 12 The 1897 Code Amendment Imposing a $300 Punitive Mulct Tax on the Prohibited Sale of Cigarettes and the Tobacco Trust’s Failed Judicial Strategy to Invalidate It

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Legislature Passes a Mulct Tax on Top of the Sales Ban</td>
<td>937</td>
</tr>
<tr>
<td>Senate Debate</td>
<td>938</td>
</tr>
<tr>
<td>House Debate</td>
<td>940</td>
</tr>
<tr>
<td>The Newly Codified Anti-Cigarette Provisions</td>
<td>957</td>
</tr>
<tr>
<td>Public Commentary on and Reaction to the Cigarette Mulct Tax</td>
<td>960</td>
</tr>
<tr>
<td>A Failed Attempt at Repeal</td>
<td>962</td>
</tr>
<tr>
<td>The Iowa Supreme Court Is Not Misled by “the thinnest [sic] moonshine”: McGregor v. Cone (II)</td>
<td>967</td>
</tr>
<tr>
<td></td>
<td>969</td>
</tr>
</tbody>
</table>
Contents

The Consequences of the U.S. Supreme Court’s Decision in Austin v. Tennessee (1900): Premature Predictions of the “End of the Cigarette” 982

The Tobacco Trust’s Iowa Lawyer, Frank Dunshee: A Bundle of Pro Malo/Pro Bono Self-Contradictions 999

The Tobacco Trust Attacks the Mulct Tax in Court 1004

Cook v. County of Marshall and Hodge v. Muscatine County: The Tobacco Trust Also Loses Its Judicial Challenges to the Mulct Tax 1017

The Cigarette Mulct Tax in Operation: 1898-1921 1037

13 The Iowa WCTU Achieves Two of Its Goals in 1909: Prohibition of Public Smoking by Minors Under 21 and Effective Enforcement of the General Sales Ban/Mulct Tax 1052

The Iowa WCTU’s Socialist President: Marion Howard Dunham 1054

The State Prohibits Minors from Smoking in Public 1058

The Trimmer Clubs and John B. Hammond Succeed in Securing Enactment of a Law Enforcing the Cigarette Sales Ban/Mulct Tax 1067

14 At Times Vigorous Enforcement, Legislative Deadlock, and Litigational Success: 1910-1920 1087

More Than Merely “somewhat sporadic effort at law enforcement in a few of the larger cities of the state,” Especially in Des Moines: 1910-1916 1088

Anti-Smoking Forces Reach the Limits of Their Power to Effect Incremental Amendatory Legislative Change: 1913 and 1915 1114

Legislative Stalemate: The 1917 Session 1116

The Antis’ One Legislative Success: The Stealth Ban on Advertising 1129

Attorney General Havner’s Raids and Their Litigational Sequelae: 1917-1920 1133

The WCTU Staves Off the Tobacco Industry’s Threatened Repeal of the General Ban on Cigarette Sales: The First Postwar Session of 1919 1152

The WCTU’s Post-Session Continued State of Mobilization 1167

15 The Great Compromise of 1921: The End of Statewide Prohibition and the Beginning of Local Control, Licensure, and Taxation 1173

Democrats Need Not Apply to the Thirty-Ninth General Assembly 1175
Contents

Story County Resumes Enforcement of the Absolute Ban on Cigarette Sales 1177
The Woman’s Christian Temperance Union: Not Just a Prohibitionist Organization 1183
Enter Representative Horace Husted Dodd—Obscure Electric Utility Capitalist and Cigarette Sales Prohibition Repeal Bill Requestee 1200
Introduction of and Initial Skirmishes Around House File 678 1217
The WCTU’s Attack on House File 678 and Alleged Preparation of a National Prohibition of Tobacco 1232
The Crucial Clark Substitute Bill 1238
Legislative Floor Action 1243
The House: Two-Fifths of the Members Oppose Repeal 1245
The Senate Defeats Repeal, But Then Tergiversates 1248
Gubernatorial Hearing 1254
Governor Kendall Approves the Repeal Bill, But Stresses Local Government Power to Continue the Prohibition of Cigarette Sales 1270
The Pro-Corporate Public Utilities Bill: A Sideshow to the Pro-Corporate Cigarette Bill 1280

PART III
THE CONTEXT OF STATE ANTI-CIGARETTE AND ANTI-SMOKING LEGISLATIVE TRENDS IN THE 1910S AND 1920S BEFORE, DURING, AND AFTER REPEAL IN IOWA

16 Repeal, Reinforcement, the Last New Laws, and the First Public Smoking Bans 1305
Repeal 1309
Tennessee (1919/1921) 1310
Arkansas (1919/1921) 1328
Nebraska (1919) 1332
Kansas and North Dakota Strengthen the Last Surviving Anti-Cigarette Laws While Staving Off the Inevitable for a Few Years: Defeat of American Legion-Inspired Repeal 1366
Progressive-Politically Based in North Dakota (1919-1925) 1367
Religio-Moralistically Based in Kansas (1917-1927) 1383
The Last Two Cigarette Sales Bans Enacted: Mormons Finally Pass Short-Lived Laws in 1921 in Utah and Idaho 1422
Father Joseph Comes Speaking the Word of Wisdom: Let It Be, Let It Be 1423
Anti-Cigarette Sales Bills in Utah, 1896-1911 1435
Utah’s 1921 Anti-Cigarette Law Bans Sales, Advertising, and (Much) Public Smoking 1449
Edward Southwick: The Utah Legislature’s Principal Anti-Cigarette Advocate 1451
Southwick’s Anti-Cigarette Measure: Senate Bill No. 12 1461
Idaho Repeals Its Ban Even Before the 1921 Session Ends 1490

Going on the Offensive Against What Was Perceived as Offensive: Total Cigarette Smoking and Partial Public Smoking Ban

Bills and Laws 1504
Oklahoma (1908/1915) 1506
Oregon (1917) 1533
Kansas (1917/1919) 1548
Nebraska (1917/1919) 1558
South Carolina (1920) 1562
North Dakota (1921) 1566
Utah (1913-1923) 1569

Near-Successes Without Organized Mormon Church Support (1913-1919) 1571
Enactment Based on Mormon Church Mobilization (1919-1921) 1584
Initial Enforcement (1921-1922) 1603
The Tobacco Merchants Association Abandons Hope of Repeal in Utah (1922) 1617
Sheriff Harries Harries Capitalist Public Smokers (1923) 1621
Evisceration with Mormon Church Connivance (1923) 1650
Sketch of Utah’s Surviving Unique Partial Indoor Smoking Ban During the Heyday of Smoking Laissez Faire (1923-1976) 1687

17 The Tobacco Merchants Association of the United States: The New Cigarette Oligopoly’s Legislative and Propaganda Arm—A Proto-Tobacco Institute (1915-1922) 1703
TMA’s Intertwined Lobbying and Propaganda Functions 1705
Fragmentary Information on the Cigarette Oligopolists’ and TMA’s Tactical Differences Concerning Their War on Anti-Tobacco Propaganda (1919-20) 1717

Frederick W. Galbraith, Jr.: A Tobacco Trust Undercover
Contents

Propaganda Organizer in an American Legion Uniform 1722
The Surgeon General’s Earliest Counter-Blaste to Cigarettes 1729
Bribing and Intimidating the Press 1732
Coopting and Degrading Physicians: The Curious Case of Dr. Oliver Victor Limerick 1750
TMA’s Campaign to Habituate the Whole World to “smoking second hand smoke” 1774

18 The Prohibition of Smoking Inside the Iowa House and Senate (1839-1933), Other State Legislatures (from 1816), and Congress (from 1822): Statehouses Themselves as the Sites of the First Struggles Against Secondhand Tobacco Smoke
Exposure at the Workplace 1783
An Overview of the History of State Legislative Self-Regulation of Smoking 1784
Iowa 1790
The Advent of Women State Legislators Produces a Surprising Impact on Smoking Rules: Examples of the “shepherdess of the male members” 1818
Arizona 1820
Oregon 1832
Nevada 1835
Kansas 1849
New Hampshire 1852
No-Smoking Rules in the United States Congress 1859
House of Representatives 1860
Senate 1874
Appendix Table: No-Smoking Rules Inside State Legislatures 1889

PART IV
Cigarette Sales Licensure and Taxation in Iowa During the Period of Laissez-Faire Smoking: 1921 to the 1960s

19 The Aftermath of Licensure: 1921-1939 1915
Cigarette Advertising Becomes Lawful 1918
Cigarette Sales Permit Mulct Taxes 1924
Cigarette Sales Excise Taxes 1929
Enforcement 1937
Contents

The Onset of the Long-Term Stagnation of Statewide Tobacco and Smoking Regulation 1947
The Aftermath: The 1939 Code Amendments 1960

20 City Councils that Actually Used Their Discretionary Power to Perpetuate the Ban on Cigarette Sales in the 1920s and 1930s 1965
The Special Case of the Skeptical Des Moines City Government 1966
Frictionless Issuance of Permits in First-Class Cities 1970
Resisting Localities 1978
Albia 1988
Cedar Falls 1989
Cumberland 1989
Earlham 1991
Grinnell 1994
Indianola 2017
Ladora 2031
Lamoni 2032
Newton 2038
Oskaloosa 2043
Rockford 2046
Rockwell 2047
Shannon City 2048
Shenandoah 2048
Winterset 2057

21 Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales: The Anti-Chain Store (and Especially Anti-Great Atlantic & Pacific Tea Company) Battle 2059
Perry (1928) 2061
Waterloo (1930) 2070
Marshalltown (1930-33) 2078
Iowa City (1930-33) 2089
Initial Laissez-Faire 2089
Finally the Council Rebuffs A & P 2092
Ford Hopkins Company Wants to Sell Cigarettes Too 2097
Ford Hopkins Unsuccessfully Requests the District Court to Order the City Council to Issue a Permit 2106
The Republican Iowa Supreme Court Reverses the Trial Court 2116
The Democratic Iowa Supreme Court Reverses Itself 2125
The City Council Reverses Itself and Snatches Defeat from Its
## Contents

Own Victorious Jaws 2132

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
<td>Iowa Repeals Its Unique Prohibition of Cigarette Vending Machines: 1939-63</td>
<td>2139</td>
</tr>
</tbody>
</table>

# PART V

THE INCIPIENT NATIONAL MOVEMENT TO AVOID SECONDHAND SMOKE EXPOSURE IN THE 1970S

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>23</td>
<td>Non-Smokers’ Widespread Aversion, Science, and Legislation Begin to Confront an Entrenched Oligopoly and Its Addicted Customers’ Sense of Entitlement</td>
<td>2151</td>
</tr>
<tr>
<td></td>
<td>A Pre-History of Scientific-Medical Understanding of and Militant Opposition to Exposure to Secondhand Tobacco Smoke</td>
<td>2151</td>
</tr>
<tr>
<td></td>
<td>The Rollback of Laissez-Faire and the Advent of the New Prohibitionism: Surgeon General Jesse Steinfeld’s Role in Launching the Attack on Passive Smoking</td>
<td>2159</td>
</tr>
<tr>
<td></td>
<td>The First Statewide Anti-Smoking Law and the Cigarette Manufacturers’ Opposition in the Early 1970s: Arizona</td>
<td>2177</td>
</tr>
<tr>
<td></td>
<td>The Battle over the New York City Ordinance</td>
<td>2218</td>
</tr>
<tr>
<td></td>
<td>The Cigarette Manufacturers Are Made to See “the handwriting...on the wall”—and Try to Erase It</td>
<td>2221</td>
</tr>
<tr>
<td></td>
<td>R. J. Reynolds’ “Restrictive Smoking Activities Project”</td>
<td>2221</td>
</tr>
<tr>
<td></td>
<td>Philip Morris Pays a Professor to Dismiss the Dangers of Passive Smoking</td>
<td>2231</td>
</tr>
<tr>
<td></td>
<td>Ramping Up the Tobacco Institute’s State Legislative Lobbying</td>
<td>2137</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>24</td>
<td>The Minnesota Clean Indoor Air Act of 1975: The Comprehensive Model Statute that “didn’t prevent anyone from smoking”</td>
<td>2252</td>
</tr>
<tr>
<td></td>
<td>Professor Edward Brandt’s Initiative</td>
<td>2254</td>
</tr>
<tr>
<td></td>
<td>The Formation of the Association for Non-Smokers Rights (ANSR) and the First Failed Legislative Initiative in 1973</td>
<td>2257</td>
</tr>
<tr>
<td></td>
<td>ANSR’s Bill Dies in 1974</td>
<td>2273</td>
</tr>
<tr>
<td></td>
<td>What the Tobacco Institute Was Up To in the Meantime</td>
<td>2289</td>
</tr>
<tr>
<td></td>
<td>Enactment of the Minnesota Clean Indoor Air Act in 1975</td>
<td>2296</td>
</tr>
<tr>
<td></td>
<td>Preliminary Battles over Smoking Inside the House Itself</td>
<td>2298</td>
</tr>
</tbody>
</table>
Contents

Phyllis Kahn Introduces H.F. 79
The House Health Care Subcommittee Votes to Water Down the Bill
Radisson Hotels as Cigarette Manufacturers’ Secret Agent?
The House Health and Welfare Committee Recommends Passage of a Diluted H.F. 79
The Full House Passes a Weakened H.F. 79 by a Solid Majority
The Tobacco Institute Propaganda Tour Comes to the Twin Cities
The Restoration of Restaurant Coverage at the Senate Health, Welfare, and Corrections Committee Meeting on April 29: Double-Cross or Lobbyists’ Comedy of Errors?
The Full Senate Upholds Inclusion of Restaurants and the House Concurs
Was the Tobacco Industry Really Asleep?
The Minnesota Clean Indoor Air Act: An Overview and Evaluation
Enforcement and Compliance Before the Administrative Rules Went into Effect
Drafting the Department of Health Rules
Initial and Preliminary Drafting Not Fully Embodied in Publicly Accessible Drafts
Publicly Available Drafts of the Board of Health’s Proposed Rules Prior to Its Public Hearing in December
The December 2, 1975 Public Hearing on the Rules to Implement the MCIAA
The Department of Labor and Industry Draft Rules
Post-Hearing Efforts by Regulatees and ANSR/Kahn to Modify the Health Department Rules
The Final Board of Health Rules
The Final Labor and Industry Department Rules
Contemporaneous and Later Views of the MCIAA’s Effectiveness
Finally Articulating the Need to Dismantle the Scientifically Obsolete Regime of Designated Smoking-Permitted Areas
Compliance and Enforcement, Such As They Were
The Tobacco Industry’s Efforts to Weaken the MCIAA and Stanch Its Emulation in Other States
PART VI
THE STRUGGLE IN IOWA FOR ANTI-PUBLIC SMOKING BANS: 1970s TO 2008

25 Non-Smokers’ Struggle Against Exposure to Tobacco Smoke: Its First Meager Fruits in Iowa, 1970-1982 2513
Iowa’s First Feeble Forays into Anti-Public Smoking
Legislation in the Maelstrom of the National Drive for Nonsmokers’ Rights 2513
Senate File 106 in 1975 2520
The House of Representatives Takes a Tiny Step Toward Cleaning Its Own Air 2524
Senate File 106 in 1976 2526
The Avalanche of State Anti-Smoking Bills in the Second Half of the 1970s and Cigarette Manufacturers’ Increasing Alarm 2535
Senate File 2022 in 1978: Iowa Finally Enacts Very Limited Regulation of Public Smoking 2540
Enforcement as an Afterthought 2554
The House Expands the Scope of Its No-Smoking Rule: 1979 2558

The Tobacco Industry’s Failed Campaign to Disrupt the Formation of a Scientific Consensus on the Health Consequences of Secondhand Smoke Exposure 2562
Jo Ann Zimmerman’s Initiative of 1983-84: House File 248 2574
The Blow-Up Between Cigarette Manufacturers and Iowa Wholesalers 2580
The Tobacco Action Network 2591
The Next Abortive Effort: House File 102 in 1985-86 2602
Iowa Citizen Action Network (ICAN): Vendor of Grassroots Lobbying to the Cigarette Companies 2624
The Tobacco Institute Seeks to Co-opt a Skeptical and Resistant Iowa Restaurant Association 2633
Scientific Advances in Understanding the Health Impacts of Exposure to Environmental Tobacco Smoke Sharpen the Industry’s Visions of the Endgame 2643
House File 79 in 1987: Stores Finally Become a “Public Place,” But Restaurants Remain Excluded 2651
The Cigarette Oligopoly May Have Won a Partial Victory in Iowa.
Contents

But Philip Morris Recognizes that Nationally “we are [i]n deep shit” 2664
Dishonoraria 2670

27 House File 209 in 1989-1990: Restaurant Coverage Is Finally Achieved—But at the Price of Conceding to the Tobacco Industry What Purported to Be the Preemption of Local Anti-Smoking Ordinances 2684
Smoking in the Des Moines Skywalks 2685
Sunsetting the 1988 Cigarette Tax Increase 2688
House File 209 Stalls in 1989 2693
The Cigarette Manufacturers Fit Iowa into Their Nationwide Preemption Campaign 2698
House File 209 Passes in 1990 as Restaurant Coverage Is Traded Off for a Version of Preemption of Local Control that Even the Cigarette Manufacturers Deemed No Broader Than What “Iowa Constitution already says” 2712
Kaleidoscopic Accounts of the Reasons for the Resurrection and Passage of H.F. 209 2739
Post-Mortems 2748
Anti-Smoking Senators—Purportedly as Powerless as Inmates in the Maximum-Security State Pententiary—Make Yet Another Unsuccessful Attempt to Clean the Air in Their Workplace: 1990 2751

28 Instead of Repealing Preemption of Local Anti-Public Smoking Ordinances in 1991, the Legislature Enacts What the Tobacco Industry Purported to Be the Preemption of Local Cigarette Sales Ordinances 2756
The Tobacco Institute Solidifies Its Coalition with the Iowa Citizen Action Network and Iowa Federation of Labor 2757
H.F. 104: Regulating Children’s Access to Tobacco (and Repealing Local Preemption) 2766
The Tobacco Institute and the U.S. Department of Health and Human Services: Dueling Model Bills Regulating Children’s Access to Tobacco 2770
The Struggle over and Enactment of H.F. 232: Kind of Sort of Regulating Tobacco’s Access to Children and Preempting Local Control of Cigarette Sales 2787
The Cigarette Oligopolists Celebrate Their Victory and Their
29 The 1992 Session: The Cigarette Companies’ Lobbying Juggernaut Fails to Pass a Bill Prohibiting Employers from Discriminating Against Smokers

Preliminary Skirmishes at the 1992 Session

The Tobacco Industry’s Nationwide Drive to Outlaw Employment “[d]iscrimination against our customers”

The Early Twentieth-Century Movement Among Employers to Refuse to Hire Cigarette Smokers

The City Government of Clinton, Iowa Tries to Prohibit Its Newly Hired Employees from Using Tobacco At or Away from Work

Iowa’s Turn: The Cigarette Manufacturers Try But Fail to Pass a Law Prohibiting Employers from Discriminating Against Smokers

30 Cigarette Manufacturers Thwart All Anti-Smoking Legislation During the Years of Divided Party Control of the Legislature: 1993-1996

31 Democrats’ Decade in the Desert: Stalemate and Stagnation in the General Assembly, 1997-2006

The Republican Party’s and Senate Majority Leader Iverson’s Ascendancy

The Preemption Battle of 1997

The Iowa Attorney General’s Medicaid Reimbursement Lawsuit Against the Cigarette Oligopoly: 1997-1998

Cigarette Tax and Cigarette Sales Legislation: 1998

The Struggle over the Use of the Master Settlement Agreement Funds: 1998-2000

Prohibiting the Free Distribution of Cigarettes: The Federal Courts Undo the Cigarette Manufacturers’ Rare Defeat in the Iowa Legislature: 2000-2001

Youth Access to Tobacco and Possession, Use, and Purchase Penalty Laws: 2000

Yet More Defeats of Anti-Tobacco Initiatives: 2000-2004

After Years of Failing Stings, Iowa’s Biggest Cigarette Retailers Negotiate Wholesale-Rate Penalties for Selling to Minors: 1997-2003
## Contents

Compliance Check-Triggered Permit Suspensions Galvanize Retailers 2976
Kwik Shop, Inc.’s Frivolous Statewide Litigation Campaign 2984
Cutting a Legislative Deal Instead 2993

**Unsuccessful Smoking Ban and Local Preemption Repeal Bills Even in the Wake of Republicans’ Loss of Control of the Senate: 2005-2006** 3005

### 32 The Battle Against Smoking in the Senate Itself: 1985-2008 3015
- Tamara Barrett’s Single-Handed Extra-Parliamentary Struggle for the “total emancipation” of the Capitol from Tobacco Smoke: 1992-93 3030
- Representatives Philip Brammer and Rod Halvorson Finally Clear the Tobacco Haze in the Capitol Rotunda Despite the Opposition of Democratic Majority Leader Wally Horn and Republican Minority Leader Jack Rife: 1993 3034
- With the Republicans’ Loss of Their Majority and the Fall of the Cigarette Manufacturers’ Friend, Majority Leader Stewart Iverson, Senator Michael Connolly’s “long battle to rid the Senate of smoking...finally come[s] to an end”: 1997-2008 3046

### 33 The State’s Two Main College Towns Adopt Anti-Smoking Ordinances, But the Iowa Supreme Court Invalidates Them as Inconsistent with, and Thus Preempted by, the State Clean Indoor Air Law: 1999-2003 3059
- Origins 3061
  - Ames 3061
  - Iowa City 3064
- The Board of Health of the People’s Republic of Johnson County Rejects a Proposal Even to Request the County Attorney to Draft an Ordinance Banning Smoking in Restaurants 3070
- The Ames City Council Takes Up the Ban 3076
- Clean Air for Everyone Comes Forward with a Draft Ordinance in Iowa City 3096
- The Ames Tobacco Task Force, Pessimistic About Securing a City Council Majority for a Broad Ban, But in a Hurry for Some Progress, Acquiesces in Owners’ Proposal for a Part-Time Ban 3101
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exposure to Thirdhand Smoke: The New Learning</td>
<td>3119</td>
</tr>
<tr>
<td>The Attorney General Opines that Local Control Is Not Preempted</td>
<td>3122</td>
</tr>
<tr>
<td>The Ames City Council Unanimously Passes the Weak Red Light/Green Light Compromise Ban</td>
<td>3124</td>
</tr>
<tr>
<td>CAFÉ Attacks Red Light/Green Light for Ames and Iowa City</td>
<td>3135</td>
</tr>
<tr>
<td>The Cigarette Oligopoly Protects Its Investment in Its 1990 Preemption Amendment: Philip Morris Litigates to Invalidate the Ames Ordinance</td>
<td>3138</td>
</tr>
<tr>
<td>Iowa City Adopts an Ordinance, Too</td>
<td>3144</td>
</tr>
<tr>
<td>The Town Hall Meeting: October 16, 2001</td>
<td>3156</td>
</tr>
<tr>
<td>First Consideration: Nov. 27, 2001</td>
<td>3165</td>
</tr>
<tr>
<td>Second Consideration: Dec. 11, 2001</td>
<td>3175</td>
</tr>
<tr>
<td>Third and Final Consideration: Jan. 8, 2002</td>
<td>3181</td>
</tr>
<tr>
<td>The District Court Finds No State Preemption</td>
<td>3189</td>
</tr>
<tr>
<td>The Latest Is the Greatest: The Iowa Supreme Court Reverses</td>
<td>3196</td>
</tr>
<tr>
<td>The Legislative History of the Statutory Amendment Prohibiting the Designation of Smoking Areas in Places in which Smoking Was Already Prohibited by “the Fire Marshall or by Other Law, Ordinance, or Regulation”</td>
<td>3199</td>
</tr>
<tr>
<td>The Ames and Iowa City Ordinances as the First and Last Hurrah of Local Control in Iowa</td>
<td>3204</td>
</tr>
</tbody>
</table>

### 34 2007: The First Democratic Legislative Majority and Governor in 42 Years Enact a One Dollar Cigarette Tax Increase—But Are Unable to Repeal Preemption of Local Control, Let Alone Enact a Statewide Public Smoking Ban

- **Statewide Ban versus Local Control** 3224
- **In Lieu of a Smoking Ban: A Cigarette Tax Increase** 3244
  - In the Senate 3246
  - In the House 3256
  - The Impacts 3262

### 35 Iowa Leaps from Outdated Designated Smoking Areas to a Comprehensive Statewide Ban—Finally, Resistantly, Barely, But Also Boldly: The Smokefree Air Act of 2008

- **Continued Tactical Tensions Between Advocates of Local Preemption Repeal and a Statewide Ban** 3268
- **House Study Bill 537—Yet One More of Petersen’s Statewide Bans** 3280
- **The House Commerce Subcommittee Hearing** 3284
  - The Gambling Industry’s Use of the Economic Impact of Other...
## Contents

36 Administrative Rules for, Bar Owners’ Unsuccessful Constitutional Challenge to, Enforcement of, and Abortive Efforts to Amend the Smokefree Air Act 3494

The Governor Approves—But Some Others Don’t 3494

Some Bar Owners Feel Freedom Move Under Their Feet and the Iowa Constitution Tumbling Down 3498

The Iowa Department of Public Health’s Proposed and Final Rules 3509

Bar Owners’ Unsuccessful Litigation Challenging the Smokefree Air Act’s Constitutionality 3564

Enforcement 3594

Leery Legislative Leadership Prevents Floor Debate of Bills to Strengthen or Weaken the Act During the 2009 Session 3646

More Stasis Even with a Large Republican House Majority in 2011 3667
Contents

Tables

1 Years in Nineteenth Century in which One House of State Legislature Passed a Bill Generally Prohibiting Cigarette Sales (or Public Smoking, Use, or Possession) or Both Houses Did and Governor Vetoed It 45
2 Years in which State Laws Generally Prohibiting Cigarette Sales Were in Effect 47
3 Membership of the Iowa WCTU, 1891-1921 701
4 Cigarette Mulct Tax Collections in Iowa for Year Ending Sept. 30, 1906 1045
5 Cigarette Mulct Tax Collected in Scott and Polk Counties, 1897-1921 1047
6 No-Smoking Rules Inside State Legislatures 1889
7 Annual Collection (in $) of the Iowa Cigarette Stamp Sales Tax, July 4, 1921 to June 30, 1932 1931
8 Iowa Cities and Towns in which Resistance to Issuance of Cigarette Sales Permits Took Place in 1921 1979
9 Iowa WCTU Membership (1921) and Votes on Liquor Prohibition in Iowa (1917 and 1933) by County 1982
10 Total Number of Smoking Restriction Bills, 1979-1988 2650
11 Honoraria Paid by the Tobacco Institute to Iowa State Legislators, 1985-1988, 1990 2677
12 Party Control of the Iowa Legislature, 1983-2008 2722

Maps

1 Years in Nineteenth Century in which One House of State Legislature Passed a Bill Prohibiting Cigarette Sales (or Public Smoking, Use, or Possession) or Both Houses Did and Governor Vetoed It 46
2 Years in which State Laws Generally Prohibiting Cigarette Sales Were in Effect 49
3 Iowa WCTU Membership in 1921, by County 1981
Illustrations

The bolded numbers at the left indicate the pages that refer to the illustrations or to which the illustrations refer. The illustrations themselves appear following this page in the same sequence.

cover  “Soda Creek Sam, of Jordan, Montana—‘Fer Cat’s Sake!’”  USTJ, v. 71, Apr. 24, 1909 at 3
lxx  “Dispossessed,”  USTJ, vol. 54, June 3, 1905 (5)
208  “It Must Go,”  AC, Oct. 29, 1893 (21:1-2) (“Mr. Sears Knocks Out the Deadly Cigarette”)
327  “The Deadly Cigarette and the Big Hat Must Go—So Say Our Solons,”  LAT, Feb. 26, 1895 (1:5-6)
374  “Monday in the House,”  IN, Mar. 4, 1895 (2:2) (“Representative M’Caskey Moves to Suspend the Reading of the Journal”)
522  “Chicago’s Modern ‘John’ Quixote Charges on the Cigaret,”  CT, Mar. 3, 1897 (1)
649  “Congressman Woodman’s Scheme to Extinguish the Cigaret,”  CT, Feb. 15, 1897 (1)
844  “Cigarettes by Mail,”  TDL, June 3, 1893 (1:3-4)
888  “Free Buttons!”  Daily Telegraph (Atlantic, IA), Oct. 12, 1896 (1:5-6)
1042  “Story Without Words,”  CFR, Jan. 8, 1914 (1:3-5)
1313  “Armistice Day,”  CCP, Nov. 11, 1920 (1:3-5)
1388  “The Cigarette—And We Stand Idly By,”  DN, Feb. 5, 1921 (sect. 4, VIII:3-7)
1421  “Gone Are the Days of Yore,”  MO, Feb. 10, 1917 (1:3-5)
1421  “This May Happen Some Day,”  National Democrat (DM), May. 3, 1917 (1:3-5)
1421  “You Fellers Needn’t Feel So All-Fired Cocky; They’ll Be After You Next,”  National Democrat, Aug. 30, 1917 (1:3-5)
1513  “Steps That Take Young Fellows Down to Failure,”  DN, Jan. 25, 1921 (sect.2, 1:3-5)
1678  “You’d Better Run for Your Life, Mister,”  USTJ, June 5, 1915 (3)
1679  “The Hero of the Street Car Smoke Nuisance,”  R&L, May 24, 1909 (1:4)
Illustrations

Soda Creek Sam, of Jordan, Montana—"Fer Cat's Sake!"
DISPOSSESSED.

'Way out West in Indiana,
Under Freedom's Starry Banner,
Where Moral Statesmanship beams bright
Our hero's getting his, all right!

IT WAS NOT
LIKE THIS IN
THE DAYS OF
OLD.
LEAP YEAR--1916.
Oh, Ferdinand! Say Yes to me!
Will you give up Smoking if I do, Angelica?
MR. SEARS KNOCKS OUT THE DEADLY CIGARETTE.
While our municipal politics are full of corruption and crime is rampant in San Francisco and Sacramento our representatives are wasting their time in idiotic and unconstitutional legislation on these subjects.
Representative McCaskey moves to suspend the reading of the journal.
CHICAGO'S MODERN "JOHN" QUIXOTE CHARGES ON THE CIGARET.
CONGRESSMAN WOODMAN'S SCHEME TO EXTINGUISH THE CIGARET.

Chorus—"O. Woodman, snare that weed!"
Cigarettes by Mail.

Smokers will be supplied with

VANITY FAIR
CIGARETTES.

BY MAIL OR EXPRESS, CHARGES PREPAID, AT THE
FOLLOWING PRICES:

<table>
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<th>Packages (60 Cigarettes)</th>
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<tr>
<td>5</td>
<td>25 cents.</td>
</tr>
<tr>
<td>10 &quot; (100 &quot; )</td>
<td>$0.50</td>
</tr>
<tr>
<td>25 &quot; (250 &quot; )</td>
<td>$1.10</td>
</tr>
<tr>
<td>50 &quot; (500 &quot; )</td>
<td>$2.00</td>
</tr>
</tbody>
</table>

Those who wish the goods sent by Registered Mail, should remit 8 cents extra.
Remit by Draft, Postal Money Order, Postal Note or Postage Stamps.
Write name and address plainly and send to

W. S. Kimball & Co. BRANCH,
The American Tobacco Co.

344 Ankeny St., Portland, Oregon.
FREE BUTTONS!
AN ELEGANT BUTTON FREE
WITH EACH PACKAGE OF
SWEET CAPORAL CIGARETTES
AN OPPORTUNITY TO MAKE
A COLLECTION OF BUTTONS
WITHOUT COST.
Hey, buddy!
Remember where we were 2 years ago today?
WHEN PROSTITUTION stripped off its mask of decency and rushed madly forward to batter down the bulwarks of civilization, the powers of right quickly allied themselves, grappling with the hellicious thing and crushed out its life.

And now the cigarette! It, too, is known at last for what it really is— a vile, insidious poison which injures health, impairs progress and saps manhood. Like a deadly moth it permeates among youth—boys and girls—invading their hopes and blocking their way to achievement; like a firebrand, it blackens and reduces their vitality and energy.

Parents—will you stand idly by, wishing the cigarette were out of the reach of your boy or girl— but lacking the moral courage to remove it? Which will you heed, the frantic tirade of selfish tobacco interests or the moral appeal of innocent youth, yet unsmitten by the blighting poison of the cigarette?

The fight is on—NOW. This crucial hour is at hand. In the name of Utah's young manhood and womanhood, voice your sovereign will; tell your lawmaking body what.Absolute you wish them to make of Senate Bill No. 12.

Ban the cigarette and save the youth of Utah.

YOUNG MEN'S AND YOUNG LADIES' MUTUAL IMPROVEMENT ASSOCIATION

of Salt Lake County; With a Membership of 15,000.
GONE ARE THE DAYS OF YORE.

HE SMOKED CIGARETTES

"THOU SHALT NOT ATTEND AMUSEMENTS ON THE SABBATH"

HE CHEWED VIRGINIA LEAF

"HE WENT TO THE MOVIES ON SUNDAY"

YOU ARE CHARGED WITH COOKING ONIONS AND GARLIC IN A FLAT.

"THOU SHALT DO ONLY THAT WHICH IS PRESCRIBED BY LAW."

FAREWELL, FELLOWS, YOU WILL SOON GO TOO.

PIE
According to "The Tobacco Leaf," anti-cigarette-bills are pending in the legislatures of 30 states. Those who were instrumental in having liquor prohibited are now fighting tobacco. In several states it is a misdemeanor to smoke cigarettes or to sell them. The New York Evening Telegram, in the above cartoon, describes what may happen.
"You Fellers Needn't Feel So All-Fired Cocky; They'll Be After You Next."

[From Life]
Steps That Take Young Fellows Down to Failure.
THE HERO OF THE STREET CAR SMOKE NUISANCE
SMOKIN' OR NON SMOKIN'?  DOES IT REALLY MATTER?
I'm more concerned with financial health over public health.

Cough! Hack! Jackpot!!

Gasp! Cough!

Hack.
TOUCHING AIN'T IT?

WE WANT YOU! WE NEED YOU! WE MISS YOU! PLEASE COME BACK!!

DEATH AND DISEASE
### Abbreviations

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

<table>
<thead>
<tr>
<th>Abbreviation</th>
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</tr>
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<tr>
<td>CBN</td>
<td>Council Bluffs Nonpareil</td>
</tr>
<tr>
<td>CCJ</td>
<td>Center for Creative Justice</td>
</tr>
<tr>
<td>CCP</td>
<td>Charles City Press</td>
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<tr>
<td>CDG</td>
<td>Charleston Daily Gazette (WV)</td>
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<tr>
<td>CDS</td>
<td>Chicago Daily Socialist</td>
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<tr>
<td>CE</td>
<td>Cincinnati Enquirer</td>
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<tr>
<td>CFDR</td>
<td>Cedar Falls Daily Record</td>
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<td>CFR</td>
<td>Cedar Falls Record</td>
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<td>CH</td>
<td>Chicago Herald</td>
</tr>
<tr>
<td>C-J</td>
<td>Courier-Journal (Louisville)</td>
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<td>CN</td>
<td>Chicago News</td>
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<tr>
<td>CO</td>
<td>Charlotte Observer</td>
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<tr>
<td>COBRA</td>
<td>Clinton’s Organized Bar &amp; Restaurant Association</td>
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<tr>
<td>CR</td>
<td>Congressional Record</td>
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<td>CRDR</td>
<td>Cedar Rapids Daily Republican</td>
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<td>Cedar Rapids Evening Gazette</td>
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<td>Cedar Rapids Tribune</td>
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<td>Chicago Tribune</td>
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<td>Chicago Times-Herald</td>
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<td>CTJ</td>
<td>Citizens for Tax Justice</td>
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<td>CT-S</td>
<td>Cincinnati Times-Star</td>
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<td>DC</td>
<td>Daily Capital (Frankfort)</td>
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<td>DCO</td>
<td>Daily Charlotte Observer</td>
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<td>DD</td>
<td>Davenport Democrat</td>
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<tr>
<td>DDL</td>
<td>Davenport Daily Leader</td>
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<td>DD&amp;L</td>
<td>Davenport Democrat and Leader</td>
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<td>DDR</td>
<td>Davenport Daily Republican</td>
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<td>DEN</td>
<td>Deseret Evening News</td>
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<td>DFP</td>
<td>Detroit Free Press</td>
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<tr>
<td>DI</td>
<td>Daily Iowan (Iowa City) (University of Iowa student newspaper)</td>
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<td>DIC</td>
<td>Daily Iowa Capital</td>
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<td>DIO</td>
<td>Daily Inter Ocean (Chicago)</td>
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<td>DKJ</td>
<td>Daily Kennebec Journal</td>
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<td>DLI</td>
<td>Department of Labor and Industry</td>
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<td>DM</td>
<td>Des Moines</td>
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<td>DMC</td>
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<td>Des Moines Leader</td>
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<td>Des Moines Register and Leader</td>
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<td>Floyd County Advocate-Herald</td>
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<tr>
<td>FCLAA</td>
<td>Federal Cigarette Labeling and Advertising Act</td>
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<tr>
<td>FDD</td>
<td>Fayetteville Daily Democrat</td>
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<td>FF</td>
<td>Fargo Forum</td>
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<td>FMDD</td>
<td>Fort Madison Daily Democrat</td>
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<td>FR</td>
<td>Frankfort Roundabout</td>
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<td>Florida Times-Union and Citizen</td>
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<td>Galveston Daily News</td>
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<td>GH</td>
<td>Grinnell Herald</td>
</tr>
<tr>
<td>GP</td>
<td>Greensboro Patriot</td>
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<td>GR</td>
<td>Grinnell Register</td>
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### Abbreviations

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<td>Howard County Times</td>
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<td>HN</td>
<td>Hutchinson News</td>
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<td>HT</td>
<td>Harrisburg Telegraph</td>
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<tr>
<td>IAB</td>
<td>Iowa Administrative Bulletin</td>
</tr>
<tr>
<td>IAC</td>
<td>Iowa Administrative Code</td>
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<tr>
<td>IATD</td>
<td>Iowa Association of Tobacco Distributors</td>
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<td>IBC</td>
<td>Iowa Business Council</td>
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<td>IBOC</td>
<td>Iowa Bar Owners Coalition</td>
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<td>IC</td>
<td>Iowa City</td>
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<td>ICAN</td>
<td>Iowa Citizen Action Network</td>
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<td>Iowa City Citizen</td>
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<tr>
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<td>Iola Daily Register</td>
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<td>Idaho Daily Statesman</td>
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<td>IE</td>
<td>Improvement Era</td>
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<td>IER</td>
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<td>Iowa Hospitality Association</td>
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<td>Indianapolis Journal</td>
</tr>
<tr>
<td>IJHP</td>
<td>Iowa Journal of History and Politics</td>
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<td>IL</td>
<td>Iowa Legionnaire</td>
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<td>ILC</td>
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<td>ICGA</td>
<td>Illinois Casino Gaming Association</td>
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<td>Inter-Mountain Republican</td>
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<td>IOR</td>
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<td>Iowa Restaurant Association</td>
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<td>Iowa Restaurant and Beverage Association</td>
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<td>Iowa Racing and Gaming Commission</td>
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<tr>
<td>IS</td>
<td>Indianapolis Sentinel</td>
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<tr>
<td>ISA</td>
<td>Indiana State Archives</td>
</tr>
<tr>
<td>ISD</td>
<td>Iowa State Daily (Ames) (Iowa State University student newspaper)</td>
</tr>
<tr>
<td>ISJ</td>
<td>Indiana State Journal (Weekly)</td>
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## Abbreviations

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<td>Iowa State Register</td>
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<td>IT</td>
<td>Indianola Tribune</td>
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<td>ITPA</td>
<td>Iowa Tobacco Prevention Alliance</td>
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<td>IU</td>
<td>Iowa Unionist (Des Moines)</td>
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<td>IVA</td>
<td>Independent Voters Association</td>
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<td>IVH</td>
<td>Iowa Veterans Home</td>
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<td>IWA</td>
<td>Iowa Women’s Archive (University of Iowa Library)</td>
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<td>Journal of the American Medical Association</td>
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<td>James B. Duke Papers</td>
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<td>Johnson County Citizens for Tobacco Free Youth</td>
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<td>JISSH</td>
<td>Journal of the Illinois State Historical Society</td>
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<td>Knoxville Daily Journal</td>
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<tr>
<td>KHS</td>
<td>Kansas Historical Society</td>
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<td>LAT</td>
<td>Los Angeles Times</td>
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<td>LS</td>
<td>Lehi Sun</td>
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<td>LTDL</td>
<td>Legacy Tobacco Documents Library</td>
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<td>MA</td>
<td>Montgomery Advertiser</td>
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<td>Minnesota Association of Commerce and Industry</td>
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<td>MCA</td>
<td>Morning Call (San Francisco)</td>
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<td>MCG-G</td>
<td>Mason City Globe-Gazette</td>
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<td>MCIAA</td>
<td>Minnesota Clean Indoor Air Act</td>
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<td>MDH</td>
<td>Minnesota Department of Health</td>
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<td>MDN-T</td>
<td>Muscatine Daily News-Tribune</td>
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<td>Mid-Iowa Community Health Committee</td>
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<td>Milwaukee Journal</td>
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<td>Morning Oregonian (Portland)</td>
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<td>MT</td>
<td>Minneapolis Tribune</td>
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### Abbreviations

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<td>N&amp;O</td>
<td>News and Observer (Raleigh)</td>
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<td>NA</td>
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<td>North Carolina State Archives</td>
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<td>Nonpartisan League</td>
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<td>NR</td>
<td>Newton Record</td>
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<td>National Smokers Alliance</td>
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<td>NSHS</td>
<td>Nebraska State Historical Society</td>
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<td>NSJ</td>
<td>Nebraska State Journal</td>
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<td>NT</td>
<td>Nashville Tennessean</td>
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<td>New-York Daily Tribune</td>
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<td>New York Medical Journal</td>
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<td>NYT</td>
<td>New York Times</td>
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<td>Ottumwa Courier</td>
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<td>Oklahoma City Times</td>
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<td>ODR</td>
<td>Oelwein Daily Register</td>
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<td>OE</td>
<td>Ogden Examiner</td>
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<td>Pharmaceutical Era</td>
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<td>PFG</td>
<td>Principal Financial Group</td>
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<td>Phoenix Gazette</td>
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<td>Philadelphia Inquirer</td>
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<td>Quad-City Times</td>
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<td>RACI</td>
<td>Racing Association of Central Iowa v Fitzgerald</td>
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<td>Rare Book, Manuscript and Special Collections Library, Duke U.</td>
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<td>Record-Union (Sacramento)</td>
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<td>Robert Wood Johnson Foundation</td>
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<td>Smokefree Air Act</td>
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<td>SAC</td>
<td>Social Advisory Committee</td>
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<td>Sioux City Journal</td>
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<td>Sumter County Sun (Alabama)</td>
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<td>San Francisco Chronicle</td>
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<td>SHSI</td>
<td>State Historical Society of Iowa</td>
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<td>SLB</td>
<td>Spirit Lake Beacon</td>
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<td>Salt Lake Tribune</td>
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<td>SPDG</td>
<td>St. Paul Daily Globe</td>
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<td>SPDPP</td>
<td>St. Paul Daily Pioneer Press</td>
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<td>SPPP</td>
<td>St. Paul Pioneer Press</td>
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<td>STC</td>
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<td>STJ</td>
<td>Southern Tobacco Journal</td>
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<tr>
<td>SW</td>
<td>Shenandoah World</td>
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<td>TAN</td>
<td>Tobacco Action Network</td>
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<tr>
<td>TC</td>
<td>Tobacco Control</td>
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<td>Topeka Daily Capital</td>
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<td>Tacoma Daily Ledger</td>
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<td>TFC</td>
<td>Tobacco Free Coalition</td>
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<td>Twin Falls Daily News</td>
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<td>TI</td>
<td>Tobacco Institute</td>
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<td>Tobacco Industry Labor Management Committee</td>
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<td>TIN</td>
<td>Tobacco Institute Newsletter</td>
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<td>Tobacco Merchants Association</td>
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<td>Tobacco Observer</td>
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<td>Topeka State Journal</td>
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<td>Tennessee State Library and Archives</td>
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<td>Tri-Weekly Sentinel-Post (Shenandoah)</td>
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<td>UCSA</td>
<td>Unfair Cigarette Sales Act</td>
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<td>UHQ</td>
<td>Utah Historical Quarterly</td>
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<td>UI</td>
<td>University of Iowa</td>
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## Abbreviations

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<td>University of Iowa Hospitals and Clinics</td>
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<td>Union Signal</td>
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<td>United State Tobacco Journal</td>
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<tr>
<td>VC</td>
<td>Vancouver Columbian</td>
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<td>VI</td>
<td>Vancouver Independent</td>
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<tr>
<td>WC</td>
<td>Waterloo Courier</td>
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<td>WCTU</td>
<td>Woman’s Christian Temperance Union</td>
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<td>WDC</td>
<td>Waterloo Daily Courier</td>
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<td>WEC</td>
<td>Waterloo Evening Courier</td>
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<td>Wall Street Journal</td>
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<td>Western Tobacco Journal</td>
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<td>WT-T</td>
<td>Waterloo Times-Tribune</td>
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<td>Young Men’s Independent League</td>
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<td>YMMIA</td>
<td>Young Men’s Mutual Improvement Association</td>
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<td>YWJ</td>
<td>Young Woman’s Journal</td>
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Note on Citation

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

The following archivists, librarians, government officials, and museum curators, many of whose efforts far transcended their job descriptions, provided copies of crucial documents.

**Alabama:** Mary Beth Newbill (Birmingham Public Library Southern History Dept.); Paul Pruitt (U. Alabama Law Library)

**Arizona:** Barbara Howe (Arizona State Law Library); Darci Johnson (AZ House Chief Clerk’s Office); AZ Senate Resource Center; Joshua Roffler (Tempe History Museum); Brad Nichols (U Arizona Law Library)

**California:** Rose Sheehan (UC Davis Law Library)

**Colorado:** Bruce Hanson (Denver Public Library Western History Dept); David Hays and Leanne Glenn (U Colorado Libraries)

**Florida:** John Nemmers (U Florida Libraries)

**Georgia:** Lloyd Busch (Emory U Library); Kathy Shoemaker (Emory U Library MS/Archives)

**Idaho:** Carolyn Ruby Idaho State Historical Society; Julie Monroe Spec Coll U Idaho Lib

**Illinois:** Lyle Benedict (Harold Washington Library); Autumn Mather (Newberry Library); Ryan Prehn (Illinois State Archives); Glenn Brammeier (Illinois Regional Archives Depository)

**Indiana:** Alan January (Indiana State Archives); Jennifer Bryan (Indiana U Law Library)

**Iowa:** Linda Brown-Link, Mary Bennett, and Carol Kirsch (IC), Jeffrey Dawson and Meaghan McCarthy (DM) (State Historical Society of Iowa); Patty Funaro (Legislative Services Agency); Rusty Martin (Iowa Senate Democratic Staff communications director); Dean Fiihr (Iowa House of Representatives Communications director); Mary Sanders (Iowa House Clerk’s Office); Sharon Wright and Linda Andersen (Iowa Ethics & Campaign Disclosure Board); Marian Karr (City of Iowa City city clerk); Becky Mills (Johnson County Board of Health); Diane Voss (Ames city clerk); Jennifer Baughman (Indianola city clerk); Kathy Timmerman (Earlham City clerk); Tracy Vander Linden (Warren County Auditor); Ruth Hall (Warren County Historical Society); Beverly Dickerson (Warren County Historical Society); Jayme Ewing (Newton City adm. asst.); Karen M. O’Connor (Davenport Public Library Spec. Coll.); Dorrie Lalonde (Drake Community Library Grinnell Room); Cheryl Neubert (Grinnell College Library Archives); Doni DeNucci (Iowa Restaurant Association); Marilyn Miller (Oskaloosa City clerk); Jeannette Peddicord (Perry City clerk)
Acknowledgments

**Kansas:** Cindy Roupe and Kim Harp (State Library of Kansas); Susan Forbes (Reference Library & Archives Div. Kansas State Historical Society); Nancy Gray (Washburn U Law Library)

**Kentucky:** Tim Tangle (KY State Library and Archives); Robert Jenkins (KY Legislative Research Commission; Ramona Newman (Frankfort City Clerk)

**Maine:** Sheila Bearor and Mark Knierim (Maine State Law and Legislative Reference Library); Maine State Archives Search Room

**Massachusetts:** Jennifer Fauxsmith (Massachusetts State Archives); Betsy Lipman and Sean Casey (Boston Public Library); Terri Gallego O’Rourke (Boston U. Law Library)

**Michigan:** Janice Murphy (Library of Michigan)

**Minnesota:** Jeanne Weigum (ANSR); Kathryn Otto (Minnesota Historical Society); Elizabeth Lincoln and Robbie LaFleur (Minnesota Legislative Reference Library)

**Mississippi:** Jeff Coleman (Vicksburg Old Court House Museum); Christine Chouccoli (Warren County Vicksburg Public Library)

**Nebraska:** Linda Hein and Patricia Churray (Nebraska State Historical Society Library/Archives Div.); Marie Wiechman (Nebraska State Library); Stefanie Pearlman (U. Nebraska Law Library)

**Nevada:** Michael Maher (Nevada Historical Society); Teresa Wilt (Research Library Legislative Counsel Bureau); Christopher Driggs (Nevada State Library and Archives)

**New Hampshire:** Jane Lyman (NH State Library); Mary Searles (NH Law Library)

**North Carolina:** Elizabeth Dunn (Duke U. Library MS/Spec. Coll.); Brenda Freeze, Angela Davis, Jeanne Peek, and Stephanie Kelly (Charlotte City Clerk’s office); Juanita Cooper (Greensboro city clerk); Patricia Poland (Union County Public Library); Lisa Coombes (NC Dept of Cultural Resources); Alice Soles (Columbus County Library, Whiteville); Helen Snow (Greensboro Public Library)

**North Dakota:** Jim Davis (ND State Archives); Marilyn Johnson (ND Legislative Council); Curt Hanson (U. of North Dakota Library); Ted Smith (ND Supreme Court Library)

**Ohio** Cincinnati Public Library Genealogy and History Dept.

**Oklahoma:** Patricia Jones (Oklahoma Historical Society); Oklahoma State Archives Oklahoma Dept of Libraries; Jennifer Gerrish (U. Oklahoma Law Library); Melissa Antonucci (U. Tulsa McFarlin Library)

**Oregon:** Patricia Nielsen (Oregon Legislative Library); Andrew Needham (Oregon State Archives)

**Pennsylvania:** Randall Tenor and Susan O’Neill (Pennsylvania Bureau of State
Acknowledgments

Library)

South Carolina: Jane Yates (Citadel Military College Archives)
Tennessee: Vince McGrath (Tennessee State Libraries and Archives); Sally Polhemus (Lawson-McGhee Library Knoxville)
Texas: Nancy Watson (Legislative Reference Library)
Utah: Heidi Stringham (Utah State Archives); Marilyn Banasky (Lehi city recorder); Isabelle Roehrig (Salt Lake City Public Library); Meredith McNett (Utah Law Library)
Washington: Crystal Lentz (Washington State Library); Jennifer Laine (Washington State Law Library); Jeannette Voiland (Seattle Public Library)
West Virginia: Debra Basham (WV Archives)
Wisconsin: Nancy Mulhem (Wisconsin State Historical Society)
U.S. Senate: Katherine Scott (Historian’s office); Tamara Elliott (Library)

Special thanks are also owed to: Rodney Clare, for transcribing a letter by J. B. Duke in the Duke University Library Archives; Carol Ann Goodding, for taking digital photographs of some correspondence in the John C. Houk papers in the McClung Historical Collection at the Knox County Public Library; Louise Blankenburg, for taking digital photographs of several lengthy articles in old bound newspaper volumes at the State Historical Society of Iowa as well as of some cartoons in bound journals; Merle Davis, for (generously, intuitively, and on his own initiative) printing out, as a by-product of his own unfathomably prodigious microfilm reading of Iowa newspapers, numerous cigarette-related articles; John Bergstrom, the interlibrary loan librarian at the University of Iowa Law Library, for his more than two decades of incredibly fast, efficient, competent, persistent, and creative locating and securing of thousands of items, without which neither this book nor several others would have been possible; and Bob Ramsey, for scanning in illustrations.
Preface

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

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

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

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

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3Calculated according to data in National Clearinghouse for Smoking and Health, U.S. Department of Health, Education and Welfare, Use of Tobacco: Practices, Attitudes, Knowledge, and Beliefs: United States—Fall 1964 and Spring 1966, at 465 (1969). The breakdown of responses to the same question in the 1966 survey of 5,770 respondents was virtually identical, the only deviation being that 24 percent of former smokers disagreed. Id. at 466. In both surveys a higher proportion of women than men disagreed with the statement. For example, in 1964 34 percent of female and 27 percent of male never smokers disagreed, whereas in 1966 the figures were 35 and 26 percent, respectively.
all men strongly agreed, while the corresponding figures among never smokers were 42.5 percent and 26.1 percent, and among current smokers 20.7 percent and 18.6 percent, respectively. When it published these data in 1973, the National Clearinghouse for Smoking and Health of the U.S. Department of Health, Education, and Welfare characterized as “significant” the fact that nearly two of five respondents had said that the sale of cigarettes should be stopped completely. Even Roper surveys conducted for the Tobacco Institute between 1968 and 1978 reported that between 16 and 20 percent of all non-smokers (and, by 1978, 22 percent of never-smokers) agreed that a “law should be passed against the sale of all cigarettes.” Nineteen and 20 per cent of all adults in 1978 and 1981 Gallup surveys, respectively, strongly or mildly agreed that the sale of cigarettes should be banned completely. And finally, as recently as 2001, a survey conducted for Philip Morris revealed that when presented with two options—“No further regulation of the tobacco industry is necessary, that previous efforts have changed the industry sufficiently” or “The tobacco industry...
should be almost regulated out of existence, using governmental authority to almost eliminate smoking”—41 percent of respondents, including 32 percent of Republicans, opted for the quasi-prohibitionist alternative.9

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

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

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


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

12See below ch. 16.


Preface

himself much later characterized as extensive press coverage\textsuperscript{15} and a public hearing, the full House accepted without a floor vote the Social Welfare Committee’s recommendation that it be held over for the 1971 session.\textsuperscript{16} In his “Annual Summary Report on State Legislative Proposals and Activities” to Tobacco Institute President Horace Kornegay, a bewildered Executive Vice President Frank Welch commented: “We gave close attention to this bill. Strange to say, there was some sentiment in favor.”\textsuperscript{17}

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

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


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

\textsuperscript{18} Tobacco Issues (Part 1): Hearings Before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce House of Representatives 593 (100th Cong., 1st Sess. 1989). See also H. Sapolsky, “The Political Obstacles to the Control of Cigarette Smoking in the United States,” Journal of Health Politics, Policy, and Law 5(2):277-90 at 277 (1980): “Today, fifteen years after the Surgeon General first reported on the medical dangers of smoking, and when the health care and productivity costs of cigarette smoking are officially claimed to measure in the tens of billions of dollars, no one seriously proposes a ban on cigarettes.” With virtually identical words (“‘I know of no one who seriously favors a total ban’”) the chairman of the Consumer Product Safety Commission, Richard Simpson, in October 1973 sought to lay to rest a controversy that he had sparked in August by telling a reporter that he “was prepared to seek a ban on all or some [high tar] cigarettes if, as expected, an examination confirms the surgeon general’s findings on the hazardous nature of cigarette smoking.” John Morris, “Regulatory Power on Cigarettes by New Safety Agency in Doubt,” NYT,
anarchic consequences of foisting prohibition on tens of millions of nicotine addicts. In sharp contrast, the late-nineteenth- and early-twentieth-century movement to ban the sale of cigarettes was in no small measure driven by the realization of the urgency of using the window of opportunity before the addiction of scores of millions doomed such a campaign.

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

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

Oct. 3, 1973 (27); Gerald Gold, “Cigarette Ban to Be Asked by Federal Safety Official,” NYT, Aug. 23, 1973 (1:7). After the Tobacco Institute had unleashed a broadside against Simpson’s “sheer bureaucratic arrogation of power” and mobilized congressional support, the commission by a vote of 3 to 2 ruled that it lacked authority to ban even high-tar cigarettes. Tobacco Institute, [Press Release] (Aug. 23, 1973), Bates No. 501470068; “Safety Unit Bars a Cigarette Ban,” NYT, May 18, 1974 (36). On the tenth anniversary of the issuance of his landmark surgeon general’s report and on the occasion of his signing the Nonsmokers’ Bill of Rights, Luther Terry stated with regard to Simpson’s remark about barring all cigarettes that: “I don’t believe in that sort of prohibition.” CBS Morning News, WTOP TV (Jan. 11, 1974) (Radio TV Reports, Inc. Transcript for Tobacco Institute), Bates No. TIMN0114244/8. These assertions to the contrary notwithstanding, as late as 1965, Lee Berglund, the executive director of the Minnesota division of the American Cancer Society, testified before Minnesota House Welfare subcommittee on a bill to require warning labels on cigarette packages that: “There is no question in my mind that all cigarettes should be taken off the market.... But you don’t legislate things right off the bat.... You have to create some understanding of the problem first.’ But eventually, Berglund made clear, the cancer society would push for a complete ban on cigarette sales.” “Cigarette Smoking Called ‘Catastrophe,’” Minneapolis Star, Mar. 13, 1965, Bates No. T108741245.
Preface

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

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


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

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

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

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

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

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

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

24For example, the assertion by Ronald Rychlak, “Cards and Dice in Smoky Rooms:
For example, one of the world’s leading tobacco control scholars asserted in 2009 in a 200-page work on the history of tobacco control in Iowa that that state had gone “as far as to completely prohibit the use of tobacco in 1897” and had not repealed this prohibition until 1921, at which time the legislature “again allowed tobacco use by adults....” In fact, Iowa prohibited the manufacture and sale of tobacco bans and modern casinos,” *Drake Law Review* 57:467-514 at 474 (Winter 2009), that anti-cigarette laws “were primarily based on the perceived immorality of tobacco use” was based on no sources, let alone primary ones. Although Cassandra Tate, *Cigarette Wars: The Triumph of “The Little White Slaver”* (1999), based as it was on a doctoral dissertation in the history department of a major university, did use primary sources, the author was so unfamiliar with the legal system, so reliant on “scores of archivists and librarians who responded to my written inquiries by digging into their records to do research that I could not do in person” (id. at v)—the author appears to have been unaware that legislative journals could be borrowed through interlibrary loan and that copies of bills could be ordered from state archives—and so unsystematic and sloppy a researcher that she apodictically announced the results of her (or her ersatz-researchers’) almost random search as absolute certainty. For example, she declared that: “In all[,] eight states considered anti-cigarette legislation during the first half of the 1890s. Most were in the South or West....” Id. at 46. Her own lists (“State Cigarette Prohibition Laws” and “Cigarette Prohibition Laws Considered”) included only six states satisfying that chronological criterion (Washington 1893, North Dakota 1895, Alabama 1892, California 1895, Massachusetts 1892, Michigan 1892). Id. at 159-60; C. Cassandra Tate, “The American Anti-Cigarette Movement, 1880-1930” at 502-504 (Ph. D. Diss. U. Washington, 1995). The last mentioned was erroneous: that even-numbered year the Michigan legislature met only for a two-day special session in the course of which cigarettes were not mentioned. *Journal of the Senate of the State of Michigan: Special Session* (1892). In fact, during the sessions of 1889, 1891, 1892, 1893, and 1895, in addition to the enactments in Washington and North Dakota, one house of the legislature in Michigan, Arkansas, Pennsylvania, Mississippi, Alabama, Kentucky, Minnesota, California, Nebraska, Georgia, Colorado, Indiana, Massachusetts (and Oklahoma Territory) actually passed prohibitory laws, Arkansas and Pennsylvania doing so three times, and Nebraska and California twice (once when both houses did so but the governor vetoed the bill). See below Table 1. Tate’s book, published in paperback by a prestigious press, is an example of shoddy historical research that other authors who know even less than uncritically praise. See, e.g., Nancy Bowman, “Questionable Beauty: The Dangers and Delights of the Cigarette in American Society, 1880-1930,” at 52-86, at 85 n. 76, in *Beauty and Business: Commerce, Gender and Culture in Modern America* (Philip Scranton ed. 2001) (“a thorough examination of the anticigarette crusade and its legislative efforts”).

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Preface

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

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

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

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


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

\textit{Preface}

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


\textsuperscript{31}See below ch. 5.

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

examination of data we are induced to believe that the prohibition sought...would save to this State, annually, something more than one million dollars.” And (6) Because laws were “being enacted prohibiting the manufacture and vending [of] poison, to be drank [sic] as a beverage,” there was “an equal necessity” to enact them to “prohibit the manufacture and sale of an article to be used for snuffing, chewing and smoking, known to be destructive of much social happiness, and as well known to contain a deadly poison.” Report of Select Committee, to Whom Was Referred the Petition of Citizens of Jefferson County, Prohibiting the Sale and Manufacture of Tobacco 3-4, in Appendix to Assembly Journal (1854). Chairman Baker’s committee report was accompanied by a much longer Minority Report by Adolph Rosenthal, who at the time of the 1860 Population Census was a 30-year-old lawyer and a decade later a consul for Germany. The diatribe’s sarcasm culminated in the barb that: “The tobacco plant in its enormous consumption on the two hemispheres...becomes a deadly poison—a lingering cancer...; a sneaking evil, the eradication and extirpation whereof would entitle a legislative body to immortality....” Rosenthal attacked the committee report, which ignored contrary medical authorities, for its inability to “conceive any sound reason for granting aid and compensation to those who have heretofore been enriching themselves by selling sickness and death to our inhabitants” and its belief that “it is the fault of the tobacconists and segar dealers, in case they should be ruined by this law, because they did not foresee, that science and chemistry were going to make a sudden and really surprising step towards truth.” Finally, speculating that tobacco plantations might move north to Wisconsin, Rosenthal recommended against passage as “opposing the agricultural interest....” “Minority Report,” in id. at 4-12, at 5, 10, 11-12. (In fact, commercial tobacco production had just begun in 1853. Tobacco Institute, Wisconsin and Tobacco 5 (1960).) The day before Baker presented the report, the Assembly had rejected an amendment by another member to include tobacco in the prohibitory liquor bill (then being debated), to which Baker’s bill was virtually identical. “Legislature of Wisconsin,” Daily Argus and Democrat (Madison), Mar. 7, 1854 (2:1-5 at 3); “Wisconsin Legislature,” Weekly Wisconsin, Mar. 8, 1854 (7:1-2); “Legislative Matters,” Milwaukee Daily Sentinel, Mar. 9, 1854 (2:3-4).

After the committee of the whole had reported A. No. 334 with (unidentified) amendments, the bill was, “in a spirit of frolic,” ordered engrossed, but was then defeated 28-40 (Rosenthal and Bernhardt, who had strenuously opposed the liquor prohibitory bill, voting No). Journal of the Assembly of Wisconsin: Annual Session, A. D. 1854, at 678-79 (Mar. 25), 702-703 (Mar. 27) (1854); “Legislative Matters,” Milwaukee Daily Sentinel, Mar. 30, 1854 (2:2-3). The Prussian-born Bernhardt, who did not sign Baker’s report, was an unsuccessful cigar manufacturer; a graduate of the University of Berlin, he became a noted teacher in Wisconsin. William Whyte, “Beginnings of the Watertown School System,” Wisconsin Magazine of History 7(1):81-92 at 90 (Sept. 1923).
historical research will lose any excuse for existence that it never had anyway. Many of these ahistorical escapades will be mentioned throughout the book, but a few are highlighted here to offer a justificatory foretaste.

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

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


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


38See below chs. 3-4.


40Christopher Snowdon, Velvet Glove, Iron Fist: A History of Anti-Smoking 44 (2009). Among the (less important) untruths that Philip Morris vice president James Bowling told
an object lesson in perpetuation of historical error.\footnote{41}

A number of Surgeon General reports on the health consequences of smoking are marred by this methodological and substantive sloppiness. In 1986, for example, it asserted that by 1887—an error or typo for 1897—North Dakota, Iowa and Tennessee had “completely banned the sale and use of cigarettes,”\footnote{42} whereas in fact only Indiana (in 1905) banned keeping or owning cigarettes\footnote{43} (language that the Indiana Supreme Court the next year interpreted as not embracing keeping or owning for personal consumption)\footnote{44} and Washington State (in 1909) banned possession\footnote{45} (that statute being legislatively repealed in 1911\footnote{46} following some degree of enforcement\footnote{47} and after a superior court judge had held during an interview on “60 Minutes” was that: “Seven states passed laws that outlawed the sale of cigarettes because [everybody thought] they caused t.b. The only thing that happened was that they quit looking for the real cause of t.b. for a period.” Mike Wallace Interview of James C. Bowling - July 18, 1973 for CBS Television Program “60 Minutes” at 9, Bates No. 1005119555/63. Bowling embellished the untruth during an infamous interview in 1976 (later partially incorporated into the film \textit{Death in the West}): “You know seven states in the United States outlawed the sale of cigarettes as recently as the 1920’s because they were sure they caused tuberculosis.” “This Week: Philip Morris: Mr. James C. Bowling, Vice President, Philip Morris Inc., being interviewed by Mr. Peter Taylor,” Thames Broadcasting Co., London, August 16, 1976, Bates No. 1002410318.


\footnote{43}\text{1905 Indiana Acts ch. 52, \S\ 1, at 82 (“it shall be unlawful for any person...to...keep or own, or be in any way concerned, engaged or employed in owning or keeping any such cigarettes...”). See below vol. 2.}

\footnote{44}\text{State v Lowery, 166 Ind. 372 (1906). See below vol. 2.}

\footnote{45}\text{1909 Washington Laws ch. 249, \S\ 284, at 890, 978 (“Every person who shall...have in his possession any cigarettes, cigarette papers or cigarette wrappers, shall be guilty of a misdemeanor”). See below ch. 11 and vol. 2.}

\footnote{46}\text{1911 Washington Laws ch. 133, \S\ 2, at 649, 650. See below ch. 11 and vol. 2.}

\footnote{47}\text{E.g., “Fined for Smoking Cigarettes,” \textit{Leavenworth Echo} (Wash.), June 18, 1909 (6) (‘North Yakima—The first person arrested for violating the anti-cigarette law here was John Smith, a stranger, who came here to take a position in a hay field. While waiting for a rig to take him to a ranch, he smoked a cigarette and was fined $10’). See also ‘‘Bill’ Haywood, Socialist, with the ‘Makin’s,’ Arrested for Smoking Cigarettes,” \textit{SP-I}, June 17, 1909 (1:3-4); “Haywood Pays $2.50 Fine for Smoking Cigarettes,” \textit{SP-I}, June 18, 1909, sect. 2 (2:6) (saying “he was sorry he could not remain and carry the case up to test its constitutionality”). See vol. 2.}
it unconstitutional as an interference with interstate commerce).\textsuperscript{48}

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

\textsuperscript{50}1907 Ill. Laws 265 (approved June 3).
\textsuperscript{53}Peter Jacobson, Jeffrey Wasserman, and John Anderson, “Historical Overview of Tobacco Legislation and Regulation,” Journal of Social Issues 53(1):75-95 at 77 (1997), Bates No. 520593632/3 (erroneously using “store” instead of “keep”). The aforementioned article that inspired the Iowa judge’s flight of historical fancy, Ronald
Preface

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

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

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

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

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

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

57 1900 Census of Population (HeritageQuest); U.S. Census Office, Census Reports, Vol. 1: Twelfth Census of the United States, Taken in the Year 1900: Population, Part 1, tab. 5 at 265 (1901). In 1920 Davis was still a station agent.


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

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

63 House Bill No. 105, State of New Hampshire (1901) [In New Draft], §§ 1-3 (introduced by Committee on Revision of Statutes) (copy furnished by Jane Lyman, New Hampshire State Library). The House substituted this draft for the bill as introduced by
Two weeks later a majority of the Judiciary Committee of the Senate (which Republicans controlled 23 to 1)\(^{64}\) recommended for passage an amended version of the House bill, while a minority recommended the latter unchanged; after the full Senate had rejected by a vote of 9 to 13 a motion to substitute the minority for the majority report, the chamber passed the amended bill and sent it to the House for concurrence.\(^{65}\) The one-member committee minority was Daniel Clark Remich, a 39-year-old lawyer, who had retired from his law practice in 1890 to enter the stereoscopic view business with his father-in-law; he also became president of glove and shoe manufacturing companies. Remich complemented his state legislative career, which began in the House in 1895, with extensive writing on temperance and other reforms, causes for which he advocated in the legislature, before courts, and on political platforms.\(^{66}\) In 1906 he became a founding member of the Lincoln Republican Club, the New Hampshire Republican mugwump good-government reform movement targeting above all the Boston & Maine Railroad’s control of the party.\(^{67}\) Remich urged his colleagues to adopt the original bill, which was “for the good of the boys, protecting them

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\(^{65}\)\textit{Journals of the Honorable Senate and House of Representatives of the State of New Hampshire: January Session, 1901} at 659 (Feb. 28) (1901). At that time House rules provided that bills would not be printed until the relevant committee had recommended their passage; the handwritten bills as introduced were not retained if superseded by a committee revision, and in this particular case, the New Hampshire State Archives lacks the files of the Committee on Revision of Statutes for the years 1895 to 1903; consequently, the contents of H.B. No. 105 as introduced are unknown. Telephone interview with Jane Lyman, reference librarian, New Hampshire State Library (July 15, 2010); email from Jane Lyman to Marc Linder (July 26, 2010). On the meaning of “original package” and its impact on the stringency of cigarette sales bans, see below chs. 10-12.

\(^{66}\)History of Littleton New Hampshire 2:18, 3:412 (James Jackson ed. 1905).

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

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

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

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

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

Preface

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

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

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

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72“Promoting Lawlessness,” Manchester Union, Mar. 23, 1901 (6:2).
731900 Census of Population (HeritageQuest).
74Nearing the End,” Concord Evening Monitor (Legislative Edition), Mar. 21, 1901 (1:2-3, at 2:1-5 at 4-).
75Jane Fant, Sallie Ramsden, Judy Russell, Lyme 32 (2006); 1900 Census of Population (HeritageQuest).
76“The End Reached,” Concord Evening Monitor, Mar. 22, 1901 (1:4). The lawyers were Silas Hardy and Arthur O. Fuller. Party affiliations are taken from The New Hampshire Register, Farmers’ Almanac and Business Directory for 1901, at 268-72 (1901).
77Journals of the Honorable Senate and House of Representatives of the State of New Hampshire: January Session, 1901 at 844 (Mar. 21) (1901).
78Another cigarette sales ban bill was introduced in 1903, but the House took no action
"See," as Hans Christian Andersen might have said, "that was a real story."

Ironically, neither latter-day foes of nor cheer-leaders for non-existent nineteenth-century and early-twentieth-century cigarette/tobacco use bans focus on the real, albeit partial, public smoking bans.\footnote{For example, see below ch. 16.} For example, in 1919, the Nebraska legislators seeking repeal of the state’s 14-year-old cigarette sales ban encountered such robust resistance that they were able to achieve that objective only by agreeing to impose a ban on cigarette smoking in public eating places. Of interest here is not so much that innovation itself\footnote{On the Nebraska law (which was not repealed until 1937), see below ch. 16, which also discusses the law’s failure to ban other kinds of tobacco (especially cigar) smoking.} as an astonishingly prescient editorial on it in the independent Republican Lincoln \textit{Nebraska State Journal}, which documents the existence almost a century ago of the capacity to articulate a modern, non-religious and non-moralistic public policy basis for suppressing secondhand smoke exposure:

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

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

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

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

If tobacco ever gets bumped clean out of business, it will be because of this imperialistic aspect of its use. Chewing presented no such problem. The chewer can expectorate in his pocket or in the unfeeling gutter and no one be harmed unless it be himself. But the smoker, given his present carte blanche, spouts his smoke promiscuously on it other than to postpone it indefinitely. \textit{Journals of the Honorable Senate and House of Representatives of the State of New Hampshire: January Session, 1903} at 152, 631 (Jan. 26, Apr. 2) (1903) (by Spurzhie Worthley).
in other people’s air. With the further development of human sensitiveness, that will ultimately be as intolerable as it would be now to have a tobacco chewer deposit his expectorations in the water he must drink.

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

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


INTRODUCTION

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

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

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

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

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

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

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

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

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

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

¹“Cigarette Smoking,” USTJ, vol. 22, Sept. 18, 1886 (3:1).
²Borden Deal, The Tobacco Men 245 (1965). This fictionalized account of James B. Duke and the Tobacco Trust, which originated in notes that Theodore Dreiser had made in 1932 in preparing a script for a film, ascribed these remarks to Duke at the meeting ca. 1889 at which he persuaded his chief competitors to join him in forming a trust.
⁴“The Cigarette’s Peril,” SLH, Oct. 30, 1900 (4:1) (edit.).
of cigarettes has grown within the past few years.” Previously the industry was “almost unknown,” the reason apparently being that, although domestic consumption had “increased largely,...the real course of activity” was the “great export demand” to Europe and especially South America.\(^5\) Whereas cigar production declined somewhat between 1874 and 1877, the manufacture of cigarettes more than quadrupled. To be sure, even by the latter year almost a dozen cigars were still being produced for every cigarette.\(^6\)

The *Tobacco Journal* interpreted the consumption of cigarettes in such “immense proportions” as “[o]ne of the signs of the hard times”: one of the consequences of the “financial depression” was that as a “matter of economy” many people smoked a package of [20] cigarettes in lieu of their former diet of three to six cigars.\(^7\) (A decade later the same journal explained the “growth of the habit...by the fact that...one can get twenty cigarette smokes for the cost of one cigar smoke.”)\(^8\) But cigarette production continued to expand even after the depression had morphed into the prosperity phase of the business cycle: the press reported that the number of cigarettes on which tax was paid had risen approximately 30-fold between fiscal years 1870 and 1880 from about 14 to 409 million. The figures prompted Bradstreet’s to observe in 1882 that whereas until recently their consumption had been confined “almost entirely to the foreign born portion of our population...[t]o-day more natives than foreigners smoke them.” With considerable exaggeration it added: “The Americans may be said to have become a nation of cigarette smokers.”\(^9\) (Even in 1911, when the press repeated that “[t]his nation of 90-odd millions is, indeed, a nation of cigarette smokers,”\(^10\) the claim was still premature, though by 1920, when over half of young males

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\(^5\)“Manufacture of Cigarettes,” *USTJ* 1(26):2:3 (Aug. 1, 1876).
\(^6\)Cigar production declined from 1,835,000,000 in 1874 to 1,816,000,000 in 1877, while cigarette production rose from 35 million to 157 million; manufactured tobacco and snuff stagnated. Calculated according to U.S. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970*, Part 2: ser. P 239-41 at 2:691 (Bicentennial ed. 1975).

\(^7\)“Cigarettes and Cheap Segars,” *USTJ* 3(19):2:3 (June 19, 1877).
\(^8\)“Cigarette Smoking,” *USTJ*, Sept. 18, 1886 (3:1) (vol. 22).
\(^9\)Bradstreet’s 3(136) (80:1-2) Feb. 5, 1881 (untitled). Even more hyperbolic was the contemporaneous claim of the Raleigh *News and Observer* that: “Cigarettes have well nigh replaced cigars in popular favor.” At the same time it reported that physicians had declared cigarettes to be “more dangerous because the cigarette is smoked closer....” *N&O*, May 31, 1881 (2:1) (untitled).
\(^10\)“Cigarettes,” *Daily Times Press* (Middletown, NY), May 11, 1911 (4:3).
Cigarette Industry/Nicotine Trust

smoked cigarettes, and especially by 1929, when “[n]ine out of ten American men, it is said, smoke cigarettes as regularly as they read their newspapers,” it was much more plausible.) In any event, Bradsreet’s characterized the United States as “the heaviest cigarette producer in the world” and predicted that the industry would “steadily increase,” singling out exports for special mention.

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


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

14Bradsreet’s 6(229):327:2 (Nov. 18, 1882) (untitled). For a contemporaneous pessimistic evaluation of the past and future of cigarette making machinery, see “Cigarettes
Cigarette Industry/Nicotine Trust

machine was capable of producing 120,000 cigarettes a day, thus replacing 48 hand workers. The machine’s impact can also be gauged by the fact that, with the most highly skilled workers making 3,000 cigarettes a day, 30 of Bonsack’s machines “could have saturated the...market” by 1885. When “[o]utput soared [s]elling became the problem,” the solution, according to “Mr. Duke’s excellent advice,” was advertising, which could also extricate individual manufacturers from the “excessive competition” that Duke identified as the cause of the low prices that accounted for cigarettes’ “increased popularity....”

As cigarette production quintupled during the 1880s, the press sought the demand-side reasons for this “enormous” increase. The “hard times” argument, this time applied to the depression of 1882-85, reappeared, but manifestly became inadequate as the economy revived. No less an authority than Samuel Gompers, vice president of the Cigarmakers’ International Union, after declaring the fact of cigarettes’ being cheaper (than cigars) as the explanation, offered a more nuanced cultural interpretation, which, however, focused on cigar smokers’ reasons for switching to cigarettes (and thus, perforce, on higher-income men who smoked cigars) to the exclusion of the expansion of the universe of smokers, especially by means of addicting boys. Faulting his members’ employers’
failure to “‘recognize the principal wants of the smoking public—i.e., the desire for a short smoke’”—he specified to the United States Tobacco Journal in 1887 that: “It frequently happens that a man has say five minutes to wait for a train, or has a short walk from his house or office which will take that length of time. He knows well that if he lights a cigar he will throw it away presently. To gratify his appetite for smoking is his desire, but that is too expensive a way; consequently he turns to a cigarette, of which he gets ten for the price of a 5-cent cigar, and one of which for the time satisfies his craving for a smoke. That is but one instance however. It may be, again, that you go to a theatre, between the acts you feel like smoking. ... When you take into consideration the number of theatre-goers, and men who are out all day traveling from street to street, and who, as it were, smoke on the wing, you can see how the cigarette smoking increases.”\textsuperscript{21}

In early 1896, when state laws prohibiting cigarette sales were either no longer in effect\textsuperscript{22} or yet to be enacted in Iowa, Tennessee, and elsewhere, the financial and general press reported that the decline in American Tobacco Company share prices from 80 to 77\textsuperscript{a} on February 26 in heavy trading in New York—which, in turn, depressed the general market—had been attributed to selling prompted by the passage of bills in the South Carolina and Kentucky House of Representatives establishing such bans.\textsuperscript{23} Having reported the day before that “an inside interest keeps selling on a feeling that the company is being hampered and damaged by the litigation and legislation and expected some bad news this week,”\textsuperscript{24} the Wall Street Journal declared in its brief analysis of tobacco stocks: “The legislation against the sale of cigarettes is a considerable

\textsuperscript{21}“Cigarettes,” \textit{USTJ}, vol. 23, Feb. 12, 1887 (2:6).

\textsuperscript{22}See below this ch. on the Washington State (1893) and vol. 2 on North Dakota (1895) statutes, which in the meantime had been judicially invalidated and mysteriously deleted from the state code, respectively.

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

\textsuperscript{24}“Tobacco,” \textit{WSJ}, Feb. 26, 1896 (2:1).
bear factor.”

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

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

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

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25“Tobacco,” WSJ, Feb. 27, 1896 (2:3).
26See below ch. 6.
27Both houses of the Kentucky legislature did pass an anti-cigarette bill in 1898, but the lieutenant governor vetoed it. See below ch. 6.
28See below ch. 10, 5.
29“Tobacco,” WSJ, Feb. 27, 1896 (2:3).
30See below ch. 6.
Cigarette Industry/Nicotine Trust

U.S. industrial firms after the U.S. Steel Corporation.\(^{32}\)

Nevertheless, general state prohibitions on the manufacture and sale of cigarettes and special laws forbidding use by minors were in fact, pacè Duke, qualitatively different than the legal interventions facing any other companies except the liquor industry. The public, thanks to the federal excise taxes—the tripling of the rates of which in 1897-98 presumably depressed demand\(^{33}\)—collected and the data published monthly and annually by the Commissioner of Internal Revenue and disseminated by newspapers, knew that aggregate national production of cigarettes fell from sharply from 1896 to 1901.\(^{34}\) Although comparisons are made difficult by changes in tax classifications of tobacco products during these years—before 1897 small cigars were included in small cigarettes as were large cigarettes before 1898\(^{35}\)—as well as by differing statistics collected on a fiscal and a calendar year basis,\(^{36}\) and those including and

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


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

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

\(^{36}\)Manufacturing data on a calendar year basis (which included exports) showed a decline of 45.2 percent from 4,967,444,232 in 1896 to 2,722,979,167 in 1901. *Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1901,*
Cigarette Industry/Nicotine Trust

excluding exports, by any set of data the decline was impressive, ranging from 29.5 percent (4,967 to 3,503 billion) to 38.2 percent (3,674,027,490 to 2,271,622,626) just from 1898 to 1901. Thus, for example, the Statesville, North Carolina Landmark reported in 1900 that the “promoters of anti-cigarette crusades” regarded the more than 25-percent fall in production over the previous year “cheerfully,” adding that “others remark that the decline probably means nothing more than a temporary glut in the paper cigarette market.”

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

38 Arthur F. Burns, Production Trends in the United States Since 1870, tab. 44 at 298 (1934).

39 Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1898, at 44 (House Doc. No. 11, 55th Cong., 3d Sess., 1899); Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1901, at 29 (House Doc. No. 11, 57th Cong., 1st Sess., 1901). Fiscal year 1898 was chosen here because it was the first year in which small cigars (together with large cigarettes) were segregated out of the data for small cigarettes; exports are also excluded. Small cigarettes were defined as taxed at $1.00 per 1,000 in 1898 (including the old stock still taxed at 50 cents) and $1.50 in 1901.

40 Fewer Paper Cigarettes Made,” Landmark, Feb. 20, 1900 (1:6). See also “Paper Cigarettes Less Popular,” N-YDT, Feb. 14, 1900 (14:3): “Anti-cigarette crusaders are finding satisfaction in the January figures for the two great cigarette making Internal
Cigarette Industry/Nicotine Trust

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

The Woman’s Christian Temperance Union itself, the nationwide engine of anti-cigarette agitation, was acutely aware that “[t]he use of the cigaret is decreasing.” Eliza B. Ingalls, the longtime national superintendent of the organization’s anti-narcotics department and “perhaps the most attractive apostle that the anti-tobacco crusade has developed,” informed the WCTU’s annual meeting in 1900 that withdrawals from factories for consumption had fallen from 4,403,798,737 in 1896 to 2,639,899,780 in 1900, while truthfully observing that these figures “must not be considered wholly a decrease in the use of cigarettes, as many smokers now roll their own cigarettes.” Praising Iowa and Tennessee for having “the best laws,” she declared the strategy that a century later was reforged among anti-cigarette activists: “We must make the smoking of cigarettes disreputable.”

By the beginning of 1902 she cheered her troops in a circular letter predicting that: “If we work quietly, easily and keep at it, the cigaret will be driven out of existence in ten years. If half our membership work earnestly, we will kill the cigaret trade in two years.” Even though the membership let her down, she was nevertheless pleased with the “marvelous” results that “a large number” of WCTU members had achieved.

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

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41 “Consumption of Cigarettes Decreasing” Landmark, Jan. 29, 1901 (1:3).

42 Thumb Nail Sketches of White Ribbon Women 50 (Clara Chapin ed., 1895).

43 Report of the National Woman’s Christian Temperance Union: Twenty-Seventh Annual Meeting 248, 249 (1900). These data, while giving the right trend, deviated from those published by the Commissioner of Internal Revenue and cited above. Oddly, in 1907 and 1916 Ingalls omitted Iowa from the list of states prohibiting the sale and manufacture of cigarettes. Report of the National Woman’s Christian Temperance Union: Thirty-Fourth Annual Convention...November 8-13, 1907, at 265; Report of the Forty-Third Annual Convention of the National Woman’s Christian Temperance Union...November 17-22, 1916, at 236.

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

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


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


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

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

Cigarette Industry/Nicotine Trust

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

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

54 Report of the Industrial Commission on Trusts and Industrial Combinations 13:320 (57th Cong., 1st Sess., H. Doc. No. 182, 1901). Whether related to this substitution for manufactured cigarettes or not, a strong increase in the production of smoking tobacco by the Tobacco Trust took place between 1897 and 1901 that exceeded the increment accounted for by its takeover during these very years of many independent producers. Report of the Commissioner of Corporations on the Tobacco Industry, Part III: Prices, Costs and Profits, tab. 19 at 84 (1915).
cigarette business has shrunk nearly two-fifths, I should think. ... The decrease has been mainly due to the knocking out of the 20 for 5 cents rate." 55 The Bureau of Corporations later confirmed that the Trust’s profits had decreased between 1897 and 1901 while “the tax increased very decidedly.” 56

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

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

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

populated states (plus the Territory of Oklahoma). Yet the considerable litigational and lobbying/bribery resources that the ATC devoted to combating such legislative measures before, during, and after these years—as early as 1894 the press had reported that the cigarette trust’s “lobby in Washington [D.C.]...is second in size and boodle only to that of the sugar trust”—strongly suggests that the Trust regarded them as more injurious than Duke let on. Another factor contributing to the decline in consumption, at least according to some contemporaries, was state legislation prohibiting sales to minors.

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

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


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

60 The Deadly Cigarettes,” Macon Telegraph, July 14, 1898 (5:3-5 at 3-4) (the article was originally commissioned by the Nashville American). To be sure, the article claimed that this loss had in part been compensated for “among middle-aged men and fashionable women” among whom “the habit...is very likely to find its more prolific ground and its most ardent devotees.”
of rejections is due to the large number of young men applying for enlistment who have become victims of the cigarette habit.”\textsuperscript{61} Eliza Ingalls, zealously availing herself of the propagandistic boon furnished by the datum that cigarette smokers had been responsible for raising the aggregate rejection rate from 15 percent during the Civil War to 25 percent in the Spanish-American, observed in the WCTU’s house organ:

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

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

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

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

\textsuperscript{61}Many Volunteers Rejected,” \textit{NYT}, May 11, 1898 (3) (quoting Dr. Benjamin King, who had been an examining physician during the Civil War).

\textsuperscript{62}Testimony Concerning the Cigaret,” \textit{US} 24(6):6:1 (June 30, 1898).

\textsuperscript{63}An Alleged Victim of Cigarettes,” \textit{USTJ}, 24, Aug. 13, 1887 (2:6-7).
smokers throughout their lives.” And with the assistance that “[o]pinions from medical authorities that the cigarette was not harmful in its effects on adults” gave to breaking down the “prejudice” against cigarettes,64 Barney could reassure investors at the outset of the Great Depression that “the smoking habit is one that is not acquired, and readily discarded as a matter of style. Economy may dictate a change in the form in which tobacco is used, but it does not eliminate the habit. Here is the soundness and strength of the industry.”65 Nor was this insight born of hard times. In 1924 the same stock brokers reported that: “Once formed, the habit of cigarette smoking, in the great majority of cases, has a tendency to become permanent, and, therefore, the millions who in recent years adopted cigarette smoking, as well as the many thousands of maturing men who each year form the practice, are likely to be constant cigarette smokers throughout their lives.”66

In his Report on the Tobacco Industry, the Commissioner of Corporations in 1915 gave full credence to the contemporary notion that: “The year 1896 marked a turning point in the cigarette industry. A decline in output occurred at that time which seems to have been due in part to adverse legislation. Several States had placed laws upon the statute books either prohibiting or making more difficult the sale and consumption of cigarettes.” To be sure, the commissioner linked the recovery in production—the “second turning point in the cigarette business”—of 1901 to the alleged fact that: “Much of the adverse State legislation...appears to have spent its force by that time.”67 However, since the general prohibitory laws of Iowa (1896) and Tennessee (1897) were still in effect, and a new wave of such statutes began to be enacted in the first decade of the twentieth century in Oklahoma (1901 and 1905), Indiana (1905), Wisconsin (1905), Nebraska (1905), Arkansas (1907), Washington (1907), Kansas (1909), Minnesota (1909), and South Dakota (1909),68 it is unclear why production explosively expanded during those very years, increasing by 174 percent from 1900 to 1910.69

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

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

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

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


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

(One circumstance often adduced was that the “increased popularity” of brands manufactured from Turkish leaf was “a very important factor” in “[t]he great revival in the cigarette industry after 1901....”) One possible explanation is that the number of cigarette smokers and the average number of cigarettes they smoked in the much more populous non-prohibitory states increased at a rate that far more than compensated for any possible loss of markets in the smaller prohibitory states. The population of the latter at their peak prevalence in 1909 (11 states) accounted for only 21.1 percent of the total national population. If it was true that as late as 1910 smokers in New York...
Cigarette Industry/Nicotine Trust

City “accounted for 25 percent of all cigarettes sold in the U.S.,” the opportunities for expanding the market were legion regardless of its curtailment in some less populous states.

population census of 1910 was 19,361,000. Calculated according to U.S. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970*, Part 1: ser. A195 at 1:24-37, ser. A 2 at 8 (Bicentennial ed. 1975). In contrast, in 1900, the only two states (Iowa and Tennessee) with universal cigarette sales bans accounted for only 5.6 percent of the U.S. population, while in 1920, five states (Arkansas, Iowa, Kansas, North Dakota, and Tennessee) accounted for 8.4 percent. *Id.*

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

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

[A]t the afternoon session of the A[merican]. F[ederation]. of L[abor]. convention [t]he fraternal delegates from the W.C.T.U. were given the floor..., the convention voting to cease smoking while the women were present.

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

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

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

Regardless of whether they opposed cigarette smoking, physicians and scientists in the late nineteenth and early twentieth century held many biological
and physiological views of physical and mental disease caused by cigarette smoking that were, in retrospect, scientifically absurd. In particular, an epidemic of press reports in the late nineteenth and early twentieth century recorded an epidemic of deaths from insanity caused by cigarette smoking. For example, The New York Times published a stream of seemingly preposterous articles on (deaths from) insanity caused by cigarette smoking. In 1905 an editorial in the Journal
WCTU’s Health-Based Anti-Cigarette Strategy

of the American Medical Association, sarcastically rebuking “intemperate temperance advocates” who “from time to time have attempted to pass laws prohibiting the use of certain forms of the weed in various states,” positively referred to “much evidence” indicating “the stimulating and sedative effect of smoking in moderation.” The Journal claimed that on the mouth and tongue the effects were “in the main, minor,” and that in general “serious consequences” resulted only from excessive use, but even then “severe lesions are rare....” Nevertheless, even the daily press presciently reported in 1898 not only that nicotine—which constituted “the narcotic element of the tobacco that the taste of the smoker craves”—unduly affected the heart, which “struggles to manage the accelerated blood,” but that cigarettes could cause lip and tongue cancer and weaken the lungs. Such early-twenty-first-century anti-smoking advocates as the Surgeon General and Smoking OR Health might well be proud to appropriate the journalistic “ultimatum” of the 1890s that “‘you cannot smoke and live.’”

In the contemptuous view of some late twentieth-century social scientists and historians, “the prime motivation for the attack on cigarette smoking” by the Woman Christian Temperance Union and similar groups was “moral” in the sense that it was based on the belief that cigarettes corrupted and “could lead to even worse behavior,” or at best was founded on the claim that cigarette smoking stunted adolescents’ growth. To be sure, bizarre and ignorant claims abounded...
among anti-smoking groups. A humorous specimen was on display at the June 1894 monthly meeting of the Chicago Central WCTU, which, as the subhead in the Chicago Tribune had it, was “Horrified by the Cigaret Evil.” Though members had already known that the effects of cigarette smoking were “exceedingly bad,” they had “no conception of the real extent of the horror until “[s]ome women gave an account of their personal observations of the deadly effect of the paper-encased abominations....” The pre-eminent herald of these horrifying tidings was Mrs. Harriet B. Kells, who had been head of the Mississippi WCTU and editor of its state newspaper, but rose through the national ranks to become National Superintendent of the Press Department. Of her Belle Kearney, another Mississippi WCTU figure, said that she was “one of the brainiest, most cultured and advanced women of the South, who had made her record as an educator, and afterward became distinguished as a leader of thought in the National Woman’s Christian Temperance Union....” An official WCTU publication characterized her as “a thinker with the world’s best thought.” Kells’s sole source of intelligence on youth smoking was a friend who was a school principal in Vicksburg, whose letters related how her pupils’ eyes had grown dull, “their limbs palsied, their cheeks sallow, as they were stricken by the

“[P]rofessional historian” Louis Kyriakoudes, who testified in many cases on behalf of plaintiffs suing tobacco companies (and who erroneously focused on Lucy Page Gaston to the exclusion of the WCTU as having “spearheaded the cigarette prohibition movement”), asserted that that movement offered a “moral based critique” and stated that “I’m not aware of one [critique] coming from a medical basis.” E.g., Trial Testimony of Prof. Louis Kyriakoudes at 1133, 1155, 1158 (Mar. 17, 2003), in Eastman v Brown & Williamson Tobacco Corp. (Cir. Ct. 6th Judicial Cir. Fla., Civ. Case No. 97-5968-CI-11

Similarly, it was not the case that “[w]ith issues of class, ethnicity, age, and gender so obviously underlying concerns about tobacco use, the chief objectionable effects of tobacco were behavioral rather than physiological.” Lee Anderson, “‘Headlights upon Sanitary Medicine’: Public Health and Medical Reform in Late Nineteenth-Century Iowa,” Journal of the History of Medicine and Allied Sciences 46:178-200, at 197 (Apr. 1991). R. Alton Lee, “The ‘Little White Slaver’ in Kansas: A Century-Long Struggle Against Cigarettes,” Kansas History 22(4):258-67 at 260 (Winter 1999-2000), condescendingly included “some” anti-cigarette “crusaders” who “argued with more emotion than scientific method” that cigarettes “were dangerous to one’s health” among reformers whose “sincerity...should be accepted, just as in the current debate of creationism versus evolution.”

12Belle Kearney, A Slaveholder’s Daughter 135 (1900).
plague. They rapidly turned into semi-idiots, perfectly powerless to help themselves.”14 Warming up to her subject, Kells then read these extracts from the principal’s letters:

If cigaret smoking is what I believe it is then I am forced into the conviction that there will be no more men raised in this community. So far as my observation goes, and my opportunities are exceptional, there are almost no boys between the ages of 5 and 10 who do not smoke. Older than 10 only a few have escaped. In this section of the country at least this evil is worse than the alcohol habit, for it seems actually to threaten extermination. There are babies, two of them only 5 years old, who say they have been smoking for two years and the statement is corroborated by their elder brothers. One of the little ones was a pouting lipped cupid two years ago, now his tiny face is pinched and wrinkled and his mouth hands loose and relaxed like an old man’s. In a public school recently the teacher called up a boy for inspection who was 10 years old who said he had been smoking for five years. The dark stunted little creature walked from his seat to the platform with the aid of a cane, on which he leaned.... He told us his body was covered with sores.15

“Many of the women shuddered at the disclosures,” but a local Chicago member revealed that that picture “would apply to Chicago if it were a little blacker.” Thereupon the group adopted a resolution urging Illinois and the nation to “direct their efforts to the annihilation of the poisonous cigaret as an article of commerce....”16

However, in contrast to such comic-book-like presentations and later scholarly sneering, one medico-scientific point that anti-cigarette organizations got right ad nauseam in their propaganda was that cigarettes were more injurious than cigars or pipes because, by and large, only cigarette smokers inhaled and almost all cigarette smokers inhaled.17 For example, Reverend George S. Ball, a Unitarian clergyman, and long-time temperance advocate and member of the Massachusetts legislature,18 observed on the floor of the House of Representatives, during a debate in 1892 on a bill to prohibit the sale and manufacture of cigarettes, of the poisonous nicotine: “The cigarettes are smoked in a peculiar way. The smoke is inhaled and thus the nicotine, through the lungs,
WCTU’s Health-Based Anti-Cigarette Strategy

goes into the circulation and affects the whole system.”

Contemporaries, such as the editorialist of *The New York Times*, noted that it was difficult to say why cigar and pipe smokers as a rule did not inhale, while cigarette smokers did, but insisted that “it is an acknowledged fact that it is so.”

Much later, addiction researchers explained that prior to the twentieth century, when tobacco was snuffed, chewed, or smoked in pipes or cigars, tobacco was air-cured and produced an alkaline smoke from which some nicotine may be absorbed through the buccal and nasal mucosae without any need for inhalation into the lungs. The absorption of nicotine from all these routes...is very similar. There is a slow increase to relatively low blood nicotine levels and, in particular, no puff-by-puff nicotine peaks in the case of non-inhaled smoking. The smoking of a whole pipe or cigar in this way provides but a single relatively nonintense pharmacologic reward or reinforcement.

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

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


21. M. Russell and C. Feyerabend, “Cigarette Smoking: A Dependence on High-Nicotine Bolus,” *Drug Metabolism Reviews* 8(1):29-57 at 53 (1978). As one of the post-World War II pioneers of research into disease caused by smoking observed of the importance of the increase in cigarette and decrease in cigar and pipe smoking from the 1920s to 1960: “Smoke from cigars and pipes is heavy and as a rule slightly alkaline. Few people can inhale it without coughing or becoming dizzy or nauseous. Cigarette smoke, on the other hand, is relatively light, nearly neutral and can be inhaled readily. Most habitual cigarette smokers inhale to some degree, and heavy cigarette smokers tend to inhale deeply.... Only 7 per cent of the cigarette smokers among the men [in a large study]
The early twenty-first-century discovery, moreover, that 10 percent of sixth graders who smoked and inhaled “lost autonomy over their tobacco use” within two days of first inhaling\(^{22}\) suggests that late-nineteenth-century concerns about the risks of cigarette inhalation among minors were not baseless.\(^{23}\)

Even the press sounded impressively modern and scientific when discussing cigarette inhalation.\(^{24}\) As early as 1876, the business press reported: “No true cigarette smoker puffs his cloud from his mouth, as he would in smoking a cigar or pipe, but he inhales it, drawing it into the lungs, often holding it there while he eats, drinks or speaks, then expelling it through the nostrils.”\(^{25}\) In 1878 the New-York Daily Tribune reported that “cigarette smoking is much more injurious than cigar smoking because the smoke is generally inhaled,”\(^{26}\) adding five years later
that “[m]ore than 90 per cent of the men who smoke cigarettes habitually inhale
the smoke.”

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

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

28 “Cigarette Smoking,” USTJ, vol. 22, Sept. 18, 1886 (3:1). More than a century later, one of the leading public health economists studying tobacco, who called cigarette smoking “the ‘dirtiest,’ most deadly form of nicotine delivery ever created,” observed that smokers “suck into their lungs contains as many as 6,000 chemical compounds, over 50 of which are known human carcinogens. The list of chemicals inhaled by smokers every time they puff on a cigarette includes ammonia, arsenic, benzene, carbon monoxide,
WCTU’s Health-Based Anti-Cigarette Strategy

the fact had become sufficiently conventional wisdom that even the Wisconsin Supreme Court adduced inhalation as one of the chief grounds of disapproval of cigarette smoking.29

29Goodrich v. State, 133 Wis. 242, 247 (1907). Nevertheless, a much bally-hooed lecture by a lawyer before the Medico-Legal Society in Nov. 1897—whose point of departure was the claim that “the innocuousness of the cigarette” was a “self-evident truth”—stated that “[t]he inhalation question was disposed of” in 1883 in The Lancet by Meyer Dutch, who had written that “the inhaled smoke rarely passes beyond the bronchi” and that “[i]f any smoke enter the air vesicles...it must be a very small quantity indeed, for as a rule it is nearly immediately expelled, and there is no time for diffusion.” W. H. Garrison, “A Brief for the Cigarette,” Medico-Legal Journal 15:280-91 at 287, 288 (Dec. 1897). Garrison’s assertion that Dutch’s mini-communication had “disposed of” a scientific controversy demonstrated how untrustworthy his arguments were since all that Dutch had sought to do was ask whether his observations corresponded with those of “any” of the journal’s readers. His first observation was that inhaling cigarette smoke resulted in the deposition of carbonaceous particles on the upper part of the larynx and pharynx: “I have known some cigarette smokers to suffer from continual ‘hawking,’ the phlegm being very nearly black.” He then hedged the statement that Harrison ripped out of context and abbreviated: “The smoke, if I judge correctly, rarely passes beyond the bronchi, as the result of which slight attacks of asthma occur.” Meyer Dutch, “Cigarette Smoking,” Lancet 1:1028 (June 9, 1883). Little wonder that “[o]ne man proved to his satisfaction that Lawyer Garrison had received a retainer to make this plea in the interest of the cigarette manufacturers.” T.D.C., “The Cigarette Question,” Cincinnati Lancet-Clinic n.s. 40:347-48 at 347 (Apr. 2, 1898). A review of the lecture in Scientific American concluded: “Thus science lays another robust falsehood in the dust. The cigarette smoker may henceforth enjoy his rings of smoke in peace of mind.” “A Brief for the Cigarette,” Canadian Journal of Medicine and Surgery, 3:295-96 at 296 (1898) (reprinting Cyrus Aldrich, Scientific American). One of the responses to Garrison’s “Brief”—written by Harold N. Moyer, a neurologist and professor at Rush Medical College, who agreed that there was “a wholly unfounded prejudice against the use of the cigarette in this country which has been reflected in the legislation in some of our States”—focused on the issue of inhalation, which he regarded as “one of [the cigarette’s] chiefest dangers” because “[t]he majority

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

29Goodrich v. State, 133 Wis. 242, 247 (1907). Nevertheless, a much bally-hooed lecture by a lawyer before the Medico-Legal Society in Nov. 1897—whose point of departure was the claim that “the innocuousness of the cigarette” was a “self-evident truth”—stated that “[t]he inhalation question was disposed of” in 1883 in The Lancet by Meyer Dutch, who had written that “the inhaled smoke rarely passes beyond the bronchi?” and that “[i]f any smoke enter the air vesicles...it must be a very small quantity indeed, for as a rule it is nearly immediately expelled, and there is no time for diffusion.” W. H. Garrison, “A Brief for the Cigarette,” Medico-Legal Journal 15:280-91 at 287, 288 (Dec. 1897). Garrison’s assertion that Dutch’s mini-communication had “disposed of” a scientific controversy demonstrated how untrustworthy his arguments were since all that Dutch had sought to do was ask whether his observations corresponded with those of “any” of the journal’s readers. His first observation was that inhaling cigarette smoke resulted in the deposition of carbonaceous particles on the upper part of the larynx and pharynx: “I have known some cigarette smokers to suffer from continual ‘hawking,’ the phlegm being very nearly black.” He then hedged the statement that Harrison ripped out of context and abbreviated: “The smoke, if I judge correctly, rarely passes beyond the bronchi, as the result of which slight attacks of asthma occur.” Meyer Dutch, “Cigarette Smoking,” Lancet 1:1028 (June 9, 1883). Little wonder that “[o]ne man proved to his satisfaction that Lawyer Garrison had received a retainer to make this plea in the interest of the cigarette manufacturers.” T.D.C., “The Cigarette Question,” Cincinnati Lancet-Clinic n.s. 40:347-48 at 347 (Apr. 2, 1898). A review of the lecture in Scientific American concluded: “Thus science lays another robust falsehood in the dust. The cigarette smoker may henceforth enjoy his rings of smoke in peace of mind.” “A Brief for the Cigarette,” Canadian Journal of Medicine and Surgery, 3:295-96 at 296 (1898) (reprinting Cyrus Aldrich, Scientific American). One of the responses to Garrison’s “Brief”—written by Harold N. Moyer, a neurologist and professor at Rush Medical College, who agreed that there was “a wholly unfounded prejudice against the use of the cigarette in this country which has been reflected in the legislation in some of our States”—focused on the issue of inhalation, which he regarded as “one of [the cigarette’s] chiefest dangers” because “[t]he majority
WCTU’s Health-Based Anti-Cigarette Strategy

To be sure, inhalation was often also the only medical fact that anti-tobacco advocates got (largely) right.30 (Some scientists, however, did come to an early understanding of some aspects of smoking-related disease causation. For example, Scientific American reported in 1889 that William Dudley, a chemistry professor at Vanderbilt University, had demonstrated “the actual cause of the mischief, namely, the cigarette smoker’s absorption of the carbonic oxide and other gases, causing deoxidation of the blood....”)31 This combination of scientific accuracy and pure phantasy was illustrated by Helen Bullock, who presided over the WCTU’s narcotics department. In 1889 in the course of a lecture at a Baptist church in Minnesota she mentioned inhalation together with

of cigarette smokers...inhale deeply, and consequently there may be a much greater absorption of nicotine in this way than there would be from the use of the cigar. Mr. Garrison is inclined to make light of the question of inhalation, stating that at most the smoke only reaches the larynx and larger bronchi. I do not believe that he is correct in this opinion, as the experiments of H. M. Thomas would go to show that particles considerably larger and heavier than tobacco smoke may easily find their way into the smallest bronchi, or even into the air cells themselves. ... Absorption by the respiratory passages is in direct proportion to the depth to which the substance penetrates. The epithelia become thinner and more delicate from the mouth to the air cells. The circulation also increases and the rate of absorption. Of course, it is the amount that is absorbed that affects the nervous system.” Letter from Harold N. Moyer printed in Clark Bell, “The Cigarette: Does It Contain Any Ingredient Other Than Tobacco and Paper? Does It Cause Insanity?” Medico-Legal Journal 15:442-85 at 456-58 (Mar. 1898).

30 The global reference to nicotine was too undifferentiated in an era before the thousands of chemical compounds (many of them toxic or carcinogenic) constituting tobacco smoke were identified. However, by the turn of the century “numerous studies had demonstrated clinically and experimentally that cigarette smoking or cigarette smoke constituents, most notably nicotine, caused an elevation in blood pressure and heart rate during smoking.” U.S. Department of Health and Human Services, The Health Consequences of Smoking: Cardiovascular Disease: A Report of the Surgeon General 3 (1983). For example, in 1895, Herman Bumpus, a professor of comparative anatomy at Brown University (and later director of the American Museum of Natural History), experimentally demonstrated to a class that the pulse rate of a student who smoked three cigarettes rose by 25 percent. The press reported that: “After this practical exhibition of the exact physical effects of cigarette smoking the popularity of cigarettes has rapidly declined at Brown university.” “The Horrible Cigarette,” SP-I, Nov. 25, 1895 (3:3).

the addition of opium as the chief sources of the injuries inflicted by cigarette smoking; moreover, she embedded this deleterious character in the alleged manufacture of cigarettes largely from cigar stubs: since, as the cigar grew shorter while being smoked, the nicotine became “too strong for the endurance of the smoker. Thus tobacco which is too strong for an adult is turned into a cigarette for the use of boys.”

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

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

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

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


34. As late as the 1930s, the author of a doctoral dissertation on the WCTU could still contend that: “In common with the rest of the country the W.C.T.U. was deeply prejudiced against the cigaret, as being especially dangerous to health, [sic] and morals. The prejudice against this particular form of tobacco did not begin to give way till the World
minuscule proportion of total tobacco consumption—for half-decades between 1880 and 1909, cigarettes, by weight, consumed between 1 and 3 percent of the tobacco product compared with 56 to 41 percent for chewing tobacco, 24 to 27 percent for cigars, and 14 to 25 percent for smoking tobacco—it was imaginable that a window of opportunity existed during which prohibiting and actually stopping their use by adults was legally, politically, socially, and behaviorally achievable. Hence the focus on “creatin[g] a prejudice against cigarette smoking in the country.” Then as now this causal demonstration-effect direction from adults to children was seen by the most radical anti-smoking activists as the key to preventing children from starting to smoke. (In sharp contrast, Lucy Page Gaston insisted that “anti-cigarette” was a misnomer as applied to her crusade inasmuch as it was an anti-tobacco movement encompassing a pledge to abstain from using any form of tobacco until the age of 21; yet not only did this approach potentially heighten interest in smoking as

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36Michael Schudson, Advertising, the Uneasy Persuasion: Its Dubious Impact on American Society 193 (1984), incorrectly asserted that the WCTU was only “active in opposing the use of cigarettes among women and children.”


38[T]he public health community should realize that the best way to keep kids from smoking is to reduce tobacco consumption among everyone. The message should not be ‘we don’t want kids to smoke’: it should be ‘we want a smoke-free society.’ As the tobacco industry knows well, kids want to be like adults, and reducing adult smoking sends a strong message to kids about social norms.” Stanton Glantz, “Editorial: Preventing Tobacco Use—The Youth Access Trap,” AJPH 86(2):156–58 at 157 (Feb. 1996). To be sure, Glantz added: “[T]he current concentration on keeping kids from buying tobacco products shifts the focus away from the tobacco industry to tens of thousands of convenience stores and gas stations and the same kind of failed law enforcement-based approach that has characterized the war on illegal drugs. If there is one lesson to be learned from the war on drugs, it is that law enforcement and supply controls cannot prevent people from getting addictive drugs that are profitable to sell.” Id. See also P. Ling, A. Landman, and S. Glantz, “It Is Time to Abandon Youth Access Tobacco Programmes,” TC 11:3–6 (Mar. 2002). However, the WCTU and its allies never shied away from attacking the quasi-monopolist Tobacco Trust, while banning sales to adults as well as to minors made enforcement a much more transparent process.
WCTU’s Health-Based Anti-Cigarette Strategy

a marker of maturity, it expressly disavowed any interest in dealing with the source: “‘It aims at the curtailment of no man’s liberty,’” but only at protecting “‘childhood and youth at a period when they stand in greatest need.’”)39 Frank Irish, the president of the National Anti-Cigaret League, put the point during a lecture tour of Iowa in 1902 under the direction of the WCTU: “Tobacco using parents and teachers should remember constantly that in training a child a single ounce of example is worth more than a whole ton of precept.”40 And three-quarters of a century later, one of the medical giants of tobacco-caused disease investigation repeated: “As long as members of a society continue to smoke cigarettes, young people will continue to experiment with tobacco and, for many, casual experimentation may lead to acquisition of a habit that persists for most of their lives.”41 And since cigar and pipe smoking appeared to be a much less likely entry-level initiation for minors than the cigarette—“‘the McDonald’s of the tobacco trade, the fast food of smoking’”—the possibility of a future smoke-free society seemed plausible, especially since even in the 1880s, as was still the case more than a century later,42 it was widely known that a “boy who grows up to

39For Anti-Tobacco Leagues,” CT, Feb. 9, 1898 (12).
43In 1991, 89.0 percent of all persons 30-39 years old who had ever smoked first tried a cigarette by age 18. Office on Smoking and Health, U.S. Dept of Health and Human Services, Preventing Tobacco Use Among Young People: A Report of the Surgeon General tab. 7 at 65 (1994). But see Pamela Ling and Stanton Glantz, “Why and How the Tobacco Industry Sells Cigarettes to Young Adults: Evidence from Industry Documents,” AJPH 92(6):908-16 at 914 (June 2002), who point out that: “The tobacco industry has long been aware that ‘anti-smoking attitudes the [children] have learned in school and elsewhere can be unlearned or replaced by pro-smoking norms held by others their own age or a little older.’ Working to delay smoking initiation among youths while allowing it to continue among young adults has little long-term benefit” (quoting 1972 internal Philip Morris Co. document).
manhood without contracting the tobacco habit will not, as a general rule, be likely to fall into that habit in his adult years.”\(^{44}\) As late as 1907, the Wisconsin Supreme Court observed that the kind of tobacco used for manufactured cigarettes was “originally selected because of adaptability to inhalation, but also serv[ed], by reason of its mildness, to remove the protection which nature placed in the way of acquiring habits of use of the more vigorous tobacco commonly used in cigars. Before the day of the cigarette, mastery of the tobacco habit was obstructed by agonies of nausea usually sufficient to postpone it to a period of at least reasonable maturity.”\(^{45}\) (Snuff and chewing tobacco—the latter accounting for a very large proportion of all tobacco use—were more difficult to deal with.)

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

> The facilities enjoyed by boys for learning to smoke are much greater than they were twenty years ago. Then a school boy had to pool in with two others and buy a strong three cent cigar, and cut it up, and the second whiff would make his diaphragm flop over and play mumbletypeg with his palate, he would turn pale, lean over a fence and give away to his feelings. Now the stores keep mild cigarettes, with just enough tobacco in to keep his stomach right side up, to begin on, and after he has got so his eyes stay in their sockets, a stronger one is sold to him, and he thus forms the habit gradually, without those soulstirring scenes we used to enjoy behind the barn of a summer evening. Verily, boys of the present day have a soft thing.\(^{46}\)

In its more streamlined version, the WCTU’s justification for a universal ban on cigarette sales was straightforwardly oriented toward effective enforcement: “As sane and impartial observers we see that a law which forbids a sale to persons of a certain age while permitting it to persons of another age is vastly more difficult of administration than a law forbidding the sale altogether.”\(^{47}\)

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

\(^{45}\)Goodrich v. State, 122 Wis. 242, 247-48 (1907).

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

\(^{47}\)“Anti-Cigarette Bill,” *BDWC*, Mar. 2, 1897 (3:7) (letter to editor by J. J. Bucknam, recording secretary, Bangor, Maine WCTU). The unreflective contrasting view was advocated at length editorially a year later by the *Boston Evening Transcript* after a general anti-cigarette bill had passed the Massachusetts House: “To prevent the young
WCTU’s Health-Based Anti-Cigarette Strategy

However, the politically more complex underlying design of the WCTU’s strategy was nicely (if atypically) captured by a letter to the editor from Elizabeth Preston, the long time head of the North Dakota WCTU48—which had the country’s highest ratio of WCTU members to state population49—and a political figure of towering importance in that state’s late-nineteenth and early-twentieth-century history.50 Preston stood firmly in the aforementioned tradition of insisting on the “well known fact that cigarettes are made from stumps of cigars and quids of tobacco raked out of spittoons and gutters”—a “delectable mixture...prepared for use by adding opium, Havana flavoring made from the tonca bean, which contains a deadly poison, brandy, rum and other drugs” all wrapped in paper “made from the filthy scrapings of rag pickers...and then treated with a preparation of arsenic and lead, to give the appearance of rice paper.”51

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

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

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


51 Elizabeth Preston, BDT, Feb. 8, 1901 (2:3-4 at 3) (letter to the editor). Exactly the same day that Preston’s letter appeared Dr. Leonhardt, a physician, speaking at a school meeting on cigarettes in Lincoln, Nebraska, stated: “It is a mistake to tell boys that cigarettes are made from barn sweepings, cigar stubs and the refuse of tobacco. Tell the truth. Boys are not fools.” To be sure, he added that boys knew that “the habit is a fastidious one.” “Make War on Cigarettes,” Nebraska State Journal, Feb. 11, 1901 (6:3). However implausible the claim that cigarettes were made from discarded tobacco products, by the first decade of the twentieth century a number of cities had adopted virtually identical ordinances making it unlawful both to pick up any cigar or cigarette butt with the intent of selling it to be used in any form of manufactured tobacco and to use any such stubs in manufacturing any form of tobacco; they also made it unlawful for parents knowingly to permit their children under 18 to pick up butts. The Municipal Code of the City and County of Denver: Approved April 12, 1906, §§ 1009-1013 at 385-86 (1906). See also The Revised Municipal Code of Chicago of 1905, §§ 1086-89 at 309-10 (1905); Revised Ordinances of the City of Peoria, Illinois, §§ 1007-11 at 398-89 (1910). In turn,
Writing on February 8, 1901, the day after the North Dakota House had killed one anti-cigarette bill\textsuperscript{52} (and, unbeknownst to her, the same day as the Senate killed another), Preston offered the bill’s interstate-commerce-clause-caused leakiness as a refutation of libertarian opposition and then tacked on a utilitarian argument for adult sacrifice:

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

> With all deference to the Russians and cowboys, we cannot but believe it far better to save the North Dakota boy, even though it deprives them of a “luxury,” or puts them to some inconvenience to obtain it.\textsuperscript{54}

A petition submitted to the North Dakota Senate in 1903 in support of an anti-cigarette bill was even more revelatory. Its authors, the missionary and anti-liquor prohibitionist superintendent of the Fort Berthold Indian Reservation and his wife, argued: “Let our legislators set the standard high and our people will follow. Our older men ought to be willing to sacrifice in the indulgence of a bad habit for the sake of our children who are being dwarfed in body and soul by its indulgence.”\textsuperscript{55} So long as relatively few “older men” smoked cigarettes, while the vast majority smoked pipes or cigars or chewed tobacco, little sacrifice would

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

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

\textsuperscript{54} \textit{BDT}, Feb. 8, 1901 (2:3-4 at 4) (letter to the editor).

be required of them because the anti-cigarette movement was careful to leave these other “bad habits” untouched except in statutory bans affecting minors only.\(^{56}\) This strategy of placing a burden on a modest proportion of adult tobacco users in order to protect children\(^{57}\) found its counterpart a century later in state laws\(^{58}\) and municipal ordinances\(^{59}\) totally prohibiting cigarette vending machines everywhere (even in places into which it was unlawful for persons under 18 to enter), thus inconveniencing some adult smokers in order to eliminate one source of unlawful access to cigarettes to minors.

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

> Of course we know that objection is made that you are depriving the grown-up people of the privilege, or the pleasure...of smoking cigarettes. Well, I appeal to the good sense of this House. There are many other forms in which tobacco can be used, and if gentlemen cannot forego the pleasure of smoking cigarettes for the purpose of helping the boys of this country, I am mistaken in the calibre of the men who occupy seats in this House. As I said, there are other ways in which people may use this narcotic if they feel inclined to do so.\(^{60}\)

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

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


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

WCTU’s Health-Based Anti-Cigarette Strategy

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

Thus in 1904 she explained to the national convention that: “If it were possible to so interest the Christian men of this country that they would

thousands of Canadian men who smoked cigarettes “would be willing to make some small sacrifice for the general well-being of the nation.”Id. at 344. However, the initiative came to nought when Liberal Prime Minister Wilfrid Laurier argued that since Maclaren did not deny that “cigarettes can do no harm to anybody who is grown up...it is neither logical nor practical to ask that tobacco in the form of cigarettes should be prohibited altogether to every citizen of the country.”Id. at 362. The resolution, as introduced in 1903 by Liberal member Robert Bickerdike, a nationally prominent capitalist, had passed by a vote of 103 to 48 (Prime Minister Laurier voting nay), but failed to be enacted for procedural reasons. Official Report of the Debates of the House of Commons of the Dominion of Canada: Third Session—Ninth Parliament 58: 820, 846-47 (Apr. 1, 1903) (1903); “Canada and Cigarettes,” NYT, Apr. 2, 1903 (1). After having debated the issue again in 1907-1908, the House of Commons appointed a Select Committee on Cigarette Evils in 1914 to inquire whether it was expedient to enact a law prohibiting the manufacture, sale, giving away, or importation of cigarettes. No witness straightforwardly supported prohibition, but one member did suggest that instead the remedy might be preventing anyone from inhaling. Proceedings and Evidence of the Select Committee Appointed to Inquire and Report as to the Expediency of Making Any Amendment to the Existing Laws for the Purpose of Remedyng or Preventing Any Evils Arising from the Use of Cigarettes 5, 14, 32 (rev. ed. 1914), in Journal of the House of Commons, Appendix (1914).

61Report of the National Woman’s Christian Temperance Union: Thirty-Second Annual Convention...October 27 to November 1, 1905, at 274.

62Standard Encyclopedia of the Alcohol Problem 3:1324 (Ernest Cherrington ed. 1926). Frederick H. Ingalls' commitment was on display as the Prohibition candidate for Congress from a district in St. Louis, in garnering only 85 votes or 0.3 percent of the total. W. H. Michael, Official Congressional Directory 69 (2d ed. 51st Cong., 1st Sess. 1890).
WCTU’s Health-Based Anti-Cigarette Strategy

abandon the use of tobacco, our battle for the boys would be won.”63 The following year she bemoaned the fact that the WCTU was not “taking the highest possible stand” on the tobacco question because it refused to include tobacco in its pledge for honorary (i.e., male) members, whose smoking “set a fearful example to our boys.” Women members refused to take the step lest it reduce the group’s honorary membership. Ingalls, in contrast, advocated for “asking Christian temperance men to refrain from leading boys into the tobacco and cigaret habit.” Without offering the slightest empirical or even probabilistic basis for her odd belief, she opined that: “If only men could see how their influence is causing ruined lives for our boys, I believe they would rather their noses were cut off than walk about with a pipe or cigaret between their lips.”64

In 1907 Ingalls optimistically, but again bereft of any realistic strategy to convince adult cigar smokers to quit for the sake of preempting boys’ uptake of cigarette smoking, argued that “formerly our women were quite willing to condemn the cigaret, but loath to attack tobacco. They are now realizing it is not consistent to ask the boy to refrain from cigaret smoking, when his father, his teacher, and alas! sometimes his pastor, smoke cigars, and so the fight upon tobacco grows stronger.”65

By more than a century the WCTU also anticipated the reconceptualization of smoking as a “pediatric disease” by Dr. David Kessler, the commissioner of the Food and Drug Administration,66 which the CEO of R. J. Reynolds called a stroke of “‘tactical brilliance. ... We couldn’t beat that.’”67 The WCTU’s approach—which it supplemented with the gendered moral opprobrium attaching to any tobacco use by females68—was pragmatic so long as cigarettes remained

63Report of the National Woman’s Christian Temperance Union: Thirty-First Annual Convention...November 29 to December 4, at 249 (n.d. [1904]).

64Report of the National Woman’s Christian Temperance Union: Thirty-Second Annual Convention...October 27 to November 1, 1905, at 273-74.

65Report of the National Woman’s Christian Temperance Union: Thirty-Fourth Annual Convention...November 8-13, 1907, at 266.


68For example, as late as 1928, the Iowa WCTU protested the speaking engagement at the State University of Iowa of Rev. Agnes Maude Royden, an English minister, who had previously worked on behalf of women’s suffrage in Iowa, on the grounds that her cigarette smoking set a bad example. E.g., Ida B. Smith (Iowa WCTU president) to Walter Jesup (SUI president) (Jan. 7, 1928), in File: Letters in re Maude Royden, SHSI, Iowa
WCTU’s Health-Based Anti-Cigarette Strategy

a marginal commodity. From 1890 to 1896, the first years of the Tobacco Trust, the output of cigarettes almost doubled—from 2,505,167,610 to 4,967,444,232—while the proportion of all leaf tobacco used in their manufacture rose from 3.1 percent to 5.8 percent. The year 1896 marked the enactment (in Iowa) of the first enduring general cigarette sales prohibition law followed the next year by another in Tennessee, which some contemporaries (improbably) viewed as having occasioned the 45.2 percent drop in output to 2,722,979,167 by 1901. The ensuing reversal in production did not regain and exceed the level of 1896 until 1907. Similarly, cigarette manufacturers’ share of total leaf tobacco consumption did not regain and exceed the peak level of 1896 until 1911.69 Interestingly, 1909 (midway between 1907 and 1911) also marked the end of the last major wave of state general anti-cigarette enactments: once the increase in cigarette production and use in the six to eight years preceding U.S. entry into World War I70 became seemingly irresistible and cigarettes ceased to be a


70 Without gainsaying the social-psychological impact of the spread of cigarette smoking among U.S. soldiers in Europe on its prevalence in the United States after the war, it is important to note that quantitatively the proliferation antedated the war. See Tennant, The American Cigarette Industry, fig. II at 16. As Jack Gottsegen, Tobacco: A Study of Its Consumption in the United States 29 (1940), noted: “[C]igarettes were becoming fashionable prior to the World War. This event, contrary to the usual belief, was not responsible for the shift to the cigarette,” although the war did “extend the conditions responsible for a further expansion of the cigarette market.”
WCTU’s Health-Based Anti-Cigarette Strategy

marginal novelty—the number of the new “modern” Camel cigarettes shipped in the last prewar year of 1916 exceeded total output of all cigarettes in any year before 1909—the WCTU’s strategy lost its political and behavioral plausibility, and repeal replaced enactment on legislative agendas.

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

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

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

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

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

75SPDG, Feb. 8, 1893 (4:1) (untitled edit.).
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In addition, between 1900 and 1913 one house of the following state legislatures also passed such a bill: 1901: DE, WI, NH, IL, MN****; 1903: DE, WI, AL; 1906 OH, MD; 1907: WI*, MO; 1908: OK*; 1909: MT, IL; 1911: CO, NV, IL; 1913: MO. The bill passed in 1908 by the House in Oklahoma (which did not achieve statehood until 1907), did not limit the ban on cigarette smoking to public places. See below ch. 16.
Map 1: Years in 19th Century in which One House of State Legislature Passed a Bill Prohibiting Cigarette Sales (or Public Smoking, Use, or Possession) or Both Houses Did and Governor Vetoed It.
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Table 2: Years in which State Laws Generally Prohibiting Cigarette Sales Were in Effect

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Note: Oklahoma did not become a state until 1907.
Map 2: Years in which State Laws Generally Prohibiting Cigarette Sales Were in Effect
The First Successes Fail: 1889-1892

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

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

The Trust’s response to the threat of anti-cigarette legislation was strategic. The years 1895, 1896, and 1897, in the words of the Report of the Commissioner of Corporations, constituted one of the most interesting periods in the history of the Combination. Before 1895 the development of its cigarette business had been the leading interest of the company. The effect of State legislation hostile to the cigarette business, among other causes, led the company to begin in 1895 an energetic campaign for a large proportion of the plug [chewing] business of the country.³

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

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

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

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

Q. Almost cut in two?

A. Yes. After that we got in the Turkish cigarette business and it is growing again. Last year we increased six or seven hundred million and the cigarette business last year is the largest in the history of the business. That is all by work, pushing, advertising and attracting people’s attention to it. 7

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

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


prevalence of cigarette smoking:

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

Q. Why is it greater in America?

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

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

A. No; we want the competitors to go on. I think we make more money than if we had a monopoly of the business. I know it is the case of the cigarette business because when we had so nearly all of it it was cut in half in four and five years and as soon as we had competitors we built it up again. There are plenty of people now in America that don’t consume tobacco. If there is enough work put back of them we will make them all consume it.9

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

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

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

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

With a $50 license fee the retail dealers would give up the sale of cigarettes, unless they could get them at a reduced rate from the Trust, or sell them at a higher rate to the public; but as the public, that is, the consumer, is always the one to pay the taxes in the end, it is to be expected that any increase in the price would seriously affect the sale of cigarettes; for thousands on thousands have gotten into the habit of smoking them on account of their cheapness as compared to the cost of cigars.11

Little wonder that for years tobacco dealers virtually everywhere ban bills were introduced both complained that the Trust was forcing them to sell a commodity that generated for them a disproportionately low (or no) profit margin and expressed an expectation that if cigarettes sales were suppressed, their profits would rebound because they would sell more of other kinds of tobacco.12
Moreover, if the Trust, like many physicians and the bulk of the anti-cigarette movement, believed that cigarettes, because of their greater inhalability, were much more likely to addict users than other forms of tobacco, it had all the more reason to make them the centerpiece of its consumer marketing strategy.

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

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

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

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

The prohibition of the manufacture or sale of cigarettes by an act of the Michigan Legislature is about as small and silly a piece of legislation as the article legislated against. It would be just about as proper to order by law that all people shall wear ear-muffs when

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See above ch. 2.

See also the discussion of North Dakota in vol. 2.

Christopher Snowdon, *Velvet Glove, Iron Fist: A History of Anti-Smoking* 47 (2009). This author cited no late-nineteenth or early-twentieth-century state- or city-level cigarette sales data.

the thermometer registers less than thirty degrees. It cannot be denied that cigarettes are injurious when used to excess, but so are cigars, and so is pretty much everything that man eats or drinks. But even if injurious to the individual who uses them intemperately, cigarettes cannot be said to be in any way prejudicial to society..., so there is absolutely no ground for such legislation. The mind of the Michigan legislator must be wonderfully constructed if it can evolve a good and legal reason for the passage of such a bill.\textsuperscript{17}

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

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

\textsuperscript{17}``Cigarette Legislation,” \textit{North American} (Philadelphia), Apr. 20, 1889 (2:2).

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

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

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

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

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

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

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

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

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


(24) Journal of the Constitutional Convention of the State of Michigan: 1867, at 327, 398 (1867). The three named petitioners were, according to the population census, all farmers. Alexander Davis, who offered the anti-smoking resolution in 1861, represented Grand Blanc.


adjoining, whether the House is in session or not.”27

These struggles, both as to compliance/enforcement and as to whether to adopt a ban each session at all went on for decades in the House. (The Senate in 1873 finally adopted a resolution that smoking not be permitted in the chamber during that legislative session.28 In 1903 the Senate incorporated the ban, which the presiding officer was required to enforce, in its rules.)29 For example in 1891 the session’s only ban resolution was tabled,30 while two years later one to ban smoking in the hall of the House was rejected before a ban during session was adopted the next day.31 The conflictual character of the issue was especially intense at the next session in 1895, when, after the House—99 of whose 100 members were Republicans—had adopted a resolution offered by anti-smoking militant Fremont Chamberlain to instruct the Sergeant-at-Arms to prohibit smoking on the House floor (including the committee of the whole),32 it rejected the following resolution:

\begin{verbatim}
WHEREAS, Anything that tends to reduce the asperities of labors of the House while industriously engaged in its duties at evening sessions; and

WHEREAS, Many members find solace in an indulgence in tobacco after the evening meal, a custom which induces to good nature, promotes the amenities of life, ameliorates the irksomeness of labor and generally puts the individual at peace with the world; therefore

Resolved, That smoking be allowed at evening sessions in committee of the whole.33
\end{verbatim}

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


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

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

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

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

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

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

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


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

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

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

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

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

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

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

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

\textsuperscript{45}See below ch. 9.

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


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


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


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

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

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

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

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

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

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

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

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


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

1. Have any facts come to your notice which would lead you to form an opinion relative to the subject of the above resolution?
2. Have you reason to believe that the practice is common among the pupils of your schools, or is it confined to a small number?
3. If any are in the habit of smoking the cigarette, do you notice any signs of impaired mental ability to do school work?
4. What effects, if any, have you observed in regard to the health of those who indulge in this habit?
5. If a physician, would you please give your experience and observations and opinion as to the evil effects of cigarette smoking.\(^{60}\)

Succinctly summarizing, the special committee commented that the respondents’ “uniform testimony” was that “the effect of the cigarette habit on the young is one that stunts the growth, benumbs the mental faculties, causes nervousness, weakens the action of the heart, etc."\(^{61}\) Quoting “from some of the letters received which characterize the answers of all in regard to the effects of the cigarette habit,” the committee highlighted the statement of a “Dr. Hammond, of New York, than whom there is no higher authority,” which was a stereotypical mélange of incipient scientific-medical findings and nonsense:

“That no speedier method for rendering existence painful is more efficacious than to smoke cigarettes and inhale the fumes into the lungs. The action of the brain is impaired thereby, the ability to think, and in fact all mental concentration is weakened. Neuralgia, especially about the face, throat diseases, nasal catarrh, serious affections of the eyes, dyspepsia, and above all, interruption in the normal action of the heart are among the consequences resulting from cigarette smoking. Investigation shows that the cigarettes sold in this country are, as a rule, vilely adulterated and with substances even more injurious than tobacco. In the city of Washington I saw a few days ago, a wretched looking child scarcely five years old smoking a cigarette and blowing the smoke through his nostrils. His pale, pinched face was twitching convulsively, his little shoulders were bent, and his whole appearance was that of an old man."\(^{62}\)


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

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

The special committee then characterized as “inevitable” the conclusion that “the increase of the habit is alarming and that the time has come for radical legislation.” By “radical” Jackson and his two colleague presumably meant H.B. 584, which banned the sale of cigarettes to adults too.

The Davenport Morning Tribune commented that the committee’s summary had “astonished” the House, which then by unanimous consent immediately called up the bill for a third reading. The vote in favor was an overwhelming 74 to 3, whose impressiveness was undercut only slightly by the failure of

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

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

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

Although Republican Governor Cyrus Luce, who had lost many thousands of votes at his re-election because of his “sturdy and uncompromising sentiments in favor of temperance and against the liquor traffic,” had announced that he would

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69 *Journal of the House of Representatives of the State of Michigan: 1889, 2:1207-1208 (Apr. 11). Two of the three no votes were cast by representatives from Wayne County (Detroit), four of whose other representatives did not vote, while four others voted yes. Id. at 4, 1208. The three no votes were cast by Democrats, who held only 30 of the 100 House seats. Official Directory and Legislative Manual of the State of Michigan for the Years 1889-90, at 590-95 (1889). An Ohio newspaper, which mistakenly reported that “Michigan has passed a law,” urged Ohio to “do likewise.” Daily Democrat Times (Lima), Apr. 17, 1889 (2:1) (untitled edit.). For similar misreporting by an Ohio paper, see “Down on the Dudes,” Newark Daily Advocate, Apr. 25, 1889 (1:6).
71 *EN, Apr. 11, 1889 (2:2) (untitled editorial).
72 *EN, Apr. 11, 1889 (2:2) (untitled editorial).
73 *Anti-Cigarette Legislation,” DFP, Apr. 12, 1889 (4:2).
sign the bill if the Senate—which his party controlled 24 to 875—passed it,76 its reception there was distinctly less than welcoming. The Committee on Public Health, after recommending that an amended substitute for the House no-cigarettes-for-minors bill do pass,77 in an extraordinary step for a state legislative committee, actually gave “some of the reasons” influencing its decision:

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

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

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

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

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

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

76“No Cigarettes for Michigan,” CT, Apr. 12, 1889 (7).
77Journal of the Senate of the State of Michigan: 1889, 1:700 (1889) (Apr. 18). The committee substitute made several changes, but the Senate committee of the whole tabled it, recommending instead passage of the original bill. Id. at 750 (Apr. 24). According to a press account, the vote was 13 to 5. “Fighting a Meat Inspection Bill,” CT, Apr. 25, 1889 (5). The substitute, inter alia, raised the age of legal purchase to 18, made it illegal to “buy for” a minor, and increased the fine and extended the term of imprisonment. File No. 126, Senate, Senate Substitute for House Bill No. 584 (file no. 251), reported by Committee on Public Health (Apr. 18, 1889) (copy furnished by Janice Murphy, Library of Michigan, June 29, 2006).
which would make it a misdemeanor to sell cubebs, rolled in the form of a cigarette, which are used largely for medicinal purposes. For these and other reasons your committee are of the opinion that the substitute offered by them should take the place of the House bill.  

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

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

“It is quite amusing to see how some of the laws passed by Michigan’s law-makers are quietly and tacitly ignored on all sides. At the last session a furor was created over the injurious effect of cigarette smoking on young boys. Wise scientists and deep thinkers were called upon to advance opinions. Lobbying delegations were set to work to pass that bill alone. No effort was spared to do all that was possible towards a law that was to rescue the small boys from the pernicious influence of the brain softening cigarette that is

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79 Journal of the House of Representatives of the State of Michigan: 1889, 2:1414-15 (Apr. 25). An immediately prior vote had to be retaken because an insufficient number of members had voted; the sergeant-at-arms had to be dispatched after several; Jackson himself was “absent without leave” and then appeared after the motion to excuse him from the call did not prevail. It is unclear whether these maneuvers were related to the substance of the bill. Id. at 1413-14.

First Successes Fail: 1889-1892

capable of such disastrous results. Statesmen worked themselves into frenzies in
denunciation of the terrible pest, and at last the law was safely piloted through. Fathers
and mothers heaved sighs of relief and the state rejoiced. The coming generation was
saved to posterity! It was a glorious record.

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

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

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

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

in an untitled paper by the unnamed superintendent). Fenton is a small town about 10
miles from Flint.


83On Feb. 21, 1893, Republican Charles H. McInley of Minden City introduced S.B.
344 in the Senate to regulate the sale, manufacture, and use of cigarettes, but on his own
motion the bill was tabled that same day. (The Library of Michigan lacks this bill: “This
most likely means that the bill never made it out of committee. During that era, it was the
committees that wrote the bills and they did not get file numbers until they requested
them.” Email from Janice Murphy, Library of Michigan (Nov. 27, 2006).) Later that day
he introduced S.B. 422, prohibiting the sale or the keeping or offering for sale of cigarettes, so called, or any similar article, which was read a first and second time and
referred to the Judiciary Committee. Section 1 of the bill provided: “That it shall be
unlawful for any firm, partnership corporation, person or individual within the jurisdiction
First Successes Fail: 1889-1892

legislative effort. Unsurprisingly, the state WCTU’s officers and members played a prominent role in petitioning the legislature to take action.84 One of these petitions, submitted by the organization’s superintendent and superintendent of narcotics and several hundred of its members as well as by scores of Christian ministers and school principals and teachers, was published in the Journal of the House of Representatives:

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

Many of these WCTU petitions—including the one quoted—were presented by Republican Representative Fremont C. Chamberlain, an attorney from the western end of the Upper Peninsula, a mining and forestry region, who also introduced the principal bill and led the forces seeking passage.86 Chamberlain’s

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84 For the many individual petitions, which in the aggregate were presented on behalf of many hundreds of officers and thousands of members, see Journal of the House of Representatives of the State of Michigan 1897, 1:353, 487 (8,063 members), 668, 783, 968 (3,000 officers and members) (1897).


86 Journal of the House of Representatives of the State of Michigan 1897, 1:4 (1897);
First Successes Fail: 1889-1892

advocacy of a prohibition of the sale of cigarettes was presumably strongly influenced by his experience as a school teacher for 12 years before becoming a lawyer.  

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

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


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


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

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

93 Journal of the House of Representatives of the State of Michigan 1897, 2:1533-34
the section providing for punishment of minors who illegally bought cigarettes, consolidated H.B. 268/416/3 was agreed to by the overwhelming majority of 72 to 5.\textsuperscript{94} As passed, the bill provided, according to the next day’s news account, that “any boy under 17 caught using tobacco in any form or any youth under 21 found using cigarettes” was subject to escalating fines and, after repeated violations and a finding of incorrigibility, to 90 days’ incarceration in county jail or the Industrial Home.\textsuperscript{95}

Now diluted to a ban on sales to minors only, the bill was sent to the Senate, which had already similarly watered down its own S.B. 148, but referred it back to committee without having voted on it.\textsuperscript{96} By a unanimous vote of 28 to 0 the Senate then agreed to the House bill as amended by the Senate Public Health Committee.\textsuperscript{97} By a vote of 67 to 10, the House concurred in the Senate amendments, the chief of which appears to have been lowering from 21 to 17 the age below which the aforementioned punishment applied.\textsuperscript{98}

On taking office as governor in 1897, the progressive urban social reformer Hazel Pingree, who had been mayor of Detroit from 1890 to 1897, faced a state legislature that “was overwhelmingly Republican and was not favorably disposed to reform; like its G.O.P. predecessors in 1893 and 1895, it was a bulwark of conservatism.”\textsuperscript{99} Though a Republican himself, he had become anathema to many businessmen in Detroit, and powerful economic interests looked especially to the state Senate to quash bills imposing railroad regulation and equal taxation of corporation property, and stricter factory inspection and child and women labor regulation that Pingree might push through the House of Representatives.\textsuperscript{100}

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

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(1897) (Apr. 8). Neither the House Journal nor the Detroit Free Press shed light on why the House made this crucial change.
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\textsuperscript{94}Journal of the House of Representatives of the State of Michigan 1897, 2:1770-71 (1897) (Apr. 22).
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\textsuperscript{95}It Was Easy!” DFP, Apr. 23, 1897 (1:3-4). Unfortunately, neither the legislative journals nor the newspaper printed the verbatim text of the bill.
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\textsuperscript{96}Journal of the Senate of the State of Michigan 1897, 2:1727-28 (1897).
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\textsuperscript{98}Journal of the House of Representatives of the State of Michigan 1897, 2:1886-87 (1897) (Apr. 29). Again, without successive bill texts to compare, it is difficult to determine what several other Senate amendatory strike-outs referred to.
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\textsuperscript{99}Melvin Holli, Reform in Detroit: Hazen S. Pingree and Urban Politics 198 (1969).
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\textsuperscript{100}Melvin Holli, Reform in Detroit: Hazen S. Pingree and Urban Politics 194, 199 (1969).
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“[m]oral questions” to which civic uplift groups gave priority. Thus he “had no desire to enforce the Sunday saloon-closing law, and prostitution was tolerated by his administration as a ‘necessary evil.’” He also vetoed the school board’s adoption of bible readings for the curriculum because he eschewed the religious strife that such a program would trigger between proponents, on the one hand, and opponents, on the other, among Jews, Catholics, thousands of German atheists, and some Christians.  

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

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

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

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

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

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

\textsuperscript{106}Journal of the House of Representatives of the State of Michigan 1897, 2:2062 (1897).

\textsuperscript{107}Journal of the House of Representatives of the State of Michigan 1897, 2:2062-63 (1897).
cigarettes as embodied in the original bill shorn of penal sanctions for children is unknown.

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

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

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

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

In an interview Bliss offered some background information shaping his boy-centered position:

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

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

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

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

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

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

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

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117“Governor Bliss Against Cigarettes,” Boy 2(1):9 (Jan. 15, 1901).
First Successes Fail: 1889-1892

the sale of cigaretts by every little corner dealer in small lots.”

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

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

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

\section*{The First Southern Chamber to Pass a Sales Ban: Arkansas Senate 1891}

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

\textsuperscript{129}1909 Mich. Pub. Acts No. 226, § 3, at 411-12. The judge could suspend the sentence if the minor informed on whoever furnished him with the cigarettes and that person was convicted. This proviso was repealed six years later. 1915 Mich. Pub. Acts No. 31, at 42.
\textsuperscript{132}Journal of the House of Representatives of Arkansas: Thirty-Eighth Regular Session 359 (1911).
Arkansas experienced considerable turmoil during the 1880s as economic disaster pushed 75,000 farmers, organized as the Agricultural Wheel, to advocate, on the state level, for railroad, telegraph, and telephone rate regulation, a usury law, an end to convict labor and corporate employment of armed men, and prohibition. Democrats’ failure to accommodate these demands legislatively prompted the Wheel to build a class-based third party with blacks and labor unions, which came to fruition in 1888, in the wake of the Democratic governor’s assistance in breaking a railroad strike in 1886, with the support of the Knights of Labor in the form of the Union Labor Party. In addition to demanding state intervention to regulate corporations and mines, end convict labor, and limit immigration of Chinese laborers, the new organization attacked Democrats by calling for the elimination of the electoral fraud in which they had pervasively engaged. Although on a fusion ticket Republicans supported the Union Labor gubernatorial candidate in 1888—an election at which the third party came closer to ousting the Democrats from political power than would occur for decades, and UL won 15 and Republicans 11 seats in the gerrymandered 95-member House and only failed to gain more because of the white supremacist Democrats’ electoral fraud—the fused parties’ legislative representation slipped in 1890. With some farmers objecting to the alliance with Republicans, they instead formed an Arkansas branch of the (Southern) Farmers’ Alliance, whose analysis of agricultural distress and the “brutality of industrial capitalism” facilitated its morphing into the People’s Party by 1892.\footnote{Clifton Paisley, “The Political Wheelers and Aakansas’ [sic] Election of 1888,” *Arkansas Historical Quarterly* 25(1):3-21 (Spr. 1966); Edward Ayers, *The Promise of the New South: Life After Reconstruction* 216 (1993 [1992]); Carl Moneyhon, *Arkansas in the New South, 1874-1929*, at 64-68, 81-90 (1997); J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*, at 123 (1975 [1974]); Theodore Saloutos, *Farmers Movements in the South, 1865-1933*, at 83 (1964 [1960]) (quote). On the merger of the more class-conscious Agricultural Wheel with the Farmers’ Alliance in Arkansas later in the decade, see Robert McMath, *Populist Vanguard: A History of the Southern Farmers’ Alliance* 58 (1975); W. Scott Morgan, *The Wheel and Alliance, and the Impending Revolution* (1889). Theodore Saloutos, *Farmers Movements in the South, 1865-1933*, at 68 (1964 [1960]), characterized the Wheel as a “‘dirt-farmer’ organization” that “appealed chiefly to the destitute tenants and small landowners who felt insecure, and found it difficult to adjust themselves to capitalistic methods of farming. Their anti-big business, anti-monopoly, anti-merchant, anti-banker, anti-foreign, anti-big planter, and anti-Negro sentiments reflected this insecurity.” Edward Ayers, *The Promise of the New South: Life After Reconstruction* 244 (1993 [1992]), argued that the Alliance’s loss of the 1890 election, together with its successful discrediting by Democrats as “race traitors and Republican collaborators,”}
In 1889 the Arkansas legislature had enacted a relatively weak statute prohibiting selling or giving away tobacco in any form to anyone under 15 years of age.\footnote{1889 Arkansas Acts ch. 21, at 20.} Apparently, however, even this very limited intervention was excessive for a majority in the House, which in 1891 voted 37 to 25 to repeal the no-sales-to-juveniles law.\footnote{Biennial Report of the Secretary of State of the State of Arkansas: September 30, 1888, at 63 (1888) (Rules for the Government of the House of Representatives of the State of Arkansas, Rule XV § 8); Biennial Report of the Secretary of State of the State of Arkansas: September 30, 1890, at 251 (1890) (Rules for the Government of the House of Representatives of the State of Arkansas, Rule XV § 8).} In contrast, for their own sake, members did not care to be exposed to tobacco smoke, as witnessed by the chamber’s governing rules, which provided that: “Smoking in the House during session hours is strictly forbidden.”\footnote{Among Arkansas Leaders 14 (Lex Davis comp., H. Barnes. ed. n.d. [1934]). In various official and unofficial contemporaneous documents his name was spelled both “Mehaffy” and “Mehaffey.”}

The repeal bill was introduced by Tom Miller Mehaffy, a Methodist, lawyer,\footnote{Journal of the House of Representatives, State of Arkansas: Twenty-Eighth Session, 139-40 (Jan. 26) (1891) (H.B. No. 29); Journal of the Senate of Arkansas: Twenty-Eighth Session 80 (Jan. 26) (1891) (House informing Senate of passage). “The Legislature,” AG, Jan. 27, 1891 (6:1-6 at 4), and “To-Day’s Session,” AD, Jan. 26, 1891 (1:5), merely reported that the bill had passed without any account of the debate.} and future Arkansas Supreme Court justice, who, as a senator in 1893, would play a prominent pro-tobacco role.\footnote{Journal of the House of Representatives, State of Arkansas: Twenty-Eighth Session, 139-40 (Jan. 26) (1891). The sole black Democrat, B. F. Adair, did not vote. Five of the 13 Democrats opposing repeal were Methodists, but only six of 33 Democratic supporters were.} Also a member of the Little Rock school board, “this patriarch of the bench and bar” would later be extolled as “one of the most public spirited citizens of the state.”\footnote{Among Arkansas Leaders 14 (Lex Davis comp., H. Barnes. ed. n.d. [1934]). In various official and unofficial contemporaneous documents his name was spelled both “Mehaffy” and “Mehaffey.”} Remarkably, of the chamber’s 10 black Republicans, eight voted against the repealer and not a single one voted for it, while the only two white Republicans supported the bill and the four white Union Laborites split.\footnote{Journal of the House of Representatives, State of Arkansas: Twenty-Eighth Session, 139-40 (Jan. 26) (1891). The sole black Democrat, B. F. Adair, did not vote. Five of the 13 Democrats opposing repeal were Methodists, but only six of 33 Democratic supporters were.} Mehaffy’s backward-looking initiative came to nought,
however, when, a week later, the Senate—which also operated under a no-smoking rule\textsuperscript{141}—by a vote of 17 to 7, supported a motion by Edgar Kinsworthy (who in the next session would play a significantly different part in shaping the course of a general cigarette sales ban bill) to postpone the bill’s discussion indefinitely.\textsuperscript{142}

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

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

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

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

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

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


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

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

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


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

153 See below ch. 9. The role of the WCTU in Arkansas in anti-cigarette legislation is unclear. Although a state organization was founded in the late 1870s and was involved in women’s suffrage and anti-liquor campaigns, the formation of the male Arkansas Prohibition Alliance in the 1880s, which excluded women, diminished the latter’s participation. Carl Moneyhon, Arkansas and the New South, 1874-1929, at 119 (1997); Jeannie Whayne, “Prosperity Eluded: Era of Transition, 1880-1900,” in Arkansas: A Narrative History 240-71 at 251 (Jeannie Whayne et al. ed. 2002). See generally, Janie Evins, “Arkansas Women: Their Contribution to Society, Politics, and Business, 1865-1900,” Arkansas Historical Quarterly 44(2):118-33 (Summer 1985). During the first part of 1891 Kinsworthy’s mother-in-law, one of the highest-ranking officials of the Arkansas WCTU, reported to the national organization on developments, including legislative enactments, but failed to mention the anti-cigarette bill. E.g., Mrs. F. L. Sutton, “Arkansas,” US 17(18):10 (Apr. 30, 1891), and 17(10):10 (Mar. 5, 1891). The organization’s weekly from 1888 to 1893 discussed Arkansas legislative developments, but failed to deal with cigarette legislation—though it did publish brief stereotypical attacks on cigarettes—let alone indicate that it was advocating any measures. E.g., “The Deadly Cigarette,” Woman’s Chronicle 1(51):4 (Feb. 16, 1889); “Crazed by Cigarettes,” Woman’s Chronicle 5(49):5 (Feb. 4, 1893). As in other states, the Arkansas WCTU was
passed its in 1899, the prescribed subjects encompassed only alcoholic drinks, stimulants, and narcotics. However, in 1891 not even a majority of the Senate favored it: Kinsworthy’s motion was tabled by a motion offered, bizarrely, by, of all senators, the chief general sales ban advocate, Miller. Presumably it was not coincidental that Kinsworthy’s mother-in-law, Mrs. F. L. Sutton, was the Arkansas State WCTU’s corresponding secretary.

To be sure, these abortive forays into tobacco regulation were only a sideshow to what, together with the bill to constrict voting by blacks (and poor whites), was the session’s legislative pièce de résistance—Arkansas’ contribution to the first wave of Jim Crow enactments, which segregated railway coaches in the majority of southern states between 1887 and 1891. Ironically, one of the practical roots of this movement was tobacco use on railroads, the networks of which proliferated in the South during the 1880s: “Trains ran cars of two classes: in the first-class car rode women and men who
did not use tobacco, while in the second-class car rode men who chewed or smoked, men unaccompanied by women, and people who could not afford a first-class ticket. To travel in the second-class car was to travel with people, overwhelmingly men, who behaved very differently from those in the car just ahead. The floors were thick with spit and tobacco juice, the air thick with smoke and vulgarities.\footnote{Edward Ayers, *The Promise of the New South: Life After Reconstruction* 137 (1993 [1992]). In the wake of Tennessee’s passage in 1891 of a law requiring railroads to provide racially segregated cars two black men complained that they and their families had to run a gauntlet of smoke and tobacco juice when boarding trains because their section was divided by a partition from the white smoking area. Rogert Hart, *Redeemers, Bourbons, and Populists: Tennessee 1870-1896*, at 164 (1975).} The “problem” presented by railroads to a white-supremacist society lay in the fact that blacks were “seeking first-class accommodations where women as well as men traveled, where blacks appeared not as dirty workers but as well-dressed and attractive ladies and gentlemen.”\footnote{Edward Ayers, *The Promise of the New South: Life After Reconstruction* 140 (1993 [1992]). During House floor debate on the Arkansas railroad seating segregation bill, R. C. Weddington, a black Republican and teacher, observed that “the more he ["the negro"] educates his taste, it seems the more obnoxious he becomes....” Weddington opposed the bill “because we do not believe that we will get equal accommodation as the bill requires.” He based this belief on his personal experience with the operation of such a law in Mississippi, where the cars set aside for “colored people” were “as filthy as the most filthy place I ever saw....” Nevertheless, the “persons belonging to the white race, who seek seats among the colored people, are not your best people, they are not your aristocrats, but are those among you...known as ‘subordinates and inferiorites’—those addicted to immoral habits, such as drunkenness, profanity and profligacy.” “Legislative,” AD, Feb. 18, 1891 (6:1-5 at 2).} The bill’s introducer, Senator John Tillman, confirmed this viewpoint by sarcastically rejecting the “objection...urged by the colored people to this measure...that it does not compel railroads to provide first and second class fare on their lines, so that there may given to the better class of negroes an opportunity to avoid riding with inferior specimens of their own race. They insist upon a setting up of class distinctions which the white people will not attempt for themselves. ... They say they want those who never use soap separated from those who do use soap. They want us to draw the soap line. [T]he negro should not become too aggressive nor too bold to dispute the evident superiority of his white neighbor.”\footnote{Passed the Senate,” AG, Jan. 30, 1891 (6:1-4 at 3). For black floor speeches against the bill in the House, see “The Legislature,” AG, Feb. 18, 1891 (6:5-7 at 6-7).} Senate Bill No. 2 required railways to provide “equal but separate and sufficient accommodations for the white and African races, by providing two or more passenger coaches for
each passenger train” and imposed a fine of $10 to $200 for any person “insisting on going into a coach...to which by race he does not belong.” Segregational line-drawing was supposed to be enabled definitionally by providing that a person in there was a “visible and distinct admixture of African blood shall...be deemed to belong to the African race.”  

The bill passed the Arkansas Senate on January 29 by a vote of 26 to 2, the Nays being cast by the sole Republican, George W. Bell, who was black, and one of the two Union Laborites. The House followed suit on February 17, 1891, by a strict party-line vote of 72 to 12, all the Republicans (10 of whom were black) accounting for all of the Nays, whereas even the three voting Union Laborites all supported the Jim Crow law.

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

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

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

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

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

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


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

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


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


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


175 Legislature of Pennsylvania, File of the House of Representatives, No. 205, Session of 1891, Mr. Fow, in Place, Jan. 27, 1891 (copy provided by the State Library of
Fow’s other bill was even more radical, making it “unlawful for any person to smoke burn or use upon the highways streets avenues lanes alleys courts and sidewalks of this Commonwealth any cigarette made of tobacco or any other substance.” The bill also provided that a violator “upon conviction before any justice of the peace alderman or magistrate in a summary proceeding forfeit and pay the sum of ten dollars...with costs and stand committed until the same is paid.”

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

Pennsylvania).  

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


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


First Successes Fail: 1889-1892

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

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

Fox was presumably referring to the law, passed during Fow’s first term in 1889, which prohibited the sale of cigarettes to anyone under 16, imposing a maximum fine of $300 on violators. One in a national wave of WCTU-

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181 See below ch. 6.
183 Samuel Pennypacker, The Autobiography of a Pennsylvanian 414 (1918). The former Pennsylvania governor described Fow: “Short and fat, when he spoke he shook all over. When he argued he began in the middle of the proposition and worked both ways at once with the most intense energy. Yet, worthy and assiduous, he won respect and, what is more remarkable, reputation as a constitutional lawyer.” Id. at 415. One paper called “‘Fog Horn’ Fow...quite a fluent talker, but neither a very logical nor a very agreeable one.” “Beaver’s Expenditures,” Bradford Era, Apr. 11, 1891 (1:3).
185 “Victims of Misplaced Confidence,” Pittsburg Dispatch, Apr. 29, 1891 (4:1) (edit.)
186 L. Webster Fox, “Eyesight, in Middle Life and Old Age, with a Few Hints for Its Care and Preservation,” Journal of the Franklin Institute 133(6):454-69 at 455 (June 1892). Fox claimed that “excessive” tobacco use weakened the eye muscles, reduced visual acuity, and produced a form of color blindness. While condemning chewing tobacco outright, he asserted that men subject to mental strain were “better for smoking” one to three cigars a day because “smoking brushes away the cobwebs and makes man a more sociable creature.” Id. at 457.
187 1889 Pennsylvania Laws No. 111, at 105. One paper asserted that the first
First Successes Fail: 1889-1892

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

The House Public Health and Sanitation Committee quickly reported Thompson’s bill with a negative recommendation, and the next day the House recommitted it to committee. In contrast, S.B. No. 123 was making progress. Two days after the press had reported that the no-cigarette-sales-to-boys bill was important, seemed to be becoming more so every day, and would “unquestionably pass” because many legislators thought that it was incumbent on them to help “blot out this pernicious habit,” the Senate Vice and Immorality Committee reported S.B. 123 without amendment. After the adoption of several weakening but not fatal amendments on second and third readings, the

conviction and sentence under the law did not take place until 1891, when a dealer in Philadelphia was merely required to pay $30 in costs because his employees, in his absence, had sold cigarettes to boys. Purportedly the court would also have fined him had the costs not been “so large.” The reporting newspaper claimed that the outcome would “serve to make dealers particular to whom they sell the cigarettes.” “Latest News in Brief,” Tyrone Daily Herald, Mar. 2, 1891 (8:2-3). However, a proceeding had taken place at the end of December against a seller in Reading. “The Cigarette Nuisance,” North American, Dec. 26, 1889 (2:1).

See below ch. 9.

Legislature of Pennsylvania, File of the Senate, No. 123, Session of 1889, Mr. Woods, in Place, Feb. 6, 1889 (copy provided by the State Library of Pennsylvania); Journal of the Senate of the Commonwealth of Pennsylvania 203 (Feb. 6) (1889).

Legislature of Pennsylvania, File of the House of Representatives, No. 360, Session of 1889, Mr. Thompson, in Place, Feb. 12, 1889 (copy provided by the State Library of Pennsylvania); Journal of the House of the Commonwealth of Pennsylvania 328 (Feb. 12) (1889). Section 2 empowered justices of the peace and aldermen to try cases.

Journal of the Senate of the Commonwealth of Pennsylvania 364, 403 (Feb. 15 and 22) (1889).

Legislation at Harrisburg,” Agitator (Wellsboro), Feb. 19, 1889 (2:3).

Journal of the Senate of the Commonwealth of Pennsylvania 293 (Feb. 21) (1889). The bill passed its first reading the next day. Id. at 310 (Feb. 22).
Senate unanimously passed the bill by a vote of 29 to 0.194 Following the demise of H.B. 360, the House Vice and Immorality Committee, to which S.B. No. 123 had been referred, quickly reported it as committed.195 At its second reading on April 2 House members offered numerous amendments to the Senate bill. The House first rejected amendments that, inter alia, would have confined coverage to boys, struck out the willfulness standard for violations, made it a misdemeanor for minors to misrepresent their age to obtain tobacco, and created an exemption for minors who had orders from their parents. Then Fow intervened with a motion to substitute “sell cigarettes” for “wilfully sell give or in any way dispose of any tobacco in any for or shape or any mixture thereof,” thus limiting coverage to cigarettes. After a Republican had unsuccessfully sought to toughen Fow’s amendment by making it unlawful also to give cigarettes to under-16-year-olds, a Democrat tried to kill the bill by moving to postpone further consideration indefinitely, but it was defeated 56 to 106. Following adoption of Fow’s amendment with 106 Yeas, the House rejected a killer amendment by Democrat George Skinner, a lawyer-tanner, virtually to ban cigarette sales by prohibiting them to anyone under 60, and prepared the bill for its final reading.196 A month later the House by an overwhelming vote of 127 to 24 passed the bill with Fow’s amendment,197 in which the Senate unanimously concurred (34 to 0) the same day.198 Why successful advocacy of an amendment worded “so that all kinds of tobacco could be sold to minors excepting cigarettes”199 made Fow deserving of generational gratitude in Dr. Fox’s view is unclear—unless it was the ban on the sales of cigars and pipe tobacco to minors that had killed off H.B. No. 360.

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

194Journal of the Senate of the Commonwealth of Pennsylvania 321-22, 385-86 (Feb. 26 and Mar. 12) (1889). Woods himself successfully moved to insert a willfulness standard; on third reading imprisonment was struck out.
196Journal of the House of the Commonwealth of Pennsylvania 903-06 (Apr. 4) (1889). With Fow’s intervention the House passed the bill by “amending it so as to apply only to cigarettes.” “Pennsylvania Legislature,” HT, Apr. 5, 1889 (1:5).
197Journal of the House of the Commonwealth of Pennsylvania 1395-96 (May 2) (1889). The 24 Nays were evenly divided between Democrats and Republicans, who held 60 and 144 seats, respectively.
199“Our Harrisburg Letter,” Gettysburg Compiler, Apr. 9, 1889 (2:2); see also “The State Legislature,” Daily Morning Patriot (Harrisburg), Apr. 5, 1889 (1:8).
First Successes Fail: 1889-1892

...t[ru]tting about with viler smelling cigarettes in their mouths, a nuisance to everybody, would be bad enough, but well-informed physicians say that cigarette smoking has largely increased pharyngeal, bronchial and catarrhal troubles, which are fast laying the seeds of phthisis, filling our hospitals and cemeteries with consumptives faster than an epidemic.” Though the information might have come with more grace from a source that was not profiting from the phenomenon, a tobacconist may have been all the more reliable for his material interest in pointing out that the “cigarette habit...ha[d] enormously increased the numbers...smoking and the amount of tobacco consumed, not only by this addition to the ranks of smokers, but out of all proportion the amount smoked by those who were only moderate cigar-smokers before, have now become cigarette fiends.”

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

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

200“Cigarettes,” Tyrone Daily Herald, May 2, 1889 (4:3).
201“Pennsylvania Legislature,” Indiana Progress (Indiana, PA), Feb. 11, 1891 (2:7).
204“Pennsylvania Legislature,” Agitator (Wellsboro), Apr. 15, 1891 (2:2-3).
205Before the Pennsylvania House took up its dual bans, seven of 17 voting state senators in neighboring New Jersey voted for an absolute prohibition of sales subject to a fine of at least $20. “Cigarettes Are Vindicated,” News (Frederick, MD), Feb. 18, 1891 (1:6) (introduced by Sen. Fowler of Cumberland County).
sparked “considerable debate.” As soon as H.B. No. 205 was taken up, Democrat Samuel Wherry offered an amendment to include cigars in the sales/manufacture ban, which the House rejected. Since Pennsylvania was the largest manufacturer of cigars in the United States, accounting for 28 percent of all production (but manufactured only a minuscule number of cigarettes), the amendment seemed to be designed as a bill-killer despite Wherry’s animus against smoking. An economic dreamer Wherry was in any case not: a Princeton graduate whose hobby was political economy, he had, during the previous session, been the Democratic leader and enjoyed some power despite his party’s minority status by virtue of his acknowledged expertise in revenue tax laws.

The debate then generated a series of additional amendments, the first of which, Republican Ward Bliss’s amendment to weaken the fine by converting the $1,000 floor into a ceiling, the House adopted. Republican newspaper reporter E. A. Coray, Jr., stopped this flow of amendments long enough to ask Fow whether his bill was not sumptuary legislation. The question appeared to be rhetorical, but Fow managed to avoid the obvious admission by concocting a definition that was discontinuous with centuries of policy: “[I]t is not sumptuary legislation, because it does not take away from any one that which is necessary to his health or his happiness. Sumptuary legislation is that which assumes control over a man so far as his method of living is concerned, his eating.” Unclear is why no

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


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


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

216Legislative Record for the Session of 1891, at 1:1358 (1891). The claim that sumptuary legislation applied only to food was patently incorrect, but even if Fow had
opponent chose to contest Fow’s disingenuous obfuscation, which evaded the crucial underlying element of governmental paternalism vis-a-vis individual citizens’ private decisions as to how to spend their income on consumption commodities. Following this interrogatory interlude, the House refused to strike out the penalty of imprisonment as proposed by Democrat William Ziegler and rejected Democrat John Dunkle’s killer amendment that would have applied the ban only to cigarettes “made of any other substance than tobacco,” but did agree to the amendment offered by Democrat G. Morris Eckels (a druggist-physician) to except cigarettes used for “medicinal purposes.”

The weak link that Fow’s antagonists did focus on was the so-called original package doctrine, which was to become the mainstay of the litigation campaign that the new Tobacco Trust mounted against all state cigarette prohibitory statutes. Democrat Peter Weber, a German-born dry-goods merchant, initiated this attack by noting (incorrectly) that the bill’s objective was “no doubt...to prevent excessive cigarette smoking,” but because “the bulk of cigarettes” were not manufactured in Pennsylvania, the bill “would not prevent the [sic] use” since they could be imported by mail or express. Turning his sympathies to producers, Weber objected to “throwing a burden upon those who are engaged in a manufacturing business as legitimate as any other,” especially since “as long as they are manufactured anywhere else I cannot see the benefit” of H.B. No. 205.

Fow replied that the benefit could be seen by examining the state’s licensing laws regarding intoxicating liquor: “You cannot prevent, under this bill, any man from bringing cigarettes into this State, but if anyone undertakes to sell them he will be amenable under this act. Cigarettes are now sold in our confectionery stores, and by the peanut venders on our streets, and that will all be stopped under the provisions of this bill.” Fow’s response, conflating two different regulatory/prohibitory regimes, made little sense: although a high cigarette license would presumably have forced the kind of low-volume sellers (who often sold to

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

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

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

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

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

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

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

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

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

227 See below Part II.


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

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

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

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

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

232Legislative Record for the Session of 1891, at 1:1359 (1891).
233Legislative Record for the Session of 1891, at 1:1359 (1891).
235Legislative Record for the Session of 1891, at 1:1359 (1891).
public streets,” and although he would not “question the character of anyone who does it, I still want to go upon the record...by saying that it is an unmanly and ungentlemanly thing to do...”237 Despite the availability of some contemporaneous medical-scientific evidence justifying heightened health concerns about cigarette smoking, Fow did not rise to the occasion to defend either of his bills’ omission of non-cigarette tobacco.

After the House had rejected Wherry’s amendment, it agreed to Eckels’ renewed “medicinal purposes” amendment (by a vote of 90 to 35), rejected Morrison’s killer amendment exempting citizens of Pennsylvania, passed the bill on second reading, and sent it on to a third reading,238 but not before Republican Philadelphia lawyer Frank Riter had unleashed a critique that 120 years later may still resonate with some:

To say that a man should be fined for smoking a cigarette upon the highways, streets or alleys of this Commonwealth is such an infringement of the common rights of mankind that I do not think this House will put itself in a position of endorsing such a view. Is this House going to put itself upon record as saying that a man cannot smoke a cigarette excepting in the field or in his house? It is really too absurd to argue about.239

On final passage three weeks later the press reported that both of Fow’s bills “went through with a puff,”240 but in fact only H.B. No. 205’s passage was relatively frictionless.241 In contrast, the circumstances surrounding passage of the anti-public smoking measure were bizarre inasmuch as Fow opened the debate by revealing that: “I introduced these bills at the instance of an association of ladies and I do not think this last bill is a very good bill myself and I move it be indefinitely postponed. [Cries of ‘No, no, no.’]”242 Unfortunately, Fow shed no further light on the bills’ requester, but his remark suggests the possibility that the WCTU stood behind both anti-cigarette measures, although reports by the Pennsylvania state organization to the national WCTU did not mention the anti-cigarette bills.243 Instead, Fow went on to insist that he agreed with H.B. No. 205’s

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

Much of the press was convinced that House passage of H.B. No. 206 was a lark. For example, as far as the Patriot was concerned, the House had acted “in a facetious mood,” prompting the newspaper to predict that both bills would “probably be promptly killed in the Senate.”

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244 Legislative Record for the Session of 1891, at 2:1932 (Apr. 28) (1891).
246 Legislative Record for the Session of 1891, at 2:1932 (Apr. 28) (1891).
247 “Senate and House,” Patriot (Harrisburg), Apr. 29, 1891 (5:1).
Inquirer passed on corridor gossip to the effect that “the members of the House thought the gentleman with a voice was not so enthusiastically in favor of the bills as he would have it appear. That’s why they insisted upon passing them finally. It is doubtful if the bills will receive serious consideration in the Senate.”248 And the Republican Tyrone Daily Herald reported that the House had passed Fow’s bills in an “uprorious [sic] mood” despite Fow’s not wanting the smoking bill passed.249

In the event, Fow’s bills secured majorities of greater than two thirds—109 (69 percent) to 49 for H.B. No. 205 and 115 (68 percent) to 53 for H.B. No. 206.250 Indeed, despite his opposition to the bill of mysterious provenience, even Fow voted for the latter. The vote was not at all strictly along party lines, but prominent differences nevertheless separated Republicans and Democrats as well metropole and periphery.251 (With respect to the typical Democratic opposition to and Republican support for sumptuary legislation, the 1890 Republican state platform urged on Congress the “immediate necessity” of passing legislation that would prevent the importation of intoxicating liquor into Pennsylvania contrary to the state’s regulatory and restrictive legislation, whereas the Democratic state platform was silent on the issue of prohibition.)252 Whereas 72 and 73 percent of Republicans voted for H.B. No. 205 and 206, respectively, the corresponding figures for Democrats were 65 and 60 percent. However, the data for Philadelphia (which accounted for about one-fifth of the state’s population and of House seats) present a considerably different profile: only 38 percent of voting Philadelphia Republicans (who held 34 of the county-city’s 39 seats)253 supported H.B. No. 205, while 55 percent favored H.B. No. 206. In contrast, Fow’s four

251Party affiliation was taken from http://staffweb.wilkes.edu/harold.cox/legis/109H.pdf, as corrected (and supplemented) by Smull’s Legislative Hand Book and Manual of the State of Pennsylvania: 1891, at 707-16. The three fusionists from Bradford County are not included in the Republican or Democratic totals below.
252Smull’s Legislative Hand Book and Manual of the State of Pennsylvania: 1891, at 121. On congressional enactment of such an Original Packages Act in August 1890, see below ch. 11. For a Democratic newspaper’s editorial endorsement of Fow’s bills, see “State Legislation,” Warren Ledger, May 1, 1891 (4:1-2) (edit.).
253“The Philadelphia Republican machine was without question one of the most awesome organizations of its kind ever constructed.” Walter Burnham, The Current Crisis in American Politics 143 (1983[1982]).
fellow Philadelphia Democrats followed his lead: none opposed either bill, all supporting 206 and three 205. Thus if the Philadelphia Republicans are segregated out, 88.5 percent of voting non-Philadelphia Republicans supported the anti-sales bill and 81 percent the anti-smoking bill. Separating out in addition the Pittsburgh House contingent (composed of seven Republicans and one Democrat) reveals that 91 and 82 percent, respectively, of non-metropole Republicans voted for the bills. Representatives also manifestly perceived significant differences between the two bills inasmuch as 11 who opposed the sales ban supported the public smoking ban, while 13 who opposed the latter supported the former.

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

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

254 Republicans’ House majority shrank to 80 to 73 outside of Philadelphia and Pittsburgh.

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


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

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


261 Journal of the Senate of the Commonwealth of Pennsylvania 1473 (May 25), 1510, 1512 (May 26) (1891); The Legislative Record for the Session of 1891, at 2:2967 (May
session on third reading by a successful motion for indefinite postponement by three-term Democrat Milton Henninger, a former county district attorney.\textsuperscript{262} Because he saw no difference between cigarettes and cigars, he argued that: “You might as well say that cigars cannot be manufactured.” More importantly, he rehearsed the traditional Democratic anti-sumptuary line: though he did not use tobacco in any form, some of his neighbors did: “I will not regulate my fellow Senators or any other citizen of this Commonwealth with reference to what they shall use.” By a vote of 24 to 8 his colleagues agreed to postpone H.B. No. 205 indefinitely. The other bill, banning public use of cigarettes, transcended Henninger’s practical experience: “Why I never saw such legislation introduced in Pennsylvania before. I think the other House passed this bill as a joke.”\textsuperscript{263} After he had asked who would introduce such a bill and heard Fow’s name, the Senate agreed to postpone H. B. No. 206 indefinitely as well.

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

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

... After recess two Philadelphia politicians took seats in front of the clerk’s desk and puffed away vigorously at fragrant havanas. Sergeant-at-Arms Hoopes attempted to make them stop, but they only did so when they were ready.\textsuperscript{264}

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

\begin{enumerate}
\item H.B. No. 205 was held up briefly by a motion to reconsider.
\item\textsuperscript{262}\textit{Journal of the Senate of the Commonwealth of Pennsylvania} 1618 (May 27) (1891).
\item On Henninger, see \textit{Smull’s Legislative Hand Book and Manual of the State of Pennsylvania} 666 (1891).
\item\textsuperscript{263}\textit{The Legislative Record for the Session of 1891}, at 2:3267 (May 27) (1891).
\item\textsuperscript{264}“Like a Circus,” \textit{Patriot} (Harrisburg), May 28, 1891 (4:5-6).
\end{enumerate}
The First Two Legislative Chambers to Investigate Cigarettes, After Hearing Scientists Refute (Trivial and False) Criticisms, Initially Refuse to Ban Their Sale

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

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

**Georgia House 1891**

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

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

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

On July 13, 1891, 52-year-old Representative William Asa Sinquefield, a former teacher, and, like a large proportion of his House colleagues, a farmer, filed a bill to “prohibit the manufacture and sale of cigarette tobacco, cigarette material and substitutes to evade the law against the manufacture and sale of cigarette tobacco and cigarette material” and to make it a misdemeanor to offer for sale or furnish such materials, which was referred to the Temperance Committee. Like many other recently elected Georgia legislators, Sinquefield, too, was a member of the Southern Farmers’ Alliance, a mass protest organization and forerunner of the Populist party, into which it was transformed by the early 1890s. Indeed, the Georgia Alliance, which supported, inter alia, government ownership of railroads, telegraphs, and telephones and abolition of the convict lease system, and whose membership by 1890 reached 100,000, succeeded in electing so many members that year that the state general assembly was known as the Farmers’ Legislature; purportedly 31 of 44 senators and 137 of 174 representatives during the 1891 session were Alliancemen. (Nor was Georgia one of four states (Alabama, Florida, and North Carolina being the others) in which representatives elected with the Alliance’s help held legislative majorities in 1890. Edward Ayers, The Promise of the New South: Life After Reconstruction 246 (1993 [1992]). By 1890 Georgia was also one of four states (the others being Arkansas, Florida, and Mississippi) in which more than half of “all eligible people—rural folk” over 21—joined the Alliance; more than 40 percent of the same group joined in Alabama, South Carolina, North Carolina, Texas, and Tennessee. Id. at 220. The precise extent of the significant majority that Alliance members gained at the Georgia House and Senate elections in 1890 has been subject to dispute. William Holmes, “The Southern Farmers’ Alliance and the Georgia Senatorial Election of 1890,” Journal of Southern History 50(2):197-224 at 206-207 (May 1984). Regardless of their numerical majority, Alliance members, only a minority of whom were radicals, failed to enact political-economically transformative legislation during the 1891 session. Id.

271Journal of the House of Representatives of the State of Georgia at the Adjourned Session of the General Assembly, at Atlanta, Wednesday, July 8, 1891, at 98 (July 13) (1891).
273A History of Georgia 296 (Kenneth Coleman ed. 2d ed. 1991 [1977]). Georgia was one of four states (Alabama, Florida, and North Carolina being the others) in which representatives elected with the Alliance’s help held legislative majorities in 1890.
274Theodore Saloutos, Farmer Movements in the South 1865-1933, at 111 (1964
unique: the 1890 elections produced Alliance domination of the legislatures in Alabama, Florida, Mississippi, North Carolina, South Carolina, and Tennessee as well.)

Sinquefield was not simply an “allianceman,” but had also organized several counties in his section of the state. His interventionist proposal to ban the sale of “these noxious articles” was, at least in part, rooted in his having personally “seen the effects of the habit in those with whom” he had “intimate relations.”

The prohibitory horizons of this “zealous” Baptist and father of 12 children also extended to alcohol, as demonstrated by his speech at the Georgia Temperance Association convention, which took place a fortnight after he had filed his bill: “Today...I had the pleasure of performing a duty which has made this day one of the happiest of my life. And that duty was voting for a bill prohibiting the sale of whisky within three miles of any church outside of incorporated towns.”

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

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

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283 At the 1890 census, Georgia produced only 264,000 pounds compared to 222 million in Kentucky. U.S. Department of the Interior, Census Division, *Abstract of the Eleventh Census: 1890*, tab. 10 at 131-32 (2d ed. 1896).
284 Not until November and House passage of the bill did the national newspaper of record acknowledge that the “anti-cigarette movement has reached Georgia....” “Small Talk,” *NYT*, Nov. 7, 1893 (4).
285 W. Wardlaw, “Atlanta, GA,” *Typographical Journal* 25(5):497 (Nov. 1904); Georgia: *Comprising Sketches of Counties, Towns, Events, Institutions, and Persons, Arranged in Cyclopedic Form* 3:625-26 (Allen Candler and Clement Evans eds. 1906); Thomas Deaton, “James G. Woodward: The Working Man’s Mayor,” *Atlanta History* 31(3):11-23 (1987). It is difficult to situate the political-economic and social character of Woodward’s anti-cigarette proposal: although “one of the most powerful politicians of the period” and involved in a bitter “class-conscious” election campaign in 1891 in which blacks allegedly played an important part in defeating the working-class elements, by the following year he was the first to demand the white primary. Eugene Watts, *The Social Bases of City Politics: Atlanta, 1865-1903*, at 30 (1978).
287 Lucian Knight, *History of Fulton County Georgia: Narrative and Biographical* 167 (1930).
First Successes Fail: 1889-1892

subjected anyone convicted by the recorder of selling or giving cigarettes or cigarette materials to a minor to a fine of not less than $25 and/or to work on city public works for not less than 25 days. Minors convicted of being caught smoking cigarettes or “representing to any dealer or any other person” that they were 21 years old in order to obtain cigarettes or cigarette materials were subject to a fine of one dollar for the first offense and between five and 25 dollars for additional offenses and/or to work on city public works for not less than 10 days. The press predicted that the ordinance would pass the council “with all ease” following a unanimous police committee report favoring passage, but in fact the council voted 9 to 8 to postpone it indefinitely.

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

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

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

292 On Hulsey, see Green Bag 21(7):371 (July 1909).
293 “In the City Hall,” AC, Apr. 23, 1891 (5).
294 “In the City Hall,” AC, Apr. 23, 1891 (5).
First Successes Fail: 1889-1892

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

Then on May 4, Woodward announced shortly before the general council meeting that day that “[n]ot by a long shot” had he “abandoned his fight on cigarette smoking.” At that session he introduced an ordinance to: enforce the state law banning cigarette sales to minors; impose a license tax of $200 to sell cigarettes; impose a fine of $100 for adulterated goods; and require the city attorney to take the steps necessary to secure legislation fixing the license at $2,500 or prohibiting the sale of cigarettes. Then at its session on June 16, at which the council considered an ordinance to levy and assess taxes for Atlanta for the fiscal year ending June 30, 1892, “Colonel” B. F. Abbott—a key figure among

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


the forces seeking to thwart regulation of cigarettes whose interventions are detailed below—representing the city’s cigarette dealers, presented two petitions, one for wholesalers and one for retailers, and in vain requested a reduction in the proposed $200 annual license tax for cigarette dealers (or dealers in cigarette paper or cigarette tobacco). Abbott, who on behalf of a hundred dealers protesting such “class legislation,” claimed that the proposal was “unjust and discriminatory” because only “a few men would pay the extra tax and thus monopolize the trade.” Moreover, dealers outside the city’s jurisdiction and in the suburbs “would sell cigarettes with impunity” with the result that instead of reducing the sale of cigarettes, the license tax would “simply drive a number of the smaller men out of the business.”

Councilman Hulsey claimed to be opposed to the sale of cigarettes, but, echoing dealers’ complaints, deemed the license tax wrong because it would “put the trade in the hands of a few. It will create a monopoly” and he was opposed to monopolies. Woodward strenuously opposed Hulsey’s motion to reduce the license tax to $25 and prevailed after “the friends of the deadly weed stood firm” and the council also added the “hope that the legislature will pass an absolutely prohibitory law.” A few days before the license tax went into effect dealers themselves opined that it would slash the 500 to 1,000 firms that had been selling cigarettes to at most five or six; some had already stopped selling when their supply was exhausted, while others calculated that at a 1.5 cent profit per pack they simply did not sell enough packs to justify paying the $200.
First Successes Fail: 1889-1892

One week after the $200 license tax had gone into effect on July 1, the press reported that it had become a “great deal harder to get a package of cigarettes” in Atlanta: whereas previously consumers were able to drop into almost any store (including all stores that sold tobacco) to buy cigarettes, the high license tax had caused the a huge drop in the number of firms selling cigarettes from about 1,500 to the 10 that had paid for the license. Of the latter some increased the price, for example, doubling that of a package of Duke cigarettes from five to ten cents. For licensees who did not increase the selling price: “To make this amount [$200] means the sale of over ten thousand packages of cigarettes, as not as much as two cents is made on each pack.” The twofold impact of the vast constriction in the geographic spread of sales locations and hence in buyers’ convenience (and presumably in overall supply) and the doubling of prices meant that the sale of cigarettes in Atlanta had, the *Constitution* reported, been considerably limited. Correlatively, “the wagers of the hot war against the article feel some better. But they are not satisfied yet, and say they are going to have the sale stopped altogether.”

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

305 “Only Ten Sell Them,” *AC*, July 7, 1891 (5:5). Three days later the *Constitution* self-contradictorily editorialized that someone who should be “posted” had stated that cigarette consumption had increased 10 percent since the license tax had gone into effect. The only explanation that it offered for this counter-intuitive development was speculation about “forbidden fruit,” adding that “the cigarette manufacturers, who are the most extensive advertisers in the world, do not seem to be troubling themselves at the result of this manner of advertising.” “The Cigarette Tax,” *AC*, July 10, 1891 (4:2) (edit.). How they would have manifested concern other than through the sellers’ lobbying the council the newspaper did not reveal. Two weeks later the paper quoted another dealer as claiming that his sales had risen fivefold since the license tax had gone into effect. He went on to fantasize that if the license cost $2,000 and he were the only dealer, he would charge one dollar a pack and still sell many packs because those in the habit of smoking cigarettes would not hold back on price when they were hard up. “From Our Notebook,” *AC*, July 23, 1891 (5:4). The *Constitution*’s libertarian opposition to government regulation of adult behavior spilled over into that of children as well: while not resisting a ban on the sale of...
accounts, soon the press nationally concluded that in Atlanta “[t]he authorities there evidently mean war on the perverse habit.”

Perhaps reflecting cigar dealers’ desire to eliminate the competitive threat of low-price and low-profit-margin cigarettes, Harry Silverman, who guessed that he sold more cigarettes than all other Atlanta dealers combined, publicly expressed his opposition to the sale of cigarettes and his wish that “some means could be taken to wipe out the sale completely” because they were “a curse to the people.” Nor was Atlanta alone: in June retail cigarette dealers in Rome, Georgia petitioned the city council to pass an ordinance fixing the license to sell cigarettes at $500. And at the very same time the Thomasville city council passed an ordinance (to go into effect in 60 days) to impose a $500 license because the state law prohibiting sales to minors had proved ineffective; the press predicted that the measure would probably put an end to the sale of cigarettes there.

Nor were government officials alone in undermining the viability of cigarette smoking: in 1890 as far off as California the press reported in 1890 that in Georgia when a boy appeared at a “prominent business house” to apply for a position “smoking one of the vile things” the owner refused his application, offering his advice that the next time he sought a job he not smoke “one of those things.” The newspaper added its own view that if business houses generally adopted such a rule, the effect upon the disgusting and dangerous cigarette habit would be greater than that of laws which cannot be practically enforced to any appreciable extent.

Nor was it necessary to rely on transcontinental anecdote: even in the summer of 1891 it was possible to read Help Wanted ads, for example, in the Constitution for a young man as an assistant bookkeeper/stenographer subject to the proviso: “A cigarette smoker need not

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


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


310 “No Cigarette Smokers Wanted,” Sacramento Daily Record-Union, Nov. 24, 1890 (1:7).
apply."\textsuperscript{311} And even the \textit{Constitution}, which was hostile to regulating adults’ access to cigarettes, editorially advocated banning smoking on street cars.\textsuperscript{312}

In what the Tobacco Trust—shortly before the legislative session opened the \textit{Atlanta Constitution} reported that the American Tobacco Company had just bought two of the largest manufactories in the United States and claimed to manufacture 98 percent of all cigarettes\textsuperscript{313}—would codify as an anti-regulatory protocol throughout the United States, within 10 days of Sinquefield’s having filed his prohibitory bill, it was already “exciting much attention...from the cigarette manufacturers.” It would not, the \textit{Atlanta Constitution} reported, come up for some time in the House Temperance Committee because the factories had requested a delay in order to “prepare their argument,” which would (presumably) be wielded by the counsel they had employed, who would enable them to initiate a “hard fight.” In the meantime, Sinquefield, had spoken to many House members, who were “‘heartily in favor’” of his bill, and secured “‘strong testimonials as to the importance of enacting such a law from the doctors....”\textsuperscript{314}

The possibility that Sinquefield’s anti-cigarette initiative did not enjoy solid support even within the larger prohibitory movement emerged at the aforementioned convention of the Georgia Temperance Association (which changed its name to Georgia Prohibition Association on the second day)\textsuperscript{315} when, following Sinquefield’s speech, “Mrs. Abbott” made a short address as representative of Fulton County (Atlanta). Astonishingly, she excoriated his proposed ban measure: “‘That nefarious cigarette bill..., now before the House, has my everlasting anathemas written across its face. If, as has been said, the brightest legal talent in the state has been employed to defeat it I only hope that they will succeed.’”\textsuperscript{316} Unfortunately, the \textit{Constitution} failed to mention her reasons for anathematizing the total sales ban,\textsuperscript{317} but the likelihood that her

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

Her lengthy obituary in the Constitution managed to avoid all mention of her manifold prohibitory activities. “Mrs. Abbott Dead,” AC, Dec. 28, 1893 (7:1). Even more vacuous was her even lengthier eulogy, which did, however, allude to her “looking after the neglected classes,” specifically, “[p]itying” the condition of a group of “Chinamen” and “yearning for the joy of leading them into the kingdom of truth and grace...” “Her Ideal Realized,” AC, Dec. 29, 1893 (7:1-2). Abbott had earlier published a novel that conferred on her a modest reputation as an author. Belle Abbott, Leah Mordecai (1875); Mel Colquit, “Three Southern Women Have Made a Mark,” BDT, Oct. 3, 1890 (3:3). H[enry]. Scomp, King Alcohol in the Realm of King Cotton: Or, A History of the Liquor Traffic and of the Temperance Movement in Georgia from 1733 to 1887, at 695 (1888). The Georgia WCTU was founded in 1883, though local unions had preceded it earlier that decade. J. J. Ansley, History of the Georgia Woman’s Christian Temperance Union: From Its Organization, 1883 to 1907, at 56 (1914); Nancy Hardesty, “‘The Best Temperance Organization in the Land’: Southern Methodists and the W.C.T.U. in Georgia,” Methodist History 28(3):187-94 (Apr. 1990).

Identifying the Georgia WCTU’s position on the cigarette sales ban remains a research desideratum. Its report to the national WCTU in August 1891 mentioned various legislative bills, but not the cigarette bill. Mrs. J. Jefferson Thomas, “Georgia,” US 17(33):10 (Aug. 13, 1891). One of the group’s leaders, Mrs. W. H. (Rebecca Latimer) Felton, stated in 1891: “As a wise old man remarks, ‘I did not know it was a crime to use tobacco.’” “Mrs. Felton’s Trenchant Pen,” AC, May 24, 1891 (4:1-5). The chapter on the years 1886 to 1896 of a recent doctoral dissertation that focuses on the Georgia WCTU in dealing with southern temperance women fails to mention the issue at all. Leslie Dunlap, “In the Name of the Home: Temperance Women and Southern Grass-Roots Politics, 1873-1933” (Ph.D. diss., Northwestern University, 2001). The Report[s] of the Annual Convention of the Woman’s Christian Temperance Union of Georgia for 1891, 1892, and 1893 contain, according to an archivist at the Emory
By the beginning of August, as the “fight on cigarettes seem[ed] to be growing,” the Constitution asserted without specification that since Georgia led in “many reform improvements,” it might “practice what so many preach—the abolishment of cigarettes.” In approaching Sinquefield’s bill, the House Temperance Committee was investigating not only cigarettes’ effects, but also their ingredients, about which it requested information from the state chemist. This quest was, in the newspaper’s view, “an entirely original step, and will settle one muchly-argued point”—namely, whether cigarettes were composed of “shavings saturated with tobacco spit, opium, arsenic and other poisons, or whether it is tobacco.” In entrusting this quasi-supererogatory analytic task to George F. Payne, M.D., who after serving as state chemist from 1890 to 1898, was president of the American Pharmaceutical Association (1902-1903) and dean of the Atlanta College of Pharmacy, the Temperance Committee both insured that a well-credentialed scientist would place his imprimatur on a commodity that it was in fact not inclined to ban and initiated a wave of duplicative chemical analyses in other states. Ironically, although prohibitory advocates said that “they know the effect, and that’s enough,” their desire to know the contents being merely “a matter of information,” in the event, the finding that the Tobacco Trust did not add other substances to the tobacco dominated the debate, illogically eclipsing the view of cigarettes’ “death-dealing qualities” based on an etiology that had nothing to do with such alleged adulteration. Just how militant and self-assured prohibitionists were on the eve of Payne’s divulging his findings emerges in the Constitution’s report that

no matter what’s in them, there’s going to be a big fight to get them out of the state. That’s

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

321“What’s in a Name?” AC, Aug. 5, 1891 (3:3).


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

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

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

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

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

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

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

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

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

But before Bacon even reached this anti-paternalist approach, which, in Georgia as elsewhere, failed to engage, he opened his remarks by insisting that, contrary to what some in Macon may have regarded as “a small thing” he had gone to Atlanta to talk about, in fact he had spoken about a “mighty big death, one or another is sure to result.”

332“Major Bacon on Cigarettes,” AC, Aug. 13, 1891 (4:5).
thing”—namely, “trying to save the states of Virginia, Georgia and Carolina a total annual revenue of $4,000,000,” which was “the income derived by the farmers of these three states from the sale of 15,000,000 pounds of tobacco purchased by the manufacturers of cigarettes, and used by them in the manufacture of what” some were “pleased to call the ‘death stick.’” Consequently, Bacon’s mission to Atlanta had not been to “protect...the men who want to make cigarettes, but the income derived from the tobacco used in the cigarettes...” Bacon did not reveal who had paid him to lobby the Temperance Committee, but his mention of Georgia in the same breath with Virginia and North Carolina was disingenuous since Georgia’s total tobacco output amounted to 0.003 percent of that of the other two and the flue-cured Bright tobacco that was used in cigarettes was not produced at all in Georgia in 1891.

Also arguing against the bill was, unsurprisingly, Abbott, though the Constitution failed to preserve any of his arguments for history. Benjamin Franklin Abbott, one of Atlanta’s most successful lawyers and a member of the state House of Representatives from 1884 to 1885 was also representing cigarette dealers petitioning the city council to reduce the cigarette license tax, though just the previous year, when, in the mayor’s absence, he had spoken on behalf of the city of Atlanta at the National WCTU convention held there in 1890. In the event, from the tenor of the committee hearing, the Constitution immediately concluded that Sinquefield’s bill “will be defeated in committee,...the only question” being whether there would be an adverse report or a new bill.

It seems highly plausible that Abbott and/or Bacon were the aforementioned counsel whom the Tobacco Trust had employed to fight Sinquefield’s bill. Indeed, the details surrounding another chemist’s report make it virtually certain
that Abbott did perform the role of the Trust’s chief lawyer-lobbyist in Georgia. John M. McCandless, who would succeed Payne as the state chemist in 1898, was an analytical and consulting chemist whom the Atlanta Board of Health made its own; for a time he also held a professorship at a medical college in Atlanta. The same day that the Constitution interviewed Payne, it devoted a column to an analysis that McCandless had done for the American Tobacco Company and that Abbott used in his argument before the Temperance Committee. The newspaper did not publish the report itself, but it did reprint in its entirety the letter from McCandless to Abbott, dated August 3 (three days before Payne completed his study and testified before the committee) that “[t]ransmitted” the analysis to Abbott, which he, in turn, presented to the committee. The newspaper observed that Payne’s testimony did not bring out certain essential points produced in McCandless’s report that accounted for the “universally observed [injurious?] effects of cigarette smoking.” McCandless analyzed two of the three brands that Payne was studying (Latest English and Richmond Straight Cut, and substituted Cameo for Duke’s), making the same findings with regard to the absence of opium, morphine, and arsenic. McCandless went beyond Payne in emphasizing that there was “no necessity for adulteration with opium and arsenic when we consider the poisonous nature of the nicotine which exists in the tobacco and of other poisonous bodies generated by destructive distillation in the act of smoking.” In particular, smoking generated from the tobacco prussic acid (i.e., hydrogen cyanide), formic, acetic, propionic, butyric, and [carbolic?] acid, in addition to the poisonous pyridine bases, including picoline, lutidine, collidine, and others. McCandless added that smoking also produced “very considerable volumes” of carbon dioxide and carbon monoxide gases, the latter being “particularly poisonous” when they were drawn into the lungs, entered the bloodstream, and combined with hemoglobin. He characterized it as an almost established fact that to carbon monoxide more than to any other [poisons?] present in tobacco smoke were to be ascribed “the deleterious effects upon the cigarette smoker because he inhales....” All of these poisons were also present in cigar smoke, but those smokers did not inhale. Consequently, he confirmed “a foundation for the popular prejudice against the vice of cigarette smoking, [and it is the?] manner in which the much anathematized [?] rolls are smoked.”


340“The Cigarette Again,” AC, Aug. 9, 1891 (14:6). The question-marked words in
obvious question—to which there is no obvious answer—raised by McCandless’s report is what would possibly have motivated Abbott or ATC to present this scientific indictment of cigarette smoking, to which physicians and scientists would not add much during the next several decades, to a legislature considering whether to prohibit the sale of cigarettes.

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

The identification and characterization of the various poisonous chemical compounds in the letter, which were apparently not based on McCandless’s own analysis, did not originate with McCandless, whose brief account of the acids and bases suspiciously overlapped with that in a then standard textbook: Alexander Blyth, Poisons: Their Effects and Detection: A Manual for the Use of Analytical Chemists and Experts 1:247† (2d ed. 1885 [1884]), which, in turn, was based on analyses performed in Germany in the early 1870s. For example, Hermann Vohl and Hermann Eulenberg, “Ueber die physiologische Einwirkung des Tabaks als narkotisches Genussmittel, mit besonderer Berücksichtigung der Bestandtheile des Tabakrauchs,” Archiv der Pharmacie 2d ser. 147(2): 130-67 (1871), analyzed the pyridene, picoline, and collidine in (cigar) tobacco smoke and observed the swiftly lethal consequences of infusing or injecting them into animals such as pigeons and rabbits (in one case a pigeon was exposed to picoline fumes). On more recent analysis of these toxic compounds in smoke, see U.S. Department of Health and Human Services, Reducing the Health Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General: 1989, at 79-97 (n.d.). Carbon monoxide’s affinity to hemoglobin was also well known.

Lucian Knight, A Standard History of Georgia and Georgians 5:2488-89 (1917).

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

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

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

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

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

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

345 “Judge Hines Becomes a Populist,” NYT, Apr. 17, 1894 (4); C. Vann Woodward, Tom Watson: Agrarian Rebel 264 (1972 [1938]).
347 “The Cigarette Again,” AC, Aug. 9, 1891 (14:2) (confusingly two different articles with the same headline appeared on the same page). Without elucidating the etiology, Payne went on to opine that in addition to causing tobacco heart, nicotine softened the brain.
348 See above ch. 2.
all in all, about the least harmful of all.” In the wake of Payne’s report, Sinquefield’s bill was much discussed, but the Temperance Committee was reportedly going to water it down significantly: “The main thing many seem to want to accomplish is to prevent minors from their use, and as there is a law preventing the sale, or giving cigarettes, to minors, it is probable that the outcome will be some scheme to enforce the law.” At this crucial juncture in the bill’s fate the Constitution came out editorially against the universal sales ban on the grounds of unenforceability, prematurely (and erroneously) asserting not only that it violated the interstate commerce clause, but that “cigarettes in original packages of any size could be shipped to any person...in Georgia from any point outside of the state. Under such a law Chattanooga, for instance, would loom up as a great cigarette market, and do a rushing business into Georgia.” Despite the newspaper’s extensive reporting on the chemists’ observations on the health effects of cigarette smoking, the editorialist rhetorically asked why the state should interfere with adult men’s “right” to “use tobacco in its least injurious form”—so far as smoking is concerned—in the shape of cigarettes.” Although it may have been true in terms of sales that a “sweeping law against cigarettes would, if enforced, simply play into the hands of the cigar men,” the Constitution could not rely on Payne or McCandless for the proposition that a smoker deprived of his cheap half-penny cigarette “containing scarcely any nicotine” would merely exchange it for a five-cent cigar, which would “poison his system with a much larger quantity of nicotine.”

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

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


First Successes Fail: 1889-1892

passed the committee substitute by the overwhelming majority of 94 to 10.\textsuperscript{353} Little wonder that “the cigarette men [we]re jubilant over their success in preventing the passage of the original act.”\textsuperscript{354} but the Constitution left the public to wonder about the identity and tactics of those pressure lobbyists.

In the midst of the defeat of Sinquefield’s bill, the Constitution reported that the cigarette-selling industry would renew its efforts to pressure the Atlanta council to roll back the license tax at its session on August 17, when the cigarette’s “friends” would base their petition on the monopoly that the ordinance had allegedly created. The paper also speculated that State Chemist Payne’s analysis would doubtless also shape the council’s decision.\textsuperscript{355} In the event, sellers turned out to be concerned with the other shoe that Woodward had dropped back in May when he proposed that the city secure state legislation either empowering the city to set the license tax at $2,500 or banning sales altogether. Back in early June the council had published a notice in the press that it would apply to the state legislature for passage of a bill authorizing Atlanta (and Fulton County) to charge a license fee of up to $2,500 or to prohibit the sale of cigarettes and cigarette materials.\textsuperscript{356} Consequently, on July 10, three days before Sinquefield acted, John B. Goodwin, the Atlanta city attorney, who also represented Fulton County in the House (and two years later would become mayor),\textsuperscript{357} introduced precisely such a bill (which also covered “any preparation of tobacco that is intended as a substitute to evade the law against cigarettes”),\textsuperscript{358} which the Constitution characterized as “intended to squelch the cigarette nuisance.”\textsuperscript{359} Since the outright prohibitory initiative had just failed, dealers, apparently fearing that the city government would pursue the former course, consequently petitioned the council to rescind the resolution requesting the legislature to act. The council

\textsuperscript{353}Journal of the House of Representatives of the State of Georgia at the Adjourned Session of the General Assembly, at Atlanta, Wednesday, July 8, 1891, at 576 (Aug. 20) (1891).

\textsuperscript{354}“The Cigarette Bill,” AC, Aug. 21, 1891 (9:1).

\textsuperscript{355}“The Cigarette Again,” AC, Aug. 16, 1891 (18:6).

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

\textsuperscript{357}J. K. Ohl, “The Georgia House,” AC, July 19, 1891 (17-21 at 19:1).

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

\textsuperscript{359}“Those Salt Marshes,” AC, July 11, 1891 (10).
accorded Benjamin Abbott, the sellers’ lawyer, the privilege of a hearing. Referring to the concurrent legislative proceedings, he asserted that Payne, having collected “samples of as many brands as he could procure in the city,” had submitted a “searching analysis” that “proved beyond peradventure that cigarettes do not contain deleterious or poisonous substances, but are made of the purest sort of tobacco.” This claim was fundamentally false since Payne had emphasized how poisonous nicotine was, but Alderman Woodward focused on other issues. After pointing out that even the $2,500 license tax “would not run trade away from Atlanta” because it did not affect wholesalers, Woodward took issue with Abbott’s characterization of Payne’s analysis as having encompassed 80 cigarettes:

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

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

361 “Dr. Martin Resigns,” AC, Aug. 18, 1891 (6:1-2). Woodward appears to have been confused since in fact Payne had analyzed only three brands, but one of them, as Benjamin Abbott was careful to induce Payne’s assistant to state in writing, was Duke’s Durham.

“That Cigarette Analysis Again,” AC, Aug. 15, 1891 (5:2). A contemporaneous account of the analysis going on in Payne’s office named at least six brands that he was studying.

“What’s in a Name?” AC, Aug. 5, 1891 (3:3).
decency.” At the beginning of his first mayoralty, after he had been denounced from the pulpit as a “‘drunken sot, libertine and a gambler,’” for example, the city council contemplated impeachment proceedings against him and asked for his resignation, prompting him to promise “not to take another drink during his term of office.” Moreover, his mayoral veto of a high liquor tax on saloons was ascribed to his own alcoholic proclivities. Ultimately, a biographer concluded, Woodward did “not fit the traditional mold of a Progressive era reformer,” because, although he attacked inefficiency in government and special privileges and monopolies while advocating the initiative and referendum, he opposed other “constructive measures....” Perhaps the anti-cigarette campaign of this “champion of organized labor” can be understood in the context of his entry into Atlanta politics in the mid-1880s when the labor movement was “trying to make itself respectable with a strong prohibitionist stance.”

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


First Successes Fail: 1889-1892

March off to the House to listen to the legislative discussion. In the end, the limits of the anti-cigarette coalition became visible in the 11 to 3 vote to abandon pursuit of legislative intervention to suppress the sale of cigarettes by means of a prohibitively expensive license; the only vote that Woodward and Hendrix were able to attract was that of physician Charles Ernest Murphey, who was also a professor of children’s diseases.

Massachusetts House 1892

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

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

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

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

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371 “War Against Cigarettes,” Call (San Francisco), Feb. 19, 1892 (1:3).
373 To-Day (Boston) 4(82):58 (Mar. 24, 1892) (untitled edit.). The House, as discussed below, did not pass the bill.

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took note of the fact that virtually on the same day the legislatures in Massachusetts and Mississippi had taken “widely different actions” in the “War Against Cigarettes.” On Friday, February 12, the Joint Committee of the Massachusetts Legislature on Public Health, following a hearing on the contents of cigarettes, refused to recommend passage of a bill to ban their manufacture or sale, whereas on Monday, February 15, the Mississippi House of Representatives passed a bill making it a misdemeanor to smoke cigarettes in public. This ideological juxtapositioning of the archetypal Yankee and Confederate states concealed both the considerable support that the cigarette control movement enjoyed in Massachusetts and the superficial character of the latter state’s “exhaustive inquiry,” which in fact merely repelled the bogus allegation that cigarettes were adulterated with opium and various other poisons.

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

374“War Against Cigarettes,” Call (San Francisco), Feb. 19, 1892 (1:3).
375“War Against Cigarettes,” Call (San Francisco), Feb. 19, 1892 (1:3).
379Katharine Stevenson, “Massachusetts,” in “Organization and Accomplishments of
to prevent smoking by persons under 16. On January 25, Republican Representative George Ball, a Unitarian clergyman and veteran temperance advocate,\(^{380}\) presented the WCTU officers’ petition, which was also referred to the Public Health Committee.\(^{381}\)

The WCTU’s impact on the legislative drive in Massachusetts was also reflected in the fact that the organization’s state superintendent of narcotics, 38-year-old Ella Aldrich Gleason, who was licensed as a Baptist preacher that same year\(^{382}\) (and eventually climbed the hierarchy to serve back-to-back four-year terms as state WCTU vice president and president beginning in 1913),\(^{383}\) participated alongside the committee members in the questioning of chemist James Babcock. To be sure, her quest to identify the presence of alcohol in tobacco, which Babcock denied at every turn,\(^{384}\) was as trivial and beside the point as the insistence that manufacturers spiked cigarettes with opium.

When the Joint Standing Committee on Public Health questioned Professor James Babcock—who smoked cigars but could not learn how to smoke cigarettes\(^{385}\)—on February 12,\(^{386}\) it already had at its disposal three written reports

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


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


First Successes Fail: 1889-1892

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

950297842.

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

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

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

Massachusetts Legislature on Public Health 2-9 (n.d. [1892]), Bates No. 950297842. Since it was addressed “to whom it may concern,” the identity of the addressee/requestee is unclear. Wiley presented the same findings concerning opium and arsenic, but also analyzed nicotine content. Harvey Washington Wiley became the chief advocate of the Pure Food and Drug Act of 1906.


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

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

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

950297842.

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

expertise:

The old smoker, the Cuban, the confirmed cigarette smoker, smokes his cigarettes in the scientific way, if I may call it so. He draws the smoke in to his lungs, and he holds it there as long as he can conveniently, and then he parts with it reluctantly, letting it out through his nostrils, in order to bring it in contact with all the absorbing surfaces which it is possible for him to do; but the boy that buys the cigarette, although he may eventually acquire that habit, does not smoke a cigarette in that way. He smokes it just the same as I would. I do not say that some do not, but I mean to say that generally he does not know how, and I do not know how. While I recollect very well as a boy that a five-cent cigar would make a fellow so sick that he would never want to smoke until he was a good deal older, and perhaps never; I venture to say that the character of the tobacco which is in a cigarette to-day, is such that a boy ten years old and less may smoke it without feeling the slightest sickness to his stomach...because he smokes it as a man smokes a cigar.395

The Boston Daily Advertiser opined that Babcock’s testimony had given “rather of a setback” to “certain of the good people” of Massachusetts whom young people’s use of cigarettes had caused “a good deal of anxiety” and had therefore “petitioned the legislature for a law to prevent it.”396 The Boston Herald went even further, condescendingly judging that although the hearing had “given the female reformers a fine opportunity to air their learning on the subject of narcotics...Prof. Babcock...carried too many guns for them.”397 A week after the hearing the Public Health Committee issued an “inexpedient to legislate” report (as well as a leave to withdraw report on the WCTU’s petition to ban tobacco use by minors).398 A week later, the House had “quite a debate” on the committee report, suggesting to the Boston Daily Advertiser that it was the cigarette that was “in peril” after “its deadly properties were partially exposed.”399 Initially the


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


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

399 “Cigarettes to Go?” BDA, Feb. 27, 1892 (5:1).
First Successes Fail: 1889-1892

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

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401 “Cigarettes to Go?” BDA, Feb. 27, 1892 (5:1).
402 Journal of the House of Representatives of the Commonwealth of Massachusetts: 1892, at 349 (Feb. 26) (1892). The original typewritten bill bore the handwritten notation that Clayton “gives notice that he will move to substitute this bill for the report of the committee on Public Health inexpedient to Legislate.” Commonwealth of Massachusetts, An Act to prohibit the manufacture and sale of cigarettes and cigarette tobacco (Feb. 26, 1892) (copy furnished by Massachusetts Archives). The vote of the committee (four of whose members were republicans and three Democrats) was consistent with the members’ vote on the bill on March 16: four voted against and two for the bill.
404 House No. 119 (n.d. [Feb. 26, 1892?]).
405 A. M. Bridgman, A Souvenir of Massachusetts Legislators: 1892, at 119 (1892).
406 Thirty-nine year-old Dodge had attended Harvard Medical School and been graduated from Dartmouth Medical College. A. M. Bridgman, A Souvenir of Massachusetts Legislators: 1893, Vol. II at 155.
407 “Cigarettes to Go?” BDA, Feb. 27, 1892 (5:1).
First Successes Fail: 1889-1892

Following the debate the bill overcame a fatal procedural hurdle when the House did substitute Clayton’s bill for the committee report. (That same day the Senate accepted the House report of the Public Health Committee, leave to withdraw, on the Massachusetts WCTU’s officers’ petition for legislation prohibiting those under 16 to use tobacco.)

A week later the House engaged in another short debate that produced no concrete result, but did offer a broader sense of the range of views on cigarettes. While one Republican argued that further discussion would merely waste time because the House would never pass such a ban bill, one Democrat disagreed because he regarded cigarettes as dangerous weapons in young people’s hands, destroying both health and morals. Yet another Democrat, as an opponent of cigarettes supported the principle underlying Clayton’s proposal, but nevertheless deemed the bill inadvisable. Finally, one Republican’s characterization of the bill as “ridiculous” led another Republican to observe that since the chamber had been willing to legislate in favor of porgies and mackerel, it was “about time to do something for our children.”

The emergence, during the run-up to the vote on the bill’s third reading, of a new anti-cigarette champion caused a stir in the press. It was, as far as the Fitchburg Daily Sentinel was concerned, a wonder that the house has twice stood by the bill to forbid the manufacture and sale of cigarettes.

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408 “Cigarettes to Go?” BDA, Feb. 27, 1892 (5:1). While grasping this point and adding that “the temptation to continuously smoke” was much greater among cigarette smokers, one Boston editorialist nevertheless bizarrely asserted that it would be “far better” if Turkish tobacco were used in cigarettes. “Cigarette Smoking,” BH, Feb. 15, 1892 (4:3). The inchoate and self-contradictory nature of the etiological framework that even the foremost physicians created at this time for understanding the impact of cigarette smoking was reflected, for example, in the following statements by Dr. Charles Loomis Dana, the leading neurologist in the United States. On the one hand, he agreed that: “‘Inhaling is the most pernicious feature in the contracting of this habit. Once acquired, it takes on the shape of a mania, and becomes as difficult to control as the opium or morphine habit.’” For example, Dana found it remarkable that some cigarette inhalers transferred this practice even when they took up cigar or pipe smoking. On the other hand, he found it necessary to instruct “‘the popular mind’” that cigarette smoking “‘doesn’t particularly hurt the lungs or throat....’” Allan Forman, “Cigarette Question,” Salt Lake Herald, Apr. 10, 1892 (5:1-5 at 4).


410 Commonwealth of Massachusetts, Journal of the Senate for the Year 1892, at 294 (Feb. 26) (1892); “The Legislature,” BH, Feb. 27, 1892 (2:6).

411 “Cigarettes Again,” BDA, Mar. 5, 1892 (4:5).
cigarettes. Efforts have been made to laugh it down and to argue it down, but somehow the house has had a good majority for it. One of the queer features of the debate has been that Mr. Chance of Boston, a tobacconist, is a champion of the bill on the ground that cigarette smoking is hurtful to young people and he is willing to give up his profits in order to have the law passed. It is yet too much to expect that the bill be enacted.\footnote{412}

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

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

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

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

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

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

\textsuperscript{416}“Cigarettes Win,” \textit{BDA}, Mar. 17, 1892 (8:3).

\textsuperscript{417}A. M. Bridgman, \textit{A Souvenir of Massachusetts Legislators: 1892}, at 100 (1892).

\textsuperscript{418}“Cigarettes Win,” \textit{BDA}, Mar. 17, 1892 (8:3).

\textsuperscript{419}\textit{Journal of the House of Representatives of the Commonwealth of Massachusetts: 1892}, at 458-60 (1892). Party affiliation was taken from the handwritten annotations made in a copy of of Commonwealth of Massachusetts, \textit{Manual for the Use
First Successes Fail: 1889-1892

In analyzing this vote it is well worth reflecting on what might well be a unique data set for the nineteenth century: in 1892, 1893, and 1894, A Souvenir of Massachusetts Legislators, an annual publication that continued for many years, presented figures on the number of House and Senate members who smoked. In 1892, 22 of 40 or 55 percent of senators smoked in contrast to 151 of 240 or 63 percent of House member.\footnote{A\[rthur\]. M\[ilnor\]. Bridgman, A Souvenir of Massachusetts Legislators: 1892, at 124 (1892). Bridgman also presented data on the number of smokers in each committee. For example, five of 9 members of the Public Health Committee smoked. Id. at 121. He also collected such bizarre data as the total weight of House and Senate members and how many did not like baseball. Unfortunately, 1893 was the last year in which Bridgman included data on smoking.} In 1893, 28 of 40 or 70 percent of senators smoked, while “only” 136 of 240 or 57 percent of representatives smoked.\footnote{A\[rthur\]. M\[ilnor\]. Bridgman, A Souvenir of Massachusetts Legislators: 1893, vol. II, at 183.} In 1894, exactly the same number of representatives smoked, while the number of smoking senators declined to 25 or 62.5 percent.\footnote{A\[rthur\]. M\[ilnor\]. Bridgman, A Souvenir of Massachusetts Legislators: 1894, vol. III, at 196.} That fewer than three-fifths of the prime-age males\footnote{To be sure, some proportion of the non-smokers may have chewed tobacco.} in the legislature of a highly urbanized eastern state smoked any form of tobacco during these three years is interesting in its own right, but since the proportion for 1892 was only two percentage points higher than the proportion of members who voted against H. 119, it raises the tantalizing question as to whether smoking itself might have been a or even the crucial variable. Unfortunately, however, the compendium did not identify individual smokers.

After the bill’s unexpected defeat in the House, the Fitchburg Daily Sentinel offered an explanation based on considerable statehouse talk about “corruption” in connection with H. 119. Though the talk lacked the requisite definiteness to support “bringing any specific charges,” the paper alleged that “many keen-eyed men have no doubt that there exists in the house a sort of organized gang of Irish Democrats, mostly from Boston, who tried to blackmail cigarette manufacturers to give them money to defeat the bill.” When the (unidentified) manufacturer “being negotiated with rebelled against paying the high sum asked and said he would put his money into the senate and kill the bill there,” the “strikers for money determined that the senate should not get the money” and “killed the bill
in the house.” More generally the Sentinel lamented that the election of big city Irish Democrats conferred on them “a standing in the community which no infusion of mugwump blood can offset” and which would expose both Irish and Democrats to “constant distrust until honest men...are sent to the legislature.”424

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

Whisky is not the only article this Legislature is determined to prohibit. It is also after cigarettes in a lively style.425

At exactly the same time that the Massachusetts legislature was handing a telling rebuff to the anti-cigarette cause, the movement was achieving its first legislative success in terms of regulating adult behavior. On February 15, 1892, in the course of its morning deliberations on the chapter of the new state Annotated Code dealing with crimes and misdemeanors, the Mississippi Senate—which was composed, as it would be for the following eight decades, exclusively of Democrats426—adopted a section making it a misdemeanor to sell any form of tobacco to persons under the age of 18.427 When the House, whose

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425“War Against Cigarettes,” Call (San Francisco), Feb. 19, 1892 (1:3). The WCTU was a strong and militant organization in Mississippi that Frances Willard, the national leader, helped found in the later 1880s. As was the case elsewhere, alcohol was its prohibitory focus, but the state WCTU’s racist animus came to the fore in its reaction to the wet forces’ promotion of blacks’ voting in county-level campaigns. Stephen Cresswell, Rednecks, Redeemers, and Race: Mississippi After Reconstruction, 1877-1917, at 103-107 (2006). It remains a desideratum of research to determine the WCTU’s role in the Mississippi anti-cigarette movement of the early 1890s, on which William Graham Davis, “Attacking ‘The Matchless Evil’: Temperance and Prohibition in Mississippi, 1817-1908” (Ph.D. diss., Mississippi State U. 1975), shed no light in connection with his discussion of the Mississippi WCTU’s role in pursuing statewide alcohol prohibition.
427“The Legislature,” Daily Clarion (Jackson), Feb. 16, 1892 (3:1). The section, which was adopted by a vote of 16 to 11, included two weakening amendments that imposed a knowledge requirement and lowered the maximum fine from $100 to $20; it also prohibited the sale of cigarette material and extended penalties to those procuring tobacco for persons under 18. None of these provisions was included in the final enactment, which permitted sales with written parental authorization and imposed a fine.
rules as early as 1870 prohibited smoking "in the Hall during the hours of session,"\footnote{428} came to consider the same matter during the afternoon session, the speaker of the House of Representatives—in which Republicans held but three of 133 seats\footnote{429}—offered the following additional section:

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

Speaker Hugh McQueen Street (1833-1920), Civil War veteran and Democrat, was no counter-cultural radical. He had been a “legislative factor in Mississippi for a quarter of a century”\footnote{431} and was “one of the ablest and most experienced legislators Mississippi ever had.”\footnote{432} Not only had he been House Speaker three times (1873-74, 1876-78, and 1892-94),\footnote{433} but also chairman of the ways and means committee.\footnote{434} His two great claims to political fame\footnote{435} were both
First Successes Fail: 1889-1892

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

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

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

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

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


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

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

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

442“The House,” [Weekly] Clarion (Jackson), Feb. 18, 1892 (5:2-4 at 4). This motion did not appear in the House Journal. The movant, Mr. Peyton, voted for Street’s
extend the prohibition to cigars and pipes lost.\textsuperscript{443} By a vote of 58 to 31 the House then adopted Street’s proposal making it a misdemeanor to engage in public cigarette smoking. With the chamber’s adoption of the whole chapter on crimes and misdemeanors,\textsuperscript{444} a conflict arose with the Senate.

In the meantime the House action became front-page news around the country: the full text of Street’s amendment was printed, for example, the next day in the New Orleans \textit{Picayune}\textsuperscript{445} and several days later in the San Francisco \textit{Call}.	extsuperscript{446} Mississippi’s leading newspaper, the \textit{Clarion}, which provided extensive coverage of legislative proceedings and was not focused on fire prevention, editorially welcomed the action:

\begin{quote}
The alarming growth of the cigarette habit, with its appalling injury, and oftentimes fatal consequences, to mind and body, has made necessary legislative action looking to its suppression. Public sentiment should give the law all possible moral support and contribute toward its rigid enforcement.\textsuperscript{447}
\end{quote}

This kind of journalistic encouragement failed to persuade the Senate, which on February 18 refused to concur in Street’s amendment. A senator succeeded by the narrowest of votes (16 to 15) in securing reconsideration of that vote, but his motion to concur was then decisively defeated by a vote of 10 to 26.\textsuperscript{448}

Exactly where the error in nationwide news dissemination occurred is unclear, but three days later the \textit{St. Paul Daily Globe}, mistakenly believing that the House amendment was an “act,” compounded its misunderstanding by imagining enlarged coverage. Nevertheless, despite the error-fueled animus against the

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\textsuperscript{443}\textit{Journal of House of Representatives of the State of Mississippi, at a Regular Session Thereof: Convened in the City of Jackson, January 5th, 1892, at 378 (Feb. 15) (1892).}  The movant, George McKie, a farmer and merchant, voted against Street’s amendment. \textit{Id.} at 378, 1030.

\textsuperscript{444}\textit{Journal of House of Representatives of the State of Mississippi, at a Regular Session Thereof: Convened in the City of Jackson, January 5th, 1892, at 378, 379 (Feb. 15) (1892).}  Frank Burkitt, a very important Farmers’ Alliance and later Populist leader, voted for Street’s amendment.

\textsuperscript{445}“Mississippi Legislature,” \textit{DP}, Feb. 16, 1892 (1:5).

\textsuperscript{446}“Penalty for Smoking,” \textit{Call} (San Francisco), Feb. 20, 1892 (1:3).

\textsuperscript{447}\textit{Clarion} (Jackson), Feb. 16, 1892 (2:1) (untitled edit.).

\textsuperscript{448}\textit{Journal of the Senate of the State of Mississippi, at a Regular Session Thereof, Convened in the City of Jackson, January 5th, 1892, at 328-29 (Feb. 15) (1892).}  Earlier that day the Senate had agreed to strike chewing tobacco from the ban on selling tobacco to persons under 18. “The Legislature,” \textit{Clarion} (Jackson), Feb. 19, 1892 (3:1).
\end{footnotesize}
First Successes Fail: 1889-1892

Mississippi initiative, the newspaper’s editorial opinion reflected the proliferating national anti-cigarette sentiment, which, unbeknownst to the *Globe*, would reach the Minnesota House the following year:

Among the most recent acts passed [in Mississippi] is...the most advanced measure in regard to tobacco and cigarettes that has been observed in any quarter. ... That is, a “man can be imprisoned for smoking a cigarette, or tobacco or other substance rolled in paper” in any public place. If the prohibition had been confined to cigarettes, or the substances that pass for tobacco, which are nauseating to the general nose or prejudicial to health, the reason would be apparent. But it is a refinement of civilization hardly to be expected in that quarter that bars the popular habit in all places where people gather.449

On February 23, by a close vote of 59 to 47, the House adopted the motion to recede on its own Speaker’s amendment, thus ending the chamber’s week-long stance against public cigarette smoking in Mississippi.450 Despite this set-back, anti-cigarette forces targeting adult consumption did achieve one victory in the legislature that session—imposition of a $50 privilege tax on each dealer in cigarettes or cigarette paper, which applied “even though the party has paid a privilege tax as other dealers.”451

The Mississippi House vote to prohibit adults from smoking cigarettes in indoor and outdoor public places was, despite contemporaneous complaints to the contrary, not “freak legislation”452—or if it was, the freak replicated itself the following year in Alabama and Minnesota.

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

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

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

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

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

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

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

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

The year 1893 ushered in deep economic depression⁵ and six years of double-digit unemployment⁶ along with labor and populist insurgency,⁷ but it also

³“Young Prince Nicotine,” Yenowine’s Illustrated News (Milwaukee), Feb. 17, 1894 (1:1-2).
⁶According to Stanley Lebergott, Manpower in Economic Growth: The American
witnessed an unprecedented volume of anti-cigarette measures flooding state legislatures. Just as the state legislative activity between 1889 and 1892 discussed in the previous chapter had revealed that the enactment of the first statewide general cigarette sales ban in Washington State in 1893 was in no way some kind of unmediated, freakish event, the fact that that same year also witnessed one chamber in each of eight states (Alabama, Pennsylvania, Kentucky, Minnesota, Arkansas, California, Nebraska, and Georgia) in several disparate regions pass similar bills impressively demonstrated that the anti-cigarette movement was nationally coalescing in the grips of a transformative strategy. Shedding the confines of the narrow targeting of children, members and leaders throughout the country, even if they, by and large, despite their claims that cigarettes were poisonous and, even in the absence of toxins, deleterious to grown-up men’s health, had not integrated the existing medical-scientific knowledge base and political-legal-moral discourses to demand prohibition vis-a-vis adult males, nevertheless began to grasp that they would be unable to make cigarettes inaccessible to children as long as these lethal commodities were freely and openly being sold to men. Newspaper transmission from one state to another of the facts of the initial partial successes of the new prohibitory approach—for example, on February 11 the Chicago Inter Ocean reported that passage in the Pennsylvania House of a bill prohibiting the sale and manufacture of cigarettes had made that state the fourth to “enter[] a protest against the cigarette”—and their propagation by the Woman’s Christian Temperance Union in its annual

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


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

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

\textbf{Alabama’s Evanescent Public Smoking Ban: The House}

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

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

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

\textsuperscript{10}E.g., “Since Our Last Issue,” US 19(6):1 (Feb. 9, 1893) (“The Alabama legislature [sic; should be House] has passed a bill to prohibit the sale or disposition of cigarettes, also the smoking of cigarettes in public places”).
\textsuperscript{11}CT, Feb. 1, 1893 (12) (untitled edit.).
\textsuperscript{12}DIO, Feb. 4, 1893 (4:4) (untitled).
\textsuperscript{13}Minutes of the National Woman’s Christian Temperance Union at the Eighteenth Annual Meeting...1891, at 255 (1891).
\textsuperscript{14}1884-85 Alabama Acts 48, at 113.
\textsuperscript{15}Minutes of the Alabama Woman’s Christian Temperance Union, at the Tenth Annual Meeting, Selma, Alabama, December 1st to 3d, 1893, at 36 (copy furnished by Birmingham Public Library).
\textsuperscript{16}Minutes of the National Woman’s Christian Temperance Union at the Eighteenth Annual Meeting...1891, at 255 (1891).
$10 and $50, or imprisonment in county jail, or hard labor for the county for up to 30 days.\textsuperscript{17}

Against the background of deep economic depression, dislocation, and political upheaval in Alabama during the first half of the 1890s,\textsuperscript{18} prospects for legislative intervention across a broad array of political-economic and social issues were transformed by the Populist rebellion against Bourbon Democratic control at the elections of 1892 and reflected during the 1892-93 session. This “Populist uprising” against “planter rule,”\textsuperscript{19} which was a challenge by large numbers of “native Southern whites” to the Democratic Party, has been characterized as “the most salient fact of Alabama political life in 1892....”\textsuperscript{20} (At the 1892 presidential election a greater proportion—36.6 percent—of Alabama voters cast ballots for Populist James Weaver than those of any other state east of Kansas.)\textsuperscript{21} In Alabama, as in several other southern states, the Farmers’ Alliance, a mass agricultural protest organization, soon morphed into or fused with Populism; by 1890 its (Democratic) members made up a clear majority of the Alabama House and one-third of the Senate.\textsuperscript{22} It supported Reuben Kolb, a former state agricultural commissioner and renowned watermelon plantation owner who was the state’s highest-profile agrarian figure, for governor in 1890, but failed to wrest his nomination from the Bourbon Democrats. In 1892, refusing to acquiesce in the Bourbons’ renewed effort to deny him the nomination, he and his supporters bolted the state Democratic convention on June 8 and held their own, at which they organized as Jeffersonian Democrats (though in reality hardly distinguishable from Populists) with Kolb as gubernatorial candidate.\textsuperscript{23} By this time Kolb represented and appealed to submarginal tenant
1893: Annus Mirabilis

farmers, laborers, miners, factory workers, and Republicans with a platform featuring such state-level demands as a liberal public school system, equitable property taxation, opposition to trusts and placing convict laborers in competition with free laborers, and popular election of railroad commissioners as well as national Populist proposals for a graduated income tax, free and unlimited coinage of silver, and an expansion of the currency. Although the Bourbon Democratic platform also espoused a few of these planks, the most prominent divide between the parties related to blacks’ suffrage and other rights. Whereas the Bourbons—whose statewide political power rested on their fraudulently counting blacks’ votes for white-supremacist candidates in the Black Belt counties—openly favored election laws to “better secure the government of the State in the hands of the intelligent and the virtuous,” the Jeffersonian Democrats propagated the “protection of the colored race in their legal rights” and the “encouragement and aid in the attainment of a higher civilization and citizenship, so that through the means of kindness, fair treatment, and just regard for them, a better understanding and more satisfactory conditions may exist between the races.”

The bill to bring about a generalized prohibition of cigarette sales was introduced by a young first-term Black-Belt representative, William Henry Seymour of Sumter County, which was “[w]ithout a single white Republican,” the population of which was 80 percent black in 1890, and which in 1886, at the prodding of WCTU member Julia Tutwiler and her prohibition campaign, was statutorily made dry. Born in 1867, Seymour was the son of Robert Henry Seymour, a farmer and prominent county politician, through whose “‘pull’
his son attended the U.S. Naval Academy.\textsuperscript{31} After two years as principal of the Livingston Male Academy (which he himself had recently attended)—though he had studied law, he never applied for admission to the bar—he spent a further two years as chief clerk in the Alabama Department of Education before being elected to the 1892-93 session of the Alabama House of Representatives, in which he again served in 1898-99. During the intervening years he was U.S. consul in Palermo, Italy. At the beginning of the century he made a transition to a career as a “business man,” becoming in 1904 the first president of the newly organized Alabama Division of the Southern Cotton Association and of the Mississippi-Alabama Lumber Exchange, and then in 1907 director of the Alabama Bureau of Cotton Statistics.\textsuperscript{32}

Although in announcing his candidacy for one of the two House seats to represent Sumter County in February 1892 Seymour stated that he was seeking the nomination of the Democratic and Conservative Party,\textsuperscript{33} when he (and incumbent J. Reid Ramsay) won the primary on April 30, they were “Kolb men”\textsuperscript{34} at the same time that Kolb just eked out a victory in Sumter County over incumbent Bourbon Democratic Governor Thomas Jones.\textsuperscript{35} Kolb, according to the official count of the Sumter county returns in the state election on August 1, Kolb received fewer votes than Jones—just as he is generally recognized as having been swindled out of the governorship as a result of the Bourbon Democrats’ monumental election fraud in the Black Belt counties\textsuperscript{36}—but

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

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

\textsuperscript{32}State of Alabama, Department of Archives and History, Alabama Official and Statistical Register: 1907, at 29 (Thomas Owen comp. 1907); Thomas Owen, History of Alabama and Dictionary of Alabama Biography 4:1531-32 (1921) (quote); Robert Spratt, A History of the Town of Livingston, Alabama 16 (Nathaniel Reed ed. 1997 [1928]).

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

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

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

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

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

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


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

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

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


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

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

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

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

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45.“The Legislature,” MA, Aug. 4, 1892 (4:2) (edit.).
46.“The General Assembly,” MA, Nov. 16, 1892 (1:5-6 at 2:1).
47.Youngblood was returned as a farmer at the 1900 and 1910 Census of Population. As a Populist in 1896 he received 18 percent of the vote in his unsuccessful congressional campaign against the powerful John Bankhead. http://www.ourcampaigns.com/RaceDetail.html?RaceID=485815 (visited Nov. 8, 2010).
48.Two other proposed resolutions focused on the criteria of having supported (1) the Democratic Party’s presidential, vice-presidential, and congressional nominees and (2) Governor Jones at the August elections and being pledged to the party’s future support. “The General Assembly,” MA, Nov. 16, 1892 (1:5-6 at 2:1).
49.“The General Assembly,” MA, Nov. 16, 1892 (1:5-6 at 2:1-2).
1893: Annus Mirabilis

on the dissidents are unclear, in general the 20 Kolbites decided to return to the Democratic fold because:

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

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

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

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

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

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

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55*SCS*, Dec. 1, 1892 (2:1) (untitled).
56*Journal of the House of Representatives of the State of Alabama: Session of 1892-3*, at 272 (Dec. 6, 1892) (1893); “Elyton Company,” *BA-H*, Dec. 7, 1892 (1:5-6 at 6). In the event, of the 11 committee members, only one voted against the bill on January 30, 1893, and none on January 31, 1893. For the committee membership, see *Journal of the House of Representatives of the State of Alabama: Session of 1892-3*, at 85 (1893).
58*SCS*, Dec. 8, 1892 (2:1) (untitled).
labor lost will not be greater in this case than if they were to content themselves with a puny effort to “restrict” the vice of cigarette smoking, while it will stamp their wholesome detestation of the habit much more broadly. The Oregon method is to deal with boys in this line of compulsory reformation, but the Alabama method of dealing with men will be quite as efficacious—which is to say that will make little or no difference in the consumption of cigarettes.\textsuperscript{59}

Though garbled,\textsuperscript{60} these accounts did make clear that early coverage of Seymour’s bill in one of the state’s leading Democratic newspapers, the \textit{Birmingham Age-Herald}, had, astonishingly, omitted mention of its most radical provision, the ban on public smoking (with regard to which neighboring Mississippi had been a pioneer just as it had been regarding disfranchisement of blacks).\textsuperscript{61} In addition, the press had conflated H. 263 with a cigarette license bill, which Seymour did not introduce. In fact, a bill (H. 365) had been filed on November 30 to levy a state and county tax on dealers in cigarettes or cigarette wrappers.\textsuperscript{62} The following day another bill (H. 397) was introduced to require dealers in cigarettes or substitutes therefor to pay a license tax before engaging in the business.\textsuperscript{63} Both bills were referred to the Ways and Means Committee, which on December 5, reported H. 365 favorably and H. 397 adversely.\textsuperscript{64}

\textsuperscript{59}MO, Dec. 14, 1892 (4:2) (untitled edit.).

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

\textsuperscript{61}See above ch. 3.

\textsuperscript{62}Journal of the House of Representatives of the State of Alabama: Session of 1892-3, at 190 (Nov. 30, 1892) (H. 365 by Lewis J. Morris) (1893). About Morris, a Calhoun County Democrat, nothing is known: he did not appear in any Census of Population and the Alabama History librarian at the Anniston Calhoun County Public Library was unable to unearth any information about him. Email from Tom (Aug. 6, 2010). He was absent on account of sickness from the session’s opening Democratic caucus, but would have remained had he been present—in other words, he would not have left with the Kolbites/Populists. “The General Assembly,” MA, Nov. 16, 1892 (1:5-6 at 2:1-2).

\textsuperscript{63}Journal of the House of Representatives of the State of Alabama: Session of 1892-3, at 225-26 (Dec. 1) (H. 397 by Thomas Edmund Knight) (1893). A Democrat from Hale County in the Black Belt, Knight in 1931 became an Alabama Supreme Court judge, in which capacity he wrote an opinion upholding the conviction of the defendants in the infamous Scottsboro Boys case despite the fact that his like-named son was the prosecutor. State of Alabama Department of Archives and History, \textit{Alabama Official and Statistical Register 1935}, at 98-99. Knight voted for Seymour’s bill (while Morris did not vote).

\textsuperscript{64}Journal of the House of Representatives of the State of Alabama: Session of 1892-3,
Following the latter’s death, H. 365 was recommitted to Ways and Means, which again reported it favorably, but the bill died before reaching the floor.\textsuperscript{65}

Several days after the Public Health Committee had favorably reported Seymour’s bill, press reports all over the country began appearing that the (newly formed) Tobacco Trust was already engaged in efforts to defeat the bill. On December 10 a Texas paper noted that the anti-cigarette bill had “brought a representative of one of the largest cigarette manufacturers in the country” to Montgomery and that “a strong fight will be made.”\textsuperscript{66} The next day a Pittsburgh paper added that “New York City manufacturers will make a desperate fight to prevent” the bill’s passage.\textsuperscript{67} A week later another wave of identical fillers rolled through the midwestern press stating that cigarette manufacturers would appear before the Alabama legislature to “fight the bill prohibiting the smoking of cigarettes in public.”\textsuperscript{68}

During the five-and-a-half-week House adjournment that lasted until January 19, the \textit{Birmingham Age-Herald} noted that although until the time of adjournment no lobby had put in an appearance, it was “practically certain” that a “strong lobby with plenty of boodle” would show up by the time the legislature reconvened. The reason was not far to seek: “All the big cigarette factories of the country are combined under one general head, forming a gigantic monopoly of some $10,000,000 to $20,000,000 capital. The annual sales of cigarettes in Alabama is estimated at $250,000, fully one half of which is said to represent clear profit to the manufacturers. They can afford to send down a strong lobby from New York to save such an enormous profit as that.” On the other hand, the

\textsuperscript{65}Journal of the House of Representatives of the State of Alabama: Session of 1892-3, at 526, 552, 567, 828 (Jan. 25, 26, 27, Feb. 9) (1893). In 1895, the legislature did pass a very modest cigarette license tax ranging from $5 in unincorporated areas to $25 in towns with more than 5,000 inhabitants. 1895 Alabama Acts No. 566, § 44, at 1192, 1215. Later this highest level was increased somewhat and a county tax equal to half the state tax was added; the imposition by the city of Birmingham of a tax of $40.50 still left the state’s highest cigarette privilege tax at only $93. “Would Double Cigarette Tax in Alabama,” \textit{WTJ} 42(37):2:2-3 (Sept. 13, 1915); “Cigarettes for Alabama,” \textit{WTJ} 42(44):3:1 (Nov. 1, 1915).

\textsuperscript{66}“Fighting for Cigarettes,” \textit{San Antonio Daily Light}, Dec. 10, 1892 (1:3).

\textsuperscript{67}“Late News in Brief,” \textit{Pittsburgh Dispatch}, Dec. 11, 1892 (11:4).

\textsuperscript{68}The pieces all running in the “Condensed News” column appeared in \textit{Algona Upper Des Moines}, Dec. 21, 1892 (2:7); \textit{Marshfield Times} (WI), Dec. 23, 1892 (2:2); \textit{Postville Review} (IA), Dec. 24, 1892 (1:4).
newspaper intuited that public sentiment against cigarettes was so strong that they would probably be driven out of Alabama—a process that was being expedited by businessmen, who had begun to “make war”; for example, Alabama’s strongest railroad corporation had begun denying employment in its general employment office in Montgomery to young men who smoked cigarettes.  

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

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

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

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

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

\begin{itemize}
\item \textsuperscript{72}“The General Assembly,” \textit{MA}, Jan. 29, 1893 (7:1-5 at 4). Neither this nor other press accounts mentioned the presence of a ban on public cigarette smoking. Since the sale of cigarette papers was prohibited, it is unclear why the \textit{Birmingham Age-Herald} opined that if Seymour’s bill became law, “many a fellow will have to learn to roll his own little dose of poison.” \textit{BA-H}, Jan. 31, 1893 (4:2) (untitled edit.).
\item \textsuperscript{74}“A Veto Overriden,” \textit{Daily Register} (Mobile), Jan. 29, 1893 (2:1-3 at 2).
\item \textsuperscript{75}“The General Assembly,” \textit{BA-H}, Jan. 29, 1893 (1:1-2).
\item \textsuperscript{76}Transactions of the Alabama Historical Society: 1899-1903, at 4:260-62 (1904).
\item \textsuperscript{78}“The General Assembly,” \textit{MA}, Jan. 28, 1893 (7:1-4 at 3) (Pettus’s floor speech).
\end{itemize}
1893: Annus Mirabilis

upon the statute books, instead of amending an existing law.\textsuperscript{79}

When the House on January 30 again took up the bill as unfinished business\textsuperscript{80}—the previous day the Montgomery Advertiser had predicted that it “will probably pass the House” but reported that the “clause prohibiting smoking in a public place will be stricken out”\textsuperscript{81}—Seymour, with the purpose of amending it, moved to reconsider the vote by which the bill two days earlier had been ordered to a third reading. After the House speaker had sustained a senator’s point of order that Seymour was out of order because the previous question had been called two days earlier,\textsuperscript{82} Pettus and others pressed the aforementioned point concerning the substitute’s constitutionally nonconforming phraseology.\textsuperscript{83} Then on third reading the House, without amendment, passed the bill by a more than two-thirds majority—59 to 26.\textsuperscript{84} Remarkably, of these 26 Nays only one\textsuperscript{85} was cast by the 39 (or 44) members of the anti-Bourbon Populist, Jeffersonian Democratic, and Republican parties elected to the House\textsuperscript{86} or the aforementioned

\textsuperscript{79}“A Veto Overridden,” Daily Register (Mobile), Jan. 29, 1893 (2:1-3 at 2).


\textsuperscript{81}“Legislative Notes,” MA, Jan. 29, 1893 (7:4).


\textsuperscript{83}“The General Assembly,” BA-H, Jan. 31, 1893 (1:1).

\textsuperscript{84}Journal of the House of Representatives of the State of Alabama: Session of 1892-3, at 594-95 (Jan. 30) (1893).

\textsuperscript{85}That one member was Populist O. M. Mastin (Chilton County), who was returned by the 1880 Census of Population as an engineer.

\textsuperscript{86}George Gilbert (Limestone), J. D. Poole (Lowndes), James Spier (Wilcox), and William Green Williams, Jr. (Covington), appear to have been Democrats, but may, based on the certain high-profile party-defining votes mentioned below, have been Jeffersonian Democrats. Because the legislative journals did not identify party affiliation, the Alabama legislature of today has failed to assemble such data retrospectively, and the Alabama Department of Archives and History is also unable to locate such data, determining each individual legislator’s party affiliation is a very laborious process, which, by the use of numerous web-based sources, resulted in considerable but not complete success. Telephone interview with Jon Morgan, Alabama Senate research director (Aug. 9, 2010); Rickie Bruner, Alabama Department of Archives and History archivist (Aug. 9, 2010). To determine the other House members’ party affiliation use was made of the 42-year-old dissertation research notes that J. Morgan Kousser generously made available; he had compiled a list of all members of the 1892 Alabama House with party affiliation (without, however, stating a source) for all but five and cross-referenced them by nine votes on the hallmark Sayre election law. Although he identified 28 Populists and 2 Republicans, the
24 members who walked out of the Democratic House caucus in November.\footnote{Seymour apparently sought to expedite that process by recalling his bill from the Senate.} As passed, the bill absolutely prohibited the sale of cigarettes, cigarette tobacco, or papers, or any substitute therefor; for violations it imposed a fine ranging between $10 and $50 or imprisonment in county jail or hard labor of up to 30 days. Although the bill also made it unlawful for anyone to smoke a cigarette in a public place,\footnote{Only three of the 24 did not vote for Seymour’s bill (Mastin voting against and two not voting at all).} the state’s leading newspaper and the “self-constituted guardian of the orthodox Democratic party,”\footnote{The General Assembly,” \textit{BA-H}, Jan. 31, 1893 (1:1).} the \textit{Montgomery Advertiser}, (again) predicted both that this provision would probably be eliminated before H. 263 became law and that “[w]hen the bill returns to he [sic] House [from the Senate] the prohibition as to smoking in a public place will be eliminated by amendment.” As for the aforementioned constitutional issue, the \textit{Advertiser} explained that the bill was “in a shape...which it is said invalidates its operation. However, it will be properly fixed up before it passes the Senate. The trouble with it now is that the substitute and the title of the bill do not correspond. In other words, the provisions of the bill as substituted are not properly set forth in its title.”\footnote{The \textit{Birmingham Age-Herald} was presumably alluding to the same circumstance in opining that the cigarette bill was “in bad shape,” but that it would be “shaped up and ought to become a law.”} The \textit{Birmingham Age-Herald} was presumably alluding to the same circumstance in opining that the cigarette bill was “in bad shape,” but that it would be “shaped up and ought to become a law.”\footnote{Journal of the House of Representatives of the State of Alabama: Session of 1892-3, at 612 (Jan. 31) (1893).}

\textit{1893: Annus Mirabilis}

four different designations that he used for Democrats were, by 2010, no longer comprehensible to him, let alone to anyone else. Moreover, he identified 13 (later reduced to 10) Democrats as “Independent” who had been “classed as Democrats at the beginning of the session”—again, without indicating a source—who voted with Kolbites in a contest over seating a Kolbite candidate. These notes formed the basis of the aggregate data in J. Morgan Kousser, \textit{The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910}, tab. 5.7 at 136 and n. 47 (1975 [1974]).
1893: Annus Mirabilis

conform the bill to the aforementioned constitutional requirements. 94  He then had the substitute tabled and the original amended “so as to embody the substitute and to make the title and provisions correspond.” 95  Although the Montgomery Advertiser noted that Seymour had “fix[ed] it up so as to avoid any internal trouble,” 96 the press failed to explain that before passing the bill on its third reading by an even larger majority of 63 to 18—the same Populist casting the sole anti-Bourbon Nay—the House adopted the two amendments that Seymour offered to strike out sections 4 and 3. 97 Because the House Journal also failed to specify the content of these sections (and the bill file is not preserved in the Alabama Archives), their wording is not certain, but one of them presumably contained the ban on public smoking. In the wake of House passage the Advertiser editorially wondered both whether the attempt to prevent the use of cigarettes might prove to be an advertisement for them and the proposed measure was too severe. 98

The day after House passage of his bill the Sumter County Sun published a fulsome encomium to Seymour to boost his prospects for Register of the Land Office in the state capital. Declaring that no more “deserving fellow” could be found in Alabama, the paper praised him as a “noble, upright, honorable and cultured” man, who had pursued a “manly course” in the House of Representatives, although he was “no politician...but a man who wins the respect of men by his manliness.” 99

The Alabama House action was widely reported throughout the United States, though many newspapers, neglecting to distinguish between the bills passed on January 30 and 31, erroneously stated that the measure banned public cigarette smoking. (The brief piece in the Sumter County Sun did not make that mistake.) 100 The last sentence of the Associated Press squib that ran, for example, in the Chicago Tribune under the headline, “Alabama Prohibits Cigarette Smoking,” stated that the bill also prohibited smoking cigarettes in any public

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

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

102 CT, Feb. 1, 1893 (12:1) (untitled edit.).
103 Fort Wayne Daily Gazette, Feb. 2, 1893 (4:2) (untitled edit.).
105 Times (Richmond), Feb. 3, 1893 (4:1) (untitled edit.).
of the individual family, which sought to transfer its responsibilities to society at large: “The small boy can ruin his health by smoking cigarettes, and the guardians who cannot control their boys, or are too tender-hearted to whale them, conceive the idea of prohibiting the manufacture of cigarettes, regardless of the pleasure and comfort of able-bodied men who know whether or not smoking is good for them....” What the newspaper’s animus against public “moral regulators” blinded it to was the fact that a smoking paterfamilias had no effective standing to buttress his preaching with corporal punishment while practicing the very behavior that he forbade his son, thereby making it all the more enticing to emulate.

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

That article, which appears not to have been published outside of Alabama, was placed the same day in the Birmingham Age-Herald and Montgomery Advertiser, both of which found it opportune to dedicate more than an entire column to a chemist’s analysis presented at a hearing before the Massachusetts legislature a year earlier, but which the article erroneously claimed had been held before the (non-existent) “congressional joint standing committee on public health....” This “Special Correspondence” bore various tell-tale rhetorical propagandistic hallmarks of an advocate such as the Tobacco Trust (“The war on the cigarette smoker which has been raging for years in congress, in state legislatures and elsewhere”; “The tobacco companies, it must be confessed, have shown a willingness to be investigated”). Although the finding that manufactured

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106“In a Minor Key,” DP, Feb. 12, 1893 (23:1) (also quoting the Register).
107SCS, Feb. 16, 1893 (2:1) (untitled).
108A search of the numerous newspapers included in the word-searchable digitized collections of Nineteenth-Century Newspapers, Chronicling America, or Newspaper Archive failed to find the article.
109See above ch. 3.
cigarettes were not prepared with opium may have been unexceptionable, the article’s key assertion directly contradicted the chemist’s testimony (which the Trust suppressed): “Whatever may be the harmful effects of the cigarette it [sic] lies purely in those natural to tobacco, the same that are in the cigar and the chewing article.” In fact, the chemist had unambiguously emphasized that cigarette tobacco smoke was more easily inhalable and to that extent was more injurious than that of cigars. In its accompanying editorial the Advertiser speculated that the “very common impression that cigarettes are medicated with opium or some other drug that increases the appetite for them and fastens the taste for them...probably accounts in a large measure for the widespread prejudice against them, and the many legislative restrictions being thrown around their sale.” The newspaper suggested that the chemist’s failure to find any adulteration might possibly “assist in removing the popular prejudice to a considerable extent.”

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


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

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

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

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

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

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

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

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116The Davenport Daily Democrat, Feb. 6, 1893 (1:1) (untitled), misreported that the legislature had passed the no-sales bill without mentioning the public smoking provision.
117“The Cigarette,” BA-H, Feb. 21, 1893 (4:3) (reprinted from Prattville Progress)
118Davenport Tribune, Mar. 9, 1893 (1:1) (untitled) (also mistakenly stating that Michigan had passed such a law).
119Minutes National Woman’s Christian Temperance Union at the Twentieth Annual Meeting...October 18-21, 1893, at 149-50 (1893).
120Minutes of the Alabama Woman's Christian Temperance Union, at the Tenth Annual Meeting, Selma, Alabama, December 1st to 3d, 1893, at 55 (copy furnished by Birmingham Public Library).
121See below ch. 6.
122Omaha Daily Bee, Feb. 9, 1893 (4:1) (untitled edit.).
The lower house of the Pennsylvania legislature has passed a bill to prohibit the manufacture and sale of cigarettes.... There is no more chance to destroy the cigarette evil by law than there was the “treat” nuisance, which was made the subject of solemn enactment in Wisconsin a few years ago.123

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

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

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


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

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

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127 Legislature of Pennsylvania, File of the House of Representatives, No. 13, Session of 1893, Mr. Fow, in Place, Jan. 23, 1893 (copy provided by the State Library of Pennsylvania). The bill: expanded coverage to include cigarettes “made of tobacco or any other substance and wrapped in paper”; capped the fine at $1,000; and excluded “cigarettes used for medicinal purposes.” On Fow’s bills in 1891, see above ch. 3.


129 Legislative Record 253 (Jan. 25, 1893).

130 E.g., “Severe on Alabama Dudes,” Indiana Democrat (Indiana, PA), Feb. 2, 1893 (2:3). See also “Flashes by Wire,” Titusville Morning Herald, Feb. 1, 1893 (1:3).


133 See above ch. 3.


sales ban to cigars, the House agreed to forward the bill to its third reading.\(^{137}\)

On final passage no amendments were offered and the vote was an overwhelming 150 to 18.\(^{138}\) Ten Yea{s} were cast by members who had voted against Fow’s anti-sales bill in 1891. The Nays were cast by 11 Democrats and seven Republicans, of whom four had voted against both Fow bills in 1891, two had voted for both, and one had split his votes.\(^{139}\)

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

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

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

\(^{138}\) *Journal of the House of Representatives of the Commonwealth of Pennsylvania* 361 (Feb. 7) (1893).

\(^{139}\) See above ch. 3.

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

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

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

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

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

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

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

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

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

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146 *Lebanon Daily News*, Feb. 8, 1893 (2:1) (untitled edit.).


148 See below this ch.


150 *Journal of the Senate of the Commonwealth of Pennsylvania* 303 (Feb. 8) (1893).
that, if attempted to be enforced, would “cause trouble in de land” sure, as they interfere with rights guaranteed to the citizen by all laws and Constitutions.

We were sincerely in hopes that some bill would be passed to suppress this abominable and dangerous nuisance to health and morals, but our hopes are vain so far as this law is concerned. 151

The Cigarette Sales Ban Ordinance in the State Capital: Frankfort 1889-90

Kentucky’s first major foray into cigarette control took place in Frankfort. Even in the capital of the country’s biggest tobacco-producing state, the city council in 1889 did not include tobacco among “the necessaries of life, such as green groceries, milk, meat etc.,” which stores were permitted to sell on Sundays until 10 a.m., whereas the police were instructed to prosecute all violators of the Sunday law and, in particular, drug stores for selling liquor, cigars, and tobacco. 152 The latter part of that year, Frankfort experienced a months-long “lively discussion of the effects of cigarette smoking upon boys in the schools. Parents and teachers combined to suppress the evil, but it was found impossible to keep the boys from their favorite indulgence. It was then decided to put temptation beyond their reach.” 153 In early December, the council’s license committee decided to recommend fixing a $1,000 tax on sales of cigarettes: being of the opinion that “the trade should be crushed out,” the committee believed that “a heavy license fee will go a great ways towards the desired end.” 154 The city attorney, however, advised against passage of such an ordinance because he “felt sure” that the state Supreme Court “would hold that such a fee was excessive....” He then determined and reported to the council that the city charter conferred power on it to prohibit the sale of cigarettes by ordinance. 155 On December 17,

152 The council passed this motion by a vote of 7 to 1 on Sept. 10, 1889. “Council Meeting,” FR, Sept. 14, 1889 (5:1).
153 “Cigarette Smokers Suffering,” SPDN, Jan. 4, 1890 (1:6).
154 “Cigarettes Must Go,” FR, Dec. 7, 1889 (4:2). At least one city in Kentucky, Maysville, (later) imposed a $20 annual license fee on the sale of cigarettes; the highest of many license fees was $300 for barrooms and $150 for retail merchants. “Last Call!” Daily Public Ledger (Maysville), Jan. 26, 1898 (4:2).
155 “The Cigarette Must Go,” CN (Evening), Jan. 6, 1890 (2:3). The highest court in Kentucky was (and is) called the Court of Appeals. An out-of-state newspaper had reported erroneously that a $1,000 license ordinance had in fact been passed in late December 1889 and when it went into effect on January 3, 1890, “no tobacco dealer could see his way clear to paying so steep a price even for a monopoly.” “Cigarette Smokers
1893: Annus Mirabilis

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

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

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

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

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

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

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

The occupations of the nine city councillors at the time included: superintendent of the Carlisle and O.F.C. distillery; clerk in the Old Crow distillery; steward of the Feeble-Minded Institute; contractor and builder; miller; livery stable owner; maker of the famous Frankfort reel (and “regarded as patron saint by all scientific anglers”); lumber businessman; hardware merchant. A five-member majority of this “reform council” had been elected, according to a lengthy article in the Chicago News, “as the result of a citizens’ movement to oust
what in Chicago might be called the ‘gang,’ but is here called the old council,” which included four members and the mayor. “The reformers have had a hard fight, as the mayor...and four councilmen were opposed to them. They have succeeded in carrying out many reforms, however, in spite of vetoes, injunctions, and other obstructive measures, and now point with pride to the fact that they have paid off all current debts and begin the new year with more money in the treasury than any previous council could boast. Not the least important of their reforms is the suppression of the deadly cigarette, although in this case the originator of the measure was a member of the old council,” Lewis Mangan, the 63-year-old proprietor of a livery stable.159

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

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

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

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

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

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

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

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

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162“The Cigarette Must Go,” CN (Evening), Jan. 6, 1890 (2:3).
163“They Had to Go,” FR, Jan. 4, 1890 (5:1).
164“The Cigarette Must Go,” CN (Evening), Jan. 6, 1890 (2:3).
165“The Southern States,” DP, Jan. 3, 1890 (2:1); “Cigarette Smokers Suffering,” SPDN, Jan. 4, 1890 (1:6); Atchison Champion (Kansas), Jan. 22, 1890 (6:5) (untitled).
166C-J, Jan. 4, 1890 (4:3) (untitled).
1893: Annus Mirabilis

its smokers obtuse to their own offensiveness."  For an Iowa newspaper the ordinance was “a radical step, but there is no doubt regarding its wisdom.” In going beyond state no-sales-to-boys statutes, “the Frankfort plan is far in advance of any other law. There is little good in a law that will allow one person to smoke a cigarette and prohibit another from doing the same thing. Frankfort serves all alike, and now if other cities will follow her example, our country will be all the better for it.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The House Ban on Sales and Possession

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

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

192Minutes of the Meetings of the Board of Councilmen of the City of Frankfort at 92 (Dec. 23 1890).
193Minutes of the Meetings of the Board of Councilmen of the City of Frankfort at 92 (Dec. 23 1890).
195Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 765
1893: Annus Mirabilis

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

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

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

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

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

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201 DC, Jan. 20, 1890 (2:2) (untitled edit.).
202 “Kentucky Legislature,” DC, Jan. 27, 1890 (1:3-6 at 6).
203 DC, Jan. 27, 1890 (2:2) (untitled edit.).
204 “Kentucky Legislature,” DC, Feb. 3, 1890 (1:3).
205 “Kentucky Legislature,” DC, Feb. 13, 1890 (1:2-4 at 4).
206 The bill as it passed the House in January defined a “cigarette” to include “any thing made to smoke in which tobacco mixed with any other substance, or liquid or fluid, is the chief ingredient.” “The Cigarette Bill,” DC, Jan. 14, 1890 (2:2); “Cigarette Bill,” FR, Jan. 25, 1890 (5:3).
208 The Frankfort Roundabout welcomed the law as “a step in the right direction,” but urged as the next step “crush[ing] out the demon alcohol....” “Forks of Elkhorn,” FR, Feb. 15, 1890 (5:3).
intervention. A good omen for action could be discerned in the self-protection that members of both chambers bestowed on their own space in 1892. On January 7, the House adopted this resolution moved by Louisville Democrat Albert H. Charlton, a printer and member of the Typographical Union (who the following year introduced a bill to protect unionized employees from discharge)\(^{210}\): “WHEREAS, Tobacco smoke is offensive to many persons; therefore, be it Resolved by the House of Representatives of Kentucky, That the Sergeant-at-Arms is hereby instructed to prohibit smoking in the hall at all times during this session of the Legislature.”\(^{211}\) Three months later the Senate adopted a prohibition of smoking in its chamber between 9:30 a.m. and adjournment to be enforced by the sergeant-at-arms.\(^{212}\)

The same long legislature (1891-93) considered a total ban on sales. The driving force behind this proposed legislation was representative James Knox Polk Cansler of Christian County, who had been constable and sheriff in Hopkinsville and then became a businessman, owning, inter alia, a livery business.\(^{213}\) The fact that Cansler—who had earlier presented a petition by “colored” citizens against the segregation of railway coaches\(^{214}\)—presented to the House a petition from the WCTU in Hopkinsville on the subject of alcohol\(^{215}\) suggests the possibility that his anti-cigarette measure initiative owed its impetus to that organization too. In 1892 he introduced two bills to prohibit the sale of

\(^{210}\)“To Protect One Side Only,” *Hopkinsville Kentuckian*, July 4, 1893 (2:1).
\(^{211}\)*Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky* 76 (Jan. 7, 1892) (1891 [sic]).
\(^{212}\)*Journal of the Regular Session of the Senate of the Commonwealth of Kentucky* 711 (Apr. 14, 1892) (1891 [sic]). The ban was proposed by Henry George, who a week later was one of five senators to vote against the tobacco chewing resolution.
cigarettes in Kentucky.\textsuperscript{216} One died immediately,\textsuperscript{217} while the other was reported out to be read a second time later, but was instead recommitted to the Committee on Public Health and died. In the next session, in January 1893, Cansler introduced H.B. 419, which, again, prohibited the sale of cigarettes, and was referred to the Committee on Public Morals.\textsuperscript{218} Cansler himself, for reasons unknown, soon moved to recommit the bill,\textsuperscript{219} and the House adopted the motion. The committee reported it with a substitute, which the House adopted but then rejected on its third reading by a vote of 38 to 23 (which, though a majority, did not constitute a constitutional majority of all members). The bill would have made it unlawful to “sell, barter, loan, or give, or in anywise dispose of, or to have in possession for the purpose of selling, bartering, loaning or giving, or in anywise disposing of, any cigarette or any material such as is manufactured or prepared especially for and commonly used in cigarettes.”\textsuperscript{220} But the next day the House voted to reconsider that vote and then passed the anti-cigarette bill by a 47 to 17 constitutional majority.\textsuperscript{221} The Senate, after numerous procedural skirmishes in a “red-hot filibustering fight,”\textsuperscript{222} at the end of April finally rejected

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

\textsuperscript{217}Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 1:1056, 1189 (H.B. 269) (May 21 and June 2) (1892).

\textsuperscript{218}Journal of the House of Representatives of the Commonwealth of Kentucky: Regular Session, 1891-'92, Called Session, 1892, Adjourned Session, 1892, 2:2716 (H.B. 419) (Jan. 17, 1893) (1892 [sic]).


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

\textsuperscript{222}“Blood,” \textit{C-J}, Apr. 27, 1893 (1:2-4, at 2:6). Unfortunately, the \textit{Courier-Journal
the bill 18 to 13, thus ending the initiative for that session.\textsuperscript{223}

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

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

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

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

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

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


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

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

After having lost its decades-long significant House and Senate majorities in the 1890 election to Democrats and an insurgent Farmers’ Alliance (buoyed by agricultural discontent), which formed a post-election legislative combine but failed to pass the expected economic reform legislation, Republicans regained control of the House in 1892 in large part as a result of the disappointing electoral performance of the People’s Party, into which the Farmers’ Alliance had been absorbed. In 1893, the House (under whose rules smoking was still prohibited in the hall of the House while in session) unanimously passed H.F. No. 446, which, to judge by its title in the Journal of the House, was, remarkably enough, “A bill to prohibit the use of cigarettes in the State of Minnesota.” The bill,

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2271887 Minn. Laws ch. 123 at 207.

2281889 Minn. Laws ch. 14 at 57.


232Journal of the House of the Twenty-Eighth Session of the Legislature of the State
according to the same day’s report in the Independent Republican *St. Paul Daily News*—whose headline and subheads read: “Cigarettes: So Far as the House is Concerned People Must Hereafter Forego [sic] The Habit: The Bill Prohibits the Smoking or Use of the Little Rice Paper Evil”—included no exceptions and imposed a penalty of a $25 fine or 30 days’ imprisonment.233 The out-of-state press, which widely took note of and commented on the bill’s passage in the House, followed this absolutist version.234 Unfortunately, since the *House Journal* did not print the text and the bill is missing from the state archives, its exact wording may not have been preserved and appears to be unknown.235

However, according to the more plausible (but deviant) account in the Republican *St. Paul Daily Pioneer Press* (which praised the bill), H.F. No. 446, while still radical, prohibited smoking a cigarette “in any public place”236—precisely the restriction that the Mississippi House had passed in 1892 as part of its revision of the section of the state code devoted to crimes and misdemeanors and that the Alabama House had passed as part of a bill prohibiting the sale of cigarettes eleven days before H.F. 446 was introduced and about which (together with passage of universal cigarette sales bans bills in the House in Pennsylvania and Washington State) the Twin Cities press had kept citizens and legislators informed.237

The bill was introduced, and, under suspension of the rules, read a second and third time on the same day (February 10), passing by a unanimous 78 to 0 vote238.

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235The Legislative Set at the Minnesota Historical Society, which is the state archives, lacks H.F. 446, while the State Library set of bills does not begin until 1907. Letter from Steve Nielsen, MHS (Nov. 29, 2006). Neither the Minnesota state legislature nor the University of Minnesota Law Library maintains a historical bill collection extending back to the nineteenth century. Email from Steve Nielsen (Dec. 4, 2006).
“with the greatest enthusiasm.”239 It had been introduced by Patrick H. Kelly, a wealthy wholesale grocery merchant who had immigrated to the United States from Ireland in 1847.240 As Minnesota Democratic Party boss in the 1880s and 1890s and a national party committee member from 1880 to 1888, this conservative businessman effectively carried out his assignment of insulating the Democratic party nationally from midwestern radicalism. His “overlordship of the St. Paul, and hence the state, Democracy” in cahoots with railroad magnate James J. Hill came to an end with William Jennings Bryan’s ascendancy in 1896.241 During his campaign for the House in the fall of 1892, the press noted that he represented business interests,242 while as owner of P. H. Kelly Mercantile Company he “is a considerable employer of labor and contributes large sums of money each year in wages paid for the support of families, and by profit-sharing affords his employees opportunities that are highly prized by them.”243 Kelly, whose legislative service representing Ramsey County (St. Paul) was confined to 1893-95, “became most prominent, commercially and politically, during those recent ‘boom’ years, 1888 to 1893.”244

As an Irish Catholic Democratic boss, Kelly would seem to have been an implausible advocate of a radical sumptuary law. Yet the day before he introduced his anti-cigarette bill, he had vociferously advocated on behalf of a bill to criminalize pool rooms (i.e., betting parlors) on the grounds that they were “‘the curse and ruin of our young men,’” none of whom could be hired at a commercial house in St. Paul if known to frequent them.245 And two weeks later
he vehemently opposed any exceptions to a bill absolutely prohibiting selling or giving liquor to minors, insisting that “if it was a Democratic principle to favor the sending of children with the ‘growler,’ he was not a Democrat. The custom of sending little girls to the saloon brought them in contact not only with the temptations of the saloon, but also with that of the seducer. ‘The passage of this bill will save them...not only from the curse of drunkenness, but also from that of prostitution.”

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

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

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

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

It was Mr. P. H. Kelly who came to the rescue of the people who despise a cigarette as much as they pity the smoker, those superior people who smoke pipes and cigars and people who don’t smoke at all. He introduced a bill, H. F. 446, which is to prohibit the use and smoking of cigarettes, and to the surprise of Mr. Kelly the bill was passed under
1893: Annus Mirabilis

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

Thus—allowing for a hefty dose of irony—resistance to the physical impact of adults’ second-hand smoke rather than class and/or ethnically based moral condemnation of public smoking by “[b]ootblacks, newsboys and other street urchins of tender age”250 appears to have been the guiding animus of Kelly’s ban. Nor was the Pioneer Press alone in this judgment. One provincial paper agreed that: “The law would be as much a godsend to those who have to inhale the deadly cigarette smoke as those who smoke the vile things.”251 But other newspapers joined in the anti-paternalist denunciation, predicting that Kelly’s “next onslaught is expected to be on brasswood toothpicks and parting hair in the middle,” or in hoping that before adjourning the legislature “will give us a list of what we may wear and use.”252

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

249 “Boon to Humanity,” SPDPP, Feb. 11, 1893 (2:1).
251 “Hoop Skirts, Cigarettes, Etc.,” MT, Feb. 26, 1893 (4:7) (excerpt from editorial comment in the Superior Call).
1893: Annus Mirabilis

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

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

260New Era (Humeston, IA), Mar. 1, 1893 (3:5). Why the company was unaware that the bill had actually been passed immediately is unclear.
But as the *Globe* observed two weeks later: “Any one who imagines that Hon. P. H. Kelly’s anti-cigarette bill was introduced purely as a joke is badly mistaken.”\(^{261}\) The *Globe*’s editorial position was especially illuminating because it supported the ban in spite of its principled opposition to collectivism. Perhaps concerned about its own stance as well, the paper declared:

P. H. Kelly’s Democracy will hardly survive a session’s contact with the socialistic crowd in the house. It has become so far obscured as to permit him to introduce a bill regulating one habit, that of smoking cigarettes. It may get him in a state of mind to regulate the appetite for drink, and bar out beer or Pom. See before the session end if he does not beware. Some other Democrats are becoming infected with the paternalism of their associates on the Republican and Populist side of the legislature.\(^{262}\)

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

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

But there are several other indulgences just as hurtful as the cigarette, which have been in equally as general use since long before the cigarette was invented. But few legislatures have ever attacked them, and those which have did so with reluctance and generally with little success. Why, then, has the cigarette fallen so easily? The only answers seems to be that the dude has killed it. If the dude were a man, or a mortal possessed of sensibilities, he would move off the earth after this unmistakable evidence of universal contempt for him. Of course, not every one who indulges in the vile article is a dude. Some very respectable men have, it is unpleasant to remark, become addicted to the habit. If Mr. Kelly’s bill becomes law, and it is enforced, it may work a good reformation among the latter class. So far as the dude is concerned, the sooner he smokes himself to death with cigarettes the better.\(^{263}\)

\(^{261}\)“Chiseling a Charter,” *SPDG*, Feb. 20, 1893 (4:6-7 at 7).

\(^{262}\) *SPDG*, Feb. 11, 1893 (4:3) (untitled edit.).

\(^{263}\)“The Cigarette Doomed,” *SPDG*, Feb. 11, 1893 (4:2) (edit.). The newspaper incorrectly stated the sequence in which (only one house of) the state legislatures had
The Senate considered H.F. No. 446 the very next day after House passage. Debate appears to have begun to be conducted in the same jocular tone as in the House (“The Senate Starts Out to Have Fun With It and Quits,” read a subhead in the Republican *Minneapolis Tribune*). Contrary to the *Globe’s* prediction that Senator Ignatius Donnelly, who would be in charge of the bill, would “no doubt give it eloquent advocacy,” Donnelly—who “had broken a lance for every considerable reform cause that the United States had known, beginning with pre-Civil War Republicanism, as a Minnesota Republican lieutenant governor, and then congressman, state representative and senator, before becoming a national leader of the People’s party and its unsuccessful gubernatorial candidate in 1892—moved that the bill be referred to the Committee on Drainage. (Donnelly’s belittling proposal was ironic since his like-named son, a physician who had made a special study of throat diseases in Vienna, during a lecture in St. Paul had “touched upon the cigarette as the great enemy of the throat organs. He asserted that nine out of ten users had diseased throats and afforded attractive fields for all floating bacilli, and were apt to die quite young.”) But then Democratic Senator William W. Mayo, the founder of the Mayo Clinic and former mayor of Rochester and president of the State **passed the bills.**

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

274The Legislative Manual of the State of Minnesota: Certified for the Legislature of 1893, at 572. Stevens, a lawyer, advocated pro-worker legislation as a member of the state House and Senate including factory inspections, requiring employers to provide seats for female employees in stores, and mechanics’ liens. Progressive Men of Minnesota: Biographical Sketches and Portraits of the Leaders in Business, Politics and the Professions 172 (Marion Shutter and J. McLain eds., 1897).
277Journal of the Senate of the Twenty-Eighth Session of the Legislature of the State of Minnesota 211 (1893) (Feb. 11). Without elaboration, the St. Paul Daily News observed that: “The attention of the Hon. P. H. Kelly is called to the fact that his cigarette bill is in the hands of the equally Hon. John Day Smith, who considers that he has the power to act.” SPDN, Mar. 1, 1893 (4:1) (untitled). Smith, a lawyer and leading Senate Republican, was chairman of the Judiciary Committee, of which Stevens and Donnelly were also members. Journal of the Senate of the Twenty-Eighth Session of the Legislature of the State of Minnesota 60 (1893). He had also taught law at Howard University and Columbia University. Progressive Men of Minnesota: Biographical Sketches and Portraits of the Leaders in Business, Politics and the Professions 376 (Marion Shutter and J. McLain eds., 1897); The Legislative Manual of the State of Minnesota: Certified for the Legislature of 1893, at 573. Later in March, after Washington State had enacted the first general anti-cigarette statute, the Daily News injected another warning: “The State of Washington has an anti-cigarette law. But then, perhaps the senate of Washington had no judiciary committee.” SPDN, Mar. 22, 1893 (4:1) (untitled).
1893: Annus Mirabilis

postponed. By Valentine’s day Kelly had been expressing the hope that the Judiciary Committee would “not electrocute his bill without summoning witnesses.” Whatever optimism he retained may have been energized by the “multitudes of friends” the bill had won him who were showering him with letters and valentines. Among the latter was a representation of a “convention of bootblacks, with perplexed faces, deliberating on the possible effects of the bill”; among the former were requests from Ohio for copies of the bill. A few days later the Globe, under the subhead, “Hon. P. H. Kelly’s Cigarette Bill Endorsed All Over the Land,” reported that he was receiving letters from school superintendents and legislators requesting copies of the bill and “wishing him success in pushing it through.” Such sentiments, the paper opined, demonstrated “that aversion to the cigarette fiend is deep rooted everywhere,” adding, no doubt tongue in cheek, that “the fame of the Minnesota sage has been spread to the furthest extreme of the country by his bill to abolish a general nuisance.”

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

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

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

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279 Journal of the Senate of the Twenty-Eighth Session of the Legislature of the State of Minnesota 739 (1893).
281 “Chiseling a Charter,” SPDG, Feb. 20, 1893 (4:6-7). The Globe’s further assertion that “[s]ince the bill was introduced here several legislatures have considered or adopted such an act” pointed to the national snowballing effect.
a cigarette within the state of Minnesota, without any qualifications. This is going too far. Blackstone once said the parliament of Great Britain was omnipotent in everything but one—“It could not change a man into a woman”—but this unlimited power does not pertain to American legislatures. There are certain liberties of the citizen that cannot be curtailed by legislation. An act that should prohibit a man from chewing tobacco, a woman from chewing gum, or a citizen of liberty-loving Boston from eating beans, would be without validity, as infringing on the chartered right of the American; the bill of Mr. Kelly runs against this constitutional bulwark. What Mr. Kelly wants is this: A bill that will prohibit the manufacture, sale or use of cigarettes that are not made of pure tobacco. It falls within legislative jurisdiction to prohibit the manufacture, sale or use of adulterated products of any kind...but they cannot trench upon the use of the pure article. It might be as well to include in the bill a prohibition of furnishing cigarettes or tobacco of any kind to minors; but if our reformers will take a look at the General Laws of 1889, chapter 14, page 57, they will find a law covering the whole question so far as it relates to minors.283

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

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286_Journal of the House of the Twenty-Eighth Session of the Legislature of the State of Minnesota_ 335 (1893) (Feb. 24). The language of the bill is taken from the enactment, which was not amended in this regard. It is unclear why this no-sales-to-minors provision was reenacted four years after the aforementioned enactment in 1889; the only difference was the addition of the phrase “in any way furnishes.” 1893 Minn. Laws ch. 22 at 125. The extent of the Minnesota WCTU’s involvement in securing passage of Kelly’s use ban bill in the House is called into question by an article by one of its officials confusing that bill and the no-sales-to-minors bill. Amy Green, “Minnesota,” _US_ 19(7):11-12 (Apr. 20, 1893). During the 1893 session the WCTU was occupied with advocating on behalf of a bill to give women equal active and passive voting rights in municipal elections. “For
contain opium or other constituents imagined by some anti-cigarette activists,\textsuperscript{287} and the latter because it failed to go beyond the law of 1889. Having been worded to avoid constitutional objection,\textsuperscript{288} it passed the House on April 4 by a vote of 72 to 1,\textsuperscript{289} followed the next day by a unanimous 42 to 0 vote in the Senate,\textsuperscript{290} though initially some senators, especially those of German background, had been inclined to oppose it as sumptuary legislation.\textsuperscript{291} In retrospect, the \textit{St. Paul Daily News} called first-term Democrat Kelly in a Republican House its “most powerful member,” whose secret was his “bonhomie,” “personal magnetism,” and his position as a “successful business man....”\textsuperscript{292} In the event, Minnesota would not enact a universal sales ban until 1909.\textsuperscript{293}

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

My next stop was at Little Rock, Arkansas, where the faithful ones were earnestly working for the passage of three bills in the legislature, one to raise the age of consent, another for Scientific Temperance Instruction, and the other to prohibit the manufacture and sale of cigarettes. To defeat the last, the cigarette dealers had put thousands of dollars in the hands of the members of the legislature.\textsuperscript{294}

Democratic lawyers, many of whom were Methodists—the pietistic Christian denomination that nationally advocated most strenuously for alcohol prohibition\textsuperscript{295}—provided key support for and opposition to the general cigarette

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\textsuperscript{287}See above ch. 3.
\textsuperscript{288}“House Notes,” \textit{SPDG}, Feb. 25, 1893 (6:6).
\textsuperscript{289}\textit{Journal of the House of the Twenty-Eighth Session of the Legislature of the State of Minnesota} 694-95 (1893) (Apr. 4).
\textsuperscript{290}\textit{Journal of the Senate of the Twenty-Eighth Session of the Legislature of the State of Minnesota} 701-702 (1893) (Apr. 5). The Senate amended the bill’s penalty provision slightly.
\textsuperscript{291}“Fun in Togas,” \textit{SPDN}, Apr. 5, 1893 (8:1).
\textsuperscript{292}“P. H. Kelly,” \textit{SPDN}, Apr. 24, 1893 (4:4).
\textsuperscript{293}See vol. 2.
\textsuperscript{294}Minutes National Woman’s Christian Temperance Union at the Twentieth Annual Meeting...1893, at 236 (1893) (Helen Bullock, Nat. Organizer).
\textsuperscript{295}Richard Jensen, \textit{The Winning of the Midwest: Social and Political Conflict, 1888-}
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sales ban bill passed by both chambers in Arkansas in 1893. Altogether, 45 of 100 House members and 9 of 32 senators were Methodists296 (compared to only 18 and 14, respectively in 1891).297 Importantly, Methodists also staked out the highest-profile anti-tobacco position among Christian churches. On the national level: “Among the leading denominations of America Methodists stand alone as the only one which holds the use or disuse of tobacco as a test of a candidate’s fitness for the ministry, ... ‘The use of tobacco is filthiness to the body and soul,’ said Rev. J. B. McCullough, editor of the ‘Methodist.’”298 In Arkansas, a state conference as far back as 1867 had adopted the following resolution:

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

‘Resolved, That we will use all means in our power to dissuade our members from the use of the same, and that the moral influence of the Church be against it.’”299

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

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

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


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

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

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

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


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

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308 “State Legislature,” *AG*, Feb. 21, 1893 (5:1-6 at 6). The bill text has had to be reconstructed from press accounts (and fragmentary mentions in the House and Senate *Journal*) because the Arkansas Historical Commission/State Archives has not retained bills from this period. Telephone interview with Jeff Lewellen, archivist, Little Rock (Dec. 7, 2006).


311 At the Census of Population he was returned as a physician, while *Biennial Report of the Secretary of State of the State of Arkansas: 1892*, at 70 (1893), listed him as a farmer and an M.D.


314 *History of Posey County Indiana* 344 (John Leffel ed. 1913). For the speakers’ names and biographical information, see “State Legislature,” *Arkansas Gazette*, Feb. 21,
1893: Annus Mirabilis

across the country reported the House action widely, supra note 315. For example, The New York Times, on February 21, 1893, erroneously claimed that the bill abolished cigarette smoking and predicting that the Senate would follow suit, supra note 316.

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

1893 (5:1-6 at 6); Biennial Report of the Secretary of State of the State of Arkansas: 1892, at 69-71 (1893). The floor supporters were Norwood, Kimbell, Kirby, Wright, and Hunt; the opponents were Flucks, Mitchell, and Williams.

supra note 315. E.g., supra note 315, World (New York), Feb. 21, 1893 (2:5); “No Place For Dudes,” BDT, Feb. 21, 1893 (1:5); New Era (Humeston, IA), Mar. 1, 1893 (1:1) (untitled).

supra note 316 “Telegraphic Brevities,” NYT, Feb. 22, 1893 (5).


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

supra note 319. Journal of the Senate of Arkansas, Twenty-Ninth Session 464-65 (Mar. 3) (1893). Of the six Democrats who voted No, three (Robert J. Wilson, Walter S. Amis, and Tom Miller Mehaffy) were lawyers, two (Wesley E. Davidson and Clay Sloan) were farmers, and one (John Franklin Weaver) was a newspaper editor; two (Mehaffy and Davidson) were Methodists. Biennial Report of the Secretary of State of the State of Arkansas: September 30, 1892, at 68 (1893). Sloan, though listed as a farmer, was in fact a banker and planter, who was an “ardent prohibitionist.” The Governors of Arkansas: Essays in Political Biography 297 (Timothy Donovan et al. ed. 2d ed. 1995 (1981)) (as Senate president pro tempore he was acting governor for a month in 1894 while the governor was out of state). Mehaffy was an Arkansas Supreme Court justice from 1927 to 1942. http://courts.state.ar.us/historical%20society/history3.html (visited Apr. 9, 2010).

1893: Annus Mirabilis

to 1899 — had voted for H.B. No. 98 and purported to be in favor of it, “but he had learned that a long fight would be made to keep the governor from signing the bill, and if signed it would be fought before the courts on the grounds of its being unconstitutional.” Consequently, he wanted the vote reconsidered and the bill referred to the Judiciary Committee so that its constitutionality could be examined.\(^{322}\) The press account failed, unfortunately, to reveal whether these gubernatorial and judicial fights would be fought by the Tobacco Trust, but the explanation offered by Kinsworthy—who had, after all, taken a prominent anti-tobacco position on measures concerning children in 1891 — apparently persuaded his colleagues, who voted 19 to 5 to reconsider, referring H.B. No. 98 to the Judiciary Committee. Whereas 14 of the 22 senators who four days earlier had voted for passage now voted to undo those votes, only two (Democrats) opposed reconsideration.\(^ {324}\)

Despite Kinsworthy’s purported trepidations, after a week’s consideration the Judiciary Committee, chaired by Democratic Methodist lawyer C. C. Hamby (one of only two senators who had voted for the bill and against reconsideration), did not recommend against passage on the grounds of unconstitutionality. The only amendment on which it conditioned its do-pass recommendation was striking the relatively unimportant section that gave informers half the fine. To be sure, a three-member minority (two of whom had voted against the bill on March 3) did recommend that H.B. No. 98 not pass.\(^ {325}\) Once the Judiciary Committee, the chamber’s constitutional watchdog, had dispelled Kinsworthy’s second- or thirdhand doubts—the only reason for reconsideration—the Senate should have re-sent the bill back to the House, at the very least after the full Senate had taken up the bill on March 17 and adopted the committee amendment striking the provision concerning informers. Instead, the deliberations unleashed a torrent of absurd amendments the total impact of which would have been to render the ban a virtual nullity. Since some of these radical killer amendments were offered by senators who had voted for the bill, what suddenly prompted them to change their


\(^{322}\) “State Legislature,” AG, Mar. 8, 1893 (5:1).

\(^{323}\) See above ch. 3.

\(^{324}\) Journal of the Senate of Arkansas, Twenty-Ninth Session 503 (Mar. 7) (1893).

\(^{325}\) Journal of the Senate of Arkansas, Twenty-Ninth Session 566 (Mar. 14) (1893); “State Legislature,” AG, Mar. 15, 1893 (5:1).
minds is a mystery.

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

326See above ch. 3.
328“State Legislature,” AG, Mar. 18, 1893 (3:1-2 at 3). Unfortunately, the paper did not clarify whether it was citing G.W. Bell or J. H. Bell, the former being the Senate’s only black or Republican.
probably designed to kill the bill) to ban the sale of cigars as well, but it was tabled. Mehaffy then sought to subvert the bill entirely by limiting coverage to the under-15-year-olds to whom it was already illegal to sell cigarettes, but it lost. Witt then tried to accomplish directly what his previous amendment had failed to do indirectly—namely, to exempt "persons temporarily residing or visiting" in Arkansas who gave away cigarettes. That it lost only by the narrow margin of 14 to 15 suggested, again, that the anti-cigarette forces were buckling. At this point Mehaffy had recourse to a new tactic to perforate coverage and render the ban illusory—the exemption of 11 counties, including two of his own but also Pulaski (Little Rock). Debate then focused on an issue that would continue to resonate in pro-tobacco circles in many states (including Iowa) into the twenty-first century: "[J]ust over the line at Fort Smith, Texarkana, and all around the State parties will sell cigarettes and cigarette papers to parties in this State, while the business men of this State, just inside the line, will be prohibited from selling." Once the amendment had secured a 13 to 11 majority, "Senators began to offer amendments exempting certain counties in their districts, until more than one-half the counties of the State were exempted. While this wholesale business of exempting was in progress," which even Dr. Redwine, who had earlier been the bill's reliable supporter, joined, a halt was called to this rout and further consideration of the bill and pending amendments was postponed until the following week.329

On taking the bill up again on March 24, the Senate adopted three more amendments exempting eight more counties and bringing the total to 19. The bill was then ordered to its third reading,330 but the anti-anti-cigarette legislators having arguably made their point that they had the votes to squeeze coverage to the vanishing point, further debate apparently became senseless, and the bill died. Yet another attempt would take place at the 1895 session.331

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329State Legislature," AG, Mar. 18, 1893 (3:1-3 at 2) (quotes); Journal of the Senate of Arkansas, Twenty-Ninth Session 608-10 (Mar. 17) (1893). Where the account in the Gazette deviated from that in Journal concerning votes or names of movants, the latter has been assumed to be more reliable.


331See below ch. 6.
Cigarettes Abolished. 332

The legislature of the young state of Washington has passed a bill making it unlawful for anyone to manufacture, buy, sell, give away, or have in his possession cigarettes or cigarette papers. This is sumptuary legislation with a vengeance. It’s quite evident that Washington intends to conserve the mental and physical powers of her people even if she has to go Spartan methods several points better.... 333

Washington, whose territorial legislative assembly in 1883 had outlawed the sale of toy pistols, cigarettes, cigars, or tobacco to anyone under 16 (without written parental consent), 334 in 1893, barely three years after having attained statehood, became the first state to make it unlawful, regardless of age, to “manufacture, buy, sell, or furnish to any one cigarettes, cigarette paper or cigarette wrapper,” subjecting violators to a maximum fine of $500 and/or imprisonment of not more than six months. The expansive structure, which extended liability also to buyers, was reinforced by a provision requiring that the act “shall be liberally interpreted to the end that its object shall be enforced.” 335

The legislature that passed House Bill No. 236, while not quite so lopsidedly Republican as Washington’s first two of 1889 (when the Senate was composed of 34 Republicans and one Democrat and the House of 61 Republicans, eight Democrats, and one Independent) and 1891 (when 30 Republicans stood against four Democrats in the Senate and 60 Republicans confronted 17 House Democrats and one Populist), was nevertheless distinctly under the control of the Republican party, which in 1893 accounted for 25 of 34 Senate and 50 of 78 House seats (19 Democrats and 9 Populists holding the remainder). 336

333 San Saba News (Texas), Mar. 31, 1893 (2:1) (untitled edit.).
334 1883 Wash. Laws at 67-68. Parental consent did not apply to toy pistols.
335 1893 Wash. Laws ch. 51, §§ 1-3, at 82.
The sponsor of the bill, 24-year-old Republican Chris Roscoe, who had not come to Washington until 1888 and was admitted to the bar in 1891, pleaded for passage at the conclusion of House debate on “moral grounds” by appealing for protection of “the rising generation” and suppression of “a habit that even women and girls were becoming the victims of....” The motivation for the giant leap to a universal ban depriving adult men of the right accorded them elsewhere in the United States to buy cigarettes was, unfortunately, barely illuminated in public debate, which focused on youth. This orientation was suggestive of the involvement of the state Woman’s Christian Temperance Union, about whose participation, let alone leadership, little is known. For example, the “W.C.T.U. Column” in the weekly Vancouver Columbian never even mentioned the Roscoe bill or law during 1893. And even when, a week before the law went into effect, the fourth annual convention of the Whitman County WCTU passed a resolution on the law, the group seemed to be unaware that the ban even applied to adults: “That as we now have a law prohibiting the sale of cigarettes to boys, let us see that this law be enforced. We also call on all pure and virtuous men, to prohibit by law the custom of sending out in cigarette packages the seminude pictures of women...which is such a mighty factor in the defilement of our boys.” At the same time the president of the Tacoma WCTU, in explaining her group’s work at a Baptist church, did not allude to any role in passage of the general sales ban bill, but merely mentioned that: “Our department of narcotics has put thousands of pages of leaflets into the homes of our city, warning the young against the tobacco habit, and dealers in cigarettes and tobacco have been

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


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


1893: Annus Mirabilis

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

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

Although the Morning Oregonian viewed House passage of the bill as the legislature’s taking “a long step in the direction of depriving its members of cigarettes,” the overwhelming majority of 57 to 7 that H.B. 236 garnered did not signify that all of its supporters backed it for the same reason. Thus, for example, Republican farmer J. E. Tucker declared during floor debate that he “was opposed to the cigarette trade because it promoted traffic with the Chinese. ‘Take a cigar and be an American,’ he announced as his motto.” Conversely, the small opposition was not above turning the deliberations into what the press

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

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

349Clarence Barton, Barton’s Legislative Hand-Book and Manual: 1893-1894, at 236 (1893). At the 1910 Population Census Mays was returned as a prisoner in a county jail without an occupation.
350“Turner Goes Home,” SP-I, Feb. 17, 1893 (1:6-7, at 2:1). Populist Rep. John B. Smith, who had questioned the ban on cigarette paper, cast one of the seven Nays, as did Republican Frank Nash, a lawyer, who argued that the bill was unconstitutional because it failed to deal with the cigarette stocks that dealers had on hand. Id. In 1909, Nash succeeded in persuading a state superior court judge in Tacoma to invalidate a recently enacted provision of the penal code prohibiting cigarette smoking. “Cigarette Law Will Be Tested,” Centralia Daily Chronicle, July 3, 1909 (1:4); “Cigarette Law Knocked Out in Court,” Centralia Daily Chronicle, July 10, 1909 (1:3).
351Clarence Barton, Barton’s Legislative Hand-Book and Manual: 1893-1894, at 252 (1893). Together with his father, Webb had owned the largest wholesale grocery business in Iowa in the 1870s. Id.
morality or hygiene, but of their business. A cessation of cigarette smoking means the sale of more cigars, and there is more profit in cigars. Without these powerful allies, the reformers would not have been able to pass their bill.\textsuperscript{354} (About the same time, cigar and tobacco retail dealers in New York, complaining that “cigarette manufacturers compel them to buy their stock of cigarettes through jobbers,” who left them a “very narrow profit margin,” which they felt very keenly because cigar consumption was steadily declining while that of cigarettes was increasing, “organized a mutually protective and anti-cigarette trust association.”)\textsuperscript{355} The bill’s passage was said to have prompted rejoicing among tobacco wholesalers and jobbers in Tacoma, which accounted for one-fourth of the state’s total annual sales of 40,000,000 cigarettes: “All the Tacoma and Seattle wholesale houses were represented at the capital in the interests of the bill.\textsuperscript{356} Going even further, the Western Washington Wholesale Grocers’ Association not only decided to conform to the new law when it went into effect three months later, but agreed to “countermand[ ] their orders placed with the American Tobacco Company for regular monthly supplies, and resolved to aid in stamping out the sale of cigarettes” in Washington State.\textsuperscript{357}

Public support for even more radical prohibition was visibly on display in the Senate, which (following the recommendation of its Committee on Public Morals)\textsuperscript{358} voted 25 to 2 to amend the House bill\textsuperscript{359} by making possession of cigarettes (or paper or wrapper) a misdemeanor as well. The press noted that “[i]t was seen that the bill had a great many friends, but the amendment caused considerable discussion....”\textsuperscript{360} Unfortunately, the press failed to reveal any of the

\textsuperscript{354}MO, Mar. 4, 1893 (4:4) (untitled edit.). Like many articles of the time, this one incorrectly stated that the bill as passed banned possession of cigarettes.

\textsuperscript{355}“Grievances of Retail Cigar Dealers,” NYT, Apr. 21, 1893 (9).

\textsuperscript{356}“Rejoicing in Tacoma,” MO, Mar. 3, 1893 (3:4).

\textsuperscript{357}“The Sister States,” MO, Mar. 12, 1893 (2:1-2).

\textsuperscript{358}Senate Journal of the Third Legislature of the State of Washington 331 (1893); “Senate Proceedings,” SP-I, Feb. 21, 1893 (1:7).

\textsuperscript{359}Senate Journal of the Third Legislature of the State of Washington 348 (Feb. 21) (1893). Oddly, whereas the committee had recommended that the “possession” language be added to the section declaring certain kinds of conduct unlawful and the penalty section, the full Senate adopted only the latter.

\textsuperscript{360}“Work at Olympia,” MO, Feb. 22, 1893 (2:4). To be sure, another newspaper completely contradicted this account: “Roscoe’s cigarette was amended so as to make it an offense to have cigarette’s [sic] in one’s possession. The bill went through without objection, although Senator Smith of Whitman voted in the negative. It occasioned but little or no discussion, as nearly every senator had reached a conclusion as to the merits of
substance of debate on this extraordinarily radical proposed statewide intervention in the history of tobacco control. After the House had refused to concur in the Senate amendment, the Senate refused to recede from its amendment but finally did so pursuant to a conference committee recommendation.

Local press support for the initiative was signaled by the Seattle Post-Intelligencer, which editorialized that the Senate version outlawing possession was “extremely stringent” and would, if enacted, “certainly have the intended effect. It will, at least, prevent the open sale of cigarettes and remove all temptation to become addicted to the pernicious habit of cigarette smoking. While legislation of this kind may in some cases be objectionable, in this particular instance few will be found who will object to it.” Indeed, even after the ban on possession was struck, the newspaper opined that the legislature “cannot do a more popular thing than to pass” the bill. Exactly why the law would be so popular when it deprived adult males of a segment of their consumer sovereignty the Post-Intelligencer no more explained than why their addiction had to be sacrificed on the altar of the next generation’s welfare when a strictly enforced ban on sales to and smoking by minors would also have targeted the latter issue:

If the only persons who were addicted to the habit of cigarette smoking were men of mature years, who may be said to be responsible only to themselves for their actions, the case would be different. It is well-known, however, that the great evil in connection with the cigarette habit is the constant menace and temptation to the youth of the state. If the Roscoe bill becomes a law the rising generation will become better men physically,
mentally and morally. 366

As far away as Minnesota, the press was jubilant: “Think, says the Minneapolis Journal, of riding downtown on a street car without that familiar odor like an old overshoe burning. Washington is a pretty good state [even] if it is locked away in one damp corner.”367 In contrast, The New York Times sarcastically asserted that, despite the “great wave of moral reform” that had “struck” Washington and prompted the legislature and governor to ban cigarette sales:

Nine-tenths of the members who voted for the bill did not care a nickel about the reform of the cigarette fiend, but they were anxious to knock out the Tobacco Trust. This powerful combine, which has secured control of the manufacture of all the leading brands of smoking tobacco and of nearly all the cigarettes in the United States, has been grinding the merchants and retailers to such an extent that they are glad to see it get a dose of its own medicine.

The American Tobacco Company is making more money out of cigarettes than from all other branches of its business put together, its profits last year being reported at $4,000,000 from cigarettes alone. The profits of the jobber and the retailer are now represented by a fraction of a cent on a package.

... The retailer objects to cigarettes because his percentage of profit must be large to make a living, and one dealer expressed his feelings by saying:

“I am glad the bill has passed. I am tired of getting off my stool 250 times a day to sell a five-cent package of cigarettes and then making only 10 cents on the whole lot.”368

The reason, according to the Times, that the Washington legislature had been able to pass the bill “without difficulty” was that:

The American Tobacco Company did not awake to the situation until the bill was well on

367 Freeborn County Standard (Albert Lea, MN), Apr. 3, 1893 (4:1) (untitled edit.).
368 “Fighting the Tobacco Trust,” NYT, Mar. 17, 1893 (10). Intriguingly, almost three decades later, when the WCTU succeeded in securing the introduction of a bill in the Washington House prohibiting the sale or manufacture of cigarettes, the United States Tobacco Journal expected jobbers to oppose it strenuously: “But they are not doing anything of the sort. ... They complain that there is no profit in cigarettes for them and so consequently why worry. If the bill passes, they reason, and cigarettes are taboo, why then they can sell more cigars. This may or may not be their state of mind—but that is the way things look.” “Anti-Cigarette Bill Fails to Disturb Jobbers in Spokane,” USTJ, vol. 104, Dec. 26, 1925 (48:1-2).
1893: Annus Mirabilis

its way to become a law. Then it started an expert lobbyist to Olympia with $20,000 to compass the defeat of the measure, but before he arrived it was in the hands of the Governor and the game was lost.\textsuperscript{369}

To be sure, this account contradicted that published a month earlier by the Post-Intelligencer, which, on the day that the bill passed the House, wrote that “a strong effort is to be made by the tobacco interests to beat it in the senate. Lobbyists are here to secure its defeat in that branch.”\textsuperscript{370} And on the day the legislature passed the bill, wholesalers (who supported it) reported that the “American Tobacco Company..., which controls the cigarette trade, sent three lawyers to Olympia to work against the bill.”\textsuperscript{371} In fact, the ATC, as Progressive Senator Albert Beveridge told his colleagues on the Senate floor in 1909 during a tariff debate on tobacco, became widely known for “resort[ing] to bribery in legislation. It has had its general lobbyist in New York, a man of great standing there, up to the time he died four years ago. It has had its local lobbyists with salaries and an expense fund at their command in every State where legislation affecting its interest was before the State legislature.”\textsuperscript{372}

By mid-April, at least one newspaper served up the scoop that “[a]t last the American Tobacco company, which is another name for the cigarette trust, has disclosed how they will attack the anti-cigarette bill....” One of ATC’s agents was in Seattle “giving confidence to the local retailers not to worry about the law, but to continue selling and buying, as the law cannot be enforced, and that [sic] the law can be subtravented [sic] without legal assistance.” The panacea was the original package doctrine, which had served to undo state liquor prohibition laws: ATC claimed that “each package of cigarettes is an original package, and that its sale cannot be stopped by any state law,” although its agent tantalizingly “admit[ted] the sale of them may be regulated within certain limits” without revealing how. What he did explain was that the Roscoe law had been “passed by the wholesale dealers because there was no longer any profit in the business, and that they had the bill passed so that the American Tobacco company would give them better terms” than the 15 cents per 1,000 cigarettes that they had been

\textsuperscript{369}“Fighting the Tobacco Trust,” NYT, Mar. 17, 1893 (10).
\textsuperscript{371}“Rejoicing in Tacoma,” MO, Mar. 3, 1893 (3:4).
\textsuperscript{372}CR 44:3734-35 (June 24, 1909). Although Beveridge was referring to Frederick Gibbs, who had in fact died six years earlier, and mentioned that the relevant materials had been published in Collier’s, he refused, even when a colleague requested him, to name names. On Gibbs, see below ch. 5.
1893: Annus Mirabilis

receiving.  

In the interim between the passage of the Roscoe bill and its effective date the press—seemingly inspired by the same ATC agent—charged that the law was a labor of Sisyphus because it was “simply calculated to take all the money heretofore paid for them by residents out of the state. Smokers can send to Portland and other places and purchase as many or as few cigarettes as they desire. They can get them through the mails or by express. There is nothing to prevent a man from buying cigarettes elsewhere and having them sent to him....” Although this possibility of consumer-activated imports was entailed constitutionally by the original-package doctrine, its limited practical scope, as the Iowa attorney general would point out three years later, would, especially on account of the considerably less than spontaneous or instantaneous nature of the economically burdensome individualized commercial transactions it involved, scarcely render the ban nugatory.

California: The Senate Takes the Initiative, But Time Runs Out in the Assembly

Alameda, Cal., is evidently misplaced. It ought to be in Kansas or Iowa. It has just passed a very stringent law regulating the sale and smoking of cigarettes, and curiously enough was moved to do it by a petition gotten up and signed by the tobacconists, who evidently are afraid of the cheap smokes destroying their business. ... Alameda is a very nice place to stay away from.

The Californians have sat down hard on the deadly cigarette. A bill has gone to the governor absolutely prohibiting the manufacture, sale or use of cigarettes in that state.

The same day that the Minnesota House passed Kelly’s public cigarette smoking ban bill and the day after the Kentucky House had passed its sales ban bill, Republican Senator Guy C. Earl of Oakland introduced Senate Bill No. 646

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373“To Dodge the New Law,” TDL, Apr. 14, 1893 (2:1).
375See below chs. 10-11.
376For ATC’s judicial attack on the statute and its repeal in 1895, see below ch. 11.
377“Cigarettes Tabooed,” DP, Mar. 29, 1894 (4:5).
1893: *Annus Mirabilis*

to prohibit the manufacture and sale of cigarettes on February 10. The editorial attack on the Minnesota bill that the *San Francisco Chronicle* published two days later could easily have been construed as a critique tailored to local California consumers:

The Minnesota legislature must be run in the interest of the cigar-makers. The bill making the smoking of cigarettes a criminal offense would not commend itself to the Spanish-Americans who are so numerous on this coast and in the Southwest. The cigarette to the man of Spanish blood is as much a part of daily life as is claret to the Frenchman or maccaroni [sic] to the Italian. ... If a legislature has the right to rule out the cigarette it may also specify the brand of whisky that its members and the community must drink or the quantity of clothing that they must wear.

The newly elected Earl, a lawyer in San Francisco—who would later become a wealthy electrical industry capitalist and University of California regent, but gain his most enduring fame as an eponymous party in the U.S. Supreme Court case holding that a lawful contract between him and his wife to hold his salary and attorney’s fees as joint tenants did not trump the federal internal revenue code’s requirement that the earning spouse report and pay income tax on the whole amount—seemed an unlikely California representative of a nationwide movement, but the bill quickly secured a “do pass” recommendation from the Judiciary Committee, and on the night of March 10, four days before adjournment, the Senate, in which Republicans outnumbered Democrats 22 to

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379 *Journal of the Senate During the Thirtieth Session of the Legislature of the State of California, 1893*, at 403 (Feb. 10) (1893). A local Sacramento paper made “A Bill Against the Making and Sale of Cigarettes” the subhead of the article on the previous day’s Senate proceedings, but other than listing the bill, did not discuss it. “The Proceedings,” *R-U*, Feb. 11, 1893 (5:1-2).

380 *SFC*, Feb. 12, 1893 (6:1) (untitled edit.).


383 Extensive and intensive questioning of surviving members of Earl’s family turned up no information that might shed light on his advocacy of the anti-cigarette bill.

384 *Journal of the Senate During the Thirtieth Session of the Legislature of the State of California, 1893*, at 521 (Feb. 17) (1893).
1893: Annus Mirabilis

18,\(^{385}\) considered S.B. No. 646. Debate appears to have been somewhat less one-sided than the 31 to 3 vote in favor of passage\(^{386}\) inasmuch as two senators who spoke against the bill nevertheless voted for it. Republican William Simpson, a physician, “surprised the Senate by saying that the bill was too severe. He did not think that the manufacture of the deadly things should be stopped.” After Democrat Henry Wilson, a farmer, had “paralyzed his friends by saying that cigarette smoking was all right provided the tobacco was wrapped in brown paper,” Democrat George G. Goucher, a lawyer from Fresno, “amazed” by their statements, gave both of them a “‘roasting’” and expressed the hope that, instead of being “led astray,” his colleagues would vote “to preserve the future generation. He considered the cigarette habit the next-door neighbor to the opium habit. It made the youth vicious and criminal.”\(^{387}\) In spite of the Republican majority, Democrats cast more Ayes (17) than did Republicans (14), who accounted for all three Nays.\(^{388}\) By the time the Senate acted, only three legislative days remained in the session, during which the Democratic-controlled Assembly never took up the bill.\(^{389}\) In 1895 both chambers would pass a bill, but the governor would not sign it.\(^{390}\)

**Nebraska: A Virtually Unanimous House Makes No Impression on the Senate**

The bill which had just passed the house prohibiting the sale or manufacture of cigarettes...will probably become a law. Nebraska will then be the second state to shut off

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\(^{386}\)Journal of the Senate During the Thirtieth Session of the Legislature of the State of California, 1893, at 1060 (Mar. 10) (1893).

\(^{387}\)“Legislative Notes,” *R-U*, Mar. 11, 1893 (8:3). The occupational data are taken from California, *Blue Book, or State Roster: 1893*, at 218-19 (1893), except for Simpson’s, which is stated according to the newspaper, though the *Blue Book* listed him as a druggist. The accounts of the debate in the state’s leading newspapers were perfunctory: “State Solons,” *LAT*, Mar. 11, 1893 (2:2) and “Work at the Capitol,” *SFC*, Mar. 11, 1893 (4:1-2 at 2); “How the State Is Fleeced,” *Examiner* (San Francisco), Mar. 11, 1893 (2:4-5).

\(^{388}\)The three Nays were cast by Senators Broderick (butcher), Carpenter (attorney), and Williams (clerk), all Republicans. California, *Blue Book, or State Roster: 1893*, at 218-19 (1893).

\(^{389}\)According to the *Journal of the Assembly during the Thirtieth Session of the Legislature of the State of California, 1893* (1893), the Senate appears not even to have transmitted the bill to the Assembly.

\(^{390}\)See below ch. 6.
this business, Washington having taken the lead. Other states will follow and in a few years neither a shot gun nor a search warrant can find one of these “coffin nails” in the country. Self execution in this line will then be stopped. Crazy houses will lose a prolific source of supply and graveyards will yearn for lack of dead men.391

For more than two decades, from statehood until the end of the 1880s, Republicans had controlled both houses of the Nebraska legislature by very large majorities. During that decade minority Democrats focused largely on alcohol prohibition, mounting vociferous opposition to sumptuary legislation in general, reflecting ethno-cultural constituencies of German, Czech, Irish, and Polish Catholics, whose liturgical-ritualist orientations set them in opposition to pietist Methodists and “old-stock” Protestants, who formed the core of the Republican Party and prohibitionist movement.392 Republicans lost their electoral and legislative majorities in 1890 to the upsurge triggered by adverse agricultural conditions, which in turn pushed the Farmer’s Alliance to seek independent political action. The resulting People’s Independent party advocated on behalf of reduced railroad freight rates, the secret ballot, and the eight-hour day (except for agricultural labor) in addition to free silver coinage, increased monetary circulation, and abolition of the monopoly in land.393 In order to ward off this threat, the Republican and Democratic parties offered (verbal) concessions, both in particular denouncing the trusts. One issue that increasingly loomed over all parties was liquor prohibition, from which otherwise prohibitionist-leaning Republicans shied away lest they lose the votes of the strongly anti-prohibitionist German and Bohemian immigrants. Dry Populists, too, found the issue too divisive to deal with. Only the Democratic party took a clear stance, opposing prohibition, but supporting a saloon-licensing system. Once a prohibitionist constitutional amendment made it onto the general election ballot in 1890, it became the overruling issue in Douglas County (Omaha), whose literally incredible 23,918 to 1,555 vote in opposition facilitated temporary resolution of the controversy in a statewide rejection by a vote of 111,728 to 88,292. More significantly, the 1890 elections also propelled the Populists into outright majorities in both houses of the legislature in 1891.394 During the 1891 session

391*Evening News* (Lincoln), Mar. 20, 1893 (4:2) (untitled edit.).
the Populists were, by large majorities, able to pass the so-called Newberry bill cutting railroad freight rates, but the Senate’s failure to mobilize the requisite supermajority to override the Democratic governor’s veto demonstrated the Democrats’ and Republicans’ lack of anti-monopoly commitment. Nevertheless, Populists did pass bills to secure the secret ballot, free textbooks, the eight-hour day, and state regulation of elevators and warehouses.395 When, however, the Populists—whose convention advocated, inter alia, equal pay for men and women, arbitration for settling labor disputes, direct elections for president, vice president, and senators, and opposed convict labor—who began seeking support from middle-class business and professional groups, lost their momentum at the 1892 elections, no party gained a majority, leaving the 1893 legislature “in chaos” and jeopardizing achievement of the Populist legislative program. While Democrats and Populists entered into a full-scale coalition in the House, the Senate witnessed Democrats allying with Republicans and Populists.396


396Albert Watkins, History of Nebraska 3:242-43 (1913); John Hicks, The Populist Revolt: A History of the Farmers’ Alliance and the People’s Party 262 (1961 [1931]) (quote); James Olson and Ronald Naugle, History of Nebraska 233-34 (3d ed. 1997 [1955]); Robert Cherny, Populism, Progressivism, and the Transformation of Nebraska Politics, 1885-1915, at 43 (1981). The 47 House Republicans outnumbered but did not majoritize the 40 Populists and 13 Democrats; in the Senate Populists and Republicans each occupied 14 seats, while Democrats controlled only 5. Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 115 (2007). According to Lawrence Goodwyn’s incisive, influential, and controversial interpretation, Nebraska’s Populist organization, which reached all the growth that it would ever achieve between November 1889 and July 1890, was a “shadow movement,” which “dutifully trailed” after the Kansas movement, but without any understanding of the Farmers’ Alliance cooperative crusade, the absence of which helped it attract vaguely anti-monopoly adherents unrelated to an institutional base, a collective identity, self-education, or culture required to “counter the constant intimidation of the prevailing corporate culture.” As a result, the “Nebraska People’s Party languished in complete ideological homage to the Democratic Party,” with which it fused by 1894. Lawrence Goodwyn, The Populist Movement: A Short History of the Agrarian Revolt in America 128-29, 142-43, 222
1893: Annus Mirabilis

The Nebraska anti-cigarette bill of 1893, House Roll No. 425, which was introduced on February 23, prohibited the manufacture, sale, keeping for sale, giving, or furnishing to anyone cigarettes or the material for their composition. The misdemeanor fine for conviction of each violation was $100. The introducer was 44-year-old Republican Representative Edgar M. Jenkins, who in 1879 had moved from Illinois, where he engaged in the grain and lumber business, to Alexandria (1890 pop. 1,111) in southeastern Nebraska, where he opened a drug store in addition to raising hogs. That the small town in which Jenkins decided to settle was a “moral community” was signaled by its not granting liquor licenses. As a newly elected legislator in 1893 he also self-designated occupationally as a druggist, one of only two in the House, two-thirds of whose members were farmers. Jenkins’ position as a typical Nebraska Republican of the session was underscored by his opposition to the Populists’ most important piece of legislation, the Newberry bill to reduce railroad freight rates, which was finally enacted in 1893.

After the Miscellaneous Subjects Committee to which the bill had been

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397House Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session 489 (1893). What role (if any) the WCTU played regarding the bill is unclear. Several days earlier the WCTU did submit petitions to numerous House members (but not Jenkins), but the Journal failed to specify their subject matters; they were referred to the same committee as Jenkins’ bill. Id. at 409-11 (Feb. 16). In 1885, the Nebraska had passed a no-sales-to-under-15-year-olds law “through the influence of the W.C.T.U.” Minutes of the National Woman’s Christian Temperance Union at the Twelfth Annual Meeting...October 30th and 31st and November 2d and 3d, 1885, at 128 (1885).

398House Roll No. 425, RG 046, Legislature (Neb.), Box 76 (NSHS).

399Biographical Sketches of the Nebraska Legislature and National and State Officers of Nebraska 143 (W. Howard comp. 1895), on http://www.archive.org/stream/biographicalsket00howa#page/n9/mode/2up (visited Apr. 3, 2010).


401House Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session n.p. (1893). At the 1880 Census of Population he was returned as a druggist and so self-designated during the 1895 session. House Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session 10 (1895). At the time of the 1900 Census of Population he was residing in the state capital, Lincoln, where he was a revenue clerk.

402Jenkins explained that he favored a substitute reducing rates by only 20 percent as opposed to the 20-35 percent range embodied in the bill. House Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session 707 (vote), 709 (explanation) (Mar. 10) (1893).
referred\textsuperscript{403} reported it back with a recommendation that it pass,\textsuperscript{404} the full House on March 17 passed it by the overwhelming vote of 76 to 1.\textsuperscript{405} The near-unanimity by which the House passed the anti-cigarette bill may have been linked to the fact (or at least the perception propagated by the anti-Prohibitionist Republican \textit{Omaha Daily Bee}) that “[t]here are few cities where cigarettes are so little used as in Omaha and their consumption is not extensive elsewhere” in Nebraska.\textsuperscript{406} House Roll No. 425 died, however, in the Senate, without reaching the floor for debate.\textsuperscript{407} The same battle would be resumed at the 1895 session.\textsuperscript{408}

\textbf{Georgia: The House Learns from the Defeat in 1891, But the Senate Does Not}

At the 1893 session of the legislature the anti-cigarette forces finally secured their first breakthrough in Georgia in the form of House passage of a general cigarette sales ban. Although William Sinquefield, who had championed the unsuccessful prohibitory measure in 1891,\textsuperscript{409} was still a member in 1893 and voted for the new measure, House Bill No. 374 was introduced by merchant George Stapleton of Sumter County,\textsuperscript{410} “the lady’s man of the house,”\textsuperscript{411} and

\begin{itemize}
\item \textsuperscript{403}\textit{House Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session} 518 (Feb. 24) (1893).
\item \textsuperscript{404}\textit{House Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session} 681 (Mar. 9) (1893).
\item \textsuperscript{405}\textit{House Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session} 840 (1893). Because 14 of the 22 non-voters/absentees were Republicans (and the one Nay was cast by a Republican), only 32 of 47 Republicans voted for the bill in contrast to 35 of 40 Independents/Populists and 9 of 13 Democrats. Press coverage was perfunctory; e.g., “Grief of Sheridan,” \textit{Nebraska State Journal}, Mar. 18, 1893 (3:1-4 at 4).
\item \textsuperscript{406}\textit{Omaha Daily Bee}, Feb. 18, 1893 (4:3) (untitled edit.). The paper’s sarcastic substitute bill entailed 30 days’ bread and water “for any dude convicted of smoking cigarettes....”
\item \textsuperscript{407}\textit{Senate Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session} 705, 905 (Mar. 21 and Apr. 1) (1893). The last action was the Education Committee’s recommendation that the bill be placed on general file. House Roll No. 425, RG 056, Legislature (Neb.), Box 76 (NSHS).
\item \textsuperscript{408}See below ch. 6.
\item \textsuperscript{409}See above ch. 3.
\item \textsuperscript{410}“Many New Bills,” \textit{AC}, Oct. 27, 1893 (7:1-3 at 3). That Stapleton was no morally antediluvian politician, but thoroughly capital and market oriented he made clear by introducing a bill to “authorize foreign corporations to bid in real estate upon which they
advocated for most strenuously by William M. Sears, another farmer and prominent Allianceman, who, to be sure, admitted on the House floor that he had engaged in the discussion “with very little investigation of the subject....” (At the 1892 session Stapleton had also introduced a “bill to prohibit the sale of cigarettes, and for other purposes,” but the House took no action on it.)

Nevertheless, even on the bill’s second reading the Atlanta Journal opined that indications were that cigarettes would “soon be banished from the state.”

The bill that was debated the next day, October 27, had been strengthened by the Committee on Hygiene and Sanitation, which “went Mr. Stapleton one better” by including cigarette tobacco and paper, a step that the out-of-state press ironically characterized as having “emphasized the rigid moral sense of the house” inasmuch as “this same body has been using every effort to encourage the cultivation of tobacco in the state.” The debate—the outcome of which the Atlanta Journal headlined on the front page above the fold as “Bye Bye to Cigarettes”—occupied the House for several hours on its third reading, although oddly the bill did not immediately attract attention so that before any floor discussion a rising vote of 92 to 14 was taken. At this point Representative William Harrison, a lawyer, opposed the measure on the grounds that the legislature lacked the power to curtail the use of cigarettes totally; moreover, he

have loaned money and secured themselves by lien or mortgage.” Stapleton’s motivation was to eliminate large foreign corporations’ reluctance to do business in Georgia. Instancing a Scottish loan company anxious to invest millions of dollars in Georgia which it would have been enormously advantageous to have in the state, Stapleton regarded it as “‘really an injustice not to allow these people to protect themselves by buying in land....’” On Education, AC, Nov. 1, 1893 (7:1-4 at 3).


413 “It Must Go,” AC, Oct. 29, 1893 (21:1).

414 Journal of the House of Representatives of the State of Georgia, at the Session of the General Assembly: Commenced at Atlanta, Wednesday October 26, 1892, at 454 (Dec. 7) (1892).


417 “The Immoral Cigarette,” Milwaukee Sentinel, Nov. 25, 1893 (4:6). House passage had taken place a month, not, as the article claimed, a few days earlier. By the time this article appeared, the senate had killed the bill.

questioned the use of encouraging their manufacture in Georgia when the sale of the manufactured product was “crippled or suppressed.” Representative Hendon of Troup County took a different tack in opposition, both insisting that H.B. 374 was “foolish, practical and foredoomed to be a dead letter” and “emphatically den[y]ing that the cigarette was as injurious as generally assumed.” Moreover, evasion of the law would insure that instead of saving boys’ health, the measure would “result in their smoking any kind of tobacco in any kind of paper.” Sears’s “long and impassioned speech,” which assured the House that Georgia’s women and mothers has inspired the bill, appealed to the need to “protect the rising generation and surround it with every possible safe ground.” By an almost 70 percent majority, the bill passed 101 to 45, with the Fulton County (Atlanta) delegation voting solidly against it and “the two negroes” in the House in favor.

Atlanta’s leading newspapers condemned the bill for its paternalism and the House for passing it, and appealed to the Senate and/or the governor to “send it to the graveyard where they bury legislative freaks.” While admitting that “the average cigarette is a combination of nasty tobacco and bad paper and that the habitual cigarette smoker often makes others unhappy,” the Journal contended

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420Journal of the House of Representatives of the State of Georgia at the Regular Session of the General Assembly 52-53 (Oct. 27) (1893). Apparently, in order to secure passage in the House the bill exempted from the ban so-called cubeb and medicated cigarettes. “Cigarette Bill Killed,” SPDG, Nov. 4, 1893 (1). (Cubeb is a type of pepper that, when smoked, allegedly aids in treating, inter alia, asthma. For example, the Constitution published advertisements by a pharmacy for cigarettes “For Asthma and Catarrh Trouble.” AC, Nov. 12, 1893 (8).) The same newspaper editorialized that the exemption amounted to “legislative nullification.... The line between the medicated and the non-medicated article would be drawn entirely by the dealer and the smoker, and it would not be long before the market would be glutted with the medicated article, which, however, would probably not be sufficiently ‘medicated’ to injure its sale.” “A Nonsensical Bill,” AC, Oct. 29, 1893 (18:2) (edit.). The dysfunctionality of exempting these cigarettes was highlighted in doggerel about “the worst of earthly stenches” created by a legislator who smoked one on the House floor: “While Stapleton of Sumter, turned pale around the gill, And took no further interest in the reading of the bill. And Sears of Webster, whispered in a tragic undertone, That he wished to gracious heaven he’d let cigarettes alone.” “Legislative Loot,” AC, Nov. 6, 1893 (5:3-4 at 4). A somewhat similar provision in an earlier anti-liquor law, which did not prevent licensed druggists from selling pure alcohol for medicinal purposes, supposedly undermined it. Georgia Acts and Resolves 1884-85, No. 182, § VIII, at 121, 123.


that the legislature had “properly” no more “business” with such an “extreme
sumptuary” law, which was “repugnant to the spirit of our people and to the
genius of our institutions,” than it did making it a “misdemeanor to wear dyed
socks, which are liable to stain the feet, and in some cases to produce blood
poisoning....”423 The Constitution called it “the most nonsensical bill that has
been sent to the senate from the house in a long time.” Favoring literal over
surrogate paternalism, the editorialist opined that “if a man has no more sense
than to neglect to address his attention to the welfare of his own family, it is not
part of the state to step in and exercise paternal functions for him.” Indeed, doing
so was a “much greater nuisance” than cigarette smoking.424

The day following passage, Representative Charleton Battle of Muscogee
County, yet another lawyer, moved to reconsider the vote. Including himself
among the numerous House members who smoked and had not been killed by
cigarettes, he ridiculed the “prevalent impression” that the “coffin tack...was
deathly to the health of the user.” Since, the Constitution chimed in, “Mr. Battle
is built on the roly-poly plan and is the picture of health and good nature, the
force of his illustration was exceedingly obvious.” However, Battle charged, a
real “coffin tack” might emerge if as a result of the law boys began smoking “the
vilest sorts of substitutes” they could get their hands on such as plug tobacco. He
also opposed the bill because it struck a blow at what was largely a southern
industry.425 Having learned or remembered nothing from Payne’s or
McCandless’s analysis,426 Battle, who was “‘disgusted with this cigarette bill,’”
mounted a multi-pronged assault on it:

“The hue and cry against cigarettes is unfounded fact and was started by the cigar
manufacturers whose business was cut into by the sale of them. The majority of those
who voted for the bill were influenced by blind, ignorant and unreasoning prejudice, and they
have simply taken a quarter of a million dollars’ worth of business annually out of the state
without accomplishing an iota of real good. Chemical analysis has proven that the
cigarettes on the market at present are absolutely free from all drugs or adulteration.... But
there are some blamed fools that can’t see it that way, and it is no use arguing with

425The previous day Battle had originally voted against the bill, but when he realized
that it would pass, he requested and received permission to change his vote to Yes so that
he would be eligible to move for reconsideration. “It Must Go,” AC, Oct. 29, 1891 (21:1).
426Battle’s assertion that an able chemist’s analysis had shown that cigarettes contained
no poison other than that in the tobacco overlooked McCandless’s recitation of the toxins
Finally, Battle raised the question—to which there was a straightforward answer, but one that prohibitionists evaded—as to the sense of the state’s protecting its adult citizens when there was already a law prohibiting sales to children. Sears sought to deflect the anti-paternalist criticism of the bill by arguing that parents “needed the legislature to assist them in keeping their children straight.” The extent to which his claim that Georgia’s businessmen advocated the bill was empirically well grounded was just as unclear as that by Representative William Neel that dealers themselves preferred this bill to the current no-sales-to-minors law. W.C. Bryan, a Primitive Baptist or “hardshell” preacher, whom no one could accuse of “being a representative of the dudes,” urged defeat of the ban bill on the grounds that it shifted parents’ responsibility to the state: “It was not the business of the state to look after the health of cigarette-smoking boys,” and the very mothers who were proclaimed as the bill’s sponsors could render it superfluous by simply “giving proper attention to their boys in their own households.” Neel, yet another lawyer-legislator, accused Bryan of having failed to grasp the specific division of punitive labor between state and parents with regard to this dimension of youth behavior: “While the parent was ready to punish the boy, the state must be ready to punish the man who would corrupt him by setting traps and snares for his feet...after he gets from under home influences.” The defeat of the motion to reconsider by a vote of 41 to 84, that is, by more than a two-thirds majority, indicated that second thoughts in no way were plaguing House abolitionists.

During the interim of several days before the Senate took up the House bill, the press in Atlanta and the elsewhere in Georgia and the public debated it with increasing urgency. An anonymous columnist in the Journal insisted that, if enacted, the bill would exacerbate the already existing phenomenon of “picking

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up along the gutters the remains of cigarettes cast away by those allowed to smoke by the benign laws of this glorious commonwealth. It is not the elite of the coffin-tack fraternity that engage in the profitable past-time.... The riff-raff are the ones. Already, in the early morning hours, boys from 10 to 18 years of age are seen moving swiftly along the uptown gutters, closely scanning every crack and crevice in the pavement for their morning smoke.” If the bill became law, The Polygraph predicted, it would “drive, literally, the majority of the juvenile population to the gutters....”432 Dissatisfied with Polygraph’s “sarcastic deliverances” and the Journal’s rebuke of the House, one reader, while calling for an outright ban on a thing as poisonous as cigarettes, submitted the proleptic proposal that “[i]f allowed to be sold, they ought to have the skull and bones, and the label ‘poisonous’ as a trademark.”433 A reader of the Constitution dismissed the bill as “useless” because a “2-cent postage stamp and a letter to Chattanooga or any town out of Georgia will get enough cigarettes by return mail to last a boy or man one month, postage paid”—an argument that the Journal echoed the next day in an editorial attacking the bill as “vicious” as well as condemned to become a “dead letter in effect.”434

The Senate General Judiciary Committee recommended that Stapleton’s bill do pass with (weakening and strengthening) amendments to strike the exception for so-called medicated cigarettes and to exclude cigarette tobacco from the sales ban. When the full Senate took it up on November 1, supporters attempted to force an immediate vote and defeated a motion to delay debate for two weeks by a vote of 16 to 19. Then, however, supporters (inexplicably) successfully moved (by a vote of 21 to 16) to recommit the bill to the committee, a majority of which, despite the recommendation, was said not to favor the bill. These procedural maneuverings in no way shook the “general belief...that the senate will kill the bill.”435 That killing did in fact take place the next day—just as a cigarette dealer was attracting crowds to his display window to discuss the bill and look at empty cigarette boxes above a crepe bow with the inscription: “We are mourning our


433W. O. Butler, “The Cigarette Bill,” AJ, Oct. 31, 1893 (5:2) (ltr to edit.). Butler went on to warn that: “Out of a couple of generations of poisonous cigarette smokers [w]e will have mental and physical imbeciles...driving idiocy and impotency....”


impending doom." The bill’s death was not accompanied by substantive debate; instead, wrangling, spread across 10 pages in the Senate Journal, over procedural motions to delay the vote, all of which were lost, was driven by supporters’ knowledge that the bill itself was lost unless they could gain additional time to reassemble other friends of the bill who had gone home “under the impression, if not absolute guarantee, that the bill would not come up” that day. Having exhausted their own patience filibustering and yielding to the inevitable vote on final passage, supporters—whose canvass revealed that even under the best of circumstances the 19 votes they could mobilize fell four short of a constitutional majority—were able to muster only 12 Ayes against 19 Nays.

The Senate’s action appealed to the Constitution’s anti-paternalism because “to say to a man who is old enough to be his own master, that he shall or shall not do this or that, so long as his doing so does not offend society or endanger public morals, is a resort which should be attempted only in very extreme cases.” The anti-cigarette movement’s failure to engage this argument, at least to the extent of explaining either why children would want and gain access to cigarettes so long as their fathers (and other adult males) possessed and smoked them or that inhalation of cigarette smoke was as likely to injure the health of grown men as that of growing boys, in large part undermined its ability to thwart the cigarette industry’s reliance on adult consumer sovereignty for survival and expansion. However primitive medical-scientific understanding of cigarettes’ health impacts was at the time, it would have been robust enough to carry the argument that they endangered public health. It would have had to have been yoked, however, with an empirical refutation of the editorialist’s other argument—namely, that the statewide sales ban “would have amounted to nothing so long as surrounding cities and states licensed the sale to dealers who would have profited at the expense of this state....” Had such cross-border sales to individual consumers, thanks to the original package doctrine, been significant enough to sustain and develop the burgeoning addiction in Georgia, then the anti’s would have been

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438Journal of the Senate of the State of Georgia, at the Regular Session of the General Assembly, at Atlanta, Wednesday, October 25, 1893, at 82-91 (Nov. 3) (1893).


440“Satisfactorily Disposed Of,” AC, Nov. 4, 1893 (4:3-4) (edit.).

441“Satisfactorily Disposed Of,” AC, Nov. 4, 1893 (4:3-4) (edit.).
compelled either to adopt the initiative that the House in Mississippi and Alabama had seized in banning public cigarette smoking or, as one newspaper observed, to advocate national legislation.\(^{442}\)

**Legislative Chambers That Debated But Rejected Radical Bills**

It is one thing to make sumptuary laws and another thing to get juries to enforce them. A charge of smoking cigarettes against a man or boy would be laughed out of court. The logical consequence of such kindergarten legislation is the spanking post. When the legislature creates a new crime it should devise a punishment to fit it.\(^{443}\)

Iowa, whose legislature did not meet in 1893, was virtually surrounded by states dealing with advanced anti-cigarette bills. In addition to Minnesota and Nebraska, whose Houses did pass bills, the lower chambers in Illinois, Missouri, and Wisconsin also considered controversial radical measures, thus sustaining interest in the cause and helping build momentum, especially in Wisconsin and Illinois, which did ultimately enact ban bills in 1905 and 1907, respectively.\(^{444}\) Although Iowa’s southern neighbor never enacted such legislation—in 1913 its House did pass a general sales ban\(^{445}\)—the Missouri House Criminal Jurisprudence Committee in 1893 did recommend that a bill prohibiting the manufacture, sale, or giving away of cigarettes\(^{446}\) pass, but the measure did not

\(^{442}\)“The Cigarette Bill,” *AC*, Nov. 1, 1893 (4:3) (reprinting editorial from *Albany Herald*).

\(^{443}\)“A Spanking Post Next,” *MJ*, Feb. 8, 1895 (5:6) (reprinting editorial from *St. Louis Post-Dispatch*).

\(^{444}\)See vol. 2.

\(^{445}\)House Bill No. 548 as introduced G. B. Fluty, a farmer and Democrat, also prohibited “having in one’s possession any cigarette, cigarette papers or material for the manufacture of cigarettes or cigarette papers,” but that provision failed to survive floor consideration. *Journal of the House of Representatives of the 47th General Assembly of the State of Missouri: 1913*, at 244 (Jan. 31), 457 (Feb. 13), 695-97 (Feb. 27), 759 (Mar. 1), 1023-24 (Mar. 10), 1406-1407 (Mar. 18). The Senate Criminal Jurisprudence Committee killed the bill by recommending that it not pass. *Journal of the Senate of the 47th General Assembly of the State of Missouri: 1913*, at 1302 (Mar. 24).

\(^{446}\)John W. Coots, who had been returned at the 1880 Census of Population as a teacher and in 1900 as a lawyer, introduced H.B. No. 655. *Journal of the House of Representatives of the 37th General Assembly (Regular Session) of the State of Missouri: 1893*, at 430 (Feb. 14) (1993).
1893: Annus Mirabilis

come to a floor vote. As preliminary as it was, the committee’s action prompted one out-of-state newspaper to observe (ironically) that it had “jeopardized the interests of a thriving industry and invited the wrath of the dude and the small boy....” That this defeat did not eliminate a critical mass of support for anti-tobacco regulation was on display during the 1895 session, when the following substitute for an amendment to a bill designed to apply only to minors received 28 percent of the votes cast—22 Ayes against 56 Noes—despite its unprecedented prohibitory scope: “It shall be unlawful for any person to smoke or in any way use any cigar, cigarette or tobacco in any form whatsoever in any public street, place or resort.” Legislative support for suppressing cigarettes was even more clearly signaled by the Senate’s passage, on a vote of 22 to 9, of a bill fixing a prohibitory $1,000 license for handling cigarettes and cigarette papers. When the House “broke forth in applause” upon being informed of the Senate’s action, the press reported that House passage was a “foregone conclusion,” and the House Ways and Means Committee did recommend that it pass at the very end of the session, but time ran out on the bill. Finally, the Massachusetts legislature, which held hearings on cigarettes in 1892 and whose full House debated and rejected a general sales ban, held yet another hearing on an identical bill in 1893 before the Senate rejected it.

447Journal of the House of Representatives of the 37th General Assembly (Regular Session) of the State of Missouri: 1893, at 636 (Feb. 28) (1893). The bill was ordered engrossed and the Engrossed Bills Committee found that it had been truly engrossed. Id. at 723 (Mar. 3), 881 (Mar. 11).

448“Missouri Solons,” Emporia Gazette (KS), Mar. 2, 1893 (1:2).

449Journal of the House of Representatives of the 38th General Assembly (Regular Session) of the State of Missouri: 1895, at 297 (Feb. 1) (1895). The bill went on to provide that: “Any person violating any provision of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding ten dollars nor less than two dollars for each offense.” Representative Joseph T. Davison of Poplar Bluffs, who was returned as hotel keeper in 1880 and a lawyer in 1900, offered the substitute for the amendment.

450Journal of the Senate of the 38th General Assembly (Regular Session) of the State of Missouri: 1895, at 57 (Jan. 16), 138-39 (Jan. 29), 221 (Feb. 8) (S.B. No. 95, by Senator Richard A. Love) (1895).


452Journal of the House of Representatives of the 38th General Assembly (Regular Session) of the State of Missouri: 1895, at 1252 (Mar. 23) (1895).
**Illinois: “a crime against humanity”**

The young man who is dying from excessive cigarette smoking is entitled to some sympathy, perhaps, but the victims whose olfactory nerves he tortures with the disgusting stench of the thing he smokes are entitled to much more. Let the lawmakers stamp out the vile nuisance.\(^{453}\)

The process of interstate emulation was illustrated by Illinois, where, inter alia, the Chicago Tribune reported frequently on anti-cigarette measures in other state legislatures.\(^{454}\) In 1893 the House—which Democrats controlled 78 to 75\(^{455}\)—appeared to offer a propitious environment when its Rules Committee at the outset of the session, included, among the rules modifications on which it agreed, prohibition of smoking in the House (with the provision of smoking-rooms).\(^{456}\) In Illinois, as elsewhere, the state WCTU requested legislation banning the sale and manufacture of cigarettes (in addition to a measure for county-level female suffrage).\(^{457}\)

The main legislative vehicle in 1893 was House Bill No. 185, introduced on January 23 by Democrat Freeman (“Free”) P. Morris\(^{458}\) (who was on the seven-member Rules Committee). It imposed a fine of $20 to $100 or imprisonment of 10 to 30 days for anyone who made, kept or handled for sale or gave away cigarettes in addition to fining anyone who tried to evade the law by using another name instead of “cigarette.” What made the bill remarkable, however, was its provision that “the description ‘cigarette’ shall be deemed to include all preparations of tobacco soaked in nicotine, or impregnated with opium, or...
stramonium, or belladonna, or alcoholic liquor, or valerian; or tonca bean, or mellolotis, or any other deleterious or poisonous substance.”\textsuperscript{459} Since this sub-focus on toxic supplements, which reflected a major strand of criticism in the anti-cigarette camp\textsuperscript{460} distracting attention from the real health impacts of cigarette smoking\textsuperscript{461} (even as understood by physicians and scientists of the period), did not exclude non-adulterated cigarettes from the ban, the bill’s comprehensive scope remained unimpaired.

A week into February, the \textit{Daily Inter Ocean}, confirming the aforementioned press-mediated, nationally rolling wave of state-legislative filings, observed that the (unsuccessful) “attempt of the Alabama Legislature to suppress the cigarette nuisance, which is attracting attention from the press all over the country, is likely to find a repetition in the Illinois General Assembly.” The newspaper meant the bill filed by Morris, who cleverly “caused it to be referred to” the Judiciary Committee, by which, since he happened to be its chairman, there was a “probability” that it would be “promptly reported.”\textsuperscript{462} Talking tough, but within the framework of the assault on (make-believe) adulterated cigarettes and the insanity and broken-down youth they left in their wake, Morris, who had first been elected to the legislature in 1884,\textsuperscript{463} self-confidently predicted that:

“I do not think my bill will have any opposing vote in the Assembly…. I have collected a great deal of data on the cigarette nuisance and expect to spread it before the committee. It is probable that we will ask eminent physicians to give their opinion and the expert alienists of the United States insane asylums and the superintendents of the reformatories should all be summoned before the committee. They would certify that a large percentage of the crimes of juvenile offenders can be traced to the cigarette nuisance and would tell us of the thousands of minds that have been wrecked and constitutions shattered by the cigarette habit. I think the sale and consumption of cigarettes as now manufactured is a crime against humanity.”\textsuperscript{464}

Morris’s career path—he remained a major state Democratic Party figure for many years after he had left the legislature\textsuperscript{465}—made him an improbable

\textsuperscript{459}“Enemy of Cigarettes,” \textit{DIO} (Chicago), Jan. 24, 1893 (6:4).
\textsuperscript{460}See above ch. 3.
\textsuperscript{461}For an extreme case, see A[lbert]. Sims, \textit{The Common Use of Tobacco} 152 (1894).
\textsuperscript{462}“War on the Cigarette,” \textit{DIO} (Chicago), Feb. 7, 1893 (6:2).
\textsuperscript{463}\textit{The Souvenir Album: A Legislative Manual of the 38th General Assembly} 78 (1893).
\textsuperscript{464}“War on the Cigarette,” \textit{DIO} (Chicago), Feb. 7, 1893 (6:2).
\textsuperscript{465}“Freeman P. Morris, Democratic Leader, Dies at 82,” \textit{CT}, Nov. 8, 1936 (22).
proponent of such a radical stance and intervention. After all, he was not only a railway lawyer but, as a longtime legislator, was one of a “Big Four” bipartisan House clique “united in their allegiance to the corporations which they served faithfully for a price.” Indeed, even his reference to insane asylum psychiatrists was amusing since virtually on the very day of his bill’s death he was engaged as a “rascal” whose interest in the huge Illinois Eastern Hospital for the Insane at Kankakee (Illinois’ and perhaps the country’s largest) was as a site for patronage jobs.

Occasioned by Pennsylvania House passage of a manufacture/sales ban a fortnight earlier, but in manifest ignorance of Morris’s having introduced H.B. No. 185 almost a month earlier, on February 19 the Chicago Tribune published a fiery editorial calling on “some member” of the Illinois legislature (to whom it promised no “more valuable and proper” measure) to introduce a like bill and to “stick to it” until he got it passed. Significantly, though focused on boys and obsessed with mythic cigarettes qua “worked-over stubs of cigars, fished out of the gutters and loaded with opium,” the newspaper argued that they were also “not safe for men to use,” thus providing a direct justification for eliminating one site of consumer sovereignty for adult males (albeit one that might vanish as soon as cigarettes were discovered not to consist of opium-drenched re-used cigars). Consequently, the editorialist saw

but one way to deal with this evil, and that is the radical one. As long as cigarettes are offered for sale in nearly every street boys will manage to get them. Therefore their sale should be forbidden altogether. None should be allowed to be made in the State, and no store should be permitted to keep them. Then it would be extremely difficult for boys to get those opium-soaked abominations....

Two days later, the paper, still blisslessly ignorant of Morris’s bill, but now prompted by the introduction of a bill in the Wisconsin legislature (which it mistakenly reported as a ban on cigarette sales, when in fact it more radically

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466 The Bench and Bar of Illinois 2:1125 (John Palmer ed. 1899).
467 The Portraiture of the 39th General Assembly: Illinois...1895, at 66.
470 “Stop Making and Selling Cigarettes,” CT, Feb. 19, 1893 (28).
In spite of his chairmanship, the Judiciary Committee did not take up Morris’s bill until February 21, when an effort was made to postpone consideration until March 1 so that expert testimony could be heard, but after the committee had decided not to take such testimony, consideration was scheduled for February 28. In the event, however, on that date, replicating his counterparts’ performances in Georgia and Massachusetts, Walter S. Haines, a nationally known chemistry and toxicology professor at Rush Medical College who frequently appeared as an expert on poisoning in criminal cases, testified before the committee that his analysis of eight or 10 cigarette brands had revealed “no deleterious ingredient or any substance more detrimental to health” than was present in cigars. The press reported that “[n]otwithstanding his testimony” the committee ordered the bill reported to the full House with a recommendation that it pass. It is unclear whether the verdict delivered by Haines—who purportedly had already in 1889 determined that 10 different samples of Sweet Caporal contained no opium or morphine—prompted Morris to reconsider his “crime against humanity” charge, whether wrangling took place over withdrawing the bill, or whether, once the Tobacco Trust had been exonerated (once again) of the charges of toxic adulteration, which were potentially a public relations threat, it became indifferent to the prohibitory bill because it remained supremely confident of its ability to bribe it to an early death. In the end, the Judiciary Committee’s do pass recommendation and the House order to second reading proved to be the final actions on the bill.

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471 CT, Feb. 21, 1893 (4) (untitled edit.). On the Wisconsin bill, see below this ch.
473 See above ch. 3.
474 Though already an established figure in 1893, he became an even greater toxicological luminary during the following three decades. “Dr. Haines, Noted Poison Expert, Teacher, Dies,” CT, Jan. 28, 1923 (11); Wm. McNally, “Obituary: Walter Stanley Haines,” Industrial and Engineering Chemistry 15(4):425 (Apr. 1923). Despite his scientific eminence Haines was not above giving testimonials to Royal Baking Powder as “the purest” and “strongest” in newspapers all over the country. E.g., CT, Mar. 11, 1893 (5); Frankfort Roundabout (KY), Dec. 12, 1891 (1).
475 “Opposed to Cigarettes,” Dio (Chicago), Mar. 1, 1893 (6:3). See also “Work of the Committees,” CT, Mar. 1, 1893 (3).
477 Journal of the House of Representatives of the Thirty-Eighth General Assembly of the State of Illinois 355, 386 (Mar. 1) (1893). Two Senate bills also failed to reach floor
The *Tribune* apparently regarded reports of the bill’s death as exaggerated. Two days after the committee’s action it entered an editorial plea that “[s]o meritorious a measure should not be suffered to die for lack of friends” and its supposition that Morris should and would “press his bill earnestly” and that Chicago-area legislators would heartily support it because their constituents had their children under lesser observation than was the case in the country.\(^7^8\) Two weeks later, under the urgent title, “Stop the Cigarette Evil,” it treated the bill not only as very much alive (albeit without having achieved much progress), but also as lacking “any signs of opposition...among the members, all of whom” were aware that “nothing has done more to destroy the minds and bodies” of the country’s youth than smoking “opium-saturated cigarettes.” After seeking to buttress its position by relating that the Nebraska House has passed such a bill by a vote of 75 to 1 and that Washington State had actually enacted one, it recommended adoption of the latter’s killing-two-birds-with-one-stone anti-trust motivation, which, as implemented in Illinois, would “deprive an obnoxious trust of the large market afforded by the third largest state....” Such an approach was all the more called for since the Democratic and Republican state platforms both denounced trusts and pledged that all of their members elected to the legislature would do all in their power to “overthrow” trusts. Informing both parties that they had the “power to knock out a monopoly,” the *Tribune* urged the bill’s unidentified introducer to “keep up the fight for his measure.”\(^7^9\)

The WCTU continued to fight for its passage,\(^8^0\) but whether Morris did is unclear. His bill, in any event, remained dead—even after the Swedish-born Chicago Republican Representative (and Cook County deputy sheriff) Samuel Erickson on March 9 introduced another bill to ban the manufacture and sale of cigarettes. The House Speaker ruled it out of order on the grounds that when a bill on the same subject was pending, in order to avoid confusion no further bills

\(^{478}\) *CT*, Mar. 3, 1893 (4) (untitled edit.). The *Tribune*’s prohibitory stance on cigarettes sharply contrasted with its support of a high license tax for alcohol. *Id.* (editorial on drunkards in bone-dry Maine). The same day the paper reported that the Wisconsin cigarette smoking ban bill had been killed. “Republican Member Is Seated,” *CT*, Mar. 3, 1893 (6).

\(^{479}\) “Stop the Cigarette Evil,” *CT*, Mar. 19, 1893 (28).

\(^{480}\) “Move to Abolish All Justice Courts,” *CT*, Mar. 7, 1893 (3).
could be introduced. To Erickson’s claim that his bill (“the Pennsylvania law”) was the only one of this nature that had been introduced during the session, the Speaker (incorrectly) replied that Morris’s was “an exact copy of the Pennsylvania statute....” Eventually, when the House rebelled against the underlying principle of the ruling, the Speaker withdrew it, but Erickson also withdrew his bill.\textsuperscript{481} Perhaps Morris’s four-year stint as the Watseka school board president\textsuperscript{482} accounted for his engagement on behalf of children, but in light of the fact that he had “had a great deal to do with moulding legislation at every session,” was chair of the House Democratic caucus, one of the party leaders, and a member of the steering committee,\textsuperscript{483} his failure to rescue his bill from expiration before it even reached the House floor could also (speculatively) be interpreted as part of a deal he had struck with the Tobacco Trust to use it as a decoy to block any real initiative to ban cigarette sales.

\textit{Wisconsin}

Mr. Warden said Wisconsin was not ready to adopt the prohibition idea. Control of children should be left with parents and the less legislation we have about the matter the better. ... Mr. Bailey made the point that if parents could not control their children it would be \textit{[a]} good idea to pass a law prohibiting such people from becoming parents.\textsuperscript{484}

Wisconsin’s enactment at the 1891 session of a risibly weak law that prohibited anyone from selling or giving cigars, cigarettes, or tobacco to minors only if the minor’s parent/guardian had forbidden that person to do so\textsuperscript{485} did not

\textsuperscript{481}“The Legislature,” \textit{Weekly Herald-Despatch} (Decatur), Mar. 11, 1893 (4:5). Morris’s bill was in no way a copy of the Pennsylvania House bill, the penalties of which were much more stringent and which also contained no provisions concerning tonca beans, etc. See above this ch. That Erickson’s bill contained the same penalties as the Pennsylvania bill suggests that, unlike the Speaker, he accurately characterized the two bills. “To Prohibit the Sale of Tobacco Cigarettes,” \textit{CT}, Mar. 8, 1893 (6).


\textsuperscript{483}\textit{Souvenir of the Illinois Legislature of 1893}, at 76 (1893).

\textsuperscript{484}“Money for Milwaukee,” \textit{MJ}, Mar. 18, 1891 (2:1). Warden and Bailey were both Democrats.

\textsuperscript{485}1891 Wisconsin Laws ch. 434 § 1, at 623. When Bavarian-born Democratic Assemblyman Conrad Krez offered the substitute amendment making the law operative
suggest the presence of a deep reservoir of legislative support for interference with adults’ behavior. Yet in January of that year the press had reported that: “War is being made on cigarettes, and a law will probably be passed prohibiting their sale in the State. The opposition to the ‘paper pipes’ has spread extensively and petitions have been received by a large number of the legislators asking them to support any bill which will do away with the sale of cigarettes. One petition from Geneva Lake was signed by over 7,200 people.” Among the petitioners for a ban on cigarette sales was the WCTU. In 1893 the anti-cigarette bill was introduced through the efforts of Dr. Annette J. Shaw, a physician in Eau Claire, who was the state WCTU legislative superintendent as well as the national organization’s superintendent of health and heredity. The legislator who introduced the bill on February 15, Republican Duncan J. McKenzie, apparently suffered no detriment to his political career as a result of his advocacy of this radical intervention inasmuch as he was elected state railroad commissioner immediately following his one term in the Assembly. The 43-year-old Canadian-born legislator, after having worked in the lumber industry, was appointed district lumber inspector by the governor; he remained in that position for 11 years until 1889, after which he became mayor of the small Mississippi river town of Alma. The bill, No. 286, A., which was “an act to prohibit the use of cigarettes within the state of Wisconsin,” was more radical than the bills passed in 1892 by the Mississippi House or in 1893 by the Alabama House just two weeks before McKenzie filed his since they banned cigarette smoking only in public, whereas

only when parents notified dealers not to sell to their children opponents objected that it was impracticable and/or that it might be acceptable if public notice in a newspaper sufficed, but Krez rejected this alternative and the chamber adopted his substitute by a vote of 49 to 45. “Money for Milwaukee,” *MJ*, Mar. 18, 1891 (2:1).  


487 “A Busy Morning Session,” *MJ*, Jan. 22, 1891 (1:1). Oddly, the Wisconsin WCTU’s report to the Superintendent of Narcotics for the national convention omitted any mention of such a bill. Instead, it merely noted that neither of the bills—one denying a school teacher’s certificate to anyone who used tobacco and the other conferring on mothers the same right that fathers had to file legal complaints about tobacco sales to their children—that the group had prepared for the legislature had been introduced. *Minutes of the National Woman’s Christian Temperance Union at the Twentieth Annual Meeting...October 18-21, 1893*, at 320 (1893).  


the WCTU-McKenzie bill made it “unlawful for any person to use or smoke any cigarette or cigarettes within this state” subject to a fine of $25 to $50 or imprisonment in the county jail for 10 to 30 days. Despite press characterization of the Wisconsin legislature as “following in the wake” of its Minnesota counterpart, the House there had, like the two southern states, passed a no-cigarette smoking in public bill five days earlier. As radical as the measure was, it failed to satisfy at least one editorialist, who lamented on behalf of the Monroe Evening Times that it failed to ban sales as well: if use and sales bans were paired together, “there is no doubt but that a great good would result.

In contrast, the proposal encountered sarcastic-skeptical libertarianism from the Republican Milwaukee Sentinel, which a few days before McKenzie filed had already weighed in on the issue in response to the adult-coverage bills passed in the Alabama and Pennsylvanian House, whose majorities the paper accused of “trading on the general prejudice against cigarette-smoking,” on which they relied “to keep people from seeing the absurdity and viciousness of such legislation.” This verdict was independent of the health impact of the activity: if smoking cigarettes was harmless, there was no more reason to legislate against it than against “turning up one’s trousers when it isn’t raining....” If it was not harmless, then its evils no more called for corrective legislation than did eating candy, “letting yourself get too fat or too thin, or not taking a bath at short and regular intervals.” Moreover, since no one knew whether cigarettes were harmful, legislation would be premature even if it might be justified. Ignoring the understanding of dangers specific to cigarette smoking that physicians and scientists had already developed, the editorialist appeared to dare them to apply epidemiology to the subject: “Some cigarette-smokers die young; others live to


492 “To Prohibit Cigarette Smoking,” Evening Times (Monroe, W1), Feb. 16, 1893 (4:3).

493 See above this ch.

494 “To Prohibit Cigarette Smoking,” Evening Times (Monroe, W1), Feb. 16, 1893 (4:3). Some papers erroneously reported that the bill prohibited the sale of cigarettes. E.g., “Is Against Cigarettes,” MJ, Feb. 15, 1893 (2:1).

495 Remarkably, the Sentinel was a Republican newspaper, although that party predominantly supported anti-cigarette and other sumptuary intervention. The Blue Book of the State of Wisconsin 357 (1893).
1893: Annum Mirabilis

old age. Some people who do not smoke cigarettes die still younger than those who do. Some cigarette-smokers fail in life; other succeed. As soon as Bill No. 286 had been introduced, the Sentinel was ready with its next libertarian broadside:

We don’t know who Assemblyman McKenzie is, except that he is a daisy, and that under his conception of the duty of the state to society we are to be rid of the annoyances of life. ... The reason for this bill is that some people do not like the odor of the cigarette, and we suggest that the eating of onions, the smoking of cheap cigars and strong pipes be included in the prohibition. ... If we are going to prohibit the doing by some people of things that other people do not like, we must prohibit the wearing of red neckties as well as of hoopskirts...and also the public chewing of toothpicks. There is no end of the things done by somebody that somebody else doesn’t like.

Astonishingly, such live-and-let-live pseudo-analogies forged in a period when a goodly proportion of the population would have looked derisively on the underlying claim that “[s]urely the eating of mince pie is more fatal to good health than the smoking of cigarettes” almost a century later were still part of the cigarette industry’s mendacious propaganda pooh-poohing government intervention to suppress secondhand smoke exposure.

After 273 people had petitioned for passage of the anti-cigarette use bill, the Charitable and Penal Institutions Committee reported McKenzie’s bill back unanimously recommending that it pass, but with the gutting amendment that the penalty apply only to boys under 16, which the Assembly sitting as the Committee of the Whole adopted. During a 10-minute debate, Democrat John

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496 “Cigarettes,” MS, Feb. 10, 1893 (4:3) (edit.). Attacks on cigarette smoking had long preoccupied the paper: in 1892, anticipating late-twentieth-century cigarette-industry propaganda, it made much of the facts that most cigarette smokers were apparently sane and most people who went mad or died did not smoke cigarettes. “Cigarette Smoking and Insanity,” MS, Feb. 16, 1892 (4:3-4) (edit.).


499 Indeed, even with regard to smokers themselves, as late as 1976, the vice president for science and technology at Philip Morris USA, Helmut Wakeham (who had a Ph.D. in chemistry from the University of California at Berkeley) asserted that: “Apple sauce is harmful if you get too much of it.” Death in the West (1976).


501 In Assembly: Journal of Proceedings of the Forty-First Session of the Wisconsin Legislature: 1893, at 356, 371 (Mar. 2) (1893); “Bad Boys May Smoke,” MS, Mar. 3,
Ringle, who had been a member of both chambers previously as well as mayor of Wausau and owner of a saw mill and brickmaking company, denounced conviction of and infliction of such penalties on a boy under 16 as outrageous. He was joined by fellow Democrat Michael Edmund Burke, a lawyer who rose to the state senate and eventually to the U.S. House of Representatives, who allowed as he might vote for punishing boys over 16, but not those “under the age of discretion,” because such a bill “would be a weapon in the hands of spiteful neighbors.” Burke’s motion to table the bill was then upheld by a vote of 55 to 23, thus killing the WCTU-McKenzie initiative the day after the Washington State legislature had passed the first cigarette sales ban.

The Assembly vote typified the party-line and religion/nativity-based legislative positions concerning so-called sumptuary laws characteristic of the Midwest in the late nineteenth century. In a chamber controlled by Democrats 56 to 44, fully 21 of the 23 members who voted against tabling the bill were Republicans and only two were Democrats. Conversely, of the 55 who voted to table and thus kill the bill, only 11 were Republicans, while 44 were Democrats. Thus 96 percent of voting Democrats opposed the bill, while 66 percent of voting Republicans favored it. Seen from a somewhat different perspective: 91 percent of supporters were Republicans, while 80 percent of opponents were Democrats. To be sure, these party-line configurations referred to the watered-down bill that applied only to those under 16; had a vote been taken on the adult
cigarette smoking ban bill, the polarized proportions would presumably have been even starker. As for religion and nativity/ethnicity, a study of roll call votes on contested issues such as the “cultural questions” of liquor and cigarettes as well as labor relations and taxes in the 1893 Wisconsin Assembly revealed that Democratic German and Irish Catholics, German Lutherans, and Continental Protestants voted cohesively, while Republican Yankees, British, and Norwegian Lutherans achieved a somewhat lesser “degree of bloc solidarity....”

The sharp party-line vote reflected conflicts between the Democratic and Republican parties’ platforms so stark that, given the former’s control of the Assembly, they made defeat of the WCTU-McKenzie bill’s radical suppression of adult men’s consumer sovereignty virtually a foregone conclusion. For example, the Democratic state platform of 1890, which generally excoriated the Republican Party’s “unjustifiable interference with individual and constitutional rights,” in particular criticized “the settled republican policy of paternalism” and “opposed sumptuary laws as unnecessary and unwise interference with individual liberty.” The Democrats’ 1892 state platform elaborated on the same theme, assuring voters that “[w]e...will combat the abhorrent doctrine of centralization and paternalism....” Since Democrats had been able to undermine the “Republican hegemony” (that had resulted from “the voting loyalty of most Yankees and Scandinavians, and...Protestant Germans”) and wrest and retain control of state government in 1890 and 1892 in no small part by attacking “Republican intolerance” in connection with the Bennett Law of 1889—which, in requiring, inter alia, English-language instruction in certain school subjects, especially alienated German Protestants from the Republican Party—the latter’s proposed ban on cigarette smoking represented a further fertile field for entrenching the transformation of ethnic-religious voting blocs.

When the depression of 1893 swept away the historically aberrational Democratic electoral majority and ushered in four decades of large to

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510 *The Blue Book of the State of Wisconsin* 393-94 (1891).

511 *The Blue Book of the State of Wisconsin* 419 (1893).


1893: Annus Mirabilis

overwhelming Republican state legislative majorities, a side effect was the creation of ideological space in the Wisconsin legislature for prohibitory anti-cigarette measures, which, following one-chamber successes in 1901 and 1903, led to enactment of a general sales ban in 1905.

Massachusetts

The proposed bill to do away with the smoke nuisance in Boston ought to be made broad enough to cover cigarettes.

A sales ban bill textually identical to Horace Clayton’s. defeated by the Massachusetts House in 1892 by a vote of 73 to 113, was introduced at the next session in 1893. House No. 267 prohibited the manufacture, sale, or exposure for sale of cigarettes with paper wrappers or “cigarette tobacco in any form” subject to a $100 fine. It was introduced by Rev. John Brown of Fall River, an interesting political figure, who, at the request of the presiding officer, offered prayer at the session’s opening. Born in Scotland in 1843, he prepared for the University of Glasgow, but, after leaving it for lack of means, emigrated to the United States, where he was a farm worker until he entered Union Seminary in New York. After graduation he was licensed to preach by the Newark, New Jersey presbytery and headed west, preaching first in San Francisco until failing

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515 See vol. 2.

516 BDG, Mar. 22, 1893 (4:3) (untitled editorial).

517 See above ch. 3.


519 Journal of the House of Representatives of the Commonwealth of Massachusetts: 1893, at 3 (Jan. 4) (1893). According to the Journal his occupation was “minister.” Id. at 1144.

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lungs prompted him to move to Elko, Nevada, where in 1870 he built the first church between Omaha and Sacramento and from which he traveled hundreds of miles to preach in mining camps. After helping to put the church history department of Howard University on a firm basis and building numerous churches on the Texas frontier, in 1888 he was put in charge of a Presbyterian church in Fall River, where his espousal of the cotton operatives’ cause prompted workingmen to nominate him for the state House; endorsed also by Republicans in a strong Democratic district, Brown won his seat as a Labor and Independent Republican representative.\footnote{520}{A Souvenir of Massachusetts Legislators: 1893, at 135 (Vol. II).}

On March 22, the Public Health Committee, the joint standing committee to which the bill had been referred,\footnote{521}{Journal of the House of Representatives of the Commonwealth of Massachusetts: 1893, at 127 (Feb. 1) (1893).} seven of whose 11 members\footnote{522}{Journal of the House of Representatives of the Commonwealth of Massachusetts: 1893, at 26 (Jan. 10) (1893). Rule 1 of the Joint Rules of the Two Branches prescribed the appointment of three senators and eight representatives to each joint standing committee. Id. at 1180-81.} smoked,\footnote{523}{A Souvenir of Massachusetts Legislators: 1893, at 53 (Vol. II). This publication provided only aggregate committee-wide date on smoking without identifying individual members.} held a public hearing on the bill, of which, fortunately, the Democratic \emph{Boston Daily Globe} published a rather extensive, albeit sarcastic, account,\footnote{524}{Neither the \emph{Boston Daily Advertiser} nor the \emph{Boston Evening Transcript} appears to have covered the hearing. The Massachusetts Archives shelf list has no separate records for the Public Health Committee that might contain hearing transcripts or minutes. Email from Jennifer Fauxsmith, archivist, to Marc Linder (Dec. 6, 2010).} whose headline and first three subheads read: “A Woman’s Fancy. Cigarettes Are Pandora’s Box to Her. Ella A. Gleason and Legislators Have a Smoke-Talk.” The redoubtable, irrepressible, and ubiquitous Gleason, the WCTU’s state superintendent of narcotics, who played a key role at the 1892 hearing and would again appear at center stage during legislative proceedings in 1898 (as well as in neighboring Maine in 1897),\footnote{525}{See below ch. 6.} declared at the outset that “she was intensely surprised that there was no one besides herself present to speak in favor of the bill.” (In fact, her surprise must have been rhetorical since, as she regretfully stressed in her closing speech, no “notice” had been given to others interested in the bill’s passage.)\footnote{526}{“A Woman’s Fancy,” BDG, Mar. 22, 1893 (8:6-7). On March 20 and 21 the \emph{Boston Daily Advertiser} published three columns and two columns, respectively, of descriptive announcements of committee hearings, but none of the Public Health Committee. BDA, 526}
Referring to an WCTU activist, she bemoaned: “I don’t know...what the arguments of a white-ribbon woman will have against all the powerful cigarette manufacturers and the lawyers and chemists they hire.” Proceeding to the nub of her objections, Gleason professed to be speaking for boys and young men under 21 because, she dubiously asserted, “there are not a great many men who are addicted to the habit....” She then advanced three reasons for abolishing cigarettes, one of which, the alleged presence of opium, the Globe helpfully refuted by reference to the state chemist, who, interestingly, added that nicotine caused more injury than opium. In addition to the by this time commonly adduced ruinous health consequences of inhalation specific to cigarettes Gleason denounced their cheapness, which meant that “[a]nybody 6 or 7 years of age can get five cents and buy” a package of 10.

Brown agreed with Gleason’s boy-centric approach—“If we men choose to go to the devil with our eyes open, it is all right; but we make this plea for the boys, who do not know differently”—but did not, at least according to the Globe’s account, explain why his bill deprived those very men of their freedom to go to health hell, though perhaps this proposed curtailment underlay the “laughter” that, to his surprise, met H. 267 in the House when it was first reported. Nevertheless, Brown’s further statement revealed more than a little tension between his position and the WCTU’s by indicating his lingering affection for other modes of tobacco use such as pipes and cigars: “Mr Brown said that there was no doubt but that a clay pipe smoke to a tired man had a soothing effect and also that tobacco was a preventive to some diseases.” Not a compromiser who would cut even her most important political ally the slightest slack, Gleason immediately attacked, seemingly on gendered grounds, extracting from Brown the confession that he “wouldn’t like it” if his wife smoked a clay pipe. Perceiving what an ideologically unreliable fellow she had attached her legislative star to, Gleason also made clear her wish to “answer every question” that the remonstrants’ spokesmen had asked Brown. Thus her insistence that cigarette smoking certainly inflicted greater injury than cigar smoking because the latter did not involve inhalation prompted one of the two pro-tobacco advocates, Democrat John R. Thayer, a lawyer, former state legislator, and

Mar. 20, 1893 (2:3-5); BDA, Mar. 21, 1893 (2:4-5). Announcements of two Public Health Committee hearings appeared a week earlier, but not for the anti-cigarette bill. BDA, Mar. 14, 1893 (2:4-5).

527“A Woman’s Fancy,” BDG, Mar. 22, 1893 (8:6).
528“A Woman’s Fancy,” BDG, Mar. 22, 1893 (8:6).
529The other was Jacob Otis Wardwell, a corporation lawyer, former state House member, and a leading Massachusetts Republican, who would play a prominent part in
future three-term congressman, sought to hurl her down the slippery slope to utopian failure by remarking that “if you had your way you would stop the smoking of cigars or tobacco in other forms.” Though the newspaper, unfortunately, did not make it clear to posterity whether Gleason was displaying a sense of self-irony, she immediately shot back: “‘My dear sir...if I had my way I would prohibit everything evil on the face of God’s earth!’” Undeterred, Thayer persisted in trying to corner her: “‘Mrs. Gleason, would you not work just as hard to stop the sale of cigars?’” Demonstrating, finally, that she was not an out and out maximalist who eschewed all Realpolitik even with regard to an evil as extreme as tobacco, she emphatically denied that she would.

Speaking in his own right as a remonstrant, Thayer asserted that, though “not absolutely harmless,” cigarettes “were not so deleterious as cigars.” He was followed by Daniel J. Campbell, styled merely a cigarette manufacturer from New York, but in fact of the American Tobacco Company, amin Tobacco Trust, who proceeded to convert a committee room table into a “miniature cigarette manufactory” and actually “manufacture a cigarette.” He also assured those present that there was no opium or morphine whatsoever in cigarette tobacco and that it “would not pay to use opium....” Going far beyond the chemical testimony at the 1892 hearing, Professor Charles Mayer of Springfield, a chemist and a cigarette smoker, claimed as the result of what he characterized as his “careful and thorough analysis” that smoking 20 cigarettes a day, which were as injurious as three cigars, would be certainly be injurious for a child up to the age of 12, but not to most adults; and even a child of 10 could smoke one cigarette a day without harm, the daily threshold beyond one not being generalizable. If Mayer explained the scientific basis of these assertions, the Globe reported it as little as that underlying a communication that Thayer read into the record from a former state opposing the sales ban bill in 1898. See below ch. 6.


531“A Woman’s Fancy,” BDG, Mar. 22, 1893 (8:6).

532“A Woman’s Fancy,” BDG, Mar. 22, 1893 (8:6).

533“H. F. Clinton Charged with Larceny,” NYT, Oct. 20, 1894 (6). Campbell, who died at the age of 65 in 1918, a decade after retiring, had invented various labor-saving devices for the tobacco industry. “Obituary Notes,” NYT, July 11, 1918 (11). Around the turn of the century he was a member of the board of directors and brother of the president of the Universal Tobacco Co. “Failed to Obey Subpoenas,” NYT, Nov. 22, 1903 (20); McAlpine v Universal Tobacco Co., 57 A. 418 (NJ Chancery 1904).
senator who asserted that in 25 years of selling cigarettes he “never personally knew of a case of injury resulting to any person.” Based on such meaningless charges, Thayer, in his closing argument executed the unmediated leap to the conclusion that it was not within the legislature’s province to legislate a cigarette sales ban because: “It has not been proved and cannot be proved...that cigarette smoking is as injurious as cigar smoking, or even injurious at all.”

Following the hearing, the House took no action on the bill at all, but on April 10, the joint standing Public Health Committee reported the bill to the Senate with an “ought not to pass” recommendation, and the next day that chamber rejected H. No. 267. Despite this infliction of an even more severe defeat than that at the 1892 session, the anti-cigarette forces in Massachusetts would persevere in their legislative efforts during the remainder of the decade.

A Different Strategy: (Purportedly) Prohibitorily High Licenses for Cigarette Sales

Politicians having licensed the liquor business for so many years are now turning their attention to the tobacco trade and talking about securing more revenue from the sale of tobacco.

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535Pursuant to Rule 4 of the Joint Rules of the Two Branches, “Joint committees may report by bill...to either branch, at their discretion, having reference to an equal distribution of business between the two branches.” *Journal of the Senate of the Commonwealth of Massachusetts: 1893*, at 1182 (Apr. 10) (1893). Ignorance of this rule presumably explains the opinion of a reference librarian at the Massachusetts State Library that it was more plausible that the House *Journal* had neglected to include House passage of the bill than that the Senate had rejected a House bill that the House had never passed. Telephone interview with unidentified librarian, Boston (Feb. 17, 2010).
537House, No. 267, Bill File, Apr. 11, 1893 (Senate rejected) (copy furnished by Massachusetts Archives); *Journal of the Senate of the Commonwealth of Massachusetts: 1893*, at 545 (Apr. 11) (1893). See also *Journal of the House of Representatives of the Commonwealth of Massachusetts: 1893*, at and 690 (Apr. 13) (1893) (House received notice from Senate of that latter’s rejection of the bill).
538See below ch. 6.
539*Minutes of the National Woman’s Christian Temperance Union at the Eighteenth Annual Meeting: Boston, Mass., November 13th to 18th, 1891*, at 98 (1891).
In some states and cities\textsuperscript{540} some adversaries of cigarettes—but not the WCTU, which opposed “licensing evil”\textsuperscript{541} whether it was alcohol\textsuperscript{542} or cigarettes—sought to achieve their ultimate goal of cutting off minors’ access by the more indirect means of financially discouraging dealers from selling cigarettes in the first place by imposing a license tax substantial enough to wipe out their profits. Such initiatives may have been less confrontational (especially vis-a-vis consumers) than outright bans, but they were nevertheless commonly understood as prohibitory in intent—unlike their progenitor, the high license for saloons, which, while perhaps reducing somewhat the total number of places selling alcohol, was intended both as an alternative to, not an instantiation of, prohibition and a source of tax revenue\textsuperscript{543}—though, as the case of the 1891 Atlanta ordinance

\textsuperscript{540}For example, the city council in Springfield, Missouri “made war on cigarettes by ordering all dealers to pay an annual license of $250. No dealers felt able to pay this license....” “Can’t Pay the Cigaret License,” \textit{CT}, Sept. 23, 1894 (2). A $100 license in Hartford City, Indiana was viewed as “practically prohibitive.” “Heavy License on Cigarettes,” \textit{Fort Wayne News}, July 20, 1896 (4:6). When the mayor of Emporia, Kansas—who was also the city’s largest tobacco dealer—vetoed an ordinance, passed unanimously by the city council, imposing a $500 license, he claimed that it would be unconstitutional because the amount made it prohibitory. “Mayor Has An Eye on His Trade,” \textit{CT}, Feb. 7, 1894 (3). To be sure, if the mayor needed a basis other than profit-seeking self-interest, the “cigarette trust” provided it when, following the ordinance’s passage, it sent its “western agent...to lay its side of the case before the mayor and...also supplied the mayor with a liberal assortment of printed documents in favor of cigarettes.” “A Veto Probable,” \textit{EDG}, Feb. 3, 1894 (4:3).

\textsuperscript{541}T. Holman, “Tennessee,” \textit{US} 19(21):12 (May 18, 1893). The assertion—based on non-primary sources themselves far removed from primary sources—by Jacob Sullum, \textit{For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health} 30 (1998), that between 1893 and 1909 a number of states enacted anti-cigarette sales and possession statutes and “[t]wo other states, Tennessee and West Virginia, imposed prohibitive taxes. Such laws were supported...by “Gastonites” contained numerous factual errors: the law that Tennessee passed in 1899 imposing a risible $10 occupational tax was in reality a mulct rather than a license tax; many other states did pass cigarette sales license taxes; none of them was prohibitory; and the “Gastonites” (by which he also meant the WCTU) opposed them. See below this ch.

\textsuperscript{542}Frances Willard stated in her 1894 WCTU presidential address that the Republicans’ advocacy of high license had wrought “devastation” to the temperance movement, which she illustrated by reference to Iowa, whose “degeneracy...is perhaps more marked than of any other in the Union.” \textit{Minutes of the National Woman’s Christian Temperance Union at the Twenty-First Annual Meeting...Nov. 16-21, 1894, at 101 (1894).

\textsuperscript{543}An exemplary statement of the objectives of high license was made by the eminent lawyer James C. Carter in New York: “The sum to be paid for the license must be so large
had already demonstrated, some dealers challenged them on the grounds that, instead of deterring sales, they merely facilitated monopolization by promoting concentration of sales among the largest dealers whose high volume made it possible for them to pay the tax and still sell with profit.

This view was emphatically argued in 1891 by Tennessee state Senator Thomas J. Alexander in explaining his vote against one of the earliest cigarette license bills:

I do not know the object of the bill, but I do not believe it will prevent the use of cigarettes. The only effect it will have will be to force the man of small means to evade the law and drive him out of the business entirely, and thus turn the whole cigarette business over to the rich capitalist, who is able to pay the tax, thereby giving him a monopoly of the business in that character of goods.

When Baltimore Democrat and lawyer John B. Keplinger introduced a bill on January 30, 1890, in the Maryland House of Delegates to add cigarette sellers to the list of traders required by the state code to pay for a license, barely a week had passed since “a gigantic Cigarette Trust...on the lines of the Sugar Trust” had been formed: on January 21, a certificate of incorporation of the

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544 See above ch. 3.
American Tobacco Company had been filed in New Jersey; ATC, whose capital stock was $25 million, had taken in “the properties of nearly all the large cigarette manufactories” in the United States. 547  As enacted in March, the cigarette sales license cost sellers $50 548—a small fraction of the charge that several other states would soon impose, but much higher than the mere $10 to which the legislature would reduce it in 1896. 549

Unsurprisingly, the Maryland Woman’s Christian Temperance Union appears to have had nothing to do with the license bill. Oddly, however, whereas three long field reports from the state group that the National WCTU published in its weekly publication during the first few months of 1890 contained detailed sarcastic commentary on high-license liquor bills being considered by the legislature, they never alluded at all to cigarette sales licensure. 550

While the legislature was considering the bill, tobacco dealers attending at the statehouse “apparently” favored passage, whereas one large cigarette dealer opposed it on the grounds that cigarette sales did not generate enough profit for 3,000 stores to pay $50 for a license: “‘It is not just that nine-tenths of the storekeepers are put out of their share of profits...and one-tenth of storekeepers get the entire profit, amounting to about $40,000 a year. It is a bill for the large stores against the small ones, and therefore unjust, unfair and undemocratic.’” 551 Even at $50, proponents argued that the fee “will no doubt have the effect to reduce the use of cigarettes very materially in the country districts, as the few dealers will take out the extra license required to sell them.” 552 (That pattern

547 “A Cigarette Trust Now,” CT, Jan 22, 1890 (5).
548 1890 Maryland Laws ch. 91, at 75. Sellers were also required to state (falsely) on oath that the cigarettes they sold contained no injurious drug or narcotic. The bill passed the House by a vote of 57 to 0. Journal of the Proceedings of the House of Delegates of Maryland, January Session, 1890, at 471 (Feb. 25) (1890). The Senate vote was also unanimous. “The Cigarette Bill Passed,” Daily News (Frederick), Mar. 11, 1890 (4:1).
549 1896 Maryland Laws ch. 439 at 751.
550 M.A.L., “Maryland,” US 16(6):10 (Feb. 6, 1890); M.A.L., “Maryland,” US 16(15):10 (Apr. 10, 1890); M.A.L., “Maryland,” US 16(23):10 (June 15, 1890). The last article mentioned “[a]mong the good works of the legislature...the cigarette bill, presented by the W.C.T.U.” Presumably it was alluding to 1890 Maryland Laws ch. 496, at 547, which merely raised from 14 to 15 the minimum age at which tobacco could be sold to minors (unless parents gave written consent). For the liquor license bill applicable to Baltimore, see 1890 Maryland Laws ch. 334 at 365. Similarly, the national WCTU periodical mentioned passage of a high-license bill in Maryland, but not the cigarette license bill. “Since Our Last Issue,” US 16(17):1 (Apr. 24, 1890).
551 “The Cigarette License,” News (Frederick, MD), Mar. 5, 1890 (1:7).
1893: *Annus Mirabilis*

would, later in the decade, be replicated under the Iowa cigarette sales ban, which was more strictly enforced outside of the larger cities.\(^{555}\) The law’s supporters also contended that it was in part well designed to secure its objective of reducing boys’ access to buying cigarettes. For example, in Frederick (population 8,193)\(^{554}\) it was clear to the local press that:

There is not enough profit on the sale of cigarettes to justify their being handled by many dealers in this city, with the additional rate of license, and the number of convenient shops for purchasing this little article of daily use will be greatly decreased.... The boy who now slyly glides into the grocery store on the corner to purchase his “smoke,” which he indulges in at some distance from his home and away from papa, must boldly walk into a cigar store among the “big men” and buy his cigarettes with a chance of meeting his father or seeing someone who will “tell mamma.” In this respect the law will be of great benefit, while the advantage to sellers of cigars will be quite as great as in the absence of the cheaper and inferior article, cigars, in which there is greater profit, will be in greater demand....\(^{555}\)

More importantly, even in the state’s largest and the country’s seventh largest city the *Baltimore Sun* concluded that the $50 license would “undoubtedly check the sale” of cigarettes, but would “not prevent the sale altogether.” The reason for the predicted drop in the number of sellers from 3,100 to 100 was the pre-license low level of profits, which was, according to dealers, rooted in competitively driven “ruinously low” prices. So many merchants nevertheless continued to sell cigarettes “because they were demanded, and no stock was complete without them. ... The point is that trade in other goods would be lost if cigarette smokers went elsewhere to get their favorite form of smoking goods.” This commercial logic required larger downtown stores to keep selling cigarettes as loss leaders “to hold customers for articles of greater profit,” whereas “very small general stores, whose small cigarette profits “had some importance as part” of the business’s general returns would “lose by the new law.” (As a threshold matter, with profits of one cent per package of 10 cigarettes, a dealer would have to sell 50,000 cigarettes a year or 16.6 packages a day just to break even on the license.) If, as was deemed probable, much of the general tobacco trade drifted to the big tobacconists, such “concentration” might enable them to profit from cigarette sales.\(^{556}\)

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\(^{553}\)See below Part II.


\(^{555}\)“The Crusade Against Cigarettes,” *Daily News* (Frederick), Mar. 24, 1890 (3:4).

\(^{556}\)“The Cigarette Law in Maryland,” *DP*, Apr. 26, 1890 (3:3) (reprinted from *Baltimore Sun*).
In 1891 one legislative chamber in each of two states passed high-license bills for cigarettes. In Indiana, Democrat Henry Thienes of the House (which was controlled by Democrats by more than a three-fourths majority)\textsuperscript{557} introduced a bill to require cigarette sellers to buy a $200 annual license,\textsuperscript{558} which was “intended practically to prohibit the sale of cigarettes in Indiana....”\textsuperscript{559} While the State Medicine and Health Committee was recommending its passage,\textsuperscript{560} Thienes revealed that tobacco dealers had “telegraphed to the big manufacturers in the East to help them” defeat his bill, which would “make cigarettes so expensive that dealers cannot afford to handle them” and “put them to a large extent out of reach of boys”—of whom alone in Marion County (Indianapolis) 10,000 were smoking cigarettes—whose access had not been cut off by the existing “dead letter” of a no-sales-to-minors law.\textsuperscript{561} In the course of the House floor debate on the bill, which the Democratic \textit{Indianapolis Sentinel} regarded as supposed to “protect the dudes from the cigarette incense,” Republican lawyer Jefferson Claypool “insinuated that the bill was in the interest of cigar-makers of the state and not for the protection of the youth,” prompting Thienes to reply that the cigarettes manufacturers had formed a trust.\textsuperscript{562} Following a long discussion replete with advocates’ “horrible pictures of the ravages of the cigarette,”\textsuperscript{563} the House passed the bill by the overwhelming vote of 79 to 7.\textsuperscript{564} For at least one Republican


\textsuperscript{558}[H.B. No.] 268, § 1 (copy furnished by Indiana Commission on Public Records/Indiana State Archives); \textit{Journal of the House of Representatives of the State of Indiana, During the Fifty-Seventh Session of the General Assembly, Commencing Thursday, January 8, 1891: Regular Session}, at 205 (Jan. 19) (1891) (H.B. No. 268). The bill, which also applied to manufacturers, required them and dealers to state on oath that they would sell only cigarettes containing “no injurious drug or narcotic....” Violations were subject to fines between $300 and $600 and/or imprisonment in county jail, work house, or penitentiary for six months to a year. [H.B. No.] 268, §§ 2, 4. See also “Legislature” \textit{Fort Wayne Sentinel}, Feb. 4, 1891 (2:3-4).

\textsuperscript{559}“New Systems of Taxation,” \textit{CT}, Feb. 22, 1891 (6).

\textsuperscript{560}\textit{Journal of the House of Representatives of the State of Indiana, During the Fifty-Seventh Session of the General Assembly, Commencing Thursday, January 8, 1891: Regular Session}, at 368 (Jan. 28) (1891).

\textsuperscript{561}“Odds and Ends,” \textit{IJ}, Jan. 29, 1891 (5:3).


\textsuperscript{563}“The Horrible Cigarette,” \textit{IJ}, Feb. 4, 1891 (5:3).

\textsuperscript{564}\textit{Journal of the House of Representatives of the State of Indiana, During the Fifty-Seventh Session of the General Assembly, Commencing Thursday, January 8, 1891:}
newspaper the projected smaller sales “would be most desirable to a majority” of Indiana citizens.\textsuperscript{565}

As would be replicated in other states considering cigarette license laws, Thienes’s bill prompted the criticism that rather than check cigarette use, it would merely “tend to create a monopoly in the hands of larger dealers,” of whom there were only few. Moreover, one dealer complained in a heartstrings-tugging letter to the editor: “More than one-half the cigar and tobacco stands in the United States are owned by men of small means and, in many instances, by crippled soldiers and their widows who would be unable to pay the license fee, and would thereby be deprived of keeping cigarettes in stock, while the larger dealers would.” Little wonder, then, that with cigar makers imagining that licensure would reduce cigarette sales and increase that of cigars, they and larger dealers were the “two classes who are pushing the bill....”\textsuperscript{566}

The chief advocate for the bill during floor debate in the Senate (more than two-thirds of whose members were Democrats)\textsuperscript{567} was Henry Hudson, remarkably enough an Indianapolis plumbers union president, Knights of Labor member, Irish Catholic, and Democrat,\textsuperscript{568} who focused on cigarettes’ ruinous physical effects on boys as well as the “demoralizing effects of the lascivious pictures that decorate every package.”\textsuperscript{569} When fellow Democrat Frank Burke, a prosecuting attorney,\textsuperscript{570} elicited from Hudson that Thienes was a cigar maker, Burke was able to snap the trap and conclude that the bill’s purpose was to advance Thienes’s interests by increasing cigar sales by restricting those of cigarettes. Insisting that he was opposed to legislating for one industry at another’s expense, Burke also went on record against “creating a monopoly by throwing the sale of cigarettes in a city like Indianapolis into the hands of two or three men.”\textsuperscript{571} After a coalition

\textit{Regular Session}, at 470-71 (Feb. 3) (1891).
\textsuperscript{565}\textit{Cambridge City Tribune}, Feb. 5, 1891 (2:4) (untitled).
\textsuperscript{566}Dealer, “Cigarettes in Indiana,” \textit{DIO} (Chicago), Feb. 9, 1891 (4:7) (letter to editor).
Almost a century later a similar plea was made on behalf of blind people who operated cigarette vending machines in the statehouse in Des Moines not to ban them. See below Part VI.
\textsuperscript{569}“The Talkative Senators,” \textit{IJ}, Feb. 22, 1891 (6:4-6).
\textsuperscript{571}“The Talkative Senators,” \textit{IJ}, Feb. 22, 1891 (6:4-6). Thienes was returned as a
of 12 Republicans and 11 Democrats had defeated a motion supported only by (17) Democrats to substitute the Public Health, Vital and Other Statistics Committee minority report (which recommended indefinite postponement) for the majority report (recommending passage), in which the House then concurred. \(^{572}\) Burke offered a killer amendment to subject cigar sales to licensing, too, on the grounds that morality called for movement “all along the line” as well as to provide the state with needed revenue. Hudson’s motion to reject the amendment lost on a non-party-line vote of 17 to 22, \(^{573}\) but the amendment itself also lost, though only by (another non-party-line ) 20 to 21 after the Republican lieutenant governor cast the deciding vote. \(^{574}\) Then Republican lawyer Robert Loveland moved an amendment to add “vinous, malt or other intoxicating liquors” (thus doubling the liquor license to $200), discussion of which and personal liberty displaced that of tobacco. In the welter of referral and tabling motions the amendment failed to come to a vote. \(^{575}\) More, doubtless, on substantive grounds,

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\(^{572}\) *Journal of the Indiana State Senate, During the Fifty-Seventh Session of the General Assembly, Commencing Thursday, January 8, 1891: Regular Session*, at 768 (Feb. 21) (1891) (17 to 23). The Public Health Committee to which the bill had been referred split into a four-member majority (including Hudson) and a three-member minority, the former recommending passage and the latter indefinite postponement. *Id.* at 499-500 (Feb. 14). The reports are included in the Engrossed House Bill No. 268 file (copies furnished by Indiana Public Records Commission/State Archives).

\(^{573}\) *Journal of the Indiana State Senate, During the Fifty-Seventh Session of the General Assembly, Commencing Thursday, January 8, 1891: Regular Session*, at 769 (Feb. 21) (1891). Four Republicans and 13 Democrats voted for and 7 Republicans and 15 Democrats against the motion.

\(^{574}\) *Journal of the Indiana State Senate, During the Fifty-Seventh Session of the General Assembly, Commencing Thursday, January 8, 1891: Regular Session*, at 769 (Feb. 21) (1891); “The Talkative Senators,” *IS*, Feb. 22, 1891 (6:4-6). Seven Republicans and 13 Democrats voted for and 5 Republicans and 15 Democrats against the motion.

the *Sentinel* bemoaned that the Senate had wasted a day and a half on a cigarette bill. After further procedural skirmishing, the Senate four days later, killed the bill by indefinitely postponing it, all 23 Yes votes being cast by Democrats. The Tennessee Senate in 1891 sought to intensify the prohibitory force of cigarette sales licensure with a bill that raised the fee tenfold to $500. The bill was introduced by Van Leer Polk (a grand nephew of former President Polk), the editor of a major Nashville newspaper who two years later was appointed U.S. consul general in Calcutta, India. The Senate passed his bill to make it a privilege to sell cigarettes by a vote of 24 to 5. That Polk pursued an at least partly progressive agenda was signaled by his having moved an amendment to another bill to make common carriers liable for employees’ injuries caused by fellow servants’ and co-employees’ carelessness, negligence, inefficiency, or incompetence; in contrast four of the five senators who voted against his high-license bill opposed this worker-friendly amendment. The licensure bill did not, however, become law because it died in committee in the House—to the relief of the WCTU, which favored the no-sales-to-minors bill, which the legislature passed. While admitting that such a high license fee would amount

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576 IS, Feb. 23, 1891 (4:4) (untitled edit.).  
577 *Journal of the Indiana State Senate, During the Fifty-Seventh Session of the General Assembly, Commencing Thursday, January 8, 1891: Regular Session, at 776-77 (Feb. 25) (1891).* The 18 opponents were divided between 11 Republicans and 7 Democrats.  
581 *Senate Journal of the Forty-Seventh General Assembly of the State of Tennessee* 272 (Mar. 4) (S.B. No. 216) (1891).  
584 See below ch. 5. Oddly, three weeks after the first bill had been approved by the governor, the Tennessee WCTU’s state reporter informed the national organization that the legislature had voted down such a bill because it considered the bill that it had just enacted imposing a $500 license fee on cigarette sellers to suffice. T. Holman, “Tennessee,” *US* 17(16):11 (Apr. 16, 1891). In fact, no such bill was passed, and two
to “virtual prohibition in the smaller towns,” the state organization adamantly insisted that “licensing evil is wrong, and no sophistry can make it right. If cigarette smoking is wrong and injurious to boys, I cannot see how a $500 license can make it harmless.”

City-level cigarettes sales license ordinances proliferated during the 1890s. In 1896, for example, several towns in Indiana (which did not enact a statewide cigarette sales ban until 1905) adopted ordinances imposing hefty license fees, which in places with small populations and corresponding cigarette markets were designed to be “practically prohibitive.” The city council of Hartford City (pop. 2,287 in 1890) required dealers to pay $100 for a license and $25 to $100 in penalties. The council in Shelbyville (pop. 5,451 in 1890) “intended” that its $1,000 mandatory retail license “should prohibit the sale of cigarettes”; as a flanking measure, the ordinance also made it a misdemeanor for anyone under 21 “to smoke a cigarette of any kind within the corporate limits of the city....”

“[F]or the sake of the health of the young men and boys who are addicted to the cigarette habit,” Indiana’s second largest city, Fort Wayne (pop. 35,393 in 1890), charged $500 a year for the license and imposed a fine of up to $100 for violators. Such municipal ordinances, given their numbers and high license fees—Denver, for example, in 1897 fixed the charge at $1,000, prompting a police magistrate to void it as excessive and unreasonable—may have eclipsed state laws in prominence, especially after the U.S. Supreme Court in 1900 upheld
as a proper exercise of the police power, the $100 annual license that Chicago had instituted in 1897 after several years of efforts, highlighted by nationally publicized allegations of the American Tobacco Company’s bribes to city council members.

Examination of the license tax laws enacted in Nevada and Ohio in 1893—but soon pared back after being challenged by the industry—and initiated in Texas that year but not enacted until 1897 rounds out the panorama of 1893’s intense legislative attacks on the fledgling commodity.

**Nevada**

A bill has been introduced in the Nevada legislature to provide for licensing the sale of cigarettes... The license will be $600 a year... Violators shall be fined not less than $100 nor more than $500. The bill ought to pass and the fines collected devoted to the damphool infirmary, which would be without inmates and have no excuse for its existence were it not for cigarette smokers.

As the most sparsely populated state in the country in the 1890s, Nevada was arguably in the best position to deploy a high-license strategy to deter merchants from selling cigarettes. In 1887 Nevada had made it unlawful to sell cigarettes or any tobacco to persons under 18 (except with a parent’s written order) subject to a penalty of a fine up to $200 and/or imprisonment of up to two months. Two years later the legislature increased the penalty to a fine ranging between $100 and $500 and/or 50 days to six months in jail. In addition, any dealer convicted twice of violating the law was required to forfeit his license, and

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592 Gundling v Chicago, 177 US 183 (1900), aff’g Gundling v City of Chicago, 176 Ill 340 (1898).
593 See below ch. 6.
594 In 1892 Kentucky passed and repealed a $300 cigarette license bill. “Kentucky State News,” Hickman Courier, May 13, 1892 (1:6); “Newsy Notes,” Semi-Weekly Interior Journal (Stanford, KY), May 10, 1892 (2:2); Minutes of the National Woman’s Christian Temperance Union at the Nineteenth Annual Meeting: Denver, Col., October 28th to November 2d, 1892, at 94 (1892).
595 Standard (Ogden, Utah), Feb. 15, 1893 (4:2) (untitled).
596 In 1890 and 1900 Nevada had both the smallest population and the lowest density of any state. U.S. Census Office, Census Reports, Vol. 1: Twelfth Census of the United States, Taken in the Year 1900: Population, Pt. 1, tab. 1 at 2, tab. 3 at 6 (1901).
597 1887 Nevada Laws ch. 73, at 80.
no license could be granted to him to carry on a like business again. With a total population of only 45,761 and its three largest towns, Virginia City, Carson City, and Reno, inhabited by only 8,511, 3,950, and 3,563 persons, respectively, Nevada had local cigarette markets whose minuscule sizes lacked the scale that sellers supposedly required to secure profits sufficient to pay off the license. Indeed, since Nevada, as a result of the deep depression that had begun in 1880 when silver mining, its only industry, reached a “standstill,” was the only state whose population shrank between 1890 and 1900 (as it had also been during the 1880s), the aforementioned figures were overstated by 1893 (when the legislature acted), especially in the two largest towns, whose populations by 1900 had plummeted to 2,695 and 2,100.

Nevada’s regulatory initiative in 1893 (Assembly Bill No. 37: An Act licensing the sale of cigarettes) was introduced by William Henry Asbury Pike (1854-1910) on February 2. After having been a Republican and Democratic state legislator in the 1880s, Pike served in 1893 as speaker pro tem and chairman of the Ways and Means Committee as a People’s party member. Born in Maine, a Puritan descendant, Pike attended Bowdoin College and then

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598 1889 Nevada Laws ch. 85, at 82.
600 U.S. Department of the Interior, Census Office, Report on the Population of the United States at the Eleventh Census: 1890, Pt. I, tab. 5 at 235-36 (1895). The state’s three population centers were located very close to one another.
602 U.S. Census Office, Census Reports, Vol. 1: Twelfth Census of the United States, Taken in the Year 1900: Population, Pt. 1, tab. 2 at 4 (1901). The state’s population fell to 42,335 by 1900.
603 U.S. Census Office, Census Reports, Vol. 1: Twelfth Census of the United States, Taken in the Year 1900: Population, Pt. 1, tab. 5 at 264-65 (1901). Only Reno’s population rose—to 4,500. Virginia City, on its way to ghost town status, lost population because of the decline of gold and silver mining, while the capital city’s population fell as a result of a shift in railroad routes.
604 The Journal of the Assembly of the Sixteenth Session of the Legislature of the State of Nevada, 1893, at 63 (Feb. 2) (1893).
606 History of the Bench and Bar of Nevada 81 (J. P. O’Brien ed. 1913).
apprenticed in a law office before moving to Nevada in 1874, where he taught school and was a school principal and superintendent before serving another law apprenticeship.\footnote{Thomas Wren, \textit{A History of the State of Nevada: Its Resources and People} 506-507 (1904).} Returned as stock raiser at the 1880 Census of Population,\footnote{1880 Census of Population (HeritageQuest).} Pike, after leaving the legislature, became district attorney of Washoe County\footnote{Thomas Wren, \textit{A History of the State of Nevada: Its Resources and People} 506-507 (1904).} and in 1906 was elected state district judge,\footnote{\textit{History of the Bench and Bar of Nevada} 81 (J. P. O’Brien ed. 1913).} in which capacity \textit{The New York Times} pilloried and mocked him—displaying his photograph in the Sunday magazine over the caption, “Judge Pike, Who Decides Half of the Divorce Suits”\footnote{“Reno, Nevada, Inherits the Sioux Falls Industry,” \textit{NYT}, July 18, 1909 (Sunday Magazine 5).}—for presiding over the Reno divorce mill for (celebrity) out-of-staters with no ties to Nevada.\footnote{“Reno’s Sensitive Judge,” \textit{NYT}, Nov. 16, 1909 (8); (“A well defined demand for quick and easy divorces is the justification of Reno and its Judges”); “Judge Pike’s Moral Resolve?” \textit{NYT}, Dec. 26, 1909 (10) (edit.). The newspaper doubted that “Nevada would voluntarily relinquish the profits of the illicit divorces which they customarily grant.” “A Nevada Divorce,” \textit{NYT}, Oct. 4, 1908 (8) (edit.). Fearing that granting a divorce to a New Yorker who did not even bother to appear in his court “would make him the laughing stock of the whole country,” Pike did set some standards. “Divorce Court Reform,” \textit{NYT}, Apr. 11, 1909 (10) (edit.) (quote): “Sothen Divorce Refused,” \textit{NYT}, Oct. 9, 1908 (1); “Nevada Divorces,” \textit{NYT}, Oct. 11, 1908 (10) (edit.); “Won’t Divorce Mrs. Sothen,” \textit{NYT}, Apr. 20, 1909 (1).} Republicans had been the dominant political party in Nevada until 1892, when state politics were restructured in the wake of the emergence of the Silver party, which supported the People’s party—which also advocated free coinage of silver—whose presidential candidate, James B. Weaver, received two-thirds of the state’s vote, his highest share in the country,\footnote{John Hicks, \textit{The Populist Revolt: A History of the Farmers’ Alliance and the People’s Party} 263-65 (1961 [1931]); Sally Zanjani, “A Theory of Critical Realignment: The Nevada Example, 1892-1908,” \textit{Pacific History Review} 48(2):259-80 at 260, 266 (May 1979). On the self-contradictory espousal of free silver by the Populist party, see Lawrence Goodwyn, \textit{The Populist Moment: A Short History of the Agrarian Revolt in America} 233-37 (1978).} while the local Silver party
gained control of the Assembly.\footnote{In the 30-member chamber Silverites occupied 15 and Populists 7 seats. Republicans nominally still controlled nine of the 15 Senate seats, with Silverites holding five and Populists one, but when two Republicans voted with the Silverites, the latter secured control of that chamber as well by one vote. “Nevada Legislature,” \textit{DNSJ}, Jan. 17, 1893 (3:2); \textit{Political History of Nevada} 254 (Renee Parker and Steve George ed., 11th ed. 2006); Mary Glass, \textit{Silver and Politics in Nevada: 1892-1902}, at 71-73 (1969).}

Pike’s bill imposed a $150 quarterly license for the sale of cigarettes, cigarette paper, or cigarette paper beginning on July 1, required all engaged in dealing, selling, giving away, or offering for sale to take out such a license, and fined convicted violators between $100 and $500 for each offense.\footnote{Assembly Bill No. 37, §§ 1-3 (Feb. 2, 1893, by Pike) (copy furnished by Nevada State Archives/Research Library, Legislative Counsel Bureau). The text was also published in “Sale of Cigarettes,” \textit{DNSJ} (Reno), Feb. 5, 1893 (3:4).} The press insisted that a cigarette sales license of $150 per quarter, would be “virtually prohibitory”\footnote{“Sale of Cigarettes,” \textit{DNSJ} (Reno), Feb. 5, 1893 (3:4).} or “be in effect a prohibitory law, which is doubtless the intent of the introducer,”\footnote{“Brevities,” \textit{Weekly Gazette and Stockman} (Reno), Feb. 9, 1893 (3:1).} but even in tiny Reno the high license failed to have that effect. Its failure would be exposed repeatedly by the only dealer there who complied with the law and paid the license. Long before the law went into effect, however, Alfred Nelson, was already intervening in the legislative process, although at this point he had evidently not yet concluded that payment of the $600 annual tax would be consistent with the continued profitable sale of cigarettes. On February 6, before the Public Morals Committee reported the bill back to the full Assembly, Nelson wrote a letter to the editor of the \textit{Daily Nevada State Journal} insisting that: “In justice to dealers who have been licensed to sell cigarettes and tobacco, the bill now before the Legislature to increase the license so as to virtually prohibit the sale of cigarettes should be amended so as to take effect at least six months from the date of its passage, if not longer. It is not justice to make dealers lose the stock they now have on hand. I, for one, am willing that cigarette smoking should be suppressed, as I think the habit a bad one, but as the business of selling cigarettes has been legalized, it is no more than right and proper that dealers should be given the opportunity to get rid of the stock on hand.” Nelson then added that while the legislators were at it, “why don’t [sic] the Legislature...prohibit the sale of cigarettes or cigarette tobacco altogether, and thereby put a stop to the vice altogether?”\footnote{A. Nelson, “The Cigarette License Bill,” \textit{DNSJ}, Feb. 7, 1893 (3:3). The licensing to which Nelson referred presumably meant the license mandated for anyone who sold...}
1893: Annus Mirabilis

The 36-year-old Nelson, who had emigrated from Sweden in 1869, arrived two years later in Nevada, where during the 1870s he worked in the lumber and mining and milling businesses, in which latter he was “so badly crippled by an accident as to be entirely disabled for three years....” Then in 1883 he engaged in a small tobacco business in Reno, becoming one of the state’s leading wholesaler-retailers and including cigarettes in his stock. In an advertisement posing as an article, Nelson lauded himself in a Reno newspaper as in autobiographical sync with the fluid class boundaries of the frontier: “Although now a successful business man, Mr. Nelson manifests his warm sympathy for the laboring man by conducting a free employment exchange at his office.”

Nelson did not persuade the legislature to delay the law’s effective date in order to permit him to sell off his stock without having to pay for a permit, but he did ultimately exert a major impact on enforcement.

As the legislature was dealing with the license bill, the Nevada WCTU, which was organized in Reno as early as 1882 and presumably opposed licensing the sale of cigarettes (and liquor) as the WCTU did elsewhere, was focused on other dimensions of tobacco prohibition. At the regular meeting of the Reno group on January 10, 1893, the state Superintendent of Cigarettes and Tobacco was instructed to consult with the district attorney as to the best method for enforcing the aforementioned no-sales-to-minors law. Two weeks later the superintendent reported that the district attorney “was not prepared to make a

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619 1900 Census of Population (HeritageQuest). Nelson’s occupation was listed in 1900 as cigar dealer, in 1910 as “own income,” and in 1920 as school trustee.


621 “To the Ladies,” DNSJ, Apr. 11, 1882 (3:2). By 1892, when the state WCTU held its seventh annual convention, it had a superintendent of narcotics; one of its leading members was Mrs. C[atherine] B. Norcross, who was the superintendent of the franchise department. “Woman’s Christian Temperance Union,” DNSJ, June 22, 1892 (3:2). Norcross’s sons, Charles and Frank, were Populist Assembly members in 1895 and 1897, respectively. 1880 Census of Population (HeritageQuest). In 1897, when the Assembly was considering a bill drastically reducing the cigarette sales license that also banned the sale of cigarettes to anyone under 21, Frank Norcross—a lawyer who later sat on the Nevada Supreme Court—offered an (unsuccessful) amendment to raise the age to 50. The Journal of the Assembly of the Eighteenth Session of the Legislature of Nevada: 1897, at 84 (Feb. 5) (1897).

Unwilling, apparently, to rely on the district attorney’s good-faith exercise of his prosecutorial discretion, on February 7, five days after Pike had introduced his bill, the WCTU instructed its Committee on Cigarettes to “consult an attorney in regard to drawing up a bill making it a crime for minors to be found smoking Cigarettes [sic], punishable by fine, the Bill to be sent to the Legislature in case the Cigarett Bill now before the Legislature fail [sic] to pass.”

Why and how the WCTU knew that if the high-license bill passed it would be senseless even to request that the legislature consider prohibiting minors from smoking is unclear, but that bill’s passage within the next 10 days presumably explains why the WCTU bill was not introduced. Expeditiously, following the Public Morals Committee’s recommendation that A.B. No. 37 pass, the Assembly did pass it by the overwhelming majority of 26 to 1, and a few days later the Senate followed suit by the similarly lopsided vote of 13 to 1.

Several weeks after the law went into effect on July 1, Nelson, in another adverticle, announced that he had “secured a license, and will from this date sell cigarettes until his stock is disposed of.” Apparently, even at this late date Nelson had not yet decided to take out a license for the purpose of selling cigarettes that he had not yet ordered. Since the quarterly license cost him $150, he must have carried a very large stock: at (say) a profit of one cent per 10 cigarettes, he would have had to sell 15,000 just to break even, even though he would have had almost five months between the time he had written his letter to the editor and July 1 to dispose of his stock. However, at the latest by November 9 he appears to have calculated that he could sell cigarettes profitably because on that date he advertised that he was “the only dealer in town authorized to sell cigarettes and papers.” A rough calculation indicates the constraints under

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623 Nevada WCTU, Minutes, Reno, at 159 (Jan. 24, 1893).
624 Nevada WCTU, Minutes, Reno, at 160 (Feb. 7, 1893).
625 The Journal of the Assembly of the Sixteenth Session of the Legislature of the State of Nevada, 1893, at 82 (Feb. 8) (1893). The committee recommended passage with (unidentified) amendments, which the Assembly adopted. Id. at 84 (Feb. 8).
628 “Cigarettes for Sales,” REG, July 26, 1893 (3:3). A few days later he announced that he had postponed the start date until August 1. Id., Aug. 1, 1893 (3:4).
629 “New Goods Received,” REG, Nov. 9, 1893 (3:2). Nelson also sold the Detroit Free Press, gents’ underwear, musical instruments, and novelties.
1893: Annus Mirabilis

which Nelson was operating. On the assumption that a dealer pocketed one cent of profit for every 10-cigarette package he sold, he would have to sell 600,000 cigarettes a year or about 1,644 cigarettes a day to pay off the $600 license tax. Or, as seen from the customers’ perspective: 100 consumers would have to buy 16.5 cigarettes every day before Nelson could turn a profit. By the mid-1890s, Reno’s population numbered about 4,000. Because Nevada’s (frontier) demographic age and sex composition deviated from that of the national average, being strongly skewed toward adult men, approximately 1,600 to 1,700 males 21 years and older lived there at that time. Thus, about 6 percent of them would have to have been daily heavy cigarette smokers to enable Nelson to reach the profit threshold, though, to be sure, either additional nicotine addicts or more intense addiction would be required to catapult him into sales that insured solid profitability (assuming that he was not selling cigarettes as a mere accommodation/loss leader). Imagining that at least one in 16 or 17 adult men might have constituted such smokers even in the early childhood of the cigarette industry may be plausible—especially if Nelson is presumed to have been a rationally calculating capitalist—but it would be wholly implausible to assume that the market was large enough to permit even one, let alone five other merchants, to clear the $600 license tax and attain profitability. Indeed, these guesstimates explain why no one else took out a license.

By mid-December Nelson’s impatience with his scofflaw competitors burst forth publicly:

Several Reno storekeepers are charged with violating the law licensing the sale of cigarettes and cigarette paper, and on complaint of A. Nelson, warrants were served on Marcus Fredrick, Collin & Lawr, J. J. Quinn, R. O. Wills and a Chinese merchant.

Mr. Nelson states that the only reason he instituted proceedings was for self-protection. ... Mr. Nelson is the only Reno merchant that has complied with the law so far as taking out the license is concerned, and hence instituted proceedings to compel other

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630 This estimate is, as already noted, based on linear interpolation of the population at the 1890 and 1900 population censuses.

631 In 1900, nationally males accounted for 50.9 percent of the total population, while men 21 and over accounted for 54.6 percent of all males and 27.8 percent of the total population. Calculated according to U.S. Census Office, Census Reports, Vol. 2: Twelfth Census of the United States, Taken in the Year 1900: Population, Pt. 2, tab. 1 at 2 (1902). The corresponding proportions in Nevada—no such census data were published for Reno, whose population fell far below the 25,000 minimum threshold for cities—were 60.5, 69.2, and 41.8 percent, respectively. Id., tab. 2 at 64. Thus, when Reno’s population reached 4,000 in the mid-1890s, 41.8 percent or about 1,672 of them were men 21 and older.
A few days later State v. Marcus Fredrick appeared on the docket of the justice court. Fredrick, who, in addition to selling cigarettes, cigar, and tobacco, also repaired watches, clocks, and jewelry, not only sold unlawfully, but called attention to his ongoing commission of a misdemeanor by advertising his offer of cigarettes for sale in large advertisements in the Reno press. In the criminal action for selling and giving away cigarette papers brought by the district attorney against Fredrick, which was just the first of a series of trials against the alleged violators, his lawyer defended “on the grounds that that portion of the act at least was unconstitutional which made it a misdemeanor to give away cigarettes” inasmuch as it was not mentioned in the act’s title. The following day the district attorney asked the judge to sustain Fredrick’s demurrer so that the law’s constitutionality could be tried before a court of competent jurisdiction. A week later Judge Azra E. Cheney of Washoe County District Court heard argument and quickly overruled the defendant’s demurrer. Cheney relied on state supreme court precedent to create the framework for understanding that the constitutional mandate that a law encompass only one subject “and matters properly connected therewith, which subject shall be expressed in the title” was designed to prohibit the “vicious practice of rolling together...omnibus bills,” including sometimes a hundred sections on entirely different subjects, with the title of the enactment of the first section, and for other purposes.” The proscription was not, however, designed to “needlessly thwart honest efforts at legislation.” Against this lenient interpretive background, Cheney then launched into a substantive defense of the prohibitory act—at least as far as “the young” were concerned—taking judicial notice that cigarettes are made by rolling loose tobacco in a prepared paper known as “cigarette
paper," and that the cigarette rolled, as well as the tobacco and cigarette papers, to be rolled by the user, are sold for the same purpose and used with the same evil consequences. The evident intent of the act indicated its terms and the high license required, was to restrict and as far as therein could be suppress the general and indiscriminate sale and giving away of the material known as cigarettes. The evils flowing from the use of the inferior and adulterated cigarettes and cigarette materials by the young are so pronounced and disastrous that it is not surprising that public sentiment should demand and legislators should endeavor to limit, restrict or suppress it. There can be no doubt of the power of the legislature to do so.\textsuperscript{642}

Since the title sufficiently indicated that the act’s purpose was to require a license to sell cigarettes, “matters properly connected therewith” such as cigarette papers did not need to be mentioned in the title: “It would be farcical to attach a criminal penalty to the giving away of cigarettes without a license and permit the unrestricted selling or giving away of the prepared paper by which the receiver could instantly prepare for use the prohibited article.”\textsuperscript{643}

His nitpicking defense having been rejected, Fredrick appears to have stopped advertising cigarettes in the Reno press, while Nelson continued throughout 1894 and 1895 to advertise that he was “[t]he only licensed dealer in Reno....”\textsuperscript{644} As much as he was at pains to secure the trade of customers who prized compliance with the law, he was not, however, as he would later make clear, the only merchant selling cigarettes. Whether these noncompliant dealers were concerned that they might be caught, prosecuted, and fined $500, and therefore lobbied legislators to scale back the license tax, or whether the Tobacco Trust conducted the lobbying, such a bill made considerable progress during the 1895 session. (If scofflaw sellers did not fear detection, they would have preferred the status quo since they could keep the $600 a year that Nelson was paying for his license.) On March 2, Silverite Assemblyman Charles Allen,\textsuperscript{645} who was chairman of the Committee on Public Morals, introduced A.B. No. 125, which slashed the license fee by 90 percent—from $150 to $10 per quarter\textsuperscript{646} and made it a misdemeanor

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\textsuperscript{644}E.g., \textit{DNSJ}, Sept. 2, 1894 (1:1); \textit{DNSJ}, Apr. 19, 1895 (4:4); \textit{REG}, July 3, 1894 (2:2) (“the only dealer in town authorized to sell cigarettes”).

\textsuperscript{645}At the 1900 Census of Population Charles Allen of Eureka County was returned as a mining president; in 1910 and 1920 he was returned as a miner (quartz and silver, respectively).

\textsuperscript{646}The \textit{Journal of the Assembly of the Seventeenth Session of the Legislature of the State of Nevada, 1895}, at 146 (Mar. 2) (1895); “The State Legislature,” \textit{DNSJ}, Mar. 6,
for minors (under 21) to smoke cigarettes subject to a fine of $100 or five days of jail.\textsuperscript{647} When the Assembly, sitting as the Committee of the Whole, to which the bill had been referred, took up the bill, it recommended an amendment offered by Republican J. A. Conboie to reduce the fine from $100 to $10 for minors smoking cigarettes. After Assembly Speaker Democrat Lemuel Allen had voiced his satisfaction with the current law and opposition to any reduction of the license, Populist Daniel McDonald remarked that he “was opposed to any law telling any man what he shall or shall not do. That he would smoke cigarettes if he wanted to. If they went on this way it would get so that a man couldn’t drink but one cup of coffee a day.” The bill’s introducer responded to this misplaced outburst of rugged individualism by informing (the inattentive) McDonald that the prohibition applied only to youths under 21. The Committee of the Whole then voted to report progress on the bill. Later the same day Speaker Allen strenuously objected to the bill’s provision relating to minors, wanting it stricken as an “absurd injustice,” which would cause him to oppose the bill. From a “family standpoint” Silverite J. A. Denton reinforced the Speaker’s position and “called upon every father in the House to oppose the bill.” Despite the introducer’s defense of A.B. No. 125, the Committee of the Whole agreed to report recommending that the section be stricken.\textsuperscript{548} The Committee then recommended that the bill pass as amended.\textsuperscript{649} These attacks on the proposed prohibition and penalization of cigarette smoking by those under 21 suggested that if the real basis for the allegedly prohibitory high license was protection of youth, then support for such licensing might be crumbling. Ten days later, after rejecting Denton’s motions to table and indefinitely postpone the bill, the full Assembly (which was composed of 14 Silverites, 11 Republicans, 3 Populists, ...

\textsuperscript{647} \textit{The State Legislature,} DNSJ, Mar. 6, 1895 (3:2-4 at 3). Unfortunately, the Nevada State Library and Archives, which has only scattered bills from the nineteenth century, lacks this bill. Email from Christopher Driggs (Mar. 10, 2010).

\textsuperscript{648} \textit{The State Legislature,} DNSJ, Mar. 6, 1895 (3:2-4 at 3) (quotes); \textit{The Journal of the Assembly of the Seventeenth Session of the Legislature of the State of Nevada}, 1895, at 157 (Mar. 5) (1895).

\textsuperscript{649} \textit{The Journal of the Assembly of the Seventeenth Session of the Legislature of the State of Nevada}, 1895, at 159 (Mar. 5) (1895).
and 2 Democrats) passed it by a vote of 22 to 6, three Republicans and one member of the three other parties opposing it.\footnote{The Journal of the Assembly of the Seventeenth Session of the Legislature of the State of Nevada, 1895, at 236 (Mar. 16) (1895). The data on party composition are taken from Political History of Nevada 255 (Renee Parker and Steve George ed., 11th ed. 2006)} Enactment of the decimation of the high license was, however, thwarted by the bill’s death in the Senate Ways and Means Committee.\footnote{The Journal of the Senate of the Seventeenth Session of the Legislature of the State of Nevada, 1895, at 233 (Mar. 16) (1895).} Just to make sure that the bill had in fact died, Nelson wrote the secretary of state asking whether A.B. No. 125 had passed so that “I can govern myself accordingly.” Presumably in order to put his violating competitors and cigarette consumers on notice that the repeal effort had failed, Nelson then had published in the Reno press the reply that it had not passed and that therefore the old high license law was still in effect.\footnote{“The Cigarette Law,” Weekly Gazette and Stockman (Reno), Apr. 4, 1895 (2:2).}

By 1896 Nelson, apparently suffering from virtue fatigue, stopped running ads announcing that he alone was paying the high license.\footnote{The last one found by a computerized search was DNSJ, June 2, 1895 (1:1).} In February, however, the \textit{Daily Nevada State Journal} made space available for an advertisement pleading for enforcement:

Alfred Nelson is the only cigar dealer and tobacconist in town that pays the license provided by law for the sale of cigarettes. He has paid the license willingly, believing that he would be protected. Notwithstanding the law, it is reported that there are several dealers in town that sell papers and cigarettes and simply evade the law by some slight quibble or scheme possibly originated by themselves. Mr. Nelson has paid $1,507 since the passage of the act, yet the fact that he conforms to the law does not seem to afford him any protection as far as other dealers selling the same goods are concerned. Mr. Nelson feels aggrieved at this and when complaining to those in authority he is simply answered by “well, make a regular complaint and it will be attended to.” He says that he does not feel like acting as a special detective on his branch of neighbors, but believes that the license he pays ought in a measure pay for a reasonable protection to him in this business. The license collector calls regularly for his money, yet other dealers are selling the same goods without a license. The question that Mr. Nelson would like to have answered is “why should I be required to pay the license while others go rent free.” Mr. Nelson simply asks that he receive the consideration due him in hopes that proper attention will be given to the subject by the authors.\footnote{“The Cigarette License Law Not Properly Enforced,” DNSJ, Feb. 12, 1896 (2:4); Weekly Nevada State Journal, Feb. 15, 1896 (2:4).}
1893: Annus Mirabilis

Since relatively few stores in the small town of Reno advertised the sale of tobacco and the license tax would have amounted to a non-trivial addition to government revenue, it is unclear why the officials refused/failed to undertake the minimal effort to collect the tax from the scofflaws, especially after State v Fredrick had eliminated the only (frivolous) defense that the bar was able to devise to thwart enforcement. Instead of coercing compliance, however, the state proceeded in the opposite direction—namely, turning the high into a low license, as had Allen’s A.B. No. 125 proposed in 1895. After Republican Samuel Hodgkinson, a “dealer in drugs,” had introduced a bill to repeal the 1893 law, on which the Assembly took no action, Allen once again filed a bill to reduce the license to $15 per quarter; A.B. No. 36 also both banned the sale of cigarettes to persons under 21 and made it unlawful for such persons to smoke cigarettes (anywhere), subjecting those convicted of violating this last provision to the same $100 to $500 fine that applied to violations of the bill’s other provisions. The Ways and Means Committee recommended passage, but when the chamber debated the bill, members tried to amend it radically. First, Populist Charles Stoddard moved to lower the minimum age for sales from 21 to 18, but the motion was defeated. Then Republican Frank Oliver unsuccessfully successively moved to raise the $15 tax to $500 and then to $250, but both motions lost. Finally, the chamber adopted Silverite George W. Hatch’s amendment to strike the section prohibiting under-21-year-olds from smoking cigarettes. On third

655 Unfortunately, the state government reported tax revenues from all types of licenses in one lump sum so that the amount paid for the cigarette sales license cannot be identified. E.g., Annual Report of the Controller of the State of Nevada for the Fiscal Year Ending December 31, 1894, at 6 (Jan. 7, 1895), in Appendix to Journals of the Senate and Assembly of the Sixteenth Session of the Legislature of the State of Nevada, 1895. Even the controller’s ledgers in the State Archives consisted of lump sums for licenses with no line item for cigarette licenses. Email from Christopher Driggs, Nevada State Library and Archives, to Marc Linder (Mar. 12, 2010).

656 1900 Census of Population (HeritageQuest).

657 The Journal of the Assembly of the Eighteenth Session of the Legislature of the State of Nevada, 1897, at 52 (Feb. 4) (1897).

658 A.B. No. 36 (Feb. 5, 1897, by Allen of Eureka) (copy furnished by Nevada State Library and Archives); The Journal of the Assembly of the Eighteenth Session of the Legislature of the State of Nevada, 1897, at 55 (Feb. 5) (1897); “Legislative Proceedings,” Reno Evening Gazette, Feb. 6, 1897 (1:4) (erroneously attributing introduction to Bradshaw).

659 The Journal of the Assembly of the Eighteenth Session of the Legislature of the State of Nevada, 1897, at 63 (Feb. 8) (1897).

660 The Journal of the Assembly of the Eighteenth Session of the Legislature of the
reading the Assembly (20 of whose 30 seats were controlled by Silverites)\textsuperscript{661} passed the bill by a vote of 20 to 9.\textsuperscript{662} When the Senate followed suit by a vote of 11 to 3,\textsuperscript{663} the resulting license with one-tenth of the original financial bite presumably deterred virtually no merchant from selling cigarettes. The $100 to $500 penalty for selling cigarettes to those under 21 swept aside any consideration of cutting off the supply altogether. As the \textit{Nevada State Journal} observed: “While the sentiment was decidedly in favor of prohibiting the selling or giving away of cigarettes or cigarette paper it was the concensus [sic] of opinion that it could not be done and that the only practicable method of restricting the evil was to license both the sale of cigarettes and the paper used in making them and bring the business within the control of the authorities.”\textsuperscript{664} Why the authorities would have been any more willing to enforce the $15 quarterly license than they had its $150 predecessor the editorialist did not explain, but thus ended Nevada’s four-year experience with the high-license approach to suppressing cigarette sales.\textsuperscript{665}

\textit{State of Nevada, 1897, at 84-85 (Feb. 15) (1897).} Hatch was returned at the 1910 census as a barber.

\textsuperscript{661} \textit{Political History of Nevada} 255 (Renee Parker and Steve George ed., 11th ed. 2006).

\textsuperscript{662} \textit{The Journal of the Assembly of the Eighteenth Session of the Legislature of the State of Nevada, 1897, at 91 (Feb. 16) (1897)}.

\textsuperscript{663} \textit{The Journal of the Senate of the Eighteenth Session of the Legislature of the State of Nevada, 1897, at 109 (Feb. 27) (1897)}.

\textsuperscript{664} “Licensing the Sale of Cigarettes and Cigarette Paper,” \textit{DNSJ}, Mar. 2, 1897 (2:1) (edit.).

\textsuperscript{665} In 1911 the Nevada Senate (of whose 20 seats Democrats controlled 14) passed by a vote of 19 to 0 S.B. No. 12, introduced by a Democrat, John A. Ascher, a physician, that would have prohibited the sale of cigarettes in the state. \textit{The Journal of the Senate of the Twenty-Fifth Session of the Legislature of the State of Nevada: 1911, at 20, 33 (Jan. 23 and 26) (1911).} A motion to amend by including cigars within the prohibition was defeated by a “resounding vote” because there were “too many Owl devotees among the higher-up colony to stand for that....” “Cigarettes Must Go Says Senate,” \textit{REG}, Jan. 26, 1911 (1:5, 2:4). Although the bill “caused considerable discussion among the local knights of the brown-fingered delegation” and many of the Assembly members “addicted to the habit” “refuse to speak to Ascher when they meet on the street,” Ascher nevertheless predicted that the bill would “meet with no organized opposition in the assembly unless the cigarette and tobacco trust sends an army of lobbyists to agitate against it.” “Anti-Cigarette Bill Discussed,” \textit{Nevada State Journal}, Jan. 25, 1911 (1:4); “Cigarette Bill Passes Senate,” \textit{Nevada State Journal}, Jan. 27, 1911 (6:4). Even after legislators and the public had understood that under the bill a “person could have a carload of cigarettes


1893: Annus Mirabilis

Ohio

Ohio has gone into the business of regulating the habits of people by statute, her anti-

shipped to him and smoke them all if he so desired,” a prominent assembly member was
certain of its defeat “for the simple reason that it does nothing more than make it
necessary for cigarette smokers to spend their money out of the state. ... All he [Ascher]
wants is to prohibit the cigarette dealers [in Nevada] from selling them....” “Cigarette Bill
Aimed Only at State Tobacco Dealers,” REG, Jan. 28, 1911 (1:1-3). A press report that
a bill prohibiting the sale of cigarettes to minors might be taken up as a substitute appeared
to make no sense since the 1897 law’s ban on selling to anyone under 21 was still in effect.
“Anti-Cigarette Bill Is Doomed,” Nevada State Journal, Feb. 1, 1911 (5:1); Revised Laws
of Nevada 1:1131, § 3874 (1912). In addition to reducing the fine (from $100-$500 to
$50-$100 for a first offense to $250-$500 for a second offense), the bill merely conferred
discretion on judges to place with a probation officer any minor who misrepresented
himself as an adult in order to obtain cigarettes and required the police to identify any
minor discovered smoking cigarettes and to inform the district attorney, who was required
to summon the minor and try to determine the source of the minor’s cigarettes. A.B. No.
53 (Jan. 31, by Coxe) (copy furnished by Nevada State Library and Archives). In the
event, the Assembly indefinitely postponed A.B. No. 53 by a vote of 26 to 20 because it
did not want to add “useless” on to the existing anti-cigarette statutes. “Anti-Cigarette
Measure Killed,” Nevada State Journal, Feb. 16, 1911 (3:3) (quote); The Journal of the
Assembly of the Twenty-Fifth Session of the Legislature of the State of Nevada: 1911, at
60 (Jan. 31), 113 (Feb. 15) (1911). In partial fulfillment of Ascher’s prediction, as the
Assembly was scheduled to debate the bill, several Reno tobacco dealers went to Carson
City to prove to legislators “how the bill will not prevent the evil at which it is aimed but
will simply result in money that is now being spent in Nevada being sent to other states.”
“Anti-Cigarette Bill in Assembly Today,” REG, Feb. 14, 1911 (6:3). It is unclear whether
the argument used for years in other states (such as Iowa) that only a small proportion of
consumers would go to the trouble of organizing interstate purchases played a part in the
debate, but in the end, the Assembly (25 of whose 49 seats Democrats controlled) defeated
the bill on a non-party-line vote: although 24 members voted for Ascher’s bill while 20
opposed it, it lost because it failed by one vote to secure a constitutional majority. The
Journal of the Assembly of the Twenty-Fifth Session of the Legislature of the State of
Nevada: 1911, at 109 (Feb. 14) (1911). A decade later, when women were again pressing
for enactment of an anti-cigarette bill, the press opined that: “From the amount of smoking
done in both houses, it would appear that such legislation would stand little chance of
passage in case anyone is found who is willing to foster such a measure.” Reminiscing,
it recalled “[s]everal sessions back” when “Senator J. A. Ascher..., himself an inveterate
smoker, introduced a law making it a felony to smoke cigarettes. Ascher gave as his
reason that he felt the only way to break himself of the habit was to make such a practice
unlawful.” “Anti-Cigarette Move Is Coming,” REG, Feb. 12, 1921 (3:3).
cigarette act going into operation this week. ... The wholesale violation of the law may be expected, as those who do not regard a plain law of health are not likely to pay more deference to a mere statute.\footnote{MJ, Aug 3, 1893 (4:1) (untitled edit.).}

The belief is that the law can be and will be vigorously enforced. Its object is to discourage the habit of cigarette smoking and especially, by concentrating the sale, close up those small shops in the neighborhood of schools where minors are supplied with cigarettes, in some instances at two for a cent. ... Dealers say this result will not be achieved, as those who continue to sell will do the business not done by all.

Cigarette fiends, they claim, like the victims of the opium habit, will go any distance for their pet choice, and cannot be driven to cigars.\footnote{“Ohio’s Cigarette Law,” DP, Aug. 7, 1893 (7:7).}

Shortly before the Ohio legislature began considering intervention, the press predicted that in the near future a “crusade” would be inaugurated against the manufacture and sale of cigarettes, the smoking of which was neither a trivial nor a harmless habit. A dealer became acutely aware of the root of the peculiar danger of cigarettes as a result of his “invariably” noticing that “when he sold a boy, who was just acquiring the habit of smoking cigarettes, he was always sure of one more regular customer.” The reason was the apparent presence of an opiate not found in other kinds of tobacco, and this opiate, like a serpent, seizes its victim at once and encoils itself about him,” possibly resulting in “imbecility or insanity.”\footnote{“Dangerous,” Newark Daily Advocate (OH), Jan. 16, 1893 (8:3).}

House Bill No. 1172 was introduced in the Ohio House of Representatives, which Republicans controlled by a two to one majority,\footnote{History of the Republican Party in Ohio 1:605 (Joseph Smith ed. 1898) (72 to 35).} on January 25 by 46-year-old one-term Republican lawyer Anselm T. Holcomb of Portsmouth.\footnote{Journal of the House of Representatives of the State of Ohio for the Adjourned Session of the Seventieth General Assembly Commencing on Tuesday, January 3, 1893, Vol. XC at 130 (Jan. 25) (1893).} It provided for a $300 annual assessment for a wholesale business trafficking in cigarettes/wrappers and $100 for retail dealers; fines for violations ranged between $100 and $300. The lack of controversy surrounding the initiative was reflected in the 71 to 1 vote secured by the bill,\footnote{Journal of the House of Representatives of the State of Ohio for the Adjourned Session of the Seventieth General Assembly Commencing on Tuesday, January 3, 1893, Vol. XC at 661 (Mar. 29) (1893).} whose tax was deemed high
enough to be “prohibitory...in the interest of the health of the youth of Ohio.”

Even those who did not judge the financial disincentive as quite so stringent nevertheless agreed that it would “certainly drive all the small dealers out of the business of selling, and...largely reduce the consumption.”

Though not quite so massive, the majority in the Senate, controlled by a similar Republican majority, was nevertheless a comfortable 18 to 5. Despite this appearance of easy passage, the very same day Democratic Senator William C. Gear, who had cast one of the five Nays against Holcomb’s bill, filed a bill which, as amended by the Finance Committee, contained a provision repealing H.B. No. 1172. In a complete reversal, a few days later the Senate, by a vote of 17 to 5, passed the bill with the repealer. The House not having taken up the repeal bill at the end of the session, the cigarette license law remained passed and went into effect on August 1.

The reason for this last-minute effort to repeal the license law was nicely formulated in the press, which noted that the “deadly cigarette has entered into the Ohio campaign, and the whole dude population is up in arms against a Republican legislature.” When the Holcomb bill passed the Senate: “Immediately

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673Iowa State Reporter (Waterloo), Apr. 6, 1893 (4:1) (untitled). In contrast, the press appears to have misunderstood the purpose of Holcomb’s bill as modeled on Ohio’s (Duncan) Dow liquor tax: “The cigarette fiend is to be taxed. The state is to derive some benefit from the prevailing nuisance in which dudes and other inferior creatures indulge. Representative Holcomb will introduce a bill looking to an increase in the state’s revenue and indirectly the protection of good morals among the youth of Ohio.” “Dangerous,” Newark Daily Advocate (OH), Jan. 16, 1893 (8:3) (quoting an unnamed Columbus newspaper).
674History of the Republican Party in Ohio 1:605 (Joseph Smith ed. 1898) (21 to 10).
675Journal of the Senate of the State of Ohio for the Adjourned Session of the Seventieth General Assembly Commencing on Tuesday, January 3, 1893, at 910 (Apr. 21) (1893).
676Journal of the Senate of the State of Ohio for the Adjourned Session of the Seventieth General Assembly Commencing on Tuesday, January 3, 1893, at 920 (Apr. 21) (S.B. No. 582) (1893).
677Journal of the Senate of the State of Ohio for the Adjourned Session of the Seventieth General Assembly Commencing on Tuesday, January 3, 1893, at 955 (Apr. 24), 976 (Apr. 25) (1893). The bill also made it unlawful to manufacture, sell, give, or use any cigarette with a substance foreign to tobacco and deleterious to health and penalized giving cigarettes or tobacco to persons under 16. All five senators who had voted against H.B. No. 1172 supported Gear’s bill.
the wires were burdened with protests from tobacco and news dealers, and so emphatic were these protests that Gov. [and future President William] McKinley began to grow alarmed.” When the Senate passed the repealer, McKinley was “directly charged by Republican friends of the cigarette law with having personally interfered in the matter at the request of the dealers, who insist that the only effects of high license will be to give the richer dealers a monopoly.”

During the interim between the Holcomb bill’s passage and its effective date, the press reported on the reactions of retailers, the greater part of whom would stop handling cigarettes. For example, in Hamilton (pop. 17,565 in 1890), where not more than 100,000 were sold annually, merchants’ $1.50 profit per 1,000 cigarettes meant that one dealer would have to sell more than two-thirds of the city’s total sales in order to break even on the tax, leaving no profitable market share for a second firm. Unsurprisingly, by the day before the law went into effect no retailer had yet paid the $100 license and it was deemed likely that only one would. One paper in Hamilton (located near the Indiana and Kentucky borders) concluded that “when our fiends wish to enjoy a puff of one of their ‘youth exterminators,’ they must betake themselves to the Hoosier state, or the state of the Blue Grass” and that consequently cigarette smoking there seemed “doomed.” Once the law was in force, only one dealer in Lorain (pop. 4,863 in 1890) took out a license, while in Holcomb’s hometown of Portsmouth (pop. 12,394 in 1890), where until then “[n]early every drug store, cigar store, saloon, restaurant, etc.” had kept cigarettes for sale, only one dealer would sell them, since “nearly 100,000” had to be sold to meet the tax. In Noble County (pop. 20,753 in 1890) no dealer took out a license. Even in Cincinnati, a city of almost 300,000, only a few dealers were expected to sell cigarettes, although, according to a press blurb, ATC “propose[d] to establish agents in all the cities of Ohio, for whom they will pay the license tax.” More generally, however, the

682“Coffin Nails,” Hamilton Daily Democrat, July 31, 1893 (3:1).
684“Cigarette Smoking Doomed,” Hamilton Daily Democrat, July 1, 1893 (5:3).
685Lorain County Reporter, Aug. 5, 1893 (5:4) (untitled).
687Cambridge Jeffersonian, Aug. 24, 1893 (3:2) (untitled).
689“Agencies for Cigarettes,” Hamilton Daily Republican, May 30, 1893 (1:7). Early on ATC abandoned this tactic, planning instead to give retailers the jobbers’ profits by
press expected that the tax would cause dealers to raise the price, thus making them financially less accessible to “many little urchins, who spend all their odd pennies for the pernicious compound...”690 Since “the boy with only a few cents in his possession cannot get” cigarettes, the effect would be to keep them “away from the very place [they] should not be....”691

Consistently with its litigational modus operandi elsewhere, the Tobacco Trust had secured a wholesaler and retailer in Cincinnati to seek to enjoin collection of the tax even before the law went into effect.692 At the beginning of August “centrally located cigar stores and hotel stands” filed a test case in superior court.693 In another test case, filed on September 23, 1893, in the Hamilton County (Cincinnati) court of common pleas, Edward Metz, a 63-year-old German-born cigar manufacturer694 who also engaged in the wholesale and retail business of trafficking in cigarettes as an incident of his cigar and tobacco business. So small a part of his overall business was his cigarette selling that he complained that the tax would destroy and prohibit it. ATC/Metz argued that the tax was unconstitutional and void because the law failed to apply the tax to trafficking in candies, sweetmeats, cigars, or tobacco, thus denying Metz the equal protection of the law. The Tobacco Trust and its strawman also alleged that the law’s failure to discriminate between intrastate and interstate commerce violated the federal constitutional commerce clause. The court sustained the defendant-county auditor’s demurrer, which judgment the circuit court affirmed.695

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693“The Cigarette Law,” Lima Times Democrat, July 31, 1893 (4:6). These strawmen may or may not have included the petitioner whose case was ultimately decided by the Ohio Supreme Court. Metz v Hagerty, 51 Ohio St. 521 (1894). The decision does not mention them, but according to the press the case also included Frankel v Davey and Goeltz v Davey, which arose in Mahoning County. “Cigarette Tax Law,” Lima Times-Democrat, June 23, 1894 (1:3). The latter two cases were filed in the Ohio Supreme Court on Oct. 31, 1893. “Brief Mention,” Salem Daily News, Nov. 1, 1893 (3:1).
6941880 Census of Population (HeritageQuest).
695Metz v Hagerty, 51 Ohio St. 521 (1894).
Dueling bills in the Senate and House in 1894 sought to make the Holcomb law more prohibitory by increasing the retail tax and to defang it altogether by lowering the tax to the nominal level. Republican Friend Whittlesey, a farmer, introduced S.B. No. 313, \textsuperscript{696} which proposed increasing the retail license tax to $250. With the Sanitary Laws and Regulations Committee’s do-pass recommendation\textsuperscript{697} the full Senate debated it. After a Republican senator had “mildly opposed” the bill on the grounds that litigation was pending testing the constitutionality of the Holcomb law, Whittlesey briefly spoke in support of S.B. No. 313, emphasizing that it “was not a revenue measure, but to protect the youth from the body and mind destroying cigarette” and pleading with his colleagues to “check the use of those contemptible imitations of cigars.”\textsuperscript{698} The chamber then passed the bill unanimously (20 to 0).\textsuperscript{699} The Hamilton Daily Democrat called the Senate’s decisive action “the first step toward practically prohibiting the sale of cigarettes” in Ohio. Since even under the Holcomb law only two cigarette dealers remained in Hamilton, it was “probable that under the new law these dealers will abandon the traffic as there is but little profit in it now.”\textsuperscript{700}

In the meantime, Cleveland Republican J. Dwight Palmer had introduced a bill (H.B. No. 828) in the House amending the cigarette license law by drastically reducing the tax to $25 for wholesalers and $10 for retailers.\textsuperscript{701} If Palmer’s bill were enacted, cigarettes, as the press pointed out, would “again be sold at every corner grocery and side-street drug store,” thus negating the Holcomb law’s intent

\textsuperscript{696}Journal of the Senate of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, at 560 (Apr. 4) (1894).

\textsuperscript{697}Journal of the Senate of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, at 677 (Apr. 18) (1894).

\textsuperscript{698}“Several Bills Passed,” Newark Daily Advocate, Apr. 21, 1894 (2:2).

\textsuperscript{699}Journal of the Senate of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, at 698 (Apr. 21) (1894).

\textsuperscript{700}“The Cigarette Must Go,” Hamilton Daily Democrat, Apr. 21, 1894 (5:5). The paper saw only one way for retailers to “secure the sale of these youth eradicators”—namely, “to have the cigarette trust pay the tax.”

\textsuperscript{701}Journal of the House of Representatives of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, Vol. XCI at 761 (Apr. 13) (1894) (H.B. No. 828); “Only Routine Work,” Hamilton Daily Democrat, Apr. 14, 1894 (1:4). In the 1890-91 legislature Palmer was listed as retired, while at the 1900 Census he was returned as a justice of the peace. Henry Howe, Historical Collections of Ohio: In Two Volumes, 2:iv (Addenda) (1896).
1893: Annus Mirabilis

“to prevent the use of cigarettes....”\textsuperscript{702} (In the event, by 1896, in the wake of the enactment of license taxes very much like Palmer’s, a Republican state senator from Cleveland stated that cigarette smoking by pupils, including the very young, in Ohio’s largest cities had been promoted by “the small stores generally found in the vicinity of schools....”)\textsuperscript{703} Although Palmer’s bill made no progress in its own right, its objective was achieved when, on April 26, the House Tax Committee, to which it had been referred,\textsuperscript{704} considering both S.B. No. 313 and H.B. No. 828, decided to recommend for passage a substitute for the former embodying a tax (on the amount of which it was not yet agreed) that “shall not be prohibitory as is provided in the Whittlesey bill” and a ban on selling cigarettes to anyone under 18.\textsuperscript{705} Following “a good deal of heated discussion,”\textsuperscript{706} the full House on May 4 agreed to the committee substitute that reduced the license tax to $30 for wholesalers and $15 for retailers and banned sales to those under 16.\textsuperscript{707} The tax reduction was allegedly designed to “make it productive of revenue....” Whereas the Holcomb law, according to the press, had “been found impossible of enforcement,” the committee substitute was “so drawn as to get the traffic completely under the control of the authorities. ... While the tax is reduced, the bill provides for more stringent regulations for the traffic....”\textsuperscript{708} An explanation as to why or how the Holcomb law had been unenforcible was not forthcoming, but, whatever the proposed changes were designed to accomplish, they manifestly undermined the principal objective of the 1893 law and Whittlesey’s bill, which

\textsuperscript{702}“The Dude’s Pipe,” Salem Daily News, Apr. 16, 1894 (4:2).

\textsuperscript{703}“Ohio’s Law on Selling Cigarettes to Minors,” WTJ, 22(44):1 (Feb. 10, 1896). Such stores “sold prize packages containing some toy or object that would attract the young...in connection with a cigarette and a piece of Tobacco....”

\textsuperscript{704}Journal of the House of Representatives of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, Vol. XCI at 811 (Apr. 19) (1894) (referral to Tax Committee as last action).

\textsuperscript{705}“The Boys Must Not Smoke,” Hamilton Daily Democrat, Apr. 27, 1894 (2:5). Though the article put the age at 18, it was probably 16 as stated below.

\textsuperscript{706}“Coffin Nail Tax,” Newark Daily Advocate, May 5, 1894 (2:1).

\textsuperscript{707}Journal of the House of Representatives of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, Vol. XCI at 972-75 (May 4) (1894).

\textsuperscript{708}“Coffin Nail Tax,” Newark Daily Advocate, May 5, 1894 (2:1). This article erroneously stated that the bill increased the penalty for violations to $500. In fact, the Holcomb law provided for the same penalties; the bill did, however, did quadruple the assessments for firms that began selling cigarettes without making the required return after the assessor had made his returns for any year. 1894 Ohio General Acts 91:311, § 4 at 312.
1893: Annus Mirabilis

was not to raise revenue—in fact, if they had generated absolutely no revenue at all because the high license tax deterred all merchants from selling cigarettes, their authors and supporters would have deemed them a great success—but to reduce or eliminate consumption.

On May 17, when the bill finally reached its third reading, the full House, after disagreeing to a motion to increase the license tax to $300 and $150, respectively, also rejected the lower amounts of $100 and $50, by a vote of 29 to 52; even to a motion to increase the amounts to a modest $50 and $25, respectively, the House disagreed. By the large majority of 69 to 21 the chamber then passed S.B. 313.709 The same day the Senate unanimously (27 to 0) concurred in the House amendment, Whittlesey himself joining in the subversion of his own bill.710 Why Whittlesey concurred is unclear, especially since the quid pro quo strengthening the state’s no-sales-to-minors law was minimal.711 (In 1896 Whittlesey introduced yet another prohibitory license tax bill, which would have raised the wholesaler and retailer amounts to $500 and $300, respectively, but it too failed to be enacted.)712

About a month after the legislature had repealed the Holcomb cigarette license law, replacing it with the almost nominal taxes, a majority of the Ohio Supreme Court opined in the Metz case that the act was constitutional, but, since it had been repealed, “it is not now important to give the reasons of the majority

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710 Journal of the Senate of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, at 1144-45 (May 17) (1894).

711 The bill strengthened the 1888 law by increasing the age from 15 to 16 and the fine range from $5/$25 to $10/$50. 1894 Ohio General Acts 91:311, § 8 at 313. It also prohibited selling cigarettes with photographs. Id. § 7.

for so holding.” At the same time, however, the Court reversed the judgment below on the grounds that the law did not authorize assessment for 1893.

Texas

The year 1893 also marked the origin of efforts to enact a prohibitory high license for cigarette sales in Texas, though they did not approach fruition until 1897, when the tax had to be scaled back so drastically to secure passage that the result no longer served advocates’ ambitious purpose. The impetus came from Governor James Hogg, a Democrat, who had first been elected in 1890 with support from the Farmers’ Alliance and the Knights of Labor on the strength of his anti-railroad and anti-corporate reputation as attorney general and despite the opposition of the Democratic right-wing, and was re-elected in 1892 with black leaders’ backing based on his denunciation of lynching. In his message to the Texas legislature at the outset of its 1893 session Hogg suggested placing a “tax upon all persons engaged in the manufacture or sale of all classes of cigarettes


714 “As the time for making the returns by the assessors and the assessments by the auditors, and the June payment to the treasurer, was long past before the law took effect, it cannot be inferred, without a clear provision to that effect, that the legislature intended that an act so penal in its nature, should have the effect to impose an assessment for seven months of the year, before the law was in force.” Metz v Hagerty, 51 Ohio St. 521, 527 (1894).

715 John Hicks, The Populist Revolt: A History of the Farmers’ Alliance and the People’s Party 177, 249 (1961 [1931]); C. Vann Woodward, The Origins of the New South, 1877-1913, at 204, 237-38, 261-62 (1971 [1951]); Lawrence Goodwyn, The Populist Moment: A Short History of the Agrarian Revolt in America; 147, 152-53, 159, 192 (1978 [1976]); Edward Ayers, The Promise of the New South: Life After Reconstruction 230, 243, 274, 276, 284 (1993 [1992]). To be sure, Hogg’s ant CORPORATISM was shallow as displayed in a gubernatorial campaign speech in Dallas on Oct. 1, 1892: “Capitalists may be said to be divided into two classes: First, those with money willing to permanently invest it where they can get a reasonable return for its use. Second, those with no money who expect to grow suddenly rich from concocted inflations and booms, at the expense of others. ... One is for fair dealing, the other is for fraud; one for honesty, the other for rascality.” Speeches and State Papers of James Stephen Hogg Ex-Governor of Texas, with a Sketch of His Life 196 (C. Raines ed. 1905).
and the material used therefor. Less than two weeks later, House Democrat James Green Davis, a Confederate war veteran, farmer and a leading Baptist layman, introduced a bill to impose a $100 tax on anyone wishing to engage in the manufacture or sale of cigarettes and to set a $200 penalty for violations, but a majority of the Revenue and Taxation Committee recommended a substitute, and the bill died on the calendar.

At the next session in 1895, Democrats, as they had since the early 1870s, crushingly controlled both the Senate (29 Democrats and 2 Populists) and the House (103 Democrats, 22 Populists, and 3 Republicans). To be sure, the likelihood of passage of a prohibitory, as opposed to a revenue-generating, cigarette sales license tax appeared not to depend on party composition since these parties all opposed “sumptuary” legislation. Democrat James Lafayette Greer—who a few days earlier had introduced a bill to require railroads to “provide separate rooms for the white and negro races” in passenger depots—introduced House Bill No. 162 to “regulate and fix the tax on the

717 Texas Legislative Manual for 1893, at 36 (1893); 1900 Census of Population (HeritageQuest); Frank Johnson, A History of Texas and Texans 5:2225-26 (1914). After his one term in the House, which he left because “it involved heavy expenses and neglect of business” (id.), Davis accumulated sufficient capital to become a stockholder in several banks and an insurance company and to build and own a cotton gin and warehouse. Whether his ownership of a plantation in the county from which he was elected antedated his legislative term is unclear.
720 The 1892 Texas Republican platform declared: “We are opposed to all sumptuary laws, and believe in the largest individual liberty consistent with good government.” Platforms of Political Parties in Texas 328 (Ernest Winkler ed. 1916). The Clark-Democrats “oppose all sumptuary laws which vex the citizen and interfere with his individual liberty.” Id. at 323. The Populist Party Platform was silent on the issue, but the minority report (which was tabled), denounced the liquor traffic and demanded repeal of the state liquor license law. Id. at 316. In 1896 the platform of the Gold Democrats declared: “We oppose all sumptuary legislation, no matter under what guise, and demand that the citizen be left free to pursue his own happiness without unnecessary interference by governments.” Id. at 368.
721 Journal of the House of Representatives of Texas, Being the Regular Session
manufacture and sale of cigarettes” by imposing a $100 tax. Following ten years of school teaching Greer (1836-1922) engaged in merchandising and farming, by the end of the 1880s owning “one of the largest and most valuable black land farms in Collin county,” by means of which he “accumulated a competency for old age, and by renting his farm he lives is ease.” After the Revenue and Taxation Committee had recommended that the bill pass, Greer himself on second reading made a mockery of his own bill by offering an amendment to reduce the tax from $100 to $2.50, which the House adopted. Amendatory dilution proceeded apace on third reading, when the chamber slashed the penalty from $100-$500 to $10-$25. However, after the Senate had amended the maximum penalty to $100, the House took no further action on the bill, which thus died. For his efforts Greer’s bill received top mention among measures on which the House had “squandered its time”—runners-up included bills dealing with sodomy and prohibiting minors from betting on horse races and playing pool—from the non-party-affiliated Galveston Daily News, which mockingly conceded that despite the time “wasted” on the bill, “if Colonel Greer can succeed in legislating the tobacco taste out of the mouths of the blue-eyed and fair-haired baby boys of the country and steer them clear of that great public enemy, the cigarette, he will have accomplished one of those modern wonders which will entitle his portrait to hang away up near the top of the gallery of fame. There is

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Twenty-Fourth Legislature 14 (Jan. 11) (1895).


726. Journal of the House of Representatives of Texas, Being the Regular Session Twenty-Fourth Legislature 310 (Feb. 15) (1895); “Cigarette Bill,” GDN, Feb. 17, 1895 (4:3) (printing text of bill as passed).


nothing like reforming the appetites of rosy-cheeked youth and posterity may yet have occasion to look with admiration upon the memory of the gentleman from Collin as the deadly foe of dyspepsia and a public benefactor."  

Several weeks later death in the House also overtook a Senate bill to prohibit selling or giving tobacco to anyone under 16. Unlike the license bill, which the WCTU throughout country opposed, the WCTU, in Texas as elsewhere, did support the no-sales-to-minors measure, which was finally enacted in 1899 with WCTU backing. Typical of the opposition to the Senate bill in 1895 was this sarcastic blast in the *Galveston Daily News*, which avoided libertarian grounds in staking out a realist-defeatist position that has resonated into the twenty-first century:

This bill is doubtless aimed at the young American who smokes cigarettes, but just how the most potent, grave and reverend house of lords expects to enforce such a law after they get it on the statute books surpasseth all understanding. Where a thirsty toper can not get a drink in a prohibition hamlet the irrepressible small boy can corral the seductive cigarette with the greatest ease, and that is saying a great deal. There is not one boy in a hundred who would “give away” the man who provides him with such luxuries, and that being the case, the question arises, how can such a statute be enforced? Besides, these young Arabs will have cigarettes and tobacco even if they have to forge the names of their parents or guardians, and the latter, of course, would not prosecute them. The bill, should


730 S.B. No. 72, introduced by Gage, survived amendments to lower the age to 14 and 12 before passing by a vote of 13 to 12. *Journal of the Senate of Texas: Regular Session Twenty-Fourth Legislature* 55, 95, 249-50 (Jan. 21, 30, Mar. 7) (1895). After the House Public Health and Vital Statistics Committee had recommended that it not pass, Greer moved to suspend the rules and take it up, but the chamber’s last action was to order the bill printed. *Journal of the House of Representatives of Texas, Being the Regular Session Twenty-Fourth Legislature* 474, 556, 604 (Mar. 13, 25, 29) (1895).

731“Legislative Petitions,” *GDN*, Jan. 24, 1895 (4:7); “The Legislature,” *GDN*, Jan. 25, 1895 (4:3-6 at 5). These petitions were not expressly designated as having been circulated or submitted by the WCTU—in the second article it was attributed to “ladies of Hill county”—but their inclusion with requests for such typical WCTU objectives as raising the age of consent for females and providing an industrial home for young girls clearly identified them.

7321899 Texas General Laws ch. 139 at 237.

733 For example, 25 members of the WCTU of Denison submitted a petition to the House “defining the evil effects of the cigarette habit on the youth of our State” and urging passage of the Senate bill. *Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Sixth Legislature* 553 (Feb. 27) (1899).
it become law, would be practically a dead letter. 734

The session of 1897 proved to be more propitious for passage of a high license for cigarette sales. The Populist candidate may have captured 44 percent of the votes in the gubernatorial election in 1896, 735 but the party’s representation in the state legislature declined below its (low) 1894 peak, giving Democrats continued unfettered control of both chambers. 736 A flurry of anti-tobacco activity got underway in the House—whose Rule 20 had for many years provided that “There shall be no smoking, eating, nor [sic] cracking nuts allowed in the House during its sitting” 737—when Democrat S. P. Evans, a newspaper owner and editor who for 10 years had taught school, 738 introduced a very weak bill prohibiting selling or giving cigarettes to anyone under 12. 739 After the Judiciary Committee adversely reported it, 740 he tried one that raised the age to 15, but following an adverse majority report from the State Affairs Committee, it died, 741 and not even a WCTU petition (which also embraced such legislative demands as requiring a wife’s consent to the sale of community property and “protecting boys under 17 years of age from the wiles of vile women”) 742 was able to resuscitate it. Then towards the end of the session, the Democratic chair of the House Appropriations Committee, Thomas S. Garrison, a merchant who was not only a member of the Methodist Episcopal Church, South, but had been a delegate

734 “Gage’s Cigarette Bill,” GDN, Feb. 7, 1895 (4:4-5).
735 Calculated according to http://www.texasalmanac.com/politics/gubernatorial.pdf (visited May 4, 2010).
736 In the Senate 28 Democrats faced two Populists and one Republican, while Democrats occupied 118 House seats, Populists seven and Republicans three. Texas Legislative Manual for 1897, at 56-58-61 (1897).
737 Texas Legislative Manual for 1897, at 21 (1897); A Legislative Manual for the State of Texas: 1879-80, at 177 (1879). As late as 1921, House Rule X.8 provided that “during the session of the House no member shall wear his hat or smoke upon the floor of the House.” Legislative Manual: Thirty-Seven Legislature 120 (1921).
739 Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Fifth Legislature 33 (Jan. 15) (1897) (H.B. No. 55).
740 Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Fifth Legislature 913 (Jan. 21) (1897).
741 Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Fifth Legislature 100, 217, 1427 (Jan. 25, Feb. 3) (1897) (H.B. No. 222).
742 Journal of the Senate of Texas: Regular Session Twenty-Fifth Legislature 140 (Feb. 12) (1897) (petition from WCTU of Denison).
to its last three quadrennial general conferences, introduced a bill imposing a very modest $10 annual tax on selling cigarettes. But despite receiving a do-pass recommendation from the Revenue and Taxation Committee, of which he was a member, the bill “died on Speaker’s table.” In the session’s very last days impetus for imposition of such a tax came from the Senate—pursuant to whose longstanding Rule 21 “No smoking shall be allowed in the Senate chamber during the session of the Senate” which amended a House bill, amending the state law on occupational taxes, to require all dealers in cigarettes to pay a $10 annual tax, in addition to the occupation tax on merchants, and to obtain an annual license from the county clerk. Its author, Democratic Senator George Greer, a corporate oil lawyer from Beaumont, was also a member of the Methodist Episcopal Church, South. House concurrence would finally have established a statewide cigarette license, if the governor had not vetoed it after sine die adjournment.

Ironically, Governor Charles Culberson made immediate further efforts possible by calling a special session, which began the very next day after the regular session adjourned, primarily in order to pass an appropriations bill for state government and to amend the fellow-servant law. But in a message to legislators several weeks into the special session Culberson placed a general occupation tax law at the head of the list of subjects to which he directed their

744Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Fifth Legislature 1132 (May 3) (1897) (H.B. No. 709); “The 25th Legislature,” GDN, May 4, 1897 (6:1-3 at 3).
745Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Fifth Legislature 1165 (May 6), 1445 (quote) (1897).
746Texas Legislative Manual for 1897, at 7 (1897); A Legislative Manual for the State of Texas: 1879-80, at 163 (1879).
747Journal of the Senate of Texas: Regular Session Twenty-Fifth Legislature 843, 865 (May 18 and 19) (1897) (Substitute H.B. No. 207).
748Frank Johnson, A History of Texas and Texans 3:1593 (1914).
750Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Fifth Legislature 1359-60 (May 20), 1426 (1897).
751“Proclamation by the Governor of Texas,” in General Laws of the State of Texas Passed at the First Called Session of the Twenty-Fifth Legislature i (May 21) (1897); “Legislature Adjourns,” GDN, May 22, 1897 (4:1).
1893: Annus Mirabilis

attention for legislative purposes.\footnote{“Message from the Governor,” in \textit{General Laws of the State of Texas Passed at the First Called Session of the Twenty-Fifth Legislature} ii (June 14) (1897).} The following day, in the course of the second reading of House Bill No. 24, which amended the existing general occupation tax law, William Fields, a Democrat and former newspaper reporter/editor/publisher,\footnote{E. H. Loughery, \textit{Texas State Government: A Volume of Biographical Sketches and Passing Comment} 97-98 (1897).} offered an amendment to increase the bill’s tax on cigarette sellers from $10 to $30.\footnote{“The Legislative Record,” \textit{GDN}, June 16, 1897 (4:5-7 at 6).} Fields’ motivation was not to raise revenue: “He said cigarettes were a damnable nuisance and should be taxed out of existence.”\footnote{“An Endorsement of Cleveland,” \textit{NYT}, Nov. 11, 1890 (1:3); \textit{History of Texas Together with a Biographical History of Tarrant and Parker Counties} 271-72 (1895); “The Result in Maine,” \textit{GDN}, Sept. 17, 1896 (8:1-2) (characterizing Ayers as a Free Silver Democrat); E. H. Loughery, \textit{Texas State Government: A Volume of Biographical Sketches and Passing Comment} 123-24 (1897).} Giving some economic substance to Fields’ prohibitory objective, Fort Worth lawyer Benjamin P. Ayres, a Democratic Party leader,\footnote{F. Lotto, \textit{Fayette County: Her History and Her People} 231 (1902).} immediately moved to substitute an increase to $1,000,\footnote{“The Legislative Record,” \textit{GDN}, June 16, 1897 (4:5-7 at 5).} provoking members to become “exceedingly unruly” in “the most tumultuous” session yet held. While several representatives occupied the floor simultaneously,\footnote{E. H. Loughery, \textit{Texas State Government: A Volume of Biographical Sketches and Passing Comment} 73 (1897).} Jacob Wolters, yet another Democratic lawyer—but also the grandchild of “refugees from Germany where they had identified themselves with the patriots opposed to monarchy,”\footnote{“The Legislative Record,” \textit{GDN}, June 16, 1897 (4:5-7 at 5).} his maternal grandfather having been a “revolutionist against the German government” in 1848 who “after the failure of the revolution escaped to Texas”—“succeeded in making himself heard”; he opposed both amendments on the grounds that prohibitory taxes “encroached upon the personal liberties of the people. It was not democracy. It was a case of drifting from the democratic moorings. If [Fields] wanted to stop his son from smoking cigarettes it was his
duty to do so and not call on the legislature to do it for him. He was opposed to legislating on the morals and appetites of free born American citizens.” Moreover, he argued that an “exorbitant or double tax on any legalized business would be unconstitutional.” Nor, as one of colleagues later observed, was his libertarianism confined to cigarettes:

He was always alert and ready to combat the efforts of certain members to enact sumptuary legislation. Under his leadership a bill prohibiting baseball playing on Sunday was defeated. A bill was reported which in effect would have taxed social clubs out of existence. A majority of the members seemed to favor the passage of the bill. Fayette county is full of social clubs and the proposed measure would have closed them all up. The young man from Fayette County [sic] took the lead in opposition to the measure.

(Unsurprisingly, in 1908 Wolters, by then one of the state’s leading “corporate attorneys,” became chairman of the Anti-Prohibition Organization. Later still he was Texaco’s chief lobbyist and general counsel.)

Echoing Wolters’ claims, other members, protesting against violations of individual personal privileges, “contended that such legislation was puerile and ridiculous, but that did not quell the confusion. Members howled at the chair, stood up in the aisles...and bedlam reigned during almost the entire session,” causing the chair to call on the sergeant at arms to seat legislators. Then “[d]uring a lull in the ‘cigarette storm’ it was discovered that several members had disappeared and that no quorum was present. It was also discovered that had four more members voted there would have been a quorum and the thousand...
1893: Annus Mirabilis

dollar amendment adopted." 765

Byron Drew, another Democratic newspaper owner-editor 766 and the occupation tax bill’s sponsor, who opposed both amendments, insisting that Ayres’ in particular was “offered for buncombe and ridicule;” 767 declared that “if such a ridiculous thing as the thousand dollar amendment is engrafted in his bill he will help kill the measure.” 768 However, his motion to table the substitute was defeated by a vote of 32 to 54; lack of a quorum then prompted an adjournment to the following day, when the substitute was adopted in lieu of the amendment by a vote of 54 to 44 and the amendment as substituted by a vote of 63 to 40. 769 During floor debate supporters of Ayres’ amendment openly stated that the $1,000 tax was designed to be prohibitory and not to raise revenue, while others predicted that it would force the governor to veto the whole occupation tax bill. 770

Some of the passion that erupted on the House floor was captured a few days later by an interview that a (cigarette-smoking) commercial traveler who happened to have been in the House during the debate (which was “‘the most interesting and spirited’” he had ever heard) gave the New Orleans Picayune: “‘I believe it would make the two-bit dude tremble in his shoes to have heard the thundering solons on the matter of the cigarette and the method that should be adopted incontinently to squelch the coffin spike. Oh, they hit it some heavy jolts.’” Advocates of the $1,000 license had urged a prohibitive tax not only because many youths’ health and mind were ruined by cigarette smoking, but because “‘it was injurious to every user, and did good in no possible respect to any one. It should be stopped and since it could not be done directly, it should be done indirectly, and the prohibitive tax was the thing.’” In contrast, opponents “‘darkly hinted that this was a measure inspired by some vast corporation for the purpose of monopolizing the business of cigarettes in the state of Texas.’” 771

The day after House passage of the $1,000 tax met with approval by all the Galveston wholesalers whom that city’s Daily News interviewed. Echoing opinions voiced by their counterparts and tobacco retailers in states that passed

765“‘The Legislative Record,’” GDN, June 16, 1897 (4:5-7 at 5-6).
767“‘The Legislative Record,’” GDN, June 16, 1897 (4:5-7 at 6).
768“‘The Legislative Record,’” GDN, June 16, 1897 (4:5-7 at 5).
769Journal of the House of Representatives Being the First Special Session of the Twenty-Fifth Legislature 163-66 (June 15-16) (1897).
770“‘The Special Session,’” GDN, June 17, 1897 (4:5).
771“‘Gossip Gathered in Hotel Lobbies,’” DP, June 26, 1897 (10:3-4); also reprinted as “‘He Happened in Austin,’” GDN, June 28, 1897 (2:2).
1893: Annus Mirabilis

outright cigarette sales bans, they “argue it from the moral position and that of health. They say they would willingly give up the business if they were forced to it, and they believe that that is what the law would amount to generally, though they do anticipate that a few merchants would keep cigarettes and pay the tax.” Those few would probably raise the consumer price, thus placing cigarettes “out of the easy reach of the youth” but also contributing to the reversal of the trend during the previous few years when cigarette sales “great superseded” those of cigars. Other wholesalers preferred to ignore this convenient profitable outcome, alleging, instead, that the tax “would cut the cigarette business in two, at least, but the moral effect would recompense [sic] for it.” Embroidering on this theme of gratitude for finally being liberated from the terrible dilemma of profiting from evil, another wholesaler could “only wish they would make it $2500 instead of $1000. Every day little hoodlums pass my place and say, “Mister, give me a light, please.” They each have a cigarette. I mean little fellows, 8, 9 or 10 years of age. The cigarette habit is as bad as the morphine habit. When one has smoked cigarettes a few years they can’t quit. ... There is something in these manufactured cigarettes that is rank poison. ... These little cigarette smokers turn out to be thieves and vagabonds and are of no good to a community.”

Two days after the House action the Senate defeated a motion by Democrat Robert Stafford, a lawyer, to slash the tax back down to $10, but Senator Greer, who had advocated that amount in the regular session, successfully moved to reconsider the vote (17 to 9), and the chamber then adopted the radically reduced tax. The next day the House concurred in all of the Senate’s amendments by a vote of 55 to 44, Ayres casting one of those Nays in objection to the slashing

772 See e.g., above ch. 4.
773 “In Favor of Cigarette Tax,” GDN, June 18, 1897 (4:7).
774 E. H. Loughery, Texas State Government: A Volume of Biographical Sketches and Passing Comment 56-57 (1897). Stafford was a member of the Methodist Episcopal Church, South.
776 Journal of the House of Representatives Being the First Special Session of the Twenty-Fifth Legislature 226-27 (June 19) (1897). Not all the Nays represented protests against the cigarette tax reduction: only 22 of the 44 had voted for the $1,000 substitute. Even among this half not all may have voted Nay to protest the tax cut; for example, Democrat and farmer James Crawford, in pursuit of a different moral agenda, stated that he voted against the Senate amendments because, by reducing from $1000 to $100 the tax on tenpin alleys, they would invite opening such establishments in every town in Texas, “which in my judgment will more to demoralize and wreck the youth of our country than...
of his tax and that on tenpin alleys from $1,000 to $100. Thus in the end, the anti-cigarette forces in Texas failed, as in other states, to impose a prohibitory tax.

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any other one thing that could be enacted.” Id. at 227. Crawford was the son of a Baptist minister. E. H. Loughery, Texas State Government: A Volume of Biographical Sketches and Passing Comment 66-67 (1897).

777 “The End of the Session,” GDN, June 20, 1897 (3:1).

778 1897 Texas General Laws ch. 18, sub. 62, at 49, 51. The $10 occupation tax remained in effect for decades. For erroneous press reporting that the “chappies in Texas will probably roll their own cigarettes after the new law taxing the venders of the ready-made article $1000 goes into effect,” see “Texas Newspaper Comment,” GDN, July 1, 1897 (4:4) (quoting Victoria Advocate).
The Only Major Tobacco-Growing and -Manufacturing State to Prohibit Cigarette Sales: Tennessee 1897

A Tennessee woman has killed her 15-year old son with a hatchet because he persisted in smoking cigarettes. An effective method of putting a stop to the pernicious habit.¹

In 1897, one year after Iowa, Tennessee enacted a general prohibition making it a misdemeanor (punishable by a fine of not less than $50) to sell or—which the Iowa statute had not done—to bring into the state for the purpose of selling or giving away any cigarettes.² This state intervention was especially remarkable in light of the fact that Tennessee at the time was the fourth largest producer of tobacco in the United States, growing on 53,351 acres 35,211,660 pounds valued at $2,464,816, and accounting for about one-tenth of the annual national crop.³ Tobacco was grown in all of the state’s counties, in 23 of which it was the leading crop; by 1895, it was the state’s fourth biggest crop by value, almost exactly equal to that of wheat.⁴ To be sure, by and large Tennessee did not produce the type of tobacco used in cigarettes at that time, which was largely grown in neighboring North Carolina and Virginia. (The state was the producer of the greater part of the dark-leaf tobacco supply for snuff, of which it was also a leading manufacturing location.)⁵ However, six counties in the extreme northeastern part of the state bordering on those states did, according to a tendentious, exaggerated, and self-serving statement allegedly presented by tobacco growers, at the time

¹Nashua Reporter (IA), Nov. 8, 1900 (4:3) (untitled).
⁴“Will Seek a Repeal,” CA, Apr. 5, 1897 (5:5).
Tennessee 1897

produce “a very valuable light tobacco that is in great demand for cigarette use.”

But even these counties accounted for only a minuscule proportion of total state output. If it had been the case that the state produced considerable amounts of tobacco for cigarette manufacture, passage of the law without a single no vote in the House would have been even more startling. Even so, the representatives from those northeastern counties did all vote for the law (rather than merely failing to vote). In any event, Tennessee did not manufacture cigarettes—the production of which was dominated by New York, North Carolina, and Virginia—as that any tobacco destined for cigarette manufacture could still have been shipped out of state. Moreover, unlike Iowa’s law, Tennessee’s did not even prohibit the manufacture of cigarettes.

6“Will Seek a Repeal,” CA, Apr. 5, 1897 (5:5).

7Five of the six counties accounted for only 0.6 percent of total acreage and 0.3 percent of total production in pounds; including the largest producer, Greene county, increased these proportions to only 2.2 percent and 1.4 percent. U.S. Census Office, Census Reports, VI: Twelfth Census of the United States Taken in the Year 1900: Agriculture, Part II: Crops and Irrigation, tab. 10 at 572-73 (1902). For a map of the tobacco-growing areas showing the very low production of tobacco per square mile in these counties, see Twelfth Census of the United States, Taken in the Year 1900: Statistical Atlas, plate no. 167 (1903).


10A brief discussion of the statute and the Tennessee Supreme Court case upholding it in a history of the court remarked on how “unlikely” it was that “Tennessee, a major tobacco growing state, would ban the sale of cigarettes,” but then tried to explain the measure by reference, inter alia, to the (irrelevant) competition of the cigar industry based on a source that also had not studied the situation in Tennessee. James Ely, Jr., “The Tennessee Supreme Court, 1886-1910,” in A History of the Tennessee Supreme Court 152-87 at 172-73 (James Ely, Jr. ed. 2002).
Tennessee 1897

Scientific Temperance Instruction

In 1891 Tennessee, following similar statutes elsewhere, enacted a moderate ban on the sale, giving, or furnishing to minors of cigarettes or cigarette paper, violations being subject to fines ranging between 10 and 50 dollars. The very next year a correspondent of the social-reformist Christian Union during a trip in Tennessee learned from the seventeen- or eighteen-year-old driver of his buggy that “nothing was easier” than to evade the law by getting an older friend to buy him cigarettes or to buy tobacco himself and make them. Interestingly, since “some dealers were particular enough to ask to see his pipe” when he requested cut tobacco, he sometimes brought a pipe to show.

Astonishingly forward-looking, in contrast, was the so-called Scientific Temperance Instruction law that the legislature passed in 1895 after having been under siege for eight years by the Tennessee WCTU "as only W.C.T.U. women know how to fight":

[1] In addition to the branches in which instruction is now given in the public schools of this State, Physiology and Hygiene, with special reference to the nature of alcoholic drinks and narcotics and smoking cigarettes, and their effects upon the human system, shall also be taught as thoroughly as other required branches.

The statute, which made this branch a mandatory course of study for all pupils in all schools supported entirely or partly by public money, also provided that “no certificate shall be granted any person to teach in the public schools” after January 1, 1896, who had “not passed a satisfactory examination” in this specific subject matter. (The requirement that elementary school curriculum include

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11 1891 Tenn. Pub. Acts ch. 107, §§ 1-2, at 242-43. The law required judges to give such cases in charge to grand juries. Id. § 3 at 243. Later that year at an extra session the law was amended to give grand juries “inquisitorial powers over all offenses committed under this act.” 1891 Extraordinary Sess. Tenn. Pub. Acts ch. 18, § 1, at 37.
13 On the national movement to enact such legislation, see above ch. 2.
17 1895 Tenn. Pub. Acts ch. 180, §§ 2-3 at 378 (May 14). The Tennessee statute nevertheless lacked several features that other state laws embodied such as a penalty for
teaching about the effects of “cigarette smoking” remained in effect until the legislature repealed it in 1990.) A few months later the state superintendent of public instruction assured the governor that the law would be observed by the school superintendents and other officials.

As introduced, reported for passage by the Committee on Education, debated, and passed in the House by a vote of 66 to 13, the bill lacked the “cigarette smoking” feature. During Senate floor debate Democrat William Caldwell’s 21

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21 William Parker Caldwell (1832-1903), an anti-secession Democrat, had served in the U.S. House of Representatives from 1875 to 1879. It is unclear what motivated Caldwell to advocate teaching children about “the evil effects of cigarette smoking,” but perhaps his Methodist religion (the only Christian religion to prohibit its clergy from smoking) was a factor. Robert McBride and Dan Robison, Biographical Directory of the Tennessee General Assembly, Vol. 1: 1796-1861, at 111 (1975); Goodspeed History of Tennessee: Dyer, Gibson, Lake, Obion and Weakley Counties 991 (1978 [1887]). Two obituaries in his local newspaper shed no light on his anti-cigarette stance. “Hon. W. P. Caldwell,” Dresden Enterprise, June 12, 1903 (1:1); Joseph Jones, “Hon. W. P. Caldwell,” Dresden Enterprise, June 19, 1903 (1:1-2). The account of the Senate proceedings in the Nashville Banner did not add anything to that in the Senate Journal. “The State Legislature,” NB, May 14, 1895 (1:1-3 at 2). By 1895 Caldwell was a senior politician and leading Bourbon figure, who was elected temporary president of the Tennessee Senate until a permanent president was chosen. Senate Journal of the First Session of the Forty-Ninth General Assembly of the State of Tennessee 5 (1895); J. Lewis, “The Tennessee Gubernatorial Campaign and Election of 1895,” Tennessee Historical Quarterly 13(4):301-328 at 306-307, 316 (Dec. 1954). Tobacco was a “standard crop...especially in Obion [and]Weakley” counties, which he represented. The tobacco grown there was “suitable for exportation, being...very strong in nicotine, the essential principle of tobacco.” “Everything Grows in Tennessee,” NB, May 1, 1897 (21:1-5 at 2). The western areas of Tennessee and Kentucky “grew virtually the world’s entire supply” of so-called Black Patch tobacco used for non-cigarette tobacco. Tracy Campbell, The Politics of Despair: Power and Resistance in the Tobacco Wars 12 (1993). Although the Tennessee WCTU took great pride in having secured passage of the law and removed the “stigma of
motion to “amend by including the evil effects of smoking cigarettes” was adopted, whereupon the bill was passed 26 to 2,\(^2\) and the House concurred in the amendment the same day.\(^3\)

During the two decades after 1882 all states and the federal government, prodded by the WCTU, enacted very similar laws using some variant of “alcoholic drinks, stimulants, and narcotics....”\(^4\) Tennessee, however, was the only state expressly to include in its original law any mention of a tobacco product and specifically cigarette smoking.\(^5\) Nevertheless, it is striking and significant that as early as 1895, before cigarettes had even become a major form of tobacco use, Tennessee chose to focus expressly and exclusively on cigarette smoking. To be sure, the fact that as late as 1915, the Tennessee legislature enacted a statute establishing the fourth Friday in October as Frances E. Willard Day—to honor the longtime president of the WCTU who had died in 1898—on which schools were required to teach students about the “evils of intemperance,”\(^6\) presumably had considerably more to do with alcohol than tobacco.

**In the Legislature**

Tennessee has gone so far as to prohibit the sale of cigarettes....\(^7\)

Governor Taylor and the general assembly were in a regulatory mood, for building and

\(^1\)“Tennessee,” US 21(23):11 (June 6, 1895).

\(^2\)Senate Journal of the First Session of the Forty-Ninth General Assembly of the State of Tennessee 665 (1895) (May 13).

\(^3\)House Journal of the First Session of the Forty-Ninth General Assembly of the State of Tennessee 560 (1895) (May 13).

\(^4\)See below ch. 9.

\(^5\)A history of the Tennessee WCTU that praises this law and even quotes its full text was apparently unaware of its uniqueness and did not remark on the express reference to cigarettes. Mattie Beard, *The W.C.T.U. in the Volunteer State* 11, 68 (1962).


\(^7\)Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* § 130 at 120 (1904). It is unclear what prompted Freund to ignore Iowa and mention only Tennessee—other than the prominence that the U.S. Supreme Court had conferred on it.
During the 1895 session a bill was introduced in the Senate to prohibit the sale of cigarettes in Tennessee, which progressed as far as a Sanitary Affairs Committee recommendation that it pass and then died. A House bill that would have made selling cigarettes a privilege reached the same stage before expiring.

In the next regular session of the legislature (which Democrats controlled by a 4 to 1 majority), Representative Jesse L. Rogers introduced in the House on January 18, 1897, H.B. No. 158 to prevent the sale of cigarettes. Just what motivated Rogers, a Republican lawyer from Knoxville, who, after leaving the legislature in 1899, was local counsel of the Southern Railway and the Louisville & Nashville Railroad, and a member of the Elks, to advocate an anti-cigarette measure that the WCTU of Tennessee was urging on the legislature is unclear.
For his progressive bona fides, however, the Knoxville Typographical Union, No. 100 vouched several months later when it adopted a resolution “commend[ing] the good works of the Hon. Jesse L. Rogers in advocating and securing the passage of measures in the interests of the working people of the State,” 36 A year after enactment of his bill, Rogers did state that “I regard the use of the cigarette as being most injurious of all, and one that is doing more to destroy the youth than any article now in use.” 37 Without shedding any light on this question, several newspaper obituaries in 1911 highlighted his authorship and vital role in securing passage of the anti-cigarette law 14 years earlier. 38

The Rogers bill read:

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall be a misdemeanor for any person, firm, or corporation to sell, offer to sell or to bring into the state for the purpose of selling, giving away, or otherwise disposing of any cigarette, cigarette paper or substitute for the same; and a violation of any of the provisions of this Act shall be a misdemeanor punishable by a fine of not less than fifty dollars.

Section 2. Be it further enacted, That the grand juries shall have inquisitorial power over offenses committed under this act.


An article that the Memphis Commercial Appeal published the day that the anti-cigarette law went into effect included a paragraph that began: “It may be interesting to the fiends to know that the Hon. Jesse L. Rogers is the cause of their present inconvenience,” and continued with information about him, but added nothing about his motivations. “Cigarettes Are Out Today,” CA, May 1, 1897 (5:2). During a House debate in 1897 on a liquor dealer tax, after another member had taken umbrage that Rogers had called him a “crank,” Rogers remarked that: “He was himself a crank on the liquor question—at least some people said so.” “Senate Refuses to Accept,” NB, Apr. 2, 1897 (1:5-6, at 7:6).

Undated clipping attached to H. Burnam Price, Rec. Sec. to Hon. John C. Houk, Apr. 5, 1897, in Papers of Leonidas Campbell Houk and John Chiles Houk Papers, Box 67, McClung Historical Collection, Knox County Public Library, Knoxville, TN.


Section 3. Be it further enacted, that this act take effect from and after the 1st day of May 1897, the public welfare so requiring it.\textsuperscript{39}

This measure differed from Iowa’s law in: (1) not prohibiting the manufacture of cigarettes; and (2) prohibiting importation. To be sure, the latter ban apparently did not apply to imports for personal consumption, just as the bill did not outlaw possession or use of cigarettes.

On January 22, after two proposed amendments had been tabled, the House, in accordance with the Judiciary Committee’s recommendation, unanimously voted “with much vigor and determination”\textsuperscript{40} for the bill 81 to 0.\textsuperscript{41} The core argument voiced in speeches in favor of the bill was, at least according to an account in a non-supportive newspaper, cigarette smoking’s “sapping the health and morality from the youth of the land.”\textsuperscript{42} The pithy editorial reaction of Rogers’ hometown\textit{Knoxville Daily Journal}—the state’s leading Republican daily paper—\textsuperscript{43} was that on the bill’s becoming law he “will have forever made enemies of the undertakers.”\textsuperscript{44} In a more ironic vein, displayed even in its headline, “Smoke—Up, Dudes, for Your Light is Going Out,” the Democratic\textit{Nashville American} spoke of the “considerable alarm” that the bill was “calculated to cause” both smokers and sellers of “the seductive rolls of tobacco....”\textsuperscript{45} The independent\textit{Nashville Banner} reported that even if the bill were to become law, the fate of the similar Iowa law raised a question as to whether it, too, conflicted with “the national interstate commerce law.” The newspaper misinformed readers that, since “there was no way of preventing dealers from shipping the cigarettes into the state and disposing of them in the original 5-cent packages,” the Iowa law was “practically ineffective” (though the paper correctly but self-contradictorily added that under the Iowa ruling cigarettes could not be sold in

\textsuperscript{39}H.B. No. 158, Tennessee House of Representatives, 1897, RG 60, Tennessee State Library and Archives, Nashville; handwritten copy furnished by the Tennessee State Library and Archives.

\textsuperscript{40} “Smoke—Up, Dudes, for Your Light is Going Out,” \textit{NA}, Jan. 23, 1897 (3:1-5 at 1).

\textsuperscript{41} \textit{Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee} 242 (1897) (Jan. 22). One amendment would have added, “Providing that this does not apply to cigarettes brought into the State for sale in other States,” while the other would have made the law take effect six months after passage.

\textsuperscript{42} “Smoke—Up, Dudes, for Your Light is Going Out,” \textit{NA}, Jan. 23, 1897 (3:1-5 at 1).


\textsuperscript{44} \textit{KDJ}, Jan. 25, 1897 (2:1) (untitled editorial).

\textsuperscript{45} “Smoke—Up, Dudes, for Your Light is Going Out,” \textit{NA}, Jan. 23, 1897 (3:1-5 at 1).
quantities). The article then went on to confirm for Tennessee the same resistance by tobacco dealers to selling cigarettes that led them in other states to support anti-cigarette laws:

[T]here is not a dealer in the city [Nashville] who would not be glad to see the bill passed in such a way as would really prohibit the sale in this state. A Banner reporter interviewed a sufficient number of tobacco merchants today to justify the assertion that the passage of a law that will really prohibit would give general satisfaction. The pernicious habit of cigarette-smoking has grown to an alarming extent. Its bad effects have even reached the school-rooms and young boys who have become slaves to the habit, show the bad results in their daily recitations and examinations.

The reasons offered by dealers for their position varied markedly. Some agreed with their counterparts in other states that there was “no money” or “no profit” in selling cigarettes; others stated that suppression would enhance the sale of cigars and tobacco (which were presumably more profitable). Still others, however, advanced non-financial reasons: that “even women” in Nashville were beginning to smoke “to an alarming extent”; or that no one outside the tobacco business had any “idea of the debauching influence that this cigarette habit has reached.”

On February 9 the bill proceeded to its third reading in the Senate, which, according to the Nashville American, “it was seriously thought,” would defeat the House measure. Senate opposition appeared first in the form of delaying motions to refer the bill to other committees, which failed. This tactic was in part grounded in the claim—supported by a reading of passages from “the Iowa

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46. "The Anti-Cigarette Bill," NB, Jan. 23, 1897 (1:3). On Iowa, see below ch. 10-12. As the U.S. Supreme Court dissenters in Austin v. Tennessee correctly pointed out: “[I]f cigarettes cannot be brought into the State of Tennessee and sold in the packages in which they were manufactured, but must be brought in and sold only in barrels or boxes of large size, the right of importation is practically defeated, for no consumer would buy a barrel or box for his own use, and no importer could sell it to a second party with the idea of a resale, because the moment the first sale is accomplished, the law of the State interposes to prevent the second.” Austin v. Tennessee, 179 US 343, 386 (1900).


49. "Forensic Lances Clash," NA, Feb. 10, 1897 (1:8). The paper claimed that supporters’ police power argument had trumped opponents’ interstate commerce argument.

50. Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee 360 (1897) (Feb. 9).
Tennessee 1897
decision”—that the bill was unconstitutional.\textsuperscript{51} Other senators then offered
amendments to weaken the bill, which also all failed. Republican Senator
Roderick Random Butler moved to limit the prohibition only to the sale of
cigarettes “composing poisonous matter or substance,” while Republican Senator
John C. Houk (who would soon play an important part in the post-enactment
controversy surrounding the law) moved to prohibit only “impure” cigarettes.
Butler’s next amendment, which was presumably designed to go in the opposite
direction of unacceptably radicalizing the bill, would have subjected cigars and
tobacco to the prohibition as well; it resoundingly lost by a vote of 24 to 4. The
opposition having spent its force, H.B. 158, with exactly the same text as
introduced by Rogers, passed 18 to 8.\textsuperscript{52} Of tantalizingly great interest is that
Butler and Houk between them represented the aforementioned six northeastern
counties that supposedly produced tobacco for cigarettes.\textsuperscript{53} To be sure, this

\textsuperscript{51}“The Cigarette Bill Passed,” \textit{NB}, Feb. 9, 1897 (1:5-6).

\textsuperscript{52}\textit{Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee}
360-62 (1897) (Feb. 9). Two senators provided separate explanations for their no votes
based on the bill’s alleged violation of the interstate commerce clause of the constitution.
\textit{Id.} at 362. The eight who voted Nay were evenly divided between Democrats and
Republicans.

\textsuperscript{53}\textit{Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee} 3-4
(1897) (Johnson, Carter, Unicoi, Washington, Greene, and Cocke counties); “Will Seek
a Repeal,” \textit{CA}, Apr. 5, 1897 (5:5). These counties were traditionally Republican as was
East Tennessee in general, a legacy of the absence of slaves and the population’s staunchly
unionist opposition to secession. Paul Isaac, \textit{Prohibition and Politics: Turbulent Decades
in Tennessee, 1885-1920}, at 56 n.71 (1965); V. O. Key, Jr., \textit{Southern Politics in State and
Nation} 75-81 (1949). One of the six other senators who voted against Rogers’ bill, L. T.
M. Canada, represented Robertson and Montgomery counties (in the burley tobacco region
on the Kentucky border), which led the state in tobacco acreage, production, and value.
\textit{Id.} Canada stated on the Senate floor that while he heartily favored such a measure, he
regarded it as constitutionally infirm and first wanted those defects eliminated. “Forensic
Lances Clash,” \textit{NA}, Feb. 10, 1897 (1:8, at 2:1). Unfortunately, research found no
information concerning possible differences between whites and blacks concerning
suppression of cigarettes. Ten years earlier, in 1887, when a state constitutional liquor
prohibition amendment was defeated 118,000 to 145,000, blacks supposedly furnished
90,000 of the No votes, leading prohibitionists to conclude that a majority of white voters
had favored it, while blacks had been swayed by money, liquor, and prejudice to kill it:
“Moral reformers in future contests generally took the position that Negro voting was a
threat to progress and that the success of their program depended at least on keeping
Negroes out of politics.” To be sure, after 1887 prohibitionists in Tennessee tended to
favor disenfranchising blacks, just as many early-twentieth-century Progressives nationally
regarded blacks’ political participation as antithetical to securing a whole array of political
Tennessee 1897

and economic reforms. Paul Isaac, *Prohibition and Politics: Turbulent Decades in Tennessee, 1885-1920*, at 57 (quote), 266 (1965). Nevertheless, the process of depriving blacks of the vote and ejecting them from politics, which was initiated in 1886, was in fact perpetrated, by force, fraud, and law, by Democrats, especially in the black belt, in order to weaken the Republican party, which relied heavily on black votes. Whereas during the first half of the 1880s black Republicans won seats in the state legislature from every black-majority county and even from two in which they composed less than 40 percent of the population, and as late as 1885 all 32 Republicans in the House voted for a black for Speaker, in 1890 black voter turnout fell drastically, effectively plummeting to zero after 1896. J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*, at 104-23 (1975 [1974]).

The *Banner* predicted matter-of-factly that if the supreme court upheld the law’s constitutionality, “the naughty coffin tusk must bid adieu to the whole State of Tennessee.” Yet editorially it wondered whether the bill that “went through the Senate with a whoop” would “work like the law forbidding the sale of pistols in Tennessee.... Somehow everybody...who wants a pistol gets it....” Deprecating enforcement, the paper conceded that the “cigarette evil is a great evil,” but charged that even “the existing law against the sale of cigarettes to boys is made a mockery and a sham.” Two days later, cigar-smoking Democratic Governor Robert Taylor—a representative of the party’s agrarian wing whose “major function,” according to some historians, “had been that of uniting dissident forces within the Democratic party” and during whose administration “little of significance was accomplished”—approved the bill. This legislative

54 The Cigarette Bill Passed,” *NB*, Feb. 9, 1897 (1:5).
55 Cigarettes,” *NB*, Feb. 10, 1897 (4:2) (edit.).
57 Stanley Folmsbee et al., *Tennessee: A Short History* 430 (1969). On Taylor as conciliating the agrarian and industrial factions of the Democratic Party in a southern state with a Republican Party of exceptional strength, see Daniel Robison, *Bob Taylor and the Agrarian Revolt in Tennessee* 212-18 (1935). A very different perspective on Taylor later was offered by Roger Hart, *Redeemers, Bourbons, and Populists: Tennessee 1870-1896*, at 100-106 (1975), who argued that no evidence suggested that Taylor led any revolt, be it agrarian or otherwise. He also criticized Robison’s master conciliator thesis on the grounds that it failed to resolve the contradiction between Taylor’s alleged leadership of discontented agrarians and his advocacy of industrial development (his significant ownership of stock in an iron and steel company and law partnership with a Republican railroad lawyer indicating his alliance with New South capitalism). Taylor’s ability to
success was all the more remarkable since the much older, more broadly based, and stronger Tennessee anti-alcohol movement had been unable to secure passage of any of its temperance bills that session.59

At the end of March, Senator Houk introduced a bill to repeal the newly enacted law, but it died in committee.60 Houk (1860-1923), a lawyer and “one of the most influential Republicans in the state,”61 was mentioned as a gubernatorial candidate; he was elected to fill the congressional seat vacated by his father’s death in 1891, was re-elected once and, after losing his seat in 1895, served in the Tennessee Senate sporadically from 1897 until his death in 1923.62 In 1896 his faction of the Republican Party called itself the “‘native born whites’” and its opponents “‘carpetbaggers.’”63 That he was urgently and systematically preparing an interstate commerce-based attack on Rogers’ bill was underscored by the communication that Houk wrote on February 3, 1897, about a week before the Senate floor vote, to U.S. House Speaker Thomas Reed requesting that the latter “answer following questions fully by telegraph. First, What is the trend of U.S. Circuit and Supreme Court decisions upon state laws prohibiting interstate traffic in whiskey, tobacco and cigarettes? Second, Is it or is it not to the effect that such laws are invalid or unconstitutional? Third, What is the trend of Congressional

58 Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee 509 (1897) (Feb. 12); 1897 Tenn. Pub. Acts ch. 30 at 156.
60 Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee 853, 864 (1897) (Mar. 30-31). Oddly, the author of a master’s thesis biography of Houk, while mentioning his vote against the anti-cigarette bill, not only overlooked his own bill to repeal, but was apparently totally unaware of the extraordinary session of 1898 and the nationally reported controversy about Houk’s role in the attempted bribery of Rogers. Claude Archer, “The Life of John Chiles Houk” at 65 (M.A. thesis, U. Tenn., 1941).
action upon such interstate traffic? Houk, however, sought not simply to repeal the anti-cigarette law, but to replace it with a watered-down version incorporating the provision that he had unsuccessfully offered as an amendment to prohibit only cigarettes made of any other than “clear tobacco.”

Houk’s legislative initiatives, he insisted in an account he gave to the Knoxville Daily Journal the following year, were driven by his belief that Rogers’ law would certainly be declared an unconstitutional interference with interstate commerce—a position that he had set out in a letter during the 1897 session to various religious organizations that had petitioned him to vote for Rogers’ law. He openly admitted to the newspaper that his repeal bill had been sent to him by his friend and fellow Republican New York Senator Thomas Platt, which he “cheerfully considered” and introduced because he thought it constitutional and good and one that in 1898 should still be enacted. Although he did not know it at the time he introduced the bill, even after he later learned that “the bill was satisfactory to the American Tobacco company...no reason presented itself that the bill was not a proper and just one,” and he still continued to support it in 1898.

64Jno C. Houk to Hon. Thos. B. Reed, Feb. 3, 1897, in Papers of Leonidas Campbell Houk and John Chiles Houk Papers, Box 66, McClung Historical Collection, Knox County Public Library, Knoxville, TN. The communication, which is handwritten on Tennessee Senate letterhead, appears to be a draft for a telegram. Crossed out is the sentence fragment: “First, If a state passes a law prohibiting interstate traffic in whiskey, tobacco or cigarettes”.

65Although the Senate Journal gave repeal as its short title as did the handwritten sleeve on the original bill, that provision was only § 6. S.B. 542, Tennessee Senate, 1897, RG 60, Tennessee State Library and Archives (typed copy furnished by Tennessee State Library and Archives).

66S.B. 542, § 1. The bill would also have raised the age to 18, below which it was illegal to sell cigarettes to anyone. Id. § 3.

67aCigarette Bribery,” KDJ, Feb. 8, 1898 (8:2).
Tennessee 1897

Extraordinarily Rare Local Cigarette Sales Data Emerge on the Eve of Prohibition

The rights of interstate commerce have thus far stood between “cigarette fiends” and the prohibitory laws. 68

The day (April 30) before the “cigarette business in Tennessee goes out,” the Knoxville Tribune reported that the “dealers in Knoxville intend to obey the law,” thus forcing those who smoked “the deadly cigarette” personally to send out of state for more. 69 On May 1 (which was also the opening day of the Tennessee Centennial Exposition in Nashville celebrating a century of statehood), the Knoxville Daily Journal, which supported the law, caustically observed under the headline, “Coffin Tacks Gone,” that the “fiend” who lacked the cash to stock up “will be compelled to forego the pleasure of gradually killing himself.” In the interim, however, the cash-heavy suicide was stocking up: “More cigarettes were sold in the city [Knoxville] yesterday than in any month since they have been on the market. Just how many were sold will of course never be known, but the number was enormous.” Just one single clerk at one cigar store had sold 21,000; and despite having denied the possibility of knowing, the Journal did an about-face and claimed that “[f]ully 75,000 cigarettes were sold.” 70 As in other states, dealers were portrayed as relieved that a burden had departed; in Tennessee, the Journal’s pro-prohibition stance perhaps prompted it to launch self-policing compliance by means of self-fulfilling prophecy:

Many seem to thing [sic] that the law, like many others, will not be enforced. That it will be, there can be no question of a doubt. The firms that have dealt in cigarettes, have often said that there was no money in selling them and that they only kept them to accommodate the trade. These firms will not break a law simply for accommodation and will not keep them on hand. It can be seen from this that the law will be enforced by the tobacco dealers themselves and that the officers and courts will not be compelled to settle the matter. 71

Going even further, the Journal asserted that nearly universal popular support would secure enforcement:

70 “Coffin Tacks Gone,” KDJ, May 1, 1897 (2:5). See below on the implausibility that more cigarettes were sold in one day than ever before in a month.
71 “Coffin Tacks Gone,” KDJ, May 1, 1897 (2:5).
Tennessee 1897

All people, with possibly a few exceptions, believe the law to be one of the best ever passed by the Tennessee legislature and none believe it more strongly than do cigarette smokers themselves. It is a good thing, not only for those who are addicted to the habit, but is of far more benefit to the small boys, now growing up, who have not commenced to smoke and now will have no chance to do so.

One of the best features of the law is that a heavy fine is imposed on any one who gives away a cigarette. This will prevent those who have laid in a supply from providing smokes for those who did not do so.

Many are glad that the law has gone into effect and firmly believe that the cigarette cough and fingers will, within a month or two, be a thing of the past.72

The same day’s competing account in the Democratic Knoxville Sentinel, which predicted that the law would create “pandemonium for a while” for “[c]happies” who smoked cigarettes, interviewed “the average cigarette smoker,” who offered this account of nicotine addiction withdrawal symptoms: “‘When a smoker is out of them, he has a peculiar and gnawing sensation in the breast that is relieved only by inhaling the cigarette smoke. ... It is a terrible habit, and even worse to get rid of than even the whisky or morphine curses. I know many cigarette smokers who dread the effect of cutting off their supply, and yet who would give anything they possess to be rid of the habit.’” Potentially even more significant was the Sentinel’s report that: “During the past two days nearly a quarter of a million of cigarettes have been sold, and it is thought that from four to five thousand persons in Knoxville smoke the cigarettes that are often called ‘coffin tacks.’”73 Since “[m]en addicted to the habit who had the money bought them by the thousand,”74 the average of 50 or 60 cigarettes that cigarette smokers in Knoxville had purchased during what Tennesseans imagined were the last two days of in-state availability was far from impressive.

This rare datum for the years before the 1930s on the aggregate number of cigarette smokers in a city is well worth dwelling on. The population of Knoxville at the census of 1900 was 32,637,75 up from 22,535 in 1890,76 which,

72“Coffin Tacks Gone,” KDJ, May 1, 1897 (2:5).
73“Can’t Smoke Now,” Sentinel (May 1, 1897). This extraordinary selling of 125,000 in a day should be compared with normal daily sales of about 50,000 if the claim below of annual sales of 15,000,000 was accurate and dealers complied with the Sunday blue law. Tenn. Code Ann. § 3029 at 684 (1896).
74“Coffin Tacks Gone,” KDJ, May 1, 1897 (2:5). Another account mentioned a doctor who had bought 5,000 cigarettes for $20. “In Effect Today,” KT, May 1, 1897 (2:5).
75U.S. Census Office, Census Reports: Vol. II: Twelfth Census of the United States, Taken in the Year 1900, Population, Part II, tab. 9 at 133 (1902).
76Historical Statistics of the United States: Earliest Times to the Present: Millennial
by linear interpolation, suggests a total population of about 30,000 in 1897. If it is assumed that virtually no females of any age and no males under 15 years of age smoked (or bought) cigarettes, the relevant group was the total male population 15 and over, which equaled 10,996 in 1900; scaled back for the intervening population increase, they numbered about 9,500 in 1897. Had 4,000 to 5,000 males over the age of 14 in fact been cigarette smokers, the prevalence rate would have been about one-half, which exceeds by a large margin any retrospective estimate for adult men at large before the 1930s. If this prevalence rate had obtained nationally and half of all males above the age of 14 in the United States had been cigarette smokers, the total for the whole country would have been about 12.8 million in 1900. Calculated against total national cigarette output of about 4.6 billion in 1897, per capita annual consumption would have amounted to about 359 or fewer than 1 per day; on the basis of reduced production (of 3.25 billion) in 1900, the annual average would have been only 254 cigarettes or about 5 per week. These numbers are inherently implausible,
suggesting that the Sentinel’s were too, especially since Knoxville was a small town in a rural state with a tiny foreign-born population.

These numbers become even more fascinating and mysterious when supplemented by a further datum appearing in a similar article the same day in the Knoxville Tribune. Its text was in part word-for-word identical with that in the Sentinel, but it also included (in addition to brief reports filed by “a Tribune man” who visited “nearly all the cigarette dealers in the city”) the following empirical missing link: “A careful computation has been made to ascertain the number of cigarettes consumed in Knoxville each year, and as a result the number is thought to be in excess of fifteen millions.”81 The passive voice hid the computational agent, but perhaps the reporter had collected the data from the outgoing dealers, who presumably also furnished him with the same figure of 4,000 to 5,000 that the Sentinel published. In any event, these data would yield an annual average consumption of 3,000 to 3,750 per smoker, which in turn was the equivalent of a much more plausible 8 to 10 cigarettes per day. Nevertheless, these figures too produce inexplicable anomalies. Calculated on the basis of a total population of 30,000, annual per capita consumption would have been a wholly implausible 500, whereas it was only a mere 35 for the United States as a whole in 1900 and did not reach 500 until 1923.82 Similarly, if the adult population (including women) is used as the denominator, Knoxville’s per capita consumption in 1897 was more than 700, a level that, again, was not reached nationally until the early 1920s.83 Looked at somewhat differently: whereas Knoxville residents accounted

1897 and 1900.

81“In Effect Today,” KT, May 1, 1897 (2:5).

82Jack Gottsegen, Tobacco: A Study of Its Consumption in the United States tab. x and xi at 27-28 (1940). This comparison is somewhat skewed by the fact that cigarette consumption fell sharply between 1897 and 1900; but even if the aggregate consumption of 1897 is used as the numerator, national per capita consumption would still have been only about 60. Per capita consumption (based on the population 15 and older) in the United States (1,332) did not exceed that in the United Kingdom until 1929 (1,330); total U.S. cigarette production/consumption (30.5 billion) exceeded the UK’s (25.1 billion) for the first time in 1917. UK Smoking Statistics tab. 1.2 at 5, tab. 2.1 at 13 (Nicholas Wald et al. eds. 1988). The U.S. data were calculated based on Jack Gottsegen, Tobacco: A Study of Its Consumption in the United States tab. x at 27 (1940); and U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970: Bicentennial Edition, Pt. 1, Ser. A 29-42 at 10 (1975).

83U.S. Dept of Health and Human Services, Reducing the Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General Tab. 2 at 268 (1989). The gap is understated because national data are based on a definition of “adults” as being 18 and older, whereas the census data for 1900 grouped 15-19 year-olds together; estimating that
for only 0.043 percent of the U.S. population in 1900, according to these figures they consumed 0.33 percent of all cigarettes.

At almost the same time the New York Sun published its own fascinating back-of-the-envelope calculation. Estimating that in 1896 there were about 18,000,000 men and boys of “‘cigarette smoking age’”—that is, between 14 and 44 years old—would yield an annual average of 200 cigarettes for every man and boy, “provided, of course, that cigarette smoking was general, instead of being, as it is, restricted to a very small fraction of the whole population, mostly in the cities and large towns.”

Unfortunately, this tantalizing set of data thus appears to lead to a quantitative self-contradiction. If, however, for some as yet inexplicable reasons, such a high prevalence and consumption rate really did obtain in Knoxville (and Tennessee), then the statutory imposition of a flat prohibition of in-state cigarette sales was all the more remarkable.

To be put into quantitative perspective, the Knoxville data can be compared with several random factoids mentioned in a newspaper in Maine in 1894: “It is estimated that 1,200 boxes of cigarettes are sold daily in Portland, about a sixth of them to women, and probably two-thirds of the remainder to boys under sixteen.” If the boxes were standard 10-cigarette packages, 12,000 cigarettes a day amounted to 3,744,000 in a year (assuming that Maine’s Lord’s Day prohibition on Sunday store operations was effective). Portland’s population of a little less than 39,000 in 1894 yields per capita annual sales of just under

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18- and 19-year-olds composed two-fifths of this group would yield per capita adult consumption in Knoxville in 1897 approaching 800.

84 “Cigarettes by the Million,” New York Sun (reprinted in Syracuse Daily Standard, Mar. 12, 1896 (5:6-7)).

85 That Tennessee was a major non-cigarette tobacco-growing state might explain an above-average prevalence rate of non-cigarette tobacco use, but not of cigarette smoking. It is possible that the location of the campus of the main state university in Knoxville might have increased the smoking rate, but the Sentinel article did not raise this issue, and the proportion of 20 to 24 year-olds there was very close to that in Memphis and Nashville.


86 “Maine Melange,” BDWC, Nov. 9, 1894 (1:6). This column consisted of unrelated snippets.

87 This newspaper made that assumption: “The New Cigarette Law,” BDWC, May 3, 1897 (3:7).

88 Rev. Statutes of Maine, ch. 124, § 20, at 906 (1884).

89 Portland’s population at the 1890 census was 36,425 and 50,145 in 1900; however, a large part of this increase stemmed from the annexation in 1899 of the town of Deering,
Tennessee 1897

which had a population of 5,353 in 1890. On the assumption that Deering’s population increased at the same rate as Portland’s in the 1890s, linear interpolation yields an estimated population in 1894 of somewhat under 39,000. \( \text{http://www.library.umaine.edu/census/townsearch.asp} \) (visited Aug. 26, 2006).


\( ^{92} \)Curtis Wessel, “The First Sixty Billion Are the Hardest for Cigarette Industry,” Printer’s Ink 126(5):4-6, 137-46 (Jan. 31, 1924) (“female consumption now is as large as the total output for men twenty years ago,” which was about 3 billion, while consumption in 1923 was 60 billion); Lin Bonner, “Why Cigarette Makers Don’t Advertise to Women,” Liberty 3(24):55-57 at 55 (Oct. 16, 1920) (15 percent). Retrospective birth cohort prevalence rates show that fewer than 5 percent of the female cohort born before 1900 smoked in 1920 compared with more than 40 percent of men of that cohort. U.S. Dept of Health and Human Services, The Health Consequences of Smoking for Women: A Report of the Surgeon General fig. 3-4 at 29-30 (1980). According to more refined estimates, whereas 30 percent of men born between 1881 and 1890 smoked cigarettes by about 1905, fewer than 5 percent of women born between 1891 and 1900 smoked by 1920. Jeffrey Harris, “Cigarette Smoking Among Successive Birth Cohorts of Men and Women in the United States During 1900-80,” Journal of the National Cancer Institute 71(3):473-79, figs 1-2 at 475 (Sept. 1983).
under 2,000 boys under 16 were calculated as including males from 10 to 14 years of age and 20 percent of those 15 to 19 years of age. If these proportions were, however, accurate for Portland and representative for the country (or at least for the larger cities) as a whole, then they would explain why the anti-cigarette movement was so concerned about youth smoking.

In the days immediately preceding and following the effective date of the anti-cigarette law, the Memphis Commercial Appeal published several articles emphasizing that cigarettes sales would really be stopped, though sellers would not regret their disappearance. At first misinforming its readers that the law would go into effect on April 1, the paper declared that "[v]ery much to the discomfiture of the devotees of this habit, no satisfactory solution of the problem" of where they would get them had been offered. The Commercial Appeal assured them that "the dealers say they will not handle cigarettes"—not because they were not profitable, but rather for ethical reasons: "Many of the dealers are glad of an opportunity to quit the sale of the pernicious things, as they realize as fully as the wise legislators who...passed the law that the cigarette is an evil. Therefore it is safe to say that none of the leading tobacconists will handle cigarettes.” But dealers were not the only opponents; in fact: "The almost universal antipathy to the habit of cigarette-smoking is pretty certain to aid in the enforcement..."

On the eve of the law’s actual effective date the “fiends” must have believed the press because some were buying cigarettes by the box containing 1,000. The dealers, for their part, had in the meantime found a more materialistic reason for accepting the law in line with the reactions of their counterparts in Washington State and Iowa: “The profit in cigarettes is small and they are hardly worth the trouble of handling them. The, the abolition of the cigarette will increase the demand for cigars and tobaccos for pipe use. In fact, it is a question whether the law will have a detrimental financial effect on the retail dealers at all.” By the

93Department of the Interior, Census Office, Report on the Population of the United States at the Eleventh Census: 1890, Part II, tab. 8 at 127 (1902). Boys under 16 were calculated as including males from 10 to 14 years of age and 20 percent of those 15 to 19 years of age.


95"Cigarettes Are Out Today,” CA, May 1, 1897 (5:2). To be sure, the paper added that wholesalers exhibited less “complacency”: because they believed that their customers did not want to buy cigars and tobacco in one place and cigarettes in another, they feared that some would leave them. Since the paper’s assumption was that cigarettes would no longer be sold in Memphis—except at the back door in “some places”—the wholesalers’
second day of the new law Memphis dealers, having heard that 20 detectives had been detailed to enforcement, were sufficiently compliant that the Commercial Appeal foresaw “a large number of cigarette sufferers” in a few weeks, some of whom, even if cigars were too expensive for them, would switch to pipes.96

The Nashville American’s contribution to the wave of farewells to the cigarette was heavily tongue-in-cheek, urging its readers to imagine “the overjoyed people” hear the bands play “Thou art gone to thy grave, but we will not deplore thee.” And even though the paper foresaw a world in which the “motorman on the open cars will continue to expectorate over the dashboard on windy days,” it exhorted Tennesseans to thank the legislature and governor for their henceforward being able to ride on street cars, walk along streets, enter businesses and “even private residences, without running up against that foul-smelling, yea, that worse odor than even ancient Cologne enjoyed, which is said to have possessed the flavor of 600 separate and well-defined stinks—the cigarette—which has been banished, banished, let us hope, never to return.” At the next Centennial, when Nashville was as populous as Chicago, some clerk might stumble upon a five-cent box of Duke’s cigarettes in the deep recesses of a bank vault and smoke one, wondering “what manner of man smoked such vile-smelling weeds while he is blessed with fragrant cigars,” and gazing on “the button (given free with every box) upon which is delineated the features of one of New York’s vaudeville chorus girls....” The American closed on a skeptical note: just as whisky was still sold without a license, would the corner grocery stores and saloons sell cigarettes “on the sly,” or would “they bow in humble submission to the will of the law-making power? The public has but to watch the mouths of the ‘fiends’...for the answer.”97

The Tobacco Trust Initiates Judicial Challenges

On May 3, 1897, two days after the Tennessee anti-cigarette law had gone into effect, the criminal court in Nashville met to select grand and petit jurors for the May term. In his charge to the former, Judge J. M. Anderson observed that if he came to agree with numerous lawyers that the law was unconstitutional, “it would be his duty to charge the duty to ignore it, but from examinations he had made of the law he did not see anything in it contrary to the Constitution and he would instruct the jury to indict anyone selling cigarettes, or at least to return a

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97“Has Departed from Tennessee,” NA, May 1, 1897 (20:7).
sufficient number of these cases to test the constitutionality of the act."\footnote{98}

Judge Anderson, however, apparently soon changed his mind. Two days after he had given the aforementioned charge, W.S. Sawrie, "the leading wholesale broker"in Nashville,\footnote{99} who owned "considerable property" there as well as an orange grove in Florida,\footnote{100} and whose family "stands very high in social circles,"\footnote{101} sold a package of 10 Sweet Caporal cigarettes that he had bought from the American Tobacco Company, which, having no office, factory, or warehouse in Tennessee, had manufactured them in New York City and sold them to Sawrie from Kentucky by shipping a number of such packages—"without case, covering, or inclosure of any kind around or about any of said packages, but each package loose and separate from each other"—to him in Nashville. Sawrie was arrested and charged with having violated the new anti-cigarette law, thus triggering criminal and habeas corpus proceedings. After having been tried before a justice of the peace, Sawrie, claiming that the Tennessee law was void because it conflicted with the federal constitution, requested that U.S. Circuit Court Judge Horace Lurton discharge him from custody to which he had been committed in default of bail for his appearance at the next term of the county criminal court.\footnote{102}

Looking back at this train of developments a half-year later when he was once again charging grand jurors on the cigarette law, Judge Anderson observed that he himself had been of the opinion that the law was unconstitutional insofar as it prohibited interstate commerce, but had also realized that since, regardless of any state court’s view, the federal courts would ultimately decide the question, seeking to enforce the law would merely fill the federal courts with expensive habeas corpus petitions. He had, therefore, decided to instruct the grand jury not to take action until the federal judiciary had ruled.\footnote{103} The result, according to the

\footnote{98}"May Term of Criminal Court," \textit{NB}, May 3, 1897 (2:5). The statute conferred on grand juries inquisitorial power over offenses committed under it. 1897 Tenn. Pub. Acts ch. 30, § 2 at 156.

\footnote{99}"Sensation in Nashville Society," \textit{Trenton Evening Times} (N.J.), Feb. 22, 1897 (4:4); the same report was also published in \textit{NYT}, Feb. 22, 1897 (2).

\footnote{100}"Mrs. Sawrie Enters Suit," \textit{NA}, Feb. 21, 1897 (3:1).

\footnote{101}"Will Seek Separation," \textit{NA}, Feb. 20, 1897 (3:2). Sawrie was "the senior member of W. S. Sawrie & Son.

\footnote{102}Sawrie v. State of Tennessee, 82 F. 615, 616 (Cir. Ct., M.D. Tenn.). According to "Cigarette Law Test," \textit{CA}, May 8, 1897 (2:2), and "Test Case Instituted," \textit{NA}, May 8, 1897 (3:1), the person to whom Sawrie sold the package "swore out a warrant against him." This statement did not appear in the legal documents, which also named a different buyer.

\footnote{103}"Charge to the Grand Jury," \textit{NB}, Oct. 5, 1897 (2:1).
Tennessee 1897

_Combinational Appeal_, was that from May onwards the sale of cigarettes in Nashville had been “even more universal and open” than in Memphis, where, though sales had never ceased, some dealers had made no secret of their sales, and cigarette smokers had not suffered for want of a supply, nevertheless, other retailers, “holding the law in more dread,” carried on “under cover.” That Judge Anderson’s approach was not the only possible one was made clear by Judge Smith, who, toward the end of August, instructed the grand jury of Trousdale County (northeast of Nashville) to enforce the anti-cigarette law strictly and to return indictments against anyone selling cigarettes or importing them for sale: “He said the State had nothing to do with the fact that a Federal court was considering the constitutionality of the act, and he proposed to enforce the law until higher authority declared it unconstitutional.”

ATC instigated _Sawrie_ as a test case. As its general counsel, Williamson Fuller, admitted a year later: “As soon as the bill went into effect I went to Nashville to test the law. A dealer, acting under my instructions, sold some cigarettes, and when he was arrested I obtained a writ of habeas corpus from the Federal Court.” The Tennessee attorney general, George Pickle, represented the state, while the law’s author, Jesse Rogers, appeared as an amicus. Judge Lurton, who was a former corporation (and especially railroad) lawyer and chief justice of the Tennessee Supreme Court, was later appointed to the U.S. Supreme Court by President Taft, with whom he had become friends when both served as federal circuit judges. Lurton viewed the Tennessee law as an “absolute prohibition of all commerce in cigarettes” because it penalized the sale of cigarettes in their original package by an importer; and whereas the law would not have offended against the interstate commerce clause had it been limited to cigarettes manufactured in Tennessee or to imported cigarettes not in their original packages, the facts of the case (as shaped by ATC) clearly presented the interstate commerce question.

In order to answer that question, Lurton began by examining the legislature’s objects or purposes. In the face of a statute that was silent on the issue, he felt

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104“Cigarettes on Sale Again,” _CA_, Oct. 2, 1897 (5:5).
108Gustavus Myers, _A History of the Supreme Court of the United States_ 718-38 (1912), analyzed the capitalist class bias in Lurton’s opinions as a federal trial judge.
109“Justice Lurton Dies at Seashore,” _NYT_, July 13, 1914 (1). Lurton’s tenure at the U.S. Supreme court ran from 1910 until his death.
110_Sawrie v. State of Tennessee_, 82 F. 615 at 617 (Cir. Ct., M.D. Tenn. 1897).
“authorized to assent to the assumption of the attorney general, who has appeared for the state, and to treat the act as passed for the purpose of protecting the health and morals of the people of the state against evils incident to the cigarette habit.” Instead of examining the otiose intricacies of the “original package” doctrine as applied to the facts of the test case, Lurton focused on the more important but difficult constitutional question of reconciling Congress’s commerce powers and the states’ police powers without destroying either one. Lurton argued that Tennessee’s root problem lay in the fact that, under Supreme Court precedents, the only way a state, in regulating traffic in an article by quarantining or inspection, could exercise its police powers without interfering with interstate commerce was to “aim[] at something uncommercial, by reason of its state or condition, such as articles infected, or disguised so as be a cheat calculated to lead a purchaser into buying something he did not intend to buy....” However, in spite of aiming at the suppression of what Lurton himself acknowledged to be “an evil of [sic] most profound character,” the statute was jurisprudentially indistinguishable from Iowa’s ban on the sale or importation of intoxicating liquors, which the U.S. Supreme Court had characterized as “subjects of exchange, barter, and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of the courts....” Not only, Lurton opined, could the same be said of cigarettes, but: “If all that can be said touching the evil consequences of the use of the cigarette upon the health and morals of the state be admitted, much more can be said, and was said, of the evils sought to be guarded against by the Iowa prohibition statute.” And since the Supreme Court had held the Iowa law to be inconsistent with the federal constitution “because any regulation of traffic in a commercial commodity of recognized character, as such, was an intrusion upon the exclusive power of the national government,” Lurton held that the Tennessee act was also too broad, and struck it down “partially.”

The Democratic Knoxville Sentinel, which had denounced the law from outset, editorialized that few would regret the decision because the law “smacked of a paternalism obnoxious to any American” and was “doomed to practical
In Memphis, ten days before Lurton handed down his decision, state Criminal Court Judge Cooper, in charging grand jurors, had been “very pronounced in his declaration that violators of the cigarette law should be brought before him.”  Even after Lurton’s decision became known, Cooper announced that he would not recharge the jury because he would await the Supreme Court’s review of the decision; if the grand jury returned any indictments in the interim, he would insure that none was acted on. Because dealers, like the Commercial Appeal, regarded the probability as “very dim” that the Tennessee Supreme Court would rule differently than the federal court, they were willing to risk committing indictable offenses by displaying and selling cigarettes again in plain view.

Several days later Davidson County (Nashville) Criminal Court Judge Anderson declared that he would administer the anti-cigarette law pursuant to his understanding of Lurton’s decision until the U.S. Supreme Court, to which the state attorney general had announced his intention to appeal, reversed it. Descending to the details of the key definition of “original package”—which according to Anderson the Supreme Court had never defined—he instructed the grand jurors that if a Nashville merchant ordered 400 separate 10-cent packages and they were shipped to him in a sealed larger box, he could sell them lawfully only by selling them all to one customer. Despite this significant restriction, Anderson puzzlingly concluded that the effect of Lurton’s decision was to eliminate the benefits to be derived from the statute because it made unlawful second sales (resales down the chain toward the consumer) and thus compell[ed] the retail man to go outside of the State of Tennessee and purchase from jobbers or manufacturers.... In the second place, it will tend to deny the privilege of selling cigarettes to those smaller dealers who are not able to buy in sufficient quantities that would justify them in ordering from the factory direct or from jobbers outside of the State of Tennessee and would create a monopoly in the cigarette trade among those retailers who are able to buy in large quantities or in such quantities as the manufacturer or jobber out of the State of Tennessee could afford to ship them and pay the freight on them, etc.

Why this outcome would have been at odds with the purposes of the statute is unclear, especially since, as the Iowa attorney general had already observed,

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119“Mills of Justice Grinding,” CA, Sept. 21, 1897 (5:3).
120“Cigarettes on Sale Again,” CA, Oct. 2, 1897 (5:5).
121“Charge to the Grand Jury,” NB, Oct. 5, 1897 (2:2).
shipment of individual packages in keeping with the original package doctrine was simply not commercially practicable. 122

Judge Anderson further instructed the grand jurors that the requisite facts to show an illegal sale of cigarettes were that: (1) cigarettes were sold to a consumer; (2) the seller did not buy them within Tennessee; and (3) the cigarettes were not sold in their original package. Although the judge told the jurors that they then had a “duty to indict,” he added that “you can see at once the difficulty in getting at the facts in order to make out a case, to prove where the person who sold the cigarettes bought them, from whom he bought them, in what counties, did he sell them in the original package, for if he bought them outside of the State of Tennessee he has a right to sell them and cannot be indicted. If he bought them from some person within the State of Tennessee he has no right to sell them and ought to be indicted.” 123

Finally, Judge Anderson revealed his own personal views when he admitted that: “When we remember that tobacco is one of the oldest commercial articles known to this country, and in the earlier periods of history was used as a medium of exchange, we must remember that it has never been regarded as one of those things that is harmful per se, a nuisance in and of itself. The question is at once raised in my mind, whether or not the Legislature would have any more right to prohibit the use of tobacco than they would the use of coffee or sugar....” In the face of that revelation, Anderson was constrained to concede that the fact that the Supreme Court of Tennessee no longer adhered to a jurisprudence sympathetic to such views “inclined [him] to think that...the Legislature has a right to pass the act.” Consequently, it was his and the jurors’ “duty to see that this provision, so far as it is valid under the Constitution, be carried out.” 124

A second decision in federal court, on December 11, 1897, produced a contrary result, but used the same nit-picking factual indicia of the “original package” doctrine without penetrating to any substantive policy analysis. Jacob Blaufield, a dealer in Knoxville (who two years later would lose a similar case), 125 was arrested in October 1897 for having violated the anti-cigarette law and held for grand jury action; refusing to give bond, he was held in custody by the sheriff, prompting Blaufield to seek a writ of habeas corpus in federal court. Like Sawrie, this case, too, “was begun in the interest of the...tobacco trust,” as a test case to

122See below ch. 10.
123“Charge to the Grand Jury,” NB, Oct. 5, 1897 (2:2-3). Some of Anderson’s remarks appear to have become garbled in the newspaper to the extent of inverting their meaning by the erroneous use of negatives.
124“Charge to the Grand Jury,” NB, Oct. 5, 1897 (2:3).
125See below ch. 16.
resolve a question left unresolved by Judge Lurton—namely, whether “an original package was the package in which the goods passed the state line.” Finding that precedents were “not agreed,” Charles Dickens Clark, U.S. District Judge for the Middle District of Tennessee, ruled that federal interstate commerce power “follows the original unbroken package so long as kept in that form and for the purpose of re-sale in that condition but no further....” Clark then made the factual finding that the “pine box or crate in which the cigarettes are put up for shipment and transported is the original package and that when this reaches the consignee and is broken for the purpose of selling and retailing the cigarettes in boxes, the goods pass under state control and regulation.” The judge therefore denied the writ and remanded Blaufield to the custody of the Knox county sheriff to be dealt with pursuant to the state anti-cigarette law.\footnote{126}

The garbled wire-service report in the New-York Daily Tribune and New York Times to the contrary notwithstanding, the decision neither “effectually settle[d] the cigarette question in Tennessee,” nor gave “the dealers all the liberty they desire[d].”\footnote{127} That the Tobacco Trust was far from satisfied with the outcome in Blaufield emerged clearly from an unusual interview with ATC’s local attorney in the case (and its future national anti-cigarette legislation litigator, general counsel, and chairman of the board of directors), Junius Parker,\footnote{128} that the Knoxville Tribune published. Parker asserted that the difference between Sawrie and Blaufield consisted in the packaging: in the former, 10-cigarette packages “uninclosed in any other package” were shipped

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\footnote{126}“Little Smokers Knocked Out,” KT, Dec. 12, 1897 (5:1-3). The paper referred to the dealer as “Blaufeld,” but his name was spelled Blaufield in the aforementioned later published state court decision. No person under either spelling was returned at the 1900 population census. The full text of the decision was not located; the Knoxville Tribune appears to have published the most detailed account including two paragraphs of what it called “the decision” from a “lengthy” opinion. It is unclear what Clark meant with this concluding sentence: “Judge Lurton has considered with me and concurs.”

\footnote{127}“Cigarettes in Tennessee,” N-YDT, Dec. 12, 1897 (8:3). The identical text appeared as “Cigarette Question in Tennessee,” NYT, Dec. 12, 1897 (9). This report misspelled the name as Bensfield, but “Anti-Cigarette Law,” N B, Dec. 11, 1897 (1:2), referred to him as Jake Blaufield. Otherwise this article presented a garbled account of the decision, which “held the law as to original packages to be unconstitutional” and “practically renders the anti-cigarette law operative [sic].”

\footnote{128}J. Parker, 76, Dies; Tobacco Ex-Leader,” NYT, June 12, 1944 (19). Parker (1867-1944), was born in North Carolina, practiced law in Knoxville from 1894 to 1899, when he moved to New York to become ATC’s assistant general counsel; after the Tobacco Trust’s dissolution and W. W. Fuller’s retirement, he became general counsel in 1912, and board chairman from 1925 to 1929.
into and sold in Tennessee, whereas in the latter, “the package[s] of cigarettes were put into a box and from the box one of the packages was taken and sold...” The effect of Judge Clark’s decision that the box as the original package had been broken to remove a single package and sell it was that those cigarettes “had lost their quality as imports...and the protection of the interstate commerce clause”; consequently, the state anti-cigarette law “was effective to prohibit such sale.”

Without admitting his employer’s directive role in the commercial-litigational choreography, Parker furnished enough background information to demonstrate that with the second test case ATC was trying to determine how far it could push the limits of the original package doctrine in order to subvert and nullify the scope of the state’s far-reaching prohibitory law. Asked what the effect of Judge Clark’s decision would be, Parker replied:

“...Its only effect will be to necessitate the continuance of shipment by wholesalers of the loose packages. Ever since the Sawrie case was decided, the wholesalers from outside this state have been shipping the packages loose to the dealers in Tennessee. The sale of such packages has been, and is, protected fully, and the wholesalers have not hesitated to go to the additional expense and trouble incident to this method of shipment. So far as I know, all the cigarettes now on sale in Knoxville have been received in this way.... If the decision in the Blaufeld case had been otherwise, the wholesalers would have been relieved of the expense and trouble of this method of shipment. As it is, they will not be, and this, so far as I know, is the only effect of the Blaufeld decision.”

If Parker’s account was accurate, its subtext was presumably that the Tobacco Trust had forced some other entities to part with some of their profits in order to finance this charade of a shipment procedure designed to simulate compliance with the outdated interpretations of interstate commerce and of its functions embedded in the original package doctrine. Parker implicitly confirmed this subtext in response to the Tribune’s question as to whether the Blaufeld decision would raise cigarette prices for consumers or retailers: “...No, the wholesalers have borne the increased expense caused by the method of shipment, and will continue to do so.”

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The Tobacco Trust Tries Bribery—Again

“Personal liberty” received a damaging blow in Tennessee; that is to say, the personal liberty of men who want to make money by leading children into bad habits by the sale of cigarettes. ... Smoking cigarettes is still as much of a personal privilege as ever in Tennessee[126x471]—provided the smoker can get them.132

Despite Judge Anderson’s grand jury instructions delineating the framework of the anti-cigarette law that survived Judge Lurton’s partial invalidation in Sawrie, the executive and legislative branches of the Tennessee state government felt compelled to deal with the subject matter again. On December 29, 1897, Governor Taylor issued a proclamation convening the General Assembly in extraordinary session to attend to matters “requiring immediate legislation.” And while the principal motivation for the session consisted in providing for assessment and taxation of railroad properties and dealing with governance issues of the city of Memphis, Taylor also mentioned the enactment of laws establishing privilege taxes for railroads, cigarette dealers, and circuses.133 In his message to the legislature on the session’s opening day, January 17, 1898,134 the governor, engaging in the kind of entertaining oratory that had earned him the nickname “Our Bob,” recommended that the legislators carefully consider the imposition of a cigarette sales privilege tax

in view of the fact that recent legislation prohibiting their sale has been declared unconstitutional, and laid away in the tongueless silence of the dreamless dust by the Federal Court. Whether or not a law on this subject can be enacted which will live, move, and have its being without being sentenced to death by the Federal Court, is a question which I recommend to the wisdom and genius of your honorable bodies.135

And although both chambers did consider imposing privilege taxes on cigarette sales, those bills were overshadowed by Representative Jesse Rogers’ revelations on the House floor that the Tobacco Trust had tried to bribe him into helping repeal his own anti-cigarette bill.

On January 24, Houk introduced in the Senate two similar bills either of which would have effectively repealed the anti-cigarette law by imposing a

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134The short session ended on Feb. 5.

311
Tennessee 1897

privilege tax on wholesale and retail dealers in cigarettes, cigarette tobacco, and cigarette paper. S.B. 21 would have taxed all wholesalers $150 and retailers between $25 and $75 depending on the population size of the county in which they did business, and repealed all laws in conflict with it. The more streamlined S.B. 22 would have imposed a privilege tax of $30 on wholesalers and $10 on retailers. Houk had “introduced these two extremes,” he told the Nashville Banner, “with a view to securing the committee’s careful consideration of the matter, and if possible have them recommend some bill bearing on this subject.”

Two weeks later, in the wake of Rogers’ bribery revelations, Houk gave a lengthy statement to the Knoxville Daily Journal in which he sought to defend his legislative conduct. (Houk, like Rogers, had also returned to Knoxville at the end of the extra session.) Houk (mistakenly) believed that there could be no question that the U.S. Supreme Court would sustain Judge Lurton’s decision, which in Houk’s view fully vindicated his own position; until then, however, Rogers’ law would “continue to serve as the enemy of reform as to the cigarette, in that it will prevent as it has prevented, a sensible and just regulation of the evil by law.” Without explaining how a bill “satisfactory” to the Tobacco Trust could possibly be designed to combat cigarettes as an “evil” or impose cigarette taxes on dealers, Houk went on to assert, without revealing his source, that: “I am reliably informed more cigarettes are being shipped into the state to-day than ever before without paying a cent of tax, and that at no time has the Rogers law materially affected the trade in that article.” Since the Tobacco Trust never publicly revealed state-level cigarette sales data, Houk’s source was presumably either the Trust or individual dealers; in either case, however, it is unclear why

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136 S.B. 21, Tennessee Senate, 1898, RG 60, Tennessee State Library and Archives (typed copy furnished by Tennessee State Library and Archives); Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee 47 (1898). On the $500 tax passed by the House in 1891, see above ch. 4.

137 S.B. 22, Tennessee Senate, 1898, RG 60, Tennessee State Library and Archives (typed copy furnished by Tennessee State Library and Archives); Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee 47 (1898). The Tennessee State Library and Archives holds two variants of S.B. 22; the second, which exists in a handwritten and a typed version with handwritten emendations, structurally resembles S.B. 21, but with different cut-off points and lower tax levels for retailers ($5 to $15) and wholesalers ($75). According to “Legislation Moves Slowly,” NB, Jan. 24, 1898 (1:5), this bill would have taxed wholesalers $50 and retailers $10. Both variants contained the same repeal provision as S.B. 21.

138 “Legislation Moves Slowly,” NB, Jan. 24, 1898 (1:5).

cigarette sellers would have wanted to devote any resources to repealing a law that promoted rather than prohibited sales. Against this background Houk—who appears neither then nor later to have demonstrated his bona fides as a legislative opponent of cigarettes—allegedly without any suggestion from or consulting anyone (except the state treasurer, who had said that a cigarette privilege tax could bring in $20,000 to $40,000 annually), on his own drafted the two aforementioned bills in the hope that the Judiciary Committee, which heard the treasurer’s testimony, would report a substitute bill that would calibrate the tax to generate the maximum revenue.  

The Judiciary Committee did recommend for passage a substitute bill (based on the treasurer’s figures), which the Senate adopted. On February 1 by a vote of 26 to 4 the Senate passed the bill, which then also passed its first reading in the House the same day. A similar bill had been introduced in the House on January 17, which the next day passed its second reading and was referred to the Finance, Ways and Means Committee, which in turn assigned it to a subcommittee chaired by Rogers. Houk stated that after Rogers’ subcommittee had recommended rejection of the bill, it went to the full committee, which was about to recommend passage when, "'I am reliably informed, Mr. Rogers asked the committee to go into executive session....'" Houk alleged that a committee member had told him that Rogers had told the committee that at the 1897 session

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140 "Cigarette Bribery," *KDJ*, Feb. 8, 1898 (8:2).
141 *Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee* 71, 76 (1898); “Cigarette Bribery,” *KDJ*, Feb. 8, 1898 (8:2).
142 *Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee* 78 (1898).
143 *Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee* 96 (1898).
144 *Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee* 33 (1898) (H.B. No. 3, by Democrat Frank Ottenville of Davidson County [Nashville]). In addition, Republican Representative Bennett S. Williams, who was filling a vacancy during the extra session, introduced H.B. 34, which would have imposed a $100 annual privilege tax on cigarette wholesalers and a $5 to $20 tax on retailers depending on the size of the county they did business in, and H.B. 35 to repeal the anti-cigarette law, both of which were tabled after being referred to the Finance Committee. H.B. 34 and H.B. 35, Tennessee Senate, 1898, RG 60, Tennessee State Library and Archives (handwritten copy furnished by Tennessee State Library and Archives); *Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee* 102, 118, 119, 147 (1898) (H.B. No. 34 and 35).
145 *Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee* 36 (1898).
someone had “‘offered him a bribe of more money than he could earn or had earned, practicing law, in twenty-five years,’” to support Houk’s prohibitory bill. Supposedly, then, Rogers was approached by an ATC representative at some time between the governor’s call for the extra legislative session and its opening who asked him to introduce a privilege tax bill like the one that later passed the Senate. Instead, according to Houk, “‘of course, the object of Mr. Rogers in making his statement was to kill the bill of which I was in sense, the father. The effect of his statement was to cause the committee by a small vote, to recommend the bill for rejection.’” In addition to the impending defeat of his bill, Houk experienced a blow to his reputation resulting from Rogers’ statement, which had “‘created the excuse for the inference that while he had not sold out I had done so, having introduced the two cigarette bills on which he had been offered a large bribe or bribes.’”

In a lengthy “full statement” that he gave to the Knoxville Daily Journal on February 13 in response to Senator Houk’s aforementioned statement that the newspaper had published five days earlier, Rogers explained what happened next:

We, the subcommittee, decided that it was better to have no legislation on the subject but to await the decision of the supreme court of the United States. The matter came up before the full committee on Thursday, February 3rd, and a cigarette dealer and a lawyer of Nashville appeared before the committee and urged the passage of the pending bills. I saw that the members of the committee were taken with the idea of raising revenue. I asked the committee to go into executive session which it did, and then, in accord with what I believed to be my duty I disclosed in a general way, but without going into details or giving names, the improper propositions that had been made to me at the regular session, whereupon the committee decided to report the pending bill for rejection and did accordingly so report it, and it was rejected.

The next day, February 4, Democratic Representative William Craig, declaring that “a gentleman of integrity” had stated before the Finance Committee that “efforts had been made to buy votes and influence of members,” offered a resolution to investigate the bribery charges. When asked by another

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146“Cigarette Bribery,” KDJ, Feb. 8, 1898 (8:2-3).
147“Makes All Public,” KDJ, Feb. 13, 1898 (13:4-7 at 6). The text of Rogers’ statement was reprinted in full as “the Cigarette Bribery Charge,” NB, Feb. 14, 1898 (3:1-3). For the committee’s report for rejection of H.B. No. 3, see Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee 123 (1898) (Feb. 4). The bill was then “[o]n motion...amended so as to conform to the Senate bill [No. 22].” Id at 140 (Feb. 5) (presumably by typographic error the bill was referred to here as “House Bill No. 4”).
representative to “name the man,” Craig remarked that he “would do so only on the gentleman’s authority.” On a voice vote the House quickly adopted a House Joint Resolution authorizing an investigation of the bribery charges. The House Clerk then created a “little stir” when he entered the Senate chamber to announce the resolution and submit it for the Senate’s concurrence. After it had been read, Senator Houk finally revealed the origins of the charges in the cigarette bill he had introduced at the last session: “Rogers, whom he had solicited to advocate the bill in the House, had said that he was offered large bribes by someone, and it seemed to be thought by some that Mr. Houk was the man he had reference to.” Pursuant to Houk’s request, Rogers informed the Finance Committee that he had not been referring to Houk and that the man who had offered the bribe was not in Tennessee. After Houk had expressed his support for the resolution, the Senate concurred in it by a vote of 16 to 14. On February 5, based on the statement “on good authority that certain parties have attempted to influence the vote unlawfully and bribed certain members” of the extra session of the legislature, Governor Taylor approved the resolution appointing five members of the legislature to a committee to investigate the charges (as to the regular and extra sessions) and report the relevant information to the prosecuting attorney and grand jury of the counties in which the attempted bribery took place.

As the bribery investigation was unfolding, House debate on repeal of Rogers’ anti-cigarette law began. After the bill that had already passed the Senate was substituted for the House bill to place a privilege tax on cigarette dealers on February 5, Rogers took the floor and told his colleagues that he had refused to introduce a bill drafted by Williamson Fuller, the ATC lawyer, to repeal his own anti-cigarette law. He further told of the letter from Frederick Gibbs, a member of the National Republican Executive Committee, requesting that he actively or at least passively support the Senate bill because the bill’s friends

148 “Bribery Has Been Attempted,” NB, Feb. 4, 1898 (1:5-6 at 6).
149 Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee 115-16 (1898) (H. Joint Res. No. 20).
150 Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee 102 (1898).
152 Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee 140 (1898). The bill would have taxed wholesalers $75 and retailers $15 to $6, depending on population. “Will Adjourn This Afternoon,” NB, Feb. 5, 1898 (1:2-5 at 4).
Democratic Representative Eliphalet Jarvis, who had called up the bill under consideration, contended that since it was “a purely revenue measure,” it would have no impact on the anti-cigarette statute—for which he had voted believing it to be unconstitutional—or the court case. After asserting that the evidence theretofore taken by the bribery investigation committee (of which he was chairman) had shown that ATC “had had nothing to do with it,” Jarvis called for a vote on the cigarette privilege tax bill, which, though at 48 to 23 it amounted to more than a two-thirds majority of votes cast, nevertheless fell short of the requisite constitutional majority of elected representatives. Houk later charged that had it not been so close to the end of the brief session when so many members were absent, his bill “would have passed overwhelmingly” because once the

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153 “Will Adjourn This Afternoon,” NB, Feb. 5, 1898 (1:2-5 at 4-5).
154 “Will Adjourn This Afternoon,” NB, Feb. 5, 1898 (1:2-5 at 5).
155 Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee 140-41 (1898).
The legislature had passed the resolution to investigate the bribery charges, a “strong reaction set in favor of my bill....”

The extra session having come to a close, the following day, February 6, Rogers returned home to Knoxville, where, while refusing to “make anything public until after the investigation of the committee,” he nevertheless made a lengthy statement to the Knoxville Daily Journal, which published it under the title, “Coffin Tack Story.” He explained that, after confiding in a fellow legislator, he had not reported the attempted bribery during the regular session in 1897 because he had decided that he “would be content” with the defeat of Houk’s bill, which would have effectively repealed Rogers’ newly passed bill. He made a different kind of decision at the extra session when faced with Houk’s cigarette privilege tax bill, which would have repealed all conflicting laws without expressly repealing the anti-cigarette law, because, in the presence of a bill that would have effectively destroyed that law, he felt that it was his “duty to disclose the improper proposition” that had been made to him the previous year. In explaining this decision, Rogers emphasized that: “The statute was drafted by me so as to outlaw the cigarette as a legitimate article of commerce, either domestic or interstate, and one that the state, in the exercise of its police power, has the right to outlaw as being injurious to the health of the people.” Why Rogers believed that his bill or its meager legislative history in any way asserted, let alone documented, cigarettes’ commercial illegitimacy is unclear, but he told the newspaper that if the Supreme Court sustained the law, a cigarette sales privilege tax “would have had the effect of legalizing them as an article of domestic commerce and, of course, the state cannot prohibit an article of foreign commerce which it legalizes by taxing as an article of domestic commerce.”

Houk’s detailed statement to the Knoxville Daily Journal and Fuller’s and Gibbs’s in the New York press prompted Rogers to give his own “full statement” to the Knoxville paper on February 13. In it he recounted that about March 20, 1897, that is, more than five weeks after the governor had approved his bill, J. W. Baker of Nashville (whom Rogers did not identify further) brought
him a bill that he said had been prepared by Fuller, ATC’s general counsel, and
that would have repealed Rogers’ enacted bill and substituted for it mere
inspection of cigarettes; Baker told him that he had received it from New York
Senator T. C. Platt or Frederick S. Gibbs, the national Republican committeeman
from New York, who requested that Baker ask Rogers to introduce and advocate
its passage. At Rogers’ request, Baker left the draft bill with Rogers, who
informed Baker a few days later that he would not introduce it (although oddly
Rogers did not explain publicly why he would have needed more than a few
seconds to reject outright a request from the creator of the evil he was seeking to
eliminate to repeal the law that eliminated that evil). Shortly afterwards, on
March 30, Houk introduced “a bill that was an exact copy of the one that Mr.
Baker” had given Rogers. Then on April 3, “quite an array of lawyers appeared
before the senate judiciary committee and with much force pressed the passage”
of Houk’s bill; among these lawyers was W. R. Turner of Knoxville.160 (Turner
was Attorney General Pickle’s law partner in Knoxville who represented ATC
and testified before the committee on the constitutionality of Rogers’ bill.)161

That same day Rogers received from Frederick Gibbs the following letter
(dated April 1):

My Dear Mr. Rogers:—I confirm my telegram of even date. Having met you at St.
Louis, I felt warranted in communicating with you upon a matter of great interest to many
of our political friends, and ask you if you can find it consistent with your duty to give your
support to the passage of the Cigarette Repeal bill, which I am informed has been
introduced in your legislature. Such action on your part will receive reciprocation
whenever demanded by you. I have written you today more fully and request that this
communication and letter be considered “confidential”; and further have to say that the
parties most directly interested in the repeal of the present law have been of great use to

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our organization both as large contributors and by active work in the last campaign, and feel that as a like law has been declared unconstitutional in the Iowa and West Virginia cases, it would seem only proper that this repeal bill should be permitted to pass, which we all conclude is out of the question unless it should receive at least your passive support.

I agree with you and your friends that some law should be passed to prevent the use of all narcotics by minors or at least to prevent their sale to them, and if such a measure could be placed upon your statute books to take the place of the prohibitory law now in force in your state, it seems to me it would have a much more practical and moral effect than the more seeming stringent measure.

... I trust that you will pardon what may seem like interfering or even suggesting interference in your legislative duties.\textsuperscript{162}

That same day Rogers learned from the owner of the hotel in Nashville where he was boarding that a Mr. Halpin from New York had also been staying there for 10 days with the purpose of having Rogers’ anti-cigarette law repealed. Wanting to find out exactly what Halpin was doing, Rogers asked Baker, who told him that Halpin was Gibbs’s private secretary and arranged an introduction. Foreseeing a scheduling conflict between his attendance at the legislature during possible consideration of Houk’s bill and his promise to defend an accused murderer before a court in another county, Rogers mentioned to Halpin that he would be unable to appear in court unless final action on the bill could be postponed until his return. (Rogers failed to explain why he would have risked the moral entanglement of asking a favor of the enemy, the Tobacco Trust’s lobbyist, instead of approaching the House leadership directly.) Halpin immediately replied that “his people would be glad to assist my client in the payment of my fees if I would go and attend to the case.” (It is unclear how this deal would have helped Rogers as opposed to his client.) Instead of yielding to his “first impulse” to “resent” this first improper remark, it soon occurred to Rogers that “if I would leave him to his course he would commit himself in such way that I would be easily able to defeat the pending bill which was my first desire.” Rogers then broke off the conversation, but that evening Halpin invited Rogers to his hotel room “to smoke and drink”; Rogers went, but eschewing the tobacco and alcohol, soon left, only to have Halpin ask to see him yet again later than night. The ever persistent Halpin did catch up with him at the railroad station, where he informed Rogers that “his folks would contribute $500” to his fee if he would attend to his court case; prompting no reply from Rogers, Halpin asked Rogers to telegraph

\textsuperscript{162}“Makes All Public,” \textit{K.D.J.}, Feb. 13, 1898 (13:4-7 at 4). In fact, the Iowa Supreme Court had upheld the law, while the West Virginia case dealt with a high license, not a prohibitory law. See below ch. 11-12.
him the next day, prompting yet more silence from the departing Rogers. On returning to Nashville from Knoxville two days later, Rogers met Baker at the capitol and told him that he had “better tell Halpin to withdraw the bill and leave town.” Despite having gotten the message from Baker, Halpin, instead of desisting, approached Rogers once again at their hotel and began “apologizing and explaining”; Rogers “hushed him up,” read him Gibbs’s letter, and told him that he had “committed a felony,” repeating his injunction to withdraw the bill and leave Nashville.163 Never one to retreat in silence, Halpin then appealed to me not to expose him. I then thought that the best way to defeat the pending bill was to let him remain upon the ground, and I told him that what I wanted above everything else was the defeat of the pending bill, and if no further step was taken in that matter...I would not expose him or those he represented. He then promised me that nothing should be done with the bill that day, and that he would communicate with his people in New York and let me know the next morning whether or not my terms would be agreed to. To this I assented. ... The next day...Halpin agreed that nothing further should be done with the pending bill. No lawyer argued it further. The senate judiciary committee never reported it; and although the legislature remained in daily session until...April 10th, the bill was never again heard of, and the regular session adjourned without the bill even being reported by the senate judiciary committee.164

In spite of the Tobacco Trust’s (false) boasts that anti-cigarette laws did not affect sales, that it had never lost a state anti-cigarette statute lawsuit, and that Judge Lurton’s decision was yet another victory, ATC was apparently worried enough that it risked public denunciation of its attempted bribery by approaching Rogers yet again. In the interim between Governor Taylor’s call in late December for the extra session and its convening in mid-January 1898, Parker, the company’s resident Tennessee counsel, went to Rogers’ office at the behest of general counsel Fuller to find out what Rogers’ reaction would be if a bill were introduced effectively repealing the “Rogers Anti-Cigarette law” and subjecting cigarettes to the privilege tax. Although it seems odd that the Trust would have supposed that its fiercest enemy, who also possessed the evidence to prosecute it for the felony of attempted bribery of a legislator, would be amenable to

163“Makes All Public,” KDJ, Feb. 13, 1898 (13:4-7 at 4-5). The first public mention of Halpin appears to have been on Feb. 6 in the Knoxville Tribune, which reported that he was of the ATC and had wired that he wanted to testify before the legislative bribery investigation committee. “Extra Session Is Through Its Labors,” KT, Feb. 6, 1898 (1:1).  

164“Makes All Public,” KDJ, Feb. 13, 1898 (13:4-7 at 5).  

320
acquiescing in let alone promoting repeal of his own eponymous law, Fuller and Parker may have calculated that Lurton’s decision had sufficiently weakened Rogers’ constitutional-legal position to cause him to reconsider. And in fact Rogers and Parker did discuss the Sawrie decision, but Rogers insisted that the U.S. Supreme Court should decide the issue, the upshot being that Parker was to report to Fuller that Rogers would oppose any such repeal measure.165

This rebuff notwithstanding, the Tobacco Trust, as already outlined, found other Tennessee legislators to do its bidding, though Rogers’ last-minute revelations stymied the repeal initiative. In self-justification, Rogers rejected Houk’s (sour-grapes) criticism that he would have done better to have gone public during the regular session in 1897 or earlier during the 1898 extra session; his reasons were merely pragmatic: in 1897 he had been convinced that he had a greater chance of defeating repeal without exposing the bribery attempt, and even in 1898 he would not have made his disclosures if he had not as a Finance Committee member been “brought face to face with a measure that was in exact accord with the one” about which Parker had spoken to him.166

Why, in the face of the manifest overall coordination of the repeal-bribery undertaking by the Tobacco Trust—which had engaged in similar activities in Washington State in 1893 and Iowa in 1896-97167—Rogers concluded his full statement with an exoneration of Baker and Parker, who had, after all, been ATC’s key agents in the conspiracy, as having said “nothing whatever...that was in the slightest degree offensive or improper”168 is a mystery. Indeed, it is so much more of one because Rogers himself posed seven unanswered questions at the end of his statement, all of which unambiguously implicated ATC:

Who employed the lawyers that appeared before the senate judiciary committee in advocating the Houk bill on April 2 and 3, 1897?

Why was it that no steps was [sic] taken in that bill after April 3rd?

What interest has Senator Thomas C. Platt, of New York, in cigarette legislation in the state of Tennessee?

What interest has Frederick S. Gibbs, of New York, in such legislation?

Who were the parties most directly interested in the repeal of the Rogers anti-cigarette law referred to by Mr. Gibbs in his letter as having “been of great use to his organization as large contributors?” [sic]

Why was the Houk repeal bill so suddenly dropped?

What did Mr. Gibbs mean in his letter to me when he said twice that my support of

165“Makes All Public,” KDJ, Feb. 13, 1898 (13:4-7 at 6).
166“Makes All Public,” KDJ, Feb. 13, 1898 (13:4-7 at 6).
167See above ch. 12.
168“Makes All Public,” KDJ, Feb. 13, 1898 (13:4-7 at 7).
the bill introduced by Mr. Houk would receive reciprocation whenever demanded by me both from him and his friends.\footnote{169}

The impression that Rogers had reportedly left with members of the Finance Committee on February 3 was that he had been offered a “sum ranging up in the thousands” to work to repeal his own bill, but when the joint committee of both houses of the Tennessee legislature met on February 4 to investigate his allegations, he stated that he had been offered $500.\footnote{170} In a House speech Rogers stated that Williamson Whitehead Fuller, general counsel and a director of the American Tobacco Company,\footnote{171} had drafted the bill, while Frederick S. Gibbs,\footnote{172} New York’s Republican National Committeeman, had asked him in writing to support the bill “because its promoters were among the largest contributors to Thomas C. Platt’s campaign fund.”\footnote{173} According to a front-page, above-the-fold account in \textit{The New York Times}, which revealed machinations similar to those that Philip Morris and other cigarette companies would repeat on a much more systematic and lavish scale decades later, Fuller, when confronted with these allegations, stated that he did not understand what had prompted Rogers, “the father of the Anti-Cigarette bill,” to make them. Fuller, who represented the Tobacco Trust in similar litigation across the United States, denied that he had ever drafted a bill repealing the anti-cigarette law for the simple reason that Judge Lurton’s decision had rendered it unnecessary, though he added that he would not have hesitated to draft one if it had been necessary. Sounding like the cigarette companies in the late twentieth century bragging that they had never paid out a penny in suits filed against them by smokers, Fuller, who called Rogers’ remarks “the ravings of a disappointed politician,”\footnote{174} then boasted of the trust’s unblemished litigation record:

“The laws passed in Washington and Iowa prohibiting the sale of cigarettes have been declared unconstitutional, as well as the law in West Virginia imposing a tax of $500 a
year on their sale. The $1,000 yearly license fee which the City of Denver imposed on its retail cigarette dealers met a like fate. Every bill that has ever become a law which tended to interfere with or prohibit the sale of cigarettes has, when tested, been declared void."

Denial continued up the corporate hierarchy, as ATC’s treasurer George Arents told the Times that the company had never, directly or indirectly, approached any member of the Tennessee legislature. But some light was finally cast on the proceedings when Frederick S. Gibbs, who had allegedly written to Rogers on ATC’s behalf, admitted:

I met Mr. Rogers in St. Louis at the time of the Republican National Convention in 1896, and remember him as a cripple with a bad face. I wrote a letter to Mr. Rogers about a year ago, at whose suggestion I cannot say without consulting my letter book, asking him, if consistent with his convictions, to introduce a bill in the Legislature to repeal the anti-cigarette law, and telling him the Republican Party would consider it a favor.  
... I never mentioned the American Tobacco Company in my letter.... If Mr. Rogers was offered a bribe of $500 he must be a cheap man, or the smallness of the amount perhaps insulted him.

Almost a decade later an anonymous piece in the muckraking magazine Collier’s on the nationally even more scandalous legislative bribery by the Tobacco Trust in Indiana shed light on the machinations of Gibbs. During “the high tide of commercialized politics” from McKinley’s election in 1896 until Theodore Roosevelt succeeded him in 1901 Gibbs was one of the “most powerful” men in the Republican Party:

It would not be easy to overestimate Gibbs’s importance and power. From 1896 until 1900 he was the New York member of the Republican National Committee, and after 1900 he was a member of the Executive Committee, the small inner committee in which rests the final control of the party. Within the party in New York State his power, from time to time, over a period of twenty years, had been paramount. He was a dominating member of the New York Assembly and of the Senate.... To his political prestige he added a taste in art and social graces which made him the intimate of all the men of power, in business and politics, in New York.

Gibbs’s occupation was one for which his personal affiliations and his relation to the Republican machine throughout the country abundantly fitted him. He was not a lawyer, but at No. 1 Madison Avenue he maintained offices and did business with stationery which bore merely the inscription, “Office of Frederick S. Gibbs. Among his employees was

175“Cigarettes in Tennessee,” NYT, Feb. 7, 1898 (1:5).
176“Cigarettes in Tennessee,” NYT, Feb. 7, 1898 (1:5).
177See vol. 2.
Tennessee 1897

Fremont Cole, who today occupies the same offices and was Gibbs’s successor in the same occupation. Gibbs was the prince of professional lobbyists; his office was the meeting place for those who take and those who give, and whenever the necessity arose, in one or many State capitols, for promoting or throttling legislation, Gibbs was on terms of captain and lieutenant with the men who could do the work.

... Of all Gibbs’s clients, the one concerning which accident has brought the record to light is the American Tobacco Company. This company has been peculiarly subject to hostile legislation, very often inspired by a sincere and intelligent interest in the public welfare, but quite as often inspired, as in every case where a corporation has established a “yellow dog” fund, by the itch for blackmail money.178

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178“The Trust and the Legislature: How the Tobacco-makers Fought the Law-makers,” Collier’s 40(13):9 (Dec. 21, 1907). One episode in Gibbs’s legislative career appears not to fit in with his later role as an agent of the Tobacco Trust. In 1890, when he was a member of the New York State Assembly from New York City, Gibbs introduced a bill, which as he himself moved to amend it, read as follows: “No person shall sell, exchange, or dispose of cigarettes, cigars or any article of tobacco..., or offer or attempt to do upon any representation, advertisement, notice or inducement that any money..., photograph, lithograph picture or anything likely or calculated to attract, induce or entice minors to become purchasers thereof other than what is specifically stated to be the subject of the sale or exchange, is or is to be delivered or received, or in any way connected with, or a part of the transaction, as a gift, prize, premium or reward to the purchaser, or shall sell any such article with such money..., photograph, lithograph, or picture of any kind inclosed in, or attached to the package.... But nothing in this section shall be construed to apply to the sale, exchange or disposition of any such article...for shipment to any other States or foreign countries.” Journal of the Assembly of the State of New York at Their One Hundred and Thirteenth Session, 2:789 (1890) (Assembly Bill No. 1121, Mar. 26). During debate over this bill designed to prevent the use of pictures to increase the demand for cigarettes several members argued that the bill was unconstitutional, while Tammany Democrat Joseph Blumenthal charged that it was “simply intended to ‘strike’ at a great industry.” Gibbs himself was surprised by the 72 to 17 vote for his bill, which he had not believed would pass when he had introduced it. “Pushing Ballot Reform,” NYT, Apr. 10, 1890 (5:1); Journal of the Assembly of the State of New York at Their One Hundred and Thirteenth Session, 2:1089 (1890) (Apr. 9) (vote was 72 to 18). When the Senate failed to pass the bill, the Times was pleased, calling Gibbs’s cigarette measure “idiotic.” “Their Conference in Vain,” NYT, May 2, 1890 (5:1-3 at 1). The Senate’s vote of 16 to 9 in favor did not represent the requisite majority of elected senators (i.e., 17). Journal of the Senate of the State of New York at Their One Hundred and Thirteenth Session, 1:1137 (1890) (May 1). Several months later Gibbs was expelled from the Republican New York county committee for having entered into a political alliance with Tammany Hall, leaving his then-enemy Thomas Platt absolute leader of the state party. “Mr. Platt’s Triumph,” NYT, Sept. 3, 1890 (4) (edit.); “Gibbs’ Final Expulsion,” NYT, Sept. 19, 1890 (1).
Among others, the committee deposed Junius Parker, who was litigating the constitutionality of the Tennessee anti-cigarette law together with Williamson Fuller on behalf of ATC. But the key figure in the investigation was William Halpin, the only person whom Rogers accused of having directly offered him a bribe, who traveled to Nashville, was deposed by a single member of the committee (Senator Horace Mann), and left Nashville in secrecy. Interestingly, whereas Rogers had referred to him as Gibbs’s private secretary, Mann called him “‘the representative of the American Tobacco company,’” as did Senator Houk, who added: “‘It is said...he is a responsible person, associated with some of the wealthiest and most distinguished citizens in the country in business and otherwise. He is said to have introduced, while a State Senator, the Greater New York consolidation bill in the New York Legislature.’” In fact, William Halpin was a Republican Assemblyman who during his one term did sponsor the consolidation bill in 1895; he was also “one of Gibbs’s chief lieutenants and...known as a strong Platt man”; and both he and Gibbs were members of the New York County Republican Committee, of which Halpin was chairman from 1903 to 1905 (after Gibbs’s death). Without access to the transcript of the

179“Exonerates Senator Houk,” NB, Feb. 15, 1898 (8:3). Parker, “a democrat (though not in good standing),” who practiced at the law firm of Welcker & Parker in Knoxville, corresponded with Houk concerning a bill conferring expanded jurisdiction on the Knox County Circuit Court that does not appear to have had any connection to the Trust. J. Parker to Hon. Jno. C. Houk (Jan. 21, 1897), in Papers of Leonidas Campbell Houk and John Chiles Houk Papers, Box 66, McClung Historical Collection, Knox County Public Library, Knoxville, TN (quote).

180Most newspaper accounts failed to mention Halpin’s first name. “Will Close Today,” KDJ, Feb. 14, 1898 (5:5), referred to him as Samuel. At the 1900 population census five Samuel Halpin’s were returned, all Russian Jews in their 20s and 30s living in New York, but the occupation of none remotely matched that of private secretary. The bribery investigation committee report dealing with Senator Houk called him William. “Exonerates Senator Houk,” NB, Feb. 15, 1898 (8:3). The 1900 population census returned a number of William Halpin’s living in New York, none of whose occupations matched that of private secretary.

181“Exonerates Senator Houk,” NB, Feb. 15, 1898 (8:3). The texts of this and other depositions were to accompany a separate report to be given to Attorney General Pickle to determine whether to submit the evidence to a grand jury. Id.; “Those Depositions,” NB, Feb. 15, 1898 (1:5). The press seemed to have stopped reporting on the matter before the promised report appeared.


183“Senator Houk Talks,” NB, Feb. 9, 1898 (3:2).

deposition, the press reported rumors that Halpin’s testimony was “not very favorable to Mr. Rogers.”\(^{185}\) The depositions were notable for having triggered a public fist fight between Houk and Attorney General Pickle, which erupted in the lobby of the Nashville hotel where the depositions were being held. When Houk asked Pickle to state to the bribery investigation committee that in 1897 Pickle had requested that Houk enable Pickle’s law partner, Turner, who represented ATC, to testify before the Senate Judiciary Committee on the constitutionality of the Rogers bill, Pickle’s response that he recalled no such request prompted Houk to insist that Pickle did, leading Pickle to call Houk a liar, who in turn struck Pickle, who reciprocated.\(^{186}\)

The report that the joint committee issued on February 14 not only exonerated Houk, but revealed the bias of its members (all five of whom had voted for Houk’s bill at the extra session)\(^{187}\) by asserting that that measure was

“purely a revenue measure and had for its sole purpose the gathering of revenue into the state treasury, and it is in no way connected with the bill introduced at the regular session.... We do not believe that any person connected with the passage of this revenue bill at the extra session...was prompted by any unlawful or impure motives or any other purpose than that of adding revenue to the state. We believe it was a good measure and ought to have become a law, and was defeated by being wrongfully connected with these charges of bribery relating to the bill introduced at the regular session....

“We are further of the opinion that the bill introduced by Senator Houk at the regular session, providing for the inspection of cigarettes sold in the state, was introduced with pure motives, and from all the facts gained by the committee in its investigation of this matter tends to show on the part of the introducer of the bill that he was governed solely from [sic] pure motives and not on account of [sic] any bribe being offered him.”\(^{188}\)

\(^{185}\)“Halpin Has Been Here,” \textit{NB}, Feb. 14, 1898 (1:7).


\(^{187}\)The House members were Democrats Eliphalet Jarvis and William Wesley Craig, and Republican John Edward Cassady; the senators were Democrat Christopher C. Ellis and Republican Horace A. Mann. All except Mann had voted for Rogers’ bill in 1897.

\(^{188}\)“Exonerates Senator Houk,” \textit{NB}, Feb. 15, 1898 (8:3). Even before this report was released, Senator Mann had asserted that Houk had drafted the 1898 bill himself and that whatever the details of the introduction of the 1897 bill, Houk’s actions were “conscientious and sincere.” “Halpin Has Been Here,” \textit{NB}, Feb. 14, 1898 (1:7). Rogers’ uncontradicted statement in fact revealed that at both sessions Houk had been doing the
Tennessee 1897

The committee report thus also exonerated the committee members themselves and, in all but name, charged Rogers with having misled the legislators in order to prevent passage of Houk’s privilege tax bill.

One group whose position on the anti-cigarette law has remained outside the narrative thus far is Tennessee tobacco farmers, who do not appear to have intervened publicly in the debate in 1897 and whose welfare state legislators did not mention as potentially adversely affected by the sales prohibition. On April 5, 1897, almost two months after the governor had approved the law, but five days before the regular session ended, the Memphis Commercial Appeal published a piece, “Will Seek Repeal: Tobacco Growers of Tennessee Claim Hardship in the Anti-Cigarette Law,” that bore the indicia of an organizationally purchased or planted pseudo-article, but without any indication of the organization or of any spokesperson. Some evidence suggests, however, that the organization was in fact the Tobacco Trust. First of all, the article appeared the same day that Halpin signaled to Rogers that the Trust, according to Rogers’s account, would abandon its efforts to pass the Trust-Houk bill during the remaining days of the legislative session. (Bizarrely, the piece referred to the “iron-bound bill prohibiting the sale of cigarettes” as having been passed in “[t]he last session of the Tennessee legislature,” although the session was still in progress.) Second, the bill allegedly envisioned by the growers encompassed the principal features of the ATC-Houk bill: repeal of Rogers’ law and a ban solely on selling “adulterated” cigarettes. After presenting some interesting data on the size and growth of tobacco production in the state, the piece asserted that:

it is questionable whether the planters and dealers, who number up in the thousands, will approve a measure that so injuriously affects their interests as the prohibitory cigarette bill does. Much muttering is heard that the legislature was carried off its feet by a sentiment that is founded in exaggerated rumors of the great ravages cigarettes are making among the youth of the land. Those who oppose the measure enacted by the last [sic] legislature claim that Tennessee’s great tobacco interests ought not to be dealt such a blow unless there is a better reason for it. The assertion that the use of cigarettes is deleterious to health is true only in a modified sense, as the tobacco people say, the damage resulting either from misuse of pure cigarettes or the use of impure cigarettes, and it is urged strenuously that the legislature, instead of delivering such a stab at Tennessee’s great and growing tobacco

Tobacco Trust’s bidding.

189 At this time it was common for the liquor industry to buy even editorials in newspapers. James Timberlake, Prohibition and the Progressive Movement, 1900-1920, at 108-109 (1965).

190 “Will Seek a Repeal,” CA, Apr. 5, 1897 (5:5).
Tennessee 1897

interests, should have passed a law providing for the inspection of cigarettes and thus shut out of the market those that are impure and injurious.\textsuperscript{191}

Changing its focus somewhat, the critique of the anti-cigarette law turned toward themes (freedom and autonomy) that in content and tone anticipated the Tobacco Institute’s/Philip Morris’s late-twentieth-century homicidally mendacious advertising:

It is claimed...that this prohibitory law...will not in the least lessen the use of cigarettes. Tell a free-born American citizen that he shall not do a thing, and that is the very thing he will do or die. Cigarettes will be brought into the State by the box, and every man or boy who wishes can buy them over the State line, and having thus to buy them by the quantity, they have more of them at hand and will use them more freely.

It is claimed that the damage done by cigarettes arises largely from misuse by an innocuous article (inhaling), and an excessive use. The tobacco men claim that water is equally dangerous and hurtful if a person should persist in deluging his lungs with it.\textsuperscript{192}

In contradiction of this assertion that a prohibition was senseless because it would not only not reduce consumption, but would perversely increase use, the article then claimed that the law was even more damaging to the Tennessee tobacco industry than most people imagined because “if other States follow suit, it will result in incalculable damage to the tobacco industry, and Tennessee being the fourth State, and right along beside the two great tobacco States, Kentucky and North Carolina, will feel it sensibly.”\textsuperscript{193} Since presumably none of these states was a major site of cigarette sales (and only North Carolina a major manufacturer), and the Tennessee law did not even prohibit manufacture, it is unclear why enactment of a sales ban in those two states would have especially injured Tennessee tobacco growers, who produced little if any for use in cigarettes; and even if a greater proportion of tobacco grown in Tennessee had been destined for cigarettes, it could have been shipped to New York and other states for processing and sale. To be sure, what the Tobacco Trust more plausibly feared was a nationally snowballing legislative movement that might have ultimately achieved a ban on cigarette sales and manufacture everywhere.

\textsuperscript{191}“Will Seek a Repeal,” \textit{CA}, Apr. 5, 1897 (5:5).
\textsuperscript{192}“Will Seek a Repeal,” \textit{CA}, Apr. 5, 1897 (5:5).
\textsuperscript{193}“Will Seek a Repeal,” \textit{CA}, Apr. 5, 1897 (5:5). The additional assertion that “the privilege taxes that the State was collecting will now be cut off, and the Treasury suffer a direct loss” was nonsensical since cigarettes were not at the time subject to that tax—Houk’s S.B. No. 22 of 1898 would have imposed it.
Sales Ban Bills in Other States Passed by One Chamber (or Both Chambers and Vetoed) in the Late 1890s

When the moral courage of our legislators was tested on the question of reforms as embodied in the bills, which received the sanction of the majority, it was evident that some powerful force was back of it all that compelled these servants of the people to ignore precedent and party lash, and to place themselves on the side of morality...

While we are jubilant over the reforms that were inaugurated, we may be assured that the community was far in advance of the enactments. No man could have had the courage to present such bills as Mr. Voorhees presented [regarding saloons] or as Senator Whiteley framed against selling tobacco to boys, unless he had certainly known that public opinion would endorse him. 1

Following passage of general anti-cigarette sales ban bills by at least one chamber in nine states in 1893, enactments followed in 1895 (North Dakota), 1896 (Iowa), 1897 (Tennessee), and 1899 (Florida). The supra-regional character of the surging sentiment sustaining calls for radical state intervention was amply on display in the latter half of the 1890s when at least one chamber in seven states again passed bills prohibiting cigarette sales during sessions in the odd-numbered years—in which most legislatures met exclusively 2 —of 1895 (Arkansas, California, Colorado, Nebraska, Oklahoma, Indiana, and Massachusetts) 3 and 1897 (Washington, Indiana, Alabama, Pennsylvania, Massachusetts).


2In 1894, the Louisiana House defeated a bill to prohibit the manufacture and sale of cigarettes by a vote of 26 to 39 after the Corporations Committee had reported favorably on it. Official Journal of the House of Representatives of the State of Louisiana 492, 607, 917 (June 15 and 20, July 9) (1894) (H.B. No. 369 by Charles F. Burmeister, Dem. N. Orleans).

3Not discussed below is the passage in 1895 by the House of the Territory of Oklahoma by a vote of 22 to 2 of a bill to “prohibit the manufacture, sale or giving away of cigarettes, cigarette tobacco and cigarette paper” subject to a $500 fine. Journal of the House Proceedings of the Third Legislative Assembly of the Territory of Oklahoma...1895, at 464, 808 (Feb. 5, Mar. 6); “Anti-Cigarette Law,” DP, Mar. 9, 1895 (11:7). The bill died in the Council, whose last action on the penultimate day of the session was to refer it after second reading to the committee of the whole. Journal of the Council Proceedings of the Third Legislative Assembly of the Territory of Oklahoma...1895, at 902 (Mar. 7). Also in
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

Colorado, Maine, and Illinois) in addition to Kentucky in 1896 and 1898, Massachusetts again in 1898, and Arkansas for a fourth time in 1899.

Arkansas 1895 and 1899:
The Third and Fourth Sessions to Pass an Anti-Cigarette Bill that Did Not Become Law

Another effort to secure a sales ban was mounted during the 1895 session of the Arkansas legislature when the Democrats’ already huge majorities in both houses were marginally expanded to 88 seats in the House (facing 9 Populists and 3 Republicans) and 31 in the Senate (against one lone Republican). Once again Bradley was the sponsor of the bill (H.B. No. 2) to prevent the sale of cigarettes, which this time included a greater fine, ranging between $50 and $250. Two weeks later the Judiciary Committee submitted a majority report recommending passage and a minority report recommending instead a substitute that unrecognizably dismembered the bill by converting it into a low-license regime requiring a trivial annual five-dollar tax and increasing the minimum lawful age from 15 to 21. At the same time the House defeated a motion to amend offered by physician Alfred Hathcock to include pipes and cigars within the sales ban.

On February 7, the House “devoted its entire session” to H.B. No. 2, first engaging in a “long and heated discussion” of the substitute bill, several amendments to which were offered in an effort, presumably, to gain additional

1895, after the Arizona territorial governor in his message to the legislature had stressed that the 1891 law prohibiting the sale of cigarettes to minors was being “practically ignored by the law officers...whose duty it is to enforce” it, a bill was introduced in the Legislative Assembly prohibiting the sale of cigarettes, but it was promptly postponed indefinitely. Journals of the Eighteenth Legislative Assembly of the Territory of Arizona...1895, at 28, 310, 360 (Jan. 29 and Feb. 11) (1895) (H.B. 15).

On passage of bills by one house in 1891 and 1893, see above chs. 3 and 4.


“The Arkansas Legislators,” CA, Jan. 20, 1895 (2:5).


“The Anti-Cigarette Bill,” CA, Feb. 8, 1895 (8:5).
votes by marginally strengthening it. After an amendment to increase the license fee to $25 had failed, the House adopted (Bradley voting Nay) one to cover giving cigarettes away in addition to selling them. Dr. Hathcock’s amendment to increase the license tax to $10 lost as did another to cover cigars and snuff. On third reading the weak substitute’s weak support was revealed as it secured only 34 Ayes against 58 Nays (and only 25 against 65 on a motion to reconsider). Following a test vote on a motion to put H.B. No. 2 on its third reading, which prevailed 50 to 40, the House passed the bill by the large majority of 71 to 20.\textsuperscript{11} This victory was achieved despite the fact, tantalizingly reported by the Memphis \textit{Commercial Appeal}, that a “strong lobby from the East was here working against the bill”; indeed, efforts by the unnamed Tobacco Trust were apparently so feckless, that the newspaper expressed a belief that the Senate would endorse the House action.\textsuperscript{12} In fact, while wire services carried reports of the vote to towns and cities across the country,\textsuperscript{13} the bill moved on to its senatorial cemetery.

On H.B. No. 2’s second reading Senator A. G. Gray, a Democrat, farmer, and Methodist,\textsuperscript{14} immediately offered a killer amendment to confine the sales ban to persons under 21. Two other senators pursued the same hostile intent in proposing to subject snuff and tobacco in all its forms to the ban. The bill together with what the Memphis \textit{Commercial Appeal} called these “fatal amendments”\textsuperscript{15} were then referred to the Public Health Committee.\textsuperscript{16} Two weeks later that

\textsuperscript{11}Journal of the House of Representatives, State of Arkansas, Being the Thirtieth Session 473-82 (Feb. 5) (1895). As the aggregate votes alone indicate, there was no one-to-one correlation between positions on the substitute and the ban bill.

\textsuperscript{12}‘The Anti-Cigarette Bill,” \textit{CA}, Feb. 8, 1895 (8:5).


\textsuperscript{14}Biographical information on senators in 1895 is taken from \textit{Biennial Report of the Secretary of State of the State of Arkansas: September 30, 1892, at 68 (1893); Biennial Report of the Secretary of State of the State of Arkansas: December, 1896, at 281 (1897).}

\textsuperscript{15}“Laid Low by the Lobby,” \textit{CA}, Mar. 2, 1895 (1:7).

\textsuperscript{16}Journal of the Senate of Arkansas: Thirtieth Session 447-48 (Mar. 1) (1895). The chamber’s sole Republican, William B. Morton, a Baptist lawyer (who at the 1900 census was returned as a postmaster), proposed amending section 3 by adding the proviso that “such original package shall not contain less than one thousand cigarettes, or papers for one thousand cigarettes.” \textit{Id.} at 447. Presumably Bradley’s original bill included some
committee returned the bill with a number of amendments and recommended against passage. Although the Senate Journal did not, unfortunately, include the texts of these amendments or explain their relationship to the aforementioned amendments, at least the first one may have embodied Gray’s under-21 proposal, which initially passed (after having itself been amended to ban cigarette manufacture), but was then, by a narrow vote of 16 to 14, reconsidered; when Senator Walter Amis, who had been one of the six Democrats to vote against Bradley’s bill in 1893, offered an amendment to strike out “under the age of 21 years” so that the bill reverted to being one to “prevent the sale either to minors or adults,” floor debate was interrupted by Gray’s process-stopping motion to postpone its consideration indefinitely. Included among the 17 Yes-voting senators who prevailed over the 10 resisters were all of those six bill-killing Democrats from 1893 except Amis. The “anti-cigarette bill, which occupied several days in the house, was disposed of in as many hours in the senate,” thus inflicting on the Arkansas anti’s their third defeat in three successive sessions.

The final nineteenth-century legislative efforts took place in 1899 along two tracks. In the House (in which Democrats numbered 98 and Republicans only 2) Thomas Yadon, a farmer and Methodist, introduced House Bill No. 104, which made it a misdemeanor to sell or give away cigarettes or tobacco or paper for making cigarettes to any minor under the age of 21 as well as cigars, chewing tobacco, or tobacco in any form to any minor under 15; the fine for the former violation ranged between $100 and $300 and that for the latter between $10 and $50. The Temperance Committee to which it had been referred recommended passage with an amendment lowering the former age from 21 to 19. When the full House took up this diluting amendment, Yadon himself and numerous other

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interstate commerce-based exception for sales in original packages (unfortunately the Arkansas State Archives does not have bill texts from this period). The next day’s issue of the Arkansas Gazette was lacking on microfilm.

17Journal of the Senate of Arkansas: Thirtieth Session 588-94 (quotes at 592) (Mar. 15) (1895); “Boundary Lines Are in Doubt,” CA, Mar. 16, 1895 (1:5).

18“Boundary Lines Are in Doubt,” CA, Mar. 16, 1895 (1:5).

19All the biographical information concerning legislators during the 1899 session is taken from Biennial Report of the Secretary of State of Arkansas: For the Years 1897-98, at 294-97 (1898).


members who would later vote for the bill supported it—suggesting that they may have believed that passage would otherwise have been jeopardized—whereas many of those who would later vote against the bill opposed it. After the amendment had lost by a vote of 33 to 43, farmer Joseph Howard, an opponent, offered the (by now traditional) bill-killing coverage of cigars and snuff on a par with cigarettes, but it was heavily defeated by a vote of 13 to 62.23 The floor debate on final passage, a month later, shed interesting light on the arguments that advocates urged (and the press chose to filter through and preserve for posterity) to buttress the positions they had staked out. Since his bill did, after all, target children, Yadon focused on them, though his rhetoric was stale and stereotypical by this point. Worried about the “cigarette fiends” which “the boys and even some of the girls” were fast turning into, he warned that cigarettes were being filled with “rank poison” making “the victims fit subjects for the asylums” and taking them to “premature graves.” He also repeated the commonplace that more than half of the disabilities causing rejection of volunteers for the army during the Spanish-American War in 1898 “were due to cigarette smoking.” In sharp contrast, the bill’s foremost opponent, Frederick G. West, a farmer and Missionary Baptist, ignored all such alleged deleterious health impacts and any distinctions between children and adults, prompting Yadon to remind West that his bill did not interfere with adult smoking. (The aforementioned Howard shared West’s confusion in arguing that “if cigarette smoking was to be stopped let the work be begun in the house.”) Instead, he declared that “the use of tobacco was a custom and an American privilege and he would never cast his vote to interfere with the right of any individual to use the weed.” The chamber, according to the Arkansas Gazette, “was in an uproar while he was speaking, the applause being frequent and loud.” Back on the health point, Dr. Richard H. Taylor, a physician and Episcopalian from Hot Springs, “endorsed every word spoken” by Yadon, but expressed doubt as to whether “the law could be made strong enough even for the protection of the boys and girls against the vile habit.”24 The full House then passed H. B. No.104 by the overwhelming vote of 71 to 11.25 The Senate then followed suit about ten days later, passing the no-sales-to-minors bill by the roughly equivalent vote of 23 to 5.26

26 Journal of the Senate of Arkansas: Thirty-Second Regular Session 171 (Mar. 13, 1899); “The Cigarette Bill,” AD, Mar. 15, 1899 (4:5). The enactment is at 1899 Arkansas
Several months after adjournment, the *Arkansas Democrat*, which was an enemy of such state intervention, insisted that the “Yadon cigarette law was run over the members of the last legislature by those who realized that it was either this bill or a more drastic measure. In the interest of the cigarette traffic they were willing to accept the least effective law. Next time we shall see to it that no such mistake is made.” In fact, that more drastic measure, which part of the press had put on its editorial wish list before the opening of the session, had already been debated in 1899.

In the House, on March 3, the day after H.B. No. 104 had passed, the first and second reading of a much more radical bill took place. Introduced by Charles L. Poole, a lawyer and Methodist, H.B. No. 318 proposed to “prohibit the manufacture, importation, sale or giving away of cigarettes and cigarette papers.” The press called the bill, which sanctioned offenses with fines ranging from $500 to $5,000, a “copy of the Tennessee law.” Three weeks later the House floor debate unfortunately received only scanty attention from the two major newspapers. The *Democrat* offered no account at all of all the discussion, while the *Gazette* un informatively noted that Poole himself had given “the cigarette several hard raps.” Two Methodists, one a lawyer and the other a farmer, also spoke up: one criticized the bill for its extremism in telling “free agents in this good democratic state that they could not buy a cigarette if they wished to,” whereas the other boasted that he was “as good a Democrat as anybody” and still wanted cigarettes prohibited. In contradiction of his earlier speech, West (inexplicably) supported the bill, thus garnering frequent applause.

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27 *AD*, Aug. 16, 1899 (2:1) (untitled edit.).
28 E.g., “Advice to Legislators,” *AD*, Jan. 7, 1899 (6:3) (reprinting untitled editorial from *Arkadelphia Sifting-Herald* calling for a law “excluding the sale of cigarettes within our state”).
29 *Arkansas and Its People: A History, 1541-1930*, at 4:345 (1930). The denominational designation of Methodist Episcopal is taken from this biographical sketch of Poole, for which he presumably provided the information. According to the *Biennial Report of the Secretary of State of Arkansas: For the Years 1897-98*, at 295 (1898), Poole was a Presbyterian. To be sure, it is possible that both sources were accurate because Poole changed religions.
The chamber then passed the bill by the significant majority of 56 to 22, four of the 11 representatives (including West) who had opposed the no-sales-to-minors bill now voting for the total ban. The House action was also widely reported in the out-of-state press. The Senate, however, killed the bill when it failed to muster the two-thirds majority to suspend the rules and take it up. The Arkansas Democrat, which editorially attacked the “poor makeshift” of a no-sales-to-minors law, but nevertheless claimed that it should be enforced as long as it was on the statute books, predicted in the summer of 1899 that the “next legislature [1901] will pass the Tennessee law absolutely prohibiting the sale of cigarettes to anyone, and then we can see what virtue there is in a prohibitive law.” The newspaper overestimated the speed with which legislators would act, but the anti-cigarette movement did finally secure enactment of a general cigarette sales ban in 1907, which remained in place until 1921, the same year in which Iowa’s law was repealed.

**California 1895: The First Legislature to Pass a Sales Ban Vetoed by the Governor**

Alameda, Cal., is evidently misplaced. It ought to be in Kansas or Iowa. It has just passed a very stringent law regulating the sale and smoking of cigarettes, and curiously enough was moved to do it by a petition gotten up and signed by the tobacconists, who evidently are afraid of the cheap smokes destroying their business. ... Alameda is a very

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35 *Journal of the Senate of Arkansas: Thirty-Second Regular Session* 249 (Apr. 13, 1899). The *Journal* confusingly stated that “the ayes and nays were called for and the call sustained” on the motion to suspend the rules and take up H.B. No. 318; it intensified the confusion by adding that the question was “‘Shall the bill pass’” but then describing the result as “So the Senate refused to suspend the rules.” The Senate chief counsel confirmed that since rules suspension required a two-thirds vote and none was forthcoming, there was no vote on the bill. Telephone interview with Steve Cook, Little Rock (Sept. 26, 2006).


37 See vol. 2.
nice place to stay away from.\textsuperscript{38}

The Californians have sat down hard on the deadly cigarette. A bill has gone to the governor absolutely prohibiting the manufacture, sale or use of cigarettes in that state.\textsuperscript{39}

In the interim between the Assembly’s failure to pass the Senate sales ban bill at the 1893 session\textsuperscript{40} and the opening of the 1895 session of the California legislature, anti-cigarette advocates succeeded in securing adoption of a sales ban on the municipal level in the San Francisco Bay Area. The circuitous path to this suppression of adult consumer freedom began with the self-proclaimed “crusade in the public schools against cigarette-smoking by boys under 21” that the independent San Francisco \textit{Morning Call} inaugurated on January 12, 1894, as the public streets were “filled with urchins puffing at the deadly ‘cigareet,’ as this form of drugged tobacco is vulgarly called.”\textsuperscript{41}

To be sure, the \textit{Call} was merely adopting a program that had been initiated just a few weeks earlier in New York City, when Board of Education Commissioner Charles Bulkley Hubbell, a business lawyer,\textsuperscript{42} began his own “crusade against the cigarette evil in the public schools”\textsuperscript{43} in response to complaints from several principals about the incomprehensible loss of powers of concentration among bright 10- to 14-year-old boys, who had also exhibited signs of truancy: “It was found that nearly all the incorrigible truants were cigarette fiends; that is to say, they were almost hopelessly addicted to the inhaling habit.”\textsuperscript{44} To be sure, Hubbell did not present this (scientifically appropriate) emphasis on the unique dangers of inhalation until a decade later. In 1893, in contrast, at least according to \textit{The New York Times}, the “personal observation” of

\textsuperscript{38}“Cigarettes Tabooed,” \textit{DP}, Mar. 29, 1894 (4:5).
\textsuperscript{39}“Protection for the Boys,” \textit{SP-I}, Mar. 7, 1895 (4:4) (reprinted from \textit{Sioux City Journal}).
\textsuperscript{40}See above ch. 4.
\textsuperscript{41}“The Boy’s Anti-Cigarette-League,” \textit{MC}, Jan. 12, 1894 (10:1-4 at 1).
\textsuperscript{42}C. B. Hubbell, Dead,” \textit{NYT}, July 25, 1939 (26).
\textsuperscript{43}“Schoolboys Sign Pledges,” \textit{NYT}, Dec. 3, 1893 (13). According to “Lucy Page Gaston,” \textit{BET}, May 6, 1905 (1906), Hubbell “acknowledged his indebtedness to the W.C.T.U.” for his school initiative in 1893, but no contemporaneous evidence of such a statement has been found. In its weekly publication the WCTU merely stated that the New York Board of Education “is making strenuous efforts to put an end to cigarette smoking.” “Since Our Last Issue,” \textit{US} 19(49):1 (Dec. 7, 1893).
cigarettes’ “deleterious effect” was captured by a public school graduate, “his nerves saturated with nicotine, becoming suddenly insane in the Commissioner’s Wall Street office, and another, a victim of the same vice, a hopeless inmate of a hospital....” Impelled by these insights into the etiology of phenomena of which not even today’s anti-smoking zealots have reported a sighting in many decades, Hubbell resolved to form in every boys’ school in New York City an anti-cigarette-smoking league, bound by a pledge whose two principal paragraphs encapsulated the deep flaw inherent in his approach (wholly apart from its bizarre health impact analysis): “1. From this date to abstain from smoking cigarettes in any form until we reach the age of twenty-one years. 2. To use all influence that we possess to induce all public-school boys and other boys of our acquaintance to give up and abstain from smoking cigarettes until such boys shall attain the age of twenty-one years.” This temporally limited self-abnegation was virtually designed to create a marker of maturity that would simply entice children into accelerating their emulation of grown men. Hubbell’s indifference to cigarette smoking at 21 was linked to “the fact that he has no grievance against the use of tobacco in general. He is a smoker himself....” More than health, however, was at stake: above all, it was “the deterioration of the moral principle of a lad” that concerned him because the “cigarette fiend” in time becomes a liar and a thief,” who, “narcoitized by nicotine, sits at his desk half stupefied....”

About a month after the Board of Education in New York had “heartily endorsed” the Anti-Cigarette-Smoking League, the Call launched its Pacific Coast knock-off, including the “until we reach the age of 21 years” abstention pledge (because “[w]hen he is 21 he will be safe”) without recognizing the self-contradiction of simultaneously asserting that “[t]he boy wrongly thinks this cigarette-smoking a ‘manly’ amusement.” (In contrast, Dr. Charles A. Clinton, a member of the San Francisco Board of Education and of its cigarette committee, correctly observed that: “Small boys would not smoke if the elders did not use

47. “Board of Education Meeting,” NYT, Dec. 7, 1893 (1). On its spread to Chicago, see “Vow Not to Smoke,” CT, Apr. 16, 1894 (6).
49. The Boy’s Anti-Cigarette-League,” MC, Jan. 12, 1894 (10:1-4 at 1-3).
cigarettes. It is largely a matter of imitation.””50 However, in boasting that the “anti-cigarette crusade is practically a health crusade,” the newspaper did correctly convey physicians’ appreciation that “[t]he trouble is that most [cigarette] smokers inhale” smoke into the lungs resulting in bronchitis and asthma; the concomitant absorption of poisons produced other disease as well.51

The Call claimed that tobacco dealers appeared to be unanimously of one opinion concerning the cigarette trade—namely, that if there were any profits, they were “more than counterbalanced by the trouble in handling the growing number of brands” and the concomitant loss of the more profitable cigar and pipe tobacco sales. Indeed, many “legitimate tobacconist[s]” claimed that the cigarette trade had “been the ruin of an otherwise profitable business” which it threatened to swamp. Although dealers had “decided scruples against selling these things to boys,” when the latter came in and “demand their peculiar poison we have no recourse but to sell it to them.” Consequently, in addition to being “heartily pleased to have the trade in cigarettes diminished,”” they favored a law making cigarette sales to minors a misdemeanor.52 (The only problem with the dealers’ lament was that the California Penal Code had been subjecting the sale of any kind of tobacco to anyone under 16 to a $100 fine ever since 1891.)53 The Call went so far as to assert that “without a single exception, if it was put to a popular vote, the wholesale and large retail tobacconists would cast their ballot to make the smoking of cigarettes a crime.”54 (At the beginning of 1894 there were 307 retail cigar stores in San Francisco55 or about one per every 439 males 16 years of age and older.)56

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50“A Mighty Host,” MC, Jan. 21, 1894 (17:3). Clinton was a physician and druggist. Langley’s San Francisco Directory for the Year Commencing April, 1894, at 372 (1894).
51“The Boy’s Anti-Cigarette-League,” MC, Jan. 12, 1894 (10:1-4 at 1-3). Editorially the Call appeared to concede that cigarette smoking was not safe for adults: “Whatever may be said of the right of an adult to ruin his health and impair his mind no one will contend that minors should be allowed like liberty.” “The Cigarette Habit,” MC, Jan. 13, 1894 (6:1) (edit.).
531891 California Statutes ch. 70, at 64 (Penal Code § 308) (providing an exclusion for written parental consent).
55Langley’s San Francisco Directory for the Year Commencing April, 1894, at 1576-77 (1894). This figure does not include grocery, drug, or any other kind of store selling cigarettes.
At a meeting of the cigarette committee of the board of education nine days after the newspaper had initiated the campaign one of its members, Jacob Rosewald, a music teacher, opined that special legislation was the only “effectual method of treating the evil”; in particular, he advised petitioning the board of supervisors to pass an ordinance imposing a “high license” on cigarette sales, which would cut off sales in small stores (in which minors supposedly primarily bought cigarettes). This impact makes more than plausible Rosewald’s statement that large dealers had told him that they were in favor of such a proposal. However, Superintendent John Swett doubted whether the supervisors would adopt such an ordinance; instead, he claimed that the existing law punishing dealers for selling to minors would be “effectual, the only trouble with it, however, being the want of somebody to complain” (thus ignoring the fact that it did not apply to students 16 and over). In the event, the Board of Education did not formally adopt Rosewald’s resolution to petition the supervisors, taking it merely as a suggestion. While the Board of Education was deadlocked on the question of making the pledge a formal policy, it did achieve unanimity in adopting a resolution, grounded in medical opinion that cigarette smoking harmed young people’s physical, moral, and intellectual development, requesting the Board of Supervisors to fix a license for selling cigarettes at $25 per quarter “so as to render their purchase by school children practically impossible.”

At the same time, however, the Call’s crusade was finding resonance across the Bay in Alameda (pop. ca. 13,000 in 1894), where the board of education issued a circular to parents announcing that “vigorous measures be taken to stamp out the ‘cigarette habit,’” which was “becoming alarmingly prevalent” among public school pupils. In language that the city government would soon contradict, the board went on to “recognize the fact that no laws can be framed that will to any extent decrease the spread of this pernicious habit”; instead, “wise counsel and kindly instruction must be depended on for the education of our children on...”

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Twelfth Census of the United States, Taken in the Year 1900: Population, Part II, tab. 9 at 143 (1902). The population figure was calculated by linear interpolation of the total census populations in 1890 and 1900 and of the age and sex composition in both years; it was also assumed that 15-year-olds made up 20 percent of the group of 15-19-year-olds.

57Langley’s San Francisco Directory for the Year Commencing April, 1894, at 1221 (1894).

58“A Mighty Host,” MC, Jan. 21, 1894 (17:3).


60This estimate is based on linear interpolation of the census enumerations in 1890 and 1900. U.S. Census Office, Census Reports, Vol. 1: Twelfth Census of the United States, Taken in the Year 1900: Population, Pt. 1, tab. 5 at 75 (1901).
this important subject.” Finally, the board implored parents, “by precept and example,” to teach their children that indulging in cigarettes “will certainly be followed by disease and death.” By the beginning of March 300 pupils in five schools in Alameda had signed the Anti-Cigarette League pledge promising to abstain from cigarette smoking until they were 21.

The Woman’s Christian Temperance Union sought to radicalize this movement in Alameda County, which included the adjacent city of Oakland, by initiating its own agitation under the aegis of the Triple Pledge League of the Junior Christian Endeavor Society of Alameda County, which was headed by a WCTU member, Mrs. H. C. McMath, the County Superintendent of Children’s Work. This pledge, as the Call conceded, was “far more extensive” than its own: “I promise not to buy, drink, sell or give/Alcoholic liquors while I live./From all tobacco I'll abstain,/And never take God’s name in vain.” Although the newspaper doubtless had in mind the tri-pronged scope, the WCTU pledge’s more relevant characteristic was that it no more permitted children to begin smoking cigarettes on their twenty-first birthday than all of a sudden to utter profanities.

Altogether the WCTU’s propaganda was a bit much for the local authorities. Later that same year a row broke out over the literature that the Alameda school directors had permitted the WCTU to distribute in the school, but to some of which they then took such “vigorous exception” that they thenceforward subjected pamphlets to the superintendent’s “censorship.” After the long-term school board President Cyrus A. Brown had characterized one such pamphlet by Dr. Richard Hayes McDonald (a California capitalist millionaire who had distributed tens of millions of temperance leaflets) as being “in this age of enlightenment...entirely out of place,” he called on one of the other directors to read a section from a pamphlet titled, “The Streets of Hell.”

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61 “Save the Boys,” MC, Jan. 21, 1894 (3:4).
63 The Alameda union was, in the face of constant violations of the no-sales-to-minors law, convictions for which had been hard to obtain, divided over whether to arrest the children or the tobacconists. “Temperance Meeting,” San Francisco Call, Oct. 16, 1895 (11:4).
64 “For the Parents,” MC, Feb. 5, 1894 (8:1-2 at 2).
65 “Alameda,” MC, Nov. 25, 1894 (8:4-5).
66 Pacific Bank Handbook of California 6, 8 (1888); “St. John for President,” NYT, July 25, 1884 (1). McDonald, who owned the first Atlantic to Pacific Coast overland telegraph, unsuccessfully ran for the National Prohibition Home Protection Party presidential nomination.
Tisdale, a 36-year old Republican who was also a physiology professor at Hahnemann Medical College in San Francisco, after throwing down the paper, supplied, together with Brown, this concise commentary, which underscored that at least this WCTU local melded primitive atavistic pietistic fundamentalism with a much more capacious anti-tobacco agenda, which latter it was able, in most places and at most times, to keep under wraps lest its non-cigarette smoking male tobacco addict allies flee the political embrace of the “good ladies”: “What rot! ... That is the silliest kind of stuff for our children to read.” ‘Why,’ said Chairman Brown, as he felt a cigar in his inside pocket, ‘in one pamphlet it is stated that a man cannot use tobacco and be a good Christian.’ Director Tisdale, who knows the flavor of good tobacco himself, concurred in condemning this statement.”

The Alameda school superintendent then announced that the only WCTU pamphlets that would be permitted in classrooms would be those teaching about cigarettes’ harmfulness, whereas “nothing relating to prohibition, temperance or the less injurious forms of tobacco-using” would be permitted. Instead of backing off, at least to protect its anti-cigarette alliance, the WCTU persisted in defending the “‘lurid literature,’ the Dr. McDonald brimstone tracts....” The group, however, made no headway with the board of education, which was “convinced that the white souls of the little innocents will go just as straight without dissertations on hell and its environs.”

In the midst of its anti-cigarette campaign the Call was able to report much weightier news from Alameda—namely, that its city attorney was preparing an ordinance to ban the sale or manufacture of cigarettes altogether. The 2,700 persons signing the petition to the Board of Trustees requesting this measure included “all the dealers in the weed.” The board, which passed the ordinance on March 12, justified the suppression not only on the customary health basis

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67. Alameda,” MC, Nov. 25, 1894 (8:4-5). On Brown, a house builder who first became a board member in 1884 and was still serving in 1903, see http://www.alameda-preservation.org/preservation-awards (visited Mar. 20, 2010); Annual Report and Outline of Studies of the Public Schools of the City of Alameda California for the Year Ending June 30, 1903, at 7 (1893). On Tisdale, who served from 1891 to 1899, see Joseph Baker, Past and Present of Alameda County California 2:510-12 (1914).
69. Alameda,” MC, Dec. 6, 1894 (8:3). In a blast at McDonald (which echoed many that had targeted him as a charlatan), Dr. Tisdale stated at a board meeting: “‘When a man gets rich from selling such a concoction as ‘Vinegar Bitters,’ and palms it off as a temperance drink, and then circulates literature to improve the morals of the youths and preaches temperance, things have come to a pretty pass.”” Id.
(derived from cigarettes’ poisonous ingredients), but also on the obscure grounds that the “injury...inflicted upon the user is transmitted to his posterity....”71 The ordinance—still in force in 1903—in addition to prohibiting minors from smoking cigarettes in any public place, made it unlawful for anyone to sell, offer for sale, or give away any cigarettes or to permit any cigarettes to be sold in any place owned, leased or occupied by him. The penalty for violations was a fine not to exceed $100 and/or imprisonment not to exceed 50 days.72 The Call showed no reticence about attributing adoption of the ban to its “cigarette crusade....”73 As the ordinance went into effect in mid-June,74 the press reported that “it was not thought” that local tobacco dealers would fight it because they had received time to dispose of their stock and “none who had signed the anti-cigarette petitions did so with more readiness than most of the tobacconists.”75 In the wake of Alameda’s action, 500 citizens of San Bernardino (population ca. 5,000) successfully petitioned the City Trustees to introduce an ordinance to forbid the sale or smoking of cigarettes, which the Los Angeles Times characterized as designed for “clearing the place of dudes and their imitators....”76

At the WCTU’s national convention in November 1894 it was revealed that a member from California would “present to the next legislature a petition to prohibit the selling of cigarettes.”77 At that session in 1895, when the North Dakota legislature was formally enacting a general cigarette sales ban,78 California passed a broader one by a large majority, which, however, the governor pocket vetoed. With the initiative still in the Senate, on January 15, attorney Henry C. Gesford, a Democrat from Napa who had taught in and been superintendent of schools of that county in the late 1870s79 and had voted for

72Ordinance No. 250, in Charter and General Ordinances: City of Alameda 1903, at 155-56 (passed Mar. 12, 1894) (1903).
75“Anti-Cigarette,” LAT, June 16, 1894 (2).
76“San Bernardino,” LAT, June 21, 1894 (9). After having encountered anti-puritanical resistance, the ordinance was apparently watered down to cover only minors. “San Bernardino,” LAT, July 10, 1894 (7); “San Bernardino County,” LAT, Dec. 3, 1894 (9).
77Minutes of the National Woman’s Christian Temperance Union at the Twenty-First Meeting...November 16-21, 1894, at 396 (1894).
78See vol. 2.
79http://www.calarchives4u.com/schools/sns/sns89117.htm (State Normal School
Earl’s bill in 1893, introduced Senate Bill 55, which simply added the following brief section to the penal code: “Every person who manufactures, or deals in, or sells, or offers for sale, or gives away, or otherwise disposes of cigarettes, is guilty of a misdemeanor.” Three weeks later the senate unanimously passed the bill by a vote of 32 to 0. As legislative action shifted to the Assembly, the Pasadena WCTU submitted a petition with 2,998 signatures requesting the chamber to pass equal suffrage, Sunday, and anti-cigarette laws. Two weeks later Republican Judson Brusie “made an impassioned appeal to the House not to pass the bill” on the grounds that it was “an infringement on the liberties of citizens” who would “rise against it.” He complained that at the morning session the House had “attacked our wives’ wearing apparel. Now it is our habits. Why do you not include cigars in the prohibition? [Y]ou will be trying to fix what the color of our neckties shall be next.” He finally got to the point of his protest—which was apparently the right to stave off nicotine withdrawal symptoms at will—“by reciting the hardships of not being able to indulge in a cigarette when one desired,” but his fellow Republican Hart North admonished him for conveying the “wrong impression...that this was an invasion of personal rights, when it was simply a question of manufacture and sale of cigarettes.” More concretely, North pointed...
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

out that the “‘bill does not prevent a man’s rolling a cigarette for himself. It does affect the manufacturer though.” The Assembly then passed S.B. No. 55 by a vote of 53 to 11; eight of 16 Democrats, both People’s Party members, and 43 of 62 Republicans voted for the bill, while eight Republicans and three Democrats voted against.

Hearst’s Examiner called it “one of the most sweeping measures” of the session and much more far-reaching than any cigarette bill of previous sessions had “dared to go.” One Republican assemblyman, a former San Francisco cigar dealer, opposed it on the grounds that a million dollars was invested in cigarettes in California and hundreds of people would be rendered unemployed. Another Republican ridiculed the bill because: “Every time a man put a cigarette in his mouth he would be disposing of a cigarette and would be violating the law and guilty of a misdemeanor. It would be a dead letter like the Act forbidding the sale of cigarettes to minors.” A third Republican rejected this claim: since the bill did not prohibit men from buying paper and tobacco and rolling cigarettes, they could smoke them without violating the law. Yet another Republican argued that as an “infringement on personal rights,” the bill “would be resisted by all the men in the State if it became law,” thus increasing “the general disrespect for the law.”

Tying the two bills together, a San Francisco Republican offered the laissez-faire argument during the debate on women’s hats that: “The Legislature had no more right to say that the woman could not show their pretty theatre bonnets in theatres than to say the men could not smoke cigarettes.”

Lumping S.B. No. 55 together with the bill to prohibit the wearing of high hats in theaters facilitated ridicule. Thus the Los Angeles Times in a big front-page, above-the-fold cartoon, titled, “The Deadly Cigarette and the Big Hat Must Go—So Say Our Solons,” depicted a man clothed as a cigarette walking hand-in-hand with a woman wearing a hat almost half as tall as she. The accompanying text charged: “While our municipal politics are full of corruption and crime is rampant in San Francisco and Sacramento our representatives are wasting their

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88. The Journal of the Assembly During the Thirty-First Session of the Legislature of the State of California, 1895, at 522 (1895) (Feb. 20). According to “The Silly Season at Sacramento: Gesford’s Anti-Cigarette Bill Passes the Assembly in Short Order,” Examiner (San Francisco), Feb. 21, 1895 (1:1), the vote was 53 to 12, with one additional assemblyman recorded as voting No (Brusie). “Great Heads,” LAT, Feb. 21, 1895 (3:1-2), put the vote on the prohibition of “the seductive cigarette” at 54 to 12.
89. The Silly Season at Sacramento: Assemblymen Declare Against the Wearing of Hats in Theatres,” Examiner (San Francisco), Feb. 21, 1895 (1:1). Such bills were proliferating in state legislatures; on the bill in Pennsylvania, see above ch. 6.
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

time in [sic] idiotic and unconstitutional legislation on these subjects."

In a long front-page article headlined, “The Silly Season at Sacramento,”
devoted to the assembly’s passage the same day of this bill and that prohibiting
the wearing of hats in theaters, The Examiner, echoing reports that had cropped
up in 1893 in Washington State and prefiguring others that would resurface in
other states that enacted anti-cigarette legislation, noted that there had been
“much comment about the vote of [Assemblyman J.] O’Day of San Francisco,
who has been in the tobacco business for years and yet voted for the bill. O’Day
says he voted as he did because cigarettes are full of poison, ruinous to health,
and not profitable to sell.” In a smaller appended piece, “Cigar Dealers
Satisfied: The[y] Say the Cigarette Bill Will Not Hurt Their Receipts,” the
newspaper focused on the singular role of the American Tobacco Company:

It was supposed that the tobacconists would be the hardest opponents to the Cigarette
bill. The cigar dealers in San Francisco say they made no fight against the bill. According
to them the cigarette trust only was interested in defeating the measure. If procuring
cigarettes is made difficult the dealers believe it will create a larger demand for other
smokable merchandise and there is more money in cigars and fancy pipe mixtures than in
the popular brands of cigarettes that sell for 5 and 10 cents a pack.

The Examiner went on to quote one dealer as suggesting that whereas the
“confirmed cigarette-smoker will buy cigarettes somehow...the bill will probably
stop young boys from getting into the habit.” This outcome was precisely what
anti-cigarette activists had intended.

And while awaiting the governor’s final action on the bill, the Los Angeles
Times, which, in a retrospective of the legislature’s accomplishments, claimed
that under the bill “a host could not pass the seductive cigarette at his own table
after coffee,” editorially dismissed the measure on the grounds that an
enforcement record was lacking in the one or two (unidentified) states that had
passed such laws, which were, in any event, of “doubtful validity.” Befogging the
question by referring to (another unidentified) “eminent New York physician”
who had attributed more ills to excessive tea drinking than excessive tobacco or

26, 1895 (1:5-6).
91. “The Silly Season at Sacramento: Gesford’s Anti-Cigarette Bill Passes the Assembly
in Short Order,” Examiner, Feb. 21, 1895 (1:1).
alcohol use, the editorialist denied to the legislature any more right to prohibit a form of tobacco than tea, coffee, or cocoa.\textsuperscript{95}

Despite the large bipartisan legislative majorities, and despite press predictions that he would approve the measure,\textsuperscript{96} at the end of March Governor James Budd (the last Democrat to hold that office for 40 years) left unsigned, and thus pocket vetoed, a large number of bills, including the anti-cigarette legislation.\textsuperscript{97} The narcotics department of the National WCTU prominently mentioned the veto at the organization’s annual meeting later that year.\textsuperscript{98}

The 1895 bill’s alleged idiocy and unconstitutionality to the contrary notwithstanding, by May 1897 at least San Francisco was “about to have an anti-cigarette movement,”\textsuperscript{99} as Thomas H. Haskins, a member of the board of supervisors, introduced an order making it “unlawful for any tobacconist, saloon-keeper, or any employe thereof, or any person whatever, to sell, barter, exchange, give away, dispose of or deliver to any person” any cigarettes in the city or county of San Francisco. The proposed ordinance was motivated by cigarettes’ being “injurious to health and...a causation of vice and crime.” Violators would be subject to a fine of up to $500 and/or imprisonment up to six months.\textsuperscript{100} As conventional as the measure’s purported basis was, the raison d’être that 36-year-old Haskins—himself a dealer in coffee and spirits—pleaded before the board was novel. To be sure, he assured his fellow members that he would not insist on adoption of the order, which he believed would pass (and had already been referred to the judiciary committee), if it were shown that it would injure retail merchants. But he argued that they were in fact its proponents:

\textsuperscript{95}\textit{LAT}, Feb. 24, 1895 (20) (untitled edit.).
\textsuperscript{96}E.g., “State Legislatures,” \textit{DP}, Feb. 21, 1895 (12:5); “National Politics,” \textit{GDN}, Feb. 21, 1895 (2:2). To be sure, the press also suggested that the bill might be “killed off in reconsideration....” “The Anti-Cigarette Bill,” \textit{Call} (San Francisco), Feb. 22, 1895 (2:2).
\textsuperscript{97}“Governor Budd’s Busy Pen,” \textit{Examiner} (San Francisco), Mar. 29, 1895 (3:5); “Last of the Bills,” \textit{LAT}, Mar. 29, 1895 (2) (misclassifying it as Assembly bill 5). As with the vast majority of bills that died, the press did not offer an explanation of the governor’s (in)action. The out-of-state press did not always wait for the governor’s action to report that the law would go into effect in six months. E.g., “Brevities,” \textit{Weekly Gazette and Stockman} (Reno, NV), Mar. 7, 1895 (1:1).
\textsuperscript{98}Report of the National Woman’s Christian Temperance Union: Twenty-Second Annual Meeting 240, 241 (1895).
\textsuperscript{99}\textit{Oakland Tribune}, May 18, 1897 (4:1) (untitled).
\textsuperscript{100}“A Score of Heads in the Basket,” \textit{MC}, May 18, 1897 (5:1-2 at 2).
\textsuperscript{101}1900 Census of Population (HeritageQuest).
“So far as I am able to ascertain the dealers favor the prohibition. They comprehend that the profit in handling cigarettes is very slight, owing to the monopoly in the business. Many dealers have told me they wanted a law adopted absolutely prohibiting the sale. It frequently happens that a man buying a glass of beer will say: ‘Give me a cigarette.’ The request is too small to be refused, yet when the package is broken all must be given away. Then again so many new brands are always coming out that the dealer in a business ever so small must keep from $30 to $50 tied up in cigarettes....

The law against the sale of cigarettes is in force in Alameda...and from all accounts it gives general satisfaction. ... No, I do not anticipate objection from the retail grocers, although I expect that agents of the factories or wholesale firms may present objections. My idea is to abolish a nuisance and an injury without interfering with the rights of trade or the convenience of individuals.”

This notion that San Francisco dealers themselves ardently wished for a ban on the sale of the non-profitable cigarettes and that only the Trust pleaded for their continued availability had, as noted earlier, been a mainstay of the state legislative debate in 1895. Yet the very next day after Haskins had ignited the next round of the struggle to suppress sales, the Call—in an odd about-face from its spectacularly successful catalytic role in bringing about the Alameda ban ordinance—contradicted Haskins’ claim that dealers favored prohibition by reporting that “[t]obacconists all over the City laugh at the proposed law to make it a crime to sell or give away cigarettes....” Interestingly, however, not a single one of them even alluded to, let alone refuted Haskins’ assertion that selling cigarettes was not profitable. That the newspaper may have been partial to a Pickwickian sense of the “well-known local dealers in cigars and tobacco” from surveying whom it divined “the general sentiment” emerged from its inclusion of the American Tobacco Company, which self-servingly opined that it was “ridiculous to try to pass such laws in a free country”—newspaper interviews manifestly being yet another forum in which it could promote the self-fulfilling prophecy that it was pursuing so vigorously in courts and legislatures. The Tobacco Trust’s minions parroted the monopolist’s view, three of the six dealers even using “ridiculous” and all of them conveying the point that such a “crank” measure was not passable, constitutional, or enforceable. One who dealt chiefly in cigars and “care[d] very little for the cigarette trade” colorfully added that “[t]his is the wrong City and the wrong generation for people to try experiments suitable for the dark ages or for puritanical countries.”

Several of Haskins’ fellow supervisors adopted a similar stance. For

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102 “Cigarette Ordinance,” Call (San Francisco), May 24, 1897 (6:2).
103 “Cigarette Law Scored,” Call (San Francisco), May 25, 1897 (7:5).
example, German-born Supervisor John Lackman,\textsuperscript{104} a member of the judiciary committee to which the proposal had been referred, thought that it “savor[ed] too much of a blue law,” although at this time it was understood that a majority of the board still favored the Alameda ordinance.\textsuperscript{105} Directly at odds with Haskins’ justification for his proposal was the protest against any change in local regulation by the Retail Grocers Protective Association, which insisted that the existing law prohibiting sales to minors was both “duly observed” and “amply sufficient for moral purposes.” They also opposed it because of the hardship it would cause trade.\textsuperscript{106} The result of these various rebuffs was the committee’s recommendation that the proposed ordinance be indefinitely postponed. After one of the board members had argued that Haskins had gone too far inasmuch as “the injurious effects of smoking cigarettes were now very well known and the habit was decreasing, and if the police would make arrests” under the no-sales-to-minors ordinance their use “would soon be checked,” the board voted to postpone the order.\textsuperscript{107} Thus despite the fact that in 1895 the San Francisco delegations to the House and Senate had supported a statewide cigarette sales ban by a vote of 21 to 1,\textsuperscript{108} such backing was lacking on the municipal level two years later even after neighboring Alameda had set the precedent.

\textbf{Colorado: 1895 and 1897}

The state...was at one and the same time an intensely individualistic frontier community and a colony of alien capitalists. ... The state had been virtually colonized by outside capital and was, in a quite literal sense, the creature of financial imperialism. It was to an exceptional degree the victim of absentee ownership and control.\textsuperscript{109}

\textsuperscript{104}At the time of the 1900 Census of Population Lackman was returned as sheriff of San Francisco (HeritageQuest).

\textsuperscript{105}“Champions Cigarettes,” \textit{Call} (San Francisco), May 26, 1897 (11:7).

\textsuperscript{106}“Cigarette Ordinance,” \textit{Call} (San Francisco), May 27, 1897 (4).

\textsuperscript{107}“Dr. Dodge Moves to Reconsider,” \textit{Call} (San Francisco), June 9, 1897 (9:1-3 at 2-3).

\textsuperscript{108}\textit{The Journal of the Senate During the Thirty-First Session of the Legislature of the State of California, 1895}, at 361 (1895) (Feb. 6); \textit{The Journal of the Assembly During the Thirty-First Session of the Legislature of the State of California, 1895}, at 522 (1895) (Feb. 20). The identities of the legislators from San Francisco are taken from http://capitolmuseum.ca.gov/english/legislature/history/year1895.html (visited May 4, 2006).

\textsuperscript{109}Leon Fuller, “Colorado’s Revolt Against Capitalism,” \textit{Mississippi Valley Historical Review} 21(3):343-60 at 353, 345 (Dec. 1934).
As was the case in Iowa and many other states, years before statehood the chambers of the Colorado territorial legislature sought to suppress secondhand tobacco smoke exposure. Thus as early as 1865 the House rules specified that “no smoking shall be allowed in the House.” And five years later the chamber defeated the motion of Republican C. M. Mullen to suspend the no-smoking rule for the rest of the session. And in its last session (1876) the Territorial Council (the predecessor of the Senate) followed suit, somewhat less formally, by adopting the resolution presented by Silas Hahn, a Democrat and lawyer, that “no smoking be permitted in the Council Chamber during the sessions of the Council.” Nevertheless, the press reported at the outset of the 1891 legislative session that in the House chamber the air “was thick with tobacco smoke and became very foul when the doors of the lobby were opened.

In 1887 the Colorado legislature passed a measure, which the WCTU was sponsoring throughout the country, to make compulsory instruction in the public schools about the effects of alcohol and narcotics (usually implemented to include tobacco) on the human system. In Colorado, too, the WCTU was responsible for having secured passage of a bill that opponents dubbed “cranky.”

Likewise, in 1891 it was “through the efforts” of the WCTU that a no-sales-to-under-16-year-olds bill was introduced. The organization began publicly preparing this measure at its annual state convention in September 1890, when Frances McEwen (aka Mrs. J. B.) Belford, Superintendent of Legislative and Petition Work, presented the draft of a bill it had been “decided to introduce” at the next session in January. Belford, who was married to a very prominent Republican politician, James Burns Belford, who had been a territorial legislator

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110 See below ch. 18.
111 *House Journal of the Legislative Assembly of the Territory of Colorado: Fourth Session* 17 (Jan. 5) (Rule 13) (1865).
113 *Council Journal of the Legislative Assembly of the Territory of Colorado: Eleventh Session* 30 (Jan. 11) (1876).
115 See below ch. 9.
116 1887 Colorado Session Laws 378.
and supreme court justice as well as the state’s first representative in Congress,\textsuperscript{121} was and became such an important figure in Colorado civic life (including the successful campaign for woman suffrage in 1893) that \textit{The New York Times} obituarized her as “Colorado’s leading woman citizen.”\textsuperscript{122} The WCTU proposal provided a penalty for selling or giving tobacco in cigarettes or any other form to any minor under 16 as well as for using the same in any public place.\textsuperscript{123}

The bill, S.B. No. 21, was introduced on Jan. 12, 1891, by Richard H. Whiteley, Jr.\textsuperscript{124} A Republican,\textsuperscript{125} whom the labor movement categorized as having voted for labor legislation during the 1891 session,\textsuperscript{126} Whiteley was a Harvard Law School graduate\textsuperscript{127} whose father had been an important political figure during Reconstruction in and as a congressman from Georgia and later became the leading lawyer in Boulder until his death in 1890.\textsuperscript{128} Whiteley also introduced the age of consent bill\textsuperscript{129} supported by the WCTU,\textsuperscript{130} which raised from 10 to 16 the age at which the criminal code declared carnal knowledge of a female to be rape.\textsuperscript{131}

In late January the Democratic \textit{Rocky Mountain News} described a visit to the legislature by a delegation headed by Belford as engaged in a “missionary tour

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\textsuperscript{121}http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000326 (visited May 13, 2010).

\textsuperscript{122}“Mrs. Frances McEwen Belford,” \textit{NYT}, Jan. 28, 1921 (11).

\textsuperscript{123}“The W.C.T.U.,” \textit{RMN}, Sept. 25, 1890 (3:3-4).


\textsuperscript{125}In 1894, during the run-up to the election after the Populists had gained a spectacular statewide victory, Whiteley was the first to speak at the Republican state league convention to denounce the Populist Party as “Anarchists” and urge Republicans and Democrats to “unite in a solid front” against them. “They Mock at Murder,” \textit{RMN}, June 26, 1894 (1:4-5, 8:1-5 at 4).

\textsuperscript{126}“Their True Colors,” \textit{RMN}, May 11, 1891 (5:3).

\textsuperscript{127}\textit{Portrait and Biographical Record of Denver and Vicinity, Colorado} 331-32 (1898).

\textsuperscript{128}William Rogers, Jr., \textit{A Scalawag in Georgia: Richard Whiteley and the Politics of Reconstruction} (2007).

\textsuperscript{129}\textit{Senate Journal of the General Assembly of the State of Colorado: Eighth Session} 216 (Feb. 3, 1891) (1892) (S.B. No. 152). The bill unanimously passed the Senate by a vote of 20 to 0. \textit{Id.} at 721 (Mar. 3, 1891). In the House the vote was 33 to 8. \textit{House Journal of the General Assembly of the State of Colorado: Eighth Session} 1725 (Apr. 6, 1891) (1892)

\textsuperscript{130}“Women in Politics,” \textit{RMN}, Mar. 4, 1891 (5:5-6).

\textsuperscript{131}“Called Him a Liar,” \textit{RMN}, Mar. 4, 1891 (5:1-5 at 5); 1891 Colorado Session Laws 123.
against cigarette smoking”; calling at every legislator’s desk, the members were “armed with a bundle of circulars” that declared: “Work for this! Cigarette law,” followed by the bill text, which provided for a maximum $50 fine for giving or selling tobacco to under-16-year-old minors in addition to a $2 to $7 fine for anyone under 16 who had, smoked, or in any way used tobacco in any form whatsoever in “any public street, place or resort....” Horace Hale, the president of the University of Colorado, praised Belford’s efforts to “save our boys” because he “verily believe[d] that no one thing is as effi

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<td>Everybody Pleased,</td>
<td>RMN, Jan. 25, 1891 (7:2).</td>
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<td>Hale</td>
<td>a Republican, had been a school principal, territorial superintendent of public instruction, regent, and professor of didactics before becoming president in 1887. Horace Morrison Hale,</td>
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<td>Trotting Them Out</td>
<td>RMN, Jan. 28, 1891 (5:3-4).</td>
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<td>The Senate’s Grind</td>
<td>RMN, Jan. 27, 1891 (5:1-3); Central W.C.T.U.,</td>
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Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

the state should share in the guardianship of the child through protection by legal enactments against men willing to further their own personal interests by the ruin of our coming citizenship.\textsuperscript{137}

Three weeks later the House also passed the bill by a vote of 37 to 2,\textsuperscript{138} which on becoming law prohibited selling, giving, or providing tobacco or any article made even in part of tobacco to a child under 16 without the written order of the father or guardian and provided for a fine ranging from five to 100 dollars or imprisonment of up to three months, but the legislature had dropped the ban on public use of tobacco by such children.\textsuperscript{139} On the day the law went into effect the \textit{Rocky Mountain News} dispatched a reporter to query Denver tobacconists, as few of whom knew of the law’s existence as did their small boy customers. Under the headline, “Restricting Idiocy,” the cigar-smoking reporter related that a dealer—who had just sold a package of 10 cigarettes to a 12-year-old “colored lad[!]” into whose “black hand” the reporter had dropped a nickle to grease that illegal wheel of commerce—confessed to knowing nothing about the law, but supposed that he would have to stop selling to boys, with whom he had been doing a “‘good trade,’” guessing that about half of them at the nearby school either chewed tobacco or smoked cigarettes. He purported to be obliged to the reporter for the legal news because, doing a quick calculation, “‘I don’t make enough money on the sale of tobacco to children to care much for the trade. Of course, it will make some difference in my receipts, but I guess I can stand it.’”

Significantly, the journalist discovered the existence of a market segment that in other states had prompted some in the anti-tobacco movement to advocate a high license that would have taxed it out of existence: “Near all the school houses are little stores which sell candy and various other things in this line, and in all of them the cheapest brands of cigarettes were found for sale.” The ironic subhead in the \textit{Rocky Mountain News} article—“School Boys’ Vicious Cigarettes Will Not Be Openly Sold to Senseless Youngsters”\textsuperscript{140}—was apparently prescient: three years later a WCTU delegation trekked to the police board “to urge the inauguration of a war against the deadly cigarette,” which the women knew had not yet begun in the form of the state law’s enforcement because they personally witnessed so many small boys smoking on the street daily.\textsuperscript{141}

\textsuperscript{137}“Women in Politics,” \textit{RMN}, Mar. 4, 1891 (5:5-6).


\textsuperscript{139}1891 Colorado Session Laws 131.

\textsuperscript{140}“Restricting Idiocy,” \textit{RMN}, Apr. 17, 1891 (2:7).

\textsuperscript{141}“Dulled Is the Ax,” \textit{RMN}, May 9, 1894 (8:3). Editorially the newspaper itself
In 1892 the Populists achieved highly significant successes in the national and state elections: presidential candidate James Weaver carried the state with the second-highest proportion of the vote (57 percent) of any state, while gubernatorial candidate Davis Waite was elected with 47 percent of the vote and his fellow party members won all statewide offices. More pertinently here, the People’s Party also elected 12 of 35 state senators and 27 of 65 House members, leaving Republicans with somewhat stronger representations in both chambers (15 and 33, respectively), short of a majority in the Senate and just barely with more than half in the House. Despite its enormous electoral victory, the People’s Party suffered from its composition of heterogeneous elements such as “socialists, nationalists, greenbackers, silverites, and single-taxers” as well as irreconcilable groups such as “Catholic and anti-Catholic,...drinker and prohibitionist, union militant and business leaders.” In particular, “[f]or the silverite businessmen, much of the Populist reform platform was anathema....”

And although the Populist revolt in Colorado—whose economy in large part rested on its production of two-fifths of U.S. and one-seventh of world silver output—was occasioned by silver’s diminishing returns and failing prices, which the Populists’ policy of free coinage of silver promised to reverse, “the party of dissent was not primarily a silver organization, but was committed to a thorough-going reform of the entire politico-economic order, a project obnoxious to conservatives of all ranks and party affiliations.” As a result of the Populists’ minority status, the failure of coalition, and conflicts between agrarian and nonagrarian (labor) Populists, the party “accomplished little of substance”

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145 In his inaugural address to the legislature on being sworn in as governor, Waite stated that free coinage of silver “was the prime issue in this State at the late election,” *House Journal of the General Assembly of the State of Colorado: Ninth Session...1893*, at 124 (Jan. 10) (1893).

during the 1893 legislative session (or the special session of 1894). Thus, the efforts by Waite, who regarded “existing law” as “merely the codified will of the ruling class,” to transform the legislative landscape “in the interests of the masses” were “almost completely nullified...by the concerted opposition of corporate and creditor interests” and Populists’ own divisions.

No legislative initiatives concerning tobacco, cigarettes, or smoking were filed in 1893, but at the 1895 legislative session the House did pass a cigarette ban bill. To be sure, the political-economic initiative in the new General Assembly had been shifted by the elections of 1894, which, against the background of two years of Waite’s Populism, had “consolidated all elements of opposition into a coherent organization under aegis of Republican leadership. The crusade of 1894 for the ‘redemption’ of the state was premised on the assumption that Populism...was demonstrably an onslaught upon private property and the capitalist order.” Republicans’ charge that capital would never invest in Colorado until Waite’s Populist socialism had been ousted fed on Waite’s campaign pledge that his would be a government for the people, not the...
capitalists. With the central question clearly articulated and in the face of capital’s mobilization of its “vastly superior resources,” Waite still polled 41.4 percent of the vote against 51.7 percent for the Republican gubernatorial candidate, but his performance nevertheless amounted to what The New York Times called a “crushing defeat” and a scholar later analyzed as the end of the Populists’ “role as an independent factor in local politics.” In fact, however, although in the 65-seat House Republicans secured a dominating majority, Populists actually increased their representation in the 35-seat Senate sufficiently to organize it (with the votes of the decimated rump of Democratic senators). Waite himself recognized that: “The capitalists are again in the saddle and they will use their power as they have always used it—to enslave the people.”

152 Leon Fuller, “Colorado’s Revolt Against Capitalism,” Mississippi Valley Historical Review 21(3):343-60 at 357 (quote) (Dec. 1934). Republicans were “supplied with money as they have never been before.” “The Defeat and Its Lesson,” RMN (Denver), Nov. 8, 1894 (4:2) (edit.). The chairman of the Populist state committee asserted that: “We had arrayed against us the strongest combination of capital and liquor that ever existed.” “Causes of Defeat,” EP (Denver), Nov. 8, 1894 (2:4).
153 “Populists Badly Routed,” NYT, Nov. 8, 1894 (1).
155 The numbers differ according to various sources. According to the semi-official Rules and Joint Rules of the Senate and House of Representatives...of the State of Colorado: 1895, at 52-54, 124-28 (1896), the Senate was composed of 16 Populists, 16 Republicans, 2 Democrats, and 1 Democrat-Populist, while 45 Republicans, 19 Populists, and 1 Democrat made up the House. A “correct list” in “The Next Assembly,” Evening Post (Denver), Dec. 5, 1894 (6:3), stated that there would be 16 Republicans and 19 Populists and Democrats in the Senate (although it listed only 34 senators, 14 of whom were Republicans, 19 Populists, and 1 Democrat, the missing 35th senator being a Republican) and 42 Republicans and 23 Populists in the House According to Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 30 (2007), 18 Populists, 16 Republicans, and 1 Democrat sat in the Senate, and 41 Republicans, 14 Populists, and 10 Democrats in the House. According to the Colorado state legislature’s website the House was composed of 39 Republicans, 22 Populists, and 4 Democrats, while its party affiliations for the Senate appear to be unreliable (listing only 12 Republicans, 11 Populists, 1 Democrat, with the rest designated as various Silverites and hybrids). http://www.leg.state.co.us/lcs/leghist.nsf (visited June 28, 2010). For a contemporaneous accounts of the election returns and of the organization of the chambers that include no such distinctions, see “Republican,” RMN, Nov. 9, 1894 (1:8); “Organized,” RMN, Jan. 3, 1895 (1:1).
156 “What Waite Thinks,” RMN, Nov. 8, 1894 (8:2).
Ironically for the Populists, who during the 1893 legislative session, had, unlike the Republicans and Democrats, overwhelmingly supported and made possible women’s suffrage, women voters, whose participation rate at the 1894 elections exceeded men’s, in the words of The New York Times, “redeemed Colorado from the stigma of Populist misrule.” Waite, who attributed his defeat in part to their votes, concluded that women had “not learned to think independently. They voted with the money power....”

At the outset of 1895, the Rocky Mountain News published a survey of jobbers’ reports on sales indicating increases in 1894 over the previous year. Among “tobacco men” business had been especially good in smoking tobacco: “The hard times have turned many former cigar smokers to the use of the pipe....” The 625,000 pounds of smoking tobacco consumed in Colorado cost $150,000 at wholesale compared to 1,100,000 pounds of chewing tobacco valued at $352,000. Most relevant here is that 60,000,000 cigarettes (costing $250,000) were smoked in 1894. Those cigarettes accounted for 1.7 percent of the total production of 3,621,000,000, whereas Colorado’s share of total U.S. population was only 0.68 percent. Consequently, annual per capita cigarette sales were distinctly above the national average in Colorado (129 versus 53), though both figures were very low, reflecting the incipiency of cigarette smoking in the United States.

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158 “Women Saved Colorado,” NYT, Nov. 19, 1894 (9). Among registered voters 90 percent of women and 80 percent of men voted.

159 “What Waite Thinks,” RMN, Nov. 8, 1894 (8:2).

160 “No Reason to Kick,” RMN, Jan. 1, 1895 (20:8). If these data were accurate, tobacco consumption (or rather sales) patterns in Colorado deviated from the national average in that in 1894 nationally chewing tobacco bulked more three times larger than smoking tobacco, whereas in Colorado the ratio was 1.76 to 1. Benno Milmore and Arthur Conover, “Appendix: Tobacco Consumption in the United States, 1880 to 1955,” in William Haenszel, Michael Shimkin, and Herman Miller, Tobacco Smoking Patterns in the United States 107-11 (Public Health Monograph No. 45, 1956).

161 Arthur F. Burns, Production Trends in the United States Since 1870, tab. 44 at 298 (1935).

Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

The 1895 session of the Colorado House was epochal in that for the first time in the United States a state legislative chamber was not composed exclusively of men: in fact, three newly enfranchised (Republican) women had been elected in 1894 and now occupied seats. Less important in the present context than their general political orientation was the fact that they would “not tolerate smoking”; the resulting “sadness in the hearts of some of the house members” prompted these “unfortunates” to “organiz[e] a third house on the front steps.” Thus, although both chambers’ rules had long prohibited smoking, women’s advent in the House had led to “[o]ne very marked difference in the conduct of the two houses [that] is noticeable—there is no smoking in the house, either in session or in committee of the whole. The men began the term by smoking in the usual manner, but the women raised constant objections until the practice was discontinued.” To be sure, even in the womanless Senate, the no-smoking rule did not apply or, at any rate, was not enforced in the committee of the whole, “[b]ut if the whole committee rises and resolves itself into a senate session they quit smoking.”

Newly elected, but well-known, Denver Republican William Brown Rundle, who had been “variously identified with development interests” in Colorado, including railroads and mines, and had a “first-class reputation as a businessman,” on January 19 introduced House Bill No. 176, “a bill for an act to


164 For example, in her campaign Holly had charged Governor Waite with having allegedly fomented “anarchy.” Elizabeth Cox, Women State and Territorial Legislators, 1895-1995: A State-by-State Analysis 15 (1996). Moreover, during the session, Klock and Cressingham “acted strictly within party lines and never voted in opposition to a large majority of their party.” “Women as Legislators,” RMN, Apr. 8, 1895 (8:3).

165 RMN, Jan. 15, 1895 (4:1) (untitled edit.).

166 “Women as Legislators,” RMN, Apr. 8, 1895 (8:3). Interestingly, House Journal of the General Assembly of the State of Colorado: Tenth Session (1895), reflected no such objections.

167 “Legislative Gossip,” EP, Feb. 6, 1895 (4:3-4) (quoting a woman in the Senate gallery). A few weeks earlier, when, detecting smoking in the gallery, Senator Turner called on the sergeant-at-arms to keep order, a man in the gallery replied that there was smoking in the pit too: “Senator Felker turned and stared up at him indignantly, quite unconscious that every eye was bent upon the cigar in his own hand.” “Legislative Gossip,” RMN, Jan. 16, 1895 (8:2).

Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

prohibit the manufacture and sale cigarettes,” which was referred to the Temperance, Medical Affairs and Public Health Committee. The bill provided for a $100 fine, on conviction, for manufacturing, selling, or giving away cigarettes; for a second offense the fine rose to $500 and included a six-month jail term.170

Rundle’s proposed measure fit in well thematically with a whole slew of similar and related bills that he introduced that session, including ones to prevent the adulteration of candy, dairy products, milk, intoxicating liquors, vinegar, and domestic wine, befouled wells, fraudulent repackaging, and diseased and unwholesome provisions.171 “The Story on Rundle, the Adulterated Food Man,”172 was, at least according to the intensely partisan Rocky Mountain News (which by this time had shifted from the Democratic to the Populist camp),173 really two stories. The first one had Rundle becoming “The Food Champion” after he had looked through the index to the statute books “for the subject that had the least number of laws regarding it....” But the better story that “may account for the avalanche of adulteration bills” arose just before the legislative session opened when a fruit vender offered him a “bucket heaping full” of apples for a quarter; after Rundle had paid, the vender poured out the apples into a pile that was smaller because the bucket had a false bottom; in vain, Rundle chased after the seller: “Rundle lost the quarter, but he won a chance to grow famous.”174

To the extent that labor-capital conflicts stood at the forefront in Colorado of the 1890s,175 Rundle made it clear which side of the barricades he stood on. Just a year after the Cripple Creek strike, the state’s theretofore “most viciously contended strike,” which was precipitated by mine owners to impose a nine-hour

171House Journal of the General Assembly of the State of Colorado: Tenth Session, House Bills No. 55, 56, 72, 73, 74, 75, 118, 120, 121 at 1362, 1364, 1368 (index) (1895).
172“Our Law Makers,” RMN, Jan. 21, 1895 (8:1).
174“Our Law Makers,” RMN, Jan. 21, 1895 (8:1-2 at 2).
175Unlike Populism in the Great Plains, Colorado populists in the 1890s were “labor oriented and labor dominated.” James Wright, The Politics of Populism: Dissent in Colorado 252 (1974). Similarly, whereas a whole series of studies of midwestern politics during these years focused on their ethnocultural and religious bases, in Colorado, which was characterized by “dichotomous economic politics,” “generally questions concerning labor unions, protection of property, and encouragement of irrigation seemed more important.” Id. at 278-79.
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

working day in lieu of an agreed-upon eight hours,176 he jumped into the House debate on the miners’ eight-hour bill at the end of February by “deliver[ing] himself of the sentiment,” as the News delighted in phrasing it, “almost refreshing in its novelty, that capital and labor were adjusting their relations in the most amicable and successful manner.” His unremitting opposition to state intervention was also grounded in his insistence that the bill would merely be “legislating trouble.” Rundle sought to justify his proffered amendment imposing the bill’s $500 maximum penalty of one year’s imprisonment for employers on any laborer who worked more than eight hours “by sneeringly referring to the miner who had ‘become a capitalist’ by getting a contract and working twelve or fourteen hours. He denounced the bill as class legislation and claimed that labor was a commodity, pure and simple, and had got to take what it could get. He said the eight-hour agitators were always agitating for themselves and would go home and let their wives work sixteen hours. If the bill could be amended to include wives, he would vote for it.” After several Populist representatives had (contradictorily) pointed out that Rundle himself knew that his own arguments were “fallacious” because the power of money controlled the labor market, not supply and demand, and employers and employees were subject to different laws inasmuch as the former, under Republican laws, could even buy labor in Europe, whereas laborers could find work only rarely, the committee of the whole killed Rundle’s amendment.177

On February 9, the day after the Temperance, Medical Affairs and Public Health Committee had recommended that the anti-cigarette bill not pass,178 Rundle successfully moved that the adverse report be amended and his bill be referred to the Committee of the Whole House.179 At that session two days later Rundle made it clear that he had been impelled to advocate the ban because “the law against the sale of cigarettes to minors had never been or could be enforced.” Proof that children and cigarettes needed to be kept from each other was furnished by the factoid that “[o]f the last 600 boys in the county jail only ten did not use cigarettes.” He added the commonplace that cigarettes were especially injurious to boys’ health and growth. Rundle was hardly alone in holding these views. Another Republican chimed in that “his greatest trouble in bringing up his

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177“A.P.A. and Eight Hours,” RMN, Feb. 26, 1895 (8:5-8 at 5, 7).
five boys had been their use of cigarettes,” a sentiment that a Populist echoed.  

Opposition was expressed by Republican Charles Campbell, a clothing salesman and president of the Retail Clerks’ union, who “thought it unjust to crush the cigarette manufacture in Colorado.” (In fact, there was none in Colorado.)

The committee of the whole recommended passage with two amendments: (1) application of the prohibition to cigarette paper; and (2) inclusion of a minimum penalty of $10.

The Rocky Mountain News sarcastically characterized the House action, which produced a bill everyone seemed to think was good, as the chamber’s having “acquired a sudden and astonishing streak of morality....” It nevertheless editorially supported passage primarily for the same child-related reasons voiced by Rundle and his colleagues: “Every teacher who has to deal with the befogged wits of the drugged child, every physician who has been called in to cure the cigarette fiend, every parent whose sons may be indulging in this insidious and destructive form of vice...has a direct interest in this bill.” However, the newspaper then shifted the focus to a charge that, as trite and uninformed as it was, implicated adult consumers as well: “The use of cigarettes and the use of tobacco are two very different things. The objection to the cigarette is not so much to the tobacco in it, for it contains very little, but to the use of opium and other poisonous drugs in its manufacture.” If accurate, the allegation would have conveniently furnished a basis for depriving adult men of consumer freedom.


182 “House in a Moral Mood,” RMN, Feb. 12, 1895 (8:1-3 at 3).


184 House Journal of the General Assembly of the State of Colorado: Tenth Session (Feb. 11) (1895). The bill also included a minimum $200 penalty for additional offenses. Id. at 451 (Feb. 13).

185 “House in a Moral Mood,” RMN, Feb. 12, 1895 (8:1).

186 RMN, Feb. 14, 1895 (4:4) (untitled edit.). Oddly, the Post insisted that: “The opponents of the anti-cigarette bill claim that all the evils so bitterly complained of result from smoking poor cigarettes...contaminated with opium or other deleterious substances. They insist that the smoking of pure cigarettes is as harmless as any other form of mild imbecility.” EP, Feb. 19, 1895 (4:2) (untitled edit.).

187 On the contemporaneous scientific evidence that manufactured cigarettes contained...
On the day the House gave Rundle’s bill its third and final reading, the non-party-affiliated Denver Evening Post, in its “Legislative Gossip” column, sought to manufacture additional controversy about and thwart passage of a bill that it opposed. In order to strengthen what it manifestly hoped would be the self-fulfilling prophecy that H.B. No. 176 “may not get any further,” the Post threw in the vague and unsubstantiated claim that: “An impression is gaining in some quarters of the legislature that public sentiment would hardly support officials in enforcing it should this bill become a law.” Posing a question that with equal or greater justification could have been turned against its own article, the newspaper asserted that Rundle’s bill had progressed so “much faster than many more important bills” that the question had often been asked, “‘was this bill introduced in good faith or in a spirit of buncombe or as a bid for notoriety?’”\(^\text{188}\) The principal suspicion that the Post cultivated was that somehow H.B. No. 176 might be some kind of shakedown:

Almost every other bill introduced this session has been a copy of a similar measure that was introduced at a previous legislative session. The anti-cigarette bill of the present session is, however, original. At least so far as Colorado is concerned, it is new. Curious enough, no organized movement is back of it. In eastern states anti-cigarette societies have first tabooed the cigarette dealers before they endeavored to close them by legislation. Here, alone and without much pushing, the proposition for an anti-cigarette law is originated and fairly put in a channel to become a law so quickly that all dealers and manufacturers of these goods are amazed. ...

It is admitted that this bill, if it passes, will be the cause of a loss of much revenue to small storekeepers; and it directly or indirectly affects so many people that it affords a better subject for designing lobbyists than the pawnbrokers’ and other bills that are always recognized as license for “a collection.”\(^\text{189}\)

Whatever its role in initiating the measure,\(^\text{190}\) the Colorado WCTU, whose 86


\(^{190}\)The 1895 and 1897 Colorado WCTU annual convention reports contained nothing on the anti-cigarette bills, though the latter report stated that the “Denver unions did much anti-cigarette work.” \textit{Report of the Eighteenth Annual Convention of the Colorado Woman’s Christian Temperance Union: 1897}, at 15, in Archives, University of Colorado at Boulder, Colorado Woman’s Christian Temperance Union Collection, Series II Box 3 Bundle 2; email from Archives, University of Colorado at Boulder Libraries to Marc Linder (May 19, 2010).
local unions by 1894 encompassed about a thousand women, was hardly passive during the process: as early as February 12—that is, the day after the bill’s second reading—a letter from the matron of the county jail was read at a Central WCTU meeting asking the organization to support H.B. No. 176. Following a discussion of the “growth of this evil,” one of the members was made chairman of a committee to confer with Rundle and “keep track of the bill” so that when it came up for debate, a notice could be placed in the press “in order that there may be a full attendance of those desiring its passage.” Later the WCTU—which a Republican senator in 1895 accused, on the Senate floor, of having “become an adjunct of the Populist party”—also petitioned the Senate regarding the bill, and the group’s state executive committee quarterly meeting discussed the bill at “some length.”

In the event, the House passed H.B. No. 176 by the overwhelming majority of 44 to 9. This lopsidedness applied to both parties, Republicans voting 28 to 7 and Populists 15 to 2 for the general ban. (The next day Rundle happened to 197
be part of a joint subcommittee that inspected the state insane asylum at Pueblo, where he asked the superintendent what his experience had been with regard to patients and cigarette smoking, and received the answer that the physician had found several cases attributable to the ‘‘cigarette habit.’’”

Despite this surge of support, the bill languished in the Senate, where in the session’s final days it was killed by inaction.

Although the Populist Party “did not figure heavily in any election” in Colorado after Waite’s defeat in 1894, as a movement it remained “a part of the silver consensus and the Fusionist coalition...influenc[ing] political development.”

After the Radical Populists had lost control of the party to Fusionists during the run-up to the 1896 election, they bolted and their rump convention nominated Waite for governor yet again, but he received only few votes.

Populists gained 33 of 65 House and 14 of 35 Senate seats, but these numbers were deceptive inasmuch as “[n]o less than fourteen different varieties of fusion” generated the composition of the House, while 11 were needed to produce just the newly elected (i.e., non-holdover) senators. As a result, the combinations that might be formed to secure a majority and organize the chambers were “without end.”

In the event, 25 House Populists entered into an agreement with the much smaller contingent of nine National Silverites (and a single McKinley Republican) that nevertheless conceded the speakership to a Silverite. In the Senate, a group of 10 Populists, five McKinleyites, three National Silverites, and one Silver Republican agreed on a Populist as president.
pro tempore. Within the framework of these complex deals, which conceded to House Silverites and Senate McKinleyites naming the committees on railroads and corporations, the Rocky Mountain News did not have to reach to conclude that: “The Populist party in its platform has pledged the people much remedial legislation in which particular classes of corporations are interested. The consummation of the terms of fusion ties the hands of Populist legislators.”

Even before the Eleventh General Assembly convened, Representative Clark W. Roe, a 34-year-old Iowa-born Populist “mining man” announced that he would “introduce a bill prohibiting the sale of cigarettes to any other person in the state of Colorado” in addition to a measure levying a graduated tax on inheritances when they were paid. On January 13 he did introduce H.B. No. 46, which he aspired to push to “final passage if possible.” The bill provided that beginning July 1, “no person shall sell or give away, by himself, his clerk, steward or agent, directly or indirectly, any kind, form or brand of cigarettes or cigarette papers; and the keeping of cigarettes or cigarette papers with intent on the part of the owner thereof, or any person acting under his authority or by his permission, to sell or give away the same within this state contrary to the provisions of this act, is hereby prohibited.” The penalty for a first conviction was a fine not to exceed $200, while addition convictions were subject to $300 to $500 fines and maximum imprisonment of six months. A week after the Mercantile and Manufacturing Interests Committee had recommended passage of the bill as amended by a proposed strike-out of the imprisonment penalty, the committee of the whole took up H.B. No. 46. First fending off a motion to strike...
out the enacting clause (that is, to kill the bill on second reading) by a vote of 11 to 24, the committee of the whole then adopted the committee changes, and the motion to report the bill favorably to the full House carried by a vote of 29 to 16. 211

Before the final vote on third reading on February 26, the full House made no objection to Representative Celestino Garcia’s request for unanimous consent to amend Roe’s bill by striking “cigarette papers.” 212 Thus amended, H.B. No. 46 passed by the hefty majority of 43 to 11. 213 The pervasive electoral fusions make it difficult to sort out party affiliations, but, according to the Colorado legislature’s website, Yeas were cast by 16 Democrats, 14 Populists, 4 Republicans, 2 Silverites, 2 National Silverites, 2 Democrats/Republicans, and 1 Socialist, while Nays were cast by 3 Republicans, 3 National Silverites, 2 Populists, 2 Democrats, and 1 Democrat/Republican. 214 So much for the accuracy

211 House Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 388 (Feb. 5) (1897); “Ladies Will Take Notice,” RMN, Feb. 6, 1897 (8:1-4 at 3).

212 House Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 654-55 (Feb. 26) (1897). Garcia, a rancher/cattle stock raiser who served 24 years in the House between 1891 and 1918, was “ranked as a member of both the Republican and Democratic parties” in a county in which Democrats, Populists, and Silver Republicans had fused. Sketches and Portraiture of the State Officers and Members of the Ninth General Assembly of Colorado (n.p.) (C. Swords and W. Edwards ed. 1893); http://www.leg.state.co.us/leghist.nsf (visited July 1, 2010); “Next General Assembly,” RMN, Nov. 13, 1896 (4:5) (quote). Possibly Garcia’s request was related to the aforementioned roll-your-own custom among Mexican cigarette smokers. Garcia, who nevertheless voted against the bill, also “attempted to kill the bill under the guise of friendship” by “slyly” requesting that the title be changed to conform to the bill text and then requesting that it be sent back to committee because it had been materially changed, but the speaker outmaneuvered him parliamentarily. “They Fail to Agree,” EP, Feb. 26, 1897 (8:1).


214 http://www.leg.state.co.us/leghist.nsf (visited July 1, 2010). According to a contemporaneous source, the 11 House members casting Nays were composed of one Democrat, one Republican, and nine representatives with two, three, or four (including Democratic, Republican, Populist, Silverite, and Silver Republican) affiliations. “The Next Legislature,” RMN, Nov. 6, 1896 (1:5-7). According to the state legislative website, the Socialist, Eugene Engley, was the only one ever elected to the Colorado legislature. Engley introduced bills to abolish capital punishment (which was enacted) and to prohibit
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

of the report, datelined a week earlier, in the Chicago Tribune that: “A bill absolutely prohibiting the sale of cigarets was laughed into an early grave, notwithstanding it was backed by the most influential women of the State and had the unanimous support of the women representatives.”

More than three weeks after H.B. No. 46 had been referred to the Senate Education Committee, its members presented an adverse report unanimously recommending that the measure be indefinitely postponed “because the bill is in conflict with the laws of the United States relating to interstate commerce, and that [sic] the bill is against the interests of this State.” On March 23 the Senate devoted much of the morning session to “weary...wrangling and filibustering over the cigarette bill.” After the Education Committee chairman had moved to adopt the report, Populist Senator Frank E. Moody—who in 1895 had voted in the minority against making Rundle’s bill a special order, i.e., to kill it—moved to amend the report to refer the bill to the committee of the whole. Moody’s motion encountered resistance from Casimiro Barela (“a Democrat pure and simple until the last campaign, when he took on a particle of Populist doctrine”)

the wearing of tall hats in theaters (which passed the House but not the Senate). “Ladies Will Take Notice,” RMN, Feb. 6, 1897 (8:1-4).

215“Push War on Cigarets,” CT, Feb. 20, 1897 (9:3). The article provided an overview of existing and proposed legislation in 27 states based on “special dispatches.” Of the three female House members (all from Denver), only one (Martha Conine, nonpartisan) voted (Yea). Olive Butler (Silver Republican) was among those absent, excused, and not voting, while Populist Evangeline Heartz was not recorded at all. The latter two were recorded as voting Yea and absent, respectively, on the very next bill that day. House Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 655-56 (Feb. 26) (1897).

216Senate Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 502, 844 (Feb. 27 and Mar. 22) (1897).


218“Hanging to Be Stopped,” RMN, Mar. 24, 1897 (5:1).

219Moody, who as a 21-year-old in 1880 was returned by the census as working in a silver mine, was occupied in mining in 1895. Rules and Joint Rules of the Senate and House of Representatives...of the State of Colorado: 1895, at 53 (1896).


221Senate Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 848 (Mar. 23) (1897).

1916, in addition to the two preceding terms in the Territorial Council, was the “‘boss’” of the San Luis Valley in southern Colorado, where his house was “patterned after the large Mexican hacienda and maintained by a retinue of servants.” In addition to owning “important properties in Mexico” as well as a coffee plantation in Brazil, Barela invested in banks railroads, ranches, and urban real estate in the United States. Carey McWilliams, North from Mexico: The Spanish-Speaking People of the United States 96 (1975 [1948]) (quote); Carl Abbott, Stephen Leonard, and David McComb, Colorado: A History of the Centennial State 363 (3d ed. 1994 [1982]). See also Sketches and Portraitures of the State Officers and Members of the Ninth General Assembly of Colorado (n.p.) (C. Swords and W. Edwards ed. 1893); http://www.leg.state.co.us/leghist.nsf (visited July 1, 2010); José Fernández, The Biography of Casimiro Barela (A. Gabriel Meléndez tr. 2003 [1911]).


Moody’s motion to refer the bill to the committee of the whole, Democrat William Adams suddenly “decided that he could not vote intelligently unless he knew what was in the bill. After hearing “this most vicious measure” read aloud, Barela, who had also opposed Moody’s motion, “could not see how any senator could vote for the bill.” Unable to answer Wheeler’s provocatively posed question, “‘What clause of the interstate commerce act mentions cigarettes?’” Barela instead merely “gracefully waived” it and unsuccessfully moved a recess (losing 10 to 19). Reinforcing Barela’s view, Silver-Populist James Crosby explained that he had signed the committee report “believing the majority of the senators had more sense than to vote for such a crazy bill.” In the face of opponents’ further dilatory tactics, Wheeler declared that supporters “‘will stay here until next September...unless we get a vote on this bill.’” Once noon arrived, however, the filibustering minority “having accomplished their object of preventing any business being done,” finally agreed to a vote on Morton’s motion to refer H.B. No. 46 to the committee of the whole, which was overwhelmingly adopted by a vote of 25 to 5. Barela, who, together with Adams, had “manipulated the delay tactics,” yielded “gracefully...to the inevitable” and voted with the majority.226

Well Barela could afford such graciousness: the Senate during the remaining two weeks of the session never took Roe’s “crazy bill” up again.227 And although

226Senate Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 848-49 (Mar. 23) (1897); “Victory of the Ten,” EP, Mar. 23, 1897 (2:1) (quotes). The Post, whose vote counts differed slightly from those of the Senate Journal, stated that Adams also voted Yea, but the Journal had him voting Nay together with three committee members. The Journal also summed the Yeas as 24 while listing 25 senators.

227At the next session in 1899, in which a campaign by the Western Federation of Miners and the Colorado State Federation of Labor had helped create a “workable prolabor majority,” a House bill was introduced to prohibit the sale or gift of cigarettes, but no action was taken on it. James Wright, The Politics of Populism: Dissent in Colorado 233
the House in 1911, by another overwhelming vote, once more passed a bill prohibiting the sale or manufacture of cigarettes—\textsuperscript{228}—which \textit{The New York Times} characterized as having been both regarded as a “joke” when introduced and passed under the influence of the Federated Women’s Clubs—\textsuperscript{229}—the Senate, yet again, killed it,\textsuperscript{230} and Colorado never did enact such a law.

\textbf{Invalidation of Denver’s $1,000 Prohibitory License Ordinance: 1897-98}

\textsuperscript{[I]t would seem that the evil will have to be handled as we do the liquor evil, by licensing it, thereby controlling it and restraining its sale. Such a policy is now finding vogue in some states and with success... It remains, however, to be seen how soon it will sink into innocuous desuetude. A trouble is that there is not enough moral sentiment abroad against the cigarette—not only of the right kind, what is met being usually of the maudlin kind, which does not impress youth especially when they see cigarette smoking indulged in by their elders with no seeming bad effect and as long as they feel strongly that to smoke is to embrace the first habiliment of manhood and is very pleasant withal. What is wanted and what would be best is...and abandonment of that kind of indulgence by grown men...\textsuperscript{231}

Almost as soon as Roe’s cigarette sales prohibition bill had definitively died with the adjournment of the Eleventh General Assembly in April 1897, the
Colorado WCTU launched a new initiative in a different forum to achieve the same objective. Later that month the press reported that cigarette trafficking was “among the subjects scheduled for regulation as soon as possible” by the Denver city council. A WCTU member had suggested adoption of an ordinance modeled on one that had recently gone into effect in Chicago providing that: (1) every cigarette dealer had to pay an annual $100 tax; (2) no cigarette license could be issued for use within 200 feet of a school; (3) all cigarettes sold had to be inspected by the health department to verify their “purity”; (4) no cigarette containing opium, morphine, or any other deleterious substance could be sold; and (5) violations subjected dealers to a fine of $50 to $200 for each offense and $25 for each day. The point of the proposal was to “prohibit the sale of cigarettes by small stores and shops in residence neighborhoods and especially to get at the establishments which are closely located to school houses, which are mainly patronized by scholars,” whose consumption of cigarettes would be reduced by virtue of their being forced to go downtown to buy them.\footnote{In Chicago small dealers contemporaneously stated that a package of 10 or 12 cigarettes sold on average for 5 cents allowed a margin of 1.2 cents of profit; to prevent a loss resulting from the $100 tax, such dealers would have to sell more than 8,300 package a year. “Cigaret Measure a Law,” \textit{CT}, Mar. 3, 1897 (7). Assuming dealers did not sell Sundays, they would have had to sell about 27 packages a day to break even. The health department stated that a dealer would have to sell 40 packages a day throughout the year and that no more than 25 percent of dealers would be “willing to pay the license fee of $100.” “Prepares to Enforce Cigaret Law,” \textit{CT}, Mar. 6, 1897 (8). The prohibitory character of the tax is difficult to gauge because the ordinance was allegedly weakly enforced. The number of sellers was variously estimated at 2,000 to 23,000, but no more than a few hundred paid the tax, while many others continued to sell cigarettes without having paid the tax. “Will Test Cigaret Law,” \textit{CT}, Mar. 14, 1897 (5); “Cigaret Law in Force,” \textit{CT}, Mar. 16, 1897 (12); \textit{MO}, Mar. 27, 1897 (4:4) (untitled); “To Combat Cigaret Tax,” \textit{CT}, Oct. 21, 1897 (12). See below this ch.}

The proposed ordinance, which was not even intended to—and at $100 could not—be generally prohibitory,\footnote{On the Chicago ordinance, which the Illinois and U.S. Supreme Courts upheld, see below this ch. The WCTU advocated “circulating large petitions around the city concerning the enforcement of the laws [sic] governing cigarettes....” “Will Help Newsboys,” \textit{RMN}, May 14, 1897 (5:3). \textit{Sale of Cigarettes}, \textit{EP}, Apr. 22, 1897 (8:1).} nevertheless immediately inspired a purportedly mass protest by dealers. In an open letter to the city council board of supervisors, and the WCTU, “Hundreds of Us” opposed the “‘class legislation,’” which made “war on an almost helpless class—‘small dealer’—to the advantage of a class already living in affluence.” The WCTU they accused of fighting a straw man inasmuch as “the antipathy to the cigarette is an hallucination. Many of the best...
most intelligent and respectable citizens prefer a cigarette to a cigar, and don’t care to go down town to get it, preferring also to patronize some poor cripple—‘small dealer,’” who “in most cases” was doing no more than “striving to keep from falling into the hands of fickle charity.” The dealers also predicted that everyone who smoked cigarettes (only 1 percent of which were manufactured rather than self-rolled) would smoke as many after passage of the ordinance as before, while the city would receive probably one or two $100 license fees.234

In mid-July Supervisor Orlando B. Scobey introduced a bill for an ordinance that imposed a $100 annual license, prohibited the sale of cigarettes within 400 feet of a public school house, and required a $500 bond designed as surety for the dealer’s good character and reputation, which latter the health commissioner was obligated to examine before recommending that the fire and police board granted the license. The proposed ordinance also required dealers to comply with all state laws (relating to cigarettes) and prohibited the sale of cigarettes containing opium, morphine, jimpson weed, belladonna, glycerine, or sugar. Finally, it was also the commissioner’s duty to inspect all dealers’ goods regularly and report to the police board any violations, which were subject to a $100 fine.235

Though dealers continued, after the board of supervisors had passed the ordinance,236 to file protests against passage of such an ordinance,237 alleging, inter alia, that the ordinance would only create a monopoly,238 by September the board of aldermen239 committee considering the draft ordinance recommended that the annual license fee be raised to $1,000.240 Shortly afterwards City Attorney George Norris began quoting recent court decisions to the councilmen to show that the proposed ordinance would unconstitutionally interfere with interstate commerce.241 When a federal court in Tennessee held that that state’s anti-cigarette sales law violated the federal commerce clause, Norris deemed it

235 “Cigarette License,” RMN, July 16, 1897 (10:1). On the virtually universal use of glycerine in cigarettes, which should have prompted a virtually universal sales ban, see below this ch.
236 “Cigarette Bill,” EP, July 30, 1897 (2:3); “Appropriation,” EP, July 31, 1897 (3:3).
238 “Cost of Lightning,” RMN, Aug. 6, 1897 (8:1).
239 The Denver city council consisted of a board of supervisors (composed of at least five members elected at large) and a board of aldermen (composed of 12 to 17 members elected by wards). 1893 Colorado Sess. Laws ch. 78, at 131, Art. II § 1, at 138-39.
241 “Cigarette Ordinance Illegal,” EP, Sept. 18, 1897 (6:3).
important enough to spend $6.50 to procure a copy of the full text to use in persuading the council that the license tax was unconstitutional. While awaiting its arrival, the press reported that the council would hold the proposed ordinance and, if the Tennessee ruling corresponded to Norris’s speculation, abandon it. In fact, not only was Norris wrong in informing the chairman of the aldermanic committee in charge of the ordinance that “every decision has been in line with that of the Tennessee court,” even non-lawyers who read the Denver Evening Post would have known that a federal judge in the beginning of August had upheld the validity of a Montana cigarette tax license against the American Tobacco Company’s interstate commerce challenge. Moreover, the Tennessee law would soon be upheld by the Tennessee and U.S. Supreme Courts.

In the event, the aldermen not only passed the ordinance, but amended the supervisors’ version to increase the license tax 10-fold from $100 to a quasi-prohibitory $1,000. Without debate the board of supervisors passed the amended ordinance, and as soon as Acting Mayor and Board of Supervisors President Scobey approved the ordinance on November 6, it became clear that a test case would be filed in court. Because Norris was “very much exercised” over the council’s disregarding his advice that the license fee was invalid, he was “pledged in advance to make a very strong defense of the ordinance....”

244“Montana Cigarette Law,” EP, Aug. 7, 1897 (7:3). The article incorrectly characterized the law as a Helena ordinance. On the law and the decision, see below ch. 11. In addition, a state district court in Iowa had already upheld that state’s general cigarette sales ban. See below ch. 11.
245See below ch. 12.
247“Passed the Anti-Cigarette Bill,” RMN, Oct. 31, 1897 (24:8).
248Ordinance No. 79: Series of 1897, in Denver City Ordinances: Clipped from Denver Newspapers and Indexed: April, 1891-December, 1927: Scrap Books of F. A. Williams, City Clerk, Denver, Colo (published in DR, Nov. 9, 1897) (copy furnished by Western History Dept., Denver Public Library). The ordinance as adopted was, apart from the increase in the license fee, as set forth by the aforementioned press accounts at the time of its introduction except that fines ranged between $5 and $100 (§ 7). See also Compiled Ordinances and Charter: The City of Denver § 612 at 346 (1898).
249“To Contest Cigarette Ordinance,” RMN, Nov. 7, 1897 (5:1). See also “Denver Cigarette Ordinance,” NYT, Nov. 9, 1897 (1). Norris immediately protested that the article was “unfair” because he had “found that like laws and ordinances had without exception been held void.” He also obliquely cast ethical aspersions on the council by wondering
For almost two months police and prosecutors “ignored” the ordinance and its violation by “several hundred dealers” who continued selling cigarettes without paying the license.\(^{250}\) Despite the WCTU’s support for enforcement,\(^{251}\) the city authorities’ dilatoriness resulted from their extra-legal solicitude for the non-compliant dealers’ “entreat[ies]” to give them the chance to sell off their pre-ordinance stocks profitably: “Far the greater part of the dealers did not care to take out the license required by the ordinance, as it was more than the traffic would bear, and they did not care to lose the stock on hand. The [police] board delayed action a time to allow these dealers to close out. But something has whispered in the ear of the members of the board that no one is going out of business, that as fast as these dealers run down their present stock they buy more.” Under such circumstances, the *Rocky Mountain News* concluded, “further delay would be merely robbing the city of a license fee due it.”\(^{252}\)

The procrastination, it soon turned out, was also caused by the fact that, as was also true with regard to the $100 license fee being simultaneously challenged in Chicago\(^ {253}\) (and everywhere else that general anti-cigarette sales and quasi-prohibitory license laws were being enforced), the real litigant in Denver was the Tobacco Trust. Thus, although the members of the city council favored enforcement, it gave them pause to learn that prosecution meant “a long period of litigation with the tobacco trust that will extend beyond the life of the present administration and the employment of a special attorney to carry [sic] it through.” A private lawyer would take on the case only if he were “guaranteed a sufficient appropriation to fight the matter to a finish without asking future councils for more money.” As a result, if the council decided that such funds were lacking, the ordinance would remain a “dead letter.”\(^{254}\)

Not until the final days of 1897 did the city file complaints in police court\(^ {255}\) against six of Denver’s largest dealers\(^ {256}\) (while not “molest[ing]” wholesalers for

\(^{250}\)“The Cigarette Ordinance Ignored,” *RMN*, Nov. 10, 1897 (10:3). See also “The Cigarette License,” *EP*, Nov. 11, 1897 (2:4).

\(^{251}\)“White Ribboners,” *EP*, Nov. 12, 1897 (12:3-5 at 5).

\(^{252}\)“Cigarette and Vestibule Laws,” *RMN*, Dec. 14, 1897 (8:2).

\(^{253}\)“Will Test the Cigaret Law,” *CT*, Feb. 2, 1898 (5).


\(^{255}\)Police courts in cities with a population of more than 25,000 had jurisdiction over all cases arising under city ordinances. 1885 Colorado Sess. Laws at 290, § 3, at 291.

\(^{256}\)“Cigarette Prosecution,” *RMN*, Dec. 28, 1897 (10:8). Filing was also delayed
the time being). 257 That the sellers, all of whom were represented by one lawyer, who declared that, instead of disputing the facts, they would attack the ordinance’s constitutionality, 258 were mere straw men was well-known, as it was virtually everywhere that the American Tobacco Company choreographed such litigation: “It is believed that local dealers figure in the case only because they belong in Denver, and that the real defense will be made by the tobacco trust,” which would test the ordinance’s legality “at every stage and in every court between the lowest and the highest.” 259 At the first hearing on January 20, the defense challenged the reasonableness of the $1,000 annual license fee on the grounds that “no dealer, wholesale or retail, made $500 in a year on the sale of cigarettes...” 260 The six defendants’ evidence showed that “their profits were away [sic] below $500 in all cases except one.” 261 John D. Ross, M. Hyman, and Albert Abel, claiming to be the three “heaviest dealers in paper cigars in the city,” stated that their profits “about 70 cents a day or at most $500 a year,” and $365 and $255 in 1897, respectively. An exchange between the assistant city attorney and Police Magistrate Ellis suggested that Denver’s legal representation might leave something to be desired. After hearing the dealers’ argument of unreasonableness, Norris Bachtell announced that he would subpoena the city council members to show that the fee was reasonable, prompting Ellis to ask him how he knew that the council had such information. Bachtel’s reply that having set it at $1,000, the council “‘must know. The city council never does anything except what is right,’” apparently led the magistrate to believe that Bachtel was pulling his leg: Ellis then gave him a minute-long fixed look before saying that he suspected that there was “‘some sarcasm in that answer,’” but the attorney because Police Magistrate Ellis did “not like to accept made-up evidence—that is, where the inspector goes in and buys the cigarettes in order to make a case. The only evidence that would be accepted by the magistrate was in cases where a man really wanting the article does the purchasing.” Consequently, in several stores inspectors were “compelled to hang about for nearly an hour before a bona fide purchaser...appeared,” although every store did in fact “have the contraband articles in cases, offered for sale, and in every one some one [sic] was seen to buy cigarettes.” 262 To judge by another case, involving liquor, Ellis apparently regarded the aforementioned inspector scenario as a species of impermissible entrapment. “The Drug Store Whisky Cases,” RMN, Aug. 5, 1897 (4:1) (edit.).

258“Cigarette Men Plead in Court,” EP, Dec. 29, 1897 (1:2).
260“The Cigarette Ordinance to Be Tested,” RMN, Dec. 29, 1897 (5:3).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

denied the accusation. At the continuation of the hearing a week later, Bachtell limited his argument to the single strong proposition that the city was authorized to fix the fee at $1,000 or “any sum,” whereas the defense lawyers insisted both that that amount was prohibitory and—using the Tobacco Trust’s litigational mainstay—that it violated the interstate commerce clause.

As the case progressed, the WCTU, which in principle did not even support licensing tobacco (any more than it did liquor), became increasingly involved in the case. In addition to requesting Police Magistrate Ellis to enforce the cigarette ordinance, the WCTU injected itself into trial tactics and strategy in connection with the aldermen’s discussion of the advisability of offering evidence establishing that cigarettes were injurious after the prosecution at the outset of the court hearings “for the time being abandoned” such efforts “because it seemed an [sic] herculean and costly task.” Striding into this litigational breach (the existence of which underscored how the Tobacco Trust had succeeded in economically intimidating the government of the country’s largest city between San Francisco and Kansas City into throttling its prosecution of the national mastermind of the for-profit conspiracy to violate and invalidate Denver’s regulation of cigarette sales), Adrianna Hungerford, a WCTU official who in 1904 would become state president, wrote to one of the aldermen that the

261 “License Fee Unreasonable,” RMN, Jan. 21, 1898 (10:7). After practicing in Denver from 1886 to 1903 (including one term as public prosecutor and three as assistant city attorney, Republican Bachtell moved to Los Angeles, where he became a lawyer for a private corporation. Willoughby Rodman, History of the Bench and Bar of Southern California 126 (1909).

262 “Arguments in the Cigarette Case,” RMN, Jan. 28, 1898 (6:4).

263 Another hearing was held on January 27. “The Cigarette Ordinance,” EP, Jan. 27, 1898 (2:4).

264 On the contemporaneous effort of the cigarette industry in Chicago to co-opt the WCTU in the former’s campaign to repeal that city’s license ordinance, see below this ch.

265 “Religious Services at Fire Department Houses,” EP, Feb. 1, 1898 (10:1). At the same time, the Colorado WCTU, like its counterparts elsewhere, urged the state’s legislative representatives in Congress to pass a law subjecting cigarettes sold interstate in “original” packages to state laws (precisely in order to avoid the Tobacco Trust’s interstate commerce-based constitutional challenges). Id. See also below ch. 11


267 Representative Women of Colorado 100 (1911). In 1897-1898 Hungerford was superintendent of the legislative and petition department for the WCTU district encompassing Denver. “White Ribboners,” EP, Nov. 12, 1897 (12:3); “Eighth District W.C.T.U. Election of Officers and Reports for the Year,” EP, Nov. 10, 1898 (2:3). Hungerford, who was married to a physician, later perceptively attributed Colorado
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s


organization had gathered 1,118 signatures for a petition to the council requesting prohibition of the manufacture and sale of cigarettes and asked whether enforcement of the existing ordinance would be helped by presenting the petition at that time. Expressing women’s appreciation for “the fight you are making against the cigarette,” she then offered the WCTU’s advice and aid concerning the ongoing hearings: “Would not some of the school teachers testify to the injurious effects of cigarettes? The teachers see more of them than most other people and might exhibit some victims before the police magistrate. Would it help matters if some of us could find teachers who are willing to give testimony?”

The response from Alderman Robert Golder—a Democratic-Populist candidate with extensive interests in all of the state’s mining camps whose department store ordinance “to force proprietors to provide stools for female employees” the board of supervisors passed the day after the final hearing in the cigarette ordinance case—urging Hungerford to “marshal a strong contingent of W.C.T.U. members and bring them to the police court room” when the hearings resumed presumably prompted a number of the group’s leaders to appear and speak there.

The hearing on February 10 was held by Police Magistrate James M. Ellis, a well-known lawyer, Democratic politician, and appointee of a Democratic governor to a two-year term. When Ellis filed for bankruptcy in 1899, it was revealed that the U.S. Government had sued him in 1895 for $3,173.80, which he had received as receiver of the U.S. land office in Denver and failed to turn over. Ellis opened the session by severely criticizing “various ladies” from whom he had received letters “which betray an ignorance of the ordinance. The ladies who wrote these letters have not read the ordinance.” The women—whose colleagues, if not they themselves, were present in the court room—had requested that cigarette sales to children be stopped, but Ellis protested that he lacked the power to enforce the state statute that prohibited such sales to minors. WCTU
members raised these issues toward the end of the hearing. The presence of the
three WCTU members marked, according to the Denver Republican, “[p]robably
for the first time in this country, if not in any other country, [that] women
appeared in the role of amici curiae of a Police court.”

The proceeding was also remarkable for the participation of Guy LeRoy
Stevick, a lawyer and fellow Democratic Party activist whom Ellis had
appointed as an amicus curiae, “an unprejudiced investigator of facts of [sic]
law.” Ellis’s attachment to Stevick, who had “offices adjoining” Ellis’s, may
have been linked to the latter’s lengthy defense (“He Flies to the Judge’s Rescue”) of one of Ellis’s decisions half a year earlier in response to an attack
on it by the Rocky Mountain News. Stevick, who insisted that he had “tried to
be, not an advocate on one side or the other of this case,” presented an “elaborate
brief covering all the contested points of the ordinance,” although there were
chiefly two questions for him to resolve: “‘Has the court any call or right to
inquire into the reasonableness or legality of the amount of the fee imposed on the
dealers in cigarettes?’ and ‘What is the criterion of the reasonableness of the
fee?’” Stevick’s point of departure was, correctly, the powers that the state
legislature had conferred on the city council, which were either given expressly
“‘or which are necessary for carrying into effect the powers which are expressly
given to it.’” From the legislatively enacted city charter he cited the following enumerated powers: (1) providing for “‘the licensing, regulating, and taxing of
all lawful occupations, business places, etc.’”; (2) to “‘provide for and regulate
the sale of tobacco’”; (3) to “‘regulate or prevent the carrying on of any business
which may be dangerous or detrimental to public health, or the manufacturing or
vending of articles obnoxious to the health of the inhabitants’”; and (4) “‘The city
council shall have power to enact all ordinances necessary and proper for carrying
into execution the powers specified in the act.’” Stevick then placed the limits

275Women and the Cigarette Law,” DR, Feb. 11, 1898 (7:1).
276Stevick (1865-1955) was an 1888 graduate of the University of Pennsylvania Law
School, who moved to California, where he was Pacific Coast manager and vice president
of Fidelity & Deposit Co. of Maryland. The Chi Phi Fraternity, Centennial Memorial
Volume 454 (1924).
277The Governor Arrives,” EP, Apr. 13, 1898 (10:3).
279Guy LeR. Stevick, “He Flies to the Judge’s Rescue,” RMN, Aug. 6, 1897 (4:5).
280“The Drug Store Whisky Cases,” RMN, Aug. 5, 1897 (4:1) (edit.). Ironically, the
case involved the use of police to make purchases of whisky in bottles from drug stores
and then to file complaints against the owners.
281“Full House,” EP, Feb. 10, 1898 (2:4-5). With one exception, Stevick quoted these
of these powers in their judicially interpreted context by quoting a recent Colorado Supreme Court decision that set forth a bifurcated typology for determining ordinances’ validity: “An ordinance expressly authorized by specific and definite legislative authority will be upheld unless it conflicts with the constitution of the state or nation, while an ordinance which the municipality assumes to pass by virtue of its incidental powers, or under a general grant of authority, will be declared invalid, unless it be reasonable.”282 Stevick’s conclusion that regardless of whether the ordinance had been passed pursuant to the power to license, regulate, or tax, “it must be subject to the test of reasonableness” was presumably based on his judgment that the imposition of a $1,000 annual license fee on cigarette sellers was not sufficiently expressly authorized by the legislature to qualify as subject only to the test of constitutionality. But despite his typological framework, Stevick failed to limn any usable specifics for determining reasonableness in this case. All he managed to distill from case law was that a license fee that would be prohibitory in one city would not “seriously interfere with business” in another and that where it was based on a police-power regulation “its amount is limited to a fair or liberal estimate of the various expenses growing out of the police regulation, while in those cases where the license fee is charged as a revenue measure the limitation of such a fee is that it shall not be prohibitory of the business which it attempts to tax.”283 Later during the hearing he “enlivened...the sitting” with his snide speculation that in connection with the city council’s having “ample power to pass an ordinance demanding a reasonable fee,” it had originally been set at $100, “but the board of aldermen, probably because there was a deficit in the city’s funds on some particular morning, raised that fee to $1,000.”284
Because Stevick self-contradictorily accused the city council of raising the fee to $1,000 for revenue at the same time that he rejected the ordinance as invalid because it was allegedly prohibitory, supporters of the ordinance should not have allowed him to get away with having it both ways: if the ordinance in fact raised revenue because some dealer(s) paid the license fee, then it was not prohibitory, and if it was prohibitory, then no (compliant) dealer would have sold cigarettes or paid a license and the ordinance would not have raised any revenue.

Even assuming that Stevick was right about how to classify the ordinance, his exploration of its reasonableness was too crammed by virtue of his (and his principal Ellis’s) exclusive focus on the size of the fee and failure to consider the ordinance as an exercise of the aforementioned power to “regulate or prevent the carrying on of any business which may be dangerous or detrimental to public health, or the...vending of articles obnoxious to the health of the inhabitants.”

Cigarettes’ deleterious impact on public health was after all precisely the subject on which, as shown below, the WCTU was more than eager to present evidence. Why, if cigarettes were hyper-dangerous, it would not have been reasonable for the city council to use its taxing power to prohibit their sale or—as seems more plausibly to have been its intent—to insure that their most vulnerable victims, boys, would be less likely to gain access to them by taxing the small sellers who predominantly sold to children so steeply that such dealers would no longer have a profit motive than was the case under the statewide ban on sales to minors neither Stevick nor Ellis explained. After all, as Judge and Professor John Dillon, the era’s leading treatise writer on the law of municipal corporations, who was antagonistic to any expansion of, and contributed to limiting, their powers, observed: “Where the business or matter to be regulated is one which is or has become dangerous to health or safety or injurious to public morals, the power to regulate may, we think, include the power to prohibit where the municipal council reasonably deems the public welfare so to require.”

Moreover, if Magistrate Ellis had permitted the WCTU to put on its evidence, perhaps a predicate would

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285 Attributing just such an argument to the WCTU (which “went on the proposition that as a cigarette, with a ‘fool on one end and a fire at another’ is dangerous, therefore the ordinance making the license fee so large that the cigarettes cannot be sold, should per se be declared valid”), one newspaper sexistically dismissed it: “The ratiocinations indulged in by the ordinary attorney and circumlocution of the ordinary court are not to a woman’s intuitive mind very appropriate....” See Women and the Cigarette Law,” DR, Feb. 11, 1898 (7:1).

have been laid to assimilate cigarettes to intoxicating liquor, which, according to the U.S. Supreme Court, there was “no inherent right in a citizen to...sell by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may...be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority.” If cigarettes could be analogized to liquor in terms of their deleterious health impact, at least on children, then, at least to the extent of justifying the $1,000 license fee to deter non-downtown stores from selling them at all, such an amount might have passed muster under the standard that Dillon synthesized for liquor: “When a license fee is exacted under the power to regulate, the courts generally regard the amount of the fee as largely within the discretion of the licensing authority and will not, as a general rule, hold it to be exorbitant or unreasonable....”

In the event, Stevick’s brief contained the astonishing “fact that the city had made no attempt to introduce evidence to show the deleterious effects of cigarettes. More astonishing still was Assistant City Attorney Bachtell’s admission of his failure to do so, which he attributed to: (1) congressional recognition of cigarettes as an article of commerce “after a thorough investigation of [sic; should be “by”] eminent chemists;” and (2) the inability of local experts whom he had interviewed to “testify so as to sustain the contention that they [cigarettes] are more deleterious than tobacco in other forms....” In light of Stevick’s charge that if the city was seeking to justify the prohibition of cigarette tobacco “on the grounds that it belongs to that class of business designated as dangerous or detrimental to the health of the community, evidence of such fact should be presented,” the city’s defense was incompetent and Judge Ellis’s refusal to hear the WCTU’s evidence on this very issue was perverse.

Before Ellis closed the hearing, 56-year-old Mrs. Theodore (Antoinette) Hawley, president of the Central Union of the WCTU for Eighth District (including Denver), called to Ellis’s attention the provision in the ordinance

287 Crowley v Christensen, 137 US 86, 91 (1890).
288 John Dillon, Commentaries on the Law of Municipal Corporations 2:§ 676, at 1021 (5th ed. 1911 [1872]). See also id. at 1022 n.6 (citing license fees of $1,000).
290 “Elected Officers,” EP, Sept. 8, 1897 (7:5). In the 1896 elections Hawley (and the other two WCTU members who appeared at the hearing, Mary Wrigley and Elizabeth Craise, unsuccessfully ran as Prohibition Party candidates for the state legislature from Denver). “A List of Nominations,” RMN, Nov. 2, 1896 (8). At the 1900 Census of
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

requiring dealers to obey state laws: “Could not somebody collect a penalty from the dealer who violates the state law which prohibits the sale of tobacco to minors?” The magistrate agreed, but his remitting her to state court jurisdiction merely prompted Hawley to pose yet another question (which might have been thought to be designed to prove to him that she had read the ordinance, except that she and her colleagues did not arrive in the court room until after he had chastised the letter writers) : “But the ordinance says the dealer who takes out a license must give $500 bonds. Could not someone go after the bondholders?” The WCTU’s dogged determination to identify a purchase in the licensing ordinance for enforcing the no-sales-to-minors statute may have seemed out of place at a hearing to determine the constitutionality or validity of the ordinance regardless of the practicalities of deterrence, but it underscored both the WCTU’s primary focus on denying children access to cigarette and the fact that licensing was anathema to the organization. Before Ellis could administer yet a further lesson in jurisdiction, his alter ego, Stevick, injected this confusion: “The ordinance...does not provide a penalty for violation. How much would a dealer damage the state if he sold cigarettes to a boy? The ordinance does not say, and no damages could be recovered.” Since the WCTU was champing at the bit to explain just how enormous that damage was, 52-year-old widow Mary Wrigley, a real estate dealer who was superintendent of the state WCTU department of Christian citizenship and law enforcement, asked Ellis why he did not enforce the ordinance “as you do the laws against theft and murder....” The “startled” magistrate parried her thrust with an irony that went to the core of the WCTU’s inconsistency in promoting enforcement of an ordinance that it abominated: “Madame,...would you have an ordinance enforced that gave leave to murder for $1,000? You say that selling cigarettes is murder. Would you have murder licensed?” Realizing that her analogy gambit had boomeranged, Wrigley saw only one escape route: “Why don’t you prohibit it then?” Although it is difficult to discern the thought processes that would have led her to conclude that

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291“Full House,” *EP*, Feb. 10, 1898 (2:4-5). The ordinance did, as noted above, impose a fine ranging from $5 to $100 for each violation.

2921900 Census of Population (HeritageQuest).


294“Full House,” *EP*, Feb. 10, 1898 (2:4-5). Ellis was perhaps waxing ironic while bantering with the WCTU when he “volunteered the information that he thought the ordinance a vicious measure in that it would permit the sale of the paper cigar.” “Must Invoke State Cigarette Law,” *RMN*, Feb. 11, 1898 (6:6).
the police magistrate was empowered to go the city council one better and outright ban the sale of cigarettes, especially when the state legislature had just failed for the second time to mobilize a majority for precisely such a statute, Ellis nevertheless met Wrigley on her own grounds, albeit disinformatively, having overlooked the decision that the Iowa Supreme Court had issued barely two weeks earlier upholding, against the Tobacco Trust’s interstate commerce challenge, the constitutionality of the state law banning the sale of cigarettes:

“The supreme court has decided that the cigarette business is legitimate. It cannot be prohibited. It can only be regulated.” When Wrigley pleaded that she could bring 20 mothers to the court room to “prove that their boys are in danger of ruin by cigarettes,” she harvested only Stevick’s patronizing advice: “The first thing...is to be practical ladies. Go to the city council and get a proper ordinance passed, then go to the legislature.”

Reporters who attended the hearing were engaged in vast understatement when they noted that Stevick’s brief clearly expressed the “intimation” that it was “not improbable” that Ellis would hold the ordinance void, especially since he himself had “expressed dissatisfaction with the ordinance even before the arguments were given and after he had received” the brief inasmuch as he had said that the ordinance was “apparently...for revenue only.”

The Denver Republican ironically characterized this comment, in connection with Ellis’s statement that the ordinance was “mischievous,” as “more his private opinion. If it had been his judicial opinion, there would have been no necessity for proceeding further, but the court has long been noted for having an armor plate panel between the two, only that the aforesaid panel is on sliding grooves.”

Indeed, as soon as Ellis issued his decision the same paper contended that its substance had been “expected as the court and the counsel for the city were of the opinion all along that one or two members of the council had allowed sentiment to overcome their better sense, and that the rest had not the courage to oppose the sumptuary legislation proposed.”

In the event, Ellis’s decision, a brief report on which was furnished by wire

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295 McGregor v. Cone, 104 Iowa 465 (1898); below ch. 12.
296 “Full House,” EP, Feb. 10, 1898 (2:4-5). Also replete with sexist aspersions against the WCTU’s position was “Women and the Cigarette Law,” DR, Feb. 11, 1898 (7:1).
297 “Cigarette Ordinance,” Morning Times (Cripple Creek), Feb. 11, 1898 (1:7).
298 “Women and the Cigarette Law,” DR, Feb. 11, 1898 (7:1).
300 Unfortunately, the volume containing the Denver police magistrate reports for 1898 was reported as missing (or never owned) at the Colorado State Archives. Telephone interview with Erin McDanal, Denver (July 8, 2010). Apparently the entire opinion was
service and published in *The New York Times*³⁰¹ and many other newspapers throughout the country,³⁰² was not based on the federal interstate commerce power at all, but rather on the sellers’ defense of unreasonableness.

The “evidence introduced and admitted by the city into a statement of fact”—but, oddly, not adduced or even alluded to by Ellis in his opinion—specified that defendants Ross, Abel, and Hyman were “the largest individual dealers in the city of Denver, and the profits made by the defendant Ross on the cigarettes sold by him during the past year amounted to between $250 and $350,” while Abel’s books showed that the total cigarettes he sold in 1897 amounted to $1,700, equally divided between retail and wholesale, generating a profit of $170 and $85, respectively; Hyman’s retail cigarette profit in 1897 amounted to $365.³⁰³

These data are remarkable. In 1894, as noted earlier, 60,000,000 cigarettes had purportedly been sold in Colorado at a cost of $250,000; from 1894 to 1897 national output rose by 36 percent; if Colorado sales increased by that proportion, they would have amounted to 81,600,000 (and perhaps even more since Colorado’s population growth exceeded the national average). Denver’s population accounted for 25 percent of Colorado’s, but, as its biggest city, presumably also accounted for an even greater proportion of cigarettes sold (that is, more than 20,400,000 in 1897). If a package of cigarettes cost five cents, then Abel’s total sales in 1897 would have amounted to 34,000 packages or 340,000 cigarettes or only 0.04 percent of projected state sales³⁰⁴ and less 0.1 percent of Denver sales (if Denver accounted for half of state sales or 40,800,000); his daily sales would have amounted to only 93 packages. Based on the aforementioned

³⁰³“Excessive License,” *EP*, Feb. 12, 1898 (12:4). Half of defendants’s cigarettes were manufactured by ATC and bought from local Denver dealers, jobbers, and wholesalers; the other half were bought from manufacturers or dealers outside of Colorado and imported and “sold in the original packages” in which they had been received. “He Knocked It Out,” *DT*, Feb. 12, 1898 (5:5).
³⁰⁴Abel’s $1,700 in sales in 1897 constituted 0.7 percent of the total cost of cigarettes sold in 1894; the fact, however, that this amount included his wholesale business may have inflated the calculated share.

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contemporaneous Chicago profit margin of 1.2 cents per package,\textsuperscript{305} Ross would have sold between 20,833 and 29,167 packages a year or 57 and 80 per day, while Hyman’s annual and daily sales would have amounted to 30,416 and 83, respectively. Thus none of Denver’s largest dealers was seemingly selling anywhere near the 83,333 packages a year or 228 per day that would have been required to break even while paying the $1,000 license fee. At 10 cigarettes per package, no dealer was selling even 1,000 cigarettes per day or 7,000 per week, whereas in Boston (whose population was four times greater) in 1895 one dealer sold a million per week, three sold 500,000, two sold 250,000, and five sold 100,000.\textsuperscript{306} Thus, if the defendants’ self-serving claims were accurate, either per capita cigarette sales were much lower in Denver than in Boston or sales were much less concentrated; if cigarette sales did not bulk large even in the largest tobacco stores, then the $1,000 license might in fact have been prohibitory. In view of the allegedly minuscule economic importance of cigarettes for these local dealers—amounting to a dollar a day or less—it is clear why only the Tobacco Trust, which was motivated to undo and deter all restrictions on cigarette sales anywhere in the United States, had the financial incentive to foment and carry on this litigation.

One further puzzle, however, remains unresolved. In his amicus curiae brief Stevick asserted that, according to the dealers’ testimony, not only was it the case that not one dealer in all of Denver made as much as $400 a year from cigarettes, but that even “if all the business were concentrated into four or five of the largest dealers those dealers would not make profit enough to pay the license.”\textsuperscript{307} This claim appears to be wildly inconsistent with the calculations just presented. If, as already noted, cigarette sellers’ profit margin was 1.2 cents per package, a dealer would have had to sell 83,333 packages (or 833,330 cigarettes) per year to generate $1,000 in profit. If only four dealers had remained in Denver, collectively they would have had to sell only 333, 332 packages (or 3,333,320 cigarettes). Yet, even three years earlier, 18 times as many cigarettes had been sold in Colorado for $250,000, $60,000 of which should have been profit. Even if Denver sales had been only proportional to the city’s population, even in 1894 $15,000 in profit should have accrued to Denver dealers; assuming that revenues had increased in tandem with increased sales and that per capita sales were higher in Denver than elsewhere in the state, by 1897 profits in Denver should have far

\textsuperscript{305}This profit amounted to 24 percent of the retail price. Abel’s total wholesale and retail profit of $255 amounted to 15 percent of his total sales.

\textsuperscript{306}“Good Stories for All: Cigarettes by the Million,” \textit{Boston Globe}, July 20, 1895 (8). See also above ch. 11.

exceeded $20,000 and made it possible for many more than four or five dealers to pay the license fee and pocket profits considerably higher than the defendants admitted to receiving.

The defendants interposed several defenses and raised as many objections to the ordinance’s validity, but Ellis deemed only two of them important enough to consider—first, that the ordinance violated Congress’s interstate commerce powers, and, second, that the license fee was unreasonable and prohibitory. Although he ultimately decided not to resolve the first issue, his refreshingly blunt commentary on the intractable state of U.S. Supreme Court jurisprudence on the subject is well worth noting. Ellis observed that: “No clear line of demarcation has been laid down to show just how far a state may go in the exercise of its right to protect the health and safety of its citizens without encroaching upon the rights of the general government to regulate commerce.” Adjudication in the case of the cigarette ordinance was made all the more difficult by the fact that it recognized that using cigarettes was injurious to health and applied equally to cigarettes made or bought from importers in Colorado and those manufactured outside the state and imported in original packages without discriminating against either class. Moreover, while the congressional commerce power would not permit a state or local government to prohibit the sale of a recognized article of commerce by the foreign importer in original packages, Ellis also concluded from the relevant U.S. Supreme Court precedents that it “was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country.” After quoting especially pertinent passages from a number of Court decisions, Ellis added that it “would require more time than I care to devote to this opinion to review all the authorities..., but I will content myself by saying” that an ordinance that prohibited the sale of cigarettes by a foreign importer in original packages before it became a part of the property of the state was unconstitutional, whereas “an ordinance which prescribes such regulations as are necessary for the safety of the community is not unconstitutional.” Having thus replicated the Supreme Court’s tangled knot of conflicting principles, Ellis was “not prepared to say that...the provisions of this ordinance are unnecessary for the safety of the community,” but did conclude that the ordinance insofar as it sought to regulate and license cigarette sales was not in conflict with the constitutional commerce clause because it did not discriminate against interstate commerce.308

308“He Knocked It Out,” DT, Feb. 12, 1898 (5:5-6). The pivot of Ellis’s argument was that once cigarettes reached their place of rest for sale to consumers, they became “a part of the mass of the property of this state and are subject to all the laws of this state.”
Having thus outright rejected the Tobacco Trust’s perennially favorite doctrine in such litigation, Ellis proceeded to what to his mind was the “more important question” of the ordinance’s reasonableness and specifically whether the $1,000 license fee made it prohibitory in its effect. Using as his analytic point of departure cities’ “right to regulate or prevent the carrying on of any business which may be dangerous or detrimental to public health, or the manufacturing or vending of articles obnoxious to the health of the inhabitants,” he underscored that the “lines should be definitely drawn between the power to regulate and the power to tax” when a city council attempted to exercise both in one ordinance. (Here Ellis condescendingly hinted that this litigation might not have arisen if it were not “true that municipal legislative bodies rarely contain in their membership men of the legal profession who are sufficiently conversant with the requirements of our state and federal constitutions as to always secure proper legal enactments.”) Thus where a tax was laid for both purposes, it would have to be grounded in both the police and the taxing power; conversely, if the tax amounted to an absolute prohibition of a business that the city was powerless to impose because the business was not per se injurious to the public, then the ordinance was void.309

In spite of his admission that a court needed “sufficient data and evidence [to] pronounce an ordinance unreasonable as a police regulation” and his citation to a trial court decision from New York that “‘[w]here the license fee is charged as a revenue measure, the only criterion of reasonableness is the effect upon the profits of the business. If that effect is...to prohibit the business, instead of producing revenue, then it is unreasonable both because it defeats its own purpose and because the city cannot prohibit under the guise of taxation,’” he failed

Acknowledging the conflict in the U.S. circuit courts, Ellis relied on In re May, 82 F. 422 (C.C. D. Montana, 1897), which is discussed below ch. 11. Just two years later the U.S. Supreme Court declared: “We think it within the province of the legislature to say how far they [cigarettes] may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used as against such as are imported from other states, and there be no reason to doubt that the act in question is designed for the protection of the public health.” Austin v. Tennessee, 179 US 343, 348-49 (1900). See below ch. 12.

309“‘He Knocked It Out,” DT, Feb. 12, 1898 (5:5-7). Ellis offered no basis for his claim that “[i]f prohibition of a business is permitted, it must be found under some specific grant of power...and not under the power of...regulation,” which sidestepped the aforementioned exercise of the police power to protect the public health.

310“‘He Knocked It Out,” DT, Feb. 12, 1898 (5:5-7) (citing City of Brooklyn Ry, Co. v. City of Brooklyn, 44 Supreme Court of New York 416, which does not appear on Lexis or Westlaw).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

either to cite, let alone engage, any of the aforementioned profit figures, or even to assert, let alone adduce any evidence, that the Denver ordinance was a revenue measure. The Rocky Mountain News reported that Ellis’s holding that “the city had no right to do indirectly what it could not do directly” hinged on the assertion that: “If the city had no right to make an ordinance expressly prohibiting the sale of cigarettes it could not do so by placing a license fee so high the dealers could not afford to pay it.”\(^{311}\) Apart from the fact that he failed to make such a fact finding, Ellis appears to have believed that the basis for the protasis/antecedent of the foregoing sentence was identical to that for the apodosis/consequent—namely, that the city could not make the tax “so burdensome as to prohibit the lawful exercise of the business, inasmuch as the raising, manufacture and sale of tobacco is regarded as a legitimate business, and is licensed, taxed and regulated both by federal and state laws and cannot be prohibited, except...to minors or persons not sui juris.”\(^{312}\) Only by that logic could he have felt “constrained to hold that because of the excessive license fee required the ordinance...is unreasonable and, therefore, void. The defendants will, therefore, be discharged.”\(^{313}\) In fact, however, the best that could be said of Ellis’s opinion is that he might have made a plausible technical point had he faulted the city council for using the taxing power when it should have used its police powers to ban the sale of cigarettes outright based on the need to protect the public health—evidence in support of which the WCTU had been prepared to present if only Ellis had permitted its officials to do so instead of mocking their jurisprudential acumen.

In response to city council members’ request for a statement of “what sort of an ordinance he believed would be legal,” Ellis offered as guidelines that the city was empowered to regulate the sale of tobacco in any form as well as to prohibit the sale of any kind of tobacco to minors and that “the amount of the fee should depend upon the nature of the business and should not be scrutinized too narrowly. A reasonable addition to cover the cost of police supervision may always be made. The whole expense attending the additional supervision should be made.”\(^{314}\)

The independent Denver Times praised Ellis’s opinion as “unusually able” because the ordinance permitted the sale of cigarettes by one or two monopolists to “all who cared to buy,” while doing “a very great injustice...to a very large number of small business interests,” which constituted a “violation of one of the

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\(^{312}\)“He Knocked It Out,” \textit{DT}, Feb. 12, 1898 (5:5-7).

\(^{313}\)“He Knocked It Out,” \textit{DT}, Feb. 12, 1898 (5:5-7).

\(^{314}\)“He Knocked It Out,” \textit{DT}, Feb. 12, 1898 (5:5-7).
cardinal principles of law and justice...” In other words, the ordinance “merely harasse[d], annoy[ed] and disturb[ed] business interests, without accomplishing any real reforms...” If, however, the ordinance had avoided this predicament banning cigarette sales outright, the Times would have rejected such “sumptuary legislation” too as “extremely repugnant to the principle of free government....” Insisting that such intervention would “not be tolerated by the American spirit of freedom and independence,” the newspaper was chiefly concerned that Denver’s “need[ ] to grow and expand, and to invite the co-operation of wide-awake, progressive men and women” would have been inconsistent with “contraction in ideas and freedom of action.”

The <em>Rocky Mountain News</em>, asserting that the evidence had shown that “not more than one or two firms would be able to pay the license, and that either the business would center in the hands of those firms or others would sell cigarettes surreptitiously and in violation of the ordinance,” editorially concluded that there could be little doubt that Ellis’s interpretation of the law was correct. Weightier was the paper’s view that if in fact the ordinance’s purpose was to prohibit an injurious product, its supporters would have to find a vehicle other than a license fee:

Until medical experts’ testimony is more strongly against the cigarette than it is at present, the sale of the article is likely to continue. The majority of doctors seem to be far from ready to say that the moderate use of cigarettes is more injurious to adults than the use of tobacco in other forms. There seems to be ample testimony that the use of cigarettes or tobacco by children is harmful, but so long as doctors themselves continue to smoke them publicly, as many of them do, their general use by grown-up persons, with an inclination in their favor, will continue.

Although such evidence concerning the harmfulness to adults was available in the form of the unique impact of (deep) inhalation, the editorialist had unintentionally raised the issue as to whether the even more deleterious impact on children could justify banning sales to adults if mere no-sales-to-minors laws manifestly failed to make cigarettes inaccessible to children.

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318See above ch. 2.
In the immediate aftermath of the ruling it was reported that cigarette dealers in the western town of Grand Junction (pop. 3,500) did “not appear to be alarmed about the passage of the new license ordinance which imposes a tax of $500” because they claimed it was unconstitutional.\(^\text{319}\) The City of Denver did not appeal Ellis’s decision; instead, a month later Supervisor O. B. Scobey (who as acting mayor had approved the ordinance in 1897) introduced a $100 ordinance bill before the board of supervisors “intended to correct features of the ordinance...declared unconstitutional.”\(^\text{320}\) During the 1899 legislative session two Democrat-Populists tried to overcome judicial obstacles to municipal regulation of cigarette selling by introducing a bill to “license or prohibit the sale of cigarettes within the boundaries of municipal corporations or within one mile beyond the outer boundaries thereof.”\(^\text{321}\) One of its authors, who were “tickled” that it had obtained a “good place on the calendar,” stated that the bill, which empowered city councils to “regulate or prohibit the sale or giving away of ‘coffin tacks’ to any person, of no matter what age or sex,” would go through the house, notwithstanding the efforts of the tobacco trust and Otto Mears [a very prominent Russian-immigrant railway capitalist] to smother it.\(^\text{322}\) But the next day the House Judiciary Committee recommended that H.B. No. 301 be considered by the committee of the whole without recommendation, and the bill died without any further action.\(^\text{323}\) Nevertheless, in 1901 the council adopted an ordinance imposing a $200 license for the privilege of selling cigarettes and (vindicating the WCTU’s demand in 1898) requiring a $500 bond “as a guarantee that no cigarettes will be sold to children under 16 years of age.”\(^\text{324}\) And when the City of Denver in 1906 issued its Municipal Code, the 1897 ordinance, including the $1,000 license fee, was word for word still on the books.\(^\text{325}\)

\(^{319}\)“From Our Exchanges,” Glenwood Post, Feb. 26, 1898 (4) (reprinted from Grand Valley Sun).

\(^{320}\)“March of Progress,” EP, Mar. 11, 1898 (7:3).


\(^{322}\)“Snappy Little Talks,” EP, Mar. 1, 1899 (3:5-6 at 6).


\(^{324}\)LAT, Feb. 15, 1901 (8) (untitled).

\(^{325}\)The Municipal Code of the City and County of Denver: Approved April 12, 1906, § 1003 at 384 (1906). One possible reason for the retention of the ordinance is that, despite press accounts that Police Magistrate Ellis had held that the ordinance was void because of its unreasonable license fee, it is possible that he had in reality ruled that the ordinance was not invalid on its face, but merely as applied to the defendants, whose
Nebraska 1895: “Hugging a Corpse: The Decapitated Cigarette Bill Passes the Senate”

“There is very little prospect,” remarked Col. Franz Zehrung, “of the anti-cigarette bill passing the senate. I do not care to give away any secrets, but I know that Col. Frank Polk has been organizing a strong lobby to work against the passage of the bill in the upper house, and has organized, as a last resort, a band of twenty young men who will, the moment the bill comes up for consideration, light cigarettes in the chamber and continue smoking until they succeed in killing the bill, either by breathing smoke upon it or by driving the senators to suicide.”

Everything will be run by a lot of cigarette smoking dudes in a little while.

At the 1895 session—the 1894 elections had effected “an almost revolutionary reversion to Republicanism,” which secured three-fourths majorities in both houses and proceeded, unlike the Populist-controlled 1891 session and the Democratic/Populist-controlled 1893 session, to evade the big issues—the re-elected Jenkins made another effort to pass his general sales ban
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

Though not quite so frictionless as two years earlier, the 79 to 12 floor vote in favor of House Roll No. 60 was nevertheless impressive. “Most dealers,” according to The New York Times, “seem to be pleased that the cigarette is to be barred.” The Senate, once again, proved to be the obstacle, but differently than in 1893.

The Senate’s resistance was ironic inasmuch as both houses had been prohibiting smoking in their own realms since the 1870s. The Senate had been operating continuously, at least since 1873, under a rule pursuant to which: “No smoking shall be allowed in the Senate chamber or galleries during the session of the Senate.” Similarly, as early as 1871 the House had adopted a rule providing that “there shall be no smoking in the bar or gallery of this House while in session,” and ever since 1877 it had been governed by a rule providing that the House Speaker “shall have general direction of the hall, and permit no smoking therein.”

After substituting Jenkins’ bill for a Senate manufacture/sales ban bill, the committee of the whole submitted a gutting amendment to turn the measure into

332House Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session 143 (Jan. 7) (1895) (House Roll No. 60). The same day Jenkins introduced bills to regulate telegraph line charges, for school teachers’ legal holidays, and for controlling telephones. Id. On his 1893 anti-cigarette bill, see above ch. 4.

333House Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session 769 (Mar. 5) (1895).

334“Will Bar Out the Cigarette,” NYT, Mar. 15, 1895 (8). To be sure, the account in the Times was hopelessly garbled, asserting that the House had passed a bill that the Senate had passed the previous week.

335Senate Journal of the General Assembly of the State of Nebraska, 6th Regular Session 45 (Rule 43) (1873); Senate Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session 137 (Rule 41) (1895). Senate rules in the late 1860s following statehood contained no such rule; the Senate Journal for 1871 failed to publish rules. Email from Prof. Robert Leiter, director, University of Nebraska Law Library (Apr. 5, 2010).

336House Journal of the General Assembly of the State of Nebraska: Eighth Regular Session 46 (Jan. 9) (1871) (Rules Committee reporting that it had substituted that provision for the previous Rule 49, which had obligated the sergeant-at-arms to keep House secrets).

337House Journal of the General Assembly of the State of Nebraska, Fourteenth Regular Session 58 (Rule 5) (Jan. 4) (1877); Nebraska Blue Book and Legislative Manual for the Year 1895, at 51 (Rule 5).

338Senate Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session 198 (Jan. 18), 793 (Mar. 14) (1895). Senate File No. 135 had been introduced by German-born Leopold Hahn. Id. at xxiv.
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

a no-sales-to-under-21-year-olds bill. On third reading, after “considerable discussion,” Populist farmer Walter Dale unsuccessfully moved to recommit the bill for the purpose of striking out the age limitation, and Republican physician G. E. McKeeb’s motion to postpone the bill indefinitely was ruled out of order; the severely diluted bill was then passed by the large majority of 26 to 4. The Lincoln Evening Times attributed this outcome to the fact that “the lobby got in its work,” and “[t]he cigarette manufacturers [were] jubilant over the success of the amendment.” On its return to the originating chamber, Jenkins’ unwillingness to concur in the subversion of his bill was vindicated by House adoption of his motion for appointment of a conference committee. But 10 days later he had virtually nothing to show for his resistance when the House adopted his report that he and his conferees had agreed to the crucial Senate amendment.

After this incisive setback a full decade would elapse before Nebraska finally enacted a statewide universal sales ban in 1905, which remained in effect until 1919. In the meantime, the city council of the state capital, Lincoln, in 1896 passed an ordinance making it unlawful for anyone under 18 to smoke or use cigarettes, cigars, or tobacco in any form anywhere within the city limits,
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

“except upon a written prescription of a physician authorized to practice medicine and given within thirty days from the commission of the act complained of.” The ordinance imposed a duty on all on-duty police officers to make warrantless arrests of any violators, who, on conviction, were required to be fined up to $25.  

Indiana: 1895 and 1897

A bill has been introduced into the general assembly which not only makes the manufacture and sale of cigarettes an offense, but also forbids a person smoking them under penalty. It is quite evident that the author of the bill is desirous of killing the pampered and perfumed dudes by depriving them of their substance.

There will be a tremor over the class of cigarette fiends in the state when they read of the bill of Mr. McCaskey of Grant.

Although from the Civil War to the electoral realignment of 1896 neither Democrats nor Republicans gained legislative dominance in Indiana and Democrats were known as the party of “soft money and hard liquor,” while Republicans advocated for temperance, the state legislature was almost continuously immersed in temperance issues, blue laws, and general moral regulation between 1890 and 1920, the aforementioned efforts to pass a cigarette license bill in 1891 being only one example. As early as 1889 the 56th general assembly, controlled by Democrats and historically reputed to have created extensive reform legislation, enacted an especially strictly formulated ban on sales to children under 16, which provided that it was unlawful both to give, barter, or sell any tobacco, cigars, or cigarettes not only to any such children

349 FWWG, Jan. 24, 1894 (4:1) (untitled edit.).
353 See above ch. 4.
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

to be chewed or smoked, but to any person with knowledge that it was to be chewed or smoked by any child under 16 and to persuade, advise, counsel, or compel any child under 16 to chew or smoke tobacco—subject, however, to a (minimal) $1 to $10 fine.\textsuperscript{355} During the Democratically organized 1893 session—which passed several bills supported by organized labor including a prominent anti-yellow dog contract law\textsuperscript{356}—the legislature ramped up the lower and upper fine thresholds tenfold and added a conjunctive county jail sentence of 10 to 30 days.\textsuperscript{357}

Although Indiana had no cigarette manufacturing industry to speak of—a mere 9,000 cigarettes were produced in calendar year 1895 and none the next year—hundreds of firms there produced about 62 million cigars or a little more than one percent of total national production.\textsuperscript{358} Similarly, Indiana was the ninth largest tobacco growing state, accounting for about 2 percent of national acreage, production, and value.\textsuperscript{359}

Five days into the 1895 session in the House, 80 percent of the seats in which were, in the wake of the severe depression beginning in 1893, now occupied by Republicans\textsuperscript{360} following a “landslide” electoral victory in 1894 that “virtually buried the Democratic Party,”\textsuperscript{361} Republican Harvey M. McCaskey (1849-1932),\textsuperscript{362} introduced House Bill No. 76, whose title declared that it prohibited not

\textsuperscript{355}1889 Indiana Laws ch. 131, §§ 1-2, at 271.


\textsuperscript{357}1893 Indiana Laws ch. 20, § 2, at 19. The amended statute covered “tobacco or preparations of tobacco...” The Senate passed S.B. No. 179 unanimously (41 to 0). \textit{Journal of the Indiana State Senate During the Fifty-Eighth Session of the General Assembly, Commencing Thursday, January 5, 1893: Regular Session 346 (1893).}


\textsuperscript{359}Yearbook of the United States Department of Agriculture: 1895, at 532 (1896).


\textsuperscript{362}Census of Population 1880, 1900, and 1910 (HeritageQuest); \textit{A Biographical Dictionary of the State Legislatures of the United States, 1776-1987} (1985).
only the manufacture and sale, but also the use of cigarettes363:

That on and after June 20, 1895, it shall be unlawful for any person or persons, or for the owners, proprietors, members, employes, managers, officers or agents of any firm, corporation, company, manufacturing establishment or other concern to make, manufacture, or suffer to be made or manufactured, in this State, any kind of cigarette or cigarettes, or to sell or give away or place upon the market for sale any such cigarette or cigarettes, or in any way directly or indirectly to encourage the manufacture or sale of such cigarette or cigarettes, and any person or persons, or owners, proprietors, members, employes, managers, officers or agents of any firm, corporation, company, manufacturing establishment or other concern, who shall buy or offer to buy, trade for or offer to trade for, receive or offer to receive, in any manner, either directly or indirectly any cigarette or cigarettes, to be sold, used or disposed of within the State of Indiana, shall be guilty of a felony and fined in any sum, for each offense not less than one hundred dollars and imprisoned in the States [sic] prison not less than one nor more than three years.364

This seemingly extraordinarily comprehensive and strict prohibition of producing or selling—or encouraging the sale of, presumably even by means of advertising—cigarettes also and equally reached buying or receiving even one cigarette for use in Indiana. Because it also covered giving away a cigarette, the proposed bill would have made it unlawful for anyone to receive for use in Indiana any cigarette brought back to Indiana from another state by another non-seller—coverage that might have exceeded any that the U.S. Supreme Court would at the time have recognized as constitutionally compatible with the commerce clause. Thus, although the substitute did not expressly ban smoking or using cigarettes, it is difficult to discern how anyone could have lawfully come into their possession other than those who brought them back from other states for their own use.365 The proposal’s unique stringency was also unoverlookably on display in the classification of the offense as a felony and its punishment by a monetary fine without a ceiling and by imprisonment for at least one year.

To be sure, the bill suffered from what was presumably a drafting error that

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365 H.B. No. 76 (Jan. 15, 1895, McCaskey) (handwritten copy provided by ISA).

366 The bill would apparently also have prohibited out-of-state sellers from advertising in Indiana newspapers.
almost laughably undermined its rigor: the use of the word “such” in the phrase that made it unlawful “to sell or give away or place upon the market for sale any such cigarette or cigarettes” would have prohibited the sale only of cigarettes manufactured in Indiana, of which there were, as already noted, virtually none. That the word “such” was in fact used carelessly or inadvertently in that context was underscored by its omission in the coordinate phrase making it unlawful to “buy or offer to buy, trade for or offer to trade for, receive or offer to receive, in any manner, either directly or indirectly any cigarette or cigarettes, to be sold, used or disposed of within the State of Indiana....” McCaskey would eventually strike the word.366

A possible motivation for embarking on this radical anti-cigarette initiative may have been rooted in the fact that McCaskey, a Methodist and Grant County “substantial farmer” who had been a graduate in the scientific course at the National Normal University in Ohio, taught school for 16 years. Moreover, one of his sons was a throat-nose-ear specialist in Indianapolis.367 Then, too, the bill appeared to be of a piece with McCaskey’s environmentalist orientation, which manifested itself in the measure he had introduced the previous day to interdict business-created water pollution by “prohibit[ing] any person...from throwing, conveying or depositing, offensive, malodorous, unhealthy, obnoxious and poisonous refuse and offal upon or into the lakes, ponds, rivers, and streams, from any shop, store, hotel, factory, manufactory, warehouse or other house, or business place, through any ditch, drain, trench, trough, sewer, tile, pipe, channel, or otherwise....”368

When the Committee on Rights and Privileges, to which the bill had been referred,369 reported back the bill more than five weeks later; it recommended a substitute that not only completely eliminated McCaskey’s radical approach, but, in proposing another no-sales-to-under-16-year-olds bill, stripped out some of the aforementioned stringent language of the then existing law, while merely

366See below this ch.

367Centennial History of Grant County Indiana 1812 to 1912, 2:1316-17 (Rolland Whitson ed. 1914).

368Journal of the House of Representatives of the State of Indiana During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, Jan. 10, 1895: Regular Session 91 (Jan. 14) (n.d.) (H.B. No. 18). This bill too was referred to the Committee on Rights and Immunities, which reported it back with the recommendation that it be indefinitely postponed, in which report the House concurred. Id. at 700 (Feb. 15).

Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

bumping up slightly the minimum fine to $20:

Section 1. Be it enacted by the General Assembly of the State of Indiana, That it shall be unlawful for any person or persons to give, barter or sell, either directly or indirectly, to any child under sixteen years of age, any tobacco or preparations of tobacco, cigars, cigarette, cigarettes, or any preparations containing tobacco.

Section 2. Any person who violates the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than twenty dollars nor more than one hundred dollars, to which may be added imprisonment in the county jail not less than ten days nor more than thirty days. 370

The House concurred in the report, 371 but 10 days later, on the second reading of the bill, which still bore the title of McCaskey’s original radical bill and not that of the committee’s no-sales-to-minors substitute, 372 McCaskey, moving that everything after the enacting clause of H.B. No. 76 be stricken out, offered the following amendment—which was virtually identical to his original bill except that it omitted the aforementioned “such” that confined the unlawfulness of sales to those cigarettes that had been manufactured in Indiana—be substituted for it:

That on and after June 20, 1895, it shall be unlawful for any person or persons, or for the owners, proprietors, members, employees, managers, officers or agents of any firm, corporation, company, manufacturing establishment or other concern to make, manufacture, or suffer to be made or manufactured, in this State, any kind of cigarette or cigarettes, or to sell or give away or place upon the market for sale any cigarette or cigarettes, or in any way, directly or indirectly, to encourage the manufacture or sale of such cigarette or cigarettes, and any person or persons, or owners, proprietors, members,
employes, managers, officers or agents of any firm, corporation, company, manufacturing establishment or other concern, who shall buy or offer to buy, trade for or offer to trade for, receive or offer to receive, in any manner, either directly or indirectly, any cigarette or cigarettes, to be sold, used or disposed of within the State of Indiana, shall be guilty of a felony and fined in any sum, for each offense not less than one hundred dollars and imprisoned in the State prison not less than one nor more than three years.373

The House, which was operating under a standing rule that “[it] shall be the duty of the Doorkeeper to...prevent smoking in the hall and lobbies at all times,”374 on second reading then adopted this unprecedentedly capacious anti-cigarette measure and ordered it engrossed as amended.375 Without explaining how McCaskey’s substitute differed from his original bill or why he amended the latter, the Indianapolis News, whose report on the day’s legislative proceedings included a pictorial sketch of McCaskey smoking a cigar, merely noted that his substitute, which was placed on the House calendar, made it a “felony to manufacture or sell cigarettes in the State on or after June 20, 1895.”376 Nor did the Indianapolis Sentinel understand that his original bill, too, had included the same felony: “Mr. McCaskey has again changed his cigarette bill. This time he makes it a felony to manufacture or sell them after June 20.”377 Hopelessly confused was the report in the provincial press that: “The house concurred in the bill making the sale of cigarettes to children or making cigarettes in the state after June 1, a felony punishable by imprisonment from one to three years.”378 Two days later, in a vote that the Indianapolis Journal called

373Journal of the House of Representatives of the State of Indiana During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, Jan. 10, 1895: Regular Session 1206-1207 (Mar. 4) (n.d.).
375Journal of the House of Representatives of the State of Indiana During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, Jan. 10, 1895: Regular Session 1206-1207 (Mar. 4) (n.d.). A sheet in the ISA bill file following the text of McCaskey’s introductory motion bears the annotation, “3/4/95 carried & adopted,” the former presumably referring to the motion and the latter to the amendment. Oddly, unlike the text of McCaskey’s amendment printed in the Journal, the archived handwritten version of “Engrossed House Bill, Number 76” retained the stricken out “such.”
376“Governor Writes a Veto,” IN, Mar. 4, 1895 (2:1-2 at 2).
377“Legislative Notes,” IS, Mar. 5, 1895 (5:6).
“monotonous,” the House, on third reading, passed the “bill for an act to prohibit the manufacture, sale and use of cigarettes in the State of Indiana” by the overwhelming majority of 77 to 4 (the only Republican Nay being cast by Clemens C. Vonnegut, Jr., the later novelist’s great uncle). Of the nine members of the Rights and Privileges Committee, which had voted to dilute McCaskey’s bill to virtual nothingness, seven voted for and only one against it on third reading. It is noteworthy that of the 20 House members who a week earlier had voted against the widely reported Nicholson bill, which both regulated saloons and conferred on a majority of township or ward voters the right through remonstrance to prevent the granting of a license to any applicant, only Vonnegut opposed the anti-cigarette bill, while 18 supported it.

The press failed not only to remark on the monumentality of the final House action, but even to get the facts straight. The Indianapolis Journal, for example, insisted that: “Mr. McCaskey’s famous cigarette bill, after it had been changed several times,...imposes a jail penalty and a fine on any one [sic] who manufactures or sells cigarettes or tobacco to minors under sixteen years.”

Even more wildly inaccurate was the account of the third reading in The Fort Wayne Sentinel: “The bill making it unlawful to sell tobacco and cigarettes to persons under sixteen years was also passed.”

Despite its almost unanimous passage in the House, McCaskey’s bill died in Senate Judiciary Committee five days later on the last day of the session, when it included H.B. No. 76 among numerous “unreported House Bills” in its report.

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379“Small Caucus Bolt,” IJ, Mar. 7, 1895 (3:2-4 at 3).
3811895 Indiana Laws ch. 127, § 3, at 248, 249. The law provided that “nothing in...this act shall be construed to forbid the sale of cigars and tobacco in such a place of business....” Id. § 2 at 249.
383“Has Sold Out,” IS, Mar. 7, 1895 (5:1-6 at 6) (passage of “Mr. McCaskey’s bill prohibiting the manufacture or sale of cigarettes in the state after June 20”).
384“Small Caucus Bolt,” IJ, Mar. 7, 1895 (3:2-4 at 3).
386Journal of the Indiana State Senate During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, January 10, 1895: Regular Session 914 (Mar. 6) (1895) (referral to Judiciary Committee).
some of which had been examined by the committee, which also prepared reports on some, but because the Senate had been following the regular order in considering bills on third reading and had been waiting disposition of special orders, it had not been possible for the committee to report back this last batch of bills (especially since the lieutenant-governor had announced that no Senate bills could be passed on the session’s last day). Thus in requesting that it be relieved of any further consideration of the bill, the Judiciary Committee in effect reported it without recommendation.\(^{387}\)

Its abolitionist approach may have far overshadowed any other tobacco control measure discussed during the 1895 session,\(^ {388}\) but McCaskey’s bill received far less press attention than a mere license measure, Senate Bill No. 12.\(^ {389}\) Introduced by the Senator from (McCaskey’s) Grant County, Oscar A. Baker (1850-1931), who had previously run a photographic gallery and a saloon,\(^ {390}\) it imposed an annual license fee for traffic in cigarettes and cigarette wrappers of $50 on wholesalers and $25 on retailers while permitting municipal governments to require an additional fee of $25 and $10, respectively. Violations were subject to fines ranging from $100 to $300 and jail sentences up to six

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\(^{387}\)Journal of the Indiana State Senate During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, January 10, 1895: Regular Session 1075-76 (Mar. 11) (1895). On the titanic battle between the governor and lieutenant governor over the latter’s ruling, see “It Strangles a Veto,” CT, Mar. 12, 1895 (2). Numerous House-passed bills were “killed” in the Senate thanks in large part to “[p]owerful lobbies [that] thronged the Senate chamber in the interest of railroads, insurance companies, and corporations generally....” “Bad Laws Wiped Out,” CT, Mar. 14, 1895 (3).

\(^{388}\)The Senate, by a vote of 35 to 2, passed an amendment to the penalty section of the no-sales-to-under-16-year-olds law, but it died in the House Judiciary Committee. Journal of the Indiana State Senate During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, January 10, 1895: Regular Session 808 (Mar. 2) (1895) (S.B. No. 422); Journal of the House of Representatives of the State of Indiana During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, Jan. 10, 1895: Regular Session 1176 (Mar. 2) (n.d.) (committee referral was last action).

\(^{389}\)For example, in agreeing with an editorial in the Indianapolis Journal that the legislature should not hastily reject Baker’s bill, another paper urged enactment of a law that would be “prohibitive...if necessary” in order to “save the boys.” FWWG, Feb. 7, 1895 (4:2) (untitled edit.). None of the iterations of S.B. No. 12 ever remotely approached being prohibitive.

months. Finally, the bill also “provide[d] against the evils resulting from the use of such as are deleterious to health”\(^{391}\) (by prohibiting their sale). But even Baker’s bill, despite having undergone a transformative dilution, failed to come up for a floor vote. After the bill had been amended—one amendment made it a misdemeanor to buy or receive a cigarette from an unlicensed dealer—and recommitted to the Judiciary Committee with instructions to amend,\(^{392}\) a special committee (headed by Baker himself) to which the bill was referred for amendments recommended for passage a substitute that, inter alia, set the wholesale and retail licenses at $100 and $50 (and the local government supplementary fees at $50 and $25, respectively), and reduced the minimum fine to $10. The provision making it unlawful to sell cigarettes deleterious to health clarified how harmless it was by requiring that that deleterious substance be “other than tobacco...”\(^{393}\) A month later chairman Baker reported for passage yet another substitute bill, that was watered down to a no-sales-to-under-16-year-olds measure not even as stringent as the one that the previous sitting legislature had passed, but it died without further action.\(^{394}\)

In seeking to understand how S.B. No. 12 came to distract attention from the broad sales ban bill it is worth noting that “‘Cigarette’ Baker”\(^{395}\) was a lobbyist for the American Tobacco Company in Indiana at least as early as the very next session in 1897\(^{396}\) (and continued in its employ through the 1905 session).\(^{397}\)

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\(^{393}\)Journal of the Indiana State Senate During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, January 10, 1895: Regular Session 249-51 (Jan. 31) (1895).

\(^{394}\)Journal of the Indiana State Senate During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, January 10, 1895: Regular Session 776-77 (Feb. 28) (1895). For example, the substitute made imprisonment discretionary. It did include the same “deleterious to health” provision as the previous substitute.

\(^{395}\)“Grand Jury Call to Probe Bribery,” IN, Feb. 24, 1905 (1:1).

\(^{396}\)“A List of New Laws,” ISJ, Mar. 17, 1897 (2:1-3 at 3).

\(^{397}\)“The Trust and the Legislature,” Collier’s 40(13):9-10 at 9 (Dec. 21, 1907). Baker was a “lieutenant” of Frederick S. Gibbs, “the prince of professional lobbyists....” Id. On Gibbs’s activities on behalf of ATC in Tennessee, see above ch. 5. Justin Walsh, The Centennial History of the Indiana General Assembly, 1816-1978, at 289 n. 10 (1987), incorrectly stated that Baker was a lobbyist for “tobacco growers.”
whose core bribery methods were exposed at the 1905 session in connection with his unsuccessful efforts to frustrate passage of a comprehensive sales ban bill; after one legislator whom he had tried to bribe denounced him publicly, Baker fled to Canada and Europe before he was indicted; despite a legislative appropriation of $5,000 for his apprehension, arrest, and prosecution, he proved to be non-extraditable, and when he returned in 1909 after the bribee had died, the charges were dropped. 398

The national electoral realignment of 1896 did not manifest itself in the Indiana legislature in the sense that, although Republicans remained in control of both houses, their Senate majority was stable and their huge depression-inflated House majority shrank significantly. 399 In December 1896 Republican Representative Orson Woodruff 400 announced that at the 1897 session he would introduce a bill to prohibit cigarette manufacturing and sales. At the same time, “throughout the state” the WCTU was “obtaining thousands of signatures to petitions urging” passage of a ban bill, in support of which “a delegation of Indiana’s representative women” would lobby in the state capital. 401 As the session got underway, the Indiana WCTU, whose membership totaled 3,393, 402

398 Messages and Documents of J. Frank Hanly, Governor of Indiana: January 9, 1905—January 11, 1909, at 417-18 (1909); Executive Message of J. Frank Hanly, Governor of Indiana, to the Sixty-Fifth General Assembly: January 10, 1907, at 41-42 (1907); “Fugitive Lobbyist Returns and Is Arrested,” FWS, Apr. 17, 1909 (3:3-5); “Bribery Charge Is Nolled; Baker Cleared,” FWS, July 7, 1909 (2:6). For a comprehensive discussion of Baker and the Indiana law of 1905, see vol. 2.

399 According to Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 61 (2007), from the 1894 to 1896 the number of Republicans elected to the 50-member Senate increased from 32 to 33, while those elected to the 100-member House dropped from 82 to 52. For the first time Populists were elected to both houses, two to the Senate and nine to the House. A slightly different composition is presented in A Biographical Dictionary of the Indiana General Assembly, Vol. 1: 1816-1899, at 567-70 (Rebecca Shepherd et al. ed. 1980). The data on Populists are not straightforward because they secured their victories as fusion candidates with Democrats, as which they were listed by the secretary of state. Clifton Phillips, Indiana in Transition: The Emergence of an Industrial Commonwealth, 1880-1920, at 45 and 45 n. 95 (1968).


402 Report of the National Woman’s Christian Temperance Union: Twenty-Fourth
was vigorously pushing its petition drive, especially in churches; for example, in Porter County (pop. ca. 19,000), 4,000 signatures of a projected 10,000 had already been secured on 50 petitions. The opening days of the session saw the submission of petitions for a total sales ban. The reasoning behind such a general sales prohibition was briefly set forth in a petition that the faculty of Earlham College, a Friends/Quaker institution, on January 20, 1897, unanimously directed its president to sign and forward to the General Assembly. Driven by their perception of “the evil effects resulting from the pernicious habit of cigarette smoking by the youth” of Indiana, but “recognizing...the impracticability of regulating the sale of cigarettes within our State,” the professors petitioned the legislature to “enact a law to entirely prohibit the manufacture and sale of cigarettes within the State of Indiana....”

Woodruff did in fact introduce such a measure and was hardly alone: at least 11 tobacco-related bills (eight in the House and three in the Senate) were filed during the session’s first two weeks, prompting the hyperbolic press remark that it “seems certain that trusts, cigarettes and noxious weeds have to go, for about half the members have introduced bills to abolish them.” Woodruff’s bill, like McCaskey’s in 1895, prohibited the use of cigarettes as well as their manufacture.

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Annual Meeting...1897, at 182-83 (1897). As a proportion of the state population (in 1890) membership represented 0.15 percent compared to 0.22 percent nationally.


“Things It Will Do,” ISJ, Jan. 20, 1897 (8:3). It is noteworthy that all of the representatives who introduced anti-cigarette bills voted against the bill “to prohibit obstruction of the view of persons in theaters, halls or opera houses when theatrical or public performances for which an admission fee is charged....” Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 661-62 (Feb. 8) (1897) (H.B. No. 320 by Fornshell, defeated 20 to 68). Such bills, which were considered by numerous state legislatures in the 1890s, were widely decried as the worst kind of intrusive sumptuary legislation. See above this ch. For a range of contemporaneous opinion, see “The Theatre Hat Nuisance,“ NYT, Feb. 1, 1895 (8); Irving Browne, “Hats Again,” Green Bag 7(6):304-305 (June 1895); “Ohio’s Anti-High Hat Law,” NYT, Apr. 6, 1896 (9).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

and sale.\textsuperscript{407} Two more bills banned sale and manufacture.\textsuperscript{408} Among the other House bills were two providing for local licensing\textsuperscript{409} and three prohibiting sales to minors only.\textsuperscript{410} On January 27, the House Committee on Rights and Immunities reported back the manufacture/sales ban, H.B. No. 167 (which had been introduced by Republican Elisha Reynolds, a teacher and physician),\textsuperscript{411} recommending that it be completely stripped of its contents and substituted for by a no-sales-to-minors bill. This amendment, which would have repealed the aforementioned 1893 statute, went beyond the latter in covering all minors (not just those under 16) and cigarette wrappers and doubling the maximum imprisonment to 60 days, but also reduced the upper limit to $50 for first a offense.\textsuperscript{412} The committee then proceeded to recommend that all but one of the other House cigarette bills be indefinitely postponed on the grounds that their substance was covered by the surviving H.B. No. 167.\textsuperscript{413} (The one proposed measure to escape the committee’s guillotine was another no-sales-to-children bill, H.B. No. 152, to which the committee had already given a “do pass”

\textsuperscript{407}Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 99 (Jan. 13) (1897) (H.B. No. 54 by Woodruff).

\textsuperscript{408}Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 101, 143 (Jan. 13 and 14) (1897) (H.B. No. 64 by Democrat-Populist John Engle and H.B. No. 167 by Republican Elisha Reynolds).


\textsuperscript{412}Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 367-8 (Jan. 27) (1897).

\textsuperscript{413}Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 368-70 (Jan. 27) (1897) (H.B. No. 41, 54, 64, 66, 161, 313).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

recommendation a week earlier; after being recommitted to the Rights and Privileges Committee, the bill was once again recommended for passage and was passed by the full House by a vote 58 to 11, but died in the Senate. That the House (and, in this session, the legislature’s) majority limits had apparently been reached and acquiesced in by the extra-parliamentary advocates was signaled by a press report that it was “understood” that this substitute was “a compromise between the demands of the W.C.T.U. and the objections of the cigarette lobby” and was “likely to go through.” The latter was personified by the aforementioned “ex-Senator [Oscar A.] Baker, representative of the American Tobacco Company,” who “just as anxiously watched” this bill as it was “anxiously pushed by the W.C.T.U.” Although it is unclear whether Baker was already the Tobacco Trust’s secret agent during the 1895 session, when he introduced a cigarette licensing bill, he would remain its publicly known lobbyist until 1905, when his (and its) attempt to bribe legislators into voting against a stringent general prohibition of cigarette sales was revealed by one of its targets, contributing to the bill’s passage.

When the House took up H.B. No. 167 on the afternoon of February 1, several representatives presented “eighty petitions from numerous citizens of the several counties of the State, praying that the General Assembly pass a law prohibiting the manufacture and sale of cigarettes....” During the “long discussion of the cigarette question...the lobbies [were] full of women who had..."
been urging prohibitory legislation.”  After the House had agreed to the committee amendments, members began offering their own amendments, the only one of which to be adopted authorized (but did not require) the prosecuting attorney to compel any minor found with a cigarette in his possession to testify as to its source. Once two weakening amendments—to make imprisonment discretionary and to strip the bill’s coverage of non-cigarette tobacco—had been disposed of, the House, apparently in the spirit of the alleged WCTU/ATC compromise, by the overwhelming majority of 86 to 3 passed the no-sales-to-minors substitute for a general sales ban. (To be sure, Senate amendments eventually restored these two severe dilutions and the House agreed to them.)

If the bill fell far short of the anti-cigarette activists’ goals, the reason, according to the *Indiana State Journal*, was that although “[m]ost members announced themselves as personally in favor of entire prohibition,” they “believed that it would not stand the test of the federal courts.” The Concurrent House Resolution that Republican Samuel Nicholson, the eponymous author of the 1895 anti-saloon law and a nationally prominent prohibitionist, offered, was part of a WCTU-inspired nationwide campaign to eliminate the Tobacco Trust’s chief litigation strategy designed to deter legislators from passing general cigarette sales ban bills.

*Whereas,* The cigarette habit is a growing evil and a menace to the health of our people, and,

*Whereas,* On account of the Interstate Commerce Law, the States are forbidden to deal with the question thoroughly and effectively; therefore, be it

*Resolved by the House of Representatives, the Senate concurring,* That we request the

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422*Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 480-83* (Feb. 1) (1897). Democrats cast all three Nays.

423*Journal of the Indiana State Senate During the Sixtieth Session of the General Assembly, Commencing Thursday, January 7, 1897: Regular Session 561, 677-78, 1114-15* (Feb. 8, 12, Mar. 2) (1897); “The Legislature,” *ISJ*, Mar. 10, 1897 (1:1); *Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 1357, 1409* (Mar. 2, 3) (1897).

424“Cigarettes Must Go,” *ISJ*, Feb. 3, 1897 (7:7). Editorialy the paper would go no further than stating that because the “cigarette habit has become an evil of large proportions,” sentiment prevailed “everywhere” in favor of a prohibitory law regarding boys under 18. *ISJ*, Feb. 3, 1897 (4:4-5) (untitled edit).

425See below ch. 11.
United States Senators and members of the Lower House of Congress from the State of Indiana to bring the matter before the Congress of the United States, of giving such relief to the States, immediately, as will enable them to forbid the sale of cigarettes, entirely, and that they urge speedy action in this matter.426

The House adopted the resolution and two days later the Senate followed suit,427 but this federalist cri de coeur failed to give the legislators courage to act on their own in the interim, though that same afternoon the Senate did, albeit halfheartedly, pass a generalized sales ban bill.

The three Senate bills included one for licensing,428 one to prohibit cigarettes’ manufacture and sale,429 and one to legalize their sale.430 While this last bill was indefinitely postponed,431 the Senate passed the first two.432 The House, however, indefinitely postponed both, the licensing bill purportedly because its matters, too, were embodied in H.B. No. 167.433 More centrally pertinent here is the fate

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426Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 483-84 (Feb. 1) (1897) (Concurrent House Resolution No. 15).
427Journal of the Indiana State Senate During the Sixtieth Session of the General Assembly, Commencing Thursday, January 7, 1897: Regular Session 456 (Feb. 3) (1897).
428Journal of the Indiana State Senate During the Sixtieth Session of the General Assembly, Commencing Thursday, January 7, 1897: Regular Session 103 (Jan. 12) (1897) (S.B. No. 84 by Republican Charles Shiveley).
431Journal of the Indiana State Senate During the Sixtieth Session of the General Assembly, Commencing Thursday, January 7, 1897: Regular Session 268 (Feb. 1) (1897).
432S.B. No. 84, the licensing bill, which also declared certain sales to and uses by minors under 18 unlawful, was passed by a vote of 45 to 1. Journal of the Indiana State Senate During the Sixtieth Session of the General Assembly, Commencing Thursday, January 7, 1897: Regular Session 200, 304-305, 363 (Jan. 20, 25, 28) (1897); “The Legislature,” ISJ, Feb. 3, 1897 (1:1-3 at 2).
433Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular
of the manufacturing and sales ban on cigarettes and cigarette wrappers, S.B. No. 249, which had been introduced (by request) by William McCord, a 45-year-old Republican lawyer. After the Public Health Committee had recommended its passage, on the afternoon of February 1, at the same time that House was passing the defanged H.B. No. 167, the full Senate passed S.B. No. 249 by a unanimous vote of 39 to 0. To be sure, the Republican Indiana State Journal, which characterized the day’s legislative proceedings as “Both Houses Go After the ‘Fool-Killers’ with a Rush,” explained this vote, which had not been preceded by any discussion, as, at least in part, not grounded in substantive support: “Some of the senators voted for it in the belief that it would go no further, and others upon the theory that if the people who are urging this sort of legislation desire a law that will not stand in the courts they ought to have it.” The first group’s prophecy apparently fulfilled itself: the House Rights and Privileges Committee to which the bill was referred took a month to report it back with a “do pass” recommendation, but the very next day the full House killed it by indefinite postponement.

Thus, two sessions in a row the anti-cigarette forces were unable to build on one chamber’s passage to mobilize action in the other. Not until 1905, another national high point of legislative action, would they succeed in enacting one of the most stringent statewide cigarette sales bans.

Massachusetts: 1895 and 1898

The very fact that ban bills continued to be introduced in the Massachusetts House after the defeat of Clayton’s bill in 1892 and Brown’s identical bill in
1893\textsuperscript{440} nourished opponents’ fantasies that advocates were nothing but extortionists trying to blackmail the Tobacco Trust. Bills were filed in the House every year during the remainder of the decade.\textsuperscript{441} In 1895 the House did pass a cigarette sales and manufacture ban. Republican lawyer Franklin Barnes introduced another sales ban (House, No. 179),\textsuperscript{442} which the Health Committee recommended (with one dissent) “ought not to pass.”\textsuperscript{443} This rejection, in turn, the full House negatived by a vote of 46 to 68.\textsuperscript{444} After the House, by a vote of 70 to 32, had ordered the bill to a third reading,\textsuperscript{445} debate finally took place on April 26. Thomas Keenan, a Boston Democrat and journalist, who was apparently seeking to kill the bill, moved to amend by also making it unlawful to smoke cigarettes, but the Speaker ruled the amendment out on the grounds that it was broader than the subject matter that the committee had considered. Keenan

\textsuperscript{440}See above ch. 4.

\textsuperscript{441}These bills included H. 267 (1893), H. 706 and H. 901 (1894), H. 179 and H. 364 (1895), H. 246 (1896), and H. 294 (1897). Leonard Adams, \textit{Index to Massachusetts Legislative Documents, 1883-1899}, at 52 (1994). On House No. 267 (1893), which was identical to Clayton’s bill of 1892, see above ch. 4. After the House by a vote of 80 to 16 had negatived the Public Health Committee’s “ought not to pass” recommendation of an anti-cigarette sales bill (H. No. 706) in 1894, the chamber adopted an amendment limiting the bill’s applicability to minors before passing it. \textit{Journal of the House of Representatives of the Commonwealth of Massachusetts: 1894}, at 219 (Feb. 8), 673 (Apr. 1), 795 (Apr. 13), 1017 (May 14), 1132 (May 28), 1259 (June 12) (1894). “Bay State Legislature,” \textit{Lowell Daily Sun}, June 13, 1894 (8:3), did not make clear that the bill had been watered down. H. No. 246, the ban bill in 1896, was withdrawn. \textit{Journal of the House of Representatives of the Commonwealth of Massachusetts: 1896}, at 98 (Jan. 22), 559 (Mar. 19), 598 (Mar. 23) (1896). The \textit{Syracuse Courier} hailed the bill’s defeat as a “protest against paternalism.” “Home and State Paternalism,” \textit{MO}, Apr. 16, 1896 (4:3). H. No. 294, the bill in 1897, was also withdrawn. \textit{Journal of the House of Representatives of the Commonwealth of Massachusetts: 1897}, at 108 (Jan. 27), 336 (Feb. 23), 353 (Feb. 24) (1897); \textit{Journal of the Senate of the Commonwealth of Massachusetts: 1897}, at 284 (Feb. 26), 295 (Mar. 1) (1897).

\textsuperscript{442}Journal of the House of Representatives of the Commonwealth of Massachusetts: 1895, at 89 (Jan. 22) (1895). House, No. 364, based on a petition by A. A. Williams et al., also would have prohibited the sale/manufacture of cigarettes, but it was withdrawn. \textit{Id.} at 159, 501, 528 (Feb. 1, Mar. 11 and 12).


then moved to amend by lowering the fine from $100 to one cent, but the House, after voting 55 to 45 to retain the original fine, on a very close vote (61 to 59) passed the bill to be engrossed and sent up for concurrence. Opponents made a last-ditch effort to defeat the bill three days later on a motion, by Republican William Hayes, a cigar manufacturer and wholesaler, to reconsider the vote. Hayes insisted that “the tobacco used in cigarettes was pure and the very best,” while the aforementioned Roe continued to insist on their destructiveness and lethality. Calling the bill “ridiculous and absurd, useless and foolish,” Republican William Tolman, a life insurance company agent, failed to sway the chamber, which voted 55-76 to refuse to reconsider, though the larger majority “was due more to dislike of going over the business twice than to belief in the wisdom of the bill.” As in other years, however, the Senate came to the rescue of the cigarette industry by rejecting the House bill, without even needing a division, “with no compunction whatever,” no speech even being offered in its favor.

In 1898, William T. Worth and nine others petitioned the legislature to prohibit the sale or manufacture of cigarettes or cigarette tobacco and to impose

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448 “The Legislature,” Fitchburg Sentinel, Apr. 30, 1895 (4:1-3 at 2). The House had rejected Tolman’s effort to belittle the 1894 House bill by amending it to so that it would not apply to females. Journal of the House of Representatives of the Commonwealth of Massachusetts: 1894, at 1259 (June 12) (1894).
454 “Letter from Boston,” Fitchburg Daily Sentinel, May 2, 1895 (1:4-5 at 5). This Republican paper consoled supporters with the possibility that as some House members became senators the other chamber might turn more supportive of the bill. “Letter from Boston,” Fitchburg Daily Sentinel, May 9, 1895 (4:1-2).
a $100 fine for each offense\textsuperscript{455}—the arrival of which petition the \textit{Southern Tobacco Journal} duly noted.\textsuperscript{456} Republican Representative Charles Ramsdell of Lynn, who was in the grocery and real estate business,\textsuperscript{457} introduced the bill accompanying the petition as House No. 276, which was referred to the Public Health Committee.\textsuperscript{458} Two weeks later committee chairman Senator Charles Folsom, a Boston Republican in the paint and oil business,\textsuperscript{459} announced in the press that on February 16 the committee would give a hearing for parties interested in the bill.\textsuperscript{460} Of the hearings held that morning in the state house, “the liveliest” was on the anti-cigarette bill—not because of testimony about new chemical assays, but, rather, because of the opposition’s “attempt to show that there was something unusual and mysterious concerning the origin of the bills,” which “aroused some indignation among the women...present as advocates of the measure, and protest from two members of the committee.” Indeed, “seldom,” according to the \textit{Boston Evening Transcript}, had a small committee room been the “scene of sharper questioning....”\textsuperscript{461} The ruckus was initiated by the 46-year-old House chairman of the Public Health Committee, Boston Republican Edward Callender, a lawyer who was a graduate of Harvard College and Harvard Law School.\textsuperscript{462} In explaining to reporters an order that had been passed the previous day empowering the committee to summon witnesses for the hearing\textsuperscript{463} Callender

\textsuperscript{455}Petition—House 250 (Jan. 26, 1898) (copy furnished by Massachusetts Archives).
\textsuperscript{456}“Picked Over,” \textit{STJ} 22(21):3 (Feb. 14, 1898).
\textsuperscript{458}\textit{Journal of the House of Representatives of the Commonwealth of Massachusetts: 1898}, at 104 (Jan. 26) (1898).
\textsuperscript{459}A. M. Bridgman, \textit{A Souvenir of Massachusetts Legislators, 1898}, vol. 7 at 119, on http://www.archive.org/stream/souvenirofmassac1898brid#page/n5/mode/2up (visited Jan. 17, 2010).
\textsuperscript{460}E.g., \textit{BDA}, Feb. 11, 1898 (5:5) and Feb. 12, 1898 (5:4).
\textsuperscript{461}“State House Affairs,” \textit{BET}, Feb. 16, 1898 (6:3-4).
\textsuperscript{463}Whereas the House ordered the Public Health Committee to be “authorized to compel the attendance of witnesses at hearings on matters referred to it,” the Senate amended the authorization to include only send[ing] for persons in the hearings upon the petitions for legislation to prevent the manufacture and sale of cigarettes.” \textit{Journal of the Senate of the Commonwealth of Massachusetts for the Year 1898}, at 242 (Feb. 15) (1898).
stated that “for some years an Essex County politician has circulated a petition for the prohibition of the manufacture and sale of cigarettes.... His custom...was to ask clergymen and school teachers to sign the petition. Mr. Callender...regarded this as ‘strike’ legislation, and...somebody, perhaps, had made a good deal of money out of the manufacturers by means of the petitions and bills....” The target of what turned out to be (as one of the committee members put it) Callender’s “browbeating”\textsuperscript{464} was 42-year-old Frank Bonney, by occupation a heeler in a shoe factory\textsuperscript{465} in Lynn, where, for the previous three years he had initiated petitions requesting anti-cigarette legislation because “‘I’ve been interested against tobacco ever since I was a boy, when I smoked a cigar and it made me sick.’” Callender directed a series of hostile leading questions at him, accusing him, for example, of having told someone that he received a certain sum of money for every name he got on a petition. This quasi-criminal procedure prompted protests by three committee members\textsuperscript{466} supported by expressions of indignation by a delegation of WCTU women “quite innocent of some of the dark ways of the lobby on Beacon Hill....”\textsuperscript{467} Callender tried to defend his interrogation on the grounds that “there seemed to be something queer about the way these bills had been brought from year to year,” adding the assertion (with which Bonney disagreed) that at the previous year’s hearing clergymen and others who had initially supported the bill withdrew their support once they learned of the circumstances surrounding the bills’ origins. The chairman permitted Callender to proceed, but he stopped, whereupon the long-time WCTU anti-cigarette advocate Ella Aldrich Gleason, who earlier had “given a vigorous address” supporting the bills, took umbrage and vehemently insisted that “she was willing to stand up anywhere in the United States and say that she had never done a dishonest thing in her life.”\textsuperscript{468} At least one member of the public opposed the bill, Jacob Otis Wardwell (1856-1940),\textsuperscript{469} a former leading Republican state legislator\textsuperscript{470} (who had antagonized the Republican Party’s temperance wing as a

\textsuperscript{464}“State House Affairs,” \textit{BET}, Feb. 16, 1898 (6:3-4).

\textsuperscript{465}1900 Census of Population (HeritageQuest).

\textsuperscript{466}“State House Affairs,” \textit{BET}, Feb. 16, 1898 (6:3-4). It is unclear why Bonney was the target since William T. Worth was the person who submitted the petition, which Bonney did not sign.

\textsuperscript{467}“The Anti-Cigarette Bill,” \textit{BDA}, Feb. 17, 1898 (4:6).

\textsuperscript{468}“State House Affairs,” \textit{BET}, Feb. 16, 1898 (6:3-4).

\textsuperscript{469}“J. Otis Wardwell, Boston Lawyer, 83,” \textit{NYT}, Sept. 11, 1940 (34).

\textsuperscript{470}Commonwealth of Massachusetts, \textit{Official Gazette: State Government 1890: Biography of Members 27} (1890); \textit{Massachusetts of To-Day: A Memorial of the State, Historical and Biographical} 397 (Thomas Quinn ed. 1892).
result of his vote on the liquor question in 1888), a member of the Republican State Committee, and Boston corporation lawyer held in “favor...by large corporations.” Wardwell, who in 1896 had successfully represented a tobacco dealer in a case before the Massachusetts Supreme Judicial Court, opposed the bill on the grounds that its ban on the sale of cigarette tobacco “would prohibit the sale of all tobacco that might be used in a cigarette; in other words, would strike at ordinary prepared tobacco used in pipes.”

The day after the hearing the House accepted the committee report, “leave to withdraw, on the petition” and accompanying bill. The next day Republican Charles Beede, a shoe manufacturer from Lynn, moved both to reconsider that vote and to table his own motion. Not until almost a month later did the House take up the committee report for consideration, by which time Beede moved to amend the adverse committee report by substituting for it a new bill, House, No. 1059, which motion the House adopted in spite of Callender’s renewed insistence that the measure was “the rankest kind of strike legislation.” Beede’s measure weakened the original bill by striking the ban on the manufacture or sale of cigarette tobacco, thus limiting coverage to “cigarettes covered in whole or in part with paper, and filled with tobacco” and in effect adopting Wardwell’s criticism. This change was, presumably, designed to gain
votes, but when the question of ordering the bill to a third reading arose on March 18, Beede successfully moved that it be postponed until March 21, when his motion to postpone it, again, to the next day was lost. But following debate the bill was ordered to its third reading on March 22 by the overwhelming majority of 90 to 16.\textsuperscript{482}

The 108 to 70 vote—“without a word of debate”\textsuperscript{483}—on third reading in support of the total sales ban represented a sea change compared to the vote in 1892, although the party-line difference remained salient. The overall 61-percent Yes vote was the product of the 70-percent rate among Republicans and 35 percent among Democrats (compared to only 51 and 20 percent, respectively, in 1892). Republicans, who occupied 76 percent of all House seats, accounted for 83 percent of all Yeaes and 56 percent of all Nays. (Republicans’ predominance was less prominent because only 71 percent of them voted compared to 84 percent of Democrats.) Once again, the Boston metropole’s opposition was conspicuous: of the 23 (of 29) Boston Democrats who voted 18 (or 78 percent) voted Nay, whereas of the 14 (of 20) Boston Republicans who voted seven (or 50 percent) voted Nay.\textsuperscript{484}

The following day, when a motion to reconsider the previous day’s vote was debated and defeated by a vote of 67 to 94,\textsuperscript{485} the \textit{Boston Evening Transcript} editorialized that now that for the first time after successive annual failures a bill had gotten so far toward passage, there was also for the first time “real cause for alarm lest a law that is unnecessary and unjust” would be enacted. The newspaper regarded the child-protective purpose of the existing law banning the sale of tobacco to persons under 16 as “worthy,” but also “clearly as far as the State ought to go in this matter.” The editor then raised an important aspect of public

\textsuperscript{482}Journal of the House of Representatives of the Commonwealth of Massachusetts: 1898, at 588, 596 (Mar. 18 and 21) (1898).

\textsuperscript{483}“The Legislature,” \textit{BDA}, Mar. 23, 1898 (5:3). The bill’s engrossment was challenged by a rising vote (with 76 for and 50 against the bill), after which a roll call was demanded.

\textsuperscript{484}Calculated according to \textit{Journal of the House of Representatives of the Commonwealth of Massachusetts: 1898}, at 611-13 (Mar. 22) (1898). Party membership was taken from A. M. Bridgman, \textit{A Souvenir of Massachusetts Legislators, 1898}, vol. 7 at 133, on http://www.archive.org/stream/souvenirofmassac1898brid#page/n5/mode/2up (visited Jan. 17, 2010). Only one representative voted on the two cigarette ban bills in 1892 and 1898—tobacconist Frank Francis, who switched not only from No to Yes, but also from Democrat to Republican.

\textsuperscript{485}Journal of the House of Representatives of the Commonwealth of Massachusetts: 1898, at 623 (Mar. 23) (1898). See also House No. 1059 bill sleeve (1898) (copy furnished by Massachusetts Archives).
policy that would remain insufficiently debated during the decades to come as legislatures considered universal sales bans: “To prevent the young from using tobacco it is not necessary nor just to forbid its use to adults, which in effect is what is now proposed in the case of cigarettes....” Whether the editorial was engaged in mere alarmist tactics in order to defeat this particular bill or was in fact indicative of a more collectively held assessment of how multifaceted and successful the prohibitionist movement might become, it added: “[I]f the present bill passes, we may look for another step in the same direction and against tobacco in all its forms.” At the same time, pointing to recent studies by chemists refuting (once again) claims of poisonous adulterations, the Transcript warned against “over-magnifying the danger” of cigarettes even to youth; and not content with pooh-poohing the “sensational” stories about cigarette-induced insanity, the paper, in order to support its assertion that even if enacted, a sales ban would not prevent cigarette smoking in Massachusetts, fabricated a U.S. Supreme Court “case of the Iowa law” holding that “under the interstate commerce act no state legislation can prevent the introduction of cigarettes in original packages (which of course can be made conveniently small to meet special requirements)....”

Having thus done its part to insure the self-fulfillment of its prophecy, the newspaper had “every reason to believe that the Senate will reject the House bill,” especially since it was possible that “not a few” House members voted for it in the same belief.486

In the event, the Transcript had correctly foreseen the process in the Senate, where, after two hours of debate, the chamber refused a third reading to the bill without even a vote,487 prompting the headline, “Cigarettes Win.” During that floor discussion four Republicans (including Roe) spoke in favor of the bill, while eight Republicans and a lone (Catholic) Democrat opposed it.488 Unwilling to acknowledge that a popular movement might be standing behind the initiatives,

486“The True Bill Against the Cigarette,” BET, Mar. 23, 1898 (4:4) (edit.).
487 Journal of the Senate of the Commonwealth of Massachusetts in the Year 1898, at 538 (Mar. 28) (1898); “Cigarettes Win,” BDA, Mar. 29, 1898 (8:1); “State House Affairs,” BET, Mar. 29, 1898 (3:2-3).
488“Cigarettes Win,” BDA, Mar. 29, 1898 (8:1). The Democrat was James Gallivan, a Boston journalist; also opposed was Charles Folsom, chairman of the Public Health Committee. Four of the eight oppositional Republicans were lawyers, as were two of the four supporters. Biographical data are taken from A. M. Bridgman, A Souvenir of Massachusetts Legislators, 1898, vol. 7 at 133, on http://www.archive.org/stream/souvenirofmassac1898brid#page/n5/mode/2up (visited Jan. 20, 2010). Of 40 senators 14 were lawyers; 38 of 240 House members were lawyers. Journal of the House of Representatives of the Commonwealth of Massachusetts:1898, at 1233-45 (1898).
which, after all, were being pushed all over the country by the WCTU, which no one suspected of seeking to blackmail the Tobacco Trust, the Transcript contended that the “evil” perpetrated by the anti-cigarette bill survived its death because its friends’ success in securing House passage would “probably prove a sufficient incentive to the ‘strike’ legislators to bring it up again next year, in the hope that this year’s scare will make the manufacturers come down more handsomely than ever.” In fact, the anti’s did continue to press the legislature into the twentieth century to ban cigarette sales but failed to secure its passage. By 1901 the press referred to “[t]he annual contest to get a favorable committee report to prevent the manufacture and sale of cigarettes” being waged, above all, by the principal officers of the state WCTU and supported by numerous petitions, but such efforts never came to fruition in Massachusetts.

Kentucky: The House Passes a Ban on Sales in 1896 and Is Joined by the Senate in 1898 in Banning Sales and Possession

The prospects of enactment of an anti-cigarette law in Kentucky appeared to improve sharply when William Bradley was elected Kentucky’s first Republican governor in 1895. A leading Republican politician in a Democratic post-Civil War state, Bradley had previously contested and lost many (including gubernatorial) elections, in all of which “he attracted great support from

489 BET, Mar. 30, 1898 (4:1) (untitled edit.).
490 For example, in 1900 Henry C. Long filed a petition, which became House No. 502, which simply provided that the “sale of cigarettes, so-called, is hereby prohibited in this Commonwealth” without imposing a penalty. Copy furnished by Pappas Law Library, Boston University. Long was a prominent Boston lawyer who later ran for Congress as a Progressive.
491 “At Odds over Cigarettes,” BET, Mar. 5, 1901 (4:5-6) (an exceptionally lengthy account of a legislative hearing rehearsing all the traditional attack points).
492 In addition to a petition to prohibit the manufacture and sale of cigarettes that accompanied a bill and another like bill, neither of which made any progress, a total of 69 petitions were presented to the House to prohibit the sale of cigarettes. Journal of the House of Representatives of the Commonwealth of Massachusetts: 1901, at 102 (Jan. 22) (H. No. 212), 218 (Feb. 1) (H. No. 715), 192, 276, 295, 302, 303, 313, 316, 321, 322, 330, 341, 357, 380, 389, 391, 412, 423, 436, 449, 464, 475, 518, 529, 531, 540, 542, 554, 569, 580, 633, 712, 738, 752 (1901). See also Commonwealth of Massachusetts: The Journal of the Senate for the Year 1901, at 1140 (1901) (listing 33 page references to petitions in aid).
493 No such bill appeared in the index to the 1894 House or Senate Journal.
Kentucky blacks.” In spite of the fact that “[t]he chief obstacle” to a Republican victory in 1895 was his Democratic opponent’s “appeal to Democrats to vote for their party to stop ‘Negro domination’ by Republicans,” Bradley prevailed, aided by the presence of a third-party Populist candidate, who siphoned votes away from the Democrats, and by his own courting of the American Protective Association, a nativist, anti-Catholic organization. However, with Republicans in control of the House and Democrats of the Senate, Bradley was unable to achieve many legislative successes.\footnote{Kentucky’s Governors: 1792-1985, at 108 (Lowell Harrison ed. 1985). With Kentucky Democrats denouncing the APA, its members’ votes went solidly for Bradley, who was then adopted by the organization’s press as a promising national figure, whom it then mentioned as a possible presidential candidate in 1896. Bradley was the most prominent politician in the United States to have supported the APA, which did not push the issue of liquor—except opportunistically because of the alleged link between Catholics and saloonkeepers—let alone cigarette prohibition. Donald Kinzer, An Episode in Anti-Catholicism: The American Protective Association 199, 203, 214, 81 (1964); “American Protective Association,” Catholic Encyclopedia, on http://www.newadvent.org/cathen/01426a.htm (visited May 30, 2006). The 52 House Republicans represented the party’s first and (apart from that produced by the election of 1919) only majority it ever achieved in that chamber. Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 72-73 (2007).}

Bradley had, nevertheless, presented an interesting agenda. In addition to calling for “special taxes for the sale of tobacco, cigars, etc.,”\footnote{Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 50 (1896).} under the noteworthy heading, “Public Health,” the new governor, using the by now familiar mélange of pseudo-scientific yet partly accurate denunciations,\footnote{For example, more than 90 years later the monumental Surgeon General’s report on nicotine addiction stated that “adoption of cigarette smoking has been shown to be a risk factor for subsequent adoptions of other types of substance use.” U.S. Department of Health and Human Services, The Health Consequences of Smoking: Nicotine Addiction: A Report of the Surgeon General 1988, at 400-401 (1988).} declared in his message to the legislature on January 10, 1896:

And in this connection I desire to call your attention to the sale of cigarettes and cigarette paper. The medical profession almost [sic], if not entirely, condemns the use of these articles. The most serious deterioration of body and mind, especially among the youth, is caused by the use of these slow but deadly poisons. Out of their use grows an appetite for strong drink and opiates in their most dangerous forms, which eventually lead to destruction. In conformity to the request of many of the best citizens of the Commonwealth, I recommend that the sale of cigarettes and cigarette paper be

 declarations.

\section{Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s}
Four days later three bills were introduced in the House prohibiting the manufacture and sale of cigarettes and a fourth two days after that in the Senate banning their sale. Two of the House bills fell by the wayside, but the House passed H.B. 34 by an overwhelming majority of 67 to 2. For violations it imposed a fine of between $100 and $500 and/or imprisonment for one to six months. In addition, it provided that: “It shall be the duty of circuit judges to call special attention to this act.” However, the bill died in the Senate, which, also considered, but failed to act on, its own bill, which the reporting committee recommended not passing.

Two years later, in his message to the next regular session of the General Assembly on January 5, 1898, this time under the rubric, “Public Morals,”

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497 Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 57 (1896). Whether Bradley had been influenced by the Kentucky WCTU is unclear, but in 1897 he did appoint its president, Frances Estill Beauchamp, to the first Board of Charities and Corrections. Patsy Woodring, A Glorious Past & A Promising Future: A Brief History of the Kentucky Woman’s Christian Temperance Union 1880-1995, at 10 (n.d. [ca. 1995]). See also below this ch. On the Kentucky WCTU’s efforts to secure enactment of a Scientific Temperance Instruction law, see Nellie Sloy, “Kentucky,” US 19(2):11 (Jan. 12, 1893).


500 Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 615-16 (1896) (Feb. 24). The bill was introduced by Republican Jesse C. Speight, a lawyer representing the westernmost black patch tobacco counties of Fulton and Hickman.

501 Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 544, 604 (1896). According to the index, further action was reflected on two other pages, but no such action was reported there. The Western Tobacco Journal had predicted that the bill would “probably” pass the Senate, but failed to explain why it had not. “The Cigarette Bill Passes the Kentucky House,” WTJ 22(47):2 (Mar. 2, 1896); WTJ 22(50):10 (Mar. 23, 1896) (untitled).


503 Bradley’s racial message, replete with virtually every imaginable post-bellum trope, was profoundly mixed. In recommending repeal of the Separate Coach Law (1892 Ky
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

which also dealt with an aspect of control of intoxicating liquors, Bradley once more urged passage of an anti-cigarette bill:

Again attention is called to the sale of cigarettes and cigarette papers. Their use is universally condemned by the medical profession and every day [sic] experience. They invariably impair, and in many instances, especially among the youth of the land, destroy both body and mind. They beget a taste for even more deadly opiates and intoxicating drinks. I recommend that their sale be prohibited.\textsuperscript{504}

Two days after the governor had delivered his message, the House of Representatives appeared to signal sympathy with Bradley’s position by adopting

\textsuperscript{504}Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 52 (1898).
the following resolution: “Whereas, Tobacco smoke is offensive to many persons; Therefore, be it resolved by the House of Representatives of Kentucky, That the Sergeant-at-Arms is hereby instructed to prohibit smoking in this hall at all times during the session of the Legislature.” In fact, the House had adopted the same resolution in 1894—even adding a prohibition on chewing tobacco—and 1896. And at the special session of 1897, a Methodist minister representing a burley-growing county successfully had moved the adoption of this aesthetically motivated resolution:

Whereas, the librarian has cleaned up so neatly this hall, and covered the floor with a beautiful carpet for our comfort and pleasure

Be it resolved by the House of Representatives of Kentucky, That we show our appreciation of this work by instructing the sergeant-at-arms to prohibit all tobacco smoking in this hall, and spitting of tobacco juice upon the carpet during the session of this Legislature.

Several days later, Democratic Representative Robert E. Watkins

505 Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 75 (1898).


508 Journal of the Special Session of the House of Representatives of the Commonwealth of Kentucky 10 (1897) (Mar. 13). Fred Grider was pastor of a Methodist church in Barbourville; one of the counties he represented was Casey. Adair County News (Columbia, KY), posted on http://ftp.rootsweb.com/pub/usgenweb/ky/adair/news/1897d03.txt (visited July 13, 2006). The indexes to the House Journal for the next several sessions lack any reference to such resolutions. Legislative chambers remained contested sites between smokers and their opponents. See below ch. 18.

509 In 1898 Watkins was a 27-year-old attorney from Owensboro, Daviess County. Thirteenth Census of the United States: 1910--Population (HeritageQuest). Daviess County was located in the so-called Black Patch area of western Kentucky, which “grew virtually the world’s entire supply of...a dark, strong-flavored variety of tobacco, used primarily in the manufacture of snuff, chewing tobacco, and cigars.” Tracy Campbell, The Politics of Despair: Power and Resistance in the Tobacco Wars 12 (1993). After his one term in the Kentucky House of Representatives, Watkins, who had been admitted to practice law in 1898, was a city court judge in Owensboro for eight years. Owensboro Messenger, Dec. 29, 1944 (obituary) (text furnished by Robert Jenkins, Kentucky Legislative Reference Commission). As deciphered by the unpublished “key” to Martindale’s code (which was pasted into the volume for 1913 at the University of Iowa

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introduced H.B. 5 to “prohibit the use of cigarettes,” which was referred to the Committee on Public Morals. Before the end of January petitions were “being circulated all over the state,” like the one in Paducah that already contained several hundred names, “asking the legislature to enact a law prohibiting cigarette smoking.” By mid-February, Frances Estill Beauchamp, president of the state Woman’s Christian Temperance Union, stated in an open letter that a number of senators had promised to work to secure the bill’s passage and “we have the assurance of the Governor that he will affix his signature to it at once. An immense petition has been collected by the various [WCTU local] unions of the state and presented to their various members in the House.” After rejecting a number of amendments, the House passed the bill by more than a two-thirds majority vote of 56 to 27. The Democrats, who controlled the House with 75 seats against 24 Republicans and one Populist, voted 38 to 22 for the bill, while 17 Republicans favored it and only five were opposed.

Law Library), Martindale gave Watkins the lowest wealth rating (less than $1,000). Martindale’s American Law Directory 307 (35th Year, 1903). The basis of Watkins’ intense interest in banning cigarettes is unclear. An amateurish, late-twentieth-century history of the Kentucky WCTU did not even allude to the 1898 cigarette bill, let alone detail the WCTU’s role in passing it. Patsy Woodring, A Glorious Past & A Promising Future: A Brief History of the Kentucky Woman’s Christian Temperance Union 1880-1895 (n.d. [ca. 1995]).


514On Feb. 1 a committee substitute for the bill was proposed. The differences between them are unknown since bills are not archived. Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 331 (1898).

515The House voted on the substitute for H.B. 5, which the committee had proposed on Feb. 1. Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 331, 639-40 (1898) (Feb. 24). It is unclear how it differed from the original bill.

The text of H.B. 5 read as follows:

Section 1. It shall be unlawful for any person to sell, barter or loan or give, to make, fabricate or manufacture, to have on his premises, in his possession or under his control, a cigarette, whether made by hand or manufactured, whether it be made of tobacco or other substance, whether it be covered with paper or any other material. It shall be unlawful for any person to have on his premises, in his possession or under his control any substance or material out of which any part of such cigarette could be made with the knowledge or purpose that at any time such substance or material might become a factor of such cigarette.

Sec. 2. Any person who shall violate the law as set forth in the first paragraph of this act, or shall evade it by any trick, artifice or method whatever, shall, on conviction, be fined not less than ten nor [more] than one hundred dollars, or imprisoned in the county jail for not less than five nor more than fifty days, or both so fined and imprisoned in the discretion of the jury, and each violation or evasion of law shall be deemed a separate offense.

In its comprehensiveness and scope this bill may have been the theretofore most radical state legislative initiative prohibiting the sale, manufacture, and use of cigarettes even though it, unlike its title, did not use the word “use.” The brief wire-service report in The New York Times, which called the bill “sweeping in its penalties,” noted that it “absolutely prohibits the...use of cigarettes or cigarette material.” The Southern Tobacco Journal, deeming it “ahead of anything of the kind ever before conceived” to regulate “the awfully awful little rolls,” gave free reign to its sarcasm: “While he was at it the author of this great measure should have gone farther, and inhibited verbal and printed mention of the cigarette, and required the expugation [sic] of the foul word from every dictionary now in Kentucky and from all that may hereafter be brought into the State.”

Although the Kentucky press did not dwell on identifying the forces advocating and resisting passage of the bill, the New Orleans Daily Picayune, in pointing out that opponents hoped to delay the bill in the Senate long enough to insure that the session ended before a vote could be taken, observed that: “A good deal of the opposition comes from the tobacco interests of the state, while the sentiment in favor has been worked up by the W.C.T.U. and other similar organizations.”

Confounding the Louisville Courier-Journal’s prediction (or perhaps wishful

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518“Anti-Cigarette Bill in Kentucky,” NYT, Feb. 25, 1898 (3).
520DP, Mar. 2, 1898 (4:4) (no title).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

thinking) that the bill “will probably never come up for passage in the Senate,"521 two weeks later the Senate passed it by the even larger majority of 21 to 7.522 The Democrats, who held a 27 to 11 majority in the Senate, split, with 16 voting for and six against the bill; in contrast, five of the six Republicans who voted supported H.B. 5, the only opponent being a German immigrant who was president of a distillery in Louisville.523 Swinging to the opposite extreme, the Courier-Journal reported, without any anchor in the text, that the bill “is so stringent that many think it will prohibit the sale of tobacco in any form."524 Calling it “the most remarkable product of the legislative session,” an out-of-state paper declared on its front page that “Kentucky Proposes to Shut Out Even the Smell of Cigarettes.”525

The large majority by which both houses of Kentucky’s legislature voted to prohibit the sale and use of cigarettes was little short of astonishing since the state was, after all, by far the country’s leading tobacco producer, accounting for more than one third of the national crop.526 By the same token, despite the state’s leading role as a bourbon producer, prohibition, especially as promoted by the

521 “Encounter,” C-J, Feb. 25, 1898 (1:8). Tantalizingly, the same article stated that Representative “Rev. Mr. Petty” had “led the fight against the bill.” That a Christian minister directed opposition to cigarette control would certainly have been newsworthy; in fact, Petty voted for the bill. Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 641 (1898) (Feb. 24).

522 Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 1001 (1898) (Mar. 10). The committee that reported it out expressed no opinion on it. Id. at 1009.

523 Party affiliation is taken from Emma Cromwell, Official Manual for the Use of the Courts, State and County Officials and General Assembly of the State of Kentucky 117-18 (1898). The biographical information about the lone Republican opponent, Christian Stege, is taken from the Twelfth Census of the United States (HeritageQuest); http://www.oldlouisville.com/old_louisville_east_tour.htm (visited June 13, 2006). All three senators representing Louisville voted against the bill; in the House, the Louisville representatives split 3 to 3, with one not voting.

524 “Over Veto,” C-J, Mar. 11, 1898 (5:1).


526 In 1896, Kentucky accounted for 33 percent of the acreage, 36 percent of the production, and 25 percent of the value of tobacco. U.S. Department of Agriculture, Yearbook of the United States Department of Agriculture: 1896, at 573 (1897). At the 1899 census of agriculture, the corresponding proportions were 35 percent, 36 percent, and 33 percent. U.S. Census Office, Census Reports: Volume VI: Twelfth Census of the United States, Taken in the Year 1900, Agriculture: Part II: Crops and Irrigation, tab. 1 at 526 (1902). Kentucky had been the leading producer for decades. Id., tab. 2 at 527.
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

WCTU, also made considerable progress there). To be sure, nationwide only a small share of total tobacco output at this time was destined for cigarette manufacture: during the 10 years from 1892 to 1901, leaf tobacco used in the manufacture of cigarettes accounted for between 2.8 and 5.8 percent of all leaf tobacco used in tobacco manufacture. However, the Tobacco Trust itself, according to a statement by its general counsel, W. W. Fuller, at a hearing in a New York State antitrust case in 1895, used 10 million pounds, or 25 percent of the 40 million pounds of tobacco it consumed annually, for cigarette manufacture. Kentucky’s burley crop—the country’s largest—was largely used for the manufacture of pipe and “navy plug” chewing tobacco. These relative

529“Tobacco,” WSJ, Sept. 21, 1895 (2); “Tobacco Trust Attacked,” WP, Sept. 21, 1895 (3). If these figures were accurate, the Tobacco Trust accounted for little more than one-tenth of the 344 million pounds of tobacco used in tobacco manufacture that year. U.S. Department of Agriculture, First Annual Report on Tobacco Statistics tab. 13 at 88-89 (Statistical Bull. 58, 1937).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

Averaged about one-third of the total tobacco crop. Dark tobacco provided all of the tobacco used for snuff and much of that used for manufacturing chewing tobacco. The Kentucky and Tennessee crops were chiefly exported. Report of the Commissioner of Corporations on the Tobacco Industry, Part I: Position of the Tobacco Combination in the Industry 46-47. The statements by Tracy Campbell, The Politics of Despair: Power and Resistance in the Tobacco Wars 12, 127 (1993), that burley was “used primarily in smoking tobacco and in a relatively new product, the cigarette” and “was a chief ingredient in cigarettes” are not correct for the period in question. Burley tobacco did not achieve that status until after the dissolution of the Trust, when in 1913 R. J. Reynolds Company began manufacturing Camel, which quickly became the best-selling cigarette (taking over 40 percent of the whole cigarette business within five years) and was soon thereafter imitated by Ligget & Myers (Chesterfield) and the American Tobacco Company (Lucky Strike). Nannie Tilley, The R. J. Reynolds Tobacco Company 210-11, 220, and generally 203-25 (1985); Jerome Brooks, Green Leaf and Gold: Tobacco in North Carolina 29-31 (1997 [1963]). Tilley specifically noted that these new cigarettes “paved the way for the increased use of Burley. Actually had Burley leaf not been brought into the manufacture of cigarettes, its production might easily have declined almost in direct proportion to the decline in popularity of chewing tobacco.” Id. at 224. An advertisement in 1917 for Lucky Strike in 1917 stated: “We’ve been working for five years to produce a satisfactory cigarette from Burley tobacco.” WP, Mar. 6, 1917 (9). In 1920 the chairman of the Burley Tobacco Growers Association stated that the “rise of Burley tobacco in cigarettes has been going on only for a few years.” “Burley Tobacco Growers Urged to Organize,” Tobacco 71(2):18-19 at 19:1 (Nov. 11, 1920).

Some of our exchanges seem to think the passage of the cigarette bill is a blow at the tobacco interests of the country. We cannot see upon what grounds they form their conclusions. Very little tobacco goes into the manufacture of cigarettes. The bill will not only enable us to raise the same quantity of tobacco, but a better quality of boys.531

The prohibition nevertheless represented a threat to the American Tobacco Company, which not only held a quasi-monopoly on cigarette production, but by 1898 had also formed a plug-tobacco combination (Continental Tobacco Company).532 In turn, however, the Tobacco Trust would have been in a position to inflict even greater economic injury on the Kentucky tobacco industry: “The American Tobacco Company, as the principal producers of plug tobacco in the United States, is by all odds the largest buyer of burley tobacco.”533

Hartford Herald (KY), Mar. 23, 1898 (2:1) (untitled edit.)


532 Report of the Commissioner of Corporations on the Tobacco Industry, Part I:
vulnerability of the state’s agricultural industries was underscored by the fact that Louisville was (together with St. Louis) one of the two leading centers of plug tobacco manufacture, as early as 1891 the newly formed American Tobacco Company had bought the National Tobacco Works, a leading plug manufacturer in Louisville.

The threat that ATC’s possible departure posed for the Kentucky economy was exquisitely on display literally at the same time the House voted to ban cigarettes and the following day. On the afternoon of February 24, while the House was debating and voting on H.B. 5, the Tobacco Trust—which, according to the Courier-Journal, “is constantly enlarging its mammoth plant at Seventeenth and Broadway, which is already the one of the largest in the country”—(presumably coincidentally) took out building permits for two new warehouses and factories in Louisville, which were to be built “at once.” The next day ATC’s picking, drying, and steaming warehouses in Louisville were destroyed by fire, throwing 1,400 adult and child workers out of work.

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537 “Tobacco Fire in Louisville,” NYT, Feb. 26, 1898 (3). See also the more detailed account in “The Trust’s Burned Rehandling Plant,” STJ, 22(24): n.p. [5:2-3] (Mar. 7, 1898). This trade weekly, edited in Winston, NC, which opposed the Tobacco Trust, found the frequency of fires at ATC plants odd: “This trust has been more unfortunate in this respect than any other combine on earth. ... That there was any crookedness in these [sic] multiplicity of fires is an idea no one will entertain for a moment. Rather it looks as though Fortune frowned upon the unholy combination.” “Many Fires,” STJ 22(24): n.p. [1:3] (Mar. 7, 1898). The Wall Street Journal published three brief pieces about the fire, the insurance adjustment, and J. B. Duke’s presence in Louisville, but nothing about passage of the bill. “The Tobacco Fire,” WSJ, Feb. 26, 1898 (1:2); “Tobacco,” WSJ, Feb.
company promised that within several days all these workers would begin working at two of its factories in the city and that, when rebuilt, the warehouse would employ 1,800 workers, while the large addition then being built to one of those factories would increase employment there to between 1,000 and 1,500.\textsuperscript{538} However, the next day rumors began circulating that ATC would move “the immense rehandling plant” to St. Louis. In denying these stories the company emphasized that when the aforementioned rebuilding and addition were completed, “we will give employment to about 4,500 men” in Louisville.\textsuperscript{539} Although these events failed to deter a majority of the Senate a week later from supporting the House bill, perhaps they gave the governor and lieutenant governor pause about the wisdom of encroaching on the Tobacco Trust’s interests.

Finally, the potential for igniting opposition within the state to cigarette prohibition was underlined by the fact that a greater proportion (15.1 percent) of farms in Kentucky derived their principal income from tobacco than in any other state.\textsuperscript{540} Significantly, Virginia and North Carolina, the states producing the bright yellow type of tobacco used in the Tobacco Trust’s cigarettes,\textsuperscript{541} did not pass anti-cigarette legislation.

\textit{But A Waffling Governor Passes the Buck to the Lieutenant Governor to Veto the Bill}

Business resistance to the bill, which, according to the \textit{Courier-Journal}, had “attracted so much attention throughout the state,”\textsuperscript{542} was encapsulated in a letter to Governor Bradley from the Louisville Board of Trade requesting that he veto

\textsuperscript{538} “Quick Work,” \textit{C-J}, Feb. 28, 1898 (3:3).

\textsuperscript{539} “To Stay Here,” \textit{C-J}, Mar. 1, 1898 (8:4).

\textsuperscript{540} [U.S.] Bureau of the Census, \textit{Abstract of the Twelfth Census of the United States: 1900}, tab. 119 at 130 (3d ed. 1904). The following states recorded the next highest proportions (in percent): Virginia (11.6); North Carolina (10.1); Connecticut (7.3); Maryland (6.6); Tennessee (2.7). \textit{Id.}


\textsuperscript{542} “Cigarette Bill,” \textit{C-J}, Mar. 20, 1898 (sect. 1, 7:2).
it. Written by the Board’s President, lumber merchant Charles Mengel, it presumably provided the basis for the aforementioned claim that the bill was so expansive that it could be interpreted to outlaw possession of any and all tobacco:

This bill is unjust and unreasonable, and must work a serious hardship to the citizens of Kentucky of almost all classes, and must necessarily drive capital from the State. It is unconstitutional for the reason that it deprives citizens of the right to contract for any material which might be converted into cigarettes, whether such material should have other uses or be intended for such specific purpose. It would, in fact, deprive a citizen of his liberty, through liability to arrest and imprisonment for various trivial acts, such, for instance, as having in his possession any material out of which any part of a cigarette could be made.

Visitors or transient travelers within the limits of Kentucky would...be... liable to imprisonment or fine for being found in possession of cigarettes or, indeed, cigarette material of any kind.

As far as the Board of Trade is advised, every fair-minded citizen to whom this bill has been read pronounces it thoroughly iniquitous and calculated to work harm to the citizens of this Commonwealth in ways too various to be mentioned. Since a U.S. Treasury Department report on internal commerce had noted as early as 1886 that “Louisville is the natural outlet of the greatest and most productive tobacco-growing market in the world, a fact which for many years has been utilized to her commercial advantage,” the Board of Trade’s intense opposition to any state intervention that might disrupt the local industry’s continued growth and profitability was a foregone conclusion.

In the following days the press abounded with speculation as to whether Governor Bradley would sign the bill at all and before he left the state to attend the launching in Virginia of the battleship Kentucky and what the lieutenant governor would do in his stead. Earlier, the Paris Bourbon News had reported that it was believed that he would not veto the bill and would allow it to become law without his signature. But now the Nashville Banner insisted that “the best guessers say that the cigarette bill will not be signed” and repeated the next day that Bradley was “still in the veto business at the same old stand,” adding that two

543 Twelfth Census of the United States, 1900, Schedule No. 1—Population, HeritageQuest.
544 “Cigarette Bill,” C-J, Mar. 20, 1898 (sect. 1, 7:2).
545 Treasury Department, Report on the Internal Commerce of the United States 652 (1886) (by Wm. Switzker).
546 Bourbon News (Paris), Mar. 15, 1898 (4:1) (untitled).
547 “Just From Old Kentucky,” NB, Mar. 21, 1898 (4:6).
unnamed vetoes were being prepared. Others admitted their inability to predict. Two days before his departure Bradley was so inundated with telegrams requesting that he sign or veto this or that bill that his “remarks and his manner,” on receiving, at one time, a “bunch” of nine telegrams urging him to veto the cigarette bill, were, according to the Courier-Journal, “such as to make a friend of the senders of the messages go out and send the following message to headquarters: ‘Don’t let any more telegrams come here. He is mad enough now to resolve his constitutional doubts in favor of the bill.’” The Louisville newspaper matter of factly asserted in a subheadline, “And Cigarette Measure to Be Knocked Out,” and then added in the body of the article: “The Cigarette Bill will also be vetoed.” Whose “headquarters” were involved and why Bradley would have expressly requested legislation prohibiting cigarettes in 1896 and 1898 and then vetoed what he had wished for are questions that the newspaper neither raised nor answered. But it did inadvertently shed light on the decisive influence the governor decided to permit himself to be saturated with during the ten days after adjournment at the end of which the bill would become law without his signature: on his trip to Newport News, Virginia, Bradley “will have a private car attached to the big Louisville Board of Trade special next to the sleeper in which his staff will travel.”

On the eve of his departure Bradley finally revealed that he would not act on the cigarette bill or several other important measures, leaving them for the lieutenant governor to veto or become law without his signature. On March 24—the next to last day before bills would become law without gubernatorial signature—the very morning on which Lieutenant (and acting) Governor William Worthington finally acted, the Courier-Journal reported that the cigarette bill might be allowed to become law without a signature. Instead, however, he issued a lengthy veto message. Worthington, who had fought in, and helped raise a Kentucky company for, the Union army during the Civil War, became the state’s first Republican Lieutenant Governor in 1895. Earlier he had been owner-manager of an iron furnace. A very unusual document in the early history of tobacco regulation, his message is well worth quoting in extenso:

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548“Just From Old Kentucky,” NB, Mar. 22, 1898 (2:1).
552“Pardons,” C-J, Mar. 24, 1898 (5:1).
553G. Glenn Clift, Governors of Kentucky 1792-1942, at 223-24 (1942).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

[While being in full sympathy and accord with the motives which prompted the Legislature to enact the law for the suppression of a vice which has become alarmingly prevalent in the State. And while I am free to admit the power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity of the citizens thereof, subject, however, to the restrictions and limitations contained in the state and Federal constitutions I am compelled to refuse my approval of Bill No. 5...for the following reasons:—

1st The act, as I conceive it, is in direct violation of section 1 of the constitution of Kentucky, in this, that it deprives the citizen of his inalienable rights which are higher and above all law. This bill interdicts and makes it unlawful for any person to have on his premises, in his possession or under his control any substance or material out of which any such cigarette could be made. Thus striking a fatal blow at one of the most profitable industries of the state and one that has been coextensive with the state, and one from which the state and citizens have derived more profit than from any other branch of industry pertaining to the industries thereof. Could not the Legislature with as much justice and propriety enact a law prohibiting the breeders of horses in the state from having in their possession anything in the way of the high spirited symmetrical and fleetflooded [sic] thoroughbred, because perchance he might fall into the hands of some turfman and be made to exercise his powers upon the course, simply for the reason that some bigoted individual or class of individuals might urge that it was subversive of the morals of the good people of the state, and thus strike down another of the profitable industries of the state and one that the true Kentuckyan takes more pride in than any other that pertains to this favored land.

The fiction upon which the advocates of this bill urge its approval is that the use of cigarettes is deleterious and destructive of the health of the user, not only physically but mentally. If this is true, and doubtless is, there should be some law to prevent their use. But the question arises is the use of tobacco more unhealthy when smoked through a paper tube than if smoked in the clay, cob or more fashionable meerschaum. The use of several hundred years has demonstrated to the American people that the use of tobacco is not detrimental to health but on the contrary is one of the most harmless luxuries now in use. The evil therefore resulting from the use of cigarettes is not chargeable to the tobacco, the principal ingredient in their make up, but to the adulteration thereof by the admixture therewith of the poisonous and destructive drug which allures the victim on to the destruction of both mind and body; it is also contended by the friends of the bill that the wrappers are medicated or impregnated with certain poisonous drugs, which are deleterious to health, if such be the result, which is admitted, why strike down this great industry in which so many of our citizens find employment, because unprincipled and avaricious individuals who for the sake of gain are catering to their artificially created, pernicious and destructive appetites.

Let a law be enacted making it a felony for any person [sic] persons or corporation to adulterate by the admixture of any poisonous drug or the intermingling therewith [of] any substance, whatever, deleterious or detrimental to the consumer thereof, whether in the form of cigars [sic] cigarettes [sic] smoking or chewing tobacco, and you at once strike at the root of this evil which the community is justly in arms against today and thus save the state one of its most profitable industries and to the citizen his personal liberty, to pursue,
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

unvexed by sumptuary and fanatical laws, the calling of his choice and in his opinion best calculated to subserve his personal happiness and material interests and promote his happiness and those associated with him or dependent upon him. Also we deem it a violation of Section 5 of the constitution of the State, the right of acquiring and protecting property; and also in violation of section 2 of the State constitution, which declares that absolute and arbitrary power over the lives [sic] liberty and property of freemen exists nowhere in a Republic, not even in the largest majority. Another and most serious objection to this bill is that it fails and is powerless under the decisions of the Federal Court, that prevent the evils sought to be suppressed by this act: to wit, the sale and use of cigarettes in the Commonwealth as it is violation of Article One Section three of the Constitution of the United States. “The Congress shall have the power to regulate the commerce with foreign Nations and among the several states and with the Indian tribes. See decision in the case of the state of Tennessee 82 Federal reporter page 615, in which case it was decided that citizens of the several states had the right to ship under the provisions of the section above quoted into the several states articles of commerce in unbroken packages and expose the same for sale. See also the decision in case of the State of Iowa vs McGregor 76 Federal Reporter page 956 and various other decisions of the Federal Courts upon this point. This being the case the only effect of the law would be to deprive our own citizens of the right to manufacture the article in question, and deprive them of the profits arising from the manufacture and sale of this one of our most profitable industries, thereby throwing out of employment thousands of our worthy and most valuable citizens.

Under these circumstances and a thorough conviction that the law is unconstitutional and destructive of the best interests and prosperity of the state I decline to append my signature to the bill.554

Since Worthington’s central concern was manifestly to protect the tobacco industry, he would, presumably, have simply dropped the interstate commerce argument had he faced the veto decision in 1900 after the U.S. Supreme Court had upheld the Tennessee law.555 More interesting, however, would have been the way in which he would have sought to resolve the conflict between profit and health had more robust scientific arguments been available demonstrating that cigarettes’ peculiar dangers had nothing to do with greed-driven adulteration556—especially since the accumulation of unprecedentedly

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554 Executive Journal of Governor William O. Bradley, Mar. 24, 1898, at 296-99, in Kentucky Department for Libraries & Archives, Public Records Division. The message was published the next day as “Vetoed,” C-J, Mar. 25, 1898 (4:7), but is quoted here according to the handwritten original because the printed version contained several typographical errors.
555 See below ch. 12.
556 To be sure, knowledge of the health impact of inhalation on cigarette smokers was
overwhelming medical evidence of cigarettes’ unique lethality has, more than century later, yet to prompt any legislature to pass such a sales ban.

**After Further Legislative Measures Stall, the Initiative Reverts to the Local Level**

Worthington’s veto did not end the legislative campaign for a cigarette ban. In his message to the legislature in January 1900, Bradley’s Republican successor, William Taylor (who served only very briefly before the legislature nullified his election, declaring his Democratic opponent governor),\textsuperscript{557} proposed much diluted legislation that would apply only to minors:

> Your attention is called to the widespread evils resulting from the use of cigarettes and cigarette paper. The medical profession universally denounce this habit, as a menace to the youth of the country. From such habit flows all manner of vices, which too often culminate in physical wreck and mental disorder. A more stringent law preventing the use of these articles by minors is urged.\textsuperscript{558}

Nothing came of the governor’s proposal nor did the legislature take any action on Representative Watkins’ reintroduced bill prohibiting the use, manufacture, or sale of cigarettes.\textsuperscript{559}

In 1902 two Democratic members of the House of Representatives introduced two anti-cigarette bills, one of which proposed to prohibit their manufacture or sale\textsuperscript{560} and the other their use.\textsuperscript{561} The former was read a second time and placed in the orders of the day, but the House took no further action on it.\textsuperscript{562} The anti-use bill came up for a roll-call vote on whether it should be made the special order of the day two days later, on which its supporters prevailed 48 to 32, but the

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\textsuperscript{557}Taylor v. Beckham, 108 Ky 278 (1900).

\textsuperscript{558}Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 43. (1900).

\textsuperscript{559}Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 116 (1900) (H.B. 22).


\textsuperscript{562}Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 294, 299 (1902).
chamber failed to take any action.\textsuperscript{563}

The more important proceedings in 1902 took place in the Senate where on January 23 Democrat George T. Farris introduced S.B. 140 “to prohibit the use of cigarettes.”\textsuperscript{564} Farris, who had voted for H.B. 5 in 1898, represented Garrard County, where Carry Nation had been born a few years before Farris, who was a commercial printer.\textsuperscript{565} After the Committee on Public Health had reported it out with the recommendation that it ought to pass,\textsuperscript{566} Farris’s motion on March 6 that the Senate take up the bill for consideration passed by a vote of 28 to 6, with all the No votes being cast by members of Farris’s own party, which controlled the chamber 25 to 13. Twelve Republicans voted Yes along with 16 Democrats.\textsuperscript{567}

Sections 1 and 3 of S.B. 140 were identical to sections 1 and 2 of H.B. 5, but it contained three other sections rendering it even more comprehensive and stringent than Watkins’s bill, in particular by prohibiting commercial importation:

\begin{quote}
Sec. 2. It shall be unlawful for any person, firm or corporation to sell, offer to sell or to bring into the State for the purpose of selling, giving away or otherwise disposing of any cigarette paper, or substitute for the same.

Sec. 4. Be it further enacted, That the judges of the criminal courts, and circuit courts of this State with criminal jurisdiction, shall give this matter in special charge to the grand juries of the county.

Sec. 5. Be it further enacted, That this act take effect from and after its passage, the public welfare requiring it.\textsuperscript{568}
\end{quote}

No sooner had the bill been read the next day than Farris himself began proposing amendments to weaken his own bill and presumably make it less unpalatable to opponents. First, he proposed striking from section 1 the last

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\textsuperscript{563}Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 652-53 (1902). Twenty-five of the 32 No votes were cast by Democrats, who controlled the House 75 to 25. Ex-lieutenant-governor Worthington, now the minority floor leader, voted for the motion.

\textsuperscript{564}Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 178 (1902).

\textsuperscript{565}Thirteenth Census of the United States, 1910: Schedule of Population (HeritageQuest).

\textsuperscript{566}Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 393 (1902) (Feb. 14).

\textsuperscript{567}Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 781-82 (1902) (Mar. 6).

\textsuperscript{568}Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 786 (1902).
\end{quote}
sentence making it “unlawful for any person to have on his premises, in his possession or under his control any substance or material out of which any part of such cigarette could be made with the knowledge or purpose that at any time such substance or material might become a factor of such cigarette,” which opponents four years earlier had claimed would have destroyed the entire tobacco industry. Having adopted this amendment, the Senate also voted for his proposal to strike section 5, which would have accelerated the law’s effective date. The chief arguments deployed by those opposed to regulation were the harm that the law would do to the tobacco industry in Kentucky and the ability to prevent boys from smoking cigarettes if the already existing law were enforced.

Despite these dilutions, Senator James Campbell Cantrill then tried to kill the bill by moving that it be recommitted to the Committee on Agriculture and Manufactures. Cantrill, who had voted against Watkins’ bill in 1898, was a farmer who in 1908 would become president of the Kentucky branch of the American Society for Equity, which conducted an intense campaign to secure higher prices for tobacco farmers from the tobacco companies. In that year and position he also supported a bill (opposed by the Tobacco Trust) that would have placed the tobacco industry under the police power and imposed a ten-cent per 1000 lb. tax on dealers buying tobacco leaf for manufacturers, whose author defended it as a response to the oppression of grinding monopoly that had reduced producers to “abject misery and want.” In 1902, however, Cantrill apparently placed a higher value on promoting the interests of the entire tobacco industry than on inflicting a considerable material and even greater symbolic blow on the cigarette monopoly of the oppressor American Tobacco Company. At the very same time Cantrill was also Farris’s main adversary on the Senate
floor regarding a WCTU-sponsored local option liquor prohibition bill. Cantrill’s recommittal motion lost 13 to 21, with all 13 Yes votes cast by Democrats. After Cantrill and several other senators had proposed various amendments, “further action thereon was cut off” and resumed the next day, March 8. That morning the Courier-Journal published a lengthy editorial attacking the bill. Just two days earlier it had editorially defended the Tobacco Trust by arguing that with tobacco—“an article of universal consumption and...as much a staple as iron or steel for the whole world is a buyer”—“a natural monopoly of this State...it is idle to preach that a monopoly will force the price down below the cost of production.” In the face of ATC’s growing monopolization of the entire tobacco industry (other than cigars), which had unleashed protests nationwide, the newspaper, welcoming the recent advent of tobacco factories in Louisville, asserted that despite centralization by means of consolidation: “There would always be a great leaf market here and there will always be competition for the crop.” Then on the morning of the final legislative debate the Courier-Journal protested that the pending anti-cigarette bill was “a menace to the tobacco growing interests of Kentucky, the principal tobacco growing State.” The aforementioned decade-old no-sales-to-minors law was “well enough, but for the State to attempt to regulate the tastes and practices of adults in so simple a matter is preposterous and undemocratic. The personal liberty of the citizen guaranteed by the Bill of Rights would be nullified. Such a law has no place in a republic, even if it did not mean a hardship to the tobacco planter.” The editorial then stated that Burley tobacco production was “one of the most profitable industries,” with especially high prices being paid for those types used by cigarette manufacturers, which were growing more and more Burley; increased foreign demand was likely to maintain prices at profitable levels for Kentucky planters. Consequently: “Any blow to this industry would result in heavy losses to the planting interests as well as to the manufacturers.” While admitting that cigarettes were “being used less and less in this country,” the newspaper underscored their popularity in Europe and Japan and warned against “crippl[ing] one of our greatest agricultural industries.”

The Courier-Journal exaggerated both the decline in domestic cigarette consumption (which unbeknownst to contemporaries was about to end after five

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573 The outcome was the same and the voting pattern was similar. “Finish Fight,” C-J, Mar. 5, 1902 (2:3-5); “Decisive,” C-J, Mar. 6, 1902 (1:2).


576 “Menace to a Great Industry,” C-J, Mar 8, 1902 (6:2).
years) and the role of burley tobacco as an ingredient in cigarettes, which it would not occupy for another decade. 577 However, even if, contrary to the newspaper’s claims, enactment of the anti-cigarette bill would not have directly, immediately, or significantly harmed the tobacco industry in Kentucky—which, just a few weeks earlier, the paper in a full-page article had emphasized was the state’s biggest manufacturing industry according to the census of 1900, 578 though cigarettes did not yet play a major role in tobacco growing, manufacture, 579 or consumption—the editorial nevertheless intuitively grasped the symbolic and ideological importance of such a prohibition.

That day Democrat Charles Carroll, an opponent of the bill, proposed in effect to nullify section 2 by amending it not to apply if there was “no poisonous or deleterious substance in the wrapper or filler; and a certificate from a director or other officer of the agricultural experiment station at Lexington shall authorize the manufacture or sale of the cigar or cigarette, subject to the penalties of this act if there is any deleterious substance or poison in the manufactured article.” 580

577 See above this ch. Until 1913 “cigarettes were made largely of straight bright tobacco or a blend of bright with Turkish. ... In 1913, Camel cigarettes...were the first...to use a heavily flavored...burley as part of its blend.” Elmo Jackson, “The Consumption of Tobacco Products: A Descriptive Economic Analysis: United States, 1900-1940” at 69-71 (Ph.D. diss., Harvard U., 1942). In 1912 it was estimated that only 1.4 percent (3 million of 215 million pounds) of burley tobacco was used for cigarettes; this share rose to 10.0 percent in 1917 and 53.4 percent in 1935, by which time about 30 percent of the tobacco in the new Camel-type cigarette was burley. E. Mathewson, The Export and Manufacturing Tobaccos of the United States, with Brief Reference to the Cigar Types 81 (USDA, Bureau of Plant Industry. Bull. No. 244, 1912); Jackson, “The Consumption of Tobacco Products” tab. 4 at iii, 62. Although it concurred in the policy conclusion, a North Carolina-based trade journal had remarked at the time of the previous legislative debate: “Offering as a reason why the Kentucky legislature ought not to pass the absurd anti-cigarette bill now before that body, the ‘Weed,’ of Louisville, states that ‘since the West has gone into this line of the tobacco business, more Kentucky tobacco is being used in cigarette manufacture than any other kind.’ There we take issue with our much esteemed contemporary. This statement needs revision.” STJ 22(25):n.p. [1:3] (Mar. 14, 1898) (untitled).

578 “Fine Showing Made by Kentucky’s Manufacturing and Mechanical Industries,” C-J, Feb. 15, 1902 (4). Tobacco was the biggest industry only in terms of value of products, but not with respect to wages, wage earners, capital, or number of establishments.

579 No cigarette factory was established in Kentucky until 1918-19. Annual Report of the Commissioner of Internal Revenue for the Fiscal year Ended June 20, 1919, tab. 11 at 135 (1919) (first listing for tobacco excise purposes).

580 Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 832
The Senate then voted 20 to 8 for the amendment, which would have gutted the bill, with 18 of the 20 Yes votes cast by Democrats. The two Republicans may have voted Yes solely in order to be on the prevailing side and thus entitled to move for reconsideration; on that motion Farris and 14 other senators voted to reconsider, thus barely prevailing over Cantrill, Carroll, and 12 other Democrats.581

There then followed a new round of proposed amendments. Carroll proposed amending his own amendment by adding a phrase that appeared to exclude from the entire bill coverage of any non-deleterious cigarettes or cigars. The Senate adopted both this amendment and another Democrat’s amendment eliminating the option of imprisonment from the penalty section. The Senate also adopted Cantrill’s proposal to strike section 4 and replace it with a ban on selling or giving cigarettes to anyone under 21 years of age or to anyone “with the knowledge that” they were to be sold or given to such child, but rejected (by a tie vote) his other proposed amendment to strike out section 2 altogether.582 On the deciding vote as to passage of the bill the chamber defeated it by a vote of 18 to 12 with Democrats casting 16 of those No votes, Farris himself among them.583

With this defeat the statewide legislative anti-cigarette movement in Kentucky appears to have become a spent force. The introduction in 1904 of a lone House bill to prohibit the manufacture and sale of cigarettes prompted no further action;584 a House bill in 1906, titled merely “An act concerning cigarettes and cigarette materials,” was also unable to make progress;585 and the House in

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582 Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 834-36 (1902) (Mar. 8).
583 Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 836-37 (1902) (Mar. 8). It is unclear whether Farris voted against the bill because the amendments had rendered it unacceptable to him or simply to be entitled to move for reconsideration; in the event, Cantrill so moved and to table his own motion (i.e., to kill it), in support of which the Senate voted to 17 to 12, 15 of the No votes having been cast by Democrats. Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 836-37 (1902). See also “The Bill,” C-J, Mar. 9, 1902 (sect. 4, 1:1).
1908 did take up for consideration “An Act prohibiting the manufacture and sale of cigarettes in the State, and providing punishment therefor,” but took no action on it. The Kentucky WCTU had not, however, abandoned the struggle, and in 1914 strenuous lobbying by its longtime president, Frances Estill Beauchamp, succeeded in securing passage by large majorities of a much more comprehensive prohibition relating to minors: not only did it outlaw smoking and possession of cigarettes by anyone under 18, but it also made it a misdemeanor for anyone to smoke cigarettes in any school building or on school grounds while children were lawfully assembled there. Five years later, Beauchamp, noting that fighting cigarettes through education was a preliminary thereto, announced her intention to present to the legislature in 1920 a bill to prohibit the manufacture and sale of cigarettes. And in 1921 the Kentucky WCTU declared a campaign to prohibit the manufacture of cigarettes in Kentucky, which it was undertaking “as a preliminary to an appeal” to the legislature in 1922.

As it had before the state legislature became the central battleground, the anti-cigarette campaign, which appeared to draw its strength from widespread popular sentiment, continued at the local community level after efforts at statewide action had run their course. Emblematic of the opening of a new front was a radical ordinance passed in 1908 by the Board of Council of the small town of Barbourville (population 1,633 in 1910), which was located outside the state’s

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586Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 176, 725-26, 742 (1908) (H.B. 160, by John P. Haswell, Jr.). Other radical legislation designed to regulate production of tobacco and diminish the market power of the Trust was also introduced that session. “Kentucky’s Tobacco Legislature,” USTJ vol. 69, Mar. 14, 1908 (18:3-4). No cigarette bill was introduced in the Senate in 1908 according to the index to its Journal. Journal of the Regular Session of the Senate of the Commonwealth of Kentucky (1908).


5881914 Ky Acts ch. 29, §§ 2 and 4, at 104, 105.

589“To Oppose Cigarettes,” Tobacco 72(12):23 (July 21, 1921).

590Barbourville was hardly the first small town to adopt an ordinance prohibiting public cigarette smoking. For example, in 1896 the town of Greenwood, Indiana (pop. 1,200), which was “noted for its morality,” evidenced by unsuccessful attempts to run saloons there, prohibited smoking cigarettes in the streets at any time. “No Cigaret Smoking in Streets,” CT, Apr. 14, 1896 (1).

592“Kentucky Has Urban Growth,” The Mountain Advocate (Barbourville), Apr. 21, 1911 (4:1-3).
tobacco growing areas. It provided: “That if any person shall smoke a cigarett or cigaretts within the corporate limits of the city of Barbourville after such person shall have had actual notice of the passage of this ordinance, he shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one dollar nor more than fifteen dollars, for each offense.” After having been arrested for and convicted of violation of the ordinance in 1909, Henry M. Hershberg was jailed for failing to pay the fine. He then sued the city for $5,000 in damages for unlawful arrest and imprisonment on the grounds that the ordinance was void. The Knox Circuit Court agreed, holding the ordinance void as an “unreasonable invasion of the citizen’s right of personal liberty,” but declined to grant him damages. Arguing in the slippery slope mode, Judge William Lewis opined that if Barbourville had the power to prohibit cigarette smoking within the city limits, then the legislature could not only do the same throughout the whole state, but also prohibit the use of all other kinds of tobacco as well as of liquors. Greasing the slope still further, the judge continued: “May they not go still further and do away with ‘Grandmother’s cob pipe,’ even in the privacy of her own home? [I]f all this can be done by legislative enactment, then may not the same power regulate our eating, especially the quantify [sic] because, I presume it will not be contended that a few puffs at the end of a good cigar would be more detrimental to the health of the individual, or contaminating to the public, than a ‘founder’ on pork chops?” Expressing his persuasion that “the government has no power to regulate what a man may eat, drink or smoke or to


594 Hershberg v. City of Barbourville, Petition, Exh. A, at 8 (Knox Cir. Ct., Dec. 22, 1909), Hershberg v. City of Barbourville, 142 Ky. 60 (1911), Case # 39347, Record and Briefs, Box 2038, Public Records Division, Kentucky Dept. for Libraries and Archives. Unfortunately neither the record nor the briefs shed any light on why the city issued the ordinance. Nor did “New City Council,” *Mountain Advocate* (Barbourville), Jan. 10, 1908 (3:4), which in noting that the council had passed the ordinance on January 6, stated that it also prohibited “the carrying on person the material for making cigarettes within the city limits.”

595 Hershberg v. City of Barbourville, Petition at 3 (Nov. 9, 1909). Interestingly, at the time Hershberg filed his original and first amended petitions he did not have a copy of the ordinance and alleged that the ordinance “prohibit[ed] and prevent[ed] the smoking of cigaretts on the streets, and in public....” *Id.* Not until he filed a copy of the ordinance as an exhibit and a second amended petition six weeks later did he realize and point out the all-encompassing character of the ban. Hershberg v. City of Barbourville, Second Amended Petition at 9-10 (Dec. 23, 1909).

596 Hershberg v. City of Barbourville (Knox Cir. Ct. 1909), Record and Briefs.
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

prohibit him any liberty, the exercise of which will not directly injure society," 597 Judge Lewis concluded by sliding to the bottom of the slope:

If a citizen of the City of Barbourville should, in the privacy of his bed room, at home, and in the night, smoke a cigarette, he would violate the ordinance in question; if he should while sitting on one of the beautiful hill tops (in the corporate limits), overlooking the city of Barbourville and while dreaming of its future greatness, take a few whiffs at the end of a cigalett, he would likewise violate this ordinance, but in the court’s judgment, although opposed to the habit of cigalett smoking, he would be guilty of no act directly injurious to society or the rights of the public. 598

Although the Court of Appeals, Kentucky’s highest court, acknowledged that the city council had passed the ordinance as an exercise of the police power based on its having regarded cigarette smoking as “injurious, especially to the young,” it nevertheless affirmed the lower court’s ruling that the ordinance was “not a reasonable ordinance." 599 Where Hershberg had been smoking and whether the city council had actually intended to suppress cigarette use in smokers’ own residences were questions neither posed nor answered by the court, which struck down the ordinance apparently for its spatial overbreadth and failure to explain the discriminatory treatment of one of several smokeable tobacco products:

The ordinance is so broad as to prohibit one from smoking a cigarette in his own home or on any private premises in the city. To prohibit the smoking of cigarettes in the citizen’s own home or on other private premises is an invasion of his right to control his own personal indulgencies. The city council is authorized by statute to enact and enforce all such local, police, sanitary and other regulations as do not conflict with general laws. (Ky. St. Sec. 3637, Sub. 7.) But under this power it may not unreasonably interfere with the right of the citizen to determine for himself such personal matters. If the council may prohibit cigarette smoking in the city, it may prohibit pipe smoking or cigar smoking, or any other use of tobacco. The Legislature did not contemplate conferring such power upon the council. If the ordinance had provided a penalty for smoking cigarettes on the streets

597 Hershberg v. City of Barbourville at 13-14 (Knox Cir. Ct. 1909).
598 Hershberg v. City of Barbourville at 14 (Knox Cir. Ct. 1909).
599 Hershberg v. City of Barbourville, 142 Ky. at 62, 61. The court failed to disclose the source of the statement that the city council viewed cigarette smoking as especially injurious to the young. Nothing in the record revealed such a position. In its brief the city barely argued the issue of the ordinance’s constitutionality, confining itself to the odd claim that “it would be preposterous [sic] to require or expect the thinking and judgments of a board of unlearned Councilmen to always conform to the judgment and thinking of our learned judges of this court.” Hershberg v. City of Barbourville, Brief of Appellee at 2; Kentucky Dept. of Libraries & Archives.

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of the city, a different question would be presented, but whether such an ordinance would be valid is a question not now presented or decided.\footnote{Hershberg v. City of Barbourville, 142 Ky. at 61.}

For the jurisprudential underpinnings of its libertarian decision the Kentucky Court of Appeals relied on its two-year-old decision in a case involving the violation of a 1908 Nicholasville ordinance prohibiting the bringing into town of intoxicating liquor for personal use in excess of one quart. There, citing Blackstone and John Stuart Mill at length, the court had held that:

The history of our state from its beginning shows that there was never even the claim of a right on the part of the Legislature to interfere with the citizen using liquor for his own comfort, provided that in so doing he committed no offense against public decency by being intoxicated. ... Therefore, the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the individual. It is not within the competency of government to invade the privacy of a citizen’s life and to regulate his conduct in matters in which he alone is concerned.... The right to use liquor for one’s own comfort, if the use is without direct injury to the public, is one of the citizen’s natural and inalienable rights, guaranteed to him by the Constitution.... Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent and to make them conform to a standard not of their own choosing, but the choosing of the lawgiver; that inquisitorial and protective spirit which seeks to prescribe what a man shall eat and wear, or drink or think, thus crushing out individuality and insuring Chinese inertia by the enforcement of the Chinese shoe in the matter of the private conduct of mankind.\footnote{Commonwealth v. Campbell, 133 Ky. 50, 57, 58, 63-64 (1909).}

In spite of this orthodox libertarian framework, the logic of the court’s argument clearly left open the possibility of the constitutionally permissible prohibition of smoking in public places where it injured others and (though perhaps only in a distant era) even in private residences where it injured smokers’ children.

\textbf{Alabama: 1896-97}

Yesterday, the house declared by a vote of forty-four majority, that cigarettes shall not be smoked in this state. We have no love for cigarettes. We do not waste our time smoking them. [B]ut we mention tobacco with that respect due to a superior force, and we tell the house that cigarettes will not down at its bidding.\footnote{Daily Register (Mobile), Feb. 16, 1897 (2:1) (untitled edit.).}
The bill that the Alabama House had passed during the 1892-93 session banning the sale and public smoking of cigarettes was not that state’s last legislative effort in this direction. At the 1896-97 session, when Democrats controlled both houses by large majorities, the Populists, who had reached their high point in Alabama in 1892, still held about one fourth of the seats, but following their Bryanque defeat in the 1896 election, were “reduced to impotence.” Democrat Dr. Mathew Bunyan Cameron, who “worked industriously” on its behalf, introduced the bill in the House “To prevent the sale, giving away, or disposing of cigarettes, cigarette tobacco, or cigarette papers or any substitute for any of them in the State of Alabama,” which was referred to the Public Health Committee, of which Cameron, who had been president of the county health board in Sumter and Greene counties, a county health officer, and member of the state health board, was chairman. Having grown up on his father’s plantation, the 37-year-old Cameron was a prominent physician, who had been president of the Sumter County Medical Association as far back as 1890, by 1903 he was elected president of the Medical Society of the State of Alabama.

See above ch. 4.

In the House sat 74 Democrats, 3 Republicans, and 23 Populists, while 22 Democrats, 2 Republicans, and 9 Populists sat in the Senate. Michael Dubin, Party Affiliations in the State Legislature: A Year by Year Summary, 1796-2006, at 17 (2007).


An elder in the Presbyterian church, Cameron also served in the House during the 1894-95 session. History of Alabama and Dictionary of Alabama Biography 3:292 (Thomas Owen ed. 1921).


Albert Moore, History of Alabama and Her People 2:564 (1927).


Albert Moore, History of Alabama and Her People 2:564 (1927).

Transactions of the Medical Association of the State of Alabama: Session 1890, at 197 (1890).
Alabama, whose historian he had become in 1899. His political stance can be gauged by the fact that at the 1892 Democratic convention of Sumter County (four-fifths of whose population was black) Cameron offered a resolution to restrict future primaries to white Democrats; though chosen as one of gubernatorial candidate Reuben Kolb’s four anti-Bourbon county delegates to the state Democratic convention, he was the only one of the four who refused to bolt that Bourbon convention for the Kolb reform convention. The chief antagonist of H. 489 during the floor debate on February 15, 1897, was Representative William R. Waller, a planter of “limited education,” who had been sheriff of Montgomery County from 1892 to 1896 (and returned to that office in 1900).

On third reading Cameron sought support for his bill by focusing on cigarettes’ impact not on children, but adults. He alluded to several cases in which “cigarettes had been the cause of the physical wreck of the victims of the pernicious habit” and cited a letter written by the city editor of a Mobile newspaper describing his personal experience with cigarettes during the many years he was at their “mercy.” The strength of the support for the bill manifested itself in the defeats inflicted on the numerous amendments offered to exempt various counties from the bill; similarly, motions to table to indefinitely postpone were stymied by rulings from the chair: “The members on the floor applauded and the ladies in the galleries joined them. It was evident that the gallery and lobby wanted cigarettes relegated to the rear.” H. 489 passed by the large majority of 62 to 16, which, while not a party-line vote, nevertheless concealed certain prominent differences between the major parties: whereas all 19 voting Populists supported the bill and none opposed it, Democrats, 40 of whom voted Yea, cast 15 of the 16 Nays. To be sure, the fact that Waller’s motion to reconsider that

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614 JAMA 40(21):1447 (May 23, 1903).
615 Transactions of the Medical Association of the State of Alabama: Session 1899, at 228 (1899).
616 “Victory!” SCS, May 5, 1892 (2:1). See also above ch. 4.
617 “The County Convention,” LJ, May 6, 1892 (2:1-2); “The State Convention,” LJ, June 10, 1892 (4:2). Robert H. Seymour, the father of William H. Seymour, the sponsor of the anti-cigarette bill of the 1892-93 session, was among the three delegates who did bolt. See above ch. 4.
618 1900 and 1910 Census of Population (HeritageQuest); Notable Men of Alabama: Personal and Genealogical [1]:50-51 (Joel DuBose ed. 1904) (quote).
621 Party affiliation is taken from Acts of the General Assembly of Alabama, Passed at
vote went over until the following day meant that, unless Senate action interfered, the bill would be killed since it had to be read three times in each house before passage and only two more days remained in the session.\footnote{In the event, although the Senate Public Health Committee reported the bill favorably, the Senate, on the motion of Senate President Pro-Tem Francis L. Pettus (a very influential former and future House Speaker from the heavily black-majority, planter-dominated Dallas County who was a pioneer in black disfranchisement), recommitted it to the Judiciary Committee, thus terminating that session’s initiative. \footnote{Oddly, at the National WCTU annual meeting in 1900 its long-time anti-narcotics superintendent Eliza Ingalls claimed that Alabama (and Vermont) had “recently passed very strong anti-cigaret laws, which, together with those of Tennessee and Iowa, were “the best laws.” Report of the National Woman’s Christian Temperance Union: Twenty-Seventh Annual Meeting...1900, at 248 (1900). Alabama had not recently passed any anticigarette law, let alone a strong one, whereas both Iowa’s 1896 statute banned sales and manufacture and Tennessee’s from 1897 banned sales. Vermont had just enacted a no-cigarette-sales-to-under-21-year-olds law. 1900 Vermont Laws No. 102, at 72.} In a much more optimistic alternative account, the New Orleans Daily Picayune reported that the anti-cigarette bill had been “smothered to death [i]n a moment of abstraction” when an unidentified opponent moved to refer the bill, calling it only by its number, to the Judiciary Committee to examine its constitutionality, and the senators, “worn out and weary,” so voted. Because the chamber did not meet the next day and the bill therefore could not be reported back until the day after, which was the last day of the session, it would be unable to progress any further. This reversal left Dr. Cameron “astonished” especially because H. 489 would allegedly have passed the Senate with but three Nays.\footnote{The State Legislature,” Daily Register (Mobile), Feb. 16, 1897 (1:2). \footnote{Oddly, the source indicated no party affiliation for senators for that session or for any legislators for any other session from the late 1880s until the early 1900s.} \footnote{In the event, although the Senate Public Health Committee reported the bill favorably, the Senate, on the motion of Senate President Pro-Tem Francis L. Pettus (a very influential former and future House Speaker from the heavily black-majority, planter-dominated Dallas County who was a pioneer in black disfranchisement), recommitted it to the Judiciary Committee, thus terminating that session’s initiative. \footnote{Oddly, at the National WCTU annual meeting in 1900 its long-time anti-narcotics superintendent Eliza Ingalls claimed that Alabama (and Vermont) had “recently passed very strong anti-cigaret laws, which, together with those of Tennessee and Iowa, were “the best laws.” Report of the National Woman’s Christian Temperance Union: Twenty-Seventh Annual Meeting...1900, at 248 (1900). Alabama had not recently passed any anticigarette law, let alone a strong one, whereas both Iowa’s 1896 statute banned sales and manufacture and Tennessee’s from 1897 banned sales. Vermont had just enacted a no-cigarette-sales-to-under-21-year-olds law. 1900 Vermont Laws No. 102, at 72.}}
when legislatures will not pass a law affecting so great an interest” as cigarettes,\textsuperscript{626} two years later the House once again, this time by a vote of 61 to 35, passed a universal cigarette sales ban bill,\textsuperscript{627} which left “the smoker to the sole device of having them shipped from abroad. After he gets them into Alabama from another State he must smoke them himself. He cannot give them away.” Although the bill was “strongly opposed...the House wanted it,” and a strong efforts were made to “rush it through the Senate,”\textsuperscript{628} where, however, it once again died in the Judiciary Committee.)\textsuperscript{629}

\section*{South Carolina 1896 and 1897: House Passage of a 25-Cent per Package Prohibitory Privilege Tax}

Dr. Speer, [Representative] of Abbeville, said that it was a question whether the people would rather protect their sons or the tobacco growers. The bill should pass.\textsuperscript{630}

The South Carolina House, whose session did not open until the end of November 1893, brought that remarkable year’s anti-cigarette legislative activity

\begin{footnotesize}
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\item\textsuperscript{626} “No Cigarettes,” \textit{Pratt City Herald}, Feb. 23, 1901 (2:1) (edit.). Ironically, the editorial concluded that “[t]he corporation will drive out the cigarette” in the sense that “railroads and express companies and the greater business firms will not employ cigarette smokers” because they were “not capable of hard work that requires accuracy....”
\item\textsuperscript{628} “The Cigarette Business Knocked Out in Alabama,” \textit{Landmark} (Statesville, NC), Feb. 6, 1903 (1:4).
\item\textsuperscript{629} The first and last Senate action on the bill was referral to the Judiciary Committee. \textit{Journal of the Senate of the State of Alabama} 193 (Jan. 31) (1903). A Senate bill with the same title died after being favorably reported by the Public Health Committee. \textit{Id.} at 485, 856 (Feb. 20, Sept. 5) (S. 271, by Walter Acree).
\item\textsuperscript{630} “The General Assembly,” \textit{WNC}, Feb. 17, 1897 (10:1-4 at 2) (referring to the bill, discussed below, to impose a 25-cent tax on a package of cigarettes).
\end{enumerate}
\end{footnotesize}
to a close, when the bill prohibiting the manufacture or sale of cigarettes that Zerah Hammett, a farmer from the non-cigarette tobacco growing northwestern county of Greenville,\(^{631}\) had introduced was, after the Judiciary Committee had submitted an unfavorable report on it, killed by the chamber’s agreeing to a motion by Charleston lawyer George Von Kolnitz to strike out its enacting words.\(^{632}\)

Although South Carolina never enacted a general anti-cigarette law,\(^{633}\) its House of Representatives on February 24, 1896, passed a bill to require those engaged in the manufacture and sale of cigarettes to obtain a special permit and pay a tax of 25 cents for each box of ten cigarettes.\(^{634}\) The bill’s author, farmer Lawrence Summerfield Connor\(^{635}\)—who was championing repeal of the privilege tax on fertilizer and tried to show how far the privilege or special tax could be
pushed by introducing a bill that imposed one, inter alia, on all books, furniture, and office supplies used by person engaged in literary or professional pursuits, but that was defeated by as vote of 73 to 0—declared on the House floor that: he was targeting only cigarettes; the House Medical Affairs Committee favored it; the existing (no-sales-to-minors) law was inoperative; “[e]very doctor favored everything possible to stamp out the cigarette evil”; and the Northwest was already taking such action.\textsuperscript{636} Despite being “altogether a surprise,” No. 303 “met with no opposition...”\textsuperscript{637} In contrast, however: “The cigarette consumers are already calculating how much postage it will cost them to get a week’s supply of cigarettes from some neighboring city. It will certainly be cheaper to do this than to buy cigarettes with a 25-cent tax tag on them.” No. 303 may have passed the House “with such a whirl” as to leave Connor satisfied that it would become law\textsuperscript{638} but two weeks later the Senate rejected the House bill.\textsuperscript{639}

The following year a bill was introduced in the House to prohibit the manufacture and sale of cigarettes, but after it had received an unfavorable committee report, its own introducer, later district judge George W. Gage, moved to substitute a regulatory tax bill for it and then tabled it.\textsuperscript{640} In introducing a prohibitory bill Gage had been “actuated by the views of the best men in his community,” who “asked...to be protected from this cigarette evil.”\textsuperscript{641} No. 271, introduced by York County farmer Samuel Epps,\textsuperscript{642} who declared that he had a petition requesting the introduction of such a bill and that “[a]ll he wanted was a law to protect the boys of the State,”\textsuperscript{643} imposed a 25-cent privilege tax on each


\textsuperscript{638}Journal of the Senate of the General Assembly of the State of South Carolina 526 (1896) (Mar. 7).


\textsuperscript{640}“The General Assembly,” \textit{WNC}, Feb. 17, 1897 (10:1-5 at 3). Gage had introduced his bill “by the request of his people,” and dropped it because he viewed Epps’s regulatory bill as “better suited for the purposes intended...” \textit{Id.} at col. 2. Gage was the only prominent anti-cigarette speaker in the House who at the same time joined the only black and 16 other white members in voting against the bill to impose Jim Crow segregation on railroad passenger cars, for which 80 representatives (including such high-profile anti-cigarette members as Epps, Dr. Speer, and Winkler) voted. “The General Assembly,” \textit{WNC}, Feb. 17, 1897 (6:3-4).

\textsuperscript{641}Journal of the House of Representatives of the General Assembly of the State of South Carolina 237 (Jan. 29) (1897) (Epps, No. 271).

\textsuperscript{642}“The General Assembly,” \textit{WNC}, Feb. 17, 1897 (10:1-5 at 2).
box of cigarettes—which was not permitted to contain more than five cigarettes—sold. Epps was actuated by the belief that “it was time to put a stop to the injury that was being done to the youth of the State by the sale of cigarettes.” After the Committee on Medical Affairs had submitted an unfavorable report on the bill, on February 9 the House “struggled with” the magnitude and projected impact of the tax. Following proposals of a 10-cent tax for a package and three for a quarter, Dr. John Smith, characterizing the 25-cent tax as prohibitory, argued that unless it was so intended, the bill should be killed. Charleston lawyer Huger Sinkler insisted that the proceedings should be halted because the bill was “plainly unconstitutional,” adducing as proof “the Federal decision on the Iowa case, declaring a cigarette law unconstitutional.” A more discerning lawyer, Cornelius Winkler, pointed out Sinkler’s illogic since the Iowa law prohibited the manufacture and sale of cigarettes, whereas Epps’s bill did not prohibit their sale, but permitted it with a tax. Winkler’s argument harmonized with his policy preference, “as he knew of no more damnable habit than that of smoking cigarettes.” Moreover: If the bill “injured the tobacco industry, let the tobacco industry go rather than ruin the boys of the State.” Debate on the bill that day concluded with a speech by yet another lawyer, Henry Cowper Patton of Columbia, who was “regarded as the most brilliant young man in South Carolina politics.” (Unclear is whether his brilliance was attributed to his proposal two years earlier at the state constitutional convention to radicalize disfranchisement of blacks by grandfathering in anyone who had served in the Confederate military or was a lineal descendant of such a person if alive at the time of the convention; this very first southern grandfather clause was a wee bit ahead of its time, being defeated by an overwhelming vote of 20 to 117 by the other white supremacists, who rejected it as clearly subversive of the Fifteenth Amendment since blacks could not be enlisted or drafted into that military.) The 33-year-old Patton

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643 According to the full text of the bill as published in a newspaper, violations of the law were subject to a fine of between $50 and $100 or imprisonment at hard labor for between 20 and 30 days. It is not clear whether it was a typo that according to this version the tax was 20 cents. “The General Assembly,” _WNC_, Feb. 3, 1897 (5:1-4 at 3).


645 _Journal of the House of Representatives of the General Assembly of the State of South Carolina_ 342-43 (Feb. 6) (1897).


648 “Brilliant Young Man Dead,” _Times_ (Richmond, VA), May 23, 1900 (2:4).

649 _Journal of the Constitutional Convention of the State of South Carolina_ 42, 429-30 (1895); Michael Perman, _Struggle for Mastery: Disfranchisement in the South, 1888-1908_,
declared that “he had been using cigarettes and tobacco for twenty years, and he thought he was as good a specimen of a man, physically, if not mentally, as those who were favoring the bill.” 650 Whether he had any death-bed second thoughts about this invidious comparison three years later his obituaries did not reveal, 651 but on the House floor he rebuked his colleagues for desiring to “correct the foibles of others” instead of looking at their own: “As he smoked everything ever yet known and occasionally chewed, he could speak out,” but he was amused that those who “munched their tobacco like goats find so much evil in cigarette smoking.... Personally he never saw any evil or horror in the smoking of cigarettes, certainly no more than so than in the use of other forms of tobacco.” 652 In any event, he urged that “a mother could do more with a shingle than all the statutes to break boys from smoking cigarettes.” Perhaps this legislative speech did not belong to those that an obituary lauded as “models of persuasive argument, logical, dexterous, conciliatory”: the next day the House passed the bill. 654

In the brief interim before the Senate took up the House bill on February 16, South Carolina tobacco farmers intervened in the legislative process by protesting against the proposed measure. What distinguished the public debate over anti-cigarette legislation in South Carolina from its counterparts in the larger tobacco-growing states of North Carolina and Kentucky in 1897 and 1898 655 was the transparency of the opposition by the cigarette-tobacco growing industry. To be sure, the scale of tobacco farming in South Carolina was dwarfed by that in the two leading states. As late as 1896, the U.S. Department of Agriculture’s Yearbook did not even list South Carolina’s tobacco production separately together with that of the 17 largest producing states. 656 But South Carolina’s tobacco industry was expanding: its rank, according to acreage, rose from 25th at the 1880 census to 21st in 1890 and ninth in 1900. 657 Yet even by that last

653“In Memoriam,” Kappa Alpha Journal 18(1):52 (Sept. 1900) (reprinted from an unidentified issue of The State (Columbia)).
655See below chs 7 and 6.
656Yearbook of the United States Department of Agriculture: 1896, at 573 (1897).
657U.S. Census Office, Census Reports, Vol. 6: Twelfth Census of the United States, Taken in the Year 1900: Agriculture: Part II: Crops and Irrigation, tab. 2 at 527 (1902).
census, its output of just under 20 million pounds was only about 6 percent of Kentucky’s. 658

Unlike Kentucky, however, but like North Carolina (and Virginia), South Carolina specialized in tobacco for cigarettes. On February 12, two days after the House had passed the proposed measure to impose a 25-cent tax, the Timmonsville tobacco growers, through their board of trade, passed a resolution focused on this very issue:

Whereas, it has come to our knowledge that a certain bill proposing to lay a prohibitory tax on cigarettes is pending in the General Assembly of South Carolina, having already passed the lower branch; and whereas, the passage of the said bill would work great and irreparable injury to our tobacco growers by forcing from our State and markets all buyers for cigarette manufacturers; and whereas at least one-half of the crop of tobacco raised in the State is cigarette tobacco. Therefore, be it resolved:

...  
2d. That we earnestly entreat the honorable Senators to save our State this growing and profitable industry, which the pending bill would kill.

...  
4th. That if the said bill should become a law the reduction in consumption of cigarettes would be very slight as, under recent Supreme Court decisions, the consumers could import, by mail or express, cigarettes in any quantity, and the only tangible injury would be to injure the sale of South Carolina tobacco and entail severe loss upon the planters and citizens, who have invested hundreds of thousands of dollars in leaf factories, ware houses, pack houses, barns, etc. 659

Against this background it was hardly surprising that the bill was a “debate provoker” 660 in the Senate, where Altamont Moses, corporate secretary of the Sumter Cotton Mills, 661 moved to kill it (that is, strike out the enacting clause) on the grounds that it would be “another dead letter on the statute books.” 662 In the ensuing debate on this motion—in which Connor, now a senator, supported the

[References]

658 U.S. Census Office, Census Reports, Vol. 6: Twelfth Census of the United States, Taken in the Year 1900: Agriculture: Part II: Crops and Irrigation, tab. 1 at 526 (1902).
659 “Friends of Cigarette Fiends,” WNC, Feb. 17, 1897 (3:5).
661 Census of Population 1900 (HeritageQuest); History of South Carolina 4:45-46 (Yates Snowden ed. 1920); Barrett Elzas, The Jews of South Carolina: From the Earliest Times to the Present 252-53 (1905); Biographical Directory of the Senate of the State of South Carolina, 1776-1964, at 278 (Emily Reynolds and Joan Faunt comp. 1964).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

bill—George Mower, a lawyer, who would soon vote against the bill, presented a letter from The New York Society for the Prevention of the Use of Tobacco Among the Youth, which stated that “the cigarette injury would only be checked by enacted stringent laws.” Senator William Love, a farmer from the same county (York) that Epps represented, thought the bill was “necessary to check a growing evil.” The aforementioned tobacco growers of Timmonsville were confronted directly by their Florence County senator, J. E. Pettigrew, a farmer who had been “an enthusiastic Granger, then an active [Farmers’] Alliance man,” to the extent that he became a statewide lecturer and interstate organizer. Because he was “so intensely Democratic in his nature,” the Charleston News and Courier underscored in its biographical sketch, alluding to the inner-Democratic Party split between Benjamin Tillman and the Conservatives, that he “easily fell into the Reform Movement, but tenacious as he is of the rights of the people, he regards as of paramount importance the unity of the white people of his state.”

Even though he represented a “cigarette tobacco constituency,” Pettigrew “took a bold and conscientious stand upon the bill, which he supported vigorously despite the fact that it may injure him at home.” Strongly opposed to the bill was Stanwix Greenville Mayfield, a planter-railroad lawyer, who boasted that: “I have never used alcoholic liquors or tobacco. I believe these two cause more misery than all other evils which beset mankind.” (The next year Mayfield

663 Mower was also a cotton mill director and had been a delegate to the state constitutional convention in 1895. Biographical Directory of the Senate of the State of South Carolina, 1776–1964, at 279 (Emily Reynolds and Joan Faunt comp. 1964).


665 “Lives of Our Legislators,” WNC, Feb. 3, 1897 (9:1-5 at 2). Although the Tillmanite split “involved no fundamental matters of political principle,” Tillman “rekindled opposition to the Democrats. Conservatives revolted against his rhetoric, less wealthy whites against the timidity and irrelevance of his economic programs,...and Negroes against his virulent racism.” J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910, at 145-46 (1975 [1974]). As a result of the 1882 disfranchising law and the 1895 constitutional convention, the number of black state legislators—in a 60-percent black-majority state—plummeted from their Reconstruction highs: the last black senator was elected in 1886, while the elections of 1892, 1894, and 1896 produced the last black representatives (three, two, and one, respectively). Id. at 84-91, 145-52; George Tindall, “The Campaign for the Disfranchisement of Negroes in South Carolina,” Journal of Southern History 15(2):212-34 at 216 (May 1949). For a biographical sketch of the last black Republican in the General Assembly (Robert Anderson), see “Lives of Our Legislators,” WNC, Jan. 20, 1897 (12:1-7 at 6-7).

666 J. Hemphill, Men of Mark in South Carolina: Ideals of American Life: A Collection
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

offered an amendment to the Senate rules to prohibit smoking in the Senate that was adopted.) His animus was directed at “destroying a growing industry” by means of a dead-letter law. In response, Edgar Archer, an “ardent advocate of the temperance cause” and one-time Methodist Episcopal circuit preacher, argued that “the effort was to place a tax on cigarettes and not to stop the sale.” To be sure, he added: “If the tobacco industry depended upon the cigarette industry it was not ‘worth a pin.’” Ultimately, however, the Senate voted 25 to 8 in favor of Moses’s motion, thus rejecting the bill.

The editor of the newspaper that riveted editorial attention on this debate, the Charleston News and Courier, was himself conflicted, having changed his view of the tax in accordance with proposed changes in its size. At 25 cents the paper deemed the tax “useless” because it would “fail either to prevent the sale of cigarettes, or to produce any revenue from their sale, as it would certainly serve only to throw the sale of the goods into unscrupulous hands and encourage importations from neighboring States.” However, at a “moderate” five cents these objections seemed less weighty to him. But once “the tobacco interests” voiced their opposition, the newspaper bluntly admitted being “at some loss” as to what it should think: “On the one hand, we have the earnest appeal of Mr. Waddill [a reader], who represents every home and household in the State, for the

668 "The Work of the Senate,” WNC, Feb. 24, 1897 (13:4-6 at 5).
669 J. Landrum, History of Spartanburg County 429-30 (1900). See also “Lives of Our Legislators,” WNC, Jan. 27, 1897 (1:5).
671 Journal of the Senate of the General Assembly of the State of South Carolina 297 (1897) (Feb. 16). See also “Push War on Cigarets,” CT, Feb. 20, 1897 (9:3-4). Four of the eight senators voting Nay were Methodists and thus adherents of the Christian denomination most programmatically hostile to tobacco. For biographical sketches of the four (Edgar Archer, Lawrence Connor, Hugh Stackhouse, and Columbus Rhett Wallace, see Biographical Directory of the Senate of the State of South Carolina, 1776-1964, at 173, 199, 314, 326 (Emily Reynolds and Joan Faunt comp. 1964). Other than Pettigrew, only one senator representing a cigarette tobacco growing county voted Nay (H. M. Stackhouse, Marlboro County). Of the eight senators voting Nay, five (including Archer, Connor, and Pettigrew) were among the 13 who a week later voted against killing the House-passed Jim Crow bill to segregate passenger trains; only two voted with the majority to kill the bill. “Work of the Senate,” WCN, Mar. 3, 1897 (5:4).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

protection of the boys and youths of the State from the free temptation and indulgence in a vicious and hurtful practice; on the other hand is the equally urgent appeal of the representatives of the new and growing and important industry of tobacco raising, to protect that industry from heavy loss and injury, if not ruin.\(^ {672}\)

Although the editor was glad that the decision was for the legislature and not him to make, he posed a vitally important question to the tobacco growers that at the time was little discussed in tobacco-growing states considering cigarette regulation:

> Why should a moderate tax, of...5 cents per package, on the sale of cigarettes “force” from the State and its markets all “buyers for cigarette manufacturers?” [sic]. It should not be necessary for the boys of the State to smoke cigarettes in order to provide a market for the sale of the cigarette tobacco grown in the State. The country and the world affords [sic] “a market” for the sale of such tobacco.... Are we to understand, as has been asserted, that if the State of South Carolina imposes a small tax on the sale of cigarettes, the “trust” or “someone,” which controls the manufacture and sale of cigarettes, will withdraw its buyers of cigarette tobacco from our market as a coercive or punitive measure of retaliation for such legislation? And if not, why should the tobacco buyers desert this market? It appears to us that...the representatives of the tobacco interest should be invited to explain, definitely and clearly, why the imposition of the tax would drive out the buyers of tobacco and close our markets to them?\(^ {673}\)

Having articulated the politically explosive question, the editor proceeded to pose what he deemed “really the radical question before the Legislature”: “Is it to raise more revenue for the State? Or is it to restrict the sale of cigarettes to anybody and everybody? Or is it simply to restrict their sales to boys and young men, who are most injured in body and mind by indulgence in cigarette smoking?” The editor, assuming that there was no intention to restrict smoking by adult men and that there were other ways of raising revenue, counseled that the bill should be so structured as to “make it unprofitable for tobacconists to sell tobacco to minors, and for minors to smoke tobacco in public.”\(^ {674}\) South Carolina failed to achieve either.\(^ {675}\)

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\(^ {672}\)“The Anti-Cigarette Bill,” \textit{WNC}, Feb. 17, 1897 (4:2-3 at 2).

\(^ {673}\)The Anti-Cigarette Bill,” \textit{WNC}, Feb. 17, 1897 (4:2-3 at 3).

\(^ {674}\)The Anti-Cigarette Bill,” \textit{WNC} (Charleston), Feb. 17, 1897 (4:2-3 at 3).

\(^ {675}\)In 1912 a bill to prohibit the manufacture and sale of cigarettes was progressing through the Senate when its introducer had it tabled because the chamber had voted 18 to 17 to exempt a number of counties from it. \textit{Journal of the Senate of the State of South Carolina} 256, 292-93, 379, 412, 434-45 (Jan. 18 and 23, Feb. 1) (S. 259 by Thomas
Pennsylvania: 1897

The Pennsylvania legislature dealt with no radical anti-cigarette bill during the 1895 session, but in 1897, despite Representative John Fow’s absence as a result of his defeat by a Republican barber, Republican Representative Philip Reinhard took up the cause by introducing H.B. No. 17, which simply made it unlawful for anyone to “manufacture and sell any paper wrapper cigarettes or cigarette paper” and imposed a maximum $500 fine and/or maximum 12-month imprisonment. It was, together with a fellow Republican’s bill to prevent minors from obtaining intoxicating liquors, referred to the Law and Order Committee. The 67-year-old Reinhard, who had been in the printing business and a newspaper editor before moving to Indiana where he read law, was a division chief in the Interior Department from 1861 to 1876, and then returned to Pennsylvania to practice law.

The Republican Lebanon Daily News, which was published in Reinhard’s district, may have eventually come around to support his bill on the grounds that “[t]he way to effectually keep boys from buying cigarettes is to prevent their manufacture and sale,” but the day after the bill’s introduction, the independent Republican Philadelphia Inquirer classified H.B. No. 17 under the rubric, “crank bills,” the “usual number” of which, it predicted, would make their appearance at the session. Unencumbered by memory, it credited Reinhard’s bill with being “a step in advance of the act presented by John Fow,” which had “merely prohibited the sale of cigarettes to minors.” The belittled company that

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677 Smull’s Legislative Hand Book and Manual of the State of Pennsylvania: 1897, at 661, 1043. On Fow’s bills that passed the House in 1891 and 1893, see above chs. 3-4.
678 Legislature of Pennsylvania, File of the House of Representatives, No. 17, Session of 1897, Mr. Reinhard, in Place, Jan. 25, 1897 (copy provided by the State Library of Pennsylvania); Journal of the House of Representatives of the Commonwealth of Pennsylvania 411 (1897) (H.B. No. 17 by Reinhard).
680 Lebanon Daily News, Apr. 22, 1897 (2:2) (untitled edit.).
Reinhard’s measure was keeping included Republican Augustus Seyfert’s bill to make it a misdemeanor to engage or participate in a football game. He, the paper recalled, had “made himself famous a few years ago by presenting a bill which was to prevent the wearing of tights upon the stage. In the present state of the drama this would have ruled three-fourths of the theatrical companies out of existence. His anti-football bill...would close one-half the colleges of the country. There was a titter of merriment when he presented his bill in the House and prospects of its passage are very poor, indeed.” Seyfert, who for two decades had been a public school teacher and administrator, was apparently not such an extreme crank that the McKinley administration decided that it would be undiplomatic to appoint him U.S. consul in Canada and Mexico.

The Inquirer had omitted to lambaste the genre that in several states during the 1890s enjoyed the highest profile as a “crank” bill—H.B. No. 18, “prohibiting the wearing of hats, bonnets or other coverings for the head which will obstruct the view of any public performance or entertainment to which an admission fee is charged” and imposing on owners and managers of theaters, opera houses, music halls, etc., the duty to “compel” anyone wearing such a hat “to remove the same, and in case of a refusal by such person...to eject such person from the building”—which was proceeding in tandem with H.B. No. 17. On second reading a Republican opponent who classed it with the anti-cigarette and anti-football measures as crank bills characterized it as “one of the most ridiculous bills...ever...presented to a legislative body.” He proffered his experience-based opinion that a man sitting behind a lady wearing a hat who was unable to turn his head to the left or right to get a full view of the performance “was too small to be called a man.”

Ten days after its introduction the Law and Order Committee reported

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681 “An Extra Session May Be Called,” PI, Jan. 26, 1897 (5:5). On Fow’s anti-smoking bill, see above ch. 3.
684 Legislative Record 220 (Feb. 17, 1897). Section 2 of H.B. No. 18 also made it owners’ duty to provide a toilet room to which women could retire to remove their hats and in which the hats could be safely kept. The bill received a simple majority of 79 to 71, but fell considerably short of a constitutional majority of all 204 elected members and was thus defeated. Journal of the House of Representatives of the Commonwealth of Pennsylvania 561-62 (Feb. 23) (1897).
Reinhard’s bill as committed and a few days later the House agreed to it on first reading. On second reading on February 17, Reinhard finally moved to correct the drafting error that would have rendered his measure a practical nullity because the bill literally applied only to those who both manufactured and sold cigarettes. After the chamber had agreed to substituting “or” for “and,” Seyfert was unable to secure a majority for expanding the prohibition to the frontier crossing which had given Fow himself cold feet six years earlier—namely, smoking cigarettes. The bill nevertheless passed its second reading and a week later the House passed H.B. 17 by a massive majority of 128 to 11, with 22 of 25 voting Democrats casting Yeas. The subhead of the legislative report in that evening’s *Harrisburg Telegraph* (“Cigarettes Must Go”) turned out to be premature: despite the overwhelming House support, the Senate, once again, procedurally killed the bill before it even reached the floor.

The Pennsylvania legislature closed out the nineteenth century without passing any other radical anti-cigarette measure and ultimately never joined other...
states in enacting a statewide ban in the early twentieth century.

**Maine: 1897**

It had been clearly demonstrated that there was not a particle of good arising from the use of cigarettes, while on the other hand they were exceedingly detrimental to health in a great many ways.691

By the end of the nineteenth century “Maine was a one-party, Republican state”692; not a single Democrat (or third-party member) held a seat in the 31-member state senate in 1895 and 1897, while Republicans occupied 146 and 145 of the 151 House seats, respectively.693 By building liquor prohibition—Maine had been the first state to enact rigorous general liquor prohibition in the 1850s694—into its party platform, the Republican Party reinforced its position as the representative of the state’s “moralistic political culture.”695 This constellation, together with the presence of a strong and active state WCTU—whose president from 1878 until her death in 1914, Lillian Stevens, was also president of the national organization from 1898 until 1914696—furnished Maine with favorable preconditions for enactment of a universal sales ban, which

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694*The Cyclopaedia of Temperance and Prohibition* 411-12 (1891).
696*Maine: A History, [vol. 4:] Biographical* 215-17 (1919). To be sure, Stevens never adopted the anti-capitalist politics that her predecessor as national president, Frances Willard, had developed over time. In her 1895 presidential address in Maine, for example, under the rubric “Capital and Labor,” after observing that the fact that a sweated needlewoman barely earned enough to feed and clothe her children while a man in the same city spent $7,000 to provide dinner to his friends revealed “an unfair adjustment of capital and labor,” she reiterated that turning the two billion dollars spent annually on liquor “into right channels...would do more toward the right settlement of the vexed question than all the...strikes which have been or ever will be.” *Twenty-First Annual Report of the Woman’s Christian Temperance Union, of the State of Maine, for the Year Ending September, 1895*, at 44, 45 (1895).
were, however, diminished by the Republicans’ aligning their interests with those of resource extracting corporations.697 In the event, such a law never came into being; in Maine, as in some other states, the best that the anti-cigarette movement was able to achieve was Senate dilution of a House-passed bill covering adults into one strengthening the no-sales-to-minors law by lifting the minimum age from 16 to 21.

The presence of a radical anti-tobacco element in Maine was visibly on display as early as 1881, when the House received a petition for a law to prohibit smoking at public places.698 To be sure, an adverse committee report terminated this initiative,699 but the fact that a week later the Senate adopted an amendment offered to an amendment to a bill on loitering in public places that would have treated pipe and cigar smoking in railroad or steamboat stations as a nuisance also suggested early resistance to secondhand smoke exposure, even though the underlying larger amendment was ultimately rejected by a vote of 3 to 21.700

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698Journal of the House of Representatives of the State of Maine: 1881, at 69 (Jan. 18) (1881) (petition of Henry A. Sprague and others from Charlotte). See also “Maine Legislature,” DKJ, Jan. 19, 1881 (1:2-5 at 4); “From the State Capital,” BDWC, Jan. 19, 1881 (3:1). Charlotte’s population was only 381 in 1890. U.S. Census Office, Twelfth Census of the United States Taken in the Year 1900: Population, Part II, tab. 5 at 194 (1901). Sprague was, according to the 1880 census, a 36-year-old farmer and medical student, who appears to be the same Henry A. Sprague (a farmer according to the 1900 census) who with six others in 1897 submitted the first petition in that session in support of a bill prohibiting the manufacture and sale of cigarettes. See below this ch. The Maine WCTU may not have been involved in this petition since the section in its biennial report dealing with “Legal Work” did not mention it or any legislative initiative relating to tobacco. Report of the Woman’s Christian Temperance Union, of the State of Maine, 1880-81, at 32-35.

699“Maine Legislature,” DKJ, Feb. 4, 1881 (2:3-6 at 5) (“reported leave to withdraw on petition”); “From the State Capital,” BDWC, Feb. 4, 1881 (3:1). The only action reported in the House Journal, assuming that the same bill was meant, was that the Judiciary Committee reported leave to withdraw a petition of H. W. [sic] Sprague. Journal of the House of Representatives of the State of Maine: 1881, at 159 (Feb. 3) (1881). See also Journal of the Senate of Maine: 1881: Sixtieth Legislature, at 127, 180-81 (Jan. 27, Feb. 4) (1881)

700Journal of the Senate of Maine: 1881: Sixtieth Legislature 309 (Mar. 2) (1881). See also “The State Legislature,” BDWC, Mar. 3, 1881 (2:3). The amendment was offered by Independent David Dudley, a merchant, who advocated passage of female suffrage. “Local and State News,” DKN, Feb. 15, 1881 (3:1); “From the State House,” BDWC, Feb. 16, 1881 (3:1). It is unclear that the defeat of the larger amendment was even related to
In 1885 the legislature enacted a so-called scientific temperance instruction law of the type for which the WCTU was in the process of successfully lobbying throughout the country. It required the instruction of all pupils in all schools supported by public money in physiology and hygiene with special reference to the effects of alcoholic drinks, stimulants, and narcotics on the human system, and conditioned the granting of a teaching certificate on passing an examination in the aforementioned subjects.

By the end of the 1880s the Maine WCTU was pushing intensely for enactment of a no-sales-to-minors law. In order to appreciate this struggle, this anti-tobacco initiative must be embedded in the simultaneous battle that legislators in both houses, neither of which regulated this behavior in their rules, were conducting over smoking in the chambers during the 1889 session. In the House, 125 of whose 151 seats were occupied by Republicans, on January 17, Democrat Francis A. Fox, a 31-year-old lawyer who had earlier taught school for 10 years, cast a “small bomb” and provoked a prickly debate by presenting an order that “no smoking be allowed in this hall during the remainder of the session; any member violating this order shall be subject to a
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

fine of five dollars.” A race to the top was unleashed as Republican James W. Wakefield, a former and future mayor of Bath—who resigned as federal port collector on Grover Cleveland’s election in preference to serving an administration that gained office by suppressing the rights of a large proportion of the southern population—moved to increase the penalty 10-fold. In turn, another Democrat, attorney Edwin Poor, moved to expand the order’s coverage to include chewing tobacco. After the motion by Republican Ezra Pattangall, a retail grocer (who may therefore have sold tobacco), to postpone the whole matter indefinitely had been ruled out of order, Wakefield’s amendment, which was purportedly of the killer type, was defeated. Then, “amid shouts of laughter,” 59-year-old Joseph B. Peaks, a lawyer who was a prominent Republican, declared that he wanted to move an amendment “in all seriousness. I notice that some gentlemen come into this house, not smoking, but having a half-smoked cigar, completely gone out, and if there is anything more stale than that I don’t know what it is.” He therefore moved to add “or with a cigar in his mouth,’ or words to that effect.” Now Pattangall, barely able to contain himself, intervened again to bring this “mock session” to a halt: “[W]e who come here, representing respectable constituencies, can hardly afford, at this stage of the session, to indulge in a great deal of nonsense.” Urging his colleagues to attend to “business in a decent, respectable and dignified manner,” he again moved for indefinite postponement. This trivialization of his protest against secondhand smoke exposure incurred Fox’s wrath: noting that Pattangall wanted the House to get down to work, Fox wanted to “know how the young men in this house who don’t smoke can get down to work when they are half stifled by tobacco smoke. This order moved to have smoking done away with. I would like to know how

708 Representative Men of Maine 189 (1893); Parker Reed, History of Bath and Environs, Sagadahoc County, Maine, 1607-1894, at 191 (1894).
710 1870 and 1880 Census of Population (HeritageQuest).
711 “By Telegraph,” BDWC, Jan. 18, 1889 (2:8 at 3:1).
713 “By Telegraph,” BDWC, Jan. 18, 1889 (2:8 at 3:1).
they expect us young men to stand here and do our business as we should do it under the influence of so much smoke?”

Significantly, this plea came not in sexist defense of female spectators in the galleries, but in self-defense of men against (presumably) cigar-smoking by other men. It received support from Greenville Shaw, a 36-year-old owner of several tanneries and over a million acres of Hemlock stumpage, and fancy horse breeder, a smoker who had “some respect for the feelings of those who don’t smoke” and believed that the order “would pass without any trouble....” But trouble was precisely what it did encounter as Peaks’ and Poor’s amendments were lost and Pattangall made a third call for indefinite postponement, this time denying that “personal habits had anything to do with this question.” His position was reinforced Portland Republican William Looney, a 35-year-old lawyer and never-smoker who had not “suffered any serious inconvenience by the smoke of cigars of gentlemen who do smoke.” In voting to support Pattangall’s motion and thus killing off this serious anti-smoking rebellion, a majority may have agreed with him that the whole matter was “a perfect farce.”

Ironically, by the close of the hearing held on January 29, 1889, in the Judiciary Committee room, on the bill to prohibit “the sale of the deadly cigarette or tobacco in any form” to minors under eighteen, “the lack of proper ventilation was actually visible.” This incident immediately reignited in the Senate (every one of whose 31 seats was occupied by a Republican) the secondhand smoke exposure debate that had been extinguished in the House less than two weeks earlier. The next day Senator Leander A. Poor, a 55-year-old farmer, called his colleagues’ attention to the “great annoyance” of fumes of tobacco smoke in the Senate chamber, which was “intolerable” to some persons. Unwilling to

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719 A legislative report by the Maine WCTU stating that “in proportion to their numbers the Republican members favored our measures more than did the Democratic members, thus disproving the statement that we are a ‘Democratic annex,’” was manifestly meaningless for the Senate. “Legislative Enactments in Maine,” US 15(12):4 (Mar. 21, 1889).

720 1880 Census of Population (HeritageQuest).
presume to complain on his own behalf, with alacrity he intervened for the sake of others, including “ladies.” He reported that a “prominent and estimable lady had said to him that she was laboring in behalf of moral reform and that she felt that she could not very well go into an assemblage of respectable and cultivated people to speak in favor of a great moral principle with her clothing saturated with the fumes of tobacco smoke. But if she remained in these halls and was subjected to the annoyance as she was obliged to do yesterday she would be incapacitated....” Because she had “only uttered the sentiment of a great many others...also present,” Poor presented an order that “the House concurring, the Messenger of the Senate be directed to have printed in bold type and to post in conspicuous places, in both the Senate Chamber and the House of Representatives, placards requesting gentlemen not to smoke in the halls or galleries.” As amended by another senator’s motion to make the bold type red, the order was adopted by the Senate. (Significantly, in spite of the lack of a formal rule, smoking in the Senate chamber was apparently prohibited by custom, as was suggested by Poor’s “No” to the Senate president’s question: “The chair supposes that the senator does not mean that there is smoking in the chamber during the session of the Senate.”) The press interpreted the Senate’s swift response as indicating that it had “been taken with the anti-tobacco fever which has become contagious in the House.” The same day the House passed the Senate order in concurrence. To be sure, less than a week later the House passed an order presented by the aforementioned Looney, the smokers’ nonsmoking friend, that “the clerk be directed to have the unsightly signs now posted upon the walls of this House removed forthwith.” His reasoning was arguably even more notable than the order itself: while not doubting that the legislator who had introduced the order had been prompted by “the best motives,” he nevertheless believed that all his colleagues “would agree with him that the attempt to degrade the House into the condition of a bar room or place of disreputable amusement, was a disgrace to the House and an insult to every member....” Whether Looney was suggesting that bars and the like prohibited smoking is as unclear as whether his aesthetic opposition to “the unsightly signs

723“By Telegraph,” BDWC, Jan. 31, 1889 (3:1).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

which disfigure the hall\textsuperscript{725} extended to the ban that they proclaimed and that he
and a majority of his colleagues had just turned down a dozen days earlier.

By the middle of January both houses of the legislature began to be
bombarded with WCTU-orchestrated mass petitions to prohibit selling or giving
cigarettes or tobacco to minors under 18. (The other issues on which the WCTU
was lobbying the legislature were municipal suffrage for women, a reformatory
prison for women, and an increase in the age of females’ consent from 13 to
18.)\textsuperscript{726} During the Maine winter the WCTU “women circulated the petitions,
going through snow and ice, bidding defiance to wintry winds. Longs lists of
names were secured upon the petitions, among them physicians, lawyers,
clergymen and school directors.”\textsuperscript{727} Alone from January 14 to 17 five petitions
bearing a total of 1,018 signatures were submitted.\textsuperscript{728} So many were received that
on January 19 the Judiciary Committee published a notice that it would hold a
hearing on the subject on January 29.\textsuperscript{729}

Press coverage of the Judiciary Committee hearing on January 29, 1889,\textsuperscript{730}
which also dealt with other issues and took place in a room that was “packed to
overflowing,”\textsuperscript{731} was, in part, bizarrely nonsubstantive. For example, the
Republican Portland Evening Express focused on the role reversal: “instead of
being the interested and curious listeners that the ladies usually are in legislative
matters” in the chamber galleries, as witnesses “they attracted universal
attention....” Instead of devoting any space at all to the arguments they presented,
the paper focused exclusively on physical and stylistic descriptions. Thus, Mrs.
L. M. N. Stevens’ “style was more declamatory. Her features, so well known in
Portland, lighted up as her various addresses progressed (she spoke on all the

\textsuperscript{725}Journal of the House of Representatives of the State of Maine: 1889: Sixty-Fourth
Legislature 239 (Feb. 5) (1889). See also “By Telegraph,” BDWC, Feb. 6, 1889 (2:8).

\textsuperscript{726}“Legislative Enactments in Maine,” US 15(12):4 (Mar. 21, 1889).

\textsuperscript{727}Fifteenth Annual Report of the Woman’s Christian Temperance Union, of the State
of Maine for the Year Ending Sept., 1889, at 124 (1889).

\textsuperscript{728}The number of signatories on the sixth was not stated. Journal of the House of
Representatives of the State of Maine: 1889: Sixty-Fourth Legislature 70, 75, 76, 83, 86,
94 (Jan. 14, 15, 16, 17) (1889); Journal of the Senate of Maine: 1889: Sixty-Fourth
Legislature 74, 77, 82, 83, 90, 96 (Jan. 15, 16, 17, 18) (1889); “By Telegraph,” BDWC,
Jan. 15, 1889 (2:7); “By Telegraph,” BDWC, Jan. 16, 1889 (2:7); “By Telegraph,” BDWC,
Jan. 18, 1889 (2:7).

\textsuperscript{729}“Notice,” BDWC, Jan. 19, 1889 (2:3).

\textsuperscript{730}The Maine State Archives has no documents in the bill file relating to the hearing.
Telephone interview with archivist, MSA, Augusta (July 2010).

\textsuperscript{731}“Portland Ladies,” PEE, Jan. 30, 1889 (1:4).
subjects in hearing). Her style was more that of a public speaker, and she showed that she believed that she had a mission to perform and entered upon it with unbounded assurance.\textsuperscript{732} In contrast, the \textit{Daily Kennebec Journal} at least reported that Stevens had “cited the testimony of physicians all over the country as to the deleterious effects of tobacco upon youth,” while a colleague accounted for how other states had regulated the tobacco sales to minors.\textsuperscript{733}

By the end of January the Judiciary Committee agreed to forbid the sale of cigarettes to those under 16 and to impose a penalty on the same group for smoking in public or on the street.\textsuperscript{734} On February 1, Senator Charles Libby from the committee submitted a bill, “on numerous petitions, asking that the sale of cigarettes to minors be prohibited, to “restrain[ ] the sale of tobacco and use of same by minors under sixteen years of age.”\textsuperscript{735} The bill fell short of the petitioners’ proposal in setting the minimum age for sales at 16 rather than 18, though it did encompass snuff and tobacco in any form in addition to cigarettes (§ 1). A loophole was built into § 2, which prohibited anyone, “other than the minor’s parent or guardian,” from giving anyone under 16 any of the forbidden tobacco products, “for such minor’s personal use.” The fine for violations was capped at $50 (§ 3).\textsuperscript{736} These first three sections were almost identical to the Massachusetts statute enacted three years earlier.\textsuperscript{737} New was the bill’s final section, which punished any minor under 16 who smoked a cigarette or any form of tobacco “in any street, alley, way, park, school yard, public conveyance, place of amusement, or other place of resort,” by a maximum fine of five dollars for a first offence and ten dollars for a subsequent offence.\textsuperscript{738}

When the Senate took up the bill on February 6, two lawyers were the chief protagonists, James S. Wright\textsuperscript{739} for its enemies and the more prominent Charles

\textsuperscript{733}“Committee Hearings,” \textit{DKJ}, Jan. 30, 1889 (4:5).
\textsuperscript{735}Journal of the Senate of Maine: 1889: Sixty-Fourth Legislature 201 (Feb. 1) (1889).
\textsuperscript{736}Sixty-Fourth Legislature: Senate No. 50, §§ 1-3 (1889) (copy furnished by Maine State Law and Legislative Reference Library).
\textsuperscript{737}1886 Mass. Laws ch. 72, at 57. The Massachusetts law lacked the phrase “for such minor’s personal use,” the presence of which is puzzling since Libby unsuccessfully offered it as an amendment. Senate Amendments, in Sixty-Fourth Legislature: House No. 199 (Feb. 8, 1889) (copy furnished by Maine State Law and Legislative Reference Library).
\textsuperscript{738}Sixty-Fourth Legislature: Senate No. 50, §§ 4 (1889).
\textsuperscript{739}\textit{An Album of the Attorneys of Maine} 231 (E. Bowler ed. 1902).
Freeman Libby (1844-1915) for its supporters. The son of a leading woolen manufacturer, Libby himself was both a corporate lawyer and manager. After attending Columbia Law School and being admitted to the bar, he spent two years in Paris and Heidelberg studying law and metaphysics. On his return to Portland, he became city and county attorney, in which capacity during the 1870s, while “disbelieving in Prohibition, theoretically, he enforced” the Maine liquor law vigorously. Chiefly, however, he was a corporate lawyer (and later a railroad president in his own right): “Few lawyers in the State are so actively identified not only legally, but in a managing capacity, with such large business inter[e]sts.” In 1882 he became the mayor of Portland and in 1891 both Senate president and president of the Board of Overseers of Bowdoin College. After securing the presidency of the Maine State Bar Association, in 1909 he became president of the American Bar Association.  

“The enemies of the bill,” as the press reported, “first tried to kill it by amending it.” The three weakening amendments that Wright offered all fit this description. The first struck out coverage of snuff and other forms of tobacco, thus confining the prohibition to cigarettes. Like the votes on all the amendments, the roll call revealed the narrowest of divisions, the members of which barely changed from vote to vote: by a vote of 15 to 14, the Senate adopted this crucial restriction. Because a single senator changed his vote from Ye into Nay and another voted Yea who had not participated in the first vote, the Senate rejected Wright’s second amendment, which would have struck out the ban on giving non-cigarette tobacco to minors. And finally, the third amendment, which would have struck out the ban on and punishment of public smoking by minors, was also rejected by a vote of 15 to 16. After having succeeded in watering down the bill significantly, its opponents then voted against it, leaving Libby and its supporters to vote in favor of a bill that, because of its constricted scope, no longer corresponded to their objectives. In the event, the chamber denied it passage by a vote of 14 to 17.


742 Journal of the Senate of Maine: 1889: Sixty-Fourth Legislature 233-34 (Feb. 6) (1889); “Both Houses Working,” PEE, Feb. 6, 1889 (4:5) (stating the amendments but incorrectly stating that the amendment to strike out § 4 carried); Senate Amendments, in Sixty-Fourth Legislature: House No. 199 (1889) (copy furnished by Maine State Law and Legislative Reference Library).
The Senate engaged in a “long debate” before reaching this final vote only part of which is reflected in press accounts. Contrary to his voting record, Wright contended that he was opposed only to the provision punishing youths for public smoking; while allegedly approving of the other sections, he would “not...consent to become a party to the incarceration of a boy of 12 or 14 years in jail for smoking a cigarette. And it would amount to that in cases where boys have no money or whose parents are unable to pay the five dollars fine.” He had had the bill tabled because of “some obnoxious features,” but he insisted that he “did not in any way wish to attack any measure that had even a tendency to elevate the morals of the State,” but a line had to be drawn somewhere because if the legislature enacted all such bills, it would become a “laughing stock.” Wright agreed with complaints that cigarette smoking was more injurious to young boys than (other) tobacco: “Boys under 16 as a rule did not, in the country places, go to stores and buy tobacco, but they commence upon cigarettes and get initiated in the use of tobacco in that manner.” He argued that legislating against cigarettes would largely lead to a situation in which, over time, dealers would stop selling them and in many instances a boy who reached the age of 16 without having used tobacco would not use it afterwards. His objection to penalizing a dealer who sold snuff or tobacco to a boy who was sent by his parents was rooted in his belief that legislation should be consistent with a community’s wants and needs: unless proponents wanted to prohibit tobacco entirely, men had to be expected to send their boys to buy it; it would, therefore, be unjust to penalize the dealer. Moreover, penalizing the boy for smoking in public would (as some anti-tobacco advocates still believe more than a century later) forever stigmatize him and “perhaps lead to his ruin.”

In contrast, Libby defended the bill not only on the grounds that the committee had unanimously reported it and numerous petitions supported it, but also because everyone saw boys younger than 12 smoking all forms of tobacco on the street. Projecting a view that would resonate for many decades, Libby avowed that he was not prejudiced against adult use, but declared that he would use all his efforts to prevent tobacco use during the formative growth period. In adopting the position that the “evil...is not the sale of cigarettes, but the smoking of them,” he took a very hard line (which is still controversial in the anti-smoking movement) concerning statutory punishment of youth: “No sentiment as to what might happen under certain circumstance to a boy who deliberately broke this law ought to restrain members if they believed there is real evil, from meeting that

744 “Solons at Augusta,” PEE, Feb. 6, 1889 (1:2).
745 “Maine Legislation,” DKJ, Feb. 7, 1889 (1:5-9 at 6-7).
evil in a straightforward, manly fashion.” He sought to ground the reasonableness of the proposed intervention in the fact that the bill did “not undertake to dictate what people shall do in their own homes or in private,” but nevertheless contended that if smoking was an evil, “then boys under 16 should not be encouraged to walk the streets puffing cigarettes and tobacco; not perhaps because of sentiment, but because it is an evil undermining the health and constitution of the youth.” His argument then culminated in a strategy centered on children’s personal moral responsibility and dismissing the role of profit-makers (that would find less and less support among tobacco controllers a century later): “It was time to take hold of the difficulty at the right end, and that was to direct repressive legislation, if need be, against the parties who use and abuse dangerous articles of food and drink, and not against the parties who happen to be engaged in commerce. He would direct the legislation against the evil itself and make the youth...understand that such habits are not commendable.” Hence his advocacy of leniency for merchants, who should not be exposed to a penalty unless they knowingly sold for a minor’s personal use. Libby was also persuaded that making an example of one or two youths would suffice “to cause offenders to refrain from further exhibitions of their tastes.”

Wright persisted in disavowing any intent to kill the bill, which he believed in “to a certain extent.” He personally would not object to a measure punishing a man who drank even a drop of liquor because he personally “did not believe in such habits,” but he wondered whether the Senate agreed, and if it did not, why would it punish smoking? Moreover, he raised the objection that it would be more consistent to punish an adult man for drinking liquor than a 14- or 15-year-old boy lacking the “discretion of mature years.”

Of Maine’s huge northernmost county, Aroostook, Senator George Collins, himself a merchant, remarked that tobacco use was almost universal there and “all sorts of traps were being set for the purposes of prosecution.” Merchants were “all obliged to keep tobacco and...were constantly receiving orders for it from people living at a great distance. He could see how such a law would” injure parties and he therefore opposed it, though he did not object to the cigarette provisions, but “there would be no safety in keeping tobacco if the bill became law.”

The next day Wright moved to reconsider the vote by which the bill had been

746“Maine Legislation,” DKJ, Feb. 7, 1889 (1:5-9 at 6-7).
747“Maine Legislation,” DKJ, Feb. 7, 1889 (1:5-9 at 6-7).
748“Maine Legislation,” DKJ, Feb. 7, 1889 (1:5-9 at 6-7). Collins was returned as a merchant at the 1870 Census of Population.
defeated, and the following day, when his motion passed, he offered as an amendment his stripped-down bill that covered only cigarettes and did not penalize youth smoking. He insisted that his substitute “was all that the friends of the bill could reasonably ask,” adding, implausibly, that his conversations with petitioners had convinced him that they would be content. Libby offered a diametrically opposed narrative, explaining that petitioners “preferred to have no bill unless they could have the penalty for smoking by minors under 16 years in public places.” Dramatically, he proposed as a title for Wright’s substitute bill “‘an act to impose additional burdens upon shop keepers and to encourage the smoking of cigarettes by minors under 16 years in public places.’” Wright, in turn, tried to justify jettisoning the no-smoking provision on the grounds that since the unamended law would not prevent boys from smoking all they desired in some secret place—because “a boy over 16 could buy cigarettes and give them to his comrades of 14 or 15 years”—it would not accomplish the petitioners’ purpose any more than the amended version. Wright added, perhaps with an ironic touch, that his substitute would be as effective against the sale of cigarettes as the state’s prohibitory law was against that of liquor. Senator Henry Daggett (a miller/farmer) expressed surprise that any senator could believe that Wright’s substitute would comply with the petitioners’ request; his own inquiries had revealed that the petitioners’ “unanimous voice” was that all forms of tobacco be prohibited to boys under 18. The amended bill lacked even the appearance of being of some benefit inasmuch as it was not to be supposed that boys would not use some other form of tobacco if they were unable to get in “the milder form” (i.e., cigarettes). Senator (and future Attorney General and Governor) William T. Haines partially undercut this critique by correctly pointing out that the petitioners’ “object...was to prevent cigarette smoking because the smoke is inhaled into the lungs, thereby doing serious injury to those who used tobacco” in that form. (Concurring, another senator related that his personally having seen young boys and young ladies smoking and inhaling cigarette smoke prompted his belief that the sale of cigarettes was more pernicious than that of tobacco.) Ranging far beyond that issue, however, Haines charged that although the legislature had prohibited certain articles that it deemed injurious to health, it had “never gone as far as to say what things a man should personally use.” At least in part because he believed that merchants would respect a law against cigarettes, he declared it to be his colleagues’ duty to stand up “manfully” for the substitute. To the same end another senator reported that petitioners preferred something like

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the substitute to no bill at all in 1889.\textsuperscript{750}

At this point Libby offered an amendment to Wright’s that would have inserted the phrase “known to be” before “under the age of sixteen years” in sections 1 and 2 prohibiting the sale and giving of cigarettes to such minors. Senator Herbert Heath, another lawyer, immediately opposed the amendment, declaring that he would rather see the bill defeated than passed with this provision because an indictment of a dealer would have to include the allegation that he knew that the buyer was under 16, thus making prosecutions difficult. Glad that the senators were “really getting at the meat in the cocoanut and finding out what the effect of the bill is,” Libby retorted: “If merchants were to be punished under the bill for selling cigarettes to boys, innocently, without knowledge that they were under 16 years he thought senators would agree that it was unwise legislation especially if they refused to meet the real evil—which is the smoking of the cigarettes—by legislation directed to that result.”\textsuperscript{755} Libby’s convoluted argument attracted but three of the other 24 voting senators, almost exactly the reverse of the count (20 to 5) on Wright’s underlying substitute amendment. The Senate then passed and sent it on to the House for concurrence,\textsuperscript{752} which the lower chamber furnished later in February.\textsuperscript{753}

In its report to the weekly periodical of the national WCTU on the legislative session, the Maine organization displayed a sense of irony in describing the fate of its request for a law prohibiting the sale of tobacco in any form to minors under 18. Calling the no-cigarette-sales-to-under-18-year-olds “a step in the right direction, for cigarettes are used to an alarming extent in some localities,”\textsuperscript{754} the report observed of the aforementioned Senate floor remarks by Senator Collins that:

The speech in the Senate which seemed to lead to the change from “tobacco in any form” to that of “cigarettes” only, was made by a Senator from Aroostook county, who dwelt “touchingly” upon the way it would affect some of his constituency—county traders, who sold a great deal of tobacco; delivered in most instances, to the boys. This had more

\textsuperscript{750}“Maine Legislature,” \textit{DKJ}, Feb. 9, 1889 (1:5-9 at 6).

\textsuperscript{751}“Maine Legislature,” \textit{DKJ}, Feb. 9, 1889 (1:5-9 at 6-7). On Heath, see \textit{An Album of the Attorneys of Maine} 172 (E. Bowler ed. 1902).

\textsuperscript{752}\textit{Journal of the Senate of Maine: 1889: Sixty-Fourth Legislature} 251-52 (Feb. 8) (1889); “By Telegraph,” \textit{BDWC}, Feb. 9, 1889 (3:1).


\textsuperscript{754}“Legislative Enactments in Maine,” \textit{US} 15(12):4 (Mar. 21, 1889).
weight than the petitions of hundreds of educators, presidents of colleges, members of school boards, teachers, etc., and many thousands of others. However, we are thankful for the little bit granted in this direction.\textsuperscript{755}

Half a year later, however, the WCTU exhibited little gratitude. At its annual convention at Bar Harbor, Stevens, the superintendent of legislative work, explained how she had appeared before the Judiciary Committee “with the strongest arguments and a very influential petition, embracing hundreds of educators of Maine.... The committee made a very favorable report, but it was so cut down and modified in the Senate that when it passed it was, and is, very unsatisfactory, viz., prohibiting the sale of cigarettes to minors under 16.”\textsuperscript{756} This judgment was mild compared to the plaint issued by the superintendent of narcotics, Mrs. I. S. Wentworth, which underneath a patina of Christian optimism contained what should have been profoundly troubling information for future tobacco control efforts:

You all know the result of our efforts. As one of our superintendents aptly expressed it, “We asked for bread, instead of which they gave us a very small stone.”

But who wonders at this when we consider that nearly if not quite every man in that honorable law-making body himself uses the “filthy weed,” and when the city of Portland about that same time (if the papers were correct) raised several hundred dollars to furnish Legislature [sic] with cigars and other necessaries?

But we are in no wise discouraged. That word has no place in the vocabulary of the Woman’s Christian Temperance Union. ... The outlook is hopeful. Light is being diffused, more and more, people are beginning to see the danger in the tobacco habit not only to themselves but to their posterity, and how closely it is allied with the drink habit. Ministers from their pulpits are ringing out the words of the Apostle, “Having therefore these promises, dearly beloved, let us cleanse ourselves from all filthiness of flesh and spirit,” and Christian men are beginning to see as never before that they cannot use tobacco “to the glory of God.”\textsuperscript{757}

While still taking credit for passage of the no-sales-to-under-16-year-olds, the WCTU at its annual convention in 1890, perhaps in contemplation of future supplications to the legislature, toned down its criticism, remarking now that it


\textsuperscript{756}Fifteenth Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending Sept., 1889, at 71 (1890).

was “not all we asked for, but it is a step in the right direction....” With its wonted persistence, the WCTU continued to press for additional state intervention. At its annual meeting in 1896, for example, the Maine organization:

Resolved, That we condemn the elaborate and incessant advertising of tobacco, especially in the ways designed to catch boys, as a distinct menace to the health and brain-soundness of the race, and we urge upon all our Unions serious attention to this evil, and some well-considered and united effort to suppress it.

Resolved, That we will cry aloud and spare not against the cigarette curse, as one which no community can afford to tolerate, and we recommend to our legislators the example of Iowa which has passed a law forbidding the sale of cigarettes in the State.

Nor did the WCTU confine itself to appeals to the government to act for it: direct action self-help also formed part of its political repertoire. In 1896, Wentworth was able to boast in her annual report, members of various local unions succeeded in extracting from all the cigarette dealers in the small towns of East Corinth, Kenduskeag, Pittsfield, and Skowhegan a signed agreement not to sell any more cigarettes, while in Greenville all except one signed an agreement not to sell for one year. Engaging in imaginative political theater in East Corinth, “the ladies bought the stock on hand and cremated it.” Such tactics were well received by the press. In the retelling of the Corinth caper, the Bangor Daily Whig and Courier had the WCTU committee first buying and burning all the cigarettes and then obtaining the pledge. At the beginning of the year, when the merchants in the town of Milo (pop. 1000) agreed not to sell any cigarettes for a year, the same paper opined that if the other dealers in the country followed suit, “more of our boys and young men would live to fill the positions in life they were intended for.” (Not until 1897, “after two years’ crusade,” was Milo, thanks to a WCTU boycott of two holdout dealers, able to “rejoice[ ] in victory....”) Towards the end of the year two churchmen, a Methodist and a Congregationalist, took a page from the WCTU play book by persuading the

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758 Sixteenth Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1890, at 26 (1890).
761 BDWC, Feb. 7, 1896 (4:3) (untitled).
763 Twenty-Third Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1897, at 71 (1897).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

dealers in Brewer, a town of 5,000 adjacent to Bangor, to sign and carry out an agreement to stop selling cigarettes “to old or young.” The cessation was a relief to the Republican Daily Kennebec Journal in the state capital of Augusta, which had become alarmed by the extent to which “many Brewer boys, even little fellows who are scarcely out of dresses [are] being seen smoking.”

S. Graves, a school district principal in Augusta, a town of about 11,000, impressed upon its residents that, just like their counterparts in Chicago, schoolboys from eight to 16 were “smoking away brain power every day” despite the no-sales-to-under-16-year-olds law. That “a boy of any age may be seen at almost any time on the street with a cigarette in his mouth” moved Graves to pose a sarcastic rhetorical question: “Very often the same boy is destitute of necessary clothing which, if he ever has, the city or private society must provide. Why not furnish the youngster with his cigarettes and allow him to buy his shoes?” The principal sought to mobilize non-cigarette-smoking parents for some type of decisive intervention by focusing on the “obnoxious” stench broadcast by the smoking boys, which was “sickening to the teacher and to every neat pupil in the room. I am not sure but it is the duty of school officers to provide a special department for the instruction of the cigarette fiend and thus relieve those who abstain from the unpleasant influences.” In any event, it certainly did “not seem right that a girl or boy coming from a home where such impurities do not exist should be obliged to sit five hours in close proximity to so nauseating an agent.”

The Kennebec Journal, which published Graves’s report in October 1896, used it as a springboard for governmental action at the 1897 session: “The Legislature soon assembles and would it not be a good plan to know, before that time, just how much of practical value the existing law is and what is needed to render it more effective.” E elevating the “cigarette habit” to the “evil” that in many respects at that time “most seriously threatens the next and in fact succeeding generations,” the editorialist was flexible enough to be able to dispense with the claim that cigarettes were “made from old cigar ends, saturated with nicotine, and afterward drugged,” in order assert that even if only the “purest tobacco” was used, selling two cigarettes for a penny afforded sufficient opportunity for spreading “that vice among those most susceptible to its deadly effects....” Indeed, so baneful were the latter—at least among children, in whom they amounted to “the bite of a mad dog” compared with a fly bite in adults—that

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764DKJ, Nov. 11, 1896 (4:6) (untitled).

no measure was “too rigorous to be avoided [sic] if it but assures practical results.” The paper achieved what it no doubt regarded as just the right histrionic pitch by limning the awful possibility of dependence on a female military (which was, ironically, undercut by an 1894 estimate that women bought one-sixth of the 1,200 boxes of cigarettes sold daily in Portland, the state’s largest city).

The very thought of a nation of cigarette fiends, lunatics and idiots, physical and mental incapables, is enough to make one shudder, but it is not preposterous to imagine enough of our young men being so debilitated and unmanned that the future of the country would be imperilled. Should the cigarette habit continue to increase among the boys and young men...there would come a time when we should be compelled to look to the women for national defense, for they would be the physical superiors of the males.... The present law is not enforced when by constant supervision it could be to quite a degree. Because the vice does not send its victims reeling and brawling through the streets, however, does not excuse laxity in legislation and in enforcement....

The bill in the 1897 legislative session to prohibit the manufacture and sale of cigarettes was presented in the House on January 26 by Republican Lyman L. Walton, a 47-year-old lawyer from Skowhegan, who was also a Congregationalist Sunday school superintendent and a vice president of his local unit of the million-strong Young People’s Society for Christian Endeavor.
Later, during House debate on the bill, Walton explained his motivation: “I introduced this bill for the purpose of having the matter agitated. I believe that the agitation of this measure is important for our boys. I myself have known of several instances where the use of the cigarette has resulted in the complete wreck of the boy.”

The very brief bill provided that: “Whoever, by himself, his clerk, servant or agent, directly or indirectly, manufactures for sale, sells, offers for sale, has in his possession with intent to sell, or gives away, any cigarette, shall be punished by fine not exceeding fifty dollars or by imprisonment not exceeding sixty days.” In the light of the then perceived reach of the judicially created original package doctrine, the Bangor Daily Whig and Courier overstated the case when it claimed that if the bill passed, “no cigarettes can be bought in the state.” Less exaggerated may have been its report that the bill’s referral to the Temperance Committee “raised a laugh” among House members.

Surprisingly, despite the intensity of the Maine WCTU’s dedication to the anti-cigarette struggle, it did not initiate the 1897 bill. As I. S. Wentworth, who was in her tenth year as superintendent of the organization’s narcotics department, explained to the annual convention later that year: “We have greatly desired a better cigarette law, yet we have hesitated about undertaking the task of getting it, but when a bill was introduced in the Legislature prohibiting their manufacture, sale and gift in the State, I at once sent petitions and circular letters to all the Unions, and to many towns not having a Union. These petitions were faithfully circulated, more than 16,000 names being obtained, among them many cigarette dealers. Very few persons refused to sign. The petitions were sent to the Representatives accompanied by letters asking their help. Every member of the committee on temperance also received letters asking their help.”

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(4). The YPSCE was founded in Maine in 1881. Francis Clark, World Wide Endeavor: The Story of the Young People’s Society of Christian Endeavor (1895). A South Berwick local union of Christian Endeavor, including six unions with 150 members, submitted a WCTU pre-printed petition in support of Walton’s bill. Maine State Archives, 1/1 1897 ch. 405 Box 778.

774Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 241 (Mar. 4) (1897).

775An Act to Prohibit the Manufacture and Sale of Cigarettes, § 1, Sixty-Eighth Legislature, House No. 171, State of Maine (1897). The bill, which was to take effect on May 1, also conferred jurisdiction on trial justices and municipal and police courts over the described offences. §§ 2-3.

776“Lobbyists in Evidence,” BDWC, Jan. 27, 1897 (1:5).

The Maine WCTU did in fact have a large membership base to call on. In 1897 its 173 individual unions—of which only a single one recorded a decrease in membership during the previous year—reported a total of 3,930 members.\textsuperscript{778} By 1898, membership rose by 14 percent to 4,482.\textsuperscript{779} These members represented 0.65 percent of the total state population that year. More relevantly, they also constituted 2 percent of all women above the age of 18.\textsuperscript{780} Looked at from a slightly different perspective, in 1897 the Maine WCTU, which had been organized as early as 1875,\textsuperscript{781} accounted for almost 3 percent of total National WCTU membership but only 1 percent of U.S. population. Alternatively, its membership as a proportion of state population was, at 0.62 percent, the third highest behind that of New Hampshire (0.78 percent) and North Dakota (1.1 percent).\textsuperscript{782}

The WCTU’s petition campaign was, within a week of the bill’s introduction, reflected in the entries in the House and Senate Journal.\textsuperscript{783} The pre-printed WCTU “Cigarette Petition” stated that the undersigned citizens, “realizing that the Cigarette is an unmitigated evil, injuring morally, mentally and physically, a great many of our youth, often causing insanity and death, and feeling that we greatly need a more stringent law than the one now in force, respectfully ask that the bill prohibiting the manufacture, sale and gift of Cigarettes, heretofore

\textsuperscript{778} \textit{Calculated according to Twenty-Third Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1897, at 44-50 (1897). If the separately tabulated 634 honorary members were not included in membership column, the two together amounted to 4,564.}

\textsuperscript{779} \textit{Twenty-Fourth Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1898, at 34 (1898).}

\textsuperscript{780} \textit{Calculated according to Department of the Interior, Census Office, \textit{Report on Population of the United States at the Eleventh Census: 1890}, Part II, tab. 2 at 40 (1897); U.S. Census Office, \textit{Twelfth Census of the United States Taken in the Year 1900: Population}, Part II, tab. 2 at 46 (1902). The data for 1898 were calculated on the assumption that the population increased at the same rate every year between 1890 and 1900.}

\textsuperscript{781} \textit{Minutes of the National Woman’s Christian Temperance Union at the Eighteenth Annual Meeting...1891, at 229 (1891).}

\textsuperscript{782} \textit{Calculated according to Report National Woman’s Christian Temperance Union Twenty-Fourth Annual Meeting...1897, at 182-83 (1897). The WCTU data compared membership for 1897 with population for 1890.}

\textsuperscript{783} \textit{Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 178 (Feb. 2) (petition of Henry A. Sprague and 6 others of Charlotte) (1897); Journal of the Senate of the State of Maine 1897: Sixty-Eighth Legislature 181 (Feb. 3) (1897).}
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

introduced and now pending before said legislature, be given a passage. But in the brief interval before the responses to Wentworth’s initiative literally inundated the legislature with a large number of mass petitions during the latter part of February, it was the much smaller number of remonstrances (signed by relatively few remonstrants) protesting Walton’s bill on the grounds that “it would be an unwarrantable infringement of personal liberties, and would seriously menace the hotel and summer resort business of the State” that prompted the Temperance Committee to hold a hearing on the matter. Also received was the remonstrance of Spanish-born Ernesto Ponce, a long-time Portland cigar dealer and manufacturer—a decade earlier he had been the prevailing eponymous defendant in a U.S. Supreme Court cigar trademark case—who then operated a cafe and hotel and casino. By the end of the session, the House received 19 remonstrances with at least 291 signatures; the corresponding volume, which was in large part overlapping, in the Senate reached 34 and 301, respectively. In contrast, the avalanche of largely WCTU-inspired

784 “Cigarette Petition” (of citizens of Mapleton & vicinity, Aroostook County) (Feb. 1897) in Maine State Archives, 1/1 1897 ch. 405 Box 778.

785 “An Hour’s Session,” BDWC, Feb. 10, 1897 (1:2-3). The language quoted in the newspaper presumably stemmed from remonstrances submitted to the House the previous day by hotel owners; the first named remonstrant in the House Journal was H[enry] E. Judkins, of Waterville, whom the 1900 Census of Population listed as a hotel proprietor. His remonstrance was also signed by 20 others. The fashionable resort town of Bar Harbor was the source of at least one other remonstrance; a hotel owner in Kennebunkport also submitted one. Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 209-10 (Feb. 9) (1897); Journal of the Senate of the State of Maine 1897: Sixty-Eighth Legislature 217 (Feb. 10) (1897). For additional remonstrances, see Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 244, 338 (1897); Journal of the Senate of the State of Maine 1897: Sixty-Eighth Legislature 328 (Feb. 25) (1897). Unfortunately, although some petitions have survived, the bill file at the Maine State Archives contains no remonstrances. Telephone interview with Anne Small, MSA, Augusta (July 20, 2010).

786 Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 217 (Feb. 10) (1897); 1880 Census of Population (HeritageQuest).


788 Biographical Review: Cumberland County Maine 251 (1896), on http://www.raynorshyn.com/raynorshyn/megenweb/cumberland/biographies/ponce.txt. A check of remonstrants’ names in the 1900 Census of Population revealed that many of them were hotel owners.
and also largely duplicative petitions bore more than 12,405 signatures in the House and more than 15,388 in the Senate. Both chambers’ petitions were bulked up by two, one of which was signed by more than 4,000 female members of the WCTU itself and the other by 4,000 members of the United Societies of Young People, Free Baptist church.  

On February 10, Walton appeared on behalf of the petitioners and the Augusta corporate law firm of Williamson & Burleigh for the remonstrants. Although the hearing was postponed to grant petitioners additional time to prepare their case and secure witnesses, it was already clear to the press that the bill had “many enemies as well as friends,” both of whom would “make a strong fight.” At the continuance of the hearing on February 24, the Temperance Committee, finding the “crowd,” which was “strongly anti-cigarette in sympathy,” too large for the assigned room, resumed the proceeding in the hall of the House, in which “[s]cores of ladies were present...and many clergymen.” Once again Walton conducted the hearing for the bill’s supporters, whose attendance the WCTU had mobilized and first and “foremost” among whom was Ella Gleason, who had played a prominent part in similar proceedings in Massachusetts, and whom the Kennebec Journal certified as “a speaker and


791 “In Memoriam,” DKJ, Feb. 11, 1897 (9:1-3 at 3).

792 Because petitioners had asked for additional time to prepare their case and “get witnesses present,” the Feb. 10 hearing was adjourned until Feb. 27, but was actually held on Feb. 24. “Before Committees,” BDWC, Feb. 12, 1897 (3:6); “Legislative Notice,” BDWC, Feb. 22, 1897 (2:3). Presumably, Wentworth’s account referred to the second hearing, press coverage of which was spotty. E.g., “Committee Hearings,” BDWC, Feb. 26, 1897 (3:5).

793 “After the Ball,” DKJ, Feb. 25, 1897 (5:2-4 at 4).

794 Twenty-Third Annual Report of the Woman’s Christian Temperance Union, of the
debater of unusual skill and power.” After she had “explained the evil effects of cigarette smoking with great force” and the need for legislation, Wentworth, two ministers, a physician, a school principal, several politicians, and State Superintendent of Public Schools William W. Stetson pleaded for the bill’s passage. Representing the bill’s opponents, Joseph Williamson, Jr. conceded tobacco’s injurious effects on the human system, “but claimed cigarettes to have less nicotine than other forms of the weed.” Rehearsing his client’s chief legal defense, he contested the bill’s constitutionality on the (false) grounds that, since no cigarettes were manufactured in Maine, “all brought here are in the original package from other states and over this Congress alone has control.” Wentworth later reported to the Maine WCTU that “[t]he only opposers were lawyers hired by the American Tobacco Trust Co.,” thus confirming its ubiquitous vigilance whenever legislative bodies were considering restrictions on the monopolist’s cigarettes. Following the hearing the Temperance Committee reported the bill favorably.

The day after the hearing the Bangor WCTU, purporting to speak on behalf of “the overwhelming majority of the women in this community,” adopted a resolution that touched on so many of the salient and heterogeneous topoi of the anti-cigarette movement that it is worth reproducing at length. After expressing its gratefulness for the legislators’ focus on “the cigarette curse” and praying that they do “their utmost to deliver our State from this dangerous and intolerable
evil,” the group viewed the matter from the vantage point of its members’ various capacities and roles:

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

As mothers, teachers and friends of youth, we want all boys and girls delivered from this omnipresent and apparently irresistible temptation.

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

As sane and impartial observers we see that a law which forbids a sale to persons of a certain age while permitting it to persons of another age is vastly more difficult of administration than a law forbidding the sale altogether.

Of overriding significance is that, unlike the stereotypical rhetoric in the above-quoted pre-printed petition, none of these arguments was, as latter-day scholars claimed was typical of the WCTU’s opposition to cigarettes, rooted in morality, let alone religion. Instead, the Bangor WCTU protested against secondhand smoke exposure and nonsmokers’ being forced to share the collective economic costs generated by the adverse health impacts of smoking and stressed the superior enforcibility of a general over an age-restricted sales ban.

On March 4, shortly after this resolution, which closed with the assurance that only by using “their heartiest efforts” to pass the anti-cigarette bill would the
Bangor representatives in the legislature “adequately or justly represent the overwhelming majority of the women of this community,” was presented to the House, that chamber took up Walton’s bill on the motion of Republican Isaac Rounds, a physician who also moved that it be put on its passage. Debate—the content of which is available because, coincidentally, at the 1897 session the Maine legislature initiated production of verbatim transcripts of its debates—opened when Republican Carl King, a lawyer, merchant, and farmer moved that the bill be referred to the Judiciary Committee to secure its decision regarding the question of the measure’s constitutionality. Rounds resisted the motion on the grounds that that committee was not authorized to make such determinations—only the supreme court was—though he added that many Maine lawyers had thought that the bill was constitutional in the same sense in which the state’s venerable liquor prohibition law was. King hoped, oddly for a lawyer, to sway some votes by reading from a letter from an ex-judge who, after admitting that he had had no time to investigate, merely “as a matter of recollection and impression,” weakly and tentatively opined: “I should not suppose it competent for one state to impose such an absolute prohibition against interstate commerce....” While regarding referral to the Judiciary Committee as a “waste of time,” another legislator reminded his colleagues that one thing they did know was that “the sentiment throughout...Maine is overwhelmingly in favor of this bill” inasmuch as the legislature had received “[v]ery nearly 2000 petitions” for and fewer than 400 against the bill, several of the latter having been signed by only one person. In fact, the latter figure was inflated and the

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803 Resolutions Adopted by Bangor W. C. T. U. (Feb. 25, 1897), in Maine State Archives, 1/1 1897 ch. 405 Box 778.


806 Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 18 (Howard Owen comp.).

807 Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 240 (Mar. 4) (1897).

808 Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 14 (Howard Owen comp.).

809 1900 Census of Population (HeritageQuest). By the time of the 1910 census King was a bank president.

810 Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 240 (Mar. 4) (1897).
imbalance even more lopsided: as a senator pointed out later, but 228 remonstrants stood against 16,000 petitioners. The mood among legislative enthusiasts can be gauged by the remarks of life and fire insurance agent Archie Talbot, who did “not know of a smoker but who will vote to annihilate the cigarette. It ought to be an outlaw in ever civilized community. We cannot pass legislation which is too radical against such things as this.” Portland wool and leather merchant Frederick Winslow, a long-time YMCA worker, struck a similar chord in declaring that “if the constitution of the United States interferes with the moral sentiment of the State of Maine, then we had better have the constitution of the United States changed.”

The author of the bill himself, Walton, came closest to grappling with the core constitutional and libertarian issues by (unnecessarily) conceding that if his bill were unconstitutional, so, too, would the existing no-sales-to-under-16-year-olds be. As a lawyer he could claim to know something, if not all, about constitutional matters, but in any event he knew enough to know that the question at hand was a “very grave” one.

The claim made by the author of the bill is that it is unconstitutional, for the reason that while you can prohibit the sale of intoxicating liquor, you do it upon the ground that the man may become so intoxicated that he will injure other people, but that if he takes poison and injures himself does not necessarily affect other people; and that on that account he has a right to use any kind of poison to destroy himself, body and soul. But I take issue with the alleged claim upon that ground. I say that anything that a person takes which breaks down his constitution, which destroys his intellect, which makes him a wreck, body and soul, is a matter which the people of the State of Maine have an interest in and which they have a right to legislate upon, and that as police legislation we have a right to pass any law in regard to such matters, because the germs of disease which are implanted in a person not only affect his children after him, and so in respect to such matters the people of Maine

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812 Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 20 (Howard Owen comp.).
813 Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 241 (Mar. 4) (1897).
814 Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 20 (Howard Owen comp.).
815 Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 241 (Mar. 4) (1897).
816 Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 241-42 (Mar. 4) (1897).
as well as the people of all other states have a deep and abiding interest.\textsuperscript{817}

To be sure, Walton’s approach was—even assuming that he was not positing some form of inheritance of acquired traits or diseases—so crudely and boundlessly expansive that it could have justified profoundly intrusive majority governmental suppression of an enormous swath of human activity. (For example, reading certain books or whole genres of books or failing to read any books at all might be prohibitable on the grounds that it was intellect destroying.) Nevertheless, he articulated a form of extremist paternalism that could serve as a counterpoint to mirror-image libertarianism and thus enable legislators (and citizens) to orient themselves, by attraction or repulsion, along a spectrum of policy positions on cigarettes.

In the event, King’s dilatory (if not murderous) motion to refer Walton’s bill to the Judiciary Committee was defeated by the overwhelming vote of 15 to 106. Among the 15 proponents were two hotel owners (one of them the only Democrat who voted Yea) and two grocers, who may therefore have sold cigarettes.\textsuperscript{818} Immediately after this vote, Portland banker Arthur Merrill, who had voted Yea, “threw a bomb shell into the House with startling effect,”\textsuperscript{819} which prompted members and spectators to become “convulsed with laughter,”\textsuperscript{820} to amend the bill to extend coverage to any “cigar or tobacco in any form.”\textsuperscript{821} Professing to regard the bill as “a good one as it stood” and claiming that he had voted for referral only on the grounds of its legality, he insisted that he would now vote for it. Then he added (no doubt with a constant flow of winks): “But the bill does not go far enough. I notice that about this State House tobacco is used and it is very noxious, and I think that some of the tobacco which is used is as noxious and as deleterious as cigarettes. Now I think that the members of this House, even if it deprives them of some comforts or pleasures, would be willing to go the entire length in this reform if they go at all. It is no more than just, it is no more than

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\textsuperscript{817}Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 242 (Mar. 4) (1897).

\textsuperscript{818}Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 395-97 (Mar. 4) (1897). The two hotel owners were John Kaler (Dem.) and Edward Rodick; the grocers were James Coffin and James Hancock. Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 13, 17 (Howard Owen comp.); 1900 Census of Population (HeritageQuest).

\textsuperscript{819}“Cigarette Bill,” DKJ, Mar. 5, 1897 (5:2).

\textsuperscript{820}“Maine Legislature,” BDWC, Mar. 5, 1897 (4:7).

\textsuperscript{821}Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 242 (Mar. 4) (1897).
right, and I think it would be a great advance....” The amendment, according to *Kennebec Journal*, was “so extreme that it was farcical, and the curious spectacle was presented of all the constant smokers of the House voting against the use of tobacco, and the enemies of tobacco voting against the amendment.” Despite the inconsistency, “the smokers felt they had the anti-cigarette men in a most embarrassing dilemma.” In effect daring the anti-cigarette legislators to rebut the implicit charge of hypocrisy by voting to cut off their own and their friends, relatives, business acquaintances, and customers’ ready access to cigars and pipe tobacco, Merrill called for a roll call vote. “There was applause and laughter, badinage and fun...as the aye and nay vote was taken,” which, predictably, defeated his killer amendment 42 to 79, the Yeas artificially inflated by several members “just for the fun of the thing” knowing that the motion would not pass.

The press characterized these votes as “the means of making the powerful lobby, which, it is alleged, the American Tobacco Company sent to the capitol, feel somewhat anxious.” Whatever level of anxiety weighed down on the Trust must have been mightily alleviated by the prediction that, even though the bill seemed poised to pass the House, it would “undoubtedly receive its demise in the upper branch.”

On third reading three weeks later, Benjamin Hamilton, a Methodist, farmer, president of the Maine State Agricultural Society, Harvard Law School graduate, and lawyer, who had voted for both King’s and Merrill’s amendments, offered two of his own. The first, which would have radically diluted the bill by restricting coverage to minors under the age of 21, was voted down. The second proposed to expand coverage by prohibiting anyone from “bring[ing] into this State” any cigarette. Since this provision would presumably also have applied to anyone who brought cigarettes into Maine for his own personal consumption, it

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823*Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897*, at 242 (Mar. 4) (1897).
825*Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature*, 397-98 (Mar. 4) (1897); Amendment A to House bill # 171 (n.d.), in Maine State Archives, 1/1 1897 ch. 405 Box 778. Of the 15 members who had voted to refer the bill to the Judiciary Committee 12 voted Yea; Walton voted Nay.
828*Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897*, Vol. 18, at 12-13 (Howard Owen comp.)
would have run afoul of the original package doctrine and thus insured that it would be judicially invalidated as an interference with the federal constitutional commerce clause. For that very reason it was doubtless backed by opponents of Walton’s bill, who on a division were defeated by a vote of 30 to 52.\(^{829}\) All the unfriendly amendments having been disposed of, the House voted to pass the bill and sent it to the Senate.\(^{830}\)

Two days later, when the Senate took up Walton’s bill, it was immediately faced with the same 21-and-under diluting amendment that the House had just voted down. Republican Cyrus Witham, a 26-year-old clerk and member of Sons of Temperance,\(^{831}\) opposed it for the very reason that the other chamber had rejected it. The amendment’s sponsor, Frederick Walls (who was returned at the 1900 Census of Population as a “Capitalist”),\(^{832}\) while presuming that it was legislators’ duty to “prohibit all those things that would be to the injury of mankind,” nevertheless urged his colleagues to restrict such prohibitions to “those who were already under guardianship or in their minority. Those who were over over age should have left to them the possession of their rights and individuality, and the responsibility left upon them relative to their own actions. There should be a line drawn somewhere, establishing a just medium of legislation....” Farmer Matthew Morrill closed the debate by pointing out the huge disproportion between the 16,000 petitioners and only 228 remonstrants and emphasizing the clear demonstration that “not a particle of good” arose from using cigarettes, which were “exceedingly detrimental to health in a great many ways.”\(^{833}\) On a roll call the Senate then voted 15 to 10 to adopt Walls’s amendment. After passing the bill so amended the Senate sent it back to the House for

\(^{829}\) Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 409-10 (Mar. 24) (1897); Amendments A and B (Mar. 24, 1897), in Maine State Archives, 1/1 1897 ch. 405 Box 778.


\(^{831}\) Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 6 (Howard Owen comp.).

\(^{832}\) A farm laborer was also returned as his boarder. 1900 Census of Population (HeritageQuest). He had previously been a school teacher, merchant, sheriff, non-practicing bar member, deputy customs collector, and granite company director; in 1897 his occupation was business manager and school supervisor. Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 6 (Howard Owen comp.). See also Joseph Williams, History of the City of Belfast in the State of Maine, vol. 2: 1875-1900, at 146 (Alfred Johnson ed. 1915).

\(^{833}\) Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 432 (Mar. 26) (1897).
Unsurprisingly, given the large majority for Walton’s universal cigarette sales ban, the House refused to recede and concur, as, Cyrus Blanchard, who had voted against both proposed amendments on March 4, moved; instead, it insisted on its version of the bill and called for a conference committee with the Senate by a vote of 61 to 11. Of the three Republican members appointed by the speaker to the conference committee two had also voted against both amendments, one of them, James Hamilton, a Methodist, order organizer, lecturer, and life insurance agent, having moved that the House insist.\textsuperscript{835} When the Senate received notice of the House action, Witham moved that the Senate recede and concur with the House, but his motion was defeated by a rising vote of 4 to 12, and the Senate proceeded to appoint to the conference committee three members who had all voted for Walls’s amendment.\textsuperscript{836} In the event, in conference the Senate’s defanged version of the House bill was agreed on, and on the final day of the

\textsuperscript{834}Journal of the Senate of Maine 1897: Sixty-Eighth Legislature 579-80 (Mar. 26) (1897); Senate Amendment “A” to House Doc. # 171 (Mar. 26, 1897), in Maine State Archives, 1/1 1897 ch. 405 Box 778. Between the 15 Republicans who voted Yea and the 10 who voted Nay biographical profiles do not appear to have differed decisively: the average age of the first group was 48 compared to 45 in the second; occupationally, the first group included three farmers, three lawyers, two merchants, two manufacturers, and a physician, while the second group included four farmers, two surveyors, one manufacturer, and one physician; nor was denominational affiliation within Protestantism markedly different. The average population of their hometowns did exhibit some difference: 5,500 and 3,500 respectively; the arithmetical reason for the difference lay in the fact that none of the non-compromising senators lived in a town with a population above 6,000, whereas four of those backing the bill’s severe dilution lived in towns with populations ranging from 8,000 to 22,000. However, eight of the Yea-voters lived in towns of 1,000 to 3,000. Data taken from Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 3-7 (Howard Owen comp.); U.S. Census Office, Twelfth Census of the United States Taken in the Year 1900: Population, Part II, tab. 5 at 189-95 (1901).

\textsuperscript{835}Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 437 (Mar. 26) (1897); Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 641 (Mar. 26) (1897). Blanchard was a 27-year-old Free Baptist and former school principal, who by 1897 was a lawyer and school board chairman. Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 8-9 (Howard Owen comp.). On Hamilton, see id. at 12. The other two conference committee members were Thurston Burns (who had voted to refer the bill to the Judiciary Committee) and Benjamin Burton.

\textsuperscript{836}Journal of the Senate of Maine 1897: Sixty-Eighth Legislature 585 (Mar. 26) (1897).
session both houses accepted the committee report and passed the no-cigarette-sales-to-under-21-year-olds bill, which became law. Thus the House, as the Maine WCTU noted at its annual convention, “at first refused to concur, but at last yielded.” Rather than assessing this outcome of the pro-tobacco strategy of dilution, which was frequently implemented in state legislatures, as a bill killing, the WCTU portrayed it, at least for public consumption, as contributing to “a stronger and more universal sentiment against cigarettes than ever before....” Thus while regretting the amendment, narcotics superintendent Wentworth assured the membership that “we are glad of so much advance....”

The law may have been designed to prevent boys from smoking cigarettes, but when it went into effect at the beginning of May the press reported that people generally hoped that “the noisome pestilence of a cigarette may become less and less until it may some day die a horrible death.” Though not for health reasons, tobacco dealers, as was the case in other states too, “would be just as well pleased to have the sale of cigarettes prohibited altogether.” Their indifference was grounded in their mere 1.2 cent profit from a 5-cent box of 10 cigarettes.

As predictions of the cigarette’s demise proved to be premature, the Maine WCTU radicalized its anti-tobacco program. For example, in 1899 the organization, recognizing that “the injurious effects of the use of tobacco upon the young, in cigarettes or any other form, cannot be combated successfully except by example,” adopted a resolution “urg[ing] that no certificate shall be granted to teachers who use tobacco in any form” and that church members “shall discountenance” its use “by their Sunday school superintendents and all other church officials.” Taking the next logical step the following year after receiving information “at only one remove” from a faculty member that cigarette smoking was being “practiced” by University of Maine students, the WCTU adopted a resolution expressing the belief that “our state university should imitate

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837 Journal of the Senate of Maine 1897: Sixty-Eighth Legislature 603 (Mar. 27) (1897); Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 666 (Mar. 27) (1897), State of Maine, Committee of Conference (Mar. 27, 1897) (reporting bill in a new draft and that “it ought to pass”), in Maine State Archives, 1/1 1897 ch. 405 Box 778.
838 1897 Maine Laws ch. 333, at 406.
839 Twenty-Third Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1897, at 72 (1897).
841 Twenty-Fifth Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1899, at 37 (1899).
the regulations of the United States [sic] academy, of Bates college and other progressive institutions, and receive no students who will not refrain from cigarette smoking and the use of tobacco in other forms."842 With such an arch-paternalistic, anti-libertarian intervention still on no anti-smoking agenda more than a century later, little wonder that even in the shorter run Maine failed to enact a statewide ban on cigarette sales.843

**Illinois: 1897**

Under penalty we forbid apothecaries from dispensing morphine, laudanum, or prussic acid without the order of a physician. Yet we tolerate the slow destruction of the minds and bodies of schoolboys and young men by the toxic abominations concocted in the laboratories of the cigaret trust.844

Despite the failure of the Morris bill in 1893,845 efforts to pass a cigarette sales ban in Illinois continued unabated throughout the 1890s, in part because the WCTU’s national headquarters was located in Chicago and the Illinois WCTU’s membership (12,766) was the third largest in the country,846 but also because the militant anti-cigarette crusader Lucy Page Gaston lived in Cook County. (At the 1900 and 1910 Census of Population the enumerator even recorded her

842Twenty-Sixth Annual Report: Woman’s Christian Temperance Union of Maine for the Year Ending September, 1900, at 22.

843According to the indexes to the Senate and House Journal, no other anti-cigarette bills were even introduced between 1895 and 1903. As late as 1919, a bill was introduced in the House to prohibit the smoking, manufacture, sale, importation, or handling of cigarettes, cigarette paper, or cigarette tobacco subject to a fine of $100 and 60 days’ imprisonment (plus an additional 60 days in default of payment). Seventy-Ninth Legislature of State of Maine, House No. 78 (Jan. 31, 1919). The bill died after the Public Health Committee had voted that it “ought not to pass.” Journal of the House of the State of Maine: 1919: Seventy-Ninth Legislature 382 (Mar. 5) (1919).

844“The Poisoned Cigaret,” CT, June 6, 1894 (6) (reprinted from Evening Post (Chicago)).

845See above ch. 4.

846Report National Woman’s Christian Temperance Union: Twenty-Fourth Annual Meeting...1897, at 182-83 (1897). Nevertheless, in 1897 the WCTU, as discussed below, while strongly supportive of the legislative anti-cigarette agitation, did not spearhead the campaign. On its support, see, e.g., “Upper Alton W.C.T.U.,” Alton Evening Telegraph, May 7, 1897 (4:5).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

occupation as “reformer.”) The momentum for state legislative action was also reinforced by the constant agitation for and adoption of a prohibitory high license in Chicago.

By the time the next round of initiatives was launched at the 1895 session, comfortable majorities in both houses had shifted back to the Republicans (who would continue to control the legislature until the New Deal). No fewer than five bills were introduced by Republicans and Democrats in both chambers, representing Chicago and smaller towns, and engaged in various occupations; the three House bills all died in committee, while the two Senate bills at least received a committee report. The first to be introduced and the one that gained the most press attention was H.B. 235, by first-term Chicago Democrat Frank J. Brignadello, a 30-year-old merchant. When it was referred to the Judiciary Committee, Brignadello moved to suspend the rules and refer it to the Committee on Manufactures, but his motion lost. His bill to prohibit the manufacture, sale, and giving away of cigarettes carried forward, almost intact, the language of Morris’s bill by including “all preparations of tobacco wrapped in paper, or any kind of tobacco for such use, and impregnated with opium, stramonium, belladonna, alcoholic liquor, valerian, tonca bean, or mellotis [sic], or any other deleterious matter.” The bill also made it “devolve upon the defense to show the

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847Twelfth Census of the United States, Schedule No. 1—Population, Series T623, Roll 295, Page 159 (1900) (HeritageQuest); Thirteenth Census of the United States, Series T624, Roll 241, Page 96 (1910) (HeritageQuest). In the latter year she was returned as superintendent of the Anti-Cigarette League. For a typical hyperbolic claim of Gaston’s influence, see Frances Warfield, “Lost Cause: A Portrait of Lucy Page Gaston,” Outlook and Independent, Feb. 12, 1930, at 244-47, 175-76, at 246 (“Directly or indirectly through her efforts, total anti-cigarette laws had been passed in eleven states by 1913”).

848“As a direct result of the anti-cigaret movement, a municipal license went into effect, which prevents the indiscriminate sales of the obnoxious ‘smokes.’” “New War on Cigaretts,” CT, Sept. 22, 1897 (8).

849Republicans controlled the Senate 33 to 18 and the House 92 to 61. Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 57 (2007). Between 1864 and 1932 Democrats were the majority party in the House only in 1890, 1892, and 1912, and in the Senate only in 1876 and 1892.

850The Portraiture of the 39th General Assembly of Illinois: 1895, at 202; Official Directory of the Fortieth General Assembly of Illinois: Session of 1897, at 48 (1897). Brignadello was returned at the 1900, 1910, and 1920 Census of Population as a real estate merchant.

851Journal of the House of Representatives of the Thirty-Ninth General Assembly of the State of Illinois...1895, at 155 (Feb. 6) (1896).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

articles in question are cigarettes.” As soon as the bill was filed, the Chicago Tribune reported that it did not “disturb dealers much” because they had become used to ordinances and license and adulteration measures. Indeed, cigarette dealers in Chicago, like many elsewhere, were not worried even if an absolute ban were implemented because there was “more profit in other smokes and their use would increase.” At the ATC’s Chicago office nonchalance was purportedly the reaction as it puffed to the press that “as a rule measures of the kind introduced had little power. It had been known in the office for a week that such a bill was contemplated, but the knowledge had not roused action.” Two other bills, both introduced by Republicans, followed Brignadello’s to an early grave in the House Judiciary Committee, in which an effort was to be made at the end of February to combine the three in one and report it back to the full House as a committee bill. In the Senate, Democrat Albert Brands, a physician who was opposed to “any legislation that will be likely to foster trusts or monopolies,” and 77-year-old retired merchant Thomas Hamer, a Republican, both introduced manufacture/sales ban bills, which the Corporations and Education Committees took almost four months to report, in the one instance recommending against passage and in the other without any recommendation.

Despite the House and Senate Journal’s virtual blank legislative history slate and ATC’s studied insouciance, in fact, as the Tribune also reported, the “cigaret trust” industriously lobbied the bills to death. A few days after the last of the five bills had been introduced, the newspaper noted that the “cigaret trust is being made painfully aware” of the legislative session, early in which “a couple of gentlemen representing the cigarette trust came to Springfield and remained here a week or ten days. One was a portly, fine looking, middle-aged man and the

852“To Keep the Cigaret Out of the State,” CT, Feb. 7, 1895 (5).
853“Not Worried over the Cigaret Bill,” CT, Feb. 8, 1895 (12).
854H.B. 395, introduced by Swedish-born Lars Noling, authorized local governments to regulate the manufacture, sale, and traffic in cigarettes, while farmer James Fletcher’s H.B. 452 prohibited their sale and manufacture. Journal of the House of Representatives of the Thirty-Ninth General Assembly of the State of Illinois...1895, at 224, 259 (Feb. 20, 27) (1896); The Portraiture of the 39th General Assembly of Illinois: 1895, at 100, 76.
855“Many Bills Come Up,” CT, Feb. 25, 1895 (2).
856Souvenir of the Illinois Legislature of 1893, at 22 (1893).
859“Will Resume with a Rush Today,” CT, Mar. 5, 1895 (2).
other about 55 years of age, thin and spare in flesh. They were rather cavalierly treated, particularly by some of the Chicago members, who remembered the unpleasantness over the cigaret legislation in the City Council between the representatives of the cigaret industry and Ald. Powers. Ordinarily the representatives of an interest assailed or assailable by legislation is royally welcomed during sessions of the Legislature; the cigaret men were the exceptions to the general rule.” At this point the Tribune’s narrative turned opaque as it alluded to the ATC lobbyists’ sudden departure from the state capital after they had made the acquaintance of two unidentified non-legislators. As for the fate of the bills, the paper knew no more than intimations that either the House Judiciary Committee would soon consider them or that a duplicate Brignadello bill would be introduced and expedited to a second reading without a committee referral, “thereby demonstrating to the world that the cigaret trust is resting its hopes for absolution from hostile legislation on broken reeds.”

Nevertheless, a few days later, in early March, a “good many” legislators were still “dissatisfied over the failure of some of the committees to act on measures of importance which are being juggled by lobbyists.” Chief among them was the House Judiciary Committee, which for several weeks had been sitting on “bills calculated to abolish the trade in cigarettes, or bring it within proper restrictions.” The Tribune bluntly noted that the “cigaret trust has men here watching these bills and the consequence is that the committee, although promising day after day to take them up, has done nothing with them.” A similar blockage had stymied the Pullman bills in the House Corporations Committee. Once again, the paper predicted, that, with time for action passing, unless the bills were soon reported out, duplicates would be introduced to bypass the committees because: “Nothing can stop these bills if they ever get before the House, and the project of the parties interested contemplates their smothering in committee.”

As the members who were “making war on the cigarette [we]re getting uneasy about the bills,” one of them declared that unless the committee considered them at once, he would offer a resolution instructing it to report them forthwith without

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860“After the Cigaret,” CT, Mar. 2, 1895 (4). On the city council ordinance, see below this ch.

861“Will Resume with a Rush Today,” CT, Mar. 5, 1895 (2). Many legislators’ belief that the great Pullman strike could have been averted if Pullman had entertained arbitration or compromise with the workers engendered considerable bitterness toward the corporation. In conformity with Governor Peter Altgeld’s proposal to protect people against the “extortion” in sleeping-car rates, several bills were filed to reduce rates. “Broth in the Fire,” CT, Feb. 28, 1895 (1).
recommendation so that the House could consider them. 862

Insuring that they not reach the House floor was presumably in part the doing of the chairman of the House Judiciary Committee, Daniel S. Berry. A railroad attorney and one of the “Big Four” who controlled legislative destinies that session, he was “accused of boodling.” Consequently, Berry, who declared that a legislator could also serve constituents by preventing legislation, was the chief target of reformers. 863

So adroit were the Trust’s lobbyists and their legislative assistants that they swiftly succeeded in euthanizing the sales-prohibition bills without witnesses:

There was a small business transaction in the House Committee on Judiciary one day last week which attracted little attention at the time, but it seems to have been the death knell of the anti-cigarette bills. At the time no newspaper correspondents were present. A clever move was made and all four of the bills for the prohibition of the sale of cigarettes were sent to a subcommittee. This was for the alleged purpose of combining the four into one bill. It has since leaked out, however, that these bills were sent there for burial and that it is not the intention of the cigarette trust that they shall ever again see daylight. 864

Nor did they—at least during the 1895 session.

But in November 1896, shortly after the elections had boosted the number of Republican-held seats in the 51-member Senate to 39, while leaving the party’s House majority virtually unchanged, 865 the executive committee of the Christian

862 “Plans for the Week,” DIO, Mar. 4, 1895 (7:4).

863 “Meyer Announces His Committees,” CT, Jan. 30, 1895 (2); “Illinois Lawyer Slain,” NYT, May 23, 1905 (1); “Mystery Deepens in Savanna Crime,” CT, May 24, 1905 (1, at 5:2) (quote); (“D. S. Berry Will Fight Vicious Bills,” CT, Jan. 7, 1895 (2); “Politician Slain,” CT, May 23, 1905 (1, at 4:2). In 1905 a jealous husband killed Berry.

864 “Up for Final Action,” CT, Mar. 11, 1895 (2); “Work of the Week,” DIO, Mar. 11, 1895 (4:3-4). A week earlier the same paper had reported that the Senate Manufactures Committee would consider the anti-cigarette bill in two days with the plan of combining them into one “radically modified” license measure because a sales ban was unenforceable. “Plans for the Week,” DIO, Mar. 4, 1895 (7:4-5). Since the Senate bills had not been referred to this committee, it is unclear how it would have jurisdiction over them.

865 Eleven Democrats and one Populist were elected to the Senate; the House was divided among 89 Republicans, 62 Democrats, and two Populists. Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 57 (2007). Because one Democratic senator (Albert Wells) died in early March without being replaced, by the time the Senate dealt with the House-passed anti-cigarette bill in late May, it was composed of 39 Republicans, 10 Democrats, and 1 Populist. Official Directory of the Fortieth General Assembly of Illinois: Session of 1897, at 73a (1897).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

Citizenship League—a proto-Christian Socialist organization—issued an appeal to the state’s Christians to exert their influence on the legislature to enact three pieces of legislation at the 1897 session: preserving the Sabbath as a day of rest, establishing local option alcohol prohibition, and prohibiting the manufacture and sale of cigarettes. In mid-January Republican farmer George Stubblefield initiated the session’s flow of anti-cigarette measures by introducing in the Senate a bill “to provide for the licensing of and against the evils arising from the sale of cigarettes,” which, by imposing a $2,000 and $5,000 annual license (the money to go the school fund) on retailers and wholesalers, respectively, and a fine ranging between $100 and $1,000 and imprisonment up to one year, was said to “amount to prohibition.” Four days later third-term Republican Representative Lars Noling, a Swedish immigrant who was president


867“To Influence the Next Legislature,” CT, Nov. 23, 1896 (2).

868Journal of the Senate of the Fortieth General Assembly of the State of Illinois 262 (Jan. 16) (1897) (S.B. No. 245). In yet another example of the gross factual errors with which her book is replete, Tate asserted that after the Senate had defeated the bill (H.B. No. 221) that the House had unanimously passed, “its backers immediately submitted” S.B. No. 245. In fact, the latter had been introduced 25 days before the former was even introduced and four and a half months before the Senate defeated it; nor did Tate offer any evidence that the two bills’ backers were the same. Cassandra Tate, Cigarette Wars: The Triumph of “The Little White Slaver” 47 (1999).

869“Legislative Gossip,” Chicago Eagle, Feb. 20, 1897 (4:3-7 at 4).

870“Push War on Cigarettes,” CT, Feb. 20, 1897 (9:3). Two months later, after this bill had made no progress, he introduced one to prohibit the manufacture and sale of cigarettes, on which the Senate also took no action, presumably because it was superseded by House passage of a similar measure. Journal of the Senate of the Fortieth General Assembly of the State of Illinois 325 (Mar. 11) (1897) (S.B. No. 245).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

of numerous agricultural implement factories and a newspaper,871 introduced a bill to prevent the manufacture and sale of cigarettes.872 These two bills were quickly superseded—neither saw any further action—as a result of coordinated intervention by the League and various Chicago school and women’s clubs and organizations, including the League and the WCTU, which met on February 3. Chicago school principal Mary Darrow Olson (Clarence Darrow’s older sister) and Edith Nelson, the president of the Chicago Teachers’ club, then decided to issue a call for a conference on February 20 to mobilize support for an anti-cigarette bill, which was drafted by William W. Wheelock, a lawyer, who had been a member of the Illinois House of Representatives in 1893 and also attended the meeting, as a League representative. The plan also contemplated, following the conference, mass meetings throughout Illinois organized by local boards of educations and teachers groups.873

Wheelock’s bill, which the Tribune printed in full before it was ever introduced, imposed a fine of $50 to $100 and/or 30 to 60 days’ imprisonment on anyone who made or manufactured, kept on hand for sale, offered or advertised for sale, or sold or gave away cigarettes. The proposal also defined “cigarettes” to include any tobacco “soaked in nicotine, or impregnated with” any of the substances cited in the Morris and Brignadello bills. Wheelock’s draft bill also provided that any “shifts to evade” the law such as changing the name of the thing sold when it was in fact a cigarette would be held to be a violation. The bill did not require the prosecution to show “the guilty knowledge of the principal in order to convict him for the acts of an agent or servant; or that the defendant knew the ingredients used were poisonous or deleterious....” Finally, Wheelock also

873 “Crusade on the Cigaret,” CT, Feb. 8, 1897 (7). On Wheelock, see Souvenir of the Illinois Legislature of 1893, at 90 (1893). Lucy Page Gaston, who was editor of the NCCL’s Christian Citizen, also attended the meeting. The New Encyclopedia of Social Reform 52 (William Bliss ed. 1909). Without any substantiation, Cassandra Tate, Cigarette Wars: The Triumph of “The Little White Slaver” 47 (1999), asserted that in “1897, Gaston enlisted the aid of the Christian Citizenship League in petitioning the Illinois legislature to again consider prohibiting cigarette sales and manufacturing.” The National WCTU mentioned the League’s primacy in this campaign, which the WCTU and other groups “reinforced.” “Notes and Comments,” US 23(6):1 (Feb. 11, 1897). The following month the National WCTU expressly stated that it was the League that would or would not succeed in securing passage of H. B. No. 221, while the WCTU and other groups were cooperating with it. “An Anti-Cigaret Bill,” US 23(12):8 (Mar. 25, 1897).
relieved the prosecution of the burden of showing that the cigarettes were saturated or impregnated with any of the aforementioned poisonous or deleterious substances, making it instead the defendant’s to show that they were not. 874

The anti-cigarette coalition announced that the bill would be introduced within the week and that “tremendous pressure w[ould] be exerted in its behalf from all parts of the State.” 875 Two days later Cook County Democrat and lawyer Ross C. Hall introduced the groups’ bill. 876 The day before the conference the Tribune used the occasion to publish a long article detailing the state-by-state legislative “campaign against the drugged, poison-laden, memory-destroying, corrupting cigaret,” which had “attained national proportions,” whether in the form of manufacturing and sales bans or “practically prohibitory” licensing. To be sure, the newspaper offered a cautionary retrospective of the Illinois legislature’s performance in 1893 and 1895: “There was a cigaret bill in the General Assembly four years ago which was killed in the House. There was also a bill in the session two years ago, but it did not cost the cigaret people much to kill it.” 877

The “enemies of the cigaret habit in the State of Illinois” who assembled in Masonic Temple on February 21, 1897, made it clear that their focus was school children without—at least as far as the Tribune’s extensive report reflected the proceedings—explaining, let alone justifying, the necessity of a universal sales ban that also prohibited selling cigarettes to those children’s fathers. This orientation underlay the resolutions that the various groups’ representatives passed with regard to both securing the Chicago Board of Education’s “active support...in the campaign now being waged in Springfield for the extermination of the ‘coffin nails’” and requesting it to “devise some system for the regulation of and proper licensing of school supply stores with a view to the suppression of

874“Crusade on the Cigaret,” CT, Feb. 8, 1897 (7).
875“Crusade on the Cigaret,” CT, Feb. 8, 1897 (7).
877“Push War on Cigarets,” CT, Feb. 20, 1897 (9:3).
the sale of cigarettes in those feeders to the schools."\(^{878}\) (In fact, a month later the school management committee of the board of education denied the request of a women’s club president for the board’s endorsement of the bill.)\(^{879}\) Latter-day scholars’ dogmatic derision of the late-nineteenth-century anti-cigarette movement’s alleged narrow-minded religio-moralistic puritanism is debunked by the fact that the resolution to obtain the board of education’s “cooperation in the fight” was introduced by Thomas J. Morgan,\(^{880}\) “Chicago’s foremost socialist in the last quarter of the nineteenth century”\(^{881}\) and “the most consistent advocate of independent labor politics for over two decades.”\(^{882}\) Though he, too, appears not to have addressed the issue of cutting off the proletariat’s convenient supply of cigarettes, Morgan argued that “the only real remedy was in providing a ‘better temptation’—in opening up the schools to sports in the evening and providing the children with a ‘dead load of fun’ to occupy their time harmlessly.” More materialist still and class-based to boot was the proposal by Maud Summers, the Goethe School principal, to establish soup-houses in connection with schools, “in order that the craving for cigarettes, often due to lack of nourishment, might be removed.” A Baptist minister limned an agenda that the movement had not dared to advocate: “after cigarettes were abolished, cigars should also go.” For the immediate future, Representative Hall, who was carrying the bill, recommended sending a “strong delegation” to Springfield the following week for the House Judiciary Committee hearing on the bill.\(^{883}\) Gaston and Olson were among those who did make the trip to attend that hearing,\(^{884}\) after which the Judiciary Committee reported an amended version of the bill and recommended that it pass.\(^{885}\) Gaston, on behalf of the Federated Women’s Clubs of Chicago, also

\(^{878}\)“To Shut Out Cigarettes,” \(CT\), Feb. 21, 1897 (13).

\(^{879}\)“Women Take Charge of a Committee,” \(CT\), Mar. 24, 1897 (10).

\(^{880}\)“To Shut Out Cigaretts,” \(CT\), Feb. 21, 1897 (13).


\(^{883}\)“To Shut Out Cigarettes,” \(CT\), Feb. 21, 1897 (13). The account here appears to be garbled since it had Hall as not having introduced his bill yet and described the hearing as devoted to Noling’s bill.

\(^{884}\)“Go to Fight Cigaretts,” \(CT\), Feb. 23, 1897 (12).

\(^{885}\)\textit{Journal of the House of Representatives of the Fortieth General Assembly of the State of Illinois} 219 (Feb. 24) (1897). The press report that the bill set the maximum fine at $1,000 and imprisonment at one year appears to be incorrect. “Means Defeat for Bill,”
succeeded in persuading the judiciary committee of the Chicago city council to recommend that the aldermen pass a resolution directed to the state legislature in support of the bill. On amendments, see below.

886 “Cigaret Law in Force,” CT, Mar. 16, 1897 (12).

887 “Tears for the Work,” CT, Mar. 22, 1897 (12). On Silcox, see “New Preacher Coming to Chicago,” CT, Apr. 9, 1895 (9). The very next day at a Christian Citizenship League meeting a physician stated that boys smoked cigarettes “because they were monkeys and did everything from imitation,” whereas “[g]irls did not smoke because their mothers did not set them the example.” “Argue for the Anti-Cigaret Bill,” CT, Mar. 23, 1897 (12). Two weeks earlier a Baptist minister in Chicago had stated that girls and young women did smoke cigarettes. “Curse of the Cigaret,” CT, Mar. 8, 1897 (10). See also, “Facts, Fancies and Fads of Womankind,” CT, Oct. 10, 1897 (54).

888 Journal of the House of Representatives of the Fortieth General Assembly of the State of Illinois 662 (Apr. 22) (1897). As the Tribune correctly observed in an editorial, the bill failed to “state what is to happen if the defendant shows his cigarets were made of the purest undrugged tobacco. It does not state that he is to gain by proving the purity of his goods. The natural presumption would be that if he showed his cigarets were unadulterated tobacco he should go free. But the first section of the act makes it an offense to sell ‘any of those articles of manufactured tobacco commonly called cigarets.’ That covers everything. ... Their sale should be prohibited on the ground that their use is
several significant changes: (1) expanding the scope of prohibited acts in § 1 by adding “or has in his possession with intent to sell or give away”; (2) adding cigarette papers to the prohibited objects for sale; (3) increasing the minimum fine from $50 to $100 and the maximum fine from $100 to $200; and (4) expanding the definition of “cigarettes” to include tobacco in tobacco wrappers (in addition to paper wrappers). Finally, Democratic floor leader Caleb Johnson offered an amendment making it unlawful to sell or give away cigarettes to anyone under 21 subject to a fine of $25 to $200. A week later the House, “without debate” and “amid enthusiastic applause,” unanimously passed the bill by a vote of 100 to 0. Notably, only 33 (or barely half of the) Democrats voted compared to more than three-fourths of Republicans. (Both Populists failed to vote.) Among those 33 Democrats only five represented Chicago, which elected 17 Democrats to the House; in contrast, 16 of 25 Chicago Republicans voted.

The Tribune’s report that the effort to pass the bill in the Senate would “not
encounter serious opposition”  soon proved to be surpassingly inaccurate. The Education Committee, to which it took the Senate 12 days to refer the bill, two weeks later “practically killed” H.B. No. 221 by voting 8 to 6 to postpone its consideration until the session’s penultimate day (June 3). Although the vote may not have been party specific—the Yeas were cast by six Republicans and two Democrats, the Nays by six Republicans (while two Democrats did not vote)—remarkably, senators from Chicago cast all but one of the Yeas and none of the Nays. The bill’s extra-parliamentary advocates—the “women who have been here all session urging the passage of the bill”—though “greatly disappointed, assert that a majority of the Senators are for the bill, and through the friendly offices” of Education Committee chairman Senator Bogardus, they “still hope[d] to get the bill into the Senate in time to pass it.” That chance came (and went) the very next day when Senator Henry Dunlap, the chairman of the Republican steering committee—who was an apple orchard owner, past president of the State Horticultural Society, and graduate of the University of Illinois, which was located in his district—offered a resolution directing the Education Committee to report H.B. No. 221 “without delay” and moved to suspend the rules in order to consider his resolution. The anti-cigarette women had, apparently, not exaggerated the strength of senatorial support for the bill: a clear majority (23 of 42) voted to take up the resolution, but it fell five votes short of the two-thirds required for suspension of the rules. If the Tribune’s report that, when Dunlap offered the resolution, “objections were heard from all parts of the Senate,”  was meant as a reference to party affiliation, it failed to capture the reality that Republicans cast 20 of the 23 Yeas (joined by only one Democrat, one Democrat-Populist, and the sole Populist), while five Democrats and 14 Republicans voted Nay. In addition to the fact that 90 percent of Republicans voted compared to only 60 percent of Democrats, perhaps the most striking dimension of the 14-member Chicago delegation’s behavior was that all three Democrats and nine of 11 Republicans voted against considering the resolution.
Two days after the House had unanimously passed H.B. No. 221 a Tribune editorial sarcastically wondered whether “[p]erhaps Mr. Yerkes will allow the twenty-nine [Senate] members who belong to him to amend it so that it will hold water.”\footnote{900}{“The Cigaret Bill,” CT, May 2, 1897 (32) (edit).} The allusion was to Charles Yerkes, Chicago’s street railway magnate, whose bribery of Chicago aldermen had been instrumental in turning that city into the “‘Boodle Capital of the World.’” However, dissatisfied with the mere 20-year maximum monopoly franchises that the city charter permitted, Yerkes in 1897 sought to circumvent that limitation by securing from the state legislature passage of a bill granting him a 50-year extension of his franchises. Since Yerkes’ machinations called forth massive protests by municipal reformers\footnote{901}{Sidney Roberts, “Portrait of a Robber Baron: Charles T. Yerkes,” Business History Review 35(3):344-71 at 351 (quote), 354-62 (Aut. 1961). It was not merely the fact that the “limitless” opportunities for boodle corrupted all Chicago politics that irked civic reformers, but that the city received hardly any compensation from the enactment of boodle ordinances. Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John and Hinky Dink 34-35 (1943). See generally, William Stead, If Christ Came to Chicago! 457-73 (1894).}—even “dignified merchants ranted of the tyranny of organized capital”\footnote{902}{“Tribulations of Chicago,” NYT, June 13, 1897 (6:1).}—a comparison of the Senate vote on H.B. No. 221 with those on the two sets of high-profile street railway bills may shed light on the anti-cigarette legislators’ progressive character.

On April 16 the Senate passed Yerkes’ Humphrey bills by a vote of 29 to 16. Of the 16 senators who voted against it, on May 27, 11 voted for consideration of H.B. No. 221, while only four voted against it; of the 29 who voted for the “Humphrey Boodle Bills,” 15 voted against H.B. No. 221 and only eight for it. Of the 11 Chicago senators who voted for Yerkes’ bill, 10 voted against considering the anti-cigarette bill and only one for it; of the three Chicago senators who voted against Yerkes, one voted for and two against H.B. No. 221. Of the 13 non-Chicago senators who voted against Yerkes 10 voted for the anti-cigarette bill and only two against it; of the 18 non-Chicago senators who voted for Yerkes seven voted for the anti-cigarette bill and five against it. Looked at from the other perspective, of the 19 senators who opposed considering H.B. No. 221, 15 voted for the Humphrey bill and four against, while of the 23 who voted for the anti-cigarette bill, eight voted for and 11 against the Humphrey bills. Of
the 12 Chicago senators who voted against considering H.B. No. 221 10 voted for the Humphrey bill and only two against it, while the two who supported the anti-cigarette bill split on the pro-Yerkes bill.903 The 31 to 18 vote on June 4 in favor of the Allen bill,904 the second iteration of Yerkes’ bill following House defeat of the Humphrey bill,905 was marked by a similar configuration. Of the 18 (including 4 Chicago) senators who voted against it 14 (2) supported considering H.B. No. 221 and 3 (2) opposed the anti-cigarette bill; of the 14 non-Chicago senators voting against Yerkes 12 voted for considering H.B. No. 221 and only one against it. Of the 31 (10 Chicago) senators voting for the Allen bill 15 (9) voted against and 9 (1) for H.B. No. 221; of the 21 non-Chicago senators voting for Yerkes 6 voted against and 8 for considering the anti-cigarette bill.906

The correlations between votes on the cigarette sales ban bill and the Yerkes bills were considerably more polarized when viewed from the perspective of those who voted against rather than for the former. Thus, 79 percent of those who voted against H.B. No. 221 voted for the April Yerkes bill (that is, consistently took the non-progressive position on both), whereas only 58 percent of those who voted for H.B. No. 221 voted against Yerkes (that is, consistently took the progressive position). Similarly, whereas 86 percent of Republicans who voted against H.B. No. 221 also voted for Yerkes, only 50 percent of Republicans who voted for H.B. No. 221 also voted against Yerkes. The same relationship obtained with regard to Chicago senators: 83 percent of those who voted against H.B. No. 221 also voted for Yerkes (the pro-H.B. No. 221 votes being too few to be significant); likewise, 89 percent of Chicago Republican senators voted consistently. Only with regard to non-Chicago senators was the polarization somewhat less prominent: 71 percent versus 59 percent, respectively, and among non-Chicago Republican senators 80 percent and 50 percent, respectively. The core of the discrepancy was seven non-Chicago Republicans—including the high-profile anti-cigarette Stubblefield, who had filed his own aforementioned bills—who voted for both H.B. No. 221 and the Humphrey bill.907

903“The Humphrey Bills,” CT, Apr. 17, 1897 (12); Journal of the Senate of the Fortieth General Assembly of the State of Illinois 875 (May 27) (1897); “Humphrey Boodle Bills,” CT, Apr. 17, 1897 (3) (quote).
904“House Adopts Senate Amendments to Allen Bill,” CT, June 5, 1897 (1).
905“Are Defeated in the House by a Vote of 123 to 29,” CT, May 13, 1897 (1).
906“House Adopts Senate Amendments to Allen Bill,” CT, June 5, 1897 (1); Journal of the Senate of the Fortieth General Assembly of the State of Illinois 875 (May 27) (1897).
907Rather than bribery Yerkes-arranged “logrolling” may have induced some of these non-Chicago senators to vote for his bill, which did not affect their constituents. See
correlations between voting on H.B. No. 221 and the June Yerkes bill were similar.\textsuperscript{908} That non-progressives on the cigarette bill were more consistently non-progressive on the streetcar franchise bill than progressives on the cigarette bill were on the Yerkes bill may in part be explained by the fact that, although, contrary to the Tribune’s aforementioned sarcastic commentary, Yerkes did not have all 29 senators who voted for his bill on April 16 in his pocket, 65 percent of those (23) who voted on H.B. No. 221 did vote against it; they may have been as venal vis-a-vis the Tobacco Trust as they were with regard to Yerkes. Moreover, in an overdetermined fashion, a solid bloc of 10 of the 11 Chicago senators who voted for Yerkes on April 16 also voted against the anti-cigarette bill two weeks later as did even two of the three Chicago senators who had voted against Yerkes.\textsuperscript{909}

The death of the House bill in the Senate by no means put an end to efforts to ban cigarette sales in Illinois, especially since both Republican Governor John Tanner assured the bill’s backers of “his personal interest in the measure” and “legislators testif[ied] that more correspondence” was carried on concerning the cigarette bill “than all the rest before the House put together.”\textsuperscript{910} Indeed, the century’s final legislative session in 1899 witnessed the introduction of even more such bills by members of both parties in both houses, although none reached the floor. In the Senate Stubblefield once again offered his bill to provide for licensing of and against the evils arising from the sale of cigarettes,\textsuperscript{911} while a fellow Republican introduced another to ban the sale or bringing into the state of cigarettes for sale or giving away,\textsuperscript{912} but the chamber took no action on either.

\textsuperscript{908}For example, 78 percent of those who voted against H.B. No. 221 voted for the June Yerkes bill, while only 59 percent of those who voted for the former voted against the latter. Because only 10 senators were Democrats and only seven of them voted on H.B. No. 221 their voting patterns are less significant.

\textsuperscript{909}Comparison of voting on the two bills may be skewed by the fact that the vote on H.B. No. 221 was ostensibly procedural, but senators’ knowledge that failure to expedite reporting the bill was tantamount to killing it may have rendered the vote substantive.

\textsuperscript{910}“New War on Cigaretts,” CT, Sept. 22, 1897 (8). An effort, led by Lucy Page Gaston as agent of the National Christian Citizenship League, to persuade the governor to include the anti-cigarette bill in his call for an extra session failed. \textit{Id.}

\textsuperscript{911}\textit{Journal of the Senate of the Forty-First General Assembly of the State of Illinois} 70 (Jan. 24) (1899) (S.B. No. 57, by Stubblefield).

\textsuperscript{912}\textit{Journal of the Senate of the Forty-First General Assembly of the State of Illinois} 70 (Jan. 24) (1899) (S.B. No. 59, by Harry Hall).
Three House bills also saw no action, but a fourth received a do pass recommendation from the Judiciary Committee, got as far as being ordered to second reading, and was supported by petitions. The detailed proscriptions recited in the title of H.B. No. 238, which was introduced by Republican Oliver J. Page, a high school principal and school superintendent turned journalist, are worth calling attention to: “An act making it unlawful for any person, either by himself or another, to sell, barter, loan, give, make, fabricate or manufacture or have on his premises, in his possession or under his control any of those articles commonly called 'cigarettes,' and making it unlawful for any person to have on his premises, in his possession or under his control any substances or material out of which any part of such cigarettes can be made, with the knowledge or purpose that at any time such substances or material is to become a factor in such 'cigarettes'”.

As it had in every regular session since 1893, the Illinois legislature continued considering anti-sales bill until 1907, when the anti-cigarette movement finally succeeded in securing an enactment that placed the state in the midwestern mainstream (joining North Dakota, Iowa, Oklahoma, Nebraska, Indiana, Wisconsin, Minnesota, South Dakota, and Kansas). To be sure, Lucy Page Gaston’s victory was short-lived: two days before it was to go into effect, a Cook County superior court declared the general sales prohibition unconstitutional on the technical grounds that that provision was broader than its title, which spoke only of “regulat[ing]” sales.

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916 *Journal of the House of Representatives of the Forty-First General Assembly of the State of Illinois* 122-23 (Jan. 31) (1899) (by Republican Oliver J. Page, Metropolis).

917 1907 Illinois Laws at 265. The law prohibited the manufacture, sale, or giving away of “any cigarette containing any substance deleterious to health, including tobacco” (§ 1) and made it a misdemeanor for anyone under 18 and over 7 years old to smoke or use cigarettes “on any public road, street, alley or park or other lands used for public purposes” (§ 2).

918 “Court Legalizes Sale of Cigaretts,” CT, June 28, 1907 (6). See also “First Shot Against Illinois Anti-Cigarette Law,” *USTJ*, July 6, 1907, at 5. Although the Illinois
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

Chicago’s License Ordinance, 1894-1907: Did the Aldermanic Boodlers Sandbag the Tobacco Trust or Was the Vice Versa?

The mayor [Carter H. Harrison] announced that hereafter no smoking of cigars will be allowed during the sessions of the Council.


“The cigarette day is past,” was the reply.919

There is growing conviction among business-men and employers that the inhaling of cigarette smoke is physically and intellectually injurious, and many are inclined to discourage or prohibit the use of cigarettes among their employés.920

We have had much less fact than fancy in our notions concerning the effects of smoking.... For example, we have the ever-prominent opposition to the cigarette, which prejudices opinion and even legislation as actively as ever, in spite of the fact that the claims on which this prejudice is based, namely, that cigarettes are “doped” with opium and other expensive drugs by extravagant manufacturers,...have been disproved over and over again by chemists and commissions.921

Concurrently with efforts in the Illinois legislature to pass a bill to prohibit the cigarette sales statewide the Chicago city council was engaged continuously from 1894 well into the first decade of the twentieth century in passing and defending in litigation, instigated by the Cigarette Trust, ordinances to license

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Supreme Court affirmed the superior court’s judgment, it also stated clearly that “under a proper title the legislature has the right, under the exercise of its police power, to pass an act prohibiting the sale of cigarettes.” People ex rel. Berlizheimer v Busse, 231 Ill. 251, 255 (1907). In spite of House passage of such bills in 1909 and 1911, the legislature failed to enact one. On the 1907 law, see vol. 2. The tradition of historical ignorance and disinformation disseminated by authors disregarding primary sources was visibly on display in the recent assertion that the Illinois Supreme Court ruling “contradicted the decision of the national Supreme Court, which, in 1901, had allowed states to ban cigarettes and it was an indication of how chaotic rules on the issue had become.” Christopher Snowden, Velvet Glove, Iron Fist: A History of Anti-Smoking 48 (2009). In fact, the state decision was completely in harmony with the federal decision.

919“All Are Confirmed,” CT, Apr. 25, 1893 (3). On Powers’ later involvement in a bribery scandal over a cigarette licensing ordinance, see below.

920“Cigaret Ordinance Valid,” CT, Apr. 11, 1900 (12) (edit.).


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On April 30, 1894, pursuant to the antitrust law that the state legislature had passed in 1893, Illinois Attorney General Maurice Moloney filed an information in circuit court to prohibit ATC—“one of the most ingenious, dangerous, and gigantic trusts in America...and the world”—the “octopus” that manufactured and sold 98 percent of all the cigarettes consumed in the United States, from doing business in Illinois. About this time, too, the Chicago Board of Education and School Board were receiving an increasing volume of complaints about the growing use of cigarettes by young boys, which was “nourished and fostered by the sale of cheap varieties [sic] at every corner grocery, school-book shop, and variety store.” After teachers’ attempts to suppress the practice and discourage the trade had failed, “some persons interested in children...decided to make a crusade against the poisoned cigaret trade and as a result of their efforts” Alderman John McGillen, who was also chairman of

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922 The Tribune editorially proclaimed licensure as more effective than a sales ban because it would be “practically impossible in any considerable number of cases” to prove that the cigarettes had been sold. It is unclear why the police would have greater difficulty determining whether cigarettes were being sold than whether the dealer had a license, which latter task the paper readily acknowledged “would not entail any hard work of consequence....” “Perfect the Cigaret Ordinance,” CT, Mar. 7, 1897 (28) (edit.).

923 1893 Ill. Laws 182. Both houses passed the bill unanimously. “Half-Rate Fares,” DIO, June 26, 1893 (3:1). The law defined a “trust” as a combination of capital by two or more persons or firms to carry out trade restrictions, reduce production or raise prices, prevent competition, or enter agreements not to sell below a list price (§ 1). Any corporation with a charter that violated the law forfeited the charter (§ 2) and any foreign corporation violating the law was prohibited from doing business in Illinois (§ 4).

924 “Turn on the Tyrant,” CT, May 1, 1894 (8). A dealer’s commission for selling and all business expenses was 35 cents per 1,000 cigarettes sold at not less than $2.50 per 1,000. The Trust was also accused of requiring dealers to enter into an agreement, which the Trust construed to prohibit dealers from handling any other producer’s cigarettes, to sell only at prices prescribed by ATC. On the state court decision declaring ATC an illegal corporation and prohibiting it from doing its business in Illinois and ATC’s unsuccessful contention that the state lacked the power to restrain an out-of-state corporation from shipping in and selling an article of commerce, see “Smoking Them Out,” N&O, May 16, 1897 (1:5); “Hits the Cigaret Trust,” CT, May 16, 1897 (13); “The Cigaret Trust Hit,” CT, May 16, 1897 (28) (edit.). ATC’s general counsel, W. W. Fuller had argued the case at trial. “American Tobacco Case,” NYT, Jan. 8, 1897 (1); “Tobacco Case Under Advisement,” CT, Jan. 9, 1897 (6).

925 “Children Poisoned by Cigarettes,” CT, May 27, 1894 (9).

926 Returned as an “alderman” at the 1900 population census, McGillen, who was born in 1861, at the next two decennial censuses appeared as a surety company Western agent and general manager, respectively. See also The Book of Chicagoans: A Biographical
the Cook County Democratic central committee,\textsuperscript{927} was to introduce before and urge adoption by the city council of an ordinance prohibiting the sale of cigarettes containing opium, morphine, glycerine, jimson weed, belladonna, or sugar, subject to a $50 to $100 fine and an additional daily $25 penalty for every day the person or firm persisted in violating the ordinance after conviction for the first offense. The \textit{Tribune} reported a belief that the measure would be generally supported and passed to protect school children’s health, which was seriously affected by the aforementioned ingredients. The newspaper singled out for mention glycerine and sugar, which, when “inhaled as gas in cigarettes are rank poison to children....”\textsuperscript{928} McGillen’s role was presumably shaped by the attitude of his sister, a Chicago city school teacher, who helped galvanize action by characterizing boys who smoked cigarettes as “‘dull, sallow, and listless.’”\textsuperscript{929}

When pyrolyzed, glycerine, a moistening agent that began to be used in the manufacture of tobacco products in the 1880s,\textsuperscript{930} yields acrolein, which is extremely toxic and irritating and inhibits or stops the lung-clearing movement of the cilia.\textsuperscript{931} That acrolein was a toxic product of glycerine had been known

\textit{Dictionary of the Leading Living Men of the City of Chicago} 444 (Albert Marquis ed. 1911); \textit{Illinois Political Directory}: 1899, at 159.

\textsuperscript{927}“Indictments Cut No Figure,” \textit{CT}, May 27, 1894 (6).

\textsuperscript{928}“Children Poisoned by Cigarettes,” \textit{CT}, May 27, 1894 (9).

\textsuperscript{929}“When It Is Poison,” \textit{CT}, June 6, 1894 (6) (quoting Board of Education President Trude).

\textsuperscript{930}“Glycerin” (rev. ed. n.d.), Bates No. 00901327.

\textsuperscript{931}Charles Nystrom to Dr. Alan Rodgman, Subject: Comments on “The Smoldering Flavors Issue of Cigarettes,” by Arthur L. Schell, in the Chemical Business, April 6, 1981, pg. 18-24, Bates No. 504339225; Charles Nystrom to Wayne Juchatz (RJR Interoffice Memorandum), Subject: Use of Glycerine as Humectant in Cigarettes (Apr. 29, 1983), Bates No. 502856928. Much more recently, scientists have discovered that “acrolein and acetaldehyde had the greatest potential to be respiratory irritants.” U.S. Department of Health and Human Services, \textit{How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General} 29 (2010). More specifically: “Acrolein...is present at high levels in cigarette smoke. Acrolein binds covalently to form protein adducts, and acrolein-induced modification of proteins has been implicated in atherogenesis. Acrolein modifies apolipoprotein A-I (APO A-I), the major protein in HDL.... HDL protects against atherosclerosis. Acrolein-protein adducts co-localize with APO A-I in macrophages in the intima of human atheromatous blood vessels.... Acrolein also oxidized thioredoxins 1 and 2 in endothelial cells. Thioredoxins are prominent antioxidant proteins that regulate the oxidation-reduction balance critical for normal cell function. These results suggest that oxidation of thioredoxins can result in dysfunction and death of endothelial cells, contributing to

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since the mid-nineteenth century. (By the end of World War I knowledge of acrolein’s toxicity had seeped sufficiently into popular consciousness that a Mormon poet conveniently rhymed it in her admonitory “The Cigarette Boy”: “Though he’s barely turned sixteen/He is dwarfed from nicotine/And the poison acrolein/Of cigarettes!”) Sugar, when pyrolized during smoking, yields acetaldehyde—as does glycerine—which the Environmental Protection Agency a century later classified as a probable human carcinogen, as well as formaldehyde, acetone, acrolein, and furfural. Although claims as to the use

atherosclerosis. In addition, acrolein induces production of the enzyme cyclooxygenase-2 (COX-2) in human endothelial cells in vitro. This finding is relevant because COX-2 is expressed in atherosclerotic lesions and may participate in atherogenesis. Acrolein may contribute to thrombogenicity in smokers by inhibiting antithrombin activity. Finally, acrolein induces hypercontraction in isolated human arteries and could contribute to smoking-induced coronary vasospasm.” Id. at 365.

932M[ark]. Delafontaine, “Glycerine in Cigarets,” CT, June 7, 1894 (9). The French-born Delafontaine was a high school chemistry teacher. Oddly, “Report on Cigarettes by Professor Willis G. Tucker of the Albany Medical College, Analyst of the New York State Board of Health—From the Ninth Annual Report of the New York State Board of Health” (Feb. 22, 1888), in The Cigarette: What It Contains and What It Does Not Contain: On the Manufacture and Sale of Cigarettes before Joint Committee of Massachusetts Legislature on Public Health 10-11 at 11 (n.d. [1892]), Bates No. 950297842 (originally in Ninth Annual Report of the State Board of Health of New York 516-18 (1889)), found that leaf tobacco in “some cases” was “treated with sugar, molasses, glycerin and licorice and the like, or flavored with various substances which, so far as known, are neither poisonous nor harmful.”


934D. Phillpotts et al. [Imperial Tobacco Ltd.], “The Effect of the Natural Sugar Content of Tobacco upon the Acetaldehyde Concentration Found in Cigarette Smoke” (Jan. 5, 1974), Bates No. 501013682/4. In 1912, the Journal of the American Medical Association, which was by no means on the cutting edge of tobacco research, included furfural and some other aldehydes among the tobacco combustion products that “share a possible responsibility for any untoward symptoms which may be charged to smoking.” “Some New Evidence on the Tobacco Question,” JAMA 59(20):1798-99 at 1798 (Nov. 16, 1912).


937Reinskje Talhout, Antoon Oppenhuizen, and Jan van Amsterdam, “Sugars as
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

of the narcotics opium and morphine and the toxic and hallucinogenic jimson weed and belladonna in cigarettes were outlandish, there was no gainsaying that the Tobacco Trust used glycerine,\textsuperscript{938} whose chemical properties had long been well known. After all, less than a year earlier, when an ATC factory in Manhattan burned down, it was reported that the fire had started in the basement where large quantities of glycerine were stored.\textsuperscript{939} In 1895, when a license ordinance containing the same provision had just been defeated, one Chicago tobacco seller stated that: “All tobacco...except that in cigars contains glycerine or sugar. Otherwise the tobacco would dry up and become too brittle for use.”\textsuperscript{940} And two years later, when the Chicago license battle was raging, dealers freely admitted that it was “impossible to manufacture the common American cigarette without placing glycerine in the tobacco, as the latter would ‘shuck’ from the paper unless it was kept pliable by some substance.” In the same connection the Chicago city chemist pointed out that when glycerine was burned it attacked the mucous membrane “in a vicious manner.”\textsuperscript{941} Scientists were merely confirming

\textsuperscript{938}When the French government tobacco monopoly announced that it would produce cigarettes “‘with the American flavor,’” by spraying them with brown sugar and glycerine, the Times observed that American cigarettes were “flavored only with glycerine or some other simple sweetener for the purpose of retaining their moisture and making the smoke less irritating to the tongue.” “Tobacco Flavors Obtained for Strange Ingredients,” \textit{NYT}, Nov. 3, 1929 (XX9). In a report on cigarettes a chemist in 1888 noted that leaf tobacco in “some cases...is treated with sugar, molasses, glycerin and licorice....” “Report on Cigarettes by Professor Willis G. Tucker of the Albany Medical College, Analyst of the New York State Board of Health—From the Ninth Annual Report of the New York State Board of Health” (Feb. 22, 1888), in The Cigarette: What It Contains and What It Does Not Contain: On the Manufacture and Sale of Cigarettes before Joint Committee of Massachusetts Legislature on Public Health 10-11 (n.d. [1892]), Bates No. 950297842 (appeared originally in \textit{Ninth Annual Report of the State Board of Health of New York} 516-18 (1889)).

\textsuperscript{939}“Tobacco Factory Burned,” \textit{NYT}, Apr. 3, 1893 (1). J. B. Duke stated that the factory manufactured chewing and smoking tobacco.

\textsuperscript{940}“Points on the Cigaret Ordinance,” \textit{CT}, Apr. 24, 1895 (3).

\textsuperscript{941}“Licensed Cigaret Dealers Worried,” \textit{CT}, Mar. 15, 1897 (4). In spite of all of these admissions against interest, a much celebrated lecture just a few months later, referring to the prohibited substances (including glycerine) in the Chicago ordinance, insisted that “you have an idea of the ingredients of which popular prejudice has manufactured a cigarette, which has never had any existence other than this phantom of a superactive imagination.” W. H. Garrison, “A Brief for the Cigarette,” \textit{Medico-Legal Journal} 15:280-91 at 284 (Dec. 507
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

what, according to the Chicago Evening News, the world already knew: “myriads of cigarets...need no chemist to certify their utter vileness—a whiff of their noxious fumes as one passes by leaves no doubt that they are things to be suppressed.”

The Tobacco Trust even publicly stated and physically demonstrated that it used glycerine. At a Massachusetts legislative hearing in March 1893 before the Public Health Committee on a bill to ban cigarettes’ manufacture and sale, Daniel J. Campbell of the ATC, while manufacturing a cigarette in the committee’s presence, explained that “tobacco if dried might fall to dust, and to keep it soft there was a composition of sugar, water and glycerine poured over it.”

If additional corroboration were needed, the primary unimpeachable source identifying glycerine as an ingredient was the cigarette monopoly’s co-owner, Benjamin Newton Duke, who in 1893 internally gave the “formula” used by the W. Duke Sons & Co. Branch for “flavoring and casing ‘Cameo’ Cigarettes”: 3.75 lbs of Spanish saffron soaked in 7 gallons of alcohol; 14 gallons of New England rum, 7 gallons of water, and 7 gallons of glycerine. After saffron and alcohol stood for 6 days, the saffron was strained out, the remaining liquid was added to rum, water, and glycerine and allowed to stand for 15 days. To this mixture were then added 1.5 lbs of pulverized angelica, mixed with a half gallon of alcohol, which mixture was allowed to stand 5 days and added to the above mixture. When it was ready for use as a casing, one quart of the mixture and 8 or 10 lbs of glycerine were used per 100 lbs of leaf, the quantity of glycerine being regulated by weather conditions.

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942 “Enforce the Cigaret Ordinance,” Evening News (Chicago), June 6, 1894 (6).

943 A Woman’s Fancy,” BDG, Mar. 22, 1893 (8:6). On Campbell and ATC, see above ch. 4.

944 B. N. Duke to Wm. G. Emery, Dec. 16, 1893, in BNDP, RBMSCL. ATC had selected Emery to be superintendent of a proposed factory in Australia. William Butler (ATC secretary) to W. Duke & Sons Branch, Dec. 13, 1893, in BNDP. Angelica is an herb, which has been found to be carcinogenic in animals. Philip Morris U.S.A. Inter-Office Correspondence, J. Charles to J. John, Subject: Mutagenicity and Carcinogenicity of Angelica Root Abstract, Coumarin, Caramel, Eugenol, Orange Peel Oil, and Invert Sugar, May 18, 1981, Bates No. 1000123610. The aforementioned generous quantities notwithstanding, a study done by The Lancet Analytical Sanitary Commission purported to find “extremely limited amounts” of glycerine in cigarettes, which in the commissioners’ “opinion” were “not in the smallest degree injurious,” although they did not study the decomposition products (such as acrolein). To be sure, they conceded that “it is not easy to assert with absolute confidence that glycerine is added at all on account of the difficulty attending its detection.” “The Report of The Lancet Analytic Sanitary Commission on
Thus the proposed ordinance—barring the sale of so-called medicated brands—that McGillen presented to the city council on May 28 was in part steeped in the urban myth (which served the Trust’s long-run interests by deflecting attention from the real health hazards of cigarette smoking that were known even then) that cigarettes were spiked with opium, but was in part also based on a scientifically defensible critique. Interestingly, in the mid-1880s, before the Trust was formed, one of the largest cigarette manufacturers repeatedly placed large ads in the Tribune warning consumers of “the dangers attending cheap cigarette smoking” and boasting that its high-price cigarettes were “truly A GREAT LUXURY. Do not be imposed upon by imitations or cheap brands, which are always flavored with poisonous drugs....” Although the measure at first glance appeared to border on being a sham because, unlike Morris’s 1893 legislative bill, it would not have prohibited the sale of the mass of unspiked cigarettes, if the Trust’s cigarettes were, in fact, all manufactured with glycerine, they would have ceased to be marketable in Chicago. In support of his measure before the council, McGillen “denounced the facility which every drug store had of selling poison in different forms to children and adults,” adding the other urban myth, propagated by “[e]very daily paper,” of “a mind ruined or a life destroyed by the excessive use of cigarettes.” Then the council, 42 of whose 68 members were Republicans, on the same day that McGillen introduced it unanimously (63 to 0) passed the ordinance in spite of the personal letters that Charles H. Aldrich, “attorney for a cigaret firm, had sent to the members “begging them to

American Cigarettes,” *Lancet* 2:1607-1609 at 1609 (Dec. 9, 1899).

945Later in 1894, after a proposed cigarette licensing ordinance with the same language banning the sale of cigarettes containing certain ingredients had become the subject of a bribery scandal, the accused chief boodler, Alderman John Powers, alleged that he had told the ATC official from whom he denied having solicited a bribe that he would vote for the ordinance and that “no class of goods is as injurious to the youth of this country as cigarettes which contain opium.” “Powers Strikes Back,” *Times* (Chicago), Dec. 23, 1894 (1:1-2 at 2).

946E.g., *CT*, July 13, 1884 (8).

947See above ch. 4.

948“Mayor Works in Vain,” *DIO*, May 29, 1894 (1:1, at 3:5).

949“Composition of the New Council,” *CT*, Apr. 4, 1894 (8). On the outgoing council Republicans held 38 seats. “Gang Meets Defeat,” *CT*, Apr. 4, 1894 (1). See also “All Down But Nine,” *CT*, Apr. 6, 1892 (1); “New Members of the Council,” *CT*, Apr. 5, 1893 (1); “Pick the Chairmen,” *CT*, Apr. 9, 1893 (1); “Roll of the New Council,” *CT*, Apr. 18, 1893 (2).

950*Proceedings of the City Council of the City of Chicago* 606 (May 28, 1894).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

oppose” it.951 (In fact Aldrich, a prominent corporate lawyer who had been U.S. solicitor general in 1892-93, was ATC’s lawyer in Chicago and was representing it in the aforementioned state antitrust action.)952 The Chicago Evening Press construed the Trust’s sending out its agents to defeat the measure as a de facto guilty plea to “having poisoned countless thousands...”953

Equanimity characterized the immediate reaction to the ordinance of downtown Chicago tobacco dealers with large cigarette sales, but for two diametrically opposed reasons: “A few say it will be resisted if enforced; others declare they will obey it.” As in many other localities facing prohibitions, some of the latter group welcomed the governmentally imposed collective action that substituted for competitors’ lack of capacity to stop selling on their own lest they lose customers of other, more profitable, types of tobacco not monopolized by the Trust: “‘If the down-town dealers had their wish the majority would fling cigarettes into the street.’” Even at this early stage there was already talk of dealers’ testing the ordinance, though, if such action were deemed necessary, “no doubt the cigaret trust would take care of the matter.”954

Before enforcement became an issue a hitch developed when, at the next council meeting on June 4—at which one of the city’s leading non-aldermanic Democratic politicians ostentatiously smoked cigarettes955—Democratic Mayor John Patrick Hopkins vetoed the ordinance.956 The meaning of the veto might be decoded easily enough inasmuch as Hopkins was a major boodler957—during whose administration a “series of sensational grafting scandals” took place958—but then again so were McGillen and the vast majority of Chicago aldermen.959 However, the Tribune reported a rumor in the lobby that the veto

951“Cigarets Must Go,” CT, May 29, 1894 (7).
953“The Poisoned Cigaret,” CT, June 6, 1894 (6) (reprinted from Evening Post (Chicago)).
954“Comment on Cigaret Ordinance,” CT, June 1, 1894 (9).
955“Cigarettes to Go,” DIO, June 5, 1894 (1:1). On Thomas Gahan, see “Thomas Gahan Dies Suddenly,” CT, May 1, 1905 (5). Another major Democratic politician, Frank Peabody, passed around a fresh box of cigarettes.
956Proceedings of the City Council of the City of Chicago 623 (June 4, 1894).
957“Not a Partisan Triumph,” NYT, Apr. 8, 1895 (1:1-2).
was “a mere perfunctory performance...to redeem a promise made to a delegation of cigaret dealers and their attorneys some days ago.” In his message Hopkins stressed that he sympathized with “‘any measure that will tend to drive from the market cigarettes containing poisonous or otherwise harmful substances, particularly in view of the fact that the smoking of cigarettes is so largely practiced by people of immature age....’” His animus was directed only at the prohibition of glycerine and sugar, which “‘the highest chemical authorities’” had advised him were “‘entirely harmless.’” Hopkins was willing to sign the ordinance if the two ingredients were removed from the ban, but he refused to sign one that was based on an unlawful exercise of the police power “under the pretense of health regulations to prohibit the admixture of harmless substances into articles of merchandise,” which would ultimately subject it to successful judicial challenge. The council was unmoved. In support of his motion to pass the ordinance over the mayor’s veto, McGillen declared that last year’s cigarette nuisance would probably become a “‘curse’” in 1894. Not bothering to key his allegations to the two disputed substances, he insisted that the cigarette “‘kills off more youths than the smallpox. I don’t think we ought to palter with it.’” McGillen was amenable to amending his measure if it were improved, but he feared that if it were referred to a committee, it would not soon return. Other aldermen agreed, one observing that cigarettes’ victims encompassed adults: “even Mayors...sometimes suffered from the use of cigarettes.” As for glycerine and sugar, another alderman charged that the combination made a “‘deadly poison which when inhaled or swallowed resulted injuriously.’” One of the city’s leading Republican politicians, Martin Madden, a businessman and later 12-term congressman, supported the ordinance because there were “‘too many lisping dudes in our midst who [we]re becoming imbecile from cigarette smoking.’” Although it is unclear that any youths were killed by cigarette smoking, whereas the Chicago health commissioner reported


960“Cannot Sell Weeds,” _CT_, June 5, 1894 (5). The authorities were John H. Long, a chemistry professor at Northwestern University and the aforementioned Prof. Walter Haines. Hopkins attached their communications to his veto message, but they were not included in the newspaper account. The _Inter Ocean_ stated that he quoted them to “substantiate his conclusions,” but did not report those remarks. “Cigarettes to Go,” _DIO_, June 5, 1894 (1:1). According to the Illinois Regional Archives Depository, in which the Chicago City Council’s documents are located, the City Council Proceeding Files for June 4, 1894 do “no[t] include any outside resources.” Glenn Brammeier to Marc Linder (Sept. 21, 2010). Haines and Long had reported that cigarettes sold in Chicago were not adulterated with opium or other “deleterious drugs.” “Cigarettes Not Loaded with Opium. _CT_, Mar. 11, 1894 (12).

961“Cigarettes to Go,” _DIO_, June 5, 1894 (1:1).
that alone in May 1894 a renewed outbreak of smallpox had killed 253 people in the city, the council by a massive 60 to 2 majority overrode Hopkins’ veto.

The Tribune interpreted Hopkins’ veto as the result of having been “imposed upon and deceived by hired lawyers” and attributed the huge override vote largely to information gathered by Board of Education President Alfred Samuel Trude, whose attention had been drawn to “the evils of cigaret smoking a dozen times daily by parents.” By 1893 Trude (1846-1933), who had become “the greatest criminal lawyer in the history of Chicago[,]...amassed a fortune, gave up criminal practice and secured a fine civil clientele,” defending the Tribune (and other newspapers) in numerous libel cases and railroads, averred that he knew better than that glycerine and sugar were harmless constituents: “I knew just what I was doing when I drew that ordinance. I did not put sugar and glycerine in unadvisedly.” Without bothering to explain the underlying chemical, let alone physiological or disease-etiological, processes, Trude, who was Cook County Democrats’ strategist, declared: “Glycerine used as...applied to sore throats is

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963 Proceedings of the City Council of the City of Chicago 623-24 (June 4, 1894); “Cannot Sell Weeds,” CT, June 5, 1894 (5). One of the two dissenters, who were both Republicans, was James R. Mann, who, immediately after completing two terms on the council in 1896, was elected to the U.S. House of Representatives, of which he remained a member until his death in 1922. He was best known as the eponymous author of the Mann White Slave Traffic Act. L. Ellis, “James Robert Mann: Legislator Extraordinary,” Journal of the Illinois State History Society 46(1): 28-44 (Spr. 1953); Herbert Margulies, “James R. Mann: The Illinois Years,” Illinois Historical Journal 90(3):191-210 (Aut. 1997). Mann, who had also tried to derail the ordinance before its original passage, may have viewed it as yet another instance of the inveterate council phenomenon of sandbagging. Coughlin’s later cigarette sales license ordinance he claimed to have recognized from the beginning both as having been “prepared for the purpose of blackmail” and as substantively invalid. “Guilt Is Evident,” Sunday Herald, Dec. 23, 1894 (1:7, at 2:1-6 at 2).
964 “When It Is Poison,” CT, June 6, 1894 (6).
965 “A Great City in Mourning,” NYT, Oct. 30, 1893 (1).
966 “Tribune’s Portraits of Men Who Are Talked About,” CT, Jan. 22, 1893 (9). Trude’s fame was enhanced by his success as special prosecutor in the case of the man accused of murdering Mayor Carter Harrison in 1893. A Democrat who turned down the nomination for mayor in 1893, Trude eventually amassed an estate valued at $2,000,000. Alfred S. Trude, Famed Lawyer, Is Dead at 87,” CT, Dec. 13, 1933 (20); “Alfred S. Trude Leaves Estate of Two Million,” CT, Dec. 20, 1933 (26). In 1923 his federal income tax liability was $21,027. “Chicago—Wrigley Leads,” NYT, Oct. 25, 1924 (2).
967 Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John
healing. Sugar put on tapioca pudding and put into the stomach is gratifying and
decidedly pleasant, but when you mix the vapors of glycerine and sugar with the
nicotine... contained in the smoke of the tobacco of the cigaret, you have a poison,
and a poison that kills. It is the inhalation of this mixture of stuff that makes it
so deadly. The three vapors mix, pass through the bronchial tubes into the lungs,
and by degrees get into the blood, and there they stay. The worst condition short
of death—and perhaps that’s no worse—created by this cigaret smoking is
diabetic epilepsy. This is not uncommon among boys who have acquired the
cigaret habit.’”

The ordinance appears to have been a substitute for the
prevention method preferred by many parents—having teachers “‘search the
boys’ pockets for cigarettes’”—which Trude turned down because only parents
possessed such a right. Although he correctly (and in conformity with the
medical-scientific learning of the day) pointed out that “‘without adulteration’
cigarettes were “‘bad enough because they are inhaled,’” he vastly exaggerated
the adulterants’ impact by claiming that they made the “‘arrainment... ten-fold
stronger....”

If Trude’s insistence on inclusion of glycerine and sugar in the
ban was based on his knowledge that it would be tantamount to a prohibition of
cigarette sales in Chicago—one Chicago newspaper opined that the ordinance
was “meant to” prohibit cigarettes because “nearly every cigaret on the market
contains one or more of these substances”—he at least consistently formulated
a justification for depriving adult men of cigarettes that was rarely ever discussed
in any anti-cigarette campaign during this period: “‘A child is worth more than
all the cigaret factories in the United States.’” Sensing perhaps the potential difficulties of enforcing the glycerine/sugar
ban, some council members immediately determined to make use of financial
deterrence to achieve the same end. On the same day as the council meeting, “a
score of well known and influential aldermen, both Democrats and Republicans,”
held an “informal conference” at which, proceeding from a discussion of
McGillen’s ordinance, they all “denounced the sale of tobacco in that form, and
set about to devise some means of making the present ordinance more sweeping”
and “all said they had no patience with cigarettes or dudes, or anything pertaining
to either.” Making explicit the limits of their tobacco control agenda in a manner

—and Hinky Dink 30 (1943).

968“The When It Is Poison,” CT, June 6, 1894 (6). Bryce Plapp, professor of biochemistry
at the University of Iowa, “doubt[ed] that glycerin and glucose together make anything
toxic, more than separately.” Email from Bryce Plapp to Marc Linder (Sept. 8, 2010).

969“The The Poisoned Cigaret,” CT, June 6, 1894 (6) (reprinted from Evening Post
(Chicago)).

970“When It Is Poison,” CT, June 6, 1894 (6).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

atypical for most legislative reformers of the period, they also “declared for good tobacco, either chewing or smoking, just so it was not enclosed in paper wrappers.” Since they were “all...agreed that cigarettes must go,” they decided on a $500 annual license for selling cigarettes. Since tobacco dealers purportedly deemed the amount too high to pay, the press predicted that it would “probably kill the Chicago traffic for good.” That forecast would turn out to be as overly optimistic as the claim that the measure would be passed at the next council meeting. Why the aldermen devised this roundabout procedure instead of prohibiting the sale of cigarettes outright is unclear, but on June 11 Democrat John J. Coughlin presented the $500 license measure, which was referred to the Committee on License (which would keep it bottled up for almost half a year).

The possibility that “Bathhouse John,” who was in the third year of a surpassingly corrupt aldermanic career that lasted until his death in 1938, might have been personally acting in the interest of public health seems remote (although six years later The New York Times noted that “Coughlin has often astounded his constituents and the general public by the excellence of his ideas contained in some of the legislation he proposes”). After all, when the

971 “Cigarettes Must Go,” DIO, June 2, 1894 (6:7); “Cigarettes Must Go,” BDWC, June 5, 1894 (4:3).

972 Proceedings of the City Council of the City of Chicago 699 (June 11, 1894); “Park by the Lake,” CT, June 12, 1894 (5).

973 Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John and Hinky Dink (1943).

974 “Chicago Ward Politics,” NYT, Apr. 1, 1900 (8). Cartoons frequently depicted Coughlin smoking a cigar. Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John and Hinky Dink n.p. [cartoons opposite 52 and 104] (1943). A recent web-based historical novel about Chicago in 1893 has Coughlin’s “eyes...swimming and itching in the stale cigar smoke. He detested smoking, this coming from his early days in athletics.” Gloria McMillan, Waking the Dead, ch. 15: The Boodlers and the Boodled, on http:www.neleth.com/gloria/Chapter_Fifteen.htm (1997). According to Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John and Hinky Dink 13-14 (1943), Coughlin was not athletic in his youth. When asked whether she had a source for her claim, the author replied: “He did abhor smoking. ... I think the biography on the two men found in one of my bibliography sources--standard histories of Chicago--said that John Coughlin did not smoke and discouraged the habit.” Email from Gloria McMillan to Marc Linder (Sept. 26, 2010). When told that her novel lacked a bibliography and asked to furnish the title, she failed to respond. Email from Marc Linder to Gloria McMillan (Sept. 26, 2010). A month before introducing the cigarette measure Coughlin announced that he would introduce... an ordinance fixing a $100 fine for keeping an opium den and confiscating the pipes and opium; he declared that dens would have to leave his
ordinance later became enmeshed in a bribery scandal, Republican Alderman Edward Marrenner stated that he “‘would like to know what business a man like Coughlin has to introduce such an ordinance,’” while his partymate Eli Smith declared that one of the reasons he opposed it was that Coughlin was “‘a regular clown.’” However, contemporaneous editorial judgment that sandbagging (the Cigarette Trust) was its sole purpose because it could not be defended on “general principles” was patently false. Even if Coughlin was motivated by the prospect of extorting a bribe from ATC for eventually killing the ordinance—and/or by the receipt of one from his large downtown tobacco store constituents for increasing their sales at the expense of small dealers whose profits could not justify buying a license—the fact remained, as a “well-known Chicago politician” put it, that the ordinance’s substantive “object is not to stop the sale of cigarettes, but to prevent their sale in candy stores near schools, where boys of eight and ten years of age buy them, often stealing the money for the purpose.” (Significantly, precisely such complaints by public school teachers about “cigaret-smoking...encouraged by petty hucksters who had established themselves adjacent to the school-houses” had prompted the legislature in 1887 to enact a bill that prohibited selling, buying for, or furnishing any cigars, cigarettes, or tobacco to any minor under 16 and imposed a $20 penalty for each offense.) In any event, Coughlin, “[e]ternally a Democrat,” did not intend the ordinance as run-of-the-mill sumptuary legislation is clear from his pre-election canvasses: “‘A Republican is a man who wants you t’ go t’ church every Sunday.  A Democrat says if a man wants t’ have a glass of beer on Sunday, he can have it. Be Democrats, unless you want t’ be tied t’ a church, a schoolhouse, or a Sunday school.’” The Tribune’s remark that the “possibility of cigarets as a subject for municipal legislation seems not to have been before considered by the aldermen” and that the ordinance regulating their sale “appears to have opened the eyes of Ald.

First Ward, which needed more churches. “‘Bath-House’ John as a Reformer,” CT, May 14, 1894 (1). At the same meeting at which he presented the cigarette ordinance the council unanimously passed his opium den measure. “Big Park Scheme Up,” DIO, June 12, 1894 (2:3-4).


978 “Against Selling Tobacco to Minors,” CT, June 19, 1887 (4) (edit.).

979 1887 Illinois Laws 298 (June 15).

980 Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John and Hinky Dink 19 (1943).
Coughlin to the possibilities of further action must be understood as a reference to an as yet unexplored field for sandbagging and/or boodle. After all, in March the newspaper derided Coughlin—who, interestingly, “owed much for political teachings” to Trude—as having “supported every bad measure presented” in the council during his term, and charged both that there was “no good in him” and that everything that was bad had been said of him. Moreover, he had achieved his reelection on April 3 by means of “the most outrageous...terrorism” perpetrated by “thugs” which soon led to a special grand jury indictment.

Nevertheless, even if the Chicago ordinances had been the only historically documented example of the sandbagging that the manufacturers pretended universally underlay legislative efforts to regulate cigarettes (beyond banning sales to children), they would still have hardly fit the model that one of the oligopolists later limned this way: “‘[T]he tobacco industry, for many years, was the object of most ‘strike legislation’ proposed by impecunious or avaricious politicians and reformers. We were continually being called upon to resist this sort of thing, and in every case the procedure was identical: A bill would be introduced in a legislature to prohibit the manufacture or sale of cigarettes; it would be referred to a committee, and our people would have to get busy and pay somebody to see that it died.’” Like numerous state statutes, however, the Chicago ordinances did not die in committee, and the fact that the city government battled on for many years to uphold the legality of a license fee suggests that whatever the boodlers may have intended, their legislative measures took on a life of their own that aimed at enforcement and not graft.

Coughlin’s proposed ordinance conditioned receipt of a license on furnishing

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982Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John and Hinky Dink 160 (1943).
983CT, Mar. 25, 1894 (28) (untitled edit.)
984“A Ward Where Reform Is Needed,” CT, Mar. 9, 1894 (6) (edit.).
985“Why Is Hopkins for Coughlin,” CT, Mar. 29, 1894 (6).
986“Gang Meets Defeat,” CT, Apr. 4, 1894 (1).
987“Caught in the Net,” CT, May 19, 1894 (9). In contrast, the newspaper was surprised that Alderman McGillen was also indicted.
988Lin Bonner, “Why Cigarette Makers Don’t Advertise to Women,” Liberty Magazine, 3(24):55-57 at 55 (Oct. 16, 1926) (reprinted in Advertising and Selling, 7:21, 46, 48 (Oct. 20, 1926)). The quotation was attributed to “[o]ne of the biggest men in the industry, who does not want his name mentioned for the reason that the makers do not advertise to the fair sex openly....” Id.
evidence of good character and securing a $500 bond subject to compliance with all cigarette and tobacco sales ordinances; licenses did not apply to the sale of any cigarettes containing the aforementioned prohibited substances such as glycerine and sugar (§ 1). The license, a precondition for receiving which was a $500 annual payment (§§ 2-3), was revocable by the mayor whenever he was satisfied that the licensee violated any provision of the ordinance or any condition of the bond (§ 4). The proposal also imposed a maximum $50 fine for failure to comply with the requirement to post the license in a conspicuous place (§§ 5-6). Finally, the ordinance imposed a $50 to $100 fine for every violation on anyone selling cigarettes without a license plus a $25 daily fine for every day that the seller persisted in selling cigarettes after a first conviction (§ 7).

The momentum generated by the smashing victory over the Tobacco Trust marked by the council’s passage of the ordinance galvanized an intensified and ramifying commitment to the cause. The Central WCTU in Chicago—which, since it believed that “nearly all cigarettes now on the market were drugged with opium or some other deadly poison,” regarded enforcement of the ordinance as “practical prohibition of the sale of the noxious things”—adopted a resolution endorsing Trude’s part in the “crusade” against cigarettes. It also urged “the annihilation of the poisonous cigarette as an article of commerce” so that “our men may be saved for noblest uses of life and country.” Less than a week after the council’s action the National Anti-Cigarette Association was formed in Chicago to be under the aegis of the National Missionary Evangelical Association. With ambitions of becoming a “more aggressive enemy” of cigarettes than the ordinance and a “world-wide institution,” its incorporators had acted so precipitously that they were not even certain whether such an organization did not already exist (if so, they would merge with it). While endorsing the ordinance’s ban on “drugged” cigarettes, the new group protested that the manufacture of cigarettes, all of which were poisonous, should be suppressed. The Association also urged the WCTU, YMCA, church youth organizations such as Sunday schools, the Epworth League and Christian Endeavor to “join the crusade....”

Intriguingly, the president of the National Anti-Cigarette Association was Catherine Van Valkenburg Waite (1829-1913), a fascinating feminist figure, who not only had apparently no previous involvement in the anti-tobacco movement, but had retired in 1890 to devote herself to her children and grandchildren.

990“Loaded with Death,” CT, June 8, 1894 (2).
991“Form an Anti-Cigaret League,” CT, June 11, 1894 (8). See also Alton Weekly Telegraph, June 14, 1894 (4:4) (untitled).
992Jody Scott, “Catherine Van Valkenburg Waite” at 32 (n.d.), on
One of the earliest female college graduates (Oberlin 1853), she moved to Utah during the Civil War with her husband, Charles Burlingame Waite—who had been appointed to the territorial supreme court there by President Lincoln, a former legal colleague in Illinois—thus gaining the experience and knowledge to write a critical book about Mormonism. On returning to Chicago she resumed her leadership of a girl’s school and became a well-known suffragist. In her mid-50s she attended and was graduated from law school, founded the Chicago Law Times, and became president of the International Woman’s Bar Association. The National Anti-Cigarette Association’s intimate links to Christian church groups appears odd in light of her and her husband’s high-profile agnosticism. That Waite was a neophyte in the anti-cigarette movement was, ironically, underscored just moments after leaving the group’s founding meeting. As she explained the next day: “[S]he had no plans for the future. Her only hope was to arouse public sentiment and do anything she could to enforce the anti-cigarette ordinance. She said she needed education herself.” The enlightenment that she had in mind was her discovery, on returning from that meeting, that “cigarette were sold in the office of the Hotel Holland, of which she is at present both the owner and proprietor. She lost no time in heaving the entire stick into the fire.” (She also lost no time in selling the hotel a few days later—she was also a successful financier with extensive holdings of real estate and buildings.)

Though “not overconfident of success,” Waite felt that she had to do what she could to “abate the evil.” A few weeks later the organization reported that it was “constantly growing,” and unsurprisingly, the Illinois WCTU did “heartily
endorse...the Anti-Cigaret League,"^999 which had issued a pledge to work for the enactment of municipal and state laws, backed by effective penalties, to “prevent the manufacture and sale of this mind-destroying and death-dealing curse...."^1000

Swept up in and saluting the rush to establish anti-cigarette leagues, the Tribune’s editorialist admonished the city prosecuting attorney to insure that whoever was chosen to prosecute sellers of “‘coffin nails’” not use them himself because “nobody could expect” the requisite uncompromising and vigorous action by a cigarette smoker.¹⁰⁰¹

Not until November 26, 1894, in the midst of this invigorated movement, did the city council’s Committee on License (composed of nine Republicans and four Democrats)¹⁰⁰² finally take any (public) action on Coughlin’s proposed ordinance.¹⁰⁰³ To be sure, the critically jaundiced Republican Tribune presumed that during the interval between June and November the proposal’s “possibilities as a ‘sandbag’ began to dawn upon the intelligences of such Aldermen as are supposed to be looking for an opportunity to increase their personal revenues.”¹⁰⁰⁴

In the event, the committee recommended a substitute that differed from Coughlin’s in a number of respects. Unlike Coughlin’s ordinance, the substitute empowered the mayor to revoke a license if the licensee violated any state law relating to cigarettes (§ 4). The most important change required and empowered the health commissioner, “from time to time, to inspect and examine all places where cigarettes are licensed to be sold” in order to determine whether they were complying with state laws and city ordinances relating to cigarettes, the vigorous enforcement of which it was now on the commissioner’s duty to cause. Moreover, all licensees were required, on the commissioner’s demand, to furnish the latter with samples of the all the cigarettes they sold, which he was then required to analyze, his analysis then becoming a public record (§ 7). Finally, the substitute doubled the penalty both for failing to post to $100 (§ 6) and for selling

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Association’s and Waite’s later activity appears to have focused on educational campaigns in schools featuring the inculcation of the traditional primitive claims that cigarettes were filled with cigar stumps that sick people had thrown in the gutter. In the same vein, the group’s chief organizer, Mrs. M. E. D. Gilmore, instructed girls that chewing gum led to lockjaw. “To Fight the Cigaret,” CT, Mar. 31, 1896 (3). See also “Open War on Cigarets,” CT, Mar. 27, 1896 (3).

^1000“Decided that Cigarets Must Go,” CT, June 18, 1894 (8).
¹⁰⁰¹CT, June 12, 1894 (6) (untitled edit.).
¹⁰⁰³“To License Cigaret Dealers,” CT, Nov. 27, 1894 (8).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

The Tribune outlined the impact of the changes as strengthening the latter’s legality by placing it under the health commissioner’s jurisdiction and by “hedging about the penalties....” The newspaper’s claim that other deletions and additions tended to “make it more of a terror to” cigarette manufacturers' appears to have been hyperbolic.

At the request of chairman John Larson of the License Committee, Chicago corporation counsel John Palmer submitted an opinion on November 26 on Coughlin’s proposed ordinance stressing that in order to bolster its legality as an exercise of the council’s power to promote health and suppress disease, “the cigarettes should be sold only under the supervision and subject to the inspection of the Health Department.” To this end he made some amendments to the draft that Larson had given him1007 that were presumably embodied in the aforementioned committee substitute.

The proposal mobilized collective action by the city’s leading wholesale grocers and wholesale tobacconists, whose representatives met and approved a sharp protest petition on the grounds—adduced by dealers in other cities and states as well—that the pending ordinance would “give a monopoly of the cigaret trade to a few large wealthy dealers.” Correlatively, they complained, the “un-American” trade prohibition would “drive out of the trade a large number of store-keepers, newsdealers, tobacconists, druggists, and others, whose entire profits from such business are less than the amount of the license fee, but to whom a loss of such profits will be very serious and oppressive.” Sensing that they were at risk of entrapping themselves in self-contradictory rhetoric, the wholesalers, without revealing how marginal a sideline cigarettes were for their retail customers, harped on how the licensee fee would “in many cases...take away trade that goes far towards paying rent or buying the necessities of life.” Avoiding the issue of cigarettes’ health impacts, but pouring on the pathos, the petition bemoaned the “[m]any poor or disabled people” who would “be deprived of the means of subsistence at the beginning of a hard winter.”1008

At the council meeting on December 10 Coughlin moved to make the substitute ordinance and committee report a special order for the December 17 meeting. At the same meeting the protest by 500 wholesale (and retail) cigarette dealers—which, it later came to light, ATC had organized—was presented by six

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1008 “Object to the Cigaret Ordinance,” CT, Dec. 9, 1894 (4).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

Republican and two Democratic aldermen, and the council decided to take up both related matters on the latter date, but then postponed the discussion until December 27.\(^{1009}\) Several days before then, however, the controversy over the ordinance exploded amidst revelations of an involuted, convoluted, byzantine, and opaque intrigue featuring contradictory accusatory tales told by (wannabe) boodling aldermen and the bribing (or sandbagged) Tobacco Trust, two partners or adversaries who richly deserved each other’s choreographed mendacities.

The “sensational”\(^{1010}\) bribery story that was published in the (independent) Democratic\(^ {1011}\) Chicago Herald on December 22 initially focused on Democratic Alderman John Powers, a saloon owner known as the “‘Prince of Boodlers,’” who was traction magnate Yerkes’ chief instrument on the council.\(^ {1012}\) (Powers, as he told the Tobacco Trust’s man in Chicago when he offered the alderman a cigar, did not smoke.)\(^ {1013}\) Although the scoop was immediately picked up on front pages all over the country, including that of The New York Times, the press, which generally referred only to a “morning paper” without identifying the Herald,\(^ {1014}\) omitted mention of the fact that the trap had been carefully prepared, long ahead of time, by the Trust in conjunction with the newspaper.\(^ {1015}\)

In November 1894, Neil McCoull, ATC’s resident agent in Chicago, as the Herald laid out in its five-column front-page splash, had discovered that “there was something mysterious in the handling of the anti-cigarette ordinance,” although during the years that he had spent in the “retirement” of the “not...conspicuous” building in which ATC’s Chicago headquarters were located, “[h]e had never seen an alderman, had never

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\(^{1009}\)“Story of the Cigaret Legislation,” CT, Dec. 23, 1894 (4).

\(^{1010}\)“Serious Charge of Bribery,” NYT, Dec. 23, 1894 (1:4).


\(^{1013}\)Demands a $25,000 Bribe,” CH, Dec. 22, 1894 (1:3-7, at 2:1).

\(^{1014}\)E.g., “Serious Charge of Bribery,” NYT, Dec. 23, 1894 (1:4).

\(^{1015}\)It is unclear why ATC chose the Herald, which at this time did not publish cigarette ads.
visited the council....

McCoull, who had been born in Richmond, Virginia in 1853, as early as 1880 worked for that city’s Allen & Ginter, one of the largest cigarette manufacturers and later a constituent entity of the Trust. That year, the Chicago Tribune published a brief piece—ostensibly noting “the arrival of people of prominence,” but in reality free advertising, which would later be paid back with straight advertising—based on an interview with McCoull, who was visiting Chicago in the company’s interests. The newspaper had no better use for its space than relating that he was there to introduce a brand of cigarettes by having an elegant, gold-painted and -lettered carriage driven around the business district by a man dressed in a Continental costume handing out thousands of free cigarettes, which the Tribune was not ashamed to report having tried and found “a delightfully pleasant smoke.”

An equal opportunity briber of the press, by the beginning of the following year McCoull gave the Chicago Daily Inter Ocean a souvenir sample case of cigarettes, for which that office’s smokers thanked him. By October 1881, with Chicago, 10 years after the great fire, having become the general supplier of the Southwest and West, Allen & Ginter had established a permanent agency in the city under McCoull’s management. And by the time of the scandal, McCoull qualified as one of the city’s “prominent residents,” being listed no fewer than three times in the Chicago Blue Book, albeit without mention of his occupation or employer.

In 1894, McCoull had specifically noticed that the “10,000 or 12,000 small dealers” who would have been covered by the proposed ordinance had begun writing to “the head office to make an effort to defeat the measure. The keepers of small bakeries and confectionery shops and news stations called in person to insist the size of the fee would be a hardship and deprive them of an income of

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1016 "Demands a $25,000 Bribe,” CH, Dec. 22, 1894 (1:3-4).
1017 Return of a Birth, County Clerk’s Office, Cook County, IL, No. 10628 (Apr. 18, 1891) (like-named son’s birth certificate), on http://beta.familysearch.org; 1920 Census of Population (HeritageQuest) (67-year-old tobacco business jobber living in Manhattan) According to the 1905 New York State Census, the 50-year-old McCoull was living in Yonkers, employed in tobacco manufacturing. http://beta.familysearch.org
1018 “A New Arrival,” CT, Oct. 3, 1880 (8).
1019 “Around Town,” DIQ, Jan. 5, 1881 (8:4).
1020 “Tobacco and Cigarets,” CT, Oct. 9, 1881 (20:1). By 1884, numerous Allen & Ginter ads were appearing in the Tribune prominently displaying McCoull’s name in large print and mentioning the office address. E.g., CT, July 13, 1884 (8).
1021 The Chicago Blue Book of Selected Names of Chicago and Suburban Towns: For the Year Ending 1895, at 434, 617, 790 (1894).
$25 and upward.” (This huge number of cigarette sellers and their proliferation in retail branches remote from the tobacco trade underscored the severe problem that reformers faced in trying to block or at least blunt cigarettes’ availability to children.) McCoull was not insensitive to these complaints, “but from experiences with such measures in other cities he did not suppose it would pass” and in any event doubted its constitutionality. Why, given this typical Tobacco Trust legal hubris, he nevertheless “finally concluded it was time to investigate the motive of the aldermanic activity” is unclear, but he personally visited some of the larger dealers to suggest that they try to convince their aldermen that Coughlin’s proposal would be unjust to “little merchants.” What possible material incentive they might have had to plead on behalf of their competitors, whose market share the ordinance would, it was almost universally predicted, redistribute to them as quasi-monopolistic beneficiaries, McCoull failed to reveal.\footnote{1022}

Parallel to, but independently of, McCoull’s reconnoitering, the members of the aldermanic “gang” were also “busy discussing cigarettes with the corner grocers and their constituent sellers,” but their ulterior motive for these “debates” was a concluding “cautious query as to the local head of the cigarette company.” The reason for this roundabout inquiry was the aldermen’s alleged failure, over several months, to ascertain the whereabouts of the headquarters of one of the country’s largest corporations atop the building at 60 Wabash Avenue.\footnote{1023} After

\footnote{1022}{“Demands a $25,000 Bribe,” \textit{CH}, Dec. 22, 1894 (1:3-4).  
1023}{“Demands a $25,000 Bribe,” \textit{CH}, Dec. 22, 1894 (1:3-5). Since McCoull had, with some prominence, been working for cigarette manufacturers in Chicago for 15 years, it seems odd that aldermen (who must, after all, have had privileged access to city government bureaucrats who would have maintained the relevant records) would have had difficulty identifying and locating him. In a telegram manifestly prepared for public consumption, the \textit{Herald} owner stated that “‘McCoul’s reputation as a businessman’” had (together with the latter’s “‘manly way of standing on the interview’”) been “‘all that is necessary’” to persuade “[e]verybody” that Powers was “‘lying....’” “Denies Negotiations with Powers,” \textit{CT}, Dec. 24, 1894 (8). Whether, because of the Tobacco Trust’s notoriety, ATC was intentionally seeking to keep a low profile is unclear, but there was no entry for the American Tobacco Company in the alphabetical listings of the Chicago City Directory for 1893, 1894, or 1895, or in the classified business section (under tobacco, cigarettes, cigars, or smoking) of the same publication for 1894. Email from research librarians at Newberry Library and Chicago Public Library (Sept. 28, 2010). McCoull was listed as a salesman whose business address was 60 Wabash Avenue, room 604. \textit{The Lakeside Annual Directory of the City of Chicago: 1894}, at 1074 (1894). Exactly the same address and room were listed for the National Tobacco Works, whose representative was Robert W. Rollins. Three other tobacco businesses were also listed as

523
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

hearing about these efforts to locate him, McCoull finally decided “it was time
to see exactly what was in the wind and...to let The Herald into his confidence.”
Since he had already heard “directly that the council wanted money from the
company,” he took upon himself the noble civic duty of giving “Chicago an
unquestionable proof of the dishonesty in this branch of the city government.”
Consequently, the next time that an unidentified Alderman “Minus” played
detective with an unidentified dealer “Mr. Blank,” an “especially good friend” of
McCoull who “realized but $1,200 a year on cigarettes,” Blank directed Minus
to McCoull. On December 18 Alderman Minus showed up unannounced in
McCoull’s office, eventually mentioning both his suspicion that ATC would
“prefer to have the anticigarette ordinance put out of the way” and some “straight
figures.” McCoull (who must have been enjoying his playacting) argued with the
alderman, in particular expressing “the greatest indifference as to the fate of the
ordinance,” assuring Minus that “the cigarette was not as bad as it was painted
and the opposition to it was due to prejudice and ignorance,” and trotting out the
(aforementioned) studies by Haines and Long as well as by Prof. Palmer at the
University of Illinois that purportedly declared that smoking cigarettes caused less
harm than the consumption of any other kind of tobacco (though all contained
nicotine, which they acknowledged as a poison). McCoull deemed these findings
“proof enough for an intelligent man that the cigarette is bound to win in the long
run” and therefore assured Minus that ATC was in fact less interested in the
ordinance than the council might have believed. The “scientific” basis on which
McCoull conducted their debate supposedly unnerved Minus, who insisted that
“the boys in the council had to be satisfied”—otherwise the ordinance would
pass and “the smaller shops frozen out by the big license fee.” McCoull counter-
argued that the ordinance would merely create “local monopolies” (leaving total
sales unaffected), but the alderman intoned the refrain that “‘the boys are not
philanthropists’” and insisted that they “get down to business.” Negotiations
soon bogged down, however, because, although Minus purported to have
authority to “act for the ‘boys,’” he was not “‘the real man in charge,’” whom he
would bring back in case there was a cash deal. McCoull, confirming that he had

having offices on the fifth and sixth floor of 60 Wabash. Id. at 1228, 2258. In The
Lakeside Annual Business Directory of the City of Chicago, 1894, at 602 (1894), the entry
for National Tobacco Works was 604, 60 Wabash Avenue, but there was no listing for
ATC or McCoull. National Tobacco Works was a large Louisville plug tobacco producer
that ATC had bought in 1891. “Chicago Agents Confirm the Sale,” CT, Feb. 28, 1891 (6);
“The Tobacco Trust,” NYT, Mar. 5, 1891 (1). Neither ATC nor the National Tobacco
Works was listed in the Chicago telephone directory for 1894 or 1895. Email from
Chicago History Museum Research Center (Oct. 2, 2010).
no intention of dealing with anyone other than the “power back of it all,” then “incidentally wondered how much money was to be demanded.” Minus immediately named a price of $25,000 and, despite eliciting no assent, left, “very suavely alleging he would bring Alderman John Powers” the next day. In a nice journalistic touch that must have caused the Tobacco Trust’s agent in Chicago considerable contortions to utter with a straight face—if in fact he made the statement at all—the Herald reported that it “took Mr. McCoull several minutes to revive from the shock and effrontery of the man,” after which he “then and there resolved to have no more speech with aldermen, save in the presence of witnesses.”  

In preparation for the “one-sided conference” on December 19, “The Herald man went an hour earlier and locked himself into the cupboard, which was smaller by several feet than his coffin will be.” However, when the “torture” reached the point of “suffocation...at the very moment” that Minus and Powers were scheduled to arrive, McCoull had to intervene to “unlock the door and release the witness.” Luckily for ATC, although Minus arrived on time at 3 o’clock, he apologized for Powers’ absence and asked for a postponement until 5 o’clock, during which interval McCoull secured a carpenter, who hurriedly pulled down the door on the side of the room right behind McCoull’s desk, chiseled out the center panel, put the door back into place, and moved the desk “to leave an abundant sight-hole for the witness.” Minus and Powers then appeared punctually, the former quickly leaving to stand in the hall (where he could monitor anyone who might try to enter and “prevent any undesirable listeners”), and the 20-minute “production, which was half and half comedy and tragedy,” began, of which the reporter made a stenographic verbatim report. As a unique document of a private discussion between an agent of the Tobacco Trust and a knowledgeable (albeit corrupt) supporter of (non-universal) sales

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1025.“Demands a $25,000 Bribe,” CH, Dec. 22, 1894 (1:5-6). Thus, but for the fortuity of Powers’ lateness, McCoull would, apparently, have been unable to secrete the reporter. The large drawing in the Herald depicting the scene in the office, including the desk and door, did not show the sight-hole. The question as to why Powers would have been unaware of someone’s presence in the adjoining room was raised rather than answered by the substantively and grammatically odd statement that the “room has no tenant regularly, but for thirty minutes before and after the visitation it will appear to the alderman now that it was far from empty.” Id.
regulation, it is well worth relating in some detail.

Following discussion of the weather, McCoull’s coy remark that “our folks are not so deeply interested” in the ordinance prompted Powers to assure him both that it would “interfere” with ATC’s business and that “the people,” including 90 percent of the parents of the boys smoking cigarettes, wanted it passed. Unable to shake Powers on that point, McCoull shifted the discussion to the question of whether the ordinance would put a stop to cigarette smoking. Here Powers realistically underscored that it was not intended to stop the sale of cigarettes in general, but in “those small places” because “[t]he great trouble” was that they were sold in candy stores and other little places near schools where 10- or 12-year-old boys who could steal two or three cents could buy them. Without even trying to quantify the reduction in total sales that the monopolization of the trade by large sellers would bring about, Powers was unable to construct an effective threat to “interfere” with the Trust’s business; rather, he merely confirmed that small dealers would have to stop selling them, but that “the ordinance won’t stop the manufacture of them by any means.” Instead of demanding quantification, McCoull went off on a lengthy tangent on how the ordinance would merely encourage boys and men to roll their own, but Powers—who revealed that he knew all about such substitution because he had been “in the business as a grocer for 15 years—jected some realism into the discussion by pointing out that “a boy is not going to buy a package of tobacco and take it home with him so that he could roll his own cigarettes” and refuting McCoull’s interjection that a boy after all carried a package of cigarettes around: “Oh, no: he can buy them singly.... You can go into any of the small stores and buy a single cigarette for 1 cent.” And driving home the point once again, Powers observed that by doing away with small dealers the ordinance “to a large extent, keeps the boys from buying them.” Hopelessly out-argued by Powers on all fronts, McCoull once again shifted subjects, this time bravely boasting (unfortunately without adducing any figures or even identifying any jurisdictions): “We have had some experience with ordinances of this kind, and we find that our sales are just as much as they were before the ordinances were passed.” As good a bluffer as his adversary/partner, Powers conceded that “you fellows take your monthly accounts and don’t find much difference, but there are other cities in which such ordinances are enforced,” thus implying that level sales were possible only if small dealers sold cigarettes illegally without a license. Boxed in yet again and finally admitting the obvious, McCoull abandoned his initial cavalier position: “Of course we would rather not see the ordinance passed” (repeating the preference a few minutes later while adding, presumably as a bargaining chip, that nevertheless “we are not interested in it to a great
At this point the conversation turned practical. After Powers, in response to McCoull’s question as to what he supposed the council vote on the ordinance would be, had opined that at most 15 members would vote against it, while 40 to 50 would support it, the conversation moved in the direction of the price term. Powers allegedly began laying the groundwork for his demands by repeating what he had previously told dealer Blank. This message signaled that no policy principle was at stake for Powers, who was in the business of monetizing fungible votes: “[P]ersonally I did not care whether the ordinance passed or not. But...this cigarette trust, so-called, is a great big monopoly in the country; that some of the boys in the council felt that the trust was making a whole lot of money and that it might be a good time to see if we could not talk with some of these gentlemen and see if they would not do something for us.” Consequently, Powers spoke with “a good many of the boys and found out...times are a little hard with them just now, and...they would defeat the ordinance for a consideration.” Naming numbers, McCoull then asked what it would take to get the measure dropped, but when prodded by Powers to recall the figure that he had already heard from Minus, McCoull suddenly remembered the $25,000, but added that it was “a great deal of money.” Powers sought to contextualize the sum and make it more palatable by pointing out that it had to be divided among 40 to 50 men, a number that seemed inflated to McCoull since with 15 or 18 already poised to vote No anyway, only another 18 would have to be paid off. Seeking to disabuse him of his naivete, Powers gave him a quick tutorial in aldermanic vote buying. Not only would “we...have to satisfy those who would want to know why the ordinance was dropped,” but there was “no use in beating this ordinance or having it dropped unless there is a clear understanding because any one of the boys could bring in another ordinance. If you worked on that plan and some of the boys were not satisfied they could introduce another ordinance. They would not be satisfied because they were not considered in the original deal. They would bring the matter up before the committee and might succeed in getting the same ordinance up again.” A quick study, McCoull grasped that Power’s plan was to “satisfy as many of those people who want money as you can so as to avoid the possibility of another ordinance for this purpose coming up afterward.” In other words, if Powers paid off the bare minimum necessary to defeat the measure, “there would be still left a dissatisfied element who have not been taken into...money consideration, who would give us trouble afterward.” After Powers had at length assured a suspicious McCoull that, because “the boys without any exception [were] a very decent lot of fellows,” once they had been paid off they would not

double-cross ATC, McCoull resumed harping on the theme of how great a sum $25,000 was. Once again, Powers sought to fend off this assault by pleading poverty on behalf of some of his “not well off” colleagues—but not of himself. The pre-eminent boodler boasted: “Individually, I have as much of this world’s goods as I care for. I am worth quite a lot of money. I think I can safely say that I am worth $50,000. I have had a business which has netted me $5,000 to $10,000 a year. I am in the council just for the fun of being in politics.” A “great many” members, however, faced a different situation: not only did they have to spend $2,000 to $5,000 just to be elected, but some had “no visible means of support”; moreover, it was an “outrage” that aldermen received no salary whatsoever, but merely three dollars for each meeting they attended. This sad tale failed to tug at McCoull’s heartstrings: instead, he offered his own lament that it seemed “rather hard that men in legitimate businesses should have to pay their salaries.” Having reached impasse on this issue, McCoull tried another ambush: “I suppose they make a great deal of money out of their positions.” In what was arguably the most risible statement uttered by (or at least attributed to) Powers during the entire conversation, the boodler-in-chief denied the claim, insisting that during his two decades in Chicago politics he could “count on the fingers of one hand the men who have left the council with money.”

At this point McCoull agreed to telegraph ATC headquarters in New York to find out what it could do and to telephone Powers with the response, but if McCoull did not hear back before the next council meeting, Powers was willing not only to delay taking up the ordinance, but, in McCoull’s words, to “bring that ordinance up and down without anything beyond a promise to pay that money.” Indeed, because he was dealing with a “gentleman,” Powers would both “guarantee...that no other ordinance of this kind will pass the council between now and next election” and give back the $25,000 if he failed to “deliver the goods.” After their minds had met, they played dueling lawyers, McCoull informing his aldermanic interlocutor that “our people” believed that the ordinance was unconstitutional, while Powers retorted that the city’s corporation counsel—whose opinion he promised to mail McCoull—had not hesitated a moment in assuring the aldermen that they had the right to “license anything they

1027a Demands a $25,000 Bribe,” CH, Dec. 22, 1894 (1:3-7, at 2:1-2). Among the 15 or 18 aldermen who might have voted against the ordinance without having to be bribed may have been some who, like Republican Alderman W. P. Chapman, opposed Coughlin’s measure because they mistakenly believed that it contravened their principle that “I would not be a party to any legislation that might infringe on the right of grown people to eat and drink what they please.” “Guilt Is Evident,” Sunday Herald, Dec. 23, 1894 (1:7, 2:1-6 at 4).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

want.” McCoull, according to the Herald, kept his part of the bargain by informing Powers on the afternoon of December 20 that he had not received word from New York, and Powers agreed that he would both see to it that no action was taken on the ordinance at that day’s special meeting and wait until ATC replied.  (In fact, McCoull told the press that he had never even intended to and did not wire ATC because, as his demonstrably preposterous lie phrased it, “‘I knew too well the company’s instructions on such subjects, which is [sic] alike to all agents, not to pay a single cent for political subsidies.”) 1028

When confronted with the Herald’s account, Powers did not deny that he had met with McCoull, but swore that he had gone there to convince him that the ordinance should be adopted because “[t]he wives and mothers in my ward begged to have their boys protected by the removal of the things from the penny stores.” 1030 Coughlin, who had introduced the ordinance, opined that Powers had not propositioned McCoull because he had supported its passage “‘first, last and all the time,’” not only because of cigarettes’ destructive health impact, but also because he was aware that packages included “obscene pictures, which furnished a bad object lesson for the boys and girls who purchased them.” Finally, like Coughlin, Powers, too, “realized...that the city was short in its funds to the extent of $1,500,000, and he believed that we could increase the revenue of the city from this source.” 1031

Powers did deny having suggested a bribe or that he would accept one; moreover, he claimed that it had been McCoull who had contributed 90 percent of the conversation pertaining to bribery attributed to Powers. The credibility of Powers’ account of what was allegedly “very evident” to him a “‘trap’” was undermined by his admission that his tête-à-tête with McCoull had not been his first with the Trust’s representatives: on December 15 an ATC salesman had called him to arrange a meeting with its advertising manager on December 17, at which the latter asked Powers why he was pushing for adoption of the ordinance. 1032 On hearing Powers’ answer (which the press omitted, but Powers

1028a “Demands a $25,000 Bribe,” CH, Dec. 22, 1894 (1:3-7, at 2:2-3). Coughlin’s explanation/excuse for having “failed” to bring the ordinance up at the meeting on Dec. 20 was that he was unfamiliar with various “parliamentary points”—in particular as to the permissibility of passing an ordinance on special order at an adjourned session. More importantly, he thought that lacked it lacked the requisite number of votes for passage. “Guilt Is Evident,” Sunday Herald, Dec. 23, 1894 (1:7, at 2:1-6 at 3).


1032a “Serious Charge of Bribery,” NYT, Dec. 23, 1894 (1:4).
told the press that he had informed McCoull that he had “‘always been a champion’” of the licensing ordinance because his constituents had repeatedly expressed the hope that something would be done to prevent school children from buying cigarettes, the manager hinted at “money consideration” and, after pulling out a large pocketbook, informed Powers that: “‘It matters not to our concern whether you support or oppose the ordinance, for I hold Mayor Hopkins and enough of the Aldermen in this pocketbook to defeat it without your assistance.’” Powers wanted the world to believe that he—the boodler-in-chief of a world-renowned corrupt municipal government—was so offended by this characterization that “‘hot words followed.’” Although Powers then resisted all of the advertising man’s propositions to oppose the ordinance, he nevertheless agreed to return the next day, when he had the aforementioned meeting with McCoull, who “‘intimated’” to Powers that “‘if it cost $25,000 he would defeat the ordinance,’” the “‘great trouble’” being that “‘he did not know who would be the proper party to handle the money.’” His moral rectitude blindingly resplendent, Powers informed the Trust’s agent that “‘no money consideration...could influence my course and that now, more than ever, I would work for the passage of the ordinance.’”

In evaluating this account it is important to note that in addition to trying to sell newspapers, the Herald also had an ax to grind in characterizing the incident as “so vile that its vileness cannot be exaggerated”: it editorially aligned itself with the Tobacco Trust by intensely opposing the ordinance as “contrary to public interest” and placing “restrictions on a traffic by which a very large number of well-to-do people obtain part of the means of a livelihood” without lessening the “cigarette nuisance and evil.” While insisting that “this boodle project was formed” in order to “prevent just and proper action”—a self-contradictory notion inasmuch as allegedly no action at all, just or otherwise, had existed to prevent other than the boodlers’ own “villainy”—the Herald saw the “conspiracy” in the larger context of a council lacking enough principled aldermen to “pass nor [sic] defeat an ordinance of any kind, good or bad. The boodle contingent, constituting a majority, must be paid or they will not vote for a measure that ought to pass, nor [sic] against a measure that ought not to pass.”

The Herald exposé left the Democratic Chicago Times, owned and edited by mayor-to-be Carter Harrison, Jr. (son of the recently assassinated mayor), blasé about its having made “a profound ado about overhearing” an alderman’s proposition to kill an ordinance objectionable to a trust for $25,000: “There is no

news in a statement of this kind. It has been known to a certainty any time these
twenty-five years that the common council of the city of Chicago has been
corrupt. There has not been a period, with the exception of some years when men
of honesty predominated in the council, that the votes necessary to pass an
ordinance over a mayoralty veto have not been at the service of persons who
would pay for them. [I]t is well known in this community that...not a grant of any
value has passed the common council that has not been corruptly obtained. [S]o lax
and inefficient have been the methods of those officers charged with the
prosecution of the law that not since 1872 has a single alderman been brought to
book for his corrupt practices....” Taxonomically distinguishing this type of
corruption by which “the alderman is bought to give to certain persons or
corporations municipal grants without adequate compensation to the city” from
the sandbagging of which Powers was accused, the editorial deemed the latter
“the exception”: “It is true that aldermen sometimes blackmail worthy persons by
offering in the council, as the trick is at Springfield, legislation that would prove
inimical to their interests and then proffer to kill such proposed legislation for a
consideration.”

Ironically, just three days later, in the course of issuing a fulsome apologia
for the Tobacco Trust, the Herald conflated these two analytically distinct
subcategories of bribery. In order to refute the claim that “abstractly the bribe
giver is as guilty as the bribe taker,” the editorialist argued that “[c]rimes
committed under duress have different status than those that are voluntary.”
Deploying the loaded term “duress” precisely to cover up the difference between
the two subtypes, the newspaper pointed out that “[b]ribe giving has for some
time been compulsory in this city upon citizens or corporations wanting privileges
to which they were legally entitled”—“to get free.” Bracketing here the issue of
whether, “[i]f a railroad wanted a spur track,” it was really entitled to it “free” in
the sense that aldermanic boodling entailed shifting (a part of) the compensation
that the corporation should have paid to the city to the aldermen, the Herald
enabled itself to jump to its favored conclusion only by eliding the crucial fact
that ATC was in no way “entitled” to kill an ordinance that it must have perceived
as both reducing its immediate profits and curtailing the expansion of its
monopoly commodity by interfering with the addiction of the next generation of
cigarette users. Cavalierly ignoring these fatal defects in its logic, the editorial
praised ATC for standing up to “a combination in the council that [generally] will

1036 Bribers and the Bribed,” Times (Chicago), Dec. 23, 1894 (12:3) (edit.). The
Herald did not deny that the council’s corruption had long been well known; it had merely
provided “[c]onclusive proof....” “A State Investigation Needed,” CH, Dec. 24, 1894 (6:2)
(edit.).
punish anybody who exposes solicitation of bribes.” In particular it celebrated the Trust’s sting operation: “Few men perform the admirable public service rendered by Neill McCoull in trapping the corrupt Powers and letting the community know precisely the circumstances under which that rascal undertook to ply the trade of himself and his bribe seeking associates.”

The diametrically conflicting stories, which variously cast Powers and McCoull as “hero” and “heavy villain” of an alleged bribery plot, also initially left unnamed a key actor, George Washington Turner—a person previously referred to as an ATC advertising manager—who had traveled from New York to Chicago “with the purpose of entrapping a Chicago Alderman in a compromising interview,” publication of which would help defeat the ordinance by tainting it as the product of bribery. Whether Powers and his allies would in fact execute their plan of turning the conspiracy against the Trust by insuring adoption of the measure remained to be seen. Coughlin, in any event, was laying that groundwork by standing by his on-again, off-again boodle buddy and “insist[ing] that people who are mean enough to make cigarettes are mean enough to attempt to bribe city officials.”

Turner’s real identity proved to be revelatory of the Tobacco Trust’s strategy in undoing the ordinance. Having become “disgruntled” as business manager of the New York World, in 1893 he became publisher of the New York Recorder, a Republican newspaper that the Dukes of ATC, with “plenty of money, millions to expend” on a large metropolitan daily paper, had launched in 1891 and that the World styled as “owned by the Cigarette Trust.” “One of the standing rules in that newspaper office,” which had turned into a financial “mill stone” around Duke’s neck, had “always been that no item injurious to the cigaret business should be printed in its columns, and this has been rigidly carried out, even under the control of Mr. Turner....” This profit-driven self-censorship had, in the wake of the bribery scandal, quickly given rise to the allegation that Turner was an “employé of the Tobacco Trust.” Turner’s credibility was embarrassingly on display in his Christmas-day denial of the aforementioned

1039 Cigarets and Cash,” CT, Dec. 23, 1894 (4).
statement that as editor of the Recorder he had “systematically suppressed and manipulated news in the interests” of ATC: he insisted that the president and a few others of the company were merely his “intimate friends, that his interest in the welfare of the concern, which he refuses to call a trust, is not pecuniary, but only of a friendly character.” Not only did he pretend that “I don’t know of the existence of any trust in the tobacco industry,” but he also asserted (as if being deposed) that “to the best of my knowledge and belief not one share of the Recorder stock is held by any member of the company.” While admitting that he had met Powers, he claimed that he had gone to Chicago “simply to see what the newspapers of that city thought” of the proposed ordinance. Turner’s travels were, according to his ex-employer and enemy, the World, considerably more sinister: he was “extremely active in the interests of Tobacco Trust...; going around the country endeavoring to suppress the news about the recent litigations which are affecting the interests of this great monopoly. He first appeared openly several months ago, when Miller & Co., of Newark, N.J., began suit in the Court of Chancery of New Jersey to dissolve the Tobacco Trust. Turner went around the New York newspapers with a request that they sign an agreement to suppress all reference to the hearings. He urged that this suit had not been brought in good faith, but was intended to blackmail the trust. ... The real truth of the matter was that the Tobacco Company did not want its methods of doing business exposed, fearing the result of such exposure in Wall street. ... Aided by the United Press, Turner succeeded in muzzling most of the papers in the East” and, after he had performed a similar mission in Indianapolis in mid-December, it was “believed in Chicago that Turner’s success as a manipulator in the East induced his employers of the Tobacco Trust to send him on to Chicago,” where his task was to “trap the Aldermen in order to prevent the ordinance’s passage pursuant to the Trust’s belief that ‘if the Aldermen were shown to be corrupt public indignation would kill the ordinance.’”

1046 Moses Koenigsberg, King News 367 (1972 [1941]).
1047 “The Mayor in His Wallet,” World (New York), Dec. 25, 1894 (3:1-2). It is unclear whether Turner’s departure from the World biased this report. Coughlin’s understanding was that Turner was “a heavy stockholder in the cigarette trust.” “Aldermanic Faith,” Daily Journal (Logansport, IN), Dec. 25, 1894 (1:4-5 at 5). ATC’s local Chicago lawyer, Charles Aldrich, claimed that “Turner is a relative of one of the officers of the company and that is his only connection with it.” “Bunkoed or Not?” CT, Jan. 2, 1895 (9). The New Jersey attorney general’s action to restrain ATC from doing business in that state (in which it was incorporated) on the grounds that, inter alia, it refused to deal with jobbers who sold competitors’ cigarettes was ultimately dismissed.
The plot thickened when the Tribune found out that on his arrival in Chicago Turner had been introduced by William F. (Buffalo Bill) Cody to a legendary Pony Express rider, Robert H. (“Pony Bob”) Haslam, a cigarette dealer and a “messenger from the cigarette trust,” to whom he confided that he wanted to meet Powers and other aldermen, and that Haslam arranged for Powers—who later admitted that Haslam had revealed that the subject of Turner’s interest was the cigarette ordinance—and Coughlin to meet him. During two hours of whisky drinking in a hotel cafe, Powers claimed, Turner beseeched him to defeat the ordinance, “while he was protesting that his duty to his constituents and his innate horror of cigarettes would not allow him to harbor the thought for an instant.”

Coughlin, for his part, while drinking with Turner at eleven in the morning, was asked why he wanted to pass the ordinance. He supposedly replied that the existing ordinance was unenforceable and his was “the only way to reach the cigarette evil....” Turning more personal, he added that “cigarettes had killed a first cousin of mine and that I was against them.” Hawking a lethal commodity apparently failed to faze Turner, who protested: “Well, look at the small stores you are driving out of business.” Unflinchingly, the righteous alderman shot right back: “Yes, but look at the small families that you wreck.” An uncomprehending Turner then received this hybrid scientific-urban legendary explication: “These young boys and girls around school houses who buy two cigarettes for a penny inhale the smoke, go into quick consumption, and it does not take many years for that disease to take them away.” The now thoroughly enlightened Trust agent implausibly acknowledged that Coughlin had gotten “the best of the argument,” but nevertheless “dared” him to do the pointless and vote for an ordinance that the mayor, “who is with us,” would veto—an action

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“Tobacco Trust Attacked,” NYT, Nov. 17, 1893 (2); “Tobacco Trust Victory,” NYT, Mar. 13, 1897 (14).

1048 “What the Aldermen Say of It All,” CT, Dec. 23, 1894 (4).


1050 “Guilt Is Evident,” Sunday Herald, Dec. 23, 1894 (1:7, at 2:1-6 at 3). Coughlin stated that Haslam had approached him at the Monday night city council meeting (presumably Dec. 17), wanting him to see Turner, who “represents the cigarette trust”; Coughlin claimed that he had told Haslam that he “did not want anything to do with”; Turner, but nevertheless agreed to meet him the next morning and did meet him at the Richelieu Hotel. Id. Why he was “against the cigarette trust,” as he allegedly told Haslam in explaining his reason for not wanting to see Turner, he did not reveal.

“Aldermanic Faith,” Daily Journal (Logansport, IN), Dec. 25, 1894 (1:4-5 at 5). It is unclear whether the claim that Haslam was a friend of Coughlin’s was accurate. “The Trust and Its Agent,” World (New York), Dec. 28, 1894 (3:1).
that “‘we have enough...votes to sustain.’”

Once Turner had failed to persuade Powers that newspaper stories and scientific reports that cigarettes were injurious were untrue, and they had discussed the finer points of the ordinance’s constitutionality and the council’s police power, the former’s persistence in urging the latter to “‘name a price for my influence’” left Powers increasingly frustrated because, “‘[b]ut for his being Bob’s friend I would have smashed him.’” However, Powers’ bathetic “indignation” reached new heights when, after Turner, pointing to his “‘little red-leather pocket-book,’” had bragged that “‘I’ve got your mayor and forty of your aldermen in here and they’ll kill the license,’” Powers called him “‘a __ liar and a __ fool.’” (Impressive was the self-discipline that the reigning boodler champion presumably had to summon to tell a reporter with a straight face that “‘[s]uch an imputation on [sic] Chicago’s chief executive and the City Council...could not go unquestioned’”).

Yet another version of the genesis of “negotiations for the defeat of the cigarette license ordinance” proffered by McCoull involved a peddler whose $1,200 annual profits (alone) from cigarettes would have been jeopardized by the proposed ordinance and who therefore complained to his Republican alderman that its passage “‘would take the bread and butter out of his mouth.’” Having learned from the peddler that McCoull was the person “‘in authority’” (“‘if anybody was’”), the alderman (and three colleagues in his “‘gang’”) delegated the peddler to approach McCoull, who told him that “‘he knew very well that I would not spend one dollar with these fellows,’” but nevertheless agreed to hear whatever the aldermen might wish to say to him. Within half an hour the peddler’s alderman showed up in McCoull’s office, but they were soon at loggerheads because McCoull, too, not wanting “‘to be made a child of,’” insisted on talking to “‘somebody who was in authority.’” That person turned out to be Powers. Having told this tale to a Tribune reporter, McCoull submitted to several questions, which he initially answered falsely or evasively. Thus, after having denied that ATC had done anything at all to defeat the ordinance, he was pushed

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1051“Guilt Is Evident,” Sunday Herald, Dec. 23, 1894 (1:7, at 2:1-6 at 3). In an alternative apologia given to another newspaper, Coughlin had more pithily described his support of the ordinance as “‘[f]or revenue and humanity.’” “What the Aldermen Say of It All,” CT, Dec. 23, 1894 (4). Haslam stated that he did “not remember hearing the cigarette ordinance discussed at all.” “Demands an Inquiry,” Chicago Record, Dec. 24, 1894 (3:3-4 at 4).


Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

to admit that the company’s agents had canvassed various wards by distributing to tobacco dealers a petition (against the ordinance) to the city council.1055 (In another interview he admitted that the Trust had sent its employees into every ward.)1056 As to why he had not reported the solicitation of bribery to the state’s attorney McCoull lamely excused himself on the grounds that it was for the Civic Federation to take up such a matter.1057

In any event, Powers concluded that what he characterized before the council as “‘one of...the most infamous plots ever instituted in this city’”1058 would boomerang because “‘if the aldermen don’t vote for it [Coughlin’s ordinance] who voted for McGillen’s ordinance people will suspect them.’”1059 The New York World agreed that, contrary to the Trust’s supposition that the story would kill the ordinance, it would in fact have the reverse effect.1060

At its December 27 meeting the city council afforded Powers and Coughlin the opportunity to rehearse their versions of the bribery escapade. The proceedings’ solemnity was adequately captured by the need for the sergeant-at-arms to evict a Democratic alderman from the council chamber for drunkenness. In contrast, with impunity Coughlin was able to claim that it was “‘cruel and unjust through the press that he [Turner] has accused the Common Council of Chicago as [sic] a pack of thieves....’”1061 To be sure, the Tobacco Trust’s monopoly did not extend to mentioning that fact; indeed, just three days earlier the Chicago Herald had shared a naked emperor moment with its readers by printing Republican Alderman James Mann’s cri de coeur that “‘sandbagging’” on the council had been “‘so open...that there have been times in which I have been tempted to rise in my seat in the Council Chamber and cry out to these men: ‘You are a pack of thieves.’”1062 Coughlin then “consoled” Powers by confiding to the council that he, too, had been “approached with corrupt and felonious advances on the part of the agents of the American Tobacco Company...which he

1055“Mr. M’Coul Reiterates His Charges,” CT, Dec. 23, 1894 (4).
1057“Mr. M’Coul Reiterates His Charges,” CT, Dec. 23, 1894 (4).
1058“Powers Has His Day,” CT, Dec. 28, 1894 (2).
had virtuously spurned.” In response to Powers’ demand for the “fullest investigation” of the charges, the chair appointed a special five-member committee. In advance the Herald had made the most of the delicious irony of the “impudent absurdity” of Powers’ demanding an investigation precisely from “his unspeakable associates and partners in corruption.” Unsurprisingly, this “league of aldermanic boodlers assembled to inquire into the acts of the boodler in chief” did expeditiously exonerate him. In the end, despite taunts by a Republican alderman, Coughlin did not call up his ordinance at the December 27 meeting, purportedly because he feared that he lacked the requisite number of votes for passage; instead, he decided to postpone availing himself of the advantage to which the special order procedure entitled him, thus refuting the Herald’s prediction that the “gang aldermen, having failed...to wrest $25,000 from the American Tobacco Company, will now move heaven and earth in an attempt to revenge themselves upon the corporation by passing the ordinance.” Coughlin did, however, make it clear that “just as soon as” he thought that he had a majority, he would bring it up: “I know that none of the friends of the measure has seen the officers of the trust to promise that they would vote against the measure if the prosecution against Powers was dropped. They are still for the ordinance, but they were afraid to say so, in view of the stand taken by the newspapers and the charges which had been preferred against the members of the council.” In the event, four months would pass before Coughlin pressed it again.

In a bizarre turn of events, a week into the scandal Alfred Trude launched a tale of a byzantine double-cross involving “Lew” Howard, a confidence man who had cleverly intercepted Turner, convinced him that he was a successful lobbyist (who had helped Trude get the first ordinance passed), and, since Turner allegedly had not wanted to deal with aldermen directly, was permitted to approach the latter without informing Turner that he was in fact impersonating him. The confidence man’s purpose, which was totally unrelated to the Trust’s objectives, was to carry out a (partly implemented) bunko game designed to fool

1064 It was composed of four Republicans (Mahony, Keats, Hepburn, and Howell) and one Democrat (Brachtendorf). Proceedings of the City Council of the City of Chicago 2053 (Dec. 27, 1894).
1065 The Gang to Investigate the Gang Leader,” CH, Dec. 25, 1894 (6:3) (edit.)
1066 See below this ch.
1068 “Will Ask Indictment,” CH, Dec. 25, 1894 (2:3).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

aldermen into giving him cash for (worthless) drafts for large amounts that were allegedly intended as the bribes for their votes. Remarkably, the punch line of Trude’s convoluted story served to whitewash the Trust: not only did he, like Charles Aldrich, “‘Turner’s lawyer here,’” “firmly believe” that the aldermen had never met with Turner, but he had “‘an idea Turner gave Howard some money for his alleged services in persuading Aldermen not to oppose the cigarette trust, but it was not large, as Mr. Turner had only a few hundred dollars for his campaign with the Council. I am absolutely certain the positive order from the trust was to spend no money in bribing Aldermen, and only a small fund for lobbying purposes was provided.”

Trude’s tale was not only wholly implausible—Haslam refuted it—but raised the (then unposed and unanswered) question as to how and why this anti-cigarette campaigner had become privy to ATC’s internal and secret strategies. Indeed, Aldrich, the Trust’s lawyer, who “back[ed] up his story as far as his information goes,” claimed that Trude knew more about the matter than Aldrich—except that the former was unintentionally mistaken in stating that the latter was Turner’s lawyer. But Aldrich went on to exonerate his client by asserting that, although he had had “‘nothing to do with Turner when he was in Chicago,’” he did “‘know...that Mr. Turner was not here on any such mission as some of the Aldermen would have the public believe. He was not here to look after any legislation in the Chicago City Council or anywhere else; neither was he authorized to attend to any such business. It is impossible that he should have done any of the acts the Aldermen allege or that he should have met Ald. Powers in the Leland Hotel barroom in the manner stated. ... Mr. Turner is not the kind of a [sic] man who would make such an exhibition of himself. Besides this, I know the American Tobacco Company has no intention, nor did it ever have any intention, of paying any money, no matter what the sum, to defeat this ordinance or any similar legislation. It has “millions for defense but not a cent for tribute.’” In response to the Tribune’s question as to the meaning of this statement, Aldrich capped off his highly compensated obfuscation and mendacity with the declaration: “‘That it will fight the ordinance, if it is passed, in the courts and beat it. It is willing to pay lawyers but not Aldermen.’”

Almost immediately the grand jury set the “alleged attempt to negotiate a bribe” for a hearing, but it swiftly and unanimously exonerated Powers on the basis of the testimony of McCoull, who stated under oath that Powers had not

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1071“Bunkoed or Not?” CT, Jan. 2, 1895 (9).
1072“Kern’s Case Is Next,” CT, Dec. 28, 1894 (8).
solicited a bribe or mentioned any sum of money regarding the ordinance. The remainder of McCoull’s replies to grand jurors’ questions were nonsensical, incoherent, or self-incriminating. After replying that he did not know why he had sent for Powers, he admitted that it was he himself who had made the proposals, whereas Powers had merely told him how many aldermen would have been required to defeat the measure. Finally, he claimed: “He did not know just why Turner had come to Chicago nor [sic] whether it was in the interests of the company he himself represents.” Despite his vindication, Powers swore that he would “‘get even’” with the Herald.

In the light of McCoull’s bizarre testimony, the grand jury’s failure to investigate, let alone indict, McCoull for attempting to negotiate bribing the council is a mystery, but the Tribune was more interested in why it had “decorated Powers with a coat of whitewash.” To this end it developed an “hypothesis” that was bottomed on the at best dubious assumptions that Coughlin’s ordinance, unlike McGillen’s, “was designed for the benefit of the Aldermen and not of the community” and that “the motive of the great majority of those who posed as friends of the ordinance...was blackmail. They were confident that either the dealers or the company...would pay liberally to block this legislation.” However, once the boodling aldermen discovered that the grand jury investigation might “get some of them into extremely hot water,” they decided to compromise: since (the adverse publicity meant that) they no longer could “make any money out of” the ordinance and all ATC wanted was its defeat, they could simply abandon it “in return for the failure to press the prosecution.” Being informed that the matter had been compromised and that neither side wanted to press it, the grand jury would then drop it. The Tribune saw partial corroboration of the hypothesis in the council’s failure to pass the ordinance, but ignored the overwhelmingly inconsistent fact that it was not the Trust that reported the solicitation of a bribe, but the newly formed Civic Federation, whose executive committee had resolved that “the charges should be subjected to the most searching investigation” and whose lawyers would “push the case in the courts.” Indeed, the Federation proposed to use the stenographic report “as the

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1074“No Bill for Powers,” CT, Dec. 30, 1894 (6).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

entering wedge for an investigation of the city council....”

Unsurprisingly, from the outset the proceedings of the special aldermanic committee “appointed,” from the Tribune’s jaded perspective, “to remove the stain of alleged bribery from” Powers, made it clear that its inquiry would be “more or less perfunctory....” By mid-January 1895, when no witnesses—including McCoull—showed up at its second meeting and the committee adjourned, it was “thought the committee will make no further efforts toward an investigation,” thus confirming the newspaper’s prediction that the city council would add a “thicker coat [of whitewash]....” So much for the Herald’s boast the day after it had broken the story that the “sensational exposure of the council methods raised a wave of public indignation...which insures the speedy visitation of the severest penalty under the statute. This punishment is now at hand for the convicted alderman, save for the formality of an indictment and a trial.” And so much, too, for the perspective that Lyman Gage, the Civic Federation’s president, had limned that same day—namely, that it would “‘doubtless go far to relieve the city of its present political degradation’” by exposing “‘the immensity of the conspiracy contained in the city council’” and by doing “‘more to rouse the people from their political apathy than anything that has been exposed in many years.”

A final dousing of whitewash cum hogwash was bestowed on Turner by the newly installed governor of New York, Levi P. Morton, Benjamin Harrison’s vice president until 1893. The day after publication of the first news reports about Turner’s role in the bribery scandal—which the World’s subheads burnished as “George W. Turner Creates a Stir in Chicago as a Tobacco Trust Go-Between” and “Some Trouble in Store for Turner”—and a week before Morton’s swearing
in, his private secretary informed the press that if the story were true, Morton would "unquestionably revoke his appointment." In his testimony before the grand jury on December 29, McCoull did not go out of his way to provide cover for his Trust co-conspirator. Asked whether it was not true that "Turner learned that he could not handle Powers by threats and that he then gave the report to the papers," he merely replied that he did not know; likewise, in response to a question as to why, if Turner was so eager to expose Powers, he had kept the stenographer’s notes for four days instead of giving them to the press immediately, a tight-lipped McCoull had nothing more to say than that he supposed Turner could have acted more swiftly. The World, ever ready to light upon and publish dirt on its quondam business manager, quoted a former Chicago corporation counsel citing unnamed others as believing that "Turner first attempted to tamper with Alderman Powers, but finding himself on dangerous ground, determined to make it appear to the public that Powers was after a bribe, and, with McCoull, put up the job by which Powers was inveigled into McCoull’s office." To this broadside the World appended a brief waffling statement by Governor-elect Morton that he did not know whether he would appoint Turner: because he could not base his judgment "entirely" on press reports, he had launched his own inquiry. The paper shed some light on Morton’s indecisiveness by noting that according to his friends, he had never met Turner before appointing him as a result of "pressure by Turner’s political friends."

In the event, one of those friends was at that very moment busily urging Morton to finalize the deal. On January 12, 1895, the new governor issued a statement that in early December he had chosen Turner as an aide de camp on his military staff, but that in the latter part of December "certain statements, emanating from Chicago, were published in a single newspaper concerning Mr. Turner’s communications with members of the City Council of that city. Mr. Turner thereupon requested the Governor to hold his commission until proofs of the facts concerning such allegations should be formally submitted." Morton then appended this preposterous, multi-layered prevarication to manufacture a happy end to his appointment interruptus: "Such proofs having been submitted, the Governor to-day announces that they show conclusively that the allegations are entirely unfounded, and that it also appears, not only from the editorial utterances of the Chicago papers, regardless of party, but by statements from citizens of Chicago of the highest standing, among whom are prominent members of the opposite political party, that Mr. Turner’s conduct in the matter was in aid of

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In fact, the only “proofs” that purported to exonerate Turner emanated from his employer, ATC President James B. Duke, who was also his co-conspirator in the Chicago city council caper. Twice on December 19 Duke had written to Turner at the Richelieu Hotel in Chicago,\textsuperscript{1087} once to tell him to “Stay in Chicago as long as necessary,”\textsuperscript{1088} and a second time adding: “Omitted to answer your question regarding McCoull. He is entitled to all confidence.”\textsuperscript{1089} On the last day of 1894, referring to the aforementioned \textit{World} article, Duke self-servingly and mendaciously wrote Morton:

\begin{quote}
In view of the publication of an article yesterday in one of the New York papers, I deem it due to Mr. George W. Turner to make the following statement. Mr. Turner went to Chicago simply as my friend to tell the newspapers of the injustice of the proposed ordinance to hundreds of small dealers in tobacco in that city who are customers of this Company. He was not authorized to offer one cent to anybody nor would we have asked him or anybody to undertake such a mission. Every report of attempted bribery by Mr. Turner or anyone representing the Company of which I am President, is absolutely untrue.\textsuperscript{1090}
\end{quote}

Duke not only did his sojourning adlatus a favor by helping to concoct a


\textsuperscript{1087}Although Turner was registered at the Leland Hotel, Powers stated that he found Turner at the Richelieu Hotel “in conference with Ald. Coughlin” (on December 18) “What the Aldermen Say of it All,” \textit{CT}, Dec. 23, 1894 (4). A few days later Powers’ investigation discovered that Turner had registered on Nov. 30 at the Leland Hotel as Martin, but received all his mail and telegrams at the Richelieu under his real name. “Now Looks Like a Trap,” \textit{World} (New York), Dec. 30, 1894 (2:1-2 at 2).

\textsuperscript{1088}J. B. Duke to Geo. W. Turner, Dec. 19, 1894, in Letterbooks at 28, JBDP, RBMSCL. The two very short notes to Turner are copies; though written in telegraphese and sent in a context apparently requiring urgent delivery, the texts do not state that they were sent as telegrams.

\textsuperscript{1089}J. B. Duke to Geo. W. Turner, Dec. 19, 1894, in Letterbooks at 42, JBDP, RBMSCL, Duke University. Although this communication replied to a previous one from Turner, J. B. Duke’s papers include no such. Email from Elizabeth Dunn, Research Services Librarian, to Marc Linder (Sept. 17, 2010).

\textsuperscript{1090}James B. Duke to Levi P. Morton, Dec. 31, 1894, in Letterbooks, JBDP, RBMSCL.
threadbare basis for saving Turner’s new position with Morton, but he (and Turner and McCoull) succeeded in killing the ordinance, albeit only in the short run. Although it was about to enter into hibernation, remarkably on January 5, 1895, Coughlin visited the offices of the Civic Federation to “enlist cooperation for his anti-cigarette crusade” and to argue that it was “a very commendable reform for the Federation to engage in.” Although the press, unfortunately, did not preserve for posterity the facial expressions, let alone substantive reactions, of the city’s leading reformers to such lecturing by the likes of that grotesque paragon of municipal government corruption—who, after all, found it advisable to explain that his efforts were in earnest even though some people seemed to think the ordinance a joke—it did record Coughlin’s boast that he was “in the fight to the finish” and would “not let up until the cigaret traffic at every street corner has been curtailed and the deadly articles have been put out of the reach of the city’s youths.”

After months of languishing, Coughlin’s measure was finally debated by the city council on April 22, 1895, three weeks after the aldermanic elections had produced a council composed of 50 Republicans and only 18 Democrats as well as Republican Mayor George Swift. Although headlines screamed “Boodlers

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1091 Cassandra Tate, *Cigarette Wars: The Triumph of “The Little White Slaver”* 34 (1999), over- and misinterpreted Duke’s statement to Morton: “Stung by the critical reports in New York newspapers (and no doubt concerned about their effect on the financial community), Duke enlisted the help of Morton.... [H]e asked Morton to issue a statement—as a supposedly disinterested public official—to reiterate that “[e]very report of attempted bribery by Mr. Turner or anyone representing the Company of which I am President, is absolutely untrue.” In fact, nothing in Morton’s statement (which Tate did not cite) even alluded to ATC; moreover, Duke’s statement, which is quoted in full in the text above and was manifestly written for public consumption, did not ask Morton to do anything.

1092 “A Chicago Anti-Cigarette Crusade,” *Sun* (New York), Jan. 6, 1895 (5:5) (reprinted from Chicago *Times*). The chairman of the Federation’s Municipal Committee which happened to be in session when Coughlin arrived, invited him to address the committee. At the time University of Chicago Professor Edward Bemis, a nationally prominent advocate of municipalization of utilities, was chairmain. “Will Air the Jobs,” *CT*, Mar. 1, 1895 (6). Two months after his visit Coughlin was one of 38 aldermen excoriated at a huge Civic Federation mass meeting opposing the latest examples of aldermanic corruption in the form of two municipal utility ordinances. “Clamor for a Veto,” *CT*, Mar. 4, 1895 (1).

1093 “Makeup of the New City Council,” *CT*, Apr. 4, 1895 (2). Although the newspaper gave the totals as 50 and 18, the party designations of the individual aldermen added up to 49 and 19.
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

Out and such prominent practitioners as McGillen had been defeated, “[n]o sooner was the new council sworn in than the boodling resumed. ... The public soon discovered that however indignantly Mayor Swift might protest, the Republican-dominated council was fully as bad as its predecessors. When there was money in sight the new councilmen forgot partisan differences and eagerly accepted the leadership of Powers and Coughlin.” Indeed, with “the bulk of the boodling interests centered in Coughlin’s first ward—which was thought to be “the richest political division in the world”—his power (and wealth) increased, and the alliance of the two “created a tight ring of veteran conspirators able to control the Republican majority almost at will by merely loosening the purse strings.” As his graft-based control of the council tightened, Coughlin delighted in “making himself obnoxious” to the mayor, for whom he had nurtured a “petulant dislike” during Swift’s period as a reform alderman. In particular, it “became commonplace for Coughlin, in a single session, to sponsor a blatant boodle law and with rare whimsy to produce unquestionably useful reform measures designed to irk the mayor.”

Whether Coughlin was acting out that scenario at the April 22 session is unclear, but he did come very close to securing passage of his “suspicious and peculiar” licensing ordinance. The unrestrained sarcasm that the headline and subheads of the front page lead article in the Daily Inter Ocean unstintingly ladled out represented one widespread jaundiced view of the illegitimacy that irreparably tainted any pseudo-reform associated with The Bath House: “B. H. JOHN AS A LEADER: Coughlin Engineers the Powers Cigarette Ordinance: ...

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1095. Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John and Hinky Dink 126 (1943).


1097. Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John and Hinky Dink 126-27, 136 (1943). By the end of 1895, “Powers found the Republicans fully as venal as his own gang, and far less expensive.” Id. at 136. The Herald had described the Powers-ATC scandal as the former’s “offering a job lot of republican and democratic aldermanic votes for sale.” “Powers’ Picture of the Boodle Council,” CH, Dec. 23, 1894 (30:1) (edit.).

1098. Coughlin did propose repealing a boodling gas company franchise ordinance passed in 1894 (which he had, in conformity with his “unpredictability,” opposed) on which only a small minority joined him (and which Powers opposed). “Coffin Nails to Go,” CT, Apr. 23, 1895 (1).
Famous Boodle Measure Lacks One Vote of Adoption.” Interestingly, the Tribune’s less editorially freighted front page report held out the prospect of longer-term success embedded in immediate failure: “COFFIN NAILS TO GO: Indications That Mayor Swift Will Fight Cigarettes.” Republican opposition to the license measure ignited, at least superficially, on the question of its relationship to the McGillen ordinance, which had “been a dead letter” because, as the Inter Ocean put it, former “Mayor Hopkins [had] boldly announced his intent of disregarding it, and the gang never protested against his declaration.” The Tribune’s judgment that “[w]ar will be waged against cigarettes in Chicago” was based on Mayor Swift’s statement at the council meeting that “he would examine the ordinance prohibiting their sale and it is evidently his intention to enforce it” after Republican attacks on the license proposal called his attention to the already existing ordinance.

This confidence in Swift’s will to enforce may in part have been rooted in the order that he had issued, just three days after his inauguration, prohibiting smoking in city hall, which the press praised as partial “performance of his contract with the people of Chicago to purify the City Hall....” Demands for such action antedated his election. (As far back as 1892 Republican Mayor Hempstead Washburne had prohibited city employees from smoking while on duty.) In February the Inter Ocean pleaded for relief from the exacerbation of the already existing “unavoidable evils of faulty ventilation and of uncleanly personages...by the density of smoke. The foulest pipes and the rankest cigars pollute the already bad air.... In the elevators the thoughtless or the untutored puff their smoke into the faces of delicate women and girls and of cleanly men.” It was even “more improper,” as far as the editorialist was concerned, that

1100“Coffin Nails to Go,” CT, Apr. 23, 1895 (1:1).  
1102“Coffin Nails to Go,” CT, Apr. 23, 1895 (1:1).  
1103Republican Alderman Madden was also “satisfied that the present mayor would enforce” the ordinance. “B. H. John as a Leader,” DIO, Apr. 23, 1895 (1:7), at 2:4.  
1104CT, Apr. 12, 1895 (6) (untitled edit.). See also “One of the Mayor’s Reforms,” DIO, Apr. 12, 1895 (6:3) (edit.). A women’s group also enthusiastically endorsed the ban. “Pleased with the Anti-Smoking Order,” DIO, Apr. 19, 1895 (5:3).  
1105When office doors at city hall closed at 4 o’clock “corncob pipes were flashed from desks, neglected cigars were abstracted from vest pockets, and nervous, yellow stained fingers rolled cigarette after cigarette until the enforced abstinence was fully paid for.” The ban did not apply to visitors. “Deprived of Their Labor’s Solace,” CT, May 14, 1892 (1).
smoking was permitted in city hall than in theaters because whereas people visited the latter voluntarily, they went to pay their taxes “by compulsion.” When Coughlin called up his measure, which had been made a special order, his speech in his wonted buffoonish style “evoked rounds of laughter”: “I have been sent to the City Council to do my duty. The election is over, but it is not yet too late to do good.” After stressing “the evil effects of cigarette smoking,” Coughlin “concluded by remarking that the Civic Federation had better be looking after the indecent pictures in cigarette packages rather than prosecuting the vendors of obscene literature.” Lawyer and Republican Alderman Isaiah Greenacre then offered an amendment to reduce the license fee from $500 to $25. Republican Alderman Madden criticized Coughlin’s measure on the grounds that its passage “would indicate to the people that the Aldermen do not believe in the efficacy of the other ordinance” that the council had adopted the previous year: “If we were right on the former occasion we are wrong now....” To be sure, the posited inconsistency between the ordinances would have been plausible only if McGillen’s in effect eliminated cigarette sales because of its glycerine/sugar ban; otherwise, Coughlin’s could have been viewed as supplementary. Madden also insisted that the council should not devote its time to such an “infamous” measure. At this point Madden moved to put the proposal “on file,” that is, to delay its consideration, but his motion lost by a vote of 23 to 40, not a single one of the 23 Yeas being cast by a Democrat (while 15 Democrats and 25 Republicans voted Nay). Yet another Republican opposed the license on the grounds that it would produce a monopoly. Although purporting to oppose sales under any circumstances, he argued that they should be unimpeded if the business were legitimate and stamped out if not. After Greenacre’s motion to amend by prohibiting cigarette sales within 1,000 feet of any schoolhouse and a Democrat-sponsored amendment to increase the license to $1,000 had both been defeated, the council voted 34 to 27 in favor of the ordinance, but because passage required a majority of all 68 aldermen, it failed by one vote. Not a single Democrat voted against Coughlin’s ordinance, while 19 Republicans and 15 Democrats voted for it. The _Inter Ocean_ predicted that the ordinance would probably be introduced again because “the Coughlin following seemed

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1106 “A City Hall Nuisance,” _DIO_, Feb. 20, 1895 (6:4) (edit.).
1108 “Coffin Nails to Go,” _CT_, Apr. 23, 1895 (1:1). Of the 40 Nays, Democrats cast 15 and Republicans 25. The various votes are taken from _Proceedings of the City Council of the City of Chicago, for the Municipal Year 1895 and 1896, Being from April 8th, 1895, to April 10th, 1896, Inclusive 77-78_ (Apr. 22, 1895) and party affiliation from _id._ at LV-LVI.
determined not to let the matter drop,” but in fact Coughlin waited almost a year and a half to press it again.

The Inter Ocean did not lament the killing of what it saw as a pure and simple boodle ordinance designed to “sandbag the cigarette trust,” whose shrewd agent had been able to frighten the “robbers” into abandoning “the attack upon its coffers....” To be sure, the newspaper did not believe that the ordinance’s backers had revived it “in hope of securing plunder for the aldermanic gang”; rather, its resurrection was designed to “punish the contumacy of the trust.” While acknowledging that some non-gang aldermen also voted with the majority, because they fallaciously believed that the ordinance might prevent cigarette sales to boys, the editorial advised that enforcement of the existing ordinance would achieve the same end. (The Inter Ocean did not put its mouth, out of both sides of which it spoke, where its money was: while inveighing editorially against obscene buttons given with cigarette packages, it profited from publishing ads for ATC cigarette packages with buttons.) Displaying its contempt unabashedly, ATC opined that “the ordinance was a farce and could not be enforced.” Conflict between the monopolist and its dealers surfaced here inasmuch as some cigarette sellers, as was often the case throughout the country, would “not much care” even if cigarette sales were stopped because, as one downtown retailer put it, the result would be an increase in cigar and tobacco sales. To be sure, dealers expressed skepticism of the complete enforcibility of the crucial glycerine/sugar ban in McGillen’s ordinance “because the costly services of a chemist would be necessary to determine whether proscribed ingredients were present” and the fact that one was identified in one box of one brand of cigarettes could not qualify as evidence against another.

At the same April 22 session the Rules Committee submitted its report on the council’s new rules, Rule 10 of which provided: “Smoking shall be, and is, strictly prohibited in the Council Chamber, during the session of the City Council, and this rule shall not be suspended except by unanimous consent.” (At a council meeting on April 24, 1893, Mayor Harrison had declared that “smoking

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1110A Boodle Measure Killed,” DIO, Apr. 24, 1895 (6:4) (edit.).
1112E.g., DIO, Dec. 4, 1896 (10:6) (Sweet Caporal).
1113“Points on the Cigaret Ordinance,” CT, Apr. 24, 1895 (3).
1114Proceedings of the City Council of the City of Chicago, for the Municipal Year 1895 and 1896, Being from April 8th, 1895, to April 10th, 1896, Inclusive 72 (Apr. 22, 1895). See also “B. H. John as a Leader,” DIO, Apr. 23, 1895 (1:7, at 2:1).
would not be tolerated hereafter in the council chamber....”\textsuperscript{1115}\) At the next session a week later, when the council took up the rules individually in sequence, Alderman Frank Lawler “got the rule prohibiting smoking stricken out....”\textsuperscript{1116}\) That Lawler, a one-time Illinois trade union leader and author of the state’s eight-hour law, who as a Republican and then a Democrat on the city council in the 1870s and 1880s (before serving three terms as a congressman)\textsuperscript{1117}\) “Was Always Laborers’ Friend,”\textsuperscript{1118}\) spearheaded this repeal is noteworthy. A member of the Hull House Men’s Club, Lawler was, with Jane Addams’ encouragement, its (independent) candidate at the April 1895 elections in the nineteenth ward, in an effort to undermine Powers’ rule and create the sanitary conditions there that his corrupt crony regime made impossible.\textsuperscript{1119}\) However, “the Hull House victory was short-lived,...for the successful candidate was unable to resist the attractive inducements put before him by his colleague from the nineteenth ward. Within a matter of months, Frank Lawler was Johnny Powers’s [sic] most loyal supporter.”\textsuperscript{1120}\)

Whatever Lawler’s reasons for leading the forces seeking to get rid of the proposed no-smoking rule, proponents outnumbered opponents by 43 to 20.\textsuperscript{1121}\)

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\footnote{1115}{“Begins Its Work,” \textit{DIO}, Apr. 25, 1893 (2:5).}

\footnote{1116}{“Downey at the Helm,” \textit{CT}, Apr. 30, 1895 (5).}


\footnote{1118}{“Was Always Laborers’ Friend,” \textit{CT}, Jan. 18, 1896 (4). See also “They Pass the ‘Lie,’” \textit{CT}, Apr. 16, 1895 (1) (Lawler’s introduction of ordinance to raise city laborers’ wages).}


\footnote{1120}{Allen Davis, \textit{Spearheads for Reform: The Social Settlements and the Progressive Movement 1890-1914}, at 152-54 (quote at 154) (1984 [1967]). Powers was not up for reelection that year, but one of his nineteenth ward Democratic cronies was.}

\footnote{1121}{\textit{Proceedings of the City Council of the City of Chicago, for the Municipal Year 1895 and 1896, Being from April 8th, 1895, to April 10th, 1896, Inclusive} 107 (Apr. 29,}

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A comparison of this vote with that on Coughlin’s proposed ordinance the previous week may shed light on the extent of the anti-cigarette commitment among those who backed the latter. Of the 34 aldermen who had voted for the $500 license ordinance a week earlier 32 voted on eliminating the proposed no-smoking rule, of whom an impressive 29 (including Coughlin, Powers, and Lawler) voted Yea and only 3 Nay.1122 This near unanimity is consistent with Coughlin’s repeated assurance that he had been induced to introduce the ordinance in the first place “‘[f]or the purpose of increasing the city’s revenue and to confine the sale of cigarettes to the down-town districts, where children attending the public schools cannot buy them’” and that it had taken the form of a sales license “‘[b]ecause the McGillen ordinance covered every other point.’”1123 If his child-centered objective was shared by the other aldermen who voted with him on both ordinances, they nurtured no far-reaching plan to curb smoking (of any kind of tobacco) by adult men. Typical of such council members may have been Republican James Keats, an English-born representative of large British and U.S. insurance companies,1124 who confided to the press: “‘I am liberal in my ideas and I have no objection to men smoking cigarettes if they want to, but I do want to stop the sale of them to school boys. I have been waited on by many small dealers in my ward, who have urged me to vote against the ordinance because its passage would hurt their business. They said I could not be re-elected if I voted for it. I told them I didn’t care; that I was opposed to the sale of cigarettes to children and I would vote for the ordinance.’”1125

To be sure, whether the aldermanic advocates of their right to smoke on the job had prevailed or not,1126 the overlapping group of boodlers were determined to thwart adoption of the rules altogether. The proposed rules, reported by a five-member committee all of whom were Republicans,1127 were highly contentious.
because, as the Tribune explained, they contained a number of provisions that “would make it impossible to put through boodle ordinances...in the manner in which they” were customarily passed by virtue of making the legislative process more deliberative and transparent. And although the rules would not have “converted” boodling aldermen and “caused them to give up their evil practices they would have strengthened the honest Aldermen greatly by adding to their ability to resist the passage of unfit measures. They would have been given time in which to appeal through the press to the people.” Consequently, the Coughlin-Powers boodlers mobilized to euthanize the new rules.

While the year 1895 witnessed city councils in numerous smaller towns in Illinois and elsewhere passing ordinances prohibiting the sale of cigarettes altogether, Chicago’s was still confining itself to consideration of a licensing system that no one claimed was prohibitory. During the first part of 1896, the Chicago board of education and Waite’s NACA intensified public awareness of what they regarded as the grave dangers of cigarette smoking by school children and the need to staunch the sale of cigarettes to them. In the midst of this renewed vigorous assault, “[r]epresentative retail cigar and tobacco dealers [w]ere almost a unit in denouncing cigarettes, and sa[id] they would welcome the day when there was no sale for them.” To be sure, this position was in large part rooted in the traditional complaint by sellers that there was “‘no money’” in the business, but also reflected tobacco dealers’ carefully nurtured animus against adult cigarette customers, who were “‘nervous and fidgety...’” These characteristics they attributed to an unbreakable addiction, which, in turn, “[n]early all dealers agree[d],” resulted from the presence of “‘a drug of some kind, presumably opium, for in no other way, they say, is it possible to account for the tenacious hold which the habit has upon those who have once fallen victim to their use.” Side by side with this disinformation dealers also recognized inhaling as “‘the greatest

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1127Proceedings of the City Council of the City of Chicago, for the Municipal Year 1895 and 1896, Being from April 8th, 1895, to April 10th, 1896, Inclusive 189-90 (May 6, 1895) (recommitted to committee); “Beale for the Law,” CT, May 7, 1895 (2); “Raps with His Gavel,” DIO, May 7, 1895 (2:1). On Coughlin’s leadership of a “new gang” in the council, see “Gang Stopped Short,” DIO, May 14, 1895 (1:7).
1130E.g., “Kansas Dudes Are Bereaved,” DIO, Mar. 30, 1895 (1:6) (Lawrence); “Bad Odor Killed at Paw Paw,” DIO, May 21, 1895 (1:6); “City Council of Walnut Prohibits the Sale of Cigarettes,” DIO, June 18, 1895 (2:2); “No More Cigarets in Eureka,” CT, Nov. 20, 1895 (7).
evils” because it was “simply taking so much poison into the system.” As far as children were concerned, downtown stores placed the blame on “the small outlying news and cigar stores” chiefly because they broke packages and sold cigarettes singly for one cent.\textsuperscript{1132}

Coughlin, it turned out, was either a very patient sandbagger or a very persistent protector of children’s health:\textsuperscript{1133} not until the end of September 1896 did he introduce a new cigarette licensing ordinance, which was very much like the December 1894 committee substitute for his measure, except that this time, however, he proposed radically reducing the license fee to $100,\textsuperscript{1134} which was doubtless designed to undermine resistance by dealers and aldermen and preempt arguments that the measure would foster monopoly; at the same time, however, this low license policy would necessarily dilute the effort to shut off boys’ easy access to cigarettes.\textsuperscript{1135} (In contrast, unanimous passage in July 1896 by the city council of Fond du Lac, Wisconsin, of an ordinance imposing a $200 cigarette license may have exerted a disproportionate impact in a town with a population less than one hundredth of Chicago’s.)\textsuperscript{1136} Coughlin accompanied this new initiative with a most peculiar confession, consistent with the aforementioned dealer stance, designed, no doubt, to shore up his credibility. The first part was largely an efflorescence of scientific and empirical nonsense—except for the reference to inhalation:

You think it rather funny, do you, to hear a man who deals in cigarettes say that they are harmful? Well, I don’t know how funny it is, but I know it’s true.

\textsuperscript{1132}“All Score the Cigaret,” CT, Mar. 24, 1896 (5).

\textsuperscript{1133}Interestingly, Coughlin was the chosen conduit for presenting to the council “a communication from the various reform societies advocating the passage of a State law controlling the sale of cigarettes...” Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-1897, at 1731 (Mar. 8, 1897).


\textsuperscript{1135}As inadequate as the amount was, in December Republican Alderman Greenacre, who had voted against Coughlin’s ordinance on Apr. 22, 1895, introduced a $30 cigarette sales license ordinance (which also prohibited the sale of cigarettes containing opium, morphine, jimson, belladonna, glycerine or sugar). “Four Cents a Ride,” CT, Dec. 15, 1896 (1); “Four-Cent Fare a Go,” DIO, Dec. 15, 1896 (1:1, at 4:5-6 at 6); Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-1897, at 1224 (Dec. 14, 1896) (n.d.). The only action taken was placing it on file. Id. at 1803 (Mar. 15, 1897).

\textsuperscript{1136}“Fond Dulac Attacks the Cigaret,” CT, July 29, 1896 (2).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

Everybody knows the cigaret is an evil, but they won’t own it. I think it is one of the greatest evils that boys and young men of the present day have to meet.

In the first place, no one smokes a cigaret without inhaling the smoke. That’s just where they think they get the good of it, but that’s just where they get the harm of it.

The nicotine works into the system, little by little, till by and by there is a big lump of it there, sometimes of the size of your fist. It gets in round the heart, and then the victim is done for.

Another danger is in the paper with which the cigaret is wrapped. Paper is made of rags. The rags may have come from places where there has been diphtheria or small-pox, or worse, and yet there are hundreds of thousands of men and boys sucking cigarets all the while.\textsuperscript{1137}

In the second part Coughlin’s focused on the dilemma of being a retail sales prisoner of the Trust and his ordinance’s efficacy:

I sell cigarettes because I have to. My next door neighbor sells them, and if I want to keep my custom I must do the same, but you look in my showcases and you will see that I sell no cigarets that are manufactured by the trust. If I must sell cigarettes, I won’t help the trust.

If there was a $100 cigaret license I wouldn’t sell them, and I wish there was. I don’t want to sell them, and I wish nobody in Chicago did.

If there are a few big firms who are willing to pay a big license let them do it, but that would leave out the nickel-in-the-slot cigarets and the many little shops out near the public schools, and where the boys and girls, too, can get at them.

... The city gets something out of the liquor business but not out of cigarets, and the treasury needs the money more than the dudes need the cigarets.\textsuperscript{1138}

While the prohibitory initiatives were still making their way through the Illinois state legislature during the early months of 1897, Coughlin pressed forward with his licensing ordinance,\textsuperscript{1139} which the council finally took up on


\textsuperscript{1138}“Ald. Coughlin Blasts Cigaretts, Cigaret Smokers, and Dealers,” \textit{CT}, Sept. 30, 1896 (7). Coughlin presumably sold them in his saloon and/or bath houses. On his being a saloonkeeper, see “Chicago Ward Politics,” \textit{NYT}, Apr. 1, 1900 (8).

\textsuperscript{1139}On December 21, the License Committee reported Coughlin’s ordinance, recommending that it be passed. \textit{Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-1897}, at 1263-65 (Dec. 21, 1896) (n.d.) (including proposed ordinance text). On Jan. 4 Coughlin had the measure made a special order of business for Jan. 14, although it was not taken up at that meeting. \textit{Proceedings of the City Council of
March 1. That “Republican-dominated council,” as his biographers remarked, “was fully as bad as its predecessors. When there was money in sight the new councilmen forgot partisan differences and eagerly accepted the leadership of Coughlin and Powers.” Even Coughlin’s biographers were unsure as to his motives “in sponsoring such an obvious reform ordinance,” though they speculated that muting “temporarily some of the violent criticism” of him played a part. But in addition to being “really only a sop to the anti-cigarette crusaders” it was also “part of The Bath’s general scheme for annoying Powers,” with whom he had broken at the end of 1895 when he became “enraged by his exclusion from inner council deliberations,” especially regarding various boodle ordinances, in particular those spawned by Yerkes. The Inter Ocean amused itself presenting an “eloquent” Coughlin as having “blossomed forth in an entirely new role, that of champion for the mothers of Chicago,” who had fought for the ordinance ever since introducing it “with all the powers of oratory that are in him.” Claiming that he could find no other interpretation of the ordinance than freezing out small dealers and conferring a monopoly on large ones, and hyperbolically charging that the measure “made it absolutely impossible for any one [sic], except a monopoly, to deal in this product,” Republican Alderman Madden demanded to know whether a trust lurked behind the ordinance. Coughlin furnished an explanation easily enough by repeating what he (and others) had been advancing on its behalf for several years, but effectively packaged in such oratory as would, in the Inter Ocean’s sarcastic phrase, have made Powers weep had he been present: “This cigarette has been circulating through the city of Chicago in and around schoolhouse and such places and mothers of young babies has [sic] petitioned to the board of education to have it stopped. There is not one of them [sic] little stores which is surrounded [sic] a schoolhouse which you all know well which [sic] cannot afford to pay $100. ... In behalf of the mothers of Chicago, preserve and rescue the little babies growing up around the schoolhouses from the death-dealing cigarettes that inhabits [sic]...
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

Coughlin accepted two amendments: one by Thomas Gallagher—a leading Cook County Democrat who would shortly become a member of the board of education—and then sit in Congress for six terms—outright prohibited the issuance of a license for the sale of cigarettes within 200 feet of any schoolhouse, and the other by Democrat Charles Gunther, a wealthy German candy manufacturer supported by the Civic Federation, to lower the fine for a first violation from $100 to $50. Republican John O’Neill, who had voted against Coughlin’s ordinance in 1895 when it imposed a $500 license, offered a bill-killing amendment to hike the license to $1,000 based on the argument that it would do even more good than $100, but it was opposed on the grounds that the courts would hold it exorbitant and tabled pursuant to Coughlin’s motion. Thus amended, Coughlin’s ordinance passed unanimously by a vote of 60 to 0.

The Inter Ocean exaggerated mightily in claiming that the license ordinance as passed limited, “as far as it is possible to limit, the sale of cigarettes in the city,” but its editorialist doubtless had his tongue elsewhere than in his cheek when he certified that “Coughlin has cultivated at least one flower that may bloom upon his grave.” Even if it were true, as the paper stated, that the $100 license would “act prohibitively against stores that trade exclusively or mainly with school children, or with the callow youth of the city,” the continued sale to adults that the newspaper supported—“If a man be foolish enough to smoke cigarettes no law-making body has just power to say ‘nay;’ [sic] the era of sumptuary enactments has passed”—would insure that children would “become purchasers and ultimately habitual users of the most dangerous preparation of

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1145 “Coffin Nails Are Hit,” DIO, Mar. 2, 1897 (1:3-4). Madden asserted that everyone knew that a year earlier the council had, at the urging of a Chicago newspaper, passed a similar ordinance; ATC had sued that paper for libel and settled amicably after passage of the ordinance, which the council then, again, at the paper’s request, repealed. Id. None of these assertions has been corroborated.


1148 “Coffin Nails Are Hit,” DIO, Mar. 2, 1897 (1:3-4).


1150 “Coffin Nails Are Hit,” DIO, Mar. 2, 1897 (1:3-4).
Believing that licensure could accomplish more than prohibition, Mayor Swift signed the ordinance into law the next day. The secretary of the health department promised that his department, backed up the police, who would be asked to report licenseless sellers just as they were required to do regarding saloons, would “make the most stringent efforts to enforce the ordinance” and those caught would “be shown no mercy.” In addition, the department would also “regularly inspect” the cigarettes sold, just as it did concerning meat and milk: “If deleterious substances are found in them the dealers will be prosecuted.” Dealers opined that if enforcement were thorough, the $100 fee would force many to cease selling because “the profits allowed retail dealers...by the trust” were so small that that sum would “more than extinguish profits,” which amounted to 1.2 cents on a five-cent pack of 10 or 12 cigarettes; the 8,333 packages a year (or 22.8 per day) that a dealer would have to sell generate enough profit just to pay the tax and avoid an “actual loss” exceeded the sales of the “average retail shopkeeper or tobacco merchant,” who would therefore “probably refuse to carry cigarettes in his stock.” To be sure, few dealers interviewed by the Tribune believed that any serious effort would be made to enforce compliance. For example, one downtown dealer, who already made “practically no profit” on cigarettes, would have readily given up selling them “without a fight,” but viewed the ordinance as “merely a sandbagging scheme against the American Tobacco company [which] will amount to a dead letter....” Another seller agreed that the ordinance would not (and was never intended to) be enforced, but speculated that if it were, sales would be confined to “a few large and reputable dealers, who could be easily controlled and supervised” by the health department. More cynical was the city’s largest cigarette dealer and ATC agent, G. F. Gall, who, sounding like his principal, pontificated that the “Council might just as well license the sale of sausages for all the good that this ordinance will do. There will be a thousand ways to evade it.”

Communicating directly

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1151 “The Cigarette Ordinance,” DIO, Mar. 3, 1897 (6:3) (edit.).
1152 “Cigaretan Measure a Law,” CT, Mar. 3, 1897 (8). The somewhat later statement by the health department secretary that a dealer would have to sell 40 packages a day all year round to generate enough profit to pay the fee was at odds with the figure mentioned in the text. “Prepares to Enforce Cigaret Law,” CT, Mar. 6, 1897 (8). “Cigarette Ordinance,” RMN, Mar. 3, 1897 (6:4), stated that a dealer would have had to sell 20,000 packages in order to earn the license fee, but offered no source. It also reported without attribution that 20,000,000 cigarette packages were sent annually to Chicago. If a package contained 10 cigarettes, the total of 200,000,000 cigarettes divided among 513,260 males 15 years of age and older would have mean per capita annual consumption of 390 or little more than
to the council, the Cigar and Tobacco Jobbers Association, which presumably had premonitions of a sales decline, presented a “protest against the passage of the cigarette ordinance.”1153

One of those ways was to give cigarettes away to customers while selling them as a permanent quasi-loss leader (as which, ironically, many tobacco dealers had, since the Trust’s formation, been complaining that they had been forced to treat them). As one dealer smugly confided to the Tribune: “Boys who smoke and have the money to buy the cigarettes will come pretty near getting them if the dealer can sell apples and other fruit at enough profit to enable him to throw in cigarettes for good measure.” In addition, unlike ordinances in some other cities, Coughlin’s did not regulate the separate selling of packaged tobacco or cigarette papers needed for roll-your-own cigarettes. The secretary of the health department admitted these defects, but nevertheless viewed the measure as “a step in the right direction,” whereas an assistant corporation counsel denied that it would be lawful for an unlicensed dealer to give away cigarettes in the manner suggested. The secretary also expressed the belief that at most 25 percent of Chicago’s cigarette dealers would be willing to pay the $100 license fee; to be sure, he granted that every dealer who dropped out would increase his competitors’ sales, but apparently not on a one-to-one basis, with the result that he presumed that enough business would remain to permit those 25 percent to operate profitably.1154

As the ordinance’s effective date of March 15—after which, snickered the Inter Ocean, “[g]raveyards w[ould] be robbed of some of their prey”1155—approached, the cigarette industry’s intent to contest its validity became clearer. At the city council’s meeting on March 8 the Cigar and Tobacco

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1153Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-1897, at 1719 (Mar. 8, 1897).

1154“To Dodge Cigaret law,” CT, Mar. 5, 1897 (8). Shortly thereafter the health department secretary indicated his agreement with the corporation counsel’s view and characterized the continued sale of papers as a “minor objection.” He did, however, concede that if the ban on sales were extended to a distance of three blocks from a school “it might do some good.” “Prepares to Enforce Cigaret Law,” CT, Mar. 6, 1897 (8). A dealer located across the street from a school agreed that boys went about 500 feet from their schools to buy cigarettes. “Will Test Cigaret Law,” CT, Mar. 14, 1897 (5).

1155“Few Puffs Are Left,” Dio, Mar. 4, 1897 (4:1).
Jobbers’ Association submitted a protest grounded on the novel claim that “if cigarette smoking is injurious to the public health the ordinance does not prohibit or diminish to any great extent the smoking of cigarettes” (as well as on the less controversial argument that the ordinance would tend to “centralize business in the hands of a few, chiefly the department stores”). The amusing implication of the jobbers’ attack—namely, that the measure was not stringent enough to achieve its objective—could not withstand scrutiny because there was no evidence that its actual purpose of reducing children’s cigarette smoking was not achievable by the contemplated means of making it logistically much more burdensome for children to buy cigarettes.

By that date (March 8) sellers had still held off applying for licenses because they were “waiting to see what action” ATC would take. Downtown dealers and saloon, cafe, and drug store owners with a cigarette business “worth mentioning” were still expected to take out so-called bridge-over licenses until May 1, when the annual licenses kicked in. During that six-week interval they expected that the Tobacco Trust would either get the ordinance overturned or do something that would “enable the middleman to carry the burden of the license easily”; in contrast, owners of small candy, stationery, and school stores as well as of hallway cigar stores would give up selling cigarettes. The dealers (including large department stores) who began applying for licenses on March 10 not only corroborated suspicions that the ordinance would practically restrict sales to the downtown area, but created expectations that the city’s revenues would increase by upwards of $10,000.

Two days before the ordinance’s effective date a downtown dealer wrote “under protest” across his license application and announced that he would contest the measure’s validity on the grounds that Chicago lacked the power to license a business not specifically mentioned in its charter; coyly he would not deny that ATC was behind his suit, while one of its agents was calling on numerous dealers to determine whether they were going to take out licenses. At this point the number of applications on file totaled 233 compared to an estimated 2,000 who had been selling cigarettes. As was commonly the case in

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1156“Proceedings of Council,” CT, Mar. 9, 1897 (2).
1157This litigation strategy is reminiscent of an argument (successfully) used 80 years later by a restaurant owner to attack an early anti-secondhand smoke ordinance requiring a restaurant to designate at least one table as non-smoking on the grounds that this means was not reasonably suited to achieving the legislative goal of protecting non-smokers from toxic smoke. Alford v City of Newport News, 220 Va. 584 (1979).
1158Badenoch Warns Cigaret Dealers,” CT, Mar. 9, 1897 (8).
1159“Cigaret Dealers Rush for Licenses,” CT, Mar. 11, 1897 (12).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

jurisdictions banning cigarette sales, some dealers purported to welcome enforcement that would drive cigarettes out of the local tobacco market. One downtown dealer foresaw that outcome as a result of the ban on the sale of cigarettes containing glycerine: “I do not know of a single brand of cigarettes made in this country that does not contain this substance,” which was used to keep the tobacco moist so that it would “not shake out of the wrappers.” Reflecting a commonly held view, he charged that glycerine “constitute[d] the most dangerous element in cigaret smoke,” since its combustion generated a poison. Even dealers who may not have shared his market death wish hoped for a speedy ruling by the health department as to which brands could be lawfully sold; the requisite test sampling for which the agency was to begin the day before the ordinance went into effect. Dealers who had already taken out licenses were “deeply concerned” that the analysis to be performed by city chemist Cass L. Kennicott would lead to the virtual prohibition of cigarette sales. After all, Kennicott, having already been told by tobacco dealers that U.S. cigarette manufacturers used glycerine, in turn informed the press that burning that substance produced acrolein, which viciously attacked the mucous membrane, while the health commissioner added that as soon as he received the chemist’s report he would “enforce the ordinance to the letter.” On the day the ordinance went into effect 285 sellers (of 300 applicants) had been issued licenses, prompting small dealers to grumble that the fee should have been either low enough to permit all sellers to pay it or entirely prohibitory.

In a sudden turn of events, inspired by the Trust, the ordinance was, almost as soon as it went into effect, suspended by order of the police chief. As a result, “the agents of the cigaret trust are again at work selling their goods to all whom they can induce to buy.” This dismantlement was initiated by a communication that the police chief received on March 17 from the city collector stating that

1160 “Will Test Cigaret Law,” CT, Mar. 14, 1897 (5).
1161 “Licensed Cigaret Dealers Worried,” CT, Mar. 15, 1897 (4). Kennicott had been appointed city chemist in 1892 at the age of 21, a position at the Municipal Laboratory that he held for five years. The Municipal Herald of Chicago...1895-96, at 104 (1896); Who’s Who in America: 1899-1900, at 399 (John Leonard ed.).
1162 “Cigaret Law in Force,” CT, Mar. 16, 1897 (12). This article included the vastly discrepant figure of 23,000 places at which cigarettes had been sold before the ordinance went into effect. It is unclear whether the press statement that the city collector had “a complete list of the cigarette dealers” referred to the newly licensed or the larger universe. “Approval of the Bill,” DIO, Mar. 16, 1897 (8:5). An out-of-state newspaper (mis)reported that 100 places had been licensed out of a total 5,000 that had been selling cigarettes. MO, Mar. 27, 1897 (4:4) (untitled).
because the corporation counsel wanted to test the ordinance in court, until a judicial decision was handed down, “the Police Chief was instructed to make no arrests of persons selling cigarettes without a license.” Almost as quickly as city officials, the Trust’s agents became aware of the order and sent out salesmen all over the city “bearing the news to dealers that they need not fear arrest if they violated the law....” Amusingly, “[d]ealers, as a rule, were slow in accepting the word of the trust emissaries” even in those instances in which salesmen promised that ATC “would stand for any penalty that might be inflicted.” Rather than such importunings, dealers trusted the cop on the beat, who said that the “‘Chief says we can’t touch you....’” It turned out that although, after the ordinance’s passage, Corporation Counsel William Beale had “deemed it best to make a test of the law before proceeding far, and advised Collector [Philip] Maas to get in as much money as possible without arresting the violators...[f]or some reasons Mr. Maas went so far as to instruct Chief [John] Badenoch to keep ‘hands off.’” In the immediate wake of the public revelation of this de facto suspension, Beale claimed that it had not been his idea “to have the Collector tie the hands of the police”; rather, the impression that he had wished to convey was that “there might be a possibility of the law not standing a test”; consequently, he had thought that for the time being the ordinance could be implemented “without resorting to arrests.” Despite having retained his faith in the ordinance’s validity and his regret that matters had taken the course that they had, not only did Beale evince no intention of correcting that course, but he made it clear that he was also in no hurry to test that validity: all he offered was to “try” to do so “as soon as the business of his office” would permit, but getting the matter settled might possibly take a few months. Police Chief Badenoch sought to lay the blame on Collector Maas (“‘who instructs me in the premises’”): because the ordinance, which was for revenue, did not make it a crime to sell cigarettes without a license but only a violation of the municipal code, Badenoch professed that “‘I am powerless to do anything while the present order is in existence,’” while regretting that the latter had “‘become public, as it will tend to make dealers bold....’”

1163“Cigaret Law Made Null,” CT, Apr. 1, 1897 (1). Since the ordinance (§ 8) provided only for a fine and not for imprisonment, it is unclear why the corporation counsel believed that arrests would have been possible in any event. That arrests were nevertheless carried out was demonstrated by Gundling v City of Chicago; see below this ch. The then current Chicago Code did empower the police to arrest people for violating ordinances (including the cigarette sales license ordinance) that imposed only a monetary fine and no imprisonment; specifically it provided that the police “shall have the power to arrest all persons in the city found in the act of violating any law or ordinance....” The Revised Code of Chicago § 1509 at 1:314 (William Beale rev. and comp. 1897). It is not
On April 1, the day following press disclosure of the de facto suspension of enforcement, the mayor and the health commissioner lambasted the city collector, corporation counsel, and police chief. While Mayor Swift rhetorically wondered whether the law was supposed to be null and void during the two years the litigation would last, Commissioner Kerr wanted to “‘know what right a ministerial officer like Collector Maas has to give orders to the police, anyhow,’” since enforcement was vested in his department. After Badenoch had passed the buck to Beale and Maas explained that he had supposed that Beale had had the mayor’s backing, the corporation counsel came forward with a manifestly self-inculpatory justification for his March 17 letter that only dug a deeper political hole for himself. He had, he informed the press, asked for arrests to be suspended “‘because some lawyers came to me after the ordinance was passed saying they were going to fight it. They represented cigaret dealers and said they thought it would be a good thing to have a decision as early as possible from some higher authority than a police court. ... I expected a test case would be arranged in a few days, but the lawyer that saw me about it left the city and isn’t back yet.’” Beale then added that he in fact had no opinion about the validity of the ordinance, which he had not even read until April 1, and that he hoped to leave office within 10 days, bequeathing the whole matter to someone else. The same day Dr. Kerr both informed Mass that the health department lacked the discretion to suspend his duty to enforce and asked the police chief to resume enforcement, but, while professing eagerness in that direction, Badenoch nevertheless begged off until he had consulted with Beale. But by the end of the day the mayor directed the police chief to enforce the ordinance rigidly, creating an expectation that the next day Badenoch would rescind his two-week-old suspension order. Mysteriously, however, Swift, Kerr, and Beale instead agreed to “‘let matters rest as they [we]re, until a test case’” could be brought, although Beale still did not know when such a case would be heard. And despite retention of the no-enforcement order, the corporation counsel bizarrely insisted that it was “‘not to be understood’” that people were “‘at liberty to violate the ordinance’”—a bubble that the *Tribune* pricked by pointing out that dealers were in fact still at liberty to sell cigarettes without a license.

That newspaper accompanied the report with a highly sarcastic editorial clear on what grounds, but in 1898 the police arrested a woman, who was fined five dollars, for “smoking a cigaret on the street,” where she had stood in front of a saloon and “puffed smoke in the faces of the passers by....” “Woman Cigaret Smoker Fined,” *CT*, May 22, 1898 (2).

1164“Swift Calls Maas Down,” *CT*, Apr. 2, 1897 (5).
excoriating Beale for his “subservience” to ATC on the grounds that, by his own account, “all that was required to frighten him into official paralysis was the vague suggestion of a cigaret trust attorney that he would like to have the law tested in some court of record before it was enforced.”\textsuperscript{1166} To be sure, a week later the \textit{Tribune} backtracked after the mayor had presented to the city council a new opinion by the corporation counsel that the ordinance did not require payment of the $100 license before May 1, 1897, when the “municipal year” began.\textsuperscript{1167} Swift motivated the need for the opinion by the appearance of “some misapprehension in the community respecting a present necessity for licenses....”\textsuperscript{1168} Beale, who apparently had finally gotten around to studying the ordinance, which had not been “drawn in my office” and the identity of whose drafter was unknown to him, argued that the ordinance did not expressly require licenses to be taken out before May 1, though he admitted that “the language is somewhat peculiar.” Constrained to deal with the unoverlookable fact that “the ordinance is to-day actually in force,” Beale could come up with nothing better than the lame claim that “[t]his is true, but it means no more than that the ordinance is an established ordinance, a fixed by-law of the city, already determined upon.” Even if Beale had been correct in his belief that that the ordinance had been “purposely framed so as not to require licenses until” May 1, it is unclear that the legal consequence of the six-week delay between the date on which the ordinance, by its own terms (§ 9), went into force and the date on which the licensing year began should not have been that cigarettes could not be lawfully sold during that interim. As far as the $12.50 that 375 dealers had voluntarily paid as the pro-rated license fee for those six weeks, he (and the mayor) suggested that the council pass an order providing that that money be applied to the licenses beginning May 1—a recommendation that the council unanimously adopted. More interesting was Beale’s revelation that he had considered and abandoned a plan to initiate judicial proceedings to determine whether licenses had to be taken out before May 1 as well as to “test some other questions...in order to shut off a flood of habeas corpus petitions after” that date.

\textsuperscript{1166}“The Cigaret Ordinance,” \textit{CT}, Apr. 3, 1897 (12) (edit.)

\textsuperscript{1167}“The Cigaret Ordinance,” \textit{CT}, Apr. 10, 1897 (12) (edit.); Ordinance Regulating the Sale of Cigarettes § 3 (Mar. 1, 1897), in \textit{Biennial Report of the Department of Health of the City of Chicago for the Years 1897 and 1898}, at 201-203 at 202 (n.d.). Three weeks later the \textit{Tribune}’s editorialist, apparently forgetting his previous stance, faulted the Swift administration for not having enforced the ordinance. “Cigaret Ordinance to Be Enforced,” \textit{CT}, May 1, 1897 (12) (edit.).

\textsuperscript{1168}\textit{Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-1897}, at 1947 (Apr. 8, 1897).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

because he had obtained the views of two judges of the circuit and superior courts. Beale concluded from these odd secret, ex parte, anticipatory quasi-advisory opinions that: “As there can plainly be no actual violation of the ordinance before May first, the courts would doubtless decline to pass upon other questions presented in a case made up by arrangement with a dealer who should consent to be regarded as a violator solely for the purpose of enabling the Law Department to secure an advance decision upon such questions.”

In the event, the habeas corpus petition would result, as it did almost everywhere the Tobacco Trust contested anti-cigarette legislation, “by arrangement with a dealer who should consent to be regarded as a violator solely for the purpose of enabling” ATC to secure its judicial invalidation.

Despite this contretemps, with the advent of the municipal year, the new Democratic administration’s corporation counsel and collector agreed that the ordinance would immediately be enforced strictly. Charles Thornton, the corporation counsel, “refused absolutely” to come to terms with ATC, which was “fighting for a postponement” of enforcement until a test suit attacking the ordinance’s validity was tried: “If any suit is to be brought it must be by the other fellows, and we will fight them. This ordinance will be enforced until the Supreme Court declares it invalid, and I do not think it is likely to do that. I would not be surprised if the tobacco people should appeal the first fine we impose on a violator of this law, but that will not stop us from going ahead and having all subsequent violators arrested and fined.”

In the event, ATC was apparently in no hurry to file its judicial challenge to the ordinance’s validity. Although the grounds for the months-long delay are not clear, one possible reason was the outbreak of a dispute between it and dealers over prices and profits, which had been stewing for years in Chicago and elsewhere. The Trust may have been wary of initiating litigation, which, after all, required securing the cooperation of a dealer to play the part of the (straw man) defendant, until relations with retailers had settled down again. In August, the 250-member strong Chicago Wholesale and Retail Tobacco Dealers’ Association, reportedly with the “assurance that the American cigaret trust w[ould] stand back

1160 *Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-1897*, at 1947-48 (Apr. 8, 1897).

1170“Cigaret Ordinance to Be Enforced,” *CT*, May 1, 1897 (12).


of them,” met to adopt a schedule of higher prices on all cigarettes, which they intended to implement as soon as their membership, expanded by a few hundred more retailers, was large enough to insure control of the market. The basis for this attempt at collective action was their “faith” in customers’ addiction, that is, “the appetite of the cigaret fiend and its power to relax his purse strings.” The object of the higher price level was to elevate the cigarette “from its present ignominious position as a thorn in the flesh of the trade” by making it “dignified and acceptable as a profitable object of trade.” This “movement for greater profit” foresaw, inter alia, doubling the price of a 10-cigarette package of ATC’s market-leading Sweet Caporal from five to ten cents. Once the new price structure was in place, the next step would be concerted action to induce the city council to repeal the cigarette ordinance in order to “add[ ] another $100 per annum to the profits” of each dealer. In contrast, the meeting tabled a motion that the Association secure either compliance with the ordinance or repeal. The fault lines of competitors’ collective action became impossible to overlook when, in response to retailers’ claim that the problem would disappear if jobbers simply refused to sell to unlicensed dealers, “jobbers boldly retorted they were selling to this class of dealers by the hundred, and knew it, but would not stop for fear of losing their trade in other lines of goods.” Indeed, they refused as well to identify such dealers to the city collector. Stymied by this lack of cooperation, the Association decided to employ a detective to acquire the evidence to enable the city collector to prosecute offenders.\footnote{Cigaretts to Go Up,” CT, Aug. 20, 1897 (8).}

Five days before the scheduled price rise on September 15, all of the Association’s calculations were upset when ATC telegraphed two large Chicago wholesalers that it had lowered the price of Sweet Caporal from $4.10 to $3.57 per 1,000 (applicable only to Chicago) and agents fanned out through the city soliciting orders at the “cut rates.” The Trust did not explain its action, but the press reported that the move represented ATC’s inauguration of a “war on the Chicago association of dealers,” which immediately called an executive meeting to discuss the announcement by one of those wholesalers, Best, Russell & Co., one of the largest wholesale tobacco merchants in the West, that it was withdrawing from the association. Since the price reduction was manifestly inconsistent with the “tacit understanding” that ATC was its “strongest supporter,” the association quickly realized that if the Trust’s agents had been able to secure “any considerable number of large orders” at the lower price, introduction of its own new scale was endangered.\footnote{“Cigaret War in Sight,” CT, Sept. 11, 1897 (5). On Best, Russell, see A. Andreas, \textit{History of Chicago: From the Earliest Period to the Present Time}, Vol. 3: \textit{From the Fire}}

The very next day,
however, the Association purportedly “won its first victory...over the American Tobacco company, or cigaret trust,” though the result suspiciously appeared merely to restore the status quo ante because in exchange for the Trust’s rolling back its price reduction, the Association (“for the present, at least”) called off its price increase. The reason that the dealers regarded the result as a “concession[ ]” by ATC was that it signaled that “the trust had concluded it would be wise for it not to attempt to saddle any part of the Dingley tariff duty upon the retail dealer,” which amounted to 50 cents per 1,000. “The trust had added 30 cents of this to the wholesale price, raising it from $3.80 to $4.10. But from this [day?] on the price will go back to $3.80.” Dealers had complained about the small profit before the price increase, but “since then it ha[d] not been sufficient to pay” for the license. Changing its political-economic strategy, the Association, frustrated by the city collector’s alleged failure even to try to apprehend, now began pushing for non-discriminatory enforcement of ordinance.¹¹⁷⁵

Ten days after relative repose had been restored among dealers, the Tobacco Trust publicly bruited plans for finally launching the long threatened judicial attack on the ordinance’s validity. To be sure, the strategy for this litigation departed sharply from that deployed by ATC in contesting anti-cigarette legislation in other states. Whereas there a local lawyer not otherwise associated with the Trust, was paired up with some straw man plaintiff of a local dealer, whose violation of the law, refusal to pay the fine, arrest, and imprisonment the company choreographed as the run-up to a federal habeas corpus petition, in Chicago Charles Aldrich, who was indisputably the Trust’s lawyer in that city, announced that he would be filing the action to challenge the ordinance and to secure the return of all license fees that dealers had paid—“provided” that Aldrich’s law firm could “induce members of the Chicago Tobacco Dealers’ association to sign contracts giving the attorneys all money which may be recovered from the city.” The deal, in other words, was an extreme version of a contingent fee: Aldrich would get 100 percent of any reimbursement of the license payments ordered by the court but nothing else; thus the risks were apportioned such that, if the court invalidated the ordinance but did not order reimbursement, Aldrich would get nothing; conversely, if the ordinance were upheld but the court ordered reimbursement of the license fees for the period March 15 to April 30, 1897, the plaintiffs would gain nothing. However, these risk assessments presupposed that the dealers actually wanted the ordinance

¹¹⁷⁵“Score on the Cigaret Trust,” CT, Sept. 12, 1897 (5).
struck down (and that the Trust was not paying Aldrich regardless of the
outcome). In fact, according to the Tribune, most of the 300 licensed cigarette
dealers who had paid $30,000 to the city—and definitely wanted a voice in its
distribution—“say the ordinance is a good thing, but make complaint that it is not
being enforced, and that they get no protection from illicit shops.” In contrast, it
was “to the interest of the American Tobacco company to have a free and
unrestricted sale of its products”; little wonder, then, that a report had been
circulating the previous day that ATC had “instructed Attorney Aldrich to make
a legal fight against the ordinance.” The latter, unsurprisingly, while admitting
that he was the company’s lawyer and that he might represent the dealers
depending on how much money was in sight, claimed that “‘no word of any kind
in connection with this subject has been given me.’” On this lopsided proposal
one prominent dealer offered this perceptive economic and political commentary:

“It looks to me like a move on the part of the American Tobacco company to make
the dealers pull its chestnuts out of the fire. Nobody else, so far as I know, is interested
in getting the ordinance annulled, and it is a peculiar thing that the matter is brought to our
attention by the trust’s attorney, who, by the way, will be the sole financial beneficiary.
Lately we have ample reason to think the law is not being enforced and it looks as if there
was some hidden influence at work. The trust doesn’t give a rap whether we have to pay
a big license fee or not, so long as it can sell its cigarettes, but experience has shown it the
sale of the chapter sorts such as are used by school boys is materially affected and it wants
a free market.

“If this can be secured by inducing the licensed dealers to fight for a decision against
the ordinance it would be a big thing for the trust. We—that is, the dealers who are now
paying licenses—would lose a big part of our profitable trade, and the only direct benefit
would come from a relief from payment of license fees in the future. We would not get
back the money already paid, and the money would go into the pockets of the trust
attorney. It strikes me as a pretty good thing—for the trust and its attorney.”

Intriguingly, these preparations for litigation coincided with yet another of the
Trust’s propaganda coups. Despite the absolutely crucial role that glycerine
played in the cigarette ordinance—its presence in cigarettes, which was
universally admitted to be quasi-universal, meant that their sale was not
authorized—it disappeared from public discussion. This hole was not caused
by the health commissioner’s failure to comply with his inspection and

\(^{1176}\)“To Fight the Law,” CT, Oct. 2, 1897 (12).
\(^{1177}\)“To Fight the Law,” CT, Oct. 2, 1897 (12).
\(^{1178}\)The Tribune, for example, which had followed the matter so closely, never reported
on it again (according to a word search of the electronic text on ProQuest).
enforcement duties\textsuperscript{1179}. In fact, in 1897 the city chemist carried out, within the framework of the Municipal Laboratory, 15 chemical analyses in March and one each in May and November, followed by 27 more during the first three months of 1898.\textsuperscript{1180} The subject appears not to have reemerged in public discussion until October 12, 1897, when “a Chicago despatch to the New York papers announce[d] the result of an investigation by the Health Department of that city into the purity of cigarettes on sales there.”\textsuperscript{1181} The source of this dispatch/announcement was a mystery; as the advertisers’ magazine \textit{Printer’s Ink} admiringly noted of one of its manifestations: “In \textit{Life} of October 28th is an article, or rather advertisement, taking up almost an entire page, headed: ‘Some Delusions About Cigarette Smoking.’ Nothing about the announcement shows from whom it emanates. It combats with much skill all the bad things usually said of the cigarette, and is, altogether, an interesting piece of advertising.”\textsuperscript{1182} In the New York magazine \textit{Life} the dispatch/announcement was only the last part of the longer article/advertisement and bore the heading, “Official Confirmation.” What it allegedly confirmed was that various “popular superstition[s]” about cigarette smoking were “delusions” such as the “‘snipe’ tobacco,” opium, nicotine, and

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\textsuperscript{1179}The ordinance “authorized and empowered” the health commissioner to “inspect and examine all places where cigarettes licenses are to be sold...with a view of ascertaining” whether all state laws and city ordinances relating to cigarette sales were being complied with, which laws and ordinances “it shall be his duty to cause...to be rigorously enforced; and it shall be the duty of all persons, firms or corporations licensed to sell cigarettes within the City of Chicago, upon demand of the Commissioner of Health to furnish to said Commissioner, for his inspection, samples of all cigarettes sold or offered for sale by them, which samples...shall be analyzed by or under the direction of said Commissioner... and a record of such inspection shall be made and kept in his office for the inspection of the public.” Ordinance Regulating the Sale of Cigarettes, § 7 (Mar. 1, 1897), in \textit{Biennial Report of the Department of Health of the City of Chicago for the Years 1897 and 1898}, at 201-203 at 202-203 (n.d.).

\textsuperscript{1180}\textit{Biennial Report of the Department of Health of the City of Chicago for the Years 1897 and 1898}, at 147 (n.d.). The rubric under which the analyses were carried out was “Cigars and Cigarettes,” although it is unclear whether any related to cigars and if they did under what authority. The number of analyses may have represented the number of individual brands.

\textsuperscript{1181}“Some Delusions About Cigarette Smoking,” \textit{Life} 30(774):[359] (Oct. 28, 1897). Why the dispatch was sent to New York is as unclear as why it appears not to have been published in Chicago. Neither the \textit{Chicago Tribune} nor the \textit{Chicago Times-Herald} nor the \textit{Daily Inter Ocean} carried a report on it.

\textsuperscript{1182}\textit{Printer’s Ink}, 21(5):36 (Nov. 3, 1897) (untitled).
\end{flushright}
“cigarette fiend” delusions.  
Since this version of the dispatch/announcement was abbreviated, the longer version that appeared without the “delusions” advertisement already on October 13 in the New York World offers a better sense of what its mysterious purveyor was seeking to accomplish. (That actor was presumably the Tobacco Trust since five years later a Canadian medical journal published in its advertising pages the same “delusions” cum dispatch/announcement” piece that had appeared in Life, this time prefaced with the revelation that “[t]he American Tobacco Co., Limited, of Montreal, furnished us with the following statement as to cigarette smoking.”)  
Under the headline “The Cigarette Vindicated” and datelined the previous day in Chicago, the newspaper failed to make transparent the provenience of the content, while strongly suggesting that it must have been the health department itself, although the editorial comment about the self-destructing anti’s is as utterly unimaginable as stemming from the commissioner as the narrating “I” is impenetrably opaque:

Dr. Frank W. Reilly, Commissioner of Health, assisted by Dr. Gehrmann and Prof. [sic] Kennicott, has just announced the results of the analysis of fourteen brands of cigarettes purchased in the open market, the analysis being made in accordance with a city ordinance. The result is that the anti-cigarette agitation out here has suffered an ignominious collapse, and I fancy we shall hear less of it hereafter.

NO IMPURITIES ARE FOUND

Dr. Frank Reilly said yesterday: “The Health Department has analyzed the various of cigarettes sold by Chicago dealers, as provided by the ordinance, with entirely satisfactory results. No impurities were found in any of the fourteen brands examined by the Department experts, Dr. Gehrmann and Prof. [sic] Kennicott. Exhaustive analyses were made of every brand of cigarette found for sale in the city. All have been found to be entirely free from opium, morphine, jimson weed, belladonna, atropine, hyoscyamine or other substance foreign to pure tobacco. Neither was there any lead or arsenic found in the paper wrappers.

“As a matter of fact, there is nothing in any of the fourteen brands of cigarettes on the Chicago market that the smoker need be afraid of. The tobacco used is the best ‘bright

1184 Yet another version, intermediate in length, appeared in Dr. J. C. Pomeroy, “The Evolution of the American Cigarette,” Illustrated American 22(17):554 (Oct. 23, 1897), who concluded that “there are no spectres in the cigarette.... The old bogies are gone.” Excerpts from the announcement or the alleged report (from an unidentified source) also appeared in a suspiciously pro-cigarette lecture the following month. W. H. Garrison, “A Brief for the Cigarette,” Medico-Legal Journal 15:280-91 at 283-84 (Dec. 1897).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

Virginia, and contains only about one-fourth as much nicotine as is found in cigars. The less nicotine in the tobacco the less likelihood of ill effect upon the nervous system. There is a four-fold greater per cent. of nicotine in the average smoking tobacco sold by the Chicago tobacconists or in a cigar than in any of the cigarettes sold.” Dr. Reilly declares that the cigarette-smoker may possess his soul in peace.

That the health commissioner, at a time when Chicago (like many other cities) was convulsed over the health impact of child smoking and demands for blocking minors’ access to cigarettes, would have given a clean bill of health to cigarettes, assuring, in a completely undifferentiated fashion, “the smoker” that there was absolutely nothing—not even the tobacco itself—to “be afraid of” appears wholly implausible, especially in view of Alderman Coughlin’s and the city council’s express motivation for unanimously passing the ordinance. Yet the statement stands there—unlike the even more preposterous closing flourish—in quotation marks, raising the issue as to whether even the Tobacco Trust would have risked a libel action. To be sure, not all newspapers that ran some version of the dispatch/announcement were uncritical. For example, the Morning Oregonian, which merely printed a very condensed version without direct quotations, concisely formulated the punch line as: “Therefore cigarette-smokers may go on.” Then, however, it added what multitudes of laypeople already knew and Health Commissioner Reilly must have known: “But those who know understand very well that the real subtle danger of cigarette smoking is not from the nicotine or any possible poisons, but from the practice which is prevalent among those addicted to cigarettes of inhaling the smoke. This brings the poison—for nicotine is a poison as truly as opium or stramonium or hyoscyamine—in contact with the delicate organism of the lungs, and the practice makes the cigarette danger.”

A further mystery lay buried in the absence of any mention of glycerine, which was, after all, the central issue of the chemical analysis, not only because no serious critic should have expected that manufacturers actually laced cigarettes with opium or morphine, but because the confirmation of the ubiquity of glycerine would, as everyone recognized, have led to shutting down sales in the country’s second largest city.

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1187 “Various Topics,” MO, Oct. 21, 1897 (8:3-4 at 4).
1188 “Various Topics,” MO, Oct. 21, 1897 (8:3-4 at 4).
1189 By 1899, not only had mention of glycerine and sugar had been removed from the ordinance and strychnia and cocaine added to the ingredients that made cigarettes containing them unauthorized for sale, but an anti-adulteration provision had been inserted.
No light appears to have been shed on any of the foregoing developments until the beginning of 1898, when Mrs. E. B. Ingalls, the national superintendent of the WCTU’s anti-narcotics department, after having taken notice of the statement that had been “going the rounds of the press to the effect that the Chicago board of health examined fourteen brands of cigarettes and found them free from all injurious drugs except nicotine,” on January 3 wrote to Kennicott as the alleged “authority for the statement.” A month later, Union Signal, the WCTU’s national weekly, published his brief demient: “‘the interviews credited to me in the daily papers are not authorized, and are, I believe, published to advertise.’” Remarkably, Kennicott, failed to take issue with the substance of the whitewash attributed to his report. In turn, the WCTU, whose Union Signal had never mentioned the ordinance or the possibility that the glycerine ban might transform licensing into a sales ban, did not now raise the issue of the report in order to promote enforcement; rather, Ingalls warned “all anti-narcotic workers to beware of newspaper statements” because of their potential adverse impact on the WCTU drive to secure congressional enactment of the Terry Interstate Commerce bill, which was designed to create a legislative fix to eliminate the basis for inclusion of cigarettes within the scope of the judicially devised original package doctrine, which had been the Tobacco Trust’s favored weapon for attacking the constitutionality of anti-cigarette legislation.1190 Because William Terry was a congressman from Arkansas, that state’s press took a particular interest in the “[s]trong opposition” to his bill by “the cigarette manufacturers,” which the Arkansas Democrat charged with having “sent out a circular letter with the statement” to which Kennicott’s name had been appended.1191 Whatever cigarette analysis (if any) the Chicago Health Department issued

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1190"Official Communications: Anti-Narcotics," US 24(5):12 (Feb. 3, 1898). On the Terry bill, see below ch. 11. Two weeks later, after the weekly had received numerous inquiries about the press statement, the editors reprinted Kennicott’s reply on the front page. “Notes and Comments,” US 24(7):1 (Feb. 17, 1898). Almost four decades later, the cigarette oligopoly’s trade association mendaciously or ignorantly listed Kennicott “[a]mong the distinguished scientific and medical authorities who have found the moderate use of tobacco harmless....” Tobacco Merchants Association of the United States, Supplement to Tobacco Manual 8 (4th rev. ed. 1936), Bates No. T107601531.

1191AD, Feb. 8, 1898 (2:2) (untitled) (republishing Kennicott’s reply to Ingalls).
in October 1897 is apparently no longer extant,1192 but the department’s 1897-98 Biennial Report did include three pages on “Inspection of Cigarettes,” which were largely devoted to a technical account of the procedures and methodologies used for the chemical analyses, but did not, oddly, disclose any of the findings. The only substantive comment was as surprising as it was revelatory: “The objection to sugar and glycerine in cigarettes is not readily seen. It is claimed that sugar, or saccharine substances, and glycerine are used in dilute solutions to moisten the fine cut tobacco in order to make the particles adherent before rolling, and that this is done always in the machine-rolled cigarettes.”1193 Astonishingly, then, Kennicott (or his successor) had done a complete about-face since March 1897, when he stated not only that dealers had told him that the use of glycerine was quasi-universal, but that its combustion produced acrolein, which viciously attacked the mucous membrane: now that the department no longer even knew what the problem was, it also failed to disclose whether its tests had even detected any glycerine. To be sure, it was legally irrelevant whether the city chemist—who was not ex cathedra an expert on inhalation risks—opined that glycerine’s combustion products were harmful or not since the ordinance (§ 1) did not, without any exceptions, authorize the sale of cigarettes containing it.

In the welter of the Trust’s propaganda onslaught against the ordinance, on October 20, 1897, a committee appointed by the Chicago Cigar and Tobacco Dealers’ Association informed the membership that it had completed arrangements for litigation that would be “the first round in a fight to the finish” and requested that all members back the decision. The reason for this reversal was, apparently at least in part, the negotiation of a marginally less lopsided contingent fee deal pursuant to which the lawyers would “reap[] the somewhat fat reward” of $33.33 from each member who had paid the $100 license fee. Some dealers, however, remained skeptical of ATC’s motives and designs. One large downtown dealer, for example, “confessed frankly that back of the committee and back of the association stands the American Tobacco company, the members of which saw in the passage of the Chicago ordinance a falling off in its income and a precedent which they feared other cities and towns might follow.” As rational profit-seekers, sellers might have been expected to share these Trust priorities, but in fact “[t]he dealers say that the main objection to the ordinance lies in the fact that it is not enforced impartially.” Thus, rather than

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1192Telephone interviews and emails with Glenn Brammeier, Illinois Regional Archive Depository, and Lyle Benedict, Chicago Public Library, Municipal Reference Collection (Oct. 8, 2010).

either acting out of touching humanitarian solicitude for children’s health or reflecting the quasi-ubiquitous lament about the ATC-monopoly’s depressing effect on profits, the larger, license-paying dealers merely resented that they were not securing the oligopoly profits that they had expected from licensure because there was “scarcely a score of stores in the city where cigarettes cannot be obtained, even though the keepers have never paid a cent into the treasury for the privilege of selling.” As a result, with “nearly every so-called ‘school store’ and other small shop” still selling cigarettes surreptitiously, the license-paying dealers’ profits were being “sapped, while the other fellows’ tills are as full as ever.”

The Trust’s staging of the requisite preliminaries for triggering judicial invalidation of the ordinance was delayed during the closing months of 1897 on account of misplaced hopes that the governor’s aforementioned call for a special legislative session would mention cigarette legislation. When the curtain finally rose on the performance “on or about the 31st day of December, A. D. 1897,” it was not even clear that the defendant-dealer from ATC’s central casting had actually even sold a cigarette. The actor selected for the starring role, Harry Gundling, a 31-year-old German-born druggist, was the manager of the drug store on the corner of Dearborn and Monroe Streets, which the Colbert Chemical Company—of which he was secretary-treasurer—had opened in 1894. An outspoken businessman, Gundling had recently been

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1194“Cigaret Hopes and Fears,” CT, Nov. 3, 1897 (1); “Will Test Cigaret Ordinance,” CT, Dec. 7, 1897 (4).
1195Transcript of Record 10, Gundling v City of Chicago, 177 US 183 (1900).
1196“Driven from Its Haunt,” CT, June 18, 1896 (8).
1197“Chicago,” Pharmaceutical Era 11(11):526 (June 1, 1894).
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Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

complaining that assessments, tax, and insurance rates “in many cases practically amount to confiscation of a man’s business.”

Though “backed by the cigaret trust,” Gundling was purportedly using the ATC-financed litigation to pursue his own business agenda, which was directed at the competitive threat posed to drug stores by department stores: “If the Chicago Common Council has the right to license and regulate the sale of cigarettes it can also regulate the sale of drugs by department stores. The struggle in regard to the cigarette measure has attracted little attention among Chicago druggists, but Mr. Gundling asserts it is only the entering wedge in his fight against the department stores, which he intends to push without asking for assistance from other druggists. ... Mr. Gundling says that as far as cigarettes are concerned it is immaterial to him how the matter is decided,” though he claimed that downtown cigarette dealers (whose association was supporting the litigation) paid the license, whereas those elsewhere in the city did not.

Whatever his motives, on that last day of 1897 Gundling, the parties agreed, “did have, keep, and expose for sale, and offered to sell, cigarettes...without having first procured a license....” Ten days later, Gundling was, pursuant to a warrant, based on a written complaint under oath, issued by a justice of the peace, arrested for violating the ordinance, brought into court, and—having waived a jury trial—on January 26 found guilty by Justice of the Peace George Foster and fined $50.

Following the ATC script that had been performed elsewhere, Gundling refused to pay, preferring to be remanded to jail so that he could contest the ordinance’s constitutionality by means of a motion for a writ of habeas corpus to the Illinois Supreme Court. That court, however, quickly denied his application for the writ as well as for reconsideration.

Gundling then

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1202 “Against a Higher Rate,” CT, June 28, 1896 (10).
1203 “Will Test the Cigaret Law,” CT, Feb. 2, 1898 (5)
1205 Transcript of Record 4, 10, Gundling v City of Chicago, 177 US 183 (1900). The case was called on Jan. 11, but was continued twice until Jan. 26.
1206 “Will Test the Cigaret Law,” CT, Feb. 2, 1898 (5); “Blow for Cigaret Sponsors,” CT, Feb. 4, 1898 (2).
1207 “Blow for Cigaret Sponsors,” CT, Feb. 4, 1898 (2). The denial of the writ was not reported in the Illinois Reports, but according to a drug trade magazine: “In denying the writ Chief Justice Phillips held that the case was one of appeal and not habeas corpus; that the magistrate who tried the case originally was the proper person to determine if the ordinance was valid.... The decision by the bench was divided as to granting the writ, but under the rules the court determines habeas corpus petitions instead of individual
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

appealed to the Criminal Court of Cook County, which (the defendant once again having waived a jury trial), heard the case on March 5, finding him guilty, fining him $50, and overruling his motions for a new trial and arrest of judgment. The Tobacco Trust made and Superior Court Judge William Ewing rejected the legal arguments that: (1) the Chicago city council lacked the power to enact the cigarette licensing ordinance; (2) the ordinance was illegal and void; (3) the ordinance deprived persons of liberty and property without due process of law in violation of the U.S. and Illinois constitutions; and (4) the ordinance violated the provision of the U.S. Constitution providing that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law...."

Gundling then appealed to the Illinois Supreme Court, requesting that it reverse the Cook County Criminal Court on all these points.

During the half-year interim until the state supreme court handed down its decision in late October 1898, the cigarette industry launched a party-political campaign to pressure Mayor Harrison and the Democratic city administration to repeal the ordinance or face mass defections on election day. This effort should be viewed in the context of the legislative flux that suggested that the current version of the controversial ordinance was still subject to such intensely conflicting economic, social, political, and public education and health tensions that its ultimate regulatory configuration could easily be regarded as unsettled. As early as December 1897, Bavarian-born Republican Alderman Conrad Kahler had presented an amendment quintupling the license fee to $500 and extending


1209 “Gundling Must Pay His Fine,” CT, Feb. 9, 1898 (4).
1209 Transcript of Record 5-7, Gundling v City of Chicago, 177 US 183 (1900);
“Cigaret Ordinance Upheld,” CT, Mar. 15, 1898 (8).
1209 Transcript of Record 11, Gundling v City of Chicago, 177 US 183 (1900).
1210 Transcript of Record 12-14, Gundling v City of Chicago, 177 US 183 (1900).
the no-selling cordon sanitaire around school houses from 200 to 500 feet.\footnote{Proceedings of the City Council of the City of Chicago, for the Municipal Year 1897 and 1898, at 1128 (Dec. 13, 1897) (1898); “Take $1,500 a Year,” CT, Dec. 14, 1897 (1, at 7).  Kahler, who had run the Tribune’s printing operations for more than three decades, later entered the real estate business. “Death of Conrad Kahler,” CT, June 12, 1903 (12); “Conrad Kahler—Chicago,” Deutsch-Amerikanische Geschichtsblätter 3(3):63 (July 1903).}

At the outset of 1898, Judiciary Committee Chairman Charles Walker,\footnote{On Walker, see Illinois Political Directory: 1899, at 248 (1899).} a Democrat, lawyer and personal friend of Mayor Harrison, who would soon become Chicago’s corporation counsel (in which capacity he would represent the city in the Gundling case before the U.S. Supreme Court),\footnote{Proceedings of the City Council of the City of Chicago for the Municipal Year 1897 and 1898, at LXI (1898).} reported that the committee recommended that the ordinance be passed,\footnote{Proceedings of the City Council of the City of Chicago for the Municipal Year 1897 and 1898, at 1295-96 (Jan. 10, 1898) (1898).} but a week later he did an about-face, offering a motion that the ordinance be recommitted to his committee, which prevailed.\footnote{Proceedings of the City Council of the City of Chicago for the Municipal Year 1897 and 1898, at 1423 (Jan. 17, 1898) (1898).}

Following the April aldermanic elections—although Democrats with 40 seats gained a clear majority over Republicans on the council, bolstering from the former, inspired by the election successes of the Municipal Voters’ League, which aspired to constitute the council on a non-partisan basis, made organizing the body and appointing committees difficult but, in the end, not impossible for Powers\footnote{“Fiat of the Polls,” CT, Apr. 6, 1898 (1); “Will Get the Plums,” CT, Apr. 7, 1898 (7); “Council Still Tied Up,” CT, Apr. 17, 1898 (A12); “Gang in the Saddle,” CT, Apr. 19, 1898 (5).}—the cigarette industry launched its own initiative in May 1898, when Democratic Alderman William J. O’Brien, Powers’ “political henchman” and saloon co-owner,\footnote{Allen Davis, Spearheads for Reform: The Social Settlements and the Progressive Movement, 1890-1914, at 152 (1994 [1967]).} presented a petition, purportedly signed by 7,000 dealers for repeal, which was referred to the License Committee.\footnote{Stay for Loop Plan,” CT, May 10, 1898 (12).} Intriguingly, the Federation of Labor immediately “denounced” repeal and instead called for
increasing the tax, “basing its opposition on the results of the physical examination of the troops [in connection with the Spanish-American War] at Springfield, which proved, it was claimed, the injurious effects resulting from constant cigaret smoking.” The crucial point here was, reportedly, that fewer men had been rejected in regiments composed mostly of laborers, who “probably smoked pipes,” than in the regiment consisting largely of clerks (who were presumed to smoke cigarettes). A pro-cigarette push swiftly came from Democratic Alderman Frank McCarthy (a coal dealer who later left a million-dollar estate), who, based on the aforementioned petition, which aimed at starting a “movement,” introduced an ordinance to reduce the license fee to $10, which was referred to the License Committee, which in turn sent it to a subcommittee. Shortly thereafter the Judiciary Committee recommended passage of Kahler’s new $500 proposal, but it quickly stalled when Walker succeeded in having it recommitted to the Judiciary Committee. In order to make the (nominal) $10 fee more palatable to the city council, the Cigar and Tobacco Merchants’ Association adopted a resolution promising to agree to imposition of a $50 fine for selling to minors and not to sell cigarettes within 500 feet of schools. Preemptively the Chicago Federation of Labor informed the city council directly that it was “unalterably opposed to the repeal of the present Cigarette Ordinance, as we believe it to [sic] the best interest of the young generation, now growing up, that the sale of the harmful and noxious articles be restricted as much as possible.”

By the end of July, the Association, which expected to augment its “army to 12,000 or 15,000 before election day,” had become so alienated by the Democratic city administration’s refusal to lower the licensee fee to $10 “so that

\begin{footnotes}
\footnote{120}{"For Higher Tax on Cigarets," \textit{CT}, May 16, 1898 (10).}
\footnote{121}{"Mrs. Garrett’s Estate Listed at $6,000,000," \textit{CT}, June 5, 1927 (8).}
\footnote{122}{\textit{Proceedings of the City Council of the City of Chicago for the Municipal Year 1898 and 1899}, at 184 (May 16, 1898) (1899); “Mayor Wins the Day,” \textit{CT}, May 17, 1898 (12); “May Drop Inquiry,” \textit{CT}, May 24, 1898 (12); “Cigar Men Will Fight,” \textit{CT}, July 30, 1898 (5) (quote).}
\footnote{123}{"City’s Big Tug Bill,” \textit{CT}, June 6, 1898 (12).}
\footnote{124}{"Old Scheme Bobs Up,” \textit{CT}, June 18, 1898 (4).}
\footnote{125}{"Low License for Cigarets,” \textit{CT}, July 12, 1898 (2). The \textit{Tribune} text stated that the offer was for a $5 fine, but this sum seems so trivial as to amount to self-ridicule; an article later in the month stating that it was $50 seems more plausible. “Cigar Men Will Fight,” \textit{CT}, July 30, 1898 (5).}
\footnote{126}{\textit{Proceedings of the City Council of the City of Chicago for the Municipal Year 1898 and 1899}, at 532 (July 11, 1898) (1899).}
\end{footnotes}
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

every dealer could afford to pay it...without hardship” that it “declared war on the Democratic ticket.” This decision had been prompted by the cigarette sellers’ dissatisfaction with what they perceived as the “rather shabby treatment” they had received when they appeared before the License Committee in mid-June to plead for their proposed $10 license. Their pique was intensified by Mayor Harrison’s rebuff of their request that he suspend collection of the fee during the pendency of the Gundling case on the “arbitrar[y]” grounds that because a decision in that case “did not effect [sic] the present operation of the law...he would insist upon its strict enforcement.” The Association also purported to take umbrage at the rejection by the mayor and city council of its package deal ($10 fee/500-foot no selling zone/$50 fine), which offered “greater protection upon a highly moral ground than the present ordinance.” Finally, the cigarette dealers, vowing that they were engaged in a “fight...to the bitter end,” formally expressed their resentment in a resolution opposing the mayor’s alleged plan to play them off against ATC:

The Mayor informed us that he was against the $10 ordinance because the trust and not the dealers wanted it, and said an agent of the trust had interviewed him on the subject. This means that the ordinance was conceived for the purpose of sandbagging, and is winked at by a Democratic administration. The ordinance is not enforced and was never intended to be. Only legitimate and larger dealers are bothered, because the boodlers believe they are in a position to force the trust to settle with them. We purpose to organize the entire trade against this so-called Democratic reform measure and secure its defeat or our relief if possible.

That the Cigar and Tobacco Merchants’ Association at its meeting on August 1 decided to solicit the cooperation of tobacco-selling barbers, druggists, and saloon-keepers would have surprised no one, but its assertion that it “already has assurances that the Woman’s Christian Temperance Union will aid in defeating the Democratic ticket at the next city election on account of the obnoxious license” must have struck contemporaries as a hoax. The Association’s secretary purported to have “reasons to believe that it would lend support on account of its bitter opposition to licensing cigarettes or anything else,” but prominent WCTU members declared that it would have “nothing to do with the tobacco sellers” even though it did oppose the ordinance. Matilda Carse, president of the Chicago Central WCTU from 1878 to 1913, unambiguously rebuffed any such cooperation on the grounds that her organization “never would associate itself with the

1227“Cigar Men Will Fight,” CT, July 30, 1898 (5).
1228“Cigar Men Will Fight,” CT, July 30, 1898 (5).
tobacco sellers or liquor sellers for any purpose.... The union does not believe in licensing any evil, but it would not try to further its belief in that way. We believe the sale of cigarettes should be suppressed, and,’’ she added archly, ‘‘I understand the tobacco merchants are working for a quite different object.’’ With or without the WCTU’s help, the Association, nurturing the vision that the ordinance, which it regarded as a ‘‘holdup,’’ was just a ‘‘bluff’’ that would be given up in a week or two, and that it would not be necessary to pay the $100 if they hold out,” visited the mayor to disabuse him of his belief that “it was the tobacco trust and not the dealers that opposed the ordinance.”

A bare four days later a Tribune headline blared the outcome of the confab: “Yield to the Tobacco Men: Mayor and His Administration Promise to Kill the Cigaret Ordinance.” Framed in contractual terms, the deal provided that the city administration was “pledged to compel the City Council to repeal the cigarette ordinance when it meets next month, and the Mayor...promised not to veto the repeal ordinance. These pledges have been given in consideration of an agreement on the part of the cigar and tobacco dealers not to oppose the Democratic county ticket at the fall election.”

That the Democratic politicians acquiesced in these demands strongly suggested that they were “not as cock-sure of carrying the city this fall as they pretend to be.” During an earlier phase of the negotiations, the city’s prosecuting attorney, Howard S. Taylor, an intimate of the mayor, met with Samuel H. Harris—the English-born anti-union president of a newly incorporated Turkish cigarette manufacturing company in Chicago who was also an anti-Populist Democrat who had long sought the party’s nomination for a congressional seat—to inform him that (in addition to the aforementioned quid

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1229“Tobacco Dealers Ask Woman Temperance Union’s Help,” CT, Aug. 2, 1898 (2:7). The remaining letters of the word beginning with “b” were missing and have been guessed at. On Carse, see Notable American Women: A Biographical Dictionary 292-94 (Edw. Jones ed. 1971). The Cigar and Tobacco Merchants’ Association may not have been identical with the aforementioned Chicago Cigar and Tobacco Dealers’ Association since the former had reportedly been formed the previous week; according to the Tribune’s garbled account, it had 7,000 members, but after 700 had joined during that first week, it had 1,200. “Tobacco Dealers Ask Woman Temperance Union’s Help,” CT, Aug. 2, 1898 (2:7).

1230“Yield to the Tobacco Men,” CT, Aug. 6, 1898 (7).

1231“Offering Legislation for Votes,” CT, Aug. 7, 1898 (26) (edit.).

Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

pro quo) during the period before the ordinance was repealed “it would not be enforced in a manner which would give the tobacco dealers unnecessary annoyance.” To Harris’s suggestion that it would be just as well to secure repeal before the election, Taylor replied that it would be accomplished in October.\textsuperscript{1233} The sleaziness of Taylor’s involvement in these dealings with Harris—whose commitment to the pro-cigarette cause was signaled in 1907 when, years after his company had moved to New York City, he returned as an activist in the National Tobacco Dealers Protective League\textsuperscript{1234} to lead the campaign to “take individual cases of dealers into court and make test cases”\textsuperscript{1235} against the just enacted Illinois statewide ban on selling cigarettes\textsuperscript{1236}—to undo a public health ordinance takes on a different hue when it is kept in mind that at this very time he was representing the city before the Illinois Supreme Court in the Gundling challenge to the validity of the ordinance, in prevailing in which the dealers had so little confidence that they decided to subject the plaintiff to a hefty dose of extra-judicial pressure.\textsuperscript{1237} His fraternization with the cigarette industry also stood in grotesque contrast to his position as the head of Populist party in Cook County: in 1896 the Cook County Populist convention, in requesting its delegates to support Taylor as the vice-presidential nominee at the national convention, adopted a resolution fulsomely praising Taylor (the convention chairman), who two years later would covertly accommodate the Tobacco Trust, as an “undaunted advocate of the interest of the masses as against the classes, and a defender of a people’s government in fact as well as in name,” a foe of “all forms of monopoly which rob the people of the earnings of their toil,” and an “uncompromising opponent of every form of plutocracy which in combination is so rapidly overshadowing the republic of the fathers.”\textsuperscript{1238} Moreover, Taylor was chairman of the Populist County Central Committee in 1897,\textsuperscript{1239} before being booted out as a Democratic officeholder in Harrison’s administration,\textsuperscript{1240} but was nevertheless

\textsuperscript{1233}“Yield to the Tobacco Men,” \textit{CT}, Aug. 6, 1898 (7).
\textsuperscript{1234}“Court Legalizes Sale of Cigarettes,” \textit{CT}, June 29, 1907 (6).
\textsuperscript{1235}“Fight on Anti-Cigaret Law Planned by Manufacturer,” \textit{CT}, June 24, 1907 (2).
\textsuperscript{1236}See vol. 2.
\textsuperscript{1237}“Offering Legislation for Votes,” \textit{CT}, Aug. 7, 1898 (26) (edit.).
\textsuperscript{1238}“Indorse H. S. Taylor,” \textit{DIO}, June 28, 1896 (3:1).
\textsuperscript{1239}“Dr. Taylor Keeps His Place,” \textit{CT}, Sept. 5, 1897 (5). Taylor was often publicly referred to by this honorific, the basis of which is unclear (unless it resulted from his wife’s having been a physician). On Taylor, who was prosecuting attorney from 1897 to 1907, \textit{see Illinois Political Directory: 1899}, at 121.
\textsuperscript{1240}“Kicked Out of Camp,” \textit{CT}, Oct. 29, 1897 (3). Taylor was a fusionist as opposed to the so-called middle-of-the-roaders, who wanted to protect the Populist Party’s

578
in 1900 once again put up as candidate for vice president by the state Populist Party, which instructed its national delegates to secure his nomination.\footnote{To Run Taylor with Bryan,} Despite Harrison’s and Taylor’s efforts, the dealers, though “pleased with the proof that the city administration ha[d] taken fright enough at their threats to even promise to repeal the ordinance,” were not yet convinced that it would be fulfilled—and with good reason, as far as the Tribune was concerned, because it was doubtful that the mayor could mobilize a council majority: few reform aldermen could be “used for any such purpose” and the majority was not expected to produce many votes either. Representative was the indignant determination of Alderman O’Brien not to vote for repeal on account of the reputational loss that “‘any Alderman with any respect for himself’” would suffer in the wake of a circular that dealers had recently spread all over Chicago (in addition to distributing to each council member) stating that “‘the cigaret ordinance was a blackmailing affair and the Aldermen wanted “boodle” to repeal it.’”\footnote{Yield to the Tobacco Men} The aldermen’s hurt feelings, as the Tribune pointed out, may have been intensified by the possibility that the charge was true.\footnote{Offering Legislation for Votes,} Press revelations of this deal, unsurprisingly, prompted an outraged WCTU to retract “all the nice things” that it had voiced about Harrison’s “‘clean administration.’” Instead, members of the Chicago Central union declared that he would “‘go down in history as one of Chicago’s worst smoke nuisances’” and never be elected governor “‘on a cigaret platform.’” Because the WCTU had since May been working against the $10 license ordinance in the hope that, if the council passed it, the mayor would veto it, the national organization’s treasurer was “‘shocked and grieved...that an American citizen and a father would lend his aid in placing cigaretts within easy reach of our boys.’” Of the correlative embarrassment over the negotiations there was none among the dealers, who insisted that it was a matter of utter indifference to them whether the license cost $100 or $10 so long as enforcement were universal, “‘which it never has been.’”\footnote{Object to Cigaret Deal} (This claim was manifestly a distortion based on the profit calculations of the large sellers: their small competitors, who had expressly complained that the $100 fee would have more than wiped out their profits, were precisely the dealers whose sales, largely to boys, the school authorities and their reformer allies wanted to shut down altogether.) On the contrary, Secretary S. H. Harris of the Cigar and Tobacco Merchants’ Association preferred to combine

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  \item \footnote{To Run Taylor with Bryan,}{CT, May 1, 1900 (6).}
  \item \footnote{Yield to the Tobacco Men,}{CT, Aug. 6, 1898 (7).}
  \item \footnote{Offering Legislation for Votes,}{CT, Aug. 7, 1898 (26) (edit.).}
  \item \footnote{Object to Cigaret Deal,}{CT, Aug. 7, 1898 (11).}
\end{itemize}
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

caricaturization of the ordinance as the product of Powers’ spiteful efforts to save face after being outfoxed by ATC and brazen disclosure of the cigarette industry’s plans to wield as much bribe-fueled local political power as the alcohol capitalists:

“The present ordinance, we believe, was the outcome of a failure on the part of a certain Alderman to hold up the tobacco trust.

“In the nation, the distillers of liquor and the beer interests are well taken care of, so are they in local affairs, and the tobacco men will illustrate to Alderman O’Brien that the tobacco dealers of Chicago will look well after the Aldermen next spring [when city council elections would be held], as they propose to look after the Democratic party this fall. We...do not want to have to pay a tribute to the city for the sale of an article absolute necessary for us to carry in our business for the purpose of being weapons to get even with a corporation doing business in New York.”

Before the Illinois Supreme Court former U.S. Solicitor General Aldrich achieved nothing on behalf of his client (whoever that was) with his arguments that the City of Chicago lacked the power to enact the ordinance or that the latter was unconstitutional, whereas the city prosecutor’s alternative (implied power) argument that the city’s express authority to “provide for and regulate the inspection” of tobacco, taken together with its power to “pass and enforce all necessary police ordinances” and to “make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease” validated the ordinance carried the day. Emphasizing that the power to regulate an article’s sale included that to license its sale, the Illinois Supreme Court rejected the defendant’s argument that the city council had no right to single out a particular form of manufactured tobacco for regulation: “It being well known that young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form, a legislative body may properly provide for the regulation and sale of that article in the form in which it is likely to be most deleterious and injurious, and may restrict the sales of that particular

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1245“Object to Cigaret Deal,” CT, Aug. 7, 1898 (11). Harris’s claim of “absolute necessity” may have been illustrated by a State Street drug store owner who claimed that “in his location it was practically impossible for him to handle cigars without selling the cigarettes.” “Windy City,” CREG, Aug. 16, 1898 (5:3-4 at 4). He ordered 25,000 five-cent boxes of cigarettes every two weeks (or about 6.5 million cigarettes a year). That a profit of 1.2 cents per box on 650,000 boxes would have netted him $7,800 annually demonstrates just how far from prohibitive the $100 annual license fee was for high-volume sellers, who could have paid several thousand dollars and still been profiting handsomely from the trade.

580
form of tobacco.”1246 Worse yet from the perspective of the cigarette industry, the court recognized an expansive framework for municipal health-related police powers:

When the city council considers some occupation or thing dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other. The necessity for action is often more urgent and the consequences of neglect are more detrimental to the public good in this than in any other form of local evil. It being clear that the public health and welfare of a large class in the community would be subserved and protected by ordinances regulating the sale of tobacco in one of its manufactured forms, an ordinance directed to the protection of the health or welfare of that particular class of the community would be a police regulation within the power of a city to enact under the power expressly granted by paragraphs 66 and 78. An ordinance of this character is not in conflict with any principle of the common law or with any public or general statute, and infringes no private right not necessarily infringed in the interests of good government. It subserves the public welfare, protects the health of the community, and is included within the express powers granted the city council. The ordinance was not void.1247

Consequently, the ordinance also did not violate any constitutional principle.1248 Despite the manifestly untenable legal positions that the cigarette industry was urging, the Chicago Pharmaceutical Association and the Chicago Cigar and Tobacco Association immediately declared that they would take their case to the U.S. Supreme Court, before which the main issue would be whether the city council could “prohibit the sale of a commodity recognized as such by custom.”1249 Moreover, both organizations also announced that the Illinois Supreme Court’s decision would not affect dealers’ efforts to make the ordinance an issue against Democrats during the fall election campaign or the following spring’s municipal elections. The president of the tobacco organization noted that its 8,000 members “regarded the ordinance as a vicious measure” because the city administration had failed to collect more than 300 license fees. The 5,200

1246 Gundling v City of Chicago, 176 Ill. 340, 346-48 (1898).
1247 Gundling v City of Chicago, 176 Ill. 340, 349 (1898).
1248 Gundling v City of Chicago, 176 Ill. 340, 350 (1898). Only one justice dissented. On the grounds that Gundling lacked standing to raise the issue because he neither applied for nor was denied a license, the court refused to rule on his claim that the ordinance was void because it delegated power to the mayor to determine whether to grant licenses. Id.
1249 “Will Fight to the Finish,” CT, Oct. 27, 1898 (8).
members of the Pharmaceutical Association, who “sell cigarettes and cigars in connection with their drug business,” were making common cause with “the tobacco men.” Without offering any explanation as to why the city government, which had been “scolding about the lack of revenue,” had failed to enforce an ordinance that would have brought in considerable amounts, the Tribune merely hoped that the court ruling would prompt immediate enforcement.

The city administration had still not fulfilled its promise by the time the Illinois Supreme Court decided Gundling against the industry in late October, after which two weeks remained until election day. During that time the Cigar and Tobacco Merchants’ Association, backed by the Pharmaceutical Association, once again sent out Harris’s circular from the summer and resumed its campaign against Democrats, calling on members to vote against that party on the grounds that Republicans’ success in November “would mean an annihilation of the Democratic boodlers next spring,” while insisting that with regard to the “youthful population” its legislative proposal would offer “a thousandfold better protection than that under which they are now levying a blackmail upon a few dealers.” Literally on election eve the Association adopted its political committee’s report to support Republican candidates to punish Democrats for their refusal to enforce the ordinance, and Republicans did achieve a major victory in the Cook County elections, but analysts, who ascribed the Democrats’ defeat in large part to Mayor Harrison, did not point to the cigarette ordinance as one of his cardinal errors.

Despite the electoral warning, the city council seemingly remained obdurately committed to poking its finger in ATC’s eye: in early December the License Committee, on the motion of Democrat John J. Brennan, boss of the Eighteenth Ward who would later be sent to jail for vote buying, recommended

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1250. “Cigaret Still in Politics,” CT, Oct. 26, 1898 (3). By the end of the year the city had collected $25,675.24 in fees for 292 cigarette sales licenses. “Chicago Loses Many Saloons,” CT, Dec. 31, 1898 (12); Department of Finance, Forty-Second Annual Statement of the Finances of the City of Chicago 48 (1898).
1254. “Cook County Won by the Republicans,” CT, Nov. 9, 1898 (1).
1255. “Blame Mayor for Defeat,” CT, Nov. 20, 1898 (2) (edit.).
1256. “Guilty of Election Frauds,” NYT, Nov. 30, 1903 (7); “Cell Waits for Brennan,”
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

quintupling the license fee to $500 “with the idea of showing to the tobacco trust, which is seeking a reduction in the amount of the license fee, that the City Council will not accede to its wishes.” To be sure, this move could also have been interpreted as sending exactly the opposite message to ATC: although the Illinois Supreme Court had upheld the $100 license, “the tobacco dealers said” that a $500 license would undoubtedly be litigated on the grounds this time that it was “practically prohibitive, and the trust would have a good chance of winning its case.”  During the opening months of 1899 the council continued to be stalemated, with the License Committee appointing a three-member subcommittee (including Brennan) to study dealers’ request to lower the license fee. But a month later, at the Association’s second annual dinner, Harris—who chided Mayor Harrison for being “afraid of the moral influence of the Y.M.C.A. and the W.C.T.U.”—repeating all of the dealers’ old complaints, conceded that “nothing has been accomplished.”

The Association’s threats notwithstanding, in April Harrison was re-elected and the council, despite Democrats’ nominal majority of 35 of the 68

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1257“Favors New Telephone Grant,” CT, Jan. 10, 1899 (12).
1258“Aldermen Favor Trolley Lines,” CT, Dec. 6, 1898 (2). This press account is not completely consistent with that of the official council Proceedings, which was itself internally inconsistent. The License Committee report included four “WHEREAS” clauses, one of which stated that of Chicago’s 7,000 or more cigar and cigarette dealers “fully one-half or two-thirds...regularly handle and sell cigarettes”; another referred to the aforementioned petition of “7,000 reputable and responsible dealers in cigars, tobacco and cigarettes for the repeal or modification” of the ordinance. The recommended amendments to the ordinance then inconsistently and nonsensically provided that in § 2 the $500 license fee (which must have been a typo for $100) be changed to $10 and that the $100 license fee in § 3 be changed to $500. Proceedings of the City Council of the City of Chicago for the Municipal Year 1898 and 1899, at 1075-76 (Dec. 5, 1898) (1899). For unknown reasons, a week later O’Brien, who had presented the petition, successfully moved to recommit the amended ordinance to the License Committee. Proceedings of the City Council of the City of Chicago for the Municipal Year 1898 and 1899, at 1170 (Dec. 12, 1898) (1899).
1259“S. H. Harris Scores the Mayor,” CT, Feb. 8, 1899 (5).
1260Harrison received only a plurality of votes because tens of thousands were siphoned off to Progressive Democrat and vigorous opponent of the trusts, former Governor Peter Altgeld, who, after breaking with Harrison over the question of the immediate municipalization of the traction systems, ran as an independent with the support of the Municipal Ownership League. “Mayor for Longer Term,” CT, Apr. 5, 1899 (3); “Re-Election of Mayor Harrison,” CT, Apr. 5, 1899 (6) (edit.); “Mayor and His Cabinet,” CT,
seats,\textsuperscript{1261} was organized on a non-partisan basis by a vote of 44 to 19 (with Coughlin and Powers in the minority).\textsuperscript{1262} By the end of June aldermen were once again proposing revisions to the ordinance.\textsuperscript{1263} One, presented by Democrat Edward F. Cullerton (aka “Smooth Eddy” and “Foxy Ed”\textsuperscript{1264} an aide of John Powers, would have quintupled the license fee to $500.\textsuperscript{1265} Alderman William Schlake, a brick manufacturer who had been backed by the Municipal Voters’ League and the Civic Federation in 1896,\textsuperscript{1266} introduced the other amended ordinance that drastically lowered the license fee from $100 to $25.\textsuperscript{1267} At the council session on July 6, Schlake, challenged as to the rationale for paring back the fee, merely mentioned that dealers had refused to pay the higher amount.\textsuperscript{1268} (The \textit{Tribune} reported that whereas in the ordinance’s first two years of operation

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\textsuperscript{1263}“Hitch in Caucus Plans,” \textit{CT}, Apr. 9, 1899 (4); “Non-Partisan Plan Wins,” \textit{CT}, Apr. 11, 1899 (4).

\textsuperscript{1264}“City Under Earth,” \textit{CT-H}, June 27, 1899 (2:3-4); “Asks for Big Subway Grant,” \textit{CT}, June 27, 1899 (2).

\textsuperscript{1265}Lloyd Wendt and Herman Kogan, \textit{Lords of the Levee: The Story of Bathhouse John and Hinky Dink} 40 (1943). On Cullerton’s background, see \textit{Politics and Politicians of Chicago, Cook County, and Illinois: Memorial Volume, 1878-1887}, at 508-509 (Fremont Bennett comp. 1886).

\textsuperscript{1266}Proceedings of the City Council of the City of Chicago for the Municipal Year 1899-1900, at 801-802 (June 26, 1899) (1900). The preamble included the same “WHEREAS” clauses that had already been presented in December. The motion to concur in the report of the Judiciary Committee, to which the ordinance was referred, recommending that the ordinance be placed on file prevailed. \textit{Proceedings of the City Council of the City of Chicago for the Municipal Year 1899-1900}, at 983 (July 6, 1899) (1900).

\textsuperscript{1267}Ald. Schlake Warmly Indorsed,” \textit{CT}, Mar. 7, 1896 (4); 1900 Census of Population (HeritageQuest). In April Schlake had voted for the non-partisan organization of the council.

\textsuperscript{1268}Proceedings of the City Council of the City of Chicago for the Municipal Year 1899-1900, at 818-820 (June 26, 1899) (1900).

\textsuperscript{1269}Council Blocks a Big Scheme,” \textit{CT}, July 7, 1899 (3). The Judiciary Committee, to which the ordinance had been referred, recommended on June 30 that the ordinance as presented by Schlake (including the lower fee) be passed. \textit{Proceedings of the City Council of the City of Chicago for the Municipal Year 1899-1900}, at 979-81 (July 6, 1899) (1900).
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430 and 292 of 8,000 dealers took out licenses, by 1899 “applications have ceased altogether and the ordinance today is a dead letter.”)\textsuperscript{1269} Although proponents of the reduction had believed that objections would be “overbalanced” by the ban on sales to minors, debate quickly proved otherwise. Chief among opponents who “rose on the wings of oratory” was Coughlin, whom the \textit{Times-Herald} portrayed as “pathetic on ‘the mothers of Chicago’ and on the little tots put to picking cigar stubs from the gutters to supply the cigarette factories.”\textsuperscript{1270} Republican Edward Connor, a former plumbers union president\textsuperscript{1271} who in 1891 had been a speaker on behalf of Thomas Morgan’s Socialist Labor Party mayoral candidacy\textsuperscript{1272} before running for Congress as a Republican-Populist in 1892\textsuperscript{1273} and gaining a reputation as opposing granting municipal franchises to corporations,\textsuperscript{1274} insisted that blame for non-enforcement lay not with the ordinance, but the police and city administration. After the council had passed his motion to restore the $100 fee, it unanimously (66 to 0) adopted the amended ordinance, of which the mayor undertook to secure enforcement.\textsuperscript{1275} Sponsors of the $25 license ominously predicted that because of retention of the $100 license the amended license would be “almost as inoperative as the old one,” under which 342 dealers had taken out licenses during the previous year while almost 3,000 nevertheless sold cigarettes “‘on the sneak.’” Indeed, the \textit{Times-Herald} opined that the old ordinance had “practically been permitted to lapse in expectation of a new one that could be strictly enforced.” Moreover, City Prosecutor Taylor (erroneously) advised the Judiciary Committee that “the old ordinance now in the
courts would probably be thus knocked out on the ground that the $100 license fee is unenforcible.”

The amended ordinance included three significant changes only one of which strengthened the law—namely, the prohibition, supported by a minimum $25 fine, of selling or offering to sell cigarettes to anyone under 21. This partial extension of the statewide ban may have been promoted by reports that had surfaced in April that “advertising distributors” were handing out free sample packages of a new brand of chewing and smoking tobacco to boys as they left school buildings in Chicago who then used the tobacco to make cigarettes. This type of tobacco, sold in five-cent packages was, according to a downtown dealers, “really meant to provide a means for boys to secure a cigaret. Any place that formerly kept cigarettes can keep this kind of tobacco and sell it under a low license.” The city council also reduced the ordinance’s deterrent force by halving the minimum fine for selling without a license from $50 to $25. Finally, although the insertion of a provision forbidding the sale of cigarettes containing certain named ingredients “or any other deleterious or poisonous drug” and imposing a $25 to $100 fine for a first violation and a $25 daily fine for violations after a first conviction might, on the surface, have seemed to strengthen the law, the only ingredients that the amendment covered (including the newly added strychnia and cocaine) were, as already discussed, not used in the manufacture of cigarettes, whereas the two that the council removed from the original version of the ordinance (glycerine and sugar) were universally used

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1277Proceedings of the City Council of the City of Chicago, for the Municipal Year 1899 and 1900, at 937-39 at 938, 939 (July 6, 1899) (1900) (§§ 3, 11).
1278See above this ch.
1279“Tobacco for Children,” CT, Apr. 22, 1899 (16). To be sure, the aforementioned amendment to the ordinance would not have covered cigarette tobacco, but the state law did, at least for under-16-year-olds.
1280Proceedings of the City Council of the City of Chicago, for the Municipal Year 1899 and 1900, at 937-39 at 938 (July 6, 1899) (1900) (§ 9).
1281Proceedings of the City Council of the City of Chicago, for the Municipal Year 1899 and 1900, at 937-39 at 938 (July 6, 1899) (1900) (§ 10). Strychnia and cocaine were also added to and glycerine and sugar deleted from § 2, which had merely stated that nothing in the ordinance “shall be held to authorize the sale of cigarettes containing” certain named ingredients. Id. at 937. To be sure, one puzzle remains: in 1897 an official Revised Code of Chicago was published, which contained a version of the recently passed cigarette license ordinance including a final section that had not been contained in the version passed by the council on March 1. Headed “Sale of adulterated cigarettes,” it prohibited exposing for sale, selling, or offering for sale any cigarettes containing opium,
so that their retention would have virtually barred cigarette sales in Chicago. The press was grossly negligent in failing to cover this aspect of the amendatory process.\textsuperscript{1282}

Four days after the council had acted, the police chief, based on the city...
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

collector’s letter, ordered policemen on patrol to help license officers enforce the ordinance. At the same time, a stationery store owner, pursuant to a warrant taken out by Lucy Page Gaston, superintendent of the Anti-Cigarette League, was arrested for violating the ordinance. Gaston’s focus, however, was on the sale of cigarettes to minors, in adjudicating which Police Magistrate and Justice of the Peace George W. Underwood was “adopting the policy of letting the violators of the law off easy on condition of their future observance of the law.” His approach, based on the belief that few sellers violated the ordinance intentionally, effectively endorsed and instilled a spirit of belittlement and mockery of and non-compliance with the law: “Most of the merchants brought in are respectable business-men...to whom a nickel or two would not be an inducement to violate the law and risk arrest and prosecution. I think that admonition is about all that is necessary in most of the cases.”

Panicking over passage of the new ordinance and incipient noises about enforcement, the Cigar and Tobacco Merchants’ Association held an emergency meeting less than a week after the aldermen had acted at which they adopted a resolution authorizing the immediate hiring of a lawyer—the cost of which would be borne by an assessment on all members—who had advised the group to seek an injunction against the city barring it from arresting dealers who refused to pay the license fee. That lawyer was the politically very well-connected Republican Lorin C. Collins, a former Illinois House Speaker (1883), Cook County Circuit Court judge (1884-93), law partner of Clarence Darrow (1893-95), and future Panama Canal Zone Supreme Court justice. That just nine months earlier the Illinois Supreme Court had upheld the ordinance’s validity did not deter Collins—who had resigned his judgeship because he deemed the salary “inadequate”—from redistributing to himself part of the dealers’ tobacco-based profits: already on July 19, on behalf of 250 tobacco-dealing complainants, he sought an injunction in circuit court to prevent their arrest and prosecution for selling cigarettes without a license. The petitioners complained both that the city had acted beyond its authority in passing the ordinance because Chicago lacked the power, under its charter or the state constitution, to collect that particular

1283 “To Lay Tracks July 21,” CT, July 11, 1899 (12). For additional arrests of dealers, see “Will Fight the Cigaret Law,” CT, July 13, 1899 (4).
1284 “Lenient with Cigar Dealers,” CT, July 15, 1899 (4).
1285 “Will Fight the Cigaret Law,” CT, July 13, 1899 (4).
1287 “Collins to Step Out,” CT, Sept. 30, 1893 (4).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

revenue and that the $100 license fee was excessive.¹²⁸⁸ It did not take Circuit Judge Charles Neely—who after leaving the bench taught law school¹²⁸⁹ and adult bible classes at a Presbyterian church¹²⁹⁰—long to prick Collins’s frivolous litigational balloon. On July 28, relying unsurprisingly on the state supreme court’s decision in Gundling, he denied the request for an injunction. With regard to Collins’s main argument—that the Supreme Court had not dealt with the precise issue of the fee’s unreasonableness—Neely again denied the motion for the injunction because the Illinois courts had decided that the license was not a tax and rejected the view that an ordinance authorizing a license that created revenue was invalid.¹²⁹¹ Despite this virtually inevitable outcome, the petitioners made it clear that they would take the case to the Supreme Court.

By the time the state intermediate appeals court issued its ruling in late 1900, the U.S. Supreme Court had already decided Gundling; in the meantime, however, the battle over enforcement continued. Two weeks after Neely had issued his ruling and in the absence of council passage of the “compromise ordinance” on which dealers had been pinning their hopes, the city collector announced that he could wait no longer: without further notice he would begin prosecuting dealers who sold cigarettes without a license.¹²⁹² By the next day, it was reported, more than $5,000 had been paid for licenses, bringing the total to $8,000 since the last court decision.¹²⁹³ (For the entire year 1900, gross receipts from cigarette licenses totaled $30,216.81.)¹²⁹⁴ Officials repeated this mantra.

¹²⁸⁸“To Defeat Cigaret Law,” CT, July 20, 1899 (10). The cigarette sellers also asserted that the mayor had neither approved the ordinance nor returned it to the council with his objections and that it had also not been published; the petition further requested that the mayor be restrained from signing and approving the ordinance. The complaint’s frivolousness in the wake of Gundling was heightened by the fact that dealers were challenging the old ordinance, not the new one (which had purportedly not yet become law). According to “Stands by Cigaret Law,” CT, July 29, 1899 (14), the number of complainants was 280.

¹²⁸⁹Judge C. G. Neely, Ex-Chicagoan, Dies After Crash,” CT, Oct. 18, 1930 (24). He taught at Chicago Kent Law School and Pomona College.

¹²⁹⁰Andrew Stevenson, Chicago: Pre-Eminently a Presbyterian City 32 (1909).

¹²⁹¹“Stands by Cigaret Law,” CT, July 29, 1899 (14).

¹²⁹²“Hopes to Check Smoke,” CT, Aug. 11, 1899 (10).

¹²⁹³“Put Under Merit Law,” CT, Aug. 12, 1900 (12). See also “Finds for Guard Lyons,” CT, Aug. 13, 1900 (12) (118 licenses had been taken out for the year).

¹²⁹⁴Department of Finance, Forty-Fourth Annual Statement: Finances of the City of Chicago: January 1, 1900 to December 31, 1900, at 139 (n.d.). In 1901 the amount rose modestly to $32,183.67. Department of Finance, Forty-Fifth Annual Statement: Finances of the City of Chicago: January 1, 1901 to December 31, 1901, at 105 (n.d.).
without serious enforcement or embarrassment for some time;\textsuperscript{1295} nevertheless, by the beginning of the new century, the members of the Cigar and Tobacco Merchants’ Association decided that instead of paying the $100 license they would take the issue to court (although the group’s attack on the ordinance was already pending in court). Potentially more troubling for the cigarette industry, especially for the long run, were proliferating employer bans in Chicago on cigarette smoking: while the Board of Education’s in its offices was based on the odor, Montgomery Ward “refused to employ boys addicted to cigaret smoking,” and other companies insisted that cigarette smoking undermined productivity and discipline.\textsuperscript{1296} With startling prolepsis, one manufacturer took a stand that more than a century later employers (such as the Cleveland Clinic)\textsuperscript{1297} are just beginning to be bold enough to implement: “‘The time has come when businessmen should stop paying salaries to men whose health is impaired by cigaret smoking.’”\textsuperscript{1298}

Ominously for the Tobacco Trust, this comment appeared in the press on the very day on which the U.S. Supreme Court issued its decision in \textit{Gundling}, upholding the ordinance and thus clearing the way for other cities to restrict cigarette sales by making it unprofitable for multitudes of small-volume sellers to dot the urban landscape with conveniently situated supply stations whose ubiquity also mightily manufactured an image of the commodity’s normality. The Supreme Court’s brief opinion, from which no justice dissented, scarcely concealed the dismissive attitude of the author—Rufus Peckham, whose infamous \textit{Lochner v. New York} four years later conferred a name on an era of judicial invalidation of economic regulation—toward Aldrich’s and the cigarette industry’s unserious claims. (Although the Court did not engage it, the lowest point in Aldrich’s brief was the last two sentences, which gratuitously commended nicotine addiction and suppressed the ordinance’s objective of making cigarettes less accessible to school boys: “Tobacco used in a moderate degree is found a valuable and useful stimulant, and should not be made the subject of unreasonable and unjust requirements. Nor should the thousands of merchants in the outlying districts, where the sale of cigarettes is limited, be

\textsuperscript{1295} E.g., “Charge Plot to Extort,” \textit{CT}, Oct. 24, 1899 (2) (city will prosecute 50 dealers).

\textsuperscript{1296}a “Shut Out the Cigaret,” \textit{CT}, Mar. 27, 1899 (16).

\textsuperscript{1297} http://my.clevelandclinic.org/tobacco/a_message_about_smoking.aspx (visited Oct. 25, 2010).

\textsuperscript{1298}a “Put a Ban on Cigarets,” \textit{CT}, Apr. 9, 1900 (2) (Pres. E. Heath of Heath & Milligan Mfg. Co.).
deprived of the right to sell the same on account of a prohibitive license fee.”) The first charged that the ordinance ran afoul of the Fourteenth Amendment by virtue of delegating to the mayor the arbitrary power to grant and revoke licenses, while the second asserted that the $100 fee was an unreasonable exercise of the police power because the amount exceeded the expense of issuing the license and providing for regulation, thus depriving dealers of their liberty and property by means of an interference with their rights that was not necessary to protect the public’s health. After expressing doubt whether Gundling even had standing to raise the first issue because he never applied for and the mayor never denied him a license, Peckham nevertheless gave him his day in court before concluding that the ordinance did not violate Fourteenth Amendment’s due process or equal protection clauses because, while the law called for the exercise of a judicial-type of discretion by the mayor, the record neither charged nor proved that the mayor had ever discriminated against any applicant or abused his discretion. The Court then set forth this expansive framework for state and local control over business licensing and exercise of police powers free from federal intervention:

Whether dealing in and selling cigarettes is that kind of a business which ought to be licensed is, we think, considering the character of the article to be sold, a question for the State, and through it for the city to determine for itself, and that an ordinance providing reasonable conditions upon the performance of which a license may be granted to sell such article does not violate any provision of the Federal Constitution.

Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.

Peckham disposed of the objection to the size of the license fee—which Aldrich, insinuating that the City of Chicago had sought to fleece his real client, ATC, had asserted in his brief was so “altogether unreasonable...as to justify the assumption that the members of the common council fully realized at the time of

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1299 Brief for Plaintiff in Error at 29, Gundling v City of Chicago, 177 US 183 (1900).
1300 Gundling v City of Chicago, 177 US 183, 185 (1900).
1301 Gundling v City of Chicago, 177 US 183, 186, 187 (1900).
the passage of the ordinance that the cigarette business of this country was mostly in the hands of large tobacco corporations which controlled vast wealth—just as summarily:

The amount of the fee is fixed by the common council for the privilege of doing business, and the text of the ordinance and the amount of the fee therein named would seem to indicate that it is both a means adopted for the easier regulation of the business, and a tax in the nature of an excise imposed upon the privilege of doing it. In either case the State has power to make the exaction, and its exercise by the city under state authority violates no provision of the Federal Constitution.

... It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfils [sic] the two functions, one a regulating and the other a revenue function. So long as the state law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution. 1304

The vice president of the Cigar and Tobacco Dealers’ Association was immediately constrained to acknowledge that it looked as if the decision “would be far reaching in its effect, and any city in the country would be empowered to impose a license for the sale of cigarettes.”¹³⁰⁵ The Tribune noted that the Court had “end[ed] all hope of the members of the Tobacco Dealers’ association to evade the requirements of the ordinance,”¹³⁰⁶ but its editorial comment that the case had established the “right to impose a high license upon cigarets...as a matter of public health and morals”¹³⁰⁷ was exaggerated since the payment of $100 in a populous city, as shown above, barely interfered with the profitability of large-volume sellers. Its report that the ruling meant more than $50,000 in revenue to the city suggested that only about 500 dealers—not significantly more than the peak number who had ever paid for a license in the past—would be selling cigarettes; in light of the estimates of thousands who had been selling, the

¹³⁰³Brief for Plaintiff in Error at 25, 27-28, Gundling v City of Chicago, 177 US 183 (1900). Without a source, Aldrich claimed that over 4,000 persons sold cigarettes in Chicago. Id. at 27.
¹³⁰⁴Gundling v City of Chicago, 177 US 183, 188-89 (1900).
¹³⁰⁵¹“Will Press Cigaret War,” CT, Apr. 11, 1900 (5).
¹³⁰⁶¹“Cigaret Ordinance Is Upheld,” CT, Apr. 10, 1900 (6).
¹³⁰⁷¹“Cigaret Ordinance Valid,” CT, Apr. 11, 1900 (12) (edit.).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

implication was that this larger group would in fact stop selling illegally. Consequently, it was only to be expected both that victorious Corporation Counsel Walker, repeating the aforementioned mantra, declared that the city collector would “now begin the strict enforcement of the law” and the vanquished Cigar and Tobacco Merchants’ Association yet again complained that some dealers were selling “without molestation from the city authorities....”

In fact, the U.S. Supreme Court decision did not even prompt the cigarette industry or Collins to dismiss the appeal in the other litigation that had been frivolous even before the federal Gundling opinion was handed down. The eponymous plaintiff of that latter case, Albert Breitung, the German-born president of the Association, was still denying the city right to impose the “excessive” $100 license fee. But in its opinion in November 1900 perfecting the cigarette sellers’ record of defeats in attacking the ordinance, the First District Illinois Court of Appeals was even more curtly critical than the Supreme Court had been:

Substantially every point presented by plaintiffs in error has been passed upon in Gundling v. City of Chicago...which was affirmed by the Supreme Court of the United States in an opinion handed down April 9, 1900. ...

In the Gundling case the validity of the ordinance as to the questions here complained of and its enforcement were involved. It is therefore deemed hardly necessary to do more than to refer to the opinions of the two courts in that case. It is perhaps due to counsel to say that the opinion of the Supreme Court of the United States in that case was not handed down until the very day that the original printed argument of counsel for plaintiffs in error in the case at bar was filed in this court. In their reply argument, however, counsel seek to show that neither of the reviewing courts passed upon the averment in the bill that a license fee of $ 100 amounts to a prohibition or suppression of the sale of cigarettes, and that said ordinance is therefore unconstitutional and void.

As before stated, the Gundling case in effect disposes of all the questions here presented. True, the Supreme Court does not specifically refer to one or two points here urged, but all the provisions of the ordinance now complained of were before that court.

It is not for us to question the correctness of the decisions referred to, even if we desired so to do. The decision of the Circuit Court is affirmed.

1308“Cigaret Ordinance Is Upheld,” CT, Apr. 10, 1900 (6).
1309Breitung owned a chain of tobacco stores in the Loop. “Albert Breitung Dead,” CT, July 11, 1934 (12).
1310“Will Press Cigaret War,” CT, Apr. 11, 1900 (5).
1311Breitung v City of Chicago, 92 Ill. App. 118, 119-20 (1900). See also “Holds License Law Good,” CT, Nov. 9, 1900 (12).
In the flurry of official hosannas that greeted the U.S. Supreme Court ruling authorities in Chicago, a declaration of “Cigaret War,” reflexively “promise[d] that the cigaret license law shall be strictly enforced.” The city council added its voice to the chorus when it was reported that the chairman of its License Committee would “insist that the law be enforced rigorously” so that all dealers who failed to pay the license fee would be prosecuted, a declaration echoed by the deputy city collector’s that he would “see to it that every effort possible is made to exact the license fee....” The police chief, too, chimed in that he would give “every assistance in my power,” which turned out to be the assignment of a dozen of his officers to search for license dodgers. To be sure, Walker, while remarking that the Court left “no loopholes for escape for dodging dealers,” created his own for dodging enforcers by opining merely that “the law will be more closely followed than heretofore.” By the time the city’s new license year began on May 1, the city collector was “determined to stop this license-dodging by cigaret sellers once and for all” by hauling “[e]very”licenseless seller into court and keeping up the prosecution “until he complies with the law.” Among the majority of small storekeepers who comprised the majority of violators, in particular candy store and saloon owners were put on a watch-list of suspects. The first fruits of the campaign were celebrated in mid-May when the one-day record for number of licenses taken out (47) was reached, bringing the total to 108. Yet again the authorities announced to what must by this time have been a very skeptical public that “beginning this morning all dealers found selling cigarettes without licenses will be prosecuted.” The targeted sellers themselves—of whom the collector surprisingly estimated there were only 200 or even 150 who had failed to pay—might have been forgiven their own skepticism when the new mantra was repeated on July 1 that, the “time limit” having expired, prosecutions would begin the next day. That this time perhaps some modicum of bite backed up the bark might have been detected in the report 10 days later that 252 licenses had been taken out, while 52 licenseless sellers

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1312“Will Press Cigaret War,” CT, Apr. 11, 1900 (5). A year later the city council passed an order demanding strict enforcement of the ordinance. “Must Obey Cigaret Law,” CT, May 29, 1901 (1).

1313“Kipley in Print Again,” CT, Apr. 18, 1900 (7).

1314“Will Press Cigaret War,” CT, Apr. 11, 1900 (5).

1315“Will Start License War,” CT, May 1, 1900 (13).

1316“Move for True City Accounts,” CT, May 16, 1900 (5).

1317“Says Funds Are Misused,” CT, July 1, 1900 (14) (quote); “Getting Facts to Down Noise,” CT, July 3, 1900 (16) (15).
were being prosecuted.¹³¹⁸ Through the rest of the year more licenses were taken out and a series of unlicensed sellers arrested and/or fined.¹³¹⁹

Nevertheless, in 1901 the Cigar and Tobacco Merchants’ Association continued to complain that the city had hardly made a dent in what the group persisted in insisting was a mass of 8,000 cigarette sellers only 350 of whom had paid for a license. Early that year the Association added a new twist to its indictment (which, though tacit, always amounted to larger dealers’ disappointment that, despite paying $100 a year, they were still not enjoying the oligopolistic profits that the ordinance had held out to them in the form of suppressing the small-volume sellers). Now, it (plausibly) claimed that it had “reliable information showing that certain ward politicians have been protecting dealers who refused to pay the license,” while others either received a cut rate or paid “tribute to certain ‘go-betweens’ for the benefit of various individuals with a ‘pull.’” In contrast, dealers’ assertion that the city was losing $750,000 annually as a result of not enforcing the license law¹³²⁰ was manifestly hyperbolic since a very large proportion of the purported thousands of non-paying small-volume sellers would, if the ordinance had been strictly enforced, have stopped selling cigarettes. City Collector Frank Brandecker, who was sure that there was not “anything like” 8,000 cigarette dealers in Chicago, shot back that he had done all that he could to enforce the law (including 75 prosecutions). While concurring in his fellow bureaucrat’s self-judgment, Comptroller William Kerfoot put it in a considerably different light by revealing that when detectives had been detailed to locate delinquent dealers, “‘their expenses were paid out of the contingent fund. The city has no money available for the prosecution of this class of work....’”¹³²¹ That its aggregate license revenue estimate was exaggerated the Association de facto admitted when it called for reducing the fee from $100 to

⁠¹³¹⁸ “Still Able to Gather Garbage,” CT, July 11, 1900 (12).
⁠¹³¹⁹ “Fined for Selling Cigarets,” CT, Sept. 21, 1900 (7) (including fines for selling to minors); “Cigaret Dealers Arrested,” CT, Oct. 27, 1900 (16) (reporting a police captain as having been informed that “there were numerous violators of the ordinance in the Ghetto” and listing among the arrested dealers with typically Jewish names such as Silverstein); “Cigaret Dealers Are Fined,” CT, Nov. 14, 1900 (2) (including Khedivial Tobacco Co.).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

$25 on the grounds that 7,000 dealers would pay it, thus generating $175,000 in city revenue compared to the $25,000 that 250 dealers were currently paying. To be sure, this municipal coffers perspective demonstrated to contemporaries—if by this point they still needed evidence—that the organized sellers were working at cross-purposes with the ordinance, which was designed to “discourage the sale of cigarets” in the sense that “all the small places where cigarets [we]re sold, especially those near the schoolhouses, would be unable to pay $100, and would stop selling the obnoxious article.”\(^\text{1322}\) The cigarette industry continued to lobby the council for this revision; in 1903, for example, 20 dealers, including Breitung and the president of the National Association of Cigar Dealers, appeared before the aldermen to plead on behalf of the $25 license, but the council voted unanimously against it. The spectrum of negative opinion was amusingly broad, ranging from advocacy of a $500 license and a penalty of a year in the penitentiary to “‘educat[ing] people up to smoking cigars, and not cigarets....’”\(^\text{1323}\) But Republican Charles Woodward’s judgment was most relevant in limning the ultimately narrow scope of the council’s regulatory agenda on cigarets: “‘The city has no interest in the fight against the trust.... The ordinance is to prevent sales of cigarets to minors. If the smaller dealers have licenses they will openly display and push the sale of cigarets near schools. They dare not do that now.’”\(^\text{1323}\)

By 1904, the city had issued 560 licenses, which brought in $56,334 in revenue.\(^\text{1324}\) Such numbers prompted one contemporaneous investigator to opine that there was “good reason to believe that many possible license fees are never collected”\(^\text{1325}\)—an opinion that he might well not have modified even when the number of licenses rose to 803 and 890, respectively, in 1907 and 1908.\(^\text{1326}\)

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\(^\text{1322}\)“The Cigarette Ordinance,” \textit{CT}, Apr. 21, 1901 (40) (edit.). The council’s focus on school children was again highlighted when it adopted an ordinance prohibiting the sale of cigarette papers (which could be filled with loose tobacco the sale of which was not regulated) within 600 feet of schoolhouses. “Want Uniform Price of Light,” \textit{CT}, May 28, 1901 (3).

\(^\text{1323}\)“Kill Ordinance Providing for $25 Cigaret License,” \textit{CT}, May 14, 1903 (3). The first two views were presented by Republican John Scully and Democrat John Minwegen, respectively.


\(^\text{1326}\)\textit{Chicago City Manual: 1908}, at 226, 228 (Francis Parkman prep. 1909). For later data, see Malcolm Parsons, \textit{The Use of the Licensing Power by the City of Chicago} 167,
At this point in the opening years of the century the controversy over
Chicago’s modest licensing ordinance was overtaken by efforts in the state
legislature to pass a more radical statewide ban on the manufacture and sale of
cigarettes in sync with similar enactments in neighboring Wisconsin and Indiana
in 1905.1327 In 1906-1907 anti-cigarette militants, led by Lucy Page Gaston,
women’s clubs, the public education authorities, and physicians, tried,
unsuccessfully, to persuade the city council both that banning sales to everyone
was the only way to prevent children from gaining access to cigarettes and that
only the Tobacco Trust opposed such an approach since independent dealers were
left with no profit after paying for their licenses. Whether it was decisive or not,
the suggestion by Republican Alderman John P. Stewart, owner of a downtown
cigar and tobacco store, that a state law would be superior because a municipal
sales ban would merely “cause hundreds of little stores to spring up on the
outskirts of the city whose entire business would consist of selling cigarettes [and
then] would get the cigar business and Chicago business men would suffer”
objectively carried the day.1328 When the Illinois legislature finally passed such
a bill in 1907—which was judicially held invalid before it went into effect1329—some observers of its impact focused on the revenue loss (amounting
to $75,000)1330 to Chicago once the city collector announced that the city would
cease to license the sale of cigarettes as a result of the state enactment.1331

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1327See below vol. 2.
1328“Cigarets Are Under Fire,” CT, Dec. 12, 1906 (8); “Ask Cigaret Law of City
Council,” CT, Jan. 23, 1907 (11) (quoting Alderman Stewart). On Stewart, see Chicago
City Manual: 1912, at 41 (Francis Eastman prep. 1912).
1329See above this ch. and vol. 2.
1330“Stop Smoking,” CT, June 18, 1907 (6) (edit.). The Tribune editorialist, who
fancied that “Chicago without cigarette smokers, is unimaginable,” stated that because the
revenue loss “is going to be felt...the outcry against the new statute among smokers is
echoed in the City Law Department,” while admitting that “the violence of the opposition
has greatly strengthened the anti-tobacco party.” Id.
1331“City Big Loser by Cigaret Law,” CT, June 10, 1907 (6). The article’s statement
that the loss of revenue would amount to $10,000 (the equivalent of 100 licenses) was
inconsistent with the aforementioned data.
Even the Leading Cigarette Tobacco Producing (and the Dukes’ Home) State Had to Debate Banning the Manufacture and Sale of “that nefarious little stinker”: North Carolina 1893-1905

We view with alarm the degree to which the tobacco habit has fastened itself upon the generation, enslaving men of every calling in life. The deadly cigarette in the hands of the boy is but the childish effort to imitate the folly of the fathers. ¹

Although the North Carolina legislature failed to enact a general anti-cigarette law between 1897 and 1903, the vigorous and repeated efforts to do so even in the state that was the country’s biggest producer of cigarette tobacco,² second biggest producer of all kinds of tobacco (after Kentucky),³ second-biggest cigarette manufacturer (after New York),⁴ and the home of the head of the Tobacco Trust are a phenomenon worth studying. The window of opportunity for undertaking this initiative was partly opened by Populist-Republican Fusion, which captured both houses of the legislature for the 1895 session and the governorship at the 1896 election, enabling it to control all branches of government during the 1897 session.⁵ This framework for legislative innovation was shattered in 1898 when


²“By far the largest part of North Carolina tobacco crop goes for cigarettes. This is not true of any [other] state except Virginia.” “Cigarettes by the Million,” Syracuse Daily Standard, Mar. 12, 1896 (5:6-7) (reprinted from Sun (New York)).

³In 1899 North Carolina produced 127,503,400 lbs of tobacco or 14.7 percent of the national total. U.S. Census Office, Twelfth Census of the United States, Taken in the Year 1900: Census Reports, Vol. VI: Agriculture, Part II: Crops and Irrigation, tab. 1 at 526 (1902).


⁵To be sure, whereas the Populists had been able to achieve many of their legislative objectives during the 1895 session, in 1897 they failed to enact any of their campaign planks, while many enacted Republican bills did not conform to the ideology of the Populists, who did not expand their representation at the 1896 elections, leaving

598
Democrats, through law, fraud, and violence, regained power based on a white-supremacist electoral regime. The sharp restriction of suffrage after 1900 pushed both parties to the right so that even the Republicans, having abandoned the disfranchised blacks “as a lost and damaging cause,” sought to remain competitive by staking out a “lily-white” position that cast Democrats as anti-business and pro-black.

Unlike neighboring Tennessee, North Carolina in the late nineteenth and early twentieth century lacked a successful temperance movement that could have made prohibition of liquor and the saloon a perennially central and divisive issue of electoral politics and lent support to concurrent anti-cigarette campaigns. Following the overwhelming defeat of a prohibitionist constitutional amendment in 1881, the split in the Democratic party on the question opportunistically prompted Republicans to join the anti-prohibition elements, but the ploy miscarried, and, if for no other reason, the all-encompassing ‘Negro question’ meant that the issue failed to ignite the kind of dominating party-political conflict that Iowa witnessed—at least until white supremacists succeeded in excluding blacks from political participation in 1900.

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North Carolina first regulated the sale of cigarettes in 1891, when the legislature—110 of whose 170 seats were occupied by members of the Farmers’ Alliance elected at the 1890 elections—made it a misdemeanor to sell or give away cigarettes or tobacco in any form that could be used or intended to be used as a substitute for cigarettes to a minor under the age of 17, and left the imposition of a fine or imprisonment to the discretion of the courts. Some contemporaneous evidence suggests that it was “doubtless frequently violated”—at least in the town of Statesville.

That anti-Tobacco Trust sentiment ran strong in North Carolina already in the early 1890s, barely three years after its formation, was visibly on display in an article published in the Southern Tobacco Journal in Winston and reprinted in the Statesville Landmark, a Democratic newspaper:

It is now hinted that as soon as the whiskey trust, which is about to get control of the whiskey business in the country, is perfected,...the two corporations will combine, making the largest money corporation in the world. Such a corporation would simply mean ruin to the balance of the tobacco trade in this country. The combined value of the two enterprises would be nearly $100,000,000, enough it is said to influence legislation in every state in the Union.

In its own complementary editorial the Landmark, referring to “this rapacious and remorseless trust,” predicted that after “having disposed of competition” and depressed the price of the tobacco grade used for cigarettes, the Trust would “depress the prices of other grades of tobacco” and bankrupt or drive tobacco growers out of business. In the end it would “require an effort to keep grass from growing in the streets of our tobacco towns.” That the American Tobacco Company might have pressed some farmers hard enough to cause them to wish to bring down the cigarette empire is suggested by the Landmark’s claim that with the Trust’s having “fixed” cigarette grade tobacco for several years, “and the growers of this grade of tobacco having practically no other customers, [they]
have been compelled to accept whatever price the trust in its generosity named. It has thus cost the farmers hundreds of thousands of dollars, appropriating to itself what it has taken from them.”

Nevertheless, any Populist, let alone Fusionist, effort to dismantle ATC’s power in North Carolina had to confront the inescapable fundamental local economic facts that in Durham the company, which was “the largest concern of any kind in North Carolina,” operated “the largest smoking tobacco and cigarette factories in the world,” producing 10,000 tons of the former and three million cigarettes a day.

Charlotte and Greensboro Adopt and Repeal $200 License Taxes

Even before the state legislature took up the cause of banning cigarettes in North Carolina, local action supervened. By the 1890s, the widespread sentiment in a number of states that cigarette smoking by boys was an evil that should be suppressed prompted many local governments to pass ordinances “‘to drive them [cigarettes] out.’” On December 15, 1893 the aldermen of the city of Charlotte—the state’s second-largest city—adopted a motion to add a section to the revenue ordinance for that term imposing a $200 tax on cigarette retailers (and $50 on wholesalers/jobbers) to go into effect on April 1, 1894. The press reported that “those who sell the little poisoners are kicking like mountain steers but it does no good. They say they make only $5.35 on the thousand cigarettes

22. “What the Wisconsin Legislature Is Doing,” MS, Mar. 12, 1897 (6:1-3 at 2) (Assemblyman Hurd in support of his bill to impose a license fee of $500 on cigarette dealers and prohibit sales to minors).
23. U.S. Census Office, Census Reports, Vol. 1: Twelfth Census of the United States, Taken in the Year 1900: Population, Part 1, tab. 5 at 286-95 (1901). The population for 1893 was estimated based on the assumption that population increased proportionately each year between 1890 and 1900 in Charlotte and Raleigh.
24. City of Charlotte, Minute Book 7, Dec. 15, 1893, at 269; “Cigarette Retailers,” DCO, Dec. 16, 1893 (4:2). Brenda Freeze, the current City Clerk of Charlotte, and three co-workers, Jeanne Peek, Angela Davis, and Stephanie Kelly, generously read through the minute books for the years 1891 through 1894 and provided the texts of the relevant entries.
and they can’t afford the tax. It is said on the other hand that the aldermen nearly all have boys of their own, therefore can sympathize with the mothers of the land and dare to put the evil down.” The Raleigh paper supported the same action there “if it would decrease the unparalleled nuisance of cigarette smoking.”25 (To be sure, at the supposed profit margin, dealers would have to have sold only about 100 cigarettes a day to break even on the tax, thus rendering it unprofitable only for merchants who sold them as a minor, peripheral, and occasional commodity.)26 Before the ordinance went into effect, the board of aldermen at its meeting on February 5, 1894, on the motion of the same alderman (Hall) who had moved the adoption of the tax in December, repealed the license tax and then adopted a substitute amending the original so as to make the tax $200 on cigarette retailers, wholesalers, and on the sale of paper and paper tablets used in the manufacture of cigarettes, still to take effect on April 1.27 One Kansas newspaper interpreted the action as showing that “the days of the cigarette in the land are numbered.”28 On March 5, two “gentlemen,” John Scott and R. A. Dunn, appeared before the board seeking a modification of the cigarette tax. Although they did not wish to sell cigarettes in Charlotte itself, “a large percentage of their orders from merchants outside of the City included an item for cigarettes, which article formed part of regular wholesale druggists’ stock. They desired only to sell packages to parties outside of this City as Jobbers.” On Alderman Hall’s motion, the board referred the matter to the Committee on Ordinances, instructing it to confer with the city attorneys, and to report back to the board on whether the concession requested was lawful and proper.29 With the approach of the April 1, 1894 effective date of the ordinance, the press predicted that it would stop the sale of cigarettes inasmuch as the tax was prohibitory. Dealers hired a lawyer to test its constitutionality,30 although public sentiment favored the tax.31

25“Cigarettes Doomed in Charlotte,” News-Observer-Chronicle, Dec. 22, 1893 (1:6). An Iowa newspaper added that dealers’ protest was “in vain, as the sentiment of the people is evidently in favor of it.” “Cigarette Legislation,” CREG, Jan. 6, 1894 (4:2).
26If the $200 tax amounted to 37,383 times the $5.35 profit per 1,000 cigarettes, dealers would have had to sell 37,383 cigarettes annually or 102 per day.
27“Meeting of the Aldermen,” DCO, Feb. 6, 1894 (4:3). The Charlotte City Clerk did not report any such entry for Feb. 5, 1894.
30Landmark (Statesville), Mar. 22, 1894 (3:7) (untitled).
31“Personal and General Notes,” DP, Jan. 18, 1894 (4:6).
The tax did in fact go into effect on April 1, causing, in the words of the Daily Charlotte Observer, “[t]he cigarette fiend who did not display forethought and lay in a supply of his beloved weed” to be “reduced to sponging on his more thoughtful friends” and “[m]any deep muttered curses” to be “heaped on the heads of the well-meaning aldermen.” However, on the very day (April 2) that the Observer published that report, the aldermen, under suspension of the rules moved by Hall, read three times, passed, and adopted the police ordinance presented by the aforementioned committee ordaining that “from and after April 3, 1894, no person shall be allowed to sell cigarettes within the jurisdiction of the City of Charlotte without having first obtained a license therefor from the Board of Aldermen, and for every license to sell cigarettes for the term of one year, the applicant shall pay to the City, the sum of Ten Dollars. Any person violating this ordinance shall be subject to a penalty of Fifty Dollars for every such violation.”

That the aldermen, despite the conversion of the prohibitory tax into a more typical license fee, were still serious about controlling cigarettes, was on display not only in the hefty penalty (which the original ordinance had apparently lacked) but also in their having rejected a proposed amendment “that all ordinances on the subject of selling cigarettes be repealed, and that the sale of the same be declared free to all persons.” That animus remained palpable in 1896, when a merchant advertised in the local paper for a boy who did not drink, play cards, or smoke cigarettes. The newspaper commented editorially that, though plenty of boys would like the job, “the cigarette clause will bar most of them.” It advised boys to consider that such a policy “sets the pace.”

Nor was Charlotte the only city in North Carolina to act locally against cigarettes. About the same time, on January 2, 1894, James Edmund Boyd of the Greensboro Board of Aldermen introduced a similar ordinance. Boyd (1845-1935) was an interesting political figure, whose post-ordinance career was even more prominent. A soldier in the Confederate army who in 1866-67 read law with Judge Thomas Ruffin (one of the slave South’s most renowned judges) and

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33 City of Charlotte, Minute Book 7 at 289. The text was also printed in “The Park Offered to the City,” CO, Apr. 3, 1894 (4:2).
34 City of Charlotte, Minute Book 7, Apr. 2, 1894, at 289.
36 His main obituary did not even mention that he had once been mayor of Greensboro. “Death Claims Judge Jas. E. Boyd,” Greensboro Daily News, Aug. 31, 1935 (1:5-7).
37 “Recalls a Great Romance,” RMN, Nov. 27, 1897 (4:5).
was the leader of the Ku Klux Klan in Alamance County in 1870, Boyd became well-known nationally in the Republican party, serving as U.S. District Attorney for the Western District of North Carolina (1880-1885), before entering private practice in Greensboro (1885-1897), during which time he was also elected alderman in 1893 and mayor in 1894. His loyalty to the McKinley administration secured him a post as Assistant U.S. Attorney General (1897-1900) and finally an appointment in 1900 as federal judge for the U.S. District Court for the Western District of North Carolina. It was in this position that he achieved his greatest fame and notoriety for his fossilized laissez-faire constitutionalism and antediluvian pro-capitalism in invalidating two federal child labor laws four times (twice without even bothering to write an opinion) between 1917 and 1921, in part based on his finding that prohibiting a child below a certain age from working deprived his father of his income and thus of freedom of contract (even though the child was an at-will employee, who could be fired for any reason). In a delicious historical irony, one of the corporate lawyers plotting the challenge to the child labor law and identifying Boyd as the most reliable anti-progressive judge to hear all the cases was none other than ATC’s former associate and general counsel Junius Parker. It remains unclear what motivated this railroad lawyer to antagonize the Tobacco Trust. Greensboro,

40For hefty doses of Democratic sarcasm directed at Boyd’s having forgotten his past as a Democrat and “Ku Kluxian” at the Republican state convention, see “The Dark Duke Downed,” N&O, Aug. 31, 1894 (1:3).
41Boyd defeated two Democratic candidates for mayor, receiving only 16 more votes than the runner-up. The press reported that “[t]he colored vote rallied to the support of Boyd.” “A Republican Mayor,” GP, May 9, 1894 (3:3).
42Stephen Wood, Constitutional Politics in the Progressive Era: Child Labor and the Law 81-110, 226-31, 260-68 (1968). The cases were: Dagenhart v. Hammer (W.D.N.C. 1917); Johnston v. Atherton Mills (W.D.N.C. 1919); George v. Bailey, 274 F. 639 (W.D.N.C. 1921); and Drexel Furniture Co. v. Bailey, 276 F. 452 (W.D.N.C. 1921). The historian of these cases characterized the two opinions that Boyd did write as “put together from timeworn constitutional stuff and cotton mill propaganda.” Boyd’s issuance of an injunction in the child labor tax case restraining the collection of the tax a “flagrantly improper act” since “it went directly counter to the statutory provision that no suit for restraining the collection of federal taxes could be maintained by any court.” Stephen Wood, Constitutional Politics in the Progressive Era: Child Labor and the Law 266 (1968). A lengthy editorial-obituary declared that “Judge Boyd brought over into generations which less and less sensed them...more of the bitterness of the reconstruction era than did any of his contemporaries.” “James E. Boyd,” Greensboro Daily News, Aug. 22, 1935 (6:3).
however, created for itself a reputation as a temperance leader when the board of aldermen, presided over by the new Mayor Boyd, in May 1894 passed a “rigid” ordinance requiring saloons to close by nine p.m.43

Boyd’s ordinance provided:

1. That no person, firm, or corporation shall carry on the business of wholesale or retail dealer in cigarettes in the City of Greensboro without paying the tax on said business and obtaining a license therefor as herein provided.

2. That the tax per annum for the privilege of selling cigarettes in the city of Greensboro shall be two hundred dollars, and the tax for carrying on the business of wholesale dealer shall be five hundred dollars per annum, and under the head of wholesale dealer in cigarettes shall be classed all persons who sell cigarettes in the original manufacturing lots and packages whether such persons be located in the City or is [sic] a travelling salesman.

... 5. Any person or persons, firm or corporation who shall carry on within the City of Greensboro the business of dealer in cigarettes without the license provided for in this act shall for each and every sale made be guilty of a misdemeanor and on conviction shall pay a fine not exceeding fifty dollars or be imprisoned not exceeding thirty days in the discretion of the court.

6. That this ordinance shall be in force and take effect on and after February 1st 1894.44

After voting down 6 to 3 a motion to defer consideration of the ordinance to the next meeting, the aldermen adopted the ordinance by a vote of 7 to 2, Alderman H. W. Cobb (the Tobacco Trust’s local buyer) having been excused from voting.45

To contemporaries the ordinance was manifestly “framed for the express purpose of prohibiting the sale of cigarettes” in the city, which “stirred up a bitter war among tobacconists against the law.” On January 5, 1894, they held a mass meeting to discuss securing its repeal and appointed a committee to meet with the board.46 The Tobacco Association of Greensboro sought repeal on the grounds


that the ordinance “will injure the tobacco interests of this place.” Passage of the prohibitory ordinance, “[c]oming as it did, from the heart of the tobacco belt,...attained prominence all over the country,” in addition to provoking more comment in Greensboro than any other aldermanic measure in years. Even the weekly Greensboro Patriot, which emphatically opposed the action, conceded that “condemnation of the cigarette is almost universal,” and added that there was “no more potent evil in existence today....” It was even willing to admit that “not one dealer in a thousand will venture the assertion that they are not maliciously harmful both to old and young.” What motivated Boyd—who, as his federal judicial career would make unambiguously clear, held anachronistically pro-capitalist views—to attack the interests of the Tobacco Trust in a major tobacco market and tobacco manufacturing center remains unclear.

Repeal was not long in coming. The Greensboro Tobacco Association repeal petition was read to the board and supported by a large delegation of members at its meeting on January 12. Aldermen James D. Glenn, who had opposed the ordinance, offered a resolution calling for repeal on the grounds that the board had no authority to levy the tax. In addition, expressing the board’s desire that cigarette sales to minors be prohibited, the resolution also instructed the police chief to “use every effort to carry out the provisions” of the aforementioned 1891 no-sales-to-minors statute and to prosecute all violations “to the fullest extent....” In response, Alderman Boyd offered as a substitute resolution that consideration of the proposal be adjourned to the Board’s next meeting, at which “parties who desire may be heard pro and con....” Boyd’s substitute lost by a vote of 4 to 8, and the Board then voted to repeal the ordinance by another 8 to 4 vote.

Supposedly the aldermen repealed the ordinance on the formal procedural grounds that the ordinance had been brought before the board and passed at a called meeting without satisfying the charter’s due notice requirement and

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47. “Notes About Town,” News-Observer-Chronicle (Raleigh), Jan. 9, 1894 (4:1). This article was based on one in the Greensboro Daily Record, of which, apparently, no copy survives in any library for Dec. 1893-Jan. 1894.


50. Guilford County, City of Greensboro, Council Minutes, Vol. 2: 1893-1898 at 113-14, M. 249, 10001 (Jan. 12, 1894) (NCSA). Glenn was, according to the 1900 population census, a law agent for the Southern R.R. Most of the aldermen were, based on information in the census and Jas. Albright, Greensboro: 1808-1904: Facts, Figures, Traditions and Reminiscences 41, 84-102 (1904), merchants and manufacturers. One of the three aldermen who voted against repeal was a dentist (John W. Griffith).
North Carolina 1893-1905

without granting time for considering it. The Patriot identified the cause for repeal in “a revolution in the minds of some of the men who voted for the ordinance,” but who in the meantime “remembered that their obligations to the community and the state were paramount to private conviction and have had the courage to... openly admit that they were too hasty.”51 The more plausible reason for the repeal, however, can be found in the Patriot’s “doth-protest-too-much” denials of the Trust’s role:

As for the connection of the American Tobacco company with the repeal, it is only necessary to say that it cut no figure whatever. The company holds no mortgages on the lives of any of the board. It is a fact that that company’s buyer here, Mr. Cobb, is a member of the board, but there is not a man, woman or child in Greensboro who could be induced to believe that Mr. Cobb’s connection with the company has deprived him of any of the sterling integrity and principles which have always characterized his actions. He voted to repeal the ordinance not alone through sympathy for the American Tobacco company, but in the exercise of a function which has been vested in him and which is controlled by his better judgment.

...It was stated by some of the tobacconists that they feared the withdrawal of the company’s buyer from the market. Don’t give yourselves any uneasiness on that score, gentlemen. The American Tobacco company would continue to buy tobacco here if a tax of $200 was legally imposed. There is no danger of them leaving one of the best markets in the state on account of an insignificant retail tax, prohibitory or non-prohibitory. So long as the tobacco raisers bring their products to this market, just so long will they find the American Tobacco company represented here. Tobacco will not have to be hauled from here to Oshkosh to find a market.... Greensboro will continue to be a tobacco town as long as it is on the map.52

To be sure, even the Patriot was constrained to concede that others took strong exception to its appraisal of the Tobacco Trust’s disinterestedness. Reprinted in the adjoining column was a brief excerpt from the Salisbury Herald, which cited the Greensboro Record as having written of the repeal that “the American Tobacco Company made a kick and the back bone of the aldermen disappeared.” The Patriot lamented the “wrong impression” under which the Herald, “like a number of other good newspapers,” was laboring. As far as it was concerned, ATC “has not fractured any back bones and it is not likely to”53—speculation that seemed superfluous after the aldermen had repealed the

offending ordinance.

Finally, arguing in the alternative, the *Patriot* claimed that, even if implemented, the ordinance would have been feckless since several dealers had announced their intent to pay the tax: driving smaller dealers out would not have reduced the consumption of cigarettes, which “would be just as injurious if purchased from a man who pays [a] $200 a year license as one who pays $5.” The newspaper resisted the argument that concentration of the trade would improve police enforcement on the grounds that existing state law, which had “practically become a dead letter,” could also be enforced if an order to do so were simply issued.54

Half a year later the aldermen—Boyd had in the meantime become mayor—adopted by a 5 to 4 vote a much watered-down ordinance that imposed on cigarette retailers and wholesalers a $10 and $25 annual license, respectively; each violation was subject to a $10 fine.55

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**Populist-Republican Fusion in the State Legislature Fails to Overcome the Tobacco Trust**

Wherever there are great capitalists, the name of J. B. Duke is familiar.56

Whether local license fees or fines acted as deterrents is unknown, in part because all such local anti-cigarette initiatives were preempted in 1895 when the state legislature—controlled now, as a result of the 1894 election, by the Populist-Republican Fusionists57—for the first time, inserted into its biennial Revenue Act

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55. Guilford County, City of Greensboro, Council Minutes, Vol. 2: 1893-1898 at 184, M. 249. 10001 (July 13, 1894) (NCSA). Toward the end of 1894, a Judge Hoke in Greensboro held unconstitutional a special tax of $25 on wholesale dealers of cigarettes that the board of aldermen had imposed “some time ago.” The wholesale dealers had contested the tax on the grounds that they had already been paying a tax. “Cigarette Tax Unconstitutional,” *N&O*, Dec. 14, 1894 (1:4).


57. As the legislative session opened, the state’s leading newspaper published a “complete and accurate” list of members and their party affiliation stating that the Senate was composed of 25 Populists, 17 Republicans, and 8 Democrats and the House of 32 Populists, 42 Republicans, and 46 Democrats. “The General Assembly,” *N&O*, Jan. 6, 1895 (5:4-5). In contrast, another paper insisted that the “best calculations that can now be made indicate” that the Senate would be composed of 26 Populists, 15 Republicans, and
a tax on cigarette dealers in the amount of five cents per 1,000 cigarettes, but also
prohibited counties, cities, and towns from imposing any tax, license, or fee on
such dealers. Significantly, the section also contained a proviso that nothing in
it applied to manufacturers.58

The legislative history of this intervention is instructive. The bill originally
imposed a 10-cent tax59 but in the House—which earlier in the session had
amended its rules to prohibit smoking in the Hall60—an amendment was offered
by Republican R. P. Williams to reduce it to five cents as well as to add a proviso
that “nothing in this section shall be construed to apply to manufacturers of cigars
and cigarettes, and no county, city or town shall be allowed to impose any tax,
license, or other fee on such dealers.”61

In support of Williams’ amendment
Democrat (and merchant) James L. Nelson claimed that 10 cents was the
equivalent of a 2-percent tax on cigarettes, whereas that on cigars was only 0.1
percent. While admitting that the “provision as a prohibitory one might be

9 Democrats. In the House, it was “more difficult to tell exactly the comparative strength
of the Populists and Republicans. It is very hard to ascertain the names of the Fusion
candidates who have been elected in some of the counties, and even when this is done,
their politics is, in many instances, an unknown quantity.” It reckoned that there would be
33 Populists, 36 Republicans, 46 Democrats, and 1 Prohibitionist. “The General
Assembly,” FO Jan. 10, 1895 (4:2-3). Two months into the session, the same paper listed
members and party affiliations that added up to 17 Republicans, 25 Populists, and 8
Democrats in the Senate, and 39 Republicans, 36 Populists, and 45 Democrats in the
historian, the House had been elected 42 Populists, 35 Republicans, and 42 Democrats,
while the Senate was composed of 24 Populists, 18 Republicans, and 8 Democrats. James
Beeby, Revolt of the Tar Heels: The North Carolina Populist Movement, 1890-1901, at
81 (2008). In North Carolina “[f]usion’ suggests a more thorough cohesion than actually
took place; the arrangements are better thought of as trade agreements among competitors,
or wary truces by combatants against a common enemy.” Edward Ayers, The Promise of
the New South: Life After Reconstruction 291 (1993 [1992]).

58 1895 N.C. Sess. Laws ch. 116, § 20, at 113, 117. A tax was also imposed on dealers
in other kinds of tobacco. A dozen years later the legislature permitted cities and towns
(but not counties) to levy cigarette license or privilege taxes not to exceed $10 per year.

59 “The Revenue Act,” Landmark (Statesville), Mar. 21, 1895 (1:7).

60 Journal of the House of Representatives of the General Assembly of the State of

61 Journal of the House of Representatives of the General Assembly of the State of
North Carolina, at Its Session of 1895, at 816 (Mar. 6) (1895).
effective,” he argued that as a revenue tax it should be lowered, but it lost.\(^62\) That night, “[r]epresentatives of Winston’s Cigarette manufacturing firms left...for Raleigh to appear before the Legislature and enter their protest against the passage of the bill placing a tax of ten cents per thousand on cigarettes.”\(^63\) In the Senate, sitting as the Committee of the Whole, an amendment was offered to create a new section of the Revenue Act levying on manufacturers of plug and smoking tobacco a tax of 0.5 percent per pound, on cigars of 5 cents per 100, and on cigarettes of 10 cents per 1,000.\(^64\) But Senator James M. Mewborne, a Populist who was state president of the Farmers Alliance from 1893 to 1895,\(^65\) insisted that 10 cents was “too great a tax on cigarettes” because it was “unjust and would tend to drive enterprises from the State,” and the amendment was withdrawn.\(^66\) The next day, the amendment offered by Dr. A. J. Dalby—who had engaged in the manufacturing of tobacco right after the Civil War and was one of the organizers of the Populist Party in North Carolina\(^67\)—to reduce the cigarette tax on dealers from 10 to 5 cents per 1,000 was adopted by the Committee of the Whole.\(^68\) After the full Senate’s passage of the bill on third reading by a vote of 30 to 5,\(^69\) its return to the House prompted one of the chamber’s Democratic


\(^{63}\)“The Coffey Murder Trial,” \textit{Times} (Richmond), Mar. 7, 1895 (2:3).

\(^{64}\)“And This Is Reform,” \textit{N&O}, Mar. 9, 1895 (2:1-6 at 5:1).

\(^{65}\)Collins and Goodwin, \textit{Biographical Sketches of the Members of the General Assembly of North Carolina, 1895}, at 29 (1895) (spelling name “Mewboorne”). Mewborne was also a Disciples of Christ elder. Paul Harvey, \textit{Freedom’s Coming: Religious Culture and the Shaping of the South from the Civil War Through the Civil Rights Era} 51 (2005).

\(^{66}\)“And This Is Reform,” \textit{N&O}, Mar. 9, 1895 (2:1-6 at 5:1).

\(^{67}\)Collins and Goodwin, \textit{Biographical Sketches of the Members of the General Assembly of North Carolina, 1895}, at 12 (1895). Dalby had taken a course in medicine at the Medical College of Richmond, Virginia.


\(^{69}\)“Not Ready to Adjourn,” \textit{N&O}, Mar. 10, 1895 (2:1). Presumably one of the amendments that the Senate adopted restored (with some variations) Williams’ aforementioned amendment concerning non-applicability to manufacturers and prohibiting local governments from imposing license taxes, but unfortunately the North Carolina
leaders, lawyer J. Frank Ray, to “want[ ] to know who was benefited” by the Senate’s reduction of the cigarette tax from 10 to 5 cents and “why and at whose instance” that chamber had acted, but the Fusionists stonewalled, and the chamber ultimately concurred in the Senate amendments by a vote of 59 to 25. At the low rate set in 1895 (which amounted to less than one percent of the aforementioned profit margin), virtually no merchant in North Carolina would have sold the four million cigarettes a year (or 11,000 cigarettes a day) the profits on which would have been the equivalent of a $200 annual tax. And even at the 15 cents per 1,000 cigarettes at which the Fusionist legislature set the tax in 1897 and which the Democratic legislature retained in 1899, very few if any merchants would have sold the 3,652 cigarettes per day that would have equated to a $200 tax. Finally, when the legislature converted the tax to a $5 annual retail license in 1901, it became merely nominal.

One possible explanation for this accommodating stance is the deal that the head of the state Populist party, Marion Butler (who was also a high-profile national Populist leader and U.S. senator from 1895 to 1901), made in early 1895 with Benjamin N. Duke—the son of the founder of W. Duke, Sons & Co. managing director of the Durham branch of the American Tobacco Company, who was “said to be the largest individual tax-payer in the State.” To be sure,
North Carolina 1893-1905

as soon as the November 1894 election results had been tallied, Benjamin Duke wrote his brother James B. Duke at ATC headquarters in New York that North Carolina Republican Congressman Thomas Settle had told him that “if the Legislature had a majority of Republicans and Populists, as he now thinks they have, we would...be protected....”)76 Needing investors in order to finance an expansion of his Populist newspaper (The Caucasian), which Butler regarded as crucial for mobilizing support for and strengthening the party, in addition to recently elected members of his own party, he approached Republicans to subscribe to stock. The Dukes (and ATC) were not only Republicans,77 but deeply involved in staffing and running the party organization in Durham County78 as well as financing the state party’s election campaigns—a fact that the Democratic party press sarcastically and demagogically highlighted. In reporting, for example, that Washington Duke, the founder of the company that eventually became ATC, had contributed $10,000 to the state Republican campaign fund, one Democratic paper asserted that: “The Dukes have no use for [Populist] Mr. [Tom] Watson or the Democratic party. Both are opposed to trusts, of which the American Tobacco Company is one of the most gigantic. Ten thousand dollars is a small consideration compared with the large sums which the Tobacco Trust has taken from the tobacco raisers by reason of this combine against the product of their labor.”79 In 1898, the state’s leading Democratic and largest circulation newspaper, the Raleigh News and Observer, delighted in suggesting that the Durham County Republican Party and ATC were “one and the same,” headlining and subheading its article on the Durham County Republican convention: “A.T.C. Convention. The Tobacco Trust Selects Republican Delegates. ... B. L. Duke Served as Chairman and Employees of the American Tobacco Company Made

76B. N. Duke to J. B. Duke (Nov. 10, 1894), in BNDP, Box 65, RBMSCL. Settle, as leader of the Republican Party in North Carolina, one of the strongest in the South, had formed the fusion agreement with Butler. Edward Ayers, The Promise of the New South: Life After Reconstruction 290 (1993 [1992]).

77The Dukes, according to James Hunt, Marion Butler and American Populism 75 (2003), were attracted to the Republican Party “by its high tariff stand and conservative financial program.” To be sure, Washington Duke, the founder of the company and father of James B. and Benjamin N. Duke, had joined the Republican Party in 1868 long before he “succeeded in becoming the head of the greatest cigarette factory the sun shines on.” http://library.duke.edu/digitalcollections/rbmscl/dukew/inv/; “Durham, the Magic Queen of the Golden Belt,” N&O, Apr. 5, 1896 (9:1) (quote).


Delegates.\textsuperscript{80}

The quid pro quo for Duke’s channeling some of ATC’s monopoly profits to the Populist Caucasian\textsuperscript{81} was, in the words of Butler’s biographer, his desire for “a genial relationship between his business interests and those in power.”\textsuperscript{82} As the 1895 legislative session got underway,

Duke exercised some influence. His lobbyist, James E. Stagg, pressured legislators not to pass any labor bills, such as those which might limit hours or child labor. Although such bills had not been contemplated by the Populist platform, none were passed. Duke also wanted no new taxes. The evidence that Butler helped Duke on this issue is uncertain. The legislature did not raise tax rates on banks, which the Dukes owned. On the other hand, it enacted a graduated tax on the capital stock of corporations besides banks, railroads, and insurance companies. It is doubtful this bill could have passed without Butler’s knowledge or support. Duke also opposed a new antitrust law, and here Butler’s role is clearest. Duke...thought it made any partnership or corporation illegal and would “utterly destroy business.” In fact Duke believed the motivation for the bill was not antimonopoly reform but intercorporate warfare sponsored by rival tobacco magnate R. J. Reynolds.... Duke met with Butler about the problem.... Butler advised a quiet fight against the...bill, which never came to a vote.\textsuperscript{83}

\textsuperscript{80}\textit{A.T.C Convention,” N & O, July 26, 1898 (6:3) (reprinted from Durham Recorder).}

\textsuperscript{81}In April 1896, after Republicans and Populists’ failure to reach agreement had prompted Settle to conclude that “[e]lectoral fusion is [as] dead as Julius Caesar,” he urged Benjamin Duke not to “put any more money in the Caucasian” because its policy would become “more hostile to the Republican party than it has been.” Thomas Settle to B. N. Duke (Apr. 18, 1896), in BNDP, Box 7, RBMSCL.

\textsuperscript{82}James Hunt, \textit{Marion Butler and American Populism} 80 (2003).

\textsuperscript{83}James Hunt, \textit{Marion Butler and American Populism} 80 (2003). Stagg “impressed” on William Worth, a Populist leader and state treasurer, that Duke’s cotton mills were “working only eleven hours and not employing any children under 12 years of age,” and that no legislation was needed “inasmuch as the employees had not made any complaint and were well satisfied with their treatment....” In rebuttal of Worth’s argument that legislation was needed because some mills worked much longer hours, Stagg insisted that the labor market knew best: “in the course of time and through natural processes the mills...would have to come to what you [Benjamin Duke] and the majority were doing, as it would be necessary to hold their labor, and it would be better to reach the results in this way than by legislation, even the agitation of which is always damaging to a State.” J. E. Stagg to Ben [N. Duke] at 1-2 (Feb. 1, 1895), in BNDP, Box 5, RBMSCL. Duke, in other words, feared the possible consequences of opening the Pandora’s box of hours regulation
The especially insidious aspect of the relationship between Butler and Duke that suggested that the Populist upsurge might not augur strict state scrutiny of the Tobacco Trust and its cigarettes was not so much the outright bribery, but that the “maneuvers” with Duke represented the “most dramatic application” of “Butler’s efforts to advance a ‘cautious’ reform image...” Symptomatically, other Populist leaders agreed with the substance of at least some of Duke’s legislative desiderata. As a result, it was unclear whether Populist rhetoric during the 1894 campaign about ending industrialists’ power was sufficiently close to legislative implementation that Duke really had to devote resources to sparing ATC such reforms.

Such an account of Fusionists’ fecklessness during the 1895 session was consistent with the partisan Democratic editorial in the News and Observer attacking the legislature for having killed numerous (largely Democratic) antitrust bills:

There was perhaps never a Legislature more subservient to trusts and monopolists than was that which just adjourned. And the chief spokesman and defender of all forms of trust was [Populist] Senator Mewborne, the president of the State Farmers’ Alliance.

During the campaign two years ago Mr. D. H. Gill, the Populist clerk of court of Vance county, very intemperately and very wickedly said that he would like to head a company to march to Durham and hang every member of the American Tobacco Company. It has to be observed, however, that Mr. Gill has made no such statement since the Legislature met, and now, if he should organize his company to march anywhere, and it were composed of Fusionists, they would be marching under the banner of the trusts and not against them. ...

Early in the session...Mr Hileman, Chairman of the Finance Committee and the Populist leader on the floor of the House, said he was going to reduce taxation on the people and put it on the rich corporations and trusts, and to that end he would incorporate in the Revenue Act a tax of ten cents a thousand and a tax on other manufactured tobaccos. The bill with these taxes passed the House, but when it reached the Senate, [Populist] Mr. Mewborne, that great and distinguished champion of the “plebeians,”...protested against the heavy tax. ... He plead [sic] for the manufacturers almost with tears in his eyes. His plea was in great contrast to his campaign utterances, but his argument prevailed with his fellow Fusionists and the tax was reduced one-half.

When the bill came up in the House again for concurrence in the Senate amendment,
Mr. Hileman moved to concur. 86

Even more directly relevant to the present context than the cigarette tax measure was another bill that Stagg—whose father was Washington Duke’s nephew and who was married to Benjamin N. Duke and James B. Duke’s sister87—was also trying to kill. On January 28, in the Senate—whose rules prohibited smoking in the chamber during sessions88—Senator James Montraville Moody, a “leading Republican,”89 introduced S.B. No. 201, which was modestly “to be entitled an act to regulate the sale of cigarettes in the State of North Carolina,”90 but in reality was designed to prevent their sale.91 Section 1 made it unlawful for any firm or individual “directly or indirectly to keep for sale, offer for sale, barter or give away...the article manufactured from tobacco and paper, known and commonly called Cigarettes, either in package, singly, or in any other manner, whatever to dispose of the same.” Section 2 made it the duty of every solicitor, county or city attorney, on proper information that the act had been violated, to prosecute the offender, who, on conviction, was required to pay a fine ranging between $200 and $500 (and between $500 and $1,000 for subsequent offenses), or to be imprisoned, in the court’s discretion, or both.92

87. http://www.duke-family.org/ddt.htm; http://www.duke.edu/~kwillett/wedding/house.html (visited Mar. 25, 2010). At the 1900 Population Census Stagg was returned as a private secretary; in 1880 he was a telegraph operator. HeritageQuest.
90. A Bill to Be Entitled “An act to regulate the sale of cigarettes in the State of North Carolina,” in General Assembly, Session Records, Jan-Mar 1895, Senate Bill 201, Box 13 (copy furnished by NCSA); Journal of the Senate of the General Assembly of the State of North Carolina at Its Session of 1895, at 100 (Jan. 28) (1895). The only other prohibitory cigarette bill introduced at the 1895 session—to prevent the sale of cigarettes at Wake Forest College—was tabled. Journal of the Senate of the General Assembly of the State of North Carolina at Its Session of 1895, at 177, 523 (1895) (S.B. 393, Feb. 9 and Mar. 7). It was introduced by Populist Senator O. M. Sanders of Union County. “False, Says French,” N&O, Feb. 10, 1895 (2:1-4 at 3).
92. A Bill to Be Entitled “An act to regulate the sale of cigarettes in the State of North Carolina,” §§ 1-2, in General Assembly, Session Records, Jan-Mar 1895, Senate Bill 201, Box 13 (NCSA). Section 4 provided that the act “shall in no way interfere with or be in conflict with the Inter-State Commerce law....”
North Carolina 1893-1905

Moody (1858-1903) was a lawyer who had been elected mayor of his county seat in 1884 and to a state solicitorship in 1886 and had run unsuccessfully as the Republican candidate for lieutenant general in 1892 before being elected to the state senate in 1894. In his lobbying report to Benjamin Duke written on February 1, three days after Moody had filed the cigarette bill, Stagg—who was in his own right a “wealthy and prominent Durham citizen,” whom Benjamin Duke called “[m]y private secretary and confidential friend”—devoted considerable attention to Moody’s lack of commitment to his own bill on working hours in cotton factories, which the Senate Judiciary Committee had discussed and reported unfavorably on February 1: “You will note that Moody himself voted in the Committee to report his own bill unfavorably, and I am satisfied he will act in the same way towards the cigarette bill.... I was present at the Committee meeting this afternoon, and watched with deep interest Moody’s action in relation to his own bill, ‘The Employment of Labor,’ and I am clearly of the opinion that he stands ready to undo anything that anybody has requested him to do.” In order to take advantage of Moody’s chameleonalizing, Stagg related that: “Upon Col. [Alexander Boyd] Andrews’ return to-morrow, Miller will interest him in the cigarette bill matter and get him to see Moody, and further, to tell Moody not to consider it necessary to introduce every bill that is brought to him with a request. [in handwriting] This Private.” Stagg had read Moody

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93 Memorial Addressed on the Life and Character of James M. Moody (Late a Representative from North Carolina), Delivered in the House of Representatives and Senate 43, 53 (57th Cong., 2d Sess. 1903); W. C. Allen, Centennial of Haywood County and Its County Seat, Waynesville, N.C. 71-72 (1908). Moody died during his first term as a congressman.

94 From 1893 until 1895 Stagg was private secretary to his cousin Benjamin Duke of the American Tobacco Company fame. In 1895 Stagg became involved with the Durham and Southern Railway, serving as vice-president and general manager. Stagg’s other business activities in Durham included directorships of the Erwin Cotton Mill, the Pearl Cotton Mill, the Fidelity Bank, and the Union Station Company.” http://www.waymarking.com/waymarks/WM928 (visited Mar. 26, 2010). In light of Stagg’s familial position, the fact that W. W. Fuller, ATC’s in-house lawyer in New York City, addressed the company’s lobbyist in North Carolina as if he were an errand boy hints at Fuller’s power. E.g., W. W. Fuller to J. E. Stagg, Jan. 8, 1895, in BNDP, Box 5 (RBMSCL, Duke University).

95 Letter from B. N. Duke to Marion Butler (Feb. 14, 1895), in BNDP, Box 65 (Letterbook), RBMSCL, Duke University.

96 J. E. Stagg to Ben [N. Duke] at 2-3 (Feb. 1, 1895), in BNDP, Box 5, RBMSCL, Duke University. Unfortunately, Stagg did not identify who had made the request to Moody. Andrews was a leading railroad executive, on whose Southern Railway Co. letter
accurately: a month later, on behalf of the Senate Judiciary Committee, Moody unfavorably reported his own cigarette bill (“This bill is recommended to not pass”), which the full Senate then tabled.97

The Tobacco Trust may have handily gotten rid of the cigarette sales ban bill in 1895 by surreptitiously persuading its author to double-cross its requester by aborting it, but on January 11 of the 1897 legislative session, a radical bill (H.B. 52) was introduced in the House—which the Republicans and Populists controlled with 54 and 39 seats, respectively, against 26 Democrats and 1 Silverite98—titled, “An Act to prohibit the manufacture and sale of Cigarettes in North Carolina.” It read as follows:

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97S.B. 201 (handwritten and signed annotation in bill file). A Bill to Be Entitled “An act to regulate the sale of cigarettes in the State of North Carolina,” §§ 1-2, in General Assembly, Session Records, Jan-Mar 1895, Senate Bill 201, Box 13 (NCSA); Journal of the Senate of the General Assembly of the State of North Carolina at Its Session of 1895, at 475, 502 (Mar. 6) (1895). To judge by his position on a bill to regulate the sale of liquor, Moody was an anti-prohibitionist, who did “not believe sobriety could be secured by legislation. He believed that as long as the appetite of man was the same as it is now, man was going to drink. ... He said he was not a sentimentalist. He wanted only practical legislation. He said the question was a financial one as well as a social one, and that the revenue from the whiskey traffic to the city of Asheville was $21,000 a year, and that city could not afford to cut off this income.” “The Tablers Tied,” N&O, Feb. 20, 1895 (2:2-6 at 2).

98D. Mangum, Biographical Sketches of the Members of the Legislature of North Carolina, Session, 1897, at 12-14 (1897).
Republican Representative Thomas H. Sutton (1845-1913), a lawyer from Fayetteville representing Cumberland County, introduced H.B. 52, which was apparently identical to S.B. 996. Sutton may have revealed his direct motivation on the House floor for advocating a ban when “[h]e grew pathetic as he told of the death of his own son from cigarette smoking.” But interest in prohibiting cigarette sales and manufacture may have been part of a more extensive prohibitory agenda since he also presented to the House a petition for relief from whiskey, morphine, and other narcotics. H.B. 52 was initially referred to the Judiciary Committee (of which Sutton was a member), which recommended that it not pass. It was then transferred to the Health

Section, 1-That from and after the ratification of this Act, it shall be unlawful for any person, firm or corporation, to manufacture, sell or give away, any cigarettes of any kind or character whatsoever called, in any cover, whether paper or otherwise, or any thing as a substitute therefor, in any form, in the State of North Carolina, or for any person corporation or firm, to sell or give away the same, in this State, whether manufactured in this state or elsewhere.

Section, 2-That any person firm or corporation, who shall violate the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both in the discretion of the court.

Section, 3-That this act shall be in force from and after its ratification.


100 Sutton was a member of the legislature in 1889, 1891, and 1897. A Manual of North Carolina Issued by the North Carolina Historical Commission for the Use of the General Assembly Session 1913, at 579 (R. Connor ed. 1913). In 1900 the census of population returned Sutton as living with his wife, children and two black servants.

101 It is unclear who introduced S.B. 996 and when it was introduced because the bill is missing from the North Carolina State Archives. Earl Ijames, Archivist, N.C. Dept. of Cultural Resources, Office of Archives and History to Marc Linder (July 2006). On the preprinted bill sleeve, with lines for a House and a Senate bill, S.B. 996 was entered next to H.B. 52.


103 Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897, at 481 (1897) (Feb. 13). That Sutton was no reactionary is suggested by his motion to amend a bill (H.B. 141) to protect female clerks by requiring owners to furnish fans. Id. at 167 (Jan. 26).


105 The House Journal appears to lack this reference. Written by hand on the bill
Committee\textsuperscript{106} (of which Sutton was also a member).\textsuperscript{107} On February 5 the Health Committee chairman, Republican Dr. Abner Alexander, reported favorably on the bill “to prohibit the manufacture and sale of cigarettes in this State” as amended by the committee.\textsuperscript{108} The committee’s action, according to a handwritten notation on the bill sleeve signed by Alexander, was to: “Amend by striking out out [sic] the word Manufacture in second line and Report favorably.”\textsuperscript{109} In other words, though the Trust’s large in-state industrial capital investment was saved, the universal ban on in-state sales survived. The same day, Populist and farmer\textsuperscript{110} Young C. Morton, introduced a joint resolution “in regard to the sale of cigarettes,”\textsuperscript{111} which the Raleigh \textit{News and Observer} deemed the work of a “humorist”:

That it is expedient that some method be devised for the protection of the youth of our land against the blighting influence of the deadly cigarette and its trust.

Therefore the Judiciary committee of this House be instructed to prepare and present a bill establishing a general dispensary system for the State somewhat on the lines of the Waynesville Dispensary Act, though more intelligibly constructed, regulating the cigarette traffic and consumption imposing fines and penalties such penalties to the State [sic] such fines to Trinity College and absolutely prohibiting the sale of cigarettes to any male or female under two years old and the exposure of obscene pictures in cigarette packages.\textsuperscript{112}

\textsuperscript{106}The reason for this transfer, which also appears not to have been recorded in the Journal, is unclear. An undated notation of the transfer appears on the bill sleeve signed by the House Clerk.

\textsuperscript{107}\textit{Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897}, at 1232 (1897).

\textsuperscript{108}\textit{Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897}, at 333 (1897) (Feb. 5).

\textsuperscript{109}H.B. 52, Jan. 11, 1897 (typescript), in NCSA, General Assembly, Session Records, 1897 Box 1, Folder HB 26-53.

\textsuperscript{110}Twelfth Census of the United States, Schedule No. 1—Population, Series T623, Roll 1213, Page 132 (1900).

\textsuperscript{111}\textit{Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897}, at 341 (1897) (Feb. 5) (H.J. Res 698, by Young C. Morton, of Rockingham, Richmond County).

\textsuperscript{112}“For a Cigarette Dispensary,” \textit{N\&O}, Feb. 6, 1897 (1:3). The Waynesville Dispensary was an experiment in local government liquor monopoly begun in 1895.
A week later he introduced a bill “to regulate the sale of cigarettes in North Carolina,”113 but since no copy has been preserved at the North Carolina State Archives, its wording is unknown,114 though the press reported that it proposed to tax cigarettes at 15 cents a package115—presumably a prohibitory amount since the price of a package of 10 cigarettes generally was only five cents.116

On February 20, the House took up H.B. 52 by special order. A rather extensive report of the debate in the Democratic and virulently anti-black News and Observer117 has preserved an unusually detailed account of the substance of the partisans’ arguments. Sutton himself “spoke forcibly and with intense earnestness in support of the bill, and said the committee had stricken out the part forbidding the manufacture; that this was a compromise, the best that could be done....” Sutton went on to read aloud a letter from a doctor in Raleigh “showing the frightful effects of cigarette smoking and said this terrible vice cost the lives of 200 persons in North Carolina annually”; he cited another doctor who had told him about people whom cigarette smoking had “made insane....” He then offered the aforementioned personal remarks about his own son. Republican Spencer Blackburn, a lawyer, opposed to any prohibiting legislation, argued that the bill would hurt tobacco growers, while another Republican, post office worker Robert Hancock, offered an amendment to prohibit the manufacture of smoking tobacco and cigarette paper, thus in effect restoring Sutton’s original bill.118 Republican

113Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897, at 483 (1897) (Feb. 13) (H.B. 971, by Young C. Morton, of Rockingham, Richmond County).
114Earl Ijames, Archivist, N.C. Dept. of Cultural Resources, Office of Archives and History to Marc Linder (July 2006).
116While the legislature was in session in 1895, one Raleigh wholesale/retail grocer repeatedly advertised a close-out sale of 500 for 50 cents. E.g., N&O, Jan. 15, 1895 (8:5). Another store thoughtfully made a “specialty” of selling 20 cigarettes for five cents “for the benefit of the present Legislature.” “Legislature, Take Notice,” N&O, Jan. 12, 1895 (2:4). In the latter part of 1895 ATC sold a great many packages of 20 at five cents, purportedly “to meet the competition of other manufacturers....” “The Dukes Behind on Orders,” N&O, Oct. 6, 1895 (6:2).
lawyer Virgil Lusk of Asheville—U.S. Attorney for the Western District of North Carolina in the 1870s and mayor of Asheville in 1880s, Lusk had antagonized Stagg and Duke in 1895 by introducing an hours bill identical to Moody’s—then offered the crucial diluting transformation in the form of a substitute for the bill which converted the latter into a no-sales-to-minors measure. Edgar Eddins, a teacher and Democrat, after revealing that “the cigarette interest had a lobby here working against this bill,” voiced support for Sutton’s original bill, “earnestly” conceptualizing the question in a manner that would still be valid a century later: “which are worth more to the State—her boys or her cigarette manufacturers?” Sutton then called the previous question, bringing Lusk’s substitute up for a vote. Numerous members explained their votes. Democrat A. Duffy would vote No because he “did not believe the State had a right to enact such a law.” Another Democrat, T. Parker, said that “the ineffective pleadings of his wife to their son to stop the use of cigarettes moved him” to vote Yes. Populist J. Randolph was greeted with applause when he declared that as a tobacco raiser he was “willing and desirous” to vote Yes, just as he would support a ban on the sale of opium and whiskey. Republican J. McCrary confessed that the fact that smoking cigarettes had “nearly ruined him” prompted his Yes vote. Democrat Walter Murphy and Populist C. Johnson opposed the bill “as interfering with manufacturers and the farming interests.” The watered down Sutton-Lusk bill then passed its second reading by a vote of 48 to 34.

In proceeding immediately to the third and final reading, representatives again shed light on their reasons for voting. The owner of a “large and successful mercantile business,” Democrat John Cunningham, “in opposing the bill, said that while he favored the protection of the youth and also opposed trusts, yet he could not favor prohibiting legislation or strike of [sic; should be at?] the

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120 J. E. Stagg to Ben [N. Duke] at 2-3 (Feb. 1, 1895), in BNDP, Box 5, RBMSCL.
manufacturing or farming interests.” Hancock, who switched his vote from Yes to No, regarded the bill as “a strike at one of the most important industries of North Carolina.” Lusk insisted that prohibiting the manufacturer or anyone else from selling to minors was not a strike at manufacture. Republican J. Bryan, who switched his vote from No to Yes, reported that a nine-year-old girl in his county had died from cigarette smoking: with cigarette use filling up the insane asylums, the interests of humanity required this evil to be stopped. Democrat A. Walters explained parents’ requests as causing him to vote No. McCrary took the floor again to proclaim that “all the christian people of the State would endorse” passage of a bill that would put an end to the beclouding of boys’ minds and belittling of their bodies. Populist Dr. J. Person bluntly charged that “any manufacturing interest whose existence depended upon the making of idiots should go out of existence.”

After this “considerable discussion” and “quite a wrangle,” Sutton’s amended bill passed its third reading by a vote of 66 to 28. The votes revealed a remarkable pattern. On second reading a significant majority of Republicans (23 to 16) voted against the bill, whereas Populists (18 to 4) and Democrats (13 to 7) voted strongly in favor. A similar configuration marked the third reading: lopsided majorities among Populists (23 to 4) and Democrats (18 to 4), but only a slim majority among Republicans (24 to 20). To be sure, it might be argued that the vote was not an accurate reflection of anti-cigarette sentiment because some Republican No-votes may have represented a protest against the dilution of the original bill, while, conversely, some Democrats may have voted Yes in order to insure the defeat of that more radical bill. However, without gainsaying the validity of the latter claim, the fact that Sutton and Eddins both voted Yes twice, while Blackburn, the principled opponent, twice voted No, suggests that a rift

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125 “Fellow Servant Law,” N&O, Feb. 21, 1897 (6:1-5 at 3). Curiously, Cunningham then switched his vote from No to Yes from the second to third reading.


127 “The Legislature,” Landmark (Statesville), Feb. 23, 1897 (2:3-4 at 4).


129 On third reading, all three blacks in the House, Republicans William Crews, John Howe, and James Young, voted for the bill; on the second reading, Young had voted against, while Howe had not voted. On the identification of the black members, see Helen Edmonds, The Negro and Fusion Politics in North Carolina, 1894-1901, at 59, 65 n.64 (1951).

130 Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897, at 658-60 (1897) (Feb. 20). The one Silverite voted Yes both times.
ran through the Republican party between cigarette prohibitionists and tobacco industry advocates.

The substitute read as follows:

Section 1 That after the ratification of this act, it shall be unlawful for any one to sell, or give to any minor any cigarettes; and it shall be unlawful for any minor to use or smoke cigarettes; and any minor found so smoking cigarettes shall be a competent witness to prove from whom he received such cigarettes, and the evidence so given shall not be used against such minor in any prosecution against such minor for violation of this act.131

The bill then made it a misdemeanor to sell or give cigarettes to a minor or for a minor to smoke, the punishment being a maximum $10 fine or 30-day imprisonment.132 Why the House decided to downgrade the general anti-cigarette sales bill into a merely somewhat stronger version of the six-year-old no-sales-to-minors law and why Sutton acquiesced in this transformation are unclear.

The next day the bill was sent to the Senate133—which the Populists (25) and Republicans (18) controlled against 7 Democrats134—where it was referred to the Judiciary Committee, which reported it together with its pair, S.B. 996, unfavorably a few days later.135 Already on January 14, Republican lawyer George H. Smathers introduced S.B. 75 to amend the aforementioned 1891 no-sales-to-minors act by expanding the prohibition to encompass chewing tobacco and all tobacco in any form.136 Following an unfavorable report by the Judiciary Committee,137 the Senate took up the bill on January 23. Republican Senator W. T. McCarthy made what was perhaps a unique race- and class-based contribution

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131 H.B. 52, §2 (undated), in NCSA, General Assembly, Session Records, 1897 Box 1, Folder HB 26-53. The State Archives has two handwritten versions one of which appears to be a draft. An almost identical version appeared in “The Legislature,” Landmark (Statesville), Feb. 23, 1897 (2:3-4 at 4).

132 H.B. 52, § 2 (undated), in NCSA, General Assembly, Session Records, 1897 Box 1, Folder HB 26-53.


134 D. Mangum, Biographical Sketches of the Members of the Legislature of North Carolina, Session, 1897, at 11-12 (1897).


to state legislative debates on tobacco control by urging that “colored boys in Eastern Northern Carolina could by using tobacco do without dinner, and tobacco had become a necessity.” In response to a question from another Republican senator as to whether he thought the law could be enforced, Smathers conceded that “[n]o such laws could be fully enforced,” but insisted that it would do good and was a step in the right direction. The colleague appeared unpersuaded, informing the Senate that “people sent their children to stores with baskets of eggs to be swapped off for snuff and tobacco, and the bill would work a hardship to [sic] them.” Populist Senator Abram Moye’s interjection that passing a law that could not be enforced did harm in its own right prompted Smathers to express his willingness to strike out chewing tobacco from the bill. After a motion to table the bill had lost by a vote of 22 to 15, Democrat J. Frank Ray, who had seen little boys on the street smoking cigarettes, offered a substitute repealing the 1891 statute on the grounds that it had not, so far as he knew, been enforced. Smathers replied that it had been enforced in Durham, adding that the trouble was that boys did not buy cigarettes, but, rather, smoking tobacco and made their own, but Ray correctly pointed out that the existing law already prohibited the sale of tobacco from which cigarettes could be made. Having painted himself into a legal corner, Smathers had recourse instead to pseudo-science, recounting that he “knew of many boys who had lost their minds by smoking cigarettes.” After Moye had moved to amend by striking out snuff, chewing tobacco, and cigars, the Senate referred the bill, substitute, and amendment to the Judiciary Committee, which once again reported the bill unfavorably. On the motion of its sponsor, Smathers, the Senate then tabled S.B. 75.139

In the meantime, on February 1 yet another bill was introduced in the Senate, by request, to prohibit the sale of cigarettes; at the same time the same senator also introduced by request a bill to prohibit the manufacture and sale of liquor.140 This anti-cigarette bill soon received an unfavorable committee report;141 likewise, the Senate voted to table H.B. 52/S. B. 996 on March 6,142 thus ending

139Journal of the Senate of the General Assembly of the State of North Carolina at Its Session of 1897, at 324 (1897) (Feb. 15).
141Journal of the Senate of the General Assembly of the State of North Carolina at Its Session of 1897, at 302 (1897) (Feb. 13); S.B. 293 also received an unfavorable report. Id. at 299.
142Journal of the Senate of the General Assembly of the State of North Carolina at Its
the first major initiative to prohibit cigarettes deep in the heart of Duke-land.

This setback in no way stilled the fury with which many in North Carolina reacted to the Tobacco Trust. An editorial in the Democratic Reidsville Weekly—a paper published in a town of whose economy tobacco was the mainstay and whose history was tightly interwoven with ATC’s—several months after the defeat of H.B. 52 revealed the depth of the loathing and abomination generated by the Trust and its cigarettes even and especially on their home ground:

In all the history of the trusts there has never been such a greedy, grasping, conscienceless combination as the American Tobacco Company. Its greed is insatiable. As a rule trusts are formed to prey upon the consumer, and if the Duke combination raised the price of cigarettes it would not be an unmixed evil, since the consumption of the deadly poison would be lessened and many of its victims might get a new hold on life as a result of their inability to buy cigarettes. The Duke trust differs from all others in not being content to rob the consumer, but in reaching out after the producer of its raw material. ... If the Dukes thought the sallow, sickly, half-dead smokers would use as many cigarettes at a higher price, they would not hesitate to raise it.

The Duke combination surpasses all others in hypocrisy. Its members make great pretensions to piety while sending thousands of boys to premature graves and robbing the farmers of the fruits of their labor. [W]ho, unless it be those who are feeding out of their hands, can have any respect for the sniveling hypocrites and driveling cowards who employ shrewd lawyers to draw up plans by which they may steal without getting in the penitentiary, and seek to quiet the public conscience by throwing a bone occasionally to churches, colleges, hospitals, etc.? With regard to those feeding out of the hands of the Tobacco Trust, Walter Clark, a very unorthodox justice (and future longtime chief justice) of the North Carolina Supreme Court who was also a trustee of the college in question, stated in 1898 that “in spite of a resolution of the [Methodist] Western North Carolina Conference in 1897, which conference is a half owner of Trinity [College, predecessor to Duke University], condemning the manufacture, sale and use of cigarettes, the college is a partner in the cigarette business, having $130,000 (more than one half of its endowment) of the stock of the cigarette trust.”

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144 “The Cigarette Trust the Worst of All,” Reidsville Weekly (reprinted in Landmark (Statesville), July 6, 1897 (4:2)).
145 “Judge Clark’s Side of It,” CO (reprinted in Landmark (Statesville), Sept. 6, 1898 (2:5)). See also “Judge Clark’s Speech,” N&O, Sept. 4, 1898 (1:5-6, 10:1-6); “A Modest
Ironically, several months later, “The Cigarettes Won” at the Methodist Conference when Trinity’s president, John Kilgo, a philosophy professor, announced that $100,000 of the college’s endowment, “which had been in cigarette stock, had been changed into ‘clean cash’ (that was an expressive term by Dr. Kilgo and many thought it might mean that cigarette stock was not clean).” In addition, the Methodist Conference reversed the previous year’s resolution denouncing cigarettes, which had “never pleased the Dukes who thought it was aimed at them.” In spite of a warning that such a reversal “would put the Conference in the attitude of being bought off by large donations, thus shutting the mouths of the Methodist ministry,” the Conference voted 65 to 62 against the resolution, prompting one minister to proclaim: “This Conference...goes on record in favor of cigarettes.”

It is unclear what role, if any, the Woman’s Christian Temperance Union played in the legislative campaign to ban cigarettes. North Carolina was one of the last states in which a WCTU state organization was established (1883); its membership did not begin to grow rapidly until 1896, reaching 1,500 by 1898. An out-of-state newspaper reported that “the ‘white-ribboners’ of North Carolina can designate as ‘our bill’” the no-sales-to-minors measure that passed the House, but otherwise little evidence demonstrates an important or any role for the WCTU in lobbying for a general anti-cigarette law. To judge by the reports presented at its annual conventions, the organization was focused exclusively on legislation limited to young people. At its fourteenth annual convention in June 1896, the plan of work report of the WCTU of North Carolina recommended that the local groups “endeavor to strengthen public sentiment as regards the enforcement of the [existing no-sales-to-minors] cigarette law, using every means in their power to protect the youth of the land from the pernicious habit of cigarette smoking. As one means of accomplishing this object, we suggest that effort be made to organize ‘Cigarette Clubs’ in schools, thereby pledging the boys themselves to abstain from the ruinous habit.”

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148 “Maids and Matrons,” MJ, Mar. 17, 1897 (5:2-3 at 3). The article erroneously stated that the bill had passed the senate rather than the house.
later, after the legislature had adjourned without having enacted any anti-cigarette bill, the state WCTU failed even to mention the battle over Sutton’s bill. In addition to a repetition of the aforementioned plan of work recommendation,\textsuperscript{150} the convention heard a president’s address that did not even allude to that legislative struggle, but merely stressed that “children must be preempted for total abstinence by sedulously observing that our Scientific Temperance and Cigarette Laws are enforced....”\textsuperscript{151} Most importantly, the two and a half page report on legislation, while conceding that the work had been a “failure” (in part because it “was not attended to as it should have been” by the WCTU), did not even allude to the cigarette bill among the welter of other failed bills favored by the WCTU on such subjects as a reformatory, liquor, and prostitution.\textsuperscript{152} At the convention of 1898—in between regular legislative sessions—the plan of work report modified its exhortation slightly to recommend that local groups “arouse the public conscience...to the necessity of strenuous enforcement of the state law forbidding the sale or gift of cigarettes to boys under 17....”\textsuperscript{153} Instead of recommending innovative legislation, President Mary Cartland merely mentioned that 42 states had already prohibited sales to minors. After declaring that “through the deadly narcotic found” in it, the cigarette was “[n]ot second to strong drinks itself,” she disseminated misinformation by asserting that “every other branch of the great tobacco business” was overshadowed by the “‘coffin nails,’” 750,000,000 of which were made annually (when in fact output was about six times greater).\textsuperscript{154} In her presidential address in 1899—a year in which no legislative struggle over cigarette regulation took place—Cartland at least corrected her factual gaffe (while committing another one) and attacked the Tobacco Trust:

The tobacco habit is fastening itself upon the youth of to-day with fearful rapidity. The love of lucre blinds the eye and destroys the sensibility of right in both manufacturer

\textsuperscript{150}Minutes of the Fifteenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina 27 (1897).

\textsuperscript{151}Minutes of the Fifteenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina 34 (1897).

\textsuperscript{152}Minutes of the Fifteenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina 83, 84 (1897).

\textsuperscript{153}Minutes of the Sixteenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina 23 (1898).

\textsuperscript{154}Minutes of the Sixteenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina 37 (1898).
and salesman so that our youth are being sacrificed to this greed with a recklessness that makes one shudder.

Every device of which human ingenuity is capable seems to be enlisted for this purpose. The cigarette has held sway till scientists and educators have added their protest to that of the mothers and the cigarette is looked upon with disfavor by the public. To counteract this influence and evade the laws, the manufacturers have placed upon the market the tobacco with prepared paper that each youth may make his own cigarettes, also gumbacco, a preparation of chewing gum and tobacco, but all should know that the most deadly poison in the entire product is the nicotine. One pound of tobacco contains enough poison to kill three hundred men if taken in a way to secure its full effects. When we consider that nearly all of cigarettes, at least one-half of the cigars and a large share of the smoking and chewing tobacco are consumed by young men, we can begin to realize something of the extent of this devastating evil. The government figures of 1898 show 5,041,896,410 cigarettes manufactured in the previous year, five times as many as there were five years ago.\(^{155}\)

Rather than urging more far-reaching legislation, Cartland merely expressed her belief that the time was “approaching when Christian people will regard with abhorrence this wastful [sic] and injurious habit.”\(^{156}\)

Precisely because the Republican-Populist Fusionists were able to enact “an impressive reform program” while they held a majority in the legislature, the capitalist class as represented by railroads, manufacturers, and bankers channeled considerable funds to the Democrats to help secure control of the next legislature. The Fusionists also contributed to their own defeat by permitting disagreements between their parties’ national programs to split them as well as by capitulating to some extent to Democrats’ white supremacist politics;\(^{157}\) the Populists’ attitude in particular was fundamentally anti-black.\(^{158}\) The Democrats’ electoral victory

\(^{155}\)Minutes of the Seventeenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina 35 (1899). In fact, the increase from 1892 to 1897 was only 50 percent.

\(^{156}\)Minutes of the Seventeenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina 35 (1899).


\(^{158}\)Helen Edmonds, The Negro and Fusion Politics in North Carolina, 1894-1901, at 136, 143 (1951). The Populist State Platform adopted on Apr. 18, 1900 expressly stated that the “People’s Party is and has always been more distinctly than any other party in North Carolina a white man’s party” and proposed that the North Carolina constitution be amended to disqualify from officeholding “All negroes and all persons of negro descent to the third generation inclusive.” The News and Observer, The North Carolina Year Book: 1901, at 62, 63 (n.d.).
in 1898, powerfully reinforced by the white pogrom perpetrated in black-majority Wilmington two days after that election, the restrictive suffrage legislation that they passed in 1899, and the disenfranchisement of blacks effectuated by constitutional amendment in 1900 enabled the Democratic party to give the "capitalistic elements the bridle by which to check progressive legislation. ... Manufacturing, big business, and the railroad interests were safely in the saddle...."

Yet, in spite of the recapture of the legislature by the party led by capitalist forces, the anti-cigarette movement undertook one more major initiative to enact a prohibitory law in 1901, when Democrats controlled both houses by huge majorities: in the Senate 39 Democrats stood against 8 Republicans and 3 Populists, while in the House, 101 Democrats faced only 17 Republicans and 2 Populists. In the event, the advocates and opponents of cigarette control, as far as the legislative journals and press accounts of the debates reveal, came exclusively from the ranks of the Democrats.

This time the bill (S.B. 91) was introduced in the Senate—which was operating under the rule that "No smoking shall be allowed within the Senate Chamber during the sessions"—on January 16, by Joseph Addison Brown, who was chairman of the Committee on Propositions and Grievances to which it was referred. Although he self-described at the Census of Population of 1900 as a "lumberman" living in the small south central town of Chadbourn, Brown was returned at the 1900 population census as the 38-year-old "Hon. J. A.
Brown’s business undertakings were more extensive in scope: “Strawberry culture began in Chadbourn in 1895 when Joseph Addison Brown, merchant farmer, and North Carolina State Senator, bought and/or developed thousands of acres of timber lands of the Chadbourn area for productive farm lands.”

Between 1895 and 1905 “Chadbourn was the biggest strawberry market in the world.” After a lack of railway cars in 1905 caused the destruction of that year’s crop, farmers’ enthusiasm for the crop declined somewhat, and by the end of World War I tobacco became Columbus county’s leading crop.

Brown (1862-1937), a Democrat—indeed, the chairman of his Democratic county committee—who served numerous terms in the North Carolina Senate between 1893 and the 1920s, was a member of the national executive committee of the Southern Cotton Association and, interestingly, during the Depression of the early 1930s “crusaded for the cause of the tobacco farmer and was a member of the tobacco advisory board of the southern tobacco growing states at the time of his death.” The only apparent biographical links to his anti-cigarette initiative are
that Brown “was and ardent prohibitionist all his life”\textsuperscript{173} and that he taught Presbyterian church Sunday school to “two generations of young men.”\textsuperscript{174}

As introduced, Brown’s bill, which, according to the \textit{News and Observer}, “caused a smile over the Senate,”\textsuperscript{175} read as follows:

Section 1. That it shall be a misdemeanor for any person, firm or corporation, to sell, offer to sell, or bring into the State for the purpose of selling, giving away or otherwise disposing of any cigarettes, cigarette paper or substitute for the same; and a violation of this Act shall be punishable by a fine or imprisonment or both, at the discretion of the Court.

Section 2. That this Act shall be in force from and after its ratification July 1st 1901.\textsuperscript{176}

Apart from the spelling of “cigarette,” the first clause was almost word for word identical with the statute enacted by the Tennessee legislature in 1897, upheld by the Tennessee and United States Supreme Court in 1898 and 1900, respectively, and reenacted by the Tennessee legislature a few days after he introduced his bill.\textsuperscript{177} Of special interest is that like the Tennessee law (but unlike Iowa’s), North Carolina’s did not ban cigarette manufacture, which was a central capital investment location for the Tobacco Trust. Two days after Brown had introduced it, his committee unanimously reported it with a favorable recommendation that it do pass.\textsuperscript{178} Brown himself expressed confidence that it would pass the Senate.\textsuperscript{179} The next day, the \textit{News and Observer} reprinted a piece from a magazine published by a North Carolina Baptist Children’s Home.

\textsuperscript{173}“Joseph A. Brown Called to Reward,” \textit{Columbus County News}, July 1, 1937 (1:1-2 at 2).

\textsuperscript{174} “Joseph A. Brown Political Leader Died on Senator,” \textit{News Reporter} (Whiteville, NC), July 1, 1937 (1:8, at 6:5-6).

\textsuperscript{175}“Revision of Corporation Laws,” \textit{N&O}, Jan. 17, 1901 (1:1).

\textsuperscript{176} NCSA, General Assembly, Session Records, Jan.-Mar. 1901, Box # 12, Folder Senate Bills 83-99. In the original typescript a line in ink is run through the words “its ratification” and the words “July 1st 1901” inserted by hand in ink (apparently in Brown’s handwriting). The bill file also includes a handwritten copy (apparently not in Brown’s handwriting) identical to the typescript except for the spelling “cigarette.”

\textsuperscript{177}See above ch. 5. The Tennessee law included only a maximum $50 fine. It was therefore inaccurate to call the bill a “copy” of the Tennessee law. “Anti-Cigarette Bill,” \textit{N&O}, Jan. 18, 1901 (reprinted in \textit{Landmark} (Statesville), Jan. 22, 1901 (1:5)).

\textsuperscript{178} \textit{Journal of the Senate of the General Assembly of the State of North Carolina: Session 1901}, at 62 (Jan. 18); S.B. 91, bill sleeve, NCSA, General Assembly, Session Records, Jan.-Mar. 1901, Box # 12, Folder Senate Bills 83-99.

\textsuperscript{179}“Against Cigarettes,” \textit{N&O}, Jan. 18, 1901 (1:2).
organization taking a radical populist position (which also deviated from the WCTU’s in anathematizing cigarettes more than liquor):

We would rejoice with exceeding great joy if the Legislature would pass a law prohibiting the manufacture and sale of cigarettes in the State. It is too much to hope that such a law will be enacted. The business is so entrenched in North Carolina it will take a mighty, united effort to uproot it. But it can be done. True[,] the breaking up of the business would mean the loss of vast capital and the removal of some of our wealthiest citizens; but better this than the untimely death of a thousand boys. We have no doubt in the world that the evil effects of the cigarette habit are more to be dreaded and deplored than those which follow the drinking of liquor. And yet how softly we speak of the former, and how we berate and abuse the latter. Whiskey drinking is disreputable (as it deserves to be) and decent public sentiment is arrayed solidly against it; cigarette smoking is quite popular, and a young gent suffers no loss of social favor though he blow smoke through his nose in the finest parlor. It is high time we call a spade a spade. The pale face of many a bright boy tells the tale of the work of the monster that we have nourished in our bosom. Some day when the sacrifice is great enough our people will lift their voices against this deadly enemy as the voice of one man. But the hour has not yet come.

Brown’s optimism very soon turned out to be misplaced, because the bill, which was scheduled to come up in the Senate as a special order on second reading on January 23, instead was (re-)referred to the Judiciary Committee. The previous day, even before the debate had been called, the *Landmark*, portraying a situation eerily reminiscent of tobacco oligopoly lobbying a century later, editorially waxed pessimistic, predicting some dodging. We hope the measure will become a law but we do not expect it to. The cigarette trust, with its millions, will fight it, as will also the independent cigarette manufacturers in this State; and the beneficiaries of the cigarette trust—the representatives of the colleges, schools, churches, etc., who have received money from the Dukes and Geo. W. Watts—these will be in line against it. The anti cigarette law will have a hard road to travel.

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180“The Cigarette,” *Charity and Children* (reprinted in *N & O*), Jan. 19, 1901 (4:3) (also reprinted in *Landmark* (Statesville), Jan. 25, 1901 (1:3)).


183*Landmark* (Statesville), Jan. 22, 1901 (2:3) (untitled edit.). Watts was on the ATC
On February 10, the Chicago Tribune, in a lengthy survey of pending anti-cigarette legislation in most if not all states, wrote of North Carolina: “There is considerable opposition to any bill prohibiting the sale of cigarettes absolutely. Some of this comes from the cigaret factories, of which there are two in this State, the argument being that a great industry will be broken up and many persons thrown out of employment.” Although it was self-explanatory that the Tobacco Trust would try to prevent passage of the bill on the general grounds that it would diminish sales, since the bill did not deal with manufacturing at all and the vast bulk of the factories’ output was exported to other states for sale—North Carolina and Virginia, as the New York Sun remarked in 1896, “make cigarettes for consumption elsewhere, not for home use,” whereas “New York state enjoys the distinction not only of making but of smoking more cigarettes than any other state”—the self-interested assertion that such a law would break up the industry was preposterous.

Doubtless grasping which way the political wind was blowing, on Feb. 11 Brown introduced a second bill (S.B. 638), this time merely “to regulate the sale of cigarettes....” The new bill was also referred to the committee he chaired, which two days later favorably recommended it. In watering down his own bill, Brown, replicating the fate of H.B. 52 in 1897, converted it into a no-

board of directors.

184“States Declare War on Cigaret,” CT, Feb. 10, 1901 (7:1-4 at 3).
185“Cigarettes by the Million,” New York Sun (reprinted in Syracuse Daily Standard, Mar. 12, 1896 (5:6-7)).
186Journal of the Senate of the General Assembly of the State of North Carolina: Session 1901, at 312 (Feb. 11). According to the file stamp on the bill sleeve it passed the first reading and was referred to the committee on Feb. 21. S.B. 638, NCSA, General Assembly, Session Records, Jan.-Mar. 1901, Box # 14, Folder Senate Bills 612-658. S.B. 638 was paired with H.B. 1491, which was introduced on Feb. 21 without a named introducer. Journal of the House of Representatives of the General Assembly of the State of North Carolina: Session 1901, at 643 (Feb. 13). The bill was significant enough that the News and Observer printed a drawing of Brown next to the full text of the bill. “Judges Will Get No Additional Pay,” N&O, Feb. 12, 1901 (3:1-2).
188It is unclear whether the letter writer who less than two weeks earlier had defended the anti-cigarette bill against an attack that it was merely “a rout of a small (?) evil while the greatest evil to all men and of all times—the whiskey curse—goes unthought of” would have agreed that the no-sales-to-minors bill was more than “poor comfort” when he could not “get a whole loaf” on the grounds that: “Because the government cannot, at one full
sales-to-minors bill, the principal section of which read as follows: “That it shall be unlawful for any person, firm or corporation to sell, offer to sell, give, buy for or offer to buy for any person or persons under the age of twenty one years in this state, any cigaretts, cigarett paper, or any substitute therefor.” The penalty remained as in S.B. 91. \(^{189}\) The same day that the committee reported the bill, the News and Observer, in an article that it reprinted from the New York World—but which sounded as though it had ultimately derived from the aforementioned Chicago Tribune article—incorrectly claimed that 11 states had already enacted prohibitions on the sale of cigarettes; in fact only one of them (Iowa) had. \(^{190}\) The Landmark, predicting that the new bill would probably pass, observed rather obscurely that: “The objections raised to the first bill were such as to affect manufacturing industries indirectly—not the so called ‘trusts’ which it is said it would reach, but the smaller home factories incorporated in this State.” The remark might have made some sense if the paper meant that the Tobacco Trust would not be directly affected because it sold the vast bulk of the cigarettes manufactured in its North Carolina factories in other states. The Landmark made it clear that Brown had not diluted his original bill enough to satisfy some critics, who opined that 18 or 19 should be the age limit rather than 21, “as most young men nowadays are thrown on their own resources and are their own masters before they reach the age of twenty-one.” \(^{191}\)

The Senate devoted a considerable amount of time to the second reading of S.B. 638 on February 16, discussing numerous amendments, and ultimately breaking off debate before it reached the third reading three days later. \(^{192}\) Four amendments (three of which manifestly were designed to weaken the bill and/or to make it unpassable) lost: to lower the maximum age from 21 to 17; to add cigars, tobacco, and coca-cola to the sales prohibition; and to require any party instituting an indictment under the law to be adjudged to pay the costs if the indictee was acquitted. \(^{193}\) Also defeated was an amendment to give the officer

\(^{189}\) S.B. 638, §§ 1 (quote) and 2, NCSA, General Assembly, Session Records, Jan.-Mar. 1901, Box # 14, Folder Senate Bills 612-658 (handwritten).

\(^{190}\) “War on Cigarettes,” N&O, Feb. 13, 1901 (4:3).

\(^{191}\) “Legislative Summary,” Landmark (Statesville), Feb. 15, 1901 (1:4).

\(^{192}\) “Legislative Summary,” Landmark (Statesville), Feb. 19, 1901 (2:2).

\(^{193}\) Journal of the Senate of the General Assembly of the State of North Carolina: Session 1901, at 377 (Feb. 16) (motions by Democrats John E. Woodard, George L. Morton, and James M. Gudger, Jr., respectively).
making an arrest under the law a $10 fee upon conviction.\textsuperscript{194} The Senate did adopt an amendment, taken verbatim from a pre-existing provision in the North Carolina Code giving parents, guardians, and employers the right to sue for damages resulting from the sale of liquor to minors:\textsuperscript{195} “the father or, if he be dead, the mother, guardian or employer of any minor, to whom a sale or gift shall be made in violation of this act, shall have a right of action in a civil suit against the person or persons so offending by such sale or gift, and upon proof of such sale or gift, shall recover from such party or parties so offending such exemplary damages as a jury may assess: Provided, that such assessment shall not be less than twenty-five dollars.”\textsuperscript{196} Also adopted was an amendment requiring each cigarette dealer to pay an annual state tax of at least 20 dollars to go to the school fund and to be collected by the sheriff like the tax on cigar dealers under the state act to raise revenue. With these strengthening amendments S.B. 638 passed its second reading.\textsuperscript{197}

Fortunately, as in 1897, the detailed report of the floor debate that the News and Observer published under the title, “‘Coffin Tacks’ Hammered Hard,” makes it possible to gain a sense of the range of arguments that partisans deployed. Senator Brown himself emphasized that his bill was a “compromise,” with which he was not satisfied; although he had not insisted on his original general prohibitory bill, Democrat John Woodard’s amendment to lower the minimum age from 21 to 17 would “virtually kill” the measure. In turn, Woodard, professing an opposition to cigarettes, nevertheless argued that the existing no-sales-to-minors law sufficed.\textsuperscript{198} Understating the peak initiation age by about five years even a century later,\textsuperscript{199} he declared that: “If a boy at seventeen has not

\textsuperscript{194}Journal of the Senate of the General Assembly of the State of North Carolina: Session 1901, at 377 (Feb. 16) (motion by Democrat Sydenham B. Alexander).

\textsuperscript{195}North Carolina Code § 1078 at 435-36 (1883).

\textsuperscript{196}Journal of the Senate of the General Assembly of the State of North Carolina: Session 1901, at 377 (Feb. 16) (motion by Democrat Hallett Sydney Ward). A typo in the text in the Journal has been corrected pursuant to the text of Ward’s amendment in S.B. 638, NCSA, General Assembly, Session Records, Jan.-Mar. 1901, Box # 14, Folder Senate Bills 612-658.


\textsuperscript{198}‘Coffin Tacks’ Hammered Hard,” N&O, Feb. 17, 1901 (sect. 2, 1:3).

\textsuperscript{199}Among persons aged 30 to 39 in 1991 who had ever smoked daily, 89.0 percent had first tried a cigarette by age 18, 91.3 percent by age 20, and 98.4 percent by age 25; the corresponding figures for the age at which they had begun smoking daily were 71.2, 77.0, and 94.8 percent, respectively. U.S. Department of Health and Human Services,
begun the use of tobacco [sic] he is not likely to.” He then self-contradictorily contended that he was opposed to laws that “try vainly to legislate morals into [sic] the people”: the 1891 “amply strong statute” was a “dead letter,” under which he was unaware that any indictment had ever been brought. Both he and Democrats Ward and Burroughs ascribed whatever legitimacy minors laws possessed to their intent to help parents protect their own children.200

Speaking again, Senator Brown remarked that he had consented to depart from his initial stringent bill “because he believed that that a tax of $10 would be placed on all cigarette dealers and that would put the business in the hands of a few merchants in each town so the traffic could be easily controlled by the authorities.”

Democratic Senator Sydenham Alexander defended his proposed amendment giving $10 to the arresting officer on the grounds that the current law had not been, and the proposed law would not be, enforced without “such an inducement.....” Democrat James Madison Gudger, Jr. accused the chamber of trying to legislate morality and doing so backwards: the “great companies” were allowed to manufacture cigarettes, and the dealers to sell them, but boys were not permitted to make their own or to compete with the manufacturers. Though against all use of tobacco in any form, he opposed Alexander’s proposal because it “would put a premium on spies and accomplish only mischief.”201

Democrat George Morton of Wilmington defended his amendment to prohibit all tobacco and coca-cola, too, on the libertarian grounds that “if the Legislature was going to legislate morals let’s include everything harmful. Co-cacola [sic] was said to contain a powerful narcotic which fastens its hold on victims. If legislation of this kind is in order, then let the Senate appoint a special committee to decide everything that is injurious to the people and include them all in a general prohibition bill.”202 His fellow Democrat, Needham Broughton of Raleigh—a prominent figure in religious circles and editor of a Baptist paper who had unsuccessfully run against the highest-profile black Republican House member in a judicially contested election in 1896203—regretted Morton’s attitude, confessing that: “I cannot understand how any one [sic] can fail to feel a personal interest in a bill to check the destruction now being wrought by


cigarettes: so-called ‘coffin tacks.’ I come in contact with many boys daily and the injurious effect of cigarettes is apparent from a moral and physical standpoint.” Broughton then added an unusual proletarian-class dimension to turn-of-the-century anti-cigarette rhetoric: “The powerful influence is particularly evident among those who work in factories because of their sedentary lives. You can tell the victims by their sunken eyes, haggard looks, broken constitution, weakened lungs, stained fingers and almost stained souls. This bill should be adopted and I only wish it that it was stronger than it is.”

On February 19 the Senate resumed debate on the bill now on its third reading. The chamber voted 23 to 17 to eliminate the tax amendment against Democratic Senator M. H. Justice’s motion to strike all the amendments and to leave the bill as it came from committee. The bill then passed its third reading. Once again, the News and Observer’s extensive coverage of the debate offered additional insight into the public rhetoric anchoring the protagonists’ positions. Senator Brown reiterated that he had “preferred an ironclad prohibitory bill but since that was objected to he resorted to” this no-sales-to-minors bill. The $20 dealer tax inserted during the second reading provoked considerable debate. Senator George Morton opposed it on the grounds that such exorbitant taxation would be “absolutely prohibitory to the small dealers,” whereas “[t]he Democratic idea of taxation for revenue only was his motto.” In contrast, Democrat I. W. Miller regarded the tax as “one of the best and most effective features of the bill, since it would put the dealing in cigarettes in the hands of responsible parties who could be made amenable to the laws and damages recovered for violation of the law.” A leading Democrat, Cameron Morrison, tried to distinguish between the constitutional outright prohibition of and unconstitutional use of the taxing power in order to destroy a business. In any event, he claimed that: “There is certainly very little money to be made in selling the cigarettes and this $20 tax will absolutely prohibit the sale of cigarettes anywhere in North Carolina, except possibly in the largest cities....” Senator Woodard, who insisted that “grown men...had a right to choose for themselves,” agreed that the $20 tax would absolutely prohibit sales in most places: “If a dealer sells 1,000 cigarettes a month for a year his profits will be just $15. Not many

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207“No Cigarettes in Minor’s Mouth,” N&O, Feb. 20, 1901 (6:2). Miller had introduced such a bill at the previous session. Id. No such bill was identified in the index to the 1899 Senate Journal.
small stores sell more than 1,000 a month yet this tax is...more than a year’s profits.” His analysis of the economic impact of an attack on the cigarette industry curiously omitted any reference to the predominant profit-appropriator, the Tobacco Trust: “The tobacco used in cigarettes is now raised in almost 85 [of 97] counties of the State and has brought prosperity and success to the farmers in many sections. The farmers are the ones who are benefitted by the sale of tobacco and not the small dealer, the farmers get the profits and it would be wrong to strike such a blow upon this great industry in which North Carolina is so vitally interested.” Senator Ward replied that withholding cigarettes from boys would not injure the production of tobacco, but if in fact the sale of the raw material had “to be curtailed in order to save the boys then let it be done.” In the same spirit he defended adoption of parents’ right of action from the liquor law: “A parent should have an action against a man who put a cigarette in his son’s mouth as much as if direct physical harm was done the boy.”

After passing the Senate, the bill was sent to the House, which never took it up, thus killing it together with many other bills that the Senate had passed. In the meantime, moreover, the Senate Judiciary Committee had recommended that Brown’s S.B. 91 not pass, which on February 23 the Senate voted to table. The Tobacco Trust thus prevailed in its home state. The Dukes’ victory may, however, have stopped short of total. The legislature did enact a statute to raise revenue, which included an annual tax on cigarette manufacturers (topping out at $1,000 for those whose output exceeded 500 million) and a five dollar annual license tax on cigarette retailers, which preempted any local taxation. Brown and his allies must have found some solace in the announcement that as of July 1 “the merchants” of at least one city, Mooresville in the Piedmont, “have discarded their stock of cigarettes and now that nefarious little stinker is not sold in town. All on account of the special tax imposed by the last Legislature.”

2131901 N.C. Sess. Laws ch. 9, § 81 at 116, 146. To be sure, the factory tax was minuscule in relation to the Trust’s business.
214“Cigarettes Not Sold in Mooresville,” Mooresville Enterprise (reprinted in Landmark (Statesville), July 12, 1901 (5:5).
Apparently unaware of the big picture as well as of the details of the legislature’s activities, in her 1901 North Carolina WCTU presidential address following the session Cartland erroneously asserted that “the Anti-Cigarette Law was strengthened.” The report that the convention heard from the legislation department omitted any mention of cigarette legislation.

The fact that the legislature would not even strengthen the no-sales-to-minors law—the existing law, according to the *Landmark*, was not “worth a row of pins. The law is ignored, the small boy gets all the cigarettes he wants and nobody is prosecuted”—let alone enact a general ban on sales hardly put the quietus on anti-cigarette or anti-Tobacco Trust sentiment in North Carolina. The next year the Baptist Children’s Home was still berating the product, the producer, and the charitable entities that welcomed the filthy lucre:

Notwithstanding a good deal of cigarette money has gone into North Carolina education institutions, and a good deal more may go to the same institutions provided they behave themselves, the destructive work of these boy destroyers...gathers momentum with each passing day. It is appalling to see the evil that this pernicious habit is doing all about us. And yet we are strangely silent and the cigarette makers are eulogized and praised as benefactors of mankind because, forsooth, they shed a little of the money they have made from the blood of our boys, upon a college or two. Why are they a whit better than the saloon-keeper? Why are they so good? ... The manufacture and sale of cigarettes is the most deadly evil of the day. And if every dollar of the countless millions the traffic has made were turned into channels of benevolence it would be none the less an evil and a curse.

At the 1903 legislative session yet another bill was introduced by a Democrat to prohibit the sale of cigarettes; its mere introduction was
sufficiently newsworthy to gain a sub-head on the front page of the News and Observer’s article on the day’s proceedings in the House.221 It quickly won the approval of the House Health Committee, but then expired without any further action.222 The Landmark, while supporting passage, pessimistically predicted defeat, at least in part because apparently “Church people” were not lobbying for it.223

At its 1904 annual meeting the North Carolina WCTU in its brief resolution devoted to tobacco failed to go beyond urging enforcement of the no-sales-to-minors law.224 When yet another cigarette sales prohibition bill was introduced in 1905, the Landmark, while interested in seeing how much encouragement it would get, was resigned to the fact that charitable organizations that should have been working on its behalf, had been bought off by the Tobacco Trust:

The evil results of cigarette-smoking is [sic] generally admitted. But men who have made millions out of the sales of cigarettes, and who have depressed the price of leaf tobacco grown by the farmers and destroyed other men’s business to gain ascendancy in the tobacco trade—some of these men have contributed liberally to schools, churches, hospitals, theological seminaries and orphan asylums. Therefore reformers who are after other admitted evils are as silent as the tomb when cigarettes are mentioned: and Senator Turner’s bill will fail.225

Archives. For Kinsland’s party affiliation, see The North Carolina Year Book and Business Directory: 1903; at 15 (n.d.).

221“The Inheritance Tax is Adopted,” N&O, Feb. 24, 1903 (1:7). The sub-head read “To Prohibit Cigarettes,” while the minuscule reference in the body of the article both misspelled Kinsland’s name and incorrectly reported that the bill prohibited the sale (only) of cigarette paper.


223Landmark (Statesville), Feb. 27, 1903 (2:2) (untitled edit.).


In the area of buying off potential charitable opponents, too, Philip Morris thus had a worthy predecessor in the American Tobacco Company.  

Remarkably, however, the legislature in 1905 did pass a law making it unlawful for “any person, firm or corporation to sell or exchange any cigarettes or cigarette tobacco within the city limits of Wingate in Union County” subject to a fine of up to $50 and maximum imprisonment of 30 days.  

A month earlier the legislature, in amending in various ways the charter of the town, which the legislature had incorporated in 1901, had inserted “or cigarettes or cigarette tobacco” at the end of the pre-existing charter provision making it unlawful to “manufacture, sell or give away, or dispose of in any way, directly or indirectly, any vinous, spirituous or malt liquors, wine or cider, or intoxicating drink of any kind....” Presumably the motivating force behind this prohibition of cigarette selling in Wingate was the Union White Baptist Association, under whose auspices the legislature in 1897 incorporated a school (at a time when “there was no public school in the community”) within three miles of which it was unlawful to “manufacture, sell, give or dispose of” any intoxicating liquors, and

\[226\] See, e.g., Morton Mintz, Allies: The ACLU and the Tobacco Industry (July 1993), Bates No. 2023914331


\[228\] 1901 N.C. Priv. Laws ch. 55, at 110.  H.B. No. 617, which was introduced by Representative C. N. Simpson of Union county, passed its second and third readings in the House 76 to 0 and 69 to 0, respectively.  Journal of the House of Representatives of the General Assembly of the State of North Carolina: Session 1905, at 362-63, 378-79 (1905) (Feb. 4 and 6).  In the Senate the bill (S.B. 571) passed its second and third reading 34 to 0 and 32 to 0, respectively.  Journal of the Senate of the General Assembly of the State of North Carolina: Session 1905, at 322, 344 (1905).

\[229\] 1905 N.C. Priv. Laws ch. 84 at 254.

\[230\] 1901 N.C. Priv. Laws ch. 55, § 8, at 111.

\[231\] Speculation is unavoidable since even the local county seat weekly newspaper, Monroe Journal, published nothing on the legislation in February-March 1905.  Email from Patricia Poland, local history librarian, Union County Public Library (Sept. 13, 2006) (who read the microfilm copy of the paper, which was not available for interlibrary loan, but reported that the issue for Feb. 14 was lacking).


\[233\] 1897 N.C. Priv. Laws ch. 31, §§ 1, 12, at 51, 52-53.  On the Union Baptist Association’s drive in 1905 for total statewide abolition of this “‘monster evil,’” which was
whose control of the town generally was dominating. The anti-cigarette law may have been primarily designed to deny Wingate School students access to cigarettes. Perhaps the fact that tobacco production in Union County had peaked in 1870, plummeted to 120 pounds harvested on one single acre by 1890, and then became “nearly non-existent” for several decades might explain why it was politically feasible for the Baptists to ban the sale of cigarettes without unduly antagonizing local agricultural interests. Neither the town charter provision nor the statute was apparently ever directly repealed by the legislature, though Wingate residents with memories extending back to the 1930s can also not recall their ever having been enforced. And according to the

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“more destructive of human life than the three great curses of war, pestilence and famine,” see Charles Black, J. Bivens, and M. Preslar, *History of the Brown Creek Union Baptist Association, 1854-1918*, at 184-85 (1953 [1919]).

234 Telephone interview with Patricia Poland, Local History Librarian, Union County Public Library, Monroe, NC (Sept. 8, 2006).


237 *Public-Local and Private Laws Index: North Carolina* [Vol. 1:] 1900-1945, at 548 (1946); *Public-Local and Private Laws Index: North Carolina*, Vol. 2: 1947-1967, at 533 (1971). Kim Hibbard of the North Carolina League of Municipalities speculated that “the town attorney might have advised that the provision was unenforceable at some point. ... A lot of our small towns have old charters that have never been revised and updated by subsequent act of the General Assembly. General statutes enacted over time (particularly in the 1960s and 1970s) superseded many of the provisions in those charters, particularly those dealing with finance, taxation, elections, alcoholic beverages, courts, and the powers of local governments. Towns that have never had a modern charter revision are faced with a document that is mostly obsolete. It would not surprise me if a town assumed that everything in its old charter was obsolete. For what it’s worth, the copy of the Wingate code of ordinances that we have in our library includes the town charter in the front. Both of the 1905 acts are set forth.” Email from Kim Hibbard (Sept. 13, 2006).

238 Walter Perry of Wingate, whose father owned a general store, personally saw many thousands of cigarettes sold there since the 1930s and sold many himself from the 1940s on subject to no enforcement. As a member of the town council in the 1940s he recalls that what he called an ordinance was still on the books but never enforced. Telephone interview with Walter Perry, Wingate (Sept. 13, 2006). Jerry Surratt, who a member of the town council from 1985 to 1995 recalled a “humorous discussion of Wingate’s cigarette ordinance—with the conclusion that it had probably never been repealed—and probably never enforced at all.” Email from Jerry Surratt (Sept. 13, 2006).
current Wingate town administrator: “To my knowledge, the Town has never enforced this provision in its charter. Honestly, I’m not even sure where one would search to see if this was enforced early on. As you can imagine, a small, fledgling town in the early 1900s did not keep very good records of its activities.”\textsuperscript{239}
Florida: The Last of the Nineteenth-Century Cigarette Sales Bans Is Judicially Invalidated After 18 Days in 1899

It is intimated by a friend at our elbow that Frank Clark will soon introduce a bill in the lower house of the general assembly by regulating the rise and ebb of the tides in the St. Johns river.—Sunday Call.

Yes, and it will do just about as much good as his cigarette bill, his high hat bill (for theatre only), his press-gag bill, and others, and so forth and so on. One thing, it won’t create as much trouble and expense to put it in operation and keep it enforced.¹

The fight is on between the legislature and the tobacco trust....²

The cigarette [during the last third of the nineteenth century] was an unknown smoke in the backwoods, just about half of the men smoked pipes and nearly all chewed tobacco. About 1890 the writer remembers that Old Virginia cheroots at three for a nickel were favorites for men, who on special occasions smoked cigars. Snuff-dipping was almost, but not quite, as universal among women as tobacco chewing among men.³

The life span of the cigarette sales ban law that the Florida legislature passed in 1899 was so brief that its very existence has eluded other researchers.⁴ (Indeed, the five-page overview of the year’s anti-cigarette initiatives that the WCTU’s national anti-narcotics superintendent presented to the annual meeting later that year did not even mention the Florida act.)⁵ That session of the legislature was also distinguished, thanks to “registration, poll tax, eight-box, and secret ballot laws [that] simply exterminated the opposition” of Republicans and Populists,⁶ the first in the South in which both the Senate and House were

¹Chipley Banner, Apr. 29, 1899 (2:1) (untitled edit.).
²“Trust Will Fight Clark’s Bad Bill,” Morning Tribune (Tampa), Aug. 20, 1899 (1:5); Weekly Tribune (Tampa), Aug. 24, 1899 (1:2).
⁵Report of the National Woman’s Christian Temperance Union: Twenty-Sixth Annual Meeting...1899, at 231-35 (1899).
⁶J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the

Prior to the 1899 legislative session Florida, whose WCTU membership numbered 464, had, in 1891, made it unlawful for any store-keeper, saloon-keeper, merchant, or anyone else to sell, buy for, give to, or in any way dispose of to anyone under 18 years old cigarettes, smokettes, or cigarette paper. Those convicted of violating the law were subject to a maximum of 30 days in county jail or a maximum fine of $100, one-half of which was given to law enforcement officials, whose duty it was to secure a warrant and arrest violators. On April 14, 1899, one week after Representative Frank Clark had “bobbed up with his famous anti-cigarette bill,”10 House Bill No. 17, “an act to prohibit the manufacture, importation, sale or gift of cigarettes or cigarette paper in the State of Florida and to provide penalties for its violation,” which was referred to the Public Health Committee,11 was unanimously passed by the full chamber by a vote of 50 to 0.12

Clark (1860-1936)13 represented the northeastern coastal county of Duval (county seat: Jacksonville), more than 56 percent of whose population was black.14 In 1898 Clark “was elected to the Legislature..., having accepted this commission largely for the purpose of aiding in the election of James P.

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2Report National Woman’s Christian Temperance Union: Twenty-Fourth Annual Meeting 182 (1897). Though small, this number was, in relation to the states’ populations, five times larger than neighboring Georgia’s 397.

31891 Florida Laws ch. 4024 [No. 15], at 54. On the somewhat less comprehensive amended version, see 1903 Florida Laws ch. 5149 (No. 44), at 86.

10“Pelot’s Peculiar Policy,” TMT, Apr. 8, 1899 (1:6).


Taliaferro to the United States Senate, placing his name in nomination and rejoicing in his election."^{15} Taliaferro, a wealthy and conservative Bourbon Democrat,^{16} was one of the leaders of the “corporation” faction of the state Democratic Party, with whom and with which “more conservative element” Clark was “[m]ore or less close...”^{17} An Alabama-born lawyer who had been a city attorney in the mid-1880s before serving his first two terms in the Florida House of Representatives (1889-91), Clark became U.S. attorney for the Southern District of Florida (1893-97) and then returned to private practice. Immediately after his third term in the state legislature he became chairman of the State Democratic Executive Committee, a position he gave up when, in the wake of the 1901 conflagration in Jacksonville, he temporarily moved to Oklahoma, where he became a city council member in Shawnee; on his return to Florida he launched himself into a 20-year incumbency (1905-25) in Congress. Following his unsuccessful candidacy for renomination, he practiced law in Miami, was appointed by President Coolidge as a Democrat to the U.S. Tariff Commission (1928-30), and ended his career as a lawyer for the Bureau of Internal Revenue (1933-36).^{18}

In his second term, Clark began voicing his white supremacist views on the House floor. In the context of his opposition to U.S. domination of the Philippines, which he feared might lead to its incorporation into the United States, he fired off this racist barrage in 1907:

Have gentlemen no pride of race? Are you willing to admit that the African, the Mongolian, and the Asiatic is your equal? Are you willing to assimilate with these people? With no pride of your race and with no love of your past, do you intend to attempt the alteration of the eternal decree of God Almighty in his placing the seal of superiority upon the white man? [Applause on the Democratic side.] If you do so intend, and you should be successful in carrying out your policy, what would you accomplish? You would only

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^{17}William Cash, History of the Democratic Party in Florida 96 (1936).
succeed in dragging the white man down to the level of the African, the Mongolian, and the Asiatic, and the future citizen of these United States would be a mongrel, not entitled to the respect of decent people anywhere.

I have no-patience, Mr. Speaker, with that class of my race who, for the enjoyment of a “little brief authority” secured by pandering to the whims of a few addle-brained fanatics and the impossible demands of inferior races, would consign their posterity to a status which the Creator never intended them to occupy. Two totally distinct races of people, the one the superior of the other, never have and never will live together under one government upon terms of perfect equality, either political or social.

Mr. Lincoln, I believe, said that “the Republic can not exist half slave and half free.” Neither can the Republic exist with one half of its citizenship composed of the proud Caucasian race and the other half composed of the African, Mongolian, and Asiatic races under laws seeking to compel absolute political or social equality. ... In order for this Republic to exist and go onward to the goal of its high destiny among the peoples of the earth the bars must be put up and none allowed to come. to us from other lands to make their homes with us in this God-favored land, except those of the white race who can assimilate with us, thus giving us a homogenous population and insuring the preservation of the integrity of our civilization. ...

We have one race question already to solve, Mr. Speaker, and why will certain politicians insist on giving us another? Why not let us work out a just and proper solution of the one which is now with us, and which has challenged the best thought of our wisest statesmen for more than fifty years, before we fly to the Far East in search of another one? So far as I am concerned, I know that I have nothing but the kindliest feeling for the brown man of the Philippines and the black man of continental America; I know that my people wish them no harm, and would elevate rather than degrade them. ... We have done everything in our power to ameliorate their condition, except to sacrifice the integrity of our race by receiving them as our social equals, and, we might as well be plain, this we shall never do so long as the world shall stand. There is no power under the sun that can make us do that, because the time will never come when we, our children, and our children’s children, down to the latest generation, and to the time when the angel Gabriel shall announce to a listening world that time shall be no more, would not prefer death and complete extermination, rather than amalgamation with this inferior people. [Applause.]

Exactly one year later Clark was, once again, expansively extolling white supremacy, this time in connection with his support of an segregationist amendment to a streetcar extension bill for Washington, D.C.:

If God Almighty had intended these two races to be equal, He would have so created them. He made the Caucasian of handsome figure, straight hair, regular features, high brow, and superior intellect. He created the negro, giving him a black skin, kinky hair, thick lips, flat nose, low brow, low order of intelligence, and repulsive features. I do not

19CR 41:3653, 3654 (Feb. 22, 1907).
believe that these differences were the result of either accident or mistake on the part of the Creator. I believe He knew what He was doing, and I believe He did just what He wanted to do.

We believe in God, and we are willing to accept His work just as it fell from His hands. But these people who profess to believe that “a white man may be as good as a negro if the white man behaves himself” are not satisfied with God’s work in this regard. They are quite sure that they can make a better job of it than did the Creator, hence we find them attempting to remove the black man from the menial sphere for which he was created, and where he may be useful, to a higher circle, for which he is entirely unfitted and where he is perfectly useless.\(^{20}\)

A week later Clark may have reached the height of his notoriety as a congressman in a *Chicago Tribune* headline referring to his zealous constituent service for the Florida turpentine industry in opposing federal investigation of its labor practices: “Peonage Has a New Defender.”\(^{21}\) This position may, in part, have been an instantiation of his states rights belief that “if the dreams of Socialism and other ‘isms’ were carried into effect, State lines would be blotted out, and the Republic itself destroyed.”\(^{22}\) As a congressman he proposed the following “solution of the negro problem”: “There are three methods...amalgamation, annihilation, or deportation. We won’t have amalgamation. We don’t want annihilation, and we are left to properly get rid of the whole colored problem by deportation.”\(^{23}\) Still on a racist roll in 1913, Clark introduced a bill “to prohibit the intermarriage of persons of the white and negro races within the District of Columbia, to declare such contracts of marriage null and void, to prescribe punishments for violations and attempts to violate its provisions,”\(^{24}\) which deemed “any person having one-eighth of negro blood” to be “negro” and punished violators by a fine of $1,000 to $5,000, imprisonment of one to five years, or both. Unable to conceive that any member of Congress could possibly object to the bill and mystified by why Congress had not enacted such a ban much earlier, Clark insisted that the “legislation [is] in the interest of

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\(^{23}\)William Cash, *History of the Democratic Party in Florida* 157 (1936) (stating that “Clark used substantially the following language”).

\(^{24}\)CR 50:86 (Apr. 13, 1913) (H.R. 1710).
both of the races involved. If the negro has a future in the economy of the Universe, he ought to have it as a member of a distinctive race and not as a mongrel. So far as the white race is concerned, I believe the future of the world is dependent upon the preservation of its integrity.  In 1913, asserting that Japan was seeking to colonize the United States with hundreds of thousands of Japanese for the ultimate purpose of war, and declaring that “the negro problem had already taxed the energies of the state to the utmost” and that “we are in no frame of mind to have another race problem injected into our economic system,” Clark demanded that the governor of Florida call an extraordinary session of the legislature to enact a law that “will forever prohibit the Japanese and other like races from becoming landowners in the State of Florida.” Five years later he also adopted a high-profile position in opposing the constitutional amendment establishing women’s suffrage. Clark the “conservative congressman” may have been a prohibitionist at the turn of the century, but by the 1930s he was a congressional lobbyist for American growers of Sumatra tobacco and, in the wake of the repeal of the Eighteenth Amendment, president of a national liquor dealers association.

By the time Clark introduced the cigarette sales ban bill he was already much talked about for “champion[ing] some unique measures” during the session such as prohibiting any circus from having more than one ring and theater-goers from wearing high hats. He incurred the special enmity of the press for his bill making it a felony to publish anonymous communications. Overall, then, Clark deviated from the pattern in most states in which the prominent advocates

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26 “Says Japan Wants War,” LAT, Oct. 15, 1913 (1:3).
27 “Says Japs Want War,” LAT, Oct. 15, 1913 (1:3).
29 “Suffrage Wins,” CT, Jan. 11, 1918 (1).
30 On Clark’s voting record in support of restrictions on alcoholic beverages during the 1899 session, see Tom Cox, “Congressman Frank Clark of Florida” at 14 (ms., n.d. [1989?]) (copy furnished by Manatee County Public Library). In 1907 he supported a push by local dry leaders “for total prohibition” of alcohol in Jacksonville. James Crooks, Jacksonville After the Fire, 1901-1919: A New South City 115 (1991).
33 Chipley Banner, Apr. 8, 1899 (2:1) (untitled). Many state legislatures considered high-hat bills in the 1890s; see above ch. 6 and “High-Hat Legislation,” NYT, Apr. 20, 1897 (4).
34 Chipley Banner, Apr. 22, 1899 (2:1) (untitled edit.).
cigarette sales bans generally represented progressive political positions.\textsuperscript{35}

Despite unanimity in the House, the bill’s progress through the Senate was considerably more tortuous. By April 21 the Judiciary Committee recommended that H. B. No. 17 not pass.\textsuperscript{36} On second reading three days later, after a motion by Senator W. Hunt Harris, a wealthy\textsuperscript{37} lawyer from Key West and one of the leaders of the Democratic Party’s “conservative faction,”\textsuperscript{38} who had previously been a cigar maker and later became Senate president (1907-1909),\textsuperscript{39} to table the bill indefinitely was tabled and then withdrawn,\textsuperscript{40} a series of weakening amendments was offered by 36-year-old Charles A. Carson, a grocer\textsuperscript{41} who had also supported Taliaferro for senator,\textsuperscript{42} headed several “important business enterprises,” and was also an ordained Baptist deacon who later was president of the Florida Baptist Convention for five years.\textsuperscript{43} His purpose was to make “less objectionable” the House’s “ironclad” bill, which also prohibited the importation and gift of cigarettes, by “trimming the prohibitory features down to manufacture and sale.”\textsuperscript{44} First, the prohibitions in the first section on importation and gifts of cigarettes were struck. Then the Senate agreed to strike the offense of “[giv][ing] away or attempt[ing] to give away” cigarettes in the penalty section. The only

\textsuperscript{35}The tentative and speculative assessment, based in large part on bills he introduced dealing with criminal procedure and making women eligible to be appointed notaries public, that “Clark’s early career in the Florida House of Representatives seemed to reveal a progressive, populist trend” suffered from a failure to analyze the bills’ substance or to embed them in the legislative landscape in order to compare them with other similar proposals. Tom Cox, “Congressman Frank Clark of Florida” at 13-14, [2] (ms., n.d. [1989?]) (copy furnished by Manatee County Public Library). The author, who was also unaware that Clark’s anti-cigarette bill had passed the Senate and gone into effect, shed no light on Clark’s motivations for introducing it. \textit{Id.} at 13.


\textsuperscript{39}Alex Caemmerer, \textit{The House of Key West} 70 (1992).

\textsuperscript{40}\textit{Senate Journal: A Journal of the Proceedings of the Senate of the Regular Session of the Legislature of the State of Florida} 295 (Apr. 24) (1899). Harris withdrew his amendment because, under House rules, it would not have cut off the introduction of amendments or debate. “To Smoke or Not to Smoke,” \textit{FTUC}, Apr. 25, 1899 (1:1).

\textsuperscript{41}1900 Census of Population (HeritageQuest).

\textsuperscript{42}“Fun Begins!” \textit{TMT}, Apr. 19, 1899 (1:3).

\textsuperscript{43}\textit{Baptist Biography} 2:49-51(B. Graham ed. 1920).

\textsuperscript{44}“To Smoke or Not to Smoke,” \textit{FTUC}, Apr. 25, 1899 (1:1).
proposed weakening amendment (also offered by Harris) that the chamber rejected would have eliminated the prohibition of the manufacture of cigarettes. Rather than justifying depriving adults of cigarettes for the sake of keeping them away from minors, other senators briefly remarked on the injury that cigarette smoking inflicted on young boys’ nerves and constitutions and the shock that parents experienced on discovering their offspring’s use of cigarettes. Also rejected, by a vote of 1 to 23, was a killer amendment (by Harris) to ban as well “spirituous, vinous or malt liquors,” which prompted “[a]ll the dignified Senators” to laugh while Harris “plunged into a temperance discourse to make the most inveterate drinker pause in his mad and downward career and think of reform.” Much of the Senate debate focused on “the impossibility of stopping the cigarette smoking habit by legislation.” This skepticism was rooted in senators’ personal experiences: “[m]any confessed that they smoked when boys and that their boys were smoking now.” To them it was implausible that an anti-cigarette law would “prove more effective than the rod, which, one or two testified, had been a signal failure.” How, in contrast, boys would acquire cigarettes under a regime that actually prohibited sales altogether they appear not to have explained.

When the Senate resumed consideration of the bill on May 2, it agreed to Carson’s amendment to add to the penalty section as an offense to “offer as a premium, give or offer to give as an inducement or encouragement to trade.” The same section was then narrowed by adoption of a proviso, offered by lawyer Thomas Palmer, permitting the manufacture in Florida of “cigarettes, known as Cuban or Spanish cigarettes, when entirely filled with Cuban tobacco” so long as they were not sold in Florida and a further exception, proposed by real estate agent H. W. Fuller, for “the manufacture for shipment out of the State of cigarettes filled with Florida grown tobacco.” Harris, who once again moved

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45Senate Journal: A Journal of the Proceedings of the Senate of the Regular Session of the Legislature of the State of Florida 295-96 (Apr. 24) (1899). If “importation” included purchase by individual adult consumers for their own personal use, the bill might have run afoul of the federal constitutional interstate commerce clause as interpreted by the Supreme Court’s original package doctrine.


47“To Smoke or Not to Smoke,” FTUC, Apr. 25, 1899 (1:1). Opponents pointed out that the Florida Constitution left prohibition entirely to the counties.

48“To Smoke or Not to Smoke,” FTUC, Apr. 25, 1899 (1:1).

to table the bill indefinitely, admitted that the object of H. B. No. 17 was laudable, but charged that it would be impossible for it to achieve its ends; moreover, if passed, it “would strike down a great industry in which hundreds of people are earning an honest livelihood.”50 In supporting the bill, Senator Benjamin E. McLin, a lawyer, former orange cultivator, crate manufacturer, and mill owner, and Florida Agriculture Commissioner from 1901 until his death in 1912,51 focused on the harm caused by constant cigarette consumption and providing an example to “prove that the cigarette habit was harder to break than that of any other.” Palmer—who represented Tampa—conditioned his Yea on excluding manufacture from the bill’s prohibitory reach on the grounds that “Tampa manufactured only the pure Havana cigarette that was not consumed by Florida boys. He told of how the cigar and cigarette manufacturing business had built up Tampa and other cities in the State, and hoped that the Legislature would not destroy it.”52 (The cigar industry was irrelevant since it was not covered by the bill, but the cigarette manufacturing industry in Florida was minuscule: in calendar year 1898 it produced only 6,224,920 cigarettes or 0.14 percent of total U.S. output.)53 Harris, who opined that it was the tobacco rather than the paper that was injurious, agreed with Palmer that Cuban cigarettes were not used in Florida except by foreigners, and asked for an amendment to prohibit the sale of manufactured tobacco, which would enable the bill’s supporters to achieve their objective. James E. Broome, a salesman and son of a former Florida governor, disagreed with Harris, insisting that it was the manufactured cigarette that did the harm (in contrast to the home-rolled). Turning Harris’s argument against him, he argued that if Floridians “did not use the cigarettes manufactured in Tampa, let the manufacturers go somewhere else and make them.”54 Thus amended, H. B. No. 17 was passed on third reading by a vote of 17 to 9.55 One of the latter sought to justify his Nay by reference to the aforementioned 1891 no-sales-to-under-18-year-olds law, under which he had heard of no prosecutions; based on the

53Calculated according to Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1899, tab. 3 at 46 (H. Doc. No. 11, 56th Cong., 1st Sess. 1899).
assumption that the general sales ban would suffer the same fate, his vote was a protest against legislation that would not be enforced.\(^{56}\)

The press predicted that the bill as amended by the Senate was so unlike the original House measure “that it would not be recognized” and the lower chamber would probably not concur in it, chiefly because it prevented only the sale of all cigarettes, while permitting the manufacture of certain kinds and the importation of any kind, but not for sale.\(^{57}\) In the event, after the House had refused to concur in the Senate amendments\(^{58}\) and the Senate, in turn, on Carson’s motion, insisted on its amendments, the conference committee,\(^{59}\) the House conferees to which were chaired by Clark himself,\(^{60}\) unanimously agreed to the Senate amendments to H. B. No. 17, in which the House concurred.\(^{61}\) At the time the press also predicted that the governor would not approve it because it was not believed to be constitutional inasmuch as it permitted the “manufacture of Cuban and American cigarettes made of Cuban and Florida tobacco to be shipped for sale outside the State,” while prohibiting the sale “of any kind of cigarettes in the State, although such goods can be imported, but not sold.”\(^{62}\)

In the end, Governor William Bloxham did not sign the bill because he objected to certain provisions, especially in section 2 (containing the aforementioned exemption for the manufacture of cigarettes made of Cuban or Florida tobacco), which, after multiple amendments, not only “scarcely made sense,” but also rendered the law unconstitutional by impermissibly interfering with interstate commerce.\(^{63}\) He nevertheless allowed it to become law by not

\(^{56}\)“That Cigarette Bill,” _FTUC_, May 3, 1899 (3:1).

\(^{57}\)“That Cigarette Bill,” _FUTC_, May 3, 1899 (3:1). Another paper wishfully opined that the bill had been “practically” killed. “A Rousing Reception,” _TMT_, May 3, 1899 (1:5).


\(^{62}\)“At Tallahassee,” _FUTC_, May 15, 1899 (1:1-2).

\(^{63}\)“Anti-Cigarette,” _TMT_, June 10, 1899 (2:1).
vetoing it within the constitutionally allotted time. Apart from that controversial section, H. B. No. 17 prohibited the manufacture or sale of cigarettes or cigarette paper in any form in Florida subject to a maximum $500 fine or imprisonment in county jail at hard labor not to exceed six months, or both at the court’s discretion. It defined cigarettes to include “any and all articles encased in a paper or other wrapper, and not composed entirely of tobacco in both filler and wrapper, and which are intended to be used for persons to smoke.”

The bill’s fate was, from the appreciative perspective of the conservative Tampa Morning News, typical of that of the session’s “more radical measures,” which had all “foundered.... The harmless remains of a few of them will probably get on the statute book, but there will not be substance enough left in them to consume much time of the courts, nor work and considerable annoyance to the people at whom the original bills were aimed.” Indeed, H. B. No. 17 was “[c]onspicuous among these emasculated bills” because, despite being “a good deal of a genius” and “with all his eloquence and influence,” Clark had “failed...to legislate the cigarette out of the State....” The fatal flaw was the Senate amendments exempting cigarettes made of Florida or Cuban tobacco, which had, “in plain English,” destroyed the bill’s effect: “Prosecuting attorneys would soon break down from overwork if they should attempt to test before a jury whether every cigarette sold or given away in the State contained only” exempt tobacco.

By June the press was predicting that, “with few exceptions,” cigarette dealers would “disregard the statute unless the courts sustain its validity”; and while “no arrangements ha[d] been yet made for bringing a test case,” it was nevertheless “expected that proceedings w[ould] be instituted in Jacksonville, when every effort w[ould] be made to sustain the law. The rest of the State w[ould] probably await action and abide the decision.” To be sure, the claim that the Jacksonville dealers had themselves “made up a purse to fight the law” was hopelessly naive in light of the Trust’s universal litigational modus operandi, but the Tampa Tribune at least did not withhold from its readers the existence of

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65. 1899 Florida Laws ch. 4732 [No. 71], § 1, at 121. The law included the aforementioned exceptions for Cuban cigarettes and manufacture of cigarettes filled with tobacco grown in Florida.
66. 1899 Florida Laws ch. 4732 [No. 71], § 2, at 121.
67. 1899 Florida Laws ch. 4732 [No. 71], § 3, at 121.
68. “More Radical Measures,” Morning Tribune (Tampa), May 17, 1899 (1:1). Oddly, the author erroneously believed that the bill was still in conference committee and that it might “never see the light of day.”
69. “Anti-Cigarette,” Morning Tribune (Tampa), June 10, 1899 (2:1).
a phenomenon in Florida that was encountered throughout the United States—namely, that Tampa dealers were “not, apparently, so anxious to continue the sale. They claim that the profit is so small now that it is more trouble than benefit to handle them.”\(^{70}\)

However, as the ban’s effective date (August 3) approached, the press reversed course and indicated that it would be enforced and complied with. For example, the *Tribune* matter of factly predicted that from that date on “the cigarette dude will cease to be an institution in the State of Florida.”\(^{71}\) Efforts by some members of the “army of cigarette smokers” to stock up for an extended period were “problematical” inasmuch as “these paper-covered articles deteriorate rapidly in the summer temperature of Florida...for the tendency of a species of tobacco worm to infest the cigarette is well known to dealers, who manage to have no larger supply on hand than can be disposed of within comparatively short periods.” Others, who laid in considerable supplies of cigarette papers (sales of which were also banned), planned to buy tobacco and roll their own. Since the prohibition of importation (for personal use) had been struck from the bill, it was “anticipated that it will not be difficult to secure plentiful supplies of papers, as well as of manufactured cigarettes, from Savannah or other nearby cities in the future.”\(^{72}\) Indeed, as soon as the law went into effect, a Savannah wholesale tobacconist—replicating the Tobacco Trust’s own strategy in 1893 when it shipped cigarettes from Portland, Oregon into Washington State after their sale had been prohibited there\(^{73}\)—began advertising in the Jacksonville *Florida Times-Union* that if a cigarette smoker sent $2.50 it would deliver, by express, to any part of Florida 500 (Tobacco Trust-manufactured) Dukes of Durham or Sweet Caporal cigarettes.\(^{74}\)

Florida dealers appeared to have acquiesced in the sales ban; one large seller, for example, anticipating a considerable increase in pipes’ popularity, planned to start marketing them. Moreover, since few retailers in Jacksonville, the state’s

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\(^{70}\)“Weep for the Fated Weed,” *Morning Tribune* (Tampa), July 30, 1899 (8:2).

\(^{71}\)“Weep for the Fated Weed,” *Morning Tribune* (Tampa), July 30, 1899 (8:2).

\(^{72}\)“The Smoker’s Disappointment,” *FTUC*, July 31, 1899 (5:1). In contrast, the *Tribune* reported that a difference of opinion existed on this point, with others believing that the law was “so broad as to prevent the importation of cigarettes into the State, and to make the carriers liable for the delivery....” “Weep for the Fated Weed,” *Morning Tribune* (Tampa), July 30, 1899 (8:2).

\(^{73}\)See below ch. 11.

\(^{74}\) *FUTC*, Aug. 4, 1899 (6:3). See also *FUTC*, Aug. 16, 1899 (6:5). The per cigarette price of half a cent was exactly the same as the standard price of 5 cents for a package of 10.
largest city, had any large quantities of cigarettes on hand, they would not lose anything by the ban’s enforcement, in anticipation of which saloon owners and smaller tobacco dealers had sold out their stocks earlier and not resupplied themselves, while the few sellers who still had small stocks slashed prices 50 percent to avoid being caught with contraband. Even the large wholesalers, who had been left with considerable stocks as retailers ordered less “since the prospective enactment of the law ha[d] become a certainty,” did not fear a loss because they believed that they would be able either to return them to the manufacturers or brokers or to dispose of them in other states. Overall, the Times-Union concluded that although neither Clark nor the legislature “could have contemplated that their act,” which applied to “all persons of whatever age, color or sex,” would wholly eradicate the smoking of cigarettes from the State, it will doubtless do much to lessen the practice in Florida, unlike the no-sales-to-minors law, which had “not been as strictly enforced as was the evident intention of its originators.”

To be sure, according to an alternative journalistic narrative advanced the day after the law went into effect, the Trust was also literally pursuing a different (coffin) tack. Whether this account was a disinformational ruse launched by ATC, garbled by an incompetent press, or really reflected a change in strategy, it claimed that the Trust, apparently without the services of a lobbyist or even legislative informant, had not heard about Clark’s bill until its “traveling representatives” had learned of it and immediately notified their bosses, who, after having “consulted well-known lawyers of national reputation,” decided to contest its constitutionality in court. Then ATC “abandoned” that plan in favor of “dodging” the new law by manufacturing cigarettes especially for the Florida market that were encased in tobacco instead of paper and sold in the same packages that differed only in being labeled “little smokers” instead of “cigarettes.” By August 3 this substitute was purportedly already on the market in Jacksonville, where it was readily being bought. The textual hook for creating the alleged “loophole” was section 3, which defined “cigarette” to include “not only what are commonly known as cigarettes, but any and all articles encased in a paper or other wrapper, and not composed entirely of tobacco in both filler and wrapper.”

Clark himself quickly intervened to denounce the substitute wrapper evasion as illegal on the grounds that the statute “explicitly states that nothing but tobacco

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76. "Substitute for Coffin Tacks," *Morning Tribune* (Tampa), Aug. 4, 1899 (2:1). This development had been scooped by the Jacksonville *Metropolis*, no copies of which are extant for the relevant dates.
shall go into the make-up of all these things.” Suggesting that he had foreseen this subterfuge, he boasted that “I had this in may [sic] mind when I framed the bill.” In particular, he had outsmarted the Trust “because it is a well known fact that cigarettes contain something besides tobacco. Some contain opium and others some drug equally as [sic] deleterious to the human system.” Because selling cigarettes that were “merely” encased in tobacco wrappers was illegal, he urged Duval County Solicitor Christie to examine their interior closely, “even if he has to employ a chemist for that purpose.” To be sure, a chemistry man was not needed to identify the stench: “any one [sic] who inhales the infernal things knows that tobacco forms only a part of them.” Consequently, regardless of how small the substitutes were, their sale was prohibited unless they were wrapped in tobacco and there was “positively...nothing on the inside but tobacco....” Thus, if cigarette smokers were “right in contending that the composition on the inside is the same as that formerly used,” “some wholesale arrests” might follow and Christie might have “several interesting cases....”77 If, on the other hand, cigarettes were not, as chemists elsewhere had determined,78 spiked with opium and similar narcotic substances, then Clark’s master counterstroke would fail. Nevertheless, if it was true, as the controversy surrounding the 1894 Chicago city ordinance had revealed,79 that ATC used glycerine as a humectant in the manufacture of all its cigarettes, then Clark would outfox the Trust after all. In the

77“Says Can Stop Substitute,” Morning Tribune (Tampa), Aug. 6, 1899 (2:1). Presumably, from Clark’s perspective, cigars, but for the absence of additions such as opium, would have satisfied the expanded definition of “cigarettes” and would have been prohibited as well (unless exempt by virtue of being entirely filled with Cuban or Florida tobacco). In fact, however, chemists had earlier reported that with regard to sugar, molasses, glycerine, licorice, and similar substances, cigarette tobacco was “probably much less frequently flavored and otherwise artificially treated than” that used in chewing or smoking tobacco or in cigar manufacturing. “Report on Cigarettes by Professor Willis G. Tucker of the Albany Medical College, Analyst of the New York State Board of Health—From the Ninth Annual Report of the New York State Board of Health” (Feb. 22, 1888), in The Cigarette: What It Contains and What It Does Not Contain: On the Manufacture and Sale of Cigarettes before Joint Committee of Massachusetts Legislature on Public Health 10-11 (n.d. [1892]), Bates No. 950297842 (appeared originally in Ninth Annual Report of the State Board of Health of New York 516-18 (1889)). Vanilla and tonka beans were frequently used for flavoring cigar tobacco. Testimony of Professor James F. Babcock, in The Cigarette: What It Contains and What It Does Not Contain: On the Manufacture and Sale of Cigarettes before Joint Committee of Massachusetts Legislature on Public Health 20 (n.d. [1892]), Bates No. 950297842.

78See above ch. 3.

79See above ch. 6.
event, his trap for the unwary would never be sprung.

Not until the middle of August was it “given out” in the state capital that the American Tobacco Company would test the new law’s validity in court. To this end ATC’s counsel, Junius Parker of New York, had been in Tallahassee during the second week in August “looking up the Legislative record of the bill from its introduction to its final passage.” Its purported Achilles heel was that the enrolled bill showed that the Senate officers had signed it as a passed bill on May 2, whereas the journal showed that the conference committee had made its report on May 13. Unidentified persons familiar with the legislature had, according to the Times-Union, after examining the journals of the 1899 session, concluded that many measures that were published in the session laws would, if subjected to judicial scrutiny, be “declared null and void on account of irregularities in the journal.” To be sure, the two examples adduced by the newspaper—signing and certifying a bill to the governor even though it had not passed both houses and passing and certifying to the governor two identical bills—represented more than a mere technical flaw that might have attended the passage of H. B. No. 17. At this point, the newspaper ventured no opinion on the question, confining itself, instead, to calling for ferreting out and remedying the “cause for such glaring inefficiency,” which many attributed to “the incompetency of the clerical staff employed,” while others perceived a different (but unidentified) source.80

In the event, the Times-Union had been “in full possession of this knowledge” that Parker had been preparing the Tobacco Trust’s test case since the law had gone into effect, but, at the request of Parker and ATC’s local Jacksonville counsel, Cooper & Cooper, had refrained from publishing anything about it, “although the members of the local staff ha[d] been in frequent consultation with them concerning the progress that ha[d] been made.” The paper was able to break the news on August 15 because by then the Trust had staged the same first act in its choreographed litigation that its cast had already performed in Washington State, Iowa, Montana, West Virginia, and Tennessee, by selecting someone to buy, in violation of the new law, a package of cigarettes from a dealer, and having that buyer immediately make a complaint with the local justice, who then issued a warrant for the seller’s arrest, which was served by a constable. At the hearing the justice required a $200 appearance bond, which the “voluntary prisoner” refused; at that point the habeas corpus writ, which ATC’s lawyer’s had already prepared, was submitted to Judge Rhydon Mays Call of the Fourth Judicial Circuit, the trial court in Jacksonville, who set the hearing for August 15, until which time the dealer remained in the sheriff’s nominal custody.81

The habeas petition recited that no valid law prohibited selling cigarettes because the “alleged act” was unconstitutional and void and never regularly enacted or passed by the Florida legislature inasmuch as: (a) the vote on final passage in the House of Representatives was not taken by yeas and nays and entered in the House Journal; (b) the act as signed by the officers of both houses, transmitted to the governor, and filed with the secretary of state was never passed by either house; (c) was not approved by the governor and was authenticated only as to its alleged passage by the House by the statement of its officers that it had passed the House on April 14, whereas the Journal showed that it was still being considered and acted on long after that date; and (d) that the statute (which would appear in the session laws) entitled “An act to prohibit the manufacture or sale of cigarettes” was never enacted, whereas “the only statute upon the subject of prohibiting the sale of cigarettes in the State of Florida attempted or pretended to be enacted” was (the bill as introduced by Clark) “An act to prohibit the manufacture, importation, sale or gift of cigarettes,” which was “not a proper or constitutional title for the act purported to have been passed.” In addition to these alleged procedural failings, the Tobacco Trust claimed that: the law was “so confused, uncertain and conflicting and insensible...that it is unintelligible and incapable of intelligent observance or enforcement”; the law violated the U.S. Constitution by interfering with interstate commerce by virtue of permitting cigarettes filled with Florida- or Cuban-grown tobacco to be manufactured in Florida, while discriminating against cigarettes filled with tobacco grown in any other state; that because these unlawful, unconstitutional, and discriminatory provisions were “material and essential parts” of the law and “operated as inducements to its passage,” they invalidated the whole of the law; and that the law violated the U.S. and Florida constitutions by depriving citizens of Florida and the United States of “the benefit and exercise of their rights to acquire and dispose of property and deprives them of their property without due process of law.”

At the well-attended hearing before Judge Call on August 15, ATC was represented by Parker and its local counsel, Charles Merian Cooper, who had been Florida attorney general from 1885 to 1889 as well as a congressman from 1893 to 1897. After his unsuccessful attempt to halt the case and have it

choreography in the other states, see above chs 11. Although the 1900 Census of Population was conducted less than a year later, neither the buyer nor the seller nor the constable appeared in it.

83Cooper (1856-1923) was also a member of the Florida House and Senate in the 1880s. History of Florida: Past and Present: Historical and Biographical 2:116 (1923);
transferred to criminal court, Duval County Solicitor J. B. Christie, “with violent gestures,” attacked opposing counsel: “This is a most unheard-of thing in a court of justice, a most disgraceful proceeding. ... It was all arranged who should sell and who should buy the cigarettes, which the law prohibited. The State had no knowledge of this case until last night, and I request your Honor to stop these most unheard-of proceedings, which have been rushed through before the laws have been published.” Unmoved, Judge Call tersely informed the county solicitor that the new law was on file where he could read it and then asked him how much time he needed to prepare the State’s case. Replying that he was “the busiest man in town” because the criminal court was in session, Christie asked for two weeks, but when Call elicited from him the admission that that court would be through the next day, the judge postponed the case only until August 18. The legal assistance of which the county solicitor was manifestly in need and the importance that Clark attached to the case were underscored by the fact that “the father of the anti-cigarette bill” would be associated with Christie.84

At the recessless four-and-a-half-hour hearing, which took place on Saturday, August 19, the press, seeing the tables piled high with law books, was “unnerved at the prospect of having to listen to long and tedious reports and dissertations pro and con” as to whether it was unlawful to “sell the fascinating cigarette, under the seductive influence of which Frank Clark claims the rising generation are wrecking their health and morals.” In the event, or so it seemed to reporters, “almost every law book published since Ben Franklin ran a hand press was quoted from,” and so opaque was the back and forth that, if the foot-thick legal-looking documents that both sided “waded through” had been divided up between “two juries, who hadn’t seen...the other side of the case, [they] would promptly have rendered a verdict for their respective pile of documents.” In his opening remarks County Solicitor Christie was preoccupied with process, insisting both that deciding a law’s constitutionality on the basis of writ of habeas corpus was unprecedented—a manifestly incorrect claim in light of the virtually identical litigation in Washington State and Iowa—and that the “arranged” nature of the sale and arrest made the case “unfair to the State,” which the court therefore should not have heard. The Tobacco Trust’s Parker admitted the prearrangement, but argued that it was the most expeditious way to test the law’s validity. He then rehearsed the aforementioned legislative procedures that he claimed failed to satisfy the Florida constitution’s requirements for a Yes or No vote before turning to the law’s constitutionally impermissible interference with interstate commerce:

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84 “Cigarette Law Test,” FTUC, Aug. 16, 1899 (6:1).
“if each State had the right to prohibit products from other States it would ruin trade. If each State were to build a wall around itself and use only such raw materials as were grown or excavated in its own territory, each producing State could raise its price and ruin manufactures.” Clark, who took over the state’s argument when Christie had to leave, eschewed any discussion of the law’s merits or benefits as inappropriate. Instead, he contended that the sales prohibition should not be affected by any doubts as to the validity of the manufacturing ban, especially because no legislator had objected to the former. (It is unclear why Clark would have imagined that such a claim, even if true, would bear any legal weight: after all, the legislative journals, which were not verbatim transcripts of the proceedings, would not have reflected any such objection unless it had been embodied in an amendment.) Although Clark admitted that section 2 of the bill “was not as it should be, and that it was not the act as arranged by him,” but rather the product of senators from Hillsboro County and other manufacturing areas who had “attacked the bill to protect the manufacturer,” he sought, unpersuasively, to show that the alleged interference with interstate commerce never took place because by the time the cigarettes reached the seller, who was being prosecuted as a dealer in Florida and not as an agent of the American Tobacco Company, they were articles of domestic commerce.85

Over the weekend before Call decided the case it became clear that the Tobacco Trust, which “manufactures all the popular brands of cigarettes,” had not confined its litigation stage-management to Jacksonville. Ever since the law had gone into effect, ATC had “several of its attorneys in the various cities...investigating the matter, and the fight it was “back of,” the Tampa Tribune predicted, “promises to be as warm a one as capital, with the assistance of able legal talent[,] can make it.” During the pendency of the case “the trust...advised all its largest patrons” in Florida “to continue the sale of cigarettes without attention to the existence of the law, adding that the company would assume all liabilities and pay all damages accruing to the seller.” From the fact that two saloons had placed Duke-brand cigarettes on sale on August 18 and other dealers resumed open sales the next day, the Tribune concluded that ATC’s assurances

85. Legal Lore Galore,” FTUC, Aug. 20, 1899 (6:3-4). Cooper’s argument appears to have duplicated Parker’s regarding the justification for the prearrangement; the only new element was the claim that because the journal showed no penalty, a prisoner could not be punished for violating such an act. If the press correctly reported this argument, it seems untenable because the Florida (like many other states’) legislative journals failed to print the full text of most bills. Clark, according to the article, urged the judge not to invalidate the law so that ATC could take the case to the Florida Supreme Court, but this account makes little sense since the state could also have appealed.
had undoubtedly reached Tampa, where the first arrest was made on August 19
of a bartender in a saloon, whose defense counsel was employed by ATC. Since
“the company has unlimited capital, the dealers feel that they will be safe in
continuing the sale.”

Judge Call (1858-1927), who was a state circuit court judge from 1893 to
1913 before being appointed federal district court judge for the Southern District
of Florida, which he remained until his death, did not tarry long in reaching a
decision. On Monday, August 21, following the Saturday hearing, Call declared
“[t]he famous anti-cigarette bill, of which much has been written and more has
been said,” to be “illegal and of no effect and force, at least in the Fourth Judicial
Circuit....” Although the decision affected only that circuit’s six northeastern
counties, the press assumed that it would “probably practically settle the question
through the entire State.” After the bill had “created much comment throughout
the United States,” many newspapers carried a wire-service report of Judge
Call’s having held the law unconstitutional.

Call appears to have issued no written decision, but merely said, when
“asked by the attorneys for the grounds on which he based his decision, for the
information of their clients, that the fact presented in the petition for the writ of
habeas corpus as to the alleged passage of the bill by the Legislature and the

86."Trust Will Fight Clark’s Bad Bill,” *Morning Tribune* (Tampa), Aug. 20, 1899 (1:5);
*Weekly Tribune* (Tampa), Aug. 24, 1899 (1:2) (reprinted from Aug. 20 daily edit.).

87*Memoirs of Florida* 1:468-69 (1902); *History of Florida: Past and Present:
Historical and Biographical* 3:245 (123); http://www.fjc.gov. Call was a nephew of
Florida U.S. Senator Wilkinson Call (1879-97). L. Huston, “A Political Rally of 1884 in


89."Knocked Out by the Court,” *WNC*, Aug. 23, 1899 (1:6).


The Fourth Judicial Circuit decision was final, according to several lawyers, because the
State did not have a right of appeal. “Anti-Cigarette Law Is Illegal,” *FTUC*, Aug. 22, 1899
(6:1). The State, according to a different account, would make no appeal to the Florida
23, 1899 (1:1); *Weekly Tribune* (Tampa), Aug. 24, 1899 (1:4).

91E.g., “Florida Anti-Cigarette Law Void,” *N-YDT*, Aug. 22, 1899 (3:6); “Cigarette
Law Unconstitutional,” *AC*, Aug. 22, 1899 (6:3); “Anti-Cigarette Law,” *DIC*, Aug. 22,

92Unfortunately, no case files survived the huge fire of May 3, 1901, which destroyed
thousands of buildings in Jacksonville, including the courthouse and all of the court’s
records (at least of cases that arose in Duval County). Telephone interview with Sharon,
Fourth Judicial Circuit clerk of court, Jacksonville (Sept. 15, 2006).
Florida 1899

claim of unconstitutionality were sufficient in his opinion to render the entire bill void.” Call’s judicial strategy of declaring a statute unconstitutional based on technical legislative errors alleged by the defendant’s lawyers rather than the latter’s substantive federal constitutional claims was not unprecedented. In 1896, in a nationally high-profile case involving an 1895 Florida law making it a penal offense to “conduct...any school of any grade, public, private or parochial wherein white persons and negroes shall be instructed or boarded within the same building, or taught in the same class, or at the same time by the same teachers,” lawyers for the defendant American Missionary Association school argued that the act should be voided both because its title was too narrow to cover its contents (the former applying to “White and Negro Youths,” the latter to all “white persons and negroes”) and because it violated the Fourteenth Amendment to the U.S. Constitution by being based solely on color. 

Ironically, the law, which The New York Times editorially denounced as “manifestly outrageous,” had passed both houses of the legislature unanimously and been amended by the Senate and returned to the House, which concurred in the amendments without a yea and nay vote, but since the school’s lawyers (apparently) failed to raise the issue, neither did Call sua sponte. Although he chose to strike down the segregationist law on narrow “technical” grounds without expressing an opinion as to whether the law would still be invalid if the legislature remedied the defect by bringing the title into conformity with the text, the following year James Weldon Johnson, who grew up in Jacksonville and became a multi-talented poet, novelist, educator,

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93 1895 Florida Laws ch. 4335 [No. 14], § 1, at 96. Considerable light is shed on the Florida Democratic Party by its “hearty endorsement” of the law in its 1896 platform, which expressed “the hope that it may never be expunged from the statute books of the state, or the principle it embodies be torn from the hearts of our people.” The party convention further hoped that “the state will never relax its efforts in the cause of education until every child within its limits has had the opportunity of securing the rudiments of a sound knowledge of the English language and the principles of the English language, without any discrimination of race, color or previous condition, but always and at all times in separate buildings and with different leaders.” William Cash, History of the Democratic Party in Florida 173 (1936) (reprinting platforms).


95 NYT, Oct. 24, 1896 (4) (untitled edit.).


97 NYT, Oct. 24, 1896 (4) (untitled edit.).
diplomat, and civil rights activist, attested to Call’s being a “very fair man.” In 1897, Judge Call presided over his examination in open court for admission to the bar, the first time that any black had gone through this process in state court since Reconstruction. Without revealing any underlying details, 36 years later in his autobiography Johnson observed: “Negroes in the South have a simple and direct manner of estimating the moral worth of a white man. He is good or bad according to his attitude toward colored people. This test is not only a practical and logical one for Negroes to use, but the absolute truth of its results average [sic] pretty high. ... I myself have yet to know a Southern white man who is liberal in his attitude toward the Negro and on the race question and is not a man of moral worth. Judge Call, in the estimation of the colored people of Jacksonville, was a ‘good man,’ and he was a good man.”

Clark expansively shared his opinion of the decision with the press. With regard to the alleged legislative irregularities, he reiterated his and Christie’s

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88James Weldon Johnson, *Along this Way: The Autobiography of James Weldon Johnson* 142 (2000 [1933]). Call’s goodness and fairness must have been reinforced by the behavior of one of the three members of the examining committee whom Jacksonville blacks regarded as a “bad” white man: when, during a pause in the questioning, a lawyer in the courtroom who was not on the committee leaned over and asked him what he was going to do, W. B. Young blurted out in Johnson’s face words that “made their sizzling imprint” on his brain: “‘I can’t forget he’s a nigger; and I’ll be damned if I’ll stay here to see him admitted.’ With that he stalked from the courtroom.” Id. at 143. In 1905, Call held unconstitutional a Florida Jim Crow law that required streetcars to be segregated, but on the narrow grounds that it was class legislation because it exempted black nurses taking care of white children or sick white persons; in the words of the Florida Supreme Court affirming his judgment, the law “discriminately abridges the privileges and immunities of one class of citizens of the United States by giving to another class of such citizens privileges that are withheld from the class discriminated against. It gives to the Caucasian mistress the right to have her child attended in the Caucasian department of the car by its African nurse, and withholds the right from the African mistress the equal right to have her child attended in the African department of the car by its Caucasian nurse. It also discriminates between the races in that it gives to the invalid adult Caucasian, man or woman, the right to be attended in their department of the car by his or her colored nurse, and withholds from the African invalid the corresponding right to be attended in his or her department of the car by his or her white nurse. It also gives to the African nurse the right to space in either department of the car and withholds from the Caucasian nurse the same privilege, thereby discriminating between the races in favor of the African nurse as against the caucasian nurse belonging to the same occupational class of persons.” Florida v Patterson, 50 Fla. 127, 132-33 (1905). See also August Meier and Elliott Rudwick, “The Boycott Movement Against Jim Crow Streetcars in the South, 1900-1906,” *Journal of American History* 55(4):756-75 at 766-67 (Mar. 1969).
argument before the court that the Florida Constitution’s requirement that the yeas and nays be entered on a bill’s final passage did not apply to concurrence by the originating house in the other house’s amendments. On this very point they had cited to Call a decision issued by the Florida Supreme Court in 1895.99 Waxing practical, Clark remarked that if it was constitutionally required that the originating house vote by yea and nay on the motion to concur in the other chamber’s amendments, he did not believe that “‘a single act of the Florida Legislature originating in one house and amended in the other that has been passed within the last ten or twelve years is constitutional.’” By way of illustration he pointed out that a cursory examination of last session’s Senate Journal revealed that even the general appropriations bill would not pass muster under Call’s ruling and that, consequently, “‘every dollar now being paid out is being illegally paid....’”100

The validity of the Senate amendments excepting the manufacture of cigarettes made of Cuban or Florida tobacco Clark did not even attempt to vindicate. On the contrary, he bluntly admitted that: “‘Unquestionably this portion of the act was unconstitutional and I know of no person who has ever contended that it was valid....’” Instead, he had argued to the court that, according to precedent, if one portion of an act was unconstitutional and the rest constitutional, and if the two were separable such that the constitutional part alone could be put into effect without reference to the unconstitutional part, then the former (namely the sales prohibition) should be upheld and enforced. Clark regretted that the act was “‘found in such condition that the court...had to declare it void’” because he had hoped that it would go into operation and that “‘the boys and young men of Florida would be saved from the awful condition into which the habitual user of cigarettes sooner or later finds himself.’” Perhaps with a view to legislative reenactment in compliance with Call’s ruling, he concluded by observing that the Supreme Court of Tennessee had upheld as constitutional that state’s (cigarette sales ban) law, which was “‘in active force....’”101

As soon as Call had discharged the prisoner in Jacksonville, the press in Tampa, under the headline, “‘Coffin-Tacks Win and Again on Sale,’” reported that

99.“Anti-Cigarette Law Is Illegal,” FTUC, Aug. 22, 1899 (6:1). In State of Florida ex rel. Turner v Hocker, 36 Fla. 358, 371 (1895), the Supreme Court held: “Where one house of the Legislature passes a bill through its three constitutional readings, and reports it to the other house, and the latter passes the bill with amendments that it has made germane to its general subject, either to the body of the bill or to its title, it is not necessary in such a case to re-read the bill three times again in the house of its origin.”


ATC’s agent who had “been in the city watching the progress of the case since its beginning, wired the leading merchants that have been handling the Duke cigarettes at Tampa and other cities and towns throughout the state that they could proceed to sell cigarettes at once and that the American Tobacco Company would become responsible for any trouble or expense they might be put to on account of the Clark cigarette bill.” As a result of these assurances—which the Trust had also made in Iowa—because several more dealers had begun selling cigarettes, the *Tampa Tribune* assured its readers, “there is now no difficulty in buying what you want.” The newspaper’s solicitude for the tobacco industry was the owner-publisher-editor’s policy: Wallace Fisher Stovall, the president, general manager, majority stockholder, and editor, had “been a consistent friend and supporter of the big Tampa cigar manufacturing industry, and his newspaper has always championed the interests of the manufacturers who [by 1909] have made Tampa the greatest cigar manufacturing center in the country,” an “immense industry” employing millions of capital and thousands of people.

Although the technical defects that the Trust attacked were all easily remediable, no bill dealing with cigarettes was introduced in the House in 1901. Since Clark in his post mortem had expressed the opinion that the bill’s opponents had been responsible for the amendments, it is possible that the Senate would not have been able to pass the bill without the (fatal) Cuban and Florida tobacco exemption. Indeed, it is hardly out of the question that these senatorial amendments were a component of the same “prearranged plan” by which ATC stage-managed dealers’ arrests in Jacksonville and Tampa. In 1905, however, the House did pass, by a vote of 35 to 11, a bill to prohibit the manufacture or sale of cigarettes or cigarette paper, which died in the Senate after the Judiciary Committee reported it without recommendation on the last day.
Florida 1899

of the session.\textsuperscript{109} A senator did introduce a bill in 1913 to make it unlawful to sell, barter, exchange, or give cigarettes, cigarette tobacco, or cigarette paper,\textsuperscript{110} whose passage the Temperance Committee recommended with an amendment striking out cigarette tobacco.\textsuperscript{111} The bill died after the tobacco trade petitioned against it. During this battle the United States Tobacco Journal, which expressed the hope that the Florida legislature would see the fallacy of trying to legislate the public into so-called morality, deemed it entirely reasonable to presume that the Florida public would “take no more kindly nor consider” these enactments “more seriously than many other states which have passed such attempts at a re-constructive period.”\textsuperscript{112}

\textsuperscript{109}Journal of the Senate of the Tenth Regular Session of the Legislature...of Florida...1905, at 1916 (June 2). In 1907 the legislature made it unlawful not only to sell, barter, furnish, or give a cigarette to a minor, but also to persuade, advise, counsel, or compel one to smoke any cigarette. 1907 Florida Laws ch. 5716—(No. 121) at 229.

\textsuperscript{110}Journal of the State Senate of Florida of the Session of 1913, at 1153 (May 14) (S. B. No. 441, by Lewis Zim, St. Augustine). Zim, a Catholic, was defeated by Clark in the congressional election in 1910 in part because of propaganda by an anti-Catholic organization. William Cash, History of the Democratic Party in Florida 123-24 (1936).

\textsuperscript{111}Journal of the State Senate of Florida of the Session of 1913, at 1215 (May 15).

\textsuperscript{112}“Florida Considers Anti-Cigarette Legislation,” USTJ, vol. 79, at 7:1 (May 24, 1913).
PART II

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

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

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

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

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

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

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

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

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

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

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¹Cigarettes and Their Manufacture,” N-YDT, Nov. 4, 1883 (13:4).
²Restricting Idiocy,” RMN, Apr. 17, 1891 (2:7).
³Dangerous,” Newark Daily Advocate (Ohio), Jan. 16, 1893 (8:3).
⁴See above Part I and below ch. 11.
Banning Tobacco Sales to Minors

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

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

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5. “To Help the Boys,” EDG, Jan. 6, 1894 (4:3).
7. “Since the passage of the ordinance the cigarette trust has sent its western agent here to lay its side of the case before the mayor and has also supplied the mayor with a liberal assortment of printed documents in favor of cigarettes.” “A Veto Probable,” EDG, Feb. 3, 1894 (4:3).
8. “Still Unsettled,” EDG, Feb. 6, 1894 (1:1).
10. “Over a Veto,” EDG, Mar. 6, 1894 (4:4). For the state law, see 1889 Kansas Laws ch. 256 at 388. The ordinance’s effective date was Jan. 1, 1895. In 1895 other Kansas towns followed suit. E.g., “Cigarettes Barred from Lawrence,” Emporia Gazette, Mar. 14, 1895 (1:1); “Against Cigarettes,” Daily Northwestern (Oshkosh), July 19, 1895 (6:1) (Russell).
11. “One Vice Lessened,” EDG, Feb. 4, 1895 (1:1). It is unclear whether the fact that “very seldom” were “young boys...seen handling them” meant that the law had merely prompted them to conceal their cigarette smoking.
Banning Tobacco Sales to Minors

1892, “must,” as a British lawyer observed in pointing out that by 1894 22 states had already passed such measures, “not be regarded as leaders in the crusade against smoking by youths.” This chapter embeds the state’s enactment of such legislation in 1894 in the national trend and the interrelationship between the movement’s leader, the National Woman’s Christian Temperance Union, and its Iowa state unit. It also sets the stage for understanding prohibitory cigarette sales legislation by exploring the rich context of Iowa’s extensive history of liquor prohibition.

Nationwide Developments in Prohibiting the Sale of Tobacco to Minors

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

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

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

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

Woman’s Christian Temperance Union (WCTU), which was proudly and excitedly keeping track of these enactments, more than half of the states, in all sections of the country, had already passed such legislation.17 (The WCTU took full credit for passage of all these laws. As Frances Willard pumped up her audience about no-sales-to-minors laws in her 1891 president’s address: “All this work was done by whom? The W. C. T. U.; that goes without saying; every law was gained by them, and enforcement is secured almost wholly through their

weakened by confining the prohibition to those who “knowingly” sold tobacco to minors under 16. Id. at § 1. Later that year Washington State enacted a prohibition without the scienter requirement. 1883 Wash. Laws, at 67, 68, § 2. Contrary to R. Alton Lee, “The ‘Little White Slaver’ in Kansas: A Century-Long Struggle Against Cigarettes,” Kansas History 22(4):258-67 at 261 (Winter 1999-2000), Kansas’s 1889 law did not place it “in the vanguard of this movement.” Likewise, John Burnham, Bad Habits: Drinking, Smoking, Taking Drugs, Gambling, Sexual Misbehavior, and Swearing in American History 91 (1993), was wrong in stating that “[t]he first anti-cigarette laws began to appear in the 1890s.” As late as 1885 a newspaper in Iowa that was alarmed by boys’ smoking cigarettes—as a result of inhaling “a large amount of nicotine lodges in the throat and lungs”—was unaware of such laws: “In some states they are talking of passing laws prohibiting the sale of cigarettes to boys under eighteen years of age.” “The Cigarette Curse,” Davenport Democrat, July 20, 1885 (1:5) (copy furnished by Merle Davis). As early as 1880 the Vermont House of Representatives passed (by a vote of 95 to 79) a bill prohibiting the sale of cigars, cigarettes, and chewing tobacco to anyone under 15, but the Senate refused it a third reading. Journal of the House of Representatives of Vermont, Biennial Session, 1882, at 123, 130-31 (Oct. 25) , 290 (1883).

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

In January 1891, when S. 4560 was introduced in the United States Senate to prohibit in the District of Columbia both the sale or giving of tobacco to anyone under 16 and the smoking or use of tobacco in a public place by anyone under 16, that chamber published a document summarizing the laws in 29 states that had already banned sales to youths.19

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

There is no diversity of opinion among persons of mature years as to the deleterious effects of the tobacco habit upon the young. Elderly gentlemen often maintain that to those who have reached or passed the most vigorous period of life the weed is more than a luxury—resting the weary, tranquilizing irritated nerves, promoting the digestive processes and arresting the undue waste of vital force. But these same persons are convinced that the fumes and juices which soothe and sustain the adult will stupefy the growing boy, blunt all his faculties, unstring his nerves, debilitate his muscles, set his heart a-flutter, disorganize his digestive functions, and demoralize his entire mental and physical economy. It is only fair to say that the boy holds a totally different theory. He is quite positive that the surreptitious or defiant cigarette makes a man of him at once. ... He doesn’t know much about his heart or liver, but so far as he is aware those organs behave with propriety. At all events he cannot understand why saturation with nicotine should be beneficial to the “old man” and fatal to him.20

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

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18 Minutes of the National Woman’s Christian Temperance Union at the Eighteenth Annual Meeting: Boston, Mass., November 13th to 18th, 1891, at 120 (1891).


20 Anti-Cigarette Laws,” *N-YDT*, Apr. 22, 1883 (6:4) (edit.).
observers” who held that “the quality of American manhood...is involved to a considerable extent in the treatment of this problem.” At all events, the Daily Tribune welcomed any contribution the law might make to rescuing “the coming Jerseyman from the temptation to narcotism....”21 To be sure, two days after the New Jersey law had gone into effect, when the first arrest was made for selling a cigarette to a minor in Morrisville, New Jersey, The New York Times conjectured: “The law does not prohibit young boys in the town from getting older ones to buy the desired cigarette for them, and it is possible that despite the arrest and punishment of Hartz the small boys of Morrisville will smoke as many cigarettes as before the law went into effect.”22

The Times was caustically skeptical of such intervention. The following year, in connection with the unsuccessful introduction of a similar bill in the New York State legislature,23 the paper, in suggesting that the bill should have prohibited the sale of cigarettes to those over 17, editorially expressed a common cultural animus:

The cigarette is designed for boys and women. The small-boy who wishes to commit the crime of secret smoking, but whose stomach is not stout enough for a cigar or a pipe, naturally smokes a cigarette, and thus enjoys the consciousness of guilt without the remorse of stomach. A grown man has no possible excuse for imitating the small-boy. He can smoke a cigar without fear of a subsequent interview with an avenging father in the woodshed.... The decadence of Spain began when the Spaniards adopted cigarettes, and if this pernicious practice obtains among adult Americans the ruin of the Republic is close at hand.24

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


23Not until 1889 did the legislature amend the penal code to make it a misdemeanor to sell, pay for, or furnish cigarettes, cigars, or any kind of tobacco to any child actually or apparently under 16. 1889 N.Y. Laws ch. 170, at 201, 202. Six years later Charles Hubbell, the New York City school commissioner, declaring that law and another prohibiting youth smoking to be “dead letters,” promoted the formation of an Anti-Cigarette League for pupils. “The Anti-Cigarette League,” N-YDT, Jan. 6, 1895 (10:6).

24Cigarettes,” NYT, Jan. 29, 1884 (4) (edit.). Five years earlier the newspaper had editorialized that cigarettes had “done more to demoralize and vitiate youth than all the dram-shops of the land.” “Tobacco for Boys,” NYT, Jan. 11, 1879 (4) (edit.).
Banning Tobacco Sales to Minors

Senate to prohibit selling or giving tobacco to minors under the age of 16 in the District of Columbia and supported by a petition of 257 physicians in that city,25 Senator Alexander Stewart (Republican of Wisconsin) expressed his belief that “cigarettes are destroying more youth than any other one thing that is affecting the prosperity of the country.” His colleague, Rhode Island Republican Jonathan Chace, a cotton manufacturer, agreed that the “use of cigarettes is undermining the health of the whole community by destroying the physical constitutions of the youth of this country.”26 In an editorial on the debate, the New-York Daily Tribune asserted that there “seems to be no cessation in the rate of deaths from cigarette smoking. Every few days the newspapers report a new victim.” It also referred to unquestioned estimates by physicians that at least 5,000 cases of impaired health in New York City could be traced to cigarette smoking. More interesting was the newspaper’s focus on the impact of price, advertising, and accessibility on smoking by children:

In many of our cities cigarettes are sold two for a cent at small groceries and in the stores where school supplies are on sale, so that boys are tempted to buy them instead of the traditional school-boy dainties. The result is that many boys are able to smoke without their parents’ knowledge. There never was a time, as every passenger on the elevated roads can certify, when the sale of cigarettes was being pushed so hard by showy advertisements, pretty gift cards and the like, as now.27

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

As early as 1890, the WCTU resolved to “memorialize Congress for a law against the manufacture of cigarettes.”28 On February 13, 1892, Representative William Stahlnecker (D-NY) introduced a bill to raise the internal revenue tax on cigarettes to $10 per thousand—a 20-fold increase.29 The same day the press across the country reported that the House Ways and Means Committee would be petitioned to “prepare a bill invoking the paternal condemnation of the

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28Minutes of the National Woman’s Christian Temperance Union, at the Seventeenth Annual Meeting, Atlanta, Georgia: November 14 to 18th, 1890, at 22 (1890).
30The tax had been 50 cents since 1883: 22 U.S. Statutes at Large, Act of Mar. 3, 1883, ch. 121, § 4 at 488, 489.
Banning Tobacco Sales to Minors

government upon the cigarette habit.” The article revealed that Stahlnecker, together with his New York Democratic colleagues William Cockran and Amos Cummings, had in their possession bills that the petitioners had requested them to introduce providing for the suppression of cigarette manufacture by means of the aforementioned tax increase.\(^{31}\) According to a statement accompanying the petition:

“Clippings taken from papers throughout the United States show that during the past year there have been about 100 deaths of young men, mostly under 16 years of age, from the effects of smoking paper-wrapped cigarettes. In some cases there has been an analysis of the stomach, and in most instances there has been found acid, phosphorous and arsenic, which is largely used in the manufacture of cigarette paper. Also, the same clippings will show that about 100 men have been consigned to insane asylums from the same cause.”\(^{32}\)

The petitioners plausibly contended that the proposed tax increase would place cigarettes “at a price that children could not pay, and go further than any State legislation can do....” But appending the names and former addresses of the more than 200 people who had allegedly “died or grown hopelessly insane as the effect of their pernicious habit”\(^{33}\) did little to persuade the skeptical editorial writer of the Republican Milwaukee Sentinel, who did not doubt the assertion, but deemed it misleading until it was also known how many coffee-drinkers, flute-players, Ibsen-readers, pew-holders, or men over 34 who parted their hair on the right side had died or gone mad the previous year. In addition to wondering whether cigarette-smoking caused insanity or “a predisposition to feeble-mindedness” caused smoking, he maintained that “a majority of the cigarette-smokers now alive are apparently sane,” while “the majority of the people who died or went mad during the past year did not smoke cigarettes.” The paper therefore concluded that since no one had “much real knowledge of the effect of cigarette-smoking on cigarette smokers,” the petitioners were no less ignorant than anyone else and had made no case for congressional intervention.\(^{34}\) The chief difference between this statistical skepticism in the early 1890s and

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

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

\(^{33}\)“The Cigarette Habit,” DIO, Feb. 13, 1892 (7:5).

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

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

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

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

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

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

38Minutes of the National Woman’s Christian Temperance Union at the Nineteenth Annual Meeting, Denver, Col., October 28th to November 2d, 1892, at 94 (1892).
affiliated WCTU of the State of Iowa secured petitions with about 1,500 signatures “asking congress to enact a law forbidding the sale, manufacture and importation of cigarettes..., a violation...to be punishable by a heavy fine and imprisonment.” Clara B. Willis, M.D., the superintendent of the state group’s Hygiene, Heredity, and Narcotics Department, added that: “Teachers generally, and many physicians, seemed to deem it a privilege to sign the petition which means so much for the boys of our land.” A very large volume of petitions was presented to Congress. On June 6 a discussion of the petitions unfolded on the Senate floor triggered by a question as to which committee—Finance, Education and Labor, or Epidemic Diseases—they should be referred to. Senator Daniel Voorhees (Dem. Ind.) urged referral to the last-named because:

The basis of the petition...is because of the use of the cigarette being injurious to the health of the young and rising generation.  
I heartily concur in the object of the petitioners. I believe there is nothing more injurious to the youth of the country than smoking these miserable cigarettes. ... The Committee on Epidemic Diseases have power to call before them medical testimony....

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

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

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

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39 Third Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Burlington, Iowa, October 4th, 5th, 6th & 7th, 1892, at 112-13 (n.d.)
40 For a list, see CR 22:112 (Index) (1892).
41 CR 23:5050 (June 6, 1892).
42 CR 23:5050 (June 6, 1892). On alleged cigarette-induced death from insanity, see above ch. 2.
43 CR 23:5050 (June 6, 1892). To be sure, the WCTU’s petition did not extend to
Banning Tobacco Sales to Minors

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

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

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

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44Leland Sage, A History of Iowa 220 (1987 [1974]).
45CR 23:5051 (June 6, 1892).
47Minutes of the National Woman’s Christian Temperance Union at the Nineteenth
Banning Tobacco Sales to Minors

On October 17, 1894, a few months after the Ohio legislature had enacted a prohibition on the sale of photographs with cigarettes,48 Washington Duke informed his son James B. Duke, the president of the Tobacco Trust, that he had received a letter from a minister, and was

very much impressed with the wisdom of his argument against circulating lascivious photographs with cigarettes, and have made up my mind to bring the matter to your attention in the interest of morality, and in the hope that you can invent a proper substitute for these pictures which will answer your requirements as an advertisement as well as an inducement to purchase. His views are so thoroughly and plainly stated that I do not know that I can add anything except to state that they accord with my own, and that I have always looked upon the distribution of this character of advertisement as wrong in its pernicious effects upon young men and womanhood, and therefore has [sic] not jingled with my religious impulses. Outside of the fact that we owe Christianity all the assistance we can lend it in any form, which is paramount to any other consideration, I am fully convinced that this mode of advertising will be used and greatly strengthen the arguments against cigarettes in the legislative halls of the States. I hope you will consider this carefully and appreciate my side of the question. It would please me very much to know that a change had been made.49

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

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

48 1894 Ohio Laws v. 91, S.B. No. 313, § 7, 311, 313.
49 Letter from Washington Duke to J. B. Duke (Oct. 17, 1894), in BNDP, Box 65, RBMSCL.
50 The head of the WCTU’s anti-narcotics department reported to the 1897 annual convention that: “The most wonderful advance has been made in this line of work. Sentiment is strong against cigarettes. The tide is high, and our work seems to receive a response everywhere. The use of the cigarette is increasing, but the increase was less during the past year than for many years. The Dingley Bill prohibits pictures or any prizes being placed in the boxes. Everything points to the death of the little coffin nail, if you women will only continue faithful.” Report of the National Woman’s Christian Temperance Union: Twenty-Fourth Annual Meeting, Held in Music Hall, Buffalo, New York, Oct. 29 to Nov. 3, 1897, at 343 (1897).
lack of the requisite moral fortitude to forgo pornography51:

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

51 A World War I-era, egregiously apologist book claimed that the picture inserts during the previous 30 or 40 years were “in many cases...of real educational value.” William Young, The Story of the Cigarette 97 (1916). A more recent apologist biography asserted that “J. B. Duke could hardly end the time-hallowed use of pictures of curvaceous women in cigarette advertising....” Robert Durden, Bold Entrepreneur: A Life of James B. Duke 60 (2003). In fact, as early as 1887 the city of Charlotte, North Carolina banned picture-bearing cigarettes, causing nearly all the city’s dealers in Duke’s cigarettes to remove the pictures from the packages in order to “sell the packages on their own merit” and avoid indictment. One dealer related that he would return the pictures to Mr. Duke. The same dealer stated that he had seen boys buy the packages, selecting the “loudest” pictures and throwing away the cigarettes. “Cigarette Pictures,” USTJ, vol. 23, July 23, 1887 (5:4).

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

In a forward-looking proposal for counter-advertising, a few weeks later the Chicago Tribune elaborated on the position adopted by the Boston Advertiser, which, building on the cigarette manufacturers’ acquisition of the “pictorial habit,” urged that they be compelled to make the pictures illustrative of the effects of their wares. For instance, on one side of the package could be represented the features of a boy just before he began using the poisonous weeds, and on the other side the features of the same boy after the poison had got well started in its deadly work.

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

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

the United States, 30 Stat. 151, 206, ch. 11, § 10 (July 24, 1897) (quoting the amended version of Revised Statutes of the United States § 3394). The statute also prohibited affixing to, branding, stamping, marking, writing on, or printing on the “'packages, or their contents, any promise or offer of, or any order or certificate for, any gist, prize, premium, payment or reward.’” Id. The statutory provision was virtually identical with H.R. 8699, 54th Cong., 1st Sess. (May 5, 1896); S. 3076, 54th Cong., 1st Sess. (May 6, 1896); H.R. 2282, 55th Cong., 1st Sess. (Mar. 16, 1897). This provision was “slipped in during the conference....” Dingley stated that “the clause had been agreed upon because the internal revenue officials complain that the prize-giving results in an evasion of the revenue laws and also because many of the cigarette pictures are obscene....” “A Blow at Cigarettes,” N&O, July 28, 1897 (2:2). As early as 1913 a bill was introduced in Congress to prohibit admission to the mails as second-class matter any newspaper, magazine, or other publication with “any illustrated or pictorial advertisement or advertising matter relating to cigarettes, cigars, snuff, or tobacco in any form, or to intoxicating liquors of any kind.” H.R. 10155, 63d Cong., 2d Sess. (Dec. 9, 1913) (Halvor Steenerson, Rep. Minn.). Steenerson observed of the evil to be remedied by his bill: “Cigarettes are advertised with pictures of young and beautiful women, some of angelic form and beauty, printed in colors, and others are pictures of beautiful ladies and gentlemen in most fashionable and aristocratic apparel.” Moreover, he pointed out that pictures of Henry George and Mark Twain smoking tended to create a habit in extreme youth. For his efforts Steenerson was rewarded with “An Idiotic Proposition by a Backwoods Congressman,” USTJ vol. 80, Dec. 13, 1913 (10:4).

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

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

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

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

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

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

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

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

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

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

⁵⁶On Woodman’s life, see “Woodman Is Near Death,” CT, Oct. 13, 1897 (5).
⁵⁸“Wants to Tax Cigarettes Out of the Reach of Boys,” Landmark (Statesville, NC), Jan. 5, 1897 (1:7). The identical text appeared in the NYT, Dec. 31, 1896 (2).
⁵⁹“Fear in Cigaret Shop,” CT, Dec. 19, 1896 (9).
⁶⁰CT, Feb. 4, 1897 (4) (untitled). The WCTU sounded a similar theme: “If the cigarette is so injurious as to make it desirable to virtually prohibit its use among the masses, why not legislate it entirely out of existence? This is an instance in which the welfare of the rich needs looking after. The millionaire’s son has as much right to protection in this matter as the boy of the slums.” US 23(6):(3:3) (Feb. 11, 1897) (untitled).
no-sale-to-minors law was unenforceable and the opinion of teachers and others
with contact with boys was “unanimous...that this habit is the most serious
menace the youth of the land has to confront. It is necessary to protect these
children from themselves.” The paper therefore urged the seven-member Chicago
congressional delegation to draft an appropriate bill and “push it through.”61 In
February 1897, Woodman presented an extended argument to the House Ways
and Means Committee in support of his proposal. In particular he offered a precis
of reports from school superintendents throughout the United States estimating
that 2 to 25 percent of school children (and, on average, 20 percent of boys) were
“addicted in a more or less degree to the cigaret habit,” which they all agreed was
corrupting. To be sure, the insuperable impediment for anti-cigarette activists’
was, “of course,” as the Chicago Tribune put it, that:

there was no intention of putting a prohibitory tax on cigarets, the industry having become
so large as to have acquired a distinct standing. Most of the members of the committee are
opposed to the use of the taxing power as a police regulation, and believe that the evil of
selling cigarets to children can best be reached by statutory prohibitions in the different
States.62

The WCTU’s reaction to Woodman’s approach was, “‘Not quite,’” because
even the $50 tax did not eradicate evil: “The poison still continues to grow even
with license. ... There will still be cigarette smokers among our men who can pay
25 cents a piece for them.”63 What is especially potent about this position is that

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

Committee does not appear to have held any hearing on Feb. 12, 1897, it is unclear in what
procedural context Woodman addressed the committee.

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

Woodman tried unsuccessfully to overcome the obstacle of congressional deference to capitalist power and states’ rights by predicting a fivefold increase in tax revenue that would contribute to “the redemption of an impoverished Treasury.”\textsuperscript{64} He then shifted the focus to a trope that might have resonated more deeply with Congress:

Protection is the watchword of the age. Protection to American workingmen. Protection to American industries. Protection, as by the immigration bill recently passed, to American citizenship. Protection, as in the case of the lottery law of a few years ago, of the people against themselves. Is there, then, any reason why the same protection should not be extended to our boys, especially when such protection involves a matter of much needed revenue to the government?\textsuperscript{65}

This approach of suppressing cigarettes through taxation rather than administrative controls was sometimes paired with anti-trust sentiment. In 1895, for example, the New-York Daily Tribune editorially urged the federal government to increase its revenues by raising the tax on cigarettes to high figures. It is generally conceded, except by infatuated and desiccated cigarette smokers, that the smoking of cigarettes is a pernicious and deleterious habit. The manufacture of cigarettes in this country is largely controlled by an exceptionally selfish and avaricious trust. It will be in the public interest, and great benefit to the country, if the tax on cigarettes is multiplied many times over. The Cigarette Trust is a peculiarly evil one, and it ought to be broken up.\textsuperscript{66}

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

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

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

\textsuperscript{65}“Tax on Cigarettes,” \textit{Middletown Daily Argus (NY)}, Feb. 13, 1897 (1:5).

\textsuperscript{66}\textit{N-YDT}, Feb. 6, 1895 (6:5-6) (untitled edit.).
Banning Tobacco Sales to Minors

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

In evaluating these incipient efforts at regulation, control, and prohibition, it is crucial to keep in mind that cigarette consumption in the 1880s was still in the infancy of what was to become explosive growth in the United States. The Times had observed in 1881 that Americans were smoking 10 times more cigarettes than five years earlier, a thousand times more than a decade earlier, “and so on till we reach a point about 30 years back, when we smoked none at all.”68 Nevertheless, the unsubstantiated claim in 1901 by a New York City councilman, in support of his proposed ordinance to criminalize the sale of cigarettes to persons under 18, that 99 percent of boys under the age of 15 in that city smoked cigarettes69 appears wildly implausible.

Iowa Enacts the WCTU’s Scientific Temperance Instruction: 1886

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

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

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

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57CR 34:288 (Dec. 13, 1900).
69“To Regulate Sale of Cigarettes,” N-YDT, Feb. 9, 1901 (4:5).
70Eli Brown, Youth’s Temperance Manual: An Elementary Physiology iv, 104 (1888).
Banning Tobacco Sales to Minors

every state legislature and Congress to enact such a law⁷¹ and thus became “perhaps the most influential lay lobby ever to shape what was taught in public schools”⁷²—in 1886 the Iowa General Assembly passed a law requiring:

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

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

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

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


⁷³1886 Iowa Laws ch. 1, § 1, at 1.

⁷⁴1886 Iowa Laws ch. 1, § 2, at 1-2.

⁷⁵1886 Iowa Laws ch. 1, § 3, at 2.

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

it more widely prescribed but it has received more extensive and more specific legislation than any other. It is our nearest approach to a national subject of instruction; it might be called our one minimum essential.”77 Tennessee may have been the only state expressly to include in its original law any mention of a tobacco product and specifically cigarette smoking,78 but as many states amended their laws, two updated them to include tobacco.79 Moreover, other states administratively understood “stimulants” or “narcotics” to include tobacco,80 and by the turn of the century the WCTU could boast that these school programs “are now carrying to millions of children all over this country the facts concerning the effects of alcoholic drinks and tobacco on muscular working ability which have been wrought out by scientific experiment, largely within the past decade, and which, but for this practical application, would be reposing in dust-covered volumes on the shelves of medical libraries.”81 As early as 1886, the state school superintendent of Vermont—the first state to enact a scientific temperance instruction law—remarked that: “The startling fact that so large a number of school boys are forming the habit of using tobacco by smoking cigarettes, thus

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


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


Banning Tobacco Sales to Minors

retarding physical development, disordering the nervous system, and weakening their mental power, is a sufficient incentive to all the effort that has been or can be put forth to forearm the children against this evil.” In Connecticut teachers were to teach, inter alia, that: using tobacco, “creates a strong appetite for itself
Banning Tobacco Sales to Minors

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

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

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

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


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

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

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

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

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

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

92Journal of the Senate of the Twenty-First General Assembly of the State of Iowa 80 (Jan. 26) (1886).


94The General Assembly,” ISR, Feb. 6, 1886 (8:2-4).

95Frances Willard and Mary Livermore, A Woman of the Century: Fourteen Hundred Seventy Biographical Sketches Accompanied by Portraits of Leading American Women in All Walks of Life 263 (1893); Iowa Messenger 2(13):4 (Mar. 31, 1887) (Iowa WCTU’s periodical listing Dunham as superintendent of the department of scientific temperance instruction, temperance work, colleges, seminaries); Standard Encyclopedia of the Alcohol Problem 3:867 (Ernest Cherrington ed. 1926). Thumb Nail Sketches of White Ribbon Women 34-35 (Clara Chapin ed. 1895), incorrectly stated that Dunham had secured passage of the bill in 1884.


97Journal of the Senate of the Twenty-First General Assembly of the State of Iowa 148 (1886) (Feb. 5).
Banning Tobacco Sales to Minors

Moreover, the prohibitionists’ zeal was as intoxicating as whisky:

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

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

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

98“The General Assembly,” ISR, Feb. 6, 1886 (8:2-4).
99Journal of the Senate of the Twenty-First General Assembly of the State of Iowa 148 (1886) (Feb. 5).
100“The General Assembly,” ISR, Feb. 6, 1886 (8:2-4).
101Journal of the Senate of the Twenty-First General Assembly of the State of Iowa 149 (Feb. 5) (1886). All the yeas were cast by Democrats, who held 19 of the 50 seats. Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 64 (2007).
102“The General Assembly,” ISR, Feb. 6, 1886 (8:2-4).
103Journal of the Senate of the Twenty-First General Assembly of the State of Iowa 149 (Feb. 5) (1886). All the nays were cast by Democrats.
104Journal of the House of Representatives of the Twenty-First General Assembly of the State of Iowa 153 (Feb. 8) (1886). All the nays were cast by Democrats, who held 39 of 100 seats. Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 64 (2007).
bent to the child’s mind against the use of liquor and tobacco. ... Total abstinence should be taught as the only sure way to escape the evils arising from the use of alcoholic drinks and tobacco.”

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

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

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

Sabin’s preferred pedagogical tool in achieving “[t]he chief aim in temperance instruction” of convincing pupils that “the only path to happiness or success lies through a life of temperance and sobriety” was to instill in them “an ever present, all powerful influence for good” in the form of a “high ideal of a noble life.” So taken was Sabin by this imagery that in his next report he stressed that the societal evils linked to young people’s use of alcohol and tobacco could “never be lessened by the study of an elementary text-book, and the memorizing of a few cold, hard facts.” Though the law was “good,” teachers had to “go beyond the law, and hold up that lofty ideal of a noble man, a pure woman, a grand life, which can only be reached through paths of honesty, sobriety and industry.”

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

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

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

The Woman’s Christian Temperance Union of Iowa, Its Christian-Socialist President, Marion Howard Dunham, and the National Woman’s Christian Temperance Union’s Quasi-Marxist President Frances E. Willard

The anti-tobacco crank is not confined to breeches. The female skirt covers the crank, too. The female crank of this kind is generally represented by the spinster. She hates the smoker out of revenge for her loneliness. She pretends to loathe smoke while she is inwardly yearning to press the lips from which it emanates.112

“If we own the children we own the future.”
W.C.T.U. women have tried various ways to own the children, one of which has been to secure laws forbidding the sale of cigarettes to minors...

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

111Code of Iowa § 280.10 (1973); 1974 Iowa Laws ch. 1168, § 1, at 531, 532 (codified at § 257.25); it remained in force through Code of Iowa § 256.11 (1987).
112“Have Smokers Any Rights?” USTJ, vol. 29, June 28, 1890 (2:3).
Banning Tobacco Sales to Minors

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

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

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

\textsuperscript{113}“Special Message: From Frances E. Willard National President of the W.C.T.U.,” \textit{HT}, Jan. 28, 1897 (2:3).

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

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

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

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

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

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


## Table 3: Membership of the Iowa WCTU, 1891-1921

<table>
<thead>
<tr>
<th>Year</th>
<th>Membership</th>
<th>Year</th>
<th>Membership</th>
<th>Year</th>
<th>Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>1891</td>
<td>1,730</td>
<td>1907</td>
<td>3,413</td>
<td>1908</td>
<td>3,571</td>
</tr>
<tr>
<td>1892</td>
<td>2,903</td>
<td>1909</td>
<td>3,127</td>
<td>1910</td>
<td>4,669</td>
</tr>
<tr>
<td>1893</td>
<td>1,689</td>
<td>1911</td>
<td>3,932</td>
<td>1912</td>
<td>4,233</td>
</tr>
<tr>
<td>1894</td>
<td>2,055</td>
<td>1913</td>
<td>6,369</td>
<td>1914</td>
<td>8,104</td>
</tr>
<tr>
<td>1895</td>
<td>2,666</td>
<td>1915</td>
<td>9,996.5</td>
<td>1916</td>
<td>6,847</td>
</tr>
<tr>
<td>1896</td>
<td>2,998</td>
<td>1917</td>
<td>9,954</td>
<td>1918</td>
<td>10,748</td>
</tr>
<tr>
<td>1897</td>
<td>1,664</td>
<td>1919</td>
<td>11,930</td>
<td>1920</td>
<td>11,556</td>
</tr>
<tr>
<td>1898</td>
<td>1,689</td>
<td>1921</td>
<td>13,030</td>
<td></td>
<td>13,030</td>
</tr>
<tr>
<td>1899</td>
<td>1,545</td>
<td></td>
<td></td>
<td></td>
<td>3,001</td>
</tr>
</tbody>
</table>

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

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\(^{121}\)First and Second Annual Meetings of the Woman’s Christian Temperance Union of the State of Iowa 52 (1891); Third Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 58 (1892); Fourth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 41 (1893); Fifth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 65 (1894); Sixth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 54 (1895); Seventh Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 38 (1896); Eighth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 44-45 (1897); Ninth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 44-45 (1897);
Banning Tobacco Sales to Minors

By way of comparison, paying members in the rival WCTU of Iowa numbered 3,022 in 1892 and 2,086 in 1895.\footnote{Nineteenth Annual Report of the Woman’s Christian Temperance Union of Iowa 10 (1892); Twenty-Second Annual Report of the Woman’s Christian Temperance Union of Iowa 19 (1895).}

As early as 1891, Mrs. L. A. Burkhalter of Cedar Rapids,\footnote{A 33-year-old Lucy A. Burkhalter, the wife of clergyman Edward Burkhalter, was returned at the 1880 population census as living in Cedar Rapids.} the superintendent of the nationally affiliated group’s Legislation and Petitions Department, reported to the second annual meeting that: “In as many as seven of the states, a law exists forbidding the use of tobacco to minors. There is no reason why Iowa should not have such a law and we believe that we have only to ask for it to secure our boys from this deadly and growing evil.”\footnote{First and Second Annual Meetings of the Woman’s Christian Temperance Union of the State of Iowa, held at Des Moines, Iowa, October 16th and 17th, 1890, October 6th,} At the same
time the “non-partisan” Iowa WCTU began memorializing the Senate to prohibit the sale of cigarettes to minors, and its annual meeting the following year recommended renewing efforts to secure a legal ban on the sale of tobacco to minors.

In order to capture the quintessence of the christian-socialist mind-set of the partisan WCTU of the State of Iowa at this time—which unmistakably embraced, but was not monomaniacally obsessed with liquor prohibition—Marion Howard Dunham’s annual presidential address in 1893 may be scrutinized, which took as its point of departure for analyzing the then spreading financial panic and deep economic depression the fact that “the seeming peace of society covers a seething discontent which is beginning to make itself felt.”

Dunham (1842-1922) was the president of the WCTU of the State of Iowa during its entire existence (1890-1906) and then of the reunited organization in 1907-1908, at which time she moved from Burlington to Chicago. Born in Ohio, following seven years of teaching in the Chicago public schools, in 1873 she married the noted architect, Charles A. Dunham, with whom she lived in Burlington, where she organized and led the local WCTU, until 1908, when they moved to Chicago, where he soon died and she was elected president of the Cook County WCTU.

She had joined

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125 Nineteenth Annual Meeting of the Woman’s Christian Temperance Union of Iowa 54-55 (1892).
126 Twentieth Annual Meeting of the Woman’s Christian Temperance Union of Iowa 48 (1893).
127 Fourth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Oskaloosa, Iowa, October 3rd, 4th and 5th, 1893, at 9 (1893).
128 “Election Day Convention,” CREG, Sept. 25, 1908 (8:1); “Chas. A. Dunham,” BH-E, Dec. 15, 1908; “Clarence M. Dunham,” BH-E, Nov. 23, 1909; Standard Encyclopedia of the Alcohol Problem 3:867 (Ernest Cherrington ed. 1926). She appeared in the 1880 and 1900 population censuses, but not in the 1910 or 1920 population census; she moved to Dove, California near San Luis Obispo (population 10 in 1910) in 1914, whence for several years she continued to return to Iowa to attend the Iowa WCTU annual conventions. Rand McNally, The Library Atlas of the World, Vol. 1: United States 303 (1912); Fiftieth Annual Convention of the Woman’s Christian Temperance Union of Iowa, held at Shenandoah, Iowa, October 2-5, 1923, at 118 (n.d.)). In 1897 she was the unsuccessful Iowa Prohibition party candidate for state Superintendent of Public Instruction, receiving only 7,661 of 433,438 votes, but more than the Populist party candidate. Secretary of State, Iowa Official Register 227 (13th Year, 1898); CREG, Oct. 30, 1897 (7:1-5). The Chicago Tribune said of the Prohibition ticket: “With the exception of Mrs. Dunham the candidates are almost unknown as public men.” “Name Pastor Eaton for Governor,” CT, July 29, 1897 (2).
the temperance movement in 1877, but as early as 1893, Frances Willard, the national president of the WCTU, characterized her in a tome on *Leading American Women* as having “always been a radical equal suffragist” and “Christian socialist, deeply interested in all reforms that promise to better the social system and the conditions of life for the multitudes.” Dunham’s focus was:

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

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

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

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

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

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

To be sure, National WCTU President Frances Willard herself, influenced by the economic depression of 1884-85, had also been evolving toward acceptance and advocacy of a socialist critique of capitalism. Initially she began to reconsider the organization’s claim that since drunkenness caused poverty, eliminating the former would also do away with the working class’s economic straits. Bourgeois feminists may have been alarmed by Willard’s intensifying association with the Knights of Labor in latter half of the 1880s, but by 1889 she turned her causal scheme on its head, now identifying the roots of drinking in long hours and bad working conditions134.

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

132Fourth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Oskaloosa, Iowa, October 3rd, 4th and 5th, 1893, at 9 (1893).
133Fifth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Marion, Iowa, October 3, 4 and 5, 1894, at 12.
By the time of the even deeper economic depression that began in 1893, Willard’s annual presidential addresses became ever more radical. For example, in 1894, after asking why one-eighth of the people in the United States owned seven-eighths of the property, she observed that so far from being a menace to the country, the wage-earning class were themselves the country. In addition to desiring the people’s ownership of the great plants then in the hands of “individual or associated capitalists,” Willard insisted that nothing would serve the people’s liberties and rights as their ownership of the newspapers so that they “should be the purveyors of their own ideas instead of taking them at second-hand.” The next year she asked: “Why should humanity be divided into grades based on the fact that they work or that they do not work, and by what monstrosity of delusion did it ever come to be thought that those who did not work stood at the head, and those who worked, just in proportion to the degree of their work, stood at the foot? … Because the work is not equalized, but certain thoughtless, selfish ‘privileged classes’ have heaped the work they ought to do upon those who had already more than was their share, and I am a Collectivist because I believe these burdens should be distributed according to those principles of justice which ought to teach every human being that every other has as much right as himself to life, liberty, the pursuit of happiness, the pursuit of knowledge, the pursuit of holiness. [T]he time will come when those who do not work will be drummed out of the camp and stung out of the hive, and placed by themselves as lepers are…” Willard’s Christian socialism culminated in her adoption in her very last presidential address of Marx’s identification of the source of surplus value. After urging the convention to declare in favor of the eight hour law, not only because prevailing hours were oppressively long, but also because shorter hours would lead to the employment of additional workers, she instructed the membership that:

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

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

137 Report of the National Woman’s Christian Temperance Union at the Twenty-Second Annual Meeting...October 18-23, 1895, at 103 (1895).
Banning Tobacco Sales to Minors

There is a commodity in the market which has the magic power of creating more than it costs to produce it. This is the labor power of the human being, of a free wage-worker. He sells it for a certain amount of money, which competition reduces to the average necessaries of life required to produce it; to so much food, clothing and shelter, which are absolutely necessary to recuperate his lost powers on the next morning, and to reproduce a new generation of wage-workers after this one is gone. Almost all above this goes to the employing class, and is called “the surplus value.”

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

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

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

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


707
of moralistic anti-modernity. But whatever impact Willard may have had in nudging the WCTU toward adopting socialist positions, the argument that following her death in 1898 the organization’s public image began changing—“from the best, most respected, most forward-looking women in town to narrow-minded antilibertarians riding a hobbyhorse”—did not, as will be seen below, apply to Iowa during its cigarette prohibitory period (1896-1921).

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

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

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

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141 On Dunham’s open membership in the Socialist Party, see below ch. 13.
years following enactment of the cigarette mulct penalty in 1897.145

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

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

145 See below ch. 12.
146 In the 1890s no close fit prevailed between statewide liquor prohibition and general cigarette sales bans. For example, in 1893 only six states qualified as “dry”: North Dakota, South Dakota, Kansas, Maine, Vermont, and New Hampshire. The Anti-Saloon League Year Book: 1910, at 30 (Ernest Cherrington ed. n.d.). Of these only North Dakota enacted a statewide cigarette sales ban (in 1895), while one house of the Maine legislature passed such a bill (in 1897). In 1909, when statewide cigarette sales bans reached their high point of 11, only three of those states (Kansas, Tennessee, and Oklahoma) were counted among the nine “dry” states. Id. at 31; above tab. 2.
148 Richard Bensel, The Political Economy of American Industrialization, 1877-1900, at 181 n.136 (2000). Compare the claim of one of the leading advocates of ethno-cultural political interpretation: “The prohibition question was the paramount state or local issue, year in and year out, throughout most of the Midwest (and much of the rest of the country) in the 1880s. Invariably the Republican party favored dry solutions, while the Democrats were on the wet side.” Richard Jensen, The Winning of the Midwest: Social and Political Conflict, 1888-1896, at 70 (1971).
professional party leaders.\textsuperscript{149}

In an effort to redirect historians away from “the formal and outward aspects of events” and toward an emphasis on “the vital human quality of the past...human experience, understanding, values and action,” historian Samuel Hays instanced the “vast importance” of alcohol prohibition in Iowa. Indeed: “If one can argue that a single issue was more important than any other issue in Iowa between 1885 and 1918 it was prohibition.”\textsuperscript{150} However, Hays went on to point out that

prohibition was more than an issue; it was the most specific aspect of a general conflict between patterns of culture in Iowa which dominated the political views of the state for many years. One of these cultural patterns we can call...Pietism. It stressed strict standards of behavior derived from Puritan sources, especially Sunday observance, and prohibition of gambling, dancing, and, above all, drinking alcoholic beverages. It was evangelistic; it exhorted individuals to undergo a dramatic transformation in their personal lives, to be converted, and it sought to impose these standards of personal character on the entire community by public, legal action. But there were others, whose pattern of culture was altogether different, who resisted these views. They came from a different cultural background, and their religion consisted more of a sequence of rituals and observances through which one passed from birth to death, with the primary focus of religion being the observance of those practices. For many of them Puritan morals meant little; Germans, for example, were accustomed to the continental Sunday of relaxation in beer gardens or to using wine for communion services.

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

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

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

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

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\(^{152}\)Jensen, the “issue capable of shaking enough Republicans to defeat that party...was the tension between the pietistic and liturgical world views, and in 1889 it emerged in the guise of the prohibition of the liquor traffic. Indeed, for most of the last third of the century, the liquor question, throughout the Midwest, was the major factor activating the latent tensions and leading to changes in voting patterns.” Id. at 89. For his account of the playing out of this theme in Iowa, see id. at 89-121. For another influential ethno-religious interpretation of late-nineteenth-century Iowa history, see Paul Kleppner, *The Third Electoral System, 1853-1892: Parties, Voters, and Cultures* 306-28 (1979).

**Banning Tobacco Sales to Minors**

**The Republican Party’s Embrace of Prohibition (1879-1889)**

Liquor legislation in Iowa oscillated during the half-century from statehood\(^{153}\) in the mid-1840s to the mid-1890s, running the gamut from statewide constitutional prohibition to local option and licensure (including legislation submitted for voter approval) but not unilinearly,\(^{154}\) the swings resulting from legislatively endorsed reactions by the prohibitionist and anti-prohibitionist forces to enactment of regulatory regimes that either departed too far from their positions or, in the case of the former, were not enforced.\(^{155}\) For present purposes, the narrative flow may begin with the Republican Party’s espousal in 1879 of the newly inaugurated campaign, spearheaded by the WCTU, to anchor prohibition of the manufacture and sale of intoxicating liquor in a state constitutional amendment, both the prohibitionists and the party wanting, for different reasons, to remove the issue from party politics, especially since the Democratic Party officially declared in favor of liquor licensure. In 1880 both houses of the legislature, by comfortable majorities, passed a joint resolution to amend the constitution to prohibit the manufacture for sale, sale, or keeping for sale as a beverage any intoxicating liquor, including ale, wine, and beer. During the interim before the constitutionally required second round of legislative approval at the next session, the Republican Party solidified its support of the people’s expression of their will regarding the question, while the Democratic Party reinforced its opposition to any and all such sumptuary regulation. After both houses, again by large majorities, had adopted the earlier joint resolution, the special election was set for June 27, 1882. Interestingly, one of the prohibitionists’ most often deployed contentions was that, since liquor was chiefly responsible for crime, its prohibition was justified despite the sacrifice of a few persons’ rights for the whole community’s good.\(^{156}\) (In contrast, over the years, in Iowa and elsewhere, the anti-cigarette movement would almost never

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


concede the fact that they were demanding that adult men sacrifice their right to consume cigarettes for the good of the next generation, let alone address the moral-philosophical basis of that deprivation.) In the event, 55.3 percent of the voters and three-fourths of the counties supported the prohibition amendment, the opposition being centered in the Missouri and, especially, the more heavily Democratic and German and Irish Mississippi River counties.\footnote{Calculated according to data in \textit{Official Register: Executive, Judicial and County Officers of the State of Iowa: January 1, 1889}, at 207-208; Dan Clark, “The History of Liquor Legislation in Iowa 1878-1908,” \textit{IJHP} 6(4):503-608, Map II at 606 (Oct. 1908); Richard Jensen, \textit{The Winning of the Midwest: Social and Political Conflict, 1888-1896}, at 95-97 (1971).}

Despite this victory, prohibitionists soon received a shock when in November a district court judge invalidated the amendment,\footnote{“The Amendment,” \textit{Iowa State Reporter} (Waterloo), Nov. 8, 1882 (1:3-4). The judge, Walter Hayes, a Democrat who later became a congressman and after defeat for re-election a state legislator, once delivered himself of the bon mot that in 1882 15,000 Democrats had voted for prohibition because they “wanted to get the Republicans in a hole, and they got there.” “The Resubmission Question,” \textit{Davenport Tribune}, Mar. 28, 1894 (4:1) (edit.).} before the General Assembly could even enact implementing legislation, and in January 1883, the Iowa Supreme Court affirmed on the grounds of technical form errors in legislative procedures that had resulted in submission to the voters of an amendment that was not identical to the text of the resolution passed by both houses in 1880.\footnote{Koehler & Lange v Hill, 60 Iowa 543 (1883); “The Amendment,” \textit{EG}, Jan. 19, 1883 (4:3).}

The result of the invalidation, the Democratic Party’s continued insistence on licensure, and the Republican platform’s commitment to the party’s obligation to enact legislation at the 1884 session that would establish and enforce the principle and policy endorsed by the majority of voters on June 27, 1882, was prohibitionists’ concerted focus on electing Republican majorities to both houses in the 1883 elections.\footnote{Dan Clark, “The History of Liquor Legislation in Iowa 1878-1908,” \textit{IJHP} 6(4):503-608 at 535-39 (Oct. 1908).} Although the Republican Party secured 39 of 50 Senate and 52 of 100 House seats, the “tremendous reduction” of its majorities vis-a-vis the 1882 session, especially in the House—which the \textit{Chicago Tribune} causally linked to its identification with the prohibition movement—prompted The New

\footnote{“Temperance Question in Iowa,” \textit{CT}, Oct. 16, 1883 (4) (edit.). In 1882 the Republican Party had controlled 46 Senate and 71 House seats. Michael Dubin, \textit{Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006}, at 64 (2007). In addition, in 1884 six members of the Greenback Party, whose platform also supported...}
York Times report that prohibition legislation was “considerably in doubt” because it would “have to be driven through under party discipline, and the Democratic members will go home full of schemes to render abortive, if possible, the enforcement of the law.” To such doubts about passage of statutory prohibition one small-town Iowa Republican paper counterposed this electoral logic as having locked the party into prioritizing enactment of prohibition:

The very life of the republican party depends upon the enactment and enforcement of a stringent prohibitory law. By its course since the question of submitting the amendment first came up, the party has been estranging the liquor interest and no matter how opinions may differ as to the wisdom of making prohibition a leading measure in the campaign just past, the fact remains that it was done and that the whisky vote is gone for good. As a matter of self-defense, therefore, the republican party must make warfare on that which furnishes the sustenance of democracy. Without the money contributed by the saloon the democracy can not come within 60,000 votes of carrying Iowa.... But what must be expected if the party does not fulfill its solemn promise to the people on the 27th of June? The prohibitionists now compose probably nine-tenths of the party. They feel that they have a principle at stake and will not be trifled with. We are satisfied that more than half of them would refuse to vote with the party hereafter if anything but a straightforward course is pursued this winter. The republican party had to choose whether it would lose the saloon or temperance vote. It let the former go, but it cannot afford now to let the latter go also.

In the event, the Republican Party was able to fulfill its electoral campaign promise and passed, on a virtually party-line vote, legislation including ale, wine, and beer in the prohibition of the manufacture or sale of intoxicating liquor.

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162“The Republican Victory in Iowa,” NYT, Oct. 12, 1883 (1).
163“Stand by Prohibition,” Glenwood Opinion, Nov. 3, 1883 (2:3) (reprinted from Atlantic Messenger). Two years later, The New York Times reported that “[c]onservative Republicans” insisted that the Party’s position had lost it 20,000 to 25,000 German voters, “whereas 75,000 Prohibitionist would have cut loose from the Republican Party if the party had not committed itself to prohibition. It was simply a choice of evils.” “Iowa for Any Good Man,” NYT, Mar. 8, 1884 (2).
1641884 Iowa Laws ch. 8, at 8. H.F. No. 14 passed the House by a vote of 52 to 41 (with one member later changing his vote from not voting to No and another stating that he would have voted No had he been present). Journal of the House of Representatives of the Twentieth General Assembly of the State of Iowa,...1884, at 278, 299, 443 (Mar. 1, 3, 18) (1884). No Republican voted Nay and only one Democrat voted Yea; Greenbackers joined Democrats in opposition. “Prohibition in Iowa,” CT, Mar. 2, 1884 (7). The Senate
Passage, however, turned out to be considerably easier than enforcement. Although many saloons, especially in pro-temperance communities, immediately closed, and prohibition was successfully implemented in hundreds of smaller towns, the law became a virtual dead letter in larger cities where the majority opposed enforcement and even mob violence against enforcers was not extraordinary. Some cities, despite prohibition, unlawfully imposed license fees on saloons. Nevertheless, these set-backs neither prevented the election of Republican William Larrabee, a vigorous supporter of enforcement, as governor nor deprived the Republican Party of its legislative majority. Consequently, in 1886 the Republicans pushed through the legislature a bill that,

concurred by a vote of 34 to 11. *Journal of the Senate of the Twentieth General Assembly of the State of Iowa..., 1884*, at 264-65 (Mar. 6) (1884). A separate bill, inter alia, increased the penalties for violations. It also passed largely along party lines. *Journal of the House of Representatives of the Twentieth General Assembly of the State of Iowa..., 1884*, at 582 (Mar. 28) (1884) (House substitute for H.F. No. 107, etc., 54 to 43); *Journal of the Senate of the Twentieth General Assembly of the State of Iowa..., 1884*, at 552 (Mar. 29) (1884) (H.F. No. 516½, 29 to 13); 1884 Iowa Laws ch. 143 at 146.


166 A few months after taking office Larrabee urged banishing the dram-shop from Iowa. “Proclamation on the Enforcement of the Law Relative to the Sale of Intoxicating Liquors” (May 3, 1886), in *The Messages and Proclamations of the Governors of Iowa* 6:212-13 (Benjamin Shambaugh ed. 1904). See also First Inaugural (Jan. 14, 1886), in *The Messages and Proclamations of the Governors of Iowa* 6:5-31 at 25-30 (Benjamin Shambaugh ed. 1904); Second Biennial Message (Feb. 13, 1890), in *The Messages and Proclamations of the Governors of Iowa* 6:108-97 at 184-92 (Benjamin Shambaugh ed. 1904). In his first biennial message to the legislature Governor Larrabee observed that the State University of Iowa in Iowa City had only half the number of students it should have because prohibitory laws were not enforced “with sufficient vigor in Johnson County to make it as effective as it should be to harmonize with the sentiment of those who most desire to patronize the institution.” He therefore urged banishing the sale of intoxicating liquor from that vicinity entirely. “First Biennial Message” (Jan. 11, 1888), in *The Messages and Proclamations of the Governors of Iowa* 6:32-85 at 50 (Benjamin Shambaugh ed. 1904). In the same message he urged pressing forward until the saloon and all illegal manufacture and sale of intoxicating liquor were “utterly destroyed.” *Journal of the House of Representatives of the Twenty-Second General Assembly of the State of Iowa* 49 (Jan. 11) (1888).

167 Though reduced, the party's Senate majority at the 1886 session still reached 31 seats; in the House its majority rose to 60 seats. Michael Dubin, *Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006*, at 64 (2007).
inter alia, strengthened the law’s provisions concerning abatement of nuisances\textsuperscript{168} (which was sponsored by Talton Clark, who also introduced the aforementioned successful scientific temperance instruction bill).\textsuperscript{169} By 1889 prohibition had succeeded both to some extent in closing saloons in the vast majority of counties except for those located on the Mississippi and Missouri rivers and in virtually eliminating liquor manufacture.\textsuperscript{170}

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

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

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

\textsuperscript{169}See above this ch.


\textsuperscript{172}IOR: January 1890, at 72-76. After 136 deadlocked ballots over the speakership, on which the two minor parties voted with the Democrats, the two major parties agreed that, inter alia, a Democrat would become speaker, while a Republican would become speaker pro tem and the Republicans would have first choice of standing committees and choose five committees. Journal of the House of Representatives of the Twenty-Third General Assembly of the State of Iowa,...1890, at 82-84 (Feb. 19) (1890); “Deadlock Broken,” CREG, Feb. 20, 1890 (1:5-6).
on prohibition, “which has become the settled policy of the State and upon which there should be no backward step. We stand for the complete enforcement of the law.”\textsuperscript{173} The Democratic party did not budge either, its platform once again demanding a $500 annual license based on a popularly voted-on local option.\textsuperscript{174} The New York Times depicted at least one-third of Republican rank and file as being “glad to call a halt” to the party’s full commitment to prohibition but incapable of altering that course vis-a-vis the “Simon-pure Prohibitionists,” who were demanding not only a declaration favoring the law’s “enforcement in every town, city, and county” in Iowa, but enactment of a law providing for summary removal of all local officials who failed to enforce prohibition and for establishment of a state-controlled system of constables. Finally, the Times reported, the continued (unlawful) sale of alcoholic beverages failed to generate revenues for cash-strapped local governments, whose “absolutely necessary current expenses” would require them to raise tax rates that had already reached their legal limits.\textsuperscript{175}

Prohibitionists and temperance organizations, the Chicago Tribune added, were not campaigning for the Republican gubernatorial candidate because they could not even dream that the law risked being repealed by a legislature certain to be controlled once again by Republicans. However, the newspaper speculated that such a Republican legislature might conclude from the election of a Democratic governor that “public sentiment has so changed that the repeal of the law should follow. Some of the most prominent Republicans of the State say that if the Prohibitionists allow Mr. Boies to be elected by failure to come out and vote, they will be in favor of repealing prohibition next winter. The Republican party has carried this policy at heavy expense to itself, and it will not feel like carrying it much longer if the men who are most interested in it don’t take enough interest to stand by the party on the Governorship as well as the Legislature.”\textsuperscript{176}

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

\textsuperscript{173}IOR: January 1890, at 107 (5th Year).

\textsuperscript{174}IOR: January 1890, at 110 (5th Year).

\textsuperscript{175}“Iowa’s Three Candidates,” NYT, Aug. 12, 1889 (1). This tax revenue-based argument for licensure would also become a public policy staple in the campaign against statewide cigarette sales bans.

\textsuperscript{176}“Hutchison Is All Right,” CT, Oct. 29, 1889 (6).
Banning Tobacco Sales to Minors customs of their fathers, the influence of education and the surroundings in which they live” as accounting for disparate “public sentiment” in various parts of the state that either underwrote or rejected prohibition, Boies asserted that “its enactment was the gravest injustice to a great number of our citizens....” This claim related back to the circumstance that “among the first public acts of the republican party, after it came into power [in 1858], was an act amending” an 1855 general prohibitory law to exempt beer, cider from apples, or wine from grapes, currants, or other fruits grown in Iowa. This relaxation had been the result of the insight of “sagacious legislators...that if Iowa was to be speedily developed it must be done by inviting all classes of people to come and make their homes within her borders” at a time when “[a]lmost unlimited areas of its generous soil had never been touched by the hand of man” and “citizens were needed to develop a wilderness of natural wealth into a great and thriving state....” During the 24 years that Iowans could lawfully drink beer, cider, and wine “under republican rule”—until the aforementioned constitutional amendment of 1882—“Iowa grew from a sparsely settled wilderness into a most populous and thriving state, with farms dotting its prairies in every direction and towns or cities scattered through all its counties.” To this ideal and idyllic impact of a quarter-century’s unimpeded consumption of non-whisky alcohol on Iowa’s economy and landscape corresponded an equally heartening vesting of property rights: “no man who invested his money [in] or devoted his time to a manufacturing business could point to so clear a legal right therefor as the brewers, the wine and cider makers of the state, for in addition to the right which they derived from the common law to engage in this business...they had also a statutory right, by clear implication....” Not only did prohibitionists know that their law would “destroy almost every dollar in value of the property invested in that business amounting to millions upon millions” and “bankrupt men, and that “vast industries would be crushed,” disemploying thousands of men, but the law’s underlying principle, by placing “every man’s property at the mercy of a majority” without indemnification, discouraged capital from flowing into Iowa lest “a dominant public sentiment...destroy[ ] it without mercy or remuneration, whenever in the judgment of the majority, the public good demands it....” Such a capital import boycott in combination with the state’s adoption of a “code of morals on this subject at variance with public sentiment in the great centers of population throughout the civilized world,” which meant that everyone who immigrated to Iowa “must if necessary leave behind him the lessons of his life, the customs of his fathers and the social habits of his people,” augured poorly for a state that did not have one-fourth of the population that it was “capable of supporting.” To Republican prohibitionism and all of its alleged untoward consequences Boies and the Democratic Party counterposed balkanized domination of “public
sentiment” based on “self-government,” under which local majorities of prohibitionists could keep the existing statewide regime and in other localities anti-prohibitionist majorities would instead be permitted to adopt a “rigid high license law.”\footnote{177}

In sharp contrast, Republican gubernatorial candidate Joseph Hutchison imbued prohibition with sacrosanctity. In stump speeches he stressed that public opinion had grown to support the law “‘by virtue of the moral and Christian, as well as the material advantage’” that it had bestowed on Iowa. Unhesitatingly reaffirming the “‘the struggle for morality,...for the sacred virtue and honor of the home,’” he proclaimed “‘by the goodness of God and the continued virtue of our people...to the civilized world that we shall maintain the stand we have taken.’” In particular he emphatically declared that the murder of the militant activist prohibitionist Reverend George Haddock in Sioux City in 1886 by a saloon-keeper “is sacred to us, that we look upon his blood as the seal which pledged us to everlasting destruction and condemnation of the saloon in Iowa.”\footnote{177} Denying the claim that prohibition was unenforceable, he insisted that it “was successfully enforced in nine-tenths of the counties of the state.”\footnote{178}

On the eve of voting, \textit{The New York Times} described the Iowa election’s doubtful outcome as the once in a lifetime phenomenon for the current generation. Ascribing the disaffection of leading Republicans to “disgust with the prohibition law and indignation at the course of its advocates,” the newspaper declared on its front page that with more liquor being sold in Iowa than ever before, no one would dare publicly claim that “prohibition prohibits. ... All that the Republican Party promises is that if it is successful this time it will pass another measure which it thinks will render the law capable of enforcement.”\footnote{179} Such a bill the \textit{Times} conjured up as producing a nightmare scenario (giving a

\footnote{177}“A Rousing Speech,” \textit{III}, Oct. 10, 1889 (7:1-5 at 3-5, 8:1-2). For the laws, see 1855 Iowa Laws ch. 45 at 58; 1858 Iowa Laws ch. 143 at 283. The 1858 exemptions for beer and wine were interpreted as having been dispensed “[o]nly out of regard for the Germans and in the sincere belief that mild beverages might supplant the use of stronger liquors....” “Local Option, But Not License,” \textit{ET-R}, Aug. 19, 1893 (1:4-5) (edit.). In the wake of the enactment of the stringent prohibition law some breweries closed and moved to another state (e.g., from Iowa City to Illinois), whence they shipped beer by the car load to Iowa City. “A Review of the Situation,” \textit{CREG}, Oct. 19, 1889 (2:1-3 at 2) (edit.). Such shipments became blatantly illegal after congressional enactment of the Wilson law in 1890. See below ch. 11. At the time of Boies’s speech Iowa’s population was about 1.9 million; 120 years later it is still only about three million.


\footnote{179}“Iowa a Doubtful State,” \textit{NIT}, Nov. 5, 1889 (1).
Banning Tobacco Sales to Minors

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

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

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

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

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

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

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

720
Banning Tobacco Sales to Minors

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

Outgoing Republican Governor William Larrabee’s second biennial message and incoming Democratic Governor Horace Boies’ first inaugural address were separated by only two weeks in February 1890, but they depicted parallel universes of prohibition in Iowa. Larrabee claimed that it was “safe to say that not one-tenth, and probably not one-twentieth, as much liquor is consumed in the State now as was five years ago” and denied that the 1889 state elections constituted a “verdict against prohibition” because “our temperance people, resting secure in the belief that prohibition was the settled policy of the State, took little or no part in the canvass, and thousands of them did not even go to the polls. Moreover, many who did go had their attention fixed upon other important issues....” Finally, if women had been permitted to vote in 1882, the majority in favor of constitutional prohibitions would have exceeded 200,000.\textsuperscript{184}

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

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\textsuperscript{183}“As to Prohibition,” \textit{Algona Republican}, Nov. 13, 1889 (1:2-3).
\textsuperscript{184}Governor William Larrabee, “Second Biennial Message,” in \textit{The Messages and Proclamations of Governors of Iowa} 6:189, 190 (Benjamin Shambaugh ed. 1904 [Feb. 13, 1890]).
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Banning Tobacco Sales to Minors

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

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

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187 Governor Horace Boies, “First Inaugural,” in The Messages and Proclamations of Governors of Iowa 6:287, 288 (Benjamin Shambaugh ed. 1904 [Feb. 27, 1890]).
188 Governor Horace Boies, “First Inaugural,” in The Messages and Proclamations of Governors of Iowa 6:285 (Benjamin Shambaugh ed. 1904 [Feb. 27, 1890]).
characterize as Boies’s “endorsement of a pluralistic society in Iowa,” the new governor argued that the problem was that

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

In considering this question we cannot rightfully shut our eyes to the fact that a considerable portion of our population have been taught from infancy to believe that the moderate use of malt and vinous liquors at least is not criminal, but instead thereof that it is actually beneficial. ... We cannot think alike. For some inscrutable reason society everywhere is divided into classes. Habits which are pleasant to one are distasteful to another. Christianity itself has its votaries and its foes. Why then should we expect to compel uniformity of sentiment on this subject?190

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

In my own judgment the chief obstacle to the enforcement of this law lies in the fact that in and of itself it is a cruel violation of one of the most valued of human rights. By that act Iowa stands convicted of first making the business of the brewer and wine-maker legal, of watching, without warning, the expansion of their business within her borders until millions upon millions of the capital of her citizens had been invested therein, and then coldly wiping it out without one effort to compensate those who were ruined thereby.191

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

190 Governor Horace Boies, “First Inaugural,” in The Messages and Proclamations of Governors of Iowa 6:285-87 (Benjamin Shambaugh ed. 1904 [Feb. 27, 1890]).
191 Governor Horace Boies, “First Inaugural,” in The Messages and Proclamations of Governors of Iowa 6:289 (Benjamin Shambaugh ed. 1904 [Feb. 27, 1890]).
Banning Tobacco Sales to Minors

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

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

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

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

194 S.F. No. 336, which was introduced by Davenport Democrat William Schmidt and was similar to Boies’s proposal, lost 21 to 29 on a nearly party-line vote. Benjamin Gue, History of Iowa: From the Earliest Times to the Beginning of the Twentieth Century, IV: Iowa Biography 234-35 (1903); Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa,...1890, at 271, 613 (Mar.19, Apr. 10) (1890). Republican Lewis Hanchett voted Yea on the grounds that prohibition had done more to retard and check immigration into Iowa than all other causes combined. Id. at 613. Republican Senator Richard Price criticized the bill for making the incorporated town the election unit, although it was “but the center of a community. Outside of the imaginary line which marks the boundary lies the greater part of the community who have just as great an interest in
in the constitution, but none of these came to fruition—in part because by no means were all Republican legislators prohibitionists. Even anti-prohibition Republican Senator Joseph Lawrence’s bill, which would have established a local option and a minimum annual license of $1,000 for cities with a population of more than 5,000, was doomed to be defeated because it failed to satisfy Boies’s and the Democratic Party’s demand for opening up in principle every locality to the reintroduction of whisky and thus rebuffed cooperation with anti-prohibition Republicans who were amenable to some relaxation of the law.

The question of opening the saloons within its incorporated limits as have those who live within the boundary; but under this bill the people outside of the incorporated town are actually disfranchised and the saloon is opened, a menace to his family without his consent.” Price, unsurprisingly, preferred the Republican method of taking “the state as the unit.” “The License Debate,” BH-E, Apr. 9, 1890 (2:3). On Price’s opposition to smoking in the Senate, see below ch. 18. A Democratic House bill for local option in any city, incorporated town, or township, under an annual license fee of $500 to $1,000 was indefinitely postponed by a party-line vote of 51 to 49 (or 48). H.F. No. 42 (by Dent) (bill text in University of Iowa Law Library); Journal of the House of Representatives of the Twenty-Third General Assembly of the State of Iowa,...1890, at 125, 223-24, 437, 442 (Mar. 1, 14, Apr. 4, 5) (1890) (H.F. No. 42, by Dent) (51 to 48); “No Beer for Iowa,” Atlantic Daily Telegraph, Apr. 7, 1890 (1:4); “From the Capital,” WC, Apr. 9, 1890 (1:1-3 at 2-3); “No High License,” HI, Apr. 10, 1890 (6:3) (51 to 49).

Senate Joint Resolution No. 9 to amend the constitution to prohibit the manufacture and sale of intoxicating liquor was adopted on an almost party-line vote of 26 to 22. Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa,...1890, at 336, 639, 731, 752 (Mar. 25, Apr. 11, 14, 15) (1890) (by Republican Norman Brower). James Barnett, one of the two Republicans to vote Nay explained his vote on the grounds that he was not willing to admit that prohibition had been a failure in Iowa. Id. at 752. On Joseph Lawrence, the other Republican voting Nay, who was an anti-statewide-prohibitionist, see below this ch. The House did not act on the resolution. Journal of the House of Representatives of the Twenty-Third General Assembly of the State of Iowa,...1890, at 574 (Apr. 15) (1890) (S.J.R. No. 9). The House also failed to act on its own similar constitutional resolution. Id. at 299 (Mar. 24).

At a “secret republican joint caucus” on March 28 attended by 57 (of 78 members) a motion that they support the existing prohibitory law “without repeal or modification” lost by a close vote, while another motion that dropped the qualifying clause carried, as did a third (against only 6 or 7 Nays) pledging the caucus to support re-submission of the constitutional amendment. “From the Capital,” WC, Apr. 2, 1890 (1:1-3 at 2).

“Gov. Boies on Prohibition,” Spirit Lake Beacon, Mar. 7, 1890 (1:3-4); “License Is Buried,” Upper Des Moines (Algona), Apr. 16, 1890 (2:5); Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa,...1890, at 105, 433, 616-20 (Jan. 28, Mar. 31, Apr. 10) (1890) (S.F. No. 154, by Lawrence). For the full bill text, see “The
Non-legislative anti-prohibition Republicans even organized themselves sufficiently during the session to meet on April 2 in Des Moines and adopt unanimously a resolution calling for an end to the “experiment of general prohibition,” which “in many portions of the state...ha[d] lamentably failed.” Their insistence that the party alter its platform to help “restor[e] its supremacy” initially bore—despite the prediction by Fred Faulkes, editor of the Cedar Rapids Gazette, that the conference would “prove one of the most important events in the line of moral-business-political gatherings in the history of Iowa”—as little fruit as their request to the legislature to support local option and high license so that the party could regain its strength in the river cities while retaining the support of “the most pronounced prohibitionist in the interior districts” and thus “save the party from political suicide.” The next day an 11-member committee appointed by the convention submitted a statement that had been unanimously adopted by the convention to the chairmen of the House and Senate Republican caucuses urging on them the “imperative necessity” of amending the law on moral, social, political, and commercial grounds. The

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

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

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

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

crucial reason, however, was spelled out with all possible clarity: “The party has already lost its magnificent majority solely on account of its attitude towards prohibition. The defection goes on every day.”\(^\text{202}\) Bursting with Schadenfreude, one Democratic weekly, commenting on the convention of “representative republicans taught in the disagreeable school of disaster,” congratulated Boies on “the support which a conference of distinguished republicans whom defeat has sobered gives his liquor party....”\(^\text{203}\)

The direction in which the professional party leadership wanted liquor policy to go was clearly indicated the following day by James Clarkson, “manager for...party affairs for the railroad magnates and other business interests who supplied most of the sinews of political warfare,”\(^\text{204}\) former editor of the *Iowa State Register*, the state’s leading Republican newspaper, head of national patronage, and, in 1891-1892, national party chairman.\(^\text{205}\) In an interview in Washington, D.C., where he was assistant postmaster general, Clarkson observed that while prohibition during its seven-year trial had

proved an[ ] admirable law for agricultural counties and smaller towns, it has failed to find public opinion to enforce it in the larger cities and counties on the Mississippi river, which are largely settled by people of European birth. It is an open fact that it cannot be enforced in such localities without a state constabulary, which the temper of Iowa people would never permit. The republican party has never been united in support of the measure. As many as fifty or sixty thousand republicans have opposed it, but have gone along with the party willing to see the experiment tried. Now that it has been tried for seven years and failed in part, they insist that the law be amended to give prohibition to 80 per cent of Iowa where public opinion favors and enforces it, but that some other method regulating and repressing the traffic be given to the twenty per cent of the state where experience shows it can never be enforced. ... The present legislature should, in my judgment, modify the law as demanded by the experience of actual trial. All good people wish to reach such legislation as will be nearest right and most repressive of the liquor traffic, and if possible, destruction of it, but common sense must regulate in this as in all other affairs of men.\(^\text{206}\)

Clarkson and other leaders had not yet regained the control over the party that

\(^{202}\)“Anti-Saloon,” *Pocahontas County Sun* (Laurens), Apr. 10, 1890 (1:3).

\(^{203}\)“Iowa Converts,” *Pocahontas County Sun* (Laurens), Apr. 10, 1890 (2:3) (edit.).

\(^{204}\)Leland Sage, *A History of Iowa* 205 (1987 [1974]).


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

In 1890 the Republican Party platform continued to “declare against any compromise with the saloon” and reaffirmed its solidarity with the Iowans’ “hostility to its existence, spread and power.” The following year the platform, while renewing the party’s “pledge,” became considerably more aggressive in attacking Democrats’ position and warning that whereas their control of the next legislature “means State wide license,” Republicans’ control “means continued opposition to the behests of the saloon power through the maintenance and enforcement of the law.” Prohibitionists’ hold over the Republican Party state convention was signaled by the overwhelming 951 to 84 defeat inflicted on the proposed local option/high license substitute.

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

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

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

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

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

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

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

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

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

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


220“Want It Repealed,” CREG, Nov. 24, 1891 (1:2).

221“State Questions in Iowa,” NYT, Jan. 11, 1892 (1).

222“Local Option in Iowa,” WP, Jan. 5, 1892 (4) (edit.).

223NYT, Jan. 8, 1892 (4) (untitled edit.).

224Journal of the House of Representatives of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 311 (Feb. 27) (1892) (H.J.R. No. 7, by Chase). The resolution received a favorable report and a Democratic minority report. Id. at 364-65 (Mar. 3). On straight party-line votes the latter lost 46 to 52, while the former was adopted 52 to 46 (two Republicans not voting and the only Independent, Dan Campbell, voting with the Democrats as he had on the election of the House speaker). Id. at 435-37 (Mar. 9).

225Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 460 (Mar. 15) (1892) (committee recommendation of indefinite postponement of H.J.R. No. 7, which was ordered passed on file). A Republican constitutional initiative to the same effect ultimately lost because, while gaining 26 votes, it lacked the two-thirds majority that the speaker ruled was required to consider it. Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 113, 316, 603-604 (Feb. 2, Mar. 3, 25) (1892) (S.J.R. No. 10).
them made any progress in the Senate. S.F. No. 1—which provided for a vote in any incorporated city or town or unincorporated area, based on a petition submitted by two-fifths of the number of qualified electors, on whether to permit the manufacture or sale of spirituous, vinous, or malt liquor subject to an annual license fee of at least $500\textsuperscript{226}—early on became the Democratic caucus bill, which all members pledged to support and which thus displaced other similar Democratic measures.\textsuperscript{227} Introduced by Senator Schmidt, the Democrat who had also been a prominent sponsor in 1890 and whose effort was primarily inspired by the need to “release the people of the State from the burdens of prohibition which they have carried for a decade to the great detriment of the commercial and financial interests of the State,”\textsuperscript{228} it received on February 24 all 25 Democrats’ votes but no others, thus falling one vote short of a constitutional majority.\textsuperscript{229} The hard line that many Republicans adopted on local option/license bills was rhetorically on display in the minority report filed by the two Republican members of the Suppression of Intemperance Committee, who insisted that, Iowans never having voted for licensing or legalizing traffic in intoxicating beverages, the people’s will should be respected until they voted otherwise. They also argued that liquor trafficking either was or was not detrimental to public morals, health, and welfare: if it was not, then “it ought to be as free and untrammeled as any legitimate business” in Iowa; if it was, then it “ought to be suppressed by law, as a crime against the public” like gambling, betting, selling obscene literature, and the social evils. In that connection, the claim that the prohibitory law was violated in certain places constituted no more a reason for licensing liquor than the existence of gambling in larger cities justified licensing

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

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

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

\textsuperscript{229}Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 36 (Jan. 20) (1892). For the committee amendments, see id. at 128-29 (Feb. 4); for the vote, see id. at 250-52 (Feb. 24); for speeches on the bill, see “Repeal or Not,” CREG, Feb. 12, 1892 (2:3-5). The House version of the Schmidt bill, a Democratic caucus bill, was defeated by a straight party-line vote of 41 to 42. Journal of the House of Representatives of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 43, 188-89, 476-77 (Jan. 18, Feb. 11, Mar. 12) (1892) (H.F. No. 25, by Irving Richman); “License Bill Discussion,” BH-E, Feb. 13, 1892 (1:1-3 at 2); “Legislature,” CREG, Mar. 12, 1892 (1:3).
it. 230

Linked to S.F. No. 1’s defeat, but also bristling with much greater political explosiveness, was S.F. No. 23, which had originally been introduced by Democrat William Groneweg, 231 whose orientation regarding alcohol was virtually overdetermined by his being a prosperous German-born wholesale grocer in the Missouri River city of Council Bluffs 232 (“a plain old German merchant who made an honest argument for license from the Faderland standpoint”). 233 Two days after his own bill had failed to pass, Schmidt as chairman of the Committee on Suppression of Intemperance recommended passage of Groneweg’s, 234 which, however, was quickly overtaken by a new legislative strategy that united Democrats and the minimal number of Senate Republicans needed to secure that requisite 26th vote for passage. As early as the end of January press reports had disclosed that while probably no Senate Republican would vote for Schmidt’s bill, two Republicans in the Senate and four in the House had “heartily endors[ed]” taking the county as the unit for a local option election, one of them even positively stating that he would vote for such a bill. 235 During the run-up to the vote on the Schmidt bill, just as non-legislative

230 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 178 (Feb. 10) (1892).

231 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 47 (Jan. 22) (1892) (S.F. No. 23, by Groneweg).


233 “Iowa Legislature,” Sioux County Herald, Feb. 24, 1892 (1:5). For the text of Groneweg’s speech, see “Groneweg Talks,” CREG, Feb. 20, 1892 (2:2-3).

234 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 268 (Feb. 26) (1892). Groneweg’s bill differed from Schmidt’s most prominently in not only fixing graded license fees ($800 for first-class cities, $600 for second-class cities, and $500 for incorporated towns and townships), but also creating an indeterminate fee (not less than $500) for the special charter cities of Dubuque and Davenport, “where a low license [wa]s desired. This bill would suit the saloonmen of these cities better than the Schmidt bill.” “War on Prohibition,” CT, Jan. 24, 1892 (8). The license fee provisions (which do not expressly mention Dubuque or Davenport) are found in § 11. S.F. No. 23 (by Groneweg), in 1892 Senate bill book (University of Iowa Law Library).

235 “Local Option Measure in Iowa,” CT, Jan. 30, 1892 (2). The arch-Republican Chicago Tribune, which echoed these concerns, mocked Iowa Republican legislators’ irrational insistence on retaining a prohibitory law that could no more be enforced in 25 or 30 of the largest and most populous Democratic counties than in Africa or on the moon because a decade’s experience had proved that Republicans could not make Democrats stop drinking. “Iowa Republicans and the Schmidt High License law,” CT, Feb. 9, 1892
Banning Tobacco Sales to Minors

Iowa Republican Party leaders, with an eye on the deleterious impact on national party strength of the loss of the state as a Republican electoral bastion, were renewing their complaints about state legislators’ rigid attachment to prohibition, which had lost the votes of thousands of Germans and Scandinavians.236 Senate Republicans caucused on February 17, at the request of two members, to discuss amending the prohibitory law. The latter’s proposal was a countywide option, which, in the event that a majority voted for licensure, was rendered more restrictive by confining saloons to townships and wards in which a majority also supported licensing. Other restrictions included outlawing saloon operations between 11 p.m. and 6 a.m. or on Sundays as well as any playing of games. The annual license fee was set at $500 for cities of 2,000 or under and $1,000 for the larger cities. Despite the proposal’s relative stringency, only two senators voted for it.237 Although the caucus agreed that all members would vote against Schmidt’s bill, it was “rumored that thereafter they will vote as they please.”238 Since only one Republican vote was needed to pass local option/licensure, such non-caucus-dictated voting appeared to insure an anti-prohibitionist victory, at least in the Senate. Such a prospect refuted the conclusion that The New York Times had just drawn that the party’s unanimous opposition to S.F. No. 1 was of “great political significance” because it indicated that Republicans were once again determined to retain prohibition as a campaign issue later that year.239

The same day that Schmidt’s committee recommended passage of Groneweg’s bill Republican Senator Conduce Gatch, a Des Moines lawyer,240

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236“Iowa Republicans and the Schmidt High License Law;” CT, Feb. 9, 1892 (4) (edit.).
237“Iowa Republican Senators’ Bill;” CT, Feb. 18, 1892 (2).
238“Will Vote Solidly;” BH-E, Feb. 19, 1892 (1:1) (reporting that Senators Gatch and Brower were the two dissenting members, who presumably had also requested the caucus meeting).
239“Prohibition in Iowa;” NYT, Feb. 27, 1892 (1). According to the Times, Republican National Committee Chairman Clarkson’s proposal that the party vote for a high-license law as a way of getting rid of the prohibition issue was trumped by Iowa U.S. Senator William Allison’s influence, which was “thrown against the bill” based on the argument that the party had less to fear from those whom prohibition had already prompted to defect than from “the great body of Prohibitionists...still in the party...who would leave it almost en masse if it should become responsible for license.” Id.
240On Gatch, see “Senator C. H. Gatch;” CREG, Feb. 22, 1892 (2:1); “A Sudden Summons,” DIC, July 1, 1897 (1:3-4) (obit.). At the aforementioned secret Republican joint caucus in 1890 Gatch had been one of three Republican senators to speak strongly against the motion to support the prohibitory law without repeal or modification.
“thr[е]w a bomb into the camp of politicians”241 by moving that everything after
the enacting clause in Groneweg’s bill be stricken and that his own countywide
option measure be substituted for it.242 (In fact, the substitute bill’s passage was
insured even before Gatch had offered it: when the Democrats learned the night
before that he would be proposing it, they caucused and unanimously agreed to
support it “if it was not entirely too restrictive.” Although some Democrats did
regard it as “pretty restrictive,” they also “realize[d] that if they should fly the
track now the Republicans would have the club in their own hands [(t]hereafter.”)243 Gatch had been the author of the proposal to the caucus, which
was very similar to his substitute measure,244 and he and his then-confederate,
Republican Senator Norman Brower, a former newspaper editor and owner,245 had been under “[g]reat pressure” to vote for Schmidt’s bill, but both that step and the
alternative of voting for a countywide option were favored by some in the party
who sought to conciliate “independent or license Republicans,”246 whose votes
were needed for the upcoming national presidential campaign.247 Non-
Democratic anti-prohibitionists heaped praise on Gatch, the “manly man,”248 for
his “manly action” in becoming “[a]t last” the “one true republican” with the
“courage to tear off the mask of hypocrisy,” thus liberating himself from the
“shackles” of the “farce called prohibition”249—all towards the end of saving the
Republican Party from itself by enabling it to “extricate” itself from its embrace
of “extreme prohibition” and thus to regain the electoral support of its one-time
imbibing voters.250 (Not for nothing did a critic label it the “Gatch-Clarkson-
Allison bill.”)251 Gatch’s substitute included a slew of restrictive conditions such

241“‘Our Des Moines Letter,’” Morning Sun News, Mar. 3, 1892 (1:3).
242Journal of the Senate of the Twenty-Fourth General Assembly of the State of
Iowa,...1892 at 271 (Feb. 26) (1892).
243“Iowa’s License Law,” CT, Feb. 27, 1892 (7).
244It dropped the bifurcated annual license fee according to population size, replacing
it with a flat minimum $500 (“and such additional sum as shall be fixed by the
municipality”). Journal of the Senate of the Twenty-Fourth General Assembly of the State
of Iowa,...1892 at 272 (Feb. 26) (1892) (§ 6).
246“Iowa Republican Problems,” NYT, Mar. 14, 1892 (1).
247“They Weren’t in It,” BH-E, Feb. 24, 1892 (1:5).
248“The Probable Passing of Prohibition,” CREG, Feb. 27, 1892 (2:1) (edit.).
249“Gatch’s Brave Action,” CREG, Feb. 27, 1892 (2:4).
250“The Iowa Republicans,” NYT, Jan. 27, 1892 (3).
251BH-E, Mar. 4, 1892 (2:2) (untitled edit.) (citing Des Moines News).
Banning Tobacco Sales to Minors

as: prohibiting a second election within three years of the first or more often than every five years thereafter; a requirement that the license application be signed by a majority of property owners on both sides of the street within 200 feet of the applicant’s proposed business site; a requirement that licensed saloons be closed on all public election days; and liability of licensed sellers to all persons injured by any intoxicated person if the seller caused the intoxication even in part.252

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

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

252S.F. No. 23 (Substitute by Gatch), §§ 1, 4, 6, 7, 16, in Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 271-75 (Feb. 26) (1892).
253“Iowa’s Prohibition Fight,” NYT, Mar. 2, 1892 (2).
254Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 315-16 (Mar. 3) (1892).
256“For County Option,” CREG, Mar. 4, 1892 (3:2-4, 4:4). Gatch tried to justify the
Banning Tobacco Sales to Minors

Not disappointing those who suspected Republican prohibitionists of harboring party-politically suicidal tendencies, Senator (and former state district Judge) Robert Reiniger declared that “if it was necessary to abandon right principles to avoid defeat, he preferred defeat.”  However, on March 8, the chamber did adopt all of the proposed amendments and the substitute before holding the anti-climactic vote on the bill, which passed 27 to 22, with only Gatch and Brower joining all 25 Democrats, for which apostasy both were duly “roasted” on the floor by a leading Republican prohibitionist.

Eight of those Democrats (but no Republican) found it politically prudent to issue (in some cases rather lengthy) explanations of the “expediency” of their votes to be printed in the Journal of the Senate, which generally emphasized that although the bill was far from ideal, as “one step away from prohibition” and an “‘entering wedge’” it was “the best” that the Democrats, lacking a constitutional majority, could achieve. The harshest and bluntest remarks were made by Senator Theodore Perry, a lawyer from southern Iowa, who suggested that the Gatch bill was largely a Republican Party public relations hoax. For him it was “but little better than prohibition,” “a mere deception,” and “prohibition under the guise of license.” By furnishing the absolute minimum number of Republican Senate and House votes required for passage (insured by solid Democratic support) “while the party organization will remain steadfast to the cause of their prohibitionist allies,” the bill would “be classed as a Democratic measure” and the Republican party would be spared a prohibitionist split. It thus served to achieve the purpose of U.S. Senator Allison, Clarkson, and the Republican press of “induc[ing] the Democrats to unload prohibition from Republican shoulders and tak[ing] it out of politics, so that it may cease troubling” Republicans. The mechanics of the “trap” that Gatch had set for Democrats was rooted centrally in the countywide vote, which meant that even if every voter in the cities and town voted for licensure, country voters could prevail with the result that, as Gatch...
himself claimed, prohibition would be perpetuated in 90 percent of Iowa’s counties. Why, Perry asked rhetorically, would Gatch have included such requirements if the real intention was to provide for a license? He also accused Gatch of having been “so thoughtful, while planning for county option, that in order to make the law so distasteful to the voters residing in the county that they may not vote for it, he provides that should license carry in the county, any township voting for it may have a saloon. While Democrats in the country are opposed to prohibition and are willing for cities and towns to have license, where prohibition is a mockery and cannot be enforced, they do not want saloons out in their own townships. Hence they will be disposed to vote against county license.” Perry instanced Polk County, whose county seat was Des Moines, the state capital. Claiming that prohibition had not succeeded in any Iowa city with a population above 5,000, he declared that its operation in Des Moines was “simply a farce,” because even its Republican mayor and police force did nothing to interfere with the city’s no fewer than one hundred open saloons. Even though precisely such a city cried out for licensure, he found “great room for doubt” that it could pass in Polk County because of the arithmetic of the constellation of opposing and supporting forces. Among the former he counted in the first place “all the prohibition Republicans,” who, he conceded, alone “constitute not far from a majority in the city.” (Perry failed to explain why this brute social-demographic fact alone did not cast doubt on the superiority of a city-level option regime.) Next came “all the saloon and joint keepers in Des Moines,” whom no “sensible man” could imagine voting for licensure, which would cost them $500 plus a bond and potential penalties, when under the existing unenforced prohibitory law they did not have to pay anything to sell liquor. Consequently, if the saloon keepers “and their influence” joined the prohibitionists in opposition, and “with the country vote most probably against it,” what chance did the Gatch law have in Polk County? Instead of confronting the inescapable fact that under his own assumptions no Democratic city-level option bill could attract a majority either, Perry blamed “the cunning leaders of the Republican party” and S.F. No. 23’s “able author” who “very shrewdly requires the people of the cities and towns to go into the country and procure the consent of those living in even the remotest parts of the county, thus to obstruct the operation of the law, rather than to make it possible for it to go into operation....”

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

738
issues and limiting the platform to national matters. Though silence was only anti-prohibitionists’ second choice,\textsuperscript{265} it was no choice at all for prohibitionists, who felt that they needed an express and formal attack on local option/licensure to ward off House passage with the help of five Republican defectors. In the event, with eight of the 11 Resolution Committee members “firmly believ[ing] with Gatch and Brower” that “[f]or the first time in twenty years a Republican convention [w]as...held in Iowa and its platform [wa]s bereft of an indorsement of prohibition.”\textsuperscript{266} Even if this upshot supported the conclusion that the party’s anti-prohibition wing was “again in control”\textsuperscript{267} the further prediction that the lack of a declaration on prohibition sufficed to give the Gatch bill “an exceedingly good chance” of House passage\textsuperscript{268} turned out to be the intended initiation of a self-fulfilling prophecy whose time would soon, but had not quite yet, come.

Senate passage of the Gatch bill left “the business men” of Des Moines “jubilant”\textsuperscript{269} and prompted The New York Times prematurely to declare that Iowa’s prohibitory law “was practically wiped out of existence to-day.”\textsuperscript{270} In fact, many legislators and newspapers had predicted that passage in the Republican-controlled House was doubtful or unlikely,\textsuperscript{271} and shortly after S.F. No. 23’s arrival there the Suppression of Intemperance Committee unsurprisingly recommended that it be indefinitely postponed. The committee’s Democratic minority, though far from satisfied with the bill, nevertheless recommended its passage both because the measure was an improvement over the existing law and because little time remained before the end of the session. (Democrat and Scottish immigrant Andrew Addie sarcastically explained his vote by reference to his belief that as law the bill would “tend to the suppression of cranks and hypocrites, as well as intemperance in the use of intoxicating liquors....”)\textsuperscript{272} The night before the House vote “several...Republican members who ha[d] been considered liberal on this issue” met in a committee room with the anti-prohibitionist temporary chairman of the state convention, Albert Cummins, and Nathaniel Hubbard, the Chicago & Northwestern Railway’s Iowa lawyer and one

\textsuperscript{265}“Some Iowa Issues,” CT, Mar. 17, 1892 (1).
\textsuperscript{266}“Iowa Now in Line,” CT, Mar. 18, 1892 (1).
\textsuperscript{267}“The Antis in the Saddle,” CREG, Mar. 18, 1892 (4:3).
\textsuperscript{268}“Iowa Now in Line,” CT, Mar. 18, 1892 (1).
\textsuperscript{269}“The Gatch Bill,” BH-E, Mar. 9, 1892 (1:3).
\textsuperscript{270}“Prohibition Dead in Iowa,” NYT, Mar. 9, 1892 (2).
\textsuperscript{272}Journal of the House of Representatives of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 507-508 (Mar. 16) (1892) (Andrew Addie).
Banning Tobacco Sales to Minors

of the Iowa Republican Party’s organizers and most influential leaders,273 who “urged the necessity of the bill passing the House to the end that the era of good feeling inaugurated” at the state party convention a few days earlier “not be impeded.” In the end, however, it became, according to the Chicago Tribune, “evident that the boys had been whipped into line and that not one of them was willing to make a martyr of himself for the purpose of helping the party out of the hole.”274 Consequently, with Republicans refusing to deviate from the party platform (or to acquiesce in the party’s non-legislative professional business leadership preference for abandonment of strict prohibition), on a strict party-line vote the full House voted 52 to 46 to adopt the majority report and kill the bill.275

Gatch immediately reacted by sharply criticizing House Republicans for having defied party members’ “manifest desires” as indicated by the (aforementioned) party state convention and the state’s leading Republican newspapers. Ominous for the party’s electoral future in his view was their (implied) statement that the “republican party has no use for the republicans of the counties containing cities and larger towns...where prohibition is defied and free whisky holds unrestrained sway. They have, if I am not mistaken, shut the door against the return of many thousands of as good republicans as ever followed the republican flag but who think republicanism stands for more than prohibition.”276

The Cedar Rapids Gazette, which reported that Republican legislators had crossed the Rubicon,277 adopted a different and partly perspicacious perspective (based implicitly on the non-suicidal choices that Realpolitik’s constraints


275Journal of the House of Representatives of the Twenty-Fourth General Assembly of the State of Iowa...1892 at 574-75 (Mar. 22) (1892); “Knocked Out,” CREG, Mar. 22, 1892 (1:1).


277“The Rubicon Crossed,” CREG, Mar. 23, 1892 (2:1).
imposed on the party) in declaring that “[p]rohibition cannot stand” and predicting that “within two years it will be repealed, and we would not be surprised to see it changed by the party that put it on the books.”278

A convention of anti-prohibition Republicans meeting in Des Moines made a last-ditch appeal to House Republicans to reconsider their vote on the Gatch bill or to bring up another local option/high license measure before the session ended,279 but following a secret caucus session the legislators announced that they could not renege on the party’s pledge to retain prohibition.280

The paralyzing impasse over prohibition began to dissolve in 1893 after Republican Party leaders’ alarm in Washington, D.C. over Iowa Democrats’ capture of a majority of congressional House seats for the first time in 40 years had generated outside pressure to persuade Iowa Republican Party leaders to jettison prohibition as a political issue in an attempt to restore safe Republican supremacy to Iowa.281 Public evidence of this turn toward pragmatic policy emerged at the Republican State Central Committee meeting on March 28, 1893, in Des Moines, after which Chairman James Blythe, while denying that he was empowered to speak for the committee, did tell the press that: “‘You can say...that the report which the members brought from the districts indicated that the two wings of the party are working towards each other and each seems willing to make concessions.’”282 In fact, the compromising seemed to be rather one-sided, with strict prohibitionists (allegedly) acquiescing in what was essentially the Democrats’ local option/licensure regime: all of the seven (of 11) districts represented at the session reported that a majority of Republicans “favored a modification of the present law with the view of saving prohibition to those localities where the present can be enforced and giving to other localities the power to control the traffic.”283

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

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

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

The 1893 Republican state convention itself made manifest that strife rather than harmony still prevailed in the party on the question of prohibition, which was “still the dominant one in Iowa politics. Panics may come, banks may fail and McKinley tariffs remain to oppress and burden the people, but none of them can be made to supplant this burning local question.” Boies, seeking to become the state’s first three-term governor, declared that “all other issues were subservient” to prohibition. Pressure on the Republican Party to take some action to enable cities that had already de facto undergone saloonification to license and extract revenue from liquor sellers was bubbling up in the form of the spread of saloons and anti-prohibitionism from the river counties to the interior (especially to east central and northwestern Iowa), where enforcement efforts had been abandoned and some town and city councils had begun unlawfully to impose a monthly tax or license in the form of a fine. Such initiatives constituted blatantly illegal proto-quasi-mulct tax regimes, for the local adoption of which the legislature, as discussed below, provided in 1894. (Des Moines itself was an anomaly among larger cities in not having “adopted the plan of illegal license”; instead, the capital neither regulated the saloons nor derived any revenue from

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

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

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

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

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

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

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

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

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

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

\textsuperscript{294}“Iowa Goes in to Win,” \textit{CT}, Aug. 17, 1893 (2).
mounted a chair and attempted to address the convention, but the confusion was so great that he could not be heard.” An India-rubber-lunged associate then conquered the din sufficiently to call on fellow prohibitionists to march down the aisles, with the result that Struble was now on a chair in the center of the hall, while “a hundred strong lunged prohibitionists forged forward and were demanding their rights.” Once this tumult had died down, Struble asked for the floor while large numbers of others demanded a roll-call vote on the nomination for lieutenant governor, but Chairman Blythe successfully appealed for a hearing for Struble, who together with like-minded delegates insisted on striking out the last part of the last sentence of the plank (beginning with “maintaining”) on the grounds that it “provides that the Legislature should adopt local option. They said that they were ready to accept a relegation of the matter to the legislative districts, but they were opposed to being pledged to local option.”"Remarkably, at the outset of the ensuing debate, which “furnished three hours of pandemonium” and which the Iowa State Register called “one of the most notable in the history of politics in Iowa,” delegates from such arch-anti-prohibitionist Mississippi River counties as Dubuque, Scott, and Lee seconded Struble’s amendment, but the tide turned when a delegate from the Missouri River city of Council Bluffs argued that “simple relegation would not improve the situation in Pottawattamie County, for if the matter be relegated to the districts and a majority of the districts elect Prohibition representatives they will continue...”


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


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

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

The election of a Republican licensure advocate as governor over Boies304 and the return of lopsided Republican majorities in both House (78 percent) and

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

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


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

“A Divided House,” CREG, Nov. 16, 1893 (2:1).

“A Spoils Hunter’s Howl,” CREG, Nov. 9, 1893 (4:2) (edit.).


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

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

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311The *Cedar Rapids Gazette*, for example, asserted that he was trying to “make a Moses of himself” by “concoct[ing] some kind of a split-eared scheme, the object of which is to lead the republican party...into the land of Canaan and power again.” “The Mulct Nonsense,” *CREG*, Apr. 19, 1893 (4:3) (edit.). Later it joked that he had “discovered mulct somewhere in the state of Ohio and brought it to Iowa in his hand sachel...” “The Grind Resumed,” *CREG*, Mar. 8, 1894 (2:1). Given made no secret of the saloon mulct’s origin in Ohio, where, however, it performed a different function as a result of a different constitutional and statutory background.

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

313“Suggestion of a Liquor Plank,” *ET-R*, Apr. 4, 1893 (1:2) (edit.).
law. In this way prohibition may be maintained without any backward step, all possible local benefits of repressive taxation secured without compromising with or sanctioning the traffic and a system of regulation attained that will adjust itself promptly to the advanced and advancing state of temperance sentiment in Iowa.”

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

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

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

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

316 See below ch. 12.

317 See below chs. 12-14.
Banning Tobacco Sales to Minors

that...mulct...as a repressive measure...will not amount to anything.”)

Nevertheless, in spite and/or perhaps precisely because of Given’s clear intent, his approach raised the question that he did not directly answer (in part because it appears not to have been directly posed)—namely, why, if the point was to repress all saloons and not merely to license the more ‘financially responsible’ ones, not simply increase the already existing penalties in the prohibitory law?

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

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

319The penalty for selling intoxicating liquor without a permit—selling liquor for medicinal, mechanical, and sacramental purposes was permittable—was $50-$100 for a first offense, and $300-$500 and imprisonment for up to six months for additional offenses. 1884 Iowa Laws ch. 143, § 10; McClain’s Annotated Code and Statutes of the State of Iowa 1:614, § 2381 (1888). One Democratic newspaper, which called Given’s proposal “the most delusive” of the Republican schemes to “crawl out from under the burden of prohibition, which has so nearly crushed the life out of the party,” argued that “[t]he first question that every honest man will ask” about it was: “Are not the present penalties sufficiently severe?” H.C.S., “Trying to Unload,” Cedar Rapids Standard, Apr. 27, 1893 (1:4). The closest that Given appears to have come to responding to the question posed in the text was his assertion that his mulct system would “focus anti-saloon sentiment...on the one question of enforcing repressive penalties to the greatest possible extent. With provision for two sets of penalties applied through two sets of officials...the question...must inevitably become one of enforcing the law already provided rather than asking for more law or new law.” Given’s principal purpose was to make it difficult if not impossible for Democrats to “clamor for ‘local option and high license’” by enacting “a law with all possible merits of both and the defects of neither” and thus to “take the liquor question out of [state] politics and leave [Democrats] no issue wherewith to divide the republican party.” “Taking the Issue Out of Politics,” ET-R, Apr. 11, 1893 (1:2) (edit.).

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

321“Honest Tax Mulct Doctrine,” ET-R, Apr. 10, 1893 (1:2) (edit.).

749
prohibition with a bribe under the one system and exacting a penalty without any protection in the other,\footnote{As the \textit{Register} noted: “We can clearly see that the one is a bribe and the other a mulct. But in a general way there is little or no difference. The effect is practically the same.” “The Ohio Mulct System,” \textit{ISR}, Apr. 9, 1893 (8:2) (edit.). A year later, during a debate with Given on the mulct tax at the Grant Republican Club in Des Moines, the aforementioned Republican Senator Brower argued that the mulct was not prescribed to prevent illegal liquor sales, “but intending its commission, to make safe and practicable its commission.” “Turning on the Light,” \textit{ISR}, Mar. 6, 1894 (3:2-4 at 4). And a few days after the mulct bill had passed, a weekly charged “the cranks” with responsibility for not having allowed it to be termed “a license, when in reality it is nothing else but city and county option license. ... Here is the anomaly of two laws remaining on the statute [sic] at the same time diametrically opposed to each other, one a criminal and the other a civil statute.” “The Mulct Law a Bill,” \textit{Postville Weekly Review}, Mar. 31, 1894 (2:2) (edit.). Almost a year after he had launched his intensive agitprop, Given made clear the great extent to which his animus pivoted on his perception that “[m]ore than any other one thing saloon license is the great cause of corruption in American municipal politics.” Consequently, he did not deny that there was “much truth” in the claim that “whichever form of mulct is adopted the actual result will be the same so far as the actual existence of the traffic is concerned. Communities that so desire will enforce the tax only and allow prohibition to lapse thus giving the saloon complete actual protection. This is what the saloon communities in Iowa do now, and always have done under prohibition.” The reason that he opposed letting them continue to protect saloons, under license, was “the fearful cost of the saloon in politics.” He nevertheless conceded that even in such communities it was “still possible to command some of the benefits of mulct and avoid the worst evils of license by ‘local option mulct’ under which communities elect which penalty they will enforce—prohibition or tax—the choice of one staying the enforcement or operation of the other in that particular locality. Of course, under ‘local option mulct’ the saloons in saloon towns would be actually secure if not directly ‘protected’ from any penalties additional to the tax. Yet they would fall short of being licensed by the state.” “Weakest Mulct Better Than Best License,” \textit{ET-R}, Feb. 1, 1894 (1:2) (edit.). This position may explain why in March he did not completely reject passage of the Funk-Martin bill, which, by virtue of making payment of the tax a bar to prosecution under the prohibition law, qualified as a local option mulct. See below this ch.} it remained unclear whether his proposal in fact constituted a “crippling, suppressive, prohibition supporting no-license police mulct” as a supplement to the liquor prohibitory law.\footnote{“The Ohio Liquor Law System,” \textit{ET-R}, Apr. 5, 1893 (1:2-3) (edit.).} The reason for this uncertainty is that Given also claimed that historically mulct taxes had proved able to “wipe...out of existence” prohibited commodities and effect “complete prohibition”—when set high enough.\footnote{“How Tax Mulcts Prohibit,” \textit{ET-R}, Apr. 12, 1893 (1:2-3) (edit.) (instancing a 10-percent congressional tax on state bank paper money and a $1,000 Georgia tax on every} If the mulct’s purpose was in fact to
impose a tax on saloons so high that it would eliminate all profit and thus drive them all out of business, the question again arises as to why this purely quantitative means could not have been applied more directly by simply radically increasing the fine in the liquor prohibition law itself. In other words, if Given believed that the political will existed to enact a literally prohibitory mulct, why would it not have supported amending the existing law to the same effect?

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

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

326“Taking the Issue Out of Politics,” ET-R, Apr. 11, 1893 (1:2) (edit.).
Banning Tobacco Sales to Minors

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

327 “Ohio Plan in Iowa,” CT, Apr. 20, 1893 (10).
328 At the beginning of August the press reported that: “No trace has been discovered of Welker Given’s ‘mulct’ plan, which has been mysteriously missing from Iowa politics for some time.” CREG, Aug. 1, 1893 (4:1) (untitled edit.). Senator Brower also insisted that the “‘[m]ulct plan...was never considered by the framers of the last republican platform....’” “Almost a Row,” CREG, Feb. 2, 1894 (2:3).
330 “The Prohibition Plank,” ET-R, Aug. 18, 1893 (1:4) (edit.). He went on to urge “radical republican prohibitionists” to “declare that they will give the river counties relief such as is demanded by the republican platform, but...supply it in a mulctuary no-license tax.”
331 Both before and after the election the anti-prohibitory Cedar Rapids Gazette, stressing that prohibitionists represented a majority of the Republican caucus, predicted that the legislature would oppose general licensure, mulcting, and local option. “Warning to Anti-Prohibition Republicans,” CREG, Oct. 21, 1893 (1:1-5); “Prohibition Safe,” CREG, Nov. 16, 1893 (1:5).
332 Nevertheless, Spencer Smith, a Republican who had led those opposed to striking the final clause of the plank at the convention and who insisted that it “meant local option pure and simple,” ignored the enormous press coverage in April 1893 when he erroneously asserted in March 1894 that: “‘No one in Iowa ever heard of a mulct law until this fall.’” “Wrecking the Bill,” CT, Mar. 10, 1894 (3). In contrast, the word “mulct” itself was uncommon enough that in reference to it a newspaper could joke: “The Iowa legislature ought to be able to legislate on the liquor question without going to night school to learn a new language.” SCJ, Jan. 31, 1894 (4:3) (untitled edit.).

752
Banning Tobacco Sales to Minors

particular the complaint that payment of the mulct still left liquor sellers liable to the prohibition law’s penalties—simply by making payment of the mulct tax “a bar to any other prosecutions” under the state prohibition law. In the event, this severe dilution, which turned Given’s mulct approach qua straightforward intensification of the prohibition law’s penalties on its head, became the crucial provision in the bill that the legislature ultimately passed in March 1894.

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

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

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

prohibition out of party politics by virtue of its circumventing corruptible local
elected officials forced into saloon politics and in entrusting the process to
assessors and tax collectors, seemed poised to “gain enough in popularity to
insure its enactment in some form or another.”

A year-end survey of
“prominent Republicans” conducted by an Iowa newspaper also revealed that
many favored the mulct.

Nine months after he had proffered the aforementioned “offhand” convention
plank and barely two weeks before the General Assembly was to convene, Given
bestowed greater solemnity on his proposed mulct tax by publishing a front-page
draft bill for “An act providing additional penalties against dealers in intoxicating
liquors” designed to “elicit discussion” and improve it “in the light of candid,
intelligent conversation.” In addition to limning possible amendments (such as
“putting more state power behind the tax collecting provision”), Given asked
readers whether, since the mulct would be operating in localities where the
existing liquor prohibition law was “absolutely nullified,” it would “not be well
to begin rather lightly and tighten up the law gradually” after it had taken hold.

The draft bill in its central provision (§1) required the assessment against anyone
selling or keeping with intent to sell, and on the real property where such
activities were taking place contrary to state law, a total annual tax of $500,
which the county board of supervisors was authorized to increase. The hallmark
provision that distinguished Given’s mulct from other approaches and that would
quickly become its most contentious feature and divide legislators until it was
ultimately defeated—though it would be restored when the legislature added a
mulct in 1897 to the 1896 cigarette sales ban—specified that:

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

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

338“Mulct Tax Favored,” CT, Dec. 17, 1893 (30).
340“An Honest Mulct Tax Law,” ET-R, Dec. 26, 1893 (1:3). The drafter was James
L. Carney (1847-1917), a Marshalltown lawyer, who was county attorney, a force in the
Legislators/legislatorAllYears.aspx?PID=3736.
341See below ch. 12.
liquors.\footnote{An Honest Mulct Tax Law, ET-R, Dec. 26, 1893 (1:3-5 at 4-5) (§ 16).}

The practical relevance of Given’s intervention in the statewide debate was undeniably on display in the bill that Representative Funk was to introduce a month later, which was overwhelmingly taken verbatim from this draft.\footnote{Given understated when he characterized it as having been in “substance” published in his paper. “Mr. Funk’s Mulct Bill,” ET-R, Jan. 29, 1894 (1:2).}

At the same time, however, Given was realistic enough to understand not only that his proposal was not a panacea, but that the roots of the conflict over alcohol went so deep in social life that the problem would remain more or less intractable regardless of what regulatory method was adopted to deal with it. In his response to the aforementioned end-of-year survey that he composed the day after he had published the draft mulct bill, Given, after wishing a plague on all Republican “extremists,” openly conceded that his proposal would by no means “solve the question finally.... Nothing can do that. The great contest between society and the liquor traffic will go on with varying results. Some localities, under any law, will be captured and held for a time by one side, then by the other. Whatever law is adopted, agitation will continue.” The only positive prospect that Given held out for Iowa (or any other state for that matter) was the dubious claim that a mulct tax and only a mulct tax “promises” to put the liquor question “out of party politics and dispose of it as a party issue.”\footnote{“Temperance Legislation,” Ottumwa Weekly Courier, Jan. 2, 1894 (3:1-6 at 4).}

In his inaugural message to the legislature at the beginning of the 1894 session Governor Boies observed that “the most difficult question” that would occupy the General Assembly might be that of repealing or retaining prohibition, and, on the assumption that any change in the law would involve legalizing different regulatory methods in different localities, the only difficult sub-question was the governmental unit level at which the local option law would apply.\footnote{Governor Horace Boies, Second Biennial Message (Jan. 9, 1894), in Messages and Proclamations of the Governors of Iowa 6:346-81 at 376-77 (Benjamin Shambaugh ed. 1904).}

Opting for the municipal and township unit,\footnote{Governor Horace Boies, Second Biennial Message (Jan. 9, 1894), in Messages and Proclamations of the Governors of Iowa 6:346-81 at 381 (Benjamin Shambaugh ed. 1904).} he rejected countywide regulation on the grounds that it was vulnerable to exactly the same severe criticism that applied to the statewide prohibitory law—namely, “that in a government professedly controlled by its subjects in their own interest, residents of localities...
foreign to those to be affected, having no interest in and no knowledge of their wants, are permitted to dictate their policy upon a question that most vitally affects the immediate interests of one and in no manner the interests of the other.” The (demographic-electoral) prohibitionist and anti-prohibitionist scenarios for replicating this “fact” on the county level included remote townships that could dictate to a city and a single city that, “if large enough, could force the licensed saloon into every other city, town and township of the county, no matter how unanimous any of these might be in their opposition.”

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

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

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348 Governor Horace Boies, Second Biennial Message (Jan. 9, 1894), in *Messages and Proclamations of the Governors of Iowa* 6:346-81 at 378-80 (Benjamin Shambaugh ed. 1904). It is unclear why Boies was unable to imagine a mulct law that would limit the number of mulctees in proportion, for example, to the size of the local population.
moral sentiment of such communities; from the churches and the pulpit.”\(^{349}\) Not only did Jackson fail to take a position for or against the mulct regime, but he offered no details at all concerning his vision of an appropriate method for regulating saloons in places with anti-prohibitionist majorities.

The intense controversy over the 13th plank insured that a plethora of liquor-related bills would be introduced during the 1894 legislative session. However, because the vast majority of these measures made no progress, and the mulct tax approach that was enacted is pertinent because the 1896 cigarette sales ban law was also subject to mulcting in 1897, the focus here is on the mulct measures.\(^{350}\) Although two weeks into the session the anti-prohibitionist press remained certain that Republican Party leaders would insist on the passage of some measure to implement the liquor plank—because failure to do so would “simply...restore the whole question to its old place in politics, which would mean, as it meant before, disruption of the republican party and democratic victory”—and fears that prohibitionists formed a majority of the House had lessened since the chamber’s organization, it was still possible that inner-party rifts could thwart passage of any measure. Whether prohibitionists in fact dominated the Republican caucus, let alone the House, the all-important liquor bill gatekeeper, the House Committee on Suppression of Intemperance, was “undeniably hostile to any change” that would make the existing law “less vigorous.” To the Cedar Rapids Gazette it was a “mystery”\(^{351}\) that House Speaker Henry Stone, a Marshalltown lawyer\(^{352}\) who was “a warm advocate of anti-prohibition, ever made up such a committee,” whose “complexion” was both surprising and disappointing to representatives pushing for amendment. At the center of this puzzlement and disgruntlement was committee chairman James Funk—even towards the end of the session his “mental and moral processes,” the Iowa State Register complained, were “hardly understood”\(^{353}\)—“an out and out prohibitionist,” who in his campaign speeches had “pledged himself to oppose every change in the law that d[id] not look to its more complete enforcement. He was particularly radical in his views, and his selection as chairman of so important a committee was considered a severe blow

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\(^{349}\) Governor Frank Jackson, “Inaugural Address” (Jan. 11, 1894), in Messages and Proclamations of the Governors of Iowa 7:5-18 at 16 (Benjamin Shambaugh ed. 1905).

\(^{350}\) For the introduction of and actions taken on the liquor traffic-related House bills (other than the ones discussed below), see the entries in the House bill index for H.F. No. 12-13, 29-30, 162, 177-78, 256, 263, 460, 469 in the 1894 House Journal. For the Senate bills, see below this ch.


\(^{353}\) “The Meanest of the Funks,” ISR, Mar. 9, 1894 (4:2) (edit.).

757
to the anti-prohibition sentiment.” Exacerbating the situation was that many other Republicans on the committee were also “pronounced prohibitionists,” while only three Republican members were known to favor amendment.\footnote{See “Hot Times Ahead,” \textit{CREG}, Jan. 23, 1894 (2:1-2). For the committee member list, see \textit{Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa} 41 (1894).}

Much more hospitable to amending the liquor law was the Senate Committee on Suppression of Intemperance, which, coincidentally, was headed by a “different kind of a Funk,” Abraham Funk, a newspaper editor and “avowed anti-prohibitionist,” who had been a member of the state convention resolutions committee,\footnote{See “Hot Times Ahead,” \textit{CREG}, Jan. 23, 1894 (2:1-2). The Funks were cousins. “Des Moines Letter,” \textit{Sioux Valley News} (Correctionville), Jan. 18, 1894 (2:1).} which had inserted the 13th plank, and which he regarded as “the greatest Republican convention ever held” in Iowa.\footnote{See “Republican Legislators’ Views,” \textit{CT}, Feb. 10, 1894 (9).} His leadership of and the presence of “well-known liberals” on the committee meant that an amendment “would go through flying,” while the House would “prove the stumbling block.”\footnote{See “Hot Times Ahead,” \textit{CREG}, Jan. 23, 1894 (2:1-2).}

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

Intemperance generally favored some sort of mulct measure—but doubtless much more accurate was the statement that “a careful poll of the republican members of the house” indicated that a majority favored the mulct bill. 361

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

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

360 “Will Amend His Bill,” CT, Jan. 28, 1894 (4).
363 Funk specified that the annual tax was $500 and could be increased to a maximum of $1,000 by the county board of supervisors. His bill also added two sections, one of which required the governor to enforce the bill and conferred on him the power to remove from office any assessor, county treasurer, board of supervisors member, or county attorney who wilfully refused or neglected to perform any duty that the bill imposed on him. H.F. No. 162, §§ 1, 13, 16, in “The Mulct Plan,” CREG, Jan. 26, 1894 (2:1). Given Funk’s transparent verbatim adoption of Given’s draft bill, the Sioux City Journal’s uncertainty as to whether the “common report” that Funk had prepared it in consultation with Given was odd. “Some More ‘Mulct,'” SCJ, Feb. 3, 1894 (4:2) (edit.).
364 “Will Amend His Bill,” CT, Jan. 28, 1894 (4). At least one legislative commentator immediately agreed that “the present indications are decidedly favorable to the prediction that the only modification of our present prohibitory laws will come along this line [i.e., Funk’s bill].” Charles Lawrence, “Des Moines Doings,” WDC, Jan. 29, 1894 (1:3). Nevertheless, that same day the Gazette reported that local optionists and even some prohibitionists were “very much disgusted” that Funk had introduced and championed a “radical measure” because his action “was very much against a fair hearing of the other bills.” “Enter the Arena,” CREG, Jan. 29, 1894 (2:1).
366 Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 73 (Jan. 26) (1894) (S.F. No. 99, by Harsh); S.F. No. 99, § 1 (by Harsh), in 1894 Iowa Senate bill book in University of Iowa Law Library. The bill text was also published in “Mulct Plan in Favor,” CT, Jan. 27, 1894 (3). The bill empowered but did not require a city council, “if it desires to control such saloons under this act,” to provide by ordinance for
for conferring “flexibility” on cities that had theretofore not enforced the law to control saloons,\textsuperscript{367} with only moderate exaggeration one journalist called it “simply a repeal of the prohibitory law carefully disguised.”\textsuperscript{368} Whether Republican Senator and farmer David Palmer was also waxing ironic is, at this remove, unclear, but he surely identified a significant vulnerability when he opined that he did not know whether there would be “much necessity” for making payment a bar “because in those places where relief is asked for it is hardly probable that there would be prosecutions under the present law anyway.”\textsuperscript{369}

Especially Democratic newspapers took delight in exploiting the ambiguity that Given and Funk had created in proposing the mulct fine rather than simply increasing the fine in the existing prohibitory law. The \textit{Dubuque Herald} declared that it “would be just as consistent to tack a mulct clause, or permit, on any other general criminal law of the state,” while the \textit{Clarion Democrat} submitted the modest proposal that the legislature grant a man an “‘indulgence to steal for thirty days” for $100 and “good round sums” for rape, arson, and incest. The \textit{Greene Recorder} analogically argued that the liquor mulct was the “same as leaving the penalty for burglary as now found in the code, and then permitting burglary by the burglar paying an annual fine of a few hundred dollars!”\textsuperscript{370}

In the face of the considerable controversy that was mounting over both the mulct bill’s failure to offer any accommodation to anti-prohibition Republicans and the selection of prohibitionist Funk “as chairman of the most important committee of the house”\textsuperscript{371}—inasmuch as it was delegated the task of shepherding to passage a modification of the prohibition law that would deter anti-prohibition Republicans from voting Democratic and thus jeopardizing Republican state political supremacy—it is unclear what motivated Funk at this very juncture to give a newspaper interview that seemed almost calculated to infuriate his already highly irritated opponents.\textsuperscript{372} That he manifestly felt that nothing he said in the

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\item[367] “Republican Legislators’ Views,” \textit{CT}, Feb. 10, 1894 (9).
\item[368] La Plume, “Harsh Mulct Tax Bill,” \textit{CBN}, Feb. 1, 1894 (1:5).
\item[369] “Republican Legislators’ Views,” \textit{CT}, Feb. 10, 1894 (9).
\item[372] That Funk had somehow been tricked or manipulated into agreeing to the interview comments (the accuracy of which he did not later disavow) was denied by the \textit{Tribune} reporter, J. N. Richards, who, in an interview with Given’s paper, stated: “I had no intention of misquoting Mr. Funk, nor of drawing out of him anything he desired to keep
\end{enumerate}
\end{footnotesize}
interview required him to propitiate those Republicans was visibly on display the night before its publication when, as “leader of the prohibition forces,” he said that “he would make no compromises whatever; that the senate must accept the ‘mulct’ tax as an additional penalty embodied in the bill introduced by himself, or nothing.” He made no secret of his view that the Harsh bill, which made payment of the mulct a bar to prosecution, was “worse than local option.”

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

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

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

quiet. He talked of the matter freely, and of course knew that it was for publication. Besides that, I have, and can produce evidence that he told others substantially the same thing.” “That Interview,” ET-R, Feb. 1, 1894 (3:1).

373“Funk Will Not Compromise,” CREG, Jan. 29, 1894 (1:3).

374“Has Them on the Hip,” CT, Jan. 29, 1894 (12). James Blythe was chairman of the Iowa Republican Party Central Committee and Edgar Mack had been his predecessor.
Banning Tobacco Sales to Minors

“probably...finally be adopted by the House.”

Funk’s self-revelations unleashed an outpouring of ferocious attacks on Funk and Blythe, in particular by anti-prohibition Republicans, and a “volcano...smothering in the house,” especially among (irate and/or embarrassed) members of the Committee on the Suppression of Intemperance. A driving role in this campaign was played by the anti-prohibition Republican *Sioux City Journal*, which on the very morning of the day on which the *Tribune* interview appeared editorially questioned Blythe’s role in Funk’s appointment, especially since Funk had not only introduced the mulct bill, but had reportedly also stated: “For myself I will never consent to a bill allowing the mulct tax to afford any protection to the liquor traffic.” The *Journal* did not rebuke Funk for his repudiation of the party platform plank because he had run for office upholding prohibition and had been elected in defiance of the party convention’s stand, but did demand an explanation as to why Blythe and his candidate for House speaker, Stone, selected him of all Republican House members to implement the party pledge on liquor.

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

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376One of the lighter-hearted offerings was this limerick in the *Gazette*: “There was a bright fellow named Funk,/Of statesmanship he had quite a hunk./He flirted with Jim,/Jim flirted with him,/And for prohi they went in ker-plunk.” “It Is Telling,” *CREG*, Feb. 8, 1894 (1:1).

377“Morning Sessions,” *DIC*, Feb. 1, 1894 (1:5). See also “Truth Comes Out,” *CREG*, Feb. 1, 1894 (1:3-4). For an alternative conjecture that Funk’s appointment was the quid pro quo for support by prohibitionists in the Republican legislative caucus for John Gear as U.S. senator, see “A Democratic View,” *SCJ*, Feb. 1, 1894 (4:4) (edit.) (reprinted from *Dubuque Telegraph*). See also “Almost a Row,” *CREG*, Feb. 2, 1894 (2:3) (“There is no doubt in the minds of most of the members that Funk got the chairmanship as a reward for his support of Gear”).


379The newspaper’s editor-publisher, George Perkins, was at the time a Republican congressman.


381“Who Made Funk a Dictator?” *CBN*, Jan. 31, 1894 (2:3) (edit.).
Mack was “wholly false.” More interesting was Funk’s admission that “I am aware that my bill is extreme, as are all the other bills on this subject, but it was thought best that the extreme views of the party should be outlined in the various measures and then in conference there should be such modification of these views as to meet the exigencies of the occasion and to carry out the party pledge as interpreted by reasonable men. I do not expect any bill to be adopted as it was originally presented.” Although this conciliatory attitude might explain why non-legislative party leaders might have regarded Funk as a plausible committee chairman, it appears utterly inconsistent with his no-compromise boast just three days earlier.

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

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383“Mr. Blythe and Mr. Funk,” *SCJ*, Jan. 31, 1894 (4) (edit.) (reprinted in *CREG*, Feb. 2, 1894 (4:2)).
384In the same article the *Capital* argued that Funk’s explanation was consistent with several uncontested facts about Blythe’s and Stone’s activities at the time. “Mr. J. H. Funk Speaks,” *DIC*, Feb. 1, 1894 (1:3). Lafayette Young, the paper’s editor-publisher, had been a Republican state senator and an unsuccessful candidate for the party’s gubernatorial nomination in 1893.
385“Mr. J. H. Funk Speaks,” *DIC*, Feb. 1, 1894 (1:3).
Banning Tobacco Sales to Minors

as possible reflect the good judgment of those who were not extremists on either side. That is the only legitimate conclusion that his interview warrants.” Richards then closed by noting that Funk “was evidently friendly to the mulct plan,” which Funk “thought would carry out the promises of the platform.” Although a grateful Capital certified the correspondent’s statement as Funk’s “vindication,” which “ought to set everybody right,”387 in fact Richards not only left readers in the dark as to what Funk had actually said, but failed to reconcile Funk’s alleged (but unpublished) statement that Republican leaders wanted a committee chock full of non-extremists with the apparent fact that Funk himself was an extremist. To be sure, Funk’s (published) agentless passives—“I was permitted to have a majority of the committee with me,” “I was allowed to name a majority of the committee”—were a dream come true for deniability as to Blythe (and Mack), but no spinmeister came forward to name less vulnerable plausible names.

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

387“Mr. J. H. Funk Speaks,” DIC, Feb. 1, 1894 (1:3). Without revealing that it was republishing verbatim part of Richards’ statement, the next day in a non-editorial article (datelined Des Moines and presumably written by Richards) the Tribune repeated it. “To Draft Constitutional Bills,” CT, Feb. 2, 1894 (5).
388“Has Them on the Hip,” CT, Jan. 29, 1894 (12).
390“Morning Sessions,” DIC, Feb. 1, 1894 (1:5). Concerning his mulct standard-bearer Given’s paper reported that the “‘general opinion is that...Funk has not only been indiscreet, but that he has drawn upon his imagination as to matters and things of history.’” “That Interview,” ET-R, Feb. 1, 1894 (3:1).
Banning Tobacco Sales to Minors

purely additionally punitive mulct that would alienate anti-prohibition Republican voters was fully vindicated. To be sure, Funk turned out to be admirably suited to performing this role primarily because he himself ultimately defected to the side of the supporters of the diluted mulct, payment of which became a bar to prosecution under the prohibition law.391

In the midst of these roiling controversies Funk’s mulct bill began to stall in his own committee, which on January 30, despite his zealous advocacy, adjourned after two and a half hours of “acrimonious discussion” without even voting.392 Although a press report was already speaking of an official and authoritative statement that no license or local option bill could pass either house, while only a mulct measure that in no way impaired the existing prohibitory law could,393 the legislative process was in sufficient flux that the Gazette a week later reported that the bill that would be passed would be much closer to local option than had been deemed possible just a few days earlier.394 At that time blockage in the House Committee on Suppression of Temperance forced the appointment of a seven-member subcommittee to draft a substitute for all of the many retail liquor traffic bills that had been referred to the committee. All seven were Republicans, whose views ranged from local option to prohibition, but the majority favored some form of mulct.395 Nevertheless, the dynamic situation was reflected in press rumors that two prohibitionist members of the committee were preparing interventions that revealed the House’s inclination to “recede somewhat from its position...in favor of mulct or nothing”: one was drafting amendments to Funk’s mulct bill incorporating local option, while the other intended to introduce a version of Harsh’s Senate bill (which barred further prosecution if liquor sellers paid the mulct tax).396 Pushing powerfully in the same direction of reporting out a local option licensure bill was the plan, soon to be implemented, of marshalling “a score or two of determined river city” representative Republican businessmen to testify before joint hearings of the House and Senate Suppression of

391See below this ch.
392“Democrats in It,” CREG, Jan. 30, 1894 (1:3).
393“Can’t Down Prohibition,” Emmetsburg Democrat, Jan. 31, 1894 (2:2).
394“It Is Telling,” CREG, Feb. 8, 1894 (1:4). The Chicago Tribune’s Des Moines correspondent reported that a hybrid local option/mulct bill was looming in the Senate. “Gatch Bill Favored in Iowa,” CT, Feb. 4, 1894 (3).
395“Division of Opinion in Iowa,” CT, Feb. 7, 1894 (5). See also “They Can’t Agree,” CREG, Feb. 7, 1894 (1:1-2); “‘Merchantdize,’” CREG, Feb. 8, 1894 (1:4). The subcommittee was composed of one radical, three mulct prohibitionists, and three local optionists. “May Come Today,” CREG, Feb. 13, 1894 (1:3).
396“‘Prohibs’ Giving In,” CT, Feb. 8, 1894 (7).
Banning Tobacco Sales to Minors

Intemperance Committees in an attempt to “overawe the mulct taxers of the two committees.” 397

As the practicalities of passing some piece of legislation that would finally extricate the Republican Party from its prohibition-induced electoral predicament began to weigh on legislators, the sharp differences—also concerning the meaning of the 13th plank itself—became profiled and seemingly so intractable that their harmonization appeared unimaginable. State Republican Party Chairman Blythe himself ominously allowed as the enactment of a mulct tax that was purely an additional penalty would neither find majority approval in the party nor capture the spirit of the framers of the convention platform. Although some legislators viewed the platform as (self-)contradictory, others, such as ex-senator Gatch, were certain that it meant local option. In contrast, militant prohibitionist Senator George Finn conceived of the platform as “indefinite” because if the convention had wanted license or local option, it would have been simple to insert those words; since it did not, the party must have “meant some other remedy.” Having, like the lawyer he was, recourse to gap-filling as an interpretive method, Finn reasoned that “the platform must refer to what the counties that demanded relief because they could not enforce prohibition were then asking—that is for a right to make their own penalties legal by ordinance.” As much as his argument may have sounded like sheer mockery as applied to the saloon-saturated river counties, Finn insisted that his (mercifully concise) bill, 398 which even quoted the plank—“any city or incorporated town may provide by ordinance such further and additional penalties for the sale of intoxicating liquors as shall best serve the cause of temperance and morality,” 399—was “the practical solution of the whole question, for it gives to those people who claim that they cannot enforce prohibition the right to legalize their ordinances, and that was all they asked.” Representative Funk, who agreed with Finn to the extent that he “interpret[ed] the

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

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

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

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

Whether enactment of the mulct qua mere cost of doing business satisfied that
condition remained to be seen.

In mid-February, in the wake of the emergence of Martin’s disequilibrating
draft, large Republican delegations from the Mississippi and Missouri River
saloon cities (as well as from such interior cities as Marshalltown, Fort Dodge,
and Des Moines) descended on the capital for the joint House and Senate
Suppression of Intemperance Committees hearing to urge passage of a local
option license bill and to protest against any kind of mulct measure, though some
were said, as a last resort, to be willing accept the latter if it was a bar to
prosecution and linked to a high license. That opposition to the mulct system
was not confined to anti-prohibitionists was made clear by Mary Aldrich, the recording secretary of the arch-prohibitionist WCTU of Iowa, whose “pyrotechnics” at the hearing included questioning whether cities did “not simply want to make legal what they are now doing illegally” and whose suspicions of the mulct plan were rooted in the fear that it would not enhance the law’s efficiency.\textsuperscript{403}

The day after the joint hearings the Republican members of the Senate committee met and rejected Harsh’s mulct tax bill even though it barred prosecutions of sellers who paid the tax, and declared instead for local option.\textsuperscript{404} Despite the fact that even anti-prohibition Republicans had shunted his bill aside, Harsh nonetheless reserved his sharpest criticism for those of his legislative partymates who interpreted the 13th plank as tolerating no change in the prohibitory law beyond an increase in penalties.\textsuperscript{405}

The House committee’s impasse on Funk’s mulct bill earlier in the month was, by the last week in February, turned into a deadlock on the Martin bill: what had once been a full committee dispute over whether payment of the mulct should act as a bar to prosecution in general was now transmuted into the subcommittee’s hopeless division over whether the bar should also apply to incorporated towns.\textsuperscript{406} Finally, a week later, against three dissenting votes, the House committee agreed on a compromise Martin mulct with which “[p]robably” no member was “entirely satisfied.” This committee bill (H.F. No. 537), which Chairman Funk introduced on February 28 and was made a special order for a week later,\textsuperscript{407} reduced the annual tax to $600 and provided that, although the bill was not to be construed as legalizing liquor sales or as a license and payment of taxes did not protect wrongdoers from existing penalties, when a city or county adopted the mulct system, payment of the tax did operate as a bar to prosecution.\textsuperscript{408}


\textsuperscript{404}“Reject Harsh’s Bill,” \textit{CT}, Feb. 17, 1894 (3) (describing further details of the county election procedure).

\textsuperscript{405}“It Might Be Invalid,” \textit{CT}, Feb. 19, 1894 (7).

\textsuperscript{406}“Nearly Agreed on Liquor Bill,” \textit{CT}, Feb. 21, 1894 (5).

\textsuperscript{407}Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 509 (Feb. 28) (1894). For the complete text of the bill, see “The House Has a Bill Day,” \textit{ISR}, Feb. 28, 1894 (4:5-6, at 5:3-5).

\textsuperscript{408}“Agree on a Mulct,” \textit{CREG}, Feb. 28, 1894 (1:1).
Ironically, in spite of this latter provision, initially prohibitionists were said to be less dissatisfied with the House bill than were anti-prohibitionists: although neither side was satisfied, whereas the former had to acknowledge that the platform had promised some relief (to counties in which prohibition was not enforced), the latter, wanting nothing but local option, insisted that the bill was a “make-shift at best....”\textsuperscript{409} Within a few days, however, it became clear that House prohibitionists and mulct taxers opposed the bill precisely because of its suspension of prosecution clause, whereas local optionists’ interest in it rested on their belief that H.F. No. 537 “represents the limit of liberal legislation that can possibly receive the sanction of the house.” Indeed, contrary to the aforementioned earlier report, by the end of the first week in March it developed that the House committee had reported the bill to the full House “without the approval and over the protest of five of the republican members,” including Chairman Funk, all of whom “propose[d] to prevent its passage if possible.”\textsuperscript{410}

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

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

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


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

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

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

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

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413 “Local Option Gains in Iowa,” CT, Mar. 7, 1894 (5).
414 Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 578 (Mar. 7) (1894); “Local Option Gains in Iowa,” CT, Mar. 7, 1894 (5).
416 “Liquor in the House Today,” ISR, Mar. 7, 1894 (5:3-5 at 5).
regard this question as a business proposition: that it affects their business interests...and that it affects the general prosperity of the state....’’’ They then openly formulated the threat: through their votes, influence, and money, ‘‘multitudes’’ would lend their aid against the Republican Party.\footnote{Requests for Legal Relief,” ISR, Mar. 10, 1894 (3:3-4). The petition also alleged that as a result of the Republican prohibitory law Germans had been ‘‘largely driven away from our state....’’’ The text was also published as ‘‘Threatening,’’ CREG, Mar. 9, 1894 (1:4-5, 3:3).}

Funk’s sudden about-face might also have resulted from a discussion that had taken place the previous evening at a ‘‘secret conference of the prohibition members’’ at which some decided on an alternative plan to offer an amendment to strike out all of the bill’s section containing provisions making payment of the mulct a bar to prosecution. Unsurprisingly, Representative Martin, the committee bill’s eponymous drafter, objected to this strategy: ‘‘He told the Prohibitionists who proposed by such an amendment to practically emasculate the bill that it was not an honest thing to do. He begged of them to do what was just to all parties or to do nothing.?’’ Just as unsurprisingly, the next day some of the ‘‘ultra-Prohibitionists...complained of the appointment of Mr. Martin as a member of the steering committee on account of the stand he took at the conference.’’ The possibility that his fellow prohibitionists’ new legislative maneuver might have swayed Funk to change his position is undermined by the fact that Funk himself then voted against those very amendments seeking to strike out the prosecution bar.\footnote{Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 612, 624 (Mar. 10, 12) (1894). On why he did vote for one such amendment, see below.}

During his half-hour floor speech in support of the committee bill—which ‘‘had been introduced against his protest’’—Funk, defecting from his former hard-line position ‘‘in loyalty to the people and to the republican party,?’’\footnote{Whisky War Begins,’’ CT, Mar. 8, 1894 (5). The five-member steering committee, which the approximately 30 House Republicans attending the aforementioned secret conference appointed, also included Funk; its purpose was to ‘‘pilot the committee bill through the breakers between license and state-wide prohibition.’’ ‘‘The Liquor Debate Begins,’’ SCJ, Mar. 8, 1894 (1:1). In other words, Funk’s shift in allegiance had been sealed at that meeting.} did not conceal that he still did not like certain of its features, but contended that ‘‘he had yielded his personal views to the judgment of the majority of the committee and...hoped that those who differed from him would be equally liberal.’’ He

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

Unable to ignore outright the bill’s most offensive feature—the suspension of prosecution—Funk dramatically claimed that the law’s provisions “constantly hung over the saloonkeeper like the sword of Damocles, and if he broke any of the provisions...he lost all rights and his business would be closed.” Moreover, he praised the committee bill, which sought to “protect the people against the aggression of unauthorized saloons,” because its “machinery...is entirely removed from the local sentiment so that it can be freely and fearlessly enforced.” Professing pragmatism, he confessed that “in looking abroad at the needs and wants of the State he was called upon as a law maker to do something to minimize the traffic,” and as far as he was concerned H.F. No. 537 would both implement the party platform and “harmonize the party.”

Curiously, although Funk’s abandonment of the hard-line prohibitionist position clearly marked a crucial symbolic turning point in the debate and heralded the Republican Party’s shedding of its long-time prohibitionist orientation, the press failed to focus on it.

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

on the bill began when Republican prohibitionists offered amendments to strike out the various sections containing clauses that triggered the bar to/suspension of prosecution.\textsuperscript{427} This debate and these votes were crucial because they would reveal whether the forces supporting the mulct as a purely reinforcing penalty were in a position to undo the subversion of the original Given-Funk mulct bill that the Committee on the Suppression of Intemperance had effected and that Chairman Funk himself had ultimately supported. The first such amendment, which, if successful, was to be followed by all the others, lost by an exclusively Republican vote of 28 to 44 (not a single Democrat casting a vote).\textsuperscript{428} Prohibitionists’ weak showing not only underscored that the House would not pass a bill strengthening the existing law, but encouraged those backing the local option/licensure bill prepared by (Republican and Democratic) representatives of 10 saloon cities to hope that if they could secure some Democratic votes the House might pass it.\textsuperscript{429} Despite the amendment’s defeat, Republican William Harriman, “the champion of the plan to make the bill a mulct law pure and simple,” moved to strike all of section 17 (which contained another clause barring prosecution if the liquor seller paid the mulct, a majority of voters residing in the city who had voted in the last general election signed a consent, the city council adopted a resolution consenting to the sales, and all the resident freeholders within 50 feet of the selling premises signed a consent), but it was defeated by about the same exclusively Republican vote.\textsuperscript{431} The tide seemed to turn and Funk seemed to experience a change of heart when the House reached section 18 of the bill, which applied only to cities and towns of fewer than 5,000 inhabitants and made a written consent signed by a majority of a county’s legal voters (voting at the last general election) residing outside of cities with a population of 5,000 or over a bar to proceedings against intoxicating liquor sellers (but was not to be construed as such a bar in incorporated towns in townships in which less than a majority of the township voters signed the consent or in

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

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

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

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

\textsuperscript{431}\textit{Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa} 624 (Mar. 12) (1894). The tally was 27 to 46 (which was a miscount of the listed named and should have been 47) with 28 absent or not voting, but two members (McNeeley and Taylor) were listed as having voted Yea and Nay and absent/not voting, respectively.
Banning Tobacco Sales to Minors

incorporated towns in which a majority of voters did not sign the consent). The amendment was offered by prohibitionist Joseph Morris, who represented Clarke County in south-central Iowa, the population of whose largest town (Osceola), barely exceeded 2,000. Arguing on the floor that the provision would make a saloon possible in every county, Morris, who had also voted to strike sections 16 and 17, allowed as he might possibly support the law including the bar to prosecutions in large cities, “but he could not support any bill that would undertake to bring a saloon to his county.” The amendment’s opponents turned Morris’s logic on its head: whereas he was concerned that section 18 would facilitate the opening of saloons in small towns that did not have any, the anti-prohibitionists asserted that the provision was needed to bestow the benefits of saloon control on counties without large towns but some of whose small towns already had saloons. Funk’s reasoning aligned with Morris’s—the population of Hardin County’s largest town, Iowa Falls, was only 1,796—but his high-profile chameleon-like pronouncements as committee chairman necessitated a more detailed justification. Although he had subordinated his personal convictions to the demands of House members representing cities and signaled his readiness to vote for the relief they claimed was needed, he was now confronted with a different issue:

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

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

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

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


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


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


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

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

prohibitionists[^446] and only three local optionists[^447].

Numerous representatives, doubtless driven by fears that their constituents might misinterpret (or, perhaps even more fatally, correctly interpret) the reasons for their votes, made sure that their explanations were printed in the *House Journal*. None of them expressed satisfaction with the bill. Prohibitionist Harriman, for example, defended his Yea on the grounds that H.F. No. 37 “most nearly conform[ed]...to demands of the thirteenth plank that can be passed by this House,” was “substantially a mulct bill,” did not legalize liquor selling, and would decrease the number of saloons. Prohibitionist Joseph Morris explained that he was “compelled” to vote Nay because it virtually repealed the existing prohibition law, whereas he was “instructed to maintain” the latter. Despite its “several obnoxious provisions,” Sawyer voted for the bill because it was “better than nothing” as relief legislation. And Funk himself voted Aye because it was “a repressive measure and...an additional penalty.”[^448]

Despite its defeat, the mulct bill was not dead, because 55 Republicans voted to reconsider it, although the House decided to wait five days to do so.[^449] In the meantime, House rejection of the almost unrecognizable quasi-mulct bill prompted Welker Given, the mulct’s tireless propagator, to write “the obituary of the mulct plan,” which had been “beaten fairly and squarely...even in its weakest dilution,” and concede that it “should be dropped altogether.”[^450]

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

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


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

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

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

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

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

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

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

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

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

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

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

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

The extent to which the irreconcilable extremes—radical Republican prohibitionists and Democratic anti-prohibitionists—met in opposition to the bill was explosively on display in the explanations of their votes that two of them had published in the Senate Journal. In addition to repeating the well-known charge that H.F. No. 537 violated the 13th plank inasmuch as it undertook to alter the prohibition law all over Iowa instead of maintaining it in prohibition localities and controlling liquor sales by other methods in other places “in the interest of temperance and morality,” Finn focused on liquor’s immorality: “I believe inebriety to be a disease of the most pitiable and unfortunate character,” against which Iowa “should be protected...as much as small pox or any deadly contagion.” Because the (pseudo-mulct) law—which was only slightly less virulent than the Democratic bill—tended to “recognize the legal existence of the saloon, in direct opposition to the established and declared doctrine of the party...for the last twelve years,” it empowered saloon keepers to enlarge the universe of their victims. Throwing drunkenness together with gambling and prostitution as “evils alike to be deplored,” Finn deemed their licensure “unworthy of patriotic citizenship” and forcing the public to share in their

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462Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 499 (Mar. 16) (1894). The Senate’s balkanization on liquor issues was reflected in the defeat the same day by a vote of: 13 to 34 of Finn’s substitute (which would have authorized cities of over 5,000 inhabitants to provide further and additional penalties and controls and regulations of liquor sales “as shall best serve the cause of temperance”); 16 to 31 of Democrat Groneweg’s substitute (local control/licensure of sale and manufacture); and 9 to 35 of Kilburn’s substitute (empowering municipalities to “make and enforce any regulation or restriction of the liquor traffic where the same is conducted contrary to law, and such restrictions, regulations and penalties...shall in no wise be construed to in any manner repeal any law or bar prosecution for any offense under any law now in force in the State”). Id. at 496-98. On March 22, just before substituting H.F. No. 537 for S.F. No. 324, the Senate voted 28 to 20 (the Nays being cast by 15 Democrats and radical prohibitionists such as Finn and Phelps) to reconsider the vote defeating S.F. No. 324. Id. at 561-62. In between all 34 Republicans voted against all 16 Democrats in defeating a Democratic manufacture/sale local option licensure substitute for H.F. No. 537. Id. at 562-66.

463“Strangled,” CREG, Mar. 22, 1894 (1:5).

464Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 566-67 (Mar. 22) (1894).
proceeds through the mulct “abhorrent.”\footnote{Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 568 (Mar. 22) (1894).} Democrat Theodore Perry, a lawyer from the south-central town of Albia (pop. ca. 2,500), interpreted the bill as a hoax designed “merely to relieve those in charge of the machine of the Republican party from a very perplexing and embarrassing situation,” but emphasized that those leaders had nevertheless failed to disentangle the party from the self-contradictions that were undermining its electoral coalitions because “this prohibition measure called license” was a “serious blow to prohibitionists. The Republican party...has at last done what it has so long declared it would not; it has legalized the saloon.”\footnote{Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 569-70 (Mar. 22) (1894).} Ultimately, then, Finn and Perry agreed that behind the party’s obfuscation, the bill had brought licensure to Iowa, though they imputed vastly different social, cultural, moral, and economic meanings to that innovation.

When the bill finally received its constitutional majority, Blythe, who was standing at the back of the chamber, smiled.\footnote{“Strangled,” CREG, Mar. 22, 1894 (1:5).} (While not completely to his liking, H.F. No. No. 537 was “the best that could be passed through both houses” and he viewed it as “essentially fulfilling” the party pledge.)\footnote{“A Wail of Woe,” CREG, Mar. 23, 1894 (1:1-4 at 3).} In sharp temperamental contrast, up in the gallery sat “seven sad faced...prominent W.C.T.U. ladies” who, having been present “at the birth of prohibition,” now “sorrowfully...sat as mourners at the funeral, unnoticed and unheeded.”\footnote{“Strangled,” CREG, Mar. 22, 1894 (1:5).} Thus ended (at least for the time being) what one Republican senator called “the long struggle—the most intense and bitter in the history of Iowa politics or legislation....”\footnote{“A New Liquor Law,” DIC, Mar. 22, 1894 (1:5-6).} After the resurrected “Given-Martin mulct” had become “a matter of fact,”\footnote{“In General and Particular,” ISR, Mar. 23, 1894 (4:2-3) (edit.).} the Register congratulated Given: it may not have been his mulct that passed, “but it was a bill that borrowed largely from the theories that he ha[d] been advocating.”\footnote{“A Wail of Woe,” CREG, Mar. 23, 1894 (1:1-4 at 3) (Brower).} For his part, Given was willing to take credit for the two-thirds of the new law that was “taken bodily” from the draft that his newspaper had published in December, but he was able to approve of it only “with unfeigned reluctance”; he reminded readers that the Times-Republican had “earnestly
opposed the local option or bar mulct up to the last moment and accepts it now under protest and only because it was necessary to avoid the much worse thing of state-wide license brought about “by a combination of democrats and so called liberal republicans....” The law’s chief “unfortunate effect at first, at least, and for some time” was the spread of “the saloon to new territory,” for example to central Iowa, “under the supposed shelter of the bar” to prosecution triggered by payment of the mulct. 475

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

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

Relaunching the Sideshow of Constitutionalizing Liquor Prohibition (1894)

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

473“The New Mulct Law,” ET-R, Mar. 23, 1894 (1:3-4) (edit.).
474“The Sudden Revival of the Mulct,” ET-R, Mar. 23, 1894 (1:3) (edit.). The next day he reiterated that “straight mulct could not get through and it was either the bill with a bar or something worse.” “Senator Turner’s Position,” ET-R, Mar. 24, 1894 (1:3) (edit.).
475“The New Mulct Law,” ET-R, Mar. 23, 1894 (1:3-4) (edit.). Given’s longer-term optimism was nourished by his misguided hope that the Iowa Supreme Court would invalidate the bar. See Iowa v Forkner, 94 Iowa 1 (1895).
taking no action on the House version, the House amending the Senate version, and the Senate ultimately concurring in that amended resolution. Although all passed by large majorities, not a single Democrat in either house voted for any. The constitutional amendment that the Twenty-Fifth General Assembly referred to the Twenty-Sixth for the requisite second round of voting before submission to the electorate both provided that “[n]o person shall manufacture for sale, or sell or keep for sale as a beverage, any intoxicating liquors whatever, including ale, wine and beer” and required the legislature to prescribe regulations for enforcing prohibition.

To be sure, the controversy over resubmission of the prohibitory constitutional amendment was to a large extent merely a charade since the resolution was openly known as “the price” that Republican anti-prohibitionists “paid” for prohibitionists’ vote for the mulct bill. The quid pro quo could thus

\[\text{Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa} \] 68, 345, 580, 630, 656-58, 795-96 (Jan. 25, Mar. 2, 23, 27-28, Apr. 5) (1894) (S.J.R. No. 5, by Perrin); \[\text{Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa} \] 576-77, 718, 750-52, 963-65 (Mar. 7, 19, 21, Apr. 3) (1894) (H.J.R. No. 12, by Cornwall). The final votes were 62 to 34 in the House and 29 to 16 in the Senate. The extraordinary dynamic in the lawmaking process was starkly illustrated by the fact that just after this vote 43 House members (including 27 Republicans) voted for a bill to permit the manufacture and wholesale sale of liquor on a county option basis (though 56 Republicans defeated it). \[\text{Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa} \] 969 (Apr. 3) (1894) (H.F. No. 651, by Chassell) (incorrectly tallying the voting members as 44 to 55); “Chassell’s Liquor Bill Defeated,” \[CT\], Apr. 4, 1894 (5); “The Legislature,” \[WDC\], Apr. 4, 1894 (1:4). A possibly even starker about-face was Senate passage of virtually the same manufacture bill by a vote of 27 to 17 three days before its adoption of the constitutional amendment resolution. Eight Republicans who had voted for the manufacture bill then voted for the resolution. \[Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa \] 743-44 (Apr. 2) (1894) (Substitute for S.F. No. 330, by Dent); “Wets Gain a Point,” \[CT\], Apr. 3, 1894 (2).

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

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

prohibitionists would vote for a local option bill; they then decided to make this proposition to the prohibitionists. “Local Option Gains in Iowa,” CT, Mar. 7, 1894 (5). Initiation of the plan was substantiated the very next day when Cornwall introduced the resolution. “Whisky War Begins,” CT, Mar. 8, 1894 (5). In the Senate, John Rea explained his vote for licensure bill S.F. No. 324 (which was nevertheless defeated by a vote of 12 to 36) with all imaginable clarity: “With the understanding and the assurances that I have that a constitutional amendment providing penalties for its enforcement would pass this body, should the bill now pending pass, relying upon the assurances and understanding that I have I have concluded to waive some scruples and to vote for the bill.” Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 500 (Mar. 16) (1894). To be sure, the cost to anti-prohibitionists of voting for resubmission was lower in the sense that whereas passage of the mulct bill had an immediate and palpable impact, adoption of the constitutional amendment resolution might never lead to constitutional prohibition because the legislature would have to vote again in 1896 and the electorate would not vote on it until 1897. In fact, the legislature rejected it in 1896. See below ch. 10.

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

482Twenty-First Annual Meeting of the Woman’s Christian Temperance Union of Iowa...Held at Newton October 16-19, 1894, at 39 (1894).
Given, “the high priest of the mulct system,” asked: “What boots it to take another vote with a certainty that the river counties will go one way and the interior the other?” Nor, he pointed out, would the difficulty of enforcement in the former be alleviated if the latter counties’ pro-prohibition majority increased. Consequently, resubmission would merely bring the Republican Party “out the same hole it goes in. It would still be responsible for enforcement of prohibition and yet not allowed the necessary means.”

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

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

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

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

even further toward downplaying the initiative by reporting: “Very little of importance transpired in the legislature today. The house passed a bill to prevent the sale of tobacco to minors under the age of 16 years....”\textsuperscript{489} Without offering any details of the debates, a small-town weekly remarked of it that “[o]ne bill of general importance managed to slip through both houses during the past week.”\textsuperscript{490}

Nevertheless, despite these accounts, the appearance of the absence of opposition was misleading. In fact, two attempts to pass a no-sales-to-minors bill in 1890 and 1892 had failed altogether. In 1890, numerous petitions were presented to the Senate,\textsuperscript{491} and on February 28 Senator Perry Engle introduced S.F. 95, a bill\textsuperscript{492} under which “no person or persons in this state shall sell, buy for, give, or furnish any cigar or cigarette, or tobacco in any of its forms, to any minor under twenty years of age unless upon written order of parent or guardian” and for violation of which a $25 fine was imposed.\textsuperscript{493} Engle (1840-1935), a prominent physician\textsuperscript{494} and publisher and editor of the \textit{Newton Herald}, had been a Republican in the time of Lincoln, but joined the Greenback party in 1876, and in 1889 was nominated by the Union Labor party (and endorsed by the Democrats) for the state Senate.\textsuperscript{495} By 1891 he was a central committee member of the People’s party in Iowa\textsuperscript{496} with a national profile,\textsuperscript{497} unsuccessfully ran for

\textsuperscript{489}“Each House Passes a Bill,” SCJ, Feb. 8, 1894 (1:3).
\textsuperscript{490}“The Week at Des Moines,” \textit{People’s Press} (Mapleton), Feb. 24, 1894 (2:4).
\textsuperscript{491}Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 44, 205-10, 250 (1890).
\textsuperscript{492}Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 98 (1890) (S.F. No. 95).
\textsuperscript{493}S.F. No. 95 §§ 1-2. Because the bill book was bound too tight to permit photocopying, the State Historical Society of Iowa (Des Moines) transcribed the text. See also “A Lower Interest,” \textit{DMWL}, Mar. 20, 1890 (1:1-2 at 2).
\textsuperscript{494}Engle was in charge of the X-ray machine at the newly completed University of Iowa Hospital in 1898 and the first lecturer in electrotherapeutics. Kenneth Dolan, “History of the Department of Radiology at the University of Iowa,” \textit{American Journal of Radiology} 165:1071-74 at 1071 (1995).
\textsuperscript{495}James Weaver, \textit{Past and Present of Jasper County Iowa} 1:425-26 (1912); \textit{Portrait and Biographical Record, Jasper, Marshall and Grundy Counties Iowa} 222(1894), on http://www.usgennet.org/usa/ia/county/jasper/Biographies/E/engle,_perry.htm; “Dr. Perry Engle, Pioneer Newton Physician Dies,” \textit{Jasper County Record}, July 4, 1935 (1:1, 4:2). On the Union Labor party, which was founded in 1887 and united with the Greenback party in 1890, see Fred Hynes, \textit{Third Party Movements Since the Civil War with Special Reference to Iowa: A Study in Social Politics} 206, 308 (1916).
\textsuperscript{496}[Secretary of State], \textit{IOR} 171 (G. Burkit comp., 7th Year, 1892).
\textsuperscript{497}“The Gathering,” \textit{Atchison Daily Globe}, May 20, 1891 (3:3).
Banning Tobacco Sales to Minors

Congress in 1892, and was the sole Populist in the Senate in 1892, where he often held the balance of power in the evenly divided Senate by voting with the Democrats, but he voted independently and introduced notably progressive bills such as those for woman suffrage, the Australian ballot, and prohibition.598

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

499Caldwell “figured prominently in financial circles”: he was president of the bank in and railroad to his hometown, and “made extensive and judicious investments in property and in this way accumulated a comfortable fortune.” R. F. Wood, Past and Present of Dallas County, Iowa 409 (1907).
500Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 170 (1890) (Mar. 8). The committee consisted of five Republicans, three Democrats, and one Populist. The vote by member was not recorded in the Journal, but on the floor vote to refer, discussed below, four members voted for and four against, while chairman Caldwell was absent or did not vote; two of the four Republicans voted for and two of the three Democrats against.
principles concerning liquor prohibition, McVay, according to the *Des Moines Leader*, “thought there was a difference” between a ban on selling liquor and one on tobacco, but “was unable to explain the difference further than to say that there were more restrictions necessary about the sale of liquors because there were more habitual drunkards than habitual users of tobacco who suffered by the use of the articles.” In addition, he feared that passage of Engle’s bill would merely generate crime and disregard and disrespect for the law among youth.\(^{503}\)

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

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

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

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

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

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

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

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

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

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508 “Another Phase,” BH-E, May 11, 1890 (6:1) (edit). The editorial echoed the view of a correspondent that “a democratic senator told us Iowa would now have such a law had there been more time to consider and perfect the bill introduced..., as both parties were in favor of it.” C. E. Brown, “‘The Deadly Cigarette,’” BH-E, May 11, 1890 (6:7-8).

509 L. A. Burkhalter, “Legislation and Petitions,” Iowa Signal 1(6):4-5 (July 1891). No library appears to hold this monthly newsletter, a photocopy of which was generously provided by Jeanne Lillig, the current president of the WCTU of Iowa. The newsletter was the organ of the WCTU of the State of Iowa. Burkhalter’s letter was reprinted in Third Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Burlington, Iowa, October 4th, 5th, 6th, & 7th, 1892, at 94 (1892).

510 [Secretary of State], IOR 161 (G. Burkit comp., 7th Year, 1892).

511 Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 65 (Feb. 21) (1890). On smoking in the legislature, see below ch. 18.

512 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa 189 (Feb. 12) (1892).

513 S.F. No. 222, § 1 (transcribed copy provided by SHSI DM).


515 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa 438 (1892) (Mar. 14).

516 The State Historical Society of Iowa (Iowa City) has a collection of letters to Mack

788
Banning Tobacco Sales to Minors

a measure were presented to the Senate and House in the following weeks, and all the Des Moines public school principals appeared before the Senate Public Health Committee, to which the bill had been referred, advocating the prohibition of the sale of tobacco and cigarettes to minors under 16. A majority of the committee recommended passage, provided that the bill was amended to: (1) permit exemptions with the approval of a parent or guardian; (2) reduce the penalty from $25 to $10; and (3) strike section 3, which would have expedited the bill’s effective date. Referred back to committee. Senate File No. 222 died.

Significantly, the bill (S.F. 44) that Republican Senator Alpheus Barto Conaway, chairman of the Committee on Public Health, introduced on January 23, 1894, was even titled: “An Act to License Manufacturers, Wholesale and Retail Dealers of Cigarettes,” with the prohibition of their sale to minors under 16 tacked on. Conaway was a physician who in the 1880s had also been a professor of obstetrics and gynecology at Drake University in Des Moines; his political profile became sufficiently high during two sessions as a state senator that in 1895 he became a candidate for the Republican gubernatorial nomination. A “prohibitionist from principle,” he nevertheless voted for the

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

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

Journal of the House of Representatives of the Twenty-Fourth General Assembly of the State of Iowa 243, 244, 269, 271, 286 (1892).

“Sprung a Surprise,” DIO, Feb. 27, 1892 (1:7).

Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa 387 (Mar. 9) (1892)

S.F. No. 222 (Mar. 9, 1892) (copy of file provided by SHSI DM).

S.F. No. 44 (Jan. 23, 1894); Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 56 (1894) (Jan. 23). The bill authorized local governments to issue the licenses for annual amounts ranging from $100 for manufacturers to $25 for retailers. S.F. No. 44, §§ 1-2. The text of the bill was transcribed by the SHSI staff because the Senate bill book for 1894 was bound too tightly to photocopy.

Willis Hall, Biographical Sketches of the Twenty-Fifth General Assembly of Iowa, the State Officers and Iowa Members of Congress 26-27 (1894); Benjamin Shambaugh, Biographies and Portraits of the Progressive Men of Iowa 2:617-18 (1899); William Battin and F. Moscrip, Past and Present of Marshall County, Iowa 2:969-71 (1912); “Dr. A. B. Conaway, Father of Mayor Conaway, Dead,” Marshalltown Times-Republican, Feb. 25, 1925 (10:3); http://infused.org/genealogy/?m=family&id=14207 (visited Sept. 8, 2006); Portrait and Biographical Album of Mahaska County, Iowa (1887), on http://www.beforetime.net/iowagenealogy/mahaska/portraitandbiographicalalbum/pbco

789
Banning Tobacco Sales to Minors

liquor mule tax bill (H.F. No. 537), despite the fact that it was “repulsive to me to be compelled to vote for” it, because his constituents demanded it. 524 Although Conaway on February 1 reported out on behalf of his committee an amended version of the bill that eliminated manufacturers and wholesalers from the licensing regime, it continued to mandate local licensing of retailers. 525

The two bills introduced by Republicans in the House, lacking any licensure, straightforwardly prohibited the sale of any tobacco to minors under 16. 526 H.F. No. 65, which imposed a fine of $20, 527 was introduced by Zenas Hovey Gurley, Jr., a former Democrat and former apostle of the Reorganized Church of Jesus Christ of Latter-Day Saints. 528 H.F. No. 135, which prescribed a fine not exceeding $100, 529 was introduced by David Nicoll, who was a United Presbyterian Church minister and a farmer. 530 After the Committee on Suppression of Intemperance had recommended passage of H.F. No. 135, 531

nawayalpheusb.html.

524 Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa at 568 (1894).

525 S.F. No. 44, as amended (no date); Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa at 110 (Feb. 1, 1894). This version increased the retailers’ licensing fee to $100, which was also the fine for selling without a license and for selling to minors. Id., §§ 1-2. The text of the amended bill was also transcribed by the staff of the SHSI.

526 A Swedish-language weekly published in Des Moines, omitting any reference to cigarettes, reported that the bill passed by the House prohibited the sale of tobacco and cigars. “Från legislaturen,” Sviithiod, Feb. 15, 1894 (4:1).

527 H.F. No. 65 (by Gurley, Jan. 23, 1894) (copy furnished by SHSI); Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 83.

528 AI, 3d ser., 11(4):320 (Jan. 1914); http://www.sidneyrigdon.com/dbroadhu/UT/utahmisc.htm (visited Sept. 8, 2006); Willis Hall, The Iowa Legislature of 1896, at 94 (1895). At the 1900 population census Gurley was returned as a deputy warden at Anamosa state prison.

529 H.F. No. 135 (by Nicoll, Jan. 25, 1894); Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 102.


531 Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa at 160 (Jan. 31, 1894).
House Democrats, who occupied only 21 seats in the 100-member chamber, sought to weaken the law on the floor. One Democrat (Charles Robinson) sought to eliminate tobacco other than cigarettes from the ban on the grounds that the bill’s scope was too wide, making it unenforceable. After seven Republicans and one Democrat (D. H. Snoke) had argued against it, the amendment lost on a voice vote. Cyrus Ranck, who was the Democratic Party state central committee chairman, proposed an amendment that—like the New Jersey law—would have conditioned liability on “knowingly” selling to a minor. Despite the Democrats’ minority status, the amendment lost narrowly 37 to 45. Then Republican Samuel Van Gilder (who in March would vote consistently against the quasi-mulct liquor bill) offered an amendment that weakened deterrence and enforcement by specifying a minimum fine as low as five dollars and eliminating imprisonment as an alternative penalty, which the House adopted. Republican Charles Root’s amendment to raise the age limit from 16 to 18 failed on a voice vote. The full House then passed the bill by a vote of 81 to 13. The party-line character of this partial prohibition was signaled by the fact that House Republicans voted 74 to 1 for the bill, while Democrats opposed it 12 to 7. Passage inspired the Perry Bulletin to remark that “if a bill could be passed prohibiting the manufacture or sale of cigarettes in the state it would be a great benefit to the rising generation.”

The Senate Committee on Public Health recommended that H.F. No. 135 be substituted for S.F. No. 44, and the full Senate adopted the recommendation and H.F. 135 without amendment. In the Senate, which the Republicans controlled 34 to 16, the vote was 31 to 3, with only four Democrats voting for the bill and ten not voting. Senator Warren Garst, merchant, banker, and future governor, opposed the bill on the grounds that it made it a misdemeanor for one boy to give tobacco to another. In contrast, Senators Conaway, Harsh, and Mattoon stressed

532 Secretary of State, IOR 30-33 (1895).
533 “Grinding Out Laws,” DIC, Feb. 7, 1894 (1, 4:6, at 5:2); Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 263-64 (Feb. 7) (1894).
534 Willis Hall, The Iowa Legislature of 1896, at 41 (1895).
535 N.J. Laws ch. 96, §1, at 112.
536 Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 264 (Feb. 7) (1894); “Grinding Out Laws,” DIC, Feb. 7, 1894 (1, 4:6, at 5:2).
537 Bulletin (Perry), Feb. 10, 1894 (2:3) (untitled).
538 Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa at 230 (Feb. 17, 1894); IOR 29-30 (1895).
that Iowa educators were demanding its passage.\textsuperscript{539}  

Looking back two years later, the author of the general cigarette sales prohibition bill that was enacted in 1896, Republican Senator Julian Phelps declared on the Senate floor that “a bill was introduced in the senate two years ago, which purported to tax the retail sellers of cigarettes, but was really intended to prohibit the sale of them and was so mutilated in the house of its friends, that it was entirely satisfactory to the manufacturers themselves.”\textsuperscript{540}

In the end, then, the new statute made it unlawful, subject to a fine ranging between five and 100 dollars, “for any person, directly or indirectly, by himself or agent, to sell, barter or give to any minor under 16 years of age, within this State, any cigars, cigarettes or tobacco in any form whatever, except upon the written order of his parent or guardian.”\textsuperscript{541} How often the new law was enforced in Iowa’s many hundreds of communities is unknown, but almost as soon as the law went into effect, the nationally affiliated WCTU of the State of Iowa complained that it was “deficient in that it makes it nobody’s duty to prosecute violaters [sic], and thus it is clear that the law must be amended before it can be enforced.”\textsuperscript{542} Some local unions of the organization tried to assist enforcement by printing the Nicoll law on cardboard and hanging it up where tobacco was sold and visiting dealers to remind them of the law.\textsuperscript{543} That the strictness of enforcement may have left something to be desired was suggested by a case in Webster, where in 1895 a judge imposed the minimum fine on two businessmen who had been arraigned for having sold cigarettes to small boys.\textsuperscript{544} In the meantime, the nationally affiliated WCTU resolved at its annual meeting in 1895: “That we recommend the young women of our state to assist in the suppression of the tobacco habit by refusing the company, as escort, of young men addicted to its use.”\textsuperscript{545} And looking back from the vantage point of 1898, the non-partisan WCTU could boast that passage of the 1894 anti-cigarette bill had been aided by

\textsuperscript{539}"Solons Rose Early," \textit{DML}, Feb. 18, 1894 (5:3).

\textsuperscript{540}"The ‘Coffin Nail’ Must Go," \textit{DIC}, Feb. 1, 1896 (6:2).

\textsuperscript{541}1894 Iowa Laws ch. 61, §§ 2, 1, at 63.

\textsuperscript{542}\textit{Fifth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Marion, Iowa, October 3, 4 and 5, 1894}, at 69 (n.d.) (Report of Irene G. Adams, superintendent, Scientific Temperance Instruction Dept.).

\textsuperscript{543}\textit{Sixth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Marshalltown, Iowa, October 9, 10 and 11, 1895}, at 105 (1895).

\textsuperscript{544}"A Lesson to Cigarette Venders," \textit{DML}, Dec. 7, 1895 (3:2) (copy furnished by Merle Davis).

\textsuperscript{545}\textit{Sixth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Marshalltown, Iowa, October 9, 10 and 11, 1895}, at 33 (1895).
the organization’s legislative department.\textsuperscript{546}

Iowa can also be viewed as a regulatory laggard since in the mid-1890s it had not even banned smoking by minors (and did not do so until 1909).\textsuperscript{547} As early as 1890, for example, New York, adopting language from a statute enacted the previous year in neighboring Connecticut,\textsuperscript{548} inserted into its Penal Code a provision making it a misdemeanor (punishable by a fine of not less than two dollars) for any “child actually or apparently under sixteen years of age” to “smoke or in any way use any cigar, cigarette, or tobacco in any form whatsoever in any public street, place, or resort.”\textsuperscript{549} That enforcement in New York—backed in New York City by a Board of Aldermen resolution requesting the police to

\textsuperscript{546}Twenty-Fifth Annual Meeting of the Woman’s Christian Temperance Union of Iowa 68 (1898).

\textsuperscript{547}See below ch. 13. A document apparently prepared for tobacco litigation at the end of the twentieth erroneously stated that: “The first age restrictions governing the use of tobacco (as opposed to the sale of tobacco products) were enacted in Arizona in 1917; in Idaho in 1918; and in Illinois in 1921.” “Historical Developments Regarding Minimum Age Laws Governing the Sale or Use of Tobacco Products” (Jan. 28, 1998), Bates No. 2072554892.

\textsuperscript{548}1889 Conn. Pub. Acts ch. 80, § 2, at 45, 46 (imposing a maximum fine of $7 on persons under 16 who had smoked, or in any way used any form of tobacco “in any public street, place, or resort.”) Even this ban on smoking by minors had its critics. The United States Tobacco Journal rejoiced that a minister had protested to the governor “against the disgraceful anti-tobacco bill....” Rev. John Collins had, inter alia, argued that the bill was “an encroachment on the rights and privileges of parents and religious teachers. ... I am sure that I know better how to deal with my boy for cigarette smoking, at all events, than the police. ... The infamy that will be attached to a boy, because of these police proceedings necessary in his arrest and punishment, will work him serious injury.... The proposed law is not fair to the boys. It will result in more smoking, for the boys will resent it. As soon as they get to be sixteen years old they will smoke anyway. I know human nature well enough to know that.” “A Common-Sense Protest,” USTJ, vol. 27, Apr. 13, 1889 (2:3). Susan Wagner, Cigarette Country: Tobacco in American History and Politics 44 (1971), erroneously stated that New York was the first state to enact such a ban.

\textsuperscript{549}1890 N.Y. Laws ch. 417, at 776, § 1 (Penal Code § 290). Connecticut and New York were, according to the WCTU, the only states punishing the child as well, a regime favored by the organization’s narcotics department. Minutes of the National Woman’s Christian Temperance Union, at the Seventeenth Annual Meeting, Atlanta, Georgia, November 14th to 18th, 1890 at 180, 186. However, the Society for the Prevention of Cruelty to Children in New York opposed enforcement because the law was “too severe.” “New York Gossip,” BDA, Sept. 3, 1890 (4:6).
enforce the law—was both perceived as necessary and taken seriously was revealed by The New York Times in 1894:

Brooklyn schoolboys who now appear upon the streets and in other places smoking nauseating and filthy cigarettes may think themselves lucky if they are not arrested by a policeman, carried to a station house, and locked up in a cell.

The alarming extent to which the pernicious and injurious habit of cigarette smoking has spread among schoolboys has caused the school authorities to appeal to the police to enforce the law.

There is no doubt that this will be done, and...it is likely that some parents within the next few days may find their missing sons in police stations.

The necessity in New York for such a flanking measure against use was dictated by the fact—as familiar in the twenty-first as in the nineteenth century—that, in spite of compliance with the law against sales to minors: “The boys are too shrewd to be caught buying, and they get someone who is over age to buy the cigarettes for them. One young man can in this way furnish an entire school...”

But disputes over the efficacy of no-sales-to-minors laws were about to be superseded: in early 1895, Mrs. E. B. Ingalls, the National WCTU’s Superintendent of Narcotics, which chose “The cigarette must go” as its motto for the year, declared that “our people in some states are taking up the question of forbidding the manufacture and sale of cigarettes. Every W.C.T.U. ought to work for such a law.”

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550 “After the Boys Who Use Tobacco,” NYT, Aug. 13, 1890 (2).
551 The first arrests under law, which went into effect Sept. 1, 1890, took place the next day. “Little Cigarette Smokers Warned,” NYT, Sept. 3, 1890 (8). A counter-account in an out-of-town paper stressing that the police displayed little enforcement zeal lest arrests of boys over 16 prompt complaints nevertheless reported that one policeman in the Bowery “knocked a cigarette out of lad’s mouth with a club,” and that “street urchins of tender age, who previously had gone about smoking cigarettes with evident pride, were careful to avoid ‘the cop’ when they smoked at all.” “New York Gossip,” BDA, Sept. 3, 1890 (4:6).
552 “No Cigarettes for Boys,” NYT, Dec. 6, 1894 (8).
553 “No Cigarettes for Boys,” NYT, Dec. 6, 1894 (8).
554 Mrs. E. B. Ingalls, “Narcotics,” US 21(6):12 (Feb. 7, 1895). To be sure, she added the hope that in pushing for such legislation “our women will...by no means neglect the opium habit” and in particular would “make known the dangers of using headache medicines, soothing syrups, etc.”
The Universal Prohibition of the Sale of Cigarettes: 1896

An editor in the neighboring state of Wisconsin gets off the following and then retires to be rubbed down. “The legislature of Iowa has passed a law against smoking cigarettes. Such a law is clearly inoperative. Only idiots smoke cigarettes and idiots are not responsible before the law.”

Iowa, having tired of half-way measures in dealing with the cigarette evil, has finally placed an absolute embargo on the manufacture and sale of all cigarettes of whatever material composed.

Iowa was ridiculed as a “hick state” because of that law.

Despite being a latecomer in regulating sales to minors, by enacting its total ban on the sale and manufacture of cigarettes in 1896 Iowa became a national leader. Only Washington State in 1893 and North Dakota in 1895 had preceded it, but by 1896 neither of those statutes was still on the books, and ultimately Iowa had a longer continuous experience (1896-1921) with a general sales prohibition than any other state. Moreover, by the mid-1880s, Iowa legislators,

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1Marble Rock Weekly., May 21, 1896 (4:3) (edit.).
3George Mills, Rogues and Heroes from Iowa’s Amazing Past 169 (1972).
41893 Wash. Laws ch. 51 at 82.
51895 N.D. Laws ch. 32 at 31.
6Whereas the former was judicially invalidated, the latter was mysteriously ‘disappeared’ from the state code. On Washington, see above ch. 4 and below ch. 11; on North Dakota, see vol. 2.
7As early as 1910 these statutes from the 1890s had already been lost to journalistic memory: “The first states to enact anti-cigarette laws were Wisconsin and Indiana—six years ago. Then came Missour, Nebraska, Illinois, and Michigan. In 1909 Iowa and Minnesota figuratively set their heels on the cigarette. None of the Eastern States have attempted to do more than prohibit its sale to children under sixteen. Probably more cigarettes are consumed in New York City than were in the eight States that have prohibited their manufacture or sale.” “The Cigarette and Its Users,” Harper’s Weekly, 54:25 (Sept. 17, 1910). Eugene Porter, “The Cigarette in the United States,” Southwestern Social Science Quarterly, 28(1):64-75, at 72 (June 1947), repeated these erroneous claims verbatim. The leading scholarly economic history of the industry asserted that in the latter half of the 1920s: “Laws prohibiting cigarettes were still on the books of Kansas, Iowa Indiana, and Mississippi.” Richard Tennant, The American Cigarette Industry: A Study
The Universal Prohibition of the Sale of Cigarettes: 1896

who had been banning smoking in their own workplaces since the 1830s, adopted permanent rules to that effect.8

The WCTU—whose strength, according to the Iowa organization’s socialist state president Marion H. Dunham, lay in the fact that “the wife of the millionaire and of the working man, the woman from the palace and the worker from the slums unite in truest comradeship in our ranks”9—was not especially optimistic about the prospects of securing the passage of a cigarette prohibition measure in the new Iowa legislature. In early 1896, Frank Mace, a travel agent10 and member from Des Moines, wrote to the group’s national weekly, Union Signal, that it was “the most determinedly hostile to any temperance legislation, or indeed to any reform movement, including that for universal suffrage and the raising of the age of consent of any in the history of the state.” Complaining that the legislators were amenable to no influence but the dictates of the Republican party bosses, Mace observed that two years earlier Republicans had passed the mulct law, which (in his slightly exaggerated representation) “practically repealed prohibition and legalized saloons anywhere in the state,” and passed a resolution to submit a prohibitory amendment to the current session; unfortunately, from the WCTU’s perspective, the 1895 election campaign had been conducted on the basis of retaining the mulct law, defeating the amendment, and passing a law to authorize the manufacture of liquor in Iowa, which Governor Drake had pledged to sign. Moreover, the officials in charge of committee assignments, Lieutenant Governor-elect Matt Parrott, a “liquor sympathizer,” and House Speaker Howard W. Byers, a “tool of the machine,” would appoint members who would report out the bills that the Republican leaders wanted. Minuscule as their representation was, the Democrats, who favored a general license law, would cooperate with the Republicans. All in all, sighed Mace—who failed even to mention an anti-cigarette bill—“there is little chance for anything but backward movements” from

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8See below ch. 18.
9Marion H. Dunham, “President’s Address,” Sixth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Marshalltown, Iowa, October 9, 10 and 11, 1895, at 39-51 at 41 (1895).
The Universal Prohibition of the Sale of Cigarettes: 1896

the session.\textsuperscript{11}

A formerly high-profile member of the non-partisan Iowa WCTU, Cordelia Throop Cole, a social activist, who together with her husband, William R. Cole, edited the \textit{Dial of Progress}, the organ of the Iowa Prohibitory Amendment League,\textsuperscript{12} did give pride of place to the anti-cigarette bill. In “A Woman’s Plea to the Twenty Sixth General Assembly” Cole, reproaching the legislature for forcing women to “get dreadfully tired going through slush and sleet with petitions, pleaded with it “to give us the ballot to stop the sale of cigaretts...”\textsuperscript{13}

If contemporaries in 1896 had sought to gain insight into the parties’ potential stances on anti-cigarette legislation during the upcoming session from their positions on liquor as articulated in their platforms in the summer of 1895, they would have learned nothing from the Iowa Republican state platform, which omitted any reference to temperance issues.\textsuperscript{14} Chastened by the brush with loss of the party’s long-term control of state government over the liquor issue, which had prompted the purging leaders to use “guarded phrases”\textsuperscript{15} to indicate the party’s jettisoning of its commitment to prohibition in the 1893 platform,\textsuperscript{16} leadership apparently preferred to avoid formulaic discussion of the issue altogether. Nevertheless, the public might well have logically concluded that, having just fought and won a major inner-party battle over liquor prohibition, the party professionals would scarcely be willing to jeopardize Republicans’ resuscitated dominance by permitting the party to plunge into yet another legislative campaign to ban adult consumption of a controversial commodity. In contrast, the Democratic state platform included one plank devoted entirely to liquor, objecting to the mulct law as “unfair as between communities, an immense


\textsuperscript{12}On Cole, see Frances Willard and Mary Livermore, \textit{A Woman of the Century: Fourteen Hundred-Seventy Biographical Sketches Accompanied by Portraits of Leading American Women in All Walks of Life} 191-92 (1893); \textit{The National Cyclopaedia of American Biography} 6:394 (1896); Megan Hailey-Dunsheath, “‘Save Them Before They Fall’: Cordelia Throop Cole and the WCTU’s Social Purity Movement,” \textit{Iowa Heritage Illustrated} 77(3):98-115 (Fall 1996)


\textsuperscript{14}[Iowa] Secretary of State, \textit{JOR: Eleventh Year} 136-38 (1896). Indeed, the platform did not mention any Iowa issues at all.


\textsuperscript{16}See above ch. 9.
hardship upon property owners, and compromis[ing] the honor of the state in
declaring the sale of liquors a crime, and condoning the offense for a money
consideration.” The party once again demanded a “local option high license law,
and in behalf of commercial interests of the state...a law permitting the
manufacture of liquors..., thus affording a market for the products of the farm and
the labor of our people....”

The Prohibition party attacked liquor regulation by
means of license, mulct, or taxation as “complicity with the liquor crime and
corrupting to public conscience,” and denounced the Republican party for having
enacted the mulct law as a betrayal of the popular ratification of the prohibitionist
constitutional amendment in 1882, but the Prohibition party lacked any
legislative representation.

Dr. Joseph Emmert, the Iowa State Board of Health, and the
State of Medical Understanding of the Impact of Cigarette Smoking

I sometimes remind these cigarette phobics that General Grant died of cancer produced
by cigar smoking, [but] that no one ever heard of a cigarette causing “smoker’s cancer”....

“JUST ONE MORE CIGARETTE”
The Pitiful Cry of Miss Minnie McCorkel While Dying

LaPorte, Ind, Feb. 12—Miss Minnie McCorkel, living near New Buffalo, Berrien
County, is dying. Cigarette smoking is supposed to be the cause. Her brother, who was
addicted to the cigarette habit, died a raving maniac. Miss McCorkel, it is said, smoked
on average five boxes daily and now cries piteously in her delirium for “just one more
cigarette.” She was considered handsome, but the ravages of the disease resulting from
the habit to which she had been a slave, has reduced her body to a skeleton and dethroned
her reason.

As early as 1895 the Iowa State Board of Health began publicly
demonstrating a deep interest in the dangers associated with cigarette smoking.
That year Dr. Joseph M. Emmert, a 49-year-old “[r]egular” (i.e. non-

17 [Iowa] Secretary of State, IOR: Eleventh Year 140 (1896).
18 [Iowa] Secretary of State, IOR: Eleventh Year 144-45 (1896). The People’s Party
state platform did not deal with liquor. Id. at 141-42.
20 “Just One More Cigarette,”” Daily Telegraph (Atlantic, IA), Feb. 13, 1896 (3:3)
(reprinted from Chicago Journal).
homeopathic) physician from the small town of Atlantic who had been a Board member since 1892 and was especially interested in sanitation and public health, published a four-page article on “Cigarette Smoking” in its biennial report. An amalgam of pseudo-historical and scientific misinformation sprinkled with incisive political insights and some essentially accurate medical warnings, the piece faithfully reflected the stage of enlightenment of the non-religious branch of the anti-cigarette movement. Emmert asserted that cigarette smoking, “[l]ike many other crimes and filthy habits,...originated among the lower classes of Russia, Poland and France,” to which it was long confined, but was then “adopted by the better class of persons.” Once it was transplanted to and “flourished luxuriantly” in the United States, “students of social problems” recognized it as “one of the most dangerous, degrading and demoralizing evils,” which “demands the early attention of our legislators toward its arrest.” He bluntly declared that “the only way” to achieve this object was congressional prohibition of the manufacture and sale of cigarettes. Absent such national action, the second best solution was state prohibitory laws to protect “young men and boys....”

Word of the American Tobacco Company’s intervention in Washington State must have reached Iowa because Emmert, who suddenly turned sober when he discussed contemporaneous American politics, was constrained to characterize his own reform program as easier said than done, for there is an immense amount of money and influence that will be used freely to cripple or arrest any effort in the line I suggested. Whenever a bill has been introduced into a State legislature or municipal council to interfere with the sale of cigarettes, the Cigarette Trust has had its lobbyists in swarms to buy, threaten and browbeat every officer who dared raise a voice against their nefarious business. Very few have any conception of the amount of money invested, and the number of persons engaged in the manufacture and carrying on of the business. The Cigarette Trust represents twenty-five million dollars. The firms...employ five thousand people in their factories.... Some idea of the immense profit made can be had by the large amount of money expended in advertising, which is usually of the costliest kind. One method of advertising should be

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21Eighth Biennial Report of the Board of Health of the State of Iowa for the Fiscal Period Ending June 30, 1895, at [no pagination (v)], 5-8 (1895). By his last year of membership in 1897, Emmert became Board president.


23See above ch. 4 and below chs. 11-12.
suppressed by every decent community—that of pictures of but partially clad, or nude, women, which are given away or hung in the show windows of tobacco stores.... These pictures appeal to and arouse the baser passions of boys, young men and girls, and many times no doubt are among the leading factors that cause their downfall.24

Emmert’s segue from factual recitation of capitalist bribery to moralistic critique of pornographic advertising stimulation25 heralded his wildly exaggerated account of the composition of cigarettes. Inviting readers to “go with me into a close room or smoking car where a number of dudes are smoking cigarettes,” he assured them that “you will believe with me that a cigarette contains something that has the odor of rotten fish, cabbage and other garbage, that has lain in the sun for some time and then is mixed with the material of slaughter-houses and outhouses.” If this recitation by itself did not suffice to induce revulsion in his readers, Dr. Emmert, in a rare revelation of a modicum of epistemological humility (“If my information is correct”),26 served up the piece de resistance:

[M]any cigarettes are made from old cigar stumps and quids of tobacco culled from the gutters and sidewalks and cuspidors of large cities. This business is carried on in the slums and saloons and most degraded neighborhoods where people who make it a business live, and who are of the lowest strata of society: dirty, filthy, besotted and diseased. Every large city has an army of scavengers who make their living in this way. After a cigar is partly smoked and allowed to lay [sic] for some time it undergoes some kind of change, chemical or otherwise, which will produce nausea in the oldest smoker, showing that this change has a powerful effect on the nervous system, and must be detrimental to health. If this was all, it would not be so dangerous, but at least seventy-five per cent of the manufactured cigarettes on the market are impregnated with opium, arsenic, cocaine or some other enslaving drug.27

Having laid a foundation for public health policy in the realm of what even


careful nineteenth-century empiricists could have determined to be fantasy,\textsuperscript{28} Emmert finally identified a relatively scientific basis for the struggle against cigarette smoking in the “method of smoking and its results” by focusing on inhalation:

If the cigarette was smoked like a cigar the damage would be but little greater than the smoking of a cigar;...but cigarette smokers are not satisfied to use the weed that way. They draw long whiffs into the mouth, and then by a reverse action of the muscles of the mouth and fauces fill their lungs with the result of combustion and carry the smoke into contact with the great absorbing surfaces of the lungs, where the noxious element passes at once into the circulation, traverses the entire system and exerts its morbid effects. The anatomical structure and physiological function of the mucous membrane of the lungs are such that the poison enters directly into the arterial circulation, exerting almost immediately its action upon any and all the organs.... Beside the poison absorbed we have a foreign material deposited upon the membrane that is not absorbed, but remains there to interfere with the normal functions of the lungs, to absorb oxygen and exhale carbonic acid gas [i.e. carbon dioxide]. The interference with this function soon locks up within the system an amount of this gas which interferes with and finally arrests the functioning of the different organs, beside starving the tissues because there is not a normal supply of oxygen.\textsuperscript{29}

\textsuperscript{28}The claim that manufactured cigarettes were drugged was common in the 1890s. See above chs. 2-3. For example, René Bache (1861-1933)—a direct descendant of Benjamin Franklin and “recognized by the world as the most talented exponent of popular science writing, as well as its originator”—whose articles were syndicated throughout the world, asserted in a lengthy syndicated newspaper article that an “expert tobacco buyer” had said that “nearly all cigarettes made in this country are drugged”; in particular, there was “no doubt” that opium and cannabis were “utilized to the largest extent. Each manufacturer may be said to create a special drug habit among those who smoke his brand, so that they are not satisfied with any other.” René Bache, “Brain Softeners,” \textit{MO}, Aug. 14, 1892 (14:5-7 at 5). This article also ran, without Bache’s name, as “Three Billion a Year,” \textit{MJ}, Aug. 27, 1892 (9:5-7). On Bache, see “Historical News and Comments,” \textit{Mississippi Valley Historical Review} 22(2):335-48 at 336 (Sept. 1935).

\textsuperscript{29}J. M. Emmert, “Cigarette Smoking,” in \textit{Eighth Biennial Report of the Board of Health of the State of Iowa for the Fiscal Period Ending June 30, 1895}, at 335-36 (1895). In fact, the then predominant forms of tobacco use (chewing tobacco, snuff, cigars, and pipes) delivered nicotine in a more alkaline state, which was absorbed through the nasal or oral mucosa; once new tobacco blends and curing processes made cigarette smoke mildly acidic, allowing much less nicotine to be absorbed through the mouth and nose, it had to be and could be inhaled through the lungs. Such pulmonary absorption was more efficient “because of the larger surface area of the lungs and because the nicotine can immediately (7-10 s) be transported to the brain via the carotid artery.” Gary Giovino, “Epidemiology of Tobacco Use in the United States,” \textit{Oncogene} 21:7236-40 at 7327
Emmert then applied this understanding of the general impact of cigarette smoke to specific organs. Vaguely groping at what today is termed chronic obstructive lung disease, he focused on the “hyperaemic condition of the mucous membranes of the mouth, fauces trachea, bronchial tubes down into the smaller bronchioles and air cells—in fact the entire respiratory system. This constant irritated condition soon extends into the sub-mucous tissues and becomes chronic, and in a few months, or years at farthest, the victim has a chronic catarrhal condition throughout the entire respiratory tracts with all its distress and evil results.” Emmert’s account might seem to have become less scientific as he approached cigarette smoking’s contribution to heart disease, culminating in the charge that the weakness and irregularity of a “tobacco heart” caused cigarette smokers to be “in constant danger of sudden death.” However, even this claim was eventually corroborated when a century later the U.S. Surgeon General reported that: “Cigarette smoking might increase the risk of sudden cardiac death by increasing platelet adhesiveness, releasing catecholamines, causing acute thrombosis, and promoting ventricular ectopy (arrhythmias). ... Evidence also indicates that nicotine affects the conductance of myocardial cell channels, providing a plausible mechanism for the putative association of cigarette smoking (and smokeless tobacco use) with arrhythmias and sudden death.... Cigarette smoking has been associated with sudden cardiac death of all types.”

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(2002). Emmert was also describing the build-up of carboxyhemoglobin—which forms when carbon monoxide (which cigarette smokers plentifully inhale and whose affinity for hemoglobin is more than 200 times greater than oxygen’s) instead of oxygen bonds to hemoglobin—thus “reducing the oxygen-carrying capacity of the blood and subsequent tissue oxygenation....” U.S. Department of Health and Human Services, The Health Consequences of Smoking: Cardiovascular Disease: A Report of the Surgeon General 223, 222 (1983).


The Universal Prohibition of the Sale of Cigarettes: 1896

But whatever their overwhelming defects, these explanations were the very model of modern medical etiology compared to Emmert’s (and the overall anti-cigarette movement’s) pseudo-understanding of cigarette smoking’s “moral and physical effects upon the nervous system,” for which “clinical results” corroborated a “peculiar affinity....” Even boys who had been “models of honesty, trustfulness [sic] and integrity,” once they become “‘cigarette fiends,’” “soon” suffered mental impairment and fell behind in school and then “soon” dropped out of school “to become a street loafer or, what is worse, a criminal, pauper or idiot, and thereby a menace to society and a menace to the State.” Reflecting and reinforcing popular contemporaneous newspaper reports, Emmert descended to his lowest level of public misinformation by claiming that: “The effect of the poison upon the nervous system may develop any of the neuroses; one case developing a tendency to suicide, another to idiocy, another to insanity, another to epilepsy and so on throughout the entire line of nervous diseases.”

Interjecting a second and final dash of self-awareness of the possible limitations of late-nineteenth-century medicine, Emmert concluded with a clarion call to translate science into public policy and action: “If the above is a true statement of cigarette smoking (and clinical demonstrations and the appearance of the victim confirm it), is it not time for us to arouse the public mind to the fact that something must be done to arrest and overthrow this dire evil that is eating out the very heart’s core of our national existence?” Since the attorney general was an ex-officio member of the board, he was presumptively familiar with these arguments, which doubtless came to the attention of state legislators as well.

At the August 1, 1895 State Board of Health meeting, Dr. Emmert, a Democrat who became a state senator at the end of the 1890s, returned to the subject, presenting a paper on cigarettes, which the Board then published in its next biennial report in early 1898. (Three weeks earlier, Emmett had given the


To be sure, a century later a study estimated that 44.3 percent of cigarettes in the United States were smoked by people with mental illness in the previous month. Karen Lasser et al., “Smoking and Mental Illness: A Population-Based Prevalence Study,” JAMA 284(20):2606-10 (Nov. 22/29, 2000).


35 The Iowa Official Register for the Years 1909-1910, at 638 (23rd No., 1909); Dr. J. M. Emmert Dies at Atlantic,” Register and Leader, July 16, 1909 (3:2).
main address on cigarettes at a YMCA meeting on the topic at a Methodist Episcopal church in Atlantic, speaking “in very forcible language” of “the rapidity with which the cigarette was filling our insane and feeble-minded institutions.”)  

It appears that the talk, which barely ran a printed page, was largely a compressed version of the aforementioned article.  Emmert introduced his paper by declaring that it was the board’s duty “in every possible way to help to educate the people in sanitation, including any practice that may...degrade or demoralize the individual.” Because he believed that “the laity are unconscious of the growing evil of cigarette smoking and that such matters “should at least be agitated by this Board,” he also proposed a resolution, which the members unanimously adopted: “‘Resolved, By the State Board of health, that in its judgment the habit of smoking cigarettes should be condemned because it is deleterious to health by producing nervous disease, lowering the moral tone, and checking the mental, moral and physical development, especially in the young.’”

Significantly, the resolution focused on youth and ignored the cardiovascular and pulmonary diseases his earlier paper had discussed.

Senate File No. 7 and Its Sponsor Julian Phelps

Senator Phelps, of Atlantic, is the happiest man in Iowa today. His bill to prohibit the sale of cigarettes in this state only awaits the Governor’s signature to become a law. It offers no loop-hole for evasion...and it is safe to predict that now this nuisance will be suppressed.

Although later legal writers, presumably misled by a well-known U.S. Supreme Court decision upholding the 1897 Tennessee law, have (erroneously) tended to believe or create the impression that it was the first general state anti-
cigarette prohibition, in fact Iowa’s 1896 statutory ban on the manufacture and sale of cigarettes was the first to survive beyond a few months. Remarkably, neither the legislative advocates nor the press mentioned that Iowa was in the process of enacting a nationally unique law. One reason may well have been that they were unaware that the 1895 North Dakota law—which made it unlawful to “sell or expose for sale any cigarettes of any kind or form” (but did not, like Iowa’s, ban their manufacture) and for this misdemeanor imposed a fine of between $10 and $50 and/or a maximum of 30 days’ imprisonment—that mysteriously ‘been disappeared’ from the same year’s revised state code.

At the 1896 session of the Iowa legislature two different anti-cigarette bills were introduced in the Senate and House by Republicans in chambers overwhelmingly dominated by them 43 to 7 and 79 to 21, respectively. The number of lawyers among the legislators in the 26th General Assembly exceeded that of any other session. While the press reported this presence as “fortunate” because their legal knowledge would facilitate work on the revision of the state code, on the specific issue of prohibiting the sale of cigarettes, the overrepresentation of lawyers may also have promoted doubts of its constitutionality in light of the plethora of court rulings on the so-called original package doctrine, a trivial, judge-made construct so divorced from the socioeconomic and political substance and reality of interstate commerce that only lawyers could take it seriously, let alone cherish it. Of 50 senators 22 were lawyers; of 100 representatives 27 were lawyers—second only to farmers, who numbered 29.

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42On the Washington State law of 1893 and the North Dakota law of 1895, see above ch. 4 and below ch. 11, and vol. 2.
431895 N.D. Laws ch. 32, §§ 1-2, at 31.
44See vol. 2. That a federal judge had, almost immediately after it had gone into effect, declared the Washington law unconstitutional and that the legislature had replaced it in 1895 with a license law was nationally abundantly reported. See below ch. 11.
45[Iowa] Secretary of State, IOR: Eleventh Year 47-51 (1896).
47“Iowa’s Lawmakers,” LM, Jan. 31, 1896 (6:5). House members also included nine engaged in real estate, loans, and abstracts; seven merchants; six editors; three bankers; two physicians; two teachers; two druggists; two lumber dealers, and two farmer-bankers. This article inverted the data in asserting that nearly half the House and 20 percent of the Senate members were lawyers. Although the information was collected by the Secretary of State for inclusion in the Official Register, it was not published there. To be sure, a
On January 17, 1896, Senator Julian Phelps of Atlantic—a town of a little under 5,000 in southwestern Iowa—who represented Cass and Shelby counties, introduced Senate File No. 7, which was referred to the Committee on Public Health. The next day Phelps’s hometown newspaper in its account of the previous day’s proceedings observed that the “bill will be watched closely by the people of this state who have sons of their own or are interested in the boys of the state.”

Phelps (1838-1913) was born and had lived in Vermont—one of the very first states to enact liquor prohibition (1852) and one of the only states to retain it into the twentieth century—until after the Civil War, when he attended law school and emigrated to Iowa in 1867 to practice law. After he had served in the Iowa Senate (1893-97), President McKinley appointed him United States consul in Crefeld, Germany; after four years in that post he returned to Atlantic, but neither there nor during his final years in Hollywood, California, was he “actively engaged in anything.” During the 1894 legislative session Phelps had belonged to a group of Republican senators who consistently voted against all efforts to relax alcohol prohibition, and was one of only three senators who in addition to voting against the alcohol mulct bill in 1894 also voted for the anti-cigarette bill in 1896. (In 1894, he severely tested whatever progressive bona
fides to which he might legitimately have laid claim by being one of only nine senators to vote for a pseudo-freedom of contract amendment that would have gutted a House bill guaranteeing coal miners semi-monthly wage payment.) 55 Whatever fame he secured enduring beyond his four years in office was based on his authorship of Iowa’s anti-cigarette law. 56 At the 1896 session he introduced, apart from the anti-cigarette bill, only a few measures, none of them especially important or ideologically pregnant. An explanation as to why Phelps assumed the leadership of the legislative campaign to suppress cigarette sales in Iowa never surfaced on the Senate floor or in newspapers. 57 Perhaps he was influenced by his wife, who was “a tireless worker in the Sunday school and for the past ten years has been superintendent of the Congregationalist Sunday school at Atlantic.” 58

Phelps’s bill to prohibit the manufacture and sale of cigarettes read as follows:

SECTION 1. No one, by himself, clerk, servant, employee, or agent, shall, for himself, or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in the consideration of the purchase of any property, or of any services, or in evasion of the statute, or keep for sale any cigarettes, or cigarette paper, or cigarette wrappers, or any paper made or prepared for the purpose

55The proposed amendment read: “Provided, That nothing herein shall prevent the employer and employees from contracting for payment at any specified time or times, or by any payment in goods or property, and such contract being enforced.” Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 676 (Mar. 29) (1894) (H.F. No. 37). The amendment was offered by Senator Finn, another militant Republican prohibitionist. See above ch. 9. On the class-based opposition to the bill, see E. Downey, History of Labor Legislation in Iowa 69-71 (1910).

56B. Gue, Biographies and Portraits of the Progressive Men of Iowa: Leaders in Business, Politics and the Professions 1:471-72 (1899); Proceedings of the Nineteenth Annual Session of the Iowa State Bar Association 38 (1913); “Julian Phelps Died Tuesday,” Atlantic News-Telegraph, Feb. 28, 1913 (1:1).

57The obituary in his hometown newspaper merely stated that he had been a life-long member of the Congregationalist church and “a consistent Christian always.” “Julian Phelps Died Tuesday,” Atlantic News-Telegraph, Feb. 28, 1913 (1:1).

The Universal Prohibition of the Sale of Cigarettes: 1896

of making cigarettes, or for the purpose of being filled with tobacco for smoking; or own, or keep, or be in any way concerned, engaged or employed, in owning or keeping any such cigarettes or cigarette paper, or wrappers with intent to violate any provisions of this chapter; or authorize or permit the same to be done; and any clerk, servant, employee or agent, engaged or aiding in any violation of this chapter, shall be charged and convicted as principal.

Sec. 2. Whoever is found guilty of violating any of the provisions of the preceding section for the first offense shall pay a fine of not less than $25, nor more than $50, and costs of prosecution, and stand committed to the County jail until such fine and costs are paid; for the second and each subsequent offense, he shall pay upon conviction thereof a fine not less than $100, nor more than $500, and costs of prosecution, or be imprisoned in the County jail not to exceed six months.

Sec. 3. The finding of cigarettes or cigarette paper, or cigarette wrappers in the possession of one, except in a private dwelling house, which does not include, or is not used in connection with a tavern, public eating house, restaurant, grocery or other place of public resort, or the finding of the sale, in unusual quantities, in a private dwelling house, or its dependencies of any person keeping a tavern, public eating house, grocery or other place of public resort, shall be presumptive evidence that such cigarettes and cigarette paper and cigarette wrappers are kept for illegal use.

Sec. 4. This act, being deemed of immediate importance, shall take effect from and after its publication in the Iowa State Register and the Des Moines Leader; newspapers published at Des Moines, Iowa. 59

Even if Phelps failed to explain why he of all legislators became the preeminent anti-cigarette advocate, he did tell the press “a good story of how he came to be interested at first in the matter.” To be sure, the rather trivial, coincidental, anecdotal, and second-hand origins of his interest, reinforced by scientifically incorrect information (to the effect that cigarette paper was more toxic than tobacco) and possibly urged on him by cigar dealers eager to eliminate an unprofitable competing commodity, stood in stark contrast to the measure that he introduced:

“An old German came to me...and said they had been having a little meeting down at a certain cigar store, and he wanted to see if I wouldn’t introduce a bill this winter. I thought ‘now he is coming at the liquor question, and what shall I say?’ But no, it was the cigarette business. The man had a pipe in his mouth while he was talking, but he wanted the deadly cigarette put out of the way of the boys. He and other men who spent time in cigar stores had seen little boys buying them, and larger boys buying for younger ones till he became thoroughly disgusted. In our town it has come to be something terrible. Several boys have

59Senate File No. 7.—By Phelps. The printed bill is found in the 1896 Senate bill book in the University of Iowa Law Library.
been utterly ruined by the cigarette habit. It does no good to prohibit boys of a certain age from buying them, because older boys will buy them for the younger ones. I have talked with physicians about the subject and they agree that the paper contains the worse poison, and that some of the paper sold as perfectly pure is as bad as the cheapest cigarette. So I am in favor of making it sweeping as the only sure way of preventing harm. I have canvassed the matter somewhat, and I am sure there can be no valid objection to the bill. Of course, there will be a lobby here to work against it, sent by the manufacturers. They are the only ones who are very much interested in having the trade carried on. The only trouble I can see now, is that the original package law may come in to allow the sale of cigarettes in the same way the Wilson law was passed. If that difficulty arises, I have arranged to have it treated the same way as the liquor law was.\footnote{Ayres & Hollowell, \textit{Daily Telegraph} (Atlantic), Jan. 24, 1896 (2:1) (untitled) (reprinted from undated issue of \textit{Iowa Capital}). The article was also reprinted as ‘Senator Phelps’ Cigarette Bill,’ \textit{Griswold American}, Feb. 5, 1896 (2:3). Griswold is a town in Cass county, which Phelps represented.}

This tenuous scientific knowledge base, which, interestingly, is bereft of any religious or even moralizing connotations, casts doubt on Phelps’s ability to be an effective galvanizing agent. Nevertheless, political-economically he astutely recognized not only that the Tobacco Trust was the only oppositional force, but that it would seek to bribe some of his colleagues to frustrate his legislative proposal. To be sure, this insight does not appear to have prompted him to question the trustworthiness of his initial informant, whose cigar-store associates’ animus was directed against the Trust for forcing them into selling a commodity that was less profitable than, and might diminish demand for, cigars. Indeed, shortly after the legislature had passed the bill, the press reported claims that its enforcement would “not be so difficult as that of the prohibitory [sic] liquor laws, because the cigar and tobacco dealers who are the principal retailers of cigarettes will be rather glad of an excuse for getting rid of a branch of their business that has proven both annoying and unprofitable. It is a fact that the signatures of many of these dealers were upon the petitions presented in the house and senate asking for such a law.”\footnote{‘Our Des Moines Letter,’ \textit{Sioux Valley News} (Correctionville, IA), Mar. 19, 1896 (2:3). Tobacco dealers in other states frequently made such claims. See above Part I. The previous year a physician reported that the dealers from whom a chemist had obtained samples for analysis “had expressed their hope to him that he might find all kinds of narcotics in them. They explained that handling them was a nuisance to them; that all the profit accrued to the cigarette trust.” J. Mulhall, ‘The Cigarette Habit,’ \textit{New York Medical Journal} 62:686-88 at 686 (1895), Bates No. 2083034657.} Perversely, from the perspective of public policy formation, the tobacco dealers’ opposition to cigarettes was intertwined with the
The Universal Prohibition of the Sale of Cigarettes: 1896

defense of non-cigarette tobacco products, which may also have infected (pipe-and cigar-smoking) physicians’ allegations that cigarette paper could be more poisonous than cigarette tobacco.

On January 23, before the Senate had taken any action on S.F. No. 7, the Daily Iowa Capital, Des Moines’ Republican evening newspaper, published by Lafayette Young, a former state senator and progressive, editorially praised the bill as “radical, but...one that ought to be passed” because “the cigarette is annually taking thousands of young men to an early grave....” Like Phelps, Young’s Capital, eschewing religio-moral arguments and propagating a view of cigarettes’ lethality to youth with which science has still not caught up more than a century later, focused on the political economy of public health:

No man or set of men have the right to manufacture and sell a thing so poisonous and destructive as the cigarette. It is strange that the public will submit to it when they insist that diseased hogs shall not be thrown upon the public highways on account of the danger of the spread of disease. The cigarette is killing more people than all the diseased hogs of the earth.

Two days later, Phelps’s Republican hometown newspaper, the Atlantic Daily Telegraph, which favored prohibition of liquor, editorially touted the bill as attracting considerable statewide attention and prompting “general hope” of its passage in a form that would effectively prevent “the spread of the habit” and “suppress this vice” that detrimentally affected every community in Iowa.

The Senate Debate

Probably the law will remain a dead letter until the people enforce it. Being nobody’s particular business to do it, the law depends upon interested persons to put it in force. It remains to be seen to what extent the public will take hold of it. Here is a fine opportunity for the patriot who does not mind a little trouble for the benefit of humanity.


DIC, Jan. 23, 1896 (4:1) (untitled edit.).

DIC, Jan. 23, 1896 (4:1) (untitled edit.).


Town Talk,” DIC, June 30, 1896 (4:4).
On January 31, two weeks after the bill’s introduction, the Republican physician-chairman of the Public Health Committee, Dr. Joseph Gorrell, reported it out with the recommendation that it do pass with two amendments deleting: (1) the final clause of section 1 treating violating employees/agents as liable principals; and (2) section 4 making the law go into effect immediately on publication in the newspaper. As minimal as these deletions were, it seems improbable that Gorrell, who appears to have been much more oriented toward scientific progress than motivated by Christianity, would have countenanced similar modifications in an alcohol prohibition bill. (Indeed, for whatever reason, Gorrell failed to vote on the anti-cigarette bill in 1896.)

His explanation of his vote against the alcohol mulct tax bill in 1894 was fueled by a controlled fury that found no echo in 1897 when the legislature added a mulct tax to the anti-cigarette law:

I believe the saloon is the legitimate home of vice and crime. I believe it to be the most potent lever the world has ever seen for evil. ... I am a believer in the law of evolution; it touches every domain, and it should never be forgotten that time is an important factor. Cataclysmic [sic] evolution has been so rare in the organic, ethical and social developments of humanity that neither the friends nor enemies of prohibition had a right to expect it to have redeemed the people of Iowa from the evils of the saloon in twelve years. Satisfactory results will yet be obtained if the law is not assassinated by this legislature. If the State of Iowa lose, or even relax its grip upon the greatest evil of the world, I believe incalculable woe will be the legitimate fruitage of such relaxation. If the saloon must continue to defy “the law of the survival of the fittest,” let it remain an outlaw.

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68Gorrell was returned as a physician at the 1900 population census; HeritageQuest. Gorrell (1835-1916), after his election as a Republican to the 25th and 26th General Assembly (1893-97), identified with Bryan, became a Democrat, and was elected as one to the 27th and 28th General Assembly. “Some Things About Dr. J. R. Gorrell Long Time Honored Newton Citizen,” Newton Daily Journal, May 26, 1916 (1:3-4); Past and Present of Jasper County, Iowa 2:777-80 (James Weaver ed. 1912); AI, 3d Ser., 13(2):158 (Oct. 1921).
69“After the Cigarette,” DML, Feb. 1, 1896 (3:3).
70Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 96 (1896) (Jan. 31).
71B. Gue, Biographies of the Progressive Men of Iowa 1:540-41 (1899).
72Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 115 (1896) (Feb. 1). According to “Iowa’s Legislature,” Daily Telegraph (Atlantic), Feb. 4, 1896 (2:2), he was absent rather than not voting.
73Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 499
The Senate adopted the committee report and Phelps’s motion passed to suspend the rules and consider S.F. No. 7 for passage on its third reading. The ensuing hour-and-a-half debate “created something of a sensation,” even though it was clear to the press that the bill would pass the Senate despite Democratic opposition. 74 Phelps himself moved to reconsider the suspension so that he could offer an amendment to his own bill 75 to strike an “objectionable” section. 76 The provision in question was one of the bill’s most far-reaching—the evidentiary presumption (similar to one in the prohibitory liquor law) 77 created in section 3 that unusual quantities of cigarettes were being kept for the illegal purpose of sale rather than for permissible personal consumption. Striking this provision perhaps eliminated both contentious objections over the meaning of “unusual quantities” and complaints that the bill came too close to prohibiting use by adults. These points were in fact almost immediately raised by Senator Lyman Ellis, but first Democratic Senator Cyrus Ranck of Iowa City moved to amend the penalty provision to reduce the maximum fine from $100 to $50, prompting Phelps to offer an amendment to the amendment to reduce the minimum to maximum range of fines to $10 to $50. 78 Phelps’s amendment prevailed by a vote of 22 to 20, indicating possibly that almost half of the Senate took a sterner view of violations and enforcement than the bill’s author.

Ellis, from the Mississippi River town of Clinton, was the bill’s chief opponent. Indeed, according to the account of the proceedings in the Des Moines Leader, the bill had come close to passage on January 31 “before anybody was ready to start an opposition. Then Senator Ellis came to the rescue of the cigarette, and did such valiant service for the friendless coffin nail, whose cause he made that of personal liberty in general,” that the debate had to be continued the next day. 79 Like Phelps, Ellis had been born in Vermont (in 1833), emigrated to Iowa in 1861 to practice law, and was a Republican party leader in the 1890s. During his first session as a senator (1894) he gained statewide publicity “for his memorable speech against woman’s suffrage” and was generally known for his “inflexible...views as to state policies....” In particular, he opposed alcohol

(1894) (Mar. 16).

74“The Iowa Legislature,” ISR, Feb. 1, 1896 (4:5-7 at 5).
75“After the Cigarette,” DML, Feb. 1, 1896 (3:3-4).
76“Deadly Cigarettes,” BH-E, Feb. 1, 1896 (1:5-6, 8:2-3, at 6).
77“Deadly Cigarettes,” BH-E, Feb. 1, 1896 (1:5-6 at 5).
79“After the Cigarette,” DML, Feb. 1, 1896 (3:3).
prohibition, instead favoring local option and legalization of liquor manufacture.\textsuperscript{80} Less well known but just as memorable was one of his anti-liquor prohibition floor speeches in 1894 in the course of which he lauded, by literary allusion, secondhand tobacco exposure as a “beautiful illustration of compromise,” which he posited as the source of “[a]ll that is good and great in legislation, in establishing and perpetuating governments....”\textsuperscript{81}

Predictably, he “bitterly opposed” a ban on cigarette sales.\textsuperscript{82} In his first floor speech on the bill, Ellis incorrectly charged that S.F. No. 7 proposed criminalizing bringing into Iowa any materials for making cigarettes, which he regarded as an “unwarranted interference with the liberties of people”;\textsuperscript{83} moreover, since such regulation of the individual’s “habits” could never be enforced, he moved to recommit the bill, a motion that his ally in the struggle against prohibitory legislation, Democrat Thomas G. Harper, a lawyer from the Mississippi River city of Burlington, prevailed on him to withdraw until all other proposed amendments had been introduced. Interestingly, the report in the Republican \textit{Iowa State Register} urged caution in analogizing to the alcohol prohibition controversy and conveyed the skepticism of those who were presumably Ellis’s principals over the tactical advisability of his libertarian rhetoric: “While some of the abstract principles underlie the bill which underlie the liquor question, its strength can not be interpreted to be an expression of the standing of resubmission or the bill for manufacturing. Some of the friends of manufacturing were rather surprised that Senator Ellis would endeavor to force upon the senate the question of personal liberties upon a question of no more importance than that before the senate.”\textsuperscript{84}

\textsuperscript{80}Wolfe’s History of Clinton County Iowa 2:867-69 (quotes at 868) (P. Wolfe ed., 1911). He had been elected and re-elected district attorney of the east central judicial district for many years in succession in the 1860s and 1870s. “Lyman A. Ellis of Clinton, Is Dead,” \textit{Clinton Advertiser}, June 8, 1906 (1:1-2). Ellis left the Senate in 1897 because his law practice in Clinton had been harmed by his absence. Benjamin Shambaugh, \textit{Biographies and Portraits of the Progressive Men of Iowa} 2:231 (1899).

\textsuperscript{81}“The Thirteenth Plank,” \textit{DIC}, Mar. 15, 1894 (6:1). From Walter Scott’s \textit{Heart of Midlothian}, Ellis rapturously cited the scene in which the “rector from the lowlands organized his church in the highlands: but the chieftain demanded that they be permitted to smoke during the service and the rector was obliged to yield, and so the fumes of tobacco mingled with the incense of the beautiful ritual and were wafted heavenward in the same breath.”

\textsuperscript{82}“In the Legislature,” \textit{Griswold American}, Feb. 5, 1896 (2:4).

\textsuperscript{83}“After the Cigarette,” \textit{DML}, Feb. 1, 1896 (3:4).

\textsuperscript{84}“The Iowa Legislature,” \textit{ISR}, Feb. 1, 1896 (4:5-7 at 5). Resubmission referred to passage of a resolution to resubmit to the voters a constitutional amendment prohibiting
Republican Senator John Rowen corrected Ellis by pointing out that the bill did not interfere with the right to use cigarettes bought outside of Iowa, but when he added that “the possession of a bushel of cigarettes would be evidence of intent to violate the law,” Ellis rejoined: “‘Not at all. I can smoke a bushel of cigarettes myself.’” When Republican Senator John S. Lothrop, a lawyer from the Missouri River town of Sioux City, insisted that the new law “would probably be useless” because the existing law banning sales to minors under 16 was “obeyed nowhere,” Rowen responded that by such reasoning every criminal law would be struck from the statute book. Ellis exerted little persuasive force in drawing on familial experiences to paint a “sorrowful picture of the bereaved cigarette user” under the proposed law, though his remarks did “create[] considerable amusement”: “‘All my relatives in Clinton and my wife’s relatives have been in the habit of vaporizing in this way the past ten years and if I vote to pass this bill I vote to make my own relatives criminals for they will smoke them whether this law is passed or not. They are the healthiest lot of people you ever saw and have yet to send for a doctor for the first time in many years. I am speaking in behalf of their personal liberties and the personal liberties of the people of Clinton county.’”

A Republican elected in a county that had given Democrats a 3,000-vote majority in the preceding election, Ellis, as the Republican Waterloo Courier snippingly noted, was motivated “by what might be termed a sense of self-preservation. He is elected from a cigarette smoking district and...is not so much in love with the pernicious little cigarette as he is with his seat in the senate. He felt that the occasion demanded the raising of his hand and voice up above the crowd that he might be seen and heard by the hundreds of his constituents, who are victims of the awful habit.”

In the wake of Ellis’s clownery, Phelps finally cut to the chase by replying that taking “the coffin nails out of the stores entirely would assure the enforcement of the law,” which had been circumvented only because “the younger boys can get older ones to buy [cigarettes] for them.” This clear exposition of the instrumental structure of the total ban on cigarette sales nevertheless failed to offer a fully adequate justification for depriving adults of cigarettes for the sake of children, although the scientific, politico-moral, and

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85 After the Cigarette,” DML, Feb. 1, 1896 (3:4).
The Universal Prohibition of the Sale of Cigarettes: 1896

The constitutional discourse of the day would have made it possible for Phelps to construct one. It is unclear why he did not consider it necessary to develop such an argument to refute Ellis’s view, but manifestly a large majority of his senatorial colleagues were as little bothered by its absence as Phelps.

The high point of the debate was Phelps’s very extended speech, which, fortunately, both the Atlantic Daily Telegraph and the Daily Iowa Capital printed in full. Phelps justified the need for an explanation of an otherwise self-explanatory bill by reference to “the fact that a bill was introduced in the senate two years ago, which purported to tax the retail sellers of cigarettes, but was really intended to prohibit the sale of them and was so mutilated in the house of its friends, that it was entirely satisfactory to the manufacturers themselves.”

(Another newspaper had Phelps saying that “his bill enacted by the Twenty-fifth general assembly prohibiting the sale of cigarettes to boys under 16 was ineffectual because the cigarettes are still for sale in the stores and can be easily obtained by minors. This proposed bill will stop all that...”) In the midst of his cascading passionate denunciations Phelps developed a rather startling empirical thesis:

There is [sic] said to be many million dollars invested in the making of cigarettes in the United States. The profits to the owners of this business are enormous. The loss resulting therefrom can not be reckoned in dollars and cents. A partial estimate of it may be arrived at when we consider the loss to our homes and to our country, of the bright young boys, which this nefarious business destroys.

The habit of cigarette smoking has worked its way into some of the best families in every town and city in our land—homes are darkened and hopes are blighted. Every cemetery has fattened on the victims of this habit. Our institutions for the feeble minded are crowded to their utmost, and this accursed business can boast that it has done its full share of the hellish work of filling them. There is probably not a town of two hundred inhabitants in our state, but has one or more boys between the age of eight and sixteen years, nearly imbecile; not made so by nature, for often they were our brightest boys; but because we have allowed this atrocious business to go on.

And what of our schools? All the lower grades are filled to overflowing with boys and girls, as cheery and bright as health and happiness can make them; and all preparing themselves for usefulness in the life to which they are looking forward. Here our boys occupy their share of the seats, and carry off their full share of the honors. When we reach the middle grades, we find that quite a majority of the seats are occupied by our girls, while some of the others are vacant. When we reach the High School the preponderance of girls is much greater; and anyone who has attended the graduating exercises of our high

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91. “Wrangle Over Cigarettes,” CRDR, Feb. 1, 1896 (1:1). The bill was not Phelps’s. See above ch. 9.
schools for the last ten or fifteen years, cannot fail to notice the constantly decreasing proportion of the boys among our graduates. This has alarmed very few of us because we have been saying to ourselves, “It is because our boys are taken out of school to work.” But it is worse than useless to try to account for their failure in this way, for a walk through any of our towns during school hours would disclose the fact that many of them are lounging on the streets with cigarettes in their mouths, or perhaps in groups, teaching a younger boy the same practice. It is a crime against them, and the state, to longer disguise from ourselves the fact that in this beautiful state of Iowa, there are thousands of boys between the ages of eight and sixteen years, that are already slaves to the habit; destroying alike, both soul and body. Is it any wonder that now and then a grave opens, in each of our towns, to receive a victim? Does not candor and good judgment demand that we be honest with ourselves and acknowledge the enormity of this growing evil, and arouse ourselves to take some steps to arrest it? Otherwise we might as well make female seminaries of all our high schools.92

Scrutiny of Phelps’s claim that anyone attending high school graduations since the 1880s could attest to the shrinking proportion of boys may fall under Chico Marx’s epistemological guideline: “who you gonna believe, me or your own eyes?”93 However, as plausible as Phelps’s argument seems, it runs into the empirical problem that girls have accounted for a majority of high school graduates in the United States ever since records were kept. Nationally, girls’ share of high school graduates in the United States fluctuated between 56 percent and 58 percent from 1881 to 1891 and between 58 percent and 60 percent from 1891 to 1901.94 Regardless of what Phelps may have eyewitnessed, even the data for his own hometown, Atlantic, Iowa, failed to sustain his claim. In the academic year 1890-91, girls accounted for 62 percent of those attending high school, but only 54 percent of graduates, while boys’ shares were 38 percent and 46 percent, respectively; in 1891-92, the girls’ and boys’ shares were 70 percent and 62.5 percent and 30 percent and 37.5 percent, respectively.95 Three years later, in 1894-95, girls made up 61 percent of the town’s high school students but only 55 percent of its graduates, while boys’ shares amounted to 39 percent and

93Duck Soup (1933).
94Calculated according to Historical Statistics of the United States: Earliest Times to the Present: Millennial Edition tab. Be258-264, 2:421-22 (Susan Carter et al. eds. 2006). Female high school graduates exceeded males in every year from 1870 to 1991; only in the very last year (1992) for which this source presents data did males surpass females by 3,000.
95Calculated according to Biennial Report of the Superintendent of Public Instruction of the State of Iowa: November 1, 1891, Appendix at 61 (1891).
The Universal Prohibition of the Sale of Cigarettes: 1896

45 percent, respectively. By 1896-97, girls were 56 percent of students and 47 percent of graduates, while boys accounted for 44 percent of students and 53 percent of graduates. Overall, then, during the 1890s, none of these shares trended in any direction, but the one prominent constant was that boys as a proportion of Atlantic’s high school graduates always exceeded their share of high school students, whereas girls’ share of graduates always fell below their share of students. Thus, contrary to Phelps’s observations, boys did not constitute a constantly shrinking proportion of high school graduates and their graduation rates exceeded those of girls.

Most of the rest of Phelps’s speech consisted of extracts from numerous replies that he had received from “leading” Iowa educators and physicians in his hometown in response to letters that he had written to them soliciting their views on the impact of cigarette smoking. The common denominator of the educators’ opinions was concisely expressed by William Beardshear, the president of Iowa State College of Agriculture and Mechanical Arts (and the former superintendent of the West Des Moines schools): “In a period of over fifteen years[ ] school work I have never known the cigarette smoker to take first rank in his classes. The rule is that such a pupil ranks lowest.” The East Des Moines school superintendent shared with the legislators his judgment that cigarette smoking was “the greatest curse that has come upon the boys of this generation.” The school superintendent of Ottumwa went both Phelps and Beardshear one better by asserting that: “It is next to impossible for a tobacco user to prepare himself for the high school. Indeed, I do not think one has ever entered.” To be sure, he added that it was “not so serious” if they began using tobacco later——the disinformation that cigarette manufacturers were still disseminating a century later about cigarette smoking as an “adult custom.” This approach also underlay

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96Calculated according to Biennial Report of the Superintendent of Public Instruction of the State of Iowa: November 1, 1895, Appendix at 74 (1895). The table contains an error: in 1895-96, the total of the 56 boys and 86 girls attending high school was listed as 144; the percentage mentioned in the text is calculated on the assumption that the correct total was 142.

97Biennial Report of the Superintendent of Public Instruction of the State of Iowa: November 1, 1897, Appendix at 74 (1897).


99In 1998, the chairman and CEO of Brown & Williamson Tobacco Corp. testified at a Senate hearing on the tobacco settlement with the state attorneys general that if he had to explain to a 12-year-old about smoking and health he “would explain that smoking is clearly an adult custom....” Tobacco (CEOs): Hearing Before the Committee on Commerce, Science, and Transportation, United States Senate 72 (105th Cong., 2d Sess.,
the proselytizing of the Anti-Cigarette League. Founded in 1899, its object was to “combat...the use of tobacco by boys, especially in the form of cigarettes....” The pledge that it sought from boys was to “abstain from smoking Cigarettes or using tobacco in any form, at least until I reach the age of twenty-one years.”

In addition to focusing on the greater injuriousness of cigarette smoking that resulted from almost universal inhalation, Atlantic’s physicians informed the Iowa Senate through Phelps that first among the toxic symptoms peculiar to the cigarette and presented by its victim was chorea or St. Vitus dance. The same Dr. W. Findley shared his experience of having seen a “‘strong healthy boy of sixteen transformed within a few months to a helpless imbecile.’” Less fancifully he alluded to addiction (“‘an irresistible [sic] desire’”) as “‘the chief consideration on the part of the producer and...the hope of his success.’” Offering a unique market analysis, Dr. J. Cannon claimed that “‘the greatest majority of them [cigarettes] are consumed by boys between the ages of eight and fifteen.’”

Finding his own voice again, Phelps added a labor-market dimension to the subtext for which he had laid the foundation in his remarks on education: to cigarettes—and not to a willingness to work for lower wages—was attributable the fact that “the majority of positions of responsibility which are equally well adapted to male and female workers, are today filled by our young women.” With “fidelity, honesty and honor, the three traits of character that make the services of the employe the most valuable to the employer,” but with “very few female forgers, embezzlers and defaulter,” banishing “this terrible curse” was the only way to still the “hue and cry that our young women are usurping places that should be filled by our young men....” Having disposed of his gender agenda, Phelps contrasted “the just indignation of the whole nation” over France’s imprisonment of John L. Waller, a black Republican former U.S. consul to Madagascar with ties to Iowa, with the nation’s “look[ing] calmly on and

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Feb. 24, 1998) (Nicholas Brookes). Unsurprisingly, at this late date Brookes also refused to concede that nicotine was addictive on the grounds that the term “is so inclusive as to be almost meaningless” and should “more appropriately” be confined to “hard drugs and cocaine.” Id. at 65.

100*The Boy 2(1): n.p. [2] (Jan. 15, 1901). No age limitation was placed on the pledge of the Girls’ Auxiliary, which did however extract the “promise never to admit a liking for the odor of tobacco....” Id. Lucy Page Gaston was the League’s general superintendent. See also above ch. 6.


see[ing] over three and one-half billion of cigarettes manufactured yearly in the country, whose only mission can be the enslavement of our boys. What a spectacle: a nation sitting quietly by and witnessing the destruction of debauchery of its own citizenship.”

Phelps then concluded his oration with an assault on the American Tobacco Company (from which, to be sure, he was unable to disengage his bias against higher education for women):

It is said that all the manufactories of cigarettes in this country are located in a few large cities of the east and south; and are controlled by corporations which are united in one great trust. This is the way men who wish to be considered respectable, take to escape the responsibility of carrying on this accursed business, and when they have made their millions, some of them will ease their consciences by using a few thousand dollars of their ill-gotten gains for the endowment of colleges, for the education of our young men. While if there are enough of our boys with sound bodies and minds to fill the colleges, it will be because they have been blessed with parents and friends who, having been warned before hand, have been able to keep their children’s feet out of the traps and snares set by these millionaire manufacturers.

The protagonists’ failure to engage each other’s central argument was striking. The prohibitionists’ key claim was that boys’ uptake of cigarette smoking was rooted in “a desire to appear what they call ‘manly’” and facilitated by the “imitative faculty...and parental example is a potent factor in its promotion.” In other words, boys smoked because they saw men smoke. Given the brute fact of the demonstration effect of adult smoking as the most powerful (and cheapest) advertising the Tobacco Trust could ever want, so long as

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108 *Scientific American* opined at the end of the 1880s that with “the use of cigarettes rapidly on the decline...[t]he manufacturers of these noxious things have been compelled to advertise largely to prevent the entire destruction of their business, and about the only people who can now be seen smoking the paper abominations are a few moon-faced juveniles who imagine that cigarette smoking gives them a literary aspect, or who ambitiously aim at appearing manly and graceful while poisoning the atmosphere about them....” “The Cigarette Doomed,” *Scientific American* 61(9):132 (Aug. 31, 1889). How the magazine divined the decline of cigarettes in the face of a more than fourfold increase
people above the legal age furnished boys with cigarettes, adequate enforcement of the no-sales-to-minors law was implausible. Consequently, prohibitionists advocated a total ban on the sale of cigarettes to adults primarily in order to prevent youth access and to preclude the creation and recreation of adult cigarette-smoking role-models. This structure differed fundamentally from that undergirding alcohol prohibition, which was primarily designed to protect men from themselves (and wives and children from the physical, emotional, and economic consequences of husbands’ and fathers’ drinking and drunkenness). Nevertheless, the anti-cigarette forces in the Iowa legislature did not even reveal this self-sacrificial character of their strategy, let alone try to justify it by meeting their opponents’ argument that they were depriving adult men of the freedom to smoke cigarettes. In turn, the opponents, ironically, failed to focus on the alleged need for and fact of this compulsory substitutionalist altruism, instead merely mouthing pious simplifications about the adequacy of no-sales-to-minors laws.

Following Phelps’s speech Republican William H. Berry, yet another lawyer, recounted a personal experience of a cigarette smoker “who was almost imbecile as a result of the indulgence of the habit,” and then offered an amendment to permit the manufacture of cigarettes for personal use but not for sale, which the chamber adopted unanimously. Democratic Senator Harper, continuing his party’s assault on blue laws, opposed the bill as an encroachment on personal rights and an attempt by the legislature to substitute enactments for the parents’ duty to raise boys so that “‘cigarettes will offer them no temptation.’” Tweaking the collective noses of blue laws advocates, he proclaimed: “‘I am a Democrat. I do not have bad habits and do not need the benefit of such a law. For my Republican brethren it seems necessary.’” Harper’s amendment to strike the enhanced penalties for second and third violations was defeated as was the amendment offered by Republican lawyer Nathan Marsh Pusey from the Missouri River city of Council Bluffs to make the minimum fine for a second offense $10. After Lothrop had urged that the bill be recommitted, Republican Senator Frederick Ellison—a lawyer from Anamosa who had been born in New York City

in production (from 533 million in 1880 to 2.4 billion in 1889) is unclear. Arthur F. Burns, Production Trends in the United States Since 1870, tab. 44 at 298 (1934).


111 Pusey became the grandfather of the like-named future Harvard University president.

in 1853\textsuperscript{113}—sought to subvert Phelps’s general ban by offering an amendment to make it illegal to sell cigarettes or tobacco to any minor and omitting all provisions relating to sales to persons older than 21.\textsuperscript{114} After Ellis had made one more speech, denying that cigarettes were worse than any other form of tobacco, asserting that liquor left “‘thousands,’” including “‘lawyers, the very high priests themselves,’” in an even worse condition than Berry’s cigarette smoker, and attacking enactment of yet another ineffective prohibitory law as “‘radically wrong’” because it attempted to regulate individuals’ conduct and to make criminals of persons who were not “‘in the eyes of God and man,’” the Senate adjourned until the next day, February 1.\textsuperscript{115}

When debate resumed on Saturday, the bill’s supporters denounced Ellison’s amendment as an obvious attempt to kill it. Senator Rowen, a “Minister of the Gospel,”\textsuperscript{116} came close to the nub of the tacit dispute over the justification for instrumentally curtailing adults’ ‘freedom’ to smoke cigarettes in order to prevent minors from doing so by declaring that “society has the right to protect itself, even by the restriction, in some measure, of personal liberty.” However, instead of exploring this crucial thesis adequately, Rowen veered off into a comparison of Rome’s degeneration and “the degeneracy that he predicted must surely overtake the youth of America unless the cigarette is suppressed.”\textsuperscript{117}

Such contentions prompted Ellison to argue unequivocally for the “right” of those over 21—by which age “boys’ habits were pretty well fixed”—to smoke cigarettes or cigars.\textsuperscript{118} Claiming that his amended version would be better enforced and would protect boys,\textsuperscript{119} Ellison argued that the years from 16 to 21 were “‘the age when boys are in most danger. It is from 16 to 21 that the boy wants to imitate the man. I do not think we should say what form of evil he may indulge in; that he may smoke a cigar but not a cigarette; but we can say the whole evil of tobacco may be taken away from him. The reason the present law is violated is because the age is fixed at 16 and not 21. Are you going to correct

\textsuperscript{113}Ellison had served during the previous session in the House; later he became a state court judge. \textit{The Bench and Bar of Iowa} 361-62 (1901); \textit{History of Jones County, Iowa: Past and Present} 2:168, 171-72 (R. Corbit ed. 1910).

\textsuperscript{114}“After the Cigarette,” \textit{DML}, Feb. 1, 1896 (3:4).

\textsuperscript{115}“The Iowa Legislature,” \textit{ISR}, Feb. 1, 1896 (4:5-7 at 6).


\textsuperscript{119}“The Legislature,” \textit{DIC}, Feb. 1, 1896 (3:1).
The Universal Prohibition of the Sale of Cigarettes: 1896

the morals of the men of Iowa? If you are, then right here in this senate is a good
place to begin.” 120 In fact, however, the state “could not follow its adult
citizenship into all the private places of life, or correct tastes and natural
propensities.” 121

Taking the floor again, Rowen sought to undermine one of the arguments of
the bill’s opponents by asserting that liquor prohibitionists would not admit that
that ban either had been violated or was unenforcible; their vote for the mulct law
in 1894 was not a concession of the law’s failure in their sections of the state, but
a protest against its “unlimited violation in others.” His passionate flow was cut
off when the chair upheld Phelps’s point of order that Rowen was not addressing
the question 122—in spite of the fact that he was zealously advocating on behalf of
Phelps’s bill.

Republican collectivists proceeded to speak up in favor of the ban. Senator
William Eaton, a lawyer and a Methodist, 123 insisted that the law did not exist that
was not based on a prohibition: “‘Every step of progress that has been made has
been by yielding up something. The superstructure of society has come from the
giving up of something by the individual to society.’” His colleague, editor Albert
Hotchkiss, added: “‘The right of the individual ends where the welfare of the state
begins.’” 124 And rather than absolutizing the family’s autonomy, he regarded it
as the state’s duty to intervene to protect youth where the family failed to do so. 125

Senator Ellis had been preparing lengthy remarks against the bill in order to
extend his speech beyond the adjournment hour and thus to continue debate the
following week, but he was stymied by a parliamentary move. 126 After quickly
defeating Ellison’s amendment on a voice vote, the chamber passed the bill 31
to 11 with six of the seven Democrats voting Nay (and the seventh not voting).
Six of the seven Democrats represented Mississippi River counties, while of the
five Republicans voting Nay, three lived in larger cities on the Missouri or
Mississippi rivers bordering on Nebraska or Illinois, while a fourth lived in a
town near the Minnesota state line. 127 Evidence was plentiful that cigarette sales

Legislature,” ISR, Feb. 1, 1896 (4:5-7 at 6).
123http://www.rootsweb.com/~iabiog/fremont/hfmc1901/hfmc1901-e.htm
127Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa
115 (1896) (Feb. 1). The river city senators were Ellis (Clinton), Lothrop (Sioux City),
The Universal Prohibition of the Sale of Cigarettes: 1896

bans were much less effective in border towns where smokers could lawfully buy cigarettes right across the state line.128 Moreover, in connection with liquor laws even Republicans admitted that prohibition could not be enforced within the borders of the river counties.129

The Senate’s passage of the bill—celebrated in one front-page headline as “Deadly Cigarette Goes”130—emboldened the Atlantic Daily Telegraph to predict that the House would follow suit “unless the trust can use its boodle to good effect.”131 The Iowa Capital, which vigorously supported S.F. No. 7, reported “general rejoicing throughout the state,” with mothers “generally praying” that the House might also pass the bill.132 In addition, the Capital devoted its lead editorial the evening after Senate passage to “The Boodle Is on Tap,” pointing out that the Tobacco Trust pushed no-sales-to-minors laws precisely because they went largely unenforced. By banning (in-state) sales to adults, Lafayette Young


128“Defy the Cigaret Law,” ICWR, July 22, 1896 (7:3) (discussing Sioux City).
A survey conducted by the state auditor in 1899 revealed that only one of the ten Mississippi River counties (Louisa) chose not to substitute the liquor mulct law for prohibition. In descending order, Dubuque (county seat: Dubuque), Scott (Davenport), Clinton (Clinton), and Des Moines (Burlington) counties recorded the greatest number of saloons in Iowa. Biennial Report of the Auditor of State to the Governor of Iowa: July 1, 1899, at 194-95 (1899). Similar results obtained in a survey conducted in 1906: the greatest number of saloons were recorded in Scott, Dubuque, Polk (Des Moines), Clinton, and Des Moines counties. The Iowa Official Register for the Years 1907-1908, at 574 (22nd Number, 1907).

131“Iowa’s Legislature,” Daily Telegraph (Atlantic), Feb. 4, 1896 (2:2). In spite of the widespread journalistic practice of reprinting articles from other papers, accurate information was not uniformly distributed. For example, right after Senate passage of the bill one newspaper reported that Iowa’s anti-cigarette law prohibiting manufacture or sale would be “like that of Minnesota.” The New Era (Humeston, IA), Feb. 12, 1896 (3:1) (untitled edit.). In fact, Minnesota had no such law and would not until 1909. See vol. 2.
(and Phelps) sought to insure that cigarettes and cigarette smoking were not left unscathed as—in the mendacious words of the Tobacco Trust’s late-twentieth-century successor—“an adult custom”\textsuperscript{133} that inspired emulation by children, who would then turn into the next generation of addicted customers.

The Phelps anti-cigarette bill has stirred the cigarette trust and given it more alarm than it has had for a long time. There is every prospect that the bill will pass both houses, as it ought to do. However, a member of the general assembly of the highest standing tells The Capital that an agent of the cigarette trust is in the city with all kinds of boodle and that he is approaching members who are attorneys proposing to “retain” them in a legal sense, which, of course, means bribery. There should be no compromise in this matter. It will be sought to amend the bill prohibiting the sale to persons under 21 years of age. When so amended the law would not be worth the paper it would be printed upon. It might as well be left as it is, for with that loophole every boy in Iowa who wanted a cigarette would manage to get it, but with a law totally prohibiting the manufacture and sale of these vicious articles there could be no evasion. The cigarette is annually killing more Iowa boys than all the diseased meats sold in the United States. Why are legislators willing to pass any sort of a measure to protect the people from diseased meat and they are unwilling to protect the rising generation against the poisonous and debilitating cigarette? ... There is something so fiendishly poisonous in the cigarette that the boy who becomes addicted to its use is debauched and debilitated with a natural tendency to all species and kinds of evil. The state of Iowa wants vigorous, manly, healthy mates for the bright-eyed and rosy-cheeked girls, and the general assembly of the state can do nothing better than to unanimously pass the Phelps bill and stamp out the cigarette as one would a venomous serpent that lies in the pathway to strike the innocent boy’s bare foot. No member of the general assembly can go home and explain in any rational way why he voted to continue to permit the sale of cigarettes in Iowa.\textsuperscript{134}

Like Phelps himself, the Capital’s editorial combined a realistic assessment of the Tobacco Trust’s political machinations and uncritical circulation of scientifically

\textsuperscript{133}In 1963, when the cigarette oligopoly decided to withdraw advertisements from college newspapers, magazines, and football programs, George Allen, the president of the Tobacco Institute, said: “‘The industry’s position has always been that smoking is an adult custom.’” In announcing the decision not to broadcast cigarette advertisements on television or radio before 9 p.m. in Canada, John Devlin, the president of Rothmans of Pall Mall, added new dimensions to the concept of self-contradiction by asserting that the change was “‘meant to ‘keep youngsters from getting the idea that smoking is grown-up and the thing to do.’” “Most Cigarette Makers to Drop Ads from Campus Publications,” \textit{NYT}, June 20, 1963 (1:4-5).

\textsuperscript{134}“The Boodle Is on Tap,” \textit{DIC}, Feb. 1, 1896 (4:1) (edit.). The ellipsis represents several lines half of which cannot be read because the microfilmed copy was torn.
unverifiable claims of large-scale cigarette-caused youth mortality, which, ironically, even the bill’s opponents accepted as accurate.

In contrast, the Republican party’s leading newspaper, the Iowa State Register in Des Moines, adopting the Ellis-Ellison anti-prohibitionist position because that wing of the party had drawn the conclusion from election results since the late 1880s that strict statewide abolition was a strategic mistake, urged the House not to follow the Senate:

That anti-cigarette bill will stand about as much show of being enforced as a law enacted for the repeal of the man in the moon. That apparently innocent bill is liable to give the state more trouble than the cigarette itself. The most that can be said for it is that it shows an indignant contempt for one of the most disgusting habits of the times. Who is going to do the arresting and the fining? The legislature which enacts that law ought to provide also for a system of spying metropolitan police and at least one additional court in each county. The contempt that every man feels for the cigarette fiend is a much better corrective than the enactments of a legislature.

We believe that the house ought carefully to consider this foolish piece of legislation before it is finally passed and at least amend it so as to bring it within legal possibilities. We want no more prohibitory laws. One is about as enforcible as another. Laws must be practicable. The evil is serious, but do the men on the hill for one moment suppose that they can stop it by a legislative ipse dixit? The new law forbids a man rolling a piece of paper with tobacco inside of it and giving it to a friend—who is going to watch, Tom, Dick and Harry? Two years ago a law was enacted forbidding the sale of cigarettes to boys under 16. In no place in Iowa, as far as we have been able to ascertain, has there been an effort to enforce that law. Now they say that big boys buy and give to little boys. Nonsense. The little boys have been able to buy for themselves just as if there were no anti-cigarette law and after this blanket law has been spread over the state they will have no more respect for it for the simple reason that it is an utter impossibility to enforce such a law until you abolish tobacco and paper separately. We sincerely hope that the house will make the cigarette law at least a reasonable one. As it is it is so unreasonable that it is utterly useless on the statute books and it will simply multiply the evils of law violations instead of minimizing the evils of cigarette smoking. We have had experience enough with such legislation. The present legislature had better leave personal habits to personal judgment and parental responsibility and attend to the mass of business legislation which

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136 See above ch. 9.
Unsurprisingly, the Republican *Clinton Herald*, published in an anti-prohibitionist Mississippi River town, opposed the bill, though purportedly more for reasons of impracticability. Divining that the proposed law probably intended to make the no-sales-to-minors law more effective, the newspaper speculated that it would have the reverse impact: men who supported enforcement of the existing law would oppose that of the more general law precisely because it “would hit them.” After arguing that it would be more effective to impose penalties on dealers than to “prevent traffic in everything that may be injurious to the user,” the *Herald* did an about-face, suggesting that a more “drastic” law punishing use as well might be more effective because some users would prefer to stop smoking cigarettes than to be break the law, while others would smoke much less if they had to do so in secret.\(^{138}\)

### House Action

Mr. Porter received for presentation to the House a petition from residents of Centerville asking for the passage of the bill prohibiting the manufacture and sale of cigarettes. Among the signers was Jesse Jones, who, on the evening of the day he signed the petition killed his sweetheart, Lea Martia, and her mother, and then committed suicide. The testimony at the coroner’s inquest showed that Jones was an inveterate smoker of cigarettes.\(^{139}\)

Meanwhile, in the House, on January 29, two days before the Senate debate began, Republican Representative James D. Morrison of Reinbeck in rural Grundy County,\(^{140}\) a liquor anti-prohibitionist,\(^{141}\) introduced House File No. 69,
which was referred to the Committee on Domestic Manufacturing, of which he was chairman. Morrison’s bill was more streamlined than Phelps’s:

**SECTION 1.** No person shall by himself, agent or employe, directly or indirectly, manufacture for sale, sell, barter[,] give or keep with intent to sell, barter or give to any person cigarettes in any form whatever.

**SEC. 2.** Any person found guilty of violating any of the provisions of the preceding section shall for the first offense pay a fine of not less than ten nor more than one hundred dollars and the costs of prosecution and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense he shall pay a fine of not less than twenty-five nor more than five hundred dollars and the costs of prosecution, or be imprisoned in the county jail not less than thirty days nor more than three months.

On February 1, committee chairman Morrison reported the bill out with the recommendation that it pass with amendments: (1) adding cigarette paper and wrapper to the prohibited cigarettes; (2) reducing the maximum fine for a first offense to $50; (3) increasing the minimum fine for second and additional offenses to $100; (4) eliminating the minimum period of imprisonment; and (5) increasing the term of imprisonment to six months. Nevertheless, on February 6, after Morrison had successfully moved to substitute S.F. No. 7 for his own bill, Republican W. C. McArthur of the Mississippi River town of Burlington moved to refer S.F. No. 7 to the Committee on Public Health. Morrison opposed the motion on the grounds that the bill’s subject matter was largely embodied in H. F. No. 69, which his committee had thoroughly examined and recommended that it pass; consequently, the referral was in effect a recommitment. In addition to seeing no reason to rush the bill through the chamber, McArthur read a letter from a wholesale tobacco firm in Council Bluffs stating that the bill’s passage would seriously injure its business because it sold cigarettes in Nebraska, South Dakota, Kansas, and Colorado. Attorney Samuel Mayne, another Republican, from a small town near the Minnesota border, argued for referral to the Public Health Committee on the grounds that the bill’s supporters claimed that “the cigarette habit was detrimental to health.” Despite the close vote of 53 to 44 against

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142 *Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa* 93 (1896) (Jan. 29).

143 House File No. 69.—By Morrison of Grundy (SHSI DM).

144 *Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa* 154-55 (1896) (Feb. 1).

145 *Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa* 256 (1896) (Feb. 6).

The Universal Prohibition of the Sale of Cigarettes: 1896

referral—48 Republicans voted against and 29 for, while 15 Democrats voted for and only 5 against\textsuperscript{147}—the Democratic Des Moines Leader, headlining its front-page report, “Cigarettes Are Doomed,” observed that, with the bill’s friends largely voting No, it was “deemed reasonably certain” that the House would pass the bill and that only the governor’s veto could prevent enactment.\textsuperscript{148}

In contrast, the Register editorialized that the bill was “getting hard blows from every side”\textsuperscript{149}—and for good reason:

The papers of the state are against the enactment almost as a unit. The bill strikes every thoughtful man as an extreme piece of legislation...which will interfere with the commerce of the state without in the least benefiting the morals of the people. After it has been enacted...the dealers of the state, who transact a legitimate business, supplying all wants, will be compelled to omit an article of ordinary commerce, and outside dealers will smuggle the goods into the state, reaping the profits which belong to Iowa houses. The objection would be at least worthy of consideration were it possible by such a law to prevent the use of the cigarette. No one can exceed The Register in contempt for the cigarette, nor exceed it in pity for the men, whether old or young, who are addicted to its use, but this feeling should not lead us to enact impracticable laws. Iowa cannot afford to isolate itself commercially. We are a part of the people and a part of commerce. As a matter of fact the use of tobacco, in any form, is deleterious, but we are not going to undertake to abolish its use by the enactment of laws.

We believe that the cheapness of the cigarette has much to do with its large consumption. For the price of one good cigar a man buys a dozen good cigarettes—if any cigarettes can be said to be good. If some way could be devised of taxing these goods—perhaps through the National internal revenue laws—we believe that the evil would be largely minified. But...we have no faith in prohibitory legislation as affecting such articles. There is not a member of the legislature who for one moment believes that after the bill is enacted...the consumption of cigarettes will cease in this state. There is not a member who reasons but will come to the conclusion that the law will be practically of no effect. It will be evaded in every community. It will not be but a few months until the people will have forgotten all about such a law. How many who read this knew, say yesterday, that there is now a law against the sale of cigarettes to boys under 16? No one has sought to enforce it. We must get at the cigarette evil by cultivating public contempt for it and by proper training of the boys against such evils. If the boys cannot be reached by these means, no law will reach them.\textsuperscript{150}

\textsuperscript{147}Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 256 (1896) (Feb. 6). Party affiliation is taken from [Iowa] Secretary of State, IOR 48-51 (1896).
\textsuperscript{148}“Cigarettes Are Doomed,” DML, Feb. 7, 1896 (1:7).
\textsuperscript{149}“The Cigarette Bill Again,” ISR, Feb. 7, 1896 (6:2) (edit.).
\textsuperscript{150}“The Cigarette Bill Again,” ISR, Feb. 7, 1896 (6:2) (edit.).
The Register’s framework-setting notion that Iowa had to facilitate the sale of cigarettes in order to remain a constituent link in the chain of U.S. commerce and part of the American people overlooked the role of state police powers. Its weak and implicit reference to the latter was forged by the preposterous claim that a ban on sales would be ineffective because no one would remember that the law existed. In fact, however, not only was the publicity surrounding the enactment of the 1896 statute overwhelmingly widespread and intense, but even moderate statewide enforcement activity would have constantly reminded residents of the larger cities—where the degree of compliance, even advocates conceded, was far lower than in small towns and rural areas—of its existence. The editorial’s future-looking support for denormalizing cigarettes (“cultivating public contempt”) and reducing consumption by taxation—oddly the editor appears to have been unaware that the federal government had been taxing cigarettes for years and that at that very time some in Congress were pushing for a vast increase in the tax—would have been excellent starting points for a control campaign, but nothing indicated that the Register was serious about the radical cultural and institutional steps that such a program would have entailed. Reduced to its capitalist core, the newspaper’s position was that Iowa businessmen were entitled to profit from the production and/or sale of any commodity available to their competitors in other states regardless of the health consequences. This race-to-the-bottom version of federalism implicitly but crucially hinged on what turned out to be a faulty prediction that the Iowa and U.S. Supreme Court would interpret the so-called original package doctrine in an expansive fashion to permit interstate commerce to trump the states’ exercise of their police powers to protect their citizens’ health. Much later, after those judicial rulings had swept away any such imagined constitutional obstacles to the valid enactment of cigarette sales bans, anti-prohibitionists would base their pleas for repeal on other claims such as consumer freedom and foregone state tax revenue.

That the Leader may have underestimated the degree and intensity of opposition emerged the following day when Republican Henry Nietert, a banker from a town near Cedar Rapids who had voted against referral the day before, moved to reconsider that vote. After a motion to table that motion lost 37 to 41, the House, reversing the previous day’s tally, voted 50 to 43 to refer S.F. No. 7 to the Public Health Committee after all. Not a single Democrat voted against referral, while the Republicans were divided with 43 Nays and 31 Yeas. This

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151 See above ch. 9.
152 See below ch. 15.
153 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 260 (1896) (Feb. 7).
ominous sign prompted Florence Miller, the non-partisan Iowa WCTU’s superintendent of legislation, to report on the “tribulated time” the bill was having in the House. However, the vote failed to deter the Leader from continuing to report that the bill’s “friends are just as confident as ever of its passage.” This optimism may, in spite of the Republican speakers’ charges that the referral was obviously intended to delay the bill, have been a function of the parliamentary agreement that S.F. No. 7 would be reported back within 10 days and keep its place on the calendar. For good measure, Morrison and others declared that the only conclusion that the Public Health Committee could reach concerning the effect of cigarette smoking on those “addicted” to it was that it was “injurious and suspected of being the prolific cause of filling the asylums for the insane and the homes for the feeble minded.”

At this point in the course of the debate the Register weighed in editorially with a severe commerce-focused condemnation of the anti-cigarette bill:

If the cigarette bill is made a law it will drive from the state a large number of wholesale houses. It will drive from the state all those houses which do a business outside of the state. A wholesale house that cannot supply its customers with cigarettes will be avoided by retail dealers for the purchase of other goods. It is easier to send the whole order to some house which can fill it. A retailer in Nebraska will not buy his cigars from a Sioux City house or a Council Bluffs house if he cannot at the same time buy the cigarettes he needs in his business from the same house.

This is by some called the commercial view of a moral subject. But it is important. We believe that the bill in question is a pernicious one because it is an unwarranted interference with personal habits. It isn’t right. But even those who believe it is right and morally justifiable are bound to take into consideration the commercial argument. We cannot take from Iowa business men the privilege of doing business as business is done in other states. We cannot wantonly drive from the state all the wholesale tobacco houses which it now has. We all know that tobacco is injurious, in whatever form it is used, but we are bound to take into consideration that it is still an article of commerce and will continue to be such long after the Iowa legislature has forbidden it in this state.

If the Iowa legislature could stop the cigarette habit in the state, it might be different, but it cannot eradicate that. In some places the law might be a benefit, while it is enforced, but in most places the people would not be made aware of its existence on the statute

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154 F.M., “Des Moines Correspondence,” *Dial of Progress* 7(7):[5:4-5 at 4].
156 “The Iowa Legislature,” *ISR*, Feb. 8, 1896 (5:3-7 at 6). For the claim that McArthur and his allies were motivated solely by the neutral, process-based goal of preserving the House custom of referring every Senate bill to the appropriate committee, see “General Assembly,” *BH-E*, Feb. 8, 1896 (1:5), which nevertheless deemed the 50-43 vote an indication that the bill would a “hard time” gaining a majority.
books. The passage of the bill will simply mean the transference of a large business from Iowa soil. The surrounding states will supply Iowa with cigarettes, in the form of original packages, against which there is no National law, except as to liquors. Under these conditions we believe the bill ought to be defeated, unanimously so.157

The Register’s empirical argument was deeply flawed by unproven, unprovable, and disproven assumptions. The assertion that, if the prohibition of cigarette sales were enacted, most people would never find out that it existed and therefore compliance and enforcement would be impossible was bizarre—especially in light of the intense publicity that the legislative debates generated in the press throughout the state and the fact that during the quarter-century that the law would be on the statute books no one appears to have raised the issue of ignorance of the law, let alone that it was a cause of its violation. The claim that commerce in cigarettes would continue unabated thanks to the original package doctrine would also prove to be unfounded. Consequently, the Register’s opposition to the bill boiled down to the view that a race to the top with respect to health and morality would result in the loss of some revenue and profit to out-of-state businesses. The newspaper failed to lay out the arithmetic showing that these losses outweighed the advances in health (and morality).

The press reported in mid-February that the House Committee on Public Health had decided to report a substitute for the Senate bill that merely prohibited sale to minors.158 Of this committee’s 13 members, ten were Republicans and three Democrats.159 Four Republicans were physicians (Bowen, Davis, Lauder, and Prentis), three were lawyers (Brighton, McArthur, and Weaver), and the others a hardware merchant (Brady), banker (Haugen), and retired manufacturer (Bell); the Democrats were a merchant (Jay), banker (Jackson), and retired merchant (Sullivan).160 On February 18 five Republican and Democratic

158“The Iowa Legislature,” LM, Feb. 21, 1896 (2:6). This Republican weekly was reporting on events during the previous week. Perhaps such a report had prompted Florence Miller, the non-partisan Iowa WCTU’s legislative superintendent, to misinform the membership in the March newsletter that the cigarette bill had been amended so as “to be little else than the prohibition of the sale of cigarettes to minors.” F.M., “Notes,” W.C.T.U. Bulletin 1(4):[3].
159Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 74 (1896) (Jan. 22).
160Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa iv-vii (1896). For somewhat different occupational information, see http://www.legis.iowa.gov/Legislators/historicalInfo.aspx. Sullivan, according to the 1900 census of population, was a “capitalist.” After one more term in the Iowa House, Gilbert

831
The Universal Prohibition of the Sale of Cigarettes: 1896

representatives presented petitions from citizens requesting passage of S.F. No. 7. The same day the chairman of the Public Health Committee, Republican Daniel Bowen, a physician who represented Allamakee County, which borders both the Mississippi River and Minnesota, and had twice voted to refer S.F. No. 7 to his committee, reported out to the House a majority substitute prohibiting the sale of cigarettes to persons under 21, while a four-member minority, headed by Republican Percy L. Prentis, a 26-year-old physician and the youngest House member, who had also voted for referral twice, issued a report recommending passage of S.F. No. 7. Morrison’s motion that the substitute be made a special order for the next day passed by a vote of 56 to 22.

That morning the Register editorially intervened in the debate yet again. It recognized that the legislators, “confronted with an evil of great proportions,” desired “to do what is right morally and wise practically.” Hastily drawing conclusions from what would turn out to be incorrect predictions of how the courts would mold the original package doctrine as applied to cigarettes, the newspaper insisted that it was “generally admitted that the absolute prohibition of an evil like the cigarette is impossible of attainment. No Iowa legislature can prohibit what interstate commerce recognizes as an article of transportation, and sale, in the original packages. If the bill which is now pending shall become law it would simply inaugurate an era of the original package as applied to cigarettes.

Haugen was elected to Congress for 17 consecutive terms, becoming the longest serving House member.

161Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 420 (1896) (Feb. 18).
162Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 423, 426 (1896) (Feb. 18); “Liquor Vote Is Taken,” DML, Feb. 20, 1896 (1:7, at 4:5).
1631900 population census (HeritageQuest); Willis Hall, The Iowa Legislature of 1896, at 115-16 (1895). Later Prentis moved to Chicago where he became the chief U.S. immigration inspector. 1910 population census (HeritageQuest); “After Chinese Opium Ring,” NYT, Sept. 8, 1913 (3).
165Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 426 (1896) (Feb. 18). One of the four minority members was Democrat Timothy Sullivan, the self-described “capitalist,” who otherwise voted against the Senate bill. The committee majority rejected the Senate bill on the grounds that it unconstitutionally interfered with interstate commerce because cigarettes were “sold in the original package.” “Iowa Legislature,” Monticello Express, Feb. 27, 1896 (6:6).
166Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 435 (1896) (Feb. 18).
The Universal Prohibition of the Sale of Cigarettes: 1896

The Wilson law, passed a few years ago, applied only to liquors in original packages; it is not likely that congress will enlarge the scope of that law on the application of the people of Iowa who are opposed to the cigarette.” Then stepping back and conceding that it had articulated only “one view of the question,” the Register added that, even in the absence of the original package doctrine, the paper would still not have supported the bill because it interfered with “personal habits which though they be offensive, must still largely be left to the individual or parents, or the guardians.” The newspaper favored the substitute reported out by Dr. Bowen—“one of the ablest and most conservative men in the present legislature”—as offering “a happy solution for this difficulty. The substitute...recognizes both the moral and the commercial obligations which are laid upon the members of the legislature.” The Register insisted that the substitute’s “severe” penalties were appropriate for the “altogether vicious” “cigarette habit,” as applied to which no law could be “too severe.” Consequently, if its penalties could not be made effective, the original bill’s could certainly not be. The paper pleaded the liquor law as a lesson to be learned from: successively higher penalties “only added to the number of violations, instead of diminishing them. When we have passed a sweeping prohibitory law in Iowa...we have not saved the boys.” As a consolation, the editorial suggested that in case of unenforcibility, “we may still look for some other means to check the undenied evils of the poisoned cigarette.”

On February 19, when the House took up the bill, Morrison offered a wholly new substitute, which radically deviated from the prohibitory approach underlying his own H.F. No. 65 as well as from the Senate bill by virtue of imposing a mulct tax higher than, but superficially along the same lines as, the $600 liquor mulct tax enacted in 1894. Specifically, the new section 1 assessed against anyone “engaged in selling or keeping with intent to sell at retail any cigarettes, cigarette wrappers or cigarette paper” and against any real property where they were sold an annual tax of $1,000 to be determined in the same way and devoted to the same purposes as the liquor mulct tax. Section 2 defined any sale of cigarettes valued at less than $25 as “retail.” Finally, section 3 subjected anyone giving away cigarettes, wrappers, or paper to a fine ranging between $10 and $50 for a first offense and $25 and $100 for additional offenses. Morrison’s measure was, in other words, unlike the local option liquor mulet, an...

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1681894 Iowa Acts ch. 62 at 63; above ch. 9.
169Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 448-49 (1896) (Feb. 19).
expansive statewide license tax.\textsuperscript{170} By “an overwhelming viva voce vote,”\textsuperscript{171} the House adopted the substitute, which was made a special order for the next day.\textsuperscript{172} The Chicago Tribune misinterpreted this action as meaning that the “prospects are believed to be good for the failure of the attempts at anti-cigaret legislation this session.”\textsuperscript{173} This assessment was based on the fact that while Morrison had put forward his measure as a corrective of the Senate bill flawed by its unconstitutional interference with interstate commerce, “[o]pponents of cigarette legislation contend that the Morrison bill is open to the same objection in that it imposes a tax which is practically prohibitive.”\textsuperscript{174}

On February 20, Morrison offered two amendments to his own substitute. First, he exempted from the definition of retail sales any sale valued at more than $25 if it was “accompanied by the immediate delivery and removal from the premises of the vendor, of all the goods covered by such transaction...” Second, he added a section 4, which imposed a fine of $10 to $50 for a first offense and $25 to $100 for every additional offense on anyone convicted of selling or giving away to a minor under 21 any cigarettes, wrappers, or paper.\textsuperscript{175} Republican Zenas Gurley, a real estate and insurance businessman,\textsuperscript{176} moved to amend Morrison’s

\textsuperscript{170} The liquor mulct tax law critically differed from Morrison’s substitute and the cigarette mulct tax (of 1897) by virtue of its local option features. 1894 Iowa Acts ch. 62, §§ 1, 17-18, at 63, 67-68; above ch.9. The result of the local option provision, according to Marion Dunham, was that “‘saloons were thrust into nearly half our 99 counties, in most of which there had never before been a saloon.'” The Passing of the Saloon: An Authentic and Official Presentation of the Anti-Liquor Crusade in America 245 (George Hammell ed. 1908).

\textsuperscript{171}“The Iowa Legislature,” ISR, Feb. 20, 1896 (4:4-6 at 6).

\textsuperscript{172}Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 449 (1896) (Feb 19).

\textsuperscript{173}“Aid To Cigaret Cause,” CT, Feb. 20, 1896 (3). According to this account, (Mahlon J.) Davis, whom it erroneously called the committee chairman, had said that it had been the “understanding that the Senate bill should be substituted for the House committee bill. He was much surprised at the turn matters had taken and feared it would defeat all anti-cigaret legislation. ‘I am willing...to vote for the Senate bill and let the courts settle the matter of the constitutionality of it.’” Id. Oddly, Davis, a physician, did not vote for the minority report on February 18, though he did on March 4.

\textsuperscript{174}“Liquor Vote Is Taken,” DML, Feb. 20, 1896 (1:7).

\textsuperscript{175}Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 474 (1896) (Feb 20).

\textsuperscript{176}Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa v (1896); see also above ch. 9.
substitute to include wholesalers as well as retailers. Republicans William Bell and Pardon Smith, editor and owner of the Scranton Journal, supported Gurley’s amendment, “taking the radical ground for the total extirpation of the business in the state.” Smith, whose passionate position appears to have been motivated by an acquaintanceship with a young man who had gotten delirium tremens from overindulgence in cigarettes and tried to kill his wife, “voiced the fixed convictions and the fullest endorsement of the whole state when he affirmed that they wanted the whole business stamped out of existence and swept into perdition. There was not a single moral reason, he claimed, upon which the manufacture or use of cigarettes could be defended.” After Morrison had opposed it on the grounds that it would interfere with the wholesale trade, Gurley’s amendment lost by a vote of 29 to 63, with only six Democrats joining 23 Republicans in favor, while 14 Democrats and 49 Republicans opposed it.

Morrison’s new initiative generated sharply divergent responses even within the Republican press. With growing impatience, the Iowa State Register expressed the hope that the legislature would waste no more time on what was “at best a piece of paternal legislation,” which merely afforded “sympathetic orators an opportunity to do a great deal of rhetorical weeping,” when what was needed was “solid business legislation....” After its predecessors had devoted 15 years to personal and sumptuary legislation, the current legislature had no need to re-debate “all the moral questions which have been agitating the human heart since the days of Moses.” The Register found Morrison’s substitute acceptable because it imposed severe penalties without violating “ordinary personal rights and ordinary rights of commerce” and was “one of the most drastic bills ever proposed in a legislative body regarding boys’ use of cigarettes.” Its enactment would put Iowa “morally far enough in advance of the rest of the states.”

The next day, in an editorial titled, “Crush the Cigarette,” the Marshalltown Evening Times-Republican embraced precisely the moral element that the Register had attacked. The Times-Republican outright rejected Morrison’s substitute because it merely restricted when prohibition “is what is wanted, and this is one of the prohibitions that can be practically enforced.” Morrison’s mulct tax, which would have merely confined sales to a smaller number of dealers, was

177 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 474 (1896) (Feb 20).
178 http://iagenweb.org/boards/greene/biographies/index.cgi?read=80579
179 “The Iowa Legislature,” ISR, Feb. 21, 1896 (5:3-7 at 6).
180 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 474 (1896) (Feb 20); Iowa Official Register 49-51 (11th Year, 1896).
“more in the interest of revenue than morality or health,” even though it was probably not so intended.\footnote{\textit{Crush the Cigarette,} \textit{ET-R}, Feb. 20, 1896 (4:1-2) (edit).} The newspaper—which, ironically, in 1893 had single-handedly introduced the discussion of a liquor mulct regime in Iowa\footnote{See above ch. 9.}—then offered additional empirical arguments:

Public sentiment is practically unanimous against the cigarette. A law is demanded that will effectually stamp it out and keep it out. Mulcting the traffic will not kill it. Even in a city the size of Marshalltown some dealer would doubtless run the risk of selling enough cigarettes in a year to pay the tax of $1,000. Every boy who wanted a cigarette would find that dealer and patronize him. It would be but small inconvenience to consumers not to find cigarettes on sale in a third of the business houses in town. One place would do. Hence the real object of legislation...would be defeated.\footnote{\textit{Crush the Cigarette,} \textit{ET-R}, Feb. 20, 1896 (4:1-2) (edit).}

To those who argued that if a mulct tax was expedient for liquor, it could not be less so for cigarettes, the editorial replied that whereas liquor occasionally had some good in it and was, to boot, largely confined to adults, there was “not a single argument in favor of the cigarette, except the sordid one of revenue. Its mission is wholly evil. Its effects are the more pernicious because confined so largely to the young.” Since, in order to suppress this evil, “the temptation must be removed,” any intervention short of prohibition would be of “little practical benefit.” Consequently, the primary object of any cigarette enactment had to be “moral, not mercenary.”\footnote{\textit{Crush the Cigarette,} \textit{ET-R}, Feb. 20, 1896 (4:1-2) (edit).}

During the House proceedings two days later Prentis’s motion carried to refer the substitute back to the Public Health Committee subject to the requirement that it report the bill back in five days and that it retain its place on the House calendar.\footnote{\textit{Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa} 486 (Feb. 21) (1896).} The press reported that the motion prevailed because the adoption of several amendments had left members in doubt as to the measure’s precise meaning. The \textit{Des Moines Leader} interpreted this action as an infliction of yet “another body blow” on the anti-cigarette bill.\footnote{\textit{Back to a Committee,} \textit{DML}, Feb. 22, 1896 (4:5-7).} Much more pessimistic was the reaction of the liquor-prohibitionist \textit{Dial of Progress}, which found it “passing strange that any legislator” could hesitate to apply the same “heroic treatment of entire prohibition” to “this comparatively new and most deadly foe to citizenship,
the cigarette....” Its editors could identify “no semblance of argument advanced for its continuance save that of the most barbaric greed that seeks to gather its gold from the acknowledged ruin of the bodies and souls of its victims. No known agency of destruction reaches its goal so rapidly, and consequently requires such an appalling number of victims as the Cigarette Trust.”

Another potential bad omen for enactment of cigarette sales prohibition emerged on February 27 when the legislature clearly rejected the resolution to submit to the electorate the proposed constitutional amendment to prohibit the sale of liquor in Iowa, to which the General Assembly had agreed in 1894 and which required the succeeding legislature’s agreement before submission to the people.

That the resolution faced virtually insurmountable barriers had become manifest three weeks earlier at a “decidedly sensational” meeting of the Prohibition Amendment League, which produced a blow-up between the group and several prohibitionist Republican legislators in attendance. Discussion of the presentation of a resolution “demand[ing] the present general assembly carry out the pledges of the last general assembly to submit the pending prohibition amendment to the people of Iowa” prompted “considerable feeling,” expressed initially by four of the six legislators, who said both that they were “proud” of having voted in 1894 for the mulct law, which was “working well throughout the state” and that “they believed the prohibitionists should be satisfied with the situation as it is. They believed resubmission at the present time would be dangerous to this amendment.” Unsurprisingly, these assertions, especially that concerning the mulct law—under which 1,620 saloons were still operating (and

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189See above ch. 9.
190To be sure, the WCTU of the State of Iowa, “remembering the flimsy technicality by which the [prohibitory amendment] voted in 1882 was declared null and void, [and] that during all these years the legislature has refused to re-submit, until now, when it has given the saloon a legal existence and intrenched it behind a revenue,” concluded at its 1895 annual meeting that “we can but feel that if submitted at this time, it is with the hope and purpose that it shall be defeated,” though the organization would work for the amendment if it was submitted. Sixth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa...October 9, 10 and 11, 1895, at 50 (1895). In contrast, the non-partisan WCTU of Iowa favored submission. Twenty-Second Annual Meeting of the Woman’s Christian Temperance Union of Iowa: Held at Toledo, October 22-25, 1895, at xiv, 2, 52 (1895).
191“In a Rough Wrangle,” CREG, Feb. 4, 1896 (2:2).
outside of which perhaps even more were selling liquor)—provoked two “prominent W.C.T.U. women,” Mrs. N. M. Smith and Mrs. M. J. Aldrich, into attacking the legislators for having passed the mulct bill and bitterly “brand[ing] the republicans as cowards and time-servers” who were now proposing to “go back on their pledges.” Several of the legislators took umbrage at having their motives impugned; in particular, James Funk, who had chaired the House Suppression of Intemperance Committee in 1894, walked out of the meeting, declaring “positively that he was through working for resubmission” and that he regarded the meeting as “the death knell of the last hope of resubmission.

Although Funk and his two impugned colleagues wound up voting for the resolution, without discussion it suffered a “crushing defeat”: all 41 Yea votes were cast by Republicans, while 18 Democrats joined 34 Republicans in voting Nay. What the WCTU called a broken pledge, the Republican Nay-sayers viewed differently: in 1894 the resolution was “passed under an agreement that some of the prohibition people vote for the mulct law. The agreement was kept on both sides and applied only to the legislature of two years ago.” In contrast, Republicans in 1896 “claimed and exercised the right to vote as they pleased, unhampered by the action of any former general assembly.” Whatever the source of the voting arithmetic, the anti-prohibition press delighted in predicting that the vote “settle[d] prohibition for five years at least in Iowa.”

On March 4, before the House heard committee reports, Republican lawyer Cassius Clay Dowell of Des Moines presented 12 petitions signed by more than 10,000 citizens of Des Moines and Polk County calling on the House to pass the

193 See above ch. 9.
194 “In a Rough Wrangle,” CREG, Feb. 4, 1896 (2:2).
197 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 531 (Feb. 27) (1896). H.J.R. No. 1 had been introduced by Doubleday on Jan. 28. Id. at 83-84.
198 “Resubmission Dead,” BH-E, Feb. 28, 1 896 (1:5).
199 “Resubmission Bill,” Dubuque Daily Herald, Feb. 28, 1896 (1:5). The same day that the House killed the amendment, the Senate ordered passed on file and then never acted on the committee majority report without recommendation on and the minority report recommending passage of S.J.R. No. 4 (introduced by Perrin). Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 54, 376-77 (Jan. 20, Feb. 27) (1896).
The Universal Prohibition of the Sale of Cigarettes: 1896

anti-cigarette bill, which had been pending for five weeks. Public Health Committee chairman Bowen then reported to the House that a majority of the committee recommended that the substitute for the substitute for S.F. No. 7 do pass with certain amendments. Largely identical with Morrison’s substitute bill, the new measure made it a misdemeanor to refuse to pay the tax and to sell or give away cigarettes, wrappers, or paper. Of special importance was the imposition of a fine ranging from $10 to $50 for a first offense and $25 to $100 for further offenses for selling or giving away cigarettes, wrappers, or paper to any minor under 21. The committee had, reportedly, been evenly split on the issue of reporting out the bill, but one Republican member, attorney Henry Brighton, who was said to favor it, “neglected or declined to attend” committee meetings, “thus giving the opponents of the bill a questionable majority of one.” This “radical” new committee measure thus substituted for an across-the-board prohibition a mulct tax combined with a ban on sales to minors, which, in the view of one Republican newspaper, would have “so emasculated the bill as to render it harmless to the dealers in cigarettes.” Prentis again submitted a minority report (this time on behalf of five members), recommending that the majority substitute do not pass and that S.F. No. 7 do pass with this proviso added: “that the provisions of this act shall not apply to sales by jobbers doing an interstate business with customers outside of the State of Iowa.”

Later that same day, when the House took up the substitute for the substitute for S.F. No. 7, Morrison moved that the committee report be adopted, but Prentis moved to adopt the minority report. By a vote of 58 to 24 the motion to adopt the minority report’s version of S.F. No. 7 prevailed. Remarkably, 10 Democrats

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200“The Iowa Legislature,” ISR, Mar. 5, 1896 (4:5-7 at 6). Dowell was one of only five House members (the others being Finch, Hinman, Spaulding, and St. John) who had voted against the liquor mulct bill (H.F. No. 537) on March 16 and 21, 1894, and then for S.F. No. 7 in 1896. He was just at the beginning of a long legislative career, which encompassed four years in the Iowa House, ten in the Iowa Senate, and a quarter-century in Congress, ending with his death in 1940. Biographical Dictionary of the United States Congress: 1774 to the Present, on http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000468.

201Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 621-22 (Mar. 4) (1896).

202“The Iowa Legislature,” ISR, Mar. 5, 1896 (4:5-7 at 6). Nevertheless, Brighton did vote to adopt the minority report on the floor vote that day.


204Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 622 (Mar. 4) (1896).
joined 48 Republicans in favoring the prohibitory measure, while 21 Republicans (including Morrison) and only three Democrats opposed it.205

Debate then began on the third reading, and the House was on the verge of voting “when it found itself in a parliamentary muddle.”206 Republican O. O. Tibbits moved to amend the new amendment exempting interstate jobbers by adding sales by in-state manufacturers to out-of-state customers.207 Fellow Republican Pardon Smith, opposed it on the grounds that it would weaken the bill. In turn, Republican Marcellus Temple, a lawyer from Osceola who had been a conservative Democrat until 1882 when he joined the Republicans in support of a state constitutional amendment to prohibit alcohol,208 rehearsing claims that would be repeated in the Senate a week later, argued that the bill in its current form was unconstitutional under Leisy v. Hardin209 and that it was doubtful that Congress would enact a law to overcome the original package doctrine as it had with respect to liquor. The internal Republican debate intensified when another lawyer, William S. Allen, declared that Leisy was inapplicable to cigarettes, which “have no place as a legitimate article of traffic.”210 Those who differed over whether prohibition, licensing, or local option was the best way to deal with “the drink evil” all agreed that intoxicating liquors were legitimate objects of commerce and had their proper place in medicine and the mechanical arts. In contrast: “Who will say that the deadly cigarette...is a legitimate object of barter and trade in the sense that the other is, if at all?” If not, then why would the state under the police power not have the

205 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 627-28 (Mar. 4) (1896).

206 “House Was Tied Tight,” DML, Mar. 5, 1896 (4:5).

207 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 628 (Mar. 4) (1896).

208 Benjamin Gue, History of Iowa: From the Earliest Times to the Beginning of the Twentieth Century, vol. 4: Iowa Biography 260 (1903).

209 On Leisy v Hardin, 135 U.S. 100 (1890), see below ch. 12. The (incorrect) claim that under Leisy, “the ‘deadly cigarette’...is a recognized article of commerce and may be brought into the state and sold to old and young in the ‘original package’” had surfaced in Iowa as soon as Leisy was decided in 1890. C. E. Brown, “The Deadly Cigarette,” BH-E, May 11, 1890 (6:7-8). The argument culminated in the assertion that the decision “practically nullifies all state laws regulating the sale of articles of inter-state commerce which are considered deleterious to the health of the people or opposed to the social order of the states. It takes the police powers out of the hands of the state and is...the hardest blow ever given the doctrine of states rights....” Davenport Morning Tribune, May 13, 1890 (1:1) (untitled).

210 “House Was Tied Tight,” DML, Mar. 5, 1896 (4:5-7 at 6).
The Universal Prohibition of the Sale of Cigarettes: 1896

right to determine whether to permit “‘this class of sales so destructive of human life and happiness?’” Allen concluded with this admonition: “‘You might as well say that Iowa would have no right to prohibit by statute the shipping over into our state from Illinois of mad dogs to work their terrible havoc and ravages among our people.’” Republican William Martin, who had played a major part in passing the diluted liquor mulct bill in 1894, added the syllogism that since the constitution did not prevent keeping diseased cattle out of state and everyone agreed that cigarettes were deleterious, they “should be kept out the same as diseased cattle.” Smith and Gurley pointed out that there were no cigarette factories in Iowa and that Tibbitts’s amendment would defeat one of the bill’s principal objectives—“the exclusion of the cigarette from Iowa.” They then astutely observed that “now was the opportune time to pass the law, as to do so at a time when there were no factories in the state would work no financial hardship upon anyone.”

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211 “The Iowa Legislature,” ISR, Mar. 5, 1896 (4:5-7, 5:5-6 at 5).
212 See above ch. 9.
213 “House Was Tied Tight,” DML, Mar. 5, 1896 (4:5-7 at 6).
214 “The Iowa Legislature,” ISR, Mar. 5, 1896 (4:5-7, 5:5-6 at 5). In fact, according to the (U.S.) Commissioner of Internal Revenue there were cigarette factories in Iowa, which, to be sure, produced very small quantities constituting a minuscule proportion of total national output. For calendar years 1895, 1896, 1897, 1898, and 1899, the production amounted to 451,300, 194,700, 370,100, 108,800, and 52,300, respectively. The only two of these years for which the number of cigarette factories was identified separately from the number of cigar factories were 1898 and 1899, when there were two and one, respectively. Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1896, at 35 (H. Doc. No. 11, 54th Cong., 2d Sess. 1896); Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1897, at 35 (H. Doc. No. 11, 55th Cong., 2d Sess. 1897); Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1898, at 35 (H. Doc. No. 11, 55th Cong., 2d Sess. 1898). Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1899, at 46 (H. Doc. No. 11, 56th Cong., 1st Sess. 1899); Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1900, at 35 (H. Doc. No. 11, 56th Cong., 2d Sess. 1900). By the time of the 1901 report with data for 1900, Iowa was no longer listed among the states producing cigarettes. Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1901, at 24 (H. Doc. No. 11, 57th Cong., 1st Sess. 1901). Thus, in spite of the prohibition of manufacturing cigarettes that went into effect in mid-1896, cigarettes were manufactured in Iowa in 1897, 1898, and 1899. Since machinery by this time was capable of producing more cigarettes in a day than Iowa was producing in a year, these factories were presumably not mechanized or were operating only part-time.
After Tibbitts’s motion was “overwhelmingly rejected,” extended parliamentary wrangling ensued when Dr. John Lauder, a Republican reported to be “almost perniciously active in opposition to the bill,” raised a point of order to the effect that after S.F. No. 7 had been rejected and a substitute recommended, it was out of order to adopt the committee report recommending S.F. No. 7. When the bill’s supporters insisted on a vote, House Speaker Byers observed that if the records bore out Lauder’s point, considering S.F. No. 7 would in fact be out of order. The speaker’s request for time to decide the point led to adjournment until the next day. The minority members of the Public Health Committee, according to the Des Moines Leader, which (correctly) predicted that Byers would rule in Lauder’s favor and that, in response, Prentis would offer a new bill embodying S.F. No. 7 and an amendment, acknowledged that they had committed a procedural error in having reported S.F. No. 7 for passage instead of a new substitute bill. The Register saw little reason to doubt that the House would pass the bill by a “huge majority”: with supporters amounting to more than a two-thirds majority, all they needed to do was to continue standing together.

By the time debate resumed on March 5, the advocates for S.F. No. 7 had “prepared to meet the emergency of an adverse ruling” by drafting a substitute that differed “only in the slightest degree....” Speaker Byers, “in the midst of a silence and suspense that could almost be heard, as it was certainly felt,” ruled the point well taken, determining that the substitution of S.F. No. 7, even with the amendments offered by the minority report, was out of order. The unraveling

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215 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 628 (Mar. 4) (1896); “The Iowa Legislature,” ISR, Mar. 5, 1896 (4:5-7, 5:5-6 at 5) (quote).
216 “The Iowa Legislature,” ISR, Mar. 6, 1896 (4:5-7, 5:3-4 at 4).
217 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 628 (Mar. 4) (1896); “House Was Tied Tight,” DML, Mar. 5, 1896 (4:5).
218 “House Was Tied Tight,” DML, Mar. 5, 1896 (4:5-7, 5:5-6 at 5).
220 “The Iowa Legislature,” ISR, Mar. 6, 1896 (4:5-7, 5:3-5 at 3).
of this parliamentary “tangle,” according to the Democratic Leader, was the achievement of the Speaker, to whom the bill’s supporters were indebted inasmuch as he had “abstained from declaring the bill out of order until they had time to form their plan of action.” Had Byers declared it out of order the previous day, the whole matter would have been thrown out of the House and an entirely new start would have become necessary. In the event, Senator Prentis was ready with his response to move to reconsider the vote adopting the minority report. The 70 to 17 vote adopting his motion was along party lines with Democrats accounting for 15 of the Nays (Public Health Committee chairman Bowen being one of only two Republican Nays) and only four of the Yeas. The minority report having been declared out of order, the parliamentary guerrilla warfare continued with Morrison’s successful motion to adopt the majority report. The bill’s advocates then hurriedly consulted to determine their course of action in case Byers ruled against them, and Prentis countered with a substitute for the bill, which contained the aforementioned proviso. Morrison then renewed the point of order that Lauder had raised the previous day: “Immediately consternation arose in the camp of the friends of the substitute bill, and while they gathered in little knots about the chamber to excitedly canvass the matter, Speaker Byers proceeded to calmly compare the two bills, and after a short delay ruled” that the point was not well taken that Prentis’s substitute was out of order because it was identical with S.F. No. 7.

After Prentis’s bill had been substituted for the committee substitute by a vote of 55 to 23, “[t]he fight between the two factions,” according to the Daily Iowa Capital, “was now nothing more nor less than a contest to get before the house a bill corresponding as nearly as possible in detail with that adopted by the senate. Its enemies tried to defeat the bill by adopting the bill which was favored by the majority report, as it was different from that adopted by the senate.” These parliamentary moves were dictated by the fact that it had been “an open secret for two weeks that should the bill as it came from the senate be subjected to unusual amendment in the house, it could not be gotten through the former body again.” Consequently, the bill’s supporters in the House were trying to formulate and pass

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222 “Big Bills Go Through,” DML, Mar. 6, 1896 (4:5).
223 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 638-40 (Mar. 5) (1896); “Big Bills Go Through,” DML, Mar. 6, 1896 (4:5-6).
224 “The Legislature,” ISR, Mar. 6, 1896 (4:5-7, 5:3-5 at 3).
The Universal Prohibition of the Sale of Cigarettes: 1896

a bill “as nearly identical” to the Senate “as possible under the circumstances,” while House opponents were striving to “load the measure down with amendments..., hoping, as a last resort, to secure its defeat in the Senate.”

In the event, on the final vote, the House passed the Phelps-Prentis bill 71 (or 69) to 21 (or 23); the Democrats reverted to form, with 13 of 21 voting Nay and only 5 voting Yea. In the end, then, only 9 or 10 Republicans voted against the prohibitory bill, with even Morrison abandoning his mulct tax and joining the majority. Several members’ explanations of their votes are worth noting. One Republican who believed that the law unconstitutionally interfered with interstate commerce nevertheless voted for it because “the people are demanding a law along this line....” Democrat Francis Benedict Manahan, a Catholic who opposed all sumptuary laws, nevertheless voted Aye because he realized that “the need for legislation against this terrible evil is so great....” His announcement of this conversion caused the House to “burst into spontaneous applause, which became infectious and extended from the members to the spectators, and continued until the speaker rapped for order.” Another Democrat who favored a law eliminating “the evil of the nefarious cigarettes” voted No because he believed the bill to be unconstitutional and thus “practically inoperative for suppressing” the evil. And finally, House Speaker Byers, stating that he would vote for a bill banning the sale of cigarettes to minors (without explaining why such a bill was necessary after enactment of one in 1894), declared that, since cigarettes had been recognized as a “legitimate article of commerce,” S.F. No. 7

227“The Iowa Legislature,” ISR, Mar. 6, 1896 (4:5-7, 5:3-5 at 3).
228Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 641 (Mar. 5) (1896). The House Journal tallied the vote at 71-21-7, but the actual names listed totaled 69-23-7. Newspaper accounts tallied the vote at 69-21-9, listing two river city members, Democrat Nolan and Republican McNulty, as having been absent/not voted rather than as having voted Nay. E.g., “General Assembly,” BH-E, Mar. 6, 1896 (2:4); “No Coffin Nails,” DMDN, Mar. 5, 1896 (1:1. 5:2). Two Republicans voting Nay represented the border river cities of Burlington (McArthur) and Sioux City (McNulty), while two others represented counties bordering Minnesota (Mayne from Kossuth and Bowen from Allamakee). On two intervening test votes on Prentis’s substitute the clear majority of Democrats were absent or did not vote. Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 641 (Mar. 5) (1896).
229Willis Hall, The Iowa Legislature of 1896, at 105-106 (1895).
230Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 642 (Mar. 5) (1896).
231“The Iowa Legislature,” ISR, Mar. 6, 1896 (4:5-7, 5:3-4 at 3).
The temperance weekly *Dial of Progress* saluted the legislature for being “on the side of humanity” in saving many of “our dear boys...from the madhouse and some from suicide.”

### Back to the Senate

Iowa prohibited the sale and manufacture of cigarettes—total prohibition at last achieved without controversy!..."

During the week between passage of the bill in the House and renewed debate in the Senate, the press reported that “a number of Senate lawyers have come to the conclusion that tobacco is a legitimate article of commerce, and as such the sale of original packages of cigarettes cannot be prohibited under inter-State commerce laws.” Conveniently for the American Tobacco Company, these lawyers opined that: “The most that can be done is to prohibit the sale to minors and of adulterated goods.” On March 9 this constitutional question was to be considered by the Senate Code Revision Committee. Republican Senator James Trewin, who was the leading figure on this committee, none of whose members had played a prominent part in support of Phelps’s bill, had incorporated those two prohibitions in a bill that he believed would get around the constitutional issue. The press not only did not mention the possibility that the

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232 *Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa* 642 (Mar. 5) (1896).

233“*They Protect Our Boys,*” *Dial of Progress* 7(11):[4:5] (Mar. 12, 1896) (erroneously believing that the legislature had enacted the law before the Senate’s final action).


236“*The Legislature,*” *DIC*, Mar. 9, 1896 (3:2-3 at 3)


238*Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa* 35 (1896) (list of committee members).

239“*The Legislature,*” *DIC*, Mar. 9, 1896 (3:2-3 at 3) (quote); “*The Iowa Legislature,*” *ISR*, Mar. 10, 1896 (4:5). It is unclear why the Code Revision Committee would have had jurisdiction over this issue; the press appears not to have reported on the meeting. The
Tobacco Trust had instigated this belated interest in constitutionality, but styled Trewin a “consistent and earnest supporter of the anti-cigarette legislation.”240 In the version disseminated by his hometown newspaper, he was promoted to a “deadly enemy of the cigarette,” who “wants to do all that can be done to knock out the cigarette, but as a lawyer he is convinced this is all the legislature can do.”241 Proponents of S.F. No. 7, however, would soon cast doubt on Trewin’s bona fides on the Senate floor. In any event, the Marshalltown Evening Times-Republican sensationalized this intermezzo with the misleading front-page headline: “Coffin Nails Stay.”242

When the Senate took up the House-amended S.F. No. 7 on March 13, Phelps asked that a vote be taken immediately,243 but, as predicted, Senator Trewin, who had been “in an oratorical mood the last two or three days, took the floor to oppose it,”244 Trewin (1858-1927), who had been closely linked to the passage of the liquor mulct law when he was in the House in 1894,245 was a lawyer from the Mississippi River town of Lansing across from Wisconsin and also maintained a branch office in Cedar Rapids. He was to remain in the Senate until 1903, having been a prominent candidate for the Republican gubernatorial nomination in 1901.246 (In 1894 he had also been a bête noire of President Marion Dunham of the more progressive WCTU of the State of Iowa, who, because he bore “the heaviest responsibility” for “the infamy of preventing the age [of consent for

Register referred merely to a House-Senate conference. Id.

240“The Legislature,” DIC, Mar. 9, 1896 (3:2-3 at 3).
245See above ch. 9.

246Benjamin Shambaugh, Progressive Men of Iowa: Biographies and Portraits of the Leaders in Business, Politics and the Professions 2:622-24 (1899); “James Trewin Dies of Heart Disease,” DMT, Mar. 21, 1927 (20:2); Proceedings of the Thirty-Third Annual Session of the Iowa State Bar Association 149-52 (1927). The Cedar Rapids law firm that Trewin founded in 1916 became one of Iowa’s major corporate law practices. http://www.simmonspperrine.com. Although Trewin had been “prominent in the enactment of the mulct law,” he at first voted against the bill, contributing to its defeat before supporting it on reconsideration. Johnson Brigham, Iowa: Its History and Its Foremost Citizens 2:547 (Home and School ed. 1918) (quote); Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 693, 695-96 (Mar. 16), 748 (Mar. 21) (1894). He explained his Yea on the grounds that, with no probability of securing passage of a satisfactory local option bill at that time, H.F. 537 was “a move in the direction of the regulation and control of the liquor traffic.” Id. at 750.
The Universal Prohibition of the Sale of Cigarettes: 1896

females] being raised to fifteen years,” decreed that he “should [n]ever be permitted to again disgrace the halls of legislation”—a sentence that it was “safe to say” would be meted out to him if the ballot were in the hands of the women of his county.247 Trewin’s chief point was the bill’s alleged unconstitutionality. The original package doctrine that had defeated Iowa’s efforts to ban the sale of liquor brought in from other states would, in Trewin’ view, apply to the proposed anti-cigarette law, which he did not anticipate Congress rescuing from interstate commerce restrictions as it had in the case of the liquor law (in 1890). He therefore proposed that the bill be sent to the Judiciary Committee for amendment. In place of S.F. No. 7 he read aloud his own bill, which, in prohibiting the selling or giving of cigarettes or materials to make them to minors and banning the importation, manufacture, or sale of “adulterated” cigarettes, exercised as much power as the state possessed. He also charged that the bill under debate was fatally weakened by the lack of a prohibition on giving away cigarettes, because it would not prevent giving them away to the boys who were the bill’s special object of protection.248

Senator William Perrin launched the main attack against Trewin. The biography of Perrin, who together with his colleagues Phelps and William Eaton had voted most consistently in favor of anti-alcohol and anti-cigarette measures in 1894 and 1896, was uncannily similar to Phelps’s: born in Vermont a year after Phelps, he too fought in the Union Army, entered the same law school (in Albany) in the same year, and emigrated to Iowa about the same time.249 His ultra-militant mindset is nicely captured by the bill he introduced in 1896 to empower town councils to grant licenses to buy intoxicating liquor in saloons complying with the 1894 mulct law.250 Perrin justifiably denounced Trewin’s proposal as “just the thing that would please the cigarette trust,” but that would not amount to anything, let alone accomplish the result that “the real advocates of the legislation wanted.” Perrin wanted the bill at least to get a chance in court

247 Fifth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Marion, Iowa, October 3, 4 and 5, 1894, at 11.
249 http://iagenweb.org/chickasaw/biographies/biosp.htm
250 The license was to cost $2, the fine for a violation $10, and any saloon keeper who sold to an unlicensed drinker was to forfeit all rights under the mulct law; finally, councils were prohibited from granting a license to anyone whose parent, spouse, sibling, or child over the age of 14 filed a written protest. S.F. No. 21 (by Perrin), in 1894 Iowa Senate bill book in University of Iowa Law Library; Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 45 (Jan. 18) (1896) (last action).
and rejected the argument based on “personal liberty” as a mere “shield for such evils as the cigarette,” especially as used by Trewin, who was “assuming the garb of a saint to serve the devil.”

Perrin also found it “queer” that Trewin (who had earlier voted for S.F. No. 7) was just discovering the bill’s unconstitutionality, which was a “mere subterfuge.”

After Trewin’s motion to refer the matter to Judiciary Committee had failed and he had been denied the opportunity to offer any amendments, the Senate passed the bill 34 to 10 with all seven Democrats voting Nay.

Press Reactions to Passage

If there are any who believe still that the crusade against the cigaret is a hobby, or a fad, or a fit subject for complacent derision, their immediate duty is to open their eyes to some of the thousand object lessons they have been blind to and listen to the testimony that is piling up in defense of the children’s lives. The weakness of human nature that makes the child the victim and the parent incapable of combating the foe leaves the only remedy that can be used—that of legislation. Two states are making the experiment, and though the laws enacted are crippled by injudicious and too lax provisions there is a fair promise that they can greatly lessen the evil. An effort is being made in each to declare the laws unconstitutional, and it is needless to say the men who find their occupation menaced are the instigators.

The Iowa press offered diverse assessments of the measure’s future. True to form, the Iowa State Register predicted that manufacturers would flood the state with original packages of cigarettes, prompting court tests, whose outcome would, without any doubt, render the law of no effect. Faced with such irrationality, the Register could only complain that the bill had been passed not “in obedience” to

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252 “The Iowa Legislature,” ISR, Mar. 14, 1896 (7:3-4 at 3).


254 Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 545 (Mar. 13) (1896). Of the five Republicans who had voted Nay earlier, one (Lothrop) voted Yea, three (Ellis, Ellison, and Gilbertson) were absent or did not vote, and only one (Pusey) voted Nay again. The two new Republican Nays, who had previously votes Yea, were Senators Trewin and Upton, who lived in Cresco very close to the Minnesota border.

255 “The Cigaret Must Go,” CT, Mar. 25, 1896 (6) (edit.). Presumably the other state alluded to was North Dakota.
members’ best judgment, but, rather, to “what they believed to be the moral sentiment of their communities. Many members voted for it, and stated it was simply because they were afraid to vote otherwise.” If it were actually enforced, wrote the Sioux Valley News, its effect would be to “expel the cigarette from the state.” But other papers, reproducing arguments voiced during the legislative debates, reported shortly after the bill’s passage that “some lawyers” claimed that the bill was “unconstitutional because tobacco has been held to be a legitimate article of commerce” and the states were not empowered to interfere with the interstate traffic in such goods. Consequently, cigarettes would thenceforth “be sold in original packages, as liquor was, in ounce bottles before the Wilson bill made it subject to police regulations of the State. Congress would not be likely to help the State out in this way in its crusade against the cigarette....” Senator Trewin’s hometown weekly observed of the sales of cigarettes in original packages that there was “already talk of this sort of evasion of the law in the town of Albia.” In contrast, the bill’s supporters argued that Supreme Court jurisprudence did not apply to cigarettes because—prophetically anticipating the language of the Tennessee Supreme Court two years later—“cigarettes are wholly bad and have no good use.”

The Register declared that the governor would certainly not veto the bill: “That is what he meant when he made his campaign last fall and told the people that he would not veto what was properly done by the legislature in the exercise of its legislative functions. Some of the extreme moralists at that time believed Gen. Drake was making a mistake, but now, no doubt, they are comforted by the fact that he took that position. It turns out to be favorable to them in the matter of this cigarette law.” Perhaps in order to determine whether the General Assembly had in fact been properly exercising its legislative functions, on April 2, before signing the anti-cigarette bill, Republican Governor Francis Drake requested an opinion from Attorney General Milton Remley as to its

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258“The State of Iowa,” Anamosa Eureka, Mar. 26, 1896 (7:6). This piece, as was the journalistic wont of the time, appeared in many papers.
262On Remley, who was attorney general for six years, see Edward Stiles, Recollections and Sketches of Notable Lawyers and Public Men of Early Iowa 780-81 (1916).
The Universal Prohibition of the Sale of Cigarettes: 1896

constitutionality. Two days later Remley issued his five-page opinion, which was published in full in the Iowa State Register.263

Attorney General and Governor Approve

Now that the cigarette bill has been passed and only awaits the Governor’s signature to become a law, we hope that every man and woman in the state, who is a friend to humanity and who has the welfare of the coming man at heart, may use every means in his or her power to blot out the stain that mars the fair name of our beloved state by assisting in carrying out the provisions of this righteous law.264

Remley, who, as an ex-officio member of the Iowa State Board of Health since 1895, was presumably familiar with Dr. Joseph Emmert’s aforementioned critical exposes of cigarette smoking,265 began by stressing both the undisputed power of the states to restrain and burden persons and property to protect public health and the fact that the anti-cigarette bill was precisely such a proper exercise of the police power.266 Opponents’ sole objection to the bill was that it conflicted with Congress’s power to regulate interstate commerce—not that S.F. No. 7 in any respect was unconstitutional as it applied to “property which has commingled with the mass of property” already situated within the state. From this objection opponents concluded that the U.S. Supreme Court’s decision holding unconstitutional Iowa’s prohibition of the importation of liquor in original packages (Leisy v. Hardin) both meant that any similar ban on the importation of cigarettes in original packages was unconstitutional and rendered the whole anti-cigarette statute unconstitutional. While Remley was ultimately prepared to concede the possibility that the first claim might be correct, he denied the second. In reaching these conclusions he admitted that under the relevant U.S. Supreme Court decisions, “the police power of a state and the power of Congress to regulate interstate commerce impinge so hard against each other that there

264Daily Telegraph (Atlantic), Mar. 25, 1896 (3:2) (untitled) (reprinted from West Liberty Index).
266Annual Report of the Attorney-General of the State of Iowa 75 (1898).
appears to be in some instances a direct conflict of power; or at any rate, it is
difficult at times to distinguish which power should prevail.” However, he
believed that the “application of the doctrine that, because of the constitutional
provision empowering congress to regulate interstate commerce, articles of
commerce which the state has condemned as injurious to the health, prosperity
and welfare of the state, may, notwithstanding state laws, be imported and sold
within the state, seems to have reached its high tide in the case of Leisy v. Hardin.
The trend of the decisions seems to be the other way. And in any event,
although it was “a debatable question whether” the anti-cigarette law applied to
the importation and sale of cigarettes in original packages, a ruling that it was
inoperative in that sphere in no way voided its operation in any other respects.

The controlling statement of future state policy was Remley’s conclusion that
even if the federal constitutional interstate commerce power rendered the law
unconstitutional in part, “there is no question that enough remains therein to
control traffic to a great extent within the state and to operate upon all the citizens
in the state engaged in selling cigarettes or cigarette paper, which have become
a part of the general mass of the property of the state.” In other words, under
the new law, the American Tobacco Company, if it continued to want to sell its
cigarettes lawfully in Iowa, would be limited to those that it shipped in their
“original packages.” As an empirical legal and practical matter, Remley, as he
would reveal in the months leading up to and following the statute’s July 4
effective date, would take the position that, since the appropriate “original
package” for this product was the package of 10 cigarettes in which they were
actually sold, compliance with this requirement would simply be so burdensome
and costly that it would render the only method of lawful importation of cigarettes
into Iowa for sale unprofitable; consequently, such importation would be minimal
and the law would essentially achieve its purpose. To be sure, one practical
exception remained: individual non-merchants who wanted to buy the cigarettes
for personal consumption could lawfully buy them from sellers in other states and
have them shipped into Iowa in their original packages. Though an undeniable
inroad, this method was thought to require too much effort to become widespread
and, above all, to exceed the financial, logistic, and long-range planning
capacities of the vast majority of youth, whose initiation into and maintenance of
cigarette smoking was too opportunistic and happenstantial to sustain such
systematic interstate purchasing programs. As a result, to whatever minimal

267 Annual Report of the Attorney-General of the State of Iowa 76 (1898).
extent such interstate commerce-based exceptions reduced the scope of actual exercise of state police power regulation, Remley advised Drake that “there would be sufficient remaining to preserve the integrity of the act as a whole.”

As soon as he received Remley’s opinion, Governor Drake, on April 6, signed Iowa’s anti-cigarette law, which read as follows:

SECTION 1. No one, by himself, clerk, servant, employe, or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in the consideration of the purchase of any property, or of any services, or in evasion of the statute, or keep for sale any cigarettes, or cigarette paper, or cigarette wrappers, or any paper made or prepared for the purpose of making cigarettes, or for the purpose of being filled with tobacco for smoking; or own, or keep, or be in any way concerned, engaged or employed, in owning or keeping any such cigarettes or cigarette paper, or wrappers with intent to violate any provisions of this chapter; or authorize or permit the same to be done.

SEC. 2. Whoever is found guilty of violating any of the provisions of the preceding section for the first offense shall pay a fine of not less than $25, nor more than $50, and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense, he shall pay upon conviction thereof a fine not less than $100 nor more than $500 and costs of prosecution, or be imprisoned in the county jail not to exceed six months; provided, that the provisions of this act shall not apply to the sales of jobbers doing an interstate business with customers outside of the state.

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271 Annual Report of the Attorney-General of the State of Iowa 79 (1898). In 1907, two years after Wisconsin had prohibited cigarette sales, the speaker of the Wisconsin Assembly, Herman Ekern, declared that big tobacco companies were violating the spirit of that law by teaching children how to obtain cigarettes outside of Wisconsin. “Must Smoke in Private,” USTJ, May 18, 1907 (7:2). The first day that the law went into effect United Cigar Stores Co. in Chicago published a large advertisement in the chief Madison newspaper announcing that consumers could have cigarettes delivered to them by return mail at less than store prices. Wisconsin State Journal, July 1, 1905 (3:4-7). On advertisements by ATC in Portland, Oregon, in newspapers in Washington State in 1893 offering to send cigarettes into Washington, see below ch. 11.

272 Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 791 (Apr. 6) (1896). See also “No Realty for Aliens,” CT, Apr. 7, 1896 (4).

273 1896 Iowa Acts ch. 96 at 96, 97.
The Cigarette Trust Already Initiates Plans to Evade the New Law

Same Old Poison in New Form. The Cabbage and Opium to Be Wrapped in Tobacco Leaf, Which is Expected to Evade the Law. 274

More than two months before the prohibition on selling cigarettes was set to go into effect the press already revealed the Tobacco Trust’s plans to undermine it. At the end of April the Des Moines Leader reported that the “Tobacco Trust Has a New Cigarette to Evade the Prohibition”—an ordinary cigarette with a bit of tobacco leaf as a wrapper instead of paper. Since the statute prohibited the sale of “cigarette paper” and “cigarette wrappers,” the Leader concluded that a “reading of the new law suggests that attempts...to evade the law will be futile; but they will be made, nevertheless.” In particular, the American Tobacco Company was “in the field early with a substitute...warranted to superinduce as much heart failure, sallowness, yellowness of the index finger, and general wretchedness to the human family, as any ge[ne]uine article.” The Trust sent large consignments of these “little cigars” to local dealers in Iowa accompanied by a circular “stating that no charge would be made for the first consignment, as it was...an “experiment, to see whether cigarette smokers would like the substitute, and requested that a reply be sent, indicating what smokers thought of them. It was also requested that they be distributed free to cigarette patrons.” And, as was only to be expected given the lopsided power relationship between the Trust and the dealers, ATC’s “wish expressed in the circular was “being carried out to the letter by the dealers last evening.” The circular also assured the dealers that ATC was “willing to indemnify dealers against losses until a test case can be made, should the authorities undertake to bring the substitute under the ban of the cigarette law; and they use language that evidences their anxiety to secure a test case.” Initial reports indicated that cigarette smokers found the leaf-covered cigarette “as easy to inhale” and as going “just as far in satisfying the craving.” Always attuned to the profitability associated with achievement of economies of scale, the Tobacco Trust announced that “if the substitutes prove satisfactory they will be manufactured in large quantities for the Iowa market and any other states that may see fit to legislate against the sale of cigarettes.” 275


275 “Dodge Cigarette Law,” DML, Apr. 29, 1896 (1:5); also reprinted as “Will Dodge It,” Davenport Leader, Apr. 30, 1896 (6:2); “The Cigarette Law,” CREG, Apr. 30, 1896 (8:3). The Centerville Journal, May 14, 1896 (5:5) (copy furnished by Merle Davis), reporting on such shipments to Burlington and other wholesale towns, was convinced that the evasion was lawful. See also “We Must Be Good,” DMDN, June 30, 1896 (4:3).
Public Comment on the General Prohibition of Cigarette Sales

The anti-cigarette bill had a hard fight for life. 276

Looking back at the legislative struggle in July, when the law was already under judicial attack, the Democratic Des Moines Leader, which in April had, unsurprisingly, called the measure “purely moral” and “manifestly unwise” because it unnecessarily stretched the legislative function,277 observed that the Phelps bill, which “was bitterly opposed” and one of the session’s “sensational bills,” had been “the outgrowth of an active opposition to the cigarette habit, which was both moral and sanitary in its object. There had been formed in the schools and churches of Iowa anti-cigarette leagues, the members of which were boys who pledged themselves not to [sic] use tobacco in any form. This opposition was the result of rapid growth and the obvious effects of the use of cigarettes upon the young.” To be sure, the steep rise in consumption was not confined to boys: both men and women smoked them, and “anyone who will take the pains to watch the tobacconists’ counters long enough will see that men who formerly smoked pipes and cigars, have taken to the more convenient little package.” This convenience lay in the fact that whereas pipes could not be carried in a vest pocket and had to be periodically knocked out and cleaned, “[a] man can take two or three whiffs of a cigarette and fling it away,” especially since it was so cheap. The proliferation of cigarette smoking among minors as young as ten was, moreover, promoted by the diluted form of tobacco—“which never satiates”—which did not call forth the nausea associated with cigar smoking. Neither the Leader nor anyone else in the nineteenth century may have had what by later standards would qualify as a scientific grasp of cigarette smoking’s manifold health impacts, but the newspaper did understand one aspect: it was the “narcotic principle which is the seductive secret of the drug”; and that drug was nicotine: “men smoke tobacco all over the world for nicotine that is in it.” 278

Following enactment of the anti-cigarette law the so-called non-partisan WCTU of Iowa (which had disaffiliated from the national organization) 279 at its

News of ATC’s machinations quickly reached neighboring Nebraska. “To Defeat the Cigarette Law,” LEN, May 6, 1896 (8:3).

276 Twenty-Third Annual Meeting of the Woman’s Christian Temperance Union of Iowa 37 (1896).

277 “The Work of the Legislature,” DML, April 12, 1896 (12:2) (edit.).

278 “Still There’s No Light,” DML, July 26, 1896 (5:5-6).

279 Oddly, the four-page report of the Legislative Department of the nationally affiliated
annual meeting expressed its “gratitude” to the legislature “for strengthening the moral forces of the state.” Nevertheless, the organization was stone sober about the difference between enactment and enforcement:

To forbid the manufacture and sale of cigarettes in a great state is an advance in moral and sanitary lines. The good to be secured under the law depends upon the vigilance and determination of good citizens to secure its enforcement.

Steady, persistent, unyielding vigilance is the price of any advancement. Dauntless courage is required to hold the fort against the encroachment of evil in its many devices for foothold in society and government.

A year hence the battle will all be to fight over again.

As would later be de rigueur in the newspapers of other states on the day their cigarette bans went into effect, Iowa’s press, too, could not refrain from a mock “Good Bye Cigarette” conveying the wails of “[t]housands and thousands” of its “lovers”:

Dear cigarette good bye, good bye, thou hast been unjustly accused of bringing little boys to an early grave, of driving young men to the insane asylum, consuming the gray matter in the brain, of destroying the digestive organs, of breaking down the nervous system, of entering a sound body and a sound mind and leaving body and mind utterly wrecked, but for all that dear cigarette we love them still and weep every mother’s son of us, when we think that after today their delicious odor shall never more be felt in our broad prairies or in our carpeted halls. Little cigarette, sumptuary laws may be right when it comes to prohibiting the use of sauerkraut and onions but these articles are dangerous and highly injurious to the palate, but then cigarettes takes [sic] the place of the doctor, of the concert hall, of the court jester, of the fool, for who will deny that thou can heal, can drive away evil thoughts, can produce sleep and sweet dreams and call up the past. Dear cigarette, good bye, good bye.

WCTU of the State of Iowa to its annual convention in October 1896 failed even to mention the anti-cigarette law, focusing instead on “our bill” to raise female’s age of protection to 18. The previous year’s convention had voted to circulate four legislative petitions, the other three relating to a compulsory reformatory for females, suffrage, and compulsory education. 

Twenty-Third Annual Meeting of the Woman’s Christian Temperance Union of Iowa, held at Boone, Iowa, October 14, 15 and 16, 1896, at 73-76 (1896).

Twenty-Third Annual Meeting of the Woman’s Christian Temperance Union of Iowa xiv (1896).

Twenty-Third Annual Meeting of the Woman’s Christian Temperance Union of Iowa 38 (1896).

“Good Bye Cigarette,” CRDR, July 5, 1896 (3:3).
Why Did the Republican Legislature Pass Cigarette Sales Prohibition at the Same Time that It Was Perforating Its Liquor Prohibitory Law?

In 1894 the Iowa Republican Party leadership finally prevailed over its liquor-prohibitionist wing when the legislature passed a so-called mulct tax that was widely viewed as the introduction of de facto local-option licensure. By appropriating enough of Democrats’ anti-prohibitionist position to propitiate Mississippi and Missouri River city ethnic voters who had threatened decades of Republican control of state government by voting Democratic, the party’s symbolic, official, and real abandonment of statewide liquor prohibition helped secure not only a reinforced majority during the 1896 session, but additional decades of Republican supremacy. The question then arises as to why, after having just struggled through years of intense and debilitating inner-party turmoil over liquor prohibition, Republicans about-faced in 1896 and passed a ban on cigarette sales.

The pithiest (partial) answer may, surprisingly, have been furnished four

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283See above ch. 9.

284Noteworthily, anti-prohibitionist efforts during the 1896 session to relax prohibition even further by passing bills permitting the manufacture and (wholesale) sale of intoxicating liquors all failed. In particular, the Senate Committee on Suppression of Temperance substitute bill (for three more far-reaching bills) was defeated by a vote of 22 to 27. _Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa_ 741-42 (Apr. 2) (1896). The text of the substitute for S.F. No. 8, 203, and 324 was attached to the text of S.F. No. 8 in the 1894 Senate bill book at the University of Iowa law Library. Significantly, a Democratic attempt to substitute for this committee bill a more radical bill that made it lawful to manufacture and sell spirituous, malt, and vinous liquors (including on the manufacturing premises provided that sales were in quantities not less than four gallons and that the liquors “not be drank [sic] upon the premises”) was defeated by a vote of 7 to 31, all of and only the Senate’s Democrats voting Yea. _Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa_ 738-41 (Apr. 2) (1896) (S.F. No. 149, by Hipwell of Davenport). The House defeated by a vote of 43 to 46 a motion to make a special order of the committee substitute for three individual manufacture bills (H.F. 30, 82, and 106), which it later indefinitely postponed. _Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa_ 818-19 (Mar. 20) (1896). The committee’s minority report, signed by James Funk and six other of its 19 members, recommended indefinitely postponing the three bills and the substitute because to “authorize the manufacture and wholesaling of an article of which the sale by retail is no where [sic] legalized in the state involves a manifest and palpable absurdity.” _Id._ at 819.
years earlier, when the *Chicago Tribune*, which reported systematically and in depth on the Iowa legislature’s prohibition-related actions, observed in an editorial: “Democrats will drink, and the Republicans ought to perceive by this time that they cannot hinder them. ... The Republicans have tried for nearly ten years to make the Democrats quit drinking. They have failed hopelessly.” In sharp contrast, no one in 1896 would have warned cigarette sales prohibitionists off on the grounds that they would never succeed in making Germans, Catholics, or any other subpopulation stop smoking cigarettes. Unlike saloon drinking, cigarette smoking was not identified with any ethnic, religious, class, or even age group, whose discrete electoral decisions might have subverted Republican state political control. Moreover, whereas collective drinking in saloons embodied significant cultural and political practices with pervasive group cohesion-generating social-psychological consequences, cigarette smoking was much more likely to be an individualistic, solitary activity: a tobacconist’s store, in any event, in no imaginable way fulfilled the saloon’s multifarious functions. Greater willingness to enact a cigarette than to uphold a liquor sales ban was also rooted in the disparate economic challenges that the two industries represented, which, in turn, were in large part a function of the fact that (manufactured) cigarettes accounted for a minuscule proportion of all tobacco use, whereas the ban on intoxicating liquors encompassed virtually the whole market. These vastly different supply and demand conditions meant, for example, that whereas a ban on the sale of intoxicating liquor was per se a death sentence for saloons, prohibiting cigarette sales put hardly any establishment out of business because among the various kinds of merchants selling tobacco products not even the most specialized, tobacconists, were heavily reliant on cigarettes for their profits; indeed, in various states tobacco sellers welcomed cigarette sales bans because they were low- or even no-profit commodities that the cigarette quasi-monopolist American Tobacco Company foisted on them. Thus, attacking the Cigarette Trust’s economic interests not only did not harm local businesses, but earned the attackers the applause of anti-trust forces and, sometimes, even appeared as the chief purpose of the prohibition. Whatever the relations of dominance between

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285 “Iowa Republicans and the Schmidt High License Law,” *CT*, Feb. 9, 1892 (4) (edit.).

286 On one purported exception in another state (Russian immigrants in North Dakota), see above ch. 2. In contrast, there was no tobacco-related counterpart to some churches’ sacramental use of wine—for which the law provided an exemption.

287 See above Part I.

288 For example, on the background of the 1893 Washington State cigarette sales ban, see above ch. 4.
the Whisky Trust and large breweries, on the one hand, and local saloons on the other, they did not rise to the level of the Cigarette Trust’s economic power. And, finally, with regard to the comparative health impacts, many Republicans—as Representative Allen’s House floor speech underscored—whatever their position on alcohol, simply did not classify it as a wholly illegitimate article of commerce as they did the “deadly cigarette.”
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court: McGregor v. Cone (I)

The American Tobacco Co., and the Cigarette Trust were behind McGregor.¹

Buck [James B. Duke], however, wasn’t over-disturbed. In every eruptive circle of anti-cigarette agitation, he hired lawyers and lobbyists and fixers and discovered the sweet use of fat sums, properly applied.²

With the General Assembly’s action in 1896, Iowa became the only state in the country with a functioning statewide statutory prohibition of selling cigarettes to adults (as well as to children). Its existence was intolerable to the Nicotine Trust’s need for market expansion unimpeded by such gross government interference with addicted customers’ easy access to the American Tobacco Company’s commodities. In order to eliminate this threat in Iowa and thwart the legal model’s replication in other states, ATC choreographed an elaborate commerce clause-based constitutional strategy to invalidate the law, which it had already launched against a similar Washington State act three years earlier in federal court and was in the midst of honing in litigation attacking cigarette license laws enacted in West Virginia and Montana.

The Tobacco Trade’s Business Response to Iowa’s General Cigarette Sales Ban

Cigarettes have been openly placed on sale in Des Moines this week. The risk is considerable notwithstanding the partial release from the law afforded by recent decisions. If attacked under the ruling of the State Attorney General, the costs would eat up a long line of profits, if a judgment did not follow.³

As soon as the sales prohibition law went into effect on July 4, 1896, supporters and opponents began their enforcement and dismantlement efforts, respectively. Even before the effective date, the non-partisan Iowa WCTU urged its members to “visit all dealers” in their districts and leave them copies of the law. Legislative superintendent Florence Miller also advised them to insure its

The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

The big cigarette companies of the country are experimenting with all kinds of wrappers for cigarettes which will enable them to get around the law. One concern is putting a cigarette wrapper in a tobacco leaf on the market, but the traffic in the nasty little coffin nails is not very profitable to the retailers and it is not thought that the manufacturers will be given much encouragement. The cigar dealers are glad that the law has gone into effect, for it kills off a traffic which has not been worth having and opens up a chance for an increase in the sales of respectable smoking tobaccos.

But at the same time many retailers, recognizing that the prohibition was legally valid, disposed of their stocks. One dealer in Des Moines, for example, gave away 1,200 packs of cigarettes shortly before midnight of July 4. Iowa City dealers reportedly sold out their stocks “as rapidly as possible before the Fourth of July, and almost gave them away in job lots, the night of the 3d.” With “Spartan firmness,” the Iowa City Weekly Republican observed with some indeterminable measure of hyperbole, dealers “honor the law, and in no way, shape or manner will they encourage any would-be cigaret-smoker to override the law.” Acknowledging that cigarettes were “still much seen on our streets” because “users of the little coffin nails find it very difficult to give up their death-dealing habit,” the paper surmised that they were “probably the last of a few thousand (purchased in jobs lots) that we will see here.” (Conversely, a week later, the same paper confidently predicted that if Judge Sanborn’s ruling in ATC’s favor were upheld, “the coffin-nails will doubtless be seen in the hands of their Iowa City victims as conspicuously as of yore.”) Near the end of July the

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7“Defy the Cigaret Law,” ICWR, July 22, 1897 (7:3).
8“Cigaret Win,” ICWR, July 29, 1896 (8:3).
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

Register noted that the law “has been rather rigidly enforced. There is said to be but one place in Des Moines where they are sold.”

While compliance in towns in Iowa’s interior was apparently effective, border cities experienced considerably greater (and in part even lawful) accessibility of cigarettes. In the small Nebraska town of Covington, across the Missouri River from Sioux City, for example, dealers had witnessed “a noticeable increase in their trade since the law went into effect. As soon as a ‘fiend’ learns that some friend is going across the river he, together with several others, will form a pool and the friend who crosses the Big Muddy will return with an arm load of coffin nails.”

In Cedar Rapids the press reported on the eve of the law’s effective date that “retail dealers will not make any attempt to violate the law, probably. They say the trade doesn’t amount to anything, and that if cigaret smoking is shut off the smokers will turn to cigars so it will not make much difference.” According to the Cedar Rapids Evening Gazette, the law would be enforced if “the people” wanted it: “The manufacturers will no doubt make an effort to get around it and sell their goods as original packages. If the people kick the retailer will let the business alone.” And the prescribed fines and imprisonment would, in the newspaper’s view, make leaving it alone “the best policy....” ATC was inducing dealers to stock the small cigars “on the representation that Maryland passed a similar law and that it was recently declared unconstitutional....” Yet the Cedar Rapids Daily Republican reported that the Maryland measure, a high ($1,500) license law, was not like the Iowa statute in any respect.

This professed indifference of many tobacco dealers to the legal fate of cigarettes, rising in many cases and various states to support for a ban, also found formal organizational expression. In 1893, when the Tobacco Trust accounted for 82.8 percent of cigarettes manufactured, retail dealers of cigars and tobacco in New York City formed a “mutually-protective and anti-cigarette trust association” to deal with their complaint that “cigarette manufacturers compel

9Cigarettes Cannot Be Sold,” ISR, July 24, 1896 (7:5-6).
10Defy the Cigaret Law,” ICWR, July 22, 1896 (7:3) (quoting the Sioux City Tribune).
11Several New Laws,” CREG, July 3, 1896 (5:3).
12To Test the Law,” CRDR, July 10, 1896 (3:2). It is unclear what Maryland law the paper meant. In 1890 Maryland imposed a $50 license fee for selling cigarettes, which was reduced to $10 in 1896. 1890 Maryland Laws ch. 91, at 75; 1896 Maryland Laws ch. 439, at 750, 751. See above ch. 4. An 1895 West Virginia law that imposed a $500 license fee was judicially invalidated in 1895, 1896, and 1897. See below this ch.
them to buy their stock of cigarettes through jobbers and that the latter make 40 cents on each 1,000 cigarettes which they handle, thus leaving the dealers a very narrow margin of profit.” The keenness of their sense of oppression was intensified by the fact that “the consumption of cigars has been steadily decreasing, while that of cigarettes has been increasing.”

Even cigar industry workers advocated state intervention to ward off the potentially employment-displacing impact of the increasingly competitive commodity. As early as 1889 a resolution was introduced at the annual convention of the Cigar Makers’ International Union in New York declaring:

Whereas, The practice of cigarette smoking seriously affects the growth of the trade which we represent and has served to demoralize and injure the youth of the country, injuring their health, impairing their mental faculties, and rendering them unfit for any useful purpose; be it

Resolved, That we recommend the passage of a law in the various State Legislatures which shall prohibit the manufacture of cigarettes.

And the following year the president of the North American Cigar Machinery Company caused a bill to be introduced in the New York State Assembly that would have required cigarette sellers to be licensed and conferred a private right of action on parents to prosecute anyone who sold or gave away cigarettes to their minor child.

The Tobacco Trust’s General Counsel—Williamson Whitehead Fuller

Within a few days of its initial report, the Cedar Rapids Evening Gazette was

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14Grievance of Retail Cigar Dealers,” NYT, Apr. 21, 1893 (9).
15The Cigarmakers,” NYT, Sept. 21, 1889 (9). The Committee on Resolutions reported favorably on it, but the resolution was tabled, although “a considerable number of delegates voted no.” “Cigarmakers’ Wants,” NYT, Sept. 26, 1889 (2); “The Cigarette Is Safe,” USTJ, 28, Sept. 28, 1889 (2:5) (quote). This kind of non-global attack on one form of tobacco was not confined to economically affected organized actors. For example, in 1905, in reaction to a New York Times editorial criticizing the newly enacted anti-cigarette law in Indiana as based on prejudice, a letter to the editor commented that cigarette smoke was “an unmitigated nuisance to a very large majority...an insult to a good cigar, and a pernicious pestilential outrage upon the general public from which there seems to be no possible escape unless the Legislature [sic] of the other States follow the example of Indiana.” W. Hallock, Letter to the Editor, NYT, Apr. 20, 1905 (8).
16To Regulate the Sale of Cigarettes,” USTJ, vol. 29, Mar. 29, 1890 (3:1).
able to explain in greater detail just how strategically the Tobacco Trust—which during the 20 years of its existence before its court-ordered dissolution in 1911 accounted for between 80 percent and 94.7 percent of cigarettes sold—had been preparing its litigation against the ban on the sale of its main commodity:

It is probable that the new anti-cigarette law...will be assailed desperately in the courts in the near future by the general counsel of the American Tobacco company, which is known as the tobacco trust. W. W. Fuller, general counsel for the trust, has been here [Des Moines] and at Iowa City, the home of Attorney General Remley, for several days and has just left for the east. He has been investigating the law and believes it can be set aside. Mr. Remley does not admit that this is possible, but has misgivings.

The plan of the trust is to get some dealer to violate the law and make a test case. Every dealer in the state has been assured by the trust of its protection in case he is called up for violating the law and selling the substitutes of cigarettes, which have been prepared and extensively sold by the trust, and which consists of the ordinary cigarette filler with a wrapper of light tobacco.

Fuller had gone to Des Moines to try to identify a “loop hole...through which the cigarette products can be placed on the market in Iowa towns,” although local lawyers were unanimously of the opinion that sale of the small cigar substitute would violate the law.

Williamson Whitehead Fuller (1858-1934) was the Tobacco Trust’s general counsel from 1895 until 1912, the year after the U.S. Supreme Court ordered it dissolved, when he retired a millionaire “capitalist residing at 1072 Fifth Avenue, New York,” based in part on his large stockholdings in the ATC. At the 1920 census Fuller was returned as living at the same address with his wife, four children in their 20s and 30s, two grandchildren, and a cook, butler, kitchen maid,

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18a “Will Fight the Law,” CREG, July 8, 1896 (2:3). Unfortunately, what Fuller did in Iowa City and the substance of any discussions he had with Remley may have been lost to history. The Iowa City newspapers in July did not report on Fuller’s presence or meeting with Remley.

19a “To Test the Law,” CRDR, July 10, 1896 (3:2). This alleged unlawfulness was based on the (incorrect) claim that the Iowa law “has a special reference to the sale of substitutes or articles calculated to evade the law.” Id.

parlor maid, two laundresses, and three maids (the nine servants being black, mulatto, Irish, and Swedish).  

Son of a corporate lawyer in North Carolina—a slave-owner who had himself been the leading lawyer for the W. T. Blackwell & Company, internationally famous for Bull Durham smoking tobacco—through whom “he was introduced without wearisome waiting into the practice of the law,” in 1890 Fuller became counsel in Durham, North Carolina of W. Duke Sons & Company, at which time he “cooperated in the organization of The American Tobacco Company.” Its head, James B. Duke, called on Fuller to advise him so frequently during the next five years that in 1895 Fuller “was asked, and consented, to move his residence to New York City.” During the first half of the 1890s, Fuller, in New York and Washington, was “in legal combat with the first lawyers of the greatest cities in the country, and it is in such combats that the rich men of the American Tobacco Company came to know his great ability and capacity for difficult and important legal work.” As early as 1891, for example, Fuller in Durham, in tandem with the New York firm of Evarts, Choate, was already defending Duke in federal court in Charlotte in a suit brought by the Bonsack Machine Company, whose cigarette-making machine had transformed the industry. By the time he left North Carolina “he undoubtedly had achieved the most lucrative practice” in the state. For the next 17 years “he devoted himself

21Department of Commerce—Bureau of the Census, Fourteenth Census of the United States: 1920—Population, Series T625, Roll 1213, Page 195 (HeritageQuest). Interesting light is cast on potential census overcounting of the rich with multiple residences by the fact that Fuller and the same family members (but without servants) were also returned as living in Ossining, Westchester County. Department of Commerce—Bureau of the Census, Fourteenth Census of the United States: 1920—Population, Series T625, Roll 1276, Page 152 (HeritageQuest). Fuller did not appear in the 1910 census; in 1900 he was living on West 69th Street in Manhattan with his wife, six children, and three black servants. Twelfth Census of the United States: Schedule No. 1—Population, Series T623, Roll 1102, Page 72 (HeritageQuest).

22“Ex-Slave Wills Cabin to W. W. Fuller, Former A.T. Co. Counsel,” USTJ 99(7):2-17-1923 (5:3-4) (William James McAllister’s wife had “‘belonged to’” Fuller’s father, and after the civil war it had been his pleasure to be near the Fuller family to “‘bring an intimacy between me and Mr. Willie, then a small boy’”).


The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

to the service of The American Tobacco Company.”

On hearing of Fuller’s ascendency, the Raleigh *News and Observer* reported that: “It goes without saying that the acceptance of this responsible relation to this great corporation will give Mr. Fuller a princely income and national reputation.” While the North Carolina paper placed that princeliness in the range of $25,000 to $50,000 for the man “who has for several years been in receipt of the largest income received by any lawyer in the State,” The New York Times settled on—and as far away as Oregon a newspaper picked up—the higher figure. Soon after his arrival in New York he again joined forces with Joseph Choate to defend ATC in the “continuous litigation” in which it had been engaged since its formation. Defending Duke and other officers and directors in 1896 who had been indicted under a New York State anti-trust law—the principal recurring charge against it “in all cases” focused on its contracts with jobbers and wholesalers binding them not to sell below a certain price or to use other firms’ goods—Fuller exhibited an exquisite sense of chutzpah in seeking to deflect the charge of monopolization by alleging that ATC “was only following in the line of legislation in many States when it limited the supply of cigarettes.”

Very much a man of his time and place, he was eulogized by the chief justice of the North Carolina Supreme Court as having “remained in spirit an heir of the noblest traditions of the Old South.”

One of those traditions was instantiated in 1923, when William McAllister, a 94-year-old ex-slave, whose wife had “belonged to” Fuller’s father, made “Mr. Willie” his sole heir; Fuller bought stock with the proceeds from the sale of McAllister’s “little home” and used them to provide Christmas gifts to Fayetteville “Negroes.” On the first such occasion in 1926, Fuller, his son Thomas S. Fuller, who later also became general counsel of ATC, his grandson,

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28Judge Winston’s Resignation—Mr. Fuller Goes to New York,” N&O, Feb. 12, 1895 (4:1) (also stating that his law firm “enjoys the most lucrative practice” in the state).


30b“If a Salary of $50,000 a Year,” *NYT*, Feb. 12, 1895 (6:6).


and greatgranddaughter, gathered in a bank directors’ room in Fayetteville, and “saw the old Negroes assemble...and smile their thanks as each received his ‘Chris’mas gif’.”

Fuller, who represented the company before the U.S. Supreme Court in the case, was himself one of the original 29 individual defendants named by the government in 1907 in the antitrust suit that eventually led to the break-up of the ATC. In the wake of the court-ordered dissolution of the Tobacco Trust, Fuller, who had been “one of the controlling owners” of the ATC, retired as general counsel and was replaced by Junius Parker, who had been his co-counsel in numerous anti-cigarette cases. In retirement he privately published a book combining a hagiography of his ex-boss James Buchanan Duke and poetry.

Among the most prominent services he performed for the Trust involved systematic litigation attacking various state anti-cigarette laws. As Parker, his partner in that campaign, explained to the North Carolina Supreme Court in 1935 on the occasion of a presentation to it of Fuller’s portrait:

A temporary but widespread and vehement objection to the consumption of cigarettes, which found expression in statutes passed in several states to prohibit their sale, carried him into many courts throughout the country in cases that involved the constitutional boundary between the police power of the state and the exclusive power of the federal government to regulate interstate commerce.

Tantalizing Data on Cigarette Sales for Des Moines Compared with Other Fragmentary City- and State-Level Data

The total number of male persons in the United States between the ages of 18 and 44 were returned by the last census [1890] as 13,230,000; but adding those above 44...and making allowance for the increase in population since 1890, it is safe to say that there are 18,000,000 men and boys of “smoking age” in the United States, and this would give an average of 200 cigarettes for each man and boy in the republic every year, provided, of course, that cigarette smoking was general instead of being, as it is, restricted to a very

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33“W.W. Fuller Dead; Retired Attorney,” NYT, Aug. 24, 1934 (15); “W.W. Fuller Left $2,150,667 Estate,” NYT, Sept. 1, 1937 (17).
36By-Paths: A Collection of Occasional Writings of Williamson W. Fuller (1926).
small fraction of the whole population, mostly in the cities and large towns.\textsuperscript{38}

It would seem that there is in every male human being an inborn desire to smoke something, a desire that in most of us manifests itself at a very tender age. \textsuperscript{[T]}here is not an authentic case on record where rational smoking injured anyone.\textsuperscript{39}

Fuller may not have visited Des Moines merely to read legal documents. As a fascinating article in the Iowa press later in July revealed, the Tobacco Trust had also been canvassing Des Moines for a candidate to contest the validity of the new statute. That prospect was German-born Frederick W. Youngerman, a wholesale and retail cigar and tobacco merchant in Des Moines.\textsuperscript{40} The article is of especial interest not only for the light it shed on how ATC may have sought to induce tobacco dealers to spend time in jail for the Trust’s benefit, but also because it contained unique fragmentary and tantalizing data on cigarette sales in Iowa.\textsuperscript{41}

\textsuperscript{38}“The Billions of Cigarettes Used,” \textit{Call} (San Francisco), June 7, 1896 (24:7).


\textsuperscript{40}R. L. Polk and Co.’s \textit{Des Moines City Directory: 1895}, at 629 (1895). He was returned as a cigar manufacturer at the 1900 population census. 1900 Census of Population, Series T 623, Roll 453, Page 184 (HeritageQuest). His first name was revealed in 1920 Census of Population, Series T625, Roll 507, Page 123 (HeritageQuest). His advertising could be found on the front page of the \textit{Iowa State Register} next to the banner proclaiming, in a black-bordered box: “F. W. Youngerman. The most popular Cigar Manufacturer in the West. It is his cigars that done it.” \textit{ISR}, Nov. 21, 1900 (1).

\textsuperscript{41}“There appear to be no extant local or state-level data on cigarette sales for Iowa or anywhere else in the United States before Iowa’s imposition of a tax in 1921. After 1895 all sales of all the branches of the American Tobacco Company were made through the central selling department at ATC’s central office at 111 Fifth Avenue in New York City, which was “so organized as to secure a high degree of efficiency.” \textit{Report of the Commissioner of Corporations on the Tobacco Industry}, Part I: \textit{Position of the Tobacco Combination in the Industry} 257 (1909). ATC devised a tracking system under which it put a number on every package of cigarettes and assigned a number to each consignee (which at least on “some of the principal brands”) was also put on each package “so that if we find them in any part of the country we know whom we consigned the goods to and if there is anything wrong with them...we know who it was that got them and who is responsible.” Although James B. Duke denied that the company could trace each package from the time it left the factory until it got to the consumer, George Whelan, a competitor who had sued ATC, testified that ATC was able to trace the purchase of cigarettes, for example, to Cleveland through the consignee or jobber number. \textit{Report and Proceedings}
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

A short time ago the agent of the cigarette trust, a man named Fisk[,] was in Des Moines trying to get up a case to test the constitutionality of the cigarette law, says the Capital. He was very anxious to get F. W. Youngerman into the scheme and told him it would be a great advertisement for him. Mr. Youngerman replied that he did not want any of that kind of advertising. “Ninety-five per cent of the people of the state are against the cigarette, and I am, too,” he said, “and am willing they should stay away. The retail trade is not worth anything anyway. The manufacturers make all the profit. The agent of the trust complained that Des Moines was a poor cigarette town, and that Iowa was hardly worth fighting for; he wasn’t sure they would make a fight for it. He said that a city the size of Des Moines in the east would sell twice as many cigarettes as we do here. That would be enormous, for I think it safe to say that 500,000 cigarettes are sold every month in Des Moines during the cigarette season, the summer months.” Think of it! Half a million cigarettes a month, and that regarded as only half what the more civilized east would consume! The cigarette trust is one of the most powerful and profitable in existence. The cigarettes are made by machinery, some machines making 500,000 a day. The dealers pay $4.15 per thousand for them, and then in six months they get a rebate of 35 cents per thousand. This rebate is kept back six months as security against the violation of the agreement that they will not sell below a certain price.42
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

To provide some sense of the comparison of scale in relation to Des Moines, fragmentary figures, adventitiously mentioned in newspapers, on roughly contemporaneous sales by dealers in the larger cities of Baltimore (about 8.7 times larger in 1890), Philadelphia (21 times larger in 1890), Kansas City, Missouri (about 2.6 times larger in 1894), Boston (about nine times larger in 1895) and Chicago (about 26 times larger in 1898) may be analyzed.\(^4^\) In connection with a bill that the Maryland legislature passed in 1890 requiring cigarette sellers to pay $50 for a license, the press reported that in the previous year 70 million had been sold in the state, almost 50 million of them in Baltimore.\(^5^\) The ratio of Baltimore’s population to Des Moines’ was almost exactly the same as the ratios of their cigarette sales. The stray mention in 1891 in a San Francisco newspaper that a “Philadelphia capitalist says that 35,000,000 cigarettes were consumed in that city last year”\(^6^\) generates what seems to be an outlier—a city 2.4 times as populous as Baltimore buying only 70 percent as many cigarettes. In order to gauge the impact of a proposed bill, pending in the

\(^{43}\)In 1893, without mentioning any source, let alone numbers, the Los Angeles Times claimed that: “Statistics show that San Francisco ranks third on the list of cities in the United States in the consumption of cigarettes.” “The Deadly Cigarette,” LAT, Sept. 4, 1893 (4) (edit.). The following year the Washington Post quoted the owner of one large cigar store in Washington, D.C. as asserting that he alone sold 125,000 cigarettes a week, but leaving it up to the newspaper to figure out how many the 300 other cigar stores and host of drug stores sold. “Estimating a Bad Habit,” RMN, Dec. 9, 1894 (18:4) (reprinted from Washington Post). A very early estimate of local consumption stemmed from yet another tobacco dealer whose back-of-the-envelope calculation of sales amounted to 150,000 cigarettes smoked monthly in Milwaukee. “Cigarettes,” Sentinel (Milwaukee), Jan. 7, 1883 (6:2). The annualized consumption of 1.8 million for 1882 would have created a good statistical fit inasmuch as it would have amounted to 0.3 percent of total production of 599 million, while the city’s population was about 0.25 percent of total U.S. population. U.S. Bureau of the Census, Historical Census of the United States: Colonial Times to 1970, Part 1, Ser. A 6-8, at 8 (Bicentennial ed. 1975); Campbell Gibson, “Population of the 100 Largest Cities and Other Urban Places in the United States, 1790: 1990,” (U.S. Bureau of the Census, Population Division Working Paper No. 27, June 1998), on http://www.census.gov/popest/; Arthur F. Burns, Production Trends in the United States Since 1870, tab. 44 at 298 (1934).


\(^{45}\)“The Cigarette Law in Maryland,” DP, Apr. 26, 1890 (3:3) (reprinted from Baltimore Sun).

Missouri legislature in 1895, to prohibit cigarettes sales to minors, a Kansas City newspaper calculated, based on information from various large wholesalers and retailers, that 900,000 cigarettes were “burned” in that city every week or 46,800,000 annually. The number of males 16 years of age and older residing in Kansas City in 1894 was about 58,322, whose per capita consumption, had they all smoked cigarettes, would have been about 15 per week or 802 per year. However, since only a very small proportion of males did smoke them at that time, per capita consumption by those cigarette smokers would have approximated that of a much later period. In any event, monthly sales there would have been about 3,900,000 or 7.8 times as many as in Des Moines and three times as many per male 16 and over. If the underlying sales data for both cities were reliable, then either consumption was in fact much lower in Des Moines, or Kansas City served a market encompassing a considerable population resident outside the city limits, or minors consumed more than the one-fifth to one-third estimated by sellers.

In 1895 the Boston Globe reported that:

One of the largest dealers in Boston sells 1,000,000 [cigarettes] each week, there are three more that sell 500,000 each, five that dispose of 100,000 each, and two that sell 250,000 per week. This makes a grand total of 3,500,000 sold each week by these 11 dealers.

Naturally not all of these are sold in Boston, but the greater part of them are sold in

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48Calculated according to data in U.S. Census Office, *Report on the Population of the United States at the Eleventh Census: 1890*, Part 2, tab. 8 at 122 (1897); U.S. Census Office, *Census Reports*, Vol. II: *Twelfth Census of the United States, Taken in the Year 1900, Population*, Part II, tab. 9 at 133 (1902). Males aged 15 were assumed to make up 20 percent of the population aged 15-19; the figure for 1894 was linearly interpolated from the population for 1890 and 1900.

49In 1888, when cigarette production amounted to about half of output in the mid-1890s, a newspaper, based on interviews with dealers, estimated that 40,000 people or one-fifth of Milwaukee’s whole population smoked cigarettes and that 16-22 year-olds, whose average daily consumption was 20 cigarettes, bought the most cigarettes. “Smoked by Many,” *MS*, June 10, 1888 (11:3). Such a global prevalence rate appears to be wildly implausible, especially since the article did not purport to have any aggregate sales data.

50If 10 percent of adult males smoked cigarettes, then those 5,832 men would have consumed 154 cigarettes per week or 22 per day.

51Wholesale grocers handling 100,000 to 150,000 cigarettes per week stated that their sales were principally made out of town. “Many Cigarettes Smoked,” *Kansas City Daily Journal*, Feb. 3, 1895 (3:1).
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

towns close by and are undoubtedly smoked by people who are employed in the city.
This would make every year the sum sold reach 182,000,000, which would give every individual in the city of Boston one cigarette each day in the year and still have a reserve fund.52

Thus according to these figures, alone one store in Boston was selling eight times as many cigarettes weekly than were sold in all of Des Moines (125,000); the 11 stores combined sold 28 times as many cigarettes. Similarly, a single drug store on State Street in Chicago was selling half a million cigarettes a month in 1898.53

Finally, a press report about sales in a city smaller than Des Moines raised more questions than it answered. In 1891 the Chicago Inter Ocean published the following brief piece, which then ran unchanged or abbreviated in numerous papers throughout the country. Significantly, unlike the other articles about other places, it was the only one that purported to be based not on information provided by local sellers, but on national producers with a national overview:

Cigarette manufacturers say there are more cigarettes sold in Texas than in any two other States in the Union. In San Antonio one retail firm alone has a standing order for 100,000 cigarettes a week, and this is frequently doubled. Fifteen hundred thousand cigarettes of one brand alone are sold in San Antonio every month in the year, and the total sales of cigarettes amount to about 2,000,000 a month. The cigarette smoking of the Mexicans in the city is not included in this estimate because they buy tobacco and paper and make their own cigarettes.54

Though intriguing, these figures are highly implausible. To begin with, since alone in absolute numbers, the population of Texas in 1890 was less than 20

52。“Good Stories for All: Cigarettes by the Million,” Boston Globe, July 20, 1895 (8). This article was reprinted without indication of date of original publication, in Ninth Biennial Report of the Board of Health of the State of Iowa for the Fiscal Period Ending June 30, 1897, at 305 (1897).
53。“Windy City,” CREG, Aug. 16, 1898 (5:3-4 at 4). The store sold 25,000 five-cent boxes (of 10 cigarettes) every two weeks.
54。“The Cigarette in Texas,” Sunday Inter Ocean, Sept. 27, 1891 (15:1). The identical text ran as “Cigarettes in Texas,” CT, Oct. 15, 1891 (5). Abbreviated versions ran, for example, as “Personal and General Notes,” DP, Oct. 5, 1891 (4:5); “Multiple News Items,” SPDN, Oct. 28, 1891 (2:1). The version that ran as “People Who Smoke Cigarettes,” Waterloo Daily Courier, Oct. 20, 1891 (1:5), identified the New York Sun as the source.
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

percent of that of the two most populous states, New York and Pennsylvania,\textsuperscript{55} it is unclear why per capita sales would have been more than five times greater in Texas than in those states. This improbability is reinforced by the fact that while contemporaries stressed that cigarette smoking was largely an urban phenomenon, the urban proportion of population (defined as living in places with a population of 2,500 or more) in Texas was only 16 percent compared to 47 percent and 65 percent in Pennsylvania and New York, respectively;\textsuperscript{56} moreover, whereas 26.5 percent Pennsylvania’s population and 45.2 percent of New York’s lived in cities of more than 100,000, no Texas city even approached that marker.\textsuperscript{57} The population of San Antonio, the state’s second largest city, was only 37,673 (and almost as large as Dallas’s at 38,067).\textsuperscript{58} ‘Thus a population only 75 percent as large as Des Moines’ purportedly bought more than four times as many cigarettes—a ratio that must have been significantly higher since San Antonio’s considerable Mexican population was excluded from consumers of manufactured cigarettes.\textsuperscript{59}

A somewhat different perspective is offered by Washington State in 1892, where, according to a member of the state House of Representatives—a wholesale tobacco dealer who sold 10 percent of all the cigarettes in the state and divulged this information during a debate in 1893 leading to the enactment of the country’s first state general ban on selling cigarettes—over 40 million cigarettes were sold.\textsuperscript{60} The newly admitted state’s sparse and largely rural population in 1892

\begin{footnotesize}
\begin{enumerate}
\item "Anti-Cigarette Bill,” \textit{SP-I}, Feb. 17, 1893 (1:7, at 2:1). See above ch. 4. Of the 40,000,000 Tacoma accounted for 10,000,000. “Rejoicing in Tacoma,” \textit{MO}, Mar. 3, 1893 (3:4). In 1890, Tacoma’s population of 36,000 accounted for a little more than one-tenth of the state’s population of 349,000. Department of the Interior, Census Office,
\end{enumerate}
\end{footnotesize}
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

accounted for about 0.6 of the national population, while the state’s share of the total number of cigarettes produced nationally and not exported was about twice as high. Per capita sales in Washington for the entire population was 103 compared to 48 for the population nationally.\footnote{\(61\)}

The population of Des Moines rose from 50,093 in 1890\footnote{\(62\)} to 62,139 in 1900,\footnote{\(63\)} and was, by linear interpolation, 56,116 in 1895; the comparable figures for Iowa were 1,912,297, 2,231,853, and 2,072,075, respectively.\footnote{\(64\)} Thus at mid-decade Des Moines accounted for about 2.7 percent of Iowa’s population, which in turn represented about 3.0 percent of total U.S. population (69,850,000),\footnote{\(65\)} of which Des Moines accounted for 0.08 percent. In fiscal year 1896 (which ran from July 1, 1895 to June 30, 1896, and corresponded most closely to the figures that Fisk and Youngerman had) about four billion cigarettes were manufactured in the United States (exclusive of 628 million that were exported).\footnote{\(66\)} Although, unfortunately, the number of cigarettes sold in Des Moines during the non-summer months is unknown, annual sales had to have been below 6,000,000; at 6,000,000, Des Moines would have accounted for 0.15 percent of total national

\begin{itemize}
  \item \textit{U.S. Bureau of the Census, Historical Census of the United States: Colonial Times to 1970}, Part 1, Ser. A 6-8 at 8, A 195-209, at 36 (Bicentennial ed. 1975) (linear interpolation of about 400,000); \textit{Report of the Commissioner of Internal Revenue for the Fiscal year Ended June 30, 1893}, at 27, 30 (H. Ex. Doc. No. 4, 53d Cong., 2d Sess. 1893) (3,176,693,700 cigarettes taxed in fiscal year 1892-93 (excluding exports) and 3,282,001,283 cigarettes manufactured in calendar year 1892 (presumably including exports)).
  A Tacoma jobber estimated that 10,000,000 cigarettes were sold weekly in Washington. “To Dodge the New Law,” \textit{TDL}, Apr. 14, 1893 (2:1).
  The wildly inflated figure would have generated a totally absurd per capita annual average of 1,337 and meant that Washington State had accounted for 16 percent of all cigarettes in the United States.
  In 1894, 60,000,000 (or 50 percent more) cigarettes were sold in Colorado, whose population was about 15 percent higher than Washington’s in 1892. See above ch. 6.
  \item \textit{U.S. Census Office, Census Reports: Vol. II: Twelfth Census of the United States, Taken in the Year 1900, Population}, Part II, tab. 9 at 128 (1902).
  \item \textit{Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1896}, at 34 (H. Doc. No. 11, 54th Cong., 2d Sess., 1896). Imports were negligible.
\end{itemize}
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

sales, while at half that consumption (3,000,000), Des Moines’ share of the total would have been 0.075 percent, or almost exactly the same as Des Moines’ share of total national population. If cigarette sales in similarly-sized towns in the East were twice as great, and Des Moines’ per capita annual consumption was about average for the whole country (53 and 57 respectively), then presumably per capita consumption in rural areas was much lower than average. Under these circumstances largely rural Iowa would have accounted for an even smaller proportion of total national sales than its population bore to total national population (3 percent). This small market sliver might make plausible the claim by Fisk, the Tobacco Trust’s agent, that “Iowa was hardly worth fighting for....” Yet, in fact ATC did fight for Iowa, and rather vigorously, expending considerable legal resources. Presumably, then, that fight was not so much over current sales in a rural state—though rural, Iowa’s population was not small: in 1900 it was the tenth largest state—but over the principle of fending off all legal restrictions on cigarette sales, which could spread to other, larger markets, in addition to curtailing sales in states such as Iowa where prevalence rates and per capita consumption might increase in the future. In any event, the systematic and nationally centralized struggle that ATC did conduct in Iowa and elsewhere belies later authors’ view that such laws were feckless jokes, which were never enforced and had no impact on sales. That the Trust would have devoted such concerted attention to defeating, preempting, preventing, invalidating, and repealing legislation bereft of any practical commercial effect on its sales or profits would have been profoundly counterintuitive.

If only males 15 and older bought cigarettes in Des Moines, then those approximately 20,105 people bought on average only about 25 cigarettes a month in the cigarette season or less than one a day. If like-aged women are added, these 40,577 people bought on average only 12 cigarettes a month; and if

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69Males in Des Moines 15 and older numbered 22,263 in 1900; assuming that the age structure did not change and that their population in 1895 bore the same ratio to their counterparts in 1900 that underlay the linear interpolation used above, they numbered 20,105 in 1895. U.S. Census Office, *Census Reports: Vol. II: Twelfth Census of the United States, Taken in the Year 1900, Population*, Part II, tab. 9 at 128 (1902).
The cohort born between 1890 and 1894 reached 4.45 percent in 1917, at which time the earliest birth cohort surveyed (1885-89), recorded a prevalence of 3.82 percent. Because the National Health Interview Survey did not begin to be conducted until 1964, the prevalence rates are subject to error resulting both from faulty memory of events that had taken place as many as 75 years earlier and from the fact that a higher proportion of smokers than nonsmokers in the early cohorts had presumably died. In the birth cohort over the age of 65 in 1955 and thus born before 1890, 4 percent of males began smoking before the age of 15 and 13 percent before the age of 18, while fewer than 0.5 percent of the females began smoking before 18. William Haenszel, Michael Shimkin, and Herman Miller, Tobacco Smoking Patterns in the United States, App. III, tab. 1, at 56 (U.S. Department of Health, Education, and Welfare, Public Health Monograph No. 45, 1957); John Pierce and Elizabeth Gilpin, “A Historical Analysis of Tobacco Marketing and the Uptake of Smoking by Youth in the United States: 1890-1977, Health Psychology 14(6):500-508 at 501-502 (1995).

70The cohort born between 1890 and 1894 reached 4.45 percent in 1917, at which time the earliest birth cohort surveyed (1885-89), recorded a prevalence of 3.82 percent. National Cancer Institute, Changes in Cigarette-Related Disease Risks and Their Implication for Prevention and Control, App. tab. 14 at 86 (1997). Because the National Health Interview Survey did not begin to be conducted until 1964, the prevalence rates are subject to error resulting both from faulty memory of events that had taken place as many as 75 years earlier and from the fact that a higher proportion of smokers than nonsmokers in the early cohorts had presumably died. In the birth cohort over the age of 65 in 1955 and thus born before 1890, 4 percent of males began smoking before the age of 15 and 13 percent before the age of 18, while fewer than 0.5 percent of the females began smoking before 18. William Haenszel, Michael Shimkin, and Herman Miller, Tobacco Smoking Patterns in the United States, App. III, tab. 1, at 56 (U.S. Department of Health, Education, and Welfare, Public Health Monograph No. 45, 1957); John Pierce and Elizabeth Gilpin, “A Historical Analysis of Tobacco Marketing and the Uptake of Smoking by Youth in the United States: 1890-1977, Health Psychology 14(6):500-508 at 501-502 (1995).

71The earliest National Health Interview Survey birth cohort of white males (1885-89) recorded a current smoking prevalence rate of 9.96 percent in 1901 and 8.85 percent in its thirteenth year. To be sure, once this cohort reached its 20s, its smoking prevalence rose sharply toward one-half, but this level was not reached until shortly before U.S. entry into World War I. The National Cancer Institute, Changes in Cigarette-Related Disease Risks and Their Implication for Prevention and Control, App. tab. 13 at 81, tab. 9 at 69 (1997). Although older cohorts born before 1885 (and not surveyed in the 1960s) may well have had higher cigarette smoking prevalence rates than adolescents already by the mid-1890s, they may, since cigarette smoking was still in an exploratory phase, not have been significantly higher; moreover, the higher the adult males’ prevalence rates, the lower and hence less plausible the per capita consumption.
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

The Tobacco Trust’s Litigation Strategy: Relying on Recently Choreographed Litigation in Washington State, West Virginia, and Montana and the Original Package Doctrine

Attorney General Remley returned this morning from St. Paul, and he reports that the anti-cigarette law and its foes had a one-round fight at St. Paul yesterday, and the little “dude-killers” won.72

The press revealed that the Tobacco Trust would contend that “an ordinary 5-cent package of cigarettes is an original package,” prohibition of the sale of which would unconstitutionally interfere with interstate commerce. The American Tobacco Company’s hope apparently lay in the perception that the Iowa Supreme Court had “gone further than any other court in the country in the direction of original packages” because it had ruled that a bottle of beer shipped into Iowa in a case or barrel was still an original package after it had been removed from that case or barrel; consequently, if its sale could not be prohibited, sale of a package of cigarettes would “probably” also be constitutionally protected. Attorney General Remley, according to the Evening Gazette, “says that if he is called on to argue the case he will plainly say that the court must recede from the former decision or this law will be invalidated.”73

Already on July 10 Fuller had set the machinery in motion to test the law’s constitutionality. That day Donald C. McGregor,74 a “leading tobacconist” of Cedar Rapids75 with the wholesale tobacco company of McGregor and Sailor, who had been selling cigarettes there for many years,76 was arrested and charged with having violated the week-old cigarette law. McGregor, who was arraigned but made no defense, “was accompanied by W. W. Fuller of New York, counsel for the American Tobacco Company, otherwise known as the tobacco trust.”77 McGregor pleaded guilty and was fined $25 and assessed court costs of $4 on two separate counts by Linn County justice of the peace Julius Rall, who committed

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72“Cigarets Win,” ICWR, July 29, 1896 (8:3).
73“Will Fight the Law,” CREG, July 8, 1896 (2:3).
74McGregor appears not to have appeared in the 1900 population census, but was listed in the 1896 city directory. The Cedar Rapids Evening Gazette’s City Directory of Cedar Rapids, Marion and Kenwood 202 (Dec. 1896).
76Appellant’s Abstract of Record: Petition for a Writ of Habeas Corpus at 3, McGregor v. Cone, 104 Iowa 465 (1898).
him to county jail for seven days for failure to pay the fine. The deputy sheriff who filed the information against McGregor signed it at Fuller’s request. The fines were not paid and although the tobacco trust did not initially announce its line of defense, the Evening Gazette speculated that a writ of habeas corpus would be probable as the quicker method of securing a decision:

Mr. Fuller came here with the expectation of finding a court in session which would have jurisdiction in the matter, but the superior court which he had in mind, has nothing to do with criminal actions. If the cases are appealed they cannot be reached in the district court before next term, which will be held in October.

Fuller, representing “the cigarette interest,” immediately applied for a writ of habeas corpus in federal court in St. Paul, Minnesota.

In seeking the writ on one count in state superior court in Cedar Rapids and the other in federal court in St. Paul, Fuller and the Tobacco Trust were pursuing the same legal strategy that they had seemingly successfully implemented in 1893 against Washington State’s sales ban and in 1895-96 against West Virginia’s $500 annual cigarette sales license law (but unsuccessfully in 1897 against Montana’s 1895 $10 monthly license law). In particular in Washington State ATC had developed an elaborate panoply of stage directions to simulate compliance with the federal judiciary’s antiquated conception of the so-called original package, state interference with the sale of which would trigger a finding of contravention of the federal Constitution’s commerce clause. However, close scrutiny of the Washington case reveals that jurisprudentially the Tobacco Trust failed to attain its objective, although the legislature soon repealed the law.

**Washington State**

Whatever the Tobacco Trust’s shortcomings as lobbyist in Washington in

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877
1893, it was willed to rid itself of the statute after the fact and immediately “opened its batteries on the Roscoe act.”

Many of the state’s leading wholesale and retail dealers may have been reducing their stocks and preparing for compliance—in Pullman, for example, local dealers not only all signified their intention of living up to the act’s requirements, but “each one commend[ed] the law”—but the “cigarette trust..., which has no desire to see so large a market for its wares suddenly shut off, will not rest quietly.” On June 5, four days before the law’s effective date, when “a big branch of the tobacco business will be to a great extent destroyed” unless it was contested and held unconstitutional, a Tacoma newspaper reported that George Burbank, probably that city’s largest dealer, had informed it that whereas many other dealers had disposed of their stock, he still had 25,000 cigarettes. He then went on to administer a lesson in the kind of blind obedience on which the Tobacco Trust must, to some extent, have relied to maintain its monopoly at the retail level by fracturing economically dissatisfied dealers’ united front by availing itself of individual retailers who, for whatever reasons, were not forced to carry cigarettes as loss leaders or a customer accommodation, but actually profited from their sale:

“I have been expecting an order from the American Tobacco company of New York city which practically controls the cigarette business of the country and has a capital stock of $5,000,000, to continue the sale after the law takes effect. If the order comes I shall continue to sell and if arrested will take the case to the supreme court. I would not undertake it alone, and as the city dealers do not favor combining to test the law, nothing will be done except upon the New York company’s order. The papers for a contest are prepared and it will take but a short time to decide the matter. The original package will be the point of contest. The law will be tested by Seattle dealers if not here, and we expect there will be little trouble in having the law declared unconstitutional. Many of the dealers are glad that the law was passed, but my profits are about $100 a month. The effect of the law will be to send large amounts of money to Portland and other cities on the state’s borders and if a law to prevent the sale to boys were enforced it would be much better than the present one. The only good effect of the bill will be stop the sale to the younger boys,

84On passage of the Washington State law, see above ch. 4.
86MO, June 7, 1893 (4:3) (untitled). Contrary to all previous press reports, three days later the same newspaper asserted: “There is no doubt that an effort will be made by the wholesalers to break down the law.” “In the Two States,” MO, June 10, 1893 (6:1). The article went on to confirm that “retail dealers generally show a disposition to obey the new law.”
87“No More Cigarettes,” Pullman Herald, June 9, 1893 (2:1) (edit.).
88“The Law May Be Tested,” TDL, June 5, 1893 (4:3).
and I think this could be done without total exclusion.”  

Two days later, ATC leaked to the press its plan to bring a “test case” that day in which “every artifice of legal learning will be used to have it declared unconstitutional.”  Indeed, a preview of virtually the entire legal choreography was placed in the public domain:

Arrangements have been completed, presumably at Vancouver, by which a local retail dealer, at the instigation of a wholesale house, will violate the law. The manner of procedure will be a writ of habeas corpus from the judgment of the lower court to the United States court. The point to be raised is that it is a violation of the interstate commerce act [sic] prohibiting the sale of cigarettes in original packages. The intention is to have the court say what an original package is. A description of a package intended to be sold will be furnished. Information will be prepared in the superior court from such description and as soon as the law goes into effect sales will be made and arrests will follow. Probably conviction will be secured in the superior court, resulting in commitments to jail. From that information a writ will be brought to the United States court at Tacoma. Anticipating such a test of the law, Assistant Attorney General Haight today expressed opinion [sic] that the law is constitutional.

According to plan, on that date, the sheriff of Clarke County, pursuant to a warrant of commitment issued by a superior court judge, arrested 33-year-old M[artin]. L. Coovert, a retail tobacco dealer in Vancouver, Washington, where his brother practiced law, on “eight different charges, covering all the points

90. MO, June 7, 1893 (4:3) (untitled). The WCTU also reported that: “Representatives of the American Tobacco Trust maintain that the law does not prevent the sale of cigarettes in this state in original packages, and so there will be an effort made to evade it. Retailers will be urged to continue the sale.” Etta Jones, “Western Washington,” Union Signal and World’s White Ribbon 19(24):11 (June 15, 1893).
92. Coovert was apparently a person of some means, owning race horses and being a partner in a race track. “Will Not Conflict,” MO, Jan. 28, 1892 (8:1); “City News In Brief,” MO, Apr. 23, 1892 (5:1). At the Population Census of 1900 Coover was returned as a 40-year-old living in Vancouver doing watch repairs. At the 1880 census he appeared as an artist and in 1920 an optician, when his first name was finally used. As early as 1887 Coover was a watch maker and in 1890 was, according to Portland, Oregon directories, a jeweler in Vancouver. http://boards.ancestry.com/thread.aspx?mv=flat&m=1230&p=localities.northam.usa.states.oregon.counties.polk (visited Dec. 16, 2009).
93. "The Anti-Cigarette Law,” VC, June 16, 1893(4:3). Every week for an extended period of time E. E. Coover published an advertisement on the front page of a local
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

which may arise in the enforcement of the anti-cigarette law.”94 Because the defense offered no evidence, Coovert was found guilty of each offense;95 when he failed to give the $250 bail96—Coover’s lawyer “Mr. Woods [sic] gave notice that the defendant would give no bail but would appeal to the Federal Court at Tacoma for a write of Habeas Corpus”97 because ATC’s constitutional litigation strategy required imprisonment in order to trigger federal habeas corpus proceedings—the court commanded the sheriff to receive Coovert into his custody.98 A local Vancouver weekly sought (with only partial success) to evaluate the Trust’s plan of judicial attack:

A number of cigarettes were shipped to...Coovert...in various sized packages done up in various styles, some in the manner that cigarettes are usually shipped, others in plain pasteboard boxes, and others in an ordinary shipping case with no wrapping around them, the object, the object of this to make the courts decide which is an original package....

... If the motion is lost the case will be immediately appealed to the Supreme Court of the United States, and as Mr. Woods [sic] has already taken steps to have it heard there as soon as possible it would seem he has little faith in the motion. The Tobacco Co. will not rest until they can get a decision of the Supreme Court in their favor, as they say without that the retailers will not handle their goods.

There is hardly a possibility but that the Supreme Court will declare at least one of the packages as sold by Mr. Coover an original package so the evil will only be remedied in as much that [sic] it will take a little more capital to lay in a supply.99

The following day, June 10, C. E. S. Wood of the Portland, Oregon law firm of Williams & Wood, filed a petition with the U.S. Circuit Court for the District of Washington for eight writs of habeas corpus requiring the sheriff to produce

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95: “The Cigarette Cases,””VI, June 14, 1893 (2:1).
97: “The Cigarette Cases,””VI, June 14, 1893 (2:1).
99: “The Cigarette Cases,””VI, June 14, 1893 (2:1). The newspaper failed to understand that the original package doctrine referred to the relationship between the package sold and the package shipped. Two days later, after hearing the prosecutor’s analysis, the paper understood more. “The Anti-Cigarette Law,””VC, June 16, 1893(4:3).
Coover in federal court in Seattle.\textsuperscript{100} This first lawyer ever to represent a cigarette-selling nominal client\textsuperscript{101} on behalf of the Tobacco Trust—seeing through this subterfuge, the \textit{Tacoma Daily Ledger} correctly reported that Wood “represents the American Tobacco company,” which “controls nearly the entire cigarette output in the country”\textsuperscript{102}—in its challenge to the first statewide cigarette sales ban was, ironically, not only the son of the first surgeon general of the U.S. Navy, but also a corporation lawyer and land agent for Lazard Freres, who defended the likes of Emma Goldman, Margaret Sanger, and the Wobblies,\textsuperscript{103} though he did not turn to a radical political legal practice until after the turn of the century.\textsuperscript{104} Before he became a lawyer, this West Point graduate (his oldest by the time of World War II)\textsuperscript{105} had become a dissident anti-imperialist as a result of his participation in the Army’s Nez Perce campaign in 1877 and his acquaintance with the tribe’s chief, Joseph.\textsuperscript{106} Later, however, Charles Erskine Scott Wood

\textsuperscript{100}[Petition for writ of habeas corpus] at 2-3 (June 10, 1893), in Transcript of Record, Supreme Court of the United States, Oct. Term, 1893, No. 1175, State of Washington v Coover, 164 US 702 (1896).

\textsuperscript{101}Perhaps Wood used the occasion of a Decoration day speech he gave in Vancouver shortly before filing suit to meet with his client. “Eloquent Address,” \textit{Sunday Oregonian} (Portland), June 4, 1893 (20:1-2).

\textsuperscript{102}“Will Test the Law,” \textit{TDL}, June 13, 1893 (8:3).


\textsuperscript{105}Assembly 1(3): 7 (1942).

\textsuperscript{106}\textit{History of the Bench and Bar of Oregon} 250 (1910); Edwin Bingham, \textit{Charles Erskine Scott Wood} 7-9 (1990); Robert Hamburger, \textit{Two Rooms: The Life of Charles Erskine Scott Wood} (1998); telephone interview with Robert Hamburger, New York City (Dec. 19, 2009). Although he supposedly had already been admitted to the bar of
Washington Territory in 1879, four years later he received degrees in law and political science from Columbia University. History of the Bench and Bar of Oregon 250 (1910). After having received in 1918 a million-dollar commission for the sale of a wagon-road grant to James J. Hill’s son, Wood retired, left his wife and Portland for a life of poetry with a poet. Id.

Erskine Wood, Life of Charles Erskine Scott Wood 93 (1991) (quote). According to his son, while calling himself an anarchist for the “shock” value, Wood was in fact a “philosophical anarchist like Prince Kropotkin” and believed, like Jefferson, that “that government is best which governs least.” Id. “The real meaning of the word [philosophical] anarchist,” according to Wood, “is one who believes that the ideal form of society is that in which self-interest, guided by intelligence, is the basis of action rather than a law made by a few, or a majority, and enforced upon all. For example, the anarchist would disbelieve in an enforced tax in order that the children of some might have collegiate educations in high schools and universities.” C. E. S. Wood, “Anarchy and Anarchists,” in Pacific Monthly (Feb. 1904), reprinted in Edwin Bingham and Tim Barnes, Wood Works: The Life and Writings of Charles Erskine Scott Wood 107-12 at 107 (1997). While opposed to government ownership, Wood supported socialism as “preparing the way for anarchism.” Similarly, although corporate privilege and monopoly made labor unions necessary, the “union is full of tyranny of its own—full of ignorance.... The whole thing is wrong. Out of one stupid injustice comes another.” C. E. S. Wood, [“Why Strikes?”], in Pacific Monthly (Oct. 1907), reprinted in Edwin Bingham and Tim Barnes, Wood Works: The Life and Writings of Charles Erskine Scott Wood 124-27 at 127 (1997).

C. E. S. Wood may have been the most influential cultural figure in Portland in the forty years surrounding the turn of the nineteenth century into the twentieth.” Tim Barnes, “C. E. S. Wood (1852-1944), Oregon Encyclopedia, on http://www.oregonencyclopedia.org/entry/view/c_e_s_wood/. See also E. Kimbark McColl, Merchants, Money and Power: The Portland Establishment, 1843-1913, at 313 (1988).

And one of his biographers identified the underlying drive of Wood’s service to capitalist clients:

Woods was combatively critical of the social and economic inequalities spawned by the so-called “Gilded Age”.... He despised what he called “feudalism” in all its forms: organized religion, monopolist enterprise, plutocratic government, militarism, imperialism, and the authoritarian silencing of dissident voices. ... But he also had a passion for good living.... All this cost money—far more than Wood earned. As a result, this eloquent critic of the status quo spent much of his adult life struggling to pay off sizable debts to the very banks and investment houses he criticized. Though he openly supported the forces of radical and progressive change, he earned his living in the service of some of the most powerful financial interests in America. ... Torn between irreconcilable pursuits, Wood maintained two offices. In one he conducted his legal practice, representing some of the most powerful business interests in the country. In the other, his private office, he met with radical labor leaders, anarchists, suffrage activists, and others who challenged fundamental aspects of the American system.110

The services that the rebel Wood performed for the Cigarette Trust quintessentially belonged to the lucrative luxury consumption-financing segment of his dichotomous law practice. That ATC chose this Oregon lawyer to represent it in Washington State litigation reflected the fact that, according to one of Wood’s biographers, based on his education (a Columbia University law degree), the legal services he performed for such entities as Lazard Freres and James J. Hill’s Great Northern Railroad, his social connections, and Portland’s commercial pre-eminence in the Northwest, he had become the “go-to” attorney for East Coast corporations in that region.111


111 Telephone interview with Robert Hamburger, New York City (Dec. 20, 2009). Wood had been counsel to Lazard Freres and Hill between 1884 and 1887 before he even joined Portland’s leading law firm. http://www.woodtatum.com/history/ceswood-2.html (visited Dec. 23, 2009). It remains, in light of the fact that Wood’s law firm threw out the files of Wood’s legal cases many decades ago and that none of the archives that hold his papers has relevant documents, a research desideratum to determine what role Wood played in devising ATC’s litigation strategy. Telephone interview with John Mercer, Wood Tatum Portland (Dec. 23, 2009); John Miller, former paralegal at Wood Tatum, Portland (Dec. 26, 2009); email from Peter Blodgett, curator of Western American History, Huntington Library (Aug. 27, 2010). The choice of an Oregon lawyer was all the more curious since ATC had a relationship with a corporate lawyer in Seattle, former New York Assembly Speaker Fremont Cole, who also successfully lobbied for the Trust for repeal of the Roscoe law in 1895. See above ch. 5.
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

The first habeas petition that Wood filed in Coovert’s name alleged that the dealer’s arrest and detention for having sold a package of Vanity Fair cigarettes, “being ten paper-wrapped cigarettes enclosed in a paste-board slide box,” was unlawful because the underlying law itself was unconstitutional on the grounds that it abridged the privileges and immunities clause of the 14th amendment and that “its effect is to prohibit and regulate commerce among the several States” in contravention of article 1, section 8. The Trust sought to reach this conclusion by means of the “original package” doctrine:

The said cigarettes were sold in Oregon to your petitioner by the American Tobacco Company, doing business in the State of New York, and said cigarettes were manufactured in New York and were not [sic] shipped to your petitioner in pasteboard boxes....

But the said package was, with one hundred and forty-nine other such packages, shipped by said American Tobacco Company from the State of Oregon, enclosed in a common pine shipping case, only being merely a packing case for the protection and safety of the goods in transportation, and that theretofore, to wit, April 6, 1893, the honorable the Commissioner of Revenue of the United States decided that such a package...containing a statutory quantity of cigarettes and properly stamped and cancelled and bearing the caution label and number of the manufacturing district and State and the number of cigarettes contained therein, was an original package as contemplated by United States law and regulations, and that the repacking of said packages in additional coverings of wood, paper, etc., was optional with the manufacturer.

Doubtless in contemplation of this very litigation, ATC, less than a month after the governor had approved the law, had, as part of its careful stage-management, submitted to the commissioner of Internal Revenue a sample package of cigarettes, “inquiring as to the necessity for a re-enclosing in an additional covering of paper, wood, or other material in placing the same upon the market.” To be sure, the Trust sought to confuse judicial decision-makers by

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113[Petition for writ of habeas corpus] (June 10, 1893), in Transcript of Record at 2-3, Supreme Court of the United States, Oct. Term, 1893, No. 1175, State of Washington v Coovert, 164 US 702 (1896). Wood and the county prosecuting attorney agreed to a stipulation on the dimensions of the pine box—namely, that it was 16” x 10” x 4”—and that Coovert had opened it before making the sale of the package of 10 cigarettes in question, which was not opened in Coovert’s store. Id. at 6 (June 22, 1893).

114Commissioner John W. Mason to American Tobacco Company (Apr. 6, 1893), Exhibit No. 5, in Transcript of Record, Supreme Court of the United States, Oct. Term, 1893, No. 1175, State of Washington v Coovert, 164 US 702 (1896). The language in
conflating the commissioner’s statutory use of “original package” with its unrelated meaning developed by U.S. Supreme Court precedents dealing with the congressional interstate commerce clause. The local press inferred “from the fact that the form of complaint has been printed...that similar action will be taken to defend all agents of the American Tobacco Company,” which manufactured the cigarettes in question.\footnote{Mason’s paraphrase of ATC’s letter of April 3, which was not included in the Transcript of Record. It is unclear whether ATC had prompted Mason’s reference to “original package” by using the term in its letter.}

The judge in charge of the federal habeas corpus proceeding was Republican\footnote{Republican Cornelius Holgate Hanford (1849-1926) of the U.S. Circuit Court for the District of Washington, who was also the only federal judge in the state for the first 15 years of statehood after having been the last chief justice of territorial Washington.} Cornelius Holgate Hanford (1849-1926) of the U.S. Circuit Court for the District of Washington, who was also the only federal judge in the state for the first 15 years of statehood after having been the last chief justice of territorial Washington.\footnote{Hanford had also been assistant U.S. attorney and Seattle city attorney.} His boast, in a publication that he himself edited, that the fact that denunciations by “newspapers and assemblages angered by his decisions” had never “detract[ed] from the esteem” in which “the business community” held him was a scrupulously correct admission against interest in contrast to the falsehood a few lines later that he had retired from his judgeship.\footnote{In fact, in 1912 he was impelled to resign in the midst of impeachment proceedings, which revealed just how corrupt his business relations were. The immediate trigger for Hanford’s forced departure was his cancellation of the naturalization certificate of Leonard Olsson, a Swedish immigrant who was a member of the Socialist Labor Party. Hanford claimed that Olsson had perpetrated a fraud on the federal court in order to secure citizenship because, although he knew that the Constitution forbade the deprivation of property without due process of law, the SLP “‘has for its main object the complete elimination of property rights in this country.’” From naturalization “‘[t]hose who believe in and propagate crude theories hostile to the Constitution are barred,’”}

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\footnotetext[117]{Seattle and Environs, 1852-1924, at 3: 396, 398 (C. H. Hanford ed. 1924). Hanford had also been assistant U.S. attorney and Seattle city attorney.}

\footnotetext[118]{Seattle and Environs, 1852-1924, at 3: 390 (C. H. Hanford ed. 1924). The fact that he was only 63 years old when he was forced to give up his position meant that he was “not entitled to retire on pay.” H. Rep. No. 1152: Report (To accompany H. Res. 576) in the Matter of Impeachment of Cornelius H. Hanford United States Circuit Judge for the Western District of Washington 12 (62d Cong., 2d Sess. 1912) (testimony of A. A. Nordskog).}
especially when their propaganda “is to create turmoil and end in chaos.” Victor Berger, the sole socialist in Congress, immediately advocated Hanford’s impeachment on the grounds of abusing the power of his office, but in offering a formal House resolution for impeachment three weeks later, in June 1912, Berger charged that in addition to being “an habitual drunkard,” Hanford had also issued “a long series of unlawful and corrupt decisions.” (Public outcry over Hanford, which culminated in mass meetings, calls for his impeachment, and his being hanged in effigy, had already erupted in 1911, when he issued an injunction, inimical to the position of the Seattle citizenry, fighting for a five-cent street-car fare.) Berger cited newspapers, monthly magazines, and public mass meetings as authority for the charge of “invariably rendering his decisions in favor of corporations and against the people. He is a disgrace to the bench and a parody on justice.” That very month a muckraking magazine called Hanford “the last resort of corporations distressed by legal necessities.” Berger was animated to press his claim by a letter from President Taft’s attorney general that he had “notified that United States attorney that upon the facts stated by Judge Hanford in his decisions, the department [of Justice] was of the opinion that a gross injustice had been done to Mr. Oleson [sic] in cancelling his certificate of

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119 “Judge Explains His Decree,” NYT, May 15, 1912 (3).
120 “Socialists to Fight Hanford’s Decision,” NYT, May 15, 1912 (3).
121 CR 48:7799 (June 7, 1912). Many of the charges against Hanford appear to have derived from a sworn affidavit by John H. Perry, a lawyer in Seattle admitted to practice in Hanford’s court, which was presented to the House of Representatives. In addition to charging that Hanford was a “grossly immoral and dissolute man,” a “libertine,” and a “moral bankrupt by night and a judicial pervert by day,” Perry alleged that Hanford had violated his judicial oath to “do equal right to the poor and to the rich” inasmuch as “he is a tool of corporate wealth and privilege seeking corporations, and looks with scorn and hatred upon the struggle of the great masses of mankind for better conditions and a more equitable distribution of this wealth which labor by its toil creates....” H. Rep. No. 1152: Report (To accompany H. Res. 576) in the Matter of Impeachment of Cornelius H. Hanford United States Circuit Judge for the Western District of Washington 1515, 1516, 1517, 1518 (May 22, 1912) (62d Cong., 2d Sess. 1912).
122 “Hanford Resigns; No Impeachment,” NYT, July 23, 1912 (18).
123 “Moves Impeachment of Judge Hanford,” NYT, June 8, 1912 (3). To be sure, Hanford’s conduct, in Berger’s account, did not deviate radically from that of federal judges at large, who were “generally considered by the people to be the last resort of the corporations and railroads and of all kinds of plutocratic evil-doers whenever they are in straits.”
naturalization.”

The Judiciary Committee report on Berger’s resolution recommended to the full House that the committee be directed to inquire and report whether House action was required concerning Hanford’s official misconduct “and say whether said judge has been in a drunken condition while presiding in court; ...has been guilty of corrupt conduct in office; whether the administration of said judge has resulted into injury and wrong to litigants in his court and others affected by his decisions; and whether said judge has been guilty of any misbehavior for which he should be impeached.”

In fact, a subcommittee traveled to Seattle, where it took testimony for three weeks, which filled more than 1,700 printed pages. The narrative of Hanford’s customary nocturnal bar crawls by a Burns detective who had shadowed him for weeks culminated in an account of the inebriated judge’s urinating on a public sidewalk in Seattle. More to the point was testimony by an official of the Northern Pacific Railroad, combined with Hanford’s correspondence on official court stationery, showing that the judge’s deal with the company to acquire large land tracts (for his Hanford Irrigation and Power Company) had “hung fire for a year, but was rapidly completed” after Hanford had issued a decision in a case considerably cutting the railroad’s tax liability. Other evidence showed that “Judge Hanford and his crowd” had

125“Seeks to Impeach Federal Judge,” CT, June 6, 1912 (1).


128On the company, see Clinton Snowden, History of Washington: The Rise and Progress of an American State 5:30 (1911). Since Hanford was an advisory editor of this volume, he presumably wrote or prepared the 27-page hagiographic entry on himself that opened it. Seattle and Environ, 1852-1924, at 3: 396, 398 (C. H. Hanford ed. 1924). Hanford, his three brothers, brother-in-law, “and a number of leading citizens of Seattle and Tacoma” organized the company “for utilizing the power of Priest Rapids in the Columbia river in generating hydro-electric power and for irrigating sagebrush land in that region. The corporation installed machinery and constructed a power plant..., a pumping station for elevating water from the river, an electric transmission line and ditches constituting an irrigation system, put those works in operation for service to land owners and located the town of Hanford.... The works endure, although the corporation passed into the hands of eastern capitalists who wrecked it.” Seattle and Environ, 1852-1924, at 3: 396 (C. H. Hanford ed. 1924).

129“Railroad Sold Judge Land,” NYT, July 22, 1912 (16).

130H. Rep. No. 1152: Report (To accompany H. Res. 576) in the Matter of
“successfully mulcted the school fund of the State by purchasing land worth $500 an acre for $10 an acre at a sale obscurely advertised and held without competing bids in a small town....”\textsuperscript{131} The press also revealed that “some Seattle attorneys and railroads were largely responsible for inducing”\textsuperscript{132} Hanford to submit his resignation (which Berger interpreted “as an admission of guilt”)\textsuperscript{133} and that “the threatened revelations by a newspaper editor of facts not favorable to Hanford were an accelerating factor.”\textsuperscript{134}

At the June 13 hearing before Judge Hanford, Wood—whom the local press without circumlocution reported as having instituted the action “on behalf of the American Tobacco company...for the purpose of testing the validity of the law”—argued that the five-cent, 10-cigarette package sold by the retailer to the customer was the manufacturer’s original package, the sale of which for that reason could not be abridged by state law, as had already been decided by “the Iowa liquor cases” holding that a bottle of beer was an original package. Venturing off into an entirely unrelated issue, Wood dwelt on the alleged ambiguity of the term “cigarette” in the law: because various dictionaries and Internal Revenue decisions defined a cigarette as a little cigar and it might be made entirely of tobacco, he contended that it would be “an unjust discrimination to say that a large cigar might be sold, and that exactly the same materials in the same form and different only in being smaller should not be sold.” In contrast, Clarke County prosecuting attorney C. D. Bowles contended that the manufacturer’s original package, as far as commerce was concerned and the only package in which it sold the goods, was the carton containing 50 such boxes.\textsuperscript{135} After having heard these arguments Judge Hanford granted the petition and issued eight writs of habeas corpus requiring the sheriff to produce Coovert in federal court in Seattle on June 22.\textsuperscript{136} Although, as the press observed, Hanford gave the

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anti-cigarette law a “black eye,” he did not pass on the merits of the case; instead, he granted the writs because doing so was the only way this important case could be reviewed by a higher court. 137 The proceedings, as the state attorney general later noted, had been “instituted for the purpose of securing an early decision” from the U.S. Supreme Court and Hanford had granted the writs “pro forma” in order to facilitate the process. 138 Editorially the Post-Intelligencer was persuaded that there was “little doubt” that the U.S. Supreme Court would rule against ATC’s contention that an individual package of cigarettes was an original package for purposes of interstate commerce and thus vindicate the bill. 139

From the perspective of The New York Times, the ruling’s legal soundness was a matter of indifference because this “kind of legislation” was in itself “ridiculous”:

The smoking of cigarettes may be objectionable, as are many other foolish practices, and it may be more injurious than other modes of smoking tobacco, but it is an evil which cannot be remedied by law, and it is not the kind of evil to the community at large that is a legitimate subject for legislative action. That kind of law is pretty sure to be evaded, and it begets a contempt for law in general and for public authority that is more pernicious than selling cigarettes or even smoking them. 140

The judgment that Hanford issued on June 22 ordering Coover to be discharged from imprisonment was based on a very narrow, fact-specific ruling, which, while failing even to use the term “original package,” let alone to offer the slightest substantive analysis of constitutional jurisprudence, nevertheless conclusorily gave ATC the practical result that it had sought:

[T]he said law of the State of Washington prohibiting the sale of cigarettes...is in contravention of article 1 of section 8 of the Constitution of the United States and null and void in so far as it prohibits or attempts to prohibit the selling, giving, or furnishing to any one by the importer of a slide pasteboard box of containing ten paper-wrapped cigarettes,
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

The smoke and stench of the cigarette is again abroad in the land and the thousands of “inhalers” took their fill yesterday after the opinion of Judge Hanford had given the dealers the courage to again place the “youth killers” on their counters for sale. Many of the tobacco men have been quietly selling cigarettes since the law took effect. A number of the dealers had not returned their stock left on hand on June 7th and consequently profited by the compliance of the other dealers with the law. These, however, have ordered stocks and will be selling as usual today.143

Soon, even ATC would be publicly teaching dealers a different lesson, but for the time being the press knew enough to report that some arrests might be made because there was no right to sell cigarettes until the U.S. Supreme Court so ruled.144

What Hanford had failed to deliver in terms of elaborating original-package doctrine to conform to ATC’s alleged interstate cigarette shipping practices the U.S. Supreme Court—to which Washington State Attorney General William C.

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141[Judgment] Petition for Writ of Habeas Corpus, (U.S. Cir. Ct. for the Dist. of Washington, 9th Cir., June 22, 1893), in Transcript of Record at 8-9, Supreme Court of the United States, Oct. Term, 1893, No. 1175, State of Washington v Coovert, 164 US 702 (1896). See also “Ross Can Now Build,” SP-I, June 23, 1893 (5:4). To the extent that the underlying fact patterns differed somewhat regarding the other seven writs, the language of Hanford’s judgment varied correspondingly. Hanford also ordered Coovert to enter into a $250 recognizance to secure his appearance to answer the judgment of the appellate court.

142“It Is Null and Void,” TDL, June 23, 1893 (8:1).

143“Cigarettes on Sale Again,” TDL, June 24, 1893 (4:2).

144“Cigarettes on Sale Again,” TDL, June 24, 1893 (4:2).
Jones the very next day petitioned Hanford to allow an appeal,\textsuperscript{145} which the judge immediately did\textsuperscript{146}—would, at least pursuant to the Tobacco Trust’s strategic vision, obligingly furnish. Because the anti-cigarette law’s federal constitutionality was in dispute, the state attorney general was entitled to and did appeal Hanford’s rulings directly to the U.S. Supreme Court, thus by-passing the circuit court of appeals in San Francisco. Ten days after the judge had handed down his decision the press was already reporting that it was “understood” that ATC’s lawyers and the attorney general would “unite in a motion to advance the case on the docket as early as possible.” Moreover, until the judicial system produced a final decision, “the sale of cigarettes by dealers in Washington will not be sanctioned by the tobacco company” and, pursuant to the attorney general’s instructions to all district attorneys, “if sales are made in the state the dealers will be arrested.”\textsuperscript{147}

In fact, Attorney General Jones notified all of the state’s prosecuting attorneys that Hanford’s decision “was merely pro forma and may be reversed.”\textsuperscript{148}

In his letter he informed them that:

I am authorized to advise you that the proceedings heretofore taken in the circuit court of the United States with reference to the discharge on writ of habeas corpus of one M. L. Coover, who was arrested for selling cigarettes in violation of the act of March 7, 1893, were not designed or intended to suspend the enforcement of that law, but only for the purpose of enabling the questions presented by the petitions in these cases to be speedily determined in the supreme court of the United States upon appeal.

I am also authorized to advise you that the writ will not be awarded in any other case that may arise on account of a prosecution for the violation of that law. You will therefore enforce that law and prosecute all violation thereof the same as though such proceedings

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\textsuperscript{147}“The Cigarette Case,” \textit{SP-I}, July 3, 1893 (1:4). See also “Cigarette Case Appealed,” \textit{TDL}, July 4, 1893 (1:4). Curiously, both articles’ dateline was Portland, suggesting perhaps Wood as the source. On Attorney General Jones’s appeal of the eight writs, see “News of the Northwest,” \textit{MO}, July 2, 1893 (4:7).

\textsuperscript{148}“Law Still in Force,” \textit{VF}, June 30, 1893 (4:2).
ATC appeared to play along with this understanding. In Vancouver, for example, where it had staged the Coover escapade, on July 5—the first possible date in the wake of the agreement—it began placing rotating advertisements on the front page of one and an inside page of the other local weekly for shipment by mail or express, “Charges All Paid,” from Portland of three of its brands. Interestingly—because it made a mockery of ATC’s mendacious future litigational stage directions calling for shipment of individual cigarette packages to dealers—the minimum volume was five packages (50 cigarettes), which cost 25 to 50 cents, depending on the brand, which could be paid for by draft, postal money order, postal note, or postage stamps. In the Vancouver Independent the ads ran on the front page every week through November 1, while the Vancouver Columbian published them through March 16, 1894. To be sure, Vancouver and Portland were separated only by the Columbia river, but the marketing technique strongly indicated that ATC was complying with the sales ban in Washington. In fact, as early as June 3, that is, almost a week before the law went into effect, the Trust had begun running the very same ads on the front page of a newspaper in Tacoma, located about 80 miles from the Oregon border. What is unknown (but a research desideratum) is the extent to which this lawful leakage of original packages in interstate commerce directly shipped to individual consumers was able to compensate for the in-state prohibition. The fact that ATC pushed for and secured the law’s repeal and vigorously opposed all such laws in other states suggests that direct mail was a poor substitute for retail store sales. Immediately upon repeal of the ban in June 1895, ATC began running front-page ads in the Independent announcing that the same cigarettes were “again on sale by all progressive dealers.”

In the event, despite the alleged joint effort at fast-tracking, more than three years passed before the Supreme Court decided the case. The fault did not lie with the appellant State of Washington, whose brief was (together with the transcript of record) filed on April 3, 1894 and lived up to its name, its
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

The jurisprudential core spanning barely seven small pages. The upshot of the five pages that Jones devoted to describing and recapitulating the eight scenarios that the Trust had choreographed was that “in every case the package in which the goods were shipped into the state was broken open, and a portion only of the contents disposed of at retail.” (This fact was salient because it formed the foundation of the argument that ATC failed to satisfy the central requirement of the original package safe harbor.) Jones then alerted the Court to the fact that it was apparent from the ingenuity displayed in slightly varying the circumstances attending the sale in each case, that the American Tobacco Company is desirous of securing the advice of this honorable court as to how it may violate the laws of the State of Washington with impunity, and still enjoy the protection of the constitution and laws of the United States under the federal power to regulate commerce between the states, and that it is anxious to know which of these sales, if any, was the sale of an “original package” within the scope of the doctrine announced in *Leisey* [sic] v. *Hardin*, 135 U.S. 100.

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153 Brief on Behalf of the State of Washington, Appellant, In the Matter of M. L. Coovert, Habeas Corpus, Supreme Court of the United States, Oct. Term, 1893, No. 1175, State of Washington v Coovert, 164 US 702 (1896). The brief was file stamped Apr. 3, 1894, while the same date was printed on the Transcript of Record.

154 Brief on Behalf of the State of Washington, Appellant, In the Matter of M. L. Coovert, Habeas Corpus at 8 (Apr. 3, 1894), Supreme Court of the United States, Oct. Term, 1893, No. 1175, State of Washington v Coovert, 164 US 702 (1896). Jones calculated that in each of the first six scenarios Coovert had sold one 10-cigarette package, in the seventh five, and in the eighth 50; for the first seven scenarios the number of 10-cigarette packages shipped together (in a pine shipping case or, in one scenario, in a paper wrapper bound with strong cord) ranged between 20 and 150. However, in the eighth scenario—which involved the sale of a box of 50 packages of 10-cigarette enclosed in paper and tin-foil wrappers and shipped in wooden packing cases, which were, in turn, enclosed in pine shipping cases—Jones did not indicate (because the petition for the habeas corpus writ did not state) how many such wooden packing cases were shipped in each pine shipping case. If only one wooden packing case of 50 packages was shipped in a pine case, then Coovert would have sold to one person the entire contents of the shipment and would therefore have satisfied that requirement of the original package doctrine. [Petition for writ of habeas corpus] at 2 (June 10, 1893), in Transcript of Record, Supreme Court of the United States, Oct. Term, 1893, No. 1182, State of Washington v Coovert, 164 US 702 (1896).

The attorney general argued that under none of the eight scenarios had Coovert’s sale of cigarettes been protected because the “utmost limit” to which Leisy carried the original package doctrine was that “the citizen of one state had the right to import any legitimate subject of commerce into another state and there dispose of it by himself or agent in the original package of transportation unbroken and as a whole.” In Leisy, a partnership whose members lived in Illinois made beer there, which was shipped in 122 quarter barrels, 171 one-eighth barrels, and 11 sealed cases to an agent in Iowa, who offered for sale and did sell them all in those receptacles unbroken and unopened. The Iowa Supreme Court in 1889 reversed the lower court’s decision that the Iowa statute prohibiting the sale of beer, which the sales had violated, was unconstitutional. However, the next year the U.S. Supreme Court reversed that decision, ruling that the plaintiffs, who had sold beer in Iowa “in original packages,” “had the right to import this beer into that State, and...the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the...non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create.

To be sure, the precise question that the State of Washington was raising in Coovert had not been contested in Leisy—namely, whether the beer barrels, kegs,

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157 Leisy v Hardin, 78 Iowa 286 (1889).
158 Leisy v Hardin, 135 US 100, 124-25 (1890).
or cases were original packages. To resolve this question, Jones analyzed various cases that had focused on determining whether importers/agents had been “selling this importation by the original unbroken package in which it was imported.”

The attorney general concluded that under none of the eight scenarios had Coovert even made an “attempt to bring himself within [this] condition, unless the allegation that the...commissioner of internal revenue has decided that a five cent package of cigarettes is an ‘original package’ so far as his office is concerned, can be considered such an attempt. But as we are unable to see how the decision of the commissioner..., who has nothing whatever to do with interstate commerce, can have any bearing on this case, we refrain from any further allusion to it.”

With the exception of an Iowa Supreme Court decision that Jones dismissed on the grounds that it had been decided before the U.S. Supreme Court decision in *Leisy* and another Iowa case that was decided on the

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161 Collins v Hills, 77 Iowa 181(1889). The court in effect abolished the original package doctrine: “The...packing of the bottles in boxes and barrels was a mere matter of convenience in the sale and shipment of the property. When defendant purchased one hundred bottles of either beer or whiskey, he in effect purchased that number of packages of the article, and when he sold by the bottle the transaction was of the same character. The fact, that, as a matter of convenience in handling during the transportation of the property, the bottles were packed in boxes and barrels, can make no difference as to the character, in law, of the transaction. If he had the right to bring the liquor within the state, and to sell it here, he had the right to adopt such means and mode of shipment as best suited his convenience or interest; for...there is no regulation upon the subject of either state or national enactment. The right to buy and sell in such quantities as he chose is necessarily included in the right to buy and sell in any quantity. The right to bring it within the state by the car-load is as certain as the right to bring it in by the single bottle or other package. If his interest or convenience would be better served by shipping into the state in cars fitted up with tanks, or other vessels attached to the cars, and from which the liquors must be drawn at the end of the voyage, he had the right, in the absence of statutory regulation, to adopt that mode of transportation. But in that case the liquors on their arrival within the state, would of necessity be placed in other vessels than those in which they were brought within the state; and the result of the distinction would be that, while he had the right to bring them within the state for the purpose of selling them here, yet, having brought them here in the exercise of that right, he had no right to sell them because he had
basis of the first—both of which “lend some countenance to petitioner’s contention that the packages sold by him were “original packages” because they deemed individual bottles taken out of a barrel or a package with other bottles to be “original packages”—he cited a series of recent state and federal cases, with which the two Iowa cases were “violently at variance,” that unambiguously rejected such ruses as protected by the federal interstate commerce clause, holding multi-bottle boxes to be the original packages and not the bottles sold singly. And, finally, where a federal court determined that each bottle of liquor

adopted a mode of transportation which, although perfectly lawful, required their removal from the vessels in which they were transported. The unsoundness of the attempted distinction is shown by the absurd results to which it would lead. If he had the right to sell the liquors in the state because the transaction of their purchase and transportation was one of national, rather than state, jurisdiction, it follows necessarily that he had the right to make the sales in whatever form or quantity he saw fit. Any other holding, it seems to us, would lead to results and conclusions which, owing to their absurdity, would be shocking alike to legal judgment and the common sense of mankind.” Id. at 183-84.

State of Iowa v Coonan, 82 Iowa 400, 401 (1891). Jones was remiss in failing to point out that by the logic of this opinion virtually no shipment of alcohol would not have qualified as an original package since the court ruled that 24 beer bottles placed in 24 separate compartments of open-frame boxes that were taken out individually and sold were, “there can be no doubt,” original packages.

Of the three cases cited by Jones the last was especially pertinent: In re Harmon, 43 F. 372 (C. C. N.D. Miss. 1890); Smith v State, 54 Ark. 248 (1891); Keith v State, 91 Ala 2, 7-8 (1890): “In this case, the bottles, separately wrapped in paper, were shipped in a box, and sold singly. Merely labelling each bottle ‘original package,’ did not make it one, if it was not really an original package. The term...package is a bundle or bale made up for transportation. It may consist of a single article; but, when separate articles are placed together, and prepared for transportation in a bundle, or bale, or box, or other receptacle, they do not form as many separate and distinct packages as there are articles, though they may be wrapped separately. The case, or box, or bale, in which separate articles are placed together for transportation, constitutes the original package in the commercial sense. ... Had the boxes been covered and nailed, or otherwise secured, it would not have admitted of serious question, that they formed the original packages. The purpose of securing a box with a fastened cover is the protection of its contents against loss by theft or otherwise, and for convenience for handling. A distinction between a box securely covered and one uncovered, in respect to its character and status as an original package, is a distinction without a difference, unsupported by principle or reason. The mode of shipment adopted was manifestly a mere contrivance to evade the consequences of a violation of the State
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

had been shipped separately in a box and not packed with others in a shipping case, Jones agreed that it had properly held them to be original packages. The alacrity with which he jumped to that conclusion revealed that the doctrine was in flux: within a few years even the U.S. Supreme Court would reject the view that per se ratified as an original package an individually packaged and sold commodity and adopted the position that courts had to examine the commercial reality of the shipment to control for subterfuges such as shipping individual five-cent packages of cigarettes.

Almost a year after Attorney General Jones had filed the State’s brief, Judge Hanford’s younger brother, Republican Representative Frank Hanford—who, in addition to owning an insurance business, was “interested in many enterprises in and about Seattle, and...Vice President of the Myers Packing Company, one of the largest salmon canneries on the North Pacific Coast”—filed a bill in the House

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165 Brief on Behalf of the State of Washington, Appellant, In the Matter of M. L. Coover, Habeas Corpus at 15 (Apr. 3, 1894), Supreme Court of the United States, Oct. Term, 1893, No. 1175, State of Washington v Coover, 164 US 702 (1896), citing In re Beine, 42 F. 545, 546 (C. C. D. Kansas 1890). This court staked out a radical position: “A question was raised in the argument as to whether the smallness of some of the packages sold by some of the petitioners did not deprive them of the protection given to vendors of original packages. Single bottles of beer and whisky, packed and sealed or nailed up in boxes made of pasteboard or wood, were shipped and sold in that shape. The boxes containing one bottle were not packed in any other box, but shipped singly and separately as so many distinct and separate packages. It is not perceived why, in the absence of a regulation by congress to the contrary, the importer may not determine for himself the form and size of the packages he puts up for export. The idea that small packages of liquor cannot be treated as original packages, because they are small, springs from the conviction back of it that liquor in any form, or in any sized package, is not a legitimate subject of commerce. That question is put at rest by the decision of the supreme court of the United States [Leisy v. Hardin] until congress shall act. As long as packages of liquor in any form or size may lawfully be sold by the importer or his agent in a prohibition state, the size of the package is not of much consequence. Whether the packages be large or small, the practical effect will be to seriously impair the efficacy of all laws intended to protect society from the evils of the liquor traffic.” Id. at 546-47.

166 See below ch. 5.

167 Steel & Searl’s Legislative Souvenir Manual for 1895-1896, at 96 (1895). He was also a trustee of the chamber of commerce and a member of the Seattle City Council. Seattle and Environs, 1852-1924, at 3: 395 (C. H. Hanford ed. 1924). See also SP-I, June 14, 1893 (8:6) (advertisement).
that would more effectively accomplish ATC’s agenda of eliminating the prohibitory law and its exemplary model for other states than his brother’s ruling, which had been in legal limbo for a year and a half. Ten days before Hanford filed his bill, however, Republican Senator William P. Sergeant (by request) had filed Senate Bill No. 240 to repeal the 1893 act. It was referred to the Committee on Medicine, Dentistry, Hygiene and Surgery, which on Feb. 22 recommended its indefinite postponement, which the Senate adopted the next day. Intriguingly, the press interpreted this action in the following context, which echoed the aforementioned newspaper accounts of the legislature’s motivation for passing the 1893 bill: “While it is believed that as many cigarettes are smoked now as before the enactment of the present law, there is a disposition among members to prevent the American Tobacco Company operating openly in cigarettes in the state.”

That sharply antagonistic forces were impinging on any decision to retain or repeal the sales ban was sketched out by the Morning Oregonian and the Post-Intelligencer:

There has been no measure enacted into law by the Washington legislatures that has attracted so much attention as the Roscoe cigarette law. Cigarette “fiends” raised an awful howl when it first went into effect, but it was not long before cigarettes were shipped into the state and the smokers’ appetite appeased. Roscoe, who is not a member of the present legislature, has been here working against the repeal of his law, but seemingly without effect.

This narrative, too, (non-conclusively) suggested that the ban had not been a dead 

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169 Senate Journal of the Fourth Legislature of the State of Washington 303 (1895). The committee chairman, Republican W. H. Gilbert, ultimately voted against Hanford’s bill. Id. at 693.
170 “The Week at Olympia,” MO, Feb. 24, 1895 (3:2-3). It is unclear how anyone might have measured smoking prevalence or whether the claim implied that sales had declined but that the incidence of smoking had remained unchanged because consumers had been (lawfully) importing cigarettes from Portland and elsewhere. It is a research desideratum to determine how extensively the Roscoe law was being enforced during the pendency of the State’s appeal of Hanford’s ruling in Coovert to the U.S. Supreme Court. Presumably the press would have mentioned massive or blatant non-enforcement in connection with the law’s proposed repeal.
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

letter—that while the law was still being enforced, in conformity with the attorney general’s aforementioned instructions to the district attorneys, leakage had occurred in the form of (lawful) direct importation by consumers themselves for their own personal use, which could not, under the Supreme Court’s original package doctrine, be suppressed unless either Congress voted to exclude cigarettes from the reach of constitutional interstate commerce jurisprudence as it had done in 1890 for liquor 172 or Oregon enacted its own sales ban. 173

On February 25, 1895, Hanford filed House Bill No. 558, which, although designed to convert the universal ban on cigarette sales into a mere licensing law 174 for sales to all those 18 and older, he nevertheless styled “An Act to provide for the better protection of the public health in relation to the manufacture and sale of cigarettes.” 175 The bill, which required anyone intending to sell cigarettes to obtain a license, 176 added the cosmetic and meaningless requirement (which functioned largely as government-sponsored public relations for the beleaguered cigarette industry) that an applicant for a license make an oath that “the cigarettes intended to be sold do not contain any injurious drug, narcotic or other deleterious matter” and that “he will not knowingly sell” such cigarettes. 177 H.B. 558 created a decentralized system by authorizing city councils and boards of county commissioners to draft the licenses, which cost retailers $10 and wholesalers $25 annually, contingent on endorsement by five “reputable” local

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172 See below this ch.

173 See below this ch. Even had Oregon done so, the exclusion from such a law of jobbers engaged in interstate trade with out-of-state customers would have permitted the trade with Washington consumers to continue. See below this ch.

174 The new law did not expressly repeal the old one; curiously, the final section of the bill, which provided that “[a]ll acts or parts of acts inconsistent or in conflict with this act are hereby expressly repealed,” did not appear in the enactment, although the legislative history, as embodied in the House Journal and Senate Journal, included no amendment to strike it. House Bill No. 558 (by Hanford, Feb. 25, [1895]), § 8, State of Washington, Printed Bills of the Legislature, Fourth Sess., House 1895 (copy furnished by Washington State Library). The compiler of the unofficial annotated state code of 1897 noted that he had omitted the former as “superseded” by the latter. Ballenger’s Annotated Codes and Statutes of Washington, § 2949, at 1:751 (1897).

175 H.B. 558 (Feb. 25, 1893).

176 H.B. 558, § 1 (Feb. 25, 1893).

The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

residents. The penalty for the misdemeanor of selling or giving away cigarettes without a license was $50 or 60 days’ imprisonment, the same penalty applying to anyone with or without a license who sold or gave away cigarettes to a minor under 18 years old. In order, presumably, to avoid the aforementioned fatal interference with interstate commerce, the law also penalized those selling cigarettes not in an “original and full package....” The local licensing government was required to revoke the license of anyone convicted of violating the act and was prohibited from granting such a person another license.

The bill was referred to the House Committee on Commerce and Manufactures, of which, conveniently, Hanford himself was chairman. The very next day his committee, consisting of five Republicans, recommended passage of the bill without any amendments. On March 9 the full House took up H.B. 558. Republicans had widened their majority in the House to an “overwhelming” 54 of 78 seats, leaving Democrats with only 3, while the Populists significantly increased their presence from 8 to 21. After the adoption of several minor floor amendments and hearing Hanford urge passage

178 H.B. 558, § 3 (Feb. 25, 1893). The license fees were to be retained by the local government. § 4.
179 H.B. 558, § 5 (Feb. 25, 1893). The parent of a minor under 18 to whom cigarettes had been sold or given away was authorized to prosecute a civil action against a violator for a $250 penalty. Id.
180 H.B. 558, § 6 (Feb. 25, 1893).
181 H.B. 558, § 7 (Feb. 25, 1893).
186 The most significant further diluted the already meaningless oath that the cigarettes to be sold contained no deleterious ingredients by inserting “to the best of his knowledge and belief.” Another amendment marginally strengthened the mandatory licensing by making express the unlawfulness of selling cigarettes before obtaining a license. House
on the grounds that the existing law “had proved ineffectual” and needed to be replaced by “practical legislation,” the House passed the de facto repealer by the overwhelming vote of 55 to 7, two of the four Democrats, but only three Republicans and two Populists voting No. Of the nine House members who cast votes on H.F. 236 and H.F. 558, only one voted consistently by opposing the ban in 1893 and supporting its repeal in 1895, while eight inconsistently voted for the ban and its repeal. The press observed that passage in the Senate was “probable,” thus making the Roscoe law a “dead duck,” and four days later, that chamber, which 26 Republicans controlled against only 5 Democrats and 3 Populists, followed suit, but by the much closer margin of 21 to 10. All three Populists voted against the universal sales ban repealer together with six (of 23 voting) Republicans and one Democrat. Of the 13 senators who cast votes on H.F. 236 and H.F. 558, only three voted consistently—that is, for the ban in 1893 and against its de facto repeal in 1895—while 10 voted inconsistently by voting for the ban and its repeal. Although the governor’s approval inflicted a major
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

(although temporary) setback on anti-cigarette forces in Washington, it did not signal a national trend: five weeks earlier the governor of North Dakota had approved a bill prohibiting all sales, prompting the Grand Forks Daily Herald to proclaim: “Good-Bye Cigarettes.” And even in Washington State the struggle went on. For example, in October 1895, when a man began smoking a cigarette in a municipal court in Seattle, the judge said in a loud voice: “You cigarette fiend, stand up,” fined him ten dollars for contempt of court, and sent him to jail.

The Tobacco Trust’s counsel did not file a response to Attorney General Jones’s brief until October 29, 1896, and even then did not dignify its submission with the title Brief, but merely called it a “Statement in Behalf of Appellee.” Its chief attorney was Joseph H. Choate, who by this time was “the most prominent figure in the legal profession in this country.” Doubtless occupied in early 1895 with his fabled oral argument before the Supreme Court denouncing the income tax as “communistic,” by mid-year he began representing ATC in a major trust dissolution case in New York State. It was not Choate’s work load, however, that caused the Trust to fail to respond. Rather, Choate explained, it was “considered by us” that the passage and approval in March 1895 in Washington State of a cigarette sales licensure regime

repealed and superseded the act of 1893 by reason of its inconsistent provisions, policy and penalties. If we are right in this position, there is no real question now involved in these appeals, but they present simply questions in the nature of a moot court question; for if the judgment should be reversed and the writ dismissed Coover could not be tried or punished under the act of 1893, because it is repealed, nor under the act of 1895, because it was passed after the sales complained of were made. Having this view of the law and understanding that the appeals were practically abandoned, counsel for appellee, Coover, have not filed any brief, expecting the attorney general of Washington would withdraw the


1895 N.D. Laws ch. 32, at 31. See vol. 2.

“Good-Bye Cigarettes,” Grand Forks Daily Herald, Feb. 10, 1895 (1:3).


“Joseph Hodges Choate Dies Suddenly,” NYT, May 15, 1917 (1). The “Statement” was apparently written by Choate’s law partner, Charles Beaman.


Edward Martin, The Life of Joseph Hodges Choate: As Gathered Chiefly from His Letters 2:18, 46-48 (1920); People v Duke, 44 NYS 336 (1897). ATC’s chief in-house lawyer, Williamson Fuller, joined Choate in this case.
appeals or file a consent to their dismissal.\textsuperscript{200}

Instead of explaining why it did not file a reply brief during the almost 12 months between the time when the State of Washington had filed its brief and the approval of the 1895 act or of accepting any responsibility for its reckless disregard of its briefing obligations, the Tobacco Trust imputed all the blame to the State of Washington (whose only apparent shortcoming was failing to request that the Court sanction the appellee for not having filed a reply brief): “Neither the counsel for appellee nor the court having heard from the attorney general of Washington...it is suggested that the Court, of its own motion, dismiss the appeals because of the repeal of the law upon which the opinion of the Court is sought.” If the Court refused to dismiss, Choate requested the opportunity to file briefs and make oral argument.\textsuperscript{201}

Since the overarching point of the Trust’s litigation was to secure a ruling from the U.S. Supreme Court that would unequivocally invalidate the Washington cigarette sales ban and also discourage all other states from following suit by putting them on notice that such statutory approaches were per se constitutionally foreclosed, it is unclear why ATC abandoned the litigation for almost three years and, in the end, wanted it mooted and dismissed. To be sure, the 1895 enactment served its immediate practical purposes in Washington, but by October 1896, both North Dakota and Iowa had passed similar prohibitory laws, the latter of which the Trust was energetically seeking to overturn by the same litigation strategy with which it had experimented in \textit{Coovert}. The existence of fresh U.S. Supreme Court precedent striking down the Washington law would have immensely simplified its legal burden in attacking the Iowa law, which it ultimately proved unable to carry. The Supreme Court made up for ATC’s dilatoriness: just 10 days after Choate’s “Statement” had been filed, it did precisely what he had asked it not to do in issuing a per curiam decision without opinion reversing Hanford’s order and remanding the case with directions to discharge the writs and dismiss the petitions. The Court acted “on the authority” of a line of precedent,\textsuperscript{202} wholly unrelated to the question of interstate commerce, that “except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the State; and, even after such final determination in those courts, will generally leave


\textsuperscript{201}Statement in Behalf of Appellee at 3, in Supreme Court of the United States, Oct. Term, 1896, Nos. 90 to 97, State of Washington v Coovert, 164 US 702 (1896).

\textsuperscript{202}State of Washington v Coovert, 164 US 702 (1896).
the petitioner to the usual and orderly course of proceeding by writ of error from
this court.”\textsuperscript{203}

The consequence of this decision reversing Judge Hanford’s order (which
was merely apodictic and lacked any substantive basis) was that his ruling in
\textit{Coovert} constituted no kind of precedent whatsoever either holding an individual
package of cigarettes to be a so-called original package or invalidating a state
anti-cigarette sales statute as an unconstitutional interference with interstate
commerce. The issue may have become moot in Washington State since the
legislature in the meantime had dismantled the universal ban anyway, but if
\textsc{ATC}’s strategy was to manufacture a nationally applicable Supreme Court ruling
ready made to strike down the next such statute to be enacted anywhere in the
United States, by the time the Supreme Court issued its actual decision in
November 1896, Hanford’s ruling represented no hindrance to any court’s
upholding Iowa’s newly enacted prohibition. (Nevertheless, such logic failed to
make an impression on the Portland \textit{Morning Oregonian}, which in connection
with the WCTU’s renewed efforts to secure passage of a similar bill in Oregon,
opined in January 1897 that “[i]t is hardly worth while to pass an anti-cigarette
law in Oregon, after seeing the fate of the Washington law in the federal
courts.”)\textsuperscript{204}

Moreover, the Tobacco Trust had not even succeeded in crushing its
opponents in Washington itself, as the following sketch reveals.\textsuperscript{205} In 1897 the
House passed H.B. 72, which had been introduced by J.C. Conine—a Populist
whose party controlled a majority of the chamber’s seats\textsuperscript{206}—and once again
prohibited the sale of cigarettes, by a vote of 64-11\textsuperscript{207} in spite of the press’s
prediction that it “will probably be killed”\textsuperscript{208} as a result of vigorous opposition in

\begin{itemize}
\item[\textsuperscript{203}]Whitten v Tomlinson, 160 US 231, 242 (1895). The Court cited to this page of the
opinion without quoting any particular language.
\item[\textsuperscript{204}]{“Multiple News Items,” \textit{MO}, Jan. 15, 1897 (4:4). On the WCTU cigarette sales ban
bill that died after having passed its second reading in 1895, see “To Kill Off Cigarettes,”
proposed bill for 1897, see “To Keep Out Cigarettes,” \textit{MO}, Dec. 27, 1896 (20:5); “Caucus
\item[\textsuperscript{205}]For a more detailed analysis, see vol. 2.
\item[\textsuperscript{206}]45 Populists faced 11 Republicans, 11 Silver Republicans, and 10 Democrats.
\item[\textsuperscript{207}]\textit{House Journal of the Fifth Legislature of the State of Washington} 996-97 (Jan. 26) (1897).
\item[\textsuperscript{208}]{“Three More Votes,” \textit{MO}, Jan. 23, 1897 (1:5-6 at 6).} 
\end{itemize}
the Senate on constitutional grounds.209 The bill’s few opponents (led by another Populist) argued that the 1893 Roscoe ban law had been “entirely inoperative, and caused trade of this nature to be driven from the state to Portland and other adjacent cities,” while others regarded it as unconstitutional. Supporters attacked the 1895 licensure law on the grounds that imposition of a tax was “useless in preventing minors from procuring cigarettes, and that the sale of both cigarettes and cigarette paper had largely increased during the last two years, since the prohibition was repealed.”210 The initiative to reinstitute a general sales ban, stalled, however, for a decade when the bill died in the Senate after the Committee on Education had recommended limiting the ban on sales to persons under 21.211

In 1907 the legislature initiated a new cycle of cigarette control by making it unlawful to “manufacture, sell, exchange, barter, dispose of or give away, or keep for sale any cigarettes...” The penalty for a first offense ranged from $10 to $50; for later offenses the range of fines was increased ten-fold with a maximum imprisonment of six months in the alternative. Excluded from the statute’s reach were sales of jobbers engaged in interstate business with customers outside Washington State.212

At the next legislative session in 1909 the penal code was amended to make it a misdemeanor for anyone to “manufacture, sell, give away or distribute, or have in his possession any cigarettes...”213 This spectacular anti-smoking provision was actually enforced, socialist Big Bill Hayward being only the most prominent violator to be arrested and fined.214 In adjudicating challenges to arrests of others a state superior court judge in Aberdeen ruled that the law applied only to cigarette sales and did not prohibit smoking,215 while another in Tacoma held the law unconstitutional on the grounds that it interfered with interstate commerce. Although the prosecuting attorney in that county (Pierce) announced that he would cease prosecuting cigarette smokers until the supreme

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210“To Try Another Man,” MO, Jan. 27, 1897 (1:4).
211Senate Journal of the Fifth Legislature of the State of Washington 573 (Mar. 4) (1897).
2121907 Wash. Laws ch. 148, at 293.
2131909 Wash. Laws ch. 249, § 294, at 890, 978. At the same time § 198 made it a gross misdemeanor to sell, give, or permit to be sold or given any cigarettes. Id. at 947.
214“Bill’ Haywood, Socialist, with the ‘Makin’s,’ Arrested for Smoking Cigarettes,” SP-I, June 17, 1909 (1:3-4); “Haywood Pays $2.50 Fine for Smoking Cigarette,” SP-I, June 18, 1909 (sect. 2, 2:6).
court had passed on the question, arrests continued to be made elsewhere in the state. Support for continuing the smoking ban was reflected in the defeat, inflicted six weeks after those judges had invalidated it, on an amendment offered in the House—whose rules prohibited smoking in the hall or lobby during session or recess—at the extraordinary legislative session in August to repeal it.

Even as the penal code was making its way through the legislature to the governor, the need for intensified control efforts targeting minors gained prominence in the press: the Seattle Post-Intelligencer ran a lengthy article announcing that “Big Percentage of Boys Smoke,” which various school officials estimated at 33.3 to 60 percent. But vigorous police enforcement (and presumably widespread violation) of the 1907 general prohibition were also visible. Thus the Post-Intelligencer announced under the front-page headline, “Arrests Made for Selling Cigarettes,” that a policeman in “citizens’ clothes” had arrested a tobacconist for selling him two packages of cigarettes; the alleged violator posted bail before appearing in police court, while the police seized his entire stock of cigarettes valued at $100 from under the counter.

Finally, at the following session in 1911 the cycle came to a permanent close in Washington when the legislature repealed the recently enacted misdemeanor provision in the penal code. The new orientation of tobacco control in Washington was set by the provision making it a misdemeanor for anyone under 21 to purchase or have in his or her possession any cigarette or other tobacco or intoxicating liquor.

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216Centralia Daily Chronicle, July 10, 1909 (1:3).
220“Big Percentage of Boys Smoke,” SP-I, Mar. 11, 1909 (3:2).
2221911 Wash. Laws ch. 133, § 2, at 649, 650.
2231911 Wash. Laws ch. 133, § 1 at 650.
West Virginia

In February 1895 the West Virginia legislature—whose lower house had resolved at the beginning of the session “That no smoking be allowed in the hall of the House of Delegates while the House is in Session”—by overwhelming majorities amended the state code to require persons to have a state license to sell or offer for sale any paper wrapper cigarettes or cigarette paper. The imposition of a $500 license fee on the retail sale of cigarettes was designed effectively to prohibit their sale (though when one dealer in Parkersburg nevertheless took out a license, the press joked that “the undertakers of that town are resting easy”). A few days after the law had gone into effect on May 23, when “[n]ot a single retail dealer” had taken out a license, a “cigarette famine” broke out, forcing “fiends...to send to Ohio and Pennsylvania for their supply.” Since it was immediately “announced that the American Tobacco company of New York (the cigarette trust) ha[d] decided to test the constitutionality of the law” and a hearing date had already been set for June 20, the Wheeling Intelligencer concluded that it was “not probable that any of the Wheeling dealers will attempt to sell without license or taking out a license. The consequence is that no cigarettes are being sold here.” The “cigarette fiends” may have been unable to buy them in the state’s largest city, but a “short street car ride” across the Ohio river enabled them to get all they wanted in Bridgeport, where the cigarette business was “booming”: “At the Ohio end of the back river bridge a

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224Journal of the House of Delegates of the State of West Virginia, for the Twenty-Second Session: 1895, at 6 (Jan. 9) (1895).

225The vote on S.B. 39 was 21 to 2 in the Senate and 52 to 2 in the House. Journal of the Senate of the State of West Virginia, for the Twenty-Third [sic] Session: 1895, at 101 (Jan. 24) (1895); Journal of the House of Delegates of the State of West Virginia, for the Twenty-Second Session: 1895, at 584-85 (Feb. 20) (1895). An effort in the House to reduce the license fee to $250 failed. Id. at 562a-563a (Feb. 19). No information was unearthed concerning the motivation of Senator John B. Finley to introduce the bill; he was not even mentioned in the two detailed histories of the county he represented. See Homer Fansler, History of Tucker County, West Virginia (1962); Cleta Long, History of Tucker County West Virginia (1996).


227Lima Times Democrat, June 5, 1895 (2:1) (untitled).

228“Cigarette Famine,” FWN, May 30, 1895 (10:5).

229“Cigarette Famine,” FWN, May 30, 1895 (10:5). This account mistakenly alleged that the grounds for suit was the law’s discrimination between wholesale and retail dealers.
sign informs West Virginians that cigarettes can be obtained at a drugstore.\textsuperscript{230}

The law, for the time being at least, “virtually killed the cigaret business” in West Virginia.\textsuperscript{231}

On the very day that the law went into effect ATC already staged an illegal sale by “back[ing]” 19-year-old tobacconist Frank Minor in Martinsburg, who “openly violated the law” by failing to obtain a license.\textsuperscript{232} In this case,\textsuperscript{233} on May 23 ATC shipped to Minor 50 ten-cigarette packages “in the original packages, without case or covering of any kind about any of the packages, each being loose and separate from every other....” Minor, who sold one of the packages that same day,\textsuperscript{234} was arrested (in a scenario that Fuller copied from the Covert case in Washington in 1893 and replicated in the federal branch of the McGregor case in Iowa in 1896), and by July 10 Fuller, who had filed an application for and been granted a writ of habeas corpus from the federal court in Martinsburg, had already secured a ruling in \textit{In re Minor} from circuit court judge Nathan Goff, Jr.—the leading West Virginia Republican politician and a man of great inherited wealth,\textsuperscript{235} who was a property-respecting conservative with the typical “view point toward the ‘masters of capital’”\textsuperscript{236} and a repeatedly demonstrated willingness to issue injunctions against labor organizers\textsuperscript{237}—voiding the law as applied to Minor on the grounds that it violated the commerce clause of the constitution.\textsuperscript{237} (Just a month after Goff had handed down this decision, \textit{The New York Times} editorially rebuked him regarding another case as a former “intense partisan” who

\textsuperscript{230}“Cigarette Smokers,” \textit{WI}, May 31, 1895 (3:4).

\textsuperscript{231}“Decision Rendered,” \textit{BDWC}, July 20, 1895 (3:3).

\textsuperscript{232}“Cigarette Smokers,” \textit{WI}, May 31, 1895 (3:4). According to the 1900 Census of Population, Minor was born in September 1875 and in 1900 was a dry good salesman. HeritageQuest.

\textsuperscript{233}For a summary, see “The Cigarette Law,” \textit{WI}, July 19, 1895 (1:1).

\textsuperscript{234}In \textit{In re Minor}, 69 F. 233, 234 (D. W. Va. 1895). In an otherwise identical alternative scenario, ATC also shipped to Minor, “at his request, on consignment to be sold at retail by him, as the agent of said company,” 50 10-cigarette packages one of which he sold to the same person. \textit{Id.} at 234. It is unclear how in 1895 cigarettes shipped on May 23 from New York City to Martinsburg were sold there on the same day.

\textsuperscript{235}Nathan Goff, who had been U.S. Attorney for West Virginia (1868-81), Secretary of the Navy (1881), and a member of the House of Representatives (1883-89), was a U.S. Circuit Court judge (1892-1913) before becoming a U.S. Senator (1913-19). “A New Secretary of the Navy,” \textit{NYT}, Jan. 7, 1881 (1); “The West Virginia Senatorship,” \textit{NYT}, Nov. 12, 1894 (5); “Ex-Senator Dies of Paralysis,” \textit{NYT}, Apr. 24, 1920 (15).


\textsuperscript{237}In \textit{In re Minor}, 69 F. 233, 234 (D. W. Va. 1895).
still had “the politician’s and not the jurist’s way of looking at questions which involve political rights. He would use the judicial power of the United States to overthrow state legislation because it was used to the disadvantage of his party. It is fortunate that we have few such Judges in the Federal courts.”238

The chief factual difference between Coover and Minor lay in the Potemkin village shipping scenario: indeed, despite the utter implausibility of this simulated physical commercial transaction, Goff did not even bother to explain how the shipping company kept these 50 “loose and separate” packages together and knew where to deliver them. This overreaching sham—which worked well enough with Goff, but which the U.S. Supreme Court five years later would treat with the contempt it deserved239—was presumably dictated by the Tobacco Trust’s desire to fashion an arrangement that would pass muster as giving rise to an “original package.” The reason that ATC’s litigational ploy succeeded was that Goff never even recognized as an issue whether these loose packages in fact constituted a legitimate transaction, but, rather, unreflectingly assumed that they were “original packages.”240 Instead, he rejected as “without merit” the state’s argument that the law was a proper use of its police power on the ground that that power did not extend to interstate commerce: it inhibited Minor’s sale (unless he paid the tax for the privilege) of the “original packages” that he had imported from New York while they were “still articles of [interstate] commerce.... The right to purchase in one state carries with it the right to sell the article...in another state, regardless of state laws, and independent of local interests and jealousies.”241

Despite Judge Goff’s ruling, state and county authorities in West Virginia continued undeterred to “push the matter to the last.” In February 1896, for example, a tobacco trade magazine reported that a grand jury in Morgantown had found indictments against upwards of 60 people, who had apparently been “emboldened” by the federal court decision, for selling cigarettes without a

238“Opinions of a Political Judge,” NYT, Aug. 12, 1895 (4) (edit.). The only hint that Goff gave of political views transcending the original package doctrine was his ironic but anti-realist observation that: “The suggestion that it was the intention of the legislature to restrict the sale of cigarettes within the state of West Virginia is foreign to the case before me. The state makes no effort to prevent the importation or to prohibit the sale of cigarettes; on the contrary, it invites the one and protects the other, claiming from those who accept the privilege tendered the payment of revenue for its own purposes.” In re Minor, 69 F. 233, 236 (C. C. D. W. Va. 1895).

239On Austin v Tennesee, see below ch. 4.


license.\footnote{\textit{West Virginia Cigarette License Law}, \textit{WTJ} 22(46):(1:1) (Feb. 24, 1896).} Choosing to disregard the possibility that the legislature actually intended the license fee to be prohibitory, the industry asserted that: “There is too much revenue in it for them to give up without a fitting struggle.”\footnote{\textit{WI}, Jan. 25, 1895 (3:4) (printed adjacent to article mentioning Finley’s bill).}

Perhaps in an effort to secure a court’s express rather than implied imprimatur for its alleged original packages, the month after Goff issued his ruling, in August 1895 ATC cooked up another case with a slightly different scenario by shipping to another unlicensed dealer, Charles Goetze, a druggist in Wheeling, a consignment of “a number of” 10-cigarette packages, but this time packed in a large wooden box. (One of the two brands shipped, Sweet Caporal, was advertised in the \textit{Wheeling Intelligencer} as “more sold than all other brands combined.”)\footnote{State v. Goetze, 43 W. Va. 495, 496 (1897). The circuit case was unreported, but was affirmed by the West Virginia Supreme Court of Appeals on Apr. 24, 1897.} For selling two packages Goetze, too, was arrested, and then tried and convicted in November; this time Fuller obtained a writ of error to state circuit court on June 23, 1896,\footnote{Geo. Atkinson and Alvaro Gibbens, \textit{Prominent Men of West Virginia} 463-65 (1890).} less than two weeks before the Phelps law went into effect in Iowa. (This choreography found its twin in the state court branch of the McGregor case in Iowa.) Republican Circuit Judge John Campbell of Ohio County\footnote{“Cigarette Sales,” \textit{Steubenville Herald}, June 24, 1896 (4:1) (lengthy excerpt forming the concluding portion of the unpublished opinion).} ruled that the law burdened interstate commerce in violation of the commerce clause of the federal constitution. To be sure, the rigor of his reasoning left so much to be desired that even ATC could not have been entirely satisfied with the opinion as distinguished from the result: “This court will not undertake to give the various decisions of the authorities from which it deduces the conclusion that packages that are essentially retail packages, as these are, are yet protected as being original statutory packages. It cannot escape the logic of congressional legislation and judicial interpretation thereof, that if a package of one hundred is a statutory package, and hence protected under the commerce clause of the constitution, a package of ten is likewise a statutory package and likewise protected.”\footnote{910} Failing to understand that a “statutory package” for constitutional interstate commerce purposes did not exist and that selling one package out of a box containing 10 might be as illegitimate a simulation of an original package as selling one out of a 100, at least one editorial voice prematurely viewed Campbell’s decision voiding the West Virginia law as
“practically nullifying all laws imposing a license or special tax on cigarette sales” if it came to be “generally accepted as correct.”247

To be sure, Campbell’s decision enjoyed formally somewhat greater credibility by virtue of its affirmance by the West Virginia Supreme Court of Appeals in April 1897, but the latter, hoodwinked by and regurgitating the same sham arguments that the Tobacco Trust had launched in Coovert, was hardly more persuasive:

Were they sold by the original package, or should the defendant have sold the entire contents of the wooden box, without opening the same, in order to constitute the sale by the original packages? We cannot say the wooden box constituted the original package, any more than we would say, if these paper boxes had been wrapped in thick paper and tied with twine, or packed in a barrel, for convenience in shipping, that the paper parcel or the barrel should be considered the original package. As the cigarettes came from the hands of the manufacturer, they were in paper boxes, each containing ten, for the convenience of their customers; and, whether they sold one box or a thousand, these paper boxes must be regarded as original packages. These packages...had upon them the label giving the name of the cigarettes, the caution notice, the number of the factory, the number of the revenue district, the name of the state in which they were manufactured, the name of the manufacturer, and the internal revenue stamp for ten cigarettes, duly canceled, pasted across the end of each package, so as to seal the same, in accordance with the requirements of the act of congress and the internal revenue laws governing the packing, shipment, and sale of cigarettes, all of which is required by law to constitute a package of cigarettes ready for shipment and sale; and, when these things are done, the package may be regarded as an original package. None of this indorsement or stamping is required to be placed upon the pine box or barrel or paper parcels in which these packages might be shipped, and opening the box, barrel, or parcel for the purpose of taking out the paper boxes cannot be considered as breaking the original package. These packages are, moreover, required to be put up in this particular manner by the act of congress, and a penalty is prescribed for a failure so to do. Rev. St. § 3392, contains the following provision, to wit: “That every manufacturer of cigarettes shall put up all the cigarettes that he either manufactures or has made for him, and sell or removes for consumption or use, in packages or parcels, containing ten, twenty, fifty, or one hundred cigarettes each, and shall securely affix to each of said packages or parcels a suitable stamp denoting the tax thereon, and shall properly cancel the same prior to such sale or removal for consumption or use under such regulations as the commissioner of internal revenue shall prescribe.” And section 3381 of said Revised Statutes, on the same subject, provides that “he shall neither sell nor offer for sale any tobacco, snuff, or cigars, except in original or full packages, as the law requires the same to be prepared and put up by the manufacturer for sale, or for removal for sale or consumption, and except such packages of tobacco, snuff and cigars as bear the manufacturer’s label or caution notice and his legal marks and

247“Cigarette Sales,” Steubenville Herald, June 24, 1896 (4:1).
brands and genuine internal revenue stamp which had never been used.”

So infinitesimal and fleeting was the opinion’s resonance that when, nine months later, the Iowa Supreme Court issued the second decision to cite State v. Goetze, its critique, foreshadowing the position that the U.S. Supreme Court would soon adopt, helped insure that no other court would ever cite it again:

Appellant contends that the internal revenue department has declared the small package sold by him to be “an original package,” and that this is conclusive. We do not so regard it. The package referred to in the letter from the internal revenue department is the one recognized by that department for the purposes of taxation, and has no reference to the unit of commerce which is protected by the federal constitution. The commissioner of internal revenue, in his letter heretofore set forth, says that “the repacking of said packages in additional coverings is optional with the manufacturer, and does not concern this bureau.” In the case at bar the “original package,” the unit of commerce, was broken, the contents exposed to sale, and one of the small packages was sold. Such sale was, as it seems to us, of an article which had lost its distinctive character as an import, and was therefore in violation of law. In this respect it differs from most of the cases to which our attention has been called, for in all but one of them it appears that the sales were of original and unbroken packages. See In re Minor, 69 F. 233; State v. McGregor, 76 F. 956; Sawrie v. Tennessee (U. S. Cir. Ct. Tenn.), 82 F. 615. The one case, and the only one, which we have been able to find holding to a contrary doctrine, State v. Goetze, (W. Va.) (43 W. Va. 495, 27 S.E. 225), fails to recognize the distinction between the original package of commerce and that recognized by the internal revenue department of the general government for the purposes of taxation.

The Cigarette Trust did not leave the lawful availability of the West Virginia market to judicial interpretation: at its 1897 session the legislature almost unanimously amended the licensure law to repeal the inclusion of cigarettes that it had enacted in 1895. Although the back-stage machinations were thoroughly

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248 State v. Goetze, 43 W. Va. 495, 497-98 (1897).
249 Shepherdizing reveals that the only other opinion ever to cite it did so in dictum—the case dealt with alcohol—erroneously assuming that it had correctly stated that the Revised Code prescribed what an original package was for interstate commerce purposes. Guckenheimer v Sellers, 81 F. 997, 998 (C.C. D. S.C. 1897).
250 McGregor v Cone, 73 NE 1041, 1044 (Iowa 1898).
251 1897 W. Va Acts ch. 39 at 95, 96 (striking cigarettes). The Senate, in which Republicans outnumbered Democrats 21 to 4 (with one seat held by a Populist), passed S.B. No. 54 (which had been introduced by Republican U. G. Young) by a vote of 22 to 0, three of the four Democrats and the Populist supporting it. Journal of the Senate of the State of West Virginia, for the Twenty-Third Session: 1897, at 88 (Jan. 19), 165-66 (Jan.
consistent with ATC’s modus operandi, the source of their revelation was remarkable. The state’s Democratic press delighted in reporting252 on “[t]his infamous conspiracy between the Tobacco Trust and the Republican leaders”253

[Republican House] Speaker [Samuel] Hanen let the cat out of the bag when he stated, in the heat of debate on the question of taxation in the Constitutional Committee, that the Tobacco Trust contributed a large sum of money to the Republican campaign fund in this State last year upon the condition that the party, if successful, would repeal the tax on the sale of cigarettes. Other Republicans of the Committee saw that the Speaker had made a serious blunder in thus revealing party secrets, and made an effort to whistle him down or get him to change the subject. They tried to treat it as a joke, and squirmed and twisted in their seats. They wanted to make it appear that possibly the speaker did not mean what he said, but he reiterated the statement and impressed upon his party associates that he meant what he said and knew what he was talking about.

Speaker Hanen is considered very high authority in the Republican party, and his statements will be accepted as true. ...

Everybody is...aware of the fact that the bill repealing the tax on cigarettes was smuggled through each house of the Legislature last winter under a false title—“A bill to amend the license law,” a title in which cigarettes, the subject of the bill, was not mentioned. The one thing which the people would like to know is, how much did the Republican campaign get for the job.254

It may not have been a secret, editorialized the Charleston Daily Gazette, which broke the story, that “the trusts, the great corporate interests, the gold gamblers, the stock jobbers, the tariff barons and the banks” had “leagued together” in 1896 to “purchase the Presidency and put the Republican party in power in State and Nation,” but not until Hanen “informed us of the fact...was it known officially to which trust was assigned the duty of purchasing West Virginia for the Republicans.” And now that West Virginians knew that their state had been “mortgaged to the Tobacco Trust,” the Democratic paper hoped

27) (1897). The vote in the House was 53 to 1. Journal of the House of Delegates of the State of West Virginia, for the Twenty-Third Session: 1897, at 248 (Feb. 4) (1897).

252The Republican Wheeling Intelligencer published an article about the Constitution Committee’s meetings almost every day between May 20 and the beginning of June, but nowhere mentioned Hanen’s revelations. For a compressed account, see “Alleged Trust Bribery,” NYT, June 3, 1897 (2).

253“Telling Party Secrets,” Wheeling Register, June 2, 1897 (4:2) (edit.).

254“Speaker Hanen’s Break,” CDG, June 1, 1897 (1:5) (also reprinted as “Speaker Hanen,” Wheeling Register, June 2, 1897 (3:1)). Hanen had, inter alia, been a county school superintendent and farmer before being elected to the legislature. Geo. Atkinson and Alvaro Gibbens, Prominent Men of West Virginia 598 (1890).
that they would drive Republicans from power at the next election.\textsuperscript{255}

\section*{Montana}

Goff’s ruling was quickly rebuffed. In 1895, the Montana legislature imposed on everyone “engaged in the business of selling cigarettes, cigarette papers or material used in making cigarettes, except tobacco,” the requirement of paying a $10 monthly license.\textsuperscript{256} Even this modest intervention antagonized the Tobacco Trust, which staged yet another act of made-for-litigation disobedience, this time in the form of the failure on the part of Helena cigarette retailer Robert May to apply for or pay the prescribed license. In this scenario, May, “as the agent” of ATC, bought “a number of packages of cigarettes,” which ATC had shipped to him from New York City “placed in a larger box for convenience of shipment...to be by him sold, as the agent of said American Tobacco Company,” one of which 10-cigarette packages he sold on June 3, 1897.\textsuperscript{257} The person to whom May had sold the package immediately filed a complaint with a justice of the peace, who that same day issued an arrest warrant, pursuant to which May was arrested, tried, found guilty, fined one dollar plus costs, and committed to the constable until he paid those sums. The nominal fine underscored the pro forma character of the proceeding, which statutorily could have been set at as much as $500 or six months’ imprisonment.\textsuperscript{258}

Handing down a decision just two months after May’s arrest, Harvard Law School graduate and former territorial supreme court justice Hiram Knowles, the federal judge for Montana,\textsuperscript{259} was confronted with the Trust’s habeas corpus petition claim that the license contravened Congress’s constitutional interstate commerce control because the right to ship cigarettes from Montana to New York

\begin{footnotes}
  \item[255] “The Republicans and the Tobacco Trust,” \textit{CDG}, June 1, 1897 (4:3).
  \item[256] Montana Code, § 4064.15, at 347 (1895). In addition, owners of fixed-site sales businesses were also required to pay a business license scaled from one dollar a month for businesses with sales of less than $400 per month up to $75 for those with monthly sales of $100,000 or more. \textit{Id.}, §§ 4064.1-.12; In re May, 82 F. 422, 423-24 (C.C. D. Montana, 1897).
  \item[257] In re May, 82 F. 422, 423 (C.C. D. Montana, 1897). May, who is not found as living in Montana at the 1900 Population Census, also “sold one package of those purchased by himself in New York....” This variation in the scenario was not further reflected in the opinion.
\end{footnotes}
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

In re May, 82 F. 422, 424-26 (C.C. D. Montana, 1897).

Knowles went on to state that he was “sure” that Goff’s position that “only by the sale of the imported article” did it become “mingled with the other property within the state” “cannot be maintained.” Rather, the cigarettes sold by May had “become a part of the mass of the property of the state” once they “had reached their destination and were exposed here for sale.”

In re May, 82 F. 422, 425-26 (C.C. D. Montana, 1897).

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Modified Choreography for Iowa

A letter was read [to the Wisconsin Senate] from the secretary of state of Iowa saying the law was very well observed. A business man told Mr. Bird that he saw no cigarettes in

260 In re May, 82 F. 422, 424-26 (C.C. D. Montana, 1897).

261 In re May, 82 F. 422, 425-26 (C.C. D. Montana, 1897). Knowles went on to state that he was “ sure ” that Goff’s position that “ only by the sale of the imported article ” did it become “ mingled with the other property within the state ” “ cannot be maintained. ” Rather, the cigarettes sold by May had “ become a part of the mass of the property of the state ” once they “ had reached their destination and were exposed here for sale. ”
Iowa now....

Unlike Fuller and ATC, Attorney General Remley, who had not anticipated that the Iowa case would first be heard in federal court, was uncertain as to what he would argue there since he would not be in a position, as he would have been before the Iowa Supreme Court, to urge a change in the interpretation of the original package doctrine by the state’s court of last resort.

Substantively, however, it was clear to the Cedar Rapids Evening Gazette that the American Tobacco Company would attack on the same “original package” grounds that had been used in the alcohol prohibition cases. Fuller modified his successful West Virginia stage directions in the Iowa performance only in combining the tests of the two sub-branches of the original package doctrine in one dealer. The charges against McGregor stemmed from two differently structured shipments. One contained a number of boxes of cigarettes in packages usually sold for a nickel. The other was a consignment in which single boxes of cigarettes were done up in one package:

The manner in which these cigarettes are delivered by the manufacturers to the express companies is a novel one. The cigarette boxes, as retailed, are taken to the express offices, thrown loosely into express wagons, from which they are shoveled into baskets and delivered to the express company, which is left to ship them in any manner it sees proper. By this means the tobacco trust hopes to have the courts hold that each five-cent bunch is an original package.

The count involving the loose packages Fuller filed in federal court because he could rely on his victory in West Virginia; the count involving the packages packed together in a box he filed in Iowa state court, presumably because he knew that Iowa Supreme Court precedents had already vindicated the original-package status of alcohol bottles shipped in this manner. Nevertheless, Linn County Attorney John M. Grimm, whom Iowa Attorney General Milton Remley would be assisting, did not doubt that the law was constitutional because he did not believe that judges would ever hold a five-cent, 10-cigarette pasteboard box to
be an “original box.”266
Yet another ploy devised by the Trust was to guarantee to defend from prosecution retail dealers who kept for sale “the substitute for cigarettes, called cigars, and which are made of cigaret tobacco with a thin wrapping of tobacco leaf instead of paper. However, local lawyers unanimously opined that the ruse would violate the statute, which “had a special reference to the sale of substitutes or articles calculated to evade the law.”267

Conflicting Decisions in Federal and State Court

The better legislation is the banishment of the manufactories entirely. Iowa has done this. There was a big fight as to the constitutionality of the law, and the judges and courts were puzzled over the original package clause, but the law still stands.268

On July 14 Fuller returned to Cedar Rapids to conduct the defense of McGregor, whom J. P. Rall had ordered confined in county jail, where he was “now serving his time, although he is far removed from the classic precincts of Marion’s select boarding house.” Already at this early time the Evening Gazette knew that the test case would be “fought through to the supreme court in order to establish the constitutionality of the law.”269

Already on July 18 the Evening Gazette reported that McGregor, who had been in prison since his arrest about a week earlier, had again been released from jail under a writ of habeas corpus, this time by Superior Court Judge Giberson in Cedar Rapids. Previously he had been released pursuant to the same writ issued by the federal court in Minnesota; he had also been released on a bond filed with Justice Rall on appeal to the district court: “By this means the tobacco trust has three separate strings to its kite. One is hitched onto the United States district court, another to the district court and the third from the superior court to the supreme court of Iowa.”270

266“Fight for Its Life,” CREG, July 11, 1896 (2:3).
269“That Cigaret Case,” CREG, July 14, 1896 (3:5). The Linn County jail was located in Marion, which was the county seat until 1919.
270“No End of Remedies,” CREG, July 18, 1896 (5:3). According to “Holds It Invalid,” CRDR, July 24, 1896 (8:3), McGregor had also appealed Justice Rall’s ruling to state district court, but the outcome of this appeal is unknown.
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

The day after the July 22 hearing on the petition U.S. Circuit Judge Walter Sanborn ordered that the prisoner be “discharged from detention and imprisonment....” In an initial reaction to sketchy press reports from St. Paul that the court had found the statute unconstitutional “in line with the original package decision rendered under the prohibitory law several years ago,” the Evening Gazette cited an unnamed “prominent lawyer” as characterizing this ruling as “carrying the principle of centralized power entirely too far.” Adopting a states rights position and fearing that the decision heralded the end of state authority, the lawyer opined that holding each five-cent package of cigarettes to constitute an original package “carried the principle to a ridiculous extent. ... It would be just as reasonable to name a spool of thread or a single package of chewing gum and original package.”

Whereas the Iowa State Press mistakenly concluded that Sanborn’s opinion “practically settles the question” of the application of the original package doctrine to cigarettes, the Iowa State Register was not persuaded of the

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271 State of Iowa v McGregor, 76 F. 956 (Cir. Ct. N. D. Iowa, 1896). No opinion was delivered but only the judgment. According to “May Smoke Cigarettes,” Saint Paul Pioneer Press, July 23, 1896 (8:3), Sanborn had already held the law unconstitutional and ordered McGregor released on July 22.

272 Although the national newspaper of record failed to report the event, at least the New-York Daily Tribune devoted a brief albeit error-ridden filler to it a week later. N-YDT, July 29, 1896 (6:6) (untitled).

273 “Declared Unconstitutional,” CREG, July 23, 1896 (5:4). The lawyer’s claim that “[t]he courts have held that there is practically no restriction upon states in the prerogative of police regulations” had not been true since the U.S. Supreme Court decided Leisy v. Hardin, which declared a single bottle of beer to be an original package. Similarly outdated in that light was the anonymous lawyer’s claim that a box of cigarettes in which an ordinary shipment was consigned was an original package but not a little paper box of 10 cigarettes.

274 “Law Is Laid Low,” ISP, July 29, 1896 (5:3). For an especially obtuse knee-jerk vindication of the original package doctrine, see “Reform in Iowa,” WP, July 27, 1896 (6) (edit.). Three months later the same newspaper reversed itself, becoming a champion of state police powers and protesting their “humiliating belittlement.” Although, because it opposed “superseding parental responsibilities,” it did not agree with banning cigarette sales, the editorialist opined that the law’s “merits or demerits” were “not a matter of legitimate concern to anybody outside of Iowa.” But then reverting to its uncritical judgment of the jurisprudential vitality of the original package doctrine, the newspaper insisted that the Tobacco Trust was engaged in a “safe proceeding” in sending 5-cent original packages to Iowa because, “as the precedents now stand, the law is not worth shucks against the ‘original package’ device.” To avoid this “needless belittlement of a State,” Iowa would have to persuade Congress to enact a law declaring that cigarettes were
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

significance of Judge Walter Sanborn’s decision. All that it accomplished, in the newspaper’s view, was to permit dealers to sell cigarettes in single five-cent packages if they were consigned, shipped, and received in that form without covering or boxing. However: “Fortunately cigarettes can not be so shipped and practically the decision...is worthless to dealers and cigarette consumers.”

Iowa Attorney General Milton Remley was not in Des Moines when Sanborn’s decision was handed down, but the Register, tracking him down in Iowa City, telegraphically asked for his interpretation, prompting this reply:

“It will not affect the sales in the state because there are no cigarettes shipped in that manner and from the nature of things cannot be.

The experience of shipping one 5 cent box by itself without other wrapping or other boxes of cigarettes contained within it in a larger package would eat up the profits.

Railway express companies cannot reduce their rates on cigarettes without making like reductions on other articles.

I am confident there is not a box of cigarettes in the state which can lawfully be sold under Judge Sanborn’s decision.”

As far as the newspaper was concerned, the opinion of the attorney general—who, it reported, would appeal to the U.S. Supreme Court—“settles the matter.” That Remley did not appeal the decision was presumably a function of his judgments that: (1) the shipment of individual packages was commercially implausible; (2) the state could not prevail on the issue anyway in the face of Supreme Court precedents; and (3) practically it was vastly more important to litigate the question of whether the original package doctrine was implicated when the Tobacco Trust shipped cigarette packages in their normal commercial manner inside larger packages, which Fuller had presented before a

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Sanborn went on to a very long career as a federal judge, serving 35 years. St. Louis Bar Association, Walter Henry Sanborn: A Testimonial Volume (1927).

“Cigarettes Cannot Be Sold,” ISR, July 24, 1896 (7:5).


“Cigarettes Cannot Be Sold,” ISR, July 24, 1896 (7:5). Other papers agreed that in the wake of Remley’s communication “it now appears that the decision is not so sweeping as at first supposed and is not of much benefit to dealers.” “The Cigarette Law,” Daily Telegraph (Atlantic), July 24, 1896 (2:2).

“Will Be Assessed,” CREG, Aug. 11, 1898 (5:1).
state court judge.

The Cedar Rapids Daily Republican served its editorial libertarianism with a hefty dose of legislative-historical revisionism embedded in a defective understanding of constitutional law:

When this statute was pending in the legislature, the Republicans suggested both the unconstitutionality and impracticability of the measure, but we did it, we confess, with very little enthusiasm, because the cigarette habit is one of the most contemptible of all vices, and we did not want to seem to even appear to defend it. There is no doubt that the use of cigarettes is extremely pernicious. The cigarette is a pernicious thing in itself and the cheapness of the thing places them within the reach of every kid who can command a few pennies. But law is law, and as long as there is any profit in them, they will be sold and used to a greater or less extent. To our notion, this matter properly comes under the head of parental responsibility. The man who said if he couldn’t keep his boy from using cigarettes he’d kill him, had the proper spirit, and we believe that if every parent would make up his mind to see to it that his child kept away from the death dealing quintessence of nastiness, as much or more could be accomplished than through the workings of any prohibitory law. ... Business men can also add their influence. They can refuse to employ cigarette fiends. They ought to do this for their own protection, for a youngster who uses up a box of cigarettes a day isn’t worth the ashes of a straw. Fight the cigarette in a practical manner.280

In the immediate wake of Sanborn’s ruling, confusion reigned. On July 24 the Des Moines Leader described a semi-euphoria among cigarette smokers:

There was joy among the cigarette fiends last evening when they read the announcement contained in the press dispatches to the evening papers to the effect that Judge Sanborn had decided the Iowa anti-cigarette law unconstitutional.... Judge Sanborn was more popular among the sallow-cheeked, watery-eyed fiends last evening than Judge Caldwell ever dreamed of being in a populist convention and there was strong talk of organizing a new personal liberty party and nominating him for president. The chappies were out in force as soon as the news could be spread and besieged the cigar stores with inquiries for cigarettes with which to appease the appetite that has suffered low [sic] these many days, but the cigarettes were not forthcoming. The dealers had been taken by surprise and when the announcement came to them it was so late in the day they had not time to stock up.

A reporter followed a trio of the stoop-shouldered lovers of coffin nails in their search. They went first to Gabio’s and asked for cigarettes. Gabio replied that he had not stocked up yet and probably would not until he was assured the decision was a sure go. ... Conrad Paul...told them he didn’t have any cigarettes and didn’t care whether he ever

The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

sold them again, because there was no money in them. 281

Nevertheless, on July 26 the Leader light-heartedly noted that: “The cigarette is still in search of itself. ... One thing certain is that it can’t be bought in the state, at least not with any comfort; and there are several hundred thousand of its devotees who anxiously await a determination that will relieve their suspense.” 282 Two days later the Leader reported that: “The cigarette is again being sold in Des Moines, but not generally. It was learned yesterday that large bundles, containing 50 of the small 5 cent packages, in original packages, are being sold in several places in the city.” The Leader’s belief that there was “no question of their being original packages” was as accurate as its claim that dealers and consumers were still waiting for Attorney General Remley’s “explanation of the legal status of the matter....” 283 Once Remley’s reaction was publicized, the Register found that:

Cigarettes are not being sold in Des Moines as a general thing for the reason that the dealers, having read the opinion of Attorney General Remley that the law was constitutional, are rather loath to open up the trade. There are two places in this city where cigarettes are being sold and have been sold contrary to law ever since it went into effect and those people who are on the inside have had no trouble in procuring them. Those dealers are not selling to strangers, of course, but they are supplying their old time customers whom [sic] they know can be trusted not to give them up. 284

In contrast, in Council Bluffs (across the Missouri River from Omaha), dealers had reportedly been selling cigarettes in the days since Sanborn’s ruling. The Register found that in that city, which had sent “the strong lobby” to the 1896 legislative session to work against passage of the law, it was highly probable that dealers had the encouragement of interested parties in making sales. However: “From no other section of the state is there any knowledge that sales are being made openly.” 285

(Ironically, however, almost a decade later Council Bluffs provided strong evidence that Iowa’s law was in fact being enforced and having some impact. In the immediate aftermath of Nebraska’s enactment in 1905 of its own anti-

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281 “Cigarette Law No Good,” DML, July 24, 1896 (2:1). Henry Caldwell, Sanborn’s colleague on the Eighth Circuit Court and author of an opinion in a well-known original package liquor case, had been mentioned as a possible candidate for president or vice president.

282 “Still There’s No Light,” DML, July 26, 1896 (5:5).


The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

cigarette statute, the United States Tobacco Journal reported: “Iowa has a similar law in force and the cigarette smokers of Council Bluffs have long been dependent on Omaha for their supplies. In future, of course, this source will be cut off and they will have to turn to Illinois, and other distant and unchastened States.”286

Just two days after U.S. Circuit Judge Sanborn’s ruling in St. Paul, in a writ of habeas corpus proceeding in Superior Court in Cedar Rapids for which Fuller had applied, Judge Thomas Giberson, found that the Iowa cigarette sale prohibition law did not contravene the federal Constitution because the five-cent package was not an “original package” within the meaning of the Constitution, having been put up in that form merely for the retail trade’s convenience and purpose.287 A Democratic politician who had been admitted to the bar in 1879 and served two terms as alderman in Cedar Rapids,288 Giberson also conducted an insurance business.289 Giberson had in fact already prepared his decision before news of Sanborn’s ruling reached Iowa, but nevertheless “decided not to change it....” Giberson’s orientation was underscored by his ruling that: “That the protection of the public health, order and morals demands the restriction or prohibition of the sale of cigarettes, cannot be questioned.”290

The parties, according to Judge Giberson’s decision, agreed on the fact that McGregor had bought in Illinois from ATC a number of packages containing 10 cigarettes manufactured by it in New York; these packages had been placed for shipment and delivery to McGregor in Cedar Rapids in a common pine box. On its arrival, McGregor opened the box and sold one of the packages. Because it was not simply or mainly the origin of the goods, but also the nature of McGregor’s business—which was “purely local and in no sense interstate”—that was relevant, Giberson reasoned that the form of the package was for the convenience of the retail trade; the package, once removed from the box, mingled with the plaintiff’s stock and became a part of the common mass of his stock: “Certainly it [the individual package] cannot be shipped in its present form.

289 The Cedar Rapids Evening Gazette’s City Directory of Cedar Rapids, Marion and Kenwood 113-14 (Dec. 1896).
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

Therefor large numbers of these packages are put into boxes like other merchandise and in this manner shipped and received by the plaintiff at his place of business....” Because the claim that interstate commerce was involved was “a mere pretext and an attempt to evade the just penalties of the statute,” he denied the writ of habeas corpus. Admitting that his conclusion was not free from doubt, Giberson held that it was the judicial rule to favor a statute’s constitutionality in such circumstances.291

Following the issuance of the two discrepant decisions—each dealing, to be sure, with a different structure of shipment and “original package”—two appeals avenues became available to the Tobacco Trust: to the federal circuit and Supreme Court on the one hand and the Iowa Supreme Court on the other.292 Giberson’s ruling, according to the Evening Gazette generally met with approval by lawyers in Cedar Rapids, who viewed the original-package decisions as “strained interpretations of the constitution and...unnecessary interference with the police power of the state.” More significant was that “[a] number of Cedar Rapids dealers are watching the progress of these cases with much interest. They say that they are heartily sick of the cigaret business and hope that they will not again be forced by virtue of competition into selling them.”293

With the federal court having ruled that the five-cent package shipped by itself was an “original package” and the state superior court having ruled (and state attorney general having argued) that it lost that status if shipped inside a box, the Des Moines Leader predicted that the anti-cigarette law could be “knock[ed] out” on the grounds that in the liquor prohibition cases the Iowa Supreme Court had construed “original package” to include a small one shipped into Iowa in a larger one and then taken out. However, the newspaper detected a hope for the court’s reversing itself: since the court had decided those cases

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291“Law Is Valid,” CREG, July 24, 1896 (7:1-3). See also “The Sale of Cigarettes,” ISR, July 28, 1896 (6:4-5). Four years later, in connection with issuance of the U.S. Supreme Court’s decision in Austin v. Tennessee, the Iowa press reported that: “It is known that a few years ago after the anti-cigarette law went into effect this corporation sent cigarettes to retail dealers in bulk. That is, instead of selling in lots of 500 as had previously been the case cigarettes were sold in lots of ten, or by the box, to the retailer. If he ordered a thousand cigarettes, they would come in sacks or baskets, but ten being fastened together. It was said this was the original package....” “Cigarettes Doomed,” DDL, Nov. 23, 1900 (1:3) (citing Des Moines Leader).

292“Law Is Valid,” CREG, July 24, 1896 (7:1-3). It is unclear how the Trust could have appealed Judge Sanborn’s decision since McGregor had prevailed. It is also unclear whether his decision had any legal consequences or prompted any appeal.

after Congress had enacted the Wilson Act\textsuperscript{294} exempting liquor from federal constitutional interstate commerce restrictions on state police powers—so that Iowa “could enforce its own prohibitory anyhow”—the court had defined “original package” very broadly, but in the interim it had “manifested a disposition to retreat” from that broad definition in patent medicine cases.\textsuperscript{295}

Despite Sanborn’s ruling, in mid-August the press was still reporting widespread enforcement—subject to the well-known caveat that importation for personal consumption from towns across the border in states lacking a prohibitory law undermined Iowa’s law, at least in Iowa border towns, without, however, always violating it.\textsuperscript{296} In an article headlined, “The Cigarette Law: Acts As a Bonanza for Our Trans River Neighbors,” the \textit{Davenport Daily Leader} related that:

\begin{quote}
The cities and towns strung all along across the Iowa border are rejoicing at the Iowa state anti-cigarette law. Consequently the sale of the obnoxious coffin nail has increased two fold in those fortunate localities.

The better the law is enforced here in Davenport, the more rejoiced will be our Rock Island and Moline neighbors. They already notice a substantial and profitable change in their sales, and what is worse for us there appears to be no abatement in the consumption of the deadly rice-paper cigarettes. In inter state [sic] towns the young men are forming clubs and send out agents to purchase the cigarettes in quantities. By this method the law is evaded and Iowa merchants are deprived of the profits which otherwise would accrue to them.\textsuperscript{297}
\end{quote}

\textsuperscript{294}The Wilson Act (or Original Packages Act) provides that: “All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.” Act of Aug. 8, 1890, 26 Stat. 313, ch. 728 (codified as 27 USC § 121).

\textsuperscript{295}“Still There’s No Light,” \textit{DML}, July 26, 1896 (5:5).

\textsuperscript{296}Whereas traveling to Illinois and buying cigarettes and bringing them back to Iowa to consume them oneself did not violate the statute, a nondealer who traveled to Illinois and brought back cigarettes that smokers had requested and for which they paid him did violate the law, although proving the existence of such transactions would have encountered much greater evidentiary obstacles than those taking place in stores.

\textsuperscript{297}“The Cigarette Law,” \textit{DDL}, Aug. 16, 1896 (6:5).
that at least in some cities cigarettes continued to be sold either openly or by subterfuge. At the end of November dealers in Des Moines received “large shipments” from New York and sold them in their original five-cent packages; the authorities did not try to stop the sales and it was reportedly “understood” that no effort would be made to do so “anywhere in the state.”

Whereas they had been selling cigarettes “on the quiet, and at greatly advanced prices,” they now began selling them “boldly and above board.” Consequently, in December the Polk County grand jury was investigating cigarette sales, prompting rumors that it would return several indictments. In Burlington, retailers had recourse to a “new method of evading” the law: ATC “shipped dealers...cigarettes in bushel baskets with a cover, they agreeing to make good any loss in transit. The dealers in turn place the baskets on their counters and the purchaser picks out what he wants direct from the original package.”

Little wonder that at least part of the press expressed the hope that the special session of the legislature in January 1897 would make it difficult for such dealers to close out their stock unless they did so very quickly.

Senator Phelps himself weighed in at the beginning of December to correct a “wide spread [sic] and perhaps very natural misunderstanding” as to the status of the Anti-Cigarette Law. Echoing Attorney General Remley’s legal analysis from the summer, he insisted that even if its enemies succeeded in having it held invalid (as Judge Sanborn had done), it would suffer little impairment because “it would be impracticable for any one [sic] to engage in the business of selling cigarettes when he must sell the package unbroken as he shipped it into the state”—unless the cigarettes “cross[ed] the state line in five cent packages alone, unenclosed with other packages.” Consequently, he warned that: “If any tobacco dealer in this state is now displaying cigarettes in his show case and offering them for sale, he is violating the law...and I believe that it is safe to say that he is in league with or in the employ of the cigarette trust of New York.” By the same token, he corrected the equally erroneous impression that he intended to introduce
an amendment to his own law, explaining that he knew of no defects in it to remedy.\textsuperscript{305}

The out-of-state press also took great interest in Iowa’s unique anti-cigarette law, often judging it to be a failure. In December the \textit{Macon Telegraph}—judicial news apparently took months to travel from Iowa to Georgia—commented that the “decision which declares that the Iowa law for the suppression of the cigarette to be...void, will doubtless cause rejoicing among the members of the ‘coffin tack’ brigade, but it is safe to say the general public will learn of the decision with sincere sorrow...”\textsuperscript{306} In Massachusetts, the \textit{Springfield Republican} declared that, as the U.S. Supreme Court’s original packages decisions had done with Iowa’s prohibition liquor laws, the new act had “come to naught.” In November it reported that “the tobacco trust has notified dealers in the state that it will defend cases brought against them, and will meanwhile ship cigarettes into the state in five-cent ‘original packages.’” As the precedents now stand, the state law may be ignored with impunity.” The only chance the newspaper identified for reviving the law’s validity was congressional removal of cigarettes from the articles of legitimate interstate commerce: “The blundering original-package decisions is [sic] going to cost a lot of trouble before it is reversed, if it ever is.”\textsuperscript{307}

\textbf{The Unsuccessful Initiative to Eliminate the Courts’ Original Package Doctrine Obstacle to State Anti-Cigarette Legislation by Passing a Federal Wilson Law for Cigarettes}

The question of “constitutionality” is almost as insidious as the cigarette itself and has such an air of weight and legal respectability that it may arrest the energy of the more timid. It is a question that is foreign to this crusade. It would not be raised, no one would dare to raise it, were any poison under discussion whose effects are more immediate, and it has no standing even when the lives of thousands of human beings are at stake. Constitutions are for the welfare of States, not their destruction. ... The most drastic measures that can be devised are needed to crush it out of existence, as far as children at least are concerned. Laws must be made so flawless that no chance of the poison leaking through will be possible, and that is the slogan that should be shouted by every man or woman who ever had a child or ever hopes to have a child.\textsuperscript{308}

\textsuperscript{305}“Senator Phelps’ Opinion,” \textit{CREG}, Dec. 11, 1896 (7:2).
\textsuperscript{306}\textit{Macon Telegraph}, Dec. 4, 1896 (4:3) (untitled edit.).
\textsuperscript{307}“Iowa’s Anti-Cigarette Law,” \textit{Springfield Republican}, republished in \textit{MO}, Nov. 9, 1896 (4:6).
\textsuperscript{308}“The Cigaret Must Go,” \textit{CT}, Mar. 25, 1896 (6) (edit.).
By the end of July the Iowa press reported that: “Already anti-cigarette people are planning to go before Congress and ask for a law which will protect the State in its legislation against the cigarette.” Anti-cigarette activists from other states and especially the WCTU had already done the advance work. Presumably as a result of the adverse court decisions pertaining to the Washington State anti-cigarette law and the West Virginia license tax law, a bill was introduced in Congress by Arkansas House Democrat William Leake Terry on January 15, 1896, which was designed to preempt such judicial challenges by conferring on states the same freedom from constitutional interstate commerce constraints with regard to cigarettes that the Wilson Act had created regarding liquor:

That all cigarettes transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such cigarettes had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Two days later Terry expressed his confidence to William Christian, a Washington-based North Carolina reporter, that the bill would pass if it left the committee “all right....” Anticipating the criticism that opponents would soon levy, the reporter noted “the fact” that Terry’s “brief, harmless-looking little cigarette bill” “would be helpful to” North Carolina’s “growing cigarette interests” and asked Terry what had prompted him to introduce it. Candidly replying that his purpose was to discourage rather than foster the cigarette industry, Terry pointed out that “the sentiment in Arkansas was against the vile

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309 “Around a Big State,” LM, July 31, 1896 (7:3).
310 See above this ch.
311 For information about his career, inter alia, as Little Rock city attorney and Arkansas Senate president that sheds no light on his anti-cigarette campaign, see the obituary in Proceedings of the Twenty-First Annual Session of the Bar Association of Arkansas 121-22 (1918). Leake was a Catholic convert. http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=343 (visited Apr. 22, 2010). Unfortunately, Terry’s rather thin correspondence files for the years 1894-96 at the University of Arkansas at Little Rock Archives & Special Collections contains nothing relevant to cigarette legislation. Email from Jennifer McCarty, archivist, to Marc Linder (Apr. 29 and May 11, 2010).
312 See above this ch.
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court


Nevertheless, his bill would “only give” the states the “local option” to deal with “the cigarette problem, without the bugbear of the ‘original package’ idea standing in the way....” For example, the bill would enable West Virginia “to carry out her wishes to tax cigarettes out of the State, if the State so desired, and...this was equally true of Arkansas and other States.” Ominously, the reporter closed by adding that it was “quite likely that there will be a heavy lobby against the bill.”

Christian may have revealed the identity of one lobbyist two days earlier when, in connection with publishing the full text of Terry’s bill, he interviewed W. W. Fuller, ATC’s general counsel, who was in Washington for a day or two, and was reminded of the Wilson bill. Christian was apparently conveying Fuller’s thought in reporting that passage of Terry’s bill would “subject the cigarettes of the American Tobacco Company to State taxes,” from which Judge Goff’s decision in the 1895 West Virginia cigarette sales license fee case had exempted cigarettes sold in “original packages.”

In the second half of February, when Terry told Christian that the Ways and Means Committee had reported his bill favorably, the reporter accurately predicted that “[i]t will no doubt be strongly fought.” Two months later, Christian reported from Washington that “according to my information,” North Carolina Republican Congressman Tommy Settle “is the only man standing in the way of the Terry cigarette bill.” Terry had told him that Settle’s friends had asked him to wait awhile with his cigarette bill because it would hurt Settle’s reelection. Christian, a Democratic enemy of Settle, asked: “Is he trying, as is alleged, to impede the Terry cigarette bill as an attorney for a trust, or as a Congressman?”

In fact, Settle, a political confidant of Benjamin N. Duke, arranged in general for the passage of legislation desired by ATC. On January 19, 1896, Settle wrote Duke that he had seen Fuller the previous week: “You are perhaps aware

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320 B. N. Duke to J. B. Duke (Nov. 10, 1894), in BNDP, Box 65, RBMSCL.
of the bill introduced by Mr. Terry subjecting cigarettes to the police power of the various states. It is now before the Judiciary Committee. I think I can manage it all right. I will have a conference with Gen. Henderson, chairman of the Committee[,] tomorrow, and hope to pigeon-hole it, or refer it to the Committee on Commerce. Cant [sic] you come up for a few days. I would like to see you and talk matters over.”

Settle’s active intervention had been manifest back in February when Terry revealed that Settle had requested to be heard before the Ways and Means Committee. Christian did not reveal why Terry, an anti-cigarette Arkansas Democrat, would be beholden to a pro-Tobacco Trust North Carolina Republican. Later, in the course of Settle’s unsuccessful reelection campaign, his opponent raised the issue of his “Cigarette Trust activity.”

A few days later the press reported that the Judiciary Committee had decided to report H.R. 4057 adversely. On December 14, 1896, the committee did report Terry’s bill, a majority claiming that, despite its title (“A bill in relation to cigarettes and to limit the effect of the regulation of commerce between the several States and with foreign countries in certain cases”), the bill neither had nor was intended to have anything to do with such regulation. Rather, putting it bluntly:

The bill is not in the interest of or intended to be in the interest of the public or of individuals addicted to the use of cigarettes, but is intended to injure the tobacco growers and manufacturers in certain localities and promote the interests of certain tobacco manufacturers in other sections. Your committee has nothing to say in favor of the use of cigarettes by individuals. We prefer that adults and minors let this article severely alone, and so recommend; but there is no reason for selecting out this one article and providing by law that it be subject to the operation and effect of the laws a particular State may see fit to enact in relation thereto when manufactured outside the State.

For the committee it sufficed that states retained police powers regarding retail sales once cigarettes had become part of the common mass of property within the

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321 Thomas Settle to B. N. Duke (Jan. 19, 1896), BNDP, Box 7, RBMSCL. It is unclear whether Settle’s uncertainty meant that ATC lawyer Fuller controlled the Trust’s lobbying to such an extent that ATC director Benjamin Duke in Durham might have been unaware of what Fuller was doing or that his brother, ATC President James B. Duke in New York, was the one who was centrally involved in such initiatives.


324 “Will Not Stop Cigarettes,” DIO, Apr. 29, 1896 (5:3).

state.\textsuperscript{326}

In its drive against alleged sectional legislation, the committee majority purported not to be contesting the wisdom of prohibiting the importation, manufacture, sale or use of cigarettes or liquor or others the abuse of which was injurious to the citizenry’s health. Its criticism was directed to the alleged fact that the bill did “not propose to subject cigarettes transported into a State...and remaining therein for use, consumption, sale or storage to the operation” of the state’s laws to restrict such activities with respect to cigarettes manufactured in that state; instead, the bill sought to discriminate in favor of in-state production and to “build up and promote cigarette trusts and monopolies in a State.”\textsuperscript{327}

Although two Iowa Republicans (including the chairman and soon-to-be House Speaker, David Henderson) were committee members, both were from anti-sumptuary legislation Mississippi River towns and neither voted to recommend the bill.\textsuperscript{328} A five-member committee minority (including, in addition to Terry, two Democrats from Texas, one from Missouri, and New Hampshire Republican Henry Baker), insisted that the bill, “designed to place cigarettes upon precisely the same footing” as liquor under the Wilson Act,\textsuperscript{329} served the same moralistic-medical purposes:

Cigarette smoking by the youth of our land, especially by boys of tender age, is a vast and growing evil, and the States should be left to the full and unimpeded exercise of all their police powers to deal with and counteract the same.

Many religious bodies, and notably the Women’s [sic] Christian Temperance Union, have passed resolutions deploring this mighty evil and asking for legislation to check it, and reputable physicians all over the land testify to the deadly effects of the cigarette habit upon the health and strength, the minds and bodies if its wretched victims. Congress should lend a helping hand to stay its ravages....\textsuperscript{330}


\textsuperscript{328}Henderson was from Dubuque and Thomas Updegraff from McGregor. The only two major tobacco-growing states whose representatives were members of the committee were Tennessee and Kentucky. David Canon et al., \textit{Committees in the United States Congress, 1789-1946}, Vol. 1: \textit{House Standing Committees} 659 (2002). On Henderson’s role as speaker of the house in enforcing that body’s nosmoking rule, see below ch. 18.

\textsuperscript{329}H. R. Report No. 2324, Part 2: \textit{Sale of Cigarettes} 1 (54th Cong., 2d Sess., Dec. 15, 1896). Confusingly, Terry had already submitted this minority report, with the identically same text, on June 11, 1896, when the bill was referred to the House Calendar and ordered to be printed. H. R. Report No. 2289: \textit{Cigarettes} 1 (54th Cong., 1st Sess., June 11, 1896).

A few days before the House Judiciary Committee issued its report, Senator Phelps had declared that if a supreme court determined his law to be unconstitutional, Congress could cure that defect by enacting a counterpart to the Wilson bill. In addition to implementing the advice from E. B. Ingalls, the superintendent of the Anti-Narcotics Department of the National WCTU, to “urge all Iowa to write to our [congressional] members at Washington and urge them to support this bill,” M. G. Davenport, the superintendent of the Hygiene, Heredity and Narcotics Department of the WCTU of the State of Iowa, acted on the suggestion by Senator Harlan to ask the Iowa legislature, which was in session, to pass a resolution requesting that Congress pass the Terry bill. She then secured the cooperation of Mary Butin McGonegal—a WCTU member who lived in Des Moines and in 1890 had initiated the call to preserve the nationally affiliated Iowa WCTU and was briefly appointed president pro-tem of the new organization—to set the legislative action in motion. Then the Iowa legislature’s two anti-cigarette stalwarts, Phelps and Representative Dr. Prentis, succeeded in passing a concurrent resolution at the extra session in 1897 urging Iowa’s congressional delegation to support the Terry bill. At the beginning of February Phelps declared that if the courts declared the anti-cigarette law unconstitutional, “we” would ask Congress “for an extension of the police power of the state that will allow us to suppress this evil.” Expressing the mistaken belief that Representative William Hepburn—an Iowa Republican who was chairman of the Interstate and Foreign Commerce Committee—was preparing, if he had not already introduced, such a bill, Phelps overoptimistically

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32Eighth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Creston, Iowa, September 27, 28, and 29, 1897, at 109 (1897). Senator Harlan was presumably James Harlan, U.S. senator from Iowa until 1872, when the William Allison Republican machine removed him from the state Republican party leadership, from which point until his death in 1899 “a long bleak road of twenty-seven years stretched out ahead of him, with nothing to brighten his gloom except a few empty honors.” Leland Sage, A History of Iowa 184 (1987 [1974]).

33First and Second Annual Meetings of the Woman’s Christian Temperance Union of the State of Iowa, held at Des Moines, Iowa, October 16th and 17th, 1890, October 6th, 7th and 8th, 1891, at 4 (1891). McGonegal, a 62-year-old widowed New Yorker, was returned at the 1900 population census as an editor’s clerk living in a cousin’s household in Des Moines.

34Eighth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Creston, Iowa, September 27, 28, and 29, 1897, at 109 (1897).
added that there was "little doubt it will pass." On April 23, Phelps offered this resolution, which, after quoting the bill, continued:

WHEREAS, the people of this State are greatly interested in said bill and its passage through Congress; therefore, be it

Resolved by the Senate of the State of Iowa, the House concurring, That the members of both branches of Congress from this State be requested and urged to support said bill and do all in their power to further the passage of said bill through the present Congress; and be it further

Resolved, That copies of this resolution be forwarded by the Secretary of State to each member of Congress from this State....

The same day Prentis offered the resolution in the House, which, suspending the rules, immediately voted 36 to 8 for adoption. On April 27, when Phelps called up his resolution, Code Revision Committee chairman Carpenter interjected that Congress had indefinitely postponed the bill, but Phelps and his Republican colleagues merchant and banker Warren Garst and lawyer James Carney, who was "identified with the business interests" of Marshalltown, argued that "the resolution ought to pass anyway, to express the sentiments of the legislature and to ask congress to remove the obstacles to the enforcement of the law of Iowa." The Senate then adopted Phelps's motion to adopt the House concurrent resolution, which it adopted 24 to 1, only Senator Ellis, the adamant opponent of prohibition in 1896, voting Nay. All 24 Yea votes were cast by Republicans; all seven Democrats either were absent or did not vote. A skeptical press opined that passage of the Terry bill would "bring the..."
cigarette under the police laws of the State, which would give the Phelps law new life and make it operative beyond any doubt.”

The National WCTU, which was the driving force of advocacy behind the Terry bill—its 1897 convention authorized a memorial to Congress “To protect State anti-cigarette laws by providing that cigarettes imported in original packages on entering any State shall become subject to its laws”—in no way intended to discriminate against certain states or encourage other producers. As Ingalls explained at the 1898 annual meeting: “This Department has worked very faithfully the past year to secure an inter-state commerce law. As our laws now stand, no State can forbid the importation of cigarettes. Mr. Terry, of Alabama [sic], introduced, in the last Congress, a bill covering this point, and petitions were sent to Senators and Legislators from every State and Territory in the United States.” Although Ingalls took hope from the fact that the chairman of the Judiciary Committee (George Ray of New York), who had held the bill because he was opposed to its wording, promised to introduce a bill at the next session that was “agreeable” to him, in fact he did not. The various state WCTU organizations continued to present petitions to their congressional representatives and Terry reintroduced the same bill in 1897 and 1899, but Congress took no action on it. In an effort to subvert Terry’s bill during the 1897-98 Congress, the Cigarette Trust circulated a letter to the press claiming that the Chicago board of health’s analysis of 14 brands of cigarettes had found no injurious drug in them except nicotine. In order to undermine this campaign

 resolutions were identical except that the House version lacked “therefore” at the end of the last “whereas” clause.


344Report of the National Woman’s Christian Temperance Union: Twenty-Fourth Annual Meeting...Oct. 29 to Nov. 3, 1897, at 51 (1897).

345Report of the National Woman’s Christian Temperance Union: Twenty-Fifth Annual Meeting, Held in People’s Church, St. Paul, Minnesota, November 11 to 16, 1898, at 246 (1898). Somewhat confusingly, Ingalls told the membership that the bill “does not ask Congress to pass an anti-cigarette law, only to so regulate the inter-state commerce laws that States may govern the cigarette trade.” Id. at 246-47.

346“Fighting Cigarettes,” MO, Jan. 25, 1898 (8:4).

347H.R. 55, 55th Cong., 1st Sess. (Mar. 15, 1897); H.R. 93, 56th Cong., 1st Sess. (Dec. 4, 1899). Republican Senator John Gear, former governor of Iowa, introduced a stripped down version of the Terry bill: “That whenever any State forbids the selling to minors of cigarettes or of all forms of tobacco, imported tobacco on entering such States, whether in original packages or otherwise, shall at once become subject to said State laws.” S. 4455, 55th Cong., 2d Sess. (Apr. 25, 1898). No action was taken on the bill.

348AD, Feb. 8, 1898 (2:2) (untitled).
Ingalls secured a letter from Cass L. Kennicott, the former Chicago city chemist to whom the analysis had been attributed, stating that the interviews that the press credited to him had not been authorized and were “published to advertise.”

At this time, in the immediate wake of the first imperialist expansion by the United States, the WCTU of the State of Iowa was not so obsessed with prohibition campaigns as to have lost sight of this world-historical development. In her presidential address in October 1898, socialist Marion Howard Dunham declared that:

To deal justly with millions of people of another nationality, race, temperament, language, customs and prejudices, with an almost entire lack of education, as we understand the word...; to give to these people a just, stable government, free schools and a free church; to put an end to the oppressive taxation by which they have been so long plundered, to lead them...to where they can be left to their own self-government, and the development of their own resources in their own way...demands the wisest and most unselfish statesmanship,...backed by a strong hand, that the piratical forces which have wrought such shipwreck here shall not be allowed to seize upon these fair and fruitful fields.

We have little reason to hope for this, for the trusts and syndicates of the nation have already turned their covetous eyes toward them, and new enterprises under the specious pretense of developing the country, are being planned...; and the Hawaiians, the Cubans, Porto Ricans and Phillipinos [sic] will find that with change of masters, while they will no longer suffer some forms of cruelty perpetrated by the Spanish government and they will have a certain measure of freedom never before enjoyed, they will still have to yield up, though of course by strictly legal forms, the larger share of the profits of their labor for the benefits of others. They and the people of this country will together pay all the expenses of the war,...but the monopolies will reap practically all the benefits.

At a time when “[t]he class line was never more sharply drawn,” Dunham was able to detect a silverish lining in this pitch black imperialist cloud:

The American people *struck* on behalf of the Cubans, just as the railroad employees of Chicago in 1894 *struck* on behalf of the helpless Pullman employees, and the war was as truly a “sympathetic strike” as that one. That it has commanded the sympathy of those who

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349 “Official Communications: Anti-Narcotics,” *US* 24(5):12 (Feb. 3, 1898). See also *US* 24(7):1 (Feb. 17, 1898) (untitled). On Kennicott’s role as Chicago city chemist in analyzing cigarettes for the presence of glycerine, which was prohibited by the 1897 city ordinance, see above ch. 6.

350 *Ninth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Waterloo, Iowa, October 11, 12, 13 and 14, 1898*, at 29 (1898).

351 *Ninth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Waterloo, Iowa, October 11, 12, 13 and 14, 1898*, at 31 (1898).
condemned the other, was because it was a war with arms against a foreign power, instead of an assertion of the rights of labor to a living wage, and so lessening the profits of a great capitalistic power.

But that this nation is yet capable of a sympathetic strike in behalf of the oppressed of another race and an alien language, is one of the most hopeful signs of the times, one of the brightest spots in the wide spread selfishness of our national life, and the one thing that gives us hope for the future. 352

In 1901 this same exuberantly anti-imperialist WCTU of the State of Iowa made two appeals to congressmen urging their support for the “‘Terry Bill.’” 353 At the end of 1905 temperance societies were still “pressing a national interstate anti-cigarette law...to crush this evil.” 354 And that year and again in 1905 and 1907, Kentucky Republican Don Edwards, who according to the United States Tobacco Journal, was “extremely hostile to the use of cigarettes,” 355 introduced the identically same bill, but it too died without any further action. 356 In 1906 and 1907 a more radical bill was introduced by Republican James Watson of Indiana, which incorporated Edwards’ approach but also made it unlawful to cause to deliver or mail, or for any common carrier to deliver, cigarettes or cigarette paper to a state in which it was illegal to manufacture, sell, or give them away. 357 At that point this perennially unsuccessful initiative appears to have run its course and such bills ceased being introduced. In 1908, in the course of a House floor debate on a bill to impose a license fee for cigarette dealers in the District of Columbia, conservative Illinois Republican William Wilson suggested that it would be a “good idea” for the Committee on the District of Columbia to consider prohibiting the sale of cigarettes. But his Illinois Republican colleague James Mann (eponymous author of the White Slave act), after noting that the committee chairman was “[o]f course...aware that in some States of the Union the sale of cigarettes is absolutely prohibited,” belittled the bill under discussion for

352 Ninth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Waterloo, Iowa, October 11, 12, 13 and 14, 1898, at 30 (1898).

353 Twelfth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Shenandoah, Iowa, on October 2nd, 3rd and 4th, 1901, at 81 (1901).


The Tobacco Trust's Attack on the 1896 Statute in Federal and State Court

proposing a mere one dollar a month license fee “for the privilege of selling coffin nails.”

The 1897 Code Amendment Imposing a $300 Punitive Mulct Tax on the Prohibited Sale of Cigarettes and the Tobacco Trust’s Failed Judicial Strategy to Invalidate It

“Mulct” is only another name for fine....

As state legislatures convened in the winter of 1897 and considered bills to prohibit the manufacture or sale of “the great foe of American youth” or at least to impose quasi-prohibitory license fees, the “campaign against the drugged, poison-laden, memory-destroying, corrupting cigaret” had, according to the Chicago Tribune, “attained national proportions.” In at least 15 states bills were pending that met one or the other of those criteria. In contrast, Iowa, the only state with a judicially approved general ban on cigarette manufacture and sale, was facing the possibility of its legislative repeal. Even before the Iowa legislature convened, the press had complained both that the “agitation” that passage of the Phelps law had injected into the subject of smoking by young boys had “but advertised it and resulted in its increase” and that “the publicity given the non-enforcement of this much-needed law has resulted in the disastrous increase of this habit among our young boys.” In the event, the $300 punitive tax that the legislature, adapting a related but nevertheless functionally radically different 1894 alcohol mulct tax, enacted in 1897 in order to reinforce the already existing outright sales ban was sufficiently counter-intuitive that many prosecutors and law enforcement agents either actually misunderstood or opportunistically pretended to misunderstand it as overriding the sales prohibition.

2In two different cases dealing with different fact patterns, a federal court had invalidated the law, but an Iowa state court upheld it. See above ch. 11.
4“A century later the misunderstanding persisted. Rivka Widerman, “Tobacco Is a Dirty Weed: Have We Ever Liked It? A Look at Nineteenth Century Anti-Cigarette Legislation,” Loyola Law Review 38:387-423, at 400 and 400 n.98 (1992), hopelessly misunderstood the chronology and misconceived the statutory purposes of the 1897 cigarette sales mulct tax when, after incorrectly asserting that the Iowa law of 1896 was
The 1897 Mulct Tax Amendment

The Legislature Passes a Mulct Tax on Top of the Sales Ban

Cigarettes at Des Moines are getting cheaper, as the time for the new law against them draws near. Their cheapness can never equal their cussedness.⁶

On January 19, 1897 Republican Governor Francis Drake called the Iowa legislature into extra session primarily to revise the state code,⁷ which had not been officially revised for a quarter-century. Against the background of the legal uncertainty concerning the constitutionality and validity of the new anti-cigarette statute created by the tension between the federal and state court decisions in the American Tobacco Company/McGregor case, the legislature was faced with several initiatives to revise, strengthen, or repeal the Phelps law. As early as November 1896, statehouse intelligence had been circulating that Phelps was “coming to Des Moines with another bill to prevent the sale of cigarettes. He is said to have devoted some days to the preparation of this bill, and it will probably be accompanied by a guarantee from Senator Phelps as a lawyer that it is constitutional.”⁸ The day after Drake’s action Senator Phelps, illuminating the federal-state context of his decision to file his bill in 1896, declared that he did not intend to raise the cigarette question during the special session because:

“The present law is as good a law as we can ever get...and it would do no good to pass another law until congress does something to prevent the original packages from being sent into the state. If we could get a law like the Wilson original package law[,] that would make our law effective. I was assured such a bill would be introduced before I introduced this one last winter. ... I am not sure, however, but it will be better to wait and go in for a tax entirely prohibiting cigarettes. Nothing can be said in defense of it and I am sure if the matter were called to the attention of the people of the country there would be no question about the popular sentiment in regard to it. I find that the law is very well enforced in the small towns of the state and everywhere it has resulted in reducing the sale of cigarettes. It has exerted a good and wholesome influence.”⁹

“[t]he first anti-cigarette law,” she confusedly observed: “Interestingly, Iowa did not explicitly repeal an earlier law that taxed the sale, barter, or gift of cigarettes....”

⁶CREG, Sept. 11, 1897 (4:1) (untitled).
⁷Journal of the House of Representatives of the Twenty-Sixth General Assembly, Extra Session, of the State of Iowa 5-6 (1897) (Jan. 19).
⁹DIC, Jan. 21, 1897 (4:5) (untitled). This same piece was published verbatim in Daily Telegraph (Atlantic), Jan. 23, 1897 (2:1).
The leading newspaper in Phelps’s hometown of Atlantic (pop. 5,000) shed interesting light on his claim that cigarettes, at least in small towns, were not being sold: on 47 days between October 12 and December 14, 1896, it sported, mostly at the top right of the front page, a large illustrated advertisement for ATC’s best-selling brand, Sweet Caporal, hawking free buttons with each package. The same ad also ran in other Iowa papers, but appears to have been terminated by the end of 1896. A few days later Phelps warned—and Attorney General Remley concurred—that it was a “mistake to believe that the coffin nail has knocked out” his law; on the contrary, cigarettes would “yet be banished from the borders of Iowa.” Without explaining whether he was referring to an enforcement mechanism or a ban on sale altogether, Phelps stressed that: “We will not attempt any further legislation by way of strengthening the present law....” This legislative self-restraint was paired with the expectation that the courts would still “so construe the law that it can be enforced.” Phelps drew some solace from the fact that Judge Sanborn’s decision merely decided what an “original package” was without referring to the Iowa law. His most revelatory comment dealt with compliance with the law seven months after it had gone into effect: “[T]he law has accomplished much good. It is true cigarettes can be bought in these cities, but in the small towns they cannot. The law has caused a sentiment against them that has accomplished much. Dealers in tobacco would prefer not to handle cigarettes, as they make almost no profit on them; they would rather sell cigars and tobacco, and except in a few cities they are not handling cigarettes.” In fact, as he was presumably not yet aware, he and his allies would (successfully) attempt further legislation to strengthen the Phelps law—namely, the imposition of a $300 mulct tax on the unlawful sale of cigarettes, which was designed to help enforce the law in Iowa’s large cities.

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10Daily Telegraph (Atlantic), Oct. 12, 1896 (1:5-6); Dec. 14, 1896 (4:5-6). To be sure, the fact that ATC paid for all these ads does not prove that the cigarettes were actually for sale in Atlantic.

11E.g., Carroll Sentinel, Oct. 17, 1896 (2:1-2); Dubuque Herald, Oct. 11, 1896 (6:6-7); Spencer Herald, Oct. 28, 1896 (7:5-6); WDC, Oct. 30, 1896 (3:1-2). A computerized search of the voluminous database of Iowa newspapers for this time period on Newspaper Archive found no such ads in 1897.

12a“The Cigarette Is Down,” DMWL, Feb. 4, 1897 (2:1).

13See below (especially Phelps’s speech of April 27).


**Senate Debate**

On February 11, the Fourth Division of the House Code Revision Committee, to which House File No. 85, devoted to crimes and punishment, had been referred, reported it back with the recommendation that the Phelps anti-cigarette law be inserted.\(^{14}\) The whole House then adopted this amendment and overwhelmingly passed the whole bill.\(^{15}\)

On April 1, the Senate Committee on Code Revision met to discuss H.F. No. 85. The 15-member committee, chaired by Republican Charles Carpenter, a lawyer representing the Mississippi River counties of Louisa and Muscatine,\(^{16}\) was composed of 13 Republicans and two Democrats,\(^{17}\) none of whom had been a prominent anti-cigarette advocate during the regular session in 1896. The two Democrats (Ranck and Harper) and three Republicans (Pusey, Lothrop, and Gilbertson) had voted against the Phelps bill. Only seven senators attended the meeting on April 1 in addition to chairman Carpenter: the two Democrats, two of the anti-Phelps bill Republicans, Pusey and Lothrop, and Republicans Abraham Funk, Alva Hobart, and J. M. Junkin.\(^{18}\)

Included among the amendments to the House bill that the committee recommended to the Senate in its report of April 2 was striking “cigarette” from the 1894 no-sales-to-minors law, presumably because cigarettes were already subsumed under the prohibition on selling or giving “tobacco” to them, although “cigars” remained expressly mentioned in the law. After offering this minor change, the committee proposed a radical undoing of the Phelps law in ways that must have profoundly satisfied the Tobacco Trust, if their agents did not draft the measure themselves. First, the substitute would have repealed the general ban on cigarette sales, replacing it with a meaningless and bogus ban on selling cigarettes with non-tobacco-related toxins; and second, in line with cigarette manufacturers’ position (then and now), it shifted exclusive attention to minors, raising the age...
The 1897 Mulct Tax Amendment

from 16 to 18, below which it would have been unlawful to sell cigarettes to minors, and criminalizing smoking by minors under the same age:

Sec. 7. “Any person selling or giving away any cigarettes containing any injurious drug or other deleterious matter or substance foreign to tobacco except the pure paper wrapper, and pure gelatinous adhesive substance required to enclose the same, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than fifty nor more than one hundred dollars for each offense, or be imprisoned in the county jail not exceeding thirty days, and any person, who sells or gives away any cigarette or cigarettes of any kind whatsoever to a minor under the age of eighteen years shall be deemed guilty of a misdemeanor.”

Sec. 8. “In addition to the penalty in this act provided any person who shall by himself or agent sell or give away any cigarette or cigarettes to a minor under the age of eighteen years shall forfeit and pay the sum of one hundred dollars for each sale so made, which sum may be recovered in a civil action prosecuted in the name of the parent or guardian of such person...one half of which sum so recovered shall go to the plaintiff, and the remainder to the treasury of the county wherein suit was brought....”

Sec. 9. “Any minor under the age of eighteen years who shall smoke, use, or have in his possession any cigarette shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense not less than five, nor more than twenty dollars, and may be committed to the county jail until such fine shall be paid, not exceeding, however thirty days, but if such minor shall disclose to the magistrate before whom he is arraigned or tried, at any time before conviction, the name or identity of the person from whom he obtained such cigarette or cigarettes, such proceeding may...be dismissed, but no evidence so taken shall be used against the minor in any prosecution for a violation of the provisions of this section.”

Sec. 10. “It shall be unlawful for any dealer in cigarettes to sell any package of cigarettes containing any picture, photograph, button or other article than the cigarettes with wrapper; or for any person whomsoever to sell or give to any minor under the age of eighteen years, any picture, photograph, button, or other article designed to advertise cigarettes, or induce the purchase thereof. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor.”

The next day the Des Moines Leader commented that the “new cigarette law” that the committee was contemplating was designed to replace the one that had been “knocked out by the courts.” The Cedar Rapids Evening Gazette (mistakenly) regarded the new effort to secure the “extermination of the gay and

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1976th General Assembly, Extra Session, Senate Committee on Code Revision, Minutes, Apr. 1, at 92-94 (SHSI DM). The text is also found in Journal of the Senate, Extra Session, Twenty-Sixth General Assembly of the State of Iowa 720-21 (1897) (Apr. 2).

20To Print Its Own Code,” DML, Apr. 3, 1897 (1:5).
The 1897 Mulct Tax Amendment

festive cigaret” as necessarily based on “some knowledge as to the ruling which the supreme court will make in the cases taken up on appeal from the city and county.” More significantly, the paper confirmed the view of Phelps and other supporters of the old law concerning the geo-demographic pattern of compliance and enforcement under it: “[U]ntil some law is passed which is declared to be incontestable the dealers in the larger towns and cities will supply the demands of their trade. It is understood that in only a few of the smaller towns can cigarets be purchased.”

On April 27, when the Senate resumed consideration of H.F. No. 85, Code Revision Committee chairman Carpenter moved to amend on the basis of the committee report. After the Senate had agreed to striking out the word “cigarette” from the no-sales-to-minors law, a lengthy debate ensued on the principal committee substitute, at the close of which the Senate rejected the amendment, repassed the Phelps anti-cigarette law, and added a mulct tax. The Iowa State Register summarized the proceedings:

The cigarette bill occupied the afternoon. The code revision committee had up a substitute for the present Phelps law on the ground that it is inoperative and unconstitutional. The substitute provided that cigarettes should not be sold to minors and should contain no injurious substance. Senator Phelps made a long speech in which he denounced the cigarette lobby and declared the wool had been successfully pulled over the eyes of the ministers of Des Moines who had been induced to petition the senate for the passage of the committee substitute. He declared his law was operative in most of the towns in the state and it had not been given a fair test as yet in the courts. The committee substitute was defeated. Senator Trewin then got an amendment through fixing a mulct tax of $300 for the sale of cigarettes in addition to the other penalties of the bill.

Fortunately, in the absence of verbatim transcription of state legislative proceedings, the Register (caused, for reasons unknown, to be made and)

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2. Journal of the Senate, Extra Session, Twenty-Sixth General Assembly of the State of Iowa 1019 (1897) (Apr. 27).
3. In the light of the length and detail of these debates in both chambers, the assertion by ATC’s lawyers in their brief before the Iowa Supreme Court in a case attacking the constitutionality of the mulct tax law that the amendment had been “introduced during the last days of the session, and was rushed through without mature deliberation” was utterly absurd and—since much of the debate focused on the Trust’s efforts to bribe legislators—grotesque. Brief for Complainants-Appellants at 12, Cook v. Marshall County, 119 Iowa 385 (1903).

published such a transcript of one of the most important legislative debates in the history of cigarette sales bans. Phelps took the floor to oppose the Code Revision Committee substitute. As in 1896, Senator Phelps gave by far the longest speech, which was so replete with information otherwise unavailable on nineteenth-century struggles over the regulation of cigarettes that it deserves to be quoted and read in full. In particular, Phelps’s remarks on the lobbying tactics of the Tobacco Trust—“Phelps Scalps the Lobby” read one sub-headline—reveal suggestive similarities to those of the Tobacco Institute and Philip Morris in Iowa (and elsewhere) a century later. At the time, the attack—which the Gazette condensed into the sub-head, “Boast of Trust Agents Will Not Be Made Good by Hawkeye Solons”—“caused considerable of a sensation....”

In my remarks I wish to be understood as not in the least criticizing a single member of the committee who made the report; for I do not know nor do I believe that any one whose acts I shall criticize has ever met this committee. On the contrary, I believe that their work has been done under cover and through others whose motives are the best, and not by approaching the committee directly.

When it is known all over this state that this general assembly has been infested from its beginning with lobbyists, wise and otherwise, honest and dishonest, I can see no longer any occasion for keeping silence on the subject.

That there is a place for an honest lobbyist in legislation no one doubts; but when corrupt trusts, the object of whose existence is the manufacture and sale of a certain article, send their emissaries into this state to suggest to us the best methods of suppressing the sale of this very article, they must not blame us if we do not attribute to them the highest motives.

One of the questions involved in this amendment is whether the senate is going to be run by the tobacco trust of New York, or whether we intend to run our own business in our own way.

I know whereof I speak when I say that the American Tobacco Trust is at the back of the movement to change the law, and has been at work among the members of this general

25Phelps read his speech and presumably gave a copy to the press; why and how the Register came to transcribe the other senators’ shorter speeches is unknown. The Daily Iowa Capital printed virtually the identical same speech, though the paragraphing was somewhat different; its account of the other senators’ speeches did not purport to be direct quotations, but they were in part more comprehensive than the Register’s. “The Cigarette Is Doomed,” DIC, Apr. 28, 1897 (8:3-6).

26“The Cigarette Mulct Law,” DML, Apr. 28, 1897 (1:7). Unfortunately, the incompetent microfilming of this issue left little of the rest of the article intact.

27See below Part VI.

28“The Lobbyists Are Attacked,” CREG, Apr. 28, 1897 (1:5).
The 1897 Mulct Tax Amendment

assembly ever since it convened.

When I say the bill known as the anti-cigarette bill, which was introduced before this body at its last session, had hardly been reported from the committee when there appeared upon the scene a would-be philanthropist, sent here all the way from Long Island, New York, by the American Tobacco Trust, whose proposed mission it was to see that a bill should be so framed as to best protect the youth of this state from the effect of this accursed traffic—I am speaking from personal knowledge.

He, too, like the author of this substitute reported by the committee, thought the best way to control the business was to allow the manufacturers of New York to place the cigarette on sale in all our shop windows, and then prohibit the sale to minors under 18 years of age, and fine the boy who bought or smoked them. This gentleman from New York, who honored our capital city with his presence a year ago, soon learned that New York methods in legislation were not indigenous to the prairie soil of Iowa and hied himself away to more congenial climes.

Again, senators, I weigh my words and know whereof I speak when I say that another gentleman from New York has spent the last eight weeks at one of the leading hotels of this city, he, too, claiming to be an agent of this same trust, and the avowed object of his visit is the modification of this law among the line of the proposed committee substitute.

I repeat what I said in the beginning, that one of the subjects of discussion on this proposed substitute is whether this general assembly proposes to codify the laws of this state or turn this particular part of it for codification over the tobacco trusts of this country.

I believe that it is high time that these freebooters in politics, these corruptors of legislation, these warts on humanity, these leeches on society, these paid emissaries of corrupt trusts, were notified that they are not needed at the sessions of the general assembly of the state of Iowa.

These gentlemen are not novices in their work, for we learn that we are not the only ones who have been honored or dishonored by their attentions. They openly boast that they have greatly assisted in similar legislation in other states.

The state of Washington is said to be the proud possessor of a very beneficent law upon this subject, very similar to this committee substitute, whose passage through the legislature of that state was aided by one of these same philanthropists.

This New York gentleman has related to men in this city, who are interested in this subject, how he procured the modification of the Washington law. He convinced a few leading Christian men of the capital city of that state that his bill was much better and would be much more effective than the statute they had then; then the ministers and other Christian men took hold and created public sentiment in favor of his measure and he had no trouble at all in procuring its passage through the legislature of that state. And now, senators, I want to ask you if you have observed any of his tracks over this city in the last few days?

But this is only a verification of the prophecy of our Savior just before his departure, that after him would come anti-Christ who would deceive the very elect.

He fooled the legislature of the state of Washington, for which, perhaps, it was not to blame; but if we, with our eyes open, allow him to impose upon us we alone are responsible.

And now, gentlemen of the senate, I believe that we in Iowa should show ourselves
free men and untrammeled by their dictation.

It seems to me that the services of these gentlemen are no longer needed here, and that they might be allowed to return to New York for the present, and if they are needed here at the next regular session they will be duly notified.

The main reason, Mr. President, why I am opposed to the committee substitute, is that similar laws are on the statutes of nearly every state of the Union, some placing the age limit at 14, some at 16 and some at 18 years of age; and so far as I have been able to learn they are universally a dead letter.

When you allow the cigarette to be placed on sale and provide that sales shall not be made to minors under a certain age, it is a very easy matter for boys above that age to purchase them for those under that age.

But we are told that the present law also is a dead letter. I want to say right here that in the city of Atlantic, a city of nearly 5,000 inhabitants, a place which I am pleased to call my home, I am informed, and believe, that there is not a cigarette on sale. And I have heard other members of this senate say that the same state of facts exists as to the cities in which they live.

In the large cities of this state the law is probably openly violated.

The tobacco trusts have shipped these cigarettes into the state, and have promised these tools of theirs, who handle them, immunity from the penalties of this law in case they are prosecuted.

They openly violate the law, and then offer its violation as a reason why it should be repealed; and the citizens of this state are so short sighted as to join them in the cry.

The law under consideration has never been declared unconstitutional by any court of last resort, either state or federal. That it will be so declared, so far as it prohibits the sale in original packages by the importer, some good lawyers believe.

While, on the other hand, just as good lawyers contend that the courts of this land have gone farther in this direction than they will ever go again.

There are a great many intelligent people who can not see why every state of this Union should not be allowed to make and enforce its own police regulations.

But, Mr. President, if the courts should declare that this law contravenes the interstate commerce law, in so far as it prohibits sales in original packages by the importer, and is, therefore so far unconstitutional, then it can be cured in the same manner that our law governing the sales of intoxicating liquor was cured by what was known as the Wilson bill, which passed congress after the delivery by the United States Supreme Court of its decision, known as the original package decision. And the Terry bill is such a provision.

If this law on our statutes does not curtail the sale of cigarettes in the state of Iowa, why does the tobacco trust keep a man here all winter to work for its repeal or modification?

I have on my desk a brief on the subject of the constitutionality of the present law, prepared by the attorneys of the tobacco trust, which brief cites a West Virginia case; and if any lawyer will take the trouble to read the that case he will be forced to the conclusion that if the law now on our statutes is unconstitutional the committee substitute is subject to the same objection.

The one prohibits the sale of all cigarettes because they are drugged and deleterious to the health of those who use them.
The other prohibits the sale of all cigarettes which are drugged and are therefore harmful to those using them.

If the West Virginia case announces the correct rule of law, which I do not believe, then both the present law and the proposed law are unconstitutional—in fact, according to that decision, any law that curtails the sale of this little pest is unconstitutional because it deprives the importer of the sacred right of selling his unwholesome wares in the original package.

According to that decision, any law which taxed the traffic in the original package in the least would be unconstitutional.

If this is to be the holding of the courts in this country, the sooner we find it out the better; and it will never be discovered by changing the law as often as the tobacco trust asks us to do so.

So far as I am concerned, I want it understood right here and now that I can answer to the roll call on the subject of this amendment without the aid or advice of any paid agent or attorney of the tobacco trust.

Again, Mr. President, in order that the American Tobacco Trust may never again have cause to complain that the cigarette prohibitory law of Iowa does not prohibit, we have prepared an amendment, which I believe will help greatly to enforce this law in the large cities of this state. And then, gentlemen of the senate, this man from New York, when he returns to his principals, can have the pleasure of saying to them that his mission to the wild and wooly West has not been vain, but that he has accomplished what he was sent here for, an amendment, to the Iowa anti-cigarette law.

And in return, his masters may say to him: “Fremont, you succeeded in fooling the ministers of the gospel, and came within one of fooling the superintendents of the schools of the great state of Iowa assembled at her capital; and in so far we want to say to you, ‘Well done, good and faithful servant.’ But candor compels us to say, Mr. Fremont Cole, on the whole you have made a bad mess of it this time for sure.”

And now, fellow senators, I hope that this committee substitute will be defeated, and then I understand that an amendment, which has been published in the papers and is known as the “Trewin amendment,” will be offered, and I shall support it and hope that it will prevail.

I understand also that Senator Carney will offer an amendment, fining the boys found smoking or carrying them. I shall also support this amendment and hope it, too, will prevail. In short, I am in favor of doing anything and everything that can be done to destroy the cigarette.

It has not a friend on earth, except those who make money out of it, and the human being who has been so unfortunate as to have become its slave.29

The Fremont Cole (1856-1915) to whom Phelps referred as the Tobacco Trust’s successful lobbyist in Washington State (in 1895) and unsuccessful

29. The Afternoon Senate Session,” ISR, Apr. 28, 1897 (4:7, 8:4).
The 1897 Mulet Tax Amendment

lobbyist in Iowa (in 1897) was a lawyer from western New York, who had been a Republican member of the state Assembly from 1884 to 1889, serving the final two years as speaker, before getting caught up in a political scandal—as a result of which his “career was blasted and his prestige destroyed”—and losing the Republican nomination for state senator in a failed effort to vindicate himself. Nevertheless, immediately after this defeat The New York Times profiled him as a “brilliant and brainy young lawyer...who is more than likely to be heard from later on.” After the press had reported in June 1890 that he had been appointed the Northern Pacific Railroad’s resident attorney in Seattle, he was in New York City briefly in September “settling some business for New-York parties who are interested in enterprises in the new State of Washington” (which had not joined the Union until November 1889). Whether in that connection the American Tobacco Company became familiar with his legal/business skills is unknown, but Cole then moved to Seattle, where he at once “acquired a partnership in one of the oldest and best-known law firms” in Washington State. Although the Times reported that he would “devote himself exclusively to his practice,” by 1893 it referred to him as a “businessman.” In 1894, when he was engaged in legal practice, he unsuccessfully ran as a Republican for a seat in the state senate, in the course of which contest the aforementioned scandal (accusing him of having been a “political ‘jobber’” while Assembly speaker) caught up with him. On October 3, 1895, the night before Cole left Seattle permanently “to take a lucrative position in the employ of the American Tobacco Company,” the

30 The identity of the Tobacco Trust’s unsuccessful lobbyist in 1896 is unknown.
31 American Legislative Leaders, 1850-1910, at 135-36 (Charles Ritter and Job Wakelyn eds. 1989).
33 “Fremont Cole’s Defeat,” NYT, Oct. 10, 1889 (1);
34 “Ex-Speaker Cole at Home,” NYT, Oct. 27, 1889 (9).
35 “News from the Sound,” MO, June 21, 1890 (2:1).
36 “Fremont Cole in Washington,” NYT, Sept. 12, 1890 (5).
37 “Fremont Cole’s Rosy Views,” NYT, Sept. 15, 1893 (9).
38 Hubbell’s Legal Directory: 1895, at 1166 (1895). His listing suggested that he was in solo practice, but according to “Fremont Cole,” SP-I, Oct. 15, 1894 (5:1-2), he was associated with two other men, who were not listed in Hubbell’s.
39 “The Republican Ticket,” SP-I, Nov. 6, 1894 (4:1). He lost by a vote of 564 to 777. SP-I, Nov. 8, 1894 (3:7).
40 “A Lie About Fremont Cole,” SP-I, Nov. 6, 1894 (2:3).
creditors of the “well-known attorney” attached the furniture of his residence. As far away as California the press reported that “much of his time is to be spent in the lobby of Congress.” Cole did return to New York, opening an office in New York City for what became “an extensive practice, reaching across the continent,” in which he engaged until his death in 1915. In fact, that office at 1 Madison Avenue (the Metropolitan Life Insurance Company building) housed “the prince of professional lobbyists,” Frederick S. Gibbs, another former New York State legislator, who was a key national Republican operative. On the death of Gibbs, whose “employee” Cole had been, the latter took over his office and occupation.

Whether Cole played a part in the Tobacco Trust’s effort to thwart Washington State’s passage of the country’s first general statewide ban on cigarette sales in 1893 is unclear. That statute made it unlawful to “manufacture, buy, sell, give or furnish to any one cigarettes, cigarette paper or cigarette wrapper.” Contemporaries entertained no doubts as to the Tobacco Trust’s impact on the passage of the ban, which became national news. Nine-tenths of the legislators who voted for the bill, according to The New York Times, “did not care a nickel about the reform of the cigarette fiend, but they were anxious to knock out the Tobacco Trust. This powerful combine...has been grinding the merchants and retailers to such an extent that they are glad to see it get a dose of its own medicine.” The Trust intended to subvert passage, but turned out to be
The 1897 Mulct Tax Amendment

an incompetent lobbyist.\textsuperscript{47}

Phelps’s account suggested that Cole’s role may have been limited to the amendatory process in 1895, when the Trust succeeded in undoing the severe damage of the original strict enactment.\textsuperscript{48} The bill that the legislature did enact in 1895 was well worth ATC’s investment in procuring its adoption: the new law, which made it unlawful to sell or give cigarettes to minors under 18, required sellers to obtain a license—which local governments were authorized to issue for a $10 fee for retailers—for which they had to make the meaningless oath that to the best of their knowledge the cigarettes that they would be selling did “not contain any injurious drug, narcotic or other deleterious matter....”\textsuperscript{49}

The day after Phelps had delivered his speech, the \textit{Des Moines Leader} published a very odd article that sounded as though it might have been planted in this anti-prohibition paper by the Tobacco Trust as part of a last-minute political disinformation campaign designed to thwart reenactment of the Phelps law and enactment of the mulct tax. Without naming the legislative gossipers, it alleged that it was

a matter of common gossip that the worthy senator [Phelps] was not always thus inflamed at the particular lobbyist [Fremont Cole] to whom he referred and whom he afterward named. Indeed, it is told on good authority that the lobbyist in question visited Atlantic, the home of Senator Phelps, before the beginning of the session and that the visit was not wholly unsolicited: that for some time thereafter he was in active correspondence with the “wart on humanity,” and that he cordially asked him to come to Des Moines: furthermore that the letters of Senator Phelps to this lobbyist, couched in terms of great friendliness, were in the possession of another senator at the time Senator Phelps delivered his phillippic [sic] and that the senate narrowly missed having another “sensation.”\textsuperscript{50}

The \textit{Leader} wondered why, if the reports were true, the public should not have access to this correspondence.\textsuperscript{51} The next day the paper repeated the insinuation in the formal editorial column, charging that if “Phelps had been in affectionate and friendly correspondence with the cigarette trust, and if the lobby came here

\textsuperscript{47}``Fighting the Tobacco Trust,” \textit{NYT}, Mar. 17, 1893 (10). See above ch. 4.
\textsuperscript{48}Curiously, the extensive contemporaneous press reporting on the 1893 and 1895 bills in Washington did not identify Cole as a participant. See above chs. 4 and 11.
\textsuperscript{49}1895 Wash. Laws ch. 70, §§ 1-3, 5 at 125, 126. See above ch. 11.
\textsuperscript{50}``Would Like to Read It,” \textit{DML}, Apr. 29, 1897 (2:5) (copy furnished by Merle Davis).
\textsuperscript{51}``Would Like to Read It,” \textit{DML}, Apr. 29, 1897 (2:5) (copy furnished by Merle Davis).
on his invitation, he should favor the public with a glimpse at the letters.”52 But, unanswered, the allegations, which were, at the very least, inconsistent with Phelps’s long-term active commitment to the anti-cigarette campaign, appear to have vanished as quickly as they had surfaced.

A rather different perspective appeared in the editorial column of the Cedar Rapids Sunday Republican, which opined that Phelps’s speech against “[t]hat dirty little thing, the cigarette” had “poured hot shot” into it “until its stench was as bad as it is when smoked and that is mighty bad.”53

The first senator to speak against Phelps’s view was Republican Senator Ellis, who had been such a prominent opponent of the bill in 189654.

I do not believe the senate desires to devote its time to the consideration of any lobbyist no matter what interest he may represent. I opposed this bill last session on the ground that it was sumptuary legislation. I have not changed my mind. If cigarette smoking is an evil I believe we can regulate it by preventing their sale to minors and preventing the placing of injurious substances in them. We all favor promoting the morals of the state. The only difference is as to the means to be employed. I favor the committee amendment because it prevents sales to minors and adulteration. I am in favor of it because it is the kind of law that it is. It is a wholesome law which controls the manufacturer, the dealer, and the consumer. Let us regulate and control it if we cannot have absolute prohibition.55

Republican Senator (and Code Revision Committee member) Joseph Junkin, who was responding to Ellis’s claim that every lawyer to whom he had spoken expressed the belief that the law would be declared unconstitutional,56 took a contrarian position:

I am in favor of any legislation that will restrict the sales of cigarettes and prevent their being used by the youth of this state. It is said the Phelps law is unconstitutional. That is incorrect. Our constitution says nothing about it. But it does conflict with the Federal interstate commerce laws. If we cannot prevent outsiders coming in and selling to adults we cannot prevent them selling to minors by legislative enactment. If it is decided a legitimate traffic I say we cannot pass a law making it a crime for any one to use them. If we cannot prevent the sale we cannot prevent the consumption. You might as well say that a baker shall not sell bread to a minor. A man has a right to use that which he buys.

52DML, Apr. 30, 1897 (4:3) (untitled edit.).
53“Capital Clatter,” Cedar Rapids Sunday Republican, May 2, 1897 (1:3).
54See above ch. 10.
56“The Cigarette Is Doomed,” DIC, Apr. 28, 1897 (8:3-6 at 4).
committee substitute is just as unconstitutional as the Phelps law. If one is unconstitutional so is the other. Let us stand by the Phelps law and pass the high license amendment to be introduced by Senator Trewin.\textsuperscript{57}

Republican Senator James Carney, an attorney (who had drafted Welker Given’s liquor mulct bill in 1893-94),\textsuperscript{58} taking the same position as Junkin,\textsuperscript{59} argued that:

Some regulations as stringent as possible should be adopted to prevent this evil. I believe that an addition can be made to the Phelps law which will be useful. I shall offer an amendment if the committee substitute does not carry. The Phelps law was tried before Judge Sanborn in St. Paul. I understand the attorney general is not satisfied with the trial of the case which was submitted on an agreed statement of facts. I do not believe the case was a fair test or that it has ever had a fair test. I do not believe the committee measure emanated from the tobacco trust. I have seen the trust bill. It is a high license law [sic].\textsuperscript{60}

After Carney had added that school superintendents had insisted that the legislature should authorize the arrest of minors who used cigarettes, Republican John Rowen declared that “[h]is views had been changed not by the agents of the tobacco trust, but by the educators and ministers.”\textsuperscript{61} He went on to charge that Phelps’s law did not even prevent cigarettes from getting into children’s hands:

I am as much opposed to the use of cigarettes as the senator from Cass but all any one has to do is to go down in the streets of Des Moines and see the small boys smoking cigarettes to know that the Phelps law is a failure. Out of conscientious motives, because I believe the Phelps law is a failure I intend to support the committee amendment. Within the last two hours I talked with one of the leading ministers of Des Moines. He said the Phelps law was an absolute failure in Des Moines. He asked us to give them something so they could be kept away from the small boys. The committee measure will some good at least.\textsuperscript{62}

\textsuperscript{57}“The Afternoon Senate Session,” ISR, Apr. 28, 1897 (4:7, 8:4-5). Junkin’s characterization of the $300 penalty as a “high license” was an early example of the confusion, fostered perhaps by the misleading resemblance to the 1894 liquor mulct, surrounding the mulct’s function.

\textsuperscript{58}See above ch. 9.

\textsuperscript{59}“The Cigarette Is Doomed,” DIC, Apr. 28, 1897 (8:3-6 at 4).

\textsuperscript{60}“The Afternoon Senate Session,” ISR, Apr. 28, 1897 (4:7, 8:5).

\textsuperscript{61}“The Cigarette Is Doomed,” DIC, Apr. 28, 1897 (8:3-6 at 4). On Rowen’s positions on the liquor mulct in 1894 and the Phelps bill in 1896, see above chs. 9-10.

\textsuperscript{62}“The Afternoon Senate Session,” ISR, Apr. 28, 1897 (4:7, 8:5).
The 1897 Mulct Tax Amendment

Instead of refuting Phelps’s allegations concerning Fremont Cole’s lobbying, Senator Carpenter lambasted the new law as useless in general and doing “no good whatever in large cities,” where its defiance bred contempt for law:

“There has been lots of talking. Some of it has surprised me. When I heard the senator from Cass [Phelps] I wondered where he got all his information. I have never claimed on this floor that I was incorruptible. I do not care to defend myself or my committee. I do not apologize for my position or that of my committee on this bill. I have never had to get up here and warn the members of this senate against a lobby in the fear that the members of the senate have not sense enough to know how they want to cast their own vote. When my committee came to consider the law we were confronted with the general belief that the Phelps law is useless. Judge Sanborn declared it illegal. Since then their sale has spread over the state and is on the increase. This morning the senate acknowledged the Phelps law was illegal by passing a resolution to ask congress to help us. Physicians agree that cigarettes stultify the growth of the youth but they may not injure the adult. You cannot convict a man for selling to a minor under the Phelps law because the whole law has been declared invalid. The whole intention of the committee has been to give the state a law that will remedy the evil to the greatest extent possible until congress can gave [sic] us a right to make the prohibition total.

Despite his refusal to defend the Code Revision Committee, Carpenter did just that by claiming that the committee amendments had been “made at the suggestion of Superintendent Hiatt. If this amendment is wrong it has been a mistake of the head and not of the heart.”

Senator Pusey echoed Carpenter’s remarks: “I do not rise to hurl vituperation at any lobbyist or to accuse the legislature of the great state of New York of being salable. The Phelps law is inoperative. The senator from Cass himself concedes his law is ineffective. His confession is here before this senate in the shape of the resolution he got passed this morning to memorialize congress. I favor the report of the committee because it has some force and some life while the Phelps law is dead and incapable of enforcement.”

Republican Frederick Ellison, who had filed an amendment to kill the Phelps bill and was the only non-border Republican to vote against it in 1896,

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64. “The Afternoon Senate Session,” ISR, Apr. 28, 1897 (4:7, 8:5).
65. “The Cigarette Is Doomed,” DIC, Apr. 28, 1897 (8:3-6 at 4). Amos Hiatt was the long-time school superintendent in East Des Moines.
67. See above ch. 10.
nevertheless opposed the committee amendment because “he thanked god he was not one of those individuals who was not willing to see the light.” In addition to having found that the law was enforced in his vicinity, the light that he had seen was “two boys, sons of widowed mothers, lose their reason from smoking cigarettes. He did not propose to favor any measure which contained a shadow of a backward step along such lines.”

Moving in the opposite direction, Republican A. C. Hobart stated that “he voted for the Phelps bill but he had changed his mind as to the wisdom of the vote. Last year two of the strongest speeches made against the Phelps bill on the ground that it was unconstitutional were made by the senators from Allamakee and Jones (Trewin and Ellison). To-day they are pleading for it although they have seen their prophesies fulfilled. If they are not selling cigarettes to-day in the town the senator from Jones hails from it is only a question of time until they do for they have the right to sell them.”

Carpenter then brought this part of the debate to a close by reminding the Senate of “Ellison’s eloquent speech last session against the Phelps bill and his attempt to get an amendment passed to simply prohibit the sale to minors.”

On the roll call vote, the committee amendment lost 16 to 27. All six Democrats (including the two committee members) who cast a vote supported the de facto repeal of the Phelps law. Republicans split 10 to 27; five of the six Republican members of the committee who attended the April 1 meeting voted for the amendment, the only exception being the contrarian Junkin. Of the seven Republican members who did not attend that meeting, three (Gilbertson, Rowen, and Waterman) also voted for the amendment, while four (Berry, Carney, Craig, and Trewin) opposed it. This voting record underscored the skew in committee composition that made its amendment possible in the first place.

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68. “The Cigarette Is Doomed,” DIC, Apr. 28, 1897 (8:3-6 at 4).
70. “The Afternoon Senate Session,” ISR, Apr. 28, 1897 (4:7, 8:5).
71. “The Cigarette Is Doomed,” DIC, Apr. 28, 1897 (8:3-6 at 4-5).
73. Journal of the Senate, Extra Session, Twenty-sixth General Assembly of the State of Iowa 1020 (1897) (Apr. 27).
74. Unsurprisingly, Senator Ellis, the veteran foe of the Phelps bill, also voted for the amendment.
The 1897 Mulct Tax Amendment

Senator Trewin then offered his amendment to impose an annual $300 tax, superficially similar to the $600 liquor mulct tax, on all cigarette dealers:

> There shall be assessed a tax of $300 per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with intent to be sold, bartered or given away under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct tax, and shall be a perpetual lien upon all property both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the state.

Unlike the liquor mulct, which was optional in localities and—because payment of the tax barred prosecution of the liquor seller under the prohibition law—effectively a license, the cigarette mulct was statewide and mandatory, and its payment left cigarette sellers liable to prosecution under the Phelps prohibitory law.

In support of his amendment Trewin, who lived in Lansing (population 1,566) in a rural northeastern county (Allamakee), declared that the law had “practically stopped the sale” of cigarettes in both places, resulting in the saving of a fair young man who was one of his best friends and it made him sorry that he had not voted for the Phelps bill in the first place.” Exhibiting a convert’s zealous fervor, Trewin declared that: “‘What we want...and none have disputed it, is to destroy, so far as may be, this cursed cigarette habit.’” The point of applying the principle of the mulct law to cigarettes was to “take the most
extreme measures to cut off the sale of this damnable stuff.”

By a large majority of 32 to 6 the Senate adopted Trewin’s amendment, Republicans casting all 32 yes votes; only Code Revision Committee chairman Carpenter and Pusey joined four Democrats in opposition. The Iowa press generally viewed the mulct tax as making the anti-cigarette law “stronger than ever” by imposing “an additional penalty for sale.” The *Dubuque Daily Times* observed that “the cigarette in Iowa is doomed,” while the *Shelby County Republican* ventured the prediction that: “This ought to completely annihilate the trade in the little coffin nails.”

Republican Senator Carney then offered the amendment that he had mentioned in his floor speech and that was almost identical with section 9 of the committee amendment criminalizing smoking by minors. Republican Senator Thomas Healy—who at the party’s state convention in 1893 had introduced “the famous thirteenth plank” on liquor prohibition—opposed Carney’s amendment. Healy refused to “favor any law that would result in small boys being torn from their mother’s apron strings by the brawny hands of big policemen and borne off to the police station.”

Before the Senate could vote on the amendment, Republican Thomas Cheshire, a lawyer from Des Moines who had twice voted for Phelps’s bill in 1896 and voted in favor of Phelps’s Terry bill resolution in 1897, offered an
The 1897 Mulct Tax Amendment

amendment to delete the reference to minors under 18, thus “mak[ing] it a crime for any one to smoke a cigarette. He said he could not vote for any measure that would make a criminal out of a boy that would not make it out of a man who performed the same act.” Cheshire’s proposal, which was presumably designed as a killer amendment—which was too radical even for Phelps, who had announced three months earlier that the anti-cigarette forces would not be seeking to strengthen the law—to derail the criminalization of youth smoking, served as a gauge of Senate Republicans’ attitudes toward the seriousness of the cigarette problem and the use of penal methods to control it. (Presumably, Cheshire did not expect that his amendment would become law, because either the Senate or House would reject it or the governor would veto it; alternatively, if it were enacted, perhaps he anticipated that the failure to enforce it would bring it and anti-cigarette legislation generally into disrepute.) Following Healy’s declaration that “he could not conceive of the liberality of the purpose which made a boy a criminal unless he wanted to become an informer,” Cheshire observed that “a boy would go to jail before he told where got the cigarettes. You would send him to such a place as the Polk county jail, which...ought to have been condemned years ago and...was a disgrace to the community.” Astonishingly, Cheshire’s amendment lost by the very narrow margin of 18 to 20. While four Democrats voted for it and none against, Republicans split 14 to 20. Several veteran opponents of anti-cigaretteism (such as Senators Ellis, Harper, and Lothrop) voted for the amendment, but no prominent anti-cigaretteists did; conversely, opposition to the total ban on use attracted both some of the latter such as Phelps and several high-profile opponents of strict regulation such as Carpenter.

The Carney amendment itself lost on the even closer vote of 21 to 21. All seven Senate Democrats voted against the criminalization of cigarette smoking or possession by minors under 18, while Republicans split sharply, with 14 supporting it 21 opposing it. Phelps kept his word and supported the amendment,

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92“The Afternoon Senate Session,” ISR, Apr. 28, 1897 (4:7, 8:5). In refutation, Carney instanced the curfew law as one applying only to minors. “The Cigarette Is Doomed,” DIC, Apr. 28, 1897 (8:3-6 at 5).

93“The Cigarette Is Doomed,” DIC, Apr. 28, 1897 (8:3-6 at 5). The Washington Post went further editorially, charging that the amendment placed a “high premium on sneaking hypocrisy” by enabling “every boy [to] violate a State law with impunity, and as often as he pleases, on condition that he become a sneak.” “Bad for the Boys, WP, Apr. 9, 1897 (6) (edit.).

94Journal of the Senate, Extra Session, Twenty-sixth General Assembly of the State of Iowa 1022 (1897) (Apr. 27).
but the question manifestly cut across earlier staked-out positions, jumbling protagonists and antagonists; for example, Phelps’ political twin, Perrin, joined Ellis, Pusey, and the Democrats in opposition, while Carpenter aligned himself with Phelps.95

**House Debate**

On April 30, a substitute was offered in the House for the Senate substitute embodying Trewin’s $300 mulct tax. Its author was Walter Hayes, who had been elected to represent the Mississippi River county of Clinton in a special election to take the seat of Democrat Nathaniel Merrell, who had died.96 Hayes, also a Democrat, had had a long career in public office, having been U. S. Commissioner for Iowa, a state district court judge, and a member of Congress.97 He was best known for having ruled as a judge, on narrow technical grounds, in 1882 that the newly added liquor prohibition amendment to the Iowa Constitution was invalid.98 In his private legal practice Hayes prominently represented large midwestern railroads and was himself a stockholder and director of several banks.99 During the brief election campaign the local Clinton newspapers depicted Hayes as a politician whose “only stock in trade...for sixteen years has been the liquor question”100 and who could be relied on to vote to legalize liquor manufacture.101 Not only did he vote for it, but at the end of February he had offered an amendment to the committee amendment of the relevant section of the proposed code that would have radicalized the committee’s approach to legalizing the manufacture of intoxicating liquors. Soon after Hayes’s substitute had lost by a vote of 37 to 59,102 the arch-Republican *Iowa State Register* editorialized that the liquor mulct tax had saved all the prohibition that was enforcible, and that unless the legislature permitted liquor manufacture, prohibition’s opponents

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95 *Journal of the Senate, Extra Session, Twenty-Sixth General Assembly of the State of Iowa* 1022 (1897) (Apr. 27).
97Http://bioguide.congress.gov
98The Iowa Supreme Court upheld the ruling. See above ch. 9.
99*The Bench and Bar of Iowa* 48-49 (1901).
100“A. P. Barker - Why He Should be Elected,” *Tri-Weekly Herald* (Clinton), Jan. 16, 1897 (4:2) (edit.).
102 *Journal of the House of Representatives of the Twenty-Sixth General Assembly, Extra Session, of the State of Iowa* 336-47 (1897) (Feb. 26).
would repeal it and enact a general license law. Contending that the people would not consent to go through another experiment—one in a generation or two sufficed—the paper argued that in 1897 statewide prohibition could not come within 100,000 votes of prevailing. On April 2, chairman Perrin reported out the recommendations of the Senate Committee on Suppression of Intemperance, which also legalized the manufacture of intoxicating liquors. On April 14, Perrin, Phelps, and 22 other Republicans opposed it, but when 18 Republicans joined all seven Democrats in supporting it, the Senate adopted the amendment 25 to 24. After the House, by a larger majority, had concurred in the Senate amendment on April 21, the new Iowa Code came to permit the manufacture of liquor in towns that both permitted its sale and a majority of whose voters and whose city council or board of supervisors consented to its manufacture.

Hayes’s lengthy substitute for Trewin’s amendment sought to resurrect and make even more meaningless for the purposes of cigarette suppression Senator Carpenter’s amendments that the Senate had already rejected. Hayes would merely have made it unlawful to sell cigarettes without a license. The press reported that it had been “desired by the cigarette trust....” If ATC did not itself draft this proposal, it must have been delighted that as a condition of receiving this license, the applicant was required to make an oath pseudo-certifying the pseudo-non-harmful nature of the cigarettes: “The applicant...shall make oath in writing that according to his best knowledge and belief the cigarettes intended to be sold pursuant to such license do not contain any injurious drug or other deleterious matter or substance foreign to tobacco, except the pure paper wrapper and the pure gelatinous or other pure and harmless adhesive substance required to enclose the same, and that he will not knowingly sell any cigarettes containing any such injurious drugs or other deleterious matter, or any wrapper containing

103 “Save the Possible Prohibition,” ISR, Mar. 2, 1897 (4:1-2) (morn. ed.) (edit.).
104 Journal of the Senate, Extra Session, Twenty-Sixth General Assembly of the State of Iowa 722-23 (1897) (Apr. 2).
105 Journal of the Senate, Extra Session, Twenty-Sixth General Assembly of the State of Iowa 865-68 (1897) (Apr. 14). Of the 13 members of the Suppression of Intemperance Committee the two Democrats and six Republicans voted to legalize manufacture, while five Republicans including Perrin voted against it. For the committee’s membership, see Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 31 (1896).
106 Journal of the House of Representatives of the Twenty-Sixth General Assembly, Extra Session, of the State of Iowa 841-45 (1897) (Apr. 21) (55 to 41).
108 “Iowa Legislature,” Shelby County Republican (Harlan), May 6, 1897 ([4]:4).
any harmful concoction of any kind whatsoever; and he shall also present...the written affidavit of one of the manufacturers of such cigarettes...to the effect that such cigarettes...do not contain any such drugs or deleterious matter or any other harmful matter or concoction of any kind whatsoever.” Hayes’s substitute then imposed a “duty” on city councils and boards of supervisors to grant a license to sell cigarettes to anyone filing the aforementioned meaningless oaths and affidavits, provided that the applicant paid the license fee ranging from a minimum of $10 in unincorporated areas to a maximum of $75 in towns of more than 15,000 inhabitants. The penalty for selling cigarettes with the forbidden ingredients was a fine of $50 to $100 or imprisonment for a maximum of 30 days. Hayes then tacked on the same provisions relating to minors that Carpenter had proposed.\footnote{Journal of the House of Representatives of the Twenty-Sixth General Assembly, Extra Session, of the State of Iowa 944-45 (1897) (May 1). See also “Aus dem Staate,” Der Dubuque National-Demokrat, Mar. 4, 1897 (4:3).}

When the House took up Hayes’s substitute on May 1, Hayes contended that while he “personally deplored” the federal court decisions with which the Senate amendment conflicted, “it was his duty to respect them.” He nevertheless insisted that his substitute was “acceptable in a prohibitive way....” He “wanted the evil eradicated as far as possible,” but he did not want to pass a bill that the U.S. Supreme Court would declare unconstitutional.\footnote{“Quiet Day in the Legislature,” DML, May 2, 1897 (3:4-5 at 5).} Presumably finding his remarks lacking credibility, the House “killed” Hayes’s substitute\footnote{“May Be Last Day of Session,” ISR, May 2, 1897 (20:1-3 at 2).}: on the roll call vote, only 17 representatives voted for Hayes’s substitute, 13 of them Democrats, only five of whom, together with 49 Republicans, voted against it.\footnote{Journal of the House of Representatives of the Twenty-Sixth General Assembly, Extra Session, of the State of Iowa 954 (1897) (May 1). Similarly, the vote on whether to concur in Trewin’s Senate amendment imposing the mulct tax found 56 Republicans in favor and only four opposed, while Democrats split six for and 10 against.\footnote{Journal of the House of Representatives of the Twenty-Sixth General Assembly, Extra Session, of the State of Iowa 953 (1897) (May 1). Three of the four Republicans (Chapman, McNulty, and Whelan) voting for Hayes’s substitute represented Missouri River or Minnesota border counties.}
**The Newly Codified Anti-Cigarette Provisions**

As enacted, the 1897 Code of Iowa contained three cigarette provisions, only one of which was new. Located in a chapter embodying “offenses against public policy” such as lotteries, disposing of liquors to Indians, allowing minors in billiard rooms or saloons, opium smoking, and selling firearms to minors,\(^{114}\) Section 5005 (“Sale of tobacco to minors”), codified the 1894 no-sales-to-minors law with one significant change: it removed the express mention of cigarettes from the list of tobacco products prohibited from being sold or given to minors, leaving “any cigar or tobacco in any form whatever....”\(^{115}\) The general ban on sales of cigarettes from 1896, now occupying section 5006 (“Sale of cigarettes”), underwent no changes except a very few trivial ones appropriate to a code rather than a session law.\(^{116}\) Finally, the new mulct tax in section 5007 (“Tax on sale”) provided:

> There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with intent to be sold, bartered or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property both personal and real used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the state.\(^{117}\)

Assessment, collection, and distribution of the cigarette mulct tax in the same manner as the mulct liquor tax meant that quarterly the assessor of every municipality was required to return to the county auditor a list of those engaged in the sale of cigarettes.\(^{118}\) If the assessor failed to perform this duty, three citizens of the county could provide the information to the auditor.\(^{119}\) Sellers were required to pay in quarterly installments; the tax due constituted a lien on

\(^{114}\)1897 Code of Iowa Ann. tit. XXIV, ch. 11, at 1954-55.

\(^{115}\)1897 Code of Iowa Ann. § 5005, at 1955.


\(^{117}\)1897 Code of Iowa Ann. § 5007, at 1955.

\(^{118}\)1897 Code of Iowa Ann. § 2433, at 857.

\(^{119}\)1897 Code of Iowa Ann. § 2435, at 857.
The 1897 Mulct Tax Amendment

the real property in which the business was carried on, and failure to pay within a month of the due date triggered a 20-percent penalty, increased by one percent per month thereafter.\textsuperscript{120} Of the tax paid into the county treasury the county retained half and paid the other half to the municipality in which the cigarette seller operated the business.\textsuperscript{121} The state district court, upon an application by any citizen of the county, was required to suspend or removed from office any county attorney who wilfully refused or neglected to perform his duty to insure that the mulct tax was enforced.\textsuperscript{122}

The adoption in Iowa of the mulct tax from the context of alcohol control and its adaptation to the prohibition of cigarette sales could not be seamless because it was embedded in two diametrically opposed purposes. With respect to liquor, the payment of the tax was designed, in combination with the expressed consent to its sale by the majority of voters in a locality (and a city council resolution to the same effect) and compliance with numerous conditions by the taxpaying seller, to relieve the latter of any liability under the law prohibiting such sales.\textsuperscript{123} In other words, whatever the self-contradictions inhering in an arrangement enabling those who would otherwise be criminal wrongdoers to buy their way out of liability, the law was clearly a variant of the local option exception to statewide prohibition. As applied to cigarette sales, however, payment of the mulct tax neither permitted localities to authorize them nor exempted sellers from liability under the statewide prohibition. In other words, the mulct tax was designed as an additional tool to coerce compliance and facilitate identification of potential violators of the sales ban. To be sure, on the level of politico-moral principle, the legislature would have acted more consistently and preempted accusations of hypocrisy had it simply increased the fine for violation of the sales ban by $300.\textsuperscript{124}

\textsuperscript{120}1897 Code of Iowa Ann. § 2436, at 857.
\textsuperscript{121}1897 Code of Iowa Ann. § 2445, at 859.
\textsuperscript{122}1897 Code of Iowa Ann. § 2446, at 860.
\textsuperscript{123}1897 Code of Iowa Ann. § 2448 at 860-62. As Attorney General W. H. Byers explained the difference between the liquor and cigarette mulct taxes in 1909 after he had issued an opinion that the payment of the latter did not protect sellers from the penalties imposed for violating the 1896 Phelps law: “It is the vote of the people and the fulfillsments [sic] of the other requirements made in the code that makes [sic] the saloon legal and bars prosecution.... The tax does not legalize the liquor traffic.” “The Cigarette Law,” Dubuque Times-Journal, July 3, 1909 (5:1-2).
\textsuperscript{124}The same consideration applied to the Given-Funk liquor mulct bill before it was amended to make payment of the mulct a bar to prosecution. See above ch. 9. The addition of the mulct tax did, to be sure, incorporate an important coercive enforcement
The 1897 Mulct Tax Amendment

Six years later, in adjudicating the Tobacco Trust’s (interstate commerce-based) challenge to the law, the Iowa Supreme Court found nothing self-contradictory about the cigarette mulct tax, whose “intended” role “as an aid in suppressing and punishing violations...seems too clear for controversy.” As a penalty or “fine imposed for an offense,” it was “not even a form of license by indirection, for it contains no ‘bar clause,’ but, on the contrary, expressly provides that it may be exacted in addition to the penalties named in section 5006.” Consequently, both sections sought the same “identical” end—“the suppression and prevention of the traffic in cigarettes.”

Public Commentary on and Reaction to the Cigarette Mulct Tax

The cigarette fiends of the city have but a few hours now in which to break themselves of puffing the proverbial “coffin nails,” for Friday is October 1, and on that date the new law will go into effect which will, in all probability, tend to put a stop to dealers handling the vile things.

The “Phelps-Trewin law” was, in the view of the Cedar Rapids Evening Gazette, “A Stringent Law.” In a front-page article the Democratic Davenport Daily Leader detected no contradiction in the legislature’s having adopted the Phelps anti-cigarette bill “absolutely prohibiting their sale, with an additional $300 mulct tax....” That the law may nevertheless have contained much less than met the eye emerged from the paper’s observation that “[t]he legislature has petitioned congress for a law placing cigarettes under police regulations, which would make the Phelps law operative.” In contrast, the legislative report of the non-partisan WCTU of Iowa at its annual convention in October 1898 tersely, misleadingly, but without explanation, summarized the outcome: “The cigarette law was amended to conform to the inter-state commerce law and thereby somewhat weakened.”

advantage vis-a-vis a mere increase in the fine by imposing a lien on the owner of the property on which liquor or cigarettes were being sold.

125Cook v. County of Marshall, 119 Iowa 384, 400 (1903).
126“Personal,” CREG, Sept. 30, 1897 (3:3-4 at 4).
127“Iowa Legislature,” Shelby County Republican (Harlan), May 6, 1897 ([4]:4).
128“A Stringent Law,” CREG, May 1, 1897 (2:4).
129“Cigarette Mulct Stands,” DDL, May 2, 1897 (1:7).
130Twenty-Fifth Annual Meeting of the Woman’s Christian Temperance Union of Iowa 61 (1898). Since the 27th General Assembly in 1898 enacted no law relating to cigarettes,
mulct tax’s principledness, the Chicago Tribune, which, at least at this time, editorially favored outright prohibition of cigarette sales, pointed out other ways in which the application of the mulct tax to cigarettes might prove to be less effective than in the liquor field:

The commendable object of this last Iowa mulct is to suppress cigaret selling entirely. The tax is intended to be prohibitory; it goes with an absolute interdiction of the traffic. The mulct on the saloons, on the contrary, is permissive and intended to supplant the prohibitory law wherever employed.... The original saloon mulct...was simply a disciplinary or regulative tax and always adjusted below the point of prohibition. [A]bove all else the mulct policy of giving Assessors extraordinary power to levy on a particular kind of traffic was justified because of the peculiarly open, notorious, unmistakable nature of that traffic—dramselling—under a permissive system. In the absence of delegalizing penalties a public drinking place naturally stands out in its true character.... Under such circumstances it is no trick to spot every saloon for taxation.131

In contrast, according to the Tribune, not only was cigarette selling not conspicuous, it was “not even a business by itself, but merely an incident or side feature in the legitimate sale of tobacco.... Such a traffic can easily take on a secret character.” Consequently, the paper concluded, “[s]traight prohibition, when generally supported by public opinion, is better....”132 The mulct tax approach was not confined to Iowa. Tennessee, which had basically adopted Iowa’s anti-cigarette bill in 1897, enacted a somewhat different version of the cigarette mulct tax in 1899.133

More than a month before the Iowa mulct tax went into effect on October 1,
1897, the $300 tax had impelled merchants in Le Mars, a Missouri River county
town of about 5,000, not to sell cigarettes. At the same time it was reported in
Muscatine on the Mississippi that cigarettes were becoming scarcer and fewer
were being sold every day. As the local paper reported under the headline, “The
Death-Dealing Cigarette Must Go,” a “prominent tobacco dealer” was “glad of
it.” While he had not keep them in stock for two months, some other dealers that
did were not selling many either: “The coffin nail is doomed.” The reason, he
explained, was twofold:

“All this comes about through the new revenue law by which Congress has added 50
cents a thousand as the internal revenue tax, which brings the cost to the retailer up to
$4.20 and leaves the profit on each box only four-fifths of one cent. This is the prime
cause of the advance....”

“It is known...that quite a number of dealers stopped selling the death-dealing article
when the Phelps law passed and have never begun selling them again, while others, a short
time after the scare, and several decisions of the Federal Court, which virtually declared
the law unconstitutional, again began the sale, and have continued ever since.”

The profit on cigarettes has never been large enough to make their sale a paying
transaction, but many dealers, although it has been against their principles, have been
compelled to sell them.

The price per box has not advanced in this city, although in many places it has
doubled. It is expected, however, that when the Phelps law takes effect the price will go
skyward, and may cause a total stoppage of all sales. Twenty-five cents a box may yet be
the price for ten little coffin nails.

In the very last days of September, M. G. Davenport, the superintendent of
the Hygiene, Heredity and Narcotics Department of the nationally affiliated
WCTU of the State of Iowa, reported to its annual convention that: “Since the
decision of Circuit Judge Sanborn that cigarettes may be sold in the State in
original packages the law in Iowa has been robbed of its force. Manufacturers
make the original packages so small they sell for a nickle and ship them into Iowa
in open baskets.” This unduly pessimistic assessment of the decision, which
ignored Judge Giberson’s decision and would have to undergo revision in a few

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135“The Death-Dealing Cigarette Must Go,” Muscatine Journal, Aug. 24, 1897 (5:3)
(copy furnished by Merle Davis).
136“The Death-Dealing Cigarette Must Go,” Muscatine Journal, Aug. 24, 1897 (5:3)
(copy furnished by Merle Davis).
137Eighth Annual Meeting of the Woman’s Christian Temperance Union of the State
of Iowa, held at Creston, Iowa, September 27th, 28, and 29th, 1897, at 109 (1897).
months after the Iowa Supreme Court ruled on ATC’s appeal of that ruling, did not deter one of the group’s local unions from reporting to Davenport: “‘We put up anti-cigarette law in all places where tobacco is sold: it is a restraint to many.’”¹³⁸

On the eve of the law’s effective date, the Des Moines press reported that it was not probable that any local dealer would pay the tax: “The fact is that cigarettes are sold now at a profit of less than half a cent a package, and are carried more for accommodation than anything else. Dealers do not feel like paying a heavy tax in order to accommodate their trade, and realize that they cannot earn the license.” To be sure, some dealers were already taking heart that ATC would save them from having to pay the tax by backing a test case contesting it on the same interstate commerce grounds that underlay the challenge to the Phelps law. A Trust representative had already written the dealers that he did not consider the law good and expressing the belief that it could be beaten.¹³⁹ In Cedar Rapids the Evening Gazette was certain that the $300 mulct tax would make cigarettes “an unknown quantity” because the profit was too small to enable any dealer to pay it. Moreover, the law was not liable to become a dead letter because, if a dealer sold cigarettes despite not having paid the tax, “the lawyers will have a good case.”¹⁴⁰ Within days of the law’s effective date, the authorities in Des Moines began receiving complaints of dealers’ bootlegging “the little lung destroyers” without paying the license fee. The press reported that investigations, arrests, and the first prosecutions were imminent. Nevertheless, despite the bootlegging, the deterrent effect of the new law apparently curtailed supply to such an extent that “many of the fiends have not yet become acquainted with the bootleggers and are resorting to all manner of means to satisfy their cravings.” Many were reduced to using tissue paper, but “probably the most novel method” was the adoption by restaurant waiters of tissue napkins.¹⁴¹ Once some dealers began to pay the license fee, they prepared to file complaints against the continuing bootlegging, which at least the Des Moines Leader predicted would prompt arrests and a test case.¹⁴²

Despite enactment of this “most excellent law,” whose $300 annual penalty

¹³⁸Eighth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Creston, Iowa, September 27th, 28, and 29th, 1897, at 108 (1897).
¹³⁹“Will Make a Cigarette Test Case,” DML, Sept. 29, 1897 (2:4) (copy supplied by Merle Davis).
¹⁴⁰“Personal,” CREG, Sept. 30, 1897 (3:3-4 at 4).
¹⁴²“The City in Brief,” DML, Oct. 15, 1897 (5:2) (copy supplied by Merle Davis).
for dealers had been found to be “prohibitive,” by the end of 1897 the *Cedar Rapids Evening Gazette* reported that

a surprisingly large number of boys in the city are still able to secure the cigarette paper and in out of the way places indulge their appetites of the vile, nerve and brain racking “coffin stick.” It is not believed that there is a single tobacco store in the city where either cigarettes or the paper can be purchased, but in some mysterious manner the victims of the habit have no difficulty in securing what they term “the makin’s.”

Pass along almost any of the public schools at the noon hour or at 4 o’clock and one will see from one to a score of boys, ranging in age from 10 to 16, rolling cigarettes...and dodging into alleys and behind building [sic] where they can be lighted and smoked without public observation. It is not at all infrequent to see a boy marching down the street with his comrades, puffing away at a cigarette as though his life depended on it.

It would seem as though the school boards of this country will yet be compelled to take this matter in hand and absolutely refuse admission into the schools of boys who persist in this filthy and disgusting habit. It would be the easiest thing in the world to detect the boys who are addicted to the use of cigarettes, both from the stench about their clothing, the discoloration of their fingers and their general lack of mental activity. ... Any thoughtful parent would rather see his son go down the avenue with a big black pipe in his mouth than to see him wasting his vitality on poor tobacco and vile paper.143

The Iowa press does not appear to have adduced concrete figures on the prohibitiveness of the $300 cigarette mulct tax, but discussion of a contemporaneous $100 license fee ordinance in Chicago shed important light on the question. Retail dealers there claimed that the fee would “in most cases...more than extinguish” the profits that the Trust allowed them. With the average five-cent package of 10 to 12 cigarettes allowing the small dealer a profit margin of 1.2 cents: “In order to overcome the tax of $100 a year and prevent an actual loss in the sale of cigarets over 8,300 packages would have to be sold annually.” Consequently, the average retail shopkeeper or tobacco merchant would probably refuse to stock them.144

When the Iowa State Board of Health published its biennial report at the beginning of 1898,145 it included an article on “Cigarettes,” which faulted laws that several states had enacted prohibiting cigarette sales to minors as “unsatisfactory” because they were “constantly evaded” by adults who bought

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143“A Burning Shame,” *CREG*, Dec. 16, 1897 (5:2) (copy furnished by Merle Davis).
145Although the title page bears the date 1897, a newspaper article on the report appeared in late February suggesting that it recently been published. “Do They Injure?,” *CREG*, Feb. 23, 1898 (8:3).
The 1897 Mulct Tax Amendment

cigarettes and furnished them to minors and lacked definite means of enforcement.
. The board then praised as the “latest and most efficient means of controlling the traffic” the 1897 mulct “system of taxation....” Bizarrely, the board appears to have been unaware both that the 1896 Iowa law prohibited sales to adults too and that the mulct tax was not designed as a means of “controlling the traffic” but of reinforcing the total ban. Nevertheless, for the Evening Gazette the law was unquestionably “a good one,” while the report should have been required reading for “[I]ocal cigarette fiends, who are waiting for someone to prove that the habit is injurious but who at the same time could not be convinced by a dozen reputable physicians,” though even the newspaper did not expect that “these dumb individuals” would learn from it.

A Failed Attempt at Repeal

At the regular session of the legislature in 1898, a one-term Democratic member of the House, James A. Penick, introduced a bill, House File No. 317, to repeal the codified Phelps-Trewin anti-cigarette and mulct tax laws and to “enact a substitute therefor for the purpose of restricting the sale of cigarettes.” Penick, who—unusually for a Democratic leader—represented the Burlington and Rock Island railroads, had, before practicing law, worked in the business of his father, “the merchant prince of southern Iowa,” who owned the largest mercantile business in that part of the state. H.F. No. 317 was a watered-down version of the Code Revision Committee’s sham prohibitory substitute that the Senate had rejected by a vote of 27 to 16 in 1897. Penick’s bill, introduced “by

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147 “Do They Injure?,” CREG, Feb. 23, 1898 (8:3), referred to the report as analyzing “Iowa’s system of taxation or licensing,” although the newspaper stated that the Iowa law “precludes” the sale of cigarette paper within the state.
148 Journal of the House of the Twenty-Seventh General Assembly of the State of Iowa 671 (1898) (Mar. 10). According to “It Will Be Defeated,” DML, Mar. 11, 1898 (1:5-6, 6:4-6 at 6), the bill did not repeal the $300 mulct tax.
149 A Memorial and Biographical Record of Iowa 1:335-36 (1896).
150 History of Lucas County, Iowa 703 (1978).
151 “Rites Sunday Afternoon at Funeral Home,” Chariton Herald, Mar. 29, 1934 (SHSI, IC, Clippings File, Biography).
152 History of Lucas County, Iowa 702 (1978).
153 See above this ch.
The 1897 Mulct Tax Amendment

request, included two sections verbatim from the 1897 committee substitute prohibiting the sale of adulterated cigarettes and that of cigarette packages with pictures or buttons. H.F. No. 317 also contained a watered-down version of Hayes’s substitute for Trewin’s amendment that the House had rejected by a vote of 54 to 17 in 1897. Penick would have required cigarette retailers and wholesalers to pay an annual license fee of $10 and $25, respectively, which would have been divided equally between the state and county. The penalty for violating any of the bill’s provisions was a fine ranging between $50 and $100 or imprisonment up to 30 days. Finally, Penick provided for the express repeal of the codified general cigarette ban and the mulct tax.

In an article published in Penick’s hometown newspaper, the syndicated Iowa legislative columnist Frank Bicknell, alleging that the Phelps-Trewin law was “inoperative,” asserted that the bill was “intended to be a reasonable license law, from which considerable revenue will be derived.” The press, in devoting but brief attention to the bill, uncritically characterized it as “[a]bsolutely prohibiting the sale of cigarettes to boys under 18, prohibiting adulteration and prohibiting the use of obscene pictures in advertising cigarettes.”

The House Public Health Committee, still chaired by Dr. Bowen, who had opposed real anti-cigarette legislation in 1896, recommended that the bill pass. At that point Bicknell contended that the bill might pass the House “as the

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156See above this ch.
157H.F. No. 317, § 3.
160Bicknell was a member of the executive committee of the National Republican League, a farmers’ organization. Secretary of State, Iowa Official Register 89 (10th Year, 1895).
162“It Will Be Defeated,” DML, Mar. 11, 1898 (1:5-6, 6:4-6 at 6). Another paper stressed that Penick’s bill to restrict cigarette sales imposed heavy penalties. “Adjournment Delayed,” [unsourced Iowa newspaper], Apr. 1, 1898 (4:5-7, 5:1-2 at 1).
163Journal of the House of the Twenty-Seven General Assembly of the State of Iowa 782 (1898) (Mar. 16).
members believe it would produce considerable revenue and would be enforced,” whereas the mulct tax “is not enforced anywhere in the state.”164 When the full House took up the bill at the end of the session, Republican Joseph Edwards, a lawyer from Iowa City, “earnestly” urged passage, while Republican lawyer Charles Johnston and school teacher William Hauger opposed it on the grounds that the statute in force affecting cigarette sales was “much more effective.” Debate ended when the motion by Johnston and Republican grain dealer Merton De Wolf to kill the bill (“by striking out the enacting clause”) prevailed165 by an “overwhelming” viva voce vote.166

The Iowa Supreme Court Is Not Misled by “the thinest [sic] moonshine”: McGregor v. Cone (II)

The public is hoping that the [supreme] court will forward the hearing in this case to meet the urgent conditions which exist. The law...is openly and flagrantly violated every day in all towns of considerable size in this state.167

The Supreme Court of Iowa has decided that the anti-cigarette law is a valid one. This is evidently a bid of the Hawkeye state for increased immigration—of folks who want to get rid of the habit and of the many thousands more who want to get rid of the smoker.168

In January 1897, the press in Davenport reported that that city’s friends of the anti-cigarette law were “getting anxious” to hear the state supreme court’s decision in the original package cases. Their anxiety stemmed from the (alleged) fact that whereas tobacco dealers had initially discontinued cigarette sales after the law had gone into effect, selling resumed after the lower court rulings so that there was no longer a town in Iowa “where cigarettes cannot be openly purchased.” Although “many prominent attorneys” believed that the Iowa Supreme Court would sustain the statute, in the meantime the cigarette was

165Journal of the House of the Twenty-Seven General Assembly of the State of Iowa 1082 (1898) (Mar. 31). Hauger had voted consistently for the Phelps bill in 1896, while Johnston did not vote (or was absent); in 1897 both voted consistently against the Hayes amendments. Edwards was the first Republican to represent Johnson County in 22 years. http://www.legis.iowa.gov/Legislators/legislator.aspx?GA=27&PID=3745.
166“Not Till Tomorrow,” DIC, Mar. 31, 1898 (2:4-6 at 4).
167[Untitled], Boone Standard, Jan. 30, 1897 (3:2) (copy furnished by Merle Davis).
168Lincoln Evening News (NE), Jan. 28, 1898 (4:2) (untitled edit.).
“getting in its deadly work with renewed vigor, the small boy being the chief victim,” as a stroll along any of Davenport’s business streets sufficed “to convince anyone...”\(^{169}\)

Despite having prevailed before Judge Giberson, Attorney General Remley realized, as both he and the Tobacco Trust had understood back in the first days of July 1896,\(^{170}\) that the Iowa Supreme Court would not uphold the constitutionality of the Phelps law unless he persuaded the court to recede from \textit{Iowa v. Coonan}, an 1891 decision in which it had ruled that bottles of beer and whiskey shipped into Iowa, “for convenience of shipment,” in boxes and barrels were, without any doubt, still original packages after they had been removed and sold individually.\(^{171}\)

The appellant’s brief that W. W. Fuller filed before the Iowa Supreme Court on behalf of his straw man client McGregor—ironically, in seeking to impugn the legitimacy of a tobacco merchant’s action to restrain ATC from doing business in New York State, the trust’s renowned lawyer, Joseph Choate, charged in 1895 that Whelan & Co. were “merely figure-heads,” while the National Tobacco Company was “the real mover,” whose lawyer “sat behind and pulled the wires” as Whelan’s lawyer argued the case\(^{172}\)—appealing from Judge Giberson’s decision fit firmly within the narrowest, policy-ignoring tradition of disembodying and reifying the “original package” doctrine. That doctrine, sympathetically manipulated by judges in a series of judicial invalidations of state anti-cigarette and prohibitory license laws that the Tobacco Trust had secured in Washington State (1893), West Virginia (1895-97),\(^{173}\) Tennessee (1897),\(^{174}\) and in the federal branch of \textit{McGregor}, doubtless instilled Fuller with great confidence that the Iowa Supreme Court, overruling Judge Giberson’s unprecedented adverse ruling, would also join the bandwagon.

In addition to focusing on the Iowa Supreme Court’s precedents that gave great deference to that doctrine, Fuller sought to make the most of a letter that ATC had secured from the U.S. commissioner of internal revenue in April 1893 (to use in its challenge to the Washington State anti-cigarette law),\(^{175}\) which misleadingly certified that a package of cigarettes bearing an internal revenue stamp was “a proper and original package, as contemplated by existing [federal]

\(^{170}\)See above ch. 11.
\(^{171}\)\textit{Iowa v. Coonan}, 82 Iowa 400, 401 (1891).
\(^{172}\)“Fighting the Trust,” \textit{N&O}, Sept. 21, 1895 (1:6).
\(^{173}\)See above ch. 11.
\(^{174}\)See below this ch.
\(^{175}\)See above ch. 11.
law and regulations,” and that therefore repacking them “in additional covering of wood, paper, etc., is optional with the manufacturer and does not concern this bureau.” Fuller cited *State of Washington v. Coovert*, which in 1893 had struck down Washington State’s anti-cigarette law as violative of Congress’s interstate commerce powers, as “[i]dentical” with the facts of the state branch of *McGregor* in that in Washington, too, 10-cigarette packages had been shipped together in a wooden case. (In fact, in Washington State ATC had displayed “ingenuity” in devising “eight separate and distinct sales of cigarettes, each in quantity and mode of sale slightly differing from the other sales” because it was, in the words of the Washington attorney general, “desirous of securing the advice of this honorable [U.S. Supreme] court as to how it may violate the laws of the State of Washington with impunity, and still enjoy the protection of the constitution and laws of the United States under the federal power to regulate commerce between the states....”) Fuller was also able to cite a case that he himself had litigated on behalf of ATC in West Virginia in which the company had orchestrated shipment of the packages enclosed in a wooden box. He stressed that in June 1896 the Circuit Court of West Virginia, in a decision (that was not reported) holding unconstitutional an 1895 West Virginia law imposing a $500 license on retail sellers of cigarettes as applied to an unlicensed seller who had sold “original packages” had quoted the same Internal Revenue Bureau letter to bolster its conclusion that as “statutory packages” prescribed by federal law they were necessarily original packages for purposes of interstate commerce.

Remley in his reply brief characterized the judge’s logic as a “non sequitur” and even “nonsense” and an “absurdity” which “betrays ignorance of the methods of commerce....” Instead, according to the attorney general, “[t]he usual manner in which merchandise is packed for transportation which experience has shown to be the safest, cheapest and most convenient for handling, determines what is an original package in the sense in which the term was used in Brown v.

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176 Brief for Appellant at 17 (letter from John W. Mason to ATC, Apr. 6, 1893), McGregor v. Cone, 104 Iowa 465 (1898).
178 Brief for Appellant at 18-19, McGregor v. Cone, 104 Iowa 465 (1898).
179 Brief for Appellant at 1, 6-7 (1893), State of Washington v Coovert, 164 U.S. 702 (1896).
181 Brief for Appellant at 20 (State v. Goetze), McGregor v. Cone, 104 Iowa 465 (1898).
Maryland. To ignore this distinction and permit a retail dealer...to carry on his retail trade in a state in defiance of the laws of the state by indulging the fiction that a retail package shipped in that form and manner in violation of the usages and customs of the importers, is an original package...is not only illogical and without reason, but is a long step in the direction of overthrowing the police powers of the states...."\(^{182}\)

Although Remley conceded in his brief that Coonan was “adverse” to his position,\(^{183}\) he chided the Iowa Supreme Court for the same illogic that he detected in the “decisions of an unknown nisi prius court of West Virginia”\(^{184}\)—namely, the error of “failing to make the distinction between articles of commerce put up in boxes for the convenience of the retail dealer, and the original packages in a commercial sense.”\(^{185}\) He therefore urged the court to reconsider the question in order to “bring itself in harmony with all the other courts of the country which have spoken on the question.”\(^{186}\)

Toward the end of his reply brief Attorney General Remley finally broke loose from the sterile discussion of the original package doctrine in order to introduce factual claims—none of which, to be sure, he documented—concerning the health and moral consequences of cigarette smoking. He executed this turn in an effort to take advantage of language in Plumley v. Massachusetts, a recent U.S. Supreme Court case that upheld, against an attack based on the original package interpretation of the congressional interstate commerce power, a Massachusetts statute prohibiting the sale of oleomargarine in imitation of yellow butter:

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\text{[T]he real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk, or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. ... The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying}
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\(^{182}\)Appellee’s Argument at 8, 9, McGregor v. Cone, 104 Iowa 465 (1898).
\(^{183}\)Appellee’s Argument at 2, McGregor v. Cone, 104 Iowa 465 (1898).
\(^{184}\)Appellee’s Argument at 8, McGregor v. Cone, 104 Iowa 465 (1898).
\(^{185}\)Appellee’s Argument at 4, McGregor v. Cone, 104 Iowa 465 (1898).
\(^{186}\)Appellee’s Argument at 7, McGregor v. Cone, 104 Iowa 465 (1898).
something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country? ...

The language we have quoted from Leisy v. Hardin must be restrained in its application to the case actually presented for determination, and does not justify the broad contention that a state is powerless to prevent the sale of articles manufactured in or brought from another state, and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import.187

Procrusteanly, Remley sought to squeeze cigarettes into this interpretive mold. He began by observing that the U.S. Supreme Court had not inquired as to whether any buyers of oleomargarine had actually been deceived, defrauded, or injured, but had upheld the law as a valid exercise of the police power despite margarine’s being a subject of interstate commerce.188 Thus launched, the Iowa attorney general segued into the applicability of the approach to the Phelps law: “So tobacco is an article of commerce, and cigarettes are claimed to be made of tobacco. But the form in which cigarettes and cigarette tobacco are prepared makes it easy to mix noxious and deleterious substances with the tobacco, whereby the public are likely to be, and I am persuaded are, deceived and defrauded. ... It is believed that the use of cigarettes often made of deleterious and even noxious ingredients with the vilest kind of tobacco possibly worked over with solutions of opium, is a standing menace to public health, [and] public morals and is detrimental to good order and prosperity, which the state is duty bound to conserve.”189 This rather dubious empirical claim, for which Remley could have cited Dr. Emmert’s aforementioned paper in the Iowa State Board of Health Report190 or myriad other sources, may have constituted the far-fetched jurisprudential link to Plumley that, at the same time, was wholly superfluous from the perspective of the health sciences. Perhaps Remley’s solace derived from his argument that the Iowa Supreme Court did not have to find that anyone actually was deceived or tricked. Instead, he urged the court to take judicial notice of another, subtly subsidiary, claim of personal incapacity, that deviated starkly from the vast majority of contemporary accounts of cigarette smokers’ age and gender composition:

188Appellee’s Argument at 16, McGregor v. Cone, 104 Iowa 465 (1898).
189Appellee’s Argument at 16-17, McGregor v. Cone, 104 Iowa 465 (1898).
190See above ch. 3.
The 1897 Mulct Tax Amendment

[I]t is a matter within the common observation of all, that cigarettes are prepared especially for boys and youth and women, and are used almost exclusively by them. They are put up in an attractive form and sold at a price within the reach of a boy with a few pennies, and are often accompanied with [sic] lascivious pictures to inspire lust, while the pernicious cigarette habit is sapping his physical and mental vitality, so that many promising boys before reaching the age of twenty become physical, mental and moral wrecks. Men seldom use cigarettes, unless they become cigarette fiends in boyhood. If the sales of cigarettes were limited to persons of mature years there would not be demand sufficient to justify tobacco dealers keeping them in stock. 191

Remley failed to explain how the Tobacco Trust was deceiving boys, youth, and women or how it was deceiving them more than men; if the latter were no better at uncovering the opium and other non-tobacco ingredients than the former, it is unclear how the reference to them could bridge the gap to Plumley’s applicability. On the other hand, the attorney general did presciently point to a psycho-behavioral fact of overwhelming significance to the tobacco control movement that did not, however, receive adequate consideration until late in the twentieth century—namely, that children and adolescents start smoking for age-specific reasons that are no longer relevant to adults later on in their maturational development. 192 As Thomas Roddick, a nationally prominent Canadian physician and medical professor, who was also a Conservative member of the House of Commons, observed during floor debate on a resolution to enact a national prohibition on the import, manufacture, and sale of cigarettes in 1903: “[W]e know that if a boy does not smoke up to seventeen or eighteen he will probably not smoke at all.” 193 These younger people also soon outgrow those reasons, but

191 Appellee’s Argument at 16-17, McGregor v. Cone, 104 Iowa 465 (1898).
by then they have become long-term nicotine addicts. Even if it had been as true in the 1890s (and it was not, especially among women) as it became and remained later in the twentieth century that relatively few people began smoking after their early twenties, the recruitment via addiction that may have caused ATC to focus on younger customers could not have constituted the deception required by Plumley—unless Remley had been able to perceive the much more profound deception that Claude Teague, R. J. Reynolds’ assistant research and development chief, articulated three-quarters of a century later in an internal document discovered in litigation:

Paradoxically, the things which keep a confirmed smoker habituated and “satisfied”, i.e., nicotine and secondary physical and manipulative gratifications, are unknown and/or largely unexplained to the non-smoker. He does not start smoking to obtain undefined physiological gratifications or reliefs, and certainly he does not start to smoke to satisfy a non-existent craving for nicotine. Rather, he appears to start to smoke for purely psychological reasons—to emulate a valued image, to conform, to experiment, to defy, to be daring... Only after experiencing smoking for some period of time do the physiological “satisfactions” and habituation become apparent and needed. Indeed, the first smoking experiences are often unpleasant until a tolerance for nicotine has been developed. [I]f we are to attract the non-smoker or pre-smoker, there is nothing in this type of product that he would currently understand or desire. We have deliberately played down the role of nicotine, hence the non-smoker has little or no knowledge of what satisfactions it may offer him, and no desire to try it. Instead, we somehow must convince him with wholly irrational reasons that he should try smoking, in the hope that he will for himself then discover the real “satisfactions” obtainable.194

Among those “wholly irrational reasons” that the Tobacco Trust had devised in the late nineteenth century were the “lascivious pictures to inspire lust”—forerunners of wholly irrational twentieth-century cigarette advertising suggesting health, pristine environments, vigorous exercise, and sexual attraction.195 In mentioning them and the “wrecks” that boys became, Remley came rather close to formulating the bait-and-switch strategy that tricked the first generation of cigarette smokers into lifelong addiction and that might have

qualified as deception. Instead, he appeared to be advocating on behalf of a no-sales-to-minors law, although he was in fact before the Iowa Supreme Court representing the state in defense of the Phelps law, which imposed an absolute ban on cigarette sales.

If Remley had been able to develop the bait-and-switch argument, he could have explained that consumers had not bargained for a nicotine addiction; he would then have met the *Plumley* requirement that the product’s “sale may cheat the people into purchasing something they do not intend to buy....” But he would then have faced the more difficult obstacle of showing that it was also “wholly different from what its condition and appearance import.” Undeterred, Remley valiantly strove to demonstrate that this *Plumley* standard “applies with equal force to the case at bar”:

Tobacco is not an article of food nor clothing. It is a luxury, the indulgence of which is due to a perverted taste. The desire for it comes from cultivation and habit indulged in and does not arise naturally in the normal man. While the production of tobacco in many forms prepared for chewing and for smoking has become an industry, and I will concede has obtained a place among articles of interstate commerce, it is eminently proper to forbid the sale of it, either in the original packages or otherwise, to the class of persons who from immaturity or lack of experience are unable to judge of the evil consequences arising from its use. The statute in question, however, does not forbid the sale of all tobacco. It forbids the sale only of tobacco prepared in the form of cigarettes. The form is such that adulteration of the tobacco with injurious mixtures cannot be detected.

However, Remley offered no evidence that adulteration was easier to detect in chewing or pipe tobacco or cigars; nor is it intuitively clear that it would be. Nor did (or could) he explain why the sale of non-cigarette tobacco to, and its consumption by, adults should have been lawful. Instead, he urged the court to take judicial notice of “the common understanding of mankind which includes the manner in which cigarettes are prepared and of the class of persons around whom the legislature intended to throw its protection in the enactment of this statute. It is a matter of common knowledge that men of mature years do not smoke cigarettes.” Even apart from the fact that Remley had already conceded that adult men who had become addicts in their youth smoked, his suggestion that

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196 Plumley v. Massachusetts, 155 U.S. 461, 474 (1894).
197 Appellee’s Argument at 19, McGregor v. Cone, 104 Iowa 465 (1898).
198 Appellee’s Argument at 19, McGregor v. Cone, 104 Iowa 465 (1898).
199 Appellee’s Argument at 19, McGregor v. Cone, 104 Iowa 465 (1898).
200 Illustratively, the youngest member of the Canadian House of Commons in 1904, Liberal Armand Lavergne, who opposed the resolution to ban cigarettes because it was “an
the legislature’s intent was to protect pre-adults only oddly lacked any explanation as to why then the Phelps law prohibited selling cigarettes to adults. Apparently unwilling (or unable to see the need) to present a utilitarian or deontological justification for depriving adults of cigarettes at a time when science had not yet identified them as injurious to adults’ health, Remley failed to be as candid as a Liberal Canadian legislator in 1903, who supported the aforementioned House of Commons resolution to ban cigarette manufacture, sales, or importation by frankly admitting that “while we are endeavouring to reach the young we can only reach the young by reaching the old. We have no quarrel with those of mature years who smoke cigarettes,... but when we are trying to reach the young we must also have legislation in connection with the old.”

The attorney general tried to break out of his doctrinal adulteration prison by arguing that *Plumley* revealed that the U.S. Supreme Court was not willing to push *Leisy v. Hardin* “to its full logical consequences”; rather, the “ebb flow” had already succeeded the “high tide” of the “ultra doctrine” of congressional commerce power. Consequently, he contended that that court would also have sustained the Phelps law as a public health measure under the state police power even in the absence of deception as to adulteration. Remley therefore asked the Iowa Supreme Court to decide the case “on broad general principles” of federalism. From this perspective he was confident that the court would not invalidate a “law prohibiting a traffic, the tendency of which is evil, and the evil consequences are sure to be seen in a degenerated race, mental disorders, indulgence of the passions, bad society[,] depraved mind and other consequences following uncontrolled passions often arising out of the use of cigarettes.” For good measure, he added that even if the state of Iowa were not interested in “the individual man,” it would take an interest in the safety of its “citizens who have to live in the same community with the individual man” because the aforementioned degeneration spawned “[p]auperism, insanity and crime....”

Fuller and ATC reserved their curt response to this cascade of charges to the penultimate page of their reply brief. It set the tone for the mendacious denials in which cigarette companies specialized for the next century: the attorney...
The 1897 Mulk Tax Amendment

general’s claim that “cigarettes are ruinous of health and morals” was “mere buncombe...repeatedly shown to be utterly groundless by the most experienced and eminent chemists and alienists of this country and Europe....” Fuller also attributed to Remley a second declaration that “public sentiment is against” cigarettes. The textual warrant for this attribution is lacking, but the Trust did not even bother denying the underlying truth of the declaration; instead, it launched into a pseudo-libertarian diatribe that would also remain the industry’s hallmark for more than a century: “[W]hat have courts to do with such considerations? How unhappy and deplorable would be the condition of our country if the courts should become the mere registrars of popular prejudice, how unstable our institutions and governments, and how insecure our boasted liberty, if the fleeting moods of the populace should be mirrored in the decrees of our courts!”

The Iowa Supreme Court heard oral argument in the case on October 25, 1897, in Des Moines. ATC was represented by Fuller and its local Iowa counsel, John M. Redmond, a leading Democratic politician of Cedar Rapids, who after having served as Linn County Attorney for two terms in the early 1890s and having unsuccessfully sought a seat in the state legislature, was elected mayor in March 1898. Interestingly, at the Cedar Rapids Democratic city convention in February 1897, just a half-year after Judge Giberson had issued his decision in McGregor, Redmond, who conducted a lucrative practice as a sole practitioner, seconded his nomination for re-election, declaring that Giberson had been “...a surprise in the matter of his fairness to both his friends and his enemies.” Prophetically, if against (his and ATC’s) interest, he added that Giberson’s “...record, so far as the decisions of the supreme court upon the cases appealed from the superior court are concerned, is almost unequalled by any judge on the bench in Iowa.” After Redmond had finished his opening argument for the appellant, Remley, apparently without explanation, “decided that he did not care to argue, and waived his right to be heard.” Under the court’s rules, the attorney general’s waiver precluded Fuller, who, to support his constitutional argument, had wished to present to the court the recent Tennessee federal decision (in

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203 Brief for Appellant in Reply at 27, McGregor v. Cone, 104 Iowa 465 (1898).
204 The Bench and Bar of Iowa 107-108 (1901).
205 “Democratic Victory!!” CREG, Mar. 8, 1898 (5:1-4); see also id. (1:2-4). Redmond served two terms as mayor until 1902. According to an obituary, he served one term each as county attorney and Cedar Rapids city attorney. Toward the end of his life he was a “staunch New Dealer....” “John M. Redmond, Former Mayor of Cedar Rapids, Dies,” Cedar Rapids Gazette, Feb. 23, 1940 (1:2) (newspaper clipping supplied by SHSI IC).
206 The Biographical Record of Linn County Iowa 462-63 (1901).
207 “City Ticket,” CREG, Feb. 18, 1897 (5:2).
Sawrie) as upholding the Trust’s position in McGregor, from engaging in further argument. However, the Supreme Court “would not have” it when Remley even offered to allow Fuller to argue: it declined to “listen to any unnecessary addresses just as a courtesy to Mr. Fuller.”

On January 24, 1898, the Iowa Supreme Court handed down its unanimous decision in what had become “the famous test case” from Cedar Rapids. Like many rulings in this area of the law, the Iowa Supreme Court’s decision was an uninspired and uninspiring interpretation of the original package doctrine, which failed even to rise to the level of commercial realism that undergirded Judge Giberson’s decision. The opinion left absolutely no trace of Attorney General Remley’s high-flying policy declarations, though it did adopt virtually all of his legal arguments, while studiously ignoring even Fuller’s citation to State of Washington v. Coovert, which presented the same facts because the Tobacco Trust’s legal choreography department had carefully stage-managed both productions. Against the background of the same set of agreed facts that underlay the trial court decision, Chief Judge Horace Deemer, formerly “engaged in the furniture and undertaking business,” asserted that in identifying potential conflicts between state police powers and federal interstate commerce powers, whether the article in question was “deleterious to the inhabitants of the state” was not “material, so long as it is recognized by the commercial world, by the laws of congress, and by the decisions of the court as a commodity in which a right of traffic exists.” Because it had to be conceded that cigarettes were such a commercial commodity, Deemer concluded that insofar as the anti-cigarette law regulated commerce, it was unconstitutional and void. However, he also recognized that at some point a commodity must cease to be in interstate commerce, lose its character as an import, and (together with its owner) become subject to state police regulations. This moment came “when the original package in which it is imported is broken, and the several parcels are so mingled with other property, or so exposed for sale, as to destroy the identity of the package as imported.”

Having proceeded this far, the Iowa Supreme Court had nowhere to go but to confine its analysis to selection of the proper definition of an “original package” and decide how to apply it to the cigarettes in this case (if in fact the prior decision as to the appropriate outcome did not dictate the definition). The court

209“Are Not Original Packages,” ISR, Jan. 25, 1898 (7:3).
210Willis Hall, The Iowa Legislature of 1896, at 18 (1895).
211McGregor v. Cone, 104 Iowa 465, 469-70 (1898).
212McGregor v. Cone, 104 Iowa 465, 471 (1898).
found to be “correct” the “commonly accepted” definition that “it is a bundle put for transportation or commercial handling, and usually consists of a number of things bound together, convenient for handling and conveyance.” The court also found it “quite apparent” that “the words ‘original package’ have reference to the unit which the carrier receives, transports, and delivers as an article of commerce. The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for transportation he gives it the initial step, and from that time until sold in that form or broken, and transformed, it is the subject of interstate commerce. But when sold or broken, or when it changes form, it ceases to be an article of interstate commerce, and no longer enjoys this protection. The original package, then, is that package which is delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. If sold, it must be in the form as shipped or received; for, if the package be broken after such delivery, it, by that act alone, becomes a part of the common mass of property within the state, and is subject to the laws of that state enacted in virtue of its police power.” Since, in the ATC-McGregor transaction, the “original package,” the unit of commerce, was broken, the contents exposed to sale, and one of the small packages was sold, “the article sold ‘had lost its distinctive character as an import,’ and the sale violated the new law.” The Iowa Supreme Court therefore affirmed Judge Giberson’s order.

In the immediate wake of the Iowa Supreme Court’s decision in McGregor—which the newspaper published in extenso—upholding Judge Giberson’s ruling, the Cedar Rapids Evening Gazette reported that:

The last hope of the cigaret fiend is gone. For several months he has been compelled to resort to all kinds of schemes to get even the paper with which to make the cigaretts his system craved, depending largely upon friends who travel out of the state and bring in the “makin’s.” ... It is now thought that the tobacco trust will let the law alone and there will be no further objection to its strict enforcement. The sentiment of a great majority of the people seems to be in favor of the law, for it has been openly violated in but few places.”

213 McGregor v. Cone, 104 Iowa 465, 471 (1898). Although the quoted sentence within a quotation purported to be taken verbatim from State v. Board of Assessors, 15 So. 10, 11 (La. 1894), the court ran two sentences together, inverted their order, and added “usually.”

214 McGregor v. Cone, 104 Iowa 465, 472 (1898).


The 1897 Mulet Tax Amendment

But Judge Giberson himself, having dealt with Fuller in court, had apparently developed a deeper insight into the monopoly’s mindset (though not into the ultimate judicial outcome) when he told the newspaper:

“It is entirely probable...that the trust will appeal this case to the supreme court of the United States. Several decisions have been rendered in other states exactly in conflict with the one just handed down by the supreme judges of Iowa, and the trust is determined to win this important fight, if possible.”

In fact, ATC did not appeal the Iowa Supreme Court’s decision, probably for the same reason that the State of Iowa and Linn County had not appealed Sanborn’s decision in the federal case: the losing party presumably feared that the U.S. Supreme Court would rule against it. There, however, the similarities between the parties ended: Attorney General Remley was supremely unconcerned that the Tobacco Trust had vindicated the right of its dealers to import individual five-cent packages of cigarettes because he was convinced that such shipments were commercially impracticable; conversely, Fuller must have been keenly aware that, from a practical business standpoint, the Iowa cigarette ban was legally unassailable, and that if strictly enforced, ATC would have to write off Iowa (and any other state that enacted a Phelps law) as a cigarette market.

All the more mystifying is the letter that Remley wrote on March 8, 1900, to Anna C. Cripps, the superintendent of the Anti-Narcotics Department of the nationally affiliated WCTU of the State of Iowa, in reply to her previous day’s inquiry to the attorney general about the validity of the anti-cigarette law:

I will say that I know of no bill introduced in the present legislature to change or qualify the law against the sale of cigarettes. The only difficulty in the way to enforcement is that the American Tobacco Co., and other non-resident companies, pretend to ship in the cigarettes in little five-cent packages, and claim the protection of the interstate commerce laws. Of course, this is the thinnest [sic] moonshine, and no court or jury ought to be misled by any such subterfuge. I would be very glad to have a test case made and come to the Supreme Court in order to have it settled.

Since Remley had already had and won his test case two years earlier in the

218 “Will Be Assessed,” CREG, Aug. 11, 1898 (5:1).
219 Letter from Attorney General Milton Remley to A. C. Cripps (Albion, Iowa), Mar. 8, 1900, in Eleventh Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Toledo, Iowa, on October 16th, 17th and 18th, 1900, at 83-84 (1900).
Supreme Court of Iowa on this very issue, and no other Iowa court had in the meantime been duped by the Trust’s “thinnest [sic] moonshine,” the enforcement difficulty to which he alluded remains an unresolved puzzle.

The Consequences of the U.S. Supreme Court’s Decision in Austin v. Tennessee (1900): Premature Predictions of the “End of the Cigarette”

Tobacco...has never before had the official approval of so august an authority as the Supreme Court of the United States. ...

Justice Brown is inclined to accept the theory that cigarettes are a particularly harmful form of tobacco,.... Thus the seductive and vicious little paper rolls cannot claim their share of the court’s approval of tobacco in general. The decision as a whole agrees with masculine public opinion on the tobacco subject. A Supreme Court of women might take a different view of the matter.

In order to understand the jurisprudential background of the Tobacco Trust’s litigation attacks on the constitutionality of the Iowa anti-cigarette legislation it is necessary to analyze the U.S. Supreme Court’s opinion in a case manufactured by ATC challenging the Tennessee statute of 1897. That law made it a misdemeanor, punishable by a fine of not less than $50, to sell or—as the Iowa statute had not done—to bring into the state for the purpose of selling or giving away any cigarettes, without, to be sure, banning either importation for personal consumption or possession or use of cigarettes.

Despite having immediately given notice of intent to appeal Judge Lurton’s decision in Sawrie to the U.S. Supreme Court, the state attorney general, for reasons unknown, apparently did not seek review. Nevertheless, the anti-cigarette law continued to be enforced in Tennessee, and a prosecution growing out of one
enforcement action did prompt the Tobacco Trust and its convicted straw-man
dealer to carry the litigation up to the Supreme Court of Tennessee and of the
United States with Attorney General Pickle representing the state.\footnote{225}

This case arose on November 1, 1897, in the small southeastern Tennessee
town of Madisonville, when merchant William B. Austin\footnote{226} sold cigarettes in
clear contravention of the statute. According to the evidence presented at his trial
in Monroe County circuit court on January 17, 1898, Austin had bought from
ATC (which still had no factory, office, or warehouse in Tennessee) in North
Carolina a number of packages of Durham cigarettes, which were shipped to
Austin by the Southern Express Company without case, covering, or enclosure of any kind around or about any of said packages, but
were by said American Tobacco Company piled upon the floor of its warehouse in
Durham, N.C., and said Southern Express Company notified to come and get them,..., and
said express company, by its agent, took them...and placed them in an open basket, already
and heretofore in the possession of said Southern Express Company; that these packages
were brought to the place of business of defendant by an agent of said express company
in the same open basket...and by said agent lifted from said basket onto the counter in the
place of defendant, and so delivered and receipted for by the defendant; that said basket
was not left with defendant at all....; that defendant immediately upon his receipt of said
packages put them on sale, without breaking, and sold one of them on said Nov. 1st, 1897,
to W. G. Brown, an adult resident of...Monroe county.\footnote{227}

Judge James Parks refused the cigarette merchant’s request that he instruct
the jury that under these facts Austin should be acquitted because the statute
conflicted with the U.S. Constitution.\footnote{228} On the facts of this scenario,
presumably carefully choreographed by the Tobacco Trust’s lawyer, Williamson Fuller, the jury found Austin guilty, and the court fined him $50 plus costs, the defendant to remain in custody until he paid. The court having overruled his motion for a new trial, Austin appealed to the Tennessee Supreme Court.\footnote{Transcript of Record at 2, Austin v. State of Tennessee, 179 US 343 (1900).}

In late 1898, the Tennessee Supreme Court handed down its unanimous decision affirming Austin’s conviction and upholding the act’s constitutionality.\footnote{Some uncertainty surrounds the date on which the opinion was published. Although the decision published in \textit{Tennessee Reports} is dated December 21, \textit{The New York Times} published a brief article datelined November 21, stating that Judge Caldwell had given it to the press the previous day. “Tennessee’s Anti-Cigarette Law,” \textit{NYT}, Nov. 22, 1898 (2). The opinion was authored by Waller C. Caldwell; for a memorial, see 151 Tenn. xxxi-xxxiii (1925).} It avoided all debate with the ruling by Judge Lurton—who had been its chief justice until 1893—ignoring \textit{Sawrie} until the last sentence of its opinion, in which it expressed “great respect” for his opinion only to declare its belief that its own “conclusion” was “entirely sound.”\footnote{Austin v State, 101 Tenn. 563, 580 (1898).} The court’s opinion was straightforwardly divided into “two vital inquiries”: first, whether cigarettes were “legitimate articles of commerce”; and second, whether Austin’s sale “was of an original package in the true commercial sense.”\footnote{Austin v State, 101 Tenn. 563, 566 (1898).}

The court wasted no time in answering the first question by denying cigarettes’ commercial legitimacy on the grounds that they are

\begin{quote}
wholly noxious and deleterious to health. Their use is always harmful; never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is toward the impairment of physical health and mental vigor.\footnote{Austin v State, 101 Tenn. 563, 566 (1898).}
\end{quote}

Redolent of the anti-cigarette rhetoric of the WCTU and Lucy Page Gaston, this unconditional assault, which may still remain the most virulent judicial attack ever on cigarettes, might almost pass as a prescient precursor of a surgeon general’s report—except that it lacked a scientific base and eschewed substantive debate with the opposition as stringently as it had with Lurton:

There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above, that the Courts are authorized to take
The 1897 Mulet Tax Amendment

judicial cognizance of the fact. No particular proof is required in regard to those facts which, by human observation and experience, have become well and generally known to be true.\(^{234}\)

The only quasi-empirical digression the court permitted itself was a reference to the contemporary volunteer army during the Spanish-American War: “large numbers of men, otherwise capable, had rendered themselves unfit for service by the use of cigarettes, and...among the applicants who were addicted to the use of cigarettes, more were rejected by examining physicians on account of disabilities thus caused than for any other, and, perhaps every other reason.” Without the slightest nod to even the most ephemeral of sources, the court engaged in the most generous of legislative history writing by asserting that it was “also part of the unwritten history of the legislation in question that it was based upon and brought to passage by the firm conviction in the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon that idea, and alone for the protection of the people of the State from an unmitigated evil.” Directly from this identification of “the nature of cigarettes” the court concluded that “they cannot be legitimate articles of commerce” and were therefore not comprehended by Congress’s constitutional commerce powers, but, rather, reserved to the states’ police powers for regulation.\(^{235}\)

To be sure, the states were not free to override congressional determinations of commercial legitimacy, but were, in the absence of such congressional action, entitled to act.\(^{236}\) And to the argument that the federal cigarette tax and its accompanying stamp regulations constituted precisely such preemptive action the Tennessee Supreme Court replied that, because that legislation was enacted solely for revenue purposes, it did not rise to the level of recognition of cigarettes as legitimate commercial articles.\(^{237}\) Finally, in response to the Tobacco Trust’s argument that in *Leisy v. Hardin* the U.S. Supreme Court had expressly recognized intoxicating liquors as legitimate articles of commerce, the Tennessee court—again probably in sync with early twenty-first century medical science—declared that alcoholic beverages “stand upon a higher plane in respect of inherent merit than cigarettes, for they are confessedly beneficial in some instances and for some purposes, while cigarettes have no redeeming qualities.”\(^{238}\)

\(^{234}\) *Austin v State*, 101 Tenn. 563, 566 (1898).
\(^{235}\) *Austin v State*, 101 Tenn. 563, 567 (1898).
\(^{236}\) *Austin v State*, 101 Tenn. 563, 568 (1898).
\(^{237}\) *Austin v State*, 101 Tenn. 563, 573 (1898).
\(^{238}\) *Austin v State*, 101 Tenn. 563, 571-72 (1898). The court pointed out that the Iowa intoxicating liquors law (like that of some other states) “distinctly acknowledged that the
The court made even shorter shrift of the original package issue. Although the package may have been original for federal tax purposes, it was nevertheless “not an original commercial package, because not sold and transported apart from other like articles, but in the same general receptacle with them.” The key feature identifying an original package was that it was an “aggregation of goods, put up, in whatever form, covering, or receptacle, for transportation and as a unit transported from one State or nation to another.”239 The problem with the ATC-Austin package, the judges opined, was that “it is entirely manifest to our minds that the basket, with its contents, made one original package in the true commercial sense, each box or package of cigarettes being a constituent part thereof, and that the original commercial package was broken, and each box or package of cigarettes assumed a separate identity before the law, when the basket was relieved of its contents. ... A box, crate, barrel, or basket, filled with goods for shipment, and actually transported from a citizen of one State to a citizen of another State, is no less a receptacle of the goods in a legal sense, and such receptacle is no less an original commercial package because open and not covered. The presence or absence of a covering to a receptacle...is of no consequence in determining what is...an original package.”240 Moreover, the court saw through what the Tobacco Trust’s legal staff presumably regarded as a masterstroke of constitutional packing, shipping, and receiving: “It is perfectly obvious...that this plan of shipment was resorted to as a mere device for the purpose of evading the State law against the sale of cigarettes. Prior to the passage of this law, as is well known, no such scheme was adopted in the transportation of such articles, and the carrier was not called upon to play so unusual a part in such a matter.”241 Having thus demolished the Potemkin village that ATC had so painstakingly built for judicial consumption, the judges concluded that even if cigarettes were legitimate articles of commerce, Austin’s conviction would still be sustainable because what he sold was not “an original commercial package, but only a part thereof after it had been broken and its contents thereby made subject to the laws of the State, like other local property of the same class.”242

In reporting that Judge Caldwell had given the opinion to the press on November 20, 1898, The New York Times added that the sale of cigarettes had been stopped by the police in Knoxville, the seat of the Tennessee Supreme

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239 Austin v State, 101 Tenn. 563, 574-75 (1898).
240 Austin v State, 101 Tenn. 563, 577 (1898).
241 Austin v State, 101 Tenn. 563, 578 (1898).
242 Austin v State, 101 Tenn. 563, 579-80 (1898).
The 1897 Mulct Tax Amendment

As soon as the Tennessee Supreme Court issued its decision in Austin v. Tennessee, the Iowa State Register correctly perceived that it was “a knock-out blow to the Federal decision allowing the importation of the small packages as original packages.”

In seeking U.S. Supreme Court review of the Tennessee Supreme Court’s decision in Austin, the Trust’s lawyers, Fuller and Parker, identified two alleged errors that the Tennessee Supreme Court had committed: (1) a failure to recognize that the anti-cigarette law was in conflict with the commerce clause of the U.S. constitution; and (2) “holding...that cigarettes...are not legitimate articles of commerce, and are therefore not under the protection of section 8 or section 10 of article 1 of the Constitution, and that the regulation of commerce in said articles is therefore not within the power of Congress...but is under the power of the various States....”

In light of the fact that the judges involved in the litigation all recognized the staged character of the transaction between ATC and Austin, it is unclear why Fuller and Parker thought that their preposterous claim in their main brief before the U.S. Supreme Court that Austin—whom they were representing—“was in no way connected with the American Tobacco Company, as agent or otherwise” would enhance their client’s or their employer’s credibility. The Trust’s lawyers sought to undermine the Tennessee Supreme Court’s holding that cigarettes were not legitimate commercial articles by asserting that no matter how noxious or harmful they were, such evidence—of which that court had cited none—would be irrelevant to a determination of commercial legitimacy because, unlike high explosives or malodorous guano, “they do not harm in their transit nor in their being stored, but their harm can come only, as harm comes from liquor, by an injudicious or intemperate use....” Indeed, ATC’s lawyers not only went so far as to offer their own undocumented assertion that “cigarettes constitute the least harmful form of tobacco,” but even delighted in quoting an unnamed book from 1845 that had alleged that the “cigarette...can do you no harm.”

Presumably

243 “Tennessee’s Anti-Cigarette Law,” NYT, Nov. 22, 1898 (2).
244 “Anti-Cigarette Law,” ISR, Nov. 23, 1898 (4:6).
246 Brief for Plaintiff in Error at 2, in Austin v. State of Tennessee, 179 US 343 (1900).
247 Brief for Plaintiff in Error at 21, Austin v. State of Tennessee, 179 US 343 (1900).
248 Brief for Plaintiff in Error at 9, Austin v. State of Tennessee, 179 US 343 (1900).
In fact, the quotation was from Joseph Baker, Smoking & Smokers, An Antiquarian, Historical, Comical, Verifiable, and Narcotical Disquisition 42 (1845).
Fuller and Parker were not aware that the logic of their argument would, a century later, when a unanimous science certified the per se dangers of any cigarette smoking to smokers and non-smokers, have justified the legal claim that cigarettes (or rather their manufacturers and sellers) “have no commercial rights superior to the police power of the State or municipality.”

The brief filed by the State of Tennessee did little more than negatively interrogate the Trust’s claims as to cigarettes’ commercial legitimacy without offering any supporting empirical evidence. If the latter claimed that cigarettes neither exploded nor were malodorous, the State merely asked: “Is not the cigarette a far more serious menace to the lives, health and safety of our people than any ‘high explosive’ or ‘malodorous guano?’ [sic].” Whereas Attorney General Pickle posited that “[b]eneficial uses of ardent spirits, opium, arsenic, strychnine, and even of ‘high explosives,’ ‘malodorous guanos,’ and ‘putrid meats,’ may be suggested,” he asked rhetorically: “Who can suggest any beneficial use of cigarettes? Who can suggest any but a harmful use of them?”

More than a century later no physician or scientist can, but Pickle deemed it no more necessary to document that claim than this one, whose empirical demonstrability might challenge twenty-first-century medical experts: “[W]hy should a State be denied the right to exclude from its borders cigarettes, or other product or commodity whose use by its people tends to produce paupers, lunatics, convicts, and persons likely to become a public charge?”

A five-justice majority of the U.S. Supreme Court upheld the constitutionality of the Tennessee statute on the political-economically narrow and trivial grounds of an interpretation of the original package doctrine, though the Court did offer several more far-reaching remarks about the relationship between state police powers and congressional commerce power.

The Court was “not prepared to fully indorse” the Tennessee Supreme Court’s denial to cigarettes of the status of legitimate articles of commerce, but it also did not fully reject that position. To be sure, Justice Henry Brown, writing for himself and three others, did stress that where law or custom recognized a product as from time immemorial fit for sale, and its manufacture was subject to federal regulation and taxation, its legitimacy as a commercial article was clear. Nevertheless, the Court conceded, that article might still “to a certain extent be within the police power of the States.”

Tobacco fell within this class:

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London cigar merchant and pipe dealer.

249 Brief for Plaintiff in Error at 8, Austin v. State of Tennessee, 179 US 343 (1900).

250 Brief and Argument for Defendant in Error at 8, 9, Austin v. State of Tennessee, 179 US 343 (1900).

251 Austin v. Tennessee, 179 US 343, 345 (1900).
The 1897 Malt Tax Amendment

From the first settlement of the colony of Virginia to the present day tobacco has been one of the most profitable and important products of agriculture and commerce, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of opinion that it cannot be classed with diseased cattle or meats, decayed fruit or other articles, the use of which is a menace to the health of the entire community.\footnote{Austin v. Tennessee, 179 US 343, 345 (1900).}

Presumably the Supreme Court would have opined differently had science and medicine already been unanimously disseminating the conclusion that they reached a century later that cigarette smoking “injures almost all bodily organs” and is “the leading cause of preventable mortality in the United States, resulting in nearly 16 million deaths since the first Surgeon General’s report on smoking and health in 1964.”\footnote{U.S. Dept of Health and Human Services, The Health Consequences of Smoking: A Report of the Surgeon General i, 861 (2004).} But in 1900 the Court declared that it could not, as the Tennessee Supreme Court had done, “take judicial notice of the fact that it [cigarette smoking] is more noxious in this form than in any other,” especially since Congress, in imposing license requirements on the manufacture and sale of cigarettes and a revenue tax on their sale, had “recognized tobacco in its various forms as a legitimate article of commerce....”\footnote{Austin v. Tennessee, 179 US 343, 347 (1900).} Nevertheless, the Court clearly stated that cigarettes did not belong to the class of “innocuous” articles, on the prohibition of the sale of which it had never ruled and would not have to rule in this case.\footnote{Reviewing its decisions on state alcohol prohibition laws, the Court observed that the commerce clause did not forbid state legislatures to suppress the liquor traffic if they had deliberately concluded that public safety and morals required

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The 1897 Mulct Tax Amendment

Using these state alcohol prohibition laws as a constitutional template, the Court then vindicated the same “bona fide exercise of its police power...dictated by a genuine regard for the preservation of the public health or safety”257 with respect to state legislation on cigarettes:

Cigarettes do not seem until recently to have attracted the attention of the public as more injurious than other forms of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use or to indorse the opinion of the supreme court of Tennessee that “they are inherently bad and bad only.” At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effects, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used against such as are imported from other states, and there be no reason to doubt that the act in question is designed for the protection of the public health.258

Having thus upheld Tennessee’s freedom from being “bound to furnish a market” for cigarettes, the Court turned to the central constraint prohibiting the state from “wholly interdict[ing] commerce in cigarettes”259—the original package doctrine.

As "the vital question in the case" the majority, implausibly enough, designated that as to “whether a paper package of three inches in length and one and a half inches in width, containing ten cigarettes, is an original package protected by the Constitution of the United States against any interference by the State while in the hands of the importer....”260 Even more narrowly, Justice Brown characterized “[t]he real question” as whether the governing criterion was “the size of the package in which the importation is actually made” or “the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different States.” In opting for the latter, Brown emphasized that the presumption that the actual package of importation was “strong evidence” of being an original package presupposed

256 Austin v. Tennessee, 179 US 343, 348 (1900).
257 Austin v. Tennessee, 179 US 343, 349 (1900).
258 Austin v. Tennessee, 179 US 343, 348-49 (1900).
259 Austin v. Tennessee, 179 US 343, 350 (1900).
260 Austin v. Tennessee, 179 US 343, 350 (1900).
The 1897 Mulct Tax Amendment

“honest dealers”\textsuperscript{261} and did not apply

where the manufacturer puts up the package with the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several states, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant’s contention would be far reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister state, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer’s case to a single paper box of ten, or even a single cigarette, if imported separately and loosely....\textsuperscript{262}

Underscoring that there “could hardly be stronger evidence of fraud than” the very facts of the case, Brown bluntly called the defendant’s staged transaction a “discreditable subterfuge,” thus leaving the basket as the only possible candidate—“[i]f there be any original package at all in this case....”\textsuperscript{263}

In the course of concluding its analysis of the applicability of the original package doctrine, the Court returned to the larger issue of cigarettes’ legitimacy as objects of commerce. Presuming that it would not be unconstitutional for a state legislature to prohibit the manufacture of cigarettes, Brown rejected the implication of defendant’s argument “that citizens of Tennessee may, under the commerce clause of the Constitution of the United States, bring into that state from other states cigarettes in unlimited quantities, and sell them despite the will of Tennessee as expressed in its legislation” as well as the consequence “that the commerce clause of the Constitution, by its own force, without any legislation by Congress, overrides the action of the state in a matter confessedly involving, in the judgment of its legislature, the health of its people.” The Court rejected this position because it would have justified the unacceptable outcome “that the

\textsuperscript{261} Austin v. Tennessee, 179 US 343, 359 (1900). Brown identified the origins of the original package doctrine in the traditional structure of importation of foreign goods by wholesalers who broke packages and distributed the contents to numerous retailers: “But taking the words “original package” in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other states in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the state against their importation and sale.” \textit{Id.}

\textsuperscript{262} Austin v. Tennessee, 179 US 343, 360 (1900).

\textsuperscript{263} Austin v. Tennessee, 179 US 343, 361 (1900).
reserved power of the state to protect the health of its people, by reasonable regulations, has application only in respect of articles manufactured within its own limits, and that an open door exists for the introduction into the state, against its will, of all kinds of property which may be fairly regarded as injurious in their use to health. If Congress have power to declare what property may and what may not be brought into one state from another state, then the action of a state by which certain articles, not unreasonably deemed injurious to health, were excluded from its markets, should stand until Congress legislated upon the subject. 264

The final step leading to the majority’s affirmance of the Tennessee Supreme Court’s conclusion was its rejection of defendant’s sole argument in support of the claim that the 10-cigarette packages constituted original packages—namely, that federal law required manufacturers to put up all cigarettes in packages of 10, 20, 50, or 100 cigarettes. Since Congress, however, imposed this requirement solely for purposes of better enforcement of the internal revenue law, it did not restrict states’ power over the manufacture and sale of cigarettes. 265

Just how narrow the ruling in Austin was found expression in the brief concurrence by Justice White, who furnished the deciding fifth vote. 266 Determined to preserve the original package doctrine, he declared that he was “constrained to conclude” that the Court had correctly answered in the negative the “decisive” question as to whether “each particular parcel of cigarettes [was] an original package within the constitutional import of those words” as defined by the Court’s precedents. White’s vote was swayed by the “trifling value” of each package, the lack of an address on each, and the fact that all the packages had been thrown into an open basket, thus precluding the post-arrival segregation essential to each one’s becoming an original package. 267 Notably, these facts lacked any of the references to corporate fraud that undergirded Justice Brown’s opinion.

The Court’s tortured analysis of the original package doctrine did not impress contemporaneous legal commentary. Rather, as a Kentucky lawyer observed, the Court should have straightforwardly ruled that as soon as the cigarettes imported into Tennessee arrived there, they should have been “treated just like [sic] other

264 Austin v. Tennessee, 179 US 343, 362 (1900).
265 Austin v. Tennessee, 179 US 343, 363 (1900).
266 In their petition for rehearing, Fuller and Parker complained of their “misfortune” that White (whose concurrence rested “largely on what are supposed to be the special facts of the case”) had been the only justice who had not attended oral argument. Petition for Rehearing by Plaintiff in Error at 2, Austin v. Tennessee, 179 U.S. 343.
267 Austin v. Tennessee, 179 US 343, 364 (1900).
goods already there are treated.” In other words, Austin was entitled to the equal protection of the laws of Tennessee—which prohibited the sale of cigarettes—and the mere fact that the cigarettes had earlier been in interstate commerce did not confer any extraterritorial immunity on them.\(^268\) And as *The Outlook* (in part) perspicaciously observed:

In no sense does the Court return to the position it held prior to the original-package decision of 1889, that a State may impose whatever restrictions it sees fit upon traffic in any article so long as these restrictions apply equally to producers within its borders and those outside. Tennessee can prohibit the sale of cigarettes made in Tennessee, but it cannot prohibit any person within the State from ordering for his own consumption cigarettes made in other States. Nevertheless, relatively few persons—and especially relatively few children—care to go to the trouble to import cigarettes from a distance.\(^269\)

The immediate reaction by ATC’s representative in Tennessee, Edward S. Parker, Esq., was considerably more public relations bravado than legal analysis. Two days after the decision was handed down, Parker told the *Nashville Banner* in an interview that it “will not prevent the importation of ‘coffin tacks’ into the state.” The Supreme Court’s unambiguous ruling to the contrary notwithstanding, he intoned: “The Tennessee law is plainly a violation of the interstate commerce laws, and it cannot stand. The decision...means that cigarettes cannot be shipped into Tennessee and sold in small pasteboard box packages containing ten cigarettes each. But the sale of cigarettes must be protected, and some other means of shipping them into the state will be adopted.” In fact, the decision did not permit the shipment of cigarettes into Tennessee for any purpose other than consumption by the recipient. The state was, in other words, constitutionally empowered to interdict all shipments for resale (or giving away). The immediate result of the decision was, according to a press report, that “[t]he sale of cigarettes

\(^{268}\) Shackleford Miller, “The Latest Phase of the Original Package Doctrine,” *American Law Review* 35:364-82 at 380-81 (May-June 1901). The author was attacking the Court’s legal reasoning, not the effect of the decision, which was the same as the real-world outcome of the proposed approach would have been. The author failed to note that since cigarettes were not manufactured in Tennessee, all cigarettes sold there had previously been in interstate commerce and therefore no question of equal protection of the laws was posed.

\(^{269}\) “Anti-Cigarette Law Sustained,” *Outlook*, Dec. 8, 1900, at 863. *The Outlook* left the erroneous impression that Tennessee lacked the power to ban the sale of cigarettes produced in other states.

\(^{270}\) “‘Coffin Tacks,’” *NB*, Nov. 21, 1900 (3:3). In a vast understatement, the paper stated that ATC “controls the cigarette trade in East Tennessee.”
The U.S. Supreme Court’s decision upholding the Tennessee (and by implication the Iowa) anti-cigarette law, which was in effect a resolution of a dispute between the Tobacco Trust and State police powers,\(^{272}\) may have been grounded in narrow factual, technical, and trivial definitional considerations of the “original package” doctrine, which had nothing to do with any larger policy questions of cigarette regulation, but the consequences of this “severe blow” to “[t]he cigarette trust”\(^{273}\) were immediate and widespread. By the following night:

The cigarette fiends of Des Moines suddenly found themselves cut off from purchasing cigarettes.... All tobacco dealers of the city were visited by a representative from the American Tobacco Company during the afternoon who notified them that the company would not stand back of them if they continued to sell them. ...

This step leaves some of the dealers in bad shape. A number of them have hundreds of dollars worth on hands [sic]. They cannot sell them without paying the mulct tax of $300 per year, and they declare that the profit is not sufficient to warrant this. As soon as the sale was stopped Tuesday evening the effects were noticed. People went from one dealer to another trying to buy them. The same law covers the sale of cigarette papers and so the dealers had to refuse to sell them. In several cases men actually begged certain tobacconists to sell them one packages [sic]. They were refused, however, in every case.\(^{274}\)

ATC had believed that it could risk litigation so long as the constitutionality of the mulct tax law was in doubt, but after \textit{Austin} the possibility of “endless expense in this mode of protecting the retailer” could no longer be overlooked.\(^{275}\) Because the Tobacco Trust understood that \textit{Austin v. Tennessee} entailed the probability that Iowa’s $300 annual mulct tax—which had been “violated by every person who cared to sell cigarettes”—would be judicially sustained, it

\(^{271}\)“Anti-Cigarette Law,” \textit{ISR}, Nov. 23, 1898 (4:6).

\(^{272}\)One newspaper noted that the decision in \textit{Austin v. Tennessee} had furnished the “further adjudication” of the McGregor case. “Cigarets Must Go,” \textit{CREG}, Nov. 22, 1900 (5:4).

\(^{273}\)“Court Hits Cigarettes,” \textit{Muscatine Journal}, Nov. 20, 1900 (1:5). Despite this blow, the \textit{Chicago Tribune} headlined its report, “High Praise for Tobacco,” \textit{CT}, Nov. 20, 1900 (5:4).

\(^{274}\)“No More Cigarettes,” \textit{ISR}, Nov. 21, 1900 (5:3). The national magazine \textit{Outlook} inaccurately understated the personal character of ATC’s intervention: “As soon as the decision...was handed down, the American Tobacco Company wired its agents in Iowa withdrawing its guarantee to protect them against prosecution for violating the Iowa statute.” “Anti-Cigarette Law Sustained,” \textit{Outlook}, Dec. 8, 1900, at 863.

\(^{275}\)“Cigarettes Will Go,” \textit{SCJ}, Nov. 22, 1900 (10:4).
followed up the withdrawal with a letter “announcing that sales would be discontinued and recalling all cigarettes and cigarette papers in the hands of Iowa dealers.”

In Dubuque, a “stir was created” when the American Tobacco Company ordered all tobacco dealers “to at once ship out of the state their entire stock of cigarettes.” The drug and tobacco stores in Des Moines handling ATC’s cigarettes (almost exclusively “Sweet Caporal”) had all received orders to stop selling them immediately. Already on November 23 the Des Moines City Assessor Frank French informed all cigarette dealers that they had to pay the quarterly assessment mulct tax at once in accord with the U.S. Supreme Court decision. Under the headline, “Coffin Nails Ordered Out,” the Des Moines Daily News added, without attribution, that it was “believed” that the dealers could “be held liable for the mulct tax dating from the time the original package law was sustained by the federal [sic; should be state] court at Cedar Rapids three years ago. Since that time Iowa has collected no tax from cigarette dealers who adhered to the original package, assessments being made against only those who did not do so.” According to the account in the Des Moines Leader, French had levied the $75 quarterly assessments against 300 tobacco dealers, grocers, and others who had been selling cigarettes during the quarter that began on October 1. If the assessor received legal advice supporting a decision to levy the assessments for the entire three years since the mulct tax had gone into effect, the press at first reported that liability would rest with ATC, which had guaranteed its dealers that it would assume responsibility for any penalties. Alone for the last quarter of 1900 in Des Moines the assessments would then cost the Trust $22,000, “to say nothing of those that will certainly be levied throughout the state.” The prospect of having to pay such sums prompted the prediction that ATC would “undoubtedly” fight the assessments.

Note: The footnotes are not included in the natural text.
The 1897 Mulct Tax Amendment

At the same time, it was “claimed the dealers will have recourse against the American Tobacco company for all taxes or fines that may be assessed and collected against them” on the grounds that ATC had “guaranteed to protect them against damage under this law if they went ahead in defiance of it and sold the American Tobacco company’s cigarettes. ... If the back taxes can be collected the American Tobacco company will be made a defendant in a score of suits.”281

The Leader, however, offered a rather different perspective. After dealers had concluded that ATC was “hedging,” they consulted lawyers, who opined that the contracts into which “practically every tobacconist in Iowa” had entered with ATC guaranteeing that the Trust would assume responsibility for all penalties imposed for selling its cigarettes were unenforceable as against public policy on the grounds that their purpose was to induce the dealers to commit unlawful acts. The dealers’ attorneys advised them that performance of the contracts was “purely a question of the honor of the American Tobacco company,” which could not be compelled to comply with the contracts “unless it sees fit to do so.” The Trust’s “honor” was visibly on display in the explanation by its local lawyer, Frank Dunshee, who, despite being “not disposed to talk a great deal” and “evidently strictly on his guard,” nevertheless told the newspaper that ATC would “deal fairly with all who have been fair with it....” Oddly, although this fairness purportedly meant that it would comply with the contract “to the letter,” and Dunshee admitted that the contract did “not provide against the sale of other than American goods” and merely “implied[d] that dealers guaranteed protection

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281 “Will Hold the Trust,” MDN-T, Nov. 27, 1900 (8:2).
under it should handle the American’s product only,” he insisted that “most of the dealers have failed to comply with the conditions of the contract.... Most of them have given away cigarette papers that came in other than original packages, many have bought of wholesale houses and not a few have sold cigarettes of other makes than ours that came into the state in cartons.” In spite of the dealers’ emphatic denial of the existence of such conditions and their display of the contracts to the newspaper to “substantiate their claim,” Dunshee allowed as being “positive” that in the cases of such non-compliant dealers “the company will refuse to carry out the conditions of the contract.”

Within a few days of ATC’s move, the press was reporting that:

It is almost as difficult to buy a cigarette in the State of Iowa as it was in the strictest days of prohibition to get a drink of whisky. This situation is due to the alarm sounded by the American Tobacco Company through its local representative, Charles H. Rollins, and by him hastily transmitted to agents in other cities and towns.

... Tobacconists all over the State are packing up their stocks and [sic] will be shipped back to the American [Tobacco] Company.

As a national magazine commented: “There may be newspaper exaggeration in this statement, but the importance of the decision cannot be questioned. The cigarette-dealers in Iowa are now liable for back taxes, if the law is strictly construed.” Retail dealers in the Mississippi River town of Muscatine “immediately” took in their cigarette signs. In Des Moines, although a few dealers resumed selling cigarettes and announced that they would pay the mulct tax for the last quarter of the year, they had to double the price: “Since it is certain that only a few dealers can afford the tax they will not meet with the competition that has heretofore existed. A few other small dealers are still selling cigarettes ‘on the sly,’ but they will soon be suppressed.”

The same process played itself out in Sioux City, where on November 22 the
press reported that cigarettes were likely to be forced out of stores because dealers preferred quitting the trade in “contraband smokes” to running the risk of prosecution without ATC’s guarantee or to paying the $300 tax. A “prominent tobacconist” there was not certain that he and his competitors would be prosecuted if they continued to sell, “‘but with these reformers stirring up matters there is serious risk that we may be called to account. ... If the American Tobacco company can’t afford to take the risk, we can’t. We can’t afford to pay the $300 tax, either. I suppose my place of business sells about as many cigarettes as any other in the city, but the $300 would eat up the profits and leave a deficit. It is prohibitory,’”

As in Washington State, Tennessee, and elsewhere, newspapers in Iowa were replete with reports of cigarette retail dealers who “Will Shed No Tears” over the fact that “Cigarets Must Go.” In Cedar Rapids, for example, “only a few” dealers sold “coffin sticks,” but one of them told the Evening Gazette that “he did not care how soon the law compels all dealers to stop the trade, as it is a nuisance and a constant source of annoyance.” Without explanation he stated his opposition “to the cigaret on general principles.”

On November 20, the day after the Austin decision was released, ATC’s share price closed down by more than $2; the Wall Street Journal failed to mention the Supreme Court case, but The New York Times reported that: “Tobacco Trust shares were weak on selling by traders on the belief that the position of the company would be prejudiced by the decision of the Supreme Court that cigarettes cannot be imported into that State, as they are not original packages. It was contended also that the law might be held to apply to other States.”

However, when ATC’s stock shares reached their highest price of the year the next day, the Times had a new ad hoc market explanation at the ready: “Tobacco stocks advanced on buying credited to insiders who claim, in respect to the American Company, that the adverse decision of the courts in re the importation of cigarettes into Tennessee will have no effect on the company’s

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287“Cigarettes Will Go,” SCJ, Nov. 22, 1900 (10:4). For out-of-state reporting on Sioux City, see “Bar Cigarettes in Iowa,” FWN, Nov. 23, 1900 (1:3).
288E.g., MO, Mar. 4, 1893 (4:4) (untitled).
289See below ch. 5.
290“Cigarets Must Go,” CREG, Nov. 22, 1900 (5:4).
291WSJ, Nov. 21, 1900 (6:2).
292“Market Tests,” NYT, Nov. 20, 1900 (13).
293WSJ, Nov. 26, 1900 (2:3). Significantly, in November-December 1900 the extraordinarily detailed Commercial and Financial Chronicle devoted no attention to the decision and its possible impact on ATC.
The Tobacco Trust’s Iowa Lawyer, Frank Dunshee:
A Bundle of Pro Malo/Pro Bono Self-Contradictions

A great historical irony attaches to the fact that at the same time that Frank Strong Dunshee (1862-1938) was representing ATC in its rearguard struggle to invalidate the cigarette mulct tax, he was also the first president of the 10,000-
member Iowa Anti-Saloon League, whose founding secretary, Florence Miller, was the superintendent of legislation of the non-partisan Iowa WCTU. Perhaps the compartmentalization of his life-spheres was aided by the League’s constitutional pledge “to maintain an attitude of neutrality upon questions of public policy not directly concerned with the traffic in strong drink.” Later Dunshee even litigated private actions against saloon keepers to enforce the liquor mulct tax, whose procedure the legislature adopted in toto for the cigarette mulct tax. Equally ironic is that, while assisting ATC to promote tobacco smoking in Iowa, “Dunshee was active in several reform movements” in Des Moines and “organized the first to combat smoke” there, serving on the (non-tobacco) smoke abatement commission until the mid-1920s.

A third amusing irony in Dunshee’s life was that while representing Duke’s Tobacco Trust, he successfully sued Rockefeller’s Oil Trust in his own name. From 1897 to 1899 Dunshee was a stockholder and director of Crystal Oil Company, a Des Moines oil retailer, which, after having switched from Standard Oil to another oil wholesaler-supplier in the late 1890s, was forced out of business by the latter, which had entered the retail business, lowered its prices, targeted Crystal’s customers, and then left the business. On December 5, 1899, Crystal sold and assigned to Dunshee all of the former’s claims against the Standard Oil Company. As he explained to the jury on November 10, 1908:

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298 “To Vote on Prohibition,” Clinton Mirror, Dec. 11, 1897 (7:3); “Anti-Saloon League,” Dubuque Daily Herald, Dec. 29, 1897 (1:7) (annual presidential address “extolling non-partisan prohibition”). Dunshee was elected president by the organizing convention in Des Moines on Dec. 29, 1896, which he assured of “his deep interest in the movement and that he would do all in his power to promote the best interests of the league.” “Anti-Saloon League Organized” and “The Anti-Saloon Convention,” Dial of Progress 2(1):[4:2-5] (Jan. 7, 1897). Later, after his one-year presidential term, he became secretary of the organization. Oxford Mirror, Oct. 27, 1903 (4:6) (untitled). The statement in Who’s Who in Des Moines: 1929, at 84 (n.d.), that he was president from 1891 to 1893 is erroneous since the League was not founded until the end of 1896.


305 Exhibit A-1 of Amendment to Amended and Substituted Petition at 19-20, Dunshee v. Standard Oil Co., 126 NW 342 (Iowa 1910).
The 1897 Mullct Tax Amendment

“I have paid nothing for it as yet. I undertook to conduct an investigation and
advise myself to my satisfaction as to whether or not the Crystal Oil Co. had an
action for damages against the Standard Oil Co., for its piratical attacks you have
heard about, and if I found we had a cause of action, that I was to institute a suit
against the Standard Oil Co. ...in my own name, pay the expenses out of my own
pocket and at the conclusion of the litigation, if I recovered anything, pay to the
stockholders or creditors of the Crystal Oil Co. a sum of money equal to half of
my net recovery.” In the petition that Dunshee filed pro se on April 26, 1900,
in Polk County District Court, he stated in the second sentence—as he with
almost equal truth could have said of his long-time client, ATC—that the
“Standard Oil Co., is a wealthy corporation, and is in fact, the most wealthy,
influential and potent corporation being in existence in this country or elsewhere,
and possesses and exercises vast power and influence in the City of Des Moines,
State of Iowa, and claims to be able to destroy all competition, whenever and
wherever it sees fit so to do.” The Iowa Supreme Court’s decision in the case
brought him national attention by virtue of its adherence to the principle that
“[t]he laws of competition in business are harsh enough at best; but if the rule
here suggested were to be carried to its logical and seemingly unavoidable
extreme, there is no practical limit to the wrongs which may be justified upon the
theory that ‘it is business.’ Fortunately, we think, there has for many years been
a distinct and growing tendency of the courts to look beneath the letter of the law
and give some effect to its beneficent spirit, thereby preventing the perversion of
the rules intended for the protection of human rights into engines of oppression
and wrong.”

A graduate of Princeton University, an elder, deacon, and trustee of the
Presbyterian church, and a professor of medical jurisprudence at the Drake University College of Medicine in Des Moines from 1891 to 1908.
Dunshee was apparently proud of his labors on behalf of the Tobacco Trust: as early as 1903 he specified for his entry in the nationwide *Martindale American Law Directory*: “References: J. Parker, Asst. Council [sic], American Tobacco Co., New York.”314 His pride endured: as late as 1935 his entry still read: “Have also occasionally represented American Tobacco Co. of New York City....”315 Nor did Dunshee’s manifold efforts to dismantle the cigarette prohibitory laws that the Iowa WCTU had taken such great pains to enact prevent it from cooperating with him to combat its other, greater enemy. Thus at the end of 1896—the very year in which the Phelps bill was enacted—Mrs. Florence Miller, the Superintendent of the Legislation Department of the non-partisan Iowa WCTU,316 was elected secretary of the Iowa Anti-Saloon League when Dunshee was elected president.317 And in 1906, when the Anti-Saloon League, Prohibition Party, the WCTU of Iowa, the WCTU of the State of Iowa, and the Iowa Inter-Collegiate Association created a 15-person standing co-operative temperance committee, Dunshee was elected to the legislative committee tasked with working for temperance laws in the Iowa legislature. The other members included Marion H. Dunham, socialist and long-term president of the partisan WCTU of the State of Iowa, and John B. Hammond, one of Iowa’s fiercest foes of cigarettes and liquor.318 The next year, the Waterloo local branch of the Iowa WCTU hired

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314*Martindale American Law Directory*: 35th Number 232 (1903). The last time he included this reference in this form was *Martindale American Law Directory* 228 (1913).

315*Martindale-Hubbell Law Directory* 1:401 (Biographical Section) (1935). In 1918 and 1919 Dunshee’s law firm was still representing a cigarette dealer in litigation before the Iowa Supreme Court attacking the cigarette mulct tax on the basis of the original package doctrine. See below ch. 14.


The 1897 Mulct Tax Amendment

Dunshee to attack the liquor mulct law after the saloon owners had resisted the WCTU’s efforts to close the saloons on the grounds that they were operating under that law. Dunshee’s law firm, according to the Iowa WCTU’s account, “carefully prepared eight reasons showing that the mulct law is unconstitutional. They say the whole saloon business is destructive to public morals[,] public health and public safety; it tends to idleness and the promotion of evil manners, and is therefore inherently immoral and unlawful and contrary to the foundation of every civilized government and cannot be licensed under the constitution of Iowa or the United States.”319 All these claims, in the WCTU’s worldview, also applied to the sale of cigarettes.

Most astonishing of all was Dunshee’s cooperation with Hammond on making enforcement of Iowa’s cigarette sales prohibition law stricter. This activity unfolded under the aegis of the Laymen’s Civic Union, which was organized on February 13, 1910, by representatives of every church in Des Moines with the slogan of “good municipal morals.” Dunshee was elected president and Zenas Thornburg, an educational administrator and anti-smoking stalwart, second vice president.320 At a meeting a few months later the group discussed the 1909 anti-cigarette sales law, which was designed to strengthen enforcement. However, members expressed the belief that “the state law becomes ineffective in a city because enforcement of the law is left to the county sheriff or county attorney and not to the city police.” Consequently, the press reported, “the laymen will probably ask that the law be made more rigid in Des Moines” by means of an ordinance assigning enforcement to the city police. None other than Dunshee and Hammond, who was chairman of the prohibitory legislative committee, were appointed to confer with the head of the police department, Zell G. Roe, to determine the requirements of such an ordinance.321

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321“Would Bar Cigarettes,” Register and Leader (Des Moines), June 6, 1910 (1:2). As superintendent of public safety Roe was head of the police, fire, and health departments. It is unknown whether Dunshee and Hammond approached Roe, but from the fact that two years later, when Roe was seeking re-election to the council, the Laymen’s Civic Union castigated Roe’s record as a justice of the peace through March 1910, inter alia, because he had failed to suppress the sale of cigarettes although the city assessor had
The 1897 Mulct Tax Amendment

Dunshee’s blatantly self-contradictory role-switching finally came to a public denouement in 1913, when the headquarters committee of the Iowa Anti-Saloon League, of whose board of directors he had been a charter member and of which he had once been the attorney, requested his resignation because the liquor interests, which were “‘diametrically opposed’” to the League’s, had retained him. Forced at last to decide which side he was on, Dunshee promptly resigned, explaining that he did not ‘‘feel that I can afford to reject honorable employment from the liquor interests in order to hold an official connection with the anti-saloon league.’’

The Tobacco Trust Attacks the Mulct Tax in Court

The American Tobacco Company is placing its cigarette goods freely in the hands of dealers in many parts of this state, proposing to guarantee them against loss by litigation, fines, or attorneys [sic] fees, if prosecuted under the Iowa law. In Des Moines steps are being taken to bring a test case to determine whether this cigarette act is in contravention with the federal constitution.... It is to be hoped that the Company will fail, and the sufferable nuisances be banished from our midst.

Altogether there seems to be hazard for dealers in putting much faith in the guaranty of the manufacturers.

The Tobacco Trust lost little time in judicially attacking the constitutionality of the mulct tax, which went into effect October 1, 1897. Two days earlier the Des Moines press had reported that the new tax would only exacerbate dealers’ traditional complaints of profitlessness, prompting a cessation of selling and thus the possible irrelevance of the tax: “It is not probable that any of the local dealers gathered evidence enabling him to collect thousands of dollars in cigarette mulct taxes from tobacco dealers, it seems unlikely that any such contact would have been fruitful.

“Roe’s Justice Record Will Be Condemned by Laymen’s Civic Union,” DMN, Mar. 3, 1912 (1:7-8, 3:3-6). In 1911, the Laymen’s Civic Union appointed a committee to assist the WCTU in combating illegal sales of cigarettes in Des Moines. “Laymen’s Civic Union Will Aid Cigarette War,” DMN, Apr. 24, 1911 (2:1).

“Dunshee Quits ‘Dry’ Forces for Job with ‘Wets,’” DMN, Feb. 19, 1913 (1:8, 3:4-5).

“Untitled,” Boone Standard, Aug. 6, 1898 (3:2) (edit.) (copy furnished by Merle Davis).

will pay the tax. The fact is that cigarettes are sold now at a profit of less than half a cent a package, and are carried more for accommodation than anything else. Dealers do not feel like paying a heavy tax in order to accommodate their trade, and realize that they cannot earn the license. But this quasi-automatic economic motivation on the dealers’ part might also be powerfully reinforced by the legal intervention by the Tobacco Trust:

There is also a chance, however, that the tax will not have to be paid. The American Tobacco company...will probably back a suit to defeat the present tax. Its representative has written to dealers here to the effect he does not consider the law good, and believe [sic] it can be beaten. He is evidently paving the way to bring about a test case. Local dealers do not know which one will be backed, but the impression is the case will be made in Des Moines. It is probable all of them will stand together in the test case. The claim will be made that the new law is not in any way different from the other [Phelps law] in that the penalty is so heavy that it amounts to a prohibitive clause and has the same effect on the business. The statutes provide and the decisions for years have upheld them, that a tax that amounts to a prohibition is illegal and unconstitutional.  

Ironically, the Des Moines wholesale tobacconist Frederick Youngerman, who in 1896 had refused the Tobacco Trust’s importuning to become its straw man litigant to challenge the Phelps law, was reported to have received a letter from the secretary of ATC “directing him that attorneys hold the clause to be non-effective and not enforceable, and tobacco dealers will refuse to pay the tax.” However, in early October 1897 counter-rumors—attributed to lawyers—were also beginning to circulate to the effect that the Trust’s suit would not see the light of day because of the fundamental difference between the Phelps prohibitory law (which had been “declared invalid a year ago”) and a license law, which would be upheld on the same grounds as the liquor mulct tax.

This prediction suffered a setback in early August 1898 when the press announced that ATC had begun its battle against the cigarette mulct tax: a company agent was in Des Moines and would remain there “to assist in fighting

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325 “Will Make a Cigarette Test Case,” DML, Sept. 29, 1897 (2:4).
326 “Will Make a Cigarette Test Case,” DML, Sept. 29, 1897 (2:4).
327 See above ch. 11.
328 “Will Not Obey the Law,” BDT, Sept. 29, 1897 (1:2). Though datelined Des Moines, such an article mentioning Youngerman does not appear to have appeared in the Des Moines papers.
the cases through for local dealers in the event arrests are made.”  A few days later, ATC’s general agent, C. E. Fisk, let it be known through the press that “the Iowa cigarette law is to be violated not only in Des Moines, but throughout the entire state.” The Trust had taken orders from more than a thousand dealers all over Iowa, and in order “to get these orders the company has given each dealer a contract agreeing to defend him in a case of arrest for selling the cigarettes without paying the $300 license.” The company’s legal stratagem underlying this suborned mass civil disobedience relied on its victory in the federal branch of its attack on the Phelps law: it “decided that each small box can be sent direct to the dealers as an original package, and protection under the interstate law will be afforded.” Shipping each package of ten cigarettes separately was precisely the method that two years earlier Attorney General Remley had pooh-poohed as so commercially impracticable and unprofitable that the volume of cigarettes that could be imported that way would be negligible. Whatever shipping method ATC was using, the Cedar Rapids Evening Gazette’s dyspeptic reporter in Des Moines had noted back in May 1898 that the cigarette law was not being observed in that city, “the seat of government, and anyone, young or old, rich or poor, can secure all the vile ‘coffin nails’ that they have money to pay for. This is in keeping with the high moral standard of the capital city, which permits a couchee-couchee show on the principal business street and tolerates a ‘Whitechapel’ that is a disgrace to the state.” A few months later the Gazette’s editor extended the scope of the sarcastic attack: “The attorney general of the state seems to be unaware of the fact that there is an anti-cigarette law on the statute books. It is believed he could find such an act if he should make an examination of the authorities.”

Polk County Attorney James A. Howe, who during the summer had discovered that many drug stores in Des Moines were selling cigarettes, struck back a few days later by notifying the city assessors “to levy the $300 mulct tax on all property occupied by the forty local tobacco dealers who have undertaken the sale of cigarettes under the guarantee of the American Tobacco company

331 “Violating the Law,” CREG, Aug. 5, 1898 (7:4). Around this time the Gazette reported that no demand had yet been made on Cedar Rapids dealers for payment of the cigarette mulct tax, “although a few have been ready to pay the tax provided other dealers were compelled to pay or close up.” “The Cigaret Law,” CREG, Sept. 19, 1898 (5:3).
332 See above ch. 10.
333 “Should Take Warning,” CREG, May 12, 1898 (3:5).
334 CREG, Aug. 10, 1898 (4:2) (untitled edit).
against loss by the cigarette mulct tax.” He warned the assessors that if they failed to levy the tax, citizens would request the auditor to levy the tax and actions would be brought to “remove the derelict assessors from office.” Against the background of the Trust’s having delivered 20,000 cigarettes to Des Moines within a week, Howe announced that he would also order informations filed against dealers in justice of the peace courts; if he secured convictions and dealers continued to sell, he would seek indictments for second offenses.\textsuperscript{336} Howe escalated his threats—prompting the press to pronounce him “on the warpath”\textsuperscript{337}—after an ATC representative had arrived in Des Moines to announce that the Trust would support a concerted effort by local dealers to violate and then, by litigation, to invalidate the law. Howe immediately declared that he would prosecute anyone organizing such a conspiracy to the full extent of the conspiracy statute: “‘Nothing could be more openly and violently a prostitution of the rights of an Iowa institution than to have a corporation come here and under a contract to buy their goods actually proceed to nullify and declare void a law passed by the legislature and properly attested by the governor. It is rank treason. It is trying to undermine the voice of the people.’”\textsuperscript{338}

In response, Des Moines city assessor Frank French called Howe to find out what to do about assessing the tax against the property where the cigarettes were sold. After Howe had read the law to him, he told Howe that he would soon complete the list identifying the blocks and property where cigarettes were sold and submit it to the country treasurer with instructions to assess the $300 tax against each piece of property. Howe replied that this decision would “‘cause a great deal of trouble...with those having property on which are located cigarette stores. When the tax is entered upon the books of the county treasurer it is going to take considerable trouble to get it off, and it is barely possible...that some of the dealers will probably desist from any further sales, owing to the demand of their landlord.’” It was understood by county officials that other assessors would follow French’s decision.\textsuperscript{339}

Howe, apparently engaged in a cat and mouse game with the Tobacco Trust, was using the legal leverage against the landlords to effectuate the mulct tax’s purpose of reinforcing the Phelps-law prohibition on sales rather than to facilitate licensing. Whereas the would-be buyer of Sweet Caporal several weeks earlier had paid 10 cents a package and then only five cents, suddenly there were places

\textsuperscript{336}“Fight on Cigarette Dealers,” \textit{CREG}, Aug. 10, 1898 (4:5).
\textsuperscript{337}“Howe on the Warpath,” \textit{DMDN}, Aug. 9, 1898 (4:2).
\textsuperscript{338}“Can Soldiers Vote,” \textit{Adams County Union-Republican}, Aug. 11, 1898 (1:3-5 at 4).
\textsuperscript{339}“Levy Mulct Tax,” \textit{ISR}, Aug. 12, 1898 (6:5).
they could no longer be bought at any price. The reason for these radical fluctuations in availability was ATC’s agreement with dealers to stand good for any losses that might result from their consenting to evade the law and sell the firm’s cigarettes at a uniform price of five cents a box. However, after some dealers had dumped “cubic yards” of cigarettes into their store windows, they ran into a snag in the form of French’s plan and removed the boxes, several absolutely refusing to handle them. Despite the fact that payment of the cigarette mulct tax afforded dealers no protection at all from liability for violating the Phelps law, the Des Moines Leader mystifyingly reported that those who had “paid the license that is calculated to protect them” until October continued selling. Among those who had withdrawn from the business and disposed of their stock entirely “until such time as the trade shall be safe” was Frederick Youngerman, who had earlier indignantly declared his solidarity with the majority of the population who rejected cigarettes. He had been expecting a consignment, but in the meantime had resolved to put them all under the counter because he “could not afford to put an incumbrance on his property by defiance of the law.” At the same time dealers were trying to determine the effect of the mulct law and to secure the Trust’s guarantee to hold them harmless. The company’s original letter, which had led to a price reduction and a spreading of sales, had stated “in substance, ‘in case you are arraigned or indicted we will provide counsel for you, and should you entail any loss through suit will give indemnity.’” The question now was whether this language covered the mulct levy: “If the American Tobacco company says it covers this condition the sale may be resumed, otherwise it is likely to be permanently suspended by the unlicensed dealers.” The Leader pointed to the general opinion that the Trust would “rescue the dealers from this new dilemma” because it seemed that “they are not averse to making a test case of the matter.”

After Howe had advised the Des Moines assessors that one could not read the cigarette and liquor laws “without being thoroughly impressed with the fact that it was the intent and purpose of the law that they should be strictly enforced,” the press was convinced that Des Moines was “enjoying an anti-cigarette crusade....” Soon thereafter ATC made its first legal response to Howe’s

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340“French [???]red Them,” *DML*, Aug. 13, 1898 (6:5). Unfortunately a tear in the only extant microfilm copy of this issue of the newspaper made it impossible to decipher the second word of the headline as well as several other words in the text. As early as August 1897, dealers in Cedar Rapids had raised the price to eight cents at the request of the Trust. “Personal,” *CREG*, Aug. 30, 1897 (3:2-3 at 3).


The 1897 Mulct Tax Amendment

moves on September 6. As the Register’s subhead put it: “American Tobacco Company Redeems Its Pledge to Dealers to Defend Them” by instituting, in the name of Charles C. Tam, who allegedly “keeps a cigar store” in Des Moines, and his landlord, Billy Moore, injunction proceedings in equity court to restrain the county from levying and collecting the mulct tax. The petition recited that: all the cigarettes (“so many packages of Sweet Caporal Cigarettes”) that Tam had sold since July 1, 1898, had been ordered by him from ATC, which had no place of business in Iowa; U.S. Express Company, a common carrier, had delivered these 10-cigarette paste-board boxes to him; ATC had delivered the boxes to the express company in St. Louis “without box, bale, bag, wrapping, or any covering or enclosure or anything in any way attaching said packages...together, with directions to deliver them” to Tam; the express company delivered the boxes in the same form; and Tam put the packages on sale “in the exact form in which they were received...being the original packages received by him from the common carrier....”

This by now rather unoriginal original package doctrine argument was offered by the Trust’s ubiquitously sojourning assistant general counsel, Junius Parker. Like his then superior, general counsel Williamson Fuller, Parker (1867-1944) grew up in North Carolina, but outdid Fuller in eventually rising to chairman of the board of ATC (1925-29), before returning to private practice in Manhattan. Though he did not appear in the 1900 (or 1920) population census, in 1910 Parker was returned as a 42-year-old lawyer living in Morristown, New Jersey, with his wife, two young sons, and six white female servants.

The Register reported that Polk County District Judge Charles A. Bishop issued a temporary injunction and set a hearing for September 9 to determine whether to make it permanent. This account, however, was apparently incorrect: not only does the docket sheet not indicate that any injunction was

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343 Petition in Equity ¶2 at 2-3, Tam v. Polk County, Iowa (Polk County Dist. Ct, No. 8584, Sept. 6, 1898).
344 According to the obituary in The New York Times, Parker went to New York in 1899 as ATC’s assistant general counsel; if true, then, like Fuller, he must have been working for ATC before he left North Carolina. “J. Parker, 76, Dies,” NYT, June 12, 1944 (19).
345 Remarkably, the census enumerator included the specific information that he worked for “Am. Tob. Co.” in the column that called for the “general nature of industry, business, or establishment” in which Parker worked. 1910 Census of Population (HeritageQuest).
The 1897 Mulct Tax Amendment

granted on September 6, 347 but Judge Bishop himself that same day wrote at the bottom of the petition that “it is ordered that the application for temporary injunction be and the same is set down for hearing before me at the court house in Des Moines on the 9th day of Sept 1898 at 2 o'clock p.m. two days notice to be given defts.”348 Moreover, the notice that Parker then gave defendants stated that “plaintiffs [sic] application for a temporary injunction will be heard before his honor Judge Bishop...on the 9th day of September 1898,”349 thus also strongly implying that no injunction had been granted yet.

If there ever was a litigational straw man, Tam was it. According to the Cedar Rapids Evening Gazette, he had opened the cigar and cigarette store on Monday and applied for the injunction on Tuesday.350 The Des Moines City Directory did not record him as having any occupational connection to any kind of tobacco store: in 1897 Tam was listed as working for the American Express Company, while in 1898 and 1899 he was entered as advertising agent or advertiser for the American Tobacco Company.351 Tam as fictitious plaintiff was merely an extreme example of ATC’s puppeteering approach to private

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347 Tam v. Polk County, Iowa, Polk County Dist. Ct., Appearance, Judgment, Fee and Execution Docket, No. 21, Equity No. 8584.

348 Petition in Equity at 8, Tam v. Polk County, Iowa (Polk County Dist. Ct, No. 8584, Sept. 6, 1898) (copy furnished by Polk County Courthouse Civil Div.). Since no hearing appears to have taken place on Sept. 6, 1898, the newspaper’s error may have resulted from the reporter’s having misread or misunderstood Judge Bishop’s difficult-to-read scrawl.

349 This untitled and undated notice, which is included in the Tam v. Polk County, Iowa file (and was, according to the docket sheet, served on Sept. 7), was handwritten on a pre-printed district court form, which was not entirely appropriate for the purpose, causing Parker to strike out some of the language.

350 These days do not accord with the account in the Register; the paper also incorrectly gave Parker’s first name as James. “The Cigaret Law,” CREG, Sept. 19, 1898 (5:3).

351 R. L. Polk & Co. ’s Des Moines City Directory: 1897, at 553 (vol. 6); R. L. Polk & Co. ’s Des Moines City Directory: 1898, at 623 (vol. 7); R. L. Polk & Co. ’s Des Moines City Directory: 1899, at 696 (vol. 8). Tam did not appear in the 1900 Directory. In its answer, Defendant Polk County admitted that Tam was engaged in the business of selling cigarettes and had been selling them since July 1, 1898. Answer of Defendants, Tam v. Polk County, Iowa (Polk County Dist Ct., Sept. 6, 1898). This admission was based only on the allegations in the complaint, which merely asserted that plaintiffs were liable for the tax that it was defendants’ “declared purpose” to collect; Parker did not claim that Tam and Moore were on an assessment list, let alone that the mulct tax had already been levied or collected. Petition in Equity 8584, Tam v. Polk County, Iowa (Polk County Dist. Ct, Sept. 6, 1898).
constitutional litigation, which two years earlier Parker had sought to justify with respect to the successful attack on the federal income tax: “Courts try cases on the record and there is not a case which holds that they must go behind the record and determine the motives of each of the controverting parties.”

At the hearing on September 9, after the county’s attorney, state senator Thomas Cheshire—who had played a leading but ambiguous role in the legislative debates over amending the anti-cigarette law in 1897 had made a general denial of Parker’s claims, Bishop ruled that it was incumbent on the company to prove that it had evidence that it had shipped the cigarettes in original packages from St. Louis to Des Moines, and adjourned the case until some time in October. Despite the fragmentary nature of the proceeding, the Register concluded that both Bishop and Cheshire had “intimated...that if the package is an original one...there is no reason why the writ should [not] be issued. The indications are that the tobacco company has won, and all it now has to do, apparently” was to produce someone from St. Louis at the October hearing to swear to the original package claim. The Register’s headline and subheads told the whole story: “No Cigarette Tax Is Legal. American Tobacco Company Wins a Big Victory. Court Practically Decides That the Cigarette Mulct Tax of $300 Is Illegal. Case Not Totally Tried, But Such Is the Apparent Conclusion.”

Why, eight months after the Iowa Supreme Court’s decision in McGregor v. Cone denying original-package status to ATC’s cigarette shipments, the judge, county attorney-senator, and press all reflexively presumed that the Tobacco Trust would encounter no resistance to its carefully staged, but commercially unrealistic and implausible tale of original packages, is mystifying.

The narrative extreme to which Parker and the ATC were willing to go to gussy up this interstate commerce yarn was comically visible in the response that a newspaper man elicited from Parker on the evening of September 18. Apparently impressed by “the ingenious methods by which the trust expects to get

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353 See above this ch.
354 “No Cigarette Tax Is Legal,” ISR, Sept. 10, 1898 (6:2). In order to furnish the evidence that Judge Bishop required, ATC deposed Thomas Donellan on October 7. Tam v. Polk County, Iowa, Polk County Dist. Ct., Appearance, Judgment, Fee and Execution Docket, No. 21, Equity No. 8584. The deposition transcript is not in the case file, but the stereotypically choreographed affidavit of the selfsame Donellan—an ATC packing and shipping employee in St. Louis—in another ATC-staged mulct tax suit (Cook v. Marshall County) a few months later is discussed below.
355 See also “Law Unconstitutional,” CREG, Sept. 10, 1898 (7:1).
The 1897 Mulct Tax Amendment

out from under the law,” the reporter prompted Parker to display a degree of graphic bluster exceeding even that which he and his colleague Fuller had dared to serve up in their various briefs by asking him whether he would be able to offer the proof requested by the court. The scene that Parker choreographed contemplated a delivery company even more “superserviceable” than the one the Iowa Supreme Court would ridicule five years later:

“The tobacco trust sells all cigarettes coming into Iowa in original packages, the same as one buys from the retailer. For instance, in the case of Tamms [sic], the express company was notified that a certain number of packages of cigarettes were at the company’s warehouse in St. Louis. When the expressman arrived there he found a large number of small packages of cigarettes piled up like so much cord wood. On the top of the pile was a slip giving the address of the party to whom the cigarettes were consigned. So far as the Tobacco trust is concerned it makes little difference as to the manner in which the express company handles them in transport. As a rule they employ large baskets and carry them to their destination. I understand that in the case of Tamms [sic] the express company used large paper bags and that when taken to Tamms’ [sic] place of business they were removed from the bags, showing that the express company delivered the goods in the exact condition they received them.”

Returns from five assessorial districts in Des Moines in the second half of September included 34 cigarette sellers with a total tax liability of $10,200 (compared to $39,000 in liability among 65 saloons and drugstores selling liquor). Cigarette selling had, according to the Register, undergone a marked change: “At the time when the law went into force there was a general stoppage of business among the cigarette sellers, and for some time the paper covered weed was sold on the sly. Then many of the dealers doubled the price and prepared to pay the tax.” Many others, however, were determined not to pay it, since ATC had “instructed them to ignore the law” while the Trust prepared to test its constitutionality. In fact, the tax was “prohibitive to many of the smaller dealers. They will have to stop the sale if the law is enforced.” Already at this point it was clear that as soon as the Polk County Board of Supervisors dealt with the dispute, “the fight with the dealers will begin.”

Toward the end of September the press was reporting that the mulct tax might “prove to be uncollectible.” Four dealers in Des Moines had already paid it, but

357See below the analysis of Cook v. Marshall County.
358“The Cigaret Law,” CREG, Sept. 19, 1898 (5:3). It seems implausible that Parker would literally have referred to ATC as the “tobacco trust.”
359“Cigarette Mulct,” ISR, Sept. 21, 1898 (6:3).
The 1897 Mulct Tax Amendment

one had refused to do so on the grounds that he had sold the cigarettes he had imported from St. Louis in their original packages. Although Judge Bishop had not yet decided the case, he had intimated that if the dealer could clearly prove sale in original packages, the tax would not apply. In that case, the Dubuque Herald’s correspondent in Des Moines added, “no other dealer would pay the tax, of course,” and those who had paid might be able to recover refunds. Why, in the light of the Iowa Supreme Court’s decision in McGregor v. Cone upholding the Phelps law and of the commercial impracticability of shipments in individual 10-cigarette packages, such pessimism prevailed was unclear, but the paper asserted that county attorney Howe, who had “made every effort to enforce the law and collect the tax,” had nevertheless admitted that it appeared “very doubtful.” At an all-day session on the last day of September, the Polk County Board of Supervisors heard applications from druggists and storekeepers for remission of the assessments for alleged sale of liquor and cigarettes without having paid the mulct tax. Because Assessor Calkins was unable to provide the requisite evidence of the sales, the Board remitted the tax for all the applicants (including the three alleged cigarette sellers).

A few weeks later the press reported that Judge Bishop, basing his decision on the original package doctrine, had given ATC a temporary injunction enjoining tax collectors from collecting taxes on property where its cigarettes were sold without payment of the tax. Securing this injunction was just “one step” in the Trust’s “state-wide fight against the law.” As a result, dealers were selling cigarettes “under the contract for protection.” Whether this report was accurate is unclear since the docket sheet in Tam v. Polk County contains no entry for the issuance of any injunction. That the county may nevertheless have voluntarily agreed not to levy the tax against Tam and Moore is suggested by the court’s dismissing the case on November 26 and ordering defendants to pay the costs.
On November 18, the Polk County Board of Supervisors took up several dealers’ petitions for refunds of the cigarette mulct tax assessed against them. Amusingly, eight months earlier the supervisors had unanimously passed a resolution banning smoking during their meetings: “It is presumed that the supply of Havanas brought from Cuba by Chairman Teachout has been exhausted, whereas it is beneath the dignity of the officials of this board to smoke while in session and it is not necessary for the health of the members and tends to the disrespect of others, it is hereby resolved that smoking should not be permitted in the supervisors’ chamber during its session.”

Dunshee, the Tobacco Trust’s Des Moines lawyer, represented R. Lavine, while the assistant county attorney (And Senator) Cheshire represented the county. After numerous witnesses had testified on Lavine’s behalf and the county assessor on the county’s, the board voted 4 to 1 not to grant the petition. Next, A. Cohen, also represented by Dunshee, had even less success, the board unanimously not granting his petition. Finally, the board also unanimously did not grant the petition of A. C. Bondurant, as landowner with a tenant (J. F. Cline) and as business owner. The board resumed consideration of further petitions on November 19: a succession of six petitioners, some represented by Dunshee, appeared, only to see the board unanimously (or against one Yes) not grant them, though by the time the last one testified the board voted to postpone further consideration until November 21.

After the board of supervisors had denied these petitions for refunds, ATC let it be known that it would appeal the decision in state district court. When the board reconvened, first it denied the petitions of four more dealers for a refund of the cigarette mulct tax assessed against them, and then immediately did an about-face, unanimously adopting a resolution granting the petitions of these four and nine others. The resolution remitting the mulct tax to the 13 dealers
declared:

Whereas, numerous petitions have been presented to this Board asking for a refund of cigarette mulct tax assessed against various parties, and whereas a number of such petitions have been granted by this Board for the reason that the petitioners claimed that they had only sold cigarettes received from without the state, and sold in the original packages in which they were received, and it having been held by the District Court that the State law prohibiting the sale of cigarettes could not operate against a decision in the Federal Court, permitting such sale in original packages, and whereas, numerous other petitions for a refund of cigarette mulct tax have been refused on the evidence showing that packages of tobacco have been sold and cigarette paper given away with such packages of tobacco,

Therefore be it resolved by the Board of Supervisors of Polk County, Iowa, that in as much as this conflict between the State and Federal laws exist with reference to the sale of cigarettes in original packages of tobacco, and packages of tobacco with cigarette paper given away, that an injustice is done between the classes of dealers, and in as much as numerous dealers in tobacco with which the cigarette papers come were ignorant of the law, and therefore violated it unknowingly, that the action of this Board on the following petitions be reconsidered and the petitions granted upon payment of the costs. 370

The Daily Iowa Capital underestimated the significance of this move in commenting that it would end further litigation and “doubtless prevent a further violation of the state law by those who have so narrowly escaped the penalty which the board might have required.” 371 The newspaper passed over in silence that—unless, contrary to Attorney General Remley’s prediction, ATC had been shipping thousands and thousands of 10-cigarette packages loose to Des Moines dealers—a county board of supervisors had apparently decided on its own to ignore the Iowa Supreme Court’s decision in McGregor issued just 10 months earlier: if the packages had in fact not been shipped loose, then the federal court’s decision in McGregor would not apply to them; that the Polk County Board of Supervisors had investigated the circumstances of the Trust’s shipments to each and every petitioner and determined that they fell under the federal branch of the
The 1897 Mulct Tax Amendment

case seems wildly implausible. Furthermore, the board appears to have been confused since McGregor did not involve “original packages of tobacco with cigarette paper given away...” Consequently, based on wilful disregard of the Iowa Supreme Court’s decision and an inexplicable excusal of dealers’ self-servingly alleged ignorance of the clear subjection of cigarette paper to the mulct tax, the board created a fictitious “injustice.” In contrast, the Perry Advertiser reported that the board’s action “virtually put[ ] an end to the cigarette mulct tax in Des Moines.” That the Polk County Board of Supervisors’ action had not made the mulct tax a dead letter in Des Moines was proved not only by the data on collection, but also by the fact that, for example, in 1901 the board continued to remit the tax in non-test cases. Nevertheless, the chairman of the board did state at that time that the supervisors had decided not to deal with the mulct tax until the U.S. Supreme Court handed down a decision; until then the board would hold cases and petitions in abeyance.

Enforcement was headed toward a similar climax in Cedar Rapids, where, in August the Gazette assured it readers, the cigarette industry “will undoubtedly receive the hardest blow this week that it has ever been dealt” when the assessor, instructed by County Attorney Grimm, began to enter the $300 mulct tax against every property where cigarettes were sold. Although the newspaper correctly stated that the 1897 code made the sale of cigarettes illegal, penalized it, and provided a mulct tax, the Gazette did not explain why cigarettes were still being sold. Instead, it suggested that landlords’ back-up liability under the mulct law would probably impel the owners of the property on which cigarettes were sold to require tenants to post a bond indemnifying the landlords against any and all taxes or assessments. In turn, the tenants, who were “practically the agents” of

372“Cigarette Tax a Failure,” Perry Advertiser, Nov. 18, 1898 (2:4). It is a mystery how the newspaper, in an article dated November 17, could have known what the board did not do until November 21.

373See below this ch.

374“Supervisors Fill Offices,” ISR, Jan. 9, 1901 (6:5). In the case of a drug store the board remitted the tax because the owner claimed that he had not known that cigarette papers had been disposed of: a clerk had given cigarette papers away free that had been received with tobacco consignments. In another case the property owner persuaded the board that no cigarettes had been sold by the occupant. Lucy Page Gaston’s national magazine reported that that week cigarette dealers and property owners against whom Assessor French had levied a cigarette mulct tax had presented a petition to the county board of supervisors requesting that the tax be remitted; ATC was “pushing the case” to test the mulct tax law and “if possible [for] a definition of what an original package is.”


and indemnified by the American Tobacco Company against prosecution under the mulct law, did not, like their counterparts in Des Moines, yet know whether the Trust would also pay the tax. The Gazette unwittingly revealed a deep insight into the state of enforcement in Cedar Rapids and Iowa when it praised Grimm as “one of the unalterable enemies of the cigarette, like every other well thinking man with a son of his own...” Although Grimm authorized the newspaper to report that if anyone brought a complaint against any cigarette dealer, he would “prosecute to the bitter end,”376 his enmity toward cigarettes was purely reactive:

“I am not a police officer...and do not feel that it is my duty to go around looking up testimony in these cases or endeavoring to find out who is selling cigarettes, but I know that they are being sold in this city contrary to law and I will gladly prosecute any complaint which is formally brought before me. There is probably no question but that convictions would follow, as I regard the law as perfectly plain. There is nothing which can save the property occupied by cigarette dealers from taxation, and I think that Assessor McKinlay will give the matter immediate attention.”377

This last sentence made it perfectly plain as well that Grimm’s prosecutorial activity was not only reactive, but applied only to nonpayment of the mulct tax and not to the underlying violation of the prohibition on sales under the Phelps law, which the Iowa Supreme Court had unambiguously and unanimously upheld half a year earlier.

**Cook v. County of Marshall and Hodge v. Muscatine County:**

**The Tobacco Trust Also Loses Its Judicial Challenges to the Mulct Tax**

The case [Hodge] is one of great importance to tobacco users in all parts of the state, for upon the decision of the supreme court depends in a large measure the future of the cigarette business in Iowa.378

The Tobacco Trust prepared the basis of its litigation against the mulct tax in 1898 in Marshalltown with the help of straw men379 Charles P. Cook, a 27-

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376 “Will Be Assessed,” CREG, Aug. 11, 1898 (5:1).
377 “Will Be Assessed,” CREG, Aug. 11, 1898 (5:1).
378 “Testing the Cigarette Law,” DWL, Nov. 27, 1903 (9:1).
379 According to “Cigarette Law Is Held to Be Valid,” DMRL, Jan. 17, 1905 (10:3), the mulct tax law “was attacked by F. S. Dunshee of Des Moines, attorney for the American Tobacco company, on behalf of dealers at Marshalltown and half a dozen other places.”
year-old tobacco, cigar, and cigarette dealer\footnote{As a 10-year-old at the time of the 1880 census of population Cook was returned as living with his parents in Waterloo, his father being a butter packer. He appears in the index to the 1900 census of population, but the apparent entry for him on the very last line of the census schedule page is illegible. Series T 623 Roll 448 Page 227. Cook was also returned at the 1910 and 1920 census of population as a tobacco or cigar merchant. In 1899 the city directory listed him as operating a restaurant; beginning in 1906 he was listed as operating a cigar store to which from 1908 onward were added billiards, bowling alley, and barber shop. \textit{Marshalltown City Directory}, 1899-1900, at 48; \textit{Marshalltown City Directory}, 1906, at 53; \textit{Marshalltown City Directory}, 1908, at 55. The press stated that at the time he filed the petition, Cook was a restaurant keeper. \textit{“Cigaret Law Declared Valid.”} \textit{ET-R}, Feb. 2, 1903 (3:2).} (who in 1915 would be involved in a dispute in Marshalltown over the legal consequences of his having paid the mulct tax),\footnote{“Now Easy for Boys to Obtain Cigaretts,” \textit{Marshalltown Times-Republican}, July 17, 1915 (7:2); below ch. 14.} and his landlord Edward Plunkett, a 52-year-old Irish immigrant, whom the 1900 population census returned as a “capitalist” with 10 children living in his house.\footnote{Plunkett’s age was omitted in 1900, but in 1910 he was returned as being 62, when his occupation was listed as “own income.”} “The American Tobacco company,” as the press correctly noted, “was the real plaintiff in the case....”\footnote{“Must Dig Up Now on Cigaret Tax,” \textit{CREG}, Jan. 17, 1905 (7:3).} On December 10, 1898, the Marshalltown city assessor returned their names to the Marshall county auditor as persons carrying on a cigarette business and maintaining a place where cigarettes were sold in violation of the law because they had failed to pay the quarterly mulct tax to which they were liable and which was also a lien on the premises. On January 23, 1899, Cook and Plunkett filed a petition with the county auditor denying liability for the tax on the grounds that since September 30, 1898, Cook had not sold any cigarettes except those that he had bought from ATC, which had shipped them to him in “original packages” from St. Louis, Missouri. Alleging that they were advised and believed that the tax as to such sales was void as an interference with interstate commerce, they requested that the tax be remitted.\footnote{Appellant’s Abstract of Record at 1-2, \textit{Cook v. County of Marshall, Iowa}, 196 US 261 (1905).} On January 31 Cook and Plunkett filed an affidavit, in the tradition of carefully choreographed Trust statements, by Thomas Donnellan, an ATC packing and shipping employee in St. Louis, who swore that he had shipped to Cook paste board boxes of Sweet Caporal cigarettes “absolutely loose, or at least neither the American Tobacco Company, nor myself or [sic] any one of its other employee...furnished any box, bale, bag, wrapping or other covering...
The 1897 Mulct Tax Amendment

for these packages nor [sic] in any way attached them together. These packages were not separately addressed nor were any of them addressed but at the time they were delivered to the driver of the U.S. Express Co....” Donnel[l]an swore that from the duplicate receipts the driver had given “I suppose the express Co. had notice of the number to be delivered and the name of the consignee and his address.”

After the county board of supervisors had heard the petition on April 3, 1899 and refused to grant it, the Trust’s puppets perfected an appeal to district court, and then on February 26, 1901. Dunshee traveled to Marshalltown on behalf of ATC to file an amended petition, which argued that section 5007 was invalid and assessments, levies, and taxes were void and unenforceable because the section had nothing to do with title 24 of the Code under which it was enacted, which dealt with crimes and punishments.

The gussied-up account in the Des Moines Daily News of this routine filing as a “direct body blow” at the mulct tax law did correctly note that if the argument were sustained, “thousands of dollars will be saved to the dealers of the state who have not paid into the county treasure’s [sic] the taxes accumulating for the last two years.” Much more remarkable, however, was the newspaper’s critical comment that even if ATC prevailed on this “pure technicality in the wording of the statute,” the company, in advancing this point, do [sic] not hope to be able to sell cigarettes in Iowa for the reason if the [tax] statute is unconstitutional it is not to be understood that the prohibitory features [of the Phelps law, Code sect. 5006] are invalid. They remain in force and effect just as they were originally and any attempt on the part of the American Tobacco company or any other to sell cigarettes in Iowa would result in a punishment for a violation of the prohibitory features....

385 Appellant’s Abstract of Record at 3, Cook v. County of Marshall, Iowa, 196 US 261 (1905).

386 Appellant’s Abstract of Record at 5-6, Cook v. County of Marshall, Iowa, 196 US 261 (1905).

387 The more than two-year delay apparently resulted from a “stipulation” that the parties had made that the case would be continued in district court until the U.S. Supreme Court decided Austin v. Tennessee. After the that decision was issued in November 1900, the Marshall County Attorney filed a demurrer in district court based on that ruling. “Cigaret Law Declared Valid,” ET-R, Feb. 2, 1903 (3:2).

388 “Blow at Cigarette Tax,” DMDN, Feb. 26, 1901 (8:5).

389 Appellant’s Abstract of Record at 6, Cook v. County of Marshall, Iowa, 196 US 261 (1905).

390 “Blow at Cigarette Tax,” DMDN, Feb. 26, 1901 (8:5-6).

391 “Blow at Cigarette Tax,” DMDN, Feb. 26, 1901 (8:5-6). Since the article’s
What was remarkable about this point—that the 1896 and 1897 enactments were independent of each other and that selling cigarettes remained prohibited regardless of whether sellers paid the tax or whether the tax was invalidated—was that, despite its obviousness, law enforcement officials over and over again lost sight of it during the next two decades, no matter how often it was rediscovered. 392 However, the Daily News then went on to undercut this point by stressing that the great interest in the case stemmed from the fact ATC’s victory “means the end of a war that had been waged in Iowa and other states for two years”: after county treasurers had begun enforcing the mulct tax, dealers began selling cigarettes in original packages, but had to stop after the U.S. Supreme Court (in Austin v Tennessee), “contrary to expectations,” had ruled that “the original package must go.” In fact, if the Trust had intended to comply with the underlying sales prohibition, litigating the mulct tax would have been senseless inasmuch as even an intact tax could not have represented a threat to businesses that sold no cigarettes. 393 That compliance was not uppermost in the plans of ATC or some dealers was underscored by the newspaper’s reminder that:

Here in Des Moines the dealers secured a compromise with the board of supervisors and were successful in getting a remittance of the assessments. In other sections of Iowa, however, they were not so successful with the result that the American Tobacco company has decided to bring an action looking to a nullification of the mulct law. 394

After the Trust had filed another amendment to its petition (this time alleging that the statute’s non-applicability to jobbers and wholesalers doing an interstate business denied ATC equal protection of the laws under the U.S. Constitution and violated article I section 6 of the Iowa Constitution, which provides that “all laws of a general nature shall have a uniform operation”), the district court tried the case on April 4 and, in June 1901, dismissed the petition and confirmed the tax assessment. 395 Cigarette smokers in Marshalltown were, according to the press, “dismayed” by the decision: “The white death-dealing tubes were placed under a ban here many months ago and have been hard to obtain.” Youths, deprived of...
The 1897 Mulct Tax Amendment

manufactured cigarettes, had “turned in their extremity” to rolling their own, but “even this comfort will be denied them, for the selling or even giving away of the white tissue slips is strictly forbidden unless the dealer desires to pay the almost prohibitive mulct tax of $300 a year.” In fact, however, in spite of the newspaper’s erroneous suggestion that payment of the tax immunized dealers, none in Marshalltown intended to obtain a “license” because all believed that the tax would wipe out any possible profit.  

(The year 1901 witnessed a campaign against smoking in nearby Waterloo, Iowa’s seventh largest city, while Nashua was “practically free from cigarette smokers, or if we have them they keep out of sight while smoking the filthy things.” In Boone, too, the local press supposed that those “vile destroyers of physical and moral force are not sold in the city....”)

ATC, represented by Dunshee and its associate general counsel, Junius Parker, appealed the decision to the Iowa Supreme Court. In its brief, Marshall County did not bother to conceal its contempt for ATC’s transportational manipulations and jurisprudential arguments. The County argued that “there can be no possible claim that the Austin case does not fully settle the question as to...the nature of the small packages, improperly called original packages.” In both cases, the Trust obviously sent the packages “not at all for the convenience of shipping,” since they “would be quite inconvenient, and the expense of transportation would, necessarily, be great.” The brief derisively culminated in the advice that unless the U.S. Supreme Court reversed Austin v. Tennessee, “the American Tobacco Company must resort to some other and more ingenius [sic] method of disposing of its goods...."

On February 2, 1903, the Iowa Supreme Court unanimously affirmed the lower court’s judgment. The opinion, written by Republican Justice Silas Weaver, was sharp-tongued throughout, oozing sarcasm and scorn for the Trust’s litigational machinations. In dealing with ATC’s claim that under Leisy v. Hardin and other U.S. Supreme Court decisions Cook was lawfully selling cigarettes in their original packages, Weaver observed that:

T]he question is whether ten cigarettes, put up, handled, shipped, and sold in the manner

396 “Cigarette Mulct Tax Decision,” MDN-T, June 13, 1901 (1:4) (copy furnished by Merle Davis).
397 Nashua Reporter, Nov. 28, 1901 (5:1) (untitled).
398 “They Get Them,” Boone County Republican, Mar. 7, 1901 (1:1) (copy furnished by Merle Davis).
400 Cook v. Marshall County, 119 Iowa 385 (1903).
The 1897 Mulet Tax Amendment

indicated by the petition, is such an “original package” as is meant by the authorities which the appellant relies upon. As an original proposition, addressed by common sense, aided by a conscience of average enlightenment, and uncomplicated by precedent, there would seem to be no room for doubt that this question should be answered in the negative. It must be admitted, however, that authorities are not wanting affording the appellants some ground to believe that any scheme or device, no matter how transparent the fraud, is sufficient to baffle the power of a sovereign state so long as it bears the magic legend “original package.”

Persuaded that Chief Justice John Marshall would not acknowledge “the legitimacy of the descent of the modern doctrine,” the court proceeded to take full advantage of the U.S. Supreme Court’s recent decision in Austin v. Tennessee, which had rejected the Trust’s interstate commerce-based attack on Tennessee’s anti-cigarette sales act:

There, as here, the nonresident manufacturer and the resident agent or dealer, aided by a superserviceable common carrier, undertook to convert the interstate commerce privilege afforded by the federal constitution into a shield behind which to violate the law of the state with impunity. The plan adopted may be explained as follows: To conform to the internal revenue law of the United States, the manufacturer put the cigarettes into small pasteboard boxes of ten each. These boxes are about three inches in length, and one and one-half inches in width, a convenient size for the vest pocket of the schoolboy or man addicted to the use of tobacco in that form. In filling an order for these goods from a state where the traffic was unlawful, the seller instead of packing the requisite dozens or hundreds or thousands of boxes in a larger box or package, as would be done in legitimate commercial transactions generally, placed the small boxes in a loose pile upon the floor of his warehouse, and notified the carrier, who came, gathered up the consignment in a basket, and put it in course of transportation to the consignee. By this device it was claimed that each box of ten cigarettes was to be considered an original package, which the importer might lawfully receive, hold, and sell without let or hindrance by the state authorities. The adoption of this doctrine would, of course, prove absolutely destructive of the right of the state to place any ban whatever upon the sale of this class of goods. The cause of good government and good morals is to be congratulated, however, upon the fact that a majority of the court refused to allow the last vestige of the police power of the state for the protection of its people to be thus obliterated.

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401 Cook v. Marshall County, 119 Iowa 384, 387 (1903).
403 Cook v. Marshall County, 119 Iowa 384, 389-90 (1903). In a post-mortem comment on the case after the U.S. Supreme Court had upheld the Iowa Supreme Court’s ruling, ATC’s Iowa lawyer, Dunshee, falsely asserted that “it was apparent to the [Iowa Supreme] court that the manufacturer had equipped a cigarette factory with the special processes requisite to do this business in original package way....” “Cigarette Law Is Held
Weaver noted that the sole distinction that the Trust’s lawyers could find between Austin and Cook was that in the latter no mention was made of the basket that the express company had used in the former to remove the loose pile of cigarette packages from the ATC warehouse floor. Weaver was not amused by the choreography:

The care and precision with which we are told what the tobacco company did not do in making the shipment is no less conspicuous than the omission to tell what its agent, the express company, did do in that regard. We think, however, it indicates no such material variance in the facts of the two cases as to affect the application of the rule. Conceding that the tobacco company scrupulously refrained from doing more than counting and pointing out the loose packages to the express company with directions to carry the same to the buyer in Marshalltown, yet we know, as a matter of common observation and immemorial usage, that this is not the manner “in which bona fide transactions are carried on between the manufacturer and wholesale dealer residing in different states,” and is, therefore, not entitled to claim the exemptions attaching to interstate commerce. Still further we may rightfully assume that the express company, in receiving and shipping these little boxes, did it in a rational manner, not by handling or carrying the boxes as ants carry sand, one grain at a time, but by gathering them, if not in baskets, in receptacles of some suitable and convenient kind; and in such case, under the doctrine of McGregor v. Cone, supra, the receptacle so used would be the original package, if, indeed, there be anything in the transaction entitled to that appellation. The extreme and unreasonable extension of the principle affirmed in Brown v. Maryland has been the fruitful source of much annoyance and embarrassment in many of the states of the Union. And it is a striking, but just, commentary upon the perversion of the principle embodied in that decision, to note that practically the only beneficiaries of the modern doctrine of the sanctity of original packages in interstate commerce are the whisky seller, the cigarette manufacturer, and the dealer in bogus butter—a trinity which finds it profitable to force its wares upon states whose people, speaking through their constituted authorities, seek to exclude them as injurious to public health and morals.  

The Court did not bother to attempt to disguise its contempt for the Trust’s “chief contention” at oral argument in October 1902—namely, the aforementioned claim that the mulct tax was unrelated to the Code article on crimes and punishments under which it was enacted. After mocking the Trust for urging this point “with much earnestness,” the Court re-centered the discussion by underscoring that the constitutional provision invoked by appellants “was

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404 Cook v. Marshall County, 119 Iowa 384, 393-94 (1903).
designed to prevent surprise in legislation by having matters of one nature embraced in a bill whose title expressed another." In the course of explaining why “the so-called ‘mulct tax’” was indeed “germane to the general purpose of the act” in which it was situated, the Iowa Supreme Court set forth the necessary subordination of the mulct tax to Phelps law’s sales prohibition, which would be repeatedly suppressed by the cigarette industry and many law enforcement officials as well as by the press over the following 18 years:

It certainly was competent for the legislature under this head to designate those acts which, in its wisdom, should be forbidden as against public policy, and to include therein the traffic in cigarettes. ... In codifying these statutes the legislature found already upon the statute book the prohibition now carried into section 5006 (see Laws 26th General Assembly, chapter 96), and in carrying it into the Code amended it by adding thereto section 5007, providing for the mulct. That it was intended as an aid in suppressing and punishing violations of the provisions of the preceding section seems too clear for controversy. While called a “tax,” it is a “mulct” tax, and a mulct is “a fine imposed for an offense, a penalty.” See “Mulct,” Anderson, Law Dictionary, Ebersole, Law Dictionary, Century Dictionary. It is not even a form of license by indirection, for it contains no “bar clause,” but, on the contrary, expressly provides that it may be exacted in addition to the penalties named in section 5006. The end sought by both these sections is identical,—the suppression and prevention of the traffic in cigarettes. To use the language of the authorities to which we have referred, there is here a “unity of object,” and the mulct is manifestly an auxiliary to the end sought to be accomplished. It is not wholly, unlike those familiar enactments which provide for the punishment of a crime or misdemeanor, and unite them with provision for assessing further penalty or damages in a civil proceeding. ... Other instances of like legislation will readily suggest themselves in which a “tax” or “mulct” or “penalty” is provided as an additional weapon in the hands of the state for enforcing obedience to its commands.

The Marshalltown Evening Times-Republican was not waxing hyperbolic when it reported the same day that the court had “branded” the cigarette dealer’s attempt to escape liability under the original package doctrine a “fraud.” The ruling’s fiscal result was that, with eight or nine dealers “interested,” the county stood to gain about $5,000 in mulct taxes—if the U.S. Supreme Court upheld the Iowa Supreme Court. The newspaper was as expressly certain that the Trust would appeal as it was implicitly that the outcome would be payment of the tax

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408 Cook v. Marshall County, 119 Iowa 384, 400 (1903).
409 Cook v. Marshall County, 119 Iowa 384, 400-401 (1903).
rather than enforcement of and compliance with the prohibition on sales.\footnote{410} Not all commentators were so pessimistic. For example, the \textit{Davenport Daily Republican} advised “both male and female” “Davenport rollers of the naughty little tube” that the Court had held that “according to all common sense, the cigaret people will not sell original packages in Iowa.”\footnote{411}

In spite of the Iowa courts’ unequivocal rejection of its position, ATC sought review of the decision from the U.S. Supreme Court, on whose decision in \textit{Austin v. Tennessee}, issued barely two years earlier, the Iowa Supreme Court easily rested its opinion. Fuller and Parker’s protestation in their brief to the contrary notwithstanding that their contentions “do not involve an application for a rehearing of the \textit{Austin} case,”\footnote{412} the U.S. Supreme Court in 1905 characterized their main argument as “frankly addressed to a reconsideration of the principle involved in the Austin case, and a reinsistence upon the position taken there.”\footnote{413} Without explaining why it chose to accommodate the Tobacco Trust’s request for a second bite at the apple, the Court laconically observed: “We have carefully reconsidered the principle of that case, and...we have seen no reason to reverse or change the views expressed there.”\footnote{414} Whether or not the Court’s purpose in taking the case was to put a definitive end to ATC’s interstate commerce-based legal machinations to subvert state police powers, its absolute refusal to deviate from its settled position apparently prompted the Trust to refocus on other stratagems for combating anti-cigarette legislation.

In their brief, Fuller and Parker had conceded that the difference between \textit{Cook} and \textit{Austin} was “small,” but insisted that “the distinctions and peculiarities” that produced the decision in the latter case “were themselves small.” What this small difference allegedly boiled down to was that in \textit{Cook} “it does not appear what means were adopted by the express company for its convenience in transportation—so far as appears, and therefore presumably, these packages were carried as any other express packages are carried, to wit, on the floor or in permanently attached receptacles of the express car....”\footnote{414} Why this further trivialization of the already nonsensical pseudo-constitutional original package doctrine should have prompted the Supreme Court to revisit the legality of the Trust’s shenanigans is unclear. It is also implausible that Fuller and Parker could have imagined that of all jurists Oliver Wendell Holmes, the only justice to have

\footnotesize{\begin{footnotes}
\item[411]“Cigaret Mulct Upheld,” \textit{DDR}, Feb. 4, 1903 (7:2).
\item[413]\textit{Cook v. Marshall County}, 196 US 261, 269-70 (1905).
\end{footnotes}}
replaced one who had voted against the Trust in *Austin v. Tennessee*, would have given the slightest credence to their threadbare claims.\footnote{In fact, the remaining justices voted just as they had in *Austin*, while Day, who replaced the dissenter Shiras, joined the majority, which was thus increased from 5 to 6.}

To furnish empirical support for their preposterous claim that “the unimpaired perpetuation and enforcement of [their conception of the original package] doctrine is essential to the maintenance of a National Commerce” and that “when occasions arise...for a change of conditions so as to give to the States a control in a limited way of this national subject, such change can be better made by Congressional action” than by the Supreme Court’s changing its mind about its own doctrine, Fuller and Parker asserted that, with regard to cigarettes, “it is very evident that there is no great popular demand for the regulation of their sale by the States....”\footnote{Brief for Plaintiffs in Error at 16-17, *Cook v. Marshall County*, 196 US 261 (1905).} In fact, in addition to the general anti-cigarette statutes that Washington, West Virginia, North Dakota, Iowa, Tennessee, and Florida had enacted from 1893 to 1899, alone between 1889 and 1903, at least one chamber of the legislature in at least 20 states (Alabama, Arkansas, California, Colorado, Delaware, Georgia, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, Oklahoma, Pennsylvania, Texas, Washington, and Wisconsin had at least 39 times passed a bill embodying a general prohibition on selling or smoking cigarettes.\footnote{Presumably to mobilize support from other producers, ATC added that: “The Legislature that concludes that the sale of cigarettes should be prohibited need go but a little further to conclude that the sale of tobacco should be prohibited, and but a little further still to say that the sale of coffee is injurious to the citizens and should not be allowed.” *Id* at 18.} After boasting of the four federal decisions that had vindicated the Trust’s interstate commerce position by striking down the Washington, West Virginia, Iowa, and Tennessee laws from 1893 to 1897, ATC’s lawyers argued that “Legislatures might very well have thought that it would be impossible to prohibit the sale of cigarettes by dealers who imported them and then sold them in the original packages in which imported.” Even after the Supreme Court’s decision in *Austin*, which held that when cigarette packages “were shipped in a basket at least, they were no longer original packages and therefore entitled to no immunity...no State has seen fit to pass a statute forbidding the sale of cigarettes....”\footnote{See above Table 1.} Apart from overlooking the law that the Oklahoma Territory enacted in 1901,\footnote{Brief for Plaintiffs in Error at 17, *Cook v. Marshall County*, 196 US 261 (1905).} Fuller and Parker counted their chickens prematurely: within
The 1897 Mule Tax Amendment

a few weeks of the Supreme Court’s decision in Cook, in the greatest outpouring of general anti-cigarette legislation yet, Indiana, Nebraska, and Wisconsin enacted general anti-cigarette statutes, while Oklahoma enacted a stronger version of its aforementioned law.  

As even the tobacco trade press was constrained to admit, the U.S. Supreme Court had made rather short shrift of the Trust’s argument, which the Court characterized as “the same as that which was pressed upon our attention” in Austin. There the Court had viewed the method of shipment as “merely a convenient subterfuge for evading the sale of cigarettes within the State,” and the fact that the only difference between the cases lay in the Court’s being “left to infer” that loose cigarette packages “were shoveled into and out of a car, and delivered to plaintiffs in that condition” rather than in a basket could scarcely generate a different appraisal.  

The Court continued to reject the Trust’s claim that the governing circumstance should be the “actual” package in which cigarettes were shipped, whereas the motives that prompted that type of shipment or the “fact that ordinary importations of cigarettes were made in boxes containing a large number of these so-called original packages” were irrelevant.  

The Supreme Court was manifestly impatient with ATC’s doctrinal manipulation:

While it is doubtless true that a perfectly lawful act may not be impugned by the fact that the person doing the act was impelled thereto by a bad motive, yet where the lawfulness or unlawfulness of the act is made an issue the intent of the actor may have a material bearing in characterizing the transaction. Where the lawfulness of the method used for transporting goods from one State to another is questioned, it may be shown that the intent of the party concerned was not to select the usual and ordinary method of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the State. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause of the Constitution is invoked as a cover for fraudulent dealing, and is no defense to a

420 See vol. 2.
421 Oklahoma made it a misdemeanor “to sell, or to bring into the Territory for the purpose of selling, giving away or otherwise disposing of, any cigarettes, cigarette paper or substitute for the same...” 1901 Okla. Laws ch. 13, art. 4, § 1 at 111.
422 “Iowa’s Anti-Cigarette Law Upheld by the U.S. Supreme Court in a Rather Sharp Opinion,” USTJ, vol. 54, Jan. 21, 1905 (8). The local Marshalltown paper also captured the spirit of the opinion in an above-the-fold front page article: “The Iowa Cigaret Law Is Upheld,” ET-R, Jan. 16, 1905 (1:1).
prosecution under the state law.

... While this court has been alert to protect the rights of nonresident citizens and has felt it its duty, not always with the approbation or the state courts, to declare the invalidity of laws throwing obstacles in the way of free intercommunication between the States, it will not lend its sanction to those who deliberately plan to debauch the public conscience and set at naught the laws of a State. The power of Congress to regulate commerce is undoubtedly a beneficent one. The police laws of the State are equally so, and it is our duty to harmonize them. Undoubtedly a law may sometimes be successfully and legally avoided if not evaded, but it behooves one who stakes his case upon the letter of the Constitution not to be wholly oblivious of its spirit. In this case we cannot hold that plaintiffs are entitled to its immunities without striking a serious blow at the rights of the States to administer their own internal affairs.  

The Marshalltown Times-Republican immediately understood that the Court’s decision was “one of the most important...affecting the cigaret business in Iowa that has ever been handed down....” Moreover, in the wake of the decision, “other counties where similar actions might have been brought, will make attempts to secure mulct taxes from dealers.” (According to the records of the treasurer of Linn County, in which Cedar Rapids, the state’s fifth largest city was located, “only one concern...has sold any cigarettes since the new Iowa law was adopted [in 1897]” and that firm was “not worrying about” the U.S. Supreme Court decision because it had been paying the mulct tax. The suggestion by the press that the other dealers who had been selling “‘coffin sticks’” would “probably save themselves needless annoyance by...settling on the basis of $300 a year” indicated that county officials were unlawfully treating the mulct tax as a license to violate the Phelps law’s ban on selling cigarettes rather than as a penalty.) And although all of the affected merchants in Marshalltown had “discontinued the cigaret business long ago,...the taxes dating from the time they began, until they quit the business”—and totaling some $8,000 to $9,000—were now “made collectible.” In fact, about a month later the American Tobacco Company entered into a partial settlement agreement with Marshall County and paid $7,321.50 on behalf of the dealers (including Cook) whom it had contracted to hold harmless. In dispute were the last 40 days of the last quarter of 1901 when the protectees had stopped selling cigarettes on the advice of the Trust, which, despite its public bravado, “was not willing to take any more chances” in view of

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427“Must Dig Up Now on Cigaret Tax,” CREG, Jan. 17, 1905 (7:3).
The “adverse legislation” and decisions in the pending cases that it foresaw. Ultimately the Marshall County supervisors remitted that part of the tax, but required ATC to pay the $566.72 for the rest of the quarter, bringing the grand total to $7,888.22.\footnote{“Partial Settlement Is Effected,” \textit{ET-R}, Feb. 23, 1905 (7:3); “Cigaret Mulet Tax Remitted by Board,” \textit{ET-R}, Mar. 9, 1905 (7:2) (quote). See also “Pay Big Tax for Cigarettes,” \textit{Waterloo Daily Reporter}, Feb. 24, 1905 (3:1); “News From All Over the State,” \textit{WC}, Mar. 10, 1905 (8:4). Nevertheless, in June the county treasurer reported that he had collected (only) $6,246.42 in cigarette tax for the period between Jan. 1 and June 1, 1905. “County Affairs,” \textit{Reflector} (Marshalltown), June 24, 1905 (1:5) (Proceedings of the Board of Supervisors, June 6). The Marshall County Board of Supervisors rejected the claim of County Attorney F. E. Northup, who had represented the county, for $500 in fees in collection of the cigarette tax “on the grounds of his drawing regular salary covering county cases.” \textit{Id.} (Proceedings of the Board of Supervisors, June 6). An additional $650 was assessed individually against three dealers whom ATC had not agreed to protect. The first and third articles stated that the year in question was 1900. The county treasurer’s semi-annual report for the second half of 1905 included no entry for a cigarette tax. “County Affairs,” \textit{Reflector} (Marshalltown), Jan. 28, 1906 (1:6, 7:4-7 at 5).

Nor was this denunciation of the Tobacco Trust’s underhandedness the U.S. Supreme Court’s last word on the subject. On the same day (January 16, 1905) it handed down another decision destroying ATC’s last nationally prominent legal ploy attacking the validity of Iowa’s mulct tax, this time on grounds other than interstate commerce.

Mrs. J. Tabor, who owned a house suited to the tobacconist business in the business center of the Mississippi River town of Muscatine, rented it to R. E. Hodge for operating such a business.\footnote{Transcript of Record at 1, Hodge v. Muscatine County, 121 Iowa 482 (1905).} On November 15, 1900, Tabor and Hodge filed a petition in equity in state district court alleging that the only cigarettes Hodge sold were sold in original packages shipped from out of state by ATC in exactly the same manner as alleged in \textit{Cook}, and that consequently the mulct tax as the county sought to enforce it against Hodge and Tabor was void as an unconstitutional attempt to regulate interstate commerce, entitling plaintiffs to bypass filing an application with the county board of supervisors for a remission of the tax and to seek injunctive relief from the court against assessment and collection of the mulct tax.\footnote{Interestingly, almost eight months earlier, the city assessor, while making his}
rounds on March 31, had informed tobacco dealers, grocers, and news-stand owners that the $300 annual mulct tax would be assessed against all cigarette sellers. The local press reported that the notice had come “as a surprising revelation to a majority of those selling the tissue paper poison, as they were not aware that the law provided for such a mulct.” Although dealers were apparently even more ignorant of the fact that the law also absolutely prohibited the sale of cigarettes regardless of whether they paid the tax, the financial deterrent sufficed: “All the dealers in town have decided to no longer handle the coffin nails in future and believe that the absence of cigarettes will create a larger demand for cigars, in the sale of which there is a larger margin of profit.” In contrast to the situation in Davenport, where the assessor decided to ignore the law, the alleged “unconstitutionality ha[d] not permeated the grey matter of the officials of Muscatine county.”

Four days later, a Dr. Wallace Struble of Chicago spent the whole day in the Muscatine city schools instructing pupils in the evils of cigarettes. That evening he gave a lecture, also attended by children, during which he expressed his understanding that “the officers of this city were now after the violators of the anti-cigarette law.” In order to reinforce his message that “[c]igarettes were invented by the arch enemy,” StrUBLE horrifiedly recounted the (urban-mythical) manufacturing process, which involved 2,000 six- to 14-year-old “gutter snipes” in Chicago, whose parents hired them out to Italians, who required them to hunt out three pounds of partly smoked cigars and cigarettes out of the gutter, punishing those who failed to meet their daily quota. This “practical slavery right under the eye of the eagle” produced 6,000 pounds a day just in one city. Struble continued in the graphic mode: “This old cigar which has been puffed by a man who has not cleaned his teeth in many years, who has catarrh, consumption and cancer, is ground up into material for cigarettes and snuff and sent out to spread disease or death.” The story sufficed to impel 135 of Muscatine’s school children the next day to hold a mass meeting at the YMCA to organize a boys’ and girls’ Anti-Cigarette League Juniors No. 1, who were already “keeping their

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432”Abandon the Trade,” MDN-T, Apr. 1, 1900 (1:4) (copy furnished by Merle Davis).
433“Will Not Assess Cigarettes,” EJ, Apr. 5, 1900 (1:4) (reprinted from Davenport Times) (copy supplied by Merle Davis).
434“‘Burning Brains,’” MDN-T, Apr. 4, 1900 (1:4-5) (copy furnished by Merle Davis). See also “Against the Cigarette,” EJ, Apr. 4, 1900 (4:5) (copy furnished by Merle Davis). Rev. Struble, who was the national vice chairman of the Federation of Young People’s societies, had given this talk many times in many places. Katharine Kinsey, “Fighting Deadly Cigarette,” Davenport Republican, June 9, 1901 (16:3-5 at 4); “Cigarettes from Cigar Stubs,” NYT, Aug. 27, 1899 (4).
eyes open for violators of the law."

Dealers may have been stopped in their tracks by the city assessor’s announcement, but within a few days their “general opinion” was that the mulct tax was unconstitutional as applied to cigarettes in the original package. Although many dealers in Muscatine had “rejoic[ed]” over Judge Bishop’s decision in favor of their confreres in Des Moines, the Muscatine press suspected that the U.S. Supreme Court decision issued on April 9, 1900, affirming the Illinois Supreme Court’s decision upholding the validity of a Chicago ordinance prohibiting the unlicensed sale of cigarettes, would be “more binding” than that of a Polk county judge and “the local dealers would have to shell out with their $300.” Undeterred, one of ATC’s agents, claiming that the Chicago case was irrelevant because it involved an ordinance rather than state law, traveled to Muscatine to “get them to handle the article even if the laws of the State do say that a mulct of $300 must be paid by all such dealers.” And succeed he did, at least with several merchants, despite the fact that some Muscatine city officials differed with the Davenport press as to the statute’s constitutionality so that the parties appeared to be heading for a test case. At the same time, the weakness of the local unit of the Anti-Cigarette League was visible in its judgment that it scarcely mattered whether the mulct tax was collected or not because cigarettes would still be sold one way or the other, especially since the group’s focus was not on suppressing the traffic but in getting boys and young men to reject cigarettes. How the organization imagined achieving the latter without the former is difficult to reconstruct when seven dealers handling cigarettes in Muscatine and selling thousands of packages would probably accept the backing of ATC, which had dealers “in almost every town in the State” who also did not pay the mulct tax.

The Tobacco Trust’s success in making cigarettes available statewide in spite of “a most drastic law” prohibiting their sale paradoxically also ran counter to the wishes of the regular tobacco dealers themselves, who “with real thankfulness” had initially discontinued their sale when the law had first gone into effect. But once ATC had devised its original package litigation strategy, it set in motion competitive forces that dealers, as exemplified in Burlington, were unable to hold at bay: “The fruit stands first took up the sale, supplying a certain class of trade,
and then a cigar dealer was induced to take a stock of the pernicious articles. This made it necessary for the other dealers to take cigarettes in their stock, and the result was that again the unhealthful ‘coffin nails’ are in every store where tobacco is sold,” even though not a dealer in town had a “commendatory word to say for cigarettes, as all realize their harmful properties.” Because the more profitable cigar and pipe tobacco business immediately declined, aggregate trade profits fell, prompting “some talk among dealers of signing an agreement not to sell cigarettes,” but a combination of the “‘original package’ decision” and ATC’s offer to protect dealers arrested for selling is commodities.\(^{440}\)

However, despite the Struble-inspired zealotry, and despite the fact that by the end of July it had become “generally known” that cigarette sellers were subject to an annual $300 tax, the owners of the buildings in which “these coffin nails” were sold were “astonished” to receive notices from the country treasurer that they were co-liable for the quarterly mulct tax due in a few days. Although the press predicted that the owners would be “compelled to ante up graciously or otherwise,”\(^{441}\) later in the year the dealers were back in business. The reason for the recidivism in Muscatine appears to have been the lack of a basis for collective action. During the spring of 1900, the assessor, A. C. Begey—who was also a charter member of the Cigar Makers’ Union in a city in which virtually all the cigar factory owners supported enforcement of the anti-cigarette law—found in speaking to every cigarette dealer in Muscatine that all but one agreed to stop selling:

“[I]f it were not for that one, there would not be a cigarette sold in the city to-day. When he would not quit two more dealers began again, so now there are three dealers in Muscatine handling cigarettes contrary to law. Cigarettes were previously sold in seven places. ... That which brought the policy to a head last fall when I visited the different places of sale was that many tobacco dealers did not care to violate the law and did not want others to. ... The majority wanted all to quit or none. ... The one who would not quit said he was in it for the money and that the cigarette factories were backing him. They are also backing the other two. The concern which is backing these cigar dealers is the American Tobacco Trust, which is the largest in the world. The mulct law will be enforced or the supreme court will have to declare it unconstitutional. ... Either all shall have the privilege to sell or all shall quit.”\(^{442}\)

That at least some segment of the residents of Muscatine must have nourished

\(^{441}\)“They Are Hard Hit,” \textit{MDN-T}, July 29, 1900 (1:1-2) (copy furnished by Merle Davis).
\(^{442}\)“Want It Enforced,” \textit{MDN-T}, Aug. 3, 1900 (1:4-5) (copy furnished by Merle Davis).
an acute animus against cigarette smoking was reflected in this advertisement which appeared in October 1900 in the local paper:

No Cigarette Smoke
Annoys you at the elegant
Hotel Grand Barber Shop

On November 19, 1900, the same day that the U.S. Supreme Court issued its decision upholding, on interstate commerce grounds, the constitutionality of the Tennessee anti-cigarette law, the district court judge in Muscatine granted the temporary injunction restraining Muscatine County from collecting the mulct tax. Some local dealers had stopped selling cigarettes when they heard that the county would collect the tax, “but others relying on the promise of the tobacco firms continued and as it is [al]most time for the mulct tax to be paid an attorney has been in the city, representing the American Tobacco Company....” The Trust had “backed local dealers in disregarding the anti-cigarette law, claiming that it interferes with the interstate commerce law [sic].”

The county denied that Hodge had sold cigarettes in original packages; rather, the packages “were a mere subterfuge to enable...Hodge...to retail, in violation of the police laws of Iowa, a commodity decided by the legislature and shown by experience be detrimental to health and good morals.” State district judge William F. Brannan ultimately sustained the defendant’s demurrer and entered judgment against ATC’s puppets, whose ATC lawyer, Dunshee, appealed the

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443 E.J., Oct. 24, 1900 (8:4) (copy furnished by Merle Davis).
444 See above this ch.
445 Transcript of Record at 5, Hodge v. Muscatine County, 121 Iowa 482 (1905); “Looks Much Like a Bitter Fight,” Muscatine Journal, Nov. 19, 1900 (1:3-4) (quote). The newspaper was still reporting at this time that the plaintiffs (with the same claims and arguments as those later adjudicated in Hodge) were tobacco dealer Herman Gremmel and his landlord Cook-Musser Bank Co. Id. Gremmel was an immigrant from Germany returned at the 1900 census population as a cigar maker. According to another account, the ATC’s lawyer Dumber had already secured the temporary injunction from Judge Brannan on November 15. MDN-T, Nov. 16, 1900 (4:4) (untitled) (copy furnished by Merle Davis).
446 “Decided in Favor of Cigarettes,” ISR, Nov. 20, 1900 (morn. ed.) (3:2). This brief article appeared directly below “Decided Against Cigarettes” (reporting the Austin v. Tennessee decision).
447 Transcript of Record at 6, Hodge v. Muscatine County, 121 Iowa 482 (1905).
decision to the Iowa Supreme Court.\textsuperscript{449} ATC’s brief was notable for openly admitting the undeniable fact that the mulct tax was not a license because it not only did not permit the payors to engage in the taxed occupation, but expressly declared that payment did not bar prosecution.\textsuperscript{450} In addition, the Trust was forced to concede that: “No one familiar with the history of the act can doubt that its sole purpose was to place additional burdens on the cigarette business, and make it still more difficult to engage in it.”\textsuperscript{451} That Parker must have realized the frivolous nature of the whole action was revealed by the absurd argument that he concocted to support the bizarre claim that the procedure set out in section 5007 was “arbitrary,” constitutionally “unknown,” and “revolutionary.” Asserting that “necessity justifies many innovations, many practices which verge on tyranny,” he then, risibly, appealed to “the common people,” who “hate cordially any technical and dangerous practice” and “tolerate our taxation methods only because they realize that they are justified by overruling necessity, the impossibility of maintaining government without prompt collection of its revenues....” Having allegedly aligned the Tobacco Trust with the People, Parker then tried to show that “overruling necessity” did not apply to cigarette mulct tax revenues because they made up “a very inconsiderable part” of the general tax funds, adding, preposterously, that they “grow out of an extraordinary condition of facts and cannot be relied upon as a steady source of income. They are rather an extraordinary and to some extent an unexpected addition to the ordinary revenue.” In light of the extraordinary growth in cigarette sales—which had been temporarily halted by laws like Iowa’s—the explosive growth to come, and the Trust’s own decisive contribution to dealers’ violations of the sales ban and refusals to pay the mulct tax, ATC’s bathetic plea on behalf of “the citizen” that “the rights his fathers fought for be not ruthlessly trampled upon by an inconsiderate legislature”\textsuperscript{452} was so outrageous that the Iowa Supreme Court, once again, made little effort to disguise its impatience with the plaintiffs’ contentions.

By the time the case was argued, the Trust had ceased to press the interstate

\textsuperscript{449} Transcript of Record at 8, Hodge v. Muscatine County, 121 Iowa 482 (1905). According to “May Appeal to Supreme Court, MDN-T, Dec. 24, 1901 (1:1) (copy furnished by Merle Davis), the demurrer that Brannan sustained set aside a temporary injunction restraining levying the tax.

\textsuperscript{450} Appellants’ Argument at 28, Hodge v. Muscatine County, 121 Iowa 482, 486 (1903).

\textsuperscript{451} Appellants’ Argument at 17, Hodge v. Muscatine County, 121 Iowa 482, 486 (1903).

\textsuperscript{452} Appellants’ Argument at 28-29, Hodge v. Muscatine County, 121 Iowa 482, 486 (1903).
commerce claim raised in its petition, presumably, as the court supposed, because its intervening decision in *Cook v. Marshall County* had held it to be without merit.\(^{453}\) So threadbare had the Tobacco Trust’s arguments worn that Junius Parker could not prevail in this sideshow even against an opponent that did not bother to make an appearance.

Plaintiffs’ objections to the mulct tax were all focused on the central claim that they amounted to a taking of property without due process of law. The chief objection to section 5007 of the Code was that it failed to provide for notice to the dealer or the property owner. Subsidiarily, they maintained that: the measures for enforcing and collecting the tax were not adapted to the criminal nature of the penalty; seeking to enforce a criminal penalty by means of the state’s taxing machinery was “revolutionary, and contrary to the established principles of justice”; and the principles embodied in section 5007 were “arbitrary, unusual, and unknown to ‘the law of the land’....”\(^{454}\) The basis of the Trust’s attack was the cigarette mulct tax’s peculiarity that paying it—unlike the liquor mulct tax—did not bar prosecution for violating the underlying sales prohibition.\(^{455}\) Although Iowa Supreme Court precedent had already established that liquor and cigarette sellers needed no notice of assessment or levy of the tax because the tax was specific and operated in the same manner on all sellers, the amount was fixed, and there was no need for any further inquiry or determination, ATC argued that it was raising a new question in that the property owner who was not engaged directly in the unlawful selling was entitled to notice before the tax was levied.\(^{456}\)

The court addressed and disposed of this claim by examining the nature of the mulct tax:

> It is clearly not a license, for it does not grant permission to do an act which, without such permission, would be invalid. ... It is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein. It confers no right, but imposes an impediment to the transaction of the business. It is clearly a tax on that business, levied to meet the burdens imposed upon the general public by what is thought to be the result upon the human race, and particularly upon children, of the use of cigarettes. Indemnity and

\(^{453}\)Hodge v. Muscatine County, 121 Iowa 482, 486 (1903).

\(^{454}\)Hodge v. Muscatine County, 121 Iowa 482, 486 (1903). Plaintiffs’ arguments were set out in Writ of Error to the Supreme Court of Iowa, Transcript of Record at 19-23, Hodge v. Muscatine County, 121 Iowa 482 (1903).

\(^{455}\)Hodge v. Muscatine County, 121 Iowa 482, 487 (1903).

\(^{456}\)Hodge v. Muscatine County, 121 Iowa 482, 488 (1903).
The 1897 Mulct Tax Amendment

protection to the public against evils resulting from the nature and character of the business is the central thought. It also partakes of the nature of a police regulation, but it is not to be wholly so regarded. Indeed, we think it may be fairly said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaiming it invalid. ... Being a tax, it was competent for the legislature to prescribe the proceedings and processes for its collection. From the beginning the people of this country have collected taxes through administrative officers, and there has been no suggestion that ordinary judicial processes were necessary to meet the constitutional guaranty of “due process of law.”

Because summary process was necessary to insure prompt payment of the tax, the court found that the statute was not arbitrary. The Republican Des Moines Capital opined that it would have been unreasonable for the court to rule otherwise because, after all, cigarettes bore “a similar relationship to the moral and physical well being of the community” as alcohol and should there “be treated accordingly.” Consequently, it predicted that the decision “will give very general satisfaction.”

Fuller and Parker’s arguments met with no greater success before the U.S. Supreme Court. Accepting, for the purposes of the case, the Iowa Supreme Court’s conceptualization of the mulct tax, the U.S. Supreme Court admitted that it was not easy to distinguish a tax from a penalty, but insisted that it could not “go far afield in treating it as a tax” since the statute called the assessment a tax, provided proceedings appropriate for collecting a tax rather than a penalty, and did not contemplate criminal prosecution. The Court found it “entirely clear” that no notice of the assessment or levy was required as to the person actually selling cigarettes; and if sidewalk and sewer taxes could be made liens on the affected property, it saw no reason why the legislature lacked the power to do the same with the mulct tax, especially since the owner was chargeable with knowing what business was being conducted on her property and that the latter might become encumbered by a tax on that business. The Court did concede that the landowner was entitled to notice before she could become personally liable, but observed that the statute itself protected her by entitling her to apply to the county board of supervisors for a remission of the tax and to appeal an adverse decision to district court.

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457 Hodge v. Muscatine County, 121 Iowa 482, 488-89 (1903).
458 Hodge v. Muscatine County, 121 Iowa 482, 492 (1903).
460 Hodge v. Muscatine County, 196 US 276, 279-81 (1905). The Court faulted the landowner, who alleged that she had not known of the sale of cigarettes on her premises,
The 1897 Mulct Tax Amendment

Thus by mid-January 1905, the Trust’s constitutional obstacles having, after 12 years of almost continual state and federal litigation, been swept aside, the states were now free to enact general anti-cigarette laws without running afoul of interstate commerce restrictions. Almost immediately the legislatures of Indiana, Wisconsin, and Nebraska, overcoming what now became ATC’s favored legal strategy—bribery—exercised that freedom.\textsuperscript{461}

The Cigarette Mulct Tax in Operation: 1898-1921

The cigarette people, which means that American Tobacco Company, is trying, through its agents, to get the boards of supervisors in the several counties to remit the tax on the little coffin nails they are distributing among the Iowa school boys. Some months ago they attempted to shut up the mouths of the country press of Iowa as used against this [sic] little devils, the intimation being that fat advertisements would be withdrawn otherwise. The contract was framed with a view to such a countermand. But the Iowa press thought more of the children than the ads, and lost the latter. Now their seductions are transferred to the County Boards.\textsuperscript{462}

The Iowa anti-cigarette law is constitutional—so says the United States supreme court. The American Tobacco Company tried to have this law “knocked out” but the supreme court of the nation says not. If dealers throughout the state would live up to the provisions of the law it wouldn’t be a great while before cigarettes would go out of style entirely in this state.\textsuperscript{463}

Enforcement of the mulct tax during the pendency of the \textit{Cook v. Marshall County} and \textit{Hodge v. Muscatine County} litigation appears, according to press accounts, to have waned (though the tax data from Scott and Polk counties do not bear out that trend).\textsuperscript{464} The \textit{Evening Gazette} reported in March 1902 that the fact that during the few months cigarettes had been sold in Cedar Rapids and other towns of Linn County “openly...in bold violation of the law” had prompted “some of the best known religious workers” in that city to undertake “another systematic effort” to put an end to the sale of cigarettes countywide by gathering sufficient evidence to secure indictments. Bizarrely, the dealers allegedly would “shed no

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\textsuperscript{461}See vol. 2.
\textsuperscript{462}\textit{Boone Standard}, Apr. 15, 1899 (3:2) (untitled) (copy furnished by Merle Davis).
\textsuperscript{463}\textit{Oxford Mirror}, Jan. 26, 1905 (2:4) (untitled edit.).
\textsuperscript{464}See below.
tears” because a majority of them “despise the filthy ‘coffin nail.’” The motivating factor behind this project, according to one of its participants, was the noticeable increase in cigarette consumption in Cedar Rapids in the previous few months, while the law was not being observed at all. Moralistic-aesthetic dimensions predominated among this anti-cigarette movement’s aggressively articulated concerns about visual and olfactory exposure to first-hand smokers and second-hand smoke, respectively:

“Little boys, big boys and young men, by the score, are to be seen in public places every day with the vile and offensive cigarette between their teeth. Just look at the gang that assembles in front of Greene’s opera house after any evening performance. The air is so filled with the smoke that decent people are compelled to hold their breath. Why the police allow this practice to continue is more than I can understand. The cigarette-sucking fiends not only blow their smoke in the faces of people, but stand to ogle the ladies. We mean business now, and we don’t care who is hit. If the authorities cannot see that the law is enforced we will take the necessary steps and call the attention of the courts to the dereliction of the officers.”

Since no Iowa law prohibited cigarette use let alone smoking in public, even by minors, but only the sale of cigarettes, it is not clear what legal basis the police would have had to break up outdoor public group smoking. If the cigarettes had been lawfully acquired outside of Iowa and imported individually by the smokers themselves, then clearly no legal basis would have been available for action—other than a highly refined notion of nuisance law, which presumably far transcended the jurisprudential sensibilities of the day.

The following year, the WCTU in Council Bluffs planned a crusade against the selling of cigarettes in Iowa’s fifth biggest city that was to begin by trying to induce each seller to stop by means of moral suasion. If that avenue failed, the organization proposed to “invoke the strong arm” of the Phelps law. Spurred, perhaps, by this initiative, Georgia McClellan, the president of the non-partisan Iowa WCTU, asserted that “[t]he public generally is getting interested against the sale of cigarettes.” Seven years after enactment of the law, she reminded the membership in her monthly letter that: “It will be no trouble to settle this question as the Code of Iowa prohibits the sale of cigarettes...and provides a penalty...”

By mid-1903 the Cedar Rapids Evening Gazette classified the laws

465 “After the Cigarette,” CREG, Mar. 21, 1902 (6:1).
466 “After the Cigarette,” CREG, Mar. 21, 1902 (6:1).
prohibiting the sales of tobacco to minors and “[r]egulating the sale of cigarettes and imposing a special tax” alongside those banning prostitution, fighting dogs, obscene literature, and the sale of firearms to minors among Iowa’s many dead-letter laws, the violation of which could be observed almost daily in almost any community. The statute banning the sale of cigarettes was apparently so dead that the paper transmogrified it into a mere sales regulatory scheme. Yet just a few months later, after the Iowa Supreme Court had upheld the mulct tax law in the *Hodge v. Muscatine County*, the *Iowa State Press* opined that it was “altogether probable that some steps may be taken soon in the direction of enforcing its collection.”

A considerably more impressive mobilization of public opinion was the reaction in Waterloo at the beginning of January 1905, a few days before the U.S. Supreme Court handed down its Iowa mulct law decisions, to what turned out to be a false press report—stemming from a local city official—that for the first time a tobacco dealer there had “decided to take out a license for the sale of cigarettes.” The *Waterloo Courier* may not have understood that the mulct tax was not a license entitling the payor to sell cigarettes, but it probably stuck closer to reality in stating that only in a few cities were such licenses issued, Des Moines itself being able to boast of only four or five. And even if it took an absence of “licenses” for an absence of sales in other cities, presumably the newspaper knew what it was talking about, at least in Waterloo, when it asserted that it was “next to impossible to get cigarettes or even cigarette papers in most of the cities unless they should be given away.” Unsurprisingly, the news immediately “aroused bitter opposition” by the WCTU, which, together with ministers and others, sought to mobilize public opinion against “legalizing...the sale of these little ‘coffin nails’ in Waterloo”—though if any organization, the WCTU should have known that paying the mulct tax could not legalize selling. On the first Sunday following the news revelation all the city’s ministers intended to “preach against the cigarette evil....” On the first Saturday, a resolution was adopted by those in attendance at the YMCA which, declaring that cigarette smoking was a “race suicide more potent that any other evil except drunkenness” and that the WCTU, “representing the conservers of society and the home,” emphatically protested against licensing, called on “all organizations and individuals who stand for religion, purity, morality, civic prosperity, intelligence, or [sic] health of mind to
The 1897 Mulct Tax Amendment

After hearing its minister discuss the matter, the congregation of the Congregational church in Waterloo, as unaware as the WCTU that the mulct tax in no way licensed the sale of cigarettes or exempted the payor from liability under the Phelps law, adopted a resolution protesting against any firm’s securing a cigarette sales license on the grounds that cigarette use, “especially by boys,” tended to “undermine the health, becloud the intellect, and degrade the morals...” Whether the antis succeeded because or despite the fact that in this instance the WCTU’s rhetoric was especially formulaic and ossified, a few days later a cigar maker published a notice/advertisement on the front page of the Waterloo Daily Courier denying rumors that he was the one who had been thinking of “taking out a license” to sell cigarettes: he was, in fact, “too busy” making cigars “to think of handling cigarettes,” and as a kind of shtick continued to advertise that “I am not going to handle cigarettes....”

The day after the U.S. Supreme Court had issued its decisions upholding the mulct tax in *Cook and Hodge*, the *Des Moines Register and Leader* commented that although no estimate was available on the total mulct tax on cigarette dealers affected by the decisions, “[e]very town in the state of any size has one or more dealers in cigarettes,” with half a dozen in Des Moines paying it. The next day even a Nebraska newspaper reprinted a report from Des Moines, under the headline, “Invincible Cigarette Still Doing Business,” that they had not affected sales in Iowa because the “cigarette companies” had been paying the tax since the state courts had held them invalid:

Thousands of dollars are paid into the county treasuries on this account, though the amount of the tax is such that only a few dealers in each city have been willing to undertake the payment of the $300 for the privilege of reaping a year’s profits off the sale of “coffin nails.” Des Moines has but four dealers who pay the tax and are licensed to sell the cigarettes. Smaller towns have but one or two licensed dealers. Those who roll their own “pills” have constantly increased in number therefore since the tax went into effect.

The tobacco trust has made some kind of an arrangement whereby it helped bear the tax of favored dealers but even then it has suffered a heavy loss in business. The tax has

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476“Protest Adopted,” *WC*, Jan. 9, 1905 (4:2).
477“‘Coffin Nails, Nit,’” *WDC*, Jan. 12, 1905 (1:2). George W. DeWald, Jr. was already returned at the age of 17 at the population census of 1900 as a cigar maker.
The 1897 Mulct Tax Amendment

always been paid under protest and the trust’s attorney, F. S. Dunshee of this city, felt confident that the supreme court would...declare the Iowa law unconstitutional. ...

The effect of the decision will not be apparent, therefore. Cigarettes will continue to be sold in this state under exactly the same conditions as before.480

In spite of the article’s fundamental error of characterizing the tax as a “privilege” tax licensing payors to sell and profit from cigarettes, it may have called attention to the important fact that the tax was apparently also serving its deterrent purpose by significantly reducing sales (“heavy loss in business”).

It is difficult to reconstruct how strictly the cigarette mulct tax was enforced between 1897 and 1921, when the legislature transformed its function within the new cigarette license law that repealed prohibition.481 The lack of data is ambiguous because it is unclear whether it resulted from a failure by counties to collect the tax, or merely to report and publish the data, or (most importantly) the absence of sales resulting from a lack of demand, voluntary dealer compliance,482 or local government suppression. Since the tax might have constituted a welcome supplement to local government revenues in smaller towns or counties, it seems plausible to assume that such entities would have been willing to collect the cigarette mulct tax had sales in fact been taking place.

A deeper ambiguity also inhered in the counterintuitive structure of the law, which required those who were violating the law by selling cigarettes to come forward and identify and call attention to themselves to the county assessor, thus insuring the imposition of a tax in addition to the risk of the penal fine—for the privilege of self-incrimination. The fact that any sellers at all—other than those prompted by ATC to challenge the validity of the tax—did pay the tax would be puzzling in its own right but for the bizarre ‘misinterpretation’ by many local officials (as well as sellers and newspapers) that the mulct tax was a license fee rather than a penalty. To be sure, exactly the same structure characterizes a late-twentieth-century statutory innovation in many states, including Iowa: requiring dealers in illegal drugs to pay a tax for a stamp to be affixed on the illegal drug, payment of which “does not provide in any manner a defense...to or immunity for

480“Invincible Cigarette Still Doing Business,” LEN, Jan. 18, 1905 (6:2). The identical article was published as “Coffin Nails Still on Top,” WC, Jan. 18, 1905 (4:3-4).

481See below ch. 15.

482On October 3, 1897, two days after the mulct tax had gone into effect, in an effort to “see what effect the young and stringent law would have on cigarette smokers,” a “representative” of the Cedar Rapids Evening Gazette “lingered about” a place that had formerly sold cigarettes for an hour, observing numerous smokers unsuccessfully trying to buy cigarettes or wrappers: “All [dealers] seemed to be content to wait until a test case under the new law had been brought.” “Cigarettes Out,” CREG, Oct. 4, 1897 (8:1).
The 1897 Mulct Tax Amendment

a dealer from criminal prosecution pursuant to Iowa law.” Virtually no drug dealers buy the tax stamp, but, the state of Iowa, using the law as a way of taxing the underground economy, collects significant sums from arrested drug dealers who had not paid it. This statute clearly does not signal state acquiescence in illegal drug sales.

In contrast, at least at times in the larger cities, payment of the cigarette mulct tax prompted local officials erroneously to regard the sellers as relieved of liability under the 1896 prohibition law, as if the tax were a streamlined mandatory statewide version of the liquor mulct tax dispensing with the need of a local option vote or city council action. (This outcome lacks the subtlety that legal philosopher Lon Fuller was seeking to capture when he characterized a statute as “a process of becoming. By being reinterpreted it becomes by imperceptible degrees something that it was not originally.” This misconception was nicely captured by the Des Moines Leader’s confused and incorrect report in November 1897 that the “old Phelps prohibitory law is still in force, and dealers are selling now under a mulct rider.” Similarly, of a dispute in Davenport in 1903 over whether one Reinhardt Vogel was selling cigarette papers without paying the tax the press reported: “There is a heavy license demanded by the state for the selling of cigarettes and cigarette papers and there has [sic] been two cigar stores in the city that have been paying the tax. Frequent complaints have been made that several saloons were selling cigarettes or tobacco and cigarette papers who have not been paying the tax.”

But some dealers did pay the license fee and did so publicly with the manifest intent to sell cigarettes and not, in accord with the statute’s remarkable deterrent structure, to reinforce their own compliance with the prohibition on sales. Thus,

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484 Miranda Leitsinger, “Iowa Touts Illegal Drug Stamp Tax,” AP (June 2, 2003), on http://cannabisnews.com/news16/thread16503.shtml (visited Nov. 2, 2006). Interestingly, if a drug dealer actually went to the Iowa Department of Revenue and bought a stamp to put on illegal drugs, the department would not notify the authorities. Id. The law provides that “the director or an employee of the department shall not reveal any information obtained from a dealer; nor shall information obtained from a dealer be used against the dealer in any criminal proceeding, unless the information is independently obtained, except in connection with a proceeding involving taxes due under this chapter from the dealer against whom the tax was assessed.” Iowa Code § 453B.10 (2006).
485 Lon Fuller, The Law in Quest of Itself 10 (1999 [1940]).
486 “Competition in Coffin Nails,” DML, Nov. 3, 1897 (8:3).
487 “Has Trouble in Davenport,” ISP, Apr. 3, 1903 (4:5-6) (reprinted from Davenport Leader).
as early as October 10, 1897, just ten days after the mulct tax law had gone into effect, the Des Moines press reported that Marco Chiesa, “the well-known saloon man, will pay the $300 tax and commence the sale of cigarettes...in a few days. He intends to charge 10 cents a package, which will yield him a profit of 100 per cent; and if he can secure any fair portion of the trade formerly enjoyed by dealers it ought to make him rich.” Another dealer was “also figuring on taking out a license and selling at 10 cents.” Three weeks into October five Des Moines dealers had paid the $300 for a license to sell cigarettes. Selling a package for 10 cents, they “expected to become wealthy” and “to monopolize the trade at the old figures, when now a druggist of the city proposes to also get a license and sell at half price.” The other dealers claimed that this intervention would “ruin their expected profits” because, with a package costing them 4½ cents, “after paying an annual license of $300 there is positively no money in the business for them.” And four years later a prominent Davenport paper misinformed the citizenry that “Emil Schmidt has taken out a license to sell cigarettes and has paid to County Treasurer McManus the $300 mulct tax.”

Although the legislature enacted a law in 1902 requiring county auditors to compile an annual financial report that included amounts received as mulct tax, the early county financial reports appear largely to have omitted data on the liquor mulct tax, while virtually none included cigarette mulct tax figures. Nevertheless, even the scattered data that were published show that the tax was

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488 “Bootleggers Selling Cigarettes,” DML, Oct. 10, 1897 (6:6) (copy supplied by Merle Davis). The 37-year-old Chiesa had, according to the 1900 population census, which returned him as a wholesale dealer living with two bartender-brothers, immigrated from Italy in 1884.
489 “The City in Brief,” DML, Oct. 24, 1897 (5:3) (copy furnished by Merle Davis).
490 “Competition in Coffin Nails,” DML, Nov. 3, 1897 (8:3).
491 “State Brevities,” CREG, Nov. 4, 1897 (6:4).
492 “The City in Brief,” DML, Oct. 24, 1897 (5:3) (copy furnished by Merle Davis).
493 DDL, Apr. 14, 1901 (7:1) (untitled). McManus nevertheless reported in June that he had collected only $75.00 in cigarette mulct tax. See below.
494 1902 Laws of Iowa ch. 23 at 12-13.
495 The Iowa City branch of the State Historical Society of Iowa possesses an impressively comprehensive collection of bound county financial reports beginning with 1902, whose gaps suggest that some counties may not have published a report at all. For example, in Marshall County even the auditor’s office lacks annual reports from the earliest years. Telephone interview with information desk at Marshalltown Public Library (Sept. 23, 2009).
in fact collected, at the very least, in some places at some times.\textsuperscript{496} Already for 1897 the Polk County auditor and treasurer reported that the Des Moines cigarette tax fund included $193.26 in taxes collected, of which $173.43 was paid to city treasurer A. B. Elliott, leaving a balance on hand of $20.83 as of January 2, 1898.\textsuperscript{497} For 1902 Polk County reported that among its receipts it had collected $1,260.00 in cigarette tax compared with $43,500.00 in liquor tax (apart from $217.50 in interest on the liquor and cigarette tax).\textsuperscript{498} Contemporaries, too, were curious about the size and geographic distribution of the mulct taxes. In 1899, the state auditor, “[i]n response to many inquiries received,” requested information from the 99 county auditors about the mulct law. The data, however, included information on the liquor mulct tax only.\textsuperscript{499} Again in 1907, the Iowa Secretary of State reported that, “[n] answer to many inquiries relative to the operation of the mulct and cigarette tax laws,” he had sent a blank to all of the 99 county treasurers requesting: the names of all the municipalities in which either or both laws were in operation; the number of places in those localities subject to mulct or cigarette tax according to the county auditor’s September 1906 report; the total amount collected under the mulct tax for the year ending September 30, 1906; and the total amount collected under the cigarette law for the same period. Although all 99 replied, and despite the unambiguous request for separate tabulations for the two taxes: “Six counties only reported collection of taxes for the sale of

\textsuperscript{496}The minutes of the “Proceedings of the Board of Supervisors” of Johnson County from September 1897 through January 1902 include considerable information on the collection (and remission) of the liquor mulct tax, but no reference to the cigarette mulct tax. The original handwritten books are located at the Johnson County Administration Building, Iowa City. Nevertheless, in 1903 the board of supervisors paid $36.20 to J. C. Stouffer for “assessing saloons, cigarette mulct, etc.” “List of Claims,” \textit{Daily Iowa State Press} (Iowa City), Jan. 26, 1904 (3:4).

\textsuperscript{497}\textit{Financial Report of Polk County, for 1897, by the Auditor and Treasurer to the Board of Supervisors} 107 (1898). This account does not appear to be reconcilable with the aforementioned newspaper reports that by the end of October five dealers had already paid the $300 license fee. Those early reports were presumably based on the erroneous assumption that dealers were required to pay the $300 annual tax regardless of how long they had been selling cigarettes; in fact, the tax liability accrued quarterly, and the total collection of $386.52 (the $193.26 being Des Moines’ 50 percent share of the total tax collected) approximated very closely five times the $75 due for the fourth quarter—the first and only quarter that the tax was in effect in 1897.

\textsuperscript{498}\textit{Financial Report of Polk County, for 1902}, at 48 (1903).

\textsuperscript{499}\textit{Biennial Report of the Auditor of State to the Governor of Iowa: July 1, 1899}, at 194-95 (1899).
cigarettes and cigarette paper." The press touted the report as containing “the first authentic figures showing the extent to which the laws are in operation.” The data are presented in Table 4:

<table>
<thead>
<tr>
<th>County</th>
<th>City</th>
<th>Number of Stores</th>
<th>Tax ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clinton</td>
<td>Clinton</td>
<td>2</td>
<td>975</td>
</tr>
<tr>
<td>Johnson</td>
<td>Iowa City</td>
<td>2</td>
<td>450</td>
</tr>
<tr>
<td>Linn</td>
<td>Cedar Rapids</td>
<td>1</td>
<td>300</td>
</tr>
<tr>
<td>Polk</td>
<td>Des Moines</td>
<td>13</td>
<td>4,275</td>
</tr>
<tr>
<td>Scott</td>
<td>Davenport</td>
<td>4</td>
<td>1,275</td>
</tr>
<tr>
<td>Wapello</td>
<td>Ottumwa</td>
<td>1</td>
<td>300</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>23</strong></td>
<td><strong>7,575</strong></td>
<td></td>
</tr>
</tbody>
</table>

Thus, all of the 23 stores that paid the tax were located in several of the state’s largest cities, Des Moines alone accounting for more than half of them. In comparison, the 43 counties in which the liquor mulct law was in effect (that is, in which some localities had opted out of the statewide prohibition) reported 1,770 saloons operating in 242 cities and towns and 51 townships from which $1,097,052.52 in mulct tax was collected. While it is eminently plausible that liquor sales and the number of businesses selling liquor far exceeded cigarette sales and businesses selling cigarettes, the disproportions reflected by these data (77 times as many saloons as cigarette-selling stores and 145 times as much tax revenue, which must be halved to account for the liquor mulct tax’s being twice as high) seem implausible. The unanswered (and, unfortunately, perhaps unanswerable) question is the extent to which the gap is attributable to substandard reporting by the county treasurers, incompetent assessment by local assessors, incompetent collection by county auditors, inadequate enforcement by

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500 *The Iowa Official Register for the Years 1907-1908*, at 573 (22nd No., 1907).
502 *The Iowa Official Register for the Years 1907-1908*, at 573 (22nd No., 1907).
503 *The Iowa Official Register for the Years 1907-1908*, at 573 (22nd No., 1907).
county attorneys, noncompliance by cigarette sellers, or—the most interesting possibility—the absence of cigarette sales in many localities and a significant decrease in sales and the number of tobacco stores selling cigarettes in others as a result of the double disincentive of the statutory fine for violating the absolute prohibition on sales and the mulct tax for selling.\textsuperscript{504} For reasons unknown, when the secretary of state solicited mulct tax information from the counties twice more, on neither occasion did he request data on the cigarette mulct tax, and no such data were published.\textsuperscript{505} Even later, when the state auditor devoted a section of his annual report to county accounting, data on the cigarette mulct tax were sporadic and fragmentary at best. Thus in the biennial report covering fiscal years 1916 and 1917, the same table of receipts that listed “cigarette license” for the latter year, omitted even the rubric for the former. And even the table for 1917 was blank for 96 counties, including entries only of $300 for Des Moines (Burlington), $37.50 for Iowa, and $1,129.80 for Scott (Davenport).\textsuperscript{506} Similarly, in the next biennial report the receipts table for 1918 included the rubric “cigarette license,” but the line was blank for all counties, while the table for 1919 lacked even the rubric.\textsuperscript{507}

Fortunately, Scott county did continuously publish figures on its annual collection of the cigarette mulct tax from 1901 until the anti-cigarette law was repealed in 1921, while Polk county published its from 1897 to 1915 (no liquor or cigarette taxes being listed in the reports for 1916 through 1921). These data are presented in Table 5.

\textsuperscript{504}Perhaps the 1906 data lend a modicum of credibility to a press claim in 1909 that under the pre-1909 law only 36 “licenses” were issued statewide annually, 20 of them in Des Moines. “Cigarets to Go Say the Dealers,” \textit{Davenport Democrat and Leader}, July 2, 1909 (10:4).

\textsuperscript{505}The \textit{Iowa Official Register for the Years 1909-1910}, at 717-22 (23rd No., 1909); \textit{The Iowa Official Register for the Years 1911-1912}, at 747-52 (24th No., 1911).


Table 5
Cigarette Mulct Tax Collected in Scott and Polk Counties, 1897-1921

<table>
<thead>
<tr>
<th>Year</th>
<th>Scott</th>
<th>Polk</th>
<th>Year</th>
<th>Scott</th>
<th>Polk</th>
</tr>
</thead>
<tbody>
<tr>
<td>1897</td>
<td>386.52*</td>
<td></td>
<td>1910</td>
<td>300.00</td>
<td>2,700.00</td>
</tr>
<tr>
<td>1898</td>
<td>3,077.36</td>
<td></td>
<td>1911</td>
<td>375.00</td>
<td>4,500.00*</td>
</tr>
<tr>
<td>1899</td>
<td>375.00*</td>
<td></td>
<td>1912</td>
<td>975.00</td>
<td>4,065.90*</td>
</tr>
<tr>
<td>1900</td>
<td>435.90*</td>
<td></td>
<td>1913</td>
<td>975.00</td>
<td>6,000.00*</td>
</tr>
<tr>
<td>1901</td>
<td>450.00</td>
<td>6,000.00</td>
<td>1914</td>
<td>900.00</td>
<td>7,350.00*</td>
</tr>
<tr>
<td>1902</td>
<td>600.00</td>
<td>1,260.00</td>
<td>1915</td>
<td>900.00</td>
<td>9,000.00*</td>
</tr>
<tr>
<td>1903</td>
<td>750.00</td>
<td>1,650.00</td>
<td>1916</td>
<td>600.00</td>
<td></td>
</tr>
<tr>
<td>1904</td>
<td>1,050.00</td>
<td>N.A.</td>
<td>1917</td>
<td>1,125.00</td>
<td></td>
</tr>
<tr>
<td>1905</td>
<td>1,650.00</td>
<td>2,850.00</td>
<td>1918</td>
<td>1,200.00</td>
<td></td>
</tr>
<tr>
<td>1906</td>
<td>1,275.00</td>
<td>4,275.00</td>
<td>1919</td>
<td>1,275.00</td>
<td></td>
</tr>
<tr>
<td>1907</td>
<td>1,200.00</td>
<td>4,800.00*</td>
<td>1920</td>
<td>1,200.00</td>
<td></td>
</tr>
<tr>
<td>1908</td>
<td>900.00</td>
<td>6,675.00</td>
<td>1921</td>
<td>600.00</td>
<td></td>
</tr>
<tr>
<td>1909</td>
<td>750.00</td>
<td>3,675.00</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>19,050.00</td>
</tr>
<tr>
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The 1897 Mulct Tax Amendment

Year 1919, at fold-out between 36-37 (n.d.); Financial Report of Scott County, Iowa for the Year 1920, at 35 (n.d.); Financial Report of Scott County, Iowa for the Year 1921, at 40 and fold-out following (n.d.); Financial Report of Polk County for 1897, at 107, 118 (1898); Financial Report of Polk County, for 1898, at 98, 106 (1899); Financial Report of Polk County, for 1899, at 103, 105 (1900); Financial Report of Polk County, for 1900, at 59, 61 (1901); Financial Report of Polk County, for 1901, at 60, 62, 64 (1902); Financial Report of Polk County, for 1902, at 48, 51 (1903); Financial Report of Polk County, for 1903, at 49, 54 (n.d.); Financial Report of Polk County, for 1904, at 48 (n.d.); Financial Report of Polk County, for 1906, at 57 (n.d.); Financial Report of Polk County, for 1907, at 72, 101 (n.d.); Financial Report of Polk County, for 1908, at 95 (n.d.); Financial Report of Polk County, for 1909, at 61, 65, 81 (n.d.); Financial Report of Polk County, for 1910, at 64, 69, 86, 91 (n.d.); Financial Report of Polk County, for 1911, at 71 (n.d.); Financial Report of Polk County, for 1912, at 79 (n.d.); “Semi-Annual Report of the County Treasurer of Polk County, Iowa Ending June 30, 1913,” Altoona Herald, Sept. 18, 1913 (6:3); “Polk County Board Proceedings: Report of Collections, Disbursements and Fund Balances for Period Ending December 31, 1913,” Altoona Herald, Feb. 12, 1914 (2:3); Financial Report of Polk County, for 1914, at 60 (n.d.); Financial Report of Polk County, for 1915, at 65 (n.d.). The tax for Scott County for 1901 has been calculated from the figures furnished by the county treasurer for the period through June 1 and the county auditor’s semi-annual report for the period June 1, 1901 to Jan. 1, 1902. Significant tabular excerpts from the financial reports were also published in the local press. See, e.g., “Board of Supervisors,” Davenport Republican, Jan. 27, 1903 (5:1-6). Financial Report of Polk County, for 1906, at 57 (n.d.), stated that the cigarette tax was $3,750.00, whereas the aforementioned special survey conducted by the secretary of state reported a figure of $4,275.00, which has been adopted here without any basis for clarifying the discrepancy. Of the $1,520.52 in Des Moines cigarette tax collected in 1898 $825.00 was refunded. Financial Report of Polk County, for 1898, by the Auditor and Treasurer to the Board of Supervisors 98 (1899). Of the $3,000 in county cigarette mulct tax collected in 1901, $2,343.75 was refunded.

The quality of the Polk County data was marred by the local authorities’ failure to present them uniformly during these 19 years: sometimes the figures were for the whole county, sometimes they pertained only to Des Moines, and sometimes the annual Financial Report failed to identify whether it was reporting the larger or smaller datum. Since the mulct tax law required the county to turn over one-half of the revenue to the municipality in which the business taxed was conducted, in those years in which the Financial Report expressly specified that only the Des Moines figure was being published, it has been doubled (and asterisked) in the table below. In years in which the Financial Report failed to specify which figure it was presenting, on the basis of other background information an attempt has been made to determine which one was published and, if it was the city’s share of the tax, it was doubled in the table. (To a lesser extent the same confusion affected the Scott County/Davenport data. That Polk

508 Code of Iowa Annotated § 2445, at 859 (1897).
509 Where interest payments (which were relatively minor) were reported separately they have been ignored in order to show the correspondence between the fixed amount of the mulct tax and the number of sellers paying it.

1048
The 1897 Mule Tax Amendment

and Scott counties split the mulct tax only with Des Moines and Davenport, respectively, presumptively meant that dealers only in these two cities paid the cigarette mulct tax; presumably cigarettes were not sold anywhere else in these two counties.) The lack of data in Scott county for the years before 1901  may be linked to the fact that as late as April 1900, the Davenport assessor announced that he would not “pay any attention” to the cigarette trade tax law because the Supreme Court had declared it unconstitutional “so long as the cigarettes are sold in the original packages as they are.” The Scott County Board of Supervisors appears not to have ordered the $75.00 quarterly cigarette mulct tax levied before it acted on August 5, 1901, beginning with July 1, 1901 (with retroactive force to April 1, 1901, in cases where the business had begun before July 1). Whether a causal relationship was at work here is unclear, but on July 25, 1901, a cigarette was said to have caused “one of the most disastrous conflagrations that ever visited Davenport,” injuring more people and bringing about greater property loss than any previous fire in the city’s history. The low repute in which many held cigarettes and their users found expression in a stinging editorial in the Davenport Daily Republican observing that:

It is strange that a district a third of a mile square in which were factories and outputs representing an aggregate investment of fully three-quarters of a million dollars, the cozy homes of laborers and others who had invested there the savings of a lifetime, should be wiped out through the medium of a cigarette—the most obnoxious and contemptible thing on earth. The cigaret was no doubt rolled and lighted by some idler, who is a degenerate slave of that disgusting habit. In time the cigaret lands its victim, but too often not before its slave does serious damage to others.

The cigarette mulct sums were minuscule compared with those collected

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510 The county auditor’s and treasurer’s reports for 1898, 1899, and 1900 include no entries for cigarette mulct tax. “Board of Supervisors,” DDR, Jan. 21, 1899 (5); “Board of Supervisors,” Davenport Sunday Republican, Jan. 21, 1900 (7); “Board of Supervisors,” DDR, Jan. 26, 1899 (5).

511 “Will Not Assess Cigarettes,” EJ, Apr. 5, 1900 (1:4) (reprinted from Davenport Times) (copy supplied by Merle Davis).

512 “Board of Supervisors,” DDR, Aug. 8, 1901 (5:1) (meeting of Aug. 5, 1901). When the county board of supervisors on April 2, 1901 ordered the liquor mulct tax to be levied for the April-June quarter it did not mention the cigarette mulct tax. “Board of Supervisors,” Davenport Daily Democrat, Apr. 10, 1901 (6:1) (Apr. 2).

513 “The Deadly Cigaret,” DDR, July 27, 1901 (4:1-2). The same attitude was visibly on display in a want ad for a printer which specified that “no boozer nor cigarette fiend need apply.” Des Moines Capital, Feb. 3, 1905 (6:6).
under the liquor mulct tax: for example, the more than $136,000 liquor tax collected in Scott County alone in 1902 amounted to almost eight times as much as the total cigarette mulct tax over the entire 21-year period there. With the cigarette mulct tax set at $300, the number of cigarette dealers paying it in Scott County in any year ranged from one to 5.5—implausibly low numbers since the county seat, Davenport, was the state’s third largest city with a population of more than 43,000 in 1910 and one of the six or seven cities in which cigarettes were at times openly sold.\(^{514}\)

The more fragmentary set of cigarette mulct tax data for Polk County and Des Moines,\(^{516}\) the state’s largest city and twice as populous as Davenport, reveals a total tax collection more than 3.6 times as great for about 86 percent as many years.\(^{517}\) The peak tax collected ($9,000 in 1915) represented licenses for 30

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\(^{515}\)“Coffin Nails to Die a Very Sudden Death,” Evening Tribune (Des Moines), June 26, 1909 (1:5-6). See also below ch. 14.

\(^{516}\)The total tax of $6,000 paid in 1901 (presumably by 20 dealers) is wholly inconsistent with a report in the Chicago Tribune that: “Up to last November [1900] every tobacco dealer and confectioner and many grocers handled cigarettes in Des Moines. Today only three dealers are selling them. The majority were driven out of the business by the refusal of the American Tobacco company to stand behind them any longer, this announcement being immediately upon the handing down of the decision of the United States Supreme Court” in Austin v. Tennessee. The newspaper also stated that Des Moines, Sioux City, Davenport, and three or four other cities were the only ones where cigarettes were still sold. “States Declare War on Cigarette,” CT, Feb. 10, 1901 (10).

\(^{517}\)Data are lacking for Polk County for 1904 because the Financial Report of Polk County for 1904, at 47 (1905) combined the liquor and cigarette mulct taxes ($56,900.70), making it impossible to segregate out the latter. Although the SHSI libraries in Des Moines and Iowa City, which have thousands of county financial reports, both lacked the report for 1913, which in Des Moines was designated “unobtainable” in its files, the Des Moines Public Library’s long run also lacked 1913, and the Polk County administration lacked all early reports, the data were taken from semi-annual reports published in the press. From 1916 through 1921, Polk County not only reported no liquor or cigarette tax collected, but omitted mention of the existence of these taxes that had been included in the board of supervisors resolution on county taxes in 1915 and earlier years. Financial Report of Polk County for 1916, at 14 (n.d.). In the course of instituting absolute liquor prohibition, the legislature abolished the liquor mulct tax in 1915. No cigarette tax may have been collected in 1916 because dealers stopped paying it after Miles Odle’s raid of Nov. 4, 1915 created the risk of criminal prosecution under the Phelps law. See below ch. 14. The lack of tax collections for 1917 to 1921 is more puzzling: although payments were judicially enjoined during the pendency of C. C. Taft Company’s litigation challenging the
The 1897 Mulct Tax Amendment

stores. The $69,000 in mulct tax paid by sellers in Des Moines equaled almost exactly $1,000 per quarter for the 69 quarters during which Polk County collected it (ignoring the year 1904 in which officials did not distinguish between the liquor and cigarette tax), which represented an average of a little more than 13 dealers during this 18-year period. If instead the focus is the 10-year period (1906-15) following the upholding of the tax by the state and federal Supreme Courts, the average annual tax paid was $5,304, which represented payments by almost 18 sellers. Noting in 1911 that 21 places in Des Moines were paying the $300 annual cigarette tax, a Waterloo newspaper editorialized that their ability to afford to pay it showed that they were selling large quantities. That so many dealers in Des Moines continued to pay the tax even after the 1909 enactments began providing for strict enforcement of the sales ban suggests that the Trimmers Club and Cosson laws did not completely fulfill their promise in the state capital.

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518 Waterloo Evening Reporter, Sept. 24, 1911 (4:1) (untitled edit.). The further judgment that the “inhibition of the little pills is not very effective anywhere in Iowa” was distorted not only in the sense that it overlooked the fact that in many localities cigarettes were not sold at all, but also because it failed to understand that the mulct tax was not a high license fee.

519 See below chs. 13-14.
The Iowa WCTU Achieves Two of Its Goals in 1909: Prohibition of Public Smoking by Minors Under 21 and Effective Enforcement of the General Sales Ban/Mulct Tax

“If all boys could be made to know that with every breath of cigarette smoke they inhale imbecility and exhale man-hood.... The yellow finger stain is an emblem of deeper degradation and enslavement than the ball and the chain.” No boy living would commence the use of cigarettes if he knew what a useless, soulless, worthless, thing they would make him.1

The WCTU, the driving force behind anti-cigarette legislation in Iowa, was deeply dissatisfied with the 1896-97 “prohibitory cigarette law,” which, as it noted at its annual convention in October 1909, had been “ignored in almost every particular because no provision was made for its enforcement, and no officer delegated with the authority to impose the $300.00 tax against the property.”2 Earlier that year it finally secured passage of legislation—including a ban on smoking by under-21-year-olds in public—that it believed would provide for the kind of enforcement that would fulfill the promise of the original interventionist regime designed to shut down the industry in Iowa.

A generally Progressive legislative orientation did not emerge in Iowa until the latter half of the first decade of the twentieth century. Conventionally linked to the political rise of Albert Baird Cummins, who, after being elected in 1902 to the first of an unprecedented three terms as governor, became the state’s leading Republican insurgent,3 Progressivism was initially unable to make its breakthrough in the General Assembly because the conservative Republican Standpatters, through whom large railroads controlled government in Iowa, still constituted a majority there.4 Not until the elections of 1906 ousted the

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1Woman’s Christian Temperance Union of Iowa, Forty-Second Annual Convention 139 (1915).
2Iowa Woman’s Christian Temperance Union, Thirty-Sixth Annual Convention 117 (1909).
4On the lawyers Joseph W. Blythe and Nathaniel Hubbard, who directed the Republican Party in Iowa on behalf of the Chicago, Burlington & Quincy Railway and Chicago and North Western Railway, respectively, see Leland Sage, William Boyd Allison: A Study in Practical Politics 260, 276, 327 (1956); Thomas Bray, The Rebirth of Freedom 15-31 (1957); Thomas Ross, Jonathan Prentiss Dolliver: A Study in Political Integrity and Independence 67, 139 (1958); William Bowers, “The Fruits of Iowa Progressivism, 1900-
Standpatters and produced a Progressive majority in both chambers for the 1907 session was the Republican Party “split into two hostile branches” and Cummins in a position to push his reform measures through the legislature. Indeed, at this juncture “it was no longer sufficient or even meaningful merely to say ‘Republican’; now one must always use the significant adjective, standpat or progressive,” though the latter retained their predominance in the state legislature after Cummins became a U.S. Senator in late 1908. The Progressive reform program in Iowa, not unlike the earlier Populist movement, focused in the economic sphere on curbing monopolistic trusts, regulating railroads, grain elevators, animal slaughter plants, life insurance companies, child labor, limiting working hours in certain industries, and imposing inheritance taxes, and in terms of democratic political process on the direct primary, direct election of senators, the initiative and referendum, and anti-lobbying legislation. During the 1907 session Cummins secured enactment of what he and others considered a key measure to subvert railroads’ ability in effect to bribe government officials by giving them free passes to travel on the railroad. Then in 1909 the Progressive

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1915,” IJHP 57(1):34-60 at 35 (Jan. 1959); Olivier Zunz, Making America Corporate, 1870-1920, at 42-46 (1992 [1990]). The Times characterized the Chicago, Burlington & Quincy as “the most influential corporation in politics in the State, through the manipulation of Solicitor Blythe....” “Iowa Senatorship Fight,” NYT, Dec. 4, 1893 (10). Blythe, who was obituarized as the “State leader of the Republican standpatters,” was the brother of James E. Blythe, chairman of the Republican State Central Committee in the early 1890s. “Joseph W. Blythe Dead,” NYT, Mar. 7, 1909 (11) (quote); “The Issues Outlined in Iowa,” NYT, Oct. 11, 1893 (9); Iowa Official Register 95 (1893). Hubbard died in 1902.

91907 Iowa Laws ch. 112, at 115-17; Thomas Bray, The Rebirth of Freedom 63, 65, 101 (quote), 112-14 (1957). For the anti-free passes bill passed the previous session, see 1906 Iowa Laws ch. 90, at 59. To be sure, Cummins himself had hardly been above
majority in the post-Cummins General Assembly insured passage of more, but by no means all, of the insurgents’ demands, including anti-trust, child labor, railroad, and corporate legislation.  

The Iowa WCTU’s Socialist President: Marion Howard Dunham

[N]o man ever smoked a cigarette without being hurt by it, and no man ever will. ... Cigarettes...are unmanly, obnoxious, nerve and mind-destroying. It is unbelievable that any human being in his right mind should deliberately encourage their hold on his nervous system and his success in life.

Gaining access to the Iowa WCTU’s general political orientation by the latter half of the first decade of the twentieth century is facilitated by studying its long-time president’s annual addresses at the organization’s conventions. At the 1904 convention, the organization’s partisan political position at this time can be partially gleaned from Marion Howard Dunham’s characterizations of the Populist party as not going “far enough for the radical element to rally around” and of the Prohibition party as “disappointing us in its statement of the rights of suffrage which is so carefully worded as to mean nothing for the women of the nation to whom it owes so much....” Much more enlightening was her neutral description of the Socialist party as setting out “the fundamental principles of justice on which the whole social fabric should be based,” asking “the attention and favor of the people on the ground that it represents the oppressed of all races and nations,” and making “immense demands which will do away with much of the injustice and consequent suffering which now prevails.” Of most direct relevance to the WCTU was that the Socialists, as the only party claiming to “stand for all humanity instead of a country, a class or a race,” declared as one of its basic principles “the full and complete equality of women with men....”

In 1906, at the last annual convention of the group that had remained affiliated with the National WCTU (before the non-partisan state group merged accepting railroad passes or entering into secret compromises with the railroads. Thomas Ross, Jonathan Prentiss Dolliver: A Study in Political Integrity and Independence 155, 184 (1958). Also passed in 1907 were bills on primary elections and railroad employees’ hours of service: 1907 Iowa Laws ch. 51, at 51, and ch. 103 and 106.

101909 Iowa Laws chs. 225, 145, 129, and 129.


12Fifteenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa held at Marshalltown, Iowa, October 11, 12, 13, and 14, 1904, at 32-33 (1904).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

with it), Marion Howard Dunham spoke of: “Greed, oppression, injustice, brutality everywhere. Graft seeming to be the rule of the business world and its motto, ‘Do the other fellow before he can do you,’ and failures, defalcations and embezzlements.... Injustice in the laws, favoring one class by discrimination against another, and in the courts by their assumption of autocratic power, unjust decisions.... Brutality in the lynchings in the south and the mobs of the north, the convict camps and the sweat shops, thepeonage system and the factories in all sections....” Returning to the WCTU’s origins, Dunham called the liquor traffic “the embodiment of greed....”

The departing president’s speech in September 1908, just a few weeks before the Taft-Bryan-Debs presidential election, undermines any lingering skepticism as to whether the WCTU merited categorization as fully participating in the Progressive movement. Dunham, who had been president of the nationally affiliated WCTU of the State of Iowa during its entire existence (1890-1906), was then elected president of the reunited state organization in 1906, and developed a high national organizational profile, having been prominent as a candidate for national president. The “Dear Comrades” who heard her review the economic basis of the national political parties might have been forgiven for speculating as to whether the spirit of Friedrich Engels had perhaps served as an inspiration. (This orientation was hardly an aberration peculiar to the Iowa organization. Toward the end of her life, national president Frances Willard delivered a presidential address, part of which was taken directly from Karl Marx’s explanation of surplus value in Das Kapital.)

Since the 50’s our industrial system has been completely revolutionized by the invention of machinery in so many industries by which one man can do the work of fifty or one hundred men and the forty-nine or ninety-nine are thrown out of employment and must seek new fields of labor as they can, while the concentration of wealth and its consequent power in the hands of the few goes steadily on.

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13See above ch. 9.

14Seventeenth Annual Convention of the Woman’s Christian Temperance Union of the State of Iowa 22-23 (1906).

15“Says Women Need Suffrage,” CT, Mar. 19, 1909 (8:7)


17Iowa Woman’s Christian Temperance Union: Thirty-fifth Year Convention Held at Cedar Rapids, Iowa, September 22, 23, 24, 25, 1908, at 15.

18See above ch. 9.

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The Socialist party, and Socialism in some form will be the system of the future, for as slavery, which was once the industrial system of the world, gave way to the feudal system, and the feudal system was in turn supplanted by the wage system, so the wage system is already beginning to give way to co-operation in different forms, and will at last disappear. The Socialist party has for its basic principle the absolute equality of opportunity for every human being, and that necessarily includes the complete equality of women with men, industrially, financially and politically, and is the only party which makes this a foundation principle. Its attitude in dealing with the liquor traffic is logical if we class that as an institution, which it is not, it is only a parasite upon the real industries of the world, and many of the leaders are beginning to study the question from this point of view.  

Nor had Dunham finished with her anti-capitalist tour d’horizon. Arguing that the millions of votes cast for the Republican and Democratic parties meant that “no stockholder in a Southern factory [or] a Northern sweatshop will fear that his profits from the toil of little children will be lessened, for these parties stand for the continuance of things as they are,” she insisted that just as a million votes for the Prohibition candidate would signal the rise of a sentiment that would be “recognized as the handwriting on the wall for the liquor traffic,” a million votes “for the Socialist candidate means the swift passing of the time when strong men beg for work and little children fill their places in the industries of the land.” Moreover, Dunham declared, if Iowa had the Initiative and Referendum, “the people can instruct, not petition, their representatives to pass the laws they desire,” starting with equal suffrage. 

The reason for the socialist orientation of Dunham’s speech was simple: she was the corresponding secretary (the third highest-ranking officer) of the Woman’s National Socialist Union, having joined the Socialist Party of America shortly after its founding in 1901 and become a leading organizer, coordinating

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19Iowa Woman’s Christian Temperance Union: Thirty-Fifth Year Convention Held at Cedar Rapids, Iowa, September 22, 23, 24, 25, 1908, at 19-20. In light of Dunham’s socialist orientation it is remarkable that at the same convention the retiring president gave a “touching and beautiful” response to the convention’s present to her of a “silver purse filled with gold....” W.C.T.U. Champion 2(12):[2:3] (Oct. 1908); “Election Day at Convention,” CREG, Sept. 25, 1908 (8:1).

20Iowa Woman’s Christian Temperance Union: Thirty-Fifth Year Convention Held at Cedar Rapids, Iowa, September 22, 23, 24, 25, 1908, at 20.

midwestern Socialist women’s clubs.22 A well-known party member, she openly injected her socialist politics into her WCTU work, as an appreciation of Dunham, written by one of her socialist comrades before she yielded her presidency, revealed:

At the last meeting of the Woman’s Socialist league Comrade Mary Dunham told the story of her work for Socialism: told how for many years she had been carrying the message of Socialism into the meetings of the W.C.T.U. Like all suffragists, she was born a rebel, and all her life had been a consistent one. Although born and brought up in a church she withdrew because they refused to ordain women for the pulpit.

Then, although an ardent prohibitionist, thoroughly believing in the principles of the party, she refused to support it when it turned down woman’s suffrage.

She remarked with a little twinkle of the eye that she had hardly been fair, for she had never talked temperance at a Socialist meeting, [but] she had always talked Socialism at a temperance meeting.

For eighteen years she has been president of the W.C.T.U. of Iowa, and at all meetings of the organization she distributed quantities of Socialist literature and papers.23

Although Dunham doubtless failed to persuade the bulk of Iowa WCTU members to become socialists, the fact that they re-elected a prominent socialist president for 18 consecutive years strongly suggests that this vanguard of the anti-cigarette movement hardly consisted of narrow-minded, single-issue, petty-bourgeois Christian moralists.24 Indeed, the only reason that they did not continue re-electing her is that in 1908 she and her husband moved to Chicago,25 where, at the

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22Mari Jo Buhle, Women and American Socialism, 1870-1920, at 112 (1981). Her socialist organizing techniques were unusual. In 1902 she wrote to every local of the Woman’s National Socialist Union asking them to plan a series of parlor meetings hosted at members’ homes: “You can have light refreshments, wafers and one kind of drink if thought best, for they add to the friendly feelings and loosen tongues.” Marion Dunham [untitled letter], Los Angeles Socialist, No. 52, at 2:4 (Oct. 25, 1902).

23Annah Finsterbach, “Socialist Women Meet,” CDS, July 23, 1908 (4:3-4 at 3).

24A decade after Dunham’s death, in the wake of the repeal of Prohibition, the Iowa WCTU president, Ida B. Wise Smith, in an apparently uncommon reference to her, summoned up the membership’s memory of her: “From the heights of Heaven today, if Marion H. Dunham knows of things on earth, she feels for us who have labored long and valiantly for the welfare of mankind.” Ida B. Wise Smith, “State President’s Annual Address 1933,” Woman’s Christian Temperance Union of Iowa, Sixtieth Annual Convention 13 (1933).

25In August 1908, when she and her husband were already living in Chicago, she informed the members that since she did not expect to move back to Iowa, “it will be better...to elect some one [sic] else for president.” Marion H. Dunham, “President’s
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

age of 66, “Mrs. Mary Dunham,” together with other “women members of the Socialist party, regularly mounted a soap box in Union Park and on various street corners to speak on behalf of socialism and woman’s suffrage.26

The State Prohibits Minors from Smoking in Public

It is the infernal cheapness of the cigarette, and its adaptability for concealment, that tempt this school-boy’s callow intelligence.27

Not until 1909 did Iowa introduce the control measure that many states such as neighboring Minnesota had implemented years earlier—a prohibition on public smoking by minors.28 As early as 1900, the House, by a vote of 62 to 13,29 passed a bill—virtually identical to the 1897 Minnesota statute30—providing that: “Any person under...16...years of age who shall smoke or use cigarettes, cigars or other tobacco in any form on any public highway, street, alley, park or other land used for public purposes, or in any public place of business, shall be arrested by an officer of the law who may be cognizant of such offense; and further, it shall be the duty of all such officers, upon complaint of one citizen, to arrest such offenders and take them before the proper court.” The bill then directed courts to impose a punishment in a sum not above $10 or imprisonment of more than five days in county jail. Courts were also given the power to suspend sentences against minors who gave information that might lead to the arrest of those who


28 A memorandum apparently prepared by or under the aegis of Covington & Burling’s star tobacco lawyer, David Remes, for Philip Morris in connection with the latter’s opposition to raising the legal age for buying tobacco above 18 incorrectly claimed that: “The first age restrictions governing the use of tobacco (as opposed to the sale of tobacco products) were enacted in Arizona in 1917; in Idaho in 1918; and in Illinois in 1921.” C+B (David Remes to Cristian Sainz [Philip Morris Management Corp.]), “Historical Developments Regarding Minimum Age Laws Governing the Sale or Use of Tobacco Products” (Jan. 28, 1998), Bates No. 2072554889/92.

29 *Journal of the House of the Twenty-eighth General Assembly of the State of Iowa* 982 (1900) (Mar. 27).

30 1897 Minn. Laws ch. 116, at 201. The Minnesota law set the minimum age at 18, as did the Iowa bill as filed.
violated the code in selling or giving the minor the tobacco and also testified in court against them. Anyone who harbored or granted those under sixteen “the privilege of gathering upon or frequenting any property or land held by him, who there indulge in the use of cigarettes, cigars, or tobacco in any form” were subject to the penalties provided in the anti-cigarette laws (Code sections 5005-5006). Finally, the entire bill was subject to the proviso that none of it “shall be so construed as to interfere with the rights of parents or lawful guardians in the rearing and management of their minor heirs or wards within the bounds of their own private premises.”

House File No. 200, as introduced by Republican R. G. Clark, had set the age of consent at 18, but the substitute reported out by the Public Health Committee lowered it to 16, for adoption of which Clark himself moved. Accounting for only 19 of the 100 House members, Democrats cast 7 of the 13 Nays and but 5 of the 62 Yeas. The capital’s leading newspapers briefly mentioned the passage without any commentary or hint of controversy, but the next day the Senate referred the bill to its Public Health Committee, where it died.

A paper on cigarette smoking read at a meeting of Iowa school superintendents and principals in Des Moines on December 30, 1901, prompted “considerable discussion” and passage of a resolution requesting the group’s legislative committee to work for enactment of a statute similar to the aforementioned Minnesota law. The bill, which was to be (but never was) introduced at the 1902 session of the legislature, was criticized by the Davenport Daily Republican as being “a little too drastic to be popular and effective”

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31Journal of the House of the Twenty-eighth General Assembly of the State of Iowa 646-47 (1900) (Mar. 8).
32Journal of the House of the Twenty-eighth General Assembly of the State of Iowa 283-84 (1900) (Feb. 8). Clark introduced the bill by request. Clark was a businessman, who joined the minority faction of the Republican party in the legislature to fight corporate influences especially with regard to railroad taxes. A Biographical Record of Hamilton County Iowa 378-80 (1902).
33Journal of the House of the Twenty-eighth General Assembly of the State of Iowa 646-47, 981 (1900) (Mar. 8, 27).
34Journal of the House of the Twenty-eighth General Assembly of the State of Iowa 982 (1900) (Mar. 27).
35Enact Valued Policy,” ISR, Mar. 28, 1900 (5:3-5 at 5); “Valued Policy Approved,” DML, Mar. 28, 1900 (3:3-5 at 5).
36Journal of the Senate of the Twenty-eighth General Assembly of the State of Iowa 835 (1900) (Mar. 28).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

because it did not focus exclusively on cigarettes, “the greater evil,” but instead encompassed “other features of the tobacco problem.”

Before the legislature returned to the question of youth public smoking, in 1904 it unanimously passed a bill that prohibited distributing, posting, painting, or maintaining any advertisement for the sale of tobacco or intoxicating liquor within 400 feet of any premises occupied by a public school or used for school purposes. In her annual president’s address to the nationally affiliated WCTU of the State of Iowa, Dunham merely characterized the measure as “of interest to us, even though we did not work for” it. But the group did take satisfaction from its work of “educating and saving the youth” from the deterrent effect on smoking of employers’ proliferating unwillingness to hire smokers. “When an employer advertises for help,” the superintendent of the Anti-Narcotics

\[38\] “After Cigarettes,” DDR, Jan. 31, 1902 (4:2) (edit.).

\[39\] 1904 Iowa Laws ch. 137, at 125. The statute contained an exemption for “advertisements in newspapers of regular publication, distributed to subscribers or purchasers thereof. Id. H. F. No. 352, contained no such exemption, which was added by the Senate, and concurred in by the House. Journal of the House of the Thirtieth General Assembly of the State of Iowa 608-609, 1293 (1904) (Mar. 14, Apr. 8); Journal of the Senate of the Thirtieth General Assembly of the State of Iowa 1087-88 (1904) (Apr. 8). In 1917, the legislature enacted a ban on advertising that included newspapers. See below ch. 14. The no-advertising-near schools law was not repealed until 1980. 1980 Iowa Laws ch. 1030 at 218. Repeal was, according to its sponsor, inspired by the possibility that “every school principal and librarian and many school teachers could be jailed for 30 days or fined $100 because” the law made “it a crime to place magazines with tobacco advertising in a school library.” “The Legislature,” DMR, Mar. 11, 1980 (3B:5). Why the law could not have been amended to exempt school officials while retaining the ban on nearby store or billboard advertising was not explained. The same General Assembly took no action on a bill that would have banned all tobacco and alcohol advertising—including in newspapers—in Iowa. H.F. No. 515 (Feb. 22, 1979, by Cusack). Sixteen years later Sen. Johnie Hammond included in her anti-smoking bill (S. 2174) a ban on tobacco advertising on any advertising device within 1000 feet of any school or playground when it was being used primarily by people under 18 for educational or recreational purposes, but it died. At the time Philip Morris’s profit-driven interest in legal history was piqued, as the following internal document revealed: “In 1980, the Iowa Legislature repealed a ban on tobacco ads 400 ft. from schools that had been in place since 1904. Our databases don’t have records that far back, but the state house should. Could you ask your lobbyists to check with the state to see if they can uncover why the original was repealed? It might be useful in the near future.” Note, P. J. O’Neil to Jack Lenzi (Jan. 16, 1996), Bates No. 2044010029.

\[40\] Fifteenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa held at Marshalltown, Iowa, October 11, 12, 13, and 14, 1904, at 34 (1904).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

Department, Mrs. Elsie M. Lawrence, reported to the annual convention in 1905, “you always see the phrase, ‘No cigarette smoker wanted.’ The fact is that there is always something the matter with cigarette smokers and they are ‘not wanted.”**41

The Iowa WCTU achieved one of its greatest triumphs in 1907, when Newell Miller, the superintendent of the Des Moines post office,

gave notice that smoking will no longer be tolerated there. Not an employe of the 150 men whom Uncle Sam hires to attend to the Des Moines mails will be allowed henceforth to smoke cigarettes [sic] of any kind.

“I was forced to take drastic steps to show my displeasure of cigarette smoking and it went hard with one of the employes who rolled a pill and smoked it in here. He went out of the building by the back door,” said Mr. Miller. “Since then I have let it be known that such practices shall not exist here so long as I have charge of the building. Why, I don’t know whether cigarettes hurt a man or not, the smell of them is enough to drive any decent citizen frantic. Suppose half the men in here should get to smoking cigarettes; it would put us out of business.”**42

Although the superintendent had not yet applied the ban to the lobby and customers, it was not certain that if they “should smoke so many cigarettes as to become a nuisance,” he “would not order them ejected from the building.” And the WCTU positively exulted in the fact that he was the widower of “our sainted Florence Miller,”**43 who had been superintendent of the non-partisan Iowa WCTU’s legislation department.*44 And although she had declared in 1896 that there was “no weapon the liquor traffic so dreads as the prayers of Christian women,”**45 even more effective than their devout petitions for divine intervention was apparently marriage to someone with power to exclude cigarette smokers

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**41Sixteenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Des Moines, Iowa, October 9, 10, 11 and 12, 1905, at 66 (1905).


**44 Miller died in 1906. “In Memoriam Florence Miller” (1906) (small brochure printed by the Iowa WCTU a copy of which was retained in one of the organization’s history binders donated to the University of Iowa Women’s Archives and examined on Feb. 1, 2007, before the materials were cataloged). Miller had also been president of the non-partisan Iowa WCTU in 1904-1905. Helen Tyler, Where Prayers and Purpose Meet: The WCTU Story, 1874-1949, at 272 (1949).

The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

from employment.

That the federal postal superintendent’s action was not the idiosyncratic decision of a local official motivated by his personal marital background could be surmised by juxtaposing it to an even more sweeping, consequential, and revealing intervention undertaken by the Commissioner of Immigration at the Port of New York in 1905. That year Robert Watchorn prohibited the sale of cigarettes on Ellis Island at the request of authorities in anti-cigarette states because immigrants were traveling directly from Ellis Island to those states with large quantities of cigarettes for friends and relatives. In the hands of the United States Tobacco Journal, the subtext of this fascinating indirect and tangential interference with interstate commerce by a high-ranking federal official was a dampening of the proliferation of cigarette smoking among ethnic groups that the Tobacco Trust, just as its sales were emerging from a decline, would have welcomed as bringing to the United States an especially high prevalence rate: “As to many of the immigrants, particularly Italians and Russians, cigarettes are nearly as necessary as bread. The situation that confronts them on the threshold of the promised land of freedom must seem rather peculiar and disillusionizing.”

In 1908 the City of Des Moines added another smoking prohibition that would surely have pleased Miller (even if the action was based on fire prevention) when the city council passed an ordinance making it “unlawful for any person to smoke tobacco in any form in any opera house, moving picture show room, or in any adjoining room or rooms opening into such opera house or moving picture show rooms, or on the stages of such houses or rooms,” and imposed a fine ranging between five and 20 dollars and, in default of payment, commitment to the city jail for two to five days.

Anti-smoking forces finally succeeded in mobilizing the legislature on the issue of public smoking in 1909. On January 27, Senator Aaron Van Scy Proudfoot, by request (of the Iowa WCTU), introduced Senate File No. 92. Proudfoot, a Republican lawyer, had attended Simpson College in

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47. Ordinance No. 1547, in Revised Ordinances of the City of Des Moines: 1916, §§ 1105, 1107 at 519, 520 (1916) (passed Aug. 22, 1908). The council provided an exemption for smoking “indulged in as part of the act of play, and in full view of the audience attending such act or play, or in any room especially provided as a smoking room.” Id. § 1106. Later the council provided yet another exemption—“when the management of any theater may desire to permit smoking, provided permission is granted to the management by resolution of the city council.” Municipal Code of Des Moines: 1942, ch. 62-7. When the Iowa legislature passed a statewide ban in 2008, it did not provide for an exemption for actors on stage as Minnesota had in 2007. See below ch. 35.
Indianola—both college and city, the former being maintained under the auspices of, and the latter heavily influenced by, the Methodist Episcopal Church, were centers of alcohol prohibition—where he remained and became secretary of the school board and city solicitor. An officer in the county and state Republican organization, Proudfoot was himself a “zealous” member and officer of that church as well.48 The bill was less comprehensive, harsh, and punitive than the Clark bill of 1900:

Every person under the age of sixteen years who shall smoke or use cigarettes, cigars or tobacco on the premises of another, or on any public road, street, alley or park or other lands used for public purposes or in any public place of business or amusement, except when in company of a parent or guardian, shall be punished by a fine of not more than ten dollars, or the [sic] imprisonment for not exceeding thirty days.

Any person who shall permit any person under the age of sixteen years who shall not be in the company of a parent or guardian, to use cigarettes, cigars or tobacco in any form in or upon the premises occupied by him or under his control or supervision, shall be punished for the first offense by a fine of not more than ten dollars, and for any subsequent offense by a fine of not more than twenty-five dollars, or by imprisonment for not exceeding thirty days.49

Two days later an identical bill (H.F. No. 133) was introduced in the House by Jesse Elliott, a Republican physician.50 It was referred to the Suppression of

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48Iowa Official Register for the Years 1911-1912, at 602 (24th No., William Hayward comp., 1911); William Martin, History of Warren County, Iowa: From Its Earliest Settlement to 1908, at 403-405 (1908); Edgar Harlan, A Narrative History of the People of Iowa 4:280 (1931) (quote). Proudfoot (1862-1936) was president of the Simpson College Board of Trustees at his death and for 16 years had been a member of the World Service Commission of the Methodist Episcopal Church. “A. Proudfoot Is Dead at 74,” Des Moines Tribune, June 8, 1936 (1A:7); Proceedings of the Forty-Third Annual Meeting of the Iowa State Bar Association 126 (1937).

49S.F. No. 92; Journal of the Senate of the Thirty-Third General Assembly of the State of Iowa 194 (1909) (Jan. 27). The text of the bill was furnished by the SHSI DM, which transcribed and proofread the original, which was bound too tightly to be photocopied. The bill as transcribed contains a bizarre error: the opening words of the second section, instead of containing the first five words (“Any person who shall permit”) as printed above, are: “Executive Council, and be published in accormit.” These nonsensical stray words have been deleted here and replaced with the words taken from, H.F. No. 133, the otherwise identical bill introduced in the House two days later, a photocopy of which the SHSI also furnished.

Intemperance Committee, which Elliott chaired and which reported it back with the recommendation that it be indefinitely postponed (presumably because S.F. No. 92 was the chief vehicle).\textsuperscript{51}

At the end of March the Senate Judiciary Committee recommended passage of the following substitute for Proudfoot’s bill:

\textbf{SECTION 1}. It shall be unlawful for any person under the age of twenty-one years to smoke or use a cigarette or cigarettes on the premises of another, or on any public road, street, alley or park or other lands used for public purposes or in any public place of business or amusement, except when in company of a parent or guardian.

\textbf{SEC. 2}. Any person found guilty of violating the provisions of Section 1 hereof shall be punished by a fine of not to exceed ten dollars ($10.00), or imprisonment in the county jail not to exceed three days, for each offense; provided, that if said minor person shall give information which may lead to the arrest of the person or persons violating any of the provisions of Section five thousand six (5006) of the Code, and shall give evidence as a witness in the proceedings which may be instituted against said party or parties, the court shall have the power to suspend sentence against said minor person....\textsuperscript{52}

This substitute, which was identical with the ultimate enactment, varied significantly from Proudfoot’s bill. First, it raised the minimum age for public smoking from 16 to 21, but at the same time eliminated all other kinds of tobacco than cigarettes from the prohibition. Second, it deleted the provision penalizing anyone who permitted a minor to smoke on his premises. Instead, it gave a minor an incentive to testify against anyone who gave him a cigarette in violation of section 5006 Code, which, however, did not prohibit or penalize permitting a minors to smoke cigarettes on one’s premises.

Both chambers adopted the bill by huge majorities. On April 5, the Senate, which 34 Republicans controlled against 16 Democrats, passed the amended version of S.F. No. 92 by a vote of 30 to 1; 24 Republicans and six Democrats voted for the bill, and one Democrat against.\textsuperscript{53} Three days later, the House, under the control of 80 Republicans opposed by a 28-member Democratic minority, passed the bill by a vote of 84 to 3; 59 Republicans and 15 Democrats voted for

\textsuperscript{51}Journal of the House of Representatives of the Thirty-Third General Assembly of the State of Iowa 486 (1909) (Feb. 20).

\textsuperscript{52}Journal of the Senate of the Thirty-Third General Assembly of the State of Iowa 1236 (1909) (Mar. 30).

\textsuperscript{53}Journal of the Senate of the Thirty-Third General Assembly of the State of Iowa iv-v, 1430 (1909) (Apr. 5).
and two Republicans and one Democrat against it.\textsuperscript{54}

As enacted in 1909, the statute,\textsuperscript{55} which was both more comprehensive (it covered all persons under 21) and less comprehensive than the House bill of 1900 (it was limited to cigarettes and permitted children to smoke in public in their parents’ presence), was in part identical to one enacted in 1907 in neighboring Illinois.\textsuperscript{56} Not until 1959 did the Iowa legislature lower the public smoking age to 18.\textsuperscript{57}

The new ban, to judge by the paucity of commentary in the Iowa press, appeared not to have stirred controversy.\textsuperscript{58} Apart from brief perfunctory mention of passage of the bill in the legislature,\textsuperscript{59} newspapers devoted no attention to the legislative process. As early as July 1909 the first attempt to “invoke” the new ban on public smoking by minors took place in a rather unexpected location—a justice of the peace courtroom in Des Moines. The “official ire” of Special Officer W. H. Davis, who was “particularly averse to cigarette smoking,” was aroused when he caught sight of a “youthful reporter inhaling one of the destructive ‘pills’ beneath the very noses of a constable, justice of the peace, and the county attorney who happened to be present to try a case.... Marching the beardless consumer of the forbidden ‘whiffs’ up to the bar of justice he demanded a warrant for his arrest.” In what may have been an inauspicious initiation of enforcement, the intervention of the attorney and constable “saved the young man

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54\textit{Journal of the House of Representatives of the Thirty-Third General Assembly of the State of Iowa} iv-vi, 1707 (1909) (Apr. 8).
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551909 Iowa Laws ch. 224, at 203.
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561907 Ill. Laws, S.B. No. 32, § 2, at 265 (“on any public road, street, alley or park or other lands used for public purposes, or in any public place of business or amusement”). Unlike the Iowa law, the Illinois statute expressly made it a misdemeanor for anyone to permit a minor “to frequent the premises owned by him for the purpose of indulging in the use of cigarettes” subject to a maximum fine of $50 to $100 or imprisonment of 30 days. \textit{Id.} § 3.
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571959 Laws of Iowa H.F. 266, ch. 119.
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58Four years later, when Pennsylvania enacted a similar ban on cigarette smoking by minors, the \textit{U.S. Tobacco Journal} protested that morality could not be legislated: smoking and chewing tobacco were highly satisfactory creature comforts whether to engage in which was to be determined by a man or youth “in the ratio of enjoyment relative to his own capacity, showing no more ill effect than if he had satisfied [a] permanent appetite for lettuce of boiled eggs.” “The Quaker Anti-Cigarette Law,” \textit{USTJ}, vol. 79, May 17, 1913 (12).
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59E.g., “House Favors Counsel Bill,” \textit{BH-E}, Apr. 6, 1909 (1:1-2) (included in list of bills passed by Senate); “House to Pass on Liquor Bill,” \textit{BH-E}, Apr. 9, 1909 (1:3) (mentioning House passage of Senate bill).
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from a rubber[-]tired ride to the city bastile and a confiscation of his ‘makins.’”

The Iowa WCTU, looking back during its annual convention in October 1909, was delighted with Senator Proudfoot’s anti-cigarette law: none of the “reform measures” of the 33rd General Assembly gave “more encouragement to the mother of boys,” prohibiting as it did cigarette smoking by minors and “making it a misdemeanor for property owners to permit minors to smoke cigarettes thereon.” except that, contrary to the WCTU’s wish, the committee substitute that was enacted had dropped this latter provision. The organization’s hope sprang eternal: the WCTU urged all local unions to “keep a copy...posted in conspicuous places. No law will enforce itself, but now that we have a law that will protect the growing boys against this pernicious habit, the fathers of our State ought to see that it is enforced.” However, the WCTU called into question its own capacity to enforce a statute effectively when its own legislative department was unaware that, contrary to the group’s ardent wishes, the committee substitute that was enacted had, as noted earlier, dropped Proudfoot’s provision prohibiting private property owners from permitting minors to smoke cigarettes. (To be sure, the WCTU was hardly alone in its confusion: a number of Iowa newspapers also misinformed their readers about the matter.) The law was enforced by the police and judiciary, which declared imposition of the fine and incarceration a “warning to those who persist” in smoking cigarettes in public. What the apprehension rate was and whether the law had any impact on smoking prevalence among minors are unknown.

60 • Smoked ‘Pill’ in Court,” PDC, July 21, 1909 (1:4).
61 Iowa Woman’s Christian Temperance Union, Thirty-Sixth Annual Convention, Davenport, Iowa, October 12-15, 1909, at 16 (n.d.).
63 The organization repeated this misstatement later during the proceedings. Iowa Woman’s Christian Temperance Union, Thirty-Sixth Annual Convention, Davenport, Iowa, October 12-15, 1909, at 118 (n.d.).
64 E.g., Hull Index, Apr. 9, 1909 (4:3) (untitled); “Small Boys, Be Careful,” Emmetsburg Democrat, May 5, 1909 (2:5); “W.C.T.U. Notes,” Iowa Postal Card (Fayetteville), May 13, 1909 (8:3). In contrast, “Hope for Change,” Globe (Cedar Falls), Apr. 29, 1909 (7:1), correctly noted that the provisions had been stricken out.
65 “Cigarette Smoking by Minors Must Cease,” CREG, June 6, 1910(8:4).
66 On a Des Moines school principal who frisked boys every morning for cigarettes and papers in order to enforce the law and protect them from “mental deterioration,” see “Boys Searched by School Ma’am; Finds ‘Makins,’” DMDN, Sept. 17, 1908 (2:3). As late as 1916, a high school boy who pleaded guilty to smoking cigarettes was fined $10 plus $3.25 in costs was told by the judge that he would suspend the fine if the boy would reveal his
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

The Trimmer Clubs and John B. Hammond Succeed in Securing Enactment of a Law Enforcing the Cigarette Sales Ban/Mulct Tax

The devil has three traps to catch the youth. The first trap is the cigarette habit—that is the starter. The second trap is the saloon where beer is absorbed. The third trap is the gambling den and houses of immorality. ...

Some boys think they are smart and can enter these traps and still not get caught, but the boy who smokes cigarettes nine times out of ten will get to using beer to soak up the dryness in his throat, and he in time graduates from the third trap.67

The cigarette trust is already out with a big bluff that it will evade the law in some way, and continue to sell its noxious and poisious [sic] wares, as usual. But J. B. Hammond, state manager of the Trimmer Club...and the man who led the crusade against the cigarette..., says he is ready to meet the trust on its own proposition, and ascertain whether the people of Iowa are the boss or whether the trust is running the government. ... It will be a merry war in which the “trust” is likely to get the black eye. It will be mighty risky for any person to undertake to sell cigarettes in Iowa from this time forward.68

The Iowa WCTU was even more enthusiastic about the other cigarette-related statute enacted two weeks earlier during the same legislative session. In order to correct the “deficiency” in the enforcement of the 1896-97 Phelps-Trewin prohibitionist scheme, the WCTU’s chief lobbyist, John Brown Hammond, had “framed” the bill,69 which was duly enacted. Hammond (1855-1940)—a second cousin70 of “John Brown of Harper’s Ferry,” who “carried a strain of that perfectionist character”?71—was a detective72 and former miner from Centerville, Iowa, whose prominent anti-saloon activities there had brought him to Des Moines in 1908. Although he eventually “spent a lifetime prosecuting

source; the boy asked for time to think it over, but the next day reappeared in court with the $13.25. “Fined for Smoking Cigarettes,” Iowa Recorder (Greene), Dec. 27, 1916 (1:3) (reprinted from Waverly Independent).

68“It Is Only a Bluff,” IU, July 9, 1909 (4:2).
69Iowa Woman’s Christian Temperance Union, Thirty-Sixth Annual Convention 117 (1909).
70Hammond, Liquor Foe, Led Raids on Bars in Iowa,” DMR, July 21, 1940 (1:1-4, 4:5).
72At the 1900 Census of Population, which mistakenly recorded him as being 35 rather than 45 years old, he was returned as a detective living in Wayne County, which was very close to Centerville. Series T 623 Roll 464 Page 138 (HeritageQuest).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

bootleggers, whisky druggists and saloons,” especially while in charge of prohibition enforcement in Iowa (1918-1921) and as Des Moines police chief (1922-1923), Hammond “vigorously fought all forms of vice,” including prize fighting, marathon dancing, and apartment houses. Credited with having drafted 95 percent of the state’s liquor and moral behavior laws, he nevertheless received no credit in his front-page, four-column-headlined obituary in the Des Moines Register for his role in cigarette prohibition. He succinctly expressed his fundamentalist position in an opinion piece in the Register in 1917: “‘Personal use’ of intoxicating liquor is the only objection I have to the whole liquor business. I do not care who makes it or where it is made, I do not care who sells it or where it is sold.”

Thanks in no small part to Hammond himself, 1909 turned out to be a banner year for public morality legislation in Iowa—abating houses of prostitution and prohibiting immoral plays being merely two of a slew of such laws.

Hammond’s bill, according to the WCTU, “delegated authority to any peace officer or citizen to start an action to search suspected premises for cigarettes or cigarette papers, and the presence in any public place, of either, constitutes prima facie evidence that they are kept with intent to sell or give away unlawfully.” When a magistrate made an entry of guilty he was required to certify a copy to the county treasurer, who was then required to impose the $300 mulct tax against the property.

The bill was introduced by Fred Hunter—whose father and mother had been a physician and women’s rights advocate, respectively—a Republican manufacturer representing Polk county (of which the state capital Des Moines is

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74 “Notable Deaths.” In 1936 Hammond was the unsuccessful Prohibition Party candidate for U.S. Senator from Iowa.
77 1909 Iowa Laws ch. 214 at 196.
78 1909 Iowa Laws ch. 217 at 198.
79 See also 1909 Iowa Laws ch. 215 and 216 at 198 (anti-white slave trade laws).
80 Iowa Woman’s Christian Temperance Union, Thirty-Sixth Annual Convention 117 (1909).
81 Iowa Official Register for the Years 1909-1910, at 672 (23rd Year, 1909).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

the seat), three weeks after Proudfoot had filed his.82 Though drafted by Hammond, who was closely associated with the WCTU, it was known as the Trimmer Club bill83 because Hammond had become state manager/superintendent of that new organization in December 1908, when he resigned as state chairman of the state central committee of the Prohibition Party, a post that he had held for a year,84 and he himself stated that the bill had been “drawn by the management of the Trimmer clubs...”85 The Trimmer Club Movement was initiated in 1908 by 68-year-old Samuel Saucerman, a sometime Sunday school teacher86 who had been casting about for “some scheme by which he could do the most good to humanity with a portion of his wealth,”87 which he in large part acquired by buying up land cheap during the early years of Des Moines and then developing and selling it.88 In particular, “[l]and which he had purchased for speculation twenty years before became a paying investment. A sum of $25,000 was set aside to promote the Trimmer club movement.”89 Since the “scheme of endowing libraries and that sort of thing never appealed to me very much,”89 he decided to organize a club composed of 100 boys aged nine to 12 “recruited largely from boys of the street.” A prerequisite for joining was taking the “Trimmer Pledge,” which, after declaring that “I want to be a manly man,” obligated boys to forswear intoxicating drinks, profanity, and “the useless and wasteful tobacco habit.” Finally, Trimmer boys pledged to “want to save money and earn more.” To encourage these little accumulators, Saucerman placed in trust for them one dollar plus one cent a day so that at the end of three years they would have

82Journal of the House of Representatives of the Thirty-Third General Assembly of the State of Iowa v, 452 (1909) (Feb. 19).
85“Stop Cigarette Sales Altogether,” R&L, June 18, 1909 (5:2).
86Samuel Saucerman “Passed Suddenly,” Oelwein Daily Register, Mar. 27, 1911 (4:4).
87“Sam’l Saucerman Gives His Wealth to Unique Boys’ Club,” DMDN, May 11, 1908 (1:1). The name derived from a boy’s having to “begin to trim off his bad habits” to become a member. Id. at 2:2.
89“Sam Saucerman Dies Suddenly,” R&L, Mar. 27, 1911 (1:1).
“accumulated” about $10—at a cost to Saucerman of only $1,200.\textsuperscript{90} Reading “[g]ood books” does not appear to have been part of Saucerman’s program for boys, but selling them “to earn money in their spare time” was.\textsuperscript{91} If, as the “wealthy real estate dealer” expected, the boys kept saving, by the time they reached their majority, they would each have $1,000-$1,200, “and instead of being a beggar or a tramp or a dead drunkard, they will be good, clean, sober men and help to do things in the world.”\textsuperscript{92} Saucerman gave the United States only a few generations to change in order to avoid the fate of a polarized nation consisting of “tramps and slaves to the devil with a few multimillionaires sprinkled in.”\textsuperscript{93} By February 1909, almost a thousand boys aged 8 to 15 had joined in Des Moines,\textsuperscript{94} and, with the addition of clubs in towns such as Oelwein, more than 2,000 were expected by year’s end.\textsuperscript{95}

House File No. 278 was referred to the 24-member Judiciary Committee (composed of 18 Republicans and six Democrats),\textsuperscript{96} a majority of which quickly reported it back with the recommendation that it be indefinitely postponed, while a four-member minority (consisting of three Republicans and one Democrat) recommended passage.\textsuperscript{97} On March 13, the full House took up the bill and by a vote of 69 to 20 adopted the minority views as a substitute for the majority report. Then by a vote of 68 to 26 it passed the bill with a minor amendment. That Democrats continued to contest the legitimacy of state regulation of individual adult consumption and businesses that profited from it was visibly on display in the party-line vote: only four Democrats joined 64 Republicans in supporting the

\textsuperscript{90}``Sam’l Saucerman Gives His Wealth to Unique Boys’ Club,” \textit{DMDN}, May 11, 1908 (1:1, 2:2).


\textsuperscript{92}``Trimmer Move Has Promoter in Busy Box,’’ \textit{DMDN}, Aug. 2, 1908 (3).

\textsuperscript{93}``Founder Trimmer Clubs in Oelwein,’’ \textit{Oelwein Register}, May 31, 1909 (4:6-7).

\textsuperscript{94}``Trimmers Club for the Boys,’’ \textit{Oelwein Register}, Feb. 11, 1909 (4:3).

\textsuperscript{95}``Trimmer Clubs Brewing,’’ \textit{Buffalo Center Tribune}, Oct. 8, 1909 (3:1). When Saucerman died in 1911 he made no provision in his will for the Trimmer Clubs. “Trimmer Movement Will Be Statewide,’’ \textit{DMC}, Mar. 29, 1911 (22:4). See also “Trimmer Club Dead,’’ \textit{WEC}, Mar. 27, 1911 (9:1). The year before he died Saucerman arranged for the Iowa Christian Endeavor Society to adopt his organization. “Sam Saucerman Dies Suddenly,’’ \textit{R&L}, Mar. 27, 1909 (1:1).

\textsuperscript{96}Journal of the House of Representatives of the Thirty-Third General Assembly of the State of Iowa 131-32 (1909).

\textsuperscript{97}Journal of the House of Representatives of the Thirty-Third General Assembly of the State of Iowa 508-509 (1909) (Feb. 23).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

The Senate Judiciary Committee recommended a series of non-substantive or minor amendments, having adopted which the Senate then voted 39 to 0 for H.F. No. 278. The House followed suit, concurring in the Senate amendments by a vote of 67 to 0.

As enacted, the bill provided:

If any reputable citizen of the county make oath before a magistrate, that he has probable cause to suspect, and does suspect, that any house, place or building, naming the house, building or place and the occupant, is unlawfully used as a place in which to receive, keep, store, sell or give away cigarettes, cigarette papers or cigarette wrappers, or any paper made or prepared for the purpose of making cigarettes, or for the purpose of being filled with tobacco for smoking; or that the occupant is in any way concerned, engaged or employed in owning or keeping any such cigarettes or cigarette papers or wrappers, with intent to violate the law, or authorize the same to be done, such magistrate shall issue his warrant particularly describing the place to be searched and the person or persons to be apprehended or things to be seized directed to any peace officer in the county, for the purpose of searching such house, building or place and for the seizure of such cigarettes, cigarette papers or cigarette wrappers, or any paper made for the purpose of making cigarettes, and for the apprehension of the occupant or keeper thereof; and the said cigarettes or cigarette papers and the keeper shall be brought before such magistrate to be dealt with as provided by law. All such cigarettes or cigarette papers, so seized and unlawfully kept, shall be destroyed. The discovery of cigarettes or cigarette papers in any public place shall be prima facie evidence of the keeper’s intent to unlawfully sell or give the same as prohibited in section 5006 of the code.

The magistrate was then required to collect the tax assessment of $300 against the property where the cigarettes were unlawfully sold or kept, as provided for in

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98. *Journal of the House of Representatives of the Thirty-Third General Assembly of the State of Iowa* iv-vi, 835-37 (1909) (Mar. 13). The amendment required the search/seizure warrant to “particularly describ[e] the place to be searched and the person or persons to be apprehended or the things to be seized....” *Id.* at 836.


102. 1909 Iowa Laws ch. 223, § 1, at 202, 203 (codified at § 5007-a, Supplement to the Code of Iowa 1913, at 1820 (1914)).
section 5007 of the Code. 103

On June 18, three months after the legislature had passed his bill, Trimmer general manager Hammond put the world in general and cigarette and cigarette paper sellers, property owners of the premises used for such selling, and smoking minors in particular on notice that, as his chosen vehicle, the Register and Leader, phrased it, he and his organization intended to “stop absolutely the sale of all cigarettes in Iowa.” In announcing that “‘a movement will be put on foot to enforce the cigarette laws to the letter’” Hammond explained that he did not wish to take anyone “‘by surprise,’” although ignorance of laws that for years had been “‘unenforced on account of a misinterpretation’” would be no excuse. 104 Since the 1897 mulct tax law expressly and unambiguously stated that “payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same,” 105 and the Supreme Court had upheld it, 106 it was unclear why the Register called Hammond’s view of the mulct tax “new,” but then Hammond himself, after quoting the Code and the Court’s gloss of it, also did not explain on what basis “many dealers and officers of the law” had interpreted the law as meaning that payment of the tax gave dealers the right to sell. Rather, he cited these sources so that dealers who incorrectly believed that they were “acting lawfully may prepare themselves to go out of business.” 107 Under no illusion as to the anti-cigarette movement’s capacity to agitate, prosecute, or litigate all over Iowa,
Hammond concluded his press communication with this appeal:

“The National Trimmer and Home Builders association has entered a new field and proposes to clear the ground of all obstructions for raising a crop of young men and women stronger, cleaner and more useful than has ever been raised before and they have interested themselves in laws whose enforcement will prevent public leeches from filling their coffers out of the manhood and womanhood of our country. Realizing their limited opportunities to procure the observance of these laws they call upon the enforcement officials of this state and all good citizens in every section of the state to rise up in their might and with the powers that the law gives them wipe this dangerous and disgraceful business out of our state and save our boys and girls from this degrading brain and body destroying evil.”

A week after going public with his plan and ten days before H.F. 278 was to go into effect, Hammond, its drafter, informed the attorney general’s office that in a number of Iowa cities “merchants are openly advertising and making sales of cigarettes and cigarette papers....” He then posed several questions to which he presumably already knew the answers, but they were answers that it was important to have the attorney general’s office publicly confirm. One was whether the mulct cigarette law protected the dealer in any manner; another was whether anyone was permitted to sell cigarette papers or keep them for sale or gift. On June 26, the Republican Des Moines Evening Tribune reported under the attention-grabbing front-page headline, “Coffin Nails to Die a Very Sudden Death,” that Attorney General Howard Byers—who, as the Republican Speaker of the House in 1896 had voted against the Phelps law on the grounds that it was unconstitutional—had “sounded the death knell of the cigarette in Iowa” in a letter to Hammond fully upholding and endorsing the latter’s view that it was illegal to sell cigarettes in the state regardless of whether the $300 mulct tax was paid. Fifteen cigarette dealers in Des Moines, “feeling secure in the payment of the quarterly tax of $75 each,” had laughed at Hammond’s claim that once the new law went into effect on July 4, he would begin prosecutions, but Byers’ letter not only supported Hammond, but meant that any county attorney who neglected to enforce the anti-cigarette law was as liable to removal from office as for failing to enforce any other law.

110 See above ch. 10.
111 “Coffin Nails to Die a Very Sudden Death,” Evening Tribune (Des Moines), June 26, 1909 (1:5-6). The $3,600 in cigarette mulct tax had been paid for the first two quarters
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

Byers, a Progressive, also had George Cosson, a special counsel of the attorney general (who would himself be attorney general from 1911 to 1917), research U.S. Supreme Court decisions, which “established without any question the right of a state to collect a tax and at the same time prosecute the man who pays it.” Cosson, who as a Republican member of the Senate in 1909 voted for H.F. 278, had been the chief sponsor of two bills passage of which meant that every county attorney in Iowa “would be obliged to aid [Hammond] in his efforts to thoroughly enforce the [anti-cigarette] law.” Specifically, the Cosson law both made it the duty of county attorneys to enforce all state laws and mandated the removal from office by district court of any county attorney (or sheriff, mayor, police officer, marshal, or constable) for wilful or habitual neglect or refusal to perform the duties of his office. On June 28, Cosson replied that paying the


“Coffin Nails to Die a Very Sudden Death,” Evening Tribune (Des Moines), June 26, 1909 (1:5-6). Cosson’s research involved looking up state and U.S. supreme court decisions on the morning of June 26. Id.


“It Is Only a Bluff,” IU, July 9, 1909 (4:2). Nevertheless, during his later tenure as attorney general Cosson was accused of being a selective law enforcer in the sense that he “would never been [sic] guilty of such an impolitic act” as “to take up the cause of law enforcement in Des Moines” because “[h]is time and efforts have been confined to law enforcement in Davenport, or Ottumwa, or Mason City—in fact, anywhere excepting in the shadow of the capitol dome.” Not only graft and stock watering, but “the open disregard of the Iowa cigarette and liquor laws in Des Moines, have entirely escaped his notice.” “Bi-Partisan Hypocrisy!” IH 61(39):1, 2, 4-5, 24-25 at 24 (Sept. 28, 1916).

1909 Iowa Laws ch. 17, § 2(1), at 19 (S.F. 6). Another Cosson bill applied to sheriffs. 1909 Iowa Laws ch. 34, at 31 (S.F. 7).

1909 Iowa Laws ch. 78, § 1, at 72 (S.F. 8). The Cosson law also empowered any five electors of the county to file the complaint (§ 2 at 73). The removal law, though not aimed specifically at enforcement of the anti-cigarette law—liquor and prostitution were more central issues—incontestably was covered by it. In opening his campaign for attorney general in 1910, Cosson explained the purposes of his bill in systemic terms that far transcended the anti-cigarette law: “The fundamental proposition back of the present law is the fact that no local community in the state has a right to openly and flagrantly violate the state law; in other words, if the state has the authority to pass a law, it has the authority to see that it is enforced, and in doing this it does not destroy local self government because as was well said by [Missouri] Governor [Joseph] Folk: “When any
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

mulct cigarette tax did not in any manner authorize the sale of cigarettes or cigarette papers. He added that the legislature had not enacted the mulct tax in order to relieve any payer of any of the criminal penalties imposed for violating the ban on sales; instead, “one of its objects was to add an additional impediment to the business of selling...cigarettes....” Cosson also negatived the other question: “Stronger language could not be used than that found in section 5006 prohibiting the sale or disposition of cigarettes and cigarette papers and wrappers either by way of gift or exchange....”

The Byers-Cosson letter, in conjunction with the new law authorizing search warrants, would, in the Register and Leader’s understatement, “be of more importance than was accorded it when the law was passed last winter.” In particular, “the fifty Iowa tobacco shops where cigarettes are sold must either dispose of their stocks or face a criminal prosecution.” Intriguingly, in what appeared to be an exhaustive rather than an illustrative list, suggesting that illegal cigarette sales were exclusively a big-city phenomenon, the press observed that cigarettes were “sold in Des Moines, Sioux City, Iowa City, Clinton, Cedar...
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

Rapids and Davenport.”122 The next day a newspaper in Council Bluffs, where dealers were disposed to sue over the mulct tax payments,123 one-upped its competitors by adding that city to the list.124 Apart from Iowa City, these six cities accounted for six of the state’s eight largest cities. In Waterloo, the seventh largest, “[o]nly one business man...has at all considered paying the mulct tax necessary for handling cigarette papers, but when he learned that the payment of such tax would be no protection to him, he concluded not to take out a license.”125

As the new law’s effective date approached, in Dubuque, Iowa’s fourth largest city, the cigarette dealers—of whom there only three—“experienced no such record sales” as the million sold on one day in Des Moines, because, they claimed, the Mississippi River city was “one of the poorest for cigarette sales in the country,” there never having been sold there one-third as many as in same-sized eastern cities, and most of those that were sold having been bought by “transients.”126

In Des Moines, whose 15 dealers almost equaled the number in the rest of the state combined, the sale of cigarettes, which were freely advertised, was “said to be enormous.”27 Initially the Des Moines merchants regarded Byers’ opinion “with comparative equanimity....” One of them reassuringly asserted: “‘We fellows who have been paying our tax under protest have nothing to worry about.... The money we have paid in will be refunded at compound interest and the interest will amount to as much as our profits for the next five years.’” Then

123 “To Enforce Cigaret Law,” SCJ, June 29, 1909 (3:3).
124 “Will Demand Return of Cigaret Taxes,” Sunday Nonpareil (Council Bluffs), June 27, 1909 (1:2). Two days later the Register reported that “[c]igarettes have been sold openly in Des Moines and six other Iowa cities for years.” “Officials Will Bar Cigarettes,” R&L, June 29, 1909 (10:3).
126 “Dubuquers Must Quit Cigarettes,” Telegraph-Herald (Dubuque), July 3, 1909 (8:4). According to another account, four cigarette dealers in Dubuque had carried extensive stocks; sales on July 3 equaled those on a Sunday in August two years earlier when for the first time in 50 years a Sunday closing law became effective in Dubuque. “No Cigarettes Here,” Dubuque Times-Journal, July 3, 1909 (5:3-4). The same paper referred to the “land office business” that the cigarette sellers had done on July 3. “Last of Cigarettes,” Sunday Times-Journal (Dubuque), July 4, 1909 (1:4).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

reverting to a traditional lament, the seller looked forward to a more profitable post-cigarette world that he and his competitors had been unable to create on their own: “‘There is no money in them anyway. The trust keeps boosting prices and after the tax is paid the dealer has nothing left.’” Infected by the cigarette merchants’ optimism, the Register and Leader spun out the further tale that Polk County and Des Moines might lose under the attorney general’s ruling since they “may be required to float another bond issue if the $300 per year cigarette tax is held to be unconstitutional [sic] and no bar to prosecution for the sale of ‘coffin nails.’”[128] Two days later the News gave further shape to the dealers’ plan by reporting that after having heard that payment of the tax would not even confer on them the right to sell cigarettes, “the cigarette men have banded together, and will make an attempt to collect from the state the money they have paid in the last five years.”[129]

The new law’s impact was immediate.[130] For example, as early as May, the Iowa City assessor placed notices in the local press warning grocers and other tobacco dealers that they would be “prosecuted to the fullest extent of the cigarette mulct law” for “giving cigarette papers with tobacco or having it on the premises to be taken by anybody.”[131] Then a week before the law’s effective date, the Brown and Fink cigar stores in Iowa City announced that they would no longer sell cigarettes after July 4. Since only two tobacconists had sold them,[132] after that date it would be “impossible to secure them in Iowa City. Both dealers have said that they were content to let some one [sic] else go into the courts and fight the attorney general’s ruling.”[133] As one self-reflective dealer conceded: “‘We knew the license problem had to be decided, when we first took out licenses, and we took a risk. I don’t think we’ll fight.’”[134] Because of the location of state’s leading university in Iowa City, the retailers’ statement was “of

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129“Cigarette Men After Back Pay,” DMDN, June 29, 1909 (3:8).

130In Burlington, the county attorney’s public announcement about the law reportedly would make dealers “hesitate” about having a cigarette “within forty miles” of their stores. “Law Is Severe,” Evening Gazette (Burlington), June 30, 1909 (6:3). In Des Moines, a cigar dealer’s filing voluntary bankruptcy in mid-July was attributed to the new law. “First Victim of New Law,” DMN, July 28, 1909 (2:8).

131“Notice,” ICC, May 10, 1909 (5:7) and May 12, 1909 (4:2).


133“Cigarettes Ousted,” Hawk Eye (Burlington), June 29, 1909 (3:4).

134“Cigarette Tax Fight in Court,” Iowa City Daily Press, July 1, 1909 (8:5).
more than ordinary importance locally....” Enforcement of the ban would “mean something of a loss to the dealers..., particularly during the school year, as the cigarette has many users among the students,” but, one of the two merchants voiced the aforementioned lament, “in the end we will sell more cigars. It costs considerable to handle cigarettes. The profit was not very great and license of $300 per year cuts in on the receipts.”

In Dubuque dealers, having “indicated an unwillingness to take any chance with the law by paying the mulct tax assessment,” stopped selling at midnight on July 3 and packed up what was left over to “ship them back to the manufacturers and trade them for cigars.” The flux in which commercial-legal strategizing was caught up as the law’s starting date loomed was exemplified by Davenport, where on July 1 the Democrat and Leader reported that many local lawyers had opined that the law would not withstand supreme court scrutiny because it authorized issuance of search warrants based on statements of probable cause for suspicion rather than a sworn statement of actual fact. But then the very next day, after the dealers had held a meeting, the same paper predicted that “[c]igaret sales will be a thing of the past after tomorrow night.” Sellers, based in part on the basis of legal opinion they had received, concluded that: “The penalty for violations of the act are [sic] so strenuous and the legal machinery which has been placed in operations forcing prosecutions is so strong that the dealers have concluded that the same way of law obedience is the only way of business prosperity in this respect.” In case the “level playing field” rhetoric that a century later had become gospel among their epigones meant anything to Davenport dealers in 1909, they surely drew solace from intelligence they received from Des Moines and other cities that no one would contest the law and that throughout Iowa all cigarettes would be cease to be sold on July 4. The Council Bluffs dealers—including one who had been stocking $1,500 worth and another almost as much—who had been selling cigarettes for several years, stopped all retail sales the night before the new laws went into effect: “Neither firm wants to see a minion of the law take these goods out and make a bonfire of them. This would be bad enough, but to be cinched for $300 besides would be

135 “Cigarettes Ousted,” Hawk Eye (Burlington), June 29, 1909 (3:4).
140 “Cigaretts to Go Say the Dealers,” Davenport Democrat and Leader, July 2, 1909 (10:4).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

...the final straw.” To be sure, these dealers, harkening back to the Tobacco Trust’s constitutional commerce dream that never came true, insisted that they had a right to sell cigarettes in “original packages,” but the Council Bluffs Nonpareil promptly deflated that illusion: “Whether or not dealers can sell cigarettes in original packages is not material in actual practice. Few persons buy cigarettes by the gross or by the 1,000 or 10,000.”

In Clinton, where only few stores had been selling them anyway, the press reported under the headline, “Cigarettes Doomed,” that one owner had announced that he would stop because he knew that the law would be enforced.

Des Moines, Iowa’s cigarette capital, presented a more complex situation. A few days before new laws’ effective date, city and county officials, including the chief of police, the superintendent of public safety, the county attorney, and the sheriff, assured Hammond that they were “ready and willing to enforce” the prohibition: if dealers exceeded the few days’ grace for disposal of their stocks on which the officials agreed, they would face a fine ranging between $25 and $50. On July 3, the last day on which retailers could sell cigarettes with de facto impunity under the laws that had prohibited their sale since 1896/1897, they purportedly sold one million (one dealer alone selling more than 60,000), twice as many as were sold daily in New York. (The Des Moines labor union weekly put the figure at several million.)

Sellers stopped selling at midnight “rather than pay the quarterly mulct tax today and run a risk of having to quit July 4 with no chance to recover the tax money.”

As soon as the laws went into effect, however, the press began reporting (and thereby spreading) “[r]umors” that the United Cigar Stores Company would “fight the Iowa anticigarette law....” They gained credibility from the fact that as early as July 5 the manager of the local Des Moines store stated that corporate headquarters had instructed him to consult a lawyer about “the belated enforcement of the twelve year old law.” In confirming that he would speak to a lawyer the next day he refused to reveal whether he had also “been instructed to start a test case if advised by lawyers that there is a chance to knock out the...”

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141 “Iowa Cigaret Laws,” Sunday Nonpareil (Council Bluffs), July 4, 1909 (4:4). On the original package doctrine, see above chs. 4-5.
142 “Cigarettes Doomed,” Clinton Daily Advertiser, June 29, 1909 (3:5).
143 “Officials Will Bar Cigarettes,” R&L, June 29, 1909 (10:3).
145 “It Is Only a Bluff,” IU, July 9, 1909 (4:2).
146 “Cigaret Bargain Days,” Bedford Times Republican, July 8, 1909 (8:3).
However, under the headline, “Paper Pipe Trust May Buck Law,” the Des Moines Daily News interpreted the consultation as being planned “with a view of attacking the new anti-cigarette law.” Independent dealers interpreted the move as a “sure indication” that the firm expected to try to legalize sales.

Crucial to understanding this maneuvering is the fact that the American Tobacco Company owned two-thirds of the stock of United Cigar Stores, which was, in other words, an integral part of the Tobacco Trust, which, despite the series of defeats that the State of Iowa had inflicted on it in litigation before the Iowa and U.S. Supreme Court, was, at least for public consumption, contemplating further frivolous action to stave off the dismantling of an entire state cigarette market. Interestingly, ATC was undertaking this effort despite the fact that United Cigar Stores had opened its first store in Des Moines only two months earlier, though no one doubted that it would “invade Iowa in earnest,” and local cigar manufacturers and dealers opposed the advent of the “trust,” which would send “all the profits out of the city” and whose anticipated price cutting would inure to the “discomfiture of the smaller cigar stores.” Nevertheless, the Trust’s legal machinations regarding cigarettes were hardly anathema to these lesser merchants, who were themselves not above profitmaking civil disobedience: “Orders for cigarettes to be shipped into Des Moines from Chicago and other points are already reaching the dealers, who say the anti-cigarette law will have but little effect in decreasing the number of 'pills’ smoked.” Mail order houses had sent circulars all over Iowa offering to ship cigarettes in any volume by mail or express C.O.D., one firm promising false packaging labeling large rolls of cigarette papers “‘toilet paper.’”

From the resumption of sales “in as large quantities as ever” (“ordered by the box from Chicago by dealers”) but unaccompanied by mulct tax payments the News concluded that Polk County and Des Moines would each lose $3,600 a year in revenue.

147“Will Consult Attorney,” ICC, July 7, 1909 (3:5).
152 See above chs. 11-12.
in revenue that they shared equally. The saga of cigarettes’ comeback reached its high point in the *Daily News* on Saturday July 31 with the front page announcement that “[s]oftly, quietly, without the blare of trumpets or the sound of cymbals, the little cylindrical pill, pet aversion of purists...will go on sale again in Des Moines Monday.” The occasion for their reappearance was the opinion of a half dozen of Iowa’s best lawyers that sale in original packages was a safe haven from the “Byers-Hammond ruling,” since which dealers had been in their attorneys’ “hands.” To be sure, the unidentified elite of the state bar were not satisfied with merely regurgitating the judicially discredited original-package doctrine: this time round it was paired with a new scam. In the newspaper’s folksy account:

“Can you sell me some cigarette papers?” the slave of the habit asks his dealer.

“No, but I’ll order them from Chicago for you. In a package of 500,” the wily retailer replies. He orders them—from Chicago—and gets them in the incredibly short space of 20 minutes.

The *Daily News* then unveiled “the gist of the lawyers’ opinion”: “if the retail dealer does business in this way he becomes a jobber, and escapes the law.”

How the retailer could possibly become an exempt jobber with in-state customers

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157 “County and City Lose on Pills,” *DMN*, July 29, 1909 (1:6). If sellers had paid $3,600 for the second half of 1909 as they had for the first, the figures projected by the newspaper would have been correct; in fact, however, only $75 in cigarette mulct tax was collected for the second half. *Financial Report of Polk County for 1909*, at 61, 65, 81, 85 (n.d.).

158 “Death Pills Are Again on Sale; Laws Are Evaded,” *DMDN*, July 31, 1909 (1:8).

159 The newspaper claimed that the “new ruling” would help rather than impair cigarette sales in that smokers would be “compelled” to buy “by the 500 in original cartons.” The supply would “disappear all the faster because” because smokers always had a large one on hand until they ran out. “Death Pills Are Again on Sale; Laws Are Evaded,” *DMDN*, July 31, 1909 (1:8). Naively, a provincial newspaper commented on the original package doctrine as applied to cigarettes: “To say that they may be not be sold singly, but permit their sale in certain sized packages, is simply absurd from a common sense view of the case. No self-respecting man will take advantage of a technicality in law to sell that which he knows is intended to be prohibited.” *Adams County Union-Republican*, Aug. 18, 1909 (4:1) (untitled edit.).

160 “Death Pills Are Again on Sale; Laws Are Evaded,” *DMN*, July 31, 1909 (1:8).

161 “Death Pills Are Again on Sale; Laws Are Evaded,” *DMDN*, July 31, 1909 (1:8).
when the mulct tax law unambiguously declared that “the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the state” the newspaper did not need to explain in terms of statutory construction: rather, it furnished a concise yet fully satisfactory account of the Trust’s and the lawyers’ legal tactic by noting that cigarette sellers “will at least make a test case out of the jobbers’ dodge.”

This crescendo of Trust legal shenanigans was muted by a brief report on August 10 on an inside page of the Register and Leader (which had not been competing with the Daily News for coverage of the United Cigar Stores initiative) that in fact no attempt would be “made by the majority of Des Moines tobacconists to sell cigarettes in wholesale packages, as has been claimed in a rumor that has been circulating for the past week that the distribution of the ‘pills’ in original packages would be attempted.” That “none of the dealers seem[ed] disposed” to put into practice the advice of their lawyer, whom the paper revealed to be John B. Sullivan—who a few months earlier, as chairman of the House Judiciary Committee, had reported and voted for the recommended indefinite postponement of Hammond’s search and seizure bill—that cigarettes could be sold lawfully was attributed to their belief that any such effort would lead to prosecution on the same grounds that had prompted legal action against liquor sellers who had sought to evade statewide temperance by selling liquor in the original package “being shipped in and immediately disposed of to the purchaser without either storing it or opening the keg or barrel.” Instead, cigar merchants intimated that they would try to repeal the anti-cigarette sale law at the next general assembly. Carrying this (unattributed) narrative much further, remarkably, the weekly organ of 6,000 Des Moines labor union members, which deemed the cigarette “the most dangerous enemy of youth” and as having

163 “Death Pills Are Again on Sale; Laws Are Evaded,” DMDN, July 31, 1909 (1:8).
166 “Few Will Defy Statute,” R&L, Aug. 10, 1909 (3:2). In the days following the alleged resumption of cigarette sales in Des Moines (and again after publication of the Register article) the News did not mention the subject. In mid-August a provincial weekly claimed that Des Moines dealers had “placed the coffin nails again on sale,” but it was, as was customary, presumably merely repeating what (in this case) the News had claimed almost three weeks earlier. Adams County Union-Republican, Aug. 18, 1909 (4:1) (untitled edit.).
167 IU, July 9, 1909 (3).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

“no place in a civilized nation,” editorialized: “It is not likely that the sale of cigarettes will ever again be general in Iowa. There is such a strong sentiment against the ‘dope’ stick—a sentiment that is constantly growing—that the business cannot be safe or remunerative.”

Although the Iowa legislature had banned the sale, not the smoking, of cigarettes, cutting off the supply also depressed the prevalence of smoking them. Two months after the laws went into effect, in Iowa City, one of the seven cities in which cigarettes had been openly sold under the old law, the press guesstimated that current users represented probably no more than one-tenth of their pre-July 4 numbers. Nevertheless, enough of them were smoking enough cigarettes as to raise the question as to where they were coming from. In the first instance the Iowa City Citizen identified Illinois and other non-prohibitory states as places from which they were being brought into Iowa (legally insofar as they were exclusively for the importer’s own consumption). But then it mentioned that some smokers claimed that it was “still possible to get cigarettes if it is known that you want them.” Although the newspaper was certain that no local cigar dealer was guilty of “transgressing a law which the criminal department of the state has set about to rigidly enforce,” it stressed that it was in law-abiding merchants’ interest to see to it that violators be brought to justice. Within a few days the paper, thanks to an informant, had been able to run these rumors to the ground: “A big tobacco company, one known throughout the country by its great advertisements,” was looking after smokers’ interests by offering them seven books of cigarette papers if they sent two cents in postage in an envelope.


169A Dubuque newspaper erroneously asserted that the new cigarette search warrant law was “designed to do away completely with cigarette smoking of all kinds and if rigidly enforced will accomplish its purpose as it is a strict law.” “No Cigarettes Here,” Dubuque Times-Journal, July 3, 1909 (5:3-4). Even if all sales in Iowa were prevented, it remained lawful, at the very least, for adult Iowans to buy cigarettes in non-prohibitory states and bring them back to Iowa for their own personal consumption. Moreover, not only did the anti-smoking law apply only to minors, it was not even unlawful for them to smoke in private houses.

170“Where Do They Get ‘Em?” ICC, Sept. 6, 1909 (2:2).

171“The Farmer and the Moral Hope of the Nation,” Homestead (Des Moines), July 29, 1909 (1:3-4 at 4).

172“Where Do They Get ‘Em?” ICC, Sept. 6, 1909 (2:2).

In late September 1909, three months after special counsel Cosson had issued the aforementioned opinion to Hammond, Attorney General Byers sent a long letter to county attorneys with various suggestions for law enforcement on a wide range of subjects including illegal combinations formed to destroy competition. But Byers also touched on the liquor and cigarette mulct taxes, updating the impact of the new law. Reiterating that paying the latter “in no wise relieves a person who violates any of the provisions of section 5006 of the code from any of the penalties of said section, but is simply an additional penalty against the traffic,” the attorney general added:

“In nearly every part of the state the open sale of cigarettes has been abandoned since the 4th of July, but it is still the custom of a number of persons who sell tobacco to either sell packages of tobacco which contains in each package a certain number of cigarette papers or wrappers, or else to leave a quantity of these wrappers on the counters, where the same may be conveniently appropriated by those who are addicted to the cigarette habit. This is simply another method of attempting to evade the law, and ought not to be permitted.”

The attorney general’s unambiguous declaration that the mulct tax was in no way a license to sell cigarettes that had somehow superseded the general prohibition embodied in the 1896 Phelps law convincingly revealed that four years after the U.S. Supreme Court had definitively put an end to the 12-year (1893-1905) judicial delaying action that the Tobacco Trust’s lawyers, Fuller and Parker, had devised to subvert the statutes in Washington, West Virginia, Iowa, and Tennessee, discourage other states from enacting similar bans, and counteract the nationwide decline in sales, the cigarette-suppression pioneering state of Iowa, reinforced by the adoption of the Hammond enforcement mechanism, was mobilizing and empowering its citizenry to create a cigarette-free Iowa. Little wonder, then, that a week after Attorney General Byers had circulated the aforementioned letter to the county attorneys, the WCTU at its annual convention boldly predicted that the Proudfoot and Hammond laws “will banish the cigarette from Iowa.”

Iowa’s legislative action in 1909 may have gained it national recognition, but

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174“Gets After Illegal Pools,” Altoona Herald, Sept. 30, 1909 (2:2). The identical text was published in numerous newspapers; e.g., “Attorney General H. W. Byers,” Humeston New Era, Oct. 6, 1909 (2:6). The letter, from which the newspapers printed only extracts, did not appear in the attorney general’s biennially published report and opinions. The particular evasion that Byers mentioned was not confined to Iowa; see below ch. 16 on Tennessee.

175Iowa Woman’s Christian Temperance Union, Thirty-Sixth Annual Convention 118 (1909).
the account provided by the newspaper of historical record was a comedy of errors. “The War on the Cigarette—Eight States, Through Their Legislatures, Have Taken Action to Prevent Its Sale” published by The New York Times in its Sunday magazine erroneously asserted that “the first cigarette hammering that was done in the United States occurred in Wisconsin and Indiana five years ago.”176 Why the Times believed that these two laws from 1905 were the first, when Washington State had acted a dozen years earlier (as the amnesiac Times had reported at the time)177 and North Dakota, Iowa, Tennessee, Florida, and Oklahoma, had also acted before 1905 remains a mystery.178 Interestingly, the Times denied effective agency to the anti-cigarette militants (who “gave the word for it [the cigarette] to go. But it didn’t go”) and attributed the legislative successes to business under the slogan that “the best reformer is not a reformer. Business does infinitely more.” Discovering that men who smoked “were not efficient” and “could not be trusted,” business “began to discriminate against cigarette smokers.” And unlike the anti’s, “[b]usiness didn’t preach—it practiced. It didn’t say: ‘For the sake of your immortal soul, cut out the smoke.’ It said: ‘If you smoke, skiddoo—no job for you.’ And man, requiring food, raiment, and an occasional plug of tobacco, will listen to the voice of his job, when his soul seems to have difficulty in getting in a word between the puffs. Eventually the voice of the community became law.”179 The problem with this edifying narrative is that it lacked any empirical basis.

The Times’s report of the legislative process in Iowa in 1909 was especially skewed:

Last Winter business was heard in the Iowa Legislature. Somebody proposed a law prohibiting the manufacture, sale or use of cigarettes in Iowa. Nobody smiled. Such legislation had passed the joke stage. The wisdom of the few had dribbled down into mediocrity. Therefore a majority was easily counted in both houses. The Governor approved, and on July 1 the law became effective. Iowa had crushed out the cigarette, precisely as she had crushed out the legal sale of liquor—not because she listened to the

177See above ch. 4.
178Forty years later a scholarly publication repeated this erroneous claim that Indiana and Wisconsin in 1904 and 1905 had been “the first states to pass anti-cigarette legislation.” Eugene Porter, “The Cigarette in the United States,” Southwestern Social Science Quarterly 28(1):64-75 at 72 (June 1947).
Virtually every one of these empirical claims was wrong. In fact: Iowa had begun prohibiting the manufacture and sale of cigarettes in 1896; the only ban on use proposed in 1909 applied to minors, which Iowa was a late-comer in imposing; and it was the WCTU—and not employers—that had been and remained the driving force behind anti-cigarette legislation in the state. A few days later a Times editorial reinforced and compounded these errors, asserting, for example, that in Iowa’s and other midwestern states’ recently enacted bans on manufacturing or selling cigarettes “moral reasons and preachments did not weigh.” The paper then turned a bright light on its newsgathering competence by claiming that as a result of the customary refusal of employment in the Midwest to “persons bearing this badge of servitude to nicotine...the habit began to be universally discarded.”

At Times Vigorous Enforcement, Legislative Deadlock, and Litigational Success: 1910-1920

And to think that the cigarette output should have increased in one year by over one thousand eight hundred and fifty-six millions in spite of the increase of the stamp tax from 54¢ to $1.25 and in spite of the boycotting and outlawing of the cigarette by entire States and individual associations. The more the cigarette has been sinned against by legislators and individual fanatics the greater the hold it seems to have taken of the popular favor and the wider has its consumption spread amongst the masses.¹

Contrary to later non-empirical assertions by scholars and others that the Iowa anti-cigarette statute was a dead letter that was never enforced,² numerous campaigns in larger cities (including and especially in Des Moines) demonstrate that the prohibitory cigarette statutes were in fact at times and in places enforced. (Even an American Tobacco Company traveling agent in Iowa estimated in 1913 that about half of tobacco dealers in the United States living in prohibitory jurisdictions obeyed their state law.)³ Such concerted efforts at enforcement were, to be sure, often the result of non-governmental pressure reacting to officials’ failure to perform their statutorily mandated duties. Perhaps equally consequential was the Iowa attorney general’s successfully prosecuted litigation, in support of his aggressive raids on sellers, destroying, at last, the original package doctrine even as a frivolous legal tool for the cigarette industry. And, finally, throughout the second decade of the twentieth century, despite the much ballyhooed World War I-inspired acclaim for cigarettes, opponents of cigarette and smoking regulation failed to mobilize enough votes in the Iowa legislature for repeal in the face of widespread backing for the WCTU’s program. During these same years, however, it became clear that the anti-cigarette movement, its strength having peaked, was losing its capacity for pushing its prohibitionist agenda to new frontiers. The reason for this stagnation and ultimate reversal was not difficult to discern: during the 10 years from about 1906 to 1916—that is, from the point at which cigarette production had definitively surpassed the

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²More generally, one author asserted that anti-cigarette laws “were rarely enforced. Occasionally police departments would experience little spasms of virtue (or perhaps develop a thirst for payoff money) and make a few arrests....” Cassandra Tate, Cigarette Wars: The Triumph of “The Little White Slaver” 61 (1999).
³“Tobacco Agent Tells How Law Is Broken,” WR, Jan. 29, 1913 (5:4). To be sure, he claimed that the other half sold more prohibited cigarettes in a day than they otherwise would in a week. “And in all cases a higher price is demanded in sale.”
previous high point attained in 1896 before a massive slump set in, to the time directly before U.S. entry into World War I—cigarette production/consumption quintupled. The only realistic way, as the WCTU had been acutely aware, to put an end to cigarette smoking was to ban sales before what had initially been perceived as a fad was transformed into a lifelong addiction that pervaded more and more diverse age, regional, class, gender, ethnic, occupational, and income groupings. The explosive expansion of cigarette usage during the decade preceding the arrival of the multi-million-strong American Expeditionary Forces in Europe definitively signaled the popular breakthrough that shut the window of prohibitionist opportunity that would not begin to be re-opened (by science) for half a century.

More Than Merely “somewhat sporadic effort at law enforcement in a few of the larger cities of the state,” Especially in Des Moines: 1910-1916

A. MacEachron gave a talk on “How to Enforce the Cigarette Law.” He said that it is much easier to make such laws than to enforce them, for those who are to enforce them are often not interested in them, as are those who have had them placed upon the statute books.

Whatever...failure there has been in enforcement of this law, cannot be charged to the judiciary department of the State, for it has stood squarely and unafraid for the enforcement of these laws, and has sustained the law in all of the numerous attacks made upon it.

At a meeting of the Laymen’s Civic Union—a church-spawned organization advocating municipal government morality that had been founded just a few

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4See above ch. 1.


8Women’s Christian Temperance Union of Iowa, “Important Rulings of Supreme Court of Iowa in Cigarette Cases” (n.d. [ca. 1919]), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
weeks earlier—at the beginning of March 1910 the ubiquitous and multifarious prohibitionist John B. Hammond attacked Des Moines City Councilman and Superintendent of Public Safety John Hamery for failing to enforce the anti-cigarette laws (before moving on to his shortcomings in the matter of “arresting and prosecuting fallen women”): “If proper vigilance had been exercised...there would have been arrests and prosecutions for selling cigarettes. The anti-cigarette law is violated in Des Moines every minute of every hour of every day in the year, and Hamery knows it. I saw a boy perhaps 14 years old smoking a cigarette the other day and Hamery stood within four feet of him.”

To be sure, such misfeasance was scarcely statewide: in Burlington, for example, based on information, furnished by citizens, that the manager of the local establishment of United Cigar Stores—a creature of the Tobacco Trust—was selling cigarettes, the county attorney instructed the sheriff to raid the place. Finding cigarettes, the latter arrested the manager, who was to be tried three days later in the first local prosecution under the 1909 laws.

Hammond was by no means confined to the Laymen’s Civic Union as the sole vehicle for implementing his prohibitionist program. Less than two weeks after he had launched the aforementioned attack he was named by the prohibition state central committee as its representative on a state law enforcement and legislative committee formed by almost all of Iowa’s temperance organizations (including the WCTU) one of whose principles was enforcing the state’s moral laws. The new committee’s object was to secure enforcement of state laws relating to the sale of liquor, cigarettes, and tobacco as well as gambling and “social purity” by the officials “elected for that purpose through the application of the Cosson removal laws.”

By early June the anti-cigarette movement’s relentless pressure, once again, bore fruit: during the last week of May and the first week of June the agents of City Assessor James Parker succeeded in buying cigarettes at 30 different stores in Des Moines. The owners’ names were then handed over to the county auditor,
whose task it then was to collect from them the $75 quarterly mulct tax for the second quarter. (The dealers would not be prosecuted criminally because officials did not find the cigarettes through searches.) Among the violators appearing on the list of names published in the Register and Leader were two United Cigar and two C. C. Taft stores as well as two drug stores. The obverse side of this vigorous tax enforcement action, as a result of which sales fell "alarmingly" the night it became known that publication was impending, was that despite the "grand clearance sale, disposing of nearly three million cigarettes" on July 3, 1909, they had manifestly gone back on sale after almost a month when "sales were conducted on the quiet, dealers refusing to sell to anybody but their personal friends." Ironically, the reason for merchants’ bold return to open selling was "the common supposition" that they "would not be forced to pay the mulct tax as they were practically in the face of the law.”

Legal logic finally surfaced several days after Parker’s revelations when Polk County Attorney Thomas Guthrie announced that he would prosecute the more than 30 cigarette sellers as soon as the grand jury completed its current investigation. Anticipating that action, dealers, who had already been put "on their guard" by Parker’s investigation, disposed of their cigarette stocks, which they had kept for illegal sales, making it “impossible to buy a box of the ‘coffin nails’ in Des Moines.” To Guthrie it was a matter of indifference whether they

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13. Cigarette Sales Drop,” R&L, June 8, 1910 (12:3). Also in violation was the Rex Cigar Store, which had actually advertised their sale in the anti-cigarette Iowa Unionist, Oct. 1909 (2). In fact, whereas only $75 in cigarette mulct tax was collected for the first half of 1910, $2,625 was collected for the second half (which would have represented little more than one-half of 30 payments of $150). Financial Report of Polk County for 1910, at 64, 69, 86, 91 (n.d.).


15. See above ch. 13.

were still selling, because his evidence dated back more than a month, “‘when all of the dealers were selling cigarettes.’”

After 13 years, enforcers of the 1896, 1897, and 1909 anti-cigarette sales and mulct tax laws seemed, at last, to have caught up with sellers, who “were undecided...as to what course to pursue. The majority were in favor of paying the tax, but feared that by doing so they would admit the operation of illegitimate business.” While dealers struggled to wriggle out of the trap that their own illegal acts had laid for them, Attorney General Byers—at least as filtered through the press—both counterproductively confused the legal situation and undercut their prosecution by rendering an opinion on June 18 that declared that the mulct tax was “in full force, but expressed a doubt whether the payment of the tax would protect the dealer from criminal prosecution.” Why Byers would now backtrack, expressing any doubt whatsoever, whereas a year earlier he and Cosson had set forth the only interpretation to which the law was susceptible, is unclear, but in the meantime the Polk County treasurer had requested from Guthrie an opinion as to whether he was legally permitted to accept the dealers’ tax payments.

Towards the end of June the dealers—some of whom had once again resumed selling cigarettes—raised yet another bogus issue by insisting (despite supreme court precedent to the contrary) that it “is just as illegal to try to collect a tax for the sale of cigarettes as it is to collect a tax from the proprietress of a disorderly house.” The only way to go after them was by means of criminal prosecution and the Cosson law. Unsurprisingly, Guthrie did issue an opinion a few days later that the 30 tobacconists had to pay the mulct tax assessed by the county treasurer, but by mid-July none of them had paid the $75 assessment, although the tax had been certified on the county books almost a month earlier. Knowledge that failure to pay by August 1 would trigger a levy against the owners of the premises occupied by the dilatory dealers exerted additional pressure, which was further intensified by a clause in each lease prohibiting the use of the building for any illegal purpose so that the lessees’ failure to pay the tax was “practically an admission of guilt and grounds for terminating the

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18. “Dealers Doubtful as to Payment of Cigarette Levy,” DMN, June 19, 1910 (1:6). The possibility that the press had garbled this account is supported by the absence of any such opinion by Byers in the official collection of attorney general opinions.
19. “To Give Opinion on Pills,” R&L, June 27, 1910 (2:6). The trustworthiness of this article is put into question by its self-contradictory claims that: “many” Des Moines cigar dealers were selling cigarettes again; “many” refused to sell cigarettes; and cigarettes could still be bought at a “few” stores.
20. “‘Pill’ Peddlers Will Have to Pay Taxes,” DMN, June 30, 1910 (1:6).
lease...."21 The only concession that Guthrie made was his opinion that the county lacked the power to impose a 21 percent penalty on the dealers on top of the mulct tax.22

At this juncture the C. C. Taft Company embarked on what became a decade-long rearguard legal defense campaign to avoid paying the mulct tax. Fifty-four year-old president Charles Chester Taft, who had begun as a wholesale fruit dealer in Des Moines in 1893 and expanded the scope of his business to include the retailing of cigars and tobacco in 1898, owned numerous cigar stores in Des Moines under various names. By the time of his death in 1918, his front-page obituaries noted that his chain of retail cigar stores (now numbering 22)24 had grown “until an ambition to have a “cigar store on every downtown corner seemed near of attainment.”25 With more than a score of retail stores and stands selling tobacco in 191726 in addition to his entry into the amusement industry, his business interests were “among the most substantial in Des Moines,”27 enabling him to leave an estate valued at $750,00028 (the equivalent of almost $11 million in 2009).

Of the 32 cigarette sellers against whom City Assessor James Parker levied

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23 1910 Census of Population, T 624, Roll 419, Page 109 (HeritageQuest); R. R. Polk Co.’s Des Moines City Directory 992 (v. 18, 1909); Iowa: Its History and Its Foremost Citizens 3: 818-19 (1915) (14 stores). Taft had other economic interests: he was president of the Iowa Amusement Co. and director of the Century Savings Bank. Id. The company paid the “very best compensation” to its wage earners, who in turn held the management in “the highest terms” according to a union weekly, which included Taft in its “honored roll” (of advertisers). “The C. C. Taft Co.,” IU, Oct. 8, 1909 (12:2). Taft’s daughter Jessie, whose 1913 doctoral dissertation at the University of Chicago dealt with the women’s movement, was director of the University of Pennsylvania School of Social Work from 1934 to 1950. Notable American Women: The Modern Period 673-75 (Barbara Sicherman and Carol Green eds. 1980). Ironically, her biography, written by her lifelong companion, described her father as having been in the wholesale fruit business without mentioning his leading role either as a purveyor of cigarettes in the state’s leading market or as a violator of and litigator against state law suppressing their sale. Virginia Robinson, Jessie Taft: Therapist and Social Work Educator, A Professional Biography 23 (1962).
24 C. C. Taft Dieses of Pneumonia at His Home,” DMC, Mar. 22, 1918 (1:5).
28 Taft Will Is Found Friday,” DMIN, Mar. 29, 1918 (1:3).
the mulct tax all but five (including Taft) paid. Taft’s lawyer filed a petition with Polk County Board of Supervisors for a refund, arguing that the tax was “void and not binding” and the underlying statute “not operative.” After hearing from Guthrie that the tax was valid, on August 29 the Board voted the petition down, and Taft’s lawyer intimated that the case would be appealed to the district court. A week later Taft filed an appeal in district court claiming judgment against Polk County for $375 in mulct tax that it paid in 1908, 1909, and 1910. In arguments that had been repeatedly dismissed by the courts and should have been recognized as frivolous ab ovo, the company contended that the tax assessment was “a direct violation of the free and untrammeled trade between states” and that Taft was a wholesaler and a jobber that sold cigarettes only in original packages.

Assessor Parker sustained the pressure. By mid-September he had completed his appointed rounds yet again of the city’s cigar and drug stores with a view to levying the mulct tax for the third quarter; this time he discovered that 23 of them (including all the drug stores) had stopped selling cigarettes. He levied the tax against nine cigar stores (including two of the United Cigar chain) pending the hearing of their petitions for refunds with the Polk County Board of Supervisors. Yet by early 1911 the Des Moines press reported that 90 percent of the city’s cigar stores were “selling cigarettes in open violation of the law.” Not that this non-compliance had been rampant ever since the legislature had enacted the new laws in 1909; in fact, “[t]hereafter ‘it was almost impossible to buy them. Only the men who were ‘on the inside’ could purchase ‘pills.’” As time went on and no prosecutions followed, the dealers became bolder, and now

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29. “Guthrie Declares Tax Will Stand,” *R&L*, Aug. 30, 1910 (1:2). See also “Tax Is Assessed,” *DMN*, Aug. 30, 1910 (2:1). Three drug companies requested that the tax be remitted on the grounds that they were not in the business of selling cigarettes. The hearing of their appeal was continued until Sept. 12 because their lawyer was not in Des Moines and Guthrie requested more time to prepare his resistance. “Guthrie Declares Tax Will Stand,” *R&L*, Aug. 30, 1910 (1:2); “Postpone Hearing,” *DMN*, Sept. 12, 1910 (1:8). On that date the hearing was rescheduled for Sept. 26, but the press appeared not to have reported on that meeting. “Polk County Tax Levy Is Increased,” *R&L*, Sept. 13, 1910 (1:4). The number of businesses mentioned added up to only 31.


31. “Coffin Nails Are Rare Article Now,” *DMN*, Sept. 14, 1910 (8:7); “Parker After Dealers,” *R&L*, Sept. 15, 1910 (5:2). According to another account, the procedure involved the assessor’s certifying the dealers’ names to the county attorney, the filing of the names with the county auditor and the county treasurer, who then assessed the tax against the dealers on the county books. “After the Cigar Men,” *WT-T*, Sept. 16, 1910 (12:4).
anyone can buy cigarettes openly. ...”

To the WCTU’s request that the anti-cigarette law be enforced Public Security Superintendent and Councilman Zell Roe announced that cigarettes were “not being offered for sale in the city of Des Moines.” This conclusion exonerating dealers was based on the unanimous reports of officers assigned to determine whether retailers were “trafficking in the ‘finger stainers.’” The only assurance that Roe furnished the WCTU was the police department’s willingness to cooperate with state authorities in enforcing the state law, even in the absence of a city ordinance prohibiting the sale of cigarettes—if violations were “pointed out.”

Roe’s lame promise prompted the members of “that sedate body in chorus” to chime, “Oh, piffle!” More graphically, Mrs. Joshua Jester (the 48-year-old wife of a 65-year-old real estate business owner), president of the federated WCTU clubs of Des Moines, more than skeptically responded: “Anyone with eyes knows that cigarettes are being sold in the city and the instinct of smell in the blind would tell them as much.” The WCTU’s suggestion that “Roe should...prosecute every dealer apprehended selling pills” found resonance in interesting quarters. The Iowa Unionist, Des Moines labor unions’ weekly organ—which denounced cigarettes but not other forms of tobacco—made light of Roe’s policemen’s inability to find any sellers: “One cannot step out upon the street without bumping into men and boys puffing away at the ‘coffin nails.’ These illegal ‘sticks’ are sold in Des Moines.” At least the boys could be compelled to divulge their sources, and in any event it was “not the province of the people to play the part of detective to secure the enforcement” of the anti-cigarette law. On the contrary, the 1909 Cosson law made it peace officers’ duty to “secure the evidence and to institute proceedings against offenders.” If Roe failed to perform his duty, the public would consider him “derelict in his duty....”

Within a few months the WCTU succeeded in pushing local authorities in Des Moines to go “on the warpath....” On May 3, City Assessor Parker bought cigarettes from and then certified to the county auditor the names of 14 cigarette dealers (including four C. C. Taft stores) for the $75 fine levied against violators of the anti-cigarette law. The result, according to the Republican Des Moines Evening Tribune, was that “a fine tooth comb would not have revealed a pill in any of the establishments that have been selling them in open violation of the law.” The WCTU’s “crusade against the dream producers” turned out to be

“[t]he secret of the sudden disappearance of the pill from off the shelves....” The campaign, however, had, as already noted, not proved easy. After being rebuffed by the public safety commissioner, who claimed that cigarettes were not being sold in Des Moines, the WCTU approached County Attorney Guthrie, who had been considering proceeding against cigarette dealers: “[I]t needed only the touch of the finger of the temperance people to throw the scales against the pill dispensers.” The local legal authorities then visited the city’s cigar stores, warning the owners to cease violating the cigarette law and giving them one day to dispose of their stocks. Guthrie deemed it better to warn the dealers to stop selling and proceed against them in case they committed further violations than to prosecute them because no evidence of sales had been put in his hands and the process of prosecuting under the new injunction law was slow. In the event, the dealers, attentive to the notice, moved the last cigarettes out of their stores by midnight.36 The WCTU viewed dealers’ having “voluntarily” cleared their shelves of cigarettes as a kind of ploy designed to foil the organization’s plan to stop sales altogether. Mrs. Jester declared: “‘No, we will not give up our fight.... We intend to continue to gather evidence against the dealers and see that the state law is enforced. Action of the dealers in stopping the sale temporarily will not affect our work.’ We expect to stamp out this unlawful business forever in Des Moines at least.” Although she declined to divulge the details of the WCTU’s battle plans, she intimated that the group intended eventually to submit its evidence to the grand jury.

Four months later, Des Moines Police Chief George Yeager warned dealers that the sale of cigarettes would no longer be tolerated: “‘I am going to stop the selling of “coffin” nails altogether.’” His resolve stemmed from his having “looked into the statutes pretty thoroughly’” and “‘failed to find where tobacco dealers are permitted to sell cigarettes...although they may pay a tax.’”38 His reading of the law may have been impeccable, but this law enforcement official’s apparent need to reinvent the legal wheel that the legislature and Attorney General Byers had, in the vortex of intense and widespread public debate, fashioned less than two years earlier39 was nothing short of astonishing and scandalous (though perhaps no less mysterious than why the statutory wheel of 1896-97 itself had had to be reinvented in 1909 or why a policeman rather than a learned-in-the-law prosecutor had re-discovered the obvious). Several

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38a. “Must Stop Traffic in Cigarettes,” Evening Tribune (Des Moines), Sept. 16, 1911 (1:3).
39a. See above ch. 13.
“ineffectual attempts” had been undertaken during the previous few months to rid the city of cigarettes, but, the Evening Tribune reported, the dealers were “not to be frightened. They hide their supply until after the ‘storm,’ and then begin operations anew.”\textsuperscript{40} That 21 places in Des Moines were reportedly paying the $300 mulct tax underscored not only the laxity in enforcement of the underlying sales prohibition, but also the large volume of cigarettes that they must have been selling in order to be able to afford the payments.\textsuperscript{41} Such facts prompted the WCTU to announce that it would “conduct a relentless campaign to drive cigarettes out of Des Moines”; to this end it retained a lawyer to insure that dealers be fined.\textsuperscript{42}

The fine imposed by the underlying 1896 Phelps cigarette sales prohibition law could constitute a significant deterrent: ranged between $25 to $50 for the first offense and $100 to $500 for additional offenses; more compelling, however, was the alternative for second offenders (such as Taft and United Cigars) of up to six months’ imprisonment in county jail.\textsuperscript{43} In some Iowa cities prosecutions had pursued this more coercive course. Press reporting of hints that the ban on cigarette sales was being openly violated in cities other than Des Moines\textsuperscript{44} was confirmed by an enforcement action in another major Iowa city in 1911. In Sioux City, the state’s second largest, in January tobacco stores and news stands (except one whose owner said that he would stop as soon as his stock was gone) stopped selling cigarettes after Councilman R.S. Whitley had warned tobacco dealers that search warrants had been issued and would be executed if sales did not cease immediately. The “cause of the edict,” as was true almost everywhere in Iowa, was “[a]gitation started some time ago by the W.C.T.U.,” which had sent around “spotters” to uncover unlawful sales.\textsuperscript{45} Recidivism, however, set in again: several months after three dealers had been fined $25 in January, anti-cigarette activists, led by the Holiness League, began collecting evidence against dealers they had
warned earlier; for three months spotters were sent to the stores, acquiring cigarettes without difficulty. By the first week of August the press revealed that the WCTU would prosecute sellers, beginning with 12 dealers the following week in justice court. In addition, women campaigners in the Holiness league also asked the city assessor to assess each of these dealers $300. Their double-edged strategy was calculated to generate additional evidence if the sellers admitted the charges and “took out the license,” while the militants could proceed with their cases even if the retailers refused to pay the tax. A week later, Mrs. Sarah Doebler of the WCTU filed 11 original informations against sellers (including four cigar stores, three pool halls, two hotels, and a candy store). Several days later a justice of the peace fined nine of them $25 plus costs—an outcome that the panoptically vigilant United States Tobacco Journal also duly recorded.

In Waterloo, too, sheriff’s officers secured compliance with the sales prohibition in 1911 by arresting a Mexican, Julian Alba, after having searched his basement Mexican chili restaurant where they found 60 books of cigarette papers. That very afternoon the justice of police fined him the maximum $50

46. “Crusade Against Sale of Cigaretts,” WEC, Aug. 5, 1911 (12:4). It was also reported that the “ban on ‘coffin nails’ was tacked down [so] tight by the Sioux W.C.T.U. that “cigarette smokers have begun to patronize the mail order houses.” “Iowa News,” Altoona Herald, Feb. 2, 1911 (3:5).

47. “After Cigarette Sellers,” SCJ, Aug. 5, 1911 (9:3).


49. “Cigaret Sales Charged,” SCJ, Aug. 12, 1911 (7:4). Doebler, who was 54 in 1911, was married to Martin Doebler, who was not returned at the 1910 population census, but in 1900 and 1920 listed farmer and carpenter contractor, respectively, as his occupation.

50. “Nine Cigar Men Are Fined,” SCJ, Aug. 17, 1911 (5:1). Costs for eight of them were $3, but in the test case they amounted to $19.50, because the expenses of G. F. Towner, one of the WCTU’s spotters, who had traveled from another city to secure evidence, were included. Although the dealers’ lawyer, Sam Page, had earlier intimated that the cases would be appealed to the Iowa Supreme Court if the ruling was not satisfactory, once it was handed down he was undecided. Id.


52. “Mexican Sold Cigarette Papers,” WEC, Nov. 20, 1911 (8:5). On the arrest of three Greeks for selling cigarette papers, see “Which Law Did They Violate,” CRDR, Jan. 24, 1911 (7:1-2); on an arrest following a search and seizure of 41 packages of cigarettes by the Marshalltown chief of police, see “Cigarettes Are Seized,” CREG, Nov. 9, 1911 (12:4), and “Cigaret Case Dismissed,” MT-R, Nov. 9, 1911 (8:4) (mayor dismissed case without prejudice because there was no chance of a trial soon to establish ownership, but mayor
“or its equivalent of 15 days in jail,” which latter punishment Alba chose. The conviction obligated the county attorney to assess the $300 mulct tax against the premises where the papers were kept.  

53 (A year later the Black Hawk County Board of Supervisors voted to cancel and remit three-fourths of the tax against the landlord because Alba had not sold any cigarettes or papers since his conviction.) 

54 Perhaps displaying a special preference for non-Anglo-Saxons, a year later the sheriff confiscated cigarettes at a Greek pool hall, whose owners pleaded guilty and paid a $25 fine.

55 In Cedar Rapids, too, local government enforced the sales ban. In 1914 the city attorney “gave out a gentle hint to the tobacconists...that the cigarette was ‘tabooed’ by the state laws.... It did not take the dealers long to understand...and as a result, each and every one of them made disposition of them of their stock on hand, and now their reply to inquiries for cigarettes is ‘we don’t handle them.’”

At least one major innovative non-governmental initiative to prohibit smoking unfolded in 1913 in Cedar Falls, a town of 5,000, in which Iowa State Teachers College was located. Predicting that it would be precedent-setting for “future crusaders,” the press called it a “unique campaign,” which, if successful, would mean that smokers would “have to indulge in the habit in the utmost seclusion.” Mrs. J. M. Fisk, a prominent WCTU member and church worker, induced more than 150 women from among the city’s “best families” to sign a widely circulated

intimated case might be recommenced); on an arraignment of a restaurant owner for selling cigarettes in the very small town of Dunkerton near Waterloo, see “Hearing Postponed,” WEC, Nov. 1, 1916 (5:5); on the arrest of both owners of a confectionery store near the Iowa State College campus in Ames following seizure of 37 cartons of cigarettes, see “Ames Fights Cigarettes,” WT-T, Jan. 9, 1917 (3:7-8).

55a City in Brief,” WEC, Nov. 21, 1911 (11:3). The legal source of authority for the jail time equivalent for a first offense is unclear. For the imposition of a $25 fine for selling in Mason City, see “Bootlegger Arrested,” WT-T, Mar. 2, 1913 (9:7).


“instrument” that came out “pointblank” requesting “the smokers to quit smoking in public, the reason advanced for the demand being that the power of example is the sole thing that causes the boy to take up the cigarette habit.” The circular was headed by quotations from Judge Ben Lindsey and Professor Michael Vincent O’Shea. Lindsey, a nationally famous juvenile court judge in Denver, pithily opined that the cigarette habit was “one of the leading factors in the criminality of a large per cent of the young boys in the reformatory institutions of the nation....”58 From O’Shea, a well-known professor at the University of Wisconsin who specialized in psychology, education, and the child, and would soon add jazz, movies, automobiles, and non-gymnastic dance to the innovations that retarded students’ intellectual development,59 Fisk quoted the assertion that a boy learned to use tobacco “simply because it is forced upon him through suggestion.” Once he started, “[e]verything in him rebels” because “[i]t makes him feel that he is mature, so that he tends to become indocile” toward school and home. In order to nip such rebellious tendencies in the bud, O’Shea insisted that “[o]ne cannot overstate the necessity of society controlling these suggestions....” Against the background of this “expert testimony” concerning the urgent need to impose counter-social controls to prevent the further proliferation of the myriad forms of disobedience and indiscipline promoted by smoking, Fisk’s women, desiring to “conserve the boyhood of Cedar Falls for the best and highest manhood,” asked that “the men who must smoke, refrain from doing so on the street or in other public places.”60

Despite its transparent ruling-class ideological linkages, the campaign was guided by the same social-psychological insight that motivated the late-twentieth and early-twenty-first-century tobacco control movement—to de-emphasize the one-dimensional focus on children and their access to tobacco in favor of the framework of a smoke-free society designed to disrupt the demonstration effects of adult smoking on children.61 And although Fisk boldly extended the scope of the campaign to include non-cigarette smoking—a much more widespread...
phenomenon than cigarette smoking at the time—the fact that she did not dare even suggest that fathers and other adult men not smoke in the ur-matrix of generational demonstration effects, the home, should not detract from this otherwise astonishingly forward-looking proposal. After all, the proportion of adult males who used tobacco in the early twentieth century far exceeded that of their counterparts a century later on university campuses, none of which have so far requested such voluntary abstention, though a very few have established an outdoor ban.

Perhaps as the price it extracted for accommodating the sponsors’ request that the instrument be published, the Cedar Falls Record could not refrain from mocking the initiative by wondering whether the town’s smokers would comply “or come back with a counter request that the women appear on the streets with their faces free from artificial beautifiers and clad in other garments then [sic] hobble skirt, the slit skirt, and late kindred creations....” Two weeks later the paper reported that although the campaign had not yet materially reduced the number of public smokers, it had “started an endless discussion of the smoking habit, and...focused attention on Cedar Falls as the ‘town where it’s risky to smoke on the streets’....” The publicity prompted some cigar and tobacco manufacturers to ask local dealers about the impact, but allegedly most replied that trade had increased. In a quasi-self-fulfilling prophecy, “[s]ome smokers,” who wilfully failed to understand the purpose of the WCTU’s request, irrationally offered to “meet the women halfway. They say they’ll quit smoking in public if the fair ones will give up some equally prevalent habit.” (Nevertheless, during this time the state anti-cigarette law continued to be enforced in Cedar Falls: for example, a restaurant owner was convicted of giving away cigarette papers.)

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62 The local daily newspaper inadvertently underscored this point when it included in a series of banal front-page cartoons during the run-up to Christmas one in which two young sons, in order to butter up their father in the hopes of getting better presents, bring him his smoking paraphernalia (“Pa here’s your smoking jacket, pipe and terbaccer”) to the delight of their mother looking on. “Tactful Season Is Here,” CF(D)R, Dec. 11, 1913 (1:3-5). On the twenty-first century tobacco control movement’s cutting-edge view of the “ethically complex” question of “parental smoking in private domains,” see Jill Jarvie and Ruth Malone, “Children’s Secondhand Smoke Exposure in Private Homes and Cars: An Ethical Analysis,” AJPH 98(12):2140-45 at 2144 (Dec. 2008).

63 In 2008 the Iowa legislature became the first to ban smoking on all college and university campuses. See below ch. 35.

64a “Would Have All Smoking on the Street Stopped,” CFR, Nov. 20, 1913 (5:4-5).


66a “Fined for Giving Cigarette Papers,” CFDR, Dec. 23, 1913 (4:5) ($25 fine
Statewide the press commented on the campaign. One paper opined that in seeking to "‘suppress the smoke nuisance...the good women of Cedar Falls have raised a great public question. The years were when it was a breach of good manners for a man to appear in public with a pipe in his mouth and even a cigar was in more or less disfavor. ... The experiment...will be watched with considerable interest and it is hoped that they will win.’”

An editorial in the *Waterloo Courier* shed important light on the extent to which, 17 years after the legislature had first prohibited the sale of cigarettes, Iowans had developed a social prejudice against smoking:

The crusade against smoking on the streets in Cedar Falls is interesting as bringing out radical provincial differences regarding the small habits. The state of Iowa is anti-cigarette to the extent that the sale of the “pill” is forbidden by law. To be seen smoking one on the street is only one degree removed from damnation.

In the east nearly everybody of masculine persuasion smokes. Indeed the practice is in such general good repute that some growing youths fail to see anything attractive in it and leave it alone. ... We fear that some of the Iowa people who are trying to interfere with the personal habits of others would be on the program for a fainting fit if they should happen to run across the familiar sight in the east of a professor smoking with his students within the walls of learning of a great university.

In the event, the local WCTU regarded its own request as “as mild in comparison” with the distribution by the St. Louis Central WCTU of thousands of cards all over that city with various inscriptions including this rhetorical riposte to second-hand smoke exposure: “‘Smokers Should Consume Their Own Smoke.’”

By the beginning of 1914, perhaps as a parting shot at the WCTU’s now failed public smoking crusade, the *Cedar Falls Record*’s large front-page cartoon showed a well-dressed man self-satisfiedly walking outside with a halo attached to the back of his hat. Another man, who is smoking a cigar, offers him a cigar (or perhaps a cigarette), which he twice demonstratively refuses with hand...
signals. In the final frame, as he slips on the ice, his legs are pointing skyward, and his hat and halo fall off, a bubble over his head filled with expletive-deleted typographical symbols suggests that non-smokers (or perhaps smokers who have agreed not to smoke in public) are sanctimonious hypocrites.\textsuperscript{70} A few days later the same paper smugly reported that the local WCTU, “[u]ndismayed by the apparent failure of their appeal to the adult smokers of Cedar Falls to refrain from use of ‘the weed’ on the streets and other public places,” had begun “another movement against the smoking habit—this time with more chance of success.” Aimed especially at boys, the campaign sought to make available to local physicians a prescription it had obtained from Dr. D. H. Kress in Chicago,\textsuperscript{71} who, under the auspices of the Anti-Cigarette League, operated a clinic in which he allegedly successfully induced aversion to tobacco by swabbing smokers’ throats with silver nitrate.\textsuperscript{72}

(The apparent failure in Cedar Falls did not put an end to this type of initiative. At the 1919 WCTU annual convention Natalie Gordon, the superintendent of the Anti-Narcotics department, reported that in four places “the best citizens have petitioned to have smoking prohibited in markets and where food is sold....” However, in the absence of a pre-existing state law or city ordinance, little was accomplished.)\textsuperscript{73}

In spite of the WCTU’s optimism, the struggle against cigarette sales, even to minors, continued unabated. At the end of September 1915, its anti-narcotics department informed the group at its annual convention in Iowa City that:

\begin{quote}
Iowa has most splendid laws relative to the sale and use of tobacco, and particularly cigarettes. In very few places, however, is there any enforcement of the law whatever.

... Des Moines Federation W.C.T.U. are engaged in a fight against the illegal sale of cigarette papers and cigarettes to minors. They have four detectives [sic] and two minors to ferret out the guilty parties; they already have evidence against fifty-two dealers; there are twenty places that are not holding a license for sale of cigarettes, all of whom will be punished to the full extent of the law.
\end{quote}

\begin{flushright}
\textsuperscript{70}“Story Without Words,” \textit{CFR}, Jan. 3, 1914 (1:3-5).
\textsuperscript{72}“Quit Cigaretts? Here’s Way!” \textit{CT}, Aug. 3, 1913 (3).
\textsuperscript{73}Woman’s Christian Temperance Union of Iowa, \textit{Forty-Sixth Annual Convention 127 (1919)}.
\textsuperscript{74}Woman’s Christian Temperance Union of Iowa, \textit{Forty-Second Annual Convention 23, 139 (1915)}.
\end{flushright}
The summer of 1915 also witnessed a remarkable public discussion of the interconnection between the prohibitory law and the mulct tax law, which resulted (perhaps uniquely) in Marshall County’s refusal to accept the $75 quarterly cigarette mulct tax from local dealers. The textual and policy relationships between sections 5006 and 5007 of the Iowa Code were free of ambiguity from the day the latter was had been enacted in 1897, but 18 years later they were still being contested. That in Marshalltown, the state’s 13th largest city, at least four dealers (including Charles P. Cook, who had been the Tobacco Trust’s straw man plaintiff in its frivolous challenge to the mulct tax lasting from 1898 to 1905) were selling cigarettes in 1915 “in open violation of the state law and that the county stands in the apparent light of licensing a misdemeanor” were developments that according to the Marshalltown Times-Republican had not come to light before the newspaper learned that they were paying the mulct tax for selling cigarettes. Although the newspaper made it clear that the fact that all four had paid the mulct tax for the third quarter did not bar prosecution, such a dealer “figures that he is...getting protection,” and the Times-Republican, revealing its own failure to understand the logic of the interconnected sanctions, could not help agreeing that “it would seem inconsistent, to say the least, for a county to accept a tax for the sale of cigarettes and then turn around and prosecute for those sales.” The county attorney was aware of what the dealers were doing, but emphatically denied that the county board of supervisors had promised them immunity in exchange for paying the tax, which, he correctly pointed out, was a “mismomer” for what was really a “penalty.” Nevertheless, he was constrained to admit that there was a “‘tacit understanding’...much as Des Moines and all other cities were permitting the sale of cigarettes on the payment of the $300 per year penalty.” The county auditor, who stated that the sellers in tendering the payment had explained that “‘they wanted to be on the safe side,’” insisted that he had no alternative to accepting the money, but denied that the board of supervisors had advised him to accept the tax payment in lieu of prosecuting the dealers. However, journalistic research discovered in the county auditor’s books that a payment by Fred Gates, one of the four, in March of $150

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75 A few months later the attorney general’s office issued instructions to local officials in all wet counties to refuse any liquor mulct tax payments for the first quarter of 1916 that saloon keepers were planning to tender in an effort to test the repeal of that tax, which, unlike the cigarette mulct tax, did authorize serving of alcohol if the locality approved, but repeal of which was designed to shut down the industry. “Cosson Too Busy to Take Up Odle’s Blue Law Crusade,” Des Moines Register and Leader, Dec. 11, 1915 (1:3).

76 “Growth of Cities Shown by Census,” R&L, Nov. 5, 1915 (14:1).

77 See above ch. 12.
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

was accompanied by the notation “‘in settlement of case against him.” Moreover, a stipulation linked to the settlement between the board of supervisors and the seller on file in the same office punctured the county government’s denials: “‘several causes of action now pending against the defendant, in which he is charged with the misdemeanor in the sale of cigarets, are compromised on the following terms: Said actions for misdemeanor are dismissed...and no claim shall be made for mulct tax for any year preceding Jan. 1, 1915.’” In exchange, the defendant agreed to pay the county treasurer $150 as one-half the mulct tax for 1915. Finally, the signatory chairman of the board of supervisors and county attorney furnished themselves with legal cover by including in the stipulation that it “‘shall not be construed as an agreement that the defendant may continue the sale of cigarets, and no presumption shall arise by payment of this tax that he shall be required to pay [the] full tax of 1915, should there by [sic] no further violation of the law by him in the sale of cigarets.’” Interestingly, Marshalltown city solicitor Frank Northup, who doubled as Gates’s lawyer—and in 1904-1905 as county attorney had represented Marshall County before the U.S. Supreme Court in the case against Cook aka the Tobacco Trust—sought to cite precedent to the press in the form of other cities’ extra-legal practices: although the law did not “‘contemplate immunity from prosecution by payment of the tax’” and selling cigarettes was illegal regardless of whether dealers paid the mulct tax or not, payment was nevertheless “‘treated as immunity by many cities, including Des Moines, Cedar Rapids, Dubuque, and other Iowa cities.’”

In the wake of the newspaper’s disclosures, the Marshall County board of supervisors “decided that the county would not [sic] longer stand in the light of being a party to the arrangement.” Consequently, as of October 1, 1915, the beginning of the fourth quarter when the mulct tax was again payable, the board of supervisors had instructed the county auditor not to accept the penalty/tax and “[w]hatever protection” cigarette sellers “thought they [had] built up around themselves” by paying was eliminated. Because no other dealers came forward after the first tender of payment was refused that day, the press presumed that that one attempt had been a test to determine whether the “understanding,” as the county attorney had put it, between the county and the dealers that “payments of the mulct tax were accepted in lieu of arresting and fining the dealers regularly”

78.“Now Easy for Boys to Obtain Cigarets,” MT-R, July 17, 1915 (7:2-3).
80.“Now Easy for Boys to Obtain Cigarets,” MT-R, July 17, 1915 (7:2-3). Anticigarette sentiment in Marshalltown may have been signaled by the first listing in the “Help Wanted” column adjacent to this article: “Three first class painters: no cigarette smokers need apply.” MT-R, July 17, 1915 (7:4).
was still in effect.\textsuperscript{81}

On November 4, 1915, a little more than a month after the WCTU convention, Des Moines, once again, became the statewide focus of enforcement. That cigarette selling was once again proliferating in the capital was indicated by the doubling of the total annual cigarette mulct tax collected from $4,500 in 1911 to $9,000 in 1915 (its all-time peak).\textsuperscript{82} On that date, Miles S. Odle, attorney for—but not acting under the auspices of—the Anti-Saloon League,\textsuperscript{83} who had been prosecuting violations of the liquor laws for years and was perhaps best known for his “sensational raid of whisky drug stores in September 1915,”\textsuperscript{84} secured the services of a deputy sheriff and began enforcing the anti-cigarette law by raiding four tobacco dealers (including C.C. Taft) and removing hundreds of packages of cigarettes as evidence.\textsuperscript{85} (The first store raided immediately telephoned scores of cigar dealers warning them to “‘ditch the pills.’”)\textsuperscript{86} Denying reports that he had told his salesmen not to hide their stocks, Taft claimed that “he had said nothing” to them “about not hiding their stocks of cigarettes while the morning raids were occurring.” Implausibly for one who was only halfway through decade-long frivolous litigational maneuvering, Taft insisted that if his stores were raided, “there would be no attempt made to overturn the Odle campaign.”\textsuperscript{87} The reason that he adduced for this resignation the Iowa attorney general was remiss in not quoting back at him during the height of their litigation beginning in 1917:

\textsuperscript{81}"County Turns Down Cigaret Tax Money," \textit{MT-R}, Oct. 1, 1915 (8:2). These legal developments in Marshalltown were also reported elsewhere in Iowa. E.g., “Cigarette Tax Refused,” \textit{Altoona Herald}, Oct. 7, 1915 (6:6).

\textsuperscript{82}See above ch. 12.

\textsuperscript{83}The 31-year-old Odle was returned at the 1910 population census as living in Des Moines as an attorney for the Anti-Saloon League. Between 1909 and 1917 Odle litigated about 40 liquor-related cases to the Iowa Supreme Court. He does not appear to have appeared in the 1920 census. Because he regarded then-Attorney General Cosson and Reverend J. L. Hillman, a member of the board of directors of the Anti-Saloon League, as “purely time-servers, favoring law enforcement only where they felt it could not hurt themselves” and discriminating “in favor of Des Moines law violators,” Odle “refused to renew his contract as attorney for the league” and declined to serve after being reelected. “Bi-Partisan Hypocrisy!” \textit{IH} 61(39):1-2, 4-5, 24-25 at 24 (Sept. 28, 1916).

\textsuperscript{84}“Bi-Partisan Hypocrisy!” \textit{IH} 61(39):1-2, 4-5, 24-25 at 4 (Sept. 28, 1916).

\textsuperscript{85}Odle Raids Tobacconists for Cigaretts,” \textit{Evening Tribune} (Des Moines), Nov. 4, 1915 (1:1, 13:2-3).

\textsuperscript{86}“War on Cigaretts at Capital City,” \textit{WEC},” Nov. 5, 1915 (2:3-5 at 4).

\textsuperscript{87}“More Stores May Be Raided,” \textit{R&L}, Nov. 5, 1915 (3:3).
“As I understand it there is nothing we can do, Mr Taft said. “The law is perfectly plain, and we appear to be victims of it, just as the druggists were in the soft drink crusade, with nothing to do but take our medicine.”

Not “representing anybody but myself” in what was purportedly “the first enforcement of the cigarette law in years” in Des Moines, Odle had sworn out warrants and then gone to Des Moines police headquarters; after a captain had refused on the grounds of lack of available police to serve the warrants and referred him to Police Chief Crawford, Odle and the chief got into a loud argument that the press was easily able to hear through a closed door; soon Odle left “in a white anger” in pursuit of someone to serve his warrants. Crawford, who had bluntly expressed his disapproval of the Anti-Saloon League’s methods, confided to the press after Odle’s hurried departure that the police department did “not propose to be made the tool for pusillanimous prosecution for revenue only.” Why then the police did not enforce the prohibitory law he did not explain, but Crawford insisted to the reporters that he had told Odle that the police were “anxious to” help and had helped stop the sale of intoxicating liquor, in part because “You can enforce the law successfully when you have public sentiment behind you.” But the police had their hands full suppressing saloons and liquor, while Odle did not have “the sentiment of the people” behind him in his prosecutions of druggists. Unfazed by this criticism, Odle declared that “there is no question but that the cigarette evil should be wiped out in Des Moines.”

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89 Odle Raids Tobacconists for Cigarets,” Evening Tribune (Des Moines), Nov. 4, 1915 (1:1, 13:2-3). “Cigarette selling has gone on under the eyes of city and state officials unmolested for four years. In the winter of 1911-12, a feeble effort was made to stop the traffic, but it was a failure.” “Odle Active in Cleaning City,” WT-T, Nov. 6, 1915 (2:3).
90 Odle Raids Tobacconists for Cigarets,” Evening Tribune (Des Moines), Nov. 4, 1915 (1:1, 13:2-3). The newspaper misunderstood the statutory basis of the prosecution, asserting that the prohibitory law and mulct tax law were “not relating in any way” to each other. Although Odle had received fees in connection with his prosecution of some liquor cases, he voluntarily waived $800 in fees in connection with his famous malt liquor raids. “Bi-Partisan Hypocrisy!” IH 61(39):1-2, 4-5, 24-25 at 5, 24 (Sept. 28, 1916). See also “Ten Fined for Sale of ‘Near Beer,’” DMC, Oct. 29, 1915 (1:1). The liquor mulct tax law required courts to allow 10 percent of the fine collected to the attorney prosecuting equity actions against those charged with keeping a nuisance. Code of Iowa Annotated § 2429 at 856 (1897).
91 “More Stores May Be Raided,” R&L, Nov. 5, 1915 (3:3). The day after the raids the Iowa Congress of Mothers and Parent-Teachers Association came out in favor of
Within two weeks, however, the *Evening Tribune* reported in a front-page headline: “Last Puff Is Taken Today at Cigarets.” On November 19, Polk County Attorney George Wilson\(^{92}\) sent a deputy sheriff and a police officer to almost every downtown Des Moines store that had been paying the $300 license and selling cigarettes in violation of state law to serve notice that they would be prosecuted if caught selling in the future. Although one lawyer advised several dealer-clients that selling sealed packages as they were received from the factory—as opposed to a single box—was not unlawful, all dealers interviewed by the *Evening Tribune* “said they contemplated cleaning out their stocks of contraband, and of operating on a strictly law-abiding basis from today forward.” Because unbroken packages generally could be returned, it was “expected that the express offices this afternoon and tomorrow will be flooded with packages addressed to the various cigaret factories in the east.” In contrast, broken packages, unless they could be sold to other dealers, would probably have to be destroyed. Police Chief Crawford did agree to “‘cooperate with authorities to enforce the law if...asked to,’” but nevertheless also stressed, in response to a question as to whether police patrols would watch suspected cigarette sellers, that selling cigarettes and operating dice games or candy raffles in stores “were on a different plane” because the latter was prohibited by city ordinances, whereas the former was subject to state law.\(^{93}\) Chastened by his experiences with the city authorities, Odle announced that: “‘I am going to send out investigators and ascertain whether or not the sale of coffin nails and papers has been stopped in Des Moines.... If I learn of any law violations, I will begin prosecutions immediately. Either cigarettes will get out of Des Moines or I will.’”\(^{94}\) (A front-page headline eight months later read: “Attorney Odle to Quit Des Moines.”)\(^{95}\)

Whatever the form or substance of these conflicts, the press soon observed that “practically all the business men of the city are opposed to the fight that is being made for the enforcement” of the cigarette sales ban:

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\(^{93}\)“Last Puff Is Taken Today at Cigaretts,” *Evening Tribune* (Des Moines), Nov. 19, 1915 (1:1, 10:5-6).


\(^{95}\)“Attorney Odle to Quit Des Moines,” *DMN*, July 27, 1916 (1:1).
They take the position that the sale of cigarettes in the cigar stores is no worse than the surreptitious sale would be if the stores were compelled to close out. Anyway they feel that the agitation and discussion aroused over the matter is doing injury to the city and that it would be better to leave matters alone. The cigar store influence has become wonderfully influential in business circles in the city since the closing of the saloons. 96

Commercial interests were especially concerned about the disputes because there did not “seem to be any doubt that the fight against the cigarettes will result in driving them out of public sale in the city. A large number of the women of the city banded together to assist in making the fight....” 97 Many of the dealers purportedly held a special “grudge against Odle” for not having raided their stores a day earlier and thus saving them the $75 “quarterly license to the city” that they had paid that day. 98 Until November 4, according to the farmers’ Iowa Homestead, tobacco dealers had been paying the mulct tax “as a bribe, in return for which they were permitted to violate the law openly.” 99 Under the headline, “City Loses $3,500 on Tax for Cigarettes,” the Des Moines News attacked Odle in the latter half of December on the grounds that the city was not collecting the cigarette tax for the fourth quarter after Odle’s recently announced crusade. The paper claimed that about 25 dealers had been paying the $300 a year tax, which had been collected for the first three quarters and amounted to $3,500 a year. 100 (In 1916 the News intensified this attack on Odle.) At first the Waterloo Evening Courier had reported at the end of November that in connection with the “war” that the WCTU was “waging” against cigarettes in Des Moines “local cigar dealers had given up the sale of the pills” after they had been “apprised that the county attorney was going to bring action against them unless the anti-cigaret law was obeyed.” 101 But then in mid-December the newspaper presented a wholly different perspective once it became clear that a number of leading cigar stores in downtown Des Moines—doubtless tutored by the arch-choreographer, the Tobacco Trust, whose legally frivolous scenarios had stood up poorly under judicial scrutiny—fabricated yet another “original

98 “Odle Active in Cleaning City,” WT-T, Nov. 6, 1915 (2:3). This claim is inconsistent with the claim below that the tax was paid Jan. 1, Apr. 1, July 1, and Oct. 1.
100 “City Loses $3,500 on Tax for Cigarettes,” DMN, Dec. 21, 1915 (1:6). For the official figures, see above ch. 12.
102 See above chs. 11-12 and below this ch.
package” scam for evading the anti-cigarette sales law:

By failing to keep a stock of cigarettes on hand, the dealers escape the mulct tax. Instead, they take individual orders, and sell the original packages, which are shipped in by parcel post. The consumer pays the postage from the factory to Des Moines.

Attorney [Charles] Maxwell [who together with Dunshee represented C. C. Taft Co. in its unsuccessful litigation from 1917 to 1920] advised the cigar dealers they couldn’t escape the mulct tax if they ordered the cigarettes shipped to themselves and then resold the original packages.

Instead they take your order, forward same to the factory, and have the “pills” shipped in your name to the store. When the packages arrive you pay for the cigarettes and the postage.

No orders are taken for less than five packages of cigarettes.103

Although this threadbare hoax would no more pass judicial muster than any of the others that the Trust and its lawyers had staged since the 1890s, some dealers were once again gullible into believing (or, perhaps, persuaded to pretend for public consumption that they believed) that they had cleverly slipped free from the ban: “This is fine,” said one cigar dealer. “Odle did us a favor and we are just beginning to realize it.” The “crusade” had cut down their cigarette sales “to a certain extent” because, initially, when the dealers stopped selling cigarettes, cigar sales rose sharply, but eventually “a man that wants cigarettes wants cigarettes and nothing else.” And once they began selling in “the original packages,” volume increased: “Before Odle got busy, we used to sell about 2,000 packages of cigarettes daily. Now the business is just about one-half.” Before long he expected trade to be “almost back to normal” with “a little difference,” especially since “the boys don’t kick on the postage,” which amounted to only 10 cents on 200 cigarettes.104

The Iowa Homestead regarded the unchanged situation in Des Moines in the aftermath of Odle’s intervention as a function of the quasi-immunity that that city’s wrong-doers in general enjoyed. The failure of the Anti-Saloon League, the Register and Leader, “and others who should have helped him, instead of putting every obstacle in his way” led to the renewed sale of cigarettes in “open violation of the law” at virtually every cigar stand. “The only difference,” according to the farm weekly, was “that, as a result of Odle’s raid, the tobacconists stopped paying the $300 mulct tax, since it failed to buy them immunity from prosecution, and they put up the price of cigarettes to pay for those which were lost in the Odle

raided.\textsuperscript{105} The News, in contrast, made Odle personally responsible for this outcome. In a long front-page article in August 1916 the paper waxed ironic that “[i]f...the professional reformer who is about to leave the city...could collect from Des Moines cigar dealers in a degree commensurate with the financial good he did them by his anti-cigarette crusade last November, he could build a villa in California, buy a 12-cylinder automobile, and live in luxury all the remainder of his life. He would have a $10,000 a year income.” The occasion for this irony was the fact that Odle’s erstwhile targets were retailing cigarettes as openly as ever as attested by a News reporter’s success in buying cigarettes in seven different downtown stores (including a United Cigar store and four owned by C. C. Taft Company)—several of which displayed them openly—in less than half an hour. To Odle belonged the credit for “transforming what amounted to little more than an ‘accommodation’ [sic] business by the cigar men into a very profitable one” while “cheat[ing] the city of Des Moines out of about $10,000 a year revenue, to no discernible purpose.” This outcome resulted from the destruction of the previous system under which allegedly “every person who dealt in cigarettes paid Des Moines $300 a year penalty tax.” Not only did these blatant violators of the Phelps law’s ban on cigarette sales all pay, they “always paid promptly” at the beginning of each quarter. The “Odle disturbance” merely succeeded in frightening cigar dealers into hurriedly disposing of their retail stocks in order to avoid being fined under the Phelps law. After allegedly legally selling wholesale for several weeks, the dealers, having decided that it was safe to begin again, at noon on a set date around Christmas 1915 in concert resumed retailing illegally and continued doing so without any arrests or prosecutions; indeed, they became “so sure of immunity” that they openly displayed the contraband and, at least in one instance at a United Cigar store, sold cigarettes to a man “while a policeman stood at his elbow.” Correspondingly, on the tax revenue side, “not a dollar” was paid following the Odle raid, although more dealers were selling precisely because nonpayment of the mulct tax made low-volume business profitable.\textsuperscript{106}

\textsuperscript{105}“Bi-Partisan Hypocrisy!” \textit{III} 61(39):1-2, 4-5, 24-25 at 25 (Sept. 28, 1916).

\textsuperscript{106}“City Is Losing $10,000 Year in Cigaret Tax,” \textit{DMN}, Aug. 17, 1916 (1:1). The article mentioned only one Taft store as such, but three others were owned by Taft. The claim that prior to 1916 annual tax collections amounted to about $10,000 (based on payments by 30 businesses in October 1915) was inconsistent with Polk County tax collection data, which peaked at $4,500 in 1915. However, for the first half of 1917 125 dealers owed $150 each or a total of $18,750, which however the Polk County Board of Supervisors remitted. See above ch. 12. Finally, the claim by the News in August that there had been two “pay days” since the last tax payment in October 1915 was inconsistent
The vanguard of the aforementioned female militants was organized in the WCTU, which, in order to remove Chief Crawford’s aforementioned excuse for police inaction, tried to pressure the Des Moines City Council to pass ordinances making it unlawful for those under 21 to smoke cigarettes on the street or anywhere except at home and to outlaw the sale of cigarettes to anyone. At a public hearing before the council on January 13, 1916, Anna Edworthy of the Iowa WCTU revealed that it had evidence of unlawful cigarette sales by 52 dealers, 20 of whom had not even paid the $300 mulct tax. Unlike Odle—who did not attend the meeting and to whose presence there some attendees objected—the WCTU had not yet proceeded judicially, preferring, instead, to hold the possibility over the dealers’ heads should they ever break the law again. The council, according to press reports, questioned the point of the proposed ordinances, which would merely reinforce state laws, one councilman adding that the size of the police force would be inadequate to enforce the ordinances. The ubiquitous John B. Hammond sought to meet such arguments with the following offer, which the press ridiculed as “the most spectacular stunt of the morning”:107

“For twenty-one years I have pleaded with officials to enforce the cigaret laws in Iowa..., and for twenty-one years I have received the same excuse—that the officials were busy with something more important.

If the council will pass these ordinances I will guarantee that the committee we represent will pay the salaries of special officers necessary to enforce them here.”108

When one councilman tried to subvert the WCTU’s tactic by asking whether, since the city had no prosecutor whom it could use for such cases, his organization would also pay a special prosecutor’s salary, Hammond promptly agreed to finance that part of enforcement too.109

Others introduced by Hammond did not regard the proposed ordinances as

with the statement that the quarterly mulct tax was due on Jan., Apr., and July 1. The quarterly payments were prescribed by the liquor mulct tax, which the legislature made the mandatory procedure for assessment, collection, and distribution of the cigarette mulct tax. Code of Iowa Annotated §§ 2445 and 5007 at 859, 1955 (1897).


108 “Anticigaret Forces Visit City Council,” Evening Tribune (Des Moines), Jan. 13, 1916 (1:3, 3:3-6, at 3:4). The reference to 21 years pointed back to 1895, the year after the Iowa legislature had enacted the first no-sales-to-minors law.

stringent enough. Frank B. Joseph, the state’s deputy superintendent of public instruction, who assured the council that in schoolmen’s experience “‘cigarettes are the most efficient element in making “retards” who can’t keep up with their studies,’” made a legislative prediction whose realization in Iowa remained unfulfilled until 2008: “‘I do not think it is right to allow pollution of the air I breathe in cafes, hotels, street cars and other public places by vile tobacco smoke. I think it is right, and I believe the time is coming when laws will be passed forbidding anyone to smoke in any public place.’” The Des Moines City Council neither took action on the ordinances that day nor scheduled a definite date for resuming discussion of them. The Evening Tribune justified rejection on the by no means nonsensical grounds—discussed above in the context of the WCTU’s Cedar Falls campaign for voluntary refraining from smoking in public—that it was “virtually impossible to prohibit in a minor what is sanctioned in an adult. The woman who endeavors to make it a crime for a boy to smoke is defeated in her efforts by the fact that her husband draws away at his cigar or pipe before the fireplace or as he walks downtown. The boy believes that what doesn’t hurt his father doesn’t hurt him, and it will take something more than unenforced and unenforceable laws to make him see differently.”

Although the aforementioned WCTU convention account, once again, left the impression that dealers who paid the mulct tax and sold only to adults were complying with the law, the 1896 Phelps law, enshrined in section 5006 of the Code—in the chapter, “Of Offenses Against Public Policy”—still prohibited the sale of cigarettes generally. And from the fact that county attorneys were submitting requests to the attorney general for his opinion as to the conditions under which dealers could lawfully sell cigarettes in original packages it seems plausible to conclude that local officials did not regard the anti-cigarette law as a dead letter. (That authorities took the law seriously in small towns was illustrated by the sentencing to six months and 15 days in county jail of G. Van Roekel for selling cigarettes and conducting a nuisance in his restaurant/rooming house and levying the $300 tax against the property owner in the small northwestern town of Hawarden in 1915.) This conclusion is strengthened by

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112Supplement to the Code of Iowa 1913 § 5006, at 1819 (1914).

113“Busy District Court This Week,” Hawarden Independent, Nov. 11, 1915 (1:6); “County on Good Behavior,” Hawarden Independent, Dec. 30, 1915 (1:1); “County Seat News Notes, Hawarden Independent, Feb. 10, 1916 (1:4). Van Roekel was paroled by the governor after having served somewhat more than half of his sentence. Id.
the attorney general’s responses, which, after formulaically intoning that the “state is powerless and cannot prevent a retail dealer from selling cigarettes in their original packages,” went on to stress how implausible it was that the shipments in fact satisfied the judicially glossed bona fide transaction requirement of the doctrine. For example, the county attorney in Marshalltown related that tobacco dealers were sending cigarettes all across the state in small parcel post packages consisting of three to five ordinary small cigarette packages. Although it seemed to him that such sales were legal, he refused to render such an opinion until the attorney general issued such a ruling. The assistant attorney general promptly replied that such shipments were not bona fide transactions, “but merely for the purpose of evading the Iowa law prohibiting the sale of cigarettes.” Moreover, in a case involving the cigarette mulct tax, the attorney general opined to another county attorney that with regard to a shipment of retail (as opposed to importation) packages, because the former “may become commingled with the property of the state upon its arrival at destination, by treating it as other property for sale to customers in a retail business,” it would not be protected by the original package doctrine; rather, because it had been “shipped into Iowa in a form contemplated to evade” the cigarette law, it would be subject to the mulct tax. In 1917, Attorney General Horace Havner stated his understanding that an original package was a “package containing five thousand or more cigarettes enclosed in a box or other carton or container, usually made use of by the shipper in shipping cigarettes to the trade.”

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Anti-Smoking Forces Reach the Limits of Their Power to Effect Incremental Amendatory Legislative Change: 1913 and 1915

In spite of the fact that a considerable portion of the mid-western territory is under the ban of the anti-cigarette laws travelers report business on the “nails” to be about as brisk as before any of the States adopted the “anti” slogan. ... In Iowa, Kansas and Oklahoma some pretense is said to be made in the enforcement of the anti-cigarette law, but never-the less [sic], a vast number of cigarettes are there being sold.\textsuperscript{118}

At its 1909 annual convention the Iowa WCTU declared that it had inaugurated a “plan of campaign...by which, with united forces, we might capture the next Legislature, both House and Senate.”\textsuperscript{119} In the event, the organization’s influence, at least with regard to positive tobacco control measures, had (with one exception)\textsuperscript{120} already reached its maximum. Following the hiatus of the 1911 General Assembly, by 1913 proponents and opponents of statewide regulation and prohibition had returned to the legislature to achieve their objectives. That session Senator John B. Sullivan, a Republican lawyer from Des Moines\textsuperscript{121} who as chairman of the House Judiciary Committee in 1909 had issued the report recommending that the Hammond-Trimmer Club search and seizure bill be indefinitely postponed,\textsuperscript{122} introduced a bill to amend the anti-cigarette law\textsuperscript{123} by increasing the minimum and maximum fines for a first conviction from $25 to $125 and from $50 to $200, respectively, and for additional convictions from $100 to $200,\textsuperscript{124} but the Judiciary Committee having recommended that it be indefinitely postponed,\textsuperscript{125} the Senate took no further action. However, by large

\textsuperscript{118}“Mid-West Cigarette Sales Brisk,” \textit{USTJ}, vol. 73, Apr. 16, 1910 (22:1).
\textsuperscript{119}Iowa Woman’s Christian Temperance Union, \textit{Thirty-Sixth Annual Convention, Davenport, Iowa, October 12-15, 1909}, at 16 (n.d.).
\textsuperscript{120}On enactment of a ban on cigarette advertising in 1917, see below this ch.
\textsuperscript{121}\textit{Journal of the Senate of the Thirty-Fifth General Assembly of the State of Iowa} v (1913).
\textsuperscript{122}\textit{Journal of the House of Representatives of the Thirty-Third General Assembly of the State of Iowa} 508 (1909) (Feb. 23); see above ch. 13.
\textsuperscript{123}\textit{Journal of the Senate of the Thirty-Fifth General Assembly of the State of Iowa} 688 (1913) (S.F. No. 372, Mar. 6).
\textsuperscript{124}S.F. No. 372 (1913) (copy furnished by SHSI).
\textsuperscript{125}\textit{Journal of the Senate of the Thirty-Fifth General Assembly of the State of Iowa} 1195 (1913) (Mar. 22).
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

The votes on H.F. 175 in the House and Senate were 64 to 13 and 28 to 3, respectively. Journal of the House of the Thirty-Fifth General Assembly of the State of Iowa 1478-79 (1913) (Mar. 24); Journal of the Senate of the Thirty-Fifth General Assembly of the State of Iowa 1735 (1913) (Apr. 5).

1913 Iowa Laws ch. 241, at 261.

The bill to amend the 1894 no-sales-to-minors law by expanding the universe of minors to whom it was unlawful to sell tobacco to include “any pupil enrolled in the public schools of the state” introduced by Democratic Senator Fred Hagemann, a lawyer who had been a county school superintendent for four years, passed by a unanimous 38 to 0 vote. This virtual inability to enact any further (including mildly incremental) anti-tobacco legislation stands in sharp contrast to the legislature’s willingness at every session from 1911 to 1917 to pass a large volume of increasingly stricter anti-alcohol measures, as a result of which Iowa came “under the rule of absolute prohibition.”

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126The votes on H.F. 175 in the House and Senate were 64 to 13 and 28 to 3, respectively. Journal of the House of the Thirty-Fifth General Assembly of the State of Iowa 1478-79 (1913) (Mar. 24); Journal of the Senate of the Thirty-Fifth General Assembly of the State of Iowa 1735 (1913) (Apr. 5).

1271913 Iowa Laws ch. 241, at 261.

128Iowa Official Register for the Years 1915-1916, at 714 (1915).

129S.F. No. 517 (1915) (copy furnished by SHSI DM); Journal of the Senate of the Thirty-Sixth General Assembly of the State of Iowa 839,1153, 1583-84 (1915) (S.F. No. 517, Mar. 18 and 31, Apr. 12 ).

130“Regulation That Doesn’t Reform,” WT-T, Mar. 23, 1915 (4:1) (edit.).

131S.F. No. 543 (1915) (copy furnished by SHSI DM).

132Iowa Official Register for the Years 1915-1916, at 710 (1915).

133Journal of the Senate of the Thirty-Sixth General Assembly of the State of Iowa 924-25,1153, 1583-84 (1915) (S.F. No. 543, Mar. 18 and 31, Apr. 12 ).

134Dan Clark, “Recent Liquor Legislation in Iowa,” IJHP 15(1):42-69 at 69 (Jan. 1917). Interestingly, despite dismantling the liquor mulct tax in 1915 (payment of which, unlike the cigarette mulct tax, did bar liability for what would otherwise have been a violation of the prohibition on selling liquor), which was no longer to be paid, collected or apportioned, the legislature did not repeal the implementing provisions, presumably
Legislative Stalemate: The 1917 Session

The cigaret habit now is stronger than present laws governing it.... We must pass laws that will be as strong as the habit.\textsuperscript{135}

...because it would then “have been necessary to incorporate the provisions of the omitted sections in the cigarette law if the methods of assessing, collecting, and distributing the cigarette tax were still to remain on the statute books.” \textit{Id.} at 64-65 n. 81.


...Republicans had enjoyed their typical large majorities during the 1911, 1913, and 1915 sessions,\textsuperscript{137} but in 1917 they achieved their greatest House majority since the Civil War, occupying 94 of 108 seats, and magnified their control of the Senate by securing 40 of that chamber’s 50 seats.\textsuperscript{138} The Republican state platform of 1915 still declared that: “The wise laws enacted by the Republicans of Iowa, that have resulted in the suppression of intemperance and materially aided in arousing and fostering in the state a love of temperance and good government, meet with our most hearty approval and support, and we pledge ourselves to the enforcement of the same.”\textsuperscript{139} As a tiny minority, the Democrats were hardly in a position to bring their quasi-libertarian temperance views to bear on the outcome of legislation.\textsuperscript{140} The newly elected governor, William Harding,
was also a Republican, but in a “strange switch of traditional situations,” he had opposed prohibition and had, at the election in November 1916, been “openly supported by the liquor interests, who also opposed woman suffrage on the grounds that women would vote for Prohibition,” while the Democratic candidate, publisher and Methodist Edwin Meredith, as a strong supporter of prohibition received considerable normally Republican support such as that of the Des Moines Register. 141

The key action during the 1917 session undertaken by those opposed to the general anti-cigarette regime was Senator Arthur L. Rule’s introduction of Senate File No. 159 on January 31. 142 Rule was a Republican lawyer who had been a member of the law department of the Chicago, Milwaukee and St. Paul and Burlington, Cedar Rapids and Northern railroads. 143 His bill proposed to repeal the 1896 Phelps law and the 1897 mulct tax. Its principal purpose was to transform the general prohibition on cigarette sales back into a no-sales-to-minors regime, but now subject to a $100 annual license, which the State Dairy and Food Commissioner “may withhold...from any applicant whom he may deem unworthy” and which he “may” also revoke for violating its terms. Selling cigarettes without a license would have been subject to a $100 to $300 fine; any building used for selling cigarettes in violation of any of the measure’s provisions constituted a nuisance subject to abatement in the same way that intoxicating liquor nuisances were enjoined. 144 Selling to a minor would have triggered a fine

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a degree of individual liberty as is compatible with the rights of organized society, and therefore, with...reference to the use and sale of intoxicating liquor, we are in favor of a strict local option law with high license....” The Iowa Official Register for the Years 1911-1912, at 347 (24th Number, William Hayward comp. 1911).

141 Leland Sage, A History of Iowa 250 (1987 [1974]). German-Americans, who purportedly abandoned their traditional affiliation with the Democratic Party because of President Wilson’s failure to convince them of the seriousness of his European neutrality policy, voted in sufficient numbers for Harding to “offset the Republican drys who voted for Meredith.” Id. In 1917, when the statewide (male) electorate rejected by a vote of 50.1 percent to 49.9 percent a proposed constitutional amendment prohibiting the sale or manufacture of liquor that the legislature had overwhelmingly approved in 1915 and 1917, party preference played a subordinate role, whereas (German) ethnicity, (Catholic or Methodist) religion, and vote on woman suffrage at the 1916 referendum were the leading explanatory variables. Thomas Ryan, “Supporters and Opponents of Prohibition: Iowa in 1917,” AI, 3d ser. 46(7):510-22 (Winter 1983).

142 Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 263 (1917) (S.F. No. 159, Jan. 31).

143 State of Iowa 1917-18: Official Register 314 (27th No. n.d.)

144 S.F. No. 159 § 2 (1917) (copy furnished by SHSI IC).
of $100 to $300 (up from $5 to $100). If the police or a teacher asked a minor in possession of a cigarette or cigarette paper from whom it had been obtained and the minor refused to identify the person, he was subject to a five-dollar fine, or up to five days’ imprisonment or both (but a minor under 16 years was remitted to juvenile court action). Finally, the public smoking ban would have been amended to increase the age to 21 but to eliminate non-cigarette tobacco from the prohibition.

Newspaper publishers had begun propagandizing on behalf of such a bill two weeks before Rule filed his. On January 16—just three days after the Oklahoma House of Representatives, by an overwhelming 79-21 majority, had passed a bill that prohibited the sale, possession, and smoking of cigarettes—the Associated Iowa Dailies sent out a letter (accompanied by a copy of Pennsylvania’s model adult deregulatory law and an editorial from the Davenport Times supporting a law with which cigar dealers would have a chance of complying “instead of being subject to the possible whims of a blackmailer”) to its members to simulate a statewide referendum among “newspaper men” on the cigarette law. Already three days later, under the headline, “Revised Cigaret Law Is Favored,” the Waterloo Evening Courier—whose general manager had co-signed the letter as the organization’s president—reported that all of the first replies revealed a “widespread conviction that a reasonable cigarette law rigidly enforced in Iowa would be preferable to present conditions.” Iowa’s newspaper readers were, thus, well apprised of the newspaper owners’ view that the press was “emphatically in favor of new legislation” that would ban sales only to minors well before any had been filed. To be sure, publishers did not mention their self-regarding direct economic interest in legalizing sales so that they could profit from the expected huge volume of newspaper advertising.

Of S.F. 159 the WCTU said, later that year at its annual convention,

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145 S.F. No. 159 § 1 (1917).
146 S.F. No. 159 § 3 (1917).
147 H.B. No. 3, § 1 (Jan. 3, 1917, by McCollister et al.)(copy furnished by Oklahoma Department of Libraries); Journal of the House of Representatives of the Regular Session of the Sixth Legislature of the State of Oklahoma 22, 426-27 (1917) (Jan. 3 and 13); “House Passes Anti-Cigaret Bill 79 to 21,” Oklahoma City Times, Jan. 13, 1917 (1:3). The Senate defanged the bill, in which the amendment the House (including the bill’s chief sponsor) concurred, by striking the universal ban on sale, possession, and smoking, restoring the 1915 law with its applicability only to minors, and adding a county-level $25 annual license fee. 1917 Okla. Sess. Laws of Okla ch. 148 at 238-39. See vol. 2.
149 See below this ch. and ch. 15.
“[p]erhaps no other bill...so quickly aroused the mothers of the state and the teaching fraternity....” In response, the organization’s president promptly “sent out 873 form letters to the School Superintendents and also a protest to the members of the Senate.” The WCTU also tried to outflank the anti-prohibitionists, as will be seen shortly, by requesting that the injunction law be applied to cigarette sales.150

On February 10, the Judiciary Committee, to which the bill had been referred, recommended that it be indefinitely postponed.151 Rule sought to turn sentiment around by announcing that Governor Harding supported the repeal and licensing bill and that at the governor’s suggestion he would amend the bill to remove the $100 minimum fine “in order to shut off the opening left by such a limitation for blackmail.” Insisting that the bill “had been misunderstood and regarded as a step backward from the present laws,” Rule “defended it as a measure calculated to offer the young men of the state a protection which they do not now receive....” He also alleged that the letter that the WCTU had placed on each senator’s desk that morning requesting that they oppose “any measure intended to weaken the present laws” had been written by someone who had not seen the bill. Republican Attorney General Horace M. Havner was also alleged to be backing Rule’s bill “because of the difficulties of enforcing the existing laws which,” at least according to the Register’s garbled or confused report, “are being violated under the original package doctrine of the interstate commerce commission.” As a final lure to support S.F. 159, Rule claimed that the license fees collected pursuant to his bill would bring in $200,000 annually.152 One editorialist replied that if the bill passed, the boys who used cigarettes would discover that “legislative approval of the bill didn’t include the employer’s approval of a cigarette smoking kid.”153 Some of Rule’s assertions may have been persuasive: by an overwhelming majority of 28 to 3154 (of whom Aaron Proudfoot, the

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150Woman’s Christian Temperance Union of Iowa, Forty-Fourth Annual Convention 123 (1917).
151Journal of the Senate of the Thirty-Seven General Assembly of the State of Iowa: 1917, at 410 (1917) (Feb. 10).
152“Claims Harding Is for Cigarette Repeal,” DMR, Feb. 11, 1917 (6:1). According to another paper, it was “a known fact” that Harding had suggested removing the $100 fine. “Is Harding a Friend of the Coffin Nail?” Davenport Democrat and Leader, Feb. 13, 1917 (2:3).
154Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 410 (1917) (Feb. 10).
WCTU’s chief advocate and husband of a WCTU member,155 was one) the Senate rejected the committee’s report and ordered the bill placed on the calendar. No Democrat voted Aye, while eight of ten voted Nay together with 20 of 40 Republicans.156

Undeterred, when the Senate took up the bill a few days later, Proudfoot, calling Rule’s bill the “most vicious piece of legislation that has been up to the state for many a year,”157 offered a substitute amendment that essentially applied the public nuisance provision of S.F. 159 to all buildings in which cigarettes were sold to anyone in violation of the general ban.158 Rule “heartily condemned” Proudfoot’s measure, again defending his own bill as “the work of the attorney general.” Not to be outdone in arguing from authority, Proudfoot “shouted” back: “‘My own bill was drawn in the attorney general’s office not half an hour ago.... That office is as apt to get its wires crossed as is any other.’”159 But before Proudfoot’s substitute could be voted on, another Republican senator offered an amendment to Proudfoot’s that would have added to the buildings deemed a public nuisance any one in which “cigars, plug tobacco, snuff, fine cut, smoking tobacco, leaf tobacco and all and every product of the weed known and called tobacco” were sold or kept for sale. Since the anti-tobacco movement (including Proudfoot) had not developed to the point at which it was willing to ban all tobacco, the maneuver was manifestly designed as a killer amendment, but it secured only six Ayes (including Rule’s and those of four other Republicans) against 35 Nays (28 Republicans and seven Democrats).160 Parliamentary counter-tactics having been exhausted, Proudfoot’s substitute amendment prevailed on a close 26 to 21, non-party-line, roll-call vote (21 Republicans and

155Indianola or Guthrie County, Woman’s Christian Temperance Union, Roll of the Members [1919-1924], Mrs. Lou Proudfoot (A.V.) (1920-21), in WCTU of Iowa Papers, Unprocessed, Local Branches, Indianola, Iowa Women’s Archives, University of Iowa.

156Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 410 (1917) (Feb. 10); State of Iowa 1917-18: Official Register 279-80 (27th No. n.d.). Both Proudfoot and Rule were committee members as was one of the other Aye votes; ten committee members voted Nay, and the rest were absent or did not vote. On committee membership, see Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa 126 (1917).


158Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 488-89 (1917) (Feb. 15).


160Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 489 (1917) (Feb. 15).
5 Democrats for and 17 Republicans and 5 Democrats against). Immediately, Republican Senator Charles Helmer moved to amend the pending measure by striking out the enacting clause (i.e., killing both Rule’s bill and Proudfoot’s substitute). Its adoption by a viva voce vote makes it impossible to analyze the constellation of forces behind the move.

The “progressive” Register, still profoundly misinformed about the constitutional vitality, commercial significance, and source of the original package doctrine, sarcastically summarized the outcome as meaning that: “The sale of cigarettes is still unlawful in Iowa and will still be plentiful unless Attorney General Havner goes a long way around to catch the dealer who breaks the original package to accommodate a friend. ... It will now be up to the attorney general to enforce the existing laws in so far as enforcement is possible under the ruling of the interstate commerce commission that cigarettes may be shipped into the state in original packages.” (Misinformed and misinforming newspaper reporting may not have been accidental: a poll at this time by the Associated Iowa Dailies of its publisher-members revealed overwhelming support for a change in the law, which allegedly was “so strict that cigarettes are sold only secretly and...dealers are subject to the whims of blackmailers. The state derives no revenue from that sale and none of the tobacco companies making cigarettes advertise in the newspapers of the state.” Additional evidence that publishers’ own narrow economic interests underlay their views was supplied by a quotation from an editorial claiming that many doctors believed that cigarettes were less harmful than other forms of tobacco.)

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161 Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 490 (1917) (Feb. 15).
162 Leland Sage, A History of Iowa 224 (1987 [1974]).
163 “Cigarettes Still Barred,” DMR, Feb. 16, 1917 (2:2). An search of an electronic database of all I.C.C. decisions for the relevant years revealed none relating to original packages of cigarettes. Even if such a ruling existed, how the I.C.C. could have overruled the U.S. Supreme Court’s decisions on this very point the Register failed to explain.
164 “Iowa Publishers and Cigarettes,” Tobacco 62(20):6:3 (Mar. 1, 1917). In a letter to a physician R. J. Reynolds Tobacco Company referred to this editorial and medical opinion as having been published in connection with the anti-cigarette legislation pending in the Iowa legislature. Dr. George Middleton of Davenport was quoted as quoting Dr. John Harriman, whom he described as one of the greatest anatomy professors in the United States, as having concluded from his post-mortem examinations of smokers that “cigarettes do not injure the lungs....” Amusingly, the physician—Dr. H. J. Achard, an editor of the American Journal of Clinical Medicine in Chicago—to whom Reynolds replied had asked whether “dope” was used in the manufacture of Camel cigarettes, which he smoked. Letter to H[erman]. J. Achard (May 22, 1917), Bates No. 501870769.
In fact, the “long way around” is precisely what Havner\(^{165}\) had in mind. That he would have favored vigorous enforcement of such a prohibitory law was biographically consistent: before being elected attorney general, Havner not only “had achieved large success in prosecuting leading violators of the prohibitory laws,”\(^ {166}\) but as a candidate was “the worst hated of the ‘drys’ in Iowa by the liquor interests...because of his activities as an attorney for anti-saloon organizations.”\(^ {167}\) (That the movement regarded him as having retained his prohibitory bona fides was amply demonstrated more than a decade later by the fact that Ida B. Wise Smith, the president of the WCTU, recommended Havner as U.S. assistant attorney general to President Hoover.)\(^ {168}\) In the event, Havner announced on February 20, 1917 that he would “enforce whatever laws the legislature leaves on the statute books, when it adjourns.” Stressing that he was “not making a bluff at law enforcement,” he insisted that he intended to “make the enforcement real,” and urged the legislature to repeal the laws it did not want enforced because there would be “no winking at the law after the session closes.”\(^ {169}\) Although Havner was speaking expressly about various blue laws—prohibiting, for example, Sunday baseball, theaters, and movies—in connection with legislative repeal proposals, with the possibility of local option for cities with a population under 10,000,\(^ {170}\) his threat applied to the anti-cigarette laws as well.

\(^{165}\)On Havner, who was attorney general from 1917 to 1921, see State of Iowa: 1919-20: Official Register 215-16 (28th No., n.d.).

\(^{166}\)Edgar Harlan, A Narrative History of the People of Iowa 4:159 (1931).

\(^{167}\)“Bi-Partisan Hypocrisy!” IH 61(39):1-2, 4-5, 24-25 at 2 (Sept. 28, 1916). Havner’s political positions were hardly uniformly progressive. Although as a candidate for the Republican nomination for governor in 1920 he advocated the extension to women of “absolute political equality with men, and the removal of any economic discrimination against them in our present statutes,” he aggressively positioned himself to the right of his rival (who became governor) Nate Kendall with regard to labor unions and strikes. He was “opposed to the radical demands of a section of organized labor...which clearly has for its object the sovietization of all property from railroads to the farms” and which endorsed his two opponents, including Kendall, support for whom was tantamount to repudiating the anti-strike plank of the national Republican platform. “Havner Stands on Labor Issue,” DMN, June 23, 1920 (1:4).

\(^{168}\)Lawrence Richey (secretary to the president) to Ida B. Wise Smith (June 27, 1929), in Presidential Papers - Secretary’s File, Folder: Smith, I. 1929-1933, Herbert Hoover Presidential Library, West Branch, IA.

\(^{169}\)“Havner Would Enforce Laws,” DMR, Feb. 21, 1917 (3:1).

\(^{170}\)“Move to Repeal Part Obsolete Blue Laws,” CREG, Feb. 15, 1917 (5:1).
After the anti-prohibition forces had failed to resuscitate Rule’s bill,\textsuperscript{171} the focus shifted to the House, where prohibitionists, unintimidated by the specter of the original package doctrine, controlled enough votes to pass Proudfoot’s nuisance substitute. A week after the debacle in the Senate, Republican Charles V. Findlay, who had been a teacher, county school superintendent for 10 years,\textsuperscript{172} and then proprietor and president of Tobin College in Ft. Dodge, a business college that he had bought,\textsuperscript{173} introduced House File 441, which declared any building used to sell or keep for sale cigarettes or cigarette papers a public nuisance, and provided for the latter’s abatement by injunction in the same way that the Code already prescribed for intoxicating liquor nuisances. Conviction—which was powerfully facilitated by a provision that deemed finding cigarettes or cigarette papers “in any quantity whatever” in the building prima facie evidence that the latter was a public nuisance and its owner or keeper was guilty of maintaining the nuisance—brought with it a fine of between $300 and $1,000. The bill was referred to the Committee on the Suppression of Intemperance,\textsuperscript{174} but two weeks later Findlay withdrew the bill from further consideration\textsuperscript{175} and filed in its stead House File 500, a more streamlined and stringent version.

Its origins, according to the WCTU of Iowa, were straightforward: “We asked that the Injunction law be applied to the sale of cigarettes. ... House File 500 was introduced, making the injunction law applicable to cigarettes the same as to liquors. It was worded the same as the famous Red Light Injunction Law, which has been upheld by the Supreme Court and copied by 30 states.”\textsuperscript{176} While retaining the aforementioned abatement procedure—which now more broadly applied to “[w]hoever shall erect, establish, continue, maintain, use, own, or lease” a building “used for the purpose of” cigarette selling—H.F. 500 provided for summary judicial trial and punishment of anyone who violated an injunction or abatement order by selling, keeping for sale, or giving cigarettes or cigarette

\textsuperscript{171}Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 520-21, 1068-69 (1917) (Feb. 16 and Mar. 21).

\textsuperscript{172}Edgar Harlan, A Narrative History of the People of Iowa 3:113 (1931).


\textsuperscript{174}H.F. No. 441, Feb. 23, 1917 (copy furnished by SHSI IC); Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 703 (1917) (Feb. 23).

\textsuperscript{175}Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 788 (1917) (Mar. 8).

\textsuperscript{176}Woman’s Christian Temperance Union of Iowa, Forty-Fourth Annual Convention 123 (1917).
papers or wrappers. Arrest was triggered by the filing with the clerk of the court of a sworn complaint alleging facts that constituted a violation; the judicial proceeding was the same as that for contempt in a liquor injunction suits. For a first offense the fine was 30 days to six months in county jail; one year’s imprisonment was imposed for each additional offense.\textsuperscript{177} On top of the penalties imposed by the original Phelps law of 1896 and the mulct tax of 1897, the punishment meted out by this new proposal demonstrated that the WCTU and other prohibitionists were not only unwilling to acquiesce in repeal of Iowa’s 20-year-old anti-cigarette statutes, but intended to strengthen enforcement and deterrence. After initial referral to the Police Regulations Committee, the bill, at Findlay’s own request and with unanimous consent, was re-referred to the Suppression of Intemperance Committee,\textsuperscript{178} which a few days later recommended passage.\textsuperscript{179}

In the midst of these proceedings, Republican Senator Perry Holdoegel, a businessman who had previously been a school teacher and superintendent,\textsuperscript{180} and whose voting record on the anti-cigarette bills in 1917 was not consistent, wrote to Attorney General Havner apparently asking whether Findlay’s H.F. 441, if passed, would empower the state to prevent the sale of cigarettes in original packages. Not only did Havner unambiguously negative the question, but added that the proposed law would not even “absolutely prohibit the sale of cigarettes to minors in the state of Iowa,” though “it would be a very effective means in curtailing the sale to minors....” The reason for this practical effectiveness lay in the U.S. Supreme Court’s Iowa cigarette decisions, which required original packages to be those used in bona fide transactions between manufacturers and wholesalers in different states (and not whatever schemes the Tobacco Trust contrived in order to simulate actual interstate transactions). As a result of this holding, Havner wrote: “The average minor purchases his cigarettes either two or three cigarettes at a time, or else a small box, which does not constitute an ‘original package’ within the meaning of the law.”\textsuperscript{181} Despite the fact that

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\textsuperscript{177}H.F. No. 500, Mar. 8, 1917 (copy furnished by SHSI IC); Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 783 (1917) (Mar. 8).
\textsuperscript{178}Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 867 (1917) (Mar. 13).
\textsuperscript{180}State of Iowa: 1917-18: Official Register 309-10 (27th No., n.d.).
\end{flushright}
practically speaking no sales to minors would be lawful, it is astonishing that the attorney general appeared to be implying that all the states’ no-sales-to-minors laws (including Iowa’s of 1894) could theoretically be trumped by a four-year-old with enough money to buy a case of cigarettes large enough to qualify as an original package for interstate commerce purposes.\textsuperscript{182}

When the full House took up H.F. 500 on March 28, Findlay himself offered an amendment, providing for a fine of $100 to $500 as an alternative to imprisonment, which was adopted.\textsuperscript{183} Then Otto Starzinger, a Republican hotel manager in Des Moines\textsuperscript{184}—four years later he became the second person in Des Moines to receive a cigarette sales permit after repeal of the prohibitory law\textsuperscript{185}—tried a favorite anti-prohibition tactic by moving that the bill be amended by inserting a knowledge requirement (“knowingly”) into the aforementioned “[w]hoever” clause. Prohibitionists defeated this transparent effort to weaken, if not undo, the measure, especially as to landlords, by erecting a potentially insuperable evidentiary barrier by a solid vote of 29 to 63—except that 23 of the Ayes were cast by Republicans, who accounted for almost 30 percent of the 80 Republicans who voted yea or nay.\textsuperscript{186}

Next, Republican Frank Lake, a newspaper reporter from Sioux City on the Missouri River,\textsuperscript{187} offered an amendment to limit the coverage of the injunctive procedure to selling and giving cigarettes to minors, but it attracted only 10 votes (only one of which was cast by a Democrat), while 66 Republicans and ten

April 7, refers to Holdoegel’s as being of April 17; plausibly Havner meant March 17, but by then Findlay had already withdrawn H.F. 441, substituting H.F. No. 500 for it. Since Havner did not quote from Holdoegel’s letter, its content is intuited from the reply. On the Supreme Court cases relied on by Havner, see above ch. 12.

\textsuperscript{182}No reported cases entertained let alone sustained such a claim.

\textsuperscript{183}Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 1353 (1917) (Mar. 28).

\textsuperscript{184}State of Iowa: 1917-18: Official Register 284 (27th No., n.d.). According to the Fourteenth Census of Population of 1920, 38-year-old Otto Starzinger lived with his mother, neither of whom was returned as having an occupation; at the population census of 1900, he was at college, while his father was returned as owning a hotel. The family did not appear in the 1910 census. Starzinger’s biographical entry in the Official Register was one of the shortest and, unusually, included no occupational information. State of Iowa: 1917-18: Official Register 339 (27th No., n.d.).

\textsuperscript{185}“Drop ‘Fag’ Fee,” DMN, July 1, 1921 (1:6).


\textsuperscript{187}State of Iowa: 1917-18: Official Register 283 (27th No., n.d.).
Democrats voted Nay.\(^{188}\) This overwhelming rejection of an initiative to repeal Iowa’s prohibitionist approach to cigarette sales literally a few days before U.S. entry into World War I and at a time when nationally cigarette sales exceeded by seven-fold the level attained when Iowa had banned them in 1896\(^{189}\) underscored the deep-seated character of the oppositional forces. In a final effort to kill the bill entirely, Starzinger filed an amendment bringing the sale of cigars within the scope of enjoinable public nuisances, which, given the vastly greater prevalence of cigar smoking among adult men than among children, was not even on the WCTU’s agenda.\(^{190}\) (Three years later the Kansas Supreme Court rejected a challenge to the validity of that state’s prohibition of cigarette sales based on the claim that banning the sale of one form of tobacco and permitting that of others was arbitrary and unreasonable. The court recognized the existence for years of a “well-settled opinion that the use of cigarettes, especially by persons of immature years, was harmful.... [T]he state determined that the sale of cigarettes was a greater menace to the health and welfare of the people than would be the sale or use of tobacco in other forms.... It was within the province of the legislature to determine what kinds of tobacco lead to the most hurtful results....”\(^{191}\)

All of the anti-prohibitionists’ procedural moves having been exhausted—the WCTU referred to “a hard battle by the enemies to get the word ‘knowingly’ in”\(^{192}\)—Findlay’s motion to vote on the bill’s passage prevailed, and the House passed H. F. 500 by a massive majority of 82 (including 10 of 14 Democrats) to 5 (including Starzinger and Lake).\(^{193}\) The third Republican voting Nay, George Tucker, a linotype operator from the Mississippi River town of Clinton,\(^{194}\)


\(^{189}\) In 1917 more than 36 billion cigarettes were produced compared with slightly under 5 billion in 1896. Arthur F. Burns, _Production Trends in the United States Since 1870_, tab. 44 at 298-99 (1934).

\(^{190}\) Nevertheless, 1919 was the first year in which more leaf tobacco was used in the manufacture of cigarettes than in that of cigars. U.S. Dept. of Agriculture, _First Annual Report on Tobacco Statistics (with Basic Data)_, tab. 13 at 89 (Statistical Bull. No. 58, May 1937).

\(^{191}\) State of Kansas v Nossaman, 193 P. 347, 348, 350 (Kansas 1920).

\(^{192}\) Woman’s Christian Temperance Union of Iowa, _Forty-Fourth Annual Convention_ 123 (1917).

\(^{193}\) _Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917_, at 1355-56 (1917) (Mar. 28).

\(^{194}\) _State of Iowa: 1917-18: Official Register_ 284 (27th No., n.d.).
explained his vote as based on the belief that “it would be unfair to the innocent property owner. I favor a heavy penalty for the selling of cigarettes to minors but this measure would virtually confiscate an innocent man’s property.” Correctly the Des Moines Register reported that if the Senate passed the Findlay bill, the “anticigaret bill promises to develop a full set of teeth.”

On March 31 the Senate Committee on Suppression of Intemperance needed only five minutes to recommend passage of H.F. 500, which had been endorsed not only by the WCTU, but also YMCA, YWCA, Boy Scouts, board of education, federation of women’s clubs, the city union of mothers’ clubs, the ministerial association, and the Des Moines Federation of Churches. The full Senate did not take up the bill until April 10, four days after President Wilson had declared war against Germany. Alert to efforts in the Senate to water down the bill by making the changes that the House had defeated, the superintendents of the WCTU’s Anti-Narcotics and Christian Citizenship departments sent letters to every senator warning of the ploy. As soon as the committee report was adopted, Republican Senator Frank Thompson, a lawyer from the Mississippi River city of Burlington, arguing that the bill was “too drastic,” offered Representative Lake’s defeated amendment limiting injunctions to violations involving minors. Thompson presumably believed that he was gaining votes by declaring that the bill without his amendment “merely offered an inducement to long-nosed old women-mediators to make trouble.” Irrepressibly he went on to insist that smoking cigarettes, which were not so injurious as cigars, could not be prevented and the law’s only effect would be to “make millions for mail order houses.” Despite Senator Taylor’s objection that the amendment’s adoption

197Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 1396 (1917) (Mar. 31).
198“Findlay Bill Reported,” DMR, Apr. 1, 1917 (8:7-8) (five minutes). See also “‘Best Law Legislature Could Pass.’ What Iowa’s Youngest Lobbyist Thinks of Anticigaret Law,” Des Moines Evening Tribune, Apr. 6, 1917 (4:3-5) (10-year-old appointed by his school, which in turn had been asked by Lucy Page Gaston, the president of the Anti-Cigarette League, to lobby legislature).
199Woman’s Christian Temperance Union of Iowa, Forty-Fourth Annual Convention 123 (1917).
would render the law unenforceible, the Senate passed it on a non-party-line 29 to 14 vote: six Democrats and 23 Republicans voted for the amendment, while three Democrats and 11 Republicans opposed it (including Senator Rule). Another Republican lawyer, Senator James Wilson, then offered Starzinger’s “knowingly” amendment, which was adopted on a non-roll-call vote. Proudfoot moved for a vote on third reading and joined eight Democrats and 32 other Republicans who passed the bill against only one Nay. Presumably Proudfoot and other prohibitionists regarded this “tamed” injunctive bill with most of its “teeth” yanked as a better outcome than the alternative of no bill at all. The motion to reconsider the vote by which the Senate had passed H.F. 500 failed when, on April 12, the chamber voted, again on non-party lines, 25 to 12 to table it. With “[m]uch of the poison...extracted from the fangs” of the bill, many fewer dealers could, in the words of the Des Moines Capital, “be made the victims of injunctive proceedings....” In the wake of the amendments that “largely annulled” the bill’s force, the Des Moines Capital insisted that the “principal argument” against it had been that the original package doctrine rendered it ineffective. Since the prohibitory and mulct tax laws had, for two decades, survived virtually all constitutional challenges based on that doctrine, and whatever legal force it retained could be translated into radically reduced commercial profitability, so long as the state enforced the laws, that chief argument had been discredited.

With adjournment imminent (April 14), the House took up the amended bill the same day. Findlay himself, carrying on where Proudfoot had left off, moved that the House concur in the Senate changes. Before that vote could be taken, Republican William Giltner—who had earlier voted against Starzinger’s amendment—moved to amend Findlay’s motion by substituting for it concurrence only in the Senate’s insertion of “knowingly.” Findlay, together with Starzinger, Lake, 26 other Republicans, and three Democrats voted for it, but 41 Republicans and nine Democrats opposed it. Findlay’s motion to concur in the Senate’s

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201“Cigarettes and the Long-Nosed Women,” CRDR, Apr. 12, 1917 (2:5).
204Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 1738, 1770 (1917) (Apr. 11-12). Five Democrats and 12 Republicans voted to table against three Democrats and nine Republicans.
205“Poison Taken from the Anti-Cigaret Bill,” Davenport Democrat and Leader, Apr. 12, 1917 (4:3).
206“Anti-Cigaret Bill Is Amended; Then Passes Senate,” DMC, Apr. 12, 1917 (10:7).
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

restriction of injunctive procedures to violations involving minors was then defeated by an overwhelming vote of 15 to 63, Findlay himself opposing his own motion.207 Once the senate had “extracted most of the teeth,” House backers “decided that no action was better than the brand of action proposed by the senate.”208

The following day, April 13, H.F. 500 having been returned to the Senate, Senator Proudfoot moved that that body recede from its own amendments. As in the House, the two major changes were voted on separately. On the restrictive requirement of “knowingly” violating the anti-cigarette law, the Senate voted 28 to 14 against receding, only two Democrats and 11 Republicans joining Proudfoot in voting Aye. After the Senate had voted 26 to 14 against receding on the restriction of injunctions to violations involving minors as well, on a voice vote the chamber also defeated Proudfoot’s motion to appoint a conference committee to meet with the House conference committee209 (which was appointed the next day and consisted of three Republicans who had voted against the Senate amendments and one Democrat who had voted for them).210 Thus all initiatives to weaken and strengthen Iowa’s anti-cigarette laws for the 1917 session died.

The Antis’ One Legislative Success: The Stealth Ban on Cigarette Advertising

Smoking, while not a necessity, is a recognized and quite universal habit among workmen, and an indulgence reasonably to be anticipated by employers.211

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207 Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 1990-92 (1917) (Apr. 12). Starzinger, Lake, and three Democrats were among those voting Yea, while nine Democrats voted Nay.


211 Rish v Iowa Portland Cement Co., 186 Iowa 443, 451 (1919) (not limiting smoking to cigarettes). In contrast, the state workers compensation agency, whose decision denying the cigarette-smoking worker’s claim the Iowa Supreme Court overruled, stated that whereas “lunching, getting a drink of water, seeking relief from excessive cold, and responding to calls of nature” were all “necessary requirements of efficiency on the part of workmen,” insisted that “[n]o such claim can be made for smoking.” Rish v Hawkeye Portland Cement Co., in State of Iowa: 1918: Report of Workmen’s Compensation Service for the Biennial Period Ending June 30, 1918, at 25-27 at 27.
However, the cigarette-prohibitionist forces were able to secure the enactment of one bill that year, albeit one that was a by-product of the anti-alcohol movement. Senate File No. 7, a so-called bone-dry bill passed by large majorities in both houses, made it a misdemeanor to advertise for sale in any means of transportation or public place by means of any sign or billboard, or any poster, newspaper, magazine, or periodical, any intoxicating liquor “or any other article, the sale or keeping for sale of which is prohibited by the laws of this state....” The law also made it a misdemeanor for anyone to publish or circulate any newspaper, magazine, or periodical in which any such prohibited advertisement appeared. (Kansas, which also prohibited the sale of cigarettes, had enacted a similar ban on cigarette advertising a few weeks earlier.) In addition, S.F. 7 deemed an enjoinable and abatable public nuisance any building used for printing or publishing such publications, or such publications containing “any advertisement, notice, reference, editorial or story, giving information of the place where, or the price at which” liquor or such other prohibited article could be bought or obtained, as well as any building in which such publications were exhibited or kept for distribution together with any machinery, type, fixtures, or furniture used to print or publish such publications. Because the 1896 Phelps law prohibited the sale of cigarettes, they were clearly encompassed by the term “any other article” and thus subject to this extraordinarily capacious and stringent intervention, as the WCTU of Iowa underscored at its annual convention later in 1917. (At exactly the same time Congress was debating—and soon passed—an amendment to the postal appropriations bill to prohibit depositing in the mails any letter, newspaper, or publication of any kind containing any advertisement of intoxicating liquor when such mailing was addressed to anyone in a state in which it was unlawful to advertise liquor. Although the amendment as presented

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212Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 448-50, 1386 (1917) (Feb. 13 and Mar. 31) (39 to 9 and 37 to 0); Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 1429-30 (1917) (Mar. 30) (80 to 14).

2131917 Iowa Laws ch. 136, § 2 at 158, 159. The bill originally made violations a felony punishable by a year in penitentiary, but on the Senate floor the penalty was reduced to 30 days. “Senate Passes ‘Bone Dry’ Bill,” DMR, Feb. 14, 1917 (2:7-8).

2141917 Kan. Sess. Laws ch. 166, § 2, at 212, 213. See also below ch. 16.

2151917 Iowa Laws ch. 136, § 2 at 158, 159.

216Woman’s Christian Temperance Union of Iowa, Forty-Fourth Annual Convention 122 (1917).

217CR 54:3324 (Feb. 15, 1917). On passage, which facilitated such state laws like
contained no “any other article” clause, Senator James Martine (N.J. Dem.), who
considered the amendment and especially the proposed punishment “prohibition
run mad,” offered an amendment to the amendment adding cigarettes to the
prohibition. Under no illusion that it would pass, he sought to “test out these
humanitarians,” his colleagues, who had not included tobacco because it affected
them. Martine declared that “if there is an enormity it is the cigarette habit,
which has obtained so fast a hold on the people of this country. Miserable, puny
sickly specimens of boys are seen sucking on the ends of these miserable cheroots
and spitting their lives away. ... I trust that these splendid specimens of humanity
who are advocating prohibition will...vote to save the rising generation from the
iniquity of tobacco smoking and from the horrors of the poison of nicotine.
[Laughter.]” When Mississippi Senator James Vardaman responded that they
could not vote for the amendment, Martine immediately retorted: “Of course, you
can not. It is a personal habit that has its fangs so deep in you as to be a part of
you.” Owning that Vardaman was “past redemption,” he insisted that his focus
was on “the rising generation,” but merely harvested more laughter. Even the
leading Progressive Republican, Robert La Follette—who as Governor of
Wisconsin had signed the anti-cigarette bill into law in 1905—confirmed
Martine’s image of his fellow senators: “I can not vote for this amendment upon
principle, and I can not vote against it without casting a vote affecting my own
interest, and therefore I decline to vote.” The Senate, as expected, rejected the
amendment 38 to 15, but the fact that 15 senators (including both Iowa senators
and long-time Progressive Republican George Norris) joined Martine suggested
that this intervention may not have fallen within the scope of what Martine
himself in his Senate valedictory two weeks later alluded to as commentary that
he had been “‘a buffoon and a disgrace to this body.’”

On July 4, 1917, the effective date of the Iowa anti-cigarette advertising law,
the Des Moines Register referred to “a phrase which was slipped through without
much comment.” Into its plagiarized version of this article, Tobacco inserted
the subhead: “A Little Clause that Escaped Comment Until It Became
Effective.”223 To be sure, the Register’s coverage of the legislative proceedings had mentioned only liquor,224 but the bill contained exactly the same language from the day that Republican Senator Chester Whitmore introduced it on January 11 together with his other bone-dry bills.225 In any event the newspaper acknowledged that: “No publication may now be largely sold in Iowa which contains an advertisement of cigarettes and cigarette advertisements may not be displayed upon billboards or elsewhere. The bulky athlete whiffing a pill and the debonair society man lithographed in the act of lighting some favorite brand of cork tipped divinities are alike are under the ban.” The paper added that the injunctive provision would permit closing any newsstand that sold any publication containing cigarette advertising.226 Whatever the level of compliance with the prohibition of the sale of cigarettes, newspapers in Iowa complied with the ban on advertising them—at least until about two months before the ban was lifted in 1921.227 Three weeks after the law had gone into effect, the Register reported that while the owner and manager of two downtown newsstands were clipping out the cigarette advertisements in (presumably out-of-state) magazines, other proprietors were unaware of the new law and had not been the targets of any enforcement actions.228 Although the United Press reported a rumor at the end of

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225 S.F. No. 7 (Jan. 11, 1917) (copy furnished by SHSI IC).
226 “Cigaret Ad Now Barred in Iowa,” DMR, July 4, 1917 (8:3).
227 A perusal of numerous issues of numerous bound Iowa newspapers and a search of the numerous Iowa newspapers on the computerized NewspaperArchive database found no cigarette advertisements from 1917 to May 3, 1921. To be sure, cigarette ads appear to have been uncommon in Iowa papers even before 1917. A rare ad for Chesterfield appeared twice in a paper in a very small south-central town. Moravia Union, Feb. 7 and 9, 1911 (7:4-6). The following two cigar store ads included only brief mention of cigarettes: IU, Oct. 8, 1909 (2) (Rex Cigar Co.; labor union weekly was adamantly opposed to sale of cigarettes); DMC, Dec. 18, 1914 (11) (full page ad for C. C. Taft Co.: “All the leading brands of cigarettes in holiday packages”). A billiards hall ad in the labor weekly mentioned cigarettes prominently along with cigars and tobaccos. IU, Dec. 12, 1913 (8:1). Ironically, in 1915 the Iowa press ran a very long piece in which the founder and president of R. J. Reynolds Tobacco Company extolled newspapers for enabling his commodities to become market leaders. “Newspapers The Standard Form of Advertising,” Muscatine Journal, May 15, 1915 (10:1-4). On the appearance of ads before, on, and after July 4, 1921, see below ch. 15.
228 “Pill” Ads Still Appear,” DMR, July 25, 1917 (10:2). According to the United Press, when the July issue of a national magazine carried a full page cigarette ad on the reverse side of which part of a story was printed, dealers “couldn’t obey the law and please
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

July that dealers were waiting for one of them to be “‘pinched’” in order to make a test case,\textsuperscript{229} the Iowa statute was apparently never challenged.\textsuperscript{230}

One device for circumventing the advertising ban, at least during the 16 months until the end of the world war, was to merge advertising and notices about mobilizing public support for supplying newly addicted smokers in the trenches or hospitals who “crave[d]” cigarettes.\textsuperscript{231} One such item, which was expressly labeled “Adv.,” transparently went over the line: “Millions of the famous LUCKY STRIKE Cigarettes are ‘going over’ all the time. There’s something about the idea of the toasted cigarette that appeals to the men who spend their time in cold, wet trenches.... Then, too, the real Kentucky Burley tobacco of the LUCKY Strike cigarette gives them the solid satisfaction of a pipe, with a lot less trouble.”\textsuperscript{232} Between the end of the war and repeal of the advertising ban the American Tobacco Company devised another ploy for calling mass attention to Lucky Strike cigarettes: in 1920 it repeatedly published large ads in numerous Iowa newspapers for Lucky Strike pipe tobacco that underscored that it underwent “the same toasting process that made the Lucky Strike Cigarette the greatest success in cigarette manufacturing.”\textsuperscript{233}

\textbf{Attorney General Havner’s Raids and Their Litigational Sequelae: 1917-1920}

After that State [Iowa] had let its anti-cigarette law lie dormant for more than a decade, Attorney General Havner, on going into office a few years ago, put the screws on for a week and then relaxed them, announcing that public sentiment was against enforcing the

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\textsuperscript{229}See “Cut Out the Cigarette Ads,” \textit{Oelwein Daily Register}, July 30, 1917 (2:3).

\textsuperscript{230}In contrast, the aforementioned Kansas law was litigated: a federal court, relying on precedent dealing with bans on liquor advertising in states that prohibited the sale of liquor, ruled that while a state could prohibit in-state newspapers from printing cigarette advertisements, it could not, consistently with the interstate commerce clause, exclude out-of-state newspapers carrying such advertising. Post Printing & Publishing Co. v. Brewster, 246 F. 321 (D. Kansas, 1917).

\textsuperscript{231}See “Red Cross Nurses, Army Surgeons, and Regiments of Nerve-Racked Fighting Men Appeal to You to Send ‘Smokes’ to Our Boys in France,” \textit{Cedar Rapids Republican}, Nov. 30, 1917, sect. 2 (1:4-7).

\textsuperscript{232}See “Our Boys ‘Over There’ Enjoy Toasted Cigarettes,” \textit{Maurice Times}, May 2, 1918 (7:3).

\textsuperscript{233}See E.g., \textit{BH-E}, July 7, 1920 (2:2-7).
statute.234

[E]ven in states where laws were in effect, enforcement was lax.235

That Attorney General Havner’s declared intention to resume enforcement of the prohibitory laws that the legislature had failed to repeal—the bill partially repealing the blue laws died236—was no bluff and extended to the anti-cigarette laws became clear shortly after adjournment. On Saturday morning April 28, an obviously leaked article in the Register announced that “Cigaret Lid Is Ready to Drop.”237 Havner had decided to make cigarette selling the first of his threatened enforcement actions. The Iowa WCTU must have rejoiced that its own John B. Hammond was the special agent in charge of the campaign.238 April 28 was the day on which Hammond’s verified application for search warrants was presented to Polk County District Court Judge Charles Hutchinson, who issued them that same day.239 (Four years later, no longer a judge, Hutchinson was one of the most stalwart public opponents of repeal of the cigarette sales prohibition law.)240 Although Hammond declined to disclose details, he had already collected considerable evidence of violations by a large number of Des Moines

234“Anti-Cigarette Laws Futile and Farcical Throughout,” San Antonio Express, Feb. 27, 1923 (6:2-3) (edit.). The gross factual errors in this editorial, although the events misstated had taken place only several years earlier, were typical for the press on this topic.


237“Cigaret Lid Is Ready to Drop,” DMR, Apr. 28, 1917 (5:6-8).

238Just 10 days earlier a law had gone into effect authorizing the governor or attorney general to spend up to $25,000 a year to call to his aid any peace officer in Iowa—who was thereby obligated to comply with the request—or to employ the services of any person “for the purpose of rendering assistance in procuring evidence, ferreting out crime, prosecuting law violators or otherwise enforcing the law.” These peace officers or persons acting in this capacity had the same powers as the sheriff in the county in which they were acting. 1917 Iowa Laws ch. 231 at 249-50. On Hammond, see above ch. 13.

239Appellant’s Abstract of Record at 2, State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918).

240See below ch. 15.
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

dealers—including cigar stands in most of the capital’s large hotels—against whom already prepared informations would be filed immediately. That the city’s dealers were “not entirely in the dark” as to the impending actions followed from the “open” sale of cigarettes in Des Moines and other cities, which meant that state workers had had “no trouble in gathering evidence in plenty.” Hammond’s chief agent was his own 23-year-old son, Mott, who, together with one other person, had bought cigarettes in the Des Moines stores before his father carried out the raids.

The next day (Saturday) Hammond met with 30 police officers, eight state agents, and seven members of the sheriff’s staff and gave them the requisite search warrants and instructions for executing them. At 8 p.m. the authorities swooped down on 54 stores and pool halls in Des Moines, confiscating thousands of dollars worth of cigarettes and taking them back to police headquarters, where Hammond and others spent more than two hours counting them, before placing them in a cell for eventual burning. In one store alone Hammond’s raiders confiscated $2,500 worth of cigarettes after having had to kick in the door that had been locked by the resisting owner. At one store, where they were unable to cart off the entire stock in one trip, on their return they arrested the clerk, who had in the interim sold off the remaining cigarettes; also arrested was a pool hall owner who had lied to raiders about having no cigarettes. Hammond’s strictness can be gauged by the fact that he arranged to file charges against a police officer who had allowed clerks to remove cigarettes and hide them in a non-tobacco store. Although search warrants had been issued for 130 locations, lack of manpower prevented the agents from reaching all; consequently, raids were largely limited to downtown areas, including 10 stores owned by the C. C. Taft Company.

Refraining from sabbatarian raids, on Monday the attorney general’s forces

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At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

turned to Des Moines cigarette wholesalers.244 The same day the Johnson County Attorney Steve Casey in Iowa City announced that he would insure enforcement of the anti-cigarette statute by prosecuting violators:

“Information has reached me from the Attorney General’s, making very plain the attitude of the State Department with reference to the sale of cigarettes. This information is to the effect that the statute prohibiting the sale of this commodity will be strictly enforced and violation of it prosecuted.

“This law has been upon a statute book for a number of years but has been disregarded by the people of the entire State, but it seems that the spirit of the times will no longer tolerate its violation, hence it is that all tobacco dealers are now warned of the attitude of the State Department upon this question, and are further warned that all violation of this law will be prosecuted.”245

Just the word of a possible raid in Iowa City prompted dealers there to reduce cigarette prices greatly “in order to escape confiscation of the goods.”246

Announcing that he would prosecute more than 120 people in Des Moines for illegally selling cigarettes and seek to collect a total of $36,000 in mulct tax from them, Havner directed his special agents, headed by Hammond, to see to it that the law was enforced “all over the state” and that Des Moines dealers not resume sales: “We are not making Des Moines the victim. We expect to stop their sale in all cities.” Defying what had already turned into an organized mania, Havner presumably pleased few outside of the WCTU in declaring that the $3,000 worth of cigarettes seized in Des Moines would not be shipped to U.S. soldiers in France.247 (More than a thousand dollars worth of cigarettes could not have been shipped anyway since they were soon destroyed by fire at the police station where they were being stored.)248

The “spectacular” raids in Des Moines represented just the opening blow of Havner’s statewide suppression drive, which, according to the Davenport Democrat, was planned to “descend upon practically every city and town in Iowa.

244“Drive Upon the Cigaret Kept Up,” Davenport Democrat and Leader, May 1, 1917 (2:5). Although the press reported the raids on Taft’s retail stores, Taft litigated in its capacity as a wholesaler and jobber based on the raid on April 30. Appellant’s Abstract of Record at 2, State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918).


248“Fire in Police Station Destroys Cigarettes of Value Estimated at $1,000,” Des Moines Register, Aug. 25, 1917 (3:5).
Within a month it is believed that any cigarettes obtained in the state will either be shipped in parcel post to the consumer or be purchased from bootleggers.\textsuperscript{249} The attorney general’s enforcement raids soon spread across the state as he intimated that the confiscation of slot machines and carloads of whisky in Dubuque on May 5 was just the start of a campaign to suppress the whisky and cigarette traffic.\textsuperscript{250} Havner’s campaign was exerting its intended general deterrence: under the headline, “No Cigaretts on Sale Here,” the \textit{Waterloo Times-Tribune} interviewed a tobacco dealer who opined that a raid on stores in Waterloo would not find a single package because, in the wake of the widely publicized Des Moines raids, every store in Waterloo had stopped selling cigarettes. One merchant regretted that, in light of the great demand for cigarettes, the legislature had not legalized their sale: “‘However, if the law is to be enforced and the sale of cigarettes prohibited, smokers must content themselves with cigars and pipes. Waterloo merchants are not in favor of violating the law and if the attorney general proposes to enforce this law he will not be handicapped by Waterloo firms.’” Intriguingly, the newspaper added that it was “generally understood that cigarettes have been sold freely throughout Iowa for several months, even though it is contrary to state law”\textsuperscript{251}—thus indicating that their unimpeded sale was not of long standing.

In the course of the summer the raids spread to other cities. In August, Oscar O. Rock, a state agent, and the local sheriff raided seven stores in Council Bluffs. Rock’s staff made purchases in each store before officers arrived, while a deputy was planted at each place to insure that no one tipped off other stores. Confiscating many thousands of cigarettes, including 15,000 at one location and “an immense lot” at another, the officials charged the owners with violation of the anti-cigarette law, several of whom immediately appeared before a justice of the peace, pleaded guilty, and paid the $25 fine.\textsuperscript{252} Council Bluffs illustrated the capacity of statewide centralization of enforcement to overcome local incompetence. Just eight months earlier, in December 1916, the police chief, after consultation with the county attorney, had announced his “crusade” against cigarettes, which was based on his plan to take every dealer to court who failed

\textsuperscript{249}“Cigaret Is an Outlaw in Iowa,” \textit{Davenport Democrat and Leader}, Apr. 30, 1917 (2:5-6).

\textsuperscript{250}“Rapids Law Helps Raid in Dubuque,” \textit{Cedar Rapids Republican}, May 6, 1917 (1:1).


to “pay the state license” of $300. In a vast understatement, the local newspaper mentioned that lawyers had always questioned the protection that the “license” provided sellers, since state law prohibited keeping cigarettes for sale: “For this reason there has never been sustained effort to enforce the license law in this county.” Whatever doubts lawyers may have entertained were presumably dispelled by the police chief, who, in perpetuation of the on-again, off-again statewide tradition, turned the two reinforcing laws on their head by deciding to punish all dealers who did not secure a state “license” and to reassure all who did that they “will not be molested by officials....”\textsuperscript{253} The problem was the press’s false assertion, which it had been disseminating for almost twenty years, that whereas one state law prohibited the sale of cigarettes, “another law also permits their sale upon payment of a $300 license fee.” The consequence was that allegedly “[c]onfusion as to which law applies has prevented the enforcement of either to any great extent in Council Bluffs and other Iowa cities.” The “confusion” was, however, the press’s: although it is difficult to discern how, in the face of such a long-standing and large volume of unambiguous legislative, judicial and administrative directives that the mulct tax was not a license at odds with the prohibitory act, but an additional penalty for violating the Phelps law, anyone could have continued to hold and act on the opposite view, it nevertheless seemed almost immune to refutation. To some of its adherents it may have been attractive because it offered a market-, or at least a money-based alternative to government fiat: “Most dealers cannot make a profit on the sale of the ‘pills’ if compelled to pay the state license.”\textsuperscript{254} Such an approach was, in fact, doomed to fail because the concentration of market-share among the largest stores made it possible for them to spread the tax (if the incidence fell on them at all) over a sufficiently high volume as to reconcile it with profitability.

Litigation, the cigarette industry’s favored tactic to delay the inevitable, was soon the order of the day. Following the seizures in Des Moines, C. C. Taft Company, represented by the law firm of Frank Dunshee, who had been ATC’s local lawyer for two decades,\textsuperscript{255} appeared at the hearing on June 11 before Judge Hutchinson to ask that 27 cases made up of cartons containing more than 160,000 cigarettes—including 70,000 Camel cigarettes bought from R. J. Reynolds & Co. in Winston-Salem, North Carolina, and 30,000 Omar cigarettes bought from ATC in New York—be returned to it on the grounds that they were in their original packages as shipped in interstate commerce.\textsuperscript{256} The unoriginality of the claim was

\textsuperscript{255}See above ch. 12.
\textsuperscript{256}Appellant’s Abstract of Record at 3-6, State of Iowa v. C. C. Taft Co., 183 Iowa
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

overwhelming in light of the fact that over two decades the Iowa and U.S. Supreme Court had rejected every attempt by the Tobacco Trust to vindicate this doctrinal stratagem. Attorney General Havner, representing the State of Iowa, entered into a stipulation with Taft that the cigarettes as seized were in their original packages shipped into Iowa in the ordinary course of interstate commerce. The parties also stipulated that Taft had kept the cases of cigarettes “with the intention, as its business demanded, to open the same and remove the contents therefrom and to sell the cigarettes to its customers at retail” as well as to place them in Taft’s own retail stores in Des Moines for sale in broken packages—Taft’s business method for at least one year.\(^{257}\) On August 1, the judge having found that the cigarettes were not subject to any interstate commerce exemption, ordered their condemnation and destruction, but stayed the order pending Taft’s to appeal the Iowa Supreme Court.\(^{258}\)

In its appeal brief, Taft pleaded for less than strict construction of condemnation statutes because they violated “sound economic principle”—a consideration of especial importance at a time “when the principle of conservation is so forcefully brought home to the human race....” It bemoaned “the large economic wastage” that would result from destroying cigarettes in original packages, which could “legitimately” be shipped out of Iowa and “kept and used within the state....”\(^{259}\)

In keeping with the state’s tradition in cigarette litigation, Attorney General Havner treated Taft’s legal arguments with unveiled contempt. As far as he was concerned, Taft’s stipulation that it intended to break up the contents of the original packages was the only argument needed to show that it had “lost its right to claim that those packages remained articles of interstate commerce.”\(^{260}\)

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548 (1918). The June 11 hearing was the continuation of one begun on May 8.

\(^{257}\)Appellant’s Abstract of Record at 7, State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918). On the grounds that they were in the original unbroken carton packages, Judge Hutchinson—apparently pursuant to an agreement between the state’s and the company’s lawyers—had initially issued an order releasing from confiscation the 250,000 cigarettes that had been seized from Taft, whereas all other seized cigarettes were confiscated. “Some Cigarettes Restored,” DMR, June 12, 1917 (3:3); “Cigaret Tax Case to Supreme Court,” DMR, June 26, 1917 (7:4).

\(^{258}\)Appellant’s Abstract of Record at 8-9, State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918).

\(^{259}\)Appellant’s Brief and Argument at 16-17, State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918). This latter claim was specious: at best the only person who could lawfully keep and use the cigarettes was Taft’s owner.

\(^{260}\)Appellee’s Brief and Argument at 12, State of Iowa v. C. C. Taft Co., 183 Iowa 548
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

Taft’s reply brief culminated in a wild charge that Havner had made a “somewhat vicious attack on the plaintiff.” Not only was it “unthinkable” that Taft “should lose all its constitutional rights because some of its officers have had an intent to violate a law,” but “in all earnestness” the plaintiff asserted that Havner’s effort to deny Taft a hearing was “far more reprehensible than” Taft’s intent “to violate a law which has been ignored generally by public officers and private citizens ever since it has been on the statute books.” Dunshee’s firm then accused Havner of having falsified the record and, implicitly, of having taken advantage of Taft’s willingness to acquiesce in the intent stipulation for the sole purpose of enabling him to make as strong a case as possible so as to secure a clear ruling as to “whether we have to submit to a trial of fact as to our intent when we hereafter import cigarettes to resell them strictly within the law.”

Exactly how such lawful sales might be possible Taft did not explain, but it did hint that the physical concentration of soldiers at training bases during World War I formed the basis of the stratagem: “The encampment has created a demand for a large amount of cigarettes which can be supplied by legitimate sales in original packages.”261 (Even if Taft, acting as a wholesaler, sold these self-same large

261Appellant’s Reply at 8-9, State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918). Taft was referring to Camp Dodge, just outside the city of Des Moines, with whose soldiers tobacco stores in Des Moines did a “rushing business....” “A Cigar Dealer Seldom Complains in Des Moines,” Tobacco 67(25):22, 23 (Apr. 3, 1919). At its peak, Camp Dodge, one of 16 national training centers for the war, housed 28,000 soldiers. http://www.globalsecurity.org/military/facility/camp-dodge.htm. Ironically, prohibition in Iowa and the power to keep liquor away from soldiers were largely responsible for Camp Dodge’s having been selected rather than an encampment in Minnesota. “Prohibition Paid Big Dividends to Des Moines—Herring,” DMC, June 13, 1917 (1:2). In 1909, the converse problem purportedly arose at a large army post near Des Moines (presumably Fort Des Moines), where a sutler or storekeeper sold supplies to soldiers: “The reservation belongs to the national government, not to the state, and is subject to national laws, not state laws. The soldiers may buy as many thousand cigarettes as they can pay for and bring them by street car into the city and give them to friends or act as agent and make the purchases for either friends or strangers.” “The Farmer the Moral Hope of the Nation,” Homestead 54(30):1(3-4 at 4) (July 29, 1909). Whatever extraterritoriality may have shielded soldiers on the army post from the Iowa anti-cigarette sales law would not have extended to their selling cigarettes in the city of Des Moines. In order to prevent sales from soldiers to citizens John B. Hammond announced that he would present the matter to the U.S. district attorney and Iowa attorney general and request (first-
cases of cigarettes that it had received from out of state to whoever sold them in individual packages retail to soldiers, all those retail sales would clearly have been unprotected by the interstate commerce clause and therefore unlawful, and Taft would have known that it was facilitating its customers’ violations of the anti-cigarette law.)

262 On August 24, 1917, A. T. Wallace, the acting county attorney in Des Moines, sought Attorney General Havner’s opinion with regard to tobacco jobbers there who had ordered a large quantity of cigarettes from outside of Iowa in a bona fide original package and intended to sell them in the identical package without the contents “having been mingled with the common property of the state.” Adding that the packages would retain their status as original packages and interstate commerce until they left the jobbers’ hands “in the regular course of trade,” Wallace requested Havner’s sanction or opinion as to his opinion that the transaction was “legitimate.” Assuming that the facts were as Wallace reported them and that a package contained 5,000 or more cigarettes, Havner was “inclined to concur; “While such sales would be contrary to the letter and spirit of section 5006 of the code, which in terms prohibits absolutely the sale of cigarettes within the state, yet under the holding of the supreme court of the United States and this state such statute is ineffective for the purpose of preventing sales made in interstate commerce, and in the original package, and until congress [sic] of the United States shall see fit to enact some law similar to the Webb-Kenyon law withdrawing the protection of interstate commerce from cigarettes, the state is powerless to prevent sales thereof in such original packages.” H. M. Havner to A. T. Wallace, Acting County Attorney, Des Moines (Sept. 14, 1917), in *State of Iowa: 1918: Twelfth Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1918*, at 425, 426 (n.d.). On the Webb-Kenyon Act, which prohibited importing into a state intoxicating liquor intended to be received, possessed, sold, or used, in the original package or not, in violation of any law of that state (Act of Mar. 1, 1913, 37 U.S. Statutes at Large 699, ch. 90, § 1), see James Timberlake, *Prohibition and the Progressive Movement 1900-1920*, at 159-64 (1966). Even if Havner’s legal analysis was correct as far as it went, it failed to deal with the issue, raised parenthetically in the text, that regardless of the interstate commerce exemption from the Iowa law that might have applied to the jobbers’ sales, any and all sales of individual small packages to ultimate consumers would have been unlawful, thus making the entire upstream transaction commercially nonsensical, especially since Wallace had stipulated that the jobbers’ transaction was conducted in good faith “with no intention of violating the state or federal law....” H. M. Havner to A. T. Wallace, Acting County Attorney, Des Moines (Sept. 14, 1917), in *State of Iowa: 1918: Twelfth Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1918*, at 425 (n.d.).
to evade the Phelps law: “If a mere intent to violate the law takes every shipment out from under the protection of the constitutional provision and the safety of our property is to depend in case of every shipment on the chance of testimony from someone that we intend to violate the law we cannot conduct the sale at wholesale in original packages.” In what was probably a reference to Hammond, Taft lamented that its “confidence in the reliability of the testimony of some reformers is not sufficiently strong to make” it believe that it could safely exercise its “constitutional right.”

Two days after Taft’s death in March 1918 his competitors decided to close their cigar stores for one hour to memorialize him. This genuflection before the tenacious litigator on behalf of subverting the state’s anti-cigarette laws failed to impress the Iowa Supreme Court, which in May, focusing on the stipulation that Taft had kept the cases with the intention of opening the cases and selling the cigarettes in broken packages, ruled that the cigarettes had lost their character as articles of interstate commerce, and affirmed the lower court. As a result, Attorney General Havner, who represented the state, faced no legal obstacles to conducting raids as an ongoing enforcement strategy (“Cigaret Stock Can Be Seized”). Indeed, in the wake of the ruling he voiced the view that “the effect of this opinion is that it not only bars the retailing of cigarettes, but makes it impossible for any firm to handle them in any other than wholesale manner, which is impracticable.”

Nor were the raids’ searches and seizures the only dimension of the intense enforcement campaign. In connection with the titanic struggle over Havner’s enforcement of the Sunday closing (Blue) laws—which the “well organized” cigar store owners were “militantly in favor” of defying—responsibility for securing compliance devolved upon county attorneys after the attorney general

264 “Cigar Stores to Close in Honor of C. C. Taft,” DMN, Mar. 23, 1918 (1:7).
265 State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918).
266 “Cigaret Stock Can Be Seized,” DMN, May 7, 1918 (1:2).
268 “Blue Law Lid to Be Locked Tight Sunday,” DMN, May 9, 1917 (1:7-8).
269 “Stores Open as usual Sunday, Defy Blue Laws,” DMN, May 20, 1917 (1:1). Most of them had threatened to sell, inter alia, cigarettes in original packages, but then kept their stores closed after Havner stated that he would prosecute them for conspiracy. After two Sundays of compliance a number of them did violate the law in Des Moines. Id.; “60 Blue Law Arrests Made,” Iowa City Daily Citizen, May 14, 1917 (1:4); “Blue Sunday Hits Many of Iowa’s Cities,” DMN, May 21, 1917 (1:3); “Deny Violating Blue Law Here,” DMN, May 28, 1917 (1:6).
had failed to persuade the legislature to modify the legislation. By early May 1917 Polk County Attorney Ward Henry was assessing mulct taxes that would reportedly amount to $36,000 against those establishments that sold cigarettes. This campaign, according to an announcement of the department of justice, was to be extended to Iowa’s other cities. On May 15 and 29, 1917, Hammond and two other citizens of Polk County filed with the county auditor, F. J. Alber, a “Statement for Return of Cigarette Mulct Tax” alleging that the mulct tax should be assessed against approximately 150 cigarette dealers and real estate owners (including the Chicago, Rock Island & Pacific Ry Co., the Equitable Life Insurance Company of Iowa, and several banks and hotels), who had been engaged in the business of selling cigarettes between April 1, 1916 and April 1, 1917.

The Des Moines tobacco dealers organized under the leadership of the C. C. Taft Company, which, represented again by the law firm of Frank Dunshee, on June 7 filed an equity petition in Polk County District Court seeking an injunction against the tax assessment on behalf of itself and all the other dealers and owners on the grounds that the mulct tax law was unconstitutional because it allegedly violated article VII section 7 of the Iowa Constitution by failing to state the object to which the tax applied. The defendant, represented by Attorney General Havner, demurred, and Judge Hutchinson heard oral arguments two days later. While awaiting the court’s decision Havner eyed the fiscal consequences: “If the court upholds the constitutionality of the statute...it will mean $54,000 for the state from Des Moines alone. Thirty-six thousand dollars have already been cited, and $18,000 more will be if the law is upheld. This is from Des Moines alone, and it is impossible to estimate what could be collected from all the other

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270 “County Attorney’s Offices to Enforce County Blue Laws,” WEC, May 9, 1917 (2:3).
271 Petition at 2-6, and Appellants’s Brief and Argument at 3, C. C. Taft Co. v. Alber, 185 Iowa 1069 (1919). The building owners were very sensitive to this mulct tax procedure because the county attorney would place liens on these properties constituting obstacles to titles until the tax was paid. “Cigaret Tax Case to Supreme Court,” DMR, June 26, 1917 (7:4).
273 Petition at 6, C. C. Taft Co. v. Alber, 185 Iowa 1069 (1919). A week earlier District Court Judge De Graff had issued a preliminary injunction restraining Hammond from listing the dealers with the Polk County auditor as subject to the cigarette mulct tax assessment. “Fighting Cigaret Tax,” DMR, May 31, 1917 (9:2).
cities over the state.” On June 26 Hutchinson upheld the validity and constitutionality of the tax and dismissed the petition. Since the owners of the property on which the illegal sales took place would ultimately be liable in the form of liens, they had only “one hope—the supreme court.” The cigarette sellers pursued a two-pronged response to Hutchinson’s decree. As soon as word of the district court ruling reached them, tobacco dealers rushed to the county courthouse to request a hearing before the Polk County Board of Supervisors, which granted it. The dealers argued that they were entitled to a postponement of the pending tax levy until the court had acted on its petition for an injunction; the board instructed the county auditor not to list the properties in question until after the next day for which it scheduled an extension of the hearing. The plaintiffs also immediately appealed the district court ruling and prevailed on Iowa Supreme Court Chief Judge Scott Ladd to grant their application for a restraining order to prevent the auditor from assessing the tax during the pendency of the case, although the court’s action in no way constituted a ruling on the tax’s legality. The total mulct tax for which sellers and building owners were liable was variously estimated in the press at between $32,000 and $50,000.

The appeal to the Iowa Supreme Court may have been a lengthy process, but the dealers (and property owners) could secure more expeditious relief from the board of supervisors, who already on June 27 began taking evidence in 191 cases involving dealers. At that regular session it was moved that a resolution be adopted that “[o]n account of the stipulation made and entered into by the Board of Supervisors and the parties hereto and on account of the admission of John B. Hammond to the effect that they have no evidence as to the sale or the possession for sale of any cigarettes or cigarette papers or wrappers by any of the parties who

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275 Havner Expects to Bag Big Sum by Cigaret Law,” DMN, June 12, 1917 (1:3).
276 Petition at 10-11, C. C. Taft Co. v. Alber, 185 Iowa 1069 (1919).
278 “Cigaret Tax Case to Supreme Court,” DMR, June 26, 1917 (7:4).
279 Petition at 10-13, C. C. Taft Co. v. Alber, 185 Iowa 1069 (1919); “Pill Tax Delayed; High Court to Rule,” Des Moines Evening Tribune, June 27, 1917 (4:3); “Cigaret Tax Case Tied Up,” DMR, June 28, 1917 (8:1).
280 “Supervisors Hear Hammond in ‘Pill’ Case,” DMN, June 28, 1917 (2:1).
281 “Cigaret Dealers in City ‘Stuck’ for $32,000 Mulct Tax by Judge Hutchinson,” DMC, June 26, 1917 (2:2); “Cigarette Tax Case to Supreme Court,” DMR, June 26, 1917 (7:4); “Supervisors Hear Hammond in ‘Pill’ Case,” DMN, June 28, 1917 (2:1); “Cigaret Ruling Is Appealed to Higher Court,” DMN, June 26, 1917 (2:3).
282 “Supervisors Hear Hammond in ‘Pill’ Case,” DMN, June 28, 1917 (2:1).
are now applicants for the remission of tax,” it be resolved, “that all the tax
certified or listed for the year 1916 as against any property owner or any vendor
or dealer and against the real estate be...hereby remitted, set aside and held for
naught.” The motion lost by a vote of 2 to 3, \textsuperscript{283} Charles Saverude, chairman of
the Polk County Republican committee, \textsuperscript{284} who as a drug store owner\textsuperscript{285} was
personally interested in mulct tax remission, \textsuperscript{286} voting Yes, and board chairman
Frank Thornton, who had been in charge of the county roads and bridges before
he was elected to the board\textsuperscript{287} and stopped smoking following an illness in 1915
but still found “the sight of a cigar...very tempting,” \textsuperscript{288} voting No. At the
continuation of the hearing the next day on the applications for remission of the
cigarette mulct tax lawyers for the applicants moved that the 1916 tax be
cancelled, but by the same 2-3 vote the supervisors overruled the motion and
decided to continue the hearing on July 5.\textsuperscript{289} On that date, in the course of the
introduction of testimony relating to the tax remission,\textsuperscript{290} the county attorney’s
questions to several dealers as to whether they had sold cigarettes during a certain
period prompted Dunshee’s partner Robert Haines and corporation lawyer

\textsuperscript{283}Proceedings Board of Supervisors (June 27, 1917) (Saverude and John Stewart
Yes, Thornton, Clarence Keeling, and Charles W. Keller No) (copy provided by Polk
County Archive Dept). The text was also published as “Proceedings of Board of
Supervisors of Polk County, Iowa, for the Month of June, 1917,” \textit{AH}, July 19, 1917 (8:4)
(June 27). The lack of “evidence” to which the resolution referred presumably related to
the year 1916, but Hammond’s Statement for Return of Cigarette Mulct Tax alleged that
he “had credible evidence” that dealers in Des Moines had sold cigarettes between Apr.
1, 1916 and Apr. 1, 1917. Appellants’ Brief and Argument at 3, C. C. Taft Co. v. Alber,
185 Iowa 1069 (1919).

\textsuperscript{284}“Saverude Sells Soap to County at Good Profit,” \textit{DMDN}, Nov. 3, 1916 (1:1).

\textsuperscript{285} \textit{R. L. Polk & Co.’s Des Moines City Directory 1917}, at 1009 (v. 26) (president of

\textsuperscript{286}See below this ch.

\textsuperscript{287}“Announces Candidacy,” \textit{AH}, Mar. 12, 1914 (1:5).


\textsuperscript{289}Proceedings Board of Supervisors (June 28, 1917) (copy furnished by Polk County
Archive Dept.). The text in “Proceedings of Board of Supervisors of Polk County, Iowa,
for the Month of June, 1917,” \textit{AH}, July 19, 1917 (8:4) (June 28), omitted several key
words. Ignoring the motion and vote, the \textit{News} merely stated that the hearing was
postponed because the county attorney had been unable to summon all the dealers.
“Postpone Cigaret Case,” \textit{DMDN}, June 29, 1917 (9:3).

\textsuperscript{290}Proceedings Board of Supervisors (July 5, 1917) (copy furnished by Polk County
Archive Dept.). The text was also published as “Board Proceedings,” \textit{AH}, Sept. 6, 1917
(2:1) (July 5).
Charles Maxwell to advise their clients that the “incriminatory” questions need not be answered. Even after District Court Judge Dudley on appeal had ruled the question proper and fined the person before him one dollar for contempt of court, dealers continued to be advised to refuse to answer similar questions. With more than 100 dealers still to testify,\(^{291}\) the hearing was, yet again, continued until July 9,\(^{292}\) at which time the taking of testimony from 20 dealers and property owners completed the hearing,\(^{293}\) but the matter was again continued until August 6,\(^{294}\) and continued three more times\(^{295}\) until the supervisors finally voted on it on August 24. Unanimously they decided to remit the cigarette mulct tax for 1916 as it pertained to dealers (except Saverude’s case No. 95) and property owners and to instruct the county auditor to cancel the assessment; the supervisors also voted unanimously (with Saverude passing) to remit the tax in Saverude’s case as well. Then after the motion to remit the tax for 1917 as to property owners had lost by the same 2-3 vote as on June 27 and 28, the supervisors agreed to a further hearing on September 1.\(^{296}\) The press estimated that the board’s action cut about one-third of the whole tax amount of $60,000.\(^{297}\) When the supervisors met in September, only chairman Thornton voted against reconsidering the vote to refuse to remit the 1917 taxes as to property owners, and then, replicating the earlier procedure for 1916, motions were offered to remit the taxes for 1917 first for all dealers and owners except their colleague Saverude and second for him alone. On the first motion, one of the three-supervisor majority, Clarence Keeling, switched, creating a 3-2 majority for remission; with Saverude unable to vote for himself, a 2-2 deadlock stymied his inclusion in the ranks of the illegal cigarette sellers who would not even have to pay the mulct tax for 1917 until Charles Keller switched, providing a 3-1 majority for Saverude as well.\(^{298}\) At $75 per


\(^{292}\)“Board Proceedings,” *AH*, Sept. 6, 1917 (2:1) (July 6).

\(^{293}\)“Cigaret Tax Hearing Is Continued Monday,” *DMN*, July 9, 1917 (2:5).

\(^{294}\)“Proceedings Board of Supervisors (July 9, 1917) (copy furnished by Polk County Archive Dept.). The text was also published as “Board Proceedings,” *AH*, Sept. 6, 1917 (2:1) (July 9).

\(^{295}\)“County Board Proceedings,” *AH*, Oct. 11, 1917 (9:4-6) (Aug. 6, 7, and 20).

\(^{296}\)Proceedings Board of Supervisors (Aug. 24, 1917) (copy furnished by Polk County Archive Dept.). The text was also published as “County Board Proceedings,” *AH*, Oct. 11, 1917 (9:6) (Aug. 4 [sic; should be 24]).


\(^{298}\)Proceedings Board of Supervisors (Sept. 1, 1917) (copy furnished by Polk County Archive Dept.)
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

quarter for each of 125 dealers, these actions “deprive[d] the county” of $18,750 in revenue for the first six months of 1917. To be sure, at the board’s next regular session on Sept. 10, a motion unanimously carried to reconsider the vote by which the cigarette mulct tax for dealers had been remitted as to the year 1917. Although the supervisors did not return to the question, the Des Moines Register reported the next day that “the board rescinded their former resolution providing for the remitting of the cigaret tax as to dealers and propert[ie] owners.

Although the Des Moines press reported these board of supervisors votes, newspapers failed to shed any light on why the board remitted the taxes or why some supervisors voted against remission. The only claim advanced by dealers in support of remission that newspapers mentioned was the judicially discredited assertion that taxing an industry legalizes it. The board’s purpose in remitting

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299 Remit Tax on Cigarettes,” DMR, Sept. 2, 1917 (8:1); Who’s Who in Des Moines 1929, at 247 (Sara Baldwin ed.).
300 Proceedings Board of Supervisors (Sept. 10, 1917) (copy furnished by Polk County Archive Dept.). The text was also published as “County Board Proceedings,” AH, Oct. 25, 1917 (2:2) (Sept. 1). Both motions were made by John Mason Stewart, a longtime resident of Des Moines, where he had also been in charge of streets. “Remit Tax on Cigarettes,” DMR, Sept. 2, 1917 (8:1); Who’s Who in Des Moines 1929, at 247 (Sara Baldwin ed.).
301 “County Decides to Pave Road to Camp,” DMR, Sept. 11, 1917 (3:6-7 at 7). The article appears suspect not only because “reconsider” does not mean “recede”—but rather that the body is willing to reopen the question, as it did, for example, on Sept. 1, before proceeding to vote again and reverse its vote of Aug. 24—but also because the motion did not mention property owners or the year 1916.
302 Conceivably the board might have rested its vote on a policy decision to focus enforcement on actually prohibiting the sale of cigarettes, but such a claim would have made little sense with regard to past sales and appears hardly to have been in sync with the majority’s real position.
303 The board unanimously approved a motion ordering that a transcript of the hearing testimony be ordered with an original and four copies, but the Polk County Archivist was unable to locate any such transcript. Proceedings Board of Supervisors (July 9, 1917) (copy furnished by Polk County Archive Dept.); “Board Proceedings,” AH, Sept. 6, 1917 (2:1) (July 9); email from Linda Cunningham to Marc Linder (Sept. 20, 2009).
304 “Cigaret Tax Case to High Court,” DMC, Sept. 4, 1917 (2:2). This article, in deviation from the published board proceedings, stated that the first remission was limited to the last quarter of 1916 and the second to the first quarter of 1917; According to “Board Remits Cigaret Taxes,” DMN, Sept. 2, 1917 (6:5), the second remission was limited to the
the tax for 1916 is especially in need of clarification in light of the fact that, as noted earlier, 1915 was the last year for which Polk County’s annual *Financial Report* included any statement of revenue from the cigarette mulct tax; indeed, from 1916 forward the rubric itself disappeared from the report. Why formal remission was needed when the tax had already ceased to be paid/collected anyway is unclear. Also unclear is the authority by which the board remitted a tax whose assessment the state legislature made mandatory (“There shall be assessed a tax of three hundred dollars per annum against every person”). Remarkably, neither Attorney General Havner nor anyone else appears to have criticized the supervisors’ act of nullification for subverting enforcement of the state anti-cigarette legislation or undercutting the litigation that he was prosecuting with the additional result that Polk County and the City of Des Moines would lose the significant tax revenues to which he had recently called attention. Likewise, whereas the *Des Moines News* in 1915 and 1916 attacked Odle and his raids for having indirectly prompted the dealers to stop paying the mulct tax while continuing to sell cigarettes illegally, in 1917 the newspaper did not fault the board of supervisors for directly abolishing this source of local tax revenue.

The national trade journal *Tobacco* may have declared that the cigarette dealers would make a “determined fight,” but Havner in his brief before the Iowa Supreme Court wasted no time in uttering, once again, his contempt for the plaintiffs. Observing that petitioners for equity, which is granted to do justice between the parties and not strictly as a matter of law, are required to have “clean hands,” he argued that

the very relief asked is bottomed upon the proposition that the plaintiffs are law breakers and that they are entitled to the assistance of the court to protect them against the penalty

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306 Code of Iowa Annotated § 5007, at 1955 (1897).

307 No one, including the attorney general, appears to have challenged the board’s authority in a quo warranto proceeding.

imposed because of their unlawful acts. They entered into this business deliberately, knowing that it was illegal and knowing that the tax which they are attacking would be assessed; they have danced and now object to the fiddler’s bill; and instead of coming into this court with clean hands we find them here with hands stained with this nefarious and unlawful business, yet asking the tender protection of the chancellor.\textsuperscript{309}

Coming to the nub of the plaintiffs’ legal claim, the attorney general pointed out that the mulct tax was not a property tax, but a “deterrent against the cigarette business,” which conferred no right, “but imposes an impediment to the transaction of the business. It is levied to meet the burdens imposed upon the general public by what is thought to be the result upon the human race and particularly upon children of the use of cigarettes.” It was thus more in the nature of a police regulation.\textsuperscript{310} Concluding right where he had begun, Havner expressed disbelief that the Iowa Supreme Court would “lend its sanction to those who deliberately plan to debauch the youth of this state.”\textsuperscript{311}

Two years later, the Iowa Supreme Court, as it had of the Tobacco Trust’s earlier frivolous litigation, made short shrift of the dealers’ constitutional claim, locating its fatal defect in having characterized the mulct tax as an exercise of the taxing power for revenue. Rather:

No doubt, the legislature, recognizing, or thinking that it recognized, an evil in the traffic in cigarettes, felt that the public good demanded that the restraining hand of the law be placed upon the traffic. Thereupon, the legislature, in its seeming wisdom, enacted Section 5006 of the Code of 1897, through which it undertook to prohibit this sort of traffic, and provided a penalty for any violation of its inhibition. The thought of the legislature evidently was that the traffic in cigarettes was inimical to the public good, and ought to be suppressed. The traffic was made unlawful. This unlawful traffic was carried on in buildings not owned by the person carrying on the illegal traffic. The thought of the legislature seems, then, to have been that, as an additional deterrent to the unlawful business, a penalty ought to be exacted of any person who allowed his building to be used for the unlawful purpose; and so a penalty of $300 was imposed upon the person so permitting it to be unlawfully used, and upon the property permitted to be used. This was in no sense a tax for revenue, though it may afford revenue. Its primary purpose was, not to secure revenue, but to aid in the enforcement of the inhibition found in Section 5006.\textsuperscript{312}

\textsuperscript{309}Appellee’s Brief and Argument at 8, C. C. Taft Co. v. Alber, 185 Iowa 1069 (1919).
\textsuperscript{310}Appellee’s Brief and Argument at 30-31, C. C. Taft Co. v. Alber, 185 Iowa 1069 (1919).
\textsuperscript{311}Appellee’s Brief and Argument at 42, C. C. Taft Co. v. Alber, 185 Iowa 1069 (1919).
\textsuperscript{312}C. C. Taft Co. v. Alber, 185 Iowa 1069, 1074-75 (1919).
Noting that the case was controlled by its decisions in *Hodge* and *Cook*, both of which the U.S. Supreme Court had affirmed, the decision put an end to more than two decades of unsuccessful legal assaults on the mulct tax. The 135 dealers in Des Moines were said to owe Polk County a total tax “in the neighborhood of $39,000.” The impact of the Iowa Supreme Court’s decision was immediate; the Monday following issuance of the opinion on Friday, April 11, the press reported, for example, that:

Practically all drug and confectionery stores in Sioux City will quit selling cigarettes because of the ruling of the Iowa supreme court that cigaret dealers must pay a mulct tax of $300 annually, a tobacco dealer said.

It was estimated that not more than 10 cigar stands and drug stores will be able to pay the tax because they do not sell enough to warrant carrying them.

Attorney General Havner opined that a U.S. Supreme Court ruling sustaining the Iowa Supreme Court’s decision upholding the cigarette mulct tax’s validity would “put teeth in the present cigaret law,” but C. C. Taft Company—perhaps because its search and seizure case was still pending before the U.S. Supreme Court—failed to “Appeal Fag Decision.” Havner expected that an affirmance in that case would also “further aid enforcement of the present laws” but on March 15, 1920, just three days after oral argument, the U.S. Supreme Court dismissed the case for want of jurisdiction because Taft, which, with its 18 affected stores, pursued the case to the very end after a majority of the dealers had “bowed to the law,” had failed to file within the statutorily granted three-month period. Briefing of the case may have been a mere rehash of the “original package” arguments that the Iowa Supreme Court had already analyzed and that it was very unlikely that the U.S. Supreme Court would have resolved differently, but Dunshee’s extraordinarily bombastic, undocumented, and false (if not outright

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313C. C. Taft Co. v. Alber, 185 Iowa 1069, 1075 (1919). On the cases, see above ch. 12.
317“Cigaret Case Up in Court,” *DMN*, Mar. 4, 1920 (4:1). This article’s trustworthiness was called into question by its bizarre assertion that the raids in 1917 had been carried out by agents of the U.S. Justice Department.
mendacious) outbursts on behalf of Taft were suggestive of their hopeless jurisprudential dead-end that presumably did not embarrass the cigarette industry’s well-paid lawyers and served as a seemingly immortally dead horse that could be beaten forever as the linchpin of the firms’ successful 22-year business strategy of resisting payment of the mulct tax. Without any supporting source at all Dunshee launched this untrue, bizarre, and irrelevant attack on the 1897 mulct tax law:

This statute, concededly not passed in response to a public demand for the legislation, but to the end that a certain senator might accomplish the discomfiture of a certain person connected with at the time with the American Tobacco Company in fulfillment of a private purpose, was a dead letter upon the statute books from the day of its passage, being enforced only in isolated instances. Like many other dead letters of a past day, however, it furnished a foundation for certain later [sic] day reformers to build upon,—a structure more to the glory of the builders than to the glory of essential political and civic righteousness.\footnote{Brief and Argument for Plaintiff in Error at 3, C. C. Taft C.o v State of Iowa, 252 U.S. 569 (1920). The allegation as to the motivation for the legislation was reminiscent of a press account during the debate on the Rule bill in 1919: “Some of the old timers are recalling the fight made against the passage of the bill prohibiting the sale of cigarettes when it was presented twenty years ago. The bill probably would not have passed, it is said, had it not been for the delivery to a young member of the legislature of a ‘slush’ fund of $7,000 by persons interested in defeating the bill. The facts became known to the speaker and some of the leaders in the house, who showed the member with the money the error of his ways, and ordered him to return the cash. The word was then passed out that the bill must pass, and it was put thru just as written.” “Cigaret Sale Bill Passed by Senate,” \textit{WT-T}, Feb. 21, 1919 (2:2). Tho a complete fabrication, the tale bore a resemblance to the passage of the anti-cigarette bill in Indiana in 1905. See vol. 2.}
might be seized under such warrant.\textsuperscript{320} (Oddly, both Havner and Dunshee referred to the search and seizure bill as having been passed in 1913,\textsuperscript{321} when in fact the legislature had acted in 1909; all that happened four years later was that the statute was incorporated into the Code.) Much more important was the attorney general’s gloss on the interaction of legal and cultural change, which had more than a coincidental resemblance to developments in Iowa:

It has been the history of almost all reform legislation, like statutes regulating the liquor traffic, that in the early stages, law enforcement has been extremely difficult, and that for many years such laws have remained a dead letter in certain communities while they have been enforced in others. It has been the history of these same reform statutes that as time goes on public opinion gradually catches step with the reformers and then the law is given a rigorous enforcement, resulting, as in this case, in attempts on the part of entrenched vice to set at naught criminal laws of the state.\textsuperscript{322}

The future course of state suppression of cigarettes would depend, in large part, on the extent to which the intensity and patterns of “public opinion” regarding these consumer commodities followed those regarding alcohol as well as on the economic, political, and cultural power of “entrenched vice,” aka the cigarette industry, to shape public opinion and public policy in favor of unencumbered free markets.

\textit{The WCTU Staves Off the Tobacco Industry’s Threatened Repeal of the General Ban on Cigarette Sales: The First Postwar Session of 1919}

The cigarette is sweeping along. A majority of men who smoke, smoke cigarettes. ... However big a nuisance it may be, it is not a nuisance to the majority.\textsuperscript{323}

\textsuperscript{320}Brief and Argument for Plaintiff[sic; should be Defendant] in Error at 6, C. C. Taft Co. v State of Iowa, 252 U.S. 569 (1920).

\textsuperscript{321}Brief and Argument for Plaintiff[sic; should be Defendant] in Error at 4, C. C. Taft Co. v State of Iowa, 252 U.S. 569 (1920); Brief and Argument for Plaintiff in Error at 3, C. C. Taft Co. v State of Iowa, 252 U.S. 569 (1920).

\textsuperscript{322}Brief and Argument for Plaintiff[sic; should be Defendant] in Error at 7, C. C. Taft Co. v State of Iowa, 252 U.S. 569 (1920).

\textsuperscript{323}“The Cigaret Law,” \textit{WEC}, Feb. 6, 1919 (4:5) (reprinted from undated \textit{Des Moines Capital} (edit.) (also reprinted as “The Cigaret Law,” \textit{MW-H}, Feb. 11, 1919 (6:3-4) and “Cigarettes in Iowa,” \textit{Tobacco} 67(22):5 (Mar. 13, 1919). The unsubstantiated claim that most male smokers smoked cigarettes was presumably an exaggeration inasmuch as in 1919 cigarette manufacture accounted for only 25.7 percent of all leaf tobacco in the
Despite this culminating success within the legal regime and its propitious commercial sequelae, the window of opportunity for achieving at last the long sought-after objective of shutting down the cigarette industry remained only precariously open as a result of two overridingly crucial and interconnected cultural trends featured in the Iowa press during the week following the Taft decision: during World War I the federal government was shipping to the U.S. Army in France 425,000,000 cigarettes a month, while the prevalence of cigarette smoking among women in the United States proliferated in reality and public consciousness, smashing social taboos and fatally expanding the potential market. For the principal driver of the anti-cigarette movement, the WCTU, the mass advent of women cigarette smokers was profoundly problematic. As Carolyn Vance Bell (a syndicated feature writer who a few months later became one of the founders of the Women’s National Press Club) entertainingly reported in numerous newspapers across the country including Iowa:

Only a spiral of blue smoke!

But a pair of pretty lips were propelling it heavenward right next to the W.C.T.U. headquarters in Washington.

“Think of it,” raged Miss Ada Oldfield, in charge of the headquarters, “girl war workers actually sit at the windows of their rooms next door smoking cigarettes and laughing at us.”

... The female side of the cigaret problem has just dawned upon the W.C.T.U.


325 It is important to note that the women’s increasing addiction to cigarettes antedated U.S. entry into World War I. At the beginning of 1917, when the data were published revealing that total consumption in 1916 had risen by 40 percent over 1915, the press attributed this “tremendous increase” to rising prosperity and “the growth of the cigaret habit among women. Many millions of cigarettes made for feminine users were produced in this country and imported during the past year, whereas a few years ago production and importation of such cigarettes were negligible by comparison.” “More Whisky Drunk; More Cigarettes Used; More Women Smoke,” WEC, Jan. 25, 1917 (6:4). As early as 1912, in announcing yet another anti-cigarette “crusade,” the WCTU declared: “Not only boys but girls are smoking cigarettes. ... Let everyone in the state of Iowa who believes in purity, modesty and refined womanhood, as absolutely essential in this age of fast and careless living, fall into line and fight the cigaret for our girls as well as our boys.” “W.C.T.U. Is to Fight Cigarettes,” National Democrat (Des Moines), May 2, 1912 (2:2).
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

All of their anti-cigarette propaganda will have to be revised to meet a new emergency, the growth during the war of the cigaret habit among women. The pamphlets have always been addressed to the small boy, picturing the horrors that befall the cigaret smoker in terms of deaths, heads [sic], snakes, prison stripes, etc.

One-third of all the cigarets sold in the capitol,” said Miss Oldfield, “are sold to young girls, a clerk at a tobacco counter tells me. They come to his counter, he says, well-dressed and apparently well bred....”

“It seems to me that the use of tobacco by women has increased greatly during the war, just as it has among the soldiers.”

“American women have adopted the European habit of smoking,” says Mrs. Jane Rippin, head of the women’s and girls’ [sic] section of the commission on training camp activities.

“English women, French women, Russian women have been smoking for many years without thinking much about it. It was inevitable that American women should follow.”

The salient public policy conclusion that cigarette manufacturers and those businesses (including newspaper publishers) in economic symbiosis with them drew from these trends and, with increasing plausibility, propagated was, as the Des Moines Capital editorialized: “The case is far enough along in Iowa to make it evident that the cigarette is too thoroughly established to be totally prohibited.”

If the legislative, and especially Senate, proceedings in 1917 themselves did not alert the WCTU to the danger of impending repeal of cigarette prohibition, “[t]he main lawyer representing the tobacco interests made the threat the last of the session, that the Cigarette law would be repealed sure at the next session....”

The annual convention in October drew the conclusion that “we must be on our guard and prepared to meet the enemy.” The WCTU was also acutely aware of the cigarette companies’ potentially most potent strategic weapon: “This campaign of ‘smokes for soldiers’ is undoubtedly their first step toward preparing for an assault on our laws at the next session.”

As the 1919 session approached, the WCTU articulated more specifically the character of the looming threat without suppressing its recognition that the World War may have put an end to the quarter-century of realistic opportunity to prevent


328Woman’s Christian Temperance Union of Iowa, Forty-Fourth Annual Convention 124 (1917). The lawyer’s identity is unknown.
cigarette smoking from advancing to a quasi-universal, socially acceptable, behavioral norm. At its 1918 annual convention, one month before the armistice ending the war that had contributed so powerfully to the spread of smoking, President Ida B. Wise Smith bemoaned “the evil that flaunts itself today as never before.” On the uplifting side, she stressed that it had been the WCTU’s “mission...to pioneer in unpopular causes.” Increasingly, over the years of its agitation, it had received help from “scientists and medical men, and later the business world. ... The doors of more than two hundred lines of business are closed to cigarette users.” With such authoritative support, the WCTU did not fear “being called a ‘back number’, as we are.... We want to stand for the battle line gained by society in the past, and not be swept back by the propaganda of the tobacco interests to which so many good people are unwittingly lending themselves.”[^329] The more discouraging dimension had been spawned by the war:

The “sob stories” we read of the demand for cigarettes by our soldiers are sent out in plate matter by the Tobacco Trust to any paper that will print them. The drive for “smokes” for the boys netted one tobacco Company a profit of fifteen million dollars [sic] last year. They paid a dividend of 30 per cent and carried forward eleven and one-half millions. If one company makes this, what must be the aggregate of all? Our men in many cases are being made the victims of a misguided public who in their desire to contribute to the comfort of men in the service press cigarettes upon them. Tens of thousands of boys are addicted to the use of cigarettes, who, if left to their own inclination, would be clean of the habit. And tens of thousands of more will join the company tomorrow. It seems like attempting to sweep the Atlantic back with a broom to oppose it, but the W.C.T.U. in its work for welfare and humanity has no other option but to set its face against that which works harm upon these we so tenderly love. [T]he tobacco interests have campaigned so wisely and so well that our army is now issued a tobacco ration and Bull Durham advertises with pride that it can no longer serve civilians but will be back “with medals after the war” ... The tobacco trust may influence and deceive us now. But science must win in the last analysis because it is true. A brand of tobacco being extensively sold in Iowa and no doubt in other states contains a sticker which reads “What then? If Universal Prohibition becomes a law what would you say if you were deprived of your glass of beer? That’s enough. We heard you. Write your legislators and tell them the same.” Evidently the Brewers and tobacco manufacturers have joined interests.

My comrades, our duty in the face of this danger is unmistakable. Efforts will be made to repeal our tobacco laws. Already Chicago has repealed its ordinance prohibiting the sale of cigarettes within six hundred feet of a school house. That is the first fruit of what is to come, unless the friends of the boys wage an aggressive campaign to protect

them against the prevalent cigarette craze.\textsuperscript{330}

Looking back at the 1919 legislative session in October and recalling the tobacco lobbyist’s threat, the Iowa WCTU’s legislative superintendent assured the members that having been fore-warned and thus fore-armed, the organization had been ready.\textsuperscript{331}

The election of 1918 again created huge Republican majorities in the Iowa legislature: in the Senate 45 Republicans faced only five Democrats, while 93 Republicans held House seats against 15 Democrats.\textsuperscript{332} The cigarette industry’s threat to enact repeal at the 1919 session was no bluff: on January 28, Senator Rule, once again, introduced the chief vehicle, Senate File No. 75, which was almost, but not quite, identical to his S.F. 159 of 1917. The two bills differed in three respects. First, the penalty for selling cigarettes to minors, which had been $100 to $300, lost its floor, and now consisted only of the $300 maximum. Second, totally deleted was the power conferred on the state dairy and food commissioner to “withhold a license from any applicant whom he may deem unworthy.” And third, a penalty was imposed on anyone under 21 who smoked (or now had in his possession) cigarettes in public: a maximum fine of $10 and/or maximum imprisonment of five days (with special juvenile court treatment of those under 16).\textsuperscript{333} The bill was referred to the Public Health Committee,\textsuperscript{334} whose chairman, George Ball, a banker, farmer, and manufacturer,\textsuperscript{335} had voted with Proudfoot on every cigarette law-related roll-call vote in 1917. The trade journal \textit{Tobacco} took great license in calling S.F. 75 a “sweeping ‘anti-cigarette to minors’ bill.\textsuperscript{336}

The filing of such a bill in Iowa and in other states with prohibitory laws prompted the \textit{United States Tobacco Journal} in mid-February to plunge into some would-be self-fulfilling prophecy in the form of a front-page article titled, “Wave

\textsuperscript{330}Woman’s Christian Temperance Union of Iowa, \textit{Forty-Fifth Annual Convention} 21-22 (1918).
\textsuperscript{331}Woman’s Christian Temperance Union of Iowa, \textit{Forty-Sixth Annual Convention} 120 (1919).
\textsuperscript{333}S.F. No. 75 (Jan. 28, 1919) (copy furnished by SHSI IC); \textit{Journal of the Senate of the Thirty-Eighth General Assembly} 220 (1919) (Jan. 28).
\textsuperscript{334}Journal of the Senate of the Thirty-Eighth General Assembly 220 (1919) (Jan. 28).
\textsuperscript{335}State of Iowa: 1919-20: \textit{Official Register} 268, 293-94 (28th No., Harrold Klise comp. n.d.).
\textsuperscript{336}“Iowa Legislator’s Idea,” \textit{Tobacco} 67(7):5 (Feb. 6, 1919).
of Welcome Legislation Begins.” Inspired by the Arkansas Senate’s action on February 11 in passing a bill by a large majority to legalize the sale of cigarettes (which had been banned since 1907), the trade journal inflated it into “Arkansas Lifting Ban on Cigarettes” and predicted that a “wave of legislation favorable to the smoking habit and demolishing the Puritanical local statutes that have restricted smoking here and there throughout the United States is beginning.”

Making a virtue of a necessity, the Tobacco Journal welcomed the “nominal tax on the sale” of cigarettes, which was to go to the state educational fund, “the highest purpose,” as “the least animus the state could display in the tax.” Although the legislature had not yet passed the bill, the Journal nevertheless reflected back at the trade the view that Arkansas’ “removal of the cigarette ban is confidently expected to be a fore-runner of similar action in the states of Iowa, Nebraska and Tennessee, which have suffered from more or less rigorous cigarette regulations for some time.” This admission that rigor had characterized the regulation (which was in fact prohibition) of cigarette sales in Iowa was both rare and highly significant for the tobacco trade press, which generally made light of the ban. Finally, the Journal projected its hedged intuition that the public’s attitude was “apparently...strongly inclined toward the most liberal possible personal freedom for millions of returning soldiers, to whom smoking has become second nature during the great struggle overseas. That these boys should not be hen-pecked after having offered their all is the plain sentiment of countless communities.”

After the Arkansas repeal bill had died in the House, but Nebraska did repeal its 14-year-old cigarette sales ban in 1919 (also imposing bans on advertising of cigarettes in public places and cigarette smoking in public eating places), the United States Tobacco Journal published a more sober commentary. Now it disclosed that opponents of the anti-cigarette campaign viewed Nebraska’s action as significant as “the first indication of concerted opposition to the movement against cigarettes,” and expected that this feeling would “spread widely as soon as the voice of the returning soldiers is heard.” In this regard Iowa would not disappoint in 1921. Nevertheless, in spite of these two radical provisions, the Nebraska prohibition repeal statute was less stringent than Iowa’s 1921 repeal law would be by virtue of: imposing less severe punishment for certain violations (although it did punish those who sold cigarettes without a license by fining them

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3381919 Neb. Laws ch. 198, §§ 11-12, at 401, 403-404. See below ch. 16.

between $100 and $200 or imprisoning them for 10 to 60 days, whereas the Iowa law lacked any such punishment); imposing lower license fees; not empowering local governments to continue to ban cigarette sales; not imposing a sales tax; not raising the legal age for public smoking from 18 to 21; not making the license fee a lien on the business property; and not providing for a nuisance and injunction procedure.

The Iowa Senate Public Health Committee held an open hearing on February 13 to elicit arguments for and against Rule's bill legalizing cigarette sales. According to the Des Moines Register's lengthy account—the accuracy and representativeness of which cannot be judged since no official transcript or report is extant—the bill originally provided that cigarettes should not be sold, or given to, or possessed by minors, but: "Out of consideration to the thousands of boys under 21 years of age who have been generously supplied with cigarettes while serving in the army, the bill has been amended by Senator Rule to prohibit the use only up to the age of 18." Thomas F. Duhigg, a local Des Moines physician—who, interestingly, though returned as a physician at the 1910 population census, by 1920 was listed as a general farm manager—testified: "That the cigaret is unquestionably the least harmful of all the forms in which tobacco is used has come to be universally recognized and conceded by the highest medical authority, and has been thoroughly established by careful tests in the army camps...." A good sense of what Dr. Duhigg, whose motivation for testifying is unclear, regarded as the gold standard for testing the differential health consequences associated with the use of various kinds of tobacco can be gained from his description: "[L]arge numbers of soldiers were tested by means of target practice—that being the finest of all tests of nerves and nervous reaction. Naturally, the men shot their best when they had been denied all forms of tobacco for a period because tobacco in any form is injurious to the nerves. Then they were supplied with cigars to smoke, after which they shot miserably. Better scores were made on the pipe test, and on the chewing tobacco test, but by far the..."
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

best when the men had smoked only cigaretts.”

The Register’s report gave short shrift to the bill’s opponents, quoting only briefly the assertions of a Rev. R. W. Thompson that cigarette sales lowered moral standards and that Henry Ford and Thomas Edison had declared cigarettes to be the worst form of tobacco, but according to an even briefer account in the Des Moines Capital both Thompson and Paul Jones “bitterly attacked” the licensing feature on the grounds that cigarettes were injurious to health. The paper then quickly shifted back to Duhigg, who parried this thrust by claiming that Ford had probably kept his son out of the war to make sure that he did “‘not acquire the cigaret habit.’” Committee member Senator John Price chimed in that the Chicago Tribune’s medical adviser had declared that cigarettes were the mildest form of tobacco use because of their “almost perfect combustion.”

That same day House debate touched on the issue of the cigarette law in connection with consideration of a bill to triple the appropriation for the attorney general’s hiring of special agents, some of whom were deployed to enforce the prohibition on cigarette sales. After Republican Representative James B. Weaver from Des Moines had strongly urged passage, declaring that the “‘real Bolsheviks of Iowa are the men who get together at night and plot to promote liquor and gambling,’”149 Burlington Democrat Frank Nebiker asked whether Weaver did not know that cigarettes could be bought in every drug store in Des Moines in spite of Havner’s clean-up. Weaver replied that he was willing for Havner’s force to work in the capital and hoped that they would do everything in their power to uncover every corrupt condition there.150

The next day Senator Ball reported Rule’s bill back with the recommendation that Senate File 220 be substituted for it. The Senate gave it a first and second

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348“Cigarets Debated in Senate Hearing,” DMR, Feb. 14, 1919 (2:5). Two days later Thompson published an opinion piece arguing that the world war had made it impossible to evaluate the anti-cigarette law’s efficacy: “It is scarcely fair to make the present non-enforcement of the law a test of its usefulness. It is generally known that under the abnormal conditions of the last two years many laws and customs have been disregarded. Give the law a trial under normal conditions.” R. W. Thompson, “Try Cigaret Experiments under Normal Conditions,” DMC, Feb. 15, 1919 (15:3-4 at 4).
349“House Battles Havner Fund,” DMN, Feb. 13, 1919 (1:1). Weaver was the son of the Populist candidate for vice president of the same name.
351“House Battles Havner Fund,” DMN, Feb. 13, 1919 (1:1).
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

reading and then ordered it passed on file.⁵⁵² The committee bill differed from S.F. 75 only by defining a “minor” as less than 18 years old and substituting 18 for 21 in the public smoking section.⁵⁵³

In response to this gathering threat, the next day, February 15, John B. Hammond, the president of the state anti-cigarette law enforcement committee, called a meeting at the YMCA, which protested the proposed legalization and urged that, instead, cigaret stores be treated like liquor nuisances, subject to the same abatement by injunction procedure.⁵⁵⁴ Among those in attendance were the aforementioned Rev. Thompson, a Presbyterian church minister, Ida B. Wise Smith, the Iowa WCTU president, other WCTU officers, various representatives of mothers’ groups, boards of education, schools, and the state education department, and Edward Paul Jones, a piano store dealer representing the retail merchants bureau (who had also testified the previous day).⁵⁵⁵ The very instructive resolution that Hammond—on whom the WCTU could “always depend to defend our righteous cause”—had drafted⁵⁵⁶ and that they all signed read in part as follows:

Whereas, The present cigaret laws are enforced in many of the smaller cities and towns of the state, and with the adoption of the Rule bill, the right of such towns and cities where the sentiment is against the sale of cigarettes will be taken from them, and such cities will have no recourse to prevent it, and

Whereas, There is no provision in the Rule bill through which citizens may protest against the granting of a cigaret license to any individual however unreliable and objectionable the applicant may be, and no means of knowing of such an application, and

Whereas, Every law ever enacted to permit the sale of any article to adults, such as intoxicating liquors or tobacco and prohibit the sale to minors, or the permission of any act

⁵⁵³S.F. No. 220 (Substitute for S.F. No. 75, by Public Health Committee) (Feb. 14, 1919) (copy furnished by SHSI IC).
⁵⁵⁴“Protest Against Cigaret Measure,” DMR, Feb. 16, 1919 (16-M:1). In October Anna McPherson Edworthy, the WCTU’s superintendent of legislation, offered an account of the meeting that differed in several respects from the newspaper’s. In addition to erroneously dating the meeting as Feb. 18, she stated that as secretary of the Anti-Cigarette Committee of Des Moines, of which Hammond was chairman, she had called the meeting. Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120 (1919).
⁵⁵⁶Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120 (1919).
by adults prohibited to minors, such as playing pool or other games has always proven a failure, and

Whereas, The enactment of the Rule bill is a backward step in the efforts of the state of Iowa to protect the children from acquiring the cigaret habit, which this bill itself acknowledges to be a bad thing for minors, and is a surrender to the American Tobacco company, therefore,

Resolved, That we, the undersigned, protest against the adoption of the Rule bill and urge the adoption of a law, as a substitute therefor, declaring places where cigarettes and cigaret papers are sold to [sic; should be or] kept for sale nuisances and subject to injunction and abatement in the same way and by the same proceeding as liquor nuisances are enjoined or abated.\(^{357}\)

A copy of the resolution was given to every member of the legislature, but its impact on the Senate, which, on February 19, four days after the prohibitionists’ meeting, on Senator Rule’s motion, considered S.F. 220, appears to have been limited. Republican Senator J. L. Brookhart, who had been a teacher and school principal before becoming a lawyer,\(^{358}\) offered the most far-reaching amendment, which he justified in part by reference to the attorney general’s office’s having told him that the current law could not be enforced.\(^{359}\)

Rule agreed with Brookhart concerning the law’s unenforcibility, but also took the floor to deny a statement that had gained circulation that tobacco interests were behind his bill. Rather, “the idea came to him on the complaint of a father in Mason City who could no way to stop the use of cigarets by his son.” In response, Senator Proudfoot revealed that “while it might be true that tobacco interests were not pushing the Rule bill, nevertheless literature had been placed on the desks of the senators from tobacco headquarters in New York City favorable to the cigaret and declaring that it was as ‘harmless as a glass of milk.’”\(^{360}\)

Brookhart’s lengthy amendment, which was adopted by a non-roll-call vote, applied to anyone violating any provision of S.F. 220 or selling cigarettes without a license the nuisance injunction and abatement provisions of the law dealing

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\(^{357}\)“Protest Against Cigaret Measure,” DMR, Feb. 16, 1919 (16-M:1).


\(^{360}\)“Cigaret Law Is Up for Debate in the Iowa Senate,” DMC, Feb. 20, 1919 (1:7). According to another press account, in denying the charge that the tobacco industry had endorsed his bill, Rule stated that it had been “inspired by the workings of the present law,” which was not enforceable, whereas his bill was. “Vote in June, But Not in November,” WEC, Feb. 20, 1919 (2:1).
with houses of prostitution; it also imposed a $300 tax against the owner of any such declared nuisance, which was made a lien on the land.\textsuperscript{361}

Senator Proudfoot attacked the bill on the grounds that Iowa’s policy was to prohibit, not to license, and that the prohibitory law could be enforced if it were properly amended. Senator Rule contested the enforcibility of the existing law,\textsuperscript{362} and the “warm debate...brought out the fact that Attorney General Havner had declared that the present law was unenforceable.”\textsuperscript{363} Proudfoot, attacking the provision that required minors under 18 to reveal the source of their cigarettes,\textsuperscript{364} offered an amendment that deleted the change introduced by S.F. 220 in Rule’s bill that would have legalized sales to minors 18 years old and older. Proudfoot’s amendment made the same age change to the ban on possession of cigarettes or any kind of tobacco, from which he, oddly, eliminated not only the penalties but also the coverage of non-cigarette tobacco. Before the Senate could vote on the amendment, Republican Addison Parker of Des Moines moved to amend the amendment by making the age ceiling 19 years; the change was adopted and then, as amended, so was Proudfoot’s amendment. Also adopted was Proudfoot’s equally odd amendment to the ban on public smoking, which was identical to his use amendment. A succession of amendments was then offered and rejected that would have increased, decreased, or differentiated the license fee by size of city as well as one that would have made issuance of a license contingent on filing an affidavit stating that the applicant had not violated the anti-cigarette law during the previous five years.\textsuperscript{365}

On the final vote the Senate adopted S.F. 220 by a vote of 34 to 13, with four Democrats joining 30 Republicans in favor, and 12 Republicans (including Proudfoot) and one Democrat opposed.\textsuperscript{366} Despite having been fore-warned, fore-armed, and ready, Anna McPherson Edworthy, the WCTU’s legislative superintendent, later conceded that the vote had been “surprising.”\textsuperscript{367} It was, however, already clear to the press that opponents were planning a “more

\textsuperscript{361}Journal of the Senate of the Thirty-Eighth General Assembly 606-608 (1919) (Feb.19).

\textsuperscript{362}“Senate Committee Neutral on Bill,” \textit{CREG}, Feb. 20, 1919 (10:1-3 at 1).

\textsuperscript{363}“Cigaret Sale Bill Passed by Senate,” \textit{DMR}, Feb. 20, 1919 (2:3).

\textsuperscript{364}“Cigaret Bill is Up for Debate in the Iowa Senate,” \textit{DMC}, Feb. 19, 1919 (1:3).

\textsuperscript{365}Journal of the Senate of the Thirty-Eighth General Assembly 608-10 (1919) (Feb.19).

\textsuperscript{366}Journal of the Senate of the Thirty-Eighth General Assembly 610 (1919) (Feb.19).

\textsuperscript{367}Woman’s Christian Temperance Union of Iowa, \textit{Forty-Sixth Annual Convention} 120 (1919).
determined fight” in the House, where passage was in no way assured. In 1919, it seemed to cigarette opponents, as Edworthy, a former school teacher, put it at the organization’s annual convention in October, “a wise provision that we have two different bodies in our Legislature. Our Senate certainly catered to the liberal element. They repealed the Sunday Law, cut down the appropriation to be used in enforcing law, and again licensed the sale of cigarettes. Fortunately the House was a good check for the Senate.”

On the afternoon of February 19, the Des Moines Congress of Mothers and Parent Teacher Association met and unanimously endorsed a resolution protesting the Senate’s adoption of the Rule bill as a step backward. The women also urged strengthening the law on the books by subjecting places where cigarettes were sold to the same injunction and abatement procedures that applied to liquor sales. Senator Rule and the members of the legislature from Des Moines were the intended recipients of the resolution.

In its coverage of Senate passage, the Des Moines Capital noted that although the sale of cigarettes in Iowa was “theoretically prohibited,” it was “no more than a theory in Des Moines and most other Iowa cities” (thus, once again, suggesting that the law was effective in small towns). Precisely this refusal of “public sentiment” to enforce prohibition had persuaded some senators to support Rule’s bill.

Presumably to refute such claims, the WCTU issued a four-page pamphlet, “Iowa Mayors Opposed to Rule Cigarette Bill,” which was based on inquiries it

368 “Cigaret Sale Bill Passed by Senate,” DMR, Feb. 20, 1919 (2:3). This article purported to report the story told by “old timers” about how the original prohibitory bill had been passed 20 years earlier: “The bill probably would not have passed...had it not been for the delivery to a young member of the legislature of a ‘slush’ fund of $7,000 by persons interested in defeating the bill. The facts became known to the speaker and some of the leaders in the house, who showed the member the error of his ways, and ordered him to return the cash. The word was then passed out that the bill must pass, and it was put through just as written.” In 1896 the press circulated no such account, which sounds like a conflation with real events in Indiana in 1905. See vol. 2.

369 At the Twelfth Census of Population (1900), she was returned as a school teacher; by the time of the 1910 and 1920 censuses she had no occupation. Her husband was a traveling salesman in various branches.

370 Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120 (1919).

371 “Mothers Oppose Cigaret Sales,” DMR, Feb. 20, 1919 (12:1). The president of the organization was the wife of the aforementioned Edward Paul Jones.

372 “Mothers Oppose Cigaret Bill,” DMC, Feb. 20, 1919 (15:7-8).

had made of numerous mayors. Although it did not survey the large cities and
lacked the time to canvass the whole state, the WCTU received replies from 14
county seat mayors and printed extracts from the 36 mayoral responses, 23 of
which unambiguously affirmed that the anti-cigarette law was being enforced in
their towns, whereas only three definitely stated that it was not. And even these
three supported the law, at least if the larger towns would enforce it too. The
pamphlet’s point was empirically to prove to legislators that: “Cities and Towns
Now Enforcing Cigarette Prohibition Laws Would Have Sales Forced Upon
Them by the Rule Bill.”\textsuperscript{374} The detailed reply by John H. Mills, the mayor of Mt.
Pleasant, the county seat of Henry county, illuminates the profound suspicion of
and contempt for the tobacco trust that still prevailed almost a decade after its
formal dissolution:

People get cigarettes here, but I do not know how. The dealers do not sell them. If
the cigarette and tobacco trust were capable of flooding China with cigarettes to create an
appetite, they would be capable of flooding Iowa with them and then claiming that the law
was not enforced and should be repealed, and most likely they have done it for that
purpose. Devil’s agents ought to be up to the Devil’s tricks or they are not earning their
wages in their master’s business. But “the law is not enforced” has the Devil’s ear-mark.
It is the same cry that was used against liquor prohibition.... Do they demand the repeal
of the law against stealing because so many automobiles are being stolen? No. ... Why,
then, do they demand the repeal of this law? Because the money of the Trusts demands
its repeal and they are able to reward those who manage it. ... Perhaps the question would
not have arisen, if it had not been for the action of some papers of national circulation, and
a lot of empty-headed silly men and women who solicited contributions during the war for
our dear boys over the sea for cigarettes and tobacco.\textsuperscript{375}

In the House, the day before S.F. 220 passed the Senate, Democrat Douglas
Rogers introduced House File 301, which would have repealed sections 5006 and
5007 of the Code; in their stead, it made the sale of cigarettes conditional on:
paying a $100 tax; filing a $1,000 bond and a certified copy of a city council
resolution consenting to such sales by the applicant; making no sales to minors;
and not permitting minors to smoke cigarettes in the room in which cigarette sales
took place. In addition to imposing a maximum $100 fine or maximum 30-day

\textsuperscript{374}Woman’s Christian Temperance Union of Iowa, Iowa Mayors Opposed to Rule
Cigarette Bill (n.d. [1919]), in Folder: N. E. Kendall correspondence re cigarette bill
(SHSI DM). Though undated, the pamphlet bears the handwritten date “1919.”

\textsuperscript{375}Woman’s Christian Temperance Union of Iowa, Iowa Mayors Opposed to Rule
Cigarette Bill (n.d. [1919]), in Folder: N. E. Kendall correspondence re cigarette bill
(SHSI DM).
imprisonment for violating the law, the bill provided for a civil action to recover a $25 forfeiture for each sale to a minor.\footnote{376}{H.F. No. 301 (Feb. 18, 1919) (copy furnished by SHSI IC).} After referring it to the Public Health Committee, the House took no action on the bill.\footnote{377}{Journal of the House of the Thirty-Eighth General Assembly 537 (1919) (Feb. 18).}

Having witnessed the speed with which Rule's bill had sailed through the Senate, the WCTU impressively mobilized all of its resources to insure that S. F. 220 met as many "difficulties"\footnote{378}{Woman's Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120 (1919).} in the House as possible. In her convention report a half-year later, Edworthy set the scene:

The Tobacco lobbyists swarmed in the House, they also sent literature to every member. Our Polk County Representative Hauge, received a petition with over 1,000 business men of Des Moines asking him to support the "Rule" bill. If this bill was not in the interest of the Tobacco trade why did they do these things? To offset these efforts our State President sent an earnest appeal to all the leading educators of the State and others. Mr. Hammond was sent to all teachers' conventions with our resolution to offset the insidious work of the Tobacco Trust. We presented a package of 25 excellent leaflets on the harmful effects of tobacco and cigarettes to each member as well as other literature. We were exceedingly fortunate in having Hon. Lewis J. Neff of Walnut, Pottawattamie County, as chairman of the Public Health Committee to which this bill was sent.

Mr. Neff is a man of deeds. We have staunch supporters of that committee that deserve mention here—Allen of Ringgold County, Klaus of Delaware County, Bradley of Poweshiek County, Findlay of Webster County, Kepple of Chickasaw County, King of Hardin County, Moen of Lyon County and Mills of Harrison.

As chairman Mr. Neff was fair to all, but he gave us several hearings so that we had a splendid opportunity to present several speakers. This gave us excellent opportunity to get in good work and time for the members to hear from their constituents at home. Mr. Hammond's address as given before the committee was printed in leaflet form and sent all over the State which brought in a flood of protests. The bill finally fell into the hands of the Sifting Committee[.] But it came out again on the floor of the House. I had written a short appeal on behalf of the boys and girls of the State and our future homes, asking them to vote against the bill. Just ten minutes before they were to vote, I had them given to each member by the pages. Earnest prayers went with the little message.\footnote{379}{Woman's Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120-21 (1919).}
On April 11, a week before the end of the session, the Iowa Supreme Court issued its opinion upholding the validity of the cigarette mulct tax. This important prohibitionist victory prompted the aforementioned WCTU ally and sifting committee member Representative S. W. Klaus, to declare that Rule’s bill would die because “now there is no need for the bill.” On the last day of the session, the full House took up the sifting committee’s proposed amendment of the bill’s licensing provision (along the lines of the 1894 liquor mulct law) making the issuance of a license contingent on the applicant’s filing a certified copy of the city council’s resolution consenting to cigarette sales. At least seven Republicans took the floor to oppose licensing, while only three representatives, also all Republicans, “dishonored their constituents by speaking in behalf of the bill.” Unsurprisingly, Findlay proclaimed that “he hated ‘cigaretts as the devil hates holy water,’” while proponents insisted that “many men had acquired the habit while in the army and they should be permitted to continue the practice if they so desired.” Edworthy praised Republican Representative Ellis Hook—who had been a school teacher, principal, and city and county superintendent before becoming a lawyer—for having “wielded the beheading ax by moving to strike out the enacting clause” of S.F. 220; his motion prevailed on a non-party-line vote of 65 to 25, thus staving off licensure and keeping prohibition in the Iowa Code at least until 1921. Theologically

members mentioned by Edworthy were Republicans, as were 16 of the 17 committee members. “Allen” was in fact “Allyn.” Unfortunately, no reports of these House Public Health Committee hearings appear to have survived.

See above this ch.

“Cigaret Bill Dead,” DMN, Apr. 12, 1919 (1:1).

A sifting committee was appointed late in the session (April 4) to control the flow of bills. Id. at 1647 (Apr. 4). On the final vote on S. F. 220, of the six Republicans on the committee three voted Yea, one Nay, and two were absent or did not vote; of the two Democrats on the committee one voted Nay and one was absent or did not vote. Id. at 2261-62.

Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 121 (1919).


Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 121 (1919).

57 Republicans and 8 Democrats voted for and 20 Republicans and 5 Democrats voted against killing the bill, while 16 Republicans and two Democrats were absent or did
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

reformulated, Edworthy summarized the outcome of the political process: “Again the cause of righteousness prevailed and we thanked God who gave us the victory.” What divine inspiration failed, however, to give the WCTU or its allies was the capacity and insight publicly to raise, let alone answer, the question as to why it was politically and morally justifiable instrumentally to deny adults access to in-state sales of cigarettes to the end of denying them to minors.

The WCTU’s Post-Session Continued State of Mobilization

The best way to repeal a bad law is to enforce it strictly. Law enforcement agencies have never been completely committed to the notion that the best way to repeal a bad law is to enforce it. They have long been aware that a law obnoxious to a large mass of people, and widely ignored, can easily be disposed of by letting it die an administrative death.

The National WCTU’s publication in 1918 of the not very subtly titled Nicotine Next, an anti-tobacco diatribe by Frederick Roman, an economics professor at Syracuse University, might easily have been interpreted as a signal that with alcohol’s end in sight, the organization was eyeing a new national prohibitory field, especially since the author himself predicted the swift advent of a constitutional amendment. (Because the title had “confused many people,”

not vote. Journal of the House of the Thirty-Eighth General Assembly 2261-62 (1919) (Apr. 19). The press devoted little or no attention to the vote in the welter of business conducted on the last day. E.g., “Legislature Ends Work of Session,” DMR, Apr. 20, 1919 (16-M:1-4). Of the 65 representatives who voted to kill repeal of the cigarette sales ban two days earlier 18 (including Findlay and six of the eight Democrats) had been among the 33 voting against the criminal syndicalism bill (which was enacted), which made it a crime merely to advocate industrial or political reform by means of crime, sabotage, violence, or other unlawful methods of terrorism. Journal of the House of the Thirty-Eighth General Assembly 2139-40 (1919) (Apr. 17).

388 Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 121 (1919).
389 “Bi-Partisan Hypocrisy!” III 61(39):1, 2, 4-5, 24-25 at 24 (Sept. 28, 1916).
391 Frederick Roman, Nicotine Next (1918).
the WCTU dropped “Next” from later editions.) By early 1919, the ratification of the Eighteenth Amendment having induced the organization to turn “toward ridding the rest of the world of the liquor and strong drink evil,” National WCTU Vice President Ella Boole had found it necessary to assure men that they need have no fear regarding tobacco: “Local organizations may carry on anti-cigarette and tobacco campaigns in their cities and states, but we are planning no nationwide crusade against Lady Nicotine.” The WCTU was, however, “unalterably opposed to women smoking” and by means of education “expect[ed] to prejudice the coming generation against the use of tobacco.”

In the summer of 1919, the Association Opposed to National Prohibition disclosed the results of its “exhaustive investigation”: the WCTU had assumed the leadership of an anti-tobacco crusade to enact anti-tobacco laws in every state and to have Congress submit a constitutional amendment before the WCTU’s 50th anniversary on March 20, 1924. Two months later the Association founded the Allied Tobacco League of America to combat the WCTU’s alleged campaign for a constitutional amendment to prohibit growing, selling, and using tobacco. Determined to learn from the fruitless efforts to prevent the enactment of liquor prohibition, the League would meet this new WCTU constitutional prohibitory campaign “on equal grounds and with full preparedness.” The timing of the mobilization was apparently prompted by the receipt that very day of news of the WCTU’s having caused to be filed in Oregon an initiative petition to outlaw the sale, use, or possession of cigarettes in that state after January 1, 1921.

The WCTU was riding so high by October 1919 that its “enemies,” according to Iowa WCTU President Ida B. Wise Smith, were seeking to frustrate passage of the implementing Volstead Act by accusing the organization of planning the adoption of a Nineteenth Amendment prohibiting tobacco. While echoing the


397“Tobacco Opens Fight Against Federalism,” Sun (New York) (Oct. 9, 1919) (typed copy), Bates No. 950297834. See also “Oregon to Hold Referendum Vote Upon Cigarette Question,” USTJ 92(15):16 (Oct. 11, 1919). For further analysis of this initiative, see below ch. 16.

398Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 22 (1919). On the Tobacco Merchants Association as a possible source of these accusations,
national organization’s démenti—the National WCTU denounced this “misstatement” as an effort to “discredit” the organization’s legislative activity—she was so flattered that she could not suppress her pride at the annual state convention: “No greater compliment has ever been paid to the forcefulness of the work of the W.C.T.U. than to be ‘investigated’ by the Association Opposed to National Prohibition. ... It promises speed to our work for which we never dared hope, in that it says that we expect to accomplish this by our Jubilee anniversary in 1920. To read this report, one would think that all the W.C.T.U. had to do was to make a demand of Congress and, presto! the deed is done.”

The membership of the Allied Tobacco League of America, which the Association Opposed to National Prohibition created during the days of the Iowa WCTU’s annual convention to “wage a militant campaign against the W.C.T.U.’s fight for a constitutional amendment prohibiting the growth, sale and use of tobacco,” consisted of representatives of all branches of the tobacco industry. The League asserted that the WCTU’s strategy was to avoid the tobacco-growing states at first, instead driving the entering wedge in states such as Iowa, Kansas, Nebraska, and Maine, “whose people are not interested particularly in the growth, manufacture, etc., of tobacco, but its use and where the voters will not awaken to the menace in their midst until the constitutional amendment against tobacco arrives.”

Oblivious of the WCTU’s failure to persuade most states to enact bans on selling even cigarettes, the League charged that the WCTU, taking a leaf from the book of “the old-time Democratic and Republican bosses,” would “go to Legislatures over which it can ‘crack the whip,’ and not to the people directly.” What made the League confident of success was its belief in the existence of “a people weary of fanaticism....” Opponents may have inferred the rise of a national anti-tobacco movement from “the vast amount of reform energy and ability that has been dumped upon the sociological market by the adoption of

see below ch. 17.


400 Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 22-23 (1919).


prohibition,” but the Iowa WCTU had its hands more than full with warding off the repeal of the cigarette sales ban to press for the vastly more radical step of prohibiting all tobacco.

Despite the National WCTU president’s denial of the anti-prohibitionists’ accusation, Smith—herself a future national president (1933-45)—seemed exhilarated when she replied to similar press claims:

Recently the press has been greatly disturbed because, prohibition being an accomplished fact, the W.C.T.U. would not have any work, so they were going to make war on tobacco. Indeed, we are not going to do it, for we have been making war upon it for the last thirty years; we are only going to continue hostilities. It is our duty to prevent evil, hence in our last legislature we labored to prevent the repeal of the Anti-Tobacco Law. This we did for the protection, safety and efficiency of our youth. Tobacco, and especially the cigarette, is a foe to efficiency.... The use of it is unclean, unwholesome, and wasteful. “No smoking” signs attest the charge, that all smokers are fire hazards. The loss by fire in 1918, occasioned by cigar and cigarette stubbs, ran up into the millions. Of course, we are going to continue our educative program against its use, and if need be, we will keep up the struggle for thirty years more! We will try to turn the old smokers from the evil of their ways by moral suasion, but we must do our best to save our youth from the pernicious habit, by legislation as well as by persuasion.

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404 At the national convention in November President Anna Gordon stated: “In August of this year the ‘Association Opposed to National Prohibitions’ (our long-time enemy under a new name) flooded the press...with a statement that the National Woman’s Christian Temperance Union was now to begin a campaign for an amendment to the national constitution prohibiting the manufacture, sale, and use of tobacco. The association hoped to prejudice voters in the state-wide prohibition campaigns in Kentucky and Ohio and to discredit the work of the W.C.T.U. for important legislative matters in the United States Congress. We have been kept busy correcting their misstatement and in doing so we have never failed to affirm the fact that for many years we have been in an educational campaign concerning the harmfulness of tobacco, especially upon children and youth, and that this campaign we shall continue persistently to push.” *Report of the Forty-Sixth Annual Convention of the National Woman’s Christian Temperance Union...November 15-20, 1919,* at 89-90. For press insistence during the WCTU convention itself that the WCTU was in fact pursuing national prohibition of tobacco, see Frederick M. Kerby, “Here’s the Situation in Connection with Tobacco Fight,” *Salt Lake Telegram*, Nov. 19, 1919 (3:5). Kerby was a noted reporter, who had played an important part in the Pinchot-Ballinger affair in 1910 when he was a government stenographer. “Frederick M. Kerby, 69, Newspaperman 40 Years,” *WP*, Feb. 27, 1955 (B2).

405 Woman’s Christian Temperance Union of Iowa, *Forty-Sixth Annual Convention 37* (1919).
Astonishingly, Smith seemed to be totally unaware that the law that the WCTU had helped keep on the statute books had not by suasion, but by legislation, injunction, confiscation, destruction, arrest, fine, and imprisonment, sought to prevent “old smokers” from buying cigarettes in Iowa. Perhaps her choice of words was dictated by her admission that although Iowa was one of the states that had statutorily prohibited the sale or gift of cigarettes: “[W]here is the State that, by its Department of Justice, enforces the law! Sadly, we must say that Iowa is not one—Iowa with laws touching every phase of the tobacco questions as it relates to young life.” And that focus on youth assumed ever greater necessity as Smith asserted that during the previous 20 years the “the average age of the beginning of the tobacco habit has fallen from twenty-two to eleven years, with thousands smoking as early as seven years.” This allegation, given the survey instruments available at the time, may have been as inaccurate as Smith’s bizarre assertion that cigarettes’ advent into the United States took place after the Spanish-American War.

Havner’s raids continued beyond the end of the 1919 legislative session. Even in Cedar Rapids, the state’s fourth-largest city, as late as December a tip reached town that “the same crowd of state officers supposed to be working out of the office of Attorney General Havner at Des Moines, who raided and cleaned out the cigaret supply of Waterloo a few days before, was headed this way. Naturally, local cigar stores were taking no chances. It is reported they got rid of their reserve stock, and retained only enough to do business with. In several stores the sale of cigarettes actually ceased.” The agents did actually arrive, but the Cedar Rapids Evening Gazette was unable to determine whether they had looked for cigarettes, though they did investigate other prohibited items. The dealers’ attitude in this early postwar period may have been accurately captured by their “belief that the cigaret law had died a natural death, inasmuch as they had been incorporated in the movement during the war to produce every cigaret possible for the soldiers. If the government wanted the doughboys to have their cigarets, there hadn’t ought to be any great complaint right now....”

As late as March 1920, after a “large number of substantial citizens of Cedar Rapids” had “become quite excited about the more or less open sale of

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406 Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 24 (1919).
407 Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 23 (1919). Her report of an estimate that 1,500 boys began smoking every day might be more plausible and credible. Id.
408 “Hid Cigarettes While Agents Were in Town,” CREG, Dec. 15, 1919 (2:1).
cigaretes,“409 “a deluge of letters descended on” Attorney General Havner’s office from residents of Cedar Rapids “renewing their attacks on the open sale of cigarettes” there, providing evidence, and “demanding” that Havner act. Two weeks later, the *Evening Gazette* reported in an article—whose headline (“Who’s Trying to Take Another Joy from Life?”) suggested the limits of the paper’s objectivity—that the police and county attorney had not yet received any instructions from Des Moines.410 A month later the trade journal *Tobacco* added that Havner had conducted an investigation, the evidence from which he had turned over to the local authorities; though enough to “satisfy the most captious police judge,” it had not yet prompted prosecutions. (Interestingly, the very same article reported that ATC’s crew was canvassing stores in Dubuque, featuring Lucky Strike cigarettes.)411

But not all news from Iowa inspired optimism on the part of the tobacco industry. Although Women’s Clubs, according to an internal “Summary of Anti-Tobacco Educational Activities” compiled by the impressively vigilant Tobacco Merchants Association of the United States, had apparently not demonstrated much interest in anti-smoking campaigns, the General Federation of the Women’s Clubs condemned the use of cigarettes at its biennial convention in Des Moines in June 1920. In light of the hopes that cigarette manufacturers were placing on women for expanding their market, the adoption of a resolution declaring that “the cigarette habit” was increasing among women and that tobacco use was harmful to them was bad enough. But the Federation’s adoption of another resolution “urging an educational campaign against the use of cigarettes by men” must have come as a blow to the TMA, which, however, as always in its members-only surveillance reports, refrained from passing judgment on the antis’ activities.412

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409“Is Political Plot Wrapped Up in Cigaret Complaints?” WEC, Mar. 18, 1920 (8:5).
410“Who’s Trying to Take Another Joy from Life?” EG, Mar. 18, 1920 (2:5). Purportedly, “Havner men claim it is all a plot on the part of Moore men in Cedar Rapids to get Havner in bad with the voters in the Linn county metropolis.” “Is Political Plot Wrapped Up in Cigaret Complaints?” WEC, Mar. 18, 1920 (8:5).
The Great Compromise of 1921:  
The End of Statewide Prohibition and the Beginning of Local Control, Licensure, and Taxation

It has been conclusively proved that cigarettes will be sold in Iowa regardless of any laws prohibiting the sale, and the defeat of the Dodd bill would not change conditions in the least.  

[T]he preachers of Iowa...may get up and say that men who smoke cigarettes have the minds of six year old children and all that but we have a president of the United States, who smokes a cigarette and enjoys it and no one has accused him of being mentally deficient since the first Monday in November....

Until enactment of this statute the cigarette law in Iowa has been one of the most anomalous on the statute books.  

Before the war it was quite a crime to smoke cigarettes in the State of Iowa. The W.C.T.U. fought the tobacco habit hard in that State. They tried to put such a high permit on the merchant as to eliminate the sale of cigarettes altogether.  

Some authors have called 1921 “[t]he high water mark of anticigarette legislation,” but the industry (incorrectly) boasted that of the 92 bills dealing

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4W. E. Hawse, “Cigarette Stamp Tax of Iowa and How Administered,” Report of Proceedings: Third Annual Conference of Administrators of Tobacco Tax Laws 33-40 at 39 (1929). Hawse was the superintendent of the Iowa Cigarette Revenue Department. In fact, it was never illegal for adults to smoke cigarettes in Iowa—only to sell them; the WCTU successfully advocated an outright ban and abhorred licensing “evil,” no matter how high the license fee. See above chs. 9-14. That Iowa’s highest-ranking cigarette tax enforcement officer just eight years after repeal of the statewide sales ban was so profoundly misinformed underscores the prevalence of historical amnesia even at the outset of the heyday of cigarette-smoking laissez-faire.
5Christopher Cobey, “The Resurgence and Validity of Antismoking Legislation,” U.C. Davis Law Review 7:167-95 at 171 (1974). This claim derived from an unsubstantiated claim in a nonscholarly article, which was, in turn, presumably derived from Jack Gottsegen, Tobacco: A Study of Its Consumption in the United States 153, 155 (1940), which, was taken from Carl Werner, Tobaccoland 106 (1922).
The Great Compromise of 1921

with tobacco and smoking that were filed in 28 state legislatures only one “of importance,” Utah’s latter-day general cigarette sales ban, passed.\(^6\) That year witnessed the demise of Iowa’s quarter-century-old universal ban on cigarette sales, the country’s longest-standing. It also marked the midway point between 1915, the beginning of the wave of repeals, and 1927, when Kansas repealed the last remaining statute. In that latter year, as annual national consumption reached 85 billion cigarettes, The New York Times commented that the result of “the anti-cigarette war” (which had allegedly been “at its height” between 1870 and 1912) was “legislation in every State—and increased cigarette smoking.”\(^7\)

Sixty-five years after the extraordinarily contentious struggle over retention of Iowa’s cigarette sales ban, Harvey Sapolsky, a political science professor at MIT who received $300,000 from Philip Morris to put together a book on consumers’ fears of product risks\(^8\) that featured his chapter on cigarette smoking, asserted that:

At the turn of the century when cigarette smoking was first becoming popular in the United States, the Women’s Christian Temperance Union and school principals who were worried about the decay of public morals...succeeded in having fourteen states ban the production, advertisement, and sale of cigarettes. These laws proved ineffectual because cigarette smoking had already become a symbol of maturity, sensuality, and modernity for most Americans. Consumption boomed. The laws were quietly repealed.\(^9\)

Just how noisy the repeal process was Sapolsky—who at the same time was urging the tobacco industry to create a Smokers’ Legal Defense Fund to prevent the “terribly unfair” prohibition of smoking at bar exams, in hospital waiting and jury rooms, and during therapist sessions\(^10\)—might have learned had he read even

\(^6\)Carl Werner, *Tobaccoland* 106, 108 (1922). Many of these bills, to judge by the indexes to a random collection of state legislative journals for 1921, may have dealt with minors. On the most important laws passed in 1921, see below ch. 16.

\(^7\)“Consumption of Cigarettes Reaches 85 Billion Annually,” *NYT*, Aug. 14, 1927 (sect. XX at 5). In fact, the war did not even begin until the 1880s, and, as chapter 16 documents, the war reached a new height between 1917 and 1921.

\(^8\)Blue Cross and Blue Shield of New Jersey, Inc. v Philip Morris, Inc, (E.D.N.Y.), Vol. I: Deposition of Harvey Sapolsky at 25 (Feb. 27, 2001), Bates No. 524343899/923.


\(^10\)Harvey Sapolsky to William Ruder (June 20, 1983), Bates No. T104820027.
The Great Compromise of 1921

a single primary source before making the claim so congenial to his paymaster’s interests. This chapter is devoted to thick description of the pivotally decisive repeal of the Iowa’s prohibitory law.

Democrats Need Not Apply to the Thirty-Ninth General Assembly

“Iowa would go Democratic when Hell went Methodist.”

Under the old law violations were the rule...even under the gilded dome of the state house.

The General Assembly that would ultimately decide to terminate Iowa’s prohibitory law verged on being literally a one-party legislature. The two preceding General Assemblies had also been characterized by lopsided Republican majorities, but the November 1920 state election virtually expelled the Democratic party—which was left “a total wreck, with no salvage or insurance”—from the legislative branch. “The unprecedented, overwhelming and smashing victory for the national republican ticket,” declared an Iowa farm weekly, “swept some Iowa candidates into office who would otherwise have been defeated.” The paper’s conclusion that a “horse thief could have been elected to any state office in Iowa, on November 2d, if running on the republican ticket” glossed the Harding landslide: Republicans not only won all 11 of Iowa’s congressional elections—not a single one of which was close—but controlled 48 of 50 seats in the Senate and 101 of 108 House seats in the new General Assembly. Indeed, so endangered had the Democratic party become that a statute requiring that two members of the Joint Committee on Retrenchment and Reform be members of the minority party or parties had to be amended “lest the time should come when, for lack of any minority party members in one branch of the legislature, the organization of the committee would be prevented.” Thus,

12Grant Caswell, “Legislative Letter,” Adams County Union-Republican, Apr. 13, 1921 (16:2-4 at 4).
13Iowa Republicans Ride into Power on Tidal Wave,” IHI 65(46):3 (Nov. 11, 1920).
The Great Compromise of 1921

if there had “not for years been a sufficient number of democrats [sic] in the Iowa legislature for any particular division on party lines,” by 1921, whatever conflicts arose on the issue of cigarette sales would be generated by and resolved within the Republican party.\(^\text{17}\)

The day after the legislature had convened the *Des Moines Register* found that 99 percent of legislators and observers opined that the legislature was “conservative,” the more progressive members viewing the new General Assembly as “depressingly ultra-conservative,” especially in its tendency toward “miserliness” regarding improvements.\(^\text{19}\) This structure may have underlain contemporaries’ view of the 1921 session as having been “characterized more by the important measures that failed of enactment than by the constructive legislation which was adopted.”\(^\text{20}\)

Both houses of the Iowa legislature that in 1921 was considering repeal of its quarter-century-old prohibition of cigarette sales had imposed smoking bans in their own space for years.\(^\text{21}\) Thus the Senate rule unambiguously stated: “Smoking in the senate chamber is hereby prohibited, while the senate is in session. And any officer or employe while on duty in the senate chamber or doorways leading thereto shall thereby subject himself to liability of discharge.”\(^\text{22}\) In contrast, the House, under the rubric “Decorum,” provided that no member or officer was permitted to read a newspaper within the bar of the house while the journal was being corrected, “nor shall any person be permitted to smoke on the floor of the house during its session, or in the galleries at any time.”\(^\text{23}\) Despite their important symbolism, there was, by 1921, somewhat less to these bans,

\(^{17}\)*Farmers Lead in Legislature,*” *Howard County Times,* Dec. 29, 1920 (1:1).

\(^{18}\)*[I]n a legislature where one party regularly has an overwhelming majority the roll calls will produce no significant party alignments. [T]he large majority party is likely to be divided because it represents such diverse groups and because it has no incentive to maintain party unity.*” Malcolm Jewell, *The State Legislature: Politics and Practice* 48 (1963 [1962]).

\(^{19}\)*Economy Plus May Be Menace, Solons Fear,*” *DMR,* Jan. 11, 1921 (1:1).


\(^{21}\)A ban had been prescribed since 1884. See below ch. 18. For the texts, see *The Iowa Official Register for the Years 1907-1908,* at 232 (S. Rule 32), 238 (H. Rule 65) (22d No., 1907). In 1923 the House ban was extended to the use of tobacco, but the ban became subject to a suspension by a vote of the majority of members present. House Rule 63, in *State of Iowa: 1921-24: Official Register* 254 (30th No.).


which even antedated the cigarette sales ban, than met the eye.  

**Story County Resumes Enforcement of the Absolute Ban on Cigarette Sales**

[N]agging at the cigarette is childish or feminine.  

Contemporaries ideologically hostile to Iowa’s absolute ban on cigarette sales sought to shore up their call for repeal by asserting that it “had never been enforced” or even regarded with respect anywhere in the State.” Less biased observers admitted that while cigarettes were available in the larger cities, the law was in fact enforced in smaller ones. For example, even while the legislature was in session in 1921, the proprietor of a near-beer saloon in Tama (population 2,601) who violated the law was fined and his stock of 10,000 cigarettes was seized and to be destroyed. Although the raid resulted from the owner’s having sold cigarettes to an under-age girl, the county attorney announced that in the future the anti-cigarette law would be “vigorously” enforced. The anti-cigarette movement persisted in calling for enforcement. Thus the annual Consolidated Schools Conference in December 1920 had unanimously passed a resolution favoring the prohibition of cigarettes in general.  

A more striking refutation of the unenforcibility of the ban was the *Ames Daily Tribune* five-column banner headline, “Ban on Cigarettes in Story,” detailing the launch of a strict enforcement campaign in Story county—the

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24 See below ch. 18.  
26 “Iowa Sets an Example,” *Tobacco* 71(25):6 (Apr. 21, 1921) (reprinting undated editorial from the *New York World*).  
27 G[rant], Caswell, “Legislative News Letter,” *HCT*, Mar. 16, 1921 (1:1). The author was a former state senator whose column ran in numerous papers. See also G[rant], Caswell, “Legislative News Letter,” *HCT*, Apr. 6, 1921 (1:1-3 at 3).  
28 George Mills, “A Cigarette Ban in Iowa: 1896 to 1921,” *DMR*, Jan. 13, 1964 (1:2), provided a very rare later confirmation of this fact: “Enforcement was strict in smaller communities....”  
29 *State of Iowa: 1923-24: Official Register* 574 (30th No.).  
31 *Midland Schools* 35(6):201 (Feb. 1921); typed copy in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM) (Fourth Annual Consolidated School Conference at Cedar Falls (Dec. 20).
location of Iowa State College of Agriculture and Mechanic Arts and contiguous
to Polk county, whose county seat is the state capital—while the 1921 legislature
was in session. In mid-January County Attorney Arthur Buck served all cigarette
dealers with notice that it “will be advisable for them to ‘get out from under’
before February first.” On January 18, Buck declared: “‘The time has
come...when the public is clamoring for an adjustment of the cigarette situation.
The grand jury thinks it would be no more than fair to dealers, after the leniency
of the war period, to give them all a chance to unload their present stock.”” In
Ames itself an “epidemic of cigarette buying” was expected to enable the 24
dealers to sell out long before the two-week grace period was over. Iowa’s
prohibitory law, the Ames Daily Tribune pointed out, had “generally been
enforced in the smaller towns and cities...until the start of the war.” During
World War I, however, “[r]ecognition of the cigarette in the service and the
general use of it attained made it next to impossible to enforce the law.”32 (In this
respect attitudes toward cigarette sales bans differed from those toward
prohibition of alcohol, consumption of which various warring countries sought
to reduce in a quest for efficiency.)33 Once the war was over and the large
number of newly addicted soldiers had returned from Europe, the anti-cigarette
agitation that had gone into abeyance reemerged. In Story county the recent
“considerable complaint...to officials of the sale of cigarettes to minors” had been
brought to Buck’s attention “so forcibly, that the new course of action has been
determined on” to enforce the law that made it “illegal to sell cigarettes to
adults”34 That Buck’s decision to enforce the prohibitory law against sales to
adults was animated by complaints that cigarettes “were being promiscuously
sold to minors”35 has to be understood in the context of the anti-smoking
movement’s often overlooked insight that: “It is a pretty tough job for dad to lay
[sic] back in his easy chair with a cigarette perched in his mouth and at the same
time keep ‘sonny’ from slipping down the alley and pattern [sic] himself after his
living model.”36 To be sure, opponents of repeal argued that the nonenforcement
of the statewide ban on cigarette sales in neighboring counties meant that Story
county’s resumption of enforcement would “have little, if any, effect on reducing

32Ban on Cigarettes in Story, ADT, Jan. 18, 1921 (1:5).
33James Timberlake, Prohibition and the Progressive Movement 1900-1920, at 164
(1966).
34Ban on Cigarettes in Story, ADT, Jan. 18, 1921 (1:5).
35Oh! Woe! It’s February; Black Letter Day Here; Farewell to Your ‘Fags,’” ADT,
Feb. 1, 1921 (1:2-3 at 2).
36People’s Forum,” ADT, Jan. 25, 1921 (4:5-6 at 6) (letter to editor by Fred Randau).
smoking among minors....” These free-marketeers were, however, ignoring the fact that Iowa still had in effect a statute prohibiting minors from smoking in public,\(^38\) enforcement of which could have dealt, at least in part, with the availability of cigarettes imported from surrounding counties.

While Buck was repeating his assurance that “‘[t]he law is to be enforced to the very letter’” and “‘[t]hat...means that no cigarettes can be sold to anyone,’” smokers reported that the only consequences of this local action would be more frequent (60-mile round-)trips beyond the limits of Buck’s jurisdiction to Des Moines and more purchases of cartons rather than packages of cigarettes. Potentially much more significant were threats of precipitating a legislative backlash in the form of “more or less talk among ex-service men and others of organizing in an effort to assert what they believe are their rights. There is talking of asking aid to go before the legislature...in an effort to have the anti-cigarette law repealed.”\(^39\) This reaction suggests the possibility that Buck’s strict enforcement campaign served as the final nuisance that prompted ex-soldiers and the American Legion—after all, the “pro-tobacco army” was already trying to “enlist” legionaires in the battle against anti-cigarette legislation\(^40\)—to lobby the new General Assembly to repeal the general prohibition. Although such speculation overlooks the fact that legislators had already undertaken repeal efforts in 1917 and 1919,\(^41\) when enforcement had allegedly been in abeyance, the revival of real enforcement and the stirring up of resentment against it in the greater Des Moines area might have appeared to some contemporaries to have the potential to change enough Republican votes to forge a legislative majority for repeal in 1921.

Buck’s initiative reignited a debate that had been raging in Iowa for several decades, turning the cigarette question into “the principal topic of conversation in Ames.”\(^42\) One minister, incensed that merchants were being allowed to sell off their stocks in violation of the law, told the Tribune that those selling cigarettes should be treated as the law breakers they were: the leniency shown during the war having been a mistake, the two-week grace period was uncalled for because

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\(^{37}\) “Oh! Woe! It’s February; Black Letter Day Here; Farewell to Your ‘Fags,’” \textit{ADT}, Feb. 1, 1921 (1:2-3 at 3).

\(^{38}\) See above ch. 13.


\(^{41}\) See above ch. 14.

The Great Compromise of 1921

those committing a crime “‘deserve[] to lose money.’” Another minister issued recriminations against the Christian organizations that had sent cigarettes to U.S. soldiers in Europe, thus facilitating the “‘nation-wide approval’” of smoking them. Unsurprisingly, the local WCTU chapter unanimously approved Buck’s action. At least one Tribune reader rebuked those who preferred violating the law to seeking its repeal as having engaged in “the Bolshevik method law defiance.” At the other end of the spectrum of opinion, the paper interviewed a college student who, having spent two years of the war in France, where the “‘little “pill” did any amount of good to the soldiers,’” stood in for many who could not help but identify a sequential contradiction in policies: “‘[I]f the Christian organizations such as the aid societies, the Red Cross, Salvation Army, Y.M.C.A., Knights of Columbus, and others went to the trouble to make up tobacco funds to provide us with cigarettes and tobacco in France, why do they object to our use of them after we have done our work and come home?’”

Despite the fact that businessmen were quick to predict that the only impact of enforcement would be to siphon the profits of local dealers off to Des Moines or other neighboring towns to which men would travel to buy cigarettes, remarkably, Ames’s 24 cigarette dealers “propose to abide by” Buck’s decision “if he really intends to enforce it,” so that no trouble was anticipated.

Editorially, the Ames Daily Tribune took a somewhat more nuanced position, commending Buck’s move, but questioning the “possibility of a clean up...with the county as a unit” when, in the wake of the prohibitory law’s having been “totally ignored” during the war, adjoining jurisdictions continued to sell cigarettes “unmolested.” Lamenting the war’s having undone “the work of years of reformers who made the fight against the cigarette and were in a fair way to exterminate it altogether,” the editor deemed Buck’s enforcement action “a waste of effort.” Skeptical of the advisability of retaining a law that was so widely unpopular, but ignorant of the health consequences of smoking, he doubtless spoke for many in opining that many reforms were “more necessary than that of depriving the smoker of a cigarette.”

44. “War Smokes a Mistake Says O. D. Lee,” ADT, Jan. 20, 1921 (1:1).
45. “People’s Forum,” ADT, Jan. 22, 1921 (2:3).
47. “War Smokes a Mistake Says O. D. Lee,” ADT, Jan. 20, 1921 (1:1).
The Great Compromise of 1921

On February 1, a front-page above-the-fold headline in the Tribune shouted: “Oh! Woe! It’s February; Black Letter Day Here; Farewell to Your ‘Fags.’” The paper asserted that little attention had been paid to the prohibitory law even before the war in the larger cities, but that since then it had become a dead letter even in the smaller ones. In spite of the law’s having lost its teeth, a potentially powerful new social force for repeal had emerged:

There is a disposition on the part of the American Legion posts over the state to have the cigarette question again brought before the legislature. Efforts are to be made, it is understood, to have the law amended and modified to allow the sale of cigarettes in Iowa to persons of legal age.

The denouement in Story county, however, emerged the very next day from quarters that should not have been unexpected. In spite of the Tribune’s report on February 1 that local dealers intended to comply with the ban, on February 2 the relevant subhead read: “Dealers at County Seat Find Way to Sell ‘Fags.’” The two-week grace period that Buck had given them afforded those “so disposed...plenty of time to investigate the law and arrange for interstate shipments to meet their demands.” Although it is much more plausible and consistent with a quarter-century’s worth of experience that it was the cigarette manufacturers that devised this stratagem to insure that other Iowa counties did not adopt Buck’s approach, dealers in Nevada, the county seat, had resumed the sale of cigarettes on the basis of the following adaptation of the original package doctrine (which the Tobacco Trust, despite the doctrine’s definitive rejection as a ruse in the cigarette context by the U.S. Supreme Court more than two decades earlier, had frivolously sought to perpetuate):

Wholesalers outside of the state were instructed to ship cigarettes to dealers here in individual cartons. A carton contains ten packages of cigarettes. Each carton is wrapped, stamped and mailed individually by parcel post. When the dealer receives the cigarettes, he in turn sells them over the counter just as he received them—in the original package.
Although the *Tribune* apodictically and incorrectly asserted that this simple procedure rendered the Iowa law “ineffective” and ceased reporting on the subject, thus suggesting that County Attorney Buck, too, had acquiesced in the cigarette oligopoly’s renewed machinations, as far back as 1900 the U.S. Supreme Court in *Austin v. Tennessee* had inflicted a severe defeat on the Tobacco Trust by ruling that the presumption that the actual package of importation was “strong evidence” of being an original package presupposed “honest dealers” and did not apply

where the manufacturer puts up the package with the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several states, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant’s contention would be far reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister state, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer’s case to a single paper box of ten, or even a single cigarette, if imported separately and loosely....

If shipping individual cartons to dealers in Nevada, Iowa by parcel post—which presumptively was not a cost-efficient method of transporting cigarettes in interstate commerce—deviated significantly from the normal commercial customs of mass wholesale shipments into states in which cigarette sales were lawful, then such staged transactions constituted precisely the kind of “discreditable subterfuge” that the Supreme Court had long since stripped of original-package protection.

Perhaps reflecting alarm at the debacle in Story county, just a few days later the Story City Circuit Luther League convention adopted a resolution calling on the members of the state legislature to vote against the repeal of the anti-cigarette law.

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57*Austin v. Tennessee*, 179 US 343, 359 (1900).
58*Austin v. Tennessee*, 179 US 343, 360 (1900).
60Edward D[illegible] and Amanda Hanson to the Senate and House Members (Feb. 28, 1921). RG Secretary of State: Legislative, Series: 39th General Assembly: Miscellaneous Petitions, Folder: Cigarette Law (State Archives: SHSI DM). The convention took place on Feb. 4-6; the letter asked Story county Representative H.
The Woman’s Christian Temperance Union: Not Just a Prohibitionist Organization

Prevented its [anti-cigarette law’s] repeal two years ago. During this session of Legislature more than 10,000 letters have been sent out to ministers, school people, and business men on this subject. It has been necessary to have someone traveling almost constantly to teachers’ meetings and various other meetings where the tobacco agents were in other guise. $1,000 has been spent in actual expense but we count it gain as thereby Iowa’s boys and girls are protected from the American Tobacco Co and its agents. If only officials will enforce the law!!

The long-time president of the Woman’s Christian Temperance Union of Iowa, Ida B. Wise Smith (1871-1952), wrote to Governor Nathan E. Kendall on January 27, 1921, more than five weeks before the cigarette bills were introduced in the legislature, presciently predicting the dangers facing the 25-year-old prohibitory law: “I am very deeply concerned about the Injunction as applied to the Anti-Cigarette law. The opposition to the law as we already have it, will I am sure take the form of a license policy, prohibiting the sale to minors.” Extrapolating from the increasingly menacing experiences of the two preceding sessions of 1917 and 1919, Smith was constrained to “beg” Kendall “to do anything you can to prevent such legislation.” Referring to licensing of other activities anathema to the WCTU, she observed that: “We have had such sorry

61Some Achievements of the Woman’s Christian Temperance Union of Iowa Prior to 1920” (n.d. [ca. 1920?]) (copy furnished by Jeanne Lillig, current president, WCTU Iowa).

62Smith was president of the Iowa WCTU from 1913 to 1933 and president of the National WCTU from 1933 to 1944. Etta Wallace, “Ida B. Wise Smith,” in Famous Americans 569-74 (2d ser., Warren Huff and Edna Huff ed. 1941); George Mills, “‘Dry Crusader Was Great Iowan,” DMR, Apr. 4, 1993 (3).

63The fact that Smith discussed the injunction immediately after mentioning that the WCTU’s lobbyist, John Hammond, had sent Kendall copies of the bills that the WCTU expected to sponsor in 1921 suggests that the injunction was one of them. In fact, Rep. Toleff Moen filed such a bill (H.F. 805) for the WCTU on March 8, the day after Rep. Horace Dodd had filed the chief repeal bill. This timing raises the possibility that the WCTU had been holding the injunction bill in reserve to be filed as a countermeasure only if a repeal bill was filed.
results in like measures in the past. [T]he liquor nuisance, the Red Light districts....” Based on demand for a WCTU pamphlet on the anti-cigarette law, 20,000 copies of which had been sent out, largely to teachers, boards of education, and “officials of the small towns,” Smith sought to impress upon the governor that there had “never been such widespread interest in Iowa in the endeavor to enforce the law as now.” On the pragmatic level, she also advised Kendall that in the wake of the recent enfranchisement of women, who now had “somewhat more force in citizenship,...it would be a bad move politically, if for no higher reason, to weaken the law.” In support of the organization’s position, Wise was able to articulate a strategic principle that at the beginning of the twenty-first century still undergirds the aggressive and most advanced science-based anti-smoking movement: “you cannot prohibit a thing to a minor and let an adult do it.” That she was not blind to the existence of an obstacle to enforcement of this principle, which, after all, had underlain Iowa’s prohibition for a quarter-century, emerged from her recounting to the governor that a man had recently told her in the Statehouse “that we could not expect to pass such a measure when so many members of the General Assembly were smoking cigarettes themselves.” The political defects of the WCTU’s anti-cigarette program were visibly on display in Smith’s unrealistic-idealistic response, which failed even to contemplate the need for justifying the instrumental use of adults inherent in depriving them of consumer freedom, let alone overcoming the barriers created by addiction: “I refuse to believe that these men will hold personal habits as an excuse to advance better standards of government and for the protection of the young by the power both of law and example.” She closed with a postscript designed to bolster Kendall’s courage by observing that the evening newspaper reported that the legislature in Kansas, which (since 1909 had) also prohibited the sales of cigarettes to adults, had just rejected a bill to license their sale.64 Kendall’s pro forma response—“I am in receipt of your esteemed favor of recent date, and I thank you sincerely for writing me”—should have given as little cause for hope as his stereotypical promise he would give the bills that the WCTU expected to sponsor “most careful consideration.”65

64Letter from Ida B. Wise Smith to Governor N. E. Kendall (Jan. 27, 1921), in N. E. Kendall correspondence, folder re cigarette bill (SHSI DM). Smith would perhaps have been marginally less unrealistic if what she expected was merely that cigarette-smoking adult men would return to the use of other forms of tobacco, which the WCTU never sought to prohibit. On the modern anti-smoking movement’s position on the demonstration effect of adult smoking on children, see, e.g., Stanton Glantz, “Editorial: Preventing Tobacco Use—The Youth Access Trap,” AJPH 86(2):156-58 (Feb. 1996).

Kendall (1868-1936), a moderate progressive Republican and lawyer who had completed his ten years in the Iowa House of Representatives as speaker in 1907-1908 and then served two terms in Congress, was elected governor in November 1920 with 50 percent more votes than his Democratic opponent, Clyde Herring, an automobile dealer who urged the application of business corporation methods to state government operations. The Iowa State Federation of Labor had supported Kendall’s candidacy because he was “always found to be fair to labor in every measure that was considered.”

That Kendall might have hesitated to deny anything to, let alone alienate, World War veterans, so many of whom had begun smoking cigarettes in France, was strongly suggested by the fulsome praise he showered on them at length in his inaugural address:

In the colossal war...105,000 of the bravest and best of our gallant boys were enrolled. They enlisted from every city, town and hamlet throughout the State, and every profession, business and avocation was represented in the grand army of freedom. The struggle into which they were precipitated was the most enormous in all recorded history. [T]hey met the major danger, and they wrought the supreme decision; met and wrought with muscles of iron and nerves of steel and hearts of pure gold. ... They left all, chanced all, in the holiest crusade ever chronicled in the annals of mankind, and they did not furl their flags nor sheathe their swords nor stack their guns until the malignant menace of medieval militarism was utterly eradicated from the earth. And then having rescued the world from the thralldom of tyranny...they modestly discarded the uniform they had rendered immortal and quietly resumed the employments of civil citizenship. ... I venture the prophecy that in the distracted time to come they will be an impregnable barrier against all the insidious forces of communism, anarchy and bolshevism which may challenge the permanency of our national institutions. How shall we requite their inestimable service? We cannot hope that whatever we may do will even partially liquidate our immeasurable debt to them, but surely it is obligatory upon a grateful people to restore, insofar as humanly possible, every returned veteran to the favorable status he relinquished when he was summoned to the colors.
It remained to be determined whether this unalloyed civic virtue imputed to the newly nicotine-addicted veterans would outweigh the criminal vice underlying the warden’s finding that 97.3 percent of prisoners committed to the state penitentiary at Fort Madison in 1921 used tobacco.71

On February 15, Smith wrote a “Dear Comrades” letter to the membership assessing the course thus far of the session, at which the ubiquitous John B. Hammond represented the WCTU, with Smith, the vice president, treasurer, and the Legislative Superintendent, Anna Edworthy forming a Legislative Committee in charge of “the whole matter....” With the announcement of the prospective filing of the repeal bill only nine days off, virtually every one of Smith’s predictions would soon be proven mistaken: “The cigarette matter has not been touched. It seems probable now that no effort for repeal will be made in which case our friends in the Legislature think it not wise to open the subject, but if it is opened, we shall hope to be able to meet the situation. You will be interested to know that Gov. Kendall is our warm friend in this matter.”72

Smith’s letter to the members was also important for underscoring that the variety of bills that the WCTU was advocating transcended the scope of rigidly moralistic measures that have often been exclusively associated with the organization. Smith herself exclaimed: “Is not this a wonderful array, showing vital interest in Public Welfare.” The bills that had already been filed included: establishing the age of consent at 18 and protecting boys and girls; preventing blindness by using nitrate of silver solution in new born; providing for townships and municipalities as registration districts for births and deaths (thus removing Iowa from the list of only five states not included in the federal registration area); creating a board of examiners of patent medicines to curb their misuse; requiring a health certificate before issuance of a marriage license; regulating adoption of children while safeguarding their interests; state censorship of motion pictures;
establishing a minimum wage for women; and establishing a nine-hour day and
50-hour week for women. Bills that had been drafted but not yet filed included:
punishment for those contributing to the delinquency of children; divorce
legislation; and providing for accommodation of women on juries (and the defeat
of two bills to exclude women from jury service). Every single one of them,
Smith noted, had been “given cordial endorsement” by a joint Legislative
Committee formed by Orie Klingaman, the first director of the Extension
Division at the State University of Iowa.73

The only bill advocated by the WCTU—and it “exerted every possible
influence to put [it] over”74—that did not clearly fit within the mold of these
Progressive interventions75 was one to censor motion pictures. The bill, as
amended during House floor debate, created a motion picture board, which “shall
license such parts or portions of motion picture films as are proper and moral;
and shall refuse license to all other, including such as are obscene, indecent,
vulgar, sacrilegious, those giving undue prominence to unlawful scenes of acts,
and those whose exhibitions would tend to corrupt morals or incite to crime or
race hatred.”76 Two-thirds of respondents in a statewide straw vote conducted by
the Register—styled as a “referendum” that would “indicate to the solons how the
people stand in regard to the principles and ideas embodied” in various pending
bills—expressed support for movie censorship. Six years earlier the United States Supreme Court had provided constitutional backing for such state intervention by upholding a similar regime in Ohio. Refusing to assimilate film exhibitions to the freedom of speech, writing, and publication and thus to the ban on prior restraint of speech or the press, and refusing to ignore “the facts of the world” regarding the “prurient interest” that “may be excited” and the “evil” of which film was capable, it held that such legislation was not beyond the government’s power because it was not “a mere wanton interference with personal liberty.” In part the Court reached this conclusion by declaring that “the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, not to be intended to be regarded by the Ohio constitution...as a part of the press of the country or as organs of public opinion.” Crucial to its ruling was the opinion that “there are some things which should not have pictorial representation in public places and to all audiences.” Bolstered by this ruling, already at the beginning of the 1921 legislative session censorship bills had been or were about to be introduced in 30 states. The National Association of Motion Picture Producers regarded their backers as well meaning women’s organizations and in part as those who had brought about liquor prohibition “and feel they must continue regulating other people’s morals.”

The Iowa bill, H. F. 703, passed the House by a vote of 61 to 34, but died in the Senate. If voting against the Dodd bill to repeal the universal ban on cigarette sales (which passed by a vote of 62 to 41) is interpreted as based in part on moralistic grounds or on the principle of the rightful exercise of state power to interfere with personal behavior, and support for the Dodd bill as based on libertarian-laissez faire principles, then it might be posited that most legislators who opposed movie censorship would also have opposed banning cigarette sales to adults and thus would have voted for the Dodd bill, whereas most who favored censorship would have supported the cigarette sales ban and thus would have

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77What’s Your Vote on These Bills,” DMR, Mar. 7, 1921 (2:1).
78“Industrial Court Upheld in Register Legislative Canvass,” DMR, Mar. 10, 1921 (1:1-2) (214 to 106).
79Mutual Film Corp. v. Industrial Commission of Ohio, 236 US 230, 242, 244, 245 (1915). The Court did not overrule this case until 1952.
80“Picture Industry in Greatest Fight,” ICP-C, Jan. 20, 1921 (5:2).
82State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1865 (1921) (Apr. 8) (H.F. 703 rereferred to sifting committee).
voted against the Dodd bill. To be sure, such a clear-cut voting pattern would not have been possible because overall (on the libertarian-laissez faire side) only 36 percent of representatives voted against censorship, while 60 percent voted against the cigarette ban, whereas (on the moralistic-interventionist side) 64 percent voted for movie censorship, while only 40 percent voted for the cigarette ban. In fact, however, within these aggregate constraints a comparison of the House roll call votes for the losing sides (against censorship and for the ban) on the two bills—which took place on two consecutive days—reveals two consistent libertarian-laissez faire and moralist-interventionist blocs: of the 34 representatives who had voted against censorship on March 29, 30 voted for the Dodd bill permitting sales of cigarettes to adults the next day, while only 2 voted against the Dodd bill (and two were absent or did not vote). Looked at from the converse perspective of the 41 members who voted to retain the ban on cigarettes sales to adults, the previous day only two had voted against movie censorship, while 36 voted for censorship. (More impressively still, of the 35 of these 36 who a week later also voted on the political-economically all-important pro-corporate utility bill, 29—accounting for half of all the votes against it—voted to kill it.) The view from the two winning sides (for censorship and against the cigarette ban) was less conclusive: of the 61 representatives who had voted for censorship, the next day 34 voted against and 23 for the Dodd bill; conversely, of the 62 representatives who voted for the Dodd bill 30 voted against and 23 for movie censorship. In other words, those favoring censorship and opposing the ban voted predominantly but not overwhelmingly in accordance with the thesis, giving 60 percent and 57 percent, respectively, of their votes to the hypothesized position on the other bill (namely, favoring the ban and opposing censorship, respectively). Eliminating duplication and members who were absent or did not vote: of the 91 legislators who voted on both bills, two cohesive groups of legislators numbering 30 plus 36 or 66 (72.5 percent) voted consistently with the aforementioned thesis (those who opposed censorship also opposed the ban and those who supported the smoking ban also supported censorship), whereas 2 plus 23 or 25 (27.5 percent) voted inconsistently. Since movie censorship appears to have been driven by much more straightforwardly moralistic considerations than the ban on cigarette sales to adults, it might seem puzzling that some of those who voted for what may have been an almost exclusively moralistic cause did not also vote for the less moralistic campaign—especially since advocates of both causes conceptualized the interventions as curbing adults’ liberties to protect children.

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The Great Compromise of 1921

from harms. Speculatively, the explanation as to why about 20 more representatives voted for censorship than for the cigarette ban might simply be not that the cigarette ban was insufficiently moralistic for them, but rather that they themselves smoked cigarettes (or other forms of tobacco and felt solidarity with adult male cigarette smokers), but did not watch “immoral” movies.

Of particular interest are the WCTU’s two labor bills, which—although “[n]either ‘maxy nor minny’ever came out of committee” as “because the money

84For example, one of the chief sponsors of the original House movie censorship bill and the author of the amendment version adopted by the chamber both pleaded for the bill during floor debate “as a means of preserving the children of Iowa from sensual and immoral movies.” “Amend Measure to Censor Movies,” DMR, Mar. 30, 1921 (2:3). Opponents disagreed, insisting that movies were not foisted on children, who saw them largely with the consent of their parents, who could more easily protect them from movies than from improper books or pictures. “Death Blow for Censorship,” Des Moines Sunday Capital, Apr. 17, 1921 (4A:2) (edit. quoting N.Y. Tribune editorial).

85The focus here is on the hours bill both because the minimum wage bill was withdrawn before it came to a vote and because the Iowa women’s organizations themselves devoted less attention to the bill, which was principally sponsored by former Montana Representative Jeannette Rankin, the first woman elected to the U.S. House of Representatives, who was in Iowa as the representative of the National Consumers League, advancing the argument that someone had to pay the difference by which the actual wage fell short of a living wage and no industry was entitled to pass that responsibility on to others. “Women Plead for Limit on Working Day,” DMR, Feb. 25, 1921 (1:1); “Doings Under the State House Dome,” IH 66(12):679-81, 709 at 680 (Mar. 24, 1921). As in other states, the Iowa bill created a Minimum Wage Commission and tripartite wage boards to set a minimum wage “suitable for a female employee of ordinary ability” in industries in which the wages paid to women were “inadequate to supply them with the necessary cost of living, to maintain them in good health and protect their morals.” H.F. No. 442, §§ 13 and 15 (Feb. 5, 1921, by Mills). A few days after the bill was filed the Legislative Committee of the Retail Merchants’ Bureau of the Des Moines Chamber of Commerce declared itself “unalterably opposed” to it. [Tab Retail Merchants] (Feb. 10, 1921), Minutes [Des Moines] Chamber of Commerce, Part 2—Jan. 1, 1921 to Jan. 1, 1922 [bound volume], in Records of the Greater Des Moines Chamber of Commerce, University of Iowa Library, Special Collections. The bill was withdrawn by the author. State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 953 (Mar.11). The identical companion bill in the Senate was withdrawn the next day. State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 627, 819 (Feb. 24 and Mar. 12) (S.F. No. 614, by Pitt by Request).

86Robert Hughes, “Labor Loses in Legislative Swap,” DMN, Apr. 14, 1921 (1:3-6, at 10:4).
The Great Compromise of 1921

interests could still maintain the most ‘pressure’\textsuperscript{87} and “some 500 prominent Iowa manufacturers visited the State House in a body and demanded that these bills be beaten”\textsuperscript{88}—demonstrated not only in their content and function, but also in the arguments used to support them, that whatever else the WCTU may have been, it was also a critic of some forms of capitalist exploitation. In 1921 Iowa was one of only five states that lacked any law regulating women’s working hours, and in which, consequently, an employer “would break no law if he required his women employees to work the physically impossible schedule of 24 hours a day 7 days a week.”\textsuperscript{89} The absence of such regulation was, allegedly, due to the lack of any need for it in a non-manufacturing state. Yet the total number of industrial wage workers had risen by 61 percent from 46,695 in 1913 to 75,249 in 1919\textsuperscript{90} and a survey covering about 10,000 women and 12,000 men employed in 223 firms (employing both men and women) in 21 cities, conducted by the Women’s Bureau of the U.S. Department of Labor—at the invitation of the state labor commissioner, with the governor’s approval, and endorsed by the League of Women Voters and the Iowa Federation of Women’s Clubs\textsuperscript{91}—a few months before the legislative session, a synopsis of which was sent to interested local women, revealed that 45 percent of women (and 59 percent of men) in Iowa industries were employed at least nine hours a day, while 47 percent of women

\textsuperscript{87}Robert Hughes, “39th Assembly Was Good to Legion,” \textit{DMN}, Apr. 18, 1921 (4:3-4).

\textsuperscript{88}“Iowa Legislature Dominated by Corporations and Money Crowd,” \textit{DMN}, Mar. 28, 1921 (1:1-4 at 4).

\textsuperscript{89}U.S. Women’s Bureau, \textit{Iowa Women in Industry} 19 (Bulletin of the Women’s Bureau No. 19, 1922). The other states were Alabama, Florida, Indiana, and West Virginia (two maps preceding \textit{id.}). See also “Forty-Five Per Cent of Women in Industries of Iowa Work Nine Hours a Day or More,” \textit{DMR}, Jan. 18, 1921 (4:6-7); “Doings Under the State House Dome,” \textit{IH} 66(9):523 (Mar. 3, 1921); “Doings Under the State House Dome,” \textit{IH}, 66(12):679-81, 709, at 680 (Mar. 24, 1921); “Hours and Working Conditions of Women in Industry in Iowa,” \textit{Monthly Labor Review} 14(3):133-36 at 133 (Mar. 1922) (sources differing as to whether it was five or six states). Iowa was also one of 35 states without limits on night work and one of 34 states lacking a minimum wage. U.S. Women’s Bureau, \textit{Iowa Women in Industry} 8 (Bulletin of the Women’s Bureau No. 19, 1922) (erroneously stating that Iowa was one of six states without hours regulation). It remains a desideratum of labor, legal, and social history to shed light on the reasons that Iowa never enacted a women’s hours law, has failed to enact an overtime pay law to the present, and did not enact a minimum wage law until 1989.

\textsuperscript{90}U.S. Women’s Bureau, \textit{Iowa Women in Industry} 9 (Bulletin of the Women’s Bureau No. 19, 1922).

\textsuperscript{91}U.S. Women’s Bureau, \textit{Iowa Women in Industry} 5 (Bulletin of the Women’s Bureau No. 19, 1922).
The Great Compromise of 1921

(and 66 percent of men) worked more than 50 hours per week.\(^2\) Significantly, it was the groups that had unsuccessfully advocated bills regulating women’s working hours during the three previous legislative sessions\(^3\) that had requested the assistance of the Women’s Bureau in collecting more recent data so “that they might present arguments based on actual conditions.”\(^4\)

Senate File No. 474 prohibited employers from requiring, permitting, or suffering females to work more than nine hours a day or 50 hours a week in any mechanical or mercantile establishment, factory, laundry, hotel, restaurant, telephone or telegraph business, transportation business, common carrier, or public utility, but excluded women in “executive positions” as well as in perishable fruit or vegetable canning establishments during the harvesting season. Employers convicted of violations—and each day that a female was employed in violation of the law counted as a separate offense—were subject to fines ranging between $25 and $100 and/or imprisonment up to 30 days.\(^5\) According to the aforementioned Register straw vote—which, before the results were announced, the women’s organizations supporting the bill praised as “a splendid way of testing public opinion”\(^6\)—in a “sweeping victory” 64 percent of respondents

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\(^3\)The Senate in the 1915 and 1917 and the House in the 1919 legislative session had passed a bill capping women’s working hours at 54 per week and 12 per day (with many exceptions), but each died in the other chamber. *Journal of the Senate of the Thirty-Sixth General Assembly of the State of Iowa* 1882-83 (Apr. 16) (S.F. 133 passed 29 to 6) (1915); *Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa* 1225 (Mar. 27) (S.F. 164 passed 28 to 19) (1917); *Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa* 2190-91 (Apr. 14) (1917); *State of Iowa: 1919: Journal of the House of the Thirty-Eighth General Assembly* 2055, 2253 (Apr. 15 and 19) (H.F. 437 passed 63 to 28); *State of Iowa: 1919: Journal of the Senate of the Thirty-Eighth General Assembly* 2243 (Apr. 19).


\(^6\)“City Club Women Commend Register’s Poll on Hour Law,” *DMR*, Mar. 8, 1921 (1:1).
The Great Compromise of 1921

favored the absolute cap on women’s working hours.\textsuperscript{97}

In light of the “[b]itter opposition” by many employers, the Des Moines Register declared that the hours bill would show whether legislators “are reactionary or progressive in matters of social legislation....” To the all-purpose employer claim that enactment of a limit on women’s hours would make it impossible for Iowa industries to compete with those of other states supporters replied that every adjoining state already had such a law, some of them even “more drastic” than the proposed measure.\textsuperscript{98} On February 24 the House and Senate labor committees held a joint public hearing on the bills in the House chamber itself, which—so great was the interest in the issue—was still not large enough to enable all who attended to find a seat.\textsuperscript{99} Unsurprisingly, Ida B. Wise Smith and other women representing the League of Women Voters, the Federation of Women’s Clubs, Daughters of the American Revolution, and other groups clashed with manufacturers, who claimed in the alternative that the law was unnecessary or that it would be burdensome to businesses, driving out the few manufacturers in Iowa; hotel owners trivialized the proposal by asserting that although women might be on duty long hours, “the did not actually work.” Perhaps the most striking counterargument hurled back by employers at the hours bill’s proponents was that it excluded domestic workers because coverage would affect the clubwomen themselves.\textsuperscript{100} In the sarcastic words of pharmaceuticals manufacturer G. D. Ellyson, the drug and chemical industries representative, who was the bills’ most forceful opponent: “There are hundreds and thousands of maids who are taking care of children until 10 o’clock at night while their mistresses are playing bridge.” In rebuttal the women stated that they would be “perfectly willing” to cover domestic workers, whom very few clubwomen employed anyway. After stressing that women (in the wake of enfranchisement)

\textsuperscript{97}“Industrial Court Upheld in Register Legislative Canvass,” \textit{DMR}, Mar. 10, 1921 (1:1-2) (211 to 119).


\textsuperscript{100}“Women Plead for Limit on Working Day,” \textit{DMR}, Feb. 25, 1921 (1:1, 2:5). The WCTU does not appear to have adopted the maternalistic attitude toward women factory workers regarding hours of work articulated by the first vice president of the City Federation of Women’s Clubs, Mrs. Fred Hunter, who declared that the factory woman was not always capable of judging what was best for her. “Women Voters in Clash over Nine-Hour Law,” \textit{DMR}, Mar. 6, 1921 (sect. 2, 1:8). According to the 1920 Census of Population Hunter’s husband was a coal mine manager.

\textsuperscript{101}“Doings Under the State House Dome,” \textit{IH} 66(9):523 (Mar. 3, 1921).
The Great Compromise of 1921

were finally addressing their representatives in their capacity as citizens and bluntly reminding the legislators that if most of the women in Iowa had not voted for most of them, they would not have been elected. Smith, the advocates’ opening speaker, stated that “no nation could be strong when it had a ‘subjected class,’ especially when that class was the mothers of the race.” Bracketing class and deploying the then more conventionally gendered formulation, she appealed to the legislators “not half so much for the working women of today, even though many of them are working ten and eleven hours a day, as for their children, who are having to do without their mother’s care. Even more I plead for the children of the future, for fatigue affects the potential motherhood of the future.”

One speaker introduced a dimension that, by blurring the categorical class lines drawn by the bill, sought to subvert the need for state intervention altogether. Carrie Bell, secretary of the Women’s Affairs Department of the Des Moines Chamber of Commerce’s, argued that a majority of business women in Iowa opposed the bill because “working women want to do as they please, just as men make their own rules....” (One of the rules that men made entailed that Bell was the only member at Chamber of Commerce staff meetings “that does not smoke.”) When the Women’s Affairs Department was formed in May 1920, arising out of a group of business and professional women who wanted to “[i]nculcate right principles in the thoughts and practices of womankind,” it was the first group of organized businesswomen in the United States to become actively affiliated with a men’s commercial organization and the first women’s department in any chamber of commerce. The Women’s Affairs

107 Miss Bell, “Woman’s Place in the Community” at 6 (typescript, n.d. [1920]), in Records of the Greater Des Moines Chamber of Commerce, Box 14: Women’s Bureau, Folder: Misc. 1920, University of Iowa Library, Special Collections.
The Great Compromise of 1921

Department—whose membership was “limited to professional and business women holding executive positions” and hence by definition was excluded from the coverage of the maximum hours bill—perceived its role in large part as instilling in women who performed manual labor for wages in factories, laundries, hotels, and stores attitudinal and behavioral norms that would promote capital accumulation. Thus, business and professional women (together with leisured women who were either of means or married to a man who supported them and women who worked at home without specific remuneration) “could not exist without” women wage workers, whom they had to help “obtain justice and also to realize that for value received must service be given.” Similarly, “[f]rom the viewpoint of the business woman...before the women who labor for wages can be recognized as a valuable service to the community” they had to be subjected to the same capitalist discipline as male wage workers: if a man was docked for lateness and fired for being “unfaithful to his duties,” his female counterpart both had to understand what her responsibilities were and to suffer the same punishment. What women workers needed was not “favors”—though “some sympathy” was needed—but “a chance to do an honest piece of work for honest remuneration” albeit “under desirable and sanitary conditions” (which apparently may discriminatorily not have been provided to men).

For all its bravado in rejecting “restrictive” wage and hour legislation as hampering industry at a time when it was in no shape to be subject to such measures and in proclaiming that it knew what was best for women, the Chamber of Commerce objectively confirmed Smith’s boast to the legislature about women’s electoral power. The day after the joint Labor Committee hearing, officials of the Chamber as well as of its Manufacturers Bureau charged that the bills would have been sidetracked as soon as they were filed but for legislators’ fear that such action would have endangered their chances of reelection or ascent to higher office by “the combined vote of the women.”

The growing size of the fissure within the women’s movement became clearer a week later at a meeting of the League of Women Voters when Lela Gray, a

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111Miss Bell, “Woman’s Place in the Community” at 2-4 (typescript, n.d. [1920]), in Records of the Greater Des Moines Chamber of Commerce, Box 14: Women’s Bureau, Folder: Misc. 1920, University of Iowa Library, Special Collections.

cashier and manager at the Equitable Life Insurance Company of Iowa, purporting to represent business women, revealed the managerial-careerist and non-working-class orientation of her program: “‘Just as soon as you make these laws you are hampering women.... No man gets a position of importance without spending hours working overtime and women cannot expect to do differently.’” Gray implausibly added that in her search of factories and other industries she had been unable to find women working long hours.113 (The 45-year-old widowed Gray, who lived with her mother Mary Eva Vanbuskirk together with her sister Lillian Vanbuskirk and her daughter Gladys, both of whom were also insurance company clerks,114 had been the leader with her sister and other women of “a group of militant public spirited business women” who during World War I organized a committee to avoid a transportation stoppage when “Des Moines was threatened by a street railway strike....” From this group arose the Des Moines Business and Professional Women’s Club.)115 In reply to Gray’s claims Blanche Robbins, a clerk in the House of Representatives, stated that it was a business policy of employers to prohibit “‘working girls’” from expressing their views on issues brought before the government: “‘In certain business houses every girl in the employ of the firm has been pledged to write personal letters [to the legislature] voicing the opposition’” to the hours bill.116

A second joint Labor Committee hearing was held on March 8, which was subject to sharply differing contemporaneous accounts, depending on the authors’ political sympathies. According to the syndicated column of former state legislator G. Caswell, the “‘Club women of the state met the surprise of their lives when they rushed to the aid of the ‘poor working class of women’ to demand that their hours be reduced... To refute the arguments of the club women the working class of women demanded a hearing for themselves and furnished a surprise that shook the rafters of the state house.’” Declaring that they were competent to take care of their own interests, these (allegedly) working class women “suggested that the club women might find a place to work off their pent up energies in coming to the relief of their house maids and kitchen girls....” Insisting that they were now equal to men, they stated that hours too long for women were too long for men too. Revealingly, one of these women admitted that after 30 years of rattling

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113 “Women Voters in Clash over Nine-Hour Law,” DMR, Mar. 6, 1921 (sect. 2, 1:8).
114 Fourteenth Census of Population 1920 (HeritageQuest). They also all lived together in 1910, Lela Gray being a clerk for an insurance company and Lillian Vanbuskirk a stenographer.
The Great Compromise of 1921

typewriter keys she had become an executive “because she had been ready to work extra hours when such were necessary and had been interested in the prosperity of the business.” Much more plausibly Caswell reported that opposition to the hours bill had largely stemmed from the Business and Professional Women’s League, which had quietly been engaged in reforming women’s working conditions through “harmonious deliberations with employers.”

In contrast, the Iowa Homestead’s legislative column related that, led by two department managers at Equitable, Gray and Luella Clark (who was also chairman of the Women’s Affairs Department of the Chamber of Commerce), and Louise Retz, private secretary to the president of the Iowa National Bank in Des Moines, 150 stenographers and office employees appeared. Interestingly, the author noted that lawyers in the legislature had determined that banking and insurance companies did not fall under the bill’s “mercantile establishments” and therefore such office employees would not be covered; indeed, supporters of the bill were unable to find any of these women who would have been covered. Gray and Clark had appeared before the committee earlier as representing “laboring women, but when pinned down by Senator Price...admitted that they did not represent the factory workers, mercantile clerks or any other class coming under the provisions of the measure.” Moreover, as Price pointed out using somewhat different numbers, whereas three of the 5 executive women spoke at the hearing, not a single one of the 125 “working girls” did. Of these industrial workers whom these women did not represent the aforementioned survey revealed that a 50-hour week would reduce the hours of 50 percent.

In yet another version, the Register’s, more than 200 women and girls appeared in opposition to the bills. The three aforementioned managerial and confidential employees stated that the proposed laws were detrimental to their interests because “they had a right to be on an equal footing with men.” In reply to a question, the women testified that only six of the 200 held executive positions (and would therefore be excluded from the maximum hours law). An apparently

118 Fourteenth Census of Population (1920) (HeritageQuest) (26 year-old insurance company department manager); Department of Women’s Affairs, Bulletin No. 10 (Feb. 1, 1921), in Records of the Greater Des Moines Chamber of Commerce, Box 14: Women’s Bureau, Folder: 1920-2 Bulletins, University of Iowa Library, Special Collections.
suspicious legislator wondered whether their employers had put these women up to testifying, prompting denials along with this ambiguous gloss: “‘We have found that our employer is our best friend...but we want it distinctly understood that it was through his efforts or advice that we are here....’”122

On March 18 the Senate killed the maximum hours bill by voting 36 to 13 to adopt the Labor Committee’s report that it be indefinitely postponed.123 Senatorial opponents argued that this particular measure would in fact inhibit the advancement of “working girls,” who, moreover, did not want the bill, which only club women sponsored.124 Their rejection of the proposal was presumably based either on their horror of the “‘curse to business and to the labor girls of Iowa’” that Labor Committee chairman Senator Milton Pitt pronounced the nine-hour bill to be or on their refusal to acquiesce in the legislature’s deprivation, in Senator J. L. Brookhart’s words, of “their fundamental rights of contract in the matter of how they may wish to labor.”125 The anti-corporate Des Moines News offered a more straightforward explanation of the labor bills’ defeat: although the state labor leaders were interested in their passage, employers—hundreds of whom “invaded the State House en masse and wept salty tears for their ultimate fate if

122“Women Rap Wage and Hour Measure,” DMR, Mar. 9, 1921 (2:3). On the exclusion of “executive” employees from hours laws, see Marc Linder, “Time and a Half’s the American Way”: A History of the Exclusion of White-Collar Workers from Overtime Regulation, 1868-2004 (2004). The debate in Iowa was eerily similar to one that had taken place in 1917 in the Oregon legislature, where 28 “business women...holding responsible positions” vigorously protested against being covered by a 48-hour law on the narrow grounds that “‘[o]ffice work cannot be done by the clock.’” More broadly, however, these bookkeepers, stenographers, and cashiers, while admitting that the bill “‘would probably not adversely affect inferior positions which carry little responsibility,’” believed it “‘unjust to legislate privileges to the less capable girls who are usually employed only temporarily, to the detriment of the business woman who prefers to be on a basis of equal compensation for equal service.’” In attacking this measure as “‘class legislation,’” they left no doubt as to which class they were aligned with: “‘It is not the tendency of employers in general to be unjust or unfair in hours of employment or quantity of work expected.’” “Women Fight Bill,” MO, Jan. 25, 1917 (6:2). As enacted, the 10-hour-day/60-hour-week bill did not exclude office workers. 1917 Oregon Laws ch. 163, at 208.


those two bills should become law”—cagily kept the former so preoccupied with defeating an industrial court bill to which employers were “secretly” as opposed as unions that their attention was diverted from the women’s hours and wages measures. The day after the vote the Manufacturers Bureau of the Des Moines Chamber of Commerce stressed the contribution of its own Legislative Committee and of business women in defeating both hours and wage bills.

If the Senate vote on the hours bill is compared with the April 6 vote of 27 to 22 passing the Dodd bill to repeal the ban on cigarette sales to adults, no strong correlation between the WCTU’s positions on the bills is discernible. Of the 13 senators who voted to keep the hours bill alive five voted to retain the cigarette ban; conversely, of the 36 who voted to kill the hours bill 19 later voted to end the sales ban. Since a laissez-faire orientation might explain why some senators voted against the WCTU’s interventionist stance on both bills, it could be speculated that so many more supported the WCTU’s stance on cigarettes than on women’s working hours because they joined the “business interests,” as Democrat B. J. Horchem formulated it on the Senate floor, in fighting the bill because “they were afraid labor might some day get the upper hand and they wanted to keep labor down”—a position not implicated by the cigarette dispute.

Although with the defeat of the maximum hours bill Iowa remained, as one of the leaders of the women’s clubs put it, “an open field for industry to come in and exploit Iowa women workers without restriction,” the WCTU’s advocacy of the maximum hours bill did not end at the close of the legislative session.


\[128\] *State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly* 1738 (Apr. 6).


\[131\] Business and professional women successfully continued to oppose wage and hour laws. For example, when the League of Women Voters the following year proposed such legislation, some women in the IBPWC opposed it on the grounds that it deprived women of freedom of contract and, being based on alleged physical disabilities that science had refuted, put them in the same class as children. *Iowa Business and Professional Women’s Clubs, Box 1: Minutes of Annual Meetings and Executive Committee 1920-1936*, at 26
Several weeks later, at the second annual convention of the Iowa Federation of Business and Professional Women’s clubs Gray and Bell, both of the Women’s Affairs Department of the Chamber of Commerce, were permitted to participate in the debate over special women’s legislation even though the Chamber was not affiliated with the Federation. Denying Gray’s boast that the business women of Des Moines had defeated the nine-hour bill, Ida B. Wise Smith stated that “lobbyists for Iowa industries had come to Des Moines with the express purpose of defeating it. She said it was a fight between dollars and souls, and that the women had their choice between unionization or legalization of hours.”

Enter Representative Horace Husted Dodd—Obscure Electric Utility Capitalist and Cigarette Sales Prohibition Repeal Bill Requestee

The process of legislation is influenced by so many different factors that the history of a single bill, if given in detail, might fill many volumes.

As early as February 24 the Iowa press learned that when the legislature returned from a 10-day recess on March 7 (the day before the deadline for individual legislators to file bills) one of the first bills to be filed would be a repeal of Iowa’s anti-cigarette law. Being prepared by Representative Horace H. Dodd of Howard county and based on the alleged virtual impossibility of the prohibition of cigarette sales (“the present law is openly, flagrantly violated...and prosecution is a joke”), the bill would empower the secretary of state to license

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(May 26, 1922) (SHSI IC).

132 “Predicts Women Will Take Stand Against 9-Hour Measure,” EG, Apr. 29, 1921 (1:7).

133 Minutes of the Second Annual Convention of the Iowa Federation of Business and Professional Women’s Clubs at 4 (Apr. 29, 1921), in Iowa Business and Professional Women’s Clubs, Box 1: Minutes of Annual Meetings and Executive Committee 1920-1936 (SHSI IC). See also History of the Iowa Federation of Business and Professional Women’s Clubs 1920-1934, Part One at 16 (Elizabeth Kenny comp., n.d.).

134 “Women Battle over Nine-Hour Measure,” EG, Apr. 30, 1921 (17:5).


137 “Smokers Smile,” DMN, Feb. 24, 1921 (7:2). In fact, it is unknown what role if any Dodd personally had in drafting the bill. Without indicating any dates, his resume stated that he had taken a “correspondence course in law but did not graduate as business duties became too heavy.” Horace H. Dodd [untitled e.v.] (Apr. 3, 1946) (copy furnished by Lyn
the sale of cigarettes, thus generating “considerable revenue” for the state.” In fact, the novelty of Dodd’s bill, which otherwise incorporated elements of the failed repeal bills of 1917 and 1919, was the inclusion of a consumer tax on cigarettes. It was this feature (“a special tax on smokes”) that properly underlay the characterization of the bill by Robert Hughes, the syndicated state legislative reporter of the Des Moines News, when it was filed on March 7, as “[t]he most startling” among the 55 filed that day, though it was left to the Waterloo Evening Courier to highlight this innovation in the headline, “Tax for Cigarette Sales Proposed in Bill by Dodd.” Since legislators even before the 39th General Assembly convened had been considering means for raising new sources of revenue beyond direct taxation, the inclusion of a cigarette tax in Dodd’s bill was virtually certain to secure some votes for it. To be sure, Hughes and the News later viewed the tax as part and parcel of the legislature’s beholdenness to corporations, which “got away scot free with increased privileges,” while “the people” were burdened with increased taxes. Press interest in Dodd’s bill during the recess peaked on March 3, when several newspapers carried the same article asserting that Dodd’s repeal bill was motivated by the view that the prohibitory law was “more or less a dead letter” as well as by many legislators’ feeling that cigarette sales “should net the state substantial revenue.”

The first revelatory background information about Dodd’s bill appeared in the Sunday edition of the Register announcing its filing the next day:

Although considerable opposition to the bill will undoubtedly be raised, it is believed that it has good chances of passage as at the present time cigarettes are being openly sold everywhere and the sentiment against enforcement of the present law forbidding their sale is overwhelming.

The measure has been rewritten half a dozen times in order to meet the objections of

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139Robert Hughes, “May Legalize Cigaret Sale,” DMN, Mar. 7, 1921 (1:5). See also “To Legalize Cigaret Sales,” WT-T, Mar. 8, 1921 (3:1).

140“Tax for Cigaret Sales in Bill by Dodd,” WEC, Mar. 7, 1921 (2:7).

141“Labor to Turn Biggest Guns on Kime Bill,” DMR, Jan. 6, 1921 (1:1).

142Robert Hughes, “ Voters Must Be on Guard Against Repetition of Legislative ‘Steal,’” DMN, Apr. 20, 1921 (4:4-5).

143“Under the Golden Dome,” Sun-Herald (Lime Springs), Mar. 3, 1921 (2:3). The article erroneously stated that Dodd represented Delaware county.
different organizations, and its backers feel that in its present form it prevents the sale of cigarettes to minors as well as any legislation could.\textsuperscript{144}

Although the press self-regardingly made sure to declare that the existing law’s ban on newspapers’ publishing cigarette advertisements was “abolished by the terms of the bill,”\textsuperscript{145} the article failed to identify its source, the objecting organizations, their objections, or the text of the original draft. Since the further course of the struggle over the measure nowhere suggested that the prohibitionist forces had ever been either privy to the drafting process or invited to participate in the composition of a consensus bill, presumably the negotiating parties included the cigarette companies, wholesalers and retailers, and elements interested in state and local government revenue from introduction of an excise tax and imposition of a license fee. Another possible participant was the American Legion\textsuperscript{146} as representative of the largest cohesive body of frustrated consumers. To be sure, why they or anyone else, for that matter, should have been willing to allocate scarce political capital to resolving a non-problem—after all, cigarettes were allegedly being sold openly everywhere—contemporaries never explained beyond asserting the desideratum of a law that would “not make criminals of all the Legion men and other users who are going to have them even if they have to ship them in from other states.”\textsuperscript{147} Remarkably, even the WCTU apparently never disclosed the bill’s authors other than the American Tobacco Company.\textsuperscript{148}

When introduced House File 678 was referred to the House Police Regulations Committee,\textsuperscript{149} chaired by Frank Elliott, a chiropractor.\textsuperscript{150} The selection of this particular committee by Speaker Arch McFarlane, a commercial

\textsuperscript{144}“File Cigaret Bill Authorizing Sale,” \textit{DMR}, Mar. 6, 1921 (sect. 2, 4:3).

\textsuperscript{145}“Legalize Sale of Cigarettes,” \textit{CCP}, Mar. 7, 1921 (6:5).

\textsuperscript{146}The press argued that the revenue from the cigarette tax would suffice to pay the interest on the proposed $22 million soldier bonus bonds, while the American Legionaires, who got their cigarettes from home when they were in France, “would enjoy paying for them here....” “Business Now Rushing Iowa Legislators,” \textit{ADT}, Mar. 22, 1921 (1:2, at 8:1).


\textsuperscript{148}See below this ch.

\textsuperscript{149}\textit{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly} 792 (Mar. 7).

\textsuperscript{150}\textit{State of Iowa: 1921-22: Official Register} at 338 (29th No.).
traveler\textsuperscript{151} who as Speaker in 1919 had voted with the pro-tobacco forces\textsuperscript{152} (and would again in 1921), was, in terms of the bill’s substance, hardly a foregone conclusion: after all, the House at the time had some 63 committees,\textsuperscript{153} and the companion bill in the Senate was referred the next day to the Public Health Committee.\textsuperscript{154} It is unknown whether Dodd, who after the session wrote hypothetically about how, if he were about to file a bill and were friends with the Speaker, he might persuade the latter to refer it to a favorable committee,\textsuperscript{155} was a friend of McFarlane; nor is it clear that the Speaker did him a favor by referring the bill to Police Regulations rather than to Public Health, whose members ultimately voted 15 to 2 for final passage of H.F. 678 compared with 6 to 3 among the former’s.\textsuperscript{156} The very day that Dodd introduced the bill the 830-member WCTU of Black Hawk county urged Governor Kendall to oppose repeal of the cigarette law.\textsuperscript{157}

Horace Husted Dodd (1888-1948), the co-owner and manager of Consumers Electric Company, an electric central station in rural Howard county on the Minnesota border, was a 32-year old first-term Republican. Born in 1888—of, as he phrased it in a job resume two years before his death, “American parents of English descent”\textsuperscript{158}—the year in which his father, Arthur Louis Dodd (1857-1941),\textsuperscript{159} was appointed agent for the Iowa Central Railroad in Charles City\textsuperscript{160} (in

\textsuperscript{151}State of Iowa: 1921-22: Official Register at 297 (29th No.).
\textsuperscript{153}State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 175-86 (Mar. 18).
\textsuperscript{154}State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 714 (Mar. 8).
\textsuperscript{156}State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 183, 1659-60 (Jan. 18 and Mar. 30).
\textsuperscript{157}Flora Carter to G. [sic] Kendall, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
\textsuperscript{158}Horace H. Dodd [untitled c.v.] (Apr. 3, 1946) (copy furnished by Lyn Dodd, Horace Dodd’s daughter-in-law).
\textsuperscript{159}Allison Dodd, Genealogy and History of the Daniel Dod Family in America, 1646-1940, at 312 (1940). This genealogy incorrectly states that Horace Dodd for a long time was treasurer of Hillsdale county, Minnesota and was living in Minneapolis in 1938. \textit{Id.} at 360.
\textsuperscript{160}“Mrs. Dodd Dies at Charles City,” Mason City Globe-Gazette, Apr. 26, 1933
neighboring Floyd County), where Dodd was graduated from high school\textsuperscript{161} near the top of his class,\textsuperscript{162} and his father was still a railroad labor agent at the 1900 census.\textsuperscript{163} Directly after finishing high school, Horace Dodd went to “Indian country”\textsuperscript{164} in eastern Oklahoma, where he worked from January 1906 to December 1908 as assistant cashier of the First National Bank in Talihina (which had just been incorporated), his job duties including bookkeeping and being a teller, “looking after live stock and other collateral,” and making small loans. After this three-year adventure he “[r]esigned to take better job at home.”\textsuperscript{165} Reality appears to have deviated somewhat from this account: in 1907 he in fact entered Iowa College in Grinnell (renamed Grinnell College the next year), only to leave before completing a single course.\textsuperscript{166} However, he never regretted having dropped out of Grinnell to go work for his father, according to his son, because he was an “American businessman.”\textsuperscript{167}

In 1906, Arthur Dodd bought into an existing electric light plant and the Charles City Lighting and Heating Company, combined them, and instituted day service.\textsuperscript{168} Two years later, the county directory listed Arthur Dodd as secretary

\begin{thebibliography}{9}
\bibitem{161} State of Iowa: 1921-22: Official Register at 296, 299, 337 (29th No.).
\bibitem{162} Horace H. Dodd [untitled c.v.] (Apr. 3, 1946) (copy furnished by Lyn Dodd).
\bibitem{163} Twelfth Census of the United States: Schedule No. 1—Population (1900) (HeritageQuest).
\bibitem{164} Arthur Dodd worked for the Illinois Central for 22 years, the last 13 as station agent at Charles City. He must, therefore, have begun in 1879 and stopped in 1901.
\bibitem{165} Telephone interview with Philip Dodd, Silverton, CO (Sept. 23, 2007).
\bibitem{166} “Arthur L. Dodd Dies After a Heart Attack,” \textit{CCP}, June 2, 1941 (8:1).
\bibitem{167} Telephone interview with Philip Dodd, Silverton, CO (Sept. 23, 2007).
\bibitem{168} “Arthur L. Dodd Dies After a Heart Attack,” \textit{CCP}, June 2, 1941 (8:1). Although this obituary stated that he had bought the company, when the Charles City Lighting and Heating Company’s articles of incorporation were amended in 1913, Dodd was only 

1204
and manager of the company, which employed Horace Dodd, who lived with his parents, as a bookkeeper.\textsuperscript{169} According to his resume, Horace Dodd was the assistant manager of the Cedar Valley Power Company (a name that did not exist until 1914) from January 1909 to June 1915, engaged in purchasing, power and merchandise sales, supervision of accounting and collections, and directing the work of line maintenance of construction crews.\textsuperscript{170} Arthur Dodd was still manager of the light company at the time of the 1910 census.\textsuperscript{171} Horace Dodd was returned as still living with his parents at the 1910 census, when he was a surveyor for an interurban railway.\textsuperscript{172} During the years before 1914 under Arthur Dodd’s management, the Charles City Lighting and Heating Company’s customer base underwent “phenomenal growth,”\textsuperscript{173} with practically all of Charles City’s power lines being rebuilt. In June 1914, Arthur Dodd and the other officers of Charles City Lighting and Heating changed the company’s name to Cedar Valley Power Company and bought plants or obtained franchises to supply electricity in ten towns in north central Iowa.\textsuperscript{174} At one million dollars it was Charles City’s second most heavily capitalized corporation.\textsuperscript{175} On July 2, 1914, Cedar Valley Power Company was incorporated; among the new company’s five directors were Arthur Dodd (who was also secretary and treasurer) and the future state legislator, 25-year-old H. H. Dodd.\textsuperscript{176} The state Executive Council having authorized the

secretary of the company. Amendment to Articles of Incorporation of Charles City Lighting and Heating Company (July 9, 1913) (copy furnished by Floyd County Recorder).  

\textsuperscript{169}The First Floyd County Directory of Floyd County, Iowa 47 (1908).
\textsuperscript{170}Horace H. Dodd [untitled c.v.] (Apr. 3, 1946) (copy furnished by Lyn Dodd).
\textsuperscript{171}Thirteenth Census of the United States: Population—1910 (HeritageQuest).
\textsuperscript{172}Thirteenth Census of the United States: Population—1910 (HeritageQuest).
\textsuperscript{173}“Electric Light Co. Sold,” \textit{Nashua Reporter}, Apr. 8, 1915 (1:1).
\textsuperscript{174}“Is Capitalized at Million,” \textit{Marble Rock Journal}, June 3, 1914 (6:5).
\textsuperscript{175}“New $1,000,000 Corporation for Charles City,” \textit{FCA-H}, June 2, 1914 (1:1-2).
\textsuperscript{176}Articles of Incorporation of Cedar Valley Power Company (July 2, 1914) (copy furnished by Floyd County Recorder); “Corporation Files Papers,” \textit{Floyd County Advocate-Herald}, July 3, 1914 (1:2). It seems very unlikely that the two Dodds could have mobilized any amount remotely approaching one million dollars. Of the other three directors, one, Harry Caughlan of Waterloo, was a commercial salesman of an electric company; George May of Charles City, who was also president, was a bank president; and M. A. Harrison of Hampton, IA (vice president of Cedar Valley), did not appear in the 1920 census. May had been president of Charles City Lighting and Heating Company from the time of its incorporation in 1902, when it was capitalized at $75,000; in 1913 the corporation’s capital stock was raised to $250,000. Articles of Incorporation of Charles City Lighting and Heating Company (June 12, 1902); Amendment to Articles of Incorporation of Charles City Lighting and Heating Company (July 9, 1913) (copy
The Great Compromise of 1921

consolidation of water power interests in northeastern Iowa, the Cedar Valley Power bought up power companies in other Iowa towns for a total of $419,000, assumed a bonded debt of $102,000,177 and began regional power distribution, supplying several towns more cheaply with power from main stations instead of having to maintain numerous small ones178—all under the general managership of Arthur Dodd.179 At the end of March 1915, rumors surfaced that Citizens Gas & Electric Company of Waterloo would take over the Charles City electric plant,180 but Arthur Dodd, who by this time was the president and principal owner of Central Valley Power, denied it.181 However, a few days later he confirmed the deal.182 The American Gas Company of Philadelphia (which owned Citizens Gas & Electric) bought the Cedar Valley Power Company, including Dodd’s holdings.183 Although no change was initially contemplated in the operation or control of the plants, Arthur Dodd agreed for the time being to perform the same services; nevertheless, it was probable, the buyer announced, that as the details of the consolidation were worked out, Dodd would devote his attention to ““other interests of a private nature.””184 The 1920 census returned him as manager of a milling company.185 Arthur Dodd, according to a letter that Horace Dodd wrote

178“New $1,000,000 Corporation for Charles City,” FCA-H, June 2, 1914 (1:1-2).
179Past Harvests: A History of Floyd County to 1996, at 34 (Cameron Hanson and Heather Hull eds. 1996); “Arthur L. Dodd Dies After a Heart Attack,” CCP, June 2, 1941 (8:1).
180“Electric Plant May Be Erected in Short Time,” WEC, Mar. 27, 1915 (1:2).
182CP, Apr. 3, 1915; “Electric Light Co. Sold,” Nashua Reporter, Apr. 8, 1915 (1:1);
183“Five Power Plants Change,” Le Grand Reporter, Apr. 9, 1915 (14:1). The company’s name was apparently changed to Cedar Valley Electric Company and incorporated in Delaware. “Court House Notes,” Iowa Recorder (Greene), May 12, 1915 (6:2); Moody’s Analyses of Investments, Part II: Public Utilities and Industrials 134 (1916); Moody’s Analyses of Investments and Securities Rating Books: Public Utility Securities 12 (1924). However, Annual Report to the Stockholders of the American Gas Company 5-6 (1916), states that the name of the company that American Gas Co. had bought in 1915 was Cedar Valley Electric Co.
185Department of Commerce-Bureau of the Census, Fourteenth Census of the United
to the local Charles City newspaper in 1941 to inform that city’s residents of his father’s death, had built up the lighting company “from a community liability to one of the town’s real assets.”186 At the time of the 1915 Iowa census, Horace Dodd was still living with his parents, the entire family being self-reported as Christian Scientists; he was returned as a clerk who had earned $960 in 1914187—at his father’s electric company188—and had not attended college.189 He resigned when his father sold the property to a “holding company.”190 Almost 30 years old at the time of U.S. participation in World War I, he never performed military service.191

By the middle of the decade, Arthur Dodd, who by this time had become rather prosperous, was personally acquainted with Thomas Edison, and, according to Horace Dodd’s son, Philip Horace Dodd, became and remained a big fish in the little Charles City pond192—being appointed, in addition, on July 15, 1918, mayor of Charles City to serve out the unexpired term of the mayor who resigned.193 He also sent his son Horace out to scout for municipal electric plants to buy up.194 Horace Dodd’s resume stated that between October 1915 and December 1921 he bought three small utility properties and operated them, supervising all activities including construction, maintenance, sales, accounting, collections, and purchasing of all equipment and supplies, in addition to securing the new utility franchises in all the towns.195 Thus, on June 6, 1916, the Elma city council voted to submit to the voters the question of whether the city should sell its electric light plant to Dodd, who already owned the electric light plant in Riceville and franchises in the same town and McIntire in neighboring Mitchell county, and

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186“Arthur L. Dodd Dies After a Heart Attack,” CCP, June 2, 1941(8:1).
188Grinnell College Alumni and Address Book 158 (1914).
189Iowa State Census 1915, Floyd County, Charles City, Ward 3, Card No. B236.
191State of Iowa: 1921-22: Official Register at 299 (29th No.).
192Telephone interview with Philip Dodd, Silverton, CO (Sept. 23, 2007). Philip Dodd’s recollection that his grandfather had also built the dam to generate the power for the power company appears to be incorrect. Past Harvests: A History of Floyd County to 1996, at 34 (Cameron Hanson and Heather Hull eds. 1996).
193“Arthur L. Dodd Dies After a Heart Attack,” CCP, June 2, 1941 (8:1). Dodd served until April 7, 1919.
194Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007).
intended to furnish electric current to other towns.\footnote{196} By “investing considerably more capital” in order to connect these towns, Dodd could sell much more electricity with “very little more overhead [e]xpense.” Two weeks after the special election on July 10,\footnote{197} at which the proposition to sell the plant passed by a vote of 160 to 40,\footnote{198} Dodd, acting as secretary, treasurer, and manager, and his father, as president, incorporated the Consumers Electric Company in Elma, Howard county, with a capital stock of $100,000.\footnote{199} That year the city of Elma sold the electric light plant to Dodd for $15,000 for 99 years.\footnote{200} The electricity for these local systems was, according to his son Philip, being transmitted from Arthur Dodd’s Charles City plant in what was perhaps the first long-distance transmission of electricity in Iowa.\footnote{201} According to his 1917 draft registration card Dodd was living in Elma in Howard county with his wife and working as manager of Consumers Electric Company’s electric central station; he claimed an exemption from the draft based on his wife’s being solely dependent on him and his work at the utility plant.\footnote{202} At the time of the 1920 census, he was still residing in Elma (population 874 in 1920),\footnote{203} and had been in the electrical central station business for ten years.\footnote{204} At the 1920 census his brother John R. Dodd, eight years younger, was also the superintendent of a light plant in Herrick, South Dakota. Their father presumably “had a finger” in that operation, according to
Horace Dodd’s son, since he owned a ranch and much property in South Dakota.\textsuperscript{205}

After having been unopposed in the Republican primary,\textsuperscript{206} Dodd narrowly defeated one-term Democratic incumbent Charles B. Wallace, a farmer, in a county in which Republicans and Democrats had “practically conceded that the farming interests had a right to select” the state representative.\textsuperscript{207} Running far behind Harding—who in Howard county, which was otherwise “very close politically,”\textsuperscript{208} outpolled his Democratic opponent by more than two to one—Dodd won by only 203 votes out of more than 5,000 cast,\textsuperscript{209} in an election in which the entire Republican ticket won in Howard county.\textsuperscript{210} Dodd even lost in his hometown of Elma by a large margin, the (new) women’s vote in the county seat of Cresco providing him with his small overall majority.\textsuperscript{211} The local press did not disclose much information about Dodd, but in recommending him a month before the Republican primary as a young man who would be a credit to the office, one paper declared that he was “not a political office seeker but a practical business man and in full sympathy with the farmers of the county and assisted in lobbying through the county agent bill.”\textsuperscript{212} Dodd apparently then lived up to this billing a few months later when, as point man for Consumers Electric Company, he pushed such a large increase in rates that it caused “considerable agitation” among customers in a Howard county town, who at an informal remonstrance agreed to refuse to pay it.\textsuperscript{213}

Although his father never talked to Philip Dodd (who was born at the end of 1921) about his time as a legislator\textsuperscript{214}—and, remarkably, made only a brief unspecific reference to it on his resume, omitting mention of it altogether under

\begin{itemize}
\item \textsuperscript{205} Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007).
\item \textsuperscript{206} State of Iowa: 1921-22: Official Register at 451 (29th No.).
\item \textsuperscript{207} “Charles H. [sic] Wallace for Representative,” Cresco Plain Dealer, Oct. 29, 1920 (1:2).
\item \textsuperscript{208} “Horace Dodd Representative,” Charles City Press and Evening Intelligencer, Nov. 3, 1920 (1:5).
\item \textsuperscript{209} “The Election in Howard County,” ENE, Nov. 4, 1920 (1:4); “Election Results,” HCT, Nov. 3, 1920 (3:2).
\item \textsuperscript{210} “Republican Landslide,” Sun-Herald (Lime Springs), Nov. 4, 1920 (1:1).
\item \textsuperscript{211} “’Twas No Landslide,” Cresco Plain Dealer, Nov. 5, 1920 (1:4).
\item \textsuperscript{212} “H. H. Dodd for Representative,” Riceville Recorder, May 5, 1920 (1:3-4), reprinted in HCT, May 12, 1920 (1:4), and published with slight variations in ENE, May 13, 1920 (3:1).
\item \textsuperscript{213} “Electric Company Increases Rates,” Riceville Recorder, Sept. 1, 1920 (1:5-6).
\item \textsuperscript{214} Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007).
\end{itemize}
the rubric “Experience”—the son was close to his father, received many typewritten letters from him later in life (carefully collected and bound in leather), and, once he was studying geology, worked summers in the gold mine in Ontario and mercury mine in Arkansas that Horace Dodd managed. Based on his knowledge of his father and information provided to him in 2007 about Horace Dodd’s activity in the legislature, Philip Dodd immediately, intuitively, and firmly concluded that “business politics” had motivated his father to seek a seat in the Iowa House: as an electric utility businessman in his own right and son of a utilities owner, Horace Dodd would have had as his primary business reason for entering the legislature making it friendlier to power companies. Through “family gossip” Philip Dodd had heard that his father, who had been a “medium to heavy cigarette smoker,” had been instrumental in legalizing cigarettes in Iowa, but he doubted very much that such an objective had prompted him to run for office. Rather, he speculated insistently that Horace Dodd’s prominent role in the repeal of the cigarette sales ban had been an example of business-related “back scratching”: in exchange for support for utility bills Dodd filed the cigarette bill for someone else, although Philip Dodd, who was unaware of any connection that his father might have had with cigarette manufacturers or the American Legion, did not know who that person might have been. Ironically, then, whereas Horace Dodd failed to secure enactment of the utility legislation for the sake of which he had probably run for a seat in the House, he succeeded in achieving repeal of the prohibition of cigarette sales, which may have been merely the means by which he hoped to insure passage of the former.

Once in the legislature, Dodd filed only two bills other than the “Dodd cigarette bill” of statewide front-page fame. As an electrical utility capitalist he was strategically catapulted into the chairmanship of the Public Utilities Committee—chairing an important committee, even with the very large number of House committees, was quite unusual for a first-term member—and filed one bill that would have resolved the controversy between cities and street railroad companies by conferring exclusive control over street car service and rates on the state railroad commission, but the House took no action on it (even though it had been referred to his own committee) and Dodd withdrew it. However, as

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216 Telephone interview with Lyn Dodd, Grand Junction, CO (Sept. 23, 2007).
217 Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007).
219 H.F. 622 (Feb. 24, 1921, by Dodd); State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 736, 1204 (1921) (Feb. 24 and Mar. 18) (H.F. 622);
committee chair he did promote and consistently vote for pro-corporate utility measures. Dodd also gained some prominence by virtue of his appointment to the five-member joint House-Senate committee to study the governor’s plan to merge various state government departments. In addition, his appointment to the key nine-member House Sifting Committee, which controlled the flow of bills to the floor during the final 10 days of the session, thus “becom[ing] virtually a dictator for the balance of the session,” empowered him to exert pressure on members of both houses to vote for his cigarette bill if, in exchange, they wanted their bills to get to the floor. The other cause, which Dodd successfully championed to enactment, was the appropriation of $400 for a constituent in Elma several of whose horses had been killed by the state because their affliction with glanders had been a danger to the community. In addition, he carved out for himself a high-profile role by filing an amendment weakening a bill that would have strengthened the existing wage payment law on behalf of coal miners. Why Dodd, in the absence of coal mines in his district or anywhere in northern Iowa, played such a prominent part in this effort is unclear, but the anti-corporate press reported that the “trusty guns of the [coal] operators


220See below this ch.


222*State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly* 1611 (Mar. 29). Dodd was one of only three first-term committee members; seven of the nine members voted for Dodd’s bill.

223Bills that had already reached the calendar were seldom referred to the sifting committee, which favored bills that had already passed one house. John Briggs, “The Legislation of the Thirty-Ninth General Assembly of Iowa,” *IJHP* 19(4):489-666 at 493 (Oct. 1921).


225See below this ch.

2261921 Iowa Laws ch. 319 at 354 (H.F. 374).

227Dodd’s amendment lost 27 to 62, and Dodd was one of only nine representatives to vote against the bill supported by 84 votes; after being diluted by amendment it was defeated by the Senate. Iowa Code Supplement § 2490 at 978 (1913); H.F. No. 517 (Feb. 16, 1921, by Berry); *State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly* 1283-85 (1921) (Mar. 21).
brought down” the bill. Perhaps his energetic efforts constituted another example of inter-capitalist back-scratching. The generally progressive orientation of the 41 representatives who on March 30 voted against passage of Dodd’s bill to repeal the ban on cigarette sales is indicated by the fact that only two had voted for Dodd’s coal mine amendment and none voted against the bill.

Not standing for reelection—at the end of the three-month 1921 session he had complained that legislators’ ($1,000) compensation was “not enough to pay their living expenses in Des Moines so they are actually money out of pocket in addition to the time they lose from their own business”—Dodd left the legislature after his first two-year term. Although he initially returned to Elma, by the end of 1921 he sold off the electrical plant to a “holding company and resigned to take better job.” That job, which lasted from February 1922 to August 1924, was managing the Lawton-Duncan Electric Company in Lawton,
The Great Compromise of 1921

Oklahoma at a salary of $400 per month. After a brief stay in Onawa in western Iowa, where he worked for another electric company, probably as a way to return to the business in Iowa, by the mid-1920s he climbed to the position of commercial manager of the Interstate Power Company of Delaware, which was headquartered in Dubuque and owned and controlled 42 million dollars worth of assets in Iowa and other central states. Describing this position in his resume as “actually assistant to General Manager,” Dodd stated that between October 1924 and June 1929 for a monthly salary of $550 he had “[h]andled all political and public relations activities, secured many new franchises and municipal contracts, purchased additional utility properties, negotiated major purchase and sales contracts for power and natural gas, assisted General Manager in hiring and training key personnel.” Around 1929, according to his son, Dodd “jumped ship,” switching to the other major electrical utility in Dubuque, Central

236Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007). Dodd omitted mention of his job in Onawa.
238State ex rel. Spillman v. Interstate Power Co., 226 NW 427, 428-29 (Neb. 1929). However, Dodd was neither an officer nor a director. Moody’s Manual of Investments American and Foreign: Public Utility Securities 1708 (1929). Utilities Power and Light Corporation, a Chicago-based firm that controlled Interstate Power, provided power to Howard County. Moody’s Analyses of Investments and Security Rating Books: Public Utility Investments 1560 (1922). Perhaps Dodd had become familiar with its managers when he was running electric plants in Howard county; since Elma was later part of the Interstate Power Company electric grid, perhaps Interstate was the “holding company” that bought the plant from Dodd and offered him a position. Moody’s Public Utilities Manual: American and Foreign 307 (1954). The company that took over the supply of electricity from Consumers Electric Company in Riceville on January 1, 1922 was Consumers Power Company, which was incorporated on September 1, 1921 and does not appear to have been a holding company. In 1924, Consumers Power, which had also been supplying electric power in Elma, was taken over by Northeastern Iowa Power Company, whose officers/owners appear to have had some prior control of Consumers Power. Central States Power and Light Corporation was incorporated in January 1925 in order to acquire Northeastern Iowa Power Company. Dodd later worked for Central States. “Electric Rates Lower,” Riceville Recorder, Feb. 8, 1922 (1:5); “Osage Light Rates Lowered,” Riceville Recorder, Sept. 14, 1921 (1:2); “Clermont Power Co. Buys Osage Plant,” Evening Courier (Waterloo), May 16, 1924 (15:2); “Bond House in Plant Merger of Utilities,” Davenport Democrat and Leader, Aug. 25, 1924 (12:5); Moody’s Analyses of Investments and Security Rating Service: Public Utility Securities 1297-98 (1925).
The Great Compromise of 1921

States Power and Light Corporation,\(^{240}\) a position reflected in the entry at the 1930 population census that he was the general manager of a power and light company in Dubuque.\(^{241}\) The next year he became an officer in Central States Power and Light, the only company vice president in the main office in Dubuque.\(^{242}\) As vice president and general manager at a monthly salary of $750 plus bonus from July 1929 to July 1931, Dodd had complete charge of all maintenance and operations in the firm’s 200 locations in seven states. During these Depression years he “[r]econstructed entire personnel, greatly increased volume of business and reduced operating costs.” He also bought many non-utility assets such as sawmills, box factories, cotton gins, and oil wells, and operated them until they were sold; having to learn these different kinds of businesses then gave Dodd a “reputation for being versatile and adaptable.” In spite of the large income he was receiving in the midst of catastrophically expanding unemployment, he purportedly “[r]esigned because I could not conscientiously be a party to a program dictated by holding company officials which ultimately wrecked the company.”\(^{243}\) Once the full brunt of the Depression hit, Dodd’s employment became sporadic and demanded considerable geographic mobility. From September 1931 to July 1933 he was in Brownwood, Texas, acting, for only $400 a month, as assistant trustee and manager of natural gas and

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\(^{241}\)Department of Commerce—Bureau of the Census, Fifteenth Census of the United States: 1930: Population Schedule, http://www.ancestry.com. A Horace E. Dodd (but no Horace H. Dodd) was listed in the 1927 and 1929 Dubuque City Directory employed as a clerk at the Inter Power Co., but his wife’s name (Louise) does not match that of Horace H. Dodd’s wife (Marion) at the 1920 and 1930 census. *Dubuque City Directory* 153 (1927); *Dubuque City Directory* 152 (1929). No Horace Dodd was listed in the 1930 or 1934 Dubuque City Directory. In 1930 two newspaper fillers mentioned that Horace Dodd and his wife and son were visiting the “parental home of A[rthur]. L[ouis]. Dodd in Charles City.” *CCP*, Apr. 15, 1930 (2:3); *CCP*, May 31, 1930 (9:6).


\(^{243}\)Horace H. Dodd [untitled c.v.] (Apr. 3, 1946) (copy furnished by Lyn Dodd). Dodd was presumably referring to the Utilities Power & Light Corporation controlled by Harley Lyman Clarke.
ice properties for Chicago Commerce Bank, which had taken them over under a defaulted trust deed. At this point, Dodd’s life began a downward spiral that culminated in his premature death at 60 in 1948. His frame of mind during this period was presumably shaped by his having been “pissed off” by Franklin D. Roosevelt’s election and never become reconciled to the New Deal. From August 1933 to August 1937 he found “only casual employment” including a job with a public accountant during rush seasons and a brief assignment in personnel and public relations with a management engineering firm that dissolved. During these years Dodd, his wife, and son moved in with his oldest sibling, Mabel, an unmarried Latin teacher at Evanston High School near Chicago. Though not specified on his resume, when he was not unemployed, Dodd worked for the “Chicago capitalist” Harvey C. Orton—who had been vice president of Interstate Power Company and president of Central States Power and Light Corporation when Dodd worked there and by the 1930s was a financier in Chicago—as a kind of investment counselor. After reading some books on mine management, Dodd from August 1937 to December 1939 was assistant treasurer and managing director of Midco Minerals Ltd., in complete charge of...
The Great Compromise of 1921

exploration and development of several gold mining prospects near Lochalsh, Ontario; this job ended when the project, in which Orton had invested, was abandoned as a result of the war-related excessive difficulty and expense.  

Between January 1940 and September 1941 Dodd maintained a small office in Chicago seeking and financing small mining property for the war effort. This activity led to his managing a mine for the U.S. Mercury Company in Nashville, Arkansas from September 1941 to December 1943; for $350 a month he was in complete charge of the mining and milling operations, which falling prices caused to be closed. Dodd then returned to Chicago, where from March to May 1944 he worked for a public accountant performing several firms’ annual audits. His next job took him to Mesa, Arizona, where from May 1944 to April 1945 he managed another mercury mine, for Midco Reserves, Inc. His even lower monthly salary of $300 came to an end when the mine was closed. Following an unexplained gap of eight months, Dodd resurfaced in the small western Nevada town of Lovelock, where he was employed as the accountant of the Lovelock Mercantile Company, a department store, but this job lasted only from January to March 1946, at which point he “[turned office over to less expensive successor.” His resume, written a few days later, while he was living in Reno (presumably with his youngest sibling, Margaret), ended with the plea to potential employers that he “would confidently undertake any administrative job which did not require specialized technical knowledge.” However, the only work that he was able to pick up was taking care of bookkeeping for several smaller companies in Lovelock, where he died, probably of (alcohol-related) ulcers, in his room in a “flop-house” hotel on December 30, 1948, shortly after his 60th birthday—despite the fact that just two years earlier he had boasted on his resume that “[f]allen arches only physical defect. In 40 years of very active business life have lost very few days work on

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249 Horace H. Dodd [untitled c.v.] (Apr. 3, 1946) (copy furnished by Lyn Dodd); Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007). According to his son, who worked there as a geologist during summers, Dodd was managing the Edwards Consolidated Gold Mine.


251 Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007); “Horace Dodd Is Found Dead in Hotel Room,” Lovelock Review-Miner, Dec. 30, 1948 (1:6); email from Margaret Tanttila, Pershing County Library, Lovelock, NV (Sept. 27, 2007) (quote from a longtime local resident who had known the Victory Hotel). Philip Dodd added that his father’s death had probably been hastened by Christmas-time drinking. Philip Dodd’s wife also noted that Horace Dodd, whom she had never met, had had a drinking problem. Telephone interview with Lyn Dodd, Grand Junction, CO (Oct. 3, 2007).
account of illness.” Pursuant to his request, his son and siblings held no funeral services, scattering his ashes in an unidentified place.

Introduction of and Initial Skirmishes Around House File 678

Perhaps as many public hearings, petitions and personal letters were bestowed upon the Dodd bill legalizing the sale of cigarettes as any measure before the general assembly.

H.F. 678 as filed by Dodd encompassed the following principal features. Without repealing the code provision (§ 5005) that prohibited the sale or giving of tobacco to any minor under 16 (except on a parent’s written order) subject to a fine of between five and 100 dollars, § 1 of the bill repealed § 5006, the universal ban on sales of cigarettes, replacing it with a ban on selling or giving cigarettes to any minor under 18 (except on a parent’s written order), subject to a fine ranging between $25 and $100 for a first offense and $100 and $500 for additional offenses. The proposed law lacked the code’s alternative punishment of up to six months’ imprisonment in the county jail. Dodd’s bill (§ 2) then repealed code § 5007, which contained the $300 mulct tax (payment of which did not immunize the payor against prosecution for selling cigarettes), replacing it with a $50 license fee administered by the state revenue collector. Manifestly, the very significantly reduced fee was no longer designed, like the mulct tax, to act as a powerful financial deterrent. The state revenue collector was given the discretion to revoke the license of anyone who violated any of its conditions and was required to revoke the license of any licensee convicted of violating any provision of the bill. The bill’s most innovative aspect was its imposition of a tax on all cigarettes and cigarette papers sold to consumers in Iowa to be paid before or at the time they were sold and delivered to consumers. The tax—which no other state had yet levied—amounted to one mill on each cigarette (or two cents for a package of 20). The fine for violating this tax provision ranged from $100 to $300; in addition, all cigarettes in the violator’s possession or place were to be confiscated and forfeited to the state. The funds derived from the sale of such confiscated cigarettes as well as the taxes and

253 “In Memoriam,” Lovelock Review-Miner, Jan. 6, 1949 (6:4) (copy furnished by Margaret Tanttila, Pershing County Library (Sept. 24, 2007)).
254 “Work of Iowa Solons at the State House,” Indianola Herald, Apr. 14, 1921 (7:1).
255 H.F. 678 (Mar. 7, 1921), § 1. The fines in § 5006 were the same except that the maximum for a first offense had been $50.
The Great Compromise of 1921

license fees were to be paid into the state treasury and become a part of the general fund.\textsuperscript{256} Punishment for counterfeiting any license or tax stamp with an intent to defraud the state or knowingly having such a license or stamp in one’s possession was more severe than that for other violations of the proposed measure—a maximum fine of $1,000 and imprisonment in the state penitentiary for not more than three years. Finally, any building or place used to sell cigarettes in violation of any of the bill’s provisions was to be deemed a nuisance subject to abatement by injunction by the same procedure used to enjoin and abate liquor nuisances. Despite Dodd’s and other supporters’ protestations that the central purpose of H.F. 678 was to make the ban on smoking by minors effective, § 5 lowered the age from 21 to 18 at which it was lawful to smoke in public; at the same time, however, it made the refusal of any underage smoker to comply with the request of the police or a teacher to identify who gave him or her the cigarette a misdemeanor.\textsuperscript{257}

As obscure as Dodd’s reason for filing House File 678 was the entity or person on whose behalf he filed it. The bill itself and its entry in the Journal of the House\textsuperscript{258} were both designated “(By Request),” but nowhere was it revealed by whose request. Since the House Rules nowhere mentioned the matter of bills filed by request,\textsuperscript{259} the circumstances under which the designation could or had to be used are unclear. (The identical companion bill that Republican Senator

\begin{itemize}
  \item[Dodd’s bill] repealed an existing provision under which seized cigarettes were to be destroyed. Compiled Code of Iowa § 8875 (1919).
  \item[§ 6] altered the existing provision empowering judges to suspend sentences of minors who gave information leading to the arrest of violators by referring minors under 16 to juvenile court and reduced the maximum fine from $10 to $5 for those over 16 convicted of smoking in public. Whereas Dodd’s bill, by the use of “or,” retained the force of the 1909 law under which smoking was an independent crime, as enacted, the bill failed to retain this feature so that, strictly speaking, so long as a minor informed on the person(s) who supplied him with the cigarettes, he could smoke with impunity. Thus, whereas under the 1909 law and Dodd’s bill, judges always retained discretion to impose punishment on minor-informers, under the enacted law, minors who, immediately on being asked by those empowered to ask, informed, were not exposed to any punishment regardless of how many times they were caught.
  \item[State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 791 (Mar. 7).]
  \item[State of Iowa: 1921-22: Official Register at 285-95 (29th No.). A large scholarly tome on the Iowa legislature published a few years earlier mentioned bills filed “by request,” but failed to present any information about them. O. K. Patton “Methods of Statute Law-Making in Iowa,” in Statute Law-Making in Iowa 159-284 at 206, in Applied History Vol. 3 (Benjamin Shambaugh ed. 1916).]
\end{itemize}
The Great Compromise of 1921

David Kimberly, a retired farmer from Davenport,\textsuperscript{260} filed in the Senate the following day lacked the designation.)\textsuperscript{261} Since, however, according to a leading contemporary Iowa legislative analyst, “[o]f course many other bills not so designated were [also] introduced upon the request of individuals or groups of individuals,”\textsuperscript{262} it is possible that neither other legislators nor the public was especially curious about the identities of the requesters of the relatively few openly requested bills.\textsuperscript{263} Bills filed by request were (are) not peculiar to Iowa: they were (are) fixtures in other state legislatures and Congress (as well as in other national legislatures), where, however, they typically function(ed) as a symbolic means of access to the legislative process for constituents through a legislator who signaled his neutrality toward the bill by the designation “by request,” indicating that he was not endorsing, but merely accommodating a constituent.\textsuperscript{264}

In contrast, at least one mass circulation daily newspaper offered a much less innocuous interpretation of legislation by request. Three days after the legislature had adjourned, the party-politically independent Des Moines News (part of the Scripps chain) inaugurated an extended series of articles by its Statehouse and legislative reporter, Robert Hughes, about the legislative machinery revealing “how the people are looted for the benefit of the monied interests.” Under the front-page headline, “Work of the 39th Assembly Dictated by Corporations,” Hughes argued that only in theory did 158 citizen-legislators make laws they deemed best for the state as a whole. In practice: “What really happens is that the 158 lawmakers do as the special interests request. Almost every bill introduced in the 39th Assembly was ‘by request’ or ‘by dictate.’ Bills were introduced,

\textsuperscript{260}State of Iowa: 1921-22: Official Register at 282, 326 (29th No.).

\textsuperscript{261}State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 713-14 (Mar. 8) (S.F. 717, by Kimberly). It is unclear why the Iowa WCTU president stated that in the absence of a companion bill there it had refrained from presenting one. Ida B. Wise Smith to N. E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).


\textsuperscript{263}In 1921 only 7 of 529 Senate bills and 30 of 606 House bills were formally designated “by request”; the Senate passed none and the House only four of them. John Briggs, “The Legislation of the Thirty-Ninth General Assembly of Iowa,” \textit{IJHP} 19(4):489-666 at 489, 492 (Oct. 1921).

The Great Compromise of 1921

defeated, or passed, all by order of the special interests.” Nor was this antici-
corporate blast the first of the session: two days before the House voted on the
Dodd bill, the News had published a front-page article under the eight-columned
screaming headline: “Iowa Legislature Dominated by Corporations and Money
Crowd,” which declared:

They have hung a huge Dollar Sign over the doors of the Capitol of Iowa.
It signifies the brutal slaying of the interests of the people of Iowa by the 39th General
Assembly....
It advertises to the world the complete domination of the legislative machinery of the
state by the corporations and vested money crowd.
After nearly three months of activity the Iowa legislature has to show a brilliant record
of achievement in behalf of the financial barons.
The other side of the legislative ledger displays a shameful betrayal of the people of
the state by their elected representatives.
... The common people of the state have been crucified on a scaffold erected by
themselves but operated by the corporations.
Never since the palmy days when the railroads and other monopolies dictated the
policies of lawmakers has any Iowa Legislature enacted legislation as favorably as the 39th
General Assembly has treated the monied interests.
The corporations might as well paint the words, “Our Exclusive Property” on the
gilded dome of the Iowa State House.
...
Practically every measure that the “powers that be” thought dangerous has been
sandbagged and, strangely enough, almost every bill that was drawn up by the corporations
has appeared on the calendar early and then passed.

Such sensationalist (but for all that empirically accurate) charges were de
rigueur for the Scripps chain, which, as part of its working-class-oriented market
segmentation strategy, battled against all manner of enemies of the common
people, including big business, trusts, combinations, and greedy monopolists.
The chain’s political orientation derived from that of its owner, Edward W.
Scripps, who, without being a socialist, viewed capitalism as a “tragedy.” Under
these circumstances it was scarcely a stretch for Scripps to articulate an anti-
Hegelian program: “As against the old thesis that ‘whatever is, is right,’” I have

265 Robert Hughes, “Work of the 39th Assembly Dictated by Corporations,” DMN,
Apr. 11, 1921 (1:7-8).
266 “Iowa Legislature Dominated by Corporations and Money Crowd,” DMN, Mar. 28,1921 (1:7).
The Great Compromise of 1921

set up the antithesis that ‘whatever is, is wrong’ and must be changed.” 268 His only “principle” was “to make it harder for the rich to grow richer and easier for the poor to keep from growing poorer.” 269 The infusion of such understandings into his chain’s journalism left Scripps with the fixed opinion that, except for his newspaper, the whole U.S. press was dominated by capitalism. 270

Against the background of Scripps’s mandatory anti-capitalism, the only question raised by the consistently anti-corporate legislative reporting in the Des Moines News in 1921 is: Why did it not extend to the cigarette oligopoly’s dictation of the repeal of cigarette sales prohibition? That it did not was clear from Hughes’s comment in his report on Dodd’s filing of the bill that it “was the first effort along lines urged by The News....” 271 The newspaper’s anti-tobacco prohibition stance presumptively flowed from the fact that Scripps himself was a self-professed tobacco addict who smoked so constantly that he did not attend church because he could not smoke there. 272 To be sure, even Scripps’s laissez-faire attitude toward tobacco knew limits: in mid-1920 even the News joined the proliferating nationwide battle over place restrictions on smoking 273 by editorializing against smoking on Des Moines’ street cars. Although its editor, Walter E. Battenfield, himself used tobacco, he declared that there was “nothing quite so obnoxious as a crowded street car filled with smoke from pipes, cigars and cigarettes.” Insisting that breathing such air was actually “unhealthful,” Battenfield argued that women, children, and non-smokers had after all “some rights which should be respected.”

271 Robert Hughes, “May Legalize Cigaret Sale,” DMN, Mar. 7, 1921 (1:5). No editorial was found in the News earlier in 1921 proposing such a repeal.
272 Negley Cochran, E. W. Scripps 275 (1933).
273 See below this ch.
274 “Smoking on Street Cars,” DMN, June 8, 1920 (8:1) (edit.). Remarkably, the editor admitted that he did not know whether any Des Moines ordinance prohibited smoking on street cars. In fact, as early as 1886 the Des Moines City Council had passed an ordinance imposing a fine ranging from $5 to $10 on anyone who failed immediately to desist from smoking or spitting tobacco juice in a street car when requested to do so by an employee of a street railroad company or the person operating the road. Revised Ordinances of the City of Des Moines: 1932, § 2649 at 784 (passed May 10, 1886).
Whatever the custom may otherwise have been about bills by request in the Iowa legislature, Dodd was anything but neutral about H.F. 678, which he floor managed. Remarkably, among the dozens of Iowa newspapers reviewed for the period March-April 1921, not a single one raised, let alone tried to answer, the crucial question as to the identity of Dodd’s principal. Without posing that query, one paper at least took a stab at figuring out Dodd’s purpose. The Waterloo Evening Courier editorially had “a sort of hunch” that he wanted to stir up a “rumpus” and “wake people up.” It speculated that: “No doubt he takes the view that if cigarettes are to be sold openly, not only to adults but to school boys in the grades and high schools, the state might just as well get some revenue out of the transaction.”275 If this goal could be attributed to Dodd—and there is no evidence to support that claim—the cigarette companies opposed taxes because they either reduced demand or deprived the manufacturers of the price increase that the tax represented. To be sure, the tax was possibly the detriment that the cigarette companies had to suffer in exchange for repeal of prohibition; perhaps it was even a central aspect of the drafting negotiations that the Register mentioned. The Courier’s apparent sheer speculation may have had less to do with Dodd and more with the editor’s own ideological hobby horses, which favored enforcement of all laws regardless of their contents because “[a]ny other attitude is anarchistic and revolutionary.” Although it had never been tried in Iowa, rigid enforcement of a bad law was the way to bring about its repeal; if attitudes towards cigarettes were so overwhelmingly favorable that jurors and police winked at an unpopular law, then it would be better to repeal it.276

In view of the contemporaneous opacity of the bill’s origins and of the fact that it was by far his most important bill, which kept his name on the front page of newspapers all across the state for more than a month, it is deeply ironic that, shortly after the end of the session, Dodd was asked by the editor of the local Elma weekly to write something about the session, he “felt there was little left I could say” because the newspapers had published so much about it. Disingenuous was his excuse that “perhaps a disinterested spectator is better qualified to speak than one who is too closely mixed up in the affair for one on the inside is too busy working to gain much more than a hasty impression of how things really look.” Since presumptively only Dodd (and the requester) knew who had requested that he file the repeal bill, dispassionate observers lacked the crucial inside knowledge without which a full understanding of the bill was unattainable. Instead, Dodd wrote hypothetically about how, if he were about to file a bill and were a friend of the Speaker, he might persuade him to refer the bill

275“The Cigaret,” ECR, Mar. 9, 1921 (4:2) (edit.).
276“The Cigaret,” ECR, Mar. 9, 1921 (4:2) (edit.).
to a friendly committee, whose chairman, if Dodd were friends with him, could, in turn, let Dodd choose a favorable subcommittee, and so on, culminating in the wisdom that “the man who has the ability to make and keep friends has much the advantage over one who has not this faculty.” It could be surmised that Dodd belonged to those legislators who were on the go from six a.m. to one a.m. doing “the important work of the session...at the hotel in the evening” networking for four to six hours.277

Although the president of the Iowa WCTU, Ida Wise Smith, as discussed below, charged, on rather shaky empirical grounds, that the cigaret manufacturers had drafted the bill,278 the only express inquiry into the identity of the bill requester uncovered in the extant record is the text of the remarks that John B. Hammond made at Governor Kendall’s hearing on the Dodd bill on April 8 that opponents sought in order to persuade him to veto it.279 Hammond, the WCTU’s lobbyist, expressly and directly formulated the question that the press had ignored:

Who is behind this bill which was introduced “by request”? Who made the request? It was not the W.C.T.U., who were battling every evil influence against their children. It is not the Parent-teachers Association nor the Mother’s Clubs. It is not the American Legion, about whom some of the financially interested gentlemen are so much concerned. The Chairman of the State legislative Committee of that great organization authorized me to repudiate any such insinuation and I am glad to do it here and now.

There is no one interested in the promulgation of this bill excepting the men who are profiting off of our boys and satisfying an appetite or habit they created and who now desire a little more security in their unlawful business. Are they asking for this law that they may curtail their sales and make less money? That would be a most unique position for the American Tobacco Company to take. This Company is behind this bill and it is not for the purpose of accumulating [sic] less gold but more. Patriotism and law enforcement do not appear in its Articles of Incorporation.280

277 H. H. Dodd, “Working of the Legislative Mill,” HCT, May 4, 1921 (1:5-6) (reprinted from Elma New Era). Only a few scattered issues of The Elma New Era from 1920-21 are extant (at the SHSI DM) and they do not include the weeks immediately following the close of the session.

278 “Says Tobacco Kings Behind Dodd Bill,” DMR, Mar. 16, 1921 (6:5).

279 See below this ch.

280 [No author], Letter to Your Excellency (n.d. [Apr. 8, 1921]), Folder: N. E. Kendall Correspondence re cigaret bill (SHSI DM). The letter’s salutation, “Your Excellency,” was identical to that used in Hammond’s signed letter, which immediately precedes it in the archival folder and was designated a supplement to his “argument and brief” submitted on the 8th.
The Great Compromise of 1921

Given Hammond’s central position in lobbying against H.F. 678 and his many years of experience advocating for and against similar measures, it is difficult to imagine anyone in the anti-tobacco movement in Iowa who could have been better informed about the bill’s provenance—and yet even he was remitted to (circumstantially compelling) conjecture that did not even raise the question as to why the successors to the tobacco trust had chosen Dodd as its tool.

The same day Dodd filed the bill Des Moines educators and ministers “declared war” on it. Proposed by a member of the Iowa League of One Hundred for Law Enforcement, the matter was discussed at a meeting of the Ministerial union at the YMCA, which appointed a 10-man committee (including an insurance salesman, a district court judge, and an assistant school superintendent) to “‘invade the hill’ and ‘go after’ proponents of the bill.” The committee was “‘the vanguard of the fighting force’”—composed of several hundred educators, ministers, and YMCA workers—that would be placed in the field. The president of the ministers’ association, Rev. J. P. Burling, expressed the group’s hope to kill the bill while it was still before the House Police Regulations committee. Two days later, a hundred board and committee members of the Iowa Federation of Women’s Clubs meeting at their annual spring conference, after endorsing the proposed maximum hour law for women, “strongly condemned” the new cigarette bill in unanimously adopting a resolution offered by Iowa WCTU president Ida B. Wise Smith. In her “stirring talk” she had declared that the cigarette bill and that to legalize boxing were both “hangovers of the recent war,” the “‘pathos of it all’” being that the American Legion stood behind them. Calling the two bills “the most pernicious ever presented” to the Iowa legislature, Smith was able to persuade the club women to oppose the bills because they “‘weaken the moral defenses of our young people....’”

The day after Dodd had filed his bill two other House members filed cigarette-related measures. John Rankin, a lawyer from Keokuk, filed House File 784, also by (anonymous) request, which also repealed the general prohibition on selling cigarettes, replacing it with a compulsory licensing regime that covered

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281 “Educators Oppose Dodd Cigaret Bill,” WEC, Mar. 8, 1921 (1:7).

282 “Join in Move to Kill New Cigaret Bill,” DMR, Mar. 8, 1921 (1:1). The judge was Hubert Utterback, the superintendent John Studebaker, and the salesman Paul Jones. Department of Commerce-Bureau of the Census, Fourteenth Census of the United States: 1920—Population (HeritageQuest). Two days later the Iowa Public Welfare League also announced its opposition to the Dodd bill. “Condemn Two Bills,” DMN, Mar. 10, 1921 (10:2).

The Great Compromise of 1921

cigars and tobacco as well, under which any form of tobacco could be sold to anyone 18 or older; anyone selling or giving it away to the underaged was subject to a minimum fine of $25 and a maximum fine for repeat offenders of $300. The bill provided that the licenses, which cost $5 to $25 annually depending on the population size of the town, “shall be issued by the county auditor” (on whom, apparently, the legislature conferred no discretion to deny permits for any reasons not spelled out in the bill). H.F. 784 was referred to the Police Regulations Committee, which took no action at all on it.284

The other bill was filed by Toleff Moen, a farmer, grain elevator operator, and bank director from northwestern Iowa born to Norwegian immigrant parents in 1870; a Lutheran, he lived in Minneapolis for four years, where he was a member of the Chamber of Commerce. Moen had been a member of the Lyon county board of supervisors for eight years before entering the Iowa House in 1919, at which time the Iowa WCTU singled him out as a staunch supporter on the tobacco issue as a member of the Public Health Committee.285 Ironically, although Moen’s bill was not designated “By Request,” he apparently did file it on behalf of the Iowa WCTU, which had drafted it earlier and had presumably been holding it back as a countermeasure in case a repeal bill was filed; it was no coincidence, then, that Moen filed a day after Dodd.286

House File 805 declared that anyone using any building or place for the purpose of selling or giving away cigarettes was guilty of maintaining a nuisance and was to be enjoined. The injunction procedure also applied to any cigarette bootlegger defined as anyone who sold or gave cigarettes to or bought them for a minor, or who left cigarettes or cigarette papers for a minor in a place where a minor could procure them. The bill authorized the bringing of injunction actions in equity not only by the state, attorney general, county attorney, and any peace officer, but also by any citizen of the county. The violation of any permanent or temporary injunction constituted contempt of court; the judge was empowered to try and punish the offender summarily, punishment ranging from a fine of $100 to $500 or one to three months in county jail for a first offense to imprisonment.

284H.F. No. 784 (Mar. 8, 1921); State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 855-56 (Mar. 8).
286Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120 (1919).
287See above this ch.

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for six months to one year or a minimum fine of $1,000 for each additional offense. Finally, the bill made it the express duty of every county attorney and all peace officers to enforce the law and mandatory for the county attorney to prosecute all injunction and contempt actions unless the plaintiff chose another prosecutor.\textsuperscript{288} Although the WCTU-Moen injunction bill died in the Police Regulations Committee, which took no action on it, a diluted version of this very capacious and strict measure was eventually incorporated into the Dodd bill and enacted.\textsuperscript{289} Even then the WCTU rejected the bill “since its fundamental principal [sic] is the thing to which we object—license.”\textsuperscript{290}

On March 10 a three-member subcommittee of the House Police Regulations Committee was appointed to consider Dodd’s bill consisting of Frank Lake, a newspaper reporter who had played a prominent role opposing anti-cigarette measures during the 1917 session;\textsuperscript{291} Dr. John Kime, a 66-year-old physician specializing in tuberculosis, and O. A. Hauge, president of the Iowa Trust & Savings Bank of Des Moines.\textsuperscript{292} (Whether Dodd was friends with committee chairman Elliott, who let him choose a favorable subcommittee, is unknown, but all three of its members did vote for H.F. 678 on its final passage.) For whatever its worth in terms of representativeness, the same day the Register published the results of its straw vote on the “leading questions” before the legislature to which 400 people responded. The fact that half (172) of the (345) respondents opposed legalizing the sale of cigarettes to persons over the age of 18 was inconsistent with supporters’ refrain that the ban lacked the backing of public opinion. The only bills that a (small) majority of those polled opposed were the American Legion-sponsored measure to legalize boxing and the establishment of a minimum wage for women, neither of which was enacted.\textsuperscript{293}

Within three days of its having been filed, “prominent officials of the American Legion” had endorsed Dodd’s bill, which, the press reported, advocates of legalization would “probably concentrate on...as offering the best chances for

\textsuperscript{288}H.F. No. 805 (Mar. 8, 1921); \textit{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly} 860 (Mar. 8).

\textsuperscript{289}1921 Iowa Laws ch. 203, § 16, at 213, 217.

\textsuperscript{290}Ida B. Wise Smith to N. E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

\textsuperscript{291}See above ch. 14.

\textsuperscript{292}[Iowa House] Police Regulations Committee Minute Book, Mar. 10, 1921, at 101 (SHSI DM); \textit{State of Iowa 1921-22: Official Register} 344-45 (29th No.).

\textsuperscript{293}“Industrial Court Upheld in Register Legislative Canvass,” \textit{DMR}, Mar. 10, 1921 (1:2-3).
enactment.”  If the Legion as an organization was refraining from taking a position on the bill—in nearby Kansas the Topeka post of the Legion, reportedly “‘inspired by certain big interests,’” was in early 1921 the main force demanding the repeal of that state’s ban on cigarette sales—but individual members of its legislative committee strongly urged its enactment, basing their predictions of passage on claims that: (1) the existing law was “nowhere enforced and...the people don’t want it enforced”; (2) H.F. 678 was enforcible; and (3) Dodd’s bill would increase state revenues by several hundred thousand dollars—an “enticing source of ‘untapped revenue’” in the view of many legislators, who were already being inundated with hundreds of letters from legionaires as well as opposing petitions from the WCTU and other organizations. At this point the bill’s supporters did not expect the committee to report it back to the House with more than minor amendments, its existing text being deemed “the most effective possible” measure to check cigaret sales to boys under 18 while substantially increasing state revenues—as if those were its chief purposes rather than necessary means of securing the votes required to repeal the ban on sales to adults so as not to “make criminals of all the Legion men and other users who are going to have them even if they have to ship them in from other states.”  

By March 15 the Register had learned that efforts would probably be made to amend Dodd’s bill to increase the legal age at which persons could be sold cigarettes from 18 to 21, although its supporters, who were now estimating that H.F. 678 would add $1,250,000 to state revenues annually, hoped to retain the bill in its original form. The Police Regulations Committee had also decided to hold a public hearing on the bill the following week.

Before the committee had taken any action on the bill, President Smith of the Iowa WCTU launched a full-scale attack on it and its presumed authors (“Says Tobacco Kings Behind Dodd Bill”). Without offering any examples, she charged that Dodd’s bill “shows eastern phraseology and was drafted by the cigaret

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295 “Kansas Row on Cigarettes,” NYT, Jan. 4, 1921 (18). See below ch. 16.

296 Frank Miles, who is prominently mentioned below, was a member.

297 “Rally to Support of Cigaret Bill,” DMR, Mar. 14, 1921 (10:5).

298 Grant. L. Caswell, “Legislative News Letter,” HCT, Mar. 16, 1921 (1:1). Caswell was an ex-state senator, whose column appeared in many newspapers.

299 “To Hold Hearing on Cigaret Bill,” DMR, Mar. 15, 1921 (1:3).
The Great Compromise of 1921

manufacturers” because it was recognizably “written by someone not familiar with the legal phraseology of Iowa laws. The tobacco interests write bills like this and then exploit people who have fallen victims to the habit to put temptation before others.” Pooh-poohing the claim that the license fee and stamp tax would propel “[m]oney into Iowa’s treasury,” Smith, from the perspective of Progressive-era paternalistic anticapitalism, insists that these state revenues were:

“Small sums in comparison with the millions of dollars made by tobacco companies, who in this way hide behind the brave defenders of our country whom we honor too much to permit them to be made a screen for the enrichment of these capitalists. Money can never count against men. The body is the temple of God’s own spirit.”

With an eye to the cigarette-smoking veterans of the world war, Smith observed: “‘When the interests are able to hide behind some popular movement or popular class of people they are dangerous,’

As for the content of Dodd’s and Rankin’s bills, the WCTU president sought to subvert their purported principal goal of insuring more effective denial of accessibility of cigarettes to minors by stressing the core flaw of all age-hinged laws: “‘Experience proves that prohibiting a thing to minors while adults are permitted to buy it, has never succeeded.’” In order to prevent the kind of “bootlegging” to minors in which saloonkeepers engaged before saloons were outlawed, Smith defended the position that “the only way to prevent the sale to minors is to prohibit the entire sale” (and to supplement that ban with the Moen bill’s strict injunctive and abatement provisions).

The defect in the WCTU’s analogy was rooted in the unacknowledged disanalogy between the role of minors in the cases of alcohol and cigarettes: whereas the principal alleged evil in the former was the deleterious impact of alcohol on adult men and derivatively on their families and society at large, in the latter the failure (in part of science and medicine) to identify and focus on the

300 “Says Tobacco Kings Behind Dodd Bill,” DMR, Mar. 16, 1921 (6:5). The same article appeared in the Dodd’s hometown daily: “Tobacco Kings Behind Dodd?” CCP, Mar. 16, 1921 (1:3).
301 “Says Tobacco Kings Behind Dodd Bill,” DMR, Mar. 16, 1921 (6:5).
302 “Says Tobacco Kings Behind Dodd Bill,” DMR, Mar. 16, 1921 (6:5).
303 “Says Tobacco Kings Behind Dodd Bill,” DMR, Mar. 16, 1921 (6:5). Smith also criticized Dodd’s bill for setting the legal age for buying cigarettes at 18 because it eliminated three years of parental authority. In addition, the age-setting failed to reach college students “now so lamentably affected by the cigaret habit.”
harms done to adult men by cigarettes meant that they were to be deprived of cigarettes not because of the injuries inflicted on themselves by this form of tobacco, but almost exclusively in order to prevent minors from becoming addicted to cigarettes during the vulnerable maturation process. The anti-cigarette movement’s failure to develop a plausible and persuasive justification for demanding self-sacrificing curtailment of consumer freedom from men for the (personal and collective) sake of their sons created a major political-rhetorical obstacle for the struggle to enforce and ward off repeal of prohibitory laws in Iowa and elsewhere.

The next day, in response to Smith’s charge that the cigarette manufacturers had drafted his bill, Dodd went on the offensive, declaring, on the contrary, that they “were fighting his bill....” Even more aggressively:

he asserted that he had personally seen a telegram sent by a member of the tobacco trust to its Iowa agent, in which it was stated that under no consideration should the Dodd bill be pushed, and that nothing should be done to disturb the existing status of the cigarette in Iowa.

Under present conditions, Dodd declared, the tobacco men are receiving higher prices for their cigarettes than they are in other states for the simple reason that in Iowa cigarettes are supposedly banned. This fact is used as a pretext for higher prices for their goods on the grounds that they might sometime have to undergo heavy legal expenses, which excuse is used to profiteer off of Iowa smokers.

(Dodd’s reference to “the tobacco trust” was, despite the U.S. Supreme Court’s landmark anti-trust ruling a decade earlier and the ensuing decree dividing the American Tobacco Company’s assets among several successors, not an anachronistic slip of the tongue, since many contemporaries had concluded that the result of the court-ordered dissolution was merely that “monopoly was replaced by oligopoly.” Progressive and Republican insurgent and former Iowa Governor Albert Cummins spoke for many in observing on the Senate floor in 1912: “There is no more competition in the tobacco business now than there was before. There is even less competition now than before. ... Every independent tobacco dealer, whether producer or manufacturer or seller, with whom I’ve been able to come into contact...declares that the grip of the monopoly held by the American Tobacco Co. has been strengthened instead of weakened by the

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304“Says Tobacco Kings Fighting His Bill,” DMR, Mar. 17, 1921 (12:5-6).
305“Says Tobacco Kings Fighting His Bill,” DMR, Mar. 17, 1921 (12:5-6).
In the same vein, to the bill’s two frequently trumpeted chief virtues—effectively checking sales to minors and “fatten[ing]” the “dangerously thin” “state pocketbook” to the tune of at least $1.25 million annually—Dodd now added a third: putting cigarette sales on a “legal, orderly, state regulated basis” would deprive “the tobacco trust” of any grounds for “gouging the Iowa smoker.” Although Dodd said that he would be glad to discuss his bill with the WCTU, it is implausible that he or any informed contemporary could have taken such negotiations seriously when he praised H.F. 678 for “tak[ing]” the cigarette out of the class of bootleg whisky, in which the present law has placed it, and put[ting] it on a decent, state regulated plane. After all, the nub of the WCTU’s critique, as articulated the previous day, was precisely that not even the present law had effectively treated cigarettes as bootleg commerce.

Perhaps Dodd imagined that a basis for compromise, or at least discussion, could be found in his assurance not only that: “‘I have just as much desire as Mrs. Smith to check the sale of cigarettes to minors,’” but that by means of the “‘simple machinery created by my bill, such sales can be effectively stopped.” Rather than criticizing either the behavioral foundation of the WCTU’s argument—namely, that children would smoke cigarettes as long as they saw their fathers and other adults smoking them—or the political-philosophical underpinnings of the curtailment of consumer freedom implicit in the WCTU’s demand that adults not be permitted to smoke cigarettes for the sake of the next generation, Dodd merely lauded his bill’s machinery and the alleged quasi-strict liability that it imposed on dealers for selling to minors:

“Every package of cigarettes sold under the provisions of this bill would have a state revenue stamp plainly marked with the dealer’s individual number. If a young boy were found with cigarettes, all that would be necessary would be to look at the number on the package, which would be prima facie evidence that the dealer whose number the package bore had violated the law, and so he could be easily convicted and fined, or subjected to revocation of his license.”

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307 *CR 48:4708* (Apr. 13, 1912). Cummins traced this result to the fact that the “same men who had held the control of the American Tobacco Co.” held “the very same proportions” of the stock of the successor entities. *Id.* at 4707.


310 “Says Tobacco Kings Fighting His Bill,” *DMR*, Mar. 17, 1921 (12:5-6). Dodd’s bill did not impose strict liability; if a third person (over the legal age) bought the cigarettes and gave them to the minor without indicating this intent to the dealer and no witness testified to seeing the alleged transaction, it is doubtful that the dealer could have
Despite the self-assurance with which he presented his legalistic program shorn of all societal understanding of the underlying problems of smoking, Dodd ultimately bowed to realism by conceding that “no one can stop the sale of cigarettes in Iowa,” although checking the sale to minors could be accomplished effectively and easily. 311

Combining two of the bill’s three alleged “advantages,” Dodd asserted that under his bill (annually) the state of Iowa “would receive more than a million dollars that now goes to the tobacco trust in profiteer prices.” 312 Dodd offered no evidence that such gouging was taking place or why the higher price and concomitant lower consumption would not have been welcome. (That the entire argument was fallacious would be revealed on July 4 when the new law went into effect and merchants raised prices to recoup the tax and permit fee and to increase their profit.) 313 How Dodd came into possession of the tobacco trust’s unpublished and proprietary data of the number of cigarettes sold in Iowa in order to make this fiscal estimate he did not divulge. If his estimate had been correct—in fact, the first year’s tax attained only one-half the predicted level—Iowans would have bought 1.25 billion cigarettes in 1921 or about the same proportion of total U.S. production as Iowa’s population bore to total U.S. population. That per capita consumption of cigarettes in Iowa approximated the national average was both implausible and—as Iowa’s tax data would soon reveal—empirically false. 314 Since the data on cigarette sales before that time could have come only from an industry source, the 100% overstatement suggests the possibility that the claim was intentionally inflated in order to make the tax revenues and thus repeal of prohibition itself politically more attractive. In the event, as early as July the State Treasurer estimated that the annual cigarette tax revenue would amount to only $500,000. 315

Strangely, however, in the welter of his counter-barrage, Dodd failed to make public the single most persuasive piece of evidence to refute the WCTU’s claim that would also have been easiest for him to produce—namely, the identity of the

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312“Says Tobacco Kings Fighting His Bill,” DMR, Mar. 17, 1921 (12:5-6).
313See below this ch.
314See below ch. 17.
315“Gibson to Enforce New Cigaret Laws,” DMC, July 18, 1921, vol. 38 no. 174 (8:2). Inconsistently, his estimate was based on sales of 10,000,000 packages, which would have amounted to 200,000,000 cigarettes instead of the 500,000,000 that would have generated the estimated revenue.
The Great Compromise of 1921

person or entity that had requested him to file the bill. Although on the face of it Dodd’s denial might have seemed highly implausible, one circumstance possibly lent it credibility: cigarette manufacturers then as now opposed taxes. Unfortunately, very few internal, publicly accessible cigarette company documents from 1921 have survived, but memoranda of the Tobacco Merchants Association of the United States from 1922 shed considerable light on the industry’s attitude toward the Dodd bill as enacted. 316

The WCTU’s Attack on House File 678 and Alleged Preparation of a National Prohibition of Tobacco

Our assemblies will be cursed with business of this caliber so long as the people vote cigarette-sucking drunkards into public office. The remedy may lie in electing women to all offices. 317

The public’s association of the anti-cigarette movement with the WCTU was highlighted shortly before the public committee hearing—which the press did announce 318—when WCTU president Smith received an anonymous threatening letter warning her: “If you want to keep safe...do not butt into this cigaret fight.” Signed “A Former Service Man,” the letter declared that it was “a queer thing that you women persist in sticking your noses into things that don’t concern you....” Smith made good on her declaration that she would ignore the letter 319 by appearing at the hearing.

At 3 p.m. on March 21, five of the ten members of the House Police Regulations Committee held a 70-minute public hearing on H.F. 678, which, according to the committee minute book, “was opened by those opposing the Bill. The first one speaking being Z.C. Thornberg [sic] 2nd Dr. Carson 3rd Paul Jones 4th Judge Hutchinson 5th Mr. Lee and 6th Shelby Weber. Volney Diltz spoke for

316 See below ch. 17.
319 “Cigaret Foe Gets Threatening Letter,” DMR, Mar. 20, 1921 (2-L:4). A week later she received another letter warning her to “quit on the cigarettes and boxing, and call off your helpers before Tuesday night or you will not see Wednesday.” “Anticigaret Head Is Threatened,” DMR, Mar. 29, 1921 (8:6) (article did not appear in the microfilm edition but was published in the bound copy at the SHSI IC).
The press’s attitude toward the anti-smoking movement’s zealous participation in the hearing was captured by the headline: “Anti-Cigaret Folk Storm Des Moines.” Zenas C. Thornburg, 48, had been superintendent of the Des Moines Public Schools from 1913 to 1920 and later Des Moines postmaster until his death in 1926; his involvement in the anti-cigarette struggle was signaled by the fact that his wife Laura L. Thornburg had for many years been chairman of child welfare for the state PTA and was also a prominent member of the Iowa WCTU: she was superintendent of its Polk county local union Sabbath School Work department in 1923, vice president of the statewide organization from 1927 to 1930, and editor of its organ, *The W.C.T.U. Champion* from 1927 to 1934. Dr. Andros Carson was a 56-year-old Des Moines physician and a Republican, who was associated with the WCTU. Jones was a member of the aforementioned 10-member anti-Dodd bill committee created on March 8. Charles Hutchinson, who would also appear on April 8 at the governor’s hearing on the cigarette bill, was a 56-year-old English-born lawyer who as a district court criminal bench judge for Polk county in 1917 had issued search warrants and ruled against merchants in a high-profile cigarette law enforcement case before resigning to accept an “attractive proposition” from his old law firm that “I could not afford to reject” and unsuccessfully running...

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321 [Iowa House] Police Regulations Committee Minute Book, Mar. 21, 1921, at 127 (SHSI DM).
325 Women’s Christian Temperance Union of Iowa, *Fiftieth Annual Convention, held at Shenandoah, Iowa, October 2 to 5, 1923*, at 158.
326 Women’s Christian Temperance Union of Iowa, *Fifty-Fourth Annual Convention, held at Indianola, Iowa, October 4 to 7, 1927*, at 158.
327 *Polk’s Des Moines City and Valley Junction Directory: 1921*, at 260 (v. 29, 1921); *Who’s Who in Des Moines: Biographical Sketches of Men and Women of Achievement* 52 (1929).
328 From 1926 on he provided free service to residents of the Benedict Home, which was run by the WCTU. “Dr. Carson Nominated,” *DMT*, Dec. 22, 1939 (1A:2-3).
329 See above ch. 14.
The Great Compromise of 1921

as a Republican candidate for a seat on the Iowa Supreme Court in 1919. His membership on and presidency of the Des Moines school board (1913-24)—the same page of the Register describing his appearance at the hearing announced his appointment as vice president of the board of education—and membership on the YMCA state committee (1915-25) presumably brought him into anti-cigarette circles, though he was also vice chairman of the Legislative Committee of the Des Moines Chamber of Commerce. Lee (whom newspaper accounts failed to mention as having spoken at the hearing) was presumably 26-year-old Alvin Joseph Lee, a clergyman who was a member of the WCTU, PTA, and YMCA as well, interestingly, as of the American Legion. No Shelby Weber appeared in the 1920 population census or 1921 Des Moines City Directory; nor did the press identify him as a speaker at the hearing. Volney Diltz, a 32-year-old Iowa native and lawyer, who had attended the University of Chicago and the University of London, fought in France during World War I, was a member of the Legislative Committee of the Des Moines Chamber of Commerce, and—presumably most relevantly—was the first commander of the Argonne Post of the American Legion in Des Moines, the largest in Iowa, and a leading candidate for state adjutant. As commander he worked closely with Frank F. Miles, the editor of the post’s newspaper and in 1921 of its successor, the

partner was Howard W. Byers, who led the anti-corporate forces at the hearing before Governor Kendall on April 1, 1921 on a pro-corporate public utility bill that Dodd supported and that the governor ultimately vetoed. “Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” DMN, Apr. 2, 1921 (1:2-7, 5:2-3). As attorney general (1907-11), Byers had strongly supported the anti-cigarette law, against the enactment of which he had voted in 1896 as House Speaker. See above ch. 13.


332 [Tab Legislative], Minutes [Des Moines] Chamber of Commerce, Part 1—Jan. 1, 1921 to Jan. 1, 1922 [bound volume], in Records of the Greater Des Moines Chamber of Commerce, University of Iowa Library, Special Collections.


334 Both the News and the Register listed a J. B. Weede as having spoken at the hearing without mentioning the topics he dealt with. John Brown Weede, treasurer of the American Abstract Company in Des Moines, was returned as a real estate agent at the 1920 population census. Fourteenth Census of Population 1920 (HeritageQuest); Polk’s Des Moines City and Valley Junction Directory: 1921, at 1363 (v. 29, 1921).
statewide paper, who less than three weeks after Diltz was the sole supporter of Dodd’s bill at the governor’s hearing on H.F. 678. After his appearance before the House committee, he was himself elected to that chamber as a Republican the next year, serving as a member for two terms. During his second term he successfully moved to amend a bill by eliminating the strict liability it would have imposed on cigarette sales permit-holders for violations committed by their employees.

From the coverage of the hearing in the Des Moines press some sense of the antagonists’ arguments can be reconstructed. To be sure, the account in the Des Moines News revealed more about its editorial views of cigarettes and misogyny than about the substance of the prohibitionist position:

Armed with their tatting and knitting, 40 members of the W.C.T.U. reinforced by several male reformers stormed the House Police Regulations Committee Monday, and protested against any repeal of the Iowa cigaret laws.

If any evil, crime or disease on earth could not be traced directly to the obnoxious “pill,” it was because the ladies and their friends had yet to discover any more earthly troubles. The cigaret is the right hand buddy of the undertaker and hangman, according to the W.C.T.U.

Without any content specification, the paper observed that five men (Thornburg, Carson, Jones, Hutchinson, and J. B. Weede) and Ida B. Wise Smith unleashed a “verbal barrage” against “the little white cylinder of joy to the doughboy,” which was “reviled, desecrated, denounced and exposed in all its iniquities.” In contrast, the description of the spokesman for repeal was sympathetic and specific (although it did not mention that Diltz had been an American Legion

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The Great Compromise of 1921

Against all this, one lone ex-service man, Volney Diltz, entered the lists for his overseas comrade. Diltz presented the soldier’s viewpoint of law enforcement and showed the ridiculousness of the present repression laws and urged they be repealed, new laws with teeth in them enacted and the sale of cigarettes be legalized.339

To its own relief, the News predicted that, “despite the W.C.T.U. delegation,” the committee would “probably” recommend passage of the Dodd bill, while proposing that Moen’s bill placing cigarettes “in the bootleg class” be indefinitely postponed (i.e., killed).340

In comparison, the Register’s account (“Foes of Cigaretts Invade Capitol”) was virtually a model of objectivity. If, as the newspaper reported, Dr. Carson actually explained tobacco’s deleterious effects on the human body, that focus would have been, in terms of both biology and social policy, very different than cigarettes’ negative effects on adolescents’ bodily and mental health. Such an approach could have gained even greater traction in connection with the overtoweringly important point that both Thornburg and Hutchinson made—that “the only way to prevent minors from obtaining cigarettes is to deprive adults of the habit” and that “it will be impossible to enforce the law...as long as adults smoke....” Unsurprisingly, there was no indication that either prohibitionist had proposed a moral-political justification for what may have been a unique social intervention of depriving adults of a product solely for the benefit of children. Nor, apparently, did Diltz—who was careful to assure the committee that he was not acting in any official Legion capacity—attack that argument on the grounds that it violated adults’ freedom. Instead, offering “himself as a voluntary sacrifice in order to express the reasons why the American Legion is endorsing licensing of the sale,” he urged the committee to focus on the question of whether cigarette sales should be legal or not, since “they would be sold in either case.”341

Just at this critical juncture in the progress of the battle over the Dodd bill a public relations fiasco erupted for the WCTU: on March 21 the organization’s national president, Anna Gordon, announced in Chicago a war on tobacco that would begin on April 3, with April 10 scheduled as anti-tobacco Sunday.342

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Iowa press immediately reported that, according to state leaders, this announcement of a national campaign against all forms of tobacco was “embarrassing the effort of the state W.C.T.U. to kill” the bill. In an effort at damage control, they “assured legislators that they are not warring against tobacco generally, but only against cigarettes.” Reflecting both the anti-tobacco movement’s deeper insight into the health dangers of and the moral superficiality of its attack against cigarettes as well as the inconsistency of not attacking other forms of tobacco use, Ida B. Wise Smith’s statement was manifestly designed to signal to the legislature that the WCTU was not a hopelessly utopian social critic, but a reformist organization offering practicable proposals:

“[T]he anti-narcotic department of the W.C.T.U. for all these years has urged the instruction of children in the evil of alcohol and narcotics, which includes tobacco. The legislative relation is to the cigaret and the cigaret only. There has been no designation of April 10 as anti-tobacco Sunday. It is the anti-cigaret Sunday designated by the International Sunday school committee.”

This episode did not mark the first time that the WCTU had stood accused of preparing such an assault. Perhaps because of the ambiguity of the WCTU’s denials, the organization outside Iowa was forced in 1921 to repeat them, insisting that education and prayer would be “the only weapons” it would use to “eliminate the cigarette.” Asserting “positively,” according to the industry magazine Tobacco, that “there was no campaign on foot at present to obtain anti-cigarette...legislation,” the WCTU charged that statements announcing such campaigns were “inspired by the wets, who are seeking to alienate public sympathy from prohibition and its enforcement.” The New York State WCTU—which president Ella Boole (the then national vice president and future national president) was—went further than Smith, explaining that the reason that it had never even contemplated starting a legislative campaign against tobacco was that ‘‘the question of the use of tobacco is not a normal [sic; should be moral] question. Its use does not affect the morality of the nation or the social welfare of the people as does the use of intoxicating liquor. Therefore it is not a question of legislation.”

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345See above ch. 14.

The Crucial Clark Substitute Bill

Every Congress and Legislature is all but suffocated with bills, and all too many of them are passed. Take, for example, the absurd anti-cigarette acts that the persistence of well-meaning fanatical counterblasters and legislative timidity or good nature have inflicted upon the people of certain States. They are null, despised, a joke.347

Whether such fine distinctions reassured men in Iowa that the WCTU would not one day seek to take away their cigars, pipe, and chewing tobacco as the law whose repeal they were desperately trying to thwart had outlawed cigarette sales is not clear. But at a 20-minute meeting of the Police Regulations Committee two days later on March 23, Republican Representative Charles F. Clark introduced a substitute for Dodd’s bill that was less discontinuous with the existing prohibitory law and was adopted by a vote of six to one.348 Characterized by the press as “very drastic,” the amendments would occupy the center of the “big fight” that would be “staged on these bills.”349 Clark, a 49-year-old lawyer and Judiciary Committee chair in his second term, was a pillar of society in Cedar Rapids, where he was a member of the Chamber of Commerce, Cedar Rapids Country Club, trustee of Coe College, and YMCA president, in addition to being a member of the Sons of the American Revolution.350 That Clark was in no way averse to moralistic state intervention to control adults’ behavior was eloquently on display in his hardline position on movie censorship: when asked during floor debate whether he would also advocate a law to empower a state board to censor in advance what newspapers published, he replied that “he would if newspapers printed matter as objectionable as some films.”351

Clark’s proposal, while retaining the repeal of the general ban on cigarette

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347“Respect for Law,” *NYT*, May 25, 1921 (13) (edit.).
348[Iowa House] Police Regulations Committee Minute Book, Mar. 23, 1921, at 127 (SHSI DM).
349“Our Legislative Letter,” *Palo Alto Reporter*, Mar. 24, 1921 (4:3-4 at 4). Though not corroborated by the House *Journal*, the article stated that Clark and another lawyer, Julian Calhoun, had filed the amendments.
The Great Compromise of 1921

sales, was generally more restrictive than Dodd bill. To begin with, it raised from 18 to 20 the age at which both cigarettes could lawfully be sold or given to minors (while eliminating the exception for written parental permission in Dodd’s bill and existing law) and minors could lawfully smoke in public (though Dodd and Clark both lowered the latter age from 21 in existing law). However, unlike the Dodd bill and the then-existing law, Clark’s substitute (and the bill as enacted) eliminated underage smoking as an independent crime: thenceforward any minor who, upon being required by any police, quasi-police, or teacher to reveal the source of his illegally obtained cigarette(s), immediately informed on the person(s), was guilty of no crime and could, theoretically, continue to smoke, so long as he continued to reveal his source(s). In other words, only the refusal to inform constituted a misdemeanor. Potentially the most important innovation in Clark’s amendments was the shift from Dodd’s centralized statewide issuance of licenses to sell cigarettes subject to a mandatory ministerial duty to issue once the applicant had satisfied certain conditions to a decentralized, localized, and discretionary system under which the “permit may be granted and issued by the council of any city or town”—or not, if the council chose not to exercise its discretion in that way. In addition to presumably reflecting the specific purpose of some legislators at least to retain the ban locally if it was no longer possible statewide, the amendment conferring exclusive power on local governments to issue or not to issue cigarette sales permits may have been designed to gain votes from legislators who could then assure constituents and others opposed to prohibition repeal that their communities could thus continue to ban cigarette sales. Since expansion of home rule in general had been on the legislative agenda since before the opening of the session and been given a chance of passage, inclusion of such a provision in the amended Dodd bill

352Since Clark’s amendment has apparently not been preserved with the rest of the H.F. 678 file, its provisions have been reconstructed from the amendments adopted by the committee, the amendments to Clark’s amendment, and newspaper accounts.

353H.F. 678 § 1; Committee Substitute for House File 678 § 1; Compiled Code of Iowa § 8866 at 2422 (1919).

354H.F. 678 § 5; Committee Substitute for House File 678 § 2; Compiled Code of Iowa § 8879 at 2425 (1919).

355H.F. 678 §§ 5-6; Committee Substitute for House File 678 § 2; Compiled Code of Iowa §§ 8879-80 at 2425 (1919). In this sense, it was incorrect to state that under the new law it was “a criminal offense for minors to smoke cigarettes.” “The New Cigaret Law,” WEC, June 28, 1921 (6:1) (edit.).

356H.F. 678 § 2; Committee Substitute for House File 678 § 3.

357“No Factional Divisions Seen over Policies,” DMR, Jan. 7, 1921 (1:8).
might have attracted votes from legislators who were indifferent to the cigarette issue but prioritized local control in general.

Clark’s home rule provision was not novel. Iowa could have followed its neighbor Nebraska, which in 1919, when it converted its 1905 prohibitory statute to a licensing regime, provided that cigarette sales licenses “shall be issued” by local governments without conferring home-rule powers on them. Clark, however, chose to pursue the model that Minnesota had created when it repealed its four-year old cigarette sales ban in 1913 and replaced it with a licensure system: the legislature provided that licenses “may be granted” by the city council or county board with jurisdiction over the place “wherein such right is sought to be exercised.” This home rule principle became clearer still in 1919 when the Minnesota legislature provided that: “No license shall be granted in or for any city, village or county, if the governing body of such city, village or county shall by ordinance or resolution prohibit the sale of cigarettes....” Moreover, a week before Clark offered his substitute bill, the Shenandoah World had editorially proposed adding a local control provision to the bill: “Let the Dodd measure be passed, and then if any city or town want to prohibit the sale of cigarettes within its limits, let it pass its own laws affecting the people and see to the enforcement.” To be sure, Clark’s initiative was not nearly so radical as a bill that had died on a tie vote in the Arizona Senate on March 8: like local option liquor laws that had once flourished before prohibition, it would have empowered counties, cities and, towns to prohibit absolutely the sale of all tobacco, cigars, and cigarettes by an election ordered by the county board of supervisors or mayor and city council either on its own or in response to a petition by 25 percent of the voters.

Clark additionally required applicants to file a $1,000 bond out of which taxes, fines, costs, and damages arising out of cigarette sales could be paid, and

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358 1919 Nebraska Laws ch. 180, § 2, at 401.
359 1913 Minn. Laws ch. 580, § 6, at 870, 871.
360 1919 Minn. Laws ch. 348, § 6, at 373. See vol. 2.
363 Committee Substitute for House File 678 § 4.
raised the license fee (now called a mulct tax and payable to the city) from $50 to $100. The Clark amendment provided for a process—modeled on that for enjoining and abating intoxicating liquor licenses—to deem the building in which cigarettes were sold in violation of the law a nuisance.

The Iowa press offered two versions of the committee’s action—one by the *Des Moines News* (whose Scripps chain also owned the United Press news service) and the other distributed by the Associated Press. The *News* pictured the committee substitute as “radical amendments,” which “practically make[ ] the sale of cigarettes a matter of local option.” In turn, Dodd declared that he would oppose the committee bill, whose excessively high $100 permits would effectively kill his bill, and insist that his original bill be passed. Interestingly, he did not object to the local option provision, although it presumably must have been anathema to the Tobacco Trust because it would have permitted the perpetuation of the old prohibitory regime wherever majorities supported sales bans. The AP version prematurely stressed that the committee had “worked out” a “compromise,” which, it erroneously predicted, would probably be reported out late that afternoon. Without identifying the substance of any criticism, the article, which failed to point out which provisions were new, stated that “[m]uch opposition developed to the Dodd bill in its original form.” Little wonder that the press concluded that the Dodd bill “was having difficulties, but may get through.”

That same day the sheriff of Polk county heightened the pressure on legislators by announcing that cigarettes would be “doomed” in the capital if the legislature refused to legalize their sale because it would be enforcement officers’ duty to insure tobacco dealers’ compliance. Without explaining why they had failed to perform their duty in the past, W. E. Robb declared: “I am just waiting to see if the people of Iowa want cigarettes sold. If they do and the laws

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364H.F. 678 § 2; Committee Substitute for House File 678 § 5; [Iowa House] Police Regulations Committee Minute Book, Mar. 28, 1921, at 128 (SHSI DM).

365Committee Substitute for House File 678 § 15.

366“The Register, which was generally covering the Dodd bill extensively, failed to report on the amendments.

367“‘Smoke Option,’” *DMN*, Mar. 23, 1921 (1:2). Dodd also faulted the substitute for failing to provide for a revenue tax collector with direct responsibility for enforcement.


are changed the dealers will not be molested.”

The next day, March 24, the committee met again, this time for almost an hour; the absent Representative Frank Lake—who had played a prominent anti-prohibitionist role during the 1917 session—submitted a request for a rehearing on the substitute for H.F. 678, which was voted down. After the six members of the committee present had again adopted the substitute, a request by Dodd, who was not a committee member, for another public hearing was also voted down.

In the interval between this committee meeting and its final meeting on H.F. 678 four days later, the president of the Northwestern Iowa Teachers’ Association condemned the Dodd bill (as well as the American Legion-backed bill to legalize boxing) at the opening of its annual convention in Waterloo. Adopting a decidedly advanced emulationist position, Fred Miller declared to the more than thousand teachers in attendance that “the smoking of cigarets by men had a demoralizing effect on the boys of the country....”

The House Police Regulations Committee met one last time, on March 28, for only ten minutes, to straighten out the “tangle” on H.F. 678. First, an amendment to strike out section 12 (the text of which has not survived) and add what was known as section 14 (which appears to have accommodated Dodd’s demand for a designated official in charge of the tax) was moved; then the mulct tax was reduced from $100 to $60 (which was $10 higher than the amount set in the Dodd bill). The seven members present then unanimously recommended the

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370“Robb Awaits Action,” DMN, Mar. 23, 1921 (1:2).
371See above ch. 14.
372[Iowa House] Police Regulations Committee Minute Book, Mar. 24, 1921, at 128 (SHSI DM). The committee records do not support a news service article stating that the committee had made recommendations that the compromise for the Dodd bill approved by the subcommittee be passed. “Picture Censorship Bill on Calendar for Next Tuesday,” ICP-C, Mar. 25, 1921 (10:5).
373a“Teachers Fight Against ‘Pill’ and the Boxing Bills,” DMR, Mar. 26, 1921 (10:8). WCTU President Wise had apparently requested that the association issue a statement against passage of the Dodd bill, but, Miller informed her after the end of the convention that it had not taken any “definite action.... I feel sure they would have taken action if it had been brought up, but it was overlooked.” Miller then expressed a jaundiced view of enforcement: “I certainly feel that the law we had was good enough if it was enforced. If they will strictly enforce the new one conditions will be better than they have been, but of course you and I know that it will not be enforced.” Fred J. Miller to Ida B. Wise Smith (Apr. 5, 1921), in N. E. Kendall correspondence re cigarette bill (SHSI DM). It is unclear how or why a copy of this letter wound up in the governor’s file.
The Great Compromise of 1921

One of the most conspicuous issues before the people of Iowa at this time is the cigarette question judging from the interest taken in the Dodd bill to legalize the sale. There is really a greater effort being put forward in behalf of the bill than against it but both sides are busy and never a mail arrives but what brings to the law makers some advice from home touching one side or the other.

It purports to protect a boy of 20, by legalizing the sale of cigarettes to his chum who is 21; - the present law offers protection to all.

By the time the Dodd bill reached the House floor at the end of March, Iowans had presented “petitions galore” on both sides of the question. Of the 18 petitions still extant in the Iowa State Archives, only one advocated repeal

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375 [Iowa House] Police Regulations Committee Minute Book, Mar. 28, 1921, at 128 (SHSI DM). For a detailed but not entirely accurate account of the provisions adopted, see “Iowa Boxing Bill in Final Hearing in Senate Today,” WT-T, Mar. 29, 1921 (10:1).


377 “Compromise Cigaret Bill Reported Out,” DMC, Mar. 29, 1921 (1:3).

378 “The Iowa General Assembly in Action,” SLB, Mar. 31, 1921 (2:3-5 at 4).

379 Lulu Catherine Jones (president, Parent Teacher Council of Des Moines) to Nathan E. Kendall (n.d.), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).


381 A nineteenth petition had been submitted jointly by two churches in Jesup in 1919 against the Rule bill. SHSI DM, Box: Miscellaneous Petitions for 1921, Folder: Cigarette
of the ban on cigarette sales to adults: world war veterans in Mason City, claiming that the existing law was unenforcible because it was against public sentiment, requested enactment of a “reasonable license law” that would “permit others [than boys] to exercise their right to purchase” cigarettes and sellers to handle them “without appearing as criminals under the law.” Significantly, only one of the 17 petitions opposing repeal stemmed from a similarly large city (Waterloo)—and that one was also unique in having been sent by boys at a high school.

Among the other 16, all from residents of small towns, which also represented the core of compliance with the prohibitory regime, the center of zealous advocacy was Winterset, the county seat of Madison, five of whose churches in addition to the local WCTU chapter submitted petitions to their representative and senator. Four churches (Methodist, Church of Christ, Baptist, and United Presbyterian) sent identical typed texts supplemented by statements that the congregations had adopted the petition by unanimous vote. Apart from arguing that the Dodd bill would not be any more effective than the existing law, the churches “earnestly protest[ed] against our state being financed by money received by the sale of cigaretts [sic] to our young people.” The text of the WCTU’s petition deviated slightly from the churches’, adding that inasmuch as the use of cigarettes had been “proven beyond question...harmful physically, mentally and morally,” the officers, representing more than 100 “mother-hearts,” “protest[ed] against being made partners under the law in the sale of them.” (In a more utilitarian formulation, a non-church group of residents of Clarksville, just two days after Dodd had filed his bill, asked their representative to vote against the license fees, which would “never compensate for the loss in service and efficiency that the encouraging of this filthy habit entails” and from which only
The Great Compromise of 1921

The cigaret vender profited.)\(^{386}\) The fifth church, the Methodist Episcopal (and Sunday school), 91 of whose members voted unanimously to ask their representative and senator to vote against licensing the sale of cigarettes to those above 18, observed that the community of Winterset had “expressed themselves [sic] in no uncertain terms that this Bill should be killed” and that the existing law should be enforced. Although the appointed writer had no doubt that the two legislators would vote against the bill, he knew that they could “do it with a better feeling when you know the people are behind you.”\(^{387}\) Ironically, despite this deluge of Christian opposition, both Rep. H. W. Vance and Sen. Ed. Smith voted for the Dodd bill.\(^{388}\) (The intensity of Winterset’s opposition to cigarettes can be gauged by the fact that when repeal went into effect on July 4, but local governments were empowered to continue the sales ban, the WCTU and the same churches successfully petitioned the Winterset city council to deny sales permits, but a week later proponents of licensure prevailed upon one councillor to change his vote, thus bringing about approval of permit applications.)\(^{389}\)

The House: Two-Fifths of the Members Oppose Repeal

It is of course, useless to restate the evils that have resulted from the use of cigarettes. You recognize them, and have for years, but, why is it that when once in a position of responsibility, members of the legislature think their chief duty is to cater to depraved appetites?\(^{390}\)

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\(^{386}\) To Our Representative The Hon. John M. Ramsey (Mar. 9, 1921). RG Secretary of State: Legislative, Series: 39th General Assembly: Miscellaneous Petitions, Folder: Cigarette Law (State Archives: SHSI DM).

\(^{387}\) Frank Zeller to W. H. Vance (Mar. 21, 1921). RG Secretary of State: Legislative, Series: 39th General Assembly: Miscellaneous Petitions, Folder: Cigarette Law (State Archives: SHSI DM). Presumably a separate letter was sent to the senator, but it was not preserved in the House records.


\(^{389}\) “Cigaretts Turned Down,” \(WM\), July 6, 1921 (1:1); “Council Reverses on Cigaretts,” \(WM\), July 13, 1921 (1:5). See below ch. 20.

\(^{390}\) Sara C. Wilbur to Gov. N. E. Kendall (Apr. 6, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). At the 1920 census Wilbur was returned as a 77-year-old newspaper reporter.
The Great Compromise of 1921

The House began its debate on H.F. 678 on March 30 by adopting Clark’s pre-filed amendment to insert a provision from the original Dodd bill making it illegal to forge permits or stamps or knowingly to possess forged permits or stamps. Three members then proposed substituting for the uniform $60 mulct tax for the permit a graduated tax ranging from $25 in towns with a population under 1,000 to $100 in cities of over 20,000. The amendment lost by a large majority, 17 to 75, with both Dodd and the chamber’s strongest opponent of repeal, Moen, voting Nay. Moen then tried to restore the $100 mulct tax from Clark’s original amendment, but it, too, lost, though by the smaller margin of 37 to 58. Of the 37 members who voted to make the tax more onerous and thus possibly to reduce the number of stores selling cigarettes 30 voted later that day against the bill on final passage. The last amendment to be voted on before the noon recess was offered by John Bradley—a farmer whom the WCTU had singled out for special mention as one of the staunchest supporters of cigarette sales prohibition during the 1919 session—and proposed raising to 21 the age at which cigarettes could be legally sold or smoked in public (thus restoring existing law). Ayes outnumbered Nays 63 to 32, thus administering a defeat

391Oddly, both the handwritten House minutes and the Journal erroneously stated that the debate was scheduled for Wednesday March 31 (Wednesday was March 30). House Minutes (Mar. 28, 1921) (SHSI DM); State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1578 (Mar. 28). Unfortunately the press provided even less coverage of the speeches made during the Dodd bill debates than it usually did, thus making it almost impossible to get any feel for the quality of the arguments. For example, the Register’s article on House action on March 30 did not even mention the Dodd bill (though it did mention Dodd’s successful objection to a motion to block a pro-industry utility bill). “Fail to Upset Utilities Bill,” DMR, Mar. 31, 1921 (6:7). A less discursive account called the Dodd bill “[t]he outstanding bill” passed by the House that day, but mentioned no arguments developed during the debate. “Day’s Proceedings in the General Assembly,” DMR, Mar. 31, 1921 (9:3). The skimpy reporting stands in sharp contrast to the overwhelmingly detailed coverage in the Salt Lake Tribune and Deseret News of the contemporaneous legislative debates in Utah on the Southwick bill to ban cigarette sales and advertising and to prohibit tobacco smoking in enclosed public places. See vol. 2.


395See above ch. 14.

396State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly
The Great Compromise of 1921

and an insult to the American Legion. Of the 32 (including Clark himself) who voted against the higher legal age only two later voted against final passage of the bill.

After the House had voted to adopt the legal age of 21 and adjourned for lunch, the press was already reporting that the morning’s votes indicated “conclusively that the bill would be approved by the house with several votes to spare over a majority.”  The basis for such a conclusion is not intuitively clear. The almost two-thirds majority for the higher legal age could have represented both a dissent from and a compromise with the bill—as in fact it did since 39 of the 63 voting for it voted against the bill’s final passage. To be sure, the defeat of the proposed increase of the mulct tax to $100 may have been viewed as a better gauge of sentiment for the bill.

After the recess, the House, on a voice vote, adopted an amendment offered by Julian Calhoun, a Methodist lawyer who in the morning had voted against both amendments to differentiate and increase the mulct tax, to fix it at $50, $75, and $100 in incorporated towns, cities of the second class, and cities of the first class, respectively. Moen and the other anti-smoking legislators thus achieved a modest victory, which he replicated by securing a voice vote in favor of an amendment to prohibit a city council from issuing for a period of at least two years a permit to anyone whose permit it had revoked. All the amendments having been disposed of, the House passed the bill on a roll-call vote of 62 to 41. That two-fifths of the members voted to retain the 25-year-old sales prohibition in spite of the considerable restrictions that they had been able to force on the repeal bill—in particular, local prohibition, a high mulct tax, and a ban on sales to those under 21—was a striking symbol of the anti-cigarette movement’s deep roots in Iowa even in the aftermath of the world war.

1655-56 (Mar. 30).

397“Victory in Sight for Cigaret Bill,” DMC, Mar. 31, 1921, vol. 38 no. 81 (4:3). According to “Senate Debates the Holdeogel License Bill,” PDC, Mar. 30, 1921 (1:8), it was the bill’s friends who believed that the bill would pass.


401Four of the five House members whom the WCTU had singled out for praise as
The Senate Defeats Repeal, But Then Tergiversates

For the Great State of Iowa, to license the sale of cigarettes, and go in partnership with the Great Tobacco Trust, in collecting a revenue from the people addicted to the use of the cigarette, would in my opinion be a step backward, and this Grand Old State cannot afford for a money consideration to go into such a partnership. 402

Shocked by the bill’s passage in the House, the WCTU and ministerial and teachers associations undertook a concerted effort to defeat it in the Senate. 403 On its arrival in the Senate on March 31, H.F. 678 faced the possibility of having to make its way through the sifting committee, but Senator Kimberly, whose identical companion bill had been reported by the Public Health Committee two weeks earlier without recommendation, 404 successfully moved to substitute the Dodd bill for his on the Senate calendar and made a special order for April 4. 405 One newspaper flatly stated that the Senate’s vote on suspending the rules “indicates quite conclusively that the measure has a senate majority.” 406 Nevertheless, even as late as the first week of April a syndicated newspaper column on the legislature was predicting that no cigarette bill would pass and that the law would be left as it was. 407

Sunday April 3, literally the eve of Senate debate, marked the opening in Des Moines and throughout the country of the national WCTU’s Sabbath observance week, which was to culminate in anti-cigaret Sunday on April 10. The accompanying literature urged strict Sabbath observance, a ban on smoking by minors as well as in public places by adults, and “the creation of sentiment

402 W[illiam]. R. Cooper to Gov. N. E. Kendall (Apr. 10, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill, SHSI DM.

403 “General Assembly Closes Friday,” SLB, Apr. 14, 1921 (11:2).


405 State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1486 (Mar. 31); Robert Hughes, “Iowa Legislature Begins Probe of Coal Industry to Find Profiteers,” DMN, Mar. 31, 1921 (10:3).

406 “Senate to Vote on Cigaret Bill,” DMC, Apr. 2, 1921, 38(83), (6:5). Neither the Senate Journal nor the article revealed what the vote was.

407 “Under the Golden Dome,” Adams County Free Press, Apr. 9, 1921 (4:3-4).
against allowing women to sell tobacco in any form.” Nevertheless, the national organization, while opposing unnecessary Sabbath commercialism, denied that it was pursuing a campaign to enforce blue laws: “It is merely a coincidence that our annual antitobacco and anticigaret Sunday come [sic] at the close of this week of prayer. We are striving to convince people under 21 years old of the deleterious effect of tobacco and cigarettes.”  

Whether this explanation was plausible and whether the national intervention redounded to the benefit of the last-ditch defeat of the Dodd bill in the Senate would soon be revealed.

Senators offered a large number of major and minor amendments most of which were offered by opponents and failed; one of the most interesting losing amendments was offered by Senator James McIntosh, a member of the Methodist Episcopal church and former school teacher and county and town school official from a rural county along the Missouri border who voted consistently against legalizing cigarette sales. Doubtless in an effort to restrict the potential pool of applicants, create transparency, and put local communities on notice so that they could object to licensing, McIntosh proposed requiring that everyone seeking a license file a petition stating that the applicant had: been conducting a lawful business for the previous six months in a building whose location was described; paid all mulct taxes assessable under section 5007; not been convicted of violating any law for two years; and advertised his intention to apply for the permit in a newspaper of general circulation in the county between 10 and 30 days before filing the petition, which had to be co-filed by the owner of the business premises. This intervention on behalf of community participation in and supervision of the licensing process lost—or, as the WCTU’s lobbyist told the governor, was “promptly crushed with the steam roller.”

408 “Week of Prayer Fight Cigaret,” DMR, Apr. 4, 1921 (2:7-8).
409 “Cigaret Bill Is Beaten by 1 Vote,” DMC, Apr. 5, 1921 (3:3).
410 “Senate Beats Cigaret Bill; May Revive It,” DMR, Apr. 5, 1921 (1:4).
411 State of Iowa: 1921-22: Official Register at 327 (29th No.). McIntosh was nevertheless returned at the 1910 and 1920 population censuses as owning a clothing store; clothing merchant was also his occupation according to Handbook: Iowa Legislature: Thirty-Ninth General Assembly n.p. (1921).
413 Untitled, undated, and unsigned typescript addressed to “Your Excellency,” in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). Hammond added that a similar amendment had been “offered the author of the substitute bill [Rep. Clark?] which was emphatically refused....”
innocuous among the successful amendments was one offered by Byron Newberry, a 67-year-old lawyer and progressive, a six-term senator who had first been elected in 1903 and was responsible for introducing Iowa’s first pure food and other purity bills,\textsuperscript{414} to confer on county boards of supervisors the same power that the House had granted city councils.\textsuperscript{415} Too extreme, and hence defeated, was Newberry’s amendment to “enable ‘anti’ communities to prevent the sale of cigarettes”\textsuperscript{416} by authorizing city councils to levy an additional $500 mulct tax against those selling cigarettes.\textsuperscript{417} However, since the House bill already empowered cities to achieve this end by simply denying all permits, it is unclear how even such a severe financial deterrent would have enhanced this power—unless the councillors were formalist libertarians who bridled at denying a permit outright but were willing to tolerate the same result forced by economics. What tactic Newberry was pursuing in offering another losing amendment to outlaw the sale of cigarettes to “any female”\textsuperscript{418} is likewise unclear: although of a piece with other postwar legislative efforts to suppress smoking by women\textsuperscript{419} and with the WCTU’s profound health- and morality-based animus against smoking by women (“a menace to the coming generation”),\textsuperscript{420} there is no direct evidence that the Iowa WCTU in fact pushed for inclusion of such a provision in 1921.\textsuperscript{421} In fact, Ida B. Wise Smith aggressively took the stance at an Iowa


\textsuperscript{415}\textit{State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly} 1641 (Apr. 4).

\textsuperscript{416}“Senate Beats Cigaret Bill; May Revive It,” \textit{DMR}, Apr. 5, 1921 (1:4).

\textsuperscript{417}\textit{State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly} 1642 (Apr. 4).

\textsuperscript{418}\textit{State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly} 1643 (Apr. 4).

\textsuperscript{419}For example, the House of Representatives held a hearing in July 1921 on a bill to prohibit females from smoking in public in Washington, D.C. “Women of Washington Fight Ban on Smoking,” \textit{NYT}, July 28, 1921 (1:4-5); “Oppose Bill Against ‘Female Persons’ Smoking,” \textit{Tobacco} 72(14):28 (Aug. 4, 1921). See also Cassandra Tate, \textit{Cigarette Wars: The Triumph of “The Little White Slaver”} 115-17 (1999).

\textsuperscript{420}“Education Versus Tobacco,” \textit{Tobacco} 71(24):14 (Apr. 14, 1921). On the WCTU’s unrelenting campaign in 1928 against a speaking engagement at the State University of Iowa by the British suffragette Reverend Agnes Maude Royden because she smoked, see Benjamin Shambaugh Correspondence (Jan.-Feb. 1928) (SHSI IC).

\textsuperscript{421}Nevertheless, a press report on the Dodd-Clark compromise bill voted out by the House Police Regulations Committee tantalizingly stated without any context that it made
The Great Compromise of 1921

WCTU county convention that women had as much right to smoke cigarettes as men, but neither had a moral right to do so.422 In the event, a majority of the Senate believed that “if women wanted to smoke and the bill passed...those over 21 could purchase the ‘pills.’”423 The only amendment that went to a roll call vote would have struck out the section of the bill outlawing public smoking by minors. Offered by a farmer, Jonas Buser, it was defeated 18 to 26.424 Oddly, although its effect would have been to legalize smoking by minors, Buser—who was an opponent of the bill425—according to the Register, wanted merely to delete the provision for obtaining information from minors as to the identity of those who sold or gave them the cigarettes, “on the ground that the youth of Iowa should not be taught to be ‘tattle tales,’ and that the fine or jail sentence...would cause boys to become criminals....” Unsurprisingly, the opposition pointed out that the amendment would “take the teeth out of the bill” and make it impossible to determine which dealers were selling to minors.426

When the Senate voted on final passage of H.F. 678, the outcome was initially 25 to 23 in favor, but before the result was announced, Senators Campbell, Holdoegel, and Price switched their votes from Aye to Nay, thus bringing about the bill’s defeat by a vote of 26 to 22.427 The Des Moines News explained this reversal as stemming from the fact that the “Senate frankly fears

“[n]o distinction between men and women....” “Compromise on Cigarette Bill,” ICP-C, Mar. 23, 1921 (1:8).

422 “Women As Good Right to Smoke As Men, But Neither Moral Right,” CREG, July 18, 1921 (7:1).

423 “Beat Cigaretts,” DMN, Apr. 5, 1921 (2:5).


426 “Senate Beats Cigaret Bill; May Revive It,” DMR, Apr. 5, 1921 (1:4). That 17 of the 18 senators who voted for the amendment voted against the bill on its final passage strongly suggests that it was designed to kill the bill. State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1642 (Apr. 4).

427 State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1643 (Apr. 4); “Senate Beats Cigaret Bill; May Revive It,” DMR, Apr. 5, 1921 (1:4). According to another account, the “bill hinged on Senator Adams and he voted ‘no.’” The three senators then changed their vote. “Beat Cigaretts,” DMN, Apr. 5, 1921 (2:5). Since arithmetically Adams could not have changed his vote, this report presumably meant that the three senators took their cue from Adams, who, however, must have voted after them. The Senate Roll Call sheet shows that the marks in the “Ayes” column next to the names of the three senators had been erased; no such erasure appeared next to Adams’ name. House File 678: Senate Roll Call, Senate Minutes, Apr. 4, 1921 (SHSI DM).
The Great Compromise of 1921

the influence of the W.C.T.U.” Ida B. Wise Smith may have been “jubilant” after the Senate defeated H.F. 678 on April 4, but friends and observers of the Dodd bill were hopeful of reversal of the vote because Dodd was “one of the most influential members of the House sifting committee, and several Senators may vote ‘aye’ on a reconsideration ballot if they wish to get pet measures thru the House sifting committee.” Supporters of the bill believed that they would be able to pass the bill before the end of the session because opponents’ motion to lay on the table the motion to reconsider failed 22 to 25, thus leaving the bill open for reconsideration.

Two days later more than enough senators changed their minds and votes to pass the motion to reconsider the vote by which H.F. 678 had failed by a vote of 28 to 21. The “keynote” in the Senate proceedings, according to the Register, was the speech by Milton Pitt, a farmer and former House Speaker, who ignored health considerations: “‘If it wasn’t immoral for the Iowa boys who were fighting in France to smoke cigarets, then it isn’t immoral now.’” On final passage, with Ida B. Wise Smith and Lucy Page Gaston sitting silently by, five

428 “Beat Cigaretts,” DMN, Apr. 5, 1921 (2:5).
429 State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1643-44 (Apr. 4); “Beat Cigaretts,” DMN, Apr. 5, 1921 (2:5); “Cigaret Bill Is Beaten by 1 Vote,” DMC, Apr. 5, 1921 (3:3). Twenty of the 22 votes cast to lay the motion to reconsider on the table were cast by senators who voted against the bill.
432 Gaston had been in Kansas (which did not repeal its ban on cigarette sales until 1927) supporting a House bill (which did not pass) to ban tobacco smoking in churches, school buildings, or any public place adjacent to them. When she left Kansas for Iowa the Times sarcastically observed that the “loss of Kansas is Iowa’s gain. The war against paper cigars will be waged relentlessly in the region of the Iowa Idea.” “A Fruitful Pilgrimage,” NYT, Jan. 25, 1921 (10); House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Second Biennial Session 81 (Jan. 25, 1921) (H.B. No. 68). On Gaston’s career, see “Lucy Page Gaston, Reformer, Is Dead,” NYT, Aug. 21, 1924 (11); Frances Warfield, “Lost Cause: A Portrait of Lucy Page Gaston,” Outlook and Independent, Feb. 12, 1930, at 244-47, 275-76. The press did not report that prior to her appearance in the Senate Gaston had made any contribution to defeating the repeal bill.
433 “Both Houses Pass Dodd Cigaret Bill,” DMR, Apr. 7, 1921 (4:4). In addition to Pitt, Senators Parker, Price, and Horchem “made the chief speeches” for the bill, while Buser spoke against, but the Register failed to report on their content. Two days later Ida Wise Smith wrote Kendall that three of the bill’s supporters had made speeches, but that opponents had been ruled out of order when desiring to speak. Ida B. Wise Smith to N. 1252
senators who had voted Nay on April 4 voted Aye, while only one switched his vote in the opposite direction, producing a final result of 27 to 22,\(^{434}\) thus inflicting a “bitter blow” on the WCTU leadership, which had believed the bill dead two days earlier.\(^{435}\) The see-saw battle in the Senate, even more so than the House proceedings, impressively demonstrated the enduringly broad support for a cigarette sales ban in Iowa and gave the lie to the claim two months later of the Report of the Special Committee on Anti-Tobacco Movements of the National Cigar Leaf Tobacco Association that the “antis” in Iowa had been defeated by a “decisive” majority.\(^{436}\)

The press detected a causal relationship between the Senate’s passage of the cigarette bill and its defeat of the bill to legalize boxing, the other measure posing a direct confrontation during the 1921 session between the WCTU and its political-ideological adversary, the American Legion, which “was unfortunate in having the boxing bill come up for a vote” after the Dodd bill: “senators then felt they had done enough for the liberal element in one day.” And with Ida B. Wise Smith and Lucy Page Gaston present and “considerably infuriated,” the chamber “did not wish to arouse the anger of the women voters too much.”\(^{437}\)

After watching the Senate pass the Dodd bill on April 6, Gaston, the self-professed “‘extremist of extremists,’”\(^{438}\) proceeded to the House, where she asked “to be given an opportunity to talk ten minutes. ‘Too busy,’ said the House,”\(^{439}\) which, despite Gaston’s and Smith’s infuriation, then overwhelmingly concurred in the Senate’s amendments by a vote of 72 to 6.\(^{440}\)

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\(^{434}\)State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1737-38 (Apr. 6). One of the two senators who had not voted on April 4 also voted Aye.

\(^{435}\)“Senate OK’s Cigarettes,” DMN, Apr. 6, 1921 (1:3-5); “Senate Gives Approval to Cigaret Bill,” WT-T, Apr. 7, 1921 (1:5).

\(^{436}\)“National Cigar Leaf Men Hold Notable Meeting,” Tobacco 72(6):1, 4 (June 9, 1921).

\(^{437}\)“Solons Vote Against Legion; Kill Boxing Bill,” DMN, Apr. 7, 1921 (5:1-2 at 2). The WCTU and church members had purportedly alleged that legalized boxing would flood Iowa with gamblers and “other undesirables.” “Legion Rallies Aid to Lake Bill,” ADT, Apr. 1, 1921 (1:2).


\(^{439}\)“Refused Talk on Cigaret Bill,” DMR, Apr. 7, 1921 (1:5).

\(^{440}\)State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly
None of the intense passion in favor of retaining the ban made an impression on the editor of the *Burlington Hawk-Eye*, who charged that it had been “conclusively demonstrated” that the anti-cigarette law was such a “total failure” that even the sharpest opponents of cigarettes conceded not only this point, but also that more of them were smoked in Iowa in 1921 than before the prohibitory law had been enacted. Since the editor was resigned to a future of unstoppable cigarette smoking, he dismissed the merely “theoretical” objection to the bill’s licensing sales, and joined advocates in welcoming the state and municipal revenue flow (that in Burlington would be generated by the 15 or 20 places that “more or less openly” sold cigarettes without paying any fees or taxes) at a time of high government expenses and taxes.\(^441\)

**Gubernatorial Hearing**

Women are opposed to licensing any evil. This bill coerces an unwilling half of your citizenry into partnership with alien and greedy corporations to destroy life for the purpose of helping pay taxes.\(^442\)

The law-abiding, law-loving citizenship of Iowa are not ready to surrender to these outlaw interests. They never owned a white flag, sir, and they are not contemplating the purchase of one now.\(^443\)

In the wake of the WCTU’s failure to prevent Senate approval of the Dodd bill on April 6 and the House’s quick action concurring in the Senate’s minor amendments that same day, uncertainty prevailed as to whether the governor would sign or veto the measure. Because the bill had been sent to him the day before adjournment,\(^444\) Kendall had 30 days after adjournment (April 8) to act;\(^445\) if he vetoed it after adjournment, the legislature would have no opportunity to

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\(^2003\) (Apr. 6). Two of the five House members whom the WCTU had praised as staunch anti-cigarette supporters in 1919 and who were still in the House in 1921 were among the six voting against the Senate amendments—Moen and W. C. Edson.

\(^441\)“The New Cigarette Law,” *BH-E*, Apr. 8, 1921 (4:1) (edit.).

\(^442\)Lulu Catherine Jones (president, Parent Teacher Council of Des Moines) to Nathan E. Kendall (n.d.), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

\(^443\)[John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 5, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).


\(^445\)Iowa Constitution Art. III, sect. 16.
override the veto.\textsuperscript{446} Already late on the afternoon of April 6, supposedly at the request of Lucy Page Gaston, who had been in Des Moines organizing against the bill,\textsuperscript{447} Kendall “granted to opponents of the cigaret bill the right to be heard before he takes final action on it.” The \textit{Register} reported that Dodd, “drafter of the bill, and several other friends of the measure will attend the hearing,” which would “probably” take place at 2 o’clock on April 7 (though in fact the date turned out to be April 8) in the governor’s private state house office.\textsuperscript{448}

A somewhat different version of the events leading up to the hearing emerges from correspondence between Kendall and George Cosson, a former state senator and unsuccessful Republican gubernatorial nominee who, before becoming attorney general himself, had written an opinion for the attorney general concluding that payment of the mulct tax did not immunize the payor against violation of the cigarette prohibition.\textsuperscript{449} The tone and style of their exchange were those of Republican party political confidants. On April 6 Cosson hurriedly and sloppily handwrote on lined paper without letterhead or date a brief note to Kendall on the Dodd bill, the first and last sentences of which dealt with the same issue: “The cigaret bill was backed by the press boys. ... If there is any doubt about it [i.e., as to whether Kendall will sign the bill] the press boys want to be heard.”\textsuperscript{450} Since Cosson’s law office was located in the Register and Tribune Building, he may have been especially well situated to be familiar with publishers’ views of prohibition repeal. If the governor was not yet similarly acquainted, he was very quickly apprised by telegrams and letters with which newspaper owners inundated him between April 7 and 9 while he was purportedly making up his mind about whether to sign or veto the Dodd bill.

On April 7 the publisher of the Republican \textit{Ottumwa Courier}, James Powell—who was close enough to Kendall to have received a “Dear Jim” reply\textsuperscript{451}—wrote a detailed letter to the governor prompted by the hearing the next

\textsuperscript{446}“Iowa Assembly Rejects Report of Committee,” \textit{BHI-E.}, Apr. 9, 1921 (1:7).
\textsuperscript{447}“Cigaret Bill Still in Balance,” \textit{DMC}, Apr. 9, 1921 (1:8).
\textsuperscript{448}“Both Houses Pass Dodd Cigaret Bill,” \textit{DMR}, Apr. 7, 1921 (4:4).
\textsuperscript{449}See above ch. 13.
\textsuperscript{450}C to Governor (n.d. [Apr. 6, 1921]), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). The author and date are reconstructed from Kendall’s reply. Cosson’s handwriting matches that of his courtship letter to his future wife. George Cosson to Jennie Riggs (July 24, 1904), in Jennifer Riggs Cosson Papers, Box 1, Folder: Jennifer Riggs Cosson: Courtship Correspondence July 1904, Iowa Women’s Archives, University of Iowa.
\textsuperscript{451}NEK to Jas. F. Powell (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
The Great Compromise of 1921

day. Since some of Powell’s phrasing and reasoning made their way into Kendall’s ultimate work product, the letter merits close attention:

I think that one of the most necessary things for the people to do now is to recognize the fact that we have to deal with actual conditions and not with things as we might theoretically like to have them. I think that in some form the sale and use of cigarettes in this state must be recognized and legalized. ... Cigarettes are sold and used by thousands and thousands of people of all ages, in business, on the streets, in the homes and every where [sic] and it is not regarded by anybody as illegal or immodest or disgraceful. We, as a people, are buying and selling and smoking cigarettes constantly. That being a fact, what is the use of having a law that absolutely ignores that fact and condition?452

Powell’s factual assertions were a melange of truth and falsity: while cigarette sales and use were widespread, sales were not ubiquitous and many in Iowa not only regarded sales as what they in fact were—illegal—but had charged for years that cigarettes were far worse than disgraceful.453 (For example, the president of the 4,000-member Parent Teacher Council of Des Moines, informed Kendall that the Dodd bill was “an attempt to legalize an act which the law and a majority of your constituents has [sic] long considered illegal and offensive.”)454 More importantly, Powell’s positivist or laissez-faire attitude failed to distinguish between current societal reality and models of how future reality should be shaped. His incontrovertible historical point was that the war had changed attitudes toward cigarette use (though his claim “that there are probably three or four times as many cigarette smokers now as there before the war”455 appears implausible since national cigarette production had increased by only 84 percent from 1916 to 1920, exactly the same increase that had been recorded between 1912 to 1916).456 It was this “condition,” “this fact,” that “we have to deal

452Jas. F. Powell to N. E. Kendall (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

453Ironically, one of the letters requesting that Kendall veto the bill expressly stated that “[c]igarettes is [sic] a mind destroyer and a disgrace for any sane person to use,” Judson Brush to Governor of Iowa (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). Brush was returned as a laborer living in Cedar Rapids at the 1920 census.

454Lulu Catherine Jones to Nathan E. Kendall (n.d.), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

455Jas. F. Powell to N. E. Kendall (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

456Calculated according to Arthur F. Burns, Production Trends in the United States Since 1870, tab. 44 at 298-99 (1934).
The Great Compromise of 1921

with...in a practical way instead of the foolish way in which it is now.” Although Powell personally thought that cigarettes should be subject to the existing regulation of cigars and smoking tobacco—which encompassed merely prohibition of sales to minors under 16 and of advertising within 400 feet of public schools—he was willing, “if the majority feel that there should be an extra measure for the sale of cigarettes,” to “handle it in that way,” provided that this approach (which apparently Kendall glossed as “license” in the only marginal comment written on any of the correspondence) be embedded in a recognition “that there is such a thing in the world as a cigarette and that people are using them and that they are going to keep on, for some time to come, using them” and that “the law that says anything to the contrary” should be eliminated.

Here Powell built a straw man: neither the law nor the anti-cigarette advocates were unaware that cigarettes were being sold (and in part smoked) illegally; on the contrary, the WCTU and its allies had pushed for stronger injunctive proceedings precisely in order to deter dealers from selling them. The real differences between him and them were two. First, as he made clear in an editorial the day after Kendall, in conformity with his advice, had signed the Dodd bill, he trivialized the alleged health consequences of cigarette smoking (even by the standards of medical-scientific knowledge then available) by classifying it with “eating too much candy and sleeping with the windows closed.” And second, he insisted that “volumes of laws will not stop” people from doing and continuing to do “a great many injurious things....” Curiously, however, despite his libertarian opposition to anti-paternalistic betterment campaigns, Powell, while asserting that it was “absolutely impossible to prevent” the use of cigarettes by adults, accepted national liquor prohibition, which “in time will be generally respected.” In fact, he went so far as to declare that the “legislature’s course as to cigarettes,” that is, passage of the Dodd licensure bill, “would not be a popular nor [sic] proper one to follow with respect to intoxicating liquors.” Experience may have prompted Powell to think better of his support for alcohol prohibition, but in the meantime, he made his contribution to Iowans’ continued use of cigarettes by publishing (profiting from) large three- and four-column advertisements for Camel and Chesterfield as soon as they became

457 Jas. F. Powell to N. E. Kendall (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
458 Compiled Code of Iowa §§ 8866 and 8881 at 2422, 2425 (1919).
459 Jas. F. Powell to N. E. Kendall (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
460 “Sensible Law Making,” Ottumwa Courier, Apr. 12, 1921 (3:1) (edit.).

1257
Another one of the “press boys,” John H. Kelly, publisher of the independent *Sioux City Tribune*, manifestly felt no embarrassment in revealing to the governor the press’s real motivation for advocating repeal. In his telegram sent Saturday morning April 9, Kelly laid bare the economic basis for the alliance between newspaper owners and cigarette manufacturers:

[W]e feel that the newspaper [sic] of the state are justified in asking for a real cigarette [sic] law[.] stop [I]f it were only a question of whether or not they could sell them in the state we would not take the stand we do[,] stop [T]he old law really put the hardship on the papers [stop] it kept us from getting a considerable amount of national advertising[.]  

Kelly’s brother Eugene, manager of the *Tribune*, apparently did feel the slightest twinge of unease over John’s letter: three days after Kendall had approved the bill, he wrote the governor to thank him:

Although it was more or less of a selfish matter, nevertheless, it seemed like a clean business move. To us it was not a question of whether there would be cigarettes or not....

We know from our experience with tobacco advertisers that it has merely kept them from using the daily newspapers of the state to cry their wares. To us, this seemed neither fair to the newspapers nor to the tobacco merchants.  

Unsurprisingly, the Kelly brothers began publishing cigarette advertisements as soon as they became lawful.  

Other publishers advanced the cigarette industry’s position without trumpeting their own self-interest. Luther Brewer, the owner-publisher of the *Cedar Rapids Daily Republican* and an important figure in the Republican party, claiming that “all daily newspapers in the state are for the new law,”

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461 *Ottumwa Courier*, July 5, 1921 (4:2-4), July 6, 1921 (6:3-7). The newspaper, the only extant copy of which appears to be a microfilm at the Ottumwa Public Library, appears not to have been published on July 4, the day the new law went into effect.

462 Telegram from Capt. John Kelly to N E Kendall (Apr. 9, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). Kelly’s name was handwritten; the sender was The Sioux City Tribune. John H. Kelly had recent become a director of the Sioux City Chamber of Commerce. *Sioux City: Spirit of Progress* 1(5):52 (Mar. 10, 1921).

463 Eugene Kelly to Gov. N. E. Kendall (Apr. 14, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

telegraphically urged Kendall to sign the licensing bill in order to stop the loss of thousands of dollars in state revenue.\textsuperscript{465} Verne Marshall, the editor of the independent \textit{Cedar Rapids Evening Gazette}, argued the same point to the governor.\textsuperscript{466} Brewer and Marshall both began publishing cigarette advertisements as soon as it became lawful.\textsuperscript{467}

Sandwiched in between the references to newspapers were two other points that Cosson pressed on Kendall in an effort to persuade him to sign the bill. First, Representative Clark, who had pushed the major amendments, had letters from three people in Cedar Rapids supporting the bill—the pastor of the largest church, the general secretary of the YMCA, and the president of the board of education—who could have been imagined to be leaning in the opposite direction. Although Clark did not want to give them to the press, he would let Kendall see them. And second, Senator Edward Campbell had voted against the Dodd bill (only) “because of the pool hall proprietors who prefer to bootleg.”\textsuperscript{468} The precise inference that Cosson wanted Kendall to draw from Campbell’s motivation is not clear, but plausibly the point was that the close vote in the Senate may have concealed the fact that some Nays did not represent opposition to repeal of prohibition at all, thus dispelling any compunctions the governor might have had about approving the bill. (Ironically, since the Dodd bill as passed contained no punishment for bootlegging to adults, it is unclear why the pool hall proprietors opposed it.) In a “Dear George” note the next day the governor informed Cosson that: “The objectors of the Cigarette Bill have asked for a hearing and I suppose it will occur today or tomorrow. I will notify Dodd, and he in turn can advise all the friends of the measure.”\textsuperscript{469} Later that day Kendall did explain to Dodd that “[i]f those proposing the measure desire to be heard, I shall be glad to have them present” at the hearing that the objectors had requested for April 8 at 2 o’clock.\textsuperscript{470} That same day, April 7, Kendall purported, at least to a vehement opponent of the

\textsuperscript{465}Telegram from Luther A. Brewer to N E Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
\textsuperscript{466}Telegram from Verne Marshall to N E Kendall (Apr. 9, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
\textsuperscript{467}\textit{Cedar Rapids Republican}, July 5, 1921 (3:5) (Lucky Strike); \textit{EG}, July 5, 1921 (12:1-2) (Camel). The former paper did not appear on July 4.
\textsuperscript{468}C to Governor (n.d. [Apr. 6, 1921]), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
\textsuperscript{469}Nathan E. Kendall to George Cosson (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
\textsuperscript{470}Nathan E. Kendall to H. H. Dodd (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
Dodd bill, that “I am not entirely familiar with its provisions as it finally passed the Senate and House.”

A number of prominent organized women who communicated their views to Kendall would have fit the notion of extremist articulated by 67-year-old Sam C. Westcott, retired, of Keokuk—who “felt free to talk” with the governor because he had “worked hard” for his election and would always like cigars “regardless of any law”—in a letter telling the governor not to veto the cigarette bill because “it would be very unpopular” and “the women are going entirely too far.” For example, the president of the Iowa Federation of Woman’s Clubs, Aimee Spaulding, the 51-year-old wife of a 74-year-old manufacturer, telegraphed Ida B. Wise Smith that she could use her name in urging Kendall to veto the bill “for the sake of our children and young people,” adding her belief that the “majority of fine legion men” did not favor it. Lucy Page Gaston, the founder and superintendent of the International Anti-Cigarette League, though representing what might be considered an “outside organization,” “beg[ged] leave” to inform the governor that a “great majority of states have license-minor laws passed through the work of the cigarette producers, whose aim is to have an open market for the product of their factories. In no state are these laws enforced successfully.” Consequently, the existing Iowa law, “with an organized sentiment behind it,” was “the only law” that protected youths. Like other proponents of prohibition, Gaston pleaded that enforcement, not repeal, was the answer.

472Fourteenth Census of Population (HeritageQuest). Westcott was returned as having no occupation.
473Sam C. Westcott to Hon Nate Kendall (Apr. 6, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
474Fourteenth Census of Population (HeritageQuest).
475Telegram from Mrs H W Spaulding to Mrs Ida B W Smith (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). Smith appended several communications to her own letter to the governor.
476Lucy Page Gaston to Nathan E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). The folder contains no reply by Kendall. The International Anti-Cigarette League’s letterhead stated that its vice president Hudson Maxim was the inventor of “smokeless” gunpowder. However, Maxim was chosen presumably not for this feat, but because he opined that the “‘wreath of cigarette smoke which curls about the head of the growing lad holds his brain in an iron grip which prevents it from growing...just as surely as the iron shoe does the foot of the Chinese girl.’” State Dairy and Food Commission, State of Minnesota, Bulletin No. 77: Cigarette Law and Comments 7 (Dec. 1, 1919) (quoting without source), Bates No. TIMN0098545/51.
Emphasis on enforcement of general prohibition as a realistic approach was the hallmark of the communication from the most important women’s organization. On the same day that she attended the hearing with Kendall, Ida B. Wise Smith sent him a letter with Iowa women’s “last appeal.” On behalf of the Federation of Women’s Clubs, Congress of Mothers and Parent-Teachers Associations, the WCTU, Juvenile Probation Officers, school organizations, and churches, she urged one point on the governor beyond the three (the fallacy that licensing ever bettered conditions, “the influence of example of men as a determining factors in boys’ lives and habits,” and the bill’s constitutionality) that had already been presented to him—namely, that women now voted:

“...the largest number of people interested in the prohibition of the cigarette are the women of this state. Hitherto they have not been able to function in matters of law enforcement. They have so recently become electors they have not yet been able to manifest themselves. It is not the political psychological moment to repeal a law in which this large group of new citizens is more interested possibly than in any other social legislation just at that time when they have arrived at that state when they can function in securing better enforcement. If the present prohibitory law is held I can assure you that practically every woman’s organization in Iowa, and in this I know I can speak for the schools and the churches of the State, will use their best efforts to secure an adequate enforcement of the law during the next two years.”

The intense public interest in the question of repeal was reflected in the front-page piece in the Iowa City Press-Citizen on Friday April 8 that “up to noon” Kendall “had given no indication...as to whether he will approve or veto the bill to legalize the sale of cigarettes in Iowa.” Whether because of the nature of the news cycle at that time, or because the news came too late to be included in Saturday’s editions, many papers did not publish Sunday editions, or Kendall’s announcement on Monday April 11 had made the hearing three days earlier journalistically moot, only few newspapers reported Friday’s public gubernatorial hearing—which was not the first or largest such that Kendall had held—which

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477 Ida B. Wise Smith to N. E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
478 Ida B. Wise Smith to N. E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
479“No Indication of Kendall Action,” ICP-C, Apr. 8, 1921 (1:7).
480 The previous Friday the governor had presided over a standing room only hearing on a utility bill, which became the only bill that he vetoed that session. See “Governor Holds Special Hearing,” ADT, Apr. 1, 1921 (1:6); “Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” DMN, Apr. 2, 1921 (1:1-8 at 3-4).
The Great Compromise of 1921

at least one reporter must have attended. This lacuna in the record is especially unfortunate since the brief and sketchy report that the press did publish tantalizingly suggested that the confrontation of arguments may have illuminated the real motivating forces behind the Dodd bill. (Although Governor Kendall’s papers on the Dodd bill in the state archives contain no notes, let alone minutes, of the hearing, they do include materials submitted to him by some of the attendees, which will be analyzed below.) In anticipation of the hearing, the *Iowa City Press-Citizen* reported on April 8 that Lucy Page Gaston and Ida B. Wise Smith had “staged their final assault on the Dodd bill” before the hearing, adding intriguingly that: “Cigar store and pool hall men all over the state are said to be fighting side by side with the ladies. They declare the bill will place too stringent restrictions on their business. Governor Kendall’s attitude is not know [sic]. It is believed he will be guided largely by developments at the session this afternoon.”

In a front-page account on Saturday April 9, the *Register* provided this precis, which appears to be the most detailed extant account:

In an open hearing before Governor Kendall yesterday afternoon friends and enemies of the Dodd cigaret bill alternately praised and condemned the measure.

Judge Charles Hutchinson, Mrs. Ida B. Wise Smith, head of the W.C.T.U., and John B. Hammond of the Antisaloon league protested that the bill was iniquitous, while Representative Dodd, author of the measure, and F. F. Miles, editor of the Iowa Legionaire, defended it.

The governor gave no intimation as to whether he would sign or veto the bill...

Hutchinson contended that the measure was unconstitutional, Hammond that it was unstatesmanlike, and Mrs. Smith that it was contrary to the wishes of the great majority of women of the state. All of them contended that if this bill became a law it would be a step backwards.

Miles, who said that as an individual he represented the overwhelming sentiment of the American Legion, declared that the bill was a forward step, in that it would provide means for preventing the sale to minors, a thing which he said the present law could never do.

Representative Dodd, the author of the bill, asserted that his aim in introducing the measure had been to prevent the sale of cigarettes to young boys, and that this bill would prove a great improvement over the existing law.

Although this utility bill hearing was attended by all the circumstances mentioned in the text as possibly explaining the spotty press coverage of the Dodd bill, newspapers covered it much more intensively. See below this ch.

481“Hearing Today on Dodd Bill,” *ICP-C*, Apr. 8, 1921 (6:3).

482“Cigaret Debated Before Governor,” *DMR*, Apr. 9, 1921 (1:7). On the microfilm copy at the SHSI IC of what appears to be the same edition of the newspaper the article
The nub of Charles Hutchinson’s claim that the Dodd bill was unconstitutional may have been contained in his half-page submission to Governor Kendall consisting exclusively of holdings extracted from two Iowa Supreme Court decisions without any commentary. The lesson that Hutchinson apparently wished to impart to the governor was that the Dodd bill was unconstitutional because, unlike the mulct tax upheld in *Hodge v. Muscatine*, it failed to afford owners of the real estate on which the cigarette sales business was carried on due process in the form of recourse to the county board of supervisors to apply for a remission of the tax.\(^1\) Even if this hypertechnical interpretation of the very expansive decision in *Hodge v. Muscatine*\(^2\) had been sustainable, it was an oddly opportunistic last-ditch argument for the principled anti-cigarette movement to stave off defeat by charging that the bill was infirm because it did not cut the property-owners sheltering cigarette businesses enough constitutional slack.\(^3\)

Fortunately, the text of Hammond’s remarks to Kendall at the hearing have been preserved in the Iowa State Archives folder containing correspondence to and from the governor dealing with the Dodd bill.\(^4\) By a large margin they were

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\(^{1}\)Chas. Hutchinson, “Constitutionality of Cigarette Law, Senate Substitute for House File No. 678,” in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

\(^{2}\)See the discussion of the case above ch. 12.

\(^{3}\)John B. Hammond also expressed such procedural solicitude on behalf of the landlords of law-breaking cigarette dealers. [John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 2, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). This concern was especially jarring when juxtaposed to Hammond’s comments on Iowa’s Red Light Injunction and Abatement Law, for which he had successfully lobbied in 1909: “Through prosecutions under this system, some one [sic] may occasionally be wronged in his property rights, but no man’s property rights are as sacred as his liberty and that of his daughter. If we must destroy some innocent man’s house that we may rescue some helpless woman from the lowest type of slavery that ever cursed the earth, let us consider his rights only after the rescue is accomplished.” John B. Hammond, “The Iowa ‘Red Light’ Injunction Law and Its Success,” in *The Great War on White Slavery or Fighting for the Protection of Our Girls* 358-70 at 368 (Clifford Roe ed. 1911).

\(^{4}\)[John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 4, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). A post-hearing supplement that Hammond submitted to the governor referred to this typescript as “my argument and brief submitted on the 8th inst.” John B. Hammond to Hon. N. E. Kendall (n.d. [ca. Apr. 8-9]), in Folder: N. E. Kendall Correspondence re
The Great Compromise of 1921

the most comprehensive and closely argued contemporary criticism of the bill that has survived. Hammond, the WCTU’s lobbyist, was the state’s foremost advocate and drafter of laws prohibiting ‘immoral’ behavior during the first decades of the twentieth century, his ire being drawn not only to liquor and prostitution, but to boxing and marathon dancing as well. Overall Hammond charged that the Clark-Dodd bill was so “carelessly” drafted that it could not even “meet the purposes for which it is pretended to have been” passed. Of equal importance was his caustic response to the question as to who was expected to enforce the new law: “Shall it be the gentlemen who have defied our present law and are now pointing their fingers at its failures, for which they alone are responsible?” Hammond told Kendall that it was obvious that it would be the “same class of men and women who went down into their own pockets to enforce the mulct liquor law because, contrary to the liquor interests’ promises to enforce that law, in the quarter-century of its “unholy [sic] existence” they were never responsible for a single prosecution: “Instead of enforcing that law they met the men and women attempting it with mobs, bribery, perjury, the boycott, threats of personal violence, and blackhand letters. With the latter they have already begun their campaign against cigarette law enforcement.”

Interestingly, Hammond characterized the provision criminalizing minors’ refusal to inform on those who provided them with cigarettes as “the most vicious feature of this bill” because it would “make liars and criminals out of thousands of boys instead of law-abiding and law-respecting citizens.” Alternatively, if they inform, they “would lose all self respect and be ostricized [sic] by [their] associates.” Not only, in his opinion, would competent officials, who cared about the boys’ welfare, not resort to this method of gathering evidence, but it was also unnecessary because “there are plenty of boys in every town ready to play the detective and procure such evidence and while doing so can maintain their self-respect.”

Because it thwarted local grassroots participation in the process, Hammond sharply objected to the bill’s failure to provide a procedure for applying for a sales permit. Adroitly highlighting the requirement that pharmacists, proprietary

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Cigarette Bill (SHSI DM).

487See above ch. 13.

488[John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 4, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). By threatening letters Hammond was presumably referring to a recent incident targeting Ida B. Wise Smith. See above this ch.

489[John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 1, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
The Great Compromise of 1921

medicine manufacturers, and ministers file petitions setting forth their qualifications to sell or use intoxicating liquor or wine, Hammond pointed out that the Dodd bill’s lack of transparency was by design anti-democratic: “The public is to be kept in the dark. The applicant need have no other qualification than the possession of $50.00, $75.00 or $100.00... The public is given no opportunity to enter an objection or protest however undesirable the applicant may be, as a citizen, to be entrusted with such permit.” Hammond did not expressly draw out his implication that the legislative majority was not seeking to interfere at all with cigarette sales to adults.

A prime example of careless drafting was the bill’s failure to repeal section 5007-a of the existing law providing for the search and seizure and destruction of cigarettes. Although the Dodd bill as passed did not so provide, Hammond surmised that section 5007-a had presumably been left intact in order to fulfill that purpose, but it was in fact nullified by virtue of being based on section 5006, which was repealed. Similarly, the new bill included a nuisance provision without, however, providing a penalty for maintaining the nuisance. Consequently, if Kendall signed the bill into law, there would be “no penalty of any kind for selling cigarettes without a license” to adults and no penalty for bootleggers.

Frank Miles’s appearance as the bill’s sole advocate other than Dodd himself belied his implausible claims during the previous month that the

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490 [John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 2, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

491 [John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 3-4, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). In a supplementary submission to the governor Hammond explained that “[i]n the rush of the hour a close scrutiny of the section was not made,” and instead of redrafting a new Search and Seizure Section they accepted the old law, with the evident intention of adding it to the Clark-Dodd law.” John B. Hammond to Hon. N. E. Kendall (n.d. [ca. Apr. 8-9]), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

492 [John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 3-4, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

493 A week after the hearing Miles published a piece on Legion-supported legislation stating that “at one hearing before the governor the speakers for the [Dodd] bill included George Cosson, former attorney general of Iowa, an ex-president of the Cedar Rapids Y.M.C.A., and a member of the Legion legislative committee who made it clear that he was there as an individual.” After describing Hutchinson (“a well known jurist”), Hammond (“a professional reformer”), and Smith (“a noted W.C.T.U. leader”), Miles added that: “Arrayed behind these two factions were veterans, Y.M.C.A. men and others...
American Legion was indifferent to the outcome of the controversy. Miles’s testimony, assuming that the newspaper accurately reported it, was, since cigarette-smoking soldiers were focused on unimpeded access to nicotine rather than inaccessibility for minors, similarly implausible. A month earlier, in the second issue of the Iowa Legionaire, whose founder and editor he was, Miles published a lengthy editorial responding to the repeated questions that had been directed at it during its brief existence on the Legion’s position on cigarettes that organizationally it had never considered the question. He insisted that the Iowa Department, American Legion, would not take sides because its legislative committee, of which he was a member, was operating under the instructions it had received at the 1920 state convention: “Nothing was said about cigarettes there, though several thousand were smoked.” Miles thought it safe to say that more than half of world war veterans smoked cigarettes, which had become “quite the most common custom” during the war. Uncritically repeating industry propaganda that “[t]ime and experience have proven that the stories of the harmful effects of cigarettes told twenty years ago were largely bunk,” he argued that the Iowa law was unenforceable because it lacked public support: “Veterans who smoke cigarettes can see no more reason for legislating against them than...against plug, pipes and cigars.” Miles then sought to undercut his claim that the Legion was disinterested by asserting that the Legion as an organization of smokers and abstainers would be unaffected by passage or defeat of the cigarette bill. To be sure, smoking veterans would be pleased by passage “because cigarettes cost more when ‘outlawed.’ But if the bill fails, no one will hear a growl from those same smokers.”

Although Miles did not explain how illegality increased prices, the next week a veteran did charge in a letter to the editor that: “The way cigarettes are sold at present the only man that sells cigarettes is the one that can put up enough money in case he is arrested to pay a big fine and to make the profits big enough to take the chance. He charges the fellows an extra five or ten cents a package.” Since opponents of prohibition reflexively alleged that the law had been an unenforced dead letter since the war began, it is unclear how any seller could have been fined, let alone arrested. Regardless of the empirical accuracy of the charge, the resentment of Iowa “preachers and a gang of Y.M.C.A. workers” “butting into

\textsuperscript{494}“Cigarettes,” \textit{IL} 1(2):4:1-2 (Mar. 11, 1921).
The Great Compromise of 1921

something that don’t [sic] concern them,” expressed by the ex-corporal on behalf of the 90 percent of Iowa’s 100,000 veterans who smoked cigarettes, suggested the intensity with which Iowa legionaires backed repeal.495

To be sure, Miles’s chief argument in support of his claim of the Legion’s non-involvement in the Dodd bill’s passage was the formality that the 1920 convention at Cedar Rapids—the welcoming address at which was, ironically, delivered by James Trewin,496 the author of the cigarette mulct tax in 1897497—had passed a resolution creating a legislative committee to urge the Thirty-Ninth General Assembly to enact several measures (a bonus, preference in state employment, and certain tax exemptions for world war veterans, as well as the legalization of boxing and the prohibition of teaching foreign languages before the eighth grade),498 but had taken no action on cigarettes.499 And although in his article in the Iowa Legionaire on the legislature’s record on the Legion’s proposals Miles kept formal score only for the aforementioned measures, he did stress that several other bills were pending “in which veterans are interested but which were not endorsed at the state Legion convention.” Here he inserted the article’s only bolded capitalized subhead: “Cigaretts Legalized,” explaining that: “With Lucy Page Gaston, noted anti-cigaretterworker, directing opposing forces in the state house lobbies,” the Dodd bill had been passed.500

In the absence of an intuitively obvious reason that might have prompted the Legion to conceal its successful organizational lobbying of the legislature for passage of the Dodd bill,501 Miles’s disclaimer may be taken at face value.502

497 See above ch. 12.
498 “Legion Favors Preparedness for Next War,” EG, Sept. 4, 1920 (1:4); Jacob Swisher, The American Legion in Iowa: 1919-1929, at 145 (1929). The legislative committee, the state legion’s historian noted, “was constantly on the job throughout the session endeavoring to secure such legislation as was deemed beneficial and in which the Legion was interested.” Raymond A. Smith, “American Legion History: 1921” at 4 (Aug. 27, 1921), in American Legion, Department of Iowa, R 67, Records 1919-1976, Box 7, Folder 2 (SHSI IC).
500 Frank Miles, “Three to One Is the Score of Legion in Legislature,” IL 1(6):1:1, 6:3-4 at 4 (Apr. 8, 1921).
501 When the Legion’s state legislative committee, “[s]purred by the reported coolness of the legislature toward” bills it advocated, met three days before the House voted on the Dodd bill and decided to push all its measures and try to bring them all to a recorded vote, it did not mention the cigarette bill. “Legion Group to Lobby for Bills,” DMR, Mar. 28,
Nevertheless, individual lobbying by Miles—who presumably knew the legislators well by virtue of having interviewed the General Assembly’s members before the session—and other Legion officials and rank and file may have been a close substitute for group pressure. It appears that not until several months after the 1920 state convention did Legion posts around the state, perhaps actuated by the announcement of renewed prohibitory enforcement in Story county a few days after the legislative session opened in January, begin, in a decentralized fashion, to push their representatives in the House and Senate to undertake another effort at repeal. Thus, for example, on March 25, the American Legion post in Boone unanimously voted to go on record favoring a change in the prohibitory law so that it would apply only to minors and informed the state representative and senator for Boone county of their action. To be sure, in this particular case, the post’s activism was to no avail: despite the Register’s impression that “Boone county seems almost unanimous for the change,” Representative W. S. Criswell and Senator Charles Olson, both Republicans, farmers, and Methodists, were among the legislature’s most consistent opponents of repeal, voting Nay on every single occasion. The Legion’s potential political influence in Iowa can be gauged by the fact that its 522 posts and more than 35,000 members in mid-1920 made it the fourth and seventh largest state organization, respectively, in the country.

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1921 (1:6). After the close of the session, the chair of the Legion’s legislative committee, in acknowledging the assistance of numerous House and Senate members in managing the Legion’s measures, nowhere mentioned Dodd or his cigarette bill. Casper Schenk, “Schenk Reports on Legion Work in Legislature,” IL 1(8):7:1-6 (Apr. 22, 1921). Similarly, Schenk’s report at the September 1921 state convention omitted any mention of the cigarette bill. “[Proceedings of the] Third Annual Convention of the Iowa Department of the American Legion, held at the High School Building, Spirit Lake, Iowa, Sept. 1, 2 and 3, 1921,” Friday, September 2, 1921, at B-27-B-32, in American Legion, Department of Iowa, R 67, Records 1919-1976, Box 1 (SHSI IC). The minutes of the executive committee meetings between Nov. 13, 1920 and Feb. 12, 1921 also do not mention the cigarette bill. Executive Committee Minutes, in American Legion, Department of Iowa, R 67, Records 1919-1976, Box 7 (SHSI IC).

502 At the end of March the press reported on an 11th-hour legislative drive by the Legion’s legislative committee on behalf of the aforementioned bills but did not mention the Dodd bill. “Legion Men Pull for Proposed Laws,” DMC, 38(79), Mar. 29, 1921 (3:1).


505 State of Iowa 1921-22: Official Register 328, 337 (29th No.).

The Great Compromise of 1921

Miles’s denials to the contrary notwithstanding, the *Des Moines News* regarded the American Legion and the WCTU as having “fought it out” over the Dodd bill with the result that the former, “acting unofficially very efficiently checkmated Mrs. Wise-Smith and her band...” The *News*, which ignored the cigarette manufacturers’ role, speculated that the reason that the Legion’s bills had passed so easily was “[p]robably” that “they did not affect the corporations who so closely scanned other proposed legislation.” In turn, the newspaper noting that the WCTU had been “on the job thruout the session with a very active lobby” consisting, among others, of Wise-Smith, Gaston, and Hammond, inferred that “these club women are learning the science and politics of legislation.” Indeed, since in 1921 they had already “showed that they understood ‘pressure’ and veiled threats,” once they had brooded over their “smarting defeats,” by the next session, they would “undoubtedly show some of the corporation lobbyists some novel methods in railroading a bill thru.” To be sure, given the paper’s defeatist view that the WCTU’s mistake was having tried to “pass anything that affected the money interests of the state” (such as the maximum hour and minimum wage bills for women, which “the money interests” had been able to kill because they “could still maintain the most ‘pressure’”) or was “too strongly tinged blue” (such as cigarette bans), it is unclear what part of its agenda the WCTU would ever be able to enact.

507 Robert Hughes, “39th Assembly Was Good to Legion,” *DMN*, Apr. 18, 1921 (4:3-4). At times the *News* adopted a very expansive and undifferentiated notion of “lobbying and “lobbyist,” indiscriminately subsuming “reform” organizations such as the WCTU and the “[p]rofessional reformers” they engaged under the same rubric as the “money bags” and “sinister and avaricious interests....” “Lobbyists Infest Iowa Legislature,” *DMN*, Mar. 29, 1921 (1:5-8). No reason existed to exempt reform groups such as the WCTU from the newspaper’s proposal that lobbyists be required to register and reveal their principals, the bills for which they were lobbying, and how much money represented organizations were paying for lobbying, but the identity of the WCTU’s lobbyists and of the bills it advocated was public knowledge. Robert Hughes, “Lobbyists Cracked Whip in 39th Assembly and Solons Did Bidding,” *DMN*, Apr. 19, 1921 (3:5-6). Unsurprisingly, that session the Senate Judiciary Committee killed a bill to regulate lobbying. *State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly* 717, 1034 (Mar. 8 and 19) (S.F. 734, by James Johnston).
Governor Kendall Approves the Repeal Bill, But Stresses Local Government Power to Continue the Prohibition of Cigarette Sales

Cigarettes Win in Iowa.508

Iowa volunteers and drafted men who came back from France, where they had found relief from trench and camp hardships in a quick smoke, to find that they couldn’t buy cigarettes in their own State, owing to a blue statute put on Iowa’s books, may have had something to do with a change in the law.509

Passage of the law was opposed by the W.C.T.U. and other organizations, but had the backing of business organizations.510

Despite his non-committal reaction during the hearing, Governor Kendall—who, according to former state senator Grant Caswell, was opposed to cigarette smoking511—may have tipped his hand when the *Legionaire* the same day published a front-page piece by the governor extolling the Legion and expressing his inability to understand why any veteran would hesitate to join the organization.512

Much less speculative was an article appearing in Saturday’s *Register* right next to the report on the governor’s hearing. It turned out that as its final act before adjournment the legislature had adopted a resolution raising state revenues by $1,650,000 a year above the sum generated by general taxation during the previous biennium, necessitating an increase in the setting of the general tax levy from 7.5 to 9 mills. This calculation presupposed, however, that into the state...
The Great Compromise of 1921

treasury would be flowing an additional $750,000 a year from the new cigarette tax imposed by the Dodd bill. This arithmetic “produced perhaps a conclusive indication of the governor’s intention upon the cigarette bill. Senator Foskett..., chairman of the appropriations committee, told the committee that he had been assured, when he told the governor that he must know whether the cigarette bill was or was not to become a law in figuring the next tax levy, that the bill would be signed and that he should reduce the levy by the amount that it had been calculated the cigarette stamp tax would bring in.”

The same day the Des Moines News, which viewed the legislature’s action as “a sure indication” that the governor would sign the Dodd bill because he had “surely indicated that he would sign,” reported that conversations he was said to have had Saturday morning with (unnamed) “close advisers” reinforced this belief: “It is said the governor will sign the bill disregarding the attitude of the W.C.T.U. and club women on account of the mockery of the present prohibitory laws.” At the same time, he was “also remembering the tremendous amount of revenue the stamp tax will bring into the needy coffers of the state.” Somewhat less positive the next day was the Cedar Rapids Sunday Republican, which (perhaps derivatively) reported that Governor Kendall’s “silent assent to the nine mill levy is taken by solons to mean that he will ratify the Dodd measure,” though the subhead, “His Silence Seems Golden and Speaks Volumes, Say Those Who Profess to Know,” enhanced the certainty.

On Sunday the Register diminished the suspense still further by divulging in one article that Kendall had “told the committee that they could count on the cigarette revenue” and that “he will probably sign the bill soon” and in another that “it is practically certain the governor will sign” it. These
The Great Compromise of 1921

accounts very strongly suggest that Kendall’s hearing on Friday was a charade since the timing of the events indicated that he had apparently already assured the Senate Appropriations Committee chairman that he would sign the bill.\textsuperscript{518}

On Sunday April 10, the day before Kendall announced his decision on the cigarette prohibition repeal, tax, and permit law, a thousand boys in Sioux City participated in the WCTU’s aforementioned anti-tobacco Sunday by signing an anti-tobacco pledge in what that city’s principal newspaper oddly called “the first skirmish of the W.C.T.U. with the forces of King Nicotine. The sortie was the first move in the war which the women’s organization has declared on cigarettes.” Part of a national movement launched by the WCTU, the campaign initiated an anti-tobacco week resting on an “ultimatum...by the militant anti-nicotine crusaders” embodying “the edict that the sickly ‘pill’ must go.”\textsuperscript{519}

As heralded in an eight-column, front-page banner headline on Monday, April 11, 1921, “Gov. Kendall Signs Dodd Cigaret Bill.”\textsuperscript{520} A typical reaction of the press, which would soon be profiting from a flood of cigarette advertisements, which would become lawful together with cigarette sales on July 4,\textsuperscript{521} appeared the day after Kendall’s announcement in the \textit{Davenport Democrat}, which editorially opined that a law with “some sanction of public opinion” was “much better” than one “that was being universally ignored.”\textsuperscript{522} Kendall’s approval of the prohibition repeal and licensure law was important enough that 15 years later it was his most prominent action mentioned in his obituary in \textit{The New York Times}.\textsuperscript{523} Equally important was the explanatory statement—printed in whole or in part in many newspapers across the state, often on the front page—that the

\textsuperscript{518} Perhaps Kendall’s signature had become such a foregone conclusion that, without editorializing, the brief piece in the trade magazine \textit{Tobacco} merely mentioned the local option for any community to regulate cigarette sales to adults. “Cigarettes Win in Iowa,” \textit{Tobacco}, Apr. 14, 1921, at 20.

\textsuperscript{519} “Start War on Cigaretts,” \textit{SCJ}, Apr. 11, 1921 (6:1).


\textsuperscript{521} See below ch. 19.


\textsuperscript{523} “N. E. Kendall Dead; Ex-Iowa Governor,” \textit{NYT}, Nov. 5, 1936 (27).
The Great Compromise of 1921

governor issued when he signed the bill and that even at the beginning of the twenty-first century retains its vital importance as an authoritative exposition of legislative history. According to the governor:

The terms of the measure...may be summarized as follows:

(1) It prohibits under drastic penalties the sale of cigarettes to minors, and provides that any minor discovered in the possession of cigarettes shall disclose the identity of the person from whom he obtained them, or be himself proceeded against for a misdemeanor.

(2) It empowers local governing authorities, viz, city councils and county supervisors, upon payment of license fees and mulct taxes as specified in the bill, to issue revokable permits for the sale of cigarettes to adults, and fixes substantial forfeitures for any infraction of the regulations imposed therein.

Two or three important considerations are to be constantly remembered. First: In no circumstances whatsoever is the sale of cigarettes to minors in any manner legalized. On the contrary, such sale is expressly forbidden under punishments which may extend to a money fine of five-hundred dollars and a jail imprisonment for six months. Second: The sale of cigarettes to adults in any community is entirely within the discretion of the citizens of such community, speaking through their selected representatives on the city councils and county boards. If the people of any locality are hostile to the traffic, they can easily enforce their opposition by electing municipal officials instructed to refuse permits. Third: It is conservatively estimated that if the present volume of cigarette consumption be maintained, revenues will accrue to the State aggregating annually several hundred thousand dollars. In the disordered state of fiscal affairs at this juncture, with the burdens of government increased and the ability to bear them reduced, so material a contribution to the treasury would be especially welcome.

The subject is one of infinite difficulty, and I am not unaware that there is a radical disagreement respecting its solution. Our experience with the perplexing problem has demonstrated two propositions beyond controversy: (a) That a legislative enactment is effective only so far as it is supported by an aggressive public opinion; and (b) That the disregard of a restrictive law because it is unpopular entails discredit upon all laws of similar character. The original statute was sufficiently rigorous to banish the cigarette utterly, but the majority sentiment of the people was averse to its observance. Thus we are confronted not by an attractive theory, but by a practical condition. After the maturest deliberation the General Assembly determined that a new method of dealing with the cigarette question should be inaugurated, and I am constrained to acquiesce in its conclusion.524

524Untitled and undated carbon copy typescript, in Folder: N. E. Kendall correspondence re cigarette bill (SHSI DM) (italics added). The statement was apparently included in this file because Kendall included it with the reply letters he sent to several people who had written to him urging him to veto the Dodd bill. The single page begins: “After signing the Dodd cigarette bill today Governor Kendall discussed it briefly.” The
Kendall’s analysis focused on several topics, only one of which belonged to the legislative history in the narrower sense of textual interpretation. This latter point dealt with the unlimited power and discretion that the legislature conferred on local communities and their governments to perpetuate the quarter-century-old prohibitory regime regarding cigarette sales to adults. The antithesis of state preemption of local action, this establishment of home-rule, which the governor declared absolutely, unreservedly, and open-endedly, appeared to rest textually on a single word—namely, that the permit without which it was illegal to sell cigarettes in Iowa “may be granted and issued” by the city council of any city or town or the board of supervisors of any county. In terms of the canons of statutory construction, the use of “may” expressed the requisite discretion: local governments might also choose not to grant permits. This choice was precisely the element that use of the word “shall” would have denied. That this mandatory regime was also possible in a decentralized regulatory system was unmistakably on display in the prohibition repeal statute that neighboring Nebraska had enacted in 1919 and that offered itself as a model to Iowa legislators in 1921: Licenses “shall be issued...by the Clerk of any city, town or village, and by the County Clerk of any county, upon application duly made as hereinafter provided.” Kendall, though a lawyer, was not engaging in statutory-textual exegesis, teasing vast powers out of a single word. Rather, the governor was explaining the politics of local popular control that had been a necessary component of the compromise that was repeal in Iowa, where large numbers of organizationally cohesive proponents of prohibition had been able to place their stamp on the enduring configuration of the post-repeal system. Oddly, some organizations that had urged Kendall to veto the bill did so in part because they failed to understand that it conferred home-rule power. For example, the president of the Parent Teacher Council of Des Moines claimed that the bill “forces the sale of cigarettes into thousands of Iowa communities where they are not now sold. This is un-American (19 counties now enforce the present law).” By the early 1930s the

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525 1921 Iowa Laws ch. 203, §§ 3, 6, at 213, 214, 215 (italics added).
526 1919 Neb. Laws ch. 180, § 2, at 401. The centralized license regime created by the Arkansas repeals of 1921 lacked such a discretionary element. 1921 Ark. Acts 490, § 4, at 450, 452. Similarly, the decentralized privilege tax payment regime for selling cigarettes enacted by Tennessee separately but at the same time as repeal provided no discretion to county court clerks. 1921 Tenn. Laws ch. 81, at 135.
527 Lulu Catherine Jones to Nathan E. Kendall (n.d.), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM) (not identifying the 19 counties). Similarly,
Iowa Supreme Court, availing itself both of the aforementioned canon of construction and the history of statutory prohibition that survived under repeal, would flesh out the exact contours of this power to vindicate city councils’ exercise of the power to deny cigarette sales permits. Such a hybrid juridical-political analysis was persuasive so long as decisionmakers were old enough to have experienced the battles over cigarettes. In contrast, by 1991, when historical amnesia insured that virtually no one even knew of from books, let alone remembered from life, the roots of Iowa’s existing cigarette sales regulation in a more than a century-old prohibitory law, the cigarette company’s lawyers and lobbyists could persuade the legislature to amend the 70-year-old cigarette sales law to preempt local action without, ironically, even realizing that their amendment was impotent to cancel the conferral of local powers embedded deeper in the statutory text and legislative history than their pricey legal minds could peer.

Kendall broke no new ground in implicitly conceding that the urgent need to locate a source of additional state revenue, the extraction of which did not burden business profitability or capitalist incomes across the board, was, as it were, an “attractive...practical condition.” Remarkably, the governor did not boast of Iowa’s first-in-the-nation state consumer tax on cigarettes; unremarkably, neither he nor anyone else recommended the tax as a means of marginally depressing solvent demand for cigarettes, for which no one other than the cigarette industry had a good word. Decades would pass before the anti-smoking movement perceived the effectiveness of this disincentive, although the cigarette companies had always been sensitive and opposed to federal excise taxes, more, to be sure, because of their penny-for-penny negative impact on profits than on aggregate demand.

Mrs. S. E. L[illegible] (chairman of legislative committee) (n.d.), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). Since this undated and unaddressed handwritten letter on the organization’s letterhead was included in the folder with the letters urging the governor to veto the bill, it was presumably written after its passage; if it was written earlier, it was an accurate but unusually prescient critique.
In his more wide-ranging commentary, the governor, unlike the “perplexing problem[s]” partisans, who radically disagreed, confessed that he perceived “infinite difficulty.” He argued, however, that even the protagonists would have to agree that a law was “effective only so far as it is supported by an aggressive public opinion” and that the “disregard of a restrictive law because it is unpopular entails discredit upon all laws of similar character.” Here Kendall failed to distinguish between compliance and enforcement. Why public opinion would have to be “aggressive” to insure passive compliance is unclear. By virtue of failing to distinguish between voluntary compliance and successful enforcement in smaller towns and non- or only spasmodic enforcement in larger cities, he deprived himself of the ability to probe the issue of whether governmental non-enforcement drove popular disregard or vice versa. Kendall’s claim that “the original statute was sufficiently rigorous to banish the cigarette utterly, but the majority sentiment of the people was averse to its observance,” was based on no firm empirical basis: though surely some significant proportion of adult men wanted to buy and smoke cigarettes, it was far from clear that they represented a majority of the population, let alone of the electorate, especially after women’s enfranchisement. The governor’s counterposing of “an attractive theory” and “a practical condition” was a pithy way of aligning himself with repealers’ claim that prohibition simply had not worked, would not work, and could not work. Yet, as their opponents had pointed out repeatedly, prohibition had worked in some places all the time and in other places some of the time, and could have been more effective had the legislature buttressed it with a rigorous nuisance and injunction procedure. Indeed, Ida B. Wise Smith had called the governor’s attention to “information that the Attorney General of Iowa can supply as to that portion of the state where the law is now being enforced.”

Remarkably, in letters that he wrote to several people who had urged him to veto the bill, Kendall was somewhat more forthcoming about the biases that underlay his decision. On April 9, the day after the hearing, three residents of Lamoni (a center of the Reorganized Church of Jesus Christ of Latter Day Saints), a bishop of the church, a bank cashier and director, and the long-time mayor, telegraphed Kendall that “Lamoni overwhelmingly opposes Dodds [sic] cigarette bill” (The town’s attitude toward smoking was signaled in June by its campaign

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1931 (X11). See also “Cigarettes Hit by Taxes,” NYT, Mar. 14, 1933 (C26).

531Ida B. Wise Smith to N. E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). Unfortunately, she did not disclose the information in the letter.

532A. M. Carmickael [sic], Oscar Anderson, Mayor Geo Blair to Governor Kendall (Apr. 9, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
The Great Compromise of 1921

to eliminate smoking by minors.)\textsuperscript{533} Two days later, the very day on which he announced that he had approved the bill, the governor replied that it was “almost unanimously agreed that the present law is unenforceable,” adding his belief that the new law would provide “more effective regulation.”\textsuperscript{534} Yet the governor was acutely aware that his claim was false since the large anti-cigarette movement had beseeched him to permit the prohibitory law, fortified by the Moen-bill’s nuisance-injunction process, to be enforced. After all, Kendall confided to a druggist two days later that “I am conscious that in many quarters my action in approving the cigarette bill will be severely condemned.”\textsuperscript{535} When lawyer and former Republican state legislator William Cooper informed the governor that the Civic League Committee in Newton, representing two or three thousand constituents of all the town’s churches, had voted unanimously against the Dodd bill as had 78 members of the men’s bible class of the Methodist Episcopal Sunday School,\textsuperscript{536} Kendall, claiming that “no man in Iowa detests more heartily than I the entire cigarette business,” once again wrote what he knew or at least

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On the three residents, see J. Howell, History of Decatur County Iowa and Its People 2:81, 170 (1915); Fourteenth Census of Population: 1920 (HeritageQuest). Blair was a Democrat and Anderson a Republican.

\textsuperscript{533}In mid-June a “good start” was made when an information was filed by the marshal against a boy and a warrant issued; after pleading not guilty he was tried, found guilty, fined $5 plus costs of $4.05, for which he gave a note and “agreed to work it out for the town.” The local paper reported that the “officers are very anxious to eliminate this evil from our town and can do so with the aid and cooperation of the parents and citizens.” Since there was “a lot of cigarette smoking going on among the young boys,” who, however, were on the look-out for the police, citizens would have to report them when they saw them. “Getting After Cigarette Smokers,” Lamoni Chronicle, June 16, 1921 (1:5) (defendant Lee (Bud) Traxler may have been Irving Lee Traxler, son of Moroni Traxler, returned at 1920 census as 15 years old). A week later the paper reported that another person charged with cigarette smoking on the streets pleaded guilty and was fined $3.50 plus costs. “More Cigarette Trouble,” Lamoni Chronicle, June 23, 1921 (1:3) (defendant Ralph Smith not returned in 1920 census as living in Lamoni).

\textsuperscript{534}[Nathan E. Kendall] to A. M. Carmichael, Oscar Anderson, Geo. Blair (Apr. 11, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). That same day Kendall wrote exactly the same letter to another opponent of the Dodd bill. [Nathan E. Kendall] to L. R. Rosebrook (Apr. 11, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

\textsuperscript{535}[Nathan E. Kendall] to George H. Schafer (Apr. 13, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

\textsuperscript{536}[William]. R. Cooper to Gov. N. E. Kendall (Apr. 10, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill, SHSI DM.
The Great Compromise of 1921

had heard repeatedly to be untrue—namely, that “the present law has demonstrated itself to be almost a complete failure in every locality in the commonwealth.”

The most revealing observation that Governor Kendall penned his post-approval anti-cigarette correspondents was the realist-resignationist admission that he had been unable to see his way clear to adopting their conclusions because “the habit is so universal that I think complete prohibition cannot be effective.” Had the legislative and executive branches of Iowa made this alleged fact of “universal” addiction the public cornerstone of the state’s tobacco policy, they would have created the kind of transparency that governments attained decades later when they and (virtually the entire anti-smoking movement) expressly disavowed prohibition both at the zenith of smoking prevalence in the 1960s and even in the first decade of the twenty-first century when only one-fifth of the adult population smoked. To be sure, Kendall’s claim of universality was a reckless exaggeration. Although no statewide consumption data are available for 1921, a few years later, once Iowa’s cigarette sales tax was operating, per capita consumption in Iowa was calculated to be only half of the national average. And thus if what was perhaps the first national survey of cigarette smoking prevalence, conducted in 1935—when national output had almost tripled since 1920—found that 62.7 per cent of the adult population, including 47.5 percent of men and 81.9 percent of women, were “not yet cigarette smokers,” the levels obtaining in Iowa in 1921 were with certainty very far from universal. Moreover, since prohibition in Iowa referred only to sales (and not to smoking by

537[Nathan E. Kendall] to Hon. W. R. Cooper (Apr. 11, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill, SHSI DM.

538[Nathan E. Kendall] to Sara C. Wilbur (Apr. 13, 1921), and [Nathan E. Kendall] to W. M. Stull (Apr. 13, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill, SHSI DM.

539See below ch. 19.


541“The Fortune Survey: III: Cigarettes,” Fortune 12(1):66-136 at 68 (quote), 111 (July 1935). According to the survey, 65.5 percent of men under 40 and 39.7 percent of men over 40 smoked, while the corresponding figures for women were 26.2 percent and 9.3 percent (whether people exactly 40 years old were really omitted is unclear). Fortune concluded that: “[N]ot only has the cigarette industry a tremendous exploited field of new customers, but...it may expect a mathematical increase in consumption as the younger generation carries its cigarette habit to the nether side of forty and new young cigarette smokers grow up to fill their ranks. Each year in this country 2,200,000 boys and girls come of age.” Id. at 111.
adults), and even sales were not completely prohibited since adults lawfully could individually arrange for cigarettes to be shipped to them from other states, the governor’s seemingly realistic basis for approving a licensing system was deprived of much of its robustness. Nevertheless, Iowa’s population of more than 2.4 million in 1921 surely included many tens, if not several hundreds, of thousands of adult cigarette smokers, whose potential reactions to quasi-prohibition the legislature should have considered. Instead, it articulated a policy based largely on cigarette companies’ right to profit from catering to adult men’s right to buy and smoke cigarettes.

In turn, the narrow legislative majority’s “new method of dealing with the cigarette question” boiled down to vindicating adults’ right of access to an addictive drug in the hope that cutting off minors’ access would either somehow magically insure their aversion to cigarettes at age 21, despite years of observing their fathers and other adult role models smoking, or generate initiation in adulthood when smoking’s growth-stunting properties would allegedly no longer be operative.

In 1888, a subcommittee of the WCTU’s National Executive Committee, chaired by its president, Frances Willard, stated that it “‘would come and help to float Iowa out of the “dry-dock of Republicanism” into the “broad sea of national prohibition.”’” Her opponent, Judith Ellen Foster, the head of the Iowa WCTU who led a small group to bolt from the national WCTU the following year over the issue of that organization’s election alliances with the Prohibition party, replied in 1889 that “‘if the defeat of the Republican party in Iowa be deemed by her desirable, and the repeal of the prohibitory law is the result, the ship—Iowa—will float in the full docks of whisky and beer, and the groans of women and the sobs of little children will mingle with the shouts of the demons of the still.’” The Republican party in Iowa was never defeated during the entire existence of the anti-cigarette law, and the majority of Republicans in the legislature voted to repeal it in 1921, leaving Iowa, if not to float in, then at least to inhale cigarette smoke into the twenty-first century.

542 See, e.g., Letter from W. L. Kuser, Superintendent, Iowa Training School for Boys, to Ida B. Wise Smith (Mar. 17, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill, SHSI DM.

The Great Compromise of 1921

The Pro-Corporate Public Utilities Bill:  
A Sideshow to the Pro-Corporate Cigarette Bill

The public utility corporations applying yet another crunching headlock to the submissive legislature, achieved their ambition of years standing when the Senate subserviently acquiesced in the passage of the measure.544

The bill is air-tight for the public utility corporations and leaves not a single loop-hole for the people.545

This public utilities court bill is the greatest steal ever perpetrated by an Iowa Legislature. It is a crime against the people of Iowa. It is one of the blackest splotches on the history of this great state.546

Immediately after its concurring vote on the Dodd bill on April 6 the House rejected another “attempt of the public utilities to force through some legislation that would take control of these public servants out of the hands of the people.”547

An examination of what in 1921 were arguably the most high-profile and intense corporate and populist anti-corporate legislative campaigns and of the legislature’s and the governor’s responses sheds important comparative light on the nature of capitalist lawmaking and anti-capitalist opposition in Iowa.

Introduced on February 24 by Arthur Springer, a lawyer from southeastern Iowa—but purportedly drafted by the chief counsel for a Cedar Rapids utility corporation548—the public utilities bill, which covered water, gas, heat, electricity, and street car service to the public,549 contained two especially

544“Corporations Win in Sensational Fight on Floor of Iowa Senate,” *DMN*, Mar. 30, 1921 (1:4-7 at 4).
545“Governor Alone Can Now Thwart Big Legislative Coup of Corporations,” *DMN*, Mar. 31, 1921 (1:7, at 5:1).
546“Coal Barons Win Again in Senate,” *DMN*, Apr. 1, 1921 (1:2, at 10:2).
548“Governor Alone Can Now Thwart Big Legislative Coup of Corporations,” *DMN*, Mar. 31, 1921 (1:7).
549H.F. No. 623, § 1 (Feb. 24, 1921, by Springer). Springer’s original purpose, according to some press accounts, had been to protect “progressive” farmers’ investments in, and help them extend electric lines to, their communities, but both utilities and municipalities prevailed on him to broaden the bill’s scope to include all utilities. “Springer Has Plan to Bring City Conveniences to Farmer,” *Muscatine Journal*, Mar. 18, 1921 (5:2-3). See also G. Caswell, “Legislative Letter,” *Adams County Union-Republican*, Mar. 16, 1921 (n.p.: 1-3 at 2) (NewspaperArchive).
The Great Compromise of 1921

explosive provisions. First, utilities were entitled to appeal the fixing by city councils or county boards of supervisors of rates\(^{550}\) (which were required to be “just, reasonable, compensatory and adequate”)\(^{551}\) to a newly created Court of Public Service, whose three members were to be selected by the chief justice of the Supreme Court from among the state district court judges, none of whom, however, was permitted to serve in any matter that had arisen in the judicial district in which he had been elected.\(^{552}\) This last provision would prevent affected citizens from defeating for re-election judges who in handing down pro-corporate rulings “should betray their interests.”\(^{553}\) For the anti-corporate opponents the second provision was even more provocative: any owner of a franchise to provide utility service was empowered to convert its franchise into one indeterminate in term by filing with the Court a waiver of all rights under the franchise to occupy streets, highways, or public places for a fixed term of years.\(^{554}\)

Legislative efforts by corporations to deprive citizens and their local governments of control of utilities by transferring it to a “friendly tribunal” were “nothing new,” but “never before” the 39th General Assembly, as far as the anti-corporate forces were concerned, had they introduced a bill more “brazenly indefensible” or planned and executed a campaign more “cunningly.” In previous sessions the corporations had tried measures that would have created a utility commission to resolve local rate and service disputes, “but the municipalities, knowing that it would be much easier for utilities to control or influence a commission than all the city councils, boards of supervisors, and courts of the state, ha[d] always opposed such a commission.”\(^{555}\) In order to thwart this

\(^{550}\) H.F. No. 623, § 8 (Feb. 24, 1921, by Springer).

\(^{551}\) H.F. No. 623, § 2 (Feb. 24, 1921, by Springer).

\(^{552}\) H.F. No. 623, §§ 10-11 (Feb. 24, 1921, by Springer).


\(^{554}\) H.F. No. 623, § 9 (Feb. 24, 1921, by Springer).

\(^{555}\) “People Win Hard-Fought Battle with Utility Companies,” \textit{IH} 66(14):763 (Apr. 7, 1921) (edit.). For example, in 1919 the utility corporations’ chosen legislative vehicle was S.F. 365, which would have “tak[en] rate-making power from the cities and plac[ed] it in the hands of the railroad commission.” “Utilities Bill Meets Defeat,” \textit{MJ}, Mar. 21, 1919 (12:1-3 at 1). Individual municipalities and the League of Iowa Municipalities opposed it on the grounds that such controversies could be best handled locally, whereas under the bill utility corporations “can better expect to get what they desire than at the hands of city councils.” “Ready for Action on Utility Board,” \textit{WT-T}, Mar. 21, 1919 (3:1). After test votes on amendments had revealed that opponents controlled far more votes, backers withdrew the bill. \textit{State of Iowa: 1919: Journal of the Senate of the Thirty-Eighth General
opposition, the farm weekly *Iowa Homestead* editorialized, in 1921 the corporations hit upon the aforementioned Court of Public Service, which—for reasons not explicited—succeeded in “allay[ing] the suspicions of many municipal officials, who overlooked the fact that such a ‘court’...would be subject to the same corporate influences as a ‘commission’...” The Springer bill was also more radical than earlier measures by virtue of the indeterminate franchise provision, which empowered the new court to “annul existing franchise contracts,” which had been agreed to by city councils and ratified by voters, thus effectively giving the corporations “a vested right in the streets and highways of the state without binding them to any specific performance in return...”

At the March 10 meeting of the House Public Utilities Committee, Rep. William Blake, chairman of the subcommittee to which the Springer bill had been referred, reported back the recommendation of several amendments, only two of which were specified and only one of which was relevant in the present context—namely, that the word “compensatory” be struck from the criteria that local rate-fixing governments were required to satisfy. The committee minutes merely stated that “[o]ther amendments were proposed” without disclosing their wording. The committee adopted the subcommittee’s report and the motion carried that the bill as rewritten with the suggested amendments be reported out for passage, but the minutes included no information on the vote, let alone on any discussion. In fact, two other undiscussed amendments were of great significance. First, the vital section 9 on indeterminate franchises was amended, in response to objections concerning the length of the franchise in Springer’s bill, to provide that: “The term of the indeterminate permit shall continue in force until such time as it shall be surrendered, or otherwise terminate, according to law.” Second, the Court of Public Service, the creation of which, according

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*Assembly* 144-47 (Mar. 20).


559 “Council Not in Love with Service Bill,” *EG*, Mar. 12, 1921 (2:8). William Chamberlain, a utility lawyer and owner, had pointed out that under the Iowa Code the legislature had the power to terminate franchises at any time. *Id.*

560 Committee substitute amendment to House File No. 623, by Springer, § 9 (n.d.) (SHSI DM). The section also contained a typographical error, substituting “intermediate” for “indeterminate.”
to the Des Moines News, utility corporations had been seeking for years," was given the power, in actions brought on behalf of the municipality, to cancel or annul indeterminate permit or franchise only "for non-user, or when public necessity requires." On March 11 chairman Dodd reported to the House that the Public Utilities Committee had recommended a substitute bill, which amendment the House, on Springer’s motion, adopted during debate a few days later.

The aforementioned limited and indirect cancellation provision prompted the Cedar Rapids city solicitor in a legal opinion to the mayor to raise an objection, which included the suggestion that the operative term be changed to “when public welfare requires.” Otherwise, if a city, such as Iowa City, which did not own its water works, wanted to municipalize ownership, brought suit, and was unable to convince the court that “public necessity require[d]” the action, it would be “absolutely powerless” to take the step: “Municipal ownership of public utilities at the expiration of the franchise, which is permissible under the present law which preserves the right of condemnation and purchase[,] is practically eliminated under the bill.” In fact, Iowa law at the time both prohibited cities and towns from granting public utility franchises for terms in excess of 25 years and required approval by a majority of legal electors of such grants and extensions of franchises.

During House debate on March 16, opponents tried to eliminate the indeterminate franchise altogether by amendment, but it was defeated by a large majority (18 to 73) and the margin on final passage was greater still (90 to 13).

561 “Corporations Win in Sensational Fight on Floor of Iowa Senate,” DMN, Mar. 30, 1921 (1:4-7 at 4).
566 Compiled Code of Iowa § 3966 at 1191-92 (1919)
567 State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1086-89 (Mar. 16). It is unclear why the press uniformly reported that the vote on final passage was 87 to 17. E.g., “Corporation Bill Passed by House,” DMR, Mar. 17, 1921 (2:3); “Most Important Public Utility Measure in Years Is Passed by the House,” EG, Mar. 17, 1921 (8:1); “Utility Measure Passed by House to Level Rates,” WEC, Mar. 17, 1921
The Great Compromise of 1921

At this point the focus shifted to the Senate, but before that chamber could debate and vote, a seismic shift in opinion in the House erupted in the wake of two sensationalist articles splashed across the front page of the sensationalist Des Moines News on March 28 (“Iowa Legislature Dominated by Corporations and Money Crowd”) and March 29 (“Lobbyists Infest Iowa Legislature”). The first piece, whose screaming generalities and epithets were excerpted above, illustrated “how zealously” the legislature had “guarded the interests of the corporations...and rallied to the slaughter of every bill designed to benefit the public”: a small annual franchise tax on corporate net income; an increase on taxation of insurance companies; requiring mortgage holders to give 30-day notice of their intentions; grade crossings to eliminate danger at railroad crossings; maximum hour and minimum wage; a tonnage tax on coal mine operators to finance schools attended by miners’ children; an occupation tax on railroads; workers’ compensation; and requiring employers to pay for short courses for apprentices. As far as passing measures that corporations wanted, the News mentioned a bill that “almost nullifies” limited hotel keepers’ liability for guests’ losses, before highlighting the public utilities’ success in securing passage of a public utilities court bill after years of “gum-shoeing for the establishment of a public utilities commission.” The result was that “one more dollar sign is chalked up on the legislative record of the 39th Assembly.”

It is difficult to reconstruct why legislators would or could have been ignorant of what the public took to be the newspaper’s revelations, but apparently some had not fully appreciated how they had been hoodwinked by corporate lobbyists. After all, the News itself had failed to cover the Dodd committee’s amendment of the bill or even the House floor vote on March 16, and never reported that

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568“‘Iowa Legislature Dominated by Corporations and Money Crowd,’ DMN, Mar. 28, 1921 (1:1-4 at 4). Especially emblematic of corporate power was the defeat of S.F. 515 (by Brookhart), which imposed a two-cent per ton tax on all coal mined in Iowa in order to support schools attended by miners’ children. Coal companies located their offices outside of the school districts in which they opened coal camps in order to avoid paying taxes for the schools that the miners’ children attended, thus shifting the burden onto local farmers, whose taxes were increased to finance the additional costs. The Senate rejected the bill 16 to 29. State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1491 (Mar. 31); “Coal Barons Win Again in Senate,” DMN, Apr. 1, 1921 (1:2, 10:2). As in 1919, the legislature ultimately appropriated (an inadequate amount of) money to spare the mine owners entirely and alleviate the problem. 1921 Iowa Laws ch. 295, at 332; John Briggs, “The Legislation of the Thirty-Ninth General Assembly of Iowa,” IJHP 19(4):489-666 at 559 (Oct. 1921).

569In the midst of its ludicrously fulsome self-praise in the aftermath of Kendall’s veto
the utility corporation owners had one of their very own in the legislature in the person of House Public Utilities Committee chairman Dodd in addition to identified legislators who were “trained corporation warriors” “completely under the domination of...the utility plutocrats.” Alternatively, perhaps the reaction that the News provoked was not legislators’ enlightenment, but their embarrassment once their constituents had caught wind of the “wonderful ‘Punch and Judy’ show, which the Iowa Legislature ha[d] staged” in which members had been “but puppets in the hands” of corporations seeking privileged legislation. However, since the newspaper itself admitted that lobbyists’ methods had “not changed materially thru many sessions,” and the tactics it described could hardly have surprised anyone, let alone the very legislators who were their objects, the galvanizing force exerted by the disclosure that “[t]he senators liked the affable lobbyist with his vest pocket full of cigars too well to give him any embarrassment” such as even considering a bill to require lobbyists to register and identify their principals and the bills they were monitoring remains puzzling.

In the event, on March 29 Rep. Joseph Anderson, a farmer and former school principal, who had voted consistently against H.F. 623 on March 16, moved that the bill be recalled from the Senate immediately. Easily overcoming the procedural hurdle created by the Speaker’s ruling that a two-thirds majority would be required (since a motion to reconsider had already been laid on the

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570“Utility ‘Steal’ Is Blocked,” DMN, Apr. 4, 1921 (1:3-8 at 7-8).
571“Lobbyists Infest Iowa Legislature,” DMN, Mar. 29, 1921 (1:5-8).
The Great Compromise of 1921

table), the newly enlightened secured 79 Ayes against only 20 Nays including those cast by Dodd, Springer, and Clark.573 That same day, Senator Edward Smith, publisher of the Winterset Madisonian,574 moved that the Senate comply with the House request, but the bill’s backers, acutely aware that returning it to the House was tantamount to killing or amending it to death, indignantly asserted that “the public interest demands that this constructive measure be enacted....”575 Following a “violent debate”576 the “corporation-controlled Senate”577 overwhelmingly rejected the motion by a vote of 11 to 37578—a harbinger of a series of votes on the bill that followed immediately afterwards.

Senator Frank Thompson, a lawyer from Burlington who had been the floor manager of the corporations’ unsuccessful utilities commission bill in 1919,579 apparently did not believe that he was subverting his credibility by declaring H.F. 623 “one of the most equitable bills ever presented to the legislature....”580 Yet, despite the uproar caused by the News in the House, only a “pitiful handful” of senators, as that paper put it, “remained true to the interests of the people”581 in the votes on decisive amendments and final passage. Senator Buser, who charged that the bill was “just what the corporations had been working for years to secure,”582 managed to garner only 12 of 48 votes when he offered an amendment to strike out the entire section conferring the indeterminate franchise.583 Senator

575 “Service Firms Win Battle in State Senate,” DMR, Mar. 30, 1921 (1:4) (Senators Thompson and Frailey).
577 “Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” DMN, Apr. 2, 1921 (1:2-4 at 3).
581 “Corporations Win in Sensational Fight on Floor of Iowa Senate,” DMN, Mar. 30, 1921 (1:4-7 at 4).
582 “Service Firms Win Battle in State Senate,” DMR, Mar. 30, 1921 (1:4).
John Tuck, another farmer, fared even worse in offering an amendment to entitle municipalities to buy any utilities covered by the bill at a fair and reasonable value and to use their condemnation powers: he gained only seven of 43 votes cast—even after denying “the charge that municipal ownership was socialistic.” Yet another farmer, T. C. Cessna, was able to mobilize but 15 of 49 votes for his amendment to condition the granting of indeterminate franchises on approval in a municipal election. Despite opponents’ pointing to the walls lined with lobbyists there to insure passage and warnings that with the indeterminate franchises and guaranteed profits the corporate utilities “would get an eternal hold on the cities,” predictably, the vote on final passage was an overwhelming 39 to 10. The News explained that about a hundred utility corporation workers and lobbyists were at the statehouse and “surrounded every solon who was ticketed in the doubtful column, and prevented opponents of the measure from getting within speaking distance of any wavering statesman.” Thus “the corporations,” in News-speak, “by the most high-handed buccaneering methods ever witnessed in Iowa legislative history, railroaded their pet scheme thru the Senate....”

In an effort to prevent what seemed to be the inexorable passage of H.F. 623 to the governor, on March 30, some elements of the “very large majority” of House members who “after more mature reflection” realized that they had exercised poor judgment in voting for it on March 16 sought to stop the process until the Senate honored the House request to return the bill so that the House could amend it. After several of these procedural moves had been ruled out of order, the movant, Anderson, appealed from the chair’s ruling and asked for a roll...
call, but utility owner and industry friend Dodd “jumped to his feet” and, since a member had begun speaking on another pending bill before Anderson made his appeal, was able to raise the point of order that no appeal could be taken once other business had intervened, which the speaker ruled was well taken, thus blocking the majority’s bid to overrule the speaker.

House opponents of the public utilities bill made a “frantic” effort to pull out all the procedural stops in their drive to defeat H.F. 623. On April 1 four members (all of whom had voted against the Dodd cigarette sales bill) offered a resolution to request Governor Kendall to return the bill without his signature because it made public utility corporations’ existing franchises indeterminate or in effect perpetual without giving the people the opportunity to vote on them, whereas previously they were both time limited and subject to popular votes. The resolution therefore proposed that the bill be amended so as not to apply to existing franchises, but only to those granted by popular votes. If, on the contrary, the Springer bill became law, the municipalities and the people would be denied the right of local self-government. However, after overcoming a motion to table the motion to consider the resolution by the large majority of 77 to 16, the anti-corporate forces ran into their own insuperable procedural problems: the 68 to 38 vote in favor of suspending the rule requiring that the resolution first be printed in the Journal so that a vote could be taken on the resolution then and there fell short of the required two-thirds majority. The
The Great Compromise of 1921

vote on the resolution would, therefore, be postponed until the next day.

In its discussion of the public utilities bill on April 1 the Executive Committee of the Des Moines Chamber of Commerce assured itself both that the indeterminate-term franchise was quite different than the popular understanding of it and that public rights were left intact. Apparently used to instant access, the committee directed the Chamber’s general secretary “to call personally upon the Governor this afternoon and advise him that the Chamber favored the measure....” Regardless of whether Kendall granted the organizational personification of Iowa’s corporate capital an immediate audience, that same morning Kendall did meet with a delegation of public utility leaders, headed by William Dows, “public utilities boss and millionaire of Cedar Rapids” (and himself a former two-term House member), who “stormed the governor’s office” to persuade him to sign the bill. Among the avalanche of letters and telegrams he had received were resolutions from the city council in Waterloo and Cedar Falls urging a veto, while Cedar Rapids delegates met with him seeking a signature.

To help him decide whether to approve or veto H.F. 623, on the afternoon of April 1 Kendall held a special hearing in his state house office, against whose west wall he was backed from two until well after five o’clock. The standing-room only public presence was in large part composed of utility corporation lobbyists and representatives “in full retinue,” including Mayor Julius F. Rall...
of Cedar Rapids—who in 1896 as justice of the peace had presided over the first proceeding under the new anti-cigarette law—\textsuperscript{604} in his dual capacity as leader of a delegation selected by the Cedar Rapids Chamber of Commerce to support the bill and as head of the Iowa League of Municipalities.\textsuperscript{605} Rall, according to the \textit{News}, in endorsing the bill was acting as mayor under Dows’s domination subject to the threat that otherwise his utility companies would not extend service in the city.\textsuperscript{606} Similarly, the \textit{News} accused Rall of having done “the bidding of the utility barons” by having “jammed thru a resolution indorsing the bill” at a meeting of a “‘packed’ delegation” of municipal officials right before the hearing.\textsuperscript{607} Some city officials denounced Rall’s “‘caucus...as a joke.’”\textsuperscript{608} Nor was Rall alone: the \textit{News} reported that all over the state city officials, under the utilities’ domination, “‘felt the edge of the corporate ax, and were hastily dispatched to Des Moines to bolster up the utility fighting forces.’”\textsuperscript{609}

Also in attendance was a small delegation of opponents led by the City of Des Moines’ special corporation counsel H. W. Byers—as attorney general a dozen years earlier he had strongly supported the anti-cigarette law—\textsuperscript{610} who for many years had been an “active opponent of corporations and public utilities.”\textsuperscript{611} Byers’ main contention was that the bill’s provision for creating a public utilities court composed of district court judges was unconstitutional because it would confer a second office on them. He also declared to Kendall that rates would be raised as soon as his excellency signed the bill because the companies would file with the new utilities court financial statements and appraisals of the value of their property showing a deficit and lack of adequate return on investment, leaving the judges with no choice but to raise rates, inasmuch as the judges would lack the appropriate mechanism to secure an accurate appraisal of these two

\textsuperscript{604}See above ch. 11.

\textsuperscript{605}“Carry Utilities Fight to Kendall: State House Is Stormed by Legal Lights,” \textit{DMR}, Apr. 2, 1921 (1:8).

\textsuperscript{606}“Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” \textit{DMN}, Apr. 2, 1921 (1:2-8 at 5:2); “Utility ‘Steal’ Blocked,” \textit{DMN}, Apr. 4, 1921 (1:3-8, at 8:1-3 at 2).

\textsuperscript{607}“Utility ‘Steal’ Is Blocked,” \textit{DMN}, Apr. 4, 1921 (1:3-8, at 8:1-3 at 2).

\textsuperscript{608}“Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” \textit{DMN}, Apr. 2, 1921 (1:2-4, at 5:2).

\textsuperscript{609}“Utility ‘Steal’ Is Blocked,” \textit{DMN}, Apr. 4, 1921 (1:3-8, at 8:1-3 at 2).

\textsuperscript{610}See above ch. 13.

\textsuperscript{611}“Carry Utilities Fight to Kendall: State House Is Stormed by Legal Lights,” \textit{DMR}, Apr. 2, 1921 (1:8). The mayor of Oskaloosa and city of attorney of Mason City were among the small number of opponents present. \textit{Id.} at 2:2.
variables. The precise manner in which the Springer bill would lead to higher rates against which the people would be lawfully powerless to protect themselves was straightforward: all that utility corporations with franchises having one to 25 years left to run—that is, 90 percent of utilities in Iowa—had to do was file a waiver under section 9 with the city clerk extinguishing their contracts and then request a rate increase from the city council; on being denied the increase, the company could appeal to the Public Service Court “and get it.” By providing for an “adequate” rather than a “just and fair” rate for the companies, Byers argued, this innovation in Iowa utilities legislation created “the joker by which the corporations expect to crush the people.” Before finishing his presentation, Byers sought to demonstrate the utilities’ real intent by directly asking Robert Healy, one of the corporation attorneys, what the bill’s purpose was: “Is it not true that the bill is designed to increase utility rates?” After considerable evasion, Healy finally stated that its sole object was to “decent service...at a reasonable profit.” The essence of Byers’ critique was that the benefits conferred on the companies was “out of all proportion” to “any return to the public....”

Among the “many legal lights of statewide renown” presenting arguments on behalf of the utility corporations was William Chamberlain, who was an attorney, director, and shareholder in United Lights and Railways of Cedar Rapids and other firms. Called Dows “henchman” by the News, Chamberlain had been widely regarded as the author of the Springer bill, and, unsurprisingly, “the ace of the corporation men...displayed a marvelous knowledge of the bill.” He took charge of presenting the corporations’ position after Healy’s arguments—which culminated in the implausible claim that referring all cases to the Public Service Court would “insure peace between utilities and the public” by avoiding “all litigation”—had been “torn to shreds by Byers’ superior questioning....”

613“Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” DMN, Apr. 2, 1921 (1:2-4 at 4).
615“Carry Utilities Fight to Kendall: State House Is Stormed by Legal Lights,” Des Moines Register, Apr. 2, 1921 (1:8, at 2:2).
616“Public Utilities Trying to Put Over New ‘Steal,’” DMN, Apr. 6, 1921 (1:3-8).
Chamberlain’s central claim was that corporate utilities would be unable to obtain bank credit if the bill did not become law because banks were not willing to lend money for maintenance or improvements to short-term franchisees. “‘In the case of my own company,’” Chamberlain warned the governor, “‘[u]nless this bill is signed by your honor there will be no possibility of extending light and power service to farms not now served and there will be a great danger of utter inability of the United to supply the minimum amount of light and power now required.’”619 After Chamberlain issued his plea on behalf of “the poor farmers of Iowa,” Byers asked him point blank whether the mere filing of a waiver created an indeterminate franchise. With Chamberlain’s “‘Well, yes’” admission the hearing ended.620

Following the hearing the governor announced that he would take the full three days (until Monday) allotted to him to make the decision (after which the bill automatically became law if he failed to sign or veto it) in order to study the bill, though the News reported the “common belief” that he would sign it.621 Moreover, the press reported that after being advised that a majority (68 members) of the House had opposed the bill, at least with respect to the indeterminate franchise, “he remarked that the wishes of the house would be regarded”—at least to the extent of returning the bill for correction or amendment, if the chamber could agree on the aforementioned resolution.622

On April 1, not long after the vote on the resolution to memorialize Kendall was postponed, numerous House members found on their desks sealed invitations from two of their farmer-colleagues, Edward Knickerbocker and Fred Ingersoll, to a banquet at the Fort Des Moines Hotel that evening.623 Once the attendees arrived at the feast, “they found the guests were mostly farmer representatives suspected” of opposing H. F. 623.624 (Farmers made up almost half of the House members.)625 After “a most sumptuous repast” Knickerbocker—representing...
The Great Compromise of 1921

Linn County, whose county seat is Cedar Rapids—announced that his “good friend” Dows happened to be in town from whom he was sure his colleagues would gladly hear some remarks. Of all possible topics the Cedar Rapids utility magnate proceeded to enlighten the farmer-lawmakers on the importance of electricity for farmers and how the Springer bill would facilitate rural utility connections. On finishing, Dows handed the baton off to Robert Healy, the lawyer who had spoken on behalf of the corporations at the Kendall hearing that afternoon, who, after discoursing on the same subject, introduced his friend, Charles McNider, president of the First National Bank of Mason City, who at great length also conveyed his appreciation for the bill. The point of focusing on farmer-legislators was transparent: the punch-line of the speeches was that as soon as the bill was passed, “the utilities could get plenty of money to extend their service lines to the rural districts.”

On Saturday morning, April 2, when the House took up the Edson resolution to request that the governor return the bill, Representative Willis Criswell, a farmer, in order to embarrass the utility corporations and some of his colleagues, let the cat out of the bag about the banquet designed to influence the outcome of the impending vote on the resolution. In the event, Representative Willis Edson, a former county attorney and mayor of Storm Lake, one of the four members who the day before had unsuccessfully sought to suspend the rules to push through the resolution calling on Kendall to return the bill, called up the resolution, which ran into further procedural barriers (including one raised by Clark), until finally the Speaker ruled that it was out of order on the grounds that if a single house’s resolution sufficed to request a recall, then a majority of the Senate could hold up every measure passed. (That same day Kendall asked the

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and those combining farming with other occupations ranging from grain dealer to banker and lawyer accounted for somewhat more than half of the House. *Handbook Iowa Legislature: Thirty-Ninth General Assembly* (W. Ramsay comp. n.d. [1921]).


628 “Doings Under the State House Dome,” *IH* 66(14):766, 768 (Apr. 7, 1921). Four days later, when the House was debating H.F. 871, the sifting committee’s substitute for H.F. 623, Criswell tried to “tell a little inside story” about the Dows dinner for the House members on April 1, but was prevented by a point of order raised by Clark, ever the agent of the implicated Cedar Rapids utilities tycoon. “Substitute Bill on Utilities Loses,” *DMR*, Apr. 7, 1921 (4:2).


630 *State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly*
The Great Compromise of 1921

attorney general for an opinion as to whether one chamber could recall a bill from the governor, and by the start of that day’s afternoon session Dodd successfully moved to print in the Journal Attorney General Ben Gibson’s opinion that the house in which a bill originated could not recall it from the governor without the other house’s consent.631 Unable to mobilize all those who now opposed H.F. 623 to overturn the Speaker’s ruling, Edson’s appeal was soundly defeated by a vote of 66 to 25.632 A member of that majority then moved that it was “the sense” of the House that H.F. 623 “ought not to become a law unless the provisions for the indeterminate franchise be eliminated and that the governor be memorialized to that effect....”633 Opponents found no better argument than that asking to recall the bill was tantamount to a “confession that they were negligent in passing it....”634 Obviously alluding to the exposes in the News, Clark joked that some of his colleagues “had been having bad dreams which...were unjustified, and probably induced by sleeping with newspapers under their pillows.” After the Speaker had ruled that this informal approach was the proper procedure,635 it narrowly survived a motion—made by Ingersoll, one of the inviters to the previous evening’s utilities feast—to table by a vote of 47 to 50 (Dodd, Clark, and Springer voting Aye), but following more procedural wrangling, including a failed attempt to refer the sense of the House motion to the sifting committee, it was defeated 49 to 52 because more of those who had not voted on the tabling motion voted Nay than Yea and two more of those who had voted against tabling switched sides than of those who had voted to table.636

The defeat of the resolution, as far as the News was concerned, demonstrated that Dows had spent his money with precisely the desired effect of undoing the advantage that the public had gained at the hearing and of depriving Kendall “of

1786, 1788 (Apr. 2); “Governor Vetoes Springer Public Utility Measure,” WEC, Apr. 2, 1921 (1:8).


635 “Governor Vetoes Public Utility Bill,” WEC, Apr. 2, 1921 (1:8). According to the account in the News, Clark had actually named the News as the paper under the pillows. “Utilities Find Solons Pliable,” DMN, Apr. 2, 1921 (1:8).

The Great Compromise of 1921

all moral support” against the bill. In its inimitable persiflage, the paper denounced the “solons” who had “sold the people of Iowa for a bowl of soup and a chicken wing,” allowing themselves to be “swayed into complaisance by a sumptuous feed and big fat cigars purchased by plotting plutocrats.” Dows, Healy, and McNider had “coaxed the pliable solons into a state of semi-slumber,” which “plastic ‘representatives’ proved traitor to the public and exhibited all the symptoms of a utility ‘hangover.’”

In the event, the governor did not need the full three days to make his decision. Later on Saturday he exercised his veto for the first and last time during the session, prompting the United Press to call the message “the great event of the present legislature.” At 2:45 in the afternoon the House, to which the governor had returned the bill as the originating chamber, broke into cheers when the Chief Clerk read the governor’s reasons for the veto. The governor’s non-approval of the bill—closely tracking Byers’ analysis—was based not only on the constitutional violation created by conferring an additional “office” on judges but also on the bill’s “complete reversal” of state utilities policy: “It deprives the people and their representatives on city councils and boards of supervisors of every vestige of power to protect the interest of the public in its streets and highways” by virtue of conferring on the already established utilities “a perpetual right to enjoy the benefits and privileges secured to them under contract franchises granted by a vote of the people for definite terms.” The bill’s mechanism for terminating such indeterminate franchises was “wholly inadequate” because the only grounds open to the new court for cancelling them was “‘non-user and when public necessity requires,’” but the former would only rarely occur and it was difficult to imagine a situation in which “‘public necessity would require’ the termination of a franchise no matter how inefficiently the corporation enjoying it was operating.”

The veto plunged the News into a veritable orgy of bathetic and bombastic

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640*State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly* 1821-22 (Apr. 2). In contrast, the Register’s editorial on the veto criticized the friends of a public utilities commission for having neglected other states’ models and having set up a system under which judges would be drawn away from their main duties. “Gov’ Kendall’s Veto,” *DMR*, Apr. 4, 1921 (6:2). For excerpts from editorials around the state with varying views, see “Kendall’s Veto,” *DMR*, Apr. 6, 1921 (6:4).
The Great Compromise of 1921

self-adulation stressing above all its own role and victory in thwarting “the greatest campaign of loot ever attempted or ever conceived in Iowa” by “smash[ing] with all its might at the monster” and “crush[ing] the tentacles of the utility octopus already grasping at the throat of an unsuspecting public” and thus insuring that the utility “plutocrats” went “down to the most smashing defeat in history....” Stripped of the News’s pomposity, the credit that the paper deserved for relentlessly riveting the legislators’ and the public’s attention on and making transparent the Springer bill’s “vicious provisions” was appreciatively expressed by Byers—in the News.641

Governor Kendall’s effective protest against a persistently and intensively lobbied corporate capitalist demand suggested, with a view to what his position on selling cigarettes might be, that he was by no means big business’s rubber stamp. Indeed, the veto immediately triggered prophecies by “political dopesters” of its effects on Kendall’s re-election chances in 1922, which made it clear that he could not have been unaware that he was forfeiting “some of his staunchest oldtime political support,” including that of some of “the most powerful wielders of power,” who had “undoubtedly broken” with him over the veto; chief among them was Colonel Dows of Cedar Rapids, who had been one of the bill’s principal behind-the-scenes advocates. To be sure, in addition to principle, it was unclear whether Kendall had weighed these blows against the “many thousand new votes” that few doubted his veto would secure for him. In any event, a potential rival for the Republican nomination had already emerged.642 Senator Milton Pitt—who had thunderously and dichotomously framed the issue on the Senate floor as “‘Either pass the bill or have public ownership’”643—had gained the backing of some of the party “biggest political chiefs, while the bill’s enraged senatorial supporters declared that Pitt “would surely be put forward as a candidate,” even though as a farmer he had burned his bridges to the Farm Bureau and many farmers over the assistance he had rendered the public utility corporations.644

The Register viewed the governor’s veto as a “substantial defeat” of the bill, considering it “extremely improbable” that both chambers could muster the two-thirds majority needed to override it.645 Instead, on April 5 Dodd’s House sifting

641“Utility ‘Steal’ Is Blocked,” DMN, Apr. 4, 1921 (1:3-8).
642“Speculation Rife over Kendall Veto,” DMR, Apr. 4, 1921 (1:5).
643“Service Firms Win Battle in State Senate,” DMR, Mar. 30, 1921 (1:4).
644“Speculation Rife over Kendall Veto,” DMR, Apr. 4, 1921 (1:5).
645“Utilities Bill Is Vetoed by Gov. Kendall,” DMR, Apr. 3, 1921 (sect. 2, 1:8). The huge majorities in the original House and Senate votes on the Springer bill had made it clear that a veto could easily be overridden, but once a large majority in the House repented

1296
The Great Compromise of 1921

committee—which the News called “apparently well ‘packed’ with corporation friends” without knowing that Dodd was himself a utility capitalist—at the behest of “utility magnates and lawyers,” fashioned and filed a new bill, H.F. 871 which was similar to the Springer bill but omitted the provision of the indeterminate franchise; although it dropped the name, Court of Public Service, it nevertheless retained the controversial procedure under which the chief justice of the Supreme Court assigned three district court judges—none of whom was permitted to have been elected in the district in which the dispute arose—to hear appeals of utility actions taken by city councils. This “sugar-coated” version of the Springer bill, also drafted by Chamberlain, was, from the News’s perspective, just as “pernicious” and “vicious,” and still designed to “enable the predatory utilities to crawl out from under their franchise contracts.”

The next day the new bill was immediately attacked on the House floor with an amendment requiring utilities to file with local rate-setting governments information such as a property statement and operating costs to provide them with a basis for setting rates. Dodd (whom the News singled out as one of “the friends of the corporations”) objected to the amendment on the grounds of the expense it would cause utilities. Clark joined Dodd in taking the lead in speaking for the bill, but the anti-corporate majority, apparently agreeing that the utilities were trying to “‘ram the bill down members’ throats at the last minute,’” held in the House, 59 voting to kill the bill (by striking out the enacting clause) against 35 die-hard industry followers. The News luxuriated of having let the corporate wool be pulled over its eyes, it became clear that a veto would not only be sustained, but even welcomed, at least in that chamber.

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646 “Public Utilities Trying to Put Over New ‘Steal,’” DMN, Apr. 6, 1921 (1:3-8).
649 H.F. No. 871, §8 (Apr. 5, 1921, by Sifting Committee). The Register misleadingly reported that the reference to the Public Service Court had been omitted. “Substitute Bill on Utilities Loses,” DMR, Apr. 7, 1921 (4:2).
650 “Public Utilities Trying to Put Over New ‘Steal,’” DMN, Apr. 6, 1921 (1:3-8).
in having “wrecked the corporation juggernaut” by virtue of having warned the House of the “sinister contents” that the “money barons” had “camouflaged” in the new bill. The neo-Lincolinian lesson to be learned from this “slaughter[ ]” was that the utility corporations “can fool part of the Iowa House...all the time—and the whole House part of the time—but they cannot hoodwink the whole House all the time.”

In editorializing against “the complete domination of the state’s law-making body by the corporations” “as the gravest threat to the interests of the producers and consumers of Iowa,” the farm weekly Iowa Homestead adduced the “boldness and monumental nerve of the utility magnates” as the prime example of “unscrupulousness” in action: they asked the legislature to pass a bill that would have given them at the very least “a cool 20 millions of dollars of franchise rights belonging to the people for which the utilities were to give not one penny in return”—a sum “equal to the entire amount that will be raised by direct taxation for state purposes in the next two years....”

The generally progressive orientation of those opposing repeal of the cigarette sales ban can be gauged by the extent of their opposition to the pro-corporate public utilities bill. Of the only 18 representatives who on March 16 had supported the amendment to delete the conferral of indeterminate franchises on utility companies, two weeks later 13 voted against and only four for the Dodd bill; similarly, of the only 13 representatives who had voted against the utilities bill on its final passage, seven voted against and only three for the Dodd bill. Moreover, only three of the 20 representatives (including Dodd and Clark) who voted on March 29 against requesting that the Senate return to the House the utility bill that the House had passed but that a majority then regretted having passed (after the expose in the Des Moines News of the bill’s real import as well as of the utilities’ tawdry lobbying methods) voted the next day against H.F. 678. Finally, 34 of the 41 representatives who had voted against final passage of H.F. 678 also voted against the substitute pro-corporate utilities bill a week later, while only seven of 35 who voted for the latter also voted against the

2009-10 (Apr. 6).


The Great Compromise of 1921

Likewise, of the 12 senators—whom the Des Moines News singled out for praise as having “held out for the rights of the people”—who on March 29 voted for the amendment to strike out the indeterminate franchise from the bill, nine voted on April 4 and April 6 against final passage of the Dodd bill; of the 11 senators who had voted to agree to the House request to return the Springer bill before acting on it because a large House majority had repented of passage seven voted against the Dodd bill; of the 15 senators who voted for an amendment requiring approval through an election for a franchise to be declared indeterminate 11 voted against the Dodd bill; and, finally, of the 10 senators who voted against final passage of the first utilities bill, seven voted against the Dodd bill’s final passage a week later.

The battle over the utilities bill differed in numerous striking and fundamental ways from that over repealing the universal ban on cigarette sales, which also go a long way toward explaining why opponents prevailed in the former but were defeated in the latter. To begin with, enemies of the utility companies succeeded in constructing their campaign as pitting greedy corporate capital—personified in Dows and other named tycoons—against the people, who not only individually as consumers faced being fleeced through higher rates, but also stood in danger of being collectively dispossessed of their statutorily anchored power to veto franchise contracts entered into by city councils—an impressive element of non-workplace-based, community-centered economic democracy. In contrast, in spite of the WCTU’s efforts to focus attention on the eastern cigarette oligopolists’ conspiracy to increase their profits at the expense of Iowa children’s health and well-being, the anti-cigarette movement failed to secure sufficiently widespread public acceptance of this way of framing the underlying economic antagonism. (Ironically, the anti-corporate utility groups appear not to have availed themselves at all of the propaganda value of the fact that by this time eastern gas and electric

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661 “Corporations Win in Sensational Fight on Floor of Iowa Senate,” DMN, Mar. 30, 1921 (1:4-7).


1299
corporations had gained control of numerous utility systems in Iowa.) Instead, the successors to the Tobacco Trust, if they did not vanish altogether behind the thousands of front-line local retailers and wholesalers whose illegal shenanigans were much more prominent, appeared to all too many legislators as merely passively responding to the market demand of adult men, who were being deprived of the freedom to consume.

Whereas the national cigarette companies’ role in repealing the sales ban was covert and only briefly and speculatively alluded to by opponents, the utility corporations, while not loudly boasting that their lawyers had drafted the Springer bill, hardly made a secret of their central involvement. They were manifestly not in the least embarrassed by their management of the April 1 banquet, which was tantamount to a bribe on public display to half the members of the House of Representatives. Such tawdry shenanigans only made the firms, already under attack for tricking legislators into taking back citizens’ legal rights to second-guess their own city councils’ franchise agreements, even more inviting political targets. The cigarette industry was careful never to let itself be associated with any operations even remotely resembling such machinations.

In part as a result of the wide disparity in visibility of the capitalist actors in both legislative campaigns, general press coverage, but especially critical and even investigative reporting, of the Springer bill was significantly deeper than that of the Dodd bill. Although even the state’s leading paper, the Des Moines Register, paid more attention to the utilities debate, the decisive consideration was the editorial attitude of the Des Moines News (and of its owner, the Scripps chain), which programmatically and sensationally attacked corporate greed in general and the Iowa utilities in particular, but—presumptively because of Edward Scripps’ own tobacco addiction—virtually ignored the proceedings surrounding repeal of the cigarette sales ban. Its only contribution was to add its indistinguishably conventional rejection of adult prohibition to the chorus of its avowed capitalist enemies—namely, the editors and publishers whom the cigarette oligopolists had primed with lures of advertising as soon as the ban on the product was lifted. Whereas the rambunctiousness of the News’s coverage of the utilities bill, of which even its competitors were forced, directly or indirectly, to take note, was designed to mobilize further reaches of the population in the legislative process, its staid reporting on the cigarette bill would hardly have inspired anyone to take further interest, let alone participate, in the debate.

This unmistakable divide also and especially left its mark on the governor’s hearings, which took place on two successive Friday afternoons near the end of the session. The first, the utilities bill hearing, was heavily attended, boisterous,

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663 See the discussion above of the Dodds’ sales and Horace Dodd’s employment.
The Great Compromise of 1921

and, in its publicness, verging on the circus-like. In contrast, the relatively scanty and subdued coverage of the Dodd bill hearing—whose outcome was widely awaited with great interest—failed even to make absolutely clear that it had been open to the public, let alone to convey a solid sense of the substance of the parties’ arguments. Emblematic of the gulf separating the two proceedings was the (apparent) absence at the cigarette hearing of the kind of feisty interrogation to which Byers had subjected the utility corporations’ lawyers. The reason was straightforward: no representative of the oligopolies behind the nationwide repeal movement was present at the hearing for Hammond, Hutchinson, or Smith to examine. Indeed, other than Dodd himself, the only advocate of H.F. 678 to speak was Miles, who denied that the American Legion had even lobbied, let alone pushed, for the filing of the bill—a claim that Hammond accepted. With no agent of economic interest in sight to acknowledge responsibility for having launched the repeal movement in Iowa, the inherent dynamic and blatantly open conflict and tension of the utility hearing lacked any basis at the cigarette hearing. To that extent TMA’s strategy of ensuring that its cigarette-member bosses kept a low (or, better yet, no) profile in state legislative battles proved to be prudent.

Finally, the fact that virtually everyone in Iowa (except utility shareholders) would perceive him- or herself as benefiting from preventing the corporations from raising rates created a considerably larger and broader base for the struggle against the Springer bill, which, moreover, did not lend itself to being distorted as largely busybodies’ moralistic interference with adults’ freedom to make their own consumption choices. Similarly, this cross-class anti-corporate utility movement did not suffer from the liability that, despite the fact that numerous WCTU locals, parent-teacher organizations, and churches composing the anti-cigarette campaign were located in the larger cities, the press conveyed the impression that if the antis possessed any grass-roots support, it was to be found in the smaller towns, where the law might still be enforced. No such urban-rural split fatally sapped the strength of the fight against the utility barons.
PART III

THE CONTEXT OF STATE ANTI-CIGARETTE AND ANTI-SMOKING LEGISLATIVE TRENDS IN THE 1910S AND 1920S BEFORE, DURING, AND AFTER REPEAL IN IOWA

The battle over Lady Nicotine is on in earnest. Thirty-six states have anti-cigarette bills before their legislatures.1

The enactment and repeal of laws forbidding the sale and smoking of cigarettes goes on steadily year by year.2

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1“36 States to Consider Bills Against Fags,” OS-E, Jan. 3, 1921 (1:2).
Repeal, Reinforcement, the Last New Laws, and the First Public Smoking Bans

The cigaret is a luxury and therefore a proper object to tax. Its use by minors especially is harmful and it is therefore proper to discourage such use by legislation. But the evil is not of sufficient consequence to warrant prohibition of sale to adults capable of deciding for themselves whether their welfare requires abstinence from the use of tobacco in any form.¹

With forty-two State legislatures in session this year the sum total of the results of the onslaught on tobacco is the passage of a cigarette-prohibiting law in the Mormon State Utah, with a population of 449,446, as against the repeal of the old anti-cigarette laws in...Arkansas, Iowa and Tennessee, with an aggregate population of 6,492,084.²

Anti-smoking organizations’ initial reaction to Iowa’s repeal of prohibition and the advent of licensing was muted and resigned. After expressing its regret, the legislative committee of the Parent Teacher’s Association of Des Moines urged an active campaign against cigarettes and made it the group’s business that the new law be enforced.³ The mini-epitaph for the country’s longest-lived statewide universal ban on cigarette sales in the Iowa WCTU’s report to the anti-narcotics department of the National WCTU, which was presented at the latter’s annual convention in August, was almost jaunty: “Iowa lost its splendid anti-cigaretelaw and a license law was enacted in its stead. The agitation regarding the repeal of this law was considered in almost every community and splendid interest for a greater safeguard to the young people resulted.” In the same breath and with almost equal weight the report noted that its local unit in Fort Dodge had distributed a hundred copies of “Nicotine” to teachers.⁴ Two months later at its own annual convention, the Iowa WCTU merely mentioned without commentary the defeat of the (Moen) bill that it had sponsored to apply the injunction and abatement procedures to the anti-cigarette law, which, in turn, had been repealed

¹“Cigaret Legislation,” CREG, Aug. 29, 1921 (4:2) (reprinted from Dubuque Telegraph-Herald (edit.)).
and replaced by a license measure. Not until its 1922 convention did the Iowa WCTU appear to take full cognizance of the consequences of repeal. Only then did it adopt a resolution “deploring the license policy in dealing with such an evil as the cigarette” and giving expression to the fact that “we are humiliated by the boast of our State that money in such amount is gained by the licenses to sell cigarettes.” Then reverting to form, it raised a demand for “a prohibitive law with full enforcement for this evil of young people;” thus suggesting that restoration of the universal sales ban for adults was no longer on its agenda. More far-reaching was the second part of the resolution, which urged, on account of the injurious effects of tobacco, “creation of sentiment to bring Iowa to the place attained by some other states which prohibit smoking in public places or where food is exposed for sale.” The Iowa WCTU was presumably alluding primarily to statutes enacted in neighboring Nebraska in 1919 and in 1921 in Utah and North Dakota.

No supposition that all advocates of the retreat to the pre-general prohibition, minors-only approach were shills for the cigarette companies and local sellers has been documented. Some may have been concerned about adolescent smoking, but many were either (knowing or manipulated) pro-capitalist stalking horses or, like the American Legion, feigning concern for minors while in reality self-interestedly seeking unimpeded access to cigarettes. Moreover, this last point underscored the self-contradictory underpinnings of the cigarette industry’s and other repealers’ whole strategy: why were they willing to devote so much political capital—after all, the American Legion was said to have suffered the defeat of its more highly prioritized boxing bill because some legislators felt that they had to throw a bone to the Legion’s nemesis, the WCTU, after having passed the Dodd bill—to eliminating the allegedly non-existent problem of a dead-letter law?

Much more empirically plausible than such internally inconsistent legislative lobbying behavior by savvy political operatives is the conclusion that prohibition had acted as a damper on sales in Iowa both directly in terms of enforcement and indirectly by depriving cigarettes of the full legitimacy of a lawful and freely available consumer commodity. With sales being catapulted to previously

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3Woman’s Christian Temperance Union of Iowa, Forty-Eighth Annual Convention, held at Ames, Iowa, October 18-21, 1921, at 89.
4Woman’s Christian Temperance Union of Iowa, Forty-Ninth Annual Convention, held at Oskaloosa, Iowa, October 24-27, 1922, at 73.
5Woman’s Christian Temperance Union of Iowa, Forty-Ninth Annual Convention, held at Oskaloosa, Iowa, October 24-27, 1922, at 73.
6See below this ch.
7See above ch. 15.
unimagined heights in the postwar world by the new brands (Camel, Lucky Strike, and Chesterfield), the Tobacco Trust successor-oligopolists were determined to kill off the remaining prohibitory statutes in Iowa, North Dakota, and Kansas (and the newly enacted one in Utah) not only in order to increase sales in those relatively small states, but to crush in its incipiency what appeared to have the makings of a worrisome national effort by the WCTU to “Buck Money Bags” by attacking the entire tobacco industry. As an editorial in the *New York Herald*—carefully archived as Article 17 by the American Tobacco Company in a file bearing the title, “Tobacco Smoking Pro & Con Apr. 1911-Dec. 1930”—noted shortly before the Iowa legislature passed the Dodd bill: “There was a time when the news that Utah had put the ban on the cigarette would have brought smiles of superiority and commiseration to the faces of New Yorkers. Those times are past. Acts against liquor such as Utah’s against My Lady Nicotine gave the country its first suggestion of nationwide prohibition.”

Indeed, in Utah (in 1921 the last state to enact a general ban on cigarette sales), when the Tobacco Merchants Association in late 1922 sounded out dealers on the prospects for repeal, most opined that the influence of the Mormon church was for the time being too great and “the citizens of Utah generally have not become disgusted enough with the existing Cigarette Prohibition...to secure its repeal.” Charles Dushkind, TMA’s managing director, therefore concluded that “while the trade in Kansas and North Dakota is almost unanimous in recommending that a movement looking to the repeal of the existing statutes be inaugurated, the Utah people hold out no encouragement in that direction.”

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11Robert Hughes, “39th Assembly Was Good to Legion,” DMN, Apr. 18, 1921 (4:3-4).


141921 Laws of Utah ch. 145.

15Tobacco Merchants Association of the U.S., Excerpts from Letters Received from the Trade (n.d. [ca. Dec. 1922]), Bates No. 50187678/84-5.

16Charles Dushkind, Tobacco Merchants Association of the U.S., “Memorandum in re: - Existing Anti-Cigarette Statutes in Kansas, North Dakota, and Utah,” at 1 (Dec. 4, 1922), Bates No. 501870676. All the letters that Dushkind purportedly received from dealers in North Dakota did advocate repeal. “Excerpts from Letters Received from the
be sure, “contrary opinions” existed even in the Kansas trade. In unvarnished terms the Mercantile Company in McPherson informed Dushkind: “‘We believe that you should keep your hands off the proposition and allow the people of this state to handle the matter as they see fit.’” A cigar company in Atchinson wrote that “‘[f]rom a personal point of view, we are entirely satisfied as it is.’” And most relevant to the question of the viability of the prohibitory enforcement, the Iola Wholesale Grocery Company, in addition to believing that TMA would have very little luck in getting the law repealed in a state that was so radical along prohibitionist lines, mentioned that it would feel more like favoring repeal if there were no price cutting in such commodities. But as things stood, “‘we are almost glad that we cannot sell them in this territory.’”¹⁷

By 1921, the era of general sales bans was in decline. If its high point had been reached in 1909, when 11 states had such statewide laws in force, by 1920 the universe had dwindled to only five (in Iowa, Tennessee, Arkansas, Kansas, and North Dakota), the first three of those being repealed during the 1921 legislative sessions.¹⁸ Despite this unmistakable trend, the World War I era witnessed an efflorescence of extraordinary total and partial public smoking bans, and even as late as 1921 repeal did not appear to be irreversible: not only did Utah and Idaho enact new ban laws in 1921, but anti-cigarette forces defeated American Legion-proposed repeal legislation in Kansas and North Dakota, which, in addition, strengthened their statutes. However, unlike the situation in Iowa, where the American Legion’s contribution to the repeal movement was subterranean,¹⁹ its campaigns in Kansas and North Dakota (and Idaho) were highly visible, public, and contentious. The Legion’s role was also anticipated and known to have been shaped by forces outside of it. As the press disclosed in the very first days of 1921, before state legislatures had convened and any anti-cigarette bills had been introduced: “The pro-tobacco army is trying to enlist members of the American Legion who ‘rolled their own’ over there.”²⁰

Reflecting on this constellation of legislative passage and repeal after the elections in November 1922, as the convening of state legislatures was rapidly approaching, Dushkind, in a “Special to Cigarette Manufacturers,” expressed his belief that the three aforementioned repeals, “after repeated efforts, especially at a time when anti-cigarette agitation was most intensive, should operate as a

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¹⁷Tobacco Merchants Association of the U.S., Excerpts from Letters Received from the Trade at 4 (n.d. [1922]), Bates No. 501870678/81.
¹⁸See above Table 2.
¹⁹See above ch. 15.
²⁰“36 States to Consider Bills Against Fags,” OS-E, Jan. 3, 1921 (1:2).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

stimulant to renewed activities looking to the repeal of the obnoxious statutes in the two old States [Kansas and North Dakota] still in the prohibition column, as well as in Utah....” He therefore suggested “freely” distributing industry propaganda “among legislators, newspapers, bank presidents, and other leading citizens in the three States,” where, he opined, it was “altogether probable that most of the papers...will warmly support any movement for the repeal of these statutes and for the enactment of laws providing for reasonable license fees and proper restrictions as to sales to minors under 18, instead.”

That the oligopolists’ legislative influence was limited emerged from the circumstance that, despite Dushkind’s admonition two weeks later that “due care must be taken that the...Iowa Cigarette Tax Law should not be followed in other States,” in fact Utah, North Dakota, and Kansas did follow Iowa’s model cigarette tax in passing their sales ban repeals in 1923, 1925, and 1927, respectively.

This chapter first presents an account of the repeals in Tennessee, Arkansas, and Nebraska. It then examines the successful resistance to American Legion-led repeal movements in North Dakota and Kansas as well as the ultimate repeals of the last surviving cigarette sales bans in those states later in the 1920s. Treatment of such prohibitions concludes with studies of the last two enacted, in Idaho and Utah in 1921, which were repealed in 1921 and 1923, respectively. The chapter ends with detailed analyses of bills and laws in seven states absolutely banning cigarette smoking or partially banning tobacco smoking in specified enclosed public places.

Repeal

While the argument was in progress over the bill to repeal the anti-cigarette law in the house Thursday, Mr. Tucker of Unicoi said that if a bill were introduced incorporating the Ten Commandments some representative would get up and declare that they couldn’t be enforced.

That Iowa, despite repeal of its universal ban on cigarette sales, retained

21Charles Dushkind, Tobacco Merchants Association of the U.S., “Special to Cigarette Manufacturers” (Nov. 18, 1922), Bates No. 501870686. On the propaganda materials, see below ch. 17.

22Charles Dushkind, TMA, “Memorandum in Re: Existing Anti-Cigarette Statutes in Kansas, North Dakota, and Utah” at 2 (Dec. 4, 1922), Bates No. 501870676/7.

23See below this ch.

reservoirs of deep-seated aversion to cigarettes, emerges from a comparison with contemporaneous repeals in Tennessee and Arkansas. An in-depth study of the process in Tennessee is particularly instructive because its statute, dating back to 1897, was almost as long-lived as Iowa’s. In contrast, repeal of the 1905 Nebraska law in 1919 revealed a more nuanced licensure scheme: although it failed either to empower local communities to retain the sales prohibition or to include a sales tax, it did set standards such as a cigarette advertising and cigarette smoking ban in public eating places that transcended the reach of the 1921 Iowa repealer.

**Tennessee (1919/1921)**

“As between cigarettes and whisky,” thundered a member of the Tennessee general assembly in an argument he was making against the repeal of the cigarette act,...I’ll take whisky every time.” “Same here, old man,” shouted a chorus of brother members.26

Two years after Iowa had adopted a cigarette mulct tax, Tennessee followed suit, although its assumed a somewhat different form than Iowa’s. In 1899 the legislature enacted a revenue act that imposed, among numerous occupational privilege taxes, a $10 license fee on retail cigarette dealers subject to the proviso: “Cigarettes (Not sold in violation of the criminal law).” Later that year, Jake Blaufield—the same Knoxville dealer who had failed in his challenge to the constitutionality of the anti-cigarette law before Judge Clark in federal district court in 1897 on the same charges—who had paid for and been issued a license, was indicted and convicted of having violated the general prohibition by virtue of having sold a package of cigarettes. These proceedings demonstrate that after the ruling by the Tennessee Supreme Court in *Austin* upholding the anti-cigarette law and even before the U.S. Supreme Court affirmed it, police and prosecutors in Tennessee had resumed enforcing it. In seeking to “interpose” the license as a defense to the criminal charge, Blaufield argued that since the cigarette law “absolutely prohibits the sale of cigarettes in the State in terms as broad as the

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25 See above ch. 5.
26 "Breezy Chatter Heard in Legislative Halls,” *NB*, Jan. 26, 1919 (2:4-7 at 6).
27 See above ch. 12.
29 See above ch. 5.
30 Blaufield v. State, 103 Tenn. 593, 594-95 (1899).
31 See above ch. 12.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

English language can make it...the Revenue Act of 1899, declaring the right to sell cigarettes to be a privilege, and taxing it as such, by necessary implication repeals the criminal Act of 1897." The Tennessee Supreme Court rejected the argument that payment of the privilege tax ipso facto transformed the payor into a licensee of the state entitled to perform all acts proper for enjoying the license. At most, according to the court, the tax was “assessed upon an unlawful occupation”; consequently, the payor could no more lawfully sell cigarettes than a licensed liquor dealer could lawfully sell to minors. Although the court failed to explain why a wholly unlawful trade was licensed at all, it also rejected the plaintiff’s contention that the revenue act by implication had repealed the cigarette law: because the one was a police regulation designed to protect citizens’ health, whereas the other served solely to finance state government, they were “entirely separate and distinct, and referable to different branches of legislative power.” Moreover, the legislature’s insertion of “this extraordinary clause” (“not sold in violation of criminal law”) in 1899 expressly repelled any intention to repeal by evidencing a contemplation of the earlier statute.

On December 11, 1900, just three weeks after the U.S. Supreme Court had upheld the law’s constitutionality in Austin v. Tennessee, Knox County Circuit Judge Sneed declared it invalid on the grounds that the legislative journal did not show that the Speaker had signed it. Lucy Page Gaston’s magazine Boy detected desperation in hinging success on “a mere technicality like this,” adding that it had been “broadly hinted that the absence of this signature not having been discovered before tells of possible fraud. The only hope of the Tobacco Trust is in venable legislation and temporary success through intrigue.” However, almost as soon as the Legislature convened in January 1901, it reenacted the 1897 statute unchanged. As a result, in Chattanooga, for example, when tobacco dealers received notice of its final passage, The New York Times reported that: “They will discontinue sale and return their stock to the manufacturers.” Moreover, as a more detailed account in another paper noted: “It is stated that the

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32Blaufield v. State, 103 Tenn. 593, 596 (1899).
33Blaufield v. State, 103 Tenn. 593, 598, 599 (1899).
34Blaufield v. State, 103 Tenn. 593, 601 (1899).
35Blaufield v. State, 103 Tenn. 593, 602 (1899).
36"Can Smoke Cigaretts Again," CT, Dec. 11, 1900 (9).
sale of cigarettes is practically stopped all over the state.”  

In 1903 the legislature added a prohibition on keeping in stock, giving away, or otherwise disposing of cigarettes.  

Compliance by retailers over the years appears to have been commonplace and enforcement appears to have come in the form of sporadic drives—not unlike the contemporaneous periodic raids and closings under various prohibitory liquor laws. The state WCTU was still calling for enforcement of the anti-cigarette law in 1912. Later in the twentieth century, Louise Littleton Davis, a Tennessee journalist and historian, interviewed people who had lived through the 1897-1921 anti-cigarette sales period and recalled enforcement episodes. For example, one informant, a Nashville lawyer, remembered that around 1910 police would sometimes demand to know of people whom they had “caught puffing the ‘coffin tacks’”; “‘Who sold you that cigarette?’” He added: “‘The police didn’t do that all the time, but there would be little flurries of that every once in a while—when they were trying to get the law off the books.’” Another lawyer recalled that as a young man in a small town (Savannah) he had worked from 1897 to 1899 as a clerk in a grocery store, which bought (Duke’s Mixture) tobacco from ATC; included in each shipment were free cigarette papers, which the store neither bought nor sold nor “gave away” but “just laid...on the counter. Anyone who bought smoking tobacco knew where to pick up the cigarette paper if he wanted to.” Neither that store nor any other store he knew of sold cigarettes. Later,

40. “State Bars All Cigarettes,” FWN, Feb. 1, 1901 (8:3). This account’s closing statement that “[i]ntimations are given that the constitutionality of the law will be tested” appears to have been erroneous; since the U.S. Supreme Court had just upheld the constitutionality of the identically same statute, such a test would presumably have been frivolous.


44. Louise Littleton Davis Papers, TSLA, Box 15, Folder 6: “Davis - Frontier Tales - Cigarettes: When Stolen ‘Smokes’ Were the Sweetest” at 2-3. This typescript may have appeared in a series of feature articles that Davis wrote for the Nashville Tennessean over many years. Neither her notes nor the typescript bears a date, but from internal indicia the work appears to have been done after 1956 and probably after 1964. Although the typescript and her research notes reveal that Davis did use some original sources, including, Austin v. Tennessee, newspapers, and legislative journals, she also fundamentally misunderstood certain crucial aspects of the history of anti-cigarette legislation, which she apparently did not know was a national movement; consequently,
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

in 1907, after he had begun practicing law in Nashville, a case arose involving a
cigar store selling cigarettes, and he recalled other cases in police court. 1

As late as 1916, enforcement campaigns were still necessary, but they were also still taking place. In late 1915, 65 indictments were returned against nine different dealers in Chattanooga (including the United Cigar Stores Company, once the retail arm of the former Tobacco Trust). Soon after having arranged for bonds and sought a compromise, 2 the dealers decided to form a statewide organization to secure repeal of the law. To enhance the effectiveness of their concerted action, the dealers planned to affiliate with the newly created tobacco oligopoly’s propaganda and lobbying organization, the Tobacco Merchants Association, and also expected to gain the support of Tennessee tobacco growers. 3

In the meantime some of the dealers pleaded guilty and paid the $50 fines and costs, while others were excused in exchange for agreements to refrain from further cigarette dealing. 4 Although, as the Western Tobacco Journal resignedly put it, “[f]or the present the Cigarette sales at Chattanooga will be suppressed, it seems,” the trade paper took heart: “The matter will be allowed to rest until a systematic plan of defense can be mapped out by the Tobacco Merchants’ [sic] Association, through its able secretary and counsel, Charles Dushkind. ... Every effort will be made to have the anti-Cigarette law repealed.”

1Louise Littleton Davis Papers, Tennessee State Library and Archives, Box 15, Folder 6: “Davis - Frontier Tales - Cigarettes: When Stolen ‘Smokes’ Were the Sweetest” at 7-8.
2Louise Littleton Davis Papers, TSLA, Box 15, Folder 5: Cigarette Legislation in Tennessee at 23. This folder contains Davis’s notes for the aforementioned typescript.
6“Chattanooga Trade Aided by the Tobacco Merchants’ Association,” WTJ 43(7):1:4
Nor was enforcement limited to especially zealous agents in Chattanooga. As the rival trade journal Tobacco reported:

Heeding the final warning of the authorities in Nashville, all of the uptown cigarette dealers clamped down the lid Sunday. Smokers who failed to supply themselves Saturday found it impossible to buy cigarettes at any price in a Nashville cigar store.

Acting Sheriff Yeaman...gave final notice that the sales of cigarettes in Nashville would be tolerated no longer. ...

Sheriff Yeaman...had received assurance from some of the dealers that the cigarette law would not be violated further by them. Uptown dealers, he said, have planned to sign an agreement to sell no more cigarettes as long as the law prohibiting it remains on the statute books. In the opinion of the authorities the cigarette is a thing of the past in Nashville.

... "The recent imposition of the war tax and the increased cost of cigarettes have cut down the profit of the retail dealer and it is not believed that the action of the authorities will be a great blow to the merchants. The smokers themselves are making the clamor.

“The Nashville police department will also help to exterminate the cigarette, Chief Barthell having been instructed by Mayor Gupton to have his men see to the enforcement of this law. City Judge Madison Wells has announced that any case growing out of the unlawful sale of cigarettes will be bound over to the criminal court.”

The end of the World War I brought with it manifold possibilities of a different social order. Whatever those momentous transformations may have been globally, the future of cigarettes in the United States in general and in Tennessee in particular was being shaped by a struggle between control forces, led by the WCTU, which hoped to retain the few state prohibitory statutes still on the books, and the oligopolist successors to the former Tobacco Trust, which were determined to avail themselves of the returning U.S. soldiers’ collective and individual experience with enormous cigarette consumption to repeal those statutes impeding unfettered sales. In this regard the war’s impact on production, consumption, and attitudes toward consumption was diametrically opposed to its impact on alcohol. Presumably no newspaper in Tennessee would have applied to cigarettes its view that anyone selling whisky to soldiers should be executed.

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Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

The conflicts over liquor prohibition in Tennessee during the first two decades of the twentieth century not only were especially virulent, but also generated party-political consequences perhaps unique in the South, if not nationally. Prohibition so split the Democratic party that a Republican was elected and reelected governor in 1910 (over former Governor Robert Taylor) and 1912. By 1914, prohibition had become such a “part of the accepted dogma of Tennessee politics” that its former Democratic opponents turned “ardent supporters” and the state “reverted to its normal pattern of Democratic domination.” The bi-partisan political support for stringent liquor control laws at the 1917 legislative session55 and the almost unanimous ratification in 1919 of the Eighteenth Amendment to the U.S. Constitution, making possible nationwide prohibition of intoxicating liquors,54 underscore that the apparently victorious moralism of the temperance crusade55 could not be fully shared with the anti-tobacco movement in the aftermath of a World War that had vastly enhanced the social acceptability of cigarette smoking.

At that same 1919 session the anti-cigarette-prohibition forces initially focused on a repeal bill. Already on January 14, Democratic Senator Thomas Coleman introduced (in a chamber controlled by his party 26 to 7) such a bill, S.B. No. 90, which provided for licensing the sale of cigarettes to everyone except minors.56 Three days later the “Breezy Chatter Heard in Legislative Halls”


55Paul Isaac, Prohibition and Politics: Turbulent Decades in Tennessee, 1885-1920, at 265 (1965). Isaac’s emphasis on the “close relationship between the anti-saloon crusade and progressivism in Tennessee” (id.) must be interpreted in the special context of progressivism in a South whose middle-class leaders, needing outside capital, “were not hostile to the factory and corporation as such”: “The anticorporation drive was further diluted by the cold, pure springs of prohibition. Given the moral disrepute of saloons, prohibitionists were somehow able to equate the ‘liquor traffic’ with rural and progressive suspicion of the trusts and ‘special interests.’ When reform pressures mounted, prohibition offered an easy outlet. [F]or many Southerners prohibition became the sum of progressivism...” George Tindall, The Emergence of the New South, 1913-1945, at 18 (1970 [1967]).

56Senate Journal of the Sixty-First General Assembly of the State of Tennessee 75 (1919) (S.B. No. 90, Jan. 14, by Thomas Coleman). Coleman was returned the next year at the 1920 Census of Population as a 37-year-old lawyer, but he had been a school teacher
column that appeared almost daily during the session in the *Nashville Banner* reported—a bit behind the times\(^{57}\)—that:

Indications are that before very long there will be introduced a bill to legalize the sale of cigarettes in Tennessee. Supporters of the measure claim that the state is losing considerable revenue from the fact that such sale is not legalized and further that cigarettes are not regarded as they were some years ago, when some of the women folks thought that anyone who smoked a cigarette was going right straight to the damnation bow-wows, and that few cigarette smokers died from any other cause. In fact, the cigarette proved a mighty handy friend to the boys over there (and over here, too) during their fighting, and there are few who would deny the soldiers anything within reason. It’s dollars to doughnuts they are going to want cigarettes when they get back, too. Then, too, the argument is being made that as the state needs more revenue, this would be a nifty little bill to put through to help the old state out of its financial difficulties.\(^{58}\)

The Temperance Committee recommended it for passage and it reached its third and final reading on January 22, when further action was postponed until Democratic Senator Walter Cameron could introduce another bill on the same subject.\(^{59}\) Although the Senate had generally supported S.B. 90, the bill also sparked opposition from “several senators who wanted to be certain the law protecting minors was preserved. They were assured a companion bill prescribing drastic penalties would be forthcoming soon,” but in the end the chamber decided to defer a vote until members could read the complementary measure.\(^{60}\) In its commentary on this debate the next day, “Breezy Chatter” resumed its previous focus by explaining that when the bill came up, “it developed that the idea” was to repeal prohibitory acts and to tax dealers in order to raise revenue for the state treasury, which was estimated to be about $250,000 annually. The justification for repeal was that the law was a “dead letter,” which even when alive had been “found impracticable to enforce. The courts have practically ceased to charge the grand juries on the subject and cigarettes are

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\(^{57}\)Two days earlier the *Banner*, in listing the bills introduced the day before, had given unique treatment to the bill by inserting a bolded “Anti-Cigarette Bill” above its entry. “But Few Bills Are Introduced,” *NB*, Jan. 15, 1919 (11:4).


\(^{59}\)*Senate Journal of the Sixty-First General Assembly of the State of Tennessee* 151, 160, 162 (1919) (Jan. 22). After Cameron’s bill was passed, Coleman moved to withdraw his. *Id.* at 486 (Feb. 14).

\(^{60}\)“Many Bills Are Passed During Busy Sessions,” *NT*, Jan. 23, 1919 (7:1).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

being boldly sold throughout the state to anybody, except minors, who want [sic] to buy them.” The Banner’s background intelligence on taxation as the chief motive behind repeal proved inaccurate, but not so the prediction from the senate floor that the governor would not block enactment.\textsuperscript{61}

The WCTU, however, was having none of it. On the very same day, the Banner’s front page reported—directly under the bold-headlined article on the murders of Spartacus leaders Rosa Luxemburg and Karl Liebknecht in Berlin—that Mrs. Minnie Welch, the president of the Tennessee WCTU, had declared at the annual session of the organization’s Middle Tennessee Institute that the elimination of tobacco and whisky was necessary in order to make America a safe place for the returning soldiers.\textsuperscript{62} The reason was simply (if inaccurately) stated: “‘The Medical Association found that tobacco aggravated heart trouble, and many of the young soldiers of the English army were sent home on account of heart trouble.’”\textsuperscript{63} Without explaining how such cleanliness was reconcilable with the unprecedented uptake of cigarette smoking promoted, financed, and distributed in large part free of charge by the U.S. Government, American Red Cross, and (the former opponents of cigarettes) Salvation Army,\textsuperscript{64} Welch intoned that: “‘For the first time in the history of the world an army has been taught to live clean, and that army is our own glorious United States Army.’” To be sure, the “‘sacred task’” of caring for veterans\textsuperscript{65} was not the only item on the WCTU’s post-war agenda: its goals also included Americanization of foreigners, protection of women wage-earners, and child

\textsuperscript{61}“Breezy Chatter Heard in Legislative Halls,” NB, Jan. 23, 1919 (9:3-4). If the estimate of $250,000 was based on a tax of 1 mill per cigarette—a common tax rate among the states that began taxing in the 1920s—annual consumption must have been estimated at about 250,000,000. If the tax rate was higher, consumption must have been lower. If Tennessee’s share of total national cigarette consumption (about 50 billion in early 1919) had equaled its share of total national population (2.2 percent), it would have exceeded 1 billion.

\textsuperscript{62}“W.C.T.U. Against Use of Tobacco,” NB, Jan. 17, 1919 (1:1).

\textsuperscript{63}“W.C.T.U. Will Make Fight on Tobacco,” NT, Jan. 17, 1919 (1:7).

\textsuperscript{64}Cassandra Tate, Cigarette Wars: The Triumph of “the Little White Slaver”\textsuperscript{66} 66, 76-91 (1999). To be sure, when a minister at an anti-cigarette meeting three days after the House had defeated a repeal bill accused the WCTU of having sent cigarettes to soldiers overseas, a member “indignantly denied that the W.C.T.U., as an organization, had ever sent the horrid cigarettes to the boys abroad, but sorrowfully admitted that some, in fact, quite ‘misguided’ members of the organization had been guilty of this indiscretion.” “‘Poison Tack’ ‘Panned,’ As Fifty Pay Dime to Join ‘Clean Life Army,’” NT, Feb. 17, 1919 (1:2-3).

\textsuperscript{65}“W.C.T.U. Will Make Fight on Tobacco,” NT, Jan. 17, 1919 (1:7).
During a preliminary Senate floor discussion of his as yet unfiled bill Cameron motivated his initiative on the grounds that “anybody could buy cigarettes from other states”; moreover, the situation was not “a parallel case with the whisky question” because “a man can make a cigarette out of a bit of newspaper.” Finally, Cameron declared that voting for his bill was “choosing the lesser [sic] of three evils” because “[t]he medical authorities agree that cigarettes is [sic] the least harmful of the uses to which tobacco is put”: not only were pipe and cigar smoking worse evils, but snuff dipping was possibly the worst and yet the Senate had just rejected a bill to abolish it. After a motion was offered to defer further consideration of the bill until members could examine it, Cameron announced that he was preparing a bill that would impose severe penalties on those selling tobacco to minors. Two days before the Senate floor vote the honorary president and superintendent of legislation of the Tennessee WCTU, Mary Bang, placed an appeal to every member of the legislature on every desk in the chambers urging them to defeat the bill to legalize cigarette sales: ““Another foe is threatening the welfare of our boys and youth. A sword pierced through the hearts of thousands of Tennessee mothers, when they saw through the press that an effort is being made to repeal our anti-cigarette law.”” The WCTU’s warning may have been effective since the no-sales-to-minors bill (S.B. No. 162) passed by the Senate by the overwhelming vote of 30 to 1 did not repeal the ban on welfare.

67 This debate took place on January 22, whereas Cameron did not formally introduce S.B. No. 162 until January 23. It appears that after Cameron had heard the resistance to what presumably had been a straightforward repeal bill legalizing sales to adults, he decided to stiffen the penalties for sales to minors in order to secure passage.
68 “Administration Tax Bill Wins,” NB, Jan. 23, 1919 (6:1-5 at 4-5). After a motion had been offered to reject the anti-snuff bill, S.B. No. 99, the senator who had introduced it (at a constituent’s request), seeing that opponents were in a great majority, withdrew it.
70 “Beezey Chatter Heard in Legislative Halls,” NB, Jan. 28, 1919 (9:2-3 at 3).
71 Senate Journal of the Sixty-First General Assembly of the State of Tennessee 170, 260 (1919) (S.B. No. 162, Jan. 23 and 29, by William Cameron). The Sanitation Committee considered S.B. No. 397 (To prohibit the selling of cigarettes) without recommendation. Id. at 382, 671 (Feb. 10 [by Democrat Thomas Long] and Mar. 20). According to a newspaper account, this bill would have prohibited selling, or offering to sell or giving away, or storing cigarette papers or any substitute. “Abolishing Control Board,” NB, Feb. 11, 1919 (8:2-4 at 4).
sales to adults, although it was part of anti-prohibitionists’ longer-term strategy to create the conditions for undermining prohibitionists’ resistance to repeal at the next regular session in 1921. The real import of the bill was revealed the day of the House deliberations when the Nashville Banner reported that it was “pointed out as a forerunner of the passage of the measure seeking to repeal the anti-cigarette statutes now on the books in regard to the sale of cigarettes to adults.”

Perhaps the president of the Tennessee Manufacturers Association had the anti-cigarette law in mind when he delivered his “splendid address” to the legislature warning against “the tendency toward Bolshevism” and “experiments in legislation” and complimenting legislators on their achievements, just minutes after the House had approved Cameron’s bill by a 74 to 4 margin. As enacted, the bill embodied a ban on the sale or giving away of tobacco of any kind to minors under 18, subject to a fine of between $25 and $100 and imprisonment of between 30 and 60 days—penalties the press characterized as “the most drastic.”

The Senate’s focus on minors was vividly on display during the chamber’s consideration of the bill when a “member tried to get a resolution through...to

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73. 1919 Tenn. Pub. Acts ch. 32, § 32, at 81. The statute did not create a licensing system—which had been established in 1899—but did provide for the mandatory year-long revocation of the license issued to anyone convicted of having sold or given tobacco to a minor. Id. § 3. The original bill had made it illegal to sell or give cigarettes to minors under 19, but the age was lowered by one year by amendment. There is a typed and a handwritten version of S.B. No. 162, each with its own bill sleeve, in the Tennessee State Library and Archives. The typed version, on the bill sleeve and in the text, made 19 the age with “18” written in by hand in the text; the handwritten version used 18. S.B. No. 162, Tennessee Senate, RG 60, TSLA. Oddly, a floor amendment proposed adding a provision to the bill concerning grand juries that was already in the bill. Senate Journal of the Sixty-First General Assembly of the State of Tennessee 260 (1919) (Jan. 29, by Monroe). Unlike some other similar state legislation: “Under this act a minor cannot even secure tobacco on the written consent of his parents.” “Free Pass Bill in Lower House,” NB, Jan. 29, 1919 (1:3, 2:5-7 at 6); Senate Journal of the Sixty-First General Assembly of the State of Tennessee 260 (1919) (Jan. 29).
have smoking abolished” (in the Senate),75 prompting Senator John Houk—now a prominent Progressive76 22 years after he had first sought, in the Tobacco Trust’s objective interest to thwart the enactment of anti-cigarette legislation77—to intone: “‘No telling what is going to happen next to our few remaining liberties and individual privileges.’”78 Ironically, the health-threatening, polluted physical environment in which the Senate engaged in such deliberations about cigarette sales was the subject of a special committee report on the chamber’s cleanliness and ventilation, which was issued the day after the House vote. Concluding that the sanitary conditions rendered the chamber “wholly unfit for healthy living conditions,” the committee specified that: “There were no openings for ventilation. The whole top of the chamber was filled with dust, smoke, cobwebs and dead air. The ceilings, windows, chairs and floor were covered with dust and filth. Old decaying cuds of tobacco, cigar stubs, and cigarette butts were scattered all over the floor of the gallery.”79 It emphasized that “the future health of the members requires” that the chamber be disinfected during the recess.”

In addition to concurring in the Senate no-sales-to-minors bill, the House initiated its own measures. H.B. No. 173, which would have repealed the anti-cigarette law,80 was rejected by a vote of 60 to 18.81 During the week or so preceding the vote the legislature had received petitions from “thousands of citizens, men and women, protesting against the licensing” of cigarette sales or

75“Breezy Chatter Heard in Legislative Halls,” NB, Jan. 26, 1919 (2:4-7 at 6). As early as 1851 the Tennessee Senate adopted a resolution prohibiting smoking during business hours. See below ch. 18.

76Paul Isaac, Prohibition and Politics: Turbulent Decades in Tennessee, 1885-1920, at 201 (1965). Houk turned Progressive in 1912, though Republicans charged that Tennessee Progressives were more interested in restoring the liquor traffic than in electing Theodore Roosevelt president.

77See above ch. 5.

78“Breezy Chatter Heard in Legislative Halls,” NB, Jan. 26, 1919 (2:4-7 at 6).


80H.B. No. 173, Tennessee House, 1919, RG 60, TSLA (typed copy furnished by TSLA); House Journal of the Sixty-First General Assembly of the State of Tennessee 145 (1919) (Jan. 21, by Democrats Lawrence Jackson and Sidney Carr). The Judiciary Committee had recommended it for passage. Id. at 416 (Feb. 13).

81House Journal of the Sixty-First General Assembly of the State of Tennessee 426 (1919) (Feb. 13). The Journal erroneously inverted the ayes and noes, though it correctly recorded the bill as rejected. Only three Republicans voted for the bill, two of whom represented Knox County.
repeal of the anti-cigarette law.\textsuperscript{82} The rejection by such a large majority of the effort to legalize sales to adults prompted the \textit{Nashville Tennessean}'s judgment—which, though ultimately incorrect, underscored the breadth and depth of anti-cigarette sentiment in Tennessee—that the defeat “probably ends agitation to permit the sale of cigarettes in the state.”\textsuperscript{83} The debate actually interjected some pertinent facts interspersed between “burst[s] of oratory....”\textsuperscript{84} Democratic Representative Joseph Odle a long-time Methodist Sunday school teacher and former school teacher,\textsuperscript{85} who was soon to offer his own anti-cigarette bill, did not shy away from uttering the doomsday prognosis that “he believed it were better the members had never seen the light of day than to repeal the anti-cigarette law.”\textsuperscript{86} Democrat Joseph Hanover,\textsuperscript{87} a member from Shelby County (Memphis), speculating that the law was being violated and not enforced in nine-tenths of the counties, declared that “if an iron wall were erected around the state cigarettes would be brought in and...smoked.” Rejecting the practicality (if not expressly the principle) of depriving adults of cigarettes, Hanover proposed the penitentiary for those who sold to boys and taxes on cigarettes sold to adults as “the way to remedy the evil....”\textsuperscript{88} One member of the House who appeared to have grasped the point of the general ban of cigarette sales, even though he expressed himself obscurely, was Democratic Representative Sterling Stovall—a member of the Methodist Episcopal Church and long-time Sunday school...

\textsuperscript{82}“Cigarette Bill Is Killed by Big House Majority,” \textit{NT}, Feb. 14, 1919 (1:1).

\textsuperscript{83}“Cigarette Bill Is Killed by Big House Majority,” \textit{NT}, Feb. 14, 1919 (1:1).


\textsuperscript{87}Hanover, a lawyer and practicing Jew, emigrated with his parents from Poland at the age of seven in 1895. \textit{Biographical Dictionary of the Tennessee General Assembly, III: 1901-1931}, at 293-94 (Ilene Cornwell ed. 1988).

superintendent—\textsuperscript{89} who explained to his colleagues that it “isn’t right to prohibit the boys from indulging in cigarettes and at the same time permit the father to indulge. He said he didn’t think it the time to take this backward step.”\textsuperscript{90} Democrat Dr. O. S. Hauk—a physician who doubled as a state revenue agent—\textsuperscript{91} who represented a county in extreme northeastern Tennessee, supplying a reality check on Hanover’s claim, admitted that he did not know about violations in West and Middle Tennessee, but “didn’t believe a single firm in his district violated it.” A representative from Unicoi, another rural northeastern county, stated that “not one store in twenty in that section had had cigarettes or cigarette paper beneath their counters.”\textsuperscript{92} Extrapolating, Republican Wesley Tucker, who had taught school for 30 years, been Unicoi County superintendent of schools, chairman of the county’s first board of education, and, as a member of the Baptist church, taught W.S. Tucker Bible Class named in his honor,\textsuperscript{93} claimed that: “‘Ninety per cent of the public sentiment in this state is against the repeal of the anti-cigarette law.’”\textsuperscript{94} Before the bill was defeated, the House tabled two obstructionist motions (offered by two Democrats, Hanover and another Shelby County representative) that would have appropriated all revenue derived from cigarette sales to “the rural schools where the barefooted boys live” and added to the bill’s coverage all forms of smoking and chewing tobacco as well as coffee.\textsuperscript{95}

H.B. No. 442\textsuperscript{96} appears to have been designed to save the ban on cigarette sales from repeal by softening some of its features while preserving its

\begin{footnotes}
\item[90]“An Afternoon Paper Panned,” NB, Feb. 14, 1919 (2:3).
\item[91]“Hauk Did Not Make His Salary,” NB, Mar. 10, 1919 (13:3-6).
\item[92]“An Afternoon Paper Panned,” NB, Feb. 14, 1919 (2:3).
\item[94]“An Afternoon Paper Panned,” NB, Feb. 14, 1919 (2:3).
\end{footnotes}
foundation. The bill made it a misdemeanor to “sell or offer to sell or give away or offer to give away within the confines of the State any cigarettes, cigarette papers or any substitutes therefor.” The bill thus differed from the Rogers law in that it abandoned the goal of regulating, let alone prohibiting, the importation of cigarettes from other states, which had rankled many business owners and their politicians. After having offered this concession to the law’s opponents, the bill went on to close the aforementioned major loophole by also making it a misdemeanor “for any tobacconist or other dealer to keep or store or allow to be kept or stored in, about or adjacent to his place of business any cigarettes, cigarette papers or substitutes therefor for the purpose of selling or giving away, or with the intent that the same may be appropriated and used by any patron, visitors or caller.” Enforcement was also strengthened by adding mandatory 10- to 30-day imprisonment.

The House subjected H.B. No. 442, which would have repealed Rogers’ law, to sharp debate. After surviving a motion to table by a vote of 32 to 40, it was subject to another series of unfriendly or absurdist amendments, which were all tabled. They would have: included all kinds of smoking tobacco, snuff, and chewing gum; outlawed making, giving away, or smoking corn silk or cross vine; and provided that “no member shall be put in jail under this Act for offering a member a cigarette during the session.” Although the bill gained a slim majority of 37 to 36, the vote did not constitute a majority of all elected representatives and thus failed.

The intensive participation in the anti-repeal campaign by Lucy Page Gaston, the founder in 1899 of the American Anti-Cigarette League—which she had left at the beginning of 1919 because she had always been and intended to remain “the extremist of extremists”—included her appearance before both houses of

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97H.B. No. 442, § I; copy furnished by TSLA.
98H.B. No. 442, § II; copy furnished by TSLA.
99H.B. No. 442, § III; copy furnished by TSLA. The bill also extended the range of fines from $25 to $100. Id. Presumably in response to Blaufield, the bill also made explicit that “possession by a dealer of a license to sell cigarettes shall not relieve such dealer or license holder from the penalties herein denounced.” Id. § IV.
100H.B. No. 442, § IV; copy furnished by TSLA.
101House Journal of the Sixty-First General Assembly of the State of Tennessee 515-16 (1919) (Feb. 20) (the four representatives offering these amendments, C. E. McCalm, Ernest Bell, Thomas Simpson, and O. S. Hauk, were all Democrats); “Night Session of Legislature,” NB, Feb. 21, 1919 (10:3-6 at 3-4). Only seven Republicans voted No.
102“Lucy Page Gaston Quits Anti-Cigarette League,” Tobacco 67(13):4 (Jan. 9, 1919). Among her extremist positions was the assertion that “the cigarette is in a class by
the legislature, to which the press gave partial credit for passage of the bill strengthening the penalties for selling to minors. In her speech on February 6 urging members of the House to vote against the bill to repeal the anti-cigarette law, Gaston gave what the Nashville Banner called “an interesting account of legislation with reference to the prevention of the use of cigarettes.” Gaston’s efforts, at a victory celebration of the legislature’s action on cigarettes, to organize thousands of boys in Nashville to pledge abstinence from “that ‘enemy to public health’” gave the state anti-repeal campaign a decidedly national profile. Perhaps this resistance in Tennessee was a manifestation of the national feeling that Dr. Clarence True Wilson, the general secretary of the board of temperance, prohibition, and public morals of the Methodist Church, voiced in February 1919 in denying rumors circulated by the liquor industry that prohibitionists would soon seek a similar constitutional amendment outlawing tobacco: “‘However, the tobacco men should take warning that many millions of itself—it is only masquerading as a form of tobacco. I am credibly informed, strange as it may seem, that tobacco is not a necessity in the manufacture of cigarettes and that little tobacco is used in certain brands....” Despite this bizarre view, she was, nevertheless, 69 years ahead of the Surgeon General in basing her “war on the cigarette...on the charge that the cigarette is a habit-forming drug and should be classed with opium, cocaine and other habit-forming agencies, against which the Government is putting up a fight.” “Anti-Cigarette Fight,” Tobacco 68(21):4 (Sept. 4, 1919) (reprinting Gaston’s letter to the Evening Sun). In 1988 the Surgeon General concluded that “the processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.” U.S. Dept. of Health and Human Services, The Health Consequences of Smoking: Nicotine Addiction: A Report of the Surgeon General iii (1988).

103“Mrs. Gaston Is Camped on ‘Poison Tack’s’ Trail,” NT, Feb. 14, 1919 (2:4). Grover Keaton, who co-introduced H.B. No. 442 a few days later, was the author of H. Res. No. 19, which invited Gaston to address the chamber on the anti-cigarette law and which the House adopted. House Journal of the Sixty-First General Assembly of the State of Tennessee 324 (1919) (Feb. 6). Unlike S. J. Res. No. 35, inviting Edgerton to address the legislature, the House resolution was not joint and neither the House nor Senate Journal revealed any concurring action by the Senate. Id. at 1470. The Senate Journal appears to include no reference to a speech by Gaston.


105“‘Poison Tack’ ‘Panned’, As Fifty Pay Dime to Join ‘Clean Life Army,’” NT, Feb. 17, 1919 (1:2-3). At this initial meeting only 50 boys signed. Interestingly, a Mr. Howland of the du Pont Company explained to the celebrants how many fires nationally were caused by cigarette smokers and that “the cigarette was largely responsible for the heavy fire losses in this country.” Id.
people have warmly resented the forcing of cigarettes to those of our soldiers who were not previously accustomed to them, and that they have resented with indignation the placarding of the country with giant signs saying that “cigarettes won the war” and similar advertising methods.  

In 1921, the House bill to repeal the cigarette sales prohibition statute passed that chamber by a vote of 67 to 12. The senate saw more resistance. After the House bill was substituted for a Senate repeal bill, it failed to achieve a constitutional majority (the 15 to 14 vote in favor of repeal being less than a majority of all elected senators), but one Democrat who had voted Yes changed his vote to No in order to enter a motion to reconsider. Seven of the nine Republican senators voted No, John Houk, 24 years after the scandal to which he had been connected, being the sole Republican to vote for repeal. When the motion for reconsideration later prevailed, the repeal bill finally secured a 19 to 9 majority. Thus after 24 years the cigarette sales prohibition was finally repealed. Democratic Senator W. D. Cooper, who had been a school teacher and principal, shed some light on these proceedings by explaining that he had changed his vote from No to Yes on repeal because the leaders of the repeal movement in both houses had agreed, and the leadership of both chambers had

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107. _House Journal of the Sixty-Second General Assembly of the State of Tennessee_ 51, 130 (1921) (H.B. No. 118, Jan. 10 [by E. C. Norvell] and 14). Among those voting No, eight were Republicans and four Democrats. Two Republicans represented the northeastern counties that already in the 1890s had allegedly grown tobacco for cigarettes: a physician, Dr. Nicholas Robinson of Carter and Johnson counties, and John Depew of Washington, Unicoi, and Greene counties, who was a Methodist Episcopal Sunday school superintendent. _Biographical Dictionary of the Tennessee General Assembly_, III: 1901-1931, at 575-76, 183 (Ilene Cornwell ed. 1988).
109. _Senate Journal of the Sixty-Second General Assembly of the State of Tennessee_ 187-88 (1921) (Jan. 20). The 14 senators who voted No were evenly divided between Democrats and Republicans. One of these Democrats, John Kemper, was a farmer from the big tobacco-growing counties of Robertson and Montgomery.
110. _Senate Journal of the Sixty-Second General Assembly of the State of Tennessee_ 244-45 (1921) (Jan. 26). Voting against repeal were five Republicans and four Democrats. Two additional Republicans joined Houk in voting Yes. See also “Senate Repeals Cigarette Law,” _NB_, Jan. 26, 1921 (1:3).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

given Cooper “absolute assurance,” to pass bills prohibiting the sale or giving away of cigarettes to minors “under very strict penalty” and to impose a “high privilege license on all dealers in cigarettes.” Consequently, Cooper was convinced that “the protection afforded under these laws, when properly enforced, is much better when considering the interests of the boys and girls of Tennessee, than the old laws upon the statute books not enforced.” At the same session, both houses unanimously passed a bill declaring cigarette selling a privilege subject to a tax ranging between $20 and $2.50, according to the population size of the retailer’s locality. In spite of the promise to penalize very strictly selling or giving away cigarettes to minors, the bill that opponents of repeal had introduced “to put teeth into the laws” by imposing a mandatory jail sentence for violation was defeated on a voice vote.

As in Iowa, Arkansas, and other states, the repeal forces’ chief argument was the ongoing unlawful sales and the tax revenue that the state could collect under a licensure system (combined with stringent legislation to suppress sales to minors). The Republican governor, Alfred Taylor—the older brother of the Democratic governor who had signed the original bill into law almost a quarter-century earlier—announced that he would not veto the repealer because the new law would be more effective in preventing sales to minors. He also contended that the “antiforces” had not tried to influence him to use his veto power—an assertion contradicted by the fact that Gaston, the country’s most famous individual anti-cigarette campaigner, had telegraphed him a veto request (apparently one day after he had already signed the bill). To be sure, Gaston’s sense of social-political trends was encapsulated in her hope to expand the list of

\[\text{113Senate Journal of the Sixty-Second General Assembly of the State of Tennessee 245 (1921).}\]
\[\text{114Senate Journal of the Sixty-Second General Assembly of the State of Tennessee 229, 679 (1921) (S.B. No. 335, Jan. 25 [C. L. Cummings, Democrat], Mar. 17, 29 to 0); House Journal of the Sixty-Second General Assembly of the State of Tennessee 999 (1921) (Mar. 29, 72 to 0); 1921 Tenn. Pub. Acts. ch. 81, at 135. Wholesalers paid a flat $100 annual tax.}\]
\[\text{115Senate Journal of the Sixty-Second General Assembly of the State of Tennessee 240 (S.B. No. 338, Jan. 26 [Clabo et al.]), 342 (Feb. 3, recommended for rejection by Judiciary Committee), 671 (Mar. 6., rejected); “Bill Puts Tax on Sale of Cigarettes,” NB, Mar. 17, 1921 (1:7).}\]
prohibitory-law states from the then five (Iowa, Tennessee, Arkansas, North Dakota, and Kansas) to 20, when in fact the first three were just days or weeks shy or repeal.\footnote{118}

A month after Tennessee’s law legalizing cigarette sales had gone into effect, *Tobacco* triumphantly reported that dealers unanimously believed that sales would not be affected because throughout the previous two decades cigarettes had been “sold openly in every city and many towns in the State.” Specifying, the trade journal conceded that: “In a few small towns local authorities occasionally arrested a dealer and he was jacked up by the grand jury, but for the most part cigarettes were available to the consumer, whether the dealer carried them in or under the showcase.” Since smokers had never been denied cigarettes, dealers anticipated no increase in sales. Although the trade had already witnessed an increase in the number of dealers, “‘indicating that some dealers, who have not heretofore handled cigarettes because of conscientious scruples,’” had started selling them,\footnote{119} apparently retailers did not believe that such scruples had ever deterred buyers.

Thus, a comparison with Iowa’s Dodd-Clark repealer\footnote{120} reveals that in doing away with Tennessee’s anti-cigarette sales statute, the legislature: (1) faced less resistance; (2) did not impose a sales tax; (3) imposed a maximum retail license fee only one-fifth of Iowa’s; (4) failed to authorize local communities to continue to prohibit the sale of cigarettes; (5) failed to enact a bill putting teeth into the ban on selling to minors; (6) set the legal age for cigarette sales at only 18; (7) failed to provide for a nuisance-injunction procedure; (8) failed to make the license fee a lien on the real property where the business was conducted; and (9) did not prohibit public smoking by minors under 21. However, whereas Iowa imposed no fine at all for bootlegging to adults, Tennessee did impose a fine of $25 to $100 for selling cigarettes without first having paid the privilege tax.\footnote{121} (Between the enactment and effective date of the law the press in Iowa characterized this lack of a fine as making it “very defective.”)\footnote{122}
Arkansas (1919/1921)

In 1919, by a vote of 23 to 8, the Arkansas Senate passed a bill to repeal its 1907 cigarette sales ban, but two weeks later it ran into considerable difficulty in the House, which adopted amendments doubling the retailer’s license fee from $5 to $10, striking the commitment of the license fee to the school fund and redirecting it to the general revenue fund, and lowering the minimum and maximum fines for selling cigarettes to persons under 18 from $100 and $500 to $25 and $50, respectively. The next day the House effectively killed the bill by tabling it, thus replicating the defeat of a similar bill in 1917. However, in 1921 the Arkansas legislature did succeed in repealing the 1907 prohibitory law, which was, until the end, routinely enforced. At the outset of the process, the Senate Public Health Committee recommended that Senate Bill No. 22, which had been introduced by Ben H. Johnston, the same senator who had authored the failed bill of 1919, not pass, but support for continued


125 Journal of the House of Representatives of Arkansas: Forty-Second Regular Session 771 (Feb. 25) (1919). The last action on the bill was a representative’s giving notice that he would in the future move to reconsider the tabling vote, but he did not. Id. at 774 (Feb. 25).

126 Senate Bill No. 217 (by Collins), “An Act to prohibit the manufacture sale or use of adulterated cigarettes and to prohibit the use of tobacco to minors and for other purposes,” passed the Senate by a vote of 18 to 14, but died in the House after the Public Health Committee returned it without recommendation. Journal of the Senate of Arkansas: Forty-First Regular Session...1917, at 263, 384 (Feb. 2, 14); Journal of the House of Representatives of Arkansas: Forty-First Regular Session...1917, at 748, 838 (Feb. 22, 27); “Legislature,” Fayetteville Democrat, Feb. 12, 1919 (n.p.) (NewspaperArchive).

127 For examples of $10 fines plus costs, see, e.g., “Circuit Court Dispositions,” Fayetteville Democrat, Apr. 27, 1920 (1:6); “Decisions of Grand Jury,” Harrison Times, Jan. 29, 1921 (6:2).


129 Journal of the Senate of Arkansas: Forty-Third Regular Session...1921, at 143-44 (Jan. 20).
prohibition was, as the constellation of forces endorsing repeal revealed, less than robust. The Arkansas Public Health Bureau backed the bill, as did others who had opposed repeal, because of its “strong educational features”: the funds generated by the $3 to $10 retailer and $25 wholesaler licenses were to be committed to the Public Health Department to finance an educational campaign in schools “to point out the evils in the use of tobacco by minors.” Many prosecuting attorneys also supported the bill because they regarded it as more enforceable than the existing law, while the State Board of Health gave its approval on the (even in 1921 untenable) grounds that “the cigarette is the least harmful manner in which tobacco may be used, despite the popular prejudice to the contrary.” Yet even after the senate had struck this provision dedicating the minimal funds generated by very low license fees to anti-tobacco education, the state health bureaucracy and a majority of the Arkansas “medical fraternity” continued to support the measure. None of these forces endorsed repeal in Iowa; the only common organizational feature between the two states was the American Legion’s support for cigarette sales to adults. One especially self-righteous Legion post in Arkansas memorialized the House with a statement that conveniently celebrated its members’ addiction as a custom by “deprecating the disregard of law which must always be fathered by the presence of laws upon the statute books which are not and cannot be enforced because of their conflict with well established and approved customs of the people.”

The quality of arguments advanced by repealers can be gauged by Senator Grover Owens’ bizarre declaration that “the present law prohibiting the sale of cigarettes was placed on the statute books as a result of the activities of a tobacco company, which wished to eliminate competition.” Somewhat less handily than in 1919, the Senate passed repeal by a vote of 20 to 11, but this time the House was more accommodating: after defeating a motion to table by a two-

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131 The senate adopted an amendment to an amendment (mandating that the funds from the sale of licenses be deposited in the general revenue fund to be appropriated to the State Board of Health to conduct an education campaign and to enforce this law and the food and drug laws) to delete the reference to the Board of Health and the education and enforcement campaigns. *Journal of the Senate of Arkansas: Forty-Third Regular Session 1921*, at 228 (Jan. 28, 1921).
133 “Senate Legalizes Cigarettes,” Harrison Times, Feb. 5, 1921 (3:2).
134 *Journal of the Senate of Arkansas: Forty-Third Regular Session...1921*, at 274-75 (Jan. 31).
thirds majority, it pass S.B. No. 22 by a vote of 47 to 37.  

The tobacco industry may have rejoiced that “Anti-Cigarette Bill Repealed,” but a new stumbling block turned out to be Governor Thomas McRae, who vetoed the repeal bill and in so doing issued a strong condemnation of cigarettes as an “evil” that was “unmitigated” and stressed that many supporters of repeal either wanted to profit from selling cigarettes or were “addicted to the habit, lulled by the effect of the strong drug of nicotine.” However, his chief objective was merely to increase the license fee somewhat in order to “protect the financial rights of the state.” Because state revenues were “at a very low ebb,” McRae regarded taxation of cigarettes as a “luxury” as “expedient and proper,” especially in light of the fact that “we are paying more than $20.00 per capita for tobacco in this country, while in Arkansas we are now paying $2.25 per capita for education.” Initially, he had intended to sign the bill and request the legislature to pass a second bill increasing the license fees, but then he decided to veto it while assuring the lawmakers that he would not object to signing a similar bill if the license fees were “at least doubled.”  

A cautious Senator Johnston both introduced the same day that the governor transmitted his veto message a bill that McRae would sign and moved the next day to pass his earlier bill over the governor’s veto. The 19 to 12 vote sufficed to override, but the 50 to 42 House vote a fortnight later fell one short of the requisite absolute majority, prompting the Senate the same day to pass

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135 Journal of the House of Representatives: Forty-Third General Assembly of the State of Arkansas...1921, at 575-76 (Feb. 11).


137 On McRae, a lawyer-banker and former 18-year congressman with populist and progressive leanings, one of whose key gubernatorial objectives was to change the tax system in order to fund education and highways, see http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=114.


139 Journal of the Senate of Arkansas: Forty-Third Regular Session...1921, at 533-34 (Feb. 16).

140 Journal of the Senate of Arkansas: Forty-Third Regular Session...1921, at 538 (Feb. 16) (S.B. No. 381).

141 Journal of the Senate of Arkansas: Forty-Third Regular Session...1921, at 552 (Feb. 17).

142 Journal of the House of Representatives: Forty-Third General Assembly of the State of Arkansas...1921, at 1089-90 (Mar. 4); “Shy One Vote on Cigarette Bill, Another Started,” FDD, Mar. 4, 1921 (1:7).
Johnston’s fall-back measure (with a three-fourths majority).\(^{133}\) When the House comfortably followed suit (55 to 33),\(^{144}\) Arkansas’ 14-year-old cigarette sales ban had finally been disposed of.

In the end, then, the licensure law, merely imposed modest fees of $50 and $20—to be deposited in the state treasury for the general revenue fund—on wholesalers and retailers, respectively, and fines ranging between $10 and $100 for selling cigarettes without a license as well as for selling, bartering, or giving tobacco in any form or cigarette papers to a minor under 18.\(^{145}\)

That licensure of cigarette sales had not suddenly extirpated a decades-old movement became unoverlookable one year after repeal when Governor McRae proclaimed March 22, 1922 “No-Tobacco Day,” bemoaning, to the chagrin of the pro-tobacco press, that “the general use of tobacco by men and women from youth up, generation after generation, is ‘contributing to unmistakable and certain degeneracy.’” The tobacco industry promptly alighted upon McRae’s proclamation to denounce the “light-thinking reformers” and “vicious and malignant minority,” which thought “only in terms of morality, according to their own fixed standards,” who “want to destroy this industry and the happiness and prosperity it affords to a tremendous population.” Unmindful of the “wretchedness and misery that must always follow the striking down of a great industry,” these antis would destroy “not only the one industry that [the United States] monopolizes throughout the world, but is in its financial aspect and in the number of people it employs, directly and indirectly, one of the first five industries of America.”\(^{146}\)

\(^{133}\)Journal of the Senate of Arkansas: Forty-Third Regular Session...1921, at 966-67 (Mar. 4) (21 to 7).

\(^{144}\)Journal of the House of Representatives: Forty-Third General Assembly of the State of Arkansas...1921, at 1196-97 (Mar. 7).

\(^{145}\)1921 Ark. Acts 490, §§ 1-6, 10, at 450-53. A peculiarity of the Arkansas statute was its licensing the sale of cigarettes “in the original package....” Id. §§ 1-4. Although such stringency seems implausible, the language implied that even with a license it remained unlawful to sell cigarettes that had been shipped into Arkansas in ways that failed to meet the rather strict requirements of the U.S. Supreme Court’s original package doctrine. At a special session in 1924 Arkansas imposed a $2.00/1,000 cigarette tax (and a 10 percent tax on retail price of cigars), which was judicially invalidated (on the grounds that the governor had not included the tax in the call for a special session); the law was then re-enacted in 1925. 1924 Ark. Acts 4, at 4; Sims v Weldon, 165 Ark 13 (1924); 1925 Ark. Acts 256, at 750.

Nebraska (1919)

Efforts to regulate morality [from 1905 to 1915] focused on restricting the liquor traffic. Other so-called moral issues—the prohibition of cigarettes, the tightening of divorce laws, or the forbidding of Sunday baseball games—were agitated in some circles, but the liquor issue came increasingly to the fore.\textsuperscript{147}

Nebraska has so long been identified with one great citizen moralist that the outside world has been in danger of thinking that the whole moral impulse of that State was to be found under one capacious hat. But Nebraska has produced other reformers than William Jennings Bryan—as is evidenced by the fact that the State Normal Board has refused leave of absence to the teachers under its control to study at universities where women students smoke cigarettes. Moreover, the Board has the courage of its convictions and has no hesitation in mentioning Columbia, Chicago and Northwestern Universities as dangerous zones wherein indulgence in tobacco is rife among women students.\textsuperscript{148}

In 1905, against the Tobacco Trust’s “hardest possible” resistance—“the lobby fairly swarmed with representatives of the trust”—made affordable by the “very large” profit from cigarette smokers,\textsuperscript{149} and with the support of tobacco dealers antagonized by the monopoly’s siphoning off of all profit,\textsuperscript{150} the Nebraska legislature joined Indiana and Wisconsin in enacting a general sales ban on cigarettes.\textsuperscript{151} The law, which the House passed unanimously (89-0),\textsuperscript{152} but which secured from the Senate only the bare constitutional majority of 17 Yes votes,\textsuperscript{153} made it unlawful to “manufacture sell give away or willingly allow to be taken any cigarettes or the material for their composition known as cigarette paper,” fined violators from $50 to $100 for this misdemeanor, and also held co-liable “[a]ny officer, director or manager having in charge or control either separately

\textsuperscript{147}Robert Cherny, Populism, Progressivism, and the Transformation of Nebraska Politics, 1885-1915, at 110 (1981).
\textsuperscript{148}“The Lure of Tobacco,” Tobacco 73(19):6 (Mar. 9, 1922) (edit.).
\textsuperscript{149}“Independent Dealers Oppose Cigarettes,” LEN, Mar. 1, 1905 (2:3-4).
\textsuperscript{150}“It is claimed that the trade in cigarettes is not remunerative, the profit going to the trust.” “Independent Dealers Oppose Cigarettes,” LEN, Mar. 1, 1905 (2:3-4). See also “Neglected Topic,” LEN, Feb. 27, 1905 (4:1) (edit.).
\textsuperscript{151}For comprehensive treatment of all three states, see vol. 2.
\textsuperscript{152}House Journal of the Legislature of the State of Nebraska: Twenty-Ninth Regular Session...1905, at 304 (Feb. 3) (House Roll No. 72).
\textsuperscript{153}Senate Journal of the Legislature of the State of Nebraska: Twenty-Ninth Regular Session...1905, at 1250 (Mar. 30) (17-10) (1905).
or jointly with others the business of any corporation” that committed any such violation “if he have knowledge of the same....” Ne14 Nebraska tobacco retailers and jobbers “rather welcomed the anti-cigarette law,” while the United States Tobacco Journal certified it as not as “ridiculously sweeping” as the Indiana and Wisconsin laws because it lacked their identically phrased ban on keeping, owning, or being “in any way concerned, engaged or employed in owning or keeping any...cigarettes....”

Dealers generally prepared to comply with the law, whose advent, according to the Lincoln Evening News, they still welcomed, as its July 1 effective date approached. Propelled by their unprofitableness, retailers looked forward to being prohibited from selling cigarettes and were “happy to see the tobacco trust get a body blow and hoped that it would get another jolt soon.” Rumors circulated that the Trust would fight the law, but when the press finally caught up with ATC’s representative, Omaha “cigar man” George Rogers, he was evasive. On June 30, as dealers sold off their stocks at bargain prices, the “good effects of the law [we]re already beginning to be apparent, for a good many smokers, especially such as entertain the fear that they might be arrested for the simple [act of?] smoking have already quit.”

In the state’s largest city, the Omaha World-Herald described a somewhat more differentiated situation on July 1. Under the headline, “Cigaret Fiends Aver They Will Still Smoke,” the paper observed that the key issue was whether cigarette smokers “can get the material by hook or crook.” Common to this heterogeneous group—“from the factory lad, who deftly produces the ‘makins’ from his hip pocket and twists his cigaret with one hand, to the club man whose favorite is the costly gold tipped Monopole”—was provisioning themselves, during the last days before the sales ban became operative, “for the lean years to come by purchases of a vast quantity.” Lincoln and Omaha shared the presence of a “great many dealers [who] have but little regret over the law, as the amount of cigaret sold has been so small as make but a poor showing in the sum total of their profits. But,” Omaha also had large dealers who “will drape the cigaret

154 1905 Neb. Laws ch. 198, §§ 1-3, at 690, 691.
156 “Nebraska’s Anti-Cigarette Law,” USTJ, vol. 54, June 17, 1905, at 6.
157 1905 Indiana Acts ch. 52, § 1, at 82 (Feb. 28); 1905 Wisconsin Laws ch. 82, § 1, at 143 (Apr. 13).
158 “Prepared,” LEN, June 7, 1905 (5:3-4).
159 “Will Quit,” LEN, June 23, 1905 (1:5).
160 “Cigarettes No Longer to Be Found in Stock,” LEN, June 30, 1905 (8:3-4).
show case with mourning for a time out of memory to a dead profit-maker.”161
As one of them confided to the newspaper:

It’s a mistake to believe that we are glad to see the anti-cigaret law effective. We sell
so many of them that the item of profit from that class of goods cuts a big figure in our
business. The cigarettes we sell are of the costlier brands, to the better class of smokers, and
there is a profit on them as good as on cigars which sell for an equal amount.162

The chief method by which cigarette smokers proposed to “foil the
lawmakers” was having cigarettes shipped into Nebraska in original packages;
this plan encompassed direct purchases from factories (“ordering through local
dealers and having the goods consigned to them direct”), which would achieve
cost savings vis-a-vis buying a box at a time. For Omahans another possibility
was a ride across the Missouri River to Council Bluffs, since (allegedly) “Iowa
law provides for a license on the sale of cigarettes....”163 In fact, since 1896 Iowa
had banned the sale of cigarettes and would not adopt licensure until 1921, but
it was the case that in some localities the authorities (and press) ‘mistakenly’ took
the position that payment of the $300 annual mulct tax immunized dealers from
prosecution under the prohibitory law.164 And if some Iowans ‘misunderstood’
their own law, little wonder that some of their neighbors did too. In the event,
when the Nebraska law went into effect, for example, “Central Cigar Store,
Council Bluffs, Ia., licensed,” began advertising in the Omaha press that it would
“send any brand of cigarettes or cigarette papers by mail or express.”165 To be
sure, the 1896 Iowa law did “not apply to the sales of jobbers doing an interstate
business with customers outside of the state.”166 However, since jobbers’
customers by definition were retailers and not individual consumers, their sales
to the latter in Nebraska would presumptively have violated the Iowa law;
conversely, while their sales to Nebraska retailers would not have violated the
Iowa law, those retailers could not have lawfully sold the cigarettes in Nebraska

161 “Cigaret Fiends Aver They Will Still Smoke,” MW-H, July 1, 1905 (5:1).
162 “Cigaret Fiends Aver They Will Still Smoke,” MW-H, July 1, 1905 (5:1). So much
for the claim that in Nebraska: “By 1905 it was widely held that only riff-raff, ruffians, and
vagrants smoked cigarettes, and the anti-cigarette legislation was aimed at them.” Michael
Kuzma, “Kicking the Habit: Nebraska’s 1905 Anti-Cigarette Law,” Nebraska History
86(2&3):92-96 at 94 (Summer-Fall 2005).
164 See above chs. 12 and 15.
166 1896 Iowa Laws ch. 96, § 2, at 96, 97.
to consumers under that state’s new law.

Although the new law did not ban smoking, at this late date still unresolved for enforcement purposes was the question as to whether the ban on manufacturing “permit[ted] one with impunity to roll his own cigarette...”\textsuperscript{167} As soon as the law went into effect, the deputy attorney general stated that the statutory prohibition of cigarette manufacture “is so broad that it may be construed to prevent the individual making his own cigarettes, since the making in any quantity would be manufacture.”\textsuperscript{168} In this connection one Tobacco Trust ruse for subverting the new law quickly surfaced. During recent years, purportedly, most cigarette smokers had been making their own cigarettes from standard smoking tobacco brands, along with which ATC had been sending cigarette paper. Under the new law, wholesalers were “worried over the question” as to whether they were obligated to open sealed cartons (containing a number of small sacks of tobacco and a handful of little books of cigarette paper), which they claimed were “original packages” for interstate commerce purposes, and remove the papers, or whether that duty fell on retailers. The Tobacco Trust, in order to protect and warn its “patrons,” enclosed in each such package the following notice: “‘Dealers located at points where it is not lawful to sell or give away cigarette paper should remove it from this box, and if it is also forbidden to be kept in stock, should destroy the cigarette paper.’”\textsuperscript{169} Despite disseminating this precautionary statement, ATC—at a time when the five states Iowa, Tennessee, Indiana, Nebraska, and Wisconsin, and the Territory of Oklahoma had sales bans in effect—was, the press knew,

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not going to submit tamely to the loss of its cigarette business. So it has sent to its clientele in this state, enclosed in tobacco cartons, envelopes to hand out to their patrons in which are notices to cigarette smokers to the effect that if they will mail two cents to the American tobacco trust it will send them seven packages of the kind of cigarette paper heretofore given away free with trust tobacco or for ten cents sent to it by mail it will mail the smokers three packages of a superior quality of cigarette paper.\textsuperscript{170}
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The cigarette monopoly did not even bother to wait for free market forces, personified by its addicted customers, to be set into motion. In a breathtakingly massive logistical overkill operation impressively demonstrating ATC’s marketing sophistication, it mailed about 2,000 separate packages (each bearing

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\textsuperscript{167}“Cigarettes No Longer to Be Found in Stock,” \textit{LEN}, June 30, 1905 (8:3-4).
\textsuperscript{170}“Cigarette Statute Sweeping in Scope,” \textit{LEN}, July 3, 1905 (1:6-7).
\end{flushleft}
a two-cent stamp and containing seven rolls of 25 papers) “to every man and boy in Fremont whose name appears in the city directory.” The reason for shipping enough papers to make 350,000 cigarettes to a town with a population of about 7,000 was, according to local tobacco dealers, that the new law’s ban on “selling or giving away ‘coffin-nail’ papers has had the effect of reducing the sale of certain brands of tobacco manufactured especially for cigarette use. It is presumed that the manufacturers have become aware of the situation and have taken the course of general free distribution of the papers in order to restore their sales in the state.”

Regardless of whether such individualized interstate shipments to thousands of buyers could actually have sustained ATC’s Nebraska roll-your-own cigarette market—by September it was reported that in Omaha “the cigarette fiend has had little difficulty in getting” the paper from out of state—they could not have contributed to the preservation of the Trust’s core business of mass-manufactured cigarettes, even if state authorities took the position that their shipment (to individual consumers) could not be prohibited.

An initiative undertaken by the U.S. district attorney in Oklahoma to pursue ATC officials from New York for conspiring to violate the Territory’s anti-cigarette law resonated among state enforcement agents in Nebraska, who considered whether they could be brought to that state to be tried for violating and conspiring to violate the latter’s laws. Nebraska’s own residents might also be prosecuted for conspiracy for sending their addresses to the company in New York to receive cigarette paper. In any event, ATC officials in New York were “undoubtedly guilty of misdemeanors every time they send packages of cigarette paper to persons living in Nebraska, and are chargeable with a double misdemeanor when they send the material to minors....” That the governor of New York would agree to extradite them was implausible, but before that weak point would even be explored, this entire legal strategy—at least regarding adult customers—hinged on a finding that interstate commerce was not implicated

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171 “Coffin Nails,” *Norfolk News* (Neb.), Sept. 29, 1905 (7:4) (reprinted from *Fremont Tribune*). Michael Kuzma, “Kicking the Habit: Nebraska’s 1905 Anti-Cigarette Law,” *Nebraska History* 86(2-3):92-96, at 95 (Summer-Fall 2005), completely ignores ATC’s overriding initiative in shipping cigarettes into Nebraska. By the end of 1905 “most” Lincoln tobacco dealers “promptly burn[ed] them [i.e., cigarette papers] as soon as received....” The papers were typically in a “‘big bundle placed in the box and on top of the tobacco.’” “Burn Them,” *LEN*, Dec. 16, 1905 (2:3).


174 See below this ch.
because ATC was not sending “original packages.”

In the latter half of July the Lincoln police chief, having secured “a legal opinion from high authority,” decided to test the new law’s scope by arresting “any man caught in the act of rolling a cigarette.” In the event, however, it was this enforcement regime that was arrested: police chiefs “were bent on strict enforcement of the law as they find it, regardless of the possibility of it being finally overturned,” but, as Lincoln’s observed, it would “‘not do any good to arrest violators of the law if the county attorney doesn’t want to prosecute them.’” The reason for county attorneys’ perceived procrastination was that they were casting about for the best set of facts to insure the act’s judicial validation. Contributing to the delay in instituting a test case was the mirror-image litigational strategizing by the Tobacco Trust. In the meantime, “those addicted to the use of the forbidden smokers may roll and smoke them with impunity.”

The uncertainty swirling about the Tobacco Trust’s strategy for challenging the law soon dissipated when an Omaha tobacco retailer, John Alperson, a 42-year-old Russian Jew who had immigrated to the United States in 1887, was arrested and taken into custody on September 6 for having “giv[en] away and willingly allow[ed] to be taken cigarettes and the material for their composition known as cigarette paper.” That same day Alperson’s Tobacco Trust lawyers in Nebraska, Woolworth & McHugh, petitioned the district court for a writ of habeas corpus to discharge him on the grounds that the statute pursuant to which he had been arrested was null and void inasmuch as the provisions relating to giving away cigarettes and cigarette materials were “unconstitutional and void, as being in excess of the scope of the act as indicated by the title thereof.”

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175“Mailing Cigarette Papers May Be Crime,” LEN, Sept. 21, 1905 (4:1-2). In fact, if the packages were sent to individual adult consumers they might very well have passed muster.

176“Cigarette Rollers Will Be Arrested by Police,” LEN, July 21, 1905 (5:3-4).


1781900 and 1910 Census of Population (HeritageQuest). By 1910 he was living alone as a lodger. He was listed as operating a cigar store in 1914. Omaha City Directory 1914, at 77, on http://distantcousin.com/Directories/NE/Omaha/1914/Page.asp?Page=077.

179In the Matter of the Application of John Alperson, for a Writ of Habeas Corpus, Petition, Exhibit B: Complaint (Sept. 6, 1905), Douglas County, Nebraska District Court, Criminal, Docket No. 10-35 (copy furnished by Court File Dept., Clerk of the Douglas County Dist. Ct.).

180In the Matter of the Application of John Alperson, for a Writ of Habeas Corpus, Petition at 1-2 (Sept. 6, 1905), Douglas County, Nebraska District Court, Criminal, Docket No. 10-35 (copy furnished by Court File Dept., Clerk of the Douglas County Dist. Ct.).
State District Court Judge George Day in Omaha ordered that the writ of habeas corpus be allowed to issue in Alperson’s favor returnable on September 8. Then on September 18, Day found that Alperson was being “unlawfully deprived of his liberty” and ordered him discharged from custody. The judge “based” his “decision on the argument advanced by Judge McHugh,” ruling that that part of the statute that prohibited giving away cigarette paper violated the state constitution because it was not covered in the title. Alperson’s lawyer, “Judge McHugh, asked for a writ of habeas corpus, which Judge Day grants.” Commenting on his own opinion, Day regretted that he had been “obliged to decide the question this way” because in his juvenile court work he had found that “the habit of smoking cigarettes is quite prevalent among the young boys and I have been doing what I can to stamp out the evil.”

“Judge McHugh” was William Douglas McHugh (1859-1923), whose honorific stemmed from his recess appointment by President Grover Cleveland to the U.S. District Court for Nebraska on November 20, 1896, which lasted only until February 1, 1897, when, as the result of a party-political dispute, the Senate failed to confirm him. A name partner in an Omaha corporate law firm, McHugh had been president of the Nebraska Bar Association in 1901 and in the last years of his life was general counsel of International Harvester Company. His high standing in business circles was suggested by the fact that President Taft considered nominating him to the Supreme Court and his political position was
identifying by his signing (“lawyer representing Standard Oil Company”), as one of 30 prominent Omahans. the manifesto of the Nebraska Men’s Association Opposed to Woman Suffrage in 1914, on the grounds that “woman suffrage is inconsistent with the fundamental principles upon which our representative government was founded” and would merely instantiate “emotional suffrage” at a time when the United States had “already extended suffrage beyond reasonable bounds.” Unsurprisingly, McHugh became ATC’s litigator for attacking Nebraska’s anti-cigarette law.

ATC and the state appeared before the Nebraska Supreme Court on October 3 on a habeas corpus petition—the Tobacco Trust’s favorite vehicle for challenging the constitutionality of state cigarette sales bans. However, rather than alleging an infringement of the congressional interstate commerce power, Alperson’s lawyers merely claimed that the act violated the state constitution inasmuch as its title failed to reflect its textual prohibition of giving cigarettes away. The lower court sustained this contention in preference to the state’s more subtle argument that the title, despite the lack of reference to gifts, was sufficiently broad because it demonstrated that the legislature’s purpose was to prevent the use of cigarettes and “an act to prohibit the manufacture and sale...could not be made effective if persons were left at liberty to give away cigarette paper and tobacco and thereby enable anyone...to procure by gifts cigarettes which the statute does not permit to be manufactured or sold.”

On October 19, the Nebraska Supreme Court rejected the Tobacco Trust/Alperson’s argument by determining what the law was designed to prevent:

The legislature undoubtedly supposed that the use of cigarettes was injurious to the public in general, through its effects upon the health and morals of the people. ... That the use of these injurious articles might be discouraged, and the injurious effects thereof upon the public removed as far as possible, it was made unlawful to manufacture, sell or give away the article itself. ... The intention is to remove these articles from the avenues of commerce; to banish them from the state as guilty and illegitimate things that ought not to be offered to, or easy of access by, vicious or thoughtless people who are, or may be,
Against such a background of legislative intent, the court concluded that the subject of the law as embodied in the text was not “so disguised in the title,” which mentioned the prohibition only of the manufacture and sale of cigarettes, “that the legislators would not be sufficiently notified by the language used in the title that it was intended to discourage the use of the articles referred to, and to that end, to prevent all traffic in them....” If in an earlier case the Nebraska Supreme Court upheld a statute whose title mentioned only text-books, whereas its text used “school supplies,” the court now held that: “If the barter and gift of cigarettes...are not prohibited by the act, it is manifest that the purpose and intent of the legislature is thwarted, and we think that purpose and intent is plainly to be derived from the title of the act itself.” Consequently, it reversed the district court’s judgment and remanded Alperson to custody.\(^\text{195}\)

Though some dealers in Omaha had resumed sales in the interim between the district court’s and the Supreme Court’s ruling, the latter would, the press reported, put a sudden stop to them, in which larger dealers, advised of the risk by their lawyers, had not engaged anyway.\(^\text{196}\) Rogers, the aforementioned “representative of the tobacco trust,”\(^\text{197}\) observed that the decision would make no difference to him because he had stopped selling cigarettes as soon as the law went into effect (“‘our attorney said “nixie’””). Most “‘regular cigarette smokers,’” according to him, “‘made arangements [sic] to have their supplies sent in from outside the state without getting anybody tangled up in the operation.’”\(^\text{198}\)

That ATC’s representative in Omaha had simply acquiesced in the new law does not accord with the experience of any other statewide ban state,\(^\text{199}\) and in the wake of the resolution of Alperson, the state’s focus of enforcement and the Trust’s litigation focus shifted to the aforementioned issue of the lawfulness of consumers’ rolling their own cigarettes. The first (or perhaps the first widely publicized) arrest took place in Lincoln a month after the Supreme Court had

\(^{194}\)Alperson v Whalen, 74 Neb. 680, 682 (1905).

\(^{195}\)Alperson v Whalen, 74 Nebraska 680, 683-84 (1905). See also “Supreme Court Places Ban upon Cigarettes,” MW-H, Oct. 20, 1905 (1:6-7).

\(^{196}\)“Supreme Court Stops Traffic in Cigarettes,” LEN, Oct. 21, 1905 (5:3).

\(^{197}\)“Will Quit,” LEN, June 23, 1905 (1:5).

\(^{198}\)“Supreme Court Stops Traffic in Cigarettes,” LEN, Oct. 21, 1905 (5:3).

\(^{199}\)At the beginning of November it was reported that Norfolk (pop. ca. 5,000) was Nebraska’s “only town of its size or bigger...in which it is impossible to buy a tailor-made cigarette.” “Bad for Cigarette Man,” Norfolk News, Nov. 3, 1895 (8:3).
issued its decision, when the accused, 18- (or perhaps 20-) year old Pat Raymond, was caught red-handed by a detective in a saloon. From the outset the press knew that the legal issue was whether making cigarettes for one’s own use constituted prohibited manufacturing: “If a liberal interpretation of the word ‘manufacture’ be accepted it means only the making by hand, but in modern parlance it means anything else than making by hand, for in its common acceptation it means the making for trade, which in these days is generally making by machinery.”200 The problem with the case was that Raymond, who had been in Lincoln only three or four days following work on a farm, had but two or three dollars to his name and therefore lacked the means to finance a Supreme Court adjudication. (He suggested to the police court judge that various family members might pay for a lawyer, but the judge, who actually telephoned one uncle, ascertained that the relatives were “also in poor circumstances.”) As a result of this “impecunious condition of the subject the authorities [were] somewhat perplexed as to what to do with the case. They feared that if they were to dismiss the complaint and let the lad go it might be taken as an [sic] evidence of an indisposition to attempt enforcement of the anti-cigarette law.”201

Two days later a very stern Police Court Judge Cosgrove sliced through the authorities’ perplexity by fining Raymond (the minimum) $50—which the press humorously characterized as “not so bad inasmuch as the fine...is one-sixth as large as that recently imposed by the federal court for the unlawful fencing of 212,000 acres of government land”—plus costs in spite of his having been “ready to promise to smoke no more cigarettes in this state....” Pairing epistemological humility with severity in executing the law, Cosgrove conceded that: “‘I am somewhat in doubt in regard to the meaning of the word manufacture in the law and I don’t know but what it is a broad enough term to fit the individual maker of a cigarette, but that is not for me to say. I propose to enforce this law upon every man found guilty, no matter who he may be. I regret that you are the law’s first victim, a young man without means and away from home and friends, but I see no way out of it. I am trying to enforce the laws of this state. If any man rides a bicycle upon the sidewalk, even though it be for only two feet, he is fined by me if he comes before me. I will impose the minimum penalty upon you, and when you get out I would advise you to ‘quit smoking cigarettes.’” Although the youthful offender “did not whimper,” the press perceived that Raymond “felt stunned at the prospect of so long an immersion in jail.” Feeling the “weight of the law’s displeasure with crushing force,” he pleaded in vain that “‘I didn’t know

200“First Case,” LEN, Nov. 20, 1905 (5:1).
201“Anti-Cigarette Case Goes over for One Day,” LEN, Nov. 11, 1905 (5:6-7).
nothing about any such law.” Since Judge Cosgrove “hated to fine that boy Raymond” and “even the police officers” felt that he was “hardly a proper subject to make an example of,” it was “understood” that an effort would be made to “get the governor to extend leniency to him.” Whatever trepidations might have inhibited law enforcement until this time, meting out punishment to Raymond transformed the city of Lincoln, which “suddenly got busy with violators of the anti-cigarette law.” Whereas only a few days earlier it had been possible to buy cigarettes from at least one dealer with ease, now the capital was a “model city.”

Based on the account of Raymond’s case in the United States Tobacco Journal, a New York Times editorialist pretended that: “We cannot even pretend that we actually believe this story, but it is a pleasant one to toy with, and by doing so long enough, in exactly the right spirit, one can pump up a very agreeable feeling of indignation over the present possibilities in the way of interference with the natural rights of free-born American citizens.” Whatever the empirical accuracy of claims of cigarettes’ injuriousness, the newspaper charged advocates of rigorous anti-cigarette legislation with a failure to understand that “compulsion is the poorest of arguments.”

Raymond had endured but a few days of languishing in jail when fortune, as mediated by McHugh and the Tobacco Trust, began to shine on him. Respecting no limits to the thickness of the persiflage it laid on, the Lincoln Evening News predicted that Raymond “seems likely to be given a place of distinction in the legal history of the state. A thousand years hence, when the rest of us are forgotten, the lawyers of that day, if the people be then so unfortunate as to have them, will be pouring [sic] over the Nebraska reports to encounter the name of Pat Raymond and to read his celebrated case.” When McHugh surfaced at the Lincoln police station to examine the record, the press understood that he was “interested on behalf of the tobacco trust...to make a test case,” in the creation of which the deputy county attorney was willing to participate—even to the extent of filing a new information charging Raymond with having “manufactured” a cigarette—in order to boil the litigated question down to whether anyone in Nebraska had the “right to roll a cigarette for his own use and smoke it.”

204 “Cigarette Roller Fined Fifty and Trimmings,” LEN, Nov. 22, 1905 (1:6-7).
206 “Harsh War on Cigarettes,” NYT, Nov. 27, 1905 (8) (edit.).
207 “Cigarette Law to Be Subjected to Test,” LEN, Nov. 24, 1905 (5:1-2). See also “Tobacco Companies Take Up Case,” Red Cloud Chief, Dec. 1, 1905 (6:1). Later the
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

McHugh, who was “in the employ of the cigarette trust,” and the county attorney gave new meaning to manufacturing a test case by arranging a plan starring Raymond, who “consented to become the defendant in a second case,” according to whose choreography sometime on November 25 he “will...in the presence of several witnesses deliberately roll and smoke a cigarette. Thereupon he will be rearrested on a new complaint. Immediately an application for a writ of habeas corpus will be filed and a hearing had on the application as soon as possible. The case will be carried to the supreme court at once....” McHugh, who called Raymond’s original conviction an “‘extreme case’” in that he was fined $50 for rolling a single cigarette under an interpretation of “manufacture” that ATC’s lawyer did not think “‘was in the minds of the legislators who framed the law.’”

Alas, ATC’s sun shone but briefly on Raymond, whom McHugh discarded just as instrumentally as he had bestowed momentary fame on him. In his zeal to manufacture a case with the optimal set of facts for the Trust on the meaning of the “manufacture” of cigarettes, McHugh no longer had any use for Raymond because he wished to eliminate the distraction of his age. Whereas in other states and in Alperson as well ATC’s selection of a straw man litigant typically went on behind the scenes, here the puppeteer publicly revealed his choreography and apparently even sought the press’s assistance in scaring up the proper puppet. The Omaha Morning World-Herald obliged with this entertaining come-on headline cum subhead: “Cigarette Fiend’s Chance to Play Martyr’s Role: Attorney McHugh Looking for One to Break Law and Be Arrested for Sake of Test.” The press proceeded to reveal as well that: “Attorney W. D. McHugh is in the market for a cigarette smoker who is willing to have a portion of the state anti-cigarette law tried on him. ... It is the desire of the judge to start from the very beginning of the case and make the test step by step. For that reason he is looking for someone in Omaha on whom it can be fairly tried....” In the interim, while McHugh interviewed and auditioned actors for his judicial play, the Omaha press stated that it had been “announced that he [McHugh] was retained by the tobacco trust to test the validity of the law....” “Cigarette Smokers Need Not Fear Arrest Now,” LEN, Dec. 11, 1905 (1:6-7).


211See above Parts I-II. Those straw men were also typically sellers.

212“Cigarette Fiend’s Chance to Play Martyr’s Role,” MW-H, Nov. 28, 1905 (2:3).
police obligingly announced that they would not seek to enforce the law against those rolling their own, although the police chief, with regard to “the moral aspect of the case...would like to be able to clap anyone in jail who is caught just taking the feeblest ‘drag’ at one of the so-called coffin nails.’ The chief fails to find in the dictionary words adequate to express his contempt of the habit.”

McHugh and ATC did not have long to wait for their test case: on November 29, 30-year-old Edward Stout was arrested in Omaha for rolling his own cigarette for his own use and smoking it; less than a week later, he was released by the district court on a writ of habeas corpus on the grounds that such an act did not constitute manufacture. At oral argument before the Supreme Court Nebraska Attorney General Norris Brown had contended that the law’s prohibition of manufacturing comprehended “both making for private and for public use,” but in March 1906, the court affirmed on the basis that the “[t]he only reasonable conclusion” to be drawn from Alperson v Whalen was that neither manufacture, nor sale, nor giving away cigarettes was “of itself the subject” of the law, but rather the traffic in them. At oral argument in Stout’s case McHugh had argued that “the legislature has no power to regulate the personal habits of an individual by forbidding him to use cigarettes; that it is the right of the sovereign citizen to eat, drink and smoke what he may choose to, although it may be the judgment of the legislature that he is injuring himself by so doing.” Accepting this “suggestion” (which prohibition was already in the process of refuting), the Nebraska Supreme Court concluded that “the legislature in this act has avoided any attempt to regulate the personal habits of the citizen.” Rather, its purpose was “to suppress the traffic in, and not to forbid the use of,” cigarettes. “It is true that the law assumes that the use of the articles is injurious to the health and morals of the public, and that therefore traffic in the articles themselves should be made illegitimate. The law thus discourages the use of the articles, but it intentionally avoids forbidding the individual to use them.” Instead of determining whether “manufacture” could plausibly mean the making of cigarettes by hand, the court interpretively leaped directly from ATC’s libertarianism to construing the law as using the word to mean “to engage in and carry on the business of manufacturing.” It is the business of manufacturing for

213“Tobacco Trust Attorney Passes Pat Raymond Up,” LEN, Nov. 28, 1905 (2:1-2). Although the Omaha police undertook to enforce the rest of the law, when the first ($50) fine was issued in that city for giving away cigarettes, the judge recommended to the mayor remitting the fine because the violator had a family who would suffer. Id.

214“No Crime to Roll a Cigarette,” MW-H, Dec. 6, 1905 (2); Dempsey v Stout, 76 Neb. 152, 153 (1906).

traffic that is prohibited. The act of ‘rolling cigarettes’ from one’s own materials and for one’s own use is so connected with the use as to be a part of such use, and this it was clearly not intended by the legislature to prohibit.”

As the first anniversary of the law approached, Nebraska tobacco jobbers self-interestedly complained that instead of diminishing cigarette consumption, it had merely shifted a large trade volume to their western Iowa and Kansas City competitors, who shipped directly to individual consumers under the protection of the congressional commerce power. Alternatively: “For the insignificant sum of ten cents a cigarette fiend may thus obtain by mail enough paper for the manufacture of 350 smokes, and upon this quantity at the price the trust is only too glad to pay the postage.” Dealers adduced as evidence for the claim that this latter regime was “enabling the cigarette smoker to get along pretty comfortably in the gratification of his appetite, in spite of the attempted restraints of the law,...the fact...that one recently offered brand of cigarette tobacco ha[d] met with a sale that eclipses all records.” After a year’s experience with the law, retailers and jobbers would still not have felt “hostile to it if it really accomplished anything in decreasing the use of the detested smoker [i.e., cigarette], but inasmuch as they can see the use of the cigarette go on without effective restraint, while they are prohibited from meeting the demand, they feel that the restriction upon their business is...unjust.” This reconfiguration of sales and consumption patterns prompted the Republican *Lincoln Evening News* to conjecture with, roughly equal portions of irony and hyperbole, that: “Perhaps the tobacco trust saved money when it failed to buy up the legislature for the defeat of the bill.”

That the momentum had not yet shifted to the anti-prohibitionary forces in the Democratically-controlled legislature in 1917 was signaled by the treatment of a bill to repeal the sales ban and replace it with a no-sales-to-minors cum licensure regime. The claim by the trade magazine *Tobacco* that interest in the bill was developing among legislators may have been as accurate as its assertion that for years Nebraska had had on the books “laws prohibiting the sale and smoking of

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216 Dempsey v Stout, 76 Neb. 152, 154-55 (1906).
217 “Legal to Roll a Cigarette,” NYT, Mar. 23, 1906 (1).
219 *Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of Representatives* 203 (Jan. 30) (H.R. No. 427 introduced by William Dorsey and P.B. Neff), 778 (Mar. 15) (n.d. [1917]). On Dorsey, a Republican lawyer who was appointed a district court judge at the end of the 1917 session, see *The Nebraska Blue Book and Historical Register: 1918*, at 272 (Addison Sheldon ed. 1918).
cigarettes by any person....” The publication went on to charge that the law had
“never been enforced, nor was any particular attempt ever made to enforce it,
because it appeared to be the general belief that if a grown man desired to use
tobacco in cigarette form, it was his own business and nobody had a right to deny
him that right.” The bill’s progress came to a halt when the Judiciary
Committee recommended its indefinite postponement and the full House followed
suit.

Also of great practical significance for the anti-cigarette movement was
House Roll No. 304, whose legislative fate closely resembled that of the public
smoking bill. Introduced by Democrat and stockman James A. Ollis, the
measure made it a misdemeanor for any county attorney to “wilfully neglect, or
refuse to prosecute persons violating...the Anti-Cigarette Law.” The bill was
motivated by the “common knowledge” that the 1905 Anti-Cigarette law was
“being violated openly, notoriously and continuously” and by the fact that “the
county attorneys have generally failed and neglected to enforce” it. The House
received a large number of petitions supporting the bill, and the WCTU
petitioned the Senate in its favor. After the Judiciary Committee had
recommended passage and the committee of the whole house had recommended
that it be engrossed for a third reading, another huge House majority (68 to 9)
passed the bill. Four of the nine Nays were cast by four of the nine

221 Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of
Representatives 830, 881 (Mar. 19, 21) (n.d. [1917]).
222 According to the 1910 Census of Population and Compendium of History,
Reminiscence and Biography of Nebraska (1912), Ollis was born in 1828, retired from the
farm in 1904, and owned considerable city property in addition to stock and grain land.
He had also been a member of the Nebraska House in 1901 and a senator from 1909, 1911,
and 1913. The Nebraska Blue Book and Historical Register: 1918, at 278 (Addison
Sheldon ed. 1918).
223 Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of
Representatives 158 (Jan. 24) (n.d. [1917]).
224 Senate Journal of the Legislature of the State of Nebraska: Thirty-Fifth
Session...1917, at 668 (Mar. 27).
225 Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of
Representatives 198, 215, 279, 293, 310, 325, 357, 380, 402, 414, 458, 489, 519, 635 (n.d.
[1917]).
226 Senate Journal of the Legislature of the State of Nebraska: Thirty-Fifth
Session...1917, at 280.
227 Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of
Representatives 477, 820 (Feb. 20, Mar. 17) (n.d. [1917]).

1346
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

representatives who had voted against H.R. No. 248, while only three Nays were cast by members who had voted for that bill. Again, despite this robust House majority, the bill died in the Senate, which took no action took on it after its referral to the Judiciary Committee.

By 1919, with the end of the World War and the return of the soldiers and of massive Republican majorities in both houses of the state legislature, the pressure for the legalization of the sale of cigarettes to adults intensified, though both chambers were still operating under the same no-smoking rules in force since the 1870s. The repealer, House Roll No. 297, was introduced by Republican Donald McLeod, a 64-year-old retired blacksmith, who had immigrated to Nebraska from Prince Edward Island in 1878; in the eastern Nebraska town of Schuyler (pop. 2,636 in 1920) he sat on the city council and board of education, was mayor, represented the county in the state House of Representatives in 1897, and received, as a “firm believer” in his party’s doctrines, especially sound money and protection, federal executive nomination and Senate confirmation as postmaster in 1907. McLeod’s key role in repealing the 14-year-old cigarette sales ban may have been bound up with the fact that one of his sons had been the first Schuyler “boy” to have died of his wounds in France; when McLeod received notice that his son’s body would finally be returned to the United States, he requested that the American Legion be in charge of the services and referred the notification letter to the commander of the (conveniently named) McLeod Post. In addition to repealing the sales ban, McLeod’s bill created a decentralized licensure system for the sale of

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228Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of Representatives 930 (Mar. 26) (n.d. [1917]).
229Senate Journal of the Legislature of the State of Nebraska: Thirty-Fifth Session...1917, at 722 (Mar. 29).
230The Nebraska legislature, according to Roland Jones, “Corn Belt States Plan New Tax Laws,” NYT, Jan. 27, 1929 (E2), “was persuaded by the returned soldiers to repeal” the cigarette sales law.
231See below Tab. 6.
232Census of Population 1900, 1910, 1920 (HeritageQuest); Nebraska Legislative Year Book for 1897, at 136 (1897); CR 41:4356 (Mar. 1) (1907); The Nebraska Blue Book and Historical Register: 1920, at 341 (Addison Sheldon ed. 1920); The Nebraska Blue Book: 1922, at 220, 275 (1922). Re-elected in 1920, McLeod died in 1921.
cigarettes to persons over 18 and imposed misdemeanor liability on any underage person who represented that he was of age.\textsuperscript{235}

As soon as H.R. No. 297 had been introduced, the Omaha \textit{World-Herald}, the state’s leading daily, editorially complained that the 1905 anti-cigarette statute was a “freak” law that prompted outsiders to conclude that Nebraska was a “freak state.” It charged that in enacting the “ridiculous” general sales ban in 1905 the legislature “yielded once, in a moment of weakness, to the demand of cranks and faddists” with the predictable results both that the law “fell into disrepute as soon as it went on the statute books” and that the “consumption of tobacco in cigarette form in Nebraska is many times as great today as when the law was passed!” (Unfortunately, to back this latter claim the newspaper offered no data, which it presumably also lacked, though ATC or the Tobacco Merchants Association might have been willing to provide this proprietary information in such a good propaganda cause.) The editorialist was heartened that at “every session of the legislature” since 1905 members had been “found with sanity enough to introduce bills” that proposed to restore adults’ unencumbered access to cigarettes,” but for reasons that the paper left unfathomably opaque, “every session” had also “developed a majority of members who were afraid to do that obvious and rational thing because of the clamor of a few faddists with a power for making a great noise.”\textsuperscript{236} (How a small minority of alleged extremists had, over consecutive sessions, been able to intimidate an unbeheld legislative majority remained a mystery to a newspaper that simply did not want to contemplate the possibility that, as was the case in some other states, a large number of Nebraskans had adopted a firm anti-libertarian position that it was necessary and acceptable to deprive adult men of access to cigarettes in order to deprive their sons and daughters of the same access.) What inspired the \textit{World-Herald} with hope that 1919 might be different was that

\begin{itemize}
  \item now we have a couple of score thousand soldiers some home, husky and vigorous young men, the great majority of them cigarette smokers. Those who did not have the habit before learned it in the army. They acquired it under the eye and with the consent of Uncle Sam. The Red Cross, the Y. M. C. A. and other similar organizations helped introduce them to it. Devoted women all over the land, by the scores of thousands, have given their time to packing the “little smokes” in the soldiers’ kits. The war has made the short, clean, dry smoke of “the paper pipe” respectable.\textsuperscript{237}
\end{itemize}

\begin{footnotes}
\textsuperscript{235}House Journal of the Legislature of the State of Nebraska: Thirty-Seventh Session...1919, at 233 (Jan. 29).

\textsuperscript{236}“A Lawless State,” \textit{MW-H}, Feb. 1, 1919 (10:1) (edit.).

\textsuperscript{237}“A Lawless State,” \textit{MW-H}, Feb. 1, 1919 (10:1) (edit.).
\end{footnotes}
In this mantra, favored by cigarette manufacturers into the twenty-first century, that government intervention should be confined to children, while adults must be off limits, other Nebraska newspapers chimed in. The *Fremont Herald*, for example, agreed that the current law “doesn’t prohibit worth a cent. A man can buy cigarettes in any town in Nebraska. [A]s for prohibiting the sale of cigarettes to men, it can’t be did [sic]. The cigaret has come back to stay.”  The *Lincoln Journal*, which purported to “instinctively reach for something to throw when their [cigarettes’] aroma greets our nostrils,” but quickly added that “law-making isn’t based on individual likes and dislikes,” shared the view that keeping cigarettes away from adolescents was “doing as much as is possible.... We cannot hope to prevent men of years of discretion getting them.” Even the Omaha public schools’ chief truant officer hopped on to this bandwagon, suggesting that the cut-off age for adults be lowered to 16, because then “dealers would cooperate with authorities.”

Now, Nebraska editorialists and legislative repealers were libertarians, but to a degree, they wanted everybody to be free to buy cigarettes over a certain age, but this laissez-faire sentiment did not extend to “anarchistic and destructive socialistic elements” whom the legislature was at the same time determined to “punish” by outlawing the display of red or black flags (while thoughtfully exempting railroad employees who were signaling). So intent were the legislators on “sustain[ing] the government against the forces of bolshevism and anarchy” that only one (a former socialist) voted No in the House and none in the Senate.

The House Committee on Medical Societies, to which the bill had been referred, held a hearing on February 6, at which a returned sailor along with two other witnesses spoke in favor of the bill. Interestingly, no one appeared in

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2421919 Nebraska Laws ch. 208, § 2, at 916-17. The penalty was a maximum fine of $1,000 and a maximum imprisonment of five years. *Id.* § 5.
244*Senate Journal of the Legislature of the State of Nebraska Thirty-Seventh Session...1919*, at 586-87 (Mar. 5).
245*House Journal of the Legislature of the State of Nebraska: Thirty-Seventh Session...1919*, at 1463 (Jan. 30).
opposition to H.R. No. 297, although the Nebraska WCTU leaders had been invited. World War veteran F. B. Jeffries, who had operated big naval guns in battles in France, stated that he had received cigarettes from government canteens as well as from the YMCA, Red Cross, and Salvation Army and “[w]e found them a great solace and comfort.”

Presumably having learned that cigarette use allowed him to “escape aversive states associated with smoking abstinence” or that smoking helped him “avoid these aversive states,” Jeffries—who boasted of having smoked cigarettes for six years “without ill effect” and of a six-inch

246“New Anti-Cigaret Law Reported for Passage,” MW-H, Feb. 7, 1919 (1:6). Neither Jeffries nor one of the other witnesses, Dan Whiting, appeared in the 1920 Census of Population. The third witness, Willard Washington Slabaugh, an Omaha lawyer and former state district court judge, who also taught law at the University of Omaha, was a trustee of the Omaha Child Saving Institute and professed “health” as his hobby. Albert Watkins, History of Nebraska 3:604 (1913); Nebraskana: Biographical Sketches of Nebraska Men and Women of Achievement Who Have Been Awarded Life Membership in the Nebraska Society (Sara Baldwin and Robert Baldwin eds. 1932), on http://www.usggennet.org/usa/ne/topic/resources/OLLibrary/Nebraskana/pages/nbka0248.htm. Slabaugh was the Douglas County (Omaha) Attorney in 1905 when Alperson was prosecuted in ATC’s first challenge to the general sales ban.

247U.S. Department of Health and Human Services, How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking Attributable Disease: A Report of the Surgeon General 122 (2010). Clarence True Wilson, the general secretary of the Board of Temperance, Prohibition, and Public Morals of the Methodist Church, was at this very time engaged in a campaign excoriating the Tobacco Trust for having “‘foisted’” “‘the doped cigaret...on the country in war times. The men who have been able to throw off nicotine and the poison in the activities of the field and the march and strenuous life in the trench will go to pieces utterly in the sedentary habits which they will enter when they are again in civil life. Our board must open their eyes to this poison traffic, and personally I think that the tobacco trust, by the dishonest and impudent methods of pushing its work, has gone so far beyond the pale of decency that it ought to be buried in the same grave with the pro-German brewers who trampled on the American rights in war times. Their lying advertisements, “Cigaretts Won the War,” ought to bring the blush of shame to every American who is not in fighting trim.’” Wilson announced that the Board, now that liquor prohibition had been achieved, would “‘conduct an educational and moral suasion campaign against the personal use of the doped cigaret....’” “Says Methodists Plan Anti-Tobacco Crusade,” MW-H, Mar. 12, 1919 (20:1). He nevertheless denied the outlawed liquor industry’s claims that liquor prohibitionists were seeking a constitutional amendment against tobacco, although he emphasized that “‘many millions of people have warmly resented the forcing of cigarettes to [sic] those of our soldiers who were not previously accustomed to them....’” “Denies Intent to Prohibit the Use of Tobacco,” CT, Feb. 4, 1919 (4:4).
chest expansion—touchingly pleaded that: “I want the present law repealed because I don’t want to feel that I am a lawbreaker and a criminal every time I buy cigarets, which is perfectly easy, but nevertheless unlawful at present.” The committee supported the repeal bill because the prohibitory law was openly violated, unenforcible, and, unlike, McLeod’s proposal, gave “no premium for refusal to sell to minors....” Ironically, the committee majority was composed of two physicians and a dentist (while the sole dissenter was a merchant).248

Literally on the eve of the resumption of House consideration of H.R. No. 297 the World-Herald intervened to plead for such a “sound, reasonable, certain” approach among legislators who aspired to perform “public service” instead of hoping to make “political capital by demagogic clap-trap.” To this latter group the paper assigned Republican Representative George Maurer (an Iowan who had attended Cornell College and Iowa State University before becoming a farm machinery retailer in Nebraska), who “favors sending a man to the penitentiary for life if he sells a cigaret” and Omaha Republican John Larsen (a Dane and state labor department investigator)249 who charges that the tobacco trust put cigarets in the hands of soldiers for a sinister purpose and that the power of the tobacco trust is what keeps Nebraska courts from enforcing the present law. Who can reason with a man who charges, by implication at least, that President Wilson and Secretary of War Baker connived with the tobacco trust to debauch American boys? Who can reason with a man who charges that Nebraska judges and juries are bribed or coerced into a betrayal of public trust by venal agents of the tobacco trust?250

The editorialist preferred legislators who revealed “the fact”—both that of seeing policemen, judges in court, and legislators in the legislature smoking cigarettes that they had gotten unlawfully and that the Tobacco Trust had no need to be backing repeal because “it sells all the cigarets that can reasonably be sold in


249“A Law—Or a Farce?” MW-H, Feb. 21, 1919 (8:2) (edit.). For the legislators’ background information, see The Nebraska Blue Book and Historical Register: 1920, at 341-42 (Addison Sheldon ed. 1920). Interestingly, Maurer did not vote on the indefinite postponement or final passage of the bill; Larsen voted against the latter but did not vote on the former.

250“A Law—Or a Farce?” MW-H, Feb. 21, 1919 (8:2) (edit.).
Nebraska, now, law or no law.”

For three hours of the session’s theretofore “most bitter dispute” and “hottest debate” the committee of the whole house considered the bill on February 21, resulting in the session’s theretofore closest vote. Opponents of repeal “charged its friends with being tools of the tobacco trust and characterized the cigaret as a greater agent of immorality than whisky.” It would have come as no surprise to his colleagues that Representative Fults, who had introduced the comprehensive public cigarette smoking ban in 1917 and did not shy away from calling the whole issue a “moral” one, “declared that within six years the prohibition of the use of tobacco in any form will be an issue in the Nebraska legislature” and “denounced the user as a degenerate and condemned all use of tobacco as on a par with the use of intoxicating liquors.” Fults’s prediction may have been off by at least a century, but his colleague Brantly Sturdevant, a Baptist real estate and insurance agent, was beating a dead old horse in asserting that cigarettes were full of opiates. While agreeing that cigarettes were a moral issue, Republican Milton Wildman, a University of Michigan law graduate and former city and county attorney and county judge, turned scientific in stating that cigarette smoking made “the lungs like powder, such that a man can take them between the thumb and finger and squeeze them into dust.” Challenged to substantiate his insistence that the prohibitory law was enforceable, he instanced his hometown of York (pop. ca. 5,000), though even he was constrained to admit: “Of course, I don’t mean that it is absolutely enforced. You can’t stop it all.”

In response to the claim that the cigarette question, rather than a “moral” one, hinged solely on whether the law was efficient and workable, Fults—who declared that “conditions had grown so bad that one who sat down at a table in a restaurant with a lady ran the risk of having cigaret smoke blown across the table by some degenerate”—boasted that as prosecuting attorney (of Furnas County, pop. 11,657): “I have been instrumental in collecting more money in fines for violation of the prohibitory law than has been collected in any two counties outside of Douglas.”

Using formulaic WCTU terminology, Republican

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252 “Hot Contest over Cigaret Measure,” *NSJ*, Feb. 22, 1919 (1:3) (surpassing the language and parochial school questions).

253 “Anti-Cigaret Bill Has Tight Squeeze,” *MW-H*, Feb. 22, 1919 (1:2). The population of York, which was the state’s fourteenth most populous town, was 5,388 in 1920. Oren Bowen, *The Government of Nebraska* 92 (1922). For legislators’ backgrounds, see *The Nebraska Blue Book and Historical Register: 1920*, at 335-46 (Addison Sheldon ed. 1920).
farmer Albert Miller voiced his opposition to “the licensing of evil. ‘You cannot base good government on such a scheme.’” Nevertheless, he nodded to his adversaries’ argument long enough to speculate that if the legislature appropriated funds similar to those voted to enforce liquor prohibition, “possibly the present law would be found workable.”

Typical of repealers’ focus on enforceability was the plea by House Speaker Dwight Dalbey (who before engaging in “the business of farming” was a graduate of the University of Illinois and an agronomy instructor at the Illinois agricultural college) for ecumenism and mutual tolerance among all adult tobacco smokers: “Personally, I don’t smoke cigarets, but I am not so intolerant that, because I smoke cigars instead of cigarets, I am unwilling that another man should use tobacco in the form which he prefers. Public sentiment does not support prohibition of the sale of all cigarets. It does support the non-use of cigarets by minors....” Dalbey was presumably attempting to mobilize empirical evidence in support of his accommodationalist preaching in response to Larsen’s proposal to punish even possession of cigarettes with imprisonment by offering an amendment to prohibit the possession of all forms of tobacco: as his die and let die doctrine would have predicted, both were voted down as was another to confine sales of cigarettes to those 90 and over. In seeking to persuade his colleagues to coalesce around the bill, Republican lawyer James Rodman (incorrectly) alleged that just the previous day the Senate in neighboring Iowa had said, “‘We have seen the light,’” in voting to repeal its sharp-toothed law that had been carried as a “dead letter” since 1889.

In the end, the committee of the whole recommended a series of amendments, most of which increased the minimum sales age to 21 and increased the license fees. (The word “minor” was also changed to “person” because, since women attained their majority at 18, the bill would have made it lawful for women to buy and smoke cigarettes at 18, whereas men could not have done so until 21.)

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254 “Hot Contest over Cigaret Measure,” NSJ, Feb. 22, 1919 (1:3-4 at 4, 7:2). Douglas County (Omaha) was almost 18 times larger. The state’s second most populous county, Lancaster (whose county seat was Lincoln), was more than seven times larger than Furnas. Oren Bowen, The Government of Nebraska 91 (1922).

255 “Anti-Cigaret Bill Has Tight Squeeze,” MW-H, Feb. 22, 1919 (1:2). Larson’s motion was defeated by a vote of 26 to 42. “Hot Contest over Cigaret Measure,” NSJ, Feb. 22, 1919 (1:3-4 at 4). For legislators’ backgrounds, see The Nebraska Blue Book and Historical Register: 1920, at 335-46 (Addison Sheldon ed. 1920).

256 “Hot Contest over Cigaret Measure,” NSJ, Feb. 22, 1919 (1:3-4 at 4). The Iowa law dated back to 1896 and was not a dead letter. See above ch. 14. The Senate had in fact acted two days earlier.

257 “Hot Contest over Cigaret Measure,” NSJ, Feb. 22, 1919 (1:3-4 at 4).
non-party-line roll-call vote on the motion to postpone the bill indefinitely revealed that at this point the anti- and pro-cigarette forces were almost evenly balanced: although the motion lost and the committee of the whole recommended the bill as amended for a third reading, 32 members voted effectively to kill the bill while 35 kept it alive (only two-thirds of all representatives voted). Of the eight (of 15) Democrats who voted, three or 37.5 percent supported the motion compared to 49 percent of Republicans. Largely rural, Nebraska boasted of only two population centers in 1920: Omaha (ca. 192,000) and Lincoln (ca. 55,000). Characteristically, of the 12-member Omaha delegation only one voted to kill H.R. No. 297, while seven opposed indefinite postponement; in contrast, the four-member state capital Lincoln delegation voted two to one for postponement. Of those voting to kill the bill slightly more than half were farmers in contrast to only slightly more than one-third of opponents.258

A month before the Nebraska legislature passed the provision banning smoking in public eating places The New York Times had taken editorial notice of the similar (Grinstead) bill in Kansas, which it regarded as “the natural home of all reforms, in contrast to Nebraska, which was “much less advanced and full of lyric enthusiasms than its neighbors.” Ever since enactment of Nebraska’s general sales ban all the bills introduced “to put a little sense into it and restrict the prohibition to minors ha[d] failed invariably” because the “sensible majority was bulldozed by the few violent fanatics who possess the apparently easy art of cudgeling majorities into submission.” How an alleged minority consistently pulled off this feat the paper did not reveal, but it remained certain both that “only students of pragmatic crankiness can guess at” the “new eccentric interference with personal habit” that triumphant liquor prohibition would generate and that the “fate of the Nebraska anti-cigarette law ought to be, and won’t be, a warning to the diligent remakers of the world according to their own prejudices.”259

After the House had adopted McLeod’s amendment to increase the penalty

258House Journal of the Legislature of the State of Nebraska: Thirty-SEventh Session...1919, at 530-31 (Feb. 21). Democrats occupied only 15 of the 100 House seats. Occupations were taken from id. at 6-9. Although the Journal total for Yes votes was 32, only 31 representatives were listed, of whom 16 were farmers; in addition to 12 farmers two ranchmen also voted against postponement. Bill supporters engaged in much speculation about the need on third reading to secure the votes of half of the absentees despite the improbability that they would all be present. “Hot Contest over Cigaret Measure,” NSJ, Feb. 22, 1919 (1:3).

for selling without a license, it passed the bill by a vote of 52 to 32. The number of Nays was arithmetically identical to that of supporters of indefinitely postponing the bill, but the overlap was not perfect: 19 votes were predictable, but six of those who had voted to kill the bill wound up voting for its passage on third reading (while six were excused). The vote, though, again, not party-line, did reveal a modest difference between the parties: 31 percent of voting Democrats opposed H.R. No. 297 compared to 39 percent of Republicans. Of the 11 voting Omaha representatives nine supported the bill (the two Nays being cast by Danish- and Swedish-born members). Farmers split evenly, 17 voting Yes and 17 No, though they accounted for 33 percent of all supporters but 53 percent of all opponents. Two of the three representatives to explain their No vote in the House Journal took the traditional WCTU position of opposing the licensing evil.

In the interim before the Senate took up H.R. No. 297, a fascinating source of opposition to the repeal of Nebraska’s prohibition of cigarette sales emerged from “an unexpected quarter,” the competing cigar industry, but not from factory owners or merchants; instead, it was cigar makers themselves who asked legislators not to pass a licensure law. To be sure, as far back as 1889 the Cigar Workers International Union had advocated bans on manufacture and sales to minors purportedly to protect the latter’s health. Thirty years later, however, the workers’ self-interest was nakedly on display in the following letter to the members of the Nebraska legislature:

“We members of the cigarmakers’ union of Omaha, wish to make a vigorous protest against the repeal of the present cigaret laws of the state of Nebraska.

“We are against the passage of the McLeod H.R. 297, and also Barton Green’s H.R. 63, and any other cigaret laws which would make it lawful to sell and display cigarets openly in this state.

“We, as cigarmakers, earn our livelihood making cigars and we know if the present cigaret law is repealed that cigarets will show an enormous increase in consumption and

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260 House Journal of the Legislature of the State of Nebraska: Thirty-Seventh Session...1919, at 533 (Feb. 24).

261 House Journal of the Legislature of the State of Nebraska: Thirty-Seventh Session...1919, at 547 (Feb. 25). On the biographies of the Scandinavian Omahans, see The Nebraska Blue Book and Historical Register: 1920, at 341 (Addison Sheldon ed. 1920).

262 House Journal of the Legislature of the State of Nebraska: Thirty-Seventh Session...1919, at 548 (Feb. 25) (Wildman and Gifford).

263 “Consolidation Bill Sleeping in Quiet,” ESJ, Mar. 3, 1919 (1:3-4).

264 See above ch. 11.
cigars, the products of our toils and livelihood, will show a marked decrease.

“We have just reasons to believe that the so-called ‘tobacco trust’ are the promoters of repealing the present cigaret laws, who alone will profit by increasing the sale of cigarets, which are manufactured in the east and the cigarmakers and cigar manufacturers of the state of Nebraska will suffer.

“We hope...that you will do all in your power to kill the above bills.

“Please bear in mind that cigar making is a growing Nebraska industry, whereas cigaret making is a monopoly of the eastern ‘tobacco trusts.’”

The very practical, material purpose of the workers’ lobbying constitutes strong evidence that they knew that the existing prohibition had, at the very least, been effectively limiting cigarettes sales below the level that a free market would make possible. As long-term, experienced, organized participants in the tobacco industry, who must be presumed to have been familiar with the demand for tobacco products and the sales patterns in stores that sold them, it seems extremely implausible that they would have risked squandering their political capital on an issue of no real-world importance—that is, that they would have opposed repeal of a sham law that had never suppressed cigarette sales anyway.

On March 11 the Senate committee of the whole took up H.R. No. 297 after having recommended indefinitely postponing a House bill providing for an annual temperance day named for the WCTU’s nineteenth-century president Frances Willard. The lengthy floor debate, in which virtually all senators participated, focused “largely on the matter of the injurious nature of the ‘demon cigaret’” rather than on writing an enforceable statute. Republican banker and Methodist Berton Bushee, a strong bill backer, provided a highlight by straightforwardly denying accusations that the Tobacco Trust had influenced him. Another high point was the appearance on the Senate floor, together with church and welfare workers, by Lucy Page Gaston, the indefatigable leader of the National Anti-Cigarette League, “who came from a distant state to help put a few coffin nails in the bill legalizing the sale of ‘coffin nails’ to grown people.” In contrast, “rather inconsolable looking”—at least for the moment—was Myron L. Learned, “an Omaha attorney who has been looking after the progress of the bill for

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265“Consolidation Bill Sleeping in Quiet,” ESJ, Mar. 3, 1919 (1:3-4).

266 Senate Journal of the Legislature of the State of Nebraska Thirty-Seventh Session...1919, at 676 (Mar. 11). The Senate Medical Societies Committee had recommended that the bill be placed on general file. Senate Journal of the Legislature of the State of Nebraska Thirty-Seventh Session...1919, at 629 (Mar. 7).

cigaret manufacturers.” Asked whether he would fight or quit, Learned replied that he did not usually quit.” Initially, the committee of the whole passed two amendments that “mutilated” the bill—one limiting licensed sales to cigarettes containing only “pure” paper and tobacco and the other incorporating all forms of tobacco under the licensure system—but then adopted a report recommending to the full Senate that it be indefinitely postponed. However, when the 39-year-old Lincoln city attorney, Republican C. Petrus Peterson, a second-generation Swede and University of Nebraska law school graduate, moved that the recommendation instead be to advance the amended bill to third reading, Republican Fred Johnson, a 43-year-old Methodist with “extensive farm interests” who was graduated from the same law school, moved as a substitute that H.R. No. 297 be indefinitely postponed. The 17 to 12 roll-call vote to kill the repealer suggested to the Omaha *World-Herald* that Gaston’s statement several days earlier at a committee hearing that if the legislature kept the existing law in force, she would come to Nebraska and enforce the law had “convinced several of the older members of that body that this could be done.”

The next day rumors began circulating in the Senate about an effort to resuscitate the bill, but no one believed that there was any hope of success unless quickly at least two of the 17 “could be induced to change their minds” and at least three of the four absentees voted to revive it. In the immediate wake of the bill’s apparent death Republican Governor Samuel McKelvie weighed in, indicating that he had no faith in the claim of lobbyists against repeal that if the prohibitory bill remained in effect it would be enforced. While remarking that he had not participated in the battle over H.R. No. 297 and that his administration would enforce the existing law “as far as it can be enforced,” he left no doubt that that agenda would be pure Sisyphus labor: “Of course, no law can be enforced unless it is supported by public sentiment. Public opinion does not support the view that grown men should not be allowed to smoke cigarettes and it follows that prosecutions under the present law will not result in convictions.”

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270*Senate Journal of the Legislature of the State of Nebraska Thirty-Seventh Session* 676-77 (Mar. 11). The biographical information and quotation are taken from The *Nebraska Blue Book and Historical Register: 1920*, at 331 (Addison Sheldon ed. 1920).
272“Governor Says Law Hard to Enforce,” *ESJ*, Mar. 12, 1919. At least one of the four absentees, it was reported, would have voted against the bill; at least 17 votes were required to pass a bill in the Senate.
So much for Lucy Page Gaston’s reputation as an effective enforcement agent, though, to be sure, the governor and various legislators may also have worried that she would be an all too vigorous enforcer of the old statute.

In the event, on March 13, Republican Thomas Bradstreet, a wholesale mule and horse merchant, moved to reconsider the vote, explaining that although “he hated cigarets,” he confessed that he had not fully understood how the two aforementioned amendments helped a “bad matter.” Leading the battle for reconsideration was Bushee, who valued an enforcible law in preference to the existing act, under which a man could smoke a cigar but not a cigarette. The chief opponent of reconsideration was Democratic lawyer Charles Chappell, who compared tobacco and liquor business and legislation. Another proponent of reconsideration who focused on enforcibility, Republican lawyer and Methodist Ralph Weaverling, insisted that under the current law prosecutions before juries had failed to produce convictions.274 He lent more authoritative heft to his position by announcing that it was shared by such officials as Lincoln’s mayor and police officials, who were “coming to us and asking us to give them legislation which will not make their institutions a mockery.” Nebraska’s attorney general had also personally told Weaverling that because the prohibitory law was unworkable he too favored H.R. No. 297’s passage.275 In contrast, advocates of the status quo such as Republican newspaper editor J. W. Hammond and Johnson charged that the Tobacco Trust was behind the proposed measure, an allegation that was again denied by Bushee,276 who two days earlier had gone on record that he “did not want to go on record as forbidding his neighbor to smoke a cigaret when he was smoking a cigar.”277

Whether the impression left by the press that anti-cigarette advocates had failed to engage arguments about enforcibility was accurate is unclear, but their constant insistence that the (newly oligopolized) Tobacco Trust was pushing repeal offered an implicit rebuttal in the sense that it suggested that if the sales ban were wholly unenforced (let alone unenforcible) the cigarette manufacturers would not be devoting its economic and political capital to repealing a dead-letter statute. Nevertheless, as was almost universally the case in all states, prohibitionists failed to avail themselves of this debate about enforcibility to confront the central political and moral-philosophical question of the justification

277“Cigaret Bill Dies in Senate Chamber,” NSJ, Mar. 12, 1919 (1:3).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

for instrumentally “depriving men of the opportunity of buying cigarettes” in Nebraska “in order that” boys and girls “not get an opportunity” to smoke them. If, as the Independent Republican Lincoln State Journal put it editorially, the McLeod law was able to overcome the (alleged) ineffectiveness of the prohibitory law—which resulted from the fact that “small dealers have not scrupled to sell to boys because they risked no right to sell”—by “penalizing with the loss of his license to sell the dealer who sold to minors,” then it was just “another way of reaching the evil in the smoking of cigarettes...by minors. It recognizes the principle that they should be kept away from growing youth, when their use is most harmful, and also recognizes the right of a full-grown man to decide for himself whether he wants to poison himself with them.” If the anti-cigarette movement conceded that teenagers were the law’s real target, then the difference between prohibition and licensure would be stripped of its qualitative dimension and be reduced to empirical analysis of the comparative impact on smoking prevalence; in particular, the issue of minors’ emulation of adults and the latter’s health would disappear.

In the event, the vote to reconsider fulfilled all the hopes of the proponents of adults’ unimpeded access to cigarettes. Their 19 to 12 majority resulted from five defections from the former majority opponents and three accessions from absentee senators. Of the dozen senators who formed the core of the anti-cigarette faction, 10 were Republicans, half were farmers, and none represented the largest cities of Omaha or Lincoln.

On the morning of Friday, March 14, the day after this resurrection, Republican repealers, constituting in person or by proxy the majority of the Senate, “quietly” caucused in the lieutenant governor’s office, where “it was argued that the bill shall be amended in committee of the whole and pushed thru to final passage as speedily as possible.” This plan was about to be implemented at the Senate’s morning session when the opposition protested so energetically

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278 “Took the Right Course,” ESJ, Mar. 13, 1919 (1:5) (edit.). The Nebraska law was less stringent than the 1921 Iowa law in that the former conferred discretion on courts to add the penalty of license revocation for selling to minors, whereas the latter required the issuing city council to revoke the permit of any person who violated any provision of the law, who then became ineligible for two years. 1919 Neb. Laws § 6 at 401, 402-3; 1921 Iowa Laws § 3 at 213, 214.

279 Senate Journal of the Legislature of the State of Nebraska Thirty-Seventh Session 697 (Mar. 13). In addition, one senator who had voted against indefinite postponement was absent from the reconsideration vote.

280 The biographical information is taken from The Nebraska Blue Book and Historical Register: 1920, at 329-33 (Addison Sheldon ed. 1920).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

and demanded so vociferously a procedure for offering amendments that the caucus cabal majority had to relent and provide for the bill’s special consideration in the afternoon despite the former’s request for a postponement until after the weekend. After charges and denials of the Tobacco Trust’s involvement had been hurled back and forth, the anti-repealers admitted under questioning that they would not promise to vote for the bill even if their proposed amendments were adopted, prompting President pro tem Senator Bushee—who was apparently unaware of the venerable parliamentary advice to talk if you are in the minority and vote if you are in the majority—to declare triumphantly: “‘That is what I thought...you merely want delay.'”

When one of the anti-cigarette leaders, Republican Senator John F. Cordeal, a 45-year-old railroad attorney who had attended City College of New York and was a graduate of Northwestern Law School, charged by the “cruel thrust,” charged that the morning strategy gathering to which he had not been invited was a Republican caucus, Bushee asserted that the party had never caucused on the cigarette bill, and when asked whether any Democrats had attended, smartaleckly replied: “‘Fortunately there are few democrats in this senate.’” Drawing his own conclusions as to why he had not been invited, Cordeal revealed that Learned, the aforementioned cigarette oligopoly lobbyist, vice chairman of the Republican state committee, and “‘evidently a paid agent...who has been busy here in favor of this bill,’” had approached him. This intelligence prompted reports that Cordeal intended to call for Learned’s resignation, but if the accusation by Republican Senator (and small-town newspaper publisher) J. W. Hammond that “‘the majority of the republicans in this senate has surrendered to the tobacco trust’” was accurate, such a sanction was improbale.

Later that day the committee of the whole recommended the bill’s passage with a number of amendments, the most important of which extended licensure to cigars and tobacco. At this point Cordeal moved that the following new

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282Fourteenth Census of Population (HeritageQuest); The Nebraska Blue Book and Historical Register: 1920, at 329 (Addison Sheldon ed. 1920).

283“Senate Puts Cigaret to Third Reading,” MW-II, Mar. 15, 1919 (6:4).

284“Cigarettes Cause of Party Differences,” ESJ, Mar. 14, 1919 (1:3-4).

285Senate Journal of the Legislature of the State of Nebraska Thirty-Seventh Session...1919, at 718-19 (Mar. 14). The amendments also included a (meaningless) ban on the sale of cigarettes containing perfumes or drugs and restriction of licensure to cigarettes and cigarette material “containing pure white paper and pure tobacco only....” These provisions were included in the enactment. 1919 Neb. Laws ch. 180, § 2, at 401.
section—similar to legislation the same year in Kansas and Iowa—be added to H.R. No. 297: “Cigarettes shall not be advertised in any public place, or within view of the public, or on any sign, billboard or building, or in any newspaper or periodical published in the State of Nebraska, or in any other way in the State of Nebraska.” Cordeal’s proposed penalty for conviction of this misdemeanor ranged from $100 to $1,000 or a maximum county jail sentence of one year. Cordeal pointed out in support of his amendment that, since each daily newspaper would garner about $150 a day for cigarette ads, “there was no reason why the newspapers should not be in favor of the original bill.” On a roll-call vote his motion to amend prevailed 19 to 11.

After a motion to strike the advertising ban in newspapers and periodicals had been defeated by a vote of 9 to 20, Cordeal, the chairman of the Judiciary Committee and opponent of repealing the cigarette sales ban, offered a second radical amendment, this one prohibiting cigarette smoking in public eating places subject to a fine ranging between 10 and 25 dollars. Opponents sought to subvert supporters’ complaints that men blew cigarette smoke in customers’ faces by arguing that the amendment was not offered in good faith because it failed to cover cigars; the taunting bill-killing amendment to this effect was voted down, in part because some senators objected to “depriving men of the privilege of after dinner coffee and cigars at banquets.” Cordeal’s amendment passed by a vote of 17 to 14, four of the five Omaha senators voting No and seven of nine farmers voting Yes. Then the amendment to legalize newspaper and magazine ads on reconsideration was adopted by a vote of 16 to 15. (After this threat had been averted, the Lincoln Evening Standard Journal possessed the sangfroid to ridicule some senators for having nourished “the idea that newspapers were champions of the bill because they saw visions of large additional revenues,” whereas

286 See below this ch.
287 See above ch. 14.
288 Senate Journal of the Legislature of the State of Nebraska Thirty-Seventh Session...1919, at 718-19 (Mar. 14).
289 “Cigarettes in Cafes Barred by Senate,” NSJ, Mar. 15, 1919 (12:1).
290 Senate Journal of the Legislature of the State of Nebraska Thirty-Seventh Session...1919, at 719-19 (Mar. 14). Republicans occupied 30 of 33 Senate seats; four of five Omaha senators voted against the amendment, while six of eight farmers favored it.
291 Senate Journal of the Legislature of the State of Nebraska Thirty-Seventh Session...1919, at 720-22 (Mar. 14).
292 “Cigarettes in Cafes Barred by Senate,” NSJ, Mar. 15, 1919 (12:1).
293 Senate Journal of the Legislature of the State of Nebraska Thirty-Seventh Session...1919, at 720-22 (Mar. 14).
allegedly “[e]ven the most greedy of publishers long ago learned that the real source of his advertising revenue lay in the number and character of his subscribers.”

Cordeal also (correctly) explained to the Senate that the bill was defective in that it neither required the licensee to give bond nor conferred on municipalities the option to refuse to issue a sales license; the failure to empower local governments to deny licenses meant that the sale of tobacco would be forced, for example, on University Place—an incorporated community until it was annexed by Lincoln a few years later—whose local officials had “always refused to permit its sale.”

The motion that the committee of the whole arise and report the bill back to the Senate with the recommendation that as amended it be advanced to third reading prevailed on a vote of 18 to 13, but, interestingly, Cordeal voted No as did 12 of the other 16 senators who had voted for the no smoking in restaurants amendment (and 13 of the 15 senators who had voted against reconsidering the vote on eliminating the ban on newspaper ads). In other words, the parliamentary strategy pursued by Cordeal and his allies had been to weigh the bill down with anti-cigarette provisions but in the end to oppose repeal of the sales ban. This constellation was strikingly confirmed in the converse on final passage when not a single senator who had voted against the no-smoking in restaurants amendment voted against the bill’s passage. Thus, years later The New York Times correctly reported that repeal had been secured by the inclusion of the restaurant smoking ban (though it was untrue that the margin had been a single vote).

On March 18, the full Senate, without prior discussion, passed H.R. No. 297 by a vote of 17 to 11. Of these 11 opponents, nine (including Cordeal) had also voted: for indefinite postponement; against reconsidering the vote on indefinite postponement; for the ad ban; for the restaurant smoking ban; against the amendment to exclude newspapers and magazines from the ad ban; and against advancing the bill to third reading. Of these nine hard-core anti-cigarette legislators seven were Republicans, five were farmers (and three were lawyers),

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294 “Making Real Progress,” ESJ, Mar. 17, 1919 (6:1) (edit.).
295 “Cigarets in Cafes Barred by Senate,” NSJ, Mar. 15, 1919 (12:1). Bushee’s retort that the fact that dealers could not sell without a license had to mean that local officials could deny a license simply rested on his inability to comprehend the bill text.
296 Senate Journal of the Legislature of the State of Nebraska Thirty-Seventh Session...1919, at 720-22 (Mar. 14).
and none was from Omaha or Lincoln.  

The same day McLeod successfully moved that the House concur in the Senate amendments.  Some House opponents “held out to the last,” but the controversy had been sufficiently defused that here, too, no discussion took place and, in addition, the vote was merely viva voce, though not unanimous, it was “smothering” enough to persuade the chair that “the bill had been safely boosted over.”

Taps was played for the prohibitory law by the World-Herald, which drew an editorial sigh of relief for repeal, but nevertheless despaired that “sanity” had prevailed only “by a hair.” Training its invective on the “narrow-minded intolerants who insisted” that H.R. No. 297 would license evil and compromise with the devil, the newspaper was constrained to pay its respects (anonymously) to Gaston as “an astute and active imported female lobbyist....” The editorials did not, however, assert that impediments to adults’ free access to cigarettes had been forever banished, and in fact struggle was far from over in Nebraska.

Nebraska’s repeal of its general cigarette sales ban went further than Iowa’s would in 1921 by virtue of extending licensure to all forms of tobacco, prohibiting the advertising of cigarettes in any public place, and prohibiting

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299 Senate Journal of the Legislature of the State of Nebraska Thirty-Seventh Session 764 (Mar. 18). The nine were Barr, Chappell, Cordeal, Erickson, Good, Hall, Johnson, Taylor, and Weston. Party affiliation and occupation are taken from id. at IV-V. R. C. Harriss, a Republican farmer, aligned himself with Cordeal on all the votes except final passage; he explained his Yes vote on the grounds that the bill as amended gave Nebraska “wholesale and retail dealers a better opportunity to compete with jobbers and mail order houses outside of the state. It also proposes to protect the boys of Nebraska in whom I am interested.” Id. at 764. Republican editor Hammond and Republican farmer Swanson, who did not vote on final passage, had aligned themselves with Cordeal on all other votes, while Republican farmer Warner had deviated only on the reconsideration vote.

300 House Journal of the Legislature of the State of Nebraska: Thirty-Seventh Session...1919, at 784 (Mar. 18).


304 “Sanity Wins by a Hair,” MW-H, Mar. 20, 1919 (8:2) (edit.).

305 See above ch. 15.

306 1919 Neb. Laws ch. 180, § 1, at 401.

307 1919 Neb. Laws ch. 180, § 11, at 401, 403-404. For examples of the overwhelming volume of large cigarette ads even in small-town newspapers, see Beatrice Daily Sun and
cigarette smoking in “public eating places.” The ad ban was repealed in 1925 in the face of strong opposition, especially in the House, led by Representative Sara Muir, a Lincoln high school English teacher and the first woman elected to the Nebraska legislature, who argued that: “Boys and girls learn only too easily where they can buy cigarettes.” After a number of unsuccessful repeal efforts—and passage by the Nebraska WCTU at its 1929 convention of a resolution urging enforcement—the partial public cigarette smoking ban was finally repealed in 1937. Finally, unlike Iowa (but like Tennessee), Nebraska did punish those selling cigarettes (or any tobacco) to
adults. On the other hand, the Nebraska repeal law was more lax—that is, less continuous with prohibition—in the sense that it did not confer power on local governments/communities to perpetuate the sales ban; whereas in Iowa they would have discretion to deny (all) licenses, the Nebraska law provided that “licenses...shall be issued...by the Clerk of any city, town or village, and by the County Clerk of any county” to anyone who filed an application and deposited the license fee (which was also, depending on the size of the locality, only one-fourth or one-fifth of the amount that would be imposed in Iowa, which also required the payment of a $1,000 bond). Unlike the Iowa licensure law, Nebraska’s lacked a sales tax.

Repeal of the 14-year-old cigarette sales ban did not instill a mood of resignation among opponents. On the contrary: almost as soon as the governor had approved the law, the national drug store press reported that the Nebraska “Legislature having repealed the anti-cigarette law,...the anti-tobacconists are planning a campaign to secure even more drastic legislation at the next session.” In fact, a bill was introduced at the 1921 session to repeal the new law and re-enact the old prohibitory law. The bill prompted a rare blip of self-irony in the tobacco trade press, which opined that: “Needless to say, the lobby is on the scene and the lawmakers will shortly know all about why the use of cigarettes is injurious to the health, the morals and mentality of the people, and just why cigarettes are so necessary to maintain the mental poise, the placidity and the robustness of the nation.” The day after the Judiciary Committee had recommended the indefinite postponement of House Roll No. 555 the full House “raised the anti-cigarette bill from the dead” by rejecting the committee

3141919 Neb. Laws ch. 180, § 1, at 401 (fine of $100 to $200 or 10 to 60 days’ imprisonment). The lack of such a penalty was “discovered by the friends of the bill” as a “defect” in the midst of House debate and McLeod himself moved to amend. “Defect Discovered in Anti-Cigaret Bill,” MW-H, Feb. 25, 1919 (3:2) (quotes); House Journal of the Legislature of the State of Nebraska: Thirty-Seventh Session...1919, at 533 (Feb. 24).

3151919 Neb. Laws ch. 180, §§ 2-4 at 401, 402.


317House Journal of the Legislature of the State of Nebraska: Fortieth Session...1921, at 789 (Mar. 2).


319House Journal of the Legislature of the State of Nebraska: Fortieth Session...1921, at 318 (Jan. 31) (H.R. No. 555 by Frank Anderson). Anderson had been a representative at the 1919 session but was absent from votes on indefinite postponement and final passage.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

report and voting 57 to 37 to put the bill on general file. In the end, however, the anti-cigarette forces were unable to mobilize more legislators than in 1919, and the bill was indefinitely postponed in the committee of the whole by a vote of 28 to 59. Even among anti-cigarette representatives some attrition took place: of the 14 House members who had voted for indefinite postponement of H.R. No. 297 and/or against its final passage in 1919 and were reelected and voted on H.R. No. 555 in 1921 10 opposed indefinite postponement.

Kansas and North Dakota Strengthen the Last Surviving Anti-Cigarette Laws While Staving Off the Inevitable for a Few Years: Defeat of American Legion-Inspired Repeal

An exhaustive, Nation-wide campaign, backed by the most prominent and influential anti-tobacconists in the country, is now being put under way by the Non-Smokers’ Protective League to crystallize all the anti-tobacco sentiment in the country and with it batter down the legislative defenses that have up to the present successfully fought down all the measures that have sought to do away with smoking. ... Already the Women’s [sic] Christian Temperance Unions of various States have joined the movement and have avowedly announced that hereafter one of the principal objects of the Union will be to abolish cigarette smoking.

Seventy-five per cent of the men of the country are users of tobacco. The number of women smokers is steadily increasing. ... But forewarned is forearmed. With the inner workings of the tobacco offensive announced and the precedent of [liquor] prohibition standing, the interesting question becomes, What definite steps will men and women who see their smoker’s paradise about to be destroyed take to repel the invaders and turn back their crusade?

Just as the anti-cigarette forces in Iowa had been able to ward off pro-tobacco efforts to get rid of the 1896 cigarette sales ban law during the 1917 and 1919 legislative sessions before succumbing to repeal in 1921, their counterparts in the two remaining ban states, Kansas and North Dakota, also staved off American Legion-led onslaughts until 1927 and 1925, respectively. Indeed, the anti-tobacco movements’ vitality and staying power in those states were underscored by their

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320“The Prepare for Finish,” Red Cloud Chief, Mar. 10, 1921 (3:4). See also “Nebraska Bans Cigarette Sale,” Deseret News (Salt Lake City), Mar. 3, 1921 (1:3).
321House Journal of the Legislature of the State of Nebraska: Fortieth Session...1921, at 1403 (Apr. 7). See also “Pass Language Bill,” Red Cloud Chief, Apr. 14, 1921 (2:6).
322“Must Milady Stop Smoking in Public?” Salt Lake Telegram, Nov. 11, 1923 (22:1-6 at 1, 4).
ability during those interims to strengthen their laws to a greater degree than had been the case in Iowa.

**Progressive-Politically Based in North Dakota (1919-1925)**

North Dakota is probably the most radical state in the Union. ... There are more idiosyncrasies per square inch in North Dakota than in any other state I know. ... North Dakota is the reform state par excellence.323

In 1913, almost two decades after the North Dakota legislature had passed the country’s second statute prohibiting cigarette sales324 (which then mysteriously was “disappeared” from the state code),325 the Legislative Assembly finally made it unlawful to “manufacture, sell, exchange, barter, dispose of, or give away, or keep for sale any cigarettes, cigarette paper or cigarette wrappers,” subject to a $10 to $50 fine and up to 30 days’ imprisonment in county jail.326 The state

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324 1895 N.D. Laws ch. 32 at 31.
326 1913 North Dakota Laws ch. 69, at 83-84. A Senate amendment to kill the House bill by banning cigars and tobacco as well lost on a 24-24 tie vote. *State of North Dakota: Journal of the Senate of the Thirteenth Session of the Legislative Assembly* 484-85 (Feb. 15) (1913). The amendment’s supporters charged that the legislature should not either “limit the prohibition to one class or nationality” inasmuch as “cigarettes were the national smoke of a large part of the population of the state” or “legislate against the poor man who could not afford cigars but was forced to accept the comforts to be gained from the cheaper smoke in the shape of a cigarette.” Opponents pointed out that “the idea of the bill was not so much to prevent the sale of cigarettes to adults as it was to prohibit the free distribution of cigarette papers to the minors of the state and called...attention to the fact that those who desired to smoke the little white smokes...could send out of the state” for them by parcel post. “Roll Calls Came Fast in Senate,” *BDT*, Feb. 16, 1913 (1:1, 3:1). Protagonists had been using the same arguments for years. Thus, for example, when the legislature was considering a similar initiative, the press observed that: “The anti-cigarette people are bumping up against what threatens to involve an element of the republican party in revolt. There are in the state a large number of Russians who have settled in the state in the past few years and with whom cigarette smoking is a national custom. For the legislative assembly to pass a law prohibiting the importation of cigarette paper would stir up a
WCTU hailed passage as “the first victory we have ever won over the American Tobacco Company.”

Whereas the American Legion does not appear to have been involved in the legislative repeal efforts in Iowa during the 1917 and 1919 sessions, in North Dakota it sponsored such a measure in 1919, which was defeated by the WCTU, which “maintained a lobby in opposition” to this and similar restrictive bills. Following this legislative setback, the Legion and other groups sponsored submission to the electorate at the presidential preference primary on March 16, 1920, of an initiated statutory measure to achieve the same objective of repeal. In place of the total sales ban, Initiated Measure No. 2 would have prohibited selling or giving away cigarettes to minors and made it unlawful to sell, exchange, barter, give away, or keep for sale any cigarettes, cigarette tobacco, cigarette wrappers, or cigarette papers without first having obtained a $100 license, which “may be granted” by the clerk of the district court of the county in question.

In the Publicity Pamphlet, which the secretary of state mailed to the electors, The Home Defenders—a “temporary organization formed for the purpose of carrying on this campaign” and led by churches and the WCTU—was the only
organization to present a position on the repeal of the anti-cigarette and blue laws. Its approach was nicely captured by its paternalistic-communitarian campaign slogan: “You Are Your Brother’s Keeper and This Extends to Taking Care of his Children.” Unlike the WCTU in Iowa, which pursued a long-term health-focused strategy, this group was driven largely by religio-moralistic aspirations (its medical-tinged propaganda being of the most primitive kind, recycling tales of how smokers’ blood killed leeches, the poison inhaled in smoking 20 cigarettes would kill 40 frogs, and the principal injurious agent in cigarettes came from the burning paper wrapper). Indeed, the title of its statement even designated the legislation it sought to uphold in such terms: “Will Try to Repeal Moral and Sunday Laws.” The Home Defenders’ propagandistic starting point was the belief that “the tobacco corporations and film companies are back of the move with SUNDAY PICTURE SHOWS AND THE LEGALIZED SALE OF CIGARETS AS THEIR OBJECTIVE. The cause for haste being wartime sentiment for the cigaret now rapidly changing to antagonism and the expectation of women voting in the near future.” Repeal of the then existing law, which “[p]rohibits sales to anybody,” would, the group guesstimated, “put from one to thirty places where cigarettes will be sold in towns with cigarettes exhibited in show cases and flaunted before the boys with no way to keep them away from the youth.” Looking back at high license liquor laws, under which, despite bans on sales to under-21-year-olds, “95 percent of old topers learned to drink before they were 21,” the Home Defenders asked electors: “CAN YOU SEE THE BIG BRAINS OF THE TOBACCO CORPORATIONS IN THIS MOVE?” The closest that the Publicity Pamphlet statement approached the issue of health was

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333Home Defense Committee, “Read This and Vote ‘No’ Four Times,” Courier-News (Fargo), Mar. 14, 1920 (13) (advertisement).

334See above ch. 2 and Pt. II.

the stereotypical reference to children’s stunted growth. The character of the group’s core orientation was most visibly on display in its rejection of the proposed repeal of the 1917 state law prohibiting commercial baseball on Sunday with gate receipts: “The world is seething with unrest, hate, selfishness, crime, a mad rush for money and pleasure. Some nations are paying a terrible price for past sins. Would it not be better to strengthen the moral and Christian foundations than to undermine and weaken them?”

The American Legion purported to have brought the measure before the people of the state “with the proviso, that as an organization they would take no stand either way, after having accomplished their object.” According to William T. Kroll, a Legion member and ex-trench soldier in France, who claimed that he had “personally with two or three others initiated this movement after having discussed the matter with thousands of returned service men,” repeal opponents’ statements that “tobacco corporations were financing and backing this movement” were untrue: “Practically all the money to support the movement has been given freely in 50-cent pieces by the boys who went and were willing and ready to make the supreme sacrifice for GOD, COUNTRY and HOME.” Indeed, so poorly financed were the pro-tobacco forces that they lacked funds to hire speakers, “put on a large advertising campaign,” or even to “buy space in the publicity pamphlet issued by the secretary of state,” which cost $200 per page. (Nevertheless, the Fargo-based Young Men’s Independent League, which spearheaded the repeal drive, did have the funds to place a large advertisement in the Nonpartisan League’s Courier-News two days before the vote declaring simply: “If You Believe In Real Americanism Vote 4 Times ‘Yes’ On North Dakota Blue Laws.”) Seeking to justify repeal, Kroll, who signed his letter to the editor of the Fargo Forum a week before the election, “Yours for law and order,” rehearsed the origins of the addiction afflicting his “comrades who fought with


338For the $200 per page price, see North Dakota Publicity Pamphlet: Constitutional Amendments Proposed by the Legislative Assembly and Measures Initiated by Petition to Be Submitted to the Electors at the Presidential Primary Election on, March 16, 1920, n.p. [3] (n.d.). On the Home Defenders as the only buyer of space, see “Pamphlet Space Not in Demand,” FF, Feb. 16, 1920 (3:1).

339Courier-News (Fargo), Mar. 14, 1920 (2:3-5).
me at the front”.  

When we left, and a number did not return, we were given a great send-off and we were told that nothing was too good for us. We were given CIGARETS and the medical department of the army and navy indorsed them. Everyone did not, only a few saw the hardships of battle, still we were all given cigarettes and encouraged to smoke them. Now most of the boys have learned to like them. Even our small boys smoke them, regardless of our present laws. How many do you know under 18 that haven’t done so?  

In his closing plea for getting rid of laws that a majority of North Dakotans did not observe, Kroll—who appeared unaware that his cavalier reference to “small boys” corroborated the American Legion’s worst enemies’ suspicions that addicted ex-soldiers’ sole objective was unimpeded access to cigarettes regardless of that laissez-faire regime’s impact on the next generation—not only wondered rhetorically whether it was too much to ask the state not to make criminals out of ex-soldiers, but argued that “the boys will not stay at home on the farm or in our small towns, but try to get something to do in” bordering states, whose citizens were as moral and enlightened as North Dakota’s because they lacked Blue Laws.

In a letter to the editor in the Courier-News YMIL President M. J. Loberg played variations on the same theme, asking why soldiers were “allowed these personal rights during our service period in the army” and why they were “not as good today as the day we entered the service, willing to shed our blood on the battlefields for your sake....” Approaching cigarettes obliquely, Loberg first wondered whether North Dakotans preferred Sunday commercial baseball to rape (“Would you rather have your boys playing baseball where you could see them at all times than to have them take advantage of the other sake of the other sex, going to the woods or somewhere else?”). He finished by pushing his adversaries all the way down the slippery sumptuary slope: “Cigarets classed as a narcotic brings [sic] in this class all tobaccos in any form and also tea and coffee.”

The anti-cigarette movement sought to deconstruct the argument that sales  

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had to be legalized because cigarette smoking had become the norm for soldiers in France. For example, at a civic gathering "representative farmers" from two eastern counties adopted a resolution declaring that: "‘We...protest against making permanent abnormal wartime toleration of the cigaret—inviting the coming generation to the demoralizing cigaret habit.’"344 The Home Defense Committee chimed in with: “But, say boys, you are back home now living under normal conditions. Haven’t you the will power to break such a habit?”345 One especially widely disseminated propaganda piece was an appeal to the members of the American Legion to vote No by Lydia S. Wanner,346 whose son had been killed in France, which was read in every Protestant church in North Dakota on Sunday, February 29. To claims that “the boys” had done so much for their country that nothing was too good for them, that they had become accustomed to cigarettes over there, and were entitled to have them here, Wanner counterposed the notion that: "‘While you were in France, you lived under abnormal conditions.... But now you have returned to normal living.’” Juxtaposing the return of a "‘large per cent of our heroes...with the cigaret habit’” with “‘the fast spreading habit of cigaret smoking among boys, from the first grade up,’” Wanner, astonishingly, stressed the (original package doctrine-driven) porosity of the North Dakota sales ban. With the quasi-make-believe character of the law as her subtext, she implored the Legionnaires:

“It may be inconvenient for you to send [out of state] for cigarets, but if you feel that you must have them are you not willing to do this much for the sake of the boys, with whom you have so much influence? I am sure you realize that if cigarets, or the ‘makings,’ are sold in our state the boys and girls will be constantly tempted, and many more will form the habit than would if cigarets were hard to obtain.”348

A few days later, 300 pastors of the protestant churches of North Dakota attending the Interchurch World movement conference in Grand Forks virtually
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

unanimously adopted a resolution expressing “unalterable opposition to the proposed repeal...of the moral laws, long on our statute books, placed there by the best moral sentiment of our progressive state.”

The Young Men’s Independent League developed its own approach for mobilizing the Yes vote that was original enough to get it free press publicity. A circular sent out by President Loberg in early March, to the state’s 4,000 pool hall, soft drink stand, soda fountain, and cigar store owners and managers who sold tobacco, urged the 85 per cent of them who, YMIL was “willing to gamble,” were violating the no-cigarette sales law to “cut it out. You will be living up to the law—but you will be kicking up such a roar from the ONE HUNDRED THOUSAND men who smoke cigarettes that it will put every smoker into the fightfull [sic] tilt. If the ONE HUNDRED THOUSAND cigarette smokers in the state have their supply cut off from now until the primary election, March 16, you have ONE HUNDRED THOUSAND VOTES certain. ... Make him [i.e., the customer] a fighter against propoganda [sic] of the sanctimious [sic] hypocrites who, putting their noses in your private affairs, would deprive you of your personal liberty.” Unclear is whether YMIL’s claim that “NOT A PENNY HAS BEEN PAID INTO THE FUND [for the circular] BY ANY TOBACCO CORPORATION OR COMPANY” was any less empirically false than its assertion that because cigarettes had been “blacklisted” “[w]ay back in 1889 when the state was formed...[t]he people of North Dakota have never had a vote on them.” In any event, “[a]s a result of the circular,” according to the Courier-News, “the sale of cigarets stopped suddenly in Fargo” during the first week in March, forcing “Fargo devotees of this form of nicotine” to cross the Red River into Minnesota “if they wish to continue the habit.” (As impressive as this self-boycott was, it apparently yielded few votes in Fargo or elsewhere.)

Interestingly, neither the agrarian quasi-state socialist Nonpartisan League

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349“Ministers Are for Blue Laws,” Courier-News (Fargo), Mar. 6, 1920 (8:1). The ministers seemed most worried about the fact that “the churches of some other states...have had the influence of their Sunday program rendered almost nil by the inroad of the Sunday movie....”

350“Blue Law Enemies Stop Sale of Cigarets Until Election,” Courier-News (Fargo), Mar. 3, 1920 (3:4-5). In fact, cigarette sales were not banned in North Dakota until 1913 (the 1895 ban law having mysteriously disappeared from the state code). The claim of 100,000 male cigarette smokers in North Dakota—for which no contemporaneous data existed—was highly implausible in a male population over 14 years of age of little more than 200,000 in the most rural state, whose farmers, if they smoked cigarettes at all, rolled their own. U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Part 1, ser. A195-209, at 32 (Bicentennial ed. 1975); North Dakota Leader, Mar. 6, 1920 (6:1) (untitled editorial).

Conversely, the NPL newspaper “[w]onder[ed] why the Fargo Forum and other I.V.A. papers, usually so solicitous of the welfare and jealous of the interests of the American Legion are so silent editorially on the moral issues which the returned soldier boys have put up to the people at this election.” Because the Forum was bought by city people and spoke for “the business interests,” the Leader asked whether the former was so certain that all of them would support the Legion that it could “afford to preserve” its “gigantic silence” on behalf of the “the soldier boys it pretends to love so dearly....” In fact, two days earlier, the other Fargo NPL organ, the Courier-News, had headlined a front-page, first-column, above-the-fold article: “Bosses of I.V.A. Are for Repeal.” Reports and rumors to that effect had been circulating for several days among prominent church workers “and was given fresh impetus when an official of the American Tobacco Co.” had been in Fargo a few days earlier and had been “in conference with certain of the higher-ups in the I.V.A.....” To be sure, rather than straightforwardly charging that cigarette manufacturers were simply seeking to stamp out opposition to sales of their commodities, the Courier-News quoted an unidentified supporter of the Vote No campaign as having offered the (bizarre,


353North Dakota Leader, Mar. 6, 1920 (6:1) (untitled edit.).

354North Dakota Leader, Mar. 6, 1920 (6:1) (untitled edit.).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

convoluted, and counterintuitive) explanation that “‘if the opponents of the moral laws succeed in repealing them, this fact will be heralded all over the world by the big business press as evidence that North Dakota is going to the dogs morally and that this is the beginning of what the opponents of the farmers’ program have predicted was coming in this state.’”

Although a blizzard on election day that prevented many farmers from getting to the polls prompted speculation that city dwellers might be in a position to secure adoption of the repeal agenda, in fact, as the front-page banner headline in the Courier-News put it, “FARMER VOTE WILL SAVE BLUE LAWS.”

27,212 or 53.0 percent of the 51,364 voters opposed repeal of the cigarette sales ban. The cigarette oligopoly, which pretended, at least for public relations purposes, that the North Dakota (and Kansas and Iowa) laws were “purely ‘fanatical,’” did not explain the sales ban’s plebiscitarian retention in North Dakota. The vote total amounted to only about one-fourth of the number of ballots cast at the November presidential election and less than 8 percent of the total state population, but it nevertheless revealed certain significant fissures. The No vote prevailed in 33 of 53 counties, but the pro-repeal forces gained a majority in the four largest cities; however, the larger the city, the smaller the majority: the Yes vote ranged from 71.8 percent in Bismarck (7,122), to 61.5 percent in Minot (10,476), to 52.5 percent in Grand Forks (14,010), to 52.1

355“Bosses of I.V.A. Are for Repeal,” Courier-News (Fargo), Mar. 4, 1920 (1:1).
357“Farmer Vote Will Save Blue Laws,” Courier-News (Fargo), Mar. 19, 1920 (1).
358Calculated according to North Dakota Secretary of State, Compilation of Election Returns, National and State, 1914-1928, at 34 (1930) (copy furnished by North Dakota Secretary of State). Sunday baseball was also defeated, while the boxing and Sunday movies laws were repealed.
359“Few Reformers Fight Tobacco,” Grand Forks American, Mar. 11 [should be 12], 1920 (1:2). A tobacco selling company in Fargo informed TMA that repeal failed in 1921 because legislators lacked the “backbone to stand on their own convictions. They were all apprehensive of the effect upon their own local church element and reform organizations.” TMA, “Excerpts from Letters Received from the Trade: North Dakota Favoring Repeal Activities” at 5 (n.d. [ca. Nov. 1922]), Bates No. 501870682 (Reineke Co.).
351Calculated according to Bureau of the Census, Fourteenth Census of the United States Taken in the Year 1920: Population: 1920, tab. 5 at 16 (1921).
percent in Fargo (21,961). Since these four cities accounted for only 8.3 percent of the state’s population and only 12.4 percent of all votes cast on the cigarette initiates measure, their aggregate 56.8 percent pro-repeal majority was unable to trump the tide of rural votes.\textsuperscript{362} The view that Norwegian Lutherans favored “morality legislation” while German-Russian Catholics opposed it\textsuperscript{163} found some corroboration in the voting patterns. (During the run-up to the initiative election temperance workers and church leaders were confident that they could rely on the farmers in the northern half of the state, especially the overwhelming majority who were Scandinavians and “devout members of the church and rigid in their observance of the Sunday laws,” to perpetuate “the exclusion of the cigaret from North Dakota.”\textsuperscript{364} Not coincidentally, the Nonpartisan League’s strength was also concentrated in the western and north-central regions.)\textsuperscript{365} In 1920, when Norway was the country of birth of the largest number of foreign-born whites in North Dakota (38,190), of the 16 counties with more than a thousand such persons 12 voted against repeal. Conversely, six of the 13 counties with more than a thousand Russian-born residents—Russia being the country of birth of the second largest contingent of foreign-born whites (29,617)—voted for repeal, several of them by wide margins.\textsuperscript{366}


\textsuperscript{363} Mariellen MacDonald Neudeck, “Morality Legislation in Early North Dakota (1889-1914)” at 94-99 (M.A. thesis U. North Dakota 1964). See also above this ch. on Russians’ use of cigarettes.

\textsuperscript{364} “Church Men Predict Blue Laws Victory,” \textit{Courier-News} (Fargo), Feb. 29, 1920 (12:3).

\textsuperscript{365} Michael Rogin, \textit{The Intellectuals and McCarthy: The Radical Specter} 123 (1967). On the low affinity of Russian-German Catholics for populism, progressivism, and NPL, see \textit{id.} at 109-24.

\textsuperscript{366} Calculated according to North Dakota Secretary of State, \textit{Compilation of Election Returns, National and State, 1914-1928}, at 34 (1930) (copy furnished by North Dakota Secretary of State); Bureau of the Census, \textit{Fourteenth Census of the United States Taken in the Year 1920, Vol. III: Population: 1920}, tab. 12 at 764 (1922). There was no overlap between counties with more than a thousand Norwegian- and Russian-born residents. The counties with more than a thousand Russian-born residents that strongly favored repeal of the cigarette sales ban included Emmons (64.1 percent), Grant (67.2 percent), McIntosh (60.3 percent), Morton (65.4 percent), and Stark (68.4 percent). These five contiguous
Although the press predicted that the results of the initiative vote might “precipitate a fight” during the 1921 legislative session over local option and home rule inasmuch as they revealed that “with a very few exceptions every city, town and village in the state registered a majority in favor of the repeal of the these sumptuary laws, while the rural communities voted retention,” in fact the legislature moved in the opposite direction.

In March 1920, a few days before the initiated measure election, the state attorney general had issued an opinion interpreting the cigarette sales ban as seeking to prohibit neither the importation of cigarettes (for personal use) nor agents from taking orders for sales occurring outside of North Dakota. More specifically, agents were permitted to solicit orders from persons in the state to be sold by out-of-state dealers. Moreover, if the agent-solicitor’s and the orderer’s intention was that the sale was “to take place at the time the foreign cigarette dealer accepts the order and delivers the consignment to the carrier, then of course the sale takes place outside of the state of North Dakota and beyond the jurisdiction of our cigarette law.” Much more generously, the attorney general opined that even in the absence of any intention, “the natural presumption would be that the parties to the agreement did not intend to violate the law, and contemplated that the sale should take place outside the state.”

This opinion that it was as lawful under the sales ban for an in-state agent to process orders for cigarettes to be sent by out-of-state dealers as it was for the latter to mail them directly to consumers in North Dakota was directly repudiated by the legislature a year later.

In 1921, just as Iowa was abandoning its total ban on sales, North Dakota strengthened its commitment to prohibition in three significant respects by: (1) passing a partial anti-public smoking law; (2) prohibiting in-state agents from facilitating orders filled by out-of-state dealers; and (3) killing a bill to license cigarette sales. House Bill No. 154 diminished the leakage permitted by the

367 “May Fight over ‘Blue Laws,’” Wells County Farmer, Mar. 25, 1920 (1:5).
370 See below this ch.
371 The anti-cigarette forces’ ability to secure enactment of strengthening legislation in
U.S. Supreme Court’s interstate commerce-based original package doctrine that enabled individual buyers to order cigarettes from sellers in other states for their own personal consumption by compelling those consumers to undergo the inconvenience of arranging their out-of-state purchases on their own. Specifically the amendments to the 1913 act made it unlawful for anyone to “solicit, receive, or procure from, or aid in soliciting or procuring from any person within this state any order, directions, or instructions providing for, or in any manner relating to the delivery, purchase or sale, either within or from without the state of North Dakota for any cigarettes....” The new law also made the owner’s (or his employee’s) keeping of cigarettes in his public place of business prima facie evidence of keeping them for sale; this presumption did not apply to cigarettes, “in reasonable quantities, that are carried upon the person” of the owner or his employees “for their own personal use.” And finally, the 1921 amendments also increased the fine for first offenders from $10-$50 to $25-$100 and the maximum fine for repeat offenders to $300. The measure passed both houses by large majorities; the vote was not strictly along factional lines, but the capitalist-conservative Independent Voters Association wing of the Republican Party—which had wrested control of the House (59-54) in the November 1920 election from the Nonpartisan League—while hardly opposing the bill as a bloc, supported it much less intensely than NPL. In the House, where the vote was 79 to 12, IVA accounted for 9 of the 12 Nays. In the Senate, still

1921 was conveniently ignored in the response by one Fargo tobacco firm to TMA’s aforementioned inquiry about the prospects for repeal in 1923: it explained the failure to pass repeal in 1921 in considerable part by reference to “the fact that our State Legislature at that time was deadlocked, the Independents controlling the lower House and the Radicals the upper. Both by a small margin. Practically no legislation was passed at that session.” TMA, “Excerpts from Letters Received from the Trade: North Dakota Favoring Repeal Activities” at 5 (n.d. [ca. Nov. 1922]), Bates No. 501870682 (Reineke Co.).

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372 See above ch. 11.
373 1921 N.D. Laws ch. 126, § 1, at 210.
374 1921 N.D. Laws ch. 126, § 2, at 210-11.
375 1921 N.D. Laws ch. 126, § 3 at 211. Whereas imprisonment up to 30 days under the 1913 law was possible for first offenders, the amended law provided for 10 to 30 days only for repeat offenders.
376 In 1919 NPL had controlled 81 House seats compared to only 32 for IVA. With its 35 to 14 Senate majority, NPL had completely controlled the legislature. Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 144 (2007); Larry Remele, “Power to the People: The Nonpartisan League,” in The North Dakota Political Tradition 66-92 at 86 (Thomas Howard ed. 1981)
377 State of North Dakota: Journal of the House of the Seventeenth Session of the
controlled by NPL 25 to 24, of the 16 senators who voted to postpone the bill indefinitely 15 were IVA members and only one belonged to NPL.378 On final passage, NPL members voted by an overwhelming 22 to 3 for the bill, while more IVA members (14) voted Nay than Aye (10).379 The Nonpartisan League’s position on cigarettes and smoking may be understood in the context of NPL’s advocacy of constitutionally anchored statewide liquor prohibition and declaration of a state temperance day to be observed in public schools.380

Even more consequential was the “overwhelming”381 (31-76) defeat inflicted in the House a few days earlier on House Bill No. 117 to license cigarette sales for a $50 fee.382 Although the vote, once again, was not strictly along factional lines, IVA—one of whose members, A. B. Carlson, introduced the bill—voted much more heavily for licensure than did NPL.383 Advocates of licensure argued

Legislative Assembly 570 (Feb. 21) (1921). For factional affiliation, see id. at 3-4 (Jan. 4) (straight faction-line vote on House speaker). Following adoption of the Senate amendments, the House voted 92 to 3 for the amended bill, IVA members casting the only Nays. State of North Dakota: Journal of the House of the Seventeenth Session of the Legislative Assembly 730 (Mar. 1) (1921). The Senate amended the bill to make imprisonment alternative to the fine rather than mandatory. State of North Dakota: Journal of the Senate of the Seventeenth Session of the Legislative Assembly 600 (Feb. 28) (1921). For factional affiliation, see “Names of Legislators Who Will Come to Bismarck in January,” BT, Nov. 5, 1920 (2 [sic; should be 4]:5); State of North Dakota: Journal of the Senate of the Seventeenth Session of the Legislative Assembly 19 (Jan. 6) (1921).

378State of North Dakota: Journal of the Senate of the Seventeenth Session of the Legislative Assembly 600-601 (Feb. 28) (1921).

379State of North Dakota: Journal of the Senate of the Seventeenth Session of the Legislative Assembly 600 (Feb. 28) (1921).

380Theodore Saloutos and John Hicks, Twentieth-Century Populism: Agricultural Discontent in the Middle West 1900-1939, at 172, 174 (1951).

381“Cigarettes to Stay Under the Ban by House Vote,” BT, Feb. 16, 1921 (1:2).

382State of North Dakota: Journal of the House of the Seventeenth Session of the Legislative Assembly 422-24 (Feb. 15) (1921); “House Votes, 76 to 31, to Kill Bill Legalizing Sale of Cigarettes,” FF, Feb. 16, 1921 (1:3). The vote was on substituting the Judiciary Committee’s minority for its majority report, which had recommended indefinite postponement. The amended bill recommended by the minority report proposed a system of decentralized licensure under which a city council “shall” issue a license to an applicant of whose “character” it was “satisfied”; if it found that the applicant was not a “proper person” to be licensed, it had discretion to (“may”) refuse to issue the license. After this House vote further consideration of the bill was indefinitely postponed.

383Although only a handful of NPL members voted for licensure, a considerable number of IVA members voted against it. For factional affiliation, see “Names of Legislators Who Will Come to Bismarck in January,” BT, Nov. 5, 1920 (2 [sic; should be
that it “‘would be more effective in keeping the cigarette away from the use of minors. ... We have made the license high, so that probably not over one or two in a small community would handle cigarettes, and they could be easily watched. ... Under present conditions cigarettes are easily obtainable and there is no control.’” Opponents, to judge by the excerpts from the “liberal debate” published by the press, were presumably pursuing heterogeneous agendas. One of them, for example, “agreed there was ‘a lot of solace in a pipe or cigar,’ but he couldn’t believe there was in a cigarette.”

At the National WCTU’s annual convention later that year its anti-narcotics department, contrasting legislative progress in North Dakota with Iowa’s failure, highlighted the state organization’s key role:

North Dakota defended its law and instead of weakening it, a stronger law was enacted. It is [a] misdemeanor to have even the makings of cigarettes in your possession. No advertisements or solicitations of orders for cigarettes can be made in the state. Smoking is absolutely forbidden in any restaurant, cafe or eating place except in a room specially provided and designated as a smoking room. The state president, the corresponding secretary and state treasurer were most active in securing this law.

In spite of these achievements of the anti-smoking and anti-cigarette movement, nicotine’s tightening grip on its millions of addicted consumers that was sweeping the country inexorably overcame the opposition in the two hold-out states. As cigarette manufacture reached 51 billion (or more than 500 per capita) in 1921, the Bismarck Tribune correctly judged that the “anti-cigaret people have a whale of a job on their hands.” (Production had doubled since 1916 and would double again by 1928.)

During the 1923 session, when “[t]he biennial question of licensing the sale of cigarettes in North Dakota cropped up again,” both the House and Senate were still able, despite the local tobacco firms’ assurances to TMA that prospects

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386“Smokes,” BT, Sept. 16, 1921 (4:2) (edit.).

387Arthur F. Burns, Production Trends in the United States Since 1870, tab. 44 at 298-99 (1934).

388“Antimask Bill to Be Passed in the House,” BT, Jan. 29, 1923 (2:5-6 at 6).
for repeal were much brighter in 1923,\footnote{389} to fend off cigarette sales legalization, licensure and tax bills at the 1923 session handily.\footnote{390} One reason for their failure was that, as the \textit{U.S. Tobacco Journal} was constrained to concede, North Dakota cigar and tobacco dealers were "not interested because they say there is no money to be made in selling cigarettes if such prices prevail, as in other open states."\footnote{391}

In 1925, however, the new governor, Arthur Sorlie, imparted a forceful impetus to the repeal movement in his inaugural message when he "startled the North Dakota Legislature"\footnote{392} by declaring:

\begin{quote}

The taking of snuff, and the smoking of cigarettes are habits, while to some of us these habits may appear undesirable, unhealthful and filthy, yet there is nothing inherently vicious in either; which should be inhibited by law; and these statutes are not supported by an enlightened public opinion. ... While it is legally possible to purchase the same beyond the state, and have them delivered by the United States Mail at his door, yet it is a crime for anyone to sell or give away snuff or cigarettes and a person who passes to a friend a package of cigarettes, or even one cigarette is made a criminal. This condition is unhealthy and leads to disrespect for the law.\footnote{393}

Instead of seizing the opportunity of a teachable moment to discourse on the
\end{quote}

\footnote{389}TMA, "Excerpts from Letters Received from the Trade: North Dakota Favoring Repeal Activities" at 5-6 (n.d. [ca. Nov. 1922]), Bates No. 501870682-3.


\footnote{392}“Sorlie Assails Blue Laws,” \textit{NYT}, Jan. 8, 1925 (44).

\footnote{393}“Text of Address of Gov. Sorlie to Legislature,” \textit{BT}, Jan. 7, 1925 (2 [sic; should be 4]:1-6 at 4).
glories of federalism, the interstate commerce clause, the U.S. Supreme Court’s original package jurisprudence, and the states as laboratories for social experiments, Sorlie—a conservative Grand Forks businessman who, though not a member, was nevertheless backed by NPL despite opposition by its more radical elements—reinforced cigarette consumers’ cognitive dissonance and proposed a five-cent per package tax that might generate $500,000 in tax revenue. (That the existing sales ban law had some bite was suggested by the estimate that one-third of smokers bought their cigarettes outside of North Dakota.) Sales prohibitionists mounted an energetic attack on the repealer—one representative shouted during House floor debate: “‘Some money is too damn dirty for me’” —but the Senate passed it by an overwhelming majority of 40 to 9, while the House vote was a somewhat closer 78 to 33, and legalization of the emergency measure took effect on April 1. Thus, as the United States entered the second quarter of the twentieth century, Kansas became the only state still prohibiting the sale of cigarettes.

395“Text of Address of Gov. Sorlie to Legislature,” BT, Jan. 7, 1925 (2 [sic; should be 4]:1-6 at 4).
396“Hearing Held, Opposition to Bill Is Shown,” BT, Jan. 21, 1925 (1:8).
4001925 North Dakota laws ch. 106 at 112. For a detailed account, see vol. 2. Implying that the law had been a dead letter, the United States Tobacco Journal reported that: “The retailers in the state are not in favor of having the bill repealed. They are better satisfied with a closed state.” “New Des Moines Firm to Wholesale the Consolidated Lines,” USTJ 103(7):34 (Feb. 14, 1925).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Religio-Moralistically Based in Kansas (1917-1927)

Kansas...is going to bully, cozen, intimidate, placard and educate the cigarette out of existence. 401

Kansas. There the moral forces have joined in a holy war against the cigarette, and all the machinery of the Woman’s Christian Temperance Union has been turned over to the enemies of tobacco. ...

However...there is a grave defect in the Kansas Anti-Cigarette law. The statute provides that the confiscated matter shall be burned. As a glorious auto da fé the spectacle of 20,000 cartons going up in smoke in the Court House square or the fair grounds would be satisfactory to all friends of the right, but it would not exactly have a sweet savor in their nostrils. The Anti-Cigarette law is based on the belief that cigarettes are poisonous. So long as they are permitted, only the individual smoker is harmed. But if they are burned in public the pure air of the entire State of Kansas is poisoned by the noxious exhalations and a whole people may be expected to sicken and pine away. Better take the vile things out and drown them in the nearest river. 402

In 1909, by very large majorities in both legislative chambers, Kansas joined the ranks of the states that prohibited the sale of cigarettes or cigarette papers to anyone, 403 thus imparting, in the words of the Topeka State Journal, “a rude jolt in the solar plexus” to “Old ‘Personal Liberty’....” 404 Though 1909 turned out to be the peak year for the number of state statutes in force nationwide (11), 405 by 1917, when only seven were still on the books, the production of cigarettes was soaring, and the United States was about to enter the World War, the Kansas legislature, which was also in the midst of considering at least a dozen liquor prohibition bills to enhance the state’s “bone dry” status 406 and in fact passed a

402“Poisoning by Wholesale,” NYT, Aug. 10, 1921 (8) (edit.). On the raids, which led to the arrests of 32 dealers and confiscations of cigarettes priced at $1,500, see “Thirty-Two on Bond,” HN, Aug. 4, 1921 (13:4). The statute did not appear to require burning.
405See above Table 2.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

bill outlawing keeping intoxicating liquors for personal use, strengthened its cigarette ban in two significant ways. First, the 1917 amendments powerfully enhanced the state’s capacity for enforcement by providing that:

If, upon what seems to be reasonable evidence any person, company or corporation is suspected of having in his or its possession any cigarettes or cigarette papers intended to be offered for barter, sale or free distribution; then, upon the sworn complaint of any citizen of the state of Kansas, specifying fully as to the alleged facts in the case, any officer authorized to make arrests may search the premises of such person, company or corporation and may confiscate any cigarettes or cigarette papers so found. The possession of such cigarette materials shall be considered prima facie evidence of a direct violation of this act.

And second, the new law, as companion legislation to the bone-dry liquor law, sought to suppress demand and distribution by making it unlawful to advertise cigarettes or cigarette papers, or any disguise or subterfuge of either of these, in any circular, newspaper or other periodical published, offered for sale or for free distribution in the state of Kansas. It shall also be unlawful for any person, company or corporation to advertise cigarettes or cigarette papers on any street sign, placard or billboard; or in any package of merchandise, store window, show case, or any other public place within the state of Kansas.

Support for such governmental interdiction of cigarette advertising had arisen in various organizations primarily concerned about young people, including college students. Preemptive action was taken by the State Association of School Board Members (encompassing 150 such boards) in adopting a resolution “declaring its intention to have all cigarette advertising clipped from newspapers and magazines coming into their school libraries. These clippings are to be sent back to the publisher with a protest.” The State Federation of Women’s Clubs,

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410 1917 Kansas Session Laws ch. 166, § 2, at 212, 213.
which, in connection with organizing a department to combat cigarettes, specifically requested a statute banning their advertisement. These initiatives reflected the activities of a larger movement led by the recently established Department of Child Welfare at the University of Kansas. The first of its kind at an educational institution when inaugurated in 1913, the Department was soon undertaking, inter alia, to “bring the home, the school, the church and the community into closer cooperation in their service of the young” as well as to “foster the church and Sunday-school activities of the young and connect these with other forms of juvenile training.” Of special relevance in the present context was its program to “make a plan whereby the State W.C.T.U., the State Federation of Clubs, the State Sunday School Association, the State Teachers’ Association, and the State Executive Department, and many other such agencies may all act together in an effort to drive the cigarette out of Kansas.

This anti-cigarette mission was inspired by the Department’s head, William Arch McKeever, who until then had been a philosophy professor at Kansas State Agricultural College, where he published a series of Home Training Bulletins, the very first of which was devoted to The Cigarette-Smoking Boy. McKeever declared at the outset that it was not his purpose to attack smoking generally, since a “majority of the best and ablest men of the country are smokers,” who “unquestionably get a great deal of satisfaction out of their cigars and pipes,” but he nevertheless stressed that smoking’s tendency among habituated smokers to “drive away depression and to make him [the smoker] better satisfied with his lot” did not represent an “advantage[ ] over the non-smoker....” Moreover, smoking was “somewhat filthy at its best, and disgustingly filthy at its worst, as the ordinary smoking-car will bear witness. Often, in public places, even refined women are forced to breathe the sickening fumes coming direct from the nostrils of some coarse, brutal cigarette smoker.” As early as 1909 McKeever was convinced that smoking was “entirely unnecessary to the development and refinement of the race, and it will in time doubtless go the way of the liquor-drinking habit.”

By 1915 the Journal of Education, hailing McKeever as “the fiercest anti-

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cigarette leader that the colleges and universities have produced,” published one of his diatribes demonstrating his possession of considerable (secular) polemical verve:

The greatest moral conflict of its kind that the country has ever seen is going to be staged soon with the American boy in the center of it, a conflict to determine whether his destiny is to be controlled by the powerful nicotine trust or by his parents, teachers, and the others rightfully appointed to do so. ...

Men Teachers of America! Which side of this struggle for the independence of the ordinary boy are you on—the side of the duke of nicotine, or the side of the boy and his devoted mother? All of you teachers of boys who are known by these boys to be users of tobacco—all of you have gone over to the enemy. ... If you...go over to the enemy via the nicotine route, then we shall lose this fight for at least a generation to come. ...

The cigarette is by far the greatest menace to our American boyhood and youth....

Although McKeever was well aware of the heightened deleterious health impact of inhalation, especially with regard to the heart, his propaganda was weighted toward alleged moral failings such as “sex perversion” and lapse of religious sensibilities.

In an action challenging the validity of the cigarette advertising ban by the publisher of a Kansas City, Missouri newspaper, a federal court upheld the law as applied to Kansas but not out-of-state newspapers:

while the business of bartering, selling, or in any other manner disposing of cigarettes in this state, or the business of advertising in any manner by any one within this state of the business of selling or disposing of cigarettes, is by the act in question properly prohibited, yet by reason of the exclusive control of Congress over interstate commerce it must, I think, be held, as the conduct of interstate commerce in cigarettes may not by a state be prohibited or unreasonably burdened, it follows, of necessity, the business of advertising such interstate commerce business, which advertising itself not only is a form of interstate commerce, but further adheres in the very conduct of the interstate cigarette business itself, is also beyond the power of the state to prohibit or make criminal and punish, and this for the reason it cannot be thought possible to make the advertisement of a lawful business unlawful and punishable as a crime.
To be sure, Judge John Pollock felt no inhibition about revealing his own personal contempt for the entire regime of governmental control of cigarettes sales:

it appears to have been the obvious legislative intent to prohibit absolutely and forever the barter, sale, gift, or other disposition of cigarettes in any form or manner whatsoever within this state. To accomplish this so-called beneficial result the law-making power thought it proper and necessary to prohibit and punish any one who within the state should by any writing, sign, or other means advertise the sale, gift, or other disposition of the nefarious article, lest the citizen, learning the source from which the same might be procured from without the state, should be tempted to so procure it, bring it into the state, and use it to his hurt.

It is quite probable this well-meant, even if misguided, legislation is within the constitutional power of the state in the exercise of its reserve police powers.\footnote{Post Printing & Publishing Co. v. Brewster, 246 F. 321, 324 (D. Kansas, 1917).}

Kansas City (Kansas) lawyer and Republican Senator James Getty expressed his contempt sarcastically in a different direction when he twitted one of his colleagues on the Senate floor by asking whether he did not know that “‘this bill is going to hamper the great uplift? Does he not know that the newspaper that lies awake at night planning for the uplift of Kansas gleans perhaps $500 a day from the advertising of cigarets and tobacco? Surely the senator cannot mean to aid in striking at the instrument of the uplift?’”\footnote{“Senate Decides Cigarets Can’t Be Smoked Here,” \textit{TSJ}, Mar. 7, 1917 (1:7 at 2:3).}

The radical sentiment underlying the bill is documented not only by the overwhelming vote of 101 to 4 for passage in the House (both Socialist Party members voting Yea),\footnote{\textit{House Journal: Proceedings of House of Representatives of the State of Kansas: Twentieth Biennial Session...1917}, at 326 (Feb. 8) (1917) (Elmer Barnes and J. S. Keller).} but especially by the 38 to 1 vote in the Senate, to amend the bill to ban the use of cigarettes as well.\footnote{\textit{Senate Journal: Proceedings of the Senate of the State of Kansas: Twentieth Biennial Session...1917}, at 576 (Mar. 7) (1917).} Whether this almost unanimous vote to abolish cigarette smoking was meant in earnest is difficult to discern inasmuch as “[f]riends of the measure declare[d] that the Senate action w[ould] make the bill unconstitutional and [w]e[re] making an attempt to have the...
amendment removed when the measure is taken up again in the House.”

The Topeka State Journal’s report that insertion of the “obnoxious word...was made possible by the intense desire of several senators to go as far or farther than the constitution will permit” failed to explicate that desire’s underlying substance,” though its account of the mechanics of the vote suggested that the near unanimity was illusory: “The extremists, joined with the opponents of the bill, formed a coalition on the spur of the moment and voted the amendment in.” The extremism decried by the press may have been exemplified by newspaper publisher and Senator J. M. Satterthwaite, who “branded the whole tobacco habit as a horrible thing. He drew no lines. He declared every tobacco user in the senate was a slave and would be glad to be free of the habit.”

Although the House rejected this amendment and it was dropped in conference, the House itself, a month before the Senate had adopted the aforementioned amendment, had passed an even more far-reaching prohibition of cigarette use. Defeat of both measures to ban the use of cigarettes did not, however, stop the United States Tobacco Journal from purporting to explain a Kansas cigar company’s decision to move to Missouri by disinforming its readers that the newly enacted Kansas anti-cigarette law, “the most drastic one yet passed in any state,” prohibited use and possession.


426*Senate Decides Cigarettes Can’t Be Smoked Here,* *TSJ,* Mar. 7, 1917 (1:7). Based solely on this one article, R. Alton Lee, “The ‘Little White Slaver’ in Kansas: A Century-Long Struggle Against Cigarettes,” *Kansas History* 22(4):258-67 at 262 (Winter 1999-2000), claimed that a “powerful lobby of women’s clubs...persuaded some senators to amend [the bill] by adding the word ‘use,’” but the article not only nowhere stated or supported such a claim, but actually undermined it by pointing out that: “Senator Bergen..., champion of all measures urged by the club women, was tipped off by the lobby that the senate had ‘gone and done it,’ and having voted for the wicked amendment moved a reconsideration.” “Senate Decides Cigarettes Can’t Be Smoked Here,” *TSJ,* Mar. 7, 1917 (1:7).

427*House Journal: Proceedings of House of Representatives of the State of Kansas: Twentieth Biennial Session...1917,* at 770 (Mar. 7) (1917) (motion to nonconcur in Senate amendment and to appoint a conference committee prevailed).

428*House Journal: Proceedings of House of Representatives of the State of Kansas: Twentieth Biennial Session...1917,* at 807 (Mar. 8) (1917) (vote was 86-5); *Senate Journal: Proceedings of the Senate of the State of Kansas: Twentieth Biennial Session...1917,* at 606 (Mar. 8) (1917) (vote was 24 to 11); “Anti-Cigaret Bill,” *TSJ,* Mar. 8, 1917 (2:2).

429See below this ch.

430“Quits Kansas Due to ‘Anti’ Freak,” *USTJ,* vol. 87, at 12 (Apr. 7, 1917).
By 1919 the Kansas attorney general decided to crack down on flouting of the state’s anti-cigarette legislation. In a letter he directed all county attorneys to enforce it strictly:

“War conditions caused an extensive use of cigarettes among the soldiers.... It seemed for a time that the Legislature would repeal the anti-cigarette law. However, that did not happen and it remains our duty to see that it is enforced.... I trust, therefore, that the State will have the earnest cooperation and that you will take such steps as will be necessary to stop the violations of the law.”

Thus, especially in the wake of the Kansas Supreme Court decision in 1920 upholding the statute on the grounds that the state was competent “to determine for itself the extent to which it will go in the restriction or prohibition of the sale or use of that which is deleterious to the public health or morals” and to determine that “the sale of cigarettes was a greater menace to the health and welfare of the people than would be the sale or use of tobacco in other forms,” the forces advocating strict enforcement of the Kansas “statute against the enormity” extended—contrary to the sarcastic editorial comment in The New York Times that “[t]here can be little doubt that in the course of a million years or so the physique of truckmen, stevedores and other slaves of the cigarette will degenerate”—far beyond the Anti-Cigarette League and Lucy Page Gaston. Indeed, “[l]ocal officers...conducted raids, confiscating cigarettes and prosecuting vendors in various parts of the State.”

In particular, two days before Christmas 1920, the state attorney general formally requested that two county attorneys investigate reported violations of the anti-cigarette statute and prosecute the violators if the evidence so warranted. Two high-profile cases were virtually designed to incite pro-tobacco elements by pushing enforcement of the Kansas ban on the sale or gift of cigarettes to provocative extremes. One involved 19 men in Atchison who, several days after Gaston had written President-elect Harding asking him not to smoke cigarettes, each chipped in 10 cents for a carton of cigarettes which they mailed as a gift to Harding accompanied by a
letter, in which they purported “not necessarily [to] defend cigarettes,” but expressed their resentment of the “pernicious audacity on the part of a female who writes you such an insulting letter under a Kansas dateline.” In the other, Topeka women and the local American Legion post had sent gifts of cigarettes to disabled soldiers at an army camp and in a state hospital.

The mind-set of entitlement that characterized addicted World War veterans was stereotypically captured in a letter to Kansas Governor Henry Allen from “A SOLDIER WHO HAS BEEN OVER THERE.” In it Michael W. Birmingham urged the governor to add repeal of the cigarette sales ban to the agenda of the special legislative session he had called for June 1919 to ratify national women’s suffrage:

[Y]ou and several others of the big men of the state spent your time and money willingly during the recent war in order to aid and comfort our soldier and sailor boys in their work. Nothing was too good for them. You, yourself, were connected with the RED CROSS and YMCA work and one of your principal duties was to see that the boys were well supplied with cigarettes. Are these boys not as good now as they were then? Why is it that when they take off their uniforms they are no longer allowed to smoke a cigarette? ... Do you expect your brave sons of Kansas, of whom you have repeatedly said you are so proud, and who have spent the last two years in hard training and fighting, and with whom the cigarette was their boon companion, to take off their uniforms and throw away their cigarettes, which were their best friends? Is it not a fact that when one of us was injured “over there” and sent to an evacuation hospital for first aid treatment that [sic] the first thing with which the RED CROSS NURSE greeted us was a cigarette?

You erect triumphal arches for us to march under on our victorious home coming march, but do you stop and consider that one of us may want a “Camel”?... The next day, after the American Legion post had adopted a resolution denouncing Attorney General Richard Hopkins for having ordered the organization’s rooms to be raided and the gift cigarettes to be seized, he charged that interests opposed to him were behind the resolution—the Wholesale Grocers Trust and Associated Industrials (previously known as the Employers

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438 At the 1920 Population Census (HeritageQuest) the only Michael W. Birmingham in Kansas was a 22-year-old railway office clerk.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

The seizure in February 1921 of 25,000 cigarettes at a wholesale grocery warehouse was one of the largest “since the attorney general recently began to bestir himself in the cause of the anti-cigarette law and insist on its rigid enforcement.” (By the time he issued his 1921-22 Biennial Report, the attorney general was sufficiently attuned to the needs of enforcement that he observed that the anti-cigarette law “could be made more effective by extending the power of injunction similar to the provisions now in effect for the enforcement of the [liquor] prohibitory law, the gambling law and the bawdy-house law.”)

Escalating the conflict, the same American Legion branch in the state capital began “demanding repeal” of the ban on sales to adults. The ex-soldiers’ chief protagonist—Professor McKeever, author of the very anti-cigarette law that the Legionnaires wanted wiped off the books—charged that the Legion’s resolution requesting the governor to urge repeal had been “inspired by certain big interests.” After the Legion had suggested that the governor remove McKeever from the university payroll, the latter challenged the Legionnaires at the beginning of 1921 to debate the question: “Resolved, That the cigaret is a menace to the progress of society and should be done away with.” More interesting in terms of his ideological orientation was his appeal to the American Legion to “turn from the selfish cigarette” and ‘come out on the side of Christ and Kansas. The New York Times, closely monitoring this episode from afar and waxing sarcastically libertarian, editorially suggested that the Legionnaires could achieve a “nobler revenge” than evicting McKeever from his professorial chair by identifying some of his “human weaknesses,” finding out something that he liked and that they did not (such as tea, coffee, or banana sundaes), and “get[ting] the Legislature to prohibit these selfish things.” McKeever, the department director of the Presbyterian National Board of Temperance and Moral Welfare, soon achieved an even higher national profile when, at the beginning of February, he announced that Kansas was “going to try to wipe out ‘the weed’ as it did ‘booze,’ and lead an anti-cigarette campaign” of which he had been made

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441 “Seized 25,000 Cigarettes,” *HN*, Feb. 11, 1921 (9:2).
443 “Kansas Row on Cigarettes,” *NYT*, Jan. 4, 1921 (18). The Topeka post was not the only one to favor repeal. E.g., “Against Non Partisan,” *HN*, Jan. 14, 1921 (13).
445 “Kansas Row on Cigarettes,” *NYT*, Jan. 4, 1921 (18).
446 “Kansas ‘Prof’ Dares Legion to Cigaret Debate,” *CT*, Jan. 4, 1921 (1).
447 “Professor and Legion,” *NYT*, Jan. 5, 1921 (11) (edit.).
field secretary. Even before the legislature had convened, Senator Paul Kimball, a Republican farmer, announced that he would introduce the repealer leaving intact only the regulation of minors and adding a licensure regime. Kimball did in fact file such a bill soon after the session opened, and the issue sparked “one of the most spectacular fights of the 1921 legislature” pitting the American Legion and its Women’s Auxiliary against McKeever, Gaston (who registered as a lobbyist), the Anti-Cigarette League, and State Superintendent of Public Instruction Lorraine Wooster, (a monumentally militantly moralistic “bitter foe of all things nicotine”) and resulting in consideration before a joint session of

448“Kansas to Fight Tobacco,” NYT, Feb. 4, 1920 (11).

449“Kimball Would Repeal Anti-Cigarette Law,” HN, Jan. 4, 1921 (1:1).

450 Senate Journal: Proceedings of the Senate of the State of Kansas: Twenty-Second Biennial Session...1921, at 40 (Jan. 18) (1921) (S.B. 65, by Kimball). The bill text was published in “Tobacco Battle On,” IDR, Jan. 21, 1921 (1:7). Almost four weeks later the national newspaper of record was still reporting that the Topeka American Legion post was “planning to introduce through a legislative committee” a repeal bill. “Anti-Tobacco Talk,” NYT, Feb. 13, 1921 (XX1).

451“Tobacco Battle On,” IDR, Jan. 21, 1921 (1:7). The Kansas WCTU was also engaged in opposing repeal of the cigarette ban. Its moralistic bent was on display in its efforts on behalf of a bill “prohibiting minors from attending trials in which vulgar and obscene language is used in the testimony.” “W.C.T.U. Is Scoring in the Legislature,” HN, Feb. 14, 1921 (16:3). On a WCTU anti-repeal petition, see “Against the Cigarettes,” HN, Jan. 27, 1921 (2:5).

452“Miss Wooster Talks to Walled City,” HN, May 18, 1922 (11:5). Wooster, a nationally known lawyer who was the first woman elected to statewide office in Kansas was defeated for a third term in 1923 in part because of her “strict moral stands against teachers who smoked, drank, danced, or wore makeup.” http://www.kshs.org/kansapedia/lorraine-elizabeth-wooster/12246 (visited Feb. 22, 2011). See also “Lizzie’ Now a Full Fledged Lawyer,” Belleville Telescope, Nov. 29, 1923 (7:2). In 1922 she issued a circular declaring that “no recommendations for school positions will be made for teachers, instructors, or superintendents who use tobacco in any form. No state certificates or institute certificates will be issued to tobacco users. Schools and colleges that permit the use of tobacco in any form, by administrative heads, instructors or pupils, cannot remain on the accredited list. Credits sent to the State Department from normal schools, colleges, and universities, where the heads of these institutions, faculty members, or students use tobacco in any form, will not be accepted for certification.” She closed by authoritatively stating that the notification was “in compliance with the laws of Kansas.” “Anti-Cigarette Week,” IDR, Mar. 31, 1922 (1:8). In May, she notified a school superintendent in a small town that his certificate would be revoked because he smoked cigars despite his statement that he had never smoked on school grounds or on the streets.
and his promise that he would never again smoke outside of his own house. “Smoking Kansas,” NYT, May 13, 1922 (8) (edit.). The state attorney general issued an opinion that she was without authority to implement the policies embodied in the circular’s last two sentences. “Upsets Ban on Tobacco,” NYT, June 19, 1922 (22). Unfortunately, the Twenty-Fourth Biennial Report of the Attorney-General: 1921-1922 (1922) failed to publish any opinions, and neither the Kansas Attorney General’s Office, nor the State Library, nor the State Archives, nor the law libraries of the University of Kansas or Washburn University have the opinion. For a clever ruse deployed a quarter-century earlier by a female county school superintendent in Colorado who in a letter to the female state superintendent fabricated the case of a female teacher who smoked cigars in order to determine whether there was a double standard, see “Should a Woman Smoke,” RMN, Jan. 26, 1897 (5:2); “Teacher Smoked Cigars,” RMN, Feb. 21, 1897 (5:1-2). Ironically, the county superintendent’s husband ran a drug store with a cigar department one of whose best customers was the male teacher who smoked cigars.

However, in spite of its ability to inflict this signal defeat on the American Legion and the other pro-cigarette forces, the anti-cigarette movement was unable to pass its own measures, including even a blanket smoking ban in street cars and railroads of the state library. Nevertheless, in addition to mobilizing the
submission of a huge number of supporting petitions,\textsuperscript{458} it came close to passing what was perhaps the most radical, comprehensive, and stringent anti-cigarette bill ever voted on by a state legislative chamber in the United States—the losing vote was 48 to 59. (Six of the eight voting Democrats of the 12 sitting in the 125-member House opposed the bill.)\textsuperscript{459} House Bill No. 653, “the ‘bone dry’ cigarette bill,”\textsuperscript{460} which “reversed” the original (repeal-fueled) momentum of the legislative controversy,\textsuperscript{461} was introduced by Republican farmer Cyrus White,\textsuperscript{462} whose explanation of his vote sheds light on his child-centered, religio-moral orientation:

> It is just as easy to form a good habit as it is to form a bad one. Good habits make good characters. Cigarettes are injurious to our boys and girls. The boys and girls of today comprise the nation of to-morrow. “Righteousness exalteth a nation.” In choosing between righteousness and the cigarette, I select the former and vote Aye....\textsuperscript{463}

Opponents’ animus to the bill’s anti-libertarian spirit was captured by the sarcastic explanation of vote offered by Republican lawyer and World War I veteran Lewis Hasty: “On reconsideration I find that the bill is not broad enough in its provisions. Tea, coffee, cigars and chewing gum may still be used. I must therefore vote No.”\textsuperscript{464}

\textsuperscript{458}House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Second Biennial Session...1921, at 27-33 (index of petitions) (1921).

\textsuperscript{459}House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Second Biennial Session...1921, at iii-v, 509-10 (Mar. 8) (1921); “Kill Cigarette Bill,” IDR, Mar. 8, 1921 (1:2).

\textsuperscript{460}“Kansans Can Smoke ‘Em,” Kansas City Star, Mar. 8, 1921 (27:2).

\textsuperscript{461}“No Bonds for the State Now,” HN, Feb. 28, 1921 (6:4-6 at 5) (also reporting that it was “freely predicted” that White’s bill was “due to lose some of its mainstay through the amendment route”).


\textsuperscript{463}House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Second Biennial Session...1921, at 510 (Mar. 8) (1921). The quotation is from Proverbs 14:34.

\textsuperscript{464}House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Second Biennial Session...1921, at 510 (Mar. 8) (1921). On Hasty’s
White’s “drastic”\textsuperscript{465} measure with all imaginable capaciousness provided that it shall be unlawful for any person to keep or have in his possession for personal use or otherwise, any cigarettes, cigarette papers, or cigarette makings, or permit another to have or keep or use cigarettes, cigarette papers, or cigarette makings on any premises owned or controlled by him, or to give away or furnish cigarettes, cigarette papers or cigarette makings to another.\textsuperscript{466}

The penalty for commission of this misdemeanor was a fine of $10 to $100 and/or 30 to 60 days’ imprisonment in county jail.\textsuperscript{467} The bill went on to make it also unlawful for any common carrier, firm or corporation, or any other person for hire or without hire, to bring or carry into this state or carry from one place to another within this state any cigarettes, cigarette papers, or cigarette makings, for another or for itself or himself, even when intended for personal use; and it shall be unlawful for any common carrier, its agent, or employee, to deliver any cigarettes, cigarette papers, or cigarette makings that may be in its possession to any person for any purpose whatsoever.\textsuperscript{468}

And finally under H.B. No. 653 it was unlawful for any person in this state to receive directly or indirectly cigarettes, cigarette papers, or cigarette makings from a common carrier or other carrier or person, and it shall also be unlawful for any person in this state to possess cigarettes, cigarette papers, or cigarette makings received directly or indirectly from a common carrier, other carrier or person. This section shall apply to such cigarettes, cigarette papers, or cigarette makings intended for personal use as well as otherwise, and to interstate as well as to intrastate carriage.\textsuperscript{469}

The bill’s defeat prompted the \textit{Kansas City Star}'s accurate headline,
“Kansans Can Smoke 'Em,” Kansas City Star, Mar. 8, 1921 (27:2).\(^{470}\) but they still could not buy cigarettes legally and that very week the police in Manhattan, Kansas reported that their recent raids had netted more than 10,000 cigarettes and $100 fines for every dealer caught with them on his premises.\(^{471}\)

Though ex-soldiers were “the most potent influence in the change of legislative attitude,”\(^{472}\) the American Legion was far from alone in pushing for repeal of the cigarette sales ban. In late November 1922, some weeks before the 1923 session of the Kansas legislature convened, Dushkind, the TMA’s managing director, was busy canvassing (especially wholesale) mercantile tobacco firms in Kansas on their views as to securing repeal. From the excerpts that Dushkind shared with his oligopolist bosses it emerged that several sellers were highly critical of the efforts that had been undertaken in 1921. For example, one wholesale grocery opined that they had been “very badly managed” because they were undertaken by “a bunch of Tobacco salesmen, who were so indiscreet in their method of trying to put this over.” Another suggested that next time TMA send a “man who is a polished speaker” and “have the facts from medical authorities to show the cigarette is not injurious.”\(^{473}\)

In spite of numerous local firms’ view that the 1923 session would be propitious for repeal,\(^{474}\) anti-cigarette sentiment turned out be much more tenacious and well-organized than they imagined. Almost as soon as the legislature convened, so many protests began “pouring in against the repeal of the anti-cigarette law” that the press quickly concluded that it was unlikely that such a measure would “receive much consideration....”\(^{475}\) Indeed, lawmakers were more inclined to adopt even stricter regulation than to deregulate. Thus, while the House Public Welfare Committee demonstrated its “antipathy to tobacco” by

\(^{470}\)“Kansans Can Smoke 'Em,” Kansas City Star, Mar. 8, 1921 (27:2).

\(^{471}\)“Pill Raids at Manhattan,” IDR, Mar. 10, 1921 (1:7).


\(^{473}\)TMA, “Excerpts from Letters Received from the Trade: Kansas: Favoring Repeal Activities” at 1 (n.d. [ca. Nov.-Dec. 1922]), Bates No. 501870678-9. Unfortunately, Dushkind’s (presumably form) letter to the firms is not extant in the Legacy documents.


\(^{475}\)“Committees to Work Promptly,” HN, Jan. 13, 1923 (1:3). See, e.g., Kansas Branch of National Congress of Mothers and Parent-Teacher Association, Resolution To Retain the Present Anti-Cigarette Law and to Work for Its Enforcement (Jan. 13, 1923), in Governor’s Records, Allen, Correspondence, Box 14, Folder: Legislative Special Session 1919, KHS, on http://wwwkansasmemory.org/item/214069.
killing a repeal bill, the full House passed a bill “defining as nuisances places where cigarettes or cigarette papers are sold or given away and enabling the attorney general or any citizen of the county to bring action to permanently enjoin the same.” The legislature’s regular biennial consideration of cigarettes was enriched by a variant that would gain traction only later—namely, the “cigarettes for revenue only” repeal cum tax that would net the state half a million dollars annually in revenue while lowering consumer prices.

The 1925 session—at which the cigarette industry finally achieved repeal in North Dakota—proved to be the turning point in Kansas, although even that year witnessed impressive mobilization by the anti-cigarette movement resulting in the submission of more than 200 petitions, signed by more than 23,000 people, to the House, protesting against repeal of the anti-cigarette law. The Senate, too, received numerous petitions, at least 87 of which, signed by more than 9,000 people, protested against repeal of the law or legalization or advertising of cigarettes. Significantly, several petitions justified this position on the distinctly late-twentieth-century anti-tobacco grounds that “the use of cigarettes

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476 “Move to Aid the Spanish Soldier,” HN, Feb. 9, 1923 (1:2).
477 “Booze Deaths Called Murder,” IDR, Feb. 9, 1923 (1:8).
479 Of the total of 264 petitions submitted to the House in 1925 on all matters 220 dealt with the cigarette law, of which at least 204 opposed and only 8 (signed by only 1,315 people) urged repeal (the orientation of the remainder being unidentified). The total number of anti-repeal petitioners far exceeded 23,000 because the Journal’s brief description of numerous petitions mentioned merely that they had been signed by “others” or “many others” in addition to the principal (or perhaps first listed) petitioner. Calculated according to House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Fourth Biennial Session...1925, at 175, 184-85, 191-92, 200-201, 207, 211-12, 220-21, 231, 254, 259, 268, 285, 300, 306, 325, 330, 352, 363, 376, 393, 416, 454, 765-72 (Feb. 12, 13, 14, 16, 17, 18, 19, 21, 23, 24, 25, 26, 27, 28, Mar. 2, 3, 4, 5, 6, 7, 9) (1925). Interestingly, one of the petition submitters was the aforementioned former legislator Minnie Grinstead. Id. at 200.
480 Of the total of 212 petitions submitted to the Senate in 1925 on all matters 176 dealt with the cigarette law only four of which (signed by at least 121 people) urged repeal. Although only 87 were identified by the Journal as opposing repeal, most of the others appear to have done so as well; as was the case in the House, the Journal did not state the number of signers for every petition. Calculated according to Senate Journal: Proceedings of the Senate of the State of Kansas: Twenty-Fourth Biennial Session...1925, at 23, 158-59, 163-65, 176-77, 190, 200-202, 211, 219, 228, 235-36, 242, 260, 266, 314, 655-60 (Jan. 19, Feb. 11, 13, 14, 17, 19, 20, 21, 24, 25, 26, Mar. 4) (1925).
by adults is the one of the predominating causes for its use by minors....”

And amid this avalanche of petitions the anti-cigarette forces also counter-organized to introduce bills in the House and Senate under which restaurants, stores, and other businesses selling cigarettes would be declared common nuisances and padlocked.

The announcement, right after New Year, that “a determined effort” would be made to repeal the anti-cigarette law prompted “considerable interest” in William Allen White’s Emporia, where the proposal was “unpopular.” The no-nonsense president of the WCTU, which was to “lead the fight” against repeal, had nothing to say because it “is the work that counts, and not the talk,” while the city attorney insisted on enforcement of the existing law and the county attorney favored a “‘bone-dry’ cigaret law...that will absolutely prohibit the sale, possession and distribution....” The city clerk chimed in that “I’m in favor of any law that will knock the tobacco trust.” Interestingly, the secretary of the Ministerial association, which supported the current law, nevertheless (pragmatically) opined that: “We don’t hope to keep men from smoking. But what we hope to do primarily is to protect the boys. The boys start smoking too soon now, and with the repeal of the cigaret law, there would be more smoking than there is among the boys.”

This defeatist approach made prohibitionists vulnerable to criticism not only that they were depriving adult men of their consumer freedom, but that the difference between universal prohibition and the proposed ban only for minors was in reality merely an empirical dispute over efficacy rather than a categorical public policy, health, or moral divide.

Ominous, too, for prohibitionists was that both the House and Senate that

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482 “Teeth for Fag Bill,” IDR, Feb. 14, 1925 (1:4). Bills with identical titles (“An Act relating to the sale of cigarettes and cigarette papers and the suppression of places where cigarettes and cigarette papers are kept for sale contrary to law”) were introduced in both chambers the same day, but neither came to a floor vote. H.B. 473 (by Felton) was recommended for passage by the Public Welfare Committee, but progressed no further. House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Fourth Biennial Session...1925, at 194, 208, 286 (Feb. 14, 16, 25) (1925). S.B. No. 442 (by Spencer by request) died after the Judiciary Committee recommended that it not be passed. Senate Journal: Proceedings of the Senate of the State of Kansas: Twenty-Fourth Biennial Session...1925, at 178, 190, 204 (Feb. 14, 17, 18) (1925).

483 “Proposal to Change Cigaret Law Unpopular in Emporia,” EDG, Jan. 5, 1925 (5:1-2). WCTU President Nina Clark Hembling was nevertheless a poet.
year dropped their decades-old rules prohibiting smoking in their chambers.\textsuperscript{484} But even as business owners were being tried for selling cigarettes,\textsuperscript{485} Senator Martin Van De Mark, the Republican lawyer who sponsored a repeal bill modeled on Iowa’s, predicted that the tax revenue and licensee fees would yield a million dollars for the state treasury.\textsuperscript{486} Advocates of licensure and taxation stressed that prohibition encouraged bootlegging with the result that the “mail order business done by Kansas men in Kansas City [Missouri] is almost as great as the business that would be done if cigarets were sold in the state.”\textsuperscript{487} (The pro-cigarette forces did not seem to focus on the contradiction between this account of the sales ban’s compelling wannabe buyers to cross a state border and complaints that the law was not being enforced.)\textsuperscript{488} During floor debate on Van De Mark’s S.B. No. 336,\textsuperscript{489} senators who argued that the existing law was in fact enforced in smaller towns were challenged to identify a single one where cigarettes could not be bought, and afterwards the chamber voted by a comfortable margin of 26 to 9 for repeal.\textsuperscript{490} To the galleries filled with public school pupils several senators explained their votes, one assigning as the reason for his Aye that “‘the ability to build character is not given by legislative enactment.’”\textsuperscript{491} The front-page

\textsuperscript{484}See below ch. 18.
\textsuperscript{485}“Cigarette Cases Again Continued,” \textit{HN}, Feb. 16, 1925 (5:2).
\textsuperscript{486}“Frizzell Alone Is Not Urging Any Pet Bills,” \textit{HN}, Feb. 16, 1925 (5:1).
\textsuperscript{488}To be sure, the tobacco trade and the press hungry for cigarette ad revenues insisted that the statute’s effect had been to “raise the retail price of a 15-cent package of cigarettes to 25 cents.” “Kansas Senate Repeals Anti-Cigarette Law,” \textit{USTJ} vol. 103, Feb. 28, 1925 (5).
\textsuperscript{489}The Judiciary Committee recommended passage as did the committee of the whole after striking out sect. 4, which required minors under 21 in possession of any form of tobacco to inform any peace, juvenile, or truant officer, or teacher, on request, to divulge the source of the tobacco. Session of 1927, S.B. No. 1 (by Van De Mark) (text furnished by State Library of Kansas); \textit{Senate Journal: Proceedings of the Senate of the State of Kansas: Twenty-Fourth Biennial Session...1925}, at 131, 144, 192, 220 (Feb. 10, 11, 17, 20) (1925).
\textsuperscript{490}\textit{Senate Journal: Proceedings of the Senate of the State of Kansas: Twenty-Fourth Biennial Session...1925}, at 245 (Feb. 24) (1925) (Democrats splitting 4 to 4); “Senate Adopts Bill Legalizing Cigarette Sales,” \textit{HN}, Feb. 24, 1925 (1:8); “Votes to End Kansas Cigarette Ban,” \textit{NYT}, Feb. 25, 1925 (20).
\textsuperscript{491}“Cigarette on the Way Back,” \textit{IDR}, Feb. 24, 1925 (1:8). The most bizarre “explanation of votes” published in the \textit{Journal} was offered by Democrat and former banker E. H. Ellis: “I am in favor of this bill for the reason that it prohibits ladies smoking.
headline that “Cigarette on the Way Back”492 proved to be a tad premature since the House both euthanized its own repeal bill493 and killed Van De Mark’s by a committee of the whole non-party-line vote of 80 to 31,494 thus ending the repeal movement for the session.

That the 1927 session’s “biennial revolt against the Kansas anti-cigarette law” might turn especially energetic was signaled by the emergence of several repeal proposals a month before the legislature even convened. Repealers were largely agreed on the two central features of such measures: a two- to four-cent per package tax and a $150 to $300 annual license fee revocable for violation of any provision of the law. Republican Representative Harold McGugin, one of the first legislators to commit to work for repeal, argued that the law had no excuse for existing because it did not prohibit cigarette smoking, adding the speculation that: “‘When we notice the way they are universally smoked, it is doubtful if anyone wants cigarette smoking prohibited very badly.’” (Presumably, if the legislature’s objective had been to prohibit smoking, it would have done so expressly and directly instead of devising an in-state sales prohibition that could be lawfully perforated by importation for persona consumption.) That the ban, despite denunciations for being infused with the spirit of utopian fanaticism, was in fact partial and pragmatic, would have been clear to McGugin, who asserted that the only manifestation of its existence was a price in larger cities 50 to 75 percent above that in states with legal sales, if the presumptive reduction in demand had been perceived as tantamount to a significant depression of consumption. The anti-cigarette organizations, including the WCTU, women’s clubs, and church societies, whose “flood of petitions” had swept away the repeal bill in the House in 1925, were also mobilizing in December 1926. Timing and


494Procedurally, the vote was on a motion to strike the bill’s enacting clause. House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Fourth Biennial Session...1925, at 194, 208, 286 (Feb. 14, 16, 25) (1925).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

intensity of these preparations were influenced by the announcement by authorities in Kansas City, Kansas, that they would “launch a vigorous enforcement campaign to stop the open selling of ‘fags’ there” such as several other cities had also recently initiated.495 One important structuring element of legislative pressure politics that reportedly would not change in 1927 was the state American Legion’s purported absence (which characterized the end-debate in Iowa in 1921):

While ex-servicemen have been active at the last two sessions in attempts to repeal the cigarette law, the state department of the American Legion has shied away from all attempts to embroil it in the controversy.

The department will continue this “hands off” policy again this year..., although individual posts and individual members are privileged to take any action they may desire.496

The legislative prioritization accorded overturning Kansas’s 18-year-old cigarette sales ban was signaled by the House and Senate bills’ both being the first to be introduced—by Republican lawyers. (The press viewed the numbering as the outcome of a default: “For the first time in the history of the state the house met on the opening day...and didn’t introduce a bill. ... Not a general state wide new law was proposed in either house. It is a record new in Kansas and probably has been equalled few times in the states of the nation.”)497 Senate Bill No. 1 was introduced by Van De Mark on January 12;498 House Bill No. 1, which was filed the next day by McGugin,499 was passed first and became law. S.B. No. 1 was “practically a duplicate”500 of the licensure/tax bill that Van De Mark had introduced in 1925 and that the Senate had passed by a large margin. Following S.B. No. 1’s introduction another senator presented a resolution at the request of the American Legion to repeal the sales ban on the grounds that: “Whereas the only form of tobacco barred in Kansas is the cigarette and the only result of the

495“Cry Once More Raised Against Fag Prohibition,” HN, Dec. 14, 1926 (1:3).
496“Cry Once More Raised Against Fag Prohibition,” HN, Dec. 14, 1926 (1:3).
497“House Sets New Record by Failing to Introduce Bills on Opening Day,” TSJ, Jan. 12, 1927 (1:4-5).
500“Cigaret Bill Up,” TSJ, Jan. 12, 1927 (1:5).
statute is to raise prices we regard it as class legislation....”501 Neither the Legion nor banker/merchant Senator Charles Snyder explained the nature of the injustice suffered by ex-soldiers in paying higher prices for the purchase of an illegal commodity.

The press stressed that McGugin’s H.B. No. 1 differed from S.B. No. 1—to which it was said to bear no relation—502—with respect to the basis of taxation (number of cigarettes versus weight), 503 though in fact for run-of-the-mill cigarettes the tax under both was two cents per package of 20.504 Unremarked by newspapers was the fact that the Senate bill was more rigorous than its House counterpart in a number of respects. With regard to minors under 21, S.B. No. 1, like the 1917 law but unlike H.B. No. 1, made it illegal to sell or give non-cigarette tobacco to them; unlike the 1917 law or H.B. No. 1, the Senate bill also both made it unlawful for minors to have any kind of tobacco in their possession and empowered peace, juvenile court, and truant officers as well as teachers to require such minors to give information as to the source of that tobacco. 505 In terms of the licensure and taxing provisions, S.B. No. 1 resembled the 1921 Iowa law 506 in conferring discretion on local governments to grant and issue licenses and in strengthening enforcement by means of liens on real property, abating nuisances, and seizing and destroying unlawfully kept or stored cigarettes, whereas McGugin’s bill lacked all such features. 507 Consequently, unlike the

503“House Has Cigarette Bill Today,” IDR, Jan. 13, 1927 (1:3); “Cigarette Bill Is First in the House,” HN, Jan. 13, 1927 (1:3). McGugin also intentionally omitted from his bill the provision in S.B. No. 1, § 4—which many states had enacted—that empowered police, juvenile court, and truant officers as well as teachers to require any minor under 21 in possession of any form of tobacco to reveal where he or she had obtained it. McGugin opposed this approach because he did not believe in passing a law that “increases the temptation to lie”; if subjected to an “inquisition,” most boys and girls “would fake some explanation....” “Fag Bill in House,” TSJ, Jan. 13, 1927 (9:5). For editorial support of McGugin’s position (and opposition to a cigarette tax unless all tobacco were taxed), see TSJ, Jan. 14, 1927 (4:1) (untitled edit.).
504Senate Bill No. 1, §§ 15 (Session of 1927) (copy furnished by State Library of Kansas); House Bill No. 1, § 9 (Session of 1927) (copy furnished by State Library of Kansas).
505Senate Bill No. 1, §§ 1, 3, 4 (Session of 1927) (copy furnished by State Library of Kansas); House Bill No. 1, § 2 (Session of 1927) (copy furnished by State Library of Kansas); 1927 Kansas Session Laws ch. 166, § 3, at 212, 213.
506See above ch. 15.
507Senate Bill No. 1, §§ 13, 16, 19-22 (Session of 1927) (“may”) (copy furnished by
1921 law in Iowa, where the residual opposition to cigarettes was strong enough to secure adoption of local option for continued prohibition of cigarette sales, McGugin’s bill failed even to consider that approach. Absent from both bills was any remnant of the ban on cigarette advertising.

The introduction of S.B. No. 1 coincided with the closing session of the annual meeting of the Kansas Farm Bureau, at which an explosive discussion of repeal of the cigarette sales ban ignited. The range and intensity of views expressed were highly pertinent to the legislative debate since farmers were assumed to be a group largely disinterested in or indifferent, if not outright hostile, to cigarettes. Obliquely the discussion arose out of the presentation of a resolution in support of a state income tax, taxes on tobacco and commercial entertainment, and taxation of monopolizable natural products. Though at first most members appeared inclined to approve it, the “fireworks” began when a delegate offered an amendment opposing repeal of the anti-cigarette law and passage of a license bill on the grounds that “‘the Kansas youth is our greatest asset and that his best interest is our chief concern....’” This intervention prompted another delegate who had lived in Iowa for several years to praise its licensure/tax law and oppose the amendment because under the existing Kansas ban law cigarettes could be bought everywhere, including at cigar stands, drug stores, and restaurants. The proposer countered that, as was the case with liquor, taxation would not stop cigarette consumption, and then accused his fellow members of gullibility: [“‘]Propaganda has been put out through thru newspapers and you farmers, being producers and not talkers, may believe it,’” but in fact cigarettes impaired youths’ health. The Farm Bureau’s newly elected vice president jumped in to take the hybrid position of defending cigarettes but “‘violently’” opposing a “‘nuisance tax’” on them. His admonition that “‘we’re getting...a little too puritanical’” prompted a female delegate to ask whether they wanted to “‘repeal a law which would add to the disgrace of womanhood....’” Finally, the newly elected president, Ralph Snyder, declared the current law an “‘absolute farce’” because cigarettes could be bought anywhere; moreover, he adjudged cigarettes incomparably less harmful than liquor because, if the former was harmful at all it was only to its user, whereas the former hurts everyone who came in any kind of contact with it. On one issue, however, Snyder, who purported not to use any tobacco, exceeded in insight almost all of the antis: “‘If we must have a prohibitory law, we should pass a drastic measure which would prohibit tobacco of any kind. So long as you men keep on smoking, you may be

508See above ch. 15.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

sure that your sons will follow you and smoke.” In the end, by a two to one majority, the farmers passed the tobacco tax resolution with its amendment opposing repeal of the cigarette sales ban.509

From the outset the press was impressed by the vigor with which both sides were engaged in a “positive, out in the open fight....” The party-political independent, but hardly unbiased, Topeka State Journal remarked that the repeal effort in 1925 had been “blocked, perhaps, when various members weakened under the bombardment of petitions.” In the meantime, however, McGugin and his allies had (allegedly) “dug up information tending to establish the fact that many of the lengthy petitions were sponsored by drug stores and pool halls where cigarettes are generally handled on the bootlegger basis.” They, several big firms in Chicago and Kansas City that sold cigarettes by mail at premium prices, and traveling salesmen selling cigarettes to Kansas dealers were satisfied with the existing (unlicensed, untaxed, and unenforced) regime, according to McGugin, and “masquerade as reformers interested in the salvation and welfare of the youth of Kansas. But the stuff they peddle tends to bother the weak-kneed ones and we go ahead each year keeping a law that is a fine thing for the cigaret bootlegger and doesn’t deprive anyone of a smoke.”510 In contrast, the businessmen circulating petitions to legislators in 1927 sought repeal.511 Kansas tobacco dealers, however, opposed the proposed two-cent tax on the grounds that it would disadvantage them against the mail order firms in Kansas City, Missouri, which had built up a large-volume business to Kansas and would not be subject to the tax,512 thus replicating rather than dismantling the advantage that had accrued to the latter during the period of the in-state sales ban.

The legislator chiefly responsible for pushing through repeal was Republican lawyer McGugin (1893-1946), at whose death almost two decades later his noble service on behalf of the state’s nicotine addicts remained unforgotten.513 (Indeed, a state bureaucracy grateful for the additional tax revenue that his law made possible had actually considered placing his picture on the tax stamp.514 The ultimate choice of the official state bird, the meadow lark, prompted a “storm of

511 “Petitions Out in Ottawa,” TSJ, Jan. 13, 1927 (9:5).
512 “Kansas Tobacco Dealers Say Advantage Given to K.C. Firms,” TSJ, Jan. 17, 1927 (1:2).
513 “Harold McGugin Dies After Year’s Illness,” Iola Register, Mar. 8, 1946 (1:5).
514 “Clerk Clark Wants Aid in His New Job,” IDR, Apr. 2, 1927 (6:1).
A World War veteran who had “learned to countenance smoking,” McGugin was presumably fighting for his fellow Legionnaires’ freedom since he “came to the legislature determined to do two things—legalize the sale of cigarettes and get a district court for his city.”

McGugin would later serve two terms in Congress, where during floor debate in 1932 he revealed himself to be a persistent critic of the socialist programs of the pre-New Deal Marxist Congress:

The thing which causes me to look upon the present situation with despair is that we are following the precepts of socialism in trying to solve our problems. We are constantly hearing the cry for Congress to help this one or that one. ... If we can get out of this difficulty following the precepts of socialism, then be not surprised if socialism overwhelms our country, ... We cannot escape the proposition that every time we appropriate money out of the Public Treasury to solve our troubles, whether they be troubles of the plug hats or of the humble people, we are following socialism. Marxism is sweeping this country, and nowhere is it finding greater hold than in this particular Congress by the very emergency programs we have been carrying out so far during this session.

By the time of the first New Deal Congress in 1933-34 McGugin was widely recognized as the Republican leader of the attack on Roosevelt’s (socialist) brain trust. For this public service his Kansas constituents rewarded him by voting him out of office in November 1934, prompting McGugin to blame his defeat on the very “brain-trust socialists” who were “pushing communism upon the country” who had put four meat canning factories in his district, which were “operated on a political basis” and virtually none of whose employees voted for him.

Once McGugin had gained notoriety as an up-and-coming right-winger during his first term in Congress (1931) for proposing, inter alia, that all federal, state, and county employees’ salaries be slashed by 25 percent, the national press constructed a (partial) myth about his legislative prowess in Kansas. *The New York Times* noted that:

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515 “Many Protest Use of Bird on Fag Stamps.” *HN*, Apr. 6, 1927 (2:2).
516 “Mince Pie’ Congressman of Kansas May Run for Senate,” *WSJ*, Dec. 3, 1931 (9).
518 *CR* 75:4177 (Feb. 17, 1932).
519 “Strait-Jacket for Farm, Seen as New Deal Aim,” *CT*, Aug. 5, 1934 (15).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Ever since 1927 Mr. McGugin has ridden tiptoe on the uppermost froth of the incoming wave of public opinion. In that year, as a member of the State Legislature, he introduced the law which legalized the sale of cigarette in Kansas, to the surprise and consternation of the W.C.T.U., which thereby received its first serious rebuff in twenty years. Mr. McGugin had appraised Kansas public opinion more shrewdly than they; the time was ripe for a change. 522

Embellishing the tale, the Wall Street Journal added that when fellow legislators disagreed with his evaluation of the old law as a nuisance, “he introduced a bill in the Kansas Legislature forbidding the eating of mince pie. When the session was over, the laws of Kansas had been so changed that people could both eat mince pie and smoke cigarettes. It made McGugin a well known character in Kansas and he was elected to Congress....” 523 Later Time embroidered further, claiming that McGugin had “promptly proposed a law forbidding Kansans to eat mince pie. It was foolish but it made Kansans see the folly of their law against cigarettes.” 524

A grand story with which to burnish McGugin’s reactionary credentials—except that the press got the wrong legislator and the wrong house and no such bill was ever introduced by anyone. 525 In fact what happened was that on January 17, 1927, four days after McGugin had introduced his bill in the House, Senator James W. Finley, another Republican lawyer, but also a former state judge, threatened that if the cigarette sales ban remained on the books, he would introduce a measure prohibiting the “making, serving, selling or owning of mince pies.” With his tongue almost extruding from his cheek, Finley refrained from imposing all too heavily on his fellow legislators’ or Kansans’ powers of analogic reasoning: “It has always seemed to me that there ought to be a good deal of free rein about parental rule of children.... But I may be wrong. The idea of letting the legislature prescribe rules for everyone is a fine method of delegating responsibility and I don’t want to sidestep any responsibility the people of Kansas has placed in me. For years it has seemed to me that the eating of mince pie is one of our great national evils. While I am personally rather fond

523 “Mince Pie’ Congressman of Kansas May Run for Senate,” WSJ, Dec. 3, 1931 (9).
524 Time, June 11, 1934, on www.time.com/time/magazine/article/0,9171,762176-1,00.html (untitled).
525 A week after McGugin’s repeal bill had passed the House by a large margin, at least one Kansas paper reported that Senator James Finley had introduced a bill to prohibit the manufacture and sale of mince pies, especially to children, but no such bill appeared in the Senate Journal. “In the Day’s News,” IDR, Jan. 28, 1927 (4:2) (edit.).

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of mince pie, it really doesn’t agree with me.” In the same vein he went on to impute to mince pie the tendency to give children nightmares, from which resulted loss of sleep, which in turn stunted growth and caused nervousness. According to a long wire service article that ran in numerous out-of-state newspapers, Finley also spoke non-Aesopianly, remarking that “if such asinine laws as the anti-cigarette law must remain on the statute books, there should be a great abundance of such laws as govern the personal liberties of taxpayers of the state.” However, since the legislature did in fact repeal the cigarette sales ban, Finley never introduced his just-dare-me bill.

As early as January 13, 1927, the day on which McGugin introduced his bill, the House speaker decided, after House members had shared with him their view that they would have more time for the extended debate that H.B. No. 1 would require early in the session than later, not to refer it to a committee for lengthy hearings and petitions, but to assign it to the committee of the whole for immediate debate on January 17, at which time the press predicted “a few sensations” for gallery spectators. At this point anti-repeal “lobbyists” merely requested that the speaker not refer the bill to the Judiciary Committee, of which McGugin was a member and some of whose members smoked cigarettes, thus prompting concern lest they prepare a “bed of roses” for the bill. The WCTU and its president, Lillian Mitchner, did not object to the expedited procedure. The WCTU and Mitchner’s counterparts and protagonists as leaders of the repeal movements were American Legion posts throughout Kansas. Rather conveniently for the latter, 14 Legion members occupied seats in the House.

Proponents and opponents of repeal began bombarding the legislature with petitions in a battle that was generally framed as being conducted by the

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526 “Eating of Mince Pie One of National Evils Senator Finley Asserts,” TSJ, Jan. 17, 1927 (1:4-5). For somewhat different phrasing, see “Mince Pie Fight May Be Started,” IDR, Jan. 17, 1927 (1:5). See also “Favor Mince Pie Bill,” TSJ, Jan. 20, 1927 (2:2). At least one out-of-state newspaper observed that Finley was taking up a recent humorous suggestion by (anti-smoking) Kansas editor William Allen White that “if the state really wanted to legislate against harmful things it should tackle white bread, particularly warm white bread, which he declares is more detrimental to human health than cigarettes.” “Anti-Mince Pie Bill,” Evening Independent (Massillon, OH), Jan. 22, 1927 (4:1) (edit.).

527 J. C. Johnsen, “‘No Mince Pie’ Threat Made by Kansas Solon to Legalize Cigarettes,” Lock Haven Express (PA), Jan. 27, 1927 (2:3-4). The same article also ran in Kingsport Times (TN), Jan. 31, 1927 (3:6-7).

528 “Cigaret Bill to Go on to House Floor at Once,” TDC, Jan. 14, 1927 (3:1).


American Legion on the one side and the WCTU and church groups on the other, with the repealers claiming (to be sure, with little plausibility since the cigarette oligopoly’s acquiescence in the survival of even one potentially contagious sales ban was highly unlikely) that “it is now or never.  If they lose this time...they will abide in forever in silence and the supporters can proceed with more rigid enforcement.”

On January 17, when the House speaker called for petitions to be presented, more than half of the representatives rose “waiving fists full of petitions from constituents.” That day alone 113 petitions on the cigarette law, one with as many as 1,282 names, were read. Petitions, the majority of which opposed repeal, stemmed from every part of Kansas. Telegrams were the communications medium of choice of prospective lawful cigarette sellers, who objected to the two cent per package tax on the grounds that it would encourage mail order competitors in Missouri, which collected no tax from its cigarette dealers. During that day’s debate in the committee of the whole, “watched by a large gallery,” the anti-repeal forces “flourished a mean axe” so that repealers “found themselves fighting to save the enacting clause...after a test vote on the adoption of the first section...had shown opponents of repeal leading 58 to 49.” During the run-up to that vote, McGugin, who claimed that his bill would be “‘an encouragement to government’” (presumably in the sense that the taxes would encourage government to encourage cigarette smoking), limned a preposterously refined future contrasting “the high class establishment handling cigarets in legal manner with the ‘den’ forced out of business by the high license.” Small-town Republican banker and millionaire Orlando Jolliffe, speaking first for the anti-cigarette movement, reported that the women and under-21-year-old children he represented did not want the existing law repealed, but strengthened. Apart from the practical issue as to how a seller would know whether a boy was 21 (‘‘are you going to...look at his teeth?’’), he objectively aligned himself with the WCTU approach by declaring: ‘‘The state of Kansas don’t need this dirty cigaret money.’’ Asserting that the current law could be just as well enforced as liquor prohibition, Jolliffe made it clear that he would ‘‘never disgrace a mother of this

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state by voting for a measure of this kind.’’535 (Yet Jolliffe—who two days later “denounced the tendency” of some House members to criticize the WCTU’s activities in “zealous support” of the existing law536 and in 1925 had led the forces opposed to dropping the House smoking ban537—did on final passage.) Having prevailed on the test vote, the anti-repealers, “sure of their strength”538 and led by the body’s only woman member, Stella Haines, the legislative committee chair of the Kansas Women’s Federation of Clubs and a former school teacher and school board president,539 whose mother had organized a WCTU chapter in 1886,540 moved to kill the bill outright by striking out the enacting clause. Her supporting rhetoric was redolent of liquor prohibition-like moralizing as she appealed “‘to you men to stand for decency and morality in the home.’... Waving a white ribbon [a WCTU symbol] before the house, she said it stands for temperance and abstinence from tobacco. ‘Perhaps your mother wore one of these badges and for the sake of your sainted mother, vote “No.”’’’541 The absolute tail end of the parade of horribles she conjured up for her male colleagues if they passed H.B. No. 1 was “‘a picture of a girl smoking a cigarette in front of every high school of the state.’”542 (Whether Haines was militantly committed to the cause is unclear: her declaration at the outset of the session that “‘I haven’t a single bill to introduce’...astounded veteran politicians. It is the first time since women have become members of the legislature that they haven’t come armed to the hilt with new bills.”)542 For repeal spoke Republican John L. Parkhurst, who purported to have been “elected on a platform of repeal of the cigarette law543—defeating, ironically, Lovonia Donica, who as the sole female member in 1925 had facilitated the chamber’s dropping its venerable no-smoking rule544—and “intended to stay with it. ‘I’m a dentist,’ he admitted, ‘but I’ll go jump in the lake if I ever saw a disease of the mouth caused by cigarets.’” After Frank Haucke, a former Kansas State American Legion commander who occupied

535“Cigaret Repeal Opponents Lead on Initial Test,” TDC, Jan. 18, 1927 (1:6). On Jolliffe as millionaire, see below ch. 18.
536“Final Test Near,” TSJ, Jan. 19, 1927 (1:3).
537See below ch. 18.
544See below ch. 18. On Donica’s defeat, see “Debate on Cigarettes Is Started,” IDR, Jan. 18, 1927 (1:1).
a House seat, had insisted that the bill would protect Kansas youth, the pro-
cigarette forces, seeking to “stave off decapitation of the bill,” moved to adjourn
to the following day for further debate, which carried 56 to 49.\textsuperscript{545}

For good measure another 70 petitions were presented in the House the next
day, January 18, while the Senate closed the “flood gates” in the sense that the
petitions, the longest of which bore 2,300 signatures and urged repeal, were
merely filed rather than read. McGugin took umbrage at House members who
had already stated that they would vote against his bill as a result of constituents’
petitions: “If you let petitions dictate to you...then representative government
gives way to the mob. What do all these petitions mean? They are the work of
one woman who wants to run this state.”\textsuperscript{546} Constituents’ petitions may have
earned his ire, but he apparently did not rebuke Parkhurst for having interpreted
his constituents’ votes as dictating his vote.\textsuperscript{547} Having dismissed female-led
mobocracy, McGugin sought to convict his adversaries out of their own mouths
by arguing that the current law was

“an insult to ex-servicemen. If cigarettes are harmful...why were you Christian people
sending cigarettes to us while we were in the trenches? Was it because you were friends
of Germany and wanted to undermine the man-power of the American army? Of course
not. In the seriousness of war you did these things on a common sense basis, and therefore
you would not listen to professional reformers. Cigarettes were not harmful. The United
States army instructed its soldiers to smoke cigarettes in preference to pipes and cigars,
which were known to be more injurious.”\textsuperscript{548}

\textsuperscript{545} “Cigaret Repeal Opponents Lead on Initial Test,”\textit{TDC}, Jan. 18, 1927 (1:6 at 2:1-3).
As early as 1921, a well-known cancer researcher at Johns Hopkins University published
an article on tongue cancer concluding from the fact that only two of 160 afflicted men had
not used tobacco that: “The evidence...is overwhelming that the continuous and prolonged
irritation from tobacco in some form is the chief factor in producing a lesion which may
later develop into cancer.” He found corroborating evidence in the rarity of tongue cancer
in women”; the few women with the disease had “used tobacco, usually in the form of
snuff by the mouth....” John Bloodgood, “Cancer of the Tongue: A Preventable Disease,”\textit{JAMA} 77(18):1381-87 at 1382, 1383 (Oct. 29, 1921).

\textsuperscript{546} “Dodge City in a New Bid for State College,”\textit{HN}, Jan. 18, 1927 (2:5-6 at 6).
According to \textit{House Journal: Proceedings of the House of Representatives of the State of
Kansas: Twenty-Fifth Biennial Session...1927}, at 33-35 (Jan. 18) (1927), the longest
petition bore 1,746 signatures.

\textsuperscript{547} “Debate on Cigarettes Is Started,”\textit{IDR}, Jan. 18, 1927 (1:1).

\textsuperscript{548} “Dodge City in a New Bid for State College,”\textit{HN}, Jan. 18, 1927 (2:5-6 at 6).
When Haines renewed her motion to kill the bill on January 18, it was only “with mighty oratorical efforts” that repealers succeeded in getting H.B. No. 1 “out of the ditch and on the road to somewhere” because the vote initially stood at 60-60 and “turmoil reigned, with cries of ‘call the house’ piercing the din.” This deadlock mirrored also almost perfect intra-party deadlock: Democrats split evenly, with 15 voting on each side, while 42 Republicans voted to kill the bill and 44 to pass it. Impressively, on the tie vote, 35 (or 65 percent of) farmers voted against repeal and 19 (or 35 percent) for repeal; conversely, only 23 (or 36.5 percent of) non-farmers supported retaining the prohibitory law. Only mutation of one Yea-sayer into a Nay-sayer “kept the whole proposition from going over the cliff into oblivion” on the basis of a 61 to 59 vote. Once the significance of this by “the narrowest of margins” transcendent omen had sunk in, the bill’s opponents “started to cash in on the promise of the opposition [including McGugin himself] that they would support any amendment protecting the youth of the land.” In particular, an anti-repealer’s amendment to make a jail sentence mandatory (rather than discretionary with judges) for those convicted of selling or giving cigarettes to minors was adopted—despite McGugin’s opposition on the grounds that courts should be authorized to “discriminate between the persistent violator and the honest merchant....”

That some in the anti-cigarette movement also viewed Legionnaires as the driving force behind repeal (and the law as designed chiefly to block children’s access to cigarettes) was clear from a letter to the governor written by the secretary-treasurer of a hail insurance company a few days after McGugin had taken up the cudgels for their sale:

It is firmly believed by a great majority of the best people in Kansas that legalizing

549“Enacting Clause of Cigaret Bill Lives, 61 to 59,” TDC, Jan. 19, 1927 (1:6, 3:2-3). The roll call published in this article tallied the total vote as 59-61 but listed the names of only 58 and 60 voting members; in addition, it listed “Harrison” as voting Yea, although no one with that name sat in the House. Exactly the same undercount marred the roll call published in “Final Test Near,” TSJ, Jan. 19, 1927 (1:3, 2:2), which also reported that the final count surprised McGuginites almost as much as the WCTU representatives, “who sat complacently thru the fight with an assurance and confidence based on” the earlier 58-49 vote. Party affiliation and occupation are taken from House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Fifth Biennial Session...1927, at iii-viii (1927). Counted as “farmers” were those listed as farmers, stockmen, and ranchmen or some combination of these categories; those with hybrid occupational designations such as farmer and banker were excluded. The one Independent voted to kill the bill. The Journal offered no details about the deliberations in the committee of the whole.
the cigarette is a step backward, and just because a few and generally ex-service men, wish to smoke this dangerous stick, shall the rest of us have to submit to this attack of poison being legalized to tempt our boys and girls.550

In the meantime, the protagonists hurled recriminations at one another. One young Democrat, for example, chastised cigar-smoking legislators for denying him and other World War veterans the right to choose their form of tobacco (“I am not any more of a criminal than you just because I prefer my tobacco wrapped up in paper while you want your[s] wrapped in a tobacco leaf”), while a Republican farmer informed the veterans that they had “‘not as yet faced the responsibility of rearing boys’ and therefore fail[ed] to realize the evil of cigarette smoking.” The Republican floor leader, attorney Benjamin Endres, drew on a pro-tobacco libertarian trope of long standing when he rejected any government role in the issue: “‘I know that the proper place to teach children not to smoke is the home, instead of the legislature.’”551 (In 1925 Endres as Rules Committee chair had led the forces that successfully pushed for terminating the decades-old House rule prohibiting smoking.)552

After 40 more petitions were read in the House on January 19, the chamber decided that it had had enough: future petitions would simply be received and filed—Haines casting the only vote against the procedural change. Moreover, when the issue of how the revenue from the proposed cigarette dealer licenses was raised, she sarcastically suggested that it be used to maintain an “asylum where nicotine and narcotic addicts could receive free medical attention,” but ultimately the state cigarette fund plan was rejected. Interestingly, during the committee of the whole proceeding repealers were forced to amend McGugin’s bill to retain the existing ban on advertising of cigarettes even after their sale was legalized553 “as a sop to those who look upon cigarettes as the essence of all evil.

550C. E. Booz to Governor Ben S. Paulen (Jan. 22, 1927), in Governor’s Office, Ben Paulen, 1925-28 Legislative Matters, Box 22.11, Folder 4, 1927 Cigarette Bill, KHS, on http://www.kansasmemory.org/item/217858.
551“Dodge City in a New Bid for State College,” HN, Jan. 18, 1927 (2:5-6).
552See below ch. 18.
Without such concessions, the bill could not have mustered enough votes.” Though the pro-cigarette faction thus “had to listen to the anticigaret faction,” the compromise may have been easier to accept because Floor Leader Endres argued that the Kansas court would follow a recent Utah Supreme Court decision that once the sale of cigarettes was lawful, advertising to inform legal buyers where they could be bought was also lawful. To be sure, to a press that stood (to continue) to lose significant cigarette ad revenue, it seemed that unadvertised selling (to adults) “creates a queer situation.” Nevertheless, one of the two publishers sitting in the House advocated for the newspaper ad ban because “he did not want his newspaper to be bothered with petitions against cigarette advertisements, and wished the legislature would settle the matter for him.”

1927 Kansas Session laws ch. 171, § 2, at 219, 220.


555 “Cigarette Bill to Reach Vote in House Today,” HN, Jan. 20, 1927 (1:1). In State v. Salt Lake Tribune Pub. Co., 249 P. 474, 476 (Utah 1926), a not very self-confident-sounding Utah Supreme Court reversed defendant’s conviction for having published a Lucky Strike ad on these grounds: “While the state of Utah could perhaps entirely prohibit the sale of cigarettes, in so far as the sales are not protected by the interstate commerce clause of the federal Constitution, yet...Utah merely regulates the sale of cigarettes as it regulates the sale of many other articles of merchandise. All sales of cigarettes which are made in compliance with the provisions of our statute are lawful. If it is lawful, therefore, to deal in and to sell cigarettes, why is it not lawful to inform those who may legally purchase an article where they may do so? It may be true that the state within its police power may, as a matter of regulation, seek to minimize the sale of an article the use of which it may deem injurious to the public health; and if it may do that, it may perhaps, regulate or prohibit the advertisement of such an article. Where, however, as is the case here, the article in question is an article of commerce which is protected by the interstate commerce clause of the federal Constitution, it may well be doubted whether the state can interfere with the sale of an article which is so protected. The conclusion therefore seems irresistible that, in view that the advertisement published by the Salt Lake Tribune in and of itself constitutes interstate commerce with which the state of Utah could not interfere, and further that the article likewise was protected both by the laws of Utah permitting its sale and to the extent that the article was shipped into the state in original packages was also protected from interference by the state, the defendant was clearly within its legal rights in publishing the advertisement, and that statute in question constitutes an undue interference with interstate commerce and therefore cannot be upheld.”


557 “Cigaret Bill Is Given Approval Almost 2 to 1,” TDC, Jan. 20, 1927 (1:3) (John Mack).
addition to failed “efforts to kill the bill thru crippling amendments,” Republican farmer Milton Buffington offered an amendment to penalize possession by anyone in Kansas of a cigarette, but even Haines was counted among the 94 Nays against the 26 Ayes, which “included the radical anti-cigaret element of the house.”

558 After all the amendments had been dealt with, Haines and the anti-cigarette faction once again sought to kill the bill by moving to strike out the enacting clause, but this final roll-call test vote was not close: with Nay-saying repealers securing 81 votes to only 42 for Yea-saying prohibitionists, about 20 members had shifted their allegiance from prohibition to licensure/taxation. This time Republicans split 68.5 to 31.5 percent, while Democrats displayed somewhat less support for deregulation, dividing 61 to 39 percent. 560 The large vote shift presumably resulted both from the realization that repealers had the votes to prevail and the strengthening amendments that the erstwhile prohibitionists had been able to secure. 561 To be sure, the pro-cigarette forces did not accommodate the antis in all matters; for example, a proposal to make it unlawful for a minor to have cigarettes or any other tobacco in his possession failed because, repealers argued, it would have made it “possible to send a boy who picked up a package of cigarettes to jail...” 562 One Topeka editorialist (hyperbolically) extolled the House discussion as “probably furnish[ing] the first instance in history in which legislative debate changed a vote.”

The fact that in the committee of the whole, following the test vote, the “final vote was so overwhelming that not even a rising vote was requested to settle the issue” 563 should have rendered the floor debate in plenary session seemingly anti-climactic, but with Haines commanding the defenders of a sales prohibition “‘for the sake of the youth’” and McGugin leading “the men who have rallied around his bill for giving adults ‘the privilege of smoking what they please,’” the “two rival armies in the legislative war over the Kansas cigarette law” met for what everyone understood was the decisive battle on January 20 in the House, since it

558 “Vote Two to One,” *TSJ*, Jan. 20, 1927 (1:6). The vote was by roll call, but the newspaper did not list the names.

559 According to another press account, Buffington also moved to strike all after the enacting clause and substitute an outright sales ban (that is, in effect, to retain the existing law), but it was defeated by a roll-call vote of 26 to 90. “Cigaret Bill Is Given Approval Almost 2 to 1,” *TDC*, Jan. 20, 1927 (1:3, 8:1-2).


562 “Cigaret Bill Is Given Approval Almost 2 to 1,” *TDC*, Jan. 20, 1927 (1:3, 8:1).

563 *TSJ*, Jan. 20, 1927 (4:1) (untitled edit.).

564 “Cigaret Bill Is Given Approval Almost 2 to 1,” *TDC*, Jan. 20, 1927 (1:3).
was a foregone conclusion that the Senate, whose composition had remained virtually unchanged since its passage of a similar bill in 1925, would approve repeal. The outcome on third reading in the House might also have lacked suspense since two days earlier Mitchner had “practically surrendered and left Miss Stella B. Haines, lone legislady, to carry on before a ladies’ gallery divided in support and opposition to the McGugin measure. She fought gamely, knowing it was a losing battle and that the members who sought to ride with winners were ducking over to the other side.” And shortly before the vote Haines acidly “declared that while she didn’t really wish the state printing plant any exceptionally bad luck, she could control her sorrow if the building blew up or the presses broke down before the cigaret bill was printed.” That the ban was in trouble was clearly signaled when Representative Sam Edwards, brother of John A. Edwards, who had introduced the original law back in 1909, broke ranks despite wanting to retain it “to the glory of the state and the author” because the old law “hadn’t been just all a fond parent might desire....” Another symbolic blow was struck when Jolliffe, who had fought against H.B. No. 1 from the very beginning, switched sides in order to give it a chance.

In the event, as one evening paper’s eight-column banner headline put it: “CIGARETTE BILL IS BY HOUSE.” In reporting that Senate approval seemed “assured,” another newspaper captured one dimension of the prospective law’s transformative impact that signaled the state’s self-conversion from suppressor to financial beneficiary of cigarette sales: “The cigarette smoker in Kansas will be a contributor to the state treasury instead of a law violator....” The House passed the bill by the “huge majority” of 83 to 35, which was “counted as nearly a parliamentary marvel,” since the initial vote in the committee of the whole had been 58 to 49 against the bill, and “its backers could muster only a majority of two to save it for further consideration after a day and a half of debate.” Unsurprisingly, but nevertheless notably, a significant difference again emerged between farmers and non-farmers: whereas 22 (or 39 percent of) farmers cast Nays, only 13 (or 21 percent of) non-farmers did. (That opposition

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565 “Cigarette Bill to Reach Vote in House Today,” HN, Jan. 20, 1927 (1:1)
567 “Cigarette Bill Is by House,” IDR, Jan. 20, 1927 (1).
568 “Cigarette Bill Goes to Senate as House Acts,” HN, Jan. 1, 1927 (1:1).
570 Occupational designations were given in House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Fifth Biennial Session...1927, at iii-viii
to repeal of the cigarette sales ban may not have constituted a component of a larger progressive agenda in Kansas in 1927 can be gauged by the fact that of the 22 anti-repealers who had voted in 1925 on ratification of the federal Child Labor Amendment to the Constitution 16 voted to reject and only six against rejection.)

Though not party-line, the vote nevertheless revealed significantly different levels of support: whereas 66 (or 76 percent of) voting Republicans cast Yeas, only 17 or 57 percent of 30 Democrats did. In light of Democrats’ generally anti-prohibitionist and anti-sumptuary attitudes, this differential is counterintuitive. Some Democratic Nays may have been either based on quasi-idiosyncratic grounds or related to reasons tangential to cigarettes. These possibilities emerge from the “Explanation of Votes” that a number of members had printed in the House Journal. For example, Democrat Noah Bowman voted Nay because the House had rejected an amendment that would have prohibited the sale of cigarettes containing opium or other habit-forming drugs. That 650 petitions from his district protested repeal while only 18 urged him to support repeal sufficed to justify Democrat E. A. Wallen’s Nay. And Democrat W. V. Young opposed the bill because a $50 license fee was too high for a small town. Republican Governor Ben Paulen’s announcement that “he would sign the bill if it came to him without imperfections” revealed that even the 70-percent pro-repeal House majority had not been able to root out anti-cigarette attitudes entirely.

When the Senate committee of the whole took up H.B. No. 1 on February 1, McGugin himself was present on the floor as several amendments were

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571To be sure, in the full House opponents of the amendment even more disproportionately outnumbered supporters. For the roll call, see “House, 101 to 21, Votes to Reject Child Labor Act,” TDC, Jan. 22, 1925 (1:6, at 2:3). Wet Democrats had argued for some time that: “Manufacturers who exploit child labor thrive in ‘dry’ states and contribute generously to the cause of prohibition. Most of the members of Congress who voted against the child labor bill voted in favor of national prohibition.” “Unmasked,” National Democrat (Des Moines), Mar. 1, 1917 (1:3-5).


574“Repeals Cigarette Ban,” NYT, Jan. 21, 1927 (3).

575Ultimately, the Judiciary Committee recommended that S.B. No. 1 not be passed. Senate Journal: Proceedings of the Senate of the State of Kansas: Twenty-Fifth Biennial
offered.\textsuperscript{576} The overall course of debate was significantly shaped by some senators’ inclination to accept the House provisions lest changes endanger House approval: “So pronounced was this fear that one or two provisions which it was conceded probably will be unconstitutional were retained.” The first proposal, which was overwhelmingly rejected, would have subjected all tobacco dealers to licensing. The next, which was adopted, struck the penitentiary sentence on a second conviction for selling cigarettes to minors. The constitutional issue was raised with regard to the unlawfulness of the possession of cigarettes on which the new tax had not been paid; although several senators expressed agreement with the Senate Judiciary Committee’s recommendation to apply the sanction only to those bought in Kansas (on the grounds that applying it to cigarettes bought legally in other states would run afoul of the federal constitutional commerce clause), an amendment to that effect was killed because the House, it was learned, would not accede to any amendments. House retention of the advertising ban ignited extended constitutional criticism resulting in a proposed substitute amendment to permit cigarette ads in newspapers and merely to outlaw billboard ads within a quarter-mile of schools. Senator James Getty, a Republican lawyer from Kansas City, offered the amendment also as a first attack on all billboard advertising, which he regarded as having become an “‘intolerable nuisance’” that “‘clutters up the landscape.’” Remarkably, Senator Van De Mark, whose original S.B. No. I had not banned any advertising at all, advocated leaving the House ban intact on the grounds that newspaper ads would tempt youths to use cigarettes.\textsuperscript{577} The next day, however, on his motion, all the amendments were eliminated, and the Senate passed the bill just as it been adopted by House by a vote of 32 to 5 (that is, with four fewer Nays than in 1925).\textsuperscript{578}

Almost as soon as the Senate had acted Governor Paulen announced that although he would sign the bill, he would also probably send the legislature a message objecting to several provisions: (1) the advertising ban was “‘silly’”

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\textit{Session...1927, at 166 (Feb. 15) (1927).}
\end{flushleft}

\textsuperscript{576}“Cigarette Bill Consideration Before Senate,” \textit{HN}, Feb. 1, 1927 (1:1).


because “consumers of a lawful article should have the privilege of learning through advertisements where they can buy it”; (2) one year’s imprisonment for selling to minors was too severe; and (3) the license fee for second class cities should be lower than for first-class cities.579 The next day he signed the bill accompanied by the message, which expressed his trust that the legislature would “see the necessity of making the needed corrections.”580 The within-session amendatory process was immediately triggered when a House Democrat introduced a bill to deal with the advertising ban’s potential unconstitutionality by banning instead all cigarette billboard ads within a mile of any school.581 In mid-February Van De Mark introduced five bills embodying, as a front-page headline put it, “Five Changes in ‘Fag’ Bill.”582 Ultimately, the House and Senate were unable to agree on all of the changes urged by the governor;583 most interestingly and importantly, the Senate bill (passed by the overwhelming vote of 25 to 2)584 striking the House bill’s retention of the advertising ban was defeated in the House.585

Even after having achieved repeal of the last surviving statewide cigarette sales ban in the United States and facing only the marginal issues raised by the

579“Governor to Sign Cigarette Bill,” IDR, Feb. 2, 1927 (1:3).
583The bills (S.B. No. 281 and 282) that passed reduced the penal sentence for selling to minors and lowered the license fees for first and second class cities. 1927 Kansas Session Laws chs. 172 and 173 at 224.
585House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Fifth Biennial Session...1927, at 631, 643-44 (Mar. 15, 16) (1927); “To Distribute Tags Through State Office,” HN, Mar. 16, 1927 (1:3). In connection with the “overwhelming” defeat of the amendment that would have legalized cigarette ads except on billboards near school buildings, House member and newspaper publisher Mack pointed out the inconsistency of banning ads from near school houses, but letting students “carry a full-page advertisement from a newspaper into the building and read it.” “Cigaretts Give House Another Exciting Time,” TDC, Mar. 16, 1927 (1:3).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

governor’s amendments, McGugin’s irascibility knew few bounds. The “‘Fighting Irishman of the House’ had on his scrapping togs for sure, and debate came so close to the personal at one stage as to be only a few degrees removed from the ink-well throwing stage.” The chief target of his ire was Republican farmer Ira Yingling, who had persistently voted against repeal and “took violent exception” to McGugin’s assertion that “while the American Legion boys were expected to see to the enforcement of the new cigaret law, it had been opposed by the ‘slackers and traitors.’” Yingling, 14 years his elder and already 38 when the United States entered the war, warned McGugin: “‘Don’t you call me a slacker.’” The latter, “his face flaming red” and “shaking the words from between clenched teeth in the manner of a dog shaking a rat,” thundered: “‘Where were you when four million boys went over the sea.’” Yingling’s straightforward but shouted reply that he had been on the farm served merely to set McGugin off again, this time charging that he had been “‘[g]rowing $3 wheat.’” After friends had intervened to tamp down the storm and McGugin had expressed his intention to get back to the bill, Jolliffe the apostate who had switched to McGugin’s side, could not resist muttering that “‘You’d better’” because “‘[w]e’re tired of this fooling around.’” Now “thoroly aroused, and...disposed to take on all comers,” McGugin, playing populist, “shouted back, ‘and I’m getting tired of some people strutting around this house because they happen to have some oil money that was found on their wife’s land.’” The epitaph for McGugin’s pre-McCarthyite rants was delivered by Democratic farmer George Harding in explaining his No votes on amendments on the grounds that “a bill that has not got merit enough in it to pass without some bully trying to insult every farmer in Kansas, ought never to become a law to clutter up the statute books....”

In the face of repeal of the country’s last statewide cigarette sales ban, the state executive committee of the Kansas WCTU vainly resolved to keep fighting against cigarettes. The chief means were to be “arousing public sentiment,” insisting on enforcement of the new law’s provisions regarding minors, and continuation of scientific temperance instruction in public schools. The old law’s demise may not have been synonymous with cigarettes’ ubiquitous availability was suggested by the fact that the organization’s secretary, Mary Dobbs, a Wichitan, was said to be leading a movement to prevent repeal of a city


ordinance that the state’s second most populous city had earlier adopted making it unlawful to sell cigarettes there in order to be able to try violators of the state law in local police court. However, a majority of Kansas cities had adopted ordinances based on the old law, and in the state capital, Topeka, all the members of the city commission—all of whom smoked cigars or cigarettes—supported repealing it as soon as McGugin’s bill went into effect.

As the law was going into effect on June 1, the Kansas Press Association challenged its advertising ban on various grounds, including that the state lacked the power to interfere with a lawful business as well as violations of interstate commerce, press freedom, personal property rights, and liberty of contract. On June 8, State District Court Judge George Whitcomb dismissed all the claims (with the exception of that pertaining to interstate commerce) on the grounds that the law was a lawful exercise of the state’s police power: “If there was power to enact a prohibitory statute, it must be true that the legislature could also enact one partly prohibitory and partly regulatory.” Consequently, with regard to the ban on sales to minors, “the legislature may have had in mind...the protection of minors against publicity from advertisements about the sale of cigarettes.”

On appeal before the Kansas Supreme Court the publishers asserted that the law could not protect Kansas youth from cigarette ads “because magazines and newspapers published in other states are permitted to insert such advertisements into their papers and circulate freely in Kansas.” Another of their lawyers inadvertently offered a deep insight by making the presumably ad absurdum argument that anyone who smoked in the presence of others violated the law by “call[ing] their attention to the cigarette.” In contrast, one of the state’s lawyers sought to defend the provision with this late-twentieth-century-sounding reasoning: “The legislature sought to stop the insidious propaganda of the tobacco trust.... The advertisements do not tell the youth where to buy cigarettes, but they suggest to his sub-conscious mind that he should smoke them. The pictures, showing a handsome young man with a beautiful girl watching a cloud of smoke, tell the youth who looks at the ad: “You, too, must use the cigarette if

589 “City Has Ban on Cigaretts,” TSJ, Jan. 31, 1927 (10:2-3).
591 “Kansas Session Laws Will Be Dated June 1,” IDR, May, 12, 1927 (1:2).
592 “Anti-Advertising Section Is Legal,” IDR, June 8, 1927 (1:6-7, 6:5). Regarding interstate commerce, which the lawyers had not stressed, the judge merely remarked that: “It is not perceived how the omission of cigarette advertising from Kansas newspapers could have any effect at all upon interstate commerce or prevent the free circulation of such papers in other states.”
you want to be one of the elite.\footnote{593}

Reversing the trial judge in the declaratory judgment action,\footnote{594} the Kansas Supreme Court held that the advertising ban violated Article 4, section 2 of the U.S. Constitution under which “the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states” as well as the due process and equal protection clauses because out-of-state newspapers were not prohibited from publishing cigarette advertising.\footnote{595} The Kansas Press Association’s victory, as one paper appreciatively noted, “means that the Kansas newspapers will reap many thousands of dollars every year.”\footnote{596} The virtually instantaneous price reduction from 20 to 15 cents for a package of cigarettes was allegedly the result of advertising.\footnote{597}

The coda for four decades of anti-cigarette legislation that repeal of the last state cigarette sales ban symbolized may have occasioned a celebratory piece in The New York Times a month after the Kansas Supreme Court issued its decision. Ostensibly noting domestic U.S. consumption’s having reached 85 billion in 1926, the article seemed to be reviewing a closed chapter of history of which readers could have no independent memory when it recounted that: “Opposition to the cigarette was based on its alleged evil effects on the user—mentally, morally and physically.”\footnote{598} Reflecting, instead, the historical amnesia of its own staff, the Times asserted that:

Opposition to the cigarette showed itself early and has always been strong, but has had little effect. Between 1870 and 1912 the anti-cigarette war was at its height. A large group made every effort to have the article banned. The result was legislation in every state—and increased cigarette smoking.\footnote{599}

\footnote{593}{“State Cannot Bar Cigarette Ads in Papers,” HN, July 9, 1927 (1:1, 6:4).

594}{By the parties’ agreement the relief sought in the case was a declaratory judgment rather than a preliminary injunction. “Kansas Cigarette Court Fight Will Come Off Tuesday,” IDR, June 4, 1927 (1:2).

595}{Little v Smith, 124 Kan. 237, 241 (1927). Not until 1933 did the Kansas legislature repeal the provision. 1933 (Spec. Sess.) Kansas Session Laws ch. 122, § 28, at 154, 159-60.

596}{“Cigarette Advertising,” Cuba Tribune, July 21, 1927 (1:2).

597}{“State Cannot Bar Cigarette Ads in Papers,” HN, July 9, 1927 (1:1, at 6:4).


599}{“Consumption of Cigarettes Reaches 85 Billion Annually,” NYT, Aug. 14, 1927 (sect. XX at 5:2-3).}
The Last Two Cigarette Sales Bans Enacted: Mormons Finally Pass Short-Lived Laws in 1921 in Utah and Idaho

[Representative] S. W. Morrison, Jr., of Salt Lake...said...that there had not been a single instance in America or any other country where an anti-tobacco or anti-cigarette law had been successfully enforced, or had been even a partial success.600

The cigarette bill...is a joke in the minds of those seriously attempting to curb the use of tobacco, for while it prohibits the sale of cigarettes it does not prohibit their use or importation.601

The cigarette oligopoly drew solace from the fact that the only two statewide cigarette sales bans enacted in 1921 arose in the nationally deviant circumstances of Utah, where “the influence of the Mormon Church was against tobacco,” and Idaho, where the “Mormon Church is also strong.” In turn, the pro-tobacco press in Utah was encouraged to resist passage of such legislation by repeal’s success in Tennessee and Arkansas.603 And though it was true that Mormons were the driving force behind the bills in both states, the struggle in Idaho represented an especially virulent strain of the nationally widespread conflict between the WCTU and the American Legion, which will form one focus of analysis here.604

Developments in Utah and Idaho are also usefully viewed conjointly because both of these interior Pacific slope states “never developed comparable

601 “Inter-Mountain Editorial Hilites,” Lehi Sun (Utah), Mar. 17, 1921 (2:4) (reprinted from unidentified issue of Filer, ID Record, an independent weekly).
602 Garret Smith, “Is Tobacco Doomed?” Leslie’s 132(3420):485 at 493 (May 14, 1921) (also falsely asserting that Idaho had prohibited the use of tobacco, when in fact it merely prohibited the sale of cigarettes). On Smith’s status as a hireling of the Tobacco Merchants Association of the U.S., see below ch. 17. A survey of newspaper editors paid for by TMA revealed that 42 percent of those in Utah expressed the judgment that the “general sentiment of your community favor[s]...legislation” “prohibiting the personal use of tobacco by adults compared to a nationwide average of 3 percent; the second-highest proportion (9 percent) was recorded in Delaware. Charles Dushkind, Tobacco Manual 38-41 (n.d. [1923]). For an analysis of this anything but robust survey, see below ch. 17.
604 This section of ch. 16 focuses on cigarette sales ban legislation; the following section deals with the public smoking prohibition section of the same law.
progressive movements and programs” to those of the coastal states, “although they did not lack social and political tension.” Not only was Utah “the most conservative of the Far Western states,” but both it and Idaho, “which at best had lagged in their progressivism, turned away from even the forms of direct legislation: the legislature of Idaho repealed the direct primary law of 1909 in 1919, and Utah ignored the initiative and referendum of 1917 until...1933.”

Finally, study of Utah’s law-making process in 1921 and 1923 is especially fruitful because it impressively underscores the intense resistance to state interference with adult men’s unfettered access to and consumption of cigarettes even in a state majoritized by Mormons. That even after the Mormon hierarchy had placed its theological-ideological imprimatur on and organizationally mobilized on behalf of a general sales ban, legislators who were church office-holding Mormons and purported to be personally in compliance with their religion’s anathematization of tobacco voted against that measure on the grounds of libertarianism, empathy with human frailty in the face of addiction, and/or denial that, as in the case of alcohol, smoking had involuntary secondhand effects testified to the enormous difficulties of securing legislative and extra-legislative support for even partial prohibitions at the dawn of cigarette laissez-faire’s half-century. Such Mormon legislators thus still clung to the position staked out by (non-progressive) Progressive-era Mormon President Joseph F. Smith, who “made it clear that he would not repudiate the work of faithful Saints who considered it best to leave compliance with the Word of Wisdom up to the individual.”

Father Joseph Comes Speaking the Word of Wisdom: Let It Be, Let It Be

Whether he was deluded or whether he was a shameless fraud is the major question that any biographer must try to answer.

The Mormon religion’s official programmatic position on tobacco dates back to February 27, 1833, when its founder, Joseph Smith, claimed to have:

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received the following revelation.

Word of Wisdom

A Word of Wisdom, for the benefit of the Council of High Priests, assembled in Kirtland [Ohio], and the Church, and also the Saints in Zion. To be sent greeting—not by commandment or constraint, but by revelation and the word of wisdom, showing forth the order and will of God in the temporal salvation of all Saints in the last days; given for a principle with promise, adapted to the capacity of the weak and weakest of all Saints, who are or can be called Saints.

1. Behold, verily, thus saith the Lord unto you, in consequences of evils and designs which do and will exist in the hearts of conspiring men in the last days, I have warned you, and forewarned you, by giving unto you this word of wisdom by revelation.

2. That inasmuch as any man drinketh wine or strong drink among you, behold it is not good, neither meet in the sight of your Father, only in assembling yourselves together to offer up your sacraments before Him.

...  

5. And again, tobacco is not for the body, neither for the belly, and is not good for man, but is an herb for bruises and all sick cattle, to be used with judgment and skill.

6. And again, hot drinks are not for the body or belly.

...  

15. And all Saints who remember to keep and do these sayings, walking in obedience to the commandments, shall receive health in their navel, and marrow to their bone,

16. And shall find wisdom and great treasures of knowledge, even hidden treasures;

17. And shall run and not be weary, and shall walk and not faint;

18. And I, the Lord, shall give unto them a promise, that the destroying angel shall pass by them, as the children of Israel, and not slay them. Amen.

The origins of Smith’s Word of Wisdom, 609 “which today is the best known of all that he ever wrote,” 610 and in particular of this doctrine concerning tobacco

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608 History of the Church of Jesus of Latter-Day Saints. [Vol. 1] Period 1: History of Joseph Smith, the Prophet, by Himself 327-28 (B. H. Roberts ed. 1902). This “revelation” appears, with different paragraph numbering, as section 89 of The Doctrine and Covenants on http://lds.org/scriptures/dc-testament/dc/89?lang=eng (sect. 80 of the original 1835 Kirtland ed.).


610 Fawn Brodie, No Man Knows My History: Joseph Smith, Mormon Prophet 166 (2d ed. rev. and enl. 1971 [1945]). Moreover, according to Brodie: “The average Mormon no longer reads the holy books of Joseph Smith, and the only revelation with which he is familiar is the injunction against the use of tobacco and alcohol.” Id. at 402.
were, according to Brigham Young, to be found in a prosaic marital dispute over the consequences for his (then only) wife Emma of his pupils’ tobacco expectorations, the resolution of which Smith finessed by means of the alleged revelation:

When the school of the prophets was inaugurated one of the first revelations given by the Lord to His servant Joseph was the Word of Wisdom. ... I think I am as well acquainted with the circumstances which led to the giving of the Word of Wisdom as any man in the Church, although I was not present at the time to witness them. The first school of the prophets was held in a small room situated over the Prophet Joseph’s kitchen, in a house which belonged to Bishop Whitney.... In the rear of this building was a kitchen, probably ten by fourteen feet, containing rooms and pantries. Over this kitchen was situated the room in which the Prophet received revelations and in which he instructed his brethren. The brethren came to that place for hundreds of miles to attend school in a little room probably no larger than eleven by fourteen. When they assembled together in this room after breakfast, the first [sic] they did was to light their pipes and, while smoking, talk about the great things of the kingdom, and spit all over the room, and as soon as the pipe was out of their mouths a large chew of tobacco would then be taken. Often when the Prophet entered the room to give the school instructions he would find himself in a cloud of tobacco smoke. This, and the complaints of his wife at having to clean so filthy a floor, made the Prophet think upon the matter, and he inquired of the Lord relating to the conduct of the Elders in using tobacco, and the revelation known as the Word of Wisdom was the result of his inquiry. 611

To be sure, a distinctly less supernatural account was later provided by David Whitmer (1805-88), one of Smith’s original six acolytes, who, before his excommunication, not only enthusiastically attested to his participation in the even more risibly supernatural angelic display of the golden plates of the Book of Mormon that Smith allegedly had translated, 612 but for half a century thereafter

611 *Journal of Discourses by President Brigham Young, His Two Counselors, and the Twelve Apostles* 12:157-58 (1869) (remarks by President Brigham Young, delivered at Provo, Feb. 8, 1868). Although not present at the time of the particular triggering incident—if indeed there was a camel’s back-breaking straw—Young had first met Smith several months earlier in the latter’s home in Kirtland. [http://unicomm.byu.edu/about/brigham.aspx?content=brigham2](http://unicomm.byu.edu/about/brigham.aspx?content=brigham2). Of the 22 (or alternatively 21) men in the room 20 used tobacco. Paul Peterson, “An Historical Analysis of the Word of Wisdom” 20 at n.50 (M.A. thesis, Brigham Young U. 1972); Paul Peterson and Ronald Walker, “Brigham Young’s Word of Wisdom Legacy,” *BYU Studies* 42(3&4): 29-64 at 57 n.10 (2003).

612 For Smith’s own version of this alleged event, see “History of Joseph Smith,” *Latter-Day Saints’ Millennial Star* 4(7):97-104 at 98 (Nov. 1843); *History of the Church of Jesus Christ of Latter-Day Saints: Period I: History of Joseph Smith, the Prophet, by
until his death continued to reaffirm the accuracy of his “testimony,” which remains embedded in the introduction to the untold millions of copies of that book.\textsuperscript{613} In 1886 he gave a long interview, which appeared in numerous newspapers, in which he discussed the Word of Wisdom as an example of Smith’s “alarming disposition to get revelations to cover every exigency that would arise, and in this he was eagerly urged on by some of his associates, who would frequently come to him with the request that he ‘ask the Lord’ about this thing or the other. ... A revelation was procured ‘to order’ and ‘warranted to fit,’ a thing which occurred with remarkable frequency afterward, and which caused it to be a matter of foregone conclusion that whatever the desires of the favored few expressed, or the pressing emergency of the hour demanded, it would be admirably embodied in the ‘message from heaven.’\textsuperscript{614} According to Whitmer, the “premises” for another of the “solicited revelations,” namely, the Word of Wisdom,

were suggested on the occasion of quite a little party of the brethren and sisters being assembled in Smith’s house. Some of the men were excessive chewers of the filthy weed, and their disgusting slobbering and splitting caused Mrs. Smith (who, Mr. Whitmer insists, was a lady of predisposed refinement) to make the ironical remark “It would be a good thing if a revelation could be had declaring the use of tobacco a sin, and commanding its suppression.” The matter was taken up and joked about, one of the brethren suggesting that the revelation should also provide for a total abstinence from tea and coffee drinking, intending this as a counter “dig” at the sisters. Sure enough the subject was taken up in dead earnest, and the “Word of Wisdom” was the result.\textsuperscript{615}

By its own terms the Word of Wisdom—which was later styled a “code of health dealing primarily with human nutrition promulgated...by Joseph

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\textsuperscript{615}“David Whitmer Talks,” \textit{Salt Lake Daily Tribune}, Oct. 17, 1886 (5:2-6 at 5). The article incorrectly stated that this incident had taken place several years after Whitmer had left the church, whereas in fact he was not excommunicated until five years later in 1838. It went on to state that with regard to the facts he had been “supplied with unimpeachable testimony” without identifying his source(s).
Smith—was not a commandment, but its character seemed to have been transformed in 1851 on the third day of the church’s general conference in Salt Lake City. On September 9, the Patriarch to the Church, John Smith (founder Joseph Smith’s uncle), spoke on the Word of Wisdom,

urging on the brethren to leave off using tobacco, &c.

President [Brigham] Young rose to put the motion and called on all the sisters who will leave off the use of tea, coffee, &c., to manifest it by raising the right hand; seconded

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617 Some confusion surrounds this issue because the abovequoted introductory paragraph (or verse) did not appear in the original “revelation,” but was added in italics two years later when Smith and three other editors published it in *Doctrine and Covenants of the Church of the Latter Day Saints Carefully Selected from the Revelations of God* sect. LXXX at 207-208 (Joseph Smith et al. comp. 1835). “As a result, during the Brigham Young era, the “question was raised whether the advisory clauses were a part of Joseph Smith’s original revelation or whether they had been added as an editorial afterthought intended to ‘soften’ the original wording. Unfortunately, the issue cannot be resolved. Although the earliest prepublication manuscripts on the Word of Wisdom treat these verses as part of the original revelation, these documents were written months after the receipt of the Word of Wisdom. No document contemporaneous with Joseph’s revelation appears to have survived.” Paul Peterson and Ronald Walker, “Brigham Young’s Word of Wisdom Legacy,” *BYU Studies* 42(3&4): 29-64 at 56-57 n.3 (2003).

In 1913 Mormon President Joseph F. Smith asserted that: “The reason undoubtedly why the Word of Wisdom was given—as not by ‘commandment or restraint’—was that at that time [1833], at least, if it had been given as a commandment it would have brought every man, addicted to the use of these noxious things, under condemnation; so the Lord was merciful and gave them a chance to overcome, before He brought them under the law. Later on, it was announced from this stand, by President Brigham Young, that the Word of Wisdom was a revelation and a command of the Lord. I desired to mention that fact, because I do not want you to feel that we are under no restraint. We do not want to come under condemnation.” *Eighty Fourth Semi-Annual Conference of the Church of Jesus Christ of Latter-day Saints...October ...1913*, at 14. Since, as Smith himself knew, large numbers of Mormons continued to use tobacco for decades after the putative conversion of the Word of Wisdom into a commandment and into his own presidency, his purported explanation was not robust.
and carried.

And then put the following motion; calling on all the boys who were under ninety years of age who would covenant to leave off the use of tobacco, whisky, and all things mentioned in the World of Wisdom, to manifest it in the same manner, which was carried unanimously.

... President Young... said he knew the goodness of the people, and the Lord bears with our weakness; we must serve the Lord, and those who go with me will keep the Word of Wisdom, and if the High Priests, the Seventies, the Elders, and others will not serve the Lord, we will sever them from the Church. I will draw the line and know who is for the Lord and who is not, and those who will not keep the Word of Wisdom, I will cut off from the Church; I throw out a challenge to all men and women. Have I not always counselled you right? I would rather you would cut me into inch pieces, than to flinch from my duty, the Lord being my helper. I would rather live with a few men who will serve the Lord, than live with ten thousand hypocrites.618

Although Young’s successor as president, John Taylor, declared in 1883 that the Word of Wisdom, “according to the words of Brigham Young,...had now become a law unto us,” in fact Young himself had made it clear how far removed from law the Word of Wisdom was both in behavioral reality and even aspirationally. In 1867 he observed that even church bishops in city and country wards were not keeping the Word of Wisdom. When asked why, they replied: “‘Well, this tobacco, I cannot give it up,’” prompting Young to remark: “And in this he sets an example to every man, and to every boy over ten years of age, in his ward, to nibble and chew tobacco.”620 Three years he shifted his focus to the role of members’ autonomy:

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619Robert Woodford, “The Historical Development of the Doctrine and Covenants” 2:1175 (Minutes of the School of Prophets, Salt Lake Stake, Oct. 11, 1883, at 24, 25, located in the LDS Church Archives) (Ph.D. diss. Brigham Young U. 1974). In response to questions as to what right Young had had to make it a law, Taylor offered this theological justification: “Just as much right as Joseph had to give us a portion of a revelation at our time and then add to it afterwards.” Id. The author of this three-volume dissertation, presumably (but not clearly) referring to the aforementioned 1851 event, asserted that Young had “negated verse 2” (“To be sent greeting”) “by declaring the Word of Wisdom a full commandment, binding on all Latter-day Saints.” Id.
620Journal of Discourses by President Brigham Young, His Two Counselors, and the Twelve Apostles 12:402 [27] (1869) (remarks by President Brigham Young, delivered in the Tabernacle, Great Salt Lake City, Apr. 7, 1867). He added that he thought that “we have some Bishops in this city [Salt Lake] who do not chew tobacco....” Id.
We have been striving for some time to get the people to observe the Word of Wisdom. But why do they not observe it? Why will they cling to those habits that are inimical to life and health? ... [S]ome of our Elders...still drink a little liquor occasionally, I think, and use a little tobacco. They feel as though they would die without it, but I say they will die with it, and they will die transgressing the revelations and commands of our father, and the wishes of our heavenly Father....

Now let us observe the Word of Wisdom. Shall I take a vote on it? Everybody would vote, but who would observe it? A good many, but not all. Who is it that understands wisdom before God? In some respects we have to define it for ourselves—each for himself—according to our own views, judgment and faith, and the observations of the Word of Wisdom, or the interpretation of God’s requirements on this subject, must be left, partially, with the people. We cannot make laws like the Medes and Persians. We cannot say you shall never drink a cup of tea, or you shall never taste of this, or you shall never taste of that; but we can say that Wisdom is justified of her children.

Although authoritative Mormon church publications much later stated, in reference to Young’s aforementioned declaration in 1851, that the World of Wisdom “became binding as a commandment for all Church members thereafter,” Mormon historians have demonstrated that that claim is dubious. Leonard Arrington, the leading Mormon historian, observed in the 1950s that a “tolerant rather than vigilant attitude” prevailed with regard to the Word of Wisdom into the 1860s. Indeed, in the early 1840s even Joseph Smith permitted the establishment of a brewery in the wholly Mormon-owned town of

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621 Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

622 Journal of Discourses by President Brigham Young, His Two Counselors, and the Twelve Apostles 14:16-22 at 20 (1872) (remarks by President Brigham Young, delivered in New Tabernacle, Salt Lake City, May 6, 1870).


Nauvoo, Illinois, over which he ruled, and it was not until 1860 that Mormon President Brigham Young himself, who had long “been in the habit of using tobacco...left it off” and finally, after numerous efforts, stopped chewing tobacco. And even when Mormon policy toward tobacco use began to change in the latter part of the 1860s, the Word of Wisdom, which “had not been a binding commandment in early Mormonism, nor in the 1860s when it was used in connection with the ‘grow your own or do without’ program,” appears not to have been any more stringently enforced than previously. Indeed, “[i]t was consistent with the economics of the time,” as Arrington wryly remarked, “that he [Brigham Young] should have had no great objection to tobacco chewing if the tobacco was locally grown.”

In the early 1860s Young publicly and transparently announced and sought to justify his acquiescence in, abetting of, and personal participation in mass violation of his own (alleged) commandment by imperfect and fallible humans. In remarks on the Word of Wisdom and other topics in the Salt Lake City Tabernacle on April 7 1861, he also spread the sarcasm on very thick:

You know that we all profess to believe the “Word of Wisdom.” There has been a great deal said about it, more in former than in latter years. We, as Latter-day Saints, care but little about tobacco; but, as “Mormons,” we use a vast quantity of it. As Saints, we use but little; as “Mormons,” we use a great deal. How much do you suppose goes annually from this Territory, and has for ten or twelve years past, in gold and silver, to supply the people with tobacco? ... I say that $60,000 annually is the smallest figure I can estimate the sales at. Tobacco can be raised here as well as it can be raised in any other place. ... If we use it, let us raise it here. I recommend for some man to go to raising tobacco. ... I want to see some man...make a business of raising tobacco and stop sending money out of the Territory for that article.

Some of the brethren are very strenuous upon the “Word of Wisdom,” and would like

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625 Fawn Brodie, *No Man Knows My History: Joseph Smith, Mormon Prophet* 289, 366 (2d ed. rev. and enl. 1971 [1945]).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

to have me preach upon it, and urge it upon the brethren, and make it a test of fellowship. I do not think that I shall do so. I have never done so. We annually expend only $60,000 to break the “Word of Wisdom,” and we can save the money and still break it, if we will break it. Some would ask brother Brigham whether he keeps the “Word of Wisdom.” No: and I can still say further...I come as near doing so as any man in this generation. It is not using tobacco that particularly breaks the “Word of Wisdom,” nor is that the only bad practice it corrects; but it is profitable in every path of life. If our young persons were manly enough to govern their appetites a little, they would not contact these bad habits; but they must have some weakness; they must not be perfect and exactly right in everything. It is a loathsome practice to use tobacco in any way. A doctor told an old lady in New York, when she insisted upon his telling her whether snuff would injure her brain, “It will not hurt the brain: there is no fear of snuff’s hurting the brain of anyone, for no person that has brains will take snuff.” I will say that the most filthy way of using tobacco is to smoke it. “[sic]What is the neat way? If you are going to direct any course for the people to use tobacco, let us know what it is. Cannot you who have used it for years point out a neat, modest, judicious way of using it?”[sic] The “Word of Wisdom” says that tobacco is good for sick cattle; and when you want another chew, down with it as you would a pill. It may make you vomit a little, but that is soon over, and it is good for sick cattle. That is the neatest way you can use tobacco.631

Two years later, in instructions he directed to the Mormon settlements south of Salt Lake, Brigham Young articulated the same quasi-mercantilist policy condoning the use of domestically grown tobacco: “This community has not yet concluded to entirely dispense with the use of tobacco, and great quantities have been imported into our Territory. ... I know of no better climate and soil than are here for the successful culture of tobacco. Instead of buying it in a foreign market and importing it over a thousand miles, why not raise it in our own country or do without it?”632

Even in 1867, when “a campaign for complete abstinence was launched with the object in view of stopping the cash drain from the territory and using the money saved to bring ‘the poor’ home to Zion [i.e., Utah],”633 church leaders’ discouragement, approximately three decades after the so-called revelation and 16 years after the general conference covenant, of the “use of such imported

631Journal of Discourses by President Brigham Young, His Two Counselors, and the Twelve Apostles 9:31-40 at 35-36 (1862) (remarks by President Brigham Young, made in the Tabernacle, Great Salt Lake City, Apr. 7, 1861).

632“Instructions: By President Brigham Young, in April and May, 1863, to the Latter Day Saints in the Settlements South of Great Salt Lake City,” DN, July 15, 1863 (1:1-4 at 4).

‘luxuries’ or ‘vices’ as tea, coffee, tobacco, and liquor...was not so much a moral principle as a matter of sound economic policy.”

However, once the campaign was underway, Arrington asserted, “in less than two decades abstinence from tea, coffee, tobacco, and intoxicating beverages was almost as strong a test of faith as carrying out a colonization or missionary assignment.”

However, a number of Mormon presidents thought otherwise. In 1870, almost four decades after the Word of Wisdom had been issued, not only were Mormons still using tobacco, but President Brigham Young, waxing sarcastic and caustic, was forced to rebuke tobacco spitters even in the New Tabernacle in Salt Lake City during the church’s fortieth annual conference:

Referring to the filthy practice indulged in by some, while at meeting, of chewing tobacco,

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634 Leonard Arrington, Great Basin Kingdom: Economic History of the Latter-day Saints, 1830-1900, at 223 (1966 [1958]). Astonishingly, as late as October 1921, that is, after the anti-cigarette legislation that he had promoted had gone into effect, Mormon President Heber Grant was still echoing Brigham Young’s economic autarchy arguments to bolster his advocacy of observing the Word of Wisdom. In his opening address at the church’s October General Conference he declared: “I consider it almost a crime for men and women...when the Lord Almighty gives to them a law whereby they can have health and vigor of body and mind, [to] disregard it. Every single dollar that is expended in breaking the Word of Wisdom goes out of the country. It is so much of the vital fluid...financially drawn from the community every time a man or woman drinks a cup of tea or coffee or uses tobacco or uses liquor, because we do not produce those things at home. ... I believe firmly that if all the money which has been sent out of this country from the day the Saints first located in these valleys, for those things that the Lord has said in this revelation are not good for man, had instead been kept here, the accumulation of wealth in our country would have been so great that this intermountain section where the Latter-day Saints are located, would be one of the richest and most prosperous in all the United States.” Heber Grant, “Practical Counsel: Of Intense Importance to Members of the Church,” IE 25(3):193-204 at 198-99 (Jan. 1922). See also “Thrift Keynote of the Opening Day at Conference,” SLT, Oct. 7, 1921 (1:7).

635 Leonard Arrington, Great Basin Kingdom: Economic History of the Latter-day Saints, 1830-1900, at 250 (1966 [1958]). This program of abstinence was then “[c]ontinued for reasons of ‘good health’ in the twentieth century....” Id. In 1976, 14 percent of Mormons in Utah smoked cigarettes compared to 39 percent of members of other religions. “Many Utahns Kick Habit, Some Try, Fail,” SLT, Feb. 1, 1976 (A7:4-8). According to a more rigorous survey conducted in Utah between 1977 and 1979, 1 percent of active Mormon males, 10 percent of all Mormon males, and 35 percent of non-Mormon males smoked tobacco. Dee West et al., “Cancer Risk Factors: An Analysis of Utah Mormons and Non-Mormons,” Journal of the National Cancer Institute 65(5):1083-95, tab. 4 at 1089 (Nov. 1980).
President Young said:

On Sunday, after meeting, going through the gallery which had been occupied by those claiming, no doubt, to be gentlemen, and perhaps, brethren, you might have supposed that cattle had been standing around there and dropping their nuisances. Here and there were great quids of tobacco, and places a foot or two feet square smeared with tobacco juice. I wish the door-keepers, when, in the future, they observe any persons besmearing the seats and floor in this way to request them to leave the house; and, if they refuse and will not stop spitting and besmearing their neighbors, just take them and lead them out carefully and kindly. It is an imposition for those claiming to be gentlemen to spit tobacco juice for ladies to draw their clothes through and besmear them, or to leave their dirt in the house. We request all addicted to this practice, to omit it while in this house. Elders of Israel, if you must chew tobacco, omit it while in meeting, and when you leave, you can take a double portion, if you wish to.636

An especially impressive depiction of the church hierarchy’s resigned view of the stagnation into which compliance with and enforcement of the Word of Wisdom had slipped by the end of the nineteenth century was furnished by George Q. Cannon (1827-1901), who as the first counselor in the first presidency of several administrations (including Brigham Young’s) was the second highest ranking official in terms of managing the church’s day-to-day affairs.637 Asked at its Sunday school convention in 1898 whether that institution’s workers should be rigidly held to observance of the Word of Wisdom, Cannon stressed that “compulsion was contrary to the spirit of the doctrine” so that, although he favored observance, he did not support “extreme” enforcement measures. After noting that he was “inclined to some rigidity” in the Sunday school setting,638 he made these startling remarks:

The doctrine had been a tenet for sixty-four years but he had found that no great progress had been made in its observance among the Saints. He despaired of its ever being obeyed unless something more powerful than precept should assist. “Why should we wear our lungs out talking the word of God to a people who will not accept it?” he asked. “Let all adults who must use tea, coffee, tobacco or whisky go and use them. For my part I feel like never again addressing an adult member of the church on the subject, but I would like


637Utah History Encyclopedia (Kent Powell ed. 1994), on http://www.media.utah.edu/UHE/e/CANNON,GEORGE.html. After serving four terms as territorial delegate to Congress he also served another one in federal penitentiary for polygamy.

to see the children leave them all alone.”

Ironically, however, whereas 20 years later the Mormon church would organizationally mobilize to secure secular state power-rooted protection of non-smokers from secondhand smoke exposure, Cannon would have been having none of it: “With great earnestness President Cannon stated that though mingling very much with the world he had all his life adhered to the resolution of his childhood to eschew them. He enjoyed the flavor of a good cigar when smoked by another.”

Four years later, in 1902, almost two decades after President Taylor had declared the Word of Wisdom a law for Mormons, President Joseph F. Smith, the founder’s nephew, gave a talk (“The Word of Wisdom and Its Non-Observance”) in which he reaffirmed Brigham Young’s position on the Word of Wisdom by recalling that he had been present when Young, “the mouthpiece of the Lord at that time,...declared to the people that this was no longer ‘not by commandment or constraint,’ but was from that time henceforth by commandment and constraint unto the Saints.” Nevertheless, President Smith confided to an audience of his brethren and sisters in the small town of Beaver, Utah that: “You would be astonished, no doubt, to know how little the Word of Wisdom is observed by the Latter-day Saints.”

The late-nineteenth- and early-twentieth-century policies of the church leadership towards the Word of Wisdom zig-zagged inconsistently between verbal affirmation of the commandment and lax enforcement until 1921—the year in which the Mormon church successfully pushed for enactment of a general cigarette sales ban—when the administration of militant prohibitionist President Heber Grant “made adherence to the Word of Wisdom a requirement for

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641Joseph F. Smith, “The Word of Wisdom and Its Non-Observance,” DEN, Nov. 1, 1902 (23:1-7 at 1) (delivered Sept. 29, 1902). A “comparative census of tobacco users among young male members in the St. George Stake,” located in extreme southwestern Utah, in 1916 revealed that about 85 percent of 827 “polled...adhered to the revelation,” whereas in 1891 about 79 percent of 428 questioned had observed it. Paul Peterson, “An Historical Analysis of the Word of Wisdom” at 89 (M.A. thesis, Brigham Young U. 1972). Although some wards in the stake had attained 100 percent of non-users, the stake president expressed the hope that in another 25 years “we may make a gain of 50 or 75 per cent of non users.” “Stake Conference St. George Stake of Zion,” Washington County News, Mar. 9, 1916 (1:1).
admission to the temple.”

Anti-Cigarette Sales Bills in Utah, 1896-1911

[House member Thomas F.] Roueche said that we have educated about 20,000 children to smoke cigarettes, and he thought it would work much hardship to cut them off at once.

643 Thomas Alexander, “The Word of Wisdom: From Principle to Requirement,” Dialogue: A Journal of Mormon Thought 14:78-88 at 82 (Aut. 1981) (apparently citing as a source an oral communication from a former church archivist (id. at 88 n. 15)). Alexander’s objectivity as a historian of the Word of Wisdom is undermined by his apodictic claim, based on sheer religious dogma, that it is “clear” that the Word of Wisdom “was given as a revelation to Joseph Smith.” Id. at 85. His reliability as a historian is called into question by this article’s numerous factual errors with respect to matters outside of Mormon theological developments. For example, he asserted that “[c]hurch members and leaders threw their strong support behind a bill introduced by State Senator Edward Southwick...to prohibit the sale of tobacco in Utah.” Id. at 83. Not only is this empirical claim false—the bill prohibited only cigarette sales—it completely misunderstands the character and scope of the anti-cigarette and anti-smoking movement of the period: neither the Mormon church in Utah nor the WCTU anywhere concretely advocated state legislation banning all forms of tobacco, which, given the enormous resistance to cigarette sales bans, would have been hopeless and counterproductive. For Alexander’s even more serious historiographic errors regarding cigarette billboard advertising legislation in Utah in the 1920s, see below this ch.

644“The Utah Legislature,” Salt Lake Daily Tribune, Feb. 21, 1888 (4:4). Born in North Carolina, Roueche (1833-1903) was a prominent Mormon church official elected to the Utah Territorial House on the People’s Party ticket (a populist sounding name that the Mormon church gave to its party formed in opposition to the anti-Mormon Liberal Party). http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=123582; “People’s Ticket,” DN, July 20, 1887 (8:1). Roueche was referring during debate to H.F. No. 56, which made it unlawful to sell, give, or furnish cigarettes or tobacco in any form to minors under 18. Scanned copy emailed by Utah State Archives. The bill passed both houses unanimously (Roueche being one of seven House members absent for the vote), but Governor Caleb West returned it without his approval because it would be “an encroachment upon parental authority and an invasion of the domain of family government, attendant with many evils.” He informed the legislature that he would not withhold his approval if it were to “supplement parental authority with public power” by conditioning liability on a prior “written notice forbidding it [i.e., furnishing tobacco] by parent, guardian or one having care and control of a minor.” The House did pass such a substitute bill unanimously (with Roueche voting Yes), but the Council rejected it. House Journal of the Twenty-Eighth Session of the Legislative Assembly of the Territory of Utah
The legislative conflict in Utah in 1921 was merely the latest iteration of general cigarette sales prohibitory antecedents stretching back a quarter-century
to the very first legislature after statehood. In 1896 Senate Republican Edward Allison, a non-Mormon, introduced a bill prohibiting the manufacture or sale of cigarettes. Despite the fact that Mormons occupied 50 percent of the seats in the chamber, the Senate adopted the Manufacture and Commerce Committee report rejecting the bill. Additional initiatives were undertaken in succeeding sessions. Shortly after the U.S. Supreme Court had upheld the constitutionality of the Tennessee cigarette sales ban law, a general cigarette sales prohibitory bill was introduced in the Utah House in 1901, but in the wake of a majority

which Sen. Horsley introduced, voted against Horsley’s no-sales-minors bill. Finally, in 1897 the legislature included in the session’s public school law a provision mandating scientific temperance instruction in physiology and hygiene, including the effects of stimulants and narcotics on the human system, whose passage the WCTU secured in all states. 1897 Utah Laws ch. 49 at 107, 127 (ch. 6, § 14). See also above ch. 9.

One of several major defects of John H. S. Smith, “Cigarette Prohibition in Utah, 1921-23,” UHQ 41(4):358-72 (Aut. 1973), is ignorance of this long prohibitory tradition—including introduction of similar bills in 1917 and 1919 by the same legislator who introduced the bill in 1921 that was finally enacted—which resulted in the author’s misconception that the campaign was a post-world war phenomenon. See below this ch.


Senate Journal of the First Session of the Legislative Assembly of Utah 280-81 (Feb. 25) (1896) (S.B. No. 89, by Allison by request). For the text of the rather comprehensive and stringent bill (which made it unlawful, inter alia, to “own, or keep, or be in any way concerned, engaged, or employed, in owning or keeping any such cigarettes, or cigarette paper, or wrappers with intent to violate any provision of this Act”), see http://images.utah.gov/cdm4/document.php?CISOROOT=1428&CISOPTR=111&REC7 (Series 428, Box 1, Fld 47). The text was also published in “Reservation Resolution In,” Salt Lake Semi-Weekly Tribune, Feb. 25, 1896 (6:1-2 at 2).

At the 1896 session the 18-member Senate was evenly split between “Gentiles” and Mormons (of whom six were Republicans and three Democrats). In the House 31 of 45 members were Mormons. Drumms’s Manual of Utah, and Souvenir of the First State Legislature, 1896, at 39, 41 (n.d.). Around 1904, Utah’s population was 80 percent Mormon. William Roper and Leonard Arrington, William Spry: Man of Firmness, Governor of Utah 62 (1971) (giving no source). As late as “the mid-1950s, roughly 95 percent of Utah legislators and state officeholders were Mormon, although the LDS percentage of the population stood at only 70 percent.” Richard Elulain and Michael Malone, The American West: A Modern History, 1900 to the Present 278 (2d ed. 2007 [1989]).

Senate Journal of the First Session of the Legislative Assembly of the State of Utah 352 (Mar. 9) (1896).

“Cigarette Laws,” SLH, Nov. 20, 1900 (4:1) (edit.). See also above ch. 12.
committee report recommending that the bill not be passed, the House killed the bill\textsuperscript{652} after robust debate, in the course of which one member allowed as although “men had a right to poison themselves with cigarettes they had no right to let their young sons injure themselves by smoking them.”\textsuperscript{653}

By 1907, campaigns to ban cigarette sales began to be mounted almost every session.\textsuperscript{654} This renewed push must be seen in the context of the wave of enactments at the previous session (1905) in Indiana, Nebraska, and Wisconsin of such laws and of another wave in 1907 in Washington State, Illinois, and Arkansas.\textsuperscript{655} That year the Utah vehicle was House Bill No. 74, which was introduced by Charles Milton Croft (1879-1960), a Mormon\textsuperscript{656} Republican, who


\textsuperscript{653}“Cigarette Bill Causes Debate,” DEN, Mar. 13, 1901 (1:3).

\textsuperscript{654}Except for 1915, at least one anti-tobacco or -smoking bill was introduced during every regular session through 1923. In 1915 Croft, the author of the 1907 cigarette sales prohibitory bill, planned to submit another such bill, but by early February lacked the time to prepare it; the same was true of his (and Mabey’s) statewide liquor prohibition bill, which they did introduce, but the anti-cigarette bill was not filed. House Journal: Eleventh Session of the Legislative Assembly of the State of Utah 241 (Feb. 8) (1915) (H.B. No. 162, by Mabey and Croft); “May Ask More Time to Submit Bills in Legislature,” Evening Telegram (Salt Lake City), Feb. 9, 1915 (2:1); “Four Liquor Bills Now Pending,” Evening Telegram (Salt Lake City), Feb. 18, 1915 (1:1).

\textsuperscript{655}See Table 2, Map 2, and vol. 2. In addition, in 1906 and 1907 a single chamber in several states passed general bans on cigarette sales. On the bill passed by the Ohio House, see above ch. 4. Also in 1906 the Maryland Senate, by a vote of 17 to 5, passed such a bill (supported by the WCTU of Baltimore), which the House killed by a vote of 47 to 46 in tabling a motion to substitute the bill for an unfavorable committee report. Journal of Proceedings, of the Senate of Maryland, January Session, 1906, at 219, 405 (Jan. 26, Feb. 5) (1906) (Senate bill, File No. 44, by Goldsborough); Journal of Proceedings, of the House of Delegates of Maryland, January Session, 1906, at 270, 468-70 (Feb. 9, 22) (1906); “Maryland Senate Passes an Anti-Cigarette Bill,” OW-H, Feb. 6, 1906 (6); “Failure to Organize,” WP, Feb. 23, 1906 (9:3). In 1907 the Missouri House also passed a cigarette sales ban bill, which died in the Senate. Journal of the House of Representatives of the 44th General Assembly of the State of Missouri 20, 225 (Jan. 4, 24) (1907) (H.B. No. 39 passed by a vote of 100 to 22); Journal of the Senate of the 44th General Assembly of the State of Missouri 385, 619 (Feb. 13, 22) (1907) (Criminal Jurisprudence Committee recommended that it not pass; motion in full Senate to table lost 5 to 17, but no further action according to Index); “Cigarettes Barred,” SLT, Jan. 25, 1907 (8:5).

\textsuperscript{656}Dana Palmer, “Biography of John Croft,” on http://www.dvrbs.com/People/Camden
had been a public school teacher,\textsuperscript{657} principal, and Morgan County School District superintendent.\textsuperscript{658} His anti-cigarette advocacy was, speculated his genealogical mini-biographer and great-granddaughter, strongly influenced by his English father, who, orphaned at 12 before becoming a Mormon, went to work in a tobacco factory in the late 1840s, where he was the sole non-user.\textsuperscript{659} (When, in February 1907, Croft had been late the previous day, he was, as part of House “‘horse play,’” “sentenced to smoke a cigarette, but the action was rescinded and he was allowed to purchase a box of oranges instead.”\textsuperscript{660} The bill made it a misdemeanor to “sell, keep for sale, give away or furnish to any person or persons, cigarettes or cigarette paper in any form whatever.”\textsuperscript{661} The House, 38 of whose 45 members were Republicans,\textsuperscript{662} adopted the Judiciary Committee majority report (which had recommended relatively minor changes) and then passed the bill by an overwhelming 36 to 5 majority.\textsuperscript{663} Nevertheless, the Senate, in which Republicans occupied all 18 seats, did not adopt its Public Health Committee’s recommendation that the bill be passed, tabling it instead.\textsuperscript{664}
This dry skeletal outline of the bill’s demise sketched in the House and Senate journals does no justice to the contentious disputes that generated this outcome. The day after Croft had filed his bill, the Inter-Mountain Republican, the self-styled “Official Organ of the Republican Party in the State of Utah,” waxed skeptical over Croft’s intention to drive the cigarette into exile because, as a subhead put it: “TOBACCO TRUST IS BUSY.” Suggesting that the American Tobacco Company had learned at least as much from its defeat in Indiana as the anti-cigarette movement had been inspired by it, the newspaper revealed that:

Having procured advance information that an anti-cigarette bill would be introduced at the present session of the legislature, the tobacco trust has formed a lobby that will make an effort to interfere with the passage of the bill. Some of the same tactics used in Indiana when a like bill was under consideration by the legislature of that state will be introduced. Several bulky packages of literature upon the subject of cigarettes have been shipped to this city for distribution. In these eminent medical authorities are quoted as giving their opinions that...the “paper pill” is no more injurious to health than other forms of tobacco. One doctor goes to the length of saying that less nicotine is introduced into the system via the cigarette than by the use of cigars or of pipes.

Cash arguments failed to convince the legislature of Indiana that the cigarette bill introduced into that body should not pass. It is believed by those who watched the lobby’s work that the offer of cash premiums for votes helped the passage of the law in that state.
Whether in fact the Nicotine Trust had drawn the conclusion from Indiana for guiding its bill-killing campaign in Utah that bribery was not the most efficacious lobbying method is unclear, but the controversy over H.B. No. 74 became intense. The (at this time Democratic) Salt Lake Herald, which jauntily informed “Cigarette fiends” the day after Croft had introduced his bill that “the great power of the Utah legislature” was about to take their “coffin nails” away from them, two days later editorialized in an ironic vein that any man who smoked cigarettes “ought to be compelled to go into retirement when he does it, and get sterilized before he returns to the associations of mankind.” And while the newspaper agreed with Croft’s “notion that the cigarette ought to be tabooed,” it opined: “When it comes to legislating for the reform of mature men, it is altogether likely no such law would prevail against the folly of humanity.” In this view it was reinforced by what it perceived as the lesson to be learned from the 1905 Indiana law, which allegedly succeeded merely in promoting the interstate mail-order trade. Although this focus on the fecklessness (together with the unfairness) of prohibiting adult men from buying cigarettes would run straight through the course of the debate in Utah, advocates of the universal ban failed to engage the argument or to justify the linked claim that grown-ups should sacrifice for youth.

The tenor of the lengthy House discussion of the aforementioned majority and minority reports on H.B. No. 74 on February 8, “the most animated debate of the session,” and the rising vote in favor of the former and rejecting the latter’s recommended rejection indicated to the Herald that the chamber would pass a stringent anti-cigarette law based on existing statutes in Iowa, Tennessee, Indiana, Wisconsin, and Nebraska. The press found it significant that the cigarette found not a single champion among House members: those opposing the sales ban did so based either on its unconstitutionality or on its interference with adults’ liberties. Indeed, even the bill’s most vocal House opponent, Democrat John Franklin Tolton (1861-1950), a relatively high-ranking Mormon church

lobby against Representative Croft’s bill is without foundation.”

667“Chorus of Tenors Sends Up Despairing Wail as Legislature Prepares to Banish Cigarettes,” SLH, Feb. 1, 1907 (10:3).

668“Cigarettes and the Law,” SLH, Feb. 3, 1907 (4:3) (edit.).

669“Legislative Work of Friday,” Ogden Standard, Feb. 9, 1907 (7:2).

670“Speaker Joseph Rushes Things,” SLH, Feb. 9, 1907 (10:2).

671“Anti-Cigarette Measure Wins Out in House After a Spirited Debate,” SLH, Feb. 9, 1907 (8:6-7).

672“Battle of Words over Cigarettes,” I-MR (Salt Lake City), Feb. 9, 1907 (10:3).

673John F. Tolton, “From the Halls of Memory” (1931), on http://catalog.lib.byu.edu (biographical sketch).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

official and owner of a large and profitable mercantile business in the small Mormon pioneer-settled town of Beaver who boasted of not having sold cigarettes during the previous five years. Although he believed that cigarettes were "harmful," he contended that "we have no right to forbid their use." To the full House Tolton, who had signed the committee minority report, set forth his libertarian manifesto:

"We have no more right to say that a man should not smoke cigarettes than we have to say he shall not smoke cigars, or a pipe, or use tobacco in some other form. We have no more right to legislate against the selling or using of cigarettes than we have to forbid a man drinking tea or coffee. It is as absurd for us to legislate against the using of cigarettes as it would be for us to forbid a man appearing in full dress or with a certain kind of shoes to his liking."

A Republican who advocated legislating “the cigarette habit out of existence”

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674Tolton was president of the Young Men’s Mutual Improvement Association (1883-84), high stake counselor (1887-91), counselor in stake presidency, and stake president of the Beaver Stake (1908-16). List of Stake Officers and Bishops of the Church of Jesus Christ of Latter Day Saints: October 1, 1907 (n.p.); John Franklin Tolton, “From the Halls of Memory” at 46 (1931), in L. Tom Perry Special Collections Library, Harold B. Lee Library, Brigham Young University, Provo, Utah. In 1912 he was the unsuccessful Democratic gubernatorial candidate. In 1917, when Tolton returned to the House and was elected speaker, he voted against Southwick’s anti-cigarette bill. House Journal of the Twelfth Session of the Legislature of the State of Utah 500-501 (Mar. 1) (1917). Unfortunately, Tolton’s memoir merely mentioned his being floor leader of the small Democratic contingent in 1907 without referring to any legislation. John Tolton, “From the Halls of Memory” at 36 (1931). Nowhere did he even allude to tobacco.

675“Solid South in Utah Legislature,” SLH, Jan. 28, 1907 (3:2). He was also a bank president and engaged in farming Utah and Idaho.

676Since Tolton had been in business since 1898, he apparently had sold cigarettes before 1903. John Franklin Tolton, “From the Halls of Memory” at 32 (1931); Utah State Historical Society, Historic Preservation Research Office, Structure/Site Information Form, Site No. BV-04-156 http://pdfhost.focus.nps.gov/docs/NRHP/Text/83003905.pdf (visited Sept. 2, 2011).

677“Battle of Words over Cigarettes,” I-MR (Salt Lake City), Feb. 9, 1907 (10:3).

678“Anti-Cigarette Measure Wins Out in House After a Spirited Debate,” SLH, Feb. 9, 1907 (8:6-7).

679“Battle of Words over Cigarettes,” I-MR (Salt Lake City), Feb. 9, 1907 (10:3).

680“Battle of Words over Cigarettes,” I-MR (Salt Lake City), Feb. 9, 1907 (10:3).
pointed out that Tolton’s anti-sumptuarianism lacked consistency since at the very same time he authored a bill to “prevent quiet, orderly shows on Sunday.”

Claims that his bill was unconstitutional and inoperative inasmuch as it did not prohibit interstate shipments of cigarettes for personal consumption Croft rebutted both by pointing out that such laws in the five aforementioned states had been judicially upheld and by reading printed testimonials showing that they were not dead letters. To the relatively restrained objection by John Q. Critchlow, a Mormon Republican representative, that the legislature should not instruct adults as to how to smoke their tobacco Joseph Jackson, a Mormon Republican Sunday school superintendent, replied, in a blast of expansive paternalism, that “the legislature had the right to say to men they should not use what is not good for them”—an apparent generalization of his view that “the legislature had just as much right to say that a man should not sell or give away poisonous tobacco as it had to say that adulterated food should not be sold....”

This wide variability of attitudes among Mormon legislators, who might have been imagined to constitute a solid phalanx of anti-cigarette laws’ strongest supporters, pointed up the difficulties facing passage of a general sales ban even in the state the majority of whose population was indoctrinated by its religion to eschew tobacco. During a period in which the Mormon church hierarchy still
rejected statewide liquor prohibition as creating an unnecessary risk of rift with the non-Mormon population, numerous Mormon legislators zealously advocated libertarianism as a congenial basis for taking exception to any law depriving both the Nicotine Trust of the right to sell to adult men and the latter of the freedom to buy the addictive toxins of their choice even if such laissez-faire stimulated the next generation’s attraction to cigarette smoking.\textsuperscript{686}

As soon as the House had passed the bill, the pro-cigarette smoking forces began “in devious ways” to identify means by which to “defeat the intent of Croft’s pet measure, which he thinks will stamp out cigarette smoking in Utah,” though the traditional method of shipping cigarettes from other states directly to consumers to “‘beat’” the bill if it became law was already well known.\textsuperscript{687} In contrast, the Mormon-owned \textit{Deseret Evening News} seemed eager to take advantage of the legislative momentum by editorially hinting at the need for a partial public smoking ban as well in order to protect non-smokers from secondhand smoke exposure:

\begin{quote}
Were it possible for a smoker to confine the fumes of the burning weed to the atmosphere he himself breathes, he would not be as much of a nuisance as he is. But that is impossible. He poisons the air that others have a right to have as pure as they can get it. On the sidewalks, in elevators, in public buildings, the smoker puffs the smoke into the faces of other persons, compelling them to inhale it after he has had it in his mouth. Is it not strange that any man with the instinct of a gentleman will do that? No one would, except for thoughtlessness.

Especially is this in evidence at banquets where smokers hardly finish the dessert before they commence blowing smoke in all directions. In that case guests who have not yet finished eating are compelled not only to inhale the fumes, but actually to eat the soot that necessarily settles upon the food on their plates.\textsuperscript{688}
\end{quote}

In the event, premature were both cigarette smokers’ concern about the disappearance of the supply of their self-administered drug of choice and anti-smokers’ hopes of taking their struggle to the next level. Although the Senate killed Croft’s bill, the debate between non-members that some of its members

\textsuperscript{686}To be sure, the Word of Wisdom did not expressly prohibit production of tobacco, let alone require Mormons to work for secular prohibitions.

\textsuperscript{687}“Legislative Sidelights,” \textit{DEN}, Feb. 12, 1907 (5:4).

literally stage-managed as a kind of practical joke produced some illuminating insights. The play spotlighted Fisher Sanford Harris, a transplanted Virginian turned Utah and Salt Lake booster nonpareil, who also happened to be “a violent cigarette smoker”; “much alarmed since the bill passed the house,” Harris “requested permission to appear before the senate committee in opposition to the measure.” The seat of his influence was the Commercial Club, which he had organized and whose secretary he was. Despite the fact that—or, perhaps, precisely because—he had “won his way to the hearts of all Salt Lakers,” several senators decided to use H.B. No. 74 as a way of “bait[ing]” him and laughing up their “[s]leeve” at him. Allegedly born of an idle hour weighing heavily on Public Health Committee Chairman Wesley K. Walton, the “plot” was hatched when it dawned on him that he could telephone Harris to see whether he could get a rise out of him by informing him that he was going to recommend Croft’s bill for passage. Harris, as Walton confided to the Senate president, immediately fell for it, excitedly replying to Walton: “For heaven [sic] sake, don’t do it. I’m coming down in a hack—hold the bill till I can get there.” To his surprise, on arrival he learned that he was to address not the Public Health Committee, but the committee of the whole. Another senator in on the “joke” spoke carefully “so that Mr. Harris could not,” in the words of the Deseret Evening News, “possibly be deceived into thinking this was anything but the most dignified assembly of men seeking after knowledge of the deadly cigarette, despite the fact that half of them have the brand of nicotine on their right thumb nail.”

The substance of Harris’s remarks may have been designed to suggest to legislators the kind of civil resistance that Salt Lake’s smoking businessmen were willing to put up if the bill went into effect. Eschewing any defense of “the habit of cigarette smoking,” he confined himself to urging a “statesmanlike view of the situation” that would preclude enactment of “any foolish legislation.” Bluffing an intimacy with all branches of world history and legislation and enforcement, Harris charged that no sumptuary law, which interfered with a man’s personal rights,

“ever placed on the statute books of any country in the world has been successfully enforced and if you pass this bill it will meet with the same fate. You have no right to

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690 “Fisher Sanford Harris Passes to Great Beyond,” Salt Lake Herald-Republican, Nov. 8, 1909 (1:1, 2:1-3).
691 “Sedate Senate Baits Harris,” DEN, Feb. 19, 1907 (5:1).
interfere with the tastes of an ordinary man, and even if you do, I and others will smoke as persistently as before and with as much joy. It is time for Utah to be known as a safe state and not inclined to pass socialistic, anarchistic and populistic legislation.\textsuperscript{693}

After Harris’s half-hour at center stage, the directors of this comedy then expanded its cast by dispatching the sergeant-at-arms to fetch Croft—whom they also intended to “Make A ‘Monkey of’”\textsuperscript{694}—from the House to defend his bill. He sought to refute Harris’s historical argument by pointing to the states in which similar laws were in effect and assuring senators that they “worked well.” Then reaching for the soundest medical-scientific argument at the anti-cigarette movement’s disposal, Croft declared that cigarettes were harmful “because the smoke is inhaled into the lungs.”\textsuperscript{695} Availing himself of the opportunity for rebuttal, Harris, even if he failed to live up to his “title as the greatest orator and public speaker of the west,”\textsuperscript{696} at least came across as a clever obfuscatory high school debater by offering this unique response in the annals of the late-nineteenth- and early-twentieth-cigarette controversy: “if the inhaling part is what the law drives at, inhaling should be made a crime, and officers should be authorized to accost a man on the street and find out if he was inhaling or not, and if doing so, to arrest him.”\textsuperscript{697} Whatever rhetorical skills this latter-day Demosthenes possessed stood him in ill stead when he pressed his luck too far in concluding his rebuttal with the prediction that “he would go down to his grave at the age of 102 smoking his favorite cigarette, while Mr. Croft long before by reason of a law to be passed in the near future would be deprived of his glass of milk.”\textsuperscript{698} In fact, 18 months later the 44-year-old Harris was dead of “throat cancer brought on by lifelong smoking.”\textsuperscript{699}

\textsuperscript{693}“Fisher Harris Is Bound to Smoke,” SLH, Feb. 19, 1907 (10:5).
\textsuperscript{694}“Sedate Senate Baits Harris,” DEN, Feb. 19, 1907 (5:1).
\textsuperscript{695}“Fisher Harris Is Bound to Smoke,” SLH, Feb. 19, 1907 (10:5).
\textsuperscript{696}“Fisher Sanford Harris Passes to Great Beyond,” Salt Lake Herald-Republican, Nov. 8, 1909 (1:1).
\textsuperscript{697}“Fisher Harris Is Bound to Smoke,” SLH, Feb. 19, 1907 (10:5).
\textsuperscript{698}“Legislature Resumes Work,” Ogden Standard, Feb. 19, 1907 (7:4).
In the short run Harris may have been dead, but in the even shorter run he did live to celebrate H.B. No. 74’s even earlier demise at the hands of the Senate: “As soon as the job had been completed, Sergeant at Arms Day was instructed to call up Fisher Harris at the Commercial club and announce the glad tidings. This was immediately done, but Mr. Day could not communicate the response to the anxious members as he said all he could hear was a loud noise as if some one [sic] were in a paroxysm of joy.” Whether this communication was really meant solely for Fisher or whether he was a conduit to the Tobacco Trust and its local symbionts is unknown.

The measure introduced at the 1909 session by Hugh A. McMillin of the (anti-Mormon) American Party was virtually identical to the 1907 bill, but the House Judiciary Committee recommended that it not be passed and the full House adopted the report, thus swiftly killing the bill.

But the 1911 session, at which Republican majorities in both houses remained crushing, witnessed another major anti-cigarette sales initiative, this time advanced by the WCTU, whose extensive negative legislative agenda also included constitutional liquor prohibition, outlawing gambling, prohibiting white slave traffic, a Sunday law prohibiting theaters and movies, and shorter hours for women employees and prohibiting child labor. Two identical bills were introduced by Republicans in the House and Senate, the former (H.B. No. 215)

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taking precedence. The measure was more stringent than those of 1907 and 1909 not only in banning manufacturing as well, but also in making it a misdemeanor both to bring cigarettes (or paper) into Utah for the purpose of selling or giving away and to “own, keep or be in any way concerned, engaged or employed in owning or keeping any such cigarettes....” The bill, which was thus a composite of the 1896 Iowa and 1897 Tennessee laws, passed both chambers almost unanimously—36 to 1 in the House and 15 to 2 in the Senate.

In spite of these massive majorities, Mormon Republican Governor William Spry disapproved the bill on the grounds that cigarette sales to minors were already prohibited and that adults would buy them in original packages (shipped in directly from other states), “thus taking much business out of the state.” Spry’s veto was consistent with his vetoes of liquor prohibition as well as with the stance adopted at that time by part of the Mormon church hierarchy—in particular by President Joseph F. Smith, who warned against overzealous, “‘drastic...illiberal, or oppressive’” action—and the Reed Smoot leadership of the Republican Party not to antagonize the non-Mormon population, and especially businessmen, by foisting liquor prohibition on the state.

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706 See above ch. 10.

707 See above ch. 5.

708 House Journal: Ninth Session of the Legislature of the State of Utah 390-91 (Feb. 24) (1911). The bill passed with a minor amendment recommended by the Judiciary Committee striking out a rider apportioning one-half of the fine to the complaining witness. Id. at 326 (Feb. 20).

709 Senate Journal: Ninth Session of the Legislature of the State of Utah 1911, at 764 (Mar. 9).

710 “Governor Vetoes Cigarette Bill,” Evening Standard (Ogden), Oct. 22, 1911 (2:1). The Utah State Archives was unable to locate the veto message. Email from Heidi Stringham to Marc Linder (Sept. 12, 2011).


712 See below this ch.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Utah’s 1921 Anti-Cigarette Law Bans Sales, Advertising, and (Much) Public Smoking

“I know...that it is very offensive to one who doesn’t smoke to have a smoker blow smoke in his face. There are meetings such as this at which it is not appropriate to smoke. But that is a matter that should be governed by one’s conduct as a gentleman. It is a personal subject and not within the jurisdiction of any lawmaking body.”

The dispute over a cigarette sales ban in Utah became especially contentious in 1921—legislative anti-cigarette proposals from 1913 to 1923, which focused on public smoking prohibitions, are separately discussed below—as a result of non-Mormon antagonism sparked by “admissions that the bill was sponsored by the Mormon church.” This organizational support was reflected, for example, in the fact that the vast majority of the large number of legislative petitions favoring the bill’s passage stemmed from various Mormon entities. (The

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713“Minister Grills Southwick Bill,” SLT, Jan. 29, 1921 (22:1) (Rev. Elmer Goshen, First Congregational Church, speaking to meeting of state legislators and Salt Lake businessmen at Commercial Club).

714See also below this ch. for discussion of the repeal of the general cigarette sales ban in 1923, which at the time was subordinated to controversy over repeal of the law’s anti-public smoking provision.


716Because House members complained that the cost of printing the long petitions (including the list of attached names) was excessive and that reading them took up too much time, the House decided to have them read only by title and to include only the title in the House Journal. “Action Deferred by House on County Relief Measure; Dern Land Bill Is Passed,” SLT, Jan. 29, 1921 (16:6-7). On the petitions, see also “Urge Passage of Anti-Cigarette Measure,” DN, Feb. 1, 1921 (sect. 2, 10:1).

multifaceted struggle was so intense that at the end of January the press opined that during the first month the Utah legislature’s chief development had been discussion of the anti-cigarette sales and public smoking bill.)\textsuperscript{718} Indeed, reacting to the failure of his amendment to derail the cigarette sales prohibitory law by means of licensure, Representative O. F. McShane predicted on the House floor that the anti-Mormon “American party would be revived in Utah if prominent members of the dominant church continued to take such an active part in prohibitive legislation....” He (erroneously) discounted reports that the church “as an organization” was “more or less responsible” for the 1921 law, but did believe “that the members of this church are doing it. They want to put this state back twenty years. They would see the old party lines drawn again. It is only one step from telling you what you may not do to telling you what you may do.”\textsuperscript{719} And his Mormon pro-licensure ally, Salt Lake Republican Representative M. Shirley Winder, confided to the House that “I regard as the most regrettable feature of this affair the lobbying done by a certain group of men who are members of my church, whose methods I consider despicable in the extreme.”\textsuperscript{720} Waiting until after adjournment to disclose at least one source of his wounded pride, Winder added that one member of the church Young Men’s Mutual Improvement Association advisory committee “had asked him insultingly if he had not been approached by representatives of the tobacco trust.

Ironically, despite the taboo that it placed on tobacco, to statewide cigarette sales prohibition legislation the Mormon hierarchy did not lend its advocacy until

\textsuperscript{718}“Reformers and Disrespect for the Law,” \textit{OS-E}, Jan. 31, 1921 (4:1) (edit.). The assertion that the “anti-cigarette law in Utah attracted little notice, either inside the state or out, when it was enacted” is preposterous and false. Cassandra Tate, \textit{Cigarette Wars: The Triumph of “The Little White Slaver”} 129 (1999). In fact, Utah press coverage of the debate was extraordinarily extensive and deep—more so than that for any other state at any time between the 1880s and 1920s.

\textsuperscript{719}“Anticigaret Measure Passes Utah Legislature,” \textit{SLT}, Feb. 25, 1921 (1:7).

\textsuperscript{720}“Anticigaret Measure Passes Utah Legislature,” \textit{SLT}, Feb. 25, 1921 (1:7, 12:3). On the Young Men’s Mutual Improvement Association, see below this ch.
the run-up to the 1921 session. For such seeming inconsistency there was immediate precedent: though adamantly opposed to alcohol, the Mormon church had also refrained from officially advocating prohibition in Utah until 1916-17 lest its interference in state politics reinvigorate political antagonisms between it and non-Mormons and undermine the domination of the Republican Party, which was controlled by U.S. Senator and Mormon apostle Reed Smoot. The delay in openly supporting anti-cigarette/smoking legislation was presumably linked to the ideological space that opened up once prohibition had outlawed the legal use of liquor in 1917.

Edward Southwick: The Utah Legislature’s Principal Anti-Cigarette Advocate

Senator Southwick...said he was a user of tobacco in no form whatever.... From his own town, said...Southwick, came the superintendent of the Salt Lake City schools, the superintendent of the Ogden schools, the boy scout executive of Salt Lake and Ogden, country boys all of them, not addicted to tobacco in any form, and now a Lehi boy offers the greatest piece of legislation to the people of Utah they have ever known since statehood was obtained in 1896.

Senator Southwick...summed up the debate, saying that the eight-hour law had been

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721 On the internal, non-public preparations by the Mormon church in 1920 and into January 1921, see below this ch. and John H. S. Smith, “Cigarette Prohibition in Utah, 1921-23,” *UHQ* 41(4):358-72 at 360-64 (Aut. 1973), which, however, overlooked that the bill’s introducer had announced his intentions early in January, at a time when Smith mistakenly believed that the project was still veiled. See below this ch.


The last statewide general cigarette sales ban enacted in the United States was introduced by Edward Southwick (1871-1936), a Mormon Democrat, who had also authored even more radical (but unsuccessful) measures in 1917 and 1919. After having served as recorder, school trustee, and mayor of his birthplace, the small town of Lehi, in 1913 he represented in the House Utah County, an overwhelmingly Mormon county, in which Brigham Young University, which he attended for two years after the eighth grade (when it was still called Academy), is located. Born in Utah of English-born parents—his father was a boot- and shoemaker—Southwick, following several years as a Mormon missionary in Britain and elsewhere, was employed in the commissary department of the Los Angeles & Salt Lake Railroad before working for 15 years for the Mormon church-owned Utah-Idaho Sugar Company as a farmer and overseer as well as in charge of a lake resort. Southwick, who owned 700 acres of valuable land, then went into the farming, cattle raising, and real estate businesses in addition to becoming president of a mining and a canning company as well as a bank president. He was also a very active Mormon, occupying a relatively influential position as a “high priest, a member of the high council in the Alpine stake and secretary to the deacons, elders and Quorum of Seventy” as well as “senior president of the Sixty-eights Quorum of Seventy....” By 1919 he had been a Sunday school teacher, superintendent, and stake officer for 28 years. On November 17, 1920, less than two months before he announced that...
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

he would be introducing yet another anti-cigarette bill, he became president of the newly organized Alpine Stake Mission.729

Southwick’s advocacy of radical anti-cigarette and -smoking legislation did not mark him as a Mormon dogmatist, although he did later aver during Senate floor debate: “My Church stands against the use of tobacco and I am proud as a citizen of the state and a member of that Church to stand here and defend this principle.”730 Rather, as was also the case with some anti-cigarette legislators in other states, it was part and parcel of a progressive and pro-labor agenda that he had initiated already at the very beginning of his House career in 1913, when, on the eleventh day of the session, he introduced a bill731 to amend Utah’s nationally famous two-decade-old law that made it a misdemeanor for any corporation, employer, or manager to employ any working man more than eight hours a day (“except in cases of emergency, where life or property is in imminent danger”) in any underground mine or smelter.732 Southwick’s bill would have added

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731House Journal: Tenth Session of the Legislature of the State of Utah...1913, at 117 (Jan. 23) (H.B. No. 28).

coverage of working men in all factories as well as in surface mines.\footnote{Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans} His measure coincided with a larger movement in the Pacific Coast states, galvanized by the Socialist Party, to adopt strict universal eight-hours laws by means of the Progressive-era electoral initiative.\footnote{Marc Linder, “Time and a Half’s the American Way”: A History of the Exclusion of White-Collar Workers from Overtime Regulation, 1868-2004, at 91-115 (2004).} In rigidly imposing a maximum eight-hour working day for adult men in a variety of non-mining employments, rather than creating a regime of premium pay for overtime hours, Southwick’s bill was so far ahead of its time that almost a century later the United States still lacks such regulation.\footnote{Marc Linder, The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States (2002).} The independent \textit{Ogden Examiner} immediately hailed it on the grounds that: “No man ought to be required to work over eight hours. He can earn a day’s wage in that time if he can do it at all. And if he can’t, then he ought to be gently but firmly removed and the place given to a man who can.”\footnote{“In the Legislature,” \textit{OE}, Jan. 24, 1913 (4:1-2) (edit.).} At three open hearings, the House Labor Committee, of which Southwick was a member, heard numerous prominent and powerful industrial managers, whose factories were struggling to compete with the long hours and cheap labor of well-established manufacturing centers, protest against the alleged dire consequences of an eight-hour regime, which included the claim that it was difficult to obtain the necessary labor during the busy season and sometimes impossible to staff one shift, let alone two or three. In short: “It would be suicidal to palsy the hand that feeds.”\footnote{“Open Session Held by Labor Committee,” \textit{SLT}, Feb. 1, 1913 (9:3).} That hand was manufacturing, which, in the words of President George McAllister of the Manufacturers Association of Utah, as a result of an eight-hour law “must cease” because Utah manufacturers were competing against “the 12-hour labor of the east.”\footnote{“Interest in Labor Bill Grows Apace,” \textit{OE}, Feb. 2, 1913 (5:1-2).} In contrast, the Utah Federation of Labor supported the bill,\footnote{“Lively Doings Are Expected in House,” \textit{SLT}, Jan. 31, 1913 (4:1-2 at 2).} and in line with the aforementioned broader Pacific Coast initiative, H. S. Joseph, representing miners, offered a substitute bill that would have achieved universality by setting the “period of employment of working men and working women in all classes of labor in Utah” at eight hours.\footnote{Joseph was presumably the former Utah House speaker discussed below: an opponent of anti-}
Of particular interest were the views of George Austin, the agricultural superintendent of the Utah-Idaho Sugar Company, Southwick’s former employer. After sharing with the committee his autobiographically rooted belief that as a lifelong laboring man he should have the opportunity, if he wished, to work nine or ten hours, he reported that the sugar company operated only 80 to 110 days a year, and that just when the sugar beets were being harvested, it was hard to secure men for factories when they were needed; consequently, to cut the factories down to eight hours during such critical times would do irreversible damage to the sugar industry.  

In the wake of these hearings, the House Labor Committee substituted for Southwick’s bill its own “compromise” diluted measure (H.B. No. 184), which capped the workweek of factory working men at 57 hours. On February 17, the House adopted the committee report and proceeded to floor debate of the new bill on final passage, in the course of which Southwick, according to the Salt Lake Tribune, “drew a touching picture of the workmen in sugar factories who are now compelled to work twelve and twelve and a half hours a day in rooms whose temperature is from 98 to 120 degrees. Mr. Southwick said he had assisted in carrying out of the Lehi sugar factory many men overcome by the excessive heat and noxious gases, whose vitality had been so lowered by the conditions under which they labored that they became easy prey for an unusual volume of gas.” Following Southwick’s reply to a questioner that the bill—which was designed especially to cover the sugar industry and to create an approximately eight-hour day in seven-day-a-week continuous operations and nine-and-a-half-hour days in six-day-a-week factories—in fact would affect outside of the sugar industry only

cigarette legislation, he was a mining executive, whose motivation for backing shorter hours is unclear.


one factory in Utah, which was already operating on three shifts, the House passed the bill by the huge majority of 41 to 3. In the event, Southwick’s passionate humanistic intervention on behalf of the downtrodden employees of his church-owned former employer in his own hometown went for naught: despite the Senate Sifting Committee’s recommendation three weeks later that the bill be passed, it never went beyond its second reading. (His end-of-session joint resolution to create a commission to study employer-employee conditions in order to obtain data for a workers compensation bill was even more unsuccessful: the House rejected it.)

During the 1917 session, his second term, Southwick introduced a somewhat less sweeping version of his eight-hour bill that would have extended coverage to a large array of industrial employments, including shops operated in connection with mines, smelters, or reduction works, ore sampling works, all sugar factories, cement works, gas works, powder works, brick yards, brick and tile works, steel mills, and flour plants. Southwick introduced House Bill No. 57—of which, after its defeat, an apparently relieved Deseret News reported that it would have “forced a marked change in the labor system of many Utah industries”—on January 26, just nine days after this petition had been directed to the House Labor Committee, of which he was a member: “We, the undersigned laboring men, hereby petition you to draft a law and use your endeavors to have same passed, giving eight hours to employees of cigar factories, and to all other industries where the eight-hour law does not apply.” In introducing his bill,

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744 “57-Hour Bill Is Passed by House,” SLT, Feb. 18, 1913 (9:3).
745 House Journal: Tenth Session of the Legislature of the State of Utah...1913, at 377 (Feb. 17).
746 Senate Journal: Tenth Session of the Legislature of the State of Utah...1913, at 667 (Mar. 11).
747 House Journal: Tenth Session of the Legislature of the State of Utah...1913, at 839-40, 905-906 (Mar. 12, 13) (H. J. R. No. 6); “Would Study Labor Conditions,” SLT, Mar. 13, 1913 (9:1).
750 House Journal: Twelfth Session of the Legislature of the State of Utah...1917, at 128-29 (Jan. 26).
751 House Journal: Twelfth Session of the Legislature of the State of Utah...1917, at 41. The bill was “put forward...under the plea that it was in fulfillment of a party pledge.” “House Bills Killed,” DEN, Mar. 12, 1917 (2:7).
752 House Journal: Twelfth Session of the Legislature of the State of Utah...1917, at 63-
Southwick positioned it to pass Supreme Court scrutiny with respect to adult men by stating that it would “prolong life by eliminating certain dangers of accident and providing more time for recreation.” And closing the “extended and acrimonious” floor debate on final passage, Southwick justified the inclusion of flour mills on the grounds that they “work their men from ten to fifteen hours a day, and that many of the flour employees contracted consumption from their occupation. ‘Sugar workers too…are subjected to unreasonably long hours under working conditions that are particularly distressing. I do not see how anyone in this house can vote against this measure, as it protects the very life of the working man from the exploitation to which he is now subjected by the great interests.”

At one representative who admitted sugar workers’ long hours, but claimed that they “had nothing to do but sit and watch the machinery work,” Southwick impatiently snapped that “he did not know anything about the sugar factories.” His bill—which one of its advocates characterized as considering “the rights of men from a humanitarian standpoint”—strengthened by additional coverage of railroad shops, passed the House by an overwhelming majority of 35 to 8.

Sugar factory management (including Southwick’s former employer) attacked the bill at a Senate Public Health and Labor Committee hearing on the grounds that an eight-hour law would both make it impossible to obtain sufficient labor to staff three shifts and impose “hardship” on workers by depriving them of the “privilege” of working longer hours. After considerable wrangling in committee and in the full Senate that in large part focused on treatment of the sugar industry the bill was “hurried away to the operating table...under the

64 (Jan. 15).


754 “House Passes Eight Hour Law,” DEN, Feb. 7, 1917 (2:4-6 at 5).


756 House Journal: Twelfth Session of the Legislature of the State of Utah...1917, at 208 (Feb. 7). However, a floor amendment stripped the bill of a clause providing that if any part of the section were held unconstitutional by the courts, the remainder of the act would be unaffected. Since the Lochner-era U.S. Supreme Court might well have been foreseen as invalidating at least some of the industries covered, it is possible that striking out this clause might have prompted some legislators to vote Yes because the law would not be sustained anyway. None of those voting No voted against Southwick’s anti-cigarette bill.

influence of an anesthetic and recovery is doubtful”—in other words, senators killed the bill. 759

Not until 1921 did workers—a large proportion of whom were farmers who grew beets during the summer—at the Utah-Idaho Sugar Company’s Lehi sugarbeet factory 761 strike against the 12-hour day, seven-day week regime 762 and for their demand for the three-shift eight-hour day. 763 In response to the demand management insisted that, since the eight-hour day was unworkable at some of the company’s other plants and it could not operate one plant differently than the others, the men had best return to work. The managers “appealed to them from the standpoint of the company’s present condition, the stockholders, [Mormon] church and general working conditions.” Following talks, the workers were given a few minutes alone to decide: “their decision came quickly and they walked out, almost to a man.” At a meeting of local Lehi businessmen called by an ex-mayor and attended by a committee of workers and one of the company officials, the

758 “Bills Die Before Senate Broadside,” SLT, Mar. 6, 1917 (9:1).
761 The claim in “Beet Sugar Employes Strike,” WSJ, Oct. 29, 1921 (7), that the factory was the first and oldest in the United States was incorrect, but it was the first successful beet sugar factory in the Mountain West. Leonard Arrington, Beet Sugar in the West: A History of the Utah-Idaho Sugar Company, 1891-1966, at 16 (1966); Richard Van Wagoner, Lehi: Portraits of Utah Town 238 (1990).
762 This severe pattern was exacerbated by the fact that when the day and night shifts switched every two weeks the workers had to work an 18-hour shift. Leonard Arrington, Beet Sugar in the West: A History of the Utah-Idaho Sugar Company, 1891-1966, at 37 (1966).
763 Richard Van Wagoner, Lehi: Portraits of a Utah Town 246 (1990), and Richard Van Wagoner, “The Lehi Sugar Factory—100 Years in Retrospect,” UHQ 59(2):189-204 at 202 (Spr. 1991), incorrectly stated that the two-shift regime had been in effect for 31 years until 1921; in fact, the factory operated on three shifts in 1918, 1919, and 1920, and it was apparently the return to the two-shift system that precipitated the strike in 1921. “Lehi Sugar Plant Starts Run Today,” OE, Oct. 13, 1919 (4:6); “Sugar Factory to Start Monday,” LS, Sept. 30, 1920 (1:1); “Strike Declared at Lehi Factory,” SLT, Oct. 19, 1921 (14:2). Leonard Arrington, Beet Sugar in the West: A History of the Utah-Idaho Sugar Company, 1891-1966, at 159 (1966), incorrectly stated that not until 1944 was the workweek reduced to seven eight-hour days.
businesspeople unanimously passed a motion recommending that the company grant the Lehi workers an eight-hour day. At a further meeting the company emphatically insisted that the mill conditions could not be changed and threatened that unless the workers returned to work by the next morning, it would close the plant for the season and ship the beets elsewhere for processing, but some 200 workers passed a motion to remain out for the eight-hour shift at their previous 30-40-cent hourly wage. At this point now-Senator Southwick re-emerged to reveal the limits of his pro-worker position: despite his quondam fierce advocacy of the eight-hour day for sugar factory workers and his status as a local Lehi businessman himself, he appealed to the workers to return to work, but they ignored his advice.764

For its part, the Utah-Idaho Sugar Company—whose president was Mormon church President Heber Grant765—was not bluffing: it did carry out its threat to shut down, but a divided board of directors soon agreed to the very term that the company had claimed was impossible and instituted the three-shift eight-hour regime under which the same 30-cent an hour minimum wage continued to be paid to a work force expanded by one-third (75 workers).766

Finally, in 1921, as was the case during previous sessions, Southwick paired his anti-smoking initiative with other high-profile progressive legislation. In 1921 he authored the bill to impose a personal and corporate income tax ranging from 1 percent on incomes below $1,000 to 6 percent on those above $5,000.767 From the outset, the press eagerly predicted that it was “to meet as formidable opposition among the citizens of Utah as did his non-smoking legislation.”768 On the Senate floor Southwick defended the bill both as easing (especially agricultural) property owners’ tax burden and as targeting tax dodgers and slackers, who did not pay a dollar in tax while “enjoying all the privileges of state government” and whom he hoped to hold up to “scorn and ridicule.” In particular he intended to “catch” the 49.3 percent of 18,517 Utah federal income tax payers

who “paid absolutely no property tax....”769 Ultimately, however, his arguments failed to mobilize a constitutional majority of his senatorial colleagues, who instead “defend[ed] capital,” resented as “slander” “the accusation that corporations are tax slackers,” and/or denied that the proposed tax was “just, a “leveler,” or an “equalizer of burden.”770

Despite the fact that Southwick was a member of a hopelessly minority party, his anti-cigarette and income tax bills, boasted his hometown newspaper, “caused more discussion than any other two bills introduced, and have made him a state wide character. The anti-tobacco law was fought by some of the most powerful interests in the state and nation and was also championed by more people and received more petitions for its enactment than any other measure ever introduced in a Utah legislature.”771 Some of those opponents would not soon forget or forgive Southwick. When he sought the Democratic nomination in Utah’s second congressional district in 1922, at least one newspaper opined: “Southwick’s record in working for freak and foolish legislation ought to entitle him to something but not a seat in congress. Most people who have cussed and discussed his case figure that he should be sent some place—but not to Washington.”772 Recognition did not, however, totally elude Southwick: on Arbor Day 1921 trees were planted in his honor in Lehi and other towns in Utah County.773

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770 “Motion Defeated to Reconsider Act to Create Income Tax Law for Utah,” DN, Mar. 4, 1921 (1:1-2). Senators Dern and Jenkins expressed the same resentment at Senator Smart’s injection of (Mormon) religion to support this bill (“God is the author”) that had been voiced a month earlier regarding Southwick’s anti-cigarette bill, though this time Dern voted for the bill. Id. By a vote of 8 to 9 the tax bill survived a motion to strike the enactment clause on second reading, which it passed by a vote of 10 to 8, but failed by a vote of 8 to 8—which had been 9 to 7 before Southwick changed his vote in order to be entitled to move for reconsideration—to obtain a constitutional majority on third reading, and lost the motion to reconsider by the same vote. Senate Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 606-607, 627-28, 670 (Mar. 2, 3, 5); “Southwick Income Tax Law Is Killed on Reconsideration by State Senate,” DN, Mar. 5, 1921 (1:7).
773 “Trees Planted as Tribute to Cigarette Foe,” Salt Lake Telegram, Apr. 16, 1921 (8:5).
Southwick’s Anti-Cigarette Measure: Senate Bill No. 12

“Shall those who do not make use of ‘the weed’ in any form be allowed to prevent their friends and neighbors from the free exercise of their own will in the matter?”

Southwick’s Senate Bill No. 12, introduced on January 19, 1921, was radical, prohibiting as it did not only the sale, but also the advertising of cigarettes and the smoking (in specified enclosed public places) of tobacco. In addition to making it a misdemeanor to sell or give away cigarettes or cigarette papers, Southwick’s bill empowered the police to secure a search warrant, based on any citizen’s sworn complaint based on reasonable evidence, search the suspected premises, and seize any cigarettes found; the judge in whose court the alleged possessor was convicted was then required to order the cigarettes destroyed. S.B. No. 12 also made it unlawful both to advertise cigarettes in any circular, newspaper, or other periodical, billboard, or store window and to smoke cigars, cigarettes, or tobacco in any “enclosed public place...except in extra rooms specially provided for smoking purposes”; the key term “enclosed public place” was defined to include hotel dining rooms, restaurants, cafes, cafeterias, theaters, passenger elevators, street cars, interurban and railway passenger coaches, railway station waiting rooms, barber shops, and state, county, and city buildings. Though extensive, the universe of smoking-prohibited enclosed

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777 Senate Bill No. 12 §§ 1, 2, 4 (n.d. [Jan. 19, 1921], by Southwick), http://images.archives.utah.gov/cdm4/document.php?CISOROOT=/428&CISOPTR=16524&REC=6. The full text was also printed in “Bill Prohibits Cigaret Smoking,” SLT, Jan. 20, 1921 (22:7). Ironically, the list of smoking-prohibited public places did not include churches: during the presidential campaign in 1920, the Democratic nominee James Cox spoke in the Mormon Tabernacle in Salt Lake City to a very large audience among whom “a surprisingly large number...brazenly puffed on cigars and cigarettes and as to the ground the rules were openly ignored, despite signs all over the square asking that no smoking be indulged in on the premises.” Because such smoking had taken place at similar gatherings, “Bishop David A. Smith declared it...the best possible argument against holding such sessions in a house used for religious worship, the ban against smoking in church being a recognized code of practically all creeds.” “Bishop Deplores Brazen Disregard of Propriety on the Part of Smokers,” DN, Sept. 16, 1920, clipping in Selected Collections

1461
public places, omitting as it did, for example, stores, banks, bars, hotels (outside of their restaurants), and private hospitals, fell far short of the Salt Lake Tribune’s scare subhead, “Any Indoor Public Place.”

Nevertheless, it went far beyond the similarly worded North Dakota measure, introduced a week earlier, by covering many non-eating-related public places. The trade journal Tobacco’s bathetic dirge lamented that the “interval between acts in theaters will not be soothed by a cigarette in the foyer,” while in “restaurants the end of the meal will be marked merely by paying the check and hurrying away to some private place where a quiet smoke can be enjoyed without the State’s interference.”

All of these provisions were retained in the bill that the legislature passed by large majorities and the governor approved, and which went into effect on June 7, 1921. Nevertheless, debate over Southwick’s measure was highly contentious: throughout the legislative process it was, as accounted for below, the target of intense condemnation by some of those whose unfettered access to and use of tobacco S.B. No. 12 would restrict. At a House Manufactures Committee public hearing, for example, it was attacked as “unjust in its deprivation of inalienable personal liberty and as perverting the basic principles of the constitution in attempting to force the masses to act in accord with the whims and peculiar views of certain groups.”

The day after he had filed S.B. No. 12, Southwick took pains to stress its moderation, pointing out that it was “not so drastic as that introduced two years ago, which was first passed and later killed by amendment. That bill prohibited the possession of cigarettes. Senator Southwick said there was nothing in his bill to prevent the sheep herder on the desert, or anyone else in the state, except in certain designated places, from smoking cigarettes, always excepting minors.” But he then subverted this message by divulging just how potentially fraught with
legal risks and complications for cigarette smokers his new bill was. Specifically, he interpreted the final sentence in section one ("The possession of such cigarette materials shall be considered prima facie evidence of a direct violation of this act") as meaning that, if arrested for possession, "a citizen would have to prove that he had the cigarettes for his own use, and not to sell or barter or give away." In contrast, he did possibly appease some smoking opponents by observing that S.B. No. 12 would not prevent the purchase of cigarettes through the mails from other states.786

Not that appeasement was Southwick’s tactic of choice: scarcely a week had passed since introducing the bill when he found it opportune to pick a fight with some Salt Lake women teachers, whom he charged in the Senate with smoking cigarettes. The president of the Salt Lake board of education and principals not only denied the accusation, but intimated that his charge might have been occasioned by the fact that a week earlier the Utah Educational Association had tabled a resolution to endorse his bill.787

About a week after the bill’s introduction the Senate Judiciary Committee held a public hearing on it at which member Harrison Jenkins proposed that either Southwick’s prohibitory measure be amended or that a new bill be filed to create a cigarette sales licensure system. Since this trial balloon would have subverted the heart of the sales prohibition, the fact that it initially proved to be leaden suggested the strength of support for Southwick’s bill, though later in the session it would attract significant support (but not a majority until 1923).788 At a second Senate Judiciary Committee hearing five days later a significant component of the local tobacco trade demonstrated how wildly it had misread public sentiment on

785This provision remained intact in the act. 1921 Utah Laws ch. 145, § 1, at 390.
786“Southwick Says Cigaret Bill Shorn of Severity,” SLT, Jan. 21, 1921 (11:4).
787“Teachers Resent Charge of Smoking,” SLT, Jan. 28, 1921 (20:2-3). By a vote of 34 to 24 the organization’s house of delegates had taken the step not because teachers did not regard smoking as undesirable, but because such support was not within the convention’s province. “Teachers Favor Changes in Law,” SLT, Jan. 23, 1921 (24:7). Southwick later stated that at the Senate Judiciary Committee hearing he had merely said that he knew a “lady teacher” in the city schools who smoked cigarettes. He had also “point[ed] out what to me is the most deplorable tendency in modern times, viz., the smoking of cigarettes by young women.” He defended this claim by referring to a similar statement made by U.S. Surgeon General Hugh Cumming. Edward Southwick, “Senator Replies to Criticism of Alleged Statement on Smoking,” DN, Feb. 1, 1921 (8:1-2) (letter to editor). On Cumming’s statement, see below ch. 17.
788“Judiciary Committee Has Public Hearing on Cigarette Measure,” DN, Jan. 27, 1921 (sect. 2, 8:6); “Anticigaret Measure Is Warmly Debated Before Senate Committee,” SLT, Jan. 28, 1921 (10:7).
the need to regulate cigarettes when the Utah-Idaho Wholesale Grocers Association presented the unrealistically maximalist position rejecting even Jenkins’ licensure scheme. The organization’s real reason for adopting this viewpoint was apparently, as its secretary, James Astle, stated, that: “In most towns...tobacco is sold in the general stores, possibly three in the town, none of whose traffic in tobacco is sufficiently large to warrant a license. None would probably take out a license.” Instead of simply disclosing that it was seeking to (seem publicly to) represent its members’ smaller customers’ interests, Astle gussied up his testimony with the heart-warming claim that “[in] the majority of Utah towns, the tobacco is sold by reputable dealers who are leaders in the community. These men are not the lawbreakers of the community. They know the boys who ask for tobacco.” Consequently, if none of them could continue to make a profit on tobacco above the license fee and therefore did not take one out, “[t]his would lead possibly a more unscrupulous man to come into the town, take up such a license and deal in tobacco, to the detriment of the merchants already established there.”

That same day the Judiciary Committee, by a vote of 3 to 2 (with Southwick himself in the majority), recommended passage with several “slight” amendments. During the hour-and-a-half second reading consideration the next day the full Senate adopted the report without dissent and overwhelmingly rejected Jenkins’ licensure amendment after Southwick had asserted (without explanation) that it would kill the bill because it was not possible to prevent advertising of an article whose sale was permitted. Though his charge that “[s]killed advertising

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789“Fistic Encounter over Cigaret Measure Marks Bitter Capitol Dispute,” SLT, Feb. 2, 1921 (10:2 at 3).

790Senate Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 199 (Feb. 1); “Fistic Encounter over Cigaret Measure Marks Bitter Capitol Dispute,” SLT, Feb. 2, 1921 (10:1) (quote). Senators Dern and Jenkins, who would cast two thirds of the Nays on final passage, constituted the minority. The committee report proposed amending the section on public smoking by adding “compartments and coaches” to the “extra rooms” in which smoking would be permitted and “motor and other passenger vehicles employed as common carriers” to the list of enclosed public places. It also modified the first sentence of the advertising ban section to expand coverage somewhat. These changes were enacted. 1921 Utah Laws ch. 145, §§ 4, 2, at 390-91.


792Senate Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 269 (Feb. 2); “Senator Southwick Tells Why He Desires Passage of Anticigaret Bill,” SLT, Feb. 3, 1921 (10:1). Though there was no standing vote, it seemed to the Tribune reporter that Dern, Jenkins, and possibly Standish had cast the only Ayes.
causes the boy to think he will never be a man until he smokes cigarettes” was eminently plausible, he failed to unpack his belief that S.B. No. 12 “would do away with 75 per cent of the cigarette smoking in the state.” After rejecting both a motion by Democrat Uriah T. Jones, a Mormon stake president from Cedar City, to amend by striking the sales ban and Jenkins’ killer amendment to extend Southwick’s sales and ad bans to include cigars, tobacco, and tobacco products, the Senate voted by an identical 14 to 3 both to pass the bill to its third reading and on final passage.

The lengthy and incisive debates on S.B. No. 12 on second and third readings on February 2 and 3 featured the most concentrated recriminations by non-Mormon legislators over the Mormon church’s influence on the bill. This controversy was triggered by the interjection of Mormon doctrine by Republican Senator (and Mormon stake president) William H. Smart, whose chief antagonist was Democratic/Progressive Senator George Dern, a mine manager who became governor (1925-33) and Franklin Roosevelt’s secretary of war (1933-36).

So overwhelming and interdisciplinary was the basis of anti-cigaretteism that
Smart was initially able to keep his discourse within secular bounds: “[I]t was almost useless to refer to the scientific proof of the evil side of the cigarette habit: science, morals, economy, all cry out against this evil. [T]he time will come when laws will be enacted to prescribe pure air in places where people congregate. Laws have been enacted to protect the body against impure food and will it be said that a law should not be enacted to protect the air man breathes from impurities, such as lurk in tobacco smoke.” Preparing his transition from contemporary socioeconomic critique to bible thumping, Smart declared: “‘Conspiring men...in order that they might get gain, have concocted the cigarette. In so doing they have commercialized the soul of men....’” At last, the Mormon damn burst and Smart, who enlightened his (non-Mormon) colleagues that “[w]e are living in the last dispensation, and the fullness of time,” quoted from “the Word of Wisdom, which he said a majority of the people of this state believe is the law of God and demand that such principles be enacted into statute.” In particular, he cited the admonition that “tobacco is not good for man....”

Though Dern, a senator since 1915 who would cast one of only three Nays on final passage, also advanced substantive objections to the bill, he opened his Senate floor speech by expressing “his surprise and resentment that the senate should be asked to support a measure because it happens to be in accord with a principle of the dominant church of the state.... He...had heard it intimated that the anti-cigarette bill is a Church measure but he had not expected to hear it as good as admitted on the floor of the senate.” The nonplussed Dern reproached Smart for his propagandistic reliance on Mormon religious dogma:

“I scarcely know how to introduce what I have to say on this bill.... I may say that one of the most remarkable things has just happened that has happened in Utah since statehood. This legislature has been asked to support a measure because it happens to be a part of the doctrine of the dominant church.

“While, of course, it has been very much in the air that the bill has been a church

799“Nine Senators on Record as Being for Anti-Cigarette Bill Senate Talks Show,” DN, Feb. 3, 1921 (1:1 at 4:6).
800“Measure Prohibiting Sale of Cigarets in Utah Is Passed by Senate,” SLT, Feb. 4, 1921 (8:1 at 2). On the use of “conspiring men” in the Word of Wisdom see above this ch.
801“Nine Senators on Record as Being for Anti-Cigarette Bill Senate Talks Show,” DN, Feb. 3, 1921 (1:1 at 4:6).
802“Measure Prohibiting Sale of Cigarets in Utah Is Passed by Senate,” SLT, Feb. 4, 1921 (8:1 at 2).
803“Nine Senators on Record as Being for Anti-Cigarette Bill Senate Talks Show,” DN, Feb. 3, 1921 (1:1 at 4:6).
measure, I had not intended to say anything on that phase of the case.

“But when the matter has been brought up in the form in which it has by the senator from Duchesne, I feel that I should be derelict in my duty as a legislator if I did not raise my voice in protest against bringing the subject of denominational religion in such form into this legislature.

“The arguments advanced for the bill by the senator from Duchesne are very illtimed. Why should they seek to open up the old controversy? For a number of years we have had peace and harmony and cooperation and forgetfulness of religious differences in Utah.

“Why should the old questions be reopened in a matter of this kind? His senate is not a proper place for the discussion of religion.”

Having completed his attack on the Mormon church’s recrudescent theocratic excrescences, Dern made a triple confession to: “personal aversion to the cigaret, of which he found the odor repulsive”; “prejudice against the cigaret, which had probably swayed him in employing men”; and “deep-rooted prejudice against women smoking,” which apparently had originated in a “time when only ‘tough’ women smoked,” though in the wake of the proliferation of smoking among women, he had realized, “in spite of his prejudice...that many women who smoke do not belong on the street.” This introspection led him to share with his colleagues his insight that legislators were apt to resolve public policy questions on the basis of “‘our prejudices, rather than on their merits,’” even though a legislature, “‘[o]f all places...is the place where tolerance should prevail.’” Animated, presumably at least according to his own lights, by that spirit, Dern allowed as cigarettes were “probably harmless” to adult men since he had personally never known any who had been ruined by their use. Countertuitively downplaying the importance of cigarettes for evaluating the anti-cigarette bill, he insisted that the crucial issue was whether public opinion would support S.B. No. 12, and that consequently, since legislation should follow rather than try to lead public opinion, the best method for divining the latter was the initiative process. In the meantime, Dern was willing to preempt public opinion by claiming that the (interstate commerce-driven) loophole for out-of-state mail orders was “as big as a barn door,” which, together with minors’ access to other forms of tobacco, would prompt the legislature in 1923 to amend or repeal it. And, finally, underscoring that in 1921 anti-Southwickians’ animus was the ban on cigarette sales to adults, Dern made it clear that he had “no quarrel with Senator Southwick’s argument as to the personal liberty of the nonsmokers, and personally he would be glad to see the billboard advertising abolished....” Indeed, he even suggested that limiting the billboard ban to cigarettes was

804 Measure Prohibiting Sale of Cigarets in Utah Is Passed by Senate,” SLT, Feb. 4, 1921 (8:1).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

inadequate—a wish for extended coverage, if it was a wish, that would be fulfilled, along with his prediction of repeal of the sales ban, in 1923.

Dern doubtless derived no solace from the assurances offered by Senate President Thomas Evans McKay that “this was not a Utah movement, but an international one. It was not backed alone by the churches of Utah, not by churches alone, but by smokers, too, and he knew hundreds of fathers who smoked and yet were supporting the bill.” Skepticism towards McKay’s denial of Mormon-centered advocacy of Mormon Southwick’s bill could easily have been generated by McKay’s position as an important member of the Mormon church hierarchy (and brother of a later president). Initially, McKay had intended not to speak on S.B. No. 12 “in order to avoid the appearance of any partiality,” but the offer of an amendment to strike the cigarette sales ban prompted him to ask an opponent of the bill to take the chair so that he could refute those who resented Southwick’s interference with their personal liberty by “assert[ing] the superiority of public safety and civic rights” and charging that smokers were as responsible for anti-tobacco legislation as drinkers were for prohibition.

Smart sought to defend himself against Dern’s attack by assuring the Senate

805“Measure Prohibiting Sale of Cigarets in Utah Is Passed by Senate,” SLT, Feb. 4, 1921 (8:1, at 14:5-6). Without explanation, Dern claimed that if the sales ban were enacted, more cigarettes would be shipped in for personal use “than the user now purchases over the counter.” “Nine Senators on Record as Being for Anti-Cigarette Bill Senate Talks Show,” DN, Feb. 3, 1921 (sect. 2, 1:1 at 4:7). Senator Quinney characterized cigarette billboard ads as immoral “because they glorify the cigarette habit.” Id. at 1:1. Complaining especially about billboard ads’ psychological effect, he added: “I feel deep down in my soul that this is an immoral thing.” “Measure Prohibiting Sale of Cigarets in Utah Is Passed by Senate,” SLT, Feb. 4, 1921 (8:1, at 14:5).

806See below this ch.


808McKay (1875-1958) was, inter alia, Ogden stake president and head of missionary work in Germany and Switzerland; later he rose in the hierarchy. http://www.gapages.com/mckayte1.html. Ironically, McKay was also the father of the author of a notorious scholarly debunking of Joseph Smith, who was ex-communicated from the church. Fawn Brodie, No Man Knows My History: The Life of Joseph Smith, the Mormon Prophet 421 (2d ed. rev. and enl. 1971 [1945]) ("the Mormon Church...has survived the growth of the science of anthropology, with scholars in every university save that named after Brigham Young holding the Book of Mormon to be a fantasy").

that he was “‘squarely in harmony with the separation of church and state’”—a proposition he apparently saw no irony in shoring up by declaring that he stood on the platform of rendering unto Caesar what was Caesar’s. He nevertheless insisted that just as the Hebrew, Mohammedan, and even the infidel or agnostic, “‘have a perfect right’” to cite the Talmud, Koran, and Paine, respectively, to “‘support his standpoints,’” so, too, “‘the Christian has a perfect right to refer to ancient and modern records,’” especially since in “‘the mists surrounding this [cigarette] question we are in the midst of spiritual circumstances as well as secular circumstances.’” But just in case Dern or anyone else jumped to the conclusion that he might be a Mormon automaton, Smart asseverated that he had “‘received no counsel...as to my attitude on this or any question before this legislature.’”

Smart was not the only Mormon senator who resented the accusation that he was being dictated to by his church. Since John Peters supported the amendment to strike out the cigarette sales ban—which Mormon stake president Jones, who agreed with Dern “in every particular,” had authored—such a charge would have seemed out of place, but Peters nevertheless declared that he had ceased to respect, as he had been taught, people in authority (merely) because they were in authority. The sharp differences among Smart’s, Jones’s, and Peters’ positions impressively demonstrated that Mormon faith and even office holding failed to mold a monolithic position on tobacco smoking, though Jones was careful to note on the Senate floor that his proposal would leave intact Southwick’s ban on ads and public smoking.

Two days after Senate passage of Southwick bill, the Mormon Deseret News

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810“‘Measure Prohibiting Sale of Cigarets in Utah Is Passed by Senate,’” *SLT*, Feb. 4, 1921 (8:1 at 2).

811“‘Measure Prohibiting Sale of Cigarets in Utah Is Passed by Senate,’” *SLT*, Feb. 4, 1921 (8:1 at 2).

812“‘Measure Prohibiting Sale of Cigarets in Utah Is Passed by Senate,’” *SLT*, Feb. 4, 1921 (8:1 at 14:5). Similarly, Representative Wilford Day, a stake president who had not touched tobacco, liquor, tea, or coffee for 20 years, consistently voted against Southwick’s bill and supported licensure; although he criticized the former because it singled out cigarettes and did not even propose to ban tobacco use, he alluded to the feeling of resentment caused by Southwick’s bill “‘because it would restrain’”; he nevertheless refused to “‘vote to make men thieves and cheats for a package of cigarets, and criminals because they have a package in their possession.’” “House Battles over Committee’s Amendments to Anticigaret Bill,” *SLT*, Feb. 15, 1921 (10:1-3, at 11:1-2 at 2). In addition to being Parowan stake president from 1916 to 1920, Day was engaged in large-scale agriculture, founded a bank, and managed a mercantile enterprise. “Funeral Services Held for Wilford Day,” *Parowan Times*, Oct. 24, 1910 (1:1-2).
published a large advertisement for the Young Men’s and Young Ladies’ Mutual Improvement Associations of Salt Lake County, whose membership totaled 16,000 and which were vitally involved in laying the groundwork for the 1921 measure.\textsuperscript{813} The hard-hitting, pathos-laden ad, replete with an illustration of a hyper-muscular arm and hand (“The Cigarette”) crushing nine—seven male and two female—nicely-clad and terrified youngsters, appealed to (presumably predominantly Mormon reader) parents’ (bad) conscience. Casting the cigarette as the successor to unmasked “Prussianism,” which “hellish thing” “the powers of right” had “crushed” the life out of, the young Mormons urged parents to focus on the at last unveiled “vile, insidious poison which impairs health, impedes progress and dwarfs manhood.”

Parents—will you stand idly by, wishing the cigarette were out of the reach of your boy or girl—but lacking the moral courage to remove it? Which will you heed, the frantic tirade of selfish tobacco interests or the mute appeal of innocent youth, yet untouched by the blighting poison of the cigarette!

The fight is on—NOW. [V]oice your sovereign will; tell your lawmaking body what disposal you wish them to make of Senate Bill No. 12.\textsuperscript{814}

One highly unusual and therefore significant feature of the debate surrounding Southwick’s bill was that Mormon advocacy, unlike the propaganda that anti-smoking groups issued in virtually all other states, publicly confronted, at least in one high-profile print forum, the crucial political-moral issue of justifying the restrictions imposed on adult consumer freedom for the sake of children.\textsuperscript{815} Nine days after their first advertisement had appeared but well before the House vote on S.B. No. 12, the Young Men’s and Young Ladies’ Mutual Improvement Associations of Salt Lake County bought a third of a page in the distinctly anti-prohibitionist Salt Lake Tribune on Valentine’s Day to counteract misunderstandings of S.B. No. 12 propagated by both its opponents and its friends. Offering a very different message and tone, “A Sane Piece of

\textsuperscript{813}See below this ch.

\textsuperscript{814}“—And We Stand Idly By,” DN, Feb. 5, 1921 (sect. 4, VIII:3-7).

\textsuperscript{815}Two weeks earlier a group of 80 apparently unorganized women in the southeastern part of Salt Lake City presented a petition to the legislature in support of Southwick’s bill opining that a statutory sale and use ban was the only way to stop youth from (being exposed to) “the dangers of the cigarette habit” and adding: “Such a law would be no hardship on adults who want to use tobacco as they would be able to continue the habit by using it in other forms that the boy, or girl, would not attempt.” Utah Senate 1921 Petition No. 17 (Jan. 27, 1921) on http://images.archives.utah.gov/cdm4/document.php?CISOROOT=/428&CISOPTR=19235&REC=7
Legislation” was especially intended to dispel the impression that the measure was “‘sumptuous,’ ‘freak’ and ‘insane’ legislation.” Most pertinently in the present context, the young Mormons correctly noted that the bill did “not forbid any adult person from smoking cigarettes in Utah. It merely requires that the cigarette smoker shall get his ‘smokes’ from some point out of the State, and then use them for his own consumption.” The notice then shifted the perspective, pointing out that the bill “will preserve the personal liberty of the non-smoker in many public places.” Curiously, the Mormon mutual improvers failed to mention preservation of non-smokers’ health, though the last line of the message, in tiny print, read: “Let us set up the barrier of law to the menace of the cigarette.”

The Mormon youth may have neglected to flesh out the meaning of “personal liberty” in the secondhand smoke context, but Southwick himself—just a few days after Salt Lake Typographical Union No. 115 had adopted a resolution attacking his “freak and fanatical” bill for restricting its members’ “personal liberties”—had already familiarized the public with the concept a dozen days earlier during Senate floor debate:

Senator Southwick said he was in a railroad waiting room recently in his home town, Lehi. A man was smoking in the closed room when a woman with a baby in her arms entered. The tobacco smoke choked the infant and Senator Southwick said he asked the man to refrain from smoking for the sake of the little one. The man was indignant as he left the room and said it is a “da__ shame a man can’t smoke wherever he wants to.” “We cannot bring our wives and daughters to the city, and cannot come alone without encountering tobacco smoke everywhere that saturates our clothing and nauseates us. Personal liberty! Ours is as inviolate, or should be, [as] theirs. ... I am compelled to go in places filled with tobacco smoke in the transaction of business and when it comes to personal liberty the personal liberty of the non-user of tobacco is as sacred as the personal liberty of the user of the weed.”

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816“A Sane Piece of Legislation,” SLT, Feb. 14, 1921 (7:4-7). During floor debate Senator Knight insisted that it was “time the encroachment on the personal liberty of those who object to the use of tobacco be stopped.” “Cigarette Measure Is Discussed in Senate,” DN, Feb. 3, 1921 (sect. 2, 6:1-4 at 3). A printed form protest against Southwick’s “futile” and “vicious” bill to the governor and legislature circulated in Ogden cigar stores and similar places urged that no more laws be enacted “restricting the personal liberty of our citizens.” Not a single dealer would admit to knowing who stood behind the movement. “Anti-Cigaret Bill Protested,” OS-E, Jan. 30, 1921 (10:1). At a House Manufactures Committee hearing on Southwick’s bill Judge E. F. Colburn’s attack was based almost wholly on personal liberty. “Anticigaret Bill Put Under Fire,” SLT, Feb. 10, 1921 (14:5).


Without disclosing the basis on which he proposed to resolve this antinomy of equal sacrednesses, Southwick—who considerably exaggerated the spatial stringency of his bill in declaring that it did not prevent anyone over 21 who had already “acquired the habit...from smoking in a hotel lobby, on the street, or in his own home” —was nevertheless quick and careful to make his obeisances to a public-private divide, though he seemed bizarrely unaware of the obvious self-contradiction in which his public policy choice had trapped him:

A man has the right to smoke in his own home, that’s his privilege,...but he should not be allowed the right to thwart the growth and progress of the children born to him by his good wife, children to whom the state looks for its future citizens. That man violates a moral law...for which sooner or later he will be held accountable.  

(Two weeks later House Republican N. Enoch Iverson, an anti-tobacco militant who was convinced that, “‘[f]anatic as this statement may seem,’” the “‘day will come when tobacco will be eliminated from this planet,’” playfully supplied the mathematical precision that Southwick himself had refrained from articulating: “‘Personal liberty has been argued on a 50-50 scale.... I contend that inasmuch as I have been smoked for 42 years, I now have a right to live 42 years without being smoked....’”) 

Southwick also invoked science on behalf of non-smokers’ personal liberty by seeking to show that “tobacco smoke itself is a poison. He referred at considerable length to carbon monoxide, reading aloud from a recent edition of a textbook on legal medicine and toxicology about the compound’s 200-fold greater affinity for hemoglobin than oxygen’s. “He spent but little time on the acrolin [sic], which, he said, caused smokers to cough....” In conclusion he delivered himself of a secondhand smoke exposee’s oath: “‘I don’t propose to put up with this poison.’”

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state’s leading daily newspaper had Southwick actually uttering the word “damn.” “Senator Southwick Tells Why He Desires Passage of Anticigarette Measure,” SLT, Feb. 3, 1921 (10:1). Senator Elizabeth Hayward also stated that “her personal liberty had been imposed on by the users of cigarettes.” “Nine Senators on Record as Being for Anti-Cigarette Bill Senate Talks Show,” DN, Feb. 3, 1921 (1:1, at 4:6).

823“Senator Southwick Tells Why He Desires Passage of Anticigarette Measure,” SLT,
Whatever Southwick had previously said on the Senate floor, instead of stating the logical corollary that the same provision would deprive all—and not just cigarette—smokers of personal liberty in many enclosed public places, the young Mormons’ political advertisement tried to put a better face on the situation: “It does not, on the other hand, prohibit the smoker from smoking in hotel lobbies.” Despite this circumlocution, the notice nevertheless raised the key issue, albeit in a non-straightforward response to the question: “Is this radical legislation? Certainly it would seem that if by any measure the youth of the nation can be protected, mature men ought to be willing to undergo some slight inconvenience in the interests of a clean, young manhood.”

Apart from failing to lay out why cigar- or pipe-smoking youth would be “clean,” the Mormons did not bother to explain why being forced to mail-order cigarettes from other
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

states—rather than enjoying the convenience of spontaneously reacting to cues transmitted by a plethora of sellers on every downtown street—and being prohibited from smoking in a restaurant constituted only “slight inconvenience,” but perhaps the mere fact that the bill did not absolutely prohibit the possession of cigarettes, as had Southwick’s anti-cigarette bills in the 1917 and 1919 sessions, sufficed, at least in their minds, to spare it the epithet “too freakish,” of which the House Manufactures Committee amendments were designed to relieve Southwick’s bill.

Whether or not the Mormons had been seeking to meet the arguments advanced by the Salt Lake Tribune editorially the previous day (“Liberty and Tobacco”), their advertisement did not completely succeed. The editorial’s burden was to demonstrate that laws prohibiting intoxicating liquor were “not in principle a precedent” for laws prohibiting tobacco use because, whereas “[a]n intoxicated person becomes a direct menace to the rights of others,” “[o]ne may smoke without injuring his neighbor or interfering with his comfort or convenience.” To be sure, the (typographically challenged) editorialist was willing to admit that:

Those who oppose [sic; must be support] a law against smoking are right, in so far as they object to the indulgence where it interferes with the right of other persons to pure air, but when they oppose the right of a man to smoke where the act does not interfere with the rights of others they go too far and are plainly opposing individual liberty; and the only excuse that can be offered is that smoking is not good for the individual who smokes. But this offers no justification for the law, unless the principle of individual liberty is to be wholly abandoned.

Since the Tribune purported to welcome a law that restrained an individual “immediately he seeks to exercise his own freedom to the detriment of his neighbor”—a situation that presumably included forcing others to breathe impure, tobacco-smoke infested air—the newspaper would have been constrained to acquiesce in the provision banning smoking in enclosed public places, although the Mormon youth did not even bother to spell out the associated discomfort or inconvenience. Where the Mormons fell short of refuting the Tribune’s

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825 See below this ch.
826 “Revised Cigaret Bill Suggested,” SLT, Feb. 9, 1921 (20:4). On the amendments, see below this ch.
conclusion that “prohibition of the sale of tobacco is indefensible” or of satisfying the libertarian newspaper’s schematic prerequisite for state intervention was in showing that adults’ otherwise vested right to buy cigarettes in numerous stores in Utah interfered with or was detrimental to minors’ right to be deprived of access to harmful cigarettes or, less Kantianly expressed, to the state’s power to prevent minors from destroying their health.

As soon as S.B. No. 12 was transmitted to the House a controversy erupted over whether its assignment to the Manufactures and Commerce Committee was proper. In response to a motion by (Southwick supporter) William Seegmiller to assign it instead to the Education Committee, House Speaker Edward R. Callister, presiding over a chamber composed of 46 Republicans and 1 Democrat, stated that he had assigned it to Manufactures because for weeks he had already been referring all the petitions for and against the bill to that committee; he asserted, without explanation, that he also considered it the proper committee. After Seegmiller’s motion lost on a rising vote of 19 to 22, he persisted procedurally by moving that the Manufactures Committee be discharged of the bill. Callister, a lawyer-businessman and an active Mormon who while studying law in Washington, D.C., had been Senator Reed Smoot’s secretary, parried that taking the bill away from the committee “could be construed in no other way than a reflection upon the competence and sincerity of this committee.” Speaker Callister was also quick to insist that: “Notwithstanding reports that have been circulated, the chair wants to let it be known...with all the force at his command, that when the committee on manufactures and commerce was appointed the chair had nothing in mind regarding this bill. None of the members of this committee was consulted with regard to his attitude on this measure.” Despite this protestation of impartiality, Callister in fact voted repeatedly against S.B. No. 12. And although Seegmiller dismissed conjecture that a reassignment would impeach the committee members’ integrity and argued

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832“Cigaret Bill Wings Way to Lower House; Creates Controversy Immediately,” SLT, Feb. 5, 1921 (10:6-7).
834“Cigaret Bill Wings Way to Lower House; Creates Controversy Immediately,” SLT, Feb. 5, 1921 (10:6-7).
that the bill had more to do with education (since educators were “vitaly interested in anticigaret legislation”), it seems plausible that Seegmiller may also have been able to foresee that a majority of the Manufactures Committee was opposed to the sales ban, whereas five members of the seven-member Education Committee would support it. That the House in the end voted 19 to 20 against Seegmiller’s motion (and thus to keep the bill in the Manufactures Committee) made it clear even before substantive debate began that the lower chamber was much more evenly divided than the Senate.

A four-member majority of the five-member House Manufactures and Commerce Committee objectively responded to the young Mormons the very same day by reporting Southwick’s bill to the full House partly rewritten as a watered-down sales licensure measure, but also significantly strengthened by a ban on advertising any tobacco (and not just cigarettes) and a ban on “us[ing] snuff or tobacco in any form” and thus prohibiting chewing tobacco (in addition to smoking any kind of tobacco) in enclosed public places. That opponents of the sales ban deemed it both necessary and acceptable to secure votes for licensing by expanding the scope of the advertising ban was easily explicable on

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836 Wood, Davis, Iverson, Thorn, and A. W. Morrison voted for S.B. No. 12. Seegmiller also mentioned the bill was of unusual interest as a health measure. Four of six members of the Public Health Committee (Clegg, Henderson, Killian, and Wood) also voted for the bill. The seventh member, Hammond, was sick and did not vote. On committee membership, see House Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 59-60 (Jan. 14).


838 House Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 257-59 (Feb. 14). The text was also printed in “Entire Sections of Bill Changed,” SLT, Feb. 15, 1921 (10:4), which reported that the committee “virtually rewrote the measure as it came from the senate.” The amendments largely stemmed from Republican Representative Isabrand Sander (1890-1962), a Mormon cooperative store manager and World War I veteran. “Former Ogdenite Is Visiting from Vernal,” OS-E, Nov. 21, 1920 (11:1); “Car Crashes, Pins, Kills S.L. Driver,” SLT, Aug. 5, 1921 (20:8). Sander’s draft did not retain Southwick’s public smoking ban, but did expand the advertising ban to all tobacco, and nevertheless qualified as eliminating the bill’s “freak features.” “Revised Cigaret Bill Suggested,” SLT, Feb. 9, 1921 (20:4). The Deseret News thus exaggerated in stating that “[p]ractically every effective provision of the Southwick anti-cigarette bill would be eliminated if amendments prepared by Representative Isabrand Sander are adopted.” “Proposed Amendments Would Vitiate Bill Against Cigarettes,” DN, Feb. 9, 1921 (sect. 2, 1:5). Both articles published the text of Sander’s amendments. See also “Would Change Cigaret Bill,” OS-E, Feb. 9, 1921 (3:2).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

the grounds that, as cigar- (but not cigarette-) smoking Ogden Republican and lawyer Royal Douglas put it during House debate: “‘We want to eliminate the advertising that appeals to the minor.... We want to eliminate the advertising showing Santa Claus smoking cigarettes.’” In contrast, anti-Southwickians’ willingness not only to retain, but even to expand the prohibition of public use of tobacco to include non-smoking varieties, which may have been perceived as less of a health hazard and more of an aesthetic nuisance, was not portrayed as intended to diminish minors’ attraction; it therefore suggested that tobacco addicts regarded their personal liberty as considerably less threatened by use restrictions than by a sales ban. In other words, the aforementioned Tribune editorial was being quite literal when it singled out the sales prohibition as indefensible. Indeed, the very fact that the press observed that adoption of the House Manufactures Committee amendments would leave S.B. No. 12 “Minus ‘Freak’ Clauses” despite the insertion of “substitute clauses even more drastic” indicated that restrictions on smoking and chewing tobacco in restaurants, cafes, and several other public places were far from the Southwick regime’s most vulnerable features in terms of alienating users. To be sure, this

839“House Battles over Committee’s Amendments to the Anticigaret Bill,” SLT, Feb. 15, 1921 (10:1-3, 11:1). Two weeks earlier Senator David Jenson had gotten off his chest during floor debate that “[p]articularly did his blood boil...when he saw an advertisement in Collier’s showing the patron Saint of the children, Santa Claus, with a cigarette in his mouth and a package of cigarettes in his hand. He characterized this as desecration of the child’s faith, if not blasphemy.” “Cigarette Measure Is Discussèd in Senate,” DN, Feb. 3, 1921 (sect. 2, 6:1-4 at 4). Because the Southwick bill, for reasons of interstate commerce, did not cover publications printed outside of Utah, it would not have reached ads in national magazines such as Collier’s Weekly.


841“House Committee Presents Drastic Amendments to Cigarette Measure,” DN, Feb. 14, 1921 (sect. 2, 1:1).

842The aforementioned Royal Douglas appeared to be unaware of his self-contradictory attitude toward the majority committee amendments: on the one hand he took extreme umbrage at an alleged legislative trend to “circumscribe our liberties”—which, if it continued, would soon trigger an “internal uprising”—but on the other hand he characterized the amendments as enforcible, unlike Southwick’s bill, which could not be enforced because “too many policemen and sheriffs’ deputies smoke, and they would naturally sympathize with the man who smokes.” Douglas supported the amendments (with their expanded ban on public use of tobacco) despite the fact that he objected in principle to such sumptuary prohibitions: “Cigarets are not offensive to me, but talcum powder is. Would you try to legislate to prevent the woman from taking ths shine off her nose by the use of a little powder? It seems just as sensible as trying to tell men
logically compelling conclusion would be contradicted in 1923 when the leverage point for repealing Southwick’s sales ban turned out to be the sudden enforcement of the smoking prohibition in cafes and restaurants.843

The distance between the contending positions in 1921 was reflected in the lengthy and sharp debate in the full House over the merits of the majority report and the minority report, which latter recommended passage of S.B. No. 12, in which “intense interest” had been aroused,844 as transmitted by the Senate. The zealous criticism of the Southwick bill by the chairman of the Manufactures and Commerce Committee, Alexander R. McIntyre, who owned a drug store in Ogden,845 provoked Mormon Representative and Southwick-supporter Arthur William Morrison846 into asking him whether he sold tobacco in his store. Reprimanded by the House speaker for posing a question of a personal nature, Morrison denied that he had meant it as an insinuation: rather, he had merely been trying to discover whether McIntyre’s tobacco sales might not have tended to influence his attitude in the matter. McIntyre admitted that he sold tobacco, but added that “he also sold poisonous goods, but...only as they should be sold.”847

On the basis of a comparison with similar laws in Kansas, Arkansas, and Tennessee, McIntyre reported to the House that the committee had learned that they were dead letters, and therefore concluded that only licensure would achieve what a majority of Utahns wanted—namely, effectively keeping cigarettes and minors apart.848 The difficulties that contemporaries might have experienced in seeking to discern whether proponents of licensure in good faith actually believed

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they must not smoke where it is offensive to others who do not smoke.” “House Battles over Committee’s Amendments to the Anticigaret Bill,” SLT, Feb. 15, 1921 (10:1-3, 11:1).

843See below this ch.


8451910 and 1920 Census of Population (HeritageQuest) (druggist). McIntyre took out numerous large ads for the store in the Ogden press in 1920 and 1921.


847“House Battles over Committee’s Amendments to the Anticigaret Bill,” SLT, Feb. 15, 1921 (10:1-2). See also “Southwick Bill Is Discussed in House,” DN, Feb. 15, 1921 (sect. 2, 8:1-3 at 2). Morrison posed the same question to Rep. O. F. McShane, another opponent of Southwick’s bill.

that their approach would more effectively curtail youth access or were merely well-rehearsed tobacco industry agents were illustrated by Representative O. F. McShane, who, despite admitting the truth of Representative Morrison’s accusation that he sold tobacco in his store,\textsuperscript{849} counterintuitively insisted on the House floor that licensure would bring about abolition: “The fundamental difference is that the Southwick bill would prohibit the sale but permit the use of cigarettes’.... The proposed amendments would regulate the use and sale and in time prevent entirely the use of tobacco of all kinds.”\textsuperscript{850}

\textsuperscript{849}“House Battles over Committee’s Amendments to the Anticigaret Bill,” \textit{SLT}, Feb. 15, 1921 (10:1-2).

\textsuperscript{850}“Amendments to Anticigaret Measure Rejected in Lower House,” \textit{SLT}, Feb. 17, 1921 (10:1 at 2). At the same time that the Southwick bill appeared to bog down in impasse, word began circulating that once it was disposed of, a “more drastic” measure would be introduced in the House that would prohibit the sale and use of all kinds of tobacco. Prepared by one-time House Speaker Harry S. Joseph, it was to be introduced by Rep. Seegmiller. “Drastic Bill on Tobacco Use to Be Offered,” \textit{SLT}, Feb. 17, 1921 (10:4). (That Joseph really wanted enactment of such a radical prohibition must have appeared wholly implausible to contemporaries since barely three weeks earlier he had spoken at the Senate Judiciary Committee public hearing in defense of “personal liberty,” in opposition to the Southwick bill, and for licensure. “Judiciary Committee Has Public Hearing on Cigarette Measure,” \textit{DN}, Jan. 27, 1921 (sect. 2, 8:6); “Anti-Cigaret Bill Opposed,” \textit{OS-E}, Jan. 27, 1921 (6:3). Moreover, the “personal liberty of the smoker and the non-smoker in the barber shop was a matter of a brief personal altercation between...Joseph and...Southwick, each saying that the other could shave at home....” “Anticigaret Measure Is Warmly Debated Before Senate Committee,” \textit{SLT}, Jan. 28, 1921 (10:7). More remotely, as house speaker in 1907 he had cast one of only five Nays against Croft’s anti-cigarette bill. \textit{House Journal of the Seventh Session of the Legislative Assembly of the State of Utah} 261 (Feb. 12) (1907). Joseph was Jewish, a civil engineer, and mining company president. \textit{Men of Affairs in the State of Utah: A Newspaper Reference Work} (n.p.) (1914). Katie Blakesley, “‘Sin Creeping in Among Us:’ [sic] The Fight to Save the Youth and the 1921 Anti-Cigarette Campaign” at 35 (M.A. thesis, History Dept., U. Utah 2004), misreading the press, erroneously believed that Joseph was a senator.) Once the bill had passed the House unaltered, it was “expected that Mr. Seegmiller w[ould] keep his promise to Mr. Joseph.” “Bill Prohibiting Tobacco in Any Form Promised,” \textit{SLT}, Feb. 25, 1921 (12:2). However, two days after House passage of the Southwick bill, Seegmiller charged that the new measure had been “prepared and fostered by opponents of the Southwick measure for the purpose of defeating tobacco legislation”; he had originally agreed to accept it in order to prevent others who would have introduced it immediately from obstructing progress on S.B. No. 12. “Says Anti-Tobacco Bill Is Insincere,” \textit{DN}, Feb. 26, 1921 (sect. 2, 1:6). Bizarrely, then, after the Southwick bill had been sent to the governor, Seegmiller presented this Trojan horse bill and asked for unanimous consent to introduce it while stressing that he did not want to be
The pro-Southwick rebuttal was delivered by Representative William W. Seegmiller, who quoted from a letter from the aforementioned University of Kansas Professor William McKeever, who attested to the vitality of the Kansas cigarette sales ban and compared the committee’s amendments to the 1921 Kimball bill in Kansas, which had been thoroughly repudiated. Seegmiller also charged that the amendments had been promoted by tobacco interests on the basis of the same arguments that the whisky trust has deployed against prohibition—personal liberty and unenforceability. Feeling personally targeted, Representative Isabrand Sander, who had proposed most of the substance of the committee’s amendments, insisted both that “I have never substituted for a representative of the American Tobacco company” and that he hoped for the time when tobacco could no longer be found in Utah.  

During House debate the theme of personal liberty surfaced repeatedly, nowhere more passionately than from the mouth of Republican Representative Reuben T. Rhees, a Mormon bishop (and the state’s leading beekeeper). A libertarian non-tobacco user—who claimed the privilege of doing as he pleased so long as his actions did not “seriously interfere with the rights” of his neighbors—Rhees held high the banner of diversity and die and let die: “A person should be willing to put up with some inconveniences from the actions of neighbors in order that his neighbors may be willing to put up with his peculiarities.” Rhees, who ultimately voted for licensure and against Southwick’s bill on final passage, developed the personal liberty argument at length:

“While we as a legislative body may not agree as to whether real right is infringed upon by attempting to force American citizens to smoke a pipe or a cigar, when they would

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851 "House Battles over Committee’s Amendments to the Anticigaret Bill,” *SLT*, Feb. 15, 1921 (10:1-2, 11:1-2); "Southwick Bill Is Discussed in House,” *DN*, Feb. 15, 1921 (sect. 2, 8:1-3 at 2) (quote). On McKeever (who was a professor and not, as the press reported, president) and the Kimball bill, see above this ch.

852 *Utah Since Statehood: Historical and Biographical* 3:984, 987 (1919).


prefer to smoke a cigaret, we must agree that either a real or an imaginary liberty is denied them, and whether the personal liberty be real or imaginary, it makes but little difference, they feel imposed upon just the same, and without public need makes it necessary, for the public good, a minority is compelled to make an unwilling sacrifice in the interest of the public as a whole.

“I think it wrong to deprive even a small minority of their personal liberties, even if these liberties should be imaginary. I do not believe it at all necessary in this case to antagonize a large percentage of our citizens by asking them to stop using cigarettes, or go outside of the state to buy them.

“I believe that we are agreed that what we want is to keep tobacco away from those whom [sic] we believe are not old enough to be trusted with the rights and liberties of American citizenship.”

From Rhees’s perspective “[t]he only reason for” Southwick’s bill was “to enforce the one we already have” governing minors. Purportedly for pragmatic reasons, Rhees preferred the proposed licensure measure because it was “less antagonistic to the cigaret smoking citizens”; consequently, even though he conceded that “public sentiment” had not even been strongly in favor of the existing law, Southwick’s bill would have even fewer supporters because it “would array a large number of the adult cigaret smokers and their friends actively against it,” whereas under licensure “they would remain practically neutral.” Since these cigarette smokers whom Rhees sought to accommodate were presumptively largely, if not overwhelmingly, non-Mormon, his stance appears to have replicated the aforementioned policy that the church hierarchy and Senator Smoot had previously pursued lest antagonized ‘Gentiles’ revive the anti-Mormon American Party. Whatever its motivation, Rhees’s position did not even permit him to engage the young Mormons’ argument—which underlay the Southwick bill and ultimately all across-the-board statewide cigarette sales bans—that, on the contrary, it was adult cigarette smokers who should self-sacrifice by acquiescing in cigarettes’ removal from the Utah trade for the benefit of the living minors and future generations.

House disposition of the Southwick bill was stalemated by a seemingly frozen, perfectly even 23 to 23 division between advocates of the Senate measure and those of the licensure-based committee amendments, which became insuperable because the chamber’s sole Democrat, C. A. Hammond—who was

“unofficially reported” as favoring the Southwick amendment”857—was sick and unable to cast the tie-breaking forty-seventh vote. Significantly, eight of the ten members from Salt Lake and three of the four from Weber County (whose county seat was Ogden, Utah’s second largest city) voted for the amendments; Salt Lake’s only supporters of the Senate Southwick bill were both women.858 As a result of this impasse, S.B. No. 12 was placed at the bottom of the third reading calendar; with 18 bills ahead of it; whether any effort would be made to accord it a higher priority was as yet unclear.859

More than week after the chamber had previously deadlocked, the House finally took up the Southwick bill on third reading. Shortly before debate began in mid-afternoon, it seemed to the Deseret News that a majority had formed for the amendments (even though the sole Democrat remained, as he had been for several weeks, seriously ill and confined to his room). The reason for its judgment that licensure would prevail unless the sentiment changed was based on pro-licensing leaders’ claim to have from 26 to 29 votes, although no reason for these alleged defections from a sales prohibition was assigned.860

Consideration of the bill began with a stripped-down amendment offered by Representative McShane, a tobacco seller and one of the chamber’s foremost Southwick opponents: unlike the majority committee recommendation, his motion amended only the bill’s first section by substituting for it a licensure provision similar to the committee’s, but strengthened by the requirement that licensed dealers obtain a $1,000 forfeitable bond. In other words, McShane deleted the committee’s expansion of the scope of the advertising and public smoking bans.861

858 House Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 281-82 (Feb. 16); “Cigarette Bill Is Still Under Discussion,” DN, Feb. 16, 1921 (sect. 2, 8:6-7); “Cigarette Bill on Calendar for Passage,” DN, Feb. 17, 1921 (sect. 2, 8:6). The women were Cloa Clegg and May Belle T. Davis.
859 “Amendments to Anticigaret Measure Rejected in Lower House,” SLT, Feb. 17, 1921 (10:1). Failing to understand that licensure was antithetical to Southwickian prohibition, Katie Blakesley, “‘Sin Creeping in Among Us;’ [sic] The Fight to Save the Youth and the 1921 Anti-Cigarette Campaign” at 38 (M.A. thesis, History Dept., U. Utah 2004), erroneously asserted that the Mormon “church’s campaign of peer pressure, persuasion, and legislative lobbying was so overwhelming that the Southwick bill encountered no serious opposition.”
860 “Southwick Bill to Ban Cigarettes Is Again Subject of Debate in House,” DN, Feb. 24, 1921 (1:7).
861 House Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 257-58, 378-79 (Feb. 14, 24). McShane also deleted the provision in the committee
Why McShane would have expected that this version, which presumptively would have been even less acceptable to Southwickites, would attract even the one vote needed to break the impasse is unclear. His key point in urging them to vote for his amendment was that other states’ experience demonstrated “‘the folly of enacting prohibitive laws without almost unanimous support of the people....’” He argued that his state license fee sufficed because “‘local communities...may place additional licenses at such a figure as will work prohibition to the dealer. Each municipality would be placed on its own initiative to determine the prohibitive clause for itself, and by so doing would be swayed by public sentiment and the law could be enforced.’” Considerable plausibility inhered in this proposed local option regime once McShane’s underlying premise was accepted that Southwickian prohibition would de facto not prohibit, but Seegmiller, the only opposing orator, apparently did not, at least according to press accounts, bother to engage the argument during his few minutes of rebuttal, confining himself instead to reassuring the choir that only prohibition would prohibit the “recognized evil” at issue. Just in case his central point did not carry the day, McShane escorted his listeners to the very edge of the horrific slippery slope that loomed on the legislative horizon: “‘I expect the time to come if this bill goes through unamended when the cup of coffee will be legislated off the family table...or the time whenever we eat grapefruit, we will be instructed to take a dose of cod liver oil after eating.’”

The *in terrorem* effect of cod liver oil must have worn thin on adult Utahns: the 23 to 23 vote on McShane’s motion replicated exactly the Ayes and Nays on the dueling majority and minority committee reports. In order to forestall any momentum that might have built up on behalf of S.B. No. 12 in case of a quick vote, Douglas moved to adjourn to delay any such action until the next morning, but the 22-24 defeat signaled that the impasse had finally been overcome with the advantage having passed to straight Southwickism. On the then ensuing vote on final passage, S.B. No. 12, which had “precipitated two of the most bitter

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amendment that prohibited licensed dealers from charging higher prices for cigarettes than the established retail prices in Colorado, Wyoming, or Arizona, which had been “directed chiefly at the small dealers such as grocers, drug stores and restaurants as it would practically drive these out of the tobacco business.” “House Committee Presents Drastic Amendments to Cigarette Measure,” *DN*, Feb. 14, 1921 (sect. 2, 1:1).

862 “Anti-Cigarette Bill Is Passed by Legislature,” *DN*, Feb. 25, 1921 (1:3).

fights in the lower body of the legislature this session,”864 passed by the seemingly large majority of 33 to 13.865 Ultimately, the impasse was broken only because 10 representatives defected from the licensing position upon realizing that passage of an unamended bill was the alternative to defeat of any cigarette bill.866 One reason that “deserter,” as the disgruntled Tribune preferred calling switchers, “could not vote to kill the measure in its entirety”867 may have been that, although, as the News noted, the House seemed “agreed that some form of anti-cigarette legislation should be passed,”868 some vocal and visceral opponents of prohibition nevertheless felt “‘compelled’” to vote for Southwick in the end because they had “‘pledged’” themselves to their constituents to “‘vote for antitobacco legislation.’”869 (Ironically, the House adjourned after passing the bill because, in compliance with the body’s no-smoking rule, “so many members left the hall of the house for a smoke that a quorum was lacking.”)870

In contrast to the battle in Idaho, the American Legion-WCTU clash in Utah was much more of a sideshow, in part because the Mormon church rather than the women’s organization constituted the driving force behind anti-tobacco legislation, and in part because that very Mormon domination generated and revived a broader and older anti-Mormon sentiment, to which the Legion’s was but a subordinate contribution. (Moreover, for many years the WCTU had taken a very hostile position towards the Mormon church, which had been initially prompted by the degradation of women inherent in polygamy, but then developed into a full-scale attack embracing the hierarchy’s economic investments and monopolies.)871 Nor was the Legion immune from attack by individual Mormon

864“Governor Signs Anticigarette Bill,” SLT, Mar. 9, 1921 (22:7).
866“Anti-Cigarette Bill Is Passed by Legislature,” DN, Feb. 25, 1921 (1:3). Among the 10 switchers were three Salt Lake representatives, leaving that 10-member delegation evenly split, but no Ogdenites, three-fourths of whom remained opposed to the bill.
868“Southwick Bill to Ban Cigarettes Is Again Subject of Debate in House,” DN, Feb. 24, 1921 (1:7).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

legislators. For example, in early February, Republican Senator Perry B. Fuller, a Mormon bishop and mine superintendent, 872 let loose during House floor debate on Southwick’s bill with this blistering taunt: “‘We hear...a lot of stuff about 100 per cent Americans. Isn’t that false? They would perhaps give their lives on the battlefield for their country, but they would not curtail themselves in one selfish desire or appetite to make this country the grandest place in the universe, where, instead of being only 75 per cent efficient, our young people may be 100 per cent efficient.’” 873 Finally, the American Legion itself did not monolithically oppose tobacco regulation: a number of posts even presented petitions to the legislature at 246-57. The WCTU also persistently opposed the seating of Reed Smoot in the U.S. Senate. Shepard, a long-time president of the Utah WCTU, was one of the Mormon church’s most vocal and extreme critics and traveled around the United States attacking its hierarchy. E.g., “Mrs. Shepard Again Heads the W.C.T.U.,” Salt Lake Telegram, Oct. 1, 1915 (4:4); “Mrs Lulu Shepard,” OS-E, Sept. 2, 1919 (4:1) (edit.); “Lulu L. Shepard Again Attacks Mormons,” OS-E, May 28, 1923 (6:4). The Utah WCTU under her leadership did advocate more restrictive anti-cigarette legislation. “Will Make Fight Upon Cigarettes,” SLT, Sept. 24, 1914 (7:1). However, given the scope and intensity of animosity between the WCTU in general and Shepard in particular, on the one hand, and the Mormon church, on the other, cooperation between the two would have been difficult, especially since Shepard had attacked the church because its Saltair bathing resort sold huge amounts of beer. “W.C.T.U. Will Act,” SLT, June 1, 1900 (8:5); Jeffrey Nichols, Prostitution, Polygamy, and Power: Salt Lake City, 1847-1918, at 179 (2002).


873 “Senator Southwick Tells Why He Desires Passage of Anticigaret Measure,” SLT, Feb. 3, 1921 (10:1-2 at 11:3). Missouri Republican state senator Albert Gardner made another atypical contemporaneous attack on World War I soldiers’ cigarette smoking in connection with anti-cigarette legislation. In response to another senator’s concern that a bill to make it a misdemeanor to sell or give away cigarettes to any person under 18 “would interfere with the Red Cross work, as many of the soldiers returning from France are 18, and members of the Red Cross might be violating the law in trying to do the soldiers a kindness,” Gardner “said he would penalize, if he had his way, more than anyone else the soldiers who smoke cigarettes, or the person who gave them to them” because “‘nicotine has done more injury to the physical manhood of this country than all of the alcohol that was ever manufactured.’” In addition, lawyer Gardner opined that cigarette smoking in public places “‘should be made a penitentiary offense.... We ought to legislate to isolate the cigarette smoker to a private den like the opium smoker’” because “the intolerable nuisance, the cigarette smoker,” made “the most high priced and exclusive cafes and restaurants of St. Louis and Kansas City...smell like old shoes, rubber, rags and old leaves....” “Gardner Hits Cigarette Evil, Bill Is Passed,” Chillicothe Constitution, Apr. 3, 1919 (4:5). For the law, see 1919 Missouri Laws at 262.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

urging passage of Southwick’s bill.\textsuperscript{874}

At the House Manufactures Committee February 9 public hearing on Southwick’s bill the Salt Lake post of the American Legion trained its criticism on the “attempt to take the money away from the Utah merchants and let the business firms outside the state profit by the inevitable shipment of tobacco into Utah.” Like its counterpart in Idaho, the American Legion in Utah also attacked the WCTU, but since the latter was not in the vanguard of the anti-cigarette movement in Utah, the Legion focused on an ancillary issue. At that same House committee hearing, Mrs. Stewart (Elizabeth) McLeese, the president of the Central WCTU of Salt Lake, stated that the Red Cross, YMCA, and other relief agencies had “sent tobacco and cigarets to the boys ‘over there,’ but declared that they had been hoodwinked through sinister motives of the big tobacco companies.\textsuperscript{875}” Taking umbrage, Salt Lake post No. 2 unanimously adopted a resolution condemning the WCTU for having claimed that the Red Cross “‘attempted to destroy the morals of the young manhood of America by urging them to use cigarets; that the Red Cross was the tool of the tobacco trust; that for the sake of a few paltry dollars the Red Cross would destroy the manhood of America.’” In fact, according to the Legion, those gifted cigarettes had been “a source of comfort to thousands of soldiers,” who smoked them only because they “desired to and not through any outside influence.” \textsuperscript{876}

\textsuperscript{874}House Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 222, 228 (at least four posts presented petitions signed by at least 43 members). In addition, “ex-servicemen” also signed. \textit{Id.} at 240 (42).


\textsuperscript{876}“Legion Resents W.C.T.U. Action,” \textit{SLT}, Feb. 16, 1921 (20:3). At the Senate Judiciary Committee hearing on Feb. 1, McLeese had expressed regret that “Red Cross
The American Legion’s most vigorous attack on Southwick’s bill was, unsurprisingly, framed in terms of “personal liberty.”877 (What the Legion had in mind became manifest on Christmas Eve following enactment of the Southwick bill when veterans undergoing treatment in a ward occupied solely by them in an Ogden hospital complained about the institution’s rule prohibiting smoking, violation of which, according to the superintendent, would lead to their discharge despite the fact that they did not find smoking offensive to themselves.)878 In a bathetic memorial to the legislature from the Herman Baker post No. 9 of Ogden published as a news article in the Tribune the same day that the young Mormons’ advertisement appeared, the Legionnaires, bemoaning that the anti-cigarette bill was “‘repressive of freedom and antagonistic to the principles of freedom’” for which the post stood, urged that “this tyranny, however un-self-conscious tyranny, masquerading as progress or benevolence, be not permitted to gain a grasp upon the state of Utah.”879 The ex-World War soldiers petitioned the legislature to reject the bill because the choice as to whether or not the citizen shall smoke cigarettes is purely an individual and moral choice and is of no legislative or social concern, and is a choice...which is one of the prerogatives of personal liberty and therefore of particular sanctity to your memorialist, which is composed of men who remember and strive to perpetuate in all men the memory that Americans have ever been jealous to preserve and vigilant to defend the right of individual freedom of moral...action and the right of freedom of conscience; and...senate bill No. 12, seeking as it does by effect, if not by intention, to entail the freedom of conscience and the liberty of moral action asserted by the Declaration of Independence and guaranteed by the constitution of the United States, not only [is] opposed to ancient and holy principles of American justice, but also projects the legislative function of the state into the domain of conscience, where it is forbidden to go, and makes insecure for the

877 At least one anti-Southwick bill House petition (with 50 signatures) combined criticism of its infringement on personal liberty and “hardship on the thousands of citizens whose livelihood is obtained from the growing, curing, packing, sale, etc. of tobacco....” House Petition No. 2 (Jan. 21, 1921), on http://images.archives.utah/cdm4/document.php?CISOROOT=/432&CISOPTR=137889&REC=1.


879 “Legion Attacks Southwick Bill,” SLT, Feb. 14, 1921 (14:5). Virtually the same article was published as “Legion Opposes Southwick Bill,” OS-E, Feb. 14, 1921 (3:5-6).
future that confidence in republican institutions which is at once the glory and the safeguard of our country.\textsuperscript{880}

This bombastic invocation of freedom of conscience to justify the unimpeded flourishing of nicotine addiction regardless of the public health consequences for other Utahns—pretty heady stuff for Ogden vets—was apparently composed by the 24-year-old future nationally renowned Pulitzer Prize winning historian, novelist, literary critic, essayist, editor, and conservationist Bernard De Voto. Son of a Mormon mother, he formed a socialist group at the University of Utah which he quit after unorthodox professors had been fired, transferred to Harvard, was commissioned an infantry lieutenant in the war, was graduated from Harvard, and returned to Ogden, where, in 1921, in addition to being a junior high school teacher, as chairman of the Legion committee to memorialize the legislature, he presumably got to strut his rhetorical stuff in this petition.\textsuperscript{881}

The aftermath of the passage of the Southwick bill in Utah eerily resembled that of its Idaho counterpart\textsuperscript{882} in certain respects, but revealed much deeper reserves of anti-tobaccoism, which put to nought opponents’ hopes that, on the strength of the governor’s criticism of freak legislation in his message to the legislature, he might veto the bill.\textsuperscript{883} Less than a week after Idaho’s Republican governor had signed the cigarette sales ban but admonished the legislature to substitute licensure for prohibition, thus prompting repeal, Utah’s Republican Governor Charles Mabey, a Mormon who became a leader of the Young Men’s Mutual Improvement Association (which played an important part in preparing the way for acceptance of Southwick’s bill),\textsuperscript{884} seemed to be engaged in a reprise when he signed S.B. No. 12 but announced that he “believed the measure inoperative and inefficacious so far as its ability to bring the results its proponents

\textsuperscript{880}“Legion Attacks Southwick Bill,” \textit{SLT}, Feb. 14, 1921 (14:4). Virtually the same article was published as “Legion Opposes Southwick Bill,” \textit{OS-E}, Feb. 14, 1921 (3:5-6).


\textsuperscript{882}See below this ch.

\textsuperscript{883}“Utah’s Anti-Cigaret Bill Before Governor,” \textit{OS-E}, Feb. 25, 1921 (1:1).

\textsuperscript{884}See below this ch.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

desire is concerned. Mr. Mabey intimated that if the law is repealed and a new bill, perhaps less drastic, passed in its stead, the move would meet with general satisfaction."885 However, not only did the Utah legislature not emulate Idaho’s by disavowing its own prohibitory bill in the same session, but, the national tobacco trade press reported, it was “freely predicted that the Utah act is the forerunner of a measure which will drive tobacco from the State two years hence."886

In the event, the 1923 legislative session brought about repeal of the sales ban and dilution of the smoking ban in public eating places to the point of de facto repeal, but also a retention and even a partial expansion of the advertising ban to encompass non-cigarette tobacco (thus refuting Southwick’s and others’ claims that a sales ban was a prerequisite for an advertising ban).887

885“Governor Signs Anticigaret Bill,” SLT, Mar. 9, 1921 (22:7). There had also been speculation that the governor might return the bill for amendments. “Anti-Cigarette Bill Signed by Governor; Becomes Law June 8,” DN, Mar. 9, 1921 (sect. 2, 10:6).
887See below this ch. The Utah Supreme Court invalidated the ban on advertising in Utah newspapers as an interference with interstate commerce. State v Salt Lake Tribune Pub. Co., 68 Utah 187 (1926). In 1929, a bill was introduced to repeal the entire advertising ban, but the House amended it with the result that the legislature in the end made it a misdemeanor to “display on any bill board, street car sign, street car, placard, or on any other object or place of display any advertisement of cigarettes, cigarette papers, chewing tobacco, or smoking tobacco..., except that a dealer in cigarettes, cigarette papers, tobacco or cigars...may have a sign on the front of his place of business stating that he is a dealer in such articles....” 1929 Utah Laws ch. 29, § 2 at 173. See also House Journal: Eighteenth Session of the Legislature of the State of Utah: 1929, at 230, 541-42 (Feb. 13, Mar. 11) (H.B. No. 97, by Critchlow, 47 to 5); Senate Journal: Eighteenth Session of the Legislature of the State of Utah: 1929, at 842-43 (Mar. 13) (15 to 0); “Senate Ends Needed Work,” SLT, Mar. 14, 1929 (9:3-5 at 4); “Cigaret Ads Ban pending,” SLT, Mar. 30, 1929 (28:7); “Test Case Filed on Advertising of Cigarets, Tobacco,” Salt Lake Telegram, Apr. 3, 1929 (Local page 1:2); “Tobacco Edict Action Begins,” SLT, Apr. 4, 1929 (20:3). The attorney general had previously interpreted this provision as prohibiting the display or other advertising of cigarettes or cigarette papers in any store window. Biennial Report of the Attorney General to the Governor of the State of Utah for the Period Ending November 30, 1924, at 97 (May 18, 1923). In a unanimous opinion written by Justice Brandeis the U.S. Supreme Court affirmed the very forceful and socially-psychologically realistic ruling of the Utah Supreme Court upholding the validity of the ban on bill board ads. State v Packer Corp., 77 Utah 500 (1931), aff’d sub nom. Packer Corp. v Utah, 285 US 105 (1932). The Utah Supreme Court decision was in part driven by the state’s police power to protect minors, among whom “the tobacco habit has made great inroads” in part because manufacturers and dealers had been “left free to appeal to
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Idaho Repeals Its Ban Even Before the 1921 Session Ends

The Sixteenth Session of the Idaho Legislature has produced in this bill...a measure that is entitled to admission to the legislative chamber of horrors by unanimous vote.888

We taught two millions boys to smoke cigarettes. The military authorities encouraged it, the preachers in the service sanctioned it, the Y. M. C. A. was a party to it. Now let’s throw the boys in jail for having learned it? Is it wise? Is it the best way to cure the evil?889

Though not so extensive, intensive, or nearly successful as their counterparts in Utah, failed efforts to secure passage of a blanket cigarette sales ban in Idaho went back to the beginning of the century.890 This failure even to reach a floor the boys and girls as well as adults with most alluring and attractive cigarette and tobacco advertisements....” Although the Court took judicial notice of the fact that “[t]he recruits into the ranks of smokers come largely from the boys and girls rather than from people of maturity,” it was not confining itself to minors when it added: “One cannot walk or ride along a public street or highway without being continually attracted by artistic and fascinating billboard advertisements featuring beautiful girls and handsome young men calling attention to the alleged virtues of the various brands of cigarettes and smoking tobacco.... Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them.... In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard.” State v Packer Corp., 77 Utah 500, 512, 514, 515 (1931). Unchanged, the law remains in the Utah Code. Utah Code § 76-10-102 (2008). For a thoroughly confused and empirically false account of the advertising ban culminating in the assertion that it had been judicially invalidated (because the author was ignorant of the fact that the Utah Supreme Court had reversed that lower court decision and that the U.S. Supreme Court had upheld that reversal), see Thomas Alexander, “The Word of Wisdom: From Principle to Requirement,” Dialogue: A Journal of Mormon Thought 14:78-88 at 83 (Fall 1981).

888“Smoke Wreaths,” TFDN, Feb. 26, 1921 (6:1) (edit.).


890For the bills in 1901, 1907, and 1917, see Journal of the House of Representatives of the State of Idaho: Sixth Session...1901, at 145, 156-57 (Feb. 25, 27) (1901) (H.B. No. 1490
vote in Idaho was finally overcome in 1921, after Senate Bill No. 134 was introduced on February 2. Compared to the Utah bill, the Idaho measure—which amended the existing 1889-90 law outlawing sales to persons under 21—was modest, merely making it unlawful for “any merchant, trader, peddler, pharmacist, apothecary, or any other person or persons, male or female, in this state, with or without a license, to import for sale or to have in his possession for sale, or to sell by wholesale or retail, or give away, directly or indirectly, to any person or persons, male or female, within the state of Idaho, cigarettes for smoking, or any cigarette papers or wrappers, or any paper made or prepared for the purpose of making cigarettes, or the compounds of tobacco used in the filling or makeup of cigarettes.” Those convicted of violating this provision were subject to a fine of $50 to $100 for the first offense and $100 to $300 or by imprisonment in county jail for a maximum of six months for the second offense. The bill also amended the existing 1913 law prohibiting minors, subject to a $10 fine, from smoking or using cigars, cigarettes, or tobacco in any form in any public road, alley, street, park or other land used for a public purpose or in any public place of business to fine any minor up to $100 “who shall buy, accept or have in his possession any cigarette, cigar, or tobacco in any form...or any cigarette paper or other paper or wrapper intended for the wrapping of tobacco in the form of a cigarette, or compounds of tobacco used in the filling...”

177, by Pence, read twice and referred to committee); Journal of the House of Representatives of the State of Idaho: Ninth Session...1907... at 118, 119, 134, 164, 194, 203 (Feb. 14, 18, 21, 26, 27) (H.B. No. 150 by Anderson of Bingham, committee of whole report adopted recommending author be allowed to withdraw bill after Public Health Committee had recommended that bill pass as amended); Journal of the State Senate of the Idaho Legislature: Fourteenth Session 215, 248, 265, 446 (Feb. 19, 23, 24, Mar. 10) (1917) (S.B. No. 184 by Jackson, died on 3d reading after State Affairs Committee had recommended it not pass). No general cigarette sales prohibitory bills were introduced at the 1919 session. Journal of the House of Representatives of the Idaho Legislature: Fifteenth Session...1919; Journal of the State Senate of the Legislature of Idaho: Fifteenth Session...1919.

891 Journal of the State Senate of the Legislature of Idaho: Sixteenth Session...1921, at 140 (Feb. 2).
8921889-90 Idaho Sess. Laws at 49 (codified at Compiled Statutes of Idaho v. 2, § 8362 (1919)).
893“Would Prohibit Cigarette Sale,” IDS, Feb. 3, 1921 (5:3, 3:1). S.B. No. 134 added the language “to import for sale, or to have in his possession for sale.”
8941913 Idaho Sess. Laws ch. 150, at 519 (codified at Compiled Statutes of Idaho v. 2, § 8363 (1919)).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Idaho newspaper readers would have known that the Utah proposal went far beyond Idaho’s because in early January, two weeks before the former’s introduction, the Idaho press had run an Associated Press article about it the same day that it appeared in Salt Lake City. Highlighting the provision in Senator Edward Southwick’s anti-tobacco-bill-to-be that would prohibit “the smoking of pipe or cigars in any public place, with the exception of the street,” the piece added that he had included cigars and pipes in the public smoking ban “because he felt that smokers should be compelled to show consideration for non-smokers.” Despite its radicality and his publicly known intent to “legislate [cigarettes] out of existence,” he already “knew it would have the support of a majority of the senate and...felt the house also would support” it.  

The Idaho bill’s introducer, Ralph Joseph Harding (1871-1933), was one of only five Democrats in the 44-seat Senate. A 49-year-old Mormon bishop from Malad (pop. 2,535) in Oneida County, he was a farmer and manager of the Malad branch of the Consolidated Wagon and Machine Company. Having grown up in a Mormon family in Utah and attended Brigham Young College, Harding “fulfilled an L.D.S. mission in the Eastern States” and then settled in Malad, where he opened a meat market and grocery store. There he served on the school board, city council, and county commission and as mayor, in addition to being state senator from 1915 to 1918 and 1921-22. As well as being a Mormon high priest, Harding “served as a counselor in the bishopric, was a member of the Oneida Stake High Council for many years and held numerous offices in church auxiliaries.”

Oneida County, bordering on Utah, is located in southeastern Idaho, which

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897 Journal of the State Senate of the Legislature of Idaho: Sixteenth Session...1921, at 4.
898 1900 Census of Population (HeritageQuest); Glen Harding, The Dwight Harding Family 180 (1968).
899 “Cigaret Banned in Idaho Senate,” SLT, Feb. 22, 1921 (9:5).
900 1910 and 1920 Census of Population (HeritageQuest); Glen Harding, The Dwight Harding Family 139 (1968); telephone interview with Joyce Harding Freidenberger (Harding’s granddaughter), Malad, ID (May 1, 2011).
901 Glen Harding, The Dwight Harding Family 139, 141 (1968).
902 Idaho Blue Book: 2005-2006, at 180. Glen Harding, The Dwight Harding Family 141 (1968), erroneously stated that he was a state senator for eight terms.
903 Glen Harding, The Dwight Harding Family 141 (1968).
Mormons colonized in the 1870s at Brigham Young’s direction; even at the beginning of the twenty-first century, the area’s population was still 61 percent Mormon, with individual counties’ values ranging between 35 and 92 percent. (Oneida County was one of the three southeasternmost counties whose total Mormon proportion in 1990 fell in the highest recorded group—73-100 percent.) Overall, the state’s population in 1911 had been estimated to be 30 percent Mormon so that the “parties are so evenly balanced that this is enough to permit the Mormons, by going in between, to have their way.”

During the bill’s third reading on February 21, Harding presented petitions that Mormons all over Idaho had signed urging passage of S.B. No. 134. He was also the only senator to speak on its behalf, pointing out that nationally $2 billion was spent on tobacco and that 46 billion cigarettes were manufactured annually. To bolster his claim that “[m]any great educators, business and professional men...opposed...the use of cigarettes” he showed three bundles of letters representing the opinions of more than 6,000 Idahoans and added that “the women’s clubs were all against the use of the cigarette.” The state’s leading paper, the Republican Idaho Daily Statesman, reported that Harding’s “strong point of argument was based on the destruction, which he claims the cigarette causes,” but the illustration he used merely cited his personal experience of having seen five girls under 17 years of age smoking cigarettes in a Boise cafe without explaining how “the use of the cigarette affected the mental powers of young people,” though he asserted that that reason explained why “‘many business houses will not employ young men who smoke cigarettes.”

Despite Harding’s (apparently) unenlightening cliches and “without a single word being

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905 Historical Atlas of Mormonism, map 64 at 129 (S. Brown et al. eds. 1994).


uttered in opposition,"909 S.B. No. 134 passed by the large majority of 29 to 12.910 The day after the Utah legislature had passed Southwick’s bill the overwhelmingly Republican Idaho House—Democrats occupied only three of 54 seats911—first debated for more than an hour a motion to postpone S.B. No. 134 indefinitely. Almost half of the membership participated, most speaking in support of the bill. Opponents drew on disparate and irreconcilable arguments, ranging from the claim—so prevalent in Utah—that the measure was “an unwarranted invasion of personal liberty” to the quibble that it was a weak prohibitory law because it failed to prohibit shipping cigarettes into Idaho that had been bought outside the state. House Speaker Peter Johnston handed the gavel over to another member so that he could “charge from the floor that representatives of the American Tobacco company had been lobbying against the bill.”912 After the motion to kill, which was in effect a test vote, had been defeated by a vote of 21 to 30, the House passed the bill by the even larger majority of 33 to 19.913

As soon as Idaho S.B. No. 134 became eligible for the governor’s signature, the opposition, ostensibly led by the American Legion, burst forth with sharp ad uxorom attacks on the WCTU. Seven world war veterans published a letter to the Statesman agreeing with Senator Harding that cigarette smoking affected minors’ and children’s intelligence, but asking rhetorically when Idaho officials were “appointed [sic] for the sole purpose of prohibiting the sale of tobacco to all” adults. Indignant over the affront to “true liberty and freedom” for which they had fought, the ex-soldiers wanted to know: “[I]s it any more than fair that we ask the privilege of smoking a cigarette now and then, if we so desire?” They found it regrettable that “no more of the state’s honorable senators were not [sic] in...France, when even the smell of a ‘Bull Durham’ was a mighty rare and

910 Journal of the State Senate of the Legislature of Idaho: Sixteenth Session...1921, at 307 (Feb. 21). Three of the four voting Democrats supported the bill.
911 Journal of the House of Representatives of the Legislature of Idaho: Sixteenth Session...1921, at 3-4 (Jan. 3).
913 Journal of the House of Representatives of the Legislature of Idaho: Sixteenth Session...1921, at 340 (Feb. 25). Three of the four representatives from Boise, the state’s largest city, voted to postpone indefinitely and then for S.B. No. 134. Id and at 3-4.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

pleasing sensation to the boys who wore the uniform of Uncle Sam.” So attached were the veterans, who by this point were virtually drowning in bathos, to the liberty-freedom-cigarettes nexus that even though some of them were not cigarette smokers, “in memory of our cigarette smoking buddies who are still in France, and will never be forgotten by the buddies who will ‘carry on’ for liberty and Democracy to the last letter of the last word, we strive to attain those ends we believe to be national and personal liberty!” Demonstrating just how advanced their views were, the writers took a forthright stance vindicating “a woman the same privilege” to smoke that a man had because “we are not living in Hicksville or Oneida county. We are living in the state of Idaho, governed by and for its citizens, and not by the W.C.T.U. ....”

Sticking up for “some of our most successful and brainy men” men (such as the “great Goethals, who split Panama’s isthmus”) who smoked cigarettes as well as “many a tireless general and equally brave soldier in the trenches [who] got some solace from a convenient form of tobacco in turning back a recent menace to civilization which would have given members of the women’s clubs greater things to worry about than strict and unwarranted regulation of some of life’s petty failings,” a Boise resident who purported not to smoke cigarettes also gained access to the Statesman’s columns to denounce the WCTU and its senatorial puppets:

Last Monday, without a single word being uttered in opposition, the Idaho senate passed an anti-cigarette law. There were 12 men with enough red blood and backbone to vote against this measure, dictated by a narrow-minded, bigoted, semi-religious organization, which would regulate every human activity by statute. [T]he quaking legislator has again jumped through the hoop when the beskirted mistress of the ring cracks the whip.

The Idaho legislature...should...stop this undue yielding to feminine dictation.

A sharp riposte to the veterans was administered by 66-year-old Methodist minister Wilmott Woodruff Van Dusen on behalf of the “members of the almost slandered W.C.T.U.,” one or more of whom he suspected were the mothers of the libeling signers. Having imagined that it would be “rather difficult to slander a

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914 Jack Keith et al., “Former Service Men Come to Defense of Slandered Cigarette,” IDS, Feb. 25, 1921 (5:5-7). None of the seven writers appeared in the 1920 population census as living in Idaho.

915 D. B. Leaver, “Senators Scored for Slapping Lady Nicotine,” IDS, Feb. 25, 1921 (5:7, at 10:4) (letter to editor). No one in Idaho at the 1910 or 1920 census was returned with this last name.

thing like the cigarette and the polecat,” he wondered at former soldiers who “appear to think they will be deprived of certain liberty due an American if they are not allowed to smoke cigarettes where and when they may please.” For his part, Van Dusen took umbrage at secondhand smoke exposure: “Public places which must be frequented by women, and by some men who abhor the fumes of the weed, are rendered very offensive by the users of tobacco, who insist on having the liberty to have their way, regardless of the wishes or dislikes of others who feel they are entitled to the liberty of fresh and unpolluted [sic] atmosphere.” The minister hardly minced matters in reminding his ambient air quality adversaries that they were not the only Americans who had “the right of liberty of thought and action.” The “clean air” that Van Dusen and his allies had to breathe for the “clean bodies and minds” to which they claimed a right was denied them “by people who claim the liberty to smoke in company, or where the fumes of their cigarettes peenrate [sic] the presence of others.” Instancing only one illustration among scores, he pointed out that it was a “trial to ride in a railway coach with a smoking appartment [sic] in one end, for the filth permeates the entire car, and the defenseless women and children are forced to breathe the poluted [sic] atmosphere.”

Although Van Dusen certainly did not articulate the kind of obfuscatory mutual “accommodation” program that cigarette manufacturers propagated in the last quarter of the twentieth century, his designation of the golden rule as “the correct law of life,” his appeal to smokers to “regard the rights” of non-smokers, and his plea for letting both “the law work in all directions” and “each regard the rights of others” in the absence of any call for a statewide statute—like the pending Utah bill—prohibiting tobacco smoking in various public places left unclear where “defenseless women and children” and “some men” would be free of smokers and where and how offended non-smokers would ever have to “regard the rights” of smokers. But this type of

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918 See below Part VI.
919 W. W. Van Dusen, “Tobacco Destroys Finer Senses, Says Minister,” IDS, Feb. 26, 1921 (4:3-4). That some at least believed that smokers’ rights did not in all cases extend even to their homes emerged from a letter to the editor in the same issue of the newspaper by a woman in Boise, who, arguing that “Cigarettes Affect Unborn Babes,” suggested that readers “[a]sk any honest medical man to give you the benefit of his medical knowledge as to the effects of cigarette smoking upon the embryo of an unborn child” and insisted that babies would “be marked 100 per cent in the health test...if the father has exercised the same self-denial and thought that good mothers willingly exercise.” Mrs. E. R. Hanford, “Cigarettes Affect Unborn Babes, Says Boise Forum Writer,” IDS, Feb. 26, 1921 (4:3). The author was Katharine B. Hanford, the 37-year-old wife of Edwin R. Hanford, a
accommodation was not what veterans had uppermost in mind. What they wanted to know from Van Dusen was: “Would you refuse a dying doughboy when his last words were, ‘give me a cigarette?’” [sic].

A point-by-point critique of the Legionnaires’ letter was published by a three-member committee of the WCTU union in Gooding County in southwestern Idaho. The three appointed women were 32-year-old Mrs. Eva M. Moore (corresponding secretary, whose husband was a rural mailman), 42-year-old Mrs. C. H. (Maude) Douglass (who was married to a carpenter), and 48-year-old Mrs E. E. Brandt (whose husband was county probate judge, but also a ranch lands owner, real estate businessman, former general store merchant, and Methodist).

Picking up on the veterans’ admission that cigarettes were injurious to minors, the threesome needled them: “Do they not know that thousands of minors are using them and that they will continue to get them until the cigarette is entirely outlawed? Does not little brother want to be as nearly like daddy and big brother as possible?” Questioning the ex-soldiers’ absolutizing of personal liberties, they denied that any person had a “right to liberties which will injure another” and advanced a tenet of state paternalism over biological paternalism that 90 years later has still not been universally implemented: “Does it seem right or reasonable for a man or woman...to pursue habits which science has proven might seriously injure the health or intellect of their children?” Without giving full credence to the Legionnaires’ claim that they limited themselves to an “occasional cigarette,” the WCTU acknowledged that: “Some can and do, but most men are real slaves to the habit, unable to resist smoking almost constantly.” And as for the Red Cross’s having provided cigarettes to soldiers, the women focused on the profit-making context: “But while other people were too busy to realize what they were about the tobacco trust improved the opportunity ‘to put something over on us’ and fastened the cigarette habit on thousands who had never used it before, for the express purpose of increasing their future sales.”

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922Mrs. Eva M. Moore et al., “Gooding W.C.T.U. Don’t Want Boy to Associate with My Lady Nicotine,” IDS, Feb. 28, 1921 (4:6-7) (letter to editor). A pro-cigarette, non-cigarette-smoking veteran stated that 225 of 250 soldiers in his company had smoked cigarettes as well as eight of the group of nine with whom he had been examined for the
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Because “[s]ome of the American Legion boys” regarded the cigarette sales ban “as a direct slap at them and they resent it,” the day after House passage of the Senate bill “American Legion posts all over the state...sent protests to Governor Davis...urging the governor to send the bill back to the legislature without his signature...accompanied by a note telling them [sic] he will sign a bill ‘prohibiting the use of tobacco in any form.’” The purpose of this non-discriminatory approach was to “‘kill this pernicious attack on the liberties of ex-service men.’” A dozen other posts immediately followed suit. This movement began in Nampa under the leadership of Harold Jenness, editor of a Republican newspaper there, who undertook to mobilize all the state posts. Despite an announcement that such a universal bill killer was being prepared and would be introduced within a few days, legislative repeal strategy took a different course.

At the same time that the American Legion in Idaho was pressing for repeal, tobacco dealers were expressing fears that the law would also prohibit the sale of pipe tobacco on the grounds that the law prohibited the sale of “the compounds of tobacco used in the filling or makeup of cigarettes.” The attorney general initially declined to comment because he had not studied the bill, but one Boise lawyer opined: “‘No one who sells...smoking tobacco for use in a pipe could be convicted...unless he knew or had reason to know that the tobacco was to be used as a compound in the filling or makeup of a cigarette.’” Soon, however, lawyers split on the interpretation of this provision, though it was “announced in state circles that it was probable” that the attorney general “would rule that the bill ‘had teeth’ and would stop the sale of smoking tobacco to minors.” Since the second section of the bill expressly prohibited buying by or selling to minors of “tobacco in any form,” the alleged attorney general opinion-to-be not only was superfluous, but skirted the vital issue as to whether sale to adults of pipe tobacco

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923“Gossip from the State House,” Idaho Statesman, Feb. 27, 1921 (5:3-4).


925“Gossip from the State House,” Idaho Statesman, Feb. 27, 1921 (5:3-4). Jenness, a graduate of the journalism school at the University of Wisconsin who was managing editor of the Leader-Herald under his father, had, as a member of the Idaho militia, been on the Mexican border for six months in 1916-17. History of Idaho: Gem of the Mountains 3:430 (1920); “Personals,” Editor & Publisher, Mar. 17, 1917, at 12.


came within the ban in section one on selling “the compounds of tobacco used in the filling or makeup of cigarettes.”

Ultimately of more practical consequence for the debate was (editorial) criticism that the sales ban law “can work to the benefit of one interest alone—and that is the mail order tobacco dealer. ... It puts the Idaho cigarette dealer out of business, but it does not put a stop to the cigarette business, it simply diverts it to dealers in states that have not the questionable benefits of such legislation.”\textsuperscript{928} This argument, which, since its emergence in the 1890s, had prompted advocates of anti-cigarette legislation to concede that the “original package” doctrine would unavoidably facilitate some leakage,\textsuperscript{929} doubled here as the illogical claim that the new law would make cigarettes more accessible to the youth than ever before because he would no longer have to induce a local dealer to sell them and risk being punished himself if caught—instead, “like a great many of his elders,...he may be expected to make known his wants at long distance to the mail order dealer.”\textsuperscript{930} Such speculation not only failed to raise the question as to why, under those circumstances, minors would not have preferred buying cigarettes by mail under the old law, but also overlooked the answers that they were: less able financially to afford whole packages; less socially-psychologically organized to plan the logistics of such interstate purchases; and more exposed to the risk of being seen in possession of cigarettes if they received them by mail at their parents’ home or at the post office.\textsuperscript{931} Moreover, licensure and unimpeded sales to adults made emulation possible, especially as it was exacerbated when “[y]ou see the medical profession and clergy using the weed, setting an example to the youth of our country.”\textsuperscript{932}

\textsuperscript{928}“Smoke Wreaths,” \textit{TFDN}, Feb. 26, 1921 (6:1) (edit.).
\textsuperscript{929}See above chs. 10-11.
\textsuperscript{930}“Smoke Wreaths,” \textit{TFDN}, Feb. 26, 1921 (6:1) (edit.).
\textsuperscript{931}To be sure, such public observation also had to be coupled with informing the authorities of minors’ illegal possession (if, that is, such possession, in contradistinction to to buying or smoking, was prohibited). Thus, for example, in 1923 a Utah legislator who was all for giving Utah newspapers the right to advertise cigarettes stated during floor debate on repealing Utah’s general sales ban: “‘I have seen young people in my home town get cigarettes at the postoffice by the carton when they could not buy them from home dealers.’” “New Tobacco Bill Passes Legislature, Signed by Governor,” \textit{SLT}, Mar. 9, 1923 (1:7, at 10:2) (Rep. Constantine). From 1903 to 1911 it had been unlawful for under-18-year-olds to buy, accept, or have in their possession cigars, cigarettes, or tobacco in any form; in 1911 the age was increased to 21. The maximum fine was $100. 1903 Utah Laws ch. 135 at 186; 1911 Utah Laws ch. 51, at 68; Compiled Laws of the State of Utah § 8443 at 1625 (1917).
On March 2, Republican Governor David Davis, a Welsh-born banker, notified a delegation of veterans representing American Legion posts throughout Idaho who had urged him to veto S.B. No. 134 that he would sign it. But when he returned the bill to the Senate the following day with his signature his accompanying letter contained a proposal that in effect threw out the baby with the bathwater:

“This measure is signed because of the fact that it aims to strike at the evil of the use of tobacco by minors. In my opinion, the law, as it is drawn, does not accomplish the great purpose which its author and those who voted for it had in mind. The lack of restriction on the mail order business, which would open the avenue to a large number of cigarettes being sold to minors by mail, cannot be corrected except by federal statute.

“In sending this bill back to you, signed, I strongly recommend that the legislature amend section 1, substituting therefore a section which will license and bond tobacco dealers and provide such a penalty for the breaking of the law that a conviction on the charge of selling to minors will be strongly punished. Such an amendment to this bill will, I think, reach the evil which its authors and supporters wish to accomplish, but will at the same time be fair and equitable.”

The prearranged character of this overturning of the statewide sales prohibition emerged from the fact that on the morning of the same day that Davis sent his letter, the Senate State Affairs Committee introduced the bill of Republican Senator C. W. King (who had voted against Harding’s bill), which embodied the governor’s recommendations. In place of the principal section of Harding’s bill, which S.B. No. 327 formally repealed, the new measure established a mandatory licensure system that covered the sale not only of cigarettes and cigarette wrappers and papers, but also cigars, smoking tobacco, chewing tobacco, and “any tobacco or product or compound of tobacco in any form...” (This subjection of non-cigarette tobacco dealers to licensure—which

(letter to editor).

934“Governor Will Ban Cigarettes,” DN, Mar. 2, 1921 (2:1).
936“Governor Signs Cigarette Law,” IDS, Mar. 4, 1921 (5:2); “Second Tobacco Measure Born in Upper House,” IDS, Mar. 4, 1921 (5:1). The report that Senate Republicans in caucus “Saturday afternoon” [March 5] favored the amendments must have been a typo for “Thursday.” “Governor Signs Cigarette Law,” IDS, Mar. 4, 1921 (5:2).
937S.B. No. 327, § 1, as printed in “Second Tobacco Measure Born in Upper House,” IDS, Mar. 4, 1921 (5:1).
Nebraska had implemented in 1919, but Iowa did not in 1921—was unsuccessfully objected to during Senate floor debate: one senator moved to send the bill to the committee of the whole for amendment because it was “not fair” to tobacco dealers who did not handle cigarettes, but the motion was lost. The punishment for selling without a license was a fine of $100 to $300, or imprisonment for a maximum of six months in county jail, or both. The state commissioner of law enforcement was required to issue a license to “any and all persons, firms or corporations” upon payment of a $50 annual license fee and a $500 penal bond, which would be forfeit to the state if the license holder was convicted of violating the statute. Such conviction also triggered forfeiture of the license itself and a prohibition of issuing another license to such person or corporation for five years.

The bill’s backers were engaged in considerable understatement when they conceded that it was “not so drastic as the Harding bill,” but even if they had been right in their judgment that its “restrictions upon the dealer in tobacco and cigarettes...will insure a regulated sale of these articles” and “keep dealers from selling to minors,” the unfettered availability of cigarettes to adults would insure their desirability and accessibility to minors. Within three hours of the bill’s introduction, senators began receiving “messages from distant parts of the state appealing for” its passage.

Already the next day S.B. No. 327 reached its third reading in the Senate after King had moved to suspend all the rules interfering with its immediate passage. The requirement of a two-thirds vote caused a “close squeak” for the bill, but, despite “considerable objection,” his motion carried by a vote of 30 to 11. During floor debate Harding, in his “impassioned talk against the new tobacco bill,” severely attacked Governor Davis for his duplicity in having told Harding, when the latter discussed the sales ban bill with him before introducing

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939 S.B. No. 327, § 1, as printed in “Second Tobacco Measure Born in Upper House,” *IDS*, Mar. 4, 1921 (5:1).
942 “Gossip from the Statehouse,” *IDS*, Mar. 4, 1921 (5:3-5).
944 “Gossip from the State House,” *IDS*, Mar. 5, 1921 (5:3).
946 *Journal of the State Senate of the Legislature of Idaho: Sixteenth Session...1921*, at 457 (Mar. 4). All 11 who voted Nay also voted Nay on final passage; 10 of them had voted for S.B. No. 134.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

it, that “‘you are on the right road in this war against cigarettes. Go ahead.‘”947 It is unclear whether Harding chiefly resented the real-world impact of repeal of his bill’s universal sales ban or Davis’s “lack[ing] the backbone to veto his law,” which resulted in the new bill’s “making me the goat.”948 Significantly, the vote on final passage was close, licensure prevailing by a vote of only 22 to 19. The 29 Ayes that had been cast for S.B. No. 134 dwindled to 19 Nays against S.B. No. 327 because of those 29 senators 12 switched by voting for S.B. No. 327 and one did not vote, while three who had voted against Harding’s bill also voted against King’s (presumably because they opposed any regulation beyond that already in place before S.B. No. 134 was enacted). All four Senate Democrats voted against licensure.949

The denouement in the House took place the next day since it was “understood” that the governor would sign the bill. Although “[s]trong opposition was registered against the bill,” the fact that it was the last day of the session meant that “no improvement could be made” of a compromise measure. A consensus prevailed that the bill would be “satisfactory” for the following two years until the next legislative session in 1923, when “a much better law could be passed...”950 Consequently, the large 36 to 13 majority for passage may have included some representatives who would otherwise have voted against licensure.951

The penultimate word on the consequence of enacting licensure rather than prohibition went to Republican Senator Wilford Woodruff Clark, like Harding a Mormon bishop representing a predominantly Mormon county (Bear Lake) in Idaho’s southeastern corner.952 He quipped that “soon it would be necessary to

947“Gossip from the State House,” IDS, Mar. 5, 1921 (5:3-5 at 4).
948“Solons Accept Less Drastic Tobacco Law,” IDS, Mar. 5, 1921 (5:7). Senator W. Clark from heavily Mormon Bear Lake County in southeasternmost Idaho also spoke against the new bill.
949Journal of the State Senate of the Legislature of Idaho: Sixteenth Session...1921, at 307, 457 (Feb. 21, Mar. 4).
951Journal of the House of Representatives of the Legislature of Idaho: Sixteenth Session...1921, at 340, 473 (Feb. 25, Mar. 5). The 36 members voting Aye included 22 who had voted for S.B. No. 134, while five of the 13 Nays were cast by members who had also voted against S.B. No. 134 and were presumably opposed to all such regulation. All four Boise representatives voted for S.B. No. 327, while only one from the southernmost tier of heavily Mormon counties voted against it (Thomas Preston of Franklin County).
952Clark (1863-1956), a bishop since 1893, was first elected to the House in 1894 and

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have a new sign. It used to be ‘No Smoking Allowed.’ This must be changed...to ‘If you want fresh air, go outside.’”

The ultimate word on the subject of tobacco control was reserved for the 1923 legislature, whose “much better law” turned out to be no law at all: it simply repealed section 1 of S.B. No. 327, thus abolishing even the licensure system, which in 1921 had been trumpeted as the linchpin of prohibition for minors, “with the purpose of undoing the sixteenth session’s efforts to banish or curtail the noxious cigarette.” The motivation for repeal was the claim that under the King law “hundreds of small neighborhood stores were forced to stop selling tobacco because their annual sales were not large enough to warrant the payment of the license and the posting of the bond.” Ironically, these types of stores were precisely the ones that in other states were notorious for selling to minors. (A Senate bill that might have alleviated this impact by establishing a sliding fee scale ranging from $50 in towns of more than 2,000 population to $10 in villages and rural districts died.)

Moreover, in addition to allegedly working a “hardship” on grocery stores and smaller dealers, compulsory licensing—which in 1921 generated $80,000 in fees and in 1922 $82,245 from 1,645 dealers—allegedly did not aid enforcement of the no-sales-to-minors law. The three-fourths majorities by which repeal of even the diluted 1921 law was effected in both houses suggests that the window of opportunity for tobacco control in Idaho had been very brief and was now tightly shut.

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to the Senate in 1902. Progressive Men of Bannock, Bear Lake, Bingham, Fremont and Oneida Counties 98-99 (1904); Latter-Day Saint Biographical Encyclopedia 2:35 (1913).

953“Gossip from the State House,” IDS, Mar. 5, 1921 (5:3-5 at 5). Unfortunately, neither the only issue of the WCTU’s Idaho White Ribboner that the Idaho State Archives/Idaho State Historical Society has for 1921 (namely, October) nor the group’s 1920 Annual Meeting Minutes mentioned the anti-cigarette campaign. Email from Ellen Haffner, research assistant, ISA/ISHS, to Marc Linder (May 10, 2001).

9541923 Idaho Sess. Laws ch. 5, § 1 at 6.

955“Tobacco Law May Be Taken from Statutes [sic],” TFDT, Jan. 19, 1923 (1:5).

956“Law Makers Waiting for Assignment,” TFDN, Jan. 12, 1923 (1:1).

957E.g., in Chicago; see above ch. 6.


Going on the Offensive Against What Was Perceived as Offensive:
Total Cigarette Smoking and Partial Public Smoking Ban Bills and Laws

PROHIBIT USE OF CIGARETTES. West Virginia Would Be Great State If Bill Should Pass.  

The Tobacco Merchants’ Association, at its headquarters in 5 Beekman street, New York, is very busy these days detecting and exerting all possible efforts to defeat numerous pieces of adverse legislation now pending in State legislatures throughout the country. Summarizing these “anti” measures, in an interview with the United States Tobacco Journal, Secretary Charles Dushkind strongly urged every manufacturer, jobber and dealer—as well as interested smokers—in the respective states affected to write at once to the assemblymen and senators from his district in protest against restriction of personal liberty.  

That the year 1917 has achieved iconic status in the history of cigarettes as marking U.S. entry into World War I and the definitive breakthrough of cigarette smoking may have contributed to the amnesia that has enveloped the proliferation of state legislative bills to prohibit cigarette use altogether as well as smoking in various public places during the 1917 session itself. Such proposed total bans on cigarette smoking were stricter than liquor prohibition, which was reaching a new high point in 1917 as well. This burst of legislative activity was duly reflected in the Tobacco Merchants Association’s monitoring of the progress of numerous “absolute prohibition” (of sales) bills in various states including Michigan, Utah, Minnesota, North Carolina, and Pennsylvania. 

Nor was this wave innovatory: bills to ban cigarette smoking in public had passed one legislative chamber in several states in the 1890s, and in 1907 the Wisconsin Assembly, which two years earlier had enacted a general sales ban, also passed an extraordinarily expansive measure: “No person shall smoke or exhibit upon or in a public place any cigarette or cigarette paper or cigarette
wrappers, or any substitute therefor or any paper made or prepared for the
purpose of making cigarettes or any substitute therefor for the purpose of filling
with tobacco for smoking”—subject to punishment by a maximum fine of $25 or
10 days in county jail. 967 In debate the Assembly speaker emphasized that the
people to whom cigarette smoking was offensive were entitled to rights as well
as smokers. 968

Also characteristic of this new wave of prohibitionism was a bill introduced
in January in the House of Delegates of West Virginia—a state that in 1915
prohibited common carriers from bringing into or carrying within the state
intoxicating liquors “even when intended for personal use” 969 and that in 1917
was in the process of enacting yet another liquor prohibition law 970—that
would have made cigarette smoking a criminal offense and possession of cigarettes a
misdemeanor in addition to prohibiting their sale. 971 The Wheeling Register

967 State of Wisconsin: In Assembly, No. 915, A (May 1, 1907, introduced by
Committee on Affairs) (copy furnished by WHS). See also In Assembly: Journal of
Proceedings of the Forty-Eighth Session of the Wisconsin Legislature: 1907, at 621 (May
1) (No. 915, A. introduced by State Affairs Committee), 757 (May 15) (read 3d time and
passed, but no vote given) (1907). The bill was non-concurred in by the Senate. In
Senate: Journal of Proceedings of the Forty-Eighth Session of the Wisconsin Legislature:
1907, at 1056 (June 22) (1907). The Assembly vote ordering the bill to engrossment was
(1); “Must Smoke in Private,” USTJ, May 18, 1907 (7:2). Oddly, the chief newspaper for
legislative reporting did not even mention passage in lengthy articles devoted to the day’s
(5:5-6); “Assembly Not for a Yukon Exhibit,” Wisconsin State Journal, May 16, 1907
(?:2). On Wisconsin generally, see vol. 2.

968 “Must Smoke in Private,” USTJ, May 18, 1907 (7:2).

969 1915 West Virginia Acts ch. 7, § 3 at 33, 35. But the same law provided that it was
not illegal to have intoxicating liquors in one’s home or to give them to others there.

970 In 1917, when the West Virginia legislature amended the prohibition law to make
it unlawful for anyone to bring into the state during any period of 30 consecutive days
more than one quart of intoxicating liquors, Arizona made it unlawful for any person to
have intoxicating liquors in his possession. 1917 West Virginia Acts ch. 58, § 31, at 180,
183; 1917 Arizona Session Laws ch. 63, § 2 at 93, 94.

971 “Bill Introduced in Legislature Hits Cigarettes,” Wheeling Register, Jan. 25, 1917
(1:7). To be sure, the penalty for smoking/possession was only a $5 fine, which the trial
justice had discretion to remit if the violator identified the seller. See also “M’Aboy
26, 1917 (1:6). The bill was H.B. No. 196, “A bill to amend and re-enact sections
twenty-e (1) and twenty-e (2), of chapter one hundred and fifty, of the Barnes Code of
West Virginia, one thousand nine hundred and sixteen, relating to the use of tobacco,”

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called the bill “one of the most drastic ever introduced,” which was widely reported throughout the country.

In Indiana, which had prohibited sales from 1905 to 1909, a bill was introduced in the House in 1917 to reimpose a ban on manufacture and sale and to add one on “having possession for personal use of cigarettes, cigarette papers, cigarette wrappers and other substitutes for the same.”

In order to shed light on the tenacity of deep-seated and widespread anti-smoking attitudes during the World War I era when, counterintuitively, cigarette sales bans were inexorably being repealed, an overview of the whole range of statewide total and partial smoking ban bills and laws is presented here.

**Oklahoma (1908/1915)**

The proposed law is but another example of the tyranny of the weak over the strong.
Certain members of the community, i.e., immature children, not being able to smoke cigarettes without physical injury, the hasty legislative doctors apply the drastic remedy of depriving all the members of what is, to many of them, a comfort. It never seems to occur to them that these children have parents and secular and religious teachers....

Though not admitted to the Union until 1907, by the time of U.S. participation in World War I Oklahoma—"the only state to enter the Union with prohibition written into its constitution"—had a rich anti-cigarette legislative tradition reaching back more than two decades. As early as 1890 both the Territorial Council and House had adopted rules banning tobacco smoking in their respective chambers, and in 1895 by a vote of 22 to 2 the Territorial House passed a bill prohibiting the manufacture, sale, or giving away of cigarettes, cigarette tobacco, and cigarette paper. In 1901 the Territorial Legislative Assembly made it a misdemeanor "to sell, offer to sell, or to bring into the Territory for the purpose of selling, giving away or otherwise disposing of any cigarettes, cigarette paper or substitute for the same" subject to a fine of $10 to $500. The impetus for enacting a new ban law was a failure of enforcement resulting in large part from grand juries’ failure to present cases. Strengthened by the conviction that the "health of the boys of Oklahoma is a vastly superior consideration to any paltry gain that might accrue to dealers," in 1905—the same year in which at least one county superintendent of public instruction required all teachers to sign contracts agreeing to abstain from the use of tobacco (and intoxicating liquor) during the term of the contract—both

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975 "To Prohibit Cigarettes," Muskogee Cimeter, Mar. 3, 1917 (1:2) (Black Republican newspaper).
977 See below Tab. 6.
979 1901 Oklahoma Territorial Session Laws, ch. 13, art. 4, § 1, at 111. The bill passed the House by almost the same majority as in 1895 (22 to 3). Journal of the House Proceedings of the Sixth Legislative Assembly of the Territory of Oklahoma...1901, at 214 (H.B. No. 119).
980 "Cigarette Smoking," Guthrie Daily Leader, Feb. 9, 1905 (4:2) (edit.).
chambers unanimously passed a law very similar to that of 1901. The absolutely lopsided outcomes are difficult to reconcile with the much-vaunted efficacy of the Tobacco Trust’s nationwide bribery qua lobbying and with the report that the Oklahoma law itself had been “fought tooth and nail by the tobacco companies, who were alleged to have used an enormous sum of money in an unsuccessful effort to kill the measure.” The new law made it a misdemeanor (subject to the same range of fines) “to sell, offer for sale, give away or otherwise dispose of, upon any pretext or device, or to bring into the Territory for the purpose of selling, offering for sale, giving away or otherwise disposing of, any cigarettes, cigarette paper or substitute therefor....”

By the end of 1905 the press’s expectation that the new law “will practically shut out such a thing as a cigarette in Oklahoma” found some corroboration in instructions that one state court judge gave to a grand jury—which in investigating a number of cases of cigarette smokers was seeking to identify their sources—to the effect that cigarette smoking had been reduced by 90 percent. But despite direct familiarity with the trust’s tactics, Oklahoma did not reckon with the resistance of the American Tobacco Company. Oklahoma Territory may have been a remote and relatively sparsely populated mercantile outpost in 1905, but ATC had hardly excluded it from the panoptic monitoring and interference that the cigarette monopolist was lavishing on the sales bans that three other states (Indiana, Nebraska, and Wisconsin) had enacted that same year. In September 1905 U.S. District Attorney Horace Speed began proceedings

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982Journal of the Council Proceedings of the Eighth Legislative Assembly of the Territory of Oklahoma...1905, at 132 (C.B. No. 97, 13 to 0); Journal of the House Proceedings of the Eighth Legislative Assembly of the Territory of Oklahoma...1905, at 388 (25 to 0).

983See above Parts I-II and vol. 2.

984“Going After Tobacco Trust,” Logansport Daily Reporter (IN), Sept. 18, 1905 (1:2) (quoting a “special from Guthrie”).

9851905 Oklahoma Territorial Session Laws, ch. 13, art. 3, § 1, at 193.


987“Cigarette Smoking Decreased,” Galveston Daily News, Dec. 18, 1905 (4:6). After the Guthrie police chief had identified 15 cigarette-smoking boys, the grand jury was to return indictments if the dealers’ names could be learned. “To Bar Guthrie Cigarettes,” Emporia Gazette, Dec. 14, 1905 (1:5).

988See vol. 2.

989Speed, who had once worked in future President Benjamin Harrison’s law office in Indianapolis, was appointed by him the first U.S. district attorney for Oklahoma Territory in 1890. Grant Foreman, “Horace Speed,” Chronicles of Oklahoma 25(1): 5-6 (1947).
against the company for conspiracy to violate the new law. He created a
sensation when he announced that he would apply to the Oklahoma governor for
requisition papers on the governor of New York for the return to Oklahoma of
ATC officers in New York for violating the Oklahoma anti-cigarette statute.
Specifically, he charged that ATC was selling hundreds of cigarette packages
throughout Oklahoma through the U.S. mail by means of a conspiracy that
corporate officials had with certain Oklahoma citizens designed to defeat the
law’s object. Speed intended to report the matter to the grand jury and seek
indictments.990

The United States Tobacco Journal noted that this development greatly
interested the trade not on account of ATC’s involvement,
but because the attempt to prevent smokers in certain states [from] obtaining cigarette
papers even by ordering them from parties outside the State for their own use augurs ill for
the industry as a whole. If cigarette smokers are prevented from obtaining papers the
chances are they will not smoke the tobacco and thus the sale of tobacco from which
cigarettes can be made will be injured. Beyond this, however, is the possibility that the
anti-cigarette crusade may be extended to all forms of tobacco, one after another. The
well-meaning women who are largely responsible for anti-cigarette crusades probably view
chewing tobacco, smoking tobacco and cigars with almost as much disfavor as cigarettes
and once successful in enforcing anti-cigarette laws so stringent as to prevent a full grown
man from rolling tobacco in a piece of paper and smoking it they may well extend their
efforts further.991

The WCTU never made the leap to combating tobacco as such—use of
which, it recognized, as a prevalent male phenomenon was beyond its political
reach992—but the U.S. Tobacco Journal nevertheless worried because it
understood that while it had to be “admitted that under the police powers of a
State the sale of cigarettes can be prohibited just the same as liquor, such
prohibition might be extended to all forms of tobacco....” And not just to
tobacco: presumably seeking strange bedfellows, it fantasized about bans on silks,
diamonds, or patent breakfast foods, which underscored that it seemed “almost
a denial of the rights of citizenship to prevent a man from consuming tobacco in
any manner he may wish. The principle involved is dangerous to the liberties of

990“Going After Tobacco Trust,” Logansport Daily Reporter (IN), Sept. 18, 1905
(1:2).
23, 1905).
992See above ch. 2.
American citizens." But this sumptuary nightmare never came to pass, and the Journal’s report the very next week that the Justice Department in Washington, D.C. would not do anything to assist Speed’s efforts to extradite Tobacco Trust officials from New York to Oklahoma may explain why the press apparently soon stopped reporting on the matter.  

Since the enabling act and the constitution provided that “Oklahoma laws shall immediately become operative over the entire state the moment statehood takes effect,” by 1907, the Ada Evening News observed, the “deadly cigarette will have to go and...as soon as the president signs the statehood proclamation it will be farewell to ‘coffin nails’ in Oklahoma.”  

In spite of the capaciousness of Oklahoma’s universal sales prohibition regime, it did not suffice for the state’s vigorous anti-cigarette movement, which at the new state’s very first legislative session of 1907-1908 undertook a concerted effort to enact a radical universal ban on the use of cigarettes as well. To be sure, it was not the legislature’s highest priority: that honor was accorded the urgently required imposition of Jim Crow on railroad passengers embodied in the simultaneously introduced House Bill No.1/Senate Bill No. 1, which was “assured as the first act to pass the Oklahoma state legislature.” This precedence was anchored in the Constitutional Convention of 1906-1907, whose president, William Murray (the first House speaker in 1907-1908), included this racist cannonade in his opening address to the convention:

We should adopt a provision prohibiting the mixed marriages of negroes with other races in this State, and provide for separate schools and give the Legislature power to separate them in waiting rooms and on passenger coaches, and all other institutions in the State. We have no desire to do the negro an injustice. We shall protect him in his real rights. ... As a rule they are failures as lawyers, doctors and in other professions. He must be taught in the line of his own sphere, as porters, bootblacks and barbers and many lines of agriculture, horticulture and mechanics in which he is an adept, but it is an entirely false notion that the negro can rise to the equal of a white man in the professions or become an equal citizen to grapple with public questions. The more they are taught in the line of industry the less will be the number of dope fiends, crap shooters and irresponsible hordes

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995 “Good-Bye ‘Coffin Nails,’” Evening News (Ada, OK), Nov. 9, 1907 (8:3). Several months later the attorney general’s office confirmed that the law was in effect making it a misdemeanor to sell or give away cigarettes subject to a penalty ranging between $10 and $500. “Anti-Cigarette Law Involved,” Evening News (Ada, OK) Feb. 5, 1908 (1:3).
of worthless negroes around our cities and towns. I am a descendant of an ex-slave holder.... I know them from “A” to “Z.” ... I appreciate the old-time ex-slave, the old darky—and they are the salt of their race—who comes to me talking softly in that humble spirit which should characterize their action and dealings with the white man, and when they thus come they can get any favor from me. (Applause.) When a negro...taps me on the shoulder as would an associate or equal friend I would want to land on his shins; but when he comes to me with his hat under his arm humbly saying, ‘Cap’n” or “Boss” give me a cigar, I would give it to him if it required the last cent that I had with which to purchase it, and this class of darkies can get all the favors I can possibly give.\textsuperscript{997}

Some blacks in Oklahoma, nurturing a broader conception of their rights than apartheid and unfazed by Murray’s racist rantings, submitted a petition to the convention protesting against the Jim Crow proposal.\textsuperscript{998} Though Murray did not call for constitutionalization of Jim Crow on the railroads, others at the convention did,\textsuperscript{999} but for pragmatic reasons the convention refrained from adopting it. As explained in the resolution introduced by Charles Haskell, who became the state’s first governor, and adopted by the convention: “Resolved, That it is the sense of this body that separate coaches and waiting rooms be required for the negro race; that we consider this a legislative matter rather than a Constitutional question; that Statehood is the all-important questions to relieve our people of the embarrassment of Interior Department rule; that there is apparent good reason to doubt the proclamation of Statehood if the separate coach and waiting room provision is placed in the Constitution. Resolved, we do recommend that the Legislation [sic] do by law require all railroads of the State to provide for separate but equal coaches and waiting rooms for the negro race.”\textsuperscript{1000} Three months later the state Democratic Party incorporated into its platform a declaration approving the Constitutional Convention’s resolution “pledging the enactment of laws at the earliest possible date during the first session of the first legislature providing for separate coaches or accommodations and waiting rooms for the negro race.”\textsuperscript{1001}

\textsuperscript{997}Proceedings of the Constitutional Convention of the Proposed State of Oklahoma...Nov. 20, 1906 to November 16, 1907, at 21 (Nov. 20, 1906).
\textsuperscript{998}Proceedings of the Constitutional Convention of the Proposed State of Oklahoma...Nov. 20, 1906 to November 16, 1907, at 222 (Feb. 12, 1907).
\textsuperscript{1000}Proceedings of the Constitutional Convention of the Proposed State of Oklahoma...Nov. 20, 1906 to November 16, 1907, at 251-52 (Mar. 1, 1907).
\textsuperscript{1001}Democratic Party Platform (June 8, 1907), in The Oklahoma Red Book, 2:355-57
Governor Haskell’s first message to the legislature included, under the heading, “The Races,” the recommendation of “the immediate passage, by emergency Act, of laws providing for separate railroad coaches and waiting rooms for persons of African descent....” The bills quickly passed both houses by overwhelming majorities—H.B. No. 1 passed the House 92 to 13 and S.B. No. 1 passed the Senate 37 to 2 and 91-14 in the House—and the governor’s approval followed just as quickly. Unsurprisingly, the vote exhibited very marked party differences. Against the background of a Republican Party platform that “upholds the principles of human rights and personal liberty...and of equal rights of all persons regardless of race, creed, color, or locality,” 10 of the 18 House Republicans voted Nay and 8 voted Yea on H.B. No. 1, while 12 voted Nay and only 5 voted Yea on S.B. No.1. In contrast, only three of the 92 Democrats voted Nay on the House bill and two on the Senate bill. Similarly, the only senators to vote against S.B. No. 1 were Republicans, while only one of the other three Republicans voted Yea. Significantly, the two House Democrats most responsible for passage of the bill to ban cigarette smoking did not align themselves with the anti-Jim Crow forces.

On December 20, 1907, two days after the governor had signed the railroad
segregation bill, House Democrat Andrew J. Snelson, a 45-year-old physician, introduced House Bill No. 165, “An Act to prohibit the possession of or selling of cigarettes, cigarette papers, etc.” The House—which in formulating its Rules dropped the ban on smoking on the floor or in the galleries that had been in place since 1890—referred the bill to the Judiciary Committee, but transferred it a month later to the Prohibition Enforcement Committee (rather than, for example, Public Health). Initially the measure prohibited the possession of cigarettes or cigarette paper, subject to a fine of $100 to $200, and giving tobacco in any form to anyone under 16, subject to a fine of $25 to $50. On January 11, 1908, more than 50 Oklahomans presented a petition to the Senate “asking for the enactment of a law prohibiting the use of cigarettes.” Then during the House plenary session on January 30, 1908, 44-year Democrat and druggist George D. Hudson (who chaired the Pharmacy Committee) offered this radicalizing amendment as a new section 3: “Any person found smoking a tobacco cigarette in this State shall, upon conviction, be deemed guilty of a misdemeanor and fined in any sum not less than $5 and not more than $25.” After two Democrats’ motions to table the amendment and to postpone its

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1011 See below Table. 6.

1012 *Journal of the House of Representatives of the Regular Session of the First Legislature of Oklahoma: Convened...December 2, 1907 and Adjourned...May 26, 1908*, at 71, 108 (Dec. 20, 1907, Jan. 20, 1908) (1908).


1014 *Journal of the Proceedings of the Senate of the First Legislature of the State of Oklahoma...1907...1908*, at 102 (Jan. 11, 1908) (1909).

1015 On Hudson, see “House Committees Appointed,” *New-State Tribune* (Muskogee), Dec. 19, 1907 (1:1-2); *First Administration in Oklahoma* 141 (John Brooks comp. 1908); 1910 Census of Population (HeritageQuest) (47 years old).
consideration for one week lost, the House adopted Hudson’s amendment\textsuperscript{1016} and passed the bill to final passage.\textsuperscript{1017} Some “advocates of the original bill” (which had banned possession) “pleaded that the law be not made repulsively severe,” but, according to the \textit{Daily Oklahoman}, “the house had the bit between its teeth and stopped at nothing short of the Hudson ‘lid’.”\textsuperscript{1018} The amendment was opposed by Republican Dr. Abel Sands\textsuperscript{1019} (who ultimately voted for the bill) and others, who argued that “no law is valid which pretends to say that a man can not smoke, eat or drink with pleasure, and that the provisions of the bill should be confined to the selling or giving away of such articles.”\textsuperscript{1020} During consideration of the bill House Speaker Murray, who had delighted the Constitutional Convention with his white supremacist rallying cry, left the chair to participate in the floor discussion, but his motion to recommit the bill to committee with instructions was defeated by a vote of 40 to 51.\textsuperscript{1021}

H. B. No. 165 had been pending for almost two months on third reading until March 24, when Snelson offered a committee substitute.\textsuperscript{1022} After another Democrat’s motion to recommit the bill with instructions to strike out the provision referring to smoking cigarettes was tabled, the House passed the

\textsuperscript{1016} \textit{Journal of the House of Representatives of the Regular Session of the First Legislature of Oklahoma: Convened...December 2, 1907 and Adjourned...May 26, 1908, at 137 (Jan. 30, 1908) (1908) (quote); “Bill Goes to Senate,” \textit{Evening News} (Ada), Jan. 31, 1908 (1:3); “Anti-Cigarette Bill Favored,” \textit{MT-D}, Jan. 31, 1908 (2:4). Hudson’s original handwritten amendment on his legislative letterhead is preserved in the bill file (copy furnished by OSA/ODL).

\textsuperscript{1017} \textit{Journal of the House of Representatives of the Regular Session of the First Legislature of Oklahoma: Convened...December 2, 1907 and Adjourned...May 26, 1908, at 138 (Jan. 30, 1908) (1908).

\textsuperscript{1018} “Bars Cigarettes; Smoke, Pay a Fine,” \textit{DO}, Jan. 31, 1908 (1:1-2 at 2:1).

\textsuperscript{1019} On Sands, see First Administration in Oklahoma 173 (John Brooks comp. 1908).

\textsuperscript{1020} “Must Stop Smoking,” \textit{New State-Tribune} (Muskogee), Feb. 6, 1908 (3:2); “To Prohibit Cigarettes,” \textit{Indian Journal} (Eufaula), Feb. 7, 1908 (4:4).

\textsuperscript{1021} \textit{Journal of the House of Representatives of the Regular Session of the First Legislature of Oklahoma: Convened...December 2, 1907 and Adjourned...May 26, 1908, at 137 (Jan. 30, 1908) (1908).

\textsuperscript{1022} Several copies of the substitute are preserved in the bill file including a handwritten version signed by the House speaker after passage on March 31, common to all of which was the elimination of Hudson’s amendment outlawing smoking as a separate section 3; instead, the word “smoke” was simply inserted directly before the mention of “possession” in section 1 of Snelson’s original bill. House Bill No. 165 by A. J. Snelson substitute for House Bill No. 165 by A. J. Snelson (copy furnished by OSA/ODL).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

substitute and again passed the bill to third reading. Finally, a week later the House passed it by a crushing majority of 77 to 11. Eight of the Nays were cast by Democrats, including Speaker Murray, while 66 Democrats and 11 Republicans voted Yea. Thus overall, 89 percent of Democrats and 79 percent of Republicans supported one of the most extreme prohibitionist anti-cigarette bills ever passed by a state legislative chamber. Only one of the three representatives from the state’s largest city, Oklahoma City, opposed the bill.

If the bill could be interpreted as an intentional blow against the American Tobacco Company, both parties had inserted sufficient platitudes in their state platforms to warrant an inference that such a statutory objective was consistent with their economic justice planks. Thus, whereas the Republicans boasted that because their party was “the anti-trust party,” the Tobacco Trust, Standard Oil, and other trusts “have all been upon the rack and will be made to cease their extortions,” Democrats, while declaring their belief that it was “of the greatest importance to the development of our new state, to give perfect safety and assurance to invested capital,” hastened to add that they “draw a broad line of distinction between capital invested in honest enterprise and predatory capital engaged in conspiracy against the proceeds of labor of the American people. We oppose the crafty corporations which artfully contrive to destroy competition....”

A week after House passage the attempt by Democrat and lawyer A. F.

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1026 Democratic Party Platform (June 8, 1907), in The Oklahoma Red Book, 2:355-57 at 356 (W. Richards comp. 1912). The Republican platform did not take a position on liquor prohibition, but Democrats evaded the issue as well by declaring that the question had been removed from “partisan politics” by leaving it to the people to decide by referendum. Id.
Vandeventer to reconsider it with a view to striking the ban on adult smoking was defeated by a vote of 27 to 41. The argument on which Vandeventer—who displayed ambivalence toward smoking—relied was that “when a law attempts to invade the privacy of a man’s home it is ‘going one step too far.’ He said the bill was more stringent than the liquor law [which did not ban consumption].” In defense of his bill Dr. Snelson remarked that “the strict section was aimed to protect the minors, while it inhibits the use of cigarettes by persons indiscriminately.” Presumably Snelson meant that the purpose of the universal ban on cigarette smoking was to prevent minors from smoking and adults from becoming sources of cigarettes and role models.

After the Senate Pharmacy, Drugs and Pure Foods Committee had taken a month to recommend passage of H.B. No. 165, the very next day the full Senate voted 20 to 18 in favor of the total prohibition of cigarette smoking in Oklahoma. Since a constitutional majority required at least 23 Yeas in the 44-member chamber, support fell short by three votes, and the bill was thus defeated. Not a single one of the five Republican senators voted for the ban bill: two cast Nays, while three others were absent or did not vote. (That same day Snelson spoke to the WCTU’s West Guthrie local union on “‘The Cigarette and His Bill.’”) Although there were no big cities in Oklahoma in 1907—the most populous was Oklahoma City with 32,452—some positive correlation obtained

1028“Capital News,” Evening Times (Ada), Apr. 7, 1908 (1:4-5). Oddly, the House Journal does not reflect this move to reconsider.
1029See below this ch.
1030“Billups Offers Prize,” Checotah Enquirer, Apr. 10, 1908 (9:2).
1031Journal of the Proceedings of the Senate of the First Legislature of the State of Oklahoma...1907...1908, at 587 (May 4, 1908) (1909). The typed copy of the bill attached to the committee report preserved in the bill file was the same version that had passed the House (copy furnished by OSA/ODL).
1032Journal of the Proceedings of the Senate of the First Legislature of the State of Oklahoma...1907...1908, at 594 (May 5, 1908) (1909). The following day’s motion to reconsider also lost. Id. at 600 (May 6).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

between senatorial Nays and city size: senators from the first, second, third, and sixth largest cities voted against the bill, while those from the fifth and eighth largest cast Yeas. To be sure, the seeming closeness of the vote was in part a function of the fact that before voting, senators struck out the ban on possession but resisted an effort to remove that on smoking as well, which “defeat killed the bill. Its opponents, while arguing that the present law was sufficient, would have been willing to accept the bill with that provision eliminated, but contended that any such law with the provision would be unconstitutional.”

Several senators who voted against the bill found an outlet for their libertarian contempt of sumptuary legislation in heavy-handed sarcastic motions. Lawyer R. E. Echols, for example, proposed that: “Any little boy who plays marbles for keeps is hereby declared to be a bad boy and excommunicated.” A motion offered by Senator Roy Stafford, the stereotypically racist-segregationist editor of the Democratic Daily Oklahoman of Oklahoma City, inserted into the penalty section for smoking/possession provided that any

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1034 The eight largest were (in descending order): Oklahoma City, Muskogee, Enid, Guthrie, Shawnee, McAlester, Grady, and Tulsa. The Oklahoma Red Book, 2:619-25 (W. Richards comp. 1912) (data for 1907). For senators’ home cities, see id. at 134-35. The senator from the fourth largest did not vote and no senator was from the seventh largest.

1035 “The First Legislature,” Checotah Enquirer, May 8, 1908 (9:5-6 at 6). The Senate Journal does not reflect this amendment, but the committee of the whole had recommended shortly before the vote that “Senate Bills Nos. 130 and 165 do pass, as amended” (without stating the amendments). Journal of the Proceedings of the Senate of the First Legislature of the State of Oklahoma...1907...1908, at 593 (May 5, 1908) (1909). (Since S.B. No. 165 had already previously passed on third reading, presumably the sentence contained a typo and in fact H.B. No. 165 was at issue.) However, the motions preserved in the archived bill file are not entirely consistent with the aforementioned press account: although a motion to strike out “smoke” was adopted, so were one offered by Senator Sorrells to strike the ban on possession and a bill-killing amendment by Senator Stafford to subject cigars and chewing tobacco to the same treatment as cigarettes. H.B. No. 165 bill file (copies furnished by OSA/ODL).


1037 Undated handwritten motion on letterhead of the Municipal Corporations Committee (which Echols chaired) in the bill file (copy furnished by OSA/ODL). Unlike most motions, this one bore no statement as to whether it had been adopted, lost, or withdrawn or served as notice.

Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

violator “shall be spanked with a barrel stave until he cries enough.” Failing to attract enough votes of freedom-loving colleagues, it lost.\textsuperscript{1039} P. J. Goulding noticed up an amendatory motion under which “it shall be a felony [sic] punishable by imprisonment by [sic] for life at hard labor or by hanging by the neck until dead, for a person to kiss his [sic] wife or husband, swehart [sic] or lover at any time between sundown Saturday night and sunrise Monday morning.”\textsuperscript{1040} And, finally, Senator J. S. Morris got his kicks with a proposed amendatory proviso “that in case of chewing if they swallow the juice the penalty shall not apply.”\textsuperscript{1041}

The 1905 law remained in effect until 1915, when it was repealed and converted into a no-sales to minors law. During the interim, however, the WCTU of Oklahoma City not only sought to aid state enforcement officers in suppressing retail sales, but contended that it could prosecute both several cigarette manufacturers and tobacco wholesalers in Oklahoma City.\textsuperscript{1042}

That the anti-cigarette movement in Oklahoma would confront entrenched legislative opposition to any further restrictions on smoking became unoverlookable by 1911. The aforementioned Vandeventer, who in the meantime had become a state senator, on the second day of the session successfully “moved that the Sergeant-at-Arms be instructed to stop all smoking in the Senate Chamber for the session.”\textsuperscript{1043} Nevertheless, after the Rules Committee, which he chaired, had reported a set of Rules, No. 31 of which provided that “nor shall smoking be allowed in the Senate chamber or gallery, during the session of the Senate,”\textsuperscript{1044} by a vote of 14 to 27, he unsuccessfully “moved to strike out the committee

\textsuperscript{1039}H.B. No. 165 bill file (copy furnished by OSA/ODL).
\textsuperscript{1040}H.B. No. 165 bill file (copy furnished by OSA/ODL).
\textsuperscript{1041}H.B. No. 165 bill file (copy furnished by OSA/ODL) (also bearing no annotation as to its disposition).
\textsuperscript{1042}“War on Cigarette Started in Oklahoma,” \textit{Evening News} (Ada), Apr. 29, 1910 (6:5). The superficial organizational/convention history of the Oklahoma WCTU compiled by Abbie Hillerman, who had been its president from 1903 to 1907 and 1911 to 1919, is almost completely devoid of any substantive information on the group’s activities. With regard to cigarettes, the book merely mentions that in 1901 its legislative committee reported that the anti-cigarette bill had been passed and that in 1917 Hillerman recommended legislative work covering an anti-cigarette bill. Abbie Hillerman (comp.), \textit{History of the Woman’s Christian Temperance Union of Indian Territory[,] Oklahoma Territory and State of Oklahoma: 1885-1925}, at 46, 77 (n.d. [1925]).
\textsuperscript{1043}Journal of the Proceedings of the Senate of the Regular Session of the Third Legislature of the State of Oklahoma 26 (Jan. 4) (1911).
\textsuperscript{1044}Journal of the Proceedings of the Senate of the Regular Session of the Third Legislature of the State of Oklahoma 227 (Jan. 19) (1911).
amendment to Rule No. 31 in regard to smoking in the Senate Chamber. (Astonishingly, every single one of the 13 Republican senators voted Nay, whereas Democrats split evenly 14 to 14.) Immediately thereafter another Democratic senator successfully moved to strike out the word "gallery," while a Republican succeeded with his motion to recommit the rules to the committee of the whole "with instructions to strike out Rule No. 31 with regard to smoking." The Senate Journal’s aseptically skeletal version did no justice to the earthy substance and intensity of the real battle over workplace smoking that the press captured:

That a legislator so womanish as to sicken at the smell or smoke of a good cigar should either bravely endeavor to eradicate this weakness from his system by experience, or else resign and go home, is the final determination of the majority of the Oklahoma senate, and this majority, all smokers, abolished in perpetuity its former rule against smoking. And for three hours thereafter, the helpless minority on this question sputtered and choked in the dreamy haze of tobacco smoke emanating from the perfectos, panetellas, pipes, and cigarettes of the celebrating majority.

The question of “to smoke or not to smoke” has been agitating [the] senate for three days now, and the smokers finally win all their points. The house still keeps in the ban on smoking, owing chiefly to the fact that its best-winded speakers are not smokers, and therefore easily smother in discussion any efforts of the “smokers” to lift the rule.

Shortly before the opening of the 1915 legislative session, the press hinted at the pressure building up for repealing the strict statewide sales ban by observing that the law had been written by “people more enthusiastic than practical....” Hyperbolic editorializing demoted it to a “useless” law under which “it was an offense to even wink at a cigarette paper. The law was so drastic and unreasonable that no attempt was made to enforce it; cigarettes were smoked at will by anyone who wished at any time they wished.”

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1046Party affiliation is taken from The Oklahoma Red Book 73 (W. Richards comp. 1912).
1047Journal of the Proceedings of the Senate of the Regular Session of the Third Legislature of the State of Oklahoma 259, 260 (Jan. 24) (1911). Why Republican Senator Brownlee offered the motion to recommit with instructions to strike out the smoking rule and why the majority was reversed on that vote, which was not a roll call, are unclear.
1049MT-D, Dec. 1, 1914 (4:1) (untitled edit.).
1050"Howdy," Star Gazette (Sallisaw), Mar. 26, 1915 (2:1) (edit.).
prohibitionism was nevertheless not inevitable was signaled by the virtually simultaneous adoption by the city council in Norman of an ordinance that banned bringing into or sale in the seat of the University of Oklahoma of cigarettes or cigarette paper and the introduction in the House of a bill to repeal the general sales ban, for which was to be substituted a ban on selling or giving cigarettes or papers to minors, who would be prohibited from possessing either. Although the bill was suggested by the Federation of Women’s clubs, supported by church organizations, and had the state YMCA’s active backing, which was “anxious to protect minors from the evils of the cigarette habit,” securing that objective seemed dubious in light of that group’s odd coupling with “practically all of the leading dealers in tobacco,” which also backed the proposal because they preferred a “plain enforceable law.” After all, not only was the existing universal sales ban unsurpassably plain, but the chief impediment to enforcibility was dealers’ own failure to comply with the law. Moreover, if it was, as the press insisted, a “dead letter” that was hardly if ever attempted to be enforced, why were sellers wasting their political capital on its repeal?

Even if House passage was not inevitable, the massive 81 to 4 majority strongly suggested that acceptance of adult men’s freedom as in-state cigarette buyers was coming back into vogue. Nevertheless, a “vigorous fight” for its defeat in the Senate mobilized 13 Nays against 23 Yeas on a non-party-line vote.

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1051 “Bar the Pills in Norman,” Muskogee County Democrat, Jan. 21, 1915 (7:4).
1056 “Tuesday at Noon to Mark Close of 5th Legislature,” DO, Mar. 23, 1915 (1:1).
1057 Journal of the House of Representatives of the Regular Session of the Fifth Legislature of the State of Oklahoma...1915, at 877-78 (Feb. 24, 1915). All four Socialists voted with the majority. Party affiliation is taken from id. at 7-9.
1058 “Tuesday at Noon to Mark Close of 5th Legislature,” DO, Mar. 23, 1915 (1:1).
In the end, then, the legislature repealed the absolute sales ban, replacing it with a prohibition to sell or give cigarettes or cigarette papers to minors subject to a fine of $10 to $200 and/or up to 30 days’ confinement in county jail. For minors it was a misdemeanor to be in possession of the cigarettes/papers if they refused to inform police, truant officers, or teachers from whom they obtained contraband. The press viewed the new no-sales to minors law as “an admission of that cold fact that you cannot legislate a bad habit out of a man, but a declaration of the plain truth that we can legislate the temptation away from the boy. If we protect the boys of today the men of the next generation will be better as a result of that protection.” Although there was no gainsaying the addictive hold of nicotine on adult as well as adolescent cigarette smokers, this perspective failed even to take notice of the political role played by the national manufacturing oligopoly’s and local wholesalers’ and retailers’ profit-driven search for unimpeded access to buyers.

Despite the robust legislative majorities that had been mobilized in 1915 for repeal of an allegedly unenforceable prohibitory regime, even before the 1917 session opened, “[t]he women,” a deeply irritated and misogynist Oklahoma City Times editorialized,

[we]re getting active again in the matter of anti-cigaret legislation. They want the present anti-cigaret law repealed. Spite [sic] of the fact that thousands of them, from all quarters of the state, petitioned the legislature of two years ago to give us the present law, they come trooping back to the present session, petitions in hand, asking a return to the old law.

The old law prohibited the sale of cigarettes...to any one, minor or adult. It was as pronounced a dead-letter as ever disgraced a statute. Under it cigarettes were sold everywhere, to both minor and adult. No effort was made in any quarter to enforce it because of its ridiculous restrictions.

Feeling that an adult has as much right to smoke a cigarette as a cigar or pipe, and that the only restriction upon the sale of cigarettes needed applied to the youth of the state, the last legislature supplanted the old law with the present statute, which prohibits the sale of cigarettes to minors only.... This law is being enforced wherever we have county attorneys who respect their oath of office. It is certainly being enforced in Oklahoma City.

A repeal of the present law will put us back to the conditions which existed prior to two years ago. Cigarettes will be sold indiscriminately. The youth will buy and use them the same as the adult, for the reason that it will amount to no more of a crime to sell to a minor than an adult.... The enforcement of such a law would require the entire time of the county attorney and his force of assistants to the exclusion of the enforcement of all other laws.

1060 1915 Oklahoma Session Laws, ch. 190, at 387.
1061 "Howdy," Star Gazette (Sallisaw), Mar. 26, 1915 (2:1) (edit.).
The existing law is both sane and practicable. It can be, and is, enforced. It should be let alone. If the women who are so anxious for its repeal would devote half the time to the discharge of maternal duties toward their cigaret-smoking sons as they do to the circulation of petitions asking legislative action thereon, we would be enabled to witness infinitely less cigaret smoking and not be held up as a "nut" state throughout the union.\textsuperscript{1062}

A major empirical problem with this widely held view was that in fact, according to the \textit{Muskogee Times-Democrat}, the prosecuting attorney of Oklahoma County (whose county seat was Oklahoma City) had just “started” prosecuting dealers for violations of the two-year-old no-sales-to-minors law, whose “theory” was that “if the restriction only applied to minors there would be no excuse for not prosecuting dealers who did sell cigarettes to boys.” In the event, however, “[t]his law has been violated not only in Oklahoma City but in Muskogee continuously.” As a result, the rival editorialist perspicaciously pointed out in November 1916, if the 1915 law remained unenforced, “there will be no good argument against going back to the old law which provided penalties for selling cigarettes to anyone.”\textsuperscript{1063}

At the outset of the 1917 session a strict general sales ban was introduced, which, in addition, banned smoking cigarettes altogether. This sudden reversal was embodied in the House member who introduced and was the driving force behind House Bill No. 3, J. O. McCollister, who had himself voted for repeal in the previous session. Born in Indiana in 1862 and a resident from 1873 to 1900 of Iowa, where he was, inter alia, a telegrapher and county auditor, McCollister then moved to Oklahoma, where he opened a farm loan business and later engaged in real estate, insurance, and abstracting businesses. That he was a steward and trustee of his local Methodist Episcopal Church, South, superintendent of its Sunday school for 14 years, a member of the Oklahoma executive committee of the International Sunday School Association, and “devoted to the cause of prohibition,”\textsuperscript{1064} suggests that his participation in the anti-cigarette struggle may have been largely religiously motivated. H.B. No. 3, which McCollister, a representative from Mangum (pop. about 3,500),\textsuperscript{1065}
introduced on January 3, together with Democrat Daniel B. Collums, a newspaper editor/publisher and former State Text Book Commission member, and Republican Amos A. Ewing, the former State oil inspector, made it unlawful for any person to smoke a cigarette, or individual or corporation, to have in possession, sell, offer for sale, give away, barter or otherwise dispose of, upon any pretext or devise, or to bring into the State for the purpose of selling, offering for sale, giving away, bartering, or otherwise disposing of any cigarettes, cigarette paper, or substitute therefor; or to solicit the purchase or sale of any such cigarettes, cigarette paper or substitute therefor, either in person or by sign, circular, letter, card, price list, advertisement or otherwise, or to distribute, publish or display any advertisement, sign or notice where any such cigarettes, cigarette paper or substitute therefor, may be manufactured, sold, given away, bartered or otherwise disposed of.

The punishment for violating this unusually comprehensive anti-cigarette measure, which prohibited smoking, possessing, selling, or advertising cigarettes, was a fine ranging between $10 and $500.

A week later the House Judiciary Committee, to which it had been referred, recommended its passage and on January 13 the full House passed, unamended, H.B. No. 3—“one of the most radical measures ever passed by a legislative body in the history of the state”—by the large majority of 79 to 21: 63 Democrats and 16 Republicans voting Aye, and 17 Democrats and 4 Republicans Nay. Some constitutional lawyer House members (as well as

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1066Journal of the House of Representatives of the Regular Session of the Sixth Legislature of the State of Oklahoma...1917, at 22 (Jan. 3); “Twenty Bills Introduced at Second Session,” DO, Jan. 4, 1917 (1:1, at 2:3).
10671910 Census of Population (HeritageQuest); The Oklahoma Red Book 2:145 (W. Richards comp. 1912).
10681900 Census of Population (HeritageQuest); The Oklahoma Red Book 2:149 (W. Richards comp. 1912).
1072House Passes Anti-Cigaret Bill 79 to 21,” OCT, Jan. 13, 1917 (1:3).
1073Journal of the House of Representatives of the Regular Session of the Sixth Legislature of the State of Oklahoma...1917, at 426-27 (Jan. 13). On the proceedings in the committee of the whole, see “Anti-Cigaret Bill to Third Reading,” DO, Jan. 13, 1917 (2:1).
some senators) expressed doubt as to the constitutionality of the smoking ban, but, in a radicalized prohibitionist trend, there appeared to be “some sentiment in the legislature in favor of making laws regarding the liquor traffic and the handling of cigarettes apply with equal force to both user and the seller.”\footnote{Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans}

The press all over the country took notice of House passage of a cigarette smoking ban,\footnote{“House Passes Bill Cutting Filing Fee,” \textit{DO}, Jan. 14, 1917 (4A:1-2).} though the wire service(s) doubtless heightened interest in this legal development by erroneously reporting that the proposed statute was criminal and subjected violators to arrest.\footnote{The non-Oklahoma press got its juxtapositional jollies by running a filler knocking the state’s atavistic legislators, headlined, “Oklahoma Against Birth Control and Cigarettes,” which pointed out that the Oklahoma House had “served notice on the world today that it opposes such new fangled things as birth control and cigarette smoking for women” by passing the ban on cigarette smoking and unanimously adopting a resolution congratulating an Oklahoma couple on giving birth to quadruplets.\footnote{“To Prohibit Cigarettes,” \textit{Muskogee Cimeter}, Mar. 3, 1917 (1:2) (reprinting editorial from \textit{Cincinnati Enquirer}).} The Democratic \textit{Cincinnati Enquirer} opined that the “fatuous” Oklahoma House members “must have known that their stuff and nonsense will not be heeded in the slightest by the adult citizens of their state.”\footnote{See above ch. 6.} In another sign of an attitudinal trend reversal, the \textit{Chicago Tribune}, which in the 1890s had adopted a very hard line against cigarettes,\footnote{\textit{1524}} seemed to anticipate the National Rifle Association’s rhetoric in blaming consumers and giving the commodity a clean bill of health. It now argued that it was the cigarette’s “relative harmlessness” that caused its “bad reputation in communities which still regard it as an instrument of deadly sin” despite the fact that the editor was fully aware of one basic reason for cigarettes’ heightened lethality: “Because of the mildness of the cigarette the smoke can be inhaled and the cigarette carries the medical reproach that
belongs to the manner of smoking it.” The paper therefore pooh-poohed Oklahoma’s do-gooder-legislators’ intervention as driven by their desire to “protect people from the risk of selection in their own habits.”

Once the no-smoking ban bill had gone through the House and been sent on to the Senate, the Tobacco Merchants Association, the cigarette oligopoly’s legislative and propaganda arm, busy as it was monitoring sales ban bills in various states, went into red alert mode, “address[ing] a circular to the entire tobacco trade in...Oklahoma, urging them to put up a united opposition to the bill.” Inter alia, TMA insisted that:

“It is needless to say that such legislation is an interference with personal liberty and an unjust attack upon one of the biggest industries in this country.

“We believe that the Oklahoma tobacco people should protest against the passage of such measure in the most vigorous fashion and we would respectfully suggest that the tobacco trade in Oklahoma start at once a united movement to defeat the bill in the Senate. A letter addressed to every one of your legislators protesting against such legislation will undoubtedly bring forth the desired results.”

Whether the cigarette oligopolists were conspiring to defeat H.B. No. 3 in the Senate is unknown, but from the outset the bill’s progress was impeded in that chamber, where, unlike the situation in the House, smoking was “indulged in”: “Feet are appearing on desks, pipe and cigaret smoke has been added to the haze from ‘ten centers’ that were burned as first offerings.” The Senate Prohibition Enforcement Committee held a hearing on the bill on January 30, at which 14 women, most of them WCTU members, appeared in support of the bill on the unsurprising grounds that it would serve their goal of “sav[ing] the boys of the state from the evils of the cigaret habit.” Oscar Halsell, president of an Oklahoma City wholesale grocery firm purportedly appeared not in that

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1080“Cigarets,” *CT*, Jan. 16, 1917 (6) (edit.)
1081See below ch. 17.
1083aSenators Adopt Regular Gait,” *OCT*, Jan. 11, 1917 (6:2). On smoking rules, see below Tab. 6.
1085a“Mrs. G. D. Kile for Cigaret Bill,” *OCT*, Jan. 31, 1917 (1:6). This article corrected one from the previous day that had erroneously characterized Kile as opposed to the measure. “‘Hippers’ Would Sell ‘Pills’ If Bill Is Passed,” *OCT*, Jan. 30, 1917 (1:5).
capacity—because “did not sell very many cigarets”—but as the father of two sons. His opposition to the 1901-1915 laws (and, by implication, H.B. No. 3) was rooted in their (allegedly) dysfunctional child-psychology underpinnings: it had tended to promote cigarette smoking by boys “because it was forbidden to them and securing of cigarets from ‘bootleggers’ was a kind of sport.” In contrast, prosecution under the 1915 law was “practicable” because it compelled boys to identify their sources. (Why practicing the manly art of not snitching could not be equally sporting Halsell failed to explain.) Whether any of this testimony had any impact on the committee members is unclear, but at some point, the press reported, “it seemed certain” that the committee would send H.B. No. 3 to the Senate floor with a do pass recommendation, but when members who had absented themselves from the hearing room returned, the majority flipped and Democrats Beauman, Johnson, Wilson, and Kerr, and Republican Ferguson outvoted Democrats Cordell (chairman) and Cline, forcing a continuation of the hearing on February 6, when representatives of jobbing houses and other interests were to appear. Remarkably, the press failed to report on any testimony that focused on the aspect of McCollister’s proposal that radically distinguished it from the earlier general sales ban—namely, the universal smoking ban—although it was precisely this feature that prompted both comparing it as a “joke” to the propaganda of “some elderly lady” to abolish coffee and the expectation that it would be “quickly killed” in the Senate Prohibition Enforcement Committee.

On February a three-member Democratic majority of the seven-member committee recommended that H.B. No. 3 not pass, instead recommending a substitute that simply amended the 1915 law to make jail time mandatory.

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1088“Naturalist Pleads for Wild Animals,” DO, Jan. 31, 1917 (2:4-5). If this second hearing took place the press appears not to have reported on it. Republican Walter Ferguson, who introduced the session’s “bone-dry” liquor prohibition bill, was yet another newspaper editor. “‘Bone Dry’ Bill Becomes a Law,” OCT, Feb. 24, 1917 (1:5).
1090“The Sixth Oklahoma Legislature,” Sequoyah County Democrat, Feb. 2, 1917 (6:1) (edit.) (erroneously asserting that House opponents had “deftly injected the clause ‘or the smoking of same’ with the hopes that the senate would kill it on account of its drastic restrictions”).
1091For the committee membership, see “The Legislature,” Standard-Sentinel (Stilwell), Jan. 18, 1917 (2:3-4).
1092Senate Chamber, State of Oklahoma, Sixth Legislature, Committee Prohibition Enforcement (Feb. 7, 1917) (signed by Kerr, G. L. Wilson, and Beauman) (copy furnished by OSA/ODL).
(rather than discretionary) and authorize judges to impose between 10 and 90 days (rather than a maximum of 30 days). That McCollister’s most radical proposal was dead became clear when the next day a two-member minority report (signed by chairman Cordell and Cline) recommended in lieu of the majority report passage of H.B. No. 3 with the smoking ban eliminated. The Muskogee Times-Democrat, which was owned by Democratic State Senator Eugene Mortimer Kerr, characterized the committee majority and minority bills that the full Senate would consider as “practically the present law” and “that demanded by the W.C.T.U. and Anti-Saloon League...[as] prohibiting sale in or shipment in to the state.”

So sure must the Oklahoma City Times have been that (cigarette) smoking would persist that a week later it editorially urged the city’s Carnegie library to get beyond its then policy (“that the library was a library and not a place where men might smoke”) and set aside a room in which “men might sit in the big easy chairs, read instructive books and magazines and indulge in a smoke....” At a time when public places were still contested spaces as to the appropriateness of smoking, and the editorialist, fully recognizing that nonsmokers would “[o]f course...declare that a reader should be able to get along a few hours without blowing rings of smoke above his head,” tactically eschewed a “discussion of the ethics of smoking, or considering the fearful effect of tobacco on the human system,” he nevertheless purported to be solicitous of the intellectual needs of “working men,” many of whom “would patronize the library at night” and “make better citizens” if only “there were a place where they might have a quiet smoke.”

A week later—at the same time that the House was passing a Senate bone-dry liquor bill—acting as the bill’s floor manager, Harry B. Cordell, a farmer, long-time senator, and future president of the State Board of Agriculture, moved that his minority report be substituted for the majority report. Although the Senate adopted his motion by a vote of 20 to 15 and he succeeded in all his...
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

motions to table various weakening amendments, he was unable to block a motion by Senator William Milton Bickel, a lawyer and chair of the Democratic caucus, to refer the bill to a special committee (to which Bickel, Cordell, and Kerr were appointed) with instructions to return a bill merely prohibiting the sale of cigarettes to minors and creating a dealer licensure system.\textsuperscript{1097} The amendments had all been offered by Kerr (1869-1943), who later became a member and president of the Board of Regents of the Oklahoma State University.\textsuperscript{1098} He began with a maximalist position, amending the bill back to a mere no-sales-minors law; his second amendment proposed a licensure system; and his final proposal would have clarified McCollister’s ban on cigarette advertising to include newspapers and magazines\textsuperscript{1099}—an odd one for a publisher of precisely such ads, unless he intended it as a killer amendment.

Floor attacks on the bill were initiated by yet another newspaper editor-publisher, Austrian-born Democrat John Golobie of the Guthrie Register,\textsuperscript{1100} who, deploying a topos that was frequently aired in Oklahoma, denounced H.B. No. 3 as a “an attempt to make grown men suffer deprivation of luxuries they enjoyed just to take away from home the matter of training children and make it police regulation.” (Proponents’s apparent failure to justify the instrumental deprivation of men’s consumer freedom for the sake of the next generation of men was hardly unique to Oklahoma.) Moreover, he asked supporters, if they wanted to protect minors, “why don’t you enforce the present law?”\textsuperscript{1101} Democratic Senator Robert Keller delivered himself of the debate’s most explosive oratory. An ex-Texas cowboy, lawyer, and Helen Keller’s second cousin, professed to strive to make the Democratic Party “balance between the extremes of socialism and standpatism.”\textsuperscript{1102} Declaring that “he smoked cigarettes and that no law would


\textsuperscript{1099}Journal of the Senate of the Regular Session: Sixth Legislature of the State of Oklahoma...1917, at 708-9 (Feb. 15).

\textsuperscript{1100}N.W. Ayer & Son, American Newspaper Annual & Directory 788 (1917).

\textsuperscript{1101}“Bone-Dry Bill Is Passed by House After Hot Debate,” \textit{DO}, Feb. 16, 1917 (1:1, at 3:2-4 at 4).

Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

forbid him using newspaper to roll them if he liked,” he thanked God that the state supreme court still protected people against such laws, which gave the legislature a “reputation for being a bunch of freaks.” Cordell’s response that “[a]ll the good people of the state are demanding this bill become a new law. It is for the uplift of the morals of the state,” prompted Keller to demand to know: “‘Where do you get that morals stuff.... What’s that got to do with keeping grown men from smoking cigarets if they want to?,’”1103 The question was not without justification since Cordell’s minority report had struck the smoking ban while retaining that on possession, but instead of explicating the logical links between statewide morality and enforced abstinence from cigarette smoking—indeed, instead of offering any verbal defense of outlawing sales to or possession of by adult males altogether—Cordell merely “waved a sheath of signed petitions in reply,”1104 as if sheer numbers demonstrated anything about the petitioners’ moral goodness. Having hardly shot his bolt, Keller then (literally) turned on several women observers sitting in the back of the Senate chamber: “‘Quit your lobbying and stay home and spank your own babies instead of trying to raise mine for me. Don’t make the senate raise your boys. Look after them yourselves,’ he shouted.”1105

The press did not explain why Cordell and his colleagues, who had “substituted a ‘bone-dry’ anti-cigaret bill for practical reenactment of the present law recommended by a majority of the prohibition reinforcement committee, were unable to hold their control of the situation” or why they were confronted with an exact reversal of the 20-15 vote on Bickel’s motion while a “bone-dry” liquor bill, on which the Cordell substitute was modelled, was passing through the legislature.1106


1103a “Bone-Dry Bill Is Passed by House After Hot Debate,” DO, Feb. 16, 1917 (1:1, at 3:2-4 at 4). When he was a county judge in 1911 a complaint was made to the governor that Keller had removed confiscated liquor from the courthouse and consumed it. James Klein, Grappling with Demon Rum: The Cultural Struggle over Liquor in Early Oklahoma 64 (2008).

1104a “Would Prohibit Cigarette Sales to All Minors,” MT-D, Feb. 16, 1917 (8:3).


1106a “Would Prohibit Cigarette Sales to All Minors,” MT-D, Feb. 16, 1917 (8:3). The liquor law as enacted made it unlawful both to receive directly or indirectly any liquors, whose sale was prohibited by Oklahoma law, from a common carrier and to possess any such liquor. The law applied to liquor intended for personal consumption and to interstate and intrastate shipments. 1917 Oklahoma Session Laws ch. 186 at 350. See also James
Two days after receiving its charge, the special committee reported its recommendations to: (1) retain the Prohibition Enforcement Committee majority report with the amendment that the minimum fine be increased from $10 to $25; (2) strike both the smoking and possession bans in McCollister’s bill; (3) exempt from the ban on advertising any seller who had received a sales license; (4) make the punishment for violations of the preceding ban a fine of not less than $100 and incarceration in county jail for up to one year; (5) pay one-fourth of fines recovered to the complaining witness, one-fourth to the prosecuting attorney, and the remainder to the county common school fund; (6) make it the county clerk’s duty to issue an annual cigarette sales license to “any responsible person” who paid the $25 license fee and executed a $1,000 bond; and (7) make it the county attorney’s duty to bring an action for forfeiture of the bond for violations of the no-sales-to-minors provision.1107

When the Senate debated the special committee’s proposed amendments at length on February 20, numerous other amendments were offered, but most were tabled, the only potentially consequential one among them being the conferral of discretion on county judges to “grant or refuse persons of good moral character” a cigarette sales license, which would have presumably enabled individual counties to ban all cigarette sales.1108 Also tabled was the absurdist amendment offered by lawyer Warren Snyder to add “rouge, face paint, powder or cosmetics” to the items which it was unlawful to furnish minors.1109 The only even arguably significant amendment of the special committee recommendations adopted by the


1107 The Special Committee report, dated Feb. 17, was printed in *Journal of the Senate of the Regular Session: Sixth Legislature of the State of Oklahoma...1917*, at 752-54 (Feb. 19). The original typescript of this report, bearing the same date and the members’ handwritten signatures, and including numerous handwritten insertions is preserved in the H.B. No. 3 bill file (copy furnished by OSA/ODL). The file also includes an undated but presumably later version of the Special Committee Report, which is cast as a bill rather than committee recommendations and also includes handwritten insertions. The chief change embodied in the handwritten insertions is substitution of the county road fund for the county school fund as the destination of fines and the designation of the former as the destination of license fees (as Kerr had proposed in the aforementioned second amendment that he had offered on Feb. 15).

1108 *Journal of the Senate of the Regular Session: Sixth Legislature of the State of Oklahoma...1917*, at 807-808 (Feb. 20). This and all other amendments are available in the bill file in OSA/ODL.

1109 *Journal of the Senate of the Regular Session: Sixth Legislature of the State of Oklahoma...1917*, at 805-806 (Feb. 20).
Senate was the designation of county road funds as the destination of fines and license fees.\textsuperscript{1110}

The press expressed satisfaction with the Senate version of the bill, “which can no longer be classed as freak legislation.” This revamped status derived from the undocumented claim that: “Physicians tell us that there is no more injury in cigarette smoking on the part of adults than cigar or pipe smoking. That being true, no sensible reason can be given for tabooing their sale to men who have reached their majority.”\textsuperscript{1111} Unsurprisingly, publishers did not focus on their relief that the Senate amendments did away with the McCollister bill’s ban on cigarette advertising, which would have cut off a handy source of newspaper revenue. Senator Kerr’s \textit{Muskogee Times-Democrat}, for example, ran numerous large cigarettes while the legislature was considering the bill.\textsuperscript{1112}

Thus drastically watered down to the point of unrecognizability,\textsuperscript{1113} H.B. No. 3 passed the Senate three days later by the overwhelming majority of 38 to 2.\textsuperscript{1114} On its return to the House, McCollister of all people moved that the chamber agree to the Senate’s amendments to his bill. In opposition—despite having voted against McCollister’s bill a month earlier—Representative Rollin Gish, a Harvard College (‘07) and Harvard Law School (‘09) graduate,\textsuperscript{1115} arguing that the bill at this point was “no improvement over the old law,”\textsuperscript{1116} moved that the House refuse to agree to the amendments and ask, instead, for a conference, but his

\begin{footnotesize}
\begin{enumerate}
\item Journal of the Senate of the Regular Session: Sixth Legislature of the State of Oklahoma...1917, at 806, 809 (Feb. 20).
\item \textquote{The Cigaret Bill,” OCT, Feb. 22, 1917 (10:1) (edit). Later that year, when a controversy was raging over shipment of cigarettes to U.S. soldiers in France, one Christian minister, citing a Dr. Claude Thompson as authority, opined that cigarettes were “not so likely to be injurious to the membranes of the throat as is a cigar or a pipe, providing of course that the smoke is not inhaled.” “Ministers Don’t Back Hobson Up on Cigaret ‘Evil,’” MT-D, Nov. 17, 1917 (1-B:1, at 2-B:2-5 at 2). Since the vast majority of cigarette smokers did (and do) inhale, whereas the vast majority on pipe and cigar smokers did (and do) not, this claim, risible as it was to begin with, was vacuous.
\item E.g., \textit{MT-D}, Feb. 5, 1917 (6) (Fatima); \textit{MT-D}, Feb. 13, 1917 (3) (Fatima); \textit{MT-D}, Feb. 23, 1917 (2) (Chesterfield). Both of the cigarettes were manufactured by Liggett & Myers.
\item For the changes, see Engrossed Senate Amendments to House Bill No. 3 (n.d.) (copy furnished by OSA/ODL).
\item Journal of the Senate of the Regular Session: Sixth Legislature of the State of Oklahoma...1917, at 896-97 (Feb. 23).
\item \textquote{Anti-Cigaret Measure Is Now Up to Governor,” OCT, Feb. 24, 1917 (1:1).}
\end{enumerate}
\end{footnotesize}
motion was lost and McCollister’s carried. Nevertheless, on reconsideration several days later the House reversed itself, refused to agree to the Senate amendments, and asked the Senate for a conference. However, the House conferees, of whom McCollister was one, agreed to all the Senate amendments. After the House had defeated a motion to refuse to accept the conference committee report by a vote of 25 to 57, it passed the amended H.B. No. 3 by a vote of 59 to 27.

No matter how diluted the new law, some cigarette sellers purported to be rebelliously disgruntled. Under the headline, “Drastic Oklahoma Law,” the trade magazine Tobacco reported that—as had been argued, for example, in the 1890s about high license fees in Denver and Chicago—because the requirement of putting up a $1,000 bond would “run out of Oklahoma City all small tobacco dealers, and...turn the state over to the tobacco trust,” the Merchants Cigarette Referendum office was circulating petitions for a referendum. The result of the new law, such sellers claimed, would be a cigarette business “confined to the larger drug stores and chain stores....”

At the Oklahoma WCTU’s first annual convention following the legislative session longtime President Abbie Hillerman noted, in her report on legislative work—which also included establishing a permanent State Industrial School for Girls, raising the “age of protection for girls” to 16 from 12, and the bone-dry liquor prohibition bill—that she had “put forth special effort toward securing the passage of the McCollister Anti-Cigarette bill,” which was, however, “changed and amended till it was very unlike the original, when it was finally passed....” Nevertheless, the WCTU—not even tarrying to bemoan the failure of the smoking

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1117 *Journal of the House of Representatives of the Regular Session of the Sixth Legislature of the State of Oklahoma...1917*, at 1099 (Feb. 24).

1118 *Journal of the House of Representatives of the Regular Session of the Sixth Legislature of the State of Oklahoma...1917*, at 1208 (Mar. 1).

1119 *Journal of the House of Representatives of the Regular Session of the Sixth Legislature of the State of Oklahoma...1917*, at 1389-91 (Mar. 10). The previous day after McCollister had unsuccessfully moved that the House concur in the conference report, the motion of another House conferee (Republican S. J. Bardsley) to re-refer the report to the committee carried. *Id.* at 1356-57 (Mar. 9). At least some of the resistance to the bill appears to have been procedural, based on the argument that the Senate amendments constituted a virtual rewriting. “Cigaret Bill Is Sent Back,” *OCT*, Mar. 9, 1917 (3:2).

1120 For the text, see 1917 Oklahoma Session Laws ch. 148 at 238.

1121 See above ch. 6.


Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

ban—believed that, if properly enforced, it would be more effective than the 1915 law. 1124

Oregon (1917)

The pending bill really would make the state bone-dry against cigarettes. 1125

If some aspect of Oregon society needed reforming, chances were that the W.C.T.U. was doing something about it. 1126

The year 1917 also witnessed the traditionally overwhelmingly Republican Oregon legislature 1127 making a strong move toward adoption of a virtually all-encompassing ban on public cigarette smoking. House Bill No. 268 was introduced on January 25 1128 by one of only four House Democrats, Charles Thomas Sweeney (1869-1956), a physician and surgeon, 1129 who later became president of the Pacific Northwest Medical Association 1130 and the Oregon State

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1124 Proceedings of the Tenth Annual Convention of the Woman’s Christian Temperance Union of Oklahoma...1917, at 45 (1917).
1125 “Smoking Bill Favored,” MO, Feb. 7, 1917 (7:3).
1126 David Peterson del Mar, Oregon’s Promise: An Interpretive History 146 (2003).
1127 In 1917 Republicans controlled 55 of 60 House and 24 of 30 Senate seats. The most recent session in which the Republican Party had not constituted the majority in the House and/or Senate was 1878. Michael Dubin, Party Affiliation in the State Legislatures: A year by Year Summary, 1796-2006, at 154 (2007). To be sure, “factions of the Republican Party sometimes supported the Democratic opposition” and once reformers had secured adoption of a constitutional amendment institutionalizing the initiative and referendum “the legislature’s monopoly on legislation was gone...” Earl Pomeroy, The Pacific Slope: A History of California, Oregon, Washington, Idaho, Utah, and Nevada 197, 198 (1991 [1965]). On Progressivism’s having reached its limits in Oregon by 1912 and Progressives’ return to the Republican and Democratic parties by 1916, see Gordon Dodds, Oregon: A Bicentennial History 161-84 (1977).
1128 State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917, at 337 (Jan. 25) (1917).
1130 JAMA 103(9):688 (Sept. 1, 1934).
Medical Society.\textsuperscript{1131} His progressive public health bona fides were unmistakably on display that session in his taking the lead in introducing a bill to combat the evil of questionable hospital fees that the Oregon State Federation of Labor just a few days earlier at its annual convention had articulated as one of its three legislative goals.\textsuperscript{1132}

Of specific interest here is that H.B. 268 made it a misdemeanor “for any person to smoke or use any cigarette in any public building, upon any public highway, street, alley, park or grounds, or in any public place of business, or in any railway car, in any street railway car, or in any other public conveyance, or any public place in this State.” Anyone convicted of violating this provision was guilty of a misdemeanor and “shall be punished” by a maximum fine of $5 for a first offense and $10 for each additional offense.\textsuperscript{1133} Sweeney’s bill, which, in contemplation of judicial challenges, foresightfully provided that in its entirety it “shall be deemed an exercise of police power of the State, for the protection of the economic welfare, health, peace and morals of the people of the State, and all of its provisions shall be liberally construed for the accomplishment of that purpose,”\textsuperscript{1134} represented a comprehensive regime of cigarette prohibition, including the manufacture, sale, or giving away of cigarettes. In order to preclude a common scam, it also made “[h]aving cigarettes in a place of business where others may take them or help themselves…\textit{prima facie} evidence of an intent to sell.”\textsuperscript{1135} Violations of these provisions were subject to a maximum $100 fine for the first offense, $25 to $500 and/or maximum imprisonment of 30 days for the second, and a mandatory jail sentence of up to 30 days and the aforementioned fine for the third or further offenses.\textsuperscript{1136} H.B. 268 also embodied an especially stringent ban on minors’ smoking, using, or being in possession of cigarettes: whereas some other states conferred discretion of judges to relieve minors of such

\textsuperscript{1131}\textit{JAMA} 107(9):1572 (Nov. 7, 1936).
\textsuperscript{1133}House Bill No. 268, § 5 (Jan. 25, 1917, by Sweeney) (copy furnished by Oregon State Archives).
\textsuperscript{1134}House Bill No. 268, § 3 (Jan. 25, 1917, by Sweeney) (copy furnished by Oregon State Archives).
\textsuperscript{1135}House Bill No. 268, § 1 (Jan. 25, 1917, by Sweeney) (copy furnished by Oregon State Archives). Another common scam was dealt with by a provision making it unlawful to “solicit, take or receive within this State, any order for any any cigarette…” \textit{Id.}, § 8.
\textsuperscript{1136}House Bill No. 268, § 4 (Jan. 25, 1917, by Sweeney) (copy furnished by Oregon State Archives).
liability if they revealed the source of the cigarette, Sweeney’s proposal made refusal to reveal an independent misdemeanor; both misdemeanors were subject to maximum $5 fines. The bill also prohibited, subject to a $100 to $500 fine, cigarette advertisements “by signs, billboards, newspapers, periodicals or otherwise.” Finally, included in the bill was a mandate to district attorneys “to enforce and to diligently prosecute any and all persons violating any of the provisions”; the failure, neglect, or refusal to perform this duty carried with it, on conviction, both a $100 to $500 fine and mandatory immediate “forfeiture of his office.”

The cigarette oligopoly’s legislative and propaganda organization, the Tobacco Merchants Association of the U.S., was hardly asleep at the wheel in the face of this direct assault. On the contrary, it was “very busy these days detecting and exerting all possible efforts to defeat numerous pieces of adverse legislation now pending in State legislatures throughout the country.” Indeed, the United States Tobacco Journal placed the Oregon bill at the head of the list even though, curiously, it vastly understated the reach of Sweeney’s bill as merely “practically restricting the sale of cigarettes within state limits.” On February 6, a dozen days after Sweeney had introduced the bill—but Oregon’s short regular session ran only from January 8 to February 19—TMA Secretary Charles Dushkind sent this urgent appeal (“IMPORTANT NOTICE”) on TMA letterhead, which so profoundly failed to appreciate the measure’s breathtakingly radical character that it might be taken for a form letter:

ACT AT ONCE AND PROTECT YOUR BUSINESS!

TO THE TOBACCO TRADE IN THE STATE OF OREGON:

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1137House Bill No. 268, § 6 (Jan. 25, 1917, by Sweeney) (copy furnished by Oregon State Archives). Law enforcement officials finding a minor smoking a cigarette or having one in his possession had a duty “to immediately inquire” of the minor where and from whom he received it and, if the minor failed to comply, to arrest him without warrant and take him before a judge; if the minor revealed the source, the officer was required to report the information immediately to the district attorney. Failure to perform any of these duties triggered a mandatory $50 to $100 fine. Id., § 7.


1140See below ch. 17.


1142See the almost simultaneous TMA statement on Oklahoma above this ch.
A bill has been recently introduced in the Legislature restricting or practically prohibiting the sale of cigarettes in your State. The cigarette trade undoubtedly forms a most substantial part of the tobacco business, and we feel that the Tobacco Trade in your State ought to resent any legislation that may tend to interfere with legitimate business and work a substantial injury to the merchants engaged in it.

A strong and vigorous protest on the part of the people engaged in the tobacco industry will undoubtedly have due effect, and we earnestly appeal to the tobacco trade in the State of Oregon to exercise their prerogatives as American Citizens and protest against such legislation.

We would respectfully suggest that a united movement be started at once to defeat such legislation. A letter addressed to the Representative in the House as well as in the Senate of your district will bring the desired results.

We will appreciate it very much if you would kindly let us hear from you as to your action in the matter.\textsuperscript{1143}

Despite Dushkind’s apparent ignorance of the astonishing scope of Sweeney’s bill—which the independent \textit{Evening Telegram} called “drastic in the extreme” and was backed by the WCTU, and some members of the Oregon Congress of Mothers, parent-teacher associations, and other groups\textsuperscript{1144}—and the possibility that some retail cigar and pipe tobacco dealers may not have mourned the demise of cigarette sales, and regardless of whether his circular actually galvanized protests, his cocksure optimism proved justified within four days.

TMA’s call to action came in the nick of time: on the evening of that same day, following the bill’s referral to the Health and Public Morals Committee,\textsuperscript{1145} the “House chamber was packed...with a crowd that came to hear the arguments pro and con on the Sweeney anti-cigarette bill....” More than 20 speakers representing various viewpoints engaged the issue, the WCTU, unsurprisingly, supporting passage of H.B. 268; more than one businessman opposed it on the grounds that experience in other states had demonstrated the unenforceability of such a law,\textsuperscript{1146} and a large Portland delegation attended to “voice its protest.”\textsuperscript{1147}
The intensity of the gallery’s sentiments could be gauged by its loud applause for attacks on cigarettes, which were mounted, inter alia, by school superintendents as well as by one speaker who pleaded for passage on the grounds that “women were fast becoming addicted to the habit.” Of particular interest was the Oregon newspaper business’s position presented by Elbert Greer, the owner/editor of the Ashland Tidings, who (literally) echoed the cigarette oligopoly line in stating: “The newspapers of the state will favor legislation that comes from the fathers and mothers and gives them an opportunity to keep tobacco away from their children, but you are going too far and depriving the old fellows, who have smoked cigarettes for 40 years, of their pleasure. This bill will affect the average smoker of the state and he will ignore the law. Do not enact a measure that will not have the moral support of the men of the country.” In addition to speaking through publishers protective of profits accruing from cigarette ads, the tobacco manufacturers dispatched their own direct representative, J. T. Williams of San Francisco, who, after repeating the industry’s decades-old claim that “medical science of late years had declared that cigarettes were not as injurious as other forms of tobacco usage,” shifted to the diversionary ploy that cigarette firms would be trotting out into the twenty-first century: “We want a bill that prohibits a merchant from selling cigarettes to minors...and we are willing to post a large sum of money for no other purpose than to secure convictions of men who violate the law in selling to children.”

In line with this strategy, opponents of Sweeney’s bill at the hearing expressed support for a no-sales-to-under-21-year-olds bill, which Portland business lawyer Plowden Stott had introduced and had been referred to the same committee. The next morning the Health and Public Morals Committee reported H.B. 268 favorably, “coupled with the recommendation that the Stott bill go on the calendar side by side with” Sweeney’s to be considered at the same time. Committee chairman William Elmore, a Democrat and bank

1148“Smoking Bill Favored,” MO, Feb. 7, 1917 (7:3).
1150“Smoking Bill Favored,” MO, Feb. 7, 1917 (7:3).
1151History of the Bench and Bar of Oregon 230 (1910); 1910 Census of Population.
1152Sub. H.B. 436 was Stott’s substitute for H.B. 436, which he had introduced with two other representatives. State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917, at 61, 358, 389 (Feb. 2, 7) (1917).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

1910 Census of Population (HeritageQuest).

“Cigarette Is in Line for a Slap by House,” OJ, Feb. 7, 1917 (1:4). The only provision of H.B. 268 that could have been interpreted to conflict with the U.S. Supreme Court’s original package doctrine was section 8, which made it “unlawful for any person to solicit, take or receive within this State, any order for any cigarette, or to make any contract for the sale of any cigarette....”

State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917, at 387 (Feb. 7) (1917). Stott had already signed his report on Feb. 2. Whereas H.B. 436 made it unlawful to sell cigarettes to persons under 21, Sub. H.B. 436 prohibited sale to minors. Id. at 61.


On February 8 the House gave lively third-reading consideration to both bills—“[n]early everybody took a hand in the running debate on both questions.” The gallery was so “packed” with women backing passage of H.B. 268 that it was jocularly referred to as the “‘committee on intimidation,’” with which members sought to “curry” favor or establish their “alibis.” The all-morning debate turned “personally bitter” when Representative Albert Burton, a Portland high school teacher, opined that “any man who used tobacco was filthy,” prompting 33-year-old lawyer Vernon Forbes—who would drown a year later—to retort that “when you wanted to find a simon pure ‘pin head’ president, explained the favorable report on both bills by reference to the committee’s having been “informed, on what appeared to it to be competent authority, that the Sweeney bill, if enacted, probably could not be enforced because of unconstitutionality.” The specific alleged defect was that “tobacco did not come within the terms of the Webb-Kenyon act giving states the power to regulate interstate commerce in the case of intoxicating liquor, while the Sweeney bill made that attempt.” That same day the full House adopted the committee majority report, which was signed by Elmore and recommended passage of Sweeney’s bill as amended only by an effective date of January 1, 1918. Although it rejected Stott’s minority report, recommending against passage on the grounds that his own bill, Sub. H.B. 436, “covers fully and fairly all the objections to the present law pertaining to the regulation of the sale of tobacco to minors,” the House did adopt the committee report recommending that the latter be substituted for the original H.B. 436.

1151 1910 Census of Population (HeritageQuest).


1153 State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917, at 387 (Feb. 7) (1917). Stott had already signed his report on Feb. 2. Whereas H.B. 436 made it unlawful to sell cigarettes to persons under 21, Sub. H.B. 436 prohibited sale to minors. Id. at 61.


and ‘boob’ you wanted to go hunt up a ‘man school ma’rm.’”161 (In contrast, Sylvia Thompson, the chamber’s only woman and a supporter of H.B. 268, declared: “I have liberal views about smoking.... And I do not think that every man who smokes is filthy.”)162 More substantively, Forbes, a casual cigar smoker who was unable to recall ever having bought a package of cigarettes, “did not like to have anyone tell him he could not smoke when he wanted to.”163

Discussion began with Stott’s bill, which was “mild and inoffensive alongside of the Sweeney bill,” in regard to which it was offered as a compromise; touted as “mak[ing] the law a whole lot tighter than it is now,” Sub. H.B. 436 increased the fine for selling to minors (under 21) from $50 to $250 and imposed “heavy jail sentences.” Stott urged passage of his bill on the grounds “that it would accomplish the professed objects of the anti-cigarette crusaders—that is, to prevent boys and young men from smoking them.”164 On final passage the House voted 35 to 21 in favor of Stott’s bill, nine of Portland’s 13-member delegation voting Aye and three of the four Democrats voting Nay (only Elmore supported it). The hard core of the anti-cigarette militants were presumably the 19 (including Sweeney himself) of the 21 Nay-voters who then voted for H.B. 268.165 Of these 19 militants 11 demonstrated their progressive bona fides by

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161 Anti-Cigarette Bills Pass in Oregon House,” OJ, Feb. 8, 1917 (1:8, 14:3).
163 Anti-Cigarette Bills Pass in Oregon House,” OJ, Feb. 8, 1917 (1:8, 14:3).
164 “House Vote Favors Ban on Cigarettes,” MO, Feb. 9, 1917 (6:4). The 1893 law prohibiting the sale of any tobacco to persons under 18 imposed a fine of $5 to $50. Lord’s Oregon Laws § 2148 (1910). The same 1893 law made it unlawful for anyone under 18 to smoke any tobacco in any public highway, street, place, square, or resort, subject to a $1-$10 fine and, at the court’s option, two days in jail. Id. § 2149.
165 State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917, at 4-5, 394-95 (Feb. 8) (1917). One of the two defectors was Norwegian-born Olaf Laurgaard, a prominent civil engineer, who on July 1, 1917, became the Portland city engineer. History of the Columbia River Valley from the Dalles to the Sea 3:292-97 (1928), on http://files.usgwarchives.org/or/multnomah/bios/laurgaard1056gbs.txt (visited Apr. 20, 2011). He explained his votes on the basis that H.B. 436 did not go far enough to deal with the “greatest evil effects of cigarettes” on boys under 18, while H.B. 268 went “a little too far and [wa]s too drastic in its regulation at this time.” Without explaining what kind of amendment he had in mind, Laurgaard, who did not use tobacco and was “heartily in favor of the regulation, control or elimination of the cigarette evil at this time,” was “sorry to say” that he could not support either bill without amendment. State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917, at 395 (Feb. 8) (1917).
voting the next day against a high-profile anti-picketing bill.\textsuperscript{1166} Opponents of the prohibitory measure planned to table or otherwise prevent a vote on H.B. 268 by passing Sub. H.B. 436 first, but Sweeney nevertheless succeeded in securing consideration and a vote after the opposition had attacked its unenforcibility.\textsuperscript{1167} One member, drawing on his experience of having lived in Washington State when its anti-cigarette bill was in effect, recounted that “they got all the cigarettes they wanted.” While ultimately voting in accord with his committee report for H.B. 268, Chairman Elmore declared that “he had asked the attorney general’s office for an opinion regarding the constitutionality and that the bill was unconstitutional.” More relevant to the public cigarette smoking prohibition, which could hardly run afoul of the interstate commerce clause, was Elmore’s charge that the “speaker [of the House] could not enforce the house rule against smoking during sessions..., and it would be much more difficult to enforce the provisions of the Sweeney bill.” From there he went off on a riff claiming that the police “would not enforce the existing law” and doubting whether “they would enforce any law.” Finally, twitting “those who had appealed for the passage of the Sweeney bill,” Elmore expressed further doubt that any of them “would aid in its enforcement”\textsuperscript{1168}—a rebuke that, at least as directed at the WCTU, was risible. Although Dr. Sweeney’s bill, which was backed by the WCTU and other women’s organizations, and “ma[de] the state ‘bone dry’ against the whole cigarette business—manufacture, sale, use and all”—was (accurately) “said to be one of the most drastic anti-cigarette measures ever passed by any legislative body,”\textsuperscript{1169} the House handily passed it by a vote of 35 to 24, all four Democrats supporting and eight of 13 Portland representatives

\textsuperscript{1166}Anderson, Belland, Brownell, Burton, Childs, Crandall, Lunger, Small, Sweeney, Thompson, and Tichenor. \textit{State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917}, at 402 (Feb. 9) (1917). The bill (H.B. 227) passed by a vote of 33 to 25 but did not become law. “Kubli Anti-Picket Bill Goes to Quick Death in the Senate,” \textit{OJ}, Feb. 17, 1917 (1:7). An additional eight members who had voted for H.B. 436 and H.B. 268 also opposed the anti-picketing bill. The bill’s author—K. K. Kubli—justified it on the grounds of the at that time prevalent shibboleth that “[t]here was no such thing as peaceful picketing,” adding that the bill was “intended to strike...at the lawless element, the I.W.W. hordes, who flocked to places of industrial strife.” “‘Picketing’ by Unions Loses House Support,” \textit{OJ}, Feb. 9, 1917 (1:8, at 14:4).

\textsuperscript{1167}“House Vote Favors Ban on Cigarettes,” \textit{MO}, Feb. 9, 1917 (6:4).

\textsuperscript{1168}“Anti-Cigarette Bills Pass in Oregon House,” \textit{OJ}, Feb. 8, 1917 (1:8, at 14:3-4).

\textsuperscript{1169}“House Vote Favors Ban on Cigarettes,” \textit{MO}, Feb. 9, 1917 (6:4). On the threat by Democrat Sylvia Thompson that, if the legislature rejected the bill, 30,000 women would put it on the ballot at the next election and pass it, see below ch. 18.
opposing it. Unsurprisingly, all seven representatives who 10 days earlier had voted against the bone-dry liquor prohibition bill—six of whom lived in Portland—also opposed the bone-dry cigarette bill.

Portland’s Independent Republican Morning Oregonian was not impressed. On the contrary, it editorially admonished the legislature to “retrieve its prestige” and rehabilitate representative government in the state by ceasing to “fritter[ ] away hours in the heated discussion of such trivialities as cigarette prohibition for grown men.” The next day the paper reinforced the lecture by publishing a lengthy letter to the editor, sounding suspiciously like a cigarette oligopoly ad, attacking “freak laws” and praises cigarettes as the mildest and least toxic form of tobacco smoking.

That same day, as the Oregonian must have delighted in reporting, the House, “[a]fter two days of reflection on its conduct in passing the Sweeney bone-dry cigarette bill,” voted to recall both bills from the Senate “for the purpose of effecting a compromise. It is possible that the radical Sweeney bill will be toned down so that adults will not be prohibited from buying or smoking cigarettes.” In turn, Stott’s bill would be bolstered with “[s]trict inhibitions” against youth smoking. Significantly, Dr. Sweeney was “agreeable to the change” making the bill merely “bone-dry against boys under 21....” That Sweeney and “[f]riends of anti-cigarette legislation...so readily consented to its recall from the Senate” was rooted in their fear that “the Senate would kill the bill in its original form....” The lack of a general commitment to enact even a “‘bone dry’ cigarette bill for minors” was witnessed by multiple cross-snipings over “passing the buck” and letting the Senate kill the bill or fixing it in the House. The 33-21 House vote for recall is difficult to interpret: presumably those who voted Aye with Sweeney preferred part of a loaf to none at all, but the Nays may have

1170 State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917, at 4-5, 394-95 (Feb. 8) (1917).
1171 State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917, at 343 (Jan. 29) (1917).
1172 “The Anti-Cigarette Furore,” MO, Feb. 9, 1917 (10:2) (edit.).
1173 Vic Hammer, “Cigarette Is Least Harmful,” MO, Feb. 10, 1917 (8:6) (ltr to editor). No person by that name was returned as living in Oregon at the 1910 or 1920 population census.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

encompassed both those who, opposed to prohibition, hoped to give the Senate an opportunity to kill the bill, and those who either were more principled or radical than Sweeney and insisted on prohibition or nothing or judged the chance of success in the Senate more optimistically. Of the aforementioned 19 militants 11 voted against and 7 for recall. The composition of the Nays was strikingly heterogeneous: of the 21 opposing recall: 11 had voted against H.B. 436 and for H.B. 268; six for both bills; three for H.B. 436 and against H.B. 268; and one against both. Later that same day, after both bills had been returned from the Senate, H.B. 268’s most militant advocate, Dr. James E. Anderson, an osteopathic physician known as the father of (liquor) prohibition in Oregon, unambiguously declared that the “people who had introduced the bill would rather have it killed than to have it emasculated, which was what was going to happen to it.” Seeking to implement this purist position, he moved to take Sweeney’s bill from the table in order to postpone it indefinitely, but the compromisers foiled his motion.

In the event, the very next day’s proceedings revealed that a bloc of legislators, reflecting the position of the WCTU and its allies, did in fact “Want Absolute Curb on All or Nothing.” And those in the know divulged to the press that word had gone out “asking that an avalanche of women descend on the State House” on February 12 in order to influence House members during consideration of the dueling bills; the “plan” of the supporters of the “Sweeney absolute cigarette prohibition bill in its original form,” who met on February 11 and decided “to stand on the original bill, attempt to pass it to the Senate, or kill all anti-cigarette legislation suggested, was “to pack the rear end of the House with a showing of all of the women possible to gather here.” Conservative farmer Charles Brand—“the reverse of the demagogue, for he tries to cure class hatred instead of stimulating it”—who was the driving force behind the recall move, had voted for H.B. 268, but had second thoughts, not because he feared that it

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1178 State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917, at 413 (Feb. 10) (1917).
1179 Census of Population 1910 and 1920 (HeritageQuest); Western Osteopath 15(12):16 (May 1921). In 1917 Anderson introduced H.B. 100, the “bone-dry prohibition bill,” which became law. State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917, at 50 (Feb. 10) (1917).
1180 “No-Cigarette Bills Slated to Worry House During Week,” OJ, Feb. 11, 1917 (8:1-2) (quote); State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917, at 415 (Feb. 10) (1917).
1181 “Women May Lobby,” MO, Feb. 12, 1917 (6:3-4).
could not pass the Senate, but because he almost immediately “discovered that such a bill is unworkable, that it is legislation that would be ineffective and not accomplish the purpose for which it is intended.”1183 (For his “prompt action in discovering” that he had voted for an “unconstitutional and unworkable” bill and his equally “prompt action in acknowledging this” he harvested “numerous complimentary references on his attitude....”)1184 He was nevertheless purportedly motivated by his strong support for a law that would “completely cure the possibility of minors securing or smoking cigarettes,” in aid of which he had drafted amendments to Sweeney’s bill to make it “absolutely prohibitive” for and applicable only to minors, an outcome that the Oregonian certified as “unquestionably...the desire of a large majority of the...House” and opposed only by “some” or “a few” of the die-hard, all-or-nothing prohibitionists.1185

The amended bill that the House passed on February 12 was the work product of a five-member special committee that the House speaker had appointed that day and included Brand and Sweeney.1186 The committee’s gutting amendments, which the House and Senate adopted in full, were of two kinds: (1) the selling bans were all recast to apply only to minors; and (2) the bans on manufacturing, public smoking, and ads were struck altogether.1187 The advertising ban was dropped at the suggestion of Representative K(aspar). K. Kubli,1188 owner of a printing company, who was the driving force behind the session’s contentious anti-picketing bill, later—nomen est omen: his “initials earned him free membership in Klan No. 1”1189—was affiliated with and supported by the Ku Klux Klan, and became House speaker in 1923.1190

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1186“Cigarette Ban Now for Minors Only,” MO, Feb. 13, 1917 (1:7). Two of the remaining three members, Bean and Lafferty, had voted for the original H.B. 268, the latter voting as well for H.B. 436, while the former was absent. The fifth member, Burdick, had voted for H.B. 436 and against H.B. 268.
1187State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917, at 424-25 (Feb. 12) (1917). For the statute, see 1917 Oregon Laws ch. 244 at 466. For a copy of the law as enacted from the TMA files, see Bates No. 501994504.
1190On Kubli (1869-1943), who attended Harvard Law School but never practiced law, see 1910 and 1920 Census of Population (HeritageQuest); Harvard University Directory
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Sweeney spoke on behalf of the watered-down bill that he had made possible and helped draft, although he did not wholeheartedly support it:

He said that while it does not represent the higher ideals of anti-cigarette legislation that he hopes eventually to obtain, he believes it to be a good bill and a step in the right direction. "When members who had voted for my bill said that they believed they had used poor judgment...I consented to have it come back. I think I have shown my good faith by agreeing to the amendments that have been made, and I hope now that the other members will keep their faith with me and vote for the bill as it stands."[1191]

His apologia, which was designed to refute charges that he was not acting consistently, also included the claim that the amended bill was “the best that could have been brought out of such a chaos as had been raging about it.” Finally, he urged appreciation of the great educational benefit that the “agitation” had conferred on the state.[1192]

In fact, Sweeney forfeited the faith of his closest allies in the struggle for cigarette prohibition. One of them, Dr. Anderson, declared on the House floor that the compromise was not the kind of measure that the sponsors of the original bill—the members of the WCTU and other women’s organizations—had wanted in offering “the bone-dry bill.” He hardly seemed to be exaggerating when he observed that the bill “probably had fallen into the hands of its enemies.”[1193] (Anderson’s intimacy with the Oregon WCTU’s intentions was suggested by his appearance later that year as one of the “distinguished guests” at its annual convention.)[1194] The enemy uppermost in Dr. Anderson was the American Tobacco Company, whose representatives “had been gumshoeing among the solons and exercising pernicious influences.”[1195] In the event, only a minority of


the hard-core prohibitionists joined Sweeney in compromising and defecting: of the 19 representatives who four days earlier had voted both against Stott’s bill and for Sweeney’s 12 opposed the diluted Sweeney-Brand bill. Eight of the 12 had also voted against the anti-picketing bill and against recall of the anti-cigarette bills.\footnote{1196}

Once the House had passed “‘safe and sane’” and “constructive” anti-cigarette legislation\footnote{1197} by defanging and mainstreaming the Sweeney bill and thus had “demonstrated that it was not trying to ‘pass the buck’ to the Senate,” in turn “the Senators,” by whom the original measure was “frankly regarded...as a bit of freak legislation to be classed with such measures as the anti-snuff bill,” “demonstrated [their] desire to co-operate in the fullest extent with the House in the passage of sane legislation, as opposed to laws of the freak type” by voting (against only one Nay) to suspend the rules to expedite consideration of the Sweeney-Brand bill. The Judiciary Committee then quickly, unanimously, and favorably reported out the bill without any amendments, thus enabling it to avoid what would soon become a clogged Senate calendar.\footnote{1198} On the anti-climactic third reading the Judiciary Committee chairman (hyperbolically) praised the measure as one of the best laws ever presented to the legislature, which the Senate proceeded to pass unanimously.\footnote{1199}

Two years after having been killed, Sweeney’s original radical bill experienced a quasihemidemisemi-resurrection when, availing himself of the very extensively used initiative and referendum system that Oregon had adopted in 1902 and became a hallmark institution of the state’s progressivism until the mid-

\footnote{1196}{The 12 were Anderson, Belland, Burton, Childs, Crandall, Goode, Gordon, W. B. Jones, Lunger, Meek, Small, and Thompson. In addition, five (Eaton, Porter, Sheldon, Stephens, and Thomas) who had voted for both bills opposed the watered-down compromise. Only three of these 18 representatives (Burton, Goode, and Gordon) represented Portland. Anderson, Belland, Burton, Childs, Crandall, Lunger, Small, and Thompson as well as Eaton, Sheldon, and Thomas voted against the anti-picketing bill; Anderson, Belland, Burton, Crandall, Goode, Meek, Small, and Thompson as well as Eaton, Porter, and Stephens voted against recall.}

\footnote{1197}{“Cigarette Ban Now for Minors Only,” \textit{MO}, Feb. 13, 1917 (1:7).}

\footnote{1198}{“Senate Hurries Act,” \textit{MO}, Feb. 14, 1917 (6:3); \textit{State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917}, at 232 (Feb. 14) (1917).}

\footnote{1199}{“Cigarette Bill Is Before Governor,” \textit{MO}, Feb. 17, 1917 (7:1); \textit{State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: Regular Session...1917}, at 253 (Feb. 16) (1917).}
1910s, one David E. Frost of Oregon City began circulating a proposed initiative bill petition whose purpose was “Abolishing cigarettes by prohibiting the sale, use or possession thereof,” and which, inter alia, made it a misdemeanor “for any person to smoke, use or be in possession of any cigarette in this State after January 1st, 1921.” This capacious proposal was, in large part, a verbatim reproduction of H.B. 268, and also banned advertising and required every mayor, sheriff, police officer, and other officer to ask all persons he found smoking or having in their possession a cigarette where and from whom they had obtained it; failure to comply with the request would have resulted in a subpoena, and refusal to reveal the information under subpoena would have been a misdemeanor. To be sure, the real organizer of this petition drive was—according to press reports promoted by the newly formed Allied Tobacco League of America, an offshoot of the Association Opposed to National Prohibition—the WCTU. The ever vigilant tobacco industry was carefully monitoring the proposal’s progress. For example, the United States Tobacco Journal almost immediately reported that: “They are getting busy in Oregon again and an initiative petition has been filed with the authorities calling for a law prohibiting” the sale of cigarettes, thus understating the proposal’s scope.

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1201At the 1910 Census of Population he was returned as a 46-year-old carpenter; at the 1920 census the 52-year-old’s occupation was unfortunately illegible, but his address was the same as on the petition.

1202Ballot Title: Initiative Bill-Proposed by Initiative Petition (n.d.), Bates No. 501994485.


1204Initiative Petition Relation to Cigarettes, Initiated by D. E. Frost, 304 High st., Oregon City, Oregon, §§ 7 and 5 (n.d.), Bates No. 501994468. This version was even more radical than Sweeney’s bill in that the stop-and-interrogate provision in the latter applied only to minors.


1206“Oregon to Hold Referendum upon Cigarette Question,” USTJ 92(15):16 (Oct. 11,
Although in October 1919 the petition was reportedly being circulated for the requisite 9,940 verified petition signatures for the November 1920 election, by early 1920 the Tobacco Merchants Association, having become curious if not anxious about the status of the petition, received on February 10 from the Oregon Secretary of State, which was required to all petition forms before they were circulated for signatures, in response to an inquiry the information that: “The Anti-cigarette petition has not yet been presented to us for formal approval. We understand, however, that it is now in the hands of the printer and will likely reach us within the next few days.” The official went on to explain that following approval the initiators were required to secure the certified signatures of 9,940 legal voters and file the completed petition not later than July 1 in order for it to be voted on at the November 2 biennial election. The TMA Legislative Bulletin then appended its “own advices” contained in a dispatch from “disinterested sources: ‘Sufficient signatures no doubt will be obtained. Final results impossible to predict at this time. Little comment or publicity thus far. ** Nevertheless, the initiative failed even to appear on the ballot for the November 2, 1920 election, apparently because, contrary to the TMA’s earlier intelligence, it lacked sufficient signatures.

Although the Sweeney-WCTU bill also never appeared on the initiative ballot later in the 1920s, at the general election in November 1930, three years after Kansas had repealed the last statewide cigarette sales ban, Oregon voters faced a proposed constitutional amendment to ban the importation, manufacture, sale, purchase, possession, giving away, or advertising on billboards or in newspapers or other periodicals of cigarettes, cigarette papers, or materials for the manufacture of cigarettes, backed by fines ranging from $25 to $250 or confinement in county jail between 30 and 90 days or, in the judge’s discretion,
both. More voters cast ballots on the cigarette amendment than any of the other dozen measures, but at 25.8 percent it received the second lowest proportion of Yes votes. This share may appear to be strikingly small, but that more than one-fourth of the active electorate still supported an extraordinarily radical constitutional prohibition 13 years after House passage of the similar Sweeney bill, despite the fact that, in the interim, total annual national cigarette consumption had risen 3.3-fold to 119 billion and per capita annual consumption had increased 2.7-fold to 1,485 should give pause about the extent of acquiescence in hegemony well into the era of cigarette smoking laissez-faire.

**Kansas (1917/1919)**

“What can we do?” asked a Wichita man recently. “We have the law and those who are opposed to it haven’t the time to give to fight to rid themselves of it. I am a business man. The people who got behind this statute didn’t have much else to do. They were set out for reform and they got it. I haven’t the time to spare from my business to organize an army of cigarette smokers to undo what has been done. We’ll just have to grin and bear it.”

In Kansas, which was the last state to repeal its cigarette sales ban, government officials early on advocated prohibition of smoking in various public places, but none of their initiatives came to fruition. As early as 1915, Governor (and later U.S. Senator) Arthur Capper—“who refused to advertise the cigarette

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1212 Proposed Constitutional Amendments and Measures (With Arguments) to Be Submitted to the Voters of Oregon at the General Election Tuesday, November 3, 1930, at 39 (Hal Hoss comp.).

1213 http://bluebook.state.or.us/state/elections/elections15.htm. See also “Oregon Keeps Cigarettes,” NYT, Nov. 7, 1930 (3). The proportion of Yes votes on a county basis ranged from 16.4 to 38.8 percent; in Multnomah, of which Portland is the county seat, a below-average 21.8 percent was recorded. These county-level figures were highly positively correlated with the vote three years later to retain the constitutional ban on alcohol. John Dinan and Jac Heckelman, “The Anti-Tobacco Movement in the Progressive Era: A Case Study of Direct Democracy in Oregon,” Explorations in Economic History 42:529-46, fig 1 at 533, tab. 5 at 539, fig 2 at 540 (2005).

1214 Calculated based on http://www.cdc.gov/tobacco/research_data/economics/consump1.htm (the per capita data are based on persons over 18).

Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

in any of his publications" including the *Topeka Daily Capital*¹²¹⁶—declared in his first message to the legislature that: “Smoking in polling places should be prohibited.”¹²¹⁷

That an exceptionally militant antagonism toward public smoking had developed in segments of the population as well as among legislators spectacularly burst into popular awareness at the 1917 legislative session, when two ultra-radical anti-smoking bills were introduced in the House (before the Senate passed an anti-cigarette use amendment to the search and confiscation and anti-advertising bill that did become law).¹²¹⁸

The first measure, House Bill No. 257, perhaps the most radical anti-cigarette bill ever passed by a single chamber of any state legislature,¹²¹⁹ went much further that several bills passed by a single chamber in other states in the 1890s that had prohibited cigarette smoking only in public places.¹²²⁰ The core of the bill, which was designed to supplement and not to derogate from the state’s existing cigarette laws,¹²²¹ provided:

That it shall be unlawful for any person to smoke or use, or have in his possession for the purpose of using, cigarettes or cigarette papers in the state of Kansas. Every person who shall smoke or use, or have in his possession for the purpose of smoking or using, cigarettes or cigarette papers in any form in the state of Kansas shall be guilty of a misdemeanor and upon conviction shall be punished for each offense by a fine of not less than five dollars nor more than twenty-five dollars, and every person who shall furnish cigarettes or cigarette papers in any form to any other person or who shall permit any person to frequent any premises owned, held, leased or managed by him for the purpose of indulging in the use of cigarettes in any form shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty dollars and nor more than one hundred dollars.¹²²²

¹²¹⁶“Kansas Off on Another Crusade,,” *Survey* 37:494 (Jan. 27, 1917).
¹²¹⁸See above this ch.
¹²¹⁹The assertion by Rev. A. P. Wilson (Central Christian Church), “Smoking, Box and Blue Laws,” *IDR*, Feb. 8, 1921 (8:1-5 at 1), that “Kansas at one time had a...law” that made it “illegal to smoke cigarettes” that “was TOO effective evidently for the lover of the ‘pill’ and so the law was changed to make it illegal to sell, etc. cigarettes or the ‘makin’s’” was incorrect.
¹²²⁰See above Part I.
¹²²¹House Bill No. 257, § 2, By Mr Collins (n.d.) (copy furnished by Library & Archives Div., KHS).
¹²²²House Bill No. 257, § 1, By Mr Collins (n.d.) (copy furnished by Library &
Within hours of its introduction the *Topeka State Journal* reveled in mocking the bill in above-the-fold, front-page bolded headline and subheads: “‘Pill Puffing May Be Made a Crime in Kan.  House Members Has Plan to Abolish ‘Coffin Nail’ Smoke. ...  It Provides a Fine for Everything Except the Desire.” Beyond the bombast, the article did correctly point out that the bill would strengthen the cigarette sales prohibition law.  

Introduced by Republican merchant R. A. Collins, the chairman of the Temperance Committee, H.B. No. 257 was recommended for passage by the Judiciary Committee before being stripped by the committee of the whole of the penalization of furnishing cigarettes or permitting premises to be frequented for using cigarettes. Then by a vote of 67 (including the chamber’s two Socialist Party members) to 20 the chamber breathtakingly banned the use of cigarettes.

While Governor Capper’s Republican *Topeka Daily Capital* merely matter-of-factly noted that the “Collins anti-cigaret bill, providing a penalty for cigarette smoking...came up for final vote and was passed,” the somewhat smaller-circulation Independent Republican *Topeka State Journal* of “editor, publisher, banker, capitalist” Frank MacLennan devoted a front-page article exclusively to the bill, laying the scorn extra-thick on the measure (“It Even Prohibits Smoking Before one’s Own Fireside”) and especially on its author:

Collins came from the town of Penokee, Graham county.  Penokee is located in the Graham county sand hills, and before coming to the legislature, Collins polled the Penokee social set and learned that simon pure reform was needed in Kansas.  So the gentleman

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1229“MacLennan Takes Off His Coat to Work for Soldier Boys,” *Editor & Publisher*, July 27, 1911 (22).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

from Graham has been quite active with his task of making the state better.

After coming to the legislature, Collins landed at the top of the temperance committee. This committee drew the bone dry bill and jammed it thru the house. Then came a bill which made it a misdemeanor to own, sell or keep for sale any cigarettes, paper or tobacco used in cigarette making.

But Collins was not satisfied. He recalled the good old days of corn silk, catalpa leaves and grape vine cigarettes and cigars. So he drafted a bill to reach from the after dinner parties right on down to youngsters who gather behind the barn Sunday afternoons. Then in the names of the mothers and sisters and sweethearts and all the things that are nice and good and pure, Collins rallied the house members to his measure. All of which means Kansans must do their cigarette smoking before the statute books are printed. ... Collins must be horrified, shocked, humiliated and chagrined by cigarette smokers for the two or three months required to publish the new session laws.1230

Following House passage, out-of-state newspaper coverage focused on the bill’s “making it an offense punishable by a fine to smoke a cigarette even in one’s own home,”1231 while the Kansas press accurately stressed the measure’s limitless breadth, noting that it “does not exempt class, district or place, making it just as unlawful to smoke at home or a dinner party as in public.” Oddly, the most relevant category of “persons caught smoking cigarettes” was omitted by the Emporia Gazette1232—namely, adults, whose curtailed consumer freedom had always been at the heart of the controversies over statewide universal cigarette sales bans.1233 In the event, non-minors were spared this fate when the bill died in the Senate, where the Temperance and Hygiene Committee to which it was referred never acted on it.1234

Three days after Collins had introduced his measure, the Topeka State Journal wondered editorially “[w]hy the war on the meek and lowly cigarette, while the big black cigar and the clay pipe are allowed to go free?” The paper speculated that legislators, having learned from the liquor prohibitionists who at first “declared they merely wanted to banish the saloon,” “[p]erhaps...want to try out on the ‘coffin nail’ and if they get by will attack the weed in other forms

1231“Can Be Fined for Smoking Cigarettes in Dry Kansas,” National Democrat (Des Moines), Mar. 1, 1917 (1:3-4). This same article under the same title ran in numerous papers; e.g., Muskogee Cimeter, Mar. 3, 1917 (2:2-3).
1233See above Part I.
1234Senate Journal: Proceedings of the Senate of the State of Kansas: Twentieth Biennial Session...1917, at 275 (Feb. 14) (1917).
later.”

Despite the press’s then common practice of massively infusing reportage with editorial bloviation, the editor apparently forgot that “later” was today: that very day’s front page bore the headline, “Cigar and Pipe Now Are on the Run in Kansas!”

This second bill, introduced by House Democrat Oliver P. Jewett—a farmer and grain dealer who as chairman of the House Temperance Committee in 1915 had pushed liquor prohibition—made it unlawful for any person to smoke on any passenger train or on any car used to transport the public, or on any other train, or on any interurban car, street car, omnibus, taxicab, automobile, or any other vehicle used for the transportation of the public, or on any street in any city or town, or in any room or building used by the public, and any rooms or buildings where children are kept: Provided, That smoking may be allowed in public rooms fitted up and used exclusively for smoking and designated as such by proper marking either on or above the door.

In addition to imposing a $10 to $25 penalty for such unlawful smoking, Jewett’s measure also made it unlawful for any person having care or custody of any such vehicle, street, room, or building to allow smoking there.

Decrying Jewett as a “Purist” and his bill as “even more drastic” than Collins’ ban on smoking, using, or possessing cigarettes because it applied to all kinds of tobacco, the Topeka State Journal on its front page mocked the author for “[h]is sensitive feeling against smoking,” which had “found several outbursts during former legislative sessions when he called up the anti-smoking rule in the house”; and just the previous week “he retained his former record by calling up the anti-smoking rule for the benefit of men working at the press table. Now Jewett

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1235TSJ, Jan. 22, 1917 (4:2) (untitled edit.).
1236Cigar and Pipe Are Now on the Run in Kansas!” TSJ, Jan. 22, 1917 (1:4).
12391917 House Bill No. 287, § 1 (by Mr. Jewett) (bill text provided by KHS). The text was also published in “Cigar and Pipe Are Now on the Run in Kansas!” TSJ, Jan. 22, 1917 (1:4).
12401917 House Bill No. 287, §§ 2-3 (by Mr. Jewett) (bill text provided by KHS); “Cigar and Pipe Are Now on the Run in Kansas!” TSJ, Jan. 22, 1917 (1:4) (printing text of H.B. No. 287).
would put King Nicotine put of business in Kansas...."\textsuperscript{1241} The out-of-state press also exclaimed that pursuant to the bill “a man cannot smoke in his own home if he has a child”\textsuperscript{1242} (presumably at any time, even when the child was not there).

That Jewett had long taken the issue of adults’ (including his own) exposure to tobacco smoke seriously and personally was obvious from the motion that he had offered during his first term in the House in 1909 that the House no-smoking rule be “rigidly enforced”: not only did it prevail, but “the chair instructed the sergeant-at-arms to enforce the rule.”\textsuperscript{1243} In 1917, too, the press explained his “proposed law for protection” by reference to his having been “rowing for ten days over the fact that some house members and other persons smoke in the Representative hall while he is in the room,” adding that the bill “extends that protection against tobacco to every place in the state, except in private homes and in the wide open stretches of country.”\textsuperscript{1244}

When, a week after his introduction of H.B. No. 287, the Public Welfare Committee recommended that it not be passed,\textsuperscript{1245} Jewett displayed a sense of humor in offering this resolution:

\begin{quote}
Inasmuch as the Committee on Public Welfare has seen fit to report House bill No. 287 back to the House with the recommendation that it be not passed; a bill designed to benefit our boys growing to manhood, and to make them cleaner and more desirable for positions of trust;

Further, that this House has indorsed a bill compelling our county commissioners to offer a bounty on gophers, so that our farmers who are raising alfalfa can be protected against the ravage of the abovementioned gophers, and for fear that the alfalfa crop will be so increased that the over-production will have to be provided in some way; and inasmuch as this House has indorsed smoking: therefore be it

Resolved, That hereafter in all the cigars sold or smoked in this state, the filling shall be composed of three-fourths alfalfa instead of cabbage, and in the interests of economy the wrappers be made of gopher skins.\textsuperscript{1246}
\end{quote}

\textsuperscript{1241}“Cigar and Pipe Are Now on the Run in Kansas!” \textit{TSJ}, Jan. 22, 1917 (1:4).
\textsuperscript{1244}“In the House Hopper,” \textit{TDC}, Jan. 23, 1917 (5:3).
\textsuperscript{1245}\textit{House Journal: Proceedings of House of Representatives of the State of Kansas: Twentieth Biennial Session...1917}, at 191 (Jan. 30) (1917). The text of the committee report in the bill file archived at KHS is merely a pre-printed form recommendation with “not passed” typed in.
\textsuperscript{1246}\textit{House Journal: Proceedings of House of Representatives of the State of Kansas: Twentieth Biennial Session...1917}, at 225 (Feb. 1) (H. Res. No. 20) (1917). It is unclear
One more effort to enact a partial public smoking ban was undertaken in Kansas in 1919, when the first woman elected to the Kansas legislature, Mrs. Minnie Grinstead, introduced her first measure.\textsuperscript{1247} House Bill No. 208 to prohibit smoking in public dining places.\textsuperscript{1248} Grinstead (1869-1925), a Republican, was a lecturer and Baptist minister who had joined the WCTU as far back as 1896, becoming an organizer for the state and national organizations.\textsuperscript{1249} On the same day (February 1) that the House Public Welfare Committee, to which Grinstead’s bill had been referred\textsuperscript{1250} and of which she, in her first term, was the chairman,\textsuperscript{1251} introduced its own bill to “prohibit smoking in public dining places, where women or children are served,”\textsuperscript{1252} it also recommended that her bill not be passed because the committee was offering a bill (H.B. No. 324) covering the same subject matter.\textsuperscript{1253} (Because Grinstead’s H.B. No. 208 is not extant in the Kansas State Archives or the State Library of Kansas, it cannot be compared with the

\textsuperscript{1247}“Woman’s Bill Passed,” \textit{Emporia Gazette}, Feb. 13, 1919 (1:3).


\textsuperscript{1250}\textit{House Journal: Proceedings of House of Representatives of the State of Kansas: Twenty-First Biennial Session...1919}, at 65 (Jan. 27) (1919).

\textsuperscript{1251}\textit{House Journal: Proceedings of House of Representatives of the State of Kansas: Twenty-First Biennial Session...1919}, at xvi (Feb. 11) (1919).

\textsuperscript{1252}\textit{House Journal: Proceedings of House of Representatives of the State of Kansas: Twenty-First Biennial Session...1919}, at 118 (Feb. 1) (H.B. No. 324) (1919). A week later a bill was introduced in the West Virginia House of Delegates making it “unlawful for any person...to smoke tobacco, cigarettes or cigars in any public eating place, dining room, restaurant, cafe, or other like place where food is furnished, and where such places...are visited or patronized by females.” House Bill No. 268 (Feb. 8, 1919, by Mr. Vaughn), in Legislature of West Virginia, \textit{Bills of the House of Delegates of Regular and Extra: Sessions 1919}, at 202 (1919). The Judiciary Committee recommended passage (Feb. 12) and the bill was read a first time and ordered to a second reading (Feb. 15). \textit{Id.}

\textsuperscript{1253}\textit{House Journal: Proceedings of House of Representatives of the State of Kansas: Twenty-First Biennial Session...1919}, at 120 (Feb. 1) (1919).
committee bill, which has survived.\textsuperscript{1254} The committee bill, “An Act to prohibit smoking in public dining places, where women or children are served,” provided:

\textit{SECTION 1.} That after the taking effect of this act all persons engaged in conducting, within the state of Kansas, a place where food is served to women or children, shall prohibit smoking within said place during the hours when such food is being served.

Provided however, that this act shall not be construed to prohibit the smoking in a room adjacent to said public eating place and partitioned off therefrom.

\textit{SEC. 2.} That upon conviction of any person for violation of section 1 of this act, they [sic] shall be punished by a fine of not less than $10 nor more than $25 for each such offense.

\textit{SEC. 3.} Each calendar day this act is violated, shall be and constitute a separate offense.

\textit{SEC. 4.} This act shall take effect and be enforced from and after its publication in the statute books.\textsuperscript{1255}

The measure’s protection was, then, not only confined to the times when women (and/) or children were present, thus subjecting them to the lingering stench of tobacco constantly replenished by smoking in their absence, but may have offered little or no protection against exposure to secondhand smoke emanating from the exempt adjacent rooms depending on how “partitioned off” was defined.\textsuperscript{1256}

Ten days later the House, acting as the committee of the whole, rendered the bill a virtual nullity by amending section 1 by: (1) substituting for “That after the taking effect of this act all persons engaged in conducting, within the state of Kansas, a” the language “It shall be unlawful for any person to smoke tobacco in any form or manner in any public”; and (2) adding at the end of section 1 (that is, at the end of the proviso paragraph exempting partitioned-off adjacent rooms) the

\textsuperscript{1254}Telephone interview with Susan Forbes, Reference Section, Library & Archives Division, Kansas State Historical Society, Topeka (Feb. 17, 2011); email from Cindy Roupe, State Library of Kansas (Feb. 21, 2011).

\textsuperscript{1255}House Bill No. 324 By Committee on Public Welfare (n.d.) (copy furnished by Library & Archives Div., Kansas State Historical Society).

\textsuperscript{1256}It is unclear what exactly a person conducting food service was required to do to comply with his duty to “prohibit smoking.” This gendered approach to secondhand smoke exposure was the mirror image of the purely moralistic discriminatory Sullivan Law, passed by a vote of 73 to 0 by the New York City Board of Aldermen in 1908, making it unlawful for the owner or manager of any hotel, restaurant, place of public entertainment, or other place of public resort to “allow any female to smoke” in any of those places “Women Mustn’t Smoke,” \textit{NYT}, Jan. 22, 1908 (4). The punishment meted out by the law, which did not make it unlawful for women to smoke, was a $5 to $25 fine and/or imprisonment up to 10 days.
language “nor in any room in which merchandise or drugs are sold at retail.” The bill’s supporters called the amendment, offered by Representative (and Judiciary Committee Chairman) Benjamin Hegler, a Republican lawyer, a “‘joker’” because, while ostensibly exempting drug stores that served lunch, it in fact provided that “‘smoking in public eating houses shall be unlawful except where cigars, merchandise and stocks of merchandise are kept for sale.’” Though no one objected to the amendment when it was offered, by the following day the “anti-smokers...discovered that it would exempt practically all restaurants for they all carry cigars and gum for sale.” Learning the intricacies and traps of bill drafting, “Mrs Grinstead sa[id] she will try to defeat the amendment when it comes up for passage.” (Rather than objecting at the time that the House adopted the committee of the whole’s report embodying the amendment, “Mrs. Grinstead” immediately thereafter was selected by the chamber to “attend the banquet of the Antisaloon League in celebration of the ratification of the prohibitory amendment.”) On third reading, the full House, which Republicans dominated with 110 seats to Democrats’ mere 15, then proceeded to pass H.B. No. 324 by a vote of 64 to 37. Whereas two-thirds of voting Republicans supported it, of the nine Democrats who voted, five opposed it. Grinstead tried to “re-refer the bill in the effort to get rid of the amendment, but without success.” Hegler himself, the mastermind of the emasculation of

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1257 *House Journal: Proceedings of House of Representatives of the State of Kansas: Twenty-First Biennial Session...1919*, at 196 (Feb. 11) (1919). A gross drafting error in the amendment made nonsense of the first paragraph of section 1, which now read: “It shall be unlawful for any person to smoke tobacco in any form or manner in any public place where food is being served to women or children shall prohibit smoking within said place during the hours when such food is being served.” Presumably the words “shall prohibit smoking within said place” were meant to be struck. In any event, the amendment shifted legal liability from food service owners to smokers.


Grinstead’s bill, explained his vote on the grounds that the “amendment excepting drug stores does not make the law unconstitutional, because it makes a classification between public dining rooms and stores, a classification which the Legislature clearly has a right to make. I do not think the owners of public dining rooms will generally be disposed to take an unfair advantage of the law in order to evade the law.” Interestingly, Grinstead, unlike Hegler and two other members, failed to avail herself of the opportunity to have her comment on Hegler’s machinations printed in the House Journal under the “Explanation of Votes” rubric. (The same day the Senate bill to prohibit smoking in public dining places expired when the Judiciary Committee recommended that it not be passed.)

The day the bill passed the House Progressive William Allen White’s Emporia Gazette reported that “it is generally conceded that the bill is ‘perfectly harmless,’” because “the Hegler amendment...exempted from the penalties of the bill all public eating houses carrying stocks of drugs or other merchandise.” The Hutchinson News chimed in by observing that Grinstead’s bill had “met with the ‘victory of defeat’...” Not only did the out-of-state press take note of House passage, but the International Journal of Surgery in its February issue injected into the debate this (doubtless embroidered) account in its advertising supplement:

Some horrid man smoked a cigar not long ago in the room where Mrs. Minnie Grinstead was dining, little suspecting she would have her revenge in a way given to few women. He did not know, of course, that she was the first woman legislator in the state of Kansas.

Mrs. Grinstead promptly introduced a bill prohibiting smoking in public dining-rooms. Her masculine colleagues passed the bill—but not until an artful masculine colleague had tacked on an amendment which provided that “smoking in public places shall be unlawful except where cigars, merchandise and stocks of merchandise are kept for sale.” Mrs. Grinstead, unused to legislative tactics, voted for the joker, and now discovers there are few lunchrooms which cannot boast a stock of merchandise consisting at least of a package

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1267a Woman’s Bill Passed,” Emporia Gazette, Feb. 13, 1919 (1:3).
1267t The Results Not Large,” HN, Feb. 17, 1919 (7:3-4 at 4).
1269 E.g., “First Woman Lawmaker’s Anti-Smoking Bill Passes,” CREG, Feb. 14, 1919 (1:3).
of gum.

Women legislators are going to have a hard time taking tobacco away from smoking lawmakers.\(^{1270}\)

Despite the fatal dilution that H.B. No. 324 had suffered in the House, the Senate swiftly euthanized even that now innocuous bill when its Judiciary Committee recommended that it not be passed.\(^{1271}\) Consequently, Hegler’s speculation that owners’ opportunism would not lead to smoking as usual was never tested. Perhaps as partial compensation for having allowed herself to be snookered by her procedurally more agile colleagues, at the end of the session the House adopted a “resolution by way of testimonial to Hon. Minnie J. Grinstead,” lauding her, inter alia, for having, “[w]ith unfailing good nature and generosity...accepted victory and defeat alike....” Calling her “the fearless champion of every question she believed involved the progress of this state in intellectual and moral advancement,” “we, the brotherhood of this body, standing at attention, salute our sister and coworker....”\(^{1272}\)

**Nebraska (1917/1919)**

In 1917, with Democrats in firm control of both Nebraska legislative chambers for the last time during the Progressive ascendancy (1909-17)\(^{1273}\) and until the Depression election of 1932\(^{1274}\) and liquor prohibition very much in the forefront of the legislative agenda,\(^{1275}\) Republican Representative and lawyer John Fults\(^{1276}\) introduced a bill prohibiting cigarette smoking in public places of such comprehensive scope that it must have been almost as discontinuous with


\(^{1276}\)The *Nebraska Blue Book and Historical Register: 1918*, at 273 (Addison Sheldon ed. 1918).
contemporaries’ experience\textsuperscript{1277} as it would be unimaginable to historical amnesiacs a century later. House Roll No. 248 declared it to be a public nuisance, for any person to smoke cigarettes of any description whatsoever in any public place in this state: In any passenger, coach, street car, automobile, run and operated for the conveyance of passengers; any church, court house, school house, or outbuildings or grounds belonging and used in connection with any school building; any hotel, restaurant, butcher shop, store-room, barber shop, picture and theatre, bank building, public offices, public and private stairways and halls leading to any of the above described places; in any depot, box car while standing on any railroad right-of-way; in any livery stable, blacksmith shop, garage (sic) or in any cellar, basement, outbuildings, workrooms belonging to, or used in connection with any of the foregoing places or buildings.\textsuperscript{1278}

The fine for any person over 16 violating any provision of the law ranged between one dollar and $25; alternatively, violators faced a maximum of 10 days in county jail.\textsuperscript{1279} (In 1911, the legislature had already prohibited smoking cigarettes or cigars or using tobacco in any form by minors under 18.)\textsuperscript{1280} Misdemeanor liability was also incurred by any person in possession or control of any public place who knowingly permitted anyone to smoke a cigarette there, subject to a fine ranging from $1 to $10.\textsuperscript{1281} Finally, in order to insure prosecution—considerable dissatisfaction had developed over the failure to enforce the sales ban as the press reported that the 1905 law had “stopped the anti-cigarette agitation, but it has not stopped the sale of cigarettes”\textsuperscript{1282}—the bill required all police to arrest all found violating the law, take them before a magistrate, and file a complaint against them; any officer who “knowingly [sic] and willfully neglect[ed] or refuse[d] to perform the duties” was guilty of a misdemeanor and subject to a fine of $5 to $25; on a second conviction such

\textsuperscript{1277} In its sparse coverage of the bill, the state’s leading newspaper twice misreported that it prohibited smoking only among minors, getting the facts right only on final passage. “Legislative Notes,” \textit{MW-H}, Jan. 24, 1917 (2:2); “Legislative Notes,” \textit{MW-H}, Feb. 7, 1917 (3:2); “Third Reading,” \textit{MW-H}, Feb. 17, 1917 (2:3).

\textsuperscript{1278} Legislature of Nebraska: Thirty-Fifth Session, House Roll No. 248, § 1 (Jan. 23, 1917 by J. F. Fults) (copy furnished by NSHS).

\textsuperscript{1279} Legislature of Nebraska: Thirty-Fifth Session, House Roll No. 248, § 1 (Jan. 23, 1917 by J. F. Fults) (copy furnished by NSHS).

\textsuperscript{1280} Revised Statutes of the State of Nebraska: 1913, § 8846 at 2372 (1914).

\textsuperscript{1281} Legislature of Nebraska: Thirty-Fifth Session, House Roll No. 248, § 1 (Jan. 23, 1917 by J. F. Fults) (copy furnished by NSHS).

\textsuperscript{1282} \textit{Nebraska State Journal} (Lincoln), Aug. 10, 1910 (4:5) (untitled).
violating officers were subject to impeachment.\textsuperscript{1283} Though also drawn into this mandatory enforcement regime, county attorneys retained some discretion: it was their duty, when they had “reason to believe” that any of the law’s provisions had been violated, to investigate reports of such violations; if in a county attorney’s “judgment” a violation had taken place and “the proof obtainable w[ould] sustain a conviction,” it was his duty to file a complaint, cause the alleged violator to be arrested, and prosecute all such cases.\textsuperscript{1284}

Editorially the press, which would profit from the advertising that would accompany legalization, favored legislation that proceeded in the opposite direction, but clothed its preference in laments about unenforcibility:

The cigaret law which has been on the statute books for a number of years, has not been enforced. There were spasmodic bursts of enforcement when the law was new, but for several years there have been no prosecutions and the law has been wholly disregarded. Some places the cigarettes are kept out of sight in the stores, but even that dodge is not practiced in most places. ... The use of cigarettes by men has greatly increased in recent years, and there is less prejudice against the practice today than formerly. Public sentiment does not demand the strict enforcement of the present law.\textsuperscript{1285}

After the bill’s introduction,\textsuperscript{1286} it was referred to the Miscellaneous Subjects Committee,\textsuperscript{1287} which recommended its passage with two amendments: the addition of post offices as covered public places and an increase in the age of liable smokers to over 18.\textsuperscript{1288} (It is unclear why the committee would have believed that the U.S. Constitution permitted a state legislature to regulate activity inside a U.S. Government building.) Following adoption by the committee of the whole house of the committee amendments,\textsuperscript{1289} the full House on February 16

\textsuperscript{1283}Legislature of Nebraska: Thirty-Fifth Session, House Roll No. 248, § 3 (Jan. 23, 1917 by J. F. Fults) (copy furnished by NSHS).
\textsuperscript{1286}Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of Representatives 137 (Jan. 23) (n.d. [1917]).
\textsuperscript{1287}Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of Representatives 151 (Jan. 23) (n.d. [1917]).
\textsuperscript{1288}Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of Representatives 311 (Feb. 6) (n.d. [1917]).
\textsuperscript{1289}Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of
passed the comprehensive public cigarette smoking ban by the overwhelming majority of 79 to 9. In a chamber composed of 62 Democrats and 38 Republicans, the Nays were cast by six Republicans and three Democrats, while 28 Republicans and 51 Democrats supported the ban. Of the notoriously anti-prohibitionist 12-member (all-Democratic) Omaha delegation, six voted Yes and only two No.\textsuperscript{1290} (Oddly, a month after House passage the Judiciary Committee recommended passage of a much less restrictive measure that would have prohibited smoking in the dining rooms of hotels, restaurants, and boarding houses.)\textsuperscript{1291} Despite this broad base of support, H.R. No. 248 died in the Senate, which, following the recommendation of its Miscellaneous Subjects Committee,\textsuperscript{1292} voted 17 to 16 to postpone it indefinitely.\textsuperscript{1293} The press made contextually clear the limits on the Senate’s progressive agenda:

The state senate faced the inevitable...and put the finishing touches upon the work of granting partial suffrage to women. The day before it discarded its beer and whisky and went into the dry column. It was but a short step in the march of reformation to grant the ballot to women, but the senate be goldarned if it would give up its cigarettes. It proposes to continue to blow cigarette smoke in public wherever it pleases. It was asking too much of the senate to quit the tobacco habit, so it indefinitely postponed H. R. 248, a bill to prevent the smoking of cigarettes in public places.\textsuperscript{1294}

\textsuperscript{1290}Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of Representatives 404 (Feb. 14) (n.d. [1917]).
\textsuperscript{1291}Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of Representatives 441 (Feb. 16) (n.d. [1917]). Party affiliation is taken from \textit{id.} at iv-vii. On Omaha, see above ch. 4. The largest circulation daily in the state capital gave only perfunctory coverage to the bill’s passage in a long front-page article on the day’s legislative proceedings. “Logrolling Charge Made Before House,” \textit{NSJ}, Feb. 17, 1917 (1:3-4 at 4).
\textsuperscript{1292}Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of Representatives 202 (Jan. 30) (H.R. No. 247 introduced by P. B. Neff), 778 (Mar. 15) (n.d. [1917]). Neff, a Democrat and Methodist, was an implement dealer. \textit{The Nebraska Blue Book and Historical Register: 1918}, at 277 (Addison Sheldon ed. 1918). Two weeks later the bill (together with many others still in the Sifting Committee) was indefinitely postponed. Daily Proceedings of the Thirty-Fifth Session of the Nebraska House of Representatives 1008 (Mar. 30) (n.d. [1917]).
\textsuperscript{1293}Senate Journal of the Legislature of the State of Nebraska: Thirty-Fifth Session...1917, at 531 (Mar. 13).
\textsuperscript{1294}Senate Journal of the Legislature of the State of Nebraska: Thirty-Fifth Session...1917, at 1001 (Apr. 19).
\textsuperscript{1294}“Capitol Bill Gets New Lease on Life,” \textit{NSJ}, Apr. 20, 1917 (1:3-4 at 4).
Unlike the House vote, the Senate’s manifested a greater role of party affiliation: only two Republicans voted to kill the bill, while eight opposed indefinite postponement; in contrast, Democrats split 8 to 15 with the entire five-member all-Democrat Omaha contingent voting to kill. One of those Omaha Democrats, lawyer John Moriarty, may have offered some insight into his anti-sumptuary colleagues’ mindset with his sarcastic observation on the Senate floor that “some people lost no time right after the [liquor] prohibitory amendment carried last fall in framing up a program to stop the use of everything not approved of by this class.”

A watered-down cigarette smoking ban confined to public eating places was enacted in 1919 as one of the concessions that the anti-cigarette forces were able to extract in exchange for passage of repeal of the cigarette sales ban and introduction of licensure. It remained on the books until 1937.

South Carolina (1920)

I respectfully recommend that you pass an Act prohibiting the smoking of cigarettes by boys under the age of sixteen years, and prohibiting the sale of cigarettes and cigarette papers in this State.

A straw showing the direction of the wind!

In January 1920, the Tobacco Merchants Association of the United States was

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1295 Senate Journal of the Legislature of the State of Nebraska: Thirty-Fifth Session...1917, at 1001 (Apr. 19). Party affiliation is taken from id. at 4-5. To be sure, the significance of the vote may have been somewhat diluted by the fact that it was simultaneously on three other recommendations of the committee of the whole that bills be engrossed for third reading.

1296 Capitol Bill Gets New Lease on Life,” NSJ, Apr. 20, 1917 (1:3-4, at 5:1-2 at 2). He also “wanted to know why cigarettes were any worse than pipes or cigars.”

1297 See above this ch.

1298 Journal of the House of Representatives of the General Assembly of South Carolina, Being the Regular Session...1911, at 95 (Jan. 17) (1911) (Governor Cole Blease’s inaugural address). Cole “stood without peer as the classic example of the political mountebank,” who “won...the rural plebeians” while “[o]pposing labor legislation” and “openly advocating lynching....” Georg Tindall, The Emergence of the New South 1913-1945, at 21 (1967).

1299 Passing Events,” JE 23(5):463 (Mar. 1920) (about South Carolina Senate passage of dining room smoking ban).
tracking the progress of a bill introduced in the South Carolina legislature to prohibit the smoking of tobacco during meal hours in any public eating room. S. 367 had been introduced by James Padgett (1869-1939), a state senator from 1914 to 1926, who was a lawyer, presidential elector in 1912, and delegate to the Democratic national convention in 1920; he was also an 1892 graduate and a member of the Board of Visitors from 1912 until his death of the Citadel Military College, at which a barracks still bears his name. Indeed, his attentiveness to the Citadel’s needs in the legislature was so intense that he was known as “‘The Senator from The Citadel.”

If the bill were enacted, such statewide interference with at-will smoking in a southern tobacco state might have had serious national implications—more so than Nebraska’s imposition of a ban on cigarette smoking in public eating places in 1919 in the same statute that repealed the state’s cigarette sales ban. Indeed, an editorial in the New York Commercial that the trade journal Tobacco reprinted

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1300 Journal of the Senate of the General Assembly of the State of South Carolina 50 (S. 367, by James Graham Padgett) (1920); TMA, Legislative Bulletin No. 5 (Jan. 27, 1920), Bates No. 502425067. To be sure, the TMA’s intelligence was not flawless: it mistakenly placed Padgett in the House rather than the Senate.


1302 Resolutions, Board of Visitors of the Citadel, Charleston, S.C., Death of Colonel James G. Padgett (n.d. [1939]), in Minutes of The Citadel Board of Visitors, Folder 16 (Citadel Archives). (This resolution is in large part identical with the Bar Association obituary, but, since the former is undated, it is unclear which source plagiarized the other.) An editorial in his local newspaper after his death stressed that he “‘had strong likes and strong dislikes. ... There was no middle ground with Colonel Padgett.’’’ “In Memoriam: Colonel James Graham Padgett: 1869-1939,” South Carolina Bar Association, Transactions of the Forty-Sixth Annual Meeting 121-22 at 122 (Mar. 23-24, 1939) (reprinting editorial from unidentified issue of the Walterboro Press and Standard). According to the director of the Citadel Archives, Padgett’s papers there do not shed light on his position regarding smoking. Email from Jane Yates to Marc Linder (June 7, 2010). The fact that Padgett was a Methodist, the mainstream Christian denomination that opposed tobacco most strictly, may account for his advocacy of the smoking ban. Biographical Directory of the Senate of the State of South Carolina, 1776-1964, at 285 (Emily Reynolds and Joan Faunt comp. 1964).

1303 See above this ch.
expressly stated that it was “[s]trange” that “the anti-smoke fiend has invaded the South.” But even though he had “not yet been able to go the entire length of his journey...he has got a fine foothold from which he will be able to widen his powers.” For both publications the South Carolina Senate’s action amounted to “intolerance with a vengeance prohibition run mad.” And if the antis wanted to justify this bill by reference to deference to women’s refinement, the editors let them know in no uncertain terms that “[m]ost women like to see a man enjoy his smoke,” and “[i]f they have the slightest revulsion to the practice in their impressionistic days, the antipathy quickly passes away.”

On January 22, the South Carolina Senate, after defeating a motion to kill the bill by a vote of 25 to 11, adopted an amendment subjecting hotel or other eating house managers to penalties (of fines of $10 to $20 or terms of 10 to 30 days on public work) for failing to post conspicuous notices prohibiting smoking as well as for knowingly allowing a violation of the law. The next day, however, the Senate weakened the bill by passing it with an amendment authorizing the management to provide separate dining rooms where smoking was permitted, and sent it to the House of Representatives.

South Carolina’s leading newspaper took little interest in the bill. On its second reading The State mockingly reported: “At first it looked as if the bill would be laughed off the calendar, but the egis of good manners and chivalry and every other good attribute of the people of the state was evoked and senators discussed the bill seriously for an hour or more.” In contrast, the press in the rest of the country took editorial note of this alarming development. One paper in Cincinnati—which had apparently slept through the past three decades of anti-cigarette legislation—intoning that the “crusade against the use of tobacco has won its first victory” and reminding readers of how alcohol prohibition had begun, warned against complacency, “as if distance lent you and your favorite habit immunity.”

A Wisconsin daily, sounding very much like cigarette

1308 First Step Toward Tobacco Prohibition,” Cincinnati Times Star (reprinted in Bridgeport Telegram, Jan. 29, 1920 (10:6)). For an unpersuasive attempt to interpret the South Carolina bill (which applied to men and women) as one of the “sweeping efforts of this sort” possibly resulting from “the prejudice against smoking by women” and aimed at preventing “first of all the open indulgence of a widely claimed feminine privilege,” see
companies’ restaurant-owners-know-best free-market propaganda directed at the burgeoning anti-secondhand smoke movement in the late twentieth century, rebuked the legislature for “magnifying what is at worst a petty annoyance into a crime.” Instead, it declared that if smoking in public dining rooms were really “such a nuisance,” the proprietors had the power to stop it, and if the public really favored bans, the owners would be “quick enough to yield to it without having to be forced by a statute into taking action.” Interestingly, the only example that occurred to the editor of the need for a new criminal statute was the then “unprecedented situation” of the “plotting of radical agitators against the government.” On the other hand, a small-town Iowa paper, echoing a commonly held view, commented that even if the bill were not enacted, it showed that “the smokers have some one [sic] after them, and they have no one to blame but themselves” because “[t]hey insist on smoking any and every place and have been known to light their cigarettes in church.” Tentatively detecting a coalescing resistance to secondhand smoke exposure, the Palo Alto Reporter observed that: “It begins to look as though the non-smokers were going to assert that they have some rights.”

In the end, however, the senate bill was, as someone (perhaps Harry H. Shelton) at R. J. Reynolds Tobacco Company handwrote on the copy of TMA’s Legislative Bulletin made public decades later by litigation, “killed” without a dissenting vote five days later in the House, which adopted an unfavorable judiciary committee report.

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1309 See below Part VI.


1312 TMA, Legislative Bulletin No. 5 (Jan. 27, 1920), Bates No. 502425067/9. Since Shelton’s name is handwritten at the top of this page in a similar handwriting, perhaps the company’s general counsel was personally keeping track of the bill’s progress.

North Dakota (1921)

At the same time that it was strengthening the state’s 1913 anti-cigarette legislation in other respects, the North Dakota legislature in 1921 also enacted a partial public smoking ban, making it punishable by a fine of between $5 and $25 to smoke any form of tobacco “in the dining room of any hotel, or in any cafe, restaurant or eating room in which both men and women are being served, or in any street car, or railway coach, except in rooms, coaches and compartments specially provided for that purpose”; proprietors of such establishments and conductors of such means of transportation who knowingly permitted such smoking were subject to the same fine. Despite numerous efforts to eliminate this significant government intervention, like the less capacious Nebraska anti-public smoking law, North Dakota’s was also not repealed until 1937.

The North Dakota WCTU energetically advocated for the partial ban on public smoking, which was introduced in the House by a member of the Nonpartisan League, A. J. McLarty, a farmer. The fact that when, at the legislators’ invitation, 12 to 15 women appeared on February 1 before the House State Affairs Committee, to which House Bill No. 51 had been referred, some lawmakers were smoking prompted the Bismarck Tribune to question whether the

1314See above this ch.
13151921 N.D. Laws ch. 127, at 211. Thus, unlike the smoking ban in eating establishments, which applied only when women were present, that in means of transportation applied all the time.
13171921 N.D. Laws ch. 127, at 211.
1318See, e.g., the numerous petitions that its various local groups submitted to the Senate. State of North Dakota: Journal of the Senate of the Seventeenth Session of the Legislative Assembly 156, 179-80, 198-99, 209, 220, 248 (1921).
1319State of North Dakota: Journal of the House of the Seventeenth Session of the Legislative Assembly 119 (Jan. 26) (1921); State of North Dakota: 1919 Legislative Manual 594. The bill was introduced one week after the similarly worded but more comprehensive Utah measure; see below this ch.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

indication that the committee gave that it would recommend passage stemmed from its desire to “be courteous to the women” or from its real support for the ban. Women’s self-protective motivation underlying the bill was clearly set forth by the WCTU’s spokeswoman, who remarked that H.B. No. 51 “would not prevent anyone from smoking, who wants to smoke...but would prevent women from being subjected to its noxious fumes” in covered public places. After the committee majority had diluted the ban by recommending that it be amended to limit coverage to eateries “in which both men and women are being served”—thus reflecting the WCTU’s female-centric position—the House defeated the committee’s minority report recommendation to kill the bill by postponing it indefinitely.

Three days later the House, sitting as the committee of the whole, debated the bill at length, “fiery oratory” being hurled “[t]hrough clouds of smoke...from one side of the hall to the other....” Norwegian-born farmer and IVA member Christian Ness, who was especially active in seeking to kill the bill, persisted in urging extension of the smoking ban to haymows and barns “under present laws if the hired help on your farm want to smoke you can’t help yourself. ‘I found two men smoking in my haymow last summer...and I asked them to stop and they said they didn’t have to. I had to take one by the neck and throw him out.’” A majority of representatives disagreed with him, and the amendment offered by his fellow IVA member Dayton Shipley (a railroad brakeman who consistently voted against all anti-tobacco measures) “making it illegal for any man to use tobacco in any form east of the Missouri river” was ruled out of order. At least one IVA member who consistently voted for all anti-cigarette/smoking bills that session, declared to the House that “he couldn’t see why women should be required to submit to men smoking in dining rooms.” Asked whether he opposed smoking, ex-smoker William Bauer replied: “‘No, I don’t care how much they smoke. They can go to h--- and smoke there if they want to.’” One NPL member devised an idiosyncratic self-defensive basis for supporting the bill.

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1320 “Solons Smoking as Anti-Smoking Bill Comes Up,” BT, Feb. 1, 1921 (1:5). The House no-smoking rule did not cover committee rooms. See below Table 6.


1323 State of North Dakota: Journal of the House of the Seventeenth Session of the Legislative Assembly 272 (Feb. 5) (1921).
Farmer Charles Reichert, “holding a half-used cigar in his hand,” announced that: “I’ve been smoking, not because I want to, but to keep from getting sick, because these men around me are smoking. And you can’t be around where men are smoking without smoking yourself.” Ultimately, the House, rejecting Ness’s motion to re-refer the bill to committee, adopted the majority report, and the following day, after first defeating yet another motion to postpone indefinitely by a decisive vote of 32 to 76, passed the ban 78 to 30. Although votes were not cast along strict factional lines, only eight (or 15 percent of) voting Nonpartisan League members opposed H.B. No. 51 on each vote, while 43 percent and 39 percent, respectively, of the voting Independent Voters Association members supported the bill.

In the immediate wake of the strong anti-smoking vote in the House, similar action was forecast in the Senate. After its Temperance Committee had recommended passage, the Senate debated the “Smoke Outside” bill on February 26. Opponents “made an effort to laugh it out” by amendments to extend the ban to cover tobacco chewing, the Senate, and the House and Senate chamber, the first being adopted and the last two failing. The Senate also adopted a motion to halve the bill’s minimum and maximum penalties. The

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1326 “House Pushes Anti-Smoking Bill Onward,” BT, Feb. 5, 1921 (1:1). The occupational information is taken from the 1920 Census of Population (HeritageQuest). If House members were smoking they were violating a House rule. See below Table 6.

1327 State of North Dakota: Journal of the House of the Seventeenth Session of the Legislative Assembly 252 (Feb. 4) (1921).

1328 State of North Dakota: Journal of the House of the Seventeenth Session of the Legislative Assembly 272-73 (Feb. 5) (1921). The tallies were calculated according to the factional affiliation in “Names of Legislators Who Will Come to Bismarck in January,” BT, Nov. 5, 1920 (2 [sic; should be 4]:5).


1330 State of North Dakota: Journal of the Senate of the Seventeenth Session of the Legislative Assembly 392 (Feb. 17) (1921).


1332 State of North Dakota: Journal of the Senate of the Seventeenth Session of the Legislative Assembly 583 (Feb. 26) (1921). An IVA member moved the first amendment, while two NPL members moved the last two. The ban on smoking in the Senate was proposed by NPL member John Nathan, an Odessa-born farmer, while the ban in the House and Senate chambers was offered by NPL member Eric Bowman, a Swedish-born farmer, who was also the chamber’s president pro tempore. State of North Dakota: 1919 Legislative Manual 594, 579. The Senate appears not to have regulated smoking. See below Table 6.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Nonpartisan League then mobilized to reconsider the two successful amendments: 22 of its members joined by only four IVA members prevailed over 20 IVA affiliates joined by only two NPL defectors. The Senate then struck out the ban on public tobacco chewing, but retained the reduced fines. On third reading 22 NPL members voted for and only two against the partial public smoking ban, while 11 IVA affiliates joined the majority and 13 opposed the bill. On its return to the House, H.B. No 51 was passed by the overwhelming majority of 87 to 20, only four NPL members joining 16 IVA members in opposition.

Unsurprisingly, then, as was also the case with the 1921 session’s legislation strengthening the 1913 anti-cigarette law, the statist, anti-corporate Nonpartisan League supported the curb on laissez-faire smoking much more intensely than the conservative, business-oriented IVA.

When the law went into effect on July 1, headlines all over the United States trumpeted the message that: “N.D. Law Forbids Smoking with Meals”,” “Men of North Dakota Can’t Smoke If Women Around”, “Smoking in Cafes, Hotels, Cars Banned.” More prosaically, numerous newspapers in Iowa informed readers that “[s]mokers of North Dakota can’t enjoy their cigars, cigarettes or pipes in public eating houses....”

Utah (1913-1923)

Insofar as the bill affects smoking in public places, it is only a question of those to whom the use of tobacco in their presence is offensive trying to obtain their rights which their smoking neighbors seem unwilling to concede them without compulsion. If a number

\[133\] State of North Dakota: Journal of the Senate of the Seventeenth Session of the Legislative Assembly 583 (Feb. 26) (1921).
\[134\] State of North Dakota: Journal of the House of the Seventeenth Session of the Legislative Assembly 668 (Feb. 26) (1921). The four had also voted against the bill earlier.
\[135\] See above this ch.
\[136\] “Anti-Smoking Bill Becomes Law of State,” BT, July 1, 1921 (1:3).
\[137\] WEC, July 1, 1921 (2:1).
\[138\] Woodland Daily Democrat (Cal.), July 2, 1921 (5:3).
\[139\] Oakland Tribune, July 1, 1921 (1:6). See also “It’s Illegal Now to Smoke in Cafes in North Dakota,” Evening Republican (Mitchell, S.D.), July 11, 1921 (1:2).
of citizens, instead of using tobacco saw fit to amuse themselves by shaking flour bags in a crowd, for instance (and when one comes to examine the habit of burning a weed between one’s lips it does not seem any more sane than would the shaking of a flour bag for pastime!), every smoker would object. His “liberty,” the rights granted by his citizenship, would be in danger! Yet, he thinks nothing of blowing smoke in the face of those around him.... The fact is that tobacco is a drug, and the tobacco habit is a drug habit.\footnote{Louis Ward, “‘Freak Tobacco Legislation,’” \textit{DN}, Jan. 20, 1921 (sect. 2, 3:6-7) (letter to editor). Louis Ward was the pen-name of Fredrick Louis Ward Bennett, the first president of the No-Tobacco League of Utah and a Mormon. Louis Ward, “The Anti-Cigarette Law Has Not Failed,” \textit{IE} 26(3):265-67 (Jan. 1923); see also below this ch.}

Utah politics during the Progressive era underwent a transformation as anti-Mormons left the dominant Republican Party in 1904 in protest against church influence and formed the American Party, which then controlled Salt Lake City’s municipal administration until 1911, although it never gained statewide traction and disappeared by World War I. Moreover, by 1912 the Republican Party was losing support as a result of equivocating on the initiative, referendum, and recall, blocking ratification of the 17th Amendment (instituting popular election of senators), skirting enactment of a workers compensation system, and refusing to regulate railroads or public utilities. Two years later, Progressives and Democrats fused, virtually neutralizing Republicans’ control of the House; Republican Governor William Spry’s pocket-veto of the statewide liquor prohibition bill passed in 1915 together with the legislature’s failure to pass progressive measures such as workers compensation and railroad and public utilities regulation alienated the electorate sufficiently to eliminate Republicans altogether from the House (which was composed of 44 Democrats and 1 Socialist in 1917), produce a 14 to 4 Democratic majority in the Senate, and elect a Democratic Jewish governor, Simon Bamberger, who completed enactment of the Progressive legislative agenda, including liquor prohibition. Republicans were also totally excluded from the Senate at the 1918 elections, though they managed to recapture eight House seats, and not until the nationwide Republican restoration of 1920 did they regain their legislative majorities, expelling all but a single Democrat from the House and taking 11 of 18 Senate seats. At the following three sessions, Democrats retained only one Senate seat, while their House representation was reduced from 10 to 9 to 6.\footnote{Jan Shipps, “Utah Comes of Age Politically: A Study of the State’s Politics in the Early Years of the Twentieth Century,” \textit{UHQ} 35(2):91-111 at 108-11 (Spr. 1967); Thomas Alexander, “Political Patterns of Early Statehood, 1896-1919,” in \textit{Utah’s History} 409-28 at 421-24 (Richard Poll ed. 1978); Michael Dubin, \textit{Party Affiliations in the State} 1570}
Near-Successes Without Organized Mormon Church Support (1913-1919)

We [the Utah WCTU] are working for the prohibition of the liquor traffic, the opium and tobacco traffic, the gambling house and haunts of shame.

We believe in a living wage, an eight-hour day, in courts of conciliation and arbitration, in justice as opposed to greed of gain, in peace on earth, good will to men. ... We aim...to secure laws prohibiting the sale of all narcotics, including tobacco in all its forms.\(^{1343}\)

The Mormon church, as detailed below, did not organizationally support legislation to bar adults from buying cigarettes or smoking tobacco in various public places until after World War I, but its Deseret Evening News editorialized on behalf of such measures much earlier. For example, in 1907, sparked by a discussion of public smoking in the Portland Oregon press, the paper opined: “The question is not whether smokers have a right to smoke, but whether they have a right to compel everybody else, in the streets, in elevators, in public buildings, to inhale the smoke they have discarded. No refined gentleman will claim such a prerogative. The ordinance against soiling the sidewalks could profitably be augmented by a clause relating to smoking.”\(^{1344}\) Under the identically same editorial title seven years later, the paper, prompted by a debate going on in larger eastern cities concerning street cars, revisited the issue. This time, while conceding the “personal liberty” argument to the extent of agreeing that smokers had “the right to ruin their bodies and souls,” the News countered that they had “no right to make other people sick while they are exercising that privilege.”\(^{1345}\)

As far back as 1913 the Utah Senate considered a bill to “prohibit and punish the nuisance of smoking tobacco, cigars, or cigarettes in or upon street cars or railway passenger cars.”\(^{1346}\) The measure specifically made it unlawful “to smoke

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1343Mrs. C. A. Walker [State President Utah WCTU], “W.C.T.U. Will Work After Utah Goes Dry,” Salt Lake Telegram, Oct. 23, 1916 (sect. 2, 1:6-7). There is no evidence that the Utah WCTU ever concretely pushed for enactment of a statewide ban on the sale of all tobacco, which, however, from time to time opponents of anti-cigarette legislation offered as a bill-killing amendment.

1344“Smoking in Public,” DEN, Apr. 1, 1907 (edit.), clipping in Selected Collections from the Archives of the Church of Jesus Christ of Latter-day Saints, vol. 2 (DVD 2002).


1346S.B. No. 205 (Feb. 18, 1913, by Republican Charles Cottrell, Jr., Salt Lake), on
tobacco, whether by pipes, cigars, or cigarettes, within that compartment or portion of any street car or railway passenger car which women or children are permitted to occupy as passengers, or upon the platform or entrance to such car which women or children are permitted to use for purposes of ingress or egress.”

To be sure, smoking compartments were permitted, but only if they were “so separated that the tobacco smoke therein is not permitted to enter that portion of the car which may be occupied by women or children.”\(^\text{1347}\) However, even this rather modest and gendered anti-smoking initiative was weighed down with fatal amendments “to make the bill ridiculous”—one extending the ban on smoking to “any substance” was interpreted to “prohibit the locomotive from smoking”—so that on the final roll call it fell one vote short of a constitutional majority.\(^\text{1348}\)

In 1917 a much more radical bill was introduced by Representative Edward Southwick.\(^\text{1349}\) In addition to instituting a rather capacious ban on manufacturing, selling, exchanging, or keeping for sale any cigarettes, cigarette papers, or wrappers, subject to a maximum fine of $300 or imprisonment of six months for a second offense, Southwick’s House Bill No. 180 made it a misdemeanor, subject to a maximum $100 fine, for any person to “buy, accept or have in his possession any cigarette, cigarette paper or other wrapper intended for the wrapping of tobacco in the form of a cigarette, for the purpose of smoking....”\(^\text{1350}\)

http://images.utah.gov/cdm4/document.php?CISOROOT=/428&CISOPTR=12892&REC=20. It is unclear whether some organization(s) had proposed the bill. At its annual convention in October 1912 the WCTU of Utah did not mention any tobacco-related legislation. Minutes of the Twenty-Second Annual Convention of the Women’s Christian Temperance Union of Utah...Oct. 8, 9, 10, 1912.

\(^\text{1347}\)S.B. No. 205 (Feb. 18, 1913, by Cottrell), on http://images.utah.gov/cdm4/document.php?CISOROOT=/428&CISOPTR=12892&REC=20. An owner, conductor, brakeman, or porter having charge of or operating such a car who permitted prohibited smoking was subject to a fine up to $100 and/or imprisonment up to 30 days. This provision, too, was amended to make only the conductor criminally liable. Id.; “Antismoking Bill Meets Death with Its Amendments,” Salt Lake Herald-Republican, Mar. 1, 1913 (9:3).

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\(^\text{1349}\)On Southwick, see above this ch.

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Although the bill, the introduction of which was “somewhat belated” and had been “expected by tobacco dealers,” would have outlawed not only smoking, but being in possession of, a cigarette, the press did not always realize how expansively prohibitionist the measure was. Unsurprisingly, more than 550 students at Southwick’s alma mater (Latter-day Saints’ University) and more than 350 at Ogden Senior High School petitioned the legislature to pass his bill. Aware beforehand that high school petitions would soon reach the legislature, the Mormon church-owned Deseret Evening News hailed them on the grounds that they “dispose of the time-worn argument of the tobacco advocate, manufacturer and dealer that such legislation appeals only to ‘a lot of narrow-minded old mossbacks who come in from the country and try to run the cities.’” Instead of explaining why these hundreds of “bright young men and women...who ha[d] taken up arms against the deadly coffin nail” were not merely young fogeys who had imbibed the same Mormon dogma as their elders, the News assured its readers that the “maker of cigarettes, the dealer who sells them and the smokers themselves know that they belong in the same category with the drugs and liquors which the laws of enlightened peoples have placed under the ban.” The paper also preemptively defended itself against the charge that the anti-cigarette movement was a “proposal to legislate morals into a people” by distinguishing its program as “a simple proposal to prevent them from destroying themselves and

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1351“Anti-Cigarette Bill Appears in House,” SLT, Feb. 20, 1917 (9:6). Two days later a local option tobacco bill was introduced that empowered town trustees to “license and regulate or prohibit the selling, giving away or disposition in any manner, or [sic; must be of] tobacco.” H.B. No. 204 (by Paxson) on http://images.archives.utah.gov/cdm4/document.php?CISOROOT=/432&CISOPTR=193&REC=3; House Journal: Twelfth Session of the Legislature of the State of Utah...1917, at 379 (Feb. 21). It was killed in committee. “Consolidation Bill Is Killed in House,” SLT, Mar. 6, 1917 (8:2).

1352Since the bill did not specify that the “purpose of smoking” had to be the possessor’s, even giving away a cigarette to someone 21 or over, which was not expressly made unlawful, would presumably have been unlawful if the donee’s purpose was to smoke it.

1353For example, “Proceedings of the Legislature,” Ogden Standard, Feb. 20, 1917 (3:6-7) (“designed to absolutely prohibit the sale of cigarettes”). In contrast, “Saunterings,” Goodwin’s Weekly, Feb. 24, 1917 (8:4), not only reported the possession ban, but, ironically, foreseeing cotinine tests, proposed appointment of “an inspector with authority to puncture the skin of anyone under suspicion for a blood test to be made to see if My Lady Nicotine or any of her offspring are hovering about in the smoker’s system.”

1354House Journal: Twelfth Session of the Legislature of the State of Utah...1917, at 459-60 (Feb. 27).
generations yet unborn.”

Three days after the Judiciary Committee had favorably reported the bill, it was considered by the full House, which just a few days earlier had—despite its two-decade-old standing rule prohibiting smoking—adopted a motion that smoking be prohibited in the House chamber at all times because it was “impolite to the women members.” The principal speech among the many given was Southwick’s, which, to judge by press excerpts, was well-stocked with venerable platitudes about “dull and degenerate” boys and Thomas Edison’s claim that burning the paper wrapper produced a poison that destroyed the nervous system, but nevertheless predictably sparked a round of applause from the gallery prompting the speaker of the House to declare ironically that “any further demonstrations would occasion an election.” Unclear was whether Speaker John Tolton—the Mormon church functionary who had led the opposition to anti-cigarette legislation at the 1907 session and now, once again, opined that the legislature lacked the right to “control the habits of mature men”—was still joking when he advised the bill’s advocates that if they sought passage, they should amend H.B. No. 180 to cover only minors (a superfluous task since the existing law already accomplished that objective). In the meantime, Southwick was busy taking umbrage at the levity of a motion to make the sale of tea, coffee, and tea- and coffee-pots a misdemeanor. The measure proved to be far too radical to secure majority approval, which was produced only by means of striking out two vital provisions, including and especially the ban on adults’ possession of cigarettes (the other being the penalty for selling cigarettes). Following this evisceration the House voted 25 to 11 for passage.

Without mentioning, let alone bemoaning, the deradicalization of Southwick’s bill, the Deseret News took heart editorially that enough “common-sense” legislators sat in the assembly to pass the bill “[i]n spite of the frivolous

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1355“A Plea that Should Count,” DEN, Feb. 24, 1917 (4:3) (edit.).
1356House Journal: Twelfth Session of the Legislature of the State of Utah...1917, at 443 (Feb. 26).
1357“Dry' Amendment to Be Recalled,” DEN, Feb. 21, 1917 (2:3).
1358“Anti-Cigarette Bill Passes House,” OE, Mar. 2, 1917 (3:1-2). On the law making it unlawful for anyone under 21 to buy, accept, or possess cigars, cigarettes, or tobacco, see 1903 Utah Laws ch. 135 at 186; 1911 Utah Laws ch. 51 at 68; Compiled Laws of the State of Utah §8443 at 1625 (1917). On Tolton in 1907, see above this ch.
amendments which some of the legislators with an embryotic sense of humor are trying to tack on to the anti-cigarette bill to make it ridiculous.” Its hopes were buoyed by its sense that the cigarette question was not only the last one still pending that was not a “‘party issue,’” but also no longer subject to controversy, there being “only one side to the question, political, medical, moral, or any other way; and that is that the miserable, filthy, deadly little coffin-nail should go.”

The next day the bill reached the Senate, where it was referred to the Public Health and Labor Committee, among whose members, the News reported, “the cigarette as such meets with but little sympathy....” In particular Chairman John Wootton, although he could not comment on the bill because he had not yet seen it, entertained a pronounced antipathy toward the use of cigarettes (but not at all toward tobacco): “‘As having employed in my time thousands of men...I may say I have noted the effects of the cigarette rather carefully. I have frequently noticed that it was impairing the usefulness of the men physically, and at times I have been able to persuade workmen to give up the cigarette and smoke pipes for a while. In as short a time as two weeks the physical change in the men for the better would be quite marked.”

Considerably less promising as an agent of change was committee member Archibald Bevan (who as a pharmacist and drugstore owner presumably sold cigarettes), who “intimated that he did not believe the legislature could ‘bring about the millennium’ all at once. He did not see any particular objection to letting a man of adult age having [sic] a cigarette if he insisted on smoking them [sic].”

In the event, the Mormon newspaper’s headline (“Anti-Cigarette Bill Reaches Senate; May Become Law”) was overtaken by reality the day that it appeared, when Representative Daisy Allen of Salt Lake City announced that she would move reconsideration of S.B. No. 180. The genesis of the misunderstanding is difficult to reconstruct, but many representatives, according to the press, failing to grasp the amendments’ “exact significance,” “voted under the impression that

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1361“Ban and Banish the Cigarette,” DEN, Mar. 2, 1917 (4:1) (edit.)
13631920 Census of Population (HeritageQuest).
1364“Anti-Cigarette Bills Reaches Senate; May Become Law,” DEN, Mar. 2, 1917 (10:5).
1365House Journal: Twelfth Session of the Legislature of the State of Utah...1917, at 521 (Mar. 2). A suffragist, Allen ran and was elected as a member of the Progressive Party (which was a coalition of Democrats and Republicans), though she considered herself a Democrat. Women Legislators of Utah, 1896-1993, at 61 (Delila Abbott and Beverly White comp. 1993 [1976]).
they were legislating only against the use and sale of cigarettes as far as minors were concerned.” On learning after adjournment from one of the Nay-voters what the chamber in fact had just done to the bill, “[s]everal members showed great astonishment and could not be convinced for some time.” (Since the bill text underlined the new provisions proposed to be added to the existing no-tobacco-sales-to-under-21-year-olds law and the motion to strike out the ban on possession was expressly phrased in terms of “all new matter in Section 4469x,” members’ confusion is puzzling. Unknown is whether these members understood that they had banned all sale of cigarettes but deleted the penalty for it.) Two days later, on reconsideration the House, coming to its collective senses, voted to strike out the enacting clause, thus killing what was left of Southwick’s initiative.

A deeply disappointed Deseret News editorialist sought to turn his post mortem into resuscitation by expressing the belief that, no matter how late in the session, “the legislative champions of public health, intellect and morals” might reconstruct the bill into an “unobjectionable” measure and pass it. His failure to reveal exactly what had been objectionable to whom was unsurprising since he assumed that “there could have been no honest or intelligent objection” to S.B. No. 180’s purposes and “the disgusting and deadly cigarette was hardly less [than liquor], in the minds of the people, an evil that demanded early removal and eradication.”

After his election to the state Senate in 1918, Southwick introduced a bill (S.B. No. 105) at the 1919 session that was virtually identical to H.B. No. 180 except that it omitted the phrase “for the purpose of smoking,” thus expanding the scope of the ban on adults’ possession of cigarettes. Even more
enthusiastically than in 1917, the student body of Brigham Young University, speaking through its three-member presidency, submitted a petition urging the legislature to make “Utah the first State of our Union to take this progressive step” of banning the manufacture, possession, sale, and use of cigarettes and cigarette papers. Residents of Lehi, Southwick’s hometown, also urged their county’s legislators to support Southwick’s bill.

That the Mormon hierarchy, as explained below, did not concertedly and organizationally engage on behalf of Southwick’s measure in 1919 (as it would in 1921) did not mean that it failed to lend it any support. In particular, the church’s Deseret Evening News, one of the state’s largest-circulation dailies, editorialized twice in favor of S.B. No. 105. Indeed, just a week before the bill’s introduction, under the title, “Coffin for the ‘Coffin-Nail,’” it used the occasion of a recent Colorado Presbyterian synod resolution advocating the prohibition of manufacture and sales in the entire United States to express the optimistic opinion—which stood the tobacco industry’s apprehension on its head—that “it becomes more and more evident that a great concerted move will be made against the cigarette by the present Anti-Saloon League, as soon as the changed conditions due to the demise and somewhat turbulent burial of John Barleycorn have been readjusted to the new order of things….” Despite the scorn and ridicule to which promoters of such a movement had been subjected, the Mormon editorialist assured his readers, “the same measure of success against the desplicable and deadly cigarette will be eventually chronicled.”

The day after devoting an entire article (including the full bill text) to the introduction of Southwick’s bill, the News, under the title, “The Deadly Cigarette,” editorially emphasized that “[t]he great majority of this state are strongly opposed to the use of tobacco,” adding that all reputable doctors, joined by educators, agreed that it was “injurious.” Consequently, it asked, “why should it be tolerated, as a costly, filthy, indulgence? Why especially should the use of the cigarette—probably the most insidious and destructive form in which the addict can enjoy his poison—be allowed, nay even encouraged as has been the case since the war’s outbreak…to grow to the fabulous figures of 39,000,000,000
produced in 1918 or 400 per capita?\footnote{1376} Focusing then on the course of the state’s legislation on the subject, the paper criticized previous efforts and proffered its advice on how to avoid repeating past mistakes:

Utah legislators have more than once been given an opportunity to place their state in the front rank of reform by enacting an anti-cigarette law. Measures of this kind have been presented, supported by strong public sentiment, but an insufficient number of the lawmakers have found themselves able to take the matter seriously. By some frivolous parliamentary trick, or by ridiculous amendments which the real friends of the original measures were not keen enough to detect and prevent, such legislation has thus far failed to reach the statute book except as applicable to minors. The present legislature will also have an opportunity to place itself on record; and friends of the bill introduced by Senator Southwick should see to it that no member be allowed to escape voting on the bill on its merits—in other words that it be not killed by a technicality.\footnote{1377}

A month later, after the bill had passed the Senate and was pending in the House with only two days left in the session, the News, in a blunt message to the lower chamber ("Pass the Anti-Cigarette Bill"), insisted that "if the sentiment of the people shall be truly reflected by their representatives," S.B. No.105 could be "adopted with practical unanimity." Warning against forcing Utah to wind up in the rearguard rather than in the leadership of a movement that was "already strongly under way in other states"—though the editorialist would have been hard-pressed to name them—the Mormon newspaper made transparent the chronological context for its engagement: "now that [liquor] prohibition is out of the way...the next great logical reform measure" was "decreeing that tobacco also must go."\footnote{1378}

S.B. No. 105 encountered its first sign of resistance in the five-member Senate Public Health Committee, a three-member majority of which reported on it unfavorably "in its present form." Chairman Daniel Stevens, a merchant, submitted a comment to the full Senate explaining in effect that he would support only an even more radical measure (that he knew stood no chance of passage). Since "[l]ittle or no attempt" was being made to enforce the existing no-sales-to-under-21-year-olds law:

If public sentiment against the cigarette is not sufficiently crystallized to secure an attempt at enforcement of the present law, a more drastic law would meet with popular disfavor and fail utterly of enforcement. ... It is his [Stevens'] opinion that S.B. No. 105 is

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\item \footnote{1376}"The Deadly Cigarette," DEN, Feb. 13, 1919 (4:1) (edit.).
\item \footnote{1377}"The Deadly Cigarette," DEN, Feb. 13, 1919 (4:1-2) (edit.).
\item \footnote{1378}"Pass the Anti-Cigarette Bill," DEN, Mar. 11, 1919 (4:2) (edit.).
\end{itemize}
considerably in advance of public sentiment at this time. But if the Legislature is going to force this sort of legislation upon one class of smokers, regardless of public sentiment, it should do a good, thorough job of it and treat all classes alike.

If S.B. No. 105 were so amended to prohibit the sale and use of tobacco in any form for human use, and apply it to all ages, he would willingly and gladly support such a measure.\(^{1379}\)

Reinforcing this initial set-back, the bill’s consideration on second reading was accompanied by “considerable merriment and the general impression seemed to be that it would soon be killed,”\(^{1380}\) but in fact it passed by a vote of 12 to 5 (one of the committee majority defecting to the Ayes)\(^{1381}\) and made it through final passage by a vote of 11 to 6 (the defector reverting to the Nays).\(^{1382}\) The anti-prohibitionist Salt Lake Telegram called this outcome “one of the biggest surprises of the session....”\(^{1383}\) Despite these solid majorities a potential obstacle emerged when one of the senatorial Ayes intimated that he might offer an amendment to place the issue before the people of Utah for a popular vote, and even if he did not, the press conjectured that opponents might—if the House did not asphyxiate it first. But underlying approval for the general prohibitory approach was audible in the thunderous Aye accorded another Yes-voting senator’s proposal to raise the minimum age for sale/purchase from 21 to 91 on the grounds of the infeasibility of enforcement of a no-smoking law against a boy whose parents were free to smoke.\(^{1384}\) Southwick pointed out that raising the age to 91 would render the rest of his bill dealing with sales to adults unnecessary. At least one senator opposed the bill on the grounds that, while tobacco use was harmful, so was chewing gum, but that sumptuary legislation was useless “until the people demand it,” and he saw no such public demand. Senator (and future

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\(^{1382}\) Senate Journal: Thirteenth Session of the Legislature of the State of Utah: 1919, at 516 (Mar. 7); “Committee Ignored; Cigaret Bill Passed,” SLT, Mar. 8, 1919 (13:3).

\(^{1383}\) Senate Passes Anti-Cigarette Bill,” Salt Lake Telegram, Mar. 7, 1919 (sect 2, 1:7). Even the Telegram conceded that, despite the tendency to treat the bill as “adding to the gaiety of nations...the final vote indicates that the senators eventually gave it thoughtful consideration.” “Anti-Cigaret Bill Passes Senate; Goes to House,” Salt Lake Telegram, Mar. 8, 1919 (8:3).

\(^{1384}\) Utah May Have Cigarette Ban by State Laws,” OE, Mar. 7, 1919 (2:2-4).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Governor) George Dern confessed that he no longer believed that “all cigarette smokers were no good” because most of the U.S. soldiers who had gone to France smoked cigarettes, and they were “pretty good fellows,” although he personally found cigarette smoking offensive and “did not want to see his boys get the cigarette habit.” Moreover, if Utahns wanted such a law, they now had the initiative law to enable them to secure it.1385

A month before S.B. No. 105 reached the House that chamber had received identical worded petitions from the student presidents and substantial numbers of students of two high schools urging elimination of “Utah’s greatest present menace—the cigarette.”1386 Although even the News noted that few legislators had initially expected what they deemed a “‘freak’” measure to become law, after Senate passage, “the odds against the enactment of this particular bit of moral legislation were reduced until” a few days before House consideration “its passage was assured.”1387 Nevertheless, on the last day of the session, weaker House backing for the bill became unoverlookable on a kind of test vote to table the measure in lieu of a third reading: the narrow 20-22 defeat nevertheless indicated that the constitutionally required 24-vote majority might not be available after all.1388

Before the chamber proceeded to the final vote, opponents sought to amend the bill to death by making it “so blamed ridiculous everybody will vote against it.” 1389 The most significant such amendment stemmed from Democrat Robert Hinckley—son of a well-known and influential Brigham Young University geology professor1390—who, in response to doubts expressed about his

1385“Cigarette Measure Progressing in Senate,” DEN, Mar. 7, 1919 (8:4). Using a common tactic of ridicule that opponents of anti-tobacco legislation had been enamored of since the 1890s, one senator tried to introduce a “companion bill prohibiting the use of hat-pins, rouge, powder, peek-a-boo waists and open-work stockings by women, but the senate would not let him present it.”


1387House Journal: Thirteenth Session of the Legislature of the State of Utah: 1919, at 739-40 (Mar. 13). The last legislative “day” extended beyond March 13 as the clock was stopped to simulate compliance with legal limit on the length of the session.


“sincerity,” denied that his proposal to extend the bill’s ban to all tobacco was a “joker.” Hinckley appears to have been motivated by his view that Southwick’s bill did not give the returning “soldier boys a fair deal.” Instead of responding to a question as to how his amendment would help those veterans, Hinckley launched into a fascinating riff suggesting that implementation of such a ban would incite proletarian class war: he declared that his amendment was “totally discriminatory and in view of the labor unrest, adverse economic conditions and other misfortunes which the laboring man encounters under the present social conditions, to pass such drastic legislation was ‘like shaking a red flag in a bull’s face.’” Other opponents also stressed S.B. No. 105’s discriminatory aspect, while proponents focused on the “evils of the cigarette habit” without justifying the curtailment of adults’ freedom for the sake of adolescents. As had been the case in many other state legislatures going back to the 1890s, the sales ban was also attacked on the grounds that it would merely result in turning over the business to out-of-state mail-order houses. “The House rejected the killer amendment to extend the ban on possession of cigarettes to ‘tobacco in any form.’”

The vehemently anti-prohibitionist Salt Lake Tribune, the state’s largest-circulation daily, conveniently cataloged the anti-tobacco arguments as “perhaps, the most sweeping, unsupported and unproved statements that have yet been made by proponents of any measure in the present session.” They included the claims that “the people of Utah...resented the fact that the smoking habit was encouraged during the war” and that 75 percent of them “were against the use of tobacco.” After another representative had brought to light the “astounding and new bit of information...that every great criminal was a cigaret smoker, and that the beginning of these criminal careers could be directly laid at the door of the terrible ‘pill,’” the paper poured even more editorial sarcasm into the news columns: “Prominent Utah business and professional leaders who indulge occasionally in cigarets will be shocked to learn that the minds of grown men who use the deadly things are benumbed thereby.”

By this juncture, since “nobody seemed to know what they were voting for,” one representative requested and received permission from the speaker of the House to ask the assistant attorney general, who happened to be present, to lay out the measure’s “exact provisions.” As odd as this procedure was the official’s

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woefully inaccurate “decision” that “the bill as printed provided for the prohibition of the sale of tobacco in any form to minors, and made it a misdemeanor to sell cigarettes to both minors and adults” (thus omitting mention of the bans on public smoking and advertising).

The 25 to 18 vote on third reading—which one newspaper described as “Utah Legislators Go on Record Favoring Freak Cigarette Legislation”—would, as the Tribune reported, have placed the legislature’s imprimatur on “regulat[ing] the smoking habits of Utah adults, an advanced step in the line of radical legislation that heretofore has not been put into effect.” Passage would also have sent “one of the most drastic bills passed at this session” on to Utah’s first non-Mormon Governor, Democrat Simon Bamberger, a non-smoking and non-drinking German-born businessman as well as a progressive who strongly supported liquor prohibition, but adoption of a minor amendment required a concurring vote in the Senate.

On the bill’s return to the Senate Southwick’s motion to concur in the House amendment carried, but Senator Allen Sanford urged jettisoning the bill altogether on the grounds that it was unwise to try to “force this sort of sumptuary legislation upon the people who were not in a mood for it” lest the resulting “antagonism” carry over to compliance with the liquor law as well. Then a conflict arose as to the law’s effective date on the grounds that dealers had a stock

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1397 “‘Fag’ Measure Passes After Warm Confab,” Salt Lake Herald, Mar. 15, 1919 (14:1).
1398 “Cigarettes to be Barred from Utah in Future,” OE, Mar. 15, 1919 (7:1).
1399 The Utah State Legislature: Centennial History, 1896-1996, at 325 (J. Hammond et al. comp. 1996). Whether he would have signed the bill was deemed “problematical” at the time: on the morning of the last day of the session he declined to reveal his position before the legislature acted, though its opponents claimed that he would return it for additional consideration. “Cigarette Bill Is Put to Death in Last Day Rush,” DEN, Mar. 15, 1919 (sect. 2, 1:6-7 at 7).
1400 “Cigarettes to be Barred from Utah in Future,” OE, Mar. 15, 1919 (7:1), incorrectly reported that the bill “now goes to the governor.” The amendment corrected what appears to have been an error and restored language from Southwick’s 1917 bill by declaring that anyone violating any of the provisions of the section was guilty of “a misdemeanor” (rather than of “violating any of the provisions of this section”).
of hundreds of thousands of dollars worth of tobacco in the absence of a provision for them to dispose of it. Southwick strenuously opposed the proposed date of March 1, 1921 (that is, in the midst of the next session) as meaning the bill’s defeat; its proponent, Mormon anti-prohibitionist Uriah Jones, in effect conceded this decoding when he observed that the date “would give opportunity to get expression from the people on the subject and the next legislature would be guided by such opinion in either killing the act or letting it go into force.”

When, instead, a January 1, 1920 effective date prevailed, S.B. No.105 failed to pass on a 9 to 9 vote. Sentiment in favor of enactment, however, prompted reconsideration of that tie vote, rejection of the alternative later effective date, retention of the earlier date, and final passage by a still comfortable vote of 11 to 7.

Adoption of this amendment required House concurrence, the motion in favor of which carried, but opponents sought to block the vote on final passage with a tabling motion, which lost by a vote of 14 to 22. On passage of the amended bill, which would have prohibited possession of cigarettes by anyone in Utah, proponents were able to mobilize 23 Ayes against 14 Nays, but they fell one vote short of a constitutional majority on the final day of the session, thus killing S.B. No. 105 and ending a legislative process that had been “as exciting as a horse race.”

The fact that the measure was extinguished on the basis of such a minor issue, especially when 10 members were absent, half of whom had voted on

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1402“Anticigaret Bill Fails of Passage,” SLT, Mar. 16, 1919 (11:1). On Jones, see above this ch.


1404House Journal: Thirteenth Session of the Legislature of the State of Utah: 1919, at 745-46 (Mar. 13); “Kill Anti-Cigaret Measure in Utah,” Sunday World-Herald (Omaha), Mar. 16, 1921 (1:7); “Vote That Killed Anti-Cigarette Bill in the Lower House,” DEN, Mar. 17, 1919 (2:2). The 10-member Salt Lake County delegation split evenly on all votes on the bill that day. Democrats for the first and last time until the New Deal overwhelmingly dominated both chambers in 1917 and 1919; no Republicans were elected to the House in 1917 and only nine in 1919; of the five who voted on final passage of S.B. No. 105 four cast Ayes. Party affiliation was determined on the basis of the vote for House speaker. House Journal: Thirteenth Session of the Legislature of the State of Utah: 1919, at 3 (Jan. 13). “Thirteenth Session State Legislature Begins Its Labor,” DEN, Jan. 13, 1919 (1:1-2, 2:7), provided a list of members by party, which differed slightly from that used in the text.

1405“Smoke Pill Saved to Users,” Salt Lake Telegram, Mar. 15, 1919 (1:2).

1406Some legislators opined that if the bill had included an effective date when it was introduced it would have passed. “Cigarette Bill Is Put to Death in Last Day Rush,” DEN,
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

the bill earlier that day, suggests that a more substantial and substantive opposition to passage of the radical prohibition underlay the failure to muster that one additional vote.\footnote{The Salt Lake Mormon daily noted that the “absence of advocates of the cigarette bill” was responsible for the bill’s defeat, adding in the session’s closing hours that “unless these members are present...and vote for a suspension of the rules to reconsider the measure, the Southwick anti-cigarette bill is an item of history.” “Cigarette Bill Is Put to Death in Last Day Rush,” \textit{DEN}, Mar. 15, 1919 (sect. 2, 1:6-7 at 7). According to “Cigarette Bill Is Killed by Amendment,” \textit{SLH}, Mar. 15, 1919 (9:4).} (Some House opponents had, after all, expressed the hope that some senators would reconsider the vote on the bill’s passage and “table it for the present session.”)\footnote{Although a segment of the out-of-state press erroneously reported that “Utah is the first state to follow up [liquor prohibition] with an anti-cigarette law,” it added that: “It is the enactment of such laws that the wets are depending on for a revulsion of sentiment.” This editorializing was especially ironic because the newspaper did not even mention (if it knew about) the advertising and partial public smoking bans.\footnote{“Anticigaret Bill Is Passed by House,” \textit{SLT}, Mar. 15, 1919 (9:4).} The near-passage was also, at least propagandistically, qualified by merchants’ threat, if the bill had become law, to challenge its constitutionality on the (novel if not bizarre) “grounds that since the United States government sells cigarettes to soldiers and includes the article in its allowances of overseas units, any act prohibiting its sale to soldiers at least is unconstitutional.”\footnote{“Notes and Comments,” \textit{Oakland Tribune}, Mar. 16, 1919 (28:3). For another mistaken report about passage, see “Utah Cigaret Law Bars Even Makings in State,” \textit{CT}, Mar. 15, 1919 (3).}}

Although a segment of the out-of-state press erroneously reported that “Utah is the first state to follow up [liquor prohibition] with an anti-cigarette law,” it added that: “It is the enactment of such laws that the wets are depending on for a revulsion of sentiment.” This editorializing was especially ironic because the newspaper did not even mention (if it knew about) the advertising and partial public smoking bans.\footnote{“Cigarette Bill Is Put to Death in Last Day Rush,” \textit{DEN}, Mar. 15, 1919 (sect. 2, 1:6-7 at 7).} The near-passage was also, at least propagandistically, qualified by merchants’ threat, if the bill had become law, to challenge its constitutionality on the (novel if not bizarre) “grounds that since the United States government sells cigarettes to soldiers and includes the article in its allowances of overseas units, any act prohibiting its sale to soldiers at least is unconstitutional.”\footnote{“Cigarette Bill Is Put to Death in Last Day Rush,” \textit{DEN}, Mar. 15, 1919 (sect. 2, 1:6-7 at 7). The article did not make it clear whether merchants had made this threat before or after the bill’s defeat.}

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\textit{Enactment Based on Mormon Church Mobilization (1919-1921)}
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[T]he rights of men and women who do not smoke are being offensively interfered with by tobacco smokers who either thoughtlessly or selfishly smoke in public places and thus pollute the pure air to which everyone is entitled.\footnote{Resolutions Authorized by the Convention of Y.M.M.I.A. Stake and Ward}
Although the Mormon church did not openly intervene in the anti-cigarette legislative process until after the failed attempt to pass a general sales ban during the 1919 session, in 1918 it had published a book on tobacco by Frederick Pack, a geology professor at the University of Utah, who devoted a whole chapter to the subject of the poisonous effects of “second-handed” tobacco smoke under the playful but far-seeing title, “The Smoker and the Smoked.” Based on several studies Pack concluded that it was “already a scientifically demonstrated fact that individuals associated with smokers are adversely affected by their habits.”

Although “the injury is not so great as that produced by direct smoking,” nevertheless “[t]obacco smoke should be looked upon as a marked poison, whether used first—or second-handed.” Pack’s interest was especially focused on children, a “considerable percentage” of whom in the United States were “reared in an atmosphere vitiated and poisoned by such fumes” generated by their fathers. Unfortunately, however, “the opinion is almost universally held by smokers that if any injury is being done they alone are the sufferers.” Yet despite the inarguably serious injury that a “delicate infant” would sustain “in an atmosphere laden with tobacco smoke,...parents on every hand may be seen thus abusing their children.” Moreover, there was no doubt that “many of the ailments appearing in later life are the result of being subjected to tobacco smoke in childhood.”

In leaping from is and ought to ‘shall soon be’ Pack was, perhaps,
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

overstimulated by Kansas state legislator Oliver Jewett’s aforementioned (expeditiously killed) bill that was interpreted to prohibit smoking even in a home with children1415 to make the hopelessly overoptimistic assertion that a prophet’s foresight was not needed to “declare that the time was not far distant when civil law will make it impossible for fathers to smoke in the presence of their children.”1416 Nevertheless, Pack’s insight into the requisite scientific underpinnings of the articulation of public policy was deep enough to prompt him to formulate a research desideratum that almost a century later is still in its infancy—namely, whether, apart from social-psychological parental learning/imitative processes, addiction can be acquired biochemically and/or physiologically as a result of growing up in a smoking household: “It would be interesting...to investigate the effect of early exposure in producing a craving for tobacco a few years later. Do boys reared in smoke-saturated homes acquire the tobacco habit more readily than other boys? In other words does second-hand smoking lead to first-hand smoking? If we are not mistaken the future will answer these questions in a most positive affirmation.”1417

Though not a Mormon organization, the branch of the No-Tobacco League that began to be organized in Utah in April 1919, a month after the defeat of Southwick’s bill, enabled Mormons to secure prominent positions in this independent movement from the outset. Mormon church President Heber Grant also subsidized the group by advertising in its periodical his insurance business,1418 which also housed the insurance business of the Utah No-Tobacco League’s Mormon first president,1419 and the organization held its first annual meeting in the Mormon Granite Stake Tabernacle.1420 As city organizer for the state the Indiana-based group, whose objectives encompassed the dissemination

1415See above this ch.
1416Frederick Pack, Tobacco and Human Efficiency 37-38 (1918).
of information on and passage of legislation to prohibit tobacco use, appointed Fred L. W. Bennett\textsuperscript{121} (1888-1944),\textsuperscript{122} who had converted to Mormonism and emigrated from England to Utah in 1916.\textsuperscript{123} A notice that Bennett requested the Mormon \textit{Improvement Era} to publish the month after his appointment as “organizing or field secretary for Utah” stressed that the “movement is non-sectarian and several non-‘Mormons’ as well as ‘Mormons’ have already joined the league in Salt Lake City...”\textsuperscript{124} (To be sure, a year later the League admitted that it had “received more support from the officers and members of the dominant church than from others, for the obvious reason that this church alone regards abstinence from the use of tobacco as a Divine commandment.”)\textsuperscript{125}

By the end of August 1919, 17 people formed a temporary organization of the No-Tobacco League of Utah,\textsuperscript{126} which a few days later was formally established\textsuperscript{127} and by its first anniversary boasted of having 800 members who had paid the 50-cent membership fee.\textsuperscript{128} The League’s reason for existing was seemingly straightforward, highly political, and grounded in typical progressive-era anti-corporatism:

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\textsuperscript{121}“No-Tobacco League Organizes in S. L.,” \textit{SLH}, Apr. 14, 1919 (12:2). For the tobacco industry’s account of the No-Tobacco League, which was organized in Indiana in 1915 and by 1921 had branches in California, Kansas, and Utah, see Tobacco Merchants Association of the U.S., “Summary of Anti-Tobacco Educational Activities” at 12 (June 1, 1921), Bates No. 502359512/24.


\textsuperscript{124}“Passing Events,” \textit{IE} 22(7):645 (May 1919).

\textsuperscript{125}“Non-Sectarian,” \textit{No-Tobacco News} 1(2):5 (Oct. 1920). \textit{Improvement Era} advertised in the League’s periodical, soliciting subscriptions for “a magazine that is clean and wholesome” and that had “consistently opposed the tobacco habit since its first issue.” \textit{Id.} at 2; \textit{No-Tobacco News} 1(1):3 (Apr. 1920).

\textsuperscript{126}“No-Tobacco League Is Organized by 17,” \textit{SLH}, Aug. 29, 1919 (16:6). Despite the general reference to the Utah entity as a branch of the national organization, it insisted that it was “not a branch or part of any other organization. It was founded by Utah people to whom it is alone responsible. A separate organization was considered desirable for Utah owing to the great distance from the headquarters of the national organization.” “In Brief,” \textit{No-Tobacco News} 1(2):9 (Oct. 1920).


The tobacco trusts are today threatening to enslave the manhood and womanhood of our entire nation. In view of this fact it becomes absolutely imperative on the part of the non-smokers of our country to league against this pernicious propaganda.

More than two years have now passed since that most dastardly surprise attack was swiftly and secretly launched against an unsuspecting public. Simultaneously in more than five hundred of our leading newspapers and magazines of our fair land came the plea for “well filled” pipes and “abundant cigarettes” for our boys “over there.” These tobacco advertisements, for such they really were, caught the sympathy of thousands of well meaning men and women who, by their response, flooded our armies with untold quantities of the self-destroying evil.

We are finally awakening to the duplicity of the measures that were then employed, but in the meantime the tobacco trusts are flattering themselves that smoking has been popularized to the extent that their sales have nearly doubled.

It is to stem the tide of this evil and the salvation of our boys and girls and the race that the No-Tobacco League of Utah was organized.1429

The suspicion raised by this indictment that the Nicotine Trust had given the No-Tobacco League of Utah no reason to be called into being before U.S. entry into the world war in 1917 was borne out by the group’s peculiar reified conception of its real yet agencyless adversary:

We have no hatred against the tobacco manufacturer, or dealer or the smoker. In most cases the former entered the business in good faith, we have no doubt, little thinking that it would be regarded before long as a public menace whilst the smokers as a rule acquired the habit from others and would give anything if they could overcome it.

All our hate is for tobacco, and we are going to wage war on it. ...

The aim of the No-Tobacco movement in Utah is...to arouse and crystallize the strong anti-tobacco sentiment which as always existed here.1430

Exactly how the No-Tobacco League of Utah intended to exterminate a commodity without attacking its capitalist monopolizer it did not make clear, but its publicly articulated aspirations were lofty: “We are prompted by a single desire: the uplift of humanity, and the destruction of tobacco will, we are convinced, do much in this direction.” And to this end during its first year it was industrious both internally and externally, holding 30 business and 125 public meetings.1431

The first public inking that the Mormon hierarchy had finally resolved to place its considerable influence behind anti-tobacco legislation emerged in

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October 1919, seven months after the defeat of that year’s anti-cigarette bill, when, pursuant to a resolution passed on June 2, by a Convention of Social Welfare Workers held in Salt Lake City, the church Social Advisory Committee (which represented all of the church’s auxiliary organizations) issued a brief bulletin on “The Cigarette Evil.” Prompted by the “alarming rate” of increase of cigarette consumption both nationally and among Mormon youth, the Committee decided to call the attention of the “Saints” to “this growing menace...in order to arouse and crystallize a public sentiment that shall effectually stem this tide of evil.” Against the background of the non-enforcement of no-sales-to- and no-use-by-minors laws even in Mormon-populated states, the church identified three causes of the increase in the use of cigarettes: (1) their having been lavished on soldiers during the war; (2) an increased demand for narcotics prompted by the advent of alcohol prohibition; and (3) “and probably the main cause...the extensive advertising campaigns that the tobacco interests have carried on in recent years,” taking advantage of the war- and patriotism-inspired minimization of tobacco’s harmful effects. The ubiquitization of advertising went hand in hand with that of smoking itself: “In the street-car ads, on the billboards, in the pages of the magazine and the newspaper, and on the motion picture film—wherever, in short, your eyes may rest—you will see alluring invitations, sometimes open, sometimes covert, to indulge in smoking. And always these advertisements are associated with what attracts the youth—beauty, ease, leisure, wealth. Lately special efforts are being made in advertisements to induce women to take up the habit of smoking cigarettes.”

1432 The Social Advisory Committee was founded in 1916 by church leaders as an attempt to “coordinate efforts to promote both social reform and moral retrenchment....” The initial targets were young women’s attire, censorship of movies, and prohibition of dancing based on jazz and popular music. The auxiliary organizations included Sunday School, Young Men’s Mutual Improvement Association, Young Ladies’ Mutual Improvement Association, Relief Society, and Religion Classes. The Committee had promoted attendance at a national social work conference in Atlantic City during the first week in June 1919; when three members returned, the Committee held a meeting emphasizing a Saturday half-holiday and an anti-cigarette campaign to discourage tobacco use, but also juvenile delinquency, sexual immorality, venereal disease, dancing, and censoring commercial amusements. Later in 1919, Arthur Beeley, a professor of criminal sociology at the University of Utah and later founder of its school of social work, was hired as the Committee’s executive secretary. Thomas Alexander, “Between Revivalism and the Social Gospel: The Latter-day Saints Social Advisory Committee, 1916-1922,” *BYU Studies* 23(1):19-39 at 24-26, 29, 30 (1983).

1433 The Cigarette Evil,” *YWJ* 30(10):548-50 at 548 (Oct. 1919). Under the same title the bulletin also appeared in *IE* 22(12):1033-37 (Oct. 1919). During the war the Mormon
the crucial role of advertising in priming children to become lifelong addicted customers went so far that by the 1921 legislative session the anti-cigarette bill’s Mormon introducer appeared to advocate a sales ban for the purpose of making an advertising ban possible: “we cannot prevent advertising of any article of which we permit the sale.”)

The Social Advisory Committee declared that the church had to aid anti-tobacco organizations “to drive the cigarette from our communities. It is a struggle for the boy and the girl. The men and women of the future will not be so likely to use tobacco if the boys and the girls of the present do not form the habit. But the shrewd nicotine trust levels its guns at the growing generation, knowing that a youth who learns to smoke means from a thousand to fifteen hundred dollars more in its pockets than one who picks up the habit later in life.”

Paying close attention to the capitalist profit/addicted young consumer link, Mormons understood that: “If they [i.e., young people] can keep from forming the tobacco habit till they are past the habit-forming period in life, they will be saved from the money-grubbing tobacco interests,” which “would coin the nation’s manhood and womanhood into filthy lucre.”

To be sure, a sustained systematic attack on wealth would, in light of the church leaders’ own generally sympathetic attitude toward business interests, have been unlikely.

In addition to urging local social advisory committees to forge organizational links with community “uplift forces” and against the background of the overarching goal of securing enactment of “a State law banishing the cigarette forever,” the Committee formulated as its first objective the enforcement of the existing no-sales-to-minors law, without which enactment of other anti-tobacco laws would not be possible. Bolder and more radical was the second objective: “we should seek to destroy the power of tobacco agencies working through

church had opposed sending tobacco to soldiers in Europe. “Tobacco Habit Condemned by Church Speaker,” OE, Mar. 8, 1920 (2:3).

Anti-Cigarette Bill Debated,” OS-E, Feb. 3, 1921 (4:4). Edward Southwick made this statement during Senate floor debate in opposing an amendment that would have licensed the sale of cigarette. See also below this ch.

The Cigarette Evil,” YWJ 30(10):548-50 at 549, 550 (Oct. 1919). Since the Mormons presumably knew that adults too could become addicted, they must have meant that relatively few people began smoking cigarettes later in life—a fact a century later, but not the case among women at that time. David Burns et al., “Cigarette Smoking Behavior in the United States,” in National Cancer Institute, Changes in Cigarette-Related Disease and Their Implication for Prevention and Control 13-112 at 22 (1997).

Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

advertisements to entangle the youth. Public sentiment should be roused against tobacco; local authorities should be induced, as in Murray, Utah, to put a ban on the use and sale of cigarettes, and if possible to pass ordinances forbidding billboard advertising of tobacco in any form.” Persuading store owners not to sell tobacco, “or at the least, cigarettes,” was another vital tactic, which, the Committee imagined, “ought not to be difficult” to implement, at any rate with Mormon shopkeepers; regardless of their religion, civil complaints should be filed against persistent violators because: “No one who breaks this law deserves any sympathy.” Coordinated with persuasion and law were community-wide pledges to boycott stores that sold tobacco and newspapers and magazines that advertised tobacco. 1437 The capstone of the Mormons’ totalizing attack was, ironically, both continuous with its (aforementioned) censorious moralistic approach to movies and anticipatory of an avantgarde strategy developed by the science-based tobacco control movement at the turn of the next century1438; “[W]ork with those who operate motion pictures so as to secure the elimination of all plays that show the characters using tobacco in any form. The film is one of the most impressive means of instilling into the minds of the young any ideals.... Inasmuch...as so many of the pictures on the film nowadays show the characters in the act of smoking, this becomes one of the most insidious ways of advertising tobacco....”

An editorial in early 1920 in the church’s periodical, which was edited by the Mormon church’s new President Heber J. Grant (1856-1945), underscored its new, aspirationally prohibitory position: “It would be a good thing if tobacco

1437“The Cigarette Evil,” YWJ 30(10):548-50 at 549 (Oct. 1919). Located near Salt Lake City, Murray was a smelter town of about 4,600 in 1920. A license law (under which four dealers were licensed) was in effect in Murray, but the city attorney and marshal stated that boys were still getting cigarettes, and that prohibition would be better. “Cigarette Bill on Calendar for Passage,” DN, Feb. 17, 1921 (sect. 2, 8:6-7); “Amendments to Anticigaret Measure Rejected in Lower House,” SLT, Feb. 17, 1921 (10:1). With regard to “Mormon shopkeepers”: during House debate on the 1921 Southwick bill, Rep. O. F. McShane, one of its leading opponents, admitted the truth of the accusation that he sold tobacco in his store, but added that he bought it all from the (Mormon church-owned) Zion’s Cooperative Mercantile Institution. “House Battles over Committee’s Amendments to Anticigaret Bill,” SLT, Feb. 15, 1921 (10:1 at 2).

1438Stanton Glantz’s “smoke free movies” proposal includes the U.S. movie industry’s voluntarily giving an R rating to any film showing or implying tobacco, subject to two exceptions: presentations of tobacco that clearly and unambiguously reflect tobacco use’s dangers and consequences or that are necessary to representing a real historical figure’s smoking. http://smokefreemovies.ucsf.edu/solution/index.html

Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

were cleared out of every grocery and other place of sale, in all the land, particularly where Latter-day Saints control. Why? Because it is not good to make profit out of that which is seriously detrimental to the human race, physically, morally and mentally.\footnote{1440}

In this respect Grant differed from his predecessor Joseph F. Smith (whom he had succeeded in November 1918), who had cooperated with Senator Reed Smoot, head of the Utah Republican Party and a member of the church governing body, the Quorum of the Twelve Apostles, in staving off enactment of statewide liquor prohibition (in contradistinction to a local option regime) lest it reignite the kind of anti-Mormon political formation previously embodied in the American Party, which threatened cooperation with the Republican Party’s non-Mormon business faction. During the decade preceding his presidency, Grant—who had also been one of the Twelve Apostles (since 1882)—had been both liquor prohibition’s leading advocate among the latter and the foremost Mormon Democrat, who inserted the issue into every election in contrast to Smith, who, at least in public, argued that compliance with Mormon doctrine regarding liquor should be left to individual church members.\footnote{1441}

Not having been sheltered from secondhand tobacco smoke exposure, Grant knew firsthand of its detriments, particularly because as a boy he had worked in a non-Mormon office where everyone had smoked: “I had to stand by a desk with my boss smoking all day long. It made me sick and I would go out in the backyard and ‘cast up Jonah’ regularly until I got used to it.”\footnote{1442}

That some Mormons were, however, continuing to use tobacco underlay the talk that one of the Utah No-Tobacco League’s traveling speakers gave in a

\footnote{1440}Editors Table: Practical Religion,” \textit{IE} 23(5):451-53 at 451 (Mar. 1920).

\footnote{1441}Jan Shipps, “Utah Comes of Age Politically: A Study of the State’s Politics in the Early Years of the Twentieth Century,” \textit{UHQ} 35(2):91-111 at 103-107, 111 (Spr. 1967). Despite his Democratic activism before becoming head of the Mormon church, Grant was only nominally a Democrat, his program being limited to effectuating liquor prohibition; once this goal had been achieved, he resolved his differences with Smoot, and the two parties operated without his advice let alone consent. \textit{Id}. at 111. In 1932 he supported Hoover and in 1936 Landon against Roosevelt; he vociferously opposed the New Deal for “breeding idlers.” “Mormon Church Head Feted,” \textit{LAT}, Nov. 23, 1932 (A5); “Utah Republicans See Landon Gains,” \textit{NYT}, Aug. 7, 1936 (9); Arthur Henning, “Prosperity in Utah Traced to New Deal Cash,” \textit{CT}, Sept. 26, 1936 (6) (quote).

\footnote{1442}President Heber Grant, “On the Use of Tobacco,” \textit{YWJ} 33(9):471-76 at 472 (Sept. 1922) (address at Mutual Improvement Association Conference, June 10, 1922). Even after his elevation in the Mormon hierarchy, he went on to relate, his wife once had to leave a banquet because the man seated next to her “smoked continually in her face.” \textit{Id}. at 473.
Mormon ward in Ogden in March 1920 under the auspices of the Mutual Improvement Associations marking the opening of an educational campaign against tobacco use in any form. Observing that “it ought not to be necessary to address the subject before a congregation of Latter-day Saints because in the early days of the church a revelation was received from heaven declaring that tobacco was not for the use of man,” W. D. Livingston nevertheless informed his Mormon audience that the League “intends to work up a sentiment of ‘herd spirit’ that will cause our young men who are addicted to the habit of smoking [to] understand they cannot pay attention to our daughters. We intend to make these young men so ashamed of themselves that they will either quit the habit or leave the community.”1443

The church’s comprehensive approach to the legislative campaign was encapsulated in the slogan adopted by its Mutual Improvement Associations’ conference in June 19201444: “‘We stand for the non-use and non-sale of tobacco.’”1444 At that same conference, a member of the Council of the Twelve (Apostles), Melvin Ballard, in seeking to contextualize this “slogan” theologically, reveled in revealing just how literally dogmatic it was. It derived from the Word of Wisdom, Joseph Smith’s (alleged) revelation in Kirtland, Ohio, on Feb. 27, 1833: “‘Tobacco is not for the body, neither for the belly, and is not good for man, but is an herb for bruises and all sick cattle, to be used with judgment and skill.’”1445 Ballard emphasized that there is in this revelation no particular argument of a scientific character to show why these things that are forbidden are not good for man. Quite like the teachings of the prophets in all ages is this revelation through the Prophet Joseph Smith. Not by way of argument nor

1443“Tobacco Habit Condemned by Church Speaker,” OE, Mar. 8, 1920 (2:3). W.D. Livingston was presumably the William Livingston who had been on the three-member committee that drafted the League’s constitution and by-laws. “No-Tobacco League Is Organized by 17,” SLH, Aug. 29, 1919 (16:6).

1444Katie Blakesley, “‘Sin Is Creeping in Among Us:** [sic] The Fight to Save the Youth and the 1921 Anti-Cigarette Campaign” at 1 (M.A. thesis, History Dept., University of Utah, 2004), unaware of the preceding years of Mormon anti-cigarette action, regarded the slogan announced on June 13, 1920 as an innovation, if not a deus ex machina: “No sooner had the war to make the world safe for democracy ended, than young men and women of the Church of Jesus Christ of Latter-day Saints...in Utah opened a new front against a deadly enemy.”


scientific reasoning giving forth evidences of the correctness of the doctrine have the prophets taught, but by positive, clear-cut statements, principles of truth afterwards demonstrated to be true. The prophet himself never engaged in any fine theories as to why tobacco was not good for man. The Lord Jesus taught this same way: “Blessed are the pure in heart for they shall see God.” That was sufficient. This ought to be sufficient for Latter-day Saints. It is on this basis that we shall conduct our campaign. I am glad, however, that those who have given the subject attention have brought forth abundant evidence to prove that the revelation is true and the doctrine correct, and that there is no good in those things which the Lord has commanded we should not use, and the command came when men did not know that tobacco was injurious.¹⁴⁴⁷

Shortly after the June 1920 conference the Social Advisory Committee published in its newsletter the recommendations of a small “Committee on Tobacco” that had been amended and adopted by a larger SAC group and then submitted to SAC for its consideration, after which they were to be submitted to the General Boards of the church auxiliary organizations (including the Mutual Improvement Associations).¹⁴⁴⁸ These recommendations are of especial interest because they were much more comprehensive and radical than any proposals that the Mormon church ever publicly pursued or that the Utah legislature ever considered.

Significantly, although the Committee on Tobacco formulated its charge as considering and making recommendations “on the problem of controlling the tobacco habit among the Latter Day Saints,” it in fact set forth proposals with “the purpose of stamping out the use and sale of tobacco” for entire populations and


¹⁴⁴⁸Social Advisory Committee, “News Letter,” No. 3 (July 12, 1920), at 1 (copy furnished by LDS Church History Library, Salt Lake City). The “News Letter” did not identify the members of the committee, but they may have been the members of the “sub-committee acting for the Social Advisory Committee” that “prepared and approved” the material in a pamphlet (used in 1921 to support the campaign for passage of Southwick’s anti-cigarette” bill) “[i]n order to guard against extravagant statements about tobacco and to secure the most authentic data.” The pamphlet presented “a digest of the most approved facts, figures and arguments for use during the campaign.” The members were largely stellar Mormon figures in higher education and medicine: Dean Thomas A. Beal, University of Utah Commerce School; Psychology and Education Assistant Prof. Arthur L. Beeley, University of Utah; Dean Milton Bennion, University of Utah Education School; Dr. George W. Middleton, former president of the Utah State Medical Association; Geology Prof. Frederick Pack, University of Utah; and Stephen L. Richards, member of the Council of Twelve (Apostles). The Case Against Tobacco 1 (Social Advisory Committee of LDS Church, Pamphlet No. 8, Jan. 1921).
not merely among Mormons. The committee divided these proposed measures into the “coercive” and the “persuasive” [sic]. Beginning with the former, the committee first dealt with the traditional no-sales-to or use-by minors laws before proceeding to more controversial intervention:

[W]e as social workers favor using every legitimate means to promote the passage in our respective states of the following: (a) a law prohibiting the sale, distribution, and use of manufactured cigarettes or of cigarette papers; (b) a law providing for the adequate licensing of all stores and other agencies that handle tobacco in any form; (c) a law prohibiting the advertising of tobacco by means of any periodical, newspaper or circular published in the state or on any billboards or display window, or by any means whatever, that is subject to the control of the state, [sic] and (d) a law prohibiting the smoking of tobacco in any cafe, store, or other enclosed public place, except those especially designated for the purpose.\footnote{Social Advisory Committee, “News Letter,” No. 3 (July 12, 1920), at 1-2.}

Every one of these proposals was more radical than the bill that Mormon Senator Southwick would introduce six months later: (a) prohibited the use and not merely the sale of cigarettes; (b) provided for licensing of the sale of non-cigarette tobacco; (c) prohibited advertising non-cigarette tobacco; and (d) prohibited tobacco smoking in any store or other enclosed public place (whereas Southwick did not cover stores or numerous other enclosed public places), although the exception, since it did not identify who would designate public places for smoking, left open the possibility that it would swallow the rule. (To be sure, the ban on the use of cigarettes in (a) meant that the exception could apply only to non-cigarette tobacco.\footnote{The phrase “our respective states” indicated both that some of the Mormon social workers came from states other than Utah and that the Mormon church aspired to influence public policy in such states. Numbers alone suggest that the only other state in which organized Mormons might have been able to secure passage of anti-cigarette legislation was Idaho. Whether in fact the anti-cigarette sales law that the Idaho legislature passed in 1921 was inspired by the SAC proposals is unknown, but it is any event noteworthy that, in keeping with Mormons’ much lower profile there, the bill and law did not encompass the further-reaching bans on advertising and public smoking. Also unknown is whether SAC influenced the introduction in Arizona in 1921 of a radical local option bill that would have empowered voters in counties and cities to determine whether to prohibit the sale of tobacco, cigars, and cigarettes. On the bill, which died on a 9 to 9 vote in the Senate, see above ch. 15. The introducer was Mormon Joseph G. Lines, superintendent of his stake Sunday schools and a member of its high council. List of Stake Officers and Bishops of the Church of Jesus Christ of Latter-day Saints n.p. (1907); James McClintock, Arizona: The Youngest State 771-72 (1913), on http://files.wsgarchives.org/az/pima/}
The Committee on Tobacco’s proposed “coercive measures” also included a plan for every (local) stake and ward Social Committee to choose counterpart tobacco committees to help enforce existing laws dealing with minors and—on the apparent assumption that tobacco addicts could not be trusted to enforce anti-tobacco laws strictly—to “work for the election and appointment of [sic; should be “to”] all county and local office, of men who[,] other qualifications being equal, are themselves exemplary in regard to the use of tobacco.”

With regard to the “Pursuasive [sic] Measures” the Tobacco Committee proposed an impressive networked panoply of means of enlightenment about and denormalization of tobacco use: (1) wide dissemination of “knowledge of the detrimental effects of tobacco on old and young and of the destructive designs of the American Tobacco Trust against the nation in general and our people [i.e., Mormons] in particular”; (2) encouragement by social workers of all Mormons to use their influence to elect and support “officers who are sympathetic with our views and desires in regard to tobacco laws and their enforcement”; (3) encouragement of all Mormons “to work constantly for the creation of such public sentiment as shall ultimately insure nation wide [sic] prohibition of the culture, manufacture, and sale of tobacco in any form”; (4) “minimiz[ing] so far as possible...suggestions tending to encourage the tobacco habit” by insuring that Mormons “endeavor to exclude from their homes the cheaper grade of magazines and newspapers, which feature tobacco advertising” and, where the presence of such publications was unavoidable, protest to and urge the publishers to discontinue such ads; and (5) carrying on by the Mormon church “if possible [of] an aggressive campaign of counter-advertising, showing the evil effects of the use of tobacco”; and “condemn[ation] without reservation” by the committee itself of “plays or other entertainments, presented for the amusement of our young people, in which the characters use tobacco.” Finally, the Committee on Tobacco also recommended the closest possible cooperation among the church’s general, stake, and ward officers, in particular with regard to requiring stakes, wards, and priesthood quorum officers to report at regular intervals on the sale and use of tobacco.

Like the Mormon church Social Advisory Committee, the No-Tobacco
League of Utah was also probing the acceptability of and support for expansively prohibitory legislation far more stringent than any that the legislature would consider. In August it sent out questionnaires to the state’s “[l]eading men and women,” inquiring whether they would help, hinder, or be neutral if bills were introduced in Utah: (1) forbidding the use and sale of cigarettes; (2) prohibiting tobacco use in public places such as hotel lobbies, on the street, and elsewhere; and (3) completely abolishing tobacco.1455 Noteworthily, not only did the bill that Southwick would introduce five months later not propose banning the use of cigarettes generally, let alone tobacco, but Southwick himself expressly pointed out that it did not include hotel lobbies or streets in its partial public smoking ban.1454

In October 1920, the No-Tobacco News did not know whether a bill similar to Southwick’s 1919 measure would be introduced in 1921, but it did know that if one were, its opponents would no longer have the excuse that they had used two years earlier that they were unaware of “any demand for the destruction of the cigarette....”1455 During the weeks before the 1920 state legislative elections, the officers, teachers, and students of the Weber County (Mormon) stake Sunday school adopted a resolution to use all their influence to secure prompt enactment of a law prohibiting cigarette sales and to ask all nominees to declare their position. All 11 who responded stated that they were very definitely willing to support such a measure.1456 By the end of 1920, more than a year after Nebraska had inhibited advertising and public smoking,1457 the church’s Young Men’s Mutual Improvement Association and Social Advisory Committee initiated discussion and drafting of legislative bills to ban cigarette sales, smoking in

1453“No-Tobacco Crusade,” OS-E, Aug. 31, 1920 (4:1) (edit.). A month later the No-Tobacco League’s periodical published a piece by a member of the group’s executive committee complaining about a “tobacco fiend[s]” blowing smoke in non-smokers’ faces in public parks and demanding a law under which “the person who must smoke will be compelled to do so in such seclusion as will not endanger the health and happiness of a great majority of the people.” Prof. J. M. Anderson, “A Menace,” No-Tobacco News 1(2):4 (Oct. 1920).

1454“Bill Presented in Senate Deals with Evils of Cigarette,” DN, Jan. 20, 1921 (6:3); “Cigarette Measure Is Discussed in Senate,” DN, Feb. 3, 1921 (sect. 2, 6:1-4 at 2). Finding the results of the No-Tobacco League survey and determining whether negative responses deterred Southwick from including such radical prohibitions in his bill are research desiderata.


1457See above this ch.
As early as January 3, 1921, before the legislature had even been organized, the press, against the background intelligence that “36 States to Consider Bills Against Fags,” made it front-page news that: “Utah Legislature One Body Before Which Strong Fight Will Be Waged.” Three days later, Senator Edward Southwick, who had also introduced the anti-cigarette bills in 1917 and 1919, announced that shortly after the legislature convened he would introduce what the *Deseret News* called a “drastic” bill that was “designed to abolish the manufacture, sale and use of cigarettes in Utah and would also “prohibit the smoking of pipe [sic] or cigars in any public place, with the exception of the street....” He included non-cigarette tobacco “because he felt that smokers should be compelled to show consideration for non-smokers. His attitude respecting cigarettes has been made public before, and he would legislate them out of existence.” Southwick denied reports that he would also file a bill to prevent the sale or use of tea or coffee, which he viewed as rumors intended to ridicule his anti-cigarette bill, which he knew had majority support in the Senate and felt that it would also secure in the House. No doubt as an admonition to pro-tobacco forces about the not yet introduced measure, within days an Ogden paper published a long piece about the Kansas anti-cigarette law, the point of which was to underscore that it had been enacted because single-issue reformers had nothing else to do, while businessmen lacked the time to “organize an army of cigarette smokers....”

The political significance that the Mormon hierarchy assigned to enactment of general anti-tobacco legislation was signaled by President Heber Grant’s 1921 New Year message, which called “attention to the necessity of observing what is known among us as the Word of Wisdom, in all particulars, but especially that part relating to the non-use of tobacco, which is now prominent before the people, various public places, and tobacco advertising.”

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1459 “36 States to Consider Bills Against Fags,” *OS-E*, Jan. 3, 1921 (1:2).
and in which appeals are also made to those of our Latter-day Saint merchants who are selling this weed, to abandon the sale thereof, as an example of their willingness to avoid setting the wrong example before the youth of Israel.” If the fact that even Mormon merchants’ profit-driven business practices suggested that forging public support for passage of a bill prohibiting the sale, advertising, and use of cigarettes might face considerable obstacles, Grant revealed that religious dogma might be no match for the power of addiction either: “The Lord has pronounced tobacco not good for man, and that should be sufficient reason for the Latter-day Saints to abandon it. But instead, many of our people are becoming careless in the observance of this law, and consider it a very slight matter to use tobacco in various ways. I cannot believe...that it is a slight affair for any man, woman or child, to do that which God...has commanded us not to do.” If blind faith did not suffice to guide his co-religionists’ behavior, Grant reverted to the monetary incentive: “I believe, beyond a doubt, that the financial saving to this community, by a strict observance of the Word of Wisdom...especially in the use of tobacco, tea and coffee, would amount to enough to build two sugar factories annually.” Only after underscoring that “[t]his money saved, instead of absolutely lost as it is now, could be used for many noble purposes...in furtherance of the cause of righteousness in the earth,” did Grant deviate from cost accounting that was “only financial” to ask briefly about “the moral, the mental, and the physical costs to the youth” before mentioning the “spiritual blessings” accruing to those who kept God’s commandments but “irretrievably lost to all who disobey this particular commandment of the Lord.” Indeed, as far as the Mormon president was concerned, “the financial, moral, physical, and spiritual deterioration that is correlated with this evil...appears to be a certain consequence of the breaking of the word of the Lord on this subject.”

In the same January issue of the Mormon church magazine Improvement Era, Professor Pack objectively nudged the debate in the direction of a universal ban by arguing that no-tobacco-use-by-minors laws were doomed to be unenforceable because their administrators had “been unable to see the justice in punishing a boy for an offense when his father or some other adult, guilty of the same thing, is permitted to go uncensured and even unnoticed.” Then shifting the perspective to “the average American boy,” who idealized his father and was “constantly striving to be like him,” Pack insisted that the boy who saw “adults smoke...very naturally turns to the habit himself.”

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1464 Frederick Pack, “How the Impending Tobacco Crusade Can Be Avoided,” IE 24:218-28 at 226 (Jan. 1921). Pack was unable to pursue the logic of his argument to the
During the run-up to Southwick’s introduction on January 19, 1921, of the bill prohibiting cigarette sales and ads and tobacco smoking in specified public places, the Mormon church announced that: “An intense campaign against the use and sale of tobacco will be carried on in all wards and stakes of the Church during the week of January 16 to 23. This campaign has been inaugurated by the Correlation-Social Advisory Committee, with the approval of the First Presidency and General Authority, and the General Boards of the Church.” The hierarchy conferred such great importance on this effort to shape public opinion against smoking that during that week “the regular work of all priesthood quorums and auxiliary associations will be set aside in order that programs and other exercises devoted to the tobacco campaign may be carried out.” To be sure, the basis on which Mormons sought to propagandize may have been less than optimally designed to persuade outsiders of the need for state intervention. For example, almost all the reasons that the campaign adduced for women to oppose tobacco use by men were moralistic or religious, such as “The Spirit of God can not dwell in an unclean body.”

Nevertheless, the Committee’s executive secretary, Arthur Beeley, a sociology professor at the University of Utah (who later became the founding dean of its School of Social Work), urged members to counteract pressure that was already being brought to bear by business interests against the bill. In the context of the Southwick campaign the Mormon church distinguished between its “ultimate purpose...to promote health, citizenship and spiritual welfare amongst its own membership and in society generally” and its “immediate purpose...to create a strong public sentiment in favor of the ‘non-sale and the non-use of tobacco’ by the Latter-day Saints in their communities.” In order to secure non-sale the church asked each ward social committee to “[i]nduce all merchants not to handle tobacco” and to report and help prosecute violations (of the existing

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end: after asserting that the United States was “not yet ready to demand the complete prohibition of tobacco,” though the handwriting was already on the wall, he unmediatedly concluded that: “Nothing could be more desirable than to have the tobacco interests conduct extensive investigations looking toward the correction of existing evils. The elimination of these deterring factors is the only possible way in which the impending tobacco crusade can be avoided.” ‘Id. at 228.

1465“‘We Stand for Non-Use and Non-Sale of Tobacco,’” YWJ 32(1):28-29 (Jan. 1921).

The strategy with regard to achieving non-use focused on making “an individual canvass of all persons of smoking age in their homes and with their families” urging them not to use tobacco and, instead, to “become vigorously active in some form of Church work.”

The 50,000-member-strong Young Men’s (and like-sized Young Ladies’) Mutual Improvement Associations also mobilized on behalf of Southwick’s bill. Ironically, five local social advisory committees were so radical that they presented petitions to the House disfavoring Southwick’s bill on the grounds that it was “not sufficiently drastic.”

In the days immediately preceding the bill’s introduction, the Mormon
church-owned Deseret News orchestrated an elaborate support campaign, beginning with seven columns of extracts from the Social Advisory Committee’s (newly published 16-page) pamphlet, The Case Against Tobacco, a compilation of “strictly scientific evidence,” itself excerpted from various prominent medical-scientific authorities such as Dr. William Osler and Dr. William Mayo. To be sure, this “new scientific approach” contrasted oddly with the closing paragraphs asserting that: “The most competent authority on the human body is God who created it” and in 1833 told Prophet Joseph Smith that “tobacco is not good for man,” so that its use was an “affront” and an “insult to the Creator.”

Ironically, the paper’s claim that the fire in Washington, D.C., a few days earlier that burned census records would cost the government millions of dollars to replace overlooked the fact that the virtually total and irreplaceable destruction of the 1890 census manuscripts would leave an enormous gap in the Mormons’ obsessive genealogical activity. The fire also prompted Mormon Senator Reed Smoot to introduce a bill to prohibit smoking in federal executive buildings in Washington, D.C. “Would End Smoking in Capitol Offices,” NYT, Jan. 16, 1921 (14); “United States Senate Rejects Ban on Smoking,” SLT, Feb. 6, 1921 (1:4, 3:1).

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1470The Case Against Tobacco (Social Advisory Committee of LDS Church, Pamphlet No. 8, Jan. 1921).
1472“Single Cigarette Cost Government $3,000,000,” DN, Jan. 17, 1921 (7:3-4).
which the tobacco trade ha[d] been plunged by the spread of the anti-nicotine activity.” Having divined the industry’s “semi-panic,” the newspaper for good measure published a lengthy “symposium” of condemnation of cigarettes “born of scientific tests and observation” by such luminaries as Thomas Edison and Hudson Maxim (the inventor of smokeless gunpowder). The day of the introduction (on January 19, 1921) of the cigarette sales ban bill that also prohibited smoking any kind of tobacco in specified enclosed public places, the Deseret News published a lengthy article on the huge cost of tobacco use. The following day it furnished specifically tailored support for this legislative effort to reduce secondhand tobacco smoke exposure by printing pertinent excerpts from Pack’s book (which it had published for the church) and elaborating his “intimation...that the boy who is daily ‘fumigated’ with tobacco smoke acquires the habit not alone by power of example, but...he actually and literally gets the poison in his system and is one day easily lured into taking his first cigarette. If this be true, every smoker is burdened with responsibility for forming, perchance, the habit in others—as it were by proxy.” Without expressly drawing the conclusion, the newspaper also implied that, in the wake of smoking’s ubiquitization, which had emboldened smokers to “acquire a strange indifference to the sensibilities of others,” a compulsory law was needed to counteract non-smokers’ spreading timidity: “It has come to the point where it requires almost heroic courage to venture a word of protest.”

Initial Enforcement (1921-1922)

Professor Newell K. Young of the L.D.S. university...said that the law would also

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1473“The War Against Nicotine,” DN, Jan. 18, 1921 (4:1).
1474“Prominent Men Condemn Cigarettes,” DN, Jan. 18, 1921 (5:2-4). Bizarrely, Edison stated that: “The injurious agent in cigarettes comes principally from the burning paper wrapper,” which produced acrolein. Not only is acrolein, which is a harmful substance, not the principal injurious agent in cigarettes, it results from burning tobacco. Zhauwei Feng et al., “Acrolein Is a Major Cigarette-Related Lung Cancer Agent: Preferential Binding at p53 Mutational Hotspots and Inhibition of DNA Repair,” PNAS 103(42):15404-409 (Oct. 17, 2006); ch. 6 above.
1475On passage of the Southwick bill, see above this ch.
1477“Tobacco Injurious Alike to Smoker and Smoked,” DN, Jan. 20, 1921 (sect. 2, 3:5-6).
One loophole that surfaced shortly before the Southwick law was to go into effect was its lack of jurisdiction over federal reservations, in particular Fort Douglas, which was located in Salt Lake City. (A similar anomaly had arisen under the Kansas law with respect to Fort Riley, which, however, was not located in the state’s largest city.) At the post exchange anyone would have been free to buy cigarettes with impunity, but, since the federal government was inclined to help observe state law, it appeared unlikely that any wholesale dealing would take place there.\footnote{\textit{Fort Douglas to Continue Cigaret Sale After June 7}, \textit{SLT}, June 3, 1921 (20:2-3).}

Right up until the eve of the law’s effective date a “bitter controversy ha[d] been raging between the merchants and business interests generally on the one side and...the anti-cigarette people on the other side concerning administration and interpretation of the state’s new law.” With regard to two major issues Republican Attorney General Harvey Cluff favored the tobacco industry. The first involved cans, packages, and cartons of smoking tobacco whose labels indicated that it was suitable for pipes or cigarettes. Though sale of the tobacco itself was permissible, the question was whether the word “cigarette” on the label constituted unlawful advertising. In order to avoid as much loss as possible to tobacco retailers and trouble to manufacturers, the Utah-Idaho Wholesale Grocers’ Association requested a ruling from Cluff soon after the governor had signed the bill and almost three months before it was to go into effect. Cluff opined that the courts would interpret the lettering as cigarette advertising and thus in violation of the law if a merchant had such containers “[i]n his store window, shelves or any other place within the state of Utah.” Consequently, “the only safe thing to do would be for the merchants to either have the lettering on these cans, packages and cartons changed, removing entirely any reference to cigarettes, or not to carry them at all in their merchandise.”\footnote{\textit{Carton Must Not Carry Word Cigaret}, \textit{OS-E}, Mar. 23, 1921 (3:3-4).} Unwilling to acquiesce in this outcome, the manager of Kahn Brothers Wholesale Grocers wrote Cluff on April 21 presenting a somewhat different form of tobacco labeling, which prompted the attorney general both to uphold his original opinion with regard to exhibiting cans and cartons of tobacco\footnote{\textit{Biennial Report of the Attorney General to the Governor of the State of Utah for the Period Ending November 30, 1922}, at 88-90, at 88-89.} and to backtrack, “to the

\textit{SLT}, Jan. 28, 1921 (10:7 at 17:2).
satisfaction of the merchants,” to the position that dealers could lawfully have cans of tobacco (to be used to make cigarettes) on their shelves for sale so long as they were without any special exhibit or display. Cluff sought to justify these seemingly discordant opinions by rooting them in legislative intent. If advertising something meant calling attention to it, the tobacco cans or cartons “could, perhaps, even create the desire for a cigarette, which is the prime object of advertising. I believe it was the intent of the legislature to absolutely do away with and prevent the exhibition of all signs, pictures, lettering or anything that would suggest to the mind cigarettes....” So focused had he been on this aspect, he confessed, that he did not consider any other thought, let alone his first opinion’s effect on interstate commerce. On reconsideration, he felt that “I, perhaps, went a little too far” in finding a violation in merchants’ having cans on shelves or elsewhere. His thinking now evolved toward the insight that, since the Southwick law did not prohibit the sale or advertising of (smoking) tobacco, and the shipment of cartons into Utah and the sale and distribution of cans constituted interstate commerce, “therefore, even though the lettering on the cartons and cans might be objectionable, especially if the cartons and cans were used as a special display and exhibit in the show windows, still the mere possession of the same, in connection with a stock of goods for sale and distribution” would not be prohibited by the anti-cigarette law.

Attorney General Cluff’s other pro-tobacco opinion restrictively interpreted the law’s ban on smoking in public buildings not to apply at all to privately owned public places such as office buildings or grocery, dry goods, or department stores, or to offices of public officials, but only in halls, corridors, waiting rooms, and other offices of government buildings to which the public had access.

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1482 “San Francisco News Notes,” Tobacco 72(7):36 (June 16, 1921).
1483 Biennial Report of the Attorney General to the Governor of the State of Utah for the Period Ending November 30, 1922, at 89-90. Cluff purported to have been enlightened in his rethinking by Post Printing & Publishing Co. v Brewster, 246 F. 321 (D. Kansas 1917), which, however, dealt with the different issue of the (interstate commerce) constitutionality of the Kansas anti-cigarette law in the context of prohibiting a Missouri publisher from sending into Kansas newspapers containing inserted advertisements for cigarettes that could be (lawfully) sold and bought in Missouri.
While enforcement officials optimistically anticipated little in the way of bootlegging, in Ogden, the state’s second largest city, anticipatory compliance was signaled by workers’ preparing to install small signs in public buildings indicating certain rooms as “smoking rooms.” Nevertheless, the day after the law went into effect on June 7, the Ogden press reported smoking as usual in cafes and other places. In Salt Lake City, too: “Right in the very citadel of truth and justice and sane legislation, the state capitol itself, people were strolling non-chalantly about office and corridor, smoking as usual. In the city and county building they were doing the same thing.” At a meeting with Salt Lake City and County law enforcement officials in mid-August President Milton Bennion of the Social Welfare League, a staunch Southwick supporter, both called attention to continued cigarette sales by some tobacco dealers and “declared that smoking is permitted in inclosed public places contrary to the statute.” Against the background of this paired lack of compliance and enforcement, a month later the No-Tobacco League of Utah asked the Salt Lake City Commission whether it had passed an ordinance in conformity with the Southwick law and if so, whether it was enforcing the ordinance, and if not, whether it intended to adopt one and if not, why not. After that squeaky wheel had failed to get any grease, in mid-October five officers and directors of the League—headed by Michael Mauss, who, 16 months later, would lawfully take the law into his own deputy sheriff hands—petitioned the commission to begin enforcing the anti-cigarette law while questioning the police department’s ability to enforce this or indeed any state law properly without the backing of a city ordinance. And from the commissioners’ failure to adopt such an ordinance the League, unsurprisingly, drew the conclusion that they were averse to enforcing the Southwick law.

Despite the initial setback, in September Ogden recorded Utah’s first raid and
seizure, which netted cigarettes valued at $1,500 and the arrests of five dealers, the biggest being the national chain United Cigar Store. Although initially it was understood that the defendants would combine to test the law’s legality,\textsuperscript{1493} eventually United Cigar, which—as the local press reported under a front-page, six-column banner headline—claimed that it had originally sent all of its stock of cigarettes out of state, but then resumed selling after its competitors had because it had lost sales of other merchandise to them as well, pleaded guilty and was fined $150.\textsuperscript{1494} (Other sellers did as well.)\textsuperscript{1495} More significantly, after the Salt Lake City police had finally notified cigar stores that cigarettes sales had to be discontinued immediately, the chain not only complied, but stated that it would not attack any law of Utah or of any other state so long as it was uniformly enforced. In the wake of the high-profile raid and seizure in Ogden, the county attorney in Weber County (of which Ogden was county seat) announced that: ‘‘No more cigarettes will be sold in Weber County. The law will be vigilantly enforced. ... The law relative to smoking in public places enumerated in the law will also be rigidly enforced.”\textsuperscript{1496}

By the end of 1921 a phenomenon—jury nullification—had emerged that opponents of the law would adduce as evidence that it was unenforceable because it was not rooted in popular approval. The first case in which a seller was tried in Salt Lake City involved a pharmacy clerk who had sold a package of cigarettes to an anti-vice squad policeman, who provided the only trial testimony. After the four jurors—two of whom stated during voir dire that they used tobacco but not cigarettes, and one of whom had smoked for 30 years but had quit six years earlier—had (surprisingly) acquitted the defendant, the judge cautioned them about their oath and told them to base their conclusions on the evidence, admonishing them that their verdict indicated that they believed that the officer had been guilty of the very serious offense of perjury. In response they justified their verdict on the grounds that because the package shown them in court had been unopened they did not know whether it contained cigarettes. This threadbare excuse, which was prefigured by the jury’s having interrupted its 30-

\textsuperscript{1493}“Cigarets Seized in Raid; Five Dealers Under Arrest; Value of Haul Set at $1,500,” \textit{OS-E}, Sept. 27, 1921 (6:1-2).
\textsuperscript{1494}“Cigaret Sellers Fined Here,” \textit{OS-E}, Dec. 1, 1921 (1:7).
\textsuperscript{1496}“Cigaret Sellers Fined Here,” \textit{OS-E}, Dec. 1, 1921 (1:7). Nevertheless, on the last day of 1921 raids on five United Cigar Stores outlets in Salt Lake City netted 339 cartons of cigarettes, which company officials risibly claimed were “privately owned and were merely being held at the stores until called for.” “Cigarets Seized in Salt Lake Raid,” \textit{OS-E}, Jan. 1, 1922 (8:3).
minute deliberations to ask the judge several questions circling around the issue of entrapment, insinuated itself into the verdict despite both the excusal of one juror on the basis of his opposition to enforcement of the Southwick law and the prosecution’s having taken the precaution of peremptorily challenging three members of the jury pool.\textsuperscript{1497}

Yet despite these prosecutions, Fred Bennett, the head of the 1,200-member strong No-Tobacco League of Utah,\textsuperscript{1498} wrote in the November issue of the Mormon magazine, \textit{Improvement Era}, that the law, “except insofar as it relates to the advertising of cigarettes, is more or less a dead letter...”\textsuperscript{1499} And by the end of 1921 President Grant was becoming increasingly disgruntled with the level of noncompliance with the new law. At a quarterly conference of the Ogden stake he bluntly denounced (unnamed) transgressors:

“High toned, highly educated, first class men of the state,” were scored by President Grant...for their violation of the anti-cigaret law. He said he had visited the best hotels in Salt Lake and had seen men of high standing in the community smoking in places where the habit was prohibited and these men, he said, would feel insulted if they were told they were law breakers. “Men are disobeying this law because they don’t like it. Men don’t like laws that hit them. They are in the same class as the thief who objects to laws against thievery.”\textsuperscript{1500}

Though only obliquely, Grant hinted that some of these delinquents might be found in the upper echelons of his own Saints: “In referring to the Word of Wisdom he did not wish to cast any reflections but desired to remind bishops that ‘as with the priest, so with the people.’ He said the conduct of the people depends absolutely on the example and energy of those standing at the head of the organizations.” (More transparent was Presiding Patriarch Hyrum G. Smith, who at the same conference “deplored the fact that members of the priesthood were users of tobacco....”) Only vis-a-vis Mormons could Grant have imagined that his call for blind \textit{Kadavergehorsam} would enhance the commitment to compliance with Caesar’s laws: those who disobeyed the Word of Wisdom “are decaying in wisdom and power because they had cut themselves off from the life

\textsuperscript{1497}“Clerk Acquitted in Cigaret Trial,” \textit{SLT}, Dec. 8, 1921 (24:3); “Cigaret Clerk Freed by Jury,” \textit{OS-E}, Dec. 8, 1921 (4:3).
\textsuperscript{1498}“Anticigaret Bill Put Under Fire,” \textit{SLT}, Feb. 10, 1921 (14:5).
\textsuperscript{1499}Fred Bennett, “The Utah Anti-Tobacco Law of 1920 [sic],” \textit{IE} 25(1):74-76 at 75 (Nov. 1921).
\textsuperscript{1500}Heber J. Grant Raps Cigaret Law Breakers,” \textit{OS-E}, Nov. 14, 1921 (1:2, and 2:2). For a briefer account, see “Tobacco Law Violators Are Likened to Thieves,” \textit{SLT}, Nov. 15, 1921 (1:1).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

giving stream. Obedience is the thing which counts most in the battle of life....

Violations of the cigarette sales ban and police failure to enforce it prompted an editorial in Improvement Era urging each Mormon stake and ward to appoint a committee to lobby local government officials in an effort to interest them in and help them with law enforcement. The authoritative Mormon editorialist also admonished businessmen both for violating Southwick’s prohibition of public smoking and for their self-regarding and quasi-anarchistic neglect of the second-order effects of their transgressions on the maintenance of law and order:

There are a great many men, we should judge from casual observance in mingling with the community, who have not yet learned to obey the law against smoking in public places. ... They seem to think that a law which interferes with their actions is not as valid as any other law which interferes with the illegal actions of other men. They scarcely stop to consider how very dangerous such an attitude becomes for the welfare of the community. All others who break any law take the same liberty, from their example, and argue that if a business man can break the law without being punished for it, all may do so. The result is...a great contempt for law and order which is a menace to the stability and well-being of the community. If it is illegal to smoke in public places, no man having at heart the welfare of the youth of the land and community in general will smoke there, for if he does, he will show publicly that he has a contempt for the law—a very dangerous example! ... If men were at liberty to break any law they did not like there would be chaos, disorder and anarchy as a result.

Ironically, the Mormon hierarchy was, rather late in the process, lending credence to the warnings that Southwick’s legislative opponents had voiced all along that the consequences of mass non-compliance with the cigarette-selling and public tobacco-smoking bans in terms of undermining the social-psychological micro-foundations of civic cohesion were graver than the dangers posed by tobacco use itself.

As 1922, the law’s first full calendar year of being in force, got underway, contradictory indicia of its effectiveness came to light. In Logan, Utah’s fourth largest city (pop. 9,439), the city commissioners decided that it “must be strictly enforced...in the future”; in particular, officers would be “instructed to eliminate smoking in public places.” As a result, the police chief “placed placards in all public places such as cafes, restaurants, lobbies, railroad station waiting rooms and other places where smoking has been indulged in, bearing a warning from

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Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

At the same time the Ogden Standard-Examiner published a lengthy, (unusually) bylined article on the first half-year’s experience with the Southwick law, which purported to offer an overview of the whole state, though most of its factual details came from Ogden. In order to find a gauge of public sentiment concerning the law, reporter Floyd A. Timmerman focused on jurors (whose nullifying stance has already been alluded to), insisting that it had become difficult even to impanel a jury because in response to voir dire questioning by prosecutors prospective jurors stated that they were unable to deal fairly with a case on the grounds that they were not in favor of the law. He noted that the several trials thus far had not resulted in a single conviction despite the (aforementioned) water-tight evidence. As an example he instanced two recent Ogden cases in which juries refused to convict on the basis of dealers’ (ludicrous) defense that the cigarettes found in their store were not there for sale, but were owned by people who kept them there for private use. Summarizing the conclusion of public officials charged with enforcement of a law they deemed ineffective and lacking the support of public opinion, Timmerman wrote that they “feel that it is only a matter of time until it is thoroughly determined that convictions cannot be obtained and the wide-open sale will return.” In addition, Ogden Mayor Frank Francis—a former owner and associate editor of the newspaper—while agreeing that cigarettes were “a very bad habit,” believed that the (liquor) bootlegger and gambler represented bigger tasks of reformation. More pointedly, Ogden Public Safety Commissioner J. Ray Ward opined that the Southwick law’s prohibition should have been limited to the sale of cigarettes inasmuch as its smoking ban was “superfluous” and turned public opinion against the statute. Interestingly, however, the law that he deemed a “failure” had nevertheless made it more difficult for smaller boys to obtain cigarettes and form the “habit.”

This last point was one that Timmerman himself was constrained to book as a success for Southwick; in particular, he observed that the law had reduced boys’ access to cigarettes because the boy was handicapped in ordering from out-of-state dealers (under the shelter of interstate commerce): “He may not have the price to pay for a carton and he would also experience difficulty in having the

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1505 Born in 1892 in New York, Timmerman was returned as a newspaper reported at the 1920 census and as living in Brooklyn, New York in 1910. He was killed in an airplane crash in Idaho in 1928.
package sent to his home if he did.” The reporter also focused on addiction as a motivator: “The desire of a cigarette to a boy who has not yet formed the habit is in the majority of cases only momentary and if a steep barrier is to be overcome, he generally forgets and goes about his way without them.”

Finally, Timmerman also conceded that although the law had thus far failed to prohibit smoking in public places, “it may have brought about a decrease of the practice. Most proprietors of restaurants and stores who allow their patrons to smoke have set aside a portion of the place and designated it a ‘smoking room’ and have had no trouble.” Such a separate-room regime—which should have offered greater protection from secondhand smoke than the within-room designated smoking/non-smoking areas that became a legal norm in numerous states during the last quarter of the twentieth century—notwithstanding, Timmerman was unaware of any case in Utah in which “a man was arrested and prosecuted for smoking in places where the new law prohibits.”

In an address to the Mutual Improvement Associations conference on June 10, 1922, shortly before reports began circulating that pro-tobacco forces would push for repeal in 1923, President Grant first preemptively urged the attendees: “Vote for no candidate who will not declare his willingness to retain the anti-cigarette law on the statutes,” and then issued this campaign slogan: “The Anti-Cigarette Law Ought to be Enforced—not Repealed.”

That the one provision in the Southwick law that was being obeyed was the prohibition of cigarette advertising meant both that newspaper publishers were losing $100,000 to $200,000 in revenues annually and that they were animated by a powerful self-regarding financial incentive to advocate restoration of that cash flow. It did not take Utah country newspapers long to “discover that newspapers” were the new law’s “chief victims.” A copy of the October 7, 1921

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1508 Floyd Timmerman, “Anti-Cigaret Law Failure in Matter of Convictions,” *OS-E*, Jan. 8, 1922 (7:1-3). In late 1921, a deputy sheriff in the small silver mining (and skiing) town of Park City near Salt Lake City “notified all restaurants and dance halls that smoking must cease, and that the ‘fool’ Southwick law will be enforced in that particular...because some women...complained to the deputy sheriff that smoke have [sic] been blown in their faces while at meals in some of the local eating places by male patrons.” “No Smoking in the Dining Room,” *Park Record*, Nov. 4, 1921 (1:2). On the designated smoking/non-smoking area laws, see below Parts V-VI.


1510 D.J.G., “About This, That and T’Other,” *OS-E*, Aug. 13, 1922 (4:3).
Iron County Record sent to capitol officials noted that the previous week the paper had received a contract for several hundred inches of advertising from a well-known tobacco company together with copy for a cigarette ad, which, however, the Southwick law prevented the publisher from accepting. The paper claimed that it would not have objected if only the law had had a noticeable impact on cigarette sales or smoking, but, since it could detect none, “‘the newspapers are the only firms or individuals affected by this freak legislation.’” The publisher may have been merely a frustrated profit seeker, but the paper closed with a question as to why a law officer pursued it when it was engaged in the pursuit of happiness in “‘the form of a cigarette.’”

The annual meeting of the Utah Press Association was, unsurprisingly, the site, about a year after the law had gone into effect, of what was “probably the first public attempt to inaugurate a campaign to repeal the anti-cigaret law. . . . [T]he assault was made by A. L. Fish, general manager of the Salt Lake Tribune,” the state’s largest-circulation daily, who, according to the Association’s report, “‘brought out the fallacy of the cigaret law in that it was hurting the newspaper advertising to the extent of $150,000 annually and really doing no good for us. He suggested that efforts be made to take this up in the next legislature.’” (The Provo Daily Herald, which reported this initiative, editorially boasted that it was “willing to continue WITHOUT cigaret advertising money from now until the end of its existence if by so doing it can help in making this a better city and county and state in which to live.”)

To be sure, Grant had pointed to a vitally significant link between smoking and advertising that the Southwick law had only partially severed: “Every full grown man who uses the cigarette, places an object lesson before the boy, which he ought not to do.” To the extent that compliance with and enforcement of the statutory ban on public smoking was actually appreciably reducing the volume of smoking visible to boys, this form of gratis advertising was becoming less effective. However, since the act did not prohibit adults from smoking tobacco in various enclosed public places or any unenclosed public places, let alone in any non-public places, as long as adult smoking remained lawful, it would constitute the cheapest effective advertisement.

Shortly before the state and county convention primaries were held in 1922,
the Mormon First Presidency (that is, Grant and his first and second counselor), issued a special notice underscoring the church’s “positive stand in favor of the laws in support of peace and good order, whether national or local.” Having heard of efforts in Utah to prevent their enforcement and secure repeal of some of them, the troika requested lower echelons of the hierarchy to impress on Utahns the importance of attending those primaries and on “all persons of influence” to help elect state legislators and county officers who would execute those laws and defeat obstruction. Just in case the reference was unclear, Improvement Era specified the subtext:

It is well known that certain declarations have been made here and there owing to an indifferent enforcement of the tobacco law and other health laws, that efforts are brewing to have the Legislature repeal the anti-cigarette law. ... The experience of the past two years has proved that there are officers who are not in favor of the enforcement of the anti-cigarette law, but who are rather in favor of annulling it. Some of these people are in high positions in the state, in the counties and in the cities. ... Flagrant violations in the way of sale of tobacco and smoking in public places are numerous and it has been difficult to get officers, including judges, officers of courts, mayors, policemen, and others in charge of the execution of the law, to take any interest at all in its enforcement. These men should be remembered in the election to come, and be set aside to give place to men or women chosen and publicly pledged to put forth their efforts to see that the law is properly enforced.

As the fall 1922 state legislative elections approached, the Mormon hierarchy, repeating Grant’s aforementioned declaration, made clear that it was imperative that all Utahns, regardless of party affiliation, who supported the principles of the non-sale and non-use of tobacco and the strict enforcement of the Southwick law—and the church believed that “the great majority” of the state did—“should see to it that every individual candidate is publicly pledged to allow the anti-cigarette law to remain on the statute books, and to stand firmly for its enforcement.” In Utah County (whose county seat Provo, the state’s third largest city, had recently been the site of a large cigarette raid and seizure), all

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Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

legislative and judicial candidates did in fact endorse the law.\textsuperscript{1518}

In the interim between the elections and the opening of the new legislative session, the anti-prohibitionist Republican \textit{Salt Lake Tribune} revealed that among the major tasks awaiting the legislature was a decision on the Southwick law, concerning which three policy lines had emerged: (1) providing for strict enforcement, to which newly elected Salt Lake City Republicans appeared to be pledged (“rigid enforcement of all laws”); (2) letting the anti-cigarette law preserve its “'[i]nnocuous desuetude'”; and (3) repeal in order to inculcate proper respect for the law.\textsuperscript{1519}

In the context of proliferating repeal talk shortly before the legislature convened in January 1923, Louis Ward—the pen name sometimes used by Fredrick Louis Ward Bennett (aka Fred L. W. Bennett), the first president of the No-Tobacco League of Utah\textsuperscript{1520}—a leading Mormon anti-tobacco writer, suggested that the bans on cigarette sales and public smoking had not so much failed as never been tried. The latter, Ward confirmed, had been “a dead letter from the start. It was even ignored in the City and County Building itself.” Under the former, to be sure, several cases were tried in early 1922, but “most of them failed through the unwillingness of juries to convict....” This outcome he in part explained as a function of their having been initiated by complaints sworn to by a No-Tobacco League representative rather than by law officers; as a consequence, the public, that is, the jury pool, got the “impression that the enforcement of this particular law was only desired by a ‘few cranks’....” This impression was mightily and ironically reinforced by the fact that “violation of the law was even allowed in the court room during the trials, for no effort was made to stop smoking although the law expressly states it is forbidden in the City and County Building, particularly in the public sections.” In contrast, Ward emphasized that “one section of the law...has been obeyed to the letter, and that is the one forbidding the advertising of cigarettes in any form.” So highly did he value this third prohibition that he opined that it “alone stamps the act as a worth while measure” even if the other two never became enforcible. Ward adhered to this view despite his knowledge that the total withdrawal of cigarette ads in

\textsuperscript{1518}“All Endorse Cigaret Law,” \textit{Daily Herald} (Provo), Nov. 2, 1922 (1:3-5).

\textsuperscript{1519}“Big Tasks Wait for Legislators,” \textit{SLT}, Dec. 12, 1922 (20:1). President Grover Cleveland had used the phrase in internal quotation marks to refer to a law with which he refused to comply.

Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Utah (in the amount of $150,000) had “not made much difference, so far, to the popularity of this form of tobacco”—because, as every advertising and businessman understood, the disappearance of the country’s “great tobacco manufacturers["...educational campaign on behalf of cigarette smoking in the state” would eventually “have its effect....” Indeed, Ward was unwilling to abandon this position “even if the advertising stopped by the state law could have no effect on the demand for cigarettes owing to the advertisements appearing in national publications sold here.” The reason that he would “still be proud of the law” was that someone had to be “first in these matters.” His strategic model was supporters of liquor prohibition who had succeeded in imposing it in scattered small towns prior to the Eighteenth Amendment and had not despaired when unfettered availability of liquor in neighboring towns turned “dry” islands “wet” because they were “idealists” who “looked ahead to a time when prohibition would be general, and that time came.”

Ward’s elevation of the advertising ban above all other anti-tobacco measures may seem counterintuitive, but in fact it was consistent with the explanation that Southwick himself had presented on the Senate floor in 1921 as to why he wanted his bill passed. Dwelling at length on its advertising ban, he had stated that the Utah Billposting Company had unexpired contracts worth $40,000 for cigarette advertising, and “spoke of what that means per capita to the citizen.” Southwick then launched into a decidedly modern diatribe that dismissed out of hand the cigarette industry’s never-ending, transparently false claim that its ads target(ed) only existing smokers: “It is not...those who have acquired the cigaret habit, but new material and victims, that this advertising seeks to find. Therefore, it is necessary to prohibit the sale of cigarettes in order to prevent this advertising of them.”


1522u Senator Southwick Tells Why He Desires Passage of Anticigaret Measure,” SLT, Feb. 3, 1921 (10:1). Shortly after Southwick had introduced his bill the Brigham Young University student body submitted a supporting petition to the legislature stating, inter alia, that tobacco advertising, which “takes undue advantage of the immature mind...can not consistently be prohibited unless the sale of tobacco is prevented.” “B.Y.U. Faculty and Student Body Ask for Anti-Tobacco Law,” DN, Jan. 29, 1921 (6:2). Compare also the statement made in 1923 by Prof. Milton Bennion, Mormon chairman of the Social Welfare League and long-time dean of the University of Utah Education School, that the promoters of the Southwick law “‘had the sale of cigarettes forbidden because they were advised by lawyers that in case they forbid the advertising without forbidding the sale the courts would declare the law unconstitutional.’” Moreover, in the interim between passage of the Senate and House amendments to the Southwick law in 1923, Bennion, because he took the
Finally, Southwick had affirmed the same logic from a different perspective during the same floor debate in response to a killer amendment that would have prohibited advertising all tobacco products. He averred that the bill’s backers would pledge their support for such a measure, but insisted that a universal tobacco sales ban simply could not be anchored in S.B. No. 12 because the latter did not prohibit the sale of non-cigarette tobacco products. (To be sure, when non-smoking Mormon Senator Harrison Jenkins—who was ultimately one of only three senators to vote against the bill on final passage—called Southwick’s bluff by slyly offering to rectify this situation by proposing to treat cigarettes and all other tobacco products equally throughout the bill, Southwick quickly backtracked: “I...think that would be going too deep. We should tackle the matter one step at a time....” In fact, only Jenkins voted for his own amendment.)

Almost nine decades later the time has still not come for cigarette sales to be banned in order to ban cigarette ads, but the question here is not whether anti-smoking Mormons were able to see a century into the future, but whether, in the very short run of the 1923 Utah legislative session, idealists or realists were able to articulate and implement the more effective strategy for retaining as much of the 1921 law as possible against the tobacco industry’s onslaught on restrictions on selling, advertising, and smoking cigarettes. The outcome of the 1923 proceedings revealed that Southwick, who was no longer a legislator and played no visible role in public debate, had spoken prematurely in 1921 when he “celebrated the first anti-cigarette day by asserting that ‘in a short time the last cigaret will have been smoked in Utah.’” (Even more wildly overoptimistic position that “[t]he aim of the whole measure was to prevent the sale of tobacco to minors and the advertising of cigarettes” and that the extension of the ad ban to tobacco would “prevent minors from buying tobacco,” did not appear to regret repeal of the ban on sales to adults. “Would Enforce Cigaret Law,” SLT, Mar. 5, 1923 (14:5).

When challenged to “cite any law that would prohibit a legislative body from enacting a law denying the right to advertise an article that is permitted to be sold, Senator Southwick said he could not cite the exact statute, but he was sure it would come under the common law, at least.” Id. In arguing against Senator Jenkins’ licensure amendment, Southwick had similarly asserted that: “You cannot ask a licensed dealer not to advertise what you permit him to sell.” “Cigarette Measure Is Discussed in Senate,” DN, Feb. 3, 1921 (sect. 2, 6:1).

Judiciary Committee Has Public Hearing on Cigarette Measure,” DN, Jan. 27, 1921 (sect. 2, 8:6).

Anti-Cigarette Bill Is Passed in Senate,” DN, Feb. 4, 1921 (sect. 2, 10:1-3 at 2).

Anti-Cigarette Bill Is Passed in Senate,” DN, Feb. 4, 1921 (sect. 2, 10:1-3 at 2-3).

E. C. Rodgers, “Smokers of Cigarettes in Utah Have Odd Law to Obey,” WT-T,
was the No-Tobacco News, which as a result of the bill’s passage had suspended publication indefinitely. Instead, in 1923 the legislature did away with the general sales prohibition, turning it into a local control licensure law cum sales tax adopted in large part verbatim from the 1921 Iowa law, while at the same time both severely diluting the public smoking ban and expanding the scope of the advertising ban.

**The Tobacco Merchants Association Abandons Hope of Repeal in Utah (1922)**

“[W]e are of the opinion that the Citizens of Utah generally have not become disgusted enough with the existing Cigarette Prohibition Statute...to secure its repeal. [W]e are of the opinion that it would be advisable to let the thing rest for this session of the Legislature, at least, or until such time as the Citizenship generally is converted to the fact that it is a farce and public opinion created by this thought, to such an extent, that its repeal could be made easy.”

Evaluating this statutory outcome, which will be undertaken below, requires familiarity with the campaign for repeal of the Southwick law in Utah in 1923 that the Tobacco Merchants Association of the U.S. (the cigarette manufacturing oligopoly’s propaganda and legislative organ) sought to initiate in late 1922 after the November elections had determined the composition of state legislatures. Despite the fact that the letters that Charles Dushkind, TMA’s managing director, had received from the Utah tobacco trade held out “no encouragement” “that a movement looking to the repeal of the existing statutes be inaugurated,” “[s]hould it be determined [by the cigarette manufacturers] to inaugurate such movements” in Utah (as well as in Kansas and North Dakota), he “respectfully” enumerated...
several suggestions for what in reality was the staging of the semblance of such a movement.

In first place, Dushkind recommended as a “forceful presentation against prohibition statutes” a recently compiled, transparently biased booklet, “What Is the Duty of the State in Regard to Cigarettes?,” one of whose virtues was that it contained “but brief references to the merits of the cigarette....” He was certain that both editorialists and lawyers would find abundant material in it for editorials and briefs. If the sheer persuasiveness of this pathetically primitive compilation did not do the trick, next he urged the cigarette manufacturing companies (that is, his paymasters), to pay advertising companies “with a view to securing the cooperation of the press.” Dushkind also advised the manufacturers to “instruct their retail sales forces or missionary men to endeavor to get retailers to write their...legislators, urging the passage of repeal....” In addition to TMA’s own various propagandizing activities, Dushkind stressed proposing, in connection with repeal bills, “[s]ubstitute restrictive legislation” with regard to minors and license fees, cautioning, however, against following Iowa in enacting a cigarette tax.

The ultimate point of manufacturing public opinion was, then, to draw it to state legislators’ attention and convince them that it was real because, as Dushkind assured his oligopolist bosses:

[I]t is my firm conviction that insofar as the legislators are concerned the majority in all cases would unhesitatingly vote for the repeal of such statutes, and that it is only because of their erroneous impression that public opinion and their constituencies are in favor of prohibitory laws that they may be prompted to vote against repeal.

Hence, it would seem that it is essential that the legislators be brought to a realization that public opinion is really against such obnoxious statutes.

To be sure, there was one little pesky boomerang problem that had to be weighed: “It is true that too much publicity may arouse and stir the fanatics into more intensive activity than otherwise, but can these statutes be repealed without the

North Dakota, and Utah” at 1 (Dec. 4, 1922), Bates No. 501870676.

1533Charles Dushkind, “Memorandum in re-Existing Anti-Cigarette Statutes in Kansas, North Dakota, and Utah” at 1 (Dec. 4, 1922), Bates No. 501870676.

1534For an analysis, see below ch. 17

1535Charles Dushkind, “Memorandum in re-Existing Anti-Cigarette Statutes in Kansas, North Dakota, and Utah” at 1-2 (Dec. 4, 1922), Bates No. 501870676.

1536Charles Dushkind, “Memorandum in re-Existing Anti-Cigarette Statutes in Kansas, North Dakota, and Utah” at 2 (Dec. 4, 1922), Bates No. 501870676/7.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

force of public opinion and, at any rate, is it possible to make any effort in that direction without attracting attention of the intolerants?\footnote{Charles Dushkind, “Memorandum in re:-Existing Anti-Cigarette Statutes in Kansas, North Dakota, and Utah” at 2 (Dec. 4, 1922), Bates No. 501870676/7.}

Common to the responses from tobacco businesses in Utah that Dushkind received after soliciting their views on November 23, 1922, on the need for repealing the 1921 Southwick law was, interestingly, whether they favored it or not, that they emphasized the Mormon church’s outsized influence as the decisive factor. For example, one company desiring repeal nevertheless had “some doubt as to whether or not this could be accomplished” because “the cigarette law was a measure fostered by the L.D.S. Church, introduced by a prominent member of the Church and passed a [sic] L.D.S. Legislature.”\footnote{Tobacco Merchants Association of the U.S., “Excerpts from Letters Received from the Trade” at 7 (n.d. [ca. Dec. 1922]), Bates No. 501870678/84. Unfortunately, the poor quality of the “best copy” made the company’s name and that part of the excerpt illegible which speculated about the church heads’ response to any efforts to repeal in 1923.} Categorized among the “Contrary Opinions” was the reply by Hemenway & Moser, tobacco distributors and retail merchants,\footnote{Hemenway & Moser was one of the tobacco stores raided in Ogden in 1921 for violating the Southwick law that initially threatened to litigate its validity. “Anticigaret Law to Be Tested in Ogden Cases,” SLT, Oct. 30, 1921 (17:4). It continued to maintain a high political profile: 16 years later it was still corresponding with Dushkind about the Southwick law’s remaining advertising restrictions related to window displays; specifically, it complained about R. J. Reynolds Tobacco Co.’s salesmen’s posting “obnoxious advertising material,” which might attract the Church’s attention and undermine the chance to repeal the “foolish law” altogether in 1939. Hemenway & Moser Co. to Charles Dushkind, Aug. 30, 1938, Bates No. 501996404. Two weeks later it expressed the belief that all major tobacco companies “should be reasonable in their placement of advertising materials” in order to avoid “agit[ing] the situation and prompting enactment of additional anti-tobacco legislation. Hemenway & Moser Co. to Charles Dushkind, Sept. 12, 1938, Bates No. 501996402.} which purported to express also the concensus [sic] of opinion of others, including “a number of our prominent political, financial and publicity men,” that a repeal effort “would be useless” during the 1923 legislative session.\footnote{Tobacco Merchants Association of the U.S., “Excerpts from Letters Received from the Trade” at 7 (n.d. [ca. Dec. 1922]), Bates No. 501870678/84.} The reason was straightforward:

“Both political parties were pronounced in their expression of no freak legislation this year. They are also committed to certain remedial laws on state finances. To put these over they feel that they must have the support of the dominant element in our politics, which is the Mormon Church. The head of this institution is decidedly strong against the
smoking of cigarettes and tobacco in all forms and recent expressions would lead us to believe that his efforts would be lent towards a stronger enforcement of the law rather than to submit to any change or repeal and our politicians feel that any effort at this time on this bill would avail nothing and would probably detract from other matters which they wish to put across."\footnote{1541}

To be sure, the company recognized that ""the political situation is never stable,"" so that if a movement developed to pass a license and regulatory bill, it would turn to TMA for assistance, but otherwise it ""would not approve of an effort being made on this thing in this winter’s session.""\footnote{1542} Hemenway & Moser’s pessimistic evaluation of the constellation of political forces for 1923 may have been influenced by its experience in 1921 when it (together with United Cigar Stores), provoked by declarations by Southwick supporters in the legislature that 90 percent of Utahns supported the bill, initiated an “eleventh-hour endeavor to get some evidence as to what percentage” of voters opposed the bill. After three days—during which Senate passage intervened—a total of 12,000 signatures, 8,000 of which were obtained in Salt Lake and Ogden, had purportedly been collected.\footnote{1543} That the tobacco industry, despite this undertaking, which presumably rested on mobilizing smokers, nevertheless suffered a sharp defeat with respect to every aspect of the Southwick bill, may well have made Hemenway & Moser at the end of 1922 very wary of confronting the Mormon church and its allies so soon again.

The upshot of TMA’s inquiries and deliberations was that it was very unlikely that pro-tobacco forces could overcome the Mormon-backed legislative status quo in 1923. Ironically, contrary to Dushkind’s prognosis, not only did the legislature pass a partial repeal of the Southwick law, but it came freighted, as had been the case two years earlier in Iowa, with the cigarette tax that the oligopoly was determined to avoid. Whether the cigarette manufacturers were instrumental in destabilizing the political situation and whether the tax—these government revenues represented a crucially important talking point on behalf of licensure—was the price they were forced to pay for repeal of the sales ban and partial repeal of the partial smoking ban are questions on which the as yet available internal tobacco industry documents shed no light.

\footnote{1541}{Tobacco Merchants Association of the U.S., “Excerpts from Letters Received from the ‘Trade’” at 7 (n.d. [ca. Dec. 1922]), Bates No. 501870678/84.}
\footnote{1542}{Tobacco Merchants Association of the U.S., “Excerpts from Letters Received from the ‘Trade’” at 7 (n.d. [ca. Dec. 1922]), Bates No. 501870678/84.}
\footnote{1543}{“Public Argues on Cigaret Bill,” \textit{SLT}, Feb. 5, 1921 (22:5).}
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Sheriff Harries Harries Capitalist Public Smokers (1923)

“The Senate bill is prohibitory. We have had too much of this ‘verboten stuff.’ One would think he was living in Prussia.”

One of the difficulties in the way of reform in the matter of the use of tobacco is the many men who are addicted to the habit, and who therefore stand as advocates of the evil. ... This, with the amount of money that is at the command of workers for nicotine, stands largely in the way of any effort that people who are not in favor of tobacco may exercise, to drive the stuff out of existence, or to compel the observance of law and decency in regard to smoking and other uses of tobacco in public places.

A crucial step that shaped the course of legislation took place at the outset of 1923 when the 51-year-old new Salt Lake County Sheriff Benjamin R. Harries (who had taken his oath of office on January 1) announced that he would begin enforcing the prohibition of smoking in public places. On January 6 he announced a policy statement pointing out that his office had received complaints concerning enforcement of state laws: “Most particular among these are ones pertaining to the enforcement of the cigaret law, which is apparently ignored by the public generally.” And in response to inquiries as to whether the sheriff intended to enforce it he noted that it was his purpose “to enforce all laws, whether they be popular or unpopular with the public.” Harries went on to administer a lesson in the interaction between the amendatory and enforcement processes: “If there are laws on the statute books that are bad laws the enforcement should bring about the proper remedy. The offenders and violators of any of the laws, including the cigaret law, will be prosecuted. If any of the

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1545“Tobacco and the Public Schools,” IE 25(5):455 (Mar. 1922) (edit.).


1547a“Sheriff Harries Promises Strict Enforcement of All Laws Including Anti-Cigarette Statute,” DN, Jan. 6, 1923 (sect. 2, 1:5-6).
laws are bad laws the proper place to adjust them is in the legislature and not in various law-enforcing bodies of the state.

Indeed, as long as the anti-cigarette law remained on the statute books, it “would be especially enforced.” Little wonder that by the end of February conjecture arose that the “sheriff...may be working for the repeal of the law. The Lord and Harries only know.”

Although he had not yet had an opportunity to organize his forces completely and instruct his deputies regarding the Southwick law, on January 11, in an apparently chance encounter, a “deputy sheriff informed a violator of the law that smoking was forbidden in the corridors of the City & County building.” This incident prompted Harries’ announcement that evening of a smoking ban in the corridors and outer offices of the city and county building, which would also be enforced in all other Southwick law-covered enclosed public places. In the meantime his deputy sheriffs began warning, but not arresting, violators. As to his construction of the law, Harries specified that a man could lawfully smoke in his own private office, but he had already prohibited smoking in the outer room of the sheriff’s office; moreover, bailiffs had been instructed not to smoke and not to permit jurors to smoke in the courtrooms or corridors of the county and city building during court adjournment, though they would be allowed to smoke in jury rooms, which, for reasons he did not explicate, he did not consider to be covered by the law.

Harries’ vigorous enforcement policy was especially impressive in light of the fact that at the time he was the target of a court action to oust him from his office on the grounds that his election had been invalid. This judicial complaint is highly pertinent in the present context because it was based on the claim that the Mormon church had violated the Utah constitution’s prohibition of church-state union and church domination or interference with state functions by virtue of its unduly influencing, intimidating, and compelling its members to vote for

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Harries.\textsuperscript{1553}

Mormon President Heber Grant had in fact at a church body meeting at the end of October “invited people to vote for” Harries for sheriff, explaining that representatives of the Salt Lake Ministerial Association and Social Welfare League (including Milton Bennion, dean of the University of Utah School of Education), which had endorsed Harries, had recently visited him; Grant then convened the presidencies of the seven Salt Lake County stakes, which unanimously approved his candidacy. Church officials characterized the filling of the sheriff’s office as a moral rather than a political issue and Harries’ election as “of distinct moral value to the community.” Grant stressed that since becoming Mormon president (in 1918) he had never announced his preference for anyone’s candidacy (thus contradicting charges that he had “more political control than any other man in this country’’), but also apparently sought to justify his departure from that course by arguing that the administration of the sheriff’s office had been “unsatisfactory for a number of years,” which condition he hoped would also prompt “the people...to ignore political preferences....” The president of the Salt Lake Ministerial Association also urged Harries’ election for the reason that none of the other candidates had enforced the law.\textsuperscript{1554} Ultimately, the Ministerial Association’s and Grant’s backing rested on vetting done by the Social Welfare League, which had reported that “as a deputy sheriff Harries had been a sincere advocate of law enforcement.”\textsuperscript{1555}

Bennion’s and the League’s energetic efforts on Harries’ behalf beginning in October 1921 may have been linked to a disappointing reply that they had received from the Salt Lake City police chief and city attorney and the Salt Lake County sheriff and county attorney in response to an oral inquiry concerning violations of the cigarette sales ban by certain merchants. Following several appearances before the League during the previous few weeks, these officials wrote a letter that, despite admitting that they had a sworn duty to uphold and enforce the law without questioning its wisdom, elaborated an excuse for failure: “We appreciate that in Salt Lake City and in some other communities in the county there is no pronounced public sentiment in favor of the enforcement of this law. [W]e realize fully the difficulty of enforcing a law of the character

\textsuperscript{1553}“Courts Asked to Declare Harries Election Invalid,” \textit{SLT}, Dec. 24, 1922 (24:5-6) (publishing full text of complaint).

\textsuperscript{1554}“Churchmen Seek Aid in Electing Harries Sheriff,” \textit{SLT}, Oct. 30, 1922 (1:7, 2:3). Interestingly, Milton Bennion stated in 1923 that, as a result of divided views among the organization’s officers, the Social Welfare League had had nothing to do with passage of the Southwick law in 1921. “Would Enforce Cigaret Law,” \textit{SLT}, Mar. 5, 1923 (14:5).

\textsuperscript{1555}“Ministerial Association for Independent Candidate,” \textit{SLT}, Oct. 31, 1922 (22:4).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

which is not supported by a strong public sentiment....” (The League knew how to put the issue of “enforcing rigidly all laws” to good anti-communist propagandistic effect: a few months later it sponsored a law enforcement week—focusing on the laws most frequently violated in Salt Lake County with the anti-cigarette law one of the top four—on the grounds that it rendered “a great service to the United State [sic] government by curbing “the threatening menace of bolshevism by showing respect for law and order....”)

A Mormon active in church work, Harries made a career in law enforcement from 1900 into the 1930s, having been a deputy sheriff, chief probation officer, and superintendent of a boys’ home before serving as Salt Lake County sheriff from 1923 to 1927. That Harries, a “staunch Democrat” (who had been defeated in the Democratic county convention), was running as an independent strongly supported by the Mormon church and the Ministerial Association, largely composed of Protestant Republicans, signaled to political forecasters on the eve of the election that the chief collateral damage of Harries’ campaign and victory might be inflicted on the head of the Republican ticket, its candidate for U.S. senator, Ernest Bamberger: not only would churches explain to their congregations why they should vote for Harries, but a thousand church workers would canvass virtually every voter in the county on his behalf, supplanting Republican efforts on Bamberger’s behalf.

Grant welcomed Bamberger’s defeat because, although as a Jew he satisfied the church president’s desideratum of a non-Mormon senator, Grant “detested” Bamberger, whom he viewed as an “unsavory machine politician” in the group in control of the state Republican Party. In the event, Bamberger (1877-1958), a mining engineer with degrees from Williams College and Columbia University, who was general manager of mining companies, president of utility companies,

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1556 “Ban on Cigaret to Be Enforced,” SLT, Oct. 5, 1921, clipping in Selected Collections from the Archives of the Church of Jesus Christ of Latter-day Saints, vol. 2 (DVD 2002).
1558 “Death Claims Former S. L. County Sheriff,” SLT, Jan. 20, 1941 (11:3). Harries was a member of the high priests’ forum of Wells stake. In the 1930s he worked as an enforcement agent for the Utah liquor control commission. Id. See also “Harries Files in Race for Commissioner,” SLT, Oct. 3, 1939 (20:2); “Former Salt Lake County Sheriff Dies,” OS-E, Jan. 20, 1941 (8:3). At the outset of his career he was involved in trying to apprehend Butch Cassidy. “Butch Cassidy to Surrender,” DEN, June 29, 1900 (1:1-2).
1559 “Split Hurtful to Bamberger,” OS-E, Nov. 5, 1922 (10:3).
and regent of the University of Utah,\textsuperscript{1561} lost to the Mormon Democratic incumbent by 561 votes,\textsuperscript{1562} while Harries won a plurality (39.4 percent) over the Republican and Democratic candidates.\textsuperscript{1563}

About a week before he was due to be sworn in, 92 complainants—reportedly including Republicans, Democrats, Mormons, and non-Mormons—brought an action in state district court to enjoin Harries from taking office and for a temporary injunction to the same effect pending a hearing. The complaint alleged that a majority of Salt Lake County electors were members of the Mormon church, who “are taught to believe and do believe that the directions, orders and advice emanating from the head officer of said church...known as the president [i.e., Heber J. Grant]...is [sic] and shall be controlling, not only in spiritual matters, but with respect to temporal affairs, and that the requests and advice received from such authority is [sic] inspired and the word of God, and the members of said church have ever been, in the majority of instances, in the habit of obeying such requests and advice.” The pith of plaintiffs’ case was that the Mormon church through Grant, combining with and acting in concert with the Ministerial Association, had violated the Utah constitution (“There shall be no union of church and state, nor shall any church dominate the state or interfere with its functions”) by virtue of having “resolved and determined to procure the election of...Harries, and to do so by exercising the ecclesiastical authority” of the Mormon church and other religious bodies, to which end Grant “in writing and by speech directed and instructed the members of the...church (the...instructions being authoritative and purporting to be the inspired word of God) to cast their ballots for...Harries, regardless of their personal opinions because they were so advised by” Grant. Since the other ministers heading the other churches in the “combination” advised and directed their members to vote for Harries, “by reason of the undue influence...and against the will and personal opinion of the...electors..., a large number, to wit, a number sufficient to change the result of said election, were induced and compelled to vote for...Harries, which...votes would have been otherwise cast and would have prevented the election of...Harries had they been permitted to cast a free and untrammeled ballot in accordance with their own conscience and opinion.” The complainants therefore

\textsuperscript{1561}Men of Affairs in the State of Utah: A Newspaper Reference Work (n.p.) (Press Club of Salt Lake 1914).


\textsuperscript{1563}Calculated according to data in “Sheriff Must Stand Trial in Ouster Action,” SLT, Mar. 25, 1923 (1:1 at 17:4).
concluded that on account of this “intimidation” the “election was not free and equal,” but rather the “result of undue influence and coercion and...wholly invalid.”

During January and February 1923, Harries’ aggressive enforcement of the cigarette sales ban—the complaint filed on January 16 was the first prosecution in more than a year—and hearings and submissions in the suit against him proceeded in tandem. (Two weeks after passage of the Southwick repeal bill in March the district court denied Harries’ demurrer to the amended complaint and ruled that he would have to stand trial, but he remained in office. Later that year the Utah Supreme Court denied Harries’ request for a writ prohibiting the judge from proceeding on the grounds that as an equity court it lacked jurisdiction to inquire into the validity of his election; although the court ruled that the judge did lack such jurisdiction, it held that the action could proceed as an election contest. In November 1926, less than two months before the end of Harries’ term, the Utah Supreme Court ruled that the lower court had erred in refusing to permit plaintiffs to amend their complaint and in dismissing their case, and remanded the case to district court, but also

1567Inter alia, the complainants were required to file an amended complaint offering greater specificity of charges, which alleged that Harries was a co-conspirator. “Sheriff Will Deny Charges,” SLT, Jan. 5, 1923 (22:2); “Demurrer Filed in Sheriff Case,” SLT, Jan. 6, 1923 (20:4); “Court Study in Harries Case,” SLT, Jan. 16, 1923 (16:3); “Court Rules for Sheriff Harries,” SLT, Jan. 21, 1923 (24:3); “Efforts Renewed to Oust Harries,” SLT, Jan. 24, 1923 (18:1-2); “Church Influence Denied by Harries,” OS-E, Feb. 4, 1923 (8:4); “Harries Counsel Moves to Strike Out Ouster Action,” SLT, Feb. 6, 1923 (7:3).
1568Sheriff Must Stand Trial in Ouster Action,” SLT, Mar. 25, 1923 (1:1).
1569Harries v McCrea, 62 Utah 348 (1923).
1570Ewing v Harries, 68 Utah 452 (1926). Without deciding the ultimate point in the case, the Utah Supreme Court made it clear that church officials had the same rights and privileges as other citizens and electors to reason with fellow citizens. Moreover, it asked how a court could prevent any number of electors, whether affiliated with a church or not, “from combining and uniting their efforts to bring about the election of a particular
expressed great skepticism about its underpinnings. The case became moot both because Harries’ term was expiring and, running as a Democrat, he was overwhelmingly defeated by a Republican in his bid for reelection.1571

In the midst of this increasingly active implementation of, at least, the Southwick law’s central (sales) provision, the legislative landscape changed on Valentine’s Day, when a bill was introduced in the Senate, whose impact a two-column, front-page headline in the Deseret News judged to be: “Anti-Cigaret Law Threatened.”1572 Senate Bill No. 108 was introduced by 69-year-old Republican Henry N. Standish,1573 one of only three senators to have voted against Southwick’s bill in 1921, at which time he went on record on the Senate floor as “opposed now and forever to any such legislation. He said he had used tobacco all his life and he failed to see the harmful effects of it.”1574 Speaking immediately after and in response to Southwick’s lengthy recitation of the deleterious health effects of smoking, which he himself had invited Southwick to give for his enlightenment as a smoker, Standish, “not among the ‘kindergarten’ class” of the legislature, “wondered what kind of an old man he would be if he had not” been a lifelong tobacco user, “seeing that it must have had such an injurious effect on his system.” Having drunk heavily mineral-impregnated water from the hills of Bingham for 45 years, he conjectured that his by now “‘copper-lined’” stomach might be untouchable by the poisonous carbon monoxide that Southwick had mentioned. Doubtless more serious and relevant was that “‘most of the men’” in the locality he came from were smokers, which would have made him derelict in his duty if he failed to “‘recognize the fact that they do not want this bill. I am everlastingly and all the time opposed to any kind of a measure of this sort.’”1575
Although the Southwick law repealer had been anticipated for several days, a “visible flurry” nevertheless “passed through” the Senate chamber at the reading of the title of S.B. No. 108, which gave all prospect of reopening the intense debates of 1921 and becoming “the most animated battle of the session.” Standish’s bill repealed the 1921 law almost in its entirety, leaving, oddly, only the ban on smoking in enclosed public places intact (which may have been retained as a way of attracting the votes of legislators who would otherwise have opposed licensure). Otherwise quite similar to the 1921 Iowa repealer, the bill subjected cigarette sales to a licensure regime, the permits, costing $25 to $50 a year depending on city size, to be issued by city councils and county commissions on an optional basis, though these local governments were required to revoke the permit of any holder who violated any provision. Each cigarette was also to be taxed one mill (or two cents per package of 20), which Standish guesstimated would yield annual revenues of about $150,000 based on annual consumption of 150,000,000 cigarettes under the existing law, which outlawed their sale altogether. Places where cigarettes were sold illegally could be declared nuisances, which could be abated pursuant to the laws governing the sale of intoxicating liquor. Finally, the penalty for selling cigarettes to minors was set at $25 to $100 or a maximum 30-day jail sentence for a first offense and $100 to $500 and/or a one- to six-month sentence for additional convictions.

1576 Anti-Cigaret Law Threatened,” DN, Feb. 14, 1923 (1:1). The bill’s provisions are cited according to press reports because S.B. No. 108 is the session’s only Senate bill missing from the Utah State Archives collection.

1577 See above ch. 15.

1578 Anti-Cigaret Law Threatened,” DN, Feb. 14, 1923 (1:1); “Local Option on Cigaretts Urged,” SLT, Feb. 15, 1923 (8:7, 14:2); “Stormy Scenes Expected in Closing Rush of Legislature,” OS-E, Feb. 15, 1923 (2:1-2). According to another account, unnamed “proponents” of the bill believed that it would generate $300,000 in revenue, while reducing the price of a 10-cigarette package, which cost 11 cents “in any city on the coast,” but 20 cents in Utah. “Proposed New Cigaret Law Provides Special Stamp Tax and License Fees; $300,000 Annual Revenue Estimated,” Salt Lake Telegram, Feb. 14, 1923 (Local page 1:5, 6:1). Standish’s estimate—the basis of which he did not disclose—sheds light on some important consumption phenomena. In 1923, national per capita annual consumption of manufactured cigarettes by all persons 18 and over amounted to 911. http://www.cdc.gov/tobacco/research_data/economics/consump1.htm (visited Nov. 22, 2006). The corresponding figure for Utah, based on Standish’s 150,000,000, was 561 or 61.6 percent of the national rate. U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Pt. 1, tab. A195-209, at 35 (Bicentennial ed. 1975) (Utah population data). Although Utah’s substantially lower level is thoroughly plausible, the situation becomes murkier when it is taken into account that 60 percent of the
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Despite indorsement by the Salt Lake Chamber of Commerce’s legislative committee and board of governors,1579 initial prospects for passage were poor. Three days after S.B. No. 108’s introduction, the Senate Public Affairs Committee, to which it had been referred, went into executive session after having granted a hearing to Standish, who agreed that a public hearing would be unnecessary. He sought to stress the bill’s merits, including retention of the public smoking ban and the optional nature of licensure, meaning that localities desiring to retain the existing sales prohibition could retain it. He also cited the experience of forerunner Iowa, where in the previous year $593,279.74 in cigarette tax revenue had been generated. After Standish had left the committee session, its chairman announced that its five members had unanimously decided to report it unfavorably. On reaching the full Senate, it was then referred to the bottom of the second reading calendar.1580

The bill’s negative treatment may not have expressed a substantive judgment: some senators, the Tribune reported, believed that the Southwick law would be repealed “sooner or later,” but did “not consider it an opportune time so late in the session, to permit the legislative machinery to become clogged with the discussion that will inevitably follow the serious consideration of such legislation.”1581 A very different take on the all-sidedly satisfactory stasis was offered by committee members, who wryly opined: “People who want cigarettes

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population was Mormon in 1920. Deseret News 1983 Church Almanac 272 (1983). Had no Mormons smoked (cigarettes), Utah adult non-Mormons’ per capita annual consumption would have been 1,403 or 54 percent higher than the national average. (To be sure, this figure is probably too high because Mormon families were larger and therefore non-Mormon adults presumably accounted for more than 40 percent of the adult population.) In the event, Standish’s estimate was itself too high: during the first full year that the cigarette tax was in effect (1923-24) 112,314,000 cigarettes were sold, which worked out to an average of 420 for the entire 18 and older population and 1,051 for the non-Mormon adults. “$112,313 Paid in Cigaret Taxes,” Daily Herald (Provo), May 13, 1924 (sect. 2, 1:5-8). (This figure may be too low since it did not reflect bootlegged cigarettes or cigarettes that consumers mail ordered from other states.) The non-Mormon figure was very close to the national average and would have been even closer if the presumably relatively small number of Mormon cigarette smokers were added to the denominator. In 1923-24 the cigarette tax revenue in Iowa amounted to $700,079 or about 6.2 times more than Utah’s, while Iowa’s population was about 5.2 times greater. See below ch. 19, tab. 7; U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Pt. 1, tab. A195-209, at 27, 35 (Bicentennial ed. 1975).

1579“So The People May Know,” Salt Lake Telegram, Feb. 20, 1923 (1:3).
have them and people who want the anti-cigaret law have it.” How long that make-believe equilibrium would last was put into question a few days later, when the committee’s executive session rejection of the bill was bandied about as having “given rise to much of the agitation over the existing anticigaret law.”

In Provo, a center of Mormon anti-tobaccoism, the prevailing reaction to Standish’s initiative was that the Southwick law should be strengthened rather than weakened and that “a local option law would be worse of a joker than anything tried thus far.” The stake president of the Young Men’s Mutual Improvement Association argued that local control would be worse than the current unenforced law because boys would simply buy cigarettes in nearby towns that did not choose to retain prohibition—a conclusion that, to be sure, seemed overdrawn since that option was apparently available to them even under the Southwick regime.

Two-thirds of the way through February the repeal bill thus appeared to be virtually dead. Enter Sheriff Benjamin Harries: on February 20 he set in motion a train of events that swiftly put an end to Utah’s radical prohibitory experiment, contrary to the aforementioned expectations of the cigarette oligopoly, whose local tobacco trade informants had formed the judgment that the Mormon church’s control of the legislature rendered repeal efforts inopportune during the 1923 session.

That Tuesday, “[a]t the height of the daily noon-time rush, when every seat at every table was occupied by men of high standing in the community,” two of Harries’ deputies “pushed open the swinging doors” and entered the downtown Salt Lake City Vienna Cafe—“favorite eating place of men of wealth and prominence in the community. Bankers, merchants, publishers, mine operators, financiers and professional men crowded the restaurant—and walked about two-thirds of the length of the long room until they reached a table at which was seated none other than Ernest Bamberger, who was lunching with his 53-year-old...

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1583 “Protest of Cigaret Law to Be Shown by Blowing of Whistles Today Noon,” SLT, Feb. 24, 1923 (1:6-7 at 7). In turn, rumors that committee members had been reminded of their (belowmentioned) alleged pledge not to repeal the Southwick law “proved to be the spark which finally burst into flame” after Sheriff Harries began enforcing it. Id.
1585 See above this ch.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

companion John C. Lynch, “capitalist,” general manager of the Salt Lake Ice Company, “wealthy mining man, banker and leading Republican politician of Salt Lake City,” both of whom were finishing off their meal by smoking cigars. 1587  
The dragnet that was about to descend was deprived by just moments of considerable piquancy: Nebraska federal District Court Judge Joseph Woodrough “‘had scarcely passed through the door onto the street with a cigar in his mouth when the officers entered...’”1588 Displaying their badges, the deputies informed the two businessmen that they were under arrest (for violation of the statutory ban on smoking in an enclosed public place). While Deputy John Harris was left in charge of them, Deputy Michael (Mike) Mauss walked on toward the back of the cafe, where he discovered the 32-year-old department manager of the American Smelting and Mining Company, Edgar Newhouse, smoking a cigarette. Initially, Mauss believed that the latter’s lunch-mate, Le Roy Eccles of Ogden (scion of Utah’s richest family and one-time vice-president and general manager of the family-owned Amalgamated Sugar Company), was also smoking, but Eccles showed an unlighted cigarette, prompting Mauss to apologize for having suspected him, before informing Newhouse that he was under arrest but free to finish his meal if he had not yet done so. In the welter of the ensuing commotion a customer pointed out Ambrose N. McKay, the general manager of the anti-prohibitionist Salt Lake Tribune, who was about to leave after having paid the bill at the cigar counter, to Deputy Harris, asserting that he too was smoking, but the latter was too concerned about guarding Bamberger and Lynch to arrest McKay at that time. Because the deputies had neither driven a car to the cafe nor requested one after making the arrests, they “marched” the three in their custody in a kind of extended perp walk down Main Street to the county jail for booking, but because of an argument over the demand for $10 bail for their court appearance, they were then taken to the county attorney, who issued formal complaints (also against McKay to be served later that day). The three appeared before a judge, who released them on their own recognizance to appear in court the following morning. Amusingly, the arrestees insisted that McKay had also violated the law and that “the officers dare not take the newspaperman into


1588 Protest of Cigaret Law to Be Shown by Blowing of Whistles Today Noon,” SLT, Feb. 24, 1923 (1:6-7 at 7:2). This statement was made by Minnesota federal District Court Judge Page Morris three days later at a luncheon at the Exchange Club of Salt Lake City in the presence of Judge Woodrough (who died at age 104). Morris confessed that until recently he himself had violated the law every day since arriving in Salt Lake except when he smoked in his hotel room or in his court chambers at the federal building.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

custody”; they were to be summoned the next day as witnesses against him.\textsuperscript{1589}

Despite their admission that they had been smoking in the restaurant, Bamberger, Lynch, and Newhouse were nevertheless “indignant” at having been subjected by the law officers “to arrest and detention as they would [treat] any other criminal”—an indignation manifestly shared by the Los Angeles Times, whose front-page, top-of-the-fold subhead read: “Wealthy Smokers Are Arrested.”\textsuperscript{1590} Mauss and Harris denied not only trying to frame the four as “outstanding examples of flagrant anticigaret law violation,” but even knowing their prisoners’ identities until they arrived at the jail. Moreover, Mauss insisted that if they had identified themselves in the cafe and said that they would appear in court the next day, “we would have never taken them into custody.”\textsuperscript{1591} Thus, although the deputy purported to acknowledge the privileged criminal process status to which capitalists were entitled, it is unclear why their mere presence in the lofty Vienna Cafe would not have sufficed to convey the requisite socio-economic and political signifier to him.

Deputy Mauss (1871-1937), a Mormon who served as a ward bishop and high priest and stake high councilman,\textsuperscript{1592} may have been one of those few lucky mortals whose vocation and avocation coincided: in 1919 he had been on the three-member committee that drafted the constitution and by-laws of the No-Tobacco League of Utah,\textsuperscript{1593} whose vice-president and treasurer he then became\textsuperscript{1594} and whose short-lived periodical, The No-Tobacco News, he

\textsuperscript{1589}“Deputies Arrest Citizens Smoking in Public Places,” SLT, Feb. 21, 1923 (22:6). The ages are taken from the 1920 population census. The 55-year-old McKay, a Canadian with a B.A. from the University of Toronto who had worked for other newspapers as a reporter, was a Presbyterian. Utah Since Statehood: Historical and Biographical 3:729 (1919).

\textsuperscript{1590}“Halt Crime in Utah!” LAT, Feb. 21, 1923 (1:8). While Bamberger and Lynch denied that they had intentionally violated the law, Newhouse “protested that [since] he was seated in a private booth he was under the impression that he was within the law by reason of the provision which legalizes smoking in rooms set aside for such purposes.”


\textsuperscript{1592}“Deputies Arrest Citizens Smoking in Public Places,” SLT, Feb. 21, 1923 (22:6-7).

\textsuperscript{1593}“Marshall Mauss Is Now a Bishop,” Salt Lake Telegram, Jan. 25, 1909 (1:5); http://www.findagrave.com/cgi-bin/fg-cgi?page=gr&GRid=127125 (visited July 18, 2011). Although his obituary stated that he had been in law enforcement his whole life and the 1910 census returned him as city marshal of Murray, the 1920 census returned him as a field man in a canning factory.

\textsuperscript{1594}“No-Tobacco League Is Organized by 17,” SLH, Aug. 29, 1919 (16:6).

published. In his capacity as a League officer he also traveled around the state as a speaker. Then in February 1921 he submitted a petition to the Utah House “favoring the Southwick bill, but claiming it is not a church measure.” (At the time of the arrests in 1923, the press referred to him indiscriminately as the League’s president and former president.)

The press was hardly alone in taking ersatz-umbrage at the dignitaries’ treatment: Assistant County Attorney George Cannon, Jr. not only “protested against alleged indignities” to which Mauss and Harris had subjected them, but told Chief Deputy Edward Doherty that the two deputies “should be reprimanded for taking the prisoners to the county jail to book them when, because of their prominence, it would have been more fitting and courteous to have conducted them to the committing magistrate, swore [sic] to the complaints there and fixed bail.” Doherty—without explaining how and why they had selected the where-the-elite-meet-to-eat Vienna Cafe—defended his deputies, who had merely “picked up the first three men we saw when we entered the cafe. ... Our deputies didn’t know Bamberger, Lynch and Newhouse from Jones, Smith or Brown. Any person who smokes in a cafe violates the law. All violators will be treated alike. This office will play no favorites. We shall continue arrests relentlessly.”

Sheriff Harries, too, indignantly rejected all claims that he was trying to make an example of these prominent Utahns:

“Any charges that this was a frame-up to bring this law more prominently before the public is bosh.... I have instructed my deputies to enforce this law while they are engaged in their other duties and it just happened that they dropped into the Vienna cafe and found these men smoking. Had there been other men in there smoking they would have arrested them too.

“This law is on the statute books and as long it remains there we are going to enforce

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1596a No Tobacco’ Meeting at Sixth Ward Sunday,” OS-E, June 26, 1920 (8:3); “No-Tobacco League Speakers Here Sunday,” OS-E, July 16, 1920 (7:3).
1597 House Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 223 (Feb. 9). Unfortunately, the petition is not preserved in the Utah State Archives.
1598“Harries’ Deputies Arrest Prominent Business Men,” Salt Lake Telegram, Feb. 20, 1923 (1:4); “Smokers Arrested in Grill Room; Capitol Also Scene of Raid,” Salt Lake Telegram, Feb. 21, 1923 (1:2, at 5:5); “More Utah Smokers Taken,” NYT, Feb. 22, 1923 (7). By mid-1922, Fred Bennett was the former president. “Passing Events,” IE 25(9): 854-58 at 858 (July 1922).
1599a Smokers Arrested in Grill Room; Capitol Also Scene of Raid,” Salt Lake Telegram, Feb. 21, 1923 (1:2, at 5:5); “No Tobacco Is Slogan,” LAT, Feb. 22, 1923 (1:8).
Bizarrely, then, Harries, the hand-picked Mormon choice of the Mormon president, appeared to be virtually inviting anti-prohibitionists to avail themselves of his smoking busts to break the legislative log-jam over the Standish bill in order to secure repeal of the unpopular Southwick law. At the time, too, even though no plausible political logic for them was offered, “[s]tories persisted that the crusade was the result of a carefully laid plan to discredit the anticigarette law and force action on a repealer by the Legislature..., but these reports were vigorously denied by the County Attorney and Sheriff.” Admittedly, Grant and the Mormon hierarchy had a difficult decision to make—either acquiesce in the status quo with a much flouted law or seek to ratchet up enforcement with high-profile arrests at the risk of triggering a repeal backlash.

To be sure, Newhouse had not yet come to that realization; instead, as McKay’s newspaper reported, he denounced the “outrage” that the deputies had picked out one cafe for invasion without visiting the (Mormon church-owned) Hotel Utah and other dining places: “it is another attempt of Sheriff Harries to make a record for his office by sending his assinine [sic] deputies around to arrest smokers.” In fact, several hours after the Vienna raid Mauss and Harris arrested non-prominent bridge-builder Nels Carlson as he was lighting a cigarette in another cafe.

When they were arraigned the following day—*The New York Times* reported the arrests on page 2—before City Judge Noel Pratt the threesome waived a preliminary hearing and availed themselves of the prescribed period to plead two days later, while the separately represented McKay pleaded not guilty as did Carlson. In the meantime, Harries’ deputies were showing themselves to be

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1600. “Deputies Arrest Citizens Smoking in Public Place,” *SLT*, Feb. 21, 1923 (22:6-7). The aforementioned visiting federal Judge Morris took the same stance: “‘rigid enforcement’ would work out best whether the law was repealed or not, but if the law was bad, such enforcement would lead to its repeal. “Protest of Cigaret Law to Be Shown by Blowing of Whistles Today Noon,” *SLT*, Feb. 24, 1923 (1:6-7 at 7:2).


1604. “Accused Violators of Public Smoking Statute Deny Guilt,” *DN*, Feb. 21, 1923 (1:3). When the accused appeared they declined to plead and the judge ordered pleas of
equal opportunity enforcers as their raid of the Hotel Utah’s grill room that same day netted four more violators, paper company officers entertaining an out-of-state manager, while the State Capitol itself yielded five arrests. At the conclusion of their two-day campaign, Mauss and Harris estimated that their visits to almost a dozen restaurants and cafes had resulted in 11 arrests, though apparently none had been able to compensate Mauss for his let-down at the state house: “Commenting on his desire to catch one of the legislators in the act of violating the antismoking law, Deputy Mauss said he had even invaded the cafeteria at the state capitol in the hope of sighting some lawmaker indulging in a smoke. In this quest he was disappointed, and was forced to change his scene of operations to other parts of the building before making an arrest. To be sure, despite the fact that the latter raid was “spectacular,” involving a prominent American Legion member and “Utah’s worst-wounded World War veteran,” the “outcry against the forcible handling of Bamberger” and consorts prompted a change in tactics: the sheriff’s office had instructed the deputies not to “drag[ ] the offenders to a committing magistrate,” but merely to notify the violators that they were under arrest and to order them to make an appearance.

Neither the press nor owners explained either the basis of their indignation or why enforcement of a duly enacted state statute to protect non-smokers amounted to a “crusade against...smokers,” who needed “protect[ion]” so that they might “enjoy an after-dinner cigar or cigaret.” As a puzzled Milton Bennion of the Social Welfare League observed:
“It is a custom of long standing throughout the country to forbid smoking in certain inclosed places—dining cars, for instance. If public service corporations can make and enforce such rules in the interests of the non-smoking public, why such a commotion over a similar provision in the Utah law? Does not the person who is nauseated by inhaling second-hand tobacco smoke have any rights? If the smoker is to be so insistent on his inalienable rights to smoke where and when he pleases, may he not with equal force contend for like liberty to spit on the sidewalk in defiance of the law?”

Ironically, the very same day that Mauss nabbed the capitalist smokers, across the country in distinctly non-Mormon New York City Harlem Court Magistrate Charles E. Simms fined 16 men $5 each for having smoked in the 125th Street Station of the Lexington Avenue subway. The aroused judge’s firmness by far exceeded the Salt Lake sheriff’s: “‘Conditions at this subway station have grown simply terrible.... They have become so bad in the last few months that men even light their cigars, cigarettes and pipes in the vestibules of the cars. I am going to do everything I can to stamp out this nuisance, and any subway smoker who comes before me may expect to get the limit.’”

The day after the initial Salt Lake arrests owners of Southwick-covered enclosed public places, in response to “the two days’ crusade of deputy sheriffs against Salt Lake smokers,” began trying to subvert enforcement by posting signs such as, “‘This is a public smoking room, so far as Sheriff Harries is concerned.’” Chief among these proprietors was George Morgan of the Vienna Cafe itself, whose sign read: “Vienna Cafe: Public Smoking Room.” Even he was dubious about the law-conformity of his own ploy: “Although not certain that he could include so much territory in his pronouncement, Mr. Morgan virtually included his entire establishment within the protected [i.e. for smokers] area by erecting a notice which announces in very black block letters, ‘Vienna Cafe Public Smoking Room.’ The restaurant man said he was accepting the advice of City Attorney William H. Folland that such was the best course to pursue in view of the hectic occurrence Tuesday.” In relation to a statute that clearly stated that it “shall be a misdemeanor for any person to smoke cigars, cigarettes or tobacco in any enclosed public place [including “dining rooms in hotels, restaurants, cafes and cafeterias”] within the state of Utah, except in extra rooms...specially provided for smoking purposes” Morgan’s assertion that simply by posting a

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1610 Subway Smokers Fined; Violations Arouse Court,” NYT, Feb. 20, 1923 (20).


1612 1921 Utah Laws ch. 145 § 4, at 390, 391 (italics added).
sign that the cafe was “open to the public for smoking purposes” he had “changed the status of his restaurant” was on its face so preposterous that it is difficult to imagine the legal reasoning that might have prompted a city attorney to express approval of such a manifestly non-conforming practice as a “bona fide attempt to circumvent the provisions of the two-year-old anti-smoking law by placing the room or store in the category of a place set apart where smokers may be immune from the clutches of the law”—when in fact they were not being “set apart” from non-smokers in “extra rooms.” To be sure, with breathtaking celerity this interpretive overreaching would become self-fulfilling: just two weeks later the legislature would gut this section of the Southwick law by adding the exception that “the owner or proprietor of any hotel dining room, restaurant, cafe or cafeteria may designate the same as a public smoking room by a conspicuous sign at or near the entrance.”

Sheriff Harries appeared not in the least perturbed by these verbal shenanigans: again intimating that his enforcement policy might be aimed at ridding Utah of the law altogether, he stressed that “the war on those who violate the state law has scarcely started. If it fails to bring about a repeal or amendment of the law at the present session of the legislature the fight will go right on until the next session is held, and then go on another two years if smoking in public is a crime at that time....” His chief deputy, Edward H. Doherty, was even blunter. Charging that dealers who were “reaping a harvest of anywhere from 50 to 80 per cent from the [illegal] sale of cigarettes...do not want this law repealed. They accused us of picking on foreigners for the enforcement of this law, so now we will show them that we can also pick up some of those who can, or would if they cared to help to bring about the repeal of this law if it is an unpopular one. This fight is going to go right on for the next four years if the present law remains on the statute books that long.” Doherty, who did not explain why the sheriff’s office was permitting this lucrative illegal trade to continue, was apparently referring to the Greek, Italian, Croatian, Mexican, and other sellers born outside the United States who had been arrested in February in the aforementioned raids, although why their U.S.-born competitors would have complained about their arrests is unclear, especially since some of the latter were also arrested. In

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1613["Smokers’ Raids Called Small Town Practice," OS-E, Feb. 22, 1923 (1:4).]
1614["Signs Warn Salt Lake’s Smokers,” SLT, Feb. 22, 1923 (20:1-2).]
1615[1923 Utah Laws ch. 52 § 4, at 110, 114.]
1616["Signs Warn Salt Lake’s Smokers,” SLT, Feb. 22, 1923 (20:1-2).]
1617[The nationalities of several arrestees’ listed in the aforementioned newspaper articles were identified in 1920 Census of Population; several others with names suggesting Latin or eastern European origins were absent from that census.]
any event, the chief deputy’s hardly veiled reference to the prominent Utahns arrested for smoking—*The New York Times*, which was following events closely and pouring generous doses of editorial sarcasm on Utah’s entry on to “the path of perfection,” noted that the law, whose “terrors are falling on its violators,” was being enforced “partially”—suggested, once again, the possibility that Harries’ strategy was, oddly, contrary to his Mormon benefactors’ prohibitionist goal, geared toward repeal.

At this juncture in the coalescing of business opposition to the Southwick act the chief Mormon daily took stock of its tenability and concluded not only that in principle it “should be as sacred” to Utahns and thus as “strictly obeyed” as any other state statute, but that in fact there could be “little, if any, doubt that a majority” of Utahns “favor regulation by law of certain phases of smoking.” Indeed, the newspaper’s overoptimism pushed it into making the non-self-fulfilling prophecy that it was doubtful, if given the chance “freely and sincerely to express themselves,” that Utahns “will ever permit the law to be repealed.” And while the editorialist paid lip service to opponents’ right to make their views known, especially during the legislative session, it urged that “[a]ny effort at compulsion or duress should be strongly resisted by the people themselves” and by legislators without in any way identifying that objectionable politicking.

The defense of the Southwick law by the *Deseret News* focused on public health to the total exclusion of moral considerations while minimizing (the impact on) male smokers’ rights:

Men who want to smoke may do so. Men and women who wish to avoid the contamination of the smoke should be permitted, and have the right to be able to do so. Under the law restaurant keepers can arrange to permit smoking in their places of business if they so desire. Those who wish to keep away from tobacco smoke need not and doubtless will not patronize their places of business.

To many people tobacco smoke is not only offensive but absolutely injurious; particularly it is distasteful to them when it contaminates their food. Smokers have no more right to infringe upon the rights of others in this regard than they would have of disturbing the peace or molesting the property of their neighbors in other directions. Men who smoke are accustomed to regulation, in railroad cars and theatres, for example. In such places they do not hesitate to comply with the requirement that if they want to smoke they must go to the special compartment designed for this purpose. ... The smoker’s personal rights are not taken from him. He may smoke in his home, on the street, in his office—almost any place, in fact, except those enclosed places into which the public comes

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1618*Utah Lawbreakers,* NYT, Feb. 23, 1923 (12) (edit.).
1619*Smoking and the Law,* DN, Feb. 23, 1923 (4:1) (edit.).
and where health, sanitation and the general welfare demand that the air be not defiled.\footnote{1620}

Astonishingly, after the smoking ban had been in force for almost two years and despite the intense and roiling public debate over it, the Mormon editorialist appeared confused about its scope. In stating that restaurant owners retained the right to permit smoking and that secondhand smoke non-enthusiasts could simply (continue to) avoid such places, the newspaper implied that the law had changed nothing, whereas in reality smoking was permissible only in special extra rooms. (The innovation by the Hotel Utah—owned by the Mormon church\footnote{1621} and the intermountain region’s leading hotel\footnote{1622}—initiated within three days of the first arrests, of maintaining two dining rooms, a smoking room on the main floor and a no-smoking room on the mezzanine, would have been compliant if the former rather than the latter had been the extra room,\footnote{1623} but in fact, as the Telegram precisely expressed it, “Hotel Offers Non-Smokers Private Room.”\footnote{1624} If, in contrast, the Deseret News was subtly intimating that the law was feckless because smoke drifted from those extra smoking-dedicated rooms into the main, non-smoking dining areas, which would thus not be smokefree, then the ban was a hoax and smokers would have had little reason to protest. However, this second interpretation appears implausible because the paper had already made the analogy to railroad smoking compartments without hinting that secondhand smoke foes had reacted defeatistically and simply stopped traveling by railroad.

If a top-down repeal movement was the sheriff’s objective, then Salt Lake City’s businessmen were rushing toward its achievement. By the second day after the initial wave of public smoking arrests—“all Republicans, by some curious coincidence”\footnote{1625}—about a hundred local businessmen (including Newhouse) met at the Chamber of Commerce and appointed a 15-member committee to appear before the legislature the next day “to provide other means of interesting the public in opposition to the anti-cigaret law and what was designated as ‘other freak legislation.’”\footnote{1626} The Chamber’s interest derived at least in part from its and

\footnotesize{\begin{itemize}
\item 1620 “Smoking and the Law,” DN, Feb. 23, 1923 (4:1) (edit.).
\item 1621 John Gunther, Inside U.S.A. 190 (1947).
\item 1622 “Salt Lake Fights Anti-Cigarette Law,” NYT, Mar. 4, 1923 (XX2).
\item 1623 “Crime Lull in Utah?” LAT, Feb. 24, 1923 (1:1, at 2:4). That profit trumped religious dogma was not unprecedented: the Hotel Utah had also served alcohol before Prohibition. Email from Prof. Thomas Alexander to Marc Linder (Aug. 21, 2011).
\item 1624 “Hotel Offers Non-Smokers Private Room,” Salt Lake Telegram, Feb. 23, 1923 (Local page, 1:6).
\item 1625 “Salt Lake Almost Pure,” LAT, Feb. 28, 1923 (sect. 2, at 10).
\item 1626 “Business Men Urge Repeal Cigaret Law,” DN, Feb. 22, 1923 (1:5). The chairman
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allied groups’ recent expenditure of $50,000 on advertising in eastern states designed to attract more summer tourist business, the achievement of which, the Chamber was concerned, might be jeopardized by news of the antismoking raids. This concern was heightened the next day when the Transcontinental Freight Bureau and the International Rate Association made it clear that they would refuse to hold their scheduled convention in Salt Lake on April 1 “unless assured that the delegates will not be subjected to arrest.” (In contrast, the Lions Club’s animus purported to be more straightforwardly ideological as it debated a resolution to “oppose all legislation intended to ‘reform humanity’...”).

After meeting with Senator Standish, the committee (including Newhouse) also “held informal conferences” with other House and Senate members in order to obtain a “census” of those who might favor or oppose the Southwick law. What that count revealed is unknown, but S.B. No. 108 was in enough trouble that its adherents, fearing its defeat in the Senate, tried to secure its introduction in the House, where, however, unanimous consent to do so was denied by two Nays and a motion to suspend the rules (to permit its introduction without unanimous consent) was easily defeated. Despite this further setback, what the press now dubbed the “nonpartisan and nonsectarian” “Antifreak Law League” was revving up its businessmen’s propaganda machine—insisting that the anti-

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1627 “No Tobacco Is Slogan,” LAT, Feb. 22, 1923 (1:8). Without any evidence, “So the People May Know,” Salt Lake Telegram, Feb. 20, 1923 (1:3), asserted that “our broad minded people,” in contributing to this fund, “expected that new legislators, representatives of the broader thought of Utah, would repeal this disgraceful lie” (i.e., the Southwick law).


1630 “Business Men Call on State Solons to Kill Cigaret Law,” DN, Feb. 23, 1923 (sect. 2, 1:4). The aforementioned Freed was assigned to sound out the governor on the Standish bill. According to “Protest of Cigaret Law to Be Shown by Blowing of Whistles Today Noon,” SLT, Feb. 24, 1923 (1:6-7), the committee was unable to meet with Standish.

1631 “Attempt to Kill Cigaret Law Blocked,” DN, Feb. 23, 1923 (1:7). These proceedings are not reflected in the House Journal.
cigarette law was “making Utah a joke to the rest of the country”—on behalf of a mass meeting on Saturday afternoon, February 24 at the Orpheum theater.\footnote{Antifreak Law League Launched; Legislators Deny Smoke Pledge,” \textit{SLT}, Feb. 23, 1923 (22:2-3).}

The holding of this meeting left Frederick Loofbourrow, who, as chairman of the Salt Lake County Republican committee and campaign manager during the recent election, was alleged to have made a secret pledge that the county “delegation would not tamper with the anti-cigarette law if elected,”\footnote{Antifreak Law League Launched; Legislators Deny Smoke Pledge,” \textit{SLT}, Feb. 23, 1923 (22:2-3).} in disbelief and resenting the businessmen’s lack of gratitude for the “‘proper spirit and purpose’” demonstrated by the “‘safe and sane’” legislators who thus far during the session had taken such pro-business action as defeating monopolistic insurance and added taxation and not proposing any sumptuary or income tax laws. The 1896 U.C. Berkeley law graduate, former state district judge, and future congressman lost his patience: “‘What more do the business interests of this state demand? Why hire a theater in order to blacken the reputation and standing of your fellow townspeople...?’”\footnote{“Protest of Cigaret Law to Be Shown by Blowing of Whistles Today Noon,” \textit{SLT}, Feb. 24, 1923 (1:6-7 at 9:3). For the biographical information, see http://bioguide.congress.gov/scripts/biodisplay.pl?index=L000435.}

The more than half-page paid advertisement that appeared in the \textit{Salt Lake Tribune}—which was both reporting in great detail on and cheerleading the repeal campaign—on the morning of the meeting left no doubt that businessmen were in control: “We are all stockholders in the Commonwealth of Utah and we all expect dividends from our investments and our efforts. We are entitled to legislative action that will not only protect our interests, but enhance their value, and when a legislature enacts a law like our Cigaret Law, that will provoke, however facetiously, an assumption that Utah is without the pale of the United States and itself a stench in the nostrils of the free peoples of America, it is time the free people of Utah act together in an effort to remove this impression.” Bizarrely, in unoverlookable contradiction of the movement’s underlying animus, the anti-freak law executive committee’s concluding line claimed: “We do not oppose the enforcement of any law on the Statute Books of the State of Utah.”\footnote{“Why Don’t You Move to America?” \textit{SLT}, Feb. 24, 1923 (7:4-7).}
The Tribune also editorially set the tone for the meeting by conjuring up a nightmarish Zion—that legislators “surrounded...with barb-wire entanglements of freak legislation”—in which “peace officers patrol the lobbies of our hotels for unsuspecting tourists and reckless business men” and from which Utahns “exclude fumigating desperadoes of commerce and travel who insist upon spending their smoke-tainted money in our stores, hotels and restaurants...”

At the meeting, whose more than standing-room-only attendance of more than 4,000 made for front-page headlines, speakers assailed the law for having “made criminals out of our most splendid citizens” and took issue with the claim (of the Deseret News) that tobacco smoke contaminated food or that “smoking in dining rooms was objectionable to many people.” Availing himself of a rhetorical tactic of which pro-tobacco forces are still enamored, Herbert R. MacMillan (a well-known lawyer and former president of the Utah State Bar Association) irrelevantly pontificated that: “Corn beef and cabbage...is obnoxious to some people, and they do not like to have it served at an adjoining table, but their objection would be a weak basis upon which to construct a law prohibiting the serving of such food.” In the end, the meeting decided to change the organization’s name from Liberty League of Utah to Party of Freedom, whose purposes were to “promote...the highest ideals of American citizenship, fair play, personal liberty, unrestrained [sic] government, to combat all freak legislation,” of which, according to the supporting resolution, the Southwick law, “deemed by a large and respectable portion of the citizens of...Utah to be an unjust and unwarranted curtailment of the rights and liberties of the people,” was the prime example, because: “Large sums of money have been raised and efforts expended to advertise to the entire nation the state of Utah, its scenery, its resources and its attractive possibilities, endeavoring to create a favorable impression abroad and to attract new people and new capital[, whereas, the effects of such advertising are nullified by the continuance of and enforcement of such legislation as the Southwick anti-tobacco law making the state of Utah an object of ridicule among the people of our sister states.”
The day after the mass meeting the *Salt Lake Tribune* seamlessly picked up editorially where its biased reporting had left off. In concentrated form its position expressed the either ignorant or make-believe view that behind Southwick-type state intervention stood nothing but moralistic “superannuated puritanism” bereft of even the slightest whiff of public health logic and intruding into harmonious social life in a nation in which no sane adult male had ever contested the monopolization of public breathing space by smokers:

Deputies have invaded restaurants and hotels where...customers have smoked from time immemorial; inoffensive, upright citizens have been apparently singled out for the obvious purpose of making examples of them in order to intimidate others and cause the iron hand of intolerance to be felt in the community.

These smokers were annoying no one, nor had anyone present made complaint; the cigars had not made them sick, nor hilarious, nor belligerent in conduct nor in speech; there were no ladies present and no known reason for laws or officers to interfere with the harmless enjoyment of an after-dinner smoke in a peaceful gathering of mutual friends and acquaintances.

After disregarding the facts that Utah legislators had debated the public health consequences of secondhand smoke exposure at length in 1921, that the law did not place the burden of enforcement on private complainants, and that, although at least the public smoking ban may not have been enforced in 1921 or 1922, Sheriff Harries had put Salt Lakers on notice seven weeks earlier that he would enforce it, the *Tribune* went on to castigate both owners who dignified the law by simulating compliance with it and anti-smoking customers who insisted on foisting cleaner indoor air on smokers despite the existence of pre-Southwick smoke-free restaurants thanks to market demand or owners’ proprietary preferences:

Placards are being displayed notifying smokers that they may continue to smoke in rooms where they always have smoked, at tables where they have been arrested for smoking, provided some separate nook, corner, room or alcove is indicated where smoking is not

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Meeting,” *Salt Lake Telegram*, Feb. 25, 1923 (1:1, 4:2), reported the speech by the meeting chairman, which was overtaken by events, denying reports that the committee calling the meeting intended to form a new political party; rather, stated Lester Freed, “it was purely a meeting of liberal minds...looking to the correction of a condition that had become unbearable.” On MacMillan, see *History of the Bench and Bar of Utah* 171 (1913).

permitted.

This is nothing but a subterfuge. It has always been possible for diners to whom smoking was objectionable to patronize places where signs forbade indulgence in the weed. They did not have to go to restaurants where practically everybody enjoyed smoking after meals.  

In contrast, the Telegram, which was, arguably, even more hostile to regulation, focused its attack on the moral dimension. Because Standish had retained Southwick’s partial public smoking ban, the newspaper’s prominent front-page editorial (bearing the page’s only headline in large, thick, upper-case, bolded letters) concluded that both act and bill “protect[ ] the nonsmoker against what he may deem an infringement of his rights. The nonsmoker is not injured by the sale of cigarettes when they are not smoked in his presence.” To be sure, since most (even enclosed) public places were not covered, this latter claim was hardly robust, but since it applied to both Southwick and Standish equally, it could withstand scrutiny. Where it broke down was in its neglect of the impact that the lawful sale of cigarettes had both on their perceived normality and on their attractiveness to children. The Telegram sought to minimize this difference by asserting that the Southwick law (like Standish’s bill) imposed “no legal restraint over the purchase of cigarettes” because it “casts no reflection on the man who buys his smoking materials in another state.” But this argument overlooked three important differences: (1) the diminished spontaneity associated with being forced to place mail orders—rather than being intrusively reminded of cigarettes’ availability on every commercial district street—presumptively reduced consumers’ purchases and use; (2) the prohibition of in-state sales and the compulsion to order from other states, again, interfered with children’s perception of cigarettes as a normal commodity; and (3) but for the constitutional constraints of the interstate commerce clause, anti-cigarette militants would have banned imports for personal consumption as well. The editorial then unjustifiably concluded that: “In a moral way the Southwick law has no

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1642SLT, Feb. 25, 1923 (edit. sect. 2, 2:1).


1644SLT, Mar. 4, 1923 (24:2-3 at 3).
advantage over” the Standish bill because “[n]either one prohibits or discourages smoking; neither one encourages it.” Rather, in deciding whether to amend the existing law, legislators “face two identical propositions, with the one exception that the one provides a revenue of $300,000 a year while the other does not.” This claim was irrevocably undermined both by the Telegram’s suppression of the crucial fact that the Southwick law prohibited cigarette advertising and by the pretense that those liberty-loving smokers who were allegedly driven by respect for the law would have welcomed strict enforcement of the law because it was the ‘hypocrisy’ of unenforced prohibition that disturbed them beyond the substance of the sales and public smoking bans themselves. Yet their reaction to Harries’ raids demonstrated beyond doubt that it was that pretense that was hypocritical.

The real point of contention between the anti-cigarette sales movement and cigarette smokers emerged in a comment made a few days later by Milton Bennion of the Social Welfare League explaining his allies’ support for the Southwick law as rooted in their thinking, “‘whether correctly or not, that with the local sale of cigarettes forbidden it would be easier to prevent sale [sic] to minors.’” This sales focus was even more derivative because advocates, who had acted on legal advice that prohibiting cigarette advertising while permitting cigarette sales would have been unconstitutional, regarded “‘alluring cigaret billboard advertisements...as a menace to youth and a hindrance to the enforcement of the law which forbids the use of tobacco to minors. ... This was at least one reason why they adhered to the clause prohibiting sale.’” In light of the several logical and socio-psychological steps separating the total ban on in-state cigarette sales and the basis for it that Bennion conceded, he and his comrades would have had a difficult argument to fashion to persuade adults that they should sacrifice their freedom to buy cigarettes whenever and wherever they pleased solely in order to shore up the constitutional basis for prohibiting billboard ads that might tempt children to start smoking. But since they never undertook to construct and debate such reasoning with adult smokers in 1923 (or 1921 for that matter), it is easier to understand why they may have been willing to accept a compromise amended law that jettisoned the sales prohibition but

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1646“So the People May Know,” Salt Lake Telegram, Feb. 25, 1923 (1:3-5).
1648In 1921, for example, the editor of the B.Y.U. student newspaper stated at the Senate Judiciary Committee hearing on the Southwick bill that “[p]ersonal rights...ought to be sacrificed to protect the young people of Utah”; a ban on cigarette ads would, moreover, put an end to the growth of smoking. “Fistic Encounter over Cigaret Measure Marks Bitter Capitol Dispute,” SLT, Feb. 2, 1921 (10:2-3).
retained (and expanded) the advertising ban in the hopes that somehow the latter would be judicially upheld even in the absence of the former (as in fact it was). To be sure, the reverse hope may well have motivated some pro-tobacco forces to acquiesce in the compromise.

John Lynch, Bamberger’s Vienna Cafe lunch-mate, did not attend the Orpheum meeting, but did hold strong capitalist-class opinions about what had led up to and should flow from it, which he shared with the L.A. Times a few days later on his arrival in Los Angeles for his annual winter vacation (and not, he insisted, as a refugee from the due process of law):

“The trouble with Utah is one man holds too much power there. Heber J. Grant of the Mormon Church is heeded in his command by too many people. ... It was his influence that defeated the Republican party last fall, even against the best efforts of Senator Smoot to elect Ernest Bamberger to the Senate.

But there are a lot of good people in Utah and many young Mormons are quite as zealous for an anti-church party as the so-called Gentiles. They were calling me up repeatedly on the telephone urging such an organization, and many appeared at the preliminary non-church meeting at Salt Lake City, recently. ... The initial meeting was all that could be asked as a protest against freak legislation for the State.

While a third party may be the only solution, many of my class deplore this constant turmoil that an anti-church fight creates. It does not help the business of the State. At the same time, we recognize how ridiculous it is for strangers to be arrested, as they may be while standing in the pavilion at Saltair, innocently smoking while looking over the scenic beauty of America’s dead sea. The anti-smoking law is not right and should be repealed.”

Despite the mass meeting in Salt Lake City, “no concerted opposition” was reported in Utah’s smaller cities. In fact, in the provinces “[a]ntitobacco crusades promising a temporary rigid enforcement” of the Southwick law had sprung up. For example, city commissioners in Logan decided to enforce all of its provisions, preliminarily ordering the police to notify all dealers that cigarette

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1649 “Grant Is Wavering,” LAT, Mar. 1, 1923 (1:5, 2:4). Prof. Thomas Alexander, a leading Mormon historian, when asked about Lynch’s criticism of Grant, expressed the belief that most businessmen in Utah did not feel that way about Grant—who was a businessman himself before and during his presidency—whose attitudes generally coincided with the business community’s. Email from Tom Alexander to Marc Linder (July 21, 2011). Lynch’s remarks may in part have been dictated by the needs of the aforementioned legal action to unseat Sheriff Harries on the grounds of the Mormon church’s and Grant’s undue influence over Mormon voters, which, as Lynch mentioned in the interview, would form one of the bases of his defense against prosecution for smoking.
sales had to stop; once they, in turn, passed this word on to their customers, their
stocks were quickly depleted.\textsuperscript{1650} The intense focus of public controversy
surrounding the Southwick law may have turned to its smoking ban—after a two-
day hiatus in arrests in Salt Lake City the slack was taken up in Provo, where an
18 year-old in a restaurant became that city’s first\textsuperscript{1651}—but purchasing cigarettes
in the state capital had also become “increasingly difficult.”\textsuperscript{1652}

By the last days of February, the “fight between pro and anti tobacco forces
in the Utah...ha[d] developed into the bitterest political controversy of the
decade...”\textsuperscript{1653} As the end of the legislative session loomed, the executive
committee of the newly organized Party of Freedom—which “rose like the fabled
Phoenix from the ashes of forbidden cigarettes smoked in Salt Lake City” and
was “accepted by some as an indication of a renewal of the bitter controversy

\textsuperscript{1650}“Utah Smokers Feel Pinch of Southwick Law,” Salt Lake Telegram, Feb. 27, 1923
(Local page 1:7).

\textsuperscript{1651}“First Cigaret Smoker Arrested in Provo,” Daily Herald (Provo), Feb. 25, 1923
(1:6-7).

\textsuperscript{1652}“To Protest Cigarette Law,” NYT, Feb. 24, 1923 (6). Despite the nationally
decline vitality of statewide tobacco-related bans, at exactly the same time such measures
were introduced in several legislatures. A bill prohibiting the manufacture and sale of
cigarettes in the Texas House of Representatives was almost immediately killed in
committee before ever reaching the floor. “Fine for Manufacture or Sale of Cigarettes
Proposed in House Bill,” GDN, Feb. 25, 1923 (6:2); “Where Texas Should Not Imitate,”
San Antonio Evening News, Feb. 28, 1923 (4:1) (edit.). Four bills to prohibit advertising
cigarettes or tobacco for smoking or chewing, sale or smoking of cigarettes, and smoking
in public eating places were indefinitely postponed when the Indiana House adopted
committee reports to that effect. Journal of the House of Representatives of the State of
Indiana During the Seventy-Third Session of the General Assembly...1923: Regular
Session, 41, 44, 70, 124, 318, 441, 532 (Jan. 11, 17, 24, Feb. 9, 16, 21) (1923) (H.B. No.
48, 62, 208, 469, by Peterson, Shall, Peterson, and Brown); “State Senate Now Finished
with Budget,” Kokomo Daily Tribune, Feb. 21, 1923 (1:2). A bill to prohibit selling or
smoking of cigarettes or possession of the makings was killed in the Washington House.
Chehalis Bee-Nugget, Feb. 23, 1923 (4:2) (untitled edit.); “Anti-Tobacco Bills Fail in
Washington,” USTJ 99(10):7 (Mar. 10, 1923). The Vermont Senate killed a bill to
prohibit cigarette sales. Id. Ohio House Bill 257 to protect the children by prohibiting
the manufacture, sale, and use of cigarettes and cigarette papers (and imposing a $10-$20 fine)
did not make it out of committee. Journal of the House of Representatives of the Eighty-
Fifth General Assembly of the State of Ohio: Regular Session...1923, at 195, 215 (Feb. 6,
7) (by John T. Brown) (vol. 110, 1923); “Cuyahoga-Co to Force Minimum Wage Bill

\textsuperscript{1653}“Cigaret Bill Fight to Shift to Legislature,” Salt Lake Telegram, Feb. 26, 1923
(Local page 1:6).
waged for years between the old American party and the [Mormon] church"—urgently convened in order to press for passage of the Standish repeal bill, which the new group had indorsed. And the Salt Lake Tribune was doing its utmost to enhance the chance for last-minute action in the legislature by publishing long articles detailing the humiliating ridicule that was being lavishly heaped upon the anti-cigarette and anti-smoking law and, therefore, upon Utah as well, throughout the United States. In addition to reprinting a potpourri of editorials from big-city dailies, it devoted a front-page article to a remarkable meeting at the Boston Forum, where “eminent clergymen, prominent physicians and attorneys scathingly flayed the attempts to send Lady Nicotine across the river Styx” and denounced “the war being waged against tobacco users” in Utah (and other states) as “undemocratic, unconstitutional and ridiculous....” A certain Dr. J. R. McCarthy produced the high point of the Sunday afternoon’s apologia for laissez-faire smoking by asserting that “90 per cent of the skilled surgeons of the country are heavy smokers, in some cases even during delicate operations....” Smoking “considerably” himself, McCarthy so strongly felt and knew that he had that right—just as Utahns did to bathe in the Atlantic Ocean—that he transcontinentally declared his intention to violate the law should he ever travel to Utah.

Curiously, four days later, as the Southwick repeal bill was finally proceeding through the legislature, when the Tribune resumed its review of the out-of-state press reaction to the Utah anti-smoking law, it included editorials from New York City newspapers demonstrating that public places had been and continued to be contested space between smokers and nonsmokers. While the Tribune was

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1654 “Salt Lake Fights Anti-Cigarette Law,” NYT, Mar. 4, 1923 (XX2). Inasmuch as the organization began to succeed within several days of its founding, it is difficult to credit the report that “despairing of positive action by the present Legislature, [it] was perfecting plans for a State-wide organization to obtain the election two years hence of members of the Legislature pledged to repeal the Southwick anti-cigarette law....” “Ask Lighter Tobacco Ban,” LAT, Mar. 2, 1923 (1:3-4). Party formation pursued larger objectives: Ernest Bamberger and the group controlling the Utah Republican Party promoted the Party of Freedom, which was eventually given the name of the old anti-Mormon American Party, but it was killed after its decisive defeat in the Salt Lake City Commission elections later in the year. Thomas Alexander, Mormonism in Transition: A History of the Latter-Day Saints, 1890-1930, at 56 (1996).


constrained to concede that the “arrest of smokers in public places is not a new
undertaking,” the Ogden Standard-Examiner added that some editorial writers
had “discover[ed] some small degree of merit in the effort to curb smokers.” For example, the New York Sun pointed out that while many in the East might
find the Salt Lake City arrests “a strange invasion of personal liberty,” just the
previous day

a dozen men were fined for smoking in a New York subway station and might have been
likewise punished for smoking in an elevated train or street car. The Utah law is an
extension of these regulations to other public places.... It apparently is based on similar
grounds—the discomfort caused to non-smokers when forced to go about in public rooms
filled with tobacco fumes.

Smoking in public places, indoors or out, has not always been considered proper. In
former days fastidious gentlemen did not smoke in the streets or even in their own dining
rooms.

To be sure, the Sun observed that it would no longer be easy to find a tobacco
smoke-free restaurant in central parts of New York City or any other large U.S.
or European city, but understood that it was “[p]robably...the tendency to smoke
everywhere and at any time, a comparatively recent one, that brought about
Utah’s strict legislation.” Nevertheless, the newspaper objected to Utah’s
“opposite extreme” of protecting non-smokers from discomfort as “unfair to the
smoker” in places like restaurants, whereas elsewhere the practice had “safely
been left to custom”—without explaining how indiscriminate smoking was
safe for the discomforted.

The New York Mail modified and corrected the Sun’s account to the extent
of mentioning that in fact some restaurants in New York allowed smoking in their
public rooms, while other restaurants and hotels did not allow smoking in some
dining rooms and in others did: “There have been arrests in New York for...a
breach of the peace which followed in restaurants when the waiters tried to make
the smoker desist.” Nevertheless, this paper, too, saw no need for a law: sounding

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1658a “Arrests of Smokers Awaken Press Comment of Eastern Papers on Utah,” SLT, Mar. 2, 1923 (14:3-5 at 3).
like cigarette manufacturers later in the century, it deemed “[o]rdinary courtesy” and regard for others’ claims adequate to confine smoking to places especially set apart for it.1662

Evisceration with Mormon Church Connivance (1923)

If there is any one rule of the [California] assembly that...is “cussed and discussed” more than any other, it is Rule 71, forbidding smoking while sessions are on. When the afternoon session started yesterday somebody moved to suspend the rule, and it was so ordered. Pretty soon it appeared that Governor Mabey of Utah was to be the guest of the assembly.

“Mr. Speaker,” said Miss Broughton, “inasmuch as they have a law against smoking in Utah, it seems to me it would be courteous to Governor Mabey if we suspended the suspension of Rule 71, while he is in the chamber.”

“But Mr. Speaker,” said Frank Eksward, “that law has been repealed, at least in part, so I don’t believe we need stop smoking for the Governor.”

“Mr. Eksward,” rejoined Speaker Merriam, “the repeal of the Utah law is not effective until May, so I think we might dispense with the smoking while the Governor is with us.”

It was so ordered, the windows were opened, and the atmosphere was clear when the Governor arrived.1663

Despite these multifarious nationwide expressions of solidarity with Utah’s smokers, S.B. No. 108 “appeared to be in danger” during the morning of February 27, when Senator LeRoy Dixon, a member of the Public Affairs Committee who was not viewed as the bill’s friend1664—indeed, pro-Southwick senators were already “mustering” under his leadership1665—moved for taking it up immediately as a special order, prompting suspicion that his purpose was “murderous.”1666 (A Mormon, Dixon, like Southwick, had attended Brigham Young Academy.)1667 He


1664a. To Consider Cigaret Bill Today,” SLT, Feb. 28, 1923 (8:1).


also performed magnificently as a turn-the-other-cheeker during a “Fistic Encounter” with President Church P. Castle of the Utah Manufacturers’ Association in the capitol following a Senate Judiciary Committee hearing on Southwick’s bill, at which Dixon, as mayor of Provo, spoke in favor and Castle against the measure.1668 Because, fortuitously, his motion was procedurally out of order, before he had time to offer a motion to strike the measure’s enacting clause (and kill it), Standish moved to make his own bill a special order for the afternoon. When he explained that “a committee representing various sides on the tobacco question was at work...to frame a compromise” and would probably decide the issue by that time, no senator opposed his motion.1669

The lobbying efforts of the businessmen’s Party of Freedom (to smoke wherever smokers wanted) bore first fruit on February 28 in the Senate, which, on the motion of Senator Jenkins, who had voted against Southwick’s bill in 1921, recommitted S.B. No. 108 to the Public Affairs Committee.1670 The chamber took this step after Standish had stated that the so-called citizens’ committee had requested recommittal so that certain amendments might be

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1:2). In 1921, as mayor of the Mormon center of Provo, Dixon had actively participated in committee hearings on the Southwick bill. “Compromise Cigaret Bill Is Introduced in Senate,” SLT, Mar. 2, 1923 (22:5).

1668The assault occurred after Castle had persisted in claiming that no efforts had been made to enforce the no-tobacco-sales-to-minors law despite Dixon’s statement that he had tried to enforce it during his 10 years as head of Provo’s public safety department. Dixon’s charge that Church was a liar prompted the latter to invite the former to take off his glasses; when Dixon did so, holding them in both hands with his arms extended downward, “Castle struck the Mayor a stinging blow on the head”; acceding to Castle’s invitation to “‘come over here,’” Dixon “invited the Salt Laker to go ahead and hit him again. ‘I will not strike you.’” “Fistic Encounter over Cigaret Measure Marks Bitter Capitol Measure,” SLT, Feb. 2, 1921 (10:1). See also “Come to Blows at Utah Hearing on Measure to Ban Cigarettes,” NYT, Feb. 2, 1921 (13); “Manufacturers of State in Meeting,” OE, Jan. 15, 1920 (4:3). Aggressive appears to have been Castle’s general approach to public policy disputes. In the course of his testimony before the Senate Judiciary Committee he tried to kill two birds with one stone in alluding to calls for increased taxation: “‘Are you going to raise taxes from the W.C.T.U., or from the Brigham Young college, or from business men?’” “Fistic Encounter over Cigaret Measure Marks Bitter Capitol Measure,” SLT, Feb. 2, 1921 (10:1-3 at 3).

1669To Consider Cigaret Bill Today,” SLT, Feb. 28, 1923 (8:1). According to Senate Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 433 (Feb. 27), on Standish’s motion his bill was made a special order for the following afternoon (Feb. 28).

offered; his own belief that the section in his bill retaining Southwick’s public smoking ban—which had “met with some objection”—would be the one targeted for amendment was both accurate and by this point an almost risibly vast understatement. The private group from which Standish was taking direction had met the night before at the exclusive Alta Club—which from its founding in 1883 had “attracted the financial, industrial and social leaders of the west”—at which “representatives of all parties interested in the anti-cigaret bill, for and against the amendment,” as well as legislators discussed whether anything could be done so late in the session to pass a “more workable law.”

In fact, the marathon meeting, at which “lay leaders” of both the pro- and anti-tobacco forces were said to have achieved sufficient common ground to persuade optimistic observers that enough House and Senate members could be mustered to pass a compromise bill, had lasted from 9 a.m. until 11 p.m. Hope for breaking the legislative deadlock was rooted in the presence of conservatives “aligned on both sides” who favored “some adjustment” between the “extremists on both sides,” to “a considerable following” of whom Standish’s bill had proved “unacceptable in some points”: whereas “[a]nti-tobacco radicals had previously” insisted that the Southwick law be retained intact and their counterparts demanded repeal, the compromisers sought to insure the prevention of juvenile use and protection of “the rights of nonsmokers” while granting a “full measure of personal liberty to adult users of tobacco.”

1671 “Senate Blocks Judgeship Cut,” DN, Feb. 28, 1923 (1:1).
1673 “Restaurant Smoke Room Designations to Be Questioned,” DN, Feb. 28, 1923 (1:3). The next day the L.A. Times published a front-page canard, which without attribution was clearly derived from the foregoing article, but in headline and subheads shouted: “Grant Is Wavering. Recedes on Utah Smoking Law. Mormon Church Head calls Conference to Discuss Changes in Act.” It claimed that the prospects for amendment had improved “as a result, it is intimated, of the quiet influence of President Grant of the Mormon Church in the direction of adjusting the matter.” The paper admitted the lack of any confirmation of Grant’s reported personal interest, but asserted that “men prominent in church councils were present” at the “secret meeting at the Alta Club....” “Grant Is Wavering,” LAT, Mar. 1, 1923 (1:7). The introduction the very next day of the substitute for Standish’s bill prompted the newspaper to concede that the day’s events had “disposed of reports that at a secret meeting at the Alta Club, representatives of the dominant church expressed sympathy with the movement” to modify the Southwick law: “it is known that leaders of the church are opposed to touching the present law.” “Ask Lighter Tobacco Ban,” LAT, Mar. 2, 1923 (1:3-4, 2:6).
1674 “Modification of Southwick Cigaret Bill Seems Likely as Compromise Is Proposed,” Salt Lake Telegram, Feb. 28, 1923 (Local page 1:1). Because the first five or
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Seemingly unfazed by this amendatory process, Sheriff Harries initiated an innovative phase of prosecution against another downtown cafe owner, Nelson Van Dyke—the ubiquitous Deputy Mauss was the complaining witness—to test restaurant operators’ right to designate “the major part of their places of business as smoking rooms or compartments.” When Mauss and another deputy entered the Van Dyke Cafe the owner was standing near the cash register smoking a cigar; they told him that he was under arrest despite his statement that he had displayed a “‘This is a smoking room’” sign in the cafe proper and posted “‘No smoking allowed’” signs in three booths or compartments. While confirming the existence of the signs, the deputies explained to the press that all were printed in small type and that the object of the arrest was to “test what constitutes a smoking room or compartment in cafes.” Harries intervened to deal with owners’ swiftly proliferating practice of posting signs, in response to his first wave of arrests, permitting smoking in the “main portions of their dining rooms as smoking rooms,” while “reserving but the smaller compartments or private booths” as smoking prohibited, which the sheriff (correctly) viewed as “contrary to the spirit and meaning of the law....” The aforementioned Hotel Utah would, the irrepressible Harries announced, be the next test case. Shifting his focus to another section of the Southwick law, on March 2, accompanied by Mauss, Sheriff Harries personally raided three cigar stores (including one owned by the United Cigar chain), confiscating cigarettes at two of them.

In its March 1 morning edition the Tribune disclosed that

so letters of each line of the left-hand column disappeared into the gutter of the tightly bound volume from which the newspaper was microfilmed/digitized, some of the words had to be guessed at; although “nonsmokers” makes more contextual sense than “smokers,” it is not entirely certain that there is sufficient space for the former.

1675* “Restaurant Smoke Room Designations to Be Questioned,” *DN*, Feb. 28, 1923 (1:3).
1677* “Restaurant Smoke Room Designations to Be Questioned,” *DN*, Feb. 28, 1923 (1:3). A cafe owner succinctly stated his self-interestedly false interpretation of the law: “‘It is only necessary...to set aside a single room of [sic; probably should be “or”] compartment for nonsmokers and the rest of the cafe can be designated as a smoking room.’” “Hotel Offers Non-Smokers Private Room,” *Salt Lake Telegram*, Feb. 23, 1923 (Local page, 1:6).
a committee of representative men...are seeking a sane solution of what has become a most troublesome problem in the state. The committee includes some legislators from both houses. It includes some of the most prominent business men of Salt Lake, of whose whole hearted interest in the temporal welfare of the state there cannot be the slightest doubt. And it includes some representatives of the leading religious thought in the city and state—men recognized as church leaders.

The committee, in other words, is composed of men from both the anti-cigaret and the personal liberty side of the present argument. ... Whether it would be possible to adopt a middle ground on a question and problem upon which views are frequently so radically different has been a matter of some doubt. If present hopes are fulfilled...a bill which conservative churchmen approve, as well as conservative business men and leaders of thought on both sides of the cigaret question, can be evolved.\textsuperscript{1679}

The committee was considering four features of a possible bill, three of which—the Iowa-borrowed licensure and tax regime and the public smoking ban—were already incorporated into the Standish bill; the fourth—the ban on cigarette advertising—was already in force under the Southwick law, though Standish had excluded it from his bill. With regard to the smoking issue, whereas S.B. No. 108 simply retained the existing law, the committee was discussing permitting restaurant and barber shop owners to reserve a part of their premises “as compartments, separated from the main eating room or shop by partition,” provided that a sign indicated the smoking-designated area.\textsuperscript{1680} Compared with the Standish bill, this iteration offered the anti-tobacco forces potentially stronger smoking regulation and retention of the advertising ban without giving the pro-tobacco movement anything that was not already in S.B. No. 108, which, to be sure, already proposed the overriding goal of abolishing Southwick’s cigarette sales ban.

At the Senate’s afternoon session that same day the Public Affairs Committee reported its unanimous recommendation that S.B. No. 184, its substitute for Standish’s bill, be passed; by virtue of being a committee substitute its course was streamlined and upon its introduction the bill was immediately placed on the second reading calendar.\textsuperscript{1681}

Like the 1921 Iowa law\textsuperscript{1682} and S.B. No. 108, the committee substitute repealed the cigarette sales ban, replacing it with a local option licensure system;

\textsuperscript{1679}“Licensing and Sales Tax on Cigarets Are Advocated,” \textit{SLT}, Mar. 1, 1923 (24:3-4).
\textsuperscript{1680}“Licensing and Sales Tax on Cigarets Are Advocated,” \textit{SLT}, Mar. 1, 1923 (24:3-4).
\textsuperscript{1682}See above ch. 15.
although it doubled the annual license fee for sellers in first-class cities, $1001683 was by no means “heavy.”1684 Similarly, the new bill imposed a one mill per cigarette tax,1685 which was now guesstimated to generate $300,000 in state revenue.1686 S.B. No. 184 also exceeded Standish’s bill in stringency in extending the ban on furnishing, giving, or selling cigarettes to minors under 21 to include “any tobacco of any kind whatever.”1687 The most expansive feature of the committee substitute was its incorporation of cigars, chewing tobacco, and smoking tobacco into the existing law’s broad prohibition of cigarette advertising,1688 which prompted the Tribune to comment that the bill “out-Southwicks Southwick....”1689 Finally, the Senate Public Affairs Committee sought to deal with the “furore”1690 over the arrests of violators of the smoking ban in public enclosed eating places by adding (on to the existing provision concerning “extra rooms”) an exception that

the owner or proprietor of any hotel dining room, restaurant, cafe or cafeteria may designate by a conspicuous sign a part or portion of the same as a public smoking room provided that such part or portion shall be separated by a partition so constructed as to prevent the passage of smoke from one of such parts or portions of such rooms to the

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1686“New Cigaret Bill Introduced,” DN, Mar. 1, 1923 (1:1). Why the amount was doubled in relation to S.B. No. 108 is unclear.
1687S.B. No. 184, § 1 (Substitute for S.B. #108, by Public Affairs Committee, 1923), on http://images.archives.utah.gov/cdm4/document?php=CISOROOT=/428&CISOPTR&23769&REC=4. The new bill also restructured the penalties without clearly making them more severe. Standish would have imposed a $25 to $100 fine or a 30-day jailing for first offenses and $100-$500 or one to six months for additional offenses; S.B. No. 184 imposed a uniform fine of $25-299 for all offenses and/or a maximum six-month imprisonment.
Although this language might at first blush appear to have diluted the “extra rooms” regime and therefore constituted a “concession[ ],” the requirement that partitions render the non-smoking section “tobacco smokeproof”—“[i]f a whisp [sic] of smoke gets into that room from the adjoining section, the proprietor is a law violator”—that is, totally protect people in the non-smoking parts from exposure to smoke produced in the designated smoking rooms would, as the Tribune pointed out, often make such physical reconfigurations financially unaffordable: “in many instances the restaurateur will be unable to comply with this provision without going to lengths which will make him hesitate before he undertakes to alter his premises so as to permit smoking....” To be sure, where owners could afford to undertake such renovations, S.B. No. 184’s lack of a provision guaranteeing non-smokers a certain minimum proportion of the establishment’s floor space would have made it possible for them practically to be squeezed out of the use of such eateries. As the Telegram put it: “there

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1691 S.B. No. 184, § 4 (Substitute for S.B. #108, by Public Affairs Committee, 1923), on http://images.archives.utah.gov/cdm4/document.php=CISOROOT=/428&CISOPTR=23769&REC=4. Less controversially, the bill also essentially codified existing enforcement by a proviso that “in any state, county or city building, any public officer who has a private office separate and apart from his public office, he [sic] may if he so desires, designate such private office as a place where smoking may be permitted, and so long as such private office is so designated, smoking therein shall not be considered a violation of this act.” Id.


1693 “Cigaret Measure Contains Startling Clauses,” Salt Lake Telegram, Mar. 2, 1923 (Local page 1:3, at 3:3). Letting its sarcastic imagination run wild, the Telegram added: “The proprietor of any restaurant or barber shop...must have an inclosed section for the nonsmoker. One or two barber chairs may be glass inclosed for the nonsmoker or so sealed that there is no chance of smoke getting in. In the same way one or two stools or tables in a restaurant may be similarly inclosed.”

1694 As a result, these partitions differed qualitatively from the feckless ones provided for under the Minnesota Clear Indoor Air Act of 1975. See below ch. 24.

1695 “Compromise Cigaret Bill Is Introduced in Senate,” SLT, Mar. 2, 1923 (22:5-6). This financial burden presumably underlay cafe, restaurant, and downtown hotel managers’ belief that the new bill “would prove more onerous than the law it would displace.” “New Smoking Ban Decreed,” LAT, Mar. 4, 1923 (1:4-5, at 2:1).

1696 Perhaps such a consideration prompted Senator Dixon’s judgment that the public smoking provision was the bill’s “only weakness.” “Advertising of Tobacco Would Be Prohibited,” Salt Lake Telegram, Mar. 1, 1923 (1:7).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

must be room for at least one nonsmoker in the place of business.1697

Although Standish opined that certain amendments might be offered, he stated that he accepted the bill, and he and Public Affairs Committee Chairman John W. Peters agreed that S.B. No. 184 “would meet with less objection than” Standish’s proposal.1698

Abstracting from S.B. No. 184’s proposed repeal of the cigarette sales ban, the Tribune’s judgment was plausible that: “Boosted as a compromise measure, arranged between friends and foes of the Standish measure, the bill bears every indication that the foes of that bill were at least very much in evidence, if not the controlling factor at the conference of the committee...in reaching this solution of the problem presented to the state in the attempted literal enforcement of the Southwick act.” Much less plausible, however, was the claim that the measure “would throw more stringent regulations around both the use and sale of tobacco than anything that has been accomplished under the Southwick act....”1699

The Telegram, an even more radical opponent of regulation, also saw the substitute as a vehicle of reconciliation by virtue of its merging and embracing “essential features” of the Southwick law and Standish’s bill, which “represented extremist views of the pro and anti tobacco forces,” leaders of which endorsed the committee bill. “Antitobacco chiefs” rationalized their support on the grounds that it strengthened the existing law by focusing on the main objective of preventing the spread of cigarette and tobacco use to minors, whereas “[p]rotagonists of personal liberty in matters of habit” argued that “tobacco users can have no objection” to enactment of the substitute since “it takes full cognizance of the personal rights of of adult users of tobacco.”1700

Very quickly the latter would be disabused of their premature enthusiasm for the original text of S.B. No. 184. The next day the Liberty League’s 15-member committee branded the bill as “‘far worse’” than the Southwick law and declared

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“Cigaret Measure Contains Startling Clauses,” Salt Lake Telegram, Mar. 2, 1923 (Local page 1:3, at 3:3).

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“New Cigaret Bill Introduced,” DN, Mar. 1, 1923 (1:1). A Mormon, Peters had a B.S. from Utah State Agricultural College, did one year of post-graduate study at the University of California, and taught high school social science before becoming mayor of Brigham City, where he owned a jewelry business and fruit orchards. At the 1921 session he had been Republican floor leader. J. Cecil Alter, History of Utah, the Storied Domain: A Documentary History of Utah’s Eventful Career, vol. 2 (1932), on http://files.usgwarchives.net/ut/state/bios/alter/p/peters-johnw.txt (visited July 25, 2011).

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their “unqualified opposition” to it. Instead, they urged the straightforward repeal of the existing law “as the only consistent stand for liberal thinkers to take.”

During the recess between the morning and afternoon sessions on March 2, Chairman Peters, based on soundings he had taken, predicted that the bill would pass the Senate unanimously. Yet in spite of that confidence, he was still undecided as to whether he would move to suspend the rules that afternoon in order to consider the bill on second and third readings so that it could immediately go to the House. Bizarrely, Peters denied that his committee’s bill was a “‘compromise’”: “‘It is not a new measure in any sense but a strengthening of the Southwick act’” by virtue of the expanded tobacco advertising ban. Moreover, he appeared to be motivated by moral rather than public health concerns: “‘The measure has the support of the best people of Salt Lake. It is the result of the combined efforts of those standing for high morality, and is enforceable.’”

Just before the afternoon session and the bill’s second reading got underway, the Deseret News went to press with an editorial that revealed that the Mormon church had abandoned its defense of the Southwick law and the two-year-old ban on cigarette sales. Once the law’s principal supporter had signaled that it was seeking to salvage as much as possible of the bans on public smoking and advertising in exchange for local-option licensure, repeal of the one and passage of the other became a foregone conclusion. The capitulatory editorial was based on the claim that the purpose of anti-tobacco legislation was to discourage use among youth on the grounds that if tomorrow’s men can get through childhood “without having acquired a taste for tobacco” (and especially for cigarettes), “most of them will go through life without the habit.” As far as the Southwick law was concerned, the newspaper could not deny it had not been enforced, especially in the larger cities and towns; but rather than asserting that it was unenforceable, the editorialist merely stated that its enforcement had not been “insisted upon,” adding that if law enforcement officials had acted “vigorously” from the very beginning, it was “quite likely” that by March 1923 compliance would have been “general.” Without explaining why the Mormon church had not insisted on enforcement, he expressed understanding that when, suddenly, an effort was made to enforce, the resulting “furore...quite naturally assumed large proportions and did considerable damage to the state.” In what can only be

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1702. “Cigarette Bill to Be Expedited,” DN, Mar. 2, 1923 (1:1). Peters also stated that he would oppose any amendments to the tobacco advertising ban on the grounds that it was “entirely constitutional to the best of his belief.”
viewed as an admission that the anti-tobacco movement had committed an historically irreversible strategic error that doomed the stringent Southwick law’s viability and required enactment of an at best amended compromise law, the Deseret News wrote: “The intensity of feeling aroused and the enmity created on the part of some gave rise to the necessity of seeking to formulate a plan by which the chief differences might be composed and the welfare of the state in all its phases protected.” (Ironically, the outcry had erupted over enforcement of the public smoking ban, not the cigarette sales ban, and yet the former, which benefited non-smoking adults much more than children, was, arguably, being strengthened, not weakened by S.B. No. 184.) Putting the best possible face on the Public Affairs Committee measure, the paper incorrectly characterized its proposed license fee as “high,” while accurately portraying the expanded ad ban as “a most important feature” that would insure that “the boy of Utah will not be jeopardized by the alluring advertisements of chewing and smoking tobacco which have enticed him in the past.” Plausible, too, was the editorial’s assessment of the revised public smoking ban as “aim[ing] to protect the rights and privileges of the non-smoker.” In the end, the Mormon newspaper offered the same justification for accepting the compromise that opponents of cigarette sales prohibitory bills and laws had been touting for many years: conditions under a regime that “bids fair to be enforced” would be “much better” than under “a more severe measure which remains unenforced.” Profound political astuteness was not required to predict, as did one representative hostile to any tobacco regulation, that the editorial practically insured the bill’s passage “‘unless the unexpected happens.’”

Whether the bill as it stood before its second reading would be as substantively acceptable at the end of the legislative process remained to be seen. While the L.A. Times—which was covering the anti-smoking arrests and legislative proceedings systematically and in depth, but from a blatantly biased perspective—that may have underlain the gross factual errors that permeated its articles—with some exaggeration observed that the Deseret News editorial “practically demanded passage of the measure which has been denounced as far more restrictive and freakish than the present law and the Senators belonging to the Mormon church acted accordingly,” its insistence on treating (unidentified)

1703“The Cigaret Situation,” DN, Mar. 2, 1923 (4:1) (edit.). On much higher cigarette sales license fees in various states and cities, see above Parts I-II.


1705The articles largely derived from the Salt Lake Telegram without attribution.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

Mormon senators as church automatons was made possible only by its suppressing the Yeas and Nays, which would have revealed only two of the latter, at least one of which was cast by a Mormon.1706

By the middle of the March 2 afternoon session, when word reached the lobbies that the debate was starting on the second reading of S.B. No. 184, a “sort of sigh of expectancy went over” the chamber and galleries began to fill with spectators. After the adoption of a series of “technical amendments” correcting, inter alia, typographical errors,1707 farmer William Candland moved to amend the bill by striking barber shops from the covered universe of enclosed public places because he was unable to see why a man should not smoke there since usually none but men went there. The proposal provoked Senator Dixon, a well-known smoking opponent, to complain that it was “annoying when a man is ‘helpless’ in a barber chair, to have someone in the next chair puffing at a cigarette.” The defeat inflicted on the amendment suggested to the Tribune that if the motion was designed as a test to determine which senators favored the bill as it was and which wanted to liberalize it, the outcome offered little encouragement to the latter.1708

Regardless of its resolution, this conflict illustrated that at least Southwick’s ban on public smoking was primarily designed to protect adult non-smokers rather than children.

After this “preliminary skirmish” had cleared the field for further action, Chairman Peters gave an overview of his committee’s bill, beginning with the “‘purposely high’” license fees designed to limit cigarette traffic “as much as possible by a law that will not be easy to circumvent.”1709 More realistic was

1706“New Smoking Ban Decreed,” LAT, Mar. 4, 1923 (1:4-5). The statement that “[t]here was no opposition vote,” could only have referred to the third reading, with which the article hopelessly confused the second reading. See below. The paper’s claim that “the proceedings were in keeping with the machine-like working of the radical majority in the Chamber to which tobacco in any form is anathema” was, since the bill repealed the ban on cigarette sales, absurd with respect to both readings, but especially regarding the debate on final passage, when several of the bill’s more radical provisions were struck.


1708“Senate Advances Tobacco Measure to Third Reading,” SLT, Mar. 3, 1923 (20:4) (quotes); Senate Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 502 (Mar. 2). One amendment, offered by Salt Lake lawyer Alonzo Irvine, was adopted, permitting advertising on “the package containing the merchandise licensed to be sold in this act.” Id.

1709“Senate Advances Tobacco Measure to Third Reading,” SLT, Mar. 3, 1923 (20:4) (quotes). With an annual license fee of $100/$75/$50/$25 (depending on city size), a
Peters’ assessment of the expanded ban on tobacco ads designed to rid Utah of “‘the alluring pictures spread over the country depicting the use of smoking or chewing tobacco as a desirable thing. I think I have been more mortified, embarrassed and chagrined by these than anything else. In my opinion, in that particular alone the bill is worth the amendment to the present law.’” The amendment to the public smoking ban also came in for praise inasmuch as it “‘require[d] no mere sign nor [sic] sham, but a solid partition to prevent the fumes of tobacco reaching into the nonsmoking compartments in hotel dining rooms and restaurants.’” The committee was able to draft such provisions, Peters explained to the Senate, by “‘consult[ing] those who have large interests, not only in the welfare of the community materially, but also educationally, morally and spiritually.’”

Perhaps because this description suggested that the tobacco industry was not among the consultees, Senator H. C. Tebbs, a member of the Mormon high priests’ quorum, who regarded the bill as a compromise between Senator Standish and some of S.B. No. 108’s opponents, asked Peters who was behind the new bill. Instead of giving a straight answer, Peters denied Tebbs’s premise (that the bill was a compromise), and in the end Tebbs, apparently failing to insist that his question was not contingent on whether a compromise existed, did not challenge another committee member’s evasive statement that the committee itself was behind the bill. Senator William Smart, whose controversial
An emperor-wears-no-clothes moment finally intruded into the debate with the intervention of Wilford Woodberry Warnick, a Mormon farmer and superintendent of the Alpine Stake Mutual Improvement Association, representing the Mormon heartland of Utah County, which in 1921 had submitted an above-average volume of petitions supporting the Southwick bill. Warnick (who would vote against S.B. No. 184 on second reading before switching sides on final passage) charged that: “It is said that this bill strengthens the law.... It is a question if our constituents will feel that we have strengthened a law which prohibited the sale of cigarettes when we repeal that prohibition.” He elicited a response from Public Affairs Committee member and Southwick advocate in 1921, Dixon, his Utah County colleague, who “defend[ed] himself from the criticism implied” by Warnick: “If we were prohibiting by the present law...I would agree with Senator Warnick. If we could prohibit, I would not be for this bill, but I would rather have a regulated traffic than an indiscriminate traffic. This bill will curtail the sale of cigarettes to the minimum. I do not regret that the Southwick bill was passed. It was an achievement, an accomplishment. I do not know that it has failed in the law, but it has failed in the enforcement.”

There was no evidence that the rather low license fees would reduce sales, at least to adults, at all—let alone to “the minimum,” whatever that meant—though refusals

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Telegram, Mar. 3, 1923 (local page 1:5), may have gone too far in reporting that “Senator Peters refused to state who is behind the bill....” The L.A. Times, whose reporting was so confused that it mistook second reading for final passage, nevertheless did grasp that Peters had “declined...to answer a direct inquiry as to the authors of the bill.” “New Smoking Ban Decreed,” LAT, Mar. 4, 1923 (1:4-5, 2:1).

\(^{1713}\) Senate Advances Tobacco Measure to Third Reading, SLT, Mar. 3, 1923 (20:4-5).

\(^{1714}\) 1920 Census of Population (HeritageQuest); “Joint Conference Held,” SLT, Dec. 8, 1923 (8:6).

\(^{1715}\) Senate Advances Tobacco Measure to Third Reading,” SLT, Mar. 3, 1923 (20:4-5).
At the time the new law went into effect it was reported that: “So far no community in Utah has undertook [sic] to resist issuance of permits to dealers in tobacco who qualify to handle cigarettes, as far as is known at the state capitol.” “Nearly 200 Permits to Sell Cigaretts Issued,” SLT, May 9, 1923 (22:5). Even the city commission of Provo, the home of Brigham Young University, passed an ordinance requiring a $75 license to sell cigarettes. “Cigaret Ordinance Passed by Provo,” Salt Lake Telegram, May 3, 1923 (8:4).

However, later in May, the city council of the small town of Midvale, in which important lead, zinc, and silver smelter operations were located, adopted an ordinance prohibiting the sale of cigarettes; the city recorder also announced that anyone offering cigarettes for sale would be prosecuted. “Cigaret Sale in Midvale Forbidden,” Salt Lake Telegram, May 23, 1923 (9:3). It remains a research desideratum to identify local governments that passed such ordinances or denied cigarette sales permits on a broad scale. In 1921, Rep. McShane argued that under his (rejected) licensure amendment the $100 license fee was adequate because “‘the local authorities, if they really wish to prohibit cigarets, can tack on local licenses and absolutely prevent their sale. I have taken this position on this amendment for the particular purpose of giving the towns in my county an opportunity if they actually want to prohibit cigarets to fix a local license which would force prohibition if they want it.’” “Anticigaret Measure Passes Utah Legislature,” SLT, Feb. 25, 1921 (1:7).

In fact, the amendment, unlike the 1923 law, neither provided for local issuance of licenses nor conferred discretion on local governments to deny licenses; rather, under it the “Secretary of State shall issue” the license upon payment of the fee, affidavits of three property owners within a mile’s radius of the applicant’s place of business testifying to his “moral fitness to engage in the handling and selling of tobacco,” and written approval of the district juvenile judge. House Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 378-79 (Feb. 24).

Senate Advances Tobacco Measure to Third Reading,” SLT, Mar. 3, 1923 (20:4-5).

Standish’s amendments, to which considerable objection was raised, especially by Public Affairs Committee members, included: reinstating the lower permit fees in his bill; permitting tobacco advertising in newspapers and magazines; and permitting smoking in barber shops, railway station waiting rooms, and similar places. “House Favors New Judeship,” DN, Mar. 3, 1923 (sect. 2, 1:1).
Senate then ordered the bill to its third reading.\textsuperscript{1719}

Significantly, that evening after the Senate’s action the 15-member executive committee of the Party of Freedom met at the Alta Club—present were also a number of non-member Salt Lake businessmen—and decided unanimously not to endorse the bill before the legislature. The group was “unalterably opposed” to the substitute for Standish’s bill on the grounds that it was “equally as [sic] objectionable as” the current anti-cigarette law.\textsuperscript{1720} The Freedom Party’s leaders did not explain their objections, but presumably as Utah’s bulwark of anti-legislative freakishness—Mormon-Republican Governor Charles Mabey had concluded his condition of the state message to the legislature with the admonition that the law-giver exercise restraint because “[f]reakish enactments are as perilous as the disdain with which they are met”\textsuperscript{1721}—they were repulsed by precisely what Peters had lauded in the substitute: the retention and strengthening of Southwick’s advertising and public smoking bans. However, the fact that S.B. No. 184 also repealed the existing cigarette sales ban made it difficult to credit the assertion that the bill was literally just as objectionable to Newhouse and his comrades as the Southwick law—unless the new organization was a stalking horse for the cigarette manufacturers’ oligopoly, which was, as noted earlier, reflexively hostile to any cigarette tax. It is unclear whether the Party of Freedom controlled or influenced any votes in the Senate or House, but it may simply have been signaling its displeasure with respect to the extent to which the Public Affairs Committee in revising the Standish bill had gone in accommodating the Mormon and other anti-tobacco militants and in departing from whatever provisions the executive committee had proposed. Whether this public expression of dissatisfaction with the Senate’s action carried with it any clout to shape the debate in the House during the final few days of the session or was, rather, designed to put legislators on notice that the Freedom Party, which “expect[ed] to win sufficient votes [at the 1924 state legislative elections] in the populous counties, Salt Lake, Weber and others, to force repeal of existing legislation directed at public smoking,” still planned to “make the freak laws...a political issue in the next campaign,”\textsuperscript{1722} remained to be seen.

At the same time, City Judge Pratt indefinitely continued the trial of Tribune general manager McKay and those of five other public smokers on the grounds

\textsuperscript{1719}Senate Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 502 (Mar. 2).

\textsuperscript{1720}“Freedom Party Opposed to Substitute Measure,” SLT, Mar. 3, 1923 (20:5).

\textsuperscript{1721}House Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 28 (Jan. 10).

\textsuperscript{1722}“New Smoking Ban Decreed,” LAT, Mar. 4, 1923 (1:4-5, at 2:1).
that there were “too many serious cases on the calendar at present” to hear public smoking cases.\textsuperscript{1723} The Telegram chimed in with the headline: “Court Too Busy to Waste Time in Cigaret Cases,” noting that the assistant county attorney agreed.\textsuperscript{1724} Despite this disposition, the same day Sheriff Harries’s deputies raided more than a score of business district cigar stands and tobacco stores, including four or five United Cigar stores, confiscating more than 700 cigarette packages.\textsuperscript{1725}

As the Senate was poised to vote on the committee measure, the Telegram editorially unleashed a full dose of its (overwrought) sarcastic venom against a bill that it denounced as even worse than the existing law:

If the tobacco bill brought into the senate as a substitute to the Standish bill...is a compromise with the Southwick law...may the shades of our forefathers save us from a complete surrender of the Southwick forces. Perhaps we are bound to admit that this is a compromise bill since it compromises even the liberties enjoyed under the Southwick act, which were not compromises at all, but compromises with decency and respect for the law, permitting the smoker to have his cigarettes and intolerance to have its law.

Under the Southwick act it was a crime to smoke in an inclosed public place. Under the new law it’s almost an impossibility. The trade negotiated between the advocates of the new bill and the supporters of Southwickism makes the requirements on the owner of a public place so strict that there would seem to be no course open. [T]he proposed law puts the man in the position of the minor.\textsuperscript{1726}

The next day, Saturday, March 3—the same day that a 75-member American Legion post, joining the chorus of businessmen purportedly concerned that “freak legislation,” having made Utah a nationwide “laughing stock,” would keep away tourists and conventions, petitioned its legislators to use their influence to secure the Southwick law’s repeal\textsuperscript{1727}—the Senate took up S.B. No. 184 on third reading.\textsuperscript{1728} As announced, Standish opened the amendatory process with a

\textsuperscript{1723}“Hearing of Smokers’ Cases Indefinitely Continued,” SLT, Mar. 4, 1923 (24:4). For a less freighted account, see “Trials of Alleged Smoking Law Violators Delayed,” DN, Mar. 3, 1923 (1:3).
\textsuperscript{1726}“One Freak and Then Another!” Salt Lake Telegram, Mar. 3, 1923 (6:1) (edit.).
\textsuperscript{1727}“Legionnaires Ask Cigaret Law Repeal,” SLT, Mar. 4, 1923 (24:3).
\textsuperscript{1728}Senate Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at
motion to reinstate the lower permit fees contained in his S.B. No. 108 in lieu of the committee substitute’s somewhat higher fees—$50/$100 in first-class cities, $35/$75 in second-class, $25/$50 in third-class, with smaller locations unchanged at $25—on the grounds that the higher amounts would defeat the bill’s purpose, which could hardly have been captured by his argument that “frequently persons who would otherwise be indigents eke out a livelihood by conducting stands at which tobacco, candies and newspapers are sold. He thought such persons would be deprived of a part of their livelihood by the terms of the bill.” Senator Dixon, one of the substitute’s co-authors, disagreed, insisting that “the spirit of high license is to place the tobacco business in the hands of reputable and responsible persons” (who were deemed less likely to sell to minors). Chairman Peters informed the chamber of the experience of Brigham City—whose mayor he had been—which had imposed a $50 license even before the Southwick law had gone into effect, which helped stop illegal trafficking without prompting dealer protest. The first of Standish’s pro-tobacco initiatives went down to defeat.

Senator Peters then succeeded with one of his own, designed to meet “criticism” that had arisen since the bill’s introduction, which created an exception to the advertising ban so that “a dealer in tobacco and cigars [but not in cigarettes] may have a sign on the front of his place of business stating that he is dealing in such articles.” Peters sought to justify this relaxation of “stringent regulations around the advertising of the cigarette or tobacco generally” on the grounds that there was “something to the fear felt by some dealers that if a cigar merchant placed the words ‘cigars and tobaccos’ on the sign in front of his business, he would be violating the law.” Perhaps emboldened by this inroad into the strict anti-advertising regime, Standish immediately reacted with a “counter-proposal” that proposed striking the bill’s entire ad ban section and replacing it with a severely diluted version that

513 (Mar. 3).


1734 “Tobacco Bill Amended and Passed by Senate,” SLT, Mar. 4, 1923 (24:2). Though the Tribune termed it an amendment to Peters’ amendment, the Senate Journal made it clear that Standish offered his amendment after Peters’ had already been adopted. Senate Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 519 (Mar. 3).
merely prohibited “display[ing] on any street sign, placard, bill board or street car any advertisement of cigarettes or cigarette papers or tobacco in any form,” thus totally jettisoning S.B. No. 184’s ban both on all in-state newspaper, magazine, and circular ads and on all displays of cigarettes/papers or ads for them in any store, store window, or elsewhere. Asked to explain the need for the amendment, Standish declared that “he stood for justice” and (hearkening back to an argument akin to Southwick’s in 1921 that a cigarette sales ban was a constitutional predicate for an ad ban) that it was “not just to charge a man $100 for the privilege of selling a commodity and then not permit him to advertise the sale.” And Senator Jenkins, who had opposed regulation in 1921, sought to justify Standish’s deregulation of newspaper and magazine ads on the grounds that “in this effort to fight the tobacco evil the cooperation rather than the hostility of the press is required, if advances are to be made.”

This claim’s perverse and implausible logic imputed the same meretricious editorial policy to an allegedly free press that undergirded the cigarette manufacturing oligopoly’s successfully implemented plan, in Iowa and elsewhere, to buy newspapers’ editorial favor with respect to securing and retaining deregulation by pumping considerable ad revenues into their coffers. Senator Warnick, the Mormon tobacco antagonist, preferring economic reality, replied that: “He would expect no better cooperation from the press if advertisements of tobacco were permitted. The press would support the advertiser rather than the public.” After Senator Dixon had, once again, inveighed against “alluring advertisements that entice children to use cigarettes,” Senator Winder—who, as a representative in 1921, had, from a libertarian position, attacked his own Mormon church’s advocacy of the Southwick bill—called for realism: “[t]he real menace” was “attractive billboard displays” and colored magazine spreads manufactured by a process unavailable in Utah newspapers and imported by the hundreds of thousands; in that sense Standish’s amendment would not weaken the bill. Winder’s illogic was immediately uncovered by Senator Tebbs, who, by pointing out that the legislation’s “fundamental purpose” was “to do away with the use of

\[1735\] Senate Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 519 (Mar. 3).

\[1736\] “Tobacco Bill Amended and Passed by Senate,” SLT, Mar. 4, 1923 (24:2).

\[1737\] Also Senator Charles Cottrell, Jr., who in 1913 had introduced a partial smoking ban bill and was now once again in the Senate, took the position during floor debate that “any person should have a right to advertise what he had a right to sell.” “Tobacco Bill Amended and Passed by Senate,” SLT, Mar. 4, 1923 (24:2-3 at 3).

\[1738\] “Tobacco Bill Amended and Passed by Senate,” SLT, Mar. 4, 1923 (24:2).

\[1739\] See below chs 17 and 19.
tobacco as far as possible, had no trouble concluding that Standish’s amendment was at odds with it. Senator Candland, the friend of barber shop smoking, was certainly getting at a vitally important social-psychological fact when he provocatively observed that “the most attractive” cigarette ads for the young were not printed ones, “but seeing the big fellow smoking.” However, since not even the Southwick law banned smoking—only “[b]ack east” were Sheriff Harries’ recent interventions interpreted “‘to mean that any man smoking a cigarette in Utah will be arrested”’—“we are going to permit the big fellow to smoke.” Consequently, Candland concluded, if the law was going to be enforced, “‘we must not overdo this thing.” Without articulating the issue expressly, he was essentially advising his more radical colleagues not to sweat the small stuff since they had already either acquiesced in eliminating the big stuff (such as a sales ban) or never proposed it (a statewide smoking ban). Nevertheless, why retention of the stricter version of the ad ban would have been excessive he failed to explain.

In the end, only seven senators voted for Standish’s amendment. But where Standish had failed, Peters once again succeeded in whittling away the breadth of the advertising ban: the Senate adopted his amendment to confine the ban on displays of cigarettes/papers and ads for them to store widows by striking that on “stores” and “elsewhere.” Building on this dilution, Senator Irvine tried out a further liberalization of advertising by proposing a proviso that nothing in the section “shall be construed so as to prohibit the display of tobacco and the advertisements thereof other than cigarettes and the advertisements thereof in store windows.” On the grounds that the amendment failed to conform to the spirit of “compromise” that characterized the committee substitute, the Senate at first defeated it, but on reconsideration adopted it. By this point, the advertising section of the Southwick law was so weighed down with committee

and floor amendments that “it was generally admitted” that it had become “rather incomprehensible not to say cumbersome and almost ungrammatical.”

Unsuccessful as his amendatory mission had been so far, Standish had hardly given up. Now he turned his attention to relaxing the public smoking ban. His first effort, to strike “motor and other passenger vehicles employed as common carriers,” failed, but he finally restored smoking laissez-faire to Utah’s barber shops.

The last amendment adopted by the Senate was also the most consequential in terms of gutting the Southwick law, though the Tribune’s account left opaque its importance both for protecting non-smokers from secondhand smoke exposure and for accommodating the business groups that had protested against the ridicule to which the sheriff’s arrests had exposed Utah elsewhere. The identity of the author of the amendment was almost as surprising as the virtual unanimity with which senators adopted it. Republican Senator David Jenson, a 45-year-old lawyer and former three-term Weber County county attorney, had, as chairman of the Judiciary Committee in 1921, faithfully voted with Southwick on the latter’s bill. Moreover, as a senatorial candidate in October 1920, he had, in response to a formal written request from the Weber stake Sunday school, “very definitely” expressed himself as willing to support a bill to prohibit cigarette sales. During the final passage debate on March 3, 1923, Jenson moved to amend the exception for enclosed public eating places that conferred discretion on their owners to designate a portion of them as a “public smoking room” by constructing smoke-impervious partitions. The provision now read: “excepting that the owner or proprietor of any hotel dining room, restaurant, cafe or cafeteria may designate the same as a public smoking room by a conspicuous sign at or

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1748Republican Nominees in Weber County,” OS-E, Nov. 6, 1922 (7) (advertisement); 1910 and 1920 Population Census (HeritageQuest). Jenson was elected to a two-year term in 1920 and re-elected to a four-year term in 1922. The official retrospective list of all Utah legislators misspelled his name and erroneously listed him as a different person (“David Jensen”) for his first term. The Utah State Legislature: Centennial History, 1896-1996, at 273-74 (J. Brent Haymon et al. comp. 1996); http://le.utah.gov/asp/roster/roster.asp?year=1921.
near the entrance.”

Simply by posting a sign owners would be able to convert their restaurants in their entirety back into smoking-permitted areas and thus both to restore Utah to membership in good standing in the laissez-faire smoking world so beloved by the tobacco oligopoly, the chamber of commerce, nicotine-addicted tourists and conventioneers, and skew-viewed libertarians and to free up Sheriff Harries and Deputy Mauss for other law enforcement duties. Jenson’s amendment, which eliminated the mandatory partitions, apparently without any fundamental debate, “met with the approval of all but Senator Dixon,” and even he was reduced to merely quibbling over the location and size of the sign, and fecklessly at that: not being “ready with an amendment worded as he wanted it,” he “lost out.” Dixon was actuated by not wanting to be “humiliated by going into a restaurant and having to leave when he found that it was a “smokehouse.”” He therefore proposed amending Jenson’s amendment to require “the sign to be at the entrance, at least seven feet high and with lettering six inches high.”

Perhaps disoriented by the untoward consequences of his unpreparedness, Dixon later tried to insert a similar signage requirement in barber shops, but desisted when its illogic was pointed out in the wake of the chamber’s just having struck barber shops from the list of covered enclosed public places.

After all the amendments had been defeated or adopted, the Senate, astonishingly—in light of the far-reaching character of the changes to a radical and polarizing piece of legislation—passed the bill unanimously (18 to 0), even Warnick voting Aye. What the Tribune termed “[t]he nearest approach to

\[\text{References}\]

1751 Senate Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 520 (Mar. 3); S.B. No. 184, Substitute for S.B. No. 108 (1923, by Public Affairs Committee) at 7, on http://images.archives.utah.gov/cdm4/document.php?CISOROOT=/428&CISOPTR=23769&REC=4 (handwritten insertions in bill text). Jenson’s initiative was consistent with his Senate floor statement in 1921 that he had “nothing to gain personally” from Southwick’s bill because “he can go where smokers are or can stay away, as he chooses, but it is to guard the young people that he will vote for the measure....”

1752 The influential Literary Digest, which focused on synthesizing press accounts ridiculing the Southwick law, erroneously stated that the enactment contained the partitions provision. “Utah’s ‘No Smoking’ Signs,” LD 76(12):14-15 at 14 (Mar. 24, 1923).


1754 “Tobacco Bill Amended and Passed by Senate,” SLT, Mar. 4, 1923 (24:2-3 at 3).

1755 Senate Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 520 (Mar. 3).
opposition...against the bill” arose in the explanation that Salt Lake Republican Antoinette Brown Kinney\(^{1757}\) offered in support of her (successful) request to be excused from voting:

The senator...said that the present bill places no more safeguards around traffic in tobacco, to prevent the sale of such to minors, than does the Southwick act. And the Southwick act, she added, is no improvement in this respect on former statutes. As a woman and a representative of women, she felt that she was not much interested in the measure. “The woman of the home...does not smoke. Therefore I am perfectly willing to permit the men to legislate for and impose penalties on themselves as may best suit them, since neither women nor minors are particularly interested in the outcome of this measure.”\(^{1758}\)

The claim by Kinney—the only senator not to vote on the Southwick bill in 1921\(^{1759}\)—that the Southwick law was no more efficacious than its no-sales-to-minors predecessor was dubious enough, but the assertion that women as non-smokers had no stake in a law that prohibited public smoking and advertising that could lure their children into smoking was unfathomably preposterous.

The press reported that “the vote was a complete change from that of two years ago when the Southwick bill was passed, the opponents of the measure then being the friends of the measure now,” but absent from that circle of friends was (a section of) the press itself: “From various parts of the state newspapers are wiring the representatives to vote against the bill because it prohibits the advertising of tobacco in the papers, which means to most of the smaller country papers a direct loss of from five hundred to one thousand dollars a year.” Whether that telegram campaign bore fruit immediately or not, House passage was already deemed “questionable” because at least some members’ sentiment was that the bill should not pass.\(^{1760}\) That opposition encompassed both anti-tobacco representatives who regarded the whole 1923 amendatory initiative as anathema and House members who excoriated even the profoundly diluted bill

\(^{1757}\)An 1887 graduate of the University of Michigan, Kinney, a women’s suffrage advocate and organizer of the Utah State Federation of Women’s Clubs, was the first librarian of the Utah State Historical Society before becoming a University of Utah regent in the first decade of the twentieth century; her husband was a Salt Lake City lawyer. Gary Topping, “One Hundred Years at the Utah State Historical Society,” \textit{UHQ} 65(3):200-302 at 213 (Summer 1997); \textit{Catalogue of the University of Utah: Announcements for 1908-1909}, at 6 (1908).


\(^{1760}\)“Senate Passes Cigaret Bill; Fate in Doubt,” \textit{OS-E}, Mar. 4, 1923 (1:2).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

exiting the Senate as quintessentially evil. The exceptionally lush rhetoric of Republican George J. Constantine, who had extensive economic interests in development projects in southeastern Utah and was one of the few lawyers in the House,1761 may have been situated in this ideology’s upper price range, but it nevertheless encapsulated the spirit. One of the House members “flooded... with telegrams from the country newspapers protesting against the passage of the cigaret bill because it cut out all advertising of tobacco or its products,” Constantine telegraphed back:

“[E]ach reading of that freak of freaks substituted for the Standish cigaret bill brings to realization its un-American, unjust discrimination. I will work against it, talk against it and vote against it.... This freak disregards and tramples down American liberties and will breed contempt, ridicule and disrespect. The blood of the Revolution, Civil and World wars cries out against such confiscatory, discriminatory and un-American legislation. Thank God the Federal Constitution guarantees my freedom of speech and as a member of this Legislature I denounce the substitute as a worse freak than the Southwick law.”1762

The same day (March 5)1763 that S.B. No. 184 had its first reading in the House—which continued to prohibit smoking “within the House, or gallery, while the House is in session”1764—Party of Freedom officials announced that they would “make a vigorous effort to have the bill killed by a filibuster.” Sparing no vitriol, former Democratic Attorney General Dan Shields inflationarily developed hyperbole far beyond even Constantine’s imagination in declaring that “it was not a far cry from the burning of witches to the regulation of the every-day conduct of citizens such as is proposed by this and other freak legislation.” Individual House members’ attitudes toward devoting legislative resources to repeal or amendment of the Southwick law may also have been shaped by the “belief” that even if the Southwick amendments were passed, the revised law would “prove a dead letter” in the two largest cities, Salt Lake and Ogden, whereas in “the smaller communities where the Mormon church influence is complete, however, the new law will probably be rigidly enforced as the Southwick law has been


1672
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

On the bill’s arrival in the House there was “some talk” of amending the advertising provisions, but some members believed that too little time remained before the end of the session to do so. That belief was prevented from turning into a majority view when the House that same day received a communication—which was read aloud to the members—from Salt Lake Chamber of Commerce President L. B. Hampton concerning the result of a special meeting of the organization’s governors the night before, at which the board unanimously adopted a motion recommending to the House that it strike the law’s prohibition of cigar and chewing and smoking tobacco advertising. Implicitly lauding their own toleration and moderation, the board members noted that although their proposal would not make the bill perfect, it would become more acceptable. To some House members this initiative was welcome because they themselves argued that it would be unconstitutional for the state to prohibit the advertising of a product that it licensed. However, such a constricted view was hardly compelling: at the very same time, Attorney General Cluff, responding to a request submitted by Salt Lake Republican Representative Amy Brown Lyman, who was both the head of the Mormon Relief Society Social Welfare Department and married to one of the church’s 12 apostles, opined that a law

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1765. Utah’s Smoke Law Is Given to House,” LAT, Mar. 6, 1923 (2). The dead letter claim was exaggerated in the sense that, as noted above, even if for no other reason, the advertising ban was generally complied with. Shields, who had been attorney general from 1917 to 1921 and later became a state senator, in 1933 was appointed by President Roosevelt U.S. district attorney for Utah, which he remained until 1949. http://www.justice.gov/usa/ut/history.html.  

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1673
prohibiting the advertisement of any form of tobacco while exacting a fee licensing their sale violated neither the state nor the federal constitution.\footnote{1771}{Opinion Rendered on Tobacco Ad Ban," SLT, Mar. 7, 1923 (9:3). This opinion is not included in the official collection of attorney general opinions for the biennium including 1923, which includes numerous opinions on the Southwick law.}

The following day, when the calendar (or sifting) committee,\footnote{1772}{On Feb. 26 the House speaker had appointed the committee, whose duty was to "consider all bills with respect to their importance in the following order: State, County, Municipal Government, Miscellaneous, and provide a Calendar for each session of the House." House Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 391 (Feb. 26).} by a four to three vote—the minority being composed of Salt Lake Republicans\footnote{1773}{Party affiliation is taken from “Utah Senate Is Republican,” OS-E, Nov. 9, 1922 (7:1).}—adopted a motion to let the bill die in committee rather than return it to the house with a favorable report (“amended to strike the adverse advertising feature”),\footnote{1774}{Deseret News} jumped to the conclusion that that outcome was “practically certain to result in the death of the cigaret bill....”\footnote{1775}{Cigaret Bill Made Special Order of House Business,” SLT, Mar. 8, 1923 (Mar. 8, 1923) (20:5).} In the event, the process of raising the bill from the undead was initiated by Salt Lake Republican William C. Stark, a former secretary of the Salt Lake Commercial Club,\footnote{1776}{Men of Affairs in the State of Utah: A Newspaper Reference Work (n.p.) (1914).} retail coal company manager,\footnote{1777}{1920 Census of Population (HeritageQuest).} and president of the Utah-Idaho Retail Coal Merchants Association,\footnote{1778}{Outlook Slight for Lower Coal,” SLT, Apr. 8, 1921 (22:3).} who “started the fireworks”\footnote{1779}{Cigaret Bill Made Special Order of House Business,” SLT, Mar. 8, 1923 (Mar. 8, 1923) (20:5).} by moving that the sifting committee be discharged from considering S.B. No. 184 so that the House could consider the bill\footnote{1780}{House Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 508 (Mar. 7).} that “had excited more interest than any other before the legislature.” During the ensuing extended and sharp debate Representative counselor in the General Relief Society Presidency and one of the leaders of the Church’s Social Advisory Committee which was pushing for both alcohol and tobacco reform." Email from Tom Alexander to Marc Linder (Aug. 2, 2011).
Constantine honed his hortatory hyperbole by charging that “gag[ging] the house” would be

“the greatest mistake that this body has yet made... Utah is now the laughing stock of the nation because of the freak Southwick law and this substitute in its present shape is a worse freak: legislating against the business of Utah’s own citizens in favor of those who pay no taxes and do not even have a place of business in the state. The bill in its present form so regulates dealers in the state as to say to the small man, ‘Get out of business and let the big man have it all,’ because the confiscatory licenses will legislate out of business the small dealer. Then again if the Utah tobacco dealer wishes to advertise his wares it forces him to send his advertising to concerns outside of the state to the detriment of the state’s own tax-paying newspapers and printing houses. Why hit the home business solar plexus blows and say to the man who pays no taxes in our state you may have the business that rightfully belongs to the dealers of this state.”

Constantine’s oratory was to no (immediate) avail: following a motion to amend and to amend the amendment to make the bill a special order for the following afternoon, the House on a voice vote tabled all the motions and amendments. A few minutes later, however, those wanting to repeal as much of Southwick as possible countered with a motion to take the bill together with its amendments from the table, which prevailed on a 31 to 21 roll-call vote. Before the vote on scheduling the special order Stark concluded the debate by letting the rest of the cat out of the bag: “He said that he might be prejudiced as he had been smoking cigarets for more than thirty years, but that he would rather see his boy smoke a cigaret than telling such stories as he had heard in the house from some of the members.” Perhaps the fact that Stark was only 38 years old impressed some of his colleagues, who now voted 34 to 18 to take up S.B. No. 184 the following afternoon.

1786House Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 509-10 (Mar. 7). This vote was close to that on final passage (34 to 20) though eight
As the House took up the bill on March 8 “every seat in the house and all of the standing room in the galleries was occupied.” Debate opened with a motion by Republican Randall Lunt Jones (1881-1946), southern Utah’s greatest tourism booster, an architect who worked for the Union Pacific Railroad and was a Mormon leader. His amendment, which was regarded as a “big point in the bill and was warmly contested,” proposed adding this exception and proviso to the advertising ban: “and excepting further that cigars, chewing tobacco and smoking tobacco may be advertised in any newspaper published within the State of Utah, provided however that nothing herein shall be so construed as to permit advertising [sic] of cigarettes in any manner.” Jones argued for this change on the grounds that the many small manufacturers of tobacco products in Utah—a later speaker put the number at 27—would otherwise not be permitted to advertise in the state’s newspapers; looking at the situation from the other end of the transaction, Jones also justified his amendment by reference to the unfairness to Utah newspapers, which were disadvantaged vis-a-vis out-of-state papers regarding the revenue from tobacco ads.

A principal rebuttal came from Republican Alonzo Stookey, a 62-year-old Mormon rancher, civil engineer, and surveyor, who after studying mathematics at the University of Utah was a teacher, principal, and county superintendent for 14 years (in addition to being state superintendent of Sunday schools). Mincing no words, the acid-tongued cattle-raiser insisted on the necessity of doing everything to stop tobacco advertising: “he never had advertised on his ranch and hadn’t gone out of business. He predicted that the tobacco manufacturers would not go out of business if deprived of the privilege and

representatives switched sides and two absentees voted. The sifting committee did eventually report S.B. No. 184 favorably, which was then read a second time and placed on third reading calendar. _Id._ at 527 (Mar. 8).


1920 Census of Population (HeritageQuest); “Randall Jones, Utah Scenic Booster, Dies,” _SLT_, July 11, 1946 (9:7); “Passing of Randall Jones, Beloved Son of Utah,” _SLT_, July 13, 1946 (6:1).


_Utah from Statehood: Historical and Biographical_ 3:928-29 (1919).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

intimated that it would be no great damage to anyone in particular if they did. He declared that he did not want tobacco advertising before his boys."1793

Other representatives—including Constantine—pushed Jones’s points further, adding that, since tobacco users were the majority in Utah as elsewhere, law could not be used to prevent that use. Jones himself then concluded debate on his amendment by urging his colleagues to “consider the rights of those who might think just a little differently from them”1794—a topos to which he would return during the general debate.

By the large majority of 41 to 13 the House then adopted this further evisceration of the Southwick law, the entire 16-member Salt Lake delegation voting Yea (including all three female House members) along with six of 11 Democrats. All 13 representatives casting Nays would also vote against the bill on final passage.1795

The WCTU’s constant refrain echoed in the House chamber when Republican N. Enoch Iverson—who at the 1921 session was the author of a memorial petitioning Congress to pass legislation prohibiting “Oriental aliens,” whose “presence in large numbers in our midst will always be a source of trouble,” from immigrating to the United States1796—opened the debate on passage of the bill,

1794“New Tobacco Bill Passes Legislature, Signed by Governor,” SLT, Mar. 9, 1923 (1:7, at 10:2-3). Constantine illogically argued that he had seen young people receive cigarettes from out of state by the carton at the post office because non-Utah dealers filled orders with no way of knowing their customers’ age. Not only would the amendments not have suppressed this source, but, if advocates were correct in asserting that the revised law would make it more difficult for minors to buy cigarettes in Utah, it would have encouraged the young to place even more mail orders.
1795House Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 541-42 (Mar. 8). There is some confusion in the sources as to whether 10 or 11 (or even 12) Democrats sat in the House. “New Legislature Includes 75 Members: Lone Democrat Holds Senate Place,” Salt Lake Telegram, Jan. 7, 1923 (2:5-6) (11); “Democrats Help 20 Republicans in First Fight,” Salt Lake Telegram, Jan. 8, 1923 (1:1) (10); The Utah Legislature: Centennial History, 1896-1996, at 251-301 (1996) (12); Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 184 (2007) (10); The most reliable seems to be 11. They were Atwood, Bailey, Brewer, Browning, Hollenbeck, Jacobs, Judd, Naylor, Nix, White, and Wilkins.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

which he charged had been “placed before us in a sort of state of hysteria” by asking: “Do we want the income from tobacco sales? I think we cannot conscientiously license that which we believe to be wrong.”

Democrat T. Samuel Browning, the former mayor of Ogden and president of the Mormon high priest quorum of Weber stake, pithily objected to the bill on the grounds that “a thing was either right or wrong and this was a case of the dollar against his boy.”

Another pro-tobacco celebrant of diversity and moral relativity was Democrat and lawyer Leroy Adelbert Hollenbeck (1856-1950), a most unusual figure, who had previously been elected county judge in Colorado and to two terms in the Colorado House as a Democrat/Progressive; while he was in the Utah legislature he conveniently also edited his hometown newspaper and was an amateur(ish) critic of socialism and Marxism. Hollenbeck unmistakably displayed his deviance on the day the Utah legislature convened by self-publishing a pamphlet—which he dedicated to his fellow legislators without the slightest hint as to how it might in any way be relevant to their work—containing a risibly confused attack on Karl Marx’s theory of Surplus Value and the Law of the Falling Rate of Profit. Exactly two months later, having seemingly made his

organization, the corner stone in whose foundation was “one hundred per cent Americanism,” petitioned the legislature to prevent “Oriental aliens,” who could not be assimilated, from acquiring title to land in Utah. House Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 63 (Jan. 17).


Leroy A. Hollenbeck, Capitalism versus Socialism and Communism: A Refutation of Socialism and Communism (1939), was an elaboration of the pamphlet mentioned below.

Leroy A. Hollenbeck, Surplus Value and the Law of the Falling Rate of Profit: Or
way back to planet Earth, he criticized Iverson from a moral perspective inasmuch as “each man was entitled to his own moral code...and the codes of one could not be called wrong because these differed from another. Every man must judge for himself and it is not the prerogative of this legislature or any other body to say what is right or wrong...”

Although in this absoluteness such a vision was otherworldly—since all societies prohibited certain behaviors—his claim that the smoking debate implicated a moral issue connected back to a fellow representative’s rhetorical effort to turn Browning’s position against him by insisting that “it was not a question of income but a moral question.”

Jones then concluded the debate by returning to his aforementioned rhetorical ploy of re-imagining the controversy as one of state-enforced intolerance of others who thought differently: “‘I don’t smoke and smoke is annoying to me, but that does not give me the right to tell the men who do not think as I do what they shall do.’” Turning to his vocation/avocation, southern Utah tourism, he continued: “‘We are expecting many visitors here in the near future, thousands of them in fact. I have been with many of our visitors during the last few years who have

an Adverse Criticism of an Essential Tenet of Socialism (Jan. 8, 1923). Apparently the only library owning a copy is Weber State University in Ogden.


1804In fact, not even Hollenbeck himself believed in such absolute relativity. A few months after the session he published an editorial on moral questions in which he stated outright that: “We all agree on some things as being moral or immoral.” From there he slipped into discussion of a man’s “habits,” which it would be “intolerant” to try to make him give up, because they were “his real rights” and “his life” and “[h]e will violate the law—any old law—prohibition of whisky or tobacco... It matters not to him. [I]n striking at his habits, you may have gone too far and infringed on his real rights. If you have, then, beware, for you will have trouble. Didn’t we see it in the drastic cigarette law. Didn’t both sides later agree to a compromise? Of course the compromise is probably worse than the original law, and if so you will hear from it again.” L. S. Hollenbeck, “Moral Questions,” Duchesne Courier, Sept. 28, 1923 (8:2) (edit.). With regard to smoking in public places and exposing non-smokers to tobacco smoke Hollenbeck was blind to the harm inflicted on others, which he would never have regarded as acceptable collateral damage of the exercise of a right if that activity were, for example, recklessly exposing others to poison gas. On the other hand, the anti-cigarette movement in Utah, as elsewhere, typically failed to justify the prohibition of in-state cigarette sales to adults insofar as they smoked them in private without physically harming others (though when wives and children at home were taken into account, such harmless smoking may have been less commonplace than pro-tobacco forces or libertarians imagined).

come here to see the wonders of the southern part of this state. Most of the men with whom I have mingled, and they are most estimable men, smoke and think nothing of it. We must not expect everybody to see things as we see them, but to be considerate of the rights of others." Jones’s persistent, self-serving conflation of thinking and smoking and of the right to have differing views about smoking and to expose non-smokers to tobacco smoke was grotesquely ironic in light of his admission that male tourists thought “nothing” of smoking (in non-smokers’ presence), whereas Jones pleaded with non-smokers to be considerate of smokers’ right to smoke wherever they felt like it.

In a final effort to take back some of the voluminous clean indoor air space that had been ceded to smokers in the amendment granting public eating place owners the power to permit smoking provided that they posted signs to that effect, Democrat Lawrence Atwood—like his anti-smoking brother-in-law, Senator Warnick, a Mormon farmer from Utah County—offered an amendment to divide restaurants “so that there would be dining rooms for those who smoke and for those who do not.” Following an objection based on a single instance in Salt Lake City, where a hotel’s main dining room was reserved for smokers and another room set aside “as a private dining room where no smoking was allowed,” in which purportedly no meal had been served yet, the chamber defeated the proposal—which essentially would have restored the original Southwick provision—by a vote of 20 to 33,

On final passage 34 House members approved the evisceration of the Southwick law against 20 who cast Nays. Significantly, 15 of 16 Salt Lake representatives (including all three women, one of whom, Lyman, was a high-profile Mormon welfare functionary) voted Yea. Of the nine representatives

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1808."New Tobacco Bill Passes Legislature, Signed by Governor,” SLT, Mar. 9, 1923 (1:7, 10:3). Noteworthily the non-smoking room violated the still effective Southwick law because the statutory “extra room” was set aside not for smoking, but non-smoking. This room may also have deterred diners precisely because it was the main dining room.

1809House Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 541-42 (Mar. 8). Almon T. Butterfield, the only Salt Laker to vote No, was a Mormon. http://www.humpherys.org/paf/humpherys/aqwn85.htm#2047. In 1921, only five of the 10 Salt Lake representatives had voted for the Southwick bill on final passage, but even three of those had voted for licensure and switched when it became clear that the alternative was Southwick or no law at all. House Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 379-80 (Feb. 24).
who had voted on Southwick’s bill in 1921 and on the gutting amendments in 1923, seven voted consistently—that is, for the former and against the latter (or, in one case, against the former and for the latter). Of the two who had voted for Southwick and two years later to weaken the law, one, Mormon Republican and livestock raiser H. H. Crouch, explained that in 1921 it had been estimated that 80 percent of his constituents wanted the anti-cigarette law: “But now those people have reelected me, knowing just how I stand on this subject and I have not received one protest. Evidently the people at home approve of the stand I have taken on this question.” His position was that high license would prevent minors from obtaining cigarettes. Of 11 Democrats six also voted against passage.

House passage of the bill was signaled by the gathering in the Senate gallery of a “considerable crowd” and on the Senate floor of “certain prominent citizens who ha[d] been watching the progress of the cigaret bill....” Because, according to Senator Peters, its “essential fundamentals” had been retained despite the House amendments, he urged the Senate to concur. The only senator to vote Nay (against 15 of her colleagues) was Kinney, who, this time, did not explain her action.

TMA’s lawyer, Charles Dushkind, termed the Utah legislature’s about-face the result of a “strategic error” committed by “reformers...attempting to enforce the law while the legislature was in session. In most instances our opponents show better judgment than that.”

The rather similar editorial reactions of the Mormon Deseret News and the anti-prohibitionist Tribune—both of which celebrated diversity and coexistence—were emblematic of the acquiescence in smoking that would characterize the following four to five decades of laissez-faire even in the only

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1815 Charles Cushing, “Prohibition as ‘Big Brother’ Fails to Win for Blue Laws,” NYT, May 20, 1923 (sect. XX at 5).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

state with a majority religion that bound its adherents to eschew tobacco altogether and despite the survival there into the 1970s of the fragile remnants of the Southwick law. Without in the slightest conceding that the bill that it had editorially supported a week earlier had been significantly diluted before final passage, the News chose to view the amendments to the Southwick law as an example of the “universal rule” that every community is characterized by divergent views and habits: “Those who enjoy smoking are entitled to smoke as much as they please, provided in doing so they are not offensive to those who do not smoke, many of whom become positively ill when compelled to breathe smoke-laden air. On the other hand the non-smoker is equally entitled when he goes out in public to be able to enjoy a good meal, a theatre or whatever other diversion or pleasure he seeks, free from the, to him, offensive fumes of tobacco smoke.” Despite the unoverlookable fact that, as now amended, the Southwick law no longer protected non-smokers in public eating places and that even in some of the small number of kinds of enclosed public places in which smoking was permissible in extra rooms there was no statutory requirement to prevent the wafting of smoke, the Mormon editorialist, in effect, anticipated the cigarette oligopoly’s late-twentieth-century propaganda to stave off government regulation with a we-can-work-it-out-with-common-courtesy campaign: “The new cigaret bill...is an expression on the part of both sides to outline the ordinary rules of gentlemanly consideration obtained among men of good intentions. Non-smokers who are fair minded will concur in the decision of the legislature to allow the smoker to enjoy his cigar, cigaret or pipe, and on the other hand, the honest smoker...will concede to the non-smoker the consideration which is his due.”

Ironically, when asked why the Mormon hierarchy had caved into business’s demands and abandoned its own religious tenet and public health, a leading Mormon historian sought to dissolve the alleged inconsistency by observing that “Mormon leaders had always been in business.” Moreover, since neither the Word of Wisdom nor any other “revelation” stated that cigarettes (let alone tobacco) should be prohibited in society at large, the church leadership’s attitude toward the issue became a mere “matter of policy,” from which prohibitory position it could therefore “back away...on the basis of public opinion.” Here Professor Thomas Alexander meant that: “You can only go so far in opposing public opinion. The leaders of the LDS Church were realistic in understanding that the public would not support tobacco prohibition, so they backed off.”

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1816 “The Tobacco Law,” DN, Mar. 9, 1923 (4:1) (edit.).
1817 Email from Prof. Thomas Alexander to Marc Linder (Aug. 3, 2011). In published work Alexander had also erroneously asserted that Southwick’s initiative entailed the
empirical scrutiny: in addition to being factually wrong that the prohibition of tobacco was on the Utah legislative agenda during the early 1920s, Alexander cannot sustain his assertion with regard to “the public,” which, on this matter, did not even exist as such a monolithic entity. On the contrary, Utahns and public opinion were fractured, and although the fissure did not run strictly along religious lines, pitting (majority) Mormons against (minority) non-Mormons, the division appears to have reflected a sharp conflict between smokers and non-smokers, which, to a large extent but by no means univocally, overlapped with that sectarian divide.\textsuperscript{1818}

Alexander invoked the experience of liquor prohibition, which “did not work in Utah either, even though the church leadership supported it,” to buttress his argument that when “[t]he people pushed back...the state leaders would back down, whether they were Mormons or not.”\textsuperscript{1819} While superficially pregnant with analogy, the appeal to alcohol prohibition was misleading. First of all, the ban on liquor was much more comprehensive and stringent than Southwick’s ban on cigarette sales and public smoking. Adults were free not only to continue to buy all forms of non-cigarette tobacco, but also to mail order cigarettes from other states in any quantities for their own personal consumption. Second, cigarettes were still a distinctly minority form of tobacco use.\textsuperscript{1820} And, finally, smoking could take place in numerous enclosed public places (such as stores) unconditionally, and even in some Southwick-covered places (such as restaurants) smoking was permitted under rather easily satisfied conditions only marginally inconvenient to smokers. Since alcohol drinkers benefited from no such alternative forms or venues of consumption, resistance to and violation of the relatively permissive Southwick law should have been expected to be much less pervasive and intense than was the case with regard to alcohol drinkers lacking comparable alternative forms and venues of consumption. Consequently, the Mormon hierarchy’s policy choices were considerably less constrained by public opinion than Alexander (whose grasp of the main components of the Southwick prohibition of all tobacco. See above this ch.

\textsuperscript{1818}As explained above, some Mormons smoked and some Mormon legislators opposed Southwick’s bill, while some non-Mormons did not smoke and some non-Mormon legislators voted for Southwick’s bill.

\textsuperscript{1819}Email from Prof. Thomas Alexander to Marc Linder (Aug. 4, 2011).

\textsuperscript{1820}In 1921 and 1923 manufactured cigarettes accounted for only 25.9 and 29.1 percent, respectively, of all tobacco leaf used in the manufacture of cigars, cigarettes, tobacco, and snuff in the United States. Calculated according to data in U.S. Department of Agriculture, \textit{Agricultural Statistics: 1937}, tab. 158 at 130 (1937). Not until 1935 did cigarettes exceed 50 percent.
law was deficient) imagined; in particular, once the church leadership had acquiesced in the overridingly important repeal of the cigarette sales ban in favor of licensure, it would and should at the very least have pushed more strenuously and openly for something akin to designated smoking/nonsmoking areas in order to keep alive the struggle against secondhand smoke exposure.\textsuperscript{1821}

The \textit{Tribune}, which regarded “modification of the obnoxious tobacco law of 1921” as “[t]he best advertised and in some respects the most important issue before the legislature,” also stressed that the amended law “embodies recognition of the rights of smokers as well as nonsmokers. Both classes are far too numerous to be ignored by any body selected to represent the entire state.”\textsuperscript{1822} To be sure, beyond this nod to an undefined set of rights for each, the newspaper, far from being conciliatory, overtly postulated smokers’ chronological and quasi-natural precedence:

The amendment of the law tends to legalize certain practices which experience proved could not be suppressed by legislation and which, indeed, are not sufficiently iniquitous to be suppressed. Liberalization of the provisions with respect to smoking in “enclosed public places” is proper recognition of a practice which is and has been recognized throughout the civilized world ever since tobacco smoking commenced. It is well known that smokers enjoy their relaxation, or “vice”...especially at or immediately following meals, and it has been demonstrated here that they will smoke at such times, law or no law. When those who object to such indulgence are fully advised, as required by the amended law, where smoking is and is not permitted, the predilections and sensibilities of both smokers and nonsmokers are protected.\textsuperscript{1823}

In other words, since there was nothing the law could or should do to stop smokers from smoking wherever and whenever they wanted to smoke, the amendments created the best of all possible worlds by requiring owners of enclosed public eating places to post signs putting non-smokers on notice that smokers held sway there, thus enabling them to about-face and look elsewhere for a (voluntarily) smoking-prohibited restaurant (if any existed) without ever exposing themselves to tobacco smoke-polluted indoor air.

Oddly, although the amendments adopted by the Senate on final passage gutted the bill, especially with regard to ban on public smoking, neither the \textit{Tribune} nor the \textit{Deseret News} reported or evaluated them that way. The former merely observed that the changes were “apparently intended to make more

\textsuperscript{1821}See below this ch.

\textsuperscript{1822}“The Legislature,” \textit{SLT}, Mar. 10, 1923 (6:1) (edit.).

\textsuperscript{1823}“The Legislature,” \textit{SLT}, Mar. 10, 1923 (6:1) (edit.).
workable the terms of the bill to license the sale of cigarettes,” when in fact, ironically, the strengthened provisions that they displaced had been designed to secure the support of anti-tobacco militants for a bill that repealed Southwick’s ban on cigarette sales. Consequently, Mormons and other smoking opponents received so much less in exchange for acquiescing in that fundamental repeal than the grand compromise for which they had bargained in S.B. No. 184 that the question arises as to whether they would have settled for such an outcome as an original matter and, if not, why they backed the bill in the end.

In a class by itself was the party-independent Salt Lake Telegram, by this time the smallest of the three papers, which fiercely denounced tobacco regulation and referred to a merchant convicted of selling cigarettes as a “violator of Southwickism.” Back in January, as soon as Sheriff Harries had announced that he would enforce the law’s no-smoking provision in the city and county building, the Telegram editorialized that in “all the history of the state of Utah there is no piece of legislation more asinine than the antismoking law....” A few days later, with no evidence of enforcement in the meantime, the editorialist charged that the law’s “chief evil” was the “hypocrisy attending it, which is infinitely worse than the evils of tobacco.” And the day the new law went into force the paper lovingly wrote of “innumerable cigarettes...burned on the altar of freedom. Today the Southwick anticigaret law is a fading memory of hateful history.” Insisting that “removal of the Southwick law from the statute books of Utah,” of its own sponsoring of which it was “proud,” was “not a victory for tobacco and cigarettes, but a triumph for law and order in Utah,” the Telegram purported to be concerned with eliminating the “hypocrisy at home and stinging ridicule abroad.” Without explaining, for example, why it would not have been possible to enforce the smoking ban in certain indoor public places, the editorialist asserted both that “the example of strict observance of the law is more essential to the welfare of our children than tobacco prohibitions which merely

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1825 The Tribune’s weekday and Sunday circulation in 1922 was 42,000 and 71,000, respectively; the weekday figure for the Deseret News, which did not publish Sundays, was 26,000. N. W. Ayer & Son’s American Newspaper Annual and Director 999-1000 (1922).
1826 “Chamber Asks for Change in Cigaret Bill,” Salt Lake Telegram, Mar. 6, 1923 (Local page 1:4).
make a farce of the law” and that “the good people who are opposed to the use of tobacco and the children as well will be better off without the Southwick law.”

The press’s global claim that the “new bill nullifies the Southwick act” was blatantly exaggerated and in no respect more so than regarding the retention of the ban on smoking “tobacco in any form in any enclosed public place within the state of Utah, except in extra rooms, compartments or coaches specially provided for smoking purposes,” whose crucial term, “enclosed public place,” was now “construed to mean...theatres, passenger elevators, street cars, interurban and railway passenger coaches, motor and other passenger vehicles employed as common carriers, railway station waiting rooms, [and] State, county and city buildings, excepting that...in any State, county or city building, any public officer who has a private office separate and apart from his public office, may if he so desires, designate such private office as a place where smoking may be permitted....” (The ban on advertising—which meant, for example, as the attorney general opined several weeks before the amended law went into effect, that pictures of “Uncle Ephraim taking a generous-sized corner off a plug of chewing” tobacco displayed on automobiles would be unlawful—has remained in effect ever since.) Clearly, then, although owners of eating places now had discretion to convert them into uninhibited smoking locations, several types of “enclosed public place,” such as elevators and wide swaths of government buildings, did not lend themselves to dual use by means of the construction of “extra rooms,” and would continue to be legally off limits to tobacco smoking.

Although the sheriff’s office had announced shortly before the new bill’s passage that it would make no further arrests for smoking in public places until the aforementioned test cases had been disposed of, on May 16 (eight days after the amended law had gone into effect) Harries dissolved any suspicion that his wave of enforcement in February had been designed to provoke repeal. He

1830a. “Back to the Law,” Salt Lake Telegram, Mar. 10, 1923 (6:1) (edit.). To be sure, contrary to the paper’s claim, the Southwick law’s bans on smoking in various public places and cigarette advertising remained in force.


1832. 1923 Utah Laws ch. 52, § 4, at 110, 114.

1833a. Cluff Reads Cigaret Bill and Says All Tobacco Ads Must Stop May 8,” SLT, Apr. 18, 1923, clipping in Selected Collections from the Archives of the Church of Jesus Christ of Latter-day Saints, vol. 2 (DVD 2002).

now issued a warning to offenders against the law, especially with respect to smoking in public buildings, calling special attention to the state capitol, in whose corridors, according to complaints he had received, people had frequently been seen smoking; reports had identified state employees as smoking in various offices’ public sections: “The practice must stop in all public buildings, Harries said, and promise[d] to arrest offenders.”\footnote{1835} And, despite the virtual fiat that the legislature has conferred on owners to permit smoking, the sheriff was not giving up on enforcement in restaurants and cafes either: he warned them, too, that if they failed to comply with the formality of posting a card declaring a public smoking place, his enforcement campaign would be extended to those locations as well.\footnote{1836}

\textit{Sketch of Utah’s Surviving Unique Partial Indoor Smoking Ban During the Heyday of Smoking Laissez Faire (1923-1976)}

Utah...cannot demand or even expect serious consideration in Washington when the state acts as official jester to the assembly of states.\footnote{1837}

A half-century after the events, one local historian opined that the “whole affair of cigarette prohibition in Utah can be dismissed as part of the season of excess that all America experienced in the twenties.” He went on to assert, self-contradictorily, on the one hand, that “[n]o one will deny that non-smokers have a right to protection from the tyranny imposed by smokers in enclosed public places”—Harries’ enforcement of which right was, after all, the trigger and fulcrum for the national mobilization against the Southwick law—and, on the other hand, that “[w]here the prohibition erred was in promoting an unrealistic law that went far beyond those goals the prohibitionists considered most

\footnote{1835}”Smoking in Public Buildings Is Complaint,” \textit{Salt Lake Telegram}, May 16, 1923 (Local Page 1:8).
\footnote{1836}”Sheriff Is Again After Smokers in Public Places,” \textit{SLT}, May 23, 1923 (22:7). On the other hand, two days before the amended law was to go into effect, the prosecutor announced that he would move to dismiss the charges against the 21 defendants (including the original four) arrested in February. “Charges Pending Against 14 Salt Lake Citizens for Alleged Violation of Former Law to Quashed by Prosecutor,” \textit{SLT}, May 6, 1923, clipping in \textit{Selected Collections from the Archives of the Church of Jesus Christ of Latter-day Saints}, vol. 2 (DVD 2002).
desirable—protecting minors and controlling the sale of tobacco."\textsuperscript{1838} Not only is this latter assertion factually incorrect—protecting adults from secondhand smoke exposure and prohibiting tobacco advertising ranked among their highest priorities, whereas controlling the sale of non-cigarette tobacco did not—but these alleged excesses long outlived the 1920s.\textsuperscript{1839}

Utah’s statewide ban on smoking in certain enclosed public places did not—contrary to the \textit{U.S. Tobacco Journal}’s Schadenfreude-drenched headline: “Mormons Can Smoke Anywhere, Any Place, Any Time in Utah”\textsuperscript{1840}—expire in 1923: until the modern anti-smoking movement prompted the legislature to enact the Utah Clean Indoor Air Act in 1976, it remained in the Utah Code and was not an entirely dead letter. It was enforced, though with what frequency is unknown.\textsuperscript{1841} For example, in a dance hall in Salt Lake City in 1927, a 22-year-old man was “[a]rrested because he was smoking a cigaret in a public place, and charged with being a disorderly person” when he refused to obey an order to “douse the ‘fag.’”\textsuperscript{1842}

More interesting and consequential is that in 1929—when, according to the Brown and Williamson Tobacco Company, “per capita consumption of tobacco in Utah [was] lower than in any other place in the entire world with [sic] exception of India, where nicotine is taboo”\textsuperscript{1843}—an initiative in the House, whose internal rules continued to prohibit smoking,\textsuperscript{1844} to repeal the amended Southwick

\textsuperscript{1838}John H. S. Smith, “Cigarette Prohibition in Utah, 1921-23,” \textit{UHQ} 41(4):358-72 at 372 (Aut. 1973). Although Smith was aware that many other states had prohibited the sale of cigarettes before 1921, he mistakenly asserted that “the difficulties of enforcing anticigarette laws brought about their repeal within one or two legislative sessions of their enactment.” \textit{Id.} at 359.

\textsuperscript{1839}On the partial advertising ban, which remains in effect, see above this ch.


\textsuperscript{1841}The following survey of the succeeding half-century’s enforcement merely underscores that a detailed study of Utah’s experience of local anti-smoking activity remains a research desideratum.

\textsuperscript{1842}“Cigaret Smoker Lands in Hoose-Gow: Jailed for Refusal to Douse ‘Fag,’” \textit{Salt Lake Telegram}, Feb. 14, 1927 (Local page 1:6-7). A city judge sentenced him to one day in jail. To be sure, it is unclear why a dance hall qualified as a covered “enclosed public place.”

\textsuperscript{1843}“News Notes: It’s a Privilege to Live in Utah,” \textit{Garfield County News} (Panguitch), Mar. 29, 1929 (2:4). This same column, which recounted the statement that company vice president Gregory Graham had recently made in Salt Lake City, ran in numerous Utah newspapers.

\textsuperscript{1844}House Journal: Eighteenth Session of the Legislature of the State of Utah: 1929,
law’s surviving public smoking ban, was summarily rejected. Jacob Thompson, a farmer, livestock raiser, and wool grower “deep-rooted in Republicanism,” introduced such a bill in February 1929. Thompson seemed to be as confused about the law as the press. The *Telegram*, by way of background, mentioned Sheriff Harries’ arrest of “three prominent Salt Lake citizens,” and then, as if struck by amnesia, speculated: “The result, presumably, was the repeal of the rule, but Thompson insists that section 4 of the cigaret law is a ‘joker’ and really did not effect a repeal.” The less forgetful *Tribune* seemed to mock Thompson more than the law:

> Scanning the voluminous statutes of Utah, Representative Jacob Thompson... discovered one that offended him.
> It prohibits smoking in inclosed public places. ...
> It might mean that it would be unlawful to smoke in the cloak rooms of the house or senate, to smoke in the capitol rotunda or in the elevators.
> The law might also be construed to mean that smoking was taboo in any public place, and, in the last analysis, that smoking would be lawful only in the great open spaces where the wind blows out the matches and lighters never work.

Thompson’s bill garnered a modicum of attention from the Judiciary Committee, which reported it favorably; the full House then adopted the Sifting Committee’s recommendation that it be placed on the House calendar for third reading, but after the Sifting Committee had recommended that it be placed back on the calendar and the House agreed, in the end-of-session rush the Sifting Committee ultimately recommended that the bill’s enacting clause be stricken, and the House accordingly “killed” H.B. No. 74. That the unrepealed ban lived on was unmistakably on display in Ogden in

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1847 “‘Joker’ Claimed in Utah Cigaret Law,” Salt Lake Telegram, Feb. 6, 1929 (5:2).
1944, where the law had been ignored “for a number of years.” On February 4 a joint board meeting of city and Weber County commissioners was called at the request of the police chief and sheriff to clarify a motion adopted by the same body the day before to prohibit smoking in the city-county building. In the course of discussion the statewide smoking ban in certain enclosed public places was both “upheld and ridiculed,” one “faction” urging literal enforcement and the other insisting that it could not be. Belonging to the latter group were the mayor, who opined that morals could not be legislated, and the police chief, who, in addition to reciting the (legally irrelevant) “fact that smokers and non-smokers had helped build the city-county building,” shared his belief that the habit was one of “personal preference,” although he was personally opposed to smoking. A legal justification for overriding an unambiguously clear and valid state statute the city’s chief law enforcement officer did not offer. Despite having just characterized the dispute as moral, the mayor, joined by all the commissioners, “admitted that persons not addicted to the use of tobacco were unable to find any retreat in the building not permeated by the ‘obnoxious fumes.’” A non-smoking city commissioner announced that, if a resolution were passed banning smoking, he would propose directing city and county law enforcement agencies to assign officers to patrol the building and arrest violators—an admittedly “‘absurd’” proposal, but, he noted, “‘certainly no more absurd than the law on the question.’” The local officials’ utter confusion as to the act’s substance or even words was highlighted by their voting to kill a city commissioner’s proposal to permit all office holders to post “‘no smoking’” or “‘smoking permitted’” signs in their individual offices— in spite of the 1923 law’s proviso that “in any State, county or city building, any public officer who has a private office separate and apart from his public office, may, if he so desires, designate such private office as a place where smoking may be permitted, and so long as such private office is so designated, smoking therein shall not be considered in violation of this Act.” But the joint body also killed the mayor’s proposal to prohibit smoking in all elevators, halls, and meeting rooms during commission sessions, while permitting those in charge of individual offices to designate their preferences. At least one attendee, a justice of the peace, pointed out to the commissioners that they were wearing no clothes: he demonstrated his charge that they were “‘making [them]selves ridiculous’” by requesting permission to include in a published article the announcement that a joint board meeting would soon be called “to consider whether some other law should be enforced.” Having reached

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1852 “Officials Wrangle over Smoking in Joint Building,” OS-E, Feb. 4, 1944 (B1:1).
1853 1923 Utah Laws ch. 52, § 4, at 110, 114 (codified at Utah Code Annotated § 93-3-2 (1943)).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

an impasse, the joint board voted to postpone final disposition by referring the matter to the chairman (the county chairman) and vice chairman (the mayor) for study and recommendation.\footnote{Officials Wrangle over Smoking in Joint Building,” \textit{OS-E}, Feb. 4, 1944 (B1:1-3). The press appears not to have reported further on resolution of the issue. A few days later the police chief reiterated to the Kiwanis Club that the law was “highly desirable, but impractical” because “[w]e must have the active support of the people.” “Chief Requests Kiwanians’ Aid,” \textit{OS-E}, Feb. 10, 1944 (1:3). At the same time, officials at Weber College in Ogden, which until recently had banned smoking anywhere on campus, relaxed that rule because they had found it “impossible to enforce”; smoking remained prohibited in school buildings, but was now permitted outside. “Officials Clarify Smoking Rule,” \textit{OS-E}, Feb. 9, 1944 (7:4). Though originally and for decades a Mormon school, more than a decade earlier it had been taken over by the state.}

In 1944, the Mormon church also pressed for enforcement of Utah’s partial public smoking ban, focusing attention especially on public transportation. By the middle of the last full year of World War II, which was characterized by a shortage of cigarettes for civilians\footnote{Cigarettes to Be Scarce,” \textit{NYT}, Oct. 8, 1944 (11); “Cigarette Shortage to Continue,” \textit{NYT}, Oct. 18, 1944 (6).} driven by the huge military consumption, the \textit{Deseret News} devoted a lengthy editorial (“Newcomers May Not Know It—But It’s Illegal”) to the increasing number of violations on street cars and buses in Salt Lake City and its suburbs. Often the vehicles were so crowded that operators were unable to see passengers smoking, and sometimes they simply ignored violations. Preferring (without explanation) not to believe that “anyone would willfully violate this law,” the editorialist felt that violators—especially the new arrivals from states and cities lacking such bans—were unaware of the law’s existence; to be sure, signs on street cars and buses notified the public of the prohibition, but they were easily overlooked or liable to be regarded as obsolete. The newspaper pleaded on behalf of thousands who found tobacco smoke “offensive” and did not want to be “forced to inhale it against their will,” especially since they had “watched the increase of smoking in cafes and dining rooms and cafeterias without raising their voices in protest”—presumably because the gutting of the Southwick law in 1923 enabled all owners of enclosed public eating places to turn them lawfully into entirely smoking-permitted areas just by posting signs—“but they feel that they, at least, should be permitted to ride buses and street cars without having to submit to breathing second-hand tobacco smoke.”\footnote{By 1944 the armed forces accounted for 39 percent of cigarette consumption. “Worse Days Ahead, Say Cigarette Men,” \textit{NYT}, Dec. 14, 1944 (18).}
A month later the Mormon church made its move when a 10-member delegation, led by one of the 12 apostles, appeared before the Utah Public Service Commission urging immediate strict action to enforce the ban in public conveyances. The commission chairman quickly agreed that it was a misdemeanor to smoke tobacco in such places “unless special compartments or sections” were provided, adding that since 1937 smoking had been allowed on interstate and state buses “on certain seat sections, usually the back row”; he also admitted that smoking on trains was not always confined to smoking compartments, even when they were furnished. But the chairman stated that steps would be taken in “the very near future” to enforce the ban.1858

Support for protection from secondhand smoke exposure in public transport had apparently spread such extensive roots by the end of World War II that in 1946 even the Salt Lake Tribune, which in 1921 and 1923 had strenuously opposed Southwick’s approach, found its heart for beleaguered nonsmokers. Complaining of “flagrant violations” of the no-smoking law he had experienced during a bus ride from Ogden to California, Army Chaplain John W. Fitzgerald wrote Utah Attorney General Grover Giles1859 stating that “‘[n]on-smokers...object to breathing poisonous and obnoxious tobacco fumes in public vehicles’”1860 and suggesting that “the state post a plain clothes officer on each bus to enforce the law”1861 and “remove smokers from buses.”1862 The attorney general acknowledged that the law should be enforced, but observed that the state had failed to appropriate funds for enforcement and dismissed hiring plain clothes

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1858“Smoking Ban to Be Enforced,” DN, Aug. 30, 1944 (9:4-5). The Public Service Commission rules permitted motor carriers to designate car rear seats as smoking-permitted. “LDS Urges State Ban Bus Smoking,” Salt Lake Telegram, Aug. 30, 1944 (10:2). Such a rule did not conform to the law, which permitted smoking only in “extra rooms, compartments or coachs,” but not in “sections.” 1923 Utah Laws ch. 52, § 4, at 110, 114 (codified at Utah Code Ann. § 93-3-2 (1943)). Despite the great communitarian fervor inspired by World War II, some smokers ignored and defied no-smoking rules voluntarily implemented by privately owned railroads. For example, the Boston and Maine Railroad placed a large ad in a New Hampshire newspaper in 1943 describing how five of nine passengers violating the company’s clearly posted “‘smoking in smoking cars ONLY’” rule protested even after the conductor had pointed out the signs to them. “Let’s Smother Mother—This Is a Free Country,” Portsmouth Herald, Mar. 29, 1943 (3:1-5) (advertisement).


1860“Spotlighting Utah,” San Juan Record (Monticello, UT), Jan. 17, 1946 (5:1). This column ran in numerous Utah papers.


1862“Spotlighting Utah,” San Juan Record (Monticello, UT), Jan. 17, 1946 (5:1).
officers as prohibitively expensive.\textsuperscript{1863} The chaplain, the \textit{Tribune} editorialized, was merely

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express[ing] sentiments often entertained by many who have suffered the imposition in silence. [P]eople who flaunt [sic; should be flout] the law, ignore the regulations and behave like hoodlums ought to be ejected from all public places and vehicles where “no smoking” signs are displayed.

They forfeit any claim to leniency they may assert...; they are boorishly indifferent to the comfort and enjoyment of nonsmokers....

If...the legislature cannot appropriate funds enough to put plain clothes officers on the many buses to take these offenders in custody, the citizens who travel over the various lines should be deputized to serve without pay and authorized to report violations to the bus drivers and to the police....\textsuperscript{1864}
\end{quote}

Within days Giles discussed means of enforcing the bus smoking ban with a statewide conference of county officials.\textsuperscript{1865} The attorney general’s engagement with the issue was impressive considering that five years earlier he had written an opinion in which he mistakenly claimed that the legislature had repealed the public smoking prohibition (while at the same time opining that the legislature had the power to prohibit the sale of tobacco and cigarettes entirely).\textsuperscript{1866}

An extended debate in the \textit{Tribune} in 1947-48 revealed that even during the absolute heyday of smoking laissez-faire, at least in Utah, non-smokers fought back, in part because an awareness of the existence of a semi-dormant ban on public smoking survived. A few days before Christmas 1947 the newspaper published a letter to the editor by war veteran Arthur Jensen, who ironically remarked on the “Utah, the friendly state” license plate motto and the “No Smoking” sign in the employment office where he was looking for a job, which he otherwise encountered only in the state tax office, which issued license plates. Because, in contrast, no such signs were to be seen at Okinawa or elsewhere out...

\textsuperscript{1863}\textsuperscript{a} Enforcement Asked on Smoking Law,” \textit{OS-E}, Jan. 10, 1946 (4:6).

\textsuperscript{1864}\textsuperscript{a} Smoking Where Forbidden Should Be Stopped,” \textit{SLT}, Jan. 12, 1946 (6:2) (edit.).

The attorney general’s reply to Fitzgerald did not appear among his opinions in his \textit{Biennial Report}.

\textsuperscript{1865}\textsuperscript{a} Giles Will Speak,” \textit{OS-E}, Jan. 16, 1946 (3:2).

\textsuperscript{1866}\textsuperscript{a} Biennial Report of the Attorney General to the Governor of the State of Utah for the Biennial Period Ending June 30, 1942, at 312-13 (No. 72, Feb. 15, 1941). In response to a question concerning the advertising ban, Giles opined that the 1921 law, “because of the widespread use of tobacco, was impractical, its enforcement impossible, and the Legislature in 1923 repealed the act, with the exception of one section” dealing with advertising.
in the Pacific, the vet wondered whether “these ‘state parasites’” were “so delicate they can’t stand a little cigaret smoke.” Without understanding that he had identified a quarter-century-old exemption from the statute, Jensen related that the “fellow in his private office had a cigaret in his hand, a privileged man, I suppose, not a citizen.”

This broadside provoked a visceral controversy that lasted for two months. The first responder saw Jensen as a typical smoker in that he regarded as unfriendly anyone or anything that interfered with his “‘rights’ (contaminating the air and blowing smoke in the faces of any and all who may be around)....” Turning the screw further, the response attacked smokers in general for lacking any “consideration for that other portion of humanity that doesn’t need a drug to get a little enjoyment out of life” and called for even more no smoking signs.

The debate took an unexpected turn with the intervention of Frank W. Joesten, who during the New Deal had been a Utah lieutenant of Democratic National Committee Chairman James Farley. Joesten, who sympathized with Jensen, related that he had taken up the issue six months earlier with the governor—Democrat Herbert Maw was a Mormon who opposed relaxing enforcement of Utah’s liquor law—at the protest of some returned vet and the governor assured me in a letter that the tax commission would have the sign removed.” Joesten, who was apparently unaware of the law, conceded that it was “possible that these ‘bureaucrats’ have found some loophole to crawl through and put the signs back up but the vengeful voters won’t forget this on election day.” While purporting not to smoke, Joesten was manifestly gladdened that “[t]he banks, post office, federal income tax and all public offices have long ago put the ‘No Smoking’ signs in the ash barrel where they belong,” because they were “offensive to a big percentage of our people, notably to the returned vets.”

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1871 Frank W. Joesten, “No Smoking, Please?” SLT, Jan. 25, 1948 (18A:5) (ltr to editor). If these federal offices had in fact at one time posted such signs, they would not have been required to do so by a Utah state law, which would have had no jurisdiction over them.
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

turn, another Utahn who confirmed that all of those offices lacked signage complained that “I am forced to breathe second-hand smoke which is blown into my face by the cigarette, cigar and pipe smokers who lack the decency to respect the rights of others to breathe pure air.”1872 The letters to the editor debate concluded with a contribution by a Mrs. R. J. from Ogden, who, stressing that she became “quite ill... when forced to breathe smoke-filled air,” wondered whether, if she worked in a public office, she would simply have to give up her livelihood “just for a few smokers who come in for a few minutes and yet have to befoul the air the rest of the day....” Shifting the terms of the controversy away from the moral sphere by bringing to bear the crucial point some years ahead of her time, she insisted that: “it isn’t the idea that smoking stinks! It’s the fact that smoking is deleterious to health.” Her final (ironic) word also underscored that even anti-smoking militants who had not lost track of the existence of the Southwick law’s ban on public smoking did not entertain inflated expectations of its enforcement to achieve smoke-free indoor public space: “We can control smoking in public places.... Let us not even mention that it is against the law to smoke in public buildings and vehicles.”1875

In the meantime, the upshot of the dispute in Ogden continued unresolved. Even as late as 1955, a resident who was outraged over her exposure to tobacco smoke in restaurants (though willing to accept accommodation in the form of separate sections at counters and booths) observed in the local newspaper that “one notices that there is no smoking allowed in public buildings” in Utah,1874 but she succeeded only in provoking contradiction from another reader, who asked why the city did not start enforcing the law by posting no-smoking signs at every entrance to the Municipal Building as well as on every floor.1875 But the amnesia that had descended over both the law itself and the Ogden city government’s quondam interest in compliance with it was brightly illuminated three years later during city council discussion of a new pool hall law: “Goaded by statements that the new measure was severe in its non-smoking requirements,” City Attorney Paul Thatcher “left the Council chambers for a few moments and returned with a heavy volume from which he read a section making it a misdemeanor to smoke

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1873 Mrs. R. J., “Control Smoking,” SLT, Feb. 20, 1948 (14:1-3) (ltr to editor). As an example of health impacts, she mentioned that “[i]nhaling smoke is distressing inasmuch as it often starts a coughing spasm and choking.”
in public place....” From the perspective of the *Ogden Standard-Examiner*, “[o]ne saving grace in the law” was the discretion accorded owners to post eating places smoking-allowed or to provide special smoking rooms in railway stations and hotels. The salient upshot of the council members’ deliberations was their “agree[ment] that it is a law a little out of date in many ways.”

By 1961 sufficient momentum, presumably driven by the proliferation of smoking even in Mormon Utah, had built up to coordinate the state with national trends that its House of Representatives unanimously passed a bill that stripped away additional elements of the Southwick law’s ban on public smoking. Guided by the notion that the prohibition “should be enforced where it can, removed where it cannot,” the House articulated as its philosophy: “‘Smokers have a right to smoke; I have a right to breath [sic] clean air.’” Yet the “test” for implementing that philosophy was blatantly incompatible with it—namely, “allow[ing] smokers the right to smoke ‘in places I can walk out of.’ Where people are held in captive air...the ban should be enforced.” Why smokers should receive absolute and, in effect, exclusive priority in restaurants and cafes, legislators failed to explain, but House Bill No. 137 proposed to strike, after forty years, coverage of eating places and railway station waiting rooms altogether. What the press characterized as “[t]ighten[ing] the clamps on smoking” in buses turned out to be somewhat less unalloyed. On the one hand, the bill required passenger-carrying common carriers to cooperate in enforcing the law and to post no-smoking signs and drivers to advise passengers of the ban and of the penalty for its violation and promptly to report violators to law enforcement officers. On the other hand, H.B. No. 137 conferred on owners the discretion to declare any enclosed rest or wash room a smoking room merely by posting a sign. Despite a unanimous vote in the lower chamber, three weeks later the Senate voted to kill the bill.

Southwick’s long amputated public smoking ban survived that threat, but its prominent mention three years later in a *Tribune* article on little known and

1876–Old Law Bans Public Puffing,” *OS-E*, Aug. 8, 1958 (1B:3).


largely ignored laws as “[o]ne of the most often violated laws”\textsuperscript{1882} suggested that presence in or removal from the Utah Code might be a mere formality. However, events at the beginning of the 1970s suggested otherwise. When the state fire marshal proposed a bill to the legislature in 1971 prohibiting smoking in various places for purposes of fire prevention, he made it clear that he did not quarrel with the existing law’s ban for medical or comfort purposes.\textsuperscript{1883} The bill, however, repealed the surviving provisions of Southwick’s ban on public smoking, substituting for it the fire chief’s empowerment to order owners of a broad array of places in which conditions were such as to make smoking a hazard to post No Smoking signs and declaring those who smoked in such places guilty of a misdemeanor.\textsuperscript{1884} The bill as introduced had lacked such a provision, but as amended in committee and passed by the House, the measure provided that owners “may post No Smoking signs and designate areas where smoking is permitted, subject to approval of the Fire Chief.”\textsuperscript{1885} In other words, the House dropped Southwick’s statutorily imposed prohibition of smoking in a limited number of public places in favor of a merely permissive ban within owners’ discretion.\textsuperscript{1886} Although the House—whose own more expansive no-smoking rule now read: “No person shall be permitted to smoke within the House or gallery, in and out of session, and it shall be the duty of the Sergeant-at-Arms to enforce this rule”\textsuperscript{1887}—passed the bill by a vote of 38 to 26,\textsuperscript{1888} the Senate killed it,\textsuperscript{1889} thus


\textsuperscript{1883}“Old Law on No Smoking Also Labeled No Safety,” SLT, Mar. 15, 1972 (17:4-5).


\textsuperscript{1885}Journal of the House of Representatives of the State of Utah: Thirty-Ninth Session of the Legislature...1971, at 510-11, 681 (Feb. 19, Mar. 3).

\textsuperscript{1886}A provision in a substitute version of the bill that apparently was not adopted provided that owners “may post conspicuous No Smoking signs in all areas within these premises where smoking shall be prohibited for reasons other than” the aforementioned (fire) hazard-related reasons and that those smoking where such signs were posted were also guilty of a misdemeanor. http://images.archives.utah.gov (Substitute H.B. No. 66, § 3, bill text). A fire-hazard bill with this language was introduced in 1973, but it was killed. Journal of the House of Representatives of the State of Utah: Fortieth Session of the Legislature...1973, at 313, 1047-48 (Feb. 1, Mar. 8) (H.B. No. 201, by Gardner and Orton).

\textsuperscript{1887}Journal of the House of Representatives of the State of Utah: Thirty-Ninth Session of the Legislature...1971, at XII (Rule 18).

\textsuperscript{1888}Journal of the House of Representatives of the State of Utah: Thirty-Ninth Session of the Legislature...1971, at 18 (Rule 18).
leaving the half-century-old Southwick law still alive.

The Salt Lake County commissioners were also directly confronted with the issue in 1972 by German immigrant Hermann Neumann, who complained that he had attended a meeting at a county multi-purpose center at which “‘the whole place’” was “‘filled with smoke.’” When he told a security guard about the 51-year-old state law and asked him to enforce it, the latter’s refusal triggered this revealing dialog: “Guard: ‘Are you Mormon?’ Mr. Neumann: ‘Yes.’ Guard: ‘That explains it!’” The county commissioners, whose chambers were posted with no-smoking signs, lamely replied that “they would ‘follow the law as far as possible,’” before passing the buck for study to the county attorney, whose deputy later (incorrectly) expressed his feeling that the state law “would ban smoking except where officials would permit it.” As soon as the Southwick law and its real prohibitory bite had once again re-emerged in public consciousness, the conflict between smokers and non-smokers immediately loomed: “concerned [county] employees began making their ‘smoking allowed’ signs. Some even substituted ‘preferred’ or ‘encouraged’ for ‘allowed.’”

By 1973, with Arizona having crossed a threshold by enacting the first so-called modern (but very limited) designated-smoking area law, the Utah legislature, in connection with undertaking a sweeping revision of its penal code, repealed and then re-enacted Southwick’s ban on public smoking, this time converting the misdemeanor/jail punishment to an infraction/fine penalty. The press described this change as “[outer]law[ing] smoking where signs are posted not to smoke, reversing present law allowing smoking only where permission is designated.” As a sign of legislators’ intensifying and coalescing personal anti-smoking militancy, at the outset of the session both chambers, which had banned smoking since statehood, finally extended the prohibition to committee rooms as well. The Senate, which adopted the amended rule without debate and

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1891See below ch. 23.
unanimously, limited the ban to “committee meetings while committees are in session.” The more radical House rule amendment, which prohibited smoking in committee rooms both in and out of session, prompted lengthy debate, during which several members “said smoking was extremely offensive to them and one said he couldn’t ‘concentrate on the important matters before us if I have to sit in smoke-filled committee rooms.’” Ultimately, the House voted 49 to 16 for smoke freedom.

At the 1975 session, coinciding with the enactment of Minnesota’s landmark but still merely designated smoking area law, the Utah legislature took a step that objectively imparted a dynamic to the anti-smoking law (and movement) that would soon catapult it into the modern transitional period. Proceeding from the “widely-accepted and medically proven fact” that tobacco smoking substantially increased smokers’ likelihood of falling victim to cancer and heart disease, House Joint Resolution No. 15 found (with less certitude) that “it also appears that the inhalation of smoke by non-smokers of tobacco from tobacco being smoked by a smoker may have much the same results [sic] on the non-smoker as if he or she actually smoked.” The legislature characterized its aforementioned 1973 revision of the penal code as having “made provisions to make unlawful smoking of tobacco in public places,” but then declared that despite that step and various ordinances adopted by local governments in its wake, “the law enforcement agencies and officers charged with the same being enforced have almost without exception failed to effectuate such enforcement for one reason or another.” Consequently, the legislature resolved that “all law enforcement agencies and officers charged with enforcement of the statutes of Utah are directed to enforce the restrictions and prohibitions against smoking in public places contained in these statutes in the manner contemplated thereby.”

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1898See below ch. 24.
1899One of the resolution’s House sponsors may not have shared or foreseen this development in characterizing it as “mostly meant to remind smokers of the discourtesy of smoking in the presence of nonsmokers.” “Utility Bill Rates Doomed, Weber Legislator Says,” OS-E, Feb. 7, 1975 (1A:1, at 2A:1) (Rep. Glade Sowards).
Repeal, Reinforcement, Last New Laws, and First Public Smoking Bans

In order to preclude pretextual claims of lack of knowledge, the legislature also directed the secretary of state to send copies of the resolution to all of Utah’s county attorneys, county commissioners, city attorneys, city commissioners, mayors, sheriffs, and police chiefs.\(^{1900}\) The action was not uncontroversial: unlike the Senate, which adopted the resolution unanimously,\(^{1901}\) the House saw 20 members vote Nay.\(^{1902}\)

Quickly local governments all over the state did in fact begin implementing enforcement,\(^{1903}\) although, despite the American Cancer Society’s complaint about Utah’s “long-standing but generally unenforced law,”\(^{1904}\) prior municipal observance of the law had not been unheard of.\(^{1905}\) All this interactive statewide-local momentum\(^{1906}\) set the scene for enactment in 1976 by huge majorities\(^{1907}\) of

\(^{1900}\) 1975 Utah Laws H.J.R. No. 15 at 1115-1116


\(^{1904}\) Signs to Emphasize ‘No-Smoking’ Law,” OS-E, Nov. 28, 1974 (1B:7-8).

\(^{1905}\) For example, the mayor of South Ogden (a town of about 10,000) stated in connection with the commitment by all the city council members to enforce the law within the framework of their various official responsibilities that “the city actually has been ‘observing the law since 1969.’” “Unlawful to Smoke at South Ogden City Hall, Council Says,” OS-E, Apr. 16, 1975 (18B:3-8).

\(^{1906}\) To be sure: “Pledges of support from local officers immediately followed the legislative action, but many officers said actual enforcement was difficult to impossible.” “Utah Legislators Agitate for Cut in Income Taxes,” OS-E, Jan. 21, 1976 (1:1-2 at 2:4-5). By inadequate enforcement was apparently meant that violators were asked to put out their cigarettes, but no arrests were made. “House Votes to Consider Stronger Antismoking Enforcement,” SLT, Jan. 21, 1976 (4:1-6). City and county attorneys’ refusal to file charges prompted introduction of an “innocuous bill” in 1976 that merely transferred enforcement powers from them to state and local health boards, for which however the clean indoor air act was then substituted. “Far-Reaching Anti-Smoking Bill Passed by Both Houses,” Sunday Herald (Provo), Feb. 1, 1976 (16:4-7).

\(^{1907}\) H.B. No. 25 passed the House and Senate a vote of 51 to 16, 59 to 5, and 54 to 5, and 21 to 1 and 23 to 3, respectively. Journal of the House of Representatives of the State
the Minnesota (MCIAA)-like Utah Clean Indoor Air Act, which enormously expanded the scope of covered places, but, ironically, unlike the Southwick law, absolutely prohibited smoking nowhere, replacing that approach with the feckless designated smoking area regime, which became the hallmark of late-twentieth-century regulation. This transitional character was underscored by its chief sponsor, Mormon Democrat Gerald Woodmansee, in explaining to his House colleagues why he regarded the bill as “fair”: “It is not an anti-smoking bill; in fact, it will give provisions for smoking so that you could call it either way if you would want to—a smoking bill or a non-smoking bill.”

In 1921 anti-smoking activists were operating under a decided disadvantage in Utah because they acted at the tail end of the era of anti-cigarette/smoking legislation when the few states that still had such laws on the books were repealing them. With the half-century era of national smoking laissez-faire looming, a single state would have had to overcome exceedingly powerful economic forces and social-psychological trends in order to sustain even a partial public no-smoking regime. What is remarkable about the legislative process in Utah is that when the Standish bill was introduced in early 1923 to repeal the Southwick law, it initially had very little support; only after Sheriff Harries had undertaken a series of high-profile arrests did stronger backing arise, but even then the compromise bill that was devised in certain respects actually strengthened the Southwick regime. Only during the last few days of the session was it watered down, though, again, even then it retained certain prohibitory elements that no other state law embodied until the end of the century (absolute smoking bans in various public places in contradistinction to designated smoking areas) or ever (e.g. with regard to advertisements).

The crucially explosive issue in 1923, once Harries entered the scene, was restaurant smoking, but this confrontation could have been handled differently in order to defuse it. First of all, the anti-smoking movement should have combated...
the widespread misunderstanding (especially outside of Utah) that smoking was per se prohibited in eating places by widely publicizing the fact that so long as owners created separate rooms, smoking remained lawful. Harries could and should have approached the matter from that perspective. His motivation is unclear: he repeatedly stated that he would enforce the law until it was repealed, but he apparently did not want repeal because after Southwick’s dilution in 1923 he continued to enforce whatever shreds of the law were left (such as signage).

One possible (legislative) compromise would have been designated smoking/nonsmoking sections. To be sure, this regime may be virtually without value as a public health matter, but in fact many states adopted this regime in the last quarter of the twentieth century (for example, Iowa relied on it exclusively from 1978 to 2008). If Utah had enacted such a system in the 1920s, it would at least have legislatively acknowledged, kept alive, and reinforced the notion that secondhand tobacco smoke was a public health problem and that people who objected to exposure were not (exclusively) religiously-motivated ideological extremists, thus making a small but enduring dent in laissez-faire.

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1911 See below Part VI.
1912 When the Utah legislature in 1976 was considering the bill that became the Utah Clean Indoor Air Act, Ogden Democratic Senator Darrell Renstrom remarked that “many Utahns are hesitant to take action on the matter for fear of ‘being criticized’ or linked with the ‘dominant’ church in the State. He was referring to the Church of Jesus Christ of Latter-day Saints’ avowed stance against smoking.” “Utah Legislature Vote Gives Strength to Statute Curbing Smoking Areas,” SLT, Jan. 31, 1976 (1:3-5).
The Tobacco Merchants Association of the United States: The New Cigarette Oligopoly’s Legislative and Propaganda Arm—A Proto-Tobacco Institute (1915-1922)

Scarcely does a legislative season begin when interests inimical to tobacco loosen a veritable flood of anti-tobacco measures of every description. On some occasions the tobacco industry seemed to be facing a perfect epidemic of hostile legislation. ...

Undoubtedly the tobacco trade in every State, supported by the great army of consumers, constitutes a force sufficiently powerful to combat hostile legislation. But to set that force in motion, to render it effective, and to secure concerted and quick action, it is necessary to supply direction and leadership. This is a task of no ordinary difficulty, especially in cases, as is frequently true, where legislative measures are introduced and advanced to a point of passage before the trade or the public at large is at all aware of their pendency. It is here that the services of a national bureau with its eyes wide open, and with adequate connections in every State...becomes [sic] indispensable.¹

In the wake of the resolution of the anti-trust action in 1911 by which the American Tobacco Company’s “Trust monopoly was replaced by oligopoly” ² and especially by the time the United States entered World War I in 1917, an understanding of the industry’s nationwide efforts to repeal or defeat state-level legislation to control or prohibit cigarette sales can be considerably enhanced by paying attention to the often behind-the-scenes, subterranean, and secret activities of the industry’s new public trade organization. This perspective also embeds the analysis of developments in Iowa in a national context.

The Tobacco Merchants Association was formed in 1915 in response to the consequences of the U.S. Supreme Court’s decree that ATC was an attempt to monopolize and a monopolization.³ To be sure, James McReynolds, the special assistant to the attorney general prosecuting the case (who was later appointed by President Wilson attorney general and then associate justice of the U.S. Supreme Court), characterized the plan for disintegration of the Tobacco Trust as a “‘plain subterfuge which deserves an expeditious commitment to the scrap-heap’” because “it was merely a scheme to create three big holding companies in place of one, and...these three companies would be practically under the same control

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¹ President Bloch’s Address a Thorough Survey of Industry’s Progress,” USTJ 99(20):12, at 53 (May 19, 1923) (Pres. Jesse Bloch speech at TMA convention).
as the one.” The circuit court upheld ATC’s proposal under which ATC retained assets giving it 33 percent of the value of cigarette production and two entities to be organized (Liggett & Myers Tobacco Company and P. Lorillard Company) were apportioned 21 and 26 percent, respectively, for a grand total of 80 percent. Moreover, the 29 individual defendants retained 35 percent of ATC’s voting stock and received 40.76 percent of each of the two new cigarette producers. Little wonder that the independent tobacco companies complained that these entities would still dominate and “could crush” the independents.

Nevertheless, largely as a result of the so-called Camel Revolution, launched by R. J. Reynolds Tobacco Company in 1913 (which within five years secured a 40-percent market share) and soon countered by Ligget & Myers and ATC with Chesterfield and Lucky Strike, respectively, a new oligopolistic competitive regime emerged that by 1915 prompted TMA’s president to explain that: “Since the disintegration of the former tobacco combination into a number of rival concerns competition has been so keen and so violent that the industry has become very much demoralized.” Even at the organization’s first exploratory meeting on September 25, 1915—called by “the nicotine press,” which purportedly believed that it could not prosper unless the industry was at peace—its counsel described its main object as a union of all industry interests, elements, and branches (including leaf dealers, larger manufacturers, cigar store chains, and smaller independent dealers) in order to effect changes in business methods designed to remedy trade evils. The American Tobacco Company’s chief counsel, Junius Parker, declared that it was “high time” for an industry with an annual product totaling $700,000,000 to form a trade organization. During the weeks before TMA’s formal founding on November 8, the group stressed that one dimension of its activity would be “to keep a watchful eye on legislation affecting the tobacco trade.” In the past, a spokesman argued, “‘tobacco people’”

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9“Tobacco Men Form $1,500,000,000 Union,” NYT, Nov. 9, 1915 (18) (Jacob Wertheim).
10“Tobacco War Ends; Cigarettes to Rise,” NYT, Sept. 26, 1915 (11).
11“Meet Today to End Tobacco Trade War,” NYT, Nov. 8, 1915 (14).
had been so busy fighting one another that the government found the business “easy prey” for tax increases. “All” that TMA was aiming at was the “square deal” that the industry’s disorganization had prevented it from achieving. Whatever kernel of truth this claim may have embodied made a mockery of the very effective lobbying and bribery in which the Tobacco Trust, as the de facto trade organization for two decades, had engaged to defeat anti-cigarette legislation. In any event, the industry’s very size required “some power, some substantial organization to speak for it with influence and authority,” and there was no reason to doubt the president’s expectation that TMA would soon be one of the country’s biggest trade organizations.

**TMA’s Intertwined Lobbying and Propaganda Functions**

Outright tobacco bans were passed in twelve states. In response, the Tobacco Merchants Association was formed in 1915, with the central task of squelching hostile legislation.

TMA’s articles of association set out that one of the principal objects for which the organization was formed was “to protect the tobacco industry from unfair and hurtful movements and agitations” as well as “to oppose the passage and procure the repeal of unjust and detrimental legislation affecting the tobacco industry....” Already by the time of the 1918 annual meeting of the board of directors, the president praised TMA for having defeated state-level anti-tobacco legislation. In addition, as part of its mission to counteract anti-tobacco...
propaganda, it had not only “distributed thousands of pamphlets demonstrating the harmlessness of the use of tobacco products,” but had also “persuaded the Industrial Commission of the State of New York to promulgate rules and regulations permitting smoking in factories, whereas previously it was a misdemeanor even to sample a cigar or cigarette in a factory,” thus making a vitally important contribution to the normalization of smoking in the workplace, where “arrests for smoking” had been “reported almost daily,” but many employers supported the change because “employees would work more enthusiastically if permitted to smoke.”

A report of the new organization’s ways and means committee stressed that no national tobacco organization was “known to have extended its activities to State or local matters, nor is it possible for them to keep in touch with the various movements that spring up from time to time in different parts of the country that are intended to injure the tobacco industry, such as high licenses, prohibitive statutes, anti-tobacco agitation, elimination of smoking car facilities or overstringent regulation in regard to smoking in various buildings, all of which not only intend to undermine the tobacco industry and diminish its income, but every successful move against the industry brings renewed vigor, strength and encouragement to the anti-tobacco forces.” Of overriding importance in the present context is the committee’s insight that such local measures “are even more injurious to the tobacco industry than excessive Federal taxation, for taxation simply diminishes the net income, while prohibitive and restrictive measures reduce the volume of business and cut out the income altogether.”

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19 Jacob Wertheim First President of Tobacco Merchants’ Association,” WTJ 42(46):2 (Oct. 15, 1915). Even before the tobacco trust was dissolved, an organization, the National Allied Tobacco Trades Association, had been formed to oppose all sumptuary legislation and especially to monitor the Anti-Saloon League and the WCTU in order to insure that the tobacco industry not sink in the same boat with liquor. The NATTA’s secretary, Phil Grau, argued that: “The constant repetition of anti-cigarette laws and the ever menacing and threatening attitude of prohibitionists and Anti-Saloon League agitators regarding tobacco forced the conclusion upon them that sooner or later their business would be looked upon as the next unpopular commodity in the market, and it would be as viciously attacked as the liquor industry is today.” “To Fight Prohibition,” USTJ, vol. 72, July 24, 1909 (1:4). The U.S. Tobacco Journal was skeptical of NATTA’s approach because liquor prohibition had not revealed itself to be an enemy of the tobacco trade and
Tobacco Merchants Association of the United States

The kind of state legislative presence that the new organization would mobilize was bluntly limned by the ways and means committee report (Congressional action would be launched on a far grander scale encompassing a delegation of 50 to 100 representatives and mass meetings in large cities):

Let us suppose a case where a bill has been introduced in a certain State legislature imposing prohibitory license fees for the sale of tobacco products. Such cases occur not infrequently...and we also know that such bills have been passed and that no organized opposition has ever been presented. A live trade organization would not only appear by its committee and perhaps also by special counsel to oppose such measures, but it would send one or more of its representatives to the State in question to organize the trade and to march down to the legislative halls with a big body of men. The Association would also circularize the tobacco trade in that State and move them into action.20

On November 18, 1922, Charles Dushkind, from its founding until his death in 1945 TMA’s managing director and general counsel,21 which performed some of the legislative monitoring, lobbying, and propaganda functions later conducted on a much larger, lavishly funded, and more sophisticated scale by the Tobacco Institute, sent a special bulletin to cigarette manufacturers pointing out that prior to the 1921 state legislative session Arkansas, Iowa, Kansas, North Dakota, and Tennessee had cigarette (sales) prohibition laws, but that after Arkansas, Iowa, and Tennessee had repealed their laws and Utah enacted one that year, Kansas, North Dakota, and Utah were still left “in the prohibition column.” Dushkind expressed the opinion that the three repeals “after repeated efforts, especially at a time when anti-cigarette agitation was most intensive, should operate as a stimulant to renewed activities looking to the repeal of the obnoxious statutes” in the three remaining states. He then suggested TMA propaganda literature be “freely distributed...among legislators, newspapers, bank presidents, and other leading citizens” in those states, arguing that: “It is altogether probable that most of the papers in these States will warmly support any movement for the repeal of these statutes and for the enactment of laws providing for reasonable license fees and proper restrictions as to sales to minors under 18, instead.” Dushkind reminded his bosses that since the state legislative sessions were “rapidly

approaching early attention is essential.”

The literature that Dushkind had in mind was, in addition to or in conjunction with the booklet *About Cigarettes* (which had been published in 1920 and is discussed below), excerpts from William W. Young’s book *The Story of the Cigarette* and Dushkind’s/TMA’s *Tobacco Manual*. In fact, three days earlier the TMA had put out precisely such an excerpts booklet titled, “What Is the Duty of the State in Regard to Cigarettes?”—the title having been taken almost verbatim from Young’s book—consisting of the chapter in the latter book dealing with cigarette legislation and that in Dushkind’s on a poll of newspaper editors’ opinions as to their communities “general sentiment” on prohibiting the use of cigarettes by adults.

William Wesley Young was a 48-year-old journalist in 1916 when he published *The Story of the Cigarette*, which fairly reeked of abject apologetics on behalf of the American Tobacco Company, which would have been impossible to overlook even had he not expressly acknowledged the firm’s “courtesy” of “permitting me to go freely through its warehouses and factories” and making its experts available to him.

For example, in the teeth of the decades-long...
widespread outrage at cigarette manufacturers’ insertion of “lascivious” pictures to entice purchases by children, Young not only omitted mention of this practice, but praised the firms for including “in many cases...pictures of real educational value.” By these he meant color pictures of national flags, cities, buildings, battleships, military uniforms, and war scenes constituting “a complete running pictorial history” of the world war then in progress.28 Young pretended to be just as blind to the lures that such paraphernalia represented to children as to “the real truth,” delightedly propagated by him, that, far from being “a caprice of the small boy and the dissipation of the dude,” the cigarette since the war’s start had “fairly leaped into its legitimate position as the smoke of manly men”29—a truth exemplified by the “well-known fact that no men age more slowly or sturdily than the cigarette smokers in our fighting forces.”30 Luckily for the shareholders, there was, “[i]t would seem...in every male human being an inborn desire to smoke something, a desire that in most of us manifests itself at a very tender age”; and luckily for smokers, there was “not an authentic case on record where rational smoking injured anyone....”31

When he arrived at his chapter on legislation—the chapter that TMA included in whole in “What Is the Duty of the State in Regard to Cigarettes?”—Young outdid himself in sycophancy and mock-surprise at the Tobacco Trust’s state of enlightenment. Certain that he would disagree with the “invective” a manufacturer would heap on anti-cigarette laws, he decided to speak to a manager in order to collect information to refute. Young interviewed one of the highest officials of the largest corporate cigarette manufacturer and was surprised to hear that:

“No intelligent manufacturer objects to sweeping prohibitive laws that deny grown men the right to smoke what they please. Such laws never are enforced.... A law passed without the force of general public opinion back of it, one that encroaches upon the thoroughly American principle of personal liberty, always is a dead letter. A few states have been wise enough to enact good laws prohibiting the sale of cigarettes to minors. They could be and are being enforced.”

For the time I was dumfounded. Here was one of the heads of a vast cigarette manufacturing concern taking a sane, temperate and aloof view of a question that vitally affected his business. It was the view...that, I am convinced, must be held by any individual who is neither profiting by the cigarette industry nor taking part in one of the crusades against it.

29William W. Young, The Story of the Cigarette 228 (1916).
The further I sought...the more I came to see that cigarette manufacturers as a class agree with that opinion.... Perhaps this is because only men of a broad mind can successfully manage a great business.32

Why, if cigarette producers did not object to unenforced and unenforceable cigarette sales bans, the Tobacco Trust had, for two decades, intensively and extensively devoted considerable resources to trying to defeat, repeal, and invalidate them33 it did not occur to Young to ask.

The reader is left with the conclusion that Young had originally imagined that the president of ATC would have told him flat out that his shareholders were clamoring for the unimpeded right to addict six-year-olds in order to take advantage of the fact that “the tobacco habit is easily formed, and the fragrant ‘smoke’ is more apt to be indulged in to excess by the youth....”34 But, on the contrary, cigarette manufacturing executives, like “all fair-minded people,”35 agreed with Young that “lads” should “should refrain from the use of tobacco during their tender years...for the same reason” that they should “refrain from too much meat, and from the use of strong spices, cocoa, tea and coffee,”36 which “are harmless, or even beneficial, for the adult.”37 Indeed, although Young, like his successors decades later at the Tobacco Institute, never disclosed what about cigarette smoking was harmful to children that was harmless to adults— it was, after all, “slander” to assert that nicotine or carbon monoxide was harmful to them—he would “just as enthusiastically advocate legislation prohibiting children, during their years of bodily and mental development, from using a good many foods and beverages that parents unthinkingly permit them to eat and

33See above Pt. I-II and vol. 2.
38“If smoking is not injurious to one’s health, why should the decision to smoke or not be postponed to adulthood? Why do you regard smoking as an exclusively ‘adult custom?’ [sic] Given that few people over the age of 21 begin smoking, how can your industry expect to survive without encouraging young people to smoke?” Letter from Elizabeth Whelan to Horace Kornegay, Tobacco Institute (12/18/1984), Bates No. 521043898. “No purpose would be served by engaging in a dialog with you.... These important issues can only be resolved within the framework of our democratic system.” Horace Kornegay to Elizabeth Whelan (undated), Bates No. 521054452.
drink....” It was this kind of “compelling argument” that Dushkind commended to TMA’s membership when he reprinted the chapter on anti-cigarette legislation as “What Is the Duty of the State in Regard to Cigarettes?”

TMA apparently regarded The Story of the Cigarette as its most powerful propaganda tool, still stockpiling, four years after its publication, enough copies to send them out to doubters. For example, in late 1920 a very small-town school superintendent in Kansas (which would be the last state to repeal its cigarette sales ban in 1927) had written to R. J. Reynolds Tobacco Company requesting literature on cigarettes. The latter’s general counsel sent the letter on to Dushkind, who, in turn, sent the superintendent a copy of Young’s book by special delivery together with the excerpted version and two articles, assuring the educator that reading them would bring him to the realization that “there is no justification for attack against the use of cigarettes or tobacco in any form.”

TMA carefully scrutinized the preparation of About Cigarettes, which borrowed heavily from Young’s book. In mid-1920, Frederick Galbraith, Jr., charged with supervising the organization’s anti-anti-tobacco propaganda, sent the galley proofs of the booklet to the cigarette firms’ general counsel who formed the membership of the Executive Committee of the Tobacco Committee—corporate counsel control or oversight of campaigns to defeat anti-tobacco legislation appears to have continued for some time—requesting their approval of several changes he had suggested (which, presumably, they gave, since the published version reflected Galbraith’s changes). The booklet—authorship of which Galbraith ascribed to Richard Strobridge, one of the founders of Newell-Emmett, TMA’s advertising/public relations firm—had originally borne the subtitle, “The Smoker’s side of the story,” which Galbraith

40TMA, Memorandum in re “What is the Duty of the State in Regard to Cigarettes?” (Dec. 29, 1922), Bates No. 501870638.
41Chas. Dushkind to R. C. Kantz (Nov. 26, 1920), Bates No. 501870731.
42In 1924, for example, corporate counsel of ATC, Reynolds, and Lorillard met with TMA president Jesse Bloch and Dushkind to discuss the latter’s proposals for the 1925 legislative sessions. A memorandum written by Reynolds lawyer (and future president and board chairman) S. Clay Williams closed by noting that Dushkind, who was himself the TMA general counsel, “is to work as closely as possible with and under the advice of all of us.” Since the ATC, Liggett, and Lorillard lawyers were “easily available at practically all times in New York,” Dushkind was “to take no important action without consultation with them” and—since Williams and Reynolds were located in North Carolina—“when possible, [wa]s also to confer with us.” S. Clay Williams, Memorandum (Nov. 5, 1924), reprinted in American Tobacco Co. v. United States, 328 US 781 (1946), Transcript of Trial, 5:*2611-13 at 2613 (Exhibit No. 771) (1945).
Tobacco Merchants Association of the United States

demed undesirable because this booklet and others were “educational pamphlets giving the truth as scientists and other eminent people see it, about tobacco.” In the same vein, he proposed striking “A word with you Mr. Smoker,” from the heading to the foreword because it gave “the Anti an opening.”

The text of About Cigarettes, 40-some large-print pages, purported to be “a composite of common sense and medical opinion by eminent experts,” offering “the real truth” about tobacco use. The medical statements, for none of which was a bibliographically verifiable source provided, all went to proving that physicians and chemists were “in substantial agreement, not merely that tobacco is harmless, but that in several respects it is actually beneficial.” Among the high points was a “notable investigation” that “effectively spikes the ‘‘bad for the lungs’ argument’: it “appears to demonstrate conclusively that smoking is often a protection to the lungs against tuberculosis bacilli....” Doubtless in conformity with the claim that “[n]owhere have we distorted the evidence,” the booklet cited a “famous experiment” that “clearly showed that nicotine cannot get into the blood by means of smoke inhaled into the lungs”; indeed, it was “doubtful whether any nicotine ever” reached the smoker’s mouth—and even if nicotine did, it would presumably be irrelevant since tobacco’s smoke products contained no “important quantity of nicotine.” TMA deemed it unnecessary to cite any medical authority at all in support of the more far-reaching claim that “even in excessive smoking, there is no reliable scientific proof that any real ailment is produced in the smoker.” It generously conceded that “if a man is going to smoke hundreds of cigarettes a day, he will undoubtedly tax his health—but the same would be true (only more so), if he drank coffee by the quart, or ate several pounds of candy a day. But even the universally valid maxim that “[e]xcess in anything is harmful” was put out of action by this particular commodity: “[W]hen cigarettes no longer ‘taste good’ to the smoker, he stops. And that’s all.”

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43 F. W. Galbraith, Jr. to W. B. Bell et al (June 29, 1920), Bates No. 502359617.
44 About Tobacco n.p. [Foreword] (1920).
45 About Tobacco 7 (1920).
46 About Tobacco 14 (1920).
47 About Tobacco 8-9 (1920).
48 About Tobacco 19 (1920).
49 About Tobacco 27 (1920). One difference between these claims and the infamously obfuscatory filmed assertion more than half a century later by Helmut Wakeham, Philip Morris’s vice president for science and technology, that “apple sauce is harmful if you get too much of it” is that Wakeham (who had a doctorate in chemistry from U.C. Berkeley) demonstrably knew a great deal about and was trying to deceive his interviewer and the audience about cigarettes’ lethality. Death in the West (1976).
the still skeptical reader, the clincher was four pages devoted to a parade of cigarette-smoking athletic champions—from quarter-milers to marathoners—some of whom smoked "right up to the very hour of their contest."**50** Not only did these men smoke during training, one of them "won the hammer throw—and actually laid down a cigarette to do it!"**51** No one "open to reason"**52** could disagree with the conclusion: "Not bad for men who had ‘ruined their physical health by the deadly cigarette habit.'"**53** TMA was well aware of the existence of readers who would learn such "facts about tobacco with a shock of surprise amounting at first almost to disbelief." But they were facts "nevertheless...even though we tobacco merchants have a natural bias in favor of tobacco...."**54**

At the end of 1922, TMA sent out a memorandum on “What Is the Duty of the State in Regard to Cigarettes?,” which, purporting to point out the impracticability and unpopularity of anti-cigarette laws, argued against enactment of new ones and for repeal of the three remaining ones, and was designed to be distributed during the 1923 state legislative sessions “through such channels and among such people as may be proper and advisable.”**55**

This tantalizing memorandum is, unfortunately, one of only a few TMA documents from this period that were extant in the R. J. Reynolds files and required to be disgorged by litigation in the late-twentieth century. Although no such document dealt with Iowa, it is plausible that TMA had been behind similar repeal campaigns in Iowa, which began in 1917 shortly after TMA’s formation in 1915**56**; in 1917, its Legislative Bureau and *Legislative Bulletin* were, for

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**50** *About Tobacco* 32 (1920).

**51** *About Tobacco* 33 (1920).

**52** *About Tobacco* 7 (1920).

**53** *About Tobacco* 34 (1920).

**54** *About Tobacco* 8-9 (1920).

**55** Tobacco Merchants Association of the U.S., Memorandum in re “What Is the Duty of the State in Regard to Cigarettes?” (Dec. 29, 1922), Bates No. 501870638.

**56** To be sure, this possibility is not strengthened by the fact that in October 1920, when F. W. Galbraith, a TMA vice president, raised the question as to whether the Executive Committee of the Tobacco Committee of the TMA—whose members were the general counsel of the largest tobacco companies—“should contribute to an effort to repeal the Anti-Cigarette Law of Kansas,” the committee, after a “thorough discussion...unanimously determined” that its policy was “not to contribute to efforts of this character.” [TMA], Minutes of the Executive Committee of the Tobacco Committee (Oct. 15, 1920), Bates No. 502359454. Unfortunately, the minutes did not disclose the reasons underlying this decision. Since the committee also decided that it would be contrary to its policy to take
example, tracking Findlay’s cigarette sales nuisance bills. After all, in February 1917 Dushkind, acting on TMA’s behalf, urged the Oregon tobacco trade to mount a protest against a universal cigarette sales ban bill, and within six days the cigarette industry prevailed against the WCTU.

As TMA’s first president, Jacob Wertheim, formerly president of the United Cigar Manufacturing Company (the largest independent cigar producer) and a General Motors director, who came out of philanthropic retirement to assume the post, already underscored at its first convention in January 1916, its Legislative Bureau was “perhaps the most vital feature of the active service” it provided, since a “single step” in any legislature “may cost the tobacco trade—not of a town, or of a city, but of a State, or of the Nation—very dearly.” Consequently, it was “absolutely essential” for the members to be informed of all

Tobacco Merchants Association of the United States

part in congressional deliberations on a bill permitting price regulation by manufacturers, the policy presumably had nothing to do with prohibitory laws per se, especially since Galbraith reported to the committee on the satisfactory outcome of his discussion with a bus company on prohibiting smoking except in the rear seats. The four committee members present were Frank L. Fuller (Liggett & Myers Tobacco Co.), Harry H. Shelton (R. J. Reynolds Tobacco Co.), William A. Ferguson (Philip Morris or United Cigar Stores), and William B. Bell (P. Lorillard). Junius Parker (American Tobacco Co.) did not enter the meeting until after the decision on Kansas had been made. One possible reason for non-involvement was raised by Fuller, Parker, and other general counsel four years later—“the danger of resentment of outside influence thrown into a state....” S. Clay Williams, Memorandum (Nov. 5, 1924), reprinted in American Tobacco Co. v. United States, 328 US 781 (1946), Transcript of Trial, 5:*2611-13 at *2611 (Exhibit No. 771) (1945). This possibility is strengthened by a letter from the Reynolds law department to a lawyer in Oregon in 1930 who had apparently suggested some company involvement in opposition to a referendum banning cigarettes in that state. Reynolds stated that it had “consistently refused to take any active part either for or against legislation in the various states... feeling that it would not be proper for it,” but forwarded the letter to the TMA. It also added that: “We refuse to believe that the people of the State of Oregon will cast their vote for the anti-tobacco measure.” R. J. Reynolds Tobacco Co. to R.W. Hagood (July 22, 1930), Bates No. 501994447. Its belief was vindicated as Oregonians voted three to one against the constitutional amendment. http://bluebook.state.or.us/state/elections/elections15.htm (visited Feb. 15, 2006); John Dinan and Jac Heckelman, “The Anti-Tobacco Movement in the Progressive Era: A Case Study of Direct Democracy in Oregon,” Explorations in Economic History 42:529-46 (2005).


58See above ch. 16.

59J. Wertheim Dies in His 62d Year,” NYT, Nov.5, 1920 (14).
relevant legislation. To that end, Wertheim boasted,

we have already perfected our legislative-reporting facilities to so great an extent that, in ordinary cases, never more than a day elapses between the introduction of a bill and our notification of the fact. In all cases of primary importance our correspondents are rigorously instructed to wire the facts immediately. This service has been brought to a point where copies of bills introduced in the National Congress reach our offices in less than twenty-four hours after they are printed, while from more distant capitals our advices are as rapid as the United States mail.

Wertheim then illustrated TMA’s legislative intelligence system by reference to examples awaiting the membership’s recommendation: an “excellent opportunity to secure a repeal of the anti-cigarette law in Tennessee at the next session of the legislature”; a cigarette law rejected by the Nebraska legislature would probably be put to a popular vote, “and now is the logical time to take preventive steps, if possible”; and finally, TMA “should hold itself in readiness to inaugurate a lively campaign against” a prohibitory bill pending in Massachusetts.

By 1920, the *Atlantic Monthly*—in an article by a journalist who later became president of an advertising agency working for the American Tobacco Company—was celebrating TMA as the “powerfully financed” tobacco industry agent for scrutinizing the WCTU’s “newly energized” anti-tobacco movement: “It has selected trained investigators to study the situation and to guide its policy, and has raised ample funds for such counter-propaganda as may be decided upon.”

The results of this scrutiny, which was by no means confined to the WCTU, appeared (and were presumably circulated to TMA’s membership) in the form of a hefty “Resume of Anti-Tobacco Activities,” the first of which included month-by-month reports for 1919 and 1920 on the activities of numerous organizations ranging from Lucy Page Gaston’s Anti-Cigarette League of America (“A smokeless America by 1925 is to be the slogan of the League”), the Non Smokers

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Protective League of America, the WCTU (which had branches in more than 20,000 cities, whose papers in 45 states supplied thousands of columns to other newspapers, and which boasts doing more petition work than any other organization in the world), and the No-Tobacco League (whose Indiana branch favored abolishing smoking in public places), to the Methodist Quadrennial Conference (“Many of those who use tobacco in this form [cigarettes] are regardless of the comfort of those who do not use tobacco and impose this nuisance upon them in various public places’’), the Mormon church, and even the Boy Scouts (whose National Council recommended that “all leaders refrain from using the weed while in uniform and in the presence of their boys”).

In mid-1921 TMA issued a “Summary of Anti-Tobacco Educational Activities,” bemoaning that “anti-tobacco propaganda...gets its start in the very first grade of school and is carried through to the high school....” The extent to which TMA’s investigators kept tabs on even the most localized anti-smoking developments was illustrated by its sweeping into its intelligence maw information that may have had nothing to do with the anti-tobacco movement, but that did reveal what an impressively thick network of informants TMA apparently had at its disposal: “Prof. Basset of Reed College (Portland, Ore.) in a lecture delivered before his psychology class called attention to the danger of misinterpreting statistics quoting some he collected in study of children in Pittsburgh slums which proved that smoking children were brighter than others—‘a manifestly absurd conclusion.’”

That the only features of a repeal bill that TMA was willing to countenance were a legal age of 18 and “reasonable license fees” is crucial to an evaluation of the industry’s attitude toward the 1921 Iowa law. Additional light is shed on this question by a supplement that Dushkind issued two weeks later suggesting various activities in which the cigarette companies could engage in order to hasten repeal such as hiring advertising agencies to gain the cooperation of the press and instructing “their retail sales forces or missionary men to endeavor to get retailers to write their respective legislators, urging the passage of repeal acts....” Both the cigarette manufacturers and TMA would activate jobbers on whose behalf lawyers might make public appearances. Dushkind’s proposals arose out of his “firm conviction” that the majority of legislators “in all cases


66Tobacco Merchants Association of the U.S., “Summary of Anti-Tobacco Educational Activities” at 6 (June 1, 1921), Bates No. 503259512/8.

67Tobacco Merchants Association of the U.S., “Summary of Anti-Tobacco Educational Activities” at 7 (June 1, 1921), Bates No. 503259512/9.
would unhesitatingly vote for the repeal of such statutes, and that it is only because of their erroneous impression that public opinion and their constituencies are in favor of prohibitory laws that they may be prompted to vote against repeal.” The “essential” task of bringing legislators to “a realization that public opinion is really against such obnoxious statutes” was manifestly subserved by the manufacture of such opinion by the press and advertising. Dushkind was aware of the risk that “too much publicity may arouse and stir the fanatics into more intensive activity than otherwise,” but he questioned whether it was possible to make the requisite impact on public opinion “without attracting attention of the intolerants.” Of greatest relevance in the present context is Dushkind’s seemingly non-optional suggestion that, with regard to post-repeal substitute restrictive legislation, although no opposition to restrictions on sales to minors should be interposed, “the Iowa Cigarette Tax Law should not be followed in other States.” It is this strong and unambiguous opposition to the cigarette tax—which was a component of the Dodd bill as filed and perhaps even as a trial balloon ten days earlier—that raises doubt as to whether the tobacco trust could plausibly have been the author of H.F. 678.

Fragmentary Information on the Cigarette Oligopolists’ and TMA’s Tactical Differences Concerning Their War on Anti-Tobacco Propaganda (1919-20)

Tobacco legislation is falling of its own weight as a reflex of a more liberal prohibition sentiment. [T]obacco is still on top because of the industry’s opposition to bills that would curb its sales or make its use illegal, but more particularly because of an aroused public sentiment against these measures. ... It need not stand it. The public is rapidly becoming cognizant of the injustice being done the industry and if the industry will appreciate this fact and utilize its value to the fullest extent legislators will find other lines of business better able to provide needed revenue.

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68Charles Dushkind, Tobacco Merchants Association of the U.S., Memorandum in re: Existing Anti-Cigarette Statutes in Kansas, North Dakota, and Utah (Dec. 4, 1922), Bates No. 501870676-7. The self-doubting fear of the danger of “stirring up such legislation at points where but for such activity on our part it might not be stirred up” continued to beset the TMA. The cigarette manufacturers’ general counsel all specifically raised this objection to Dushkind’s proposal to circularize the whole trade on state taxation of tobacco products. S. Clay Williams, Memorandum (Nov. 5, 1924), reprinted in American Tobacco Co. v. United States, 328 US 781 (1946), Transcript of Trial, 5:*2611-13 at *2611 (quote), *2612 (Exhibit No. 771) (1945).

The WCTU’s protestations that it was not preparing a “Tobacco Next” movement to prohibit tobacco nationally by constitutional amendment must be situated in the context of a tobacco propaganda campaign that the cigarette manufacturing companies were preparing through their instrument, TMA, in the fall of 1919. On October 6, the American Tobacco Company’s general counsel, Junius Parker, wrote to his counterpart at the R. J. Reynolds Tobacco Company, Harry H. Shelton, that he was sending him a pamphlet dealing with the need for tobacco propaganda. Issued by The Erickson Company over the signature of Francis Bellamy, it was titled, “A New Policy of Propaganda for Tobacco.” Unfortunately, the text of the letter does not, because of a successfully asserted claim of attorney-client privilege by the R. J. Reynolds Tobacco Company in the Minnesota cigarette litigation, appear on the Legacy website, and the pamphlet appears to be no longer extant. The aforementioned information from the letter stems from Shelton’s response; the brief summary of the unavailable document reveals that the letter concerned a “tobacco trade association meeting prepared by tobacco company in-house legal counsel requesting legal advice from and transmitted to RJR in-house legal counsel.” A few days after the Parker-Shelton exchange, TMA’s counsel, Dushkind, sent Shelton a copy of his own “proposed program” that he had prepared some time earlier “on the same proposition” as Bellamy’s, asking Shelton to consider both at the same time. Although Shelton, who regarded tobacco as a “harmless luxury,” soon replied that he found Bellamy’s “proposed propaganda to be fathered by some of the larger tobacco manufacturers...in a sense, unique and presented the case interestingly,” he was unable to bring himself to believe it either “wise or practicable” to adopt Bellamy’s suggestion. He referred to an apparently no longer extant letter to

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70 See above chs. 14-15.
71 HHS to Junius Parker (Oct. 10, 1919), Bates No. 502359509.
72 When asked on what grounds a letter involving people all of whom died decades ago and firms that no longer existed could still be privileged, one of the plaintiffs’ lawyers un informatively and nonresponsively stated that “the court found that it fell among the categories protected by the attorney-client privilege.” Email from Gary Wilson (Robins, Kaplan, Miller & Ceresi) to Marc Linder (Oct. 13, 2007). Another lawyer in the same firm who was even more centrally involved in the Minnesota litigation (which resulted in the disgorgement of a huge volume of internal tobacco company documents) could not recall that plaintiffs had sought any documents prior to the 1950s. Telephone interview with Roberta Walburn, Minneapolis (Nov. 5, 2007).
73 Junius Parker to H. H. Shelton (Oct. 6, 1919), Bates No. 502359510.
74 CD to H. H. Shelton (Oct. 16, 1919), Bates No. 502359504.
75 HHS to Junius Parker (Feb. 19, 1918), Bates No. 502404267.
Parker, to whom he had explained that his “current opinion” had been “well expressed” in an editorial in The New York Times just a few days earlier. Under the title, “Preparing to Save Tobacco,” the Times observed that having become “alarmed” over reports of the WCTU’s coming campaign for constitutional prohibition, growers, manufacturers, and dealers were “organizing for defensive action.” The newspaper was not bashful about offering its unambiguous counsel to the tobacco industry’s leaders, whom it doubtless knew to be careful readers of its columns:

[T]he people for whom tobacco is a means of making money, not a gentle joy and a soother of strained nerves, will refrain, if they are wise or well advised, from making themselves too prominent in the “movement” they hope to start. If they trust more to the fact that against tobacco would-be prohibitionists have a case not a hundredth part as good as they had against alcohol. Indeed, while the possibility of injury from excessive use of tobacco exists, there is the same possibility with regard to a thousand other things that nobody dreams—as yet—of abolishing, and the assumption is fairly safe that the general population will take care that intemperance and fanaticism do not imperil a blessing that has innumerable appreciators and only a handful of depreciators.

To call tobacco a “demon” would be such an obvious and wild exaggeration it simply would be laughed at. ... But it is safest when least is said and done about it, and its mercenary friends, as distinguished from the vastly greater number with no pecuniary interest in it, will only excite needless antagonism if they make themselves too prominent and too audible.

Although R.J. Reynolds Tobacco Company’s general counsel agreed with the Times’s advice that the industry’s owners would be far better off using consumer proxies to fight the former’s battles for them—indeed, Shelton had “not been an advocate of any kind of publicity”—TMA did not ultimately adopt that course. Shelton went on to appraise Dushkind’s approach, which contemplated cooperation by all of the industry’s branches, as superior to Bellamy’s, suggesting that “a matter of this magnitude should be passed upon” by TMA’s membership.

That R. J. Reynolds Tobacco Company’s asserted privileged confidences have thwarted the attempt to discover what exactly Parker told Shelton and what Bellamy and Erickson suggested to the industry more than 90 years ago, is

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77“Preparing to Save Tobacco,” NYT, Oct. 11, 1919 (8).
78“Preparing to Save Tobacco,” NYT, Oct. 11, 1919 (8).
79HHS to Paul Bagley (Oct. 20, 1919), Bates No. 502359499. Bagley was a TMA director.
especially frustrating since, ironically, Francis Bellamy (1855-1931), cousin of Edward Bellamy, author of the socialist-utopian best-selling *Looking Backward*, had himself been a leading Christian socialist in the late nineteenth century, albeit a racist and xenophobic one. During this period he also gained fame as the author of the Pledge of Allegiance. From 1904 to 1915, as the advertising manager of the muckraking *Everybody’s Magazine*, he solicited national advertisers and worked with their advertising agencies. It was therefore not a discontinuous career leap for Bellamy in 1915 to join a leading New York ad agency, Erickson Advertising Agency, where, until he retired in 1921, he was an account executive and copy writer, dealing with such large national corporate advertisers as Westinghouse and Allied Chemical. What someone with Bellamy’s unique political experience devised in order to guide the tobacco industry’s counterattack against an allegedly burgeoning prohibition movement and why TMA rejected it would be fascinating to learn.

Gaps in the available documents—in particular, correspondence and minutes of the Executive Committee of the Tobacco Committee—make it impossible to reconstruct the evolution of TMA and of the cigarette manufacturers’ propaganda plans between October 1919 and about April 1920. It is known that at its meeting on February 6, 1920, the Executive Committee had an “extended discussion of anti-tobacco activities” followed by “detailed information” from Frederick William Galbraith, Jr., the TMA’s point man on such matters, whom the committee had invited to attend. The four company lawyers present then requested Galbraith to have “suitable persons” prepare a statement of the tobacco manufacturers’ attitude toward minors’ use of cigarettes—a Potemkin village of a subject for the cigarette companies from nineteenth into the twenty-first century.

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82 [TMA], Minutes of the Executive Committee of the Tobacco Committee (Feb. 6, 1920), Bates No. 502359456. It is not clear exactly when Galbraith became a TMA vice president. TMA letterhead that Dushkind used for correspondence did not list Galbraith as a vice president on May 24, 1920 but did by Nov. 26, 1920. CD to H. H. Shelton (May, 24, 1920), Bates No. 501870737; CD to E. Eiche (Nov. 26, 1920), Bates No. 501870726. At the TMA annual convention in May 1920 Galbraith was appointed to the board of directors. “New Board of Directors of the Tobacco Merchants Association of the United States,” *Tobacco* 70(3):4 (May 20, 1920).
Unlike the *Times*, the cigarette manufacturers took accusations of health problems caused by their commodity deadly seriously. For example, in 1922 R. J. Reynolds Tobacco’s lawyers circuitously requested Dushkind to take a small cigarette manufacturer to the woodshed for stating in an advertisement that some other firm’s cigarette was “too strong for your throat.” S. Clay Williams (later president and chairman of R. J. Reynolds) told Shelton (whom he had replaced and who in private practice in Washington continued to represent cigarette companies and act as a TMA vice president) that the statement was “detrimental to the industry generally.” Shelton, in turn, reminded Dushkind that such a “dangerous” idea could be very easily capitalized by anti-cigarette organizations.

All of TMA’s feverish and centrally coordinated legislative repeal activity during the 1920s stood in startling contrast to the industry’s braggadocio in 1918 in the wake of the War Department’s adoption of the tobacco firms’ suggestion that the government furnish soldiers with tobacco free as a war necessity like food and clothing. The *United States Tobacco Journal*, for example, boasted that this “official inclusion of tobacco products as an obligatory army ration...must convince even those reactionary minds and prejudiced fanatics who ranked tobacco as one of the poisonous substances like spirituous liquors that they should be ostracised for their stupendous misjudgment and should be condemned to humiliating retraction.” Tobacco’s new status became “one of the most cheering benefits that could ever fall due to” the manufacturing companies—“not only a tremendous expansion” of production, but “an assurance of stability of their business such as they never before could have hoped to obtain.” The industry’s swaggering self-confidence culminated in the declaration that: “Once placed as a necessity for the consumption of our manhood, no attacks on its destruction [?] by any individuals or set of fanatics, whether inside or outside of legislative halls can prevail again.”

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83 SCW to H. H. Shelton (July 28, 1922), Bates No. 507875514. Shelton (1874-1937) was still listed as practicing in Winston-Salem in 1921; by 1922 he was listed as having a general practice in Washington, D.C. *Martindale’s American Law Directory* 596 (Jan. 1921); *Martindale’s American Law Directory* 1213 (Jan. 1922).

84 H. H. Shelton to Charles Dushkind (July 31, 1922), Bates No. 507875512.

85 “Tobacco Now a Military Ration,” *USTJ* 89(21):4 (May 25, 1918) (edit.). The word “destruction” appears to make no sense in this sentence.
Tobacco Merchants Association of the United States

Frederick W. Galbraith, Jr.: A Tobacco Trust Undercover Propaganda Organizer in an American Legion Uniform

In 1941, two decades after the events in question, Dushkind, still TMA’s general counsel and managing director, testified at the trial of the federal government’s prosecution of the four major successors to the Tobacco Trust on charges of conspiracy and monopolization. One of the numerous dimensions of these firms’ conspiracy was the operation of TMA as a nodal point of communication among them. In questioning Dushkind about those present at the board of directors’ annual meeting on June 3, 1920, the prosecutor asked about Galbraith’s business connections at that time. Whether time had dimmed his memory or he was less than forthcoming, Dushkind replied that Galbraith had been “employed...by a tobacco committee to look particularly after tobacco prohibition agitation that was then going on.” Asked what the tobacco committee was, Dushkind was unable to recall its members, but did still know that “Col. Galbraith cooperated with the Tobacco Merchants Association in the activities to counteract anti-tobacco agitation” and that the committee had functioned until 1922.

Dushkind omitted mention of Galbraith’s “business connections” that had brought him into the TMA before he began directing its propaganda activities. Ironically, Galbraith (1874-1921), who played a key role in TMA’s anti-anti-tobacco campaign in 1920, was more famous—a ship was even named for him during World War II—than any of the well-heeled cigarette company general counsel on the Executive Committee of the Tobacco Committee to whom he was unmistakably subordinate. His obituary in The New York Times and a brief biography that appeared a year earlier in a state historical journal were both sketchy for important periods of his life. After grammar school in Massachusetts, he went with his father to San Diego where at age 10 he became a track walker, returning to Massachusetts at 13. Already at age 16 he became a factory foreman before spending six years as an ocean-going sailor. On his return to Springfield, Massachusetts, he worked at a meat packing plant, of which he became

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87 American Tobacco Co. v. United States, 147 F.2d 93, 119 (6th Cir. 1944).
superintendent and which he saved from receivership. At this point (which must have been about 1900, a year in which he does not appear in the Census of Population) the aforementioned gap emerges: according to the brief biography, in 1908 he settled in Cincinnati, becoming treasurer of the Western Paper Goods Company, which had been incorporated in 1905. According to the sanitized account in the Times in 1921, he had gone to Cincinnati about 11 years earlier “to take charge of a tobacco plant, but gave that up to enter the paper bag business,” eventually becoming president. A much longer but even hazier article in Tobacco in 1920 had him “[f]or awhile identified with the old Commonwealth Tobacco Co., he stepped up later to a responsible position with the American Tobacco Co. From the big company he went to the Western Paper Goods Co. and now is the president of that prosperous, progressive and important corporation.”

In fact, however, Galbraith had gotten an earlier start in the tobacco industry—one that would prove relevant to his TMA mission. In 1902 he became the secretary-treasurer of Universal Tobacco Company (incorporated in New Jersey and headquartered in New York), which was caught up in a very convoluted financial and legal struggle over control involving an antagonistic and/or friendly relationship to the Tobacco Trust. By the end of 1903 Galbraith, who lived in East Orange, New Jersey, testified at a receivership hearing that he was also a company director, but had never bought or paid for the ten shares that

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90. "Col. F. W. Galbraith Dies in Auto Crash,” NYT, June 10, 1921 (4); “Colonel Frederick W. Galbraith, Jr.,” Ohio History 29:469-72 at 469 (1920). Galbraith’s entry in a standard national biography omitted mention of track walking, added that he had worked as a bank clerk, and identified the meat packing plant as John P. Squire & Co. The National Cyclopaedia of American Biography 19:170 (1967 [1926]).

91. "Colonel Frederick W. Galbraith, Jr.,” Ohio History 29:469-72 at 469 (1920).

92. Articles of Incorporation of the Western Paper Goods Company (July 26, 1905) (registration no. 21357) (copy furnished by Ohio Secretary of State).


94. "The New Commander of the American Legion: Col. Fred W. Galbraith, Vice President of the T. M. A.,” in Tobacco 70(23):5 (Oct. 7, 1920). In fact, Galbraith was, according to two corporate documents from 1920 that he signed, the secretary of the company. Western Paper Goods Company, Amendment (May 26, 1920); Western Paper Goods Company, Reduction of Capital Stock (Apr. 30, 1920) (copies furnished by Ohio Secretary of State). The president was Fred H. Berold, who held that position from the time of incorporation in 1905 until long after Galbraith’s death. The 1920 Census of Population also returned Berold as president of a paper manufacturing company.


the president had placed in his name only long enough for him to endorse.\textsuperscript{97} The following year saw the American Tobacco Company take over the Universal Tobacco Company\textsuperscript{98} and Galbraith incorporate the Queen City Tobacco Company in New Jersey.\textsuperscript{99} In fact, however, ATC “sent” him to Cincinnati “to organize the Queen City Tobacco Co., a supposedly independent concern but in control of the American.” When the Trust openly took over Queen City Tobacco, Galbraith “returned to the New York office of the American Tobacco Co.” In 1906, according to the entry for Galbraith in the \textit{National Cyclopaedia of American Biography}, he moved to Cincinnati, where he became treasurer and vice president of the Western Paper Goods Company, which manufactured paper bags, and some of whose stock he had bought during his first stay in that city.\textsuperscript{100}

Several of these biographical facts are contradicted by other, more credible sources. For example, at the federal antitrust suit proceedings against the Tobacco Trust in December 1907, special government attorney and future Supreme Court Justice James McReynolds, in questioning ATC Vice President Caleb Dula, brought out that at that time Galbraith was a salesman for ATC.\textsuperscript{101} Moreover, his will, drafted at the end of January 1908, indicated that he was residing in New York City at the time.\textsuperscript{102}

More importantly, McReynolds’ direct examination of Dula revealed that ATC had secretly furnished the money for organizing the Queen City Tobacco Company of Cincinnati—one of many firms that the Trust acquired in this manner. Many labor union-minded consumers shunned trusts in general and the Tobacco Trust in particular because of its decidedly anti-union practices.\textsuperscript{103} In order to undermine the market share that independent companies had been able to gain through the use of the union label, ATC secretly bought up and controlled numerous businesses that catered to such union-label consumers as a “powerful engine of warfare.”\textsuperscript{104} Dula testified that Galbraith had been connected with the

\textsuperscript{97}“Universal Tobacco Hearing,” \textit{NYT}, Dec. 8, 1903 (3).
\textsuperscript{98}\textit{The National Cyclopaedia of American Biography} 19:170 (1967 [1926]).
\textsuperscript{99}“Incorporated in New Jersey,” \textit{NYT}, May 1, 1904 (FS4:2).
\textsuperscript{101}United States v American Tobacco Company, 211 US 106 (1911), Record: 2: Testimony of Witnesses at 603 (Dec. 9, 1907).
\textsuperscript{102}“Will of F. W. Galbraith, Jr. Leaves Income to Widow,” \textit{Cincinnati Commercial}, July 12, 1921 (10:3).
\textsuperscript{103}Meyer Jacobstein, \textit{The Tobacco Industry in the United States} 144-45 (1907).
\textsuperscript{104}\textit{Report of the Commissioner of Corporations on the Tobacco Industry, Part I:}
sales department of the Universal Tobacco Company, which had used a Union label, in the efficacy of which Galbraith had been a “great believer....” Dula, regarding him as a “bright, smart fellow capable of running and building up a business,” decided to start up a scrap tobacco business in Cincinnati “with Mr. Galbraith in charge” and having a stock option, but the Tobacco Trust secretly furnishing all the money for the business.105 McReynolds then introduced a letter that Galbraith had written to Dula on June 22, 1904, stating that: “‘There is only one fear I have and that is that in some way the connection may leak out.’” Galbraith then requested that he and Dula conduct future correspondence—including telegrams—under assumed names so that “‘I can feel safe should anyone pump the telegraph people.’”106

Galbraith’s fear was rooted in the fact that, as he had informed Dula in a letter of July 11, 1904, he had lied to the local union, which had suspected that the company was connected with the trust, by telling its officers that there was “‘absolutely no connection....’”107 Galbraith confessed to Dula that the “‘strain has been heavy’” because “‘[t]he union is out for blood and they are getting wise’”108 since “‘they suspect they are being used by the trust. ... We will have to be very careful or the connection will be exposed.’”109 The stress that Galbraith felt was compounded by his regarding this business opportunity as the foundation of his future economic prosperity. He therefore begged Dula to appreciate his situation: “‘I am not weakhearted and never will be, but I am so anxious to make this go that I do not want to take any chance, at least none that are not necessary. This venture means as much to me as to you and more, for it is my future against your money; I have so much at stake that there can be no failure from any fault of mine.’”110 The reason that Galbraith saw the deal as his big chance was clear: not being a “m[a]n of means,” he did not pay, as Dula explained to Junius Parker,
Tobacco Merchants Association of the United States

ATC’s associate counsel, the next day on cross-examination, for the “substantial interest” in the form of a stock option that ATC had given him. Galbraith had in part earned his elevation into the longed-for circle of unearned income recipients by having shared with Dula his conviction, as Parker put it interrogatorily to Dula, “that the Union label might be of particular value in that particular product he was about to manufacture?” And Dula confirmed that: “There was a good big part of the scrap tobacco business that was put out under the Union label; of course, the various manufacturers had worked up considerable sentiment on that line in various ways, particularly by condemning us.”

The kind of duplicity and deception in which Galbraith engaged both for his own and the Tobacco Trust’s economic benefit would stand Galbraith in good stead as TMA’s behind-the-scenes manipulator of tobacco propaganda. And the fact that Junius Parker—who represented ATC in the antitrust case, and would be one of the cigarette firm general counsel members of the TMA Executive Committee 13 years later giving him directives—had heard ATC vice president Dula testify that “Galbraith was a smart fellow” who had helped pull the wool over the eyes of the public regarding the Trust’s ownership of Queen City Tobacco presumably contributed to his having been selected for his new confidential role in 1920.

Until his death Galbraith remained at the head of the Western Paper Goods Company in Cincinnati, making a “handsome fortune,” but he never left the tobacco trade inasmuch as his firm, which specialized in the manufacture of single and paraffin-lined tobacco bags and pouches, sold paper bags to the

111United States v American Tobacco Company, 211 US 106 (1911), Record: 2: Testimony of Witnesses at 683 (Dec. 10, 1907).
112United States v American Tobacco Co., 164 F. 700 (CC SDNY 1908).
113United States v American Tobacco Company, 211 US 106 (1911), Record: 2: Testimony of Witnesses at 682-83 (Dec. 10, 1907).
114Harold Littledale, “Legion’s Leader Has Record as Hard Fighter,” Syracuse Herald, Oct. 24, 1920 (11:1-4 at 1). At the 1920 census he was returned as a proprietor of a paper bag company, employing a cook and a nurse at his residence. Fourteenth Census of Population (1920) (Heritage Quest). Ten years earlier he had been returned as a paper manufacturer-employer. Thirteenth Census of Population (1910) (HeritageQuest). The filing of his will in 1921 shed no light on the size of his wealth because it was “merely a formality, as Colonel Galbraith turned all his property over to his wife when he entered the army.” “Will of F. W. Galbraith, Jr. Leaves Income to Widow,” Cincinnati Commercial, July 12, 1921 (10:3).
115Moody’s Manual of Investments and Securities Rating Service: Industrial Securities 1913 (1926). It is not clear why, but Moody’s did not begin to report on the company until 1926, 21 years after its incorporation. In 1920 Western Paper Goods Co. reported net
Tobacco Manufacturers Association of the United States

profits after federal tax of $69,747 on net sales of $1,033,395. In the mid-1920s, Galbraith’s wife, Esther G. Galbraith, was a director.

E.g., Western Paper Goods Co. had contracts with P. Lorillard Co. beginning at the latest in 1915; one was signed four days before Armistice Day and ran through and beyond Galbraith’s activity as the TMA’s special tobacco propagandist. P. Lorillard Co., Board of Directors Meeting at 261 (June 14, 1916), Bates No. 88111672; P. Lorillard Co., Board of Directors Meeting at 278, 280 (Dec. 4, 1918), Bates No. 88111371/3. For dealings with the American Tobacco Company, see “The American Tobacco Co. Fiscal Statement Dec. 31, 1921, Bates No. ATX010250527.

“Col. F. W. Galbraith Dies in Auto Crash,” NYT, June 10, 1921 (4); “Colonel Frederick W. Galbraith, Jr.,” Ohio History 29:469-72 at 469 (1920); The National Cyclopaedia of American Biography 19:170 (1967 [1926]).


“Galbraith of the Legion,” NYT, June 10, 1921 (8) (edit.).

One subject that Galbraith was much less reticent about making public was the Legion’s alleged political abstentionism captured by his claim at the time of his election that he “felt no fear of any conscious violation by the various posts of the pledges of the Legion to...be neutral in disputes between capital and

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116E.g., Western Paper Goods Co. had contracts with P. Lorillard Co. beginning at the latest in 1915; one was signed four days before Armistice Day and ran through and beyond Galbraith’s activity as the TMA’s special tobacco propagandist. P. Lorillard Co., Board of Directors Meeting at 261 (June 14, 1916), Bates No. 88111672; P. Lorillard Co., Board of Directors Meeting at 278, 280 (Dec. 4, 1918), Bates No. 88111371/3. For dealings with the American Tobacco Company, see “The American Tobacco Co. Fiscal Statement Dec. 31, 1921, Bates No. ATX010250527.

117“Col. F. W. Galbraith Dies in Auto Crash,” NYT, June 10, 1921 (4); “Colonel Frederick W. Galbraith, Jr.,” Ohio History 29:469-72 at 469 (1920); The National Cyclopaedia of American Biography 19:170 (1967 [1926]).


120“Galbraith of the Legion,” NYT, June 10, 1921 (8) (edit.).
He apparently saw no contradiction between this position and the Legion’s support for a pending anti-sedition law that “will enable us to get rid of the enemy within. ‘It is the boast...of Lenin and Trotsky that their agents are high in the councils of the legion and it is the advice of Mr. Haywood of the I.W.W. that his men should join the legion and become borers from within, but we will find them out and then they will bore no more.’” Galbraith apparently also made an exception to the Legion’s alleged neutrality for “the extremely radical”—the only one of “all classes” that it did not embrace within its membership.

His fame reached its highest point just nine months later when at age 47 he was killed in an automobile crash, prompting sympathy messages from the likes of President Harding and Marshal Foch. Newspaper obituaries faithfully noted that he had been active in Cincinnati “civic affairs,” mentioning the Business Men’s Club and Rotary Club, and Cincinnati mourned, in the words of its mayor, “one of the greatest men our city has produced for many years,” who since the war had “devoted his time and his energies to the soldiers and the whole country as well as our city,” but just as his earlier, less glorious employment for the Tobacco Trust was conveniently forgotten or suppressed, so, too, neither his publicly known vice presidency of TMA nor his invisible position as the cigarette companies’ director of propaganda sullied his posthumous reputation. (A special meeting of the TMA Executive Committee commemorating Galbraith mentioned his vice presidency, but not his confidential activities.) To be sure, if for the Times an “American to be proud of was FREDERICK W. GALBRAITH,” who “despised the slacker” and “had contempt for

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123 Col. F. W. Galbraith, Jr., “Galbraith’s Last Message a Plea to Prevent War,” Muscatine Journal, July 4, 1921 (1-4-5) (Galbraith’s last, posthumous message).
124 “American Legion Leader Dead in Auto Smashup,” WEC, June 9, 1921 (1:8).
125 “Col. F. W. Galbraith Dies in Auto Crash,” NYT, June 10, 1921 (4).
126 “Galbraith Funeral Plans,” NYT, June 11, 1921 (13); “Thousands Mourn at Galbraith Bier,” NYT, June 12, 1921 (26).
127 “Col. F. W. Galbraith Dies in Auto Crash,” NYT, June 10, 1921 (4).
128 “Cincinnati in Mourning Today for Galbraith,” CFDR, June 9, 1921 (1-5).
129 “Col. Fred’k W. Galbraith,” Tobacco 72(6):1 (June 9, 1921), did mention his TMA vice presidency.
130 “Col. Fred W. Galbraith, Jr.,” Tobacco 72(7):3 (June 16, 1921) (Executive Committee of the whole TMA, not the Executive Committee of the Tobacco Committee).
the hyphenated,”¹³¹ then perhaps more than conventional de mortuis nil nisi bonum was operating, and the paper would have perceived his dirty tricks on behalf of the cigarette oligopolists as yet further noble service for the relief of ex-soldiers, who needed unimpeded access to their nicotine. After all, just a few months before Galbraith’s death, the Times had editorially embraced the attack by the Topeka post of the Legion on Kansas’s cigarette sales ban. The newspaper mocked the law’s drafter, University of Kansas Professor William McKeever, accusing him of practicing “applied altruism...the simplest of sciences,” defined as “[f]ind[ing] out something that you don’t like and millions of people do, and tak[ing] it away from them.”¹³²

Though undocumented, the speculation seems plausible that Galbraith would have been seeking to coordinate the many local American Legion posts’ influential opposition to anti-cigarette legislation during the 1921 state legislative sessions in Iowa and elsewhere.

The Surgeon General’s Earliest Counter-Blaste to Cigarettes

“[Health Commissioner] Dr. Robertson says he is against restoring smoking on the elevated, because he desires to promote the health conditions of the city of Chicago. ... Let me ask the Doctor and his supporters this question: who are the predominant nations of the world, is it the non-tobacco using Chinaman or Hindu, who controls the destinies of mankind, or is it the tobacco using nations, such as ours, the English, the French and the Italians.”¹³³

One supervening event that occupied the attention of those at TMA centrally concerned with anti-cigarette propaganda in the early part of 1920¹³⁴ was a statement made on April 3, just days after he had assumed his new post, by the Surgeon General, Dr. Hugh S. Cumming, proposing an “intensive campaign to knock ‘the deadly cigarette’ out.” Reacting, according to one United Press account, to government reports of a 47-percent increase in tuberculosis the previous year, which he attributed to increased smoking, Cumming declared the number of women who had become “slaves to the cigarette smoking

¹³¹“Galbraith of the Legion,” NYT, June 10, 1921 (8) (edit.).
¹³²“Professor and Legion,” NYT, Jan. 5, 1921 (11) (edit.). See also above ch. 16.
¹³³“Order May Be Rescinded,” Tobacco 68(9):5 (June 12, 1919) (remarks of attorney Henry S. Blum).
¹³⁴Another was a South Carolina Senate bill to prohibit tobacco smoking during meal hours in public eating rooms. See above ch. 16.
habit...amazing...” He saw the nation’s “physical tone” as “seriously threatened” by the insomnia and nervousness, which he deemed the chief ill effects of this smoking.\textsuperscript{135} Reacting, according to a different version, instead to a 47-percent increase in cigarette consumption, Cumming appealed to women, whose complexion was ruined by the habit, not to smoke lest “the entire American nation...suffer.” Calling women’s increased smoking “one of the most evil influences in American life today,” he explained that smoking harmed women more than men because the former’s nervous system was more highly organized and thus more easily exposed to such negative impacts.\textsuperscript{136} On cue, two well-known New York physicians advised women “to go ahead and light another one.” A drug specialist and the head of the psychopathic ward at Bellevue Hospital opined that drinking tea and coffee was as bad as cigarette smoking.\textsuperscript{137} The New York World wondered whether, if women were “compelled by law to stop smoking,” men could “expect exemption at the hands of a feminine electorate....”\textsuperscript{138}

Although later medical historians of the anti-smoking movement pooh-

\textsuperscript{135}“U.S. Surgeon General Declares War upon Smoking of ‘Deadly Cigarette,’” Clearfield Progress (Pennsylvania), Apr. 4, 1920 (1:1-2). A few days later the Board of Temperance, Prohibition and Public Morals of the Methodist Episcopal Church issued a statement very similar to Cumming’s. It differed chiefly by arguing that regardless “what strict justice may declare their right and privilege to be,” it was necessary to appeal to women to refrain from using tobacco “in the name of the country’s welfare....” “Against Women Who Smoke,” Tobacco 69(15):22, 23 (Feb. 12, 1920). Oddly, neither The New York Times nor the Chicago Tribune reported Cumming’s statement. Both the Public Health Service’s official historian and a medical historian seemed to be unaware of his earlier intervention; instead they dealt only with similar comments that Cumming made in 1929. Office of the Public Health Service Historian, “The Surgeons General and Smoking,” on http://lhncbc.nlm.nih.gov/apdb/phsHistory/resources/smoking/smoking.html; John Burnham, “American Physicians and Tobacco Use: Two Surgeons General, 1929 and 1964,” Bulletin of the History of Medicine 63(1):1-31 at 2-4 (Spr. 1989).

\textsuperscript{136}“The Smoking Habit Is Spreading Among Women,” Daily Northwestern, Apr. 3, 1920 (1:7). Ironically, Cumming’s reference to complexion may be the only accurate aspect of his diagnosis in the sense that recent “[l]imited but consistent data suggest that women smokers have more facial wrinkling than do nonsmokers.” U.S. Department of Health and Human Services, Women and Smoking: A Report of the Surgeon General 332 (2001).


\textsuperscript{138}“More Moral Regulation Coming,” World (New York) (reprinted in Helena Independent, Apr. 11, 1920 (14:5).
pooched Cumming’s condemnation of smoking as weak because it applied only to women, he himself smoked, and his intervention appeared to generate no practical consequences. TMA at the time—with the huge gap in smoking prevalence rates between men and women making the latter a market-expanding factor of enormous import—did not regard it as inconsequential. In mid-April, Frederick Galbraith suggested to Shelton that TMA write Cumming asking whether the statement reported in the press was “a correct statement as issued by him.” If it turned out that the newspapers had reported the surgeon general’s remarks accurately, then—in keeping with the systematic tendentiousness and distortion that would become a hallmark of the industry’s public relations—the matter could be “referred to a list of eminent specialists whom we can select for their opinion.”

Such shenanigans were kept sufficiently invisible to the non-investigative press that The New York Times instinctively “turned to the Tobacco Merchants’ [sic] Association” “as the most reliable commercial source of information on the subject” of anti-cigarette legislation. (TMA’s manufacture of pseudo-opinion should be contrasted with the TMA’s current self-description as having been “founded in 1915 to manage information of vital interest to the worldwide tobacco industry. ... Today the TMA remains dedicated to supplying factual information to a variety of companies, associations, and other organizations, whose livelihoods depend upon timely, comprehensive and accurate data about the global tobacco business.”) Manifestly, the important functions that Galbraith was performing for the tobacco industry were not paired with equivalent autonomy: R.J. Reynolds Tobacco Company’s general counsel


141 F. W. Galbraith, Jr. to H. H. Shelton (Apr. 15, 1920), Bates No. 502359664. The TMA’s vigilance was reflected in Galbraith’s also informing Shelton that he was investigating the Chicago Board of Education’s permitting Lucy Page Gaston “to start a campaign in the schools against cigarettes to help her campaign.”

142 Charles Cushing, “Prohibition as ‘Big Brother’ Fails to Win for Blue Laws,” NYT, May 20, 1923 (sect. XX at 5).

kept him on a short enough leash that all he could do was suggest that TMA write such an innocuous letter to Cumming. A few days later Shelton, who was about to meet with N. W. Ayer & Co., Reynolds’ longtime advertising agency, for a general survey of the editorial positions of papers throughout the United States, informed Galbraith that he saw no objection to TMA’s asking Cumming for verification of the story.\textsuperscript{144}

\textbf{Bribing and Intimidating the Press}

Anti-tobacco is a thing of the past.\textsuperscript{145}

Galbraith reported to Shelton that during the two weeks following the April 7, 1920 meeting of the TMA Executive Committee of the Tobacco Committee (the minutes of which are lacking in the released cigarette company documents) there had been a “decided increase in newspaper articles concerning the attack being made upon tobacco,—most of them friendly to tobacco, which articles tend to create in the mind of the reader a sentiment unfavorable to the Anti....” The downside was that, with these pieces’ appearing only in “metropolitan dailies...the education of the rural communities is not being accomplished largely because,” as Galbraith saw it, “the editors do not realize the situation.” In a related vein, he mentioned that 10 weeks earlier he had submitted a recommendation that TMA appropriate a sum of money to be spent on trade papers that Dushkind deemed “necessary if he is to receive the whole-hearted cooperation of the trade press....” Finally, recurring to the tactic of cherry-picking medical collaborators, Galbraith expressed his conviction to Shelton that “as a foundation upon which many things can be built in the future, articles in medical journals of the same commonsense type—not too technical—will be of the greatest value, and...if the matter is judiciously handled, many articles favorable to tobacco will be published.”\textsuperscript{146}

\textsuperscript{144}HHS to F. W. Galbraith, Jr. (Apr. 19, 1920), Bates No. 502359663 (much of the letter is unreadable). Whether the TMA then wrote to Cumming is unknown.


\textsuperscript{146}F. W. Galbraith Jr. to H. H. Shelton (Apr. 22, 1920), Bates No. 502359661-2. Unfortunately, the sum of money requested is unreadable but might be $1,000 or some other four-figure sum ending in 000. In a letter to the Executive Committee of the Tobacco Committee 10 weeks later Galbraith again urged it to approve the proposal. This time he added that at some point Dushkind would meet with the trade journal editors to
In a long letter a week later to the Executive Committee of the Tobacco Committee—which appears to have functioned analogously to the infamous Tobacco Institute Committee of Counsel in “‘circl[ing] the wagons’” and was composed of five lawyers representing the four major cigarette manufacturers, ATC, Lorillard, Reynolds, and Liggett, and James M. Dixon, president of the multi-product Tobacco Products Corporation and a longtime protégé of James B. Duke—Galbraith returned to the issue of bribing the trade press because he had failed to make the matter “entirely clear” earlier. The bombshell that he dropped belied TMA’s rhetoric of a tobacco industry unified in its branches by the common struggle against the threat of universal prohibition:

Mr Dushkind, Secretary of the TMA is of the firm belief that there is a decided division of opinion within the trade itself; that a substantial number of retailers throughout the nation see no objection to cigarettes being put out of business, due to the fact that the margin on cigarettes has, in their opinion, been consistently low; that many cigar and tobacco manufacturers feel the same way because of the belief that if cigarettes were put out of business it would largely add to the use of their products; that these groups do not understand that this is not a fight against cigarettes, but a fight to prohibit tobacco in all its forms. Consequently Mr Dushkind is of the belief that it is necessary to subsidize the trade press to get their unanimous support to impress the trade with this idea. It seems unbelievable, though it may be true, and if it is, the appropriation is certainly desirable.

On May 11, the Newell-Emmett Company, a newly founded advertising agency, sent Galbraith a 10-page memorandum on “Counteracting the Anti-
Tobacco Merchants Association of the United States

Tobacco Propaganda,” which it regarded as so “widespread” that “prompt and whole-hearted action” by the entire industry was called for; if the latter were forthcoming, then, since the situation was neither “desperate” nor even “immediately alarming,” it would be “possible to swing public opinion to our side in a relatively short time.” Although Newell-Emmett deemed it unnecessary to discuss the underlying causes of the objections to cigarettes, remarkably it conceded that: “We know that the objection is deep-rooted—that at least nine out of ten men ‘half-believe’ cigarettes to be harmful and that the prejudice is strongest in country districts....” The entering wedge for industry counter-propaganda was furnished by the alleged fact that this prejudice was “largely based on ignorance” inasmuch as “according to the best medical opinion cigarette smoking by adults is not harmful—that there is no justification for objection on moral grounds—that the industry is a very large factor in the economic well-being of the country.” The advertising agency failed to raise the question of how the quasi-universal personal physical experience of millions of users over decades could be based on ignorance, but it seemed supremely confident that advertising could dispel this arguably unique mass perception of the harmfulness of a lawful consumer product by the addicted consumers themselves. Newell-Emmett’s plan was to secure and educate an audience in order to change popular sentiment “to avoid any likelihood of unfavorable legislative action, even if the old prejudice is not stamped out.” Increased consumption of cigarettes, Emmett-Newell assured its client, would be a merely incidental by-product of the successful implementation of this educational program. With almost all state legislatures meeting already by the beginning of 1921 and the introduction of anti-cigarette measures reasonably to be expected in a number of them, time and speed were of the essence. A focus exclusively on legislatures would, however, not suffice since most legislators either sought to represent their constituents’ sentiments or (absent “certain knowledge” of the latter) “to play safe by voting on what they believe to be the side of morality.” Given this view of legislative voting as purely derivative, the tobacco industry’s story had to be taken directly to the people and especially to country districts where anti-tobacco sentiment was strongest.

The advertising agency broke its proposals down into defensive and offensive activities. Among the former were four of special interest. First, systematizing a tactic in which cigarette companies had engaged for decades and would

Record, 5:*2554 (Exhibit No. 709) (1945).

Newell-Emmett Company to Col. F. W. Galbraith: Re: Counteracting the Anti-Tobacco Propaganda at 1-2 (May 11, 1920), Bates No. 502359644/5.

Newell-Emmett Company to Col. F. W. Galbraith: Re: Counteracting the Anti-Tobacco Propaganda at 2 (May 11, 1920), Bates No. 502359644/5.
continue to push into the twenty-first century, Newell-Emmett urged the industry
to initiate and support movements to enforce laws prohibiting minors from
smoking chiefly through editorials in newspapers, personal work in the trade
itself, and circulars to legislators. Since the cigarette firms knew then, as they do
now, that a successful program would decimate the replacement market for adults
who died from or stopped smoking, such ploys have always been shams. Second,
the industry should appeal to newspaper publishers for “fair play in the editorial
handling of news items reflecting on cigarettes—in other words, seek to secure,
without any hint of pressure, such cooperation between the advertising and
editorial departments of the newspapers, as will effectively close many columns
against misleading ‘anti’ propaganda.” It may be difficult to discern how this
proposal boiled down to anything other than bribery or threats to withdraw
bribery, but Newell-Emmett presumably looked with special favor on it because
the firm recommended that it be carried out by tobacco advertising agencies, thus
insuring additional business for itself. The same advantage accrued to it from the
third proposal, which involved writing to all newspapers that at the time were
refusing to print cigarette advertisements. In Iowa, to be sure, such an approach
would be senseless until the cigarette companies succeeded in securing repeal of
the sales ban, which had brought in its wake a ban on advertising as well. Finally,
the industry was to keep tabs on all the anti-cigarette organizations’ activities
with the ultimate objective of being in a position to “anticipate their moves....”

The offensive activities were, in turn, subdivided into direct and indirect
ones, both of which were subject to the same caveat: wherever possible avoid
being forced into a controversial attitude, which would boomerang by stimulating
still more activities by the antis. About the direct approach by the manufacturers
themselves Newell-Emmett had little to say other than that it would “lay all cards
on the table” to special groups such as legislators, editors, and doctors. In
contrast, the indirect approach, which was preferable for addressing the general
public, would not be operated by the “allied manufacturers,” but nevertheless “in
an entirely honorable and legitimate manner....” The principal issue here was
“whether or not we can safely keep away from open, aggressive work against the
attack.”

Oddly, the “indirect offensive” also included the very groups such as editors
that were to be approached directly and openly, apparently because the “personal

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153 Newell-Emmett Company to Col. F. W. Galbraith: Re: Counteracting the Anti-
Tobacco Propaganda at 3 (May 11, 1920), Bates No. 502359644/6. On the Iowa cigarette
ad ban, see above ch. 14 and below ch. 19.

154 Newell-Emmett Company to Col. F. W. Galbraith: Re: Counteracting the Anti-
Tobacco Propaganda at 4 (May 11, 1920), Bates No. 502359644/7.
work” of one man talking or writing to another or a group on behalf of an individual manufacturer rather than an association left “no published indication...of a concerted offensive.” Here Newell-Emmett placed special emphasis on work with organizations because the “‘antis’ have the benefit of one of the most influential of all organizations, the church.” Abandoning all hope of invading these precincts on behalf of cigarettes, the agency proposed outflanking them through “at least a partial offset”: hedging, it opined that “it would seem reasonable to believe that the tobacco industry, by using sufficient effort, can secure the influence of most of the secular organizations of the country which are composed of men, most of them being smokers.” Prime examples were the American Legion, fraternal orders, and labor unions, one of whose great virtues was their many thousands of local organizations in virtually every town and country village from which the influence that the cigarette manufacturers desired could “radiate.” Conveniently, their support could be obtained “‘indirectly’” by means of “competitive cigarette advertising” in their membership publications, “thus enlisting the active editorial cooperation of these papers against the ‘antis.’” In addition, Newell-Emmett claimed that resolutions from such organizational locals “would have great weight with legislators.” Revealing its peculiar conception of the “honorable and legitimate,” the advertising agency did not even shrink from proposing—though it surmised that it was too late for 1921—that nationally prominent lecturers be secured to enter the Chautauqua circuits. And although even Newell-Emmett was forced to recognize “that it would obviously be impossible to talk directly” about cigarettes in an adult education forum associated with churches and populism, it prefigured the cigarette companies’ late-twentieth-century techniques of rhetorical displacement by conceiving of an “effective speech on the evils of provincial intolerance, the limits of personal liberty...” Similarly indirect—that is, “[n]eeding no signature” but subject to the caveat of avoiding “evident attempts to make converts”—was the proposed “industrial educational film” showing the whole process of cigarette manufacture from the southern tobacco plantation to the cleanliness of factories to the “genuine enjoyment men find in smoking them.” As far as literature was concerned, Newell-Emmett suggested that a de luxe edition of the booklet “About Cigarettes” (which TMA was about to print) be distributed to legislators with a very large cheaper edition for nationwide distribution. It also envisioned this booklet as a vehicle for educating thousands of dealers and clerks who, having become aware of “their own importance in the chain,” could “exert a powerful influence” by understanding how to “advance a defense for cigarettes...” As the catalysts of a kind of elite chain-letter adult education program, the “better class of dealers can be...entrusted [sic] to place copies of this booklet in the hands of
their more intelligent customers.”

If taken up “whole-heartedly” by the cigarette manufacturers, a step that Newell-Emmet predicted “would be even more powerful than any effort which the opposition can hope to use” was lining up “the hearty support of almost the entire American press, both magazines and newspapers.” To be sure, it might be imagined that this proposal would run into the insuperable problem that the “typical request for free publicity is today exceedingly unpopular with every type of publisher” because of the large number of requests and shortage of paper. Newell-Emmett, however, sought to persuade its client that this aversion would not “apply to a request relative to the welfare of the tobacco industry.” The alleged reason was commercially straightforward: “in volume of advertising given to publishers, the tobacco industry stands very near, if not at, the top of the list. This means, first, that tobacco interests have a right to, and can be sure of, favorable consideration and, second, that this request for editorial support can be based, not alone on the welfare of the tobacco industry, but on the welfare of the publishers themselves.”

Making this pitch to newspaper owners, at least in Iowa, would have been a carrying-coals-to-Newcastle deal: many of them could hardly wait for the state ban on cigarette sales to be repealed so that the linked ban on advertising would fall with it; indeed, some even admitted (privately to Governor Kendall) that they were disinterested in the former per se, but supported it only for the revenue that would derive from the resumption of national cigarette advertising in Iowa.

Relevant in this connection was Newell-Emmett’s view—based on the aforementioned observation that opposition to cigarettes was even more widespread in the rural areas—that the country newspapers were even more important than the city papers and would “fall in line...if given a reasonable amount of competitive advertising from the different manufacturers.” With regard to the efficacy of bribing publishers with advertising, the agency was able to console its client with its belief that “most of the country editors who now refuse cigarette advertising do so, not on moral grounds, but, being ignorant of the real defense of the cigarette, they are afraid of the bad will of their fellow townsmen.” If company men in the field could visit such editors personally and give them “a clean, honest defense” (as, for example, presented in the aforementioned “About Cigarettes”), “nearly all of them will be glad to accept the

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155Newell-Emmett Company to Col. F. W. Galbraith: Re: Counteracting the Anti-Tobacco Propaganda at 4-6 (May 11, 1920), Bates No. 502359644/7-9.

156Newell-Emmett Company to Col. F. W. Galbraith: Re: Counteracting the Anti-Tobacco Propaganda at 6 (May 11, 1920), Bates No. 502359644/9.

157See above ch. 15.
advertising and support the movement against ‘anti’ legislation.”¹⁵⁸

Newell-Emmett, in any event, once again perceived an opportunity for an additional stream of revenue to itself: it confided to Galbraith that the key to securing press support lay with the advertising agencies handling the competitive tobacco ad campaigns, which “individually enjoy the marked respect of publishers,” a feeling that would “automatically multiply” when the agencies were associated on this project. This self-touting reached a new high point when Newell-Emmett proposed that to insure success the ad agencies approach the press “by speaking, not primarily for the tobacco interests, but in behalf of the business welfare of the publishers and agents themselves.” If that tactic were deployed, “it would seem strange if the editorial and press support of almost the whole American press could not be definitely lined up to expose the weakness and falsity of the ‘antis’ [sic] position and oppose ‘anti’ legislation.”¹⁵⁹

Following up on Newell-Emmett’s proposal, on July 2, 1920, Galbraith submitted to the same five lawyers and Dixon of the Executive Committee of the Tobacco Committee the specific suggestion to form an advertising agencies committee; Newell-Emmett would then be asked to prepare a plan for approval by the Committee; then the main agencies handling tobacco advertising would confer and decide whether to cooperate actively.¹⁶⁰

Galbraith then presented for adoption a plan submitted by N. W. Ayer & Son, which boasted that thirty years earlier it had “induced the leading tobacco men of that day...to advertise their products in the newspapers,”¹⁶¹ and which had handled Reynolds’ Camel advertising; by 1921, 22.5 percent of Ayer’s advertising involved tobacco.¹⁶² The company proposed a survey questionnaire of the editors

¹⁵⁸Newell-Emmett Company to Col. F. W. Galbraith: Re: Counteracting the Anti-Tobacco Propaganda at 7 (May 11, 1920), Bates No. 502359644/50. Since the passages quoted in this paragraph are largely unreadable in the original, they are cited according to their reproduction in F. W. Galbraith, Jr. to W. B. Bell et al. at 2 (July 2, 1920), Bates No. 502359605/6.

¹⁵⁹Newell-Emmett Company to Col. F. W. Galbraith: Re: Counteracting the Anti-Tobacco Propaganda at 6-7 (May 11, 1920), Bates No. 502359644/49-50. Much of the entire (apparently carbon copy) document is unfortunately difficult if not impossible to read.

¹⁶⁰F. W. Galbraith, Jr. to W. B. Bell et al. at 1-3 (July 2, 1920), Bates No. 502359605-7.


of all newspapers in all towns with a population of fewer than 100,000, where “the anti-tobacco propaganda is especially rife.” It commended the survey as giving “as clear an indication of the extent of the feeling against tobacco as it would be possible to secure”—provided that the questionnaire was geared toward capturing not the editors’ views, but their views of their communities.\(^{163}\) (Ayer purported to know that the editors had “intimate knowledge of the feeling” in their communities, but it did not disclose how it knew that the editors’ “opinion of the opinion prevalent” in the communities on anything, let alone tobacco, was expert.)\(^{164}\) Remarkably, the agency recommended that the tobacco question not be posed in isolation, but, rather, be included among other then-prevailing movements of public opinion, “such as Bolshevism, explained as the rule of the majority, trade unions, the right to strike, and other similar items.”\(^{165}\) The reason that Ayer deemed it “impolitic” to ask only about tobacco was the risk of giving great publicity to tobacco, to which all public attention would be directed. Without stopping to reflect on how the WCTU might react to seeing the anti-cigarette movement classified as similar to Bolshevism or whether informants’ views might be biased by fear of association,\(^{166}\) Ayer proposed distributing the questionnaire through an “important review magazine.”\(^{167}\) The point of the exercise was to determine whether the publicity received by the anti-tobacco movement was “out of all proportion to the extent of its activity, and therefore could be dismissed from further consideration” or, alternatively, whether anti-tobacco propaganda and feeling were spreading; in the latter case, the publicity that the magazine carrying out the survey “might give to this important social movement undoubtedly [would] arouse the editorial opinions of newspapers

\(^{163}\)F. W. Galbraith, Jr. to W. B. Bell et al. at 3 (July 2, 1920), Bates No. 502359605/7.

\(^{164}\)Recommendations of N W Ayer & Son: N. W. Ayer & Son to Col. Galbraith Jr. at 1 (July 28, 1920), Bates No. 502359590/1.

\(^{165}\)F. W. Galbraith, Jr. to W. B. Bell et al. at 3 (July 2, 1920), Bates No. 502359605/7.

\(^{166}\)Recommendations of N W Ayer & Son: N. W. Ayer & Son to Col. Galbraith Jr. at 1 (July 28, 1920), Bates No. 502359590/1. This new outline of recommendations dropped the reference to Bolshevism from the questionnaire, substituting for it one about effecting moral reform through legislation, and adding another about government ownership of industries.

\(^{167}\)F. W. Galbraith, Jr. to W. B. Bell et al. at 3 (July 2, 1920), Bates No. 502359605/7. Ayer preferred using the Literary Digest as the distributor, inter alia, because it was widely known that it had been conducting a questionnaire about presidential possibilities and an additional questionnaire “would not strike the average editor as unusual.” The TMA would defray the cost incurred by the Digest. Recommendations of N W Ayer & Son: N. W. Ayer & Son to Col. Galbraith Jr. at 1-2 (July 28, 1920), Bates No. 502359590/1-2.
generally and so counteract its further appeal.” In the event, the survey results turned out just as Ayer and its client desired.

At the end of August, Richard Strobridge, one of the co-founders of Newell-Emmett and the author of the aforementioned TMA booklet “About Cigarettes,” submitted a further plan to Galbraith, which revealed that the editorial survey had objectives beyond indirectly ascertaining the opinions on tobacco of the population in nonmetropolitan areas. Now the survey was also designed to uncover the “[e]ditorial and advertising policies of newspapers toward cigarettes [and] other tobacco products....” This information, in turn, “will enable us to immediately classify newspapers as (1) friendly, (2) neutral, and (3) hostile—hence will enable us to estimate the immediate cooperation we can expect from them...and the amount of personal work which may be required.” The plan was then for an executive committee of tobacco advertising agents to send letters to the papers that accepted tobacco but refused cigarette advertising as well as to those that refused all tobacco advertising in order to determine which editors were candidates for personal talks with the object of “swing[ing]” as many as possible from the “hostile” to the “neutral” or even “friendly” camp by means of presenting “the business side—mutual interests, etc.” (Shelton and Galbraith ultimately rejected separating out, especially in the questionnaire, the various forms of tobacco.)

Newell-Emmett’s proposal for the neutral papers was to “ask for fair play in editorial treatment of tobacco and cigarettes” and to try to “counteract ‘press agent' methods of antis.” Imparting a Pickwickian meaning to “ethics,”

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168 F. W. Galbraith, Jr. to W. B. Bell et al. at 3 (July 2, 1920), Bates No. 502359605/7.
171 Strobridge’s plan provided for the creation of an organization of tobacco advertising agents from whom money contributions for the project might later be solicited; Galbraith was to send them a letter expressing his belief that their proposed work would not only be “good insurance” for them, but, “by improving tobacco sentiment,” might “actually increase business....” Nevertheless, Strobridge opined that this “scheme....will give them no cause to feel ‘steam-rollered’....” Bizarrely, they were to be asked to treat the letter “as highly confidential even vis-a-vis the agents’ own organizations (whose clients the TMA members were), even though ultimately “most of the [work] burden will fall on them.” Suggested Plan of Newell-Emmett Company at 1-3 (August 30, 1920), Bates No. 502359585/6-8.
Strobridge then urged this procedure for bringing the neutral editors round: “Put this on basis of straight business ethics—volume of tobacco advertising, etc.” His suggested approach for the “friendly” press was unvarnished economic pressure: “ask for support in view of volume of advertising, as insurance for its continuance. Ask if they will give occasional space for material we can supply....” Galbraith later confided to Shelton that it would be very desirable for this committee of advertising agents to be sending to the newspapers “correct information” about the tobacco industry such as news items, interviews, and editorials that, “because of the standing of the members of the Committee would receive the consideration they deserve,—which if sent out by the TMA or other organizations would not receive the slightest consideration.” Why Galbraith found it self-explanatory that tobacco ad agents would have any more credibility with publishers or editors than their cigarette company-customers is difficult to discern.

Despite the obvious efforts to make publishers an offer they dared not refuse, TMA put on a charade with the publishers themselves. Although the correspondence itself appears no longer to be extant (or at least available), it is known that TMA on July 26, 1920, made a mailing to publishers, a number of whom replied that they regarded the offer “as another attempt to get free space....” To dispel this insight, TMA did a second mailing to the disbelievers admitting that it had apparently failed to get across its intention in offering to send “‘from time to time authoritative data upon the tobacco industry.’” TMA manifestly assumed that even a rural editor would believe the tale that it was “‘not seeking free publicity in your newspaper. We were not and are not trying to get something for nothing. We were merely anxious to have you personally know the real truth about the tobacco industry.’” TMA apparently found nothing incongruous or self-contradictory in immediately thereafter slipping in that there were “‘few industries in America today that spend as many dollars for country newspaper space as the tobacco industry (and unless all signs fail, tobacco advertising in country newspapers will continue steadily to increase). We have no desire to secure undue advantage as an industry because we are advertisers.’” Instead, its purpose in “‘acquainting you, as one of the leaders of thought in your community,...has no relation to advertising.’” Rather than space, free or paid, all it wanted—“‘[t]o be perfectly frank’”—was “‘your intelligent understanding of the facts in relation to an important industry.’”

175F. W. Galbraith Jr. to H. H. Shelton (Sept. 20, 1920), Bates No. 502359577.
Galbraith informed the TMA Executive Committee of the Tobacco Committee that a “substantial number of country newspapers” had, based on a misunderstanding of what TMA was trying to accomplish, “resented the attempt to use their publications for tobacco propaganda (as they called it).”

Interestingly, the American Press Association—an advertising representative that specialized in placing national advertising in country weeklies and small dailies—had fallen victim to the same misunderstanding, prompting its vice president to seek an interview with Galbraith in order to present a plan. The American Press Association, which published the aforementioned passages from the TMA mailings in an article on the first page of its members-only “Confidential Bulletin” sent to 6,000 country newspapers in August, was obviously carrying water for TMA in repeating TMA’s disingenuous claim that it did not intend to spread propaganda or obtain free publicity. Its manifest purpose was to reinforce the message that lucrative advertising hung in the balance. Noting that it had been bringing the “value of country newspaper advertising space” to tobacco firms’ attention for more than three years, the American Press Association boasted that it had increased tobacco advertising in country papers from zero in 1917 to several hundred thousand dollars in 1920. It then subtly intimated the potential economic consequences of a failure to cooperate with “this big industry”: “We are happy to say that, once having interested these manufacturers in country newspaper space, your newspapers have delivered eminently satisfactory results and consequently we have now established this industry as a permanent client for your newspapers.”

Galbraith, who was satisfied that the article would enhance publishers’ understanding, informed the TMA Executive Committee that he was confident that as TMA’s “campaign progresses,” the American Press Association would “use its influence amongst its members to cooperate with us to the fullest extent.”

Ironically, the American Press Association was engaged in a bitter feud with TMA’s consultant N. W. Ayer & Sons over the placement of cigarette advertising in Iowa weeklies. After the Association had written to the papers several times “claiming credit for business which...Ayer...had forwarded,” Ayer

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This form letter to country publishers quoted the TMA letters.

177 F. W. Galbraith, Jr. to W. B. Bell et al. (Sept. 10, 1920), Bates No. 502359581.
179 F. W. Galbraith, Jr. to W. B. Bell et al. (Sept. 10, 1920), Bates No. 502359581.
180 F. W. Galbraith, Jr. to W. B. Bell et al. (Sept. 10, 1920), Bates No. 502359581.
181 [American Press Association], [untitled] (August 1920), Bates No. 502359582.
182 F. W. Galbraith, Jr. to W. B. Bell et al. (Sept. 10, 1920), Bates No. 502359581.
wrote directly to the Iowa weeklies, informing them that whereas “the A.P.A. is telling the publishers of Iowa that it hopes to get some Camel Cigarette advertising for them, if they will all sign up special with the aforesaid A.P.A.,” Ayer had actually been persuading tobacco companies to advertise in newspapers for three decades.\footnote{Ralph Hower, \textit{The History of an Advertising Agency: N. W. Ayer and Son at Work}, 1869-1949, at 416 (rev. ed. 1949 [1939]).}

By mid-May 1921, about a month after the Iowa legislature had adjourned, TMA was able to publish the results of the editorial survey, of which Dushkind risibly said that it “may be properly called a census of public opinion...to ascertain in the most practicable way how the American public views the anti-tobacco agitation.”\footnote{Charles Dushkind, \textit{Tobacco Manual} 37 (1923).} Although TMA apparently never succeeded in persuading the \textit{Literary Digest} to associate itself with this charade of a poll, \textit{Leslie’s} illustrated weekly newspaper, which was not wholly bereft of cigarette advertising,\footnote{\textit{Leslie’s}, 132(3412):333 (Mar. 19, 1921) (large American Tobacco Co. ad).} not only opened its pages to the tobacco industry, but even published an accompanying editorial characterizing the outcome as “the unmistakable verdict of the people in a referendum of editors representing the entire country.”\footnote{Garret Smith, “Many Industries Tied to Tobacco,” \textit{Deep River Record} (IA), June 10, 1921 (1:6). Under the same title it appeared, inter alia, in: \textit{Ada Evening News} (OK), July 18, 1921 (4:4); \textit{Englewood Times} (IL), July 1, 1921 (6:4).} Many newspapers, including ones in Iowa, ran a somewhat compressed version of the article.\footnote{“Tobacco’s Foes Losing Ground,” \textit{Leslie’s} 132(3420):488 (May 14, 1921) (edit).}

The ostensible author of the brief article was Garret Smith, a journalist\footnote{Garret Smith, “Many Industries Tied to Tobacco,” \textit{Deep River Record} (IA), June 10, 1921 (1:6). Under the same title it appeared, inter alia, in: \textit{Ada Evening News} (OK), July 18, 1921 (4:4); \textit{Englewood Times} (IL), July 1, 1921 (6:4).} who appears to have been fully occupied at the time on behalf of the tobacco industry: at the same time he published another piece that ran in numerous newspapers (including the very country papers that TMA was targeting) stressing how great the financial loss would be to industries producing inputs for the tobacco industry if prohibition were enacted.\footnote{“‘Tobacco’s Foes Losing Ground,’ \textit{Deep River Record} (IA), June 17, 1921 (8:1-2); ‘Tobacco’s Foes Losing Ground,’ \textit{Sun-Herald} (Lime Springs, IA), July 7, 1921 (n.p.) (NewspaperArchive).} In at least one paper it appeared next to a large ad
for Camel cigarettes, while in another next to one for Chesterfield. Numerous Iowa weeklies published both of Smith’s articles during the brief period in late June and early July when city and town councils and county boards of supervisors were deciding whether to issue cigarette sales permits as repeal of prohibition was about to go into effect. For example, the Newton Daily News, which had illegally begun running cigarette advertisements at the beginning of May and ran its first legal ad on July 5, published both articles on facing pages on the day that the city council voted on the question of issuing permits. Smith’s piece, “Is Tobacco Doomed?,” like TMA, was facially focused on the antis’ alleged drive for total prohibition of tobacco, yet when it discussed actual legislative efforts in 1921, it misleadingly cited bills or laws that merely banned sales (in the case of Idaho even falsely claiming that the law banned the use of cigarettes). Since bans on use obviously dwarfed sales bans in terms of intrusiveness, Smith’s contention that “analysis of legislation on the subject [in 1921], checked up with the returns of the questionnaire, indicates the accuracy of this test of sentiment” was illogical.

Interestingly, Smith revealed that TMA (whose general objectives he failed to mention) stood behind the survey—an actual though indirect poll of popular opinion—which it had had the Press Service Company of New York conduct “in order to determine more accurately the sentiment of the general public on the
Tobacco Merchants Association of the United States

Although Smith failed to explain what the Press Service Company was, Dushkind in his later and more extensive presentation of the data, called it “an entirely disinterested concern....” In fact, the Press Service Company was a New York advertising (or, perhaps more accurately, publicity) firm with a sleazy reputation specializing in precisely the kind of operation it pulled off for the cigarette companies—and not for the first time teamed up with Smith. In 1917, for example, despite a Federal Trade Commission report indicating that no coal shortage was imminent and that “false scares” had created earlier shortages in order to drive prices up, a Lincoln, Nebraska newspaper reported that “a New York advertising concern is sending out full-page illustrated announcements forecasting a coal famine and high prices. The double-led story is written by one Garret Smith. Nowhere does there appear any indication that the story is sent out by coal companies. And the press service company sending it out has the immaculate gall to offer it free, with the illustrations, to such publishers as may be suckers enough to print it.”

In the winter of 1921, when coal profiteering had prompted calls for government control of mines and railroads, the Press Service Company conducted a questionnaire to “find out how the people feel about government ownership. And who,” asked one editor, “did they send the questionnaire to? To the editors of NEWSPAPERS, most of them CONTROLLED by the railroads, the coal mining interests, and similar beneficiaries of privilege. But suppose the questionnaire had been sent out to 5,000 representative farmers, or to 5,000 representative wage-workers, what would have been the answer?”

In 1913, congressional testimony brought out that for $2,500 a month the Press Service Company guaranteed publication of 50,000 lines a month pertaining to the sugar industry. Amusingly, on at least

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199 Charles Dushkind, Tobacco Manual 37 (1923). Although the book bore the date 1923, Dushkind was already sending out copies to cigarette manufacturers in mid-November 1922. TMA, Special to Cigarette Manufacturers (Nov. 16, 1922), Bates No. 501870686.
201 “Coal Profiteering,” Capital Times (Madison, WI), Feb. 9, 1921 (8:1).
202 “Sugar Trust ‘Educating Lawmakers,” Iowa City Daily Press, June 18, 1913 (1:5). The sugar industry was of special interest to the Press Service Company because one of its incorporators, corporate lawyer Herbert Lakin, was also heavily involved in sugar investments in Cuba as president of the Cuba Company. “New York Incorporations,” NYT, Mar. 4, 1906 (22); “Cuba Near Normal, Says Big Investor,” NYT, Aug. 2, 1922
Tobacco Merchants Association of the United States

one occasion even *The New York Times*—possibly inadvertently—pierced the veil of one of the Press Service Company’s corporate pseudo-public opinion polls. In 1919, the Association of Railway Executives “sent” questions to over 13,000 newspapers “through the Press Service Company” concerning government ownership of the railroads. Although the questions were framed in terms of “public opinion” and “sentiment in your community,” the article’s subhead and text unambiguously revealed what the poll really showed: “Newspapers Vote Overwhelmingly Against Government Ownership.”

The survey was conducted for TMA by Edward A. Moree, the treasurer of the Press Service Company. Before devoting himself surreptitiously to the health of the cigarette corporations, Moree had worked for several newspapers, entered social work with the Russell Sage Foundation, the New York State Charities Aid Association—helping organize the anti-tuberculosis movement and becoming an advisory expert in public health education for the New York State Health Department—and the Red Cross. (A quarter-century later, in 1946, after a stint representing automobile sellers, Moree, in his capacity as vice president of the Transportation Association of America, specialized in jeremiads about “the growing threat of nationalization, in the belief that if transportation goes over the dam into a Marxian scheme of nationalization the death-knell of private enterprise will be sounded.”) Some time in 1920 the Press Service Company sent the tobacco questionnaire to 12,518 editors of whom 7,847 or five-eighths replied;

(30); “Herbert C. Lakin, 80,” *NYT*, Dec. 30, 1952 (19). Smith also wrote an article promoting these very interests. Garret Smith, “How We Satisfy Our Sweet Tooth,” *Frederick Post* (MD), Dec. 7, 1921 (7).


205“Camp Trip Ends in Divorce,” *NYT*, Apr. 8, 1922 (13). At the 1910 population census Moree, who was 28 at the time, was returned as an office secretary living in the Bronx.


209“Port Authority Criticized,” *NYT*, May 13, 1946 (18) (letter to editor).
the circulation of the newspapers edited by the respondents totaled 21,870,046.\textsuperscript{210} The questions that TMA wanted answered were:

Do you favor the enactment of laws prohibiting the personal use of tobacco by adults?
In your judgment does the general sentiment in your community favor such legislation?
Is the use of tobacco personally objectionable to you?\textsuperscript{211}

Threadbarely ludicrous was Smith’s assertion that from the absence of any accompanying arguments or from the form of the questions “it was entirely impossible for any editor to determine the attitude of the Press Service Co. toward tobacco.”\textsuperscript{212} Given editors’ abundant experience with questionnaires distributed by the Press Service Company in order to generate a pro-industry-client outcome, it transcends plausibility to imagine that editors might have wondered whether the Press Service Company’s customer this time round might perchance have been the WCTU. Moreover, editors, as developed above, were well aware from repeated and massive contacts by TMA and its intermediaries that continued or new cigarette advertising revenue was contingent on adopting pro-tobacco editorial positions and making their newspapers otherwise mouthpieces of the cigarette companies’ messages.

Of the 7,847 responding editors 7,393 or 95 percent “represented public sentiment in their communities as opposed to anti-tobacco legislation,” while only 260 or three percent represented it as favorable.\textsuperscript{213} To be sure, this claim was a vast overstatement since the question asked not about just any kind of “anti-tobacco legislation,” but specifically and exclusively about the most extreme kind—namely, a prohibition of the “personal use of tobacco by adults”—a ban even more drastic than the recently enacted intoxicating liquor prohibition, which banned manufacture, transportation, and sale, but not personal drinking at home,\textsuperscript{214} which even prohibitionists deemed too severe.\textsuperscript{215} The hypothetical ban was discontinuous with any enacted laws, the most radical of which banned neither the personal use of cigarettes by adults nor the sale of any other kind of

\textsuperscript{210}Garret Smith, “Is Tobacco Doomed”? \textit{Leslie’s} 132(3420):485, 493 (May 14, 1921).
\textsuperscript{211}Garret Smith, “Is Tobacco Doomed”? \textit{Leslie’s} 132(3420):485, 493 (May 14, 1921).
\textsuperscript{212}Garret Smith, “Is Tobacco Doomed”? \textit{Leslie’s} 132(3420):485, 493 (May 14, 1921).
\textsuperscript{213}Garret Smith, “Is Tobacco Doomed”? \textit{Leslie’s} 132(3420):485, 493 (May 14, 1921).
\textsuperscript{214}National Prohibition Act, tit. II, § 33, 41 Stat. 305 at 317 (1919).
\textsuperscript{215}Andrew Sinclair, \textit{Era of Excess: A Social History of the Prohibition Movement} 169 (1964 [1962]).
tobacco to adults.\footnote{One exception to the latter was North Dakota’s ban on the sale of snuff in 1913, which was upheld by the state supreme court. 1913 ND Laws ch. 271 at 425; State of North Dakota v Olson, 26 ND 304 (1913). The legislature did not repeal the ban until 1927, when it amended the statute to prohibit the sale to persons under 21. 1927 ND Laws ch. 253, § 1 at 418.}

That under these circumstances any editor, let alone 260, judged that the “general sentiment” of his community favored a universal use ban was noteworthy. Apart from assuming without any discernible basis that these thousands of editors could possibly know what their communities thought about the issue, the survey was methodologically flawed by the failure to ask what proportion of the community opposed prohibition of tobacco use. Even if the aforementioned percentages had been correct, the result would have been much less clear-cut if, for example, a 25-, 35-, or 45-percent minority in numerous communities had favored a ban. The example of Iowa, however, strongly suggests that even in the unlikely event that the editors gave their “unprejudiced and unbiased opinions,”\footnote{Charles Dushkind, \textit{Tobacco Manual} 37 (1923).} they did not have their fingers on their communities’ tobacco pulse. Smith insisted that the Iowa legislature’s repeal of the anti-cigarette law (in connection with the judgment of 95 percent of the editors in Iowa that the general sentiment of their communities did not favor the hypothetical adult use ban) confirmed his claim that “analysis of legislation on the subject [in 1921], checked up with the returns of the questionnaire....”\footnote{Garret Smith, “Is Tobacco Doomed”? \textit{Leslie’s} 132(3420):485, 493 (May 14, 1921).} In fact, however, legislative repeal and editorial judgment bore no such confirmatory relationship to each other; more plausibly they were incommensurable with each other. As the House and Senate votes on the bill impressively revealed, almost half of the members opposed repeal of the universal ban on cigarette sales,\footnote{Smith mistakenly asserted that Arkansas’s law, repealed that year, had been in effect for over 20 years; he correctly stated that Tennessee’s had been too, but by implication suggested that Iowa’s had not.} and no proponent charged that the alignment failed to reflect—in Smith’s words—“an overwhelming opposition by the public to anti-tobacco legislation.”\footnote{See above ch. 15.} On the contrary, participants in the debate generally agreed that opinion was closely divided, albeit most sharply along big city/small town-rural areas lines. Indeed, the very fact that so many people had commented that the old law was still being enforced in many small towns where it enjoyed wide support either made it implausible that only 17 editors believed that they lived in communities whose...
Tobacco Merchants Association of the United States

general sentiment favored the total tobacco use ban or showed a large-scale disconnect between attitudes toward the hypothetical ban and the real cigarette sales ban.

It may very well have been the case that only a small proportion of the population in the United States wanted to prohibit adult men from smoking cigars or pipes or chewing tobacco, though many more may have supported various kinds of bans on cigarettes. But, as the cigarette companies were well aware, it was also very unlikely that the WCTU and other groups would waste their political capital on the highly implausible cause of universal tobacco bans just at the moment when the industry was inflicting the coup de grace on the last of their old-style cigarette sales bans. It was therefore tactically clever of the cigarette manufacturers to project tobacco as a homogeneous target in order to protect the only even marginally plausible object of attack—cigarettes, especially as smoked by women and children.

TMA’s counterattack had become so intense by 1920 that its president felt compelled to warn the members of the need to guard against “uncalled for, unnecessary and ill-advised aggressiveness in defense of our industry.” Nevertheless, at the annual convention in May, Charles Eisenlohr urged, now that “famous chemists, physicians, toxicologists, physiologists, soldiers and experts of every nation and clime...had given tobacco a clean bill of health and pronounced it a great God-given boon to mankind,” that everyone in the industry “constitute himself a guardian of the personal liberty involved in this issue”—otherwise “[t]he very objects for which this great republic was founded...would...be subverted....” The tobacco industry’s self-portrayal as the target of a global prohibitory target was very convenient at a time when manufactured tobacco, snuff, and cigar production were just beginning their long decline, eclipsed by what had all the makings of an inexorably and indefinitely

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221 In Iowa 415 editors responded that the general sentiment in their communities did not favor the ban, while only 17 responded that it did. Charles Dushkind, Tobacco Manual 39 (1923). In an article on the macroeconomic impact of a tobacco ban that Smith wrote for the TMA and that was published in many newspapers at the same time he mentioned that: “In their remarks accompanying their replies many of the editors expressed it as their opinion that the opposition of their communities to the abolition of tobacco was based to some extent on the damage that such a change would do to the business interests of the community. This was particularly true in the tobacco growing states and centers where there were large tobacco plants.” Garret Smith, “Many Industries Tied to Tobacco,” Hopewell Herald (NJ), June 1, 1921 (2:2). Neither Smith’s article in Leslie’s nor Dushkind’s chapter mentioned such qualitative responses.

222 “Eloquent and Well Considered Address of President Eisenlohr,” Tobacco 70(3):5, 7 (May 20, 1920).
Tobacco Merchants Association of the United States

Why branches that were losing market share and profits to the cigarette manufacturers should have been concerned about laws that restricted only their competitors’ sales may not have been intuitively clear. At TMA’s 1920 convention Eisenlohr sought to give substance to the organization’s founding message that its purpose was to “look out for its [i.e., the industry’s] general welfare” by declaring:

[A]s to whether or not the cigarette is the only object of these intolerant reformers is entirely immaterial. The cigarette business is an inseparable branch of the tobacco industry and it is incumbent upon the entire industry and upon each and every branch of it to stand solidly behind every division of the trade. ONE FOR ALL and ALL FOR ONE is the principle that we must follow when any member of the tobacco family is under fire.

Coopting and Degrading Physicians: The Curious Case of Dr. Oliver Victor Limerick

The court held that Limerick was the sewer pipe through which the filth was to flow....

In laying the groundwork for a pseudo-scientific campaign bearing remarkable similarities to more sophisticated ones developed by the cigarette companies and the Tobacco Institute many decades later, Galbraith informed the Committee that, based on having talked to many doctors, he believed that “the opinion of the great majority of the medical profession can be crystallized into a common sense opinion as to the moderate use of tobacco.” To be sure, he then disingenuously added that it was “extremely desirable in advance of securing the opinion of the medical profession to do some education work in crystallizing the same....” To that end he recommended that: a “committee of eminent scientists and doctors be formed by and acting under the direction of one man who will be responsible to your Committee”; this group would “make a [sic] thorough research and submit a report favorable to the use of tobacco,” which would be


224 “Tobacco Men Form $1,500,000,000 Union,” NYT, Nov. 9, 1915 (18).

225 “Eloquent and Well Considered Address of President Eisenlohr,” Tobacco 70(3):5, 7 (May 20, 1920). Eisenlohr was himself a cigar manufacturer.

226a “Sensational Grounds,” CT-S, June 3, 1897 (1:1). See also “One Ohio Blackmailer Convicted,” PE 17(22):665 (June 3, 1897).
submitted to and published by a leading medical journal—“preferably” by the Journal of the American Medical Association or the Medical Record. Reprints of the article could then be mailed to the 125,000 doctors listed in the American Medical Directory. Having been duly subjected to the desired “education work,” all these doctors were to be sent, “preferably” by the journal, a questionnaire, which, like that for newspaper editors, would contain several important questions being widely discussed by physicians and one on tobacco. To prepare this project, Galbraith had “carefully investigated” and then conferred with Dr. Oliver Victor Limerick, who then submitted a proposal, which, “owing to the confidential relation which he bears to the medical profession and to his clients,” Galbraith urged the Committee members to guard carefully. Unfortunately, the copy that Galbraith appended to his communication to the Committee appears no longer to be extant. He expressed his excitement about the value of the “tremendous amount of favorable opinions” generated by the results of the questionnaire poll for “any future activity”—that is, “if” the results themselves were “favorable”; if not, they would not be published. In case the Committee was not able to see its way to adopting the plan on a national scale, Galbraith suggested possible implementation in Oregon and “a few middle western Anti or near-Anti states which will need some attention later.”

The tobacco industry documents made available through recent litigation do not definitively reveal whether this plan was adopted, the article published, or the survey conducted. However, Limerick himself did publish an article in 1921 in the New York Medical Journal—which, notably, merged with the aforementioned Medical Record the next year—that appears to be just what the doctor ordered for TMA. Moreover, the Journal of the American Medical Association published in its Current Medical Literature department an abstract of the article (consisting of the authors’ conclusions) twice within two weeks just a few weeks after the article’s appearance.

Before analyzing Limerick’s article, it is well worth delving into its author’s biography in order to highlight the bizarre personality to which Galbraith and the cigarette companies were willing to entrust this highly important propaganda campaign. Limerick (1872-1926) was born and grew up in Mississippi, where his

227 F. W. Galbraith, Jr. to W. B. Bell et al. at 3-5 (July 2, 1920), Bates No. 502359605/7-9.

228 A search of all articles listed in Index Medicus for 1920-22 on tobacco, smoking, or cigarettes found no publication that plausibly fit the TMA’s requirements other than Limerick’s discussed below.

229 “Current Medical Literature,” JAMA 76(126):1859 (June 25, 1921); “Current Medical Literature,” JAMA 77(2):154 (July 9, 1921).
father, John Aldridge Limerick, was a pharmacist (in the drug business) and analytic chemist,\(^3\) whatever those occupational designations may have encompassed in nineteenth-century Rodney, a small Mississippi River town south of Vicksburg, which eventually died after the river changed its course.\(^4\) By the age of 19, in 1891, Oliver Victor Limerick was himself working as a “pharmaceutical chemist” in Vicksburg,\(^5\) but was not listed in any late nineteenth- or early twentieth-century Vicksburg city directory,\(^6\) although his obituaries in the local newspapers stated that “[y]ears ago deceased was engaged in business... in that city and specifically in the “drug business...”\(^7\) He had been preceded in Vicksburg by his older brother, a physician, who had attended Bellevue Hospital Medical College in New York.\(^8\) While still in his teens O. Victor Limerick went to Baltimore to study chemistry, after completing which studies he took up medicine\(^9\) and in 1893 was graduated from the College of Physicians and Surgeons in Baltimore.\(^10\)

What Limerick did directly after graduation or where he went is not known,\(^1\)

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\(^3\) Biographical and Historical Memoirs of Mississippi 1:1133 (1891). According to William E. S. Fales, “Introduction,” in Billy Burgundy, Toothsome Tales Told in Slang 13-15 at 14 (1901), Limerick was “a collegian by education...” Where and when he attended college is unknown.

\(^4\) Telephone interview with Jeff Coleman, Old Court House Museum, Vicksburg, (Nov. 15, 2007).

\(^5\) “Dr. O. V. Limerick Dies in New York City Last Night,” Vicksburg Evening Post, May 11, 1926 (8:5).


\(^7\) Dr. G. S. Limerick Died Early This Morning,”, Vicksburg Evening Post, July 8, 1904 (6) (copy furnished by Warren County-Vicksburg Public Library).


\(^9\) Physicians and Surgeons: A Graduating Class of 170 Members,” Sun (Maryland), Apr. 20, 1893, on www.genealogybank.com. The college later merged with the University of Maryland medical school.

\(^10\) If one of his obituaries was not in error in stating that he had gone from Vicksburg to New York, he must have returned to Vicksburg after medical school. “Dr. O. V.
but in November 1895, when in Louisville, Kentucky, he applied for a trademark for Antipyrexine, a “medicinal powder for certain named diseases,” stating that that name had been used since November 1, 1892.\textsuperscript{240} In 1895 he was living in Cincinnati, where he was listed in the city directory as a physician boarding at the Palace Hotel.\textsuperscript{241} Absent from the 1896 directory, he reappeared in 1897 with the same occupational designation boarding at the St. Clair Hotel.\textsuperscript{242} Despite the listing, he was apparently not practicing medicine since, according to family lore, illness had prevented him from ever practicing.\textsuperscript{243} Nor was he licensed to practice.\textsuperscript{244} In fact, Limerick was in Cincinnati as the “local agent” of the Fraser Tablet Triturate Manufacturing Company of New York,\textsuperscript{245} which, among the 300 million tablets it produced annually,\textsuperscript{246} manufactured opium tablets for bronchitis and heroin tablets for asthma.\textsuperscript{247} Limerick, then, “traveled for the Fraser Drug
Tobacco Merchants Association of the United States

Company”—he was, in other words, some kind of drummer for Fraser. Limerick, whom Fraser had employed as an agent “for some time,” had been “at one time a trusted and faithful employee of the Fraser Tablet company, but...was discharged because his sales for the past year were not satisfactory.”

These facts became widely known as far off as Oregon and Limerick himself was stripped of his obscurity when, on April 10, 1897, he was arrested in Cincinnati in his capacity as a “discharged employee of the Fraser Tablet Company of New York,” who “evidently tried to get even with his old employer by threatening to have the latter’s goods held up by the Food Commission.” The charge, as readers as far away as San Antonio, Texas learned, was attempted blackmail—a conspiracy to “shake down” Fraser. According to the company’s sole owner, the wealthy and socially prominent Dr. Horatio N. Fraser, in March Dr. J. W. Prendergast, the Cincinnati Health Officer, and Dr. Limerick originally asked for $10,000, but then for $2,000 agreed to “fix things” so that Fraser’s company would not have any trouble with

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248“Ohio,” ADPR 30(9):278 (May 10, 1897).
249At the same time, according to the city directory entry for Fraser Tablet and Triturate Manufacturing Company, Samuel A. Crocker & Co. was Fraser’s general agent. Williams’ Cincinnati Directory 514 (1896); Williams’ Cincinnati Directory 538 (1897); Williams’ Cincinnati Directory 556 (1898). Information provided by Genealogy and History Department, Cincinnati Public Library (Dec. 1, 2007). Crocker, who was Fraser’s “manager” in Cincinnati, testified at the trial discussed below that he had been afraid that he would be arrested because of Fraser’s substandard tablets. “Ohio Blackmailers in Court,” PE 17(15):455 (Apr. 15, 1897) (quote); Limerick v. Ohio, 14 Ohio C.C. 207, 212-13 (1897).
250“Justice,” CE, Apr. 15, 1897 (12:1-5 at 2).
251“Overruled,” CT-S, Apr. 17, 1897 (1:4). Alternatively, Fraser testified that Limerick had been discharged because there was “a difference between Limerick and the tablet house.” “Justice,” CE, Apr. 15, 1897 (12:1-5 at 3).
252“Charges Against City Health Officer,” MO, Apr. 13, 1897 (6:6).
253“Health Officer Arrested,” CT-S, Apr. 12, 1897 (2:1).
254[No Title], NYT, June 3, 1897 (2) (erroneously referred to as “A. V. Limerick”).
256“Blackmailing Officer,” San Antonio Daily Light, Apr. 12, 1897 (1:3).
257“Limerick,” CE, May 26, 1897 (7:1).
258“Prendergast’s Trial Begins,” CT-S, Apr. 14, 1897 (1:7).
259“Dr. Horatio N. Fraser,” NYT, Nov. 9, 1942 (23).
260The statement in “Prendergast Back,” PE 18(24):886 (Dec. 9, 1897), that Limerick was an Assistant Health Officer appears to have been erroneous.
the Ohio pure food department. Until then Prendergast had been using Fraser’s pills “at all of the city stations in his official practice—that is, having them used by police surgeons and others.” Prendergast had been furnishing Fraser’s tablets to “the out-door poor”; the active ingredient that had allegedly been deficient in at least one kind was caffeine.) Their conversation in a Cincinnati hotel room was allegedly overheard by a Pinkerton agent, whom Fraser had stationed in an adjoining room, while Limerick was on duty standing guard outside the door.

When “the celebrated case,” which attained “unprecedented prominence” because of Prendergast’s prominence, “the brilliant array of legal talent and the disclosures promised,” came on for an evidentiary hearing, “crowded to suffocation,” before a magistrate on April 14 and 15, Fraser testified that Prendergast had told him that part of the money they demanded was for George Cox, “a well-known Cincinnati politician” otherwise known as Boss Cox, who ran the city for a quarter-century. The 25-year-old Limerick, whom the prosecution called the “Mephistopheles of the conspiracy,” had approached Fraser before the hearing, apparently with the desire of unburdening himself to the prosecuting witness, but he left Fraser’s hotel before doing so. A grand jury quickly indicted Limerick and Prendergast, and, in order to avoid being outsmarted by the defendants at trial, the prosecution allegedly had respectable local chemists analyze Fraser’s tablets to prove that they were not substandard, thus demonstrating that the basis of the attempted blackmail—namely, that the

261 “Under Arrest,” Daily Times (Portsmouth), Apr. 12, 1897 (3:2).
262 “Ohio Blackmailers in Court,” PE 17(15):455 (Apr. 15, 1897) (quoting letter by Fraser).
264 “Under Arrest,” Daily Times (Portsmouth), Apr. 12, 1897 (3:2). See also “Telegraphic Brevities,” NYT, Apr. 18, 1897 (2).
265 “Trial and Conviction of Dr. C. [sic] V. Limerick,” ADPR 30(11):323, 324 (June 10, 1897).
266 “Justice,” CE, Apr. 15, 1897 (12:1-5 at 1).
268 “Justice,” CE, Apr. 15, 1897 (12:1-5 at 2).
271 “Gauzy,” CE, Apr. 16, 1897 (10:1-5 at 5).
272 “Limerick,” CE, Apr. 18, 1897 (8:2).
273 “Big Men,” Daily Times (Portsmouth), Apr. 24, 1897 (1:5).
274 “Ohio,” ADPR 30(9):278 (May 10, 1897).
Tobacco Merchants Association of the United States

State Dairy and Food Department chemist’s analysis of some of the medicinal tablets that Fraser’s firm had furnished to the Cincinnati Health Department for use by district physicians had found them to be impure—was a mere pretext.275 On June 1, after Prendergast had jumped bail276 and following a five-day trial, the jury, never in doubt about Limerick’s guilt277 and not crediting his claim that he had “simply carried messages between Mr. Fraser, his employer, and Dr. Prendergast,”278 and had been ignorant of Prendergast’s motives and really been working in the interest of the company, which in the meantime had re-employed him,279 found Limerick guilty of attempted blackmail.280

When the jury announced its guilty verdict at 10 p.m., “Limerick took his sentence coolly and when informed he would have to go to jail, lit a cigarette and smoked it.”281 Overruling Limerick’s motion for a new trial, Judge Murphy conceded that: “I don’t know whether you are the victim of another designing person or whether you yourself put the whole thing in motion.” He mentioned that Fraser and (unnamed) personal friends had appealed to him on Limerick’s behalf, but, despite feeling sorry for Limerick, he had to do his duty.282 The judge then sentenced him, as even residents of Denver read, to “Two Years in the Pen.”283 While still in court, “Limerick took the sentence more coolly than his

276“Prendergast Has Fled,” *CT-S*, May 24, 1897 (1:1).
277“One Ohio Blackmailer Convicted,” *PE* 17(22):665 (June 3, 1897).
278“Limerick on Trial,” *CT-S*, May 25, 1897 (1:3).
281“Two Years,” *CT-S*, June 8, 1897 (1:1).
282“Two Years in the Pen,” *RMN*, June 9, 1897 (6:7). See also “Two Years in the Pen,” *Portsmouth Times*, June 12, 1897 (2:7); *Daily Public Ledger* (Maysville, KY), June
aged father, who...could not repress the tears that flowed down his cheeks.”

But once the judge had remanded him to the sheriff’s custody, he exhibited the “first signs of breaking down” and when he saw the “preparations being made to take him to the bastile he refrained from weeping with the greatest difficulty.” Scarcely able to speak, Limerick, accompanied by his father—who had been “more affected by the sentence than his son”—asked the prosecutor whether he could get out on bond, but, being rebuffed, was taken to jail. Having previously given bond for his appearance, he had not been in jail so that when the basement door to the jail opened, according to the bathetic account of a Cincinnati Enquirer reporter, “a perceptible shudder went over his frame.”

He then “asked if he could smoke,” and when the jailer said yes, Limerick “dispatched a deputy for a package of cigarettes. ... The doctor looked at the iron stairs which lead up to the cells. He could hardly keep from sobbing as he said: ‘Will I have to go up there?’” Hearing from the jailer that “there was no alternative[,] the slight, almost girlish form of the doctor quivered as he swallowed the lump in his throat....”

Before returning to New York, Fraser had presented a strong appeal for mercy for his ex-employee, to which was appended a “touchingly pathetic” personal request from Limerick’s mother. The letter to Fraser from “the aged mother of the prisoner” pleaded that her son “was easily led into doing things, which, if he had a stronger individuality, he would not do,” and that “if he had done wrong in this instance he was led into it by others.” Fraser had become “decidedly adverse to continuing the prosecution” once he felt that Limerick and Prendergast had been sufficiently punished by the “public degradation that their disgraceful conduct brought upon them.” Fraser even made the “kindly offer” to withdraw the prosecution if Prendergast and Limerick signed a written acknowledgment of their guilt and the authorities agreed to it, but Prendergast refused and in any event the prosecutor intended to “go to the full limit in the performance of his official duty.” In the letter he sent to Judge Murphy before Limerick was convicted, Fraser asked him to be lenient to Limerick as a first
offender, adding that he felt no ill will toward him “and would like to see him start life again without the stigma of the penitentiary against his chances.” Fraser had contact with Limerick’s parents since he mentioned that the trial expense “will cost his parents about all they are worth” and enclosed to the judge a copy of a letter he had received from Limerick’s mother showing that “any punishment he gets will hit her and his father harder than the boy himself.”

While Limerick remained in jail, on June 17 his lawyers filed a bill of exceptions with the First Circuit Court in Hamilton County, which was “based on the alleged partiality of Judge Murphy and the jury under the influence of public clamor” and quoted the judge’s characterization of Limerick as “the sewer pipe through which the filth would flow.”

It took the appeals court less than a week to reverse the judgment and remand the cause to the Court of Common Pleas for further proceedings. Although Limerick was granted a new trial, the pharmaceutical trade press reported that this turn of events had not “given general satisfaction” in Cincinnati, where “public feeling against” the defendants was strong and the view was held that another conviction would result. Fraser, for his part, disavowed any personal interest in Limerick’s prosecution or conviction as an individual other than regarding its impact on his firm: “If guilty, these men are representatives of a class that is dangerous alike to society and the interest of all manufacturers who market their products in the State of Ohio.” In the meantime, the notoriety had not made it impossible for Limerick, who was released on a $1,500 bail bond, to return to the same occupation, “acting as a

291“Limerick Sentenced to the Penitentiary,” PE 17(23):695 (June 10, 1897) (quoting from letter from Horato Fraser to Judge John P. Murphy ((May 27, 1897).

292Docket No. 2638, Entry for June 17, 1897, Circuit Court Record Book; telephone interview with Anna Haas, Microfilm Department, Hamilton County Court of Appeals, First Appellate District of Ohio (Dec. 3, 2007).

293“Limerick’s Last Chance,” PE 17(25):756 (June 24, 1897).

294Docket No. 2638, Entry for June 24, 1897, Circuit Court Record Book; telephone interview with Anna Hoff, Microfilm Department, Hamilton County Court of Appeals, First Appellate District of Ohio (Dec. 3, 2007).

295Limerick v. Ohio, 14 Ohio C.C. 669 (1897). The reversal was based on errors made by the trial judge concerning a juror’s partiality and admissibility of evidence. See also “Reversed,” CE, June 24, 1897 (12:5); “New Trial in the Latest Ohio Case,” ADPR 31(1):18 (July 10, 1897).

296“The Cincinnati Boodlers,” Denver Evening Post, June 23, 1897 (5:2); “Another Chance for Limerick,” Daily Times (Portsmouth), June 25, 1897 (1:6). See also “Miscellany,” JAMA 29(2):93 (July 10, 1897) (“Dr O. V. Limerick...was granted a new trial”).
representative of an Eastern drug house.” Rumor had it that Limerick was in fact “quietly working” for Fraser again, but when Fraser visited Cincinnati in October 1897 he denied that his firm would restore Limerick to his former position as its local agent if the prosecution were dropped. The date for Limerick’s new trial was not scheduled even after Prendergast returned to Cincinnati, and finally in December 1898 the prosecution agreed not to pursue the matter any further because it had proved impossible to insure the attendance of its witnesses from New York “doubtless” as a result of Fraser’s unwillingness to spend more than the $6,000 that Limerick’s trial had already cost the firm.

Where Limerick went and what he did immediately after the blackmail charges were dropped are not clear, but it was presumably at this time that “he was called to New York to edit a medical journal”; by 1900, however, he “deserted the field of medical literature to devote himself to fiction.” From 1901 to 1904 he published five small books of purportedly humorous short stories pseudonymously under the name of Billy Burgundy. The likelihood of his

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297 “A New Trial for Dr. Limerick,” PE 18(2):50 (July 8, 1897).
298 “Mr. Fraser in Cincinnati,” ADPR 31(8):266, 267 (Oct. 25, 1897).
299 “Prendergast Back,” PE 18(24):886 (Dec. 9, 1897); “Dr. Prendergast Returns to Stand Trial,” ADPR 31(11):357 (Dec. 10, 1897).
301 “Attractive Feature for Sunday Times-Dispatch,” Times-Dispatch (Richmond, VA), Aug. 30, 1903 (13:6-7). The biographical information for this article announcing that the newspaper would be publishing a Billy Burgundy story every Sunday presumably derived from Limerick himself.

302 Billy Burgundy, Toothsome Tales Told in Slang (1901); Billy Burgundy’s Letters (1902); Billy Burgundy, Billy Burgundy’s Opinions (1902); Billy Burgundy, The Villagers: Comprising Humorous Sketches (1904); Billy Burgundy, A Feast of Fun: Twelve New Stories Picked from the Fun Tree (1904). Although the books all use the same pseudonym, the author was identified on the dedication page of the first book: “to my dear friend Harry Kent Holmes Billy Burgundy (nee [sic] O. Victor Limerick).” Billy Burgundy, Toothsome Tales Told in Slang n.p. (1901). Henry Kent Holmes was some kind of Wall Street financier. “Harrison Gets Injunction,” NYT, Sept. 18, 1910 (10). The introduction to this first volume by William E. S. Fales (1852-1906), a magazine writer and lawyer who lived in Brooklyn, stated of “Billy Burgundy” that “[f]or several years his skits and sketches have made the country laugh, and have brightened dull hours for myriads of readers.” William E. S. Fales, “Introduction,” in Billy Burgundy, Toothsome Tales Told in Slang 13-15 at 15 (1901). The Oxford English Dictionary 16:503 col. 2 (2d ed. 1989), erroneously states that Billy Burgundy’s Opinions at 57 contains the first published use of “stand up” as in snub someone by not showing up for an appointment.
Tobacco Merchants Association of the United States

having lived in New York at this time is strengthened by these books’ factual focus on New York City as well as by his having testified in 1902 at a friend’s divorce proceedings in New York, the press account of which characterized Limerick as a “book and magazine writer,” without mentioning any connection to medicine or pharmaceutics. 303  The Chicago Tribune opined that the best thing about Billy Burgundy’s Letters was that it was less than a hundred pages, 304  but other critics were considerably less critical. In 1905, there appeared under the name Robert Louis Sanderson, who in his nearly two decades as a French teacher at Yale never advanced beyond assistant professor, 305  a ten-page brochure, “Billy Burgundy: An Appreciation,” which bore all the marks of literary hucksterism. Revealing Limerick’s authorship and including biographical details that presumably only Limerick would have known, the brochure was replete with the fulsome praise that only a press agent eager to sell “Billy Burgundy’s stuff in slang [a]s undeniably the greatest circulation multiplier ever placed at the disposal of newspapers” could utter. 306  Praising the “universality of his attainments” but skipping over Limerick’s fortnight in the Cincinnati slammer, Sanderson, offering no sources, called him “a chemist of no mean grade,” a physician, “an authority upon therapeutics,” and “without any doubt the greatest inventor of slang words and phrases we have ever had....” Moreover, Limerick allegedly “had earned a celebrity as a writer upon medical subjects, especially therapeutics, before he devoted himself to fiction writing.” 307  For Sanderson

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303  “Absolute Divorce Given to Mrs. William E. S. Fales,” Brooklyn Eagle, July 31, 1902 (6). Fales had written the introduction to the first of Limerick’s Billy Burgundy books. What articles Limerick had written in which magazines is unknown. Searches of numerous periodical indexes for these years found no references to him.

304  “Gossip of the Theatrical and Operatic Stage,” CT, Aug. 23, 1902 (16:1-3 at 3).

305  Sanderson, who was born in France in 1851 and did not come to the United States until he was 21, appears to have published only translations and textbooks in his field. “Prof. Robert Louis Sanderson,” NYT, Nov. 7, 1922 (16).

306  Robert Louis Sanderson, “Billy Burgundy: An Appreciation” n.p. [8] (1905). It is unclear how the brochure, which only one library (Wisconsin Historical Society) in the world appears to have cataloged, was distributed. The copyright-holding Cosmopolitan Press Association of New York was presumably the agent, whose purpose was to drum up business for “Mr. Next,” Limerick’s “latest creation,” which does not appear to have made it into book form. Id. at [5-7].

“genius” was a “trite and inadequate” description of Limerick aka Billy Burgundy because he was “without question, one of the most talented writers of the day,” “held in the highest esteem by literary folk,” and had “perhaps done more to enlarge our vocabulary than any other writer of the day.”

What else he may have been doing from the turn of the century until World War I is also largely unknown. He was missing not only from the 1900 and 1910 Census of Population—perhaps because he lived in a hotel in New York City—but also from the world: in 1902 his friends in New York, “mystified and worried over his prolonged and unexplained absence” and “fearing foul play” with regard to the unmarried and temperate writer known to have had a “considerable sum of money with him,” reported him missing to the police.

Two of Limerick’s judicial entanglements there in 1904 indicate that New York was his place of residence during these years: a summons to his “former literary partner, ‘Steve’ Floyd,” to appear before a magistrate in the Tombs Court to “explain why he laid claim to checks, which Limerick said wehe [sic] his, although made out to Floyd’s order” and a judgment filed in court against O.

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309 In addition to not having been returned as living anywhere in the United States at the time of the 1900 or 1910 population census, Limerick was also not listed in the 1900, 1901, 1904, 1910 or 1915 city directory for Manhattan/Bronx. *Trow’s General Directory of the Boroughs of Manhattan and Bronx City of New York for the Year Ending July 1, 1900* (Vol. 113); *Trow’s General Directory of the Boroughs of Manhattan and Bronx City of New York for the Year Ending July 1, 1901* (Vol. 114); *Trow’s General Directory of the Boroughs of Manhattan and Bronx City of New York for the Year 1904 Ending July 1, 1905*; *Trow’s General Directory of the Boroughs of Manhattan and Bronx City of New York for the Year Ending August 1, 1910* (Vol. 123, 1909); R. L. Polk’s 1915 *Trow General Directory of New York City Embracing the Boroughs of Manhattan and the Bronx* (Vol. 128, 1915). He also did not appear in the 1899, 1902, 1903, 1904, 1906, 1907, 1908, or 1909 city directory for Brooklyn, according to a search done by the staff of the Brooklyn Collection of the Brooklyn Public Library. Email from Joy Holland to Marc Linder (Dec. 13, 2007).
310 In 1902, for example, he “made his home” in the Criterion Hotel in New York City. “‘Billy Burgundy’ Has Disappeared,” *Evening World* (New York), Aug. 22, 1902 (4:4).
312 “Checks for Early Riser,” *Evening World* (New York), Jan. 15, 1904 (9:3). Limerick and Floyd had written syndicate letters to newspapers under the name “‘Steve Floyd,’ the business man.” The magistrate dismissed the summons. At least some Billy Burgundy stories published in newspapers appeared under copyright by Steve Floyd. E.g.,
Victor Limerick “or Billy Burgundy” for $27.313 His father’s obituary in 1908 also stated that he was living in New York.314 At the 1920 Census of Population the 47-year-old Limerick did not tell the enumerator that he was a physician, but rather an author of books,315 though he appears not to have published one since 1904. The remainder of what is known about Limerick is best interwoven into the account of his aforementioned article of 1921.

Limerick, who at the time was the director of the pharmacology department at the Brooklyn Diagnostic Institute—founded in 1910316 as an early example of a new type of clinic established for the purpose of diagnosis317—co-authored the piece, “The Effect of Tobacco on Man,” with two academics, who were much better known. William John Gies—whose lengthy entry in that year’s Who’s Who eloquently testified to his research and administrative eminence318—was a very prominent professor of biochemistry at Columbia University, where he had been a founder of the School of Dental and Oral Surgery. Later he wrote a landmark report on revamping dental school education for the Carnegie Foundation.319 Max D. Kahn, a physician with a doctorate in biochemistry, was also an associate professor in biochemistry at the College of Physicians and Surgeons at Columbia and an expert on metabolism. Two years later Kahn became famous for his discovery of intarvin, an alternative to insulin for diabetes treatment.320 Since

Billy Burgundy, “Tale of Book-Worm Who Found Change of Diet,” Times-Dispatch (Richmond), Nov. 15, 1903 (sect. 3, 4:5-7).
313“Judgments,” NYT, July 21, 1904 (9).
315Census of Population, 14th Census (1920) (HeritageQuest) (residing on Riverside Drive in Manhattan).
316“Dr. Jacob Gutman, Physician 44 Years,” NYT, May 9, 1944 (19).
317The clinic’s aim was “declared to be ‘to hold at the command of the general practitioner the highest type of skill and to be scrupulously observant of the loftiest standards of professional ethics.’” With each of its 17 departments “under the direction of a well-known specialist in the given field,” Limerick was presumably one in pharmacology. “News of the Week,” New York Medical Record 97(2):73 (Jan. 10, 1920).
320“Dr. Kahn Reveals Diabetes Treatment,” NYT, Aug. 3, 1923 (17). Kahn died even younger (at 39) than and only a few weeks before Limerick. “Dr. Kahn, Noted Physician, Dead,” NYT, Apr. 10, 1926 (17); “2,500 Mourn Dr. Kahn,” NYT, Apr. 12, 1926 (21).
neither of Limerick’s coauthors appears to have studied or published on tobacco
or smoking, Limerick was the only one to respond to a critique of the article, and
the article’s argumentative anti-anti-tobacco style resembled that of an article on
 tobacophobia published by Limerick a few years later, it seems plausible that
Limerick was the real author, whose colleagues for reasons unknown merely
permitted their illustrious names to be used,\textsuperscript{321} which preceded his alphabetically
in the publication.\textsuperscript{322}

In addition to their formal institutional connection, Gies and Kahn had
collaborated on a study of caries as early as 1912.\textsuperscript{323} In 1920 Kahn published a
book dedicated to Gies, who in turn wrote the foreword.\textsuperscript{324} How they knew
Limerick is less obvious. One link went back to the beginning of 1915, when
Gies and Limerick were both members of a “committee of prominent New York
physicians and surgeons” petitioning Congress to rescind the war tax on
toothpaste on the grounds that it severely undermined governmental work on
behalf of oral hygiene.\textsuperscript{325} Intriguingly, since Limerick, according to an obituary,
“had been residing in New York City for many years, being connected with

\textsuperscript{321}Dr. Allan Formicola, former longtime dean of the Columbia University School of
Dental and Oral Surgery and honorary trustee of the William J. Gies Foundation for the
Advancement of Dentistry of the American Dental Education Association, when told about
the article and its background, responded that the “whole thing seems out of context of
what I know about Gies as a careful researcher and individual.” Email from Allan
Formicola to Marc Linder (Nov. 14, 2007).

\textsuperscript{322}Whether the TMA paid any of the authors is unknown. Interestingly, Gies was a
nonsmoker. Frank Orland, \textit{William John Gies: His Contribution to the Advancement of

\textsuperscript{323}William Gies and Max Kahn, “An Inquiry into the Possible Relation of
Sulfocyanate to Dental Caries,” \textit{Dental Cosmos} 55:40-53 (1913). Gies also wrote the
foreword to Max Kahn et al., \textit{Functional Diagnosis} (1920). Later they co-authored an
article on intarvin. Hattie Heft, Max Kahn, and William Gies, “Studies in the
Physiological Behavior of glyceryl-tri-margarate (intarvin),” \textit{Proceedings of the Society

\textsuperscript{324}Max Kahn et al., \textit{Functional Diagnosis} n.p. [v], vii-viii (1920).

\textsuperscript{325}“Tooth Wash Tax Opposed,” \textit{NYT}, Jan. 11, 1915 (16); \textit{JAMA} 64(4):351 (Jan. 23,
1915); \textit{American Journal of Tropical Diseases and Preventive Medicine} 2(8):538 (Feb.
1915). Gies’s participation in this petition was ironic since a year and a half earlier he had
causd a stir when he announced his finding that toothpastes promoted rather than
prevented dental caries, which could be more effectively prevented by brushing with food
acid such as orange juice. “‘Food Acids' for the Teeth” \textit{NYT}, July 28, 1913 (6) (edit.);
“Acid Bad for the Teeth? Not at All, Says Chemist,” \textit{NYT}, Aug. 10, 1913 (Sunday
Magazine at 6).
Tobacco Merchants Association of the United States

Colgate and Company," perhaps Limerick was pursuing some commercial (self-)interest. Another link was forged in 1919 when Limerick, together with seven other doctors and dentists, published an article in the *Journal of Dental Research*, a new dental journal edited by Gies. Titled, “Highfalutin Dupery: Comment on the Falsity of Various Published Claims for Certain Dentifrices,” the article complemented work that Gies himself published in the immediately following pages of the journal attacking the claims made by the manufacturer of Pepsodent. Since all four toothpastes attacked by Limerick et al. were competitors of Colgate, suspicion arises, again, that Limerick’s critical efforts may have been driven by some non-science-based interest, although Gies appended a note to the article by Limerick et al. praising it as “the verdict of trustworthy sources of specialized enlightenment” whose “respectable authority” it had become expedient to enlist in the “uproot” of certain “popular fallacies.”

Ironically, the vitriol—such as “A dog will return to his vomit”—that Limerick and his co-authors (doubtless justifiably) poured over manufacturers’ efforts to “enrich themselves” by means of “a mass of scientific imbecilities” as well as the responsibility that they placed at the door of magazine and newspaper publishers and editors for giving publicity to such “previcication” would have applied with greater force then and even more decades thereafter to cigarette manufacturers and the press. Much more profoundly ironic, however, was that the barbs hurled by Limerick and his dental and medical associates at “certain grades of intellect in the medical and dental professions” in whom “bombastically propounded fallacies sometimes take root” and who then become “phrase-juggler[s]” with a “tremendous power for...evil” by virtue of being able to “make black appear to be white” while disseminating the “utterly

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326“Dr. O. V. Limerick Dies in New York City Last Night,” *Vicksburg Evening Post*, May 11, 1926 (8:5). Another obituary stated that Limerick “was connected with Colgate and Co., at the time of his death.” “Dr. Victor Limerick, Former Vicksburger, Dead in New York,” *Vicksburg Herald*, May 12, 1926 (3:7).

327There appears to be no scholarly history of the Colgate Company that might shed light on the firm’s use of scientists in its toothpaste production in the early part of the twentieth century. Shields Hardin, *The Colgate Story* (1959), is a vapid hagiography. The company itself asserted that it had no relevant archival records. Email from Tom Paolella to Marc Linder (Nov. 28, 2007).


preposterous” should have been cast at their own article on tobacco, which was a prime illustration of the “testimony of experience” in medicine and dentistry as “the testimony of erratic speculations—a succession of phrase-embellished fads that do not survive intelligent deliberation.”

What at its core distinguished Gies’s and Limerick et al.’s toothpaste debunking from Gies, Kahn, and Limerick’s tobacco bunk was that the latter was supported by absolutely no theoretical or empirical-experimental science conducted by others or themselves. The tobacco article thus conformed admirably to the model constructed for toothpaste, permitting cigarette manufacturers also “to adjust their methods of dupery to”

the growing tendency on the part of the average individual to require explanations that appear to him to have scientific basis or the support of high authority. ... In order to invest this fiction with an appearance of having due corroboration, lavish use is made of quotations from the writings of such members of the medical and dental professions as can be made prey to dialectic trickery. The wickedness of this use of dazzling language, supported by what is falsely represented as reputable authority, lies in the fact that it at once deceives the unsophisticated and casts discredit on the respectable members of the medical and dental professions.

Gies, Kahn, and Limerick’s barely three-page article cast aspersion on the “emotionalist,” who was unable to reason from cause to effect or distinguish between fact and fallacy, and whose testimony on “the so-called tobacco question” was not deserving of as much consideration as the conclusions derived by “those specially trained in scientific investigation....” To be sure, the authors nowhere alluded even to a single investigation to support any of their numerous assertions masquerading as “conclusions.” Nowhere, for example, did they even mention in passing how they as scientists had “taken recourse to the most rigid methods of verification” to discover that the “development of tolerance to tobacco...explain[ed] the absence of deleterious effects in the many who habitually use tobacco in excess,” or that such tolerance was “partly inherited” and that it was therefore “certain that the tobacco habit is preserved, in some


332William J. Gies, Max Kahn, and O. Victor Limerick, “The Effect of Tobacco on Man,” *NYMJ* 113(15): 809-11 at 809 (June 1, 1921).
degree, through [natural] selection,” or, that “excessive tobacco smoking is rare
in the servile” (as opposed to those “engaged in intellectual pursuits”), or, finally,
that what “persistently tends to exist presumptively has a valid basis”—meaning
specifically the “smoking impulse, or craving for tobacco,” in the form of which
“[w]e invariably find on investigation that Nature is justified in what it repeatedly
expresses....”333 In the event, their “conclusions” delivered with all imaginable
clarity the message for which Galbraith and TMA had contracted:

The habitual moderate use of tobacco is not harmful to adults.
The moderate use of tobacco proves distinctly helpful to certain adult types.
The habitually excessive use of tobacco may prove harmful to certain individuals.
But the same holds equally true of all foods.
The excessive use of tobacco may prove harmful in certain neurovascular
disorders.
The habitual use of tobacco by juveniles is harmful.334

Oddly, the last “conclusion” was based on absolutely nothing since juveniles
were nowhere mentioned in the article (except with regard to their manufacturing
“makebelieve cigarettes”).335 Nevertheless, it fit in well with the cigarette
companies’ public relations strategy of pretending to discourage use by minors.
The speculative concession that “excessive use” by adults might cause
neurovascular disorders was also odd since in the text the authors pooh-poohed
the claim that “immoderate use...bears a causal relation to arteriosclerosis”: not
only did they call the (unmentioned) underlying theory “implausible,” but
asserted that what was commonly termed “smoker’s heart” was often “due to
endocarditis associated with gonorrhea, syphilis,...tonsilitis,...dental
abscesses....”336 In the same vein, Gies et al. declared that the “moderate but

333William J. Gies, Max Kahn, and O. Victor Limerick, “The Effect of Tobacco on
Man,” NYMJ 113(15): 809-11 at 810, 811 (June 1, 1921).
334William J. Gies, Max Kahn, and O. Victor Limerick, “The Effect of Tobacco on
Man,” NYMJ 113(15): 809-11 at 811 (June 1, 1921). For some criticism of the article four
deades later, see Tobacco: Experimental and Clinical Studies: A Comprehensive Account
of the World Literature 521, 532 (S. Larson et al. 1961). Two years later a British tobacco
manufacturers organization referred to the article (along with several others) as offering
“medical or other scientific reporting...on the basis of impression or experiment, of the
tranquilising effects attributed to smoking.” Tobacco Research Council, “Review of Past
and Current Activities” at 13 (1963), Bates No. 500051463/78.
335William J. Gies, Max Kahn, and O. Victor Limerick, “The Effect of Tobacco on
Man,” NYMJ 113(15): 809-11 at 810 (June 1, 1921).
336William J. Gies, Max Kahn, and O. Victor Limerick, “The Effect of Tobacco on
temporary rise in blood pressure” that was “the immediate effect” of tobacco—along with “an increase in the power of concentration, in consequence of a better adjustment of the ego to its environment”—that “laymen” stressed who condemned tobacco use did “not exceed in degree or duration that which ordinarily follows a cold bath or sponge” and “rarely ever equals that caused by such wholesome pastimes as dancing.”337 In purported refutation of the “possible contention” that tobacco had to be an “economic menace” because its excessive use “occasionally affect[ed] the vascular system and neuromuscular coordination” the three co-authors offered the “quite simple” answer that only the total net effect of a thing could determine whether it was an economic asset or liability. To carry out the necessary calculation, they left it to their readers to reason analogically back to tobacco from their tale that no right-minded person would advocate closing the schools just because the eye strain caused by the reading that is essential to education required some to wear glasses.338

Unsurprisingly, nowhere in the article was to be found any trace of the finding published in Gies’s own Journal of Dental Research in 1919 that leucoplakia, a precancerous oral lesion, was “invariably caused by excessive use of tobacco,” and that unless the cause was removed, “we invariably have carcinomatous degeneration.”339

Omitted from Gies et al’s formal conclusions was the unmediated assertion that the “sequence of the potency of the different forms in which tobacco is generally used runs as follows, in the order of greatest degree to least: Chewing, smoking pipe, smoking cigar, smoking cigarette.” From this pure assertion allegedly followed: “It can thus be seen that, contrary to the prevailing belief among laymen, the cigarette is in fact the least harmful form in which it is possible to use tobacco,” whereas “in fact” the only thing that could be “seen” was that the authors had made that assertion in the previous sentence (and just in case the reader or a popularizing publicist had overlooked it, they justified their “emphasis on the relative innocuousness of the cigarette” by reference to the “persistence with which the misinformed strive to convey a contrary impression”).340

Man,” NYMJ 113(15): 809-11 at 811 (June 1, 1921).
340William J. Gies, Max Kahn, and O. Victor Limerick, “The Effect of Tobacco on
Also absent from the final conclusions was the claim—odd given the proliferation of cigarette smoking by women at the time—that tobacco had “no special attractiveness for the female of the species” but was merely a passing fad: “The same impulse that caused some women of yesteryear to wear the deforming corset and others of today to expose their legs to wintry winds will prompt a few to affect a fondness for tobacco until another and more fetching stratagem of sex attraction has been thought of.”

Limerick’s dogmatism was vividly on display in a reply to an objection raised by a Pennsylvania physician several weeks later in the New York Medical Journal. Dr. D. W. Collins had had a mine inspector do tests to determine the volume of carbon monoxide in the gases drawn through a cigarette and the amount of carbon monoxide absorbed by the tissues of the mouth. The result was that between 0.6 and 0.7 percent of the carbon monoxide in the gases given off during smoking were absorbed in the upper air passages; crucially, the physician added, “[i]nhaling the smoke would materially increase the amount of carbon monoxide absorption, and the continued absorption of carbon monoxide certainly would have a deleterious effect on the human organism.” Collins’ conclusion harkened back to a health-related aspect of smoking peculiar to cigarettes that physicians and scientists had emphasized for decades: “As the cigarette smoker is, as a rule, an inhaler, I cannot understand why assertion is made that the cigarette is the least harmful form of tobacco, especially when the smoker absorbs a larger amount of carbon monoxide.”

Limerick’s very brief response continued in the purely apodictic mode of his original article by asserting that the cigarette was the least harmful form of tobacco use because “it yields the smallest amount of toxic materials.” He then made two additional uncorroborated empirical assertions: “Carbon monoxide is not the most toxic constituent of tobacco smoke. The inhalation of tobacco smoke is not confined to cigarette smokers.” Limerick did not specify the other more toxic compounds, but the Gies et al. article had mentioned nicotine, pyridine, collidine, and aldehydes as producing, together with carbon monoxide, tobacco’s vascular effects. But why cigarette smokers would not inhale more...
of these toxic compounds as well he explained nowhere. Thus his entire defense boiled down to the implication that cigar and pipe smokers inhaled too. Although no one denied that some of them did inhale, it had been uncontradicted common knowledge and the central scientific basis of attacks on cigarettes for decades that a much higher proportion of cigarette smokers inhaled. Limerick’s reply was thus pathetically irrelevant.

Presumably also as part of the TMA’s anti-anti-tobacco propaganda and publicity strategy a summary of the article, correctly stating its alleged conclusions, appeared a few weeks later on the “Things You Ought to Know” page of the Sunday World Magazine of the New York World. Titled, “Tobacco Injurious Only When Abused,” the piece, which was pitched as of interest to “those now engaged in the anti-tobacco crusade,” absurdly and grotesquely characterized Gies, Cahn [sic], and Limerick’s “study of the effects of tobacco on man” as “exhaustive.” And the editor of the Cigar Makers’ Official Journal, which was published in Chicago, may not have read the New York Medical Journal, but he quickly brought the conclusions of the article—which he called “lengthy” and highly technical”—to members’ attention.

Definitely not planned by Galbraith was a brief but sharply critical contemporaneous review of the article by Friedrich Wohlwill (1881-1958), a well-known German-Jewish neuropathologist and teacher on the Medical Faculty at the University of Hamburg (who was later forced to leave Germany by the Nazis, emigrated to Portugal, and, after World War II, emigrated to the United

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See above ch. 2.

“Tobacco Injurious Only When Abused,” World Magazine Section, July 10, 1921 (11:1). This article was one of 26 (including the Gies et al. article itself) listed in an “Index” in American Tobacco Co. documents produced in litigation. Index (n.d.), Bates No. 950297792/3 (erroneously dated 1915 but could not have been compiled before 1921). The World at this time appears to have opened its pages to pro-tobacco propaganda. The ATC files also included an article published there a few weeks earlier stating that Dr. William Golston had opined at a New Jersey State Dental Society annual convention that if reformers succeeded in banning tobacco along with liquor, the result would be an increase in diseases of gums and teeth because chewing tobacco was “‘one of the best disinfectants known to dental science’ by virtue of promoting saliva formation around the teeth and thus preventing bacteria from gaining a foothold. “Tobacco the Teeth’s Finest Quid Pro Quo,” World, June 2, 1921, Bates No. 950297937.

“Professional Opinion,” Cigar Makers’ Official Journal 45(8):3 (Aug. 15, 1921). Unsurprisingly, the piece did not allude to the article’s rank-ordering of various tobacco products’ harmlessness.
States where he worked at Boston University and Harvard Medical School) in the Zentralblatt für die gesamte Neurologie und Psychiatrie, which accurately and dismissively treated the article as “a kind of apology for tobacco.”

Whether the article was produced with this purpose in mind is unknown, but at least on one occasion the American Tobacco Company’s chief chemist trotted it out more than ten years after its publication in response to a letter to the company asking whether tobacco smoked in a pipe was safer than the same amount in a cigarette. A. L. Chesley of the research department found it “impossible for me to answer the question” because its underlying premise that smoking was injurious “seems to be wrong.” His basis for this refutation was none other than the article by Geis [sic] “in collaboration with” Kahn and Limerick, whose five “conclusions” he conveniently quoted. The only comparison between pipes and cigarettes he was willing to offer was to “foods which are very highly seasoned and foods which are but little seasoned.” As late as 1936, TMA listed Gies, Kahn, and Limerick in the supplement to its Tobacco Manual as “[a]mong the distinguished scientific and medical authorities who have found the moderate use of tobacco harmless....”

Although, as noted earlier, in 1920 TMA did not realize its plan to use the Literary Digest as a vehicle for its bogus editor/publisher survey, five years later it may have achieved success. Less than a year before his death, Limerick published in a medical journal a diatribe against the “tobaccophobe,” in which he, inter alia, attacked the false belief that inhaling smoke could cause lung disease on the grounds that very little smoke ever entered the smoker’s lungs when he “inhaled” because the smoke was not conveyed further than the larynx. Such false beliefs and the prejudice against tobacco in general were based largely on “popular opinion,” which was “the scum of mass reaction.” In fact, Limerick asserted, the “habit of inhaling tobacco smoke was every whit as pure and undefiled in origin as is the habit of kissing.” (According to researchers at the


349 Fr. Wohlwill, [Review], Zentralblatt für die gesamte Neurologie und Psychiatrie 26:274 (1921).

350 A. L. Chesley to Charles A. Mack (Nov. 11, 1931), on tobaccodocuments.org/atc/60322323.


Swedish National Institute of Hygiene, 96 percent of particulate matter, ranging from 86 percent of acetone to 99 percent of acetyldehyde and isoprene, and 54 percent of carbon monoxide in cigarette smoke was retained in the lungs.)353 Was it sheer coincidence that of the thousands of medical articles the Literary Digest could have digested for its readers, it had no better use for three magazine pages than spreading across them these and other excerpts from Limerick’s piece?354 Or did the invisible hand of the cigarette oligopolists grease the decisionmaking process? Because TMA documents from the period in question were by and large too old to be relevant for late-twentieth-century litigation, not enough of them have been required to be produced to answer this question. It is nevertheless astonishing that almost a quarter-century later a semi-scholarly book adduced Limerick’s tobaccophobe article as an example of doctors’ having presented a “mild defense of the weed” in the 1920s.355

Ironically, in the 1950s, when the president of Philip Morris (for reasons unknown) wanted to find a statement by the biostatistician Raymond Pearl about cigarettes and tuberculosis and tasked his company’s public relations firm with the chore, the closest its “comprehensive research” came to turning up such a statement was a quote in the Nov. 14, 1925 issue of Literary Digest by “a Dr. Victor Limerick”: following the aforementioned assertion about smoke’s not entering the lungs, Limerick had claimed that more non-smokers than smokers had been discharged on account of tuberculosis during the World War I draft.356 Manifestly by the mid-1950s the cigarette manufacturers had lost their institutional memory of the services that Limerick had once performed for them and had to reinvent that wheel.357

Less amusingly ironic is that at the end of the twentieth century one of the leading tobacco addiction researchers in the United States, writing in a National Cancer Institute/National Institutes of Health publication, actually cited Gies et al. as a source for the proposition that “[m]easures of physiological response (e.g. Gies, 1921...)...demonstrate that humans can be exposed to high levels of nicotine

353Tore Dalhamn, Marie-Louise Edfors, and Ragnar Rylander, “Retention of Cigarette Smoke Components in Human Lungs,” Archives of Environmental Health 17:746-48 at 747 (Nov. 1968). Ironically, Rylander was Philip Morris’s paid agent. See below ch. 23.
356John Scott Fones to [O. Parker] McComas (July 8, 1955), Bates No. 1005039633.
through their consumption of cigars—despite the fact that they had measured nothing at all.

Limerick had a far darker side than even his ludicrous articles in the cigarette oligopolists’ service revealed. In his family’s papers at the Vicksburg Old Court House Museum is preserved a seemingly completed typescript in a cardboard binder tied with string on which (presumably) his sister handwrote in pencil: “This is what Victor was working on at time of his death.” Titled, “The Inside of the Melting Pot: An Epochal Picturization of the Laws of Heredity,” the typescript appears to have been the prospectus for a motion picture, which was so profoundly racist and anti-Semitic, so thick with ignorant and obsessively stereotypical eugenicist hogwash, and so thoroughly suffused with delusions of grandeur that it is difficult to imagine that its author could have possessed the self-reflective distance or social skills to prevent his pathetically xenophobic and trivial Ku Klux Klanish psyche from communicating itself to multicultural society at large in New York City, let alone to associates such as Galbraith and Gies. Stringing quotations together renders commentary unnecessary while doing complete contextual justice to Limerick’s nonsensical prejudices.

In subhead form Limerick’s quasi-title page boasted that the script was (in upper case): “The most stupendous and entrancing treatment of momentous facts in all the history of mankind” and followed up with self-certification of the project’s “Absolute Accuracy” and “Scrupulous Fidelity to Scientific and Historical Fact.” Limerick then declared that saving the American family from “extinction through promiscuous bastardization” would “confer an endless blessing on all humanity” by insuring that “its blood shall not be lost to the world in the veins of a mongrelized herd.” Limerick’s film would “open our eyes to the hideous fact that we have been contaminating the blood of a truly wonderful race with that of the dregs from all parts of the world” and, by exposing this “ghastly

358Reginald Fant and Jack Henningfield, “Pharmacology and Abuse Potential of Cigars,” in Cigars: Health Effects and Trends 181-93 at 186 (1998). In addition, they found it “interesting[ ]” that Gies et al. had “listed cigars before cigarettes in order of greatest to least degree of psychoactive and toxic potency,” id. at 181, although, the rank-ordering was based on absolutely nothing. Even though Henningfield could not fairly be expected to have known that the cigarette companies had stood behind the writing and publication of this article, it is astonishing that he apparently read the text in such a slipshod manner that he remained unaware that the authors neither cited nor conducted any empirical investigations on which their then facially either plausible or implausible allegations could have been based.

Tobacco Merchants Association of the United States

truth...in photographic fidelity,” prompt the surviving American family members to “think soberly of their own unborn.” The film would “be refreshingly free from the low-appealing touch of men just come from the Cloak and Suit factory....” Despite or perhaps precisely because of the scores of millions in America who were unable to read a book, the film was designed to “present within the brief space of a single afternoon or an evening a complete exposition and a simple explanation of facts that could not possibly be ascertained in a whole year of intensive reading of the literature dealing with the laws of heredity and their all-powerful effect on the lives of individuals and the destiny of human races.” As such it would “completely outstrip ‘Uncle Tom’s Cabin’ and ‘The Birth of a Nation’ in its appeal to human emotions. It will go down in history as the most gripping, convincing admonition of all times.” Among the scenes that would “surpass in magnitude and nicety of detail anything of the kind hitherto cast upon the screen” would be: contrasting Ancient Greece’s grandeur with today’s “bootblack and banana-monger”; the “Ghetto of New York; filth; disease; ignorance; poverty; crime; push-cart peddlers; Bolshevism. Lower Fifth Avenue at noon; a gesticulating swarm of alien faces; foreign language newspapers screaming class hatred and demanding more and more tolerance. Ellis Island: a ‘close-up’ of the source of our racial ruin. Sing Sing; the conspicuously small number of Anglo-Saxon faces”; “Marriage of an Anglo-Saxon girl of distinguished ancestry to a Jew. Offspring flat-footed, twisted-nosed, swarthy boy, who later in life burns store to collect insurance.” The film would also show that “when a white crosses with a negro, the offspring is a negro; a Nordic with a Jew is a Jew; an Alpine with a Hindu is a Hindu.” The script ends with the sequence of scenes, which culminates in “[o]pening our gates to the world’s unfit,” followed by the start of the “historical romance that will hold interest” in the film. “End.”

Limerick had apparently moved on since his Billy Burgundy days, when his writings were “always free from animosity” and he found “food only for harmless fun in the imperfections of life,” but was “never brutal” and “always sweet in

360[Oliver Victor Limerick], “The Inside of the Melting Pot: An Epochal Picturization of the Laws of Heredity” [unpaginated] (n.d. [ca.1926]), in Limerick/McRae file, Old Court House Museum, Vicksburg, MS. Limerick’s obsession with heredity was reflected in an article on acid dentifrice he co-authored with two periodontia instructors at Columbia University that gratuitously asserted that “intelligence is chiefly a matter of native endowment” and that in “the higher spheres of intellectual pursuit...we find proof that the transmission of mental abilities is subject to the laws of heredity....” Paul Stillman, John McCall, and O. Victor Limerick, “The Acid Dentifrice as an Intelligence Test,” *Dental Items of Interest* 45:303-305 (April 1923).
temper, playful and tender; even sympathetic.”

It is unknown whether Limerick carved out an exception from his blanket condemnation of ethnic and racial otherness for his Russian-Jewish immigrant co-author Dr. Max D. Kahn or his boss, Dr. Jacob Gutman, the Latvian-born founder and director of the Brooklyn Diagnostic Institute or, alternatively, whether Kahn, Gutman, and their ilk formed part of his experience with the world that prompted him to end his days ranting and raving about New York’s non-Anglo-Saxon population, countless thousands of whom, sharing Limerick’s anti-tobaccophobic position, were helping to expand the cigarette market to unprecedented levels. When Limerick died of angina pectoris at the age of 54 in 1926, The New York Times did not even dignify his death or life with an obituary.

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**TMA’s Campaign to Habitate the Whole World to “smoking second hand smoke”**

Frank Walden Pettigrew, son of United States Senator Pettigrew, of South Dakota, was assaulted and seriously injured by an usher in the theatre here [Kansas City] tonight. Young Pettigrew lighted a cigarette in the lobby and became involved in a controversy with the usher as to the rule forbidding smoking. He was struck a vicious blow on the right cheek bone, fracturing it, also dislocating the jaw. He was removed to a hospital.

A bitter and long fought squabble over smoking marked the opening of the socialist national convention... yesterday.

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362 “Dr. Jacob Gutman, Physician 44 Years,” NYT, May 9, 1944 (19).
363 JAMA 87(23):1933 (Dec. 4, 1926).
364 The news that he had died in Harlem Hospital on May 11 after a brief illness appeared in a column of death announcements. “Died,” NYT, May 12, 1926 (27); “Died,” NYT, May 13, 1926 (25). Five years after his death, his name appeared on a list of unclaimed deposits at the Manufacturers Trust Company; oddly, the date of the original deposit was the day he died. “Unclaimed Deposits,” NYT, Sept. 9, 1931 (45). Limerick must have been sufficiently well-known for the author of a book on smoking in 1939 to have been aware that he had died. Referring to, without citing, Limerick’s article on tobacophobes, the non-medical author correctly pointed out that contrary to Limerick’s claim that heavy smokers, unlike (other) drug addicts, reached a plateau of dosing, more recent (also uncited) research had discovered that “instead of increasing the number of cigarettes smoked daily, the inhaling cigarette addict is always increasing the depth and duration of his inhale...” J. Furnas, So You’re Going to Stop Smoking! 76-77 (1939).
365 “Young Pettigrew Hurt,” DDR, Dec. 29, 1900 (1:3).
When the motion to prohibit it was introduced nearly every delegate jumped to his feet and demanded to be heard. The chairman, after considerable pounding for order, recognized John Kerrigan of Texas, who declared that “to prohibit smoking in this convention is destructive of that comradeship for which we socialists stand.” Mrs. J. Smith, a delegate from Oregon, demanded the passage of the motion on the ground that “we who do not smoke protest against smoking second hand smoke.”

After a futile appeal from the decision of the chair the motion was declared passed amid confusion. 366

[T]he only persons who will receive the proposition [to provide a smoking car on the New York City subway] without shuddering will be cigar manufacturers so prosperous that their automobiles take the place of public conveyances. No! air is what we need in the subway, not smoke. The atmosphere of the subway would be an insult to a decent cigar.” 367

During the years of cigarettes’ inexorable ascendancy to domination of the tobacco industry TMA sought to propitiate the other branches by suggesting that cigarettes, far from diminishing consumption of the other forms, actually increased it. Thus in praising cigarettes (as what later would be called a gateway drug) at the 1923 annual convention President Jesse Bloch offered his sincere conviction that the Cigarette Industry is the fountain source that constantly supplies the cigar trade, as well as the pipe tobacco business, with new consumers. As smoking is becoming more popular from year to year, and as there is probably a yearly addition to the great army of tobacco users of approximately a million young men who attain maturity, the cigarette is the form of tobacco that gets the first call in the great majority of cases, for usually the new tobacco consumer begins with the cigarette, but eventually he adds also the other forms of tobacco....

Thus, with the multitude of new consumers that the cigarette industry is apparently creating from year to year, cigar smoking, as well as pipe smoking, should secure their proportional shares of increased business. 368

For those whose cash registers told a different story 369 what better way to

366 “Socialist Have a Row over Rule ‘No Smoking,’” CT, May 2, 1904 (4).
368 “President Bloch’s Address a Thorough Survey of Industry’s Progress,” USTJ 99(20):12 (May 19, 1923).
369 Production of large cigars had peaked at 8.1 billion in 1920 and declined to 6.95 billion by 1923; peak production of small cigars was 1.2 billion in 1911 and fell to 633 million by 1923; smoking tobacco production peaked at 258 million pounds in 1918 before dropping to 235 million by 1923. In contrast, whereas large cigar production had less than doubled from 1890 to its 1920 peak and smoking tobacco production had less than
foster solidarity of firms facing a shrinking market with their expanding rivals
than by conjuring up the specter of a movement dedicated to achieving a
“Tobaccoless World by 1925”?\textsuperscript{370} A less speculative and more tangible tactic was
to focus on regulatory restrictions that in fact already did affect all branches of
the smoking tobacco industry—namely, the “[l]ack of accommodation for
smokers on surface cars and rapid transit lines,” which, according to TMA,
reduced tobacco merchants’ sales by more than a million dollars alone in New
York City in 1916 and prompted the TMA to appeal to the Public Service
Commission and railroads for “more liberal arrangements.”\textsuperscript{371}

This battle over secondhand smoke exposure was in fact one of the first
public manifestations of the new organization: already at its founding meeting in
1915 TMA used the regulation of smoking on public transportation in New York
City as an example of the consequences of the fact that “no trade organization has
ever taken any action in that regard”—namely, the loss of millions of dollars of
business there and in other big cities such as Philadelphia and St. Louis, where
similar regulatory action took place also in the absence of any representation of
tobacco interests. Nor were these disputes confined to means of transport: TMA
groused that: “In New York we see people arrested daily and fined as high as $50
for smoking in their own offices, and according to present indications it will not
be long before smoking will be prohibited in every building and in every shop
building in New York.” When a hearing had been held, the TMA recounted, on
whether the Public Service Commission should eliminate the smoking cars from
the Coney Island trains, the most militant anti-smoking figure in New York City,
doubled from 1902 to its peak in 1918, cigarette production had increased 27-fold from
1890. U.S. Department of Agriculture, First Annual Report on Tobacco Statistics (with
Basic Date), tab. 14 at 90 (Statistical Bull. No. 58 (May 1937). Similarly, whereas peak
per capita consumption of large cigars (86) was recorded in 1907 and of smoking tobacco
(2.37 pounds) in 1916, that of cigarettes continued to rise from 35 in 1900 to 578 in 1923
(and far beyond in later years). \textit{Id.} tab. 16 at 100.

\textsuperscript{370}L. Ames Brown, “Is a Tobacco Crusade Coming?” \textit{Atlantic Monthly} 120: 446-55
at 446 (Oct. 1920).

\textsuperscript{371}“No Smoking’ Costs Millions to Trade,” \textit{N.Y.T}, Feb. 21, 1916 (12). After cigar
companies had persuaded the Public Service Commission in St. Louis to permit smoking
in the three rear seats of street-cars when the weather permitted the windows to be open
and at all times on all open rear platforms, it was “estimated that means an increased
consumption of 20,000 cigars daily.” “Permit Smoking on St. Louis Cars,” \textit{USTJ}, vol. 83,
Apr. 24, 1915 (4:4). In Chicago cigar sellers estimated that the prohibition of smoking on
surface and elevated cars reduced consumption of cigars by 12 to 15 million dollars
annually. “Chicago Cigar Dealers Resent Interdiction Upon Smoking in Cars,” \textit{USTJ}
91(20):82 (May 17, 1919).
Dr. Charles Pease, the president of the Non-Smokers’ Protective League of America, had been there with “all his forces,” but “not a single organization to represent the tobacco industry that is now losing a million dollars worth of business every year.”372 (At its founding in 1911 the tobacco trade press denounced the League for seeking to “crib, cabin and confine smokers” so that its sympathizers “may not have their dyspeptic systems deranged by a puff of good tobacco smoke.”)373 To be sure, in 1916 Dushkind and TMA fared no better when they requested that the Commission rescind its 1913 order—not even when firms were supported by the Joint Advisory Board of the Cigar Makers Organization, which requested “greater liberties” for smokers because the existing rule was “prejudicial” to many union workers and “discriminatory and unjust to the large majority of the people who indulge themselves in the pleasurable habit of smoking.”374

In the welter of the public health, cultural, political, moral, and economic wars to reduce and end secondhand smoke exposure that have been raging since the 1970s, historical memory has been blotted out of the reverse contentious and contested process, forced by profit-hungry producers rallying their addicted customers, that began in the nineteenth century and led to the nearly ubiquitous de jure and de facto acceptability of tobacco smoking by the 1960s. (Even when users of the Kansas City, Missouri street-railway in 1912 voted three to one to retain the company’s prohibition, “[a] rule of that kind couldn’t be enforced, it

372 “Jacob Wertheim First President of Tobacco Merchants’ Association,” WTJ 42(46):2 (Oct. 15, 1915). Presumably the bans in offices were fire related. On Pease and his group, see “Form Non-Smokers’ League,” NYT, May 10, 1910 (18); Arden Christen and Joan Christen, “Charles G. Pease, DDS, MD: Anti-Tobacco Crusader and Clean Life Advocate,” Journal of the History of Dentistry 49(2):81-86 (July 2001). Pease, noting that “we have allowed custom to ride roughshod over us,” urged the right to breathe air uncontaminated by tobacco smoke, which produced headache, dizziness, nausea, and fainting in addition to injuring eyes and lungs. Chas. Pease, “The Non-Smokers’ League,” NYT, Nov. 10, 1911 (10) (letter to editor).

373 “Cranks Combine,” USTJ, vol. 76, July 8, 1911 (7:2).

374 “Only 4 Seats for Smokers,” NYT, May 23, 1916 (22). Back in 1913, too, the Central Federated Union of Greater New York, representing 300,000 workers, attacked Pease for trying to abridge the personal liberty of many thousands of workers who found “in the pipe or cigar a solace and harmless pleasure after their day’s toil.” “Workers Assail Dr. Pease,” NYT, Aug. 10, 1913 (11). In connection with a street-car anti-smoking ordinance in St. Louis one alderman argued that since “many workingmen were not permitted to smoke during working hours...they should not be denied the pleasure of smoking going to and from their work.” “The Anti-Smoking Ordinance in St. Louis,” Tobacco 69(16):19 (Feb. 19, 1920).
was said. The right to smoke was too well intrenched [sic].” Both conflicts over the externalities caused by smoking on modern means of mass transportation—especially as commuting distances to and from urban workplaces increased and smokers spent more time traveling on them daily—and tobacco products firms’ complaints of lost business resulting from restrictions and prohibitions long antedated the formation of TMA and even preceded the creation of the Tobacco Trust. As early as 1887, the *United States Tobacco Journal* bemoaned the intransigence of officials of the elevated trains in New York City, who failed to appreciate the need to accommodate nicotine addiction and the tobacco industry’s profitability:

New York is the largest producer of cigars in the world; but it is relatively and comparatively not the largest consumer of them. As a very considerable part of the time of a New Yorker is spent on the cars, and mostly on the elevated roads, where even the use of the platform for an occasional puff is denied him, he is restricted to the consumption of the fragrant weed more by the lack of opportunity than of his own volition. He may be craving for a smoke; but then he remembers he has to take the cars either up-town or down-town; it won’t do just now to light a cigar to throw it away the next minute, and he has to forego his appetite. Millions of cigars have thus lost their chance of being consumed, and our manufacturers lose their best and most profitable opportunity of enlarging their trade in home consumption.

Without speculating about the possible market niche that might be opened up for the as yet infant cigarette, which could be smoked much more quickly than a cigar, the cigar-centered *Journal*, which preferred to impute reified quasi-agency to its favored commodity, spun out its market-widening dream:

But fancy the result if smoking cars should be attached to the elevated trains! Most people like to light a cigar right after breakfast. At present they have to stifle their liking till they reach their downtown offices. Urgent business may await them there, and they forget their cigars till after luncheon. The trade’s opportunity is lost. But if the smoker knew he could

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375 F. J. Munagle, “Voting Out the Street-car Smoker,” *Harper’s Weekly*, 56:23 (July 20, 1912). The company held the referendum after the “[t]he cigar men” had induced the city council to pass an ordinance authorizing limited smoking on the street-cars because the company did not acknowledge the city’s right to permit smoking on the company’s cars. Despite having been “[d]eprieved of the moral influence of official support,” the company continued to enforce the ban for “sanitary” reasons. When rare wilful violators persisted, “the car was stopped to wait until they got off or threw away their cigars, a result which was always aided by the manifestations of outraged and indignant sentiment on the car.”

enjoy his cigar on his ride down-town he would light it after breakfast and keep on smoking all the forenoon. For appetite begets appetite. Likewise in the evening.... At least several hundred thousand more cigars would be consumed daily, and the bulk of the benefit our home manufacturers would reap.\textsuperscript{377}

The management of the elevated train in New York, much to the \textit{Journal}'s consternation, characterized anyone who would want to smoke a cigar on it as "belonging to that class of people whose bump of selfishness overtops their numerous other bumps.... They are always looking after their own enjoyment and comfort, regardless of the annoyance and discomfort they may occasion others, so long as their own wants are satisfied." Management was primarily concerned about the additional employment costs associated with hiring workers to clean the smoking cars, but it also rejected the proposal because inevitably smokers—including boys carrying their "odorous cigarettes"—would walk through the entire train to get to the smoking car. The \textit{Journal}, though chagrined by management’s opting to "inconvenience the gentlemen" to save a "trifle" in cleaning expenses, realized that its hope for a smoking car could be "pushed into reality" only by "our manufacturers, to whose advantage and profit it will turn out ultimately.\textsuperscript{378}

The battle over smoking on New York’s elevated trains raged on. Two years later, even Russell Sage, robber baron and elevated railroad owner, rejected smoking outright on the grounds of odor alone, but assigned as an additional "clincher" that the provision of smoking cars would necessarily also confer on smokers the privilege of lighting their cigars wherever they pleased because one important reason for wanting to smoke on the elevated was the wish to finish a cigar that they had been smoking when they reached the stairs: "Consequently while women and children and men who do not smoke are standing on the platform waiting for the train they are subject to the annoyance of smoke."\textsuperscript{379}

Two decades later, public revulsion at smoking on elevated trains was reflected in the view of the Frank Hedley, the vice president and traffic manager of the Interborough Rapid Transit Company about the state of smoking cars on the “L”: “The car cannot be kept clean. Windows are clouded, the straps and seats saturated by tobacco juice secretions; passengers none too clean in their habits expectorate everywhere and anywhere; and the car comes to justify the name it bears wherever it is employed—the Hog’s car.”\textsuperscript{380} In its push to

\textsuperscript{377}“Smoking on the ’L,’” \textit{USTJ}, vol. 23, Feb. 5, 1887 (2:7).
\textsuperscript{378}“Smoking on the ’L,’” \textit{USTJ}, vol. 23, Feb. 5, 1887 (2:7).
\textsuperscript{379}“To Smoke on the ’L,’” \textit{USTJ}, vol. 28, Sept. 14, 1889 (4:2-3).
\textsuperscript{380}“Hedley Against Smoking Car,” \textit{USTJ}, vol. 71, May 8, 1909 (7:3-4). Four years
Tobacco Merchants Association of the United States

eliminate all space-and-time limitations on smoking in order to increase both smoking prevalence and per capita consumption, the tobacco trade in 1909 did not even shy away from accusing the New York City Board of Health of “obtuse and reactionary paternalism” for suppressing smoking on subways.\(^{381}\) Although the Board of Health stood its ground and strengthened enforcement,\(^{382}\) the tobacco industry—which by 1925 acquiesced in the subway ban to the extent that, while mourning the untold hours during which “several billion passengers a year” were not permitted to consume tobacco, urged that suggestions for permitting its use “not be pressed where the plan is not feasible, or liable to become a nuisance and redound to the disadvantage of the industry”\(^{383}\)—soon found no end of other forums in which to agitate for freedom to smoke. Thus, for example, when Dr. Pease complained about smoking at Central Park concerts—the parks commissioner agreed that smoking should not occur immediately in front of the band stand because some people there were annoyed by it, but favored smoking at “reasonable points about the stand” because it was “his duty to make the public as comfortable as possible at the concerts”\(^{384}\)—the United State Tobacco Journal took Pease to task for having written that while he was not requesting that tobacco

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\(^{381}\)“A Rebuke to Paternalism,” NYT, Mar. 20, 1909 (8) (edit.).


\(^{383}\)“Industry Should Encourage Smoking in Conveyances When Proper Facilities Are Provided,” USTJ 104(1):12 (July 4, 1925). By 1934, during a two-week anti-smoking campaign, more than 2,600 people appeared in city magistrates’ courts, 1989 of whom paid $2,631 in fines for having carried lighted cigarettes, cigars, or pipes into subway stations or trains. “2,600 Appear in Court for Smoking in Subways,” NYT, May 3, 1934 (2). By 1950, transit police served court summonses on 9,167 for smoking. “10,175 Arrested in Subways,” NYT, Jan. 9, 1951 (39). Whether these figures, against the background of billions of passengers annually, indicated widespread compliance and strict enforcement, is unclear.

\(^{384}\)“Won’t Stop Park Smoking,” NYT, July 19, 1913 (6).
smokers as nuisances be prohibited from smoking, he was requesting that they be prohibited from discharging tobacco smoke into the air that nonsmokers had to breathe. The trade journal’s response was curiously at variance with its touted medical findings that smoking did not vitiate the air people breathed because it was carbonic acid gas exhaled during ordinary breathing that did so and the condition of smokers’ mouths was, according to leading dentists, “far better” than nonsmokers.\(^{385}\) Accusing Pease of “unchecked idiocy,” the Tobacco Journal rhetorically asked what the smoker was supposed to do with his cigar, pipe, or cigarette smoke: “Absorb it into his lungs, swallow it and eat it? Is a smoking man to be converted into a kind of coal smoke consuming furnace?”\(^{386}\)

Having achieved a partial success at open-air concerts, the tobacco industry went after movie theaters: if only a “material percentage” of them “could be induced to permit smoking in the whole or a portion of their auditoriums”—many theaters in New York City permitted smoking in balconies and loges—“another tremendous influence would be at work for an increased consumption of tobacco products.” The Journal urged the trade to tell smokers to make their wishes known because smoking would be permitted if enough people asked for it. After all: “There is no doubt that smokers and wives, sisters and sweethearts of smokers, are in the majority.”\(^{387}\)

A turning point in this particular locus of the secondhand smoke conflict was marked by the decision of the Public Service Commission in 1913 not to permit smoking on New York City’s mass transit except in the four rear rows of open cars.\(^{388}\) Contrary to TMA’s later account, the tobacco industry was represented

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\(^{385}\)“Seek Smoking Privilege on ‘Low-Level’ Cars and ‘L’ Trains in New York,” USTJ, vol. 83, May, 29, 1915 (8:2-3). The medical authority was Dr. J. Gardner Smith, who at an earlier Public Service Commission hearing had “pointed out the scientific value of tobacco as a disinfectant...” “Hearing Before the Public Service Commission Attaching Smoking Cars,” USTJ, 80, Oct. 25, 1913 (1:1-4 at 4). Smith claimed that 75 percent of men smoked and 75 percent of women liked it, whereas he was asking for only 20 percent of space for 75 percent of the population—otherwise 5 to 10 percent of people would crowd all the rest out of their personal comforts. “Seek Smoking Privilege on ‘Low-Level’ Cars and ‘L’ Trains in New York,” USTJ, vol. 83, May, 29, 1915 (8:2-3).

\(^{386}\)“Who’s the Nuisance?” USTJ, vol. 80, July 26, 1913 (4:1-2) (edit.).

\(^{387}\)“Smoking Permitted,” USTJ, vol. 83, Mar. 20, 1915 (24:3-4). The Journal later bemoaned the drop in consumption that would result if even only one-thirteenth of the 13 million people attending movies daily were men prohibited from smoking one to two hours a day, regardless of how much they smoked the rest of the day. “For Smoking Privileges in Picture Shows,” USTJ, 83, June 5, 1915 (24:3-4).

\(^{388}\)“Lays Down Smoking Rule,” NYT, Aug. 2, 1913 (1). Making a virtue of a necessity, the United States Tobacco Journal tried to depict the retention of this exemption
as a victory because it “is to the practice of smoking in open cars that the trade owes a very great part of the increase in consumption of cigars, cigarettes and tobacco in Greater New York during the Summer.” “A Hearing Against Smoking on the Open Surface Cars,” USTJ, vol. 79, June 14, 1913 (1:2-3). Thus the continued exemption meant that “the increased consumption of cigars, cigarettes and tobacco is not threatened.” “Smoking Permitted as of Yore,” USTJ, vol. 79, Aug. 9, 1913 (1:4). However, although the Journal urged that a “crushing defeat administered the ‘anti-tobacs’ now will scatter their puny strength for years to come,” the paper did not assert that it had been achieved. “A Hearing Against Smoking on the Open Surface Cars,” USTJ, vol. 79, June 14, 1913 (1:2-3).

According to an anti-smoking group, in 1913 the Sanitary Code had been briefly amended to ban all smoking on public vehicles in Brooklyn and the various lines complied with the provision for a few months. Consequently, “[t]he tobacco interests” suffered, and signs were displayed in all stores where tobacco was sold with the message: “Smokers, Assert Your Rights.” The Public Service Commission then issued an order permitting smoking in the rear four seats of open cars. A. Fraser, “Smoking on Surface Cars,” NYT, Sept. 3, 1914 (6) (letter to editor).

389 “72,000 Smokers Petition,” NYT, Oct. 12, 1913 (6).
390 “Topics in Wall Street,” NYT, Oct. 15, 1913 (14:).
391 “To Smoke or Not to Smoke,” NYT, Aug. 21, 1913 (8).
392 “Smokers Demand a Place on Cars,” NYT, Oct. 24, 1913 (12); “Officials Oppose Cars for Smokers,” NYT, Nov. 7, 1913 (7).
The Prohibition of Smoking Inside the Iowa House and Senate (1839-1933), Other State Legislatures (from 1816), and Congress (from 1822):

Statehouses Themselves as the Sites of the First Struggles Against Secondhand Tobacco Smoke Exposure at the Workplace

There is nothing goofier than legislators banning smoking here, there and everywhere around the state—EXCEPT where they gather to work.\(^1\)

For more than three and a half centuries legislators in the New World have been resisting exposure to their colleagues’ tobacco smoke at their workplaces and prohibiting smoking in legislative chambers. As early as 1646 the House of Deputies in Massachusetts Bay “ordered, y’ if any ps on shall take any tobacco within the roome where the Courte is sitting, he shall forfeite, for euy pipe so taken, 6\(^6\); & if they shall offend againe, in contemñng this wholesome order, he shallbe [sic] called to y’ barr for his delinquency, & pay double his fyne. Voted.”\(^2\) (This ban was hardly surprising considering that 14 years earlier a court in Boston had “ordered that noe ps on shall take any tobacco publiquely vnder paine of punishm' also that ewy one shall pay j\(^d\) for every time he is convicted for takeing tobacco in any place....”)\(^3\) Ironically, the House of Burgesses of Virginia, the epicenter of tobacco growing, in 1663 included among its “Orders to be observed in the house” (governing such behavior as absences, irreverence, drunkenness, and interrupting): “That every member that shall pipe it after the house is begun to be called over, until adjournment or publick licence by consent of the major part of the house in the vacancy from any business, shall be fined twenty pounds of tobacco.”\(^4\) The New Hampshire Assembly followed suit in 1699, providing as the fifth of the Orders of the House that “none smoak tobacco in the house after calling over, on Penalty of 3 d for the Clerk.”\(^5\) And the lower house of yet

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\(^3\) A Court holden att Boston New Octob’ 3, 1632, in Records of the Court of Assistants of the Colony of Massachusetts Bay: 1630-1692, 2:28 (1904).
\(^4\) Journals of the House of Burgesses of Virginia 1659/60-1693, at 26 (Sept. 19, 1663) (H. R. McIlwaine ed. 1914); William Hening, The Statutes at Large; Being A Collection of All The Laws of Virginia, from the First Session of the Legislature, in the Year 1619, 2:207 (Sept. 19, 1663).
\(^5\) Provincial Papers: Documents and Records Relating to the Province of New
The Prohibition of Smoking Inside Legislatures

another New England colony, Connecticut, in 1726 adopted a resolution that “if any of the members thereof shall presume to smok tobacco in the chamber wherein they commonly sit, at any time whatsoever, [they] shall pay a fine of 6d. for each offence, to be to the use of the House.”

By 1924, when Robert Luce, a former decade-long member of the Massachusetts House and at the time in the midst of his 20-year tenure in Congress, devoted two pages of what eventually became a four-volume, 2,800-page treatise on *The Science of Legislation* to smoking, he opined that “[f]ormal prohibition” of smoking was then “to be found in the rules of nearly all the Legislatures.” He nevertheless added that: “Probably there are few rooms of standing committees where smoking is forbidden.” In fact, not only had quasi-universality of formal bans been attained far earlier, but, as the case of Iowa demonstrates, by the 1920s the rise of the seeming quasi-ubiquity of smoking was leading to the dismantling of that solid front.

An Overview of the History of State Legislative Self-Regulation of Smoking

WHEREAS, A large number of the Senators and employes of the Senate, as well as the visitors to the Senate Chamber, are not addicted to the habit of smoking, therefore, be it

Resolved, That the file room and cloak room be designated as the smoking rooms, and that those desiring to smoke be allowed the use of said rooms for that purpose; and that smoking in the Senate chamber and in the committee rooms be prohibited, and the sergeant-at-arms and other officers are instructed to see that this resolution is enforced.  

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1 Robert Luce, *Legislative Assemblies: Their Framework, Make-Up, Character, Characteristics, Habits, and Manners* 637 (1924). Luce mentioned two limitations: The California rule made a “generous exception that at evening sessions it may be suspended by majority vote without notice or reference to a committee,” while the Michigan Senate did not extend the ban to the committee of the whole. *Id.*

2 *Journal of the Senate of the Thirtieth Session of the Legislature of the State of Minnesota* 203 (Feb. 11, 1897), Bates No. BYL-000002 (Republican Senator William Yale). Because a senator gave notice of debate, “the resolution went over, under the rules.” *Id.*

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The various rules that the Iowa House and Senate have created over the years to prohibit smoking at the state capitol have reflected changing attitudes among the public at large towards smoking, but they also constitute material for a unique look at the first workplace-based struggles against secondhand smoke. As the Iowa legislature began requiring schools to educate children about the dangers of tobacco in the 1880s, the House and Senate, like their counterparts in some other states, codified in their standing rules bans on smoking in their chambers that for decades had been formulated in less formal resolutions. To be sure, as early as 1816, the Pennsylvania House, following vigorous debate, incorporated this ban in its rules: “It is not permitted to any person to smoke tobacco, at any time, within the chamber of the House.”

Unsurprisingly, these bans remained in force during the period (1896-1921) in which the Iowa General Assembly prohibited the sale of cigarettes in Iowa, though legislatures in some states banned internal smoking that had never enacted sales bans (e.g., Ohio, North Carolina, and South Carolina). Soon after the Iowa legislature had repealed its statewide sales ban, the two houses began deregulating smoking at the capitol. During the heyday of virtually unimpeded smoking in the United States, no rules interfered with smoking in the Iowa legislature. (To be sure, even at the zenith of smoking laissez-faire, some restrictions were enforced at the local level in Iowa. For example, still in force during World War II was a 1916 Des Moines ordinance prohibiting smoking, snuffing, or chewing tobacco in any bakery. In 1936 the Des Moines police and health departments joined in a “drive for more rigid enforcement of the city ordinance against smoking and spitting on street cars.... The ordinance was enforcible “regardless of whether women are aboard the cars.” And even during

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9See above ch. 9.
10For example, in 1887 Rule 64 of the Kansas Senate provided that: “No person shall be allowed to smoke tobacco in the Senate chamber or the galleries.” Senate Journal: Proceedings of the Senate of the State of Kansas 77 (Jan. 13) (1887).
11Journal of the Twenty Seventh House of Representatives of the Commonwealth of Pennsylvania 61, 64, 91-92 (Dec. 13 and 18, 1816) (1816-17). For detailed discussion, see above ch. 3
13Press ‘No Smoking’ Rule in Street Cars,” DMT, Jan. 8, 1936 (1A:6-7). For the original 1886 ordinance, see above ch. (on 1921). A somewhat later ordinance read: “It shall be unlawful for any person to smoke on any streetcar, bus or other vehicle operated for the carriage of passengers as a common carrier except in a place provided for smoking therein by the owner thereof.” Ord. 4273, § 6, Municipal Code of Des Moines 1942, ch. 104-11 at 474. In 1942, the City of Des Moines still prohibited smoking in opera houses.
World War II the police in Iowa’s capital were detailed to remove from street cars any passengers who refused to stop smoking.\(^{14}\)

Not until the mid-1970s, when the Iowa and other state legislatures began debating and enacting statewide (but limited) public smoking bans did the House initiate a process of incremental restrictions on internal smoking.\(^{15}\) The Senate did not follow suit until the early 1990s—in large part because of the power exercised by smokers who held leadership positions—having fallen behind the laws that it had helped enact for the rest of the public buildings in the state. By 2007, the situation had been reversed: both houses had banned smoking virtually everywhere in the state capitol, thus affording legislators more rigorous protection from exposure to secondhand smoke at their workplace than they did for (almost) the rest of Iowa’s working people until 2008.\(^{16}\)

In order to put the Iowa experience in the national context, the (non-exhaustive) overview of nineteenth- and early-twentieth-century smoking bans in state legislatures displayed in Table 6\(^{17}\) impressively underscores how early on and broadly legislators throughout the country successfully protested against being forced to endure the tobacco fumes during interminable sessions. The salient point of this review is not merely that, with the possible exception of several New England legislatures (which had, ironically, already in the colonial period formally penalized smoking and in which in the nineteenth and early-twentieth century custom may have formed the basis for the absence of smoking), virtually all legislatures (and many state constitutional conventions) at some point imposed such bans.\(^{18}\) Rather, at least as significant were the strong, sharp, and

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13. See below ch. 25.
16. See below at end of this ch.
17. Identifying which state legislative chambers established, by rule or resolution, internal no-smoking bans between the beginning of the nineteenth century and World War I would be excruciatingly burdensome enough if it could done by looking up “smoking” or “smoke” in the indexes of nearly 10,000 House and Senate journals (accessing which, since no single library has all of them, would impose a tremendous burden on an interlibrary loan department), if they all had indexes and those indexes were relatively comprehensive. In fact, however, most journals fail to index “smoking” even when the word appears in the volume; in such instances, eyeballing a large volume of as many as 2,000 pages, with undiminished vigilance, for a single word mentioned once or twice is scarcely an optimal use of limited research time, especially when a large proportion of the journals do not contain the word. (That smoking was banned during one session does not
mean that it was necessarily banned the next session; it is also more likely that a smoking ban formulated by resolution than by rule will be found in a journal. Moreover, the fact that “smoking” is not used may be ambiguous because it may not mean that the chamber did not deal with the issue, but that the rules (which were often adopted from the previous session’s) are not printed in the volume, though they may have been printed in a much more ephemeral and inaccessible publication; on the other hand, in some states, especially from the late nineteenth century on, they were included in legislative manuals, yet all of the following manuals contain House and Senate rules, but none mentions smoking.

Register and Manual of the State of Connecticut: 1889 (1889); Register and Manual of the State of Connecticut: 1893 (1893); State of Connecticut: Register and Manual 1908 (1908); Maine Legislative Manual: 1867 (1867); Maine State Year-Book, Annual Register, For the Year 1871; and Legislative Manual for 1870 (Edmund Hoyt comp.); Edmund Hoyt, Maine State Year-Book, and Legislative Manual, for the Year 1885-86; Maine Register or State Year-Book and Legislative Manual: From April 1, 1891 to April 1, 1892 (G. Donham comp. 1891); Maine Register, State Year-Book, and Legislative Manual No. 31—June 1900 (1900); Maine Register, State Year-Book, and Legislative Manual No. 36—June 1905 (1905); Maine Register, State Year-Book, and Legislative Manual No. 40—June 1909 (1909); Maine Register, State Year-Book, and Legislative Manual No. 45—July 1914 (1914); Commonwealth of Massachusetts, Manual for the Use of the General Court (1859, 1863, 1878); Manual for the Use of the General Court of New Hampshire for 1895 (1895); Manual for the Use of the General Court of New Hampshire for 1917 (1917); Manual for the Use of the General Court of New Hampshire for 1931 (1931); Manual for the Use of the General Court of New Hampshire for 1941 (1941); Manual for the Use of the General Court of New Hampshire for 1951 (1951); Manual for the Use of the General Court of New Hampshire for 1961 (1961); Manual, with Rules and Orders, for the Use of the General Assembly of the State of Rhode Island, 1889 (1889); Manual, with Rules and Orders, for the Use of the General Assembly of the State of Rhode Island, 1895-96 (1896); Manual, with Rules and Orders, for the Use of the General Assembly of the State of Rhode Island, 1912 (1912); Manual, with Rules and Orders, for the Use of the General Assembly of the State of Rhode Island: 1916 (1916); Manual of the State of West Virginia: Legislative, Executive and Judicial Departments: Corrected to January 1, 1899 (1899); Manual of the State of West Virginia for the Years 1907-1908 (1907); West Virginia Legislative Handbook and Manual and Official Register: 1917 (John Harris ed.); West Virginia Legislative Handbook and Manual and Official Register: 1920 (John Harris ed.); West Virginia Legislative Handbook and Manual and Official Register: 1922 (John Harris ed.). In recent years, many hundreds—but thus far only a small proportion—of state legislative journals have been digitized and can be word-searched on the websites www.hathitrust.org, www.archive.org, and books.google.com; even with less than perfect performance of its optical character recognition software—Google Books, in particular, fails to retrieve many journals when searched by title that can, however, be found by a textual word search—this enormously powerful labor-saving technology still awaits its application to thousands of others journals. (At least one library organization is considering digitizing all of the journals, some of which
The Prohibition of Smoking Inside Legislatures

salty rhetoric and the type of arguments that legislators deployed to justify bans, which predominantly focused on non-smoking legislators’ own health and physical comfort. Moreover, ahistorically deformed imagination buckles at the notion that in the mid- and later-nineteenth century legislative majorities existed to “suppress smoking”\(^19\) and thus deprive arch-rugged individualist colleagues, even in such preserves of personal freedom as Texas, Nevada, and (Territorial) Montana and Wyoming, of their god-given right to smoke tobacco wherever and whenever they felt like it. Of overriding cultural importance here is that this massive and pervasive rejection of exposure to secondhand smoke both antedated the cigarette era—during the last two decades of the nineteenth century cigars accounted for about 25 percent of all tobacco consumed compared to only about 18 percent for all other forms of smoking tobacco (including cigarettes) combined\(^20\)—and did not implicate race, ethnicity, nationality, religion, or party since the state legislators were a relatively homogeneous group.

To be sure, the existence of non-smoking rules did not mean that all smokers complied with them all the time. Evidence of mass violation was impressively on display even in Mormon Utah just four days after achieving statehood, when the House Speaker invited the janitor to offer prayer at the opening of the session on January 8, 1896:

the members dutifully arose and bowed reverently their heads. In deference to the invocation, some of the members who had been smoking ceased temporarily their puffing,

\(^{19}\) House Journal of the Thirteenth Session of the Legislative Assembly of the Territory of Montana...1883, at 283 (Mar. 3) (1883).

The Prohibition of Smoking Inside Legislatures

only to resume it with “Amen” pronounced.

This aroused the ire of Mr. Gibson of Uintah county, who inquired sarcastically if it would not be well for the members to learn the rules, which prohibited smoking. “As for me,” he said, “I hate smoking worse than—” but comparisons failed, and he sank back into his seat. The smokers kept on puffing.21

Determined, stolid, and open resistance to a rule created by a majority of suffering white male colleagues, fellow party members, and co-religionists suggests just how contentious the battle for control of (breathing) space could become even in the nineteenth century. And that smokers and libertarians, especially when they constituted a legislative minority, sought to construct as many procedural barriers as possible to the imposition of anti-smoking rules in their workplace was humorously illustrated by this debate in 1855 in the House of Representatives of Missouri, which was at the time the seventh largest producer of tobacco, which enjoyed special state protection and aid:22

Mr. Acock offered the following resolution:
Resolved, That smoking shall be prohibited in the Hall of the House of Representatives during sessions thereof.

Mr. Brown of St. L., offered the following amendment:
That no more apples be eaten in this Hall.

Mr. Clippard moved to lay the resolution and amendment on the table;
Which was decided in the negative.

On motion of Mr. Morrow, the amendment was laid on the table.

Mr. Heryford offered the following amendment:
Amend by instructing the door-keeper to furnish member [sic] with a twist of pig-tail tobacco each day, and pay for the same out of the contingent fund of the House, which was,

On motion of Mr. Williams, of D., laid on the table.

Mr. Barrett offered the following amendment:
If gentlemen will chew tobacco, they shall not be allowed to spit, which was,

On motion of Mr. Ritchey, laid on the table.

Mr. Lightner offered the following amendment:
After the word “smoking” add “and chewing ot tobacco,” which was,

On motion of Mr. Smith, of P., laid on the table.

The Prohibition of Smoking Inside Legislatures

The resolution was then adopted.23

Iowa

Like legislatures in many other states, the Iowa House and Senate began banning smoking long before the rise, let alone mass proliferation, of cigarettes, thus underscoring the non-empirical basis of deconstructive claims that anti-smoking movements were driven by ethnic, religious, and gendered antipathy to cigarette smokers. The persistent majorities that voted for protecting nonsmoking legislators from secondhand smoke undermine the empirically unsupported claim that in the late nineteenth century “few respectable Iowans would condemn the enjoyment of cigars by bankers, lawyers, and other solid middle-class males....”24 Beginning with Iowa’s very first territorial legislature, the House of Representatives on January 7, 1839, on the motion of Andrew Bankson (1787-1853), a Tennessean25 who had been an Illinois state senator from 1822 to 1826,26 resolved that “no person shall be allowed to smoke a pipe or cigar in this hall during the sittings of the House of Representatives.”27 Perhaps Bankson was moved to propose this prohibition by his experience as a member of the Illinois

23Journal of the House of Representatives of the State of Missouri, at the First Session of the Eighteenth General Assembly...one thousand eight hundred and fifty-four 271 (Feb. 12, 1855) (1855).
26Official Directory of the Fortieth General Assembly of Illinois: Session of 1897, Appendix 22-23 (1897). As a senator, Bankson was one of 15 Illinois legislators who joined in an appeal to the people of Illinois, “in the name of the injured sons of Africa, whose claims to equal rights with their fellow men will plead their own cause against their usurpers before the tribunal of eternal justice,” to oppose the calling of another constitutional convention designed to make Illinois a slave state. E. B. Washburne, Sketch of Edward Coles, Second Governor of Illinois, and of the Slavery Struggle of 1823-4, at 102 (quote), 107-108 (1882).
27Journal of the House of Representatives of the First Legislative Assembly of the Territory of Iowa, Begun and Held at the City of Burlington, on the Twelfth Day of November, One Thousand Eight Hundred and Thirty-Eight 188 (n.d.).
The Prohibition of Smoking Inside Legislatures

Constitutional Convention of 1818,\textsuperscript{28} which had operated under the rule that: “No person shall be permitted to smoke tobacco in the convention while in session.”\textsuperscript{29} At Iowa’s second territorial legislative session, on the motion of Democrat Thomas Cox (1787-1844), a Kentuckian who had been a senator in the first Illinois state legislature and became Iowa House speaker during the third session,\textsuperscript{30} the House “Ordered, That no gentleman be allowed to smoke within this House.”\textsuperscript{31} The Territorial Council—the forerunner of the Senate—followed suit at the third session when, on the motion of Whig Jesse B. Browne, another Kentuckyan, who had been president of the first Council and later became the House speaker of the first legislature after statehood,\textsuperscript{32} it resolved that “smoking


\textsuperscript{31}Journal of the House of Representatives of the Second Legislative Assembly of the Territory of Iowa, Begun and Held at the City of Burlington, in the County of Des Moines, on the Fourth Day of November, One Thousand Eight Hundred and Thirty-Nine 137 (Dec. 23) (n.d.).

\textsuperscript{32}Benjamin Gue, History of Iowa: From the Earliest Times to the Beginning of the Twentieth Century 4:31-32 (1903).
The Prohibition of Smoking Inside Legislatures

in the hall of the Council, during session hours, be prohibited.”

Successful interdiction of smoking was initiated already at the first special session of the General Assembly of the State of Iowa in 1848 when John F. Sanford (1824-74), a noted physician who two years later became “the inspiring genius” and “the father” of the Iowa State Medical Society, offered a resolution that “no person be permitted to smoke in the Senate Chamber during the time the Senate is in session.” Whether in jest or in support of suppression of noxious organic fumes, Senator Evan Jay moved to amend the motion by adding after “person” the phrase “or the stove in the lobby.” The Senate then adopted the resolution as amended. However, because this resolution, like all Iowa no-smoking resolutions until 1884, was not incorporated into the chamber’s standing rules (which were adopted each session from the previous session’s, sometimes with amendments), each session a member had to take the initiative to offer a new resolution. No legislator did so until 1856 (after the elections that brought the new Republican Party to quasi-permanent control of the legislature), when the House adopted the motion of Democrat and farmer Daniel Cort that it “dispense with smoking when the House is in session.”

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33Journal of the Council of the Third Legislative Assembly of the Territory of Iowa, Begun and Held at the City of Burlington, on the Second Day of November, One Thousand Eight Hundred and Forty 231 (Nov. 5) (n.d.).

34Walter Bierring, “Iowa State Medical and Chirurgical Society,” in One Hundred Years of Iowa Medicine: Commemorating the Centenary of the Iowa State Medical Society 1850-1950, at 21-109 at 21 (1950). Sanford, who became an “excellent teacher” at various medical schools and “one of the leading surgeons of his period,” had attended medical lectures at the Medical College of Cincinnati and Philadelphia College of Medicine, “practiced[d] surgery in Keokuk until 1869 when he retired to New York City to become associated with a life insurance company.” Everett George, “Presidents of the Iowa State Medical Society 1850-1950,” in One Hundred Years of Iowa Medicine: Commemorating the Centenary of the Iowa State Medical Society 1850-1950, at 110-75 at 110-11 (1950). See also David Fairchild, “The Medical Profession in Iowa,” in John Brigham, Iowa: Its History and Its Foremost Citizens 2:694-700 at 694 (1918); History of Lee County, Iowa 1:311-12 (Nelson Roberts and S. Moorhead eds. 1914). The Iowa Medical Society still confers an annual John F. Sanford Award on non-physicians who have contributed to health, although it is unaware that Sanford was a legislator, let alone that he successfully led a battle against secondhand smoke exposure. Telephone interview with Lucinda Stephenson, vice president for communications, Iowa Medical Society, Des Moines (May 19, 2010).

35Journal of the Senate of the Extra Session of the First General Assembly of the State of Iowa 55 (Jan. 14) (1848). Jay was returned at the 1860 census as a farmer.

36Journal of the House of Representatives of the Sixth General Assembly of the State
In 1857 opponents of secondhand tobacco smoke exposure achieved a major victory when the state constitutional convention in Iowa City agreed to the resolution offered by lawyer Lewis Todhunter that “there shall be no smoking allowed in this Chamber during the sittings of the Convention, and that the Sergeant-at-Arms be required to strictly enforce this resolution.” Remarkably, a brief one-paragraph obituary 45 years later observed that his “most distinguished service” had occurred at the convention, in the early days of which “he introduced a resolution to prevent smoking in the hall, which was unanimously adopted.” In 1856, Todhunter (1817-1902) had been one of the founders of the state Republican Party, which secured control of the legislature at the 1856 elections (retaining it until the Great Depression) and used it to implement the priority of Republicans qua “ambitious capitalists” of calling the convention “to eliminate the hated constitutional restriction on banks and other corporations.” A “most aggressive and uncompromising prohibitionist of...
more than state reputation,”42 Todhunter had “joined the great army of teetotalers in 1840” and later became president of the State Temperance Association.43 Todhunter was a Methodist who settled in Indianola in 1854 and in 1860 became the president of the organizing trustees of Methodist Simpson College,44 whose historian remarked: “If one is to understand the breathtaking sobriety of Indianola and Simpson College during the late nineteenth and early twentieth centuries, one has but to understand the dedication of men like Lewis Todhunter to the cause of temperance.”45 In Indianola he became prosecuting attorney, treasurer, city solicitor, and mayor,46 but was “widest known” as a temperance man,47 who was lauded as having “doubtless prosecuted a greater number of men who were charged with violating the [liquor] law than any other attorney in the state.”48 Together with his wife, he became a member of the Woman’s Christian Temperance Union and the Iowa State Temperance Alliance, being a delegate of

42W. Schooley, “Governing a Municipality,” Pella Chronicle, Mar. 18, 1903 (3:3). Numerous non-Iowa papers published a filler calling Todhunter “one of the most zealous and effective attorneys employed in enforcing the prohibitory law in Iowa.” E.g., DIO, Sept. 12, 1887 (4:6). Two years later he barged into an anti-prohibitionist Republican convention, which “was at first disposed to throw him out,” but then, since prohibitionists at another Republican convention had gagged those who disagreed with them, decided to teach them what “free speech” meant. He then “spoke from an extreme prohibition standpoint.” “Anti-Prohibition Convention,” BH-E, Apr. 3, 1890 (1:4-5 at 5). A delegate who had known him all his life called him a “crank of the first water.” “Some Speeches,” CREG, Apr. 4, 1890 (2:2-4 at 4). As a hotel owner and bank director, he was able to retire from the law with a “competency.” The United States Biographical Dictionary and Portrait Gallery of Eminent and Self-Made Men: Iowa Volume 778 (1878); “Lewis Todhunter,” Proceedings of the Eighth Annual Meeting of the Iowa State Bar Association 50 (1902) (obituary) (quote).


45Joseph Walt, Beneath Whispering Maples: The History of Simpson College 9-10 (1995). On Indianola as the last city in Iowa to issue cigarette sales licenses, see below ch. 20.


48The History of Warren County, Iowa 426 (1876).
The Prohibition of Smoking Inside Legislatures

both organizations to the World’s Temperance Congress in 1893. The other 35 Constitutional Convention members may or may not have shared his views on alcohol, but manifestly a majority sympathized with (or at least acquiesced in) his antipathy to tobacco smoke.

Once Republicans gained control of the legislature—a caesura that coincided with the removal of the state capital from Iowa City to Des Moines and the occupation of a new (temporary) brick capitol in 1858—non-smoking resolutions were offered and adopted with greater frequency from the late 1850s to the early 1880s, the House going through this process in 1858, 1864, 1866, 1872, 1874, 1878, 1880, and 1884, and the Senate in 1860, 1864, 1872, 1874, 1876, 1880, 1882, and 1884. Alone the fact that the smoking ban was neither instituted in every session nor incorporated into the permanent rules strongly suggests that its rationale was not fire hazard. This variability also points to the contested nature of such initiatives as well as the need for especially committed advocates.

A sense of the controversies can be gained by examining passage of the resolutions. In 1858, when Republican Representative W.B. Davis, a physician and a Methodist, offered a resolution that “no smoking shall be allowed in this House during the session hours,” the chamber rejected a narrowing amendment (“except during a call of the House”) by Republican lawyer Ezekiel Cooley and adopted the resolution. Two years later the Senate followed suit in adopting the resolution offered by Democrat William Pusey, a banker and former lawyer from Council Bluffs, that “during the sittings of the Senate, smoking shall be


50Without any evidence or argument, an early twentieth-century scholar hinted that some religious motive had underlain adoption of the smoking ban: he asserted that in connection with the fact that in contrast with the constitutional conventions of 1844 and 1846, each session in 1857 opened with a prayer, “an incident [namely, the ban] should be mentioned which affords further insight into the character of the delegates.” Erik Eriksson, “The Framers of the Constitution of 1857,” IJHP 22(1):52-88 at 60 (Jan. 1924).

51Smoking ban resolutions were identified by examining all the indexed resolutions in the legislative journals or word searching digitized texts.


53Journal of the House of Representatives of the Seventeenth General Assembly of the State of Iowa 456 (Mar. 2) (1858). For Cooley’s biographical data, see Charles Tuttle, An Illustrated History of Iowa 716-18 (1876); The United States Biographical Dictionary of Eminent and Self-Made Men: Iowa Volume 63-64 (1878).
prohibited within the Senate Chamber and Gallery,” after rejecting motions by Democrat and lawyer John Johnson to ban chewing tobacco and by Democrat and physician Gideon Bailey to table the proposed resolution.\textsuperscript{54} In 1864 Republican Coker F. Clarkson, a farmer, newspaper editor-owner, “staunch” Methodist, abolitionist, and prohibitionist,\textsuperscript{55} pushed the Senate even further toward clean air with his resolution that “members, officers and visitors be prohibited from smoking in the Hall of the Senate during business hours, and for thirty minutes previous to the meeting of the Senate.”\textsuperscript{56} The same year, the House adopted the resolution offered by Republican Azro Hildreth,\textsuperscript{57} a newspaper editor and prohibitionist, to forbid smoking (and ticket selling) in the Hall and to instruct the sergeant-at-arms to see to it that the resolution was “properly enforced.”\textsuperscript{58}

Not until 1866 did the first effort to attach moral opprobrium to workplace smoking by fellow legislators take place when 34-year-old Samuel Flanders, a New Hampshire-born Republican farmer from Des Moines County who was also a Baptist deacon,\textsuperscript{59} offered the following provocative resolution cum preamble:

\begin{quote}
WHEREAS, the practice of smoking in this hall is indecent and ungentlemanly; therefore be it

Resolved by the House of Representatives, That any member of this House who shall hereafter smoke within this Hall, either before, during, or after the daily sessions of the House, shall be deemed guilty of a breach of decorum and be liable to be reprimanded by
\end{quote}

\textsuperscript{54}Journal of the Senate of the Eighth General Assembly of the State of Iowa 75 (Jan. 12) (1860). The biographical data are taken from List of Members of the Eighth General Assembly of the State of Iowa 6 (1860).

\textsuperscript{55}Rules and Statistics of the Senate and House of Representatives, Adopted by the Tenth General Assembly, January 1864 (1864); Leland Sage, William Boyd Allison: A Study in Practical Politics 106 (1956) (quote); Benjamin Gue, History of Iowa: From the Earliest Times to the Beginning of the Twentieth Century, 4: Iowa Biography 53-54 (1903). In 1870 Clarkson and his two sons bought what became Iowa’s most important newspaper, the Des Moines Iowa State Register.

\textsuperscript{56}Journal of the Senate of the Tenth General Assembly 334 (Feb. 25) (1864).

\textsuperscript{57}Rules and Statistics of the Senate and House of Representatives, Adopted by the Tenth General Assembly, January 1864 (1864); The Life and Times of Azro B. F. Hildreth iii, 176 (Charles Aldrich ed. 1891).

\textsuperscript{58}Journal of the House of Representatives of the Tenth General Assembly of the State of Iowa 402 (Mar. 3) (1864). A motion by the aforementioned W. B. Davis to strike ticket selling lost.

\textsuperscript{59}1870 Census of Population (HeritageQuest); Biographical Review of Des Moines County, Iowa 250, 255-56 (1905).
the chair.\textsuperscript{50}

However, shortest shrift was immediately made of this innovative approach by the successful motion of fellow Republican John Garber, a Virginia-born county judge, sheriff, and farmer,\textsuperscript{61} to table the resolution.\textsuperscript{62}

After this rebuff six years passed before the next attempt to suppress smoking in the House—albeit an especially capacious one proposed by Republican Michael Leahy, a lawyer who had once taught school\textsuperscript{63}—which prohibited smoking tobacco on the House floor and in the gallery, “both during the sittings of the House and the intervening time of adjournment,” and directed the sergeant-at-arms to effectuate the resolution. The scope of the prohibition was enlarged when the House adopted an amendment by John P. Irish, the publisher-editor of the Iowa City \textit{Daily Press} and one of the state’s leading Democrats, to include chewing as well. After defeating motions to table and to strike the enforcement clause, the House adopted the resolution.\textsuperscript{64} That Irish may have intended his amendment to kill rather than strengthen the resolution and that it boomeranged on him seems probable in light of the article on the legislature that his paper published that likened the double ban to a resolution of the Pennsylvania legislature prohibiting its members from “eating bread and cheese on the front steps of the capitol and coming in to the House or Senate bare footed.”\textsuperscript{65}

\textsuperscript{50}Journal of the House of Representatives of the Eleventh General Assembly of the State of Iowa 95 (Jan. 17) (1866).


\textsuperscript{62}Journal of the House of Representatives of the Eleventh General Assembly of the State of Iowa 95 (Jan. 17) (1866).

\textsuperscript{63}\textit{History of Franklin and Cerro Gordo Counties Iowa} 180-81 (1883). Leahy, who was a graduate of the University of Wisconsin and the University of Michigan Law School, later became the acknowledged leader of the Greenback Party in his county.

\textsuperscript{64}Journal of the House of Representatives of the Fourteenth General Assembly of the State of Iowa 86 (Jan. 16) (1872). The movant of the two defeated resolutions was West Liberty farmer (and bank shareholder) William Evans, a Republican. He was a school board member with a special interest in public schools. \textit{Portrait and Biographical Album of Muscatine County, Iowa} 547-48 (1889). The next day the House also defeated a motion to reconsider by Democrat Edward Campbell, Jr., a farmer. \textit{Id.} at 95 (Jan. 17). On Irish, see \textit{History of Iowa: From the Earliest Times to the Beginning of the Twentieth Century, 4: Iowa Biography} 142-43 (1903). Minimal biographical information on the members was provided by \textit{Rules of the Fourteenth General Assembly of the State of Iowa} 25 (1872).

\textsuperscript{65}“Des Moines’ Letter,” \textit{Daily Press} (Iowa City), Jan. 18, 1872 (4:2).
That contemporaries might have had some justification for suppressing tobacco chewing as well was graphically documented a few years later in Waterloo:

Several months since we were requested by a lady that had an elegant suit ruined by falling on the sidewalk in tobacco spittle, to send a card to the City Council asking that body to prohibit smoking in the streets and spitting tobacco juice on the sidewalks. Believing our City Fathers had the legal right to do as much as to keep the sidewalks clear of snow-drifts, and hearing that Oberlin, Ohio, and Boston, Mass., have such regulations, and believing tobacco is the stepping-stone to intoxication, and having been nauseated and choked on the streets so frequently by the fumes of the weed, we complied, the editor of the Courier giving our manuscript a place in his columns. Then came a reply from Barclay Township, saying men had a right to smoke, etc., and that “when tobacco spittle was piled up high as snow-drifts on the sidewalks, then it should be removed.\textsuperscript{66}

Three days after the House action, Senator Albert Boomer, a physician who 16 years earlier had been a co-founder of his county medical society,\textsuperscript{67} injected a qualitatively new health dimension into the rationale for smoking bans by securing Senate agreement to a resolution that “the practice of smoking in the Senate Chamber is offensive to many, and positively injurious to others, and the Sergeant-at-Arms be required to suppress it.”\textsuperscript{68} Boomer, a Methodist and a “strong prohibitionist,” took, while a senator, “a very decided stand on the temperance question....”\textsuperscript{69}

Despite the comprehensive scope of the 1872 House resolution, since it had not been incorporated into the standing rules, once the next session in 1874 opened, the ban was no longer in effect, and, consequently, as the Burlington Hawk-Eye reported, smoking was being “carried on indiscriminately in the Hall and postoffice.”\textsuperscript{70} Consequently, at the end of January, Cornelius T. Peet, a delegate to the founding convention of the Iowa Republican Party in 1856\textsuperscript{71} and

\begin{footnotesize}
\footnote{\textsuperscript{66}Citizen, “Reply to Barclay Township,” Iowa State Reporter (Waterloo), Nov. 28, 1877 (3:4).}
\footnote{\textsuperscript{67}“Delaware County Medical Society,” North-Western Medical and Surgical Journal n.s. 5(5):241 (May 1856).}
\footnote{\textsuperscript{68}Journal of the Senate of the Fourteenth General Assembly of the State of Iowa 47 (Jan. 19) (1872).}
\footnote{\textsuperscript{69}The United States Biographical Dictionary and Portrait Gallery of Eminent and Self-Made Men: Iowa Volume 255 (1878).}
\footnote{\textsuperscript{70}“From the Capital,” BH-E, Feb. 1, 1874 (1:2).}
\footnote{\textsuperscript{71}Republican State Convention,” Des Moines Valley Whig (Keokuk), Feb. 27, 1856 (3:1-2).}
\end{footnotesize}
The Prohibition of Smoking Inside Legislatures

a farmer-lawyer and former sheriff of Delaware County,\(^{72}\) offered a resolution to prohibit smoking in those two areas between 6 a.m. and 9 p.m. and to require the sergeant-at-arms to “enforce a strict compliance with this resolution during the rest of the session.” The House adopted the resolution after a Democrat’s motion to amend to add tobacco chewing to the ban had lost by a vote of 19 to 68 and a motion to table the resolution had been defeated.\(^{73}\) That Peet himself voted against the amendment strongly suggests that it was designed to kill the resolution. The House was able to come to an understanding about a smoking ban just after it had finally resolved the titanic struggle over organizing the chamber that the Anti-Monopoly Party had succeeded in thwarting through more than 140 50-50 deadlocked votes over the speakership.\(^{74}\) The Hawk-Eye predicted that the Senate would “probably follow suit,”\(^{75}\) and the very next day it did. After Banker Elisha Smith had offered a resolution with virtually the same language as the House version, Republican John Chambers then offered this much more expansive substitute: “That the Sergeant-at-Arms be instructed to prevent all smoking in the Senate Chamber and post-office.” Merchant Elisha Howland’s killer amendment adding “chewing tobacco and gum” and his motion to postpone both failed, but Republican lawyer John Shane’s to strike “post-office” prevailed; Republican John Rumple’s narrowing amendment to add “while in session” failed as did merchant George Maxwell’s killer amendment to add “tobacco chewing.” In the end, then, the Senate adopted the substitute as amended.\(^{76}\)

At the next session the Senate acted again, but this time at the suggestion of one of the Republican Party’s major figures, long-time senator and future governor William Larrabee, “probably the largest landholder in the state” as well as “one of the state’s wealthiest men.”\(^{77}\) His resolution prohibited smoking in the Senate chamber or the post office while the Senate was in session and ordered

\(^{72}\)Biographical Souvenir of the Counties of Delaware and Buchanan, Iowa 489-91 (1890), on http://users.rootsweb.ancestry.com/~iadelawa/bios/1890/peetcorneliusbio.htm; John Merry, History of Delaware County Iowa and Its People 1:75 (1914).

\(^{73}\)Journal of the House of Representatives of the Fifteenth General Assembly of the State of Iowa 104 (Jan. 30) (1874). Nine of the 19 voting for what was presumably a killed amendment had voted for the Republican (and future governor) John Gear for speaker. Id. at 9.

\(^{74}\)Fred Haynes, Third Party Movements Since the Civil War With Special Reference to Iowa: A Study in Social Politics 73 (1916).

\(^{75}\)“From the Capital,” BH-E, Feb. 1, 1874 (1:2).

\(^{76}\)Journal of the Senate of the Fifteenth General Assembly of the State of Iowa 59 (Jan. 31 (1874).

\(^{77}\)Leland Sage, William Boyd Allison: A Study in Practical Politics 198 (1956).
The Prohibition of Smoking Inside Legislatures

The resolution immediately ran into determined resistance when Dubuque Senator Dennis Cooley, a lawyer, bank president, and Republican of some national prominence—having been secretary of the National Republican Committee for Lincoln’s second campaign and Commissioner of Indian Affairs in 1865-66—moved to postpone the resolution until a date beyond adjournment. The yeas and nays demanded on the motion did not reveal strict party-line positions, but with only nine Democrats in the 50-seat Senate, five of them were among the 16 casting Yes votes for killing the resolution, while only three appeared among the 28 opponents of postponement. The Senate rejected three further motions to kill the resolution before adopting it as amended by Cooley’s motion to strike coverage of the post office.

In 1878 the House adopted the resolution offered by Republican Gamaliel Jaqua, a farmer who had once taught school, that “smoking be prohibited in the Hall of this House, and in the Post office; the Sergeant-at-Arms is hereby requested to enforce strict compliance with this resolution during the rest of this session.” During the 1880 session both the Senate and the House sought to ban smoking by resolutions. Senate action was prompted by Republican Lafayette Young, the founder and publisher of the Atlantic Telegraph (who attained greater prominence in state party affairs after buying the Des Moines Daily Iowa Capitol in 1890 and briefly serving as U.S. Senator in 1910-11), whose straightforward resolution read “That no smoking be allowed in the Senate Chamber.” As narrowed by the amendment (“during the session of the Senate”) offered by

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78 *Journal of the Senate of the Sixteenth General Assembly of the State of Iowa* 274 (Feb. 28) (1876).
80 The proposed postponement time was 12:30 p.m. on March 20; the legislature adjourned on March 16.
81 *Journal of the Senate of the Sixteenth General Assembly of the State of Iowa* 274 (Feb. 28) (1876). Identification of party affiliation is in part based on data in *Rules of the Seventeenth General Assembly of the State of Iowa, and a List of Standing Committees and Members* 26-27 (1878), which resumed inclusion of such information. The three killer motions (to refer to the Committee on Constitutional Amendments, to table, and to adjourn) were offered by Democrat Nathaniel Merrell and Republican Henry Rothert).
Democrat Nathaniel Merrell, a lawyer and “one of the prominent capitalists of eastern Iowa,” who had unsuccessfully sought to kill the resolution in 1876, the chamber adopted it. In the House, however, anti-smoking forces were defeated when Republican lawyer (and later judge) Lorin Hayes succeeded in moving to table the resolution (“That no smoking be allowed in the Representative chamber, and that the Sergeant-at-Arms and Janitor be required to see that this resolution is enforced”) offered by fellow Republican farmer Abner Lewis. In 1882, the Senate adopted the resolution offered by Republican Lott Abraham, a farmer who in “the temperance cause” was “quite active” and “never afraid to express his opinion freely upon that question,” that “it shall be the duty of the Sergeant-at-Arms to enforce the order in regard to smoking in the Senate Chamber during the sessions of the Senate.” To be sure, although the press explained that the resolution dealt with “the order on the west wall of the Senate,” the Journal of the Senate mentioned no such pre-existing order. The Republican Cedar Rapids Times editorially saluted the initiative as “a step toward public decency, and consequently toward reform. In fact, there should be a law prohibiting smoking in all legislative halls and government buildings where large bodies of men assemble.”

Almost a half-century of serially successful skirmishes against smoking in the
The Prohibition of Smoking Inside Legislatures

House and Senate was boosted to a new plane of intensity by the dedication and occupation of the new and permanent Capitol on January 17, 1884. Barely a few minutes after the Senate had returned to its chamber at 4:10 p.m. from the joint dedication convention, and with the Senate just having received the previous day’s communication from the Board of Capitol Commissioners that at 2 p.m. on January 17 various spaces, including “smoking rooms,” would be ready for occupancy, Senator Larrabee, in the last of his 17 years in the Senate before being elected governor, offered another resolution that “smoking shall not be permitted in this Chamber or the galleries, and the Sergeant-at-Arms is hereby required to strictly enforce this order.” Two amendments broadening the ban to include “chewing” and “tobacco” were accepted and the Senate adopted the expanded resolution. Larrabee’s opposition to being exposed to tobacco smoke at his workplace was part and parcel of his more generalized anti-smoking position. As soon as he became governor in 1886, he, as the press ironically observed, “gently hint[ed] by placards that ‘no smoking is allowed’ in the executive offices”—the letters on those cards in every room being six inches high. Not only did he not smoke tobacco, but he did not permit smoking in his 1874 mansion “Montauk,” near Clermont, and on at least one occasion told a visiting politician who was about to light a cigar to go outside with it and enjoy nature.

Following a weekend adjournment, virtually the first matter that the House took up on Monday, January 21 was a resolution that soon led the Iowa General Assembly finally to incorporate a smoking ban in its own brand new building into its formal rules. Republican Representative John A. Storey, a 33-year-old lawyer from Adair County, offered this motion on January 21: “Resolved, That

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96 *Journal of the Senate of the Twentieth General Assembly of the State of Iowa* 33 (Jan. 17) (1884); “Iowa Legislature,” ISR, Jan. 18, 1888 (3:7). The amendments were offered by two lawyers, Republican John Kamrar and Democrat Benton Hall (who later became a one-term congressman).

97 Malvern Leader, Feb. 4, 1886 (1:2) (untitled).


99 Telephone interview with Nadine West, director of the SHSI-owned Montauk (May 25, 2010). West, a week shy of retirement after a quarter-century’s work there, was unable on the spur of the moment to identify the document describing the incident, but stressed that mention of Larrabee’s anti-smoking position was a staple of the guided tour of the house. Larrabee’s attitude may have been continuous with or related to the energetic anti-saloon and liquor stance he adopted as governor from 1886 to 1890. See above ch. 9.

100 *A List of Executive and Judicial Officers of the State of Iowa, Also Trustees of State
smoking on the floor of the House and in the galleries thereof be absolutely prohibited, and that the Sergeant-at-Arms and the doorkeeper be and they are hereby instructed to strictly enforce this resolution.”101 This initiative prompted the Iowa State Register to predict that: “Probably no smoking will be allowed in Representative Hall. Spittoons are provided, however, for the tobacco chewers.”102 Three days after Storey’s motion had been referred to the Rules Committee,103 the committee appointed to report rules for the self-government of the House in the transaction of its business recommended adding as Rule No. 66: “No member or officer of the House shall be permitted to read newspapers within the bar of the House while the journal is being read, nor shall any person be permitted to smoke on the floor of the House or in the galleries at any time.” The House then adopted the recommendation,104 and thus from 1884 on smoking was banned in those areas.105 Notably, “[t]he most important legislation passed” that year, “in terms of immediate political consequences, was...a [liquor] prohibition law” on which Republicans had campaigned.106

The Senate followed suit at the next legislative session in 1886. Republican Senator John S. Woolson, a lawyer who was a member of the state senate for ten years before becoming a federal judge during the 1890s,107 offered a resolution to add as Rule 32 to the Senate Rules: “Smoking by Senate employees, while in the discharge of their duties in connection with the Senate chamber or doors leading thereto, is hereby forbidden. Violations of this rule shall subject the employee to liability for discharge by vote of the Senate.”108 Republican Senator Preston

1803

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101 Journal of the House of Representatives of the Twentieth General Assembly of the State of Iowa 33 (Jan. 21) (1884).
103 Journal of the House of Representatives of the Twentieth General Assembly of the State of Iowa 33 (1884).
104 Journal of the House of Representatives of the Twentieth General Assembly of the State of Iowa 55 (1884) (Jan. 24). “Iowa Legislature,” Iowa State Leader (Des Moines), Jan. 25, 1884 (1:3), discussed other rules changes at some length, but ignored the adoption of no-smoking rule.
105 Rules of the Twentieth General Assembly of the State of Iowa 21 (1884).
107 A List of Executive and Judicial Officers of the State of Iowa, Also Trustees of State Institutions, Etc., January 1, 1886, at 14 (n.d.); http://www.fjc.gov/public/home.nsf/hisj
108 Journal of the Senate of the Twenty-First General Assembly of the State of Iowa 12 (1886) (Jan. 13).
The Prohibition of Smoking Inside Legislatures

Sutton, a lawyer from Marshalltown, then offered this amendment: “And smoking of tobacco is hereby prohibited in the hall of the Senate.” The Senate adopted the proposed rule as amended. The new Rule 31 as it appeared for the first time in that year’s compilation of rules read: “Smoking in the Senate Chamber is hereby prohibited. And any officer or employe who shall indulge in smoking while on duty in the Senate Chamber or doorways leading thereto, shall thereby subject himself to liability of discharge.” Reinforcing the seriousness of the commitment to a smoke-free workspace, when the Senate that same year added a new rule specifying the duties of its officers and employees, it expressly included among those of the sergeant-at-arms that he “shall see that the rule prohibiting smoking in the Senate Chamber is strictly enforced....”

Another Senate proceeding in 1890 created an especially interesting and perhaps unique gauge of legislators’ attitudes toward smoking, which were hardly homogeneous and appear to have been in flux. On January 23, Madison County Republican Senator Richard Price, a 41-year-old lumber dealer, “provoked considerable merriment by calling for the enforcement of the smoking rule in the senate chamber”—or repeal of the disregarded ban. The “chief objection” that Price, who according to another press account, had called attention to the rule

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110 Journal of the Senate of the Twenty-First General Assembly of the State of Iowa 12 (1886) (Jan. 13); “The Legislature,” ISR, Jan. 14, 1886 (8:2).

111 Rules and Standing Committees of the Twenty-First General Assembly with List of Executive and Judicial Officers of the State of Iowa 19 (1886). See also Rules and Standing Committees of the Twenty-Second General Assembly with List of Executive and Judicial Officers of the State of Iowa 6 (1888). It is unclear whether there was any sanction for members of the Senate who violated the rule.

112 Rules and Standing Committees of the Twenty-First General Assembly with List of Executive and Judicial Officers of the State of Iowa 20-21 (1886) (Sen. Rule 38). Unchanged, the language remained in the Senate rules as long as the ban itself was in effect. Rule 46, in State of Iowa: 1925-26: Official Register 241 (31st No.).

113 Senators’ occupations are taken from Rules and Standing Committees of the Twenty-Third General Assembly with Official Register: 1890, at 12-13 (1890). For short biographies of Price, see History of Madison County, Iowa 548-49 (1879); The Longstreth Family Records 302-303 (Agnes Longstreth Taylor rev. 1909).

114 “In the Senate,” BH-E, Jan. 24, 1890 (1:2). The Journal of the Senate did not record any discussion concerning smoking during the very abbreviated proceedings on January 23. Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 26 (1890) (Jan. 23).

The Prohibition of Smoking Inside Legislatures

prohibiting smoking in the chamber by employees, raised was “the fact that so many poor cigars were smoked.”116 More specifically, Price “did not object to the aroma of a fragrant havana, but he was sorry to say that many cigars...the fragrance from which would raise the hair on a wooden Indian were smoked in the room.”117 The chair then “ruled that any employe caught in the act would subject himself to discharge, and any senator who desired to smoke in session or out would have to go to the cloak room,”118 conducted by the sergeant-at-arms.119

After the Senate had adjourned for the day, the Burlington Hawk-Eye reported, Republican Senator Frank Bayless “lit a cigar and the sergeant-at-arms was at his side at once to conduct him out. The cigar went instead, and henceforth smoking will be abolished in the senate chamber.”120

A month later, during a debate on the Senate rules, Republican Edward Seeds, a lawyer121 who would soon vote with Dr. Perry Engle on referring (and thus keeping alive) the latter’s no-sales-to-minors bill,122 moved to amend the rule by striking out “smoking in the Senate Chamber is hereby prohibited.” After it had lost on a voice vote, Democrat Michael J. Kelly, moved to amend the rule by adding after “prohibited” the words “while the Senate is in session.”123 This significant relaxation, which permitted smoking in the chamber during the hours

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116“The Iowa Legislature,” Hawarden Independent, Jan. 30, 1890 (2:3).
118“In the Senate,” BH-E, Jan. 24, 1890 (1:2).
120“In the Senate,” BH-E, Jan. 24, 1890 (1:2). Much less dramatically, “The Senate,” ISR, Jan. 24, 1890 (8:4), reported that Price’s request for the rule’s enforcement “led to a little discussion, and the chair ordered the rule to be enforced.” The report a week later in the Hawarden Independent, which may have been garbled because it referred to a nonexistent Senator Woodman who wanted to amend the rule to include senators (when they were already covered), stated that Adolph Meservey, a Republican lawyer, had, with an unlit cigar in his hand, asked whether dry smoking was permitted. In response, Lieutenant-Governor John Hull declared: “‘No; only smoking as is smoking.’ It was his opinion that if the senator refrained from smoking the example would [sic] become contagious and there would be no further cause for complaint.” “Iowa Legislature,” Hawarden Independent, Jan. 30, 1890 (2:3). See also “The Senate,” SCJ, Jan. 24, 1890 (1:1).
121In 1890 Seeds was appointed a justice on the New Mexico Supreme Court; after returning to Iowa he became a law professor at the State University of Iowa. B. Gue, Biographies and Portraits of the Progressive Men of Iowa: Leaders in Business, Politics and the Professions 363-64 (1899).
122See above ch. 9.
123Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 64 (1890) (Feb. 21).
The Prohibition of Smoking Inside Legislatures

the Senate was not in session—since legislators had (and still have) no offices, their desks functioned as quasi-offices before and after daily sessions—and thus enabled smokers to “make the hall blue at other hours regardless of feminine presence,” was adopted by a vote of 28 to 9. Joining Engle in opposition were 6 Republicans (including Price), only one Democrat, and the only Independent; the majority was composed of 15 Republicans and 13 Democrats. The overlap between the voting pattern on the no-smoking rule and that on referring Engle’s bill was not straightforward. Of the eight senators who had voted with Engle, a month later seven (including Engle) voted to refer his bill and only one voted against referral, whereas of the 28 who had voted to relax the no-smoking rule, 12 later voted not to refer Engle’s bill, but 10 voted to refer it. The final motion, by Senator Price, “to strike out section 31 entire,” was defeated by a vote of 26 to 9, with 16 Republicans and nine Democrats joining Engle; in contrast, five Republicans, three Democrats, and the only Independent voted to delete the no-smoking rule. The motion that Price, an activist in the temperance movement at least since the 1870s, offered is difficult to interpret since the press reported that he (and fellow Republican Thomas Weidman, a farmer, who voted with Price on the latter’s and Kelly’s motions) “are radically opposed to tobacco smoking and...presented a resolution prohibiting smoking in the hall, but the smokers outvoted them, agreeing not to smoke during sessions.” Whether he (and the five of the other eight opponents of Kelly’s

124“Boies’ Inauguration,” Sioux County Herald (Orange City), Feb. 27, 1890 (3:5).
125Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 64 (1890) (Feb. 21). The Journal totaled the number of yeas at 29, but in fact it listed only 28 legislators who had voted Yea. For the rule’s new wording, see Rules and Standing Committees of the Twenty-Third General Assembly with List of Executive and Judicial Officers of the State of Iowa 8 (1890).
126Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 256 (1890) (Mar. 17).
127Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 65 (1890) (Feb. 21).
128Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 65 (1890) (Feb. 21).
129At the Temperance Convention in Winterset on May 17, 1879, Price was appointed to the resolutions drafting committee. The History of Madison County, Iowa 413 (1879). See also Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 590 (Apr. 8) (1890) (Price’s motion to prohibit licensure of liquor sales within three miles of any public school building or state institution of learning).
130“Boies’ Inauguration,” Sioux County Herald (Orange City), Feb. 27, 1890 (3:5). According to “Lively Tariff Talk,” DML, Feb. 22, 1890 (5:1-3 at 2), and “The End at
The Prohibition of Smoking Inside Legislatures

motion who voted for Price’s motion) were expressing the ultra view that exposure to the lingering smoke produced by smoking before and after sessions was not a superior outcome to no limits on smoking at all seems implausible, but the press failed to formulate, let alone, solve this puzzle. (Instead, the Des Moines Leader mocked: “It will be entirely proper for Senators Price and Weidman to appear in the senate chamber with sponges adorning their very sensitive olfactory nerves since the passage of the senate rule permitting the smokers to revel in the luxury of a havana in the chamber at any time except when the senate is in session.”) The actual outcome was variously described in the press as a “compromise” and as one the result of which was that the “smokers gained a victory by amending the rules so that smoking in the senate chamber is prohibited only when the senate is in session.” Although almost three-fourths of the voting senators chose to retain limits on exposure to secondhand smoke, here, too, the overlap with the vote on referring Engle’s no-sales-to-minors bill was far from perfect. Of the nine who had voted to eliminate the no-smoking rule, five (including Price and Weidman) voted to refer, while three voted not to refer; of the 26 who voted to retain the no-smoking rule, 15 later voted to refer the bill, while 7 voted not to refer.

Although the no-smoking rules remained formally unchanged until 1923—in 1894 the House adopted a resolution instructing the sergeant-at-arms to “eject all reporters smoking in the press gallery during the sessions of the House”—by the time of World War I and of the more concerted legislative initiatives to repeal the cigarette sales ban, they began, at least in the Senate, to be observed increasingly, if not in the breach, then in any event in the suspension. On March 8, 1917, a motion by Senator James Wilson (who supported Senate efforts to

Last,” DML (Weekly), Feb. 27, 1890 (1:1-7 at 7), “Senator Price attempted to have smoking in the entire senate chamber prohibited at all times, but was unsuccessful.” Although this aim seems in character for Price—who was, after all, merely advocating the status quo—his motion would have achieved its opposite; by the same token, it is puzzling that more senators opposed to any limits on smoking did not vote for his motion.

132 “To Visit the Institutions,” ISR, Feb. 22, 1890 (5:3-6 at 5) (stating that in the entire discussion of Senate rules “there was nothing brought out of general interest”).
133 “The Trusts in Iowa,” SCJ, Feb. 22, 1890 (1:3).
134 Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 256 (1890) (Mar. 17).
135 Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 545 (Mar. 2) (1894) (resolution offered by Republican Charles Coonley).
136 Based on spot checks of the Journal, no suspensions appear to have been sought in
The Prohibition of Smoking Inside Legislatures

repeal the ban on cigarette sales in 1917 and 1919) to suspend the no-smoking rule for the afternoon session carried. A week later he successfully moved for suspension near the start of the day, and by March 29, the rule had been suspended on a total of seven days on the motion of five different senators (four of whom were Republicans), including Senator Arthur Rule, who was the chamber’s leading advocate of repealing the anti-smoking statute in 1917 and 1919.137 (Efforts at this time to suspend non-smoking rules were not confined to Iowa; for the example of Nevada, see below.)

Although no earlier suspension was found in the Senate Journal, March 8, 1917 may not have been the first instance. Not only did the Des Moines newspapers not report on it, but, by serendipity, the Register published an article the next day on a joint Senate-House Constitutional Amendments Committee equal suffrage amendment hearing, chaired by Wilson, which had taken place in the Senate chamber on the afternoon of March 8. In describing the lack of interest that most senators who happened to be at their desks had displayed in the proceedings, the article noted that outspoken anti-suffragist Senator John Price—who by 1921 would become the Senate’s premier movant of suspension—“sat back with his feet cocked up on his desk, enjoying a smoke and the speeches.” Although the fact that a hearing was going on may have meant that the Senate was not in session and that therefore the rule was not implicated, the mention of Price’s smoking suggests that the press would also have highlighted Wilson’s successful motion if it had produced a precedent-setting rule-suspension. Presumably, then, nothing new under the Senate sun occurred that day, which also witnessed a “pickaninny ragtime concert” in the lobby.138

In 1919 the drive for suspensions began already on January 14, the second day of the session, when, on the motion of Republican Senator Ben Edwards, the no-smoking rule was suspended right after the day’s introduction of bills. A succession of Republican senators replicated his success on five more days in January and February, including the two days before the Senate passed Rule’s new licensure bill, on which all the moving suspenders voted Aye. On March 24, four days after Thomas Kingland, a Republican lawyer, who was also the only

137 Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 747, 867, 1107, 1134, 1219, 1259, 1294 (Mar. 8, 14, 23, 24, 27, 28, and 29) (1917). The other senators were Thomas Kingland, William Evans, and Nicholas Schrup. On the legislative debates in 1917, see above ch. 14.

138 “Anti-Suffragists Have Clear Field,” DMR, Mar. 9, 1917 (3:1).
The Prohibition of Smoking Inside Legislatures

senator to move to suspend in 1917 and 1919, had made his third successful motion to suspend the rule that year, bank president Walter Anderson secured a majority for his motion to suspend the rule for the remainder of the session (which ended on April 19).\(^{139}\)

The press took note of some of these suspensions. For example, on February 18, 1919, the *Des Moines News*, which would observe on March 24 that the Senate Rule No. 33 had gone “up in smoke,”\(^{140}\) published this small article (among 50) on its front page under the title: “A ‘Reg’lar Feller’”:

Senator Stoddard of Woodbury co. is the most accommodating member of the upper house.

Observing Tuesday morning that one-half of the senators were chewing on long black cigars, he arose and stated that altho he did not smoke himself he would ask the suspension of rule 33 which prohibits smoking during Senate sessions.\(^{141}\)

That farmer and grain elevator operator Bertel Stoddard was a nonsmoker not only sheds important light on politicians’ readiness to go along to get along, but also highlights the need not to jump to the conclusion that everyone who voted to suspend the rule smoked.

By 1921 a majority of the Iowa Senate was prepared not only to repeal the general ban on cigarette sales,\(^{142}\) but also to make smoking the norm in the chamber despite the continued existence of the rule prohibiting it. On the very first day of the session, as soon as the old Senate rules had been adopted, Senator John Price, a Welsh-born lawyer who had worked in coal mining in Iowa as a child,\(^{143}\) successfully moved to suspend Rule 33. No such motion was offered on the following four legislative days (on one of which the senators met in joint session in the House chamber to listen to the governor’s message and several of which were largely devoted to procedural-organizational matters) or during two very short sessions later in January. Then on January 28, anti-smokers fought back, defeating Senator Walter Anderson’s motion to suspend the rule—the only

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\(^{140}\) “Smoke Lid Is Off,” *DMN*, Mar. 24, 1919 (1:8).

\(^{141}\) “A ‘Reg’lar Feller,’” *DMN*, Feb. 18, 1919 (1:1). Virtually identical text was run as part of “Doings of the Iowa General Assembly,” *Maurice Times*, Mar. 6, 1919 (4:3-4 at 4) and in many other papers.

\(^{142}\) See above ch. 15.

\(^{143}\) *State of Iowa: 1921-22: Official Register* 329 (29th No.).
such loss that smokers suffered that year. Why no one moved to suspend the rule on February 5 is unclear, but thereafter the Senate voted to suspend the no-smoking rule every day for the rest of the session—ironically including April 4, when it defeated the House bill to repeal the statewide sales prohibition, but not on April 6, the day on which the chamber reconsidered and passed it. Overall, on 58 of the session’s 67 days senators were free to pollute the air. Twenty-five—exactly one half of all—senators acted as movants, though Price alone performed the task 11 times. Oddly, there was very little correlation between moving for suspension of the no-smoking rule and voting on the bill to repeal the cigarette sales ban. On the first Senate vote on April 4, when the bill was defeated 22 to 26, 12 of the movants voted for and 12 against the bill—including Price and Henry Adams, who was that day’s movant. Even two days later, when the bill finally passed 27 to 22, nine of the 25 movants opposed the bill. Possibly this seeming inconsistency may in large part be accounted for by accommodationist nonsmokers like Stoddard (who was a movant five times) and by cigar and (to a lesser extent) pipe smokers, who looked down on cigarettes.

Smoking senators were even more energetic and successful in suspending the no-smoking rule during the 1923 session. Beginning, once again, on the first day of the session, they moved for suspension every day except two (on one of which a very brief meeting was held); anti-smokers succeeded three times (including on the session’s opening day) in defeating the motion. After refraining from moving for suspension on the opening day of the 1925 session, smokers moved to suspend the rule every single day. This unbroken skein was facilitated by the fact that the governor delivered his message and Helen Keller and her teacher Ann Sullivan spoke at joint sessions that were held in the House 


\[145\] See ch. 15.

\[146\] During the 1923-24 special session the rule was also suspended daily. State of Iowa: 1924: Journal of the Senate of the Fortieth General Assembly: Extra Session 9, 1609 (Dec. 4, 1923 and July 30, 1924).

\[147\] The days without motions were January 16 and February 12; the days on which the motions were defeated were January 8, and February 2 and 22. State of Iowa: 1923: Journal of the Senate of the Fortieth General Assembly 5, 351, 609. Senators John Ethell and John Price were the movants 11 times and eight times, respectively.
chamber over which the senators had no control.  

Finally, in 1927, smokers (and non-smokers acquiescing in secondhand smoke exposure) in the Senate (which was composed of 49 Republicans and one Democrat), after the opening day of the session, succeeded in suspending the rule every day through January 27, when they secured the rule’s outright repeal. Newspapers featured reports of the denouement on their front pages. The Iowa City Press-Citizen, for example, under the headline, “Senators Will Enjoy ‘Smokes,’” recounted that:

No longer will the smokers of the senate be forced to gain permission of the majority each day before they may indulge in a cigar, cigaret or light up their pipes. They were in such force this morning that when an effort [was made] to make it possible for one third of the membership to bar smoking instead of a majority, they put through a substitute rule which strikes the anti-smoking rule from the book and removes all restrictions.

Senator Skromme of Story county, who does not smoke, proposed the amendment which would have made it possible for one third of the senators to clear the senatorial air. He figured that it cost the state $7,000 a session, at the rate of $10 a minute, for the senate to consume one minute each day suspending the anti-smoking rule. Elimination of the rule, with the provision that it might be reinstated by the one-third vote, would save this sum, he pointed out. Senator Haskell of Linn wanted to add to this saving the cost of a “dozen cases of matches furnished the assembly by the state each session.”

Then Senator Benson of Clayton observed that there was little prospect of ending the daily contention over the smoking privilege unless the rule was thrown out all together [sic] and this was done.

The action, at the rate Senator Skromme figures the senate’s time, cost the state about $150.

What Republican Senator Lars Skromme, a Norwegian-born farmer, had sought to do was to reverse the rule’s procedural order by amending Rule 37 to read: “Smoking in the Senate chamber is hereby permitted while the Senate is in session. And any officer or employee may indulge in smoking in the Senate chamber or doorways, while on duty. Provided, this rule may be suspended by
a vote of one-third of the members present.”  Thus Skromme’s seeming abolition of the no-smoking rule was merely a bone he threw to his smoking colleagues: instead of placing the burden on them to seize the initiative daily and seek to suspend the rule, his amendment made smoking the default position, but only a one-third minority would have to be mobilized, although these anti-smoking senators would have to act on a daily basis to preserve their right to clean air. Interestingly, C. A. Benson, another Republican farmer, who took up the cudgels for smokers, “also d[id] not use the weed.”  Equally indicative of the fluid alliances despite the intensity of preferences was that at least six senators (Darting, Haskell, McLeland, Shane, Shinn, and Stoddard) voting against abolition of the no-smoking rule had moved to suspend it over the previous 10 years. Indeed, McLeland had been the movant the very day he voted against ending the rule. The close 23 to 20 roll call vote in favor of Benson’s substitute amendment and for “Freedom for Smokers” demonstrated that anti-smokers in the 50-member chamber presumptively constituted more than a one-third minority—at least in 1927. In the event, more than four decades of de jure protection of senators from exposure to “[s]econd hand tobacco smoke,” which was “objectionable to the majority of men and repulsive to the majority of women,” had come to an end.

Guerrilla warfare against the smoking ban developed later and more sporadically in the House. No attempt to suspend the no-smoking rule appears to have been made before the afternoon session of February 18, 1921, when Representative Frank Lake, the newsman who had staked out a high-profile anti-

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155State of Iowa: 1927: Journal of the Senate of the Forty-Second General Assembly: Regular Session 183 (Jan. 27). During the few days of the session leading up to repeal McLeland had been the movant three times, while Shinn and Stoddard had made the motion twice each.
prohibitionist position in 1917, successfully moved to do so. The House permitted smoking on a total of 12 days in 1921. Horace Dodd, who filed H. F. 678, the bill that became the statute that repealed the statewide cigarette sales ban, was the movant two days before the House passed his bill; ominously, the House suspended the no-smoking rule on March 30, the day of passage, and, with great symbolism, by unanimous consent suspended the rule again the day after passage.

On January 26, 1923 the House adopted the recommendation of its Rules Committee, on the one hand, to expand the ban by prohibiting using rather than merely smoking tobacco, and, on the other hand, in principle to repeal it by adding the sentence: “This rule may be suspended by a majority vote of the members present.” Smokers presumably made this change to facilitate suspensions, which would otherwise be subject to House Rule 54, pursuant to which standing rules had to be approved by a two-thirds majority of those present. The non-party-line vote of 57 to 37 saw nine Democrats and one Independent join 47 Republicans in the majority, while 32 Republicans and five Democrats opposed the changes. Perhaps reflecting the ambiguity of the rule change, of the 46 representatives holding over from 1921 who voted on both the Dodd bill to repeal the statewide prohibition on cigarette sales in 1921 and the House smoking rule change in 1923, only 7 voted Nay both times and 10 Aye both times, while 12 who had voted against repeal in 1921 voted for the rule change in 1923 and 17 who had voted for repeal in 1921 opposed the rule change. Emblematic of the sea change in attitudes was the fact that one of the Republican supporters of the reintroduction of smoking was John A. Storey, who 39 years earlier had initiated the entire rule-based no-smoking campaign in the legislature. Moreover, when he returned to the House in 1921, Storey lived in

159See above ch. 14.

160State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 569, 709, 1285, 1353, 1436 1468, 1525, 1604, 1643, 1686, 1786, 1875 (Feb. 18 and 24, Mar. 21, 23, 25, 26, 28, 29, 30, and Apr. 2 and 5). Nevertheless, three of the nine movants (Shores, Fackler, and Westervelt) voted against passage of the Dodd’s bill.


163State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1659-60 (Mar. 30); State of Iowa: 1923: Journal of the House of the Fortieth General Assembly iv-vi, 329-30 (Jan. 29). Notably, Toleff Moen, who had been the most militant anti-repealer in 1921, voted against the rule change.
The Prohibition of Smoking Inside Legislatures

Indianola and represented Warren County, one of the driest communities in Iowa, which did not permit the sale of cigarettes until 1933, 12 years after the legislature legalized it. The potential suspension immediately became reality when, directly after the vote, a motion (proposed by a representative who had voted against the changes) prevailed to suspend the rule for the rest of the day.

Pro-smoking forces waited two weeks to move to suspend the new rule: following a successful motion on February 10 by William Children, a Republican farmer from Council Bluffs who had voted against the Dodd bill in 1921, they initiated a spasm of suspensions that began on Valentine’s day, lasted until recess on February 23, and then resumed for two days on March 8-9, only to vanish again. Anti-smokers’ varying degrees of successful resistance were on display on three of these 10 days. On February 15, the anti-smokers defeated the motion to suspend the no-smoking rule; on February 20, an objection subverted the request by Representative John Rankin (who in 1921 had filed a bill to repeal the cigarette sales ban) for unanimous consent to suspend the rule, forcing him to achieve his goal by means of a motion; and, finally, on March 9, opponents defeated Samuel Fackler’s motion to suspend the rule for 30 minutes, but were unable shortly thereafter to prevent hog-breeder James McClune’s motion to suspend for the rest of the day from prevailing.

The battle almost immediately after the start of the first day of the 1923-24 special session (to complete the revision of the Iowa Code), when anti-smokers defeated Rankin’s motion to suspend for the rest of the forenoon, but in the afternoon McClune’s motion to suspend for the rest of the day carried. A fortnight later a motion to suspend the rule for the remainder of the forenoon prevailed, but then considerably later in the session, when Children moved to

164On Storey’s generally conservative legislative record in 1921, see “Judge Storey’s Work in the Legislature,” Indianola Herald, Apr. 14, 1921 (4:2).
165On Indianola, see below ch. 20.
166The representative was R. O. Garber, a Republican lawyer from Adair.
171State of Iowa: 1924: Journal of the House of the Fortieth General Assembly: Extra
suspend, a roll call was demanded, which makes possible a comparison with the
ing the voting pattern on Dodd’s bill in 1921. Although the close 29 to 24 vote in favor
of suspension was ultimately moot because it was immediately thereafter
determined that a quorum was absent, of the 11 members who both had voted on
the Dodd bill and voted Nay on Rule 63, nine had (consistently) also voted
against repealing the cigarette sales ban, while only two had voted Aye.
Somewhat less consistently, 12 of the 17 representatives who voted to suspend
the rule had also voted for Dodd’s bill, while five had voted against it.\footnote{172}
Although three weeks later the House suspended the rule for the remainder of the
session,\footnote{173} presumably because the House then recessed for three months, on the
day it resumed proceeding, it suspended the rule for that day and again the next
day, but not for the last days of the session.\footnote{174}

At the end of 1923 the State University of Iowa student newspaper published
a brief article even the title of which ("Anti-Smoking Rule in Iowa Legislature Is
Always Suspended") forcefully underscored how quickly the tide had turned
against protection from secondhand tobacco smoke exposure, ushering in a
decades-long socioeconomically pressured acquiescence:

One of the first house and senate rules the newcomer to the general assembly learns
by number is the rule forbidding smoking during the sessions—63 in the house and 33 in
the senate. The senate generally suspends the rule a few moments after convening, while
the representatives seldom wait more than an hour to let down the anti-smoking bar.
On the usual aye and nay vote the nays are frequently louder than the ayes, but the
chair nearly always declares the ayes have it and there is no protest.
The few non-smokers make up in volume for the lack in numbers, but always good
naturally submit.\footnote{175}

\footnotetext{Session 170 (Dec. 19, 1923) (n.d.) (by Davenport Republican John Hansen).
172State of Iowa: 1924: Journal of the House of the Fortieth General Assembly: Extra
Session 1352-54 (Apr. 5, 1924) (n.d.); State of Iowa: 1921: Journal of the House of the
Thirty-Ninth General Assembly 1659-60 (Mar. 30). Once again, Moen voted against the
suspension; one of the two members who had supported Dodd's bill but voted against the
suspension was House Speaker J. H. Anderson.
Session 1683 (Apr. 25, 1924) (n.d.). George Venard, who had been the other member to
vote against suspension on April 5 who had voted for the Dodd bill, made the motion.
Session 1712, 1731 (July 22 and 23, 1924) (n.d.) (Rankin and Hansen, respectively, the
movants).
175"Anti-Smoking Rule in Iowa Legislature Is Always Suspended," \textit{DI}, Dec. 23, 1923
(1:4).}
The Prohibition of Smoking Inside Legislatures

Only a few attempts were made in the House to suspend the rule in 1925, beginning with a success on the opening day of the session for the remainder of that day and again during the forenoon of January 28. No initiative was made on February 3, when Helen Keller and Ann Sullivan addressed a joint legislative session in the House chamber, but the next day, Volney Diltz, who played a prominent role on behalf of the American Legion in repealing the sales ban in 1921, sought to have the rule suspended for the remainder of the forenoon; anti-smokers defeated his motion only to see Representative L. Forsling’s to suspend it for the forenoon prevail shortly thereafter. After another suspension a few days later, smokers appear to have relented until March 16, when Representative David Brittain, a Farm Bureau official from Madison county, unsuccessfully moved to hollow out the rule by amending A. G. Rassler’s motion to suspend for the remainder of the day by extending it to the rest of the session. After the amendment’s defeat, smokers had to make do with the freedom to smoke just for the rest of that day, which appears to have been the last suspension of the session.177

In 1927, the resistance of the anti-smoking legislators was again on display when, on January 26, the House rejected the motion of Representative Irving Knudson, a Republican auctioneer-banker, to suspend the rule for the forenoon.178 Later that morning, however, George Edge, a Republican farmer from Newton, offered another motion to suspend the no-smoking rule for the forenoon, triggering a demand for a roll call vote, which laid the basis for the second record of the comparative strength of pro- and anti-smoking forces in the Iowa House on the issue of smoking in the legislature itself prior to the 1970s. That almost two-fifths of House members—the vote was 61 to 38—objected to being exposed to secondhand smoke as late as 1927 indicates that the antagonism was widespread and in no way the preserve of a fringe group of WCTU-affiliates.179 The intense contentiousness of smoking and nonsmokers’ tenacity were impressively underscored for a third time that day during the afternoon session on January 26,

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176 See above ch. 15.
when the chamber defeated a motion by Republican lawyer Leonard Simmer to suspend the rule. Thereafter, the pro-smoking contingent managed to prevail on 16 additional occasions, while their opponents defeated the motion to suspend only once more (on February 4), though smokers ceased offering such motions after February 19.

No attempt appears to have been made in 1929 to suspend the House no-smoking rule, but in 1931 the House Rules Committee proposed amending the rule by not permitting smoking “prior to ten o’clock a.m. on any legislative day.” Floor amendments were proposed to push the smoking time back to 10:30 a.m. and twelve o’clock as well as to strike the committee amendment altogether, thus leaving the old rule in place. Ultimately the House adopted 10:30 a.m. as the end of daily smoke-and tobacco-freedom. Thus the new rule read: “[N]or shall any person be permitted to use tobacco on the floor of the house during its session, prior to 10:30 o’clock a.m. on any legislative day, or in the galleries at any time. This rule may be suspended by a majority vote of the members present.”

Finally, at the next session, in 1933, the House proceeded to abolish even this tenuous regulation. The elimination of the last vestige of regulation took place without any debate or even express declaration that the no-smoking rule was at stake. The Rules Committee merely submitted a report recommending that “Rule 63 be stricken”—without any mention of that rule’s content—and that a rule of totally unrelated content (relating to rules suspension) be inserted in its stead. On February 6 the House, without discussion, adopted the “committee

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The Prohibition of Smoking Inside Legislatures

amendment to Rule 63,187 thus ending almost a century of codified prohibition of smoking in the Iowa legislature and ushering in more than four decades of laissez-faire.188

The Advent of Women State Legislators Produces a Surprising Impact on Smoking Rules: Examples of the “shepherdess of the male members”

[E]vidently Madame Nicotine appeals to them more strongly than Madame Rachael [sic] Berry.... 189

How many ever saw a real woman legislator, the kind able to withstand the haze of tobacco smoke and other “wickedness” in the legislative halls at Salem?190

Yet a decent regard for the rights of others should preclude it [smoking] if women are in attendance [as members of legislatures]. This truism would be both superfluous and smug were it not for the astonishing fact that some men with brains enough to be preferred for public office by their fellows, do fail to use them in this particular. When none but men are in the room, question of propriety is not so fairly raised, for most men who take part in public affairs are quite accustomed to tobacco smoke, and it is expected that the unlucky exceptions to the rule will submit in silence rather than interfere with the satisfactions of their neighbors.191

Some legislators’ willingness to put up with secondhand smoke exposure was not confined to Iowa192 and may, surprisingly, even have been reinforced by the advent of women as members of state legislatures beginning in the mid-1890s in the West, where, purportedly, “no such asceticism prevailed” as to ban smoking.

188 See below ch. 25.
189 “Random Notes,” Bakerfield Californian, Mar. 5, 1915 (12:2) (edit.).
191 Robert Luce, Legislative Assemblies: Their Framework, Make-Up, Character, Characteristics, Habits, and Manners 637-38 (1924).
192 In 1889 the Kansas House adopted a resolution instructing the sergeant-at-arms to enforce House Rule 67—which prohibited smoking in the hall, rooms opening into the hall, or the galleries, while the House was in session—which was “constantly being violated, to the great discomfort of many members....” House Journal: Proceedings of the House of Representatives of the State of Kansas 268 (Jan. 23) (1889).
Consequently: “When women lawmakers began to appear, it was wondered whether their presence would expel the cigar.”

Indeed, initially in Colorado in 1895, when the first (three) women elected to a state legislature sat in the House, they made it their “business to see that the rule against smoking on the floor was enforced strictly.” In particular of 32-year-old Brooklyn native Clara Cressingham the New York World contemptuously asserted: “Her delicate nostrils would invariably detect the most delicate smoke wreath ascending from behind any of the big oaken desks, whereupon she would immediately demand that the Sergeant-at-Arms enforce the House rule without delay.” When “men members felt greatly annoyed because, as a result of the women legislators’ “sustained pertinacity,” “they could not solace their brains with tobacco” and “toward the end of the session no smoking was allowed for a minute in the house,” the New York Sun commended the women “without stint” for having rendered “a most excellent service...to the cause of good manners in the Legislature.” In contrast, the Chicago Tribune (falsely) complained that they had intervened only to protest “venerable and accepted masculine privileges,” such as smoking, thus making themselves “disliked.” The paper editorially pounded on this theme as evidence that the “woman suffrage experiment in Colorado” was largely a “fad,” of which the women themselves were the first to “get tired....” Four years later, the press (misleadingly) reported that: “On appeal of the women members of Colorado house, smoking has been prohibited in the house chamber.” And given the repeated references during congressional debates to the need to protect women in the galleries from members’ tobacco smoke on the floor, an expectation that legislatures would

193 Robert Luce, Legislative Assemblies: Their Framework, Make-Up, Character, Characteristics, Habits, and Manners 637 (1924).
194 See above ch. 6.
196 Sun (New York), Apr. 16, 1895 (6:4) (untitled edit).
197 “Tired of Their Fad,” CT, Apr. 12, 1895 (6) (edit.). For a similar (false) complaint about the female members’ failure to distinguish themselves, see “Those Women Legislators,” World (New York), Apr. 14, 1895 (7:7-8). For a more positive evaluation of their overall performance by the local press, see “Women as Legislators,” RMN, Apr. 8, 1895 (8:3).
198 Even before statehood Colorado’s territorial legislative chambers had banned smoking. See above ch. 6.
200 See below this ch.
intensify their anti-smoking bans would have been eminently plausible. In the event, new female legislators in a number of states enabled their male colleagues to smoke on the job and expose their non-smoking co-workers to the by-products.

**Arizona**

The first nationally newsworthy female facilitation of legislative smoking took place in Arizona in 1915, when for the first time a woman occupied a seat in the Senate (as well as in the House). Soon after Arizona had achieved statehood in 1912, women secured the right to vote through an initiative measure, in part as a result of the efforts of Frances Lillian Willard Munds (1866-1948), the president of the Arizona Equal Suffrage Association from 1909 to 1912, whose participation in that struggle had arisen out of her activity in the Arizona WCTU.201 In 1914 Munds won election to the Senate of the state’s second legislature, only the second woman ever to be elected to a state senate in the country.202

At the same session, Rachel Berry (1859-1948), a Mormon emigrant from Utah and “ardent [liquor] prohibitionist,” who had been “a factor to be reckoned with in the suffrage campaign,” became the first woman elected to the Arizona House.203 On the day that they took their seats, January 11, 1915, smoking, as a headline put it the next day, became the “First Serious Issue in New Legislature.”204 Directly following election of a House speaker and a motion to make the First Legislature’s rules the Second’s temporary rules, Berry, whose

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primary legislative concerns were women, children, and education, introduced Resolution No. 1, which triggered the session’s “first clash”: “That no smoking be permitted on the floor of the House during all sessions of the House and that the Sergeant-at-Arms be instructed to enforce the same in the lobby” —leaving, as the *L.A. Times* put it, “the gallery mob without mention.”

During the ensuing discussion, a member (of the entirely Democratic House) from Tempe, James Cooper Goodwin, a prominent rancher, was Berry’s most ardent supporter. Indeed, the fact that Goodwin during his only other term, in 1897, had successfully moved the adoption of an identically worded resolution in the Territorial House strongly suggests that he was cooperating very closely with Berry. On the second day of the 1897 session, Goodwin had introduced a simpler resolution that “no smoking be permitted during all sessions of the House,” which the official *Journal* reported as tabled. The carnival atmosphere in the chamber emerged in a press account: “The speaker, taking a cigar from his mouth, asked something about intermissions for refreshments and then, with an eagle swoop the house dropped on the resolution and it was no more.” Undaunted, the next day, “in a cloud of fragrant Havana smoke,” Goodwin offered a more expansive resolution (with precisely the same wording that Berry submitted 18 years later), which the House, “[m]uch to the astonishment of the lobby and possibly of the members,” adopted. The Assembly then promptly took a 20-minute recess, during which “everybody lit a fresh cigar.” Two

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207 *Journals of the Second Legislature of the State of Arizona: Regular Session...1915*, at 24 (Jan. 11). The fact that Berry found it necessary to offer the resolution implied that the House rules embodied no such ban. The House rules for the First and Second Legislature (1912-13 and 1915), according to rare separate prints (*Rules of the House of Representatives*), contained no reference to smoking. Email from Barbara Howe, Arizona State Law Library, to Marc Linder (May 9, 2011).


209 *Journals of the Nineteenth Legislative Assembly of the Territory of Arizona...1897*, at 16 (Jan. 19) (1897).

210 Unidentified and undated newspaper clipping in James C. Goodwin Folder, Biographic Files Collection, Tempe History Museum Research Library (copy furnished by Joshua Roletter, Curator of Collections).

211 *Journals of the Nineteenth Legislative Assembly of the Territory of Arizona...1897*, at 20 (Jan. 20) (1897).

212 Unidentified and undated newspaper clippings in James C. Goodwin Folder, Biographic Files Collection, Tempe History Museum Research Library (copy furnished
weeks later the struggle over smoking broke out again, when a motion to allow smoking during session hours lost, but in March smokers secured a partial victory by a motion that excepted Committee of the Whole proceedings from smoking ban.

In 1915 Goodwin “warmly sustained the Hon. Mrs. Berry’s contention that tobacco is a nasty weed and that smoking is a wasteful and even injurious habit that should be abolished generally and that, therefore, should be shown disapproval in any body of representatives of the people.” Their addicted antagonist protested that: “Tobacco gave him clarity of vision. He needed tobacco in order to do his best work for his constituents....” After Berry had yielded to a motion to strike out enforcement of the ban in the lobby, the House passed her resolution on a 25 to 10 roll call vote. The “many members” to whose “obvious distress,” the resolution, according to the Arizona Gazette, prevailed, presumably did not exceed 10. In a press interview, Berry explained her position: “If smoking were abolished it would be a benefit to mankind. It’s all nonsense about tobacco quieting the nerves. If the men did not use it they would not be nervous.” The Arizona Republican was impressed that Berry had articulated this view “in a quiet, dignified way that stamped the speaker an earnest reformer yet not one seeking notoriety by freak legislation.” And the rival Arizona Gazette, while “still for Mrs. Berry,” was “much disappointed in” her because the ban was “mighty tough on the press lads” and would “spoil what

by Joshua Roffler, Curator of Collections).

The vote of 13 to 9 failed to achieve the requisite super-majority. Journals of the Nineteenth Legislative Assembly of the Territory of Arizona 110 (Feb. 4) (1897).

Journals of the Nineteenth Legislative Assembly of the Territory of Arizona 272 (Mar. 13) (1897).

“Women Shy on Teamwork,” LAT, Jan. 16, 1915 (II3). Yet another legislator insisted that “if the atmosphere of the house were vitiated by tobacco smoke his constituents would be deprived of his best efforts.” “Second State Legislature Convenes at State House,” AR, Jan. 12, 1915 (1:1-2).

The press made sarcastic comments suggesting that there was no such space as a lobby. E.g., “Second State Legislature Convenes at State House,” AR, Jan. 12, 1915 (1:1) (“the lobby, whatever or whe[re]ver that may be”).

Journals of the Second Legislature of the State of Arizona: Regular Session...1915, at 24 (Jan. 11).


looked like a nice cozy session with plenty of free smokes.”

In the Senate, Munds pursued the diametrically opposed tack. When the Arizona Republican noted that she had “said that she had no objection to indulgence by her colleagues in the weed,” what it really meant was, as Munds herself stated, “[w]hen the question of smoking came up in caucus I asked that it be continued” because she, a self-described “democrat, progressive but not radical,” had “fought for equality” and hoped she was “consistent.” In other words, whatever Munds said, she said it not on the Senate floor, but in the non-public caucus setting. The Arizona press reported that: “In the senate members can smoke all they please. Mrs. Frances Munds not only approved of smoking but insisted that male legislators continue to smoke during the session.” Munds, to whom her colleagues’ smoke was “perfectly agreeable,” even disclosed her partly opportunistic motivation in an interview with the Republican that seemed to take direct exception to Berry’s aforementioned position: “‘Abolish smoking on my account? Not if I know it! I certainly hope the men will smoke. It will soothe their nerves and keep them in good humor. When my husband gets cross, I run for his tobacco and even fill his pipe.’”

Vindicating...

\[\text{\textsuperscript{220}}\] “At the Capitol,” Arizona Gazette, Jan. 12, 1915 (4:3).
\[\text{\textsuperscript{221}}\] “Second State Legislature Convenes at State House,” AR, Jan. 12, 1915 (1:1).
\[\text{\textsuperscript{222}}\] “Smoking Is First Serious Issue in New Legislature,” AR, Jan. 12, 1915 (5:2).

Consequently, the Senate Journal for Jan. 11, 1915 did not record any intervention by her with regard to smoking. Journals of the Second Legislature of the State of Arizona: Regular Session...1915, at 1-3 (Jan. 11). The Senate rules for the First and Second Legislature (1912-13 and 1915), according to rare separate prints (Rules of the State Senate) in the state library, contained no reference to smoking. Email from Barbara Howe, Arizona State Law Library, to Marc Linder (May 9, 2011). The 1917 Senate rules also did not address smoking. Journals: Third Legislature of the State of Arizona 49-65 (Jan. 23) (1917) (Senate). Since the Senate rules included no smoking ban, Munds was merely signaling to fellow Democrats (who occupied all but one Senate seat and monopolized the House) that she would not be proposing one. To be sure, press coverage of the caucusing during the weekend before the legislature convened did not mention smoking. “Dr. W. P. Sims to Be President of the State Senate,” Arizona Gazette, Jan. 9, 1915 (1:1); “First House Caucus Today,” AR, Jan. 9, 1915 (5:3); “Sims, President; Brooks Speaker, Caucus Results,” AR, Jan. 10, 1915 (1:4-6); “Veterans Chase and Cook to Call Solons to Order Today,” AR, Jan. 11, 1915 (1:1);

“Doings in the State Legislature,” Tombstone Epitaph, Jan. 17, 1915 (4:1-2). The use of “continue” suggested that legislators’s smoking had already been unconstrained by Senate rules and that Munds merely announced that she was acquiescing in that regime.


The Prohibition of Smoking Inside Legislatures

the wisdom of her plan, the Los Angeles Times noted that Munds “got some sincere applause coming her way at the very outset of her career as a stateswoman.” The out-of-state press—wire-service blurbs appeared in many newspapers across the country, which were amused by the two women’s opposed approaches—invited a formal process that had never taken place by adding that: “She had little difficulty in securing the passage...of a motion to that effect.”

Dunbar’s Weekly, edited and published by J. O. Dunbar, “a prickly, independent and generally astute political observer with strong prohibitionist sentiments,” expressed a widely held (male pro-smoking) view in praising Munds’s and ridiculing Berry’s approach:

We commend the tact and good judgment of Mrs. Senator Munds for her refusal to prohibit the senators from smoking. Mrs. Munds has had a heap of experience dealing with men politically and she realizes that they always respond to the just demands of women. Smoking is indulged in the houses of probably 90 percent of the people of the nation, and just why any person would seek to prevent their associates from this privilege is peculiar, to say the least. Senator Munds has certainly started her senatorial career along the right lines, and we predict she will be a valuable member of the second Arizona legislature.

The female of the species—in the person of Mrs. Berry of Apache—got herself in the limelight (and incidentally got herself disliked in many places) by butting in at the earliest possible moment with a “no-smoking” resolution. The resolution would have come with much better grace from some of the men, but Mrs. Berry, it seems, decided to take no chances. Many of the men voted for the resolution out of a mistaken sense of chivalry.... Out of revenge, it is said that a resolution will be offered demanding that Mrs. Berry lay aside the skyspicewhich adorns her crown of glory. One member said he favored the no-smoking resolution because cigar smoke contaminated the air the rest were forced to breathe [sic]. As long as this is to be a perfectly sanitary Legislature, and “safety first” is to be the watchword, why not make all visitors secure doctors’ certificates of health and purity

According to “Women Shy on Teamwork,” LAT, Jan. 16, 1915 (II3), Munds “request[ed] her colleagues to not consider her at all if they wanted to smoke. She wanted to be on an equality...and she had observed that mankind, and particularly her own husband, was much more pacific and manageable when under the influence of nicotine.”

229“Woman Legislators Carry Their Point,” SLT, Jan. 12, 1915 (9:3).
before permitting them entrance to the gallery.232

In contrast, boasting that it had “not been subsidized by the iniquitous tobacco trust whose practices were infinitely worse than its products,” the self-proclaimed independent progressive Republican judiciously declared that both Berry’s and Munds’ way of looking at the question had much to recommend them.233 While failing to mention that the all-male Arizona Territorial House and Council in 1897 and 1905, respectively, had prohibited smoking (and as early as 1887 the House printed large placards prohibiting smoking in the Assembly chamber or lobby while the House was in session),234 the editorialist traced Berry’s position all the way back to Sir Walter Raleigh:

To most women, before the suffrage movement had a start, smoking was repugnant. ... We may add that the repugnance to tobacco in any form is not confined to women. Many men share it, as we learn from the members of the house who supported Mrs. Berry’s resolution against smoking....

Mrs. Munds, we may presume, is no more favorable to smoking than her sister at the other end of the capitol. But she was inclined to accept it as one of the lesser evils of American politics into which she entered with the full knowledge that a majority of men are smokers. She doubtless had a hope, as well as the rest of us who favor participation by women in political affairs, that equal suffrage would work a purification of politics. But it is a question whether it should be begun with a purification of the physical, rather than the moral air of our legislative chambers.235

Its Solomonic suggestion for dealing with “stubborn” male legislators, who reacted to their pipes and cigars’ being taken away from them like children whose toys had been snatched away, was to put ventilation fans into the chambers’ walls.236

From the two pioneering legislators’ irreconcilable preferences the weekly Tombstone Epitaph male chauvinistically constructed commonality by detecting the unifying principle that they had “established the supremacy of a single female wish over a large number of male votes in the senate and house.”237 Unwritten

234See below Table 6.
was the contradictory logical implication that a large number of senators resented their uncollegial colleagues’ exposing them to secondhand smoke and that in both houses majority rule had been instantiated. The out-of-state press reveled in invidiously comparing the two legislators’ tactics. The Oakland Tribune, for example, knew that with regard to “securing legislation benefiting her particular district it is by no means difficult to determine which of the two ladies will have the most influence on the nicotine-loving membership, and it is safe to predict that the senator will have a decided advantage over her sister in the lower house.” With Munds “wish[ing] the men to smoke if they wanted to,” and Berry “determined to stop them, no matter what they wanted,” the Los Angeles Times could “imagine which one of the two had the most influence in the Legislature.” To be sure, in the most literalist factual sense, this claim was incorrect: despite her favor-currying acquiescence in being inundated with male senators’ tobacco smoke, Munds succeeded in securing enactment of only one of the 13 bills she had introduced—exactly the same number as Berry, who refused to prioritize winning friends and influencing people over her own personal health or establishing the principle of smoke-free public places.

Ironically, almost a century later, the leading historian of early Arizona women politicians, according no weight to Berry’s anti-public-smoking initiative and therefore perceiving no public policy trade-off in Munds’ acquiescence, replicated yesteryear’s male chauvinist press praise of Munds’ willingness to accept traditional male prerogatives. Apparently unaware that all-male legislatures throughout the United States, including Arizona’s, had been banning smoking in House and Senate chambers for decades before women’s advent as colleagues, Heidi Osselaer objectively associated herself with early-twentieth-century pro-tobacco politicians and journalists by charging that “Berry had no
by stating that “[e]ven” one who had criticized Munds during her campaign “applauded her reluctance to ban smoking” as indicating that she would be a cooperative legislator. 


it would in no way improve their morals or their dispositions.” The minister may have “severely criticized” her, but her colleagues applauded her and “smoked as much as they pleased on the Senate floor and thanked Frances for it.”

Munds “request[ed] her colleagues to not consider her at all if they wanted to smoke. She wanted to be on an equality...and she had observed that mankind, and particularly her own husband, was much more pacific and manageable when under the influence of nicotine.” Apart from the issue of human beings’ comparative tractability while under the influence of withdrawal symptoms, Munds’s aspiration to equal treatment brings into sharp focus the one circumstance in which her laissez-faire approach toward smoking would have attained its greatest plausibility: if—counterfactually—the sole or chief reason for the legislative smoking ban had been to comply with a prevalent male-chauvinist behavioral code, shared by some women, that it was disrespectful for men to smoke in women’s presence. But in fact many years before Munds and Berry’s election anti-smoking male legislators such as Goodwin had prevailed upon their all-male chambers to institute smoking bans and Berry herself did not urge prohibition based on gendered notions of courtesy. If, on the contrary, public smoking disputes are interpreted as public health policy questions and not as grounded in narrow-minded religious dogmatism propagated by puritanical WCTU WASP busybodies trying to stick their noses into everyone else’s personal rights and privileges, then Munds’s willingness to jettison debate in order to disarm men who might be won over as allies on some other substantive matters takes on a much different character, which would have to be evaluated according to traditional criteria probing the efficacy of legislative compromise and trade-offs wholly unrelated to the advent of female legislators, whose successes would have to be judged in relation to those of their anti-smoking male predecessors and contemporaries in the statehouse.

In the event, Berry’s victory was not definitive. Evidence that smoking representatives had failed fully to internalize the need for compliance surfaced at the House session on January 29, when Berry, detained by a big rain storm,

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245Sally Munds Williams, History of Valuable Pioneers of the State of Arizona 78-79 (1987 [1979]). In quoting a version of this passage, an historically amnesiac late-twentieth-century reporter insisted that Munds had “sidestepped an issue which could have been as unpopular then as a suggestion to ban Monday night football might be now.” Bonnie Walker, “Frances Willard Munds: Suffragette, Senator,” Courier (Prescott, AZ), Sept. 17, 1985 (1C:1), on http://news.google.com/newspapers?id=ocQAAAAIABAJ&sjid=TU8DAAAAIABAJ&pg=4778,3551877.

246“Women Shy on Teamwork,” LAT, Jan. 16, 1915 (I1).
arrived a half-hour late. During her brief absence, the House rules were, on the motion—“greeted with enthusiastic applause”—of one of the representatives who had voted against her resolution, suspended, and “about two thirds of the members, with contented sighs, began puffing at cigars and pipes.” On Berry’s arrival, according to the Arizona Gazette, “the smoker came to an end, most of the members resembling boys caught with their fingers in the jam.” The Republican less plausibly reported that the House had passed a resolution rescinding Berry’s, which “went through with a whoop and the next instant the chamber began turning blue.” Why the members, who “smoke[d] pipes, cigars and cigarettes... for the first time since the legislature met three weeks ago,” would have bothered to try to “conceal the evidence of a broken rule”—especially with “the smoke... everywhere”—is unclear if they had properly suspended the rules, but an amused male-chauvinist press instinctively trivialized the anti-public smoking initiative by headlining the wire-service report: “Naughty Legislators! She Caught ’Em Smoking.”

Then, on March 1, with only 10 days left in the 60-day session, “[a]fter almost fifty smokeless days” during which male members had seemingly learned to control their addiction, the “Lure of Nicotine Proves Too Strong,” as the Boston Globe headlined the wire-service report that was picked up across the country. The day’s “most thrilling episode,” at least from the Gazette’s
The Prohibition of Smoking Inside Legislatures

perspective, was the rebellion by the “disciples of My Lady Nicotine” who had been “in more or less agony,” which was psychologically exacerbated by the Senate’s “wont to blow smoke in their faces and to remind them that the sovereign house of lords was not bound by blue laws.” That day, “[h]uman nature being so constituted that it can stand just so much,” Representative John B. Flanagan, who lived on the Colorado River Indian Reservation and had voted for Berry’s smoking ban, offered Resolution No. 7: “that smoking is hereby permitted on the floor of the House during all sessions of the House.” While Flanagan aimed at affording members freedom to “puff their souls into purgatory if they saw fit,” Berry’s ally “Goodwin complained that even the slight abatement of the nuisance” under her resolution “had not afforded him relief and, ‘what would be his state if all the bars were thrown down?’” Speaker Brooks allegedly feared “that the action would be considered a reflection that Mrs. Berry had lost her hold upon the legislature.” Member Joseph Lines—who in 1921 as a senator would introduce a bill to empower local governments to prohibit the sale of all tobacco—wondered whether the “age of chivalry had passed away....” Seconded by a representative who had voted against Resolution No. 1, it carried by a “rising vote—which the Gazette

Mar. 2, 1915 (5:5). If it was already clear at this time that a special session would be necessary (to deal with appropriations and tax bills), then perhaps the smokers were signaling that they would not tolerate another ban.


255 1910 and 1920 Census of Population (HeritageQuest). In 1920 he was returned as a Ford auto dealer; his occupation was illegible in 1910.


260 See above ch. 15.


The Prohibition of Smoking Inside Legislatures

confusingly characterized as “fifteen in favor of the smokes”—over Berry’s protest and vote.\(^{263}\) Dunbar’s Weekly, which called “repeal of the no-smoking rule...the most important thing the House has done for a week,”\(^{265}\) was unable to resist a sarcastic poke in the eye: “The Hon. Mrs. Berry refuses to smoke even after being ordered to by the house.”\(^{266}\)

Munds was scarcely the last female legislator in Arizona publicly to declare her refusal to stand in the way of male smoking. Prefiguring Chesterfield’s 1926 woman-centered “Blow Some My Way” advertisement,\(^{267}\) Democratic Representative Nellie Bush (1888-1963), a former teacher, principal, and justice of the peace,\(^{268}\) and future Southern Pacific Railroad and Santa Fe Railroad lawyer,\(^{269}\) virtually solicited exposure to men’s tobacco smoke as part of her principle that women in politics “simply have to eliminate some of their old fashioned ideas regarding the difference in sexes.” As she told a reporter in 1922: “I expect nothing more from a man in politics than life gives another man. If he wants to smoke, I say, ‘Go ahead and smoke.’ And if he wants to swear, I’ll sit by and enjoy hearing him do it. If it doesn’t hurt him, it certainly isn’t going to hurt me.”\(^{270}\) Practicing what she preached, in 1921, during the first of 16 years

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\(^{264}\)“Lure of Nicotine Proves Too Strong,” BG, Mar. 2, 1915 (8:8). “Stateswoman Gets Colleagues on Edge,” Lock Haven Express, Mar. 4, 1915 (3:2), appears to have invented quotations in attributing to Flanagan (“the member from Gila Bend,” which was located in Yuma County, which he represented) a motion, which allegedly carried unanimously, back in January “that we abstain from smoking during our deliberations, lest the smoke offend Representative Berry’s nostrils.” Presumably similarly invented was his supposed statement in March that he was “confounded—that is I’m very weary—of dodging into a corner of a committee room or Jim Higley’s ‘Statesmen Rest’ whenever I want a puff of a cig.” Also fabricated presumably was Munds’s alleged remark to senators, by which she “made herself immensely popular,” that they should “smoke as much as you please....I like the odor of a fragrant cigar.”


\(^{266}\)Editorial Comment,” Dunbar’s Weekly 2(8):6 (Mar. 6, 1915).

\(^{267}\)http://tobaccodocuments.org/pollay_ads/Ches01.01.html


The Prohibition of Smoking Inside Legislatures

in the legislature, Bush moved (seconded by Republican John Udall), that “members of the House be allowed the privilege of smoking during the session of the House.” The only other woman in the House, Democrat Miss C. Louise Boehringer, joined the majority in adopting the motion by a vote of 24 to 14.\(^{271}\) When, as late as 1931, a female House member who was “personally opposed to the habit,” nevertheless “would not deny a man one of life’s few remaining pleasures,” Osselaer judged this “decision to tolerate spittoons and smoke-filled rooms [] as important to female success: women did not seek to radically alter the way business was conducted but rather tried to achieve their goals by quietly blending into the existing male power structure.”\(^{272}\)

Oregon

An account of the experience of Sylvia (Mrs. Alexander) Thompson, a Democratic minority member of the Oregon state legislature from 1917 to 1920,\(^{273}\) was provided by Carrie Chapman Catt, the president of the National American Woman Suffrage Association, who pointed out that architectural changes would be necessary to give women a “‘fair deal’” in statehouses because, while men were discussing politics during recess “‘wreathed in halos of smoke,’”


\(^{273}\) The press and Oregon legislative documents appear always to have identified her as Mrs. Alexander Thompson; according to the 1920 population census the 46-year-old’s first name was Sylvia. Catt erroneously referred to her as a member of the Senate, when in fact she was a member of the House in 1917, 1919, and during the special session of 1920. *State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly Regular Session: 1917*, at 5 (1917); *State of Oregon: Journals of the Senate and House of the Thirtieth Legislative Assembly Regular Session: 1919*, at 5 (1919); David Duniway, *Members of the Legislature of Oregon, 1843-1967*, at 40 (Oregon State Archives, Bull. No. 2, Rev., Publication No. 30 (1968); Oregon Legislative Assembly: *Legislators and Staff, 1841-2007*, on http://arcweb.sos.state.or.us/legislative/histleg/statehood/1917reg.htm; http://arcweb.sos.state.or.us/legislative/histleg/statehood/1919reg.htm; http://arcweb.sos.state.or.us/legislative/histleg/statehood/1920spe.htm. Thompson was not the first woman legislator in Oregon: in 1915 one served in the House and the Senate. Elizabeth Cox, “The Three Who Came First,” *State Legislatures* 20(11):12-19 at 12 (Nov. 1994).
The Prohibition of Smoking Inside Legislatures

the woman member sat alone in some room “‘out of the atmosphere of the matters she is dealing with as well as of the tobacco smoke.’”

“A story in connection with smoke, showing how well women fit into politics...from Oregon. When Senator [sic] Mrs. Alexander Thompson went to the state senate [sic] a committee of gentlemen from the house went to her and said, ‘Senator [sic], what are you going to do about rule 5?’

‘Well, I don’t know what rule 5 is,’ she replied.

‘It deals with the smoking in the senate [sic] chambers,’ she was told.

‘What are you in the habit of doing with it?’ she asked.

‘Overlooking it,’ was the reply.

‘Well, gentlemen, I’m in the habit of living up to laws and rules that are made; but if you are in the habit of overlooking rule 5, do as you have been doing.’

Shortly after the opening of the meeting one senator [sic] rose and addressed the speaker, asking what disposition was to be made concerning rule 5. Before an answer could be made Mrs. Thompson rose and made a move [sic] that rule 5 be suspended. It was seconded and passed. The room was filled with smoke as usual. Again later in the session the same incident occurred, and was again met by Mrs. Thompson with a motion to suspend the rule.

When the house closed the members had taken up a subscription to present the speaker with a gift. As the moment for the presentation neared the speaker, sensing the situation, called Mrs. Thompson to the chair while he received the gift and made a fitting speech. Immediately following the words of the speaker another gift was sent forward and presented to the woman senator [sic]. It was marked, “With appreciation from the smokers,” and it developed that no man, no matter how much he wanted to, was allowed to contribute to the gift unless he was a smoker.”

Thompson’s acquiescence was especially noteworthy in light of the fact that during the House debate in February 1917 on a radical bill that would have not only banned the sale of cigarettes to anyone, but prohibited smoking cigarettes by anyone in any indoor or outdoor public place, she declared: “‘I blush with shame for my sex when I consider how women are taking up the cigarette, and I warn you men right now that if you turn down this bill the 30,000 women of Oregon who are behind it will put it on the ballot next election and put it through.”

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276 House Bill No. 268, §§ 1 and 5 (Jan. 25, 1917).
277 “House Vote Favors Ban on Cigarettes,” *MO*, Feb. 9, 1917 (6:4). Thompson voted for the bill, which initially passed the House, against recalling it from the Senate, and against the watered down version, which applied only to minors. *State of Oregon: 1833*
Thompson’s successors would have both an easier and harder time politicking in the context of smoking: as soon as she left the legislature, at the beginning of the 1921 session the House adopted its Rules Committee’s proposal to eliminate Rule 66, which had provided that: “No person shall be allowed to smoke in the hall or lobby thereof while the House is in session.”

The go-along-to-get-along moral that Chapman Catt derived from Thompson’s acquiescence in and facilitation of smoking was that “Oregon men appreciate the truth that women know how to handle their affairs, and needless to say, Oregon’s woman senator [sic] had little opposition in her work.”

Presumably, Chapman Catt would not have approved of the gendered self-censorship in which Thompson’s colleagues had earlier engaged. Ironically, on January 24, 1917, soon after Thompson had become a member of the House, the speaker, complaining of throat trouble, turned the gavel over to her for the remainder of the morning session, making her the first woman to preside over that chamber. Representatives addressed her as “Mrs. Speaker” as they introduced their bills, “and not one of the fifty-nine men on the floor lit a cigar during her rule.”

Less clear is how Chapman Catt would have evaluated the confrontational approach of Thompson’s colleague Walter Pierce, one of only three Democrats in the Oregon Senate in 1919, who offered the following resolution, which the Senate promptly adopted:

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*Journals of the Senate and House of the Twenty-Ninth Legislative Assembly: 1917, at 395, 413, 425 (Feb. 8, 10, 12) (1917).* See also above ch. 16.

*State of Oregon: Journals of the Senate and House of the Thirty-First Legislative Assembly Regular Session: 1921, at 303-304 (Jan. 12) (1921).*


*Although only one of four Democrats in the House, Thompson seconded the motion to make a Republican speaker. State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly Regular Session: 1917, at 304 (1917) (Jan. 8).*

*“Politics Lonely Life for Woman,” WEC, Jan. 24, 1920 (12:5).*

*“Mrs. Speaker’ in Oregon House for First Time,” CT, Jan. 25, 1917 (3). See also “Woman Presides over House,” Pinedale Roundup (WY), Feb. 8, 1917 (6:5). Oddly, the House Journal did not reflect that Thompson had sat in the speaker’s chair. State of Oregon: Journals of the Senate and House of the Twenty-Ninth Legislative Assembly Regular Session: 1917, at 327-30 (1917) (Jan. 24).*

1834
The Prohibition of Smoking Inside Legislatures

Whereas there are many members of the senate to whom smoking on the part of other members is very obnoxious, and often causes sickness and headaches; therefore be it

Resolved, That there shall be no smoking allowed in the senate chamber during the time the senate is in session.²⁸³

Nevada

The Nevada legislature had been prohibiting smoking in its chambers for more than half a century before a woman finally became a member in 1919. Indeed, not even the language of those bans had changed from the very first legislative session of 1864.²⁸⁴ As in Iowa, by the time of World War I conflicts over these rules were becoming more frequent as a number of legislators sought to suspend them in order to permit smoking on various days.

As far back as the second legislature of 1866, the Assembly suspended the rule temporarily during an evening session.²⁸⁵ During the following decades the confrontation of smokers’ withdrawal symptoms and non-smokers resistance to secondhand smoke exposure burst forth sporadically.²⁸⁶ In order to supplement its standing rule banning smoking during its sessions, the Senate in 1879 adopted a resolution “that the Sergeant-at-Arms be requested to prohibit smoking in the Senate Chamber prior to convening each day.”²⁸⁷ Just how contentious the

²⁸⁵Journal of the Assembly During the Second Session of the Legislature of the State of Nevada, 1866, at 68 (Jan. 15) (1866).
²⁸⁶Identification of references to smoking in the Nevada legislative journals was facilitated by Google’s word-searchable digitization of all House journals and almost all Senate journals through 1921. The search words were “smoking,” “smoke,” and the House or Senate rule number in effect in each year. It is possible that less formalized disputes and their resolutions were not captured in the journals, which were not stenographic reports of debates.
²⁸⁷Journal of the Senate of the Ninth Session of the Legislature of the State of Nevada: 1879, at 51 (Jan. 20) (1879).
addiction vs. breathing battle became manifest nine days later when the Senate adopted another resolution “that smoking in the Senate Chamber shall be allowed up to within ten minutes of the convening of the Senate; and at that hour of each day the Sergeant-at-Arms is instructed to shut off smoking and open the windows.”

A dozen years later the Assembly suspended its rule for the evening of the penultimate day of the session, but then voted down the same member’s motion the next day to suspend the rule for the balance of the day.

By the second decade of the twentieth century these disputes erupted with ever greater frequency. In 1911, after the Assembly had voted down a motion in mid-February to suspend Rule 58 during evening sessions, a member “protested against” the Assembly’s “wasting fifteen minutes of time (which cost the people of the State of Nevada large sums of money) upon a frivolous question and one below the dignity of the Assembly....” On five days in March four different members successfully moved to suspend the rule during various hours. In the Senate that year, however, the rule was suspended only once and even then only for the reading of a single bill. By 1913, the Assembly had become a hot house of rule suspensions. No fewer than nine members on 18 occasions on 16 days (including almost every day during the last two weeks of the session) moved to suspend Rule 58; three of those times the anti-smoking representatives succeeded in defeating the motion. The Senate, in contrast, was quiescent: no motions to suspend were offered. House suspensions were radically reduced in 1915: only two members moved for them, one motion losing and the other

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290 Journal of the Assembly of the Twenty-Fifth Session of the Legislature of the State of Nevada: 1911, at 130 (Feb. 17) (1911).
291 Journal of the Assembly of the Twenty-Fifth Session of the Legislature of the State of Nevada: 1911, at 204, 213, 223, 252, 263 (Mar. 3, 4, 6, 9, 10) (1911).
292 Journal of the Senate of the Twenty-Fifth Session of the Legislature of the State of Nevada: 1911, at 138 (Feb. 28) (1911).
294 Journal of the Senate of the Twenty-Sixth Session of the Legislature of the State of Nevada: 1913 (1913).
The Prohibition of Smoking Inside Legislatures

carrying. A revealing event on the last night of the session suggested that compliance with the no-smoking rule may well have been strict: the governor sent a message “To the Honorable the Assembly. You are respectfully requested to suspend Rule 58 and to have a cigar with my compliments.” The motion to thank him for the cigars carried. That same session on three days a different senator successfully moved to suspend the other chamber’s no-smoking rule.

In 1917, the Senate suspended its Rule 50 only once, but smoking conflicts erupted often in the Assembly: on five separate days Rule 58 was suspended; on one occasion pro-smokers failed to muster the requisite super-majority; once a smoker was fined for smoking; and once the Assembly voted to fine a smoker for having succeeded in using the suspension procedure. On the third day of the session, the “first real debate” was “staged” after Harry C. Heidtmann, a 43-year-old, German-born, Reno beer bottler, had moved to suspend Rule 58 for the day. Then 68-year-old William Booher offered—presumably just in case—the main motion carried—an amendment prohibiting cigarettes. That it lost by a vote of 13 to 19 was interpreted by the press as meaning that a majority of assemblymen were cigarette smokers. Heidtmann’s motion secured 20 of 35 votes but fell short of the required two-thirds majority. Thus, although the smoking ban remained in effect, the press cautioned that the situation might be different the next day because “smokers are seeking new recruits and may be able to muster the required two-thirds majority” the next time. No such motion was

300 1910 Census of Population (HeritageQuest) (saloon employee); Nevada State Journal, Apr. 1, 1916 (8) (ad for Heidtmann’s bottling business).
303 “Assembly Places Ban on Smoking After First Real Debate of Session Is Staged,” Nevada State Journal, Jan. 18, 1917 (3:4-5). The press accounts are adopted here in preference to the seemingly confused procedure in the Journal, which had the amendment
The Prohibition of Smoking Inside Legislatures

offered the next day, but a week later the rule was suspended for the day. On the last day of January, the rule was enforced when the Assembly voted unanimously in favor a motion to fine Isaac Alexander, a physician, a box of candy because he had “consciously or unconsciously, lig[h]ted a cigar and was serenely puffing away at the weed, much to the discomfort of his colleague Fulmer. Fulmer declared he had no objections to anyone smoking, but he did object to the weed that Alexander was using to perfume the assembly chamber.” Two days later an extended conflict unfolded, when smokers, controlling a majority but not two-thirds of the votes, were “Unable to Scent Up Assembly.” After the first motion lost on a standing vote, Heidtmann—anticipating the widespread but feckless designated smoking/no-smoking sections of the last quarter of the twentieth century—“moved that the suspension apply only to the east half of the chamber, where the greater number of smokers are seated,” but his motion “was not entertained when it was pointed [out] there could be no such division.” Undaunted, a Democrat asked whether chewing unlighted cigars was permitted; not only was no objection raised, but some frustrated addicts doubtless drew solace from the announcement that, since the rule did not ban it, the chewing of tobacco could also be indulged in. Nevertheless, in spite of these smokeless concessions, smoking remained “tabooed” and “the assemblymen were forced to go out in the hallway for their morning smoke.” Two days after another rule suspension on February 6, the Assembly voted to fine a senator (whose presence was not explained) a box of cigars for smoking, and on the same day the members voted 28 to 7 to suspend

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first losing and then carrying without a vote on the main motion. *Journal of the Assembly of the Twenty-Eighth Session of the Legislature of the State of Nevada: 1917*, at 9 (Jan. 17) (1917).


305“Violation of Assembly Rules by Smoking Cigar Costs Alexander of White Pine One Box of Candy; Fair Attaches Given a Treat,” *Nevada State Journal*, Feb. 1, 1917 (3:6-7). At the 1910 census Fulmer was returned as a deputy sheriff.

306“Smokers Unable to Scent Up Assembly,” *Nevada State Journal*, Feb. 3, 1917 (3:7). Oddly, none of these disputes was reflected in the Assembly Journal, which indicated that the day’s session lasted only about a half hour. *Journal of the Assembly of the Twenty-Eighth Session of the Legislature of the State of Nevada: 1917*, at 51-52 (Feb. 2) (1917).

307Journal of the Assembly of the Twenty-Eighth Session of the Legislature of the State of Nevada: 1917, at 60 (Feb. 6) (1917).
The Prohibition of Smoking Inside Legislatures

Rule 58 for the rest of the day. On Valentine’s Day, after the House rule had been suspended for the rest of the morning, Democrat C. W. Renfro—who always objects to suspending Rule 58...because smoke injures his throat—successfully moved to amend the motion to require its movant, Speaker pro tem Roy Hardy, to furnish two dollars for candy for attachés. If Renfro was trying to discourage smokers from seeking to suspend the rule by imposing a financial penalty, Hardy revealed that two dollars was not a sufficiently severe deterrent when he stated that the privilege of smoking was worth the fine for making the motion. Finally, on March 2, on the motion of Danish-born farmer Christian Duborg pro-smokers succeeded for the last time during the session in suspending Rule 58.

The tension between want-to-be-smoking and anti-smoking Assemblymen was visibly on display on February 22, when the chamber “had considerable fun” over the introduction by “five of the leading smokers of the lower house” of a bill to ban the manufacture or sale of cigarettes. After one of the members who had successfully moved to suspend Rule 58 moved to refer the bill to “a select committee composed of Renfro,” the Assembly, by a standing vote, defeated Duborg’s motion to reject the bill, but the speaker nevertheless declared the motion carried and the bill rejected.

\footnote{Journal of the Assembly of the Twenty-Eighth Session of the Legislature of the State of Nevada: 1917, at 69 (Feb. 8) (1917).}

\footnote{“Cigarette Bill Talk Gives Assembly Fun,” REG, Feb. 22, 1917 (2:1).}

\footnote{Journal of the Assembly of the Twenty-Eighth Session of the Legislature of the State of Nevada: 1917, at 89 (Feb. 14) (1917). Later that day Heidtmann successfully moved that another member be fined two boxes of candy for not knowing that Rule 58 had been suspended. \textit{Id.} at 92. The candy-fine system was not limited to punishment for smoking violations. For example, it was imposed against a member for sitting with his feet on the table. \textit{Id.} at 304 (Mar. 14). On another occasion a member was fined “a box of cigars for the exclusive use of the Speaker, Chief Clerk, and the Sergeant-at-Arms” for having made a mistake in a motion; the whole Printing Committee was fined a box of cigarettes for not having had the rules correctly printed. That the cigarettes were designated for the exclusive use of Renfro, one of the chamber’s leading opponents of suspending Rule 58, suggested the theatrical character of the fine system. \textit{Id.} at 157 (Mar. 2).}

\footnote{“It Cost Hardy Two Dollars to Take Smoke,” REG, Feb. 14, 1917 (8:3).}

\footnote{1920 Census of Population (HeritageQuest).}

\footnote{Journal of the Assembly of the Twenty-Eighth Session of the Legislature of the State of Nevada: 1917, at 157 (Mar. 2) (1917).}

\footnote{“Cigarette Bill Talk Gives Assembly Fun,” REG, Feb. 22, 1917 (2:1). The Assembly Journal revealed neither by whose “request” the bill was introduced nor its subject matter. \textit{Journal of the Assembly of the Twenty-Eighth Session of the Legislature of Nevada: 1917, at 313 (1917).}
In 1919, a motion was offered in the womanless Senate on February 7 to suspend the rule for the rest of the session, but it lost; such a motion did finally carry, but not until the last day of the session.\textsuperscript{315} That motion was offered by Dr. John V. Ducey, a well-known dentist\textsuperscript{316} and member of the Board of Dental Examiners,\textsuperscript{317} who a week earlier had successfully moved to suspend Rule 50 for the day.\textsuperscript{318} Earlier in the session his colleagues both punished him for violating the no-smoking rule and potentially expanded the universe of his dental patients by fining him a box of candy for the legislative attachés.\textsuperscript{319}

On February 13, 1919, Nevada’s first female legislator, Republican Mrs. Sadie D. Hurst, successfully moved to suspend Rule 58 until the noon recess.\textsuperscript{320} She offered no other such motions during the rest of the session, but ten different male representatives did on 19 separate occasions, all but one of their motions carrying.\textsuperscript{321} Smokers’ overwhelming string of victories was not uncontested: following anti-smokers’ defeat on March 14, they may have drawn some small solace from the Assembly’s vote to fine Elbert Stewart—who had successfully offered more (four) motions to suspend Rule 58 than anyone else that session—candy for the attachés because he had smoked before the rule’s suspension that day.\textsuperscript{322}

\begin{itemize}
\item \textsuperscript{315}Journal of the Senate of the Twenty-Ninth Session of the Legislature of the State of Nevada: 1919, at 116 (Feb. 22) (by Stewart et al.) (1917).
\item \textsuperscript{316}Journal of the Senate of the Twenty-Ninth Session of the Legislature of the State of Nevada: 1919, at 53, 277 (Feb. 7, Mar. 20) (1919).
\item \textsuperscript{318}State of Nevada: Message of Gov. Emmet D. Boyle to the Legislature of 1917 (Twenty-Eighth Session) 37 (1917).
\item \textsuperscript{319}Journal of the Senate of the Twenty-Ninth Session of the Legislature of the State of Nevada: 1919, at 189 (Mar. 13) (1919).
\item \textsuperscript{320}Journal of the Senate of the Twenty-Ninth Session of the Legislature of the State of Nevada: 1919, at 48 (Feb. 6) (1919); “Jots from Legislature,” \textit{Nevada State Journal}, Feb. 7, 1919 (5:2).
\item \textsuperscript{321}Journal of the Assembly of the Twenty-Ninth Session of the Legislature of the State of Nevada: 1919, at 104 (Feb. 13) (1919).
\item \textsuperscript{322}Journal of the Assembly of the Twenty-Ninth Session of the Legislature of the State of Nevada: 1919, at 345 (Mar. 14) (1919) (motion by James Lockhart).
\end{itemize}
The Prohibition of Smoking Inside Legislatures

Hurst made what was perhaps the most unoverlookable effort at going along to get along when, at the 1920 special session devoted to ratifying the congressional resolution proposing woman’s suffrage, she “moved that inasmuch as the women were so greatly indebted to the members of the Assembly for their cooperation, that [sic] Rule 58 be suspended for the remaining portion of the session.” The motion carried unanimously, though the very brief mini-session lasted only a few hours.323

During the 1921 session, 23-year-old Ruth Averill,324 the only woman in (and the youngest member of) the legislature, shortly before the end of the third day of the session, successfully moved to suspend Rule 58 for the remainder of the day.325 On two other days Averill also secured rule suspension late in the day,326 another day her motion carried unanimously,327 but her last motion was defeated.328 All 19 of male legislators’ we-wanna-smoke motions carried, five of them offered by lawyer James Lockhart,329 who in 1919 had offered the motion to fine that session’s leading smoking advocate for smoking before a suspension went into effect.

Shortly after the session had adjourned, Averill, in response to a request from

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324“Pioneers of 1921: Ruth Averill of Nevada,” Woman Citizen 6(3):11 (July 30, 1921). Averill was a first-grade teacher one year out of college who had been admitted to the bar but had never practiced law.
327Journal of the Assembly of the Thirtieth Session of the Legislature of the State of Nevada: 1921, at 175 (Feb. 28) (1921).
328Journal of the Assembly of the Thirtieth Session of the Legislature of the State of Nevada: 1921, at 195 (Mar. 2) (1921).
329Journal of the Assembly of the Thirtieth Session of the Legislature of the State of Nevada: 1921, at 61, 88, 105, 126, 132, 155, 185, 197, 216, 230, 242, 251, 168, 270, 277, 288, 299, 344, 366 (Feb. 2, 8, 11, 16, 17, 24, Mar. 1, 2, 4, 7, 8, 9, 10, 11, 12, 15, 16, 17) (1921). The Assembly also voted to require anyone violating Rule 58 to buy the attachés a box of candy, though the fine was not imposed. Id. at 141 (Feb. 21). In light of the fact that the overwhelming majority of motions to suspend were offered by male legislators, it is misleading to state that: “Assemblmen did not rely entirely on their new female colleagues—some men still made the motion....” Dana Bennett, “Smokin’ in the Boys’ Room: A Case Study of Women State Legislators in Nevada, 1919-1931,” Frontiers: A Journal of Women Studies 31(1): 89-122 at 93 (2010).
The Prohibition of Smoking Inside Legislatures

a woman’s periodical to discuss her experience as a pioneering state legislator, chose to focus on her pro-smoking initiatives, which, in their avowedly manipulative purpose, mirrored Munds’s approach in Arizona six years earlier:

...especially I am a true Nevadan and not a radical reformer, for I am afraid a radical would not last very long in the Nevada legislature. I have no sympathy with the “blue laws.” One of my first moves was to suspend the rule against smoking in the legislature. Although I never would smoke myself and hate to see a woman doing it, I feel that men are much easier to get along with when they have something sticking in their mouths to talk around and look wise over. The men seemed to appreciate my attitude and were certainly wonderful to me.

In 1921, pro-smokers in a Senate that would remain utterly bereft of women senators for many years pursued suspension of Rule 50 just as energetically as their fellow addicts in the Assembly—without suffering a single defeat. On 20 days one of 10 senators succeeded in securing permission to smoke (including one motion that covered the last four days of the session). Just how little male smokers needed women to make the motion to enable them to smoke became manifest in 1923 when the Senate simply amended Rule 50 to strike out the ban altogether and thus introduce smoking laissez-faire.

During the remaining years until the Assembly followed suit and outright repealed its own no-smoking rule in 1931, battles continued to be fought over retention or suspension. After all four assemblywomen during the opening days...
of the 1923 session had “courteously taken the initiative” in taking turns moving suspension of Rule 58 rather than declaring that “tobacco smoke [wa]s offensive” to them, on the eighth day Mrs. Louise Hays, contemplating “dispensing with the daily formality,” gave notice that on some future day she would offer an amendment to Rule 58. The next day the chamber adopted Hays’s Assembly Resolution No. 8, suspending the rule for the remainder of the Thirty-First Session. In 1925, the next contingent of four assemblywomen again took turns offering the motion virtually every day from February 5 to 25 before they “concluded that they have been wasting a lot of breath”: the next day’s motion to suspend the rule for the remainder of the session carried unanimously. On the second day of the short special session in December 1926, Mrs. Ethel McGuire was the movant. In 1927 the press reported that McGuire, that session’s only woman legislator, “has assumed the doubtful honor of asking each day that the rule forbidding smoking be suspended. Mrs. McGuire admits she doesn’t care much for the job but it seems to be expected of her so she willingly complies. Each day, a bouquet of flowers graces her desk, lending a dash of color to the drab assembly room.”

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335“Legislative Doings Told in Summarized Form,” REG, Jan. 23, 1923 (5:2).


341Frank Helmick, “Repeal of Primary Law Not on Program of 1927 Session, Leaders
The Prohibition of Smoking Inside Legislatures

first days of the session, when in fact McGuire had been the only movant on two
days; over the entire session, however, while she offered the motion 18 times,
eight different male members were the movants on 19 days.342 That anti-smokers
succeeded in defeating suspension only twice was misleading inasmuch as it did
not mean either that smoking had become hegemonic in the Assembly or that non-
smokers had gone along to get along. On the contrary; as the press reported
midway through the session:

Smoking in the assembly chamber, coupled with the defeat of a bill to provide better
ventilation in the room, may cause a rupture in the lower house. Already there’s a break
in sight although it is in a more or less humorous stage at present. But some of the
members cherish the smoking privilege and when a motion to suspend the no smoking rule
was voted down yesterday, they resented it somewhat. Earlier in the week a bill was
introduced by Boak to provide ventilation in the assembly and senate chambers. ... There
weren’t enough votes to put it over when the roll call was taken but the non-smokers and
those persons who insist there’s too much tobacco smoke in the air most of the time had
their innings yesterday. They stuck tight to their refusal to permit fellow-members to
smoke and there was a real division among the members for the first time. A recess had
to be called during the afternoon because so many of the smokers walked out [for?] respite
from the smokeless room.343

This standoff was replicated several days later when the House speaker broke a
tie vote to defeat yet another motion to suspend the smoking ban.344

At the beginning of the special session in January 1928 the press reported that
it was “indicated” that assemblymen would be allowed to smoke during
consideration of a motion to “rescind the smoking rule.... Mrs. McGuire told the

Assert,” REG, Jan. 22, 1927 (2:2-4 at 4).

342Journal of the Assembly of the Thirty-Third Session of the Legislature of the State
of Nevada: 1927, at 6, 10, 19, 22, 25, 35, 40, 45, 51, 55, 61, 66, 74, 87, 92, 101, 106, 111,
130, 134, 144, 148, 154, 159, 175, 185, 196, 203, 208, 215, 225, 237, 246, 255, 265, 277,
289 (Jan. 18, 19, 24, 25, 26, 31, Feb. 1, 2, 3, 4, 7, 8, 9, 11, 14, 15, 16, 17, 21, 23, 24, 25,
26, 28, Mar. 2, 3, 4, 5, 7, 8, 9, 10, 11, 14, 15, 16, 17) (1927). Men were the movants every
day from Feb. 28 to the penultimate day of the session; on the final day McGuire offered
the motion, triggering a unanimous vote of thanks.

343“New Set of Candidates Must Be Chosen in 1930 Say Democratic Leaders,” REG,
Feb. 19, 1927 (3:2-5 at 5). The Journal did not reflect any Rule 58 motion on Feb. 18 or
19, let alone a defeat.

344“House Lobbying Frowned upon Again by Tandy,” REG, Feb. 23, 1927 (2:5). The
Journal merely stated that the motion “lost” without specifying the vote. Journal of the
Assembly of the Thirty-Third Session of the Legislature of the State of Nevada: 1927, at
134 (Feb. 23) (1927).

1844
The Prohibition of Smoking Inside Legislatures

assembly that she enjoyed holding the smoking club over their head but under the circumstances might relent.”345 How McGuire with her one vote might have been able to wield power on this or any other issue over 36 other legislators the press did not reveal. In fact, while she did offer the first Rule 58 motion, the other seven motions during the 20-day session stemmed from three male legislators.346

At the outset of the regular session in 1929, McGuire “tried hard to offer a resolution” to enabled smoking, but: “While assemblymen, badly in need of a smoke, looked wistfully at her she arose to make the motion but the presiding officer heeded her not and no smoke curled...over the assembly desks.”347 This proceeding raised a different aspect of McGuire’s mysteriously unique power: why were male smokers dependent on McGuire to act at all when in fact any one of them could have moved to suspend the rule himself? In the event, the following day one of the other two assemblywomen successfully moved to suspend Rule 58 for the balance of the session.348

Whatever room female legislators had had at their disposal for accommodating or playing off male smokers and non-smokers against each other disappeared in 1931, when women themselves disappeared from the “unanimously masculine”349 Assembly, whose Rules Committee Resolution No. 5 recommended, inter alia, that Rule 58 be eliminated from the chamber’s permanent rules. Even now, with a sharply divided committee the House speaker had to cast the tie-breaking vote in the chamber at large so that the repeal carried by a vote of 19 to 18.350

Repeal, according to Dana Bennett, a former longtime Nevada legislative

345“House Smoke Rule May Be Rescinded,” REG, Jan. 18, 1928 (2:1).
347“Senate Gives Smoking Right to President,” REG, Jan. 22, 1929 (3:2). The article’s statement that McGuire succeeded the next day does not accord with the Journal. See below.
349“Women Gone; Assembly to Smoke Again,” Nevada State Journal, Jan. 23, 1931 (2:7).
350Journal of the Assembly of the Thirty-Fifth Session of the Legislature of the State of Nevada: 1931, at 20 (Jan. 22) (1931); “Tie in Assembly Vote on Rules Broken by Speaker,” REG, Jan. 22, 1931 (2:3). To be sure, the three Republican and two Democratic committee members, despite having submitted majority and minority reports, appear to have agreed on the smoking rule.
research analyst and lobbyist,\textsuperscript{351} “exposed men’s antagonism toward their new colleagues. ... Claiming that the nonexistence of women now permitted the legislators to smoke freely,” the all-male lawmakers “quickly moved to repeal the no-smoking rule and establish men’s right to smoke at will during floor sessions.”\textsuperscript{352} Bennett’s interconnected assertions lacked both an empirical foundation and logical coherence. Since all of the women legislators, as Bennett will shortly be seen to have argued, had purportedly been the smoking male legislators’ benefactors by virtue of their role as the monolithic and chief facilitators of rule suspension, it is unclear why their absence was a prerequisite for rule repeal; this causal-temporal link is especially puzzling since Bennett also contended that their support had been strategic and self-interested rather than charitable or altruistic; in other words, they were acting as calculating politicians who conferred on smoking legislators the right/opportunity to smoke (which cost the women nothing if they were indifferent to secondhand tobacco smoke exposure) in exchange for those legislators’ cooperation in passing the women’s bills. But if the male smokers would not otherwise have voted for those bills and were therefore forced to give up something for the giving free(r) rein to their nicotine addiction, their most rational action would have been to achieve the even superior outcome of total carte blanche (rather than mere hit-or-miss daily or periodic suspensions) without any trade-offs by repealing the no-smoking rule, which the women (who, between 1919 and 1929, occupied a minuscule 2.7 to 10.8 percent of the Assembly seats) would have been powerless to prevent—unless the women had entered into a (complicated and complicating) alliance with the non- and anti-smoking males, about whose existence Bennett mentioned (and may have known) absolutely nothing.

Ignoring or ignorance of those men made it possible to ignore the question as to why legislators had had no “right to smoke at will during floor sessions” during the 55 years preceding women’s advent as legislators. Presumably the principal reason for permanent repeal of the no-smoking rule in 1931 was not, as Bennett imagined, women’s (temporary) disappearance, let alone any shift in the “delicate balance” between the benefits and costs of women’s advocating suspension,\textsuperscript{353}


but, rather, the growing ubiquitization of (especially cigarette) smoking, which reduced directly the number of non-smoking male legislators and indirectly that of anti-smoking male legislators, the increasing implausibility of whose stance was a function of the solidifying acceptance of and acquiescence in cigarette smoking as a quasi-natural attribute of social life in the United States, which endured, virtually uncontested, into the 1970s. In this regard repeal in Nevada closely resembled its simultaneous counterpart in Iowa as well as the action by the Nevada Senate in 1923 and other legislatures in the 1920s and 1930s.

Bennett’s arguments (and their brittleness) were embedded in her analysis of Nevada’s early female legislators from 1919 to 1931, for whom she sought to carve out an exceptionalist niche by asserting that they “deliberately permitted smoking,” whereas in other states such as Arizona, “the new female legislators simply tolerated men smoking. In Nevada they actively encouraged it.” Apart from the fact that the minuscule number—ranging from one to four—and proportion of women in the Assembly made it impossible for them to permit or prohibit anything (unless they were able to furnish or withhold the crucial swing votes to reach or deny the requisite super-majority for rule suspension), the reference to Arizona was ironic since, as detailed earlier, Senator Munds had pursued a similarly opportunistic course (as did female legislators in New Hampshire discussed below). Bennett then imputed to the 13 assemblywomen who served between 1919 and 1929 a crafty strategic deployment of their motions to suspend the no-smoking rule, the empirical success of which she, however, never even attempted to document:

[T]he first female legislators maneuvered the antismoking rule to their benefit.... Through the rest of the 1920s, as each of Nevada’s female legislators rose to move the temporary suspension of Assembly Rule No. 58, they revealed their sophisticated political skills and nuanced understandings of group dynamics. They clearly recognized the legislature as a place where rules mattered, cooperation could be beneficial, and battles should be carefully chosen. They acted like politicians. ... Once elected, they played by the rules of the legislative game as it then existed, rather than try to change the game completely. This is particularly noticeable through the haze of cigar smoke. When the first women arrived in the Nevada assembly chamber, they discovered that smoking was a privilege granted by one’s colleagues, and they quickly adopted that strategy. Inviting the male legislators to

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355 The press was, therefore, also incorrect in stating that “Women Legislators to Permit Men to Smoke;” Nevada State Journal, Jan. 23, 1923 (4:3).
smoke, but not smoking themselves, female legislators demonstrated that they could work with men without altering men’s behavior or, especially, trying to be men. For ten years, the strategy worked well, and female legislators achieved some legislative successes. By the end of the decade, however, that delicate balance was tilting.  

These far-flung claims raise and ignore more questions than Bennett ever tried to answer. Ironically, the very fact that Bennett, to her credit, was aware of the Nevada legislature’s long pre-1919 tradition of smoking bans and suspensions made even more serious her failure to raise, let alone discuss, the question as to whether the dynamics between male anti-smokers and smokers before and during women’s representation differed from those between non-smoking female legislators and their smoking male colleagues. In other words, did male opponents of smoking deploy their (larger number of) votes in the same opportunistic fashion as all the women (allegedly) did or did they insist on breathing cleaner air regardless of whether that confrontation might have thwarted passage of some legislation they favored? By treating men as an undifferentiated mass, Bennett rendered incoherent her celebration of all the women as not “trying to be men.” Which men—the smoking or the anti-smoking ones, who had been protesting against their tormentors for decades? In other words, would “trying to be men” have entailed smoking or self-protectively “altering men’s behavior” by opposing smoking regardless of the impact on some legislative initiatives? This question, in turn, cannot be explored unless information were unearthed as to whether these anti-smoking male legislators themselves had acted strategically or principledly both before and after 1919.

Bennett’s overlooking the internal male struggles also rendered meaningless her assertion that the women played by the existing “rules of the legislative game”—instead of trying to “change the game completely”—which in this particular instance referred to collegial grants of smoking privileges, which “strategy” they then “quickly adopted.” But in fact the women, by the structural logic of Bennett’s account, did change the game (or the rules) completely: whereas anti-smoking men in the past both created the no-smoking rule and resisted smokers’ efforts to suspend it, the women (purportedly) immediately and persistently capitulated to the smokers even to the extreme of moving for suspensions on their behalf. Nowhere did Bennett explain how or why this invariant active intervention reflected “sophisticated political skills and nuanced understandings of group dynamics.” Indeed, Bennett did not reveal (and it is

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probably no longer possible to know) whether the (or any) women ever voted against suspension or whether their failure to move for suspension on various days constituted casting a kind of implied strategic Nay, and if it did, what the success rate of each strategy was. Although Bennett asserted that the women had been motivated by the recognition that such “cooperation could be beneficial,” she failed to come to grips with the fact that, since male legislators were not a monolithic bloc but riven between smoking and non-smoking factions, women who sided with the former inevitably ran the risk of alienating the latter, who might well have expected their support in resisting exposure to secondhand smoke. Whatever those cooperative benefits might have been, she nowhere quantified them, merely claiming globally, without any documentation, that “the strategy worked well, and female legislators achieved some legislative successes.” Yet even she was forced to admit that “their success was mixed”—alone because three of them had introduced no bills whatsoever, while all the measures of three others failed.357 Much more intractable methodologically, however, was the lack of any effort by Bennett to correlate passage of certain (or any) bills and the women’s compliant motions for suspension. And even if she had perceived this problem and been able to assemble data to test what should have been an hypothesis, the lack of a control group would still have made it impossible to discover whether the women could have achieved roughly the same level of success even if they had not sought to ingratiate themselves with smokers by facilitating their addiction.

Kansas

The pattern of acquiescence soon spread east to Kansas, where it was replicated in the person of Lovonia Myrtle Donica (1881-1942), who during the 1925 session was the only female legislator.358 To be sure, that year’s “New Legisladay”359 was not the first woman elected to the Kansas legislature. That precedent had been set by Minnie Grinstead, whose election in 1918 prompted male House members to wonder whether she would ‘‘nag’’ them for smoking cigars.360 And the longtime WCTU member did not disappoint: the first bill she

358 http://www.kslib.info/legislators/membd.html
360 Kansapedia, on http://www.kshs.org/kansapedia/minnie-j-grinstead/11734 (visited
introduced prohibited smoking in public eating places. 361

In contrast, “Miss Donica,” a Republican, teacher, and county superintendent of public instruction, was engaged in a vast understatement when she confided to the press that she “will go to Topeka with no revolutionary ideas.” 362 Not only did she “not intend to vote on legislative measures from a purely feminine viewpoint” or “to fight the men” or “want them to fight me,” she made it clear that, while she had not yet formed an opinion on whether to support the federal child labor amendment, “if she decided it was Russian soviet propaganda as had been stated by its opponents, she would vote against it despite the fact that it had been indorsed by various woman’s organizations.” 363 In the event, Donica must have concluded that conferring power on Congress to limit, regulate, or prohibit labor by under-18-year-olds was a Bolshevik plot: her House floor speech 10 days later opposing it not only struck a blow against its supporters, but amounted to cozying up to her all-male colleagues by belittling her erstwhile female ones: “She warned the gentlemen of the house against the propaganda of the women’s organizations supporting the federal plan, organizations of which she is a member. She said they were accustomed to recommend measures they did not understand...and that their recommendations were not to be taken too seriously.” 364

Both houses of the Kansas legislature had banned smoking for decades 365 and retained those rules through the 1923 session. 366 But in 1925 the House and Senate both dropped the rules 367 —“[t]he first day out they kicked the daylights out of the anti-smoking rule” 368 —and, at least in the House, that change was linked to Donica. On the first day of the session “[f]oes of the ‘fag’ lost the first round...when members of the house rejected a temporary rule of the 1923 session

Feb. 16, 2011).

361 See above ch. 16.

362 “Miss Donica in Capital,” IDR, Dec. 31, 1924 (2:3).


365 See below Table 6.


367 The 1925 Senate rules no longer included the smoking ban. Senate Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Fourth Biennial Session...1925, at vii-xvi (Jan. 13) (1925). The Rules Committee report recommending amendments did not mention the smoking ban. Id. at 69 (Jan. 28).

The Prohibition of Smoking Inside Legislatures

which forbade smoking during regular meetings.” Republican ranchman W. V. Jackson, the leader of the “attack against tobacco users,” insisted that although “legislators should be the first to obey the anti-cigarette law,” in fact House Rule 70 “never is obeyed and ought to be stricken out.” In contrast, millionaire banker Orlando Jolliffe, who did not smoke and did not “like to breathe the smoke that others make,” urged the rule’s retention, adding that the sergeant-at-arms should be “instructed to enforce it rigidly. ‘Besides,...we have a lady member who doesn’t want to breathe a lot of tobacco smoke. We ought to think of her.’ The lady member, Miss Lovonia Donica...sat mute.” A “thundering majority” nevertheless voted to strike the rule. After the Rules Committee had recommended that the no-smoking rule be dropped from the permanent rules—its chairman expressing confidence that “all the members were perfect gentlemen and would not abuse their smoking privileges”—the House eliminated it. Donica “won the hearts of all the men” when, in response to a resolution that House members refrain from smoking “out of deference to the Lady Member,” she asked that “no special rule be enacted on her account, calling attention to the fact that the chamber was large and the ceiling high and declaring that the smoke would not be in the least offensive to her.” In general, she “oppose[d] any alteration in house rules ‘because there is a lone woman present,’” and although she “appreciate[d] the courtesy intended by sponsors of the [no-smoking] resolution who say my presence prompted it[,]...it would embarrass me to feel that I was interfering with the pleasure of the other 124 members—or as many of them who care to smoke.’” Donica’s acquiescence in smoking was consistent with, if not entailed by, her reflexive support for Republican Party measures: “‘I will not permit my woman’s viewpoint to reflect any prejudice in

369“Won’t Forego Fags While in Session,” HN, Jan. 13, 1925 (2:3). Kansas law prohibited the sale but not the smoking of cigarettes. See above ch. 16.
370“Members in House May Smoke If They Want to Without Violating Rules,” TDC, Jan. 14, 1925 (5:5). On Jolliffe’s role in repealing the statewide sales ban in 1927, see above ch. 16. Ranchman W. V. Jackson successfully moved to amend the motion to adopt the 1923 rules as the temporary rules in 1925 by striking out the no-smoking rule (Rule 70). House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Fourth Biennial Session...1925, at 4-5 (Jan. 13) (1925).
371“Legislative Notes,” TDC, Jan. 20, 1925 (3:3).
373IDR, Jan. 21, 1925 (6:1) (untitled editorial).
The Prohibition of Smoking Inside Legislatures

my voting.” The (male-dominated) press appreciated Donica, ironically noting that when the smoking question arose in the House, “Lovonia didn’t assume that pure, holy, superior air of some of our new world creating feminine political reformers, nor when the boys voted to have their smokes did her nose go up in the air and she make biting comment about boorish, filthy males. ‘It’s all right with me, boys,’ she smiled. ‘Far be it from me to deprive you of the pleasure you get out of it.”

While boasting that she could take a joke at her own expense, she nevertheless explained in a letter to the editor of her local newspaper that the press had not provided a completely accurate account, offering this corrective: “When approached by a number of members of the House who are non-smokers and asked by them whether they should make the stand to have no smoking in the session this year on account of a woman being present, I told them that if the rule were adopted I felt it should be because a majority of the House favored it and not because one woman demanded it.” (On the other hand, Donica had no objection to receiving the privilege of first choice of seats after the speaker and speaker pro tem).

New Hampshire

Beginning in the late 1930s, over several decades several women in both chambers of the New Hampshire legislature systematically and programmatically facilitated smoking by their male colleagues (though by the 1970s other women led the struggle to ban it). The New Hampshire legislature appears to be one of the very few that neither by rule nor by resolution banned smoking. Nevertheless, the fact that in 1931 the House adopted a resolution that “smoking

374“Only One Woman in Kansas Legislature Interested in School Activities,” Lawrence Journal World, Feb. 12, 1925 (4:3-4). There was no such resolution; procedurally, the question was whether the previous session’s rules, including the smoking ban, would be adopted.
375“But Look at the Newspaper She Has Been Reading All Her Life!” IDR, Jan. 23, 1925 (4:3) (reprinted from Chanute Tribune).
be permitted in the House for the 1931 session” presumed must have meant that (as was the case in the U. S. Senate before 1914) an unwritten custom prevailed that members would not smoke. Then at the outset of the 1939 session, the House by a viva voce vote adopted the resolution offered by Republican Mabel Thompson Cooper “that the members of the House of Representatives be permitted to smoke during sessions of the House.”

Ironically, Cooper, a first-term representative and insurance agency owner who went on to serve 12 terms, until the end of her life may have been “an emancipated female of long standing, but that (female) doesn’t go as far as smoking or bending the elbow. Her two pet taboos for women would be smoking and drinking.” Such sexist-suicidal solicitude on behalf of the (male) smokers hardly went unnoticed: at the end of the session the House unanimously adopted this resolution: “Whereas, the lady members at the opening of the 1939 session, voluntarily, thoughtfully and courteously motioned and carried a rule that granted the men members the privilege to enjoy the universal weed tobacco to their heart’s content.... We, the men, wish to express our thanks and appreciation by a rising vote.” At the beginning of the 1941 session Cooper once again came to her addicted male colleagues’ rescue by offering a resolution that House members “be allowed the privilege of smoking during the time the House is in session.” On this occasion, however, after a male representative had spoken against resolution, it was, on a viva voce vote, not adopted. Then Hilda

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380 The House rules contained no such prohibition. See above this ch. for references to the Manual for the Use of the General Court of New Hampshire for various years from 1895 to 1961. Press sketches of legislators in 1901 depict two smoking (one a cigarette and the other a cigar) “during the noon hour”; one of them appears to be sitting in his chair in the House chamber. “Thumbnail Sketches During the Noon Hour,” Manchester Union, Jan. 3, 1901 (1:4-6).


The Prohibition of Smoking Inside Legislatures

Constance Frederika Brungot, on her way to 19 terms and “an all-time world’s record as a woman legislator,”\(^{386}\) intervened. A “conservative Republican” who more than three decades later was “quite against women’s lib,”\(^{387}\) Brungot during the discussion on reconsideration of the first vote told the House that: “Men are better humored, yes, and much better to handle if they have not been denied their smoke.”\(^{388}\) After the chamber had on reconsideration voted viva voce to adopt Cooper’s resolution,\(^{389}\) at least one newspaper credited Brungot, “a mother of six children who doesn’t smoke herself,” with having made it possible for the 422 House members to “smoke during their sessions....”\(^{390}\) By now almost a ritual, the end-of-session resolution once again embodied the male members’ gratitude to the “lady members” for permission to smoke.\(^{391}\)

In 1943, however, the anti-smokers regained the upper hand when, after both the Republican majority leader (future U.S. Senator Norris Cotton) and the Democratic minority leader had spoken in favor of it, by a vote of 203 to 129, the House adopted a resolution that “in recognition of the dignity of our position as members of the state government, smoking during the time the House is in session shall not be allowed.”\(^{392}\) In 1945 virtually the same resolution banning smoking during its proceedings was offered by Republican majority floor leader J. Walker


\(^{388}\) “N.H. Solons Vote Right to Smoke,” \textit{Portsmouth Herald}, Jan. 9, 1941 (9:7). See also Gail Parker, \textit{More Than Petticoats: Remarkable New Hampshire Women} 140 (2009): “Hilda later stated that her motives were not simply a maternal concern for the men’s comfort. Being practical, she knew that if they were more comfortable, they would be more likely to agree with her” (from the chapter “Hilda Brungot: 1886-1982: Legendary Legislator”).


Wiggin, who justified it on the grounds that the House “‘represents the people of New Hampshire and should maintain a certain amount of decency and decorum, and avoid having billows of smoke rising to the ceiling which would prove inconvenient to onlookers in the gallery.’” Interestingly, this time Brungot (and other female legislators), “were talked out of taking the issue to the floor for debate, as they wanted to go on record, they later explained, as not wanting special consideration from their male associates.” In the event, the House overwhelmingly adopted the resolution by voice vote.\textsuperscript{393} To be sure, the question of compliance was raised by a photograph of the full House in session from 1945 that clearly reveals two men with cigarettes in their mouths.\textsuperscript{394}

After the “dignity” resolution had once again been adopted, by voice vote, in 1947,\textsuperscript{395} Mabel Thompson Cooper in 1949 once again “assumed a leading part in” what the \textit{Nashua Telegraph} called “the annual comedy in the House to decide whether or not there shall be smoking while the lawmakers are in session. Rep. Cooper was instrumental in getting a resolution to ban smoking killed.”\textsuperscript{396} The House defeated that resolution, which was identical with the text of the 1945 ban, by a vote of 126 to 180.\textsuperscript{397} In April, after having blocked the anti-smokers’ initiative, Cooper, who “declared she did not personally object to smoking,” succeeded in securing “overwhelming” support\textsuperscript{398} for adoption of a compromise pursuant to which “for the remainder of the session, the members of the House shall refrain from smoking until noon, out of courtesy to the visitors in the Gallery.”\textsuperscript{399} How precisely “it would be pleasanter and more dignified not to

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\textsuperscript{394}Leon Anderson, \textit{To This Day: The 300 Years of the New Hampshire Legislature} 166 (1981).
\textsuperscript{396}“Concord Notes,” \textit{Nashua Telegraph}, Jan. 13, 1949 (11:1).
\end{flushright}
smoke for the first hour of the session" but would have become less so if the ban lasted all day she did not explain. (The year 1949 also witnessed the intervention of a female colleague in the Senate, when, on July 19, on motion of Republican Sara Otis, “smoking was permitted in the Senate by its members during today’s session.”)

This regime of one daily hour of smoke-freedom in the House became a standard of sorts into the early 1970s when the modern anti-secondhand smoke exposure movement arose. During the 1951, 1953, 1957, 1959, 1961, 1965, and 1967 sessions the House, often at the urging of female members, adopted Cooper’s 1949 no-smoking-before-noon practice. An ahistorical view of this much diluted regulation was presented by a senator in 1961, who attributed it to the House’s having become “concerned with public relations. [T]he House voted, and has continued to vote, that there would be no smoking from 11-12 in order that school children and others in the gallery would not be in a smoke

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401 Journal of the Honorable Senate [of New Hampshire]: January Session of 1949, at 583 (July 19). Again, this need for permission logically suggests that there must have been a pre-existing prohibition, yet neither did the Senate rules contain such a ban nor did its Journal mention any, suggesting that the ban, as was the case in the U.S. Senate before 1914, rested on custom. Such an understanding may explain a press report in 1947 that the Senate had “for many years prohibited smoking while in session.” “Solons Vote to Ban Smoking This Session,” Concord Monitor and Patriot, Jan. 10, 1945 (1, 6) (copy furnished by Jane Lyman, NH State Library). The same consideration applies to a point of personal privilege raised by Senator Curtis Cummings during the 1950 special session when he asked that senators be permitted to smoke for the balance of the session and the Senate President Perkins Bass granted the privilege. Journal of the Honorable Senate [of New Hampshire]: Special Session of 1949, at 52 (May 18, 1950). Similarly, two years later, when the Senate on a viva voce vote rejected Republican Senator Katharine Jackson’s motion to grant the same privilege, presumably the default rule must have been no smoking. Journal of the Honorable Senate [of New Hampshire]: January Session of 1953, at 240 (May 5). Jackson was married to Bass.
The Prohibition of Smoking Inside Legislatures

haze.” At least one attempt to reduce the no-smoking period failed—a motion in 1955 to suspend the rules to allow smoking during the call of the roll. In other years, the House Journal contains no reference to a resolution regulating smoking at all. At the end of this phase, the 1971 session, which also coincided with the golden anniversary of women’s membership in the legislature, the House paid tribute to Brungot for having, inter alia, “functioned through the years as shepherdess of the male members, sponsoring smoking privileges for them during dreary deliberations....”

In the event, women also led the battle to put an end to smoking in the House. On January 9, 1973, a House session most of which was devoted to a “smoking versus non-smoking debate,” Republican Alice Davis (in her ninth of 10 terms) offered a resolution that no smoking be permitted on the House floor. Her justification was thoroughly in line with that of the burgeoning national anti-smoking movement: “The people that have to sit in here during a long day’s session go out of here with sore eyes and sore throats.... When we have to inhale this second-hand smoke blown out by others, I think it’s an imposition on us as individuals.” Unsurprisingly, Brungot opposed the resolution, as did Republican Malcolm Stevenson, who complained that “a ban would impose hardship on him as a smoker.” He then continued in the jocularly irrelevant vein that still fit within the framework of early discourse on secondhand smoke: “I think I would take to chewing tobacco...and that would be a danger to all who are

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404 Journal of the House of Representatives [of New Hampshire]: January Session of 1955, at 79-80 (Jan. 12) (Mr. Spaulding). It is unclear which rule Spaulding was referring to.
409 See below Pt. IV.
sitting near me." Despite the quality of his argument, Stevenson succeeded in securing a 215 to 129 majority to table the resolution. Because the House, after defeating Davis’s no-smoking resolution, was “left...without any limitation,” the next day’s proceedings were also “confined mainly to deciding when to smoke and when not to....” In the last hurrah of female-facilitated smoking, the House adopted Brungot’s Cooper-era resolution. In opposing an amendment to prohibit smoking in the legislative hall while members were required to be in their seats, Democratic Minority Leader Ernest Coutemarsh deployed an argument that apparently did not strike a majority as based on a theretofore unknown type of logic: “[P]ointing out that tobacco revenue is important to the state [h]e said it would be inconsistent for the lawmakers to stop smoking in the chamber when ‘we have been trying our best to get everyone who is not a member to smoke the state into solvency.’” The anti-smokers’ weak position was underscored a week later when the House adopted a motion to postpone indefinitely as well Davis’s cri de coeur resolution that at least the “legislative lounge be reserved for non-smokers.”

House anti-smokers finally achieved a major objective in 1975, when, in an inversion of the previous session’s voting arithmetic, the House, by a vote of 234 to 114, adopted Democrat Marian Woodruff’s resolution to prohibit smoking on the floor of the House while it was in session, but to permit smoking at all times in the Legislators’ Lounge and the Sergeant-at-Arms’ Room. Woodruff, a

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413 Journal of the House of Representatives [of New Hampshire]: January Session of 1973, at 72 (Jan. 9). Pending was also an amendment by Sara Townsend to water down the resolution by expanding the smoke-free period to the first two hours of the session.
The Prohibition of Smoking Inside Legislatures

(second-term) nonsmoker who complained that more than once she had gone home with a headache caused by exposure to the smoke in the House, was reinforced by other members who underscored the unfairness to those with heart or lung problems. At this point, in New Hampshire, as elsewhere, attention shifted to protecting the non-legislative population from secondhand smoke.

No-Smoking Rules in the
United States House of Representatives and Senate

For the past season I have heard no complaint as to the ventilation of either the Senate or the House of Representatives, and I have made frequent inquiries of the members of the House, who have said that there it is as good as it need be, or would be except for a novel habit of some novel members who indulge occasionally in smoking in spite of the majesty of the Speaker and the mace of the Sergeant-at-Arms.

Neither a dead letter nor universally complied with, the smoking ban in the House of Representatives dating from the early 1870s was sharply contested: from the periodic crescendos of frustration by representatives fed up with exposure to secondhand smoke that were recorded in the Congressional Record as appeals to the speaker, who invariably called on smokers to comply, it is apparent that rule-backed social pressure was in constant demand to suppress an activity that was obnoxious to many adult power-holding men, but that had not yet transformed their smoking peers into pariahs who had internalized the majority’s loathing for the external effects of their addiction. Rather, a kind of equilibrium evolved in this pre-cigarette era, in which anti-smoking congressmen galvanized collective opinion against the acceptability of tobacco smoking in their very public workplace, but had not yet succeeded in prevailing on their own smoking colleagues consistently to conform their behavior to an explicit rule arrived at democratically and without any audible opposition.

In contrast, until well into the twentieth century the ban on smoking in the Senate chamber during public sessions was based on custom and, apparently, secured greater compliance than the formal House rule.

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422CR 10:3312 (May 13, 1880) (Vermont Republican Justin Morrill).
House of Representatives

The inception of a smoking ban in the United States House of Representatives was remarkably straightforward, albeit contextually mysterious. An unsuccessful effort was undertaken as early as 1822, when, in connection with a general discussion of House rules, Democratic Republican, Robert Wright, a former governor of Maryland, moved as a new rule that “no person shall be permitted to smoke a cigar in the hall nor in the outer lobby of the hall.” Without a division, the House negatived the motion.423 Although conventionally historians recite that “smoking was permitted on the floor until 1871,”424 in 1856 the press reported that: “Little printed cards have been hung up in the hall of the House of Representatives at Washington signed by Speaker [Nathaniel] Banks, direct[ing] the Doorkeeper to prevent smoking on the premises.”425

Nevertheless, a new regime did begin on February 28, 1871. In the middle of his three-term incumbency, Representative Ginery Twichell, a Massachusetts Republican who was the president of the Boston & Worcester Railway and the Atchison, Topeka & Santa Fe Railway,426 apropos of nothing being discussed that day, asked unanimous consent to offer a resolution amending House Rule 65 by adding: “Smoking is prohibited within the bar of the House or the galleries.” His proposal prompted an apparently bewildered Illinois Republican John Farnsworth to object: “This is not necessary. Is not that the rule already?” In clarification, Republican House Speaker James Blaine—a future unsuccessful presidential nominee and two-time secretary of state who was in the second of his three terms as speaker—set the record straight: “There is no rule upon the subject. The Chair has been appealed to by a great many gentlemen to prevent smoking in the House, but he has no power.” This intelligence, in turn, sparked bipartisan “[t]here

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423 Annals of the Congress of the United States 39:1301 (Mar. 13, 1822) (comp. 1855). Previously, Wright had opposed an amendment—which was also negatived—prohibiting a member from reading newspapers or reading or writing a private letter in his seat during the session. Id. According to the House Journal Wright’s language was slightly different: “No person shall be permitted to smoke cigars in the lobby between the hall and the post office attached to the House.” Journal of the House of Representatives of the United States, Being the First Session of the Seventeenth Congress 353 (1821).


425 South Carolinian (Columbia), Feb. 29, 1856 (2:1) (untitled). Republican Banks, who became a Civil War general, had just recently assumed the speakership.

ought to be a rule” enthusiasm by Indiana Democrat William Niblack (the Democratic Caucus chair) and California Republican Aaron Sargent.” Hearing no objection, Speaker Blaine announced that the rule was agreed to. The House then inserted the new prohibition into Rule 65 of its Standing Rules and Orders for Conducting Business, which The New York Times reported under the rubric, “Reforming Bad Habits.”

A brief overview of the conflicts that broke out in the immediately ensuing years offers a sense of the tenor and frequency of the struggles, which did not even always require member complaints. For example, in 1872 in the midst of a testy procedural dispute over motions to suspend the rules, adjourn, and recess at the time of a debate over building a marine hospital in San Francisco, on his own, Speaker Blaine, “though not connected with this subject,” directed the clerk to read the non-smoking rule aloud. During the final months of the Forty-Third Congress in January-February 1875 the contentious subject burst forth again, this time in connection with the fierce procedural battle that Democrats were mounting to thwart passage of the Civil Rights Bill: with a Democratic majority due to replace the Republican majority in the Forty-Fourth Congress at the beginning of March, Democrats sought to bring the proceedings to a halt by a neverending cascade of motions to adjourn. As yet another such motion was being launched, Radical Republican William Kelley’s request for unanimous consent to be excused from attending that day prompted Kentucky Democrat James Beck to declare: “We will excuse all you gentlemen on that side of the House.” After Kelley had explained that his throat was in such a condition that he was unable to “remain in this atmosphere with impunity,” Beck’s question as to whether any other Republicans wanted to be excused was matched by Indiana Republican Jeremiah Wilson’s request for unanimous consent to excuse “all the gentlemen on the other side of the House...from further attendance,” which the speaker pro tempore, Republican John Cessna, held not in order, “although the Chair would be very happy to entertain it.” At this point Tennessee Republican Horace Maynard, chairman of the Republican Conference, asked for the last clause of Rule 65 to be read. Following the clerk’s recital of the smoking ban,

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428 Journal of the House of Representatives of the United States 70:522 (Appendix, 1871). It is unclear why, when, or how the rule was changed to read “or gallery.”

429 “Forty-First Congress,” NYT, Mar. 1, 1871 (5:2-4 at 4).

430 Congressional Globe 3389(42d Cong., 2d Sess., May 13, 1872). Remarkably, the two central actors in the debate were Farnsworth and Sargent; two other participants, Garfield and Speer, are mentioned below as involved in smoking disputes.
Maynard explained that: “I ask to have that rule enforced. I do it for the benefit of various persons within the House.” Rather incongruously, Democrat Robert Speer then asked Maynard: “Do the other side intend to smoke us out?” The speaker pro tempore then concluded this series of exchanges by declaring that “the officers of the House are requested to see that the rule is enforced.”

In March 1876, Republican Representative (and future President) James Garfield rose to a point of order: “The heat of this Hall is very great, and the discomfort under any circumstance. I respectfully ask for the reading of the last clause of the sixty-fifth rule of the House, and ask that it be enforced.” After the had clerk had read it aloud, the chairman declared that: “The Doorkeeper will see that this rule is enforced.” A year later, the new speaker, Pennsylvania Democrat Samuel Randall (who “never uses tobacco in any form”), called to the attention of the House that he had received repeated complaints that Rule 65 was being violated on the House floor. The particular complaint that he had received that day stated that non-House members who were there by courtesy of the House were in the habit of smoking within the bar of the House. In addition, however, Randall, revealing both just how insistent he was on compliance with the letter of the rule and underscoring the health hazard linked to smoking, pointed out that he had himself noticed that members sometimes in the hurry of coming from the cloak-room to vote keep their cigars in their hands, but hereafter the Chair requests that members when they come into the Hall of the House from the cloak-room, where they have the privilege of smoking, will see that they do not smoke within the bar. The ventilation of the Hall is a subject of serious complaint and a source of injury to the health of members, and smoking inside the bar of the House increases and augments the difficulty in that respect. The Chair hope that, therefore, from now until the close of the session he will have no further complaints in this respect.

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431 CR 3:793 (Jan. 27, 1875). A watered down version of the bill eventually passed the House. Id. at 1011 (Feb. 24).
432 CR 4:2056 (Mar. 29, 1876).
433 “The Use of Tobacco,” The Laws of Life: A Family Health Journal 28(6):229 (June 1885). Other congressional “total abstainers from the weed” included both senators from Massachusetts (Dawes and Hoar) and New Hampshire (Blair and Pike), and the Quaker senator from Rhode Island (Chase), as well as two House members New York (Cox and Hewitt). Id.
434 CR 5:1874 (Feb. 23, 1877). At this point, Massachusetts Republican Nathaniel Banks, himself a former House speaker, asked Randall why, if members did not have the privilege of smoking cigars there, half a dozen to a dozen cigar stands were located in that part of the Capitol. After Randall had explained that they were already there when he
The Prohibition of Smoking Inside Legislatures

Nine months later Speaker Randall felt compelled to intervene again as a result of repeated complaints “and again this morning....” After the clerk had once again read the prohibitory rule aloud, the speaker declared: “Gentlemen desiring to smoke during the pendency of public business will be kind enough to do so elsewhere than in the Hall of the House.” In the teeth(lessness) of Randall’s admonitions, three months later Tennessee Democrat John Atkins, a Confederate lieutenant colonel, rose to a question of privilege, directing the chair’s attention to the rule. Reduced now seemingly to the role of a mere supplicant, the speaker intoned that: “This rule is known to members as well as to the Chair, and the Chair hopes that members will obey the injunction of the rule.” Once again in 1879 the speaker began the day’s proceedings on April 23 by having the clerk read the smoking ban rule aloud and then launched into yet another admonition: “The Chair has thus far refrained from directing the members of the House to this subject, in the hope that without being reminded of the rule they would see the necessity of abstaining from smoking in the Hall of the House; but to-day the Chair has been requested not to delay any longer to remind members of the existence of this rule. Those who do not smoke complain that members smoke in their seats on the floor. The Sergeant-at-Arms and his deputies will hereafter notify gentlemen who are smoking in the Hall that it is in violation of the rules.”

As a result of the initial revisions of the House Rules in 1880, Rule 65, transformed into Rule XIV (“Of Decorum”), provided, inter alia, that “during the session of the House no member...shall smoke upon the floor of the House; and the Sergeant-at-Arms is charged with the strict enforcement of this rule.” Then, as the debate on the rules proceeded, the Rules Committee proposed amending the provision by charging the Doorkeeper as well with strict enforcement of the smoking rule. After Randall, who was participating in debate while a speaker pro tempore was in the chair, had remarked that “[w]e want everybody we can called into the service to prevent smoking in the seats,” the chamber agreed to the

became speaker and that he was opposed to them but had transferred the power to grant applications for such stands to a committee, Banks proposed a resolution instructing the committee to forbid the sale of cigars in the portion of the Capitol controlled by the House, but it failed. Id. at 1874-75.

435 CR 6:345 (Nov. 12, 1877).
436 CR 7:716 (Feb. 1, 1878).
438 CR 10:206, 830 (Jan. 6 and Feb. 11, 1880); Asher Hinds, Hinds’ Precedents of the House of Representatives of the United States 2:750, § 1136 (1907).
The Prohibition of Smoking Inside Legislatures

Just three weeks later, when a procedural battle over a bill was raging that involved repeated motions to adjourn and mass unexcused absences, Tennessee Democrat Charles Simonton requested that the no-smoking rule be enforced because the “atmosphere becomes disagreeable when we have to stay here all night. Michigan Republican Omar Conger then denounced this request as a ruse: “This is an attempt to withdraw the Sergeant-at-Arms from his duty. He has been sent to arrest [absent] members and should not be recalled to arrest members for smoking. He is fulfilling the order of the House now.” However, the speaker pro tempore ordered the sergeant-at-arms and doorkeeper to enforce the rule. Strengthening the enforcement corps failed to deter congressional smokers: a month later Ohio Democrat Adoniram Warner felt compelled to request enforcement, not on his own account, “but on behalf of ladies in the gallery, from whom I understand complaint is made of the violation” of the smoking prohibition. With this prompt the chair requested the sergeant-at-arms to enforce the rule. Even if the pleas for enforcement recorded in the Congressional Record represented merely the no longer suppressible complaints about a minuscule fraction of infractions, just how frequent and massive those violations were is unclear, though even two interventions by the sergeant-at-arms within a short space of time on a single day were not unheard of. Transgressions resulted in part from the failure of representatives who had actually left the Hall to smoke to extinguish their burning tobacco when hurrying back in to participate in a debate that suddenly compelled their presence. For example, in 1881 Republican Conger wanted the question to be put on a motion he had made even though he did not want it “driven along, but I do not want, while I am back here smoking, to have matters going on without my knowledge.” When Randall, his speakership valedictory only three days off, one last time intoned that “[t]he rule prohibits smoking,” Conger replied: “I asked that the question be put, so that I might go back out of the place where the rules prohibit smoking. I was making


440 CR 10:1853 (Mar. 24, 1880). For an illustration of the huge gap in efficacy between the sergeant-at-arms’ mass arrests of absent members and his enforcement of the no-smoking rule, see CR 7:2944-48 (Apr. 29, 1878).


442 E.g., CR 11:1630 (Feb. 15, 1881).

443 CR 11:2040, 2044 (Feb. 24, 1881).
an unsuccessful effort to comply with the rules. [Laughter.]” Democrat Warner then made it clear that smoking and taking part in floor debate were mutually exclusive: “We have no objection to the gentleman’s retiring to the smoking-room, but we cannot consent that he shall retain while there the right to object.”

That compliance and enforcement left something to be desired was highlighted the following year, when the Cleveland Leader’s new Washington correspondent, Frank Carpenter, turned his attention in one of his regular columns to the question of smoking. Focusing on the House, he asked rhetorically:

Do Congressmen smoke during the session? Why, bless you, yes! I have seen ladies grow sick in the galleries from the vile odor of the tobacco that rises from the two-for-five-cents cigars in the mouths of the so-called gentlemen below. The Congressmen smoke in their very seats, and peer through wreaths of smoke to catch the eyes of members behind them.

As simple and straightforward as the rule was, even the House speakers at times failed to enforce it. These failings were revealed in 1884 in connection with a request for enforcement by Massachusetts Independent Republican Theodore Lyman, a marine biologist, who was, inter alia, a member of the National Academy of Sciences and American Academy of Arts and Sciences as well as a Harvard University overseer. After Lyman had conveyed complaints by women about air in the galleries so bad that they were often compelled to leave, Speaker John Carlisle, a Bourbon Democrat from the leading tobacco producer, Kentucky, “observed with regret” that members had frequently violated the rule and that he had more than once directed the sergeant-at-arms and doorkeeper to enforce the rule; he then directed those officers once again to enforce it rigidly on behalf of members on the floor as well. When Carlisle stressed that the no-smoking area encompassed the Hall of the House, the seats, and the lobby, his immediate predecessor, as speaker, Ohio Republican J. Warren Keifer, asked, whether it extended to the part of the Hall outside of the railing. Not only did it, but it also extended to the lobby in the rear of the speaker’s chair; however, Carlisle admitted that he had “never undertaken to enforce the rule strictly in the lobby,” the reason (perversely) being that it was “the most convenient place for members to meet, in order to avoid the disagreeable effect

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444CR 11:2312 (Mar. 1, 1881).
The Prohibition of Smoking Inside Legislatures

In 1886 in connection with a row over allegations that non-members had been present on the floor of the House and the need to define that space, Indiana Republican Thomas Browne observed that many members thought that “they may smoke anywhere outside of the seats without being guilty of an infraction of the rules,” adding the he himself was “in the habit of violating this rule as much as anybody else.” Rejecting the contention of Georgia Democrat Nathaniel Hammond that the smoking issue was “ridiculous in comparison with” the “graver” issue of non-members, Pennsylvania Republican William Brown contended that it was “a matter of a great deal of concern,” particularly to non-smoking House members, and especially because smoking violations were, unlike non-member intrusions, anything but rare. Browne explained that the problem was not the failure to read the rule aloud repeatedly during the session, but the practice of members whose attention was called to the fact that they were smoking in their seats of “simply retir[ing] to the rear of the desks and continu[ing] to smoke at some point there, believing in good faith, I suppose, that they may do so without violating the rule.” Although Browne readily admitted that smoking was “offensive to many gentlemen,” that members should know that the smoking-prohibited space meant “anywhere this side of the cloak-rooms,” and that the smoking rule was “more frequently violated than any other,” the resolution to instruct the Rules Committee to investigate the entire matter was tabled.  

Despite this contretemps, the following year the press reported that during the closing session the atmosphere in the House was “well impregnated with tobacco smoke, notwithstanding the repeated appeals of the speaker to the members requesting them to observe the rule which prohibits smoking on the floor.” Fortunately for history, in 1890 Robert Graves, a syndicated Washington correspondent inventoried tobacco use in Congress, naming names. Taking a walk through its deserted halls, inhabited only by renovators and carpenters, on October 7, he noted that: “The only thing that reminded me of the absent statesmen was a smell of tobacco smoke in the cloak rooms.” Attendants confided to him that “the odor of tobacco could not be taken out of these apartments without consuming them literally and wholly by fire. Walls and ceilings and furniture have become so saturated with nicotine during the long session just ended, and the many sessions long and short which preceded it, that

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450 In this position Graves appears to have flourished between 1888 and 1895.
their woodwork is like an old pipe.” In the aggregate, he recorded that: “Fully two-thirds of the members of congress smoke. By coming over here and taking a look at our statesmen foreigners are able to see at a glance what a nation of nicotinists we are. Those of our legislative representatives who do not smoke use the weed in the other way. I doubt if there are two dozen men in both houses of congress who do not use tobacco in one way or another.” In addition to these two-thirds cigar smokers and one-third tobacco chewers, Graves was able to identify only one member of congress who “had the nerve to appear in the cloak room of the house with a pipe in his mouth” and only two senators who still used snuff, even though the Senate made an annual appropriation to provide it free of charge. Perhaps the most revealing sign of the times (as well as of the legislators’ age and wealth) was that as far as Graves had been able to see, “there is not one cigarette smoker in congress,” even though 2.5 billion cigarettes were produced in 1890 compared to 4.2 billion cigars.

New Hampshire Republican Senator Henry William Blair, also a high-profile alcohol prohibitionist, was “the most conspicuous anti-tobacco champion we have in congress....” He would, in Graves’s estimation, “as soon think of throwing himself from the top of the Washington monument as of putting a cigar or a quid of tobacco in his mouth.” However, on the House side Massachusetts Republican Elijah Morse rivaled Blair for the honor of the foremost anti:

When Mr. Morse first came to congress [in 1889] he was very much annoyed by the smoking on the floor of the house. In vain did Mr. Morse endeavor to have the rule strictly enforced. The rule is that no member shall smoke on the floor, but members do smoke on the floor, the rule and Mr. Morse to the contrary notwithstanding. Mr. Morse has appealed to the sergeant-at-arms, to the speaker and to the members themselves, but without avail. Tobacco smoke is one of the fixed features of the American congress, and if Mr. Morse doesn’t want to inhale the odor of the tobacco plant he will have to stay out of congress, that’s all.

452 Arthur R. Burns, Production Trends in the United States Since 1870, tab. 44 at 298 (1934).
453 H. W. Blair, The Temperance Movement: or, the Conflict Between Man and Alcohol (1888). For Blair’s hostile allusions to tobacco, see id. at 70, 145.
455 Robert Graves, “The Virginian Weed,” North American (Philadelphia), Oct. 8, 1890 (5:2-3). As an example of violation of the no-smoking rule Graves adduced New York Democrat Amos Cummings, a former editor of the New York Tribune, who had “a trick of
Morse’s complaints in 1889-90 are significant because they occurred under the speakership of Thomas Reed, of whom another House member said that during his first term as speaker (1889-91) “smoking was not allowed, not in a single instance.”

During the 1890s, with “the smoke nuisance” having become “the question of the hour,” complaints about smoking in the House increasingly focused on its health consequences. For example, in 1892 the speaker pro tempore, Tennessee Democrat James Richardson, in causing the clerk to read the rule again, noted that several members had “complained that they are ill, and can not remain here if members persist in smoking.” He nevertheless sounded almost apologetic in “appeal[ing] to members not to violate the rule....”

The loopholes were tightened somewhat the following year at the initiative of Morse, a stove polish manufacturer who had been the unsuccessful Prohibition Party candidate for lieutenant governor in 1877. He proposed expanding the existing rule, which covered only members during the session on the House floor, to include “any other person...at any time” on the floor so that “Tom, Dick, and Harry should [not] be permitted before the meeting of the House to fill this Hall with vile cigar, cigarette and pipe smoke....” Morse’s motivation was his observation, during his three-term incumbency, that the “amount of sickness” among his colleagues was “great” and the death rate “appalling”—14 members had died alone during the 1889-90 session—which he attributed, “in no small measure to foul, vile, bad air that we are asked to breathe in this Hall.” Especially in the winter, when the windows were closed, the air was “blue with this vile

456Sanitary Conditions of the Capitol Building, Etc. 8 (H. Rep. No. 1980, 53d Cong., 3d Sess. Mar. 2, 1895) (Rep. Joseph Walker). On at least one occasion in 1890 Speaker Reed did say that his attention had been “called to what is either a case of smoking in the gallery or of smoking on the floor so that it seems to be in the gallery. The Chair hopes that the rule of the House will be obeyed alike by members and individuals in the galleries. The doorkeepers will see that order is preserved in the galleries.” CR 21:8343 (Aug. 8, 1890).

457“A Smoke Nuisance,” DP, Dec. 5, 1893 (3:6). The press reported that Interior Secretary Hoke Smith had issued a fiat that “the infantile clerk who infests the department with his cigarette shall be crushed. He will be called upon to decide whether his smoke or his job is more valuable to him. Smoking by the official force during office hours is to be squelched.”


The Prohibition of Smoking Inside Legislatures

smoke to such an extent that you could scarcely see across the room, and this is especially offensive to our lady visitors in the galleries.” Without, unfortunately for the sake of a quantitatively curious posterity, providing any numerical estimates, Morse referred to the group on whose behalf he was seeking to regulate: “There are a good many members of this Congress, as well as its predecessors, who do not use tobacco in any form, and a smaller number to whom it is downright offensive and poisonous.” Willing to grant “all deference” to smokers, Morse nevertheless insisted that non-smokers did “have some rights in this matter, and that our convenience and health ought to be a subject of some little consideration as well as theirs.” Morse’s pleading climaxed with a religious analogy: “The children of Israel, under Divine direction, established what was known as ‘cities of refuge.’ The Committee on Rules have in their wisdom established in this vast building at this end one ‘city of refuge’ for nonsmokers by forbidding the members to smoke in this Hall.”

In the end, as The New York Times reported the next day, “[e]nough members agreed with” Morse that “this room of all others ought not to be turned into a bacterial machine for the propagation of disease” that the House adopted his amendment strengthening the rule prescribing spatial segregation of smokers. Two years later, in reporting that “Stove Polish Morse” was proposing to “banish tobacco smoking from the House of Representatives,” the Memphis Commercial Appeal treated him as a self-righteous officious intermeddler: “Because Mr. Morse is virtuous shall there be no more cakes and ale? ... The average statesman could not endure the good habits of Mr. Morse.”

460 CR 25:1147-48 (Sept. 1, 1893). Morse went on to declare: “Every other part of this vast building, except the Senate chamber, the lobbies, the corridors, the Rotunda, the committee rooms, and every part of the building, except these Halls, are open to smokers.” Id. at 1148. Presumably the first “except” was a typographical error; its presence not only subverts Morse’s manifest meaning, but creates a grammatical error since “part” does not agree with “are.”


463 Commercial Appeal (Memphis), Nov. 26, 1895 (4:3) (untitled edit.). The editorial failed to mention the specifics of Morse’s new proposal, but Morse expressed the belief that there would be “enough gentlemen” in the next House to “enable him to get through his oft defeated measure for the prohibition of smoking in the house.” “Personal and General Notes,” DP, Nov. 22, 1895 (4:5-6 at 6). See also “To Abolish Smoking,” Lowell Daily Sun, Nov. 27, 1895 (4:1).
Even after the innovation, in June 1894, in the midst of a floor discussion of ventilation in the Hall of the House, Tennessee Democrat Benjamin Enloe complained to his assembled colleagues that: “Despite that rule I have seen—particularly during the consideration of the tariff bill when we had long continuous sessions requiring the continued presence of members—I have seen the atmosphere of this Hall so dense with tobacco smoke that you could scarcely see persons in the galleries. Members of the House were violating the rules and smoking their cigars in this Hall, making the atmosphere impure, giving themselves and the visitors in the galleries headaches, and disgracing the American Congress.”

That conflicts over smoking continued to disrupt the House was manifested on March 2, 1895, the last day of the Fifty-Third Congress and of Democratic control of the chamber, when Indiana Democrat William Bynum rose to a point of order requesting that the no-smoking rule be enforced. Outgoing Speaker Charles Crisp, a Democrat from Georgia, transcended the traditional appeal for compliance by noting not only the pervasive noncompliance, but also the intensity of the nonsmokers’ demands for protection and the untoward political consequences of their continued exposure: “While we all know that this rule is very much disregarded, yet the Chair appeals to gentlemen, in view of the probably protracted character of the session, to observe this rule. There are many gentlemen on the floor who have privately said to the Speaker that if the smoking be persisted in they will be forced to absent themselves from the Hall.” Crisp then requested that smokers go to the Speaker’s lobby or the cloak room if they wanted to smoke.

The very same day the Joint Committee on Ventilation and Acoustics and Public Buildings and Grounds submitted its report, Sanitary Condition of the Capitol Building, Etc., which concluded that smoking was “largely accountable for the bad air complained of” in the House and that enforcement of the House smoking rules and abstention from tobacco use there would contribute to purifying the air from its “present unhealthy condition.”

A few days after Republican “Czar” Thomas Reed had begun his second term as House Speaker in December 1895, A. Maurice Low, a British-born journalist who was the Boston Globe’s Washington correspondent, described the smoking scene in the House:

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464 CR 26:5993 (June 8, 1894). Enloe also accused the smokers of “violating the proprieties of life by smoking in the presence of ladies....”


Mr. Reed has always been opposed to the practice of smoking on the floor while the house is in session, and although the rules prohibit it, the rule has been more honored in the breach than the observance.

When Mr. Reed was speaker in the 51st congress he drove the smokers off the floor, and this year he is more determined than ever that members who want to smoke must retire either to the cloak rooms or the corridors or else go outside.

Today on two separate occasions he sent pages to two members to tell them that smoking was in violation of the rules. Both of the members when they received the message looked somewhat surprised, but at once they threw their cigars away. Curiously enough both members were republicans.467

The congressional struggle for protection from secondhand tobacco smoke exposure and its grounding in health considerations reached a higher plateau in 1896 when Iowa Republican David Henderson, soon to become speaker himself, but for now chairman of the Judiciary Committee and, next to the speaker—Thomas Reed, who three decades later was still credited with not permitting smoking on the House floor468—the highest-ranking member of the Rules Committee,469 presented the latter’s proposed rules revisions to the House. Henderson’s role here was noteworthy since he opposed liquor prohibition and had a “legendary reputation as a heavy tippler,” though he also “crusaded against intemperance.”470 The change in question consisted simply in striking the word “other” from Morse’s amendment so that by now reading, “Neither shall any person be allowed to smoke upon the floor of the House at any time,” it prohibited members from smoking there as well. Prompted by Mississippi Democrat Thomas Catchings to explain this “amendment of very great importance” to the House so that members could grasp its “full significance,“471 Henderson limned its reach and basis:

Mr. HENDERSON. I suppose from the manifestation of applause on the part of the House that this provision is thoroughly appreciated. ... Under the present rule smoking is prohibited only during the sessions of the House and on the floor of the House—within this Hall. Under the amendment reported from the committee smoking is never to be allowed

468 Robert Luce, Legislative Assemblies: Their Framework, Make-Up, Character, Characteristics, Habits, and Manners 637 (1924).
The Prohibition of Smoking Inside Legislatures

before or after the sessions in this Hall. It is absolutely prohibited here.

Many Members. That is right.

Mr. HENDERSON. The cloakroom is not a part of the House....

The theory of the committee in making this recommendation was briefly this: It is well known that many ladies are compelled to leave the galleries of this House because of the impure air resulting from the practice of smoking. This evil is not averted by discontinuing smoking during the sessions of the House if it goes on upon this floor one, two or three hours before the gavel falls for the commencement of business. The committee believe that at all times the air of this Legislative Hall should be exempt from the polluting influence of tobacco in this form, so that the American citizen desiring to look down upon Congress from our galleries may do so without suffering the contaminating influence of tobacco smoke. [Applause.]

In addition to that, Mr. Speaker, I believe that since I have had a seat in this body members have been killed not alone because of the polluting effects of tobacco, but generally because of the impure air in this Hall. I think this provision will be a great step toward the preservation of the health of this body. [Cries of “Vote!” “Vote!”]

The question being taken, the amendment proposed by the committee was agreed to. [Loud applause.]472

Both Henderson’s starkly aggressive and accusatory anti-smoking language, culminating in the charge that tobacco “killed,” and the wide, enthusiastic, and boisterous resonance that it elicited from congressmen suggest that even in the period before the breakthrough of mass cigarette smoking, a significant proportion of adult males not only did not smoke tobacco, but intensely resented the involuntarily inhalation of tobacco smoke and welcomed liberation from it.473 That Henderson himself had internalized the limits of the contest that smokers and nonsmokers were engaged in he revealed the very next day when he stated during debate that “since we have established a more strict rule against smoking, a larger latitude may be needed in that respect outside of this Hall, and gentlemen desiring to smoke who have hitherto indulged upon the floor may be driven into these corridors to enjoy their cigars.”474

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473 Press coverage focused on the new rules’ design to centralize power, control members, and stifle debate; the smoking ban was mentioned only perfunctorily. E.g., “Making the House Harness,” NYT, Jan. 11, 1896 (3). One important paper did report that the smoking ban was received with “general applause.” “New Rules for the House,” New-York Tribune, Jan. 11, 1896 (13:2-3).

The Prohibition of Smoking Inside Legislatures

Yet four months later Kentucky Republican Samuel Pugh rose to an ironic parliamentary inquiry: “While we are laboring here with closed doors in this dense atmosphere in the presence of this magnificent assemblage of ladies who grace with their presence this kindergarten performance of the national schoolhouse, I would like to know whether a call of the House suspends the rule against smoking in the Hall?” After the speaker pro tempore had informed him that anyone who smoked was infringing the rule, Pugh revealed that: “Not only one, but quite a number of those present have been infringing the rule, and while it may be fun for the boys on the floor, it must be very disagreeable to the ladies and other visitors in the galleries.”

Even when Henderson became speaker he was not only compelled to continue the ritual readings of the rule and admonitions—“and this [was] never more necessary than at the close of a session of Congress”—but, at least on one occasion, he had to point out that he had “learned that officers of the House, when calling attention to smoking, even during the session, have been very severely spoken to by members.” More pleading than leading, Henderson was “glad to say that he is not advised who any of these members are; but appreciating this rule and its object—the comfort of the persons in the Hall and galleries, as well as the health of members—the Chair trusts that every pains [sic] will be taken by members to observe this rule; and if, forgetting it for a moment, one of these subordinate officers should call attention to it, it is hoped that members will appreciate the fact that he is discharging a duty and not desiring to be offensive to any member.” The speaker’s plea to representatives to be nice to the sergeant-at-arms was a far cry from the latter’s rule-bound duty, which he was still performing in the late-nineteenth and early-twentieth century, to bear the mace vis-a-vis contumacious members and, if need be, arrest them. In 1901, five years after having closed the loophole, Speaker Henderson indirectly admitted that the nation’s lawmakers did not understand a brief, unambiguous rule: “Many members have been under the impression in the past, without having carefully examined the rule, that they could smoke in this Hall when the House is not in session. That is against the rule.” Rather than rebuking them for their sloth, negligence, or lack of comprehension, he cheerfully “trust[ed] that every member of the House will feel it to be a pleasure to aid in the enforcement of this most needed rule. [Applause.]”

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476 CR 33:6224 (May 29, 1900).
The Prohibition of Smoking Inside Legislatures

On February 1, 1915, when the Henderson’s 1896 rule was still in force, Speaker Champ Clark, according to the *Western Tobacco Journal*, “came down heavily...on one of the supposed immutable rights of the members of Congress.” Speaking in a “honeyed...tone which gave no portent of the ominous declaration he was about to make,” Clark stated that he desired to make a statement before taking up the next bill: “The rules of the House prohibit smoking inside of this Hall. Complaint has been made to the Chair more than once about Members smoking in the Hall. Now, there is plenty of space outside of this Hall for gentlemen to smoke. And while the Chair is at it, he will suggest it is a good thing for Members to keep their feet down from the tops of the seats. [Applause.]”

### Senate

**The Chairman** [South Carolina Democrat Rep. George Shell, Committee on Ventilation and Acoustics]. Colonel Bright, is it the habit and practice of the members of the Senate to smoke in the Senate Chamber while it is in session?

Mr. [Richard] Bright [Senate Sergeant-at-Arms]. No, sir. The rule of the Senate would require if a Senator was smoking in the Senate Chamber for him to be notified promptly. ... The cloakroom is used for a smoking room, and I do not remember to have ever seen a Senator smoking a cigar in the Chamber. ... If it was my own grandfather, and he was a Senator, I would notify him. That is mandatory on the part of the rule of the Senate.

In contrast, not until 1914 did the U.S. Senate vote to protect its nonsmoking members from secondhand smoke exposure by amending its rules so that “no smoking shall be permitted at any time on the floor of the Senate, or lighted cigars be brought into the Chamber”—a rule that remains in effect today (as Rule 33),

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481 *CR* 52:2823 (Feb. 1, 1915).


483 S. Res. No. 42, 63d Cong., 2d Sess. (1914), amending Senate Rule 34. Similarly, at the turn of the century the U.S. Supreme Court held “cigarets as an abomination, though it gives a respectful place to the custom of smoking tobacco. In the clerk’s room there is displayed a large notice—‘Cigaret Smoking Prohibited’—but cigars may be freely used.” “Still Using Quill Pens,” *Davenport Republican*, May 18, 1901 (7:5).
The Prohibition of Smoking Inside Legislatures

strengthened by the ban in 1979 on lighted cigarettes and pipes. Until then, according to the Senate Historical Office, by unwritten custom, "senators never smoked in the chamber during public sessions," but "happily brought out their cigars whenever the Senate went into executive session to consider nominations and treaties." This regime, in fact, turns out to have been considerably more blurred than that global account suggests, but before filling in some of the gaps,


486 http://www.senate.gov/artandhistory/history/minute/Smoking_Ban.htm (visited May 26, 2010). Senators did, however, use snuff and chew (and spit) tobacco during public sessions. Telephone interview with Donald Ritchie, Senate Historian, Washington, D.C. (May 27, 2010). Purportedly, it was not until 1889 that it was publicly known that senators smoked during executive sessions. New Hampshire Republican Senator Henry Blair, an ardent supporter of alcohol prohibition and an opponent of tobacco, “gave away a secret of executive sessions by saying that ‘if Senators would not smoke during executive sessions the air in the Senate chamber need not be complained of. This was [a] bombshell. [I]t was never known before that smoking was one of the customs indulged in during those conclaves. We all know that Representatives smoke their cigars on the floor of the House...but that body of most potent, grave and reverend seigniors, the United States Senate, never before was suspected of permitting the ignition of a cigar during either open or executive sessions. [T]hat smoking was indulged in—who would have thought it?” Smith D. Fry, “From the Capital,” Milwaukee Daily Journal, May 25, 1889 (3:1). Fry was a syndicated Washington columnist; this article also appeared, e.g., as “Washington Letter,” Elyria Democrat, May 23, 1889 (6:4-5). Eighteen years later, the Washington Post insisted that the “secret” that senators smoked during executive sessions was not revealed until 1907, when, after the end of a brief secret session, which, contrary to the expectation of a dozen smoking senators, was not adjourned without reopening the doors, “assistant sergeant-at-arms and pages were kept busy for at least five minutes warning Senators that they were transgressing the rules against smoking in the open sessions of the Senate.” Ultimately the officials “succeeded in banishing every cigar” except that of Henry Cabot Lodge (the body’s only holder of a law degree and a Ph.D. from Harvard); they “created much hilarity by their efforts to lasso Mr. Lodge’s cigar. They would plant themselves squarely in front of him to attract his attention, but the Massachusetts Senator was evidently not a hypnotic subject. He failed to see them. He would suddenly shift his position or turn around, and then the sergeant-at-arms and his scouts would shift again, and again line up at ‘Present arms.’ But Mr. Lodge smoked on.” At the end of the open session, “Lodge, his cigar still firmly planted between his teeth, marched out, unmindful that he had created such a flutter by his unconscious defiance of Senate rules.” “Smoked in Senate Chamber,” Washington Post, Feb. 3, 1907 (6) (copy provided by Katherine Scott, Assistant Historian, U.S. Senate Historical Office).
it is useful to examine the Senate’s regulation of smoking outside of the chamber.

As early as March 15, 1884, the Senate Rules Committee adopted Rules for the Regulation of the Senate Wing of the United States Capitol, under Rule XIII of which smoking in the elevator was “strictly forbidden.” By 1896 the prohibition was extended to elevators, corridors, and passageways. Possibly this expanded rule had its origins in 1890, when, according to a report in The New York Times, the sergeant-at-arms, “under instructions from” third-term Kansas Republican Senator John Ingalls, the president pro tempore, issued an “order” forbidding any person “(except Senators, of course)” from smoking in any corridor in the Senate wing of the capitol. Whereas, pursuant to this order, “[g]entlemen with lighted cigars in sight will be stopped by policemen or doorkeepers when they attempt to cross the line between the central building at the north wing, and given an opportunity to put their cigars out or turn back[,] Senators...will continue to sit in the doorways of the cloak rooms and puff out little clouds of tobacco smoke, to float up for the benefit of the ladies and gentlemen occupying the visitors’ galleries.”

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487 Rules for the Regulation of the Senate Wing of the United States Capitol: Adopted by the Committee on Rules, March 15, 1884, at 8 (1884). See also Standing Rules for Conducting Business of the Senate of the United States 46 (1890).


489 “A Little Steal Stopped,” NYT, Aug. 9, 1890 (2). For further evidence of the difference between the House and Senate mentioning that police made visitors throw away their cigars when approaching the Senate wing, in which no smoking was allowed except in the cloak rooms, see “Plumb and Prohibition,” Galveston Daily News, Aug. 25, 1890 (6:1). The president pro tempore was empowered by the Senate rules to enforce the Rules Committee’s orders for the use of the Senate wing of the capitol. Since Ingalls frequented the smoking room (Willis Hawkins, “Nast in Washington,” LAT, June 22, 1890 (9:1-3)), his animus against tobacco smoke might be puzzling but for a newspaper article many years later that claimed that Ingalls had complained about smoke wafting into the chamber from the corridors or cloakrooms; in fact, the smoke had resulted from burning waste. “Smoked in Senate Chamber,” Washington Post, Feb. 3, 1907 (6). Ingalls was a reactionary, whom the Populists unseated in 1891. Scott McNall, The Road to Rebellion: Class Formation and Kansas Populism, 1865-1900, at 174, 274, 276 (1997). Ironically, several years later, the chief newspaper in his hometown in Kansas referred to the “queer rules” of the Senate under which “[a]lmost hourly some man is asked to stop smoking a cigar” as he walked from the House- to the Senate-controlled half of the capitol: “The American house of lords has shut down upon tobacco smoking in its half of the capitol, save in committee rooms and the senators’ lobbies. It is often comical to watch the
The broader prohibition was prompted by Senator “Pitchfork” Ben Tillman, the white supremacist from South Carolina, who, being “very sensitive to the odor of tobacco,” in February 1913 complained about smoking during the Senate’s executive sessions, but, in the absence of a rule covering the matter, failed to have it banned. He then announced that he planned to introduce a resolution prohibiting smoking at all times in the Senate chamber on the grounds that there was no more reason to permit smoking in closed than in open sessions: “‘Many men object to tobacco smoke and just because they are members of the senate they should not be compelled to sit where they must submit to it.’” 490

Soon thereafter he introduced two identical resolutions to ban smoking in the Senate chamber. 491 A year later, after the Rules Committee had reported the resolution without recommendation, 492 Tillman was finally able to secure its consideration. 493 He sought the ban because four years earlier he had been paralyzed and tobacco smoke began to nauseate him. He was well aware that “a large majority” of senators were smokers, whom, “unfortunately, a pernicious habit has so mastered...that they are nervous and miserable when they do not get the nicotine poison which soothes their nerves. Consequently, as soon as the doors are closed for executive session they light their cigars and puff away, and the Chamber soon has the appearance of a beer garden.” He complained that since the smoke forced him to leave the Chamber, it infringed on his rights as a senator, whereas the smokers could go to the cloakrooms to smoke; similar circumstances prevailed in the Democratic caucus, so that he was “beset with the danger of being driven out of the party and of the Senate itself....” (He nevertheless opined that tobacco was “in moderation....harmless....”) In response to a letter that Tillman wrote in May 1913 to all his colleagues seeking their opinion and urging them to adopt the ban he received replies from almost all; one of their most interesting features was that “the nonsmokers are far more anxious lest they have the appearance of selfishness than some of the smokers.” He had the Senate secretary read an outstanding exemplar of this genre, which not only

American citizen, the independent sovereign of this land of ours, as he is requested by a member of the capitol police to remove the cigar from his mouth.” “Senate Exclusive,” Atchison Daily Globe, June 3, 1896 (2:8).


represented an extreme version of going along to get along in politics, but illustrated, several decades before the zenith of nearly ubiquitous cigarette smoking, the coercive power of social pressure to acquiesce in exposure to secondhand smoke even when the large minority of nonsmokers was keenly aware of negative physical consequences. In the letter non-smoking Vermont Republican Carroll Page replied that “I accept with best possible grace the discomforts that result from the gratification of their [his smoking colleagues’] appetites for tobacco. ... I enjoy making sacrifices for my friends, and regard this as one of the qualities of a gentleman.” Page would also have been pleased to make “any reasonable sacrifice” on Tillman’s behalf, but he wanted to act so that he did not seem to be what he really hoped he was not, “selfish, and I should seem selfish if, disliking the intense smoke of the Senate, which sometimes reaches a density that is quite offensive, I should act from a selfish standpoint and vote against smoking in the Senate.” Tillman also had read aloud the letter of a smoker, New York Republican Elihu Root, a wealthy Wall Street lawyer, who had been secretary of war and secretary of state, and was supremely centrally situated in the U.S. political economy. Root allowed as the informality and freedom of executive sessions, which prevented frictions and unnecessary delay, was “a good deal aided by the fact that the Members are at liberty to smoke.” Though personally willing to “forego [sic] the privilege” if it inconvenienced Tillman, Root—who had received the Nobel Peace Prize the previous year for his contribution to international arbitration—suggested “a general understanding as to the conduct to be observed when you are present without making a new rule.”

Amusingly, during the latter half of the first decade of the twentieth century, while he was secretary of state, Root was “Tobacco’s man in the higher circles of government”: when the Justice Department began considering antitrust prosecution of the American Tobacco Company, its general counsel, Williamson Fuller, “persuaded Root to defend the Tobacco position within the Administration and, if possible to prevent an antitrust suit.” In the event, the Senate agreed to Tillman’s resolution unanimously.
The Prohibition of Smoking Inside Legislatures

The rule was apparently enforced: for example, in 1922, when senator-elect Burton Wheeler created the “unusual but brief spectacle” of smoking a cigar on the Senate floor, another senator sent a page to inform him of the rule.497 This nationally widely reported incident prompted one newspaper to editorialize that the “rule is a never-ending source of joy to anti-tobacco crusaders.... It is creditable to the senate that the rule against smoking is maintained. [O]n the floor of the chamber there is greater dignity when the faces of the speakers are not hidden by clouds of tobacco smoke.”498 And even when Huey Long a decade later walked up the aisle holding a lighted cigar, whose ashes he “flicked...all over the carpeted floor,” as he was being sworn in, everyone understood that his violation of the Senate rule was just one of his many intentional provocations.499

Ironically, if Tillman’s account, according to which even prior to 1914 senators had in fact abstained from smoking in the chamber during public sessions (“[w]hen the executive session is not on they have to go to the cloak rooms to smoke”),500 is credited, senatorial compliance with custom was much stricter than House compliance with a formal written rule.501 Interesting light was shed on the purportedly reflexive conformity by an “unusual scene”502 involving senior Republican Senator Joseph Hawley of Connecticut and Sergeant-at-Arms Richard Bright, who, during his own long Senate career, “had become an authority on the Senate’s rules, procedures, and customs.”503 The incident, which was memorialized by the Chicago Tribune, took place during a public session on the Senate floor in 1897 when Hawley and Bright were seated near Hawley’s desk engaged in conversation:

source for this erroneous assertion.

497“Smokes Cigar in Senate,” NYT, Dec. 8, 1922 (3).

498“Smoking Prohibited,” BT, Jan. 18, 1923 (4:3) (edit.) (reprinted from Pittsburgh Sun).


500Congressional Record 51:4531 (Mar. 9, 1914).

501In 1941 Michigan Republican Representative George Dondero, a stickler for rules, charged that the no-smoking rule was “honored more in its breach than in its observance,” albeit “in most instances behind the rail, nevertheless on the floor.” CR 87:4483 (May 27, 1941). Eight years later he stated that the rules was “grossly violated by many members....” CR 95:537 (Jan. 25, 1949).

502“Jail for Rich Men,” CT, Apr. 21, 1897 (1).

503http://www.senate.gov/artandhistory/history/common/generic/SAA_Richard_Bright.htm
The Prohibition of Smoking Inside Legislatures

One of the most rigid rules of the Senate Chamber prohibits smoking on the floor at any time and no one is more punctillious [sic] about observing the rules of the Senate than Gen. Hawley.... Apparently oblivious of the sensation that his act was about to create Senator Hawley drew a cigar from his pocket and striking a match on his boot heel proceeded to light his fragrant weed and waft the smoke upwards into the gallery. There were few Senators on the floor at the time and those who were there paid no attention to the breach that was being committed by Senator Hawley, and he puffed away for quite a while with a zest that showed that he was enjoying his cigar. There came a pause in the conversation, however, during which the Connecticut Senator took the cigar from his mouth and for the first time seemed to realize the enormity of his offense in breaking through a strict Senate regulation. He looked at the cigar, then he looked at Sergeant-at-Arms Bright in a quizzical, hesitating way as if trying to see what effect this breach would have upon that functionary, and then both their faces were wreathed with smiles. Not a word passed, but Senator Hawley, rising from his seat, took Col. Bright by the arm, and both of them ambled off to a Senate cloak room where the...Senator probably finished his seed leaf cigar in comfort.

That senators were also otherwise known to comply systematically with the custom was evident from a New York Times piece in 1882 that mentioned in passing that a speech that a senator was reading on the floor “most of the Senators could hear only from the cloak-rooms, to which they had retired to smoke their after-lunch cigars.”

Nevertheless, scattered press mention of congressional smoking in the latter part of the nineteenth century suggests Senate violations may have been widespread. For example, in 1873, Grace Greenwood, the pen name of Sara Jane Lippincott, the first woman journalist to report from Washington, where she was a New York Times correspondent for years, complained about the “bad air” in the Senate and House galleries, which was “very much mixed with cigar-smoke from the ante-rooms and the breaths of seventy-five Senators.” And the next year the Times reported that: “Some members have been known to smoke in their seats in the Houses of Congress, and they would often do so if the rules against it were not enforced.

One of the most eloquent strands of evidence documenting senators’
The Prohibition of Smoking Inside Legislatures

willingness to refrain from smoking on the floor and to have recourse instead to the cloak room arose, ironically, in connection with the chamber’s rejection of a proposed ban on smoking in executive branch office buildings. This initiative emerged as an immediate response to the fire on January 10, 1921 that destroyed irreplaceable census manuscript schedules in the Commerce Department building.\(^{509}\) The very next morning Utah Republican Senator Reed Smoot, a right-wing businessman who was both a very high-ranking member of the Mormon church hierarchy and chairman of the Public Building Commission, which was in charge of housing federal government activities, stated on the floor of the Senate that, against the background of four other recent fires in government departments, which had been reportedly “started by employees carelessly throwing down a lighted cigarette stub,” he could “not conceive of a fire starting” in “what was supposed to be a fireproof vault...unless it came from carelessness on the part of an employee, and more than likely from a lighted cigarette stub.” He therefore concluded that “the time has arrived when there should be an order made in all the departments that while employees are at work smoking shall be prohibited.”\(^{510}\) Four days later he introduced a bill embodying this proposal:\(^{511}\)

That any person who shall smoke, or carry a lighted cigar, cigarette, pipe or any form of tobacco for smoking purposes, in any building in the District of Columbia, which is owned by the Government of the United States and used by any executive department or independent establishment of the Government, including the respective field services of such departments or establishments, shall be guilty of a misdemeanor and when convicted thereof shall be fined not more than $50.\(^{512}\)

Without spelling out the basis for such a construction (of “executive department or independent establishment”), The New York Times claimed that a

509“Fire Ruins Records,” \textit{WP}, Jan. 11, 1921 (1): “Census Records Lost in Washington Fire,” \textit{NYT}, Jan. 11, 1921 (1). To historians’ dismay, almost all of the 1890 census manuscript schedules were destroyed, but more by the tons of water that the fire fighters poured on to the fire than by the flames. The documents’ exact condition during the interim before the Commerce Department, with the approval, acquiescence, and authorization of the Census Bureau, Library of Congress, and Congress, physically destroyed them in 1934/35 is unclear. Kellee Blake, “‘First in the Path of the Firemen’: The Fate of the 1890 Population Census,” \textit{Prologue} 28(1):64-81 (Spr. 1996), on http://www.archives.gov/publications/prologue/1996/spring/1890-census-1.html.


511\textit{CR} 60:1440 (Jan 15. 1921) (S. 4853).

“strict interpretation” would also make it unlawful for the president in the White House, senators and representatives in the cloakrooms, and Supreme Court justices in their chambers to smoke. To be sure, though Smoot was said to be intent on pressing for quick action on the bill, it was “certain to be opposed by many Senators of both parties.”

In the event, instead of proceeding with S. 4853 as an independent bill, Smoot secured its adoption by the Appropriations Committee, of which he was the ranking majority member, as an amendment to the sundry civil appropriations bill (H.R. 15422), of which he was in charge. His anti-smoking proposal provoked a multidimensionally revelatory debate lasting almost two hours in the Committee of the Whole on February 5. Interpreting the amendment as not applying to the Congress, Arkansas Democrat Joseph Robinson—the soon-to-be Senate minority and later majority leader, who did not smoke and “suffers a good deal physically when others smoke about him”—wanted to know why the prohibition was confined to executive departments because: “I apprehend that it would work great inconvenience and discomfort to thousands of persons employed in the Government service, and it seems to me it ought to be made universally applicable if adopted rather than applied to certain classes.”

Smoot’s initial response was that the purpose was to protect not only buildings, but also government records, while the Capitol and Senate Office Building were excluded both because they were fireproof and because they housed few records. Robinson contested this latter point, but he was centrally concerned with the alleged unfairness and unreasonableness of senators’ prohibiting the secretary of state, attorney general, and other cabinet secretaries from smoking in their offices while exempting themselves from this ban. At this juncture Smoot shifted his own focus away from fire protection and toward a theme that would not begin to resonate for decades: “I do not think there has ever been anything suggested in the Senate that has met with such popular approval


514 The account of the congressional debate provided by Smoot’s biographer is marred by his ignorance of Smoot’s high-profile bill and his false assumption that Smoot was concealing his authorship of the amendment. Milton Merrill, *Reed Smoot: Apostle in Politics* 162-63 (1990).

515 *CR* 60:2627-28 (Feb. 5, 1921); “Harding May Smoke in the White House,” *NYT*, Feb. 6, 1921 (3). The texts of the bill and the amendment were identical except that the latter extended coverage to buildings that the U.S. Government also rented or leased. According to one news report, the Government was renting the Commerce Department building. “Census Records Lost in Washington Fire,” *NYT*, Jan. 11, 1921 (1).

516 *CR* 60:2629 (Feb. 5, 1921).
The Prohibition of Smoking Inside Legislatures

by the employees of the Government as this very proposition. I have had thousands of letters giving a description of what takes place in the departments, and...there is an immense amount of time lost in all of the departments through the smoking that is going on in them."

He then quoted from a letter from a chief clerk of a division who confided: “The smoking employee thinks more of his smoking than he does of his work. He will stand around with a cigar in his mouth, sometimes a cigarette or a pipe, and talk to others who do not smoke, blowing the smoke in their faces, and he will sit at his desk making the room blue with smoke, like an old-fashioned country tavern, regardless of women or others who may be compelled to work in the same room. ... Furthermore, the loss of time and labor on the part of this army of smokers— they all stick together—as they stand around in the toilet rooms and elsewhere taking their smoke, which occurs regularly several times a day, is far greater than all the losses by fire from smoking.”

The theretofore unrepresented tobacco addicts’ paladin finally stepped forward in the figure of Arizona Democrat Marcus Aurelius Smith, a lame duck with less than a month’s incumbency. Having been defeated for reelection in 1920, in part because of his anti-labor stance, he was about to deliver his libertarian swan song—“my final protest in public life against the effort of...the Congress of the United States to reach out its hand under various pretenses of power, through the interstate commerce clause of the Constitution, or some other device, to go into the homes of the people...and regulate...them all in their conduct, where that conduct, even if it is not exactly the right thing, takes no right from anyone else, and leaves them at least in the possession of some of the natural liberties of man.”

(In fact, because President Wilson appointed Smith to the International Joint Boundary Commission effective the day after his Senate term ended, Senate Democrat Henry Myers wondered whether the “outburst of oratory” by Smith might have something to do with his feeling that the proposed legislation “may encroach upon his personal fondness for the fragrant Habana or the pleasing cigarette” inasmuch as he was to “continue in the service of the Government, in a department of the Government not located in the Capitol....”)

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517 CR 60:2629 (Feb. 5, 1921).
518 CR 60:2631 (Feb. 5, 1921).
520 CR 60:2632 (Feb. 5, 1921).
522 CR 60:2633 (Feb. 5, 1921).
The Prohibition of Smoking Inside Legislatures

Denouncing the amendment “as the entering wedge of a most contemptible and restraining blue law backed by the Government of the United States to suit the particular tastes of different gentlemen who find great pleasure in looking over all parts of the human body to see if they can find a boil”—Smith audibly took comfort from relating the tale of a senator who, after having said that he did not smoke, never chewed, and had never taken a drink of whisky, was asked by another senator, “one of the most distinguished men in this country,” “‘What do you do to smell like a man?’”—he readily conceded his own addiction: “I have tried many a time to stop the use of tobacco. I have found, as far as my health or my happiness is concerned, that it was an impossibility with me.” Deeply empathizing with a secretary of labor or other cabinet official “who likes his cigar,” he rebuked his colleagues who would continue to be entitled to “go through the corridors and smoke” while saying to that executive department head that “he must carry on the multifarious and responsible duties of that great office without the consolation of a cigar,” with the result that they would “drive out of the departments for hours in the day every responsible head. The heads..., if not allowed to smoke in them, will find time, when they feel they have to smoke, outside of the department, with a result ten times worse than any possible condition could be now.” Certain that Smoot’s ban, like other “blue laws,” prohibited men from doing “things that are harmless to other people and harmless to themselves,” Smith floated on a rhetorical tide of bathos to “a final question as to whether the human family shall be deprived of tobacco.” But before his arrival at that destination, he tarried long enough to regale the senate with his impassioned plea not to block the rise of the next generation of tobacco addicts and inhalers of secondhand smoke:

I protest against an effort to raise the great American boy of the future under a glass globe, as you would protect the delicate tints of a frail flower, not letting the winds of heaven visit his damask cheek too roughly. You will thus raise a generation of dudes and nincompoops.

Man must be brought up in his environment. He must feel the touch with other men. [Y]ou can not isolate him..., you can not make him an earthly angel by taking from him those habits exercised among the men with whom he comes in contact, which raise his character as a man....

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523CR 60:2631 (Feb. 5, 1921).
524CR 60:2631 (Feb. 5, 1921). Smith’s position was further developed three quarters of a century later by Brown & Williamson Tobacco Corporation’s chairman and CEO, Thomas Sandefur, who, after swearing that he believed that tobacco was not addictive, responded to Congressman Wyden’s other theatrically brilliantly scripted question as to what he would say to a seven-year-old asthmatic witness whose exposure to secondhand
Smoot’s lapidary response to Smith’s wide-ranging complaints was that it would not hurt the secretary of state to refrain from smoking during business hours.\textsuperscript{525}

Support for Smoot’s amendment came from only two senators. Florida Democrat Park Trammel, that state’s former attorney general and governor, expressed his astonishment that department heads had so little respect for their “women and girl employees...as to permit the men to sit all around among them smoking their cigarettes, their cigars, and their pipes. Many of the rooms in these Government departments may more properly be called smoking rooms than working rooms.” Smith may have been loath to condone disrespect for womanhood, but Trammell’s characterization of a female employee’s tormentor as a “cigarette or pipe fiend” precipitated a lengthy colloquy in the course of which Trammell, who himself smoked, settled on a definition that stamped a man as a “fiend” if he was “such a slave to the pipe or the cigarette” that, as a result of being deprived of the privilege of smoking in his office, he spent three of his seven work hours with his pipe or cigarette out of his office. In the end, rejecting the label “blue laws,” Trammell also denied that an office smoking ban would be unjust to or curtail the liberty of an employee. The senator framed the issue as one of managerial prerogatives: it was simply “the custom when employing people to tell them what it is proposed to do during office hours.” Otherwise, by an inverted logic, “[w]e might as well say it is a restraint of the freedom of speech because, forsooth, some concern that employs a large number of employees prohibits promiscuous conversation during office hours.”\textsuperscript{526}

This same position stressing the need for employers to impose discipline in the interest of productivity underlay the support for Smoot’s amendment offered by Montana Democrat Henry Myers, a former and future state court judge who smoked “a great part of my life, and I like now to see those who are addicted to the habit enjoy a fragrant cigar or soothing pipe.”\textsuperscript{527} Going even further than Trammell he rigidly insisted that “people should have some recreation and

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\textsuperscript{525} CR 60:2632 (Feb. 5, 1921).
\textsuperscript{526} CR 60:2632 (Feb. 5, 1921).
\textsuperscript{527} CR 60:2633 (Feb. 5, 1921).
amusement, but Government employees should have it in their own time and not in the time of the Government. They only work between seven and eight hours a day, and during those hours I think the Government is entitled to their best efforts and all their time and attention. I think they should not mix pleasure and recreation with their work.”

Many decades would pass before empirical studies were conducted on the impact of smoking on workers’ productivity and non-smoking workers became antagonized over extra smoking breaks that employers granted smoking co-workers in workplaces in which smoking was prohibited. However, in 1921, the Senate resolved the controversy on the basis of a substitute for Smoot’s committee amendment offered by New York Republican James Wadsworth. Scion of one of the largest land-owning families in New York, Wadsworth, whose father had been a congressman and whose grandfather had been one of the founders of the Republican Party, was very conservative and opposed liquor prohibition; his opposition to women’s suffrage contributed to loss of his Senate seat in 1926, and when, after a hiatus, he was elected to the House, he became an adamant opponent of the New Deal. The substitute provided that:

The heads of executive departments and independent establishments of the Government are hereby directed to issue and enforce such regulations as will prevent smoking in those portions of buildings owned or leased by the Government in which smoking endangers Government property or constitutes a hindrance to the efficient conduct of Government business.

This new version prompted Democrat Charles Thomas, a former Colorado governor and another lame duck, to get off his chest complaints that he had been storing up about federal civil servants “who are protected by governmental regulations and laws whereby their places are secured for life or during good behavior and whose length of daily service is limited in many instances by seven and in others by eight hours” and who were nevertheless engaged in “deplorable neglect of their duties” (regardless of whether they smoked tobacco) and employed in numbers exceeding those “necessary for the business which is

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528 CR 60:2634 (Feb. 5, 1921).
531 “James Wadsworth, Ex-Senator, 74, Dies,” *NYT*, June 22, 1952 (1).
532 CR 60:2634 (Feb. 5, 1921).
The Prohibition of Smoking Inside Legislatures

transacted.” Consequently, while regarding Wadsworth’s proposal as “much the best method of legislating upon this subject,” Thomas was unable to reconcile himself to what he deemed “[t]he fact that employees can do as they please with impunity under civil-service regulations, whether conformably to them or not, without running the risk of discharge,” which in his view “ma[de] the amendment...somewhat deficient unless it confers power upon the heads of departments to discharge summarily those who are guilty of the violation of these regulations.” He was disappointed to hear Wadsworth state that not only could this rule “not visit summary discharge upon” violators, but—divining Thomas’s real interest—especially that “I do not think we can repeal the civil-service law in this way....” Stymied, Thomas sputtered: “If these employees are so addicted to smoking that they can not quit it...regardless of the duties which their positions require them to discharge, then they should be made to quit....” The only backing that his cri de coeur engendered came from Smith, who proposed fining executive department employees who smoked in working rooms in the presence of others during working hours $10 for the first and second offenses and dismissing them for a third offense. Not even Smoot welcomed this last salvo: revealing that he had never imagined that the Senate would pass his bill, he explained that his real object had been that “publicly this abuse” would be called to the department heads’ attention. He harbored no objection to Wadsworth’s substitute, because it would “have the effect at least of checking for a month or two the outrageous abuses...in the different departments.”

Ironically, after the Senate had devoted two hours to debating the issue of smoking and adopted Wadsworth’s wording “by an overwhelming majority,...immediately two-thirds of the Senators in the chamber sauntered into the cloak room to enjoy their cigars or pipes, as the case might be.” In so doing, however, that large majority continued to comply with the Senate’s custom-based smoking ban in the chamber itself. In spite of the Senate vote, later that month Smoot’s initiative became moot; when the appropriations bill was returned to the House—some of whose smoking members were less punctilious about observing its formal no-smoking rule—the chamber, under the prodding of Iowa Republican and Appropriations Committee Chairman James Good, who opined that the provision “would be a farce” if a department, which already was able to prevent smoking “if it wants to,” did not want to prevent smoking, insisted on disagreeing to the amendment. The pro-tobacco scene on the House floor

533 CR 60:2634-35 (Feb. 5, 1921).
534 “Harding May Smoke in the White House,” NYT, Feb. 6, 1921 (3).
was depicted by the national press: “The House, composed largely of smoking men, stood up last night for the man who smokes peacefully while working at a government desk. There was a shouting of ‘Noes’... Less than a score of members supported” the Senate amendment. Under the compromise worked out by the conference committee, of which Smoot himself was a member, the Senate receded from the Smoot-Wadsworth amendment, thus ending this tentative federal government inroad against the ascendancy of smoking laissez-faire.

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536 “Smokers in House Protect Clerks from Tobacco Ban,” WP, Feb. 25, 1921 (4); “House Upholds Smokers,” NYT, Feb. 25, 1921 (15:5).
537 CR 60:4432, 4499-4500 (Mar. 3, 1921).

1888
## Appendix

### Table 6: No-Smoking Rules Inside State/Territorial Legislatures

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>Body</th>
<th>Type of Prohibition</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>1861</td>
<td>S</td>
<td>Rule introduced: “Smoking shall not be allowed in the Senate chamber during the time the Senate is in session.” Senate on January 18 “‘was principally occupied with a discussion of a new rule....’ One member thought the Senate should become accustomed to smoke, for in less than six months they would smell much smoke of a sulphurous character, and it was well to begin on tobacco smoke. The rule was finally withdrawn.”</td>
</tr>
<tr>
<td></td>
<td>1873</td>
<td>S</td>
<td>Resolution: “That it shall be considered as a standing rule of the Senate that no smoking shall be allowed in the Senate chamber.”</td>
</tr>
<tr>
<td></td>
<td>1896</td>
<td>H</td>
<td>Rule: “No person shall be allowed to smoke within the house, lobby or gallery.”</td>
</tr>
<tr>
<td></td>
<td>1901</td>
<td>CC</td>
<td>Rule: “No person shall be allowed to smoke within the house, lobby or gallery.”</td>
</tr>
<tr>
<td>AK</td>
<td>1915</td>
<td>H</td>
<td>Rule: “No person shall be allowed to smoke in the hall or lobby thereof during the session.”</td>
</tr>
<tr>
<td>AZ</td>
<td>1887</td>
<td>H</td>
<td>“On motion of Mr. Worres the Sergeant-at-Arms was instructed to have several large placards printed, prohibiting smoking in the Assembly chamber or lobby during the time the House is in session.”</td>
</tr>
<tr>
<td></td>
<td>1897</td>
<td>H</td>
<td>Resolution: “That no smoking be permitted on the floor of the House during all sessions of the House, and that the Sergeant-at-Arms be instructed to enforce the same in the lobby.” Adopted</td>
</tr>
<tr>
<td></td>
<td>1905</td>
<td>C</td>
<td>Resolution: “that smoking shall not be indulged in by members of the Council while in the Council Chamber, nor shall any other persons be permitted to smoke in the Council Chamber while the Council is in session...[a]nd...that the President of the Council instruct the Sergeant-at-Arms to strictly enforce this regulation.” Adopted 11 to 1.</td>
</tr>
<tr>
<td></td>
<td>1915</td>
<td>H</td>
<td>Resolution: “That no smoking be permitted on the floor of the House during all sessions of the House and that the Sergeant-at-Arms be instructed to enforce the same.” Carried 25 to 10. Resolution: “[T]hat smoking is hereby permitted on the floor of the House during all sessions of the House.” Carried by rising vote.</td>
</tr>
<tr>
<td>AR</td>
<td>1871</td>
<td>S</td>
<td>Resolution passed to prohibit smoking in the Senate chamber. Rule: “[N]or shall smoking be allowed in the Senate Chamber, hall or gallery, during sessions of the Senate.”</td>
</tr>
<tr>
<td></td>
<td>1901</td>
<td>S</td>
<td>Rule: “Smoking in the House During session hours is strictly forbidden.”</td>
</tr>
<tr>
<td></td>
<td>1907</td>
<td>H</td>
<td></td>
</tr>
</tbody>
</table>

1889
<table>
<thead>
<tr>
<th>Year</th>
<th>Action</th>
<th>Resolution/Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>1851</td>
<td>A</td>
<td>Resolution: “<strong>WHEREAS</strong>, this House has no rule prohibiting smoking in the Hall during business hours; and <strong>WHEREAS</strong>, this improper practice is indulged in to a disreputable extent, not only by members but by others having privileges within the Bar of this House: Therefore, <strong>Resolved</strong>, That it be made the duty of the Speaker of this House to forbid any person from smoking during the sessions of the House; also, the Speaker shall give his order to the Sergeant-at-Arms and Doorkeeper not to suffer a member or other person to come within the Bar in the act of smoking, or suffer any one to smoke within the Hall during business hours.” Substitute Resolution: “That smoking shall not be permitted within the Hall during the sessions of the Assembly.” Resolution and substitute both tabled 17-11.</td>
</tr>
<tr>
<td>1851</td>
<td>S</td>
<td>Ordered by Motion: “[N]either smoking nor chewing will be allowed within the bar of the Senate, during the remainder of the present session.”</td>
</tr>
<tr>
<td>1854</td>
<td>A</td>
<td>Rule: “No smoking shall be allowed within the Assembly Chamber during the session of the House.”</td>
</tr>
<tr>
<td>1854</td>
<td>S</td>
<td>“Mr Coffroth submitted the following as Rule 47. ‘Smoking shall not be allowed at any time in the Senate Chamber or lobby.’ Mr. Smith submitted as a substitute: ‘No smoking shall be allowed within the bar of the Senate during its sessions.’” “[T]hey were referred to the Committee on Vice and Immorality.” The committee reported that it “would recommend adoption of the Rule as originally introduced, in preference to the substitute.” “The report was accepted and laid on the table.”</td>
</tr>
<tr>
<td>1862</td>
<td>S</td>
<td>Senate Rules for trial of District Judge James Hardy: “No smoking shall be allowed within the bar of the Senate during said trial.” Adopted by roll-call vote 20 to 8.</td>
</tr>
<tr>
<td>1863</td>
<td>S</td>
<td>“Mr Perkins offered the following resolution: <strong>Resolved</strong>, That no smoking shall be allowed in the Senate Chamber.” Adopted by roll-call vote 31 to 5.</td>
</tr>
<tr>
<td>1878</td>
<td>S</td>
<td>“By Mr. Satterwhite: <strong>Resolved</strong>, That the Sergeant-at-Arms be instructed to allow no smoking in the Chamber at any time.” Adopted</td>
</tr>
<tr>
<td>1891</td>
<td>S</td>
<td>“By Senator Maher: <strong>WHEREAS</strong>, The rules of good breeding and health require that smoking be not allowed in the Chamber; therefore, be it <strong>Resolved</strong>, That the Sergeant-at-Arms be instructed to arrest all Senators smoking within the bar of the Senate.” Adopted</td>
</tr>
<tr>
<td>1905</td>
<td>S</td>
<td>Rule: “No smoking shall be allowed within the Senate Chamber.”</td>
</tr>
<tr>
<td>1911</td>
<td>A</td>
<td>Rule: “No smoking shall be allowed within the Assembly Chamber during the session of the House; <strong>provided</strong>, that during night session, this rule may be suspended by a vote of the majority of the members present, without notice or reference to committee.”</td>
</tr>
<tr>
<td>1921</td>
<td>S</td>
<td>Rule: “No smoking shall be allowed within the Senate Chamber when objected to by the presiding officer or by any five members.”</td>
</tr>
</tbody>
</table>
The Prohibition of Smoking Inside Legislatures

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>House</th>
<th>Resolution/Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>CO</td>
<td>1865</td>
<td>H</td>
<td>Rule: “no smoking shall be allowed in the House.”</td>
</tr>
<tr>
<td></td>
<td>1875</td>
<td>CC</td>
<td>Rule: “no smoking shall be allowed in the hall of the Convention.”</td>
</tr>
<tr>
<td></td>
<td>1876</td>
<td>C</td>
<td>Resolution: “That no smoking be permitted in the Council Chamber during the sessions of the Council.”</td>
</tr>
<tr>
<td></td>
<td>1887</td>
<td>S</td>
<td>Motion carried “that the senators smoke, and they did, Chairman Christian smoking as much as any one.”</td>
</tr>
<tr>
<td></td>
<td>1895</td>
<td>S</td>
<td>Rule: “During the sessions of the Senate, smoking within the Senate chamber shall not be allowed.”</td>
</tr>
<tr>
<td></td>
<td>1895</td>
<td>H</td>
<td>Rule: “[N]o member or other person shall smoke in the lobbies or upon the floor of the House, and the Sergeant-at-Arms and the Doorkeeper are charged with the strict enforcement of this rule.”</td>
</tr>
<tr>
<td>CT</td>
<td>1918</td>
<td>H&amp;S</td>
<td>Rejected resolution to prohibit smoking in Hall of House or Senate chamber during session hours.</td>
</tr>
<tr>
<td>DE</td>
<td>1847</td>
<td>H</td>
<td>Amendment to resolution “That the Sergeant-at-Arms be directed to prevent smoking in the hall of the House” was lost.</td>
</tr>
<tr>
<td></td>
<td>1901</td>
<td>H</td>
<td>Resolution to prohibit smoking in the House chamber while the House in session and instructing the sergeant-at-arms to enforce rule adopted last day of session.</td>
</tr>
<tr>
<td></td>
<td>1907</td>
<td>H</td>
<td>Motion prevailed “that no smoking be allowed in the House while in session.”</td>
</tr>
<tr>
<td></td>
<td>1909</td>
<td>H</td>
<td>Resolution: “That any member, attachee or visitor who indulges in smoking in the hall of the House of Representatives while in session, shall be arrested by the sergeant-at-arms.”</td>
</tr>
<tr>
<td></td>
<td>1917</td>
<td>H</td>
<td>Resolution: “that from and after the passage of this resolution no person whether or not he shall be a member of the General Assembly shall smoke in the Hall of the House of Representatives while the House is in session.” Motion lost.</td>
</tr>
<tr>
<td></td>
<td>1919</td>
<td>S</td>
<td>Resolution: “that smoking within the Senate Chamber shall be and is hereby prohibited during such times as the Senate shall be in session.”</td>
</tr>
<tr>
<td>FL</td>
<td>1854</td>
<td>H</td>
<td>Motion “that Sergeant-at-Arms be instructed to inform persons within and without the bar that smoking is not permitted in the Representative Hall during the sitting of the House” was lost.</td>
</tr>
<tr>
<td></td>
<td>1893</td>
<td>H</td>
<td>“Resolved, That smoking shall not be allowed in the hall during the session of the Legislature.” Adopted</td>
</tr>
<tr>
<td></td>
<td>1895</td>
<td>H</td>
<td>Resolution No. 11: “That smoking is strictly prohibited in the House of Representatives while in session.” Adopted</td>
</tr>
<tr>
<td></td>
<td>1903</td>
<td>H</td>
<td>Rule: “No person shall be allowed to smoke in the hall while the House is in session.”</td>
</tr>
<tr>
<td></td>
<td>1913</td>
<td>S</td>
<td>Rule: “[D]uring the session of the Senate no Senator shall...smoke upon the floor of the Senate....”</td>
</tr>
<tr>
<td>GA</td>
<td>1857</td>
<td>H</td>
<td>Rule: “No member shall smoke in the House....”</td>
</tr>
<tr>
<td></td>
<td>1891</td>
<td>S</td>
<td>Rule: “No smoking shall be allowed in the Senate Chamber during the Sessions of the Senate....”</td>
</tr>
</tbody>
</table>
The Prohibition of Smoking Inside Legislatures

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>Body</th>
<th>Rule/Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>HI</td>
<td>1901</td>
<td>H</td>
<td>Rule: “No member or officer shall smoke within the Hall of the House during any of the sessions of the House.”</td>
</tr>
<tr>
<td></td>
<td>1901</td>
<td>S</td>
<td>Motion carried “that the rules be suspended in order to allow smoking during the Senate’s wait for the message from the governor.”</td>
</tr>
<tr>
<td></td>
<td>1911</td>
<td>S</td>
<td>Rule: “No member or other officer shall smoke within the Senate Chamber during any of the sessions of the Senate.”</td>
</tr>
<tr>
<td>ID</td>
<td>1867</td>
<td>H</td>
<td>Rule: “No smoking shall be allowed within the Assembly Chamber during the session of the House.”</td>
</tr>
<tr>
<td></td>
<td>1891</td>
<td>H</td>
<td>Rule: “No smoking shall be allowed in the house while in session.”</td>
</tr>
<tr>
<td></td>
<td>1901</td>
<td>H</td>
<td>Rule: “No smoking shall be allowed in the representative chamber, gallery or any committee room.”</td>
</tr>
<tr>
<td></td>
<td>1907</td>
<td>S</td>
<td>Rule: “During the session of the senate, smoking within the Senate Chamber shall not be allowed, nor in a committee room during a sitting without the consent of the committee.”</td>
</tr>
<tr>
<td></td>
<td>1917</td>
<td>H</td>
<td>Rule: “No smoking shall be allowed in the Representative chamber or gallery.”</td>
</tr>
<tr>
<td>IL</td>
<td>1818</td>
<td>CC</td>
<td>Rule: “No person shall be permitted to smoke tobacco in the convention while in session.”</td>
</tr>
<tr>
<td></td>
<td>1834</td>
<td>S</td>
<td>Rule: “No person shall be permitted to smoke tobacco in the Senate Chamber while in session.”</td>
</tr>
<tr>
<td></td>
<td>1840</td>
<td>H</td>
<td>Rule: “That no smoking be allowed in the Hall during the hours of the session.”</td>
</tr>
<tr>
<td>IN</td>
<td>1850</td>
<td>CC</td>
<td>Rule: “No person shall be allowed to smoke within the Hall, nor within the lobbies or galleries thereof.”</td>
</tr>
<tr>
<td></td>
<td>1858</td>
<td>S</td>
<td>Resolution: “That the Door-keeper be directed to prevent smoking in the Senate Chamber during session hours.”</td>
</tr>
<tr>
<td></td>
<td>1861</td>
<td>S</td>
<td>Resolution: “That the Doorkeeper is requested to prevent smoking in the lobbies while the Senate is in session.”</td>
</tr>
<tr>
<td></td>
<td>1879</td>
<td>S</td>
<td>Rule: “No smoking will be allowed in the Senate chamber before, during, or after the sittings thereof.”</td>
</tr>
<tr>
<td></td>
<td>1893</td>
<td>H</td>
<td>Rule: “It shall be the duty of the Doorkeeper...to prevent smoking in the halls and lobbies at all times....”</td>
</tr>
<tr>
<td>IA</td>
<td>1839</td>
<td>H</td>
<td>Resolution: “That no person shall be allowed to smoke a pipe or cigar in this hall during the sittings of the House of Representatives.”</td>
</tr>
<tr>
<td></td>
<td>1840</td>
<td>C</td>
<td>Resolution: “That smoking in the hall of the Council, during session hours, be prohibited.”</td>
</tr>
<tr>
<td></td>
<td>1884</td>
<td>H</td>
<td>Rule: “nor shall any person be permitted to smoke on the floor of the House or in the galleries at any time.”</td>
</tr>
<tr>
<td></td>
<td>1886</td>
<td>S</td>
<td>Rule: “Smoking in the Senate Chamber is hereby prohibited. And any officer or employe who shall indulge in smoking while on duty in the Senate Chamber or doorways leading thereto, shall thereby subject himself to liability of discharge.”</td>
</tr>
<tr>
<td></td>
<td>1927</td>
<td>S</td>
<td>Rule: Repealed</td>
</tr>
<tr>
<td></td>
<td>1933</td>
<td>H</td>
<td>Rule: Repealed</td>
</tr>
</tbody>
</table>

1892
# The Prohibition of Smoking Inside Legislatures

<table>
<thead>
<tr>
<th>Year</th>
<th>Assembly</th>
<th>Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>1859</td>
<td>CC</td>
<td>Resolution: “That no smoking shall be allowed in this Hall, either within or without the bar, and that the Sergeant-at-Arms be instructed to strictly enforce this rule.”</td>
</tr>
<tr>
<td>1861</td>
<td>S</td>
<td>Resolution: “That the smoking of tobacco be prohibited in the Senate Chamber during the time of session.”</td>
</tr>
<tr>
<td>1862</td>
<td>H</td>
<td>Resolution: “That smoking shall not be allowed in this room while the House is in session.”</td>
</tr>
<tr>
<td>1874</td>
<td>H</td>
<td>“Resolved, That smoking in the Hall of Representatives be and hereby is strictly forbidden while the House is in session. Mr. Drenning moved to amend by substituting the words, ‘no smoking will be allowed in this hall at any time.’ The motion as amended revailed, and the resolution was adopted.”</td>
</tr>
<tr>
<td>1874</td>
<td>S</td>
<td>“Resolved, That smoking in the Senate chamber, or in the wash-room connected therewith, be disallowed during the sittings of the Senate, in any capacity whatever, and that we request the President of the Senate to see that the provisions of this resolution are strictly enforced.” Adopted after being amended to strike out “wash-room” and substitute “Sergeant-at-Arms” for “President.”</td>
</tr>
<tr>
<td>1875</td>
<td>H</td>
<td>“Resolved, That smoking is entirely prohibited in the hall of the House of Representatives during the present session.” Adopted.</td>
</tr>
<tr>
<td>1876</td>
<td>S</td>
<td>Resolved, That smoking be absolutely prohibited in the Senate chamber, and the post office and cloak room connecting with said chamber, during the actual sessions of the Senate, and for half an hour previous to the meetings of the Senate; and that the sale or keeping for sale of cigars or tobacco within any of the rooms aforesaid be prohibited at all times; and that the Sergeant-at-Arms be instructed and required to enforce the requirements of this resolution strictly. Senator Crichton moved to amend so that spitting tobacco spit on the floor of the Senate chamber be also prohibited, which motion to amend did not prevail. The question recurring on the motion to adopt the resolution a vote being had, the motion to adopt prevailed.”</td>
</tr>
<tr>
<td>1881</td>
<td>H</td>
<td>“Mr. Snoddy moved that it be made a standing order, that no smoking be allowed in the building. The motion prevailed.”</td>
</tr>
<tr>
<td>1883</td>
<td>H</td>
<td>Rule: “No person shall be allowed to smoke in the hall, or in the rooms opening into the hall, or the galleries, while the house is in session.”</td>
</tr>
<tr>
<td>1889</td>
<td>H</td>
<td>Resolution: “Whereas, Rule 67, of the rules governing this body, declares that ‘no person shall be allowed to smoke in the hall, or in the rooms opening into the hall, or the galleries, while the house is in session’; and Whereas, Said rule is being constantly violated, to the great discomfort of many members; therefore, be it Resolved, That the Sergeant-at-Arms be duly instructed to enforce said rule.” Adopted.</td>
</tr>
<tr>
<td>1889</td>
<td>S</td>
<td>Rule: “No person shall be permitted to smoke tobacco in the Senate chamber or the galleries.”</td>
</tr>
<tr>
<td>1891</td>
<td>H</td>
<td>Rule: “No person shall be allowed to smoke in the hall, or in the rooms opening into the hall, or the galleries.”</td>
</tr>
<tr>
<td>1920</td>
<td>S</td>
<td>Rule: “No person shall be permitted to smoke in the Senate chamber or the galleries during the session of the Senate.”</td>
</tr>
<tr>
<td>1921</td>
<td>H</td>
<td>Rule: “No person shall be allowed to smoke in the hall, or the galleries, while the House or committee of the whole is in session.”</td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>Year</th>
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<th>Resolution/Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>1876</td>
<td>H</td>
<td>Resolutions: “That members of the House be requested to abandon the habit of smoking during business hours in this Hall.” “That hereafter smoking within the Chamber or lobbies shall not be permitted.”</td>
<td></td>
</tr>
<tr>
<td>1892</td>
<td>H</td>
<td>“WHEREAS, Tobacco smoke is offensive to many persons; therefore, be it Resolved by the House of Representatives of Kentucky, That the Sergeant-at-Arms is hereby instructed to prohibit smoking in the hall at all times during this session of the Legislature.”</td>
<td></td>
</tr>
<tr>
<td>1892</td>
<td>S</td>
<td>Resolution: “That the Sergeant at Arms is hereby directed to prohibit smoking in the Senate chamber after 9:30 A.M. until the Senate adjourns.”</td>
<td></td>
</tr>
<tr>
<td>1906</td>
<td>S</td>
<td>Resolution: “Whereas, tobacco smoke is offensive, obnoxious, and unbearable to many members of the Senate; and, Whereas, smoking in the presence of ladies is ill-mannerly and ungentlemanly; and, Whereas the presence of good women at our session is appreciated and desired by the members; and, Whereas, smoking is productive of foul, filthy and impure air, which is destructive of the health and comfort of the members. Therefore, be it resolved that smoking in this hall be prohibited, and the Sergeant-at-Arms of the Senate is hereby requested to rigidly enforce this rule, ‘No Smoking Allowed.’”</td>
<td></td>
</tr>
<tr>
<td>1916</td>
<td>S</td>
<td>Rule: “No smoking shall be allowed in the Senate Chamber, except under the galleries.”</td>
<td></td>
</tr>
<tr>
<td>1864</td>
<td>S</td>
<td>Resolution: “that hereafter no smoking be allowed in the Senate chamber while the Senate is in session.”</td>
<td></td>
</tr>
<tr>
<td>1879</td>
<td>CC</td>
<td>Rule: “No smoking shall be allowed in the hall of the Convention while it is in session.”</td>
<td></td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>Year</th>
<th>House</th>
<th>Action</th>
<th>Quote</th>
</tr>
</thead>
<tbody>
<tr>
<td>1889</td>
<td>H</td>
<td>Presentation of order</td>
<td>“no smoking be allowed in this hall during the remainder of the session; any member violating this order shall be subject to a fine of five dollars” was postponed indefinitely despite presenter’s rhetorical question as to “how the young men in this house who don’t smoke can get down to work when they are half stifled by tobacco smoke.”</td>
</tr>
<tr>
<td>1889</td>
<td>S</td>
<td>Order adopted</td>
<td>“the House concurring, the Messenger of the Senate be directed to have printed in bold type and to post in conspicuous places, in both the Senate Chamber and the House of Representatives, placards requesting gentlemen not to smoke in the halls or galleries.”</td>
</tr>
<tr>
<td>1889</td>
<td>H</td>
<td>After concurring in the Senate order, the House adopted a motion</td>
<td>for an order that “the clerk be directed to have the unsightly signs now posted upon the walls of this House removed forthwith.”</td>
</tr>
<tr>
<td>1917</td>
<td>H</td>
<td>Rule</td>
<td>“Smoking is not allowed in the hall of the House while the House is in session.”</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Rep. and future Gov. Percival Baxter explained his amendment to the House Rules:</td>
<td>“in my opinion it detracts a good deal from the dignity of the House if the members smoke while in session. I also think it lessens the efficiency of the House. We are going to have serious work here and we need clear heads. One of the first requisites for a clear head is pure air; and I believe we will do better work and that our health will be better, if we refrain from smoking. Also, we often have ladies present as our guests, and it seems to me it is not quite courteous to smoke in their presence.”</td>
</tr>
<tr>
<td>1920</td>
<td>H</td>
<td>Rule</td>
<td>“Smoking is prohibited in the Hall of the House of Representatives while the House is in session.”</td>
</tr>
<tr>
<td>1921</td>
<td>H</td>
<td>House Speaker:</td>
<td>“By your vote this morning, you adopted the rules of the preceding session. The Chair will call the attention of the House to a rule which prohibits smoking in the House of Representatives during business sessions. This rule will be implicitly obeyed by the members and no less by the guests of the House.”</td>
</tr>
<tr>
<td>1888</td>
<td>H</td>
<td>On motion</td>
<td>it was ordered “that no smoking be permitted in this Hall during the session of this House.”</td>
</tr>
<tr>
<td>1906</td>
<td>H</td>
<td>“Ordered, That the use of cigars, cigarettes and pipes be prohibited in this chamber while the House is in session, and that the doorkeepers allow no one to enter if using either [sic] of them. That the Sargent [sic]-at-Arms and pages see that this order is enforced.”</td>
<td></td>
</tr>
</tbody>
</table>
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<tr>
<th>State</th>
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<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>MA</td>
<td>1877</td>
<td>H</td>
<td>Order offered: “That no smoking be allowed in the rooms and halls connected with the Representatives' Chamber, and that the Sergeant-at-Arms be instructed to strictly enforce this order.” Indefinitely postponed.</td>
</tr>
<tr>
<td></td>
<td>1895</td>
<td>H</td>
<td>Rule: “No smoking shall be allowed in the writing room of the House or in the ladies’ parlor.”</td>
</tr>
<tr>
<td></td>
<td>1898</td>
<td>S</td>
<td>Rule: “Smoking shall not be permitted in the reception room.”</td>
</tr>
<tr>
<td>MI</td>
<td>1850</td>
<td>H</td>
<td>Resolution: “That the committee on education be instructed to inquire whether the practice of smoking in this hall be not detrimental to the health of members.” Committee Report: “If that which produces nausea of the most disagreeable kind, if that which pollutes the air so as to be unfit for the respiration demanded by nearly a hundred pair of lungs from six to eight hours a day...be detrimental to health, then there can be no doubt that the smokers and the smoked are all in the same category of danger, from which there is no escape for the latter, but in the forbearance and gentlemanly consideration of the former.”</td>
</tr>
<tr>
<td></td>
<td>1861</td>
<td>H</td>
<td>Resolution (unanimously adopted): “That the practice of smoking in this Hall is ungentlemanly, prejudicial to the health of members, and disgusting to those who do not indulge in the filthy and disgusting habit.”</td>
</tr>
<tr>
<td></td>
<td>1863</td>
<td>H</td>
<td>Resolution (unanimously adopted): “That the atmosphere of this Hall is sufficiently impure without the introduction of the poisonous fumes of tobacco smoke; and that the members of this House be requested to desist from that practice in this Hall and its ante-rooms, as a nuisance to the majority of the House.”</td>
</tr>
<tr>
<td></td>
<td>1869</td>
<td>H</td>
<td>Resolution: “That no smoking shall be hereafter allowed upon the floor of this House, by any members or employés of this House, during the session of this Legislature.”</td>
</tr>
<tr>
<td></td>
<td>1873</td>
<td>S</td>
<td>Resolution: “That no smoking be permitted in the Senate Chamber during the present session of the Legislature.”</td>
</tr>
<tr>
<td></td>
<td>1901</td>
<td>S</td>
<td>Rule: “Smoking shall not be allowed in the senate chamber during the time the senate is in session, and the presiding officer shall enforce the rule.”</td>
</tr>
<tr>
<td>MN</td>
<td>1859</td>
<td>H</td>
<td>Resolution: “That no smoking be allowed in the Hall of this House previous to adjournment on each day.”</td>
</tr>
<tr>
<td></td>
<td>1889</td>
<td>S</td>
<td>Rule: “No senator or officer of the Senate, or other person, shall be permitted to smoke in the Senate chamber during the session of the Senate.”</td>
</tr>
<tr>
<td></td>
<td>1889</td>
<td>H</td>
<td>Rule: “No person shall be permitted to smoke in the hall of the house while in session.”</td>
</tr>
<tr>
<td>MS</td>
<td>1870</td>
<td>H</td>
<td>Rule: “No smoking shall be allowed in the Hall during the hours of session.”</td>
</tr>
<tr>
<td></td>
<td>1890</td>
<td>CC</td>
<td>Rule: “nor shall any smoking be allowed in the hall of the Convention, during its session.”</td>
</tr>
</tbody>
</table>

1896
### The Prohibition of Smoking Inside Legislatures

<table>
<thead>
<tr>
<th>Year</th>
<th>Body</th>
<th>Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>1839</td>
<td>S</td>
<td>Resolution: “[T]hat no person be allowed to smoke cigars or tobacco in any manner in this Hall, or lobby, during the setting hours.”</td>
</tr>
<tr>
<td>1845</td>
<td>S</td>
<td>Resolution: “That smoking is not allowed during the remainder of the session, within the Senate Chamber, and the door-keeper is authorized to prevent the same.”</td>
</tr>
<tr>
<td>1851</td>
<td>H</td>
<td>Resolution: “That smoking tobacco shall not be allowed hereafter in the hall of the House of Representatives, and that the Speaker be instructed to notify the House of the tenor of this resolution.”</td>
</tr>
<tr>
<td>1852</td>
<td>H</td>
<td>“Resolved, by the House of Representatives, that there shall be no more smoking allowed in the House or about the door of said House, during the sitting of the present extra session.”</td>
</tr>
<tr>
<td>1853</td>
<td>H</td>
<td>Resolution: “That the smoking of cigars and pipes be prohibited in the Hall of Representatives, in session hours, during the present session of the General Assembly, nor shall members of this House, take grog during the sitting of the House.” Resolution instructing rules committee to incorporate this rule in the rules they report for government of the House rejected.</td>
</tr>
<tr>
<td>1855</td>
<td>S</td>
<td>“Resolved, That there shall be no smoking in the House, during the Joint Session” (to elect Bank of Missouri presidents and directors).</td>
</tr>
<tr>
<td>1855</td>
<td>H</td>
<td>“Resolved, That smoking shall be prohibited in the Hall of the House of Representatives during the sessions thereof.”</td>
</tr>
<tr>
<td>1857</td>
<td>S</td>
<td>“Resolved, That smoking within the Senate Chamber be, and the same is, hereby forbidden during the session of the Senate.”</td>
</tr>
<tr>
<td>1857</td>
<td>H</td>
<td>“Resolved, That, in the sense of this House, it is proper for the Speaker to prevent smoking within this Hall, and that his efforts to do so will be approved by this House.” Read first time and, being a proposition to amend House rules, under a House rule, it lay over and was never taken up again.</td>
</tr>
<tr>
<td>1861</td>
<td>H</td>
<td>“Resolved, That no member or officer of this House, and no person not a member thereof, be allowed to smoke in the Hall of the House while the House is in session. Resolved, That the Speaker and all other officers of this House be required to enforce the foregoing resolution.”</td>
</tr>
<tr>
<td>1861</td>
<td>SC</td>
<td>Rule: “No member or other person shall be permitted to smoke within the hall or lobby at any time.”</td>
</tr>
<tr>
<td>1869</td>
<td>S</td>
<td>“Resolved, That notice be given that smoking is not allowed within the Hall while the Senate is in session.”</td>
</tr>
<tr>
<td>1873</td>
<td>S</td>
<td>Rule: “No smoking shall be allowed within the Senate Chamber while the Senate is in session.”</td>
</tr>
<tr>
<td>1883</td>
<td>S</td>
<td>Rule: “No smoking shall be allowed in the Senate chamber between 9 o’clock in the morning and the final adjournment of the Senate for the day.”</td>
</tr>
<tr>
<td>1883</td>
<td>H</td>
<td>Rule: “Speaker...shall preserve decorum and order and prevent smoking in the hall....”</td>
</tr>
<tr>
<td>1887</td>
<td>S</td>
<td>Rule: “No smoking shall be allowed in the Senate Chamber.”</td>
</tr>
<tr>
<td>1917</td>
<td>S</td>
<td>Rule: “Smoking shall not be allowed in the Senate chamber.”</td>
</tr>
<tr>
<td>1921</td>
<td>H</td>
<td>Resolution: “Whereas, Rule 7 [sic; should be 6] has been put into force prohibiting smoking; therefore, be it Resolved, That the ash trays ordered for desks be sold as junk and funds derived from such sale be returned to contingent fund of the House.” Failed of adoption.</td>
</tr>
</tbody>
</table>

1897
### The Prohibition of Smoking Inside Legislatures

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>Session</th>
<th>Passage</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>MT</td>
<td>1869</td>
<td>H</td>
<td>“Resolved, That there be no smoking allowed inside the bar of this House. Carried.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1883</td>
<td>H</td>
<td>“Resolved: That the Sergeant-at-Arms of this House be instructed to suppress smoking within the bar of this House during the sessions thereof.” Adopted.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1895</td>
<td>H</td>
<td>Rule: “during the session of the House no member shall wear his hat...or smoke upon the floor of the House; neither shall any other person be allowed to smoke on the floor of the House at any time; and the Sergeant-at-Arms and Doorkeeper are charged with strict enforcement of this clause.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1907</td>
<td>H</td>
<td>Rule: “Loud talk or smoking shall be discontinued on request of the Speaker.” Adopted.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1911</td>
<td>H</td>
<td>Motion that “after this date the smoking of cigarettes be prohibited in the House” tabled.</td>
<td></td>
</tr>
<tr>
<td>NE</td>
<td>1858</td>
<td>H</td>
<td>Resolution: “That no member be allowed to smoke within the bar during the time the House is in session.” Laid over.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1871</td>
<td>H</td>
<td>Rule: “there shall be no smoking in the bar or gallery of this House while in session.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1873</td>
<td>S</td>
<td>Rule: “No smoking shall be allowed in the Senate Chamber or galleries during the session of the Senate.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1877</td>
<td>H</td>
<td>Rule: “The speaker...shall have general direction of the hall, and permit no smoking therein.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1917</td>
<td>H</td>
<td>Rule: “The speaker...shall not permit smoking while the house is in session.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1931</td>
<td>H</td>
<td>Rule: “No smoking shall be allowed in the house chamber, lobby, or gallery, during session [sic] of the house or its committee of the whole.”</td>
<td></td>
</tr>
<tr>
<td>NV</td>
<td>1864</td>
<td>A</td>
<td>Rule: “No smoking shall be allowed within the Assembly Chamber during the session of the House.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1864</td>
<td>S</td>
<td>Rule: “Smoking shall not be allowed within the Senate chamber during the session of the Senate.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1923</td>
<td>S</td>
<td>Rule: Repealed</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1931</td>
<td>H</td>
<td>Rule: Repealed</td>
<td></td>
</tr>
<tr>
<td>NH</td>
<td>1931</td>
<td>H</td>
<td>Apparently by custom smoking was prohibited in the House chamber for some period before 1931 since that year the House adopted a resolution that “smoking be permitted in the House for the remainder of the 1931 session.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1943</td>
<td>H</td>
<td>Resolution: “in recognition of the dignity of our position as members of the state government, smoking during the time the House is in session shall not be allowed.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1949</td>
<td>S</td>
<td>Apparently by custom smoking was prohibited in the Senate before 1949 since on July 19, 1949, “smoking was permitted in the Senate by its members during the balance of today’s session.”</td>
<td></td>
</tr>
<tr>
<td>NJ</td>
<td>1872</td>
<td>A</td>
<td>Rule: “It shall be the duty of the Sergeant-at-Arms, at all times, not to allow any person to smoke in the Assembly Chamber.”</td>
<td></td>
</tr>
</tbody>
</table>
### The Prohibition of Smoking Inside Legislatures

<table>
<thead>
<tr>
<th>State</th>
<th>Year(s)</th>
<th>Body</th>
<th>Rule/Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>NM</td>
<td>1899</td>
<td>H</td>
<td>“No person shall be allowed to smoke tobacco in the chamber of the galleries while the House is in session.”</td>
</tr>
<tr>
<td>NY</td>
<td>1859</td>
<td>A</td>
<td>Resolution: “Whereas, the smoking of tobacco upon this floor is exceedingly offensive, therefore Resolved, That the Sergeant-at-Arms and Door-keepers be, and are hereby directed to prevent any smoking, either on this floor or in any room adjacent thereto.”</td>
</tr>
<tr>
<td></td>
<td>1867</td>
<td>S</td>
<td>Resolution: “That smoking be strictly prohibited in any of the rooms or ante-rooms of the Senate while the Senate is in session, and that the Sergeant-at-Arms and his assistant be directed to see this resolution strictly enforced.”</td>
</tr>
<tr>
<td>NC</td>
<td>1875</td>
<td>CC</td>
<td>Rule: “No smoking shall be allowed within the hall during sessions.”</td>
</tr>
<tr>
<td></td>
<td>1895</td>
<td>S</td>
<td>Rule: “No smoking shall be allowed within the Senate Chamber during the sessions.”</td>
</tr>
<tr>
<td></td>
<td>1895</td>
<td>H</td>
<td>Rule: “Smoking shall not be allowed in the hall.”</td>
</tr>
<tr>
<td>ND</td>
<td>1889</td>
<td>CC</td>
<td>Rule: “No smoking shall be allowed within the hall at any time, whether the Convention be in session or not.”</td>
</tr>
<tr>
<td></td>
<td>1889</td>
<td>H</td>
<td>Rule: “No smoking shall be allowed in the House while in session.”</td>
</tr>
<tr>
<td>OH</td>
<td>1857</td>
<td>H</td>
<td>Resolution: “Whereas the smoking of tobacco is very offensive to a number of the members of this House; therefore be it Resolved, That the members and officers of the House of Representatives be requested to refrain from smoking within this Hall, whether the House be in session or not, and that the Sergeant-at-Arms be instructed not to permit it to be done by others.” As amended to include chewing tobacco, defeated 38-40.</td>
</tr>
<tr>
<td></td>
<td>1870</td>
<td>S</td>
<td>Rule: “It shall be the duty of the Sergeant-at-Arms and his assistant to prevent smoking within the Senate Chamber during the session of the Senate.”</td>
</tr>
<tr>
<td></td>
<td>1884</td>
<td>H</td>
<td>Resolution: “That during the sessions of the House no smoking be permitted within the Hall, and that the Sergeant-at-Arms be required to strictly enforce this order”</td>
</tr>
<tr>
<td>OK</td>
<td>1890</td>
<td>C</td>
<td>Rule: “It’s shall be the duty of the Sergeant-at-arms and his assistants to prevent smoking within the Council Chamber during the session of the Council.”</td>
</tr>
<tr>
<td></td>
<td>1890</td>
<td>H</td>
<td>Rule: “nor shall any person be permitted to smoke on the floor of the House or in the galleries at any time during the session of the House.”</td>
</tr>
<tr>
<td></td>
<td>1905</td>
<td>C</td>
<td>Rule: “No smoking shall be allowed during the session of the Council.”</td>
</tr>
<tr>
<td></td>
<td>1905</td>
<td>H</td>
<td>Rule: “nor shall any person be permitted to smoke on the floor of the House or in the galleries at any time during the session of the House.”</td>
</tr>
<tr>
<td></td>
<td>1906</td>
<td>CC</td>
<td>Resolution: “Whereas, There are members to whom smoking is offensive; therefore, Be it Resolved, That all smoking upon the floor of the Convention hall be prohibited during the hours of sitting of the Convention.”</td>
</tr>
<tr>
<td></td>
<td>1909</td>
<td>H</td>
<td>Rule: “No member or other person shall be permitted to smoke on the floor of the House or in the gallery during sessions.”</td>
</tr>
<tr>
<td>OR</td>
<td>Date</td>
<td>CH</td>
<td>Rule</td>
</tr>
<tr>
<td>------</td>
<td>------</td>
<td>----</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>1856</td>
<td>H</td>
<td>“No person shall be allowed to smoke within the Hall or lobby thereof.”</td>
</tr>
<tr>
<td></td>
<td>1860</td>
<td>H</td>
<td>“No person shall be allowed to smoke in the hall or lobby thereof while the House is in session.”</td>
</tr>
<tr>
<td></td>
<td>1911</td>
<td>S</td>
<td>Resolution: “Whereas there are many members of the senate to whom smoking on the part of other members is very obnoxious, and often causes sickness and headaches; therefore be itResolved, That there shall be no smoking allowed in the senate chamber during the time the senate is in session.” Adopted.</td>
</tr>
<tr>
<td>PA</td>
<td>1816</td>
<td>H</td>
<td>Rule: “It is not permitted to any person to smoke tobacco, at any time, within the chamber of the House.”</td>
</tr>
<tr>
<td></td>
<td>1908</td>
<td>H</td>
<td>“An amendment introduced by Mr. Kearney proposing a new rule as follows: ‘smoking shall be prohibited on the floor of the House during the session thereof,’ is not passed.”</td>
</tr>
<tr>
<td>RI</td>
<td>1898</td>
<td>S</td>
<td>Rule amendment: “Nor shall smoking be permitted in the Senate chamber.”</td>
</tr>
<tr>
<td>SC</td>
<td>1885</td>
<td>CC</td>
<td>Rule: “No smoking shall be allowed inside the hall during the sessions of the Convention....”</td>
</tr>
</tbody>
</table>
**The Prohibition of Smoking Inside Legislatures**

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>Decision Type</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>TN</td>
<td>1851</td>
<td>S</td>
<td>Resolution: “That smoking be prohibited, either in the lobby, or in the bar of the Senate during business hours.”</td>
</tr>
<tr>
<td></td>
<td>1853</td>
<td>S</td>
<td>Resolution: “that neither pipe nor cigar shall be smoked in the Senate Chamber in business hours, during the present session of the Legislature.”</td>
</tr>
<tr>
<td></td>
<td>1869</td>
<td>H</td>
<td>Rule: “No member shall smoke tobacco within the Representative Hall during the hours of the session.”</td>
</tr>
<tr>
<td></td>
<td>1875</td>
<td>S</td>
<td>Resolution: “WHEREAS, Members and visitors have been in the habit of smoking in the Senate Chamber, and filling the same so full of tobacco smoke as to make some members of this House, who are not in the habit of smoking the weed, sick, when they come into the Chamber, and thereby rendering them unfit for business; therefore, be it Resolved, That the members of this House be most respectfully requested, and visitors strictly forbidden, from smoking in the Senate Chamber while the Senate is in session, and for one-half hour before the setting of the same; and that it shall be the duty of the Doorkeeper and porter to see that this Resolution is carried into effect.” Withdrawn.</td>
</tr>
<tr>
<td>TX</td>
<td>1849</td>
<td>H</td>
<td>Resolution: “Whereas, It is deliterious [sic] to the health of many of the members of this House to inhale fumes of tobacco; and whereas, all respectable deliberative bodies consider smoking during their sessions, as a breach of decorum; Be it therefore resolved, that this House consider smoking during its session, to be a breach of decorum, and shall therefore not be permitted either within the bar of the House, or its lobby.”</td>
</tr>
<tr>
<td></td>
<td>1849</td>
<td>S</td>
<td>Rule: “No smoking shall be allowed in the Senate Chamber during the session of the Senate.”</td>
</tr>
<tr>
<td></td>
<td>1875</td>
<td>CC</td>
<td>Rule: “No smoking shall be allowed in the Hall during the session of the Convention.”</td>
</tr>
<tr>
<td></td>
<td>1879</td>
<td>H</td>
<td>Rule: “There shall be no smoking, eating or cracking nuts allowed in the House during its sitting.”</td>
</tr>
<tr>
<td>UT</td>
<td>1896</td>
<td>S</td>
<td>Rule: “No person shall be permitted to smoke in the Senate chamber....”</td>
</tr>
<tr>
<td></td>
<td>1896</td>
<td>H</td>
<td>Rule: “No person shall be permitted to smoke in the House of Representatives....”</td>
</tr>
<tr>
<td></td>
<td>1899</td>
<td>H</td>
<td>Rule: “No person shall be permitted to smoke in the House of Representatives, or in the committee rooms....”</td>
</tr>
<tr>
<td></td>
<td>1917</td>
<td>H</td>
<td>Motion that smoking be prohibited in the House Chamber carried.</td>
</tr>
<tr>
<td></td>
<td>1919</td>
<td>H</td>
<td>Rule: “No person shall be permitted to smoke within the House, or gallery, while the House is in session.”</td>
</tr>
<tr>
<td></td>
<td>1919</td>
<td>S</td>
<td>Rule: “No person shall be permitted to smoke within the Senate Chamber while the Senate is in session.”</td>
</tr>
<tr>
<td></td>
<td>1921</td>
<td>H</td>
<td>House speaker rule interpretation: “while the House is in session” meant only “the actual time the body was in session” and not the entire 60-day period.</td>
</tr>
</tbody>
</table>
### The Prohibition of Smoking Inside Legislatures

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>Type</th>
<th>Resolution/Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>VT</td>
<td>1878</td>
<td>S&amp;H</td>
<td>Joint Resolution: “That the Sergeant-at-Arms is hereby directed and authorized to prohibit the smoking of pipes and cigars within the Hall of the House, Senate, library and executive chamber.”</td>
</tr>
<tr>
<td>VA</td>
<td>1882</td>
<td>S</td>
<td>Resolution: “That the sergeant-at-arms of this Senate be, and he is hereby required to prohibit and prevent smoking by senators and all others, within the Senate chamber while the Senate is in session, and on every day before the opening of the day’s session.”</td>
</tr>
<tr>
<td></td>
<td>1883</td>
<td>H</td>
<td>Resolution: “That the sergeant-at-arms be, and he is hereby instructed to take such steps as will prohibit all persons from smoking in the hall.”</td>
</tr>
<tr>
<td></td>
<td>1901</td>
<td>CC</td>
<td>Rule: “No person shall be allowed to smoke in the hall, lobby, or galleries during the sitting of the Convention.”</td>
</tr>
<tr>
<td>WA</td>
<td>1889</td>
<td>H</td>
<td>“The speaker ruled that smoking was out of order during the sessions of this House.” Motion carried and ordered: “That it is the sense of this House that members be prohibited from smoking in the hall during recesses.” “The sergeant-at-arms was directed to enforce rule No. 56, prohibiting smoking in the hall or lobby during recess.”</td>
</tr>
<tr>
<td></td>
<td>1889</td>
<td>S</td>
<td>Rule: “Smoking shall not be allowed within the Senate chamber during the session of the Senate....”</td>
</tr>
<tr>
<td></td>
<td>1891</td>
<td>H</td>
<td>Rule: “No person shall be allowed to smoke in the hall or lobby thereof during session or recess.”</td>
</tr>
<tr>
<td></td>
<td>1897</td>
<td>S</td>
<td>Rules Committee report recommended amending rule by striking out “within the Senate Chamber” and inserting instead “on the upper floor of the capitol building, except in room 6. The purpose of this change is to prevent smoking, which is offensive to so many members, in and about the Senate, and confining [sic] smoking to the room adjoining [sic] the room of the sergeant-at-arms.” Adopted</td>
</tr>
<tr>
<td></td>
<td>1921</td>
<td>H</td>
<td>“On motion of Mr. Adams, Rule No. 20 was suspended for the purpose of permitting the House members and employees to enjoy the smoking of cigars presented with the compliments of Senator Barnes.”</td>
</tr>
<tr>
<td>WV</td>
<td>1895</td>
<td>H</td>
<td>Resolution: “That no smoking be allowed in the hall of House of Delegates while the House is in session.”</td>
</tr>
<tr>
<td></td>
<td>1923</td>
<td>S</td>
<td>Concurrent Resolution: “A Bill to prohibit the smoking of cigarettes within the temporary state capitol building or any of the offices of said building” failed to secure required 3/4 majority.</td>
</tr>
<tr>
<td>WI</td>
<td>1853</td>
<td>A</td>
<td>Rule: “No member or officer of the assembly shall be permitted to...smoke in the assembly room at any time.”</td>
</tr>
<tr>
<td></td>
<td>1878</td>
<td>S</td>
<td>Rule: “Smoking on the floor of the Senate, or in the lobby, while the Senate is in session is prohibited.”</td>
</tr>
</tbody>
</table>
### The Prohibition of Smoking Inside Legislatures

<table>
<thead>
<tr>
<th>WY</th>
<th>Year</th>
<th>Chamber</th>
<th>Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1888</td>
<td>H</td>
<td>“No smoking shall be allowed within the Assembly Chamber at any time.”</td>
</tr>
<tr>
<td></td>
<td>1888</td>
<td>C</td>
<td>“Smoking shall not be allowed in the Council Chamber while the Council is in session.”</td>
</tr>
<tr>
<td></td>
<td>1889</td>
<td>CC</td>
<td>“No smoking shall be allowed in the hall while the convention is in session.”</td>
</tr>
<tr>
<td></td>
<td>1895</td>
<td>H</td>
<td>“Smoking shall not be permitted on the floor of the House while the House is in session.”</td>
</tr>
<tr>
<td></td>
<td>1895</td>
<td>S</td>
<td>“Smoking shall not be allowed in the Senate while the Senate is in session.”</td>
</tr>
<tr>
<td></td>
<td>1917</td>
<td>H</td>
<td>Proposed Rule: “Smoking shall not be permitted on the Floor of the House while the House is in the Committee of the Whole.” “Mr. Kelley moved that the report of the Special Rules Committee be amended by striking out ‘Smoking shall not be permitted while the House is in the Committee of the Whole,’ which motion prevailed.”</td>
</tr>
</tbody>
</table>

**Abbreviations:** A=Assembly; C=Council; CC=Constitutional Convention; H=House; SC=State Convention; S=Senate

**Sources and annotations:**

**Alabama:** *Journal of the Called Session of the Senate of the State of Alabama...1861*, at 20 (Jan. 17) (1861); “All Ended in Smoke,” *Milwaukee Daily Sentinel*, Feb. 6, 1861 (2:2); *Journal of the Session of 1872-73 of the Senate of Alabama 133* (Feb. 8, 1873) (1873); *Journal of the House of Representatives of the State of Alabama. Session of 1896-7*, at 95 (1897) (Rule 48); *Journal of the Proceedings of the Constitutional Convention of the State of Alabama 59* (1901) (Rule 19)

**Alaska:** *Journal of the House of Representatives of the Second Legislative Assembly of the Territory of Alaska 347* (1915) (Rule 46)

**Arizona:** *Journals of the Fourteenth Legislative Assembly of the Territory of Arizona...1887*, at 280 (Jan. 15) (1887); *Journals of the Nineteenth Legislative Assembly of the Territory of Arizona 20* (Jan. 20) (1897); *Journals of the Twenty-Third Legislative Assembly of the Territory of Arizona...1905*, at 212 (Mar. 11) (1905).


**California:** *Journals of the Legislature of the State of California; at Its Second Session...1851*, *Journal of the Proceedings of the Assembly 1441-42, 1452-54 (Mar. 27-28) (1851); Journals of the Legislature of the State of California; at Its Second Session...1851*, *Journal of the Proceedings of the Senate 418* (Apr. 17) (1851); *Journal of the Fifth Session of the Legislature of the State of California: Journal of the Proceedings of the Assembly 70* (Jan. 11) (1854) (Rule LXVII); *Journal of the Fifth Session of the Legislature of the State of California...1854*, at 368, 377 (Mar. 31, Apr. 1) (1854); *Journal of the Senate During the Thirteenth Session of the Legislature of the State of California: 1862*, at 574 (Apr. 17) (1862) (Rule XIII); *Journal of the Senate During the Fourteenth Session of the Legislature of the State of California: 1863*, at 7 (Jan. 5) (1863); *Journal of the Senate During the Twenty-Second Session of the Legislature of the State of California, 1877-8*, at 19 (Dec. 7, 1877) (1878); *Journal of the Senate During the Twenty-Ninth Session of the Legislature...1903*
The Prohibition of Smoking Inside Legislatures

of the State of California, 1891, at 553 (Feb. 27) (1891); Journal of the Senate During the Thirty-Sixth Session of the Legislature of the State of California: 1905, at 77 (Jan. 6) (1905) (Rule 62); Journal of the Assembly During the Thirty-Ninth (Extra) Sessions of the Legislature of the State of California, 1911, at 13 (Nov. 27, 1911) (1912); List of Members Officers and Committees and the Rules of the Two Houses of the California Legislature...for the Year 1921, at 83 (1921) (Rule 71). Under the rubric, “Votes Necessary on Senate Activity,” No. 30, the Senate also provided that a majority of those present was required to permit smoking during a night session. Id. at 86. The 1921 Senate rule was still in effect in 1931: Journal of the Senate During the Forty-Ninth Session of the Legislature of the State of California: 1931, at 246 (Jan. 12) (1931) (Rule 71)


Hawaii: Journal of the House of Representatives Regular and Extra Session of the 1901: First Legislature of the Territory of Hawaii...1901, at 75 (Feb. 28) (1901) (Rule 74); First Legislative Assembly of the Territory of Hawaii: 1901: In Extra Session: Journal of the Senate 6 (May 9) (1901); The Sixth Legislature of the Territory of Hawaii: Journal of the Senate: 1911, at xxxii (1911) (Rule 72)


1904
The Prohibition of Smoking Inside Legislatures


**Indiana:** *Journal of the Convention of the People of the State of Indiana, to Amend the Constitution...1850*, at 38, 58 (Oct. 11, 14) (1851) (Rule 43); *Journal of the Indiana State Senate, During the Forty-First Session of the General Assembly...1861*, at 108 (Jan. 18) (1861); *Journal of the Indiana State Senate, During the Called Session of the General Assembly...1858*, at 11 (Nov. 22) (1858); *Journal of the Indiana State Senate, During the Fifty-First Session of the General Assembly...1879*, at 68 (Jan. 16) (1879) (Rule 57); *Journal of the House of Representatives of the State of Indiana During the Fifty-Eighth Session of the General Assembly...1893*, at 90 (1893) (Rule 74)

**Iowa:** *Journal of the House of Representatives of the First Legislative Assembly of the Territory of Iowa, Begun and Held at the City of Burlington, on the Twelfth Day of November, One Thousand Eight Hundred and Thirty-Eight 1838* (Jan. 7) (n.d.);
*Journal of the Council of the Third Legislative Assembly of the Territory of Iowa, Begun and Held at the City of Burlington, on the Second Day of November, One Thousand Eight Hundred and Forty 231* (Nov. 5) (n.d.);
*Rules of the Twentieth General Assembly of the State of Iowa 21* (1884) (Rule 66);
*Journal of the Senate of the Twenty-First General Assembly of the State of Iowa 12* (1886) (Jan. 13) (Rule 32); *State of Iowa: 1927: Journal of the Senate of the Forty-Second General Assembly 189* (Jan. 27); *State of Iowa: 1933: Journal of the House of Representatives of the Forty-Fourth General Assembly 309* (Feb. 6)

**Kansas:** *Kansas Constitutional Convention: A Reprint of the Proceedings and Debates...1859*, at 40 (July 7, 1859) (1920);
*Senate Journal of the Legislative Assembly of the State of Kansas...1861*, at 15 (Mar. 27) (1861);
*House Journal of the Legislative Assembly of the State of Kansas at Its Second Session 51* (Jan. 22) (1862);
*House Journal: Proceedings of the Legislative Assembly of the State of Kansas: Fourteenth Annual Session...1874*, at 80 (Jan. 19) (1874);
*Senate Journal: Proceedings of the Legislative Assembly of the State of Kansas: Fourteenth Annual Session...1874*, at 112 (Jan. 26) (1874);
*House Journal: Proceedings of the Legislative Assembly of the State of Kansas: Fifteenth Annual Session...1875*, at 103, 125 (Jan. 15, 18) (1875);
*Senate Journal: Proceedings of the Senate of the State of Kansas: Sixteenth Annual Session...1876*, at 205 (Feb. 5) (1876);
*House Journal: Proceedings of the House of Representatives of the State of Kansas: Second Biennial Session...1881*, at 110 (Jan. 18) (1881);
*House Journal: Proceedings of the House of Representatives of the State of Kansas: Third Biennial Session...1883*, at 147 (Jan. 17) (Rule 67) (1883);
*House Journal: Proceedings of the House of Representatives of the State of Kansas: Sixth Biennial Session...1889*, at 268 (Jan. 23);
*Senate Journal: Proceedings of the Senate of the State of Kansas: Sixth Biennial Session...1889*, at 147 (Jan. 16) (Rule 64) (1889);
*Admire’s Political and Legislative Hand-Book for Kansas: 1891*, at 59 (Sen. Rule 64) (1891);
*House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-First Biennial Session...1919*, at xiv (1919) (Rule 72);
*House Journal: Proceedings of the House of Representatives of the State of Kansas: Special Session...1920*, at xxxii (1920) (Sen. Rule 66);
*House Journal: Proceedings of the House of Representatives of the State of Kansas: Twenty-Second Biennial Session...1921*, at xiv (1921) (Rule 70). The House and Senate both dropped their no-smoking rules in 1925. See above this ch.

**Kentucky:** *Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky...1875*, at 490 (Feb. 5, 1876), 694 (Feb. 17) (1876);
*Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky ’76* (Jan. 7, 1892) (1891 [sic]);
The Prohibition of Smoking Inside Legislatures


Mississippi: Manual of the Legislature of the State of Mississippi: Session of 1870, at 63 (1870) (House Rule XLV); Journal of the Proceedings of the Constitutional Convention, of the State of Mississippi...1890, at 44 (Rule XIV)

Missouri: Journal of the Senate, of the State of Missouri, at the First Session of the Tenth General Assembly...one thousand eight hundred and thirty-eight 296 (Feb. 3) (1839); Journal of the Senate, of the State of Missouri, at the First Session of the Thirteenth General Assembly...one thousand eight hundred and forty-four 265 (Feb. 8) (1845) (amendment to include chewing tobacco negatived); Journal of the House of Representatives of the State of Missouri, at the First Session of the Sixteenth General Assembly 324 (Feb. 12) (1851); Journal of the House of Representatives of the State of Missouri, at the Extra Session of the Seventeenth Extra Session...1852, at 80 (Sept. 11, 1852) (1852); Journal of the House of Representatives of the State of Missouri, at the Extra Session of the Seventeenth Extra Session...1852, at 250, 251 (Jan. 4, 1853) (1852); Journal of the Senate of the State of Missouri, at the First Session, Being the Regular Session of the Eighteenth General Assembly...one thousand eight hundred and fifty-four 80 (Jan. 15, 1855); Journal of the House of Representatives of the State of Missouri, at the First Session of the Eighteenth General Assembly...one thousand eight hundred and fifty-four 271 (Feb. 12, 1855) (1855); Journal of the Senate of the State of Missouri, at the First Session, Being the Regular Session, of the Nineteenth General Assembly...one thousand eight hundred and fifty-six 81 (Jan. 14, 1857) (1857); Journal of the House of Representatives of the State of Missouri, at the First Session of the Nineteenth General Assembly...one thousand eight hundred and fifty-six 105-106 (Jan. 15) (1857); Journal of the House of Representatives of the State of Missouri, at the First Session of the Twenty-First General
The Prohibition of Smoking Inside Legislatures

Assembly 65 (Jan. 7) (1861); Journal and Proceedings of the Missouri State Convention...March, 1861, at 14 (Mar. 1) (1861) (Rule Forty-Fifth); Journal of the Missouri State Senate at the Regular Session of the Twenty-Fifth General Assembly...one thousand eight hundred and sixty-nine 75 (Jan. 14) (1869); Journal of the Missouri State Senate at the Adjourned Session of the XXVIIth General Assembly...1873, at 87 (Jan. 9) (1873) (Sen. Rule 73); Journal of the Senate of Missouri of the Thirty-Second General Assembly (Regular Session): 1883, at 75 (Jan. 9) (1883) (Rule 46); Journal of the House of Representatives of the Thirty-Second General Assembly, of the State of Missouri (Regular Session): 1883, at 84 (Jan. 9) (1883) (Rule art. II sec. 2); Journal of the Senate of Missouri of the Thirty-Fourth General Assembly (Regular Session): 1887, at 42 (Jan. 7) (1887) (Rule 46); Journal of the Senate of the Forty-Ninth General Assembly of the State of Missouri: 1917, at 55 (Jan. 17) (Rule 46); Fifty-First General Assembly (Regular and Extra Sessions): Journal of the Senate of the State of Missouri 23 (Jan. 12) (1921). The 1883 House rule was still in effect in 1921. Fifty-First General Assembly (Regular and Extra Sessions): Journal of the House of the State of Missouri 1:95 (Jan. 19) (1921). The 1917 Senate rule was still in effect in 1921. Fifty-First General Assembly (Regular and Extra Sessions): Journal of the House of the State of Missouri 1:31 (Jan. 12) (1921).

Montana: House Journal of the Sixth Session of the Legislative Assembly of the Territory of Montana 102 (Dec. 22, 1869) (1870); House Journal of the Thirteenth Session of the Legislative Assembly of the Territory of Montana...1883, at 283 (Mar. 3) (1883); House Journal of the Fourth Session of the Legislative Assembly of the State of Montana...1895, at 67 (Jan. 17) (1895) (House Rule XI.7); Senate Journal of the Tenth Session of the State of Montana 49 (Jan. 17) (1907) (Rule 1 amended); House Journal of the Twelfth Session of the Legislative Assembly of the State of Montana...1911, at 35 (Jan. 6)

Nebraska: House Journal of the Legislative Assembly of the Territory of Nebraska, Fifth Session...1858, at 161 (Oct. 26) (1859) (not taken up); House Journal of the General Assembly of the State of Nebraska: Eighth Regular Session 46 (Jan. 9) (1871) (Rules Committee reporting that it had substituted that provision for previous Rule 49, which had obligated the sergeant-at-arms to keep House secrets); Senate Journal of the General Assembly of the State of Nebraska, 6th Regular Session 45 (1873) (Rule 43); House Journal of the General Assembly of the State of Nebraska, Fourteenth Regular Session 58 (Jan. 4) (1877) (Rule 5); Manual of Nebraska Legislative Procedure: Edition of 1919, at 44 (Rule 2). The Senate rule (now Rule 58) was unchanged from 1873. Id at 42; House Journal of the Legislature of the State of Nebraska: Forty-Seventh Session...1931, at XXVIII (Rule 20). By 1931, when the Senate rule was no longer in effect, “the senators voted almost to the man against a proposal to ban smoking in the senate chamber.” “Would Prohibit Campus Smoking,” BDS, Mar. 11, 1931 (1:5). That year the House prohibition was still in the rules but apparently not stringently enforced: “Max Kier, speaker of the Nebraska house of representatives, arose in session yesterday and read a standing rule against smoking in the chamber. Two members had requested him to do so. While he spoke, blue rings of cigar smoke circled lazily upward. After he concluded, more of it continued to rise. Today smoke continued to rise in the Nebraska house of representatives.” “Take Rules Lightly,” BDS, Jan. 15, 1931 (10:3). Nevertheless, shortly thereafter the House voted to table a motion to strike out all of the rule. House Journal of the Legislature of the State of Nebraska: Forty-Seventh Session...1931, at 169 (Jan. 16).

Nevada: Journal of the Assembly During the First Session of the Legislature of the State of Nevada 1864-5, at 51(Dec. 16, 1864) (1865) (Assembly Rule LXVII); Standing Rules of the Senate (n.d.) 11 (Rule LXV), in Appendix to Journals of Senate of the First Session of the Legislature of the State of Nevada (n.d. [1864-65]); Journal of the Senate of the Thirty-First Session of the Legislature of the State of Nevada: 1923, at 7 (Jan. 16) (1924); “Tie in Assembly Vote on Rules Broken by Speaker,” REG, Jan. 22, 1931 (2:3); “Women Gone; Assembly to Smoke Again,” Nevada State Journal, Jan. 23, 1931 (2:7). The rule was enforced by means of fines. For example, in 1919 Sen. Ducoy was fined for breaking Rule 50: “The fine was a box of candy for the attaches.” “Jots from
The Prohibition of Smoking Inside Legislatures

Nevada:
- Journal of the Honorable Senate: January Session of 1949, at 583 (July 19).

New Jersey:

New Mexico:

New York:
- Journal of the Assembly of the State of New York: At Their Eighty-Second Session, at 97 (Jan. 14) (1859); Journal of the Senate of the State of New York: At Their Ninetieth Session...1867, at 144 (Feb. 1) (1867).

North Carolina:

North Dakota:
- Journal of the Constitutional Convention for North Dakota 11 (1889) (Rule 37); State of North Dakota: 1889-90 Legislative Manual 15 (1890) (Rule 57). As late as 1915 the Senate still had no rule regulating smoking. State of North Dakota: Journal of the Senate of the Fourteenth Session of the Legislative Assembly 20 (Jan. 6) (1921). On the first day of the 1915 session a motion to eliminate the House anti-smoking rule was lost. State of North Dakota: Journal of the Senate of the Seventeenth Session of the Legislative Assembly 54-61 (1915). The Legislative Manual (or Blue Book) was not published in 1915 or 1917, and when publication resumed in 1919 it no longer contained the House and Senate Rules; it then ceased publication again. The 1921 Senate Journal adopted the rules of 1919 without printing them. State of North Dakota: Journal of the Senate of the Fourteenth Session of the Legislative Assembly 54-61 (1915). The Legislative Manual (or Blue Book) was not published in 1915 or 1917, and when publication resumed in 1919 it no longer contained the House and Senate Rules; it then ceased publication again. The 1921 Senate Journal adopted the rules of 1919 without printing them. State of North Dakota: Journal of the Senate of the Fourteenth Session of the Legislative Assembly 20 (Jan. 6) (1921). On the first day of the 1915 session a motion to eliminate the House anti-smoking rule was lost. State of North Dakota: Journal of the Senate of the Fourteenth Session of the Legislative Assembly...1915, at 61 (Jan. 5) (1915); “Fourteenth Legislative Session Organized Without Any Friction,” BT, Jan. 6, 1915 (1:6). Some weeks later, during an evening session, when the acting house speaker “had a freshly lighted cigar in his hand” despite the fact that the House rule had been brought to members’ attention that very afternoon, a member, noticing his “predicament,” successfully moved the rule’s suspension for the evening “and the speaker had his smoke.” “Legislative Notes,” BT, Feb. 24, 1915 (4:7). The House rule in 1923, as it had ever since the first legislative session of 1889, read: “No smoking shall be allowed in the House while in session.” State of North Dakota: Journal of the House of the Eighteenth Session of the Legislative Assembly...1923, at 62 (Jan. 8) (1923) (Rule 57). That same year the Senate rules contained no such provision.

Ohio:

Oklahoma:
- Journal of the First Session of the Legislative Assembly of Oklahoma Territory...1890, at 33 (Sept. 1), 56 (Sept. 3) (1890) (Council Rule 65 and House Rule 62); Journal of the Council Proceedings of the Eighth Legislative Assembly of the Territory of Oklahoma 33 (1905) (Council Rule 48); Journal of the Proceedings of the House of Representatives of the Eighth Legislative Assembly of the Territory of Oklahoma...1905, at 63 (Rule 60) Proceedings of the Constitutional
The Prohibition of Smoking Inside Legislatures


South Carolina: Journal of the Senate of the General Assembly of the State of South Carolina: Being the Regular Session Commencing January 11, 1898, at 189a (Feb. 12) (1898) (amending Rule IV); Legislative Manual of the Seventy-First General Assembly of South Carolina 86, 88 (1916) (Rule 82)

South Dakota: Dakota Constitutional Convention...1885, at 1:71 (Sept. 9) (1907) (Rule 7); State of South Dakota: Journal of the Senate of the First Session of the Legislature: January 1890, at 27 (Jan. 7) (1890) (Rule 36)

Tennessee: Senate Journal of the First Session of the Twenty-Ninth General Assembly of the State of Tennessee...1851, at 175 (Nov. 6) (1852); Senate Journal of the First Session of the Thirtieth General Assembly of the State of Tennessee...1853, at 23, 27 (Oct. 6 and 7) (1854); House Journal of the First Session of the Thirty-Seventh Session of the State of Tennessee 235 (1869) (House Rule 54); Senate Journal of the First Session of the Thirty-Ninth General Assembly of the State of Tennessee, at 426, 449 (Feb. 25) (1875)

Texas: Journals of the House of Representatives, of the State of Texas: Third Session 307 (Dec. 18) (1849) (by Adolphus Sterne); Rules for Conducting Business in the Senate of the State of Texas 5 (1849) (Sen. Rule 19); Journal of the Constitutional Convention of the State of Texas...1875, at 18 (Sept. 8) (1875) (Rule 17); A Legislative Manual for the State of Texas: 1879-80, at 177 (1879) (Rule 20)

Utah: Senate Journal of the First Session of the Legislative Assembly of the State of Utah 76 (Jan. 13) (1896) (Rule 35); House Journal of the Special and First Session of the Legislature of the State of Utah 97 (Jan. 14) (1896) (Rule 18); House Journal of the Third Session of the Legislature of the State of Utah 70 (Jan. 11) (1899) (Rule 18); House Journal: Twelfth Session of the Legislature of
The Prohibition of Smoking Inside Legislatures

the State of Utah 355 (1917); House Journal: Thirteenth Session of the Legislature of the State of Utah: 1919, at 73 (Rule 18); Senate Journal: Thirteenth Session of the Legislature of the State of Utah: 1919, at 19 (Rule 15); “House Smoking Rule Interpreted by Speaker,” SLT, Jan. 18, 1921 (10:2); House Journal: Fourteenth Session of the Legislature of the State of Utah: 1921, at 70 (Jan. 18) (Rep. A. W. Morrison moved to amend House Rule 18 to read: “No person shall be permitted to smoke within the House or gallery during the Fourteenth session of the Legislature,” but the motion died in Rules Committee). The House Rules of 1915 contained the identically same no-smoking provision as those of 1896. House Journal: Eleventh Session of the Legislature of the State of Utah 77 (1915) (Rule 40). Neither the Senate nor House Rules of 1917 contained any mention of smoking. House Journal: Twelfth Session of the Legislature of the State of Utah 44-55 (1917); Senate Journal: Twelfth Session of the Legislature of the State of Utah: 1917, at vii-xix, 8-19. The press offered various explanations for Salt Lake Rep. J. W. McKinney’s 1917 House motion to prohibit smoking in the House chamber: (1) smoking in House chamber was prohibited “at all times” because “it was impolite to the women members”; (2) House banned smoking “in its legislative chamber at all times” because “the health of some members ha[d] been injured in the chamber during the past six weeks”; and (3) “[i]nasmuch as smoking has not been tolerated while the house was in session in the past, the action has to do only with the periods when the house is in recess.” ‘Dry’ Amendment to Be Recalled,” DEN, Feb. 21, 1917 (2:3); “Appropriation of $100,000, for Ogden Fair, Favored by the Joint Committee,” Ogden Standard, Feb. 21, 1917 (6:3); “Lady Nicotine Introduced and then Banished,” Salt Lake Telegram, Feb. 21, 1917 (3:3). The House and Senate Rules of 1923 were identical to those of 1919. House Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 33 (Rule 18); Senate Journal: Fifteenth Session of the Legislature of the State of Utah: 1923, at 13 (Rule 18). The identical House rule was still in effect in 1929. House Journal: Eighteenth Session of the Legislature of the State of Utah: 1929, at 110 (Rule 18).

Vermont: Journal of the Senate of the State of Vermont: Biennial Session, 1878, at 116, 117 (Oct. 31) (1879); Journal of the House of Representatives of the State of Vermont: Biennial Session, 1878, at 176, 177, 179 (Nov. 1) (1879)


Washington: House Journal of the First Legislature of the State of Washington: Commencing...1889...and Ended...1890, at 10 (Nov. 7, 1889), 24 (Nov. 13, 1889), 505 (Feb. 14, 1890) (1890); Senate Journal of the First Legislature of the State of Washington: Begun...1889...Adjourned...1890, at 38 (Nov. 20, 1889) (1890) (Sen. Rule 62); House Journal of the Second Legislature of the State of Washington: Begun...1891...Adjourned...1891, at 27 (Jan. 9) (1891) (Rule 54); Senate Journal of the Fifth Legislature of the State of Washington: Begun...1897...Adjourned...1897, at 75 (Jan. 15 (1897); House Journal of the Seventeenth Legislature of the State of Washington: Begun...1921...Adjourned...1921, at 199 (Feb. 14) (1921).

The identically same House and Senate smoking bans were still in effect in 1921: House Journal of the Seventeenth Legislature of the State of Washington: Begun...1921...Adjourned...1921, at 70 (Jan. 25) (1921) (Rule 20); Senate Journal of the Seventeenth Legislature of the State of Washington: Begun...1921...Adjourned...1921, at 610 (1921) (Rule 63)

West Virginia: Journal of the House of Delegates of the State of West Virginia, for the Twenty-Second Session: 1895, at 6 (Jan. 9) (1895); Journal of the Senate of the State of West Virginia for the Thirty-Sixth Regular Session...1923, 441 (1923). The 1917 House rules contained no reference to smoking. Journal of the House of Delegates of the State of West Virginia, for the Thirty-Third Regular Session...1917, at 14-31 (Jan. 15) (1917)

Wisconsin: Manual for the Use of the Assembly of the State of Wisconsin, for the Year 1853, at 103 (1853) (Rule 29); In Senate: Journal of Proceedings of the Thirty-First Annual Session of the
The Prohibition of Smoking Inside Legislatures

*Wisconsin Legislature*: 1878, at 303, 313 (Feb. 27 and 28) (1878) (Rule 53)

PART IV

CIGARETTE SALES LICENSURE AND TAXATION IN IOWA DURING THE PERIOD OF LAISSEZ-FAIRE SMOKING: 1921 TO THE 1960s

The state department is planning to have a force of deputies gumshoeing about to pick up violators. 1

Cigarette law is having its trouble. Several town and city councils refused to grant permits for the sale. 2

It is true that there has always been more or less opposition among certain groups...toward cigarette consumption, with the result that the tax may have been originally levied in part for regulatory purposes. ... The writer of this dissertation vividly recalls the agitation against cigarette smoking that was rife in the middle-western sector of the United States a few years ago,—an agitation that was based upon the combined grounds of immorality and health deterrents allegedly connected with cigarette smoking.

If the aim in taxing cigarette sales in Iowa had been primarily one of regulation, the revenues from this tax, of necessity, would have been of secondary importance. However, in view of the fact that the Joint Legislative Committee on Taxation recently proposed to the General Assembly of Iowa an increase in the rates on cigarette sales, in addition to a tax on the sales of other forms of tobacco, all for the purpose of gaining more revenue, it may be concluded that the essential purpose of the present tax in Iowa is to raise revenue for the state. 3

1“Iron Clad License Is Necessary to Sell,” Oelwein Register, July 15, 1921 (4:3-4).
2“Neighborhood News,” Adams County Free Press (Corning), July 16, 1921 (1:1).
The Aftermath of Licensure in Iowa: 1921-1939

“[W]hile our victory in the recent anti-tobacco war has been almost complete, the menace has not yet passed, and it is not likely to pass so long as professional agitators are able to pass their hats and collect the coin.”

Because his department had been receiving so many requests for copies of the new cigarette law, which was to go into effect on July 4, 1921, William Burbank, the new treasurer of state, who was in charge of enforcement, on April 30 published a leaflet containing the statute’s full text prefaced by a comprehensive synopsis by Attorney General Ben Gibson. Burbank furnished newspapers with copies of the pamphlet, requesting that they publish the synopsis. From a reading of the act Burbank discovered that it had “two ends in view”: raising revenue for cities and the state and eliminating minors’ use of cigarettes. Interestingly, Burbank’s focus on the goal of insuring that minors stopped smoking cigarettes was broader than Gibson’s more formalistic stress of suppressing sales to minors. Underscoring that this law was definitely worth far more than the “mere scrap of paper” it was written on, Burbank point blank expressed his expectation that “every person, hamlet, city and county” in Iowa would “do its bit in the observance of this measure and earnestly solicit[ed] the hearty co-operation of officers and people in the plain duty of enforcement.”

Before being elected state treasurer in 1920, Burbank had been county treasurer in Black Hawk county (whose county seat is Waterloo) and treasurer of a smaller county as early as 1900, though at the time of the 1910 census he was a bookkeeper of a wholesale grocery. While still state treasurer, Burbank in 1923 self-published a 300-page anti-Catholic screed, The Knighthood of Catholicism, whose title page announced that the book contained a “Map of the Papal State in which the Author Resides,” which midwest papal state turned out...
to extend all the way into Wyoming and the capital of which was Dubuque.\textsuperscript{6} When he left the state treasurer’s position in 1924, he unsuccessfully ran as a candidate in the Republican primaries for governor “under a Klan banner” and was “termed the klan candidate for governor.”\textsuperscript{9} In March 1924, residents of Waterloo found on their doorsteps copies of \textit{The New Menace} devoting considerable space to Burbank’s gubernatorial candidacy as well as to a review of his book, the proceeds from which were impliedly to be used for his campaign.\textsuperscript{8} In Waterloo, the Ku Klux Klan’s local organizer urged Burbank’s candidacy as a means of replacing three state officials appointed by Governor Kendall whose religious affiliations were objectionable to the Klan.\textsuperscript{10} Although Burbank failed by a narrow margin to secure the Republican nomination, the KKK did succeed in winning Polk county for him.\textsuperscript{11}

By way of hortatory introduction Gibson emphasized that the law “‘should be enforced by every official’” in Iowa and that in order to implement the legislature’s intentions, as expressed in the bill and on the House and Senate floor, there should be no hesitation to bring prosecutions or injunction suits for enforcement.\textsuperscript{12} As summarized by Gibson, the law encompassed the following elements:

1. No one is authorized to sell cigarettes except a permit-holding dealer.
2. A permit may be issued by city councils and county boards of supervisors to any person, firm, or corporation complying with the law’s provisions.
3. No permit can be issued until the applicant files a bond of not less than $1,000.
4. The annual permit fee is $100 in first-class cities, $75 in second-class cities, and $50 elsewhere, regardless of when during the permit year the permit is issued; the fees are to be paid to the treasurer of the city or county issuing the permit.

\textsuperscript{6}W. J. Burbank, \textit{The Knighthood of Catholicism as Advertised and as It Really Functions} 261 (1923).
\textsuperscript{7}Ed. Dose, “McCoy Backed by Burbank’s Klan Element,” \textit{DD&L}, May 30, 1925 (10:5).
\textsuperscript{8}“Burbank Kluxers Given Credit for Victory in Caucus,” \textit{WEC}, May 17, 1924 (1:7).
\textsuperscript{10}“Ku Klux Organizer Speaks for Burbank,” \textit{WEC}, May 29, 1924 (5:1).
\textsuperscript{11}David Chalmers, \textit{Hooded Americanism: The History of the Ku Klux Klan} 139 (1981 [1965]).
\textsuperscript{12}“New Cigarette Law Goes into Effect July 4th,” \textit{Jackson Sentinel} (Maquoketa), June 7, 1921 (4:2-6 at 2-3). See also “Council Reverses on Cigarets,” \textit{WM}, July 13, 1921 (1:5).
(5) No cigarettes or cigarette papers maybe sold or given to anyone under 21.
(6) The law applies equally to sales of cigarettes and cigarette papers/wrappers.
(7) Cigarette dealers are required to attach and cancel stamps in all sales of cigarettes and cigarette papers amounting to one mill per cigarette on those weighing not more than three pounds per thousand and one-half cent per 50 papers.
(8) Any dealer failing to attach stamps is subject to a fine ranging between $100 and $300 and commitment to jail until the fine is paid for up to six months; all cigarettes and papers [in the possession of violators] are to be confiscated and forfeited to the state.
(9) All cigarette packages have to contain specified a number of cigarettes ranging between 8 and 100.
(10) Stamps will be on sale by the treasurer of state, who will redeem unused stamps.
(11) “The permit fees are called mulct taxes,” and anyone, whether a permit-holder or not, who fails to pay the permit fee “may be assessed a mulct tax for the amount thereof,” which is assessed by the assessor, who is “liable for a fine for failure to do so. If the assessor fails to assess the mulct tax the sheriff or three citizens may do so.” After one month failure to pay the mulct tax “results in a penalty being added thereto of twenty per cent and [1 percent per month until] the tax is fully paid.”
(12) Minors found possessing cigarettes or papers “are required to furnish to any peace officer, juvenile court officer, truant officer, or teacher information as to where the same was obtained,” refusal to comply being a misdemeanor punishable by a maximum $5 fine or five-day jail sentence or both. Minors under 16 have to be certified to juvenile court for action deemed proper by the court. The court is empowered to suspend the sentence of any minor who afterwards gives evidence in proceedings against the person who furnished cigarettes or papers to him.
(13) The punishment for furnishing cigarettes or papers to minors under 21 is a fine of $25 to $100 for first offense or imprisonment for up to 30 days; for additional offenses the punishment is a fine ranging between $100 and $500, or imprisonment from one to six months, or both.
(14) Anyone violating any of the law’s provisions or maintaining a place where cigarettes or papers are sold or kept with intent to sell in violation of any of the law’s provisions “shall be deemed guilty of keeping and maintaining a nuisance, and the building or place so used...shall be deemed to be a nuisance, and such person, firm or corporation may be enjoined and such building or place abated as a nuisance,” the injunction/abatement procedure as well as that for...
contempt for violating such an injunction are to be the same, as far as practicable, as provided for enjoining/abating intoxicating liquor nuisances.\textsuperscript{13}

In addition to omitting mention of the fact that the mulct tax was made a lien on the real estate where cigarette selling business were located, the attorney general failed to specify for citizens and government officials that local governments had the discretion not to issue cigarette permits.

**Cigarette Advertising Becomes Lawful**

Apparently some senators had the idea that newspapers were champions of the [1919 Nebraska cigarette sales prohibition repeal] bill because they saw visions of large additional revenues therefrom. At any rate a strong effort was made to bar manufacturers and dealers from advertising them in the newspapers. It is quite natural that this should occur to them. They simply fail to distinguish between the newspaper business and most others. Even the most greedy of publishers long ago learned that the real source of his advertising revenue lay in the number and character of his subscribers. There are also publishers who daily turn down advertising offered them that offends their sense of propriety and decency or are opposed to their standards of what should be admitted, and the editorial conduct of their newspaper is not swayed by considerations of revenue in the sense that revenue considerations govern what shall appear in the policy making department of the newspaper.\textsuperscript{14}

The day of buying cigarettes under cover is past in Iowa. All over the state bill boards carry advertisements of the popular sellers. Since July 2 cigarettes have been displayed in cigar store windows in the large towns.\textsuperscript{15}

On July 4 and 5, 1921, the day and day after the repeal of the anti-cigarette law went into effect and cigarettes were therefore no longer an article the sale and advertising of which were prohibited,\textsuperscript{16} Iowa newspapers resumed publishing such advertising. To be sure, even during the four years (July 4, 1917 to July 4, 1921) while the advertising ban was in effect the American Tobacco Company

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\textsuperscript{13}“New Cigarette Law Goes into Effect July 4th,” *Jackson Sentinel* (Maquoketa), June 7, 1921 (4:2-6 at 4-6). For a shorter version, which nevertheless included some information omitted from the longer version, see “Recently Passed Cigarette Law,” *Riceville Recorder*, May 18, 1921 (1:1).

\textsuperscript{14}“Making Real Progress,” *Evening Standard Journal* (Lincoln, NE), Mar. 17, 1919 (6:1).

\textsuperscript{15}“Neighborhood News,” *Adams County Free Press* (Corning), July 16, 1921 (1:1).

\textsuperscript{16}On the enactment of the ban in 1917, see above ch. 14.
in cahoots with receptive publishers skated right up to the edge of the law and over by publishing three-quarter-page ads for Lucky Strike roll cut tobacco for pipe or cigarette that contained the sentence: “This is the same toasting process that made the Lucky Strike Cigarette the greatest success in cigarette manufacturing.”

The 12 weeks between the governor’s approval of the Dodd bill and the law’s effective date proved to be an agonizingly long time for the cigarette manufacturing oligopolists to wait to acquaint potential solvent demanders with their still contraband commodities and for publishers to wait for the advertising revenue to start rolling in. Consequently, at the beginning of May, with two months still to go before the advertising ban was to be lifted, many newspapers, especially small rural weeklies, which had been enticed for a considerable period of time by the Tobacco Merchants Association and its member-cigarette manufacturers with prospects of lucrative advertising if the ban on sales and advertising were repealed and the press contributed to that outcome, began publishing the same relatively small one-column advertisements with the text: “Lucky Strike cigarette Its toasted.” One of these appeared on May 3 in the *Newton Daily News*\(^{17}\) and the *Waterloo Evening Courier*,\(^ {19}\) followed by its appearance in the immediately following days in numerous small weeklies. For example, the next day the *Palo Alto Tribune* in Emmetsburg, a small rural town in northwestern Iowa, published not only the same ad but one six-times as large for Liggett & Myers’ Chesterfield on the same page.\(^{21}\) Nor did ATC remain content with breaking the law with smallish Lucky Strike ads: two weeks later, the company began publishing ads almost five times larger that boasted of

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\(^{17}\) *Iowa City Daily Press*, June 10, 1920 (6:2-7). See also *Iowa City Daily Press*, Sept. 30, 1920 (7:4-7) (“As in the famous Lucky Strike cigarette, this toasted flavor is delicious”). These ads also ran numerous times between June and September 1920 in the *Waterloo Evening Courier, Waterloo Times Tribune, Muscatine Journal, and Des Moines Daily News* (search result on NewspaperArchive).

\(^{19}\) See above ch. 17.

\(^{21}\) *Palo Alto Tribune* (Emmetsburg), May 4, 1921 (8: 1, 5-7). The same Lucky Strike advertisement also appeared in *Marble Rock Journal*, May 5, 1921 (3:1); *Anita Record*, May 5, 1921 (8:6); *Anita Tribune*, May 5, 1921 (3:1); *Griswold American*, May 5, 1921 (2:3); *Kellogg Enterprise*, May 6, 1921 (3:1); *Alton Democrat*, May 7, 1921 (2:7); *Boyden Reporter*, May 7, 1921 (8:1); *Ruthven Free Press*, May 11, 1921 (3:6); *Progress-Review* (LaPorte City), May, 12, 1921 (7:7); *Stanton Call*, May 12, 1921 (6:6); *Vicor Record*, May 12, 1921 (7:1); *Adams County Free Press*, May 14, 1921 (4:1). See also *ICP-C*, May 7, 1921 (9:8).
facilitating and profiting from violations of the still valid sales ban by announcing that “[d]ealers now carry both sizes: 10 for 10 cts; 20 for 20 cts.”\textsuperscript{22} On May 19 they appeared in two papers in the same small southwestern town of Anita,\textsuperscript{23} one of which, ironically, in the same issue ran an article published all over the state, titled, “New Cigarette Law Is Most Stringent.”\textsuperscript{24} During the final days of the old prohibitory regime the American Tobacco Company and publishers launched yet another wave of unlawful advertisements for Lucky Strike.\textsuperscript{25} One publisher who surely was not ignorant of the law he was violating when his \textit{Winterset Madisonian} published a Chesterfield advertisement on June 15\textsuperscript{26} was Edward Smith, who as state senator had voted for the Dodd bill just two months earlier.\textsuperscript{27}

Although no publisher appears to have been prosecuted for any of these violations, the Iowa Press Association was well aware of them. The May 1921 issue of the \textit{Corn Belt Publisher}—an official organ of the Association—published a detailed and accurate exposé, which manifestly failed to deter member-publishers from illegally enriching themselves and the cigarette oligopolies. Written by Grant Caswell, a former state senator who as the Association’s field secretary edited the monthly,\textsuperscript{28} the article was excerpted by at least one daily newspaper.\textsuperscript{29}

On passage and signing of the new cigarette law...tobacco companies and cigarette manufacturers got busy prematurely to place their goods on the Iowa market and advertise same. Newspapers and bill boards in Iowa for the first time in several years contain prominent mention of cigarettes in connection with tobacco advertising—a thing which we have seen and read here in Iowa only through other mediums and in papers published outside the state but freely distributed in Iowa.

\textsuperscript{22}\textit{Lewis Weekly Standard}, May 17, 1921 (3:1-2). See also \textit{Brooklyn Chronicle}, May 26, 1921 (7:1-2).

\textsuperscript{23}\textit{Anita Record}, May 19, 1921 (2:4-5); \textit{Anita Tribune}, May 19, 1921 (7:1-2).

\textsuperscript{24}“New Cigarette Law Is Most Stringent,” \textit{Anita Tribune}, May 19, 1921 (4:1).

\textsuperscript{25}\textit{Sun-Herald} (Lime Springs), June 30, 1921 (8:6) (a weekly in Horace Dodd’s own Howard county); \textit{Rock Rapids Reporter}, June 30, 1921 (6:6) (Lyon County, of which Rock Rapids was the county seat, was represented by Moen, the Dodd bill’s most vociferous opponent in the House).

\textsuperscript{26}\textit{WM}, June 15, 1921 (6:5-7).

\textsuperscript{27}See above ch. 15.

\textsuperscript{28}On Caswell’s position as the Iowa Press Association’s field secretary, see the notice he placed in \textit{Spirit Lake Beacon}, Sept. 15, 1921 (1:1-2). On Caswell’s editing and publishing the \textit{Corn Belt Publisher}, see \textit{N. W. Ayer and Son’s American Annual and Newspaper Directory} 291 (1920).

\textsuperscript{29}“Cigaret Advertising Not Legal Till July,” \textit{Oelwein Register}, June 1, 1921 (7:7).
The Aftermath of Licensure in Iowa: 1921-1939

We say prematurely, for at least three and perhaps more agencies began making schedules and placing orders for cigarette and tobacco advertising the first of May when the old cigarette law is still in force and the new law ineffective till after the first of July. Apparently the only information the big concerns handling this advertising had of the illegality of such advertising at this time was by way of a telegram from Field Secretary Caswell to the Newell-Emmett Co., New York, suggesting that our newspapers could not legally run their schedules at this time. They came back with a further inquiry regarding the matter, when we gave them the information that the governor’s office had advised us that the new law cannot possibly become effective until July 4th...

That Newell-Emmett was facilitating illegal advertising was hardly unexpected since it had been the Tobacco Merchants Association’s chief media and propaganda consultant, whose strategy in large part hinged on securing the cooperation of rural weeklies in the anti-anti-cigarette campaign by promising them cigarette advertising revenue.

After offering ignorance of the law’s effective date as an explanation of the “premature” advertising, Caswell commented that a bill’s “long and rocky road” had been “particularly hard to travel” in the case of the cigarette bill “because of the prejudice against cigarettes in some people’s minds and the fear that the new law might make it easier for boys to get and smoke the little pills.” He also belittled the violations by referring to the ban on cigarette advertising as “[t]his hidden law,” which was, to boot, “perhaps unconstitutional”; and although he asserted that “nobody wants to violate” it, he was even more certain that no one at that late date wanted to bother to seek its invalidation by the Iowa Supreme Court. (Since his own Corn Belt Publisher had never contested the law’s validity, let alone constitutionality, when it was passed in 1917 or later, Caswell’s newfound interest in this excuse was curious.) Lame and lacking credibility was his closing rhetorical question: “Just why there should be such hurry to get this cigarette advertising started in this state we cannot see. Results cannot be secured for advertising that which cannot be sold, at any rate.” Since Caswell’s syndicated column analyzing weekly developments in the Iowa legislature during the 1921 session had uniformly disparaged the anti-cigarette law, claiming that it was neither respected not obeyed, he was acutely aware that cigarettes were

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30“Cigaret Advertising Illegal,” Corn Belt Publisher 5(9):1 (May 1921).
31See above ch. 17. On the ambiguous relationship that Caswell, who was supposed to be representing the publishers’ interests vis-a-vis advertising agents such as Newell-Emmett Co., which placed tobacco advertising for Liggett & Myers, maintained with Newell-Emmett, see “Respect Iowa B. R. List,” Corn Belt Publisher 5(8):5 (Apr. 1921).
33See above ch. 15.
being sold in many cities, giving manufacturers every incentive to advertise them.

By way of excusing its own “non olet” approach to making money by publishing cigarette ads, the *Upper Des Moines-Republican* in mid-May also sought to distinguish itself both from its openly scofflaw and from its ethical competitors:

[W]hen the cigarette law in this state was changed tobacco factories began sending out advertising. The advertisement of cigarettes under a present law is illegal so few papers accepted the ads not wishing to violate the law. On July 4th the sale of cigarettes will become legal, so will the advertising. Several papers in this state have refused to accept this advertising because they believe the use of tobacco to be wrong. [T]hese editors have the privilege of selling their space to whom they please. It is no worse for a newspaper to advertise tobacco than it is for the groceryman to sell it and they all do. It is probable that this paper will run tobacco ads as we already have several contracts ready and copy for the July 5th issue. We expect to be criticized by some for doing it but the critics are entitled to a square deal and we will sell them space if they so desire to combat the sale of the weed. That is our business.\(^{34}\)

On July 4, the veritable flood of lawful cigarette advertisements began to cascade through the state. The *Des Moines Register*, the paper with the largest daily circulation in Iowa, published a large advertisement for Camel and a smaller one for Lucky Strike,\(^{35}\) while the *Dubuque Times-Herald* also published one for Lucky Strike.\(^{36}\) The next day large advertisements for Camel appeared, inter alia, in the Cedar Rapids *Evening Gazette*,\(^{37}\) *Muscatine Journal*,\(^{38}\) *Iowa City Press-Citizen*,\(^{39}\) and *Ottumwa Courier*,\(^{40}\) while Lucky Strike ads appeared in the *Sioux City Tribune*,\(^{41}\) the *Waterloo Times-Tribune*,\(^{42}\) the *Cedar Rapids Republican*,\(^{43}\) and the *Des Moines News*.\(^{44}\) The *Charles City Press*, Dodd’s hometown paper,
published two Lucky Strike advertisements and one for Camel on July 5; in the same day’s issue of the Marshalltown Times-Republican an advertisement for Liggett & Myers’ Fatima cigarettes appeared, which that day also adorned the Council Bluffs Nonpareil along with one for Camel. Nor did Liggett & Myers stint on Chesterfield: the Oskaloosa Daily Herald published a very large one on July 6—the same day that it reported that the city council had denied the issuance of cigarette permits—and printed a different one six days later. The cigarette oligopolists did not renge on their promises to spread their advertising wealth to small-town papers. On July 6 and 7, the Iowa Recorder in Greene and Rockwell City Advocate published large Camel ads, while the Albia Republican and Hamburg Republican on July 7 and 8 made sure their readers did not forget Chesterfield. The weekly Howard County Times—a leading paper in the county that Horace Dodd, who had made it all possible, represented—published Camel and Chesterfield advertisements on July 6. The same day the Marengo Republican hit the nicotine revenue jackpot when it carried ads for all three oligopolists’ market-dominating commodities, a feat matched two weeks later by the Anita Tribune. Some small-town or specialized weeklies, such as the Riceville Recorder and the Iowa Farm Republic, took an extra week to publish their first advertisements. And at least one small-town weekly, the Deep River Record, wanted to have it both ways: On July 1, noting that Grinnell and Newton had “refused to grant the privilege,” it editorialized that the town “council has the right to refuse to issue a permit if it wants to exercise its authority in the matter. Maybe it would be a good thing banish the pill

45 CCP, July 5, 1921 (2:7, 3:7, 4:5-7).
46 MT-R, July 5, 1921 (7:5-8).
47 Council Bluffs Nonpareil, July 5, 1921 (2:1-3, 6:6-8).
48 Oskaloosa Daily Herald, July 6, 1921 (2:4-7).
49 See below ch. 20.
50 Oskaloosa Daily Herald, July 12, 1921 (3:2-5).
51 Iowa Recorder (Greene), July 6, 1921 (6:4-6).
52 Rockwell City Advocate, July 7, 1921 (3:5-7).
53 Albia Republican, July 7, 1921 (7:2-4); it also published one for Lucky Strike (3:2).
54 Hamburg Republican, July 8, 1921 (3:3-6).
55 HCT, July 6, 1921 (6:4-6, 8:4-6).
56 Marengo Republican, July 6, 1921 (2:4-6, 3:4, 7:4-6).
57 Anita Tribune, July 21, 1921 (4:1-3, 7:5, 8:4-6).
58 Riceville Recorder, July 13, 1921 (7:6, 8:4-6) (Lucky Strike and Chesterfield).
59 Iowa Farm Republic, July 14, 1921 (3:1) (Lucky Strike).
The Aftermath of Licensure in Iowa: 1921-1939

altogether." But then from July 8 on the paper began publishing Lucky Strike and Chesterfield advertisements galore.61

Cigarette Sales Permit Mulct Taxes

With the stub of a black cigar clenched firmly between his teeth, Mr. Dushkind tilts back in a swivel chair and speaks frankly.

“Five years ago? Six States then had laws entirely prohibiting the sale of cigarettes...Arkansas and Tennessee, North Dakota, Kansas, Nebraska, and Iowa. [T]oday there are only two states left...which continue to carry on their statute books laws forbidding the sale of cigarettes to adults. They are North Dakota and Kansas. The South Carolina Legislature at its latest session imposed a heavy tax on cigarettes...but this is a measure affecting price, not a prohibition. So on the whole we can’t complain.”62

One way of tracing the extent to which local communities made use of their statutory power to deny cigarette sales permits is to examine the data on cigarette license receipts for the hundred or so largest cities published in the auditor of state’s annual Report on Municipal Finances to determine whether any cities reported no such receipts.63 Since the 1921 statute required the mulct tax, which applicants had to pay for the license, to be paid to the city or town treasurer and go into its general fund,64 the absence of cigarette license receipts in the uniform statewide reporting should be interpretable as the result of a city council’s blanket

60“Local and General News,” Deep River Record, July 1, 1921 (5:1). Deep River (population 487 in 1920) is about 25 miles southeast of Grinnell.
61Unfortunately, from June to October 1921 the Deep River Record neither published any minutes of any town council meeting nor referred to any council action on cigarette permits.
62Charles Cushing, “Prohibition as ‘Big Brother’ Fails to Win for Blue Laws,” NYT, May 20, 1923 (XX5).
63During the 1920s, there were a total of 107 to 111 first- and second-class cities (based on federal and state censuses), the former having a population of 15,000 or more and the latter of 2,000 to 15,000; the categories were somewhat more flexible inasmuch as once a city’s population reached these thresholds, subsequent population decreases did not cause a city to lose its status unless its population fell below 10,000 and 1,500, respectively. Compiled Code of Iowa §§ 3507-3508 at 1063 (1919); Code of Iowa §§ 5623-24 (1924). Unfortunately, for the approximately 800 incorporated towns (with a population of under 2,000) the auditor of state did not publish separate data on cigarette license receipts.
641921 Iowa Laws ch. 203, §§ 5 and 12, at 213, 214-15, 216.
denial of permits. However, although this procedure eventually functioned as expected, several start-up problems frustrate its use in the earliest years. To begin with, the state did not publish such receipts data for the first partial year of the law’s operation (July 4, 1921 to March 31, 1922). It is known that during the first two months 3,000 permits had been issued and by February 1, 1922, 3,200, and that during those first seven months in the aggregate permit fees to cities, towns, and counties had amounted to $225,000. Second, even for the first full year, 1922-23, apparently not all cities reported their cigarette license receipts, even though they had collected them. Thus, the state’s four largest cities, Des Moines, Sioux City, Davenport, and Cedar Rapids, and the sixth largest, Waterloo, all lacked entries for cigarette license receipts, although the press reported that they had issued permits for which dealers had paid the mulct tax. It seems implausible that the few cities that failed to report cigarette license receipts intermittently had actually granted, then denied, then granted permits. For example, Dubuque, the fifth largest city, reported receipts of $5,400 in 1922-23, nothing in 1923-24, and $6,600 in 1924-25.

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66 “Golden Stream Pours in Iowa’s Coffers from Cigaret Laws,” WEC, Sept. 10, 1921 (8:4).
69 The auditor of state identified several municipalities that had failed to report as required, but the largest cities mentioned below were not among them. Auditor of State, State of Iowa: 1923: Report on Municipal Finances for the Year Ending March 31, 1923: Statistics of Cities and Towns of Iowa 5. However, one of the smallest cities, Hamburg, which was listed as having no receipts of any kind for 1923-24, was among the cities having failed to report as required. Auditor of State, State of Iowa: 1924: Report on Municipal Finances for the Year Ending March 31, 1924: Statistics of Cities and Towns of Iowa 6.
70 “The City Council,” DD&L, July 25, 1922 (8:8); see below.
This methodology identified two cities as likely candidates for further scrutiny: Grinnell, the 32nd largest city, with a population of 5,362 at the 1920 census, which did not report cigarette license receipts until fiscal year 1924-25, when it collected $675; and Indianola, the 55th largest city, with a population of 3,628 at the 1920 census, which reported no cigarette license receipts until fiscal year 1934-35, when, as the 59th largest city with a population of 3,488 at the 1930 census, it reported $525 in receipts. The struggles that underlay these bare chronologies are analyzed below.

Before proceeding to an account of those last open local conflicts over cigarette sales in Iowa for several decades, the growth of the cigarette trade in Iowa during the 1920s can be tracked by reference to the aforementioned total annual permit fees in the first- and second-class cities, which at the 1920 federal population census accounted for 925,152 or 38.5 percent of the total state population of 2,404,021, at the 1925 state census for 987,720 or 40.8 percent of the total population of 2,419,927, and at the 1930 census for 1,038,166 or 42.0 percent of the total population of 2,470,939. Keeping in mind that the receipts for the very largest cities were missing for 1922-23 and 1923-24, the total receipts developed as follows: 1922-23: $101,111.09; 1923-24: $105,038.88; 1924-25:


73See below ch. 20.

$193,953.50; 1925-26: $201,130.92; 1926-27: $208,415.00; 1927-28: $217,128.30; 1928-29: $222,049.88; 1929-30: $231,044.30. By way of comparison, stray aggregate figures for 1923-24 and 1928-29 revealed statewide local permit fees of about $300,000 and $350,000, respectively.

During the last five years, beginning with the inclusion of data for the largest cities, the mulct tax rose by about 19 percent, suggesting a modest increase in the number of permit holders. At $100 per permit in the first-class cities—at the 1920, 1925, 1930 censuses the population in 14, 15, and 16 cities, respectively exceeded 15,000—it is possible to estimate the number of permit holders in each city, which only roughly corresponded to the rank-ordering of population. Des Moines, the largest city with a population of 141,441 in 1925, collected $26,700 in receipts (its peak figure during the 1920s) in 1925-26, which would have translated into 267 permit holders. Its only close competitor, Sioux City, the second largest city with a population of 76,411, collected cigarette license receipts of $21,600, indicating 216 permit holders—a gap that by 1928-29 closed to $1,525 or only 15 permit holders. The smallest first-class city in 1925-26, Iowa City, with a population of 15,289, collected $2,275 from (presumptively)


76 “Cigarette Revenue Nets $700,078.12 to State in Year,” Davenport Democrat and Leader, July 11, 1924 (10:7-8); W. E. Hawse, “Cigarette Stamp Tax of Iowa and How Administered,” in Report of Proceedings: Third Annual Conference of Administrators of Tobacco Tax Laws 33-40 at 33 (1929). The figure for 1928-29 may have been somewhat overstated since Hawse (who was the Cigarette Revenue Department superintendent) also stated that Des Moines with “a population of 167,000, received in the neighborhood of $30,000.00” in 1928. Id. Yet, in fact Des Moines (whose population was about 25,000 lower) received cigarette permit revenue of $24,875.
about 23 permit holders. The largest second-class city, Keokuk with a population of 14,501, collected $2,300 in receipts, which at $75 per permit was (presumptively) paid by about 31 permit holders. The 15 first-class cities collected $127,775 in cigarette permit fees, which would have translated into about 1,278 permit holders; the remaining $73,355 collected by the 95 second-class cities would have been the equivalent of about 978 permit holders, for a grand total for the state of 2,256. Thus for all 110 first- and second-class cities there was one permit for 438 people, but a greater density of permits in the smaller cities: one permit for 478 people in the first-class cities and only 385 in the second-class cities. Among the first-class cities, the density ranged from one permit for 354 people in Sioux City to one for 672 people in Iowa City.\textsuperscript{77}

Whether the difference was accounted for by the permits issued by the approximately 800 towns and by numerous county boards of supervisors in unincorporated places or by some flaw in the aforementioned methodology, a total of 3,400 retail dealers in Iowa held permits in early 1923,\textsuperscript{78} which would have worked out to a little more than 700 people per permit.

Shortly before the law went into effect it was assumed that the combined impact of the mulct tax (which amounted to $50 in towns smaller than second-class cities and in unincorporated places) and the required $1,000 bond\textsuperscript{79} would

\textsuperscript{77}Auditor of State, \textit{State of Iowa: 1926: Report on Municipal Finances for the Year Ending March 31, 1926: Statistics of Cities and Towns of Iowa}, table 1A at 14-15; Auditor of State, \textit{State of Iowa: 1929: Report on Municipal Finances for the Year Ending March 31, 1929: Statistics of Cities and Towns of Iowa}, table 1A at 12-13. Density may have been lower in larger cities because stores were larger. In its first year Grinnell granted so few permits that there was only one for 777 people. The equivalence between the amount of receipts and number of permit holders is not perfect since the former may have included penalty payments and been reduced by less than full amounts paid by holders who applied for permits later in the fiscal year. 1927 Iowa Laws ch. 33, at 26.

\textsuperscript{78}"Direct Tax Upon All Tobacco Sold Provided in Bill," \textit{WEC}, Mar. 8, 1923 (9:1-2 at 2).

\textsuperscript{79}In 1939 the legislature reduced the bond for retailers from $1,000 to $500 and in 1974 eliminated it altogether. 1939 Iowa Laws ch. 72, § 10.9, at 102, 109; 1974 Iowa Laws ch. 1116, § 1, at 368, 369. In 1974 Democratic Representative Robert Krause tried to amend an unrelated Senate cigarette bill by adding the bond repeal, but the amendment was deemed non-germane; a few days later the House reconsidered the vote, adopted the amendment, and passed the bill 91 to 0. \textit{State of Iowa: 1974: Journal of the House: 1974 Regular Session Sixty-Fifth General Assembly} 2165-67, 2213-14, 2263-65 (Apr. 26, 29, and May 1). The press did not report on this measure, but 34 years later Krause recalled even the details of the first amendment whose passage he as a freshman legislator had secured. The need for repeal had been suggested to him by a banker in his small town of
prompt smaller groceries and other smaller stores that had been selling cigarettes illegally to stop.\textsuperscript{80} And although the financial pressure did in fact eliminate some dealers,\textsuperscript{81} the state treasurer’s office later concluded that a smaller number of stores would sell the same number of cigarettes.\textsuperscript{82}

### Cigarette Sales Excise Taxes

The object of the law is to prevent the sale of cigarettes to minors, and to enable the control of the sale of cigarettes; it was not passed primarily to increase revenue.\textsuperscript{83}

[T]he more broadly prohibitive anti-tobacco legislation...has been proven to be unsatisfactory by practical experience. The penumbra of malediction once surrounding the use of tobacco has considerably faded in recent years. [T]here is reason to suggest that further experiments with this type of legislation would result in but little progress. ... It would seem to be by far the more practical course for lawmakers to regard tobacco in the light of a source of revenue only.\textsuperscript{84}

\textsuperscript{80}“Twenty-Five Dealers May Sell Cigaretts,” \textit{CRR}, June 18, 1921 (8:4) (discussing Cedar Rapids).

\textsuperscript{81}For example, in 1925 the Goreham Hotel in Grinnell requested that its permit “be cancelled on account of not wishing to pay the required tax.” “Proceedings of the City Council,” \textit{GR}, July 6, 1925 (5:4) (June 30).

\textsuperscript{82}W. E. Hawse, “Cigarette Stamp Tax of Iowa and How Administered,” in \textit{Report of Proceedings: Third Annual Conference of Administrators of Tobacco Tax Laws} 33-40 at 36 (1929). The mulct tax’s bite in 1921 can be presumed from the fact that almost 90 years on it remains unchanged, although the consumer price index has risen almost 12-fold in the interim. Iowa Code § 453A.13.3 (2010).

\textsuperscript{83}“The Cigaret Law,” \textit{Evening Tribune} (Des Moines), Sept. 9, 1921 (6:2) (edit.).

\textsuperscript{84}C. Wheatley, Jr., “Anti-Tobacco Legislation,” \textit{Law Notes} 35(11):204-206 at 206
Iowa was the first state to enact a cigarette sales tax, which quickly proved to be “such a lucrative source of state revenue” that before it had even been in effect for a full year “other states [were] casting covetous glances its way, and several requests have come to the state treasurer for copies of the law, and a report on its administration.” 85. The sales tax was also a much more sensitive indicator of cigarette sales than the sales permit mulct tax. Table 7 shows the amount collected from July 4, 1921 through June 30, 1932:

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86. “State Gets Big Revenue from the Cigarets,” *DD&L*, June 13, 1922 (2:1).
The Aftermath of Licensure in Iowa: 1921-1939

Table 7: Annual Collection (in $) of the Iowa Cigarette Stamp Sales Tax, July 4, 1921 to June 30, 193287

<table>
<thead>
<tr>
<th>Year</th>
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<td>1,371,683.44</td>
</tr>
<tr>
<td>1930-31</td>
<td>1,406,928.59</td>
</tr>
<tr>
<td>1931-32</td>
<td>1,207,137.94</td>
</tr>
</tbody>
</table>

As early as January 1923 the state treasurer’s office had commented that the increased tax collections reflected (not so much a higher rate of compliance but)

87Executive Council of the State of Iowa, Census of Iowa for the Year 1925, at lix (data for 1921-22); State of Iowa: 1932: Report of the Treasurer of State for the Biennial Period July 1, 1930, to June 30, 1932, at 41 (data for all other years). The state treasurer initially reported that the excise tax collected on cigarette and cigarette papers during the first year the law was in effect amounted to $590,918.99. State of Iowa: 1922: Report of the Treasurer of State for the Biennial Period July 1, 1920, to June 30, 1922, at 5. In the next biennial report the figure for 1921-22 given as $490,918.99 was presumably a typographical error. State of Iowa: 1925: Report of the Treasurer of State for the Biennial Period July 1, 1922, to June 30, 1924, at 5. The figure in the table, taken from the 1925 state census volume, presumably corrected the initial figure, just as the 1932 state treasurer’s report corrected the initial published figure for 1922-23. On June 2, 1921, State Treasurer Burbank estimated that one company selling cigarettes in various cities and towns in Iowa “will pay more than $70,000 yearly as their share of the tax due the state from the sale of cigarettes. Another company will contribute more than that....” “Heavy Cigarette Tax,” Times-Republican (Bedford), June 6, 1921 (2:4). The article did not identify either company and no other newspaper was found with a more complete report.
increased sales caused by lower cigarette prices during the second half of 1922.88

Representing a tax of one-tenth of a cent per cigarette, the tax collections multiplied by 1,000 conveniently translated into an approximation of total annual cigarette sales and consumption, which more than doubled during the eight years ending with the onset of the Great Depression. Although the tax also covered cigarette papers, contemporaries typically assumed the full equivalence, as, for example, was expressed in this press account: “The full amount collected for 1928 was $1,183,032. This means that 1,183,000,000 were smoked in Iowa last year.”89 The periodic publication of cigarette tax revenue data thus finally offered the public for the first time ever the opportunity to gauge the consumption of cigarettes in an individual state—information that theretofore only cigarette companies had possessed but not shared with government officials.90 For example, in June 1922 the press noted that the $2,000 a day in tax revenue collected on average during the first eight days of the month reported by the assistant state treasurer in charge of cigarette revenue collections meant that two million cigarettes a day were smoked in Iowa, almost the equivalent of one for every man, woman, and child: “This enormous consumption of the slim, white, ‘fags,’ while possibly proving injurious to cigaret addicts, is proving a very profitable source of revenue to the state....”91 By mid-1924, when the state

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88“Licenses for Cigarets Give State Million,” DD&L, Jan. 7, 1923 (3:4). How sellers managed to lower prices while having to pay the new sales tax and permit mulct tax is unclear.

89J. Jarnagin, “News and Comment About Iowa People and Events,” Iowa Recorder (Greene), Mar. 27, 1929 (9:1-3 at 3).

90In 1927 the legislature amended the cigarette law to require (non-wholesaler) retail permit holders to file with the treasurer of state a monthly report detailing the number of cigarettes they had bought during the previous month, the names of the suppliers, and the kinds and brands of cigarettes. 1927 Iowa Laws ch. 33, § 3, at 26, 27 (codified at Iowa Code § 1570-b1). The onset of this reporting requirement in 1927 was associated with a very marked rate of increase in revenue collection. Neil Jacoby, “Statistics of State Cigarette Revenues and Cigarette Sales, with Particular Reference to Iowa” at 2-3 (Address at a dinner meeting of members of the staff of the Iowa Cigarette Tax Administration, Des Moines, June 1931), in Collected Articles and Papers of Neil H. Jacoby, Vol. 1: 1930-1942, at 26-33 at 27-28 (1975) (available only at Rosenfeld Library, Anderson School of Management, UCLA). The monthly reports do not, however, appear to have been published.

91“State Gets Big Revenue from the Cigarets,” DD&L, June 13, 1922 (2:1). Whereas earlier records had showed the $2,000 a day average for working days only, by August it included Sundays and holidays. “Iowans Smoking over Two Million Cigaretts a Day,” DD&L, Sept. 8, 1922 (2:3).
treasurer’s office was forecasting that annual sales would reach one billion “fags,” it estimated that daily consumption was on the order of 2.5 million. A year later state cigarette tax collectors estimated that “Iowans Smoke Up Nearly 3 Million Cigarets Every Day.”

A nationally unique contemporaneous opportunity to calculate cigarette sales on a county and even city level was given in 1930 to Neil H. Jacoby, a research assistant at the University of Chicago studying state sales taxation in general and state tobacco taxation in particular (who went on to become dean of the UCLA School of Management and a member of President Eisenhower’s Council of Economic Advisers). Because Iowa’s tax had been in force for the longest period and was also the only one showing tax collections for cigarettes alone, and the trends, if there were any to be discerned, had already had time to appear, Iowa, he explained at a dinner meeting with the staff of the Iowa Cigarette Tax Administration in June 1931, afforded “the best evidence for study” of cigarette tax yields. At the time there were no other data available on cigarette sales at the county or city level.

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92 Ed Dose, “Iowa Launches Drive to Get Cigaret Taxes,” DD&L, June 5, 1924 (2:4).
93 “Iowans Smoke Up Nearly 3 Million Cigarets Every Day,” WEC, July 2, 1925 (2:8).
95 Neil Jacoby, “Statistics of State Cigarette Revenues and Cigarette Sales, with Particular Reference to Iowa” at 1-2 (Address at a dinner meeting of members of the staff of the Iowa Cigarette Tax Administration, Des Moines, June 1931), in Collected Articles and Papers of Neil H. Jacoby, Vol. 1: 1930-1942, at 26-33 at 26-27 (1975) (available only at Rosenfeld Library, Anderson School of Management, UCLA). In 1975, four years before his death, Jacoby personally assembled and had bound and cataloged at the UCLA business library a set of “all available articles and papers, published and unpublished” that he had written during the previous 45 years; he excluded, however, “unpublished monographic studies of considerable length,” which would have made the collection “far too bulky.” Collected Articles and Papers of Neil H. Jacoby, Vol. 1: 1930-1942, at iii (1975). This informal paper “presented some results of a yet unfinished statistical study on cigarette tax yields and cigarette consumption, with particular reference to the state of Iowa.” Id. at 1 (1:26). It seems likely that the paper was related to a larger study that he wrote the next year: Neil H. Jacoby, “The Estimation of Yields for State Tobacco Taxes,” prepared for the Social Science Research Committee, University of Chicago (Feb. 1932) (unpublished), which was cited a year later by E. Schoenberg, “The Demand Curve for Cigarettes,” Journal of Business 6(1):15-35 at 18 n.5 (Jan. 1933). Since the page number cited by Schoenberg was 116, it is possible that the paper, which does not appear in Jacoby’s collection, was excluded because it fell into the category of “unpublished monographic studies of considerable length.” Neither the UCLA management school library nor dean’s office nor Jacoby’s son was able to find the study; likewise, librarians

1933
consumption or sales (which he used synonymously) for any state. Jacoby needed such data to estimate cigarette tax yields in various states, determine the volume of evasion achieved by consumers who bought cigarettes in non-taxing states, and discover heavy and light revenue-yielding areas in each state that did tax cigarettes. His first choice as a source for such data had proved inaccessible: “The different cigarette manufacturing companies to whom an urgent application was made for sales data by states or geographical areas, politely refused to divulge any information whatsoever.” The next best sources were the states that required dealers to file reports periodically on their cigarette purchases (of which Iowa had been one since 1927). Fortunately for Jacoby, William E. Hawse, the superintendent of the Iowa Cigarette Revenue Department, gave him

at the University of Chicago were unable to find the paper within the records of the Social Science Research Committee located there. Both of these papers appear to be related to an address that, as W. E. Hawse, the superintendent of the Iowa Cigarette Revenue Department explained, “a gentleman...from Chicago” was supposed to present on September 2, 1931 to the annual conference of state tobacco tax administrators that took place in Des Moines that year; he was to have been on the program, but with “time pressing us too much to give him any time now,” he was, instead, to “present the facts that he has compiled on the tobacco tax through the Business Research of the Chicago University at the banquet tonight.” Report of Proceedings: Fifth Annual Conference of Administrators of Tobacco Tax Laws: September 1-2, 1931, at 72. At the next conference, M. F. Snider, the head of the Tobacco Division of the U.S. Internal Revenue Dept., referring to the previous year’s conference, mentioned a “young fellow, an economist from the University of Chicago, who had been given access to the figures of collection in the State of Iowa by counties, and his analysis of them was very good,” singling out the data for the county in which the University of Iowa was located as showing the difference between rural and urban consumption. Report of Proceedings: Sixth Annual Conference of Administrators of Tobacco Tax Laws: September 16-17, 1932, at 32 (statement by M. F. Snider, head, Tobacco Div., U. S. Internal Rev. Dept.).


98Hawse’s career sheds interesting light on the background and ethics of enforcement officials. A 27-year-old bakery clerk in Grundy Center at the time of the 1920 population census, the Virginian was a world war veteran, who was an inspector in the Cigarette Department from 1921 to 1928. When he left he bought a cigar store in Waterloo and obtained a cigarette sales license; later in 1928 when he was appointed superintendent of
access to the Cardex file reporting individual dealers’ purchases and cigarettes and stamps, enabling him to calculate for 1930 each dealer’s sales and, cumulatively, those for the state and by county.\textsuperscript{99}

With cigarette sales at 1,340,484,000 in Iowa in 1930, per capita consumption was 543 or about 58 percent of the 940 recorded for the United States in 1929. With no reason to believe that Iowa’s figure was the country’s lowest and knowing that some states must have had averages much higher than 940, Jacoby raised the question as to what made cigarette consumption relatively high or low in any state, and tentatively answered it by reference to relative population density. To test his hypothesis, he constructed a scatter diagram plotting population per square mile and per capita cigarette consumption for each of Iowa’s 99 counties.\textsuperscript{100} Unfortunately for purposes of historical research, the fruits of Jacoby’s unique access to this unique data set have been irretrievably lost because Jacoby failed to include any of the charts in the sole copy of his unpublished paper that he left behind.\textsuperscript{101} Consequently, all that remains is his very brief discussion of the data, which began by pointing out that since the points were not closely strung out along an upward and rightward slanting line, the relationship between greater population density and high per capital consumption was “not significantly close,” although generally densely populated counties were also characterized by high consumption. However, he did, as another missing scatter diagram revealed, find a close relationship on the county level between total cigarette consumption and total population. Equally interesting to him was whether the deviations from the line of average

\textsuperscript{99}Neil Jacoby, “Statistics of State Cigarette Revenues and Cigarette Sales, with Particular Reference to Iowa” at 4 (Address at a dinner meeting of members of the staff of the Iowa Cigarette Tax Administration, Des Moines, June 1931), in Collected Articles and Papers of Neil H. Jacoby, Vol. 1: 1930-1942, at 26-33 at 29 (1975). Since dealers’ duty to provide monthly data began in 1927, presumably Jacoby had access to the data for all of 1928 and 1929 as well, which are now also no longer extant.


\textsuperscript{101}The Iowa State Archives does not have the underlying data from the Cigarette Revenue Department or any other relevant documents. Email from Jeffrey Dawson to Marc Linder.
relationships were readily explainable. For example, the very high per capita consumption (943 cigarettes) in Johnson county, the site of the State University of Iowa, relative to its total population was “undoubtedly due to the high percentage of cigarette-smoking individuals in its population” (the basis for which he did not mention). At the other end, Dubuque, Des Moines, Lee, Pottawattamie, Appanoose and Page counties’ relatively low per capita consumption—he mentioned no numbers—relative to their population density was explicable by reference to their location on the borders with non-cigarette-taxing states. Finally, Warren county’s especially low (but unfortunately unspecified) per capita consumption relative to its population density he explained as a function of the strong Methodist community there, which had resulted in the cigarettes’ not being purchasable in the county seat of Indianola.

Jacobi also separately compiled the sales data for 21 cities with a population above 10,000. Although this scatter diagram has also been lost, it showed that per capita sales there were much higher than in the counties: with only 29 per cent
of the population, these cities accounted for 33 per cent of permit-holding dealers and more than 50 per cent of cigarettes sold. In particular, the two largest cities, Des Moines and Sioux City, accounted for 23 per cent and 13 per cent, respectively, of all cigarettes sold in all Iowa cities. The diagram indicated that the 21 cities were “grouped fairly closely about a line of average relationship,” meaning that in cities with more than 10,000 inhabitants, once the population was known, per capita sales could be predicted within a small margin of error at about 1,027. Overall, per capital consumption for cities was 944 compared to only 543 for counties.  

Enforcement

[T]he new law provides for a tax on cigaret sales which will add materially to state revenues. The danger is that we may be too apt to collect the revenue without enforcing the other and more important feature of the law.

Mayor Ahrens, of Sac City, has authorized the town marshal “to arrest every boy under 21 years of age seen smoking in public. The boy will be brought before the mayor and required by law to tell where he obtained his cigaret.” ... The same attitude all over the state will make it decidedly interesting with minors who persist in looking with favor upon the seductive coffin nail.

A corps of secret operatives is constantly on the move in the state seeing that the cigaret law is enforced, Mr. McCoy declares.


105 “The Cigaret Law,” Evening Tribune (Des Moines), July 5, 1921 (10:1-2 at 2) (edit.).

106 J. W. Jarnagin, “News and Comment About Iowa People and Events,” Spirit Lake Beacon, July 21, 1921 (32:3-6 at 3). This paragraph of the article was printed adjacent to a three-column advertisement for Chesterfield.

At the beginning of July 1921, when the city council in Decorah, a northeastern Iowa town of about 4,000 with a heavy Norwegian concentration, issued eight cigarette sales permits, the local newspaper remarked that they represented about one-fourth of the dealers who had been selling cigarettes during the prohibition period.\textsuperscript{108} In order to market their legality, the next week six of these permittees—including owners of a hotel, a lunch parlor, and two restaurants—took out a large joint advertisement in the weekly paper under the heading: “Buy Your Cigarettes of Decorah’s Licensed Dealers.”\textsuperscript{109}

The dealers’ judgment of Decorah’s law-abidingness may have been exceptional. Less than three weeks after the new cigarette licensure and tax law had gone into effect the first arrest in Iowa for selling cigarettes without revenue stamps took place in Davenport on July 23, 1921.\textsuperscript{110} A “new situation” arose in state “law enforcement circles” by virtue of the law’s having turned over enforcing powers “entirely” to the treasurer of state’s office.\textsuperscript{111} The number of men in the “picked group” in pursuit of bootleggers was kept secret so that, despite having badges numbered from 1 to 19, no one outside the treasurer’s office knew exactly how many.\textsuperscript{112} They were, boasted their boss, Clarence C. McCoy, in mid-1922:

“At work all the time. They do not make their presence known in a town until they have evidence they are after, and the tax violators under arrest. They do not cooperate with local officials. Cases are on record where they have gone into a town, secured the evidence, made the arrests, and had fines imposed in less than an hour after their arrival.

“The number of cigarettes sold daily in the state without the revenue stamps is exceedingly small....”\textsuperscript{113}

\textsuperscript{108}“Eight Cigarette Licenses in Decorah,” Decorah Journal, July 13, 1921 (1:4).
\textsuperscript{109}Decorah Journal, July 20, 1921 (3:5-7).
\textsuperscript{110}“Cigaret Stamps Are in Demand,” DMC, July 27, 1921, 38(182) (14:1).
\textsuperscript{111}“State Gets Big Revenue from the Cigarets,” DD&L, June 13, 1922 (2:1). Two weeks after the law had gone into effect one newspaper erroneously reported that Attorney General Gibson would be enforcing the cigarette law because the treasurer of state was given no law enforcement officers. “Gibson to Enforce New Cigaret Laws,” DMC, July 18, 1921, 38(174) (8:2).
\textsuperscript{112}“State Gets Big Revenue from the Cigarets,” DD&L, June 13, 1922 (2:1).
\textsuperscript{113}“State Gets Big Revenue from the Cigarets,” DD&L, June 13, 1922 (2:1). In at least one instance when agents did cooperate with local officials by requesting that the deputy sheriff in Davenport obtain search warrants for 31 raids, a district court judge, overruling the issuing justice of the peace, later held them illegal because the deputy sheriff, knowing nothing about the facts of the alleged violations, had merely sworn to the warrants at the state agents’ request. “Court Order Holding Writs Illegal Stands,” DD&L, July 26, 1925.
A year later, reviewing the first 18 months of the law’s operation, McCoy reported that under a “program of rigid prosecution for all violators” 104 had been arrested, of whom 96 were convicted; four cases were still pending and only four dismissed. Local governments had promptly revoked the permits of 53 of the violators, no explanation being given as to why the city and town councils had not complied with the law’s mandate that they revoke the permits of all violators. The state treasurer’s office considered the cigarette act “one of the smoothest working laws of its type” in Iowa because the “fact that revenue stamps must be placed on every package...makes it immediately patent to the purchaser whether the dealer he patronizes is complying with the law.”

This conspicuousness would have been relevant only if much enforcement had been driven by customers’ denunciations to the agency, but the press did not indicate that the secret treasury agents’ swoops were in fact based on such information.

The superintendent of the cigarette revenue department of the state treasurer’s office, 47-year-old McCoy, was a protégé of William Burbank, the state treasurer. McCoy had also been in charge of the motor license department under Burbank when the latter was Black Hawk county treasurer. During World War I, leaving his job as a traveling salesman, McCoy became a Red Cross official. After his election as state treasurer, Burbank hired McCoy to work in the collateral inheritance department in February 1921 and on June 1 transferred him to a clerk position to prepare a new department to collect the new cigarette tax and enforce the law. Then on July 1, Burbank transferred McCoy, who was deemed an expert accountant, to the superintendent’s position, thus making him

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(12:1). Although the attorney general ordered an appeal to the Iowa Supreme Court, no such appeal appears to have been decided. “Carry Cigaret Litigation to Supreme Court,” DD&L, July 31, 1925 (10:7).

“Licenses for Cigaretts Give State Million,” DD&L, Jan. 7, 1923 (3:4) (headline incorrect and misleading since article was not about licenses). In early March 1923, five dealers were arrested by state agents in LeMars for selling cigarettes to minors. “Direct Tax upon All Tobacco Sold Is Provided in Bill,” WEC, Mar. 8, 1923 (9:1-2 at 2).

For an extreme position speculating that the new law might eventually have to be “entered in the legislative joke book along side of [sic] many other side-slitting [sic] comedies which purport to be laws,” see “Is It a Farce?” Jackson Sentinel (Maquoketa), Aug. 16, 1921 (4:1) (edit.).

At the 1920 census McCoy was returned as having no occupation; in 1910 he was a dealer in mineral lands (or perhaps bonds); and in 1900 he was a music dealer (HeritageQuest). He died in California in 1945. “Friends Notified of Sudden Death of Former Resident,” Progress-Review (La Porte-City), June 27, 1946 (8:7).

an assistant state treasurer. 118 Little more than a month into his superintendency, McCoy found himself the object of a legal action filed in Polk county district court by a Spanish-American war veteran, Fred G. McCutcheon, under the newly enacted Soldier’s Preference law to force Burbank to hire him instead of McCoy. 119 That law, which had gone into effect on April 12, provided that in every public department and on all public works on the state level and in all political subdivisions, honorably discharged army and navy soldiers, sailors, marines, and nurses in wars from the Civil War to the world war were entitled to preference in appointment, employment, and promotion “over other persons of equal qualifications”; whenever such a person applied for such appointment or employment, the official charged with filling the position was required, before appointing or employing anyone, to investigate his or her qualifications and appoint or employ him or her if he or she was man or woman of good moral character. A refusal to allow the preference entitled the person to a right of action for mandamus to right the wrong. Excluded from the act was the “position of...deputy of an official or department” or “any person holding a strictly confidential relation to the appointing officer.” 120 Arguing at a hearing on Burbank’s demurrer at the end of September were a former Supreme Court judge, speaking for 19 lawyers who volunteered to represent McCutcheon, and Attorney General Gibson for Burbank. Oddly, at the same time, the Iowa branch of the American Legion, while professing interest in enforcing the new preference law, disavowed any interest in this or any similar suit. 121

Though district court Judge James C. Hume in October refused to sustain Burbank’s demurrer, thus ruling in McCutcheon’s favor, his “somewhat humorous discussion” of the case openly “ridiculed” the preference law as “freak legislation,” and, since the position in dispute involved enforcement of the new

118 “C. C. McCoy Chosen Head Cigaret Tax Collector in Iowa,” WEC, May 4, 1921 (1:8); “M’Coy’s Record thru War Good,” WEC, Aug. 24, 1921 (6:6).
119 “Test Recent Iowa Law out on W. J. Burbank,” Sunday Times Tribune (Waterloo), Aug. 7, 1921 (1:1); “M’Coy’s Record thru War Good,” WEC, Aug. 24, 1921 (6:6). The plaintiff was perhaps the Fred McCutcheon of Sioux City who had unsuccessfully run for chief clerk of the Iowa House of Representatives in January. “MacFarlane Choice for Speaker,” ICP-C, Jan. 8, 1921 (1:8). No such person was returned at the 1920 population census; the only person by that name was a 66-year-old laborer in Fairfield. A Fred McCutchten, an insurance agent born in 1875 was returned in the censuses of 1900 (living in Iowa City), 1910 (living in Onowa), and 1915 (living in Sioux City) and, spelled McCutchinn, of 1920 (living in Des Moines).
120 1921 Iowa Laws ch. 166, §§ 2-3, at 162-63.
121 “Vets Preference Case Before Court,” CREG, Sept. 28, 1921 (3:5).
cigarette law, threw in his “contempt” for that statute for good measure, characterizing it as “the product of prejudice and conceit.” More generally, he declared that legislatures had long been “subject to ridiculous and illogical enactments.” Rejecting the state’s argument, Hume ruled that if the legislature had intended the person appointed by the state treasurer to enforce the cigarette law to be a “confidential adjunct to the office the measure would doubtless have so stated.” The attorney general’s office immediately announced that it would appeal the decision to the Supreme Court. In the interim McCoy retained his position.\footnote{Freak Legislation Ridiculed by Judge,” \textit{CREG}, Oct. 10, 1921 (3:1). See also “Judge Rules Against M’Coy,” \textit{Progress-Review} (La Porte City), Oct. 13, 1921 (1:1). The legislature included the broad and unspecific confidentiality provision in the statute when it was first enacted in 1913, eight years before enactment of the cigarette law and creation of the position at issue. McCoy denied the press claim that according to the decision he could remain in his position but not be paid. “C. C. McCoy Explains Opinion Rendered by Judge,” \textit{Progress-Review} (La Porte City), Oct. 20, 1921 (6:2).}

Having retained former attorney general H. M. Havner\footnote{See above ch. 14 on Havner’s enforcement of the anti-cigarette law.} to assist in his defense, Burbank would offer as his main contention on appeal that under the law the soldier must be given preference if other things were equal, which in this case they were not.\footnote{“Soldier Preference Case Now Goes to Trial on Its Merits,” \textit{WEC}, Oct. 25, 1921 (11:1).} Since McCutcheon did not replace McCoy, Burbank presumably ultimately prevailed on this claim, which he intended to substantiate in large part by reference to the proceedings in McCutcheon’s divorce case, for which purpose he employed the lawyer who had represented Mrs. McCutcheon to assist the attorney general.\footnote{“Soldier Preference Law to Be Tested in Burbank’s Office,” \textit{WEC}, Dec. 19, 1921 (9:1). This article stated that the trial would take place within a few weeks, but the press appears not to have reported on further proceedings. See also “Iowa News Notes,” \textit{Adams County Free Press} (Corning), Nov. 12, 1921 (6:4-6 at 5). The Polk County Clerks Office was unable to locate any file on the case, McCutcheon in any name index, or a docket number corresponding to the time when the case was filed. Email from Angie Johnson to Marc Linder (Dec. 3, 2007). Fred Clifton McCutcheon’s death on Sept. 17, 1922 may explain why his suit was apparently never prosecuted to conclusion or why, if he was successful, he never replaced McCoy. \url{http://www.familysearch.org}.}

In 1925, when McCoy announced that he would leave the treasurer’s office to become a candidate in the Republican primaries for secretary of state, the press reported that he was being backed by the same Ku Klux Klan elements that had supported Burbank when he ran for the gubernatorial nomination in 1924.\footnote{Ed. Dose, “McCoy Backed by Burbank’s Klan Element,” \textit{DD&L}, May 30, 1925}
From the outset McCoy talked and acted tough. He frequently appeared before city councils to persuade them to apply the strict letter of the law. At the beginning of 1922 he asked the council in Cedar Rapids to revoke permanently the permits of two dealers who had recently been convicted of selling cigarettes without revenue stamps\(^{127}\) (although the statute mandated revocation for a violation and merely prohibited reissuance of a permit before two years had passed).\(^{128}\)

In February 1922, about seven months after the law had gone into effect, he reminded “everyone in Iowa dealing in cigarettes and cigarette papers that the law has teeth enough to make itself felt” and gave warning to “‘watch your step.’ Revenue agents are scouring the state at all times and experience shows that the hand of the law is felt in many unexpected places.” While—for reasons unknown—absolving Burbank of any responsibility for the law’s enactment, McCoy stressed that the former’s desire to be fair but firm entailed that violators had to be prosecuted. He was also able to boast of the enforcement successes that the state had already achieved (although the factual basis for some of his claims was not always clear). To begin with, more than 95 percent of 3,200 permit holders were “living up to the letter of the law. A few are violators and they are being apprehended and prosecuted.” During the act’s first half year, the state had “secured conviction in every case of violation except one....” Of unstamped cigarettes sales were “very light”; although he insisted that the “sale of cigarettes to minors in Iowa is practically wiped out,” McCoy made no claims about the suppression of smoking by minors.\(^{129}\)

A squad of the cigarette revenue department’s agents paid special attention to all of Iowa’s county fairs in pursuit of concessionaires who sold cigarettes without revenue stamps. After the first such arrest in 1922 had resulted in a justice of the peace’s meting out a $100 fine, McCoy issued a warning that his department “will not countenance any violation of the cigarette law any place in the state during the fair season.”\(^{130}\) In order to implement the law’s ban on sales to minors, McCoy institutionalized statewide cooperation with the Boy Scouts, which as an organization “does not approve of cigarettes for minors and does not use them, and is ready and willing to assist as pals and help to keep them clean so that they will not form the cigarette habit.” The assistance contemplated by


\(^{128}\)1921 Iowa Laws ch. 203, § 3, at 213, 214.


McCoy and the Boy Scouts, which appears to have involved sting operations, was especially useful in the case of a tobacco dealer who “has what is commonly known as free papers or the ‘makings’ and furnishes them to minors, or puts them into a receptacles or in the back yard of his place of business where they are convenient to minors,” and who was as guilty as anyone selling directly to minors.¹³¹

In the course of their zealous enforcement efforts McCoy’s agents were not above entrapment. Thus in 1923 two departmental enforces entered a candy kitchen in the small town of Spencer to buy cigarettes: “as the clerk was about to put the revenue stamps on the state agent told him not to bother as he often bought them without the stamps. After the transaction the officers made their business known.” The owner was fined $100 plus costs.¹³² Pursuant to the new law’s provision mandating the confiscation and forfeiture to the state of all cigarettes in the possession or place of any offender convicted of violating any provisions of the sales tax section,¹³³ the agents confiscated $6,000 worth of the proprietor’s cigarettes. Although the 1909 search and seizure law, which the legislature left untouched in 1921, mandated the destruction of seized cigarettes, the state did not destroy the cigarettes, but “usually” disposed of them by sending them to disabled soldiers at the state hospital at Knoxville.¹³⁴ (The next year, after the legislature had revised the Code, requiring seized cigarettes to be sold with the proceeds to go to the county school fund, such lethal gifts presumably...

Jury nullification was not unheard of in selling-to-minors stings. One enforcement agent related that with the help of a county attorney he had secured the services of a 14-year-old boy whom he accompanied into a billiard parlor after having received complaints about sales to boys regardless of age. Following the sale he and the boy filed an information with a justice of the peace, who issued a warrant; the owner pleaded not guilty and asked for a change of venue because the old judge “looked as though he would deal out justice with a capital ‘J.’” When the defendant asked for a jury trial before the next court, the “bailiff went out into the city park and gathered a jury of six loafers who happened to be there”; at trial, after the boy and the agent had testified and the owner had denied the charges, the jury took five minutes to return a verdict of not guilty. The next day the agent happened to see the foreman and asked him about the evidence on which the jury had based its verdict; biting off a generous chew of tobacco, the foreman replied: “Just like the damn prohibition law, don’t amount to anything’…” Report of Proceedings: Fifth Annual Conference of Administrators of Tobacco Tax Laws: September 1-2, 1931, at 50-51.

¹³²“Near-By News Notes,” HI, Mar. 8, 1923 (3:1-6 at 3).
¹³³1921 Iowa Laws ch. 203, § 13, at 213, 216.
¹³⁴“Near-By News Notes,” HI, Mar. 8, 1923 (3:1-6 at 3).
stopped.)

In fact, the Cigarette Revenue Department systematically sought to identify dealers who might be inclined to sell cigarettes without tax stamps. When, as field agent J. L. Hicks explained to his counterparts from other states gathered at the Annual Conference of Administrators of Tobacco Tax Laws, which in 1931 happened to take place in Des Moines, auditors determined that a dealer was short on revenue stamps purchased, his name was written down in the “‘Little Black Book’” that all the enforcement agents carried with them, and each time they happened to be in that dealer’s town, they would “purchase a few packages or a carton of cigarettes from him and eventually he gets a little more careless and we are able to make the purchase without revenue and when this happens, we take him into court....”

Although the press was fond of opining that it had not heard of minors’ having any difficulty buying cigarettes, McCoy’s men also descended upon schools, even in small communities. For example, toward the end of 1923 a state agent and a deputy sheriff raided a school in Gilman (population 490), where in the course of a search they found “‘pills or the ‘makins’s’” on a number of boys, thus providing evidence that they had been illegally supplied with cigarettes, and threw a “‘[s]care” into the local “[l]aw [b]reakers.”

In some cities and counties enforcement was rigorous from the outset. For example, the Black Hawk county attorney notified the sheriff in writing the day after the law went into effect that he was to investigate complaints of persons alleged to have sold or kept for sale without a permit: “‘You will report to this office in reference to such investigation and a rigid prosecution will follow to all persons whom the facts show to have been illegally selling cigarettes.’”

Contending that it was one of the law’s bedrock purposes to “enable the authorities to check up on the distribution [of cigarettes] at all times, the Muscatine county attorney issued an opinion that it was a violation of the law to distribute them as premiums in games or contests without a permit.

The 1921 cigarette sales law provided that any city council that issued a permit “shall revoke the permit of any person who has violated any of the

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135See below this ch.
137“The Cigarette Law,” Evening Tribune (Des Moines), Sept. 9, 1921 (6:2) (edit.).
140“After Violators of Cigaret Law,” WEC, July 6, 1921 (3:1).
provisions of this act, and no such permit can be issued for a period of two years thereafter. Superintendant McCoy reiterated in February 1922 that the legislature’s intent was to “create a prohibitive measure,” attaching to the conditional privilege to sell cigarettes “a command to city and town councils and boards of supervisors to take these privileges away from anyone on the first offense.” In May 1922, in revoking a cigarette sales permit the Waterloo city council adopted the view pressed upon it by McCoy that not only was revocation mandatory on conviction for a first offense, but that it was “not even necessary to convict a dealer in court in order that his license be revoked” since the statute mandated revocation whenever any permit holder violated any of its provisions, although court conviction was “absolute proof” of violation. (To be sure, McCoy’s more relaxed interpretation became textually impossible once the 1924 Iowa Code changed the language from “has violated” to “has been convicted of violating.”)

It is unclear why an attorney general’s ruling was needed to interpret this unambiguous command, but a dispute broke out in Davenport in 1922 over canceling the license of William Smith, a cigar store owner, who had been convicted of selling cigarettes to minors. When the Davenport city council, pursuant to Attorney General Ben Gibson’s recently issued ruling that it was mandatory to revoke the licenses of those guilty of violating the law, finally ended the dispute by revoking Smith’s permit, his lawyer, Glenn Kelly, insisted that the council had “now made it possible for the state to accomplish what is a virtual cigaret prohibition” in the city. His contention was based on the assertion that under a mandatory revocation regime it was “an easy matter for the state to bring about convictions of practically every local cigaret seller, since there is no certain way of knowing, at the time of the sale, whether a patron is or is not a minor.” To be sure, Kelly’s alarmist claim was untenable: a cigarette dealer

142 1921 Iowa Laws ch. 203, § 3, at 213, 214.
144 “City Smoke Laws Held Sufficient,” WEC, May 23, 1922 (9:3-4). The relevant statutory provision was 1921 Iowa Laws ch. 203, § 3, at 213, 214.
145 See below this ch. By 1924 McCoy also announced that there would be stringent enforcement of the law voiding all permits on which the mulct tax had not been paid by July 1. Ed Dose, “Iowa Launches Drive to Get Cigaret Taxes,” DD&L, June 5, 1924 (2:5).
The Aftermath of Licensure in Iowa: 1921-1939

intent on not violating the law had means at his disposal to avoid selling to minors by leaning on the side of caution. One means that he did not have was erroneously reported as available under the statute itself by the Howard County Times, just two days after the statute’s effective date: “A young man wishing to purchase cigarettes must sign a paper stating that he is at least 21 years of age. Then when the poll-tax collector calls on him and he declares he is not 21 years of age he is at once in the clutches of the law and subject to severe penalty.”147 In fact, as Walter French, the Black Hawk county attorney in Waterloo, had written to the sheriff the day before: “‘The merchant sells cigarettes to minors at his own peril. Representations made by the minor to the merchant that he is 21 does [sic] not constitute a defense in behalf of the merchant.’”148

Cigarette dealers soon (unsuccessfully) lobbied the Iowa legislature to amend the law to criminalize such misrepresentation,149 although at least in Waterloo dealers reported that, knowing that they would be unable to get cigarettes, few minors tried to evade the law by trying to “‘fool us with their age.’”150 In the meantime, however, an understanding judiciary could be of some help. For example, in Muscatine the first prosecution under the new law took place in September 1921 involving Peter Callas, a cafe owner, who pleaded guilty to selling cigarettes to Robert LaGrille, 19-year-old barber. In offering the plea on Callas’s behalf, his lawyer, Everett Richman, argued that he had not wilfully violated the law because the “LaGrille boy [had] misrepresented his age,” throwing in that Callas did not operate a tobacco store, but “merely keeps cigarettes for the accommodation of the cafe patrons.” In an effort to deflect attention and responsibility from his client, Richman informed Justice Harry Horst that: “‘I believe that there are several tobacco shops in town where cigarettes are sold to minors...because I see boys smoking cigarettes on the streets

147“No Cigarettes for Boys,” HCT, July 6, 1921 (1:2). Two months later a capital city paper repeated this error by claiming that a “minor who misrepresents his age in order to purchase cigarettes is liable to punishment.” “The Cigaret Law,” Evening Tribune (Des Moines), Sept. 9, 1921 (6:2) (edit.).
148“After Violators of Cigaret Law,” WEC, July 6, 1921 (3:1). In 1917, after Oregon had enacted a stricter no-sales-to-minors law, one county district attorney sent out a circular pointing out “the fact that since the War Census registration of all males citizens between the ages of twenty-one and thirty-one...the production or non-production, by a civilian seeking to purchase cigarettes, of his blue registration card, will quickly inform the seller whether or not such person may lawfully buy cigarettes.” Walter H. Evans, “To Whom It May Concern” (n.d.), Bates No. 501994501.
149See below this ch.
150“Few Minors Try to Buy Cigarettes,” WEC, July 20, 1921 (7:4).
every day. The police should be able to see them as well.” In imposing the $25 minimum fine for a first offense against the no-sales-to-minors provision, Justice Horst observed that he had taken the circumstances of the case into consideration. Three years later Attorney General Gibson cut the ground from under another collusive ploy when he opined that a written order from an adult authorizing the minor to buy cigarettes for him or her would not relieve the seller of liability for violating the ban on sales to minors. In the meantime, however, some held that the law was defective because it failed to impose a jail sentence on minors who refused to divulge the source of their cigarettes. In the small south-central town of Deep River, for example, sensing that more boys were smoking than ever, the town council decided in August 1922 to find out who was selling them the cigarettes. But when it summoned a number of minors to appear at its regular monthly meeting to “tell what they knew about the prevalence of the cigarette habit...the city dads reckoned without their host. When they questioned the boys they found them as dumb as oysters regarding their course of supply, each one refusing to divulge the name.” Confronted with this stonewalling, the mayor assessed a five-dollar fine on each one, but the local press speculated that the threat of jail might induce youngsters to be more forthcoming.

The Onset of the Long-Term Stagnation of Statewide Tobacco and Smoking Regulation

The state senate yesterday...defeated the additional one cent tax proposed to be placed on cigarettes. ... [S]mokers would get their cigarettes by mail from other states, thereby paying no tax whatever on them, except the federal tax. [T]here is now being paid six cents on each package of cigarettes as a federal tax, and in addition to that two cents as a state tax, making a total of eight cents that is already being paid. If this was increased to nine cents, this together with city license of $75 to $100 per year paid by the retailers would almost make the handling of them prohibitive. In view of the fact that these cigarettes are sold now to the retailers for 12 cents a package, it would leave but little profit for the

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The Aftermath of Licensure in Iowa: 1921-1939

dealer or manufacturer unless the tax was all passed to the consumer. Then as a matter of equity, is it right to tax a twelve cent article three-fourths of the price? That almost amounts to confiscation. We are not upholding cigarettes particularly...but we do know there are any number of folks who do enjoy them and would be placed at a considerable inconvenience if they had to send out of the state to get them, as many would do. If it resulted in stopping the smoking of them, perhaps this might have some compensation, but it would not.\textsuperscript{154}

The inception of the Dodd-bill regime marked the end of the long period of dynamism and statewide contestation of tobacco and smoking regulation in Iowa. A half-century would pass before the quasi-ubiquitous ascendancy of (cigarette) smoking as a social norm would generate sufficient anxieties as a self-destructive and even other-destructive activity that the Iowa legislature would begin to concern itself with intensifying its regulatory hold on tobacco use.

The first effort at amending the cigarette statute took place almost immediately in connection with the first codification since 1897 of Iowa law, which had been pending since 1919, but which the legislature failed to complete during the 1921 session.\textsuperscript{155} Once the Dodd bill had been enacted, the code commissioners had to include that body of law in the codification process. As they formulated it in 1922 in their “brief,” the purpose of Bill No. 257 on cigarettes and tobacco was to “gather into one chapter all the present law relating to those subjects.” However, in 1921 the General Assembly had left five or six sections of the old cigarette law “untouched,” which were “apparently...purposely left as a means of better enforcement.” But since they were “adapted to the former law of absolute prohibition,” they needed “modification to adapt them to the present mulct tax law.”\textsuperscript{156}

The most important changes proposed by the Code Commissioners in the cigarette law were adopted by the legislature and enacted as part of the new Code of 1924. First, the prohibition of the possession of cigarettes by minors under 21 anywhere except on the “premises” of their parents\textsuperscript{157} was modified to apply only to their parents’ “home.”\textsuperscript{158} The commissioners, who here went far beyond

\textsuperscript{154}“Defeated Cigarette Tax,” \textit{ODR}, Feb. 15, 1929 (2:1) (edit.).
\textsuperscript{156}\textit{Supplement to the Code Commission’s Report of 1919}, at 581 (U. Whitney ed. 1922); Code Commissioners’ Bill No. 257, in \textit{File of Code Revision Bills} 257-1(1923). The brief of Code Commissioner’s Bill No. 257 was prepared by J. C. Mabry, a lawyer from Albia.
\textsuperscript{157}1921 Iowa Laws ch. 203, § 2, at 203.
\textsuperscript{158}Code Commissioners’ Bill No. 257, § 4, in \textit{Supplement to the Code Commission’s
neutral editorial suggestions and presented their own policy judgment in implicit criticism of the legislature, justified this change on the grounds that: “At present a minor can purchase his cigarettes from a ‘bootlegger’ in the alley and rush to an old building or a business block, a vacant lot or a farm building, [belonging?] to his parent and smoke to his heart’s content while the bootlegger plies his trade in security. There should be no immunity anywhere, but we have ventured to propose a change of this newest legislation to the extent of conferring the immunity to [sic] the home alone.\textsuperscript{159}\textsuperscript{159} Second, the commissioners raised from 16 to 18 the age at which minors could be sentenced to a fine and/or imprisonment for refusing to reveal the source of their illegally possessed cigarettes.\textsuperscript{160}\textsuperscript{160} Third, they changed from “has violated” to “has been convicted of violating” any provision of the cigarette law as the mandatory trigger for revocation by local governments of a permit.\textsuperscript{161}\textsuperscript{161} The commissioners explained the change as designed to “make [the language] more definite and certain so that the authorities could not hesitate about revocation.”\textsuperscript{162}\textsuperscript{162} While plausible, the revision also undermined Superintendent McCoy’s aforementioned efforts to persuade city councils to revoke permits for violations not based on judicial convictions.

Two other notable changes proposed by the commissioners and adopted by the legislature revised the search and seizure law that the legislature had enacted in 1909\textsuperscript{163}\textsuperscript{163} and did not amend in 1921. First, the commissioners deleted the provision requiring the destruction of all illegally kept cigarettes that were seized,\textsuperscript{164}\textsuperscript{164} replacing it with one requiring the magistrate who found that the seized cigarettes had been kept in violation of the law to enter an order for their forfeiture to the county in which they had been seized and to direct any peace officer of that county “to sell such forfeited goods to any person having a permit

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\textit{Report of 1919, at 645 (1922); Iowa Code § 1555 (1924).} \\
\textsuperscript{159}\textsuperscript{159}J. C. Mabry, Brief of Code Commissioners’ Bill No. 257, in Briefs of Code Commissioners’ Bills 581-82 (U. Whitney ed. 1922). \\
\textsuperscript{160}\textsuperscript{160}1921 Iowa Laws ch. 203, § 2, at 203-204; Code Commissioners’ Bill No. 257, § 5, in Supplement to the Code Commission’s Report of 1919, at 646 (1922); Iowa Code § 1556 (1924). \\
\textsuperscript{161}\textsuperscript{161}1921 Iowa Laws ch. 203, § 3, at 203, 204; Code Commissioners’ Bill No. 257, § 8, in Supplement to the Code Commission’s Report of 1919, at 647 (1922); Iowa Code § 1559 (1924). \\
\textsuperscript{162}\textsuperscript{162}J. C. Mabry, Brief of Code Commissioners’ Bill No. 257, in Briefs of Code Commissioners’ Bills 583 (U. Whitney ed. 1922). \\
\textsuperscript{163}\textsuperscript{163}See above ch. 14. \\
\textsuperscript{164}\textsuperscript{164}1909 Iowa Laws ch. 223, § 1, at 202, 203. \\
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to keep and sell the same at the highest cash price he can obtain."165 The peace officer was then required to pay the proceeds from the sale to the county treasurer, who in turn had to credit them to the county school fund.166 The commissioners’ explanation for the change was that, whereas under the old prohibitory law the cigarettes could not lawfully be sold at all, since they were now “an article of commerce that may be lawfully sold, there is no reason why they should be destroyed."167 While a certain plausibility attached to this purely monetary viewpoint, by treating cigarettes as a normal commodity, it departed from the underlying legislative judgment—soon to be emphasized by the Iowa Supreme Court168—that cigarettes were in principle contraband except under narrow circumstances specified by the legislature. The other change made in the search and seizure law deleted the provision deeming the “discovery of cigarettes or cigarette papers in any public place...prima facie evidence of the keeper’s intent to unlawfully sell or give the same as prohibited” in the old law,169 and substituted for it a provision under which only a dealer’s refusal or failure to exhibit his permit to a requesting peace officer constituted such prima facie evidence.170 Again, the commissioners’ explanation was that mere finding of the cigarettes should not by itself be prima facie evidence of guilt, but only when coupled with the refusal to exhibit the permit.171 Since (voluntarily) permanently displaying a permit was no burden at all and refusal by a legitimate permit holder to show it to an official seemed so irrational as to verge on the empirically improbable, the commissioners and the legislature drained the provision of any efficacy as an enforcement tool that it ever may have possessed.

In considering Code Commissioners’ Bill or Senate File No. 257172 during the extra session on February 9, 1924, the Senate voted on several significant

166Code Commissioners’ Bill No. 257, § 27, in Supplement to the Code Commission’s Report of 1919, at 655, 656 (1922); Iowa Code § 1580 (1924).
168See below ch. 21.
1691909 Iowa Laws ch. 223, §1, at 202, 203.
amendments that went beyond the scope of the commissioners’ proposed changes. Senator Lloyd Thurston, who had been a consistent opponent of the Dodd bill in 1921, offered one to delete imprisonment as punishment for a minor who refused to give information about the source of his illegally possessed cigarettes, but it lost on a voice vote.\footnote{State of Iowa: 1924: Journal of the Senate of the Fortieth General Assembly 611 (Feb. 9).} Most of the debate on the bill was provoked by an amendment offered by Senator M. L. Bowman\footnote{“Senate Passes Cigaret Law,” DMR, Feb. 10, 1924 (Iowa sect., 1:5).}—who had been a professor in the farm crop department at Iowa’s land grant college at Ames\footnote{State of Iowa: 1923-24: Official Register 270-71 (C. Lundberg ed. 30th Number).}—presumably at the behest of cigarette dealers, subjecting, on conviction, to a fine of $25 to $50 or imprisonment of up to 30 days “[a]ny minor who misrepresents his age to a dealer in cigarettes for the purpose of making such a purchase....” Before the chamber voted on the change, it adopted by a vote of 21 to 15 an amendment to the amendment, offered by George Banta, who had voted against the Dodd bill on its final passage, striking the imprisonment provision.\footnote{State of Iowa: 1924: Journal of the Senate of the Fortieth General Assembly 611-12 (Feb. 9).} Of the 21 senators voting Aye 13 had voted on the final passage of the Dodd bill in 1921, nine of whom favored and only four of whom opposed it; similarly, of the 15 voting Nay, ten had opposed and only three favored the Dodd bill.\footnote{State of Iowa: 1921: Journal of the Senate of the Fortieth General Assembly 1738 (Apr. 6).} Although the alignment between the two votes might seem intuitively plausible—those who supported retention of prohibition supported imprisonment of minors who refused to denounce those who supplied them with cigarettes, while those who opposed prohibition opposed imprisonment—the voting patterns may have been somewhat confused by the fact that John B. Hammond, the WCTU’s lobbyist, in 1921 had sharply rejected criminalization of minors’ refusal to testify.\footnote{See above ch. 15.} Immediately after this vote, the Senate rejected an amendment offered by Perry Holdoegel, who had voted inconsistently on the Dodd bill, providing that “the fact that the minor has misrepresented his age does not in any manner absolve the dealer from responsibility in the sale.” To be sure, since nothing in Bowman’s original amendment implied, let alone stated, that a finding of the minor’s guilt absolved the dealer, the basis of the opposition to the amendment is unclear. When the chamber finally voted on Bowman’s amended amendment, only six senators
supported it against 31 Nays.\textsuperscript{179} Why the press characterized the chamber’s action as having “strengthened the law as to the responsibility of the dealers who sell tobacco to minors” is difficult to discern.\textsuperscript{180} In contrast, the United Press delighted in interpreting the amendment’s defeat as senatorial condonation of lies a darker shade of white: “Boys who lie about their age in order to purchase cigarettes are no worse than their fathers who telephone home that an important business deal will detain them at the office when in reality it is something else....” In the same vein, Senator Ed Smith twitted some of his colleagues by remarking that making it a crime for a boy to tell a falsehood would create a legal standard more drastic than that to which senators were subject. That the gender dimension was becoming more prominent than it had been during the debates in 1921 was highlighted by the proposal by Willis Haskell (who had voted for the Dodd bill on final passage) to increase the legal age for buying cigarettes. Decrying “flapperish tendencies,” he demanded: “‘Catch those who are selling cigarettes to girls.... The girls are leading on our boys and the boys do nearly anything the girls say.”\textsuperscript{181} In the end, the Senate passed the bill in its entirety by a vote of 33 to 2.\textsuperscript{182} After making one minor change, the House also passed the bill by a vote of 74 to 7,\textsuperscript{183} and the cigarette laws were codified.\textsuperscript{184}

One year later at least one larger city accomplished what the legislature had been unable to pass. Acting at the behest of local cigarette dealers, Marshalltown sought, by means of an ordinance, to deter minors from involving permit holders in sales to them. In 1925 the city council, in response to a petition, decided that “[t]he only way to make the cigaret law effective...and the only equitable way to enforce the law is by placing the cigaret purchaser in the position of violating the law as fully as the man who sells the ‘pills.’” In order to share the responsibility for sales to minors, the council provided that it was unlawful for anyone under 21 not only to buy, accept or receive cigarettes or cigarette papers from any merchant or dealer, but also to “‘represent, pretend to claim that he is 21 or over for the purpose of inducing any merchant or dealer in cigarettes or papers to sell to such minor person, in violation of the law.’” The deterrent consisted in imprisonment

\textsuperscript{179}State of Iowa: 1924: Journal of the Senate of the Fortieth General Assembly 612 (Feb. 9).

\textsuperscript{180}“‘Gun Toting’ Bill Is Passed,” ICP-C, Feb. 9, 1924 (1:2).

\textsuperscript{181}“House Bill Will Let Only Sheriff Issue Gun Permit,” WEC, Feb. 9, 1924 (1:2).

\textsuperscript{182}State of Iowa: 1924: Journal of the Senate of the Fortieth General Assembly 612-13 (Feb. 9).

\textsuperscript{183}State of Iowa: 1924: Journal of the House of the Fortieth General Assembly 832, 879-80 (Feb. 12 and 23).

\textsuperscript{184}Iowa Code §§ 1552-86 at 246-50 (1924).
up to 30 days or a fine of up to $100. The local ordinance could not override the state statute and absolve dealers of guilt in selling to minors who, for example, lied to them about their age, but might dissuade some from trying.

In 1925, the year after the special session had codified the state’s cigarette and tobacco laws, the House Judiciary Committee filed a bill to introduce several changes, which on balance might have strengthened the law somewhat. First, it prohibited local governments from granting a permit to any person who had twice been convicted of violations of the statute when the second had taken place within two years of the permit application. Second, it conferred on all special enforcement agents all the authority vested in peace officers. Third, it amended the nuisance/abatement section by imposing as punishment for selling cigarettes without a license a fine between $100 and $500. Fourth, giving city councils the flexibility that the law (and McCoy) had denied them, it increased the number of convictions for violations of the statute from one to two after which local governments were required to revoke a person’s permit. And fifth, for the purposes of this section, it construed any violation of the statute by “any manager, agent, clerk or employee of a permit holder during such employment and in connection therewith...to be a violation by the permit holder.”

A week later, when the House debated the bill, Volney Diltz, who in 1921 had been one of the American Legion’s most prominent backers of the Dodd bill, filed an amendment designed to undo dealers’ strict liability for the unlawful acts of their workers by making the permit holder liable only for his subordinates’ violations committed with his “knowledge or consent....” The provision having been stripped of its bite, the House adopted the amendment and then passed the weakened bill by a vote of 56 to 14. The effort, however, was for nought: the bill died in the Senate sifting committee, thus leaving the law unchanged.

In his inaugural address at the outset of his second term in 1923, Governor Kendall promoted an expansion of Iowa’s pioneering role as a cigarette taxer by suggesting that its also become the first state to tax other forms of tobacco: “The slave of the cigar—why should he go free while the devotee of the cigarette is

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186 H.F. No. 374, §§ 2-5 (Mar. 20, 1925, by Judiciary Committee No. 2).
187 See above ch. 15.
189 State of Iowa: 1925: Journal of the Senate of the Forty-First General Assembly 948 (Mar. 30) (referred to sifting committee).
Kendall’s rhetoric was (inadvertently) ironic: although the proposal was driven by the need for enlarged government revenue by means of a new taxable object of consumption so that the general property tax rate could be lowered, and he alluded to the cigar smoker’s addiction as a justification for the burden, the chief reason that the WCTU and other anti-tobacco groups had shied away from calling for the prohibition of the sale of non-cigarette tobacco to adults was the acknowledgment that since so many more millions of adult men smoked cigars and pipes and chewed tobacco than smoked cigarettes that such a ban would trigger much more widespread and intense resistance, undermining most of whatever support for, or at least acquiescence in, cigarette bans that could be mustered. Yet here was the governor himself, who had refused to rise to the occasion and give a reprieve to the country’s oldest universal prohibition of cigarette sales, attacking and mocking the enslaved adult cigar smoker.

Five weeks later Republican Senator Ben Abben, the youngest bank president ever elected in Iowa, filed a bill that went even farther than Kendall’s suggestion, proposing the imposition of a retail price-differentiated sales tax on cigars, smoking and chewing tobacco, and snuff. Five-cent cigars would be taxed a half cent and 25-cent cigars two cents; the tax on chewing and smoking tobacco costing less than 10 cents would be one-half cent, while snuff containers retailing at 10 cents or less would be taxed one cent and more expensive kinds at 10 percent of the retail price. Abben estimated that the new tax would generate $1.5 million annually, which, together with the cigarette tax, would lower the general millage levy by two mills. It was referred to the Ways and Means Committee as was the identical companion bill in the House. The “blow,” as a newspaper headline put it, may have been “aimed at the users of tobacco,” but it was definitely not designed to depress consumption. By March the press was reporting the belief that the bills, which were popular—after all, according to “the best information available,” such a law would bring in $2 million “and nobody would feel the burden”—would pass both houses. This sum would, according to McCoy, the head of the cigarette revenue department of the state treasurer’s revenue department.
office, have sufficed to lower the general state levy by two mills. The chief obstacle was the opposition by tobacco retailers, who claimed that as drafted the measure would require them rather than the consumer to pay the tax. Their assertion was, ironically, based on the argument that the tax on “popularly priced cigars” was so small that it might require the sellers to pay it instead of shifting it to consumers.

The expected tobacco tax revenue was exposed to one potential threat: “cut-rate mail order houses” had been trying to use the cigarette tax law by advertising in Iowa newspapers lower-priced, tax-free cigarettes available by parcel post. Although this method of competition had, according to McCoy, not yet noticeably affected tax revenues, Iowa retailers, who had paid $50 to $100 for their permits on top of the stamp tax, resented it. In order to deal with this problem, bills were filed in the House and Senate at the same time as the Abben tax bill that made it illegal for anyone except dealers with Iowa cigarette sales licenses to solicit orders to sell cigarettes by advertisements in newspapers, magazines, posters, billboards, hand bills, or other printed matter. Likewise, the bills made it unlawful for anyone but licensed dealers to publish or circulate such advertisements or to permit such billboards to remain on his premises. However, in mid-March the House adopted the recommendation of the Committee on Police Regulations to postpone the bill indefinitely, and two days later the Senate sponsor asked that his bill be withdrawn from further consideration.

Toward the end of March, however, the Associated Press disclosed that growing business resistance had made key legislators pessimistic about passage

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197 “Direct Tax upon All Tobacco Sold Provided in Bill,” WEC, Mar. 8, 1923 (9:1-2 at 1).
198 J. W. Jarnagin, “Record Broken for New Bills,” HI, Mar. 15, 1923 (1:5). Since the tax payment provision was the same as in the cigarette law the basis for the retailers’s claim is unclear.
199 “Direct Tax upon All Tobacco Sold Provided in Bill,” WEC, Mar. 8, 1923 (9:1-2 at 1).
200 “Direct Tax upon All Tobacco Sold Provided in Bill,” WEC, Mar. 8, 1923 (9:1-2 at 1).
201 H.F. 517, §§ 1-2 (Feb. 16, 1923, by Ralph Rumley); S.F. 474, §§ 1-2 (Feb. 16, 1923, by Ray Scott).
of the tobacco tax bill. Now it was the tobacco wholesalers who were identified as having become “alarmed” and done “highly thoro” work to beat the bill: “When a man buys a cigar, he is asked to sign a letter protesting against the imposition of a tax on his indulgence in the weed. Literally thousands” of these identical letters had in the meantime inundated the state house, most going to the chairmen of the two ways and means committees. As a result of this “widespread opposition,” neither Abben nor Oliver, the House sponsor, was sanguine that the bills would be passed.204 By a vote of 16 to 6 the House Ways and Means Committee soon acted in accordance with this sense,205 recommending that the bill be totally stripped of its original language, instead of which it recommended the mere licensing, for an annual $10 fee, of the sale of non-cigarette tobacco. The House adopted the committee report, presented by committee chairman Tollef Moen,206 who had been the chamber’s most ardent anti-cigarette advocate in 1921 and represented the same county as Abben. Even this proposed “nominal” license fee substitute, which would have generated only “negligible” revenue,207 died in the sifting committee.

Therewith Iowa lost the opportunity to become also the first state to tax other kinds of tobacco. Even before the tobacco merchants had killed the Iowa bill, South Carolina not only became the second state to tax cigarettes, but at the same time also subjected cigars and smoking tobacco—though not plug chewing tobacco or snuff—to a license tax measured by sales volume and weight or price.208 Two additional states, Utah (which expressly modeled the repeal of its short-lived universal ban on cigarette sales on Iowa’s law) and Georgia, enacted cigarette sales taxes in 1923, followed in 1925 by North Dakota and Arkansas (which also taxed cigars), and in 1927 by Kansas and Alabama (which also taxed cigars). That year South Carolina also became the first state to tax chewing tobacco and snuff, and in 1929 Tennessee became the second state to tax all forms of tobacco.209 Thus six of the first nine states to enact cigarette taxes

205Minutes of the [House Ways and Means Committee] Meeting held April 6, 1923 (SHSI DM). Unfortunately, although the vote was by roll call, the minutes reveal neither how members voted nor whether there was discussion.
2081923 South Carolina Acts No. 11, § 10 at 12, 18-19.
209*State of Iowa: 1930: Report of Joint Legislative Committee and State Board of Assessment and Review* 22-23 (1930). In 1926 Louisiana enacted a tax on all tobacco products amounting to 10 percent of the retail price, but it was repealed in 1928. 1926 La.
(Iowa, Utah, North Dakota, Arkansas, Kansas, and Tennessee) had had universal cigarette sales bans and repealed them between 1921 and 1927.\textsuperscript{210}

In order to raise more revenue to make up for a reduction in the state levy two years earlier and to help finance the current year’s increased appropriation without increasing the “millage levy too radically,” at the end of January 1929 Governor John Hammill urged the Senate Ways and Means Committee to increase the cigarette stamp tax by one cent, thus yielding an additional $600,000 in state revenue.\textsuperscript{211} The next day the committee filed a bill increasing the cigarette tax from 1 to 1.5 mills per cigarette.\textsuperscript{212}

The Senate debate two weeks later was the occasion for the resumption of a wide-ranging discussion of a social conflict that the advent of licensure in 1921 had not at all laid to rest. Even the burgeoning question of women smokers arose when (now) Senator Clark, who had contributed so heavily to the amendment of the Dodd bill in 1921,\textsuperscript{213} suggested (albeit jocularly) that a higher cigarette tax “might ‘get women used to paying for equal suffrage.’”\textsuperscript{214} More generally, controversy “resolved into a dispute between smokers and non-smokers” as well as between advocates and opponents of sales taxes.\textsuperscript{215} The intersection of these two issues generated a “strange alignment of votes,” prompting progressives such as Toleff Moen, the Dodd-Clark bill’s most vociferous opponent in the House a decade earlier, and farmer George Patterson, to “follow[ ] the leadership of their arch political enemy,”\textsuperscript{216} William Baird, the committee chair and the bill’s chief proponent, who had consistently voted against the Dodd bill in 1921. Baird, a conservative who typically voted with the sales tax bill’s principal opponent,
Joseph Frailey, who had consistently voted for the Dodd bill, charged that the latter had “‘a personal interest in this matter’” because he smoked “‘all the time.’” Demanding to know “‘why don’t you fine us instead of calling it a tax,’” Frailey, making a not so “veiled threat[ ] of an uprising similar to the Boston tea party,” hinted at the nicotine addiction issue: “‘Cigarettes are necessary to 80 per cent of the smokers. You remember what happened in the colonies when England taxed tea?’” Frailey, who railed against those who “‘want to tax our cigarettes,’” also turned empirical: characterizing the measure as “‘unscientific,’” he argued that it would be self-defeating because the tax increase would merely cause smokers to buy their cigarettes by mail. 217 Not coincidentally, this argument about interstate leakage was made by Frailey and Senator J. O. Shaff, both of whom represented Mississippi River counties. 218 To be sure, this claim, especially when intertwined with the related claim that the increase in out-of-state mail order business would redound to the detriment of “many folks in Iowa making their daily income off the sale of” cigarettes, 219 was not confined to the border counties.

Provoked by Frailey into calling cigarette smokers immature, 220 Baird, who admitted that the precedential character of the bill’s passage would probably lead to the introduction of bills to tax other kinds of tobacco, chewing gum, near beer, and cosmetics, 221 incautiously suggested that the cigarette sales tax “would be paid by those who complain the least.” 222 (This remark came back to haunt Baird later that day as he presided over a joint Ways and Means Committees hearing on S.F. 80, Moen and Patterson’s income tax bill, in the course of which Baird asserted that its advocates “desired to cripple industry and take unjust revenues from those who were successful in the management of their business,” prompting Patterson to allude to Baird’s earlier comment and add that proponents of the income tax also wanted to tax those with the greatest ability to pay. Patterson then parried Baird’s charge that he was a socialist by countering that Baird’s stand and the current tax system were the world’s best breeding ground for socialism.) 223 Even Moen, a progressive with impeccable anti-cigarette

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218 “Iowa Senate Votes Against Cigarette Tax Boost,” DD, Feb. 14, 1929 (1:1, at 12:1).
219 “Exceeding the Limit,” ODR, Feb. 1, 1929 (2:1) (edit.).
221 “Iowa Senate Votes Against Cigarette Tax Boost,” DD, Feb. 14, 1929 (1:1, at 12:1).
222 Byron Allen, “Legislative News from Des Moines,” PAR, Feb. 21, 1929 (3:2-7 at 3).
credentials, justified the cigarette sales tax on the grounds that increased revenue was needed to pay for increased appropriations and the enactment of special taxes was superior to an increase in the general property tax. When the cigarette tax bill came up on its final passage, the Senate defeated it by a vote of 21 to 28, thus signaling rejection of the principle of the sales tax as a general state revenue policy. Later in the session the House Ways and Means Committee introduced a more wide-ranging sales tax, which included an additional tax on cigarettes amounting to 25 percent of the existing tax. Though endorsed by the governor and many legislative leaders, it faced “tremendous opposition” from businesses at a joint Ways and Means Committees hearing and never came to a vote.

During the Depression, towards the end of the 1931 legislative session—when there were already over 5,000 permitted dealers in Iowa—the Senate sifting committee introduced a bill to increase the cigarette tax to 1.5 mills per cigarette (or three cents per pack of 20). At the same time, it would have required dealers in all other kinds of tobacco to obtain permits, which would have cost $15 in first-class cities, $10 in second-class cities, and $5 elsewhere. The bill would also have imposed a sales tax on all non-cigarette tobacco amounting to 10 per cent of the retail price. Unsurprisingly, Senator Moen voted for the bill, but only eight other members joined him, and the Senate resoundingly defeated it by a vote of 9 to 33. What little discussion preceded the vote focused on the claims of Clark, now chairman of the tax revision committee, who supported it, but in order to reduce personal property taxes. He estimated that the non-cigarette tobacco tax would raise an additional million dollars annually; since there was little opposition to the cigarette tax, which brought in even more revenue, he saw no reason for not taxing other forms of tobacco. Opponents,

231S.F. 421, §§ 3-4 (Apr. 6, 1931, by sifting committee).
especially Senator Joe Frailey (from the Mississippi river town of Fort Madison), alleged that the new taxes would both prompt Iowa tobacco users to make their purchases in Illinois, Nebraska, and other neighboring states and promote shipments into Iowa by out-of-state mail order houses, driving local dealers out of business with the net result that state revenue would be lower than under the then existing law.233

In the event, decades would pass before the Iowa legislature finally enacted a non-cigarette tobacco tax.234

The Aftermath: The 1939 Code Amendments

By 1939, according to estimates, 40 percent of the cigarettes smoked in Iowa were evading the tax stamp system run through the state’s 8,000 permitted dealers.235 This porousness was a function of Iowa’s being surrounded by states without cigarette tax laws. Moreover, the perception of a lax law and comparisons with cigarette tax revenues in other states left administrators in little doubt that bootlegging and shipments of unstamped cigarettes into Iowa were the causes.236 In 1939, the legislature, which the Republicans, after a brief New Deal hiatus, once again dominated by huge majorities (38-12 in the Senate and 89-19 in the House),237 was driven by the goals of suppressing the bootlegging of cigarettes from other states and increasing tax revenues—by $800,000 to $1,000,000 above the $1.8 million then being collected annually238—by making manufacturers (distributors) and wholesalers responsible for affixing stamps to packages before they entered the state rather than continuing to require retailers to attach the stamps.239 After having failed to achieve these objectives during the


234 1967 Iowa Laws ch. 348, § 2, at 666, 667.


238“Senate Sends Governor Reorganization Bill,” ODR, Mar. 6, 1939 (1:1); “Vote to Curb Bootleg Cigaret,” ICP-C, Mar. 8, 1939 (1:8).

239“House Adds Approval to Senate Measure to Curb Bootlegging of Cigaret,” MCG-
1937 session, the General Assembly amended the cigarette sales statute to establish a bifurcated permit structure under which “[e]very distributor, wholesaler, and retailer...shall obtain a state and/or retail cigarette permit.” S.F. 128 also provided that on the state level, “[t]he treasurer shall issue state permits to distributors, wholesalers, and retailers, subject to the conditions hereinafter provided.” In contrast: “Cities and towns may issue retail permits to dealers within their respective limits.”

G, Mar. 8, 1939 (14:7); “Cigarette Law Welcomed,” HI, Mar. 9, 1939 (4:3); “Bill Against Bootleg Cigarettes,” ODR, Mar. 25, 1939 (2:2) (edit.). The new framework was also designed to deter consumers from bringing back to Iowa large numbers of untaxed cigarettes bought elsewhere. The new law penalized the possession for use of more than 40 unstamped cigarettes. S.F. 128, § 32.1 (1939); Iowa Code § 1556.31 (1939). In general, the new approach was supposed to deal with the problem that tax evasion was facilitated by the lack of a penalty for mere possession (as opposed to the sale) of unstamped cigarettes. “House Passes Cigarette Bill,” DMR, Mar. 9, 1939 (15:3).

240 The 1937 bill was also designed to stop bootlegging and increase tax revenues. “Cigarette Tax Paid by Jobber,” ODR, Apr. 9, 1937 (1:7, 6:5). The measure, which was similar but not identical to the bill that passed in 1939, specified that the state “shall” issue permits to distributors and wholesalers (but the state was also empowered to deny licenses to those known to be unreliable), whereas city and town councils and county boards of supervisors “may issue retail dealer’s permits.” S.F. 465, § 8.2 (Apr. 3, 1937, by Manufacturing, Commerce, and Trade Committee). The bill passed the Senate by a vote of 40 to 0, but died in the House. State of Iowa: 1937: Journal of the Senate of the Forty-Seventh General Assembly 1018 (Apr. 9). In 1939 the same structure marked H.F. 27, which was withdrawn. H.F. 27 (Jan 17, 1939, by Scott and Kohlhaas); State of Iowa: 1939: Journal of the Senate of the Forty-Eighth General Assembly 343 (Feb. 10).

241 1939 Iowa Laws ch. 72, § 9.1, at 102, 107. The current structure of the law, under which the Department of Revenue “shall issue state permits to distributors, wholesalers, and cigarette vendors,” whereas “[c]ities may issue retail permits to dealers within their respective limits,” was introduced in 1980. Iowa Code § 453A.13.2.a (2007); 1980 Iowa Laws ch. 1029, § 6, at 211, 212.

242 1939 Iowa Laws ch. 72, § 9.2, at 102, 107. The bill as it passed the Senate included the provision that: “The treasurer shall issue state permits to distributors, wholesalers and retailers...who, in the opinion of the treasurer based upon the past record and history of the applicant, can be relied upon to comply faithfully with the provisions of this act.” S.F. 128, § 9.2. However, the House deleted the “who” clause and the Senate concurred in the amendment. State of Iowa: 1939: Journal of the House of the Forty-Eighth General Assembly 661 (Mar. 7) (amendment by Phil Roan), 677 (Mar. 8) (adopted); State of Iowa: 1939: Journal of the Senate of the Forty-Eighth General Assembly 578 (Mar. 10).

this slightly modified language (which was now in the active mood rather than casting councils in the role of passive agents) against the background of high-profile Iowa Supreme Court decisions was visibly on display later that year in Keokuk’s new municipal code. It explained that under the new statute “permits to sell cigarettes are to be granted by the City Council but it shall have absolute discretion as to the granting of all permits.”

One other aspect of S.F. 128 is relevant because it imposed a prohibition on a very convenient form of cigarette sales and purchases in a period marked by the dismantlement rather than the erection of such barriers. As early as 1931 the treasurer of state had asked the attorney general for an opinion as to whether it was lawful for a cigarette permit holder to dispense cigarettes by means of a vending machine and whether, if a minor used the machine to buy cigarettes, the permit holder would be liable. The attorney general failed to respond to the first question at all, limiting himself to the seemingly foregone conclusion that the permittee would indeed be just as liable as if had sold the cigarettes “personally” to the minor. In 1938, a county attorney asked a successor attorney general whether it was permissible for a city council to issue permits to people considering the sale of cigarettes through vending machines. If it was, the attorney wanted to know whether it would also be permissible for the council to deny a permit to “reputable people, with the express intention” of using vending machines, on the grounds that they would enable minors to buy cigarettes and make it more difficult to police permittees properly. After noting that the earlier attorney general opinion “inferentially approves” cigarette vending machines, the new opinion, based on the Ford Hopkins and Bernstein cases, pointed out that since city councils did have discretionary power with regard to granting

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244 See below ch. 21.

245 Municipal Code of Keokuk, Iowa: 1939, § 339, at 146, 147. This language was retained in the 1970 Municipal Code. Keokuk Municipal Code: 1970, ch. 4.12.010. By 1984, “shall have absolute discretion” was replaced by: “The chief of police shall investigate the location wherein it is proposed to sell cigarettes, ascertain if the applicant is a person of good moral character, and make a recommendation to the city council. The city council shall either issue the license or deny the license, stating in writing the reason for any denials.” Keokuk Municipal Code: 1984, ch. 4.12.010


248 See below ch. 21.
permits—though whether that discretion was absolute or limited was uncertain—they were empowered to “refuse to grant a permit where such refusal is substantiated by facts which establish that the granting of such permit may be inimicable [sic] to the health or morals of the community or where such granting may hinder law enforcement.” Evading as studiously as his predecessor the primary question of whether cigarette vending machines were per se legal, the attorney general dealt only with the subsidiary question as to whether a city council had the discretion to deny permits to applicants wishing to use them. Focusing on the improbability that the operator could constantly observe all transactions as easily and the fact that a “machine would not refuse to deal with a child as would a reputable merchant,” the opinion concluded that machine sales fell into a different classification than ordinary personal sales, which it would not be unreasonable or arbitrary for a council to use as the basis for denying a permit.\footnote{State of Iowa: 1938: Twenty-Second Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1938, at 711.}

Treading where attorneys general had feared to, S.F. 128—presumably in response to what Attorney General John Mitchell had called “questions of considerable public interest”—as it passed the Senate by a vote of 47 to 0\footnote{State of Iowa: 1938: Twenty-Second Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1938, at 708.} made it “unlawful to sell or vend cigarettes by means of a device known as a vending machine.”\footnote{State of Iowa: 1939: Journal of the Senate of the Forty-Eighth General Assembly 236 (Feb. 9).} Then in the House, Mrs. Isabel M. Elliott, a 49-year-old farmer and Democrat,\footnote{S.F. 128, § 32.6.} filed an amendment to delete the ban.\footnote{State of Iowa: Official Register: 1939-1940, at 53 (38th No., David Brown ed.).} Whereas the amendment’s sponsors called the “‘death sentence’” imposed by S.F. 128 on vending machines “‘confiscation without due process of law,’”\footnote{State of Iowa: 1939: Journal of the House of the Forty-Eighth General Assembly 530 (Feb. 23).} those opposed to the amendment argued that it would facilitate sales to minors.\footnote{“House Buries Cigaret Bill,” ICP-C, Mar. 6, 1939 (1:6).} The House then “expressed itself very clearly on the matter of cigarette vending machines”\footnote{“Senate Sends Governor Reorganization Bill,” ODR, Mar. 6, 1939 (1:1, at 2:7).} by its overwhelming defeat of Elliott’s amendment by a vote of 15 to 79.\footnote{“Action Delayed on Cigaret Bill,” DMR, Mar. 7, 1939 (5:5).} After
the House had passed the bill by a huge majority (92 to 5)\textsuperscript{259} the ban on vending machine sales of cigarettes went into effect, remaining in place until 1963 when, Iowa, which for years was the only state with such a prohibition, finally repealed it.\textsuperscript{260}

\textsuperscript{259}State of Iowa: 1939: Journal of the House of the Forty-Eighth General Assembly 677 (Mar. 8). The Senate, as already noted, concurred in numerous House amendments.

\textsuperscript{260}See below ch. 22.
City Councils that Actually Used Their Discretionary Power to Perpetuate the Ban on Cigarette Sales in the 1920s and 1930s

The new cigaret law places in the hands of the city councils absolute power either to grant or deny licenses.¹

Several towns in the state have refused to allow any licenses whatsoever to be issued.²

The governor has held that cities have discretionary power regarding the issue of permits....³

Even during the 12-week interim between the law’s approval and effective dates the 25-year-old law, which opponents had declared long dead, continued to be enforced in places in which it had always been enforced. For example, in Indianola, a Methodist sanctuary of prohibitionism, just days after Governor Kendall had signed the bill into law, a number of members of the high school YMCA organized sting operations by buying cigarettes; they informed the county attorney, who drafted an information against cafe and confectionary store owners, who pleaded guilty and paid the $25 fine.⁴

More importantly, if localities chose not to authorize cigarette sales, essentially the 1896 prohibition would continue in perpetuity. As James Powell, the publisher of the Ottumwa Courier, who editorially proclaimed that it was “practically impossible to prevent” the sale of cigarettes to adults, put it, “[i]f there is a community in Iowa where the local officials find it possible and practicable to prevent the sale of cigarettes, even to adults,” then “for practical purposes the condition is unchanged....”³

Nevertheless, despite the emphasis that Governor Kendall had placed on the home rule powers unambiguously conferred by the legislature, there were, according to a front-page, above-the-fold article in the Des Moines Capital in mid-May, to judge by the number of inquiries that newspapers and the secretary had received, “quite a few folk in Iowa who don’t understand all about the new

¹“Council Inaction on Cigaret Permits,” DMC, June 23, 1921, 38(153) (9:8).
³Cigaret Hearing Tomorrow,” T-WS-P, July 18, 1921 (8:3).
⁴“High School Boys See Cigaret Law Is Enforced,” DMR, Apr. 17, 1921 (10M:2-4); New Era (Humeston), Apr. 20, 1921 (4:1) (untitled). It appears that the students may have focused on stores that sold to minors rather than adults.
⁵“Sensible Law Making,” OC, Apr. 12, 1921 (3:1) (edit.). On Powell’s letter to Kendall urging him to sign the Dodd bill, see above ch. 15.
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

law....” And it turned out that “[o]ne of the particularly foggy points” was whether it really provided for local option in granting permits. The paper affirmed that indeed city councils and boards of supervisors did have “arbitrary power in the matter”: nothing in the law abridged their right to grant or deny a permit to anyone.⁶

The Special Case of the Skeptical Des Moines City Government

During the almost three months before the Dodd bill went into effect local communities and governments had the opportunity to discuss and determine whether they would avail themselves of the power afforded them by the new law to ban cigarette sales within their borders. Already the day after Governor Kendall had signed the bill, members of the city council of the state’s largest city, Des Moines, stated that licenses would probably be granted. Despite his reservations, Mayor H. H. Barton, a building contractor committed to a nose-counting approach to democratic local control, concurred:

“Personally, I wish there were no cigarettes...but I do not intend to be narrow and attempt to force my prejudices on other people.

The war and the change in public opinion during the last few years has done away with the stigma and opprobrium which was formerly attached to a cigaret smoker. The use of them by so many men, among them many of our best business men, indicates...that the public desires them to be sold.

City Council wants to be governed by the wishes of the people and I believe if the matter comes to a vote in Council meeting the licenses will be granted to dealers.”⁷

The very next day Des Moines dealers declared that on July 4 they would increase the price of a package of cigarettes—which in April cost 16 cents at the factory and retailed for 20 cents—by five cents in order to enable them to “make any profit” after the imposition of the two-cent stamp tax and the $100 annual permit.⁸ As of June 23, the city council still had not adopted a policy and only two applications for permits had been filed.⁹ On July 1 the city council rejected the Des Moines corporation counsel’s plan for a $75 surcharge to finance

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⁶“Cigaret Licenses Local Question,” DMC, May 12, 1921 (1:2).
⁷“License Fags,” DMN, Apr. 12, 1921 (6:1).
⁸“Dodd’s Bill May Increase Cost of Fags,” DMN, Apr. 13, 1921 (1:8).
⁹“Council Inaction on Cigaret Permits,” DMC, June 23, 1921, 38(153) (9:8).
enforcement on top of the $100 statutory permit fee\textsuperscript{10} on the grounds that “very little extra police work will be occasioned by the cigaret law, and that practically no extra clerical work will be required for permits.”\textsuperscript{11}

Unlike city councils in most cities and towns in Iowa, which merely approved or rejected applications for permits, the Des Moines city council on July 1 passed a kind of framework ordinance, which shed interesting light on the lingering skepticism about the entire enterprise of selling cigarettes even in the state’s largest city on a council that decided to issue permits.\textsuperscript{12} The preamble to the ordinance underscored the administrative, enforcement, and economic burdens that licensure would impose:

:\textit{Whereas}, by Chapter 203, Acts of the Thirty-ninth General Assembly...authority is given to cities to issue permits for sale of certain commodities heretofore prohibited by law; and if permits are granted therefor large expense will be caused to this city for clerical work, printing and postage, and for extra police and other inspection and regulation, and for litigation in the Municipal and other courts, in connection with such business and the regulation thereof...; and

:\textit{Whereas}, numerous inquiries have been received, and some bonds have already been filed with the City Clerk preparatory to asking the issuance of permits to engage in such business; but this city is unwilling to issue such permits, or incur the expense incident to said matters, without being assured adequate protection against loss or expense in connection therewith and the inspection regulation of such business and enforcement of the laws respecting same....\textsuperscript{13}

The two most salient sections revealed the council’s perception of the broad array of looming and lurking dangers and risks, its apparent impatience with the need for the permit system altogether, and its desire to put applicants on notice that its deeply rooted suspicion of them meant that they enjoyed virtually no

\textsuperscript{10} Drop ‘Fag’ Fee,” \textit{DMN}, July 1, 1921 (1:6).

\textsuperscript{11} Cigarets to Cost Dealers $100 Year,” \textit{DMC}, July 1, 1921, 38(160) (16:1).

\textsuperscript{12} Many of the formal ordinances passed by other city councils merely tracked the statute, adding no local restrictions. E.g., “Cigaret Ordinance Adopted by Council,” \textit{Rockwell City Advocate}, June 9, 1931 (1:5); Rockwell City, Ordinance No. 188, \textit{Rockwell City Advocate}, June 30, 1921 (3:2-4) (passed June 6, 1921); “Council Proceedings,” \textit{Rockwell City Advocate}, July 7, 1921 (7:5-7) (unanimous); Lytton, Ordinance No. 27 (Aug. 2, 1921), in \textit{Lytton Star}, Aug. 4, 1921 (8:1).

\textsuperscript{13} Ordinance No. 3124, in \textit{Ordinances of the City of Des Moines: Passed During the Fiscal Year Ending March 31, 1922}, at 79-82 at 79. These provisions remained identically in place in the city’s revised ordinances 11 years later. \textit{Revised Ordinances of the City of Des Moines: 1932}, ch. 99 at 362-63.
vested right in the permits, which could be revoked at any time by new rules necessitated by as yet unforeseen interference with the public interest:

Sec. 6. No permit shall issue for such a business to be conducted in a residence district, unless the City Council is fully assured that there is no objection thereto by residents of the neighborhood; nor to a person or party not of good character; nor to one who is found guilty of violation of such act or of this ordinance. And any such permit may be revoked for violation of said act of this ordinance, or for other cause arising whereby it is deemed to the public interest or welfare to have same revoked or canceled. And further provisions may be made as to the terms on which and the persons to whom permits may issue, and the causes for revocation thereof.

Sec. 7. No loud or boisterous conduct, no loafing or lounging, and no immoral or illegal act, shall at any time be permitted in any place for which a permit is held under this ordinance. Especially shall no violation of said act be permitted in any such place.14

After the council had passed the ordinance, about 30 dealers filed their bonds and paid their fees so that they could be issued permits and secure state tax stamps in time to do business on July 4.15 Dealers’ self-fulfilling price prophecies came true: after “flocking” to city hall, dealers made sure that on July 4 the price of a package rose by the two-cent tax that kicked in that day, and it was anticipated that within a few days dealers would increase the price by an additional three cents because their “margin of profit is so narrow they are unable to make an adequate profit at the lower price."16

Despite the Des Moines city council’s refusal to provide financially for strict enforcement and to use the surcharge to restrict the number of permit holders, the anti-smoking movement continued the struggle in other forums. On July 5, the day after the Dodd-Clark law had gone into effect, the Des Moines school board, under the leadership of Charles Hutchinson, who had testified against the Dodd bill before the House Police Regulations Committee and the governor,17 passed a resolution prohibiting teachers, principals, and employees from smoking on duty or while on school grounds.18 The ban applied as well to “coaches and

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14Ordinance No. 3124, in Ordinances of the City of Des Moines: Passed During the Fiscal Year Ending March 31, 1922, at 79-82 at 81. These provisions remained identically in place in the city’s revised ordinances 11 years later. Revised Ordinances of the City of Des Moines: 1932, ch. 99, §§ 1411-12, at 364.
15Cigarets to Cost Dealers $100 Year,” DMC, July 1, 1921, vol. 38 no. 160 (16:1).
17See above ch. 15.
18‘Don’t Smoke, Board Says to Its Teachers,” DMC, July 6, 1921, vol. 38 no. 165 (2:3).
assistants, whether paid or not, at any game or public exhibition given by or participated in by any of our Des Moines schools, whether held on premises controlled by the school board or elsewhere."\(^{19}\) Moreover, according to another resolution sponsored by Hutchinson, which was also imbued with the WCTU’s strategic insight into youths’ emulation of adult behavior, the “board will ‘look with disfavor’...upon the smoking of cigarettes in any public place where persons of school age are present. The resolutions were passed because the State law prohibiting the selling of cigarettes to minors will be very difficult of enforcement if teachers and others with whom they come in contact at school, are allowed to smoke....”\(^{20}\) As the *Oskaloosa Daily Herald*’s front-page article put it the same day that it reported the Oskaloosa city council’s mass denial of cigarette sales permits: “Woe to the school teacher, principal or other employee of the board of education who is caught with a cigarette in his mouth while on duty or, in fact, most any place except in the privacy of his own room.”\(^{21}\) The intrusiveness of this rule, which regulated employees’ conduct during nonworking time in myriad public places away from their workplace—even though the board acknowledged that it had no control of employees during such time or in such places\(^{22}\)—revealed that the intensity of the anti-smoking movement’s efforts to prevent the formation of the next generation of cigarette smokers had in no way been diminished by the signal defeat that enactment of the Dodd bill had inflicted on it.

But the movement, even as applied to the schools, was unable to gain the upper hand everywhere in Iowa. A few days before the new law went into effect, the board of education in Cedar Rapids submitted an objection to the city council regarding the granting of cigarette permits to businesses located within 400 feet of school buildings.\(^{23}\) The board was referring to the 400-foot rule in a 1904 law, still on the books, prohibiting tobacco advertisements.\(^{24}\) It took the city council only two days to decide that dealers in tobacco, “particularly the wicked cigarette,” would be permitted to sell their commodities. The council reasoned that since the

\(^{19}\)“Teachers Cigaret Placed Under Ban by School Board,” *DMR*, July 6, 1921 (1:6).

\(^{20}\)“Don’t Smoke, Board Says to Its Teachers,” *DMC*, July 6, 1921, vol. 38 no. 165 +(2:3). In her letter to Governor Kendall back in April, Lucy Page Gaston had mentioned that when schools reopened in September, the Des Moines school authorities were planning a citywide campaign to eliminate smoking in the schools. Lucy Page Gaston to Nathan E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

\(^{21}\)“Teachers Cigaret Placed Under Ban,” *Oskaloosa Daily Herald*, July 6, 1921 (1:6).

\(^{22}\)“No Smoking,” *DMN*, July 6, 1921 (4:6).

\(^{23}\)“Many Will Sell ‘Em,” *CRT*, June 30, 1921 (1:6).

\(^{24}\)Compiled Code of Iowa § 8881, at 2425 (1919); see above ch. 13.
law did not prohibit selling tobacco near schools and permit-holders had to post a $1,000 bond to insure compliance with the new law, including its ban on sales to minors, it was “unnecessary to take further precautions.” Since the chief purpose of the two laws acting in concert was to prevent children from starting to smoke—and not to increase municipal revenues from bond forfeitures—the council’s argument was irrelevant. Even if, implausibly enough, the advertising were all inside the store and not visible to those outside, the city council could nevertheless have exercised its absolute discretion not to issue permits to tobacco stores within 400 (or any number of) feet of schools on the grounds that they were a species of attractive nuisance to children. In this sense the speculative claim made two days earlier that the city solicitor would hold that the courts would construe denial of a permit as discriminatory because “minors are barred and none others attend school” was irrelevant under the new law, which conferred absolute discretion on councils to deny all permits.

**Frictionless Issuance of Permits in First-Class Cities**

The city councils of numerous towns are just now wrestling with the question of whether their town shall license the sale of cigarettes...

In none of the 14 first-class cities (with a population of 15,000 or more) did the city council decide in 1921 not to issue any cigarette permits. The largest city in which any form of resistance was recorded was Fort Madison, the seventeenth largest with a population of 12,066. There, when the eight-member city council met in special session on July 6, 1921 to deal with 20 applications for permits, it voted 6 to 1 to approve each of them. One member, William H. Benbow, voted against each resolution. Benbow, a 65-year-old retired farmer, had been born...
in Utah, the son and grandson of English-born Mormons. Presumably his religion’s prohibition of tobacco and smoking underlay his across-the-board opposition to the issuance of any cigarette permits.29

Initially, the lead in issuing permits appears to have been gained by the state’s second largest city, Sioux City (population 71,227), where by June 14 applications for permits were already coming in steadily and predictions were for 120 to 150 to be issued.30 By June 30 the city government, which was pushing permits—the city clerk announced that they “may be taken out at any time”—had already been “enriched by the sum of $12,800” from the sale of 128 permits. With five days to go before the law even was to go into effect, 150 dealers were expected to be engaged in the sale of cigarettes.31

Typical for the process was Council Bluffs, the seventh largest city, with a population of more than 36,000. Two weeks before the new law went into force, when 20 to 25 people had already made known their interest in buying a permit, the city council held a special meeting to consider their applications.32 After approving the first 16, the council held a second special meeting a week later to act on 14 more that had been filed in the meantime with the expectation that another 10 to 15 would be filed later.33 In fact, 33 were filed and 33 approved, “the councilmen run[ning] across none...that should been denied in their opinion of the matter. This makes a total of forty-nine permits issued and none denied....” The total of $4,900 in mulct tax paid into the city treasury34 was “unexpected income to the city...which was not figured on when the city budget was made out.”35 If the windfall pleased the city government, by the time the law went into effect the “Cigaret Dealers Are Smiling Now”: indeed, they were so filled with proper confidence in their own rectitude” that most of the dealers who had not


30“Nine Fag Permits Issued,” SCJ, June 14, 1921 (7:5).


32“Council to Discuss the Cigaret License,” CBN, June 21, 1921 (6:1).

33“Special Meeting of City Council,” CBN, June 27, 1921 (5:5).

34“More Licenses to Sell Cigarets,” CBN, June 29, 1921 (7:4).

35“Special Meeting of City Council,” CBN, June 27, 1921 (5:5).
yet received their revenue stamps from the state treasurer went ahead and
( illegally) sold cigarettes anyway, allegedly charging buyers for the tax and
keeping track of sales “with the idea of setting aside the requisite number of
cigaret stamps” after they received them. 36

In Cedar Rapids, the state’s fourth largest city with a population of almost
46,000, the local government was so eager to facilitate issuance of the greatest
number of permits that it announced a month before the law was to go into effect
that permits would be available at city hall on June 6. Indeed, it “urged that
dealers obtain permits and bonds immediately as a duplicate of the permit must
be sent to the secretary of state [sic] before stamps can be issued to the
applicant,” adding that dealers’ “[q]uick action” would “insure that they will be
inside the law when the new law goes into effect....” 37 Mayor Rall—who,ironically, as justice of the peace exactly a quarter-century earlier had presided
over the first prosecution under the sales prohibition law 38—was so impatient to
initiate licensure that he had arranged to have permits ready a month before the
new law went into effect and had to seek an opinion from the attorney general as
to whether dealers could be officially licensed before that date. 39 By June 17,
with two and a half weeks to go, 25 dealers had already made the city $2,500
richer with estimates of another 25 to be issued by July 4; by July 24 the number
of permits issued had reached 47. 40

Two days before the law went into effect, the city council in Mason City, the
eleventh largest city, with a population just over 20,000, had already issued 32
permits to a broad array of businesses, including hotels, drug stores and
pharmacies, cafes, a grocery store, a soda grill, a chocolate shop, and a pool hall
in addition to cigar stores. The local government may have shared the
(erroneous) view of the local newspaper that the new law’s primary purpose was

37. “Cigaret Dealers Must Get Permits to Sell,” CREG, June 4, 1921 (8:5-6).
38. See above ch. 11.
opinions of the attorney general for 1921 contain none on this subject, but the treasurer of
state did send instructions to city clerks at about this time stating that: “City or town
councils or boards of supervisors may use their pleasure in issuing permits prior to July 4,
but in each and every case the issuance of each permit must be confirmed by the said city
or town council or board of supervisors immediately after July 4, 1921.” “Date Here on
Cigaret Sale,” OC, June 20, 1921 (2:2).
40. “City Gets $2,500 from Cigaret License Sale,” CREG, June 17, 1921 (15:5).
41. “Defer Action on Bids for Paving,” CREG, June 24, 1921 (3:1).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

to “raise the revenue of the city...”42 In Iowa’s sixth largest city, Waterloo, whose population exceeded 36,000, the city council already in May decided not to require dealers to post more than the statutory minimum bond of $1,000;43 before the end of June it had already issued about thirty permits,44 approving still more later.45 In mid-June the city council of Muscatine, the thirteenth largest city with a population of 16,000, unanimously46 passed a framework ordinance authorizing in principle the sale of cigarettes by holders of permits.47 It then promptly approved 14 petitions for permits.48 In Burlington, Iowa’s ninth largest city, whose population exceeded 24,000, dealers had already been granted 22 $100 permits by June 25, prompting officials to predict that mulct tax revenue would reach $3,000 before July. In fact, by the time the law went into effect during the first week of July the “substantial present” that the legislature had given the city49 had already reached $4,900.50

Davenport, with a population of almost 57,000 the third largest city, favored mass processing. At its July 6 session, the city council, on motion of one of the aldermen, authorized the city clerk to issue permits to 102 cigarette dealers who had furnished bonds in the proper amounts. Among the permit holders was, beyond the usual array of cigar stores, drug stores, pharmacies, pool room, and a wholesale grocery store, one especially interesting location: the Palmer School of Chiropractic, the first and largest in the world. Of note, too, was that the Davenport Chamber of Commerce also received a permit.51 (Later, the city

42a“Permits Issued to 32 Dealers Here,” *Mason City Daily Globe-Gazette*, July 2, 1921 (2:1-3).
43a“Local Cigaret Dealers Must Post $1,000,” *WT-T*, May 29, 1921 (2:1).
44a“New Bus Line Given License,” *WT-T*, June 28, 1921 (7:1); “Council Proceedings,” *WEC*, July 2, 1921 (11:4) (June 27, 5 permits ordered issued).
46a“War on Motorists Shifts to City Council Chamber,” *Muscatine Journal*, June 17, 1921 (4:1).
47a“Official Proceedings of City Council,” *Muscatine Journal*, June 20, 1921 (5:3-7 at 6) (June 16).
48a“Permission to Sell Smokes Given to 14,” *Muscatine Journal*, June 21, 1921 (8:2); See also “Eight More Ask to Sell Smokes,” *Muscatine Journal*, June 24, 1921 (5:2).
49a“Cigaretts Aid City,” *BH-E*, June 25, 1921 (2:2).
51aDavenport City Council, Council Proceedings, Regular Session, July 6, 1921, at 1973.
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

council restricted the issuance of cigarette sales permits to applicants “engaged otherwise than incidentally or as an adjunct to some other occupation not...listed” in the following listed “occupations”: retail grocery, retail tobacco, restaurant, or hotel business, selling of malt beverages, or operating a private club.)

In Dubuque, Iowa’s fifth largest city with a population in excess of 39,000, at the end of June the city council, on the city manager’s recommendation, authorized him to issue permits to 30 applicants who had already filed applications as well as to all dealers who filed applications and posted the proper bonds between then and the next council meeting on July 3. During the ensuing days many more dealers than expected applied. Unlike their counterparts in Council Bluffs, dealers in Dubuque, who had failed to receive their tax stamps by Monday morning July 4, law-abidingly resisted the importunings of would-be buyers who were “unable to satisfy their cravings for the weed,” who were forced to wait until late afternoon when some dealers received the stamps.

In Ottumwa, the tenth largest city (population 23,003), the council on July 5 unanimously granted 32 permits. The city council in Clinton, the eighth largest city with a population of 24,151, approved 37 permits on July 1, 1921. Fort Dodge, the twelfth largest city with a population of 19,347, issued six permits to cigar, candy, and grocery stores on June 21. Boone, the sixteenth largest city with a population of 12,451, issued two permits on June 22.

Nor was the quasi-automatic granting of permits confined to the larger cities. Kalona (pop. 632), Lake Park (789), Lime Springs (595), Lytton (278),

13396 (copy furnished by Karen M. O’Connor, Special Collections, Davenport Public Library).

521943 Municipal Code of the City of Davenport, Iowa, ch. 16, Ordinance No. 107, at 347. Existing permit holders were grandfathered in regardless of a change in occupations.

53“Grant Manager Authority to Issue Permits,” DT-J, June 29, 1921 (3:1).


56Email from Ann Cullinan (Ottumwa City Clerk) to Marc Linder (Jan. 15, 2008).

57“New Cigaret Licenses to Be Taken Out,” Clinton Advertiser, July 2, 1921 (10:1).


61“Council Proceedings,” Lake Park News, July 14, 1921 (2:5) (2 applications approved July 7); “Council Proceedings,” Lake Park News, Nov. 17, 1921 (10:4-6 at 5)
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

Milford (908), Renwick (501), Riceville (960), and Stanton (749) were just a few of the small towns that followed that same path. One town with fewer than a thousand residents may have won the race to the bottom in terms of the laxity of its regulation. The town council of Victor, a town of 802 located a few miles from the even smaller Ladora and 20 miles from Grinnell, both of which banned cigarette sales, already on June 9 unanimously passed a resolution effectively waiving the council’s power to vet each application individually. Instead, the resolution provided that beginning on July 4 “it shall be lawful for any persons engaged in business in the Town of Victor, who shall pay to the Town Treasurer the sum of Fifty Dollars per year in advance and file with the Town Clerk a good and sufficient bond in the sum of One Hundred Dollars to have, keep for sale and sell...cigarettes...and the Town Clerk is hereby authorized and empowered to issue permits to such person, persons, firm or firms as comply with the conditions hereof.” Not only did the council permit applicants to bypass council scrutiny, but it grossly violated the law by requiring a bond of only $100 whereas the statute unambiguously imposed a minimum bond of $1,000. Similarly, at a special meeting a month later, the town council of Sidney (pop. 1,154)—which was founded after the discovery of gold in California and initially served as a way station to the West—in Fremont county, the state’s southwestmost and a WCTU stronghold of prohibition, by majority vote decided to grant permits to “all reputable dealers....”

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63 Council Proceedings,” Lytton Star, July 14, 1921 (5:4) (July 7, unanimous, 1 permit).
64 New Cigarette Law in Force, Milford Mail, July 14, 1921 (1:1).
65 Council Proceedings,” Renwick Times, July 14, 1921 (1:4) (July 5, all Aye).
67 City Council Met Last Night in Regular Session,” Stanton Call, July 7, 1921 (two permits).
68 Council Minutes,” Victor Record, June 9, 1921 (8:2). The occupations of three council members at the 1920 census were building contractor (Ellis Bowman), salesman (Charlie McAninch), and retail farm implement merchant (Samuel Steffy); a fourth had no occupation (Steven Smith), and the fifth did not appear in the census (Jas. Lawlor).
69 1921 Iowa Laws ch. 203, § 4, at 213, 214.
70 Thumbprints in Time: Fremont County Iowa 404 (1996).
71 Council Licenses ‘Fags,’” Sidney Argus, July 7, 1921 (1:1) (only 1 permit issued to the Nix brothers who owned a restaurant, but 2 more applications anticipated at next meeting). In this first issue in which cigarette ads became lawful the Argus ran two large
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

In small many cities, too, city councils acted expeditiously to approve applications for cigarette sales permits. Among them were Anita (1,236), Chariton (5,175), Charles City (7,350), Cherokee (5,824), Colfax (2,504), Decorah (4,039), Emmetsburg (2,762), Hamburg (2,017), Hampton (2,992), Hawarden (2,491), Humeston (1,214), La Porte City (1,443), Leon (2,193),

ones for Chesterfield and Camel. *Sidney Argus*, July 7, 1921 (2:4-6, 6:4-6). The article was also reprinted as “Cigarettes Sold at Sidney,” *T-WS-P*, July 11, 1921 (3:6). The expression “majority vote” suggests that it was not unanimous; unfortunately, exploration of the presence, magnitude, and character of the resistance to issuing permits has become impossible because the Sidney town council lost its minutes from 1921 to the 1930s.

Email from Sidney Town Clerk (Suzanne) to Marc Linder, Feb. 13 and 14, 2008. The brief article in the *Argus* provided no other details and, even if the newspaper did publish the council minutes, they were not published through the issue of July 21, 1921, after which a three-year gap in holdings by any library opens. The *Fremont County Herald*, which was also published in Sidney in 1921, printed neither the council minutes nor any article on the permit issue. Presumably one of the two additional permits in Sidney was for C. M. Ambler Drug Co., a drug store, which by the end of the month was advertising that it sold cigarettes in the county paper, which in the same issue also ran ads for Camel, Chesterfield, and Lucky Strike. *Fremont County Herald*, July 28, 1921 (2:1-2).

*Council Proceedings,* *Anita Tribune*, July 14, 1921 (3:2) (July 6, 4 permits).

*Council Men Get Cigaret Permits,* *OC*, July 7, 1921 (2:3) (6 permits).

*Cigaretts Not Legalized in Rockford, Ia,* *WEC*, June 30, 1921 (3:2) (4 permits).

*Dealers Apply for Cigaret Licenses,* *Semi-Weekly Democrat* (Cherokee), June 27, 1921 (1:5) (5 permits granted).

*Colfax City Council Gives Cigarette Permits to Six Dealers,* *Newton Record*, July 15, 1921 (2:3).

*Eight Cigaret Licenses in Decorah,* *Decorah Journal*, July 13, 1921 (1:4).

*Council Proceedings,* *Emmetsburg Democrat*, July 20, 1921 (7:3-6 at 4) (NewspaperArchive) (June 27, 21, 4 permits). To be sure, at least one newspaper asserted that because the new law was “very drastic...very few who have been handling cigarettes have been taking out licenses.” Only three had applied in Emmetsburg because “[m]any dealers here do not figures [sic] that they can get enough out of the cigarettes to pay this license fee and have anything left over.” “Take Out Licenses for Cigarettes,” *PAR*, June 20, 1921 (1:2).


*License Pill Dealers,* *Hampton Chronicle*, July 14, 1921 (12:4) (5 permits).

*City Council Meets,* *HI*, June 30, 1921 (8:1-2) (June 22, 2 permits, June 27, 5 permits).

*Four Cig Licenses Granted,* *Humeston New Era*, July 13, 1921 (1:1) (unanimous).

[Untitled], *Progress Review* (La Porte City), July 7, 1921 (3 permits granted to only
Maquoketa (3,626), Oelwein (7,455), Red Oak (5,578), Rockwell City (2,039), Sac City (2,630), Spencer (4,599), Spirit Lake (1,701), and Tama (2,601).

The press depicted both large and small cities as eager for the windfall largesse of the permit fees. For example the *Ottumwa Courier* reported that the city clerk was “beginning to ‘recover’ this afternoon from the ‘effect’ of eight $100 checks submitted to the city this morning for the first cigarette licenses ever distributed in Ottumwa.” Town councils in the smaller towns were especially receptive to the mulct tax revenue, which municipalities of all sizes turned into a purpose in its own right (“Cigarette Aid City”). The council, as one member of the Humeston town council put it, “thought the town had ‘just as well have that $50 per.’” Many smaller municipalities were no more immune than the bigger cities to uncritical appreciation of the “Golden Stream” that was pouring into their coffers thanks to the cigarette law.
Resisting Localities

However eager most city and town governments may have been to obtain as much mulct tax as possible from issuing permits, battles over these decisions did take place in councils in numerous smaller cities and towns, some of which in fact refused to countenance cigarette sales within their limits. The largest such city was Oskaloosa, Iowa’s nineteenth largest, with a population of 9,427 in 1920. Table 8 shows all cities and towns (with their population and rank for cities in 1920) in which opposition (defined here minimally as the casting of at least one vote on the council against issuance of permits) is known to have manifested itself in 1921; in many instances the opposition was much more intense.

This list in no way purports to be complete—councils in (perhaps even many) other, especially smaller, towns, may have resisted or even prohibited cigarette sales. For example, a newspaper in neighboring Shenandoah reported that the town council in Farragut, a town of 494 people in southwestern Iowa founded in the early 1870s, was “laboring with the cigarette question,” but had not yet decided “whether to license the so-called ‘coffin nails’ or not.” In order to put the town’s indecision into context, the Tri-Weekly Sentinel-Post presented the hostile extreme view:

Most of the people who believe in the welfare of the human race would like to see the cigarette abolished from the face of the earth but they are divided in opinion as to the attitude a town council should take. Some say that a public official should [not] make any compromise with evil, no matter what course might be taken elsewhere. Others say that if the state legalises the use of cigarettes and provides the way to secure them the people will get them and use them and the town council might as well be in position to regulate the sale and to derive some revenue from it.

A weekly in neighboring Sidney added that: “Many of the citizens are opposed to license and circulated petitions asking the council not to grant licenses.” Unfortunately, the council’s ultimate action is unknown because none of the newspapers covering Farragut followed up on it in the following weeks, and, even more fatally, the Farragut town council lost all of its minutes for meetings from...
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

1915 to 1934.\textsuperscript{101} The information about resistance derives from reading scores of bound and microfilmed contemporaneous Iowa newspapers and systematic computerized searches of a web-based, full-text facsimile of many, but far from all, Iowa newspapers from 1921 and 1922.\textsuperscript{102} Since newspapers often reported on denials of permits in other towns,\textsuperscript{103} including quite small ones, it is plausible that the list more than scratches the surface. Thus a small-town weekly in Stanton in extreme southwest Iowa, after reporting that the town council had approved two permits, noted that “[p]ractically all our neighboring towns” had granted permits, but that the council in Shenandoah had “decided that ‘fags’ cannot be sold legally” there.\textsuperscript{104}

<table>
<thead>
<tr>
<th>City/Town (County)</th>
<th>1920 Population/Rank</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albia (Monroe)</td>
<td>5,067/36</td>
<td>Mayor briefly delayed issuance</td>
</tr>
<tr>
<td>Cedar Falls (Black Hawk)</td>
<td>6,316/25</td>
<td>1 council member opposed issuing any permits</td>
</tr>
<tr>
<td>Cumberland (Cass)</td>
<td>561</td>
<td>Ban for 11 weeks</td>
</tr>
<tr>
<td>Earlham (Madison)</td>
<td>803</td>
<td>Ban until 1931</td>
</tr>
<tr>
<td>Fort Madison (Lee)</td>
<td>12,066/17</td>
<td>1 Mormon councilman voted against issuing all 20 permits</td>
</tr>
<tr>
<td>Grinnell (Powesheik)</td>
<td>5,362/32</td>
<td>Ban until 1924</td>
</tr>
<tr>
<td>Indianola (Warren)</td>
<td>3,628/55</td>
<td>Ban until 1933</td>
</tr>
</tbody>
</table>

\textsuperscript{101}Telephone interview with Farragut town clerk Marilyn (Feb. 14, 2008).
\textsuperscript{102}Newspaper Archive.
\textsuperscript{103}For example, a weekly in Corning in one column on its front page reported on denials in three towns within about 50 miles. “Neighborhood News,” Adams County Free Press, July 16, 1921 (1:1).
\textsuperscript{104}“City Council Met Last Night in Regular Session,” Stanton Call, July 7, 1921 (1:3).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

<table>
<thead>
<tr>
<th>City</th>
<th>Population</th>
<th>Year</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ladora (Iowa)</td>
<td>340</td>
<td></td>
<td>Ban at least thru 1924</td>
</tr>
<tr>
<td>Lamoni (Decatur)</td>
<td>1,787</td>
<td></td>
<td>Issued no permits until 1935?</td>
</tr>
<tr>
<td>Newton (Jasper)</td>
<td>6,627/24</td>
<td></td>
<td>Ban, reversed 2 wks later</td>
</tr>
<tr>
<td>Oskaloosa (Mahaska)</td>
<td>9,427/19</td>
<td></td>
<td>Ban, lifted (1922?)</td>
</tr>
<tr>
<td>Perry (Dallas)</td>
<td>5,642/30</td>
<td></td>
<td>Mayor vetoed ordinance; council overrode veto</td>
</tr>
<tr>
<td>Rockford (Floyd)</td>
<td>1,031</td>
<td></td>
<td>Ban (until 1927)</td>
</tr>
<tr>
<td>Rockwell (Cerro Gordo)</td>
<td>800</td>
<td></td>
<td>Unanimous vote against issuing permits</td>
</tr>
<tr>
<td>Shannon City (Union)</td>
<td>333</td>
<td></td>
<td>Ban</td>
</tr>
<tr>
<td>Shenandoah (Page)</td>
<td>5,255/34</td>
<td></td>
<td>Refused then granted permit, but mayor vetoed twice; then in Sept. 1921 permits issued</td>
</tr>
<tr>
<td>Winterset (Madison)</td>
<td>2,906/68</td>
<td></td>
<td>Ban, reversed 2 days later</td>
</tr>
</tbody>
</table>


Remarkably, most of these towns were located in Iowa’s southwestern area in which the group was especially strong. In 1921 WCTU membership was 13,030—or, in relation to the state population, one member for 184 Iowa residents. This statewide average density concealed very large county-level differences: whereas the ratio for most of the counties with the largest cities far exceeded the statewide average, in most of these southwestern counties the ratio was much lower. Map 3 and Table 9 show WCTU membership and density by county as well as the percentage of voters in each county who voted for the (failed) Iowa state constitutional amendment on liquor prohibition in 1917 and against ratification of repeal of the 18th Amendment to the Constitution in 1933.

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105 Since the WCTU was a women’s organization (with a small number of male honorary members) this ratio should be halved, but presumably the gender ratios among counties did not vary sufficiently to skew the averages.
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s
<table>
<thead>
<tr>
<th>County</th>
<th>% Voting for State Liquor Prohibition Constitutional Amendment in 1917</th>
<th>WCTU Members in 1921</th>
<th>County Population 1920/WCTU Members in 1921</th>
<th>% Voting Against Repeal of National Prohibition in 1933</th>
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<tbody>
<tr>
<td>Adair</td>
<td>56</td>
<td>133</td>
<td>107</td>
<td>59</td>
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<tr>
<td>Adams</td>
<td>66</td>
<td>102</td>
<td>103</td>
<td>74</td>
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<tr>
<td>Allamakee</td>
<td>31</td>
<td>25</td>
<td>691</td>
<td>21</td>
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<tr>
<td>Appanoose</td>
<td>60</td>
<td>35</td>
<td>872</td>
<td>53</td>
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<td>Audubon</td>
<td>47</td>
<td></td>
<td></td>
<td>46</td>
</tr>
<tr>
<td>Benton</td>
<td>40</td>
<td>48</td>
<td>502</td>
<td>24</td>
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<tr>
<td>Black Hawk</td>
<td>49</td>
<td>1,127</td>
<td>50</td>
<td>38</td>
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<tr>
<td>Boone</td>
<td>55</td>
<td>298</td>
<td>100</td>
<td>49</td>
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<tr>
<td>Bremer</td>
<td>28</td>
<td>87</td>
<td>192</td>
<td>25</td>
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<td>Buchanan</td>
<td>50</td>
<td>73</td>
<td>272</td>
<td>45</td>
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<tr>
<td>Buena Vista</td>
<td>59</td>
<td>[81]</td>
<td>[229]</td>
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<td>Butler</td>
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<td>233</td>
<td>77</td>
<td>50</td>
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<tr>
<td>Calhoun</td>
<td>51</td>
<td>[21]</td>
<td>[847]</td>
<td>41</td>
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<tr>
<td>Carroll</td>
<td>32</td>
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<td>Cass</td>
<td>53</td>
<td>[43]</td>
<td>[452]</td>
<td>51</td>
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<tr>
<td>Cedar</td>
<td>44</td>
<td>162</td>
<td>108</td>
<td>32</td>
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<tr>
<td>Cerro Gordo</td>
<td>55</td>
<td>189</td>
<td>183</td>
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<tr>
<td>Cherokee</td>
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<td>Chickasaw</td>
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<tr>
<td>Clarke</td>
<td>74</td>
<td>117</td>
<td>90</td>
<td>71</td>
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<tr>
<td>Clay</td>
<td>57</td>
<td>83</td>
<td>189</td>
<td>48</td>
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</table>
**City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s**

<table>
<thead>
<tr>
<th>City</th>
<th>1920 Sales</th>
<th>1930 Sales</th>
<th>1983 Sales</th>
<th>1983</th>
<th>1983</th>
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<tbody>
<tr>
<td>Clayton</td>
<td>52</td>
<td>133</td>
<td>188</td>
<td>18</td>
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<tr>
<td>Clinton</td>
<td>31</td>
<td>96</td>
<td>452</td>
<td>7</td>
<td></td>
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<tr>
<td>Crawford</td>
<td>36</td>
<td>81</td>
<td>254</td>
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<tr>
<td>Dallas</td>
<td>63</td>
<td>184</td>
<td>137</td>
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<tr>
<td>Davis</td>
<td>71</td>
<td>4</td>
<td>3144</td>
<td>65</td>
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City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

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### City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

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City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

Thus, whereas the population/membership ratio for Polk (Des Moines), Pottawattamie (Council Bluffs), Scott (Davenport), and Woodbury (Sioux City) counties was 238, 275, 302, and 357, respectively, the ratio for Madison (Earlham and Winterset), Page (Shenandoah), Mahaska (Oskaloosa), Warren (Indianola), Union (Shannon City), and Jasper (Newton) counties was 64, 67, 70, 75, 87, and 125, respectively. To be sure, above-average WCTU density and opposition to alcohol did not translate into resistance to, let alone prevention of, cigarette sales. Thus, the city council of Bedford, the county seat of Taylor, a southwestern county, whose dry voting record was exceeded by none, nevertheless immediately issued a cigarette permit to a cigar maker. Yet, in other counties and towns the WCTU’s strength was on display even where its exercise failed of its purpose. For example, in Clarinda (population 4,511), the county seat of Page county, in which Shenandoah is also located, the city council unanimously issued a permit to one firm and sent word to other dealers that it was prepared to act on their applications, too, as soon as they paid their fees and

106The total membership was calculated by adding the members reported by the individual county chapters to the annual convention in October 1921. Total membership was probably somewhat higher since some counties (e.g., Cass, in which Cumberland is located) failed to file a report, while others (including Floyd, in which Rockford is located) were unorganized and may not have had a complete count. The convention report also included (without methodological explanation) an alternative total membership of 15,250, which would have produced a statewide density of 158. Woman’s Christian Temperance Union of Iowa, Forty-Eighth Annual Convention 31-51 (1921). WCTU membership in 1921 is used as a gauge of the group’s strength during its battle against repeal of the cigarette sales ban that year. There are no membership data for a number of counties for 1921 either because the county was unorganized or the county organization failed to submit a report. In the latter instance data have been inserted (in square brackets) from 1920 (when the total membership was 11,556), if available, but they have not been included in the statewide totals. In a few unorganized counties a few residents nevertheless paid dues directly to the state WCTU, producing very low membership densities for those counties.

107To be sure, several counties were outliers. For example, Black Hawk, which included Waterloo as well as Cedar Falls and had the largest membership (1,127), exhibited a very low ratio (50). Decatur, in which Lamoni is located, had only 71 members and thus an above-average ratio (233). Powesheik, in which Grinnell is located, had a slightly below-average ratio (165).

108“One Cigarette License,” Times-Republican (Bedford), July 11, 1921 (1:3) (permit issued to L. D. Willman at July 9 meeting); 1920 Census of Population (HeritageQuest). Two more applications were to be presented at the next council meeting.
posted their bonds. The council took this action despite having on file remonstrances from nine local organizations and the presence at the meeting of two people seeking to use their influence against cigarettes. The groups included the WCTU, City Federation of Missionary Societies, Christian Endeavour, Society of the Christian Church, Presbyterian Congregation, Methodist S. S., Troop 2 Boy Scouts of America, Official Boards of the M. and E. and Christian Churches, and the Alethan Class of the Methodist Church. Ames, the location of Iowa State College of Agricultural and Mechanic Arts, offers another example. The density of WCTU membership in Story county (74) was far above average as was its electoral opposition to alcohol in 1917 and 1933. Yet, apparently without any opposition, the Ames city council granted eight cigarette permits as early as June 20, although at the same session the WCTU presented a petition with upward of 1,600 signatures requesting an ordinance prohibiting the showing of movies on Sunday.

Finally, to be distinguished from towns in which formal resistance to selling cigarettes took place were those in which the market, so to speak, knew better: perceiving no profitable demand, potential sellers did not bother to apply for a permit. For example, in the small north-central town of Burt (pop. 626), by the time the law went into effect no one had applied for a permit, prompting the local Republican weekly to comment: “People who must have them will have to go to the neighboring towns for their supply of `pills.’” But the paper then added: “We doubt if very many care if the sale of cigarets in this burg was dispensed with entirely.” That, however, someone cared about sales even in tiny Burt was manifested in the very same issue (July 6) of the town’s only newspaper, which was the first in which cigarette advertising became lawful: the back page displayed an ad for Lucky Strike, as it did throughout July and until the last week in August when it was replaced by a larger one for Chesterfield. Whether American Tobacco Company and Liggett & Myers were seeking to stimulate

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110“New Pavement Project Starts by August 1st,” ADT, June 21, 1921 (1:7); “Official Proceedings,” ADT, June 27, 1921 (5:4-6) (minutes of council meeting of June 20). This newspaper began publishing (large) cigarette advertisements as soon as it became lawful to do so. Id. July 5, 1921 (3:5-7) (Camel).
112“No Cigarets for Burt,” Burt Monitor, July 6, 1921 (1:1). It is assumed here that, unlike the situation, described below, in Lamoni, potential applicants in Burt were not deterred by the knowledge or perception that the city council would not approve a permit.
113Burt Monitor, July 6, 1921 (n.p. [8]:1).
cigarette smokers in Burt to travel to the nearest town where cigarettes could be bought\textsuperscript{114} or to build up a market in Burt itself so that demand would justify paying for a permit is unclear, but after ATC had, for an extended period in 1922, published ads for its new brand, 111, on August 9 a motion carried in the city council to authorize the clerk to issue a permit to Francis Pratt,\textsuperscript{115} a 32-year-old retail druggist,\textsuperscript{116} whose sales continued to be supported by ATC: the same issue of the newspaper that published the council minutes also ran an ad for 111, and soon Lucky Strike again appeared on the back page.\textsuperscript{117}

\textbf{Albia}

The minimal resistance in Albia appears to have been carried on by one person—Mayor Pabst—who engaged in a limited holding action, which the local newspaper called a “rather unusual and to some extent embarrassing condition....” Although the new statute did not expressly confer any power on mayors to deal with issuing permits, mayors in neighboring towns called special city council meetings to act on it, but councils could also meet on their own. In Albia, the mayor had “taken it upon himself to handle the matter...to suit his own interpretation of the law and as a result of his action no permits will be issued in Albia until after” the next regular meeting on the evening of July 4. Because the rush on stamps at the state treasurer’s office was causing delays of three days to three weeks in securing them, the seven or eight dealers in Albia who had applied for permits and paid the $75 mulct tax would not be permitted to sell cigarettes (even if their applications were approved). The \textit{Albia Republican}, which consequently headlined its account, “No Cigarettes for July Fourth,” was unable to explain the mayor’s usurpation of all authority and control over the permits.\textsuperscript{118} In fact, the council did meet at 8:00 o’clock on July 4 and authorized the city council to issue permits, but the permit applications for the dealers were not processed until after the regular meeting on July 4. The council then issued permits to the dealers who had applied and paid the mulct tax.

\begin{itemize}
\item \textsuperscript{114}In Algona (pop. 3,724), the county seat of Kossuth County, which was 10 miles away, the city council immediately issued permits to five sellers (including three pool halls). “Five Are Given Permits to Sell Cigarettes in Algona,” \textit{Kossuth County Advance}, July 7, 1921 (8:2). But even Titonka (pop. 418), which was even smaller than Burt and almost as close, issued two permits. “Council Proceedings,” \textit{Burt Monitor}, Aug. 9, 1922 (1:3).
\item \textsuperscript{115}1920 Census of Population (HeritageQuest).
\item \textsuperscript{116}“Council Proceedings,” \textit{Burt Monitor}, Aug. 9, 1922 (1:3).
\item \textsuperscript{117}“No Cigarettes for July Fourth,” \textit{Albia Republican}, June 30, 1921 (1:1).
\end{itemize}
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

clerk to issue permits to eight applicants.\textsuperscript{119}

\textbf{Cedar Falls}

With a population of 6,316 in 1920, Cedar Falls was the location of Iowa State Teachers College, whose enrollment was 1,402.\textsuperscript{120} The local WCTU’s innovative anti-smoking campaign in 1913 underscored the movement’s size, influence, and vibrancy.\textsuperscript{121} By the last week in June 1921 it was publicly known that at least six dealers would definitely and another three probably apply for cigarette permits, but the city council had not considered the matter before its meeting on June 27.\textsuperscript{122} At that session three applications were on the agenda, while three others were not discussed because they were not accompanied by bonds. Five different and liberally signed petitions, submitted by three WCTU organizations in Cedar Falls and two church groups, were read urging the council not to issue any permits. One council member, Robert Waters, a 57-year-old livestock buyer, voted against each petition because he was opposed to granting any licenses as provided by the new law. The majority, however, voted to issue permits to a drug store, cafe, and cigar store/billiard hall because they regarded cigarette sales “licensed under strict regulations” as “preferable to a ‘closed town’ with the constant temptation to ‘bootleg’” cigarettes.\textsuperscript{123}

\textbf{Cumberland}

The council of this small town called a special meeting on June 27, 1921, whose sole object was to consider the matter of granting permits for the sale of cigarettes. After an informal discussion Councilman H. Glenn Liston, a 32-year-old undertaker, offered a resolution authorizing the clerk to issue cigarette sales permits “to any party whose application is accompanied by the town treasurer’s

\textsuperscript{119}“The City Clerk Issues Permits,” \textit{Albia Republican}, July 7, 1921 (1:6).
\textsuperscript{120}http://www.uni.edu. It later became the University of Northern Iowa.
\textsuperscript{121}See above ch. 14.
\textsuperscript{122}“Cedar Falls,” \textit{WT-T}, June 26, 1921 (6:5) (NewspaperArchive).
Receipt for $50 and good and sufficient bond in the sum of $1,000 to comply with the law governing the sale of cigarettes.” The council then defeated the motion to adopt the resolution by a vote of 4 to 1. In voting against his own resolution, Liston was joined by Councilmen William Burton Denham (a 31-year-old veterinarian operating his own veterinary hospital), H. Lee Breckenmaker (a 34-year-old meat market merchant/butcher), and Whitney (either 33-year-old Floyd, an undertaker, or his 36-year-old brother Orville G., a general store merchant and Baptist association activist); the sole Nay was cast by Lattimer (either 67-year-old George H., or his 38-year-old son John M., both of whom were carpenters). The press did not adequately describe the generalized and programmatic character of the council’s action when it reported that the council had merely “refused to grant a license to cigarette vendors....”

The council did not discuss the cigarette question at its monthly meetings on July 7 or August 2, but did return to it on September 12 in connection with the permit applications of C. Mott Pigsley (a 41-year-old produce buyer), and C. F. Lassen. Councilman Breckenmaker’s motion to reconsider the resolution that had been defeated 11 weeks earlier was seconded by Lattimer and carried by a vote of 4 to 1. Breckenmaker’s motion to adopt Liston’s resolution, again seconded by Lattimer, passed this time by a vote of 3 to 2, Whitney and Denham adhering to their earlier Nays. The clerk was then authorized to grant permits when applications were accompanied by proper bonds and the treasurer’s receipt of $50 for the license, thus ending Cumberland’s brief resistance against cigarette sales.
Earlham

Founded by Quakers, the small town of Earlham was by 1927 the place of publication of the WCTU Champion, and as late as 1933 its exquisite ideological dryness was on display in its 80 percent electoral majority against repeal of national liquor Prohibition in the teeth of a 60 percent statewide vote for repeal. In mid-1921 the Madison County WCTU was “making a determined effort to make the [county?] solidly prohibitory of cigarette smoking. They believe they have the campaign against the pill well in hand in all of the smaller towns as well as in Winterset,” the county seat. The intensity of feeling in Earlham on the question was reflected in the extraordinary procedure used by the community to form and measure public opinion. On Sunday June 26 a vote was taken in every church to determine the congregations’ sentiment regarding cigarette sales permits: “There proved to be slight division of opinion expressed. Aside from a few who failed to register their vote, the sentiment was almost unanimously against the licensing of local dealers to sell the ‘pill.’” To be sure, the Earlham Echo hardly expected to see a majority casting a vote in church for licensing cigarettes, “especially in a community where the cigarette smoker is in the minority as he is in Earlham.” But it was nevertheless clear that licensing was “unpopular.” On the other hand, the cigarette smoker was allegedly “not deeply concerned one way or the other. He figures if he can’t buy ‘em one place he can buy them another.” During the run-up to the council vote the press was aware that the members were split, some opining that “licensed sale was not worse an evil than unlimited bootlegging” because a licensed dealer would be “the surest safeguard against misuse of cigarettes through his efforts to curb the illicit trade in them.” How and why such dealers would perform that service the Echo did not disclose, but since it believed that the new law’s “principal purpose” was to “withhold the pestiferous alkaloid laden things from the minor” so that enforcement would “unquestionably reduce the amount of cigarette smoking within a decade by curtailing the formation of the habit,” it is odd that the paper began publishing cigarette advertising on the first day it became lawful. At a special meeting of the Earlham town council on July 8 to consider a dealer’s application a committee of representatives of local churches, including

129 “Repealists Are Victors Tuesday,” EE, June 22, 1933 (1:1).
130 “Cigarette License Unpopular Here,” EE, June 30, 1921 (1:5-6). The word “county” inserted in square brackets may be the word that appears to have been mistakenly omitted in the newspaper.
131 EE, July 7, 1921 (8:4-6) (Chesterfield).
the Friends, Methodist, Christian, and Presbyterian, “registered a strong protest against” cigarette sales permits. The council then defeated the application for a permit by a vote of 4 to 1.\textsuperscript{132}

The council during the next three years appears never to have dealt with the question of cigarette permits at any of its mid-year meetings with the exception of June 1924, when Edward G. Tough, a cafe owner, asked for one, but the “Council failed to take action thereon.”\textsuperscript{133} Likewise, from 1925 through 1929 the council minutes again did not mention cigarettes.\textsuperscript{134} That the refusal to issue permits really meant that cigarettes were not sold in Earlham was confirmed by a lifelong resident (born in 1916), one of whose earliest childhood memories was of his older brother’s having to go to the even smaller town of Dexter, six miles away, to buy them sometime during the 1920s.\textsuperscript{135} Although during these years the \textit{Earlham Echo} did publish a long, two-column front-page article quoting various prominent opponents of youth smoking,\textsuperscript{136} it was an unoriginal piece that was probably placed in the paper by the WCTU, the printing of whose \textit{Champion} had become a major component of the \textit{Echo}’s business.\textsuperscript{137} More interesting, perhaps, is that the WCTU entrusted the work to a newspaper that regularly published

\begin{itemize}
\item \textsuperscript{133}“Council Proceedings,” \textit{EE}, June 5, 1924 (4:4). Unfortunately, the minutes as published in the newspaper often omitted the date of the meeting and did so on this occasion; since it was a regular meeting, which was held Mondays, the date was probably June 2. The biographical information on Tough is taken from the 1930 Census of Population, T626, Roll 666, Page 174 (HeritageQuest), and http://iagenweb.org/boards/madison/obituaries/indexcgi?read=92844 (accessed Feb. 7, 2008).
\item \textsuperscript{135}Telephone interview with Frank Inman, Earlham (Feb. 14, 2008). When Inman’s father found out, he was angry that his son was wasting his time instead of working.
\item \textsuperscript{136}“Tobacco Traffic Menaces Youth,” \textit{EE}, June 14, 1928 (1:3-4).
\item \textsuperscript{137}“To Echo Patrons,” \textit{EE}, June 2, 1928 (1:3-4).
\end{itemize}
cigarette advertising. 138

In 1930 Tough once again applied for a permit as did John E. Bechtel, another cafe owner. At the June meeting the council voted 3 to 2 to deny the request to accept their cigarette bonds and in July denied another request by Bechtel alone by the same vote. The five members were all businessmen, who were returned at the 1930 Census of Population as engaged in the following occupations: John H. Junkin (coal dealer), Charles E. Deets (grain elevator manager, farmer in 1920), Sanford J. Golightly (farmer), Robert J. Lewis (general store owner), and Edward A. Anderson (implement store owner), the first two voting Aye and the last three Nay. 139 Undeterred, on October 6, 1930, Deets introduced the following resolution:

WHEREAS, there are no cigarettes now being sold in the Town of Earlham, Iowa and [sic] are being sold in all neighboring towns and in justice to tobacco dealers in Earlham, Iowa and in view of increasing the funds of the Town of Earlham, Iowa

Now therefore be it resolved by the Town Council of Town of Earlham, Iowa that the Town Clerk be instructed to issue to E G Tough and J E Bechtel a cigarette [sic] permit.... 140

Manifestly, the worsening impact of the Great Depression on Earlham’s financial solidity prompted it at last to abandon the decade-old legal expression of the townspeople’s aversion to cigarettes, but it is nevertheless noteworthy that instead of justifying the facilitation of cigarette sales on the grounds that the policy was not working because residents were going to other towns to buy them anyway, the council chose to focus on—to use today’s ubiquitously deployed rhetoric to justify market-driven legislative decisions—‘creating a level playing field’ for Earlham merchants who were already selling other tobacco commodities, which did not require a permit. When Anderson, who had cast one of the three Nays in June and July, seconded the motion to adopt the resolution, the die was cast: on roll call he shifted to Aye, thus producing a 3 to 2 majority, and bringing Earlham’s ban to an end. 141

138E.g., EE, Sept. 15, 1927 (7:4-6) (Camel).
139Email from Kathy Timmerman, Earlham Town Clerk, to Marc Linder (Feb. 19 and 20, 2008); 1920 and 1930 Census of Population (HeritageQuest). Unfortunately, no issues of the Earlham Echo—which published the council minutes—from 1930 appear to be extant.
140Earlham, Iowa Town Council Minutes, Oct. 6, 1930, at 173 (copy furnished by Town Clerk Kathy Timmerman).
141The loss of the Echo for 1930 eliminates what would otherwise be the most accessible source of gauging public reaction to the reversal in policy.
By the next year the same members achieved unanimity: at its meeting on July 6, after passing a motion to accept the cigarette bonds of Tough and Bechtel, the council unanimously passed a resolution “that since cigaret [sic] permits were in effect in Earlham, Iowa, and also that the town is badly in need of funds,...the Town Council...grant a cigarette permit to E. L. Scar....” Remarkably, Elmer Scar, a drug store owner, was the town clerk. The following year the council again accepted Scar’s and Tough’s bonds, but the motion to accept Bechtel’s lost. Then at the bottom of the Depression in 1933, the council unanimously passed a resolution that since cigarettes were being sold in Earlham, a permit be issued to Bechtel.

**Grinnell**

A college town located in a rich farming community about halfway between Iowa City and Des Moines, Grinnell was the most prominent example of secular-political municipal action against cigarette sales that was not led by the WCTU or churches. (It is unclear that there was a rift between the WCTU and the city government, but in 1922 in connection with a legal dispute over an ordinance banning movies on Sundays, the mayor strongly objected to an impression created by the WCTU that “this worthy organization” had been the campaign’s main force; in fact, the WCTU, he charged, had neither lent the movement any active cooperation nor been in any way identified with it.) Grinnell also most clearly embodied that part of Governor Kendall’s declaration of legislative intent at the time of signing the Dodd-Clark bill advising anti-cigarette Iowans to elect like-minded citizens to their city council if they wished

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142“Council Proceedings,” *EE*, July 23, 1931 (2:3-4) (July 6, 1931).
144“Council Proceedings,” *EE*, July 13, 1933 (4:4-6) (July 3, 1933). Because the newspaper was apparently bound very tightly, the last several letters of the lines in the right-most column of the article were in the gutter and not captured by the microfilming; consequently, some of the words had to be guessed at.
145According to Grinnell College, its enrollment in 1921-22 was 880 students, while faculty members numbered 79. Email from Chris Jones (Grinnell College Special Collections and Archives) to Marc Linder (Jan. 5, 2011). According to *State of Iowa: 1923-24: Official Register* 623 (13th No.), enrollment that year was 794.
146*Polk’s Iowa State Gazetteer and Business Directory: 1922-1923*, at 565 (Vol. 20, 43rd Year, 1922).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

to retain their communities’ ban on the sale of cigarettes. The town’s interest in tobacco control antedated 1921: among its revised ordinances of 1917 was a section prohibiting and making a misdemeanor of the distribution of sample packages of tobacco (or any drug, medicine, nostrum, or soap) by leaving them on “any porch, steps, sidewalks, or by throwing the same in any doorway or yard...”

The city council that met on June 20, 1921, to decide whether to permit the sale of cigarettes had been elected on March 28, when the Citizens ticket, headed by mayoral candidate James L. McIlrath (1871-1955), gained five of the six seats, largely by wide margins, leaving only one seat to the People’s Ticket. Just 10 years old when his dying father charged him with caring for his mother and five younger siblings, by the age of 14 McIlrath was in full control of the family’s 80-acre farm not far from Grinnell. At some point, with “[n]o money, no schooling, or any qualification upon which I could build a career,” he took up auctioneering. By 1921 the 49-year-old own-account auctioneer was well-known in Iowa with a reputation of being a strong leader with strong opinions. McIlrath was a relatively high earner: he reported to the Iowa state census enumerator that his total earnings from his occupation as auctioneer was $3,500 in 1914—when the average annual money earnings of employed wage earners in all industries in the United States was only $580. The value of his farm or

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148See above ch. 15.
149 Grinnell Revised Ordinances of Nineteen Hundred Seventeen, sect. 74 at 18 (S. Crosby ed. 1917). The “actual delivery of such sample to any adult person” was not covered by the provision.
151“City Election Is Over,” GH, Mar. 29, 1921 (1:3); 1900, 1910, 1920 Census of Population (HeritageQuest); A Reader, “The People’s Ticket,” GH, Feb. 25, 1921 (4:3) (letter to editor). For a list of the People’s and Citizens tickets and Independent candidates, see [Untitled], GH, Mar. 25, 1921 (4:1).
152“J. L. McIlrath Tells of His Life in County,” Montezuma Republican, Jan. 1, 1952, at 1 (clipping provided by James L. McIlrath). Unfortunately and oddly, this very lengthy autobiographical account, which 81-year-old McIlrath wrote while recovering from a broken hip, consists largely of isolated details about auctions and does not even mention his having been mayor or state legislator.
153 Telephone interview with James McIlrath, auctioneer, Grinnell (Mar. 16, 2008) (a relative, but non-direct descendant, of McIlrath, who is custodian of his papers).
154 Iowa Census 1915, Poweshiek County, Grinnell, Card No. [A]835.
155 Paul Douglas, Real Wages in the United States 1890-1926, tab. 84 at 230 (1930). In 1914 the earnings of John H. Patton, a leading lawyer in Grinnell and Poweshiek
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

home was also considerable at $35,800. The five victorious Citizen ticket candidates were: 65-year-old James Harpster, a merchant and Methodist Episcopalian at the 1915 Iowa census, who was also a director (and about to become president) of the Mutual Home Loan and Savings Association, and was otherwise “a power always” in “various business organization”; 64-year-old Horace S. Lowrey, who was returned as a retired farmer and Methodist Episcopalian at the 1915 Iowa census; 50-year-old Charles Cratty, a mechanic employed in a garage; 59-year-old William Simmons, a farmer; and 62-year-old David McBlain, who had been returned as a waterworks engineer in 1910. (The Citizens ticket’s only defeated city council candidate was Herbert Brock, a dentist.) The only successful People’s ticket council candidate was Bernard Carney, the 28-year-old vice president of the Grinnell Savings Bank. A capitalist class bias in the composition of the People’s ticket seemed to emerge from the fact that, in addition, McIlrath’s opponent on the People’s ticket, Jesse Fellows, was the director/manager of Grinnell Washing Machine Company, and Cratty’s, Charles Snyder, was a furniture business employer, but other unsuccessful People’s candidates for city council were a washing machine company foreman (Cedric Barnes), telephone company lineman...
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

(James C. Martin), railroad freight agent (John Foster), and carriage factory receiving clerk (Michael J. Garrigan, the only incumbent).

As in other Iowa towns of the period, the Grinnell ticket platforms were suffused with such commonplaces that it was difficult to tell them apart. McIlrath himself, responding to a letter to the Grinnell Herald seeking information about the various platforms, declared that “the city of Grinnell is not in ‘Politics’” and the campaign’s “real goal” would be “lost if our city should be divided into factions drawn up along lines representing factional platforms which did not represent the interests of all the People.” Drawing out this harmonized suprafaction, -class, and -gender ideal, he insisted that “Grinnell is a city of homes, churches and educational institutions, business enterprises, factories, etc., wage earners, business men, professional men and women, and retired citizens, all of whom represent the high type of character which has placed Grinnell in a high class by herself as a model home town.” Anticipating Coolidge’s “the business of America is business,” McIlrath’s secular manifesto declared that Grinnell “is looking for executives and not politicians. Men who have business ability to manage the business affairs of the town in the interests of economy as well as good business expansion, men who have the courage to stand for the enforcement of the ordinances of the town and thereby maintain the moral character and ideals of the city.” Projecting—on the very day that Warren Harding became president—an apolitical normalcy, “refus[ing] to develop or discuss any factional issue in this campaign,” and “vouch[ing] for every candidate on the ‘Citizens’ ticket,” he assured the public that a “‘Radical’ has no place in such a position any more than a ‘Liberal’....”

Even voters’ complaints that candidates had been “very vague in regard to what they stood for” were unable to tempt McIlrath to violate his self-imposed promise not to campaign on “factional issues,” but just three days before the election “a few mis-statements relative to my position on certain questions pertaining to the blue laws” did finally prompt McIlrath to speak out. In particular, he objected to allegations that “I would go as far as to interfere with the personal habits and practices of individuals that did not conform to my own of thinking.” After noting the obvious point that no mayor was authorized to enforce restrictions not provided for by ordinances or statutes, he allowed as that he stood for “a clean Grinnell or a standard of public morals that will be

161“J. C. Martin Was Buried Tuesday,” Grinnell Herald-Register, July 1, 1943, on http://www.grinnell.lib.ia.us/Obit/M/MartinJC.pdf
wholesome for the great aggregation of young people that make up the whole life as well as the school life of our city.” Without explanation McIlrath also revealed that he had developed a position on the completely unrelated matter of utility rates, which, he owned, were “little short of burdensome, but any candidate would...show a great lack of judgment who takes a rap at such utilities until he had made a thorough and impartial investigation of such rates by competent authorities”; judiciously he would then “feel in duty bound to use my influence to bring about such action that would secure justice to producer and consumer alike.” And to make sure that the electorate had not forgotten his program of subordinating “the administration of city affairs [to] the highest kind of business efficiency obtainable,” McIlrath promised that as mayor he would “give to the municipal affairs the same active interest, hard work and careful attention to details which heretofore I have given to my own private business.”

Despite McIlrath’s reluctance to be pinned down on specific policies, he was well known as an opponent of smoking. (Although a member of the Congregational church from the time he moved to Grinnell in 1909, McIlrath for almost 25 years taught an adult Sunday School at the First Methodist church; whether this engagement had any connection to his position on cigarette sales is unknown.) The author of a purportedly humorous letter to the editor observed several weeks before the election that “sum say if Mac is elected, he wunt let ennyboddy smoke on Sunday nor Thanksgiving day, but if Jess [Peoples ticket candidate Jesse Fellows] is Mayr they can smoke every day and nites to, after they have gon to bed even if they do set the howse on fire....” Moreover, incumbent mayor and Independent candidate Dan White “don’t care a dam who smokes or goze to church and he wunt interfer with no smoker nor no drinker if he donte drink nuthing hotter than Wawter or Cowfee.”

Despite his earnestness and zeal on the subject, McIlrath also displayed a sense of humor on cigarette law enforcement in his newspaper column just a week after he had been sworn in. After a mayor in Iowa had recently been “elected on an anti-cigarette and law and order platform,” the city council appointed a young
lawyer as city solicitor “who was some what [sic] of a cigarette smoker. On being sworn into office he thanked the council for the honor bestowed on him and addressing the Mayor assured him every cooperation in enforcing the law and making a clean city. ‘All right,’ replied the Mayor. ‘Just tell me where you are buying your cigarettes?’”

McIlrath’s ability to take a joke on the subject was (presumably) on display a few months later when he wrote in his column: “The Mayor has just received a package of twenty-four books of cigarette papers from the American Tobacco Co., of Durham, N.C. The merchant who placed the order for for [sic] use [sic; should be “us”?] forgot to include the tobacco otherwise the papers are worthless to us. However if he will call at our office we will gladly remit for them.” Since the sale of cigarette papers was as unlawful as the sale of cigarettes without a permit, and since no one in Grinnell (thanks to McIlrath) had a permit, this transaction was unlawful (at least as mediated by a merchant, though a consumer could lawfully have directly bought cigarettes for his own use from an out-of-state seller). But even if it had been lawful, McIlrath’s making and smoking his own cigarettes while spearheading the city’s drive against (manufactured) cigarette sales would have been so bizarre as surely to have prompted his opponents to accuse him of hypocrisy. Since McIlrath’s platform clearly stated that he did not smoke, perhaps the order placed in his name had been an anonymous hoax and McIlrath was jocularly acknowledging and trying to smoke out the hoaxster. (That McIlrath was a lifelong nonsmoker was consistent with his ability in 1951 to blow out all 80 candles on his 80th birthday, “indicating that he has lost none of his lung power which he had developed during his 50 years...as a livestock auctioneer.”)

At the special council meeting on June 20, 1921, Cratty of the Citizens ticket moved—seconded by Carney, the sole People’s ticket member—a framework resolution putting the city in principle on record in favor of licensure. After citing the new cigarette law as making it optional with city councils to grant permits and as “rigidly” safeguarding minors’ interests, the proposed resolution focused primarily on the public and private financial advantages accruing from a sales regime:

WHEREAS, Refusal to grant permits under said law will deprive the city of revenue and dealers of profits that will go to other municipalities and will not insure protection to

167[. L. McIlrath.] “Mayor’s Corner,” GH, Apr. 12, 1921 (4:5-6).
169See below.
170“J. L. McIlrath Was Honored on 80th Birthday Saturday,” Montezuma Republican, Sept. 27, 1951 (SHSI IC, biography clippings file).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

minors,

THEREFORE BE IT RESOLVED, that it is the sense of this Council that upon proper applications being made and strict compliance with the said law relative to applications for and the granting of said permits, that [sic] permits will be granted by the City Council of the City of Grinnell, Iowa.\textsuperscript{171}

No member having joined the mover and the seconder, the motion was defeated 2 to 4,\textsuperscript{172} and Grinnell became one of the first cities in Iowa programmatically to oppose licensure, although strictly speaking the form of the defeated resolution did not necessarily mean that the majority had committed itself to denying all individual requests.

Unfortunately, the press failed to shed any light on the arguments deployed at the meeting, but Mayor McIlrath in his regular column in the \textit{Grinnell Herald}—which at least through September published no cigarette advertisements\textsuperscript{173}—offered a sparse account of “[o]ne of the most spirited council meetings yet held under the present administration,” the cigarette permit question being “[t]he principal bone of contention....” After the aforementioned resolution had been presented by the owner of the Rex Cigar store, 25-year-old E. J. Sullivan\textsuperscript{174}—previously engaged in the bank business in Canada, Chicago, Davenport, and Los Angeles, Sullivan had just bought the store in February\textsuperscript{175}—a 90-minute discussion ensued, resulting in its defeat, which the mayor “heartily endorse[d]... believing it to be the sentiment of the majority of the voters of Grinnell.”\textsuperscript{176} A month later, the Poweshiek county board of supervisors reinforced the council’s action by refusing to grant a permit to an applicant: “If Grinnell wants cigarettes sold in the city or just outside, the Board thinks the council is abundantly able to handle the matter.”\textsuperscript{177}

\textsuperscript{171}“Cigarettes Lose Out,” \textit{GH}, June 21, 1921 (1:1) (minutes).
\textsuperscript{172}“Cigarettes Lose Out,” \textit{GH}, June 21, 1921 (1:1) (minutes).
\textsuperscript{173}However, both before and after cigarette ads became lawful on July 4, 1921, the \textit{Herald} did publish some pipe tobacco ads. E.g., \textit{GH}, July 29, 1921 (7:4-6). In contrast, the \textit{Register} early on published ads for Lucky Strike and Chesterfield. \textit{GR}, July 7, 1921 (2:7, 3:5-7).
\textsuperscript{174}1925 Population Census Schedule—Iowa, Roll No. 344, Poweshiek County, Grinnell, 2d Ward.
\textsuperscript{175}“Mayor’s Corner,” \textit{GH}, June 21, 1921 (2:4).
\textsuperscript{177}“Mayor’s Corner,” \textit{GH}, June 21, 1921 (2:4).
\textsuperscript{178}“Board Refuses Sale,” \textit{GH}, July 22, 1921 (4:4) (meeting of July 18).
Despite these setbacks, would-be cigarette sellers did not abandon their efforts to undo the council’s action. At the council meeting on August 1, 1921, which lasted four and a half hours but dealt with other matters as well, such as utilities and the city dump, the American Legion, represented by John Horn, a 26-year-old bank bookkeeper who had unsuccessfully run for city treasurer against the People’s ticket candidate, asked the council to reconsider its refusal to permit cigarette sales. In a remarkable role reversal for a churchman, one Rev. Mr Roberts—who, interestingly, had to be imported from Sheffield, 80 miles away—“spoke in behalf of the Legion and the change of sentiment that had come over the country in its attitude toward this habit.” However, as the mayor ironically reported in his column: “Further discussion soon revealed the fact that this so-called change of sentiment had not taken possession of the council as yet and the matter was not brought to a vote.”

On April 3, 1922, the day before the first anniversary of the new council’s swearing in, Emery Boren and Carl Phelps, two restaurant owners, joined Sullivan in presenting petitions requesting permits. Mayor McIlrath broke the tie-vote by voting No and thus preserved the ban.

In explaining the basis for his vote to Grinnell’s citizens three days later, Mayor McIlrath revealed an elaborated, deeply held, and historically shaped view of cigarette sales. His motivation for disclosing these beliefs was, once again, rooted in what he regarded as critics’ misstatements of his actions: “As mayor I have been frequently accused of trying to force my personal opinion upon the people of this community by those who have been opposed to the policies of the present administration.” In the not unrelated area of banning the public showing of movies on Sundays, he had experienced vindication in the form of an Iowa Supreme Court decision, issued the day after the council vote, that he took as “proving that I was clearly within my rights on one of these questions where religious intolerance was charged and [I] was simply carrying out the policies of the community as outlined in the laws and ordinances of the city that were handed to me at the beginning of this administration.”

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179 “Mayor’s Corner,” GH, Aug. 2, 1921 (4:1).
180 “Carl Phelps Has Gone,” undated clipping, on http://www.grinnell.lib.ia.us/Obit/P/PhelpsC.pdf. At the 1925 census Phelps was returned as a cafe owner with no religion. 1925 Population Census Schedule—Iowa, Roll No. 344, Poweshiek County, Grinnell, 4th Ward.
181 “Cigarettes Lose,” GH, Apr. 4, 1922 (1:2); “Minutes of the Council Meeting,” GH, Apr. 4, 1922 (5:4) (Apr. 3).
182 “Mayor’s Corner—For You and Me,” GR, Apr. 6, 1922 (3:1-5 at 1-2). The case was G. W. Mart & Son v Grinnell, 194 Iowa 499 (1922).
concerned, whatever his “personal opinion” may have been regarding the “cigarette habit,” it was without weight in this discussion. Segueing to the history of the law, the mayor adopted what may well have been, at least for a secularist, an unprecedentedly broad, publicly articulated view of the taint with which the Iowa legislature intended to imbue cigarette sales even while empowering local governments to issue permits. McIlrath reminded his fellow citizens, who had been aware of his stance at the election, that for some period of time until July 1921, cigarette sales had been “absolutely abolished”:

A strong effort was made to appeal the law and legalize the traffic within the state but they [i.e., the legislature] refused to do so. Why? They must have had some reason other than their own personal opinion. The law making body of the state of Iowa has given the traffic in cigarettes whatever [sic] questionable flavor it may have and not the mayor of this or any other city. A license measure was enacted however which resembled the old mulct law governing the liquor traffic except that the option of granting a license was left with the town councils...instead of a county referendum. On this point as mayor I positively refused to cast the vote that would commit Grinnell to a license policy on this or any other traffic which has been considered questionable in the eyes of the state law or the local sentiment of my constituents and as I stated to the members of the council last Monday under these circumstances I would owe my resignation to this council if I would commit Grinnell to such a license law before the community had expressed themselves otherwise by a referendum vote. I do not believe that the voters of Grinnell elected me to license the cigarette traffic or any other traffic not having the moral freedom of the laws of the state. If the cigarette traffic is to be legalized within the state and given its full moral freedom, I believe the state of Iowa should so enact, but until such time I shall refuse to commit Grinnell to any license policy unless I have a different expression from the one given at the last city election. 183

Finally, McIlrath hypothetically set forth one criterion that he would use for deciding whether to vote to grant a permit and at the same time distinguished himself from those (presumably the WCTU and various church organizations) that would interfere with smoking—as opposed to buying—cigarettes:

If I were ever to cast my vote for such a license I certainly would exercise my personal privilege of refusing to vote to issue such a license to any person whose court records showed had been willful violators of the law governing such as I would have no reason to believe that the rights of the community would be safely guarded when such licenses were issued to such applicants. In this position we are dealing only with this question as a traffic and not in any way antagonizing those who may wish to indulge in the use of cigarettes as

183“Mayor’s Corner—For You and Me,” GR, Apr. 6, 1922 (3:1-5 at 3-5).
a habit. That is their own personal business and not the mayor’s.\textsuperscript{184}

The WCTU of Poweshiek county—whose local unit in Grinnell in March 1922 urged members to study conditions relating to “cigarette-using” and announced that Anti-Cigarette Sunday would take place April 23\textsuperscript{185}—reported to the state convention in October 1922 that in “cooperation with others” it had “prevented licensing the cigarette in the County.”\textsuperscript{186} What activities it had engaged in to achieve that objective it did not reveal.

In spite of the ongoing ban on the sale of cigarettes in Grinnell, unlawful selling was nevertheless not unknown. For example, at the end of October and beginning of November 1922, state officers, who traveled all over Iowa, were in Grinnell investigating; in addition to finding a minor smoking a cigarette and identifying the boy who had given away cigarette papers to him (leading to judicial imposition of a fine), they “filed an information against George West, colored, an employee of a local cigar store, for selling cigarettes to minors.” A representative appeared before Superior Court Judge James Robison on November 3 to “plead guilty for the offender,” but no sentence had been passed by the time the local press lost interest in the case.\textsuperscript{187} What is remarkable about this account is that the \textit{Grinnell Herald} omitted any mention whatsoever of the fact that this sale, regardless of whether it was to a minor or an adult, had violated the state law because neither that store nor any other store in Grinnell had been issued a permit by the city council. Yet the article said nothing about the owner’s failure to pay the mulct tax, imposition of a penalty for that failure, or any effort to seek an injunction to abate the nuisance that the owner was carrying on. Likewise, although the store owner had presumably sold the cigarettes without having paid the sales tax, neither a prosecution nor confiscation of the cigarettes in his possession was mentioned. Whether cigarette prosecutions were impeded by “the ‘silent’ sympathy of the well meaning public” is unknown, but McIlrath denounced “this class of citizen” whose failure to cooperate actively hampered liquor law prosecutions.\textsuperscript{188}

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\textsuperscript{184}“Mayor’s Corner—For You and Me,” \textit{GR}, Apr. 6, 1922 (3:1-5 at 5).
\textsuperscript{186}Woman’s Christian Temperance Union of Iowa, \textit{Forty-Ninth Annual Convention} 40 (1922).
\textsuperscript{187}“For Selling Cigarettes,” \textit{GH}, Nov. 3, 1922 (1:4). 32-year-old Missouri-born George West had been living in Des Moines in 1920 as a teamster for an ice and fruit company. At the time of the census only eight blacks live in Grinnell. 1920 Census of Population (HeritageQuest).
\textsuperscript{188}“Mayor Puts It Before Public,” \textit{GR}, Jan. 22, 1923 (1:1).
The paper may have ignored the city’s ban on cigarette sales, but not another dimension of the cause in which many residents continued to take an intense interest. For example, on January 3 and 4, 1923, a “fair-sized crowd” attended a program of entertainers and speakers under the auspices of the Anti-Cigarette League presented at the Friends church and Christian church. The Herald observed that “[i]n addition to speaking on the evils of the cigarette habit, its spread and reforms,” Messrs Filmore and Huddleston had been “great entertainers,” who “kept the audience in good humor throughout the program” and would, if their appearance had been better advertised, have faced a “much larger crowd.”

By February 1923 Grinnell was gearing up for the biennial city election. The tickets’ fluid and/or nonbinding character was reflected even in their name changes: this time round McIlrath’s group called themselves Progressives, while their opponents nominated candidates “under the party name of ‘Citizens’ the idea being to make the...candidates a group to be voted for on one ticket.” Initially the Citizens’ mayoral nomination was James Harpster, who had been elected to the city council in 1921 on McIlrath’s Citizenship ticket. In the wake of McIlrath’s intimation on March 1 of the possibility of being a candidate for reelection—“while I feel that I cannot really afford to give the city two more years of my time, there are some things I can afford better than others”—the Citizens ticket, which had already undergone changes in composition, now was headed by former mayor Daniel White, a founder and for many tears director of the Mutual Home Loan & Savings Association. The six Progressive candidates for city council—every one of whom McIlrath heartily endorsed as owning his own home or place of business and as a taxpayer and thus “in a position to understand the problem of the taxpayers, and carefully guard their interests”—were: James Corrough (farmer), Norman Pilgrim (retired farmer), Horace S. Lowrey (none), Fred Dee (director of Grinnell State Bank and

189 “Against Cigarettes,” GH, Jan. 5, 1923 (1:1).
190 “Name Ticket for Election March 26th,” GR, Feb. 22, 1923 (1:1).
191 “McIlrath Says He May Be Candidate,” GR, Mar. 1, 1923 (2:6).
194 “Mayor M’Ilrath Gives His Platform,” GR, Mar. 19, 1923 (1:3-5 at 5).
195 On all the candidates of both tickets, see “White to Head the ‘Citizens’” and “New Ticket Now in Field Headed by Mac,” GR, Mar. 8, 1923 (1:1); 1920 Census of Population (HeritageQuest); [Untitled], GH, May 23, 1924 (4:2).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

Methodist Episcopal church Sunday School superintendent), 196 John Will Ent (owner of Grinnell Laundry Company),197 and David McBlain (engineer),198 Lowrey and McBlain being incumbents. The five Citizens candidates (none of whom was an incumbent or a candidate in the Third Ward) included Gilbert Hatcher (own-account automobile dealer),199 Howard Triplett (planing mill owner),200 Morris Bidwell (electric utility engineer), Albert Dickerson (garage owner),201 and John Jantzen (pop corn elevator laborer). 202

During the run-up to the election the two mayoral candidates explained in some detail their tickets’ platforms, of which cigarette sales and Sunday movies were virtually the only matters set forth with sufficient specificity to put the voters on notice as to what they might expect from either administration. To be sure, White’s statement left readers awash in platitudes such as “[t]he greatest good to the greatest number is always a safe and sane policy” and “I am committed to a city policy that will, as nearly as possible, meet with the reasonable and lawful desires of all our citizens....” Arguably no less trite was his belief in administering the city so as to increase business and engender “a spirit of cordial invitation to people to come to our city to live and transact business,” but the public might have understood his promise to “endeavor, by lawful means, to bring back and hold patronage that has been lost to us through ignoring and violating such a policy” to encompass the McIlrath council’s outlawing of the cigarette trade, which prompted addicted residents to patronize out-of-town stores. So, too, might voters have detected a reference to the refusal to grant


197 At the 1915 Iowa census Ent was a traveling salesman without a religion; at the 1925 census he was a Baptist. Iowa Census 1915, Poweshiek County, Card No. A911; 1925 Population Census Schedule—Iowa, Roll No. 344, Poweshiek County, Grinnell, 3d Ward.


201 In 1915 Dickerson was returned as a Baptist. Iowa Census 1915, Poweshiek County, Grinnell, Card No. B-153.

202 At the 1925 census, Jantzen was returned a shipping clerk and a Methodist/Baptist. 1925 Population Census Schedule—Iowa, Roll No. 344, Poweshiek County, Grinnell, 4th Ward.
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

permits in White’s declaration that “I am unalterably opposed to imposing upon the many the peculiar wishes and dogmatic demands of any clique or faction.” But there was no need to speculate on opaque references to cigarettes: after all, White devoted more space to the question than any other in his platform statement:

There is a good deal of talk about permits to sell cigarettes. The Iowa law authorizes the sale of cigarettes, but gives the city council power to grant or refuse permits to sell them. I do not smoke cigarettes. If the council grants permits to sell them, dealers will be protected in their rights. If the council refuses to grant permits to sell them, violators of the law will be prosecuted. My personal attitude, if called upon to express it officially, will be governed by the will of the majority, as I may be able to determine it. I do not feel called upon to commit myself to a policy which may prove to be the policy of an inconsiderable minority. This would not be fair to the people generally.

Since White “believe[d] in indiscriminate enforcement of all laws,” his promise to apply his unconditional enforcement policy to whatever stance the council took shed as little light on his own position as did his plan to divine the townspeople’s views in case he was required to cast a tie-breaking vote. Nevertheless, since his ticket was viewed as hostile to McIlrath’s administration and as favoring licensure, voters could be presumed to interpret “inconsiderable minority” to refer to the antis.

McIlrath’s platform, presented a week later, was more forthcoming than that of White, whom he challenged to prove his assumption “that any legitimate business has been driven away from Grinnell or that we have as a town incurred the hate of any one [sic] on the outside unless it is a few disgruntled bootleggers and booze-fighters who have been obliged to leave town and are anxiously awaiting the return of the old regime that they may return to Grinnell and carry on their business unmolested.” After having thrown down the gauntlet to White, the incumbent confusingly asserted that “we coincide with him exactly and have no quarrel with him” regarding cigarettes and Sunday movies:

He says he does smoke cigarettes. Neither do we nor do we have any quarrel with those who do so long as they procure them in the manner prescribed by law. If the council votes to

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203“Dan White States His Platform,” GR, Mar. 12, 1923 (1:3-5 at 3).
204“Dan White States His Platform,” GR, Mar. 12, 1923 (1:3-5, at 1-2). White made parallel opaque comments on Sunday movies.
205“Dan White States His Platform,” GR, Mar. 12, 1923 (1:3-5).
206Mayor M’Ilrath Gives His Platform,” GR, Mar. 19, 1923 (1:3-5). The same text was published as “McIlrath States Platform,” GH, Mar. 20, 1923 (2:1-2).
license the sale of cigarettes we bow to their decision but if obliged to cast a deciding vote we still refuse to vote to license a traffic which the state law will not give the moral right of way.\textsuperscript{207}

Since White had never stated that he would break a tie by voting against granting permits, it is unclear why McIlrath glossed over their sharp difference, but precisely what goal he was pursuing with the suppression of cigarette sales absent any objection to smoking them he did not explain. Instead, he emphasized that movies and cigarettes were “only incidents in the process of law enforcement,” while the taxpayers were “vitaly interested” in other questions as well. Concrete where White had been silent, McIlrath specified certain aspects of the city disposal plant, police, superior court, and streets as interesting taxpayers more than “imaginary things” developed by “anti-administrationists...purely for campaign purposes.”\textsuperscript{208}

In its large newspaper advertisement several days before the election, the Citizens ticket emphasized that if it were elected, “individual dictation” would yield to government by majority rule and legislation by the council. Taking yet further aim at McIlrath and his “vilifying screed” of a platform, the Citizens defended farmers who had ceased trading in Grinnell as “neither bootleggers nor booze fighters.”\textsuperscript{209}

Gauging “how moral” each party was in the upcoming “moral election” was easy for one self-appointed town humorist: “Jim McIlrath don’t smoke cigarettes and so don’t Dan, of who it may be said he is strictly moral. But Jim McIlrath don’t even chew gum so if Jim wins maybe it’s going to be a ex-Spearment after all.”\textsuperscript{210} Less amused by McIlrath’s moral leadership was the dean of the city’s (and county’s) bar, John H. Patton, a one-time city solicitor and mayor,\textsuperscript{211} whose animus against McIlrath was presumably in part shaped by his unsuccessful representation of the plaintiff in the aforementioned case testing the city ordinance against Sunday movies.\textsuperscript{212} Four days before the election Patton warned voters that if McIlrath were reelected, “with three pliable echoes [on the city council], as he has had the past two years, his personal notions and ambition are

\textsuperscript{207}“Mayor M’Ilrath Gives His Platform,” \textit{GR}, Mar. 19, 1923 (1:3-4).

\textsuperscript{208}“Mayor M’Ilrath Gives His Platform,” \textit{GR}, Mar. 19, 1923 (1:3-5).


\textsuperscript{212}G. W. Mart & Son v Grinnell, 194 Iowa 499 (1922).
likely to be very expensive.” Mocking McIlrath’s declaration that movies and cigarettes were “only incidents” as capable of fooling no one, Patton charged that the mayor had “said the same thing in the press two years ago. After he was elected he insisted that he was elected on the Sunday movie issue” and then spent $3,000 of “taxpayers’ money” on the litigation. Patton concluded that McIlrath “seems to be more concerned about making people live according to his pattern,” which was none of the mayor’s business.213

At the election on March 26, which generated more interest than any in years and the largest turn-out in Grinnell’s history,214 McIlrath secured 58 percent of the votes. His Progressive ticket won four of the six council seats, including the two at-large races, by virtually the same margin as the mayor’s. Lowrey, the only successful incumbent, won 72 percent of the vote in the First Ward, but Ent gained only 47 percent of the vote against two independent candidates in the Third Ward, where the Citizens fielded none, although it was the only ward in which White outpolled McIlrath. Dickerson won in the Second Ward by a bare majority of 50.7 percent, while Jantzen with 55 percent turned out the incumbent McBlain.215

Patton may have been depressed that the “cohorts of darkness and retrogression prevailed,” but he took hope from the “protest” vote for the Citizens ticket, which he regarded as “almost a majority....” Insisting that—without explaining why—only the vote for individual ward councilmen (as opposed to at-large councilmen or mayor) could be “considered in determining the wishes of the voters as to administrative policy,” he concluded that if, as many believed, voters treated cigarette permits and Sunday movies as an issue, it was “very clear” that a majority of Second, Third, and Fourth ward voters had voted for permits and movies. Rather than analyzing the underlying substantive issues, Patton merely left readers with the trivial arithmetical question as to whether the fewer than three-fourths majority of the First ward should determine the city administration’s policy. In any event, without on-site cigarette sales (and Sunday movies), Grinnell would not be “restored to its former favorable estimate by the traveling public and the people in the surrounding country....”216

Following its first meeting two weeks earlier,217 all six members of the new
city council met in special session on April 16 to deal with the payment of interest on water bonds and other matters. Not a single No was cast on any motion except that moved and seconded by the two Citizens representatives Dickerson and Jantzen to grant Sullivan’s newest application for a cigarette permit at the Rex Cigar Store. Because councilman Ent broke ranks with his No-voting Progressive colleagues to vote Aye, the council was tied 3 to 3, causing Mayor McIlrath, unsurprisingly, to cast the deciding vote against violating his own principles, his sense of the town majority’s stance, and granting the city’s first permit ever.\textsuperscript{218} Ent’s apostasy may not have been unforeseen: Patton’s post-mortem election analysis observed that it had been “well known to the promoters of the Citizens ticket that either [sic] of the three candidates in the Third ward would be satisfactory, hence no candidate for councilman from the Third ward was placed upon the Citizens ballot.”\textsuperscript{219} To be sure, the fact that the Citizens ticket in its advertising urged Third Ward voters to place an X in the square opposite the name of “a Third Ward candidate for councilman...no matter where you find it,”\textsuperscript{220} still left unexplained why the Progressives included Ent on their ticket.

In its piece the next day on the council’s action, the \textit{Herald} provided some background on how cigarettes had taken “the ropes in the first round.” In addition to the tactical criticism voiced by some proponents of licensing of Sullivan’s “starting something” at an inopportune time\textsuperscript{221} (meaning, presumably, while McIlrath was still in a position to break deadlocks) and speculation that certain tobacco dealers in Grinnell would probably be unable to obtain permits even if the council decided to grant them to others, the newspaper focused on several fundamental dimensions of the conflict:

Councilman Dickerson says that he has tried to inform himself as to the desires of the people, and so canvassed the business houses finding an overwhelming majority in favor of licensing the sale. This, he thinks, indicates the feeling of the public.

Those of course favoring the license say it will outlaw bootlegging of cigarettes, and make it much harder for minors to get them, and also that it is costing the people of Grinnell too much in gasoline to drive to adjoining towns to buy their coffin nails.

Those opposing the license stand on the proposition that the young public needs an education on the injurious effects of cigarettes and that outlawing cigarettes is the best

\textsuperscript{218}Minutes of Council Meeting,” \textit{GH}, Apr. 17, 1923 (5:1-2) (Apr. 16); “Proceedings of the City Council,” \textit{GR}, Apr. 19, 1923 (3:3-4). At this time the \textit{Register} was publishing cigarette ads regularly. E.g., \textit{GR}, Apr. 16, 1923 (2:5) and Apr. 23, 1923 (2:7) (Lucky Strike).


\textsuperscript{220}GR, Mar. 22, 1923 (4:1-7).

\textsuperscript{221}“Our Cigarette Corner,” \textit{GH}, Apr. 17, 1923 (1:3).
example to the young.\textsuperscript{222}

That Dickerson, himself a businessman, surveyed only other business owners, was hardly surprising, but the report that the anti-smoking movement was sophisticated enough to understand the ban as an educational measure designed to delegitimate cigarettes among young people confirms the view of Grinnell as the leading example of a non-religiously motivated refusal to grant permits; the leakage represented by the (inconvenient and expensive) out-of-town cigarette-buying trips may even have reinforced rather than under undermined the denormalization efforts.

Enforcement of the state law also contributed to cigarettes’ image as contraband. In addition, “the best argument yet made against that license,” as the editor of the \textit{Herald} noted, was that “so many of the dealers who wish to have them licensed have been guilty of selling them illegally.” If Grinnell ever licensed them, he urged the council to grant the privilege only to law-abiding tobacco dealers “and not those who have been caught red-handed in the act of violating the law.” (The editorialist went on, with impeccable logic, to ask rhetorically why, when a cigarette manufacturer or wholesaler “sends a salesman into a town where there is no license to secure customers,” it should not be treated as a “bootlegger within the meaning of the law as much as the lesser man who hocks them in the alley?”)\textsuperscript{223}

The pro-licensing group’s strategy of biding its time until McIlrath, the driving force behind city government’s steadfast refusal to permit cigarette sales, left the mayor’s office, finally came to fruition on January 21, 1924, when he confirmed rumors that he would resign no later than April 7. Although he would give up his position in any event in order to take up work that would no longer permit him the time required by the mayoralty, he also admitted that he might become a candidate for state legislative representative in the Republican primary in June.\textsuperscript{224} The \textit{Grinnell Register} editorially took up the cudgels for McIlrath as representative, praising his knowledge of agriculture and the contribution he could make in the legislature to the “relief of the farm interests.”\textsuperscript{225} The breathtaking praise that the prominent Republican editor and owner, Charles Needham, bestowed on Vladimir Ilyich Lenin—“If we try to judge him by the effete standards of a smoothly working society, his greatness becomes doubtful.
But Lenin worked under conditions which few Americans can ever understand. ... Russia has advanced amazingly under his influence.... He was a Communist, but Communism is better than imperialism”226—who died the same day that McIlrath announced his resignation, manifestly did not taint McIlrath, who was elected in November 1924 and became a Republican House member for one term.227

Once McIlrath had officially tendered his resignation to the city council on February 4,228 a long battle erupted over electing his successor. At its meeting on April 7—the day McIlrath’s resignation went into effect—a “sudden and unexpected upheaval in the smooth running machinery of the city administration...re-opened several old arguments that were supposed to have been dead for lo these many months.”229 With Lowrey, the council president, presiding instead of McIlrath, the council undertook several unsuccessful efforts to elect a new mayor. The two Citizens members, Dickerson and Jantzen, moved and seconded the election of the Progressive Corrough to McIlrath’s unexpired term,230 but the council deadlocked at 3 to 3 (the nominee presumably voting for himself and all his ticket mates against him). Dickerson raised the point of order that since, according to an 1888 rule “‘the presiding officer***shall have the casting vote on all questions upon which the council is equally divided but otherwise not,’” Lowrey was not entitled to vote on an otherwise non-tie vote, but Lowrey, arguing that the rule was not law and that the consequence of Dickerson’s interpretation would be the First Ward’s disenfranchisement, declared the motion lost and Corrough was not elected.231 Then Corrough moved and his ticket-mate Pilgrim seconded that Ross V. Coutts, a bookkeeper for a building materials firm, be elected mayor, but this motion also lost. Making a more concerted effort at 9:30 that evening, the council met in special session to elect a mayor. Dickerson moved and Pilgrim seconded that the council vote by ballot to fill the mayoral vacancy. However, another impasse arose when Corrough again received three votes and Frank Knight, an auto salesman who...
was an employer at a garage, received the same number.232

The stalemate, as the out-of-town press observed, was rooted in the council’s even split on the McIlrath administration’s ban on cigarette sales (and Sunday movies): “Now the opposition swear they will control the election [of the next mayor] and repeal the ordinance [sic].”233 In the event, even before a new mayor was elected, the opposition, more by crook than by hook, achieved its objective. “In the absence of two of the up-holders of the blue laws,”234 Progressive-ticket anti-cigarette members, Lowrey and Pilgrim, at the special council meeting on May 19, 1924, Dickerson was elected chairman. After the council had voted to buy two flags and requisition two copies of the Iowa Code, Jantzen, seconded by Ent, moved that Sullivan be granted a permit for the Rex Cigar store.235 With Dickerson joining the pro-permit faction, only Corrough voted No.236 Thus, after a three-year struggle, the free commerce forces won by an anti-climactic 3 to 1 vote, and for the first time in 28 years one store could lawfully sell cigarettes, at least to adults.

Whether the WCTU had been caught off guard is not clear, but the next day at the Grinnell local branch’s monthly meeting—which was held at the home of member Mrs. John Mincer, whose non-drinking, -smoking, or -chewing husband, astonishingly, owned a pool hall, which “he endeavored to maintain...along strictly business lines”237—after the president had opened the session for the 42 attendees with a song, “The World Is Going Dry,” and scripture had been read, “Miss Buck, Lincoln and Richards were appointed to give attention to the city
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

councils [sic] action toward the selling of cigarettes.238 If they in fact hastened to perform their mission, it went unreported and failed: three days after its precedent-setting vote, the council, meeting again in special session, this time called by three councilmen for the purpose of approving cigarette bonds, granted, by the same voting configuration, a permit to restaurateur Phelps.239

The only implicit analysis of this turn of events that the Register offered was a nod to an editorial in a Des Moines paper that prompted the conclusion that cigarettes had become “the great national smoke” and “the ideal smoke” because, unlike cigars, they were short and cheap.240 Even less analytically, the Grinnell College student newspaper was elated that Mr. Sullivan had traveled to Des Moines several times to buy “the necessary supplies” and downright proud that he was going to announce their arrival in a “Scarlet and Black advertisement.”241 And that pride swelled the collegiate editorial breast much sooner than the ten-day wait Sullivan had predicted: on May 24, one day after the Rex Cigar Store had run a large ad in the Herald—adjoining a piece on, of all things, the aforementioned WCTU meeting—announcing its “complete line of Turkish and Domestic Blends” and adding at the bottom, “Positively No Cigarettes to Minors,”242 the Grinnell Scarlet and Black published one more than twice as large, shouting that “The CAMELS Are Here. Arrived at THE REX CIGAR STORE This Morning.” After listing 10 brands he carried, Sullivan dropped the “Positively,” simply stating in the smallest unbolded font: “No Cigarettes Sold to Minors.”243 Since a solid majority of Grinnell students were presumably under the legal age of 21 for buying or being sold or given cigarettes, the advertisement itself represented precisely the kind of bad-faith temptation of minors that all

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238[Minutes of May 20, 1924], Record of Woman’s Christian Temperance Union, Grinnell, Iowa, Book V [1913-1928] at 157, in WCTU of Iowa, Unprocessed, Local Branches, Grinnell, Iowa Women’s Archive. University of Iowa. For a much abbreviated account of the meeting that failed to describe the “regular business,” see “Entertains W.C.T.U.,” GH, May 23, 1924 (4:4-5). Buck was presumably 65-year-old Harriet Buck, a school teacher, who for many years was treasurer of the local WCTU. “Miss Harriet C. Buck Is Dead,” [unsourced newspaper clipping], Aug. 20, 1926, on http://www.grinnell.lib.ia.us/Obit/B/BuckHarrietC.pdf

239“Council Votes Cigaret Permits to Both,” GR, May 22, 1924 (1:2); Proceedings of the City Council, GR, May 22, 1924 (2:3-4); “Grant C. C. Phelps Cigarette Permit,” GH, May 23, 1924 (1:2); “Minutes of City Council,” GH, May 23, 1924 (3:4) (May 22).


241“Council Grants Cigarette Permit,” Grinnell Scarlet and Black, May 21, 1924 (1:2).

242GH, May 23, 1924 (4:5-6).

243Grinnell Scarlet and Black, May 24, 1924 (2:4-6).
elements of the anti-cigarette movement had all along feared and suspected would accompany legalization and licensure. This reckless commercialism was of a piece with the fact that Sullivan had already been convicted twice of violating the cigarette law and cast the three-member council majority into further disrepute.

Grinnell’s antis had, to be sure, lost the battle against the suppression of cigarette sales, but they could not resist launching an afterclap to underscore the underhanded manner in which the commerce über alles forces had secured their triumph. The day after the rump council had granted the second permit, councilman at large Pilgrim announced on May 22 that he was resigning in protest. On returning on May 20 from an out-of-state trip that could not be put off, Pilgrim was informed that a special meeting had been called (on May 19) during his absence at which a permit was granted. He explained why he regarded the scheduling as devious:

As this was one of the clean-cut issues during the last campaign and while both sides had their ardent devotees, the result of the election gave forth no uncertain sound as to where the large majority stood on the question. So I have felt in honor bound to carry out the desires of my constituency on this question and hence it struck me as a little cowardly or at least an unmanly act on the part of some members of the council to take advantage of the absence of some of the members of the council who have consistently stood for the platform upon which they were elected.

He had nevertheless been willing to let the whole incident pass without protest, “but the straw that broke the camel’s back” had been the appearance of two police officers on the morning of May 22 calling him out of bed and demanding his presence at the city office. Having assured the city clerk that he would attend the meeting as soon as he received notice of it and never having been in police custody before, Pilgrim took such umbrage at this “drastic” step that he apparently resigned rather than attend the meeting at which the second permit was granted.

Surprisingly, the circumstances surrounding his encounter with the police were even more bizarre than Pilgrim himself had let on. As a backgrounder in the Herald disclosed, the police had rung his bell around five o’clock in the morning

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244 See below this ch.
245 Pilgrim was returned as a Baptist in 1915 and a Methodist in 1925. Iowa Census 1915, Poweshiek County, Grinnell, Card No. A19; 1925 Population Census Schedule—Iowa, Roll No. 344, Poweshiek County, Grinnell, 4th Ward.
to present him with a summons to appear at the council meeting at eight. Members of the council admitted to the *Herald* that Pilgrim had been “the victim of a misunderstanding” and that one policeman appearing somewhat later would have sufficed.\(^\text{248}\) Although it is unclear why the council members who had pushed through the permit on May 19 would have wanted to insure Pilgrim’s presence on May 22 when the second one would be debated, ironically, had Pilgrim attended the meeting, he might have been able to mobilize greater resistance. However, without Lowrey—whose absence went unexplained and whose presence the other council members apparently did not seek to compel—he would presumably nevertheless have been unable to forge the tie to deny Phelps a permit.

Former Mayor McIlrath could barely contain his wrath. In a letter to the *Register* four days after Pilgrim’s resignation, he handed down a damning judgment on the political processes, remarking:

That the game played in putting over this piece of legislation would not stand the ruling of a referee.

That for the first time in the history of the city, Grinnell is committed to a license law...permitting a traffic which the state law will not give the moral right of way.

That if getting the money is the chief argument there are many other things which would be equally...productive of revenue. Why not [l]icense them all and “get the money.”

That accepting a place on a ticket representing a certain platform has no bearing with certain councilmen as to how they will vote on these questions when elected.

That the cigarette license may have come to stay but the tactics of its promoters will not be forgotten in the next spring election so why not forget it for the time being.

... That the cigarette license seems to have been so important to the business interests of Grinnell in the minds of these three Councilmen, that it was necessary to deprive the entire First ward of their representation by taking advantage of the temporary absence of their Councilman [Lowrey].

That there might have been some ground for sincerity in the purpose of these councilmen were it not for the fact that the first permit granted was to an applicant who had been twice convicted for violation of the Cigarette laws.\(^\text{249}\)

Unfortunately, McIlrath failed to flesh out the details of the connections between and among the city’s “business interests,” cigarettes, and Councilmen Dickerson, Jantzen, and (the Progressive renegade) Ent. Had he analyzed these links,

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\(^{248}\) [Untitled], *GH*, May 23, 1924 (4:2).

perhaps he would have explained his belief in the inevitability of the future permanence of cigarette sales in Grinnell and explored whether and/or why his three-year successful resistance had been merely conjunctural, serendipitous, and ultimately subject to certain defeat, and what the anti-cigarette movement might have done to build a more solid base to overcome the businessmen’s profit über alles drive for licensure.

As a counterpoint to Pilgrim’s and McIlrath’s complaints and criticisms, the *Herald* also published a defense of the council by someone who professed not to be a member, but lacked the courage to self-identify. Taking exception to the impression created by opponents that a few members “had craftily waited until other members were out of town,” the anonymous letter writer insisted that the meeting, which “was perfectly legal in every respect,” had been called by (Progressive and No-voting) Corrough as well as by Ent and Dickerson. However, the gravamen of the riposte was the Schadenfreude at the sight of tables’ allegedly being turned:

If it is true that three of the councilmen were elected to oppose cigaret legislation, it is equally true that three others were elected to favor it. The same logic that applies to one applies to the other as well. On previous occasions attempts to grant cigaret permits were blocked by three members of the council and there was no outcry from the other three. Now, when the worm turns and the three under dogs are in the saddle temporarily, there is great indignation from some quarters, by people who forget that for more than a year a city with half its council favoring cigarets has been forced to bow to the will of the other half.

It still makes a difference whose ox is gored.250

What the author conveniently failed to deal with was that Grinnell had elected Progressives to four of the six council seats, thus affording them, especially with McIlrath as the tie-breaker, an insuperable majority. Regardless of whether the rump council had arranged the May 19 meeting as a surprise attack or not, given the overriding significance of the matter and intensity of convictions, making the outcome hinge on the fortuity of one-third of the membership’s absence was manifestly not an act of quintessentially democratic self-governance.

Undaunted by this brief postlude, the council, having earlier elected the editor of the *Herald* mayor and the owner of an implements business to replace Pilgrim,251 doubled the number of outstanding permits on June 16, 1924, by

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251 “Ray Is Mayor,” *GH*, June 6, 1924 (1:5); “Minutes of City Council,” *GH*, June 6, 1924 (3:3-4) (June 3, W. G. Ray and Harry Sanders).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

granting four more to a hotel, smoke house, news depot, and billiard parlor.\textsuperscript{252} Two years later, when five of the six permittees applied for new permits, the council accommodated all of them with two-year permits.\textsuperscript{253}

**Indianola**

Located only 17 miles from Des Moines in an agricultural area in south-central Iowa, Indianola, the 59th largest city with a population of 3,488 in 1930, refused to issue any cigarette sales permits for the longest period among all 110 first- and second-class cities in Iowa: not until 1933, after 12 years, did the city council grant the first permits. Although the density of WCTU membership (1 in 75) in Warren county, of which Indianola was the seat, was one of the highest in the state, even more important for the longevity of prohibitionist practices in Indianola was the influence of the Methodist church and its educational institution, Simpson College, on whose campus smoking was prohibited.\textsuperscript{254}

The sentiment against cigarettes was so widespread and deeply ingrained in Indianola at the time the new cigarette law went into effect in mid-1921, that: “Not a single application for licenses to sell cigarettes was made here by business men. The feeling of the council on the subject was too well known for anyone to give them a chance to express it.”\textsuperscript{255} The WCTU in Indianola and Warren county actively combatted cigarettes there, reporting to the 1923 state convention that it had “protested against renewal of cigarette license.”\textsuperscript{256}

That the town’s attitude toward cigarettes was still forcefully negative in 1927, when Indianola had already become the only first- or second-class city to continue the ban on cigarette sales, was visibly on display in connection with an expose by the Simpson College student newspaper of a plan by the American Tobacco Company to mail a sample package of cigarettes to every male student at the college and to sample the town as well in an effort to “stampede Indianola with the sale of cigarets....” As part of this plan a farmer named John Piffer had

\textsuperscript{252}“Proceedings of the City Council,” *GR*, June 19, 1924 (5:4) (June 16); “Others Licensed to Sell Cigaretts,” *GH*, June 17, 1924 (1:3); “Cigaret Licenses Granted to Four,” *GR*, June 19, 1924 (4:2).

\textsuperscript{253}“Proceedings of the City Council,” *GR*, June 7, 1926 (3:2-3) (June 3).


\textsuperscript{255}ICP-C, July 9, 1921 (3:4) (untitled).

\textsuperscript{256}Woman’s Christian Temperance Union of Iowa, *Fiftieth Annual Convention* 46 (1923).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

applied to the Warren County Board of Supervisors for a cigarette permit to set up a stand beyond the city limits on the north and south sides of town, which would net $300 a month. \(^\text{257}\) Although Piffer claimed that he would “advise anybody against” cigarettes, since he believed that they were being bootlegged anyway in Indianola, “he thought he might as well have the profits to use in paying for his farm....” \(^\text{261}\) However, after the board at its meetings in September and October had postponed action on his application, \(^\text{258}\) at its meeting on November 14 the board had refused the application, \(^\text{259}\) interestingly, on the grounds that issuance would both be contrary to the college’s interests and circumvent the city council’s regulations. However, ATC apparently had its own method for creating demand for cigarettes among students and townspeople (based on a modern understanding of early onset nicotine addiction): it was focusing on students “on the theory...that if the young man starts the habit early, he will be a regular customer of the tobacco industry for life.” To this end the company intended to send the male students several brands so that the light smoker might choose the one that suited him best, thus “making him a constant smoker.” If its readers had not intuited the point, the student newspaper added that “[c]ommercial reasons are back of the plans of the syndicate.” \(^\text{260}\)

The editor, Wendell Tutt, hastened to add that “it is not that we are opposed to cigarettes. They have their place....” Although the tobacco syndicate’s plan to “circumvent” the city council’s ban on cigarette selling was “not unlawful,” it was “underhanded and crooked.” The only illegality the editor could discern was sampling the entire male student body because more than half of it consisted of minors. \(^\text{261}\) Pushed by a letter to the editor arguing that since minors in Indianola who wanted cigarettes could and did buy them in Des Moines, thus profiting dealers there, “the dealers of Indianola should be allowed to use the profits of cigarette sales which are inevitable,” \(^\text{262}\) the editor returned to “The Fag Question” the next week. Sharpening the critique of the original article, whose purpose he now admitted was “to cripple, if possible,” the cigarette manufacturer’s


\(^\text{258}\)“Tobacco Firm Plans Sales Campaign Here,” *IT*, Dec. 6, 1927 (1:1).


\(^\text{260}\)“Plan Cigaret Campaign Here,” *Simpsonian*, Dec. 5, 1927 (1:4-5).


campaign, the editor observed that the company’s plan was to sample the college’s men, 75 percent of whom were under 21, “in order that they might develop the ‘habit’ and become regular customers in later life.” Turning bolder this time round, he now substituted “‘illegal’” for “‘underhanded.’” As for the suggestion that the Indianola dealers might as well receive the profits, he agreed that such a redistribution would be “a fine thing,” but asked whether “profits and material gain” were “the only goal in life....”263

The cooperation between Warren county and Indianola was not a one-time phenomenon. (Similar coordination took place between the Poweshiek County board of supervisors and Grinnell.)264 Although the county board of supervisors did issue some cigarette permits in the 1920s,265 it steadfastly refused to grant permits to sell in locations it deemed too close to Indianola. Evansville, six miles away, was the closest place it had permitted sales; in 1928, it denied a permit to the owner of a filling station under a mile from Indianola.266 Unlike Piffer, who had twice unsuccessfully sought a permit at the same station, as had two other operators,267 J. E. Hackley, an applicant in 1932, did not simply abandon his quest for cigarette profits. On March 26 he applied for a permit to sell from a business combining a gasoline and oil filling station with a restaurant selling soft drinks, candy, and lunch—he had taken over the aforementioned gas station on March 1—located less than one mile north of Indianola, arguing that the board had no

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264In 1922 the supervisors refused to permit cigarette sales at a dance pavilion just outside of the city limits because they “did not care to issue license [sic] so close to Grinnell when the city authorities refused to issue license [sic] inside the corporate limits.” “Local News,” Pella Chronicle, May 4, 1922 (4:1).
265According to the Warren County Auditor, the board granted the first permit in 1923. Supervisors’ Minute Book, No. 11, Warren County, Iowa, at 14-15 (Dec. 3, 1923) (to John C. Duncan) (copy furnished by Warren County Auditor); email from Mary Lynn Keene to Marc Linder (Feb. 4, 2008). See also Supervisors’ Minute Book, No. 11, Warren County, Iowa, at 126 (July 6, 1925) (to W. B. Evans); “County Board Proceedings,” Indianola Herald, Sept. 1, 1927 (7:6) (at July 5 meeting permit of sellers who gave up business cancelled and auditor directed to issue permit to seller in Beech); “Board Proceedings,” Indianola Herald, July 9, 1931 (7:1) (application for permit renewal granted at June 1 meeting).
266“Refuse Hackley Permission to Sell Cigarettes,” Indianola Herald, Apr. 7, 1932 (1:8).
267“Hackley Denied Permit to Sell Cigaretts Here,” Indianola Record, Apr. 7, 1932 (1:1).
right to deny such an application. The board, which had consistently denied all permits within a five-mile radius of Indianola in deference to the city’s ban on cigarette sales within its limits, took the position that it did have the right to deny permits to everyone within that area, treating all alike. WCTU representatives, the Simpson College president, and the Indianola mayor attended the supervisors’ meeting on April 4, asking that the application be denied or postponed until the case’s legal aspects could be further studied. The board appeared to be proceeding in that direction anyway, since it was awaiting a report from Joseph Watson, Jr., the county attorney, who had already informed it that, since “legal precedent in such cases is conflicting,” he wanted more time to study the facts in the local case before submitting his report. The next day Watson delivered his report, which very cautiously stated that, based on the consistent precedent of denying all permits to persons operating at locations within a five- or six-mile radius of Indianola, the board was justified in denying one to Hackley. He added his (unexplicated) belief that the Iowa Supreme Court decision in *Ford Hopkins Co. v City of Iowa City*, which had been decided just two months earlier and had been called to his attention, was “‘not controlling in this matter.’” Unfazed, Hackley immediately insisted that “I don’t know just how soon but we are going to have cigarettes here.” His optimism derived from his having retained Des Moines lawyer Howard L. Bump, who planned straightaway to file an action seeking a writ of mandamus forcing the board to issue the permit.

At its meeting on April 5 the board of supervisors offered a surprisingly detailed and concrete explanation of the reasons for its action, which proceeded from its (and its predecessors’) consistent denial of permits within a five-mile radius of Indianola, which it justified on the grounds that:

This board feels that since the City of Indianola has seen fit to deny applications for cigarette [sic] permits...and since the reason for said denial has been the presence...of Simpson College and the various public schools, this board should aid in the curbing of smoking and sale of cigarettes in said City, and feels that by denying the issuance of cigarette permits where the place of business is within a radius of five miles...it will be cooperating with the City of Indianola in preventing the smoking of cigarettes by the students in the various schools....
Considerably less transparent was the constitutional basis for the board’s open
declaration of assistance to a church school’s implementation of what was in part
a religious tenet: “This board further feels that since Simpson College is a
sectarian school and is attempting to prevent its students from smoking cigarettes,
by denying permits within the above radius it will be aiding the college in its
program.”272

Hackley’s response to the board’s contention that it could not have
discriminated against him because it had already denied applications for permits
at the same filling station four or five times was that once the supervisors granted
a permit in any part of the county outside of the incorporated towns, denying his
application constituted unfair discrimination—even though the eight county
permits then outstanding were all for locations more than five miles distant from
Indianola.273

On April 7, two days after being rebuffed by the council, Hackley filed his
petition for a writ of mandamus in Warren County District Court, claiming that
the board had “arbitrarily, and without legal excuse or reason,” refused to grant
him a permit, thus unjustly, unfairly, and illegally discriminating against him.274
That very same day, District Judge Norman Hays, a Harvard Law School graduate
who later became an Iowa Supreme Court justice (1946 to 1965),275 assigned
April 27 as the trial date.276 A week after Hackley had filed, the board answered,
denying that it had discriminated against him since it had “repeatedly refused”
permits to others to sell cigarettes within a five-mile radius of Indianola because
of its “desire to cooperate with...Indianola...in preventing the smoking of cigarettes”
there. Consequently, granting Hackley a permit would constitute
discrimination—in his favor. The supervisors also stressed their desire to
cooperate with the officials of Simpson College and Indianola’s public schools
who had requested the city council to refuse to grant permits, pointing out that
permitting cigarette sales within five miles of the city would “nullify” Indianola’s

272Supervisors’ Minute Book, No. 12, Warren County, Iowa, at 71 (Apr. 5, 1932)
(copy supplied by Warren County Auditor). The minutes were published in “Board
Proceedings,” Indianola Herald, May 12, 1932 (7:4-6 at 6) (Apr. 5).

273“Hackley Cigaret Hearing Called for Wednesday,” IT, Apr. 26, 1932 (1:7).


275http://www.judicial.state.ia.us/wdata/frame1773-1463/pressre172.asp

276Hackley v. Powers, Order (No. 8635, Warren County Dist. Ct., Apr. 7, 1932) (copy
archived at Warren County Historical Society, Indianola).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

ban. Finally, and in the present context most importantly, the Warren County Board of Supervisors argued that the act of granting or denying a cigarette permit to Hackley was “a matter within this board’s discretion,” which was not subject to compulsion pursuant to a mandamus action.277

At trial, in an effort to undermine the logic of the board’s argument, his lawyer, Bump, elicited testimony from the defendant board members that some of the county’s eight permit holders were located closer to consolidated schools than Hackley’s business was to Indianola schools. In refutation, county attorney Watson elicited from his clients the differentiating datum that no one had protested against the issuance of any of those permits. In his summation he explained that the board’s denial of a permit to Hackley had been actuated by the fear that granting his would then force it to grant one to the operator of an oil station just outside of Indianola’s southern limit (if he should ever apply), with the ultimate consequence that the board “would virtually nullify” Indianola’s ordinance.278 As expeditiously as Hays heard argument on the case, it took him an entire year—during which the board of supervisors continued to renew cigarette permits279—to issue a very brief decree on April 22, 1933, denying Hackley’s request for a writ of mandamus on the opaque grounds that the board of supervisors had acted “by a vote duly recorded by the secretary” and that their “denial was for good cause...and was within their sound discretion.” Hays also ordered that the supervisors recover $14.10 in costs from Hackley.280 By the time the judge issued his decision interest in the outcome had diminished considerably, not least of all on the part of Hackley, who in November 1932 had left the filling station to farm in another county.281

277 Hackley v. Powers, Answer at 2-3 (No. 8653, Warren County Dist. Ct., Apr. 13, 1932) (copy archived at Warren County Historical Society, Indianola). The defendants alleged that Hackley’s place of business was located two miles north of Indianola.

278 “Hays Ponders on Cigarette Mandamus Case,” Indianola Herald, Apr. 28, 1932 (1:8). See also “Hays Considers Petition Asking Cigarette Permit,” IR, Apr. 28, 1932 (1:8, 3:7-8) (copy supplied by Indianola Public Library).

279 E.g., “Board Proceedings,” Indianola Herald, July 14, 1932 (8:2) (June 6).


281 “Hackley’s ‘Fag’ Permit Decided; But He’s Gone,” Indianola Herald, Apr. 20, 1933 (1:5-6). This article had appeared before the written decision was issued because Hays had “recently...made an oral ruling to” the county attorney. Id.
The regular city council meeting on May 15, 1933 (the same day on which the Iowa Supreme Court announced its decision upholding the power of the Iowa City city council to limit the number of cigarette permits) was a harbinger of the anti-prohibitionist finale. On March 22, 1933—between the time in February when Congress voted to submit the repeal of the Prohibition Amendment to the states and its ratification by the requisite number of states in December—Congress passed a bill amending the National Prohibition Act so as to exempt 3.2 percent beer from its scope. On April 15 the governor approved the bill passed by the Iowa legislature to give cities the power to issue retail permits to sell such beer. Interestingly, the legislature required cities to determine—as they were not with regard to cigarette permit applicants—that applicants were of “good character.” On the other hand, if applicants met this requirement and several objective requirements, the beer permit statute, unlike the cigarette permit statute, provided that permits “shall be issued,” leaving cities with no discretion as to whether any permits would be issued at all or as between individual applicants.

On April 17, with “the whole town on the qui vive over the return visit of Old John Barleycorn,” the Indianola city council “was all set...to issue the required licenses to sell..., but 'nary' an application was filed.” This failure to file “opened up the beer question for discussion,” prompting members who had heard that some local dealers were planning to apply to “admit[ ] that there was no other way out in case the applicants to sell squared with the new beer bill.” On the other hand, other local merchants—pointing to a risk that did not appear to factor into the profit-and-loss calculation of would-be cigarette permittees—had informed the council that “75 per cent of their trade is made up of minors and even if their transient customers demanded beer they could not afford to sell it on account of the continual trouble that would arise over the legal age limit.” Council members nevertheless expected that local people would apply for permits a little later.

In Indianola, pursuant to an announcement at a special session on May 11 that the council would vote on the issuance of beer permits, 14 organizations in Indianola presented signed petitions requesting the council not to issue beer permits. The groups included the WCTU of Indianola and of Warren county, the Baptist and United Presbyterian Sunday schools, the Friends church, the ladies...
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

Aid and Woman’s Home Missionary societies of the Methodist Episcopal church, a parent-teachers association, two bible classes, the Ministers’ Wives association of Indianola, and the Simpson College faculty. During the almost hour-long discussion on May 15, four opponents addressed the council, including Dr. Ruth Van Clark, a physician who was the president of the Warren county WCTU, John L. Hillman, the president of Simpson College, Rev. W. C. Smith, and Florence Conrey, the 73-year-old wife of a clergyman. President Hillman’s wife, former Warren county WCTU president and physician Rose Butterfield, and three other women also appeared before the council.287 One claim that drys such as Van Clark and Hillman pressed on the council members was that they would be violating their oath of office by voting to implement the unconstitutional beer law.288 Smith even went so far as to warn the councilmen that by granting beer permits they would “‘violate God’s law. It would be against your own conscience. ... You are facing a question of righteousness or sin. You will violate the vows to your church if you vote for the license. Don’t listen to the Iowa law when the constitution of the United States says the sale of beer is illegal.’” But such admonitions merely provoked the members to reply that, on the contrary, refusing to obey the state law and to grant the permits might, as the city attorney had advised, make them personally liable in ensuing litigation.289 Hillman, who assured the council that he spoke for the students’ parents as well in pleading with it to refuse the permits, astonishingly descended from the religio-moral plane to engage in commercial competition by intimating that Simpson College brought more cash to Indianola than beer ever would when he declared that: “‘We are standing for an institution that brings more money to the town than any other institution in the town. The welfare of the college depends to a very great degree upon the moral condition of the town. We will be able to make less of an appeal to our constituents for students if beer is allowed to be sold here.’”290

Some of the prohibitionists fancied themselves legal experts as well. When Hillman opined that “‘I doubt if a court could compel you to grant these permits,’” city attorney Berkeley Wilson presented a sharply differing legal opinion, explaining that “the only question involved is the ministerial power to issue permits. The only judicial or discretionary matter is a consideration of the

287 “City Council Votes 3.2 Beer for Indianola,” Indianola Herald, May 18, 1933 (1:8).
288 “Council Grants Permits; Beer Goes on Sale,” IT, May 16, 1933 (1:7). The drys argued that it was unconstitutional for Congress to define 3.2 beer as not comprehended within the scope of the proscribed “intoxicating liquors” because some courts had ruled that even 1 percent beer was intoxicating. Id. at 8:1.
289 “Council Grants Permits; Beer Goes on Sale,” IT, May 16, 1933 (1:7, 8:1-3 at 1-2).
290 “Council Grants Permits; Beer Goes on Sale,” IT, May 16, 1933 (1:7, 8:1-3 at 1).
applicants’ character.”

Growing impatient with the drys’ opposition, councilman and building contractor William Fears argued that the only result of refusing the permits would be the appearance of bootleggers on every corner. Pleading for identical treatment of the two commodities, he offered a basis for changing the council’s course: “The beer situation would be similar to the cigarette situation here.... Everyone knows that any boy can go five miles and buy cigarettes. We might as well bring beer and cigarettes too out in the open.”

Despite the concerted urging by the venerable town leadership of the temperance/prohibitionist movement, the councilmen voted 5 to 1 to issue 3.2 beer permits to three applicants (two of whom would soon be applying for cigarette permits as well). The only No vote was cast by 74-year-old James McGranahan, who had retired in 1928 as a retail grocery merchant. One of the city’s “most highly esteemed citizens,” McGranahan was a long-time Presbyterian church elder. He disagreed with his colleagues regarding the law’s constitutionality, taking the prohibitionists’ position that because other states had declared beer unconstitutional and other towns had refused permits, Indianola could too.

During their beer debate the other council members manifestly were acutely aware that, unlike the cigarette permit law, that providing for beer permits conferred no discretion on them not to issue them for reasons other than those expressly set forth by the legislature. As Mayor N. D. Gordon, who believed that all beer was intoxicating and knew that “saloons were the worst curse of prohibition days,” put it, “Iowa law makes it mandatory on the council to grant the permits....” Consequently, the day after the council had voted to issue beer permits, “beer trucks rolled into Indianola,” where beer began to be sold legally for the first time in more than half a century. Whether cigarette sales would follow suit, despite the undisputed discretion that the Indianola city council had been exercising for a dozen years and was indisputably empowered to continue...
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

exercising not to issue any permits to sell them, would be decided next.

The key role played by the Simpson College Methodist hierarchy sheds light on the moralistic underpinnings of the anti-cigarette movement in Warren county. At the same time that President Hillman and others were agitating against beer, a battle was raging at the college over dancing: in April 1933 the board of trustees had “agreed that something must be done to meet the growing unrest on the campus due to a continuation of the ban against dancing.” In exchange for students’ compliance with the ban until June, the trustees agreed to take some action favoring the students’ requests. After the students had lived up to their side of the bargain, the student council declared that if the trustees did not live up to theirs, the council refused to accept responsibility for the student body’s action. The upshot was that in June the trustees, without granting specific permission to dance, decided to leave the decision up to individual conscience as prescribed by Methodist Episcopal church doctrine. To be sure, dancing continued to be prohibited in college buildings and campus social programs had to be “‘kept free from dancing so that our college be not responsible for that activity [against] which our church warns,’” and whatever dancing did take place had to be supervised by administration-approved people. Smoking, drinking, and dancing hardly exhausted the universe of proscribed activities on the Methodist index. Cause for grave concern was given by all manner of amusements including “‘attendance upon immoral, questional [sic] and misleading theatrical or motion picture performances’” as well as games of chance, which had been “‘found to be antagonistic to vital piety’” and “‘productive of worldliness,’” thus “‘dull[ing] the spiritual life....’”298

Ironically, one activity in which the college administration permitted its charges to indulge at the nadir of the Great Depression was listening to socialists proclaim that capitalism, a doomed “epileptic” system, was due to be replaced by a cooperative commonwealth.299

No business appears to have applied for cigarette permits from the city council in 1932.300 Yet the decision to end the prohibition on cigarette sales in Indianola which, under the statewide law (1896-1921) and as a result of the non-issuance of any permits since 1921, had lasted continuously for 37 years,301 was

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298“Students May Dance But Not on the Campus,” IT, June 6, 1933 (1:7, 5:7).
300“Council Proceedings,” Indianola Herald, July 21, 1932 (7:3-5) (no mention of cigarette permit applications at June 20 or July 5, 1932 meetings).
301The account in a local newspaper turned history on its head by stating that: “Cigarettes will be legally sold for the first time since the passage of the state license law. Prior to that time no licenses were required.” “City Council Permits Sale of Cigarettes,” IT, June 20, 1933 (1:8). In fact, from 1896 to 1921 no licenses were issued because selling

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made, seemingly, not even with a whimper, at a city council meeting on June 19, 1933. In contrast to the deliberations on beer permits five weeks earlier, the front-page articles in the Indianola Tribune and the Indianola Herald mentioned no protest petitions or appearances by the WCTU, Simpson College officials, or church groups. Instead, the resolution to authorize the city clerk to issue cigarette permits (effective on July 1) to five applicants was voted on “without discussion.”\textsuperscript{302} This apparent silence\textsuperscript{303} was all the more remarkable since the very next day, June 20, Iowans voted in record numbers (in a special election) to repeal the national Prohibition Amendment. Whereas 60 percent of voters statewide supported repeal, southern Iowa alone showed any unified opposition; in Warren county as a whole the drys “won a smashing victory,”\textsuperscript{304} 70 percent of voters opposing repeal.\textsuperscript{305} To be sure, even this high proportion masked the fact that 66 percent of voters outside of Indianola voted against repeal, while in Indianola itself that shared reached 80 percent.\textsuperscript{306} Whether the temperance movement was too preoccupied with that vote to be able to devote adequate attention to the council vote seems improbable, but is unclear. Without any doubt, however, the anti-alcohol campaign took precedence: the Warren County Emergency Prohibition group insured that for more than two weeks before the vote and “[r]ight up to the hour when the flap in the voting booths closes on the last voter” a “fighting campaign all over Warren county” was waged that included numerous meetings and rallies, at which Simpson College President Hillman and other college administrators and professors were featured speakers.\textsuperscript{307} The relative neglect of the city council’s action on cigarettes was, ironically, symbolized by the fact that the council’s first vote on June 19 dealt with a petition concerning a water pipe submitted on behalf of a relative by attorney A. V. Proudfoot, who as a state senator in 1909 had, at the WCTU’s behest, been the chief legislative advocate of the bill banning public smoking by minors.\textsuperscript{308}

\textsuperscript{302}“City Council Permits Sale of Cigarettes,” \textit{IT}, June 20, 1933 (1:8); “City Council Votes Permits for Cigaretts,” \textit{Indianola Herald}, June 22, 1933 (1:8).

\textsuperscript{303}The \textit{Indianola Record} (of June 22, 1933) did not even report the issuance.

\textsuperscript{304}“Warren Co. Drys Win Smashing Victory Tues.,” \textit{IR}, June 22, 1933 (1:1).

\textsuperscript{305}“Vote by Counties,” \textit{MCG-G}, June 21, 1933 (2:4).

\textsuperscript{306}Calculated according to “Unofficial Results in Warren County Wet-Dry Vote Tuesday,” \textit{Indianola Herald}, June 22, 1933 (1:3-6).

\textsuperscript{307}“Dry Meetings Are Schedule Up to June 18,” \textit{IR}, June 8, 1933 (1, 8) (copy furnished by Indianola Public Library).

\textsuperscript{308}See above ch. 6.
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

Although Proudfoot did not address the council on cigarette sales,\textsuperscript{309} he was the main speaker at one of the big anti-liquor prohibition repeal rallies.\textsuperscript{310}

In any event, the resolution to grant permits to five applicants, including two drug stores, two cafes, and the A & P—despite the fact that other cities much less hostile to cigarettes had denied permits to chain stores selling them and the Iowa Supreme Court had upheld their discretion in doing so\textsuperscript{311}—was passed by a vote of 4 to 2. Interestingly, in spite of the absence of any discussion, councilman McGranahan was joined this time by another dissenter—Lester D. Weeks, a dentist, who this time did not have to vote against his conscience as he had on the beer permit vote. The four-member majority included building contractor William F. Fears, barber shop owner Bruce Rowe, local bank president William Buxton, Jr., and Robert Ernest Hansell (automobile or farm implement dealer).\textsuperscript{312}

Two weeks later, by a vote of 3 to 2, with, once again, McGranahan and Weeks voting Nay, the council granted a cigarette permit to the first person to whom it had granted a beer permit in May.\textsuperscript{313}

Indianola was the only city in Iowa that collected no cigarette permit taxes in 1932-33.\textsuperscript{314} The next year, the first in which all 110 first- and second-class cities recorded such receipts, Indianola’s receipts totaled $525 (the equivalent of seven permits), than which only 17 cities received less.\textsuperscript{315} By October 1934, when a druggist applied for a cigarette permit, Weeks deserted McGranahan, leaving the

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\textsuperscript{309}Indianola City Council Minutes at 327 (June 19, 1933) (copy furnished by city clerk’s office); on Proudfoot’s legislative activity, see above ch. 13.

\textsuperscript{310}“Dry Meetings Are Schedule Up to June 18,” \textit{IR}, June 8, 1933 (1) (copy furnished by Indianola Public Library).

\textsuperscript{311}See below ch. 21.

\textsuperscript{312}Indianola City Council Minutes at 327-28 (June 19, 1933) (copy furnished by city clerk’s office); “City Council Permits Sale of Cigarettes,” \textit{IT}, June 20, 1933 (1:8); “City Council Votes Permits for Cigarets,” \textit{Indianola Herald}, June 22, 1933 (1:8); “Council Proceedings,” \textit{Indianola Herald}, Sept. 21, 1933 (6:5) (June 19). The biographical information, which was needed in part to determine the kinds of businesses to which the permits were issued, is taken from the 1920 and 1930 population censuses (HeritageQuest), and “R. E. Hanssell Rites Friday,” \textit{Indianola Record Herald}, Aug. 31, 1967 (copy furnished by Indianola Public Library).

\textsuperscript{313}Indianola City Council Minutes at 330 (July 3, 1933) (copy furnished by city clerk’s office); “Del Comito Given Cigaret Licenice [sic],” \textit{Indianola Herald}, July 6, 1933 (1:2).

\textsuperscript{314}State of Iowa: 1933: Report on Municipal Finances for the Year Ending March 31, 1933, tab. 1A, at 8-11.

\textsuperscript{315}State of Iowa: 1934: Report on Municipal Finances for the Year Ending March 31, 1934, tab. 1A, at 8-11. All but one of those cities was smaller; many cities were tied with Indianola.
latter as the only No vote, a pattern that was replicated in 1936 when the council composed of the same members granted four permits. Finally, in June 1937, when McGranahan was no longer a member but Weeks was, the council granted permits without any No votes, this time to the A & P and seven other applicants, including three of the other original four permit holders. This pattern of no Nays persisted through at least 1945 with the exception of one session on June 21, 1943, when, after granting two permits unanimously (including one to A & P), the council voted 4 to 2 to deny a permit to a cafe that had been one of the original permit holders from 1933, although it then by a vote of 6 to 0 granted one to the same person for a lunch room. Two other permits were also granted 6 to 0, but when the council tied 3 to 3 on a cigarette permit to the first beer permittee and one of the first cigarette permittees from 1933, the mayor broke the tie in the applicant’s favor; one of the persistent Nay-voters also cast a lone vote against a permit for a cigar store. The reasons for these No votes are unknown.

The end of World War II also marked the end of Indianola’s unique position in another way. When nicotine-addicted soldiers returned to Simpson College, they at first complied with its campuswide smoking ban by standing across the street to smoke. But after a while the veterans chafed under what they perceived as an “infringement on their personal rights,” a criticism that the student newspaper reinforced by arguing that because this “‘national habit’” was not a “‘social evil,’” the college’s tradition had to give way to “‘the dictates of modern society.’” In order to persuade the administration to yield, one day dozens of young male students confronted professors as they were leaving the administration to walk to weekly chapel at the Methodist Church: flanking both

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316 Indianola City Council Minutes at 464 (Oct. 15, 1934). These and all later minutes were identified by the city clerk’s office, which found some council items dealing with cigarette permits from 1933 to 1946. Email from Jennifer Baughman to Marc Linder (July 7, 2006).

317 Indianola City Council Minutes (June 15, 1936) (page number missing from copy).

318 Indianola City Council Minutes at 195 (June 21, 1937).


320 Indianola City Council Minutes at 148 (June 21, 1943). The only councilman to cast three Nay votes was John L. Main, who served on the council from 1939 to 1949; in addition to having been a custodian at Simpson College and an operator at the municipal light plant, he had also been in the restaurant and real estate businesses. “Services Held Wednesday for John L. Main,” Indianola Record Herald and Tribune, Dec. 28, 1967 (1:2) (copy furnished by Indianola Public Library).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

sides of the walk, “each one silently, confidently, even jauntily holding a lighted cigarette, their ranks formed a smoky gauntlet through which the astonished faculty was forced to pass. Not a word was said by anyone. And afterwards, no notice was taken of their act of defiance. No rules were changed. But from that day forward smoking on the campus—not in the buildings, to be sure—was commonplace, at least among the men.”

In the late nineteenth and early twentieth century many colleges prohibited students from smoking on campus. For example, in 1887 when the college faculty of the University of Pennsylvania forbade students to smoke within the building, the tobacco trade press wondered whether the university would also side with Pope Gregory that the sun moved around the Earth and require students not to hold to Galileo’s theory. “A Ukase Against Smoking,” USTJ, vol. 24, Nov. 19, 1887 (3:4). Columbia College in New York City had prohibited smoking anywhere on campus until 1889, relaxing the ban that year to cover only inside buildings. “Cigarettes and Classics,” USTJ, vol. 27, Apr. 6, 1889 (4:2). By 1897 the press spoke of the beginnings of a “crusade against the use of tobacco” at universities, mentioning Boston and Ohio Wesleyan University. “Should Students Use Tobacco?” WNC, Feb. 17, 1897 (2:7). In 1911 the University of Notre Dame began penalizing students who smoked cigarettes on campus, in the streets, or in residence halls with suspension. “College Bars Cigarettes,” NYT, Sept. 28, 1911 (1). On the ban at the University of Minnesota in the first decades of the twentieth century culminating in the year-long suspension of the future New York Times reporter Harrison Salisbury, see vol. 2. In 1921, John Hibben, the cigarette-smoking president of Princeton University, objected to the “war on cigarette smoking” declared by Chancellor Day of Syracuse University, who had been “shocked to see” male students who “insolently blew smoke in girls’ faces.” “Hibben Smokes ’Em; Fags Safe at Princeton,” NYT, Jan. 30, 1921 (2). But 40 years later Princeton barred smoking in lecture halls and classrooms—purportedly “merely match[ing] rules long in force at Yale and Harvard”—in an effort “not to stop smoking ‘as a moral evil,’” but to save $16,700 annual cleaning, sanding, and refinishing costs. “Princeton Bans Butts,” Crimson (Harvard), Oct. 13, 1960, on http://www.thecrimson.article.aspx?ref=248723 (visited May 9, 2006). The same year the president of Barnard College asked students to observe a longstanding rule against smoking in classrooms, but added that there would be no penalties for violations. “No Smoking, Positively,” NYT, Oct. 25, 1960 (41). In fact, in 1952 Yale prohibited smoking (along with “putting feet on other seats”) in classrooms, but continued to allow it in seminars with a limited enrollment. “Yale Smoking and Slouching Prohibited by Dean’s Office,” Crimson (Harvard), Feb. 27, 1952, on http://www.thecrimson.article.aspx?ref=482513 (visited May 9, 2006). In 1927 Harvard University for the first time permitted smoking in any college library when it allowed it in the reading room of the new business school library.

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322 In the late nineteenth and early twentieth century many colleges prohibited students from smoking on campus. For example, in 1887 when the college faculty of the University of Pennsylvania forbade students to smoke within the building, the tobacco trade press wondered whether the university would also side with Pope Gregory that the sun moved around the Earth and require students not to hold to Galileo’s theory. “A Ukase Against Smoking,” USTJ, vol. 24, Nov. 19, 1887 (3:4). Columbia College in New York City had prohibited smoking anywhere on campus until 1889, relaxing the ban that year to cover only inside buildings. “Cigarettes and Classics,” USTJ, vol. 27, Apr. 6, 1889 (4:2). By 1897 the press spoke of the beginnings of a “crusade against the use of tobacco” at universities, mentioning Boston and Ohio Wesleyan University. “Should Students Use Tobacco?” WNC, Feb. 17, 1897 (2:7). In 1911 the University of Notre Dame began penalizing students who smoked cigarettes on campus, in the streets, or in residence halls with suspension. “College Bars Cigarettes,” NYT, Sept. 28, 1911 (1). On the ban at the University of Minnesota in the first decades of the twentieth century culminating in the year-long suspension of the future New York Times reporter Harrison Salisbury, see vol. 2. In 1921, John Hibben, the cigarette-smoking president of Princeton University, objected to the “war on cigarette smoking” declared by Chancellor Day of Syracuse University, who had been “shocked to see” male students who “insolently blew smoke in girls’ faces.” “Hibben Smokes ’Em; Fags Safe at Princeton,” NYT, Jan. 30, 1921 (2). But 40 years later Princeton barred smoking in lecture halls and classrooms—purportedly “merely match[ing] rules long in force at Yale and Harvard”—in an effort “not to stop smoking ‘as a moral evil,’” but to save $16,700 annual cleaning, sanding, and refinishing costs. “Princeton Bans Butts,” Crimson (Harvard), Oct. 13, 1960, on http://www.thecrimson.article.aspx?ref=248723 (visited May 9, 2006). The same year the president of Barnard College asked students to observe a longstanding rule against smoking in classrooms, but added that there would be no penalties for violations. “No Smoking, Positively,” NYT, Oct. 25, 1960 (41). In fact, in 1952 Yale prohibited smoking (along with “putting feet on other seats”) in classrooms, but continued to allow it in seminars with a limited enrollment. “Yale Smoking and Slouching Prohibited by Dean’s Office,” Crimson (Harvard), Feb. 27, 1952, on http://www.thecrimson.article.aspx?ref=482513 (visited May 9, 2006). In 1927 Harvard University for the first time permitted smoking in any college library when it allowed it in the reading room of the new business school library.
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

town, remained decades ahead of its time.

Ladora

A very small town located about 25 miles east of Grinnell, Ladora appears to have devoted much of the early twentieth century to burning down. The town’s active WCTU organization presumably contributed to banning the sale of cigarettes into the mid-1920s. Because no copy of the Ladora News from 1921 is still extant, the events surrounding the introduction of prohibition there are unknown, but renewed struggles in 1924 (“Ladora Delivers Blow to Cigarettes”) shed some light on the origins. At the town election on March 31, 1924, considerable interest focused on the question of issuing cigarette permits. Indeed, the “Citizen’s ticket ran on a platform which proposed the issuance of cigarette licenses.” Because “the old council, which had in past years declined to issue licenses, refused to make the race...only one ticket was printed on the ballot.” Nevertheless, “the opponents of cigarettes rallied in force and wrote in the names of their candidates in sufficient numbers to elect a mayor and three of
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

five councilmen.” Although there was “some talk of a contest,” none appears to have been conducted. Unfortunately, even the press account that revealed cigarette sales permits to have been the central issue of the election failed to mention which of the newly (re-)elected councilmen belonged to the anti-cigarette group.

Lamoni

Lamoni, located in south-central Iowa a few miles from the Missouri border, was founded as a religious colony and became the headquarters of the Reorganized Church of Jesus Christ of Latter Day Saints, a Mormon split-off. In 1921, prominent townspeople, including the mayor, had opposed the Dodd bill

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327 “Much Interest in Ladora Town Election,” Victor Record, Apr. 3, 1924 (1:2). Part of this article was republished as “Ladora Delivers Blow to Cigarettes,” GH, Apr. 4, 1924 (4:4).

328 The Ladora News did not report on a contest or cigarette sales permits during the following weeks.

329 “Ira Wyant Re-Elected Town Mayor,” Ladora News, Apr. 4, 1924 (1:6), the main article on the election did not even mention the cigarette or any other issue. Clearly Mayor Wyant, who was a farmer, belonged to the anti-cigarette group. Of the five councilmen, three (Oliver Davis, George Morse, and Elwyn Madison [and not Matteson, as reported in the newspapers]) were farmers; one (Lawrence Shedenhelm) was a 23-year-old machinist working at a battery service station); and one, Jasper L. Augustine, was a physician-surgeon and director of the local bank, lumber company, and gas company, and member of the Ladora Improvement Company (and father of the future first Nancy Drew ghost writer, Mildred Augustine Wirt Benson aka Carolyn Keene). On Dr. Augustine, see History of Iowa County Iowa and Its People 2:38-39 (1915); “Well Known Iowa County Physician Dies,” Williamsburg Journal-Tribune, Nov. 4, 1937 (1:2); The First 100 Years: Being a Historical Outline of the First Century of Ladora, Iowa n.p. [5] (C. Morgan, Edith Shaul, and Margaret Daniels eds. Aug. 17, 1968); Melanie Rehak, Girl Sleuth: Nancy Drew and the Women Who Created Her 33-34 (2005). The occupational data are taken from the 1920 population census. The newspapers stated that H. W. Smith was elected, but he received only 59 votes compared to Morse’s 61. The current town clerk’s lack of cooperation in finding the council minutes made it impossible to determine when the council first issued permits.

330 Lamoni: The Story of a Town Established Fifty Years Ago: 1879-1929, at 3 (n.d.); Joseph Anthony, Lamoni’s Passing Parade: Stories of Lamoni and Mamoni People 19 (1948). Although the church later moved its headquarters across the border to Missouri, the college’s presence in Lamoni reinforced the church’s continuing influence there.
and urged Governor Kendall to veto it.\textsuperscript{331} The church’s position on smoking is reflected in the fact that its college, Graceland University in Lamoni, has always prohibited smoking on the entire campus, indoors and outdoors, to the present day.\textsuperscript{332}

The local newspaper, the \textit{Lamoni Chronicle}, which published no cigarette advertisements in July-August 1921, also did not mention that the town council had received any applications for cigarette permits or taken any action on them.\textsuperscript{333}

That the council minutes for 1921-30 also contain no references to cigarette permits,\textsuperscript{334} in combination with the church’s influence on the town at that time, strongly suggests that sentiment against cigarettes was so strong that no one applied for a permit. At its April 1931 meeting Howard M. Silver, a 40-year-old cafe manager\textsuperscript{335} who had no church affiliation, but whose mother, an LDS member, owned the cafe,\textsuperscript{336} asked the council to consider an application from him for a cigarette permit, but it took no action at the meeting.\textsuperscript{337} Silver appeared again at the May meeting, asking the council to consider and act on his

\begin{footnotesize}
\textsuperscript{331}See above ch. 15.
\textsuperscript{332}Telephone interview with Alma Blair, former history professor at Graceland, who began teaching there in 1955, Lamoni (Dec. 21, 2007). In contrast, the church’s influence on the town has waned considerably. Emblematic of this diminution (as well as of the persistent opposition to smoking) is the current city clerk’s statement that since two council members are adamantly opposed to issuing alcohol and cigarette permits, whenever the council meets on these matters, they have to make sure that none of the three other members is absent—otherwise they would be unable to issue permits. Telephone interview with Deanna Ballantyne, city clerk, Lamoni (Dec. 21, 2007).
\textsuperscript{333}“Town Council Meeting July 5, 1921,” \textit{LC}, July 28, 1921 (1:2). The paper did not publish the minutes for the June council meeting.
\textsuperscript{334}Telephone interview with Deanna Ballantyne, city clerk, Lamoni (Dec. 21, 2007). In September 1921 the council did pass an ordinance on cigarette sales to minors. \textit{Id}. The city clerk examined the minutes through July 1923. The minutes for June and July 1924 as published in the local newspaper also included no mention of cigarette permits. “Council Proceedings: July 7, 1924,” \textit{LC}, July 10, 1924 (5:2).
\textsuperscript{335}1930 Census of Population (HeritageQuest).
\textsuperscript{336}Silver did not appear in the 1925 Iowa state census, but in 1915 he was returned with no church affiliation and garage work as his occupation; his mother Flora was a member of LDS, while his father Joseph Silver was returned as a restaurant proprietor who had been born in Utah and was also without a church affiliation. Iowa Census 1915, Decatur County, Card No. A500, A499, and A498. At the 1920 population census Joseph Silver was again returned as a restaurant owner; in 1930, he no longer appeared, but his wife was returned as a cafe owner.
\textsuperscript{337}“Council Proceedings,” \textit{LC}, Apr. 23, 1931 (6:3) (Apr. 6).
\end{footnotesize}
application, but the minutes do not include any response.\textsuperscript{338} Through 1934 cigarette permits were not mentioned in any council minutes for the months of June or July, in which they would typically have been granted/have had to have been renewed.\textsuperscript{339}

That change had come to Lamoni, however, heralded by the fact that although less than a year earlier 80 percent of the town’s voters had opposed repeal of the national Prohibition amendment,\textsuperscript{340} remarkably, on June 5, 1934, the council unanimously granted a beer license to William Hollands,\textsuperscript{341} who at the 1930 population census had been an electric utility manager in Lamoni, but by the middle of the Great Depression was operating the Coffee Shoppe. A year later, on July 1, 1935, the council—whose five members were all businessmen, and four of whom were also members of the Reorganized Latter Day Saints Church\textsuperscript{342}—unanimously approved the cigarette permit applications of Silver.

\textsuperscript{338}“Council Proceedings,” \textit{LC}, May 21, 1931 (6:3) (May 4). The same issue of the newspaper that published the minutes included a large advertisement for Lucky Strike that claimed that it protected the larynx from “certain harsh irritants,” which were expelled and “sold to manufacturers of chemical compounds.” \textit{LC}, May 21, 1931 (2:3-6). A different version of the same advertisement appeared in \textit{LC}, July 2, 1931 (2:3-6).


\textsuperscript{340}“Decatur County Polls Dry Majority,” \textit{LC} June 22, 1933 (1:2); “President Briggs Opposes Locating Liquor Store Here,” \textit{LC}, May 23, 1935 (1:2).

\textsuperscript{341}“Council Proceedings,” \textit{LC}, July 5, 1934 (6:4-5) (June 5, 1934). The council at the same time unanimously rejected two other beer permit application applications pending from the May 7 meeting.

\textsuperscript{342}The 1930 population census returned the council members as Everett W. Bell (Ford dealer), Albert W. Fleet (department store merchant), Edward Stoll (creamery manager), David Vredenburg (general store merchant), and George H. Derry (garage manager). All but Bell (who belonged to the United Brethren) were RLDS members as was Mayor Joseph C. Danielson. 1925 Iowa Population Census Schedules (listing all but Stoll). According to Alma Blair, a former professor at Graceland College and historian of the
Hollands, and cafe owner Thomas S. Williams\textsuperscript{343} (a high-ranking official of the RLDS who had been “released” in 1932, opened a cafe to support himself during the Depression, and later was mayor for many years)\textsuperscript{344} as well as a new beer permit for Hollands and Lewis Cafe.\textsuperscript{345} Although the council minutes do not reveal any earlier issuance of permits\textsuperscript{346} and the Lamoni Chronicle did not publish any article commenting on the issuance of the first permits in the town, it did state on July 4, 1935, that since “all licenses to sell beer and cigarettes were cancelled the first of the month, necessitating renewals being made,” the three aforementioned “[n]ew” cigarette permits had been issued on July 1.\textsuperscript{347} A year later the council unanimously issued yet another cigarette permit\textsuperscript{348} to someone to whom it had issued a beer permit the month before.\textsuperscript{349}

Why a town government so heavily influenced by a church opposed to alcohol and tobacco—though not quite so rigidly and categorically as the Mormons\textsuperscript{350}—did an about-face and issued permits for beer and cigarettes in the mid-1930s is not quite so puzzling as on first sight.\textsuperscript{351} After all, from the town’s church and Lamoni, Stoll was also a member. Telephone interview with Alma Blair, Lamoni (Feb. 14, 2008).


\textsuperscript{344}Williams, a coal miner in southern Iowa from 1900 to 1920, had held the position of stake president (the equivalent of bishop), supervising about 20 congregations. The loss of his employment embittered him toward the church, which, in turn, was probably alienated by his selling cigarettes. Telephone interview with Prof. William Russell, History Dept. Graceland University and nephew of Thomas S. Williams, Lamoni (Feb. 17, 2008); telephone interview with Alma Blair, Lamoni (Feb. 14, 2008).


\textsuperscript{347}“Beer Permits Renewed,” \textit{LC}, July 4, 1935 (1:2).

\textsuperscript{348}“Council Proceedings,” \textit{LC}, July 9, 1936 (2:4-5) (July 6, to Ralph King).

\textsuperscript{349}“Council Proceedings,” \textit{LC}, June 25, 1936 (2:4-5) (June 3, to Ralph King).

\textsuperscript{350}Both groups adhered to the prohibition of tobacco in the Word of Wisdom section 89(9).

\textsuperscript{351}Church and town historian Prof. Alma Blair found the turn of events, with which he had not been familiar, surprising. Telephone interview with Alma Blair, Lamoni (Feb. 14, 2008). The nephew of Howard Silver, the first recipient of a cigarette permit, when asked when and why the prejudice against cigarettes had disappeared in Lamoni,
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

inception a large number of people in Lamoni, including RLDS members (but not its prominent leaders), smoked. The RLDS’s somewhat more “flexible” attitude meant that it would not even have been out of character for a member to run a cafe and permit smoking, though many in that church would have frowned on it and him, but expulsion from the church would not have followed. That Lamoni, despite its refusal to issue cigarette sales permits for so many years, was nevertheless no fanatical anti-tobacco fortress, is strongly suggested by the following large advertisement, which appeared at the top center of the front page of the Lamoni Chronicle in 1919:

Do you know the Fern cafe is the only one in the West that is not selling tobacco in any form? Do you still want a Nice, Clean place in your city like the Fern, where your mother, daughter and respectable friends can go and not endure the perfume of tobacco?

Of course we all know that cigars are a good drawing card for any Cafe, and if you want a good cigar that is your own affair and you can find them in other Cafes. But the question is—Do you still want a place like the Fern in your city?  

The fact that the Fern’s owner, at a time when cigarette sales were unlawful in Iowa, apparently felt constrained to plead with the public to patronize a smoke-free and tobacco sales-free cafe, constitutes rather impressive evidence that even in Lamoni many smoked and others put up with exposure to smoke even while eating.

The businessmen-city council members who, in the view of church and Lamoni town historian Alma Blair, were good but not especially pious RLDS members, “would not have been excessively strict in their religious beliefs when applying them to the civic situation.” And Graceland University history professor William Russell, Thomas Williams’ own nephew, explained the council’s decision to issue permits as an example of businessmen’s commercial sense and mentality overcoming their church mores.

Ironically, one of these members in 1935, David Vredenburg, a general store merchant—in 1923 representatives of the RLDS had approached him to take over the church-sponsored General Supply Store in Lamoni—was the co-founder of

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352 Email from Alma Blair to Marc Linder (Feb. 15, 2008).
353 LC, Aug. 28, 1919 (1) (copy furnished by Alma Blair).
354 Email from Alma Blair to Marc Linder (Feb. 15, 2008).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

what became a major midwestern supermarket chain (Hy-Vee), the largest private employer in Iowa and by the late twentieth and early twenty-first century one of its largest cigarette sellers. Even in the 1930s as a member of the RLDS and co-owner of an expanding grocery chain, Vredenburg sold pipes and smoking tobacco, although this commerce “didn’t mean that smokers or chewers were welcome in the store.” Neither he nor his partner “used tobacco in any form but neither one ever came right out and said ‘Don’t smoke.’” His partner, Charles Hyde, “had his own way of getting his message across. If a salesman came in with a pipe full of tobacco and smoking a cigarette or cigar, Charlie came running with a broom and dustpan...ready to sweep up any ashes that might happen to fall on the floor.” Vredenburg did not like his employees to smoke, especially in his presence, and at least on one occasion in the 1930s decided not to hire a 21-year-old applicant as a store manager because he was not a member of the LDS church and had smoked a cigarette during his job interview. The key to the disconnect between Vredenburg’s and Hyde’s business practices and their RLDS-inspired religious beliefs was that: “They took their church membership seriously but they were wise enough to realize that a particular religious affiliation did not guarantee success.” Nevertheless, as late as 1951, two years after Vredenburg’s death, the Hy-Vee in Lamoni still did not sell cigarettes. Indeed, at that time the only place in town to buy them was a pool hall owned by the aforementioned Thomas Williams, who despite being the mayor, sold them to

357 With 26,113 employees in Iowa Hy-Vee purports to be the state’s largest private employer. Email from Marilyn Gahm, customer service coordinator, Hy-Vee, to Marc Linder (Feb. 19, 2008). See also http://www.fundinguniverse.com/companyhistories/HyVeeIncCompanyHistory.html;http://www.hyvee.com/about/about.asp. Vredenburg remained with the company, which his son presided over, until 1949. E. Mae Fritz, The Family of Hy-Vee 89 (1989). Although by 1935 Vredenburg and Hyde owned eight stores, which should have been subject to the chain store tax that the Iowa legislature passed that year, their relatively small size might have meant that they were not perceived as chains, especially since they were owned by varying combinations of owners. E. Mae Fritz, The Family of Hy-Vee 28-29 (1989).


362 Vredenburg, who had been born in 1884, died on Sept. 24, 1949. “Chain Grocer Dies,” Cedar Rapids Gazette, Sept. 26, 1949 (17:5); email from Marilyn Gahm, customer service coordinator, Hy-Vee, to Marc Linder (Feb. 18, 2008).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

minors, at least one of whom was expelled from Graceland for smoking. Despite having been expelled, Edwards became vice president of the college. Although Silver still operated a cafe and gas station in 1950-51, he no longer sold cigarettes. Edwards—who returned to Lamoni in 1960 and lived there until 1982—noted that his son, who worked at the Hy-Vee as a bagger, reported that the store did sell cigarettes. Hy-Vee’s senior vice president for corporate procurement and logistics, when asked whether the company had made a central decision to begin selling cigarettes and when that might have been, at first replied that: “We cannot even try to surmise what total view our founders had toward the sales of cigarettes, but I can tell you that we have had tobacco products in our stores well before 1951. They may not have had them in Lamoni, but there were other areas that did sell the.” Email from Ron Taylor to Marc Linder (Feb. 19, 2008). When asked whether there was some way to obtain this information from the company archives, he admitted that: “My comment that we had them before 1951 is based on several veteran people who have around 40 years of service. These particular people would actually have no way of knowing exactly either, it was simply their memories that we carried product back to the early days of our company.” Ron Taylor to Marc Linder (Feb. 20, 2008).

In the event, by 1939, selling cigarettes had become so much a part of second nature even in Lamoni, possibly Iowa’s last hold-out, that when, in the wake of a newly effective law cracking down on cigarette smuggling to avoid taxes, state officials were stopping trucks daily for inspection in the area, the tenor and content of the Lamoni Chronicle’s front-page lecture to its readers would have been unimaginable just a few years earlier:

The cigarette tax is beneficial to every community in the state and everyone receives some good from the funds thus derived.

Another reason why persons here should cooperate in keeping the law is because of the fact that each purveyor of cigarettes in Lamoni will reap a benefit. So, besides being a good citizen of the state, those observing and carrying out the law will also be helping their neighbors here.

Newton

By 1921 Newton, situated about 35 miles east of Des Moines, was a midsize

363 Telephone interview with Paul Edwards, Independence, MO (Feb. 18, 2008). Despite having been expelled, Edwards became vice president of the college. Although Silver still operated a cafe and gas station in 1950-51, he no longer sold cigarettes. Edwards—who returned to Lamoni in 1960 and lived there until 1982—noted that his son, who worked at the Hy-Vee as a bagger, reported that the store did sell cigarettes. Hy-Vee’s senior vice president for corporate procurement and logistics, when asked whether the company had made a central decision to begin selling cigarettes and when that might have been, at first replied that: “We cannot even try to surmise what total view our founders had toward the sales of cigarettes, but I can tell you that we have had tobacco products in our stores well before 1951. They may not have had them in Lamoni, but there were other areas that did sell the.” Email from Ron Taylor to Marc Linder (Feb. 19, 2008). When asked whether there was some way to obtain this information from the company archives, he admitted that: “My comment that we had them before 1951 is based on several veteran people who have around 40 years of service. These particular people would actually have no way of knowing exactly either, it was simply their memories that we carried product back to the early days of our company.” Ron Taylor to Marc Linder (Feb. 20, 2008).

364 Again in 1937 without any Nays the council instructed the clerk to issue beer and cigarette permits to Joe Dwyer. “Council Proceedings,” LC, July 15, 1937 (2:5-6) (July 7).

365 See above ch. 19.

manufacturing town owing to the location there of numerous industries, including a foundry, flour mills, manufacture of agricultural implements and gasoline engines, but especially of the Maytag Company, which was on the verge of becoming the world’s leading producer of washing machines and turning Newton into a company town. Even before the company achieved its ascendancy, its owner, Fred Maytag, had been elected to the town council twice in the late 1880s and early 1890s, to the state senate from 1902 to 1912, and mayor of Newton from 1919 to 1921.

Auspiciously, at the city council meeting on May 31, 1921, at which Alderman William Brock, a 62-year-old former farmer (whose wife was treasurer of the WCTU Newton local union), initiated discussion of the cigarette question, those in the audience chamber saw a new sign on display: “‘No cigarette smoking allowed in this office.’” In response to Brock’s request that city solicitor George Campbell report on the question of permits, astonishingly—in light of the unambiguous legislative history of that year’s Dodd-Clark bill—the lawyer remarked that “the question as to whether the granting of licenses was optional was one that he had been unable to determine.” Equally startling was the source of Campbell’s uncertainty: “there was some doubt as to whether” the “may” in the provision that councils “may” issue permits “would be construed as ‘may’ or ‘shall.’” After the solicitor had explained that he had unsuccessfully tried to get in touch with the attorney general, Brock did not object to a motion to postpone the discussion for a week until an opinion had been secured from Attorney General Ben Gibson. The apparently commercially minded mayor found no fault with the motion except that “some of the dealers were anxious to get an early decision,” and the council voted unanimously for postponement. By the very next day the Newton Daily News succeeded where Campbell had failed: Gibson told the newspaper that “at this time he did not care to hand down any ruling. He went on to say that the question was really a big one” and that therefore before issuing an opinion he wanted to study the situation carefully that week.

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367 Polk’s Iowa State Gazetteer and Business Directory: 1922-1923, at 697 (Vol. 20, 43rd Year, 1922).


369 Woman’s Christian Temperance Union of Iowa Forty-Ninth Annual Convention 156 (1922).

370 See above ch. 9.

371 “Council Holds Question Over,” NDN, June 1, 1921 (1:3).
Since the *Daily News* had scooped the issue, presumably it would have reported any opinion that the attorney general issued, yet it ran no such report.\(^{372}\) Moreover, the attorney general published no such opinion, which, given its universal applicability and centrality for the administration of the cigarette law, would surely have been published and not merely communicated quasi-privately to city solicitor Campbell.\(^{373}\) And, finally, the fact that the Newton city council on June 20 did decide not to issue any permits strongly suggests that Gibson must have informed the city council that it did indeed have the discretion to do so.

In anticipation of the discussion at the council meeting on June 6, 1921, many people interested in the issue on both sides planned to attend, but since, as of noon, the *Daily News* reported, the attorney general had not yet been heard from, it was unclear whether the council, which wanted to know “whether the word ‘may’ is to be construed as ‘must,’” would take up the question. The intense interest in the semantic question stemmed from the opposition of some members to issuing any permits “unless the law is to be construed as meaning that they ‘must.'”\(^{374}\) At that session Brock informed the city council that he had prepared a resolution on the question of cigarettes,\(^{375}\) but the absence of one member prompted the body to table the discussion until the next meeting or until all members were present.\(^{376}\) By June 18 the *Daily News* reported that three council members were known to oppose issuing permits, while two favored it; how the sixth member would vote was unknown, but if he voted Yes, the mayor would have to break the tie.\(^{377}\)

All members were present at the next meeting on June 20, at which “[l]adies
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

representing the WCTU were present and took part in the discussion of the CIGARETTE question.” Brock submitted the question: “Shall the City of Newton, Iowa, issue licenses or permits for the Sale of Cigarettes[?].”378 After Brock had explained why cigarettes should not be sold in Newton, Minnie Grimes (whose husband was a farmer) spoke on behalf of the local WCTU, of which she was the president.379 She urged the need to protect Newton’s girls during a period of proliferating cigarette smoking among girls, while Brock took up the need to defend boys. With no other comments forthcoming, the council then voted 4 to 2 against issuing any cigarette permits. The four no votes were cast by Brock, Robert Sayre (a banker), Bert Beatty (a 49-year-old who had no occupation), and William Elliott (a factory pattern maker); the two votes in favor of issuing permits were cast by George Warner, a real estate agent, and John H. Harvey, a woodworker at the washer factory. Since the public was generally aware of how the members would vote, the result was no surprise. Had the vote been a tie, a rumor had been circulating that Mayor John McLaughlin would have voted against permits, though he denied its truth and refused to divulge his stance. That same night the Grinnell city council rejected cigarette sales by the same margin.380

It was doubtless people like Brock and Grimes whom the weekly Newton Record—which inaugurated cigarette advertising in its first issue after legalization381—had in mind when, back in April, it editorially excoriated the “anti-tobacco people”:

There is, of course, no such case to be made against tobacco as could be made against alcoholic liquor, but enough of a case can be made against the weed to appeal with force

378City of Newton Council Proceedings, Regular Meeting at [82] (Sheet No. 895) (June 20, 1921) (copy furnished by Jayme Ewing, adm. asst., City of Newton, Adm. Dept.).

379“Cigarettes Not to Be Licensed After July 4,” NDN, June 21, 1921 (1:7); “Council Refuses to License Cigarette Dealers,” NR, June 24, 1921 (3:5-7) (same article); Woman’s Christian Temperance Union of Iowa Forty-Ninth Annual Convention 156 (1922).

380City of Newton Council Proceedings, Regular Meeting at [82] (Sheet No. 895) (June 20, 1921) (copy furnished by Jayme Ewing, adm. asst., City of Newton, Adm. Dept.); “Cigarettes Not to Be Licensed After July 4,” NDN, June 21, 1921 (1:7); “Council Refuses to License Cigarette Dealers,” NR, June 24, 1921 (3:5-7). See also “Newton Refuses,” GH, June 21, 1921 (4:3). The occupational information is taken from the 1920 population census; because the newspaper did not mention the aldermen’s first names, it is unclear whether John H. Harvey or his brother Will Harvey was the alderman, but both were returned with the same occupation and John H. had already been alderman in 1916 (information provided by Newton Public Library, Dec. 31, 2007).

381NR, July 8, 1921 (6:5-7) (Chesterfield).
to that class which enjoys compelling other people to be as good as the class thinks itself to be. There are many people in this class and they have frequently dominated the affairs of this nation and others. They never wither under silent contempt and they never die of ridicule. The only weapon that is useful against them is sound reason....

As in several other towns, on July 5, two weeks after the first vote, the council, at a meeting adjourned from July 4, on a motion by Warner and seconded by Sayre, voted 4 to 2 (Brock and Beatty) to reconsider its action denying permits. Before the vote was taken, Alderman Elliott explained that he had in the meantime concluded that the council had made a mistake: though a church member, he was able to find only one “big point” in the law—keeping cigarettes away from minors—which he believed licensing would facilitate. After Brock had again explained the basis of his opposition, the council, by the same 4 to 2 vote, Brock and Beatty voting Nay, voted both to issue permits and to issue one to the sole applicant, a confectioner. Following this defeat, Brock announced that at the next meeting he would propose an amendment to the city ordinances requiring that moving picture shows (as well as skating rinks, merry-go-rounds, and other entertainments) be closed Sundays. A week later the council defeated Brock’s motion to amend the ordinance, only Beatty joining him. After Brock had left to catch a train, the council issued three more permits (to another confectioner, a cigar store, and the Dreamland) by a vote of 4 to 1, this time Sayre casting the lone Nay, as Beatty changed sides. At the next meeting, no one joined Brock in opposing the issuance of a fifth cigarette permit to a pool hall manager.

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383 City of Newton Council Proceedings, Regular Meeting at [85] (Sheet No. 898) (July 5, 1921) (copy furnished by Jayme Ewing, adm. asst., City of Newton, Adm. Dept.).
384 “Council Backs Up on Question of Cigarettes,” NDN, July 6, 1921 (1:7); “City Council Gives License for Cigarettes,” NR, July 8, 1921 (7:6) (identical article).
385 City of Newton Council Proceedings, Regular Meeting at [85] (Sheet No. 898) (July 5, 1921) (copy furnished by Jayme Ewing, adm. asst., City of Newton, Adm. Dept.). The confectioner was Clyde Roswell.
386 “Council Backs Up on Question of Cigarettes,” NDN, July 6, 1921 (1:7); “City Council Gives License for Cigarettes,” NR, July 8, 1921 (7:6).
388 “Council Hunts for Big Game,” NDN, July 19, 1921 (1:2). Frank McCarl’s occupation is taken from the 1920 population census.
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

Oskaloosa

The state’s nineteenth largest city with a population of nearly 10,000, Oskaloosa in south-central Iowa was both the most populous and industrialized city to ban cigarette sales in 1921. The town’s industrial base included flour and feed mills, iron and brass foundries, garment, cigar, hardware, and washing machine factories, extensive brick and tile works, and surrounding coal mines employing 3,000 miners. At its meeting on July 5, the day after the statewide law had gone into effect, the Oskaloosa city council considered a resolution offered by councilman David Eckenbom, the president of a wholesale drug business, to issue cigarette sales permits to 17 applicants, including six pool halls, three candy stores, two drugstores, two restaurants, a cigar store, a wholesale grocery, and an Eagles Lodge. The council voted 4 to 2 against the resolution, Eckenbom, and Charles Gunnar, a longtime railroad yard foreman—the former a second generation and the latter a first-generation Swede—voting Aye. The occupations of the members casting No votes were lawyer, commercial salesman, garage owner, and (perhaps) farmer or farm laborer. Two weeks later the council “stood pat on its refusal to grant permission to dealers to sell cigarettes in Oskaloosa” by voting unanimously to refund to a dealer the money accompanying his application and then to each of the 17 applicants. For its action refusing licensure the council received commendatory letters and special resolutions from the WCTU, citizens, St. James Episcopal church, the Christian church. The press in Iowa indulged its taste for mockery of the anti-cigarette

389 Polk’s Iowa State Gazetteer and Business Directory: 1922-1923, at 720 (Vol. 20, 43rd Year, 1922); N. W. Ayer and Son’s American Newspaper Annual and Directory 310 (1920).

390 City of Oskaloosa, Iowa, Council Proceedings at 185-86 (July 5, 1921) (copy furnished by Marilyn Miller, city clerk, Oskaloosa); “No Cigarettes for Oskaloosa,” ODH, July 6, 1921 (1:1). The kinds of businesses were identified either directly in these sources or indirectly through the population census, and, in one case, Phil Hoffmann, Oskaloosa: or the First One Hundred Years in a Mid-West Town 141 (1942) (H. L. Spencer Wholesale Grocer Co.). The likely business of one applicant, whom the census returned as a livestock shipper, could not be identified. The occupations of the council members (LeRoy Corlett, Alonzo Drinkle, James Lewis, and C. E. Stockham) were identified thought the population censuses and the first names mentioned in Revised Ordinances of the City of Oskaloosa Iowa 18 (1936). No such Stockham was returned as living in Iowa in 1920, but it was conjectured that the Charles E. Stockham in nearby Davis county in 1900 and 1910 was the councilman.

movement by analogizing the action in Oskaloosa to the sumptuary rules in Zion City near Chicago, a bizarre planned religio-utopian community that banned, in addition to alcohol and tobacco, gambling, theaters, circuses, pork, dancing, swearing, doctors, politicians, oysters, and tan-colored shoes. At the election of 1911, the “overseer” of Zion City, Wilbur Glenn Voliva (the successor to its founder, John Alexander Dowie), had declared that if he regained power, he “would appoint a vigilance committee of prominent citizens to horsewhip on sight any user of tobacco” and “refuse to admit any industries unless it is positively guaranteed that no users of tobacco are hired.”

Over the next two years bloody physical battles erupted over efforts by disciples to prevent employees of an electrical company from smoking. Eventually, in 1914, the Illinois Supreme Court, reversing the county circuit court, invalidated as regulation and control of “the habits and practices of the citizen without any reasonable basis” and as an “unreasonable interference with the private rights of the citizen” the Zion City ordinance outlawing the smoking of tobacco “in any form...in or upon any street, alley, avenue, boulevard, park, parkway, public passageway, depot, depot platform, depot grounds, hospice, hotel, store, post-office, or other public building or public place.”

The article that numerous Iowa newspapers published declared:

Though naughty Manhattan would not listen to Voliva’s agents from Zion City nor forsake its “wicked” ways, Voliva’s blue edicts have found their way into the hands of Oskaloosa’s guardians of public behavior and as a result cigarettes have been outlawed and bare dimpled knees are taboo.

City fathers of this none too wild community have decreed that “fags” are not to be smoked in the best of families, and permission to sell “coffin nails” has been denied seventeen applicants. License fees today were returned to seventeen surprised tobacco merchants by City Clerk Tom Carlin in compliance with the council’s decision.

Mail order business in cigarettes went forward with a bound today when it was found that cigarettes were no longer on the market and a new type of bootlegger has put in his appearance. He’s puttin’ out smokes on the q.t.

And that “ain’t” all.

Rolled down stockings and abbreviated skirts displaying a bit of feminine daintiness do not have the sanction of the city dads.

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393 “To Whip Tobacco Users,” NYT, Jan. 31, 1911 (7).
394 “Zionist Rioting over Smoking,” NYT, Apr. 23, 1912 (7); “Riot in Zion City,” NYT, Apr. 30, 1912 (1); “Workmen Attack Volivites,” NYT, Mar. 21, 1913 (2).
395 City of Zion v. Behrens, 262 Ill. 510, 513, 510-11 (1914).
No siree.

Policewoman Nellie Howe has her hands full telling the more daring of the dashing young flappers that the long ones must be worn up according to Hoyle and that that bit of nothingness labeled skirt must reach the knees at least. \footnote{396}{“Bare Knees and Cigarets Taboo in Oskaloosa,” CFDR, July 8, 1921 (1:2). See also “Cigarets and Bare Knees to Be Taboo, City Council Rules,” MCG-G, July 8, 1921 (9:5); “Iowa News,” Oxford Mirror, July 28, 1921 (7:4). Though the meaning of “Voliva’s angels” is unclear, in 1903 Dowie had descended on New York City with thousands of his followers, but failed to achieve his goal of prophecy and salvation. E.g., “Dowie and His Host Mass in the Garden,” NYT, Oct. 17, 1903 (1); “Hostile Audience Howls at Dowie,” NYT, Oct. 20, 1903 (1).}

To be sure, since the city council minutes directly before, at, and after this time include no reference to such dress codes,\footnote{397}{Email from Marilyn Miller, City Clerk, Oskaloosa, to Marc Linder (Jan. 3, 2008).} the story may have been a joke or a hoax,\footnote{398}{Since the original version of this article appears to have run in the Oskaloosa local paper, it would have been a joke rather than a hoax; whether the out-of-town papers understood in the same way is unclear. “Must Cover ’Em Up,” ODH, July 7, 1921 (6:4), did not mention cigarettes at all; instead, it stated that “[s]trict enforcement” of dress reform prevailed in Oskaloosa.} just as the assertion that the Oskaloosa city council had in any way limited smoking (as opposed to buying) cigarettes was a canard. Nevertheless, entrepreneurs did immediately seek out profitable methods for satisfying pent-up demand. Three days after the council’s denial of the permits local tobacco merchants were considering opening cigarette sales stores “just outside” the city’s corporate limits, and one had already begun setting up a roadside shop.\footnote{399}{Oskaloosa city clerk Marilyn Miller was unable to identify the first time the council issued a permit.}

Exactly how long the city council continued to prohibit cigarette sales in Oskaloosa is unclear,\footnote{400}{Oskaloosa city clerk Marilyn Miller was unable to identify the first time the council issued a permit.} but the ban ended no later than 1922, since for the year ending March 31, 1923, the city collected $1,350 in cigarette permit taxes,\footnote{401}{State of Iowa: 1923: Report on Municipal Finances for the Year Ending March 31, 1923, tab. 1A at 16-17.} which was the amount corresponding to 18 permits. On July 1, 1923, the city collected a further $1,275 for 17 permits for the year 1923-24.\footnote{402}{“Cigaret Licenses,” ODH, July 6, 1923 (5:7). Since at the same time the council approved the 17 permits it revoked the permit of a holder who had failed to pay the fee for 1923-24, the council must have issued permits for 1922-23.} Signaling its definitive retreat from its one-time anti-cigarette stance, the council on October
15, 1923, passed a boiler-plate ordinance regulating the sale of cigarettes, which presumably meant that it had decided to issue permits. The same ordinance was still in force in 1936, but a decade later the council sequentially capped the number of permits in force at any one time at 55, 59, and 61, before repealing this limitation in 1947 and thus apparently putting an end to Oskaloosa special regulatory approach to cigarette sales.

**Rockford**

Little is known about the action taken by the small northcentral farming town of Rockford because the local weekly paper, the *Rockford Register*, in a very brief notice, merely reported that on June 7 the council “took up this important matter, and after an animated discussion as to the merits and demerits of the licensing plan decided by a vote of three to two not to grant any cigaret licenses to retailers in Rockford.” According to the 1920 Census of Population, two of the three Nays were cast by the council’s only farmers, the third by a garage manager; the Ayes were cast by a carpenter and either a hardware dealer or a salesman. How the Cedar Rapids *Evening Gazette* uncovered this motivation is unknown, but seven weeks after the event it reported that this refusal to grant permits “was taken because the three members of the council disapprove of the use of cigarettes and in the belief that Rockford might set an example to other towns.” Whatever the reason, the result was that a “fag can not be purchased in

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403 Ordinance No. 287, City of Oskaloosa, Iowa, Ordinance Record No. 4, at 28-29 (Oct. 15, 1923) (copy furnished by Oskaloosa city clerk Marilyn Miller); “Ordinance No. 287,” *ODH*, Oct. 17, 1923 (5:7).

404 Revised Ordinances of the City of Oskaloosa Iowa ch. 46 at 52-53 (1936).


408 The Nays were cast by farmers (Wallace) Talbot and (Elmer) Webster and garage manager (Charles) Elliott; the Ayes by carpenter (Samuel) Lohr and either hardware dealer (Albert) Koerner or salesman (William) Koerner. Since the newspaper did not mention the members’ first names, these identifications presume that the census did not omit other residents with the same last names.
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

Rockford, but must be smuggled in. 409 Exactly how long the ban was in place is also unknown, but since no permits were applied for, granted or rejected in 1926, but on July 5, 1927 the council, on the motion of two members, issued two permits, at least one of them to the manager of a billiards room, it seems likely that the ban was in effect until 1927. 410

Rockwell

As reported in the press elsewhere in the state, 411 at a special July 4 meeting of the town council of Rockwell—an even smaller town than neighboring Rockford, but a trading center for an extensive farming and animal stock raising district in north-central Iowa 412—called to decide whether to issue permits, the councilmen (including a telegraph operator, a general store owner, and a 54-year-old German without an occupation, who had been a farmer) voted unanimously not to issue any. 413

409“Cigaretts Are Banned by Rockford Council,” EG, July 26, 1921 (3:4). The use of “smuggled” was misleading since the refusal to permit sales did not set any limits on buying cigarettes elsewhere and bringing them to Rockford. A small piece in a Waterloo paper was even less informative. “Cigaretts Not Legalized in Rockford, Ia,” WEC, June 30, 1921 (3:2).

410Telephone interview with Pam, Deputy City Clerk, Rockford (Dec. 20, 2007). The mention in the minutes consisted of a newspaper clipping: “Council Proceedings,” Rockford Register, July 6, 1927 (1:5). According to the deputy clerk, the city council minutes are missing from 1921 through 1925, but the minutes for June and July 1926 contain no reference to cigarette permits. Telephone interview with Pam, Deputy City Clerk, Rockford (Jan. 14, 2008). Oddly, the council proceedings that the Rockford Register published for July 5, 1927 were the only ones it published from 1922 to 1927. One of the permittees, George Dawson, had been returned as the billiards room manager at the 1920 population census. The council also approved the bonds of two other applicants.

411The Rockwell Tribune for 1921 appears no longer to be extant.

412Polk’s Iowa State Gazetteer and Business Directory: 1922-1923, at 777 (Vol. 20, 43rd Year, 1922).

413“Rockwell City Council Forbids Cigaret Sale,” EG, July 5, 1921 (15:5); “No Cigarettes Sold at Rockwell, IA,” Albia Republican, July 7, 1921 (1:5). The occupational information about Sam J. Rankin, Walter L. Williams, and Gerhart A. Block is taken from the 1920 population census; the occupation of one of the other two councilmen, J. H. [F.?] Hillis, who was a business owner, was illegible, while no one corresponding to A. M. Geer was listed. Oddly, according to the Rockwell city clerk, there is no record of a council
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

Shannon City

The “boom” that the railroad brought Shannon City in 1887 lasted until the 1920s, though the southwestern Iowa town’s population peaked at 380 in 1900. At the council’s evening meeting on July 8, 1921, 25-year-old Rev. Clare H. Maple presented a petition signed by an astonishing 109 voters in a town whose population was only 333. The councillors, according to a brief account published directly above a Lucky Strike advertisement in a neighboring town’s weekly, “at once took action,” voting to “sustain the petition so that until a new council is elected next spring, cigarettes cannot be legally sold in this town.”

Shenandoah

Located in the southwestern corner of the state, about 12 miles from the Missouri border, 20 miles from the Missouri River border with Nebraska, and 60 miles from Council Bluffs, Shenandoah, with a population in excess of 5,000, had an industrial base consisting of foundries and machine shops, flour mills, and large brick and tile works, as well as the largest seed house in the West and two of the largest flower and tree nurseries in the United States.

On March 19, 1921, while the legislature was debating repeal or retention of the statewide anti-cigarette law and during the run-up to the city elections in Shenandoah, an information was filed in Shenandoah Superior Court charging “William Manos, the Greek,” with illegally selling cigarettes. The 35-year-old Manos, who had emigrated in 1906 and not yet become a U.S. citizen, owned

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414 Union County Iowa History 50-51 (1981).
415 “Neighborhood News,” Adams County Union-Republican, July 13, 1921 (2:1). The article gave Maple’s first initial as “S,” but the only Maple in Shannon City according to the 1920 population census was 24-year-old Clare H., a West Virginia pastor living with his sister.
417 “Charge Against Wm. Manos,” T-WS-P (Shenandoah), Mar. 21, 1921 (1:5).
Manos Cafe and Candy Kitchen. The prosecuting witness was 26-year-old James Way, a 26-year-old Kansas-born married laborer with three children. The Tri-Weekly Sentinel-Post, which charged that the law was “generally a dead letter over the state,” predicted that if Manos was convicted, it was “likely that a great many other arrests will follow,” adding sarcastically that “extra jail room” would have to be hired if all violators were arrested. Presumably seeing no way to overcome the prosecuting county attorney’s evidence, Manos immediately pleaded guilty and Judge Frederick Fischer imposed the $25 minimum fine plus costs.

In its next issue, the Republican Sentinel-Post, which had not shied away from intrusively injecting its editorial position into the original report, returned to the subject in a formal editorial. The orthographically shaky editor urged on his readers that the Manos prosecution brought “Shenandoah people face to face with the anamolous [sic] condition of a state law generally a dead letter over the state”—as witnessed by “flagrant[ ]” cigarette smoking by young boys and even “some girls” in Shenandoah and “every other town.” After getting off his chest what by this time had become a cliche about the “travesty” of arresting and fining someone for selling cigarettes to “the boys who acquired the habit under the quasi sanction of the great religious and humanitarian organizations of the country” during World War I, the editor shifted to an innovative criticism of dead-letter laws as giving people the chance to “get even” with enemies by “get[ting] the goods” on them for violating a law that “most everybody else does” too without legal consequences. Without explicitly stating that Manos had fallen victim to such personally selective denunciation, the editor sought to assimilate the target of prosecution for illegal cigarette sales to America’s preeminent racist and ethnic discrimination by declaring that civilized law “will not pick out the Greek in Shenandoah, the Negro in Mississippi and the Japanese in California for punishment for the same things that ten million Americans two three generations from England or Ireland or Sweden are permitted to do.”

The mayor and city council that would have to decide whether to permit cigarette sales in Shenandoah was voted into office at the election on March 28, 1921, which was contested by the Citizens, People’s, and Independent tickets (of

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418 1920 Census of Population, Ser. T625, Roll 506, Page 74 (HeritageQuest); SW, Sept. 6, 1921 (7:5-7) (advertisement).
420 “Charge Against Wm. Manos,” T-WS-P, Mar. 21, 1921 (1:5). The maximum fine for a first offense was $50. Compiled Code of Iowa § 8868 at 2423 (1919).

2049
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

which the latter gained no seats), “[t]he main issue” being enforcement of Sunday closing laws. The People’s candidate for mayor, incumbent Fred Hackett, took the position that “when you try to compel [sic] people to follow a strict observation of the Sabbath day, and to take pleasures from them in which they, in their own minds, can see no harm, you are pouring oil on the flames of dissatisfied creation.” As far as he was concerned, “it would be far better to permit Sunday Ball Games and clean picture shows to exist than to drive our people to highways and byways and perhaps to other cities where they could find the amusements best suited to their tastes. My way would be to keep them at home with clean amusements, so that they would be fit for their daily tasks when Monday morning came.” That the People’s ticket was not a citadel of secular libertarianism was underscored by Hackett’s support for the “good work” performed by the “Gospel Team” and others “converting these souls to our Master.” Nevertheless, by analogy Hackett could be imagined as opposed to forcing Shenandoahans to travel to other cities to buy cigarettes as well. The Citizens ticket candidate for mayor, George B. Warner, promised to “strive to keep the city as clean and moral as possible” and to “use his best efforts to keep the amusement places clean and free from vice, so that they may be a necessary adjunct to the business life of the city and not a menace.” Though Warner’s rhetoric made the differences among the tickets on this issue difficult to discern, the Citizens ticket could be interpreted as leaning more toward a regulatory than a laissez-faire stance.

The Citizens candidates secured the mayor’s office (Warner, a farmer) and two council seats (J. W. McMichael, president of a farmers supply company, and H[allie]. A. Rawlings, a carpenter), while the People’s ticket gained three of the
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

five council seats (Harry Shurtz, a poultry man, Clarence Welch, a nursery man, and Oscar Rutledge).\(^{426}\) One newspaper characterized the impact of this outcome on ""Sunday Amusements"" as "about an even break,"" with three councilmen favorable to an open Sunday and two advocating a closed Sunday. Nevertheless, the *Tri-Weekly Sentinel-Post* argued that since the question had been "magnified out of all proportion to its importance in the campaign," it was unlikely that any member of the new council would "take extreme positions" on it.\(^{427}\)

The city council—which, as the *Sentinel-Post* understood, was empowered to "license or reject the plan of licensing"\(^{428}\)—began discussing cigarette permits at its meeting on June 13, but deferred action until all members were present. One local newspaper noted that it was believed that the council would adopt the local licensing option "as it is in the majority of the cities the size of Shenandoah,"\(^{429}\) while another reported the consensus of opinion that the council would issue about four permits.\(^{430}\) The Democratic *Shenandoah World*—which published its first cigarette advertisement on July 8\(^{431}\)—reported that the council had decided on June 17 to license cigarette sales, but this confused and skimpy account may have been erroneous,\(^{432}\) as revealed by its next report that the council might decide the issue on June 24. In fact, a previous "conference among members" had "left the matter in doubt," with three favoring permits for a limited

\(^{426}\)"City Election Will Be Held on Monday on Three Tickets," *SW*, Mar. 25, 1921 (1:1, at 2:5-7); "Warner Has Majority over Hackett of 16," *SW*, Mar. 29, 1921 (1:6-7). The occupational information is taken from the population census; no Oscar Rutledge appeared in Iowa in 1920, but in 1910 a 25-year-old by that name was an assistant farm manager in another county. Use of the 1920 census was complicated by a curious error that apparently listed everyone living in Shenandoah as living in the much smaller town of Shambaugh in Page county. The same ticket names were used in the local elections in Grinnell, Mayor McIlrath of the Citizens ticket leading the cause against permits. What the press meant by the statement that "the election resulted in a one-sided ticket having the majority of the members on the city council" is unclear. "Council Learns Shenandoah’s Debt Is Now $308,500," *SW*, Apr. 8, 1921 (1:3).


\(^{428}\)"Change Plumbers License," *T-WS-P*, June 13, 1921 (1:5).

\(^{429}\)"City Council Meets," *SW*, June 14, 1921 (6:4). By June 13 it is very unlikely that most same-sized cities had made any decision, let alone that this newspaper would have known whether they had in fact.

\(^{430}\)"Council Has Taken No Action," *T-WS-P*, June 15, 1921 (1:5).

\(^{431}\)"Council Selects New Fire Chief," *SW*, June 21, 1921 (1:4). Not only did the article fail to disclose the vote, but it conflated the state law and the council’s purported action.
number of merchants and two “disfavoring the idea.” Unsurprisingly, several of Shenandoah’s “leading merchants” requested that they be among the chosen few in case this proposal were limited, their reputations lending credence to their law-abidingness. The council’s failure to issue any licenses, the World commented, would “result in thousands of dollars each year being sent out of the city to procure smokes” by residents. Presumably in order to take advantage of such failure, Council Bluffs, Omaha, and other cities were reportedly monitoring the council’s decision. The council did formally, albeit tentatively, act on June 24, in the presence of a local WCTU delegation, which presented a petition signed by an impressive 480 voters requesting that no permits be issued in Shenandoah. In the WCTU’s immediate presence, following lengthy discussion, the council by a 3 (McMichael, Welch, and Rawlings) to 2 (Rutledge and Shurtz) vote rejected the only application that had been submitted. To be sure, the vote appears not to have been a principled decision since the press observed that the council would probably have further opportunities to act on other applications. Whether Welch would continue to vote with the Citizens ticket against his People’s ticket colleagues remained to be seen.

The possibility that smoking residents of Shenandoah would have to leave town to buy cigarettes triggered diametrically opposed value judgments in the press. A weekly in neighboring Adams county observed that “if the Shenandoah users want to make a ‘stink’ in that town and color their fingers a creamy yellow, they will have to get the ‘paint’ some place else.” The editorial writer of the Times-Republican, published in Bedford, the county seat of neighboring Taylor county, viewed the council members as having “laid down the bars for their young men to either send their money to neighboring towns or burn up $5.00 worth of gasoline making trips to Missouri or to towns who are permitted to sell the ‘coffin nails.’” Committed to a narrow economic framework, the perplexed paper asked: “What will Shenandoah profit by closing the door on the sale of cigarettes when almost every town surrounding it will be permitted to sell?” As far as it was concerned, “[t]he best way to handle the ‘weed’” was licensure

433“Council May Decide on License Issue,” SW, June 24, 1921 (1:3). See also “No Cigarettes in Shenandoah,” Boyden Reporter, July 7, 1921 (8:4). “Divided on Cigarette Sales,” T-WS-P, June 17, 1921 (1:2), had reported earlier that the council was “divided on the propriety of issuing” cigarette permits.

434“City Council Says No Cigaret Sales Will Be Licensed,” T-WS-P, June 27, 1921 (1:1); “To Discuss Oil and Cigarette Cases,” SW, June 28, 1921 (1:2); “Shenandoah Bars Cigarette Sales,” CBN, June 28, 1921 (10:3).

435“Neighboring News,” Adams County Free Press, July 16, 1921 (1:1).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

combined with the appointment of enforcers “who are not users.....” 436 Though the latter point was meritorious as far as it went, it nevertheless failed to deal with the ever-present issue of ubiquitous role-modeling for emulation by minors.

For reasons that the press did not explain, the council’s 3 to 2 vote against permits shifted to favoring them, as Welch switched sides (realigning himself with the other People’s ticket members) at the meeting on July 1, when the council voted to grant permits to six applicants, including owners of two candy stores (one of whom was none other than Manos, the confessed transgressor under the old law), two cafes, a cigar store, and the Elks lodge. However, the shift was trumped when Mayor George Warner vetoed the resolution. 437 With four votes required to pass the resolution over the veto, the press speculatively concluded that unless another opponent of cigarette sales changed his vote, they would be unlawful in Shenandoah. 438 When the applicants’ lawyer declared that he would secure a court order compelling the council to issue the permits, the Sentinel-Post (which two days later inaugurated publication of cigarette advertising), 439 playing legal expert, incorrectly characterized the law as “specifying] that the council shall pass separately upon each applicant for a permit and may grant or reject the same.” The paper then proceeded to conjecture that: “The theory of the law probably is that the discretion of the council is simply as to the general qualifications or fitness of the applicant and does not contemplate the rejection of permits in toto.” However, the article understood that even this restrictive approach could bring about the latter outcome anyway because “the council may reject all applications one by one as they are presented....” And although it significantly overestimated the urgency (“very soon”) of judicial intervention, the Sentinel-Post did correctly predict that the question would probably be tested in the courts because Shenandoah’s dispute would doubtless be replicated in other cities and towns. 440 In the meantime, the likelihood that for some time cigarettes could not be sold lawfully in Shenandoah prompted a cafe in Essex, a smaller town six miles away, to take out a large ad in the Sentinel-Post calling attention to the cigarette brands that it was selling. 441

At the meeting on July 13, with “[t]he cigarette question still occup[ying] the leading place in city activities,” 442 after the six applications that had been

436“No Cigarettes,” Times-Republican (Bedford), July 7, 1921 (4:3) (edit.).
439T-WS-P, July 6, 1921 (3:4-6) (Camel).
441T-WS-P, July 8, 1921 (4:1-3) (Model Cafe).
442“Mayor Again Vetoes Permits to Dealers to Sell Cigarets,” T-WS-P, July 15, 1921
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

presented at the previous meeting were again presented to the council, the members once again voted 3 to 2 in favor of granting permits, and the mayor again vetoed each such motion. To be sure, lawyers in Shenandoah were uncertain as to the veto’s legality and the city government awaited an opinion from the state attorney general.\(^{443}\) The local press framed the question in terms of whether mayors could veto cigarette permit actions of city councils which, according Governor Kendall, had “discretionary power” over the matter.\(^ {444}\) In the meantime, as the out-of-town press reported under the headline, “Shenandoah Has Battle over Fags,” one of the lawyers for the would-be cigarette sellers notified the city clerk that unless he issued the permits by a certain hour, the attorney would “start mandamus proceedings against him personally on the theory that the city clerk is a creature of the council and must obey the wish of the council.”\(^ {445}\) The clerk, however, decided not to act until an opinion was issued by the attorney general,\(^ {446}\) who announced that he had received similar questions from other towns, on all of which he would probably provide an opinion at the same time.\(^ {446}\)

In any event, the Shenandoah Superior Court would not decide the applicants’ mandamus action and therefore no lawful cigarette sales could take place until the court’s next term began on August 3.\(^ {447}\) In turn, the council majority that voted to issue permits was rumored to have decided not to fund the clerk’s legal defense, though an alternative source of funding was also said to be available.\(^ {448}\)

On August 2, Attorney General Gibson responded to the question posed by the Page County Attorney as to whether the mayor of Shenandoah had a right to veto the motion passed by a 3 to 2 city council majority to grant cigarette sales permits. Noting that the new cigarette sales statute did not prescribe any procedure for city councils to follow, Gibson pointed out that in fact councils had been using three methods: ordinances, resolutions, or motions duly recorded. Whereas the last mentioned did not, by judicial precedent, require any mayoral approval, the Iowa Code required councils to pass ordinances and resolutions

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\(^ {443}\)“Vote on Cigarettes,” \textit{SW}, July 15, 1921 (1:2).

\(^ {444}\)“Cigaret Hearing Tomorrow,” \textit{T-WS-P}, July 18, 1921 (8:3).

\(^ {445}\)“Shenandoah Has Battle over Fags,” \textit{EG}, July 19, 1921 (7:2). The same article also ran under a different title: “Shenandoah Has Hot Cigaret Fight,” \textit{WEC}, July 18, 1921 (7:6-7).

\(^ {446}\)“Cigaret Hearing Tomorrow,” \textit{T-WS-P}, July 18, 1921 (8:3).

\(^ {447}\)“Cigarette Sales in City Will Not be Decided Until August 3,” \textit{T-WS-P}, July 20, 1921 (1:2).

\(^ {448}\)“Council May Refuse Attorney Fees to Fight ‘Cig’ Case,” \textit{SW}, Aug. 2, 1921 (1:1).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

over vetoes by at least a two-thirds majority. Since the mayor had vetoed a resolution, his action was valid, but in the meantime the judge held a hearing in the case against the city clerk. As the local press observed, however, Judge Frederick Fischer’s decision would “have but little bearing upon the final outcome, for if the three councilmen favoring the applicants for permits pass a simple motion to grant the permits the mayor cannot veto the action and it would appear that the applicants will therefore win their claim if the three councilmen stick to their former position.” Judge Fischer finally issued his decision on August 26, upholding the mayor’s veto and denying the writ of mandamus without explanation.

In the wake of the ruling vindicating the council in sustaining the executive veto of the permits, the lid was “clamped down” on sales. The next phase in “Shenandoah’s ‘cigaret war’” opened a week later, on September 3, when the deputy sheriff raided several confectionary stores, securing a large number of cigarettes from the businesses of two applicants, the recidivist William Manos and Tom Atherton (the owner of Candyland), which they had allegedly been selling without permits. Superior Court Judge Fisher was also to be in charge of their trial on charges of unlawful selling. It is unclear whether the Sentinel-Post’s editor was now satisfied that the authorities had unambiguously plumped for enforcement.

With two competitors facing charges, the prohibitory regime’s longevity appeared solid enough that on September 6 Zurmuehlin & Gunnoode Smoke House in Council Bluffs (about 60 miles away) published a large advertisement in the Shenandoah World with the following text:

**CIGARETTES**

You needn’t be without them.

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450 “Cigarette Veto by Mayor Valid,” *SW,* Aug. 9, 1921 (1:2).


453 “Cigaret Stocks of Two Dealers Now at City Hall,” *Shenandoah Tri-Weekly Sentinel-Post,* Sept. 5, 1921 (1:1). The version of this article that appeared as “Officers Raid Alleged ‘Pill’ Bootleggers,” *WT-T,* Sept. 9, 1921 (1:1), confusingly got the date of the raid wrong.
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

We have them in any quantity you want.
We will send them by mail to you.
Just enclose a money order for the quantity you want, send your name and address, and the brand you want, and you’ll have them in a jiffy.

**KEEP YOUR MONEY IN IOWA EVEN THOUGH IT MUST LEAVE SHENANDOAH**

Remember, just an order, and you can smoke.\(^{454}\)

This solicitation (by Louis Zurmuehlen, the mayor of Council Bluffs, who two years later was investigated by a grand jury for selling cigarettes without stamps)\(^{455}\) not only presupposed the continuing existence of the prohibition on cigarette sales in Shenandoah, but also hinged on the hope that townspeople’s Iowa commercial pride would deter them from driving a dozen miles to the Missouri border to stock up. And although this outcome was presumably not intended by the Council Bluffs merchants, at a special meeting the very next day, September 7, the city council granted permits to three of the original six applicants (Edwards Brothers, Oviatt & Son, and the Elks Club), the three People’s councilmen, Rutledge, Shurtz, and Welch, voting for and Citizens ticket councilmen McMichael and Rawlings against each application. Although Mayor Warner gave notice that he would veto the council’s actions, under the attorney general’s opinion the veto power did not extend to the procedural vehicle of a “simple motion,”\(^{456}\) which, not requiring the mayor’s approval, was thus immune to his veto.\(^{457}\) Despite this defeat the mayor nevertheless gained the praise of the local WCTU for his stand.\(^{458}\) On September 22 the council then granted permits

\(^{454}\)SW, Sept. 6, 1921 (7:5-7)


\(^{456}\)“Cigaret Dealers at Last Granted Selling Permits,” T-WS-P, Sept. 9, 1921 (1:1).

\(^{457}\)“Mayor’s Hands Tied Is Ruling in Cigaret War at Shenandoah,” EG, Sept. 13, 1921 (3:7); “Shenandoah Loses Big Cigaret Fight,” CRR, Sept. 14, 1921 (10:5). For still later and more abbreviated accounts in weeklies, see “Iowa News” in Humeston New Era, Sept. 21, 1921 (5:5); Lytton Star, Sept. 22, 1921 (6:1); Oxford Mirror, Sept. 29, 1921 (9:7). After the legislature in 1924 had prescribed “resolution” as the sole procedure for issuing permits, the dispute as it had unfolded in Shenandoah could no longer be replicated. Iowa Code § 1557 (1924).

\(^{458}\)“Commends Mayor’s Stand,” T-WS-P, Sept. 12, 1921 (1:5).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s
to Atherton and one cigar store, while voting on, but not granting a permit459 to
cigar maker, because Rutledge deserted his co-People’s ticket colleagues to join
Rawlings and McMichael, who had voted “steadily against all permits.”460
Although, or perhaps precisely because, the anti-cigarette movement had lost the
selling war in Shenandoah and greater availability was anticipated, a few days
later the school superintendent announced that any pupil found with any form of
tobacco on his person would be suspended for three days and for a second offense
“expelled...for good.”461 Thus ended the “Cigaret War at Shenandoah.”462

Winterset

The county seat of Madison county—which may have had the state’s highest
per capita WCTU membership, which had vigorously and concordantly opposed
the Dodd bill463—Winterset was surrounded by extensive farming and livestock-
raising operations.464 A few months later it engaged in a see-saw struggle over
permits, for which by June 29 only three applicants (two drugstores and a
restaurant) had applied.465 At its crucial meeting on the night of July 5, the city
council received petitions protesting licensure from the WCTU, the Methodist,
Presbyterian, United Presbyterian, and Baptist churches, and Church of Christ,
the YMCA, and the ministerial association. With the council vote split 2 to 2, the
mayor cast the deciding vote against issuing permits to any of the four
applicants.466 However, at the next council meeting held two days later, more

459“Candyland Granted Cigarette License,” SW, Sept. 23, 1921 (1:6). Atherton, the
owner of Candyland, the next day published a large advertisement touting its home-made
candies and sanitary candy kitchen without mentioning the commodity it was newly
authorized to sell. SW, Sept. 23, 1921 (6:5-7). Why Atherton’s application was approved
but not Manos’s is unclear as is the outcome of the charges against them for selling without
a permit.

460“Grant Two More Licenses,” T-WS-P, Sept. 23, 1921 (1:4). The rejected applicant
was William Tomlin.

461“Put a Ban on Smoking,” SW, Sept. 30, 1921 (1:1).

462“Mayor’s Hands Tied Is Ruling in Cigaret War at Shenandoah,” EG, Sept. 13, 1921
(3:7).

463See above ch. 15.

464Polk’s Iowa State Gazetteer and Business Directory: 1922-1923, at 938 (Vol. 20,
43rd Year, 1922).


466“Cigaretts Turned Down,” WM, July 6, 1921 (1:1).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

petitions were presented, this time also by those favoring licensure, who secured theirs “after the petitions signed at the close of Sunday church service” had been submitted at the previous session. The press failed to identify the backgrounds of those urging licensure, merely noting that many who disapproved of the use of cigarettes and acknowledged their injuriousness nevertheless doubted that prohibiting any form of tobacco to adults would be successful. In the event, one of the two council members who had voted Nay—Charles Christensen, a 42-year-old plumber with his own shop who had emigrated from Denmark as a child—for reasons unexplained in news accounts, changed his vote to Aye, thus producing a 3 to 1 vote for issuing permits and ending Winterset’s two-day old ban.467

467“Council Reverses on Cigarets,” WM, July 13, 1921 (1:5). The Nay-voting councilman who did not change his vote, 46-year-old Earnest Hiatt, was county engineer. The two consistent Aye-voters were Albert Rees, a 53-year-old blacksmith, and (apparently) Edward or Will Davis, both of whom were laborers. The occupational information is taken from the 1920 population census. There is a confusion of dates in the two newspaper articles: the first article, which appeared on Wednesday July 6, spoke of the first meeting as having taken place “last night” (Tuesday July 5), whereas the second article, which appeared on Wednesday July 13, referred to the first meeting as having taken place the previous Wednesday (July 6) and the second meeting the previous Thursday (July 7). If the dates mentioned in the second article are correct, then the ban had lasted only one day. A blurb in an out-of-town weekly stated that the first meeting had taken place on Tuesday. “Neighborhood News,” Adams County Free Press (Corning), July 16, 1921 (1:1).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales: The Anti-Chain Store (and Especially Anti-Great Atlantic & Pacific Tea Company) Battle

With cigarettes being sold by chain grocery stores at a price which it is impossible for the merchants handling only tobacco products to meet.¹

MR. JONES: Does your state compel the municipality to issue the license?

MR. HAWSE: It does not.²

The resistance in the later 1920s and 1930s to permitting the Great Atlantic & Pacific Tea Company to sell cigarettes in various Iowa cities such as Perry, Waterloo, and Iowa City was part and parcel of a nationwide struggle between small independent retail tobacco dealers and the “world’s largest retail organization,”³ the number of whose stores, already at 14,000 in 1925, increased by 1933 to 16,000,⁴ and whose sales for the fiscal year ending February 28, 1930, exceeded a billion dollars.⁵ That A & P was the flash point for disputes over cigarette permits was hardly fortuitous: by the early 1930s it had for several years been selling not only one-tenth of all the food sold at retail in the United States, but also tens of billions of cigarettes. These facts together with the company’s 90,000 employees prompted Fortune to launch this extravagant praise: “If a communistic government, aided and abetted by the toploftiest ‘planned economists’ alive, should set out to devise the most efficient food distribution

¹Chas D. Barney & Co., The Tobacco Industry: Annual Review for 1928, at 23.
²Report of Proceedings: Fourth Annual Conference of Administrators of Tobacco Tax Laws: November 19-20, 1930, at 64. H. M. Jones was a field agent of the Alabama Tobacco Tax Department; W. E. Hawse was the superintendent of the Iowa Cigarette Revenue Department in Iowa.
⁵A. & P. Company Sales for Year $1,053,692,882,” WDC, Apr. 18, 1930 (2:8).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

system and should produce anything half so effective as the Great A & P, the Supreme Food Dictator would command the headlines of the world. In all Soviet Russia there is no division of production or distribution which even in the crude matter of size can compare with the Great A & P.”

Regardless of the Stalinist Soviet Union’s alleged envy, A & P stood at the center of the anti-chain store movement’s protest against the concentration of capital and its impact on economic democracy.7

A study conducted by the Federal Trade Commission during the last week in December 1928 revealed that cigarettes were the commodity on which grocery store and drug store chains showed the greatest losses in terms of selling prices below their total costs (14.0 percent and 26.2 percent, respectively).8 The dispute in Iowa City reflected in part a larger, indeed nationwide, cigarette war between chain grocery stores (preeminently A & P) and chain tobacco retail organizations (primarily the United Cigar Stores Corporation, of which the Duke interests were co-owners, and the second largest firm, Schulte Retail Stores Corporation),9 which local independent dealers feared would destroy them. The latter complained that chain stores were using cigarettes as loss leaders,10 selling them below cost, as the head of the Independent Retail Tobacconists of America put it in New York in 1929, “as a means of bringing people into their stores in order to sell them profitable lines of other goods.” With the list price of cigarettes at 12 cents a pack for small dealers, who were expected to sell them at two for 25 cents, the economic ruin of 400,000 cigar dealers loomed since they were unable to withstand the “unfair competition” of the chains, which could sustain selling


8Federal Trade Commission, Chain Stores: Chain Store Leaders and Loss Leaders tab. 22 at 44, and tab. 25 at 47 (Sen. Doc. No. 51, 72d Cong., 1st Sess. 1932). The FTC reported that “loss leader” included commodities sold below net invoice cost, net purchasing cost, net manufacturing cost, or even the usual mark-up. Id. at viii.

9Recent Economic Changes in the United States: Report of the Committee on Recent Economic Changes, of the President’s Conference on Unemployment 1:366 (1929); “Retailers Aroused by Cigarette War,” NYT, May 21, 1929 (30). On earlier (unsuccessful) efforts to merge the two chains, see “United Cigar Plans to Buy Schulte Co.,” NYT, Oct. 27, 1921 (1).

below cost, whereas small stores found even the 4 percent profit rate unsustainable. These periodic price reductions were in part designed by the cigarette manufacturing oligopolies to undermine competition from manufacturers of cheap 10-cent cigarettes, whose share of total cigarette sales skyrocketed from 0.26 percent in January to 22.78 percent by November 1932, but dropped back down to 6.43 percent by May 1933 in the wake of A & P’s reduction of its selling price to 10 cents. A & P’s large and widespread impact on retail price structures enabled the cigarette oligopolists to use it as “a price-cutting instrumentality,” in connection with which from 1930 to 1933 the oligopolists paid the chain more than $2.5 million for window and counter displays and sales cooperation. In view of A & P’s central role in the oligopolies’ pricing strategy, Iowa municipalities’ denial of permits to the chain stores under their jurisdiction was tantamount to a counterattack by small local sellers on the giant manufacturers.

Remarkably, the city councils of the four cities forced into litigation over the question of their power to deny cigarette sales permit had put up no resistance to issuing them at the outset of licensure in 1921.

**Perry (1928)**

The power to grant permits for the sale of cigarettes is a matter of public interest. The public interest is against the sale and use of cigarettes and therefore opposed to the granting of such permits. Construing the word “may” as favorable to the public interest, it must be construed as permissive and discretionary in application.

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11“Retailers Aroused by Cigarette War,” *NYT*, May 21, 1929 (30).
15American Tobacco Co. v United States, 147 F.2d 93, 106 (6th Cir. 1944).
17Appellant’s Brief and Argument at 8-9, Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

On July 11, 1921, a week after the new cigarette law had gone into effect, the city council of Perry, the state’s thirtieth largest town, with a population in 1920 of 5,600, located near Des Moines, and the center of an important agricultural district with some farm-related industries in addition to cigar and washing machine factories, passed a boilerplate cigarette ordinance. The ordinance had been passed at the previous meeting, but Mayor Adrian Cross, for reasons that he had stated, but that neither the city clerk in her Certificate of Passage of Ordinance over Refusal of Mayor to Sign Same nor the Perry Daily Chief revealed, vetoed it.

Cross (1868-1924) had been publisher and editor of various newspapers before becoming Perry city clerk in 1904, a post that he held until 1923 except for the year and a half he was mayor. Throughout his career he was also extensively involved in various charities and was a long-time Presbyterian Sunday school teacher and superintendent.

Cross’s veto message (“Mayor’s Objections”) of July 5, which he filed with the clerk and is attached to the council minutes, was read by the clerk to the council on its instruction at the July 11 meeting. A unique document in the 1921 post-repeal permit process, it deserves full quotation:

I cannot sign the cigarette ordinance for the following reasons:

First. Because there is no good reason for the use of cigarettes, and furthermore they are exceedingly offensive to the person who does not smoke.

Second. The smoking of cigarettes in restaurants and hotels and other public places, where ladies are present, is being permitted to the extent of becoming a very serious nuisance.

Third. Not only is the cigarette habit very pronounced among young men and boys, but is reaching out to women and girls which is a most deplorable fact.

Fourth. I can see no good reason why cigarette permits should be issued promiscuously to everyone who makes application, merely as a revenue producing proposition. The number of permits should be limited (since the Council have the matter in hand), and the sales confined to the proper places and under the more favorable...
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

conditions.

Fifth. The new cigarette law delegates all the powers to the City Council, so that the Mayor has no voice in the matter, up to the point of signing the Ordinance. I cannot therefore consistently sign my name to an Ordinance that would legalize the sale of cigarettes in Perry.\(^{22}\)

Interestingly, the first reason that Cross, who was not a member of a church that programmatically or doctrinally banned smoking,\(^{23}\) offered for objecting to the issuance of permits was the extreme offense that cigarette smoking caused nonsmokers in general. In second place he listed the nuisance it caused women. Then shifting focus, he drew attention to the increase in smoking by females that increased availability of cigarettes would bring about. Finally, taking a reformist tack, he proposed that, instead of quasi-automatically issuing permits to everyone who met the minimal formal statutory requirements merely in order to raise revenue for the city, the council cap the number of permits and formulate criteria for identifying the sales locations (and presumably sellers) that would give rise to less destructive consequences.

After the mayor’s objections were read, the council—which consisted of an eye doctor, grain elevator manager, feed store merchant, grocery store clerk, and auto salesman\(^{24}\)—passed it over the mayor’s veto by a vote of 4 to 0\(^{25}\) “without discussion or argument.”\(^{26}\) By the same vote the council then issued permits to 13 applicants,\(^{27}\) including the owners of two restaurants, a cigar store, two drug stores, and a billiard hall.\(^{28}\) From 1922-23 to 1928-29 Perry issued between 14

\(^{22}\)Adjourned Regular Meeting of the City Council at 170 (July 11, 1921) (copy furnished by Perry City Clerk Jeanette Peddicord).

\(^{23}\)Cross listed himself as a Presbyterian for the state census. Iowa Census 1915: Dallas County, Card No. B136.

\(^{24}\)The members were B. Roy Emms, Charles A. Etnire, David Hall, Leo Dignan, and E. J. Haupert. Eugene Hastie, History of Perry, Iowa 135 (n.d. [1962]). Edward J. Haupert was not listed in the 1920 population census, but did appear in the 1915 Iowa census, Dallas County, Card No. 71. Etnire’s occupation is illegible, but his occupation from 1910 is used here. Dignan operated the grocery store after his father’s death in 1926. Eugene Hastie, History of Perry, Iowa 144-45 (n.d. [1962]).

\(^{25}\)Adjourned Regular Meeting of the City Council at 171 (July 11, 1921) (copy furnished by Perry City Clerk Jeanette Peddicord). Dignan was absent and did not vote.

\(^{26}\)Council Issues Permits to Sell Cigarettes,” PDC, July 12, 1921 (1:1).

\(^{27}\)Adjourned Regular Meeting of the City Council at 172 (July 11, 1921) (copy furnished by Perry City Clerk Jeanette Peddicord).

\(^{28}\)Council Issues Permits to Sell Cigarettes,” PDC, July 12, 1921 (1:1). See also “Perry Licenses Sale of Cigarets,” Des Moines Sunday Capital, July 17, 1921 (12:7).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

Unfortunately, the 1920 population census did not permit unambiguous identification of the other permit holders. 29 Judicially cognizable problems developed in February 1928, when the Great Atlantic & Pacific Tea Company applied for a permit for its grocery store in Perry, which its manager was “in a hurry” to obtain, 30 presumably because the store had not been in a position to sell cigarettes lawfully since its opening in January 1927. 31 A & P’s involvement in this test litigation was hardly fortuitous: after all, the company was “[t]he largest purchaser of cigarettes in the United States.” 32 By 1934, A & P’s purchases accounted for 5.04 percent of all cigarettes produced in the United States—more than 50 percent more than the next five grocery chains combined. 33 A & P’s share also exceeded the 4.6 percent accounted for by the three largest drug and tobacco chains (United Cigar Stores, Schulte Retail Stores Corporation, and United Drug Company, which operated Louis K. Liggett & Company stores). 34

After the manager had paid the requisite mulct tax and posted the proper bond, the city clerk interviewed all but one of the city council members, and, forming the belief that they were “favorable,” issued the permit. Since the council had never acted on the application, let alone issued the permit by the statutorily prescribed procedure of a resolution, the clerk lacked authority to issue it and her action was without legal effect, although A & P suffered no harm, since it actually was able to sell cigarettes pursuant to the permit during the entire term and 17 permits annually. 29

29 Calculated by dividing the permit tax revenue by the $75 fee. See the various issues of Report on Municipal Finances cited above ch. 19.


31 Eugene Hastie, History of Perry, Iowa 154 (n.d [1962]).


33 Report of the Federal Trade Commission on Agricultural Income Inquiry, Part III: Supplementary Report tab. 27 and 28 at 143, 145 (1938). Although it did not reveal absolute dollar amounts, according to an internal cigarette company document on A & P sales from 1930 to 1932, Camel cigarettes accounted for between 24 and 44 percent of the chain’s cigarette sales, while Lucky Strike and Chesterfield accounted for between 36 and 40 percent and 20 and 25 percent, respectively. Sales of Cigarettes in A and P Stores (Feb. 20, 1933), Bates No. 502407226

of its alleged validity.\textsuperscript{35}

In June 1928, as the permit period was approaching its expiration, the manager apparently realized that A & P would need a valid permit and therefore filed an application together with the required bond and tax. But while denying A & P’s application, the council granted “most, if not all, the other applications,”\textsuperscript{36} prompting A & P, on August 24, 1928, to file a mandamus action against the City of Perry, the mayor, the five council members,\textsuperscript{37} and the city clerk in Dallas county district court,\textsuperscript{38} alleging that the council had acted arbitrarily in denying the company a permit and seeking a writ directing the defendants to grant the plaintiff the permit. A & P’s principal claim was that since it had not violated the law before filing its application, “the council had no discretion, but was under legal obligation to issue the permit.”\textsuperscript{39}

\textsuperscript{35}Great Atlantic & Pacific Tea Company v. City of Perry, Iowa at 1 (No. 11,777, Dallas Cty Dist. Ct., Nov. 2, 1928).

\textsuperscript{36}Great Atlantic & Pacific Tea Company v. City of Perry, Iowa at 1 (No. 11,777, Dallas Cty Dist. Ct., Nov. 2, 1928). It is unclear when the council denied the application. According to the minutes of the special session on July 24, the council, which had not discussed the matter at its special session on July 6, tabled the matter of A & P’s application until the next regular meeting. Perry City Council [Minutes], July 6 and July 24, 1928 at 383 (copy furnished by Perry city clerk). The council postponed the discussion until the next regular meeting when all members were present because two members had been absent. “Council Attacks Sewer Problem at Special Session,” \textit{PDC}, July 25, 1928 (1:5). All members were present at the called session of August 1, but the subject was not raised; two members were absent from the regular session on August 6, when the subject was also not discussed. Perry City Council [Minutes], Aug. 1 and Aug. 6, 1928 at 384 (copy furnished by Perry city clerk). Two detailed articles published on the August 14 regular meeting did not mention the issue. “Council Discusses Heat for Building” and “Damages Asked by Building Owner from City Council,” \textit{PDC}, Aug. 15, 1928 (1:2, 5). The next regular meeting was scheduled for September, but A & P filed its action on August 24.

\textsuperscript{37}The members were Barney Archer (marble works), Clinton A. Knee (carpenter), Adelbert M. Thornburg (real estate agent), C. B. Allshouse (carpenter), and Albert S. Kibby (washing machine factory owner/manager). Eugene Hastie, \textit{History of Perry, Iowa} 136, 192-93 (n.d. [1962]); 1920 Census of Population.

\textsuperscript{38}Great Atlantic & Pacific Tea Company v. City of Perry, Iowa (No. 11,777, Dallas Cty Dist. Ct., Nov. 2, 1928), Appearance Docket, Judgment Docket and Fee Book, A-9, at 90. A & P’s lawyer, George J. Dugan, was a leading figure in the Iowa Democratic party and a delegate to the 1928 Democratic National Convention. Edgar Harlan, \textit{A Narrative History of the People of Iowa} 3:291-92 (1931).

\textsuperscript{39}Great Atlantic & Pacific Tea Company v. City of Perry, Iowa at 1 (No. 11,777, Dallas Cty Dist. Ct., Nov. 2, 1928).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

It is unclear whether the parties or the court was aware of the fact that on December 5, 1927, the treasurer of state had requested an opinion from the Iowa attorney general regarding these two questions:

“1. Can a Board of Supervisors or a City or Town Council, where they have granted permits to some persons, refuse to grant a cigarette permit to others?
   “2. In refusing to grant a cigarette permit, can the Board of Supervisors, City, or Town Council, be compelled to furnish or give a reason why said permit was refused?”

The attorney general, who replied four days later, did not reveal (and perhaps was himself not familiar with) the context in which the questions had arisen—not even as to whether the treasurer was himself reacting to an inquiry or merely hypothetically raising the issue on his own. The attorney general’s brief, one-sentence, opinion was based on section 1557 of the Iowa Code, which, in pertinent part, merely provided that a “permit may be granted by resolution of the council of any city or town...and when so granted, may be issued by the clerk of such city or town.” Without engaging in jurisprudential exegesis or offering any explanation as to how he had arrived at his conclusions, the attorney general simply asserted that: “In view of the language used in the above section we are of the opinion that the granting of a cigarette permit by either a board or city council is absolutely discretionary, and they may refuse to grant a permit and are not compelled to give any reason therefor.”

Regardless of what District Judge W. S. Cooper may have known of similar disputes elsewhere in Iowa, he conceded that “all laws and ordinances must operate with equality”; he was even willing to acknowledge that “probably it is true that the discretion vested in the council is not an arbitrary discretion, but rather a legal discretion, but he nevertheless found that “the record does not sustain the contention of plaintiff’s council [sic] that the council was coerced by other cigarette dealers into refusing this permit.” Rather, the evidence showed that after discussing the matter the council decided to grant no permits to grocery stores to sell

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41Iowa Code § 1557 (1927).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

cigarettes. It seems to me that this was a matter within its discretion. At one time the sale of cigarettes was prohibited; then it was allowed under the restriction that none should be sold until after a permit to do so had been granted by the council. If the council has no discretion in the latter, then the Chapter in relation to this amounts to little.44

Since statutes prohibiting the sale of liquor in certain places such as grocery stores or hotels had been upheld by courts, Judge Cooper reasoned that at the very least “[s]urely some discretion rests with the council as to the places where cigarettes may be sold.” On the other hand, the most that he would concede (counterfactually and speculatively) to A & P was that if its “place of business had been singled out for a denial, such denial might possibly not be upheld unless there was some particular reason therefor, but when the denial of the right extends to all engaged in similar business then no abuse of discretion is shown for that reason alone.”45 Without deciding what obligation the council may have had to explain its reasons, the judge guessed at some plausible ones, some of which, significantly, might also have applied to adults:

Children patronize grocery stores more than other places of business; grocery stores as a rule do more credit business than drug stores, grocery stores deliver goods, more freedom is usually allowed in going about the merchandise in grocery stores than in other stores. All of these reasons and perhaps others might have been in the minds of the council. In the absence of some showing of wrongful motive, the discretion of the council should not be interfered with by the Court.46

Even more remarkable than Judge Cooper’s failure to cite any judicial precedents for the conclusions in his brief and typo-studded ruling47 was the lack of any concrete rootedness in the cigarette sales statute: not only did he not seek to parse the meaning and scope of the legislature’s grant of discretion to local governments, but he appeared to be ignorant of the direct connection, relevance and significance of the legislative history for the question of the extent of city councils’ home rule powers. Although A & P excepted to the ruling,48 it does not

47The local paper’s assertion that the “three page ruling...was a long one” was curious: it was about 55 lines. “Verdict for City in License Case,” PDC, Nov. 5, 1928 (1:5).
48Great Atlantic & Pacific Tea Company v. City of Perry, Iowa at 2 (No. 11,777,
appear to have filed an appeal; in any event, the Iowa Supreme Court did not rule on it. But when that Court finally did resolve the same question three times in 1932-33, the statute and legislative history played a central role.

The Iowa Attorney General, apparently during the final two months of 1928, appended a footnote to his aforementioned opinion to the Treasurer of State: “So held in Great A. & P. Tea Co. vs. City of Perry, Dallas Co. Dist. Court, 1928.” Although the assertion that Judge Cooper had held that the city council had the absolute discretion to grant or deny a permit (that the Attorney General had read the statute as conferring) was an exaggeration, the Supreme Court’s superseding decisions soon created or confirmed precisely such a power.

In the meantime, predictably—in view of A & P’s central importance for cigarette sales and vice versa—A & P did not abandon its efforts to sell cigarettes in Perry. On July 7, 1930, the chain once again presented a request for a permit to the city council, which discussed the question, which had become “touchy” since the previous litigation, for more than half an hour, as two A & P representatives from Des Moines were afforded time to state the company’s reasons for the request. In the course of the discussion “[i]t was intimated that the number of permits in the city was already too high numbering 18 which is more than the number allowed in several Iowa towns of this size or larger. Because of the unusually large number already issued it was not considered that more were needed.” These grounds replicated the “opposition to the promiscuous granting of permits...organized by certain organizations” in some other towns. Acutely aware, especially since the district court’s ruling two years earlier, that the state law conferred on the council “full authority in the issuance of permits,” which made the members “privileged to grant or refuse permits as they desire,” they unanimously passed a motion to table the application (along with one by another grocery, Snowball Market), which “constituted a refusal to grant the license....”

Although the city of Perry collected cigarette mulct taxes amounting to $1,462 in 1930-31, 1931-32, and 1932-33, and then $1,106 in 1933-34, suggesting (at $75

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49 Seventeenth Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1928, at 273. Since the Attorney General’s opinion was dated Dec. 9, 1927, it could not possibly have relied on the A & P case, which did not even arise until mid-1928.

50 Council Refuses Grocery Stores Cigaret Permits,” PDC, July 8, 1930 (1:8).

Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

per permit) a total of 20 and then 15 outstanding permits, the council appears not to have granted a permit to A & P during those years or even as late as 1938 and 1939.52


Waterloo (1930)

“May” Means “Must” 53

Despite its defeat in Perry, by no means did A & P acquiesce in efforts by city councils to deny it the privilege of selling cigarettes. In Waterloo, the state’s seventh largest city with a population just shy of 46,000, though the total number of cigarette permits outstanding was plentiful, the taxes they generated for the fiscal year ending March 31, 1930, nevertheless accounted for only $10,300 of the city’s total receipts of more than $1.6 million. 54 The A & P stores there did have permits in 1928 and 1929 but “allowed them to lapse.” 55 A & P applied for permits in February 1928 and the council granted all five; 56 in April the council, without objection, received A & P’s application for renewal of cigarette permits and placed them on file, 58 and two months later, at its mid-year session, approved five permits for the same store locations. 59 At its mid-year session in 1929, the Waterloo city council approved all of the almost hundred applications for permits with “but one exception”—A & P’s, which were tabled. 60 The parties later


55 A & P appears not to have been issued permits in 1927: it was not listed among the applicants whose applications were granted at the mid-year session on June 27, 1927. “Council Proceedings,” WEC, July 4, 1927 (9:6-8 at 6-7) (June 25). Nor was A & P listed as having been granted a permit in the minutes of any other council meeting in 1927 published by the Courier, at some of which permits were granted.


60 “City Speed Code Changed in Line with State Law,” WEC, June 25, 1930 (4:1-3 at
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

stipulation revealed what happened at this point without explaining why A& P, “[i]nstead of paying the mulct tax due and payable on each of said permits, on July 1, 1929,...filed new applications for permits” at each location, attaching new bonds and proper mulct tax fees. As a result, “by reason of filing for new permits, instead of paying the mulct tax, under the old permits, then in force, the same [sic] expired.” The council not having acted on the applications or bonds, A & P withdrew them, but filed the five applications again in December 1929, which, however, the lawyer who would was about to represent it in litigation against the city again withdrew.61

Presumably of causal relevance to the battle that would be fought out in 1930 was the cigarette price war that erupted in Waterloo in mid-April 1929, when a store in the United Cigar chain (the country’s largest retail tobacco company) reduced the per package price on “standard brands” from 18 to 15 cents, thus meeting the price that A & P stores were charging. Local cigarette dealers did not support this price war, which was a local manifestation of an impending national price war, because they claimed that their profit was already narrow as it was on the higher price. In addition, from the two-cent profit on the 15-cent package they had to pay the $100 mulct tax.62

After the company had filed five applications for cigarette permits for five stores on January 13, 1930,63 which the city council did not grant,64 A & P filed

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2). For the list, see “Council Proceedings,” WEC, July 5, 1929 (20:8, 21:1-2) (June 24).

61 Atlantic & Pacific Tea Co. v City of Waterloo, Stipulation at 3 (Black Hawk County Dist. Ct., Case No. 27875 Chancery, n.d.).

62 Cigaret Price War Opens Here,” WEC, Apr. 18, 1929 (22:5-7). The annual permit fee was thus the equivalent of the profit on 5,000 15-cent packages or 2,000 18-cent products. A report in the local press three weeks later that a truce in the destructive national price war was impending turned out to be premature. “Cigaret Price War Truce Is Predicted.” WEC, May 10, 1929 (24:3-4).

63 Great Atlantic & Pacific Tea Company v City of Waterloo, Petition at 1 (Black Hawk County Dist. Ct. Feb. 1930); Atlantic & Pacific Tea Co. v City of Waterloo, Stipulation at 1 (Black Hawk County Dist. Ct. Case No. 27875 Chancery, n.d.).

64 The answer and stipulation agreed that the council denied the permits on May 12, Great Atlantic & Pacific Tea Company v City of Waterloo, Answer at 2 (Black Hawk County Dist. Ct., #27875 Chancery, June 27, 1930); Atlantic & Pacific Tea Co. v City of Waterloo, Stipulation at 2 (Black Hawk County Dist. Ct. Case No. 27875 Chancery, n.d.). Yet the petition, which was filed in February, asserted that already by then the defendants had “failed and refused and still fail and refuse to grant and issue” the permits. Great Atlantic & Pacific Tea Company v City of Waterloo, Petition at 2 (Black Hawk County Dist. Ct. Feb. 1930). Apparently, in January 1930 the council referred the applications to its committee of the whole, whose failure to report prompted the company to file its
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

a mandamus action in Black Hawk County District Court requesting an order requiring the defendant city, mayor, clerk, and council members, who had granted and issued permits to “all others who have heretofore filed applications...,” including many who are engaged in the same or similar businesses” as A & P, to issue the permits to A& P because the defendants had acted in a “capricious, arbitrary, unreasonable and discriminatory” manner in denying them. By the end of February the council instructed the city attorney to defend against the action. The city’s defense rested on the claim that section 1557 of the Iowa Code conferred on it discretion in granting or refusing permits and that the council had exercised its “sound discretion” in refusing permits to A & P. At the city council meeting on May 12, 1930, the applications for the permits met a “deniance,” the motion carrying by a vote of 4 to 2, but no reason being announced. Unfortunately, the failure to take a roll-call vote makes it impossible to identify the Ayes and Nays among the six councilmen, who were predominantly, but not entirely, businessmen, and who were the same members

65Great Atlantic & Pacific Tea Company v City of Waterloo, Petition at 2-3 (Black Hawk County Dist. Ct. Feb. 1930). The parties later that year stipulated that the city council records did not reveal that the council had refused any cigarette permit applications during the previous three years, although there were some applications that the applicants withdrew after the council had neither refused nor granted them. Atlantic & Pacific Tea Co. v City of Waterloo, Stipulation at 2-3 (Black Hawk County Dist. Ct., Case No. 27875 Chancery, n.d.).

66“Council Proceedings,” WDC, Mar. 5, 1930 (17:6) (Feb. 24). The notice that A & P’s petition asking for the writ would be filed on or before February 21 was served on the defendants on February 19. Great Atlantic & Pacific Tea Company v City of Waterloo, Original Notice (Black Hawk County Dist. Ct., Feb. 19, 1930).

67Great Atlantic & Pacific Tea Company v City of Waterloo, Answer at 2 (Black Hawk County Dist. Ct., #27875 Chancery, June 27, 1930). It is unclear why the city did not file its answer until the day of the hearing more than four months after the filing of the petition.

68Atlantic & Pacific Tea Co. v City of Waterloo, Stipulation at 2 (Black Hawk County Dist. Ct. Case No. 27875 Chancery, n.d.) (“deniance”); “Council Proceedings,” WDC, May 17, 1930 (18:5-7), and May 19, 1930 (26:5-8 at 8). The Courier’s article on the session did not mention the permits. “Andrew G. Reid Will Take Office As City Attorney,” WDC, May 13, 1930 (9:1).


70Kenneth L. Bragdon was an assistant manager of a poultry medicine company (having been a bank cashier in 1920); John A. Hartleip was the manager of Hartleip
who had tabled A & P’s applications in June 1929. 71

At a court hearing on June 27, A & P argued that since it had complied with all legal requirements, the city was required to issue the permits. In contrast, the city contended that because granting permits was discretionary with the city council, the court lacked jurisdiction over its action. 72 Republican Judge Alva B. Lovejoy ruled in A & P’s favor on July 16, ordering the city council and clerk to issue the five permits. 74 The judge proceeded from an analysis of the defendants’ claim that the city council had discretion to deny or grant permits and that this discretion derived principally from the use of the word “may” in section 1557 of the Iowa Code in the sentence: “Such permit may be granted by resolution of the council....” 75 Certain that the statute itself contained “conclusive evidence that the word ‘may’ was not here used in merely a permissive sense,” Lovejoy immediately pounced on the city’s argument, pointing out that the code also provided that after the permit had been granted, it “may be issued by the clerk of the city.” Irrefutably he observed that: “No one would seriously contend that the word ‘may’ in the last sentence implied there was a discretion on the part of the clerk whether he would issue the permit after the council had by resolution granted it. Yet the language in form is not mandatory upon the city clerk any more than it is made mandatory on the city council to grant the permit....” Lovejoy went on to point out that, in contrast, the procedure established for unincorporated areas provided that permits “may be granted by the county board of supervisors, and when so granted ‘shall be issued’ by the auditor.” Rhetorically, the judge asked whether it could be successfully argued that the city

71 They had taken office on Apr. 2, 1928; three members of the new council had also been on the old council.


73 Three Judges Nominated for Election Again,” WT, July 20, 1930 (3:1).

74 Great Atlantic & Pacific Tea Company v City of Waterloo, Peremptory Writ of Mandamus (Black Hawk County Dist. Ct., No. 27875 Ch., July 16, 1930).

75 Great Atlantic & Pacific Tea Company v City of Waterloo, Decision at 1 (Black Hawk County Dist. Ct., No. 27,875 Equity, July 16, 1930). Unfortunately, since the case file archived at the Black Hawk County courthouse includes no briefs, the parties’ legal arguments are known only as filtered through the judge’s remarks.
clerk had discretion and the county auditor none “simply by virtue of the use of the word ‘shall.’”? This seemingly unassailable abstract linguistic analysis led him to opine that “the permissive word ‘may’ was used loosely in this statute and that it cannot be successfully maintained that by its use a discretion was vested in the city council.” From this intermediate conclusion Lovejoy then leaped to the far-reaching opinion that “the only discretion” that the legislature conferred on the council was “to determine whether the applicant has complied with all of the requirements of the law preliminary to the issuance of a permit.” If so, then “the council has no discretion, but is required to issue the permit.” In other words, the court, as the press pointed out, held that “‘May’ Means ‘Must.’”

While denying that the city council had any discretion—after all, the statute did not even require applicants to be of good moral character—Judge Lovejoy queried whether, if it did have discretion, the council would be empowered to “grant permits to a favored few and refuse all others” and thus to “to create a monopoly in a business not prohibited by law and which under the statutes of Iowa does not come within the police power,” although he acknowledged that some 30 grocery stores already had permits. After suppressing the elaborate history of the legislature’s subjection of cigarettes to the police power, the judge asserted that, if the council could grant a permit to one applicant and deny it to another without giving a reason or stating the underlying facts, such an exercise of power would be arbitrary, but the court was “unable to extract from the statute that such was the legislative intent.”

In order to understand how these semantic difficulties forming the core of the legal dispute arose, it is necessary to review the historical sequence of legislative events. The original statute of 1921 provided that the “permit may be granted and issued by the council of any city or town....” In 1924 the General Assembly changed the wording to read: “Such permit may be granted by resolution of the council of any city or town...and when so granted, may be issued by the clerk of such city or town.” This change was prompted by the code commissioners’ argument that: “No permits are ever ‘issued’ by a city or town council, which would imply that each councilman must attach his signature to it.” The second

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76Great Atlantic & Pacific Tea Company v City of Waterloo, Decision at 1-2 (Black Hawk County Dist. Ct., No. 27,875 Equity, July 16, 1930).
78Great Atlantic & Pacific Tea Company v City of Waterloo, Decision at 3-4 (Black Hawk County Dist. Ct., No. 27,875 Equity, July 16, 1930).
791921 Iowa Laws ch. 203, § 3, at 213, 214.
80Iowa Code § 1557 (1924).
81Brief of Code Commissioner’s Bill No. 257, prepared by J. C. Mabry, in Briefs of
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

use of “may” in the code was odd and ambiguous: if the use of “may” as applied to the council is interpreted as signaling and, indeed, constituting the legislature’s grant of discretion, it would be more than implausible to interpret the second use as also conferring discretion on the clerk to issue or not to issue the permit that the council had granted. On the contrary, the clerk’s action would be a prototypical example of a non-discretionary ministerial act. Interpretation is complicated by the fact that the code commissioners’ report had provided that a “permit may be granted by resolution of the council...and when so granted may be issued by the mayor of such city or town.” The commissioners explained their own modification as providing “for granting ‘by resolution’ of the city or town council and issued by the chief executive officer.” Although it is conceivable that the commissioners actually meant to confer a veto power on the mayor to nullify the council’s action, it seems implausible that they would have chosen such a subtle and indirect way of creating this power, especially since they did not provide for any override of a veto by the council. To be sure, further ambiguity arose because in the very next sentence, dealing with the corresponding procedure to be used in unincorporated areas, the code commissioners proposed and the legislature approved diametrically opposite language: “If issued to a person for use outside of a city or town such permit may be granted by resolution of the board of supervisors and when so granted shall be issued by the auditor of the county.” Despite substituting “shall” for “may,” the commissioners appear to have believed that they were providing for the same procedure: “The language which applies to a city or town council as to granting and issuing permits, likewise applies to the board of supervisors, hence the change that the board grant the permit by resolution and the auditor issue it.” Although the county auditor,
like the mayor, was elected (whereas the city clerk was appointed by the council), the auditor did function as clerk to the board of supervisors, and it was therefore logical not to confer any discretion on the auditor not to issue permits that the board had granted.87

In any event, the code commissioners’ bill with the word “mayor” and the aforementioned explanatory note (“issued by the chief executive office”) was the bill that the legislature considered (as Senate File No. 257) in 1924.88 After the Senate had passed the bill without any amendments to this section, Representative John Rankin, a Republican lawyer from Keokuk who chaired the subcommittee on H.F. 257 of the House Committee on Police Regulation, proposed that “clerk” be substituted for “mayor”; the committee adopted the proposed change, unfortunately without any discussion recorded in the minutes.89 The committee then reported out the bill with the recommendation that it pass with this amendment.90 Two days later the House adopted the amendment without a recorded vote and then passed the bill by a vote of 74 to 7.91 Whether the committee and/or the House would have changed “may” to “shall” had it reflected on the meaning of the substitution of a ministerial subaltern for the chief executive officer is unknown. These incongruities came to an end in 1939 when the legislature amended the code to remove all references to individual officials’ roles and powers so that thenceforward “[c]ities and towns may issue retail permits to dealers” and “[c]ounty boards of supervisors may issue retail permits to dealers.”92

The Waterloo city government did not immediately decide whether to appeal the adverse ruling; it would have had to post an appeal bond, but during the pendency of the appeal permits would be withheld.93 At its meeting on July 28 the council decided, for reasons that neither the minutes nor Waterloo’s major newspapers reported, not to appeal; instead, A & P paid the $500 mulct tax and

87 Iowa Code §§ 520, 5141, 5633, 5640 (1924).
88 Code Commissioners’ Bill No. 257 § 6, in File of Code Revision Bills (1923), 1923-24 Special Session.
92 1939 Iowa Laws ch. 72, § 9, at 102, 107; Iowa Code § 1556.08.2 (1939).
93 “A. & P. Stores Win Decision on Cigaret Permit,” WT, July 17, 1930 (5:1).
the council ordered the five permits issued.94 Despite the fact that by mid-1933 the Iowa Supreme Court’s decision in (the Iowa City case) Ford Hopkins II95 would have justified not renewing A & P’s permit, the Waterloo city council did grant all five permits again at the end of June.96 Moreover, five days before Ford Hopkins opened its first store in Waterloo on September 23, 1933, the city council met in special session to vote on an application for a cigarette permit submitted by Ford Hopkins’ district manager. That the council unanimously ordered the permit issued97 might have been part of an appreciative city government’s quid for the chain’s $10,000 investment in Waterloo and employment of 20 Waterloo construction workers for four to six weeks and of 37 Waterloo residents in the store98 at the very nadir of the Great Depression. Or perhaps the council members had drawn their conclusions from the Realpolitik practiced by their counterparts in Iowa City, news of whose agreement to issue Ford Hopkins a permit despite their victory before the state supreme court had appeared in the Waterloo press.99 In any event, press coverage of the permit’s timely issuance100 may have motivated some of the 19,462 people who visited the store on its opening sale day.101

Although the district court opinion was—like all trial court decisions in Iowa—unreported, it is nevertheless noteworthy that neither plaintiff from Iowa

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94“City Council Gives Shirey Paving Work,” WT, July 29, 1930 (1:6); “Shirey Awarded Paving Contract on $32,385 Price,” WDC, July 29, 1930 (2:3); “Official Council Proceedings,” WT, Aug. 3, 1930 (21:3) (July 28). Neither the minutes nor the newspapers indicated whether any council members argued for appealing and/or voted against issuing the permits.

95See below this ch.


100“One Dance Hall and Two Cigaret Permits Issued,” WDC, Sept. 19, 1933 (8:2).

101WDC, Sept. 25, 1933 (12:4-8) (Ford Hopkins advertisement). Nevertheless, the firm’s full-page advertisement two days before the opening included cigars and pipe and chewing tobacco, but no cigarettes. WDC, Sept. 21, 1933 (16).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

City and Marshalltown in the ensuing Iowa Supreme Court litigation ever alluded to the favorable ruling.

Marshalltown (1930-33)

Sales of cigarettes are still criminal except to those who have obtained an immunity from proper authority. ... The granting of such immunity is placed by statute upon and delegated to the policy forming and deliberative bodies of local authority. Before them every applicant must come. Every applicant in effect...must say “Here is my application for an immunity. Kindly give it your deliberative judgment and if approved authorize the issuance of the privilege I am seeking.”

The state’s fourteenth largest city and smallest first-class city, with a population of 15,731 in 1920, centrally located Marshalltown boasted a large packing house and numerous manufacturing plants. In mid-June 1921 the city council expected at least eight applications for cigarette permits, but by the end of the month it had already approved 16, including those of at least one cafe and one drug store. By fiscal year 1929-30—when Marshalltown was the thirteenth largest city with a population in excess of 17,000—cigarette permit fees had risen to $3,575, the equivalent of about 36 permits, from $2,700, the equivalent of 27 permits, in 1922-23. Despite the alacrity with which the council had handed out permits, by 1930 it decided to draw a line.

On December 8, 1930, one A. H. Bernstein filed an application for a permit to sell cigarettes at his wholesale/retail newspaper and magazine business, which the Marshalltown city council rejected at its meeting that same day.

102Appellant’s Brief and Argument at 11, Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933).

103Polk’s Iowa State Gazetteer and Business Directory: 1922-1923, at 634 (Vol. 20, 43rd Year, 1922).

104“Bond for Cigaret Dealers Is $1,000,” ET-R, June 18, 1921 (7:1-2).


108“Action Deferred on Scott’s Bills,” Marshalltown Times-Republican, Dec. 9, 1930 (8:4); Appellant’s Abstract of Record at 10-11, Bernstein v. City of Marshalltown, 215
Indiscriminately the plaintiff’s name was spelled “Bernstein” and “Burnstein” in various court papers in the case; the Marshalltown city directory in the 1930s spelled it “Burnstein,” supplying Albert as his first name. According to the 1930 Census of Population, however, which returned him as Abraham H. Burnstein living in Marshalltown, he was a 28-year-old merchant in magazines and newspapers, who had been born in Poland to parents also born there, whose mother tongue was “Jewish,” and who had immigrated to the United States in 1914; his wife Minnie, who also spoke “Jewish,” had emigrated from Russia in 1905. In Fort Dodge, where he had also been a news dealer before moving to Marshalltown, the city directory had also listed him as Albert Burnstein one year and Abraham H. Burnstein the next. The plaintiff’s various names and spellings and his background might be relevant as perhaps suggesting that the WASPish council members’ resistance to his application may have been rooted in anti-semitism. Bernstein’s lawyer aggressively raised this possibility in his brief before the Iowa Supreme Court: “Perhaps the fact that the appellee is a Jew, with red hair and blue eyes[,] had its effect upon the minds of some of the council. Such would be just as reasonable as the excuses given by some of them as to why they voted to reject his application.” The plausibility of such a discriminatory motive would have to explain why back in 1921, when the city council had first issued permits, one of the first applicants granted a permit had been Martin Greenstein, a grocery store owner who had been born in Russia and

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111 Polk’s Fort Dodge City Directory 1928, at 78 (1928); Polk’s Fort Dodge City Directory 1928, at 70 (1929). He was not listed in the Fort Dodge directory before 1928.
113 Appellee’s Reply, Brief and Argument at 8, Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

whose mother tongue was also “Jewish.”  

On January 12, 1931, Bernstein, according to the pleadings in the case, filed a second application, and, not having received a response, five days later filed a petition in Marshall county district court seeking a writ of mandamus compelling the city to issue the permit. On January 26 the council rejected that application as well. To be sure, the contemporaneous press accounts differed somewhat. The Marshalltown Times-Republican reported that already on January 12 the council had rejected Bernstein’s third application, while it granted one to (Greek-born) Nick Patakotis. An attorney, Albert B. Hoover (who would later represent Bernstein before the Iowa Supreme Court) appeared at the council meeting to explain that the charges that had been filed against Bernstein when he was arrested for selling obscene literature had in the meantime been dismissed because his brother Herman (whose name was Hyman), the guilty one, had been punished by fine and an order to leave Marshalltown and “stay out.” As for the council’s meeting on January 26, the Times-Republican called the cigarette permit and gas station ordinance on the agenda that night “[t]hose two ‘niggers’ in the city governmental wood pile....” The council did grant cigarette permits to one A & P—whose application had been rejected twice before—and a lunch room, but it voted down Bernstein’s, which had been held over from the previous meeting when the mayor had fruitlessly asked for a motion. This time councilman Clifford Jennings, owner of Jennings Greenhouses, “settled all doubts by the emphatic tone of his voice in moving that the application be rejected.”

In 1931 33 cigarette sales permits were outstanding in Marshalltown, issued to grocery, drug, confectionary, and cigar stores, restaurants, and one news stand. In addition to Bernstein’s, the council had rejected only one application—A & P’s; in fact, A & P’s application for another store had been either rejected or

114“More Cigaret Permits,” Marshalltown Times-Republican, July 1, 1921 (9:3). The 40-year-old Greenstein had immigrated in 1893 and been naturalized in 1912. Fourteenth Census of Population (1920). His hair/eye color is unknown.
115Appellant’s Abstract of Record at 2, 6, Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933).
116“Bernstein Again Refused Permit,” MT-R, Jan. 13, 1931 (9:3). The biographical information on Patakotis is taken from the 1920 census. The 21-year-old Hyman Burnstein was returned at the 1930 census as living with his brother, like whom he spoke “Jewish” and had immigrated from Poland in 1914.
Litigation over Cities' Home-Rule Power to Prohibit Cigarette Sales

tabled but was finally approved and issued.\footnote{118} One reason for the council’s denial of the A & P application was that, according to the testimony of councilman Albert M. Treat, “there were about twelve people who were handling cigarettes came up there who said that they couldn’t sell cigarettes for what these people were willing to sell them at. That if we were willing to take one hundred dollars from A. & P. and they drop out, and lose twelve hundred dollars, all right. I considered it a matter of revenue for the city. The A. & P. permit was later granted for the west end. I voted for it, as some citizens prevailed upon me as other grocery stores had them.”\footnote{119}

The ostensible reason for the council’s denial of Bernstein’s application was that the police had raided his place of business on the basis of complaints—one of which had been made by a councilman who was also a school board member—\footnote{120} that obscene literature, cow itch powder, and “iron mechanical dogs which would perform vulgar and foul tricks” were kept in the store, which young people frequented.\footnote{121} Although the charges were eventually dropped, the council members did not view the dismissal as proof that Bernstein was “of good moral character and worthy of a permit to sell cigarettes in Marshalltown.”\footnote{122} The “moral reason”\footnote{123} undergirding the council’s conclusion that “it wasn’t a good thing to have a cigarette permit in a questionable place” which “young boys and girls” entered\footnote{124} was the feeling that Bernstein “might sell cigarettes to minors if granted a permit.”\footnote{125}

In April 1931 trial Judge Bertram O. Tankersley found that Bernstein was entitled to a writ of mandamus ordering the city to issue the permit to him.\footnote{126}
judge characterized the city’s defense as based wholly on the argument that Code section 1557 conferred discretion on the council to grant or deny permits, which the council and its individual members had properly exercised in denying Bernstein a permit.\(^{127}\) Tankersley, who allowed as the aforementioned items in Bernstein’s store were, in his opinion, not “particularly offensive, but are...well known to be on display and for sale in other reputable places of business in Marshalltown and other cities,” detected “decided hostility” toward Bernstein by some councilmen-witnesses, which was based solely on their knowledge of the search and arrest. Since they had failed to investigate the real facts and disregarded the dismissal of the charges, the judge found that even if the council had the right to exercise its discretion, it had done so arbitrarily and without valid reasons.\(^{128}\)

Judge Tankersley next identified the same semantic problem in the code provision regulating the issuance of permits on which Judge Lovejoy had dwelt in Waterloo in 1930. Whereas section 1557 provided that permits “may be granted by resolution of the council” and when so granted “may be issued by the Clerk,” the corresponding provision for boards of supervisors and county auditors used “may” and “shall,” respectively. Refuting Tankersley’s argument that “[c]ertainly it can not be contended that the use of the word ‘may’...would give the City Clerk the power and discretion to nullify the action of the City Council” would be onerous. Considerably less persuasive was his conclusion that “it may well be questioned whether the words ‘may’ and ‘shall’ have been used in Section 1557 with such care as to be of value in determining the meaning when considering this Section alone.”\(^{129}\) The failure of the City of Marshalltown’s lawyers and, much more significantly, of any member of the Iowa Supreme Court to engage Tankersley’s opinion on this important issue was not a sign of intellectual integrity;\(^ {130}\) in particular the Supreme Court was remiss in failing to bring to the legislature’s attention the need, at the very least, to reconsider whether the seemingly discordant and incongruous uses of “may” and “shall”

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127 Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 40, Order and Decree (Apr. 4, 1931).
128 Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 41-42, Order and Decree (Apr. 4, 1931).
129 Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 42, Order and Decree (Apr. 4, 1931).
130 Bernstein’s lawyer did repeat Tankersley’s argument without attribution or enlargement. Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellee’s Reply, Brief and Argument at 5.
were the product of sloppy drafting or actually (but implausibly) designed to express some legislative intent.

To be sure, Tankersley’s critique was hardly the final word. Astonishingly neither he nor any of the litigants or judges involved in any of the three cases appeared to be aware of the legislative history in 1921 that indisputably forged the compromise that paired licensure with local power to continue prohibition.\(^{131}\) Thus, regardless of the ambiguous or careless word usage, that the legislature had empowered local governments to decide whether cigarettes would be sold in their communities constituted, as shown above, the universal and monolithic discourse of the debates surrounding the initial issuance of permits in 1921. There is no evidence that anyone, even where councils approved applications, ever disputed the existence of the power to deny them. After all, even the *Afton Star-Enterprise*, a weekly published in a town of 926, knew enough to report that cigarettes might be sold in another town “provided that the city council says so. Such is the meat of the local option provision of the committee bill passed as a substitute for the Dodd bill.... The granting of permits to sell is purely optional with the council.”\(^{132}\) Second, none of the judges or litigants appeared to realize that the semantic inconsistencies that Tankersley pointed out did not arise until 1924, when the legislature, pursuant to the code commissioners’ proposed amendments, changed the wording without debate or consideration of the possible real-world consequences. It is inconceivable that either the legislature would have intentionally undermined the historic compromise without any debate or municipalities or anti-smoking groups such as the WCTU would have failed to challenge the changes; rather, it is virtually certain that the General Assembly in 1924 was simply ignorant of the ambiguities it was creating.

In 1933, during the pendency of Bernstein’s case before the Supreme Court, at the lowest point of the Depression, an attempt was made in the legislature to make the case and the issue moot by amending the permit provision of the cigarette statute. As filed by Democrat William Sheridan, a lawyer and American Legion member from Keokuk,\(^ {133}\) House File No. 406 read in pertinent part:

No person shall sell cigarettes...without first having obtained a permit therefor in the manner provided by this chapter. The council of any city or town...may in its sole and unqualified discretion either grant such permit, or, likewise, in its sole and unqualified discretion, may refuse to grant such permit. The grant of or refusal to grant, [sic] shall be by formal resolution, and when so granted such permit shall be issued by the Clerk of such

\(^{131}\)See above ch. 15.

\(^{132}\)“Council Controls Sale of Cigaretts,” *Afton Star-Enterprise*, June 23, 1921 (3:4-5).

\(^{133}\) *State of Iowa: 1933-1934: Official Register* 102 (Lester Drennen ed., 35th No.).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

city or town. Such city or town council may grant a permit to one applicant and refuse a permit to another. Likewise, such a permit for use outside a city or town shall be either granted or refused by a resolution of the Board of Supervisors and when so granted shall be issued by the Auditor of the County.\(^{134}\)

Sheridan’s bill thus unambiguously conferred absolute and unfettered discretion on local governments both to deny all permits and to pick and choose among applicants. And by substituting “shall” for “may,” it also eliminated the anomaly created by the Code amendments of 1924 (seemingly) giving discretion to the city clerk to issue or not to issue permits approved by the council.

When the House took up H.F. 406 on March 31, 1933, Republican Blake Willis of Perry, another American Legionaire and long-time city and Dallas county attorney,\(^{135}\) moved to amend by striking the sentence containing the grant of “sole and unqualified discretion” and inserting at the end of the passage quoted above the following proviso:

Provided, however, that there shall be no discrimination between applicants for licenses unless said applicants have previously been convicted of violating any law of this State; and no application for a license shall be refused on the ground that the applicant has refused to join in any combination to fix the price of cigarettes and cigarette paper.\(^ {136}\)

Willis’s amendment, both of whose wings A & P—which, as the country largest cigarette buyer, was getting discounts and manufacturer rebates\(^ {137}\)—would presumably have found quite congenial, would have gutted the bill by eliminating councils’ and boards’ discretion to devise their own criteria for determining on which applicants to bestow immunity from prosecution for what would otherwise have been the crime of selling cigarettes, though it would not have affected their discretion to deny all permits and prohibit all cigarette sales. Given the decision in the Perry A & P case and especially the Supreme Court’s decision in the Iowa City case, the amendment would have left local governments with less discretion than they had under existing law. In a House with a 77 to 31 Democratic majority\(^ {138}\)—the Republican party had never before been in the minority in the

\(^{134}\)H.F. No. 406 (Feb. 24, 1933, by William Sheridan).

\(^{135}\)State of Iowa: 1933-1934: Official Register 106 (Lester Drennen ed., 35th No.).


\(^{138}\)State of Iowa: 1933-1934: Official Register 73-75 (Lester Drennen ed., 35th No.).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

House since its founding—Willis’s amendment was adopted by a vote of 55 to 39, but while 35 Democrats and 20 Republicans voted for it, 32 Democrats and only 7 Republicans opposed it. That the amendment’s point was to kill the bill was clearly on display on the final vote, which overwhelmingly defeated the bill 6 to 88.140

Rather than examine any of these legislative developments, Judge Tankersley, in apparent ignorance of history, turned the statute on its head by asserting that it merely created a state revenue raising system: by means of section 1557 and others the legislature “simply set up part of the machinery by which the revenue law and the regulations of cigarette sales are to be put in operation.”141 Having excised the entire struggle over cigarettes, even to the extent both of omitting all reference to the purpose of insuring that minors had no access to them—which, together with controlling the cigarette business, Attorney General Ben Gibson in 1921 had stressed as the purpose of the law—and of seeking to draw meaning from the lack of a requirement that applicants be of “good moral character,” Tankersley subordinated all elements of the law to the maximization of state revenue. He then leaped to the breathtakingly unmediated and ahistorically counterintuitive conclusion that “it was not the intention of the State Legislature to vest in the City Council any discretion, but that a ministerial duty is prescribed for the City Council as an agency for aiding and assisting the putting in force and operation of a state law designed for the purpose of raising revenue.” Because the council thus had no discretion, it instead “had a legal duty to issue the permit to the plaintiff....”143

139Democrats had not controlled the House since 1852, when the Whigs were in the minority. Frank Stork and Cynthia Clingan, The Iowa General Assembly: Our Legislative Heritage 1846-1980, at 5 (1980).


141Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 43, Order and Decree (Apr. 4, 1931).


143Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 44, Order and Decree (Apr. 4, 1931). The only opposing view Tankersley cited was a recent student note in the Iowa Law Review, which he did not even bother to refute. Unfortunately, the note, which tantalizingly referred to unnamed city councils that had interpreted the statute as giving them full discretion to refuse permits, provided absolutely no facts and did not even make any reference to any cases involving A & P. While concluding that councils did have some discretion, the note, making as little use of specific legislative history as Tankersley, interpreted the limits of that discretion much more restrictively than the Iowa Supreme Court would in 1932-33. “Power of Local Authorities to Prohibit Cigarette Sales.”
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

Before the parties had filed all their appeal submissions with the Iowa Supreme Court, it had issued its decision in *Ford Hopkins Company v City of Iowa City* on February 9, 1932. Thus by the time the court handed down its decision in *Bernstein v City of Marshalltown* on April 4, 1933, an outcome upholding the city council’s action would have been foreclosed if the same justices had ruled and voted the way as they had a year earlier. Indeed, given the extraordinary constraints that the majority in the Iowa City case had imposed on city councils once they decided in principle to issue a permit to anyone, the same result would have been such a foregone conclusion in the Marshalltown case that it would have seemed improbable that the Supreme Court would, without more, have chosen to devote further resources to the question. In fact, considerable turnover on the Court and (now) Chief Justice Kindig’s apparent insight that he should have joined the dissenters (who then would have become the majority) instead of allowing his agreement on a subordinate factual issue to enable three justices to stand the cigarette law on its head generated an almost diametrically opposed result.

Whereas no Democrat sat on the *Ford Hopkins* Court, by the time it handed down *Bernstein* a year later, the Court was composed of five Democrats and four Republicans. Of the three Republican majority justices in *Ford Hopkins*, only the author, Albert, was still on the court, whereas Grimm and De Graff had left. Of the two justices who had specially concurred, Morling (who had no party affiliation), had died, whereas Kindig was now chief justice. Of the four Republican dissenters, Evans and Stevens remained, while Faville and Wagner had left. Thus, overall, only four justices remained on the court—two dissenters, the majority opinion author, and one concurring justice. All five of the new justices were Democrats—John Anderson, Maurice Donegan, Richard Mitchell, Hubert Utterback, and John Kintzinger—elected in November 1932 as part of the unprecedented Democratic victory in Iowa.

The majority opinion that Chief Justice Kindig wrote and Evans, Stevens, Anderson, Donegan, and Mitchell concurred in reversed District Court Judge Tankersley based in large part on a verbatim adoption of the dissent in *Ford Hopkins*. Similarly, the dissent by Utterback, concurred in by Kintzinger and
Litigation over Cities' Home-Rule Power to Prohibit Cigarette Sales

Albert, was taken in large part from the latter’s majority opinion in the same case. Curiously, however, despite the fact that the Marshalltown decision merely inverted the majority and dissenting opinions of the first Iowa City case, nowhere was that case cited.

Kindig proceeded from the conclusion that the “whole history, theory, and purpose of the statute indicates that each individual application is to be considered on its merits.” By granting a permit, local government was entrusting to the holder an immunity from prosecution for what would otherwise be an offense. Because the legislature’s use of the police power to declare the sale of cigarettes “objectionable and against the public policy of this state” was (in spite of the repeal of the absolute prohibition in 1921) “still in effect,” the permit provision imposed on local governments “the duty...to determine who may be thus rendered immune from criminal prosecution.” The use of “may” undoubtedly connoted permissiveness and discretion, whereas nothing in the statutory purpose or context suggested that the legislature meant to impart to the word the unusual meaning of “shall” or “must.” This conclusion was hardened by the consideration that the measure constituted a police regulation of cigarettes, whose sale the legislatively declared public policy deemed “illegal and dangerous to the public health and morals.” Consequently, when Bernstein applied for a permit, “he was not demanding an absolute right, but rather asking for a privilege as a matter of grace.”

Conversely, in being charged with administration of the permit system, local governments were “burdened with a great responsibility...of granting immunity to persons who otherwise would be guilty of a public offense,” which required the exercise of discretion. Moreover, this need for discretion was inconsistent with Bernstein’s contention that once a city council decided to grant a cigarette permit, that council and all its successors were legally bound to grant every application regardless of the applicant’s fitness. Indeed, future councils—in the final link in Kindig’s ad absurdum argument—“would be helpless to limit the number of permits or to refuse permits already issued, even though such future council unanimously felt that there should be no permits in the municipality.”

To Bernstein’s other argument that the foregoing general rule concerning discretion did not apply when a city council discriminated in a purely arbitrary and capricious manner the City of Marshalltown offered the counterargument that such exceptions covered only useful occupations as distinct from ones recognized as not being useful and therefore prohibited by the police power and “merely tolerated only to a limited extent.” The majority found it unnecessary to resolve

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144 Bernstein v City of Marshalltown, 215 Iowa 1168, 1170-72 (1933).
145 Bernstein v City of Marshalltown, 215 Iowa 1168, 1173-74 (1933).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

Bernstein v City of Marshalltown, 215 Iowa 1168, 1174-76 (1933).

This dispute and thus to determine whether the city council had “an absolute right to discriminate or act arbitrarily” with respect to denying Bernstein’s application because under the facts of the case the council had “acted clearly within a legal discretion....” What the Iowa Supreme Court had in mind was the evidence before the council that he had “conducted an immoral place”; and even though the charge of “keeping, exhibiting, and selling obscene and lewd magazines” on which he had been arrested was dropped, the fact that the police had also found in Bernstein’s business “‘foul trinkets’...and ‘cow itch or itch powders’”—the latter of which school boys frequenting the premises bought and “caused the boys who took physical exercise in the gymnasiums of the public schools annoyance and physical discomfort”—sufficed to demonstrate that the council had “acted within a sound legal discretion” in denying a permit to an applicant who had surrounded the many young people who visited his store to make purchases with “immoral conditions.”

The three dissenters did not go beyond Albert’s majority opinion in Ford Hopkins I in asserting that: “It would seem that the only discretion conferred by the legislature on the city council is the power to determine in the first instance whether cigarettes may or may not be sold within the boundaries of the city.” Consequently, the dissent agreed that the question was not whether the council was empowered to “prohibit the sale of cigarettes entirely, but whether it can grant permits to some and refuse permits to others similarly situated” when, in this case, Bernstein had complied with the sole statutorily required formality of owning or operating the business where the cigarettes sales were to take place. That the statute did not expressly include any requirements as to applicants’ moral character or business operations was interpreted by the dissenters as proof that taking such factors into consideration was tantamount to an illicit exercise of discretion. Utterback realized that a city council might, pursuant to his statutory interpretation, “some time be required to grant a permit to a person who [sic] on moral grounds it would prefer to refuse,” but such an outcome was not “a wrong that the court can remedy. For protection against such situations, the people must resort to the polls and the legislature, and not to the court[ ],” whose majority opinion was “the equivalent of a legislative amendment to the statute.”

The Iowa Supreme Court in Bernstein v City of Marshalltown thus vindicated local governments’ power both to ban all cigarette sales and to use considerable discretion to discriminate among applicants for permits. Whether city councils also had an absolute right to discriminate arbitrarily was a question that the Court

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146 Bernstein v City of Marshalltown, 215 Iowa 1168, 1174-76 (1933).
147 Bernstein v City of Marshalltown, 215 Iowa 1168, 1182 (1933).
148 Bernstein v City of Marshalltown, 215 Iowa 1168, 1183 (1933).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

left open.

**Iowa City (1930-33)**

There is no provision in the laws and statutes of the State of Iowa which delegates to the City Council the duty of forcing its views on the subject of tobacco on an unwilling public.  

This Court recently decided the case of *Ford Hopkins Co. vs. Iowa City*. The opinion reveals the inner turmoil of this honorable Court. This appellant...most respectfully observes that the majority opinion seems a strange and ingenious construction of what was the legislative intent and purpose in the cigarette statute.

**Initial Laissez-Faire**

The city council of Iowa City, the state’s premier college town and eighteenth largest city with a population of 11,267, displayed no reluctance whatsoever in 1921 to begin issuing cigarette sales permits. On the contrary, the council, composed of businesspeople, approved them freely. During the run-up to the city elections in March 1921, the Democrats advertised themselves as “A Ticket of Business Men” who “promise a clean, business administration.” The party’s advertising included the business affiliation of all seven of their council candidates except that of Charles Chansky, whose soft drink and billiard parlor was in the process of being shut down as a nuisance for having sold alcohol—the result, ironically, of a raid by the irrepressible John B. Hammond,

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149*Ford Hopkins Company v City of Iowa City*, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 35.

150*Bernstein v. City of Marshalltown*, 215 Iowa 1168 (1933), Appellant’s Brief and Argument at 11-12.

151James J. Carroll (butcher); Charles Chansky (soft drink and billiard hall owner); Curtis Dey (civil engineer); Emma Harvat (women’s clothing store owner); William F. McRoberts (treasurer, River Products Co.); Martin O. Roland (manager, Masterphone Co [advertising]); Owen R. Williams (hog dealer). *Smith’s Directory of Iowa City and Johnson County, Iowa: For 1918*, at 103 (Vol. 6, 1918); 1920 Census of Population; *Smith’s Directory of Iowa City and Johnson County, Iowa: For 1922*, at 66, 86, 184, 237, 297 (Vol. 8, 1922).


state peace officer of Des Moines, who had played such a major role in state cigarette legislation—but who refused to withdraw from the race. Since no one, presumably, doubted the Republican Party’s business bona fides, its city ticket advertising did not need to mention its candidates’ occupation or include a pro-business slogan, though its mayoral candidate’s political advertisement promised “every effort and endeavor to give you a Clean, Businesslike Administration.” 158 On March 28, while the labor movement succeeded in electing a socialist mayor in Mason City, Iowa City’s electorate gave Republican businesspeople (including the city’s first councilwoman) a 4 to 3 majority over Democratic businesspeople. 159

By mid-June the city clerk was animating would-be permit holders to make sure that they missed no deadlines so that they could start selling on July 4: “‘Thus it behooves every dealer to get busy right away, and to get his bond and application filed with me by next Monday.’” 161 On June 20 the city council met and accepted the bonds of all 14 applicants, directing the city clerk to issue them permits. The first four went to Fred Racine, who owned in the downtown central business district four cigar stores (in several of which he also operated soda fountains and pool halls); the others were issued to a cigar and news merchant, owners of two cafes, two drug stores, two pool/billiard halls, a candy store, a fruit store, and a grocery store. At its meeting on July 1, the council directed the clerk to issue seven more permits, this time to owners of two

157ICP-C, Mar. 26, 1921 (3:3).
159“Mason City Elects a Socialist Mayor,” ICP-C, Mar. 29, 1921 (1:2).
160“G.O.P. Controls Council” and “Mayor Swisher Elected Again Defeats Paine,” ICP-C, Mar. 29, 1921 (1:2, 8).
161“Cigarette Law Looms,” ICP-C, June 16, 1921 (2:3).
162Minutes of an Adjourned Meeting of June 20, 1921of the Iowa City City Council 16:509-10; “Proceedings of the City Council,” ICP-C, July 22, 1921 (6:3-4) (June 20). The types of businesses were derived from the occupational data in the 1920 Census of Population, and Smith’s Directory of Iowa City and Johnson County, Iowa: For 1919-20, at 173, 203, 224 (Vol. 7, 1919).
163Irving Weber, Historical Stories About Iowa City 3:135-38 (1985). The first permit went to Store No. 1 at 132 E. Washington St, on the northwest corner of E. Washington and S. Dubuque St. No. 2 and No. 4 were located across the street at 131 E. Washington and the Jefferson Hotel; No. 3 was located around the corner at 24 S. Clinton St.
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

restaurants, two billiard parlors, a hotel, a cafe, and a candy store. What actuated the council is unknown, but several weeks later it solemnified the process by passing a resolution that “ratified, confirmed and approved” the 21 permits “in order to remove any doubt as to the[ir] legality or effect.” The council had, as the Press-Citizen put it, declared all cigarette dealers whose bonds had been filed “bona fide salesmen of the ‘coffin nails’.” Eighteen of these first 21 permitted dealers were densely packed in the compact four square block central downtown business district adjacent to the State University of Iowa campus. Indeed, a decade later, the city, in defending against an action for failure to issue a permit, stated that several of these stores “were located close to the campus and close to the buildings of the University, which certainly would be contrary to the spirit if not to the letter of the statute which prohibits the advertisement of cigarettes within four hundred feet of a school.”

The leading local paper was presumably reflecting the council’s position when, under the heading, “Cigarettes Enrich Community,” it jauntily reported two days before the new law went into effect that:

Once more local merchants proved that the cigarette is a great little medium for enriching the community’s treasury. Seven applicants for licenses filed $1,000 surety bonds, and were granted permits making a total of 21 stores in Iowa City, now authorized, or soon to be authorized, to sell the aromatic little “coffin nail.” That means, at $75 per

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164Minutes of a Regular Meeting of July 1, 1921 of the Iowa City City Council 16:524-25; “Proceedings of the City Council,” ICP-C, Aug. 29, 1921 (5:5-6). The types of businesses were derived from the occupational data in the 1920 Census of Population; Smith’s Directory of Iowa City and Johnson County, Iowa: For 1919-20, at 91, 94, 171, 173, 206, 247 (Vol. 7, 1919); Smith’s Directory of Iowa City and Johnson County, Iowa: For 1922, at 275 (Vol. 8, 1922).

165Minutes of an Adjourned Meeting of July 28, 1921 of the Iowa City City Council 16:540.


167The area was bounded by S. Clinton St., E. College St., S. Linn St., and Iowa Ave, and included S. Dubuque St. For business listings by street, see Smith’s Directory of Iowa City and Johnson County, Iowa: For 1922, at 317-22, 331-32, 349, 364-66 (Vol. 8). In 1995 and 2005, when the total number of permits outstanding in Iowa City was 94 and 70, respectively, 14 businesses in this same central business district had cigarette permits. Calculated according to [Iowa City] City Clerk, Cigarette Permits (Apr. 20, 1995); [Iowa City] City Clerk, Cigarette Licenses (Feb. 9, 2006).

168Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 79.
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

license, $1,575 paid into the city’s strong box, made stronger by cigaret smoke.  

In fact, however, that cigarette mulct tax amounted only to about 0.5 percent of the city’s total receipts or expenditures.  

By 1929-30, when the city had become the state’s fifteenth largest, Iowa City’s mulct tax collections had risen to $4,025—higher than those of the two next biggest cities and much higher than the smaller ones below it.

From the outset of the permit issuance process in June 1921 until 1928 not only did the city council never deny any permit, no council member was ever recorded as having cast a Nay.  

To be sure, this uninterrupted stream of approvals did not mean that permit holders were all complying with the law.  

For example, in 1922, four permittees—three owned pool or billiards halls and one a cafe—were charged with selling to a college freshman, who was a minor.

Finally the Council Rebuffs A & P

The permitting process itself ran into a first obstacle on May 4, 1928, when the council, controlled by Republicans with a 5 to 2 majority, defeated a motion

\(^{169}“\text{Cigarettes Enrich Community,}”\text{ ICP-C, July 2, 1921 (7:6).}\)


\(^{172}\text{A number of votes were recorded only as “motion carried,” which could possibly have included split votes, but no recorded or roll call votes included any Nays. Not even the notes in the city clerk files on which the minutes were based contain any roll calls for such votes. That no permits were denied during these years was stipulated to by the parties to the litigation discussed below; the city clerk also testified to this fact. Ford Hopkins Co. v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Abstract of Record at 14-17. Even the defendant-councilmen themselves apparently did not recall how they voted on these unrecorded or non-roll call votes since their attorney, city attorney Will Hayek, who presumably himself attended at least some of these council meetings, felt compelled to assume for purposes of litigation that “all members who were present at the meeting voted in favor of the particular motion if it was carried, or against it if it was lost.” Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 4.}\)

\(^{173}“\text{Cigarettes Cause Clash,}”\text{ ICP-C, Feb. 23, 1922 (6:3) (Epeneter, Hungersford, Musark, and Smith).}\)

\(^{174}\text{Party affiliations are taken from “Democrats Leading in Election,” DI, Mar. 29,}\)
to grant the Great Atlantic & Pacific Tea Company’s application for a permit by a vote of 2 to 4. The two councilmen who supported A & P were Democrat Leo Kohl (a publishing company press room foreman) and Republican Edward Greer (a retired grocery store manager), while the opponents were all Republicans—William McRoberts (treasurer of River Products Co.), Lou Kaufmann175 (a meat market owner), carpenter Charles Paine, and farmer Clark C. Roup.176 Coming in the midst of the similar disputes in Perry and Waterloo, the battle over issuing cigarette sales permits to A & P in Iowa City microcosmically reflected the national competition between the giant retailer and small independent retail tobacco dealers.

Fortunately, the Iowa City newspaper revealed more of the background to the dispute than did Perry’s. A & P’s application for a permit for its newly opened store “brought the first public opposition to chain stores in Iowa City. As readers of newspapers may have noted, two or three small towns in eastern Iowa have refused to license the A. & P. Company as cigaret dealers because of the objections of their local competitors.”177 The store was not A & P’s first in Iowa City: in 1924 and 1925 it had opened two others in the downtown area.178 Oddly, as recently as February 7, 1928, the council had granted A & P’s application for permits for these two stores.179 In light of the controversy to which A & P’s
applications for cigarette permits had given rise elsewhere, why its competitors had not objected to the issuance of permits for these first two stores is unclear. The Press-Citizen’s report of the meeting on February 7 had even characterized the granting of the permit to A & P as one of “several minor matters” to which the council had attended, which apparently paled in significance compared to its approval of the purchase of a used Buick for $350 for the fire department to use to respond to small alarms.180 Perhaps the paper’s blasé attitude was somehow related to its publication on the day of the council meeting of a large Lucky Strike advertisement featuring a testimonial by star professional hockey player Billy Burch that “‘Luckies never cut my wind....’”181 In any event, after A & P had applied for a permit for the third store,182 Joseph (Gus) Pusateri, a 51-year-old, Italian-born retail fruit merchant,183 who had been among the very first permittees in 1921,184 appeared before the council on May 4 as the representative of nine local retailers objecting to A & P’s permit. To lend weight to their objection, Pusateri threatened that if the council granted the chain store a permit, his group would not renew theirs when they came up for renewal in July.185 At $100 a

182It was located at 110 E. College St., which was virtually across the street from the first store. Minutes of an Adjourned Meeting of June 29, 1928 of the Iowa City City Council 19:648.
184Minutes of an Adjourned Meeting of June 20, 1921 of the Iowa City City Council 16:510. His business address of 130 S. Clinton put him across the street from the site of the first A & P, which had opened in 1924.
185“Council Asks Inquiry of Rates on Fire Insurance; Hope to Get Lower Figure,” ICP-C, May 5, 1928 (2:4-5). In light of such a public statement to the council, its defendant-members were at best disingenuous in later quibbling with the Iowa Supreme Court’s finding that local businessmen had told the council that if it issued a permit to Ford Hopkins, their permits would become worthless by virtue of their being undersold. Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 26-27.
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

After its population surpassed 15,000 at the 1925 state census, Iowa City became a first-class city and the mulct tax on its cigarette permits rose from $75 to $100. Eight weeks later, at the council’s last meeting before the cigarette permits’ annual expiration date, 24 motions were presented for “renewal” of cigarette bonds and voted on separately: 23 carried, whereas the motion for renewal of A & P’s for its two older stores lost. The council voted the company “out with a whoop, not one of the aldermen voting in favor of the renewals.” For good measure the council then voted not to grant the company’s application for a new permit for its third store, although all other applicants for new permits were successful. “[U]n- fair competition” in the form of A & P’s selling prices below the “prevailing rates” was the basis for dealers’ complaints that they had been injured. Preceding Pusateri’s renewed advocacy on their behalf, A & P’s assistant superintendent, W. L. Caley of Des Moines, had requested the council to renew/grant the three permits. While conceding that the company might be underselling other dealers, he insisted—presumably seeking to anticipate claims that A & P was using cigarettes as loss leaders—that it nevertheless made a “satisfactory profit” and that as an Iowa City taxpayer it was as entitled to the council’s consideration as any other business. Doubtless seeking to parry the small dealers’ threat to deprive the city of their mulct taxes, Caley recited the sums that A & P paid in Iowa City in street light assessments and general taxes. No councilman expressed any opinion on the matter or explained his vote, but the “chorus of ‘noes’ made it quite clear that the plaint of the local dealers had registered with” the council, whose de facto “right to regulate prices,” in the Press-Citizen’s view, “seemed unquestioned.”

Although A & P “consistently undersold the tobacco stores on cigarettes,” the majority of permit holders in Iowa City were not tobacco stores at all, but

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186 After its population surpassed 15,000 at the 1925 state census, Iowa City became a first-class city and the mulct tax on its cigarette permits rose from $75 to $100.
190“A. and P. Loses Cigaret Fight,” ICP-C, June 30, 1928 (2:3). The student newspaper merely stated that no reason had been given for denying the permit. “City Council Buys 2 Traffic Signals; Renews Licenses,” DI, June 30, 1928 (1:3).
rather cafes, restaurants, lunch diners, pool halls and billiard parlors, candy stores, as well as independent local grocery and drug stores, just as the vast majority of businesses selling cigarettes nationally were not tobacco stores, but grocery stores, eating and drinking establishments, drug stores, and candy stores.192 This very structure may have underlain the question that councilman and acting mayor Will Hayek (who would later represent the city in litigation over the issuance of permits) raised at a council meeting in 1924 as to “whether small dealers really made any money on cigarettes. It was decided that they really didn’t make any money.” Ironically, the council members concluded that even they were treating cigarettes as loss leaders: “Some of them actually lose money on the ‘coffin nails.’ However they help to bring people into stores and visitors are always potential customers.”193 Such an account matched up remarkably well with later analysis by the Federal Trade Commission, which concluded that the hundreds of thousands of retailers for which cigarettes (and tobacco products generally) formed a small part of their total business but a large proportion of the manufacturers’ output had become “accustomed to selling these fast moving tobacco products at a lower mark-up than that customarily received by strictly tobacco distributors....”194 Indeed, despite regarding the profit margin on the oligopolists’ cigarettes as “inadequate,” their customers’ demand “practically force[d]” such retailers to sell them, even against their will at cut-rate prices lest “important sales volume...be lost on other products if they do not meet competitive prices.”195

192 Although for the period in question there were no comprehensive data on the proportion of all cigarettes sold by various types of retailers or the proportion of total sales of each type of retailer accounted for by cigarettes, it was known that cigar stores/stands constituted a minuscule and diminishing proportion of all cigarette retailers (which, excluding vending machines, numbered between 850,000 and 900,000 by the end of the 1930s) and accounted for an absolutely declining dollar amount of tobacco product sales between 1929 and 1935. In 1934 there were only about 15,000 cigar stores, whereas 355,000 grocery stores, 251,000 drinking and eating establishments, 57,000 drug stores, and 55,000 candy stores, in addition to untabulated gas stations and recreation centers, constituted “potential” retail sellers. Report of Federal Trade Commission on Resale Price Maintenance 447-48, 450-51 (1945).


Ford Hopkins Company Wants to Sell Cigarettes Too

A year after the city council had stripped A & P of its permits, a much smaller chain applied for a permit. Ford Hopkins Company, a Chicago-based Midwest drug store chain, was established in 1928 by Lewis J. Ruskin, a Yiddish-speaking child of Russian parents, who was born in London in 1903 and emigrated to the United States in 1905. It opened its first store in Illinois in 1928 and by the time Ford Hopkins first appeared in the Directory of Chain Drug Stores in 1932, it included 16 stores, five of which were located in Iowa (three in the Mississippi River towns of Clinton, Fort Madison, and Keokuk, as well as in Iowa City and Ottumwa in eastern and southeastern Iowa), three in Wisconsin, and eight in Illinois, all eleven being smaller towns. The next year it expanded to 23 stores ranging from Mason City and Sheboygan, Wisconsin in the north to Ottumwa in the southwest. At trial in October 1930, its officials characterized the company as “creating a national chain of drug stores in small cities, confining their operations only to rural communities,” though at the time

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196 Ironically, a quarter-century later, D. A. Schulte Inc., a tobacco store chain, arranged to buy Ford Hopkins “to signalize the emergence of Schulte beyond the tobacco shop...into a vigorous new enterprise in the chain drug field.” “Chain to Expand, Change Its Name,” NYT, Jan. 14, 1954 (39, 43:5).


199 American Druggist, Directory of Chain Drug Stores 18 (1932). The threshold for inclusion was four stores.


201 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 37 (testimony of Lewis Ruskin).
the chain encompassed only eight stores. In anticipation of opening a store in Iowa City, the company at the council meeting on May 24, 1929, filed a petition for permission to hang out a sign, but when the council—which was now controlled by a 5 to 2 Democratic majority—found that it measured nine feet by five feet and weighed 1,300 pounds, the body referred the request to the Sidewalk Committee and city engineer. More consequentially, at the same meeting the motion by Democrat Charles Sample (dairyman and city milk inspector), seconded by Republican Lou Kaufmann, to refuse the company’s application for a cigarette permit carried. Although “the action was taken without comment,” the Press-Citizen surmised that “the reason is probably the same as actuated the council a few months ago in denying permits to the Atlantic and Pacific Tea Company, which had aroused the antagonism of other dealers by selling cigarettes at less than the current price.” (If Ford Hopkins in fact intended to use cigarettes as loss leaders, that motivation distinguished it from late twentieth and early twenty-first century chain pharmacies, which sell cigarettes as profit leaders, that is, very profitable commodities that also allegedly bring in “traffic.” In contrast, Ford Hopkins’ health ethics did not differ from that of latter-day chains, which continued to sell huge numbers of cigarettes despite the fact that in 1970 the House of Delegates of the American

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202 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 29 (testimony of C. Paul Johnson, dist. mgr).

203 “Democrats Sweep City Election,” DI, Mar. 26, 1929 (1:8).

204 Iowa City Finance, Council Proceedings, May 4, 1928-June 1929, Roll No. I 9 (Iowa City Clerk’s Office); Minutes of an Adjourned Meeting of May 24, 1929 of the Iowa City Council 20:212; “Council Votes $42,419 Paving Progress; Hearing June 12,” DI, May 25, 1929 (8:1).

205 Smith’s Directory of Iowa City and Johnson County, Iowa: For 1922, at 241 (Vol. 8, 1922); “Of Interest to Every Voter,” DI, Mar. 24, 1929 (10:5-8) (Democratic City Central Committee political advertisement); Smith’s Directory of Iowa City and Johnson County, Iowa: For 1930, at 250 (Vol. 12, 1930).

206 Minutes of an Adjourned Meeting of May 24, 1929 of the Iowa City Council 20:212. Unfortunately the council minutes did not record the vote and the Iowa City Press-Citizen did not disclose the vote.

207 “Benda Wants ‘Black Maria,’” ICP-C, May 25, 1929 (2:4). The article incorrectly stated that Bywater (rather than Kaufmann) had made the motion together with Sample.

Pharmaceutical Association adopted the position that “mass display of cigarettes in pharmacies is in direct contradiction to the role of the pharmacy as a public health facility” and in 1971 that the same body approved a resolution recommending that tobacco products not be sold in pharmacies.209

At its meeting on July 1, the council had before it a resolution to direct the city clerk to issue permits to 35 applicants (most of whom were seeking renewals). Republican Councilman Jacob Van der Zee (1884-1960), a Dutch-born political science professor at the State University of Iowa with legal training210 who had been a Rhodes Scholar and an assistant to the Iowa Code Commission,211 moved (and Democrat William L. Bywater, a physician who had practiced in Iowa City for three decades and been a member of the school board,212 seconded the motion) to amend by striking from the list The Academy of Interest to Every Voter,213 “Candidates Seeking Municipal Office,”214 and “Of Interest to Every Voter.”215


211“Candidates Seeking Municipal Office,” DI, Mar. 28, 1931 (1:3-6, at 3:2-4 at 3).

212“Of Interest to Every Voter,” DI, Mar. 24, 1929 (10:5-8) (Democratic City Central Committee political advertisement).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

Cigar Store and Pool Hall (which also maintained a soda fountain, served food, and frequently advertised in the student newspaper, the *Daily Iowan*, offering free delivery of cigarettes on orders of 50 cents or more). Van der Zee’s animus was directed against its owner, who had “‘been thumbing his nose at the city administration and doesn’t deserve any favors from the council,” because he had pleaded not guilty to charges of keeping a gambling house, which had been filed the previous week after a raid on slot machines, whereas seven other local men had pleaded guilty. The WCTU’s executive committee may have conveyed its congratulations on the raid, but none of Van der Zee and Bywater’s colleagues having shared their outrage, the motion lost by a vote of 2 to 4; in turn, Van der Zee and Bywater opposed adoption of the original resolution, which was passed by a vote of 4 to 2. In the next few months the council granted the additional applications without opposition by Van der Zee, Bywater, or any other members. The customary unopposed mass approvals for 1930 took place at two meetings at the end of June and beginning of July, generating a total of 36 permits.

On Saturday July 20, 1929, Ford Hopkins finally opened its store in the busiest part of downtown Iowa City across the street from one of the A & P stores. Two days earlier the *Press-Citizen* had opened its columns to a public

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214 *DI*, Mar. 28, 1931 (3:5). For an example of an earlier tobacco-related ad, see *DI*, Jan. 3, 1928 (6:5-8).
215 “Horrabin Company Gets $27,600 Paving Contract for Seven Local Streets,” *ICP-C*, July 2, 1929 (3:1-4 at 1-2). The Academy was called “‘poor sports,’” who “‘would not take their medicine.’” “Council Lets Paving Contracts to Horrabin Company,” *Daily Iowan* (Iowa City), July 2, 1929 (8:1).
216 Minutes of an Adjourned Meeting of July 1, 1929 of the Iowa City City Council 20:257.
217 Iowa City City Council, Minutes of a Regular Meeting of July 5, 1929, 20:262; Iowa City City Council, Minutes of a Special Meeting of Sept. 27, 1929, 20:358; Iowa City City Council, Minutes of an Adjourned Meeting of Apr. 25, 1930, 20:512; Iowa City City Council, Minutes of a Regular Meeting of May 2, 1930, 20:521.
218 Iowa City City Council, Minutes of an Adjourned Meeting of June 27, 1930, 20:564; Iowa City City Council, Minutes of an Adjourned Meeting of July 3, 1930, 20:569.
219 “Ford Hopkins Store Ready,” *ICP-C*, July 18, 1929 (15:1-2); *id*. (6-7) (full page ads for opening). The store at 108 S. Clinton St. was not listed in the 1928 city directory, but was listed in 1930. *Smith’s Directory of Iowa City and Johnson County, Iowa: For 1928*, at 365 (Vol. 11, 1928); *Smith’s Directory of Iowa City and Johnson County, Iowa: For 1930*, at 330 (Vol. 12, 1930).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

relations article that was presumably a quid pro quo for the two-page advertising spread that highlighted the “Cozy Luncheon Room where 80 people may dine in [an] environment of Art, Beauty and AMERICAN SANITATION” eating food, such as “home baked” pies and cakes, “prepared by trained cooks,” as well as reduced prices for Kotex, antiseptic douche solution, and vaginal douche syringes. The soda fountain’s ice cream sodas and “triple rich chocolate malted milk” and “elaborate candy department” were hardly designed to repel minors.\footnote{ICP-C, July 18, 1929 (6-7).} The PR piece quoted an unnamed company official as confiding that Ford Hopkins had entered into a long-term lease because it believed that Iowa City was “‘destined to become a large and important city. We make a complete study of a city before deciding whether it can support so large a store as ours. We carefully analyze its resources, its location, and its people.’”\footnote{“Ford Hopkins Store Ready,” ICP-C, July 18, 1929 (15:1-2).} Whether that market analysis included the local demand for cigarettes, especially among the students who formed such a large proportion of the city’s population and whose campus was just across the street from the store, the article failed to reveal. (In fact, as early as 1915 the cigarette industry was very attentive to college students as consumers: that year, when the city council of Columbia, Missouri, where the University of Missouri was located, made cigarette smoking in public, allegedly “for the first time in history,” a “statutory offense,” the \textit{United States Tobacco Journal} called the city Missouri’s third best cigarette town, its desirability as a market stemming from the large number of college students, who made up one-fifth of the population.)\footnote{“Cigarette Smoking Statutory Offense,” \textit{USTJ}, vol. 84, Nov. 11, 1915 (1:4).} The company’s ad masquerading as an article also avoided discussing the question of whether in the long run the company could meet the payroll of “nearly a dozen assistants” at the soda fountain and ten store clerks if it was deprived of the legal ability to attract customers—who would breathe air cleansed and cooled every three minutes by a new ventilating system—by means of cigarettes. Instead, it rushed on to assure readers that the “interior incorporates a number of features seen in few stores west of New York.” In particular, “the walls were designed by John Greco, a famous painter who

\footnote{220ICP-C, July 18, 1929 (6-7).} \footnote{221“Ford Hopkins Store Ready,” ICP-C, July 18, 1929 (15:1-2).} \footnote{222“Cigarette Smoking Statutory Offense,” \textit{USTJ}, vol. 84, Nov. 11, 1915 (1:4).} The previous week the council had raised the license tax from $10 to $250, prompting a violent protest; in retaliation the council “decided to throw cigarettes out of town altogether.” The \textit{Journal} cited “local opinion” to the effect that the action reflected “a hysteria that any small-town public is likely to contract, and consequently cannot be cried down too quickly or severely.” Purportedly dealers were in the process of finding a lawyer to secure quick repeal an allegedly flagrantly unconstitutional measure.
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

decorated two Raphael-loggias in the Vatican for the late Pope Leo.223

A few days after the grand opening, to which many were doubtless lured by the offer of a box of free miniature toiletry gifts, the company published a large advertisement in the Press-Citizen both thanking and apologizing to the public:

For surely never before had so many people come to any store in Iowa City in one day—9,687 people—(by door count) passed through Ford Hopkins last Saturday!

To the many thousands who could not get near the counters to be waited on—for the items which were completely sold out—

We Sincerely Apologise.

We had prepared a complete stock—far larger than even Chicago or New York stores carry. We had trained 10 Iowa City men and women—BUT NO QUANTITY OF DRUGS and DOUBLE THE SALESFORCE WOULD HAVE BEEN ENOUGH, so far beyond our expectations was Iowa City’s appreciation of this BEAUTIFUL STORE, THE FRESH MERCHANDISE and the LOW PRICES.

We wish to thank the many Iowa City business men, the university, the banks, the Press-Citizen, the Daily Iowan, and many others for their floral tributes and active cooperation.224

The gala was marred only by what no store in New York or Chicago lacked—the cigarettes and the accompanying profits that the denial of a permit put out of legal reach. Until Ford Hopkins managed to obtain one that would enable it to supply the “FRESH DRUGS” in that particular commodity, “graduate and registered pharmacists” would be confined to advising customers on a variety of other drugs that would defeat deafness, make “rheumatics wild with joy,” or make it possible for them to eat pickles, lobster, and pie without gas or bloating.225

By May 1930 the Cedar Rapids city council had been receiving complaints for months from local dealers that chain stores were selling cigarettes below cost as a way of attracting customers. After the assistant city solicitor had reported that chain stores had not fought Marshalltown’s denial of cigarette permits to them and read aloud a state attorney general opinion that councils were empowered to deny permits without giving reasons, the Cedar Rapids city council unanimously passed a resolution denying permits to chain stores once their existing ones expired in June. Making explicit the pressure that dealers had exerted in Iowa City two years earlier, councilman (and former mayor) Louis

224ICP-C, July 25, 1929 (3:4-7).
225ICP-C, July 25, 1929 (3:4-7).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

Roth remarked that he “could see no reason why the council should allow five or six stores to jeopardize the legitimate business of some 110 others who pay $100 each into the city treasury annually for permission to sell cigarets” (meaning that it would be irrational to sacrifice $11,000 in tax revenue to retain $600).226 The chain stores, which were selling two packages of cigarettes for 25 cents plus tax, announced, according to The New York Times, that they “would appeal the case to the highest Federal court, if necessary, on the grounds that the City Council had no right to seek to fix the price of a commodity.”227 The threat appears to have been mere braggadocio: no decision in such a case was ever published.

In Iowa City the dispute with the chains came to a head at the session of August 1, 1930, when the council by a vote of 4 to 2 initially passed a resolution directing the clerk to issue a permit to Ford Hopkins after all. This time Bywater and Van der Zee supported approval, joining Democrats Leo Kohl (the press room foreman) and Charles Regan (nursery owner), while Democrat LeRoy Mercer (vice president of his family’s Economy Advertising Company, one of the city’s largest and oldest manufacturing industries) and Republican Lou Kaufmann (a meat market owner) opposed issuance.228 Then the council, faced with yet another application from A & P (this time for two permits), split 3 to 3 after Bywater had switched to the anti-group, necessitating a tie-breaking vote by Democratic Mayor Carroll, whose Nay caused the motion to fail. Apparently sensing which way the majority sentiment had now drifted, Bywater, seconded by Kaufmann, moved to reconsider the vote on the Ford Hopkins permit; against only Van der Zee’s opposition, the council voted 5 to 1 to reconsider, and then by a vote of 2 to 4 (only Van der Zee and Kohl from the original majority continuing to vote Aye) defeated the resolution to grant the permit.229 Immediately thereafter Bywater’s motion that the Ordinance Committee “bring in an ordinance limiting the number of cigarette permits to the number of permits now issued” carried.230

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226“City to Bar Chains from Cigaret Sales,” EG, May 1, 1930 (25:1). Interestingly, when asked why the council did not merely refuse to renew the permits without explanation, Roth replied that such action would be “‘arbitrary.’” Id.


228Iowa City City Council, Minutes of a Regular Meeting of Aug. 1, 1930, 20:600. The occupational data are taken from: “Of Interest to Every Voter,” DI, Mar. 24, 1929 (10:5-8) (Democratic City Central Committee political advertisement); Smith’s Directory of Iowa City and Johnson County, Iowa: For 1930, at 171, 199, 238; “Life Sketches of Five Office Seekers Told,” DI, Mar. 29, 1931 (1:1-2). Regan had taken the seat held by Democrat Charles Sample in early 1930.

229Iowa City City Council, Minutes of a Regular Meeting of Aug. 1, 1930, 20:600.

230Iowa City City Council, Minutes of a Regular Meeting of Aug. 1, 1930, 20:601.
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

The *Press-Citizen*, which made the invasion by “aldermanic rigmarole” responsible for the twofold refusals, offered two reasons for the council’s action, which may not have been consistent with each other: “there are enough cigarettes sold in Iowa City at the present time” and “no more retailers of cigarettes were needed in Iowa City....” It is unclear whether inserting a low-price chain-store seller into an already physically crowded market would have widened the market or merely reduced the prices and profits of local merchants. To be sure, those resulting lower prices might have increased sales.

In spite of these actions, on August 8 the council voted unanimously to place Ford Hopkins’ application on file for further consideration, but, as the *Press-Citizen* noted, “Ford Hopkins is a chain store and heretofore such stores have been refused licenses.” The council treated A & P’s two applications the same way two weeks later, Van der Zee alone voting Nay because he opposed “the delay”.... A Ford Hopkins representative appeared before the council on September 19 to make “an urgent appeal” for a permit. He sought to convince the members that its “local store was a public servant, that they received many calls for cigarettes and that cigarettes belong to a drug store. He said further that...Iowa City was the only city that had denied the company’s stores a cigarette license,” and cited, not so subtly, instances in other cities in which court action had forced the city councils to issue permits. Prefiguring the litigation strategy that Ford Hopkins would soon pursue, the company’s agent—as the State University of Iowa student newspaper, which was following the dispute carefully, reported—argued that “independent merchants” in Iowa City were “charging illegitimate prices,” whereas “a chain store selling at lesser amounts would save persons thousands of dollars annually.” The council, after hearing a “lengthy discussion,” during which the representative quoted the (aforementioned) attorney

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232Iowa City City Council, Minutes of a Regular Meeting of Aug. 8, 1930, 20:604.
234Iowa City City Council, Minutes of a Regular Meeting of Aug. 19, 1930, 20:613.
235“Iowa City City Council, Minutes of a Regular Meeting of Aug. 19, 1930, 20:613. With the same voting configuration the council also placed on file the application of Mrs. Alice Goza. For the motion and roll call, see Iowa City Finance, Council Proceedings, Aug. 5, 1929-Oct. 1930, Roll. No. 110 (Iowa City Clerk’s Office).
general opinion, voted 4 to 3 to postpone action on Ford Hopkins’ application to its next meeting.

On September 23, Owen Elliott, a partner in the Cedar Rapids corporate law firm of Wheeler, Elliott & Shuttleworth, wrote Democratic city solicitor Will Hayek that it had been retained by Ford Hopkins Company, which had authorized the lawyers to file suit against the city if it did not issue the cigarette permit. However, since Elliott understood that there was a possibility that the permit would be granted at the council meeting on September 26, the firm would refrain from filing the action until after the meeting, unless Hayek informed him that the council had “definitely determined not to issue the permit....” Although a score of local merchants with cigarette permits and wholesalers, along with Ford Hopkins representatives, attended the meeting on September 26, none addressed the council. Faced with pending applications from Ford Hopkins and Quality Lunch, the council, “[t]aking a definite stand and defying threatened legal action,” passed a resolution to deny both of them on the grounds that “there are already large numbers of permit holders in Iowa City and each permit granted places an additional burden on the City to enforce a law relative to the sale of cigarettes to minors.” The 4 to 2 vote found Van der Zee and Kohl in the minority. As important as this motive may have been and as sincerely as the majority may have meant it, the council failed to reconcile this objective with the fact that as early as 1924 it had granted a permit to sell cigarettes at the city’s own Recreation Center. On the other hand, the plausibility of the council’s

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239Iowa City City Council, Minutes of a Regular Meeting of Sept. 19, 1930, 20:636 (Bywater, Mercer, Piper, and Kohl voting Aye, Van der Zee, Kohl, and Kaufmann Nay). The erroneous recording of Kohl as having voted both Aye and Nay should presumably be corrected by substituting Regan, who had made the motion, for him as having voted Aye.
241O. N. Elliott to Wm J. Hayek, Sept. 23, 1930, in Iowa City Finance, Council Proceedings, Aug. 5, 1928-Oct. 1930, Roll No. 1 10 (Iowa City Clerk’s Office).
243“City Council Takes Stand and Defies Legal Action; Denied Cigarette Permits,” ICP-C, Sept. 27, 1930 (3:1).
244Iowa City Finance, Council Proceedings, Aug. 5, 1929-Oct. 1930, Roll No. 1 10 (Sept. 26, 1930) (Iowa City Clerk’s Office).
245Iowa City City Council, Minutes of a Regular Meeting of Sept. 26, 1930, 21:13 (Mercer, Piper, Kaufmann, and Regan voted Aye, while Bywater was absent).
246Iowa City City Council, Minutes of an Adjourned Meeting of Oct. 17, 1924, 18:171.
trepidations about facilitating minors’ access to cigarettes was underscored by Ford Hopkins’ conscious efforts to attract children to its stores. In opening a store elsewhere in 1932, an “important executive official” of the company candidly told the press that “‘when we decide to establish a Ford Hopkins drug store in a city, we try to get the very best location, one which is easily reached and accessible to the farmers, to every city resident and above all, to school children.”

**Ford Hopkins Unsuccessfully Requests the District Court to Order the City Council to Issue a Permit**

On October 2 Ford Hopkins, as a seven-column banner headline blared across the front page of the university’s student newspaper,” filed an action in equity in Johnson County District Court against the City of Iowa City, the mayor, the council members, and the city clerk, complaining that the defendants had violated their statutory “duty” to issue the company a cigarette permit by arbitrarily refusing to issue it, and seeking a writ of mandamus ordering the defendants to grant and issue the plaintiff a cigarette permit. The company alleged that the city had granted many permits to others retail drugs stores, whose cigarette sales were “lucrative and profitable,” whereas Ford Hopkins was unable to sell cigarettes to customers who asked for them and then left the store without buying anything. The only reason that the city had ever given for denying the permit, according to the petition, was that increasing the number of permits beyond the large number already outstanding would impose a greater enforcement expense on the city. In fact, Ford Hopkins claimed, this reason was a “sham, false and made for the sole purpose of masking the motive which actuated” the city—namely, the company’s being a “so-called ‘chain store.’” Presumably in order to reinforce the allegation of arbitrariness, the plaintiff pointed out that the city had issued permits to two or more drug and/or cigar stores owned by the

249Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Petition in Equity, in Appellant’s Abstract of Record at 2, 3, 9, 10.
250Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Petition in Equity, in Appellant’s Abstract of Record at 4.
251Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Petition in Equity, in Appellant’s Abstract of Record at 5.
same person, thus arbitrarily discriminating even among chain stores, although Ford Hopkins’ hands were clean in the sense that it had never violated the cigarette law or encouraged minors or anyone else to violate any Iowa laws; moreover, its place of business was “not a place where loafers and lawless people congregate....”\textsuperscript{252} The defendants’ purpose in discriminating against Ford Hopkins was rooted in their “attempt[ ] to create a monopoly for the sale of cigarettes...by compelling the people of Iowa City...to purchase cigarettes from those dealers upon which the...defendants are pleased to capriciously bestow their favor....” Without explaining how limiting sales to 51 dealers (rather than 52) could create or sustain a monopoly, the company alleged that the “great loss and damage” that it incurred by being “deprived of profits”\textsuperscript{253} was also a deprivation of property without due process.\textsuperscript{254}

The defendants’ answer was substantive and set the terms for the resolution of the dispute. The city stressed that the refusal to grant a permit to Ford Hopkins was rooted in its “good faith effort to limit the number of places” where cigarettes could be sold to 51 and thus to “control the traffic in cigarettes” in a city in the “peculiar position” of having an “unusual proportion of minors”: of a total population of 15,000, more than 3,000 university students were under age in addition to a thousand in high schools and junior high schools. The city was acting in the youth’s interest because “the law recognizes the detrimental effect upon minors of the use of cigarettes” as witnessed by the ban on advertising them within 400 feet of any school. Since the law authorized the city council to determine “what permits” to grant and provided for declaring places selling cigarettes without such permits to be enjoineable and abatable nuisances, “compel[ling] the City Council to issue permits to all applicants in unlimited numbers violates both the spirit and letter of the law.”\textsuperscript{255} In refutation of the plaintiff’s allegation that the city’s denial of the permit was based on Ford Hopkins’ being a chain store it referred to its simultaneous denial to Mrs. Alice Goza; and to refute the charge of attempted monopolization the city pointed out that among the 51 sellers were five within a block of the plaintiff. Finally, the

\textsuperscript{252}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Petition in Equity, in Appellant’s Abstract of Record at 6. The stores were Whetstone’s three drug stores and Racine’s four cigar stores.

\textsuperscript{253}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Petition in Equity, in Appellant’s Abstract of Record at 9.

\textsuperscript{254}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Petition in Equity, in Appellant’s Abstract of Record at 8.

\textsuperscript{255}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Answer, in Appellant’s Abstract of Record at 11-12.
defendants denied that Ford Hopkins had any “legal right to demand a permit” because if it did, then any applicants would too and the “City Council would...be compelled to sanction and encourage the unlimited extension of traffic in cigarettes recognized as detrimental to the health and”—introducing the specter of a threat thereto absent from public policy discussions—“subversive of the habit of thrift in the youth....” Why the city council gauged 51 permits as the effective limit of enforcement city attorney Hayek explained no more than what the city had been doing to protect minors’ health and thrift before Ford Hopkins’ advent in 1929.

Johnson County District Judge R. G. Popham257 set the hearing on issuance of the writ for October 13.258 That first day numerous witnesses testified including councilmen, the mayor, and city clerk, as well as Ford Hopkins’ district manager, C. Paul Johnson, the local store manager, J. C. Gussmann, and Ruskin himself.259 The plaintiff’s “star witness”260—whom city attorney Hayek alternatively characterized as the company’s “pet witness”261—was, by a wide margin, councilman and professor Jacob Van der Zee, the only council member who testified on the company’s behalf. He recalled for Popham’s benefit that when Ford Hopkins applied for a permit in May 1929 “it was well understood” among the council members “that a permit should not be granted because the Ford Hopkins store was a chain store.” In particular, several (unnamed) members had stated before the vote that “the Iowa City dealers were opposed to a chain store getting a cigarette permit, that the chain store would undersell...the local dealers.” Moreover, no member offered any other reason, such as limiting the total number of permits, for denying the permit. A year later, around August 1,
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

when the company again applied for a permit, no local merchant tried to “get” him to vote against granting it, but about ten days later, Whetstone, whose three drug stores were all permitted to sell, did speak to him; without trying to influence Van der Zee, he told the councilman what cigarettes cost him wholesale and “that in order to continue to sell cigarettes, he should be allowed to sell them at the present prices.” As for the August 1 meeting, at which the council at first voted to grant Ford Hopkins’ application, Van der Zee testified that right after that vote a councilman predicted that A & P would be in to get its permits (which prediction immediately came true). Prompted by the company’s lawyer, Van der Zee complianantly explained that after the fact Hayek had advised the council that it would be empowered to deny permits on moral grounds or to limit their number. Incredibly, although Hayek had already objected to numerous questions, he said nothing at all when Ford Hopkins’ lawyer asked the professor whether Hayek had offered that opinion in response the council’s request as to “what excuse” it could give for refusing to issue the permit to the company. After giving his unequivocal Yes, Van der Zee testified that despite the council’s instruction to the Ordinance Committee—which he chaired—to present an ordinance, it never did, just as it also never tried to enforce the cigarette law or assigned the police to inspect cigarette sellers.262

Johnson (who by 1932 was the company vice president)263 stated that in the course of conversations with all the city council members about the permit application, he was told by John Piper, who was engaged in the wholesale and retail coffee business, that “personally he had no objections but for business reasons, if he voted for the chain store for cigarettes, he would lose a number of business accounts.” Similarly, LeRoy Mercer, who was involved in a soda bottling business that supplied several dealers, had told him that “he would be liable to lose a number of customers” if he voted to grant a chain store a permit.264 Johnson and Gussmann complained that the lack of a cigarette permit had a negative impact on Ford Hopkins’ ability to compete with six nearby drug stores (including three Whetstone branches)265 because customers—who demanded cigarettes every day—wanted to buy cigarettes in order to be able to make all

262Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 22-27.
263American Druggist, Directory of Chain Drug Stores 18 (1932).
264Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 28-29. Gussmann, who had been present, corroborated Johnson’s testimony about Piper. Id at 30-31.
265Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 32-33.
their purchases in one place. More generally, Johnson’s experience was that it was a benefit to a retail drug store’s general business to sell cigarettes. 266

Perhaps the most intriguing testimony was offered by Ruskin (modestly self-styled company general manager although he was also president), 267 who, after boasting that “[w]e do not permit people to loaf or congregate around our store in Iowa City, particularly young people”—and just to make sure, “[w]e also maintain a system of...store sharpers...[who] lay traps, so to speak, which would immediately detect any let down in the morale or the carrying out of the company’s orders and policies”—testified about an “experiment” that Ford Hopkins had performed in its store in Clinton, Iowa, which it opened after the council in Iowa City had refused to issue a permit in May 1929. Once the city council in Clinton had made it clear that it did not object to granting a permit, “we decided that for some months we would run our store without selling cigarettes and get the volume of business we did, comparing it with the time of the year, and then apply for the cigarette license.... As I recall we permitted that store to operate without cigarettes through the holiday season, to give it the benefit of the best time of the year, or at least rather close to it; then we applied and received our permits [sic] and started the sale of cigarettes, and we noticed a perceptible increase in business, and a great many comments by customers, stating that it made it much easier for them to purchase their drugs where they purchased their cigarettes, and there was a definite increase in business from almost the first week, and now the increase is very considerable.” 268 In light of this remarkable controlled experiment, which was self-serving but also self-inflicted short-term financial loss, it is puzzling that Ruskin, who presumably had initiated the plan in contemplation of precisely this litigation, failed to offer any quantitative estimate whatsoever of the loss of sales/profits caused by the lack of a permit.

Ruskin did provide quantitatively precise data on prices and apparently stylized (but perhaps real) data on turnover and planned/realized profit rates designed to project Ford Hopkins’ image as smokers’ benefactor, which did not prompt city attorney Hayek to ask whether lower prices might attract more underage smokers. After stating that the general wholesale per package price was 11.6 cents (minus 2 percent for cash discount) and the prevailing retail price in Iowa City was 18 cents (though he himself had also bought them there for as much as 20 cents), Ruskin purported to reveal this much about the firm’s profit-

266 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 30.
267 American Druggist, Directory of Chain Drug Stores 18 (1932).
268 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 34-35, 36.
price matrix:

We require that every dollar invested in merchandise return a certain profit; let us say..., just entirely for example, that that profit be 50 per cent. Now if that article of merchandise sells once a year, and it cost a dollar, then necessarily that sells at $1.50, that would be the fifty per cent profit. If the article had a turnover of ten times per year, we would only require five cents profit, or a profit of $1.05 to get our fifty percent profit back at the end of the year, the fixed overhead remaining the same throughout the year. It necessarily follows that with an item like cigarettes, a daily turnover of stock...it is not at all necessary for us to have a full margin of profit to [sic] get on our slow moving article, to realize the same return on our investment over a year’s period.

The general public gets the benefit of the increased turnover.\textsuperscript{269}

Defendants’ witnesses featured four named defendant councilmen and the mayor, all of whom swore that their votes against Ford Hopkins and/or A & P had absolutely nothing to with their being chains.\textsuperscript{270} Indeed, Councilman Kaufmann testified that he was unable to remember why he had voted to refuse to renew A & P’s permit or to grant one to Ford Hopkins\textsuperscript{271} (though he did insist that he had first begun “thinking there were enough cigarette permits in Iowa City when about thirty-five had been issued”).\textsuperscript{272} The most persuasive testimony, such as it was, came from Dr. Bywater, who did not smoke cigarettes, “[a]s a medical man...kn[e]w whether or not a cigarette is harmful to a minor,” and did “not believe in young girls smoking cigarettes.”\textsuperscript{273} Insisting that Ford Hopkins’ status as a chain store played no part in his vote against granting it a permit on August 1, 1930, Bywater testified that the only reason for his vote was that:

I think we have enough licenses in Iowa City, in fact I think we got too many as it is. We have all these young boys and girls here to look after and to protect, and the Ford Hopkins people have a store right in a prominent part of town where young people are passing all the time, they have got an attractive front that is more attractive than any store in Iowa

\textsuperscript{269}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 36.

\textsuperscript{270}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 49 (Charles Regan), 52-53 (L. H. Kauffman [sic]).

\textsuperscript{271}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 46.

\textsuperscript{272}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Second Amendment to Abstract at 9.

\textsuperscript{273}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 46.
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

City, it has a tendency to bring boys and girls into that store, and when they get in there why they can—in a position to buy their cigarettes. I think that the little store outside, in much more out of the way place, just to settle, the locality, is much more desirable than a store in a prominent place like Ford Hopkins, and I think we have too many places now.274

On cross-examination, Ford Hopkins’ lawyer, Owen Elliott, elicited from Bywater the admission that the plaintiff’s store was hardly the central commercial magnet of students:

The intersection of Clinton Street and Washington Street and the northeast corner thereof is probably passed by more students than any other corner in Iowa City. The student traffic is greater there than any other place in Iowa City. The corner is occupied by the Whetstone Drug Company which has a large business with the young trade. The Whetstone Drug Company makes a special effort to attract the student trade. It has a subpostoffice station and cashes students’ checks. The store is frequented largely by students and has a cigarette permit. It is a very attractive store inside and out. It has many times over the amount of student trade that the Ford Hopkins store has.275

Why, given their alleged solicitude for students’ well-being, neither Bywater nor any of his colleagues ever voted to deny a permit to Whetstone, which also had permits at two other stores in the downtown business district, the physician did not reveal. Nevertheless, the city council had no compunctions about annually renewing the permits of Whetstone Drug Company, locally owned but operating three stores each with a cigarette permit, despite the fact that the aforementioned branch was “a busy student center with post office boxes for fraternities and sororities” and famous for its sherbets, malted milks, and soda fountain.276 The council apparently perceived no contradiction between Whetstone’s perpetual and ubiquitous sale of cigarettes and the company’s boast on one of its anniversaries277 of “55 years of serving the public health.”278

274Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 41-42.
275Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 44.
276Irving Weber, Historical Stories About Iowa City 6:240 (1990). Store No. 1 was located at 32 S. Clinton St. at the corner of Washington St. Iowa City City Council, Minutes of a Regular Meeting of July 3, 1931, 21:204. This store’s “fountain served as a kind of a [sic] student union before the Iowa Memorial Union was built.” Irving Weber, Historical Stories About Iowa City 6:287 (1990).
277“Three Whetstone Stores Observe 55th Anniversary,” ICP-C, July 9, 1929 (2:5-6).
278ICP-C, July 9, 1929 (12) (full-page ad). The next year the store advertised to
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

That Bywater had never visited any of Racine’s four stores or a pool hall to “see whether it was a fit place to be granted a permit” and “never made any attempt to find out where these minors purchased these cigarettes” suggests that his devotion to “safeguarding the morals of the youth” was as staunch as his conviction that increasing the number of permits from 51 to 52 “would be a tremendous detriment to the youth of Iowa City”—especially since he admitted that he and the other councilmen had, despite their alleged insight as far back as 1929 that there were enough outstanding permits, nevertheless “added some.”

And, to judge by the attention that the cigarette manufacturing oligopolists were paying to them, well might Bywater and his fellow councilmen have been concerned about the university students. The student newspaper, the Daily Iowan, which as early as the outset of 1924 had begun publishing small advertisements for Lucky Strike, soon was printing many large ads for the cigarette trust successors almost daily. By 1930, Liggett & Myers was hawking Chesterfield to SUI students, in a large advertisement featuring a football player motif, as so mild that “You don’t have to learn to like them.” Indeed, two days after Bywater had testified university students read that: “You can bet your bottom dollar—They Satisfy.” This print immersion was not confined to cigarettes or national manufacturers. Racine’s, which in tamer days had advertised its malted milks, now urged students (in the same issue of the paper detailing Ford Hopkins’ efforts to persuade the city counsel to issue it a permit) to take “A Pipe Course” at its four stores.

Elliott, aided by one witness’s apparent ineptitude, effectively undermined the defendants’ monolithic narrative. On cross-examination, Elliott asked Le Roy Mercer, who had just testified that he had never even given any thought to Ford Hopkins’ chain-store status, why suddenly, after having voted to grant 51

students that whatever they wanted from a drug store Whetstone would send over. DI, Nov. 25, 1930 (6:4-5).

279Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 44-47.
280DI, Jan. 8, 1924 (3:5).
281E.g., DI, May 2, 1926 (7:1-3), Mar. 25, 1927 (7:2-5) (Lucky Strike), Feb. 7, 1928 (8:5-8) (Camel), May 24, 1928 (8:5-8) (Old Gold).
282DI, Oct. 19, 1930 (10:5-8).
283DI, Oct. 15, 1930 (6:3-5).
284DI, July 19, 1921 (4:2-3).
285DI, Sept. 20, 1930 (6:4-5).
286Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 57.
permits, he concluded that there were already enough permits in Iowa City:

A. Well, you are always getting new thoughts and they have to come to you at one
time or the other.
Q. And this thought broke in on you that night?
A. Yes, it came right then.
Q. The thought just snapped into your mind then?
A. Just popped right out.
Q. How did it happen that the same thought came to—how many councilmen was it
there, five of them, right that one night of Aug. 1, 1930?
A. Mental telepathy, I imagine.\

Hayek did not even bother to try to rehabilitate his witness on redirect.\

The defendants’ final witness was James Carroll, Democratic mayor since
1925 and owner of a meat market, who, at least in the version of the testimony
that Ford Hopkins printed for the record presented to the Iowa Supreme Court,
allegedly testified on direct examination that he had broken the tie vote on and
opposed A & P’s application on August 1, 1930, “because it was a chain store.”
In reality, as the city pointed out in its Denial of Appellant’s Abstract of Record
and Amendment to Abstract, Carroll had expressly denied that he had voted
against granting the permit on the grounds that A & P was a chain. His precise
motivation, however, remained unclear. When Hayek asked him directly what his
reasons had been for voting no, the mayor, after Elliott had objected to the
question’s irrelevance, replied that it had been his first opportunity to vote No on
a cigarette permit. Instead of continuing and stating his reasons, Carroll was
interrupted by Hayek, who asked: “Do you believe in the issuance of a great
number of permits in...Iowa City...?” Neither his denial nor his reasons—“Morals

287 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s
Evidence, at 58.

288 Pursuing a serendipity defense, in an appeals brief the city insisted that the trial
judge “clearly and plainly was convinced” that the “City Council seemed to believe that
the sales of cigarettes must be limited and they must put a stop somewhere and sometime,
and the only arguments appellant has is imputing bad faith because the stop happened to
be made upon the application of the Ford Hopkins Company....” Ford Hopkins Company
v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on
Resubmission at 66.

289 1920 Census of Population (HeritageQuest).

290 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s
Evidence, at 58-59.
and welfare of the young people—were more plausible than the councilmen’s, but, unlike them, the mayor was able, without fear of refutation, to suggest that the fact that his first (No) vote was directed at A & P was purely coincidental. (Ford Hopkins’ lawyers’ excuse for the falsified record testimony—“the apparent misquotation was due solely to a mistake or inadvertence of the printer”—was about as credible as the councilmen’s denial that they had voted against granting the permits because the stores were chains.) He also stated that there was “quite a bit of smoking among minors in Iowa City,” which the police had “made an attempt to curb....” On cross-examination he added that although the police chief had tried to find out where minors got cigarettes, he personally had not, confining his own investigative activities to “find[ing] out where students...are loafing. I find that they are loafing in pool halls that have been granted permits to sell cigarettes by the City Council....” The mayor had seen them loafing in drug stores, including Whetstone and Ford Hopkins.

The lawyers’ arguments occupied the session on October 14. City solicitor Will Hayek argued that the council’s “sincere effort to restrict the sale of cigarettes” on behalf of the large number of minors “should be praised....” The company’s lawyers contended that it was impermissible for cities to discriminate arbitrarily among persons engaged in the same business.

On December 5, 1930, Judge Popham—who after leaving the bench became law partners with Will Hayek, the Iowa City city solicitor who had litigated the case before him—issued his judgment, which had been awaited with “great anticipation” in Iowa City and “over the state,” that “the equities are with the defendants,” dismissing the petition without any substantive opinion.

291 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Denial of Appellant’s Abstract of Record and Amendment to Abstract at 3.
292 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Reply Brief and Argument at 3.
293 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 59-60.
296 “Court Upholds City in Cigarette License Case,” ICP-C, Dec. 5, 1930 (2:1).
297 Ford Hopkins Company v. City of Iowa City, Iowa, Judgment and Decree (Johnson County Dist. Ct., Cause No. 24417, Dec. 5, 1930) (archived at Johnson County Courthouse).
The Republican Iowa Supreme Court Reverses the Trial Court

Ford Hopkins quickly filed a notice of appeal to the Iowa Supreme Court, which ruled that the case would be heard in March 1931. In its brief the company failed to formulate precisely what question(s) it was submitting for the Court’s resolution, but it seemed to be requesting: (1) a fact finding that the city council’s declared reason for denying the permit (namely, that it was limiting the total number of permits to 51) was a “subterfuge,” whereas the real reason was that Ford Hopkins was a chain store; and (2) a legal finding that this latter reason was impermissible because the council had admitted the plaintiff’s “equality...with others to whom permits had been granted” without giving Ford Hopkins “an equal opportunity to compete for permits.” The plaintiff charged that the council, in an attempt to legitimate its discrimination against chain stores and in favor of local merchants, “began a systematic course of conduct solely for the purposes of anticipated litigation consisting of numerous self-serving acts and declarations and manifested an intense interest in the morals and welfare of the youth of Iowa City..., an interest which had lain dormant for many years, but was suddenly inflamed by the necessity of finding an excuse for denying a cigarette permit to a so-called chain store.” Although Ford Hopkins made the aforementioned point that the use of “may” in the statute created the “absurd result” that city clerks had discretion not to issue the permits that city councils had granted, whereas county auditors lacked such discretion vis-a-vis county boards of supervisors, its attempt to salvage some meaning for the word by claiming that it was “merely used to indicate” whether an applicant was to apply to a council or board was implausible. As an alternative or fallback position,

298Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Notice of Appeal, in Appellant's Abstract of Record at 63 (Dec. 9, 1930); “Drug Company Appeals Case,” ICP-C, Dec. 12, 1930 (2:6).
299“Supreme Court to Consider Cigarette Appeal in March,” ICP-C, Dec. 16, 1930 (2:4).
300Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 2.
301Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 15.
302Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 22.
303Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 30.
the plaintiff, admitting for the sake of argument that by the use of “may” the legislature had conferred some discretion on city councils, conceded that the word “might very logically be held to confer” on the city council the discretion “to determine whether or not cigarettes would be sold within the city limits” in the sense of a binary local option. Mockingly, Ford Hopkins suggested that the council should indeed have exercised that option and prevented the sale of cigarettes if it had really been “so desirous of protecting the numerous minors within the city...” But once the council had decided to grant some permits, it lost any further discretion because—as the company, without any textual support and in complete disregard of the legislature’s clearly expressed intent to retain features of a police power even after licensure—the law, and in particular the mulct tax, was designed “solely for the purpose of revenue” and thus deprived the council of any discretion because under such a revenue law “every one who complies with the conditions expressed as to filing bond and paying the mulct tax is entitled to a permit.” As a final public policy argument, which would ring perversely today, but even in 1931, given the lingering concern for smoking initiation among minors, presumably drew whatever resonance it may have engendered from the lower incomes of the Great Depression, Ford Hopkins attacked the council’s purported capping of the number of permits (so as to exclude the chains) as logically resulting in allow[ing] those having permits to exploit the public and to maintain an artificial price level. ... The fear of the present permit holders who are so anxious to have a permit denied to this plaintiff is that if a permit is granted the present permit holders will not be able to maintain the artificial and unwarranted price of cigarettes which now prevails in...Iowa

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304Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 31.
305Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 49.
306Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 32.
307Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 15.
308Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 48. In fact, Ford Hopkins implicitly conceded that the council did retain some discretion by stating that the council could not refuse it a permit “when it brings itself in [sic] the same situation and class as those to whom the City Council has granted cigarette permits.” Id. at 32. Without explaining what those terms meant, the plaintiff was presumably conceding that the council could lawfully distinguish between and among applicants in different situations and classes.
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

City... It is the duty of the members of the City Council...to do those acts which will enable the people of Iowa City...to secure the benefits of free competition among merchants. ...

It is difficult to see how the defendants can profess to serve the great mass of the people who elect them and can exercise the powers “held by them in trust for the people of this municipality, and for the public generally,” when they vote to maintain an artificial price level on a commonly used article of commerce, particularly when the result of the artificial price level is to increase the wealth of a limited number at the expense of the majority.309

The city’s brief, filed in February 1931, was much more concise and focused. In contrast to the multiple and diffuse factual issues that Ford Hopkins presented to the court as the questions for resolution, the defendants articulated one question—whether a city council had “legal discretion to limit the number of...permits it will issue when in its judgment a greater number would be inimical to the safety, health, and morals of the inhabitants of the municipality and especially of its youth....”310 Although the medical and lay opinion that cigarettes were harmful for minors might not be universal, “where there are conflicting scientific beliefs...it is for the city council to determine upon which theory it will base its regulations....”311 The city rebutted the plaintiff’s suggestion that the city council lacked authority to limit the number of permits because it was not specifically granted by arguing that it was comprehended within the authority to refuse all permits.312 Hayek’s most transparently untenable argument was directed at refuting the plaintiff’s critique of the statutory meaning of “may.” His assertion that the statutory language confirmed the construction of the city council’s power as discretionary and “not merely ministerial” was nonsensically based on the further assertion that although the statute did use “‘may’” with regard to the council’s granting the permit and the clerk’s issuing it, the law also

309 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 48.
310 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument, at 2.
311 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument, at 16. Bizarrely, Hayek injected his “personal opinion...that the youth should be confronted less frequently with the appealing cigarette.” The sole basis for this opinion was his equally bizarre reference to a finding in a series of tests by “Miss Frey, former research worker in Iowa City,...that cigarette-smoking coeds fell 13.3 per cent. below non-smokers in physical efficiency.” Id. at 13.
312 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument, at 13.
went on to use “‘may’” for the county board of supervisors and “‘shall’” for the county auditor. It is difficult to imagine that Hayek had failed to understand that these disparate, irreconcilable, and ultimately incoherent uses of “‘may’” could, when subjected to a purely abstract semantic interpretation, devoid of analysis of the legislative history (including the sloppily drafted, but ultimately meaningless, word changes) and purpose, not ground city councils’ discretionary powers.313 Finally, the defendants, while staunchly denying that they had denied Ford Hopkins a permit because it was a chain store, remarkably conceded that “[w]e do not contend that appellant may be discriminated against because it is a chain store.” Their much more modest contention was simply that the plaintiff had not carried and could not carry its burden of proving that the council’s decision to limit the number of permits in order to enforce the ban on selling to minors more effectively—the real reason for denying Ford Hopkins a permit—was capricious and arbitrary.314

The plaintiff’s reply brief of March 1931 was even testier and more sarcastic than its previous submission. Although skepticism regarding council members’ asseverations that their votes against A & P and Ford Hopkins had not been motivated by anti-chain store sentiments was hardly out of place—surprisingly, nowhere did the plaintiff seek to buttress its claim of discrimination by pointing to similar litigation in Perry and Waterloo and the city council’s action in Cedar Rapids, where Ford Hopkins’ law firm was located—the plaintiff went far beyond challenging the city council’s “good faith” and its being in cahoots with “Mr. Whetstone and other local merchants [who] didn’t want their profit-seeking monopoly interfered with”315 by charging bias on Judge Popham’s part: “Even the trial court, anxious as he [sic] was to find in favor of the City Council, would not go to the extent of declaring the action of the City Council was in good faith.”316

313 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument, at 16-17. Hayek revamped his analysis in the defendants’ petition for rehearing, but it remained absurd. He asserted that the legislature used “‘may’” because cities had “‘various agencies for performing ministerial duties such as Mayors, City Clerks, City Auditors, Collectors, and others,’” thus implying that the council “‘might designate this ministerial duty to others of its agents,’” whereas “‘shall’” reflected the uniform designation of auditors as the ministerial officer in the counties. Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 31.

314 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument, at 22 (quote), 13.

315 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Reply Brief and Argument at 7.

316 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s
The only further concession that the company appeared willing to make at this late stage of the litigation again pertained to the statutory term “may”: assuming, for the sake of argument, that the word indicated a legislative intent to confer some discretion on city councils, the plaintiff now acknowledged that such discretion was “of necessity limited to” (but in any event included) “a determination of the question whether the applicant for a license is a fit person qualified to have a license...”  

However, the most significant break with its previous approach that Ford Hopkins made in its reply brief was its plea to the Iowa Supreme Court to turn a new jurisprudential page by getting in sync with the age of normalcy’s acceptance of the sale and use of cigarettes as perfectly legitimate and normal commercial and social activities that had in fact become the norm:

At one time considerable sentiment opposing the sale of cigarettes was prevalent in some of the United States. Laws forbidding the sale of cigarettes were enacted. These laws were sustained by the Supreme Court of the United States solely upon the ground that the legislature could declare the public policy of the particular state. The prejudice against the use of cigarettes has disappeared, and the use thereof has become almost universal. The change of sentiment has been reflected in the various state legislatures which have repealed the legislation forbidding the sale of cigarettes. The legislature of the State of Iowa, at the 39th General Assembly, repealed previous anti-cigarette legislation and legalized the sale of cigarettes in Iowa. This act of the legislature was clearly a recognition of the change in public sentiment and was a recognition that the sale of cigarettes was a legitimate business.

As plausible as some of these empirical claims were, the far-reaching distorted interpretation of legislative history and intent that the company’s lawyers sought to hitch to them was mere assertion based on no reference whatsoever to the slightest shred of evidence:

There is nothing in the act authorizing the sale of cigarettes in Iowa which in any way indicates an intention on the part of the legislature to authorize local authorities to prohibit the sale of cigarettes by a particular individual or to limit the number of permits. Such construction is inconsistent with the legislative pronouncement.

\[\text{Reply Brief and Argument at 9.} \]

\[\text{\textsuperscript{317}}\text{Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Reply Brief and Argument at 15.}\]

\[\text{\textsuperscript{318}}\text{Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Reply Brief and Argument at 26.}\]

\[\text{\textsuperscript{319}}\text{Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s}\]
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

In the interim before the Iowa Supreme Court issued its decision on the appeal, the city council at its mid-year session in 1931, immediately after having directed the clerk to issue permits to 34 applicants, unanimously voted to adopt a resolution that stopped short of imposing a ceiling on the number of outstanding permits at any one time, although the Press-Citizen regarded the council as having “stood firm...on its previous decision about new cigaret licenses....”

WHEREAS, it is the desire of the City Council that the number of licenses to sell cigarettes and cigarette papers be limited and that permits be granted only to such persons, firms, and corporations as will comply with the law relative to the sale of cigarettes and cigarette papers, and before any permits are granted, except in cases where the City Council has knowledge of the record of the applicant as to the observance of the law, investigation shall be made, therefore,

BE IT RESOLVED, that permits be granted to such persons, firms, and corporations only as have previously been granted permits, and that all other applications be filed and action thereon deferred pending investigation as to the question of the qualifications of the applicants and the general limitation of the number of permits to be granted.

In a fractured opinion issued in February 1932, the Iowa Supreme Court—none of whose members was a Democrat—reversed Judge Popham’s denial of mandamus, ruling instead that the city council should have granted Ford Hopkins Company a permit. Written by Republican Justice Elma Albert (1925-36), the opinion was concurred in by Republican Justices Lawrence De Graff (1921-32) and John Grimm (1929-32), who, remarkably, had, until his appointment to the Court, been a name partner in the Cedar Rapids corporate law firm that represented Ford Hopkins in the case he decided and that he rejoined immediately after resigning from the Court in 1932. It became the majority opinion of the nine-member Court because Justices Edgar Morling (1925-32) and James Kindig (Republican, 1927-34) specially concurred in it.

Albert framed the case as dominated by two interlocking questions: Did the city council have “any discretion whatever” in acting on plaintiff’s permit application? And if so, what limits were placed on the exercise of that discretion?

Reply Brief and Argument at 26.

321Iowa City City Council, Minutes of a Regular Meeting of July 3, 1931, 21:204.
322All were Republicans except Edgar Morling, whose various biographical sketches mentioned no party affiliation. State of Iowa: 1929-30: Official Register 201 (33d No.); State of Iowa: 1931-32: Official Register 213-14 (34th No.); State of Iowa: 1933-1934: Official Register 54-56 (35th No.).
323Martindale’s American Law Directory 273 (1929); http://www.judicial.state.ia.us
Albert concluded that although factually the record did “not show the reasons for the refusal of this permit,” there was no doubt that the council had discriminated against Ford Hopkins, even vis-a-vis other chain stores. The council, however, took the position that it had “a broad and unqualified discretion to grant or refuse a permit for any reason deemed by it, in good faith, to be sufficient.” This “absolute discretion” derived, according to the defendants, from the legislature’s use of “may” in authorizing councils to grant permits.324

Albert rejected this absolutist, but good faith-constrained, interpretation because:

A review of the past legislation touching this subject shows that until the adoption of the present law, the sale of cigarettes and cigarette papers was absolutely prohibited under the statutes of this state. Their sale is still prohibited unless a permit for the sale is procured in the manner provided by law. It is apparent, after reviewing the past and taking into consideration the present legislation on this subject, that the purpose of the Legislature in passing the present law was to give each municipality designated in the statute the right to say whether or not cigarettes should be sold within its boundaries. In other words, it was the “local option” statute pure and simple, and the use of the word “may” in the above statute shows that was the intent of the Legislature, and thereunder each municipality might determine for itself whether or not cigarettes should be sold within its boundaries.325

To this analysis explaining that the legislature had empowered local governments to prohibit the sale of cigarettes Albert then tacked on this non sequitur: “It necessarily follows from this that when the city council has determined that cigarettes shall be sold within its boundaries, every applicant for a permit who complies with the requirements of the statute is entitled to a permit.”326 Albert failed to justify his interpretive leap that denied that a conceded legislative conferral of all-encompassing power to prohibit all cigarette sales excluded the authority to limit the number of permits in order to insure adequate enforcement consistent with the city’s budgetary resources. The only requirement or qualification that Albert found in the statute for being granted a permit was owning or operating the place where the sales were to be made. Thus

324Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 687-88 (Iowa 1932).
325Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 688 (Iowa 1932).
326Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 688 (Iowa 1932). The defendants ironically characterized this discretion as dying “upon its being exercised”; alternatively, “as soon as the Council has...granted a permit to one person, then the word ‘may’ in the statute is,...by some subtle alchemy, turned into the word ‘must.’” Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 7, 8.
once the council decided that cigarettes may be sold, and once it found that this
“condition precedent” had been met, “there is nothing left for the city council to
do except to grant such permit.” The majority’s lame exegesis of the word “may”
was that it was designed to indicate that the council “‘may’ refuse to grant a
permit” if the applicant did not own or operate the place where the cigarettes were
to be sold.\footnote{Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 688 (Iowa 1932).} However, this interpretation was illogical and incoherent since the
legislature conferred no discretion on councils to grant permits to applicants who
lacked this qualification; on the contrary, it was, according to Albert, the only
basis for denying a permit. Nevertheless, the majority, reversing the trial court,
held that the council should have granted Ford Hopkins Company a permit.

The special concurrence was based on the asserted grounds that the evidence
conclusively showed that the city council’s denial of a permit was unlawful
because it was “discriminatory and purely arbitrary....” In other words, Morling
and Kindig did not subscribe to the rest of Albert’s opinion, but merely agreed
with the outcome because they took the position that no matter how much
discretion the legislature conferred on councils, it could not have lawfully
encompassed this kind.\footnote{Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 689 (Iowa 1932).}

Despite the majority opinion’s narrow, if not crabbed, basis, it is crucial to
observe that even the majority fully acknowledged that, without any doubt, the
legislature had empowered local governments to perpetuate the prohibition on
cigarette sales that had been initiated in 1896.

The dissent, written by Republican Justice Frederick Faville (1921-32) and
concurred in by Republican Justices Henry Wagner (1927-32), Truman Stevens
(1917-34), and William Evans (1908-34), criticized and refuted the entire basis
of Albert’s approach. Although the dissenters did not deny that city councils
were empowered to ban all cigarette sales if they so chose, they correctly pointed
out that:

The statute does not contemplate any such thing as a general resolution of a city council
as to whether permits to sell cigarettes shall or shall not be granted within the municipality.
Section 1557 makes the granting or refusal of a permit a personal matter between the
applicant and the city council in each and every separate and individual instance. ... There
is not a hint in the statute as to any general resolution of the city council as to whether
permits to sell cigarettes shall or shall not be allowed within the municipality.\footnote{Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 689 (Iowa 1932).}
Instead, Faville observed:

The whole history, theory, and purpose of the statute is to make the permit a trust granted by proper local authority which renders the holder immune from prosecution for that which, but for the permit, would be a crime. It is most distinctly and essentially a police regulation. By the very terms of the statute the duty is imposed upon the city council (or board of supervisors) to determine who may be thus rendered immune from criminal prosecution. The Legislature used the word “may” advisedly and intentionally. By express, direct, and unambiguous language it placed a discretion and a responsibility as well upon the local authorities.

In my judgment, it is a clear perversion, not only of the intent but of the very language of the statute, to hold that because the city council may grant a permit to one proper applicant, ipso facto it must grant a permit to each and every applicant, regardless of who or what such applicant may be, save only, as the majority say, the applicant “owns or operates the place from which sales are to be made.” Under such a holding the Y. M. C. A. and the notorious bootlegger stand on an absolute equality, and each must be clothed with the trust to do that which otherwise would be a crime.

The law does not so provide, and we should not enlarge it beyond its plain and explicit language.

It is the universal holding that in statutes of this character the word “may” is to be construed as permissive and not mandatory. The decisions are almost without number and can be found in Words and Phrases, First, Second, and Third Series, under the word “May.” The majority construe the word as mandatory instead of permissive. They make it the equivalent of “must,” which is directly contrary to every rule of construction as applied to statutes of this character. ... I think the city council has not only a right but a duty under this statute to properly exercise its discretion as to whether a permit shall be granted to any individual applicant, and that duty involves much more than merely ascertaining whether or not the applicant owns or operates the place where the sales are to be made.330

Turning to the facts, the dissenters noted that once the council had issued 51 permits, on August 1, 1930, it ordered its ordinance committee to draft an ordinance limiting the number of permits and granting none beyond that level. Shortly thereafter both Ford Hopkins and another applicant filed applications, both of which the council denied while adopting a resolution explaining that with the already large number of existing permit holders, granting additional permits burdened the city’s ability to enforce the law regarding the sale of cigarettes to minors. Following this denial, the dissenters found, the council had denied all applications. This self-limitation was simply an exercise of the legislatively conferred discretion, for which the Supreme Court was not authorized to

330Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 690 (Iowa 1932).
substitute its own discretionary judgment as to whether the cap should be set at a higher number. 331

As far as the plaintiff’s claim was concerned that the council had acted arbitrarily because its denial of the permit was based on Ford Hopkins’ status as a chain store, the dissenters argued that the trial judge had correctly ruled that the plaintiff had failed to prove this point. However, even if the council had refused the permit on these grounds, the dissenters argued that such a judgment would still not have been so arbitrary as to justify issuance of a writ of mandamus: “Many good reasons could well be urged why a city council might hesitate to grant a permit to a foreign corporation, with only employees living within the city where the permit was granted, and with the possibility of frequent changes in such employees. The law contemplates a large degree of personal responsibility on the part of one to whom the permit is granted and we should not hold, as a matter of law, that the refusal of a permit to a foreign corporation operating as a chain store is such an arbitrary classification as to require the court to hold it to be void.” 332

The Democratic Iowa Supreme Court Reverses Itself

Three days after the Iowa Supreme Court had handed down its decision, the press reported that the city council might seek a rehearing based on the ruling’s nature and closeness. 333 A week later Ford Hopkins filed another application for a permit, 334 which the council tabled pending the city attorney’s report on the advisability of petitioning for a rehearing, which the council then promptly decided to instruct Hayek to request. 335

In its petition for rehearing the council lashed its fate to the dissenting opinion so irretrievably that it ventured the sarcastic blast that the dissent was so “able, logical and... convincing” that “[t]he only reason that we can think of for” the majority’s not having adopted it was “that the majority did not read it.” 336 The

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331 Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 691 (Iowa 1932).
332 Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 691 (Iowa 1932).
334 Application for a Cigarette Permit (Feb. 19, 1932) and Bond for Sale of Cigarettes (Feb. 19, 1932). Iowa City Finance, Council Proceedings, Nov. 1931-Apr. 1933, Roll No. I 12 (Iowa City Clerk’s Office).
335 Iowa City City Council, Minutes of an Adjourned Meeting of February 19, 1932 (21:313); “Council Asks Re-Hearing of Cigaret Case,” ICP-C, Feb. 20, 1932 (2:8).
336 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 7.
city forcefully sought to extend the boundaries of its discretionary power to grant cigarette permits by contending that it “had the right to refuse to grant a license to the appellant solely on the ground that it was a ‘chain store’...and such a decision would not be arbitrary” because “granting...a license to carry on a detrimental and tolerated business contemplates a consideration of all the qualifications of the applicant as bearing on the probable manner in which the business will be conducted. [T]he difference between a store owned by a non-resident corporation, and operated entirely by hired servants, many of whom are not even permanent residents of the city, and a store owned and operated by a resident taxpayer, who is presumed to have the moral welfare of his city at heart, is such as to justify a distinction or discrimination in granting a permit...”

The city’s aggressiveness was also reflected in its belittling Ford Hopkins’ position of basing “its desire to sell cigarettes upon no other ground” than wanting to “make a little more money” rather than an “intention...to advance the morals, or improve the health or benefit in any way the citizens of Iowa City, whether young or old.” But the heart of the defendants’ petition was its very expansive, yet (largely) historically accurate, portrayal of the discretion that the legislature had conferred on local governments to suppress or promote cigarettes. Although akin to the dissenters’ approach, the city’s went even further in arguing that:

The Legislature did not intend when it prohibited the sale of cigarettes and then only allowed their sale under certain conditions and upon the granting of a license to so arrange it that every place of business in a town should be allowed to sell cigarettes. The Legislature evidently did not intend to make it extremely convenient for everyone to purchase cigarettes without going more than a block away from home; yet such situation may very readily develop if the Council of the City has no authority or power to limit the number of licenses.... Even entirely aside from moral grounds for such limitations or if not moral, at least, grounds which took into consideration an attempt to diminish the evil of the sale and use of cigarettes, particularly by minors, the Council had a right to take into consideration the financial situation or its effect upon the town and the revenues of the town. It had the right to say, “the more cigarette licenses were issued, the larger will be the revenue, and therefore, we will issue all the cigarette permits that are asked for and not only that, we will encourage people to ask for them.” On the other hand, they had the right to consider the overhead or expense that they would incur in any additional inspection or police control that might be required to see that the law as to selling cigarettes to minors

337Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 6.

338Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 41.
was obeyed. They had a right to figure, for instance, that one additional policeman could perform all the additional work required to keep track of fifty places where they sold cigarettes, but that he could not take care of any more than that and therefore, the granting of one, two or a dozen more would create an expense greater than the revenue derived. ... The council...had the right to consider that the more places...that were licensed to sell cigarettes, the more temptation there would be on the part of each place to sell cigarettes to minors, because the more competition there was in the sale of cigarettes, the more anxious the people selling them would be to increase their sales or at least prevent the decrease of their sales in order to be able to pay the license fee. There was therefore a direct danger here with regard to minors buying cigarettes or procuring cigarettes on account of the increase of the number of permits.  

Ironically, the defendants, while implying that Iowa City belonged in the group that had taken the legislature up on its offer to “diminish the evil of the sale and use of cigarettes,” had in fact been integral agents of a more than decade-long tradition of freely granting and issuing permits without giving any publicly expressed thought to the consequences for the general welfare as opposed to local businessmen’s profits. Indeed, the city council’s laissez-faire policy, which entailed flooding the central business district with permits that kept downtown awash in cigarettes, had implemented one dimension of the legislature’s intent (or at least acquiescence in a foreseeable result) that the defendants’ brief had self-contradictorily misrepresented—namely, making cigarettes extremely available, accessible, and convenient to buy if local communities and the government officials they elected desired such an outcome.

Much of Ford Hopkins’ submission resisting the city council’s petition for a rehearing filed in April 1932 was devoted to hurling invective at the councilmen and their monopoly-seeking mercantile “friends,” some of it recycled from previous pleadings. Speaking “off the record,” the company’s lawyer taunted the defendants by asking why the council granted numerous permits to its “special friends” in July 1931, while the case was pending, especially if it really desired to protect the youth’s moral welfare and to limit the consumption of cigarettes: “The entire record presents a situation wherein it is preposterous and ridiculous to ask the Court to find that the appellees were acting in good faith.” In particular, Whetstone, whose three stores were in “direct competition with” Ford

339Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 34-36.

340Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Resistance to Appellees’ Petition for Rehearing at 18.

341Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Resistance to Appellees’ Petition for Rehearing at 4.
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

Hopkins, was scored as “one of the leaders in a movement to preserve for himself and other local merchants a virtual monopoly on the cigarette business in Iowa City...at exorbitant prices.” The sarcasm reached its peak when the company accused the city council of having suborned Alice Goza to apply for a permit: “‘poor Alice’ no doubt served her useful purpose in having her application denied, together with the application of the appellant, in order that an appearance of apparent fairness was given to the farce enacted by the appellees on September 26, 1930.” Without explaining how 51 small stores could constitute a “monopoly,” Ford Hopkins did unburden itself of the precise source of the outrage that purportedly went to the absolute core of the commonwealth: “[I]t is difficult to imagine any result more foreign to American institutions and justice than the idea that a group of municipal officers could at their whim and fancy confer or withhold the right to sell cigarettes without any measure of judicial regulation or control.” In the event, the lawyers for the city council saw no constitutional dimension implicated in the absence of a “vested right to engage in the cigarette business” and the Iowa Supreme Court apparently failed to share the cigarette price-cutting chain drug store’s sense of political abomination: on June 24, 1932, it withdrew the original opinion and granted Iowa City’s petition for a rehearing.

The city council in its brief submitted to the Court on resubmission reinforced its aggressive stance, adopting the position that even though it had refused the permit on the grounds that “too many were engaging in the business for the well being of the town,” it could nevertheless be lawful to deny a permit because the applicant was a chain store:

342Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Resistance to Appellees’ Petition for Rehearing at 11.
343Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Resistance to Appellees’ Petition for Rehearing at 16.
344Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Resistance to Appellees’ Petition for Rehearing at 50.
345Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Reply to Resistance to Rehearing at 9.
346Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument on Resubmission at 3; “Petition for Rehearing in Cigaret Case,” ICP-C, June 20, 1932 (2:1); “City to Get Rehearing in Cigaret Case,” ICP-C, June 24, 1932 (2:1).
347Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 76.
[1] If the council did actually refuse to grant the permit on the ground that the applicant was a foreign corporation or was what is commonly known as a chain store, yet if the council really believed that there were disadvantages to the city in this class of business in allowing it to be carried on by a foreign corporation or a chain store, such a decision, if made in good faith, would not be arbitrary in such a sense as...would justify the courts in interfering with it.348

Whatever plausibility attached to the city’s arguments in the abstract concerning possible relevant differences between locally owned and national chain stores was dissipated by the self-contradictory assertion that a permanent resident engaged in the “detrimental business” of selling cigarettes was “presumed to have the moral welfare of the residents of his city at heart....”349 Instead of explaining why such a moral businessman would be selling cigarettes at all, the defendants chose to dwell on the claim that it was “significant” that

the first chain store permits refused, and, in fact, the first permits refused at all...were permits refused to a chain store which were not original permits but renewals. In other words, they had tried out the particular chain stores, the Great Atlantic & Pacific Tea Company, and after a trial, we presume of two years,...they had decided not to issue them any more and they stuck to that position. And possibly their experience with this chain store had something to do with their refusal to issue a permit to another chain store, the plaintiff in this case.... 350

This sheer speculation not only stood in sharp contrast to the defendants’ alleged preference in this context for “concrete evidence,”351 but verged on the surreal since the speculators were the defendant councilmen themselves and their lawyer, the city attorney, who had been free to put on whatever evidence they wished to shed light on their actual reasons for having refused to renew A & P’s permits. (This faux-schizophrenic approach was also on display in the claim that “[i]f the Council should be criticised [sic] at all it would seem to us that it might be criticized for issuing so many cigarette permits rather than for issuing so few. It would seem to us that they would be entitled to greater praise if they had begun

348Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 76-77.
349Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 77.
350Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 77.
351Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 77.
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

to limit the number when there were only thirty-five....”\textsuperscript{352} Yet, to the extent that they testified about A & P at all, none of them offered any substantive reason for the refusal, let alone made any mention of alleged deleterious experiences with A & P.\textsuperscript{353} In light of the contemporaneous newspaper reporting about local retailers’ dissatisfaction with A & P’s lower cigarette prices, the defendants’ smokescreen speculation in their brief forfeited any claim to credibility. Apparently, although the lawyers were willing to argue to the Iowa Supreme Court that the city council was empowered to single out foreign chain stores for denials, they did not believe that they would enhance their chance of prevailing if they conceded that they had discriminated against them simply because they were outcompeting local retailers. It is unknown whether Iowa City’s counsel considered developing the argument that a city council was authorized to deny permits to chain stores on the grounds that their lower prices encouraged the consumption, especially by young people, of a “deleterious” commodity.

The same spirit of aggressive optimism about pushing the boundaries of permissible discretion also pervaded the city-defendants’ critique of Ford Hopkins’ contention that if the council were empowered to limit the number of permits, the end result might be the creation of a monopoly for a favored few. Again manifestly taking the position that cigarettes constituted a special category as a harmful commercial product, the city argued that “[w]hile we contend that in a business of this sort where the attempt is to regulate and discourage it the Council would even have a right to grant only one or two permits, yet it is not necessary that we should be right as to this in order to meet the situation in the present case” (because the existence of 51 sellers would preclude any concern about monopoly).\textsuperscript{354}

On rehearing the opinion was unanimous, but only six justices participated—the same six who had formed the majority in \textit{Bernstein v. City of Marshalltown} six weeks earlier. Hubert Utterback did not participate because his

\textsuperscript{352}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 79.

\textsuperscript{353}Elsewhere in the same brief the city asserted, without a shred of evidence, that the plaintiff had “los[t] sight of the fact that the refusal to renew three permits to the Great Atlantic & Pacific Tea Company...would indicate that there was something unsatisfactory about the way this chain store was handling the business, and that permits were refused on that ground.” Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 14. As the city well knew, the way A & P was pricing cigarettes was “unsatisfactory” to the other permit holders.

\textsuperscript{354}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 84.
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

term had come to an end on April 16 as a result of a judicial resolution of a dispute as to who was entitled to the seat vacated by Morling’s death. Why Kintzinger and Albert, who did vote in other cases decided the same day, did not participate is unclear; especially puzzling, given his investment in the majority opinion in Ford Hopkins I, is Albert’s failure to dissent.

Based on the same argument that the Court had deemed without merit in Bernstein v. City of Marshalltown, Justice Kindig quickly dismissed Ford Hopkins’ contention that the only discretion the city council had was to “decide the general policy of permitting or not permitting cigarette sales,” but that once it decided to permit sales, it was required to grant a permit to each applicant complying with the law. Proceeding to the plaintiff’s alternative argument that even if it had discretion, the council could not exercise it arbitrarily, Kindig found that, as in Bernstein, the facts in Ford Hopkins II made it unnecessary to determine whether the city council’s discretion to grant cigarette permits was absolute or limited. The principal fact—as represented by the preponderance of the testimony—that the Court had especially in mind was that the council had refused the permit not in order to discriminate against chain stores, but because it wanted to limit the total number outstanding at any time to 51 in order to police the holders better and protect minor school children in addition to 3,000 minors attending the State University of Iowa, many of whom passed the plaintiff’s attractive store front prominently located in the central downtown. That the council also denied permits to “many other stores” for the same reason also demonstrated it had “clearly acted within its discretion....”

Discussion of Ford Hopkins’ third and final contention that the council had violated its constitutional interstate commerce and due process rights prompted the Iowa Supreme Court to review its and the U.S. Supreme Court’s anti-cigarette cases going back to the 1890s (which were analyzed in detail above). The central conclusion that Kindig derived from these cases was that since it was “constitutional under the police power of the state to prohibit the sale of cigarettes entirely, it is likewise constitutional to regulate and limit the sale thereof.”

355Brown v Martin, 216 Iowa 1272 (May 15, 1933) (Kintzinger and Albert participated). In Anderson v Droge, 216 Iowa 159 (May 15, 1933), and Ransom v Mellor, 216 Iowa 197 (May 15, 1933) Albert participated as did George Claussen, who had ousted Utterback on April 16.

356Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286, 1288 (1933), reh’g denied (1933).

357Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286, 1289-91 (1933), reh ’g denied (1933).

358See above chs. 11-12.
Because the city council neither infringed on congressional power to regulate interstate commerce nor discriminated against cigarettes manufactured or sold in or imported into Iowa, the factually and legally substantial basis, grounded in the police power to protect minors’ health and morals, for setting a maximum number of permits was not arbitrary.\textsuperscript{359}

\textit{The City Council Reverses Itself and Snatches Defeat from Its Own Victorious Jaws}

Several weeks after the Iowa Supreme Court had issued its second decision in the case, Tyrrell M. Ingersoll, one of the lawyers from the Cedar Rapids firm (Wheeler, Elliott, Shuttleworth, & Ingersoll) that represented Ford Hopkins “wandered into the office” of the Des Moines firm (Clark, Byers, Hutchinson & Garber) that had co-represented the City of Iowa City.\textsuperscript{360} Charles Hutchinson, who had played such a prominent role in opposing the repeal of the cigarette ban in 1921,\textsuperscript{361} informed Iowa City’s city attorney, Will Hayek, that “Mr. Ingersoll...served a notice of intention to petition for rehearing in our famous cigarette case,” adding dryly: “I had supposed in view of the Marshalltown case and that the opinion in our case was on a rehearing that that would have satisfied the other fellows, but apparently it has not.”\textsuperscript{362}

Hutchinson’s irony notwithstanding, on June 30, just six weeks after the Supreme Court decision—“in a case which attracted national attention in legal circles”\textsuperscript{363}—had vindicated the city council’s power to deny permits, the council made its peace with Ford Hopkins by approving the latter’s application for a permit by means of a blanket resolution encompassing 31 other applicants as well. To be sure, the action was contested, two of six members opposing the entire

\textsuperscript{359}Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286, 1294-95 (1933), \textit{reh’g denied} (1933).

\textsuperscript{360}Chas. Hutchinson to Will J. Hayek (June 8, 1933), in Iowa City Finance, Council Proceedings (Apr. 1933 - Apr. 19, 1935), Roll No. I 13 (Iowa City Clerk’s Office).

\textsuperscript{361}See above ch. 15.

\textsuperscript{362}Chas. Hutchinson to Will J. Hayek (June 8, 1933), in Iowa City Finance, Council Proceedings (Apr. 1933 - Apr. 19, 1935), Roll No. I 13 (Iowa City Clerk’s Office). The city council received and placed this letter on file. Iowa City City Council, Minutes of an Adjourned Meeting of June 16, 1933 (21:602).

\textsuperscript{363}“Three Year Legal Battle over Cigaret License for Drug Store Brought to End,” \textit{ICP-C}, July 1, 1933 (3:3-4).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

Control of the council, on which Democrats had held a majority of 5 to 2 in 1929 and 6 to 1 in 1931, had passed to Republicans, who, having appropriated the slogan “New Deal” from President Roosevelt, in 1933 gained four of seven seats, but party composition does not appear to have generated the outcome, since, with one Republican not voting, two-thirds of members of both parties voted to grant the permit. Republican Roswell B. Ayers, a chamber of commerce member who owned a lumber yard, offered an amendment striking out Ford Hopkins from the list of applicants, but it lost because none of his colleagues would second it. Nevertheless, on the resolution itself Democrat Michael J. McGuan, a pharmacist who owned his own drug store, joined Ayers in voting Nay, while Republicans Van der Zee and James Stronks (manager of Standard Publications and one-time president of the chamber of commerce), and Democrats Edward Sybil (owner of a sheet metal works/stove store) and John P. Memler (retail grocery store owner) voted to adopt it. Sometime before the meeting Ford Hopkins had notified the council that—like the city in 1932—it would request a rehearing from the Supreme Court. On June 29, when the store’s manager, Thomas Meredith, had applied for a permit, he had appended a letter, stating through the firm’s lawyers, R. C. Davis and former Iowa City mayor Ingalls Swisher, that Ford Hopkins “would be willing to dismiss the case and pay all court costs if the council granted the company a cigaret permit.”

364 Iowa City City Council, Minutes of an Adjourned Meeting of June 30, 1933, 22:3. Two years later, with an entirely new membership except for Van der Zee, the council granted the permit unanimously. Iowa City City Council, Minutes of an Adjourned Meeting of June 21, 1935, 22:382.

365 The party affiliation for 1933 is taken from “Republicans Sweep City Election,” DI, Mar. 28, 1933 (1:5-8).

366 “Candidates Seeking Municipal Office,” DI, Mar. 28, 1931 (1:3-6, at 3:2-4 at 4); Polk’s Iowa City (Iowa) Directory: 1932, at 78 (1931) (F. E. Ayers Co.).

367 Iowa City Finance, Council Proceedings, Apr. 1933-Apr. 19, 1935, Roll No. 113 (June 30, 1933) (Iowa City City Clerk’s Office).

368 1920 Census of Population (HeritageQuest).

369 Polk’s Iowa City (Iowa) Directory: 1932, at 348 (1931); “Republicans Sweep City Election,” Daily Iowan (Iowa City), Mar. 28, 1933 (1:5-8, at 8:5-7 at 6).


371 1920 Census of Population (HeritageQuest).


373 “Three Year Legal Battle over Cigaret License for Drug Store Brought to End,” ICP-C, July 1, 1933 (3:3-4).
threat/offer would have exerted any pressure on the city counsel is unclear: after all, the Supreme Court’s unanimous vote in *Ford Hopkins Company v. City of Iowa City* and the cumulative impact of that decision and *Bernstein v. City of Marshalltown* made it extraordinarily improbable that the Court would revisit the issue. Moreover, granting the permit would subvert the public policies underlying the decision to litigate in the first place. The city, in the view of the *Press-Citizen*, had permitted Ford Hopkins to deprive it of its freedom of action by dealing with its application at a time when only 33 other applications were on file or already granted: since the total of 34 fell below the limit over which the city had litigated, the council was precluded from refusing a permit on that basis. In the event, Ford Hopkins’ manager announced that the store would start selling cigarettes the following Monday.

Curiously, in spite of the deal, Ford Hopkins not only did not dismiss the case, but in July 1933 adopted a possibly even more sneering tone toward the council in its petition for rehearing than it had displayed in earlier submissions. In addition to accusing the councilmen of having had as their “real purpose...protect[ing] their political henchmen against competition in the sale of cigarettes,” the plaintiff hinted at bribery in connection with “creat[ing] a monopoly for the benefit of...friends with or without secret compensation.”

The company undertook a special effort to enhance the credibility of its star witness, Van der Zee, whom in December 1932 it had praised for not being a “political trimmer,” by inferring from his being the “only University representative” on the council that he “was really interested in the welfare of the students.” Incredibly, the lawyers appeared to be oblivious of the self-refutation they were creating by praising him for having voted to grant Ford Hopkins a permit “because he opposed the existing profiteering by maintenance of high prices by those holding permits....” How to reconcile his support for lower

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374“Three Year Legal Battle over Cigaret License for Drug Store Brought to End,” *ICP-C*, July 1, 1933 (3:3-4) (erroneously stating twice that the limit was 41 instead of 51). In addition to the 31 other applications granted on June 30, the council had earlier unanimously directed the clerk to issue two permits. Iowa City City Council, Minutes of a Regular Meeting of June 2, 1933 (21:598); Iowa City City Council, Minutes of a Regular Meeting of June 16, 1933 (21:601).
376*Ford Hopkins Co. v City of Iowa City*, 216 Iowa 1286 (1933), Appellant’s Petition for Rehearing, Argument and Notice of Oral Argument at 2-3.
377*Ford Hopkins Co. v City of Iowa City*, 216 Iowa 1286 (1933), Appellant’s Reply Brief and Argument on Resubmission at 3.
378*Ford Hopkins Co. v City of Iowa City*, 216 Iowa 1286 (1933), Appellant’s Petition
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

cigarette prices, which would stimulate even greater consumption, with a concern for students’ welfare Elliott and his fellow lawyers did not stop to explain. (The city, which had earlier mockingly declared that it was “a little difficult to understand why” a university professor like Van der Zee “should be so obsessed with the idea that the sale of cigarettes in unlimited quantities would be a good thing for the students,” submitted a one-page reply, which did not even bother to hide its contempt for what it regarded as a baseless petition.)\textsuperscript{379} Moreover, the company did not even submit its petition until after the city council had granted the permit. Indeed, it called the Supreme Court’s attention to that action, explaining that the council had mooted the issuance of the writ of mandamus. Nevertheless, in addition to pointing out that the question of costs was still involved, Ford Hopkins assured the justices that “more important is the fact that the present opinion establishes a bad precedent and one wholly wrong in principle. It will lead to serious abuses. In the interest of public justice and to safeguard the rights of other applicants for permits of various kinds from city councils, the opinion should not be permitted to stand.”\textsuperscript{380}

That Lewis Ruskin was generously footing the legal bill on other firms’ behalf is so implausible—after all, Ford Hopkins was only a small chain competing against national drugs chains with hundreds of stores\textsuperscript{382}—that it raises the possibility that he was seeking to prevent other cities in Iowa from frustrating his profitable sale of cigarettes as he opened stores elsewhere. In fact, the store that Ford Hopkins opened in Cedar Rapids in 1936 was its sixteenth in Iowa and

\textsuperscript{379}\textsuperscript{379} Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 78.

\textsuperscript{380}\textsuperscript{380} Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286 (1933), Resistance to Appellant’s Petition for Rehearing at 2. In particular, the defendants ridiculed the appellant’s having quoted “the alleged funny column of the Register,” whose author would be appropriate to quote if he were a member of the Supreme Court, but since “he has never advanced in the law so far as even being a Justice of the Peace,” they failed to see the relevance. \textit{Id}. For the quotation, see Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Petition for Rehearing, Argument and Notice of Oral Argument at 7. The column’s charge was that “[s]ince there are more than a dozen places within mashie shot of the campus where cigarettes are sold...[t]he ruling merely gives city councils a chance to...haze an occasional merchant who isn’t in the good graces.” H. S. M., “Over the Coffee,” \textit{DMR}, May 16, 1933 (16:3).

\textsuperscript{381}\textsuperscript{381} Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Petition for Rehearing, Argument and Notice of Oral Argument at 7-8.

its thirtieth overall. And while advertising themselves as “the world’s finest...druggists,” who “cater to” their customers’ health, the stores did include in their advertisements in Iowa “fresh mild smokes.” Another, albeit completely speculative possibility, is that Ford Hopkins was fronting for A & P, which might have concluded that its seemingly inexorable expansion and consolidating status as a commercial giant largely owned and controlled by one immensely rich family during a period of proliferating state-level anti-chain-store legislation would not have redounded to its benefit in further litigation. This speculation is at the very least consistent with the fact that the Cedar Rapids law firm representing Ford Hopkins was also counsel to A & P. To be sure, as soon as the Iowa legislature, joining the national trend, in 1935 enacted a Chain Store Tax Act, A & P challenged its constitutionality, securing a ruling from the U.S. Supreme Court that its graduated tax on gross receipts violated the equal protection clause of the Fourteenth Amendment. Defendant City of Iowa City, finally responding to plaintiff’s repeated taunts that the councilmen’s favored cigarette monopolizers were the real litigants footing the bill, counter-conjectured about how Ford Hopkins “alone could afford to carry on this ‘long and interminable course of litigation’ and still persist in it merely to obtain the

384MCG-G, June 1, 1933 (12:1-3).
385MCG-G, Feb. 21, 1935 (9:5-8).
387Recent Social Trends in the United States: Report of the President’s Research Committee on Social Trends 1435 (1933).
3891935 Iowa laws ch. 75, at 89. The law imposed both a per store tax rising from $5 to $155, depending on the number of stores in the chain, and a graduated gross receipts tax. Id. §§ 4(a) and (b) at 91-93.
390Great Atlantic & Pacific Tea Co. v Valentine, 12 F.Supp. 760 (S.D. Iowa 1935), aff’d, 299 US 32 (1936). The two giant drug store chains, Walgreen Co. and Liggett Drug Co., were also plaintiffs and/or intervenors in this litigation. Justices Brandeis and Cardozo dissented on the basis of their dissent in Fox v Standard Oil Co., 294 US 87 (1935), which argued that gross receipts were a sufficiently reasonable surrogate for profits as an indicator of capacity to pay to sustain a graduated gross receipts tax as a surrogate for a graduated profit tax, which was constitutional. The Iowa Supreme Court, in separate litigation, upheld both the validity of the graduated tax on the number of stores and the exemption of certain kinds of stores from the statute. Tollerton & Warfield Co. v Iowa State Board of Assessment and Review 222 Iowa 908 (1936).
391Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Resistance to Appellees’ Petition for Rehearing at 3.
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

privilege of selling a few cigarettes in the City of Iowa City. Either there is a tremendous profit in the cigarette business or the appellant is a great stickler for constitutional rights, or else there is some other reason, for their using ‘every conceivable device’ to get a decision from the Supreme Court to the effect that a city council has no discretion as to the issuance of cigarette permits after it has issued one permit.” 392 Whatever the strategy underlying the effort to secure a second rehearing, however, on December 14, 1933, the Iowa Supreme Court denied the request. 393

In 1936 the city council reinstated its pre-1929 laissez-faire policy by unanimously granting two permits to A& P. 394 The council’s quondam alleged solicitude for minors’ health was invisible in its unanimous decision that year to issue a permit to the University’s Iowa Memorial Union Dining Service. 395 The council continued to grant permits unanimously to Ford Hopkins, 396 which featured cigarettes in its large newspaper advertisements 397 and remained in Iowa City until the early 1960s. 398 The city’s post-Ford Hopkins actions gave the most

392 Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 3.
393 Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286 (1933).
394 Iowa City City Council, Minutes of an Adjourned Meeting of June 26, 1936, 23:53. The Press-Citizen’s extensive account of the meeting mentioned the permits, but offered no background information. “With the ‘City Fathers,’” ICP-C, June 27, 1936 (3:2-3). By 1959, the city council issued a permit to the Memorial Union and five university dormitories. Iowa City City Council, Minutes of an Adjourned Meeting of June 15, 1959, 34:25.
395 Iowa City City Council, Minutes of a Regular Meeting of March 6, 1936, 22:567. Unlike the minutes, the Press-Citizen characterized the action as a “renewal,” but an earlier grant was not identified in previous minutes. “With the ‘City Fathers,’” ICP-C, Mar. 7, 1936 (3:2-3).
397 E.g., Sheboygan Press, Nov. 30, 1934 (3:5-8) (charging $1.20 for a 200-cigarette carton of Lucky Strike, Chesterfield, Camel, and Old Gold).
398 1961 was the last year in which Ford Hopkins was listed in the city directory. Polk’s Iowa City (Iowa City, Iowa) Directory: 1961, at 141. In 1962, when it was no longer listed, its last address (201 E. Washington St.) was “vacant.” Polk’s Iowa City: Directory of Householders: 1962, at 127 (1963). As late as 1959 the city council issued a cigarette permit to Ford Hopkins. Iowa City City Council, Minutes of an Adjourned Meeting of June 15, 1959, 34:25. In 1948, the city council issued cigarette permits to Ford Hopkins and A & P, both of which had by then moved to other locations. “Proceedings
eloquent lie to its litigational claims that its denial of permits to two chains had been motivated by a concern for the evils of unchecked cigarette sales and smoking.

In the aftermath of the Supreme Court’s rulings in Bernstein and Ford Hopkins, the Iowa attorney general issued an opinion concluding that city councils and boards of supervisors had “discretionary power” regarding the issuance of cigarette permits. Although the Court had not “squarely” decided whether that discretion was absolute or limited, local governments, the attorney general opined, might “refuse to grant a permit where such refusal is substantiated by facts which establish that the granting of such permit may be inimicable [sic] to the health or morals of the community or where such granting may hinder law enforcement.”\textsuperscript{399} And into the twenty-first century the Iowa Revenue Department’s regulations, citing these 70-year-old cases, declared that the “power to grant retail permits is discretionary with the city council or board of supervisors” (adding inaccurately, that “uniform, nondiscriminatory limits may be placed on its issuance”).\textsuperscript{400} But the existence of this ongoing discretion was a matter of indifference to the city council of Iowa City, which, like the rest of the state’s municipalities, lost the nerve to take any steps that might dampen ringing cash registers.\textsuperscript{401}


\textsuperscript{400}Iowa Administrative Code § 82.1(7)a.(2).3. (2000 [2002]).

\textsuperscript{401}See below ch. 28.
Iowa Repeals Its Unique Prohibition of Cigarette Vending Machines: 1939-63

“[I]t should be no concern of the state how cigarettes are sold.”¹

Although the period from the 1930s to 1964 may realistically be regarded in Iowa, as elsewhere in the United States, as the high point of smoking laissez-faire, when few restrictions were placed on access to or the use of cigarettes, the Iowa legislature did in fact prohibit one significant form of access that it took the cigarette oligopolists a quarter-century to dismantle. By the early 1950s the prohibition on the sale of cigarettes through vending machines enacted by the General Assembly in 1939² left Iowa as the last and only state with such a ban still in place.³ The anti-regulation forces had to struggle from 1953 to 1963 before overcoming this last bulwark of prohibitionism, which was rooted partly in the fear that vending machines would expand minors’ access to cigarettes. Ironically, just as other states were considering imposing a total cigarette vending machine ban,⁴ Iowa repealed its.

As early as 1953 bills in the House and Senate would have conferred discretion on city and town councils and county boards of supervisors to issue retail permits authorizing cigarette vending machine sales in the same locations as their existing business, but they died in committee.⁵ Four years later opponents of the ban seemed to be on the verge of repealing it. First the Senate defeated its bill 23 to 24,⁶ but voted the next day to reconsider its action after a senator

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²See above ch. 19.
⁴These states included Maine (1963), Michigan (1964), Oregon (1951), Pennsylvania (1951), South Dakota (1961), and Utah (1963). Tobacco Merchants Association of the United States, “Restrictive Legislation Affecting Tobacco Introduced in State Legislature 1950-1963” (Oct. 1963), Bates No. 968196267/88/95/313/314/317/320. The claims that in 1961 Idaho killed in committee a bill calling for a complete ban on cigarette vending, while a similar ban was defeated by two votes in the North Dakota Assembly by Ben and Mike, “Reflections: Smoking & Health,” American Automatic Merchandiser, Dec. 1962, Bates No. 84410130/1, were not confirmed by the TMA publication.
⁵H.F. 425 (Mar. 9, 1953, by Nelson and Schroeder) and S.F. 286 (Mar. 9, 1953, by Nolan).
⁶State of Iowa: 1957: Journal of the Senate of the Fifty-Seventh General Assembly
declared that he had an amendment on file that would deal with objections that legalizing cigarette vending machines would open Iowa up to syndicates “controlled by ‘undesirable elements.’” The lengthy debate in the House, which culminated in passage by a vote of 63 to 41, did not focus on gangsters, but rather on “whether it would be easier for youths to obtain cigarettes illegally from the machine than in some other way. One contention was that merchants would be better able to determine the age of a cigarette purchaser than would a machine,” whereas the bill’s supporters claimed that supervised machines out in the open would make it harder for youths to get cigarettes. The Senate then followed suit by the much smaller margin of 26 to 23, but at this point Democratic Senator Joseph Coleman—newly embarked on the first of his record-breaking 34 years in the Senate—changed his mind: although he had been a cosponsor of the Senate bill, he moved to reconsider and to request that the bill be returned from the House, to which it had been sent for concurrence in an amendment. His motion carried by a vote of 26 to 23, and after the House, which had not yet acted, had complied with the request, the Senate renewed debate. Coleman, unconcerned that Iowa was the only state that banned cigarette vending machines, felt that it should set an example, and since in his area the only proponents were backers of pinball machines and other gambling machines, he urged the bill’s defeat. Republican William Tate, a real estate and insurance businessman, was unable to understand such worries: after all, this “‘simple bill...would only permit selling cigarettes the same way candy and peanuts are sold.’” If, on the other hand, opponents’ real fear was that “‘youngsters will get cigarettes, they’re getting them anyway. Most youngsters don’t have to go any farther...than their mother’s purse.’” Consequently, opposition being no virtue, voting against the cigarette vending machine bill would not qualify for entry into
heaven. Ignoring Tate’s admonition, the Senate voted to reconsider its earlier vote to pass the bill and then tabled it, thus effectively ending the measure for that session.

The economic pressure that was being brought to bear on Iowa legislators to accommodate commerce by the cigarette manufacturing industry, the stores (such as groceries and restaurants) that wanted to sell more cigarettes, and the vending machine industry was encapsulated in the fact that by 1958 nationally the number of packages of cigarettes being sold and bought weekly through 675,000 vending machines had risen to 60,750,000. The same year the Iowa attorney general opined that if a clerk had to perform some act enabling him to retain control of the machine’s dispensing process, then it was lawful to use it to sell cigarettes. The sea change that this opinion represented was conspicuous alongside an attorney general’s opinion from 1939, which stated that it would be illegal to use a machine for showing or displaying cigarettes even if an employee operated the mechanism. Nevertheless, in 1959, when repeal bills were once again filed, many Iowa legislators refused to yield, this time focusing on health issues as well. To be sure, the Senate did pass a measure by a vote of 37 to 13, and “[o]ne of the reasons given for passing the bill is that one of the largest manufacturers of vending machines is located in Des Moines but cannot sell the products in this state.” However, the two-hour debate revealed deep rifts. In addition to ongoing fears over (criminal) “syndicates,” legislators also echoed the apprehensions expressed by cities such as Dubuque and Muscatine that legalizing vending machines would reduce their revenues from permits as well as facilitate minors’ access to cigarettes. Senator Coleman, switching themes, voted against
the bill because the ready availability would enable children to “get at cigarettes at an early age”\textsuperscript{22}—a remarkable insight from the man who would become the Senate’s heaviest smoker and its most strident and obdurate adversary of the victims of his and others’ secondhand smoke who demanded restrictions on smoking in the chamber.\textsuperscript{23} Republican Majority Leader, Jack Schroeder, a nonsmoker, pooh-poohed Coleman’s concern as yet another attempt to “legislate morals”: although he hoped that his children would not smoke, he also knew that: “‘You cannot take all temptations of life away from my children. They must learn through example and teaching.”\textsuperscript{24} What children would learn from the majority of adults (including parents) who smoked in a society characterized by cigarettes’ ubiquitous availability and normalcy, Schroeder did not reveal. To those justifying the bill on the grounds that it would be naive to imagine that minors were not already getting cigarettes somewhere anyway one Republican senator offered the rhetorical question: “‘But aren’t we going to make cigarettes more accessible for them?’”\textsuperscript{25} While his point may have cut both ways in the context of the debate, Waterloo Democrat Melvin Wolf underscored the vitality of the home-rule foundations of Iowa’s cigarette sales law 38 years after Governor Kendall had made it the centerpiece of the great compromise of licensure in 1921: the vending machine law was “‘permissive legislation only.’ He said cities will still control the issuance of cigaret permits and ‘do not have to give one to anyone they don’t wish to.’”\textsuperscript{26}

That keeping youths away from cigarettes may not have been a high legislative priority after all was suggested by the filing the same day by five House Democrats of a bill that grafted a lowering of the minimum age from 21 to 18 for lawful purchases of cigarettes onto the governor’s request for an increase in the cigarette tax.\textsuperscript{27} (A bill filed by two Democrats in 1957 to lower the age to 18, which died in committee, was explained as proceeding from the recognition that 18-year-olds were already buying cigarettes if they wanted to do so; its purpose was to “remove the unrealistic age requirement of 21 years which is not publicly accepted and which creates an utter disregard for law


\textsuperscript{23} See below ch. 32.


Iowa Repeals Its Unique Prohibition of Cigarette Vending Machines: 1939-63

The next day, the sponsor of the House companion vending machine bill (H.F. 87), Republican Clark McNeal, himself a businessman, called up the bill, terming it “a good businessman’s bill,” and declaring: “It would appear that we have sanctioned the sale of cigarettes in Iowa. This measure simply provides another way in which a retailer may sell them.” Two years later, in an equity action brought by cigarette vending machine manufacturers, distributors, and owners to enjoin state agencies from interfering with their use, the chief justice of the Iowa Supreme Court, disagreeing with the majority, who chipped away at the scope of the definition of an unlawful cigarette vending machine, shed light on McNeal’s distortion of the development of legislated restrictions on the sale, purchase, and availability of cigarettes in the state:

Plaintiffs concede the legislature could, within constitutional limits, prohibit sale of cigarettes to minors through an automatic vending machine. I think the legislature has the power to prevent sale of cigarettes to anyone by means of a vending machine.

...The legislature conceivably may have reasoned from evidence it deemed convincing that the use of cigarettes, especially excessive use, is harmful to the health of adults as well as minors; that the sale of cigarettes by means of vending machines would stimulate their sale and use; and it would promote the public health to prohibit this means of selling cigarettes.

Certainly anything the legislature honestly feels would be apt to promote the public health is a legitimate exercise of the police power. If the legislature, as it might have done, reasoned as above suggested, the statute is not to be held unconstitutional merely because we may think it acted unwisely. But there is no showing such reasoning would even be unwise. On the contrary, its wisdom is attested by plaintiffs’ argument that one retailer converted his loss from the sale of cigarettes into a profit of $1500 per year by use of a vending machine.

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28H.F. 348 (Feb. 20, 1957, by Andrew Frommelt and Casey Loss). Frommelt was the former president of the Dubuque Trades and Labor Congress. *State of Iowa, 1953: State of Iowa Official Register: 1953-1954*, at 68 (45th No. Sherman Needham ed.). That Frommelt may have harbored a more extensive tobacco agenda was suggested by an amendment he filed (and withdrew) as a senator in 1959 that would have struck a provision from a bill reinstating mandatory revocation of a retailer’s cigarette sales permit even for the first violation of the ban on selling to minors. *State of Iowa: 1959: Journal of the Senate of the Fifty-Eighth General Assembly 1262* (Apr. 30) (H.F. 266).


vending machine in question here, that they are attractive pieces of paraphernalia which add to the appearance of a place of business and “may even have some advertising value in calling attention to the availability of cigarettes on the premises.”

Following McNeal’s intervention the House engaged in “a lengthy debate over the desirability of preventing young people from purchasing cigarettes.” After one Republican representative had questioned “whether the public health is adequately safeguarded” by the bill, another, Lawrence Carstensen, a Methodist and lawyer, who had started smoking at the age of 15, administered the following lesson in cognitive dissonance to his colleagues:

“I’ve been smoking up a storm ever since. It’s ridiculous—a dirty, lousy, rotten, filthy habit—and I wish I didn’t do it. Maybe if my parents had instructed me about the evils of tobacco I wouldn’t do it, but unfortunately they weren’t alive to instruct me.

However, as long as I do it, I don’t see that it makes any difference whether I buy my cigarettes out of a machine or from some sweet little old lady behind a counter. I’m in favor of the bill.”

Tacking on a non sequitur for good measure, Carstensen confided to the world that his right to buy cigarettes had never even been questioned until he was 25, when a “nice elderly lady made me show her my driver’s license. I respect her more than any person I have ever known.”

In light of the prevailing disagreements over health and safety questions pertaining to young people, the House—at the behest of Iowa City Democrat Scott Swisher, who smoked a big black cigar during the debate—narrowly voted to send the bill back to committee for further study. When the bill finally returned to the floor six weeks later, the House defeated it by a vote of 41 to 65.
and then by an even larger margin refused to reconsider its vote. Not the least of the factors contributing to this outcome was, ironically, “pressure from cigarette companies producing the less popular brands which felt that their packages would not be offered for sale in machines.”

In tandem with action on the cigarette vending bill, the House demonstrated that privileging 18-to-20-year-olds to destroy their health and shorten their lives may have had more to do with expanding cigarette sales than young people’s civil rights: the same day that its Steering Committee advanced the measure lowering the minimum age for buying cigarettes from 21 to 18, its Constitutional Amendments Committee killed a proposed constitutional amendment to reduce the minimum voting age from 21 to 18. Despite this clear rebuff to the general entitlement of this cohort, supporters of the lower age for cigarettes trotted out a version of the same argument: If we believe that they’re old enough to kill those we deem our country’s enemies, they’re old enough to kill themselves. Democrat and bank president William Johannes—who felt that 18 was “realistic because the evidence shows that young fellows under 21 are getting cigarettes somewhere anyhow”—declared: “If they’re old enough to serve in the armed forces, they’re old enough to buy cigarettes and accept responsibility for handling them.” Apparently convinced, the House then voted by an overwhelming 95 to 8 to lower the age to 18 after defeating a proposal to make it a misdemeanor for persons under 18 to possess cigarettes. Six weeks later the Senate followed suit by a vote of 32 to 13, thus establishing the new lower legal smoking age that endured.

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44 *State of Iowa: 1959: Journal of the House of the Fifty-Eighth General Assembly* 963-64 (Mar. 26) (H.F. 266, amendment by Des Moines Democrat Howard Reppert). The law then in effect made it a misdemeanor to possess only if the minor refused to disclose the source of the cigarettes.
Iowa Repeals Its Unique Prohibition of Cigarette Vending Machines: 1939-63

into the twenty-first century. Ominously, the legislature’s massive support for a lower minimum age at which cigarettes could be lawfully bought foreshadowed its ultimate abandonment of the ban on vending machine sales.

The persistent strength of the opposition to cigarette vending machines was once again on display during the 1961 legislative session at the outset of which the Iowa Supreme Court ruled that the purpose of the legislature’s 22-year-old ban was merely to support the prohibition against sales to minors; consequently, since the machines in question were not fully automatic, but required the participation of the owner in operating a remote-control device, he therefore had the same opportunity and duty to determine the age of the would-be buyer as he would in a face to face sale and the machines thus did not fall within the law’s coverage. Despite this setback, opponents of vending machine sales succeeded again in thwarting repeal. To be sure, the Senate passed a bill by a hefty margin of 38 to 9, but it died in committee in the House. Senate supporters used the Supreme Court’s recent decision as a basis for legalizing all the machines and “end[ing] the hypocrisy.” In response to one Republican who argued that the bill would enable children to get cigarettes at any time, its chief sponsor, Democrat Peter Hansen (state vice-commander of the American Legion, bank board chairman, and, most relevantly, past state president of the Iowa Retail Food Dealers, Iowa Independent Businessmen, and Associated Retailers of Iowa), “cried out, ’It’s about time we legalize lots of things that are going on in our state. You can play bingo almost anyplace and get liquor-by-the-drink too.’”

In the interim between the 1961 and 1963 legislative sessions, the automatic merchandising industry, more than 40 percent of whose gross volume was accounted for by cigarette sales, had become alarmed by the problems that the “[r]apidly growing forces in the tobacco-health-cigarette-sales-to-minors controversy” could cause. The industry saw the tobacco-health problem as “particularly difficult because there is no clearcut issue.” Because there was “just

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48 1959 Iowa Laws ch. 119, at 160. Presumably for the sake of uniformity, the amended law increased from 16 to 18 the age at which it was lawful to buy and be sold tobacco other than cigarettes.


50 Iowa Official Register: 1961-1962, at 47 (49th No., Edward Mason ed.).

51 "Vending Machine Bill Is Approved by Senate," ADT, Apr. 21, 1961 (1:6-8).

52 "Vending Machine Bill Is Approved by Senate," ADT, Apr. 21, 1961 (1:6-8).
about as much “scientific research” against as proving the basic premise that cigarette smoking contributed to the incidence of cancer, “the entire issue will undoubtedly be fought along emotional rather than factual lines.” The problem for the industry lay not in anti-tobacco groups’ scaring adults into abstinence, but rather in making it “as difficult as possible for minors to obtain cigarettes with an ultimate objective of seriously curtailing smoking by future generations. This is the point at which the vending industry could well be seriously hurt. It is the ill-founded premise that ‘most minors purchase their cigarettes from vending machines’ that is at the heart of our problem.” The tactical response was a call for a “common front” and “sensible self-policing” by operators to remove the most conspicuous unsupervised machines and to post all machines with labels stating that it was illegal for minors to buy cigarettes.55

Against the background of this potential crisis for the cigarette vending machine industry, in 1963 Senator Hansen filed another bill to repeal the ban.56 The same arguments were deployed, opponents’ claims of racketeering pitted this time against Hansen’s feeling that about half of the court-approved remote-control machines were (presumably because of fear of prosecution) not being used.57 Following Senate passage by a vote of 36 to 12,58 “without debate” the bill “sailed through”59 the House with an impressive 83 to 19 majority.60 Repeal of the almost quarter-century prohibition61 ushered in an era of lawful cigarette vending machine sales in Iowa that has survived into the twenty-first century62—despite bills to reinstate the ban,63 calls for statewide bans in all states

56S.F. 126 (Feb. 4, 1963, by Hansen et al.).
57“Senate Approves Cigarette Vending Machines for Iowa,” ADT, Feb. 25, 1963 (1:4-5).
611963 Iowa Laws ch. 97, § 2 at 156.
62Iowa Code § 453A.36.6 (2007). In 1997 the legislature limited cigarette vending machines to locations at which “the retailer ensures that no person younger than eighteen years of age is present or permitted to enter at any time.” 1997 Iowa Laws ch. 136, at 281.
Iowa Repeals Its Unique Prohibition of Cigarette Vending Machines: 1939-63

by the Secretary of Health and Human Services\textsuperscript{64} and the Institute of Medicine,\textsuperscript{65} the agreement to a nationwide ban by the cigarette companies in the (unimplemented) 1997 Global Settlement Agreement,\textsuperscript{66} and the advent of total statewide bans in two states\textsuperscript{67} and numerous local communities.\textsuperscript{68}


\textsuperscript{65}Institute of Medicine, \textit{Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths} 212-14 (Barbara Lynch and Richard Bonnie eds. 1994).

\textsuperscript{66}Martha Derthick, \textit{Up in Smoke: From Legislation to Litigation in Tobacco Politics} 84 (2002).


PART V

THE INCIPIENT NATIONAL MOVEMENT TO AVOID SECONDHAND SMOKE EXPOSURE IN THE 1970S

Now that hardly any area is off-limits for smoking, the sensitive nonsmoker has a real problem. Relief depends partly on the ingenuity and resources of the patient. One man, employed in a large office, has organized the nonsmokers, and these outcasts have grouped their desks together in a corner. Some patients change jobs or even occupations, first making sure that the new position will not involve heavy exposure to smoke. College students may enroll in a school sponsored by a religious group which frowns on tobacco.¹

[M]ake no mistake about it, the antismoking zealots desparately [sic] want to bring about the death of this industry. And I can tell you here and now that this productive industry and its productive people are not about to lay [sic] down and die. We will not let them drive us off the farm and out of the factory and into the growing ranks of the unemployed. Our adversaries and their bureaucratic and legislative allies have imagination and persistence. But we have every bit as much as they do. We also have one other quality, often lacking on the other side—an abiding interest in and respect for facts and truth.²

Between the time of the Surgeon General’s discussion of involuntary smoking in 1972 and the first Surgeon General’s Report solely on secondhand smoke 14 years later, scientific understanding and citizen action increased but not necessarily in that order.³

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Non-Smokers’ Widespread Aversion, Science, and Legislation Begin to Confront an Entrenched Oligopoly and Its Addicted Customers’ Sense of Entitlement

Passive smoking issue most dangerous industry has ever faced, greater than personal health, taxes, anything else.¹

The first feeble legislative attempts at reducing nonsmokers’ exposure to secondhand smoke in Iowa during the 1970s cannot be understood outside of the national and state contexts in which similar efforts were being undertaken. This chapter focuses on: the role played by Surgeon General Jesse Steinfeld in advocating regulatory intervention based on the initial medical-scientific alerts to the health risks linked to exposure; the struggle over the enactment in Arizona in 1973 of the first statewide legislative limitations on public smoking; and the origins of cigarette manufacturers’ campaigns to thwart such regulation. The following chapter is then devoted to the overtoweringly important Minnesota Clean Indoor Air Act of 1975, which was both a model nationally and a legislative lodestar for the 1978 Iowa enactment, which, to be sure, fell far short, in terms of coverage and stringency, of Minnesota’s, which in its own right marked just the incipient stage of protection for nonsmokers because its central feature—the conferral of extraordinary discretion on owners and managers of covered public places to designate areas where smoking was permitted as an exception to the default prohibition of smoking—to a great extent subverted the statutory purpose of shielding the nonsmoking population from exposure to secondhand smoke.

A Pre-History of Scientific-Medical Understanding of and Militant Opposition to Exposure to Secondhand Tobacco Smoke

We have talked, we have pleaded and prayed, and all has had good effect, but we have borne quietly the smoke that envelopes [sic] us. Now we have ceased to permit ourselves to be smoked and from this day women will make smoking universally unpopular.²

¹T.I. ComCom [handwritten notes of Tobacco Institute Communications Committee meeting] (Apr. 10, [1973]) (remark by Horace Kornegay, president, Tobacco Institute).
²Report of the National Woman’s Christian Temperance Union: The Fortieth Annual Convention: Held in the Casino, Asbury Park, New Jersey, Oct. 31-Nov. 5th, 1913, at 274 (Eliza Ingalls, Superintendent of Anti-Narcotics).
Medical-scientific awareness of and popular aversion to the adverse health impact of nonsmokers’ inhalation of others’ tobacco smoke, as inchoate as they may have been, reach back about a century before their conventional dating in the 1970s. Surprisingly, at least as long ago as 1871, German chemists, in connection with analyzing toxins such as pyridene, picoline, and collidine in (cigar) tobacco smoke, observed the swiftly lethal consequences of exposing a pigeon to picoline fumes. Four years later, the Massachusetts State Board of Health published a report by a physician on the “deleterious effects of the concentrated fumes of tobacco” in railroad smoking cars, who, despite being familiar with the German study, in essence held that you don’t need a chemist to know which way the ill wind blows: “The bad hygienic condition of these moving fumatories must be more or less familiar to all. The fact that the air is irrespirable by most non-smokers, including the whole female sex, is sufficient to show this without the aid of chemical tests....”

To be sure, the publication, more than half a century later, by the American Journal of Public Health of an editorial with a decidedly mixed message underscored how little scientific-medical research had advanced understanding of the impact of secondhand smoke exposure:

Tobacco smoking in meetings has always...passed unnoticed. There are doubtless a number of persons who object to tobacco smoke and who would prefer to have smoking prohibited, since it is disagreeable to many persons, irritates the throats of others, and sometimes is so thick as to interfere with lantern slide demonstrations.... However, smoking is usually passed by in silence...for several reasons, the chief one being the fear of being considered a crank, while the habit is so general that one feels hopeless of making any change. ... That tobacco is a narcotic poison is...not disputed by anyone in authority. ... “Scientific evidence is hardly needed to show that to some extent the person breathing a smoke tainted atmosphere is liable to the same evils as the person who is smoking, for the experience of a non-smoker who has spent an evening in the atmosphere of a smoking concert is often that he sustains a disturbance of health similar to that sometimes

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2Theo. Fisher, “Ventilation of Railroad Cars,” in Sixth Annual Report of the State Board of Health of Massachusetts 225-40 at 228-29 (Pub. Doc. No. 30, 1875). Interestingly, Fisher pointed out that smoking cars were a “purely American institution”: whereas in England and France smoking was forbidden in first and second class carriages, in Germany “smoking is so universal that a contrary custom prevails, and smoking is allowed everywhere, except in certain compartments” marked for nonsmokers. *Id.* at 228.
Non-Smokers' Aversion, Science, and Legislation Confront an Entrenched Oligopoly

complained of by the excessive smoker."

We do not believe this is a major point in sanitary advance, but it is certainly worth our while to consider the facts.5

Likewise, militant collective opposition to exposure to secondhand tobacco smoke was not a product of the 1970s. Ironically, legislators themselves in almost all legislatures, as detailed above, had already begun to prohibit smoking in their own workplaces early in the nineteenth century.6 Indeed, various colonial legislatures had banned tobacco smoking in their own chambers in the seventeenth century,7 at the end of which Pennsylvania enacted a law pursuant to which in Philadelphia and New Castle “no person shall presume to Smoak tobacco in the Streets, either by day or night and every person offending herein, shall forfeit for every such offence twelve pence...."8 To be sure, the prohibition was designed to foster fire prevention, as was an 1818 Massachusetts enactment of a statutory penalization of smoking or having in possession a lighted pipe or cigar on any street, lane, or passage way or on any wharf in Boston.9 More relevant, however, is that in 1881, just a year after the Massachusetts legislature had finally repealed that law,10 it enacted another making it “disorderly conduct”

5"A New View of Smoking,” AJPH 18:1285-6 (1928) (edit.) (quoting Lancet, Apr. 26, 1913 at 1181). In a compendious work on tobacco published in 1939, a German physician devoted a small section to what he called “Passive Smoking,” though the chief adverse health consequences he identified were eye irritations. Fritz Lickint, Tabak und Organismus: Handbuch der gesamten Tabakkunde 260-65 (1939).

6See above ch. 18.

7See above ch. 18.


101880 Mass. Acts ch. 38 at 36. At the time of repeal the press reported that the law was “violated so constantly by those who make as well as by those who execute the law, that its continuance on the statute books is an absurdity.” It had last been enforced 30 years earlier when abolitionists, “eager to harass” a slave-catcher trying to return two slaves to bondage, “had him arrested and fined for smoking in the streets....” “Boston’s Peculiar Law,” Bath Independent (Maine), Feb. 28, 1880 (4:3). In fact, such a warrant had been issued for the slave-catcher in November 1850. See “Hughes, the Slave-Hunter’s Account of His Mission,” Liberator (Boston), Dec. 6, 1850 (3:3-4). The following year a Smokers’ Circle was established in Boston Common: “It is a well-known fact that—while a man may enjoy the weed by inhaling the fragrant fumes of a cigar in any

2153
for anyone who smoked or had in his possession a lighted pipe, cigarette, or cigar in a town, ward, or precinct meeting or a meeting held for an election. In 1887 the Committee on Hygiene and Public Health of the Kansas House of Representatives expanded the protective scope beyond its own precincts by recommending passage of a bill prohibiting the use of cigars or tobacco in “the house of the Lord or any other place of worship.” 12 Four years later a member of the Indiana House of Representatives introduced a bill to prohibit the use of tobacco in churches, schoolrooms, and public halls.13 That public demand for protection from exposure extended to a much broader universe of public space was reflected in the passage, as detailed earlier, by the lower houses of

other city in the Union—in Boston a fine is exacted from any person who presumes to smoke in the streets. Our worthy mayor, sympathizing with the oppressed consumer of the weed, has had a circle of seats arrayed in a shady grove of our beautiful park; and here scores of persons resort each afternoon and evening to inhale the bewitching weed.” “Smokers’ Circle, Boston Common,” Gleason’s Pictorial, Aug. 9, 1851, at 240. See also M. DeWolfe Howe, Boston Common: Scenes from Four Centuries 62 (1910). Despite the contemporaneous statement that by 1880 the law was a dead letter, a large collective tome on the following half-century asserted that in 1880: “People [were] given the right to smoke in public for the first time. Smokers were formerly liable to arrest on the streets and even on the Common, except in the “Smokers’ Circle.”” Edith Guerrier (comp.), “A Chronicle of Important and Interesting Events: Incidents in the Life of Boston, 1880-1930,” in Fifty Years of Boston: A Memorial Volume Issued in Commemoration of the Tercentenary of 1930, at 715-50 at 715 (Elisabeth Herlihy ed. 1932).

11 An Act to Aid in Preserving Order at Elections went on to mandate that the meeting moderator or presiding officer order such person to remove the pipe, cigarette, or cigar or withdraw himself from the meeting place; if the smoker refused to do so, the moderator was required to “direct any police officers, constables, or others present, to take him from the meeting, and confine him in some convenient place until the meeting is adjourned.” The smoker was liable to forfeit $20 for each such offense. 1881 Mass. Acts ch. 27, at 597. The law for “the physical purity of elections” was designed to “prevent smoking and drinking at the polls on election days.” “The Legislature,” BDA, May 7, 1881 (1:10). The bill as reported by Committee on Election Laws did not cover cigarettes. Id.


Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

Pennsylvania, Mississippi, Alabama, and Minnesota of bills prohibiting public cigarette smoking.\(^{14}\)

Lawmakers may have been in a privileged position to protect themselves, but they constituted far from the only examples of government intervention on behalf of nonsmokers. As long ago as 1890, when the New Orleans City Council adopted an ordinance prohibiting tobacco smoking in street cars on the grounds that the “custom...is a most vile and objectionable one to the majority of our citizens,” it found that it was the only city in the United States that still “allow[ed] such a discomfort to those of its citizens who ride in the public cars.”\(^{15}\) In fact, the end of the nineteenth and beginning of the twentieth century witnessed numerous and widespread battles in the United States over the permissibility of smoking in various forms of public transportation.\(^{16}\) In upholding the constitutionality of the ordinance and the sentencing of defendant to payment of a $25 fine or 30 days’ imprisonment for each of two separate violations, the Louisiana Supreme Court ruled that:

There is no doubt of the fact that smoking in the street cars in the City of New Orleans had caused to the great majority of people using them material annoyance, inconvenience and discomfort. This is particularly so in the winter season when the cars are closed. There is not only discomfort, but positive danger to health from the contaminated air. The record establishes these facts.\(^{17}\)

The court revealed its views as not unbridgeably in advance of the Zeitgeist when it added that: “Smoking in itself is not to be condemned for any reason of public policy. It is agreeable and pleasant, almost indispensable to those who have acquired the habit, but it is distasteful and offensive, and sometimes hurtful to those who are compelled to breathe the atmosphere impregnated with tobacco

\(^{14}\)See above chs. 3-4.

\(^{15}\)State of Louisiana v Heidenhain, 7 So. 621 (La. 1897) (quoting Council of the City of New Orleans, Ordinance No. 4197 (Jan. 2, 1890)).

\(^{16}\)See above ch. 17.

\(^{17}\)State of Louisiana v Heidenhain, 7 So. 621 (La. 1897). The Prussian-born defendant, Henry Heidenhain, was a 28-year-old state assessor and a 39-year-old broker at the time of the 1870 and 1880 Population Census, respectively. He had also been a state legislator during various years between the end of the Civil War and 1884. Membership in the Louisiana House of Representatives 1812-2012, at 170, 172, 179 (rev. 2010), on http://www.legis.state.la.us/members/h1812-2012.pdf (visited Jan. 7, 2010). Heidenhain, who had been in the Union Army and is listed (together with two other lawyers) as representing himself, was by the 1880s a lawyer and some type of judge.
in close and confined places." After having abjured targeting smoking from the perspective of public policy, the Louisiana Supreme Court proceeded to certify the city council’s power to target it from the perspective of public health, under which the council had authority under Section 7 of the charter to provide for the public health. It can therefore require in public places, theaters, halls, etc., that there shall be ventilation for a supply of fresh and pure air; and in order to preserve the public peace, order and health, and under its general police authority in said Section 7, it can compel the owner of public halls and theaters to provide means to prevent fires and to supply fire escapes in case of fire. And in pursuance of the same power it can, in order to preserve pure and fresh air in crowded halls, and to prevent fire, prohibit smoking in the same.

The same authority and the same reasons apply in the prohibition of smoking in street railway cars.

It is as essential to health and to comfort to have pure air in them as in any other crowded place.

In 1891 the Woman’s Christian Temperance Union—which for several years had been campaigning for a smoking ban in waiting rooms and post offices—referring to conditions in its national headquarters city, insisted, apparently without tongue in cheek, that industrial-strength air pollution was a bagatelle compared to the aggregate impact of cigarette smokers:

The last few months there has been a great deal of commotion in Chicago in regard to the chimneys...which belch forth their great clouds of smoke to the greater polluting of the air. [P]roceedings are to be taken compelling the owner of the chimney to put a smoke consumer on the smoke-stack so that the pure air of his neighbors be no longer polluted.

Now, why all this commotion about a little carbon smoke from a few score chimneys when there are tens of thousands of lesser chimneys giving out a far more vile, obnoxious and injurious smoke, against which scarcely a protest is being made! Boys, youths, men, and, alas! even women, are to be seen on the streets...smoking their vile cigarettes, puffing clouds of abominable, acrid smoke, not into the air, but into the very face and lungs of the passer-by; and he who dares to protest is a “crank,” one who would deprive his neighbor

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18State of Louisiana v Heidenhain, 7 So. 621-22 (La. 1897).
19State of Louisiana v Heidenhain, 7 So. 621, 622 (La. 1897).
20Minutes of the National Woman’s Christian Temperance Union at the Sixteenth Annual Meeting, Chicago, Illinois, November 8 to 13, 1889, at 164 (1889); Minutes of the National Woman’s Christian Temperance Union at the Seventeenth Annual Meeting, Atlanta, Georgia, November 14th to 18th, 1890, at 181 (1890); Minutes of the National Woman’s Christian Temperance Union at the Eighteenth Annual Meeting, Boston, Mass., November 13th to 18th, 1891, at 97 (1891).
Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

of a “legitimate pleasure.”

If the smoke consumer is needed in the one case, where the smoke itself goes largely into the upper clouds to be carried away over the lake and there dispersed, it is certainly much more needed where the passer-by is compelled to inhale and suffer it....

Unsurprisingly, the WCTU did not abandon this quest for smoke-free public air. To its national convention in 1913, Eliza Ingalls, the organization’s redoubtable and irrepressible longtime Superintendent of Anti-Narcotics, reported this “plan” for dealing with the problem that “we are a narcotized people, the men from the use of tobacco, and the women from the inhalation of men’s tobacco”:

If a man smokes in the room, we will leave the room; if he smokes at the counter of a store where we are trading, we will ask that he put out the cigar or himself; if he smokes in the street car, we will insist that the law regarding smoking be enforced. ....

Too long have we smoked a “good cigar” at second hand. ... Now we will protest, drive the smoker of the species, be it man or woman[,] to the smoking den, the garage or the desert, in all kindness, as self[-]preservation is the first law of nature.

Just such a plan was embodied in a bill on which in 1915 the Legal Affairs Committee of the Massachusetts legislature held a hearing to prohibit all tobacco smoking “at all times” in public places, including in or upon common roads, streets alleys, passageways, parkways, promenades, sidewalks, platforms, waiting or resting places, seats, parks, playgrounds, wharves, docks, landings, and in all common parts, such as the entrances, porticoes, piazzas, vestibules, corridors, lobbies, hallways, stairways, elevators, waiting rooms, offices, halls[,] rooms or apartments

23The bill (H. 433), accompanied a petition submitted by Fremont LaForest Pugsley, a lawyer and prohibitionist, and 30 others, was sponsored by Representative Fred P. Greenwood of Everett, a 60-year-old retiree who had been in the House since 1911. Petition—House (File stamped No. 293, Jan. 11, 1915) (copy furnished by Massachusetts Archives); Journal of the House of Representatives of the Commonwealth of Massachusetts: 1921, at 55, 1355 (Jan. 12). In Massachusetts, citizens had (and still have) a “right of free petition” to propose legislation, on which, if the proposal is sponsored by a legislator, a committee must hold a public hearing as with every other bill. http://www.mass.gov/legis/lawmkng.htm (visited Dec. 21, 2009). For example, on Feb. 8, 1915, when the Legal Affairs Committee held the hearing on Pugsley’s H. 433, dozens of other hearings were also scheduled. “Committee Hearings for Monday,” BET, Feb. 5, 1915 (2:6).
of all building[s], structures or enclosures, and in or upon all common parts of all vehicles or conveyances of common carriers of passengers, whether upon land or water, and in all other places whatsoever used by persons in common or for public purposes: provided, nevertheless, that the smoking of tobacco is permitted in or upon private property, used entirely for private purposes, when not objected to by any lawful or rightful occupant thereof, or by any occupant of any adjoining property affected or disturbed by such smoke; and such smoking is also permitted in any separate and closed building, structure, car, cabin, room or apartment, especially designed and set apart for and appropriated entirely to smoking, and so constructed as to prevent the escape of smoke to the offense or annoyance of any person in rightful proximity to such smoking place.24

This almost unimaginably extraordinarily capacious indoor and outdoor smoking ban,25 which almost a century later has still not seen its like implemented anywhere in the United States, was a tad much even for the first speaker at the hearing, William Shaw,26 the general secretary of the United Society of Christian Endeavor (and later that year Prohibitionist gubernatorial candidate), who nevertheless declared: “‘A smoker has no more right to blow his secondhand, dirty smoke in my face than he has to expectorate at me. I can hit him for one thing, but in the other instance he may continue to blow noxious fumes into my face without consideration.’”27 Although Shaw deemed public smoking a public nuisance that “should be treated on a par with spitting,” he was apparently not
content with his “remedy” of “‘biff[ing]’” tortfeasors. Regarding the “bill to prohibit smoking in any places except what Mr. Shaw termed...‘receptacles made for smokers’” as “a bit too broad,” he argued in favor of one whose restrictions would coincide with existing ones on spitting.\textsuperscript{28} The first fruits of such demands for statutorily imposed relief from ubiquitous exposure to tobacco smoke were achieved in 1919 and 1921 in Nebraska, North Dakota, and Utah, which enacted legislation banning smoking in eating establishments and some other enclosed public places.\textsuperscript{29}

The Rollback of Laissez-Faire and the Advent of the New Prohibitionism: Surgeon General Jesse Steinfeld’s Role in Launching the Attack on Passive Smoking

During the early 1950’s just about all of my chiefs in the National Cancer Institute smoked and in later years a series of directors of the National Cancer Institute smoked cigarettes, cigars or pipes. It is small wonder that my requests for “no smoking” in meetings, conferences and poorly ventilated areas were quickly, laughingly and overwhelmingly rejected.

Further, during the 1950’s and 1960’s I had the temerity or lack of intelligence to approach the leadership of the American Association for Cancer Research, the American College of Physicians, the American Medical Association and the American Cancer Society and to suggest the desirability of a “no smoking” rule during meetings of those organizations as a standard for the rest of the medical profession and of society. I was not successful.\textsuperscript{30}

\textsuperscript{28}“Opposed to Public Smoking,” \textit{BET}, Feb. 8, 1915 (2:2). The next day the Committee on Legal Affairs filed a unanimous report with the House opposing the petition. “No Recourse to Blue Laws,” \textit{BET}, Feb. 9, 1915 (2:2). The committee withdrew the bill. \textit{Journal of the House of Representatives of the Commonwealth of Massachusetts: 1915}, at 296, 312 (Feb. 9 and 10). Tobacco industry magazines continued to call attention to proposed measures to ban public smoking in Massachusetts. The next year a House member introduced a bill prohibiting the manufacture/sale of cigarettes and smoking in any post office or public building. “Massachusetts Anti-Cigarette Bill,” \textit{WTJ}, 43(6):4 (Feb. 7, 1916). In 1921, it reported that the Massachusetts legislature had defeated a bill banning smoking or carrying a lighted cigarette or cigar in public. “Jokesmiths Kill Anti-Smoke Bill,” \textit{Tobacco}, 71(18):1 (Mar. 3, 1921).

\textsuperscript{29}See above ch. 16 and vol. 2.

The time appears to have come in our free society for nonsmokers to assert their rights.\textsuperscript{31}

The campaign for the right of the nonsmoker to breathe pure air has upset the tobacco companies more than anything that has been done medically, educationally, scientifically, by legislation, or by government regulation. The reason for the tobacco merchants’ concern is as simple as it is important: if smoking is unacceptable social behavior—relegated to bathrooms, poolrooms, and barrooms—then the cigarette will follow the spittoon to oblivion. But so long as smoking is regarded as a private form of slow suicide or self-pollution, it will be difficult to generate the societal forces needed to combat what is, after all, a societal problem.\textsuperscript{32}

Even in the immediate wake of the individual behavioral and public health disequilibrium caused by the Surgeon General’s 1964 report, which was not concerned with the issue of involuntary smoking, resistance to exposure to others’ smoke received little or no direct scientific support.\textsuperscript{33} For example, in connection with the convening of the National Conference on Smoking and Youth that same year, the U.S. Children’s Bureau published a pamphlet directed at helping teenagers make the “very personal” decision about whether to smoke. Astonishingly, the publication, to which the Surgeon General’s Public Health Service contributed and which the Children’s Bureau reprinted as late as 1968, contained the following question and answer:

Can it harm you to breathe the smoke from other people’s cigarettes?
No. It may make your eyes tear or make you cough a bit; but it cannot harm you. The harm in smoking lies in inhaling the hot smoke from the cigarette directly into your own mouth, throat, and lungs.\textsuperscript{34}

\textsuperscript{31}Remarks by Jesse L. Steinfeld, M.D., Surgeon General of the U.S. Public Health Service at the National Interagency Council on Smoking and Health on the 1972 Report, “The Health Consequences of Smoking” at 13 (Jan. 11, 1972), Bates No. 503583252/64.


\textsuperscript{33}As late as 1967, a reputable historian mocked the refusal of William Allen White, the famed editor of the \textit{Emporia Gazette}, to allow smoking in the newspaper’s offices as “obsolete” in the same sense as Senator Carter Glass’s distrust of automobiles and Justice James McReynolds’ leaving “the Supreme Court chamber when a woman lawyer came to the bar....” Otis Graham, Jr., \textit{An Encore for Reform: The Old Progressives and the New Deal} 89 (1967).

Little wonder that for years the cigarette manufacturers never tired of hurling this embarrassing statement back at a medical-scientific establishment whose research advances in the meantime had long superseded it.\(^{35}\)

In the late 1960s scattered voices of authority began identifying cigarette smoke as a component of air pollution in urgent need of elimination. Philip Abelson, a renowned physicist and editor of *Science*, pointed out in an editorial in 1967 that concentrations in two of automobiles’ toxic products, carbon monoxide and nitrogen dioxide, were “tiny” compared to those found in cigarette smoke, which, moreover, included toxic agents absent from ordinary air pollution such as hydrogen cyanide; in addition, he highlighted the presence of carcinogens. While smokers themselves bore the brunt of the chief health impacts of their own smoking, Abelson concluded that “when the individual smokes in a poorly ventilated space in the presence of others, he infringes the rights of others and becomes a serious contributor to air pollution.”\(^{36}\)

By the end of the decade demands for practical, governmentally imposed suppression of such exposure in confined transportation spaces began to be raised, most prominently by Ralph Nader.\(^{37}\) Otherwise no ideological comrade, Supreme Court Chief Justice Warren Burger, after exposure to 37 smokers on a literal “red-eye” flight, lent his unique legal prestige to the campaign by writing in a letter to the head of the Federal Aviation Administration: “It is incomprehensible to me that FAA has not long ago ‘segregated’ smokers as was done on railroads as far back as 1840.”\(^{38}\) And although the administrator merely “asked airline presidents to try to restrict smoking on their planes,” a front-page article in the *Wall Street Journal* in January 1970 reported that long-suffering and uncomplaining nonsmokers had opened a “broad new front...in the war against tobacco.” Demonstrating more impressively still how anti-smoking positions could cut across political lines, even (nonsmoking) President Richard Nixon made his contribution by banning smoking at his press conferences (sessions that until his administration had been “traditionally smoky”). While Nader envisioned requesting state governments to prohibit or restrict smoking in hospital and railroad and bus station waiting rooms,\(^{39}\) Representative Andrew Jacobs and


\(^{37}\)See below ch. 25.

\(^{38}\)Warren Burger to John Shaffer (Dec. 18, 1969), Bates No. 980075670. The incident had occurred five years earlier.

\(^{39}\)Albert Karr, “No Smoking: Pressure Builds to Curb Smokers in Airliners, Other
Senator Mark Hatfield introduced legislation in Congress to confine smoking to specified seats on airplanes, and similar measures were filed in Illinois and Indiana. A New York State senator about to introduce such a bill declared that: "People are becoming aware of their right to have clean air to breathe, uncontaminated by clouds of tobacco smoke."

Of the more than 500 bills relating to tobacco and health that were introduced in state legislatures between 1950 and 1970, only 45 were enacted (in 24 states), of which only 36, according to the Tobacco Merchants Association of the U.S., were restrictive in nature. Sixteen of the 36 dealt with sales to minors, six to teaching about tobacco in schools, and five to other educational programs, while the remaining nine enactments pertained to smoking (namely, a 1959 Connecticut law banning it on school buses), vending machines, package labeling, study groups, and petitions or memorials.

Perhaps the first new-wave state legislative bills to propose a non-transportational smoking restriction were introduced in 1969 in Illinois by
Chicago Democrat Edward Wolbank, an antique store operator, who would have required restaurants to set aside 25 percent of seats for nonsmokers and empowered cities and counties to prohibit smoking on the premises of any establishment that sold food to be consumed off the premises. The former bill (H.R. 2) was quickly dispatched by a committee “do not pass” recommendation. The cigarette oligopoly, through its disinformation and lobbying arm, the Tobacco Institute, helped kill the bill as the latter’s annual summary of state anti-tobacco legislative activity colorfully described the operation: “We encouraged the Illinois distributors to oppose this bill. As a matter of fact, it was killed by humorous comments by opponents in the House.” (Frank Welch, the TI executive vice president who was in charge of the State Activities Division from its inception in 1962 into the early 1970s and wrote these annual summaries, was academically and governmentally well-connected, having been a member of the National War Labor Board, a director of the Tennessee Valley Authority and the Cleveland Federal Reserve Bank, and dean of the agriculture schools at Mississippi State University and the University of Kentucky before being appointed assistant secretary of agriculture for federal-state relations at the outset of the Kennedy administration.) The other bill, according to the Tobacco Institute, experienced exactly the same kind of death by comical cuts. However, Wolbank, who was also the paladin of the elimination of pay toilets, refused to let his initiative die laughing. Although in March 1970 he told the press that his
bill had been beaten 2 to 1 in committee and that “[s]ome people said I was 10 years ahead of my time,”\textsuperscript{49} a few weeks later he refiled it, and this time the committee recommended that it “do pass.” Then on May 13, the full House voted 53 to 44 for mandating restaurants to set aside 25 percent of seating for non-smokers, but since the Yeas fell far short of a constitutional majority of the whole membership, even feckless smoking-free but not smoke-free segregated restaurant seating remained out of reach.\textsuperscript{50} Nevertheless, the bill appears to have become less of a laughing matter for the Tobacco Institute, which laconically reported its status as having “died....”\textsuperscript{51}

On the occasion of the sixth anniversary of the issuance of the Surgeon General’s landmark 1964 report, the new (non-smoking) Surgeon General, Dr. Jesse Steinfeld, told The New York Times in January 1970 that he favored “firmer enforcement of no-smoking regulations in places and situations where smoking may involve fire risks and discomfort to nonsmokers.”\textsuperscript{52} Soon Steinfeld became the country’s most authoritative, eloquent, and outspoken advocate of public smoking bans. In September 1970, going far beyond his predecessors, he told the first National Conference of the National Interagency Council on Smoking and Health in San Diego that “the time is ripe for government and voluntary groups to mount a more vigorous program on all fronts to portray cigarette smoking as what it really is—a dirty, smelly, foul chronic form of suicide....”\textsuperscript{53} As one dimension of that portrayal he announced that federal agencies were limiting smoking areas in hospitals.\textsuperscript{54}

Marking the seventh anniversary of his predecessor’s Smoking and Health on
January 11, 1971, Steinfeld, at the very end of a “personal speech”\textsuperscript{55} he was required to give to the National Interagency Council on Smoking and Health\textsuperscript{56} because he was not permitted to summarize the new Surgeon General’s report, which had not yet been cleared by the Office of the Secretary of Health, Education, and Welfare or the Executive Office of the President, made a “call for a nonsmokers’ rights movement,” which that Office did not regard approvingly and which prompted the tobacco industry to name Steinfeld “‘Public Enemy Number One’”\textsuperscript{57}.

Finally, evidence is accumulating that the non-smoker may have untoward effects from the pollution his smoking neighbor forces upon him. Non-smokers have as much right to clean air and wholesome air as smokers have to their so-called right to smoke, which I would redefine as a so-called “right to pollute.” It is high time to ban smoking from all confined public places such as restaurants, theaters, airplanes, trains, and busses. It is time that we interpret the Bill of Rights for the Non-Smoker as well as the Smoker.\textsuperscript{58}

Interestingly, the lengthy account of this speech by the chief science reporter


\textsuperscript{56}The National Interagency Council on Smoking and Health was formed on July 9, 1964, under the guidance of Surgeon General Luther Terry to implement the remedial action proposed by the 1964 surgeon general’s report. Members in addition to the American Cancer Society, American Heart Association, American Public Health Association, and National Tuberculosis Association, included the U.S. Public Health Service, the Children’s Bureau, and the U.S. Office of Education. National Interagency Council on Smoking and Health (1965), Bates No. 70108714. By 1974 the membership had expanded to include many other organizations, including the American Medical Association, the U.S. Department of Defense, and the National Jogging Association. Bill of Rights for Non-Smokers at 2-3 (Jan. 11, 1974), Bates No. 502669802,3-4.


of The New York Times omitted any reference to the call for a public smoking ban, although the Washington, D.C. press turned it into headlines. Nevertheless, two weeks later, the national newspaper of record did report the announcement by the New York City Commissioner of Marine and Aviation, himself a smoker, of a smoking ban on the Staten Island ferries: “The official was said to be acting on the advice of” of Steinfeld, “who recently called for a ban on smoking in confined public places....” ( Asked by a pro-tobacco congressman whether a smoking ban on the ferry decks was “going a little too far,” Steinfeld unabashedly replied: “I wrote them a letter of congratulation.”) Although, as he later recounted, “[w]herever he spoke, Steinfeld...proposed a ban on smoking in such enclosed public places,” these recommendations that were added at the end of the annual Surgeon General reports were “regularly removed” by the Nixon administration Office of Management and Budget.

By 1971 the U.S. Public Health Service, as Steinfeld mentioned to Representative Bill Young in March in applauding the latter’s introduction of a congressional bill to require the Transportation Secretary to issue regulations designating a portion of the seating capacity only for nonsmokers on airplanes, trains, and buses in interstate commerce, was “in the process of developing an assessment of the effect of tobacco smoke from other people’s smoking on the nonsmokers....” Results of that study appeared in the 1972 Surgeon General’s report, which finally synthesized an initial scientific basis for the harm caused by nonsmokers’ involuntary exposure to tobacco smoke and thus for limiting or

61Smoking to Be Banned on Staten Island Ferry,” NYT, Jan. 27, 1971 (74).
prohibiting such exposure. The chapter (“Public Exposure to Air Pollution from Tobacco Smoke”) was a brief (10-page) summary of “the present state of evidence concerning the effects of exposure to an atmosphere containing either tobacco smoke or its constituents.” Such knowledge as research had yielded was categorized under four major heads: (1) the extent to which cigarette smoke components contaminated the atmosphere and were absorbed by nonsmokers; (2) the effects of low levels of carbon monoxide on human health; (3) nonsmokers’ allergic and irritative reactions to cigarette smoke; and (4) the harmful effects of passive inhalation of cigarette smoke in animals.

First, the extent of air pollution was highlighted by the finding that “tar” and nicotine levels in sidestream smoke emanating from the cigarette’s burning cone might be significantly higher than those in mainstream smoke, which comes through the mouthpiece and might be harmful to nonsmokers. For example, three times as much benzo(a)pyrene was found in sidestream as in mainstream smoke; unsurprisingly, levels of such compounds in indoor smoky spaces were much higher than in the outside atmosphere.

Second, the carbon monoxide levels to which nonsmokers were exposed and the resulting elevated carboxyhemoglobin levels were observed to have adverse physiological and psychophysiological effects, including “alter[ing] auditory discrimination, visual acuity, and the ability to distinguish relative brightness,” as well as to be associated with impaired performance on psychomotor tests and physiological stress in heart disease patients. In summary:

The level of carbon monoxide attained in experiments using rooms filled with tobacco smoke has been shown to equal, and at times to exceed, the legal limits for maximum air pollution permitted for ambient air quality in several localities and can also exceed the occupational Threshold Limit Value for a normal work period presently in effect for the United States as a whole. The presence of such levels indicates that the effect of exposure to carbon monoxide may on occasion, depending upon the length of exposure, be sufficient to be harmful to the health of an exposed person. This would be particularly significant for people who are already suffering from chronic bronchopulmonary disease and coronary

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Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

...heart disease.  

Third, generally exposure to tobacco smoke “can contribute to the discomfort of many” people by exerting “complex pharmacologic, irritative, and allergic effects” in addition to exacerbating allergic symptoms in nonsmokers with pre-existing allergies. More specifically, inhaling tobacco smoke was found to cause bronchial constriction, mucus hypersecretion, and ciliary stasis. 

Finally, the import of the animal studies, which found that particulate matter and the oxides of nitrogen adversely affected pulmonary and cardiac structure and function, was uncertain because the experimentally inflicted damage was observed “after prolonged exposure to high concentrations of cigarette smoke and the comparability of animal exposure and human exposure in smoke-filled rooms was unknown. Consequently, the report concluded that it was at the time “impossible to be certain from animal experimentation about the extent of the damage that may occur during long-term intermittent exposure to lower concentrations.”

At the outset of his prepared remarks at the press briefing on the report on January 10, 1972, Steinfeld observed that although the number of deaths clearly related to cigarette smoking far exceeded those caused by epidemics of a number of infectious diseases (such as poliomyelitis, cholera, and typhus), the measures taken by government and citizens to combat smoking had fallen far short of those to protect society from communicable diseases: “Of course, the difference is that cigarette smoking is largely a personal thing whereby the cigarette smoker harms only himself”—which he immediately modified parenthetically: “(if one assumes the non-smoker does not have equal rights, and is not subject to any harm from his cigarette-smoking neighbor).” When his commentary reached the report’s

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73 On dogs that inhaled cigarette smoke through tracheostomas, “were ‘smoked’” for 875 days, and either died during the experiment or were “sacrificed” after day 875, see U.S. Department of Health, Education, and Welfare, The Health Consequences of Smoking: A Report to the Surgeon General: 1971, at 158 (n.d.).


As some of you may know, I have very strong feelings that we have too long neglected the rights of the non-smoker. We have exposed him to annoyance and in some cases hazard by subjecting him to other people’s smoke where he works, where he dines, and when he travels. Support for action to give this non-smoker relief is to be found in the 1972 report. Although we cannot say with certainty that exposure to tobacco smoke is causing serious illness in nonsmokers—the long term research necessary for such a finding has not yet been done—it is clear that such exposure can contribute to the discomfort of the nonsmoking individual and can produce exacerbation of allergic symptoms in those who are suffering from allergies of various other causes. There is ample proof that those who complain of discomfort in smoke-filled rooms are not disagreeable malcontents, but can have a legitimate cause for their complaint.\footnote{Steinfeld [and] Daniel Horn at 2 (Jan. 10, 1972), Bates No. 503583217/8. It is unclear whether this transcript was prepared by HEW or the cigarette companies (though the misspelling of Steinfeld’s first name suggests the latter); the last part of the parenthetical statement beginning with “and” was not included in the typescript of Steinfeld’s remarks. Remarks by Jesse L. Steinfeld, M.D., Surgeon General of the U.S. Public Health Service at Press Briefing on 1972 Report, “The Health Consequences of Smoking” at 7 (Jan. 10, 1972), Bates No. 504830060/7. To be sure, these early tentative findings were vast understatements of the cardiovascular, cancer, and respiratory related morbidity and mortality caused by secondhand smoke exposure that scientists and physicians would eventually uncover,\footnote{Remarks by Jesse L. Steinfeld, M.D., Surgeon General of the U.S. Public Health Service at Press Briefing on 1972 Report, “The Health Consequences of Smoking” at 7 (Jan. 10, 1972), Bates No. 504830060/7. U.S. Department of Health and Human Services, \textit{The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General} (2006).} and although Steinfeld acknowledged that the average person might not face frequent exposure to these high smoke concentrations for long periods without relief, the conditions were nevertheless dangerous enough—especially for those with pre-existing heart or chronic bronchopulmonary disease—to signal a warning.\footnote{Remarks by Jesse L. Steinfeld, M.D., Surgeon General of the U.S. Public Health Service at Press Briefing on 1972 Report, “The Health Consequences of Smoking” at 7-8 (Jan. 10, 1972), Bates No. 504830060/7-8.} Previously investigators had not realized that the “so-called passive cigarette smoker” was exposed to such CO levels and build-ups of carboxyhemoglobin as to be associated with such harm. Their significance lay in the fact that all the findings of “all our animal experiments showing effects on the pulmonary system, that is, emphysema and chronic dysplasia, and ultimately...
cancers...are similar to that of [should be “on”] the non-smokers, because the animals exposed to cigarette smoke inhaled it passively, and this is similar to that of the non-smoker exposed to the smoke by his cigarette-smoking neighbors.”

Asked at press conference whether, in addition to carbon monoxide’s impact, carcinogens in smoke also had an effect on nonsmokers, Steinfeld characterized his aforementioned statement as a “left-handed way” of trying to answer that question because the kinds of experiments performed on animals would be very difficult to—and he hoped scientists would never—do on humans. Moreover, neoplasms took a much longer time to develop than carboxyhemoglobin, which was much easier to measure than carcinogenic hydrocarbons. Nevertheless, even though science was as yet unable to quantify the impact of tobacco smoke on nonsmokers in terms of such carcinogens, the surgeon general did, in response to another question, “make a flat condemnation of the effect of smokers on non-smokers” as he had with regard to the effect of smoking on smokers. Rephrasing his declaration from 1971, he still felt that “the non-smoker should have the Bill of Rights interpreted for him,” and made his small contribution to that project by reminding the assembled that in contrast to the previous year, in 1972 smoking was banned in the very auditorium in which the press conference was taking place and in all HEW auditoriums. Ultimately, Steinfeld hoped that the report’s new data would stimulate legislative and administrative action to reduce public smoking.  

Perpetuating and developing the kind of PR that shaped the industry’s reputation for having no credibility—by 1978, Brown & Williamson’s general counsel informed the company’s top brass that “[o]n crucial points in the debate, the public opinion percentage scores against the industry read like a thermometer in July. Over 90 do not believe anything we say” —a month later the Tobacco Institute’s general counsel and senior vice president charged before a wholesale grocers convention that on the basis of the chapter on secondhand smoke in the 1972 report it was necessary to conclude that “the number one public health problem is not cigarette smoking, but is the extent to which public health officials may knowingly mislead the American people.”

References:
82 J. C. Blucher Ehringhaus, Jr., Remarks Before the Annual Convention of Arkansas Grocers’ Association, Inc. at 6 (Feb. 26, 1972), Bates No. TIMN0131800/5.
The limited character of the progress toward achievement of nonsmokers’
rights was visibly on display the day after Steinfeld’s press conference at
the annual meeting of the National Interagency Council on Smoking and Health when
Steinfeld expressed his pride in HEW Secretary Elliott Richardson’s having
“taken leadership” and a “bold step” in creating nosmoking sections in HEW
cafeterias and “asking supervisors...to arrange smoke-free work areas where this
can be arranged without undue inconvenience.” 83 As a further sign of the not yet
fully propitious times, Richardson’s ban, which covered conference rooms,
auditoriums, clinics, and elevators, did not apply to lobbies, corridors, and
restrooms where, allegedly, smoking did not present a “serious problem’’
because ventilation was adequate and “enforcement would be very difficult.” 84

Nevertheless, Surgeon General Steinfeld had made a unique and outstanding
contribution to reconfiguring public discourse about the legitimacy of resistance
to and elimination of secondhand smoke exposure. Indeed, the cigarette
oligopolists ceaselessly lambasted Steinfeld and his speech of January 11, 1971
for having “created” the “so-called ‘passive smoking’ issue.” Self-interestedly suppressing all reference to millions of nonsmokers’ personal experience, in 1974 R. J. Reynolds Tobacco Company grudgingly saluted Steinfeld: “[A]s a result of the 1971 speech and 1972 report, the ‘passive smoking’ issue was created. These two actions were all that anti-smoking forces needed to convince many nonsmokers that their health was also being threatened by exposure to tobacco smoke.” And the “momentum that this anti-smoking movement had gained in less than three years” was, as far as the company (and presumably the rest of the industry as well) was concerned, “alarming.” Two years later—at a time when it was chagrined to concede that during the intervening five years “campaigns to make smoking ‘socially unacceptable’ had greatly changed public attitudes, and the number of adults who agree that smoking in public should be restricted...” was increasing each year—Reynolds was still berating Steinfeld for having “created the false issue of harm to the nonsmoker in 1971.”

The cigarette manufacturers managed to camouflage their counterattack on Steinfeld as emanating from a congressional source. The occasion was a hearing on April 26, 1971, before a House Appropriations Committee subcommittee on the next fiscal year’s appropriations for the Department of Health, Education, and Welfare, at which Steinfeld testified. The cigarette oligopoly’s agent on the subcommittee was conservative anti-labor Missouri

90Remarkably, the Tobacco Institute’s initial public responses to Steinfeld’s speech ignored his comments on secondhand smoke exposure. Horace R Kornegay, President of the Tobacco Institute (Jan. 11, 1971), Bates No. TIMN0131735 (untitled press release); Tobacco Institute, For Simultaneous Use with 1971 Surgeon General’s Report on Smoking and Health (Jan. 25, 1971), Bates No. TIOK0000703. Even an internal newsletter omitted mention of them. Tobacco Institute Newsletter, No. 12, Jan. 18, 1971, at 1, Bates No. 1001817062.
Democrat William Raleigh Hull, Jr., who was, conveniently enough, a co-owner of Hull’s Tobacco Warehouse, a tobacco farmer, a cigarette smoker, and an unregenerate and ignorant opponent of the surgeon general’s consensus report of 1964. In an (apparently) unpublished document the Tobacco Institute provided Hull’s prompts, enabling Hull immediately to focus on Steinfeld’s January 11 speech by asking why the alleged accumulating evidence of the adverse impact of smoking on nonsmokers had not been discussed in the 1971 surgeon general’s report. Steinfeld patiently explained that it had taken many years and much research to “convince first the medical community and then the general public about the hazards of cigarette smoking vis-a-vis lung cancer, emphysema, and arteriosclerotic heart disease” for smokers; now that researchers were beginning to collect data on nonsmokers, they were discovering, for example, that children of two smoking parents had more respiratory illnesses. In addition, he mentioned that the fact that carbon monoxide in cigarette smoke had an affinity for hemoglobin 200 times greater than oxygen’s meant that several smokers in a car could generate carbon monoxide levels resulting in carboxyhemoglobin levels “high enough to interfere with driving performance and judgment.” Steinfeld alerted the committee to the existence of a preliminary report and of a whole section on smoking’s impacts on nonsmokers in the following year’s surgeon general’s report. As a parting shot he informed Hull that: “If we used the logic of the Delaney amendment [which prohibited the Food and Drug Administration from approving food additives that had been found to cause cancer in animals or humans] on areas permissible for smoking, we would ban smoking in confined public places, since practically all of our evidence on animals is from studies in the smoking chamber, which is the equivalent of a nonsmoker inhaling the smoke that the smoker puts out.”

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95Departments of Labor and Health, Education, and Welfare Appropriations for
Hull then proceeded to the next question for which the Tobacco Institute had prepped him and which it presumably hoped would plunge the surgeon general into hopeless self-contradiction—namely, concerning the aforementioned government booklet stating that breathing other people’s smoke was not harmful. Instead, Steinfeld calmly pointed out the obvious fact that scientific and medical researchers revised their views as “new knowledge accumulates. I certainly think if we were writing that statement now we would not say it in that way.” The one debating point that Hull managed to score resulted from asking Steinfeld whether he “honestly feel[s] that smoking in public places is a substantial health hazard to a normal health person.” Instead of asking Hull what “substantial” meant, he risked producing propaganda for the cigarette manufacturers by offering this answer to the vague question: “I cannot determine that at this point, nor can anyone else.” Turning to the incidence of heart disease and attacks in males in young life, he speculated that some of nonsmokers’ problem might be “due to inhalation of smoke that others have created,” and then uttered the sentence that the cigarette industry would quote endlessly: “I think we just do not have enough information to make any categorical statement other than that it is unpleasant.”

Although the reason for Steinfeld’s choice of words was unfathomable, since even the preliminary findings went far beyond “unpleasant,” the cigarette manufacturers were not content simply to broadcast their propaganda coup: instead, they turned it into yet another vehicle of disinformation in their war of subversion against the incipient anti-public smoking movement by claiming that the surgeon general’s statement constituted a recantation (even after publication of the 1972 report), and had been a response to the question about the booklet and to a question as to whether there was “any effect of smoking on

1972:Hearings Before a Subcommittee of the Committee on Appropriations House of Representatives, Part 2: Health Services and Mental Health Administration: Statement of the Assistant Secretary for Health and Scientific Affairs 61 (92d Cong., 1st Sess. 1971). Because the affinity between hemoglobin and carbon monoxide is 200 times greater than that between hemoglobin and oxygen, CO’s bonding interferes with oxygen transport to the body.


nonsmokers.”

In spite of this verbal contretemps, Steinfeld’s intervention was in no small part responsible, for example, for a report (”Anti-Smoke Movement”) on the “CBS Evening News” in March 1973 culminating in the statement that: “The conclusion in scientific journal after scientific journal: breathing what passes for air in smoke-filled rooms does the same thing to your lungs, your heart and your blood vessels as smoking cigarettes yourself.” (An enraged cigarette industry knew no better response than hurling back the pseudo-paradox that “the ‘case’ against tobacco smoking has been based almost exclusively on studies of statistics which report the comparative well-being of nonsmokers.”) In turn, these media accounts were responsible for the fact that, as Philip Morris was aware at the time, surveys revealed that as early as 1974, even before the question had become a focus of intense worldwide scientific study, 46 percent of the U.S. population (including 57 percent of non-smokers and even 30 percent of smokers) believed that environmental tobacco smoke was “probably hazardous.” By 1978—that is, precisely at the end of the initial four-year burst of nationwide state and local anti-smoking legislation—these proportions rose strongly to 58, 69, and 40 percent, respectively.

Whereas the initial 1964 surgeon general’s report on Smoking and Health (and the ongoing outpouring of studies) indisputably became the catalyst for the anti-smoking movement in the United States, and Steinfeld’s efforts in the early 1970s crucially catalyzed the anti-public smoking movement, comparatively little medical/scientific progress in studying the health impacts of involuntarily tobacco smoke exposure was achieved or disseminated to the general public during the remainder of the 1970s. For example, as late November 1975, the best

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99Statement at Hearing of N.Y. City Board of Health (Apr. 18, 1974), Bates No. 503812826/34 (by attorney William Shinn appearing on behalf of Tobacco Institute).

100CBS Evening News (Mar. 28, 1973), Bates No. 500081603 (Radio TV Reports, Inc. transcript).


102JRN, The ETS Issue: Science and Politics (May 1987), Bates No. 2023551401 (data from Roper Surveys and Philip Morris USA). This four-page memo may have been written by John (Jack) R. Nelson, who at the time was manager of public affairs research and issues planning at Corporate Affairs, Philip Morris, Inc., the next month became director of corporate affairs planning, and in 2002 became president for operations and technology of Philip Morris, Inc. Philip Morris Glossary of Names, http://legacy.library.ucsf.edu/glossaries/pm_gloss_n.jsp

103See, e.g., the summary in U.S. Department of Health, Education, and Welfare,
scientific-medical case for state intervention to protect nonsmokers from “actual harm” done by smoking in their presence that Dr. Luther Terry, the surgeon general at the time of the 1964 report, was able to come up with during a radio interview while the Washington D.C. city council was considering an ordinance to prohibit smoking in public places was

that there is a certain percentage of the population where it has been very clearly demonstrated that certain persons with allergies or with chronic diseases can definitely be harmed by an inhalation of smoke of others.

I think for the vast majority of our population, however, it is not a question of proven harm, though there may be harm; it’s not as much a proven harm as it is discomfort and just not desiring to be subjected to that sort of experience.104

Consequently, while the scientific underpinnings of the battle against passive smoking stalled, large numbers of nonsmokers, unlike physicians and scientists, were not at all reticent to draw the conclusion that, if firsthand smoke caused lung cancer, obstructive lung disease, and heart disease, then sidestream smoke, which was, gram for gram, even more toxic and carcinogenic than the smoke inhaled by smokers, would too.105 Ironically, then, popular resistance to and legislated bans on secondhand exposure spiraled upwards without the benefit of continuously advancing scientific evidence—much to the amazement and annoyance of the cigarette oligopoly.

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105 In connection with his petition in 1969/70 to ban smoking on buses, Ralph Nader, based on studies showing that children living with adults smokers had a higher incidence of respiratory and other diseases, straightforwardly asserted that “the health hazards present in tobacco smoke affect the individual who inhales the smoke whether or not the inhalation occurs as a result of the individual smoking or as a result of someone else smoking.” “Memorandum: The Inhalation of Smoke as a Hazard to the Health of Non-Smokers” at 7 (1969), Bates No. 03757217/23. In 1974, when he headed the cancer center at the Mayo Clinic in Minnesota, Steinfeld, in a talk at the first annual meeting of that state’s Association for Non-Smokers Rights, tentatively and speculatively suggested that, since research had not yet identified the lowest level at which substances in cigarette smoke could cause lung cancer, it was “conceivable” that a nonsmoker could be exposed to a cancer risk by being present in a smoke-filled room. Lewis Cope, “Steinfeld Cites Several Hazards of Smoke on Non-Smokers,” MT, Feb. 24, 1975 (10A:1-8 at 2).
The First Statewide Anti-Smoking Law and the Cigarette Manufacturers’ Opposition in the Early 1970s: Arizona

The campaign drew its real first blood two weeks ago. Arizona enacted a restrictive bill despite every best effort to defeat it.106

In the campaign of the non-smokers, Arizona is special for two reasons. First, it has a large population of health-conscious retirees who moved in from elsewhere to breathe clean air. Second, one of them happens to be Mrs. Betty Carnes, a crusader for nonsmokers’ rights who devotes almost full time to the cause of clean indoor air.107

[I]f there were to be a monument in this important battleground, it would have to be a statue of Mrs. Betty Carnes, her fist upraised and a squashed pack of cigarettes under her foot.108

From Arizona, the anti-smoking forces have spread their campaign rhetoric across the U.S., basing their ‘game plan’ on the example set here.

To date, over 20 states have enacted legislation to restrict or prohibit smoking in restaurants, stores, and other public places. Twenty states in slightly over two years—not a bad record, is it?109

The U.S. Department of Health, Education, and Welfare erroneously characterized Arizona, which enacted a tobacco smoking control statute in 1973,110 as “the first state to restrict public smoking for health, rather than for fire reasons.”111 In fact, as early as 1919, Nebraska had prohibited smoking in “public

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111 U.S. Department of Health, Education, and Welfare, Smoking and Health Programs Around the World 41 (Dec. 1973), Bates No. 2501443742/88. Sixteen years later the surgeon general’s report still regarded Arizona as “the first state to restrict smoking in a number of public places, and the first to do so explicitly because smoking was a public health hazard.” U.S. Department of Health and Human Services, Reducing the Health
Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

eating places.” While setting forth that “smoking tobacco in any form” was “a public nuisance and dangerous to public health if done in any elevator, indoor theater, library, art museum, concert hall, or bus which is used by or open to the public”—curiously, the provision did not expressly prohibit smoking, although the bill was titled, “Prohibiting Smoking in Certain Public Areas”—the Arizona law nevertheless permitted smoking in those self-same areas “if the smoking is confined to areas designated as smoking areas.” This very restricted coverage and dysfunctional permissiveness did not prevent John Banzhaf, the pioneering anti-smoking leader of Action on Smoking and Health, from celebrating the law as “an historic first statewide legal breakthrough on behalf of America’s nonsmoking majority” and one that “can become a model law.” Although R. J. Reynolds concurred that the law was “a major breakthrough,” which quickly became “the model” for anti-smoking groups, it may have welcomed this particular statutory iteration because at the time the governor signed it the company viewed the Arizona law as “the least harmful of any of the punitive measures introduced to date” precisely because it permitted smoking in


112 1919 Neb. Laws ch. 180, § 12, at 401, 404. See above ch. 16 and vol. 2.

113 1973 Ariz. Sess. Laws ch. 122, at 715-16. This structurally self-undermining feature of the law spawned a dispute over accuracy in reporting between NBC News and the Tobacco Institute. After the former had stated that it was “illegal in Arizona to smoke in such public places as elevators, buses, libraries, museums and theaters,” the latter informed the former’s vice president for public relations that the “Arizona statute [sic] specifically provides for ‘areas designated as smoking areas’ in such facilities.” “NBC Nightly News” (Sept. 12, 1973), Bates No. LG0082339/45 (transcript); William Kloepfer, Jr. to Robert Kasmire at 2 (September 18, 1973), Bates No. LG0082339/44. NBC’s PR head incoherently replied that “I am assured that unless it has been recently amended the Arizona law states that it is illegal to smoke” in the named public places. “It does not provide for areas where smoking can take place, although it offers the option of providing for such areas if those responsible for the facilities wish to.” Robert Kasmire to William Kloepfer, Jr. (Oct. 5, 1973), Bates No. LG0082339/41.


116 [R. J. Reynolds Tobacco Co.], “Presentation on Smoking for Executives and Employees of Tobacco Manufacturers” at 9-10 (May 1, 1974), Bates No. 5012388969/77-8.
designated areas. That this tiny step forward also constituted a sea change was reflected in the judgment of a later surgeon general’s report that “[a]lthough not comprehensive by current [1989] standards, the law was regarded as comprehensive when passed” as witnessed by the press’s characterization of it as “sweeping.” The achievement was further diminished by the fact that smoking had largely already been banned in most of the locations covered by the statute anyway. Moreover, almost a year after the law had gone into effect, the police in Phoenix had not yet arrested anyone for having violated it. An official explained: “‘We’ve had a few complaints...but it was hard to say whether they were valid. And anyway, no one is looking out for this.’”

According to its chief sponsor, the law “would not mean people ‘would be dragged down to jail or hit with huge fines’ for smoking. Rather, it would help make smokers aware that tobacco smoke is harmful to some people.’” As late as 1979, the bill’s primary non-legislative sponsor not only knew of no one who had ever been fined, but was “‘not in favor of it.... With all the crime that is rampant today, police have more important things to do than arrest smokers. Whatever has been accomplished in the no-smoking field has been caused by smokers who never before realized they were harming other people.’”

The Arizona initiative originated in two different but interconnected personal sources. One was Betty Carnes (1905-1987), a former smoker and an internationally well-known ornithologist whose move (with her nine-year-old
husband) in 1960 to Scottsdale, Arizona from New Jersey\(^{125}\) may have associated her with large numbers of middle-aged and elderly people who emigrated to the state for health reasons and in particular “seeking cures for respiratory ailments”\(^{126}\) as well as with others “here seeking clean air.”\(^{127}\) To the news media it was “[n]o wonder...that the non-smokers’ rights movement took hold” in a state to which asthmatics and older people with respiratory problems were attracted because they “welcome the dry, relatively smog-free climate around Phoenix and the state.”\(^{128}\) Spurred on by a 39-year-old close friend’s death from lung cancer,\(^{129}\) Carnes struck out on an activist career, in the course of which, as an obituary noted, she “single-handedly arranged for the first three rows of nonsmoking seats on any scheduled carrier (American Airlines, New York to Phoenix, beginning 8 August 1971), and thus began a world-wide social revolution.”\(^{130}\) The New York Times may have been exaggerating when it credited Carnes with having been “almost single-handedly responsible for Arizona’s being the first state to limit public smoking for health, rather than fire, reasons,”\(^{131}\) but the Tobacco Institute acted as if she had. For example, a few months later it explained its appeal to Lorillard for assistance on the grounds that: “We need all the help we can get in countering the aggressive activities of Mrs. Betty Carnes in her efforts to expand the coverage in the bill passed this year.”\(^{132}\) And following the 1973 session, R. J. Reynolds noted that during her three-year campaign Carnes had “personally interviewed each member of the Arizona legislature and determined their smoking habits and how they would vote on the proposed ban” in addition to having attended every legislative committee meeting in 1972 and 1973. Overall, Carnes’s efforts had “undoubtedly made the most


\(^{131}\)“Arizona Curtails Smoking in Public,” \textit{NYT}, Sept. 4, 1973 (16). As noted above, Nebraska’s, Utah’s, and North Dakota’s laws had antedated Arizona’s by more than a half a century.

\(^{132}\)J. C. B. Ehringhaus and Frank Welch to Bud Bass at 3 (Nov. 9, 1973), Bates No. 85644118/20.
significant contribution” to Arizona’s anti-smoking legislation....”\textsuperscript{133} The organizational form that Carnes gave her activities was the Arizona chapter of Action on Smoking and Health (ASH)—later known as Arizonans Concerned About Smoking—which she founded in 1966 as one of the first nonsmokers’ rights groups in the United States.\textsuperscript{134}

The other person who was instrumental in securing passage of the 1973 law was Stan Turley, a self-professed “blue-nosed Mormon,” a Republican rancher who had entered the House in 1965, already in his second term served as speaker, and in 1971 introduced H.B. 28 to ban smoking only on elevators. As limited as it was, the elevator bill—which Turley regarded as one of only two “really good” things that he did in the legislature—had been several years in the making and arose in his larger environmental imagination. In 1965 or 1966 while attending a House Democratic-Republican coalition meeting at which the smoke was so thick that the ceiling was barely visible, the somewhat asthmatic Turley suddenly realized the irony inherent in the situation that the group of legislators discussing shutting down the copper smelter in Douglas because the population in the vicinity was unable to deal with the smoke was itself spewing out so much tobacco smoke that Turley smelled so bad that his wife would never let him into the house. He decided to deal with the problem by stopping smoking on the elevators. Although he failed to explain then or later how this tiny step could possibly have served that purpose, it fit within his general approach of “an inch at a time rather than jump across the river.” The connection between Turley and


\textsuperscript{134}Stella Bialous and Stanton Glantz, “Tobacco Control in Arizona, 1973-1997” at 7 (1997), on http://repositories.cdlib.org/ctcre/tcpmus/AZ1997 (incorrectly stating the group’s early name and that “[t]he 1973 state law restricted smoking in most public places, such as government buildings, health facilities, public places”). Information on the early name was provided by email from Dr. Leland Fairbanks, president, ACAS to Marc Linder (Jan. 28, 2009). As late as 1973 the group was still referred to in the press as the Arizona chapter of Action on Smoking and Health. “Senators Will Speak About Public Smoking,” Phoenix Republic, Mar. 3, 1973, Bates No. TCAL0004715. Fairbanks, however, stated that by the time he returned to Arizona in July 1970, anti-smoking activities “were referred to publicly as actions of Betty Carnes as President” of ACAS. According to Fairbanks, “early on, in the early 1970’s Betty Carnes was ACAS. She then had followers but not members.” Email from Leland Fairbanks to Marc Linder (Jan. 28, 2009). For a brief mention of the overtopping role played by Betty Carnes in persuading the legislature to act, see Richard Kluger, Ashes to Ashes at 374 (1996). Carnes was, in addition, chair of ASH’s national fund raising. Patricia McCormack, “If You Love Someone Who Smokes, Do Something!” N&O (Raleigh) (III:11), July 8, 1973, Bates No. TIMN0136397.
Carnes—whose single-minded persistence prompted Turley four decades later to call her, good-naturedly, a “nuisance” and a “pest”—came about as a result of her approaching him after she had heard about his interest in introducing legislation.\footnote{Telephone interview with Stan Turley, Mesa AZ (Jan. 24, 2009). See also interview with Stan Turley by Pam Stevenson, at 25 (Nov. 4, 2004), on http://www.cap-az.com/pdfs/oral/Interview%20with%20Stan%20Turley.pdf (visited Jan. 24, 2009).}

Rather than being a case of politics making strange bedfellows, Carnes, a wealthy Republican—her husband was vice president of American Home Products Corporation, a multi-billion-dollar pharmaceutical firm, and a longtime contributor to the Republican Party\footnote{“American Home Products Promotes Three Officials,” NYT Jan. 9, 1950 (37) (named director in 1948 and vice president in 1950); Herbert E. Carnes, Letter to Editor, AR, Sept. 5, 1977, Bates No. TCAL0005163.}—and Turley, a conservative Republican and farm, ranch, and motel owner and banker,\footnote{Stan Turley, The Kid from Sundown 130-31, 137, 139, 158-63 (2002).} exemplified how the anti-smoking movement defied congruence with liberal or leftist positions.\footnote{On Turley’s conservative politics, see Stan Turley, The Kid from Sundown 164-212 (2002). His political judgment can be gauged by his account of a three-week trip to South Africa at the invitation of the apartheid-era government: after reviewing the flora and fauna, he characterized apartheid as a “difficult system.... It appeared everyone was trying to work out appropriate changes....” Id. at 203.} It may have been easy for even a Barry Goldwater forcefully to back federal Food and Drug Administration intervention to prevent cigarette companies from “hook[ing] another generation” of children,\footnote{Barry Goldwater, “Smoke and Fire: Save the Children,” WSJ, Aug. 8, 1912 (A12). Goldwater expressly conceded that if smoking were, as the tobacco industry claimed, “a simple matter of individual rights and adult choice...I would be on their side.”} but for otherwise orthodox glorifiers of free enterprise to advocate overriding property rights and managerial prerogatives and imposing behavioral norms on customers and business owners may have required an ideological compartmentalization (‘urgent public health considerations’) to block off a slippery slope to open-ended state control. What is interesting about this early anti-passive smoking campaign is that it encompassed such rigid foes of social engineering even before science and medicine had concluded that secondhand smoke exposure was a major public health concern.\footnote{Turley’s disgust for smoking and cigarette companies appears to have been indelibly molded by an experience some years before his election to the legislature when he was hospitalized after cartridges thrown into a camp fire had exploded and pieces of the shells struck his eye. In the next bed lay a man in his thirties in a coma for three days following an accident that had killed his wife and child. While the man’s mother sat there,}
In the interim before he filed the elevator bill in 1971, Turley conducted an “experiment” by successfully banning smoking during the meetings of the House committee he chaired. By the beginning of 1970 Turley’s attitude toward public smoking was sufficiently well known that a proposal he had made in jest “requiring all smokers to wear a fitted plastic bag over their heads” was seemingly taken seriously in a letter to the editor by a man who, having recently been surrounded for 30 minutes in a hematologist’s waiting room by five people smoking cigarettes and a sixth a cigar, imagined that pursuant to Turley’s putative bill smokers “can inhale and reinhale without endangering anyone else. Why not? Think of the money they would save! Three or four cigarettes would give them the same amount of pleasure as one or two packs, meaning a savings of between $75 to $100 a year.”

When Turley finally introduced the bill in 1971, which merely applied to elevators, he and his cosponsor, Democrat Craig Davids, “were laughed off the floor.” Making it unlawful to smoke or carry lighted tobacco in a passenger elevator, the bill imposed a fine of up to $50 for a first offense and up to $100 and/or up to 90 days in jail for additional offenses. In addition to requiring the building owner or manager to post a sign with these terms, Turley required the provision of non-combustible receptacles for the disposal of lighted tobacco at the entrance to every elevator. As far as the political editor of the Arizona Republic was concerned, the bill’s only failing was that it did not “go far enough”: the ban should have been extended to all rooms in public buildings except those set aside as smoking lounges. At a House Judiciary Committee
meeting two weeks later Davids explained that restricting smoking in a “confined space” was “particularly important here in Arizona because so many people are here because of respiratory problems.” Why, in the light of this worthy purpose, the protection was limited to this one location, which represented a trivial proportion of all the time that respiratorily challenged new-Arizonans spent in public confined spaces, Davids did not reveal.

Several weeks later Senate Democrat Joe Castillo, a nonsmoker who was “sick and tired of smelling smoke while trying to eat in public places,” introduced, together with five Democratic and three Republican colleagues, a bill (S.B. 166) that declared smoking in the dining area of public restaurants to be a “public nuisance and dangerous to public health.” It prohibited smoking or carrying lighted tobacco in the dining area of a public restaurant, prohibited owners and managers from permitting such smoking or from providing ash trays in dining areas, made violations misdemeanors punishable by fines ranging from $10 to $100, and required restaurant owners to post nosmoking signs stating that those convicted of violating the law would be subject to those fines. However, Castillo (who presumably sensed that he was venturing out further than a majority vote would support) also authorized the state Board of Health to adopt regulations to “permit smoking in separate dining areas...not to exceed thirty per cent of the total seating capacity when there is adequate ventilation and separation from the principal dining area.” Although Castillo and his cosponsors were not seeking to make smokers quit, but to stop the “‘contamination of other people’s air while they’re eating,’” the bill included a very forceful health-based statement of

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147Minutes of Meeting, [House] Committee on Judiciary, Suffrage and Elections (Jan. 28, 1971) (copy furnished by Arizona House of Representatives Chief Clerk’s Office). Neither Betty Carnes nor anyone else who could be identified as a proponent or opponent of the bill was listed among the visitors (all of whose affiliations were named). Neither Carnes nor any other plausible proponent or opponent was listed among the visitors to the meeting of the Governmental Relations Committee, which recommended that the bill do pass. Minutes of Meeting, [House] Committee on Governmental Relations (Feb. 22, 1971) (copy furnished by Arizona House of Representatives Chief Clerk’s Office).


151“Senator Proposes No-Smoking Rule for Restaurants,” Star (Tucson), Feb. 10,
legislative intent:

The use of tobacco for smoking purposes is being found to be increasingly dangerous, not only to the person smoking, but also to the nonsmoking person who is required to breathe such contaminated air. The most pervasive intrusion of the nonsmoker’s right to unpolluted air space is the uncontrolled smoking in public eating places. The legislature intends, by the enactment of this act, to protect the health and atmospheric environment of the nonsmoker by regulating smoking in public restaurants.\textsuperscript{152}

The Senate Public Health and Welfare Committee (which was chaired by Douglas Holsclaw, a strong anti-smoking advocate), despite the opposition of one member who felt that restaurant owners themselves should achieve the bill’s objective without legislation, recommended passage.\textsuperscript{153} That S.B. 166 did not cover bars or taverns\textsuperscript{154} failed to assuage the Rules Committee, where it died.\textsuperscript{155}

On March 9, “[j]okes, laughter, poetry and statements of outrage preceded”\textsuperscript{156} House passage of Turley and Davids’s elevator bill by a vote of 43 to 13.\textsuperscript{157} One opponent opined that the bill was “as foolish a piece of legislation as asking those who do not smoke to hold their breath during an elevator ride or take the stairs.”\textsuperscript{158} While several representatives vituperated against the bill, calling it unfair, foolish, and undeserving of consideration, Turley, surprisingly, conceded

\textsuperscript{152} Senate Bill 166, § 1 (Feb. 9, 1971, by Castillo et al.).


\textsuperscript{155} Journal of the Senate: Thirtieth Legislature First Regular Session of the State of Arizona: 1971, at 1173. Turley later remarked with regard to the demise of Castillo’s bill that Republicans were not about to let a Democrat run a bill. Telephone interview with Stan Turley, Mesa, AZ (Jan. 24, 2009).


that “‘it won’t make much difference whether this bill passes or not...it might cause more understanding from some of those who use tobacco.'”\(^{159}\) Despite the large House majority, H.B. 28 died in committees in the Senate.\(^{160}\) Before the Senate Judiciary Committee Davids stated that the measure “would provide psychological leverage for the protection of nonsmokers caught in the closed space of public elevators. ‘Not too many citizens will the flout the law in the presence of others.’” Then, presumably addressing the concerns of those who eschewed law and favored voluntarism, he added: “‘I can’t conceive of any judge sending anyone to jail.’” One committee member captured the essence of this kind of hybrid measure: “‘It’s a matter of common courtesy, like a gentleman taking his hat off. Maybe we need a law to enforce it.’” But a five-member majority (including future Supreme Court Justice Sandra O’Connor) of the committee disagreed, defeating the bill.\(^{161}\) One reason that Turley reportedly encountered such strong resistance was that “[p]rophets of business disaster were convinced that if shoppers had to put out their cigarettes and favorite cigars to ride the elevators to shop on upper floors above the first floor, all businesses located above the first floor would be at tremendous economic disadvantage and possibly face financial disaster from loss of customers.”\(^{162}\)

In 1972 Castillo (and eight other senators) introduced S.B. 1109, which was virtually identical to his 1971 bill, to ban/limit smoking in restaurants.\(^{163}\) Considerable discussion in Holsclaw’s Public Health and Welfare Committee focused on “setting certain areas off rather than prohibiting smoking entirely in restaurants,” but despite Carnes’s support for the bill, the committee held S.B. 1109 rather than recommending passage.\(^{164}\) The first time that the Commerce and


\(^{162}\)Email from Dr. Leland Fairbanks (pres., Arizonans Concerned About Smoke) to Marc Linder (Jan. 28, 2009).


Labor Committee (of which Castillo was a member) considered the bill, Carnes, representing Action on Smoking and Health, presented material in support of S.B. 1109, but the bill was held for a week after Dave Wynn, the lobbyist for the Hotel and Motel Association of Arizona, an ally of the tobacco industry who stated that restaurant owners opposed the bill based on “operational difficulties,” had requested an opportunity for them to appear before the committee. In the meantime it was suggested that the owners “try to find out the general public preference.” At a meeting three weeks later Castillo presented amendments to his own bill that would have eliminated coverage of small restaurants with a seating capacity of fewer than 75. The Arizona Restaurant Association opposed the bill on the grounds that, as its representative Joe Banks stated, it would be very difficult and expensive for restaurants and the state Public Health Department to enforce. Neither Carnes’s renewed advocacy nor a weakening amendment that would have excluded one-room cafes could prevent the bill’s defeat on a 4 to 3 vote.

Undaunted, though uncertain as to whether the bill would pass in 1973, Turley, now a member of the Senate—of which he became president 10 years later—remained convinced that some day the Arizona legislature would pass a law banning smoking in public places in order to prevent what was at best a public nuisance and at worst harmful to nonsmokers’ health. In the meantime, he was “furious” when someone came to his tiny office to complain about smelter smoke “and all the time he’s blowing tobacco smoke in my face.” In this regard Turley shared a perspective with many Arizonans: “Although a native, Turley, like thousands of persons who came to Arizona for health reasons, has a respiratory problem and finds at times he must leave a committee room when the smoke begins to congeal.”

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166 Minutes, Commerce and Labor Committee, Arizona State Senate, 30th Legislature, Second Regular Session (Mar. 6, 1972) (copy furnished by Arizona Senate Resource Center).


170 Bernie Wynn, “Smoking Is Nuisance, Bill’s Sponsor Feels,” AR, Feb. 16, 1973,
The four co-sponsors of S.B. 1313 included Republicans and Democrats and smokers and nonsmokers. The most important co-sponsor was Douglas Holsclaw, the chair of the Public Health and Welfare Committee—to which the bill was assigned—who was in his mid-70s and had studied at the Harvard Medical School as well as law at the University of Arizona, in addition to operating a successful real estate business. During his seven terms in the House (beginning in 1952) and four terms in the Senate he established a record for having sponsored more than 200 bills that were enacted into law. S.B. 1313 reproduced, virtually verbatim, the aforementioned strong health-focused statement of legislative intent from Castillo’s 1971 and 1972 bills banning smoking in restaurants (which failed to survive Holsclaw’s committee in 1973).

Despite its tough and forward-looking perspective—which one contemporaneous commentator linked not to the “‘blue-noses’ or ‘prudes’ or ‘religious cranks’” who at the turn of the century regarded cigarette smoking as “‘sinful,’” but to “the same people who oppose burning trash dumps, smoke belching from smelter stacks, and oily fumes from automobile exhausts”—the bill, which, in addition to elevators, indoor movie and other theaters, libraries, art galleries, museums, concert halls, and buses, also covered restaurants and cafeterias, and made violations a misdemeanor and imposed a fine ranging between $10 and $100, nevertheless did “not prohibit” smoking in any, let alone all, of the aforementioned covered buildings (including elevators) “if the smoking
Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

is confined to areas separated from those used by the general public.” (During Senate floor debate the language “separated from those used by the general public” was struck; instead, “designated as smoking areas” was inserted.)

This fact did not stop R. J. Reynolds from charging that the law “prohibited smoking in any” of those places and holding up the “militant anti-smoking movement in Arizona” as a “prime example of this new era” in which legislators and regulators “at every level are on a hysterical binge of protectionism—a new ‘ism’ where people are trying to force their self-righteousness on the general public through government sanction.”

Emblematic of the kind of resistance that Turley’s bill encountered was an editorial in the Arizona Republic, which, while conceding that the health aspects were “inarguable,” found the sight of the “government’s hand” “bothersome.” The paper insisted that a “more sensible approach” would have been to “see whether private entrepreneurs—now awakened to sizable public approval of protecting nonsmokers—can demonstrate a voluntary willingness to simply accommodate requests of patrons for separate seating.” (Once the bill was passed without restaurant coverage, the newspaper was more than satisfied when two restaurants in Phoenix voluntarily set aside nonsmoking areas, thus instantiating “elective, free choice” so that no restaurant was “forced to segregate patrons, any more than patrons should be forced to patronize certain restaurants....” In fact, after the law went into effect in August an increasing number offered nosmoking sections.)

At the meeting of Holsclaw’s Public Health and Welfare Committee on March 13, after Senator John Roeder had moved to delete restaurants, cafeterias, and elevators, Turley, who was not a committee member, stated that “he had received a lot of correspondence in favor of the bill and they were not crank letters but people who really needed help with the problem.” He added that “one of the biggest problems existed in doctors offices and hospitals, but [he] did not see how this could be legislated as they were private entities” (without explaining how they differed in this regard from covered restaurants). Before voting on the

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179 Cover Sheet S.B. 1313 (n.d.) (copy furnished by House Chief Clerk’s Office).
motion, the committee heard Carnes and another ASH representative speak of the “urgent need” for the law and Joe Banks of the Arizona Restaurant Association assert that S.B. 1313 “would put the small restaurant owner out of business” because it “would require a tremendous effort on the part of most restaurants” to create separate areas for smokers and nonsmokers. The committee then defeated, on separate votes, the motion to strike eating places and elevators. However, it promptly did an about-face and voted to strike the lengthy, informative, and eloquent legislative intent clause; oddly, not only was there only one No vote, but it was cast by Roeder.

In the full Senate the stand-in for the tobacco industry apparently fared better on March 15: by a standing vote of 18 to 8 the chamber tentatively approved S.B. 1313 after having adopted a floor amendment striking out restaurant coverage authored by none other than Turley himself, “a member of the Church of Jesus Christ of Latter-day Saints and a nonsmoker and teetotaler.” He explained his action on the grounds that, having had “previous experience” with a similar measure in the House, “I knew the bill would have no chance without that exclusion.... It’s not a great thing but it’s something in the right direction.” Even a Republican and smoker who supported the bill bemoaned the Senate’s having “crippled” it, while Holsclaw unsuccessfully “pleaded with his colleagues” not to exclude eating places since, after all, the “federal government is banning smoking in all its employe cafeterias because of health hazards.” Ominously, Democratic minority leader Harold Giss, according to Carnes, “got up on the floor of the Senate and puffed furiously away on his cigarette” denouncing the bill as an invasion of his personal privacy. Exactly one month later he dropped dead of a heart attack, leaving only seven smokers (whose ranks were reduced to

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six a few months later when yet another one succumbed to a heart attack.\footnote{188}{Arizona Curtails Smoking in Public,” \textit{NYT}, Sept. 4, 1973, (16); “Barry Farber Show” at 3 (WOR, Oct. 18, 1973), Bates No. TIMN0069236/8 (quote).} The next day the Senate passed the bill by a vote of 22 (including, this time, Sandra O’Connor) to 8, the opponents being equally divided by party.\footnote{189}{Journal of the Senate: Thirty-First Legislature First Regular Session of the State of Arizona: 1973, at 323 (Mar. 16). As passed the bill included two floor amendments offered by Turley and Holsclaw. \textit{Id.} at 802.} All eight dissenters were smokers.\footnote{190}{“Arizona Dampers Public Smoking,” \textit{Cincinnati Enquirer}, Aug. 9, 1973, Bates No. 85644122.} Speaking prematurely, on March 29, Tobacco Institute President Kornegay boasted to his board of directors with respect to anti-tobacco measures in state legislatures that “[o]ur record is still clean.”\footnote{191}{“Suggestive Statement to Be Used by Mr. Kornegay in His Report Tomorrow, March 29, 1973” (Mar. 28, 1973), Bates No. TIMN0136390.}

At the House Rules Committee hearing on S.B. 1313 on April 5, Carnes held up a “Smoking Kills” sign and urged the committee to protect the state’s two-thirds majority of nonsmokers.\footnote{192}{“Bill to Limit Smoking Clears Panel,” \textit{AR}, Apr. 6, 1973, Bates No. TCAL0004755. Carnes later stated that the survey she had conducted of 18,000 people in Arizona at the time the bill was introduced revealed that fewer than a fourth smoked. “Barry Farber Show” at 3 (WOR, Oct. 18, 1973), Bates No. TIMN0069236/8.} Underscoring the 80,000 cancer deaths a year caused by tobacco, Turley told the committee that the bill would “create public awareness of a real problem.”\footnote{193}{[Meeting Minutes, House] Judiciary Committee at 3 (Apr. 5, 1973) (copy furnished by Arizona House of Representatives Chief Clerk’s Office).} He also stated that “while he felt it did not go far enough, since they had to strike ‘cafeterias and restaurants’ he still felt it to be an opening wedge to the problem.”\footnote{194}{“Bill to Limit Smoking Clears Panel,” \textit{AR}, Apr. 6, 1973, Bates No. TCAL0004755.} The proposed amendment by committee chair Peter Kay, reinserting restaurant and cafeteria coverage removed in the Senate, was voted down after one member had cautioned that “‘[w]e’re liable to lose the whole bill’” if those locations were put back in.\footnote{195}{“Bill to Limit Smoking Clears Panel,” \textit{AR}, Apr. 6, 1973, Bates No. TCAL0004755.} The committee also
heard from at least one opponent of the bill, Earl Cunningham, who argued that "[a]utos kill a lot more people than cigarettes, but you don’t ban autos." 196 (Apparently Cunningham was not a good listener: Turley had just stated that tobacco caused 80,000 deaths a year from cancer alone, whereas total traffic fatalities numbered 56,600 in 1972.) 197 The press account of the hearing failed to identify Cunningham, but he was the executive secretary of the Arizona Association of Tobacco and Candy Distributors, who the next year would become the cigarette oligopoly’s official lobbyist in Arizona. After the Rules Committee had recommended the bill for passage, 198 the House Health and Welfare Committee considered S.B. 1313 at its April 28 meeting, at which Carnes (her affiliation was identified as “citizen”) appealed to the members to pass it for Arizonans’ health and welfare. Before the committee voted to recommend passage, the motion by Jones and seconded by Kunasek to add coverage for restaurants, cafeterias, doctors’ offices, and hospitals carried, 199 but the full House on April 28 passed the bill by a vote of 47 to 7 200 without the additional covered locations. 201

201 Arizona’s legislative journals make it impossible to reconstruct legislative history,
Looking back, Carnes regretted that eating places had been excluded, but she recognized that many legislators believed that inclusion would have led to the bill’s defeat yet again. Her position that some part of a loaf was better than nothing was, at this critical juncture in launching the anti-passive smoking movement, difficult to criticize, but her more detailed reasoning revealed both how grateful Carnes was for even the slightest restriction on exposure to tobacco smoke and how undeveloped the understanding of the health consequences was in the early 1970s. She was willing to accept a separate section of a dining room rather than a separate room for nonsmokers because: “People would still be able to smell some smoke, but it would be a lot better than having someone blowing smoke right in your face while you are trying to eat.” How low her initial sights were set was also indicated by her claim that (in the context of continued exposure to tobacco smoke wafting from designated smoking areas and in places excluded from the law altogether) the new law put nonsmokers, who had been “second-class citizens,” “on an equal basis.” Of a piece with these views was her insistence, which would have been quite congenial at the time to some cigarette manufacturing executives, two years later that: “‘If all smokers were considerate of others...we wouldn’t have any need for these laws.'”

The large House majority cast grave doubt on the Tobacco Institute’s intelligence-gathering capacity (as well as the industry’s lobbying competence):

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203 John Kuhn, “Get Your Ash Out of Arizona, She Said,” *Hackensack Record*, June 11, 1973, Bates No. TCAL0004746. Even a decade later, a physician’s (and Arizona anti-smoking activist’s) exaggerated account of the scope of voluntary compliance elided the continued exposure to smoke wafting from smoking to nonsmoking sections by asserting that when “positive peer pressure...remind[ed] a few poorly compliant individuals and facility managers from time to time as to their responsibilities under the law” they “eventually respond when they see that they will be identified as non-compliant...if they do not keep the air clean.” Leland Fairbanks, “Sidestream Smoke: A Mainstream Health Problem—The Arizona Response,” in *Proceedings of the Fifth World Conference on Smoking and Health* 1:519-21 at 520 (William Forbes et al. eds. 1983).


205 In its first newsletter to appear after the governor had signed the bill into law TI still headlined the news “Smoking Ban on Its Way?” *TIN*, No. 73, May 8, 1973, at 5, Bates...
just three days earlier it had reported to R. J. Reynolds—which had asked TI to keep it informed on the progress of any bills that would prohibit or discriminate against smoking and offered “assistance in working with State Tobacco Wholesalers or others in organizing our position on any type of punitive State legislation”—that Welch, the TI’s vice president for state activities, had personally visited Arizona and “believes that this bill will not be enacted.”

At this time the Tobacco Institute took the disingenuous position for purposes of litigation that, although it was “concerned with anti-tobacco legislation anywhere it occurs, in any state,” “[w]e don’t lobby” (for example) in California because the “people in the state, the tobacco people, the distributors and their organizations, know best how to handle those matters. We do not. It would be officious of us to interject ourselves into the operation in California or any other state.”

In fact what TI did, as its president, Kornegay, testified in a deposition, was to pay the California Tobacco and Candy Distributors to hire lobbyists. (Why TI was circumspect about openly lobbying was clear: in April 1973 Welch reported that when the executive director of the California Association of Tobacco and Candy Distributors “got up to speak for us” at a legislative committee hearing on a smoking restriction bill, he was “hissed and booed....”)

At a celebration on May 4, the day the governor signed the bill (which was to go into effect on August 8), Banzhaf, the founder of ASH, lauded Arizona as the first state to “‘guarantee the rights of nonsmokers.’” Refusing to rest on their laurels, the celebrants announced that they would return to the legislature in 1974 to extend coverage to schools, restaurants, cafeterias, food markets, public meeting rooms, hospitals, doctor’s offices, waiting rooms, and interstate buses. To be sure, Turley warned against precipitous action: while agreeing that “the change in public attitudes in a few years that made the new law possible” was “‘amazing to see,’” he nevertheless urged his co-celebrants not to seize the momentum: “‘But I caution you not to go too fast in seeking too much
Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

The public must be educated first. Don’t develop too much resentment by the public in seeking an expansion of this law—advice that Turley himself ignored as chief sponsor of successful and unsuccessful anti-smoking measures in 1974, 1975, 1976, and 1978.211

In a post-mortem interview on the bill’s passage in the U.S. Tobacco Journal, Cunningham both proffered various excuses for the industry’s defeat and sought to trivialize the substance of the enactment. While conceding that “the anti-smokers really got to us this time,” he noted that “we’ve been monitoring them all along but they got a lot of help from that Washington group, the National Interagency Council on smoking and health, and we just didn’t think they would muster the strength they did.” Without mentioning Turley by name, he also attributed the new law to the Mormon religion’s strictures on smoking. “There’s a good-sized Mormon segment here and when they go into government they bring their religion with them.” Cunningham then “minimized” the law’s likely impact, calling it “harassment which probably won’t have any effect on cigarette sales.”212 Philip Morris’s vice president for PR was less sanguine: a month after the governor had signed the bill, James Bowling, wondering whether “this extension of government control represents further erosion of the private citizen’s...ability to exercise freedom of choice,” told a tobacco audience that “we can expect an avalanche of this kind of proposed legislation to continue to be advocated by the anti-smoking forces,” whose arguments were “based on passion and emotion rather than valid scientific data.”213 Efforts would, he added, nevertheless be made to have the law repealed.214 R. J. Reynolds, charging that the Arizona legislature had acted “under considerable pressure from militant anti-smoking and environmentalist groups,” appeared to take some solace from the fact the law “did not ban smoking outright....”215 Revealingly, the only point that the cigarette oligopoly’s representative failed to mention was that, as Democrat

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211 Turley later stated that his filing more bills did not contradict his advice in the sense that he had not regarded those bills as pushing the envelope. Telephone interview with Stan Turley, Mesa, AZ (Feb. 4, 2009).
Larry Bahill had stressed at the House Judiciary Committee hearing, “‘[p]eople are getting sick and tired of having smoke blown in their face and inhaling the used air of other people.’”216 Cunningham’s reaching out for scapegoats to excuse his own failure to thwart enactment was consistent with Turley’s later judgment that the tobacco industry had not taken his bill seriously because it had not been worried about the likelihood of the measure’s passage or enforcement.217

The closest Cunningham came to addressing this health issue was his announcement that “‘[w]e’re also coming out with a positive claim that will encourage people to enjoy smoking while considering the non-smokers around them.... Our hope is this sort of positive approach will get the anti-smokers off our backs.’”218 Shortly thereafter Cunningham created “cartoons depicting common sense smoker courtesy practices.” Their purpose was “to subtly tell smokers that some non-tobacco users find the habit unpleasant in confined areas such as elevators....” The coordinating director of the Coordinating Board of Tobacco Trade Associations enthusiastically reported to the cigarette manufacturers that “[s]uch a program could have far-reaching public relations possibilities for an industry currently barraged with ‘non-smoker’s rights’ legislative proposals.”219 How the CBTTA imagined reconciling this inculcation of courtesy with its plans to mobilize smokers to “protest the erosion of financial and personal freedoms being suffered by people desiring to use a legitimate product” at the very same time220 it did not explain. (Moreover, Cunningham was

217Telephone interview with Stan Turley, Mesa, AZ (Jan. 24, 2009).
219Jack Beaty to American Brands, Inc. et al., Subject: Quarterly Report at 3 (July 11, 1973), Bates No. 680517400/02. The CBTTA, a creature of the cigarette oligopolists, was formed in 1970 to strengthen the tobacco industry at the state level. Deeming the “submissiveness of the tobacco consumer to restriction after restriction and tax after tax...inexplicable,” the CBTTA concluded: “We must wage a campaign which will arouse the natural instincts of the consumer to resist unfair treatment.” Jack Beaty, Confidential Report: Prepared Especially for the Executive Committee of the Tobacco Institute Special Committee on Industrial Coordination at 1, 8 (June 30, 1971), Bates No. 03602097/8/10. Beaty’s contract with the cigarette manufacturers required him to use his “best efforts” to encourage tobacco trade associations to “recognize that their own best interests require them to oppose...the enactment of” “state and municipal legislation to discourage smoking by imposing restrictions on the promotion or sale of cigarettes.” William S. Smith [chairman of the board, R. J. Reynolds Tobacco Co.] to Jack Beaty and Associates (Jan. 21, 1974), Bates No. 502076478.
220Jack Beaty to Earl Cunningham (May 9, 1973), Bates No. 500034469.
unsure whether the Tobacco Institute would support his initiative\textsuperscript{221} precisely because the industry lacked a uniform position on this so-called courtesy tactic. For example, during a discussion of the issue at a TI Communications Committee meeting, John Blalock, the Brown & Williamson PR director, argued both that it was “[d]angerous to preach smoking ethics” and that he “would not want to admonish smokers. They are harrassed [sic] enough.”\textsuperscript{222}

Carnes and Turley did not achieve their success as a result of some neglect or failure on the part of cigarette manufacturers to become involved in the legislative process in Arizona. The Tobacco Institute, though scarcely as well funded to lobby in the states as it would be by the late 1970s, let alone the 1980s or 1990s, was nevertheless panoptically observant. Thus as early as 1967 TI, in its annual account of “State Anti-Tobacco Legislative Activity,” noted that it had appraised more than 600 bills that it believed were or might be detrimental to the tobacco industry, none of which was enacted. The report made it clear that it was attentively monitoring developments in Arizona: “No tobacco punitive/restrictive type legislation has been introduced in past session of the Arizona Legislature, and the chief spokesman for the anti-tobacco forces, the State Health Officer, has given no indication that he will seek such legislation next year.”\textsuperscript{223}

From the 1969 report it emerged that the Tobacco Institute had engaged in lobbying in at least 21 states and New York City, though in some of them the industry appeared to be operating behind the scenes and without a formal representative.\textsuperscript{224} To be sure, at this juncture, when state legislatures had as yet passed scarcely any measures hostile to the tobacco industry, the Tobacco Institute neither was nor needed to be the much feared/admired lobbying machine that it would soon become. The low level of competence and sophistication of which TI was still capable was on display in 1969 in West Virginia, where the organization had not even heard about a certain bill because the (legislative) reporting service had not reported it to the Tobacco Institute until late in the session.\textsuperscript{225} More revelatory of the industry’s lack of lobbying prowess was the

\textsuperscript{221}“Anti-Smokers: Do or Die?” \textit{USTJ}, May 17, 1973, Bates No. TCAL0004653 (edit.).

\textsuperscript{222}T.I. ComCom [Communications Committee meeting handwritten notes] (Apr. 10 [1973]), Bates No. 500081708/13/14.


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comment in the 1970 report about the New York State legislature, which for the previous six years, spearheaded by Republican Senator Edward Speno, had considered “a rash of anti-tobacco bills,” which “covered a wide range [sic] attack on the tobacco industry.” Only after these years of steady onslaught triggered by the surgeon general’s report in 1964 was the Tobacco Institute able to state that: “We are now well organized in Albany with competent legislative assistance, and this year we got more help from other organized groups than we have had heretofore....” Nevertheless, the bill watchers lamented that the “persistence and competency of the adversaries in the New York Legislature make the situation there difficult and pressing.”

Carnes herself stated the day after the Arizona governor had signed the bill into law that: “‘You have no idea how hard it is to fight the large restaurant and tobacco industry lobbies. They have thousands of dollars for the smoking campaigns. I had only time.’” She quickly made it clear that she would be using more of that time to lobby the legislature in 1974 for smoking bans in food stores, hospitals, and doctors’ offices. By the fall of 1973 the Tobacco Institute began preparing to thwart any such legislative expansions in Arizona. On November 9, TI general counsel J. C. B. Ehringhaus and state activities vice president Welch wrote to Lorillard’s vice president for sales requesting “assistance on evolving problems in Arizona....” After mentioning that Turley and another senator had already publicly declared that they intended to introduce a bill in 1974 to cover places not included in what the TI regarded as the “relatively mild” 1973 law, and that proposed coverage might be comprehensive or “fairly limited with better prospects of getting it enacted,” Ehringhaus and Welch revealed that they had spoken to Cunningham and Weldon Hill, the operator of two wholesale tobacco firms in Arizona, who had “agreed to start now in organizing and developing a program of resistance to this prospective proposal.” In addition they had also contacted the aforementioned Dave Wynn, the lobbyist for the Hotel and Motel Association of Arizona, and Joe Banks, the executive secretary of the Arizona Restaurant Association, who both “agreed to

Bates No. 1002909020/79.


mobilize their forces and cooperate with the tobacco industry representatives in an aggressive campaign to prevent further restrictive legislation in the state.” The Tobacco Institute requested that Lorillard both deploy its sales representatives in this battle and contact motor carrier organizations that transported and a warehouse company that stored most of the cigarettes in Arizona to request that they offer their services to Cunningham, who would be working with TI’s “excellent lobbyist” in Arizona, Tom Sullivan.229 In spite of this meticulously planned counter-lobbying, in 1976 R. J. Reynolds mendaciously charged, in the wake of Carnes’s (partial) success in 1974, that: “Her techniques were laudable in terms of lobbying efforts in that she HAD NO ORGANIZED OPPOSITION to her crusade. For lack of that, she established a foothold in Arizona’s two legislative houses.” Even for 1975, Reynolds, suppressing the cigarette manufacturers’ overriding important role, claimed that: “Concerned citizens and local tobacco trade organizations were successful in defeating the restrictive legislation.”230

The enhanced efficacy of the tobacco industry lobby during the 1974 session of the Arizona legislature can be gauged by comparing the scope of the additional locations of restricted smoking in S.B. 1213 as introduced by Turley, Holmes, and another senator231 and the actual expanded scope of covered places that survived to enactment. The bill encompassed: public lecture halls; waiting rooms, restrooms, lobbies or hallways of any health care institution; public waiting rooms of health associated laboratories or facilities; any nonsmoking patient’s room; public waiting rooms of any physician, dentist, psychologist, physiotherapist, podiatrist, chiropractor, naturopath, optometrist, or optician; school buildings; beauty parlors; passenger areas of any intrastate bus, airplane, or railway coach; the public selling area of any food, drug, or department store; dining areas in hotels, restaurants, cafes, cafeterias, and theater cafes; and public waiting lines in buildings containing motor vehicle license offices. To be sure, as under the 1973 law, smoking was not prohibited in any of these places if it was confined to designated areas.232

As passed, S.B. 1213 included only lecture halls, school buildings, public waiting rooms of the offices of physicians and other

229J. C. B. Ehringhaus and Frank Welch to Buss Bass (Nov. 9, 1973), Bates No. 85644118.
health professionals, as well as waiting rooms, rest rooms, lobbies, and hallways of health care institutions.\(^{233}\) Carnes justified coverage of doctors’ offices, hospitals, and food stores on the grounds that they “‘all are places we must go—we have no choice.’”\(^{234}\) Perversely, however, patient rooms, however, were excluded.\(^{235}\)

The demise of the other smoke-free locations was sealed at a one-hour hearing before Holsclaw’s Senate Public Health and Welfare Committee on February 26,\(^{236}\) which was exposed to smoking by two pipe smokers and one cigarette smoker. The committee’s chopping up and watering down of the bill left Carnes “livid, ‘‘furious,’’ and ‘‘heartbroken,’” especially at the “joking manner in which the subject was handled.” Many of the additional locations that Turley had included in the bill were struck by close votes on motions by Republican Senator Hal Runyan, a cigarette smoker. These locations included nonsmoking patients’ rooms, beauty parlors, public selling areas of food, drug, or department stores, dining areas, passenger area of intrastate planes or railways, and waiting lines.\(^{237}\) Three days later the Senate passed the scaled-back version by a vote of 20 to 10.\(^{238}\) The significant number of smoking legislators—for example, several members of the House Health and Welfare Committee leaned back in their chairs and began smoking as soon as the bill’s supporters had left the hearing room—\(^{239}\) insured that the House Judiciary Committee rejected an amendment by Democratic Representative Elwood Bradford to include the legislative floor and committee rooms as nosmoking areas, especially since even those who favored such inclusion recognized that it would kill the bill.\(^{240}\) During


\(^{237}\) Don Bolles, “Woman Crusader Against Smoking Fumes as Committee Plays It Cool,” \emph{AR}, Feb. 27, 1974, Bates No. TCAL0005168.


\(^{239}\) “No Smoking’ Signs to Cost Up to $2.50,” \emph{AR}, Apr. 4, 1974, Bates No. TCAL0005256.

debate in the House Committee of the Whole Bradford offered an amendment to segregate smokers in certain areas of the legislative chambers and committee rooms. Surrounded at his chamber desk by several of the House’s heaviest smokers, Bradford observed that nonsmoking representatives “obviously suffered sitting next to those who smoke.” Its defeat on a “surprisingly close” vote was, ironically, made possible by many of the measure’s strongest supporters, who feared that it would be a bill killer. On final passage S.B. 1213 secured an overwhelming majority of 47 to 11.

At the Tobacco Institute’s annual meeting in January 1975, President Kornegay observed that during the previous year’s state legislative sessions his organization, “with limited resources,” had been “remarkably successful, or lucky, or both” in handling about 100 bills (in addition to several times that number on the local level). Nevertheless, not only did the tobacco industry not always win, it lost “sometimes without even knowing that a measure was being considered,” although he hoped that this “knowledge gap” would be narrowed in the future. Without mentioning Arizona, Kornegay asserted that where TI was involved, its “participation made a difference in the sense that “even when a bill was enacted, it always emerged greatly watered-down. The opposition always received less than they demanded.” The reason for the oligopoly’s barrage of efforts to thwart the passage of additional restrictive legislation was set forth in a simplified example by Reynolds’ director of field sales: if such laws caused all 56 million smokers to smoke just one fewer cigarette per day, the total annualized sales loss would be $449 million.
By 1975, resistance organized by the tobacco industry thwarted further legislative action in Arizona at a time when, according to Carnes’s count, only 16 of 60 House members and six of 30 senators smoked. Turley’s vehicle in 1975, S.B. 1101 (which was co-sponsored by six senators and 14 representatives), added the public selling area of any food or drug store and the dining area in any hotel, restaurant, cafe, cafeteria, or theater cafe to the list of covered places. The bill became a symbol for the increasing disarray in which the cigarette oligopolists found themselves. President Kornegay’s summary statement to TI’s executive committee in March about the “extremely well organized anti-smoking activities” on the state legislative level vastly understated the panicky mood that was enveloping the company executives. In a memorandum to the file the next day, Arthur Stevens, Lorillard’s general counsel, described the “sense of urgency” that existed “because the situation has already become extreme”:

The most important matter considered at the meeting relates to the current epidemic-like increase in nationwide state and local smoking prohibitions. The level of activity has already passed the point where the Tobacco Institute staff is physically able to act or respond. We are desperately behind and are losing the battle—both with respect to new bills and ordinances, and also as regards strengthening amendments to existing legislation. (For example, see the attached Arizona bill.)

Stevens attached a statement of the problem by Ehringhaus and TI vice president William Kloepfer, Jr., who highlighted the proliferating “[s]ocial ostracism of smokers” effected by governmental action all over the country and the successful identification of smokers as “[s]ocial menaces” by “[s]elf-appointed spokesmen for the ‘nonsmoking majority,’ backed by well-financed health organizations.” In contrast, the Tobacco Institute, the “only defense and the only organized opposition to this drive,” was unable to “cope with the growing public acceptance of and agreement with the notion that smoking harms the nonsmoker.” Their only legislative recommendation was the articulation by the Institute of a

TITX0032101/2.


249 Tobacco Institute, Minutes of the Fifty-Sixth Meeting of the Executive Committee at 3 (Mar. 13, 1975), Bates No. LG6508408/10.

“‘fall-back’ position” of providing for separate areas for smokers and nonsmokers in some public facilities and no smoking in poorly ventilated areas. But even in extremis this tentative compromise manifestly went against the grain of the industry’s inveterate take-no-prisoners’ style: “The Institute staff is aware that this is not without risk, in the sense that it could lead to passage of ‘foot-in-the door’ legislation subject to subsequent strengthening. For this reason, utmost caution would be observed.”

That Turley, Carnes, and the anti-smoking movement were “ecstatic” that the Senate Government Committee recommended that S.B. 1101 pass but with an amendment sharply curtailing coverage of restaurants and cafes may merely have been a function of Turley’s tactic of pushing for more than was achievable in order to be able to agree to a compromise that embodied the provisions for which he had really been aiming. With regard to this particular iteration of the developing law, however, Turley seemed to be adopting an end-of-history view: “‘I think this may be about as far as we can go on this.... Pretty soon, people are going to fight back.”’ And the press unpacked “people” to mean cigarette smokers who had “docilely acceded each year to the smoke-haters’ moves to expand the places where smoking is prohibited.”

Despite the account that Carnes gave the committee of a party that she and her husband had attended in a smoke-filled restaurant the fumes from which had given her husband a heart attack, coverage of eating places unraveled when several committee members and the cigarette oligopoly’s lobbyist, Ernest Hoffman—ostensibly representing local tobacco wholesalers—argued that the bill might cause enforcement problems, which Hoffman hyperbolically portrayed this way: “‘You’re going to have to create a department of enforcement which may be about as big as the Department of Public Safety,’” especially since the existing law was not being enforced. (In contrast, Carnes maintained that the law had never been designed to facilitate prosecution, but rather was a form of “‘long-term public education’” that gave

254 Telephone interview with Stan Turley, Mesa, AZ (Jan. 24, 2009).
nonsmokers “‘courage to tell off other people who are smoking.’”) 258  Oddly, Hoffman claimed that he had not run an “aggressive campaign to derail” S.B. 1101 because “‘it’s kind of a motherhood bill, it’s tough to argue against it.’” 259  The amendment entailed giving restaurant and cafe owners the choice of (without requiring) setting aside certain areas for nonsmokers which, if posted “no smoking,” would have the force of law. 260  If the original restaurant provision was amended because members deemed it “too severe,” the department, food, and drug store restriction encountered no such obstruction after the spokesman for the Arizona Retailers Association, interestingly focused on cigarettes’ destructiveness of non-animate objects, stated that it “wouldn’t object to being included because of burned carpeting and merchandise.” 261

On April 1 the Senate passed S.B. 1101 by a vote of 18 to 12, with seven Democrats and five Republicans opposed, 262  but the bill’s passage in the House was less certain from the outset 263  and soon enough its planned death became certain.  By the latter part of May the Republican chairs of the House Commerce Committee and Health Committee, James Skelly, a heavy cigarette smoker, and nonsmoking Diane McCarthy, respectively, insisted that “‘you can’t legislate courtesy by enacting no-smoking bills’” and made it clear that the bill had little chance of passage.  Indeed, McCarthy, who told the press that she believed that she had the votes to kill the bill in her committee, added that it was “‘extremely doubtful’” that a public hearing would take place.  Such legislators and “tobacco industry lobbyists” argued that the successful antismoking campaigns had not only infringed on individual rights, but diminished the state’s cigarette tax revenues.  In contrast, the charge made by some of the bill’s supporters that the House Republican leaders had ordered the chairs to “squelch” S. B. 1101 “quietly” came in the wake of the cancellation of the Health Committee’s public hearing on one day’s notice, but also, and more importantly, was based on the fact that the tobacco industry had contributed $1,700 to the election campaigns of 10 of the most influential House Republicans (and one Democrat in addition to

261“Committee Adds Stores to No-Smoking Ordinance,” AR, Mar. 20 [?], 1975, Bates No. TCAL0005246.
$1,385 to seven Senate Republicans and two Democrats). The contributions to
nine of the House members were officially made by Earl Cunningham, the
industry’s lobbyist in 1974. To be sure, such funding did not guarantee pro-
industry votes: in 1975, half of the Senate Republicans who took money
nevertheless voted for S.B. 1101, including Turley himself, who received $150.264
In Turley’s case, he accepted the contribution because he never turned down
money from any source (except the John Birch Society); as to what would have
motivated the cigarette companies to help finance the reelection of their greatest
legislative thorn in Arizona, Turley later explained that he had been friends with
Cunningham and in general had liked lobbyists.265

On May 26, Mike Hendley, the president of the Tobacco, Candy Wholesalers
Association of Arizona, Hoffman’s ostensible client, issued a press release, much
of which the Phoenix Gazette published in the guise of an article, albeit one that
contained virtually none of the paper’s own words, let alone the slightest hint of
criticism or even a question. The release asserted that S.B. 1101 was emblematic
of the situation of the day in which one group, bereft of “good scientific
evidence,” was seeking to “make illegal a wide spread [sic] and long-standing
social practice of another group of people they find annoying.” Asserting that the
tobacco industry could “live with” the existing Arizona laws (which,
astonishingly, the unpublished press release called “reasonable”), Hendley
charged that the 1975 bill brought on a “whole new dimension” revealing that the
Arizona nonsmoking movement’s real mission was not to protect the nonsmoker
from the smoker, but the latter from himself. Drifting off into rhetoric redolent
of canned Tobacco Institute material, he insisted that further restrictions “could
ultimately negate all our freedoms.” Then, finally focusing on the immediate
threat to the industry’s profitability, Hendley argued that the anti-smoking bills
enacted had “already accomplished their purpose” in the sense that “Arizona
leads all States in the decline of packages sold of cigarettes. For the first nine
months of the...1974-75 fiscal year, some six million less packs have been sold
than the previous year.” Whereas in the country as a whole sales had risen by 3
percent, Arizona recorded the greatest decline (3 percent). Finally, seeking to
persuade both nonsmokers and legislators that they were beneficiaries of the
significant contribution that tobacco taxes made to financing the state
government, he urged them to “give clear thought to where will the monies come

264 Steven Tragash, “Antismoking Bill Expected to Die in House Panels,” AR, May 25,
1975, Bates No. TCAL0005239/40.

265 Telephone interview with Stan Turley, Mesa, AZ (Feb. 4, 2009). Given the low
cost of election campaigns at the time (he spent only $1,300 on his first and often ran
unopposed), Turley stated that even $150 was a significant contribution.
from if the tobacco industry were not in Arizona.”

In the event, the House committee chairs never did hold hearings—McCarthy insisted that “private enterprise” could deal with the smoking issue, whereas Carnes pointed out that business owners were afraid to ban smoking privately lest they lose customers—and thus succeeded in killing the bill. Hoffman self-congratulatorily hailed S.B. 1101’s death a “significant victory,” especially since it had been considered “a sure winner...and was done by the anti-tobacco forces to make Arizona once again the ‘model anti-smoking law’ State.” He nevertheless admonished tobacco interests not to rest on their laurels merely because they had gotten through one session “unscathed”: more bills would be introduced in 1976—a prediction with which Turley definitely agreed. And Carnes went a step further, confidently assuring the world that the public would continue to insist on the expansion of coverage of the anti-public smoking law, which would eventually be legislatively ratified.

The struggle over regulation did not even wait for the next legislative session: instead, the scene shifted to Tucson, where by August anti-smokers (and at least one council member and the mayor) were attempting to expand the city’s May 1972 ordinance, which banned smoking in public theaters, movie houses, and various auditoriums, to include department stores and sections of all eating

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266 Tobacco, Candy Wholesalers Association of Arizona, “Smoking Bill Infringes on Basic Rights of Individuals” (May 26, 1975), Bates No. 500011146/7-8; “Crusade Against Tobacco Claimed,” PG, May 26, 1975, Bates No. TCAL0005238. Hendley claimed that the taxes amounted to about $60 million, but this sum included $18.6 million in federal excise taxes. A separate memorandum that appears to have been written in the name of the same organization made clear that only $38 million of those taxes “stayed in Arizona” and stated that “S.B. 1101 seeks to discourage an economic activity that has paid over $400 million to Arizona governments in the past ten years” and constituted the fifth largest item in Arizona’s general fund revenue. Memorandum on Senate Bill 1101 (1975), Bates No. 500011128/29-30.


270 Ernest Hoffman to Tobacco Interests, Anti-Smoking Bill in Arizona Fails (June 11, 1975), Bates No. 501791670/2.

places. The anti-smoking movement was especially strong in Tucson because many people had moved there “because of respiratory problems.” In September Hoffman reported to Ehringhaus at the Tobacco Institute that he was “deeply involved again...‘holding the fort’” at the Tucson city council before which the expanded ordinance was being raised four times a month. He emphasized that only by a tenuous 4 to 3 majority were the pro-tobacco forces able to keep tabling motions; if one vote switched, “we are in trouble. A public hearing would absolutely create a new ordinance, as I understand the Carnes’ [sic] forces are prepared to take over City Hall if that matter comes before the Council.” Against the background of this democratic groundswell for further government intervention, the only suggestion that Hoffman had for his customer was spending money on an ad campaign “to create the proper pressure on the Council.” In order to apply the proper pressure on the cigarette oligopoly, he observed that the “significance of losing here is that it would set a precedence [sic] for Phoenix to follow the same course.” Having prepared the ground, he then made an indirect pitch to renegotiate his contract: “It frankly has turned out to be a full-time effort on our part and certainly I did not bargain for this when I came aboard the tobacco band wagon.”

Off this wagon Hoffman had definitely not fallen, as a memo he directed to Dowdell at R. J. Reynolds later in 1975 revealed. In commenting on an enclosed article from the previous day’s New York Times (“Warning: Cigarette Smoking May Be Hazardous to Your Social Standing”) he presented himself as a true believer, whom such anti-tobacco press accounts “frankly nauseate....” Expressing more outrage than his interlocutor at the country’s biggest cigarette manufacturer, he took the opportunity to “expouse [sic] my strong feelings again—that is, the TOBACCO INDUSTRY IS LOSING BY DEFAULT.” In seeming disbelief he insisted that: “Surely with a joint industry of some $16 billion, there must be some way we can get back to the general public with our message. ... Our national efforts are a drop in the bucket compared to what we should be doing in the industry.” And if Dowdell failed to grasp his meaning, Hoffman ominously warned that unless “our people...come up with some type” of counter-campaign, he expected that what they were witnessing “may be the beginning of the end for the industry.”

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274Ernest Hoffman to J. C. B. Ehringhaus (Sept. 11, 1975), Bates No. 500011132/3.
275Ernie Hoffman to James Dowdell (Nov. 12, 1975), Bates No. 500011119.
Two weeks later, Hendley, the president of the state tobacco wholesalers association, sought to reinforce Hoffman’s plea for more “financial assistance” by opening his letter to Dowdell, the director of R. J. Reynolds’ state legislative relations, with the bald exclamation: “We’re in trouble in Arizona!” While differing from Hoffman in stating that he had expected a decline in the anti-smoking movement after the end of the legislative session, he sounded the alarm that “we are on the verge of having our allies crumble under the pressure of Mrs. Carnes and A.S.H.” For his troubles, Hendley received fulsome praise a few months later for defeating S.B. 1101 from Reynolds’ director of field sales, who told his association’s annual convention that without “Hendley and a few other men of courage like him” and if the association had not hired Hoffman as its lobbyist, “there is no question that you would have even more discriminatory, more restrictive laws...today” and “the segregation of smokers from non-smokers would have been more complete...in a land that was founded on the principle that men could go where they wanted to go when they wanted to.”

By mid-January 1976 the press reported that the Tucson city council was moving toward adoption of an ordinance that would ban smoking in food, drug, and department stores with 15 or more employees (supposedly because long check-out lines and crowding made smoking more offensive there) and in 70 percent of dining areas in restaurants, cafes, cafeterias, and hotels. Penalties for violations would be set at a maximum of $300 and/or six months in jail. Despite the fact that the ordinance proposed by the “zealots” was “in essence...the same one defeated last year at the State Legislature only with more severity,” Hoffman could hardly contain himself when he reported to the Tobacco Wholesalers Association that, although he had been trying to convince the restaurants, innkeepers, and liquor associations since June 1975 that if certain city councilmen were defeated, the associations would be “in trouble”—and in fact those defeats wound up giving anti-smokers a 4 to 3 majority—when he addressed them a few days before the city council vote, “for the first time, they are alarmed!” Hoffman’s pessimism was reinforced by the lack of opposition to the ordinance by the grocery or department store owners.

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276 Mike Hendley to James Dowdell (Sept. 23, 1975), Bates No. 500011131.
279 Ernest Hoffman to Tobacco, Candy Wholesalers Association of Arizona, Subject:
Even before the council voted, R. J. Reynolds waxed indignant over the “efforts to enforce a broader ban on smoking in Tucson [which] went...far beyond anything undertaken in our country, where freedom and human rights are the cornerstone of our government.” Even in the area of tactics, the master of dirty tricks was “appalled to learn that ASH wasn’t content in hauling hundreds of senior citizens, in advanced stages of all the diseases that afflict the aged, to pack the halls when the city council met. As if that wasn’t deplorable enough, they established picket lines around Ernie Hoffman’s home and subjected his wife and daughters to an unheard-of degree of harassment and abuse. I ask you and the rest of the citizens of Arizona—was this Arizona in 1975 or Germany in 1937?”

In the meantime, Turley had introduced yet another bill (S.B. 1149, co-sponsored by four other senators and five representatives). To the Senate Government Committee hearing on February 25, Hoffman did not come to praise Arizona for holding “the distinction of leading the states in the decline in smoking,” but rather to warn senators about the millions of dollars in cigarette tax revenue that the state stood to lose if smoking continued to decline. In the event, the committee recommended the bill’s passage with an amendment striking coverage of eating places but leaving intact the smoking ban in selling areas of department, grocery, and drug stores. The timidity of Carnes’ type of advocacy was nicely encapsulated by her response that the “drastic drop” of two million dollars in state tobacco tax revenue assailed by cigarette lobbyists was “not because [sic] of the no-smoking law, but because of the education of a non-informed public, aware of the dangers of smoking.” Her unwillingness to give credence to the oligopoly’s empirically eminently plausible gloomy predictions of reductions in the number of cigarettes smoked brought about by governmentally imposed restrictions and bans on public places available for smoking, let alone to admit that that outcome was, together with protecting non-smokers from exposure to secondhand smoke, one of the anti-smoking

Anti-Smoking Bill Tucson City Council (Jan. 19, 1976), Bates No. 501791681.


2209
movement’s driving forces, underscored how circumscribed its goals were precisely because it tacitly accepted smokers’ alleged freedom and autonomy and cigarette manufacturers’ right to continue to profit handsomely from hawking uniquely lethal commodities.

On the Senate floor, Republican Stephen Davis, a smoker, sought to subvert the law in its entirety by offering an amendment to eliminate its mandatory character by eliminating all existing designated no-smoking areas and, instead, conferring legal backing on any no-smoking regime that any public or private manager or owner voluntarily created. He purported to have chosen this approach to offer greater flexibility because anti-smoking advocates kept requesting the addition of new banned locations, but he also hyperbolically claimed that it was also “‘the only valid way to go if the legislature wants to continue the right to private ownership.’” Turley, who argued that the proposal would merely create confusion and more problems than it would solve, addressed Davis’s claim by stating that he would not introduce more bills in future sessions seeking additional smoke-free locations if S.B. 1149 were enacted, but vowed to return to continue his campaign with greater vigor if it failed since “[s]ome people are unable to go to public places where they should be able to go because of heavy smoking.” The Senate’s defeat of Davis’s amendment by a vote of 9 to 19 signaled the vote on final passage: the next day the Senate once again passed S.B. 1149 by a vote of 18 to 10 (with seven Democrats casting Nays). The bond between Davis and R. J. Reynolds was tight enough that a few months later Dowdell planned for him to meet corporate CEO William Hobbs and other officials during a trip to North Carolina. Although Davis’s own scheduling initially prevented the meeting from taking place, Dowdell informed Hoffman that he was hoping Davis could get back to Winston-Salem “so that some of our people may have an opportunity to let him know how much we all appreciate his outstanding support in the Arizona Senate.” Dowdell did, however, have an opportunity to speak to Davis, who reported, as Dowdell approvingly told


Hoffman, that “between the two of you you came very close to getting your permissive legislation through. Maybe it’s something you should consider introducing early in the next session. The very thought of repealing the restrictive smoking laws now on the books and leaving it up to the proprietor of an establishment to decide whether or not smoking would be permitted would, I believe, be the strongest possible deterrent to any additional legislation extending your present no-smoking laws.” Otherwise he lamented that he was unable to give Hoffman any further information about new efforts to resist passage of additional anti-smoking legislation. Emblematic of the difficulties that the Tobacco Institute was encountering was that it was not even able to “line up some qualified scientists who can speak with conviction on the passive smoking issue.”

Anti-public-smoking forces were, in the meantime, coordinating progress toward a stricter ordinance in Tucson with developments in the legislature. Holsclaw, no longer a state senator but now a member of Citizens Concerned About Smoking and Health, announced that the group had decided to ask the city council to eliminate restaurants from the proposed ordinance’s list of additional regulated places. Instead, CCASH, which had scaled back its demands in order to conform the scope of the ordinance to that of the now reduced reach of S.B. 1149, agreed to ask restaurant owners voluntarily to set aside no-smoking sections. In turn, the Southern Arizona Restaurant Association’s executive secretary proffered his “solemn promise” that every member would be asked to provide such areas. Whether anti-smokers’ willingness to acquiesce in the tobacco industry’s free enterprise circumvention of the problem of smoke exposure was a reaction to the association’s survey of restaurant customers, which revealed that fewer than half favored no-smoking sections, is unclear.

Unfazed by the Tucson Chamber of Commerce’s claims of a “constitutional right” of a business owner to determine whether to permit smoking in his establishment and of a person to smoke during his daily shopping and eating,
in March a 5 to 2 majority of the Tucson city council did vote to ban smoking in grocery, drug, and department stores, but defeated coverage of eating places and reduced the maximum fine from $300 to $100. 292

Almost seven weeks after the Senate had passed S.B. 1149, the House Government Operations Committee “overwhelmingly” recommended passage of S.B. 1149 in spite of the tobacco industry’s strong opposition. Turley’s argument that “[o]ur right to breathe fresh air is superior to the right of smokers to pollute the air” apparently prevailed over Hoffman’s advocacy of “voluntary compliance” in stores. 293 Hoffman, the only witness to oppose the bill, also contradicted Carnes’s assertion that cigarette consumption in Arizona had continued to rise since enactment of the original law in 1973: while tobacco tax revenues may have risen as a result of an increase in the tax rate, consumption had dropped by 4.2 percent. 294

The bill, which had received the backing of the state-level cancer, lung, heart,
and medical associations, then stalled in the House Health Committee, whose chair, Diane McCarthy, was expected, once again, to kill it, but this time she worked her legislative euthanasia by assigning it to a subcommittee to study how much it would cost store owners to post nosmoking signs. At a full committee hearing on April 29, the almost 80 tobacco industry supporters in attendance had, Hoffman, boasted, “a marked effect on the Health Committee.” However, as Hoffman also well knew, their presence was not a prerequisite for favorable action since, “unbeknownst” to the anti-smoking forces—to whom McCarthy had proclaimed that, after the subcommittee had made a few needed changes, S.B. 1149 would be returned to the full committee’s agenda—she in fact, as a political commentator put it, “sen[t] the bill to the chain-smoking buddy of the tobacco lobbyist, who has been fighting the legislation tooth and nail”: it turned out that Hoffman was not only the “close personal friend” of Republican subcommittee chair Tom Goodwin, but also his campaign manager. It was, therefore, a risible understatement for Hoffman to report to his clients that “[i]n its current sub-committee it is highly unlikely that it [S.B. 1149] will be reported out...” Moreover, he knew that he could rely on McCarthy—whose hobby horse was the threat to freedom posed by state and federal regulatory agencies, especially the Environmental Protection Agency, and who admonished corporations to “do a better job of telling citizens of the benefits of the free market system as it relates to individual welfare and freedom”—to deny that she was “‘sandbagging’” S.B. 1149 “by shutting it off to a hostile subcommittee,” though she openly admitted that she regarded the bill as unnecessary. (The Arizona Republican Party’s prioritizing the tobacco lobby above the state’s nonsmoking majority in general and McCarthy’s “complete disregard for the health and welfare of Arizona citizens” in particular prompted Carnes’ husband, a longtime contributor to the national, state, and local Republican Party, to become “so disgusted with the

297Ernest Hoffman to Members Association, Subject: Tobacco Legislation (May 6, 1976), Bates No. 501791683.
299Ernest Hoffman to Members Association, Subject: Tobacco Legislation (May 6, 1976), Bates No. 501791683.
actions of leading Republicans...in Arizona that I have decided to withdraw my financial support for the G.O.P. everywhere until there is a change in their attitude in the state.”)301

To be sure, the cigarette oligopoly’s lobbyist also knew that Goodwin and McCarthy’s unwavering allegiance to his client did not insure victory because: “The danger now lies in a floor amendment to another bill! As long as the Arizona statute Title 36 [public health and safety] is being debated...(and there are 36 bills with that title) we are vulnerable to a surprise amendment from either the Senate or House and we can expect such a move before” the legislature adjourned in early June. To his paymasters Hoffman did not conceal the fact that the real danger was majority rule: “The support for the bill is enough to pass in either House.”302

Unsurprisingly, on June 4 Goodwin’s subcommittee unanimously voted to give a “do not pass” recommendation to the bill, endorsing instead a “voluntary” program of posting nosmoking signs. Dr. Glenn Friedman, a pediatrician, pointed out at the hearing that such a regime would not work because, while it might be voluntary for smokers, it was not for nonsmokers. He was also forced to instruct the chain-smoking subcommittee chairman, who pontificated that everyone had the right to do whatever he wanted with his own body, that nonsmokers lacked the complete control over their own health that smokers possessed. Carnes did not soften these “sharp exchanges” by testifying that: “Smokers have no idea of what they do to nonsmokers. God help them for they know not what they do.”303 As the world would learn later, in the 1970s neither Carnes nor science knew either.

The danger that Hoffman had foreseen emerged on June 10, when the Senate, by a vote of 17 to 7, adopted Turley’s floor amendment to a House bill (on hospital districts) that was almost identical to S.B. 1149. Turley motivated his action on the grounds that, having been “kicked around in the House...he wanted the amendment ‘to send it back to them in a form they will understand.’” Davis, by now virtually the senator from Winston-Salem and purportedly angered by the move, asked Turley why he had not attached a $250,000 appropriation to pay for no-smoking signs in stores. In reaction to Turley’s dismissal of his question as fallacious, Davis, doubtless racking up further bonus points with R. J. Reynolds, upbraided S.B. 1149’s backers for their “outrageous behavior” and slammed his


302Ernest Hoffman to Members Association, Subject: Tobacco Legislation (May 6, 1976), Bates No. 501791683.

Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

microphone on his desk.”

In June, having insured the demise of S.B. 1149, anti-anti-smoking Republicans, including House Majority Leader Barton Barr, joined with the Arizona Retailers Association and the Retail Grocers Association of Arizona to displace legislative intervention altogether by implementing the cigarette companies’ “voluntary program” the basis of which was “simple courtesy.” The retailers’ groups rejected the bill as “an attempt to mandate by law actions that properly fall under the purview of management.... In effect management was to be deprived of its right to manage.” The “businessmen’s response to legislation that is both unnecessary and unenforceable”—the country’s first of its kind statewide voluntary program—was a sign that “says simply, ‘As a courtesy to others, thank you for not smoking.’” By 1977, McCarthy, who as chair of the House Health Committee held a hearing to conclude that the program was working, asserted that: “You can’t legislate courtesy by enacting a no smoking bill” because the “wide resentment” would foster “delight in breaking it,” whereas the “volunteer [sic] program appeals to people’s sense of manners.”

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308 [No Author], Background Information on Voluntary “No Smoking” Program (n.d. [rec’d June 24, [1976]), Bates No. 501791686. This document stated that it had been agreed at a recent meeting of the two retailers’ organizations, Arizona ASH, and the House of Representatives that “industry would voluntarily undertake a program to discourage smoking in the retail stores in question.” The retailers’ aforementioned press release did not mention ASH involvement.


310 “In Arizona Capital: Lawmakers Balk at Smoking Bans,” Tobacco Observer, Feb. 1977, at 3, Bates No. 1000283344/6. Ironically, McCarthy and Turley agreed that “courtesy” was the key concept; what separated them was Turley’s view that it was “unfortunate we have to legislate matters of courtesy” (because the department stores were not voluntarily posting nosmoking signs). Steven Tragash, “Panel Is Appointed to
Two days after the November 1976 election Hoffman jubilantly wrote to Dowdell that: “It certainly paid off working on the political scene as we did this past summer and fall. We swept many liberal-type politicians out of office and I can see a more conservative approach to State government in the next two years. The liberal movement, without exception, were [sic] the ones sponsoring the anti-tobacco legislation in Arizona.” In fact, no progress was made in the Arizona legislature in restricting public smoking for many years (although numerous local ordinances were adopted). On a letter he had received from Hoffman in 1977 Dowdell handwrote an annotation that summed up the reversal that concerted lobbying had effectuated: “Arizona is where it started. Thanks to Hoffman, bills to further restrict smoking have been defeated in the past two legislative sessions. The battle now is in Tucson, and the ‘opinion poll’ attached is being conducted there by Ernie, who used the same tactics to defeat a Phoenix ordinance last year.” The next year brought another victory for the cigarette oligopoly over Turley’s bill that would have extended coverage to grocery, drug, and department stores and any waiting line in which people were in close contact. Turley admitted that he was “‘not under any illusions it will be easy to pass’”; he thought that he had a “‘fair chance in the Senate,’” but he doubted whether it had “‘much chance in the House where two committee chairmen have killed past attempts to kill the law.’” The bill went nowhere, and Turley stopped introducing anti-smoking bills both because he began focusing on other issues and because other legislators took up the slack. No substantive expansion of coverage occurred.

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311 Ernest Hoffman to J. S. Dowdell (Nov. 4, 1976), Bates No. 500003827. Hoffman did add: “Now we must proceed further in trying to come up with another campaign for four candidates to replace those under recall for our [Tucson] City Council.”


313 JSD to FHC (Sept. 26, [1977]), on Ernest Hoffman to James Dowdell (Sept. 21, 1977), Bates No. 500000860.

314 S.B. 1110 (Jan. 18, 1978, by Turley). In 1977 a bill was introduced in the House to prohibit smoking in certain areas of state buildings, which had six cosponsors in the House and 12 in the Senate including Turley, but it never made it out of committee (including the Health Committee). Journal of the House of Representatives: Thirty-Third Legislature First Regular Session of the State of Arizona: 1977, at 180, 1293 (Feb. 14) (H.B. 2218 (by Rallif et al.).

until 1991, when the law was applied to state buildings, and not until the passage of Proposition 201 in 2006 did Arizona reemerge in the forefront of statewide anti-public smoking legislation, although by the early 1990s localities with 90 percent of the state’s population had already adopted smoking control ordinances.

Regardless of later legislative stagnation in Arizona, by 1975, success there had prompted enactment of similar measures in at least 20 other states. Although most shared the timidity of the Arizona law—which by this time R.J. Reynolds Tobacco Company placed in the second tier of state laws (“Less Severe But Above Average Restrictions”)—in permitting huge exceptions that effectively maintained nonsmokers’ exposure to secondhand smoke, a very few went further in certain respects. For example, Massachusetts banned smoking in supermarkets outright, while Nevada uniquely permitted designation of smoking areas only “where it is possible to confine the smoke to such areas.”

319 James S. Dowdell to D. W. Grout et al. (Nov. 15, 1976), Bates No. 500656975. Dowdell was director of corporate affairs at R.J. Reynolds Tobacco Co.
320 Dowdell was director of corporate affairs at R.J. Reynolds Tobacco Co.
322 1975 Nev. Stat. ch. 326, § 3.2(b) at 462. A 1975 Washington State Board of Health regulation did outright ban smoking in several public places such as museums, concert halls, theaters, and indoor sports arenas (in all of which smoking was permitted in physically separate lobbies), hallways and waiting rooms of health care facilities, office reception areas and waiting rooms of government buildings (except the state legislature), public areas of retail stores and financial institutions, classrooms and lecture halls of schools, colleges, and universities, and public meeting rooms (except in the state legislature). Wash. Adm. Code. § 248-152-030(3)-(9) (1975). To be sure, these regulations were not enforceable and had to “depend on the willingness of the general public to abide by its provisions.....” WAC § 248-152-050 (1975).
The Battle over the New York City Ordinance

The Tobacco Institute represents our interests in opposing both state and local attempts to restrict smoking. [T]hey can...even provide expert medical and scientific witnesses to testify convincingly that there is little hazard to non-smokers.323

State legislatures were not the only bodies that intervened to restrict indoor smoke exposure. Inspired, perhaps, by the Model Ordinance Prohibiting Smoking in Public Places drafted by the National Institute of Municipal Law Officers,324 numerous cities and counties, including Arlington and Newton, Massachusetts, Duluth, Minnesota, Fort Lauderdale, St. Petersburg, and Dade County, Florida, and Culver City, Davis, Sacramento, Orange County, and San Diego, California passed nosmoking ordinances between 1973 and 1975.325

The highest profile campaign took place in New York City in 1974, when Dr. Lowell Bellin, the city health commissioner and chairman of the Board of Health, proposed “‘apartheid of smokers,’”326 not “for the comfort of nonsmokers, but for their health.”327 The proposal prohibited smoking—except in smoking areas designated by the owner—in theaters, opera houses, concert halls, restaurants, hospitals, nursing homes, museums, libraries, lecture halls, or any other enclosed spaces in which 25 or more people gathered for social, political, recreational, or religious purposes.” Only elevators were off limits to the designation of smoking areas.328 However, the “most dramatic” impact of the proposed segregation of smokers and nonsmokers in various public places, which Bellin expected to trigger considerable opposition both from outside of and on the Board itself, was

323W. R. Bauer [R. J. Reynolds Tobacco Co. director of field sales], (untitled speech in Arizona), Bates No. 500074962/72-3 (1976).
324NIMLO Model Ordinance Service, Vol. 1, §§ 8-1901 to 8-1911 (1981). Unfortunately, this compilation failed to state the original date of publication.
327“City May Segregate Smokers in Public,” NYT, Mar. 31, 1974 (1:5, 54:4-6).
328Max Seigel, “City Smoker-Segregation Bill May Be Eased,” NYT, Apr. 19, 1974 (42); Resolution of the Board of Health of the Department of Health of the City of New York (1974), Bates No. HK01142062.
anticipated in restaurants. Nevertheless, Vincent Sardi, the celebrated Broadway restaurateur and nonsmoking president of the Restaurant League of New York, regarded the proposal as a good idea that would not pose a major problem for the industry.329

At the end of 1972, William Kloepfer, Jr., a one-time press secretary to Vice President Richard Nixon and a senior vice president of and, since 1967, in charge since of the Tobacco Institute’s PR330—the sole product of the cigarette manufacturers’ disinformation and lobbying arm—wrote to Charles Wade, a Reynolds senior vice president, about some matters that Kloepfer believed the TI communications committee should discuss after the organization’s powerful executive committee had directed it “to come up with alternatives” to the “high-visibility ad series about smoking and health in tony magazines, on the ground it would kindle new regulatory efforts.” Kloepfer bluntly admitted that “[w]e’re very low on two major counts—scientific credibility, [sic] and the ability to generate news. Conversely, our adversaries are high on both.”331 A year later TI was manifestly seeking to raise both profiles in marshalling considerable resources in an effort to defeat the New York City measure, which was the subject of a public hearing on April 18, to which it dispatched several witnesses, including a physician, a pharmacologist, a chemist, and a lawyer, the burden of whose testimony was the lack of any evidence of the harmful effect of tobacco smoke exposure to nonsmokers.332 Interestingly, the account of the hearing in The New York Times failed to mention them at all.333 Domingo Aviado, a pharmacology professor at the University of Pennsylvania, who made a career of being a highly paid cigarette company consultant,334 revealed his mercenary bias

329“City May Segregate Smokers in Public,” NYT, Mar. 31, 1974 (1:5, 54:4-6).
330Biographical Notes William Kloepfer Jr. Senior Vice President - Public Relations (1973), Bates No.521045014.
331William Kloepfer, Jr. to Charles Wade (Dec. 29, 1972), Bates No. 500081660. This letter is in large part identical with another document, which appears to have been erroneously dated on the Legacy website because of an irrelevant handwritten date on the page. Points for Discussion (May 7, 1973), Bates No. 501470103.
332Tobacco Institute, Before the New York City Board of Health in the Matter of a Proposed Resolution Amending Article 181 of the New York City Health Code (June 1974), Bates No. 03595255.
333Max Seigel, “City Smoker-Segregation Bill May Be Eased,” NYT, Apr. 19, 1974 (42).
334A few months later, after Aviado had testified as the industry’s principal witness before the Health Board in the State of Washington, the TI president praised Aviado for having “done yeoman services for us. While we have every indication that he will
by testifying, in an area remote from his expertise and without the slightest empirical evidence, that: “Since tobacco smoking first became a part of our lives, smokers and nonsmokers have co-existed with little, if any, friction, between them.” The industry’s arrogance was visibly on display in the testimony of William Shinn (of Shook, Hardy, and Bacon), one of its leading lawyers and Aviado’s handler, who allowed as: “While...there are those who would prefer to live in a non-smoking world, this prospect appears remote and impractical.”

Following the three-hour hearing, Bellin said that he was prepared to “soften” the measure, in particular with regard to its application to small restaurants, whose “valid economic concerns” prompted him to contemplate compromise: “And although the public health is paramount, we’ll try to see if we can meet both problems.” One possibility was increasing the coverage threshold from 25 to 50 persons. When the Board of Health considered the proposal a month later, it in fact unanimously approved in principle a provision merely requiring restaurants with 51 or more seats to set aside at least 20 percent of them for nonsmokers; at the same time it endorsed an absolute prohibition on smoking in supermarkets. In June the Board ultimately rejected segregated seating in restaurants altogether, but otherwise amended the Health Code largely in accordance with the previous version of the proposed resolution. Outvoted by the Board, Bellin conceded that “enforcement might be a problem,” but he hoped to “create a climate in which the smoker is uneasy” and to be able to rely on the public for help.
The Cigarette Manufacturers Are Made to See “the handwriting...on the wall”\(^\text{340}\) —and Try to Erase It

No product has ever been so thoroughly assaulted from so many respected sources as has ours. Popular indoctrination against it is widespread and steadily reinforced.

... Our credibility is weak because our motive is assumed to be personal profit.\(^\text{341}\)

From the early 1950s on the cigarette oligopolists had been preparing themselves for public disclosure of the fact that, as “Philip Morris and everyone else in the industry knew...cigarette smoke did contain cancer causing elements.”\(^\text{342}\) The manufacturers had even put forward the names of two of the ten members of the Surgeon General’s Advisory Committee on Smoking and Health\(^\text{343}\) which in 1964 published the report that produced the upheaval whose repercussions still reverberate in the twenty-first century. In sharp contrast, however, the companies were not only taken by surprise by the inexorably spreading nationwide rebellion against enforced exposure to their customers’ tobacco smoke, but even after top management had finally been persuaded by their somewhat more socially attuned subordinates and the Tobacco Institute to grasp and acknowledge the movement’s current and potential gravity, years passed before the industry was able to formulate and implement a coherent counter-strategy, albeit one that ultimately failed to thwart what became a worldwide science-based mass struggle against tobacco’s lethality. The following sections shed light on the initial stages of that evolving response.

**R. J. Reynolds’ “Restrictive Smoking Activities Project”**

Organized anti-tobacco forces in our country have begun a new national campaign to restrict smoking and cause a decrease in U.S. tobacco consumption. The objective of the new crusade is to convince the public that tobacco smoke is harmful to nonsmokers and,
Among the cigarette manufacturing firms R. J. Reynolds Tobacco Company was especially aggressive in pushing early on for the industry to combat the anti-secondhand smoking movement. At the time and for many years Reynolds had held the largest domestic market share, which was not seized by Philip Morris until 1983.\textsuperscript{345} During the period under review (1970-82), the six largest producers accounted for 100 percent of sales, with Reynolds accounting for about one-third throughout and Philip Morris doubling its share from about one-sixth to one-third.\textsuperscript{346} During the summer of 1973, several of Reynolds’ marketing officials, having become especially concerned about the proliferation and success of anti-smoking initiatives, developed a plan to alert the company’s top executives to what they viewed as an alarming process and galvanize them and, through the Tobacco Institute, the other cigarette manufacturers, to intervene and roll that movement back. To be sure, higher management was not totally clueless, although it is unclear whether even these executives grasped the potential seriousness of the trend. For example, in mid-August, Charles B. Wade, Jr., Reynolds’ senior vice president, third highest ranking official, and “the house intellectual,”\textsuperscript{347} having seen many letters to the editor recently on “[p]assive smoking” in the \textit{Washington Post}, suggested to TI Vice President William

\textsuperscript{344}R. J. Reynolds Tobacco Co. to Our Customers (Jan. 30, 1974), Bates No. 500016597.

\textsuperscript{345}On how Reynolds staved off losing its first-place position to Philip Morris for several years by means of “trade-loading,” which bulked up its apparent market share, but in fact merely simulated net sales, some of which constituted gross revenues that would be diminished by buy-backs of wholesalers’ unsold inventory, see Richard Kluger, \textit{Ashes to Ashes} 515 (1996).

\textsuperscript{346}In 1970 the oligopolists sold the following percentages of all cigarettes in the United States: Reynolds (31.8); American (19.3); Brown & Williamson (16.9); Philip Morris (16.8); Lorillard (8.7); Liggett (6.5); in 1982 the figures were: Reynolds (33.55); Philip Morris (32.85); Brown & Williamson (13.37); American (8.77); Lorillard (8.55); Liggett (3.17). In 1983 Philip Morris finally overtook Reynolds: their shares were 34.4 and 31.5, respectively. Irwin Kellner, “The American Cigarette Industry: A Re-examination” tab. XVII at 90 (Ph.D. diss., New School for Social Research, 1973), Bates No. 00137423/528; R. J. Reynolds Tobacco Monthly Performance Analysis—Dec. 1982 (Feb. 11, 1983), Bates No. 501261717/22; Overview of U.S. Cigarette Market (Mar. 1984), Bates No. 2500002253/8. By the first decade of the twenty-first century, the industry trended toward duopoly with Philip Morris far outdistancing Reynolds, even after the latter’s acquisition of American and Brown & Williamson.

\textsuperscript{347}Richard Kluger, \textit{Ashes to Ashes} 384 (1996).
Kloepfer: “Wouldn’t it be a good idea for us to flood the letters to the editor to such an extent that the paper would tire of the matter and stop publishing on either side! That is the only way I can think of to give less exposure to our adversaries.”

A key figure in the early counter-movement at Reynolds was Clifford Perry, Jr., of the marketing research department, who by August 1973 was working on the Restrictive Smoking Activities Project (MRD # 73-0221). On August 15, he and R. A. Blevins, the director of marketing planning, and James Dowdell, the company’s PR head, visited the Tobacco Institute with the “purpose” of emphasizing the company’s “concern over recent activities to restrict cigarette smoking” as well as of using information compiled by TI to: fashion a chronological history of such activities since the (1964) surgeon general’s report; determine how their nature and frequency had changed; determine the reasons that anti-smokers had used to affect restrictions in various situations and how these activities were initiated; and (the literal bottom line) “determine whether or not such restrictive activities have adversely effected sales or the social acceptance of smoking.” The urgent motivation for their pilgrimage to a repository of source materials was the feeling that “restrictions proposed by anti-smoking forces as a result of the ‘passive smoking’ issue could represent the most serious health threat to the cigarette industry since the 1964 Surgeon General’s Report.” The new attack’s obviously heightened significance was that “both smokers and non-smokers are now directly involved....” Moreover, a review of the Institute’s files reinforced the Reynolds employees’ concerns based on the considerable headstart that their opponents had achieved: whereas anti-smoking groups had been able to secure “extensive” publicity for this issue in the form of editorials, letters, and feature articles in almost every state in support of their position and (more importantly) to propose and “in numerous cases” to enact restrictions for “almost every type of public place,” “arguments supporting the tobacco industry’s position have appeared infrequently and are usually deemed ‘self-serving.’”

While Perry and his cohorts were launching their project, Reynolds and the

\[^{348}\text{Chas. B. Wade, Jr. to William Kloepfer (Aug. 17, 1973), Bates No. 500013908.}\]

\[^{349}\text{Clifford W. Perry, Jr. to R. A. Blevins, Re: Trip Report -- Tobacco Institute (Cigarette Smoking Restrictions) (MRD # 73-0221) (Aug. 20, 1973), Bates No. 501098314.}\]

\[^{350}\text{Clifford W. Perry, Jr. to R. A. Blevins, Jr., Re: Trip Report -- Tobacco Institute (Cigarette Smoking Restrictions) (MRD # 73-0221) (Aug. 27, 1973), Bates No. 501098310. It is unclear why this second report with somewhat different contents was written a week later.}\]
Tobacco Institute were expressing increasing perplexity and dismay about the “real set of problems” posed by smoking restrictions established by local governments, whose agendas were “[u]sually...buried in the press,” thus giving the cigarette companies little time to intervene if they even found out about the proposals. Dowdell and Frank Welch, TI vice president for state activities, had agreed in August that distributors and company sales representatives might be “two logical sources of information,” but Welch doubted the former’s dependability. However, if Reynolds encouraged its sales people to provide “reasonably full coverage,” the Institute would “try to get the other companies to do likewise.”

(In early November Reynolds did inform its field sales representatives of the “obnoxious and unwarranted smoking ban ordinances” that anti-smoking organizations, supported by local chapters of anti-tobacco private health associations, were seeking to enact, and solicited their help in ferreting out advance information in newspapers and newscasts of city councils’ consideration of such measures.)

Although Dowdell believed that the industry should inform local governments (such as Hollywood, Florida) that had passed restrictive ordinances that they were “predicated upon an absolutely false assumption” and that they should be modified to protect smokers’ and non-smokers’ rights, he despaired that “I haven’t any good ideas how at this late date the industry can mount an effective campaign to prevent the spread of smoking restrictions at the local level.” Referring to a strategy that the industry (and especially Philip Morris) in the 1970s and 1980s would successfully implement far beyond his imagination, Dowdell lamented that: “There is no way I can see to mobilize support for preemptive action by any of the State Legislative bodies. ... It doesn’t help much to defeat the issue at the state level only to find local ordinances being enacted that accomplish the same objective.” In the absence of such state-level action barring local governments from restricting smoking in public places, Dowdell saw “no alternative except to establish some form of organization that would provide the Institute with advance information on actions proposed across the nation at the local government level to discriminate against smokers. If such an early warning system could be established, and if it worked properly, the industry could have a representative present when smoking restriction laws were proposed to present the other side of the issue” (though in the case of Hollywood, even Dowdell was constrained to admit that it “could be difficult to get a sympathetic hearing” from
Unmentioned in this context was the logistically far more significant fact that even if the companies were able to secure the requisite information in a timely fashion, even their oligopoly- and addiction-swollen profits were inadequate to counter the growing “agitation for ‘non-smokers rights’...by the anti-tobacco zealots and the environmentalists”\textsuperscript{354} in tens of thousands of local communities with the same effectiveness that they had traditionally deployed lobbying resources especially at the federal level and, at least with regard to tobacco taxes, also in the state legislatures (though, as passage of the Arizona anti-public smoking bill in 1973 demonstrated, the industry’s defensive lobbying on health-related legislation in the states as yet lacked potency).\textsuperscript{355}

In mid-October Perry explained to J. H. Sherrill, Jr. of the marketing research department that the smoking bans project had three phases or objectives. First, it was necessary to “\textit{convince management} that statutory smoking restrictions “can have a damaging effect on the cigarette industry” by means of a presentation (which Perry had drafted) of the history and variety of such laws and their potential effect on sales. Second, a program would have to be designed to combat these activities in 1974 in a couple of key test states. Since such a step would require management approval, nothing would be undertaken until after the first phase. And third, Reynolds and other companies would “curtail these restrictive activities throughout the country by means of an effort similar to the state tax program.”\textsuperscript{356} A few days later Perry specified to Blevins that in November the aforementioned presentation would be made to management, and that the key states might be California and Illinois.\textsuperscript{357}
Then on November 16, the same Reynolds trio that had visited the Tobacco Institute in August, returned to make a “Restrictive Smoking Activities” presentation (which had been reviewed by Reynolds management) to Kornegay and his vice presidents. Afterwards the Reynolds and TI staff discussed a program to combat such legislation, whose most important aspect was securing “a lobbyist or spokesman to act for the tobacco industry in each state.” Importantly, the Tobacco Institute was to determine the number of personnel and the resources needed for implementation (including the creation of a state-level “information feedback system”) and to present these requirements to its executive committee at the end of the month.\(^{358}\) The RJR presentation, which emphasized the threat to the “[s]ocial acceptability of tobacco products,” included, in addition to data on the growing number of anti-smoking bills in state legislatures and city councils as well as in 522 hospitals and 12 passenger railroads, model calculations on lost profits: based on the number of packs of cigarettes not smoked as a result of the ban ordered by the Washington, D.C., Transit Authority, which purportedly cost the industry $13,500 and Reynolds $4,500 a year, the company made a national projection of lost profits from bans on city transit and in movie theaters and basketball and hockey coliseums of $3,575,000, of which $1,295,000 went to Reynolds’ account. Just one fewer cigarette smoked per week would result in a total industry loss of $8.2 million with Reynolds’ share amounting to $3.0 million.\(^{359}\)

Kornegay and his staff were, according to Dowdell’s report to Wade, “so deeply impressed” by Blevins and Perry’s work that Kornegay intended to adopt their presentation for his own to the TI executive committee. The Tobacco Institute’s involvement had, according to Kornegay and his vice president Kloepfer, until that time been “minimal because of the objections” of some executive committee members, “specifically,” those of Edwin Finch, the chairman

\(^{358}\) Clifford Perry, Jr. to F. H. Christopher, Jr., Re: Trip Report—“Restrictive Smoking Activities” Presentation to Tobacco Institute (MRD# 73-0221) (Nov. 28, 1973), Bates No. 50001032.

\(^{359}\) R. J. Reynolds Tobacco Co., “Restrictive Smoking Activities” (1973), Bates No. 501343552-67. For somewhat lengthier versions, see [Untitled] [(erroneously dated May 1973)], Bates No. 500450625; [Untitled] (Jan. 1, 1974), Bates No. 500001034. Interestingly, some months later Perry admitted to one of the higher-ups at Reynolds that “[i]t is not possible at this time to determine the effect these [restrictive smoking] measures may have had on cigarette sales.” C. W. Perry, Jr. to F. H. Christopher, Jr., Re: Restrictive Smoking Legislation (MRD# 73-0221) (Apr. 3, 1974).
and CEO of Brown & Williams. After the TI staff had pointed out the increase in the volume of anti-smoking measures submitted to state and local legislative bodies at the executive committee meeting on November 29, Kornegay stated that the Institute planned to recommend an increase in funding for state activities to the budget committee.

By the time the anti-smoking forces achieved their “major breakthrough” in Arizona, some managers at the individual cigarette companies and TI officials began to realize that the industry was facing an unprecedented threat to the acceptability, sales, and profits of cigarettes, of the existence and exigency of which they had to convince the highest corporate executives. One such lower-level advocate actually styled his letter to William S. Smith, chairman of the board of R. J. Reynolds Tobacco and of TI’s board of directors—the same letter was sent to Smith’s counterparts at the other cigarette manufacturers—“a plea for help.” John D. Kelly, the executive director of the California Association of Tobacco and Candy Distributors and the state tobacco lobbyist (and later a TI vice president), wrote to Smith in May 1974 about the “very serious problem...all over the nation” of the “rapid proliferation” of state and local laws prohibiting smoking in various public and privately owned places: “In my judgment, if we don’t do something and very quickly, these laws will have an impact on our industry that will be at least as serious and detrimental as high cigarette tax rates.”

The strategic impediment lay in the fact that the industry’s traditional lobbying tools had lost their effectiveness in combating “‘non-smokers’ rights’ bills” and were “not persuasive to most legislative bodies,” seemingly “because ‘everybody knows something is harmful’ or ‘non-smokers have the right not to breath [sic] air polluted by tobacco smokers.’” Ten years after the surgeon general’s consensus report on smoking, “we know these things are not true,” but unfortunately “the general public does not.” Far more troubling (because suggestive that the end-game was in sight) was the perception, according to a survey, “that even smokers are beginning to feel guilty about their smoking practices.” To Kelly it was “obvious...that if smokers find themselves in

360 J. S. Dowdell to C. B. Wade, Jr. (Nov. 23, 1973), Bates No. 500011034. The proposed program to identify political allies at the state and local levels would be based on recommendations made by Martin Haley, which are discussed below.

361 Tobacco Institute, Minutes of the Fifty-First Meeting of the Executive Committee at 2-3 (Nov. 29, 1973), Bates No. TIMN0006763/4-5.

362 [Anonymous], Presentation on Smoking Restrictions for Executives/Employees of Manufacturers at 8 (1974), Bates No. 501800385/94.

363 None of the letters to the others whom Kelly cc’d appears to have been included in the Legacy documents.
restaurants, public meeting rooms, theaters, etc., where they used to be able to smoke but cannot now, they probably are going to smoke less. Equally important, smokers are going to be constantly reminded and made to feel self-conscious by ‘no-smoking’ signs in these various places. I am convinced that this is the exact goal the various anti-smoking groups are seeking.” In stressing that “the industry is losing this battle and losing it rapidly,” and expressing the hope that manufacturers, “perhaps through the Tobacco Institute,” solve the problem by “creat[ing] the image with which we can counter this trend,” Kelly was careful to point out that he was “not talking about lobbying in the usual sense,” but “the reaction of the general public to our industry.” Although no reply letter has been found among the millions of documents that the cigarette companies were later forced to disgorge in litigation, the cigarette oligopoly did soon develop and implement a well-funded nationwide counterattack.

On May 19, 1973, in the wake of the passage of the Arizona law, Horace Kornegay, a lawyer and North Carolina congressman in the 1960s who was TI president from 1970 to 1981, addressed the question of the political, social, and economic consequences of antagonizing non-smokers in wide-ranging remarks at its spring meeting at yet another posh luxury resort, The Homestead, in Hot Springs, Virginia. Reflecting the startling rapidity with which anti-smokers had begun to organize, but also, no doubt, in part in an attempt to ward off potential criticism of his own inattentiveness by his bosses, Kornegay reported that his notes for his talk a year earlier had contained no warning of what had turned into the industry’s “number one problem,” which demanded the executives’ “very serious attention.” What he was willing to fault himself (and others) for was having overlooked “the strategic advantage that the passive smoking question provided for the antismoking zealots.” What their antagonists had “going for them” was, on the one hand, the “very logical, visible, direct form of air pollution,” which at the time was galvanizing the country, and, on the other, the “logic...that in conventional wisdom tobacco smoke is harmful to smokers, and therefore how can it be safe for those who inhale it involuntarily?” However, even more powerful and crucial a factor paralyzing the cigarette companies’ ability to fight back and undermine their new opponents’ attack was the

364Jack Kelly to W. S. Smith (May 8, 1974), Bates No. 500799725/6.
365The assistant to the board chairman of American Brands, the successor to the American Tobacco Company, did reply in Robert Heimann’s absence, “recogniz[ing] the potential seriousness of this problem,” and stating that he was circulating Kelly’s letter to executives. Richard Stinnette to John Kelly (May 20, 1974), Bates No. 946219020.
undisputed fact that “many find tobacco smoke in a subjective sense a profound irritation.” But it was precisely this subjectivity that made it impossible for the tobacco industry to hire scientists and physicians who could assert, as they had done with regard to studies of smoking’s impact on smokers, that they had identified statistical deficiencies or evidentiary gaps. Moreover, Kornegay himself acknowledged that not even all smokers disagreed with non-smokers.367

Though unwilling to admit that “the roof has fallen in,” Kornegay suggested that “the size of the termites in the beams” could be judged by the increasingly favorable press accounts of “the nonsmoker subject,” culminating in the appearance of 50 “bad” editorials and no “good” ones in the latter half of 1972. Worse was the introduction in 1973 of 36 bills in 20 states restricting or prohibiting public smoking both because fewer smoking-permitted places would translate into fewer cigarettes smoked and because “the more the smoker is made to feel that he is socially unacceptable, the more he may consider improving his social standing by ceasing to use tobacco.” In this context the just enacted Arizona law declaring smoking to be a public nuisance and a danger to public health might, Kornegay told his cigarette company bosses, be “relatively modest,” but “its reverberations will show 49 other legislatures that it can be done, and the only question is how many in which it will be done.” Especially worrisome was that the industry’s “traditional—and until now highly successful—responses to proposed punitive legislation are not sufficient.” As an example he mentioned that a California legislative committee chairman had said to a “tobacconist, ‘Show me one bit of evidence that the tobacco industry has yielded the slightest recognition that nonsmokers have a problem!’”368

Kornegay understood that the Tobacco Institute’s and the cigarette manufacturers’ previous lobbying methods were not up to the task of dealing with legislation being urged by a new coalition of populists, scientists, and private and governmental public health advocates, but his proposed “positive ‘handles’ to modify public reaction and oppose restrictive legislation” were not only hardly calculated to “defuse some of the initiatives we are seeing in the nonsmoker problem,” but, by focusing on “the annoyance factor,” were doomed to failure once further research revealed that exposure to tobacco smoke subjected nonsmokers to the same range of diseases as smokers. The four conclusions that the Tobacco Institute’s brainstorming came up with included the necessity of: (1) “making every effort possible within our traditional areas of operation to thwart


368 Remarks of Horace Kornegay [at Tobacco Institute Spring Meeting] at 3-5 (May 19, 1973), Bates No. TIMN0252920/2-4.
enactment of unwarranted legislation.” Although Kornegay had just pronounced this approach inadequate, he seemed to believe that its potency would be magnified by “careful use of our new statement...on the origin and substance of the nonsmoker issue as it relates to the health aspect.” How the statement, a diatribe against (by then) former Surgeon General Steinfeld and the “doctored case of hazard to nonsmokers from tobacco smoke,” which gave short shrift even to “circumstances in which smoke can irritate any person,” would extricate the companies from their predicament Kornegay did not explain; (2) “mount[ing] a public campaign regarding smoking courtesy—a direct bid...for some understanding and recognition among those to whom smoking supposedly is personally offensive.” Although the word “supposedly” suggested that the Tobacco Institute did not even accept the sincerity of the expression of subjective perception and Kornegay admitted that the strategy was a “difficult platform,” he was confident that the campaign, in which smoking would be merely one of “many kinds of social courtesy,” would “reflect credit upon our industry”; (3) considering “endorsement of reasonable voluntary efforts to help assure the comfort of both smokers and nonsmokers and their respect for each other.” Speaking “quite bluntly,” Kornegay boldly asked his paymasters whether they did not “have a great deal more to gain than lose by complimenting [sic] such efforts when they may forestall or supplant government regulations?”; and (4) confronting the “mounting involvement of cigarette smoke as a form of air pollution” and fighting back against other industries that were “now in a position to throw the burden of environmental pollution control off their backs and onto ours.”

This proposal appears to have been the origin of the cigarette companies’ on-again-off-again “accommodation” strategy, which they deployed selectively into the 1990s. Neither then nor later were they ever able to explain how this verbal PR ploy could ever achieve its alleged objective, which, even by the then underdeveloped understanding of exposure, would have required precisely the types of pariah-like segregation of smokers that would have been unacceptable

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369 Remarks of Horace Kornegay [at Tobacco Institute Spring Meeting] at 6 (May 19, 1973), Bates No. TIMN0252920/5.
371 Remarks of Horace Kornegay [at Tobacco Institute Spring Meeting] at 6-7 (May 19, 1973), Bates No. TIMN0252920/5-6.
373 See below chs. 27.
to the industry because it would, despite Kornegay’s assertion that they did not imply second-class citizenship, have taken smokers out of the socio-cultural mainstream. Thus instead of facilitating “mutually greater comfort of both smokers and nonsmokers in their social encounters” and enhancing the industry’s “credibility” by reducing some of its critics’ “antagonisms” and playing a “constructive role,” so-called accommodation would, even if implemented in the most superficial manner, merely have created the precedent for further denormalization of smoking and, based on nonsmokers’ ever so minor relief, laid the groundwork for additional calls for further-reaching separation—in other words, precisely the scenario that did play itself out and that prompted the cigarette companies to adopt an ambivalent attitude toward their own creation, which at times seemed like their only plausible strategy, and to vacillate between it and a hard-line no-concessions approach.

**Philip Morris Pays a Professor to Dismiss the Dangers of Passive Smoking**

Even before the Tobacco Institute had had a chance to formalize its conclusions, Helmut Wakeham, Philip Morris’s vice president for research and development and chief scientist, intervened with a terminological correction, by means of which he hoped to undermine attacks on his employer and other producers of cigarettes for injuring nonsmokers’ health. On July 3, 1973, Wakeham, who had a doctorate in chemistry from the University of California at Berkeley, wrote to Kornegay (but also to others, including Ernest Wynder, a giant of early research linking smoking to lung cancer who then later had a decades-long unacknowledged financial relationship with Philip Morris) proposing that “we avoid the use of the term passive smoking in reference to smoke exposure in enclosed spaces. We should more simply refer to ‘Effects of

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374 Remarks of Horace Kornegay [at Tobacco Institute Spring Meeting] at 8 (May 19, 1973), Bates No. TIMN0252920/7.


376 Helmut Wakeham to Ernest Wynder (July 3, 1973), Bates No. 000259806 (“Dear Ernie”).

Tobacco Smoke on Nonsmokers.” Wakeham claimed as the basis for his coinage a “real serious error” in using “passive smoking”—namely, that the phenomenon in question was neither passive nor smoking. He asserted that the term was contradictory because “smoking applies to a deliberate act..., whereas the term passive implies being subjected to an external act....” Instead of explaining why being compelled to inhale tobacco smoke did not qualify as “smoking,” Wakeham objected to the term because it implied exposure similar to that experienced by smokers, whereas in fact “the smoker gets mainstream smoke...which differs substantially in chemical composition from sidestream smoke generated between puffs and dispersed in the surrounding atmosphere.”

(A month earlier, when his corporate colleague James Bowling had charged before the Burley Tobacco Warehouse Association in Louisville that “‘passive smoking’...is not a scientific term. It is the language of people with a social cause,” that city’s Courier-Journal editorially dismissed his objections to nonsmoker protective legislation as “‘simply too self serving to weigh heavily in any serious debate on this issue.’”) What Wakeham conveniently neglected to mention was the fact, well known since the 1960s, that sidestream smoke contained many compounds (including such carcinogens as aromatic polycyclic hydrocarbons) in much higher concentrations than did mainstream smoke. Wakeham may have failed to persuade Wynder or scientists in general to adopt his ideologically driven and deformed terminology—two years later Wynder co-authored an important article that persisted in using the anathematized term—but Kornegay welcomed the
verbal fix with open arms. He also added his “feeling,” for which he admitted he lacked evidentiary proof, “that the anti-smoking groups have intentionally and perversively [sic] employed the term ‘passive smoking’ in an effort to create confusion and misunderstanding.”

To be sure, though useful, attaining hegemony over the vocabulary of the struggle over cigarettes’ undermining of nonsmokers’s health was not Wakeham’s only contribution to Philip Morris’s efforts to undermine its opponents’ burgeoning scientific research: more important at this point was his crucial role in securing money to organize a pseudo-scientific conference designed to whitewash secondhand smoke exposure. The workshop was proposed by a Swedish professor, Dr. Ragnar Rylander, who as a researcher in environmental medicine at the University of Geneva was in fact for years a secret consultant-employee of Philip Morris fraudulently pretending to be an independent scientist. On July 11 Wakeham informed Philip Morris’s general counsel, Alexander Holtzman, of the workshop, “which would put into proper light the alleged hazards to which nonsmokers are exposed in various situations involving smokers.” Wakeham strongly urged Philip Morris and the other manufacturers to finance the conference (which was to take place in the hardship location of Bermuda) to the tune of $30,000. He touted the conference, which Kornegay was “all for,” as “invaluable in putting some sense into the legislative drive to restrict smoking in public places, and the sooner the better.” Turning legislative analyst, Wakeham closed with the admonition: “Time is important! It is easier to prevent laws than to repeal them!”

Wakeham and Kornegay, however, had not reckoned with rejection by the
Tobacco Institute’s Committee of Counsel, which on July 17, agreed with the (know-nothing) position taken by David Hardy, the industry’s leading trial defense lawyer, “that there were sufficient publications to support the industry position that smoking is harmless to nonsmokers. He argued that there was no need for additional support, so why should the industry run the risk of sponsoring a workshop which might find that there is a hazard to the nonsmoker.” Unwilling to acquiesce in abandonment of the project and being aware of those who disagreed with Hardy, Wakeham advised Rylander that when the latter came to New York on August 29, they would try to convince the lawyer of the workshop’s benefits. The details of the resolution of the dispute are unclear, but ultimately Philip Morris approved the financial support, which was also “cleared by the legal group.” By February 1974, a month before the workshop was scheduled to take place, Wakeham confided to the technical director of Imperial Tobacco Limited that Philip Morris hoped that it would “provide us with a document we can use to quiet some of the hysteria on the subject. Our main concern is the legislation restricting smokers now being passed in some of the local governments in the U.S.A.”

Once the workshop had taken place, Rylander informed Wakeham that he had already discussed publication of the manuscripts with the Philip Morris general counsel and Don Hoel, a lawyer from Hardy’s firm, and would engage in further discussion with them and Wakeham in the United States. Philip Morris’s puppeteering reached its high point when Wakeham informed Hoel, Holtzman, and Rylander that one of the company’s own research center employees, acting as what Wakeham himself called a “ghost writer,” had drafted a summary of the workshop for publication “over the name of Ragnar Rylander” in the “Meetings” section of the prestigious Science. Wakeham, incredibly, characterized the summary as representing “a very nice compromise between the opposing points of view on the topic” and hoped that Rylander would “find it acceptable without substantial modifications.” At the conclusion of the exoneration of

386“The primary purpose” of the Committee of Counsel, which was composed of the general counsel of the cigarette companies that financed the Tobacco Institute, was, in the words of one of them, to “circle the wagons.” United States v. Philip Morris USA, Inc., 449 F. Supp. 1, 77, 78 (D.D.C. 2006).
387H. Wakeham to C. H. Goldsmith (July 20, 1973), Bates No. 1004863279.
389H. Wakeham to Max Hauserman (Sept. 12, 1973), Bates No. 1000257859
390H. Wakeham to Herbert Bentley (Feb. 26, 1974), Bates No. 1004864214/5.
391Ragnar Rylander to H. Wakeham (May 16, 1974), Bates No. 10000259703.
392H Wakeham to Don Hoel, Alex Holtzman and HW to Ragnar (Aug. 16, 1974),
environmental tobacco smoke (apart from irritation of some people “for reason(s) not yet clear”) Philip Morris had inserted this transparently self-regarding laissez-faire policy judgment, which was the pay-off for the company’s having shelled out $30,000: “Within such a scientific vacuum one may legitimately question the wisdom of taking such drastic steps as the arbitrary banning or segregation of smokers in public places. Until more reliable information becomes available, the best course of action is to urge smokers to exercise appropriate courtesies and to inform them of the irritating nature smoke can have in certain circumstances for some persons.”

Being saddled with this piece of corporate pandering was too much even for Rylander, who, after having deleted it from the draft that he and two participants (who had presumably not been informed of Philip Morris’ role) had prepared and that he had amalgamated with Philip Morris’s, and after having been asked by Raymond Fagan, the company’s principal scientist, to add it, replied on October 3 that although he “sympathize[d]” with the policy statement and “opinions concerning public health administrative matters” and understood the company’s “desire especially from the lawyers’ view included [sic] in the Science article,” he regarded its inclusion as “extremely unfortunate” (for the pragmatic reason) that it “would with certainty evoke reactions from at least one, probably several participants in the workshop. They would probably by some kind of publicity try to disconnect themselves from this view and state differently. This would...mean that the whole concept behind the workshop would be endangered and the document would not represent something that was more or less completely agreed upon by individual participants.”

The apparent lack of further correspondence and the fact that in the end Science refused to publish the summary leave it unclear as to how exactly this dispute was resolved, but Philip Morris was nevertheless presumably satisfied that it had gotten what it paid for in the form of Rylander’s acquittal of secondhand smoke in his summary of the meeting (“Workshop Results”) that

Bates No. 1000260215.

393Ragnar Rylander, “Environmental Tobacco Smoke and the Non-Smoker” at 7 (n.d. [Aug. 16, 1974]), Bates No. 10000260216/22 (the estimated date of Mar. 27, 1974 on the Legacy website document is presumably mistaken since it marked the first day of the workshop).


395Raymond Fagan to Ragnar Rylander (Sept. 12, 1974), Bates No. 1004863736.


2235
Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

appeared with the individual contributions in a supplement to the *Scandinavian Journal of Respiratory Diseases*\(^{398}\) (as well as in book form published by the University of Geneva): “[A] personal conclusion is that the risk for the development of chronic pulmonary effects due to environmental tobacco smoke exposure is non-existent among the population in general.”\(^{399}\) Indeed, Wakeham may have felt that his employer (and the rest of the industry as a free rider) had gotten its money’s worth when three years later he was able to quote this very sentence to an editorialist for the *Los Angeles Times*.\(^{400}\) In to the bargain Philip Morris got Rylander’s belittlement of “[a]nnoyance reactions” as self-fulfilling prophecies of ideologically biased minds: “Some people may believe that exposure to environmental tobacco smoke affects their health. In addition to dislike of the odor such beliefs may be an additional source of annoyance. These reactions are influenced by underlying attitudes, socio-economic conditions and other factors.... It is possible that such psychological influences might, in certain cases, contribute to the development of acute upper respiratory symptoms; of asthmatic origin, for example, where psychosomatic factors are known to contribute.”\(^{401}\) Even earlier Rylander’s report received some legitimacy in a setting of supreme importance to Philip Morris: in 1975, in response to a request by a Wisconsin state legislator who was advocating a House Joint Resolution to study the effects of tobacco in confined spaces for information on the effect of tobacco smoke on nonsmokers, the Wisconsin Legislative Council prepared a memorandum, which included a section summarizing three reports of panels of experts. The memo devoted more space to the conclusions of the Rylander colloquium (which was the most recent of them) than to the 1972 surgeon general’s report. To be sure, the staff member who wrote the memo was thorough


\(^{400}\)Helmut Wakeham to Ernest Conine (Aug. 8, 1977), Bates No. 1000217977. In opposition to passage of the Washington Clean Indoor Air Act of 1985, Rylander was one of the “impartial experts” quoted by the Tobacco Institute in support of its claim that there was no persuasive scientific evidence that environmental tobacco smoke was a health hazard to nonsmokers. Tobacco Institute, “Analysis: Washington State Senate Bill No. 3039” at 3 (Feb. 1985), Bates No. TNWL0043571/5.

Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

enough to have noted that the conference had been supported by a grant from Fabriques de Tabac Réunies and that one participant had been a former consultant to the Council for Tobacco Research who had “recently published an article challenging the contention that cigarette smoke has been proven to cause serious diseases in the smokers themselves,” but the staffer nevertheless not only did not dismiss the Rylander publication, but melded its information in his conclusion that “tobacco smoke at levels commonly encountered in public places is distressing and physically irritating to some people.”402 Two weeks later Philip Morris and cigarette manufacturers generally got even more mileage out of the Rylander escapade when the lobbyist for the Minnesota Restaurant Association submitted the Wisconsin memo as an exhibit at a hearing on the proposed regulations to implement the Minnesota Clean Indoor Air Act. 403 Yet another bonus for Philip Morris was a laissez-faire policy recommendation—that two of Rylander’s Bermuda workshop cohorts (including Morton Corn, who two years later would become the administrator of the Occupational Safety and Health Administration) joined him in supporting—that “smokers be made aware of...pockets of high concentrations [of tobacco smoke] and that some people are unduly sensitive. Their smoking should then be adjusted accordingly.”404

Ramping Up the Tobacco Institute’s State Legislative Lobbying

We are meeting here today shortly after the tenth anniversary of the opening of official hostilities between our industry and the Federal Government. On January 11, 1964 the United States Public Health Service became the official spear carrier for an assortment of individuals and interests who wanted then—as they want now—to make the world safe from cigarette smoking. ...

402 Wisconsin Legislative Council Staff Memorandum, Ed Applebaum to Representative Edward Jackamonis, “The Effects of Tobacco Smoke on Nonsmokers” at 6, 7 (Nov. 17, 1975), Bates No. 500040600/5/6. The participant was Dr. Domingo Aviado, whose publications “illustrated a common tobacco industry technique to bootstrap its consultants’ work into scientific authority that is used to influence legislation and smoking policy.” His papers at tobacco company-sponsored symposia “were then cited in congressional testimony and other forums without featuring the fact that the symposium...was industry funded.” Stanton Glantz et al., The Cigarette Papers 310 (1996).

403 Exhibit 24, Health Department, MSA, MHS, 112.H.18.3(B).

At the executive committee meeting in November, we...warned that the movement [to prohibit smoking in public places] could lead to the virtual elimination of cigarette smoking.footnote{405}

The immediate consequence of Kornegay’s initiative of May 19, 1973, appears to have been the downgrading by TI’s executive committee of his “proposed ‘policy’ statement” to a “‘guideline’ statement,” which the Tobacco Institute would not issue or use as a document or release as a statement, but which was “designed to give structure to the industry’s position and to create a context in which the problem can be responded to and otherwise discussed.”footnote{406} So minimalist was this proposal that Kornegay hastened to explain to the cigarette companies’ top executives that the staff did not even intend to use the guidelines publicly per se, but merely to “treat them in proper context as part of our effort to discourage governmental efforts to prohibit smoking in various places.” Nevertheless, he needed his bosses’ approval before TI could make any use of them. The four guidelines encompassed the assertions that: (1) many “adults enjoy tobacco products”; (2) no “[v]alid scientific evidence” supported the claim that tobacco smoke harmed nonsmokers (just as science had not found that smoking harmed smokers); (3) “[f]or the comfort of smokers and nonsmokers...it is practical, sensible and traditional to provide areas in public facilities for those who wish to smoke and those who do not. In small, crowded, poorly ventilated places, smoking is inappropriate”; and (4) “[v]oluntary efforts and exercise of personal regard and consideration will assure the comfort of smokers and nonsmokers. Laws and governmental regulations, which are both intrusive on personal rights and impractical, if not impossible to enforce, are neither required nor justified.”footnote{407} The first two points represented no concession of any sort—David Hardy having suggested that his clients “not...concede anything on” the claim that smoking harmed smokersfootnote{408}—whereas the third sought to suggest (counterfactually) that public no-smoking areas were not an innovation. The final

footnote{405}H[orace]R[.]K[ornegay], Statement at Annual Meeting of Tobacco Institute at 1, 3 (Jan. 31, 1974), Bates No. TIMN0136556/8.

footnote{406}Arthur Stevens to P. R. Tisch and C. H. Judge, Tobacco Institute -- Executive Committee Meeting -- July 26, 1973 (July 27, 1973), Bates No. 03769103 (Lorillard general counsel’s memorandum to company’s top executives).

footnote{407}Horace Kornegay to William S. Smith (July 30, 1973), Bates No. 501470082. For a draft of the guidelines, see [untitled] (July 17, 1973), Bates No. 680239461.

footnote{408}[Untitled handwritten notes on the TI executive committee meeting, presumably made by Arthur Stevens, Lorillard’s general counsel] (July 26, 1973), Bates No. 03769107.
point embodied the crucial issue for the cigarette oligopoly because the absence of government intervention insured the fecklessness of any such initiative and, consequently, that it would not proliferate.

The corporate heads on the TI executive committee weighed in with comments ranging from “‘Excellent’” to “‘Satisfactory.’” Philip Morris failed to respond, and only one executive, Raymond Mulligan, the CEO of Liggett & Myers, offered substantive suggestions—namely, to water down the third guideline even further by inserting “some” before “public facilities” and to change “is” to “may be” before “appropriate.” Obediently, the Tobacco Institute incorporated the dilutions of its already very thin soup.409

To be sure, by the beginning of September 1973 Kornegay had already succeeded in having a letter to the editor published in The New York Times, which, in the course of responding to a three-month-old op-ed by a psychiatrist who had opined that smokers should have both their heads and their lungs examined and sarcastically wondered why on their early trip to the grave they should be taking nonsmokers down with them,410 broadcast the claim that “[t]he key consideration is comfort. The answer lies in courtesies between those who enjoy tobacco and those who do not. Laws and further Government interventions are overreactions.”411 (Kornegay did not quote the statement of his senior vice president, Kloepfer, who some months earlier had let the cat out of the bag in a letter to Reynolds’s senior vice president, Wade, insisting that “[t]here must be a way we can remind smokers to avoid annoying the people who seem to have such a good ability to organize against them....”)412

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409William Kloepfer, Jr. to Horace Kornegay, Memorandum: Guidelines on nonsmoker issue (Sept. 27, 1973), Bates No. TI04002517/8. A handwritten notation stated that the guidelines were to be resubmitted to the October meeting (of the executive committee), but the minutes do not reflect such a discussion, although they do mention discussion of other non-smoker matters. Tobacco Institute, Minutes of the Fiftieth Meeting of the Executive Committee (Oct. 4, 1973), Bates No. 500799274.


412William Kloepfer, Jr. to Charles Wade (Dec. 29, 1972), Bates No. 500081668/9. Kornegay failed to reconcile the assertion that smokers were “by and large courteous and considerate about smoking and its possible annoyance to others” with opposition to smoking bans in taxis, restaurants, bars, workplaces, bus and train station, or sporting events. Remarks of Horace R. Kornegay at the Tobacco Association of the United States at 10 (Mar. 1, 1973), Bates No. TIMN0154983/92. In fact, for whatever probative value smokers’ self-reporting about their own smoking behavior possessed, 36 percent of all
How the corporate PR representatives on the Tobacco Institute’s communications committee—which was in charge of reviewing and approving TI’s media plans and PR campaigns and at least as early as April 1973 had discussed passive smoking, which was “said to be the most important health problem facing the industry”—reacted to this op-ed and how the Times reacted to the cigarette industry’s lobbying for its publication are worth noting. Meeting two weeks after the op-ed attack had appeared under the provocative title, “The Community Menace,” the communications committee urged TI senior vice president William Kloepfer to “prepare and take to The New York Times personally a rebuttal, to be signed by Mr. Kornegay....” Kloepfer did in fact hand-deliver the letter to and meet personally with A. H. Raskin, for years arguably the best known mainstream labor reporter in the United States, but by now, as assistant editorial page editor, apparently reduced to schmoozing over op-ed space with the PR designee of the cigarette oligopoly, whose lucrative full-page ads in the Times—including on the day on which Kornegay’s letter appeared also bought the kind of access, as Kornegay put it, to “your fine publication” for “responsible and informed sources.” Raskin, according to Kloepfer, was “most cordial,” skimmed the piece, asked no questions, expressed interest, and stated that Kornegay would hear from Harrison Salisbury (the op-ed page editor, who as a college student and managing editor of the student

smokers and 42 percent of heavy smokers, according to the 1974 Roper survey paid for by TI, admitted that indoors when other people were present they “[l]ight up without thinking about it”; 53 percent of all smokers and 48 percent of heavy smokers claimed that they looked around and then decided, asked others, or just did not smoke. Roper Organization, “A Study of Public Attitudes Toward Cigarette Smoking and the Tobacco Industry in 1974: Prepared for the Tobacco Institute, 1:49 (1974), Bates No. 85425610/89.

413United States v Philip Morris USA, Inc. 449 F.Supp. 2d 1, 81 (2006).

414Leonard Zahn [public relations counsel for Council for Tobacco Research] to H. H. Ramm and W. T. Hoyt (Apr. 23, 1973), Bates No. 10396009. At the meeting Welch “discussed the problems presented by increasing attacks on ‘second-hand smoking.’” Communications Committee Minutes at 2 (Apr. 10), Bates No. LG0233930/1.

415Communications Committee Minutes (June 26, 1973), Bates No. TIMN0124671.


419[James S. Dowdell], T.I. Communications Committee at 1 (Sept. 5, 1973), Bates No. 500081660 (handwritten meeting notes). Without indicating the context or implication, Kloepfer reported that “Raskin agreed anti-smoking people now working passive smoking issue acknowledge failure of past efforts to significantly deter smokers.”
newspaper had been expelled from the University of Minnesota for “‘deliberate and public’ defiance” of a new smoking ban in the university library).\textsuperscript{420} Although Kloepfer was annoyed that Raskin had not informed him during their tête-à-tête of the Times policy of not publishing op-ed responses to previous op-eds, he told his corporate PR overseers that he and Kornegay saw no reason for “quarreling” over the offer to publish a re-submitted piece as a 400-word letter to the editor\textsuperscript{421}—especially since the letter enjoyed the privilege of passing virtually untouched through the hands of the newspaper’s compulsively interventionist top-heavy editorial staff.\textsuperscript{422}

Another opportunity for the Tobacco Institute to try out its trivialization campaign presented itself in October, when during a radio debate with Betty Carnes Kornegay claimed that the newly enacted Arizona law had not set off any controversy “because the tobacco industry does not take the position that people ought to smoke in art galleries, on elevators, in churches, or in operating rooms, and places like that.” But, he insisted, there was absolutely nothing specific about smoking here: “there are places where it’s inappropiate to smoke. Just as it’s inappropriate to do a lot of other things, to eat or to drink, that sort of thing.” Although, as always, the point was to “accommodate the comfort of both” smokers and non-smokers, Kornegay had apparently not thought through the question as to why the logic of his preposterous categorization did not require accommodating the comfort of both eaters and non-eaters and drinkers and non-drinkers in churches and operating rooms. That his exhaustion of logic had not exhausted his stock of analogical absurdities was embarrassingly on display in his denial that smoking was addictive: “It’s a custom, a habit, it’s something that you do, you pop your fingernails, you smoke.... I smoke, I enjoy smoking.” Incipient organizational coordination took shape at the end of February 1974, when, again, under the aegis of the industry leader, Reynolds, the Tobacco Institute, the Tobacco Tax Council, the Coordinating Board of the National Association of Tobacco Distributors, and the Tobacco Growers’ Information Committee fashioned a memorandum of agreement—which, ironically, ignored Wakeham’s terminological admonition—on the “Industry Response to the Passive Smoking Issue,” which assigned responsibility to TI for “coordinating and

\textsuperscript{420}“Minnesota University Suspends Student for Year for Smoking,” \textit{NYT}, Jan. 15, 1930 (1).

\textsuperscript{421}William Kloepfer, Jr. to Blalock et al. (Sept. 10, 1973), Bates No. 500003419.

\textsuperscript{422}The letter as submitted is Horace Kornegay to Kalman Seigel (Sept. 7, 1973), Bates No. 500003420.

\textsuperscript{423}“Barry Farber Show” at 4 (Oct. 18, 1973, 8:00 p.m., WOR, New York), Bates No. TIFL0518215/8 (Radio TV Reports, Inc.).
directing opposition to smoking ban proposals” and directed the other associations not to initiate any action at the state or local level without first consulting and obtaining the approval of TI. The “legislative tactics” for defeating anti-smoking measures were to “follow the pattern established for tax legislation, i.e., retention of counsel or legislative lobbyist to represent industry.” Counsel would also be retained in “selected local issues of significant concern.” In accordance with previous internal tactical declarations, the organizations recognized the “need for some appropriate public accommodation between smokers and non-smokers”—if for no other reason, then because “[l]egislative councils...need examples of industry good faith.” The companies’ continued bad faith was blatantly (albeit internally and secretly) on display in the Institute’s unwillingness to do any more than trot out earlier shams such as “campaigns to stress smoking courtesy and non-smoker tolerance....” Lodged in a similar ethical price range was the plan to “counter false health hazard claims...by...exploiting government-sponsored research that exonerates tobacco smoke as potentially injurious.”

Two days later Kornegay warned the Tobacco Association of the United States that “the old antismoking bandwagon is headed backwards—down the discredited road to out-and-out Prohibition.” Smelling a conspiracy, but unwilling to identify the conspirators, he alleged that much of the movement’s “propaganda on the nonsmoker issue...serves the interests of those who would like to see cigarette smoking take the blame for the health hazard associated with air pollution. Indeed, there seems to be taking shape an unholy alliance of more than a few vested interests.” The cigarette oligopoly may not have appreciated (imaginary) conspiracies arrayed against it and aimed at suppressing the super-profitable production of lethal consumer commodities, but it was acutely attentive to identifying disparate potential allies whose assistance in delaying, if not sidetracking, anti-tobacco legislation might be bought if they could not be persuaded that they had a stake in combating the alleged “attempt to make cigarette smoking the scapegoat for the ills of air pollution and occupational hazards.”

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424 “Memorandum of Agreement Industry Response to Passive Smoking Issue” (Feb. 27, 1974), Bates No. 500040551/2. Opaque was the solicitation of suggestions to counter anti-smoking groups’ effective use of women to support anti-tobacco legislation.


427 Remarks of Horace R. Kornegay, Pres., The Tobacco Institute, Inc., at the Tobacco...
Now here is an issue which is inherently phony and obnoxious to many more people than just those poor harassed smokers. It ought to infuriate the people who operate restaurants, hotels, motels, theatres, sports arenas, and retail stores. It ought to upset their employees. It ought to depress environmentalists, trying to clean up the atmosphere. It ought to worry union members, struggling to clean up the dust and fumes of mines and mills. And above all, it ought to give serious misgivings to those concerned about the gradual erosion of civil liberties in our land.

Our job—yours and mine—is to tell all these people that the brush fire in the tobacco fields today may burn down their barns tomorrow.\footnote{428} As speculative and difficult to mobilize as such interests might be, Kornegay knew of many others, occupying the non-vertically integrated segments of the industry, who were only all too aware that “the bell tolls”\footnote{429} for them—namely, the “people who share a common destiny...as in ‘we are all in the same boat,’” the tobacco community—farmers, warehousemen, dealers, suppliers, manufacturers, wholesalers and retailers...” With them he pleaded to lend the “weight and reach of large numbers” without which even the (rich and powerful) manufacturing corporations would be unable to fight and win alone.\footnote{430}

Three weeks later a lengthy discussion at a meeting of the TI Communications Committee—attended by two of the industry’s leading lawyers, Stanley Temko of Covington & Burling\footnote{431} and Don Hoel of Shook Hardy—resulted in the group’s advising Kornegay to notify the manufacturing corporations’ chief executives that “authorization is needed for development of a public campaign to respond to those forces who would put restraints upon public smoking.”\footnote{432} This relatively bland result masked an intense discussion,
some of the fervor of which has been preserved in the notes taken by Dowdell and
the memo that Wade (the committee chair) wrote to Reynolds’ CEO. After
mentioning the huge and growing volume of anti-smoking bills introduced in state
legislatures in 1974 and the 60 to 70 local ordinances passed, Ehringhaus, TI vice
president for state activities, stressed that “[s]ocial unacceptability” was the
objective pursued by all the “anti forces.” Kornegay reviewed the history of TI’s
attempts to secure the cigarette manufacturers’ support for counter-actions before
issuing this cri de coeur: “We must have something to combat this campaign.’
The time has come to set the record straight with the average person.” ‘The
can’t be fought at the legislative level.’ ‘We call on you for help; the
longer we delay, the more difficult the problem. The antis have tasted blood and
they want more.”’ James Bowling, the Philip Morris PR head, agreed that
management was “not sufficiently alarmed,” but speculated that the next Roper
public opinion poll might cause management to “see we are being hurt and...do
something about it.” If Kornegay was astutely analyzing the legislative corner
into which the anti-smoking organizations had painted the companies, Ehringhaus
was hardly pointing the way out with his insipid and risible call to imitate other
industries by showing that the “smoking public and manufacturers are
considerate, responsible groups.” After John Blalock, Brown & Williamson’s PR
chief, characterized smoking bans as the “number one priority,” Arthur Stevens,
Lorillard’s general counsel, cautioning that he did not think that they should
“panic,” asked whether, after all, they were actually being hurt. Ehringhaus
agreed, but observed that they were still in the first year and once the anti-
smoking groups returned the following year, the tobacco industry had “nothing
to give, to fall back on.”

Offering a broader assessment of the discussion, Wade observed that “for the
first time there was unanimous agreement that the Institute, backed by the entire
membership, needed to stop procrastinating and get going on the
counteroffensive.” The reason that Ehringhaus believed that the problem, which
he regarded as “much greater than anyone had anticipated,” could not be “solved

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433 It is possible that Wade’s memo was in part based on Dowdell’s notes, but in places
it differed; since he was also at and chaired the meeting, his version may have been
independently written, but since Dowdell’s was actually made contemporaneously, it is
preferred where the two are irreconcilable.

434 J. S. Dowdell, Subject: T. I. Communications Committee Meeting at [6-8] (Mar. 22,
1974), Bates No. 500081649/54-6. The illegibility of one word in the notes makes it
difficult to determine whether Stevens was offering a remarkable concession or merely
being facetious, but after agreeing that “[w]e do need fall back,” he added: “Perhaps we
should accept [separation ?segregation?] in Greensboro auditorium.” Id. at [8].
Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

by the usual legislative tactics” was that, despite the industry’s employing lobbyists and achieving some success, there was simply no way to stop the anti-tobacco groups from returning for more the following year, especially since “all have not given the lobbyists a fall-back position.” Given Reynolds’ leadership in combating the new wave of legislation, Wade was presumably expecting to score points with his boss for reporting that the representatives of Philip Morris, Brown & Williamson, and Lorillard had all “conceded that their top management may not be sufficiently alarmed.” He also emphasized the general agreement reached that although the newly legislated restrictions had not yet exerted any great impact on sales, “unless something could be developed to slow down the smoking bans, the industry could be seriously damaged in the years ahead.” In light of the overarching mood that, if left unchecked, might prompt the new anti-smoking tactics to trigger the beginning of the end-game, the committee’s timid recommendations appeared scarcely up to the task: (1) that Kornegay explain the “growing seriousness of the problem” to the executive committee and ask for “authority to start immediately to develop a counteroffensive”; and (2) that TI develop the programs needed to help deal with the state legislative problems and “to gain some degree of public understanding and support.”

Overall the impression left by that the cigarette companies’ PR chiefs was that although they had indeed sensed, before their bosses, the import of their adversaries’ skillful turn toward secondhand smoke exposure as the key to galvanizing the nonsmoking majority and overcoming the wealthy manufacturers’ traditional lobbying advantages in state legislatures, they were unable to devise any credible or plausible extra-parliamentary plans that would make any sense to anyone not blinded by unquestioning devotion to saving a lethal consumer industry and his own job. The PR managers were floundering because, while the majority of the population was beginning to recognize both that cigarette smoke was sickening them and that as a vocal majority they were not fated to continue to acquiesce in this decades-old assault, the cigarette producers were disabled from dissuading the requisite number of nonsmokers from believing their own bodies and sensory perceptions because the companies’ increasingly mendacious denials of the murderous impact of firsthand smoking had manifestly disqualified them from participating in any serious public policy debate.

Crucial to understanding the direction in which the cigarette oligopoly at this very juncture moved in order to ward off state-level smoking bans is the set of proposals that political consultant Martin Ryan Haley submitted in 1973-74.

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435 Chas B. Wade, Jr. to W. S. Smith (Mar. 26, 1974), Bates No. 500799773-4.
436 One service that Haley performed more publicly on behalf of the cigarette oligopoly was as liaison between Philip Morris and the Vatican in arranging an exhibition of the
Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

Haley, an early organizer of the so-called right to life movement, played a less visible but no less important role on behalf of tobacco companies’ right to death (of their customers) movement.\(^{437}\) The Haley connection originated in the cigarette companies’ long-term discussions about merging their Tobacco Tax Council (which lobbied against state tobacco excise taxes)\(^{438}\) into their Tobacco Institute in order to increase efficiency and reduce duplication. In response to a request in December 1972 from the TI executive committee to study the matter,\(^ {439}\) the TI/TTC study group met on March 27, 1973, at which all the company representatives agreed to ask Haley to attend the group’s next meeting to determine whether he would agree to marshalling facts to present to the TI executive committee.\(^ {440}\) A few days later Haley agreed to meet with the study group in early May.\(^ {441}\) Then on May 10, 1973, the Tobacco Tax Council Operating Committee recommended that the two groups not be formally merged. Instead, as the result of informal discussions of the TI’s and TTC’s “legislative [i.e. lobbying] functions” with an “outside consultant,” this study group recommended that each “explore the feasibility [sic] of retaining such outside consultant to make a report on improving the state legislative efforts of each


\(^{437}\)As liberal Congressman Morris Udall had put it: “I think people are entitled to smoke if they wish to. The Constitution guarantees us all these great freedoms including the freedom to abuse our health and make fools of ourselves if we want to, and I do not intend to deprive people of these great freedoms.” \textit{Cigarette Labeling and Advertising—1965: Hearings Before the Committee on Interstate and Foreign Commerce House of Representatives on H.R. 2248}, at 24 (89th Cong. 1st Sess. 1965 (statement of Morris Udall).


\(^{439}\)Tobacco Institute, Minutes of the Forty-Eighth Meeting of the Executive Committee at 3 (Dec. 7, 1972), Bates No. 04209485/7; A. H. Galloway to Joseph Cullman et al. (Dec. 26, 1972), Bates No. 03680616.

\(^{440}\)EAV[assalo], TI/TTC Study Group Meeting at 1 (Mar. 27, 1973), Bates No. 501470133. Vassalo was R. J. Reynolds’ representative on the TTC; his internal memorandum appears in large part to have been self-serving and designed to enhance his importance in the eyes of his bosses, who were purportedly strongly in favor of keeping the activities of the TI and TTC entirely separate because they did not want to mix health and tax issues.

\(^{441}\)Richard Robertson [Vice President, Philip Morris] to DeBaun Bryant et al. (Mar. 30, 1973), Bates No. 680239467.

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A week later at the TI board of directors meeting, President Kornegay informed the assembled cigarette manufacturing executives and their lawyers that the proliferating non-smokers’ rights activities, especially proposed legislation, were “of serious concern to the Institute....” The overriding point, as far as the minutes reveal, made during the discussion was that since “there was no scientific basis for a claim that cigarette smoking caused deleterious effects to non-smokers...the issue was mainly being advanced on the basis of claimed annoyance to the non-smoker”—hardly a startling conclusion coming from the for-profit stonewallers who were still pretending to be in denial over the health consequences to smokers themselves. Later during the meeting Kornegay (who was himself a member of the study group) read the aforementioned letter about a merger, about which the ensuing discussion “emphasized that no contract had been entered into with the consultant and that all that had been authorized” was to request the consultant to “consider the question and submit a proposal for study.” This consultant was Martin Haley. On July 26 the TI executive committee, after hearing Kornegay’s presentation of Haley’s proposal to analyze the TI’s and TTC’s state legislative activities, finally agreed to authorize TI participation; all the manufacturers present concurred except Lorillard, which abstained.

In his original proposal Haley had estimated that a comprehensive report would take eight months to prepare, but nine and a half months passed before it was submitted at the end of May 1974. (Perhaps the delay was in part attributable to the memorandum that he prepared for the Tobacco Institute in March/April on the aforementioned New York City Health Department proposal to restrict public smoking.) Each numbered copy of Ryan’s report, “A State

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442 DeBaun Bryant et al. to William S. Smith (May 10, 1973), Bates No. 03769163.
443 Tobacco Institute, Minutes of the Thirty-First Meeting of the Board of Directors at 2-3, 5 (May 19, 1973), Bates No. 03769146/7-8/9. The somewhat testy wording may have been linked to a memorandum by Lorillard’s general counsel to the company’s high executives expressing surprise that the study group had suggested retaining a consultant to consider the matter further. Arthur J. Stevens to Preston R. Tisch et al., Tobacco Tax Council-Tobacco Institute Merger (June 5, 1973), Bates No. 03769160.
Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

Legislative Plan for the Tobacco Industry,” bore the warning: “HIGHLY CONFIDENTIAL Disclosure of this Report Could be Damaging.” Although the report was in part prefigured by an article that Ryan had published at the beginning of 1974 in the *Harvard Business Review* and appended to his report, he made it clear from the outset that, far from engaging in an academic exercise, he recommended “applying continually the axiom that the objective of a state legislative program must be helping to defend the bottom line and, whenever possible, to protect and expand markets.”

En route to recommending against the TI-TTC merger, in large part because the taxation and secondhand smoke issues had to be kept separate in some states in order to avoid the industry’s being “whipsawed by legislators who ask which issue is more important” inasmuch as they would support the cigarette companies on one or the other but not on both, Haley focused on two questions that he felt he had been asked—namely, how the industry could best “conduct its state legislative programs” and how to spend its state legislative budgets. The principal tidings that he brought the cigarette manufacturers were “the tidal wave” of state-level anti-business legislation, which was rooted in the “‘quiet revolution’ in the statehouses,” which was, in turn, based on a number of mutually reinforcing changes: a 250 percent increase in the volume of state legislation in 13 years; an increase from 24 to 43 in the number of legislatures meeting annually in the previous 10 years; an increase in the length of sessions from 60 to 120 days and an increasing number of legislatures meeting virtually year round; increasingly active interim committees between sessions; more hearings resulting from procedural changes sponsored by groups such as Common Cause; a monumental turnover in membership; a drastic decline in legislators’

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age; an occupational shift from lawyers to teachers, housewives, students, and retired persons; entry of new groups such as women, blacks, youth, and Chicanos into the political system; and a breakdown in bloc voting, which made it necessary to lobby one member at a time. The overall result was that: “Starting with the Supreme Court’s one-man-one-vote ruling in 1965 accelerated by consumerism, Common Cause, and activism, the New Politics have created New Legislators, who are in the ascendency—if not already in control—in New Legislatures. These legislatures and their members are simply not business oriented. Hence, abetted by the difficulties of oil, transportation, insurance, and utilities companies, the broadest and most perilous state legislative antibusiness climate in our history is rapidly gaining momentum.”

Without shedding any light on whether or how these new political configurations would affect the cigarette oligopoly differently than other industries, Haley did warn his customer against “the fallacy of establishing state legislative priority according to the size of [the tobacco] market.” The reason that every state had become important was that legislation passed in small states would be conveyed to other states within weeks and not, as had been the case even 10 years earlier, over a period of years. In light of the acceleration of this interstate communication process by the national publication of state model bills, Haley would have not been surprised if some national legislative organization produced a “model non-smoker bill” later in 1974. And, most significantly, since small market states were not only important, but “just as important as a California or New York,” he was in effect urging a 50-state lobbying strategy for the Tobacco Institute. (Unbeknownst to the presentist Haley and his amnesiac customer, in the late nineteenth and early twentieth century the cigarette oligopoly had already adopted such a lobbying and litigation strategy to combat no-cigarette-sales-to-adults statutes in all states regardless of the size of cigarette sales in them precisely because statutory wording wandered from state to state from one session to the next and because litigation, especially in federal courts, automatically nationalized the precedential basis for future rounds of legislation and judicial intervention.)

Whether he fully misunderstood the flow of science, policy, culture, and history or was merely humoring and cynically milking very deep-pocketed

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455See above Parts I-II.
customers, Haley—who must have recognized that advising the companies to prepare for the end-game would have prompted termination of a lucrative contract—urged the cigarette manufacturing executives to regard the “non-smoker campaign” as just another example of “[d]iscriminatory and otherwise adverse legislation” (such as the “pro-abortion effort,” which was personally anathema to Haley) that ran in faddish cycles. Although these cycles allegedly ran in 7 to 15-year cycles, but had become shorter in sync with the aforementioned legislative acceleration, he nevertheless alerted the Tobacco Institute to the need to expect the accelerating anti-smoking campaigns (at least 150 non-smoker bills in more than 40 states in 1975) to continue at least until 1980, but “more likely 1985.”

The real heart of Haley’s strategy-changing recommendations was financial: the tobacco executives had to eliminate the “false economy” that had misled them to dedicate only $135,000 of the Tobacco Institute’s budget to state legislation in 1973, $160,000 at the beginning of 1974, and $250,000 for that year: “Put bluntly, the dimensions and growing momentum of anti-smoking legislation will not permit such economy in 1975.” Since “the handwriting [wa]s on the wall,” he recommended that the Institute not only expand the state legislative budget to as much as one million dollars, but institute a “crash program” in the summer to put into place an adequate defense by the opening of the legislative session in January 1975. In addition, Haley pointed out that the individual cigarette companies themselves needed to commit the requisite human resources and money to develop state government relations departments befitting large corporations. (Philip Morris and R. J. Reynolds, which never fully trusted their TI hirelings, did eventually create parallel state lobbying regimes.)

At the TI executive committee meeting on July 25, after Haley had presented his analysis and recommendations, vice presidents Ehringshaus and Kloepfer summarized for the assembled corporate top brass various proposals that TI had developed in response to Haley’s report, the most consequential of which was the

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456To be sure, even these pockets eventually had limited patience with Haley’s self-generous billing practices: for another project in 1991 the Tobacco Institute brusquely refused to pay some of his invoices. E.g., Martin Gleason to Martin Haley (Sept. 27, 1991), Bates No. TIMN0355060.
460See below ch. 26-27.
deployment of a “modest but effective organization of field representatives,” of whom two were to be in place by the end of the year and six by January 1, 1976. In addition, TI was to become an expanded source of information for expanded state activities. After discussion and questioning of Haley, the heads of the three largest firms, Reynolds, Philip Morris, and Brown & Williamson, expressed agreement with Haley’s viewpoints and the Institute’s program, while Liggett’s and Lorillard’s representatives needed more time to consider the matter.\footnote{Tobacco Institutes, Minutes of the Fifty-Third Meeting of the Executive Committee at 3-4 (July 25, 1974), Bates No. LG0508394/6-7.} In October, Kornegay reported to the executive committee that the first field representative would begin work on November 1.\footnote{Tobacco Institute, Minutes of the Fifty-Fourth Meeting of the Executive Committee at 3 (Oct. 3, 1974), Bates No. LG0406993/5.}

In accordance with Haley’s advice, if not quite so rapidly as he recommended, the Tobacco Institute’s State Activities Department legislative budget was ramped up to $842,111 in 1978 and for 1979—when “a large number of anti-smoking initiatives all over the country” were expected—advanced to $1,170,055 to reflect the opening of numerous state and area manager offices.\footnote{Tobacco Institute, Inc., Proposed Budget for 1979 (Oct. 5, 1978), Bates No. 501518801/8/9; Tobacco Institute, 1980 Budget at 29 (Oct. 31, 1979), Bates No. 2025390157/85.} Sixteen years later, Haley himself, seeking another lucrative contract with the Tobacco Institute (this time to combat congressional proposals to ban cigarette advertising), reminded its president that a “very high proportion of the Recommendations was gradually put to work...by 1975, the overall structure as we know it today was being built.”\footnote{Martin [Haley] to Samuel Chilcote (Nov. 7, 1990), Bates No. TIMN354943.}
Minnesotans who thought the smoking problem would disappear after the law was passed have been disappointed. Enactment of the law—although of great importance—was only one step in a lengthy, difficult and most educational process... [T]here is still a long road ahead. In some restaurants the no-smoking area is next to the kitchen door, is situated in a drafty spot, or consists only of two tables, but an attempt is usually made to comply with the law.  

One reason for the renewed interest in an anti-public smoking law in Iowa in the mid-1970s was the enactment in June 1975 by neighboring Minnesota of a “landmark” “clean indoor air act,” which included the first modern ban on smoking in private workplaces—as early as 1866, Minnesota had enacted an “Act to Prohibit Smoking in Mills, Machine Shops, Stables, or other Buildings where notice prohibiting the same is kept posted”—and quickly became a model for other states, including Iowa, which adopted some key provisions verbatim from
the Minnesota statute. Cigarette manufacturers immediately labeled the Minnesota law the “Most Severe.”

This chapter offers a detailed account of the background of the Minnesota Clean Indoor Air Act as well as an in-depth analysis of the substance of the law, its implementing regulations, and the latter’s political-economic drafting and lobbying processes. The purpose of this chapter is twofold: first, to capture the broader national context within which anti-smoking legislation was being debated and enacted in the mid-1970s; and second, to shed light on the sources of the 1978 Iowa law, which, in large part, was adopted from the MCIAA, although the Iowa legislature failed to take over many of the more controversial and far-reaching aspects of the Minnesota law, including coverage of privately owned commercial public places, and especially restaurants. Iowa’s failure to create an administrative regulatory-enforcement framework, which, whatever its shortcomings in Minnesota, embodied the possibility not only of expanding the scope of the skeletal statute through rulemaking, but also of permanently driving the anti-public smoking campaign forward institutionally by means of the interaction between the responsible agency’s public health officials and the Association for Non-Smokers Rights, accounted, in large part, for the very slow progress in Iowa, which depended almost wholly on favorable political constellations in the state legislature, unmoored from the pressures of a legally empowered and energized corps of public health officials and an organized popular movement. These dual objectives explain why the focus of the chapter is on developments in Minnesota until the time in 1978 when the Iowa legislature was debating its public smoking law. However, since the Iowa law’s profound weaknesses propelled ongoing debate during the 1980s over amendments to strengthen it, the chapter also devotes some attention to the more stringent regulations promulgated in Minnesota in 1980, which widened still further the gap between the Iowa law and the MCIAA, which, more than ever, became the aspirational model of anti-smokers in Iowa.

Professor Edward Brandt’s Initiative

[S]moke...bothered me...a great deal. 7

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6On anti-smoking and anti-cigarette sales legislation in Minnesota in the early twentieth century, see vol. 2.
7Email from Ed Brandt to Marc Linder (Apr. 30, 2007).
The Minnesota Clean Indoor Air Act of 1975

The American Lung Association, which has played the leading role in pushing for nonsmokers’ rights in Minnesota and other states, says its efforts are pro-nonsmoking, not antismoking.\(^8\)

Neither Heart nor Cancer supported the effort. It was not until many years later that they stopped allowing smoking during their board meetings. There was still smoking allowed in the Lung association until at least the 1980’s.\(^9\)

The initial impetus for passage of the Minnesota Clean Indoor Air Act, whose gestation period lasted from 1973 to 1975, came from Edward Brandt, who had recently completed a doctorate in political science,\(^10\) was an assistant professor at the College of St. Thomas in St. Paul, and had been a two-term member of the Minnesota House of Representatives (Nonpartisan Election-Conservative Caucus, i.e., a Republican, but a self-professed “liberal...on issues of economic justice”)\(^11\) representing a Minneapolis district including the University of Minnesota from 1969 to 1971.\(^12\) On the House floor he had had the “misfortune” of being forced to sit among heavy smokers.\(^13\) In fact, it was especially this exposure to smoke in the legislature in addition to other personal experience that motivated Brandt’s involvement in ANSR and efforts to secure passage of an anti-smoking law.\(^14\) As a legislator he had already demonstrated his anti-smoking bona fides by writing a letter to the Federal Highway Administration in March 1970 supporting Ralph Nader’s petition to amend the Motor Carrier Safety regulations to ban smoking on interstate buses: “I do so on the grounds that such smoking represents not only a serious nuisance but a health hazard to other occupants. Most smokers have little idea as to what acute discomfort they cause to some non-smokers, especially

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\(^9\) Jeanne Weigum (executive director, Association for Non-Smokers-Minnesota) to Marc Linder (Apr. 19, 2007).

\(^10\) Edward R. Brandt, “Confidence and Crises of Confidence in International Relations: A Case Study of West German Political Attitudes Towards the United States During the Postwar Period” (Ph.D. diss., U. Minnesota, 1970).


\(^12\) The Minnesota Legislative Manual 1971-1972, at 81, 142 (Larry Anderson ed. n.d.).

\(^13\) Telephone interview with Ed Brandt, Minneapolis (Apr. 26, 2007).

\(^14\) Email from Ed Brandt to Marc Linder (Nov. 5, 2009).
The Minnesota Clean Indoor Air Act of 1975

those who may be suffering from temporary or permanent nasal difficulties of even a minor nature.” Brandt concluded by calling adoption of the amendment “a small but important step in promoting more civilized human behavior.”

As early as 1971 Brandt drafted an anti-smoking bill, but decided not to introduce it because he was not “sure...whether the public climate was strong enough at the time for its passage....” His electoral support came largely from Democrats in Northeast Minneapolis who, like Brandt himself, “were upset by the radicals who had gained control over the party apparatus. .... My announcement stated that I was running on behalf of the Humphrey Democrats and Republicans, in contrast to the radical McCarthy Democrats, who were the most radical group among students and some faculty in the university area.” A self-professed “unpaid citizen lobbyist,” Brandt may not have received the enduring public credit that he deserved for his role in instigating the Minnesota law, but those who were leading figures in the first half of the 1970s have unambiguously acknowledged his leadership. For example, Phyllis Kahn, the legislator who in 1973 introduced an anti-smoking resolution that Brandt had drafted and continued, more than any other Minnesota legislator, to be identified with anti-smoking initiatives for the next 35 years, observed that he had been “the initiator” and approached her about sponsoring his bill draft. When Brandt left Minnesota

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15 Edward R. Brandt to Kenneth L. Pierson (Mar. 18, 1970), Bates No. 03757187. Brandt’s letter may have been prompted by an aggressive press release of the Minnesota Highway Department, which, after stating that “[i]f you are one of those bus passengers who is nauseated by smoke from cigarettes, you may be in for some relief soon,” explained to whom comments could be directed. Minnesota Highway Department, Ban on Smoking in Buses Proposed (Mar. 13, 1970), Bates No. 03757189.

16 Email from Ed Brandt to Marc Linder (May 2, 2007); [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 1 (Nov. 6, 1993) (notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt).

17 Email from Ed Brandt to Marc Linder (Feb. 14, 2009).


19 Telephone interview with Phyllis Kahn, Minneapolis (May 8, 2007). A comparative study of anti-smoking legislation in several states published by RAND completely misunderstood the dynamics of the passage of the MCIAA, giving all the credit to Kahn (“the driving force behind the bill was a single legislator”) and none to ANSR (the influence of the anti-smoking coalition was ranked as “absent”). Peter Jacobson, Jeffrey Wasserman, and Kristiana Raube, The Political Evolution of Anti-Smoking Legislation 58, 15 (1992). Hyman Berman, a labor historian at the University of Minnesota who sold his services to the cigarette manufacturer-defendants in the pivotal suit brought by the State of Minnesota as an alleged expert witness on the history of the public’s awareness of the dangers of tobacco smoking, erroneously testified that “the primary mover of the
in 1976, the staff of the newsletter of the organization he helped create and led proclaimed that without his “tireless efforts” there would have been no organization or MCIAA.20 And Robin Derrickson, who had been with the Lung Association in Minnesota since 1972 as a respiratory therapist working with chronic lung disease patients21 and spent much time at the state legislature from 1973 to 1975 attending committee meetings, stated in 1978 simply that: “The success of nonsmokers rights legislation in Minnesota should be attributed to Ed Brandt.”22

Minnesota Indoor Air Act was representative Phyllis Kahn...she was very instrumental in arranging coalitions,...getting the advocacy groups to support the bill....” He then identified these advocacy groups as the Cancer, Lung, and Heart organizations, “plus informal groups like Committee for a Smoke-Free Society, a group headed by Jean Rosenbloom called Committee for Non-smokers Rights and things of that nature.” He failed to mention ANSR. State of Minnesota v. Philip Morris Inc., Transcript of Proceedings, Vol. 47, Pages 9095-9371 at 9307-9308 (File No. C1-94-8565, Minn. Dist. Ct 2d Jud. Dist., Mar. 25, 1998), Bates No. 525470931/1143-4. Neither Ed Brandt, ANSR president at the time of the MCIAA’s passage, nor Jeanne Weigum, its current president and a leading member since 1975, ever heard of Rosenbloom. Weigum opined: “Clearly he got his history wrong.” Email from Jeanne Weigum to Marc Linder (Nov. 16, 2009).

21. Email from Robin Derrickson to Marc Linder (Feb. 14, 2009).
22. Robin Derrickson, Untitled Typescript at 1 (Sept. 1978) (talk given at Western Lung Conference) (copy from Ed Brandt’s papers furnished by ANSR). In delineating his roles, Brandt disavowed having been “the chief lobbyist. I drafted the law, found the individual chief authors [i.e., legislative sponsors], and testified before committees, but I was not the one who spent time contacting individual legislators.” In addition, “as an ex-legislator...I had more credibility and I was the one who knew what amendments I had to accept in order to give the bill its best chances.” The chief (unpaid) lobbyist, according to Brandt, was Glenna Mills Johnson, an ANSR member, whom Brandt regarded as “one of the most important of the ‘forgotten heroes.’” Email from Ed Brandt to Marc Linder (Apr. 30, 2007). Johnson was an M.F.A. student in photography at the University of Minnesota from 1974 to 1976 and received her degree in 1978. Email from Nancy Johnston, University of Minnesota, to Marc Linder (Feb. 25, 2009). Thirty-five years later Johnson’s intensity as an advocate of the MCIAA was so deeply etched in the memory of the associate administrator of the University of Minnesota Art Department that she was still unable to go to a restaurant without remembering that she owed its non-smoky air to Johnson. Telephone interview with Evonne Lindberg, Minneapolis (Feb. 24, 2009). A fellow ANSR member, Johnson’s self-proclaimed “right-hand man,” recalled her as “the mover and shaker” and “the person in the state” who initially made the law work. Telephone interview with Gerald Ratliff, St. Paul (Oct. 31, 2009). Although more than three decades later Mills had no recollection of having lobbied and stated that she had
The Minnesota Clean Indoor Air Act of 1975

The Formation of the Association for Non-Smokers Rights (ANSR) and the First Failed Legislative Initiative in 1973

Kahn says...“I’ve never been as concerned with the suicidal tendencies of smokers.... Smoking is an appropriate activity to be conducted among consenting adults in private, just like adultery, fornication or homosexuality.... My major objection is damage to the innocent public.”23

Don’t mix up anti-smoking with non-smokers’ rights. (Others have a right to smoke. You have a right to smoke-free air.)24

To be sure, Brandt hardly imagined himself to be a lone wolf: a former legislator, foreign service officer in the U.S. Information Agency, and self-conscious political scientist, he realized that no legislative goals were attainable without an organization, a movement, and a strategy. indeed, he was not even present at the founding of that organization on December 20, 1972, when seven people met under the name, as the minutes put it, “Ad Hoc Committee on Non-Smokers Rights (for lack of a better name).”25 The Respiratory Disease Association of Hennepin County (Minneapolis)—on whose letterhead the minutes were typed26 and on whose board of directors Brandt sat27—had, together

never lobbied, a non-ANSR-member friend who had accompanied her on lobbying excursions did remember (when Mills asked her in 2009). Telephone interview with Glenna Mills, Oakland (Nov. 1, 2009); email from Glenna Mills to Marc Linder (Nov. 5, 2009).

23Jim Shoop, “3-Cent Tax Boost Sought on Higher-Tar Cigarettes,” Minneapolis Star, Jan. 25, 1979, Bates No. TIMN0462285/6 (quoting Rep. Phyllis Kahn). Kahn relished the phrase as evidenced by her public use of it three years earlier, when she told a public health meeting that the MCIAA “didn’t even go as far as my favorite statement about how smoking should be considered—as a practice to be engaged in only in private among consenting adults, in the same light as adultery, sodomy, and fornication.” Representative Phyllis Kahn, Speech Before Public Health Association, St. Cloud at 5-6 (Oct. 8, 1976), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B).

24Program Perspectives,” ANSR, Fall 1982, n.p. [2].

25Ad Hoc Committee on Non-Smokers Rights, Minutes (Dec. 20, 1972) (copy from Ed Brandt’s papers furnished by ANSR).

26The minutes were typed on Hennepin County RDA letterhead because Julie Shaw, the minute taker, was employed by that organization.

27Robin Derrickson, Untitled Typescript at 1 (Sept. 1978) (talk given at Western Lung Conference) (copy from Ed Brandt’s papers furnished by ANSR).
with the counterpart organization in Ramsey County (St. Paul), initiated the meeting, \(^{28}\) each providing the group with a thousand dollars in start-up funding.\(^{29}\) (The National Tuberculosis and Respiratory Disease Association, which in 1960 had declared cigarette smoking to be a major cause of lung cancer and in 1968 urged its local chapters “to develop and sponsor an active program to prevent young people from becoming smokers, and to convince smokers that they should stop smoking,” changed its name to the American Lung Association in 1973.)\(^{30}\) The organization’s then-executive director, Gerald Orr, having decided to create the group because “you could do a lot more radical things” outside of the old and established lung association\(^{31}\)—one of the more radical things that could not be done at the Hennepin County association was, as Brandt noted, to “have the courage to ask its (one?) smoker in the office to quit” smoking in the office\(^{32}\)—assigned Julie Shaw, a program associate in smoking deterrence/program administrator in smoking education at Hennepin County RDA,\(^{33}\) to found it. (As early as January 1969 the organization’s board of directors had decided to create Minnesota’s first staff position of anti-smoking coordinator.)\(^{34}\) Shaw, whose staff time RDA was lending to the new group,

\(^{28}\) Another attendee, Karyn Diehl, represented the Respiratory Disease Association of Ramsey County. Diehl indicated that some inter-organizational rivalry characterized the relationship between the two groups; 36 years later she still recalled one occasion on which she saw Julie Shaw, her counterpart, cutting off the bottom corner of a sheet of paper that was to be distributed to the legislature and contained the name and address of the Ramsey County group. Diehl left both the Lung Association and ANSR in 1974. Telephone interview with Karyn Diehl, St. Paul (Mar. 2 and 3, 2009).


\(^{30}\) http://breathehealthy.org/index.php/about/story

\(^{31}\) Telephone interview with Gerald Orr, Burnsville, MN (Feb. 16, 2009). Interestingly, Orr was, according to a program director at the RDA of Hennepin County at the time, a big cigar smoker. Telephone interview with Robert McNattin (Feb. 15, 2009).

\(^{32}\) Email from Ed Brandt to Marc Linder (Apr. 30, 2007).


\(^{34}\) Ant-Smoking Director,” \textit{Minneapolis Star}, Jan. 25, 1969, Bates No. TIMN0461939.
The Minnesota Clean Indoor Air Act of 1975

opened the meeting by explaining RDA’s reasons for being “interested in helping to organize a citizen’s action group to work for the rights of the non-smoker....” Emblematic of the perverse prevalence of smoking at the time, Shaw listed as the first reason “to put pressure on hospitals” (and other public places) “to better control indiscriminate smoking in order to protect the health, safety and comfort of non-smokers.” In addition, RDA wanted to educate the public about tobacco smoke’s health effects on nonsmokers in enclosed environments and make smokers aware of the “appropriate and inappropriate places for smoking.” After Shaw had outlined the activities of similar groups elsewhere in the United States, those present “decided that the group must have a positive image—being ‘anti’ anything would only make progress difficult.”

Brandt decided to attend the group’s second meeting on January 9, 1973—at which the name, Association for Non-Smokers Rights, was adopted—after state Senator Mel Hansen, who two months later would introduce the first anti-smoking bill and with whom he was a member of the Lung Association-inspired outdoor air pollution-focused Metro Clean Air Committee, had told him about the new organization, whose focus on indoor tobacco smoke was of greater concern to Brandt. The agenda stated that the first item of new business would be presented by Brandt and dealt with a “bill regarding non-smokers’ rights.” Handwritten notes on the agenda (presumably by Brandt) suggested that the group’s anti-anti approach was already flourishing. A proposal for the motto of a button read: “I like smokers. I don’t like smoke.” Equally non-confrontational was the admonition: “ANSR asks you to be considerate.” Bending over backwards not to antagonize smokers was also exemplified by the formulation of one of the group’s objectives as “encourag[ing] establishment of appropriate ventilated places for those who choose to smoke.”

35 Ad Hoc Committee on Non-Smokers Rights, Minutes (Dec. 20, 1972) (copy from Ed Brandt’s papers furnished by ANSR).

36 [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 1 (Nov. 6, 1993) (notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt); telephone interview with Ed Brandt, St. Paul (Feb. 14, 2009). Hansen, a founder of the Metro Clean Air Committee, was chairman of its policy committee in the early 1970s as well as a member of the executive board of the Hennepin County Respiratory Disease Association. The Minnesota Legislative Manual 1971-1972, at 48 (Larry Andersen ed. n.d.). MCAC supported the anti-smoking bill H.F. 2801 in 1974 because subjecting people to smoke indoors would have defeated the purpose of cleaning up outdoor air. Testimony of Metro Clean Air Committee before the Subcommittee of the House Committee on Health and Welfare Friday, Feb. 22, 1974—HF-2801, in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3.(B).

At the January 9 meeting, attended by eight members, the first questions that arose dealt with the organization’s objectives, name, and relationship to the anti-air pollution movement. With respect to the last named, Shaw, whom the first issue of ANSR’s newsletter presumably meant to praise for having “the drive of a General Motors executive,” explained that “our particular group is being formed to deal with the problem of indoor pollution resulting from cigarette smoking and as far as the Respiratory Disease Association is concerned, will come under its Smoking Deterrence Program.” In response to a suggestion that the group be called IDS for “I don’t smoke” another member stated that that name implies attacking and that we should perhaps be attacking smoke and not necessarily the smoker—a more positive approach might be easier to put across.”

As soon as Brandt suggested ANSR, the group excitedly embraced it and proceeded to formulate four major objectives: (1) educating the general public about tobacco smoke’s health and safety hazards in enclosed environments, “especially as it affects the non-smoker”; (2) insuring nonsmokers a smoke-free environment and encouraging creation of “appropriately ventilated areas for those who choose to smoke”; (3) putting “pressure on public places including health-care facilities, public meeting rooms, recreation areas and vehicles of public transportation to better control indiscriminate smoking in order to protect the health, safety and comfort of all persons”; and (4) supporting and encouraging public policies, legislation, and appropriations to promote the first three objectives. Shaw then “explained the structure of ANSR in its beginning stages” as comprising three circles: the inner core of the founding members charged with initiating action and policies and with organizing the outer circles; an intermediate second circle of key people in the community, such as media personalities, legislators, and prominent political, educational, and medical people, who would offer to help publicize and organize ANSR; and an outer circle of people who would respond to publicity drives and become “‘card-carrying’ members.” Finally, Brandt presented his resolution to be submitted to the Minnesota House of Representatives on limiting smoking in public places. Offered mainly for its “educational value,” the resolution, if it interested the community in such legislation, could help ANSR to prepare more a “meaningful” measure later.

39Association for Non-Smokers’ Rights (ANSR), Minutes at 1-2 (Jan. 9, 1973), American Lung Association of Minnesota, Association Records, 1907-1994, MHS Mss Coll., 149.B.17.12F. Of the 11 members of ANSR’s executive board during 1973-74, four were paid employees or volunteers at the Respiratory Disease Association of Hennepin and Ramsey County, five had business backgrounds, one was a professor, and one was a high
At the third meeting on January 25, Brandt reported on his legislative resolution, which Senator Hansen had tentatively agreed to introduce. Although Brandt emphasized that the resolution would have no legal effect, it would “open the door for preparation of something with legal hold.” A week later Brandt informed the group that in the House Democratic-Farmer-Labor Phyllis Kahn had agreed to sponsor his resolution, which would be co-sponsored by Jim Swanson (DFL), chair of the Health and Welfare Committee, who would hold a hearing on it. The following week Brandt related that he had approved Kahn’s making a minor change to emphasize “the environmental issue.” Promising was Kahn’s revelation to him that “the other legislators were ‘clamoring to have their names on the bill.’”

Brandt and Kahn, who had just been elected to his old seat, were, given the “vast gap between our ideological perspectives,” an odd couple, but he “knew how the legislature functioned and knew that only a bill with a chief author who was a member of the majority had any chance of passing.” Kahn, a Jew from Brooklyn, New York, with a doctorate in biophysics from Yale, in her first term representing the district that encompassed the University of Minnesota, at which she had been a research associate in genetics and cell biology before being elected, was arguably the most left-wing member of the legislature. Indeed, at least one Hennepin County Republican told Brandt that “he wished I had found another sponsor, since Phyllis was seen as belonging to the far left in those days.” Kahn’s fit for her role as chief sponsor was in part a function of the fact that until she entered the legislature she had “never really [been] bothered by other people’s cigarette smoke.... ‘I really led a very sheltered life.... I was a

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40 ANSR Meeting Minutes at 1 (Jan. 25, 1973) (copy from Ed Brandt’s papers furnished by ANSR).
41 ANSR Association for Non-Smokers Rights, Minutes (Feb. 1, 1973) (copy from Ed Brandt’s papers furnished by ANSR).
42 ANSR, Minutes at 2 (Feb. 9, 1973) (copy from Ed Brandt’s papers furnished by ANSR).
43 Email from Ed Brandt to Marc Linder (Feb. 14, 2009).
44 http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10302 (including link to video of interview with Kahn). Later she also received an M.P.A. from Harvard.
46 Email from Ed Brandt to Marc Linder (Apr. 29, 2007).
The Minnesota Clean Indoor Air Act of 1975

research scientist (in biochemical genetics and microbiology) at the University of Minnesota for 10 years and we had very strict nonsmoking rules. There are some very delicate instruments used in our work that were affected by cigarette smoke. We needed the cleanest atmosphere possible. So when I was shoved into these committee rooms at the Legislature and at DFL meetings, they were just choked with smoke. When there are 30 people in a room and half of them are smoking, you can’t find a place to sit where somebody isn’t blowing smoke in your face.”

A preview of the legislative struggle over an anti-public smoking measure was offered by the battle over smoking in the Senate itself in February. When Nicholas Coleman, the first Democratic Senate Majority Leader in 114 years—1973 marked the first time in the twentieth century that the DFL controlled the Senate, House, and governorship—a heavy smoker, and chairman of the Rules Committee, reported the committee report on the Senate’s permanent rules for the 1973 session on February 8, Rule 77 read: “No Senator or officer of the Senate, or other person, shall be permitted to smoke in the Senate Chamber. There shall be no smoking in the visitors section of the galleries.” This rule constituted a significant expansion of the rule as it had existed in 1971, which had banned smoking in the Senate chamber only during a memorial service—a rare occasion. Four days later, on February 12, DFL Senator Edward Novak, a St. Paul lawyer, former FBI investigator, and a smoker, moved to amend the Senate rules, inter alia, by reinserting the stricken words, “during the Memorial Service.” The Senate adopted the amendment, thus

48http://www.leg.state.mn.us/legdb/fuldetai.asp?ID=10107
54http://www.leg.state.mn.us/legdb/fuldetai.asp?ID=10470
55Email from (ex-Sen.) George Conzemius to Marc Linder (Mar. 23, 2009).
The Minnesota Clean Indoor Air Act of 1975

reinstating smoking senators’ virtually complete freedom to inundate their nonsmoking colleagues with tobacco smoke. That Novak was one of Coleman’s “most trusted colleagues” prompted Coleman’s biographer to conjecture that the majority leader might have sensed that it would be hard to stop the rule change in committee and therefore had Novak kill it on the floor.57 Later that same day, however, Senator David Schaaf, a newly elected florist who was plagued by a cigar-smoking colleague who sat in front of him58 and in 1974 would be the Senate sponsor of ANSR’s anti-smoking bill, moved to strike the reinserted restrictive wording, and the Senate adopted his amendment, thus restoring the new ban.59

However, the struggle over clean air in the Senate chamber was not over yet.60 On April 18, Majority Leader Coleman’s motion that Rule 77 be suspended for the evening session prevailed.61 Then on May 1, the motion by cigar-smoking62

57Email from (ex-Sen.) John Milton to Marc Linder (Mar. 11, 2009).
60A newspaper article appearing on April 15 gave an account of the banning of smoking in the Senate chamber (without mentioning any date), according to which DFL Senator Ed Schrom, an ex-smoker, was the chief advocate, and the 33-28 vote was “strictly nonpartisan. It was the smokers versus the nonsmokers. Fifteen minutes later, ashtrays in the Senate chamber were picked up. Some nicotine-crazy senators resorted to chewing on unlit cigars or making frequent trips to the hallways or bathrooms to smoke. The bathrooms got so smoky that nonsmoking senators thought of requesting their own bathroom.” Peg Meier, “Nonsmokers Stand Up for Rights,” MT, Apr. 15, 1973 (1E:1-2). Oddly, Schrom voted on May 1 to suspend the rule for the remainder of the session. See below.
62Email from John Milton (ex-state senator) to Marc Linder (Mar. 7, 2009).
DFL Senator Charles “Baldy” Hansen\(^63\) that the first sentence of Rule 77 be suspended for the rest of the session received 36 affirmative votes as against only 24 negative votes (including those cast by Mel Hansen and Schaaf), but, lacking a two-thirds majority, it failed to prevail. Only five of the 24 senators who voted against suspending the no-smoking rule voted against the Minnesota Clean Indoor Air Act in 1975, whereas 17 voted for it (and two did not vote); in contrast, 12 of the 36 senators voting to suspend the no-smoking rule voted for the MCIAA, whereas 20 voted against it (and four did not vote). Nor can the voting pattern be accurately characterized as a caucus vote, even though a significant party-line difference was discernible: whereas almost two-thirds of the DFL voted (23-12) to suspend, just over one-half of Republicans did (13-12).\(^64\) Whatever might shed light on how and why this 36-24 vote in favor of smoking in senators’ own workplace morphed into a 36-28 vote against smoking statewide two years later\(^65\) would be even harder put to explain why the very next day, May 2, Republican Minority Leader Robert Ashbach’s identical motion prevailed.\(^66\)

\(^{63}\)Hansen, a banker and “very conservative” DFL’er—it would have been difficult for a Republican to be elected from the big “meatpacking” town of Austin—was closely allied with Victor Jude, a former senator who owned a tobacco distributorship and was a lobbyist in 1975 (see below). Typical of the low regard in which he was held was the comment by one colleague that he was “one of the worst legislators” he had ever known. Email from Robert North to Marc Linder (Mar. 14, 2009). Another remarked that Jude and Hansen were “the closest we came in my days to Chicago-style corruption....” Email from John Milton to Marc Linder (Mar. 14, 2009). In 1975 he chaired the Labor and Commerce Committee, which “many Capitol observers refer to as the ‘Forest Lawn’ of the Senate,” because its conservative stance led to the demise of so many bills. Gary Dawson, “Senate Gives Labor Bill Last Rites,” \(St. Paul Pioneer Press\), Apr. 30, 1975 (15:5-8). A reporter who covered the legislature in 1975 characterized Jude as a sleazy lobbyist, who had operated virtually directly out of Hansen’s office, where many lobbyists hung out who had business before the committee chaired by Hansen, who was close to them. Telephone interview with Steven Dornfeld, Minneapolis, Minneapolis (Mar. 13, 2009).


\(^{65}\)Journal of the Senate, State of Minnesota, Sixty-Ninth Legislature: 1975, at 2281 (May 14). Schaaf, who did not regard the setback as ominous because it suspended rather than repealed the rule, explained the suspension as a function of the end-of-session rush that generated long floor sessions, more stress, and less time for heavy smokers to leave the chamber to smoke; in turn, some anti-smokers were themselves too stressed and distracted by the press of the proceedings to argue over it. Telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009). Ed Brandt offered conjecture to the same effect. Email from Ed Brandt to Marc Linder (Mar. 6, 2009).

\(^{66}\)Journal of the Senate, Sixty-Eighth Legislature, First Session, Legislature, State of
The Minnesota Clean Indoor Air Act of 1975

On March 5, Brandt’s resolution was introduced in the House and a very weak bill was introduced in both chambers. The House concurrent resolution (“relating to smoking; urging limitations on smoking in places of public resort”), which Kahn and four other representatives sponsored, did indeed embed public indoor tobacco smoking deeply in the burgeoning national environmental concerns:

WHEREAS, the legislature recognizes the fundamental right of each person to the preservation and nondegradation of the natural resources of the earth including the air; and
WHEREAS, each person has the responsibility to contribute to the protection, preservation and enhancement thereof; and
WHEREAS, industry must shut off its smoke stacks when outside pollution reaches alert levels; and
WHEREAS, studies indicate readings taken in bars, committee rooms, homes, and even hospitals have reached pollution levels far greater than alerts for industry....

Only then did the resolution recite the U.S. Public Health Service showing that smoking was detrimental to nonsmokers’ health inasmuch as it caused them “acute discomfort...and sometimes even...illness....” The practical resolution then embodied “state policy to discourage smoking in any enclosed public facility, including public buildings and vehicles used for public transportation, except for rooms or sections specifically set aside for smoking in those instances where comparable alternative facilities are available for nonsmokers.” Even if the resolution had had legal force, its use of “discourage” would still have deprived it of any real-world power to protect nonsmokers. The resolution’s timidity flowed from what Brandt decades later revealed as his own world view: “I am conservative in my views as to how quickly you can get human beings to change their behavior. That is why ANSR was very cautious in its approach and why in

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House Concurrent Resolution No. 7 (Mar. 5, 1973, by Phyllis Kahn (DFL), Bill Kelly (DFL), Paul McCarron (DFL), Jim Swanson (DFL), and Gerald Knickerbocker (Rep.) (copy furnished by MHS).


The Minnesota Clean Indoor Air Act of 1975

1973 it pushed only for a resolution. In that sense, ANSR was very patient in its approach, but not because of thoughts about pressure by lobbyists. Rather, the question was how much public support we could count on.\(^{70}\)

To compensate for the non-binding character of the resolution, Brandt and ANSR also arranged for some of the same legislators to introduce identical bills in both houses. Senate File 917, as introduced by Mel Hansen, and House File 966, as introduced by House Republican Gerald Knickerbocker (whose participation was impelled by his experience of exposure to tobacco smoke inside and outside the legislature)\(^{71}\) and four other representatives (including Kahn), simply provided that: “All public buildings, public places and public means of transportation having public areas with room for 40 or more people shall have separately designated smoking and nonsmoking sections in such areas except that separately designated areas shall not be required when more than five square feet is normally available per person.”\(^{72}\) Apart from the lack of any enforcement or penalty provision, which rendered the bill purely aspirational, the quantitative space cut-offs would have excluded vast numbers of places and left huge numbers of nonsmokers unprotected—if being surrounded by all of five square feet of floor space could be taken seriously as per se conferring any protection whatsoever from tobacco smoke on nonsmokers.

The same day ANSR complemented this legislative action with a news conference in the State Capitol Building, covered by all four television stations, which featured Representative Kahn announcing the introduction of the resolution and Dr. Charles Mayo II (grandson of the co-founder of the Mayo Clinic and a prominent Cancer Society official).\(^{73}\) Perhaps in a bid to appeal to

\(^{70}\)Email from Ed Brandt to Marc Linder (Apr. 29, 2007).

\(^{71}\)Telephone interview with Gerald Knickerbocker (Apr. 26, 2007). That the House and Senate bills were identical and filed on the same day renders implausible Knickerbocker’s much later statement that he had drafted the House bill before and not in sync with Hansen.


\(^{73}\)Anonymous untitled undated handwritten draft of [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 1 (Nov. 6, 1993) (notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt); ANSR, “A News Conference to Announce a Resolution, Pollution Research, and Hospital Policies in Support of the Rights of the Non-
corporate hierarchies, Kahn stressed that: “Along with increasing desires to protect our environment from industrial pollution, comes the realization that the air quality in the executive committee room of an industrial plant may be in even poorer condition than the air quality near its smokestacks.” She also made it clear that ANSR did “not seek to eliminate smoking,” but only “to establish the right to breathe clean air as a fundamental public right.”

In the immediate aftermath of the day’s events an average of 20 people a day became ANSR members and media exposure proliferated. In connection with its hearing on April 12, Julie Shaw submitted testimony to the Health Subcommittee of the Senate Health and Welfare Committee on S.F. 917 in her dual capacity as chairman of ANSR—which at this point already had a membership of more than 600—and as a program administrator at the Hennepin County RDA. Shaw devoted some of her testimony to medical-scientific findings that in part went beyond those of the 1972 surgeon general’s report. For example, she noted that cigarette smoke caused the “natural cleansing mechanism of the lungs to shut down. The bronchial cilia are paralyzed by high concentrations of cigarette smoke in the air.” She also quantified the prevalence of tobacco smoke-induced eye irritation among nonsmokers at 70 to 80 percent. The annual combustion into the air of 573 billion cigarettes and seven billion cigars—that is, the burning of one billion tons of tobacco—she characterized as “certainly a major pollutant in our environment!” Accurately calling the bill a “very modest first step toward remedying a major air pollution problem,” Shaw pointed out that it did not even “require the smoker to stop smoking when danger levels are reached. It only requires separation of smokers and non-smokers so that the pollutants will be somewhat diluted before they reach the non-smoker’s lungs.” As timid an initial solution as S.F. 917 was, ANSR hoped to make “stronger and more comprehensive legislation available” to the legislature in 1974.


ANSR, Testimony from the Respiratory Disease Association of Hennepin County and from the Association for Non-Smokers Rights: For the Health Sub-Committee of the Senate Health and Welfare Committee on SF 917, Relating to Regulating Smoking in Enclosed Public Places (Apr. 12, 1973) (copy furnished by ANSR). It is not clear whether
The Minnesota Clean Indoor Air Act of 1975

Two weeks later the Senate Health, Welfare and Corrections Committee adopted S.F. 917 with amendments increasing the exclusion level to 10 square feet of space for nonsmokers. However, the bill failed to make it to the Senate floor before adjournment. Since Hansen was a Republican and therefore in the minority in 1973, it was clear to Brandt that legislative party politics had made it very unlikely that his bill would pass. In contrast, neither H.F. 966 nor House Concurrent Resolution 7 was considered by a committee. In retrospect the House bill’s chief sponsor, Knickerbocker, concluded that although H.F. 966 had been introduced before its time, it did help pave the way to enactment of the Minnesota Clean Indoor Air Act two years later.

On April 15, ANSR’s public profile was enhanced by a full-page inside cover advertisement soliciting members in the television supplement to the Sunday Minneapolis Tribune, half of the cost of which was paid for by Rudy Boschwitz, a Jewish refugee from Nazi Germany and future Republican U.S. senator from Minnesota, who at the time owned Plywood Minnesota, a home improvement chain. The text, which bent over backwards to avoid attacks and to stress the objective of one big happy family of smokers and nonsmokers, focused on a nonsmoker people called Goofy George who liked smokers (except, presumably, Shaw presented this statement orally, since a week later an ANSR report noted that Hansen’s bill had been “passed through sub-committee without testimony from ANSR.” ANSR, “Progress Report: Current ANSR Activities” at 2 (Apr. 20, 1973) (copy furnished by ANSR). Shaw offered the same testimony in ANSR, Testimony from the Respiratory Disease Association of Hennepin County and from the Association for Non-Smokers Rights: For the Health & Welfare Committee of the Minnesota House of Representatives on House Concurrent Resolution #7 relating to regulating smoking in enclosed public places (Apr. 18, 1973).


78 ANSR, Legislative Summary at 1 (Bills Relating to Use of Tobacco) (n.d. [1973]) (copy furnished by ANSR).

79 Email from Ed Brandt to Marc Linder (Feb. 14, 2009).

80 ANSR, Legislative Summary at 1 (Bills Relating to Use of Tobacco) (n.d. [1973]) (copy furnished by ANSR).

81 Telephone interview with Gerald Knickerbocker, Minnetonka (Apr. 26, 2007).

82 Although Boschwitz “felt lukewarm about this issue,” he paid for the ad for Brandt’s sake because they knew each other personally. Brandt’s later recollection was that the lung association paid the other half since ANSR at that point lacked the membership or funds to pay. Email from Ed Brandt to Marc Linder (Feb. 16, 2009).
The Minnesota Clean Indoor Air Act of 1975

About the same time both a Minnesota Poll revealing that three-fourths of respondents stated that they believed that nonsmokers had a right to a smoke-free environment and feature articles in the news media on nonsmokers’ rights reinforced interest in the group, triggering daily accessions to membership of 60 to 100. Although the Poll, covering 600 people 18 years of age and older and published on the front page of the Family section of the Minneapolis Tribune, showed that smokers, who composed 37 percent of the respondents (but 47 percent of those under 30 years of age), “answered the question [as to nonsmokers’ right to a smoke-free environment] the same way,” only 60 percent of them stated that they ever had misgivings about smoking in nonsmokers’ presence—the same proportion of smokers who replied that they had ever been bothered by other people’s smoke. An article on the same page on nonsmokers’ rights that highlighted ANSR stated that individual memberships cost one dollar and that ANSR wanted “to keep peace” between smokers and nonsmokers, for example, by recommending that well-ventilated areas be provided for smokers. As a result of this publicity, by April 20, paid (individual, family, and business) membership had reached 1,100 (including a $100 membership from the large

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84. "Minnesota Poll: Does Smoke Annoy You? Don’t Suffer—Speak Out,” MT, Apr. 15, 1974 (1E:3-4, 4E:2) (quote); [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 1 (Nov. 6, 1993) (notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt); telephone interview with Ed Brandt, Minneapolis (Apr. 26, 2007). A year later, when the Minnesota Poll determined that virtually the same proportion (59 percent) of nonsmokers reported that they had been bothered by smoking, 63 percent of women but only 54 percent of men expressed that view; by age, the younger the nonsmokers the more likely they were to be bothered, ranging from 76 percent of those 18 to 25 to 40 percent of those over 65. “Minnesota Poll: Most Non-Smokers Admit that Smoking by Others Sometimes Chokes Them Up,” MT, Apr. 7, 1974, clipping in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).

The Minnesota Clean Indoor Air Act of 1975

retailer, Dayton-Hudson Corporation\textsuperscript{86} and a month later rose to 1,543\textsuperscript{87}—a far cry from the 10,000 members Shaw wanted to have by June 1, but still a good start for a group begun with “a couple thousand dollars of Twin Cities Easter Seal money,”\textsuperscript{88} especially when by September 15 memberships reached 4,356 representing almost 7,000 people.\textsuperscript{89} ANSR’s aspiration of expanding to 50,000 members, thus becoming Minnesota’s largest organization and positioned to “work on much needed projects for clean air in hospitals, restaurants, motels, lunch rooms, homes, etc.,” by March 1974 (marking a full year of “selling memberships”)\textsuperscript{90} would remain out of reach, in spite of its “philosophy of...quietly and patiently objecting to smoke—not the smoker,” who “may be our friend and neighbor” or family member.\textsuperscript{91}

On April 26, the day on which the Senate Health and Welfare Committee adopted S.F. 917, Democrat Willard Munger, the life-long non-smoking\textsuperscript{92} chairman of the House Environmental Preservation and Natural Resources Committee from Duluth (who had been a House member since 1955 and at his death in 1999 was its longest serving member ever)\textsuperscript{93} and four others (including Kahn, a Democratic physician and two Republicans) introduced a much more

\textsuperscript{86}ANSR, “Progress Report: Current ANSR Activities” at 2 (Apr. 20, 1973) (copy furnished by ANSR). Richard Cesario, an ANSR member since March, chair of its policy committee, and elected vice-chairman of its executive board in June, was a Dayton-Hudson lawyer. \textit{ANSR} 1(2):[2] (July [1973]); ANSR, “Executive Board Roster 1973-74” at 1 (n.d.) (copy furnished by Ed Brandt). Brandt later surmised that his prior work at the Dayton-Hudson Foundation was the reason for the $100 corporate membership. Email from Ed Brandt to Marc Linder (Nov. 6, 2009).

\textsuperscript{87}ANSR, “Current Activities Report” (May 21, 1973) (copy furnished by ANSR).


\textsuperscript{91}“1, 2, 3, 4, 5...Count to Ten!” \textit{ANSR} 1(3):n.p. [3] (Aug. [1973]).

\textsuperscript{92}Telephone interview with Will Munger, Jr., Duluth (Apr. 8, 2009); Patricia Lehr, Duluth (Apr. 11, 2009) (Munger’s daughter).

\textsuperscript{93}http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10443

2270
comprehensive bill (H.F. 2384), which was not only enforcible, but in one central respect was also more radical than any that would become law anywhere in the state or country for years.\textsuperscript{94} “It would, according to Brandt, “be more accurate to call Munger’s bill the Don Ternes bill.” Ternes, whom Brandt also characterized as “the key member of the Duluth chapter of ANSR,”\textsuperscript{95} was a recent college graduate from Duluth, an environmental activist, and very active in the DFL. The fact that “I couldn’t breathe” at many of the political meetings he attended was one of the main drivers of his intense interest in securing passage of a nosmoking bill in Minnesota. Unable 36 years later to state with certainty whether he had drafted the bill, Ternes was nevertheless willing to accept credit for having been its “catalyst”: he had sought out and received copies of anti-smoking laws and bills from around the country from John Banzhaf at Action on Smoking and Health (who had supported the bill that became the first statewide smoking restriction law in Arizona in 1973) and approached a number of legislators including Munger in an effort to persuade them to support anti-smoking legislation.\textsuperscript{96}

H.F. 2384’s preamble was stronger than S.F. 917’s in noting that tobacco smoking had been found to be “a significant health hazard” to nonsmokers breathing tobacco smoke-contaminated air; in view of the “significant harm to the public” caused by tobacco smoking, the bill declared Minnesota’s public policy that “there is a right to be free from tobacco smoke which transcends any right to smoke tobacco and which must, in the interest of public health, prevail over the latter whenever the two are in conflict.” More generally the bill’s purpose was to protect the nonsmoker’s health and environment “by preventing infringement on the right to be free from tobacco smoke to the maximum extent reasonably possible.”\textsuperscript{97} The scope of coverage of enclosed indoor public places “made available to the general public” included restaurants, retail stores, grocery stores, public conveyances, public school buildings, and commercial establishments. Ironically, given ANSR’s original focus on hospitals, they were subject to an exception for rooms or areas not housing nonsmoking patients “as permitted by


\textsuperscript{95}Email from Ed Brandt to Marc Linder (Feb. 17, 2009). Ironically, 36 years later Ternes was unable to recall whether he had belonged to ANSR at all, though he did not dispute the possibility. Telephone interview with Don Ternes, Maplewood, MN (Apr. 15, 2009).

\textsuperscript{96}Telephone interview with Don Ternes, Maplewood, MN (Apr. 15, 2009).

\textsuperscript{97}H.F. 2384, § 1 (Apr. 26, 1973) (copy furnished by MHS).
The Minnesota Clean Indoor Air Act of 1975

physicians” as well as to an exclusion of “enclosed offices not ordinarily frequented by the general public.”

The bill’s most radical provision straightforwardly prohibited smoking in all covered public places instead of conferring discretion, as was and would be universally the case in the United States for many years, on owners/managers to designate separate smoking-permitted sections. Those in charge of such public places were required to post signs outside each entrance stating that smoking was prohibited and to provide fireproof receptacles at each entrance for disposing of lighted tobacco; violators were subject to a $10 to $100 fine; and complaints could be filed with the state health department. Those responsible for covered public places (and their employees) were prohibited from willfully or knowingly permitting smoking or providing ash trays. The state board of health was charged with issuing regulations needed to carry out the law’s purposes, including the creation of a uniform citation and complaint system; with the local boards of health and county and local enforcement agencies the state board of health shared enforcement powers; the boards of health were also empowered to seek judicial injunctions for prohibiting or preventing violations. Finally, violators of any of the law’s provisions were subject to the aforementioned $10 to $100 fine.

ANSR was not certain, in Brandt’s words, “whether the public political climate was strong enough at the time” for passage of H.F. 2384—“just as I had drafted a bill in 1971 but did not introduce it for the same reason.” “The only problem with Munger’s bill,” as Brandt ironically observed decades later, “was that it had no chance of being adopted by the legislature.” Raising popular consciousness may have been one of Munger’s priorities, but in order to close the gap between aspiration and reality ANSR decided to back Munger’s bill but with significant amendments, to which Munger—who had been “Mr. Environment” in the legislature for many decades—himself agreed. In June, Shaw met with Munger to discuss proposed amendments to his bill to substitute a separation of smokers for the flat ban on smoking; Munger agreed not only to this (radical) change, but also to add a section on employee rights. In mid-June

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93 Email from Ed Brandt to Marc Linder (May 2, 2007).
94 Telephone interview with Dr. Harold Leppink, Boca Raton, FL (Apr. 12, 2009). Leppink had been the executive officer of St. Louis County Health Department in Duluth and worked with Munger for many years.
95 See Mark Munger, Mr. Environment: The Willard Munger Story (2009).
Brandt’s ANSR legislative committee decided that a separate back-up bill regarding only hospitals should be prepared in case Munger’s failed. Revealing an apparent division of opinion with ANSR, its executive board engaged in “considerable discussion...about whether or not this legislation was sufficiently strong to provide the results we are seeking,” but in the end decided that responsibility for legislative activities should reside with Brandt’s committee, on whose expertise and advice the board should rely.\textsuperscript{105} Brandt’s committee then decided to support Munger’s bill with the aforementioned changes, which was both “more comprehensive than any we have seen so far” and provided for enforcement.\textsuperscript{106} Oddly, Munger’s bill disappeared in the second session in 1974 and Munger became a cosponsor of ANSR’s identical House and Senate bills.\textsuperscript{107} Shaw’s departure from the RDA and ANSR in June and Brandt’s election as chairman of the executive board marked the transition from full-time lung association leadership to volunteers.\textsuperscript{108}

\textbf{ANSR’s Bill Dies in 1974}

ANSR...is a new organization...formed not to get smokers to quit but to get everyone into his own corner. ...

\textsuperscript{105}ANSR, ANSR Executive Committee Meeting Minutes at 2 (June 21, 1973) (copy furnished by ANSR).

\textsuperscript{106}ANSR, “Current Activities Report” at 2 (June 29, 1973). Julie Shaw’s report failed to make it clear to members that the original bill had been much more capacious. Julie Shaw, “Current Activities Report,” \textit{ANSR} 1(2):n.p. [2] (July [1973]). See also ANSR, “Election of ANSR Board Chairman” (July 2, 1973) (News Release) (stating that the ANSR board had approved its Legislative Committee’s proposal to “give full support” to Munger’s bill, “which will provide broad requirements for separate areas for non-smokers in all public places,...”

\textsuperscript{107}See below. In ANSR’s papers is found an undated page titled, “Amend H.F. 2384 to read as follows,” which provided, inter alia, that: “Smoking shall be prohibited in all public places, except where separate facilities are provided for smokers and non-smokers so as to protect the non-smokers’ right to breathe clean air.” Such “separate facilities” were defined as meaning “separate rooms divided from each other by a wall or a partition within a single room which will prevent smoke from filtering through to the maximum feasible extent.”

\textsuperscript{108}ANSR, “Current Activities Report” at 1 (June 29, 1973) (copy furnished by ANSR); Anonymous untitled undated handwritten draft of [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 1 (Nov. 6, 1993) (notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt).
The Minnesota Clean Indoor Air Act of 1975

“We want to get the puffers on one side and the breathers on the other.... All we are asking is the right to breathe somewhere, sometime. ... All we really want is for smokers to be more courteous.”

Part of the group’s activities in the Twin Cities includes a campaign to get all restaurants, where feasible, to cordon off areas for smokers and designate them as such.109

In spite of the bills’ deaths, a special ANSR legislative subcommittee chaired by Brandt intensified the group’s efforts at the Capitol during the interim until the opening of the 1974 session. The issues that the subcommittee planned to deal with included: (1) improved smoking control in hospitals and health care facilities, and food preparation and/or sales businesses; (2) creation of smoking/nonsmoking areas in public places; (3) encouraging employers to provide nonsmoking employees with “clean and healthful working environments”; and (4) prohibiting discrimination against employees who petitioned for nonsmoking working areas.110

For the 1974 session Brandt’s legislative committee, aided by friendly legislators, worked out a more comprehensive bill, which included enforcement and penalty provisions. He then asked Representative Kahn and Senator Schaaf to sponsor ANSR’s bill.111 The Minnesota Clean Indoor Air Act, House File 2801, introduced on January 16 by Kahn and four others,112 and Senate File 2889, introduced by Schaaf two weeks later,113 was thus based on ANSR


110ANSR, Legislative Summary at 2 (Bills Relating to Use of Tobacco) (n.d. [1973]) (copy furnished by ANSR). In October ANSR leadership bemoaned that there had been “little progress” on hospitals since the summer, but mentioned that the Minnesota Medical Association was “behind us and we can use them to help the Hospital Association Effort.” ANSR, Progress Review Minutes (Oct. 12, 1973) (copy furnished by Ed Brandt).

111Telephone interview with Ed Brandt, Minneapolis (Apr. 26, 2007); email from Ed Brandt (Apr. 29, 2007); telephone interview with David Schaaf, McGregor, MN (May 12, 2007).

112H.F. 2801 (Jan. 16, 1974, by Kahn, Swanson, Munger, Dale Erdahl (Rep.), Richard Andersen (Rep.)).

The Minnesota Clean Indoor Air Act of 1975

Earlier in the month Kahn had been thrown onto the defensive, in her dual capacity as legislator and ANSR member, by Minneapolis Tribune columnist Will Jones, who had recounted his repeated encounters in downtown Minneapolis movie theaters with illegal smoking and management’s feckless attempts to put a stop to it. Jones urged nonsmokers sharing his attitude to “speak up now. Don’t wait for organizations like the Association for Non Smokers Rights to help you. The association collects money and spins wheels with surveys and makes pious noises about seeking legislation to require no-smoking areas in public places, but there’s no action.”

Two days later Kahn stressed in a letter to Jones, who had “denigrat[ed]” ANSR’s efforts, that since 1973 “we have rewritten our bill, with one eye on what other states have done and also on what is politically feasible.”

Jones’s criticism was consistent with the complaint voiced internally in October 1973 by Hugh Morgan, the chairman of ANSR’s Public Awareness Committee “that there were not enough signs of action....” In response to his felt “need for something to report on,” the group’s leaders “agreed that we may be trying to do much and we should zero in on just a few targets. There are still only a small number of activist volunteers so we must limit our priorities.” Years later Ed Brandt acknowledged that, although Will Jones became “very supportive of ANSR and the MCIAA,” at the beginning of 1974 “ANSR had existed for less than a year, so we couldn’t possibly have achieved much, in terms of concrete

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115Will Jones, “After Last Night,” MT, Jan. 7, 1974 (1B:7, at 2B:7). It was already illegal (presumably in Minneapolis), according to Jones, to smoke in theaters, “except for certain approved, designated smoking areas,” public elevators, city buses, and retail stores: “If we could just get the slobs to obey the law in the places where smoking already is banned, we’d be a giant step ahead in the struggle for clean, breathable air.” Spurred on by a survey done at the Upper Midwest Hospitality Conference showing that 49 of 73 restaurant and hotel managers stated that they would support legislation separating smokers and nonsmokers, ANSR leaders agreed that “our major project” between October and December 1973 “would be to personally survey and report on the metropolitan area restaurants. The restaurants agreeing to separate smoking areas would receive free publicity in our Newsletter and ANSR members could see actual results regarding action taken by the organization.” ANSR, Progress Review Minutes (Oct. 12, 1973) (copy furnished by Ed Brandt).

116Phyllis Kahn to Will Jones (Jan. 9, 1974), Legislature, House, Kahn (Rep. Phyllis), Files, in MSA, MHS, 118.F.8.3(B).

results, by then.\textsuperscript{118}

In the meantime, the Tobacco Institute was panoptically monitoring state anti-public smoking bills. At the meeting of its executive committee on November 29, 1973, vice president and counsel Ehringhaus gave an overview,\textsuperscript{119} explaining that the first element of what the staff believed could be “the most effective program to combat” such legislation was the need to “concentrate our efforts and resources in those states in which we expect the problem to be the most acute next year, and to thereby measure the longer range effectiveness of our efforts.” At that juncture the staff identified those priority states in 1974 as California, Massachusetts, Illinois, Arizona, Connecticut, Michigan, Texas, Florida, and New York. The omission of Minnesota was presumably based on the judgment that no “prompt and authoritative information”\textsuperscript{120} from the state had alerted TI to the emergence of developing problems that should have altered the view that the 1973 bill had not posed a significant risk of passage. That the cigarette oligopoly’s intelligence network did not collect and disseminate publicly available legislative filings instantaneously was revealed by the fact that on January 17, 1974 (the day after Kahn had filed the MCIAA), Dowdell informed Wade at R.J. Reynolds that anti-public smoking bills had been introduced or were being held from 1973 in California, Indiana, Maryland, Nebraska, and South Carolina, while measures had been drafted but not yet introduced in Arizona, Illinois, and South Dakota. Moreover, in all of these states TI’s state activities department had “arranged to have industry representatives appear in opposition” to them.\textsuperscript{121} (A month later Dowdell added Minnesota to the list of 16 states in which smoking restriction bills were pending.)\textsuperscript{122} And even two weeks later, when President Kornegay addressed the Tobacco Institute’s annual meeting, he vastly (and perhaps ignorantly) understated the threat in Minnesota (where Kahn’s bill far exceeded the scope of the Arizona law) while covering himself before his assembled bosses with an assurance that TI was fully prepared and equipped to deal with the looming catastrophe:

At the executive committee meeting in November, we called attention to one aspect

\textsuperscript{118}Email from Ed Brandt to Marc Linder (Nov. 15, 2009).

\textsuperscript{119}Tobacco Institute, Minutes of the Fifty-First Meeting of the Executive Committee at 2 (Nov. 29, 1973), Bates No. TIMN0013429/30.

\textsuperscript{120}[Untitled typescript of presentation at TI EC meeting] at 16, 17 (Nov. 29, 1973), Bates No. LG0312489/505/6.

\textsuperscript{121}J. S. Dowdell to C. B. Wade, Jr., Update on Smoking Ban Activities (Jan. 17, 1974), Bates No. 500061504.

\textsuperscript{122}J. S. Dowdell to C. B. Wade, Jr., Subject: Smoking Ban Legislation (Feb. 15, 1974).
The Minnesota Clean Indoor Air Act of 1975

of the new agenda: Specifically, the successful efforts made in 1973 to prohibit smoking in public places. We illustrated the potential impact on sales and warned that the movement could lead to the virtual elimination of cigarette smoking.

Two months later, we can report that the threat was not understated nor underestimated. If we erred in our earlier views, it was only in our guess as to where and in what order the attack would be mounted.

For your information, measures largely similar to the Arizona bill have been introduced since January first in the legislatures of Pennsylvania, California, Washington, South Dakota, South Carolina, Nebraska, Indiana, Massachusetts, Maryland, Kansas, Minnesota and Michigan. ...

In November, we also listed nine states as prime targets for attack. Of the nine, four are now in the acute stage—that is, bills have been introduced, committee hearings held or in immediate prospect and floor action threatened. All the necessary countermeasures are being taken in these states. In non-target states where bills have been introduced, appropriate action is underway. I should warn you, however, that this effort may well cause us to call for more and more help from your sales personnel.

In accord with our assurance in November, we are attempting to get as much help as possible from the restaurant, hotel, trucking, retail and other business groups. Not surprisingly, we encounter reluctance on their parts because of fears of boycott, retaliation or whatnot. We have begun to pick some holes in those arguments and are starting to get some favorable responses. ...

So you can see these last two months have been devoted both to intense preparation for and active response to punitive legislation. ... The employment of industry spokesmen in the various states is progressing, a bit slowly sometimes because of problems which are the responsibility of the Tobacco Tax Council. These will be worked out promptly so that always industry interests will be protected. We would be less than candid, however, if we did not tell you that the disparity in expenditures in the past raises serious problems in some crucial areas. 123

The MCIAA, of which the Tobacco Institute quickly took note, 124 was shorn of the previous year’s elaborate public policy preamble, which instead merely stated the bill’s purpose as “protect[ing] the public health, comfort and environment by prohibiting smoking in public places at public meetings except in designated smoking areas”125—this last phrase revealing the crucial dilution of Munger’s bill. The regulatory scheme’s spatial scope was indicated by the definition of “public place” as encompassing “any enclosed, indoor area used by the general public or serving as a place of work, including restaurants,

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124TIN, No. 91, at 4 (Feb. 4, 1974).
125H.F. 2801, § 1 (Jan. 16, 1974).
retail stores, offices and other commercial establishments, public conveyances, educational facilities, hospitals, nursing homes, auditoriums, arenas and meeting rooms.”

Here the crucial innovation was the introduction of general coverage of workplaces. The bill then proceeded to prohibit smoking in such places “except in designated smoking areas,” which might be designated by proprietors, state and local health boards, and local and county law enforcement officials, provided that such areas were “separate, of adequate size and with adequate ventilation” to fulfill the bill’s purpose. Anyone who smoked in violation of the prohibition was subject to a $10 to $100 fine, while the fine for proprietors who failed to enforce the prohibition ranged between $100 and $300, each day constituting a separate offense. Finally, the ANSR bill empowered state and local health boards to seek court injunctions against repeated violations.

Schaaf introduced S.F. 2889 a week after the Senate had killed Hansen’s 1973 bill S.F. 917. On January 23 the Senate as the Committee of the Whole (a procedural device used by legislative bodies to engage in freer and more informal debate) recommended that S.F. 917 be re-referred to the Health, Welfare and Corrections Committee subject to a motion by Hansen himself to amend his bill in a number of respects. First, he specified that the smoking ban on public means of transportation apply whether they were publicly or privately owned. Second, he excluded from coverage “lobbies, hallways, skyways or any other public structure used mainly as a thoroughfare.” And third, he deleted entirely the provision not requiring a no-smoking section when more than 10 square feet was available per person. The motion having prevailed and the amendment having been adopted, the Committee of the Whole then re-referred the bill to the Health, Welfare, and Corrections Committee.

As decoded by the press the following day, this opaquely worded procedure in fact meant that the Senate had killed the bill: “Majority Leader Nicholas Coleman, a cigarette smoker, called the proposal a ‘pious hope’ and said it would be unenforceable.” Brandt further explained that “a combination of senators who wanted no non-smokers rights bill and those who wanted a stronger bill” had done S.F. 917 in.

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126 H.F. 2801, § 2(1) (Jan. 16, 1974).
127 H.F. 2801, §§ 2(2) and (3) (Jan. 16, 1974).
128 H.F. 2801, § 3(3) (Jan. 16, 1974).
131 “No-Smoking Bill Killed by Senate,” Minneapolis Star, Jan. 24, 1974 (16B:5).
By mid-February ANSR judged that passage of MCIAA looked “less than hopeful, since the house and senate can’t even agree to ban smoking in their own chambers.”\textsuperscript{133} The high point of the legislative process was the nearly hour-long hearing that the Health Subcommittee of the House Health and Welfare Committee held on February 22,\textsuperscript{134} at which former Surgeon General Jesse Steinfeld, who in the meantime had become head of the Mayo Clinic’s cancer treatment program in Rochester, Minnesota, testified in support of the bill. In her opening remarks before the subcommittee Kahn expressed the hope that H.F. 2801 was “fairly non-controversial,” declaring later that it was “a very, very mild bill” (so much so that chain-smoking House Speaker Martin Sabo “almost went on as a co-author”). Calling it a “a first step in securing a cleaner, safer environment, she bemoaned that: “For years nonsmokers have sat quietly and politely while smokers blew smoke in their faces, on their food, or fouled the air of their homes.” To be sure, her bill would not apply to those homes, in which children were exposed to smoke who were “brought up by smoking parents” and were therefore “far more prone to respiratory diseases and asthmatic attacks,” any more than it would deal with fatal fires in homes (and the concomitant increase in insurance premiums for all). Indeed, Kahn stressed that “[w]e are not seeking
in this bill to eliminate smoking” without explaining how, in spite of that self-imposed restriction, it could possibly achieve its goal of “establish[ing] the right to breathe clean air as a fundamental right.” For the time being, the main beneficiaries of this right would be adults “subject to watery eyes, sore throats and sordid [sic] degrees of distastes or discomfort in smoke-filled rooms.”

Ironically, as Kahn herself recollected three years later, as she was speaking to the Health Committee in 1974, “‘three of the committee members sitting at the table were puffing away so furiously...that there was practically a smoke screen between us.’”

Finally released from the Nixon administration’s censorship, the former surgeon general was at last free, positioned on a future perch, to look back “‘with horror and amazement’” on smoking as slow-motion suicide that also imposed a “‘noxious environment’” on nonsmokers. In extraordinarily expansive terms, Steinfeld excoriated the greedy cigarette manufacturers and governments that derived revenue from taxes, without which “our[ ]...primitive, unhealthy, unintelligent era” would be “inexplicable.” Focusing on the impact of carbon monoxide on hemoglobin, he directed the legislators to recent data showing “a clear-cut physiologic and pharmacologic effect on the non-smoker who is subject to smoking products in unventilated or poorly ventilated areas.” (While noting that “[m]ost rooms are inadequately ventilated,” ironically Steinfeld pointed to the modern jet airplane as “about the only adequately ventilated public areas....”


136Larry Adcock, “Do Smokers Have a Right to Make You Sick?” Mpls, July 1977, at 24-27 at 25, Bates No. TITX0032082/3. Kahn went on to note that one of the “enormous” intervening changes had been that self-same committee’s having forbidden smoking. Id. Yet, in a film made in 1976 about the passage of a bill in Minnesota smoking was prevalent not only at committee hearings, but virtually everywhere else except in the House chamber. The First Branch of Government: From Grass Roots to Law (1976), on http://www.leg.state.mn.us/lrl/lrl.asp.
The Minnesota Clean Indoor Air Act of 1975

He also mentioned a new finding that the surgeon general would probably soon publish that "the air exchange in most private and public buildings is inadequate to remove the harmful constituents of cigarette smoke within any reasonable period of time.") He sought to impress upon the subcommittee the seriousness of secondhand smoke exposure, despite the lower level than that to which smokers subjected themselves, by noting the absence of any scientific demonstration of a threshold effect for chemical carcinogens—a fact that underlay the congressional Delaney amendment’s ban on any food additive that caused cancer when fed in any amount to any animal species. Clinching his argument, the former surgeon general drove home the point that "if one applied the same reasoning to cigarette smoking," it "would be outlawed completely since no safe level has either been shown to the smoker himself or his non-smoking companions who were forced to breathe the polluted air which the smoker pours into the environment." To be sure, prompted by a question from a DFL legislator as to whether tobacco smoke harmed mainly people with certain ailments or everyone to some extent, Steinfeld was constrained to admit that "we haven’t been able to demonstrate the harm to everyone, that would have to be by inference on the basis of the fact that there are over a thousand constituents that have been identified...in cigarette smoke," some of which were "definite carcinogens in animals...." The contribution that Steinfeld, whose testimony and letters Kahn later singled out as having been “particularly useful” for passage of the MCIAA— the subcommittee’s discussion of which he regarded as ”

137 State of Minnesota, House of Representatives, Health Subcommittee of the Health and Welfare Committee: February 22, 1974, House File 2801 at 2, 3 (unofficial transcript), Bates No. BYB000482. Stein stated that it was “likely” that the finding would be published in the 1975 “Health Consequences of Smoking,” but it appears not to have been included in the chapter on involuntary smoking. Despite Steinfeld’s aforementioned direct statement to the contrary and his observation that the bill’s objective was to “provide areas for the non-smoker where he can breathe air inside somewhat comparable to that which he breathes outside,” J. B. Clifford, a Republican opponent of the bill, charged that the bill prohibited smoking in restaurants, offices, and other commercial establishments “where generally the ventilation is such to keep the smoke out...and that to me is the kind of thing that the Volstad [sic] Act did....” Id. at 5.


139 Phyllis Kahn to Mildred Jeffrey (UAW) (Sept. 30, 1975), in Legislation, House,
The Minnesota Clean Indoor Air Act of 1975

giant step forward in this country—made was not limited to this testimony: he was constantly talking to people, including legislators, about the importance of enacting the bill. (Steinfeld refrained from divulging to the subcommittee a target at which he directed his blunt talk in his speech the next day at ANSR’s first annual meeting: since surveys showed that “the educated, intelligent population has largely discarded smoking,” he predicted that for “the future we will see the diseases associated with smoking restricted largely to the unintelligent and the uninformed.”)

After the subcommittee had had an opportunity to question Steinfeld, a series of restaurant and hotel representatives mounted “[m]ajor opposition” to the measure on various grounds. A spokesman for the hospitality industry argued that the bill was superfluous because, as a business that was “frankly based on...trying to please people...the Hospitality Industry will accede to the demands of the public.” It would “provide for relief in this matter voluntarily. ... Yeah, we’ll clean up the air when the public asks for it”—thus implying that no such demand had yet come forth. While calling H.F. 2801 a “fine bill,” the representative of the Minnesota and the City of Minneapolis Hotel and Restaurant

Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).

__State of Minnesota, House of Representatives, Health Subcommittee of the Health and Welfare Committee: February 22, 1974, House File 2801 at 6 (unofficial transcript), Bates No. EXHIBBYB000482.__

__Telephone interview with Lewis Cope, Minneapolis (Mar. 12, 2009) (Minneapolis Tribune’s medicine and science reporter in 1974-75).__


__State of Minnesota, House of Representatives, Health Subcommittee of the Health and Welfare Committee: February 22, 1974, House File 2801 at 8 (unofficial transcript) (Frank Dedridge), Bates No. EXHIBBYB000482.__

__Ironically, when Republican Gary Laidig asked whether, without H.F. 2801, if someone sat down near his table and began smoking and he asked the maitre d’ to stop the smoking, the latter could so, Johnson replied that the maitre d’ should ask the other people whether they “would mind moving to another table,” but he failed to explain what the next step would be if the smokers refused or how the restaurant could “do what the public wants” when “the” public makes conflicting demands. State of Minnesota, House of Representatives, Health Subcommittee of the Health and Welfare Committee: February 22, 1974, House File 2801 at 10 (unofficial transcript), Bates No. EXHIBBYB000482. Chum Bohr, representing the state hotel, resort, and restaurant associations, conceded the latter point when he mentioned that “a maitre d’ finds himself in a very funny position...and we find irate patrons don’t help the hospitality business when we’re trying to do everything to please.” Id. at 12.__
Associations insisted that it did not conform to members’ feeling that “we do operate public places for the smoker and non-smoker alike.” Concretely he complained that the bill failed to define what “adequate size” or “adequate ventilation” meant, adding that whatever the latter’s meaning, it would be “very costly.” The restaurant industry hypothesized that if a majority of customers were smokers, seats in the no-smoking area would remain vacant, causing a loss of revenue to the owner and tax revenue to the municipality and state and prompting “some other state...to capitalize on it.” A member of the board of directors of the Greater Minneapolis Hotel Association who characterized his own smoking as a “nasty habit” nevertheless rejected the law outright “because frankly smoking is not illegal” and imposing restrictions on smokers was “discriminatory.” The executive vice president of the Minnesota Hotel, Resort, and Restaurant Associations, Chum Bohr, who would play a high-profile lobbying role in 1975, based his suggestion of perpetuating a “voluntary” regime on his claim that “the non-smoker rights people have done a pretty good job of discouraging many, many, many people from smoking and maybe one of these days they’ll even get me pretty well convinced because I’m leaning that way somewhat.”

This barrage of criticism caught Kahn off guard. Though she admitted that she “wasn’t quite expecting so much opposition from the hotel and restaurant people,” she was relieved that the manager of a national chain cafeteria in a Twin Cities suburb was willing to break ranks to testify briefly that his institution of a non-smoking section had been well received by smokers and nonsmokers. To be sure, he failed to address the other witnesses’ objections, but Kahn herself

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claimed that there was in fact no problem with “empty tables not being put to use” because “[i]f non-smokers come in and...wish to sit in the smoking section, there is nothing to prevent them from doing so. They will be aware that they are going into a smoking section, and they will have a choice of either waiting for an empty table [in the no-smoking section] or taking that table.” Continuing in this vein, which was presumably conjuring up owners’ worst nightmares of customer revolt-driven reduced profitability, she insisted that if newly arrived smoking customers found empty tables only in the nonsmoking section, “they also don’t have terribly much [sic] problem, they can just sit there and eat and not smoke and then go somewhere else for their cigarette break.” Kahn inadvertently revealed just how minimal the progress was that MCIAA might offer when, in order to refute opponents’ claims of vacant nosmoking section seats, she noted that in her experience with airplanes, those sections always filled up first, and then recounted that when six nonsmoking legislators on a recent trip had to take seats in the smoking section to sit together, they were able to make sure that no smokers sat next to any of them.¹⁵¹

In addition to the massively experienced propinquity of smoke in airplanes, Kahn failed to mention that the Civil Aeronautics Board regulations, which had just gone into effect on July 10, 1973, expressly required carriers to “insure that a sufficient number of seats in the ‘no-smoking’ areas of the aircraft are available to accommodate persons who wish to be seated in such areas,”¹⁵² whereas MCIAA lacked such a mandate. To be sure, it might have been possible to argue that an implication to that effect could be teased out of the bill’s requirement that “[s]moking areas shall be...of adequate size and with adequate ventilation to fulfill the purpose of this act,” which was “to protect the public health, comfort and environment by prohibiting smoking in public places and at public meetings except in designated smoking areas.”¹⁵³ Kahn did not take that position, but Thomas Berg, the subcommittee chair, offered an argument that, although it substantively worked in the diametrically opposite direction, might, by analogy, have served an anti-smoking gap-filling purpose. J. B. Clifford, a Conservative Caucus member and insurance broker,¹⁵⁴ who offered an allegedly “friendly amendment” to gut the whole bill by removing coverage of all public places, thus

¹⁵³H.F. 2801, § 2, subd. 3 and § 1 (Jan. 16, 1974).
¹⁵⁴http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10105
leaving only public meetings covered, let the cat out of the bag by complaining that “an individual isn’t going to be able to smoke at his desk if he wants to, he isn’t going to be able to smoke in his office unless it’s somehow or another magically designated. I think it’s almost harassment.” Turning more personal, he charged: “Fellas, you don’t say that I can smoke in my office. I cannot. I cannot smoke in a private office within the wording of your bill,” and then competently followed through the bill’s interlocking provisions to arrive at his Q.E.D. At this point DFL lawyer Berg intervened to chastise Clifford for his statutory literal-mindedness and offer him an administrative deus ex machina: “I can appreciate...your concern for...what the words say on the piece of paper, I have long been a believer that we should feel free to ask those kinds of questions in committee regardless of the subject matter. But it seems in this one that, possibly, some of these things could be taken care of by the Health Department with some regulations, would have to implement this as provided in here....

In the event, no one joined Clifford in voting for his killer amendment—which he announced would be offered during House floor debate—but which now lost by a vote of 6 to 1, only one Conservative Caucus (Republican) member joining five DFLers. The committee then recommended to the full committee that, unamended, H.F. 2801, pass.

Unmentioned until now, but of overriding significance in the context of those contemporaries and later scholars who claimed that that industry did not publicly oppose the bill, the press reported that, “[a] tobacco industry spokesman also voiced objection to the bill because of its intent to cut down smoking.” That

157 State of Minnesota, House of Representatives, Health Subcommittee of the Health and Welfare Committee: February 22, 1974, House File 2801 at 16 (unofficial transcript), Bates No. EXHIBBYB000482. § 3 of the bill did require the Board of Health to issue implementing rules.
159 Robert Milis, “Dr. Steinfeld Boosts Smoker Restriction Measure,” Post Bulletin (Rochester, MN), Feb. 25, 1974, Bates No. TIMN0461983. Thirty-five years later, Milis, who, after having been a reporter became a lawyer and represented Blue Cross in Minnesota litigation against the cigarette manufacturers, was no longer able to remember
The Minnesota Clean Indoor Air Act of 1975

representative was Peter J. Lindberg, who spoke on behalf of the Northwest Tobacco and Candy Distributors Association, whose lawyer-lobbyist he had become after leaving the law office of Joseph Robbie, where, from 1964 to 1969 he had been an associate. Robbie, who was the head of the Minnesota Candy and Tobacco Distributors Association, had left most of that organization’s lobbying and other legal work to Lindberg in the second half of the 1960s after Robbie had moved from Minneapolis to Miami to form the Miami Dolphins National Football League team. After Lindberg’s non-amicable departure for another law firm and assumption of leadership of the competing Northwest Association, another lawyer in Robbie’s office, which by this time had largely shriveled to representing the tobacco distributors, took over this task, but when he left in 1974, Robbie may have been left with no one else to speak at the hearing, although he did return to Minnesota regularly. (In any event, he did not coordinate with Lindberg, to whom he had stopped speaking after the latter had left his employ with some of his distributor-members.) To be sure, whether Robbie appeared or not, he was primarily a behind-the-scenes operator, who may have been lobbying legislators in his own fashion. In the event, Robbie wanted,


According to Lindberg, he founded the Northwest group with some distributors who split off from Robbie’s group because of Robbie’s absenteeism. Telephone interview with Peter Lindberg, Eden Prairie, MN (Nov. 23, 2009). This account differs from but appears to be more accurate than that provided by Robbie’s (and the Minnesota Candy & Tobacco Distributors Association’s) long-time secretary, according to whom the Northwest group had existed before Lindberg’s departure and consisted of larger firms interested in price cutting; because the smaller firms in Robbie’s group had no such interest, a conflict arose. Telephone interview with Audrey Nessheim, Golden Valley, MN (Nov. 16, 2009).

161 Telephone interview with Peter Lindberg, Eden Prairie, MN (Nov. 23, 2009).

162 Telephone interview with Stephen Bergerson, Minneapolis (Nov. 16, 2009) (Robbie’s nephew, who rented space in Robbie’s law office after graduation from law
The Minnesota Clean Indoor Air Act of 1975

but was unable, to testify and asked (in vain) subcommittee chair Berg whether
the subcommittee hearing could be “laid over,”

Nevertheless, and more
generally, the secretary of the Minnesota Candy and Tobacco Distributors
Association/Robbie’s office manager distinctly remembered 35 years later that
the Tobacco Institute had helped with lobbying.

With a directness absent from any other witness’s testimony, Lindberg made
it clear that the industry’s opposition was total and self-explanatory: “Obviously,
we are opposed to this legislation. ... [A]s an industry, we are obviously opposed
to [this] legislation. Then “setting aside the obvious economic problems to the
industry,” Lindberg pointed to “an economic problem to the state as well. The
tobacco tax brings in about $75 million...revenue to the state every year. This is
something that could be upset by legislation affecting smoking, and its [sic]
nothing to be scoffed at because it’s a major item in the state budget. And it’s an
important situation.”

Lindberg was well versed in delivering such warnings: a decade earlier, at the outset of his lawyer-lobbying career on behalf of the
Minnesota Candy and Tobacco Distributors Association, he had testified before
another House Welfare subcommittee on a bill to label cigarette packages with
warnings of possible health hazards as a means of combating the “catastrophe”
that cigarette smoking had become. Then, too, his organization had opposed the
bill because “it probably would hurt cigarette sales,” causing the state to lose
some of its $30 million in annual tax revenue. (For good measure, back in 1965
Lindberg had thrown in the obfuscatory claim that labels would “‘have no serious
bearing’” anyway since education at home was “‘the key to warning children
about any health hazards.’”)

To the puzzlement of at least one subcommittee member and without further explanation, Lindberg also testified that

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“constitutional questions” attended the bill in terms of discrimination regarding room size and the definition of “public place.”

Thirty-five years later Lindberg—who had been active in DFL politics and was appointed a state district court judge by the governor two months after he had testified—recalled that because MCIAA had been a “direct shot” at smoking tobacco, his member-distributors, who were “huge” enough to be able to get Philip Morris’s attention, had to testify. Indeed, he observed that it would have been “folly” for them not to do anything. Significantly, he also recalled that the “Tobacco Institute was involved” in 1974, adding that it could also have been engaged in other lobbying, for example, by telephone.

This proof that the tobacco industry was not only not inattentive and did not keep its counsel to itself, but openly testified against the MCIAA in 1974 squarely jibed with the recollections of Robin Derrickson who, as an employee of the Hennepin County Lung Association and ANSR activist, spent a great deal of time at the legislature attending committee meetings from 1973 to 1975. During these years she met three or four out-of-state tobacco lobbyists in hallways and elevators who often spoke to her; without a public presence, they were there to “hold the hands of” and “coach” restaurant and hotel representatives with regard to lobbying. Their opposition to the bill on the grounds that it was designed to cut down on smoking stuck in her memory as one of the statements that they had made to her.

The tobacco spokesperson’s objection was, to be sure, also interesting because it directly contradicted ANSR’s steadfast asseveration that it was “not in the business of convincing people to quit smoking,” but only to protect nonsmokers from secondhand smoke exposure. If in fact, as seems eminently plausible based on its repeated declarations that it sought to improve ventilation

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169Telephone interview with Robin Derrickson, Prescott, AZ (Aug. 20, 2007). Without being able to recall names, Gene Rosenblum, a St. Paul lawyer and ANSR activist who had lobbied legislators on behalf of MCIAA, when informed that the dominant account was that the industry had been asleep, replied: “I don’t believe that.” He had known that tobacco lobbyists, including those representing cigarette sellers such as distributors and drug stores, were present. Telephone interview with Gene Rosenblum, St. Paul (Nov. 19, 2009).

in places where smokers did smoke, ANSR really did not aspire to reduce smoking, the cigarette companies nevertheless understood how the logic of the endgame would unfold, knowing that restricting the places and times their customers could smoke would inevitably reduce the number of cigarettes sold and smoked and eventually prompt many smokers to bend to social pressure. Significantly, in 1975, Stephen Bergerson, the head of the Minnesota Candy & Tobacco Distributors Association (the Joseph Robbie group that was the chief competitor of Lindberg’s), in an interview with a Tobacco Institute publication expressed the same view to which Lindberg had given voice and that was the cigarette oligopoly’s chief concern with MCIAA and all similar regulation—namely, that it was “inevitable that the law will force down tobacco sales.”

On March 15, the House Committee on Health and Welfare reported back H.F. 2801 with the same recommendation, but only with decisively weakening amendments. First, the committee radically narrowed the definition of a covered “public place” by specifying that it be “publicly owned” and then striking the reference to workplaces and all other individually identified places such as restaurants and retail stores, so that it now encompassed only “any publicly owned enclosed, indoor area used by the general public.” In accordance with this exclusion of privately owned public places, the committee then deleted “proprietors of public places” as authorized designators of smoking areas and as responsible for enforcing the law (thus leaving health boards and law enforcement as the sole agents for both actions and no one as subject to penalty for failing to enforce the nosmoking ban). The House adopted the committee report, including the re-referral to the Appropriations Committee, where the bill died.

**What the Tobacco Institute Was Up To in the Meantime**

In those days you were never really away from the tobacco lobbyists.

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171See above ch. 23.

172“Stringent No-Smoke Law Failing?” *TO* 1(2):1, at 9 (Nov. 1976), Bates No. TI47350808/15.

173*Journal of the House of Representatives, State of Minnesota, Sixty-Eighth Session of the Legislature: 1974*, 4:6210 (Mar. 15); H.F. 2801 (first engrossment, Mar. 15, 1974) (copy furnished by MHS). In retrospect Brandt stated that he was glad that the bill with such amendments had died. Email from Ed Brandt to Marc Linder (Feb. 23, 2009).

174Telephone interview with Lewis Cope, Minneapolis (Mar. 12, 2009). Cope, who had been a medicine/science reporter for the *Minneapolis Tribune* at the time MCIAA was
Although it may be difficult to argue with success, tobacco industry lobbying in Minnesota in 1974 may not have been optimally effective. In his speech to the spring meeting of the Tobacco Institute in May, President Kornegay was unable to contain his contempt for what he pretended was nonsmokers’ newly invented make-believe complaints about breathing smoke: “A little over two years ago, few were offended or annoyed by cigarette smoke. Seldom did we hear of the nonsmoker’s allergies, or aggravated bronchitis or emphysema. ... Suddenly it seems, the nation is shaken by a frenzy of protest. Sixty percent of the country, it is said, is offended, annoyed, sickened and irritated by the cigarette smoking of the other forty percent. People with bronchial and asthmatic problems seem to be coming out of the woodwork, and cancer is alleged to threaten people who do not smoke.”

He scored the result as the filing in 1973 of 53 restrictive bills in 21 states, in which “[w]e lost in two states—Arizona and Oregon.” During the first four months of 1974, 90 such bills had surfaced in 30 states, and “[a]lready we have lost ground in four states” (including South Dakota and Nebraska, which enacted Arizona-like laws, and Arizona itself). Although “our resistance also seems to be effective in preventing passage of measures” to the extent that “we have not been routed, our losses are on the increase. And if the present trend continues unabated, we foresee more losses in more states.”

To his assembled bosses—except Philip Morris chairman Joseph F. Cullman, 3rd, to whom Kornegay wrote a fawning missive declaring that “all of us missed you very much...at the business sessions and on the golf course and tennis courts”—Kornegay bragged about the “massive legislative counter-attack” that the Tobacco Institute had mounted against this proposed legislation in 1974. He stressed, however, that they had both won and lost, “not on the merits of the case, but on the politics of the case.” By “politics” Kornegay meant that “[s]o many legislators, just like other people, really believe that smoking is harmful to the non-smoker. Our white paper and other literature giving the facts on the ‘other side’ are met, if not with scorn and ridicule, certainly with little credibility.”

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177 Horace Kornegay to Joseph F. Cullman, 3rd (May 24, 1974), Bates No. 1002907063.

In a fleeting acknowledgment of reality, Kornegay admitted (part of) the reason for the cigarette industry’s lack of believability: “It is a simple fact that our public and political problems are only symptoms of the real malady—unchallenged research finding and unchallenged critics with advanced degrees who keep feeding the anti-smoking fires.” His response was to urge the cigarette oligopolists to buy some credentialed propaganda, that is, to “have available scientific experts to communicate with the community.”

The fact that ANSR’s bill died unceremoniously in 1974 may explain why Kornegay called no attention to Minnesota, but two weeks later, Martin Haley, in his aforementioned report to the Tobacco Institute, directed considerable criticism at lobbying in Minnesota, where it was “obvious that there are problems” largely on account of the existence of two distributors organizations, one run by lawyer Joe Robbie (Minnesota Candy and Tobacco Distributors Association with 20-30 percent of the business) and the other by Lindberg (Northwest Tobacco and Candy Distributors Association with 70-80 percent). From informants Haley had learned that even divided, “the industry is capable of being very effective on selected issues,” but that “the principal legislative work in Minnesota in the past four to six years has been carried by Lindberg in spite of and not because of any assistance that the Robbie group offered.” Although those same sources recommended that lobbyists there “should be more accountable to the industry” and the two entities should be unified, the “problem” became “more complicated” because Lindberg had been appointed to a (state district court) judgeship on May 1; consequently, unification would “perhaps” have to be effected under Lindberg’s (not yet named) successor. Haley’s sources nevertheless believed that even a local industry that was “geared up” would still have only a slight possibility of being effective enough to prohibit tax increases or achieve cuts. Three months later, on August 26, Haley told the first meeting

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180 See above ch. 23.

181 Martin Ryan Haley & Associates, Inc., “A State Legislative Plan for the Tobacco Industry,” Appendix 13-15 (May 29, 1974), Bates No. 03682828/996-8. On Lindberg’s successor as lobbyist, James Erickson, see below this ch. Robbie had a high national profile in the tobacco industry, having been president of the Coordinating Board of Tobacco Trade Distributors. At the group’s mid-year meeting in Bermuda in September 1973, Robbie had argued that, with regard to “the zealous, unreasonable tax increase proponents and anti-smoking forces [w]e can no longer afford the luxury of being reactive when these bombs keep hitting us.... With the change in make-up of state legislatures, the day of the single lobbyist will soon be passe.... Each manufacturer should consider the state association executive as an extension of its own corporate office in that state.”
of the joint liaison committee of the Tobacco Institute and Tobacco Tax Council that “[a]s a bellweather state in the development of new legislation,” Minnesota was a “likely nominee for a strong anti-smoking drive.” The continued coexistence of the two distributors organizations prompted the committee to agree to “study developments closely.” The cigarette manufacturers, in other words, were acutely aware of the drive for and the correlative need to insure effective lobbying to thwart passage of the Minnesota Clean Indoor Air Act.

Despite the deaths of the anti-public smoking bills in 1974, another development in Minnesota caused TI “serious distress.” In October, John Christopher Blucher Ehringhaus, Jr., the TI’s general counsel (and son of a like-named Depression-era North Carolina governor who had ties to the tobacco corporations), expressed this “distress” in a telephone call to Robbie about the first statewide no-smoking “D-Day,” which had been held on October 7. Although it may be surprising that a successful and politically well-connected millionaire businessman like Robbie, who was chairman of the CBTTA and owner of the Miami Dolphins football team, lacked the acumen to anticipate that the cigarette oligopoly would not abide any company’s or industry’s actively discouraging the purchase of its commodities, once TI spelled out the source of its ire to Robbie, he quickly informed the members of the MCTDA that Ehringhaus had been
particularly concerned that the Minnesota Bankers Association helped sponsor this anti-smoking campaign. Twin City Federal Savings and Loan Association in Minneapolis even ran an advertisement suggesting that smokers refrain from smoking and deposit the money in their savings account. This is a boorish ad using the anti-smoking campaign for crass commercial purposes.

The Northwestern National Bank and First National Bank of Minneapolis were among the main sponsors of this anti-smoking campaign.

It is my suggestion that each of you send me the name of the bank where you do business. I will prepare a resolution and send a copy of it to each bank plus the Minnesota Bankers Association.

It would seem to me that the bankers have as little reason to attempt to damage the business of their tobacco clients as they would to attempt to restore the Volstead Act to bring back Prohibition.

It will also help if any of you wish to mention to your own bankers that the Bankers Association is fighting your business.  

The D-Day that gave rise to this conflict was devised by Lynn R. Smith, the publisher of the Monticello Times, who at the end of 1972 published a full-page editorial in his paper, “The Tyranny of Smoking,” a manifesto that opened with this post-proletarian appeal: “Non-smokers of the world, unite. You have nothing to lose but your oppression.” Apparently overlooking the millions of children among the nonsmokers who had “long suffered in silence the stings of outrageousness by smokers,” Smith conceded that nonsmokers had “never questioned the right of consenting adults to pollute the air in the privacy of their homes,” but identified “smoking in confined public areas [a]s a different matter.” Bluntly he proclaimed: “Our interest in the entire thing is one of selfishness. The more smokers that swear off, the better off we ourselves will be.” An accomplished publicist, Smith sent off a copy of his editorial to the cigarette oligopolists’ PR agents, inviting them to submit comments that he would publish in his newspaper. His gambit provoked TI to issue a two-page scatter-shot response to his “sermon.”

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188 Joseph Robbie (exec. dir. Minnesota Candy & Tobacco Distributors Association, Inc.) to MCTDA members (Oct. 24, 1974), Bates No. TIMN0461875. The memo was excerpted in TIN #110, Nov. 11, 1974 at 3, Bates No. 950307814/6.
190 Lynn Smith to Brown & Williamson Public Relations Dept. (Jan. 9, 1973), Bates No. 690018123.
Smith was not content to issue a manifesto. A year later, on January 7, 1974, he organized D-Day, to persuade all the smokers among the 1,700 residents of Monticello (about 40 miles from Minneapolis) to pledge not to smoke that day. Smith published the names of 253 smokers who pledged not to smoke that day and later estimated that 70 to 80 percent of them did in fact quit for the day. The widespread publicity that the event generated caught the attention of the American Cancer Society and other groups, which then organized a statewide Minnesota D-Day on October 7, 1974, which they labeled “the broadest assault on smoking in a single state in the history of the U. S.” The governor signed a proclamation declaring October 7 D-Day, numerous mayors endorsed the campaign, and supervisors in several departments at Minnesota Mutual Life Insurance Company in St. Paul banned smoking for the day. More than 475 businesses with 140,000 employees participated and a total of 400,000 pledge cards were distributed. A spot check by one newspaper at eight stores found that cigarette sales had fallen by 20 percent. Even the Tobacco Institute Newsletter was constrained to admit that the Associated Press had reported that Don’t Smoke Day had been “successful.” Internally, a Lorillard sales manager in Minnesota tried to put the best face on the mass attack on his and their livelihoods by informing corporate higher-ups that: “All reports received indicate that the D-Day activity was ineffective in that it did receive a great deal of publicity for that one day, but the following day it was business as usual. Retailers reported that the sale of cigarettes was lower that day but the volume returned the following day....” Even this apostle of good news was constrained to bring up “one effect...that may result...that could be damaging to us and the industry as a whole”—namely, “talk that this could be a quarterly event or, at the

198 TIN, #109, Oct. 29, 1974, at 6, Bates No. 950307818

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very least, an annual happening. It could also spread to other states and eventually turn into a national program.” 199 In fact, D-Day did become an annual statewide event (that Robbie’s Minnesota Candy & Tobacco Distributors Association continued to monitor for the Tobacco Institute)200 and then in 1977 the American Cancer Society’s nationwide Great American Smokeout.201

That the cigarette manufacturers in general and Ehringhaus in particular were chastened by the Minnesota D-Day was underscored at a TI executive committee meeting on April 11, 1975, at which the organization’s officials reported to the companies’ top brass on yet another (hopeless) ad campaign to achieve the twin objectives of, as President Kornegay put it, taking the “first step on the road back to justifiable credibility for this country’s oldest industry and its principal spokesman in public affairs, The Institute” and “stop[ping] the rapidly growing nationwide movement to limit the opportunities for enjoyment of tobacco products, and to diminish the social acceptability of the use of tobacco.” For the time being, however, the Tobacco Institute’s goal was much more exploratory and preliminary—namely, discovering whether it had “the capacity to develop a more reasonable climate” and “the means to stop the continuing erosion in public opinion which is the fertile field from which so many of the unjust legislative weeds and other tribulations are growing.”202 As millions of people were finally beginning to demand protection from what they perceived to be the poisonous smoke that consumers of billions of cigarettes were spewing at them, the transparently obfuscatory ad text on which the TI was betting the alleged restoration of its masters’ and its own alleged credibility opened with: “The Way Some People talk, eat, drink, smoke, snore, stare, dress, push, whistle, sing, kiss is annoying. We need more courtesy.”203 James J. Morgan, Philip Morris’s marketing guru and later its CEO and president, wrote on the cover letter

200Audrey Nessheim (MCTDA secretary) to Nancy Parrish (TI) (Oct. 16, 1975), Bates No. TIMN0461910.
201http://www.cancer.org/docroot/subsite/greatamericans/content/History_of_Smokeout.aspx
202Statements of Horace R. Kornegay, President, and J.C.B. Ehringhaus and William Kloepfer, Senior Vice Presidents, of the Tobacco Institute, to the Institute Executive Committee, April 11, 1975, at 1-3, Bates No. LG0432811/2/3.
203Statements of Horace R. Kornegay, President, and J.C.B. Ehringhaus and William Kloepfer, Senior Vice Presidents, of the Tobacco Institute, to the Institute Executive Committee, April 11, 1975, at 9, Bates No. LG0432811/20.
The Minnesota Clean Indoor Air Act of 1975

accompanying a copy of the text: “THIS IS BAD, BAD, BAD (and dumb!).”

In case any of the cigarette company executives missed the obvious, TI Executive Vice President Kloepfer pointed out: “We have stayed completely clear of the nonsmoker health issue, deliberately choosing, as a laymen’s organization, not to make our first outing interpretable as non expert propaganda, regardless of our high level of expertise.” Among the 10 communities in which TI planned to publish these newspapers ads, in Vice President Ehringhaus’s words, “to invade the mind of the public, so to speak,” was “Minneapolis-St. Paul, where anti-cigarette sentiment was especially cultivated last year with a so-far somewhat unique ‘D-Day’, for Don’t-Smoke Day, civic observance, in which all too many local businesses and institutions took part. The presence there of one of our more public-spirited distributors, Joe Robbie, is also a factor in the choice.”

Enactment of the Minnesota Clean Indoor Air Act in 1975

In the last analysis, the clean indoor air legislation can achieve its goal by securing the voluntary cooperation of at least the more considerate smokers, because there is no way the state of Minnesota can hire enough policemen to enforce the law effectively if smokers as a whole remain adamantly hostile. But the law at least ensures that the problem will be discussed and acted upon—not simply ignored, as was so long the case.

“We get discouraged thinking people are still doing this (smoking where they shouldn’t) despite the law. But travel to other states and you’ll see.... It’s heaven here. Even if you have to point out the law, you can. We have a utopia.”

In the aftermath of the failure in 1974 even to move MCIAA to the floor of either house—the Kahn bill died at the last committee meeting for lack of a

204Alexander Holtzman to J. T. Landry (Apr. 15, 1975), Bates No. 1005110506 (cc: J. Morgan and handwriting initialed “JJM”).

205Statements of Horace R. Kornegay, President, and J.C.B. Ehringhaus and William Kloepfer, Senior Vice Presidents, of the Tobacco Institute, to the Institute Executive Committee, April 11, 1975, at 10-11, Bates No. LG0432811/21-22.

206Statements of Horace R. Kornegay, President, and J.C.B. Ehringhaus and William Kloepfer, Senior Vice Presidents, of the Tobacco Institute, to the Institute Executive Committee, April 11, 1975, at 11-12, Bates No. LG0432811/22-23.


The Minnesota Clean Indoor Air Act of 1975

quorum—ANSR decided to execute a tactical retreat for the next effort in 1975. (The Tobacco Institute had already reported in mid-March 1974 that the legislature’s failure to act on the “smoking segregation bill” meant that it had been killed for the session, but “[l]ocal observers expect reintroduction next year.”) As Beverly Schwartz of the Ramsey County Lung Association explained: “The restaurant owners, through their association, absolutely smashed the clean indoor bill the last time, so the next time, we’re taking restaurants out of the proposed legislation…. We don’t want to do that, but we figure that’s the only way we can get a bill passed.” Despite the fact that ANSR received more complaints about smoking in restaurants, which were “‘definitely the problem area,’” than in any other public place, Brandt omitted them from his draft of the 1975 bill based on “input” from or, “more accurately,” as a “concession” to Chum Bohr, the restaurants’ lobbyist, who was “the only staunch opponent” and had “attended ANSR meetings.” Brandt’s “strategy was to pass a bill which I thought could pass and then return to fighting for inclusion of restaurants later.”

As far as supermarkets were concerned, Schwartz pointed out that they were also “tough to crack”: one chain, for example, even had “ash trays in all the aisles.” Hospital administrators may not have been as “adamant” as restaurant owners—and for that reason presumably were not marked for exclusion from the 1975 version of MCIAA—but Brandt was flabbergasted by their lack of vigilance: “They put nonsmoking patients in the same room with smokers. They allow visitors to smoke in rooms and in lounges. They allow doctors and nurses to smoke in rooms....” (Even when the House of Delegates of the Minnesota State Medical Association in mid-1974 voted unanimously for a resolution urging hospitals to prohibit visitors and staff from smoking and expressly cited studies showing harm to nonsmokers from exposure to tobacco smoke, it excepted designated areas and patients who had their doctors’ approval.) On the other

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209 Anonymous untitled undated handwritten draft of [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 1 (Nov. 6, 1993) (notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt).


213 Email from Ed Brandt to Marc Linder (Feb. 18, 2009).


215 Lewis Cope, “Hospitals Urged to Ban Smoking, Sale of Tobacco,” MT, May 18, 1974 (16:2-3). The Medical Association also called on hospitals to stop the sale of
hand, the results of a questionnaire that Brandt had sent to about 275 candidates during the run-up to the November legislative elections made him much more optimistic about the prospects of securing many more votes in 1975: almost 99 percent of respondents (half of whom were elected) replied that they would favor a clean indoor air law.\footnote{Bob Protzman, “Group Lights Up Attack on Smoke,” \textit{St. Paul Dispatch}, Nov. 27, 1974 (17, 18), Bates No. TIMN0462231/2. The poor quality of the scan makes it uncertain whether the number of respondents to Brandt’s survey was 190 or 100. See also “Legislators State Views of Non-Smokers’ Rights,” \textit{ANSR} 2(4):1-6 (Oct. 1974) (listing 88 candidates who answered, “Yes, I support legislation to protect the non-smoker’s right to breathe smoke-free air”). Later ANSR stated that 44 candidates of the approximately 100 who responded favorably were elected. “Time to Start Thinking Legislation,” \textit{ANSR} 2(5):n.p. [2] (Dec. 1974).}

\textit{Preliminary Battles over Smoking Inside the House Itself}

The legislative prelude to consideration of the 1975 version of MCIAA was the skirmish that Kahn initiated on January 3 when she tangled with the powerful DFL House Speaker, chain-smoking Martin Sabo, in proposing that the Rules and Procedures Subcommittee of the House Rules and Legislative Administration Committee change the House rules to ban smoking altogether in the House chamber, visitors’ section of the galleries, and House committee rooms—which the then assistant health commissioner Dr. Ellen Fifer likened to “smoke-filled tobacco as an implicit promotion of smoking. Cope spotted only five physicians smoking (pipes) among the 104 delegates during the three-hour meeting. As early as 1967, the Council of the Minnesota State Medical Association endorsed a resolution of its Pulmonary Diseases Committee going on record as being opposed to smoking in hospitals except in areas designated by the hospital administrator. “Resolution on Smoking in Hospitals,” \textit{CA: A Cancer Journal for Clinicians} 18(2):111 (Mar.-Apr. 1968). As late as 1986, ANSR reported that at one brand new hospital “[s]ome physicians have taken the stance that they will not interfere with their patients’s smoking and have routinely written the order to allow their patients to smoke in their rooms, often while recuperating from smoking-related illnesses.” In contrast, the chief of staff at another hospital planning to phase in a total smoking ban by Jan. 1, 1987 replied to those wondering what would become of nicotine addicted patients: “‘We don’t provide alcoholics with alcohol to support their addiction in the hospital. We offer them support and counseling about detoxification. The same rationale is appropriate for tobacco.’” “Hospitals Diagnose Indoor Air Problem,” \textit{ANSR}, Spring 1986, at 4. On the statutory amendment that banned smoking in hospitals, see below this ch.
incinerators”—and halls. Much as would be the case in MCIAA as enacted, under Kahn’s proposal, smoking would, in striking concessions, still have been permitted in private enclosed offices occupied exclusively by smokers as well as in a designated area of committee rooms, because “[p]eople seem to have nicotine fits at the thought of committee meetings without smoking.” When Kahn offered her proposal, “Sabo pointedly lighted a cigarette and began smoking.” In a prickly confrontation—journalistically captured in the headline, “She Huffs, He Puffs,” which riveted popular attention at the time and remained etched in anti-smokers’ memories more than three decades later—Kahn told Sabo while

217 Telephone interview with Ellen Fifer Green, Minneapolis (Mar. 28, 2009).
218 Two decades later the Minnesota Department of Health still “recognize[d] that it cannot eliminate smoking in an individual’s private office because of Minnesota Statutes, section 144.413, subdivision 2, even if it gives rise to complaints from people in adjacent nonsmoking areas. Only the proprietor of a public place of workplace may eliminate smoking in these areas.” A separate ventilation system would have “[i]deally” alleviated the problem of “smoke spillage” into adjacent areas, but here, too, the statute prohibited the Department from requiring such a system. The most that it was able to propose was a rule requiring that the door to a private enclosed office remain closed while smoking was occurring, which “may help minimize smoke in adjacent areas.” State of Minnesota, Minnesota Department of Health, In the Matter of Proposed Rules of the Minnesota Department of Health Relating to the Clean Indoor Air Act, Minnesota Rules, parts 4620.0050 to 4620.1500 (Mar. 24, 1994), at 18-19 (copy furnished by MDH).
219 Kahn’s two rules read as follows:

IV. Pertaining to health and comfort of members of the House, Employees, and the public.
No smoking in Chamber. No member of the House of Representatives or officer of the House, or other person, shall be permitted to smoke in the House Chamber. There shall be no smoking in the visitors’ section of the galleries.
No smoking in House committee rooms or offices or hallways. Smoking shall be prohibited in committee rooms and halls of the area of the State Capitol complex under the control of the House of Representatives or its employees or officers, but excluding private enclosed offices occupied exclusively by smokers. In addition, by motion and affirmative vote of any committee of the House, a designated smoking area not greater than one half of the room may be allowed during meetings of that committee.

221 E.g., telephone interview with Ed Brandt, St. Paul (Apr. 26, 2007). A legislator
The Minnesota Clean Indoor Air Act of 1975

he “was exhaling cigarette smoke with a broad grin on his face” that “she would go along with allowing smoking at the speaker’s podium ‘if that should be necessary.’”222 During the remainder of the discussion, astringently recorded in the official committee minutes, House Minority Leader Henry Savelkoul moved that the subcommittee “incorporate a provision to prevent smoking in the House Chamber,”223 but Bernard Brinkman (DFL), owner of a truck stop cum diner/liquor store,224 spoke against it. A motion to amend Savelkoul’s motion was offered by high school teacher Bruce Vento (DFL) to divide the House chamber into smoking and nonsmoking sections, prompting Savelkoul to withdraw his motion and move that the subcommittee consider certain sections of the chamber as smoking and nonsmoking areas—a motion that carried and concluded the discussion.225

Three days later Kahn’s proposed ban was rebuffed when the House Rules Committee did not even vote on it because of the obvious lack of a majority, and instead decided, after Sabo had expressed willingness to consider dividing smokers and nonsmokers in assigning seats in order to deal with “the problem smoking causes some people,” to examine the possibility of creating smoking and nonsmoking sections in the chambers. This “compromise” was suggested by

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222Betty Wilson, “Legislative Smoking: She Huffs, He Puffs,” Minneapolis Star, Jan. 4, 1975 (1) (copy of clipping provided by ANSR). Rather lamely, Sabo later insisted that he had puffed to distract attention from Republicans. Telephone interview with Martin Sabo, Arlington, VA (May 14, 2007).


224Email from Ted Suss to Marc Linder (Mar. 3, 2009). Suss, a cosponsor of H.F. 79 and “a very good friend” of Brinkman at the time, interpreted Brinkman’s votes against H.F. 79 both when the House initially passed it and when it was returned from the Senate as those of “hard core small business.”

225Committee on Rules and Legislative Administration Subcommittee on Rules and Procedures, [Minutes] at 1-1 (Jan. 3, 1975) (copy furnished by Robbie LaFleur, Director, Minnesota Legislative Reference Library). Brinkman was not a member of the subcommittee, although he was a member of the full committee.
DFL member Bruce Vento who said, while “brushing away the clouded air rushing from the end” of Sabo’s cigarette, that “he can tolerate his puffing colleagues.” Indeed, Vento’s tolerance went so far that he opposed a ban on the grounds that it “would drive smokers out of the chambers at important times during deliberations and that such an exodus ‘wouldn’t reflect well on us.’” Vento’s advice—“If smoke bothers you, then don’t sit next to someone who smokes”—was refuted by Republican (and future governor) Arne Carlson, who pointed out that it was “impossible” to prevent the smoke from wafting from one section to another: “There are times when you can look up at the ceiling and see a haze. ... If you brought a pollution meter in there, we’d have to close the House down on certain days because of a pollution alert.” In crafting a rule implementing MCIAA later that year that certified a location within a covered public place as an “acceptable smoke-free area” if it was merely separated from a smoking-permitted area by four feet, the Health Department would be sorely in need of being reminded of this law of physics.) In contrast, Savelkoul apparently saw smoking, along with members’ reading newspapers and leaving their seats more as detracting from “decorum.” In addition to rejecting Kahn’s main proposal, her colleagues also defeated her proposed ban on smoking in hallways and offices. The Minneapolis Tribune editorially welcomed as “better than nothing” the committee’s nod in the direction of a nonsmoking section, which was a concession on the part of the House’s smoking majority.

ANSR was disgusted by smoking legislators’ selfish rigidity. One of its senior members, Beverly Schwartz, published a blunt letter in the St. Paul Pioneer Press—a newspaper overflowing with large cigarette ads—in which she proceeded from the proposition that the rights of smokers to smoke and of nonsmokers to “breathe the freshest air possible...obviously conflict at times” to


230 “The House’s Example on Smoking,” MT, Jan. 8, 1975 (4A:1-2) (edit.) The next day the newspaper confessed error for having claimed that a majority of Americans were smokers as well. “Smokers No Majority,” MT, Jan. 9, 1975 (6A:2). Later Brandt doubted that a majority of House members had smoked, though he conceded that perhaps a majority of the committee had. Email from Ed Brandt to Marc Linder (Feb. 23, 2009).
charge that: “House Speaker Sabo...and the rest of the ‘can’t live without it’ smokers refuse to even consider common courtesy or the rights of their co-workers. If they can’t be considerate to people they know, then I am inclined to feel sorry for the ‘common’ people of the state who don’t even have personal contact with their state representatives.”

Anti-smokers, however, did not acquiesce in their defeat at the hands of the Rules Committee. On January 20—later on the same day after Kahn had introduced the new MCIAA—in the course of consideration of the rules for the session by the full House a smoking rule was debated. Kahn (and fellow DFL James Rice) moved to add this new rule: “No member of the House of Representatives or officer of the House, or other person, shall be permitted to smoke in the House Chamber except in designated smoking areas, confined only to the front desk and the legislative retiring room. There shall be no smoking in the visitors’ section of the galleries.” Before a roll call vote could take place, John Tomlinson, a DFL who worked as a chemical engineer at 3M Company, moved to amend Kahn’s proposed rule by including in the designated smoking areas sections 1, 2, and 6 and all of section 5 except the last three rows. After the House, by a vote of 77 to 53, had defeated what the press called an effort to create smoking and nonsmoking sections on the House floor, it also rejected Republican Maurice McCauley’s amendment to designate the last rows in each section of the House Chambers as smoking areas. Then William Kelly (DFL), not “see[ing] why any area of the chambers should be excluded,” moved to amend Kahn’s amendment to exclude the Speaker’s area from the designated smoking area. Kahn sought to defend her exclusion on the grounds that

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233 http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10668
238 Journal of the House of Representatives, Sixty-Ninth Session of the Legislature, State of Minnesota: 1975, at 107 (Jan. 20, 1975). In addition to the Speaker’s area, the front desk included the chief clerk and deputy chief clerk. Email from Ed Brandt to Marc
smoking at the speaker’s desk “would be less offensive to the sensibilities” of nonsmokers than smoking elsewhere: “You will notice...that smoke from the speaker rises directly over his head into the ventilation system.” This specious argument quickly prompted Kelly, a high school teacher, to produce a brochure that Kahn herself had distributed and to read off the names of potentially harmful chemical compounds contained in cigarette smoke: “If the other officers at the desk are allowed to smoke, these noxious compounds will go directly by the speaker on their way to the ventilating system and he would be disabled in a short period of time.”

Neither Kahn’s curious reply—that she saw “nothing wrong with justice tempered by mercy”—nor her No vote was of any avail: Kelly’s amendment passed on a vote of 89 to 34. On the final House vote of 86 to 42 in favor of Kahn’s motion as amended by Kelly’s only 67 percent of DFLers voted Yea compared to 70 percent of Republicans. The DFL’s two-thirds vote represented the lowest degree of party cohesion on any rules vote during the session. “Once the solidarity of voting with the majority on the rules had been broken,” as Brandt later pointed out, and especially after the “She Huffs, He Puffs” headline, which, by Sabo’s own account, generated “more mail than he had ever received on any other issue, including hot-button issues such as abortion, he was in no position to try to force the caucus to support him.”

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239 “Rep. Sabo Smoked Out as House Passes Ban,” Minneapolis Star, Jan. 21, 1975 (6E:3). Brandt did not know whether Kahn’s exclusion was meant as a quid pro quo for Sabo’s sponsorship of the 1975 MCIAA, but intuited that: “At a minimum, she wasn’t taking any chances of losing support.” The difference between Kahn and Kelly was not that the latter was a stricter opponent of smoking, but that “she was wooing votes, while he wasn’t.” Email from Ed Brandt to Marc Linder (Feb. 23, 2009).


243 Edward Brandt, “Legislative Voting Behavior in Minnesota,” in Perspectives on Minnesota Government and Politics 202-22 at 211 (Millard Gieske and Edward Brandt ed. 1977). Brandt’s study, which covered only the first 30 days of the session (during which most if not all of the rules votes presumably took place), did not identify the rules votes, but the lowest degree of cohesion was 67 percent and only one vote achieved it.

244 Email from Ed Brandt to Marc Linder (Mar. 4, 2009).
The Minnesota Clean Indoor Air Act of 1975

Kahn then alone moved to amend the rules to prohibit smoking “in committee rooms and working areas of the part of the State Capitol complex under the control of the House...or its employees or officers, but excluding private enclosed offices occupied exclusively by smokers. In addition, by motion and affirmative vote of any committee of the House, a designated smoking area not greater than one-half of the room may be allowed during meetings of that committee.” Apparently even this modest default rule, which could have been overridden by majority vote of any committee, was too extreme even for most supporters of Kahn’s less-indiscriminate-smoking-in-the-chamber rule: by a vote of 94 to 33 the House voted to refer it to the Rules Committee for further study.\footnote{245}

Phyllis Kahn Introduces H.F. 79

The next iteration of the Minnesota Clean Indoor Air Act (H.F. 79) was introduced by Kahn and four others on January 20,\footnote{246} one week after Governor Wendell Anderson had proclaimed January 11-17 National Education Week on Smoking\footnote{247} and Kahn and Schaaf, flanked by a British poster (“Is it fair to force your baby to smoke cigarettes?”) discouraging pregnant women from smoking, held a press conference to announce that they were sponsoring another bill to regulate smoking in public places.\footnote{248} The proclamation, which ANSR itself had developed,\footnote{249} stressed that “sidestream smoke inhaled by the non-smoker is higher in noxious compounds than the mainstream smoke inhaled by the smokers...”\footnote{250}
That two of Kahn’s cosponsors were House Speaker Martin Sabo and Republican Minority Leader Henry Savelkoul enhanced, at least in the judgment of ANSR Chairman Brandt, the bill’s prospects of passage.251 “The public,” according to Kahn, responded with outrage” to Sabo’s behavior: “Sabo’s secretary called to ask Phyllis to drop the clean air issue because of the nasty letters Sabo was receiving. The upshot was that Sabo ended up signing onto the bill as co-author. ... ‘It was very helpful to have a chain smoker supporting the bill.’”252 Brandt’s view that the “unprecedented amount of mail” that Sabo received on account of the “She Huffs, He Puffs” publicity had prompted Sabo to “decide[ ] that it was politically wise to co-sponsor the bill”253 appears considerably more plausible than Sabo’s after-the-fact insistence that he had supported Kahn’s bill in order to stave off passage of the kind of total statewide ban that the legislature enacted in 2007.254 Savelkoul, who noted that his cosponsorship would not have influenced any Republican votes because the bill “was not a caucus issue,” explained his position and involvement as a “basic philosophical thing” in the sense that “I believed basically other people have no right to interfere with the air we’re consuming.” His attitude was in part molded by the incidents that “we all had” of having had tobacco smoke blown in his face.255

The backgrounds of the two other cosponsors, both young members of the large class of DFL House members elected at the post-Watergate elections in November 1974, shed interesting light on supporters’ variegated composition. Burnham (Bud) Philbrook, a 28-year old who had lost two previous elections in

non-smokers’ Bill of Rights...was passed by Congress on Jan. 11, 1974.” On the non-congressional signing ceremony in Philadelphia, see below ch. 25.

251 Ed Brandt, “Kahn-Schaaf Bill Protects Right to Smoke-Free Air,” ANSR 2(6):2 (Feb. 1975). In contrast, Bud Philbrook, one of the sponsors, took the position that since the smoking bill was not the kind of legislation that would have prompted a leader to impose party discipline, Sabo’s and Savelkoul’s sponsorship did not signify that passage was a foregone conclusion. Telephone interview with Bud Philbrook, St. Paul (Mar. 1, 2009). A news article stating that Sabo’s decision to co-author the bill was “said” to have enhanced the prospects of passage may have been an unattributed reference to Brandt.


253 Email from Ed Brandt to Marc Linder (May 2, 2007).

254 Telephone interview with Martin Sabo, Arlington, VA (May 14, 2007). Anti-anti-smoking restaurant lobbyist Chum Bohr remarked that Sabo’s cosponsorship had indicated that he had known “which way the wind was blowing.” Telephone interview with Wencel (Chum) Bohr, St. Paul (Mar. 4, 2009).

255 Telephone interview with Henry Savelkoul, Sun City West, AZ (Mar. 2, 2009). 2305
The Minnesota Clean Indoor Air Act of 1975

the state’s most heavily Republican district, had smoked from the age of 16 to 26, but quit two years before entering the legislature. By his own admission still addicted (as he was sure he remained 34 years later), he “gagged” at secondhand smoke. Unaware of Kahn’s earlier bill or her plan to file another in 1975, when Philbrook informed the Speaker’s office early in the session that he wanted to introduce an anti-smoking bill, he was told about Kahn, who, on hearing of Philbrook’s deep interest, asked him to co-sponsor hers.256 Even younger, 25-year old Ted Suss, a Vietnam War Marine,257 when asked 34 years later what had motivated him to become a cosponsor, observed:

Part of what motivated me to become an author was youthful ignorance. I did not realize at the time that authoring a controversial bill can cause problems for you in the future. Thus my willingness to stick my neck out.

As a lifelong non-smoker, my motivation was at least informed by my disgust with sidestream smoke and the smoky atmosphere in so many offices, business places, and public buildings. This disgust opened my mind to trying to do something about the problem. Once I started talking to people, it became apparent that my feelings about smoking were shared by many others. Listening to the public debate on the issue before I was elected to the legislature convinced me that there was a huge public health issue at stake apart from the comfort issue.

Once educated on the public health impact smoking had on non smokers, I wanted to do something about it. Phyllis’ bill was a very handy tool for me to express my views and make what I considered to be good public policy. I think, this may be giving myself more credit than I deserve, I knew deep down inside that this non-smokers rights and more attention to public health was a direction America needed to go and I wanted to be part of taking the first steps in that direction. I do recall telling someone once, I think at a National Council of State Legislators meeting, that I felt it important for one state to break the ice on this issue to give motivation and perhaps political cover to legislators in other states.

Between election day in November of 1974 and swearing in day in January of 1975, I met Phyllis for the first time and asked if there was any chance of becoming a co-author of her bill. She laughed in response knowing full well that finding five authors for that legislation was not going to be easy.258 A third of a century later Suss still took “great pride in having been an author of this law. For the law itself, but more so for the snowball that this law started rolling down the hill.”259

256 Telephone interview with Bud Philbrook, St. Paul (Mar 1, 2009).
257 http://www.leg.state.mn.us/legdb/fulldetail.asp?id=10642
258 Email from Ted Suss to Marc Linder (Mar. 2, 2009).
259 Email from Ted Suss to Marc Linder (Mar. 2, 2009).
The Minnesota Clean Indoor Air Act of 1975

In language identical to H.F. 2801 (of 1974) and the MCIAA as enacted, H.F. 79’s key prohibition declared that: “No person shall smoke in a public place or at a public meeting except in designated smoking areas.”260 In later analyses of MCIAA Kahn glossed this provision as making her statute path-breaking or even revolutionary:

Certain other states have listed a greater or lesser number of places where smoking is prohibited. The Minnesota law takes the step of forbidding smoking everywhere unless it is specifically allowed, but this step is psychologically far more difficult for people to understand. This single line in state law required a massive change in cultural attitudes and it is not surprising that it was difficult to get instantaneous comprehension and enforcement.261

In fact, however, even the first statewide ban, the 1973 Arizona law, had included the same prohibitory structure perforated by permissively designated smoking areas.262

ANSR implemented its aforementioned determination to exclude restaurants from the 1975 bill in order to neutralize its strongest opponents, by the circuitous route of retaining their specific identification in the definition of “public place” while conferring alone on owners of restaurants (and bars) the authority to designate the entire public place a smoking area. In other respects, too, it differed significantly from H.F. 2801.263 First, the definition of covered “public places” made clear that the list of named public places was illustrative (“not limited to”) rather than exhaustive. Second, it narrowed coverage by expressly “excluding private, enclosed offices occupied exclusively by smokers” (thus forcing co-employees, customers, and visitors to inhale especially concentrated smoke or to forgo contact with the occupants).264 Third, from the prohibition of smoking

262 See above ch. 23.
263 Theodore Tsoukalas, Jennifer Ibrahim, and Stanton Glantz, “Shifting Tides: Minnesota Tobacco Politics” at 9 (2003), on http://repositories.cdlib.org/cere/tcpmus/MN2003, erroneously asserted that: “The original bill introduced by Representative Phyllis Kahn in 1974 (HF 2801) was introduced again as HF 79 in February 1975.” Replete with gross factual errors, the authors’ legislative history of MCIAA is unreliable. For example, they bizarrely asserted that House File 966 had passed the Senate Health Committee, whereas in fact it was not even considered by a House committee. Id. at 7.
except in designated smoking areas were excluded “cases where an entire room or hall is used for a private social function” whose seating arrangements were controlled by the sponsor and not the owner. 265 Fourth, “persons in charge of public places” were added to proprietors as designators of smoking areas, but both were denied such authority “in places where smoking is prohibited by the fire marshall or by other law, ordinance or regulation.” Fifth, H.F. 79 set forth a complex of controls governing designated smoking areas, providing that “physical barriers shall be used to minimize the toxic effect of smoke in adjacent non-smoking areas.” Where, however, a public place consisted of a single room, “the provisions of this law shall be considered met if one side of the room is reserved and posted as a no-smoking area” 266 (suggesting that no physical barriers or ventilation would be required where they were most urgently needed). 267 Moreover, restaurants and bars were excluded from the prohibition of designating a public place in its entirety as a smoking area; the only condition attached to designating a restaurant or bar as a smoking area in its entirety was posting this designation conspicuously on all entrances used by the public. 268 Sixth, H.F. 79 raised the threshold for prosecution of owners/managers for failing to enforce the law by making only a willful failure a violation. 269 And seventh, the new bill conferred on “any affected party” the right to file a court action to enjoin repeated violations of the law. 270 Overall, then, Kahn accurately described the bill as “‘more moderate’” than the previous year’s. 271

Soon after the bill’s introduction Brandt was persuaded that it was likely that the legislature would confer at least some protection on nonsmokers because, as noted earlier, 90 of 131 House members present voted to restrict smoking in the House itself on at least one of three roll calls on the House rules and even some

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267 Although the implementing rules did not expressly address the issue, the chief drafter later observed: “I don’t recall the statutory construction that allowed it but the rules required use of space separation or barriers (minimal as they were) even if the public place consisted of a single room. I don’t know if we were interpreting what it meant to be a ‘side of the room’ or some other provision that needed clarity to implement reasonably. I do know that enforcement required space or barriers, not merely one side of the room defined solely by the proprietor.” Email from Kent Peterson to Marc Linder (Nov. 6, 2009).
of those who voted No would support regulation of public smoking. And while greater uncertainty prevailed concerning senators’ attitudes, the aforementioned vote on the Senate rule in 1974 suggested that they did not differ significantly from those of their House counterparts. Brandt may have concluded that it was unlikely that either chamber would defeat MCIAA, but at the same time he also acknowledged that “the bill may be so weakened by amendments as to be ineffective, unless the public demands a strong bill,” especially since he conceded that “[e]ven as introduced, the bill falls far short of the ideal,” though it “would still represent a great improvement over the existing situation.” Nevertheless, even the results of his own questionnaire indicated that a watered-down bill was a real possibility: of the 47 representatives who told ANSR that they would support a nonsmokers’ rights bill, only 14 voted to restrict smoking on all three roll calls, while 17 did so on two, 6 on only one, and nine on none (suggesting that “the kind of legislation they may be willing to support may not be very adequate”).

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**The House Health Care Subcommittee Votes to Water Down the Bill**

The bill’s first test took place before the Health Care Subcommittee of the House Health and Welfare Committee on February 13, at which in addition to Kahn and Brandt, a representative of the Lung Association, and Dr. Paul B. Johnson, chief of the pulmonary division of St. Paul-Ramsey Hospital, spoke for the bill, while a lobbyist for the Radisson Hotels and the president of the Minnesota Association of Commerce and Industry spoke against H.F. 79. Serendipitously, despite the Minnesota Historical Society’s destruction of all the audio tapes of committee hearings from the 1970s and 1980s, some knowledge of this hearing (and of the full committee hearing on February 25) has been

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273 State of Minnesota, House of Representatives, Committee on Health and Welfare, Subcommittee on Health Care, [Minutes] (Feb. 13, 1975), in MSA, MHS, 129.A12.6F. Dr. Johnson, who “was not an out and out activist,” had been involved in the Lung Association and, as he reconstructed the situation 34 years later, was probably recommended as a witness by that organization. Telephone interview with Paul Johnson, Edina, MN (Nov. 10, 2009). MACI’s public testimony against the bill refutes the later claim by ANSR’s president that “[t]he only opposing organization was the Hotel, Motel and Restaurant Association.” Jeanne Weigum, “Passage of the First Comprehensive, State-Wide, Smoking Control Law in the U.S.,” in *Proceedings of the Fifth World Conference on Smoking and Health* 2:327-31 at 327 (William Forbes et al. eds. 1983).
The Minnesota Clean Indoor Air Act of 1975

preserved for posterity because Honeywell, Inc., which was so eager to press its position that smoking in office workplaces be regulated solely by the Department of Labor and Industry that, in connection with the public hearing on the proposed regulations in December 1975, its corporate employee relations attorney and personnel director assigned the company’s in-house lobbyist to review the tapes of the committee hearings and floor debates “to provide them with some idea of the legislative intent of the ‘No Smoking’ act” in general and especially regarding the adoption of the amendment to place factories, warehouses, and similar workplaces under DLI’s jurisdiction.274

At the subcommittee hearing Kahn emphasized that she was not seeking to eliminate smoking, but “‘only...to establish the right to breathe clean air as a fundamental public right.’”275 Interestingly, instead of admitting that the decision to permit owners to permit smoking everywhere in restaurants, thus watering down the bill compared to her measure in 1974, was simply driven by the need to neutralize the restaurant owners’ opposition that had helped kill the previous year’s bill, Kahn disingenuously and implausibly claimed that she was reacting to the “strong and legitimate criticism” that had been directed at the earlier bill: “Restaurants are a more voluntary place where people go...”276 Brandt insisted that cigarette smoking was the “No. 1 air pollution problem... You get the same amount of pollution standing next to a smoker as you do next to an exhaust pipe of a car.”

In contrast, David Kuduk, Radisson’s lobbyist, both called the bill unnecessary and specifically objected to a provision that he argued might result in the Health Department’s requiring businesses to install barriers and ventilation

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274Patsy Randell to W. C. Viitala, Subject: Clean Indoor Air Act Rules and Regulations (n.d.), in Health Department, MSA, MHS, 112H.18.3(B). To be sure, the usefulness of the preserved knowledge depends on the accuracy and truthworthiness of Randell’s notes. On Honeywell’s position on the regulations, see below. In addition to transcribing the tapes, Randell as lobbyist had also attended the hearings and debates. Telephone interview with Patsy Randell, Minneapolis (Apr. 4, 2009). Randell was not included in the list of registered lobbyists for 1975. State of Minnesota, State Ethics Commission, Registered Lobbyists (Feb. 11, 1975).


276Patsy Randell to W. C. Viitala, Subject: Clean Indoor Air Act Rules and Regulations at 1 (n.d.), in Health Department, MSA, MHS, 112H.18.3(B).

The Minnesota Clean Indoor Air Act of 1975

That the hotel was so adamantly opposed to the law even after restaurant coverage had been removed (so that Chum Bohr, the lobbyist for the combined restaurant-hotel-resort hospitality association, of which Radisson was a member, did not even bother to appear at the House hearing) suggests, in connection with behind-the-scenes information discussed below concerning the fact that its owner, Curt Carlson, also owned the company that supplied the trading stamps for two of the cigarette manufacturers, the possibility that Radisson was perhaps acting on behalf of the tobacco industry. (Radisson’s hard-line position was underscored when, soon after the law had gone into effect, it posted smoking-permitting signs “throughout the area” at a Minnesota Hairdresser’s Convention at the downtown Radisson at which ANSR ran a booth selling nosmoking signs so that “the level of smoke on the conference floor could have stopped traffic.”) Finally, before the subcommittee Oliver Perry, the head of MACI, focused on what he called “serious practical problems,” especially for small businessmen” during a recession, when “hav[ing] to deal with another inspection procedure could possibly be the last straw.”

Following this testimony, the subcommittee adopted the weakening motion offered by Rep. Howard Smith, a DFL retail businessman and rural conservative, to amend the bill by adding the word “existing” before “physical barriers and ventilation systems” so that where none existed, owners who chose to designate smoking areas would be under no obligation to use those barriers/systems to minimize the toxic impact of the smoke that wafted over to nonsmoking areas. That Kahn agreed to this amendment meant, according

278 Bruce Nelson, “Nonsmoking Backers Get Taste of Victory,” *SPPP*, Feb. 14, 1975 (15:1-3). More than 30 years later Kuduk, who by then was a longtime legal services lawyer, did not recall what Radisson’s objections to the bill were, but thought that they probably were related to a fear of loss of sales. Telephone interview with David Kuduk, Grand Rapids, MN (May 22, 2007). Minority Leader Savelkoul conjectured that Radisson might have been especially opposed to the bill because in addition to hotels it also owned an entertainment/convention venue in the Twin Cities area. Telephone interview with Henry Savelkoul, Sun City West, AZ (Mar. 2, 2009).

279 Telephone interview with Wencel (Chum) Bohr, St. Paul (Mar. 4, 2009).


282 Email from Ed Brandt to Marc Linder (Feb. 23, 2009).

283 State of Minnesota, House of Representatives, Committee on Health and Welfare,
to Ed Brandt, that “she wasn’t sure whether the bill would get out of the sub-committee without Smith’s amendment.” If business owners were in fact adamantly opposed to being forced to spend money on new barriers or ventilation and had the votes in the subcommittee to make the provision a deal-breaker, the Minnesota Health Department’s post-enactment promulgation of a rule that under certain circumstances would nevertheless have imposed precisely such an expenditure suggests just how far the agency went to override at least one of the law’s weaknesses (even though barriers in fact may not have protected nonsmokers at all from exposure to secondhand smoke).

The colloquy between Kahn and several antagonists, in particular Republican real estate businessman O. J. Lon Heinitz, who wanted to dilute the bill even further by striking “or serving as a place of work” from the definition of “public place,” thus limiting coverage to public places used by the general public, was instructive. In response to Heinitz’s question as to whether her bill covered factories, Kahn stated that it did, but incorrectly added that “the point here is that you have to designate [smoking] areas or allow smoking breaks,” when in fact H.F. 79 imposed neither duty. Then, when Heinitz explained that he asked in order to find out how the bill related to OSHA and to the fact that “[y]ou can’t move machinery around to accommodate [sic] smokers and non smokers [sic],” Kahn bizarrely back-pedaled, apparently willing to deprive nonsmoking industrial workers of all state protection from exposure to their colleagues’ secondhand smoke: “A factory is not really open to the public in the same sense that a...store is and certainly I would think that if there’s no disagreement among workers, and there’s generally no problem, you could designate the entire place smoking...because a factory might not be generally open to the public I don’t feel this is a problem. Industry can work this out with it’s [sic] workers.” Kahn then reversed herself yet again, in response to Republican John Kaley’s question as


285Email from Ed Brandt to Marc Linder (Mar. 13, 2009). Not recalling that he had attended the hearing, Brandt was reconstructing the logic that must have underlain Kahn’s move.

286See below this ch.

287http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10251 (visited Nov. 10, 2009). Heinitz’s interest in excluding workplaces may have been connected to the fact that earlier in his legislative career he had been president of the employment agency Snelling and Snelling in Minnesota. The Minnesota Legislative Manual 1971-1972, at 77 (Larry Anderson ed.).
to whether the factory owner had the right under the bill to declare a whole area nonsmoking, by pointing out the obvious—that the owner had no such power and that “working is one of the necessities of life and protection is needed for people who are irritated by smoke and who work.” Kaley’s counter that Kahn’s approach would force a factory owner to reorganize his whole assembly line prompted her to revert to her suggestion of smoking breaks. The two Republicans received reinforcement from Kuduk who, despite being Radisson’s paid lobbyist, suddenly began testifying “[o]n behalf only of myself.” After pointing out correctly that under H.F. 79 workplace coverage did not turn on being open to the public, he insisted that coverage of his 15-employee law office “would be a problem for us....” Prompted by Heinitz to devise an amendment to solve the problem, Kuduk favored deleting “serving as a place of work,” a phrase that made the bill “all inclusive”—and whose function finally dawned on Heinitz. Now Oliver Perry of MACI entered the fray, conjuring up the specter of conflicting jurisdiction with OSHA as well as between the Board of Health and the Department of Labor and Industry. Kahn sought to tamp down this eruption by observing that “[w]e need...higher standards of clean air than OSHA standards.”

That Heinitz’s amendment failed only by a vote of 4 to 5 (both Republicans and two of seven DFL’ers voting Yes), suggested, along with the watered-down designated smoking areas provision, that while the subcommittee was willing to recommend to the full committee that the bill pass as amended, business owners far beyond the restaurant industry (which was exempt) opposed regulation of smoking on their premises and a large majority of the legislature was not about to commit to an expansive law. Heinitz made his motion after Kahn had rejected his proposal to hold the bill over for further study. He sought to exclude workplaces because coverage might create problems for employers unable to provide separate smoking and nonsmoking areas: “‘What would the factory do? ... Have machines for smokers and machines for nonsmokers?’” Kahn simply cut this Gordian knot by pointing out that the bill “would resolve those types of problems by banning smoking in the entire area if facilities could not be established for nonsmokers.” The health justification and poetic justice were clear: “‘For years we have been resolving those kinds of situations in favor of the smoker.... It’s time we begin to resolve them in favor of the nonsmoker.’”

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288 Patsy Randell to W. C. Viitala, Subject: Clean Indoor Air Act Rules and Regulations at 1-3 (n.d.), in Health Department, MSA, MHS, 112H.18.3(B).
The Minnesota Clean Indoor Air Act of 1975

The same day that the House subcommittee acted, the Minnesota Board of Health, which H.F. 79 tasked with writing the implementing regulations for MCIAA, voted 9 to 1 to prohibit smoking at all public meetings held in Minnesota Health Department buildings. The dissenter, insurance agent Robert Willmarth (who by 1976 would be Board chairman), “with cigar in hand, told fellow board members that ‘I don’t drink coffee—I’d like to ban it.’” In response to the distinction drawn by psychologist Michael Keable that coffee drinking did not bother nonsmokers, Willmarth asserted that he did not like the fumes that coffee gave off.\(^{291}\) When the discussion then veered off onto the smell of perfume and after-shave lotion it became manifest that not all members of the Board, several of whom smoked, had even the slightest grasp of the emerging science of secondhand smoke exposure. The Board’s action was not coincidental: in light of the legislature’s and the Minneapolis city council’s consideration of restricting smoking at public smoking, some Board members stated that they should set an example.\(^{292}\)

**Radisson Hotels as Cigarette Manufacturers’ Secret Agent?**

That Radisson was the sole individual corporation to oppose the bill raises the tantalizing possibility that it was acting as a subterranean agent for the cigarette manufacturers, especially since it was a member of the hospitality coalition whose lobbyist, Chum Bohr, was sitting out the hearings because he had already

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\(^{291}\) Lewis Cope, “State Health Board Restricts Smoking, Leaves Coffee Alone,” *MT*, Feb. 14, 1975 (1A, 5A), Bates No. TIMN0461954. Recalling the incident many years later, Willmarth—who owed his appointment to having a brother-in-law who was a state legislator—asserted that he had not “really” been opposed to the nosmoking rule, but had made this “newspaper comment” so that the public would understand that people are bothered by various odors. Willmarth’s memory or bona fides were cast in doubt by his claim that he had had no reason to oppose the ban since he did not smoke at Board of Health meetings anyway (which was contradicted by the reporter’s eyewitness observation). Telephone interview with Robert Willmarth, Rochester, MN (Apr. 1, 2009).

\(^{292}\) Lewis Cope, “State Health Board Restricts Smoking, Leaves Coffee Alone,” *MT*, Feb. 14, 1975 (1A, 5A), Bates No. TIMN0461954. The occupational information came from a telephone interview with Michael Keable, St. Joseph, MN (Mar. 20, 2009). Among the Board members whom he was able to recall 34 years later, Keable identified three smokers including one physician. Member Elizabeth Kalisch identified Bridget Coleman, the wife of then-Senate Majority Leader Nicholas Coleman, as a smoker. Telephone interview with Elizabeth Kalisch, White Bear Lake, MN (Mar. 20, 2009).
achieved privileging restaurants to permit smoking everywhere. Two years earlier Radisson had briefly become the target of the tobacco industry’s ire in response to the company’s announcement in April 1973 that, beginning May 1, it would set aside special space for nonsmokers in banquet and convention facilities at gatherings of 25 or more people. At the time, Radisson owned hotels in Minneapolis, Duluth, and Bloomington, Minnesota as well as in Omaha, Lincoln, Denver, and Tobago.293 As soon as the cigarette oligopolists’ panoptically active surveillance of their possible enemies caught wind of this treachery, their agents went into red alert mode to warn the top of the hierarchy. On May 2, R. Marshall Edelen, the vice president for distribution services at Brown & Williamson, forwarded to Edward Finch, the company’s president, chairman, and CEO, a newspaper clipping with the announcement that a Pittsburgh department manager had included in his weekly letter.294 Edelen added that Radisson was owned by Curt Carlson of Minneapolis, who also owned Gold Bond Stamp Company and other affiliated entities that engaged in coupon and promotion programs used by Lorillard and Liggett & Myers.295 Two days later, Brown & Williamson’s vice president and general counsel sent a copy of the clipping to his counterparts at Lorillard and Liggett as well as to the Tobacco Institute president, simply mentioning that Carlson owned Radisson.296

Manifestly aware of the cigarette manufacturers’ sensitivity to the slightest slight and constant vigilance to detect any possible threat and prepared to kowtow to avoid offending economically much more potent corporations, Radisson sought to preempt any retaliatory action by writing an abject letter of apology before the manufacturers could even plan their inevitable reprisal. On May 9, Harry Greenough, Carlson’s “top pitchman,” president of the Carlson entity in charge

of Gold Bond stamps, wrote to Curtis Judge, the president of Lorillard, to fill him in on "a dumb thing that happened in our hotel division. Your clipping service will probably send you a copy of an article...which states the Radisson Hotels have initiated a policy of reserving a special space for non-smokers during their banquet and convention activities." Addressing Judge by his first name, Greenough then sought to disabuse his customer of any suspicion of betrayal by recounting that an (unidentified) convention group had moved into the Radisson in Omaha and requested that smoking be banned from their space: “Of course this was impractical, and our manager was smart enough to counter by suggesting that during their activities certain areas be reserved for smokers and an adjacent area for non-smokers. They accepted this compromise and everything went smoothly. The next thing that happened was that our manager was discussing the situation with some of his staff and one bright sole [sic] got the idea that this could be a possible ‘sell’ for the hotels and rushed off to the newspaper.” Greenough then concluded by groveling: “Our people involved have been duly reprimanded and straightened out; and, as stated, there is no such policy at the Radisson Hotels.” Five days later Greenough sent an identical account to the marketing vice president at Liggett & Myers.

Whether Greenough’s story was factually correct is as unclear as whether it succeeded in propitiating the cigarette companies, since, after all, Greenough had praised his manager, at the very least, for having accommodated a large group of customers (precisely) by reserving a special space for non-smokers during a convention and did not appear to have admonished him never to show such flexibility again. (Interestingly, two years later, in the midst of the Minnesota legislature’s deliberations on the 1975 MCIAA, an article appeared in the Washington Post, and was circulated among R. J. Reynolds executives, on antismokers’ growing success in carving out public spaces, at the very end of which the Radisson PR chief to whom Greenough had cc’d his letter to Judge was quoted as commenting on the chain’s having tried and dropped nosmoking sections in their restaurants “because the ban was impossible to enforce and because there was no way to keep smoke from drifting to nonsmoking sections”:

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300 H. W. Greenough to Curtis H. Judge (May 9, 1973), Bates No. 680261889.
301 H. W. Greenough to Samuel White (May 14, 1973), Bates No. 680261887.
The Minnesota Clean Indoor Air Act of 1975

“‘We tried it, it was a great idea, everybody loved us, but it didn’t work.’”[302]

Moreover, especially at a time when the cigarette companies were being inundated with news of metastatizing nosmoking areas on airplanes, trains, buses, and now hotels and restaurants—indeed, the day after Greenough had sent his letter to Judge, the Philadelphia Inquirer published a long article on the subject, a clipping of which was circulating at R. J. Reynolds[303]—it seems unlikely that they would have appreciated Radisson’s subtle distinction between a policy and a practice.[304]

That Greenough knew what potential harm he was warding off when he submitted his abject apology became clear the very next day when the head of the Coordinating Board of Tobacco Trade Associations informed R. J. Reynolds that his organization had recently sent an “admonition to state executives in Minnesota, Nebraska and Colorado to think twice before using Radisson Hotels which recently announced plans to set aside ‘special space for non-smokers.’”[305]

And the corrective action that the manufacturers would have set in motion was hinted at in a memo from Finch at Brown & Williamson to his general counsel Bryant instructing him to discuss the matter with Lorillard and Liggett & Myers, “pointing out what we did with Marriott.”[306] Exactly what the cigarette companies did to Marriott is not clear from the industry’s disgorged online documents, but what is known suggests at least the possibility that by April Radisson might already have been aware of what treatment the cigarette oligopoly was meting out to a hotel chain that had “crossed” it, but that, unlike Radisson, was not even its partner in hawking cigarettes.

On February 13—two months before the Radisson press release—Marriott announced that it was making one whole floor of rooms in each of three hotels in Washington, D.C. nonsmoking. As if wanting to poke the cigarette companies in the eye, The New York Times led off its article with: “Nonsmokers have a new hero today. His name is J. Willard Marriott....”[307]

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[304] Lorillard’s general counsel forwarded Greenough’s letter to Judge to Kornegay and DeBaun Bryant without comment. Arthur Stevens to Horace Kornegay and DeBaun Bryant (May 17, 1973), Bates No. 680261888.


The Minnesota Clean Indoor Air Act of 1975

those floors—which Philip Morris preferred belittling as “isolation wards” and a “sales gimmick”\footnote{See \textit{The Stop Smoking Industry} at 7 (drafted May 10, 1973 and revised July 12, 1973), Bates No. 1005099001/8.}—huge framed signs declared that tobacco smoking was banned. What Marriott styled an “experiment” the chain’s 27 other hotels would probably hasten to adopt if it proved successful. Giving the cigarette manufacturers a vital incentive to nip this innovation in the bud was the fact that Marriott, which, according to the American Hotel and Motel Association, was “the first to offer such a haven for nonsmokers,” appeared to have “hit upon a popular idea,” which was driven by guests’ comments about smoke odors.\footnote{“Washington Hotels Offer Entire Floor to Nonsmokers Only,” \textit{NYT}, Feb. 14, 1973, Bates No. 1005073665.} The hotel’s “motive, apparently, ha[d] nothing to do with the principles of the Mormon Marriott family. Profit is the lure”—not only by increasing occupancy rates bulked up by nonsmokers who had been “gagged by the lingering tobacco smell,” but also by cutting the costs caused by frequent cleaning of smoky drapes and cigarette burn damages to carpets and furniture.\footnote{John Holusha, “New Motel Policy: No-Smoking Floors,” \textit{Evening Star} (Washington, D.C.), Feb. 13, 1973, Bates No. 1005073666.} (In retrospect, a former president of the Minnesota Restaurant Association and well-known Twin Cities restaurateur who had opposed the MCIAA because smoking was legal admitted that even in the short run the law had been for the best because it had saved him the cost of cleaning windows and wooden paneling twice a week.)\footnote{Telephone interview with Jack Kozlak, Naples, FL (Oct. 15, 2009).} The cigarette manufacturers may not yet have determined whether hotels’ profit motive or principle constituted the greater threat, but they presumably found utterly unforgiveable that former Surgeon General Steinfeld was scheduled to attend the “kickoff.”\footnote{Richard Kluger, \textit{Ashes to Ashes} 235 (1996).}

The very same day that the \textit{Times} articles appeared, John T. Landry, Philip Morris’s group vice president and director of marketing for tobacco and the company’s “resident advertising genius” (especially in relation to Marlboro),\footnote{John T. Landry to Sam Huff (Feb. 14, 1973), Bates No. 1005073666.} shot off an outraged letter to his “old friend”\footnote{John Holusha, “New Motel Policy: No-Smoking Floors,” \textit{Evening Star} (Washington, D.C.), Feb. 13, 1973, Bates No. 1005073666.} Sam Huff, a famous former professional football player who, beginning in the 1950s, had worked for Philip Morris as a salesman for Marlboro (which was heavily advertised on television...
during professional football games)\textsuperscript{315} and in the meantime had become a Marriott vice president of special markets. Venting about Marriott’s “inane publicity release” concerning the nonsmoking floors, Landry complained that the hotel chain had “not only taken a cheap shot at our industry but a very uninformed one.” Not having to bother to explain to a fellow Marlboro hawker of what exactly Marriott was ignorant, he instead relied on Huff’s having “worked very closely with us for some time” and thus being “aware of the great pride we take in our products” to make him understand Landry’s “annoyance.”\textsuperscript{316} (If Landry was merely annoyed, he must have mellowed in the two years since midnight on New Year’s Day 1971 when “[h]e sat home alone by his television set, watched four of his beloved cowboys gallop off into the sunset for the last time, and wept”\textsuperscript{317} as the ban on cigarette advertising went into effect.)

What action the companies took next is unknown, but as late as June Marriott was still anathema to them, when one of its market development officials wrote to Philip Morris President George Weissman urging him to consider an expensive corporate suite in Essex Towers in Manhattan.\textsuperscript{318} Weissman’s terse reply said it all: “In view of the Marriott attitude toward smoking, your letter was obviously misdirected.”\textsuperscript{319} The next critical links in the conflict are missing, but by September Brown & Williamson noted that Marriott had reported the termination of its “no smoking” accommodations because ‘there just wasn’t anybody asking for’ those restricted rooms.”\textsuperscript{320} That lack of demand prompted the abandonment of the initiative seems implausible—after all, in November, the Tobacco Institute noted that whereas “Marriott gave up, apparently the Quality Inn chain is expanding its no-smoking quarters.”\textsuperscript{321} Rather, the real reason, as the Chicago Tribune somewhat opaquely revealed in a review of the growing number of places where smoking had been restricted or banned, had not been difficult to imagine: “Marriott Hotels, gungho for smoking and nonsmoking areas, ushered in the latest no-smoking trend with relish. Since that initial fanfare...the Marriott program has been dropped, apparently because the corporation-to-corporation lobby was as strong as its Springfield [Illinois] contingent,” which “strong tobacco lobby” had

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\item[\textsuperscript{315}] Ray Jones, To Our Friends in the Tobacco Industry (Oct. 25, 1960), Bates No. 2012511756.
\item[\textsuperscript{316}] John T. Landry to Sam Huff (Feb. 14, 1973), Bates No. 1005073633.
\item[\textsuperscript{317}] Richard Kluger, \textit{Ashes to Ashes} 335 (1996).
\item[\textsuperscript{318}] Peter Duncan to George Weissman (June 5, 1973), Bates No. 2025015072.
\item[\textsuperscript{319}] George Weissman to Peter Duncan (June 8, 1973), Bates No. 2025015071.
\item[\textsuperscript{321}] TIN, No. 86, Nov. 12, 1973, at 6, Bates No. 950307081.
\end{itemize}
\end{footnotesize}
defeated a bill in the state legislature that session that was more inclusive than the Arizona law.\textsuperscript{322}

The burden of this account of the aforementioned convoluted series of events is to raise the possibility that Carlson’s/Radisson’s direct and open opposition to H.F. 79 may have represented a quid pro quo that they were impelled to perform in order to dispel any lingering suspicion by the cigarette oligopolists that Carlson was biting the hand that fed him and to retain Liggett & Myers and Lorillard’s trading stamp business.

\textit{The House Health and Welfare Committee Recommends Passage of a Diluted H.F. 79}

When the full House Health and Welfare Committee considered H.F. 79 on February 25, only Kahn spoke in support of it, emphasizing that the bill permitted bar and restaurant owners to designate their entire space as smoking areas if they conspicuously posted signs to that effect at all entrances normally used by the public.\textsuperscript{323} The bill’s only opponents were once again Radisson and MACI, which pursued the same tacks as before the subcommittee. Kuduk “argued unsuccessfully that ‘places of work’ should be excluded from the bill,” whereas Perry contended that inside work environments were more properly under the Occupational Safety and Health Administration’s jurisdiction.\textsuperscript{324} The committee then proceeded to accept the subcommittee’s report with its sole amendment of adding “existing” (to qualify “physical barriers and ventilation systems”) as well as two of the author’s (i.e., Kahn’s) further weakening amendments. First, the exclusion of “private, enclosed offices occupied exclusively by smokers” was expanded to apply “even though such offices may be visited by nonsmokers.” And second (despite the press’s aforementioned judgment that the committee had rejected Radisson’s and MACI’s objections), the general prohibition on smoking in public places was relaxed by excluding from its application “factories, warehouses and similar places of work with a ceiling of more than fifteen feet and not usually frequented by the general public, unless the close proximity of

\textsuperscript{322}Pat Colander, “If Smoke Gets in Your Eyes,” \textit{CT}, Nov. 1, 1973 (B1, at B3).

\textsuperscript{323}Minnesota House of Representatives, \textit{Weekly News Wrap-Up} (n.p.) (Feb. 27, 1975).

\textsuperscript{324}Bob Goligoski, “House Panel Approves Bill Regulating Smoking,” \textit{SPPP}, Feb. 26, 1975 (15:1-3). Kahn objected to Kuduk’s proposal because it would “deprive some people of their livelihood or the type of job they want...it is a conflict but we’ve attempted to resolve it in a moderate way.” Patsy Randell to W. C. Viitala, Subject: Clean Indoor Air Act Rules and Regulations at 4 (n.d.), in Health Department, MSA, MHS, 112H.18.3(B).
workers or the inadequacy of ventilation creates a problem of smoke pollution.” Kahn made this turn of events possible by executing yet another about-face, this time acknowledging that a “legitimate problem” had been raised in subcommittee in that the general public did not generally frequent workplaces like factories, “where it would be very difficult to rearrange workers to deal with smokers and non smokers [sic], such as [on] an assembly line.... It was also a legitimate point that these places are usually large buildings and...generally workers are not that close together....” (Asked later whether she had offered the latter amendment because it was clear that she would be unable to get the bill out of committee without it, Kahn replied: “I believe so. Or it may have been just to get one group of opponents out of the way for the whole process of the bill.”) Heinitz, who


326Patsy Randell to W. C. Viitala, Subject: Clean Indoor Air Act Rules and Regulations at 3-4 (n.d.), in Health Department, MSA, MHS, 112H.18.3(B). At the Health Department’s public hearing on MCIAA’s implementing rules, Kahn, while conceding that her remarks “would not have the implications of formal legislative intent,” repeated and expanded on her committee statement by noting that “the thought that went into that separate kind of regulation...was the fact that those places, one, often have quite high ceilings, besides the fact that they are not open to the general public. They also, often because of the kind of materials that are used, have certain regulations dealing with smoking, usually the prohibition of smoking in such places. It was also put in as a constraint because of the thought of problems with assembly lines and the fact that people’s jobs in dealing with machinery that was set on the floor would not allow the ability of moving around as, say, a secretarial pool could. ... And I think the distinction...was probably because there was no legal terminology that anyone could think of. I think the white collar-blue collar distinction that has come forth is probably as good a practical one as has appeared.” Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, [Transcript of Public Hearing] at 164-65 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

327Email from Phyllis Kahn to Marc Linder (Mar. 21, 2009). Many years later Brandt expressed the opinion that: “Regardless of whether or not this [amendment discriminating against nonsmoking blue-collar workers] was essential to passage of the bill in the House, I am convinced that it was necessary for passage in the Senate. There was a higher percentage of Republicans in the Senate than in the House. How many would have catered to MACI at that time is unclear, but very likely a majority of Republicans would have. If three more Senators would have voted no or abstained instead of voting in favor of the MCIAA, it would not have become law.” Email from Ed Brandt to Marc Linder (Mar. 21,
The Minnesota Clean Indoor Air Act of 1975

had almost succeeded in excluding work places altogether in subcommittee, was now able to water down this new provision by securing the committee’s agreement to striking the 15-foot ceiling. In the wake of these dilutions, the committee recommended that the bill pass.\textsuperscript{328}

Beverly Schwartz, the director of ANSR (which by now had 5,000 members and chapters in Duluth and Rochester in addition to the Twin Cities),\textsuperscript{329} had expected neither the “overwhelming” voice vote nor the ease with which the “controversial bill” had been approved, but now expected that the Senate would pass it as well.\textsuperscript{330}

\textbf{The Full House Passes a Weakened H.F. 79 by a Solid Majority}

On February 28, a week before the full House took up H.F. 79, the Minneapolis City Council intensified the momentum for anti-smoking action by unanimously (12-0) passing an ordinance banning smoking at public meetings of governmental bodies covered by the state open-meeting law. Backed by a $100 fine, the ordinance required those conducting meetings to inform those in attendance of the ban.\textsuperscript{331} (At the end of 1974 Duluth had passed an even broader

\textsuperscript{328}State of Minnesota, House of Representatives, Committee on Health and Welfare, [Minutes] at 9-10 (Feb. 25, 1975), in Legislature, House Committee Minutes—Health & Welfare, MSA, MHS, 129.A.12.5(B); \textit{Journal of the House of Representatives, Sixty-Ninth Session of the Legislature, State of Minnesota: 1975}, at 354-55 (Feb. 27); H.F. No. 79, First Engrossment (Feb. 27, 1975). It is unclear how the statute could have been interpreted in this sense, but Kahn supposedly “said if the work space is small enough so as to make it uncomfortable for the nonsmoker, the rights of the nonsmoker should be recognized.” “Non-Smokers Rights,” \textit{Thief River Falls Times}, Apr. 16, 1975 (copy of clipping furnished by ANSR).


The Minnesota Clean Indoor Air Act of 1975

anti-public smoking ordinance, which, however, the Lung Association of Northeast Minnesota did not regard as “‘the most effective,’” but merely “a step in the right direction.”)

Before the House gave preliminary approval to H.F. 79 on March 6, Kahn, definitively abandoning the logic of the scientist she had been and adopting the politician’s meaningless hyperbole, called the bill “the ‘most moderate bill that will ever appear before this body....’” By the huge majority of 103 to 19, the House, sitting as the Committee of the Whole, struck the provision that made guilty of a misdemeanor any proprietor or person in charge of a covered public place who wilfully failed to enforce the act. (While admitting that this amendment weakened the bill, Brandt noted that through the “cumbersome procedure” of a court injunction the bill still made it possible to require owners to protect nonsmokers’ rights.) The objection to “forcing private citizens to enforce the measure” was driven by the scenario that several legislators had depicted of high school principals’ being charged for having failed to stop students from smoking. Kahn voted against the amendment, but was joined by only a few stalwarts, who did not even include two of the bill’s cosponsors. The Committee of the Whole then recommended passage of the amended bill to the House by a vote of 88 to 38. With the DFL controlling the House by the almost equally huge majority of 104 to 30, alone the 71 DFL caucus members who voted Yea would have sufficed for the motion to prevail. Their 72 percent Yea-
vote (71-27) surpassed the 61 percent among Republicans (17-11). When the bill came up for final passage four days later, Kahn stressed that it did “not prohibit smoking,” but was “just a separation of smokers and nonsmokers to protect the health of everyone alike.” The House passed the bill by a vote of 78 to 54 with 64 percent (65 of 102) of the DFL caucus but only 43 percent (13 of 30) of the Republicans voting Yea. Republicans, who made up 22 percent of the House membership, accounted for 31 percent of the Nays compared to only 19 percent of the Nays cast against the ban on smoking in the House chamber on January 20. The Republicans’ 17-13 split against the bill revealed, in Brandt’s view, “very weak caucus pressure at most,” thus confirming Savelkoul’s aforementioned account. Objections, according to one press account, came from “smokers on the floor of the House claim[ing] that the proposed legislation was an infringement on some sort of inalienable right” and other opponents who insisted that H.F. 79 “was impractical and lent itself to possible harassment of smokers.”

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340 Ed Brandt tallied the party vote on an untitled and undated sheet that was included in copies of his papers that ANSR made available.


342 Journal of the House of Representatives, Sixty-Ninth Session of the Legislature, State of Minnesota: 1975, at 512-13, 105 (Mar. 10); Brandt’s tally of party votes. Brandt characterized the fact that 20 representatives had switched their votes (“fluidity of legislative sentiment”) as demonstrating why it was critical for voters to contact their legislators. Ed Brandt, “H.F. 79 Passes Houses,” ANSR 3(1):2 (Apr. 1975). For the bill text as the House passed it, see H.F. 79 (second engrossment) (copy furnished by MHS). Of the 54 House members who voted against H.F. 79 26 had also voted against Kahn’s motion to ban smoking in the House chamber.

343 Email from Ed Brandt to Marc Linder (Oct. 26, 2009).

344 “Tokin’ Bill,” St. Cloud Times, Mar. 18, 1975 (copy of clipping provided by ANSR). Press coverage of the floor debate was very skimpy. E.g., Steven Dornfeld, “At the Capitol,” MT, Mar. 11, 1975 (2B:1). The wholly inadequate press reporting on all the floor debates together with the aforementioned destruction of the audio tapes of all floor debates (and committee meetings) from their inception in 1973 through the 1980s makes robust legislative history for this period impossible. Even when news reporting on (unrelated) floor debates was less unsatisfactory, one former House member vividly recalled thinking when reading accounts of debates in which he had participated: “I must have been in the Wisconsin legislature.” Telephone interview with Bud Philbrook, St. Paul (Mar. 1, 2009).
The Tobacco Institute Propaganda Tour Comes to the Twin Cities

In April, as the focus of legislative action shifted to the Senate, the Minneapolis Tribune, without explaining the context or newsworthiness of devoting 10 column inches to an interview with an assistant to the president of the Tobacco Institute visiting Minneapolis (for no identified purpose), permitted Constance (Connie) Drath to regurgitate the cigarette oligopoly’s cliché that “laws restricting smoking in public places are ‘unnecessary’” because most smokers were courteous, denounce the “‘segregation’” of “forc[ing] smokers to sit in the rear of airliners,” and insist that smokers’ “‘civil rights’ should be respected.” In fact, the Tribune failed to inform its readers that it was allowing itself to be used as a small component of a large-scale propaganda campaign in which the cigarette manufacturers were engaged. Drath, whom the press dubbed the industry’s “‘Smokes Person,’” had been newly added to the “public relations staff” of the Tobacco Institute (as if the TI were anything but one gigantic PR operation) to travel around the United States to speak to live and broadcast audiences. Drath’s special mission coincided with state legislative sessions: she was, for example, in Texas, as the Dallas Morning News was at least open enough to admit in interviewing her, “crusading” against the public smoking bill then pending in the legislature. Just a few days before the Iowa Senate Human Resources Committee took up S.F. 106, Drath flew into Des Moines for a 15-minute appearance on television, a possible newspaper interview, and as a guest for an entire hour of call-ins on a radio show on the state’s most important

345 Lewis Cope, “Tobacco Industry Calls Most Smokers Courteous, Says They Also Have Rights,” MT, Apr. 9, 1975 (B4:2-5).

346 Decades later the reporter, who had covered medicine and science, vaguely recalled the interview and criticized himself for having failed to explain why the interviewee had been in Minnesota (he strongly surmised that she had had other interviews scheduled as well). He observed that in the context of the tobacco industry’s constantly urging him (and other reporters) to present its side of the story, he viewed this particular interview as “being easy enough.” Telephone interview with Lewis Cope, Minneapolis (Mar. 12, 2009).

347 “Call Her ‘Smokes Person.?‘” St. Antonio Light, Mar. 15, 1975, Bates No. TITX0032095.


350 See below ch. 25.
radio station. With H.F. 79 having passed the House and now in the Senate, it was Minnesota’s turn. (Stanton Glantz and colleagues incorrectly asserted that: “It was not until 1976, after the Act [MCIAA] was being implemented, that the Tobacco Institute began to respond. In response to the American Lung Association’s support and promotion of nonsmokers’ rights, the Tobacco Institute sent out Public Relations representatives across the country, spreading the message that the nonsmokers’ rights were ‘an infringement on smokers’ rights.’” This error is closely linked to their other mistaken claim that MCIAA’s “evolution and ultimate passage...occurred without interference from the tobacco industry” and that “the first indication of the tobacco industry’s involvement came in 1976....”) The TI and its bosses were immensely self-congratulatory about the impact of Drath’s “standard speech,” which she delivered to the likes of the Lions Club and which, 11 years after the surgeon general’s initial report, repeated the manufacturers’ mendacious allegation that “controversy” still surrounded smoking’s health impacts in addition to blasting government attempts to “regulate social conduct” and to “subject the tobacco consumer to a lifelong criminal record” for smoking in an “unthinking moment” in a prohibited place. Such drivel prompted Arthur Stevens, Lorillard’s otherwise dour general counsel and the chairman of the industry’s mighty Committee of Counsel, in May to praise the results Drath had already achieved as “totally unreal. We could not have ever hoped to have attracted such highly qualified spokespersons.” Stevens was referring to TI’s board of trustees meeting two days earlier at the posh Greenbrier in White Sulphur Springs, the minutes of which recorded: “The

351Connie Drath to Kloepfer and Ehringhaus (Feb. 28, 1975), Bates No. TIMN0261698 (memorandum laying out her schedule for “[m]y debut” for the TI in the Midwest).
352For a map of her appearances, see William Kloepfer at 44 (Sept. 24, 1975) (untitled), Bates No. TIMN0075481/7.
354William Kloepfer to Ave et al. (Mar. 14, 1975), Bates No. ZN22935.
355Text of Remarks by Connie Drath Assistant to the President of the Tobacco Institute Inc. Before the Lions Club of Tyler, Texas Monday, Mar 10, 1975, at 5-7, Bates No. ZN22936/40-42.
356Arthur Stevens to William Kloepfer (May 23, 1975), Bates No. 03766622 (referring also to another PR person).

2326
The Minnesota Clean Indoor Air Act of 1975

meeting was then shown film clips and heard tapes of various presentations by Ms. Drath and Mr. Dwyer. This was followed by short talks by the two spokespersons. The presentations were received with a spontaneous and prolonged round of applause.357 This vision of the masters of the cigarette killing machine wildly cheering what they knew to be nothing but their own elaborately scripted obfuscation designed to “get across the idea still that there is a—a—a cigarette controversy”358 and delivered by someone hired without scientific knowledge of tobacco or health matters who then “received a two-week orientation course” consisting of lectures by TI executives and a field trip to a cigarette factory359 and whose shtick was that she purported to be a nonsmoker who “likes the smell of cigarettes”360 demonstrated how desperate and clueless they were in the face of an anti-secondhand smoke movement that was proving to be their commodity’s undoing.361

The Restoration of Restaurant Coverage at the Senate Health, Welfare, and Corrections Committee Meeting on April 29: Double-Cross or Lobbyists’ Comedy of Errors?

The crucial step in Senate consideration of H.F. 79 took place on April 29 (an event overshadowed by the world-historical surrender of the South Vietnamese government and evacuation of the remaining U.S. presence) at the Health,
The Minnesota Clean Indoor Air Act of 1975

Welfare, and Corrections Committee meeting, of which, unfortunately, press coverage ranged from nonexistent to extremely meager and the minutes have not been preserved. The notable amendments that the committee adopted included: (1) striking from the exclusion of factories and warehouses not usually frequented by the general public the provision “unless the close proximity of workers or the inadequacy of ventilation causes smoke pollution,” thus making the exclusion absolute; (2) striking restaurants from the provision excepting only restaurants and bars from the ban on declaring a covered public place as a smoking area in its entirety; (3) re-establishing the responsibilities of proprietors or other persons in charge of public places by requiring them to “make reasonable efforts to prevent smoking in the public place by (a) posting appropriate signs; (b) arranging seating to provide a smoke-free area; (c) asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke; or (d) any other means which may be appropriate”; and (4) conferring discretion on the state board of health, “upon request, [to] waive the provisions of this act if it determines there are compelling reasons to do so and a waiver will not significantly affect the health and comfort of nonsmokers.”

362“Legislative Update,” Minneapolis Star, Apr. 29, 1975 (7C:1), stated merely that the committee had amended the bill to “prevent owners of restaurants from designating their entire establishments as smoking areas” and to “spell out a proprietor’s obligations to enforce the law” without shedding any light on positions taken or participation by lobbyists. The Minneapolis Tribune merely stated that the committee had approved the bill without mentioning any amendments. Jack Coffman, “Party-Designation Requirement Included in House Primary Bill,” MT, Apr. 30, 1975 (2B:1). The St. Paul Pioneer Press failed to allude to the bill at all. Of the extremely scanty coverage of the hearing Brandt archly observed: “[I]f [lobbyist] Chum Bohr slept on his job, could you really have expected more from our newspapers?” Email from Ed Brandt to Marc Linder (Mar. 2, 2009).

363The minutes were lacking at the only two institutions at which committee minutes are archived—the Minnesota Legislative Reference Library and the Minnesota Historical Society/State Archives. Email from Robbie LaFleur, director, Minnesota Legislative Reference Library, to Marc Linder (Feb. 27, 2009); telephone interview with former state Representative Steve Trimble, St. Paul (Apr. 18, 2009) (Trimble searched the box with the committee’s papers for 1975). Honeywell’s lobbyist, as noted above, reviewed the tapes of the Senate committee meeting (which the Minnesota Historical Society later destroyed), but took no notes because “[t]here was little discussion....” Patsy Randell to W. C. Viitala, Subject: Clean Indoor Air Act Rules and Regulations at 1 (n.d.), in Health Department, MSA, MHS, 112H.18.3(B).

364Journal of the Senate, State of Minnesota, Sixty-Ninth Legislature: 1975, at 1502-1503 (May 1). As odd as it seems, the use of “or” (between (3)(c) and (d)), which remained in the final enactment (§ 6), presumably signaled the legislature’s intent to limit
The committee meeting was remarkable both for what happened and did not happen. As noted earlier, in order to eliminate the opposition of restaurants and to improve the bill’s prospects of passage, Brandt, on behalf of ANSR, had agreed with Wencel (Chum) Bohr, the lobbyist for the Minnesota Restaurant Association, Minnesota Hotel and Motor Hotel Association, and Minnesota Resort Association (combined under the umbrella organization, Minnesota Hospitality Group, of which he was the chief staff executive from 1968 to 1978, when he stopped lobbying), that ANSR would remove coverage of restaurants from the 1975 version of the anti-smoking bill. Bohr later charged that ANSR had agreed to insure that the bill would not be amended to reestablish such coverage. These charges were presumably designed to explain why Bohr had made the fatal lobbying error of failing to appear at the Senate committee hearing on April 29, at which the Episcopal minister Robert North (DFL), not seeing any reason why restaurants should be excluded, moved to amend the bill to cover them. Some time earlier the committee had informally discussed the bill, the Health Department’s implementing rules to the imposition on owners of only one of the four specified means of making reasonable efforts to preventing smoking—despite the fact that the title of the section used the plural, “Responsibilities of Proprietors.” Asked whether he had interpreted the use of “or” that way and, further, whether in the absence of any seating an owner had no duty to provide a “smoke-free area,” the chief drafter of the implementing regulations, Kent Peterson replied: “I do not recall any discussion of narrow interpretation of those provisions. Considering your appropriate reading of those provisions and existence of controversy, I have no explanation of your questions. However, the law and rules had to be read together for enforcement and perhaps that’s why there needed to be amendments to the law before substantial enforcement could occur.”

365 State of Minnesota, State Ethics Commission, Registered Lobbyists 8 (Feb. 11, 1975). Bohr’s lobbyist registration cards stated that the issues on which he would be lobbying were taxes, signs, labor, and insurance, but did not mention smoking in public places as did some other lobbyists.

366 Statement of Chum Bohr (Sept. 15, 1978), Bates No. 500024298; telephone interview with Chum Bohr, St. Paul (Mar. 4, 2009); http://www.hospitalitymn.com/index.php?page=40 (the associations did not merge but formed a management company (Upper Midwest Hospitality)).

367 Telephone interview with Ed Brandt, St. Paul (Apr. 26, 2007); email from Ed Brandt to Marc Linder (Mar. 4, 2009). According to Brandt, who attended the meeting, North said something to the effect that he could see why bars were exempt, but why restaurants? Email from Ed Brandt to Marc Linder (Mar. 17, 2009). More than three decades later North had absolutely no recollection of his role at the hearing, though he did not deny that he had done what Brandt remembered. Telephone interview with Robert
because it regarded smoking as a big issue like abortion or the death penalty. Committee chair George Conzemius—a nonsmoker who had himself drafted an anti-smoking bill, but dropped it when Schaaf introduced S.F. 602—recalled (more than three decades later) that the committee, many of whose members were “idealists,” overwhelmingly supported North’s amendment and the bill, which he, nevertheless, did not think would pass the legislature.\textsuperscript{368} Schaaf, who agreed that the committee was “very liberal,” while also distinctly recalling North’s intervention, nevertheless offered a very different account, according to which North, rather than moving to amend, spontaneously questioned Schaaf as to why his bill did not cover restaurants and asked why the committee would not pass a “clean” bill. Schaaf, for his part, agreed that the bill was not perfect, but called it a tremendous first step. In his recollection, he offered author’s amendments that (must have) included restaurant coverage, though he admitted that if he had brought such amendments to the committee, North would have had no reason to raise the issue of restaurant coverage.\textsuperscript{369}

\textsuperscript{368}Telephone interview with George Conzemius, Cannon Falls, MN (Mar 1, 2009). Conzemius opined that no one took Kahn, who “comes up with some really flaky and weird stuff,” seriously either back then or in 2009 in her 37th year in the House. In contrast, anti-anti-smoking lobbyist Chum Bohr sought to explain the success of Kahn’s bill on the grounds that in the House she “could get away with murder.” Telephone interview with Wencel (Chum) Bohr, St. Paul (Mar. 4, 2009).

\textsuperscript{369}Telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009). Given the disappearance of the committee minutes, the destruction of the audio tapes, and the lack of any detailed press coverage, reconstruction of what happened at the hearing based on
The convoluted and internally inconsistent story that Bohr told to excuse his absence at the Senate committee hearing began in the summer between the 1974 and 1975 sessions, when he was invited to a meeting at which “they” (ANSR) were going to “go after smoking” to the extent that they had drafted 150 bills from which they would “take from the middle of the pile” one and introduce it and if it failed, keep introducing weaker and weaker ones until it passed.370 As implausible, bizarre, and directly contradicted by ANSR as this assertion may be, 371 Bohr insisted that “they” told him to “get behind the bill,” but he responded that he was unable to do so both because decisions about smoking in restaurants were driven by the market and because owners were in no position to act as policemen since they already had their hands full under the dram shop law.372 Although Bohr failed to explain why ANSR deleted restaurant coverage, the fact, as already noted, is that ANSR did. Perhaps his knowledge that H.F 79 as introduced on January 20, 1975, permitted restaurant owners to permit smoking everywhere was responsible for his having failed to state the very next day on his lobbyist registration cards that he would be lobbying on the issue of “smoking in public places,” as the two Radisson Hotel lobbyists stated when they registered on January 23.373

When asked many years later why he had failed to lobby against restaurant coverage in the Senate, Bohr replied that “we didn’t get much of a chance” because he had asked for, but did not get notice of, the Senate (Health and Welfare) Committee hearing on the bill. As to why the committee had not given him notice, he simply said: “I was declared the enemy.” Instead of trying to explain on what basis a committee chair owed a lobbyist a duty to inform him individually and personally of a committee meeting date when such information was publicly posted in the legislature and available to all and especially to

the 34-year-old memories of Brandt, Conzemius, and Schaf (who was “almost positive” that he had submitted author’s amendments) is the unsatisfactory alternative.

370 Telephone interview with Wencel (Chum) Bohr, St. Paul (Mar. 4, 2009).
371 Edward Brandt, while agreeing that Bohr had attended one ANSR meeting, stated that at most ANSR had drafted a total of two bills. Telephone interview with Edward Brandt, St. Paul (Mar. 4, 2009).
372 Telephone interview with Wencel (Chum) Bohr, St. Paul (Mar. 4, 2009).
373 State of Minnesota, State Ethics Commission, Registered Lobbyists 11, 91 (Feb. 11, 1975) (William Fern Brooks, Jr. and John Michael Tancabel). David Kuduk, who actually did lobby for Radisson on this issue before the House Health and Welfare Committee, was a registered lobbyist, but not for Radisson (though he was registered for Carlson’s Gold Bond Stamps) or on this issue. Id. at 47-48. Kuduk worked at the law firm of Chestnut & Brooks.
Bohr circuitously responded with a very long and incoherent story about a free medical study in which he had participated during the Nixon administration, the chief point of which appeared to be the advice not to smoke. (Bohr, who had smoked in the 1970s, remained as late as 2009 in a state of denial about smoking’s adverse health impacts.) In other words, the “enemy” was tobacco, with which the committee associated him. If the committee associated Bohr with the tobacco industry, it was not alone: at the time many in the anti-smoking movement perceived him as a “puppet” lobbying for it and tobacco lobbyists as very clearly working and speaking through him and the restaurant and hospitality industry in general. Ignorant of the fact that H.F. 79 would be discussed on April 29, Bohr instead attended a hearing on unemployment insurance elsewhere in the capitol; as he left that hearing, someone asked him why he had not attended the other committee hearing, thus giving him a first inkling that H.F. 79 had been discussed.

This much of reality may have been reflected in Bohr’s account: that the committee chairman, George Conzemius, himself had not known that H.F. 79 would be on the committee’s agenda on April 29 because its chief sponsor, Senator David Schaaf, had failed to bring H.F. 79, which had passed the House more than seven weeks earlier, to the committee. Indeed, Conzemius had advised Schaaf that the legislature would soon adjourn and that if he failed to present the bill to the committee by April 29, he would have to wait until the 1976 session for action on it. In the event, five minutes before the meeting was to end, Schaaf appeared and the meeting ran 10 to 15 minutes late in order to deal with the

374 Telephone interview with George Conzemius, Cannon Falls, MN (Mar. 4, 2009).
375 For example, a week after the Board of Health hearing on MCIAA rules an ANSR activist who had spoken at the hearing wrote a lengthy follow-up letter to the hearing officer stating that: “I hope the panel will recognize that our opposition came from people who were paid lobbyists. No doubt with connections to the mighty, devious Tobacco Inst, ever present, not always visible.” Faye Mowers Topliff to Kent [Peterson] (Dec. 9, 1975), Health Dept., MSA, MHS, 112.H.18.3(B). Decades later Topliff and another former ANSR activist from Duluth independently offered this perspective. Telephone interview with Faye Topliff, Duluth (May 9, 2009) (quote); telephone interview with Betty Christensen, Duluth (May 11, 2009).
376 Telephone interview with George Conzemius, Cannon Falls, MN (Mar. 4, 2009). Both Brandt and Schaaf opined that the unemployment hearing would have been more important for Bohr’s client, Brandt going to the extent of claiming that even if Bohr had known about the scheduling conflict between both hearings, he would still not have attended the MCIAA hearing. Telephone interview with Ed Brandt, St. Paul (Mar. 2009); telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009).
The Minnesota Clean Indoor Air Act of 1975

To be sure, the accuracy of Conzemius’s memory (not to mention Bohr’s probity) is strongly called into question by the fact that the daily column in the St. Paul Pioneer Press publishing the agendas of that day’s legislative committee meetings stated that “smoking in public places” was one of seven bills with which the Senate Health, Welfare and Corrections Committee was scheduled to deal at 8 a.m. Conzemius was not certain as to why Schaaf had not presented the bill earlier, but Schaaf had told him that he had been trying to mobilize support for it among his colleagues. Alternatively, committee member Robert North later noted that Schaaf had not enjoyed a reputation for being the chamber’s “hardest working member.” Schaaf himself, while unable to offer a reason for the lateness, did note that MCIAA had not been “at the top of my agenda”; on the contrary, it was about his sixteenth priority among 17 bills. For this very reason, perhaps, during April Kahn had been suggesting to Minnesotans who had written to her in support of her bill that they urge Schaaf and Conzemius finally to schedule a hearing on S. F. 602.

The day after the hearing Brandt “got a call from Chum Bohr...asking what I had done to him, to which I honestly replied, ‘Nothing.’” North acted on his own. There was no testimony before the committee and no one approached him, or any other committee member, in any way whatsoever.” Bohr nevertheless remained “bitter about the way the measure was enacted. ‘At first we were told

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377 Telephone interview with George Conzemius, Cannon Falls, MN (Mar. 1 and 4, 2009).
378 “Legislature Today,” SPPP, Apr. 29, 1975 (14:3). Possibly this agenda did not become known until relatively late since the previous day’s corresponding column in the Minneapolis Tribune stated that the committee’s agenda was not available. “At the Capitol,” MT, Apr. 28, 1975 (2B:1).
379 Telephone interview with George Conzemius, Cannon Falls, MN (Mar. 1, 2009); telephone interview with Robert North, Galena, IL (Mar. 2, 2009). Brandt also observed that Schaaf was not as effective a legislator as Kahn. Telephone interview with Edward Brandt, St. Paul (Apr. 26, 2007).
380 Telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009).
381 Phyllis Kahn to Louise Udden (Apr. 3, 1975), and Phyllis Kahn to David Carr (Apr. 16, 1975), in Legislation, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).
382 Email from Ed Brandt to Marc Linder (Mar. 5, 2009). According to Kahn, the (unnamed) restaurant lobbyist also went back to her and “complained, ‘You promised me you weren’t going to have restaurants in there.... You have to go to the conference committee and take them out.’” Phyllis explained that she had removed restaurants from the House version of the bill but she had not said anything about the Senate version. It was the lobbyist’s job, not hers, to lobby the Senate.” Billie Young and Nancy Ankeny, Minnesota Women in Politics: Stories of the Journey 49 (2000).
that restrictions on smoking would not apply to restaurants.... But at the last minute they slipped restaurants in. This caught us unawares.” However, Kahn “denied there was any trickery involved. ‘The restaurant people are just trying to cover up their own sloppy lobbying.... The House did vote to exempt restaurants, but the Senate put restaurants back in. The restaurant people should have been watching the bill all the way; they didn’t follow through.’” And an unusually thorough piece in the St. Louis Post-Dispatch agreed that the 800-member Minnesota Restaurant Association was simply “not effective in lobbying against” the MCIAA.383 For his part, Bohr, instead of fessing up to his incompetence, sought self-exculpation in the story, published in the Tobacco Institute’s own house organ, that ANSR was “a one-issue lobby ‘which tied itself to motherhood and apple pie’ in an election year when the legislature was especially sensitive.”384

In seeking to draw lessons from the course of ANSR’s efforts to secure MCIAA’s passage, Brandt later classified this incorporation of restaurant coverage as a result of a lobbyist’s absence as an example of the “influence of accidental factors.”385 But even Brandt was unaware of the fact that Bohr’s

383 Harry Wilensky, “Effort to Ban Smoking Results in Murky Law,” St. Louis Post-Dispatch, Nov. 16, 1975 (cont. at 20A), Bates No. TIMN0240663/4. The restaurant lobby, as a nearly contemporaneous University of Minnesota graduate school paper put it, “was so confident of their success that they left their lobbying posts.” Susan Goodwin Gerberich, “Prevention Through Legislation: University of Minnesota-ANSR Project” at 5 (PH-5-502, Spring 1976) (copy furnished by ANSR).

384 “Stringent No-Smoking Law Failing,” TO 1(2):1, 9 (Nov. 1976), Bates No. 01418984/92. In a statement that he filed (but did not deliver orally) during the Health Department’s public hearing on its proposed regulations in 1975, Bohr, in an incompetent attempt to prove that “the circumstances of how the bill became law only assumes [sic] legislative intent based on one sided testimony,” asserted that, because restaurants (and other businesses) had been exempted from H.F. 79 as introduced, “our industry and many other industries informed the author in the House that we wouldn’t oppose the bill in testimony. When the bill passed the House and went to the Senate, assuming the bill would stand as is, we put our efforts to other bills of importance to our industry. Then lo and behold, we learned the exemptions were pulled. Unfortunately, it was too late to get a hearing. The bill passed the Senate and passed the House without a conference committee discussion during the last hectic day of the legislative session thus preventing intelligent discussion that could have resulted in a law we could live with to better serve all of our customers.” [Chum Bohr, untitled], Exhibit 23 [Public Hearing Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975 (Dec. 2, 1975)], in Health Department, MSA, MHS, 112.H.18.3(B).

385 [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 2 (Nov. 6, 1993)
accidental absence was inextricably linked to the accidental silence of another anti-MCIAA lobbyist who was in fact present.

The mystery of the failure of any anti-smoking-regulation lobbyist to speak up at the April 29 meeting is deepened by the fact that the prominent lobbyist who was present had stated on his lobbyist registration card that he would be lobbying on the issue of smoking in public places on behalf of the Radisson Hotel Corp. Associated for years with the DFL power structure, William Brooks, Jr., of the law firm Chestnut, Brooks, & Burkhard, prominent and high-powered lobbyists, represented many other large corporate entities and business associations, including Carlson’s Gold Bond Stamp Co. Brooks appeared at the April 29 hearing pursuant to instructions from Curt Carlson, who, however, had also directed him not to speak unless and until a representative of the hospitality industry also showed up and spoke. (Brooks’s presence at the hearing may have been fortuitous in the sense that he was there to oppose another Schaaf-sponsored bill banning public pay toilets.) Carlson arranged for such a person to appear, but Bohr did not show up, thus leaving Brooks mute. Brooks never found out why Bohr had not shown up, but suspected that his absence was intentional and a result of some “deal” that Brooks was never able to unravel. Brooks also claimed that he had spoken privately to committee members, counted votes, and had therefore known that if Bohr (and Brooks) had spoken up, the committee would have killed the bill. This last claim flatly contradicts

(Notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt).

390Telephone interview with William Brooks, Jr., Minneapolis (May 12, 2007).
391Telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009).
392Telephone interview with William Brooks, Jr., Minneapolis (May 12, 2007). To be sure, Brooks’s judgment and/or memory was called into question by his claim that no lobbying had taken place in the House because Kahn had that chamber under control, whereas in fact Brooks’s own associate, the aforementioned David Kuduk, testified twice before House committees. Confronted later with the information about Kuduk’s House testimony, Brooks merely observed that his instruction had pertained only to the Senate.

2335
chairman Conzemius’s characterization of the committee and its vote as well as the statement by Brandt, an eyewitness, that the vote was overwhelmingly or unanimously in favor of H.F. 79,393 although Schaaf, who had not been a committee member, later commented that Brooks’s claim about the head count might have been accurate.394 The fact, however, that four of the committee’s 16 members then voted against the bill (while one did not vote) on the Senate floor two weeks later395 suggests the possibility that Bohr or someone else had lobbied them in the interim.

Carlson never explained to Brooks why he did not want Radisson to go out on a limb in testifying before the Senate committee, though Brooks observed that without any doubt hotels had been opposed to the bill. He also purported not to know whether tobacco companies had ever approached Carlson about opposing the bill, but he also volunteered the opinion that if they had, Carlson would have told them to go “jump in the lake.”396 In light of the aforementioned documents...

393Email from Ed Brandt to Marc Linder (Mar. 5, 2009). Brandt also speculated that it was not clear that Bohr would have been able to thwart adoption of the amendment had he been there. On the other hand, he also opined that if MCIAA had been enacted without restaurant coverage: “In view of the fact that I was in Harrisburg from mid-1976 to mid-1978, it is unlikely that we could have passed a bill including restaurants within a few years. At the minimum, it would have taken until Jeanne Weigum had several years as executive director [of ANSR] behind her before this would have had a reasonable chance of happening. By that time, partisanship had increased greatly, which certainly would have complicated things.” Email from Ed Brandt to Marc Linder (Mar. 16, 2009).

394Telephone interview with David Schaaf, McGregor, MN (May 12, 2007).

395Journal of the Senate, State of Minnesota, Sixty-Ninth Legislature: 1975, at 2281 (May 14). The four Nays were cast by Robert Lewis (DFL), George Perpich (DFL), Earl Renneke (R), and Sam Solon (DFL). Committee membership was taken from http://www.leg.state.mn.us/legdb/committeeresults.asp#search. Perpich, a smoking dentist, conjectured many years later that he must have voted against the bill as a favor to (nonsmoking) Solon, whose restaurant-owning constituents must have been bugging him. Telephone interview with George Perpich, St. Paul (Mar. 7, 2009). Lewis, the Senate’s first black member, smoked and died of a heart attack at 47. http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10374; email from John Milton to Marc Linder (Mar. 6, 2009). Renneke, according to Perpich, did not smoke.

396Telephone interviews with William Brooks, Jr., Minneapolis (May 14 and 25,
revealing Radisson’s supine attitude toward cigarette manufacturers, Brooks’s view of his customer’s independence should be judged skeptically.

The factually false contention that restaurant coverage had been “tacked on to the bill at what one official of the Minnesota Restaurant Association called ‘the twelfth hour’” notwithstanding—more than two weeks remained before the full Senate voted on the bill and the House on repassage—Bohr was later unable to explain why he had failed to lobby against the bill during that interim. Presumably Bohr was that unidentified official.

Instead, he assailed the tobacco industry for having “sat on its hands,” especially since he had “called the tobacco companies and warned them well in advance” of the bill. Purporting not to know why they had failed to lobby, he could only conjecture that perhaps their strategy had been that if they just kept quiet, the anti-smokers would leave them alone.

Overall, then, under the Senate Health committee amendments, whereas the factory/warehouse provision weakened the law, those dealing with restaurants and owners’ duties strengthened it; the health board’s power to issue waivers was manifestly designed to create administrative flexibility so long as the effect on nonsmokers was significant—to the extent that prohibiting smoking in (but not the wafting of smoke into) certain areas significantly improved their health and comfort in the first place. Two days later the Senate adopted the committee report.

**The Full Senate Upholds Inclusion of Restaurants and the House Concurs**

When the full Senate took up H.F. 79 on May 14, it adopted the motion by
Senator Robert Brown, a professor of education at the College of St. Thomas and chairman of the Minnesota Republican Party, to amend the committee amendment by reinserting the aforementioned factory/warehouse language, but now the provision would be administratively regulated: “except that the department of labor and industry shall, in consultation with the state board of health, establish rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.”

Brown grounded the need for this amendment, which the committee had been unable to work out, in the inappropriateness of having the Board of Health “interfere” and two agencies in a workplace in which the public normally was not involved. Schaaf accepted the amendment, which he believed had been worked out with Brandt of ANSR and MACI.

After several senators had spoken against the bill, Al Kowalczyk, a very conservative Republican senator who had otherwise never spoken on the floor, made an impassioned plea for the bill because his asthmatic son reacted violently to smoke and was forced to leave restaurants. North, the Episcopalian minister
who had seized the opportunity in committee to propose the insertion of restaurant coverage and who even at this late moment was not certain that the bill would pass, experienced Kowalczyk’s intervention as one of the rare occasions when a floor speech actually changed votes.\textsuperscript{403}

On its third and final reading, the bill passed by a vote of 36 to 28\textsuperscript{404} (two more Yes votes than the constitutionally required majority of all 67 elected senators).\textsuperscript{405} Not only was the result much closer than in the House—prompting Brandt to speculate that the closeness might have been a function of Bohr’s having lobbied the full Senate after all\textsuperscript{406}—but the DFL approval vote itself at 57 percent was both much more closely divided and almost identical to the Republicans’ 55-percent Yea-rate: whereas Democrats supported the bill by a vote of 20 to 15, Republicans approved 16 to 13.\textsuperscript{407} The closely divided DFL vote

\textsuperscript{403}Telephone interview with Robert North, Galena, IL (Mar. 2, 2009). Senator Jerald Anderson also recalled Kowalczyk’s speech. Telephone interview with Jerald Anderson, Sun City West, AZ (Mar. 23, 2009). Senator Jack Davies, who was also an academic specialist on the legislative process, observed that “personal appeals” had often been very effective in the Senate. Telephone interview with John Davies, Minneapolis (Mar. 23, 2009). Senator John Milton, who was chair of the Health subcommittee of the Senate Health Welfare Committee of which Kowalczyk was a member, found it “amusing” that Kowalczyk had given such a speech because: “In my dealings with self-styled conservative politicians, they’re against everything except where they have a personal interest.” Email from John Milton to Marc Linder (Mar. 11, 2009). The account of the proceedings is based on senators’ personal recollections 34 years later because, astonishingly, the press virtually ignored the bill’s passage. For example, none of the five articles on the legislature that the Minneapolis Tribune ran on May 15 even mentioned the bill, whereas the minuscule filler in the Pioneer Press presented no information on the debate. “Senate Advances Smoking-Area Bill,” \textit{SPPP}, May 15, 1975 (25:6). In this sense Brandt’s judgment is puzzling that: “The media have given good coverage to the bill. From inception to enactment to implementation, the media have kept a watchful eye on the law and have done an adequate job in informing Minnesotans about the law’s provisions.” Ed Brandt and Mary Jo Matczynski, “This Is Clean Indoor Air Country,” American Lung Association Bulletin, Jan.-Feb. 1976, at 11-13 at 13.


\textsuperscript{406}Email from Ed Brandt to Marc Linder (Mar. 5, 2009). To be sure, early lobbying is more effective before momentum has built up: “Fewer members are involved in decisions at the start of the process so the task of persuading decision makers is less difficult.” Jack Davies, \textit{Legislative Law and Process in a Nutshell} 23 (1975).

\textsuperscript{407}\textit{Journal of the Senate, State of Minnesota, Sixty-Ninth Legislature: 1975}, at 2281
demonstrated that it was not a so-called caucus vote because Majority Leader Coleman was able, as Brandt noted, to “win or defeat any bill, if he was determined to do so.” In fact, Coleman, as his biographer and former state Senator John Milton put it, “preferred not to make votes on controversial issues ‘caucus votes’—abortion, gun control, ban-the-can, ban on smoking, gay rights, et. al., for two reasons: he didn’t like some of them, but more importantly he knew that his DFL caucus was more conservative than us ‘dreamers’ wanted to accept, and that there were on some issues more votes to be harvested from the Republicans.” More plausibly, the narrower Senate vote may simply have stemmed from the new coverage of restaurants, which made the bill much more intrusive and irritated many restaurant owners who may have possessed some local political power that they could bring to bear against incumbents. Impressive was the fact that whereas Brandt was unable to perceive any commonality among the 15 DFLers who had voted against the bill in terms of ideology, occupation, or the make-up of their districts, 11 of the 15, according to a reconstruction by two of their DFL senatorial colleagues, smoked. Among the few nonsmoking DFLers who, surprisingly, voted against H.F. 79 principle was not the motivating force. For example, Jerald Anderson, a dentist whom Milton recalled as “very public health conscious,” voted No because “my wife smoked a pack a day at the time. It was as simple as that.” The Nay cast by Jack Davies, a liberal and law professor, surprised not only Brandt more than any

(May 14); http://www.leg.state.mn.us/legdb/ (party affiliation). According to Brandt’s contemporaneous roll-call analysis, the majority in favor of the bill among Twin Cities metropolitan area senators was as striking as the majority against it in the rest of the state. Email from Ed Brandt to Marc Linder (Nov. 1 and 5, 2009).

408Email from Ed Brandt to Marc Linder (Mar. 2, 2009).

409Email from John Milton to Marc Linder (Mar. 10, 2009). In contrast: “Those that were virtually automatic (follow the leader/trust the leader) were: conference committee reports on all major spending bills, election-related issues, and, of course, a motion by the Majority Leader to adjourn. You followed Nick on these or you paid the price!”

410Telephone interview with Rolf Nelson (a Republican Senator in 1975 who was a member of the Health and Welfare Committee), Minneapolis (Mar. 14, 2009).

411Email from Ed Brandt to Marc Linder (Mar. 23, 2009).

412Email from John Milton to Marc Linder (Mar. 23, 2009); telephone interview with John Davies, Minneapolis (Mar. 23, 2009). The smoking senators were Borden, Chenoweth, Kleinbaum, Laufenburger, Lewis, H. Olson, G. Perpich, Purfeerst, Schrom, Solon, Stokowski; the non-smokers were Anderson, Davies, A. Olson, and Willet.

413Email from John Milton to Marc Linder (Mar. 23, 2009).

414Telephone interview with Jerald Anderson, Sun City West, AZ (Mar. 23, 2009).
of the others,415 but Davies himself, who 34 years later, after having served as a judge on the Minnesota Court of Appeals for a decade, good-naturedly and self-deprecatingly confessed: “I’d chalk it up to dumbness.”416 The best that the lifelong nonsmoker, who in 1975 had published a book on the legislative process,417 was able to “make up” was “my disbelief that it was going to work”—of which he was then very quickly disabused.418

The difference in voting patterns between the two houses may, in the view of Burnham (Bud) Philbrook, one of the House sponsors of H.F. 79, have been a function of the fact that because the entire House had stood for election in 1974 in the immediate aftermath of the Watergate scandal, the DFL not only secured a huge majority, but its expanded caucus was replete with more liberal/progressive members, a phenomenon lacking in the Senate, none of whose members had stood for election in 1974.419 In contrast, Senator Conzemius, the chair of the Health and Welfare Committee, conjectured that the reduced majority for the bill in the Senate may have been accounted for by the fact that once the bill had passed both the House and his committee, those opposed to smoking regulation intensified their lobbying efforts in the full Senate.420

After Senate passage Bohr reminded Kahn that she “had agreed to not put restaurants in. But I told him I had never agreed to take it out once the Senate put it in.”421 Bohr insisted that her agreement with the restaurant association meant that, even if Kahn had nothing to do with the Senate’s action, she was still obligated to see to it that the bill went to a conference committee and to oppose restaurant coverage on behalf of the House, but she refused.422 Just as North’s committee amendment to cover restaurants had, according to Brandt, been “totally spontaneous,” on the bill’s return to the House two days later (May 16), “Kahn was only too glad to move that the House adopt the Senate bill, instead of sending it to a conference committee. But I had nothing to do with that either. I know only because Kahn told me so.”423 (With only three days left in the

415Email from Ed Brandt to Marc Linder (Mar 22, 2009).
416Telephone interview with Jack Davies, Minneapolis (Mar. 23, 2009).
418Telephone interview with Jack Davies, Minneapolis (Mar. 23, 2009).
419Telephone interview with Bud Philbrook, St. Paul (Mar. 1, 2009). The entire legislature stood for election in 1972, but four-year senatorial terms (in contrast to the two-year House terms) meant that senators did not campaign in 1974.
420Telephone interview with George Conzemius, Cannon Falls, MN (Mar. 1, 2009).
421Email from Phyllis Kahn to Marc Linder (Mar. 23, 2009).
422Email from Phyllis Kahn to Marc Linder (Apr. 21, 2009).
423Email from Ed Brandt to Marc Linder (Mar. 5, 2009).
session, sending it to conference would presumably have killed it for 1975; opponents’ failure to make such a motion was presumably a function of their knowing that they lacked the requisite votes.) Sounding a triumphant note at the ANSR annual meeting 10 years after the MCIAA’s passage, Kahn observed of her own tactic in 1975: “To appease the Restaurant Association, I agreed to take the restaurants out of the bill, and it initially passed the House in that form. However, they forgot that bills go through the Senate too and that body added protection in restaurants back and I simply accepted the Senate version for final passage.”424 Kahn’s motion that the chamber concur in the Senate amendments and repass H.F. 79 prevailed. By a vote of 96 to 31 the House then repassed the bill. The inter-party differential intensified, with 80 percent of the DFL voting Yea compared to only 61 percent of Republicans.425

Was the Tobacco Industry Really Asleep?

“It’s offensive to me to say it,” Rep. Phyllis Kahn, its author, told the Los Angeles Times, “but nobody took us seriously. The tobacco lobby knew about it but didn’t consider it a serious threat since it didn’t actually prohibit smoking.... Nobody’s been able to do it since, and the reason is because of our success.” ...

“Basically I think the law is effective...[b]ut when people choose to ignore it, there is no question they ignore it with impunity.”426

Despite the striking firsthand evidence presented earlier of the presence and involvement of tobacco lobbyists in the legislative process, the dominant narrative in the literature on the MCIAA, which lacks any evidentiary basis, denies any cigarette industry participation. Ashes to Ashes, Richard Kluger’s influential panorama of cigarette manufacturers’ conspiracy to conceal the truth about the lethal consequences of smoking, forged the mould for this story by


425Journal of the House of Representatives, Sixty-Ninth Session of the Legislature, State of Minnesota: 1975, at 2878 (May 16); Brandt’s tally of party votes. The press’s lack of understanding of the bill was reflected in the claim that the Senate’s addition of restaurant coverage and removal of the penalty of $300 and 90 days’ imprisonment were “relatively minor changes.” “Capitol Approach,” SPPP, May 17, 1975 (8:2).

claiming that after the enactment of the Minnesota law, “[b]elatedly, the tobacco industry awoke to this new threat at the state level. Its lobbyists flocked to state capitals and argued that smoking restrictions were unfair, unjustified by scientific findings, and unenforceable.... Throughout the 1970s, though, the antismoking effort was hardly a groundswell as the industry installed an effective political apparatus at the state level. While Utah, Nebraska, and Montana passed clean-air laws in the wake of the Minnesota statute, theirs were less comprehensive....”

Citing Kluger, Stanton Glantz and Edith Balbach, two leading anti-smoking advocates, wrote that the “Minnesota law was the last time that clean indoor air legislation would pass without vigorous opposition from the tobacco industry.”

(Ironically, Glantz may have merely been citing himself: although Kluger, as was the case with the vast majority of his factual claims, failed to provide a source for this statement, he had interviewed Glantz, who told him that the Minnesota Clean Indoor Air Act had been enacted in 1975 “‘largely because nobody was paying att.,’ it came out of nowhere & caught industry by surprise....”) In a monograph devoted to tobacco politics in Minnesota Glantz repeated this by then received wisdom, insisting, based on sources that had absolutely nothing to do with the assertion, that the law “was enacted without any overt opposition from the tobacco industry..., something that would never happen again. The tobacco industry was caught off-guard.... Minnesota’s experience in passing a Clean Indoor Air Act was the last time that the tobacco industry did not play a major role to defeat such activities. In the early to mid 1970s, the tobacco industry did not interfere with tobacco control efforts in Minnesota.”

429 Stanton A. Glantz [interviewed by Richard Kluger] (July 18, 1989), Bates No. 83724526.
430 Theodore Tsoukalas, Jennifer Ibrahim, and Stanton Glantz, “Shifting Tides: Minnesota Tobacco Politics” at 1, 6 (2003), on http://repositories.cdlib.org/ctcre/tcpmus/MN2003. In support of the assertion that MCIAA “was enacted without any overt opposition from the tobacco industry” the authors cited “Association for Nonsmokers Rights. Minnesota Clean Indoor [Air] Act Becomes Law. The ANSR. 1975;3(2) [June 1975]” and “Association for Nonsmokers Rights [Ed Brandt]. Kahn-Schaaf Bill Protects Right to Smoke-Free Air. The ANSR. 1975;2(6) [Feb. 1975].” Theodore Tsoukalas, Jennifer Ibrahim, and Stanton Glantz, “Shifting Tides: Minnesota Tobacco Politics” at 1, 4 (2003), on http://repositories.cdlib.org/ctcre/tcpmus/MN2003. Neither the first reference (which was not an article but a headline encompassing more or less the entire issue of the newsletter) nor the second (which was published right after the bill had been introduced and before a subcommittee had even dealt with it) mentioned anything about tobacco
Scholars were hardly alone in denying cigarette companies’ agency. The American Lung Association in Minneapolis was distorting history when its public information director, Maggie Vertin, later claimed that “in 1975, the tobacco industry was ‘not yet on to the wave of non-smoking sentiment sweeping the country.’” So Ms. Kahn’s bill ‘really did slip through.’” Indeed, in 1980 the Tobacco Institute itself demonstrably disseminated disinformation by claiming that it had been “caught off guard” by the passage of the MCIAA in 1975, which “was long before we knew of this [i.e., nonsmokers’ rights laws] as an issue. We were kind of absent from that fight.” In point of fact, the Tobacco Institute and its member companies were, as already recounted in detail, deeply immersed, if not submerged and drowning, in those waves all over the United States.

Kahn herself—who had not been surprised and did not at the time think about what she perceived as an absence of tobacco lobbying—took a different tack, acknowledging that “[t]he tobacco lobby knew about it but didn’t consider it a serious threat since it didn’t actually prohibit smoking.”

industry opposition. Globally undifferentiated and without substantiation was also the assertion by Allan Brandt, The Cigarette Century 289 (2007): “With the tobacco industry’s lobbying focused in Washington, these early bills came in under its radar.” Ironically, if the tobacco industry did display lobbying incompetence in Minnesota in 1975, it was not the last time. In 1979-80, when the Health Department proposed important amendments to the MCIAA regulations, the Tobacco Institute’s lobbyists, though aware of the administrative proceedings, “did not fully understand that their assignment from us extended to regulatory proceedings as well as legislative actions.” Expressing chagrin at not having been “fully on top of any matter affecting our interest,” the senior vice president for state activities promised R. J. Reynolds’ manager for state public affairs that that “situation has been rectified and will not recur.” John Kelly to Larry Bewley (May 23, 1980), Bates No. 500024344.

Mislled by such claims, the reporter chimed in that MCIAA “moved through the Minnesota Legislature practically unnoticed.”

In a pregnant
formulation that would be repeated many times over the years, Kahn mentioned during a discussion of the law’s legislative history at ANSR’s annual meeting on February 2, 1976, a “fact she believe[d] actually helped gain passage of the Bill: ‘they laughed the Bill all the way to the Governor’s office—then they sat up and read it.’” To be sure, this view was not compelling since MCIAA did not differ from the scores of other bills and ordinances opposed by the industry opposed at the time that also failed to prohibit (rather than) restrict smoking.

Such claims, unsupported as they are by contemporaneous sources, need to be tested empirically. In light of the considerable resources that the cigarette companies devoted to combating (and defeating) anti-smoking bills in Arizona (and elsewhere) in 1973, 1974, and 1975, their alleged failure to lobby in Minnesota in 1975 would have been anomalous, especially since the Tobacco Institute was closely monitoring the course of the bill in Minnesota, noting when it was introduced and when it passed the House, and that Americans for Non-Smokers Rights, headquartered in Minneapolis, was “pushing for ‘the Minnesota Clean Indoor Air Act.’” Moreover, according to Charles Wasker, a long-time tobacco lobbyist in Iowa, a competent lobbyist did represent the tobacco industry in the Minnesota legislature in 1975.

More importantly, a number of participants with firsthand knowledge independently and more than 30 years after the events had taken place stated that one particular tobacco lobbyist had lobbied against the bill. Victor Jude both owned a wholesale tobacco distributorship (Jude Candy and Tobacco Co.) and was a director of the Minnesota Candy & Tobacco Distributors Association. In addition, he was a DFL member of the Minnesota House from 1957 to 1966.

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436 “Annual Meeting—Many Attend, Learn ANSR Ready to Go the Second Mile,” ANSR 4(1):1 (Apr. 1976). See also Phyllis Kahn, “The Minnesota Clean Indoor Air Act: Legislation Enacted with Volunteer Group Support,” in Proceedings of the Fifth World Conference on Smoking and Health 2:309-11 at 310 (William Forbes et al. eds 1983): “I...believe that the bill passed in part because it was not taken very seriously by its opponents. They thought it was such a ridiculous thing to do that they kept laughing at it all the way to the Governor’s office.”

437 See above ch. 23.

438 TIN, No. 91, Feb. 4, 1974, at 4, Bates No. 950307982; TIN, No. 120, Apr. 8, 1975, at 1, 3 (quote), Bates No. 950307736.

439 Telephone interview with Charles Wasker, Des Moines (Mar. 30, 2007).

440 E.g., Joseph Robbie to MCTDA Members (Oct. 24, 1974), Bates No., TIMN461875 (letterhead).
and of the Senate from 1967 to 1972, after which he became a lobbyist. Although his lobbyist registration for 1975 listed the Minnesota Railroads Association as the only entity for which he would be lobbying, Ted Suss, a cosponsor of H.F. 79, remembered 34 years later that Jude had been “active lobbying against the bill”; possibly Jude was “freelancing on that issue” when “he was making points about its negative effect,” prompting Suss at the time to think about Jude’s own business’s being harmed by the measure. Even Brandt, who steadfastly denied that the Tobacco Institute ever lobbied during the bill’s pendency, admitted that Jude was “[t]he local representative of the tobacco industry at the time.” Radisson’s anti-MCIAA lobbyist, William Brooks, stated with certitude that Jude had been lobbying against the public smoking bill in 1975. Similarly, Senate Health and Welfare Committee chairman Conzemius observed that because Jude worked behind the scenes, he did not have personal knowledge of Jude’s lobbying, but he was sure that Jude opposed and lobbied against the bill. House Minority Leader Savelkoul remarked that he

441 http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=12423
442 State of Minnesota, State Ethics Commission, Registered Lobbyists 43 (Feb. 11, 1975). His son Thaddeus Jude, who entered the legislature in 1973, was alone in his insistence that his father had lobbied only for railroads in 1975. He stated that Joseph Robbie, the executive director of the MCTDA, had been a tobacco lobbyist in the 1960s, and that James Erickson was a tobacco lobbyist from 1975 on, but that he was unable to recall who the lobbyist was from 1970 to 1975. Telephone interview with Thaddeus Jude, Minneapolis (Apr. 26, 2007).
443 Email from Ted Suss to Marc Linder (Mar. 2, 2009).
444 Email from Ed Brandt to Marc Linder (Feb. 18, 2009). Several years after the MCIAA’s passage Brandt asserted that “the lobbyist for Minnesota tobacco dealers did not testify on the Minnesota bill as it went through the legislative process, since the people whom he represented had concluded that it would not affect them. They were right.” Comments by Edward R. Brandt (Co-Founder and Former President of the Association for Non-Smokers Rights) on the Effectiveness and Effects of the Minnesota Clean Indoor Air Act and Related Issues (elaborating upon testimony before the Wisconsin Assembly Committee on State Affairs, March 20, 1979, on Assembly Bill 80 [to be entered as testimony for American Lung Association of Mid-Maryland], Bates No. TI03870504/09. In fact, they were wrong and so was Brandt. Later, when asked whether Jude had actually made such a statement to him, Brandt was unable to recall and then shifted to a different argument: “He [Jude] may well have decided that a ban on indoor smoking would not hurt his sales. Inasmuch as non-compliance remained a serious issue for many years, he probably was right.” Email from Ed Brandt to Marc Linder (Mar. 11, 2009).
445 Telephone interview with William Brooks, Jr., Minneapolis (May 12, 2007).
446 Telephone interview with George Conzemius, Cannon Falls (Mar. 1, 2009).
The Minnesota Clean Indoor Air Act of 1975

would be surprised if Jude had not lobbied against the bill “behind the scenes.” 447—a description that virtually all informants offered as his modus operandi. 448 Schaaf, the bill’s chief sponsor in the Senate, later observed that he had been surprised at the time that he had seen no tobacco lobbyists; he conjectured that wholesalers had not lobbied because they did not believe that the law would depress cigarette sales. 449 At the same time, he assumed that the tobacco industry believed that the bill could be handled by the restaurant lobbyists. 450

The most undeniable evidence of lobbying by the tobacco industry stemmed from its one registered lobbyist in Minnesota in 1975, James Erickson. A multi-client lawyer-lobbyist who had been graduated from law school in 1972 451 and was just beginning his lobbying career in 1974-75, 452 Erickson was registered as lobbyist for the Northwest Tobacco & Candy Distributors (the rival to Robbie’s organization), but, unlike Radisson’s lobbyists, did not specifically mention smoking in public places as one of his issues; instead he merely referred to “[i]tems of general interest to the tobacco and candy distributors.” 453 Asked in 2009 about his lobbying on the MCIAA in 1975, Erickson immediately insisted that the cigarette manufacturers were “the lead dogs,” whereas the distributors organization took a “back seat” and merely followed the “signals called” by the national tobacco companies. 454

447 Telephone interview with Henry Savelkoul, Sun City West (Mar. 2, 2009).
448 For example, former Senator Jerome Hughes (1967-92), one of the MCIAA sponsors in 1975, characterized Jude in particular as a “low-key” lobbyist and added that tobacco lobbyists had been around but in the background in 1975. DFL Senator Steve Keefe (1973-80) recalled Jude as a tobacco lobbyist, but emphasized that tobacco lobbyists, did not specifically mention smoking in public places as one of his issues; instead he merely referred to “[i]tems of general interest to the tobacco and candy distributors.” 449 Schaaf, the bill’s chief sponsor in the Senate, later observed that he had been surprised at the time that he had seen no tobacco lobbyists; he conjectured that wholesalers had not lobbied because they did not believe that the law would depress cigarette sales. 449 At the same time, he assumed that the tobacco industry believed that the bill could be handled by the restaurant lobbyists. 450

449 Telephone interview with David Schaaf, McGregor, MN (May 12, 2007).
450 Telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009).
452 Telephone interview with James Erickson, Minneapolis (Apr. 20, 2009).
Finally, the fact that internal cigarette manufacturing company documents reveal that early in 1976 the Tobacco Institute was working closely with the hospitality industry (through Bohr) and MACI (through Perry) to challenge the MCIAA in court or to amend it legislatively strongly suggests that whatever lobbying strategy the tobacco companies had been pursuing in 1975 that dictated concealing their involvement, Bohr and Perry may have been its primary executors.\textsuperscript{455} Indeed, once Peter Lindberg, the industry’s chief lobbyist during the first half of the 1970s, had been appointed a state district court judge for Hennepin County in 1974\textsuperscript{456} and was thus no longer available for public lobbying on behalf of the cigarette industry, the oligopoly may have decided that more experienced non-tobacco lobbyists Bohr and Perry would, given burgeoning anti-tobacco public opinion in Minnesota, better serve its interests.  

\textbf{The Minnesota Clean Indoor Air Act: An Overview and Evaluation}  

Non-smokers who sit near the smoking section say they have little benefit.\textsuperscript{435}  

“Tell them in Des Moines we think this law is stupid.”\textsuperscript{436}  

\textsuperscript{455}See below this ch. That a Legacy Tobacco Documents Library search identified no materials from 1975 suggesting contacts between the tobacco industry and Bohr or Perry (or other lobbyists) does not mean that none exist(ed).  


\textsuperscript{436}Bonnie Wittenburg, “No-Smoking Law Stirs Good-Natured Minnesota Fuming,” \textit{DMR}, Aug. 2, 1975, Bates No. TIMN0462047 (quoting smoking customer of barbershop,
The Minnesota Clean Indoor Air Act of 1975

As approved by the governor on June 2 and as it went into effect on August 1, MCIAA, 437 whose purpose was to “protect the public health, comfort and environment,” 438 prohibited smoking in public meetings and public places, defined as “any enclosed, indoor area used by the general public or serving as a place of work, including, but not limited to, restaurants, retail stores, offices and other commercial establishments, public conveyances, educational facilities, hospitals, nursing homes, auditoriums, arenas and meeting rooms, but excluding private, enclosed offices occupied exclusively by smokers even though such offices may be visited by nonsmokers.” 439 The relatively capacious scope of the prohibition was, however, subverted by the same huge exception that severely limited the usefulness of virtually all public smoking laws of the period: “No person shall smoke in a public place or at a public meeting except in designated smoking areas.” And even this mere segregation of smokers but not of their smoke did not apply at all to “factories, warehouses and similar places of work not usually frequented by the general public....” Although this wording suggested that coverage of workplaces was a mere consequence of the principal purpose of protecting the public, the legislature did go on to require the state department of labor and industry, in consultation with the state board of health, to “establish rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.” 440 The designation of smoking areas was entrusted to proprietors or others in charge of public places, whose discretion was limited in only two respects: they were not permitted to designate as smoking areas places in which the fire marshall or other law prohibited it; and, except for a bar—which, if designated as one entire smoking area, had to be conspicuously posted to that effect at all normal entrances 441—no public place could be designated as a smoking area in its

437 For background on the law, see Mark Wolfson, The Fight Against Big Tobacco: The Movement, the State, and the Public’s Health 49-67, 152-54 (2001).
438 1975 Minn. Laws ch. 211, § 2, at 633.
439 1975 Minn. Laws ch. 211, § 3 subd. 2, at 633.
440 1975 Minn. Laws ch. 211, § 4, at 634.
441 Several months after the law had gone into effect but before the administrative rules had been promulgated, Kahn told a St. Louis alderman seeking her advice about a proposed city ordinance that “I can’t give you any good reasons for the separate category for bars in our law except a gut feeling that we had that the clientele of bars are probably less sensitive to a smoky atmosphere than those of cafeterias or better restaurants or most
The Minnesota Clean Indoor Air Act of 1975

entirety. Where a public place consisted of a single room, the legislature, in a less than transparent manner, declared that “the provisions of this law shall be considered met if one side of the room is reserved and posted as a no-smoking area,” thus raising the question both as to what “one side” encompassed and whether merely reserving no-smoking areas wherever the proprietor desired (as was permissible in multi-room public places) was also lawful. In addition, owners were not required to make any physical changes to protect nonsmokers from smoke: only already “existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent non-smoking areas.”

442 1975 Minn. Laws ch. 211, § 5, at 634.

443 To the aforementioned St. Louis alderman Kahn explained with regard to the “one side” of a single room language that “we ran into some trouble with the lack of a definition of the word ‘side.’ When the bill was written, we obviously meant ‘side’ to be at least a [sic] half a room or very close to a half, but the Department of Health has ignored this and has just defined it as a continuous [sic; should be “contiguous”] section.” Phyllis Kahn to Bruce Sommer at 1 (Oct. 24, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B). Nevertheless, in an internal guideline the Health Department characterized the “one side” of a single room language as the MCIAA’s “only standard for size of the designated area....” Guidelines Regarding Implementation and Enforcement of Minnesota Clean Air Act, Laws of Minnesota, 1975 Chapter 211 (For Internal MDH Use Only) at 3 (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).

444 While noting that “[n]othing in the law requires a proprietor to designate a portion of the establishment as a ‘smoking permitted’ area,” the Health Department merely specified that “the proprietor should use his/her own judgment on the size of the smoking permitted area if any smoking area is permitted.” Guidelines Regarding Implementation and Enforcement of Minnesota Clean Air Act, Laws of Minnesota, 1975 Chapter 211 (For Internal MDH Use Only) at 2, 3 (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).

445 1975 Minn. Laws ch. 211, § 5, at 634.
The Minnesota Clean Indoor Air Act of 1975

the toxic effect of smoke in adjacent nonsmoking areas.” In other words, if existing barriers and ventilation could not be so used, the agency was required to prohibit smoking entirely.

The severe constraints imposed on what on its face appeared to be an expansive prohibition fully confirmed ANSR’s analysis of the final bill text as an illustration of “the difficulty of working within the nature of the political process—which is a compromising process.” Just how far the initial legal regime was from ANSR’s aspirational end goal was made clear by the group’s director, who informed the press the following year that: “Our thinking is that smoking should be considered socially unacceptable and limited to consenting adults in private.” By the same token, however, ANSR correctly stressed that MCIAA’s “intent is to prohibit smoking unless there is a designated smoking area. Smoking is the exception, not the rule. ... The intent of the law is not to designate no-smoking areas, but to establish smoking permitted, if SMOKING IS TO BE PERMITTED.

To the extent that the Minnesota legislature focused enforcement on owners, the “reasonable efforts to prevent smoking in the public place” required of them were potentially capacious but ambiguous so that it was difficult to discern whether proponents imagined effective compliance resulting from them. Posting signs was helpful, but “arranging seating to provide a smoke-free area”—a much more expansive term than “no-smoking area” and one that should have been interpreted to mandate protection from exposure to smoke drifting from designated smoking areas—could have formed the core of an administrative rule with a powerful protective bite. Similarly, requiring owners to “ask[ ] smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke” did not limit owners’ responsibility to addressing smokers

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446 1988 Minn. Laws ch. 613, § 9, at 726, 730 (italics added).
447 A bill filed by Kahn would have conferred these additional protections on all employees, but it failed to survive consideration by the House Health Committee. “State Employees Get Additional Protection,” ANSR Bulletin 2(2):1 (May 1988).
451 In fact, the Health Department’s rule drained the provision of all such potential by interpreting “smoke-free area” to mean merely “acceptable smoke-free area.” See below this ch.
452 1975 Minn. Laws ch. 211, § 6, at 634.
who were violating the law in the sense of smoking in nonsmoking areas, but would have encompassed smokers whose smoke was drifting from smoking into nonsmoking areas. At the same time, however, owner intervention was completely complaint driven: even if an owner saw people smoking in a nosmoking area, he was under no obligation even to ask them to stop so long as no “client” or employee complained; moreover, even when he did respond to a request and asked smokers to stop, he was also under no obligation to report this violation to any law-enforcement authority. Thus, although the Minnesota statute made it a petty misdemeanor to smoke in a nosmoking area, the real-world mechanism by which a prosecution could take place remained unexplained. Apparently, the legislature must have intended enforcement to be effected at best indirectly, since the only court action that an “affected party” or the state or local board of health was entitled to institute was for an injunction of “repeated violations” of an owner’s responsibilities to post signs, arrange seating, or ask smokers to stop smoking. Finally, although the statute required the state board of health to adopt rules and regulations “necessary and reasonable to implement” MCIAA, it also conferred discretion on the health board, “upon request, [to] waive the provisions” of MCIAA if the board “determines there are compelling reasons to do so and a waiver will not significantly affect the health and comfort of nonsmokers.”

MCIAA cost its supporters $75,000, including $20,000 in ANSR expenses from February 1973 through August 1975 and $20,000 and $35,000 in Hennepin and Ramsey County Lung Association staff salaries and program staff time, respectively. In light of this relatively modest financial outlay, Kahn offered six reasons to explain “[w]hy we were able to pass this fairly stringent restriction

\[453\] 1975 Minn. Laws ch. 211, § 7 subd. 2, at 635.
\[454\] 1975 Minn. Laws ch. 211, § 7.3, at 635.
\[455\] 1975 Minn. Laws ch. 211, § 7.1, at 634-35.
\[456\] Robin Derrickson, Untitled Typescript at 1 (Sept. 1978) (talk given at Western Lung Conference) (copy from Ed Brandt’s papers furnished by ANSR). To be sure, Jeanne Weigum, who by 1983 was the president of ANSR but who had not been involved in the organization or the campaign for MCIAA in 1975, offered a radically lower estimate: ANSR and the three Minnesota lung associations invested less than $10,000 (largely for staff time), while the opposition spent “in the neighborhood of $500.” Jeanne Weigum, “Passage of the First Comprehensive, State-Wide, Smoking Control Law in the U.S.,” in Proceedings of the Fifth World Conference on Smoking and Health 2:327-31 at 327 (William Forbes et al. eds. 1983). It is unclear how Weigum could have determined how much the opponents had spent. That she incorrectly believed that the Hotel, Motel and Restaurant Association was the only opposing organization may in part account for this implausibly low figure.
on what people have considered to be their right for certainly the past 30 years i.e., [the] right to smoke tobacco in any form, in any place whatsoever...” First, as a “persistent and devoted non-smokers rights group” ANSR “gave extreme support during the entire process,” including drafting the bill, mobilizing witnesses to testify before committees, “writing continual [sic] letters” and “putting tremendous pressures on the legislative process at every moment.” Second, a “sound body of scientific knowledge,” in particular the surgeon general’s report detailing tobacco smoke’s effects on nonsmokers and its translation by an American Lung Association popular pamphlet “into words that not only the public, but even legislators could understand” were especially helpful. Third, virtually every health organization in Minnesota lent its support. Fourth, “a dramatic change in the composition in [sic] the legislature...around 1972” that produced “a majority that had not only decreased in age and increased in educational experience but also went from a majority of smokers to a majority of non-smokers.” Fifth, whereas Wisconsin with a small tobacco industry had been unable to pass any tobacco control measure in recent years, Minnesota lacked “any sizeable tobacco industry.” And sixth, the fact that MCIAA appeared to everyone to be “utter[ly] reasonable[ ]” undercut opposition.457

Despite the spatial comprehensiveness that the law achieved in comparison to that of other states, it still did not, as Brandt explained one of MCIAA’s deficiencies “in layman’s terms,” “specify what portion of a public place may be designated as a smoking area,” although the question was “a possible subject for regulations to be adopted by the State Board of Health.” Similarly, until DLI issued the relevant rules, MCIAA established “no legally binding restriction on smoking” applicable to “places used chiefly by employees” rather than the general public.458 Even in the interim between the gubernatorial signing ceremony and the law’s effective date the lung associations in Minnesota reported that two problems had cropped up: restaurant owners purportedly “fear a loss of customers and wasted space if segregated smoking and nonsmoking areas are

457Representative Phyllis Kahn, Speech Before Public Health Association, St. Cloud at 4-5 (Oct. 8, 1976), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B). Earlier, to a St. Louis alderman Kahn made light of the opponents of the bill apart from the Restaurant Association: “to a lesser extent” opposition came from the “Minnesota Association of Commerce and Industry, who claimed that all the business [sic] would move out of the state so that their workers could smoke” and “to an even lesser extent from the Association of Retailers, who claimed that all the shoppers will be going to Wisconsin so that they’ll be able to smoke.” Phyllis Kahn to Bruce Sommer (Oct. 24, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B).

mandated”; and DLI “fears it is currently considered impossible to enforce such regulations in the work place.”459 Nevertheless, the law, as Time reminded its readers as soon as MCIAA went into effect, “shifts the balance of power between smoker and non-smoker” by “put[ting] the burden on the smoker to find a smoking area, rather than on the non-smoker to find a spot of clean air.”460 It may not have been apparent to ANSR at the time, but even this power shift, like segregation on airplanes, offered such minimal (to non-existent) immunity from tobacco smoke that it could not possibly appease nonsmokers or create even a temporary social-political equilibrium—a prospect of the slippery slope to the endgame that never ceased to agitate the cigarette oligopolists.461

459“An Explanation of the Minnesota ‘Clean Air Act,’” ANSR, July 1975, Appendix II at 4, Bates No. 85646234/7. The source of this information is difficult to identify: the statement cited in the text was tacked on to a re-typed version of Ed Brandt, “Bill in Layman’s Terms,” ANSR 3(2):1-2 (June 1975) (no issue appeared in July 1975).


461See, e.g., the tobacco lobbyist’s aforementioned statement that the industry opposed the bill because of its intent to reduce smoking. Robert Milis, “Dr. Steinfeld Boosts Smoker Restriction Measure,” Post Bulletin (Rochester, MN), Feb. 25, 1974, Bates No. TIMNO461983. According to a Minnesota Poll, whereas 37 percent of state residents had said that they smoked cigarettes in 1975, two years later only 31 percent did. “Minnesota Poll: Cigarette Smoking Declines in Minnesota in Last 2 Years,” MT, July 17, 1977, clipping in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B). The poll did not explore MCIAA’s impact on this decline, but in 1976 Kahn offered the speculative/anecdotal argument that although the law “was not aimed at individual smoking deterrence,...its [sic] had an interesting effect on smokers. This is probably why the tobacco industry became so interested in it albeit belatedly. It turns out that as smoking is considered socially and legally unacceptable and also as it becomes more difficult to smoke, people smoke far less. Legislators have told me that with the passage of the no-smoking rule on the floor of the House, their cigarette consumption has gone way down just because of the additional effort it takes to go someplace else to smoke.” Representative Phyllis Kahn, Speech Before Public Health Association, St. Cloud at 7 (Oct. 8, 1976), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B). Despite cigarette manufacturers’ fears, as late as 1979, Brandt remained extremely skeptical that MCIAA would reduce cigarette sales or smoking: “[C]onsidering the limited impact that tremendous publicity about the harmfulness of smoking to the smoker had on tobacco consumption, it seems inconceivable to me that publicity about the harmful effects of smoking on the non-smoker could lead to more than very marginal changes.... Logically, there is no reason why requiring separate smoking and no smoking sections should lead to any significant decrease in smoking.” Comments by Edward R. Brandt (Co-Founder and Former President of the Association for Non-Smokers Rights) on the Effectiveness and Effects of the Minnesota Clean Indoor Air Act and Related Issues
In light of the significant advance that MCIAA represented beyond all previous state laws, President Kornegay’s failure even to allude to it in his report on state legislation to TI’s annual meeting in January 1976 was astonishing. Pooh-poohing “the Banzhafs of this world,” who “boast[ed] of legislative successes” in 1975 and gave “the impression that smoking and the tobacco industry are on the run,” Kornegay gamely tried to convince his bosses that “we did lose some, but we struck some counter blows, and the effect is beginning to tell. The important point is that we won more often than we lost—and most of the losses were close contests.” Pretending that the rich and powerful cigarette oligopoly was the underdog (but at the same time inadvertently revealing just how unpopular the tobacco industry had become), he stressed that “we have gone into every contest with the initial odds greatly against us and with hostile public sentiment whipping up the press and activist clamor being generally supportive of the restrictive measures.” Purporting to “tick off the states where the anti-smokers are claiming ‘victory’ [and] we can see their public claims of success might be tinged with private frustration,” but in fact cherry-picking nine states in which smoking restrictions/bans were very narrow in scope (applying, for example, only to elevators), Kornegay boasted that these enactments had hardly been victories, though “they could have been if our spokesmen[,] our field men and our legislative representatives had not beaten back the fires, dampened the public uproar and convinced legislators to soften measures that could not be laid to rest.”

Where MCIAA fit into this heroic Goliath and David yarn was nowhere in evidence.

Enforcement and Compliance Before the Administrative Rules Went into Effect

I say if they [smokers] can even sit two tables away from me I’d consider it a victory.\(^{463}\)

Letting people smoke in one end of the room and not the other end, does very little good
The Minnesota Clean Indoor Air Act of 1975

as that smoke carries right to the other end of the room. The smaller the room the quicker it gets there.\(^{464}\)

Passing the country’s then-strictest anti-public smoking law had been difficult enough, but putting it into practice might prove to be much more arduous. On no one was this concern less lost than the bill’s most energetic and ardent legislative sponsor, Phyllis Kahn. Unlike many, if not most legislators, who, either holding to a rigid view of the separation of powers or perhaps simply not wanting to spend any more political capital on the issue, regard enforcement, even of their own pet legislation, as belonging entirely to the administrative agency on which the legislature conferred such exclusive authority, Kahn, though perhaps not acting as a one-person compliance officer, nevertheless, even before MCIAA went into force on August 1, took a very hands-on and even personal approach.

By mid-July she had already begun bugging the commissioner of the Department of Administration—who was in charge of buildings in which she spent considerable time—about “what steps you are taking to enforce” MCIAA when it became effective in the State Building Complex, almost every area of which was covered by the broad definition of “public places.”\(^{465}\) Even after the commissioner had replied, Kahn did not let him forget that although the Board of Health rules (when they were issued)\(^{466}\) would help him in designating smoking areas, this prospect did “not relieve proprieters [sic] of the responsibility of [sic] the immediate enforcement” of the MCIAA,” which, it was her interpretation and the attorney general’s, went into effect on August 1 with or without the implementing rules.\(^{467}\) (The Health Department, which was in charge of drafting rules and enforcing the law, took the same position.)\(^{468}\) Three weeks after that date, she once again reminded the commissioner that “the law did not have a

\(^{464}\) Ralph Brown to Dr. Warren Lawson (Nov. 20, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

\(^{465}\) Phyllis Kahn to Richard Brubacher (July 14, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).

\(^{466}\) The Board of Health filed the final rules with the Department of State on Apr. 2, 1976. Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six at 9, in Health Department, MSA, MHS, 112.H.18.3(B) (file stamps).

\(^{467}\) Phyllis Kahn to Richard Brubacher (July 30, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).

\(^{468}\) Guidelines Regarding Implementation and Enforcement of Minnesota Clean Air Act, Laws of Minnesota, 1975 Chapter 211 (For Internal MDH Use Only) at 1 (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).
provision for delay of adherence until after the drafting of regulations,” although this time she did acknowledge that he had “made a good start on adherence” by posting signs in cafeterias and conference and meeting rooms in state buildings. As for the prohibition of smoking except in designated areas, Kahn was not at all shy about suggesting that smoking be prohibited in corridors, lobbies, passageways, and registration lines because “it would be impossible to designate a smoking area in anyone [sic] of these and maintain a smoke-free area for the general public.”

While also making certain to convey her one-person legislative intent to the Health Department as it drafted the crucial implementing regulations, Kahn intervened wherever she deemed it necessary to remind violators of their duties. Thus, already on August 1, she wrote to Commissioner Thomas Ticen, the chairman of the Hennepin County (Minneapolis) Board, that she had noticed that it had voted that week to permit smoking at its meetings in the belief that MCIAA permitted public bodies to designate smoking areas in public buildings. Because, however, as Kahn pointed out, the act expressly excepted places in which smoking was “prohibited by the fire marshall or by other law, ordinance or regulation” from the general grant of authority to owners to designate smoking areas, and the Board’s public meetings in the City of Minneapolis were governed by the latter’s (aforementioned) ordinance banning smoking in such places, “you are not allowed to set up designated smoking areas.” Kahn, who closed by instructionally expressing her expectation that the Board would “rescind this illegal action” at its next meeting, was unable to resist enjoying her triumph over attorney and fellow DFL member Ticen, who had himself been a state legislator (smoked, earlier in the year had resisted the applicability of the city ordinance to the Board, and eventually died of lung cancer): “I...am somewhat perplexed that among the large and well-paid staff of Hennepin County, there is no one who is able to correctly interpret one of our less complex state laws.”


470For example, Kahn informed the MDH official charged with drafting the rules that she was “somewhat concerned with the definition of ‘private social function.’ The legislative intent of this exclusion was not to get into the business of legislating conduct at weddings, confirmations, and the like; and I am not sure that your definition recognizes this desire.” Phyllis Kahn to Kent Peterson (Sept. 29, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3.(B).

Ten days later, in response to a letter from a non-constituent (who had tried to secure passage of a nosmoking bill in student model legislation programs), Kahn “strongly recommend[ed] membership in ANSR,” adding that nonsmokers’ diligence would certainly be required to educate owners about their responsibility to prohibit smoking, especially since her own observations while traveling had made it clear to her that enforcement was “spotty, particularly out of the Twin Cities area....” 472 (Against this background of uninhibited interventionism it seemed out of character that in October she not only merely requested that an official of the Northwestern Bell Telephone Company who was also chairman of the State Information Services Advisory Council at their next meeting “either ban smoking entirely or else reschedule it in a room that has somewhat more area and more adequate ventilation,” but even politely wondered whether she was “[p]erhaps...being unduly sensitive” and superfluously added that she did “not think that the smoke-filled room adds anything to the atmosphere.”) 473 In November Kahn informed the associate dean of the University of Minneapolis Veterinary Hospital (with a copy to the university president) of a “flagrant violation of the law” that she had witnessed on a recent visit to the clinic with her cat: when she pointed out to a receptionist who was smoking at the desk that she was violating the MCIAA—Kahn did not mention to the dean whether the receptionist recognized the university area’s legislative representative or whether Kahn identified herself and her unique authority regarding the MCIAA—and that a sign on the door expressly prohibited smoking except in designated areas, “she replied that the entire waiting room was a designated smoking area.” Kahn then admonished the dean for “such a cavalier regard for the health of the public” displayed by an “agency dealing with public health.” 474

The Health Department received only 23 complaints from nonsmokers by the
The Minnesota Clean Indoor Air Act of 1975

beginning of October,\textsuperscript{475} but Kahn was under no illusions as to state health inspectors’ ability to “‘police this law effectively, even if they add a smoking check on their yearly visit.’” Nevertheless, despite knowing that violations had taken place, she was “‘by and large...satisfied with the present situation,’” which was just a “‘first step.’”\textsuperscript{476}

H.F. 79’s cosponsor Bud Philbrook experienced first-hand the extent of compliance in rural small-town Minnesota in the summer of 1975 when a House colleague invited him to visit his hometown of 300 to 400 after the new law had gone into effect. When they walked into a restaurant, Philbrook reminded his host of the new law; the colleague in turn explained to the waitress that Philbrook had been one of the new law’s chief sponsors and that they wanted to sit in the nosmoking section, thus prompting her to guide them into, through, and out of the kitchen into a space near the rear entrance where a table had been set up. Still smiling, she announced: “This is our non-smoking table.” Having gotten the point of the exercise, Philbrook and his friend retreated to the restaurant, where they would be exposed to smoke as if the bill had never passed.\textsuperscript{477}

Restaurant owners did not reserve such treatment exclusively as punishment for state legislators nor was the practice confined to the boondocks. For example, shortly after the Health Department’s public hearing on its proposed rules a resident of Minneapolis submitted a comment to the principal drafter, Kent Peterson,\textsuperscript{478} about asking for the non-smoking section at a restaurant and being “told to pick any table and that would be my non-smoking table.”\textsuperscript{479} (Even three

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\item\textsuperscript{475}Gordon Slovut, “State Health Board Gives No Quarter to Smoking Foe,” Minneapolis Star, Oct. [10], 1975 (1A, 4A), Bates No. TIMN0462141/2.
\item\textsuperscript{476}Harry Wilensky, “Effort to Ban Smoking Results in Murky Law,” St. Louis Post-Dispatch, Nov. 16, 1975 (1), Bates No. TIMN0240663.
\item\textsuperscript{477}Telephone interview with Bud Philbrook, St. Paul (Mar. 1, 2009). The scene was exquisitely captured by a cartoon of a waiter ostentatiously showing customers to their non-smoking table in a garbage-strewn back alley. “‘Table for Two Non-Smokers, This Way, Please,’” Minneapolis Star, Aug. 2, 1975 (4A), Bates No. TI47350692. For a contemporaneous account of the haphazard and disparate compliance with MCIAA as it went into effect in Rochester, see “Businesses Here Try to Abide by New Law, Butt...,” Post-Bulletin (Rochester), Aug. 1, 1975 (1), Bates No. TIMN0462144.
\item\textsuperscript{479}Earl Schleske to Kent Peterson (Dec. 18, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Schleske had been active in ANSR. Telephone interview with Earl Schleske, Minneapolis (Oct. 10, 2009). As late as December 1975 the editor of one Twin Cities daily blamed “the nonsmoking majority of Minnesotans” for not “demanding the
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The Minnesota Clean Indoor Air Act of 1975

years later the best light in which the president of the Minnesota Restaurant Association could cast compliance was that “most Minnesota restaurants have at least a nominal area for nonsmokers....” At the same time, however, he acknowledged the make-believe character of compliance in “small restaurants that do not have enough room to substantially separate smokers and nonsmokers.”

Immediately after the law had gone into effect on August 1, the Health Department revealed, albeit only within the agency, how limited its enforcement activities would be:

The Minnesota Department of Health does intend to enforce this law. The legislation had no appropriation for an administrative or investigatory staff for enforcement of the Act; therefore, the Department of Health must limit its enforcement activity to inspection of places where Health Department staff currently go, namely, restaurants, hotels, resorts and health care facilities. Beyond these places, the Department will refer complaints to local Boards of Health or issue a warning through telephone or written communications.

Even more suggestive of the modest niche that the Health Department had carved out for itself as well as of the reputation that ANSR had gained as an effective and reliable partner was the Department’s recommendation to the public that, if an owner refused to comply with MCIAA, the “affected party” contact either Glenna Johnson (telephone number included), the chairperson of the Public Awareness Committee of ANSR (which was “pursuing a program to inform proprietors of the requirements of the law and will advise proprietors on ways to assure clean air for the non-smokers”) or the MDH itself, which would follow up on complaints “as appropriate”—meaning by means of inspectors in the aforementioned types of businesses, referral to local health boards, telephone or letter, or, in the case of “‘repeated violations,’” seeking a court injunction.

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481 Guidelines Regarding Implementation and Enforcement of Minnesota Clean Air Act, Laws of Minnesota, 1975 Chapter 211 (For Internal MDH Use Only) at 3-4 (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).

482 Guidelines Regarding Implementation and Enforcement of Minnesota Clean Air Act, Laws of Minnesota, 1975 Chapter 211 (For Internal MDH Use Only) at 4-5 (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).
light of ANSR’s single-minded zealous advocacy—by the time MCIAA went into effect on August 1, some of ANSR’s approximately 6,000 members had devoted the month of July to informing businesses of the law’s requirements\textsuperscript{483}—MDH’s delegation of first-line enforcement to this NGO may actually have been designed to enhance the state bureaucracy’s capacity for securing compliance, but farming out enforcement to an organization lacking legislatively conferred powers was nevertheless a sign that the Department did not envision vigorous enforcement as a central dimension of the struggle for Minnesota’s new smoke-free culture.\textsuperscript{464}

And even three years later the Department’s director of the division of environmental health complained that, because he lacked a budget “for an investigation arm to pay closer attention to the 1,200 complaints” that the MDH received annually, he had to “‘steal’ money from other budgets to enforce” the MCIAA. Consequently, its restaurant and resort inspectors were able to visit each establishment only once every 9 to 18 months “even if a complaint [wa]s filed during the interim....\textsuperscript{485}

Chum Bohr, the executive vice president of the Minnesota Restaurant Association, may have been an incompetent lobbyist\textsuperscript{486} whose absence from the crucial Senate committee hearing had made possible restaurant coverage (which otherwise might not have secured a legislative majority for some years), but once the law was in force he charged that “[t]here’s a lot of ambiguity in the law”\textsuperscript{487}
and ambiguously stated that restaurants would “adjust the smoking and nonsmoking space to fit the needs of the day.” Kahn’s outright refutation that that position was “entirely incorrect,” inasmuch as “any restaurant, whether or not it sells liquor, must offer a smoke-free section or room,” did not faze the Minnesota Restaurant Association, which, literally on the eve of the MCIAA’s effective date, distributed a legal opinion claiming that “any restaurant selling liquor, wine or beer may call itself a bar and avoid having to set aside a special smoking area—a contention that Bohr himself propagated. His semantic shenanigans prompted a Twin Cities columnist to acknowledge that his “dinosaur mentality” at least had the “virtue of candor” in saying that MRA members “reserve[d] the right to comply or ignore at their discretion.” An especially absurd instance of restaurant owners’ trying to circumvent the law by proclaiming themselves exempt bars was reported to various officials, including the head of the Minnesota Health Department, by three women who, on asking for seats in the nosmoking section of a Howard Johnson’s Restaurant in the Minneapolis suburb of Bloomington, were told by the general manager that, as a bar, Howard Johnson’s was not required to provide a nosmoking section. Unable to reconcile this claim with either Howard Johnson’s self-advertising as a family restaurant or the presence of children on the premises, they left.

Drafting the Department of Health Rules

[T]hose of us in the non-smokers’ rights movement tend to be impatient, action oriented people who do not take time to measure conditions before and after. Clever researchers would have studied the Minnesota scene as soon as the law passed and would have continued sampling as years went by. No such thing happened. Unfortunately, we do not

493Judith Dixon et al. to Mayor Robert Benedict (cc: Warren Lawson), Oct. 30, 1975, in Health Department, MSA, MHS, 112.H.18.3(B). This issue was not definitively resolved until 1976 when the Health Department rules went into effect defining “bar” and “restaurant.” See below this ch.
even have Health Department Statistics of the number of Minnesota smokers or the number of cigarettes smoked per smoker pre MCIAA. 494

Initial and Preliminary Drafting Not Fully Embodied in Publicly Accessible Drafts

By early summer the state Health Department had initiated the process of drafting a set of proposed implementing rules. Notice was given to “all interested persons and groups” of the Board of Health’s intent to “obtain information on these rules from non-agency sources.” Among the parties from whom staff “sought input into preparation” of the rules were legislators who authored the bill, ANSR, “other voluntary health organizations which supported the Act,” and “associations of restaurants, office building managers, retail stores,” and other establishments that would be affected by the new law.495 Kent Peterson, the chief drafter, “met with any group that made a request,” including Minneapolis building owners (who “saw the issues of the debate,” whereas businesses outside of the Twin Cities metropolitan area “could just ignore the whole issue”); “even more meetings” took place with the Minnesota Restaurant Association as well as with Representative Kahn and ANSR members, who were “quite involved.”496

Exactly when the Health Department turned out its first draft, is unknown, but the earliest MCIAA document labeled “draft” extant in the Department’s files at the Minnesota State Archives or at the Department itself was dated July 7.497 Of its


496 Email from Kent Peterson to Marc Linder (Oct. 13, 2009).

497 Minnesota Department of Health Adult Health Section, Subject: Draft of Proposed “Rules and Regulations of the Minnesota State Board of Health for Regulating Smoking at Public Places and in Public Meetings” (July 7, 1975), in MSA, MHS, 112.H.18.3(B).

Some mystery attends the authorship of this draft, which, in light of the scattered topics it addressed and unmediated beginning, presumably represented responses to an already existing draft. The only name on the draft, “Kist” (written in the same handwriting as the date), was presumably that of Anthony Kist, who had been chief of health facilities standards and compliance until shortly before the date of the memo, when he was transferred to another division following revelations of his involvement in a large nursing home scandal. Elizabeth Emerson, Public Health Is People: A History of the Minnesota Department of Health 1949 to 1999, at 232 (n.d.), on http://www.health.state.mn.us/
small number of definitional provisions fleshing out statutory terms two were noteworthy. First, an interlinear handwritten addition to the typewritten definition of a “single room” public place (reserving “one side” of which as a nonsmoking area MCIAA declared to be lawful) required the nonsmoking area to consist of “not less than ½” of the total area. The Department’s failure to include such a definition in the final rules was, as noted below, a disappointment to many anti-smokers, including Kahn, but this early insertion suggests controversy within the Department as well.

498 1975 Minn. Stat. ch. 211, § 5, at 633, 634.
499 Based on the handwriting, Peterson guessed that this comment had been written by Deputy Commissioner Dr. Ellen Fifer. Email from Kent Peterson to Marc Linder (Oct. 15, 2009).
500 The Health Department rejected a definition in terms of a “particular percentage of the room...because it would not be reasonable for all public places,” especially since the Department chose the vague definition “to provide reasonable implementation of the law in public places which consist of a single room and therefore have less flexibility to separate smoking and nonsmoking areas.” Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 12 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
501 Two months later, Special Assistant Attorney General Terry O’Brien, who was assigned to advise the Health Department on MCIAA rulemaking, commented to chief drafter Kent Peterson that “[g]iven the Legislature’s decision to use this term [“one side of the room”], I think your proposed definition is as precise as one can establish.” Terry O’Brien to Kent Peterson, Proposed Rules Implementing the Clean Indoor Air Act at 3 (Sept. 4, 1975), in Health Department, Attorney General Papers, MSA, MHS, 103.1.15.1(B). Apparently, the definition was “a contiguous portion of the room, including any seating arrangements.” Regulations for Implementation of Minnesota Clean Indoor
The Minnesota Clean Indoor Air Act of 1975

The lack of agency unanimity was also reflected in the penciled comment (in another handwriting), “Not need” to the typescript’s requirement of “reserved for no-smoking” signs every 10 feet marking the boundary of that area—another mandate that was not adopted. In an incompetently drafted section implementing owners’ statutorily imposed duty to minimize the toxic effect of smoke in adjacent nosmoking areas, the typescript provided that they “shall” do A “and/or” B without explaining under what circumstances one would suffice. The first involved using “existing physical barriers such as walls and partitions to the extent feasible and extending any existing booth partitions to a minimum height of 60 inches,” whereas the second meant “[p]roviding an isle [sic] space buffer of at least 4 feet,” but subject to the proviso that “the ventilation system(s) in the public place...have ample air handling capacity which will assure that smoke will not be carried by air movement from the ‘smoking permitted’ area to the ‘no-smoking’ area(s).” The proposed height of the barriers was four inches higher than the Department’s ultimate specification, the reason for which change is discussed below. The mandatory extension of existing booth partitions (which a handwritten comment, inserted by Peterson, rejected) seemed oddly compulsory since a public place without walls, partitions, or booths would have been subject to no barrier requirement at all. Moreover, the weasel phrase “to the extent feasible” opened up the interpretive possibility that some owners would be freed from this mandate altogether (and thus, correlative, nonsmokers freely exposed to smoke). In contrast, the four-foot buffer zone, which, like the five-foot barrier, made its first appearance in this draft, was not only not subject to any such feasibility standard, but was attached to a ventilation standard that would have been virtually impossible to satisfy. Since the statute merely provided that “[w]here smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent non-smoking areas,” and thus imposed absolutely no protective duties on owners whose public places lacked such barriers or ventilation, the proposed rule presumably also lacked any such authority. Whether the Health Department was

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Air Act, Rule 2.f) (Draft, Sept. 9, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

502 Minnesota Department of Health Adult Health Section, Subject: Draft of Proposed “Rules and Regulations of the Minnesota State Board of Health for Regulating Smoking at Public Places and in Public Meetings” (July 7, 1975), in MSA, MHS, 112.H.18.3(B). A further section on ventilation required nosmoking areas always to be designated “in areas where positive pressure is provided by the ventilation system in relation to adjacent areas” so as to “remove any smoke that may be present in adjacent area(s).” Id.

503 1975 Minn. Stat. ch. 211, § 5, at 633, 634.
empowered to weaken the requirement on the basis of feasibility or, conversely, to impose the four-foot space requirement on owners with or without barriers or ventilation both was unclear and, at least as to the latter issue, would soon be contested. Finally, without attending to the complication created by the “and/or” provision, an infelicitously worded, handwritten insertion (by Peterson) added yet another method for minimizing smoke’s toxic effect—“rearrangement of business equipment and customer seating as reasonable to not have smoke”—which would, as discussed later, in somewhat altered form, play an important but complex and ambiguous part in the array of protections embodied in the final rules.

ANSR had also been occupied with drafting its own proposed rules, the earliest set of which it submitted to the Health Department at the end of July. In sync with the times, ANSR stressed that implementation of the MCIAA’s intent to provide a smoke-free environment for nonsmokers in all indoor public areas could be effected “without destroying the right of the smoker by providing him/her with a smoking area within each establishment, if the proprietor so designates” (a possibility, to be sure, that it promptly rendered less probable by providing that “[n]othing in these regulations shall be construed to require the proprietor of a public place to designate a smoking area”). Although ANSR specified that separate smoking lounges had to be “ventilated to remove the toxic air so that it cannot travel to the non-smoking sections,” it was nevertheless willing to permit smoking and nonsmoking sections within a single room so long as they were separated by a partition (of undefined height) or a four-foot-wide aisle. Brandt may have been inspired to sponsor the latter device by his familiarity with its having been proposed in the petition that Action on Smoking and Health had submitted to the U.S. Transportation Department and Federal Aviation Administration in 1969 for promulgation of a rule requiring the separation of smoking and nonsmoking passengers on all commercial domestic air carriers. In it the group’s founder, lawyer John Banzhaf, proposed seating nonsmokers on the left and smokers on the right side, so that “the center aisle would be an effective barrier between the two groups,” although the petition

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504 Minnesota Department of Health Adult Health Section, Subject: Draft of Proposed “Rules and Regulations of the Minnesota State Board of Health for Regulating Smoking at Public Places and in Public Meetings” (July 7, 1975), in MSA, MHS, 112.H.18.3(B).

For a modified form of this proposal that later appeared in a draft, see below this ch.

505 Rules and Regulations as submitted by the Association for Non-Smoker’s Rights n.p. [1-3, 6] (July 29, 1975), in MSA, MHS, 112.H.18.3(B). Many years later Edward Brandt assumed that he was at the very least involved in writing this submission. Telephone interview with Ed Brandt, St. Paul (Oct. 14, 2009).
pointed out that air circulation in an airplane was “typically poor.”

The tragically absurd public health consequences of the four-foot-wide-space proposal—which, as noted, was already embodied in the Health Department’s draft and remained enshrined in the final set of rules—by what was arguably the country’s leading and most successful statewide anti-smoking organization would be spectacularly on display in the testimony of an elementary school teacher at the Health Department’s public hearing on the rules toward the end of the year. A self-professed “sort of nervous” Gerald Ratliff—who had been “extremely involved” in ANSR, devoting countless hours to seeking to persuade businesses to comply with MCIAA—explained that whereas in other elementary schools in his suburban Twin Cities district teachers had negotiated for smoking lounges, his school had a one-room lounge. We have a very small one. I would say it’s [a] ten by twenty or ten by fifteen room, [in] which are four very small tables like in bars. And what they have done is separate the two tables from the other two tables by four feet and let people smoke in there. And it’s the only place for teachers to smoke in the building. So it’s worse than a bar. And I just am wondering if it’s possible to add to...Section 442, or...Section (p) on minimum room size, where you can allow smoking, because it’s really almost absurd because the smoke is so thick, you know. If you have a room that has two chairs in it and you split one chair for smokers and one for non-smokers, it doesn’t seem to be reasonable. So I would suggest adding a minimum room size for the definition of “room.”

No ANSR member took up the cudgels for Ratliff or proposed a change to deal with the extreme exposure to which he had been exposed. Nor did the Department’s principal rule drafter, Kent Peterson, who did answer one of Ratliff’s other questions, respond or suggest that some other provision in the

506 Brandt attached a reprint of the petition to ANSR’s post-Board of Health public hearing statement. CR 115(213) (Dec. 20, 1969) (n.p.), appended to Edward Brandt to Kent Peterson (Dec. 19, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Why, given the plentiful experience with the fecklessness of such a “barrier” after the rule had gone into effect on July 10, 1973, anti-smoking advocates were willing to extend the discredited model to other settings is unclear. For the rule, see 14 Code of Federal Regulations Part 252, in CR 38(90):12207-11 (May 10, 1973).

507 Board of Health Hearing Transcript at 171 (Dec. 2, 1975).


510 Asked about the complaint decades later, Peterson, while understandably not recalling it, commented that “I think (and you can see in the documents) that there probably was not statutory authority to make as intrusive a requirement as to impose a
rules that Ratliff had perhaps overlooked already made the school district’s arrangement unlawful.\textsuperscript{511} Ratliff’s experience was made all the more poignant by the overwhelmingly significant fact, which he did not reveal at the hearing, that only a very small minority of his fellow teachers smoked and yet intolerably polluted the air of the small lounge. Indeed, the very fact that at the time such monopolization of indoor air by smokers was considered the norm, which disqualified complainers as supersensitive deviants to whom business owners resented being required to cater, was precisely the social-psychological-cultural-legal foundation to whose dismantling compliance with the MCIAA would eventually contribute so powerfully. But that process was just being initiated, and for Ratliff and similarly situated exposees it would be many years before the law provided any protection.\textsuperscript{512} (Asked decades later what MCIAA had changed for such nonsmoking teachers, Peterson observed: “For what we now know about the health consequences of air in a confined space only separated by a minimal 4 foot space, nothing changed for their health. It did however send a message to all smokers that the social acceptability of smoking had changed. Smokers were restricted to a space—unfortunately the air was not. ... MCIAA was the initial statement of rights for non-smokers; it took a while to learn how much change was needed to preserve safety of health consequences.”)\textsuperscript{513}

\textsuperscript{511}Ironically, when the nervous non-tenured teacher asked whether he could be fired for asking his employer for clarification of the policy or an improvement of the situation, Assistant Attorney General Terry O’Brien was unwilling to give him an answer without having researched the question, though he “suspect[ed]” that Ratliff could not be fired. He nevertheless went on to suggest that Ratliff could not count on the Health Department for any assistance: “That is a question for the two parties in private actions to work out. [I]f you have a very bad employer or if you have an employer that is running around the room smoking or whatnot, that...will be something that those two will have to work out among [sic] themselves....” Board of Health Hearing Transcript at 173 (Dec. 2, 1975).

\textsuperscript{512}Telephone interview with Gerald Ratliff, St. Paul (Oct. 31, 2009). Ratliff confirmed that separation of smokers and nonsmokers by four-foot-wide spaces in restaurants helped somewhat in some restaurants and not at all in others.

\textsuperscript{513}Email from Kent Peterson to Marc Linder (Oct. 29, 2009). As for what was known about the health consequences of secondhand smoke exposure, it is noteworthy that when ANSR in a post-Board of Health proposed rules hearing submission presented documentation so that the Board would have access to the facts that had persuaded the legislature to enact the MCIAA, it focused on eye and nasal irritation, headaches, and coughs. Edward Brandt to Kent Peterson (Dec. 19, 1975), in Health Department, MSA,
How deeply compromised MCIAA was by this point was nicely encapsulated in the gloss that Kahn had put on the 1974 version of MCIAA at the House Health Subcommittee hearing on H.F. 2801. Citing the provision declaring that “[s]moking areas shall be separate, of adequate size and with adequate ventilation to fulfill the purpose of this act,” she observed that “I would imagine if you had a small room where it was impossible to provide a separate smoking and a non-smoking area, that would be interpreted to mean that you could not designate it a smoking area. It is only permissive to designate the area, it is not mandatory.”

In contrast to this lax regime in mixed-use rooms, ANSR would have banned smoking entirely in hallways, corridors, skyways, concourses, elevators, restrooms, lobbies, ticket and registration areas, public meetings, and the non-seating areas of shopping malls. Bolder still was the flat ban on smoking in retail stores, businesses, agencies, and public service establishments, except in private enclosed offices and even there only if they were ventilated so as to prevent the smoke from entering public and work areas. Also ahead of its time was the requirement that public places “which have intercom systems shall periodically announce over the system that smoking is not permitted except in designated areas” unless they had “other effective means of enforcing the no-smoking ban.”

Restaurants may have been anti-smokers’ bête noire, but ANSR apparently deemed it too discontinuous with addictive cultural practices even to propose an outright smoking ban; indeed, it also over-generously would have permitted owners to designate up to 50 percent of the total service area as the smoking section (although the smoking prevalence rate was far lower and ANSR’s other proposed proportions in other mixed-use public places such as waiting rooms in health clinics and medical treatment centers, government building smoking lounges, various lobbies, and seating sections of shopping malls...
The Minnesota Clean Indoor Air Act of 1975

were limited to one-third). Then, however, ANSR cast off this timidity by subjecting this provision to the de facto impossible-to-satisfy condition that the smoking section “be properly ventilated to prohibit [sic] the smoke from entering the other areas of the restaurant.” Almost as intrepid was ANSR’s definition of the statutorily exempt “bar”: to qualify, 90 percent of an establishment’s revenue was required to derive from the sale of liquor—a hurdle whose stringency would, in the event, far exceed the definitional criterion that the Health Department would eventually devise. ANSR’s proposal also raced beyond the Department’s ultimate rule in totally banning smoking in all classrooms in educational facilities, but, again, it acquiesced in the vested privileges of addicted professors and staff by permitting their private, enclosed offices to be designated smoking areas\(^\text{518}\) (even though and while students might be required to meet with them there).

On August 4, Peterson sent Special Assistant Attorney General Terry O’Brien for comment a draft of the “format” he intended to use to draft the rules. By this point he had already finished preliminary drafts of Rules 1 and 3, which, together with drafts of Rules 2 and 4, were to be finished the next day, when he was going to be discussing them with “interested parties during the next two weeks.” He also informed O’Brien that a draft (of the complete rules) would be available for review by the Board of Health by August 29. Although neither the first two drafts, which Peterson attached, nor the second two are extant, a copy of the format, which was simply the table of contents of the rules, has survived.\(^\text{519}\)

Already this earliest skeletal structure of the rules closely resembled the final

\(^{518}\)Rules and Regulations as submitted by the Association for Non-Smoker’s Rights n.p. [4-5] (July 29, 1975), in MSA, MHS, 112.H.18.3(B).

\(^{519}\)Kent Peterson to Terry O’Brien, Subject: Review of Matters of Format, Preliminary Drafts and Jurisdiction Issues (Aug. 4, 1975), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B). Presumably the rulemaking schedule was delayed and the Aug. 29 deadline became Sept. 12 as noted below. Peterson posed several questions to his legal adviser the most interesting of which dealt with whether it was lawful to enforce MCIAA in patient areas of hospitals and nursing homes: “The reasoning against application to patient areas is that the area is ‘rented’ to a patient for his/her temporary use. However, I am in doubt regarding application to large wards of patients...or double occupancy rooms.” Id. The rules ultimately did apply to patient areas, but O’Brien’s response, which he may have given orally, is not preserved. Peterson also asked about MCIAA’s applicability to federal government buildings and interstate transportation. Finally, Peterson also mentioned that on Aug. 7 he and O’Brien were scheduled to meet with Judith Pinke (assistant to the Labor and Industry commissioner) and Ray Adell (an attorney in that department) to clarify the statutory exemption of factories and warehouses from Health Department jurisdiction and the meaning of an enclosed, indoor public place serving as a workplace. No record of that discussion appears to be extant.
work product except in one striking respect\(^{520}\), whereas the key provision of this draft was framed in terms of implementing the statutory requirement of “minimizing the toxic effects” of smoke in adjacent nonsmoking areas by means of existing physical barriers, ventilation systems, and seating arrangements,\(^{521}\) later Peterson re-assigned its role to the only partly statutory term “acceptable smoke-free area.” MCIAA used the term “smoke-free area” only in the ambiguous context of imposing on the proprietor responsibility for making “reasonable efforts to prevent smoking in the public place”\(^{-}\)—but solely with respect to one of four such alternative types of efforts, namely, “arranging seating to provide a smoke-free area.”\(^{522}\) This crucial phrase\(^{523}\) underwent several changes with regard to its placement and function in the rules; the exact chronology of its insertion into the draft rules is uncertain because the August draft(s) is/are not extant, but its later fate is instructive: after two decades of enforcement agents’ travails with anti-smokers who (cantankerously but understandably) took “acceptable smoke-free area” literally, the Health Department decommissioned the source of the truth-in-packaging dispute.\(^{524}\)

The next steps in the rule drafting process are difficult to reconstruct gaplessly because what was apparently the first complete draft, that of August 11, has not survived, although its contents are, to some extent, known\(^{525}\) from...
detailed comments that Assistant Attorney General O’Brien sent Peterson on September 4.\textsuperscript{526} Deeming the draft “an excellent starting point in getting these rules into effect,” O’Brien generally focused on pointing out to Peterson ambiguities (such as the qualifier “reasonable”) that vested too much discretion in state officials and that regulatees could manipulate into loopholes.\textsuperscript{527} Of particular interest is O’Brien’s discussion of the term “smoke-free,” which Peterson had apparently used in the sub-rule governing restaurants (and perhaps several other public places). O’Brien first dwelt on the term in a general section emphasizing that “[s]tandards or criteria for determining a result should be distinguished from statements of results.” He identified “smoke-free” as merely stating a conclusion rather than “the analysis by which that conclusion was reached.” However, in order to be enforcible, the rule had to “state the methods

\textsuperscript{526}Terry O’Brien to Kent Peterson, Proposed Rules Implementing the Clean Indoor Air Act (Sept. 4, 1975), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B).

\textsuperscript{527}O’Brien did not cover all points at this time, but only “some major areas of concerns,” deferring a more in-depth memo until Peterson submitted a final proposed draft. Terry O’Brien to Kent Peterson, Proposed Rules Implementing the Clean Indoor Air Act at 1-2 (Sept. 4, 1975), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B).
with which to determine whether or not an area is ‘smoke-free.’"528 Under the specific discussion of its use in the restaurant sub-rule, O’Brien then posed three important questions: “Who decides what is ‘smoke-free?’” [sic]. Once decided, how is it proven? What demonstrable evidence could be introduced to indicate compliance or non-compliance in the event of dispute?529 Presumably it was this methodological-interpretive admonition that prompted Peterson in the next iteration of the draft to adopt the heavily freighted phrase “acceptable smoke-free area” and to define it in terms of physical criteria—height of barriers, width of aisle spaces, air changes per hour of ventilation systems, and concentration of carbon monoxide—that an inspector could (theoretically) readily measure.530

To be sure, this definition in terms of means rather than results531 left open the question as to whether barriers and spaces, which turned out to be the only means that owners ever used, could in fact produce smoke-freedom (acceptable to whom?) rather than meaningless circularity insensitive to the substantive public health objectives underlying the drive for state intervention. That ahistorical hindsight was not needed to question the robust protectiveness of barriers or spaces was demonstrated a little later by the complaint of no less an authority figure than the assistant personnel director for the Minnesota Department of Public Safety. Two weeks after the Board of Health had held a public hearing on its proposed rules (which included the option of separating smoking and nosmoking areas by 56-inch-high barriers or four-foot-wide spaces), Jean Rozeske submitted a comment on official letterhead contesting the adequacy of the rules for an eight-hour-a-day working environment “based on experience in a work area which essentially complies with two of the criteria set forth by the Board of Health in reference to physical barriers and separating space. Although these conditions are met, I continue to suffer with daily headaches, congestion, sore throats, and difficulty with breathing.”532 In the event, such a statement was

528Terry O’Brien to Kent Peterson, Proposed Rules Implementing the Clean Indoor Air Act at 1 (Sept. 4, 1975), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B).
529Terry O’Brien to Kent Peterson, Proposed Rules Implementing the Clean Indoor Air Act at 4 (Sept. 4, 1975), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B).
530Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 2.i) (Draft Sept. 9, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
531Only the CO concentration was a result, but, as noted below, inspectors never measured it. Moreover, in the event, particulate matter, which was far more lethal, was less amenable to measurement at the time.
532Jean Rozeske to Warren Lawson (Dec. 17, 1975), in Health Department, MSA,
The Minnesota Clean Indoor Air Act of 1975

unable to dissuade the Board of Health from upholding the Health Department’s unsubstantiated assertion that 56-inch-high barriers were “sufficient to completely interrupt the direct flow of smoke from seated persons and to provide deterrence from indirect shifting of smoke.”

Publicly Available Drafts of the Board of Health’s Proposed Rules Prior to Its Public Hearing in December

On September 12, the Health Department sent to all Board of Health members a draft of proposed rules, requesting them to make suggestions for the proposal being prepared by the Department’s staff. Whether that draft is extant is uncertain because when, on October 1, Dr. Warren Lawson, the Department’s executive officer, attached “[t]he staff recommendation for proposed rules” to the materials he sent the Board members for their meeting on October 9, it was unclear whether that iteration incorporated the members’ suggestions that he had solicited on September 12. To be sure, on September 11 the press obtained a copy of the 19-page proposal (stamped “not official, draft only”), which the Department was sending to restaurant owners, hotels, office managers, citizens groups, and other interested parties. The copy of a draft preserved in the Minnesota State Archives bearing the date of September 9 and otherwise corresponding to the press account of it may be the draft that Lawson sent to Board members on September 12. The only reason for uncertainty as to whether the September 9 draft was identical to that of September 12 was that on September 10, Peterson held a meeting attended, at the very least, by Neil

MHS, 112.H.18.3(B).


536Regulations for Implementation of Minnesota Clean Indoor Air Act (Draft 9/9/75) (every page is stamped “Not Official Draft Only”), in Health Department, MSA, MHS, 112.H.18.3(B).
Solberg, chairman of the Downtown Committee of the Building Owners and Managers Association of Minneapolis, whose members owned or controlled 10 million square feet of office space, Raymond Jones, the director of administration of Pillsbury Company, and a representative of IDS Properties, Inc., a subsidiary of Investors Diversified Services, Inc., which owned several million square feet of downtown Minneapolis office space, but presumably also by other Twin Cities firms covered by MCIAA. That the written statement by Solberg (which appears to have been prepared for oral presentation) and a letter by Jones, both dated September 10, made it clear that they were responding to the (aforementioned no longer extant) draft of August 18 suggests that they were not yet privy to the September 9 draft.

Solberg, on behalf of the Minneapolis building owners and managers, sought to identify a dichotomy in the proposed rules between “public facilities” or “public areas,” on the one hand, and the “office building industry” on the other. Whereas, in his group’s view, the rules were “heavily oriented” toward the former, they were “extremely ambiguous and inadequate” regarding the latter: “We are essentially dealing with two distinctly separate problems: controlled office space with existing highly scientific work flow procedures which govern the positioning and layout of employee work stations as opposed to public areas.”

This alleged contradiction between profitably and scientifically operated offices and government-mandated public health intervention became the hallmark rhetorical ploy of Twin Cities big business’s opposition to the MCIAA rules. To one of the rules’ key operating provisions concerning the

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537 Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 2 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

538 Raymond Jones/Pillsbury Co. to Kent Peterson (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

539 Because it seems implausible that Peterson would have withheld the September 9 draft from precisely the businesses whose input he was seeking, it is possible that he at the very least revealed to them whatever changes he had made since the August 18 draft, that they commented on them, and that he then made some last-minute changes in the draft that the press received on September and that Lawson distributed to the Board on September 12. If not, then the September 9 draft was the September 12 draft.

540 Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 1 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

541 In 1975, two of the principal resisters, Pillsbury Co. and Honeywell Inc. had sales of $1.2 billion and revenues $2.8 billion, respectively. “Pillsbury Reports Record Sales and Earnings for Year,” NYT, June 27, 1975 (57); “Honeywell and Control Data Show
The Minnesota Clean Indoor Air Act of 1975

minimization of the toxic effects of smoke in adjacent nonsmoking areas the owners unconditionally objected on the grounds that it was “undefinable in terms of specifics and could lead to undue confusion as well as dogma [sic] of requirements based on non-engineering criteria”\textsuperscript{542} without offering a corrective. It is difficult to discern any rational kernel of BOMA’s objection (other than a possible failure to construe the inter-linked proposed rules properly), since, although at this stage the Health Department had operationalized its minimization sub-rule only in terms of unquantified “considerations,”\textsuperscript{543} which did apply to offices and office buildings, at the same time the “acceptable smoke-free area” standard, which also applied to these specific locations,\textsuperscript{544} was defined by

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\textsuperscript{542}Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 1 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

\textsuperscript{543}Rule 3.d) required owners who designated smoking-permitted areas to minimize the toxic effect of smoke in adjacent non smoking areas according to the following considerations:
1) In selection of the smoking permitted area, existing physical barriers including walls, pillars and partitions shall be utilized.
2) Designation of the smoking permitted area shall contemplate ventilation capacity and general air movement in the “public place or meeting room.” The general air movement shall not be from the smoking permitted area to the no smoking area.
3) Arrangement of seating shall provide a distance between the smoking permitted area and no-smoking area.

Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 3.d) at 8 (Draft 9/9/75) (every page is stamped “Not Official Draft Only”), in Health Department, MSA, MHS, 112.H.18.3(B). It is assumed here that the structure of the pertinent sections of the Aug. 18 draft to which the building owners were responding was sufficiently similar to that of Sept. 9 to support the analysis of the owners’ criticism. The discussion of O’Brien’s memo on Peterson’s Aug. 11 draft and of the latter’s “format” suggest that it was. If it was not, then Solberg’s comments could still not have persuaded Peterson to quantitate the minimization provision since Peterson would already done so in the Sept. 9 draft.

\textsuperscript{544}The sub-rule governing offices provided that in an open work area office that was not used by the public, but was a workplace “occupied by both smokers and non-smokers,” the owner would be considered in compliance with the MCIAA if he used any of these three mechanisms: (1) prohibition of smoking in the entire area; (2) prohibition of smoking in the entire work area and provision of a smoking lounge in a separate area; or (3) permission to smoke “in one or more sections of the open work area which are used exclusively by smokers and people who permit smoking, but prohibit[ion] in all sections
of the open work area in which people do not expressly permit smoking. Smoking permitted areas shall be limited to assure that the remainder of the room is an acceptable smoke-free area as defined in Rule 2(i).” Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.c) at 10-12 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).

Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 2.i) at 4 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). For the text, see below this ch. This provision does raise the possibility that the Aug. 18 draft had been superseded by that of Sept. 9. The owners complained that the “seating requirement calling for ‘reasonable distance’ is not specific and could indeed cause hardship and confusion to all parties.” Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 2 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). On Sept. 4 O’Brien had advised Peterson that a “rule setting a standard of ‘reasonable distance’ is pregnant with problems. The word ‘reasonable’ states a conclusion not a process. What is reasonable? Who decides what is reasonable? On what standard is reasonableness determined. What is ‘reasonable’ to Phyllis Kahn may be patently unreasonable to Stan Mayslack [a former professional wrestler and restaurant owner]. You might consider a specified distance as being reasonable.” Terry O’Brien to Kent Peterson, Proposed Rules Implementing the Clean Indoor Air Act at 4 (Sept. 4, 1975), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B). Although O’Brien referred to this provision as Rule 3.2.(c)(ii), it appeared to correspond to Rule 3(d)(3) in Peterson’s aforementioned Aug. 4 “Format,” which dealt with the arrangement of seating (to separate smoking and nonsmoking sections in order to implement owners’ duty to minimize the toxic effects of smoking on adjacent areas). By the time of the Sept. 9 draft Peterson had dropped “reasonable” altogether from the minimization provision, leaving only a “distance,” but at the same time requiring the aisle space under the definition of “acceptable smoke-free area” to be at least four feet. Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 3.d)3) at 8 and Rule 2.i) at 4 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). Peterson later explained his initial failure to quantify certain standards as a function of the fact that it was “difficult to find specific measurements with some evidence. I used the best measurements that I could justify based upon current knowledge.” Email from Kent Peterson to Marc Linder (Oct. 18, 2009). O’Brien and Solberg clearly agreed on this point on which Peterson had accommodated them, but it seems odd that the building owners would have been wasting everyone’s time at the Sept. 10 meeting criticizing a superseded draft. The explanation may be that the written version of Solberg’s oral presentation had been prepared before Sept. 9 (or whenever owners had been apprised of the new draft) and did not in its entirety reflect what the owners actually said at the Sept. 10 meeting. This confusion is exacerbated by the fact that one of the participants later thanked Peterson for the “opportunity of expressing our feelings toward
The Minnesota Clean Indoor Air Act of 1975

seeking a special exemption finally became obvious in their last specific comment keyed to the sub-rule governing offices: “Smoking in office areas is difficult to post and control because of the innumerable work stations involved, the movement of people from station to station, and the very fact that open area plans and work stations have passageways which can support smokers and non-smokers alike. It would appear that this section should be eliminated as well as any other pertinent part within this text in that the restrictions on smoking could relate to public areas in public buildings or perhaps other public areas in private buildings when so designated properly.”

This special pleading on behalf of office workplaces that the general public did not frequent made no impression on Peterson (who many years later explained): “Since the law includ[ed] places of employment of that type, we could not consider exempting them. We talked to them to try to find workable ways to make it possible for them to manage while still enforcing the law.” The building owners then concluded by asserting that the August 18 draft rules “place an undue burden on the employer’s ability to administer effectively together with an unnecessary financial burden.” Solberg also accused the “text” of being “completely unaware of the engineering and architectural efforts that will be required to satisfy these general objectives.”

At the end of his prepared statement Solberg turned the discussion over to Jones “so that the employer’s position might be shared with you [i.e., Peterson].” The “brief comment” that Jones then made was presumably not so detailed or specific as his letter of September 10. The August 18 draft, which Raymond Jones, who would continue attacking the rules throughout the rulemaking

the new draft” at the meeting. Larry Strohkirch (IDS Properties, Inc.) to Kent Peterson (Sept. 30, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Without any direct recall, decades later Peterson noted that before fax machines and the internet: “If there was a meeting on Sept. 10 and there was a draft approved for release the prior day, there would not have been an opportunity to give it to them earlier.” Email from Kent Peterson to Marc Linder (Oct. 14, 2009).

546Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 2 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

547Email from Kent Peterson to Marc Linder (Oct. 14, 2009).

548Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 2 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

549Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 2 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

2378
process, criticized appears, at least with respect to the provisions at issue (smoking/nonsmoking areas in single room public places and office space), to have been identical to that of September 9/12. Jones insisted that it was “imperative to clarify the wording because this is a critical operating issue. Office space is arranged to aid employees in the performance of their jobs.” After quoting an industrial psychologist who had argued that because “[f]unctional, behavioral and technical aspects determine the layout of individual work places, groups and departments,...the building is built around the organization, the organization is not squeezed into predetermined spaces,” Jones informed Peterson that Pillsbury had spent $1.49 per square foot for studying, planning, and the layout of two 28,147 square-foot “largely open-area floors to assure the effective operation of the units located there.” From there he jumped to unsubstantiated and fanciful anti-procrustean claims of pending commercial doom under MCIAA. According to the first opaque scenario, if the firm designated all non-private office space nonsmoking, the “loss of productivity” would amount to $462,000 annually—“[i]f an estimated 264 smoking employees in our Headquarters offices were absent from their work station one hour per day to visit Smoking Permitted areas...” Under the second scenario, which “would quite possibly” bring about an ever greater productivity loss, designating one side of a room smoking and the other nonsmoking would cause “many employees to travel to another part of the floor to contact those with whom they closely work”—a travelog that “contradicts” the aforementioned “scientific study.” Under a capitalist nightmare of a prestidigitated example, Jones claimed that “to separate the Commodity Analysts, Decision Makers and Internal and External Information Systems could easily cost us $10,000.00 in 10 minutes with a $.10 per bushel market on 100,000 bushels of wheat by delaying our reaction time.” Having limned these slippery slopes to bankruptcy, Jones requested that MDH reword the “single room” and office space provisions to authorize owners to “[d]esignate individual work station areas as No Smoking or Smoking Permitted areas in open office space” in order to “permit continued high productivity, scientifically planned.”

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50 At the Board of Health public hearing Jones presented the same criticism of designating one side of a room smoking and the other nonsmoking on the grounds that it interfered with “scientific” work flow. Board of Health Hearing Transcript at 116 (Dec. 2, 1975).

51 Jones’s next letter of Sept. 26, as noted below, indicated that some changes had been made between Aug. 18 and Sept. 12.

52 Raymond Jones/Pillsbury Co. to Kent Peterson (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). The press picked up this tale of huge losses occasioned by interference with grain-buying teams’ need for instant reactions to rapid
The Minnesota Clean Indoor Air Act of 1975

As asked decades later about the reality content of such complaints, Peterson observed that “I would not be surprised if the specific example cited from Pillsbury would have been viewed as reality in 1975 whereas it’s not now.”

Unfortunately, Jones did not engage in a dialog with an employee at the downtown St. Paul office of a large insurance firm who complained to the Health Department in 1975 about being subjected to the kind of individual work station regime for which Pillsbury was pleading, under which “there is really no smoke free area at all.” She added that if management did not like the efficiency consequences of separating smokers and nonsmokers, “then the answer of course is to prohibit smoking altogether. I am paid to work. I resent employees who are paid to smoke.”

(Nothing in MCIAA, as Brandt later observed of Jones’s complaint about alleged costs of compliance, “requires any employer to pay employees who are off smoking and not working.”)

The September 9/12 draft included several crucial provisions that had to carry the burden of both implementing the legislature’s unexpressed intent as to how capacious or narrow the outright prohibition of smoking was to be and, correlatively, how numerous and extensive or few and confined the exceptional designated smoking areas and interpreting the expressed directive that “existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent non-smoking areas.” The key operative term in this context was the “Acceptable Smoke-free Area,” which, oddly, was not keyed to MCIAA’s only use of the term “smoke-free area”—namely, owners’ § 6 duty to “make reasonable efforts to prevent smoking in the public place by (a) posting appropriate signs; (b) arranging seating to provide a smoke-free area; (c) asking

fluctuations in market prices. Austin Wehrwein, “Nonsmokers Rights Law Sparks Minnesota Dispute,” *WP,* Oct. 6, 1975, Bates No. TIMN0462140. At the Board of Health public hearing the Northwestern National Life Insurance Co.—40 percent of whose 650 employees at its headquarters in Minneapolis smoked—aligned itself with Pillsbury’s complaints and proposed solutions. Preposterously, the company also asked the Health Department to consider “treat us like an office supporting a factory....” Board of Health Hearing Transcript at 155-60 (quote at 160) (Dec. 2, 1975).

553 Email from Kent Peterson to Marc Linder (Oct. 14, 2009). With regard to the practical significance of such claims, Peterson added: “Those broad estimates of dollars lost in productivity don’t have much impact when writing the rule. I have always thought that good managers can adjust work circumstances to maintain productivity. However, the rule had to be justified as reasonableness and their input meant something there.” *Id.*

554 Nancy Cincoski to Secretary and Executive Officer of the Board (Dec. 17, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

555 Board of Health Hearing Transcript at 161 (Dec. 2, 1975).

556 1975 Minn. Laws ch. 211, § 5, at 633, 634.
smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke; or (d) any other means which may be appropriate.” Indeed, this version of the draft rules dealt with this duty only indirectly (without even mentioning “smoke-free place”) by noting that: “Permissible alternatives to the mechanisms described in Section 6...may include any of the following: 1) If on entry into the location all persons are asked their preference for a smoking permitted or a no smoking area, then the proprietor...shall be deemed in compliance if at least one sign advising the public of this mechanism is conspicuously posted at all entrances normally used by the public. 2) (Other mechanisms are being prepared.)” This alternative presumably qualified as one of the statutory other appropriate means. Instead of regulatorily implementing the “smoke-free area” provision in its narrow statutory context, the Health Department applied it to various “Categories of Affected Places” covered by Rule 4. First, however, drafter Peterson defined an “Acceptable Smoke-free Area” as

an area of the public place or public meeting where smoking is prohibited and at least one of the following conditions exist [sic]:

1) There is a continuous, physical barrier of at least five feet in height to separate the smoking permitted and no smoking areas.

2) There is an isle [sic] of space of at least four feet in width to separate the smoking permitted and no smoking areas.

3) The ventilation system in the room containing both a smoking permitted and no smoking area has total air circulation (recirculated plus air) not less than six air changes per hour including supply of tempered air not less than 7½ cubic feet per minute per person.

4) By using a combination of the ventilation system, isle [sic] space or physical barriers, the concentration of carbon monoxide in the no smoking area shall at no time exceed 10 milligrams per cubic meter (9 parts per million).

5) (Other acceptable standards being prepared)

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557 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 3.e) at 9 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). Since the MDH abandoned this structure in later drafts, other mechanisms were not prepared. In the next iteration this provision dropped the express reference to § 6 of MCIAA and deemed the preference asking a “reasonable effort...to prevent smoking...” Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 3.e) at 7 (Draft 10/9/1975), in Health Department, MSA, MHS, 112.H.18.3(B); Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 3.e) at 7 (n.d. [Oct. 1, 1975]) (copy furnished by MDH).

558 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 2.i) at 4 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).
The application to individual affected places was exemplified by restaurants, in which smoking was limited to designated smoking areas, the size and location of which smoking-permitted areas were required to be “limited to provide an acceptable smoke-free area in the remainder of the establishment.”

The same requirement to provide/assure an “acceptable smoke-free area” was also applied to other locations, including retail establishments, office areas, public conveyances, passenger terminals, health care facilities (including patient dining rooms or activity rooms and lounges), public meeting rooms, and educational facilities.

Since the Health Department at this stage did not explain the meaning of the interpretive gloss “acceptable” or the reason for its insertion, let alone the scientific bases for the barrier heights or aisle space as guarantors of smoke-freedom, their analysis is postponed until the account here reaches the stage in the process when such justifications were forthcoming. Noteworthy is the great emphasis that this draft placed on implementing the mandate in § 5 of MCIAA that: “Where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent non-smoking areas.” An entire sub-section of Rule 3 was devoted to “Minimizing the Toxic Effects,” which was eliminated from the October iteration, which, in turn, inserted in its stead a subsection generally operationalizing “Acceptable Smoke-free Area” in lieu of splintering its application to the aforementioned selected locations. The September draft required owners, where they designated smoking-permitted areas, to carry out the minimization “according to the following considerations: 1) In selection of the smoking permitted areas, existing physical barriers including walls, pillars and partitions shall be used. 2) Designation of the smoking permitted areas shall contemplate ventilation capacity and general air movement in the ‘public place or meeting room.’ The general air movement shall not be from the smoking permitted area to the non smoking area. 3) Arrangement of seating shall provide a distance between the smoking permitted area and no smoking area.”

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559 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.a) at 9 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). The same mandate applied to the designated no-smoking side of a single-room restaurant. Id.

560 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 3.b), c), d) e), f), i), and k) at 10-17 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). The mandate did not, however, apply to auditoriums, arenas, gymnasiums, theaters, hotels, motels, or places of work (unless the latter were located in any of the aforementioned public places).

561 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 3.d) at
Department proposed rules thus reproduced the fecklessness of the MCIAA while adding rules too vague or weak to be usefully enforcible (such as “contemplate”). Like the statute, the rules did nothing to protect nonsmokers from secondhand smoke in public places that lacked pre-existing barriers or ventilation systems. Why the seating arrangement provision did not require even the inadequate four-foot space called for by the “acceptable smoke-free area” the Department did not explain.

Having previously concluded that it lacked authority to prescribe any quantitative apportionment of the space, the Health Department was able to shed only weak light on the opaque determination in § 5 of the MCIAA—namely, that the owner of a single-room public place was compliant if he reserved and posted “one side of the room...as a no-smoking area” was to define “one side” as “a contiguous portion of the room, including any seating arrangements”562 and to require that the “size of the no smoking area shall be at least proportionate to the preference of patrons of that establishment for such an area.”563

The proposed resolution of the contentious issue of regulating smoking in the open work area of an office (defined as a location in which “professional activities or clerical and administrative activities are the principal usage”)564 that was not used by the general public but was occupied by smoking and nonsmoking workers conferred discretion on owners to achieve compliance with their responsibility under § 6 of MCIAA to “make reasonable efforts to prevent smoking” by using any of three mechanisms: (1) banning smoking in the whole area; (2) banning smoking in the whole area and providing a smoking lounge in a separate room; and/or (3) permitting smoking in one or more sections “used

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8 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). Like the “acceptable smoke-free area” provision, the minimization mandate was applied to selected categories of affected places, including restaurants, retail establishments, offices, public conveyances, passenger terminals, auditoriums, arenas, gymnasiums, theaters, hotels, motels, public meeting rooms, and educational facilities.

562 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 2.f) at 3 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).

563 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 3.b) at 6 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).

564 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 2.j) at 4 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). The criterion that the draft used to identify office space covered by DLI’s rules was whether it “supports activities which are principally to manufacture or assemble goods, products or merchandise for sale, or to store goods, products or merchandise not for the purpose of retail sale....” Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.c) at 12 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).
The Minnesota Clean Indoor Air Act of 1975

exclusively by smokers and people who permit smoking” but prohibiting it in all sections in which “people do not expressly permit smoking.” Inherent in the third mechanism was the fatal defect of undermining protection for nonsmokers by subjecting them to the full brunt of precisely the kind of workplace pressure to go along to get along that would perpetuate their self-injurious acquiescence that MCIAA was meant to abolish in favor of compulsory norms.

In any public conveyances with a capacity of 10 or more passengers (including the driver) the Health Department authorized owners to designate smoking-permitted areas, thus implicitly prohibiting smoking altogether in public transport with eight or fewer passengers (plus the driver). How owners would go about “assur[ing] an acceptable smoke-free for non-smokers” or minimizing toxic effects in such close quarters as in a bus the rules failed to spell out. Such a seemingly hopeless task of compliance might suggest that the Department was seeking to effectuate a de facto ban on smoking there, but the later course of the drafting process would refute such a hypothesis.

The more than two pages that the Health Department devoted to health care facilities constituted the most extensive attention bestowed on any category of affected places. However, despite patients’ greater than average vulnerability to the health impacts of smoke exposure, the rules were hardly the most stringent. For patient bed areas the rules offered two alternative procedures. First, in a scenario not unbridgeably remote from the “More doctors smoke Camels than any other cigarette” ads that had been terminated more than two decades earlier, the administration could ask prospective patients whether they preferred a smoking-permitted or a no-smoking area, assigning rooms “according to this preference when space is available.” If no space was available in either the no-smoking or smoking areas, then “smoking shall be prohibited in all patient bed areas except areas which are used exclusively by smoker patients and patients who have expressed permission for smoking”—thus, once again, subjecting nonsmokers to social pressure to acquiesce in smoking at a time in their lives when they might have the least social-psychological wherewithal to mount resistance. On top of this lax governance, the Health Department also prioritized hospital administrators’ wishes over the availability of warnings to nonsmokers by

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565 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.a) at 11 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). This special sub-rule was presumably meant to instantiate MCIAA § 6(d), which provided that owners could also use “any other means which may be appropriate” in complying with their duty to “make reasonable efforts to prevent smoking....”


2384
allowing health care facilities to satisfy the signage requirements merely by posting a single sign at the entrance to each wing or floor stating that smoking was prohibited except in designated areas. Alternatively, if management did not assign bed areas according to patient preference, smoking had to be prohibited in all patient bed areas except rooms “occupied exclusively by smoker patients or patients who have expressed permission for smoking”—setting up the same stress test for nonsmokers.\footnote{Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.f)1) at 13-14 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).}

Imposing the burden of enforcement on sick nonsmokers stood in sharp contrast to the endorsement in 1974 by the board of the Minnesota Hospital Association of a unanimous resolution of the Minnesota State Medical Association urging hospitals to allow patients to smoke in multi-bed rooms only with the approval of their own doctors and that of the non-smoking patients’ doctors.\footnote{“Hospital Unit Seeks Tobacco-Sale Ban,” \textit{MT}, June 15, 1974 (10B:5-7). Though only a non-binding recommendation to hospitals, the vote was considered a “major victory” for ANSR, which had been trying to use hospitals to set an example. The recommendation also included a ban on hospital sales of tobacco.}

Finally, in order to effectuate the provision in § 7 of MCIAA for waiving the act’s requirements if the Board of Health determined that there were “compelling reasons” and the waiver would not significantly affect nonsmokers’ health and comfort, the September draft rules required applicants to prove that the law’s implementation would both “[r]esult in the public place[’s] not being able to provide the service for which the place is intended, and...[e]ndanger the ability of the public place to meet its costs for operation”; the draft also required that, despite the waiver, the CO concentration “in all sections of the public place at no time will exceed” the regulatorily mandated 10 milligrams per cubic meter for an “acceptable smoke-free area.” In connection with making these eligibility determinations the Board of Health permitted itself “access to all records of the public place pertinent to such application”\footnote{Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 5 at 18-19 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). By October the Health Department dropped the requirement that the applicant prove that implementation would result in “not being to provide the service....” Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 5.b) at 11 (Oct. 1/9, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (and copy furnished by MDH).}—an intrusion into the documentation of the factors underlying regulated businesses’ profitability that the Board/Department modified by the time it made its proposed rules available

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\footnote{567} Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.f)1) at 13-14 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).
\footnote{568} “Hospital Unit Seeks Tobacco-Sale Ban,” \textit{MT}, June 15, 1974 (10B:5-7). Though only a non-binding recommendation to hospitals, the vote was considered a “major victory” for ANSR, which had been trying to use hospitals to set an example. The recommendation also included a ban on hospital sales of tobacco.
\footnote{569} Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 5 at 18-19 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). By October the Health Department dropped the requirement that the applicant prove that implementation would result in “not being to provide the service....” Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 5.b) at 11 (Oct. 1/9, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (and copy furnished by MDH).}
The Minnesota Clean Indoor Air Act of 1975

at the public hearing in December.\textsuperscript{570}

While drafting the proposed regulations, staff of the Health Department—whose head, Dr. Warren Lawson, was a heavy smoker\textsuperscript{571}—met, after the State Board of Health had given notice of its intent to seek information from sources outside the agency; these “interested parties” included “legislators who authored the Act, voluntary health organizations which supported the Act and associations of establishments affected by the Act.”\textsuperscript{572} Asked whether the Department had received any guidance from the legislature as to how to frame the regulations, Peterson, their chief drafter, noted that the only legislator with whom he had met was Kahn herself, but that her voice had been only one of many and her views had not been accorded any greater weight than anyone else’s. The principal constraint that Peterson faced in drafting the rules was the issue of how far they could extend without imposing an “undue burden” on businesses (including their profitability) so that they could be reasonably implemented by virtually all businesses. By the same token, the regulations had to accommodate the “feeling that there was a right to smoke.”\textsuperscript{573} Since MCIAA neither explicitly nor implicitly embodied either a right to smoke or any indication that the legislature intended the regulatory agency to subordinate its public policy of protecting the public health to business profits—except for the provision for a waiver, which owners had to request and which therefore operated apart from the general framework, but nevertheless could not be granted if it significantly affected nonsmokers’ health and comfort\textsuperscript{574}—the drafter’s acquiescence in such

\textsuperscript{570}“The Board has the right to request any other information reasonably necessary to determine the merits of the waiver application. Failure to submit such requested information may result in denial of the waiver application.” Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 445(a) at 15 (n.d. [Dec. 2, 1975]), in Health Department, MSA, MHS, 112.H.18.3(B). The provision was retained in the final rules.

\textsuperscript{571}Telephone interview with David Giese, Hopkins, MN (Apr. 5, 2009) (Lawson’s administrative assistant at the time). In 1977 Lawson, together with some other public figures such as the president of the state American Cancer Society, signed a pledge not to smoke on no-smoking day (D-Day) 1978. Elizabeth Emerson, Public Health Is People: A History of the Minnesota Department of Health 1949 to 1999, at 235 (n.d.), on http://www.health.state.mn.us/library/dhsjournals/Chapter9.pdf

\textsuperscript{572}Consideration of Proposal to Authorize Public Hearing Relating to Regulation for the Minnesota Clean Indoor Air Act, in Warren Lawson to Members of the State Board of Health, Re: Agenda Material for October 9 Meeting (Oct. 1, 1975) (copy furnished by Minnesota Health Department).

\textsuperscript{573}Telephone interview with Kent Peterson, Minneapolis (Apr. 1, 2009).

\textsuperscript{574}1975 Minn. Laws ch. 211, § 7, subd. 1, at 633, 635.
an overarching constraint on the shielding of nonsmokers from secondhand smoke exposure suggested that the regulations would not even reach the outer limits of a statute that was already deeply flawed by its permissive authorization of designated smoking areas. Peterson’s pragmatic defense of the regulation emphasized that: “At the time, many felt that the separate areas did protect us non-smokers better than without the law. ... I believe that an unacceptably strict law and rules would have been ignored or, worse yet, repealed before acceptance of non-smoking areas were [sic] shown. Investigation and enforcement of more stringent standards was not an option.”

The possibility of such a backlash was visibly on display in a letter to Peterson in mid-September from Representative Bruce Nelsen, a Republican who had voted against H.F. 79 on final passage in the House but then voted for it after the Senate had amended it. While purporting to view MCIAA as an “admirable attempt to resolve a problem of growing concern” that “eventually will help mold and alter public attitudes about the rights of non-smokers,” Nelsen reported that “organized groups supporting this legislation are now trying to do by rule and regulation what they did not obtain through legislation.” He acknowledged that “there would be many different ideas of the exact legislative intent of this bill,” but he was nevertheless “absolutely amazed” when he read about some proposals for which he insisted that, as he saw it, legislative intent did not call such as “[i]nstallation of ventilating fans; required four-foot isles [sic]; requiring large and expensive signs at all entries; hiring a person to make announcements over the PA system or maintaining a four-foot buffer zone between smoking and non-smoking areas.” What his animus boiled down to was that many such proposals were “really asking the private sector to pay for changing...public attitudes. Only when the state of Minnesota decides it will rent the areas involved in a four-foot wide buffer zone will the financial responsibility be replaced.”

In turn, ANSR met informally with the Board and covered businesses in order to “get input into the regulations from those concerned so that the regulations will effectively protect the nonsmoker and also take into consideration the reasonable concerns of proprietors.” Business owners’ schmoozing with agency officials pursued a different end. For example, John Kahler, who in 1975-76 was both president of the Minnesota Hotel & Lodging Association and corporate general manager and executive vice president of Kahler Corporation, whose Kahler

575 Email from Kent Peterson to Marc Linder (Apr. 2, 2009).
576 Bruce Nelsen to Kent Peterson at 1-2 (Sept. 15, 1975), in Health Department, MSA, MHS, 112.H.18.3.(B).
Grand Hotel in Rochester serviced the Mayo Clinic,578 pressed on Robert Willmarth, the aforementioned cigar-smoking member of the state Board of Health, his opposition to any ventilation system air exchange requirements.579

By October Bohr was apparently trying to make amends for his lack of diligence in legislative lobbying by spearheading the Minnesota Restaurant Association’s “rear-guard action”580 to persuade the world that “any place serving beer, wine or liquor is a ‘bar.’” For the many restaurant owners “banking on the act’s ‘bar loophole’” to escape coverage this implausible contention was apparently the ultra-thin reed on which they were resting their case against ANSR in “battling to influence” the Health Department, which was under time pressure to meet its November deadline to issue regulations. Even some restaurants that purported to comply were in fact engaged in guerrilla warfare: for example, “a couple at a fancy restaurant who complained that a tiny third-floor, nonsmoking area reminded them of a toilet” found themselves “escorted out by the bouncer.” Nor were restaurants outliers: the Minnesota Association of Commerce and Industry also began resisting on the grounds that smoking restrictions in offices and factories “would be costly and disruptive—if not impossible to implement,” because, for example, fixed machinery and equipment could be incompatible with creating “smoke segregation areas.” Little wonder that ANSR accused some big firms and banks of “dragging their feet, fearful that smoking customers will complain.”581

In distributing the September 12 draft rules, Peterson included a letter asking recipients for comments. Based on the responses preserved in the Department’s archived files, he did not receive many before the Board of Health met on October 9 to consider whether to authorize Lawson to hold a public hearing, but those that were submitted came largely from the same aforementioned Twin Cities building owners and managers, some of whom continued adamantly to oppose application of the law to their commercial space. Indeed, BOMA’s resistance had stiffened to the point that it lambasted coverage even of “public areas” (i.e., areas accessible to members of the general public who were not employed in the offices housed in buildings owned or managed by BOMA members) to which it had seemed reconciled just three weeks earlier. But on October 2, Arthur Olofson,

the association’s executive secretary, informed Peterson that the fact that by personal observation he knew that there was “certainly a lack of recognition for the ‘no smoking’ restriction in elevators”—which had already been off limits before the MCIAA—suggested that enforcement was “poor if not impossible. We recognize that public areas which include corridors, washrooms and skyways will have similar problems of enforcement. It would appear to be pure folly to attempt to legislate in these areas.” In other words, taken together with BOMA’s earlier claim that enforcement in tenant space was all too possible and destructive of productivity, this new negativity would have led to a total exemption for office buildings from a law that Olofson conceded had “merits,” which, however, he did not bother to spell out. Instead, he insisted that, given the differences in size and complexity of space usage as between small and large tenants, there was “no equitable way to treat individuals on a similar basis and therefor [sic] to define areas for smoking should be a decision of management.” Consequently, BOMA shifted to the position that even as to the private entrepreneur, office tenant, or office owner the proposed rules “will be difficult and burdensome to implement technically and will be difficult if not impossible to enforce from a practical viewpoint.”

Even more hostile was the Northern States Power Company, whose property and land manager had received inquiries from all manner of employees not a single one of whom had mentioned a word about an “undesirable condition caused by smoking.” Opposed to coverage of “so called [sic] ‘public’ office buildings” whose use by the general public was “incidental,” he complained that MCIAA had “created an opportunity for a small vocal minority to stir up a lot of animosity within the building that has little or nothing to do with health hazards from inhaling smoke.”

Without explaining the change it sought, IDS Properties contended that among its tenants were many occupying as little as 200-300 square feet and no private offices; since each smoker would have to be surrounded by 200 square feet of space and the buildings’ bathrooms and corridors were public and therefore smoking-prohibited, if any employee was opposed to smoking, no employee in such small offices could lawfully smoke in the building and a great deal of time and effort would be lost as a result of the smokers’ leaving the building to smoke.

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582 Arthur Olofson (Building Owners and Managers Association of Minneapolis) to Kent Peterson (Oct. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
583 Donald Robbins (Northern States Power Co.) (Sept. 22, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (no addressee).
584 Larry Strohkirch (IDS Properties, Inc.) to Kent Peterson (Sept. 30, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
The indefatigable Jones from Pillsbury weighed in again, taking a much different stance than the unrelenting opposition displayed by BOMA (which he stated he was sure would have “thoughts of their own”). Instead, in order to “ease compliance capability on the part of an office building occupant” he cooperatively proposed a number of specific modifications, at least one of which the Health Department immediately adopted before it even submitted the next iteration to the Board of Health. This proposal, which hardly lived up to his claim of merely “clarify[ing] the language,” reduced the minimum height of the physical barriers sub-branch of the “acceptable smoke-free area” from five feet to 56 inches; it also would have deleted the requirement that the physical barrier be “continuous.” Pillsbury sought to justify these two changes on the grounds that in a so-called open-plan or landscaped office—which purportedly accounted for 60 percent of all offices “‘now on the drawing boards’”—“physical barriers are often not continuous but are sufficient to provide a degree of audio and visual privacy and interrupt horizontal air flow. Standard heights of free standing ‘landscaping’ screens of at least one major manufacturer are 56 inches and 72 inches—not five feet—whereas at least two major manufacturers of open-plan panelling use standard heights of 62 inches and 80 inches.” In addition to including the claim about “interrupt[ing] horizontal air flow,” later in his formal “Justification” for the rules, Peterson did in fact adopt the 56-inch standard, which appeared in the draft presented to the Board of Health on October 1/9, but did not jettison “continuous.” It is noteworthy that although the sole basis for the height change was the purported commercial availability of barriers, and although three of the four types exceeded five feet, Jones opted for (and the

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585 Raymond Jones (Pillsbury) to Kent Peterson at 1-2 (Sept. 26, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (internal quote from magazine Architectural Management).

586 See below this ch.

587 See below this ch. Pillsbury also proposed that the four-foot-wide aisle space be modified to delete “wide” and “aisle” because aisles in office landscaping layouts were “ill-defined or non-existent.” Peterson deleted the former but not the latter. Finally, Pillsbury prevailed in its proposal to delete the requirement that where smoking was permitted in one or more sections of the open work area of an office, “[s]moking permitted areas shall be limited to assure that the remainder of the room is an acceptable smoke-free area....” Raymond Jones (Pillsbury) to Kent Peterson at 2-3 (Sept. 26, 1975), in Health Department, MSA, MHS, 112.H.18.3(B); Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.c)3) at 11 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B); Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4.a) at 8 (Oct. 1, 1975) (copy furnished by MDH).
The Minnesota Clean Indoor Air Act of 1975

Health Department acquiesced in) the only one that lowered the standard. As for dropping continuousness, whatever make-believe “degree...of privacy” non-continuous barriers (or, for that matter, even continuous 56-inch barriers) provided against noise and the distractions of seeing and being seen and whatever minimal efficacy they displayed in interrupting horizontal air flow, they would be wholly impotent against drifting smoke.

Finally, Peterson also received extensive comments on the September 9/12 draft rules from Radisson Hotels lawyer-lobbyists Brooks and Kuduk, who, in addition to misleadingly asserting that their client had “not opposed the concept of separating smoking and non-smoking areas”—after all, they had testified before the legislature that the whole bill was unnecessary—submitted a lengthy laundry list of objections, only one of which was adopted by the Health Department in its October 1/9 draft and all of which combined would have severely compromised not only the implementing rules, but the statute itself. Their complaints began with the claim that the definition of “place of work” (“any location at which two or more individuals perform any type of...service for consideration of payment under any type of employment relationship, including but not limited to employment by a[n]...individual”) was so broad that it embraced a private residence when the owner hired two or more people to provide a service in his own house—a result that, without explanation, they claimed was not statutory intent. The definition of “bar” was “unacceptable” because Radisson saw no reason to use a quantitative capacity to serve (50) meals as an exclusionary classificatory criterion. The only criterion that did not “necessarily include false or arbitrary considerations” was “whether an establishment can sell alcoholic beverages....” These commercially self-serving assertions failed to explain why the legislature had bothered to exempt bars but not restaurants, why Representative Kahn had acquiesced in the restaurant industry’s pressure to exempt restaurants from H.F. 79, why great controversy had attended the Senate’s coverage of restaurants late in the process, or why Chum Bohr and the Restaurant Association had displayed intense animosity toward that amendment if, as Radisson claimed, any restaurant could nevertheless exempt itself by the simple expedient of securing a license to sell alcohol, which presumably Radisson and the vast majority of restaurants had. The lawyers’ only objection that was even plausibly anchored in the text of the law was to that part of the definition of “acceptable smoke-free area” framed in terms of five-foot-high physical barriers “and” ventilation systems with numerically specified air changes. Because MCIAA “specifically indicated that existing” barriers and ventilation systems

588Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 2.a) at 1 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).
“were to be used to facilitate the separation of smoke-free areas,” Brooks and Kuduk argued that the sub-rule “clearly goes beyond the statutory intent.”

Their argument would have been robust if (1) they had not falsely charged that the Health Department required compliance with both the barriers and ventilation methods and (2) the proposed sub-rule had not given covered public places the option of using four-foot wide spaces, about which the act was silent and which, in fact, according to the Health Department’s original and long-time head of MCIAA enforcement, was the most commonly used means of compliance with the “acceptable smoke-free area” requirement.

The only one of Radisson’s numerous suggestions that was embodied in the next iteration of the rules was one small part of its proposed elimination of the prohibition of smoking-permitted areas in such common traffic areas as entry lobbies, registration areas, or hallways of hotels/motels on the grounds that the ban exceeded the bounds of MCIAA, which merely required that nosmoking areas be provided in those areas. The only concession that the Health Department made in this regard was to permit the designation of “a portion of the seating area of a lobby or lounge” as smoking permitted. It nevertheless retained its general ban on smoking-permitted areas in “common traffic areas...or other areas which would be required to be used by non-smokers.”

Brooks and Kuduk failed to mention that the provision to which they objected was not specific to hotels, but rather a “general provision[ ],” which prohibited the location of smoking-permitted areas “in a complete area which non-smokers

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589 William Brooks, Jr. and David Kuduk to Kent Peterson (Oct. 3, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). The letter stated that the comments were based on a draft of the rules labeled “second draft”; the draft of Sept. 9 bore no such designation, but textually and in terms of section numbering it corresponded to Radisson’s references. The Health Department did insert a provision in the rules expressly excluding private residences, but not until the final version following its public hearing. See below this ch.

590 Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009). Schneider retired in 1994.

591 William Brooks, Jr. and David Kuduk to Kent Peterson (Oct. 3, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

592 Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4.f)2) at 10-11 (Oct. 1/9, 1975) (copy furnished by MDH). This sub-rule of the later draft was arguably even broader than that criticized by Radisson inasmuch as the latter had limited such common traffic areas to those “used by non-smokers to accomplish the activities for which a hotel, motel or resort is intended.” Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.h) at 16 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).
would be required to use to accomplish the activities for which the public place is intended” and was exemplified by the prohibition of smoking-permitted areas “in a complete area of required public use such as an entry lobby, ticket areas, hallways, elevators or similar places which must be used by non-smokers.” As with the applicability of the mandate to minimize toxic effects, the September 9/12 draft rules inserted this general provision in several categories of affected places, but with precise locational specifications. Perhaps the most prominent and consequential application was to areas in retail establishments that “must be used by the non-smoker to utilize the retail store, such as the complete entry or exit lobby or all counters at which payment is made for the goods and services.” The other two locations were passenger terminals, in which smoking shall not be permitted in a ticket area or public movement areas such as hallways, stairways and waiting lines to board the public conveyance and health-care facilities, in which the Department prohibited smoking in “common traffic areas such as the entry area, corridors, elevators or other areas which must be used by non-smokers to get from one location to another in the health care facility.”

Ironically, whereas Radisson’s lobbying resulted in only a minor paring back in the October draft rules of the total ban on smoking in common traffic areas in hotels, the proposed ban was totally eliminated with regard to retail establishments and passenger terminals (as a consequence of those locations’

593 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 3.a) at 5 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). The Oct. 1/9 draft was almost identical except for the deletion of the imprecise “complete,” which was then reintroduced in the December 2 proposed rules. Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 3.a) at 4 (Oct. 1/9, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (and copy furnished by MDH); Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 443(a)(3) at 7 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

594 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.b) at 10 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).

595 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.e) at 13 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).

596 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.f) at 14 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).

597 Asked 34 years later about this about-face, Peterson observed: “I don’t remember any smoking/nonsmoking check-out lanes. It seems incredible now to think of people walking around a retail store smoking and even considering a smoking checkout.” Email from Kent Peterson to Marc Linder (Nov. 22, 2009).
elimination from the rule governing “categories of affected places”) and, arguably, cut back sharply in health-care facilities, concerning none of which has any written record of lobbying been preserved. (The smoking ban in common traffic areas in health care facilities was absent from the December 2 version of the proposed rules as well as in the final rules.}\(^{599}\)

The Health Department later sought to justify this ban on the grounds that “it is felt that these designated smoking permitted areas shall be arranged to provide smoke free access to the activities which are conducted in the public place.” And even if the Department’s “feel[ing]” that “it would be contrary to the basic intent of this legislation”\(^{600}\) to permit hybrid use of such areas was reasonable, it is difficult to discern any difference that would have justified such radically different treatment as between common traffic areas and, for example, a restaurant, so as to have justified complete smoke-freedom in the former and inundation with smoke from numerous smokers only four feet away in the latter. Indeed, the Board of Health later inadvertently conceded as much in upholding the Department’s position: “The Board...finds that this rule is necessary to conform with the intent of” §§ 6(b) and 2 of MCIAA “in that non-smokers should have access to the activities conducted within the public places without being subjected to the harmful effects of tobacco smoke.”\(^{601}\)

That even the Health Department officials most intensively participating in drafting the rules insufficiently appreciated or understood the exposures from which they were purportedly protecting nonsmokers—even according to the laws of physics and the standards of human sensory perception of the time—was embarrassingly on display in December in the response to a complaint by Estelle Swanson, an ANSR activist and representative of an emphysema club, about

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\(^{598}\)The October draft deleted from the September draft “to get from one location to another in the health care facility...” Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4.e(2) at 10 (Oct. 1/9, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (and copy furnished by MDH).

\(^{599}\)See below this ch.

\(^{600}\)Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 17, MDH Ex. 11 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).


\(^{602}\)“Volunteer Thanks,” *ANSR* 3(3):n.p. [2] (Oct. 1975). This issue was labeled “3,”
The Minnesota Clean Indoor Air Act of 1975

conditions in the common traffic areas in the very Health Department building in which the Board of Health public hearing on its proposed rules was taking place:

MS. SWANSON: [B]eing that the law specifically states that it was going to protect me from smoke-filled places, why isn’t there something in the law to eliminate smoking in entranceways. Now right here in this building, had I gone out and had to come back in during the recess, as an emphysema patient, I probably would have gone down. It was blue with smoke right in the entryway. ... There is no other way for me to get into this building. Why isn’t there something in the law to protect us from entrances.

MR. PETERSON: It is the purpose of one of the general provisions to speak to reasonable protection of entrances and exits of buildings. We have posted our lobby as a no smoking area, and have not posted the distance between the two doors. ... I understand your point, and I think we should consider as to whether there would be significant smoke buildup between the two doors so that we would have to post that also. Our initial thought was that with that door being opened frequently, that the air does change so frequently that there couldn’t be much smoke....

This farce reached its high point when MACI representative Oliver Perry intervened to inform the hearing examiner that “the policeman who is guarding the door out there is smoking in the non-smoking area in your building.”

Based in part on the comments that the Health Department had received, it effected a number of significant changes in the October 1 draft proposed rules that the staff recommended to the Board of Health for the latter’s consideration at its October 9 meeting. The definition of “acceptable smoke-free area” was marginally tightened by requiring that it constitute a “contiguous portion of the public place...including seating arrangements” and weakened by catering to

but the number was struck out by hand and replaced with “4.” The issue referred to an August newsletter, but no such issue appears to be extant.

603 Board of Health Hearing Transcript at 31 (Dec. 2, 1975).


605 Board of Health Hearing Transcript at 171 (Dec. 2, 1975). Giese replied that although the policeman was “not an employee of ours...we will pursue the matter with him.” Id.

606 This draft incorporated suggestions for changes that Board of Health members (and others) had made to the draft that the Health Department had sent to them on September 12. Consideration of Proposal to Authorize Public Hearing Relating to Regulation for the Minnesota Clean Indoor Air Act, in Warren Lawson to Members of the State Board of Health, Re: Agenda Material for October 9 Meeting (Oct. 1, 1975) (copy furnished by MDH). At least one version of Proposed Rules for Implementation of Minnesota Clean Indoor Air Act was labeled “Draft 10/9/1975”, in Health Department, MSA, MHS, 112.H.18.3(B).
Pillsbury’s request and lowering the minimum required barrier height from five feet to 56 inches. In addition, the Department watered down the purported ultimate touchstone of acceptable smoke-freedom—carbon monoxide concentration—by setting it not at 10 milligrams per cubic meter (9 parts per million) in the area in question, as it had been in the previous draft, but at that level in excess of the “background concentration of carbon monoxide in air immediately outside the facility....”

Whereas the September draft rules lacked a unitary sub-rule for applying the definition of the key concept of the “acceptable smoke-free area,” October’s iteration restructured Rule 3 (“General Provisions”) by replacing the sub-rule on “Minimizing the Toxic Effects” with one on “Acceptable Smoke-Free Area,” which was now operationalized uniformly: “The size and location of all smoking permitted areas shall be determined such that toxic effects of smoking are limited in no smoking areas. The proprietor or other person in charge is responsible for making arrangements for an acceptable smoke-free area....”

The Health Department’s prescription in this foundational provision merely to “limit” smoking’s toxic effects in nosmoking areas in the face of an express statutory mandate of “minimiz[ation]” boded ill for prospects that the regulations would interpret and implement the MCIAA to be more rather than less protective of nonsmokers. (To be sure, by the time of the December 2 version of the proposed rules, the Department had thought better of this misstep, inserting instead “minimized,” which then remained in the final rules.)

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607 Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 2.j) at 3-4 (Draft 10/9/1975), in Health Department, MSA, MHS, 112.H.18.3(B); Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 2(j) at 3-4 (n.d. [Oct. 1, 1975]) (copy furnished by MDH). The Health Department later justified the use of outside air background CO levels as the baseline on the grounds that “there may be greater levels of carbon monoxide produced on the outside by motor vehicles. Outside CO pollution will not be a consideration in determining the inside concentration which is ‘acceptable smoke-free.’” Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 9-10, MDH Ex. 11 (Dec. 2, 1975), in Health Department, MSA, MHS, 112H.18.3(B). By the time of the public hearing the proposed rules defined the outside air as within 12 feet of the building. Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 442(a)(2)(dd) at 3 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).


609 Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for
The Minnesota Clean Indoor Air Act of 1975

The October draft’s general provisions went on to mandate that if smoking was to be permitted—in conformity with the statute, which conferred discretion on, but did not require, owners to permit smoking at all—610—the smoking areas that owners were responsible for designating “shall not be located such that non-smokers would be required to use the areas in order to participate in the activities for which the public place is intended.” As examples of locations that would be off limits to smoking the draft mentioned those that had to be used by nonsmokers such as hallways, elevators, and entry, exit, and ticket areas. Moreover, the size of such designated smoking areas “shall not be more than proportionate to the preference of patrons of that establishment for a smoking permitted area, as can be demonstrated by the proprietor.”611 (The final regulations watered this provision down by specifying that it “shall not be construed to prevent designation of a smoking-permitted area in a portion of the establishment which non-smokers must briefly cross to reach the intended activity.”)612

In implementing the MCIAA’s imposition on owners of the responsibility for making “reasonable efforts to prevent smoking in the public place by...posting

610Smoking areas may be designated by proprietors....” 1975 Minn. Laws ch. 211, § 5, at 633, 634. A decade later the Department pointed out that “when a proprietor...exercises the option to provide smoking permitted areas, this is done with the knowledge that there will be some costs involved. These are costs which they have opted to incur but which are not necessary in order to comply with the law.” Before the Minnesota Commissioner of Health: Statement of Need and Reasonableness at 3 (June 13, 1986), Bates No. TIMN0458156/8.


612Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 443(b)(3) (Apr. 2, 1976), Bates No. TIM0240635/39. While the MDH rules were being drafted Kahn opined to an alderman from St. Louis, whose proposed anti-smoking ordinance expressly prohibited designated smoking areas from encompassing more than 20 percent of the total seats or total area of the room, that his approach was “good because we did not do that in our bill, and the State Board of Health doesn’t seem to have enough nerve to do it in their rules and regulations. Phyllis Kahn to Bruce Sommer at 1 (Oct. 24, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B). The provision was § 3(1) of the ordinance, which was attached to the correspondence.
The Minnesota Clean Indoor Air Act of 1975

appropriate signs,”  “arranging seating to provide a smoke-free area,” “asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke,” “or...any other means which may be appropriate," the October draft proposed rules specified one of these “other means” alternative to the first three by declaring that “[i]t shall be considered to be a reasonable effort by the proprietor...to prevent smoking in a public place if all persons are asked upon entry into the public place their preference for a smoking permitted or a no smoking area and all persons are then directed to the appropriate area. Furthermore, at least one sign advising the public of this mechanism shall be conspicuously posted at all entrances normally used by the public.” (The Health Department did not retain this sub-rule in the final rules: although the provision, beginning with “if” did reappear, it functioned only as a partial substitute for the duty to post signs.)

613 1975 Minn. Laws ch. 211, § 6, at 633, 634.

614 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 3 e) at 7 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). The Department characterized this method as “particularly satisfactory for restaurants which currently use a host or hostess to direct people to seating and no further cost in personnel or changes in the seating arrangements of the facility would be required.” Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 17, MDH Ex. 11 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

615 Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 443(d)(8) (Apr. 2, 1976), Bates No. TIMN0240635/41. The Health Department deleted from the final rules the provision spelling out an alternative method for owners to carry out their responsibility to prevent smoking. Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of the Minnesota Clean Indoor Air Act at 12, attached to “Adoption of Rules Implementing the Minnesota Clean Indoor Air Act of 1975” (n.d. [after Dec. 2, 1975 and before Apr. 2, 1976]), in Health Department, MSA, MHS, 112.H.18.3(B). Oddly, this explanation by the Health Department staff to the Board of Health of the Department’s post-hearing proposed deletions and additions to the rules failed even to mention the dismantlement of this provision. The Board’s “Findings of Facts” offered an opaque and misleading explanation by claiming that “MHD 443(d)(8) relating to inquiries of all users as to their preferences for placement was initially proposed in another section. However, based upon testimony...at the Hearing,...the Board finds that its inclusion in MHD 443(d) relating to signs is appropriate inasmuch as this rule permits an alternative to posting several signs.” Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 29 at 10 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B). In fact, at the hearing, restaurant
The Minnesota Clean Indoor Air Act of 1975

The October draft introduced a number of changes in Rule 4 creating special rules for individual “Categories of Affected Places.” First of all, half of these places (including retail establishments, passenger terminals, auditoriums-arenas-gymnasiums-theaters, and public meeting rooms) were eliminated. With regard to the specific places retained, the Department bestowed a great favor on restaurant owners at the expense of their nonsmoking customers by providing that “[d]uring hours of operation when a facility which may otherwise be considered a restaurant does not serve food but does serve alcoholic beverages, the facility shall be considered a ‘bar’”—meaning that it was lawful to permit smoking everywhere, including in areas that were otherwise strictly nonsmoking, but that now would be super-inundated with particulate matter on various surfaces and the stench that it would continue to offgas. In the sub-rule that now merged coverage of workplaces and offices “not customarily used by the general public”—owners of which were now freed from compliance with the general signage rules and were required merely to post one sign per floor stating that smoking was prohibited except in designated smoking areas—the Health Department further weakened protection for nonsmokers by applying to both the social pressure-ridden rule for offices that owners would be “considered to [be] making reasonable efforts to prevent smoking if smoking is permitted only in sections of the place of work or office which are used exclusively by smokers and people who permit smoking.” In some small workplaces/offices the indiscriminate designation of such smoking areas in the same room as no-smoking areas might have been constrained to some extent by a new sub-rule that required each no-smoking area to be at least 200 square feet. Exposure to smoke was also intensified for people in public conveyances with a capacity of fewer than 10: if everyone, including the driver, expressly consented, the conveyance in its

lobbyist Bohr stated his belief that “at the time we discussed” the provision (presumably at some non-public consultation with Peterson), “we were talking about the number of signs that would have to be used, and could we get away with signs by doing something else. I think this could be construed by people reading it that all of a sudden it becomes a qualification of what people must do. I think that the words ‘in lieu of signs’ is missing in this thing.” Without in any way mentioning the proposed rule’s entirely different function of offering owners an alternative method of discharging their responsibility to prevent smoking, Peterson agreed with Bohr, called the point “well taken,” and announced that the Department would consider the suggestion. Board of Health Hearing Transcript at 120-21 (Dec. 2, 1975).


entirety could “considered a smoking area...”\textsuperscript{618} Finally, the rule regarding health care facilities was modified to prohibit visitors and staff from smoking in patient rooms “unless patients expressly permit”\textsuperscript{619}—a comically tragic form of a ban in light of patients’ obvious reluctance to jeopardize the company, care, and expertise of the very people whom they needed most in the world during those critical days by vetoing those persons’ ministering to their own addiction, which for decades until August 1, 1975, had been their unquestioned and uncontested vested privilege. The Department inserted the same mechanism into the sub-rule governing patient dining, activity, and day rooms and lounges, in which, under the September draft, smoking had been prohibited except in designated smoking areas; in contrast, the October draft extended smoking to theretofore nonsmoking areas if “expressly permitted by all patients and residents of the facility...”\textsuperscript{620}

Except for blue-collar workplaces (subject to DLI rules), MCIAA did not distinguish among various kinds of workplaces on the basis of whether the general public frequented them or not. On the contrary, the statute defined “public place” to include “any enclosed, indoor area used by the general public or serving as a place of work...”\textsuperscript{621} Thus MCIAA did not distinguish for coverage purposes between non-blue-collar workplaces that the general public used and those it did not use. Similarly, the definition of “office” in the Board of Health’s draft proposed rules meant “every building, structure or area which is used by the general public or serves as a place of work at which the principal activities consist of professional, clerical or administrative services.”\textsuperscript{622} The rules nevertheless impermissibly discriminated against nonsmoking white-collar workers whose workplaces and offices were “not customarily used by the general public”; the draft rule provision that the owner “shall be considered to [be] making reasonable efforts to prevent smoking in the public place if smoking is permitted only in

\textsuperscript{618}Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4. c)2) at 9 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). See also below this ch.

\textsuperscript{619}Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4. e)1)cc) at 10 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH).

\textsuperscript{620}Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4. e)3) at 10 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). The sub-rule for patient dining and other rooms was absent from the proposed rules available at the public hearing and the final rules.

\textsuperscript{621}1975 Minn Laws ch. 211, § 3 subd. 2, at 633 (italics added).

\textsuperscript{622}Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 2 c) at 2 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH).
sections of the place of work or office which are used exclusively by smokers and people who permit smoking,” by virtue of jettisoning objective criteria and introducing the subjective criterion of whether nonsmokers “permit[ted]” smoking, subjected nonsmokers to potential intimidation to acquiesce in their colleagues’ smoking.

The workplace/office rule went on to provide that where smoking-permitted and no-smoking areas existed in the same room, each no-smoking area was required to be at least 200 square feet and an “acceptable smoke-free area” (meaning that it was required, for example, to be separated from the nonsmoking area(s) by 56-inch-high physical barriers or four-foot-wide spaces). Owners who availed themselves of this option were freed from the obligation to comply with the otherwise much more specifically informative sign-posting requirements that, by pin-pointing where smoking was prohibited and permitted, promoted the compliance and enforcement processes. Instead, the only signage requirement to which those in charge of non-blue-collar workplaces and offices were subject was to “conspicuously post at least one sign on each floor which states, ‘Smoking is prohibited except in designated smoking areas.’”

623 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4 a) at 8 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). This provision was dropped from the final rules. When asked many years later whether he agreed with the analysis in the text, then Assistant Attorney General Terry O’Brien replied: “I see the discrimination, but I don’t recall anyone raising the issue at the time of the rules process. Also, I don’t remember anyone suggesting a discriminatory intent, or for that matter, thinking about [it] in the context you raise. That, in retrospect, is the problem.” Email from Terry O’Brien to Marc Linder (Apr. 10, 2009).

624 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4 a) at 8 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). The area-specific signage rule required that one of two posting methods be used. Under the first, “smoking permitted” and “no smoking” signs had to be placed at an easy-to-see height and location; in addition, “[t]he boundary between a no-smoking area and smoking permitted area shall be marked with signs so that persons may differentiate between the two areas.” Rule 3 c) 7) (aa) and (bb). In 1980 the Health Department created across-the-board equity by amending the definition of “acceptable smoke-free area” to require that all such areas be at least 200 square feet. This amendment was driven by inspectors’ observations that under the original rule owners “could designate an unreasonably small area as being smoke-free and still be in compliance. Non-smokers had little recourse in such instances.” The 200-square-foot rule was also designed to insure accommodation of up to 20 nonsmokers. [Minnesota Department of Health], Clean Indoor Air Rules: Statement of Need and Reasonableness at 1 (n.d. [1979]) (copy furnished by MDH).

The press was more interested in a number of provisions in the draft rules dealing with bars and restaurants. A bar, which alone among public places was authorized by the statute to be “designated as a smoking area in its entirety,” was defined by the draft regulations as an “establishment where one can purchase and consume alcoholic beverages, but excluding any such establishment having table and seating facilities for serving of meals, in consideration of payment, to more than fifty people at one time.” Restaurants were defined as “every building, structure, or area used as, maintained as, or advertised as, or held out to the public to be an enclosure where meals are served for consideration of payment.” Regardless of the impact of lingering smoke, restaurants qualified as bars—and were thus entitled to be designated as smoking areas in their entirety—during those hours when they served no food, but did serve alcohol.

Newspapers called special attention to the rule that required bars that served meals to more than 50 people at one time to set aside nonsmoking areas, prompting Glenna Johnson, the head of ANSR’s Awareness Committee, to oppose the 50-person threshold on the grounds that in small communities bar-restaurants serving under 50 might be the only place in town to eat. In contrast, ANSR’s director, Mary Jo Matczynski, who called the MCIAA a “revolutionary idea,” though “pleased” with the Health Department’s proposals—which did

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626 1974 Minn. Laws ch. 211, § 5, at 633, 634.
628 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 2 b) at 2 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). The rule went on to exclude from the definition of “meals” “foods which are prepackaged when served to the public or foods which are served as snacks or appetizers.” This sub-definition was dropped from the final rule, which instead specified that the meals “are made available to be consumed on the premises.” Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 442(p) (Apr. 2, 1976), Bates No. TIMN0240635/39. See also MHD 442(c).
The Minnesota Clean Indoor Air Act of 1975

not set forth how much space in a restaurant, office, or other public place had to be reserved for nonsmokers—suggested a 50-50 division in restaurants as “fair.” Indeed, since 63 percent of adults, and presumably even more pre-adults, were nonsmokers, Matczynski may even have been short-changing her constituents, but Peterson, the drafter, appeared to dismiss her rigid numerical approach by insisting that “it would be impossible to have an absolute minimum that would apply to all restaurants because they are so different in nature.”

The October draft also created special rules for several other kinds of public places. The Health Department staff created a bifurcated rule for “public conveyances” (which included “every air, land or water vehicle” used to transport people “for compensation,” including airplanes, trains, buses, boats and taxis) based on passenger capacity: in any public conveyance with a capacity of 10 or more persons (including the driver) designated smoking-permitted sections were authorized; those with a capacity of fewer than 10 “may be considered to be a smoking area in its entirety if the driver and the passengers expressly consent.”

Since the provisions for specific public places such as public conveyances prevailed over the general provisions if they “conflict with or are inconsistent with” the latter, presumably smoking sections could be lawfully designated in the larger-capacity conveyances even if they were inconsistent with the existence


632The only rule applied to educational facilities was that smoking-permitted areas were prohibited in areas “normally used” by under 18-year-olds. Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4 d) at 9 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). It was retained in the final rules. Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 444(f) (Apr. 2, 1976), Bates No. TIMN0240635/43.


636Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4 at 8 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). Although this provision stated that “[a]bsent irreconcilable conflict” owners “shall be expected to comply” with both provisions, the word “irreconcilable” was not repeated in the sentence quoted in the text. The meaning of the curious directive “shall be expected” was opaque.

The Minnesota Clean Indoor Air Act of 1975

In its official “Justification,” the Health Department staff sought to explain its proposed special rule for small vehicles on the grounds that “[w]e feel that it is not likely that a smoke free area could be maintained” in a smaller than 60-square-foot public conveyance with a low ceiling if any smoking were permitted. The staff nevertheless managed to transmogrify this commonsensical conclusion into a rule sanctioning smoking-permitted areas by means of the unsubstantiated and highly dubious claim that the “concept of permitting the driver and all passengers to express their consent for smoking permitted in the entire public conveyance is also analogous with [sic] the public policy created in” MCIAA “for private, enclosed offices occupied exclusively by smokers.”

This attempt at analogic reasoning broke down, inter alia, because whatever rationale the legislature may have imagined supported perpetuating white-collar employees’ smoking privileges “[e]ven though such offices may be visited by non-smokers” and even though employees might have to enter those offices as a condition of employment, the legislature nevertheless deemed them “private,” whereas it expressly regulated only what it called “public” conveyances. The only discernible carryover from the imagined rationale for occupants of private offices would have been protecting the (mobile) workplace-based privilege of the drivers of those public conveyances to continue smoking regardless of the health impact of the smoke exposure in such extraordinarily confined spaces on their countless thousands of passengers. Yet the result could just as well have been intimidation of nonsmoking drivers into exposing themselves to (tipping) passengers’ smoking. Apart from creating the potential for intimidating nonsmokers into acquiescing in making smaller-capacity conveyances into smoking areas in their entirety, the sub-rule left it unclear how it would be administered in the real

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638 Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 24 (MDH Ex. 11, Dec. 2, 1975). The Department replicated this argument in declaring with regard to the sub-rule governing hotel rooms that “it is felt that [the] sleeping room which is rented to the guest is logically excluded from application of this law.... The concept of this exclusion is analogus [sic] with [the] exception of a ‘private social function’....” Id. at 26.

639 1975 Minn. Statutes ch. 211, § 3(2).

640 At the Board of Health public hearing on the proposed rules Chum Bohr, latching on to this consent provision in the public conveyance and hospital resident rules and the lack of one in the office rules, suggested that the inconsistency be eliminated by making the “consent privilege” prevail throughout. Brandt objected to a consent clause governing workplaces because many people felt intimidated by their employers. Board of Health Hearing Transcript at 142-43 (Dec. 2, 1975). After the hearing, Associated Industries of
world as passengers entered and left: would, for example, the appearance of a new passenger, who refused to consent to smoking, require everyone to stop smoking, which would then resume as soon as that passenger left, although the smoke might linger during the return to the nosmoking regime? Or, as in a much more piquant scenario imagined by a speaker at the public hearing on the Health Department rules: “[I]f you got into a limousine and three passengers wanted to smoke and one didn’t...they couldn’t kick the other guy out. And it seems to me there ought to be some provision for that. You can’t kick somebody out because he doesn’t want to smoke. Or...he wants to be in a smoke free area when the other want to smoke. I mean, they are common carriers, and they shouldn’t be allowed to throw out a person that doesn’t want to smoke because the other passengers want to smoke.”

641 Minnesota, in opposing the provision requiring owners to determine customers’ preferences in order to determine the relative size of a smoking-permitted area, suggested that if the rule remained, employers be given the opportunity to ascertain employees’ willingness to consent to an area that would be entirely smoking permitted. Donald Lenarz to Hearing Examiner (Dec. 19, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

641 Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, at 140 (Dec. 2, 1975) (Bennett Davis), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B). The question/comment elicited only a “Thank you” from the hearing examiner. Id. After Kent Peterson had answered in the affirmative a question by another member of the public as to whether the rule meant that it was possible that smoking areas could be allowed on Metropolitan Transit Commission buses, he added in response to a follow-up question as to whether a local ordinance would override the state law that a more stringent city ordinance would take precedence. Id. at 141-42 (Michael Hennen). These conundrums might therefore have been mooted by pre-existing local ordinances banning smoking in some kinds of public conveyances. At least Minneapolis appears not to have adopted any. Email from Mary Rumsey (reference librarian University of Minneapolis Law Library) to Marc Linder (Apr. 17, 2009) (based on the indexes and tables of contents of the non-circulating Minneapolis Ordinance Code, July 1, 1960, As Amended Through December 31, 1972). An ordinance may, at least substantively, have been superfluous because, according to the director of customer services at Metro Transit: “Although I don’t have first-hand knowledge, it is my understanding that smoking has never been permitted on the buses of Metro Transit and its forebears since the first days of public ownership under the Metropolitan Transit Commission, which was created by the state legislature in 1967 and operated its first publicly owned transit service in 1970. The major private predecessor was Twin City Lines. It’s [sic] Trainmen’s and Bus Drivers’ Guide dated July 1, 1950 says: ‘Passenger Smoking. Passengers shall be allowed to smoke on the rear platforms of the standard type car if city ordinances permit. On P.C.C. cars or on buses smoking is not allowed . . .’” Email from Robert Gibbons to Marc Linder (May 6, 2009).
The Minnesota Clean Indoor Air Act of 1975

That the Health Department proposed a more rather than less smoking-permissive regime for health care facilities was (seemingly) as astonishing as the fact that, as one ANSR activist put it, “hospital administrators fought us tooth and nail,” matched only by bar owners.642 This stance was squarely placed in a

These proposed provisions were retained in the final rules. Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 444(a) and (e)(1) and (2) (Apr. 2, 1976), Bates No. TIMN0240635/41/43. Asked decades later whether passengers were as little protected as the text seemed to suggest, Peterson replied: “Smoking in taxicabs or similar small spaces was a difficulty and we tried to work out a compromise with the consent provision. There may not have been either authority nor scientific evidence to order a public place to be totally non-smoking. Your observations about whether or not nonsmokers were protected uses the current knowledge of second-hand smoke. In 1975 we had very little of that evidence.” Email from Kent Peterson to Marc Linder (Apr. 10, 2009). In fact, however, as shown elsewhere in this chapter, contemporaries were acutely aware of the impact of secondhand smoke and the fecklessness of the law’s prophylaxis. For example, a week after Peterson had drafted the first set of proposed rules, he received comments pointing out, inter alia, that: “Many elderly people with heart and respiratory ailments must ride buses and would be subjected to an extremely unhealthy atmosphere if this section is allowed to remain.” Gerald Peterson to Kent Peterson (Sept. 18, 1975), in Health Department, MSA, MHS, 112.H.18.3 (B). Another Minnesotan informed the Board of Health just three days before the public hearing on its proposed rules that when several rows of seats were set aside at the back of a Greyhound bus, “the air is filled with smoke all the way to the front of the bus and our lungs and clothing are saturated with the foul odor for smokers.” Lucile Ahrens to Dr. Warren Lawson (Nov. 29, 1975), Health Department, MSA, MHS, 112.H.18.3(B). Three years after MCIAA’s enactment several pro-smoking senators introduced an amendatory bill that, after authorizing owners to designate nonsmoking areas, prohibited the Metropolitan Transit Commission from designating any of its public conveyances a nonsmoking area in its entirety if the scheduled run from beginning to final stop on the route exceeded 30 minutes. S.F. 1995 (Feb. 9, 1978, by Olson, Vega, Stumpf, Ueland, Solon). The bill would also have imposed the same condition on all public places under the control of the state of Minnesota or any of its political subdivisions. Because an “overwhelming number of ANSR supporters” showed up to testify, the hearing on Mar. 2, 1978 was cancelled and the bill was pulled at the last minute and died. Gene Rosenblum et al., “ANSR Appeals for Help,” ANSR 6(2):n.p. [1] (May-June 1978) (quote); email from Jeanne Weigum to Marc Linder (Apr. 14, 2009).

642 Telephone interview with Gerald Ratliff, St. Paul (Oct. 31, 2009). Light on the scope of smoking in hospitals and administrators’ cavalier attitude toward smoking was shed by an anti-smoking activist-emphysema patient who had devoted many hours to securing passage of the MCIAA. In a letter to the state health commissioner she characterized practices at St. Joseph’s Hospital as “a good example of the downright
commercial context by a long-time anti-tobacco activist pulmonary physician: “In the 1970’s and ’80’s one of the questions a hospital admitting office asked was, ‘Do you want smoking or non smoking’. Hospital administrators were worried that if they took a stand against smoking, they would offend and lose their smoking customers. It wasn’t until we had voluntarily produced strong smoke free environments in outpatient clinics and a few leader hospitals in smaller communities and the Mayo Clinic did the hospital leaders in Minnesota support a legislative ban on smoking in healthcare facilities (exempting mental health units) in 1990. The two year phase in to 1992 went smoothly once they were convinced by the legislation that they would be protected by what they called ‘a level playing field.’ And while agreeing that hospital administrators had fought against MCIAA, Kent Peterson was “not sure they all had the same reasons but some fought it because they were fighting state standards of all types. The hospital industry has long prided itself [on] private accreditation as a substitute for state regulation. Basically that is ‘self-regulation’ and to avoid regulation by multiple jurisdictions and potentially the need to sort out multiple standards. It would be ok if there were the same or more stringent standards in accreditation and public accountability, but there was not. Several years later, medical leaders convinced hospitals executives to become leaders in the non-smoking movement. It became good PR. But they were anti-regulation like any other businessperson initially.”

Like the aforementioned special signage sub-rule for white-collar workplaces, that for patient rooms relieved owners of any duty to post signs in those rooms “if there is at least one sign at the entrance to each floor and wing which states:

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defiance going on, even in hospitals where smoking should not be allowed at all.” Estelle Swanson to Warren Lawson (Nov. 24, 1975), in Health Department, 112.H.18.3(B), MSA, MHS. To her letter she attached a response to her complaints about the hospital’s lack of compliance from the administrator, who, after observing that the law was “a very controversial subject, with each side claiming rights and privileges,” defended the hospital’s compliance by reference to a large sign at the entrance stating that smoking was not allowed “except” in the automat, coffee, shop, cafeteria, conference rooms, locker rooms, lounge area, private offices, staff hall, and waiting rooms. With the exception of the coffee shop and cafeteria, in which there were “marked tables where smoking is not permitted,” apparently the hospital permitted smoking everywhere in the named areas. In addition, in the lobby “we feel there is ample space to allow for freedom for both smokers and non-smokers without interference to either group.” Sister Marie de Paul to Estelle Swanson (Aug. 22, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

643 Email from Dr. A. Stuart Hanson to Marc Linder (Nov. 8, 2009).
644 Email from Kent Peterson to Marc Linder (Nov. 1, 2009).
The Minnesota Clean Indoor Air Act of 1975

‘Smoking is prohibited except in designated smoking areas.’ As for the patient rooms themselves, owners or those in charge were free to choose between two options. First, they could “ask all prospective patients” whether they preferred a smoking-permitted or no-smoking area; when space was available, they were then required to “assign rooms according to this preference”; when no space was available in a no-smoking room and “a patient is admitted to a room originally designated for smoking, smoking shall be prohibited in that patient room unless expressly permitted by the non-smoker.”

Or second, if the owners did not assign rooms in accordance with patients’ preferences, “smoking shall be prohibited in all patient rooms except patient rooms occupied exclusively by patients who smoke or patients who have expressed permission for smoking.”

These procedures, which put nonsmokers whose health was compromised in the vulnerable position of going along to get along in order to avoid aggravating their anxieties by confronting their roommates, were retained in the final rules. Arguably even greater potential for intimidation was built into the provision, which the final rules also retained, that “[v]isitors and staff shall be prohibited from smoking patient rooms unless patients expressly permit.”

Ironically, the Health Department sought to justify these rules by reference

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648 Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 444(g)(2) (Apr. 2, 1976), Bates No. TIMN0240635/43.

649 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4 e) 1) (cc) at 10 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH); Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 444(g)(3) (Apr. 2, 1976), Bates No. TIMN0240635/43. Amusingly, after the statute and rules went into effect, some hospitals permitted smoking only with a physician’s permission and only if a nurse was present. “Minnesota Clean Indoor Air Act (MCIAA) Regulations Explained,” ANSR 4(4):3 (Oct. 1976).
to “the unique characteristics” of patients, who were “more likely to be suffering from a health condition which is adversely affected by toxic byproducts of cigarette smoke.” Moreover, since patients’ rooms were so small that “any amount of smoking...could affect the health and comfort of non[-]smoking patients,” the Department perceived the need—and claimed that its rules provided—for “maximum efforts to totally separate smokers from non[-]smokers.”

Significantly, the final rule dropped one of the few outright bans on smoking embodied in the draft rule—namely, in such “common traffic areas” as corridors, elevators, entry or exit areas, or other areas that non-smokers had to use. (In 1980, agreeing with complaints filed by non-smokers that smoking was inappropriate in hospitals and “most inappropriate” in corridors, emergency rooms, treatment rooms, admitting areas, and intensive care units, the Health Department promulgated a rule prohibiting those in charge from designating any such places smoking-permitted areas. Not until 1987 did the Minnesota


651 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4 e)2) at 10 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). Neither the chief drafter of the rules nor his legal adviser was able to recall why this provision had been deleted from the final rules. Email from Kent Peterson to Marc Linder (Apr. 10, 2009); email from Terry O’Brien to Marc Linder (Apr. 10, 2009).

652 [Minnesota Department of Health], Clean Indoor Rules: Statement of Need and Reasonableness at 6 (n.d. [ca. 1979]) (copy furnished by MDH) (quote); State Register 3:2065 (May 21, 1979); Minn. Code of Agency Rules 7 § 1.444 F. 4 (Apr. 14, 1980). Nevertheless, 15 years later, when the Health Department proposed similar rules changes whose validity turned on the same statutory language, the administrative law judge found them to be defective. The first proposed change would have prohibited smoking in office buildings except in private enclosed offices and designated smoking areas of lunchrooms or lounges. Doug Kelm, lobbyist for the Tobacco Institute and R. J. Reynolds objected that MCIAA did not authorize such a rule and the ALJ agreed: although the change was supported by record “facts showing its reasonableness, it negates the authority of ‘proprietors or others in charge’ to designate smoking areas in office buildings. This authority is granted by statute and cannot be removed by rule.” State of Minnesota, Office of Administrative Hearings for the Minnesota Department of Health, In the Matter of Proposed Permanent Rules of the Minnesota Department of Health Relating to Clean Indoor Air: Report of the Administrative Law Judge, Finding of Fact 28.b, 28.d, and 29.a (1-0900-8678-1, Aug. 2, 1994), on http://www.oah.state.mn.us/aljBase/09008678.rr1.htm. The ALJ went on to concede that although the proposed rule’s effect “is laudable, is supported by public opinion...and is based upon present day knowledge of second hand smoke,” it nevertheless went beyond the MCIAA of 1975, “which was presumably based
The Minnesota Clean Indoor Air Act of 1975

The legislature amend MCIAA by and large to ban smoking in health care facilities including doctors offices.\textsuperscript{653}

The structure and evolution of the special rules for hotels, motels, and resorts resembled those for hospitals. The draft rules excluded sleeping rooms rented to guests from the smoking ban except in the designated smoking areas regime\textsuperscript{654} (thus subjecting all nonsmokers to smoke residues in rooms previously occupied by smokers),\textsuperscript{655} but at the same time they prohibited the establishment of

\textsuperscript{653}1987 Minn. Laws ch. 399, § 2, at 3158. The provision in this amendment that allowed patients to smoke if their attending physician authorized smoking in writing was repealed by 1992 Minn. Laws ch. 576, § 2.

\textsuperscript{654}Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4. f)1) at 10 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH).

\textsuperscript{655}This same disregard of residues attended the decision to permit smoking in restaurants during those hours when they sold no food but did sell alcohol. The Health Department staff argued that this sub-rule provided both “flexibility” for owners and “adequate protection of the public’s health.” Before the Minnesota State Board of Health,
The Minnesota Clean Indoor Air Act of 1975

smoking-permitted areas in “common traffic areas such as registration areas, hallways, elevators or other areas which would be required to be used by non-smokers.” From this prohibition, however, the rules excepted “a portion of the seating area of a lobby or lounge...." As was the case with hospitals, the final rule deleted the partial ban on designated smoking areas in common areas.

The agency’s proposed eligibility criteria for implementing the statutory provision conferring discretion on the state Board of Health to waive the law, on request, for “compelling reasons” if the waiver did “not significantly affect” nonsmokers’ “health and comfort” were, correspondingly, twofold. The applicant bore the burden of demonstrating the existence of both those “[c]ompelling reasons to necessitate a waiver,” which might “consist of evidence that implementation of the Act would endanger the ability of the public place to meet its costs of operation,” and “clear and convincing evidence to prove that even” if the act and rules were waived, “the concentration of carbon monoxide in all sections of the public place shall at no time exceed the background concentration of carbon monoxide in air the building by more than 10 milligrams per cubic meter (9 parts per million).” In other words, as long as the owner


657 Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 444(h) (Apr. 2, 1976), Bates No. TIMN0240635/43. This ban had still been included in the proposed rules at the time of the public hearing. Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 444(h)(2) at 14 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

658 1975 Minn. Laws ch. 211, § 7 subd. 1, at 633, 635.

659 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 5 b) 1) and 2) at 11 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). The final rules modified both criteria somewhat: for “meet its costs of operation” was substituted “produce sufficient income to meet its operating expenses”; and the outdoor air carbon monoxide background reference was limited to that within 12 feet of the building. Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 445(b)(1) and (2) (Apr. 2, 1976), Bates No. TIMN0240635/44. At the Board of Health public hearing on the proposed rules their principal drafter, Peterson, stated that “the amount of unusable space [caused by the four-foot-wide space rule] and projections as to how much...income would be derived if you could use that space” might be evidence that implementing the law could cause an owner to be unable to meet his costs of operation. Board of Health
demonstrated that the entire public place was the equivalent of an “acceptable smoke-free area” in terms of this carbon monoxide level test (despite the fact that smoking were permitted in the place), the law might be waived on grounds of profitlessness. (The legislature did not repeal the waiver regime until 1995.)

Remarkably, the Health Department sought to justify this rule on the grounds that “the statute was not intended to cause adverse economic effects or to cause termination of employment” and claimed that this “concept is found” in the MCIAA provision stating that “no additional physical barriers or ventilation systems would be required to be installed.”

That restaurants were looming as the law’s Achilles heel and that the Minnesota Board of Health was not inclined to prioritize protecting nonsmokers from exposure to smoke over owners’ self-perceived financial interest in prioritizing smokers became clear at the October 9 Board of Health meeting in response to a proposal by Board member Michael Keable, to require restaurants (and other covered public places) to reserve at least 25 percent of their total floor space for nonsmokers. Underlying his initiative was personal experience: when he and his wife had asked for seats in a nosmoking area in one of the “better restaurants” of his hometown (St. Cloud), they “were led to a card table set up in the basement.” Having been “made to feel like a second-class citizen,” Keable offered the amendment to close a “loophole” in the staff’s proposed regulations because “[t]echnically, the card table in the basement may have complied with the law....” In principle Keable’s proposal appealed to Assistant Health Commissioner Dr. Ellen Fifer, who, however, found the need for inspectors to measure the floor space to check compliance—no one appears to have cut this Gordian knot by suggesting seating as the alternative criterion in restaurants, as in fact occurred when the rules were amended in 1980—an
additional enforcement burden. Another board member, retired policeman Patrick Daugherty, based on his guess that in northeast Minneapolis the majority of restaurant goers were smokers, (illogically) challenged the fairness of the figure of 25 percent, prompting Keable to point out that, with the cigarette industry claiming at most 63 million smokers out of a total population of 220 million, 25 percent would be “conservative.” His arguments, however, were of no avail, and the Board defeated his proposal by a vote of 10 to 2. Chief rule drafter Peterson, adducing no statutory warrant for such a policy, insisted that the draft regulations represented “a ‘middle ground’” reached after discussions with the restaurant industry and other businesses as well as with those seeking to protect nonsmokers from tobacco smoke’s “potentially harmful health effects.” The key to attaining this golden mean was the aforementioned rule that prevented large bar-restaurants from lawfully declaring themselves exempt bars if they could seat more than 50 for food at one time. In reality, such a rule not only did nothing to protect consumers in smaller restaurant-bars, but authorized owners to declare their restaurants “‘part-time’” bars and thus exempt them from coverage during the hours when they did not serve food.\[664\]

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As far as Keable’s own restaurant encounters were concerned, years would pass before they improved. In the meantime he was persuaded that “some restaurateurs were ‘going out of their way to harass nonsmokers.’” Moreover, as wholly inadequate as restaurant compliance may have been, “unfortunately,” in Keable’s view, “business and management aren’t going out of their way to provide the same level of rights [for employees] as they would for customers in public areas.”

Keable was merely a highly visible and vocal target of such guerrilla warfare tactics engaged in by restaurant owners to subvert the law. Restaurants, as many people informed the Health Department in public comments submitted during the run-up to the public hearing, “often designate just two or three tables for nonsmokers and make sure that those tables are in the worst locations—no view, near noisy busing stations, near smelly rest rooms and drafty doors. And worst of all, a haze of smoke from the adjacent tables hangs over the nonsmokers.” To be sure, even such debilitating and demeaning conditions would have passed muster under the proposed regulations so long as the tables were four feet away from a smoking area.

The Health Department may have received only 23 complaints from nonsmokers by the beginning of October, but even Kahn was under no illusions about the state health state inspectors’ ability to “police this law effectively, even if they add a smoking check on their yearly visit.” Although she knew that violations had taken place, she was “by and large...satisfied with the present

“acrimonious.” He felt at the time that anti-smoking regulation had to be developed gradually—if nonsmokers pushed for precipitous change that dropped the axe on everyone, “we’d get slapped down.” Telephone interview with Michael Keable, St. Joseph, MN (Mar. 20, 2009). The Board of Health, which was the Health Department’s administrative body, was composed of 16 members, nine of whom broadly represented licensed health professionals and six of whom were public members. The Minnesota Legislative Manual: 1975-1976, at 361-62 (listing only six members with health-related degrees).


Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009) (original chief of enforcement of MCIAA).

Gordon Slovut, “State Health Board Gives No Quarter to Smoking Foe,” Minneapolis Star, Oct. [10], 1975 (1A, 4A), Bates No. TIMN0462141/2.
The Minnesota Clean Indoor Air Act of 1975

situation,” which was just a “‘first step.’” Bohr, the executive vice president of the Minnesota Restaurant Association, must have been more than satisfied when, at the end of November, he received a letter from the St. Paul police chief after the later had reviewed the proposed MCIAA rules:

Violation of the law, as far as we can determine, is a misdemeanor of the lowest order and as such will receive absolutely no attention from our Department except as it might be necessary to respond to specific complaints occurring within our jurisdictions. To date we have received no complaints and have taken no action, and we are not anticipating any great change in that area of police activity.

In fact, in so far as I can determine, the whole thrust of the regulation is directed toward some sort of health and welfare inspection program. If anyone is really serious about enforcing the Statute and the regulations to the letter of the law, it seems to me it speaks toward hiring some sort of an army, armed with citation booklets and loosed upon the unsuspecting public for some yet undetermined purpose.

Sure looks like a money-maker, if nothing else. Bohr recycled this written expression of manifest revulsion against his police force’s involvement in enforcing such a law by a Twin Cities police chief bubbling over with such undisguised bias against the mere thought of protecting nonsmokers.

Nor was the police department the only St. Paul government agency aiding and abetting the pro-smoking forces. Far more astonishing was the set of comments on the state Health Department’s proposed MCIAA rules submitted to Peterson by the Deputy Health Officer of the Division of Public Health of St. Paul’s Department of Community Services. Based on his staff’s review of the draft rules, Edward Eberhardt underscored “a very severe bias toward the rights of non-smokers as opposed to those of smokers.” Without revealing what those latter rights were and what qualifying expertise he, qua public health official, possessed to evaluate them in relation to the former, he believed that both had to be considered, though he also found “the entire concept to be distasteful.” While acknowledging that that bias was “perhaps, the intent of the law,” he nevertheless

670 Harry Wilensky, “Effort to Ban Smoking Results in Murky Law,” St. Louis Post-Dispatch, Nov. 16, 1975 (1), Bates No. TIMN0240663.

671 Richard Rowan to W. J. Bohr (Nov. 25, 1975), Bates No. TIMN0462137.

672 Bohr later quoted it. “Statement of Chum Bohr” (Sept. 15, 1978), Bates No. 500024298/301-2. He also attached a copy of the letter to his post-Board of Health hearing statement, claiming that it “establishes [t]he inability of the State and local Health Department to enforce the law against the smoking violator...” W. J. “Chum” Bohr to Kent Peterson (Dec. 19, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
The Minnesota Clean Indoor Air Act of 1975

found it worthy of criticism that “many of the areas affected are, by their characteristics, of such a nature that they could designated only as a non-smoking area.” He implicitly contested the entire tenability of the MCIAA by characterizing its core feature, the “acceptable smoke-free area,” as “an impractical requirement relative to existing practice.” In particular, he called attention to his inability to grasp the process of reevaluation that tobacco use was undergoing by admitting that “I find it completely out of the realm of my imagination to envision compliance by a bowling alley if they must designate smoking areas.” Beyond his failure to perceive any overriding public health interest as between smokers and those exposed to their smoke, Eberhardt shared one concern with the police chief—shielding his “already overburdened staff” from “a considerable influx of complaints.”

The December 2, 1975 Public Hearing on the Rules to Implement the MCIAA

At the time of the hearings, the local newspapers as well as TV stations carried the story. I was particularly concerned because one of the local TV stations, WCCO, captured some film of some health department officials, including bigwigs, sneaking cigarettes, during the break. At the time, the Commissioner, Assist. Commissioners, and others were smokers, and the [sic] smoking was permitted in offices at the Department. I implored one of the reporters not to broadcast health dept. officials puffing on their heaters during breaks from the hearing. He didn’t.

On October 23, the Board of Health ordered that a public hearing on the proposed rules be held on December 2. During the combined nine-hour public

673 Edward Eberhardt to Kent Peterson (October 31, 1975), in Health Department, Minn. State Archives, MHS, 112.H.18.3(B).

674 Email from Terry O’Brien to Marc Linder (Apr. 8, 2009). In 1975 O’Brien was an assistant attorney general who both assisted Kent Peterson in drafting the Board of Health rules and acted as its lawyer at the public hearing.

675 Before the Minnesota Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, Order for Hearing (Oct. 23, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). The hearing was to be held directly preceding one conducted by DLI. Before the Minnesota Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, Notice of Hearing (Oct. 27, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Earlier the hearings themselves had been tentatively scheduled for October 23. Schedule for Regulations Regarding Minnesota Clean Indoor Air Act (n.d.),
h "trotted out" the proposed MCIAA regulations. The more than seven of those hours that were held under the auspices of the State Board of Health witnessed wide-ranging attacks on the law and agency rules by building and business owners, although the approximately 150 people in the audience were “clearly on the side of nonsmokers, applauding when persons testified how they had been bothered by smoking in restaurants, offices, while waiting in line at banks and bus stations, and even in restrooms.” (Ironically, the entire back page of the following day’s issue of the St. Paul Pioneer Press that reported on the hearing was devoted to an ad for Marlboro.) In contrast, the audience at the Labor and Industry Department hearing, which did not begin until after 5 p.m., was, according to ANSR, “very small” and engaged in limited discussion. In addition to the presentation of ANSR’s policy statement, the vice president of the Minnesota AFL-CIO, Leonard LaShomb, merely explained that he “had not heard much” from union members about the smoking regulations for factories and warehouses.

The proposed rules on which witnesses commented differed from the draft that had been submitted by the staff to the Board of Health most saliently with regard to a new limitation and two gaping exceptions to it. Under the general provision governing smoking-permitted areas: “One and only one smoking permitted area shall be designated per room. However, rooms containing at least 20,000 square feet...in total floor space may designate more than one smoking permitted area....” Then under the special sub-rule governing workplaces as
The Minnesota Clean Indoor Air Act of 1975

one of the “categories of affected places,” the Health Department added yet another huge exception to the just created “one and only one smoking permitted area per room” rule: in workplaces “not customarily frequented by the general public” the same room “may contain several, separate no smoking and smoking permitted areas provided” that the former were at least 200 square feet in area.\(^{682}\) New, too, was the related provision that: “In a public place which contains two or more rooms which are used for the activity, the responsible person may designate one entire room as smoking permitted as long as at least one other comparable room has been designated as a no-smoking area.”\(^{683}\) All of these changes sparked controversy analyzed below.

Hearing Examiner David Giese explained at the outset of the Board of Health hearing that the proposed rules had been divided into 14 sections on which testimony would be received seriatim from witnesses,\(^{684}\) who, by the end of the marathon session, numbered 36.\(^ {685}\) On the first section, which dealt with the authority, scope, and purpose of the rules, only the bill’s principal author, Phyllis Kahn, offered testimony. In addressing what she “perceive[d] as the legislative intent in the passage of this law,” Kahn observed that “[t]he basic problem has
been that for much too long, smokers have claimed all air as their inalienable territorial right, thus, it requires a special effort to assert that the right to be free from tobacco smoke transcends any right to smoke tobacco and must in the interests of public health prevail when the two are in conflict.\footnote{Statement by Rep. Phyllis Kahn for the Hearing on Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act (Dec. 2, 1975), in Legislative, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B). This part of Kahn’s statement is quoted from this source because the transcript’s version is incorrect and incomprehensible.}

After wandering off point to join ANSR in urging rejection of the DLI rules as “totally inadequate,” she also emphasized that although nothing in the law implied a balance between smokers’ and nonsmokers’ rights (or even required designation of smoking areas), neither the law nor “hopefully the regulations to be adopted” sought to “eliminate smoking”; rather, they “seek to establish the right to breathe clean air as a fundamental public right.”\footnote{Board of Health Hearing Transcript at 10-12 (Dec. 2, 1975).}

Comment then proceeded to the crucial and contentious issue of the regulatory definition of an “Acceptable Smoke-Free Area,” which accordingly attracted extensive testimony, none of which, however, challenged the agency’s insertion of the non-statutory modifier “acceptable.” Such an objection might have been expected from ANSR, but its representative, Edward Brandt, the organization’s legislative committee chair—who later recalled that business representatives’ testimony had “made it clear that many employers considered any requirement to do anything to protect the health and comfort of non-smokers to be unreasonable interference”\footnote{Email from Ed Brandt to Marc Linder (May 2, 2007).}—concisely signaled that awareness of the intense counter-pressures that political-economically powerful owners of covered public places were bringing to bear on the Health Department was prompting ANSR to make do with much less than fulfillment of its maximum agenda:

Ideally, the Association for Non-Smokers Rights would like to see a stronger definition of a smoke-free area than is contained in here, because we do not believe that it is going to completely resolve the problem of insuring that smokers /sic/ have a right to breathe fresh air. Nevertheless, in keeping with the extensive consultations which the staff members of the Board of Health have participated in in trying to get the comments of various parties who are interested in and affected by these regulations, we feel that what is contained in here...is a reasonable compromise, even though it falls short of our ideal. We believe that it does take into consideration the legitimate concerns of people with varying interests.\footnote{Board of Health Hearing Transcript at 12-13 (Dec. 2, 1975). The “/sic/” was inserted by the court reporter. See also “Proposed No-Smoking Rules Called Too Strict.”}
The Minnesota Clean Indoor Air Act of 1975

In order to understand what ANSR (and owners\textsuperscript{690} of covered public places) were reacting to, it is necessary to discuss the Health Department’s explanation of “acceptable smoke-free area” in its “Justification,” which was included as one of the hearing exhibits. The Department was careful to point out that this definition ostensibly implemented MCIAA’s (only) provision to use the term “smoke-free area”\textsuperscript{691}—namely, § 6, which made it owners’ responsibility to “make reasonable efforts to prevent smoking in the public place by...arranging seating to provide a smoke-free area...” (That is, “arranging seating to provide a smoke-free area” was one of four alternative means of making “reasonable efforts to prevent smoking.”)

Although the Department did not mention this issue in explaining its definition of the phrase, later in the “Justification,” when dealing with the operative rule that required owners to “make arrangements for” the “acceptable smoke-free area”\textsuperscript{692} defined earlier, it characterized the statutory phrase

\textsuperscript{690} The December 2 proposed rules included for the first time definitions of the terms “proprietor or other person(s) in charge of a public place(s)” used in §§ 5-6 of the MCIAA. “Proprietor,” which applied to a corporation and an individual, meant “the party, regardless of whether he is owner or lessee of the public place, who ultimately controls, governs or directs the activities within the public place” and did “not mean the owner of the property unless he ultimately controls, governs or directs the activities within the public place.” Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 442(l) at 5 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). “Other person in charge” was awkwardly defined as “the agent of the proprietor authorized to perform [sic; should be “give”?] administrative direction to and [perform] general supervision of the activities within the public place at any given time.” Id. MHD 442(i) at 4. Finally, the regulatory term “responsible person” meant the “proprietor or other person in charge.” Id. MHD 442(n) at 5.

\textsuperscript{691} Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 3 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

\textsuperscript{692} MDH 443(d) (Oct. 1, 1975). Glossing MCIAA § 5, this sub-rule (which was retained in the final rules as MDH 443(e)) also provided that the “size and location of any smoking permitted area shall be determined such that toxic effects of smoking are minimized in the adjacent no smoking area.” In turn, the Health Department glossed its own rule by arguing that § 5 of the statute gave the Department “authority to require that the size and location of any smoking permitted area shall be determined such that the toxic effects of smoke are minimized in the adjacent no smoking area. While the proprietor still has general flexibility to designate a smoking permitted area as the business operation dictates, there must be a certain over-riding concern for the toxic effects of smoking which
“arranging seating to provide a smoke[-]free area” as “ambiguous.” 693 Exactly what that ambiguity was the staff failed to mention. Nor, at first glance, does “smoke-free” appear to be, even in the slightest way, capable of two or more interpretations; on the contrary, the term appears to be especially unequivocal and translucent. After all, the legislature could have required the area to be merely nonsmoking or smoking free; that it did not so choose might have had been linked to the fact that the MCIAA’s hallmark was its ban on smoking everywhere except in smoking-permitted areas (rather than requiring certain areas to be nonsmoking). 694 However, since the statute did use the term “non-smoking areas” and “no-smoking area” in § 5, it certainly could have used the term in § 6. That it instead used “smoke-free” could therefore prompt the conclusion that the legislature envisioned three kinds of areas: smoking permitted, nonsmoking, and smoke-free, in the last of which both smoking and smoke from smoking-permitted areas would be prohibited. Indeed, it is only by interjecting § 5 that the “Justification” was able to create the appearance/semblance of an ambiguity where otherwise none would have been in sight. That section provided that: “Where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoking in adjacent non-smoking areas.” In contrast, § 6 did not deal with minimizing the drift of smoke from smoking-permitted areas into smoke-free areas, but with the “prevent[ion of] smoking in the public place” altogether by means of signs, “arranging seating to provide a smoke-free area,” and “asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke.” In other words, whereas § 5 contemplated that smoking would continue to take place and

693 Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 21 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

694 As the head of ANSR’s public awareness committee looked back at her efforts to explain to owners their obligations under MCIAA: “What I...remember is how difficult it was for people to see that what we were telling them was that they had to find a place for the smokers, not the non-smokers.” Email from Glenna Mills to Marc Linder (Nov. 1, 2009).
The Minnesota Clean Indoor Air Act of 1975

that owners would be required to take at least one physical measure to reduce the smoke’s drift into nonsmoking areas, § 6 contemplated that no smoking would take place and that therefore the nonsmokers would be seated in a (completely) smoke-free area.

The major interpretive obstacle that this reading must confront (other than that apparently no one at the time championed it) is how to identify these two different areas; the only assistance that the statutory text offered was that § 5 specified that a public place consisting of a single room may contain a merely “no-smoking area” on “one side of the room,” which would be subject to the owner’s duty to “minimize the toxic effects of smoke” emanating from the adjacent other side of the room. It also turned out that § 6 did contain an ambiguity after all, albeit not one to which the Department called attention: since the “smoke-free area” resulted from arranging seating, smoke-freedom would not have been mandatory in areas that lacked seating—a conclusion that suggested that the legislature was concerned with situations/places in which nonsmokers were spending more extended periods of time (and therefore were sitting) as opposed to ones in which they were transiently moving through an area or standing for shorter periods.695

Neglecting these subtleties, the treatment of the definition by the “Justification,” favoring the agentless passive and running together §§ 5 and 6,696 declared: “It is felt that the term ‘acceptable smoke-free area’ is more appropriate to use in regulations because only ‘reasonable’ efforts are necessary and designation of a smoking permitted area is allowable. Therefore, the law does not necessarily expect 100% ‘smoke-free’ conditions and ‘acceptability’ of the no-

695 The Health Department turned this logical structure on its head when it not only defined, in the sub-rule, “acceptable smoke-free area” to mean a “contiguous portion of the public place...including seating arrangement,” but also glossed the sub-rule as necessarily including seating arrangements “so that a proprietor does not designate non-seating portions of the public places as the only no-smoking area.” MHD 442(a)(1) (Oct. 1, 1975); Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 3 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

696 The Board of Health went even further in this direction by finding that since § 6 required a smoke-free area and § 5 required use of existing barriers/ventilation to minimize toxic smoke effects, MHD 442(a) “merely clarifies the optional conditions available to proprietors to maintain a ‘smoke-free area.’” Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 4 at 2 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B).
smoking area is the real question.”697 Because the “reasonable efforts” of § 6 refer to prevention of smoking rather than to achievement of smoke-freedom, the Department failed to demonstrate that it had persuasively identified the legislature’s intent to mean “non-smoking” both when it used “non-smoking” and “smoke-free area.” The Health Department belittled and debased the legislature’s choice of a smoke-free standard even further when it characterized the carbon monoxide threshold level as the measurement “for determination of relative smoke-free conditions....”698

Acquiescence by the state’s premier anti-smoking organization in an administrative standard of smoke-freedom that was at best a misnomer ensured that no individual criticisms of 56-inch barriers and four-foot spaces would prompt the agency to strengthen the criteria.699 In contrast, businesses were not satisfied with the concessions that the Health Department had made to smoking. Indeed, a broad front of businesses and business organizations, led by Pillsbury Company’s representative, Raymond B. Jones, flayed the Department’s effort to regulate smoking among white-collar employees in offices. After digressing to attack the “double standard” that was “unfair to all employees” resulting from the fact that 13 of Pillsbury’s installations were subject to the Board of Health’s jurisdiction and 9 to the Labor Department’s and recommending that both agencies adopt the latter’s (extraordinarily relaxed rules), Jones urged striking...
"continuous" as modifying "barriers" on the grounds that it was "vague." In the event, he attempted to explain neither what could possibly be vague about "continuous" nor how any protection whatsoever could be provided nonsmokers if smoking and nonsmoking sections were, at intervals, separated by nothing.

President Oliver Perry of the 1,700-member Minnesota Association of Commerce and Industry briefly complained about the "unduly restrictive" conditions imposed by barriers and spaces, which might undermine efficiency and morale in offices. Expanding on these points in a written statement that he did not read, Perry—whose remarks were surely most congenial to the R. J. Reynolds top executives and TI President Kornegay who were on the list to which the newspaper clipping reporting Perry’s them was circulated—claimed that employers embedded their drive for "maximum efficiency in an environment responsive to employee needs," whereas erecting barriers and rearranging space “to comply with regulations for which there is no demonstrated need or demand would be counter [sic] productive.” Conjuring up another specter, the state’s principal employers organization implausibly imputed reason to a demand by its class antagonist: Perry warned that it was “entirely reasonable that organized labor would request special concessions for smokers if these proposed rules are implemented.” Constructing nonsmokers and unions as mutually exclusive, he predicted that “[i]f such a request became a part of the collective bargaining agreement, then non-smokers could demand the same” presumably for paid breaks.

Associated Industries of Minneapolis pushed MACI’s arguments beyond the breaking point. When Donald Lenarz, presumably without a shred of irony, insisted that “[c]ertainly a barrier of at least 56 inches in height, even with the three or four foot interval, could as effectively separate smoking permitted and no smoking areas as could the four foot space,” the grain of truth that underlay his claim was the latter’s fecklessness. Based on what he had heard at the

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700 Board of Health Hearing Transcript at 16 (Dec. 2, 1975).
701 Statement of Oliver S. Perry Before State Board of Health at 1 (Ex. 22, Dec. 22, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
702 Board of Health Hearing Transcript at 18 (Dec. 2, 1975).
703 Board of Health Hearing Transcript at 154 (Dec. 2, 1975).
705 Statement of Oliver S. Perry Before State Board of Health at 5 (Ex. 22, Dec. 22, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
706 Board of Health Hearing Transcript at 20 (Dec. 2, 1975). AIM also urged both the acceptability of lower (51-inch) barriers and the total elimination of smoking/no-smoking
sections if the public place satisfied the ventilation standard. Id. at 20-21.

707Donald Lenarz to Hearing Examiner (Dec. 19, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

708Bohr’s level of competence was painfully on display during the discussion of the definition of “bar,” when he got down to metaphysical brass tacks: “Dining in a supper club is not just dining, it’s an emotional experience.” Board of Health Hearing Transcript at 36 (Dec. 2, 1975). See also Gordon Slovut, “Rival Views Cloud Hearing on Smoking Law,” Minneapolis Star, Dec. 2, 1975, Bates No. TIMN0461869. Debating the law that allegedly interfered with that experience at a public hearing in the Minnesota Health Department Building at which smoking was prohibited apparently did not produce the same level of frustration. Lewis Cope, “The Air Doesn’t Clear After Debate on New Nonsmokers’ Rights Law,” MT, Dec. 3, 1975, Bates No. TIMN0461866.

709W. J. “Chum” Bohr to Kent Peterson (Dec. 19, 1975), in Health Department, Minn. State Archives, MHS, 112.H.18.3(B).
by declaring that the provision under discussion was “clearly an over-extension of the law” and “prohibitive,” not only because many businesses were unable to afford “sophisticated ventilation systems,” but also “because of limited space, can neither meet the four foot separation or [sic] provide physical barriers. There are hundreds and hundreds of little ten-stool truck stops in this particular category.”

Bohr’s arguments prompted the first of several remarkable interventions by drafter Peterson regarding “our justification for these rules.” Assuring regulatees that Bohr’s point that the law did not require any additional barriers or ventilation system was “well taken,” he explained that “[t]hat is why there is the (dd) section requiring an objective standard of carbon monoxide concentration.” Consequently, small businesses would be free, instead, to “combine those mechanisms or use some other system to provide an area that has less than nine parts per million of carbon monoxide at all times.” The Health Department, in other words, had adroitly avoided giving grounds for judicial invalidation of the rule by pointing out that it in no way had fallen into the trap of imposing a requirement that the legislature had expressly declined. Effectively, however, it imposed a requirement that the legislature had not mentioned at all—the four-foot-wide space between smoking-permitted and nosmoking sections.

And when the Minnesota Retail Federation repeated businesses’ (physically wholly implausible) claims that existing barriers that were neither 56 inches high nor continuous “will adequately prevent smoke infiltration,” Peterson again felt called upon to comment. This time, however, his response rejected opponents’ mystifying position, but also made the agency’s standard vulnerable to contestation, and potentially, invalidation:

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710 Board of Health Hearing Transcript at 24-25 (Dec. 2, 1975).
711 Board of Health Hearing Transcript at 26 (Dec. 2, 1975). Sub-section 4 of the draft rules of September 9/12 had expressly included, as noted above, the (ungrammatical) directive that “[b]y using a combination of the ventilation system, isle [sic] space or physical barriers, the concentration of carbon monoxide in the no smoking area shall at no time exceed 10 milligrams per cubic meter,” but this “combination” clause was eliminated from later drafts.
713 Board of Health Hearing Transcript at 27 (Dec. 2, 1975).
While few observers (who did not imagine that smoking restrictions would undermine their livelihoods) with their senses of smell and sight intact might have disagreed with Peterson’s skepticism regarding the smoke-shielding capacity of lower barriers, he himself had now cast doubt on the science base of the Department’s own claim that 56-inch barriers (or four-foot-wide spaces) would create “acceptable smoke-free areas.” Later, when the subject reemerged, one hearing participant who characterized the height as having been “arrived at arbitrarily,” suggested that “scientific data” should be gathered or tests conducted to determine whether such a barrier was in fact ineffective in separating smoking and nonsmoking areas. Peterson injected himself to remark that he was “certain” that in the course of implementation the Department would make such a determination, but then, prejudging any such undertaking (which never took place), he asserted, without citing any evidence, that “56 inches is adequate for seated individuals. And it does significantly deter the drifting of smoke for people who are standing.” Still later in the hearing Peterson appeared stymied when pressed to explain the basis for the Health Department’s “intent” that a 56-inch barrier, four-foot-wide space, ventilation system with six air changes and a supply of at least 7.5 cubic feet of tempered outside air per minute per person, and carbon monoxide concentration no more than nine parts per million in excess of that in the outside air within 12 feet of the building would “accomplish generally the same results.” Asked by his interlocutor whether, in developing the rules, he had research results showing such equivalence, Peterson stumbled: “Well, this is the intent, that physical barriers do that.” Told directly that to state such an equivalence “without any research support” was not adequate, the chief drafter failed even to venture a justification: “I see your point. Thank you.”

714 Board of Health Hearing Transcript at 67-68 (Dec. 2, 1975) (Steve Olson).
715 Board of Health Hearing Transcript at 151-52 (Dec. 2, 1975) (Bennett Davis). This discussion took place in the context of the prerequisite of achieving the aforementioned carbon monoxide concentration for receiving a waiver: if this criterion was the fundamental one, it created an opaque enforcement situation for the public, who would be unable to smell, let alone, measure the CO, 10 milligrams per cubic meter of which were deemed to be “the chemical definition of ‘acceptable smoke-free air’” because exposure to that concentration for eight hours could produce carboxyhemoglobin blood levels in excess of two percent, against which the preponderance of research literature indicated that humans needed to be protected. Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 9 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Although the Department of Health was well aware that tobacco smoke consisted of hundreds of gases and particles (including carcinogenic benzo(a)pyrene), it selected CO “as the chemical to be measured for determination of relative smoke-free conditions because equipment is readily available to
Indeed, even the Department’s formal “Justification,” which became publicly available at the time of the hearing, offered absolutely no scientific (or any other type of) evidence to support the assertion that a 56-inch-high barrier could “demonstrate that an area is ‘acceptably smoke-free,’” let alone that such a barrier did or could stand in any empirical relationship to the maximum

measure the level in air and carbon monoxide is one of the most dangerous absorbed gases in tobacco smoke.” Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 7 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Whatever the availability of such equipment, in fact Health Department inspectors never measured CO. See above this ch.

The explanatory “Justification” of the proposed rules, which set forth the reasoning to support, inter alia, the barrier height and space width requirements, was lacking in the file on the MCIAA regulations maintained at the Health Department. Telephone interview with John Olson (Enforcement Coordinator, Indoor Air Unit, Minnesota Health Department), St. Paul (Mar. 31, 2009). Fortunately, however, a copy was located at the Minnesota State Archives/Historical Society. Many years later Kent Peterson spoke of having prepared the Statement of Need and Reasonableness. Email from Kent Peterson to Marc Linder (Apr. 2, 2009). However, this precise terminology appears not to have been used in the Minnesota Statutes until 1982. Minnesota Statutes § 14.23 (1982). To be sure, the legislature amended the Administrative Procedure Act in 1975 so that “[a]t the public hearing the agency shall make an affirmative presentation of facts establishing the need for and reasonableness of the rule proposed for adoption,” but this requirement did not go into effect until July 1, 1976. 1975 Minn. Laws ch. 380, § 2, at 1285, 1287. The APA in effect at the time the Health Department was proposing the MCIAA rules did require administrative rules before being adopted to be based on a “showing of need for the rule,” which, together with the reasons for it, had to be submitted to the attorney general. 1974 Minn. Laws ch. 344, § 2(4), at 577. See generally, George Beck et al., Minnesota Administrative Procedure 8-14 (1987). Beck, who was an administrative law judge within the Office of Administrative Hearings from its inception in 1976 until 2005 and had been a hearing officer in the Commerce Department from 1973 to 1975, stated that prior to 1976 the statements that agencies had provided to the Attorney General had been very brief (one page) and had not adequately explained the basis for proposed regulations. Telephone interview with George Beck, St. Louis Park, MN (Apr. 15, 2009). A lawyer at the Minnesota Office of Administrative Hearings, which after 1975 was given centralized authority over agency rules hearings, stated that administrative proceedings before that time were “pretty wild west.” Telephone interview with Michael Lewis, St. Paul (Apr. 9, 2009). Dr. Lawson, the Board of Health secretary and executive officer, did sign a Statement of Need, but it was merely a brief recitation of the legislature’s mandate to the Board to adopt rules. Before the Minnesota Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, Statement of Need (n.d.), Exhibit 9 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
acceptable CO level (10 mg/m$^3$). The crucial question as to how a barrier over which tobacco smoke drifted could possibly fulfill its assigned function of reducing the CO level to acceptable from above acceptable—after all, since the CO level was the ultimate touchstone, if the acceptable level had already existed, there would have been no need for a barrier—the Health Department never posed, let alone answered. Although the Department neither presented nor needed scientific evidence to bolster its commonsensical rejection of non-continuous barriers “because a sufficient degree of interrupted horizontal air flow could not be assured,” when it came to the criterion of height, the “Justification” merely claimed that the 56-inch standard “was selected because 56 inches or more is sufficient to completely interrupt the direct flow of smoke from seated persons and to provide partial deterrence of the smoke from indirect drifting of smoke.”

The Health Department staff never even tried to explain what “interrupt” meant or where and into whose air space the smoke drifted after the interruption was over.

For the four-foot-wide space separating smoking-permitted and no-smoking areas, which turned out to be public places’ principal means of satisfying the “acceptable smoke-free area” standard, the Health Department never even purported to offer any public health-based justification. The only pseudo-explanation it was able to devise was that four feet was “a standard, accepted distance of comfortable aisle space which is used in commercial establishments.” That some relevant and plausible relationship existed between a distance that owners used to avoid customers’ chairs’ being backed into one another or other undesirable entanglements such as drowning out conversations and one that would protect nonsmokers from drifting smoke the Department was prudent

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718 Although the Department’s ventilation system requirements may have been better grounded (in the building code and recommendations of the American Society of Heating, Refrigerating and Air-Conditioning Engineers), the staff incautiously admitted that satisfying that standard might not suffice and that reinforcement by yet another standard might be necessary despite the rule’s requiring owners to meet only one: “With an adequate ventilation system in use the level of toxic products from smoking would not exceed low concentrations and it is reasonable that no health danger would result. While there may be minor discomfort among the people most allergic to smoke, this discomfort would be minimal if the non-smokers are separated from smokers in some manner.” Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 4-5 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
The Minnesota Clean Indoor Air Act of 1975

enough to refrain from making itself ridiculous by trying to demonstrate. Instead, the only justification it set forth pertained to the question as to why it did not impose a wider “neutral zone”; and here the reason had absolute nothing to do with public health: “Widths greater than four feet were considered but these were rejected because of a possible adverse economic effect on commercial establishments which would keep an unusually wide ‘aisle space’ to be [sic] in compliance with the Act and these rules.”\textsuperscript{719} Despite the Department’s failure to address the issue, let alone to provide any reason whatsoever for this wildly implausible claim, the Board of Health crowned this charade by finding that four feet was “of sufficient distance to minimize toxic effects of smoke.”\textsuperscript{720}

Most striking about the origins of these crucial methods for implementing the compromise that the legislature struck between protecting nonsmokers from secondhand smoke and permitting the owners of public places to continue to permit people to smoke by minimizing the toxic impact of drifting tobacco smoke is that they were adopted from general considerations guiding seating capacity and spacing in public buildings totally unrelated to the (hopeless) task of blocking the movement of tobacco smoke. Why the Health Department concluded that such dimensions adopted from irrelevant functions would have served at all, let alone maximally, to preclude the spread of toxic smoke is unclear.\textsuperscript{721}

\textsuperscript{719}Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 4 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).


\textsuperscript{721}The Health Department official who drafted the proposed regulations, asked 34 years later for the sources of these two requirements, observed: “I do recall real difficulty finding existing standards from anywhere to use for [sic] basis for specific distances or heights. We got suggestions from interested parties in Minnesota but there were no other states with standards at the time. I was not aware of anyone in the surgeon general’s office or at HEW to ask for standards. I am not aware that they were working on the smoking/non-smoking area concept. I recall researching the height of barriers and distances used to create separation when people are seated in public buildings. I got information about the commercially available barriers and typical building practices. I recall that barrier height was easier than distance...for height we could use the height to create visible separate [sic; should be separation] when seated...that’s the justification for 56 inches. I do not recall the basis for 4 feet...but there must have been something similar; it was a practical rule of thumb or really just a compromise.” Email from Kent Peterson to Marc Linder (Apr. 4, 2009). The assistant attorney general who helped Peterson draft
The Minnesota Clean Indoor Air Act of 1975

Before testimony was taken on other definitions, Hearing Examiner Giese interrupted the announced schedule to permit the MCIAA’s chief Senate sponsor, David Schaff, who had a conflict with a legislative committee meeting, to comment on whichever rules he wished. In the event, he chose, before entertaining questions about legislative intent, to dwell on only one aspect. His concern about endangering the health of nonsmokers in single-room eating places, even where they were apportioned half the room, and especially the specter he raised of going further “if the legislation isn’t proper,” may have been designed to dampen the opposition of restaurant owners.722

When testimony moved on to other proposed definitions, Oliver Perry of MACI picked up where Radisson had left off in its aforementioned letter to Peterson several months earlier protesting a definition of “place of work” broad enough to encompass private homes in which two or more people such as an “upstairs and downstairs maid” or two “catereses” [sic] were employed—an outcome that Perry believed would surprise and dismay legislators and the general public. The comment prompted Peterson to justify the threshold of two employees, but he failed to engage the debate about private residences despite Perry’s repetition of his challenge.723 (The Health Department nevertheless yielded: the final rules provided that they “shall not apply to a private residence when the residence is not customarily used as a ‘place of work.’”724 Its Findings of Fact expressly declared that this “specific exclusion is found to be necessary based on” Perry’s hearing testimony.)725

the rules and represented the health commissioner at the public hearing on the proposed rules recounted that: “I know we had some written record to support what I refer to as the ‘engineering’ stuff. Even in those days, the Commissioner couldn’t just pull out a number without offering a reasonable basis. It may have been brief; it may have lacked many citations, but it would have been in writing and a part of the record. The APA was going through huge changes at that time, but by then it was clear that a bureaucrat couldn’t just pull some standard out of his rear, establish it, enforce it and fine for its violation. There had to be some justification.” Email from Terry O’Brien to Marc Linder (Apr. 8, 2009).

723 Board of Health Hearing Transcript at 53-54 (Dec. 2, 1975).
724 Rules As Adopted for the Implementation of the Minnesota Clean Indoor Air Act, Minnesota Department of Health Rules Chapter Twenty-Six, MHD 444(b)(2) (Apr. 2, 1976) (copy furnished by MHD), in Health Department, MSA, MHS, 112.H.18.3(B).
725 Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 31 at 11 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B). The Board of Health suggested that it made the change because the broad sweep had not been intentional: “clarifying language” was called for because “the inclusion
The Minnesota Clean Indoor Air Act of 1975

Deviating from the procedure until that point, a member of the public directly asked Peterson what the (very contentious) term “one side of the room” meant. In lieu of answering, the chief drafter merely stated that since it had been “felt” that the statutory phrase was not clear, a definitional rule was needed to “clarify that ambiguity.” Unenlightened, the participant asked more specifically: “Does that mean half the room or just if there are 18 rows, with one side of the room with one row?” This time Peterson obliged that it did “not necessarily mean one-half of the room. ... So any group section of the room would be adequate.” 726 Despite the obvious debilitating impact that such lopsidedness could exert on public health, neither ANSR nor anyone else pursued the issue.

Having gone through the regulatory definitions, the hearing then proceeded to the general provisions, the first of which dealt with another contentious subject—smoking-permitted areas, testimony on which was extensive. The Health Department had inserted the two aforementioned significant changes into this section following presentation of a draft on October 1 for the Board of Health meeting on October 9. First, it limited the number of smoking-permitted areas per room, but then did an about-face and created an exception: “One and only one smoking permitted area shall be designated per room. However, rooms containing at least 20,000 square feet (6,096 1820 square meters) in total floor space may designate more than one smoking permitted area and shall otherwise comply with these rules.” 727 And second, the Health Department staff added a

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726 Board of Health Hearing Transcript at 55-56 (Dec. 2, 1975) (Merle Stone).

727 Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 443(a)(1) (n.d. [Dec. 2, 1975]), in Health Department, MSA, MHS, 112.H.18.3(B). Though unable to recall the matter decades later, Peterson acknowledged that because a private residence was such maids’ place of employment and home, the question “would still be unclear for maids.” Email from Kent Peterson to Marc Linder (Oct. 22, 2009).
new subsection providing that: “In a public place which contains two or more rooms which are used for the activity, the responsible person may designate one entire room as smoking permitted as long as at least one other comparable room has been designated as a no-smoking area.” The Health Department staff sought to justify the exception for rooms with at least 20,000 square feet of floor space “in recognition that it would be reasonable for the smokers to walk a distance of no more than approximately 5,000 feet to find a smoking permitted area. Assuming approximately square dimensions of a room, the room containing at least 20,000 square feet in total floor space is the type of room which would apply to this concept. [F]or airport terminals and other extremely large rooms, it is reasonable for this section to be included.”

Before touching on the staff’s difficult relationship with the Pythagorean Theorem, it is crucial to observe the complete disconnect between the MCIAA’s purpose and any justifiable basis for this exception. The Health Department declared that “[t]o remain consistent with the intent of the legislation and to help assure an acceptable smoke free [sic] area in the public place, this rule requires that there be one and only one smoking permitted area per room.” It then argued that the exception for large rooms was “permitted in recognition” of what would be a reasonable distance for smokers to walk to reach an area in which it would not be unlawful to smoke. Such a standard, however, was totally irrelevant to what was in fact the sole relevant criterion in this context—namely, whether

should have read “may” since the MCIAA (§ 5) did not impose any duty on owners to permit smoking anywhere. And second, grammatically rather than legally erroneous was the imputation of agency to “rooms” in designating themselves smoking-permitted.

Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 443(a)(2) (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).

permitting multiple smoking-permitted areas in such rooms would “assure an acceptable smoke[-]free area” in that room. By failing either to scrutinize this criterion or to cap the number of smoking-permitted areas in such large rooms\textsuperscript{731} the Health Department facilitated the constriction of smoke-free areas. As for the 5,000-foot rule, perhaps it was whimsically chosen for its propinquity to the iconic mile that smokers were alleged to be willing to walk for at least one brand of cigarette.\textsuperscript{732} In any event, it could not possibly have been the straight-line distance that anyone would have had to walk in a 20,000-square-foot, approximately square-dimensioned room,\textsuperscript{733} in which 200 feet would be the greatest such distance. If the Health Department really meant 5,000 feet, the room in question would have had to have been 25 million square feet (with sides ca. 3,535.5 feet long), the non-existence of which in Minnesota would have redounded to nonsmokers’ benefit.

No Radisson representative spoke up at the Health Board public hearing in December, but the post-hearing written comments submitted by Brooks may have reinforced the Health Department staff’s desire to avoid judicial challenges to the rules by striking offending provisions. Brooks insisted that section 5 of the MCIAA, which specifically provided that “[s]moking areas may be designated by proprietors...except in places in which smoking is prohibited by the fire marshall, or by other law, ordinance or regulation” was “in direct opposition” to the proposed ban on smoking-permitted areas in common traffic areas: “The Department of Health is without authority to adopt such a restriction.”\textsuperscript{734}

\textsuperscript{731} The sub-rule (MHD 444(b)(1)) requiring that no-smoking areas be at least 200 square feet might have acted as a de facto cap, but it applied only to workplaces not customarily frequented by the general public. This sub-rule was in its own right dysfunctional since, as shown below, it made “checkerboarding” possible. In response to the complaint by Jones of Pillsbury Company about the alleged arbitrariness of the 20,000 square foot standard Peterson pointed to the sub-rule as permitting more than one smoking-permitted area in rooms under that size. Board of Health Hearing Transcript at 92-93 (Dec. 2, 1975).

\textsuperscript{732} Roberta Rand, an ANSR member and employee in the Minneapolis Police Department dispatch office, was able to use this joke, to applause, at the end of the hearing when, in response to a complaint about the hardship for smokers who had leave their workplaces to take a walk to smoke: “the tobacco industry has made a big play for, ‘I’d walk a mile for a camel [sic].’ So why don’t they?” Board of Health Hearing Transcript at 179 (Dec. 2, 1975).

\textsuperscript{733} The Health Department presumably added this condition because, at the extreme, a room (say) 10 feet wide and 2,000 feet long (which still would not have required a 5,000-foot walk) would have been so narrow as to preclude acceptable smoke-free areas.

\textsuperscript{734} Letter from William Brooks, Jr. to Warren Lawson at 1 (Dec. 22, 1975), in Health
Astonishingly, the Health Department’s formulation of this sub-rule in the final rule turned the earlier version on its head by merely prohibiting the designation of common traffic areas in their entirety as smoking-permitted areas if non-smokers were required to use them and even authorizing “designation of a smoking-permitted area in a portion of the establishment which non-smokers must briefly cross to reach the intended activity.”735 Asked what might have prompted this reversal of policy, the chief drafter observed decades later: “It seems like a blatant gift to ‘smoking supporter’ but it is quite likely where we ended up. Such is the long process to avoid a contested rule. ... My charge was to write rules that accurately enforced the law and could be supported if there were a contested rule. I do not remember exactly which group would have appealed the rules but it was a constant issue. This was a milestone law and we wanted the rules to promote, not delay enforcement of the new law. As you know, that’s why compromises are made.”736 Incredibly, the Health Department staff in its post-Dec. 2, 1975 public hearing recommendation to the Board of Health that it adopt the final rules claimed that the “new language,” which had been “rewritten at the suggestion of several persons who felt that it was not understandable,” “has the same operative effect but is intended to be easier to understand.”737

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736 Email from Kent Peterson to Marc Linder (Oct. 19, 2009).

737 “Adoption of Rules Implementing the Provisions of the Minnesota Clean Indoor Air Department, MSA, MHS, 112.H.18.3(B). In contrast, Radisson secured no changes with its unspecified complaint that the legislature’s deletion of the provision in the original H.F. 79 making owners who wilfully failed to enforce MCIAA guilty of a misdemeanor barred the Board of Health from reimposing it. Id. at 2-3. Not only did Brooks fail to identify the rules that “attempt to make the proprietor...a policeman,” but he also ignored the fact that section 7(3) of MCIAA did empower the state board of health to seek injunctions of repeated violations of proprietors’ section 6 responsibilities, which included the duty to “make reasonable efforts to prevent smoking in the public place by” posting signs, “arranging seating to provide a smoke-free area,” “asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke,” “or by any other means which may be appropriate.” Brooks undermined his own critique of the proposed rules both by conceding that MCIAA “is designed and intended to provide a smoke-free area in public places for persons who desire such a facility “ and asserting that “Radisson hotels and restaurants have not opposed the concept of designating smoking and non-smoking areas” without reflecting on the fact that “smoke-free” was so much more comprehensive than “non-smoking” that achieving it might necessitate considerably greater restrictions on smoking than might otherwise have been anticipated. Id. at 3-4.
In point of fact, the process regarding this sub-rule was much more complex and many-layered than Peterson was able to reconstruct from memory. And although this radical change emerged, ironically, from an agreement that apparently formed spontaneously at the public hearing on December 2, the final outcome may not have represented a consensus. The General Metropolitan Area Hospitality Association, represented by attorney Gerald Singer, insisted that the common traffic area sub-rule “cause[d] more concern than any other single provision” because, for example, in order to seat someone in a single-room restaurant’s nosmoking area that was not located immediately at the entrance it was necessary to cross the smoking area—which, in many if not most restaurants, was the bar. The same problem occurred with respect to reaching the bathrooms, which were generally located in the bar area. Singer “recognize[d] the evil to which the proposed rule is sought to drive at, but nevertheless, compliance with this would require designation of basically the entire premises as a nosmoking area, or would entail the major revision and reconstruction work, which I don’t think was contemplated in the original act when they talked about existing barriers.” After Singer had complained about such renovation and the “great cost” that would be associated with it,738 Harry Erickson, a militant ANSR member from Minneapolis who spoke up more discrete times than anyone else at the hearing,739 cut Singer and the restaurant owners no slack in offering a guided tour of named “establishment after establishment” in which nonsmokers were exposed to smoking.740 Astonishingly, however, a little later Brandt himself took the floor to declare that Singer’s comment had been one of the few criticizing the proposed rules that “had some relevant factual basis and was not simply opposition to the intent of the law.” Marching much further toward compromise, he even “appreciate[d] the fact that strictly interpreted, that Subsection could create a problem for some kind of establishments. And I would not object to having some modification there to make clear that if the restaurant, for example, honestly tries to designate smoking and non-smoking areas, the fact that the smoking area would be next to an entrance or next to a washroom, that persons who would briefly have to go through such an area to get to the non-smoking area, this would be permissible.” In the event, the one caveat that he did attach to his quasi-official ANSR acquiescence was, as already shown, ignored by the Health Department: “I would urge you...to be very careful in any revision...to make sure that such a qualification would not be broader than would be necessary

739 Board of Health Hearing Transcript at 48, 2 (Dec. 2, 1975).
740 Board of Health Hearing Transcript at 71-73 (Dec. 2, 1975).
to accomplish the purpose in mind.” 741

The Department diluted protection for nonsmokers as well in another location already shown to be inextricably interwoven with common traffic areas. Earlier in the hearing Singer had raised the issue of the definition of “bar,” which he insisted was “intended” to encompass the cocktail lounge area of a restaurant despite the fact that customers sometimes received food service there. Crucially, he admitted that such cocktail lounges were “always near the beginning [i.e., entrance] of the place. So that you can’t get anywhere without walking through it.” 742 Singer did not mention the potential problem, let alone call for its elimination—presumably because restaurant owners were already treating cocktail lounges as smoking areas 743—but the proposed rules being discussed at the hearing defined a “bar” as “any establishment where one can purchase and consume alcoholic beverages.” 744 Since a cocktail lounge was not an “establishment” in its own right, but merely part of a larger restaurant establishment whose owner, despite selling alcohol in the non-cocktail lounge eating areas, was barred by MCIAA from declaring the entire establishment smoking permitted, an interpretive obstacle to declaring the entire lounge smoking permitted existed. Instead of engaging and arguing against this lesser issue (which none of the participants appeared to grasp), two anti-smokers vociferously attacked the statutory exemption for bars as a “gigantic loophole within the law.” 745

But even after Peterson had intervened to point out that “we have to somehow balance the inclusion of restaurants and the exclusion of bars,” ANSR’s chief

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741 Board of Health Hearing Transcript at 83-84 (Dec. 2, 1975). In its Findings of Fact the Board of Health ratified this agreement between restaurant owners and ANSR, expressly basing the “qualification” permitting smoking-permitted areas to be “designated in a location which non-smokers may briefly cross to reach an intended activity” on Singer’s and Brandt’s testimony; it excused this additional smoke exposure on the grounds that the modified “rule will conform with [sic] the intent of the law without placing an undue burden on proprietors.” Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 24 at 9 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B).

742 Board of Health Hearing Transcript at 34 (Dec. 2, 1975).

743 During the common traffic area discussion, Singer had used the example of a restaurant where “[y]ou have to walk by the bar where you are allowed to smoke.” Board of Health Hearing Transcript at 70 (Dec. 2, 1975).

744 MHD 442(c) (Dec. 2, 1975).

745 Board of Health Hearing Transcript at 36 (Dec. 2, 1975) (Rohalio Lasso). Maria Mueller also wondered why the law was written to exclude bars. Id. at 39.
The Minnesota Clean Indoor Air Act of 1975

representative, Brandt, failed to suggest that the proposed sub-rule be clarified to preclude within-restaurant cocktail lounges from attaining the status of totally exempt bars. Rather, his undifferentiated support for the regulatory status quo missed the issue altogether: “We strongly support the inclusion of the definition of a bar under (c), or something reasonably close to this definition as essential to carrying out the full intent of the law.”

In the event, the Health Department/Board of Health was attentive to what it characterized as the indication of “some confusion” in the hearing testimony (irrelevently citing Singer’s aforementioned statement that cocktails lounges were intended to be included within the definition of “bar”) “as to the status of a bar within an establishment and its relationship to the rest of the establishment.”

Following the hearing, the Department, whose “Justification” had not discussed this sub-issue of the definition of “bar,” recommended to the Board that the additional phrase “or portion of an establishment” be adopted to “permit a ‘cocktail lounge’ which exists as a part of an establishment which is otherwise a restaurant to be considered a ‘bar’ for the cocktail lounge portion only, and the restaurant portion to be regulated under this Act.”

Without revealing the substance of its own regulatory intent, let alone that of the overridingly important legislative intent, the Board then rubber-stamped the change on the grounds that “MHD 442(c) which defines ‘bar’ was never intended to exclude a separately designated room of an establishment in which alcohol is served but in which meals are not served. Thus, a portion of an establishment which functions solely as a bar within these rules may be considered a bar for only that portion regardless of activities conducted in the remainder of the establishment.”

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746 Board of Health Hearing Transcript at 38 (Dec. 2, 1975). Brandt’s inattentiveness to this issue may have been a function of his personal indifference, stated many times even more than three decades later, to the health impact of smoking on bar customers. Telephone interviews with Ed Brandt, St. Paul (2007-2009).


749 “Adoption of Rules Implementing the Provisions of the Minnesota Clean Indoor Air Act of 1975 (n.p. [at 2]) (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).

750 Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of
The aforementioned lack of consensus on the common traffic areas sub-rule hinged on differences between the restaurant industry, to which ANSR was prepared to make concessions, and general business offices, whose managers’ sad stories of disruption not only failed to prompt ANSR to subvert its own goals, but drove Peterson both to lose his patience with owner efforts to maintain smoking and to make an uncharacteristically unbureaucratic intervention.

The source of this resistance to the new anti-smoking regime was Donald Lenarz, representing Associated Industries of Minneapolis, an organization of 725 employers and building owners/managers, which had been formed in 1937 as a capitalist class struggle organization to deal with a growing number of powerful unions in a more “subtle” manner than the disbanded Citizens Alliance: in lieu of the latter’s head-on collisions, strikebreakers, brute force, and gunmen, Associated Industries fielded “a small army of trained employer representatives, labor conciliators and employee relations directors.” Instead of illustrating the disruptive impact on smoking in office areas of the proposed common traffic sub-rule by reference to any of AIM’s many members, Lenarz chose AIM’s own 3,600 square-foot headquarters staffed by 14 employees. Abstracting from the exempt “private offices,” he focused on the 124-sq.-ft. library, 124-sq.-ft. supply room, 350-sq.-ft. conference room, 127-sq.-ft. reception area, and 382-sq.-ft. general office area, several of which were in practice diminished by the presence of cabinets and other objects. For example, it was “impractical” to divide the library—which association members also used—being effectively less than a hundred square feet, into smoking and nosmoking sections, to put up partitions in it, or to get a four-foot space between sections. The conference room would be subject to the common traffic sub-rule because nonsmoking members of union committees would be required to use that room for the purpose for which it was intended (i.e., collective bargaining). If AIM made the room nonsmoking, since the hallways and restrooms would be posted nonsmoking, periodically unionists and others (totalling 15 or 20 people) would have to leave the building to smoke, thus interrupting the function; if, on the other hand, AIM divided the room and

1975, “Findings of Fact,” ¶ 13 at 6 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B). Against the background of this expressed regulatory intent regarding Final Rule 442(c), it would not have been lawful for owners to serve meals to cocktail lounge customers in the lounge, as Singer indicated had been the practice.

751Donald Lenarz to Hearing Examiner (Dec. 19, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

table 50-50 (without being able to comply with the four-foot-wide-space requirement), the resulting physical seating configuration would, since smoking and nonsmoking were cross-class phenomena, interestingly have ousted the traditional labor versus management constellation in favor of smokers versus nonsmokers—an outcome that left Lenarz sputtering: “So I don’t know where we are.” And, finally, the general office area for five clerical workers, four of whom smoked, could not be partitioned by barriers and was not large enough to allow for a four-foot-wide space; and “since our ventilation system probably doesn’t meet the requirements in the rules and we can’t measure the carbon monoxide concentration,” it too might have to be posted nonsmoking, thus causing those smokers to leave the building to smoke, “however many times that may be during the day.”

Having listened to a very lengthy account that did not even come close to tugging a single one of his heartstrings, Peterson mild-manneredly but definitely drew the inexorable conclusion for AIM and many Minnesota smoking aiders and abettors:

MR. PETERSON: I would like to point out that the law does put the burden on the smoker and not the non-smoker.

(Applause)

MR. PETERSON: And that these rules are consistent therefore with the law. And therefore, if the proprietor attempting to comply with an acceptable smoke-free area can find no other alternative, you would have to post no smoking in its entirety. That’s the intent, I believe, of the law.

With regard to the sub-rule pertaining to public places with two or more rooms used for the same activity, which conditioned the designation of an entire room as smoking-permitted on the owner’s designating “at least one other
comparable room...as a no-smoking area,” the Health Department’s “Justification” self-contradictorily both accurately repeated this sub-rule and misstated it, to nonsmokers’ detriment, by asserting that, “if one room is entirely designated as smoking permitted then there is responsibility to have at least one other comparable room with a no smoking area” (rather than to designate it nosmoking in its entirety).

This issue arose at the hearing when a representative of the Bloomington Hospitality Association—who, under oath, stated (and submitted as an exhibit “statistics which are not b.s. or hearsay” purporting to show) that over a 10-week period of 9,786 persons served lunch in two rooms at one restaurant absolutely none made advance reservations for a seat in a nosmoking area and only 14 so requested after entering—charged that there was a contradiction between this provision and MHD 444(b)(4), which provided that the “size of the designated smoking permitted area shall not be more than proportionate to the preference of patrons of that location for a smoking permitted area....” Despite the unambiguous language and meaning of section (b)(2), Peterson initially and erroneously responded that it “does state that at least a portion of a comparable room shall be a no smoking area.” Then finally understanding that a problem existed, he sought shelter from the criticism in the shaky conjecture that “I don’t believe that we have authority to require that the entire comparable room smoking be no smoking”—without, apparently, seeing any need to offer a statutory warrant for authorizing an owner to declare every square inch of a room smoking-permitted. Unwilling to face the reality of the rule’s text that he himself had drafted and/or too flustered to reproduce his own work product accurately, Peterson instead erroneously claimed that “it does state that where there are two rooms, one is entirely smoking, there shall be a comparable room that indicates a no smoking area.” Perhaps perceiving at last the discrepancy between his statement of the rule and the rule, he conceded that: “We may have to clarify that. Apparently you don’t understand that was the intent.” An incredulous Chum Bohr had to ask him to repeat his statement, prompting Peterson to misstate yet again that “a portion of the comparable room must contain a no smoking area.”

At least Brandt of ANSR was not hoodwinked: calling Peterson’s interpretation a “proposal to change that language,” he bluntly objected because


757 Board of Health Hearing Transcript at 73-76 (Dec. 2, 1975).
it “would utterly defeat the purpose of trying to provide maximum protection for the non-smoker. The wording should be the other way round. [A]t least one whole room should be a non-smoking facility with possible mixture in other rooms.” ANSR’s counterattack was unavailing. Peterson, backed by the Board of Health, possessed the authority not only to vindicate his mistake and bring reality into sync with it, but to impose it on the rest of the world: the final rule read just as he had erroneously claimed (“as long as at least a portion of one other comparable room has been designated as a no-smoking area”).

In contrast to ANSR’s aforementioned concession on common traffic areas, Brandt proposed supplemental language for what he deemed “the heart” and “the most important part of the entire regulation,” the adoption of which he strongly urged regardless of whatever changes might be made in other sections. That subsection (MHD 443(a)(4)) mandated that the “size of the designated smoking area shall not be more than proportionate to the preference of patrons of that location for a smoking permitted area, as can be demonstrated by the responsible person.” ANSR viewed adoption of this sub-rule as “absolutely essential” because it was “vital in dealing with the problem of token compliance,” which, as already noted, was especially rampant in restaurants.

According to the Health Department’s “Justification,” this sentence “describes the general method in which the proprietor should decide the size for designation of a smoking permitted area...if such an area is provided.” The staff deemed it “the most practicable method for such determination” after having considered and rejected “an absolute minimum percentage or a minimum square
The Minnesota Clean Indoor Air Act of 1975

...footage” because of the difficulty that the Department would have enforcing such standards and “because of the lack of ability to find a percentage or square footage which would be reasonable and proper for all public places....” While allowing owners to use “any reasonable method” (“as long as” it was consistent with MCIAA and the rules), the staff pointed out that “[m]ethods for size determination could be a combination of either surveys of customers and/or recording of the number of people who ask for smoking permitted areas in some period of time.” The Department offered two specific examples that it would find “acceptable”: (1) owners could start by designating the public place 50-50 as between smoking and nonsmoking and then “observe whether or not the size of those areas are [sic] adequate or excessive for customer demands, and then make changes in response to them; and (2) owners could, for a limited time period, ask all customers their preference for smoking or nonsmoking areas, record the numbers, and then designate seating accordingly. As long as the method was “reasonable” and “there are not a significant number of citizen complaints that the size has not been adequate,” Department inspectors would deem owners’ designations acceptable.763

Against this background, Brandt explained (to applause) that the figures cited by restaurateurs earlier in the hearing purporting to show that virtually no nonsmokers ever requested seating in a nonsmoking area were totally useless and totally beside the point, because they are based upon the assumption that the non-smoker must request the use of a non-smoking facility, which is clearly not the intent of the law. The law does not say that public places shall provide a non-smoking section for non-smokers who request it. It says smoking prohibited, period, excepting in designated smoking areas. ... If anyone is to request a specific facility, it is the smoker.... And no statistics from any restaurant have any validity whatsoever unless the proprietor has asked each and every patron what his preference is.764

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763Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 17-18 (MDH Ex. 11, Dec. 2, 1975), in Health Department, Minn. State Archives, MHS, 112.H.18.3(B). The Board of Health agreed that absolute minimum percentages or minimum square footage might not be reasonable for all public places because of “the variables of activity, use, need and population in each public place at any given time”; consequently, “fluctuating boundaries based upon demonstrable preference” were consistent with the need to protect nonsmokers’ health and comfort. Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 25 at 9 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B).

764Board of Health Hearing Transcript at 85 (Dec. 2, 1975). According to Glenna 2443
Because many nonsmokers who preferred nonsmoking sections would not initiate the request because they either were unaware of their legal rights or, “more probably,” did “not want to engage in what they think is going to be a hassle,” ANSR, comparing the experience in airplanes, \(^{765}\) proposed adding regulatory language to authorize owners to determine the percentage of patrons preferring a smoking area according to one of the following criteria: (1) the percentage of patrons expressing a preference for a smoking area “if all patrons are asked for their preference”; (2) the percentage of patrons expressing a preference for a smoking area in a survey, “provided that the survey include all patrons during a period of at least two weeks and provided that a new survey is conducted once each year”; (3) the percentage of patrons specifically requesting use of a smoking area if the owner does not ask all patrons for their preference; and (4) the percentage of smokers in the general population defined as 37 percent for establishments catering chiefly to adults and 25 percent for those catering to children and adults. \(^{766}\)

ANSR’s initiative was very rudely received by the general counsel for the Hospitality Industry of Minnesota, Robert Johnson, \(^{767}\) who earlier in the hearing, sounding as though he were mouthing Tobacco Institute propaganda, had (incorrectly) instructed those present that MCIAA was about health and “not a law to recognize certain individuals who may be irritated by smoke.” \(^{768}\)
Vociferously but incoherently Johnson accused Brandt of having presented a proposal “certainly contrary to the agreement that I thought we had with you and your organization....” The precise nature of that agreement and of ANSR’s breach was obscured by Johnson’s assertion that the “theory” that he thought that Brandt had “accepted” was that the “key” was “the preference of people we are serving,” and if Brandt was “not going to accept it, I think you really have gotten into an entirely different battle, because this then becomes an economic battle...rather than our desire to serve the public....” The only semi-intelligible sense that could be extracted from Johnson’s oration was that “there is just a heck of a lot of us that don’t smoke. We really don’t care where we sit. And if somebody else wants to smoke,...I think these people have rights....” The core of his objection appeared to be the claim that ANSR had acquiesced in the restaurant owners’ view that “preference was true preference, and indifference also was a preference on the part of the public.” Johnson wanted to “go back to that idea, that people are going to have to ask where they want to be.... But let’s not forget that there is a large segment who is indifferent, and I think that they also have to be recognized.” In other words, what Johnson in fact strenuously objected to was Brandt’s effort to use MCIAA to raise nonsmokers’ consciousness about their new right to smoke-free space in covered public places. The most that Johnson would put up with was ANSR’s “educat[ing] those people to go in and tell” the restaurants “that you want to be in a non-smoking area, then I think we have the preference of the customers coming forward.” But if Brandt’s plan was “to turn this thing around and start making policemen out of anybody in any industry”—especially if, as Johnson did not mention, nonsmoking was the default position and the burden was shifted to smokers to express their preferences—“I think we are going to have some difficulty, because I don’t think that is the way we thought in the law.”

Health Hearing Transcript at 125 (Dec. 2, 1975). After MCIAA had gone into effect the American Lung Association praised the law’s “careful wording” for “bring[ing] significant impact for other legislators using this approach. ‘Most important...is the fact that the language did not exclusively stress the ill health effects of smoke, but rather urged the protection of “public health, comfort and environment.”’” Annual Meeting—Many Attend, Learn ANSR Ready to Go the Second Mile, ANSR 4(1):1 (Apr. 1976) (statement by Karen DeCavalcante, Program Associate for Smoking and Health, and National ALA Coordinator for the non-smokers’ rights movement).

769Board of Health Hearing Transcript at 88, 90 (Dec. 2, 1975). See also Bob Goligoski, “Non-Smoking Rules Ignite Differences,” SPPP, Dec. 3, 1975 (12:5-6). Bohr also submitted as a hearing exhibit the results of a National Restaurant Association attitude survey that asked 3,192 consumers to rank order the importance of 22 features in choosing a restaurant. Depending on the type of restaurant, the presence of a nosmoking section
This position was pushed even further by John Kahler, a smoker who was president of the Minnesota Hotel & Lodging Association and vice president for operations of the Kahler Hotel in Rochester. He claimed that his hotel’s compliance with MCIAA (which consisted of having posted signs and “added the non-smoking area” by August 1) had, as far as he knew, elicited “not one single positive response from a guest,” although more than half a million people were in the building annually.\textsuperscript{770} Another seeming Tobacco Institute trainee, Kahler urged replacing “coercion and vindictiveness with some common sense and courtesy....”\textsuperscript{771} Relatively sedate at the hearing, in his post-hearing written statement Kahler shed his restraint to attack anti-smokers as just another “special interest” group that, “embark[ed] on a course of action for the oppressed,....lose sight of their real intent as they pursue their special interest.” In this case of providing “relief for a small minority of people who, unfortunately, suffer from lung or congestive problems,” anti-smokers “confused the issue” not only by including all non-smokers, but even more by failing to admit that “they recognize that the vast majority who enjoy going out for entertainment and the like don’t really give a hoot whether others smoke or not.” Indeed, most of Kahler’s smoking and nonsmoking customers felt that it was “ridiculous” to make an issue out of seating locations. He therefore proposed the market-knows-best solution (“a democratic way”) of letting hospitality operators “do their own thing” including “cater[ing] to non-smokers” and “[i]f the non-smokers are right, it won’t be long before we have a factual answer.” Such an approach would prevent non-smokers from “over-playing their hand and trying to transmit some of their responsibility to us.” In the context of the collective problem of public health, however, Kahler failed to explain how the dictum that “each of us...must assume responsibility for any personal problems we may have”\textsuperscript{772} could possibly be implemented when only state intervention could limit or eliminate the source of

\textsuperscript{770}Board of Health Hearing Transcript at 82 (Dec. 2, 1975).
\textsuperscript{771}Board of Health Hearing Transcript at 83 (Dec. 2, 1975).
\textsuperscript{772}John Kahler to Kent Peterson (Dec. 19, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
secondhand tobacco smoke exposure.

Later, Peterson himself took up this issue again when he relayed to Bohr a comment from “our health education department” concerning the conclusion that “we” had reached “about the fact that the public is not educated about the fact that this law exists, and that it is apparent that there are not many people who request a no-smoking area.” Since the legislature had failed to appropriate any funds for public education about MCIAA, the Health Department, which was “willing to work with the hospitality industry however possible to improve this public education,” inquired, without the slightest hint of irony, whether “you have some budget that could be obtained from private sources, like your own....” Instead of rising to the bait, Bohr denied Peterson’s premiss: “I’m just plain telling you that the public has been aware of it.”

In the event, the Board of Health, based on Brandt’s testimony, adopted the first and third of ANSR’s four proposed methods for determining the “proportional preference of users of a smoking-permitted area” and rejected, without explanation, one that tracked one approved by the aforementioned “Justification”.

When the hearing proceeded to focus on “Categories of Affected Places”—the rules for which, under MHD 444(a), prevailed over the general provisions of MHD 443 if the two were in conflict—Oliver Perry of MACI attacked the definition of “office,” designed to determine whether it would be

773 Board of Health Hearing Transcript at 99-100 (Dec. 2, 1975).
775 Rules As Adopted for the Implementation of the Minnesota Clean Indoor Air Act, Minnesota Department of Health Rules Chapter Twenty-Six, MHD 443(b)(4)(aa) and (bb) (Apr. 2, 1976) (copy furnished by MHD), in Health Department, MSA, MHS, 112.H.18.3(B). The final rule also gave owners the discretion to use “an alternate method which reasonably indicates the user’s preference.” MHD 443(b)(4)(cc). The final preference-determination rule read as follows: “(aa) the percentage of users of the location who express a preference for a smoking-permitted area when the responsible person asks all users for their preference, or (bb) the percentage of users of the location who request or select a smoking-permitted area when the responsible person does not ask all users for their preference, or (cc) the percentage of users who are determined by the proprietor to prefer a smoking-permitted area by an alternate method which reasonably indicates the user’s preference.”
776 “When a public place contains an office which supports activities which are principally to manufacture or assemble goods, products or merchandise for sale, or to store
subject to the Health Department or the Labor & Industry Department rules, as creating a “double standard.” He reasoned that an “intolerable situation” and a “nightmare” for compliance and enforcement would result from the fact that the corporate headquarters of (say) General Mills or 3M or that of any manufacturing firm located in a downtown Twin Cities office building would be “exempt” (that is, not covered by the former set of rules), while the “office next door” of lawyers, architects, or accountants or the headquarters of a retailer such as Dayton’s would be covered.777 Brandt counterattacked by pointing to the irony that the language to which Perry was objecting was adopted by the legislature in direct response to Perry’s objections to the possibility of dual regulations778 (Although no representative of Honeywell, Inc.779 spoke at the public hearing, the firm, which employed more than 15,000 employees in more than 20 buildings in the Twin Cities area, submitted a post-hearing written statement suggesting that the rule be amended to provide that “all facilities of a private employer engaged primarily in the manufacture of goods, which are not usually frequented by the general public, be under the regulation of one agency.” In light of the laxness of the Labor Department rules it was self-explanatory that “[p]referably this agency should be the Department of Labor and Industry.”780

778 Board of Health Hearing Transcript at 127-28 (Dec. 2, 1975). For Perry’s confused and unconvincing attempt at rebuttal, see id. at 132.
779 Honeywell’s position on MCIAA was ambivalent inasmuch as the law increased demand for the air filtration equipment that the firm produced. After Honeywell management had finally recognized that these devices were unable to remove particulates, it decided to ban smoking in its buildings—a decision reinforced by the human resources department’s conclusion that a nosmoking regime decreased health costs. Telephone interview with Patsy Randell, Minneapolis (May 4, 2009) (long-time company official who in 1975 lobbied for it on MCIAA).
780 Statement of Honeywell, Inc. at 3 (n.d.), attached to F. A. Boyle [personnel director, Honeywell] to Dr. Warren Lawson (Dec. 19, 1975), in Health Department, MSA, MHS,
In the event, based on a letter from DLI to the Health Department written two weeks after the public hearing, the provision was “rephrased to conform with” the former’s rules.\textsuperscript{782}

Brandt then segued into an extended policy discussion of the comparative merits of the two departmental sets of rules. ANSR “appreciate[d]” that the Health Department rules were a “sincere effort to determine specific and workable standards concerning the work places,” but the fact that during the “extensive consultation” held prior to issuance of the proposed rules the relatively little attention that had been directed to workplaces meant that “perhaps none of us have had a chance to think through this aspect of the regulations quite as thoroughly as we might have wished to.” Brandt then (with considerable exaggeration) praised the Board of Health for “essentially...proposing...to provide the same level of protection for the non-smoker in the work place as in the place visited by the general public.”\textsuperscript{783} However—and this circumstance assumed even

112.H.18.3(B). Although the company stated to the Board of Health that “we have a significant interest in providing a clean and healthy environment for our employees” (\textit{id. at 1}), a clerical employee (who was a single parent of three) informed Lawson that she had been “terminated on the spot” when she refused to work in an area with heavy smokers and stale air. Donna Pritchard to Dr. Warren Lawson (Dec. 18, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

\textsuperscript{781}Judith Pinke (Assistant to the Commissioner) to Kent Peterson (Dec. 18, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

\textsuperscript{782}Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 32 at 11 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B) (erroneously dating the letter as Dec. 8). Revised and final rule MHD 444(c) read: “When a public place which is a factory, warehouse or similar place of work contains an office which is incidental but related to the primary operation, such office shall for the purposes of this Act, be regulated under Rules of the Department of Labor and Industry.”

\textsuperscript{783}Board of Health Hearing Transcript at 128 (Dec. 2, 1975). For the second use of “sincere” in the transcript, which was presumably a result of Brandt’s misspeaking or the court reporter’s error, “specific” has been substituted, which appeared in ANSR’s written statement. ANSR Policy Statement, Board of Health Regulations, Minnesota Clean Indoor Air Act at 3 (MHD Ex. 21, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Despite the fact that ANSR and the Health Department had “worked quite well together on the of the original rules,” their relations were, until about 1977, “less than cordial....” This tension was apparently in part linked to the Department’s having initially regarded MCIAA “with dismay” because of the view that it was unenforceable. Jeanne Weigum, “The Self-Enforcing Law: The Way to a Cleaner Indoor Environment,” in \textit{Proceedings of the Fifth World Conference on Smoking and Health} 2:333-36 at 333
greater significance since so many manual workers were not even covered by the Health Department rules—ANSR’s “feeling” was that the standards of protection for the non-smoking employee need to be stronger than those for places that are used by the general public, for several reasons: One is that the employee normally spends approximately 40 hours a week at his work place, whereas most patrons will probably spend an hour or two at a given kind of public establishment, or a little bit more. So the amount of exposure is much greater at the work place.

Furthermore, the employee doesn’t have any option but to go to work at the one place where he has a job. Whereas the patron of a public service will sometimes have some choice of facilities which he wishes to patronize. Furthermore, since the criterion in each case is an acceptable smoke-free area, which can be met by having a...distance of four feet between the smoking area and the non-smoking area, this is probably reasonably satisfactory in a public facility like a restaurant, because if I’m given a table that’s only four feet from the non-smoking [sic; must be smoking] section, I can respectfully decline and say, I would wish to wait until a table is available to me a little farther away from the smoking section. That same four feet distance however is less adequate as a protection for the asthmatic employee whose station happens to be four feet from the chain smoker.

Brandt may have offered the airline system as one way “the state could use [sic] to force restaurants” to implement the law’s clear intent of making “smoke-free places the norm, not the exception,” but indirectly his statement underscored the obvious—namely, that airplane-style segregation in restaurants offered nonsmokers virtually no protection from secondhand smoke. ANSR took this position despite the fact that, as Brandt observed many years later, “even no-smoking areas had no real protection from smoke in most restaurants. If you asked for one, they would give you one, but it might be next to a smoking area, [sic]

(William Forbes et al. eds 1983).

784Board of Health Hearing Transcript at 128-29 (Dec. 2, 1975).


786In a notice of proposed rulemaking in 1979 the Civil Aeronautics Board—which had still “not finally decided whether the rules as now amended will be sufficient to protect non-smokers from unreasonable exposure to tobacco smoke”—in response to a comment by ASH that smoking should be prohibited in forward first class not only because its small size precluded “effective separation,” but also “because smoke drifts back into the tourist no-smoking area even when a curtain is drawn,” stated that there was no convincing demonstration...that grouping all smokers together would solve the problems associated with smoking on aircraft.” Civil Aeronautics Board, Part 252 - Provisions of Designated ‘No-Smoking’ Areas Aboard Aircraft Operated by Certificated Air Carriers: Proposed Restrictions on Smoking at 2, 4 (May 16, 1979), Bates No. 03743088/9/91.
which was useless."\(^{787}\) Such candor stood in sharp contrast to Brandt’s understandably propagandistic but nevertheless hopelessly hyperbolic claim, written in the fall of 1975 and published in early 1976, that: “When you deplane in Minneapolis or St. Paul, you’re in clean indoor air country.”\(^{788}\)

Brandt was willing to accept the four-foot-wide space as the Health Department rule for non-workplaces (even though it did not produce a smoke-free area acceptable to him)—the definition of an “acceptable smoke-free area” was “not as strict...as we would ideally like,” but overall ANSR regarded the rules as a “good compromise” that would “have a substantial positive effect on alleviating the problems stemming from indiscriminate smoking in public places”\(^{789}\)—but on behalf of ANSR he suggested one of two courses for workplace-related rules: the proposed workplace rules should either be adopted on an interim basis with the commitment to develop stronger rules as soon as experience with the interim ones made improvement possible or, “in view of our total disenchantment” with the DLI rules, deleted for the time being and both departments should immediately undertake a serious effort to draft stronger rules.\(^{790}\)

Following Brandt’s detour a crucial discussion took place about the alternative to the aforementioned MHD 443(a)(1), which prohibited the designation of more than one smoking-permitted area per room (except in rooms containing at least 20,000 square feet). Under the alternative, “a place of work which is not customarily frequented by the general public may contain several, separate no smoking and smoking permitted areas within the same room provided the no smoking areas are at least 200 square feet...in area. Such no smoking areas must comply with the requirements for an acceptable smoke-free area...”\(^{791}\) The draft of September 9/12 had lacked such a provision, a version of which appeared in the draft of October 1/9 and stated that in a workplace or office not customarily used by the general public the owner would be deemed to be making reasonable efforts to prevent smoking if it was permitted in sections used exclusively by smokers and “people who permit smoking. Where such smoking permitted areas and no smoking areas exist in the same room..., each no smoking area shall be at

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\(^{787}\) Email from Ed Brandt to Marc Linder (Mar. 19, 2009).


\(^{789}\) ANSR Policy Statement, Board of Health Regulations, Minnesota Clean Indoor Air Act at 1 (MHD Ex. 21, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

\(^{790}\) Board of Health Hearing Transcript at 129-30 (Dec. 2, 1975).

\(^{791}\) Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 444(b) (n.d. [Dec. 2, 1975]), in Health Department, MSA, MHS, 112.H.18.3(B).
least 200 square feet...and an acceptable smoke-free area....”792 The Health Department staff’s “Justification” made no effort at all to conceal the extent to which the Department had acquiesced in the aforementioned importuning by Twin Cities firms and building owners that the rules respect corporate office managers’ conception of the role played by smokers and their smoking in their “scientific” (i.e., profit-maximizing) operations. Not to be underestimated here was the fact that, as Patsy Randell, who as Honeywell, Inc.’s lobbyist in 1975 attended the legislative hearings and debates (rising to director of state government affairs and vice president of corporate diversity and multicultural business affairs), later explained, all Twin Cities corporate executives at the time smoked (drank and were white).793

Ironically, then, although ANSR failed to persuade the Board of Health to bring the level of protection for office workers up to that for the general public regarding this rule, the final rule depressed the level of protection conferred on the general public down toward that granted office workers by permitting more than one smoking-permitted area in rooms containing at least 20,000 square feet.794 The Health Department staff argued that the new rule was “necessary to provide additional flexibility to places of work” because there was need for permitting more than one smoking permitted area per room in a place of work due to the separation of employees according to activities within many work locations, the long period of time which both smoking and non smoking employees spend at the place of work, and the adverse economic effect which could be created by excess time off for smoking breaks or by separation of people doing related activities.795

The basis of the 200-square-foot rule was the 150-square-foot “standard, accepted” per person area in commercial business offices obtained from the very entities on whose behalf the pro-smoking revision was undertaken—“Minneapolis and St. Paul owners and managers.” On what scientific basis the staff decided to tack on 50 extra square feet it kept to itself, offering only this robustly opaque

792Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4.a. (Draft 10/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).
793Telephone interview with Patsy Randell, Minneapolis (May 4, 2009).
justification: “it was decided to require all no smoking areas to be a minimum area greater than 150 square feet. Hence, 200 square feet was selected as proper to maintain minimum space for a ‘smoke-free’ environment.” How these 10 x 20-foot island oases, separated by a four-foot moat from the breezy oceans of drifting smoke, could possibly merit the tag, “acceptable smoke-free area,” the “Justification” did not even seek to explain.796

By the same token, however, the staff was not even audibly embarrassed to assert that this exclusively employer-demanded arrangement would redound to nonsmoking workers’ health. Indeed, in this very context the Department did not even shy away from deploying a term that virtually per se suggested air quality degradation:

“Checkerboarding” of no smoking and smoking permitted areas is herein allowed for places of work not customarily frequented by the general public because such places generally have working areas assigned by functional activities within the place of work. Alternation of such working locations, beyond a small distance to conform to 200 square feet no-smoking areas, would not be economically feasible for employers. Employers are still required to provide an “acceptable smoke-free area”.... With the 200 square foot minimum and “acceptable smoke-free” standard, it is felt that the health and comfort of non-smoking employees will be improved.797

By whom this vision of improved health and comfort was “felt” and whether the improvement was being measured vis-a-vis the previous iteration of the rules, which lacked this beneficent public health provision, staff said not. Moreover, this cave-in stood in screaming contradiction to another explanation in the self-same Health Department “Justification” of its proposed rules, which emphasized that “acceptable smoke-free area” was necessarily defined as a “contiguous portion of the public place” to indicate that “the area must be ‘connecting or compacted’ and not broken down into ‘checkerboard’ type sections.”798 But while


798 Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 3 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS,
the Department was at it, the staff yielded to yet another corporate demand—freedom from aesthetic pollution. “Since this rule applies only when the place of work is not customarily frequented by the general public and the people who are there would be expected to understand that smoking restrictions exist within the place of work, it would not be necessary to have all the sign provisions which are required by” the general sign rule. Instead, one sign (prohibiting smoking except in designated areas) per floor would suffice to pull off this behavioral-cultural revolution the vanguard of which Minnesota was universally “felt” to be.

Impressively, both the Department’s justification and the impact of the new rule constituted an unambiguous rebuff to Brandt/ANSR’s proposal that workers needed more rather than less protection than the general public, who, by and large, not only spent much less time exposed to smoke than employees—who many or most of them were in other capacities—but were also much freer to choose less smoky (or more smoke-free) public places to frequent.

The Health Department’s gift to employers at the expense of nonsmokers’ health failed to placate one of its most insistent demanders, Pillsbury Company, which the press, with some accuracy, credited with this victory of employers over public health: “The original idea was to require that the smokers be huddled together somewhere out of the way of the nonsmokers. That was altered after a representative of the Pillsbury Co. said separation that way would interfere with office productivity. The result was the 200-square-foot rule.” Ungrateful, the firm’s ubiquitous agent, who now for the first time introduced himself as “Ray Jones, a non-smoker,” opined that “200 square feet...could become an awkward number” and urged a rollback: since the 150 square feet per work station rule of

112.H.18.3(B).

799 Raymond Jones of Pillsbury Company had complained that required 1.5-inch high lettering on signs was “aesthetically repugnant of tasteful office environment.” Board of Health Hearing Transcript at 116 (Dec. 2, 1975). ANSR militant Harry Erickson responded that “I really don’t feel that...most of the health problems are aesthetically beautiful either. And I would just as soon have some unattractive signs helping a person with asthma...as opposed to not having the signs and having them suffer....” Id. at 118-19.


801 Gordon Slovut, “Nonsmokers’ Rights Soon to Be Spelled Out,” Minnesota Star, Feb. 16, 1976, Bates No. TIMN0462127. This account is confused since the draft rule had already included the 200 square-foot-rule.
thumb “in actuality is in excess of what most businesses experience,” he requested that the Health Department consider lowering “that number to 150 in identification of work stations.” In its post-hearing “brief,” which purported to identify items of “utmost significance in operating a business,” Pillsbury revealed its desire to subvert MCIAA by recommending both that the limit on the number of smoking-permitted areas be dropped regardless of room size and of whether the general public frequented the place and that smoking be permitted in any nosmoking area “with the permission of the non-smoker(s) present.” The Northwestern National Life Insurance Company went Pillsbury one better by suggesting that the Department permit employers to “designate work station by work station non-smoking and smoking,...provided it complied with the four foot requirement.” Instead of engaging Pillsbury in a race to the bottom, Lenarz of Associated Industries of Minneapolis asked Peterson whether the proposed requirement that nosmoking areas be at least 200 square feet meant individually or in the aggregate.

In explaining that the rule meant that each of the multiple nonsmoking areas had to reach the 200-square-foot threshold, Peterson placed himself in breathtakingly sharp self-contradiction to his own “Justification” because now he claimed that the “intent of that 200 square foot requirement is to maintain some separation, some reasonable separation, so there could not be checkerboarding of no smoking areas and smoking permitted areas.” Embellishing the aforementioned derivation in the “Justification” of the 200-square-foot standard, Peterson asserted that “we wanted to have more than enough for one person so that person wasn’t just isolated in an island by himself.” This justification was unmoored from any relevant considerations: MCIAA was designed to protect nonsmokers from exposure to tobacco smoke, not to insure that two long-suffering nonsmokers might keep each other company in a 10 x 20-foot box as smoke drifted through their air space—especially not when 200 square feet represented “standard, acceptable” floor space for only one and one-third persons.

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802 Board of Health Hearing Transcript at 133 (Dec. 2, 1975).
803 Raymond Jones to Hearing Examiner at 2, 3 (Dec. 12, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
804 Board of Health Hearing Transcript at 160 (Dec. 2, 1975) (John Murphy). In a post-hearing written statement the company expressly suggested dropping the 200-square-foot requirement altogether in exchange for meeting two of the “acceptable smoke-free area” standards such as the four-foot-wide space and ventilation. John Murphy to Kent Peterson (Dec. 22, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
805 Board of Health Hearing Transcript at 134 (Dec. 2, 1975).
806 Board of Health Hearing Transcript at 135 (Dec. 2, 1975).
The Minnesota Clean Indoor Air Act of 1975

Alone this rule made a mockery of the outlandish claim by John Banzhaf, one of the country’s leading anti-smoking campaigners, that the MCIAA as “the strongest” public smoking law “makes a very simple proposition: there shall be no smoking except in certain small designated smoking areas.”

Peterson, who had drafted the regulations, observed decades later that under them smoke would be “everywhere” after an hour: its visibility and odor might have been diminished, but in terms of the air’s chemical composition, probably no change had occurred. He then added: “We simply did not know that the hazardous effects of smoking would be carried in the air away from the visible smoke and worst smell. Obviously, we now have evidence to support that even invisible effects of tobacco smoke is [sic] hazardous.”

That some nonsmokers in the mid-1970s, without the benefit of hindsight, had also been well aware of the pitifully marginal reduction of exposure to secondhand smoke that segregation effected did not mean that they realized that the new situation was no more tenable or stable than the old smoke-wherever-you-feel-like-it situation: the mere fact that society had finally recognized that smoking caused harm to others and made some (partly symbolic) gestures to rectify the problem was and was hailed as a great victory; few people (other than cigarette company executives) understood that more was not only possible but inevitable. Similarly, the objections that many building and business owners and employers raised regarding the burdensomeness of complying with and enforcing smoker segregation would foreseeably have motivated them to reach the same conclusion that airlines eventually did—namely, that the game was not worth the candle and that therefore a flat ban would be more cost effective. It was precisely this nightmarish convergence of attitudes on the part of anti-smokers and owners of covered public places that constituted the tobacco industry’s premonition of the endgame.

The Department of Labor and Industry Draft Rules

[T]he regulations proposed by the Department of Labor and Industry for places of work under its jurisdiction are woefully inadequate....

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808 Telephone interview with Kent Peterson, Minneapolis (Apr. 1, 2009).
809 Email from Kent Peterson to Marc Linder (Apr. 2, 2009).
810 ANSR Policy Statement, Board of Health Regulations, Minnesota Clean Indoor Air Act at 3 (MHD Ex. 21, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
MCIAA assigned primary jurisdiction over “factories, warehouses and similar places of work not usually frequented by the general public” to the Labor and Industry Department, while the state Board of Health retained rulemaking control over all other workplaces. MCIAA’s smoking ban except in designated smoking areas did not apply to the former workplaces; where workers’ close proximity or inadequate ventilation caused “smoke pollution detrimental to the health and comfort of nonsmoking workers” the Labor and Industry Department, in consultation with the Health Board, was required to “establish rules to restrict or prohibit smoking.” The DLI had already produced a set of draft rules by August 12, which were, however, very brief. In addition to defining the statutory scope of coverage as including “any indoor location of an employer’s enterprise used principally to manufacture or assemble goods, products or merchandise for sale, or to store goods, products or merchandise not for the purpose of retail sale,” the rules merely required employers to satisfy their duty to prohibit or restrict smoking by choosing one of three options: prohibiting smoking in the entire work area; applying for and receiving a waiver (authorized by § 7 of MCIAA if the Board of Health found that there were compelling reasons and that a waiver would “not significantly affect” nonsmokers’ health and comfort); or, “to the extent possible without unreasonable interruption of the business operation, designat[ing] a smoking area and a no smoking area, each in size approximately proportionate to numbers of smokers and nonsmokers employed in the vicinity.”

However inadequate ANSR may have deemed the Health Department’s

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811 1975 Minn. Laws ch. 211, § 4, at 633, 634.
812 Proposed Rules and Regulations of the Department of Labor and Industry Pursuant to M.S. 144.414, § I (draft Aug. 12, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). This definition was narrower—that is, less inimical to the interests of nonsmoking white-collar employees in factories and warehouses—than the next iteration and the final rules, which also mandated coverage of “those areas incidental but related to the primary operation covered by these regulations.” See below this ch. No evidence was found suggesting that the Labor and Industry Department shared this draft with the general public or regulatees; the Health Department, with which DLI was required to consult, file stamped it received on Aug. 14.
813 Proposed Rules and Regulations of the Department of Labor and Industry Pursuant to M.S. 144.414, § II (draft Aug. 12, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Under the third option, if an employer received a complaint from a nonsmoking employee about discomfort, the employer was required to “make every reasonable effort” to “arrange suitable ventilation,” eliminate the source of the smoke,” “transfer the nonsmoker,” or “make other arrangement agreeable to the nonsmoker.” Id. § II.C.2.
The Minnesota Clean Indoor Air Act of 1975

proposed regulations, Brandt, in an ANSR policy statement released a week before the joint Health and Labor and Industry hearings, excoriated those of the Labor and Industry Department as “totally unacceptable” and urged their rejection. (In contrast, ANSR supported the Health Department regulations “with a few qualifications.”) Unsurprisingly, President Oliver Perry of the Minnesota Association of Commerce and Industry said that he did not have “any quarrel” with the Labor and Industry proposal. In response to Brandt’s criticism that the rules’ vagueness invited “employer interpretation or abuse,” Deputy Commissioner Raymond Adel, while acknowledging that the rules were “not very specific,” excused them on the grounds that “there are too many situations that would have to be individually covered...we can’t make individual rules to apply to each situation.” For example, Adel insisted that “sometimes a certain employee needs to work at a certain plant location, such as being assigned to operate fixed equipment, and for that reason it is not reasonable to expect an employer to rearrange his workers.” Brandt dismissed this argument by reference to the statute’s “clear intent...that if you can’t rearrange people then the law clearly authorizes the department to prohibit smoking in an area.” The Minneapolis Star made Brandt’s charge that the proposed regulations “would subvert” the MCIAA for blue-collar workers its own: “Workers in Minnesota factories and warehouses could continue smoking, despite the state’s nonsmokers

814 The hearings were presumably held jointly because the MCIAA required the DLI, “in consultation with the state board of health,” to “establish rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.” 1975 Minn. Laws ch. 211, § 4. On October 22, the labor commissioner gave notice of the hearing, to begin on December 2 after the adjournment of the Health Department hearing. The purpose of the proposed rules he described as “establish[ing] reasonable means and methods which employers may utilize to safeguard the health and comfort of non-smoking employees.” Before E. I. Malone, Commissioner Department of Labor and Industry, In the Matter of the Proposed Adoption of Rules of the Department of Labor and Industry Governing Smoking in Factories, Warehouses and Similar Places of Work, Notice of Hearing at 2 (Oct. 22, 1975).

815 “ANSR Policy Statements: Department of Labor and Industry,” ANSR 4 [should be 3][4]:1 (Dec. 1975). An editorial preface noted that the statements were synopses of lengthier statements presented at the December 2 hearing, but the press quoted from them on November 26.

The Minnesota Clean Indoor Air Act of 1975

rights law,” under the Labor and Industry rules.817 To be sure, in answer to his own question as to why a DFL state administration, with the DFL controlling both houses of legislature, would have adopted “such extreme pro-employer regulations,” Brandt later adduced his “belief that smoking was more prevalent among factory workers than in the general population” and “a few negative responses by lobbyists for some individual unions to the law.”818 In that precise context it remained unclear whether the regulations accommodated employers more than smoking blue-collar workers and their unions,819 but in retrospect Brandt expressed the judgment “that Malone did what the majority (although maybe a slim one) of [smoking] blue-collar workers wanted,” and in that sense “was catering to union workers, not to employers.”820


818 Email from Ed Brandt to Marc Linder (May 2, 2007). A nationwide survey in 1976 revealed that, with regard to occupational groups, nonfarm blue-collar workers had the highest cigarette-smoking prevalence rate among men 20 and over—50.4 percent compared to 36.6 percent among white-collar workers; every male blue-collar subgroup had a higher prevalence rate than every white-collar subgroup. Gordon Bonham, Use Habits Among Adults of Cigarettes, Coffee, Aspirin, and Sleeping Pills: United States 1976, App. tab. 3 at 21 (U.S. Department of Health, Education, and Welfare Pub. No. (PHS) 80-1559, Oct. 1979). The only other explanation that Brandt gave in support of his position was the conjecture that Republican Senator Robert Brown had offered the amendment to transfer rule-writing jurisdiction over factories and warehouses to the Labor and Industry Department “on behalf of business interests,” since Brandt considered “specious” Brown’s claim that he had done so to avoid interfering with OSHA regulations. Email from Ed Brandt to Marc Linder (May 2, 2007). More than three decades later Brown had no recall of his amendment. Telephone interview with Robert Brown, St. Paul (Mar. 11, 2009).

819 The Labor and Industry Commissioner in 1975-76 was E. I. (Bud) Malone, a former journeyman electrician and officer in the International Brotherhood of Electrical Workers, who had been appointed by a Republican governor in 1968 and twice reappointed by a DFL governor. The Minnesota Legislative Manual: 1975-1976, at 419. When Brandt complained to Malone about the regulations, he reminded Brandt that his union had endorsed him when he ran for his House seat (although Brandt was a Republican in a heavily DFL district).

820 Email from Ed Brandt to Marc Linder (Mar. 18 and 19, 2009). The then assistant to the commissioner of Labor and Industry concurred in Brandt’s view. Telephone interview with Judith Pinke, Minneapolis (Mar. 26, 2009). Significantly, in 1994 when the Health Department proposed a rule to tighten regulation of smoking in factories, warehouses, and similar workplaces by restricting smoking to private enclosed offices and designated smoking sections of lunchrooms and lounges unless employees were stationed
The Minnesota Clean Indoor Air Act of 1975

longtime head of enforcement at the Health Department observed that blue-collar unions, which had been “very guarding” of their smoking members’ continuing to be entitled to smoke at work, never filed any complaints on behalf of nonsmokers.\textsuperscript{821}

With regard to the Department of Labor and Industry draft rules\textsuperscript{822} a role reversal took place at the hearing: whereas employers were by and large not only supportive, but urged that the Board of Health adopt the (feckless) DLI rules, on ANSR’s behalf Brandt launched a slashing critique that urged their virtually wholesale rejection, leaving only the provision dealing with employee lunchrooms, cafeteria, lounges, and rest areas unscathed.

Overall, ANSR denounced the proposed DLI regulations “as worse than no regulations at all” and called for their rejection and development of new ones that “would be meaningful, specific and consistent with the intent of the law.”\textsuperscript{823} The lunchroom provision required employers to “reserve one side or area of the room for the sole use of non-smokers, and...make a reasonable effort to minimize the toxic effects of smoke pollution in that area.”\textsuperscript{824} The provision governing general

\textsuperscript{821}Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009).

\textsuperscript{822}In 1984 the legislature transferred jurisdiction over these workplaces from DLI to the Health Department and repealed the former’s special rules. 1984 Minn. Laws ch. 654, § 113, at 1903, 1981. At the initiative of Phyllis Kahn, who had met with the Health Department regarding “enforcement of standards to restrict smoking in workplaces” under DLI, MDH, acting at Kahn’s suggestion and determining that DLI agreed, drafted bill language for the transfer. Sister Mary Madonna Ashton, Commissioner of Health, to Phyllis Kahn (Mar. 22, 1984), Minnesota Department of Health, Phyllis Kahn file (copy furnished by MDH).

\textsuperscript{823}“ANSR Policy Statements: Department of Labor and Industry,” \textit{ANSR} 4 [should be 3](4):1, back page (Dec. 1975). Alternatively, ANSR recommended adoption of Labor and Industry’s rules “with the recognition they will serve only as interim standards and with the commitment [sic] to revising the regulations as soon as some experience with implementing them has been gained.” “ANSR Policy Statements: State Board of Health,” \textit{ANSR} 4 [should be 3](4):1, back page (Dec. 1975).

\textsuperscript{824}Labor and Industry Proposed Rules Governing Smoking in Factories, Warehouses
work areas ANSR regarded as “an open invitation to employers to evade their responsibility and to violate the intent of the law to protect the health and comfort of non-smoking employees.” That provision read as follows: “Upon complaint of an employee that the close proximity of workers or inadequate ventilation is causing smoke pollution detrimental to his or other non-smoking employees’ health and comfort, the employer...shall make a reasonable effort to determine the causative factors of the smoke pollution.” ANSR criticized this last clause on the grounds that the rule, by authorizing the employer to do so, “when such cause is obviously smoking by employees...encourages an employer to refuse to recognize the validity of a complaint that an employee is bothered by smoke.” The Labor Department draft then went on to provide that: “If the employer...finds that the smoke pollution is due to the close proximity of workers or the inadequacy of ventilation, he shall make a reasonable effort to minimize the toxic effects of the smoke pollution on non-smokers.” Brandt dismissed this framework for regulating employers’ “responsibility to deal with smoke pollution [a]s so general as to be not only totally unenforceable from a legal point of view,
but also totally useless as a standard form an educational point of view.”^829

The final provision of the DLI draft rules, which dealt with efforts to minimize tobacco smoke’s toxic effects, sounded to Brandt/ANSR “like an effort at deliberate sabotage of the purposes” of MCIAA^830 because employers were required to act only “to the extent possible without unreasonable interference with the business operation.”^831 Moreover, the fact that under the rule employers’ efforts to minimize toxic effects had to include the arrangement of seating or work patterns as a means of separating smokers and nonsmokers only “provided that such an arrangement is not detrimental to the employment status of either the non-smoking or smoking employees”^832 prompted Brandt to conclude that permitting employers to refuse to separate smokers and nonsmokers on these grounds was “an outright perversion of the law.” ANSR’s critique was based on the proposition that, although the legislature did not intend for the factory and warehouse regulations to be “any weaker” than those governing places under the Board of Health’s jurisdiction, the DLI proposals “fail to incorporate even the very weak standard” embodied in the Board of Health regulations. This conclusion, in turn, derived from the argument that MCIAA was “based on scientific evidence that smoking is detrimental to the non-smoking employee if


831Labor and Industry Proposed Rules Governing Smoking in Factories, Warehouses and Similar Places of Work LICA 5 a) (n.d. [file stamped received Oct. 24, 1975, MDH]), in Health Department, Minn. State Archives, MHS, 112.H.18.3(B).

832Labor and Industry Proposed Rules Governing Smoking in Factories, Warehouses and Similar Places of Work LICA 5 a) 3) (n.d. [file stamped received Oct. 24, 1975, MDH]), in Health Department, MSA, MHS, 112.H.18.3(B). This language was also quoted by Gordon Slovut, “Proposal on Blue-Collar Smoking Turns Air Blue,” Minneapolis Star, Nov. 28, 1975 (9A), Bates No. TIMN0461951, whereas Brandt’s quotation was too abridged to be comprehensible. The final rule lacked the proviso quoted in the text. State of Minnesota, Department of Labor and Industry, Labor and Industry Rules Governing Smoking in Factories, Warehouses and Similar Places of Work, LICA 5(c) (Apr. 2, 1976), Bates No. 85646238/9. LICA 5 a) 1) and 2) also required of employers “utilization of existing physical barriers” and “consideration of the flow of air movement, so that insofar as possible, smoke shall move away from non-smokers” among their efforts to minimize toxic effects of smoke pollution.
The amendment to the bill concerning factories, warehouses and similar places of work not usually frequented by the general public, except that the department of labor and industry shall, in consultation with the state board of health, establish rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.\textsuperscript{834} (When the then assistant to the commissioner of Labor and Industry was read this provision 34 years later, she laughed heartily in recollection of her and her colleagues’ amused and bemused reaction to the question of how they would ever be able to know whether smoke had been detrimental to blue-collar workers’ health.)\textsuperscript{835} Since this weakening\textsuperscript{836} of the amendment—which Kahn herself, as explained above, was constrained to offer in order to secure passage of her bill in committee after employers, supported by pro-employer committee members, had requested an even more radical watering down of the bill—authorized a continuation of laissez-faire smoking (or whatever regime employers had in place) in such workplaces in which worker proximity or ventilation did not detrimentally affect nonsmoking employees’ comfort and health, it clearly imposed preconditions for obligatory intervention by employers that did not exist in other settings.

Brandt’s post-hearing argument to the contrary to the Labor and Industry Department was based on a retelling of the legislative history that ignored and misrepresented its basic facts:

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\textsuperscript{834} Telephone interview with Judith Pinke, Minneapolis (Mar. 26, 2009).
\textsuperscript{835} Email from Jeanne Weigum to Marc Linder (Mar. 21, 2009).
work was not meant to provide for any different degree of protection for non-smokers in these places than in any other places. It was simply designed to meet the objections of Oliver Perry that such establishments would otherwise be subject to dual regulation, and potentially incompatible regulations, by the Department of Industry under the Occupational Safety and Health Act and by the State Board of Health under the Clean Indoor Air Act.  

Although MCIAA just as clearly did not confer unlimited discretion on DLI in formulating rules to restrict or ban smoking, the law more than plausibly contemplated a lower level of protection for factory and similar workers. Whether the ulterior motive was to accommodate employers or more heavily-smoking blue-collar workers and their unions, nonsmoking workers would be disadvantaged vis-a-vis employees and the general public in other covered public places.

Although Brandt’s claim of parity may have been exaggerated, his view, expressed in amplified post-hearing comments to the Labor and Industry Department, that “nothing in these proposals...would in any way whatsoever restrict smoking” was nevertheless valid—especially in light of DLI’s later record of virtual non-enforcement. In his follow-up comments Brandt attacked the aforementioned “without unreasonable interference” language as feckless because the standard was left undefined and “business representatives at the public hearing...made it perfectly obvious that many employers consider any requirement to do anything to protect the health and comfort of non-smokers to be ‘unreasonable interference.’” He also pointed out that the “detrimental to the employment status” of any employee language “would undoubtedly be interpreted by employers unsympathetic to” MCIAA “to mean the smoking of any employee could not, or at least need not, be restricted if the employee objects”—an outcome

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837 Ed Brandt to Judy Pinke (Dec. 19, 1975) (copy furnished by ANSR).
that “would make a mockery of” the law. Little wonder that by mid-1976 Brandt complained that: “The biggest problem we’ve had is in the workplace.... We have not seen much evidence of cooperation by employers. And it’s a problem because the employee is likely to be very hesitant to approach the employer.” And Kahn agreed that a high priority for amending MCIAA was “some protection for an employee who complains about not being given a smoke-free area.”

**Post-Hearing Efforts by Regulatees and ANSR/Kahn to Modify the Health Department Rules**

The law does not say that proprietors must set aside a non-smoking section for those who ask; it says smoking in public places is prohibited, except that designated places may be set aside for smokers. The intent is clearly to make smoke-free places the norm, not the exception.

With the record left open for 20 days for receipt of written statements pertaining to the Board of Health’s proposed rules, numerous entities, but especially a number of the same firms that had forged a high advocacy profile during the previous months and ANSR, submitted detailed proposals for further changes. The Board of Health did adopt the few changes recommended by the Health Department staff, but the latter characterized them all as “no substantial changes from the public hearing draft such that a new hearing would be required before promulgation....” Several of the changes that were based on statements made at the hearing were already discussed above. Perhaps the most notable addition prompted by post-hearing comment stemmed from Representative

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842 ANSR Policy Statement, Board of Health Regulations, Minnesota Clean Indoor Air Act at 2 (MHD Ex. 21, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).


The Minnesota Clean Indoor Air Act of 1975

Kahn, who suggested this change to the four-foot-wide space provision. “This may be empty space or could be a section of seats or area acting as a buffer zone in which smoking is not permitted, but which itself is not considered to be part of an ‘acceptable smoke-free area.’” She offered owners this accommodation in the form of “more flexibility in the type of boundaries they would like to create. I think it would be particularly useful in a restaurant where one was considering the division of a line of booths and could avoid the necessary erection of a partition.” The “buffer zone” was a kind of nobody’s zone in the sense that smokers sitting there were not permitted to smoke, yet nonsmokers sitting there were not in an “acceptable smoke-free area.” Why members of either group would nevertheless have sat there is unclear, but if they did, they would to some extent have alleviated owners’ alleged concerns about reduced seating capacity. The change could be viewed as a continuation of the Realpolitik that had led Kahn to exempt restaurants from H.F. 79 in the first place, but it may also have been a clever means of precluding owners from taking advantage of the possibility that Peterson had pointed out to them at the hearing of including the income loss associated with the unusable space caused by compliance with the MCIAA in applying for waivers.

The Final Board of Health Rules

Minnesota is the model, and the proposed regulations will go far toward clearing the air.

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845 For confirmation that the change was based on Kahn’s letter, see Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 8 at 3-4 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B).

846 Manifestly, Stuart Olshansky, “Is Smoker/Nonsmoker Segregation Effective in Reducing Passive Inhalation Among Nonsmokers?” AJPH 72(7):737-39 at 737 (July 1982), was mistaken in asserting that “segregation laws simply do not specify how far nonsmokers should be situated away from smokers in an enclosed area....”

847 Phyllis Kahn to Kent Peterson (Dec. 18, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). The wording of the final rule, MHD 442(a)(2)(bb), differed largely by substituting “unoccupied” for “empty.”

848 Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009).

849 Board of Health Hearing Transcript at 149 (Dec. 2, 1975). A former Health Department inspector noted that the use of four-foot-wide spaces in smaller restaurants such as diners might have effected an overall reduction in the number of seats, but did not generally produce that impact. Telephone interview with Jim Witkowski, St. Paul (Mar. 26, 2009).
across the country.\textsuperscript{850}

Unlike the anti-public smoking law in Iowa, whose 1978 statute would not provide for administrative regulations,\textsuperscript{851} the Minnesota legislative scheme was to some extent both weakened and arguably strengthened by the regulations promulgated by the state Department of Health\textsuperscript{852} on April 2, 1976,\textsuperscript{853} which the \textit{L.A. Times-Washington Post} Service hyperbolically characterized as having “caused more controversy than anything in the state since the Sioux Indian uprising of 1862.”\textsuperscript{854} Subversive of whatever rigor MCIAA possessed was a series of changes that the final rules enshrined regarding smoking-permitted areas. To recapitulate: first, after limiting to only one the number of smoking-permitted areas that owners were authorized to designate per room, the Department reversed course by exempting rooms with at least 20,000 square feet of floor space, which were subject to no limit on the number of smoking permitted areas;\textsuperscript{855} second, a sub-rule conferred on owners of public places with two or more rooms used for the same activity the discretion to designate one entire room as smoking permitted “as long as at least a portion of one other comparable room” was designated no-smoking;\textsuperscript{856} and third, a sub-rule modified the ban on smoking in common traffic areas that nonsmokers had to use by declaring that that provision “shall not be

\textsuperscript{850}Gerald Riso (Managing Director, American Lung Assoc.) to Dr. Warren Lawson (Nov. 21, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

\textsuperscript{851}See below ch. 25.

\textsuperscript{852}Kahn (and the public information director of the American Lung Association in Minneapolis, Maggie Vertin) “conceded that there was some compromise in writing the regulations that implemented the law. ‘The regulations are much looser than the law itself’ Ms. Vertin said. ‘We lost a little in the writing.’” William Endicott, “No-Smoking Law Is Only Puffing Along,” \textit{C-J}, Oct. 12, 1978, Bates No. TIMN0461854

\textsuperscript{853}The Minnesota State Board of Health adopted the rules by resolution on Feb. 19, 1976, and Dr. Warren Lawson, the commissioner of health and secretary and executive director of the Board adopted them on Mar. 5, 1976; they were filed with the secretary of state on April 2, 1976. State Board of Health, In the Matter relating to the Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975: Order Adopting Rules (copy furnished by the Office of the Revisor of Statutes); telephone interview with Kent Peterson, Minneapolis (Apr. 1, 2009).


\textsuperscript{856}Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act MHD 443(b)(2) (Apr. 2, 1976), Bates No. TIMN0240635/39.
construed to prevent designation of a smoking-permitted area in a portion of the establishment which non-smokers must briefly cross to reach the intended activity.\footnote{Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act MHD 443(b)(3) (Apr. 2, 1976), Bates No. TIMN0240635/39.}

Even more central to, but also more ambiguous regarding, the protection that the law conferred on nonsmokers was the requirement that the person in charge of a covered public place “make arrangements for an acceptable smoke-free area....”\footnote{Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act MHD 443(e) (Apr. 2, 1976), Bates No. TIMN0240635/41.} Under this sub-rule\footnote{MHD 442(a)(1)-(2), Bates No. TIMN0240636-7.} an owner was in compliance with MCIAA so long as he separated the smoking and nosmoking sections by a four-foot space or with 56-inch high barriers—regardless of how much smoke drifted from the former to the latter. Although the rules purportedly set forth a performance standard (with regard to the ultimate statutory purpose of protecting nonsmokers from secondhand smoke) in terms of CO concentrations, because inspectors never took such measurements, in reality owners were free to satisfy a mechanical, fixed quantitative standard without any reference to whether compliance with it achieved that purpose (since the Health Department presumed that the presence of either of those physical standards would per se secure the desired outcome).

Long before it promulgated the final rules in 1976, the Department had received ample public comment complaining about how useless the 56-inch barriers and 4-foot spaces had already proved to be in practice. One commenter explained to Kent Peterson that a “five foot barrier is the same as no barrier since smoke rises and spreads. An aisle space of four feet is ridiculous because the smoker can exhale (blow) the smoke farther than that.”\footnote{Gerald Peterson to Kent Peterson (Sept. 18, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).} Another told Peterson’s boss that “[o]ne can hardly notice the difference since the law was passed. ... What good does it do to have smokers and non-smokers in the same room a few feet apart?”\footnote{Ruby Olson to Warren Lawson (Nov. 17, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).} A high school teacher expressed her “strong feelings” about designated smoking areas, which she illustrated by reference to the faculty room’s four tables, two of which were labeled smoking and two nonsmoking: “But, the entire room is in a constant haze of smoke! It is ridiculous to label or designate areas in close proximity of one another because smoke travels.”\footnote{Jean Anderson to Warren Lawson (Nov. 20, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).}
Regardless of the fecklessness of these options, inclusion of barriers and ventilation raised the question of whether the agency had overstepped its legislatively conferred powers in potentially mandating expenditures by owners, from which making the statute expressly protected them by limiting their duties to the use of “existing” ones. After all, “old ventilation systems,” as Kent Peterson (self-contradictorily) pointed out, were “‘grandfathered’ into the regulations.” Moreover, the legislative history made unequivocally clear that the bill’s chief author, Kahn, acquiesced in that limitation precisely because of the objection that the agency might impose such expenditures. Perhaps Bohr was referring to this fact when he complained that some of the Board of Health’s proposals “were an ‘overextension of the law,’ particularly as they apply to restaurants.” Notwithstanding such complaints, the Health Department managed, as explained earlier, to avoid acting beyond its powers by giving owners the choice of using the four-foot-wide space and thus making barriers/ventilation elective rather than mandatory.

Even if owners had universally complied with this elaborate scheme, it could not even remotely have protected nonsmokers from ambient secondhand smoke exposure. The absurd character of even this more sensitive regime was visibly on display in a newspaper photograph from mid-1976 showing a smiling restaurant owner leaning on a (noncompliant) 42-inch-high “barrier” dividing the restaurant into two equal smoking and nonsmoking sections and gazing at a customer whose dense cigarette smoke floats far above the barrier just inches
from his face. In 1978 Lung Association anti-smoking activist Robin Derrickson reported of her own experiences in restaurants: “The inadequacy of our law sticks out when I look to my left and just past that 4’ buffer space is a cigarette pouring out smoke. Smoke hasn’t been told about staying out of the no smoking section. ... I contend that the no smoking section is a start and that it is unfortunate that the law has been turned around—the whole place should be no smoking with the smoking section set aside.” Just how limited horizons were even at the cutting edge of the anti-smoking movement was exquisitely on display in her utopian lament that: “I calm myself thinking we’ve changed attitudes for the better, but we are not yet to the point of being able to seal smoking sections off from the remainder of the restaurant. That’s the ideal and maybe we’ll be to that point someday.”

The 56-inch-high physical barriers also performed another regulatory (if not real-world) function: the final rules added a definition of “room” as “any indoor area which is bordered on all sides by a wall or partition of at least 56 inches (1.42 meters). Such sides shall be continuous and solid except for door portals for entry and exit.” Adoption of this definition exacerbated MCIAA’s central weakness, as ANSR president Jeanne Weigum was still pointing out in 1983:

[T]he regulations allow smoking in private offices if they are not shared with non-smokers and the department has defined short walled cubicles as offices. This in effect means that work sites might have several dozen little smoking areas in a larger working area. Obviously the smoke does not remain in the cubicle and many of the complaints we receive are from people adjacent to a cubicle where someone smokes. It is our hope that the department will change their interpretation of this. At the present time this interpretation is making it more difficult to provide genuine protection for non-smokers.

In the event, it took the Health Department more than another decade to amend the rule to define a “room” as having floor-to-ceiling walls, but the

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867 Robin Derrickson, Untitled Typescript at 8 (Sept. 1978) (talk given at Western Lung Conference) (copy from Ed Brandt’s papers furnished by ANSR).
870 Minnesota Rules § 4620.0100 subp. 17 (1995). At the same time the Health Department amended the rules to define a “private enclosed office” as a room occupied
The Minnesota Clean Indoor Air Act of 1975

relevant question in this context was why ANSR—which in the interim had removed the word “Rights” from its name (but nevertheless retained the ANSR acronym)—“because we thought it made us sound too militant.... It conjured up the image of the kind of people who went around with squirt guns and we really don’t advocate such tactics”871—did not mount a similar campaign against other 56-inch-high barriers (or four-foot-wide spaces) on the grounds that they, too, failed to provide “genuine protection for non-smokers” in restaurants and other public places.872 After all, as late as 1980, a questionnaire concerning restaurants’ compliance with that year’s new MCIAA regulations revealed that 68 percent of ANSR’s own members replied that only “rarely” was a 56-inch high (or 4-foot wide) physical barrier even present.873

871 Laura Wilkinson, “Anti-Smoking Laws,” Associated Press Executive News Service, May 23, 1987, Bates No. TIMN0457515 (quoting Sandra Sandell). At the time of the change in 1984, ANSR opaquely claimed that “Association for Nonsmokers—Minnesota” would “attract the support of a wider audience” and “appeal to a broad base of the community....” “Jottings,” ANSR, No. 1, Winter 1984, at 2; “Name Changes—Goals the Same,” ANSR, No. 2, Spring 1984, at 1. However, as ANSR’s long-time president said much later: “We wanted to be less confrontational and more appealing to work places. We wanted to go in proposing solutions rather than seeming demanding about ‘rights.’” Email from Jeanne Weigum to Marc Linder (Apr. 13, 2009).

872 In its response following the administrative law hearing on the 1994 proposed rule changes to objections by the tobacco industry lobbyist Doug Kelm to the proposed floor-to-ceiling walls for private enclosed offices the Health Department noted that it had received complaints about tobacco smoke arising from office cubicles, and then proceeded to assert without explanation that the barriers functioned in the general setting: “While a barrier of fifty-six inches in height is appropriate for separating smoking and nonsmoking areas, the minimum size of the nonsmoking area is 200 square feet. ... Treating cubicles as private, enclosed offices could place smokers adjacent to every employee in the office seeking accommodation. In such a case there would be no contiguous space available to segregate ETS from nonsmoking employees.” State of Minnesota, Office of Administrative Hearings for the Minnesota Department of Health, In the Matter of Proposed Permanent Rules of the Minnesota Department of Health Relating to Clean Indoor Air: Report of the Administrative Law Judge, Finding of Fact 19b (1-0900-8678-1, Aug. 2, 1994), on http://www.oah.state.mn.us/aljBase/09008678.rr1.htm.

873 ANSR Opinions on MCIAA Restaurant Compliance,” ANSR Flyer 2(2):1-2 (Dec. 1980). Revealingly, although the questionnaire asked whether the non-smoking area was free of ashtrays, it failed to ask whether it was free of tobacco smoke.
The Minnesota Clean Indoor Air Act of 1975

The Final Labor and Industry Department Rules

When the law was passed, we were quite naive. Most of us had a belief that when the law passed the job was finished. Others would see to it that it was enforced. ... Many members became discouraged and dropped out of the organization. It appears that the people who are likely to be involved in the “grind it out” part of enforcing the law, are different from those who are likely to be involved in the passage of the law. Those who envision quick and easy results are likely to be discouraged and disappear, often in bitterness. Without people to carry on the much less glamorous enforcement and educational part of the process, legislation is much less likely to succeed.874

Issued on the same day as the Health Department rules, the Department of Labor and Industry “Rules Governing Smoking in Factories, Warehouses and Similar Places of Work” failed to attain even the aspirational rigor of the Health Department’s rules. The relaxed regulatory framework was set by the declaration that MCIAA “excludes from its provisions” factories, warehouses, and similar workplaces and merely “directs” the department to establish rules where workers’ close proximity or inadequate ventilation caused smoke pollution detrimental to nonsmoking employees’ health and comfort. Then going far beyond mechanical paraphrase of the statute, the Department articulated the purpose of its rules as “safeguard[ing] the non-smoking employee’s health and comfort within reasonable regulation of his working environment without serious disruption of the work activities at his place of work.”875 After declaring employers that


875Labor and Industry Rules Governing Smoking in Factories, Warehouses and Similar Places of Work, LICA 1(e) (Apr. 2, 1976), Bates No. 85646238. The Department defined the scope of factories and similar workplaces to mean “the indoor area of any facility of an enterprise used principally to manufacture or assemble goods, products or merchandise for sale, or to store goods, products or merchandise not for the purpose of direct retail sale, and shall include those areas incidental but related to the primary operation covered by these regulations.” Id. LICA 2. In other words, office workers in such plants were assimilated to factory workers and not to white-collar workers in covered workplaces. The final Health Department rules expressly mandated this classification. MHD 444(c), Bates No. TIMN0240635/42. Nevertheless, in 1977, three days after receiving a complaint about an MCIAA violation at the Sperry Univac plant in Roseville, Charles Schneider, the section chief of Environmental Field Services at MDH, informed the employer that a memo that the company had prepared in August 1975 stating that its legal department had taken the position that the law’s blanket restrictions did not apply to the company’s plants because they were not usually frequented by the general public was “in error”: because
prohibited smoking in areas used by nonsmokers to be compliant,\(^{876}\) it offered the former an alternative that was much less protective for the latter: in lunchrooms, cafeterias, lounges, and rest areas provided to employees and not open to the public, employers were required to reserve one side or area of the room for the exclusive use of nonsmokers and to “minimize the toxic effects of smoke pollution in that area.” The size of such areas had to be “proportional to employee preference,” about which employers were required to maintain documentary records.\(^{877}\) In contrast, in general work areas:

Upon complaint of an employee that the close proximity of workers or inadequate ventilation is causing smoke pollution detrimental to his or other non-smoking employees’ health and comfort, the employer...shall determine the causative factors of the smoke pollution.

If the employer...finds that the smoke pollution is due to the close proximity of workers or the inadequacy of ventilation, he shall minimize the toxic effects of the smoke pollution on non-smokers. The employer...shall maintain records which document the actions taken on complaints received.\(^{878}\)

Sperry Univac’s office space did not fall under the Labor and Industry Department rules, but under the Health Department’s rules governing offices, the company was required to comply with MCIAA’s workplace rules. C. B. Schneider to Roy Hain (Mar. 10, 1977), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B). Kahn’s papers also include the memo: Roy Hain to Distribution “A” (Aug. 13, 1975). Sperry Univac’s response, at least as embodied in an internal memo, did not reflect good faith: instead of complying with its MCIAA duties, it declared that (with the exception of lunchrooms, cafeterias, and lounges), “the regulations applicable to Roseville Operations are complaint oriented”—meaning that the firm would do nothing toward compliance unless and until an employee complained, and even when internal investigation showed a complaint to be valid, Sperry Univac would undertake “corrective actions” only “to the extent possible without unreasonable interference with the business operations....” One of the “acceptable” actions was “utilization of air flow to direct smoke away from the complainant....” W. H. Schreiber to Distribution “A” (May 3, 1977), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B). Ironically, once the DLI rules went into effect, the firm’s complaint-driven regime, at least in its factories, became lawful. See below.


However, employers’ duty to minimize those toxic effects was severely diluted by limiting it to “the extent possible without unreasonable interference with the business operation.” Within those confines employers were required to: use existing physical barriers; use “flow of air movement, so that insofar as possible, smoke shall move away from non-smokers”; and arrange seating or work patterns to separate smokers and nonsmokers.879

**Contemporaneous and Later Views of the MCIAA’s Effectiveness**

Once upon a time ANSR and other advocates, wallowing in spasms of naive optimism through 1975 and 1976, thought the law would mean an end to public smoking.880

Other Minnesotans were apparently also dissatisfied with the efficacy of such mechanisms: in 1987—by which time the Health Department believed that during the dozen years MCIAA had been in force no one had yet been fined for violating it—Charles Schneider, the section chief of Hotels, Resorts, and Restaurants of the Environmental Health Division of the Health Department, told the press that the enforcement staff had “‘encountered situations where a place was in compliance with the law but still had some unhappy people.’” Such people presumably included “‘people who authored the original bill,’” who “‘would have liked to [have] made the entire world smoke free.’” In fact, by this time even the higher bureaucracy at the Health Department conceded that “‘[w]ith the term “acceptable smoke-free area,” people think it means literally smoke free....’”881

Whether the Health Department’s false advertising—a much later comparative study of particulate matter and nicotine levels in smoking and designated no-smoking areas characterized identification of the latter as a “‘smoke-free area’” as “inappropriate, perhaps to the point of such usage now being misleading and deceptive”882—was even partly responsible for nonsmokers’ literalist turn did not appear to occur to Mary Thompson, the Department “official in charge of keeping smokers in their place,” who maintained that: “It’s

conceivable that you could have smoking and non-smoking areas within the same room. The smoke drifts. It’s a non-smoking-area; it’s not necessarily smoke free."883 By 1994, in connection with an administrative law hearing on the Health Department’s proposed regulation to tighten the regulation of smoking in factories, warehouses, and similar workplaces—an initiative that prompted one of the cigarette companies’ lobbyists to complain that the MDH “promotes a philosophy of deep government intrusion or micromanagement”884—the executive director of the Association for Nonsmokers-Minnesota (ANSR) forthrightly declared that after MCIAA’s enactment “many tried to meet the letter of the law by separating smokers from nonsmokers. That many governmental agencies, restaurant owners, and employers now provide smoke-free environments...testifies to their experience that separation does not work. It appears that once they were forced to do something about second-hand smoke, they eventually chose to go smoke-free.”885

Looking back, Dr. Ellen Fifer Green, who as assistant health commissioner had represented the Health Department in supporting MCIAA before the legislature, characterized it as a “very weak law” that did not help very much in terms of improving indoor air content, but whose very existence “made people feel better.”886 David Giese, a nonsmoker who worked for 36 years at the Health Department and was the hearing officer at the public hearing on December 2, 1975, looked back at the law, especially as it affected restaurants, as “pretty ineffective if you were at all close to the smoking area.”887

Charles Schneider, who from the outset was responsible for MCIAA’s enforcement, laconically judged his own agency’s regulations as having been “pointless” in seeking to neutralize the toxic effect of designated smoking areas: anyone who gave any thought to the matter or observed even compliant public

884Doug Kelm (North State Advisers), Statement of Need and Reasonableness (SNR) at 5 (June 13, 1994) (Public Exhibit No. 5, prepared testimony at hearing on MDH proposed rules (4620)) (copy furnished by MDH).
886Telephone interview with Ellen Fifer Green, Minneapolis (Mar. 28, 2009).
The Minnesota Clean Indoor Air Act of 1975

places would have had to conclude that once smoking was permitted it was impossible to protect nonsmokers. 888 To be sure, Schneider’s low regard for the rules’ theoretical effectiveness as well as his dismissal at the outset of the substance of the new law as not worth the paper it was written on, according to Jeanne Weigum, ANSR’s long-term president, largely driven by not wanting to be saddled with an enforcement burden unaided by any additional staff or funding. 889 Schneider, who had quit smoking in 1968, 890 saw no accident in his agency’s not having any full-time inspector: “The feeling we got was that if there had been money attached to the bill, it would have been voted down.” Despite the fact that Schneider knew that “the health risk from ‘second-hand smoke’ is much higher in an office situation where a person may be exposed to fumes eight hours a day,” and that the “most ‘violent’” complaints that his office had received involved office smoking policies, Schneider nevertheless felt no embarrassment in conveying his “personal opinion” to the press that there was a “‘good chance’ for some modification of the law” in a direction that could not have redounded to the benefit of office workers’ health: “There have been some cases that to absolutely comply would cost [sic] a great deal of money—primarily in office situations.... Seating arrangements are based on work flow patterns, not on smoking patterns. Sometimes it is just not possible to carry on business with nonsmoking seating patterns.” Resisting employers were fortunate in finding likemindedness in the very agency empowered to enforce MCIAA—not to mention their good fortune that the legislature had appropriated “‘not one penny for enforcement.’” 891

A former state Health Department inspector distinctly remembered more than

888 Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009). Unclear is how Schneider reconciled this retrospective judgment with his claim 30 years earlier that “‘[t]hings are a lot better for the non-smoker in Minnesota than they were before this ordinance [sic].’” Bill Douthat, “Despite Bans, Smokers Elsewhere Puff Away,” Miami News, Apr. 9, 1979, Bates No. TIFL0059493. This claim was juxtaposed to the admission by an official of General Mills, which employed 3,000 people in Minnesota, that not only did it not comply with the 200-square-foot no-smoking zone rule, but that neither employees nor Schneider’s agency had complained.

889 Telephone interview with Jeanne Weigum, Minneapolis (Apr. 7, 2009). Weigum, who became involved with ANSR shortly after MCIAA’s passage and while the regulations were being drafted, distinctly recollected Schneider’s statements at meetings during this early period; she added that his attitude eventually changed.


three decades later that smoke drift over regulation-compliant barriers rendered MCIAA only “marginally effective” —especially in conjunction with the fact (confirmed by Schneider) that the agency never performed carbon monoxide readings, never checked to ascertain whether ventilation systems produced the required number of air changes, and never revoked any restaurant’s license for failure to comply with MCIAA.  

James Brinda, the director of environmental health for the Minneapolis Health Department, who was in charge of enforcing the law in the state’s largest city, had so internalized the gap between real protection of nonsmokers and MCIAA’s permissive designated smoking areas that, in referring to the 265 and 184 complaints received by his department in 1976 and 1977, respectively, he had no compunction about publicly airing his own bias: “‘[A] lot of these beefs came from the kind of people who want to abolish smoking from the face of the earth.’” He impatiently ridiculed such otherworldly complainers:

“I get complaints from people who say they aren’t getting a smoke-free area in a restaurant, but what may be acceptable to one person may not be to another.... He said many people expect restaurant air that is totally free of smoke. “The woman who constantly complains about smoke, won’t be satisfied until the entire world quits smoking....”

892 Telephone interview with Jim Witkowski, St. Paul (Mar. 26, 2009) (still employed at the Environmental Health Division of the Minnesota Health Department).

893 Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009). In 1980 the Health Department deleted the provision dealing with carbon monoxide concentration because “inspectors found that it was nearly impossible to make reliable measurements...within the time available for carrying out an inspection. This criterion was also found to be unsatisfactory since it allowed for acceptable levels of carbon monoxide to vary in relation to changing levels in air,” which were “clearly affected by auto emissions and by a facility’s proximity to roads, etc.” Moreover, “only one or two facilities ever relied on carbon monoxide concentrations for compliance....” [Minnesota Department of Health], Clean Indoor Air Rules: Statement of Need and Reasonableness at 2 (n.d. [1979]) (copy furnished by MDH).


895 Elena De La Rosa, “Compliance with No-Smoking Areas Varies,” MT, Apr. 11, 1977 (1A), Bates No. TIMN0462112. In fact, Brinda took the position that, given the intense opposition of restaurant and bar owners, just getting the law passed had been an accomplishment, but that the law’s chief purpose had been educational, although no one in 1975 had contemplated that some day all public places would be nonsmoking. Telephone interview with James Brinda, Minneapolis (Mar. 29, 2009).
The Minnesota Clean Indoor Air Act of 1975

But even nonsmokers who merely wanted to keep the smoke out of their nonsmoking areas would have to remain unsatisfied since the Health Department’s regulations used a rigidly numerical, objective (albeit irrational) definition of “acceptable smoke-free area” as one in which smoking itself was prohibited and (and for example) from which the smoking-permitted area was separated by a four-foot space, although Brinda himself admitted that “of course” smoke did drift across the “imaginary line” separating them.\footnote{Telephone interview with James Brinda, Minneapolis (Mar. 29, 2009).}

Perhaps the most reflective, self-reflective, and playful insights into the mindset of those who played prominent roles in advocating for the initiation of statewide government controls on smoking in public were articulated by former Assistant Attorney General Terry O’Brien, who both counseled Peterson in drafting the Board of Health’s proposed regulations and represented the health commissioner at the public hearing on December 2, 1975. Asked more than three decades later whether back in 1975 he had regarded the designated smoking area system as largely subverting the intended protection of nonsmokers, inasmuch as smoke drifted over 56-inch-high barriers and across 4-foot-wide spaces, and whether he had thought that this regime was just a foot in the door or might be as good as it was ever going to get, he observed:

When the statute was passed, mainly due to Phyllis Kahn’s energy, everything was an open slate. The legislature gave little guidance except do something, and there were few existing guidelines. The entire concept was thought revolutionary by those who pushed it, and those who feared it. I don’t think any of us thought our efforts were the end game. We knew that secondary smoke traveled more than four feet and could leap tall buildings if necessary. But little was said by us since the opponents correctly guessed that this was the foot in the door. We never purported that the rules were all that would be done, but didn’t deny it either.

Looking back, the rules seem almost silly. They were, however, the foot in the door which established the concept of clean indoor air, empowered non smokers to object and report, gave the color of governmental sanction, and, to some extent, pushed smokers to acknowledge, however reluctantly, that their exhalations resulted in invasions of other people’s personal tissues. So, yes, without thinking too far ahead, none of us were crusaders, it was a job to be done and none too exciting as [sic] that, we thought we would be back at it once the public accepted the idea. And the public did.

I suspect that Hawkeyes, as well as Gophers, are shocked to be asked if they want smoking rooms when traveling to other states. We giggle now to see old black and white movies where the doc asks the patient in the hospital bed if he wants a smoke or old Movietone News showing Congressmen smoking during their hearings—as was everyone else. These rules were among the first steps of what has turned out to be a long and largely
Finally Articulating the Need to Dismantle the Scientifically Obsolete Regime of Designated Smoking-Permitted Areas

The well-mixed concentration of smoke in a space is directly proportional to the smoker density and inversely proportional to the air exchange rate. Erecting a barrier a few feet high or placing the smokers and nonsmokers in different parts of the space changes neither. Increasing the distance from the source to the target will reduce peak exposure, because of the proximity effect, which acts while the source is on, i.e., when the cigarette is lit, but does not eliminate exposure. It’s sort of like being shot with a ‘32 round instead of a ‘45.”

It took an anti-smoking activist in 1977 in Massachusetts (which in 1975 outright banned smoking in supermarkets and Massachusetts Bay Transportation Authority means of transit, except in personal offices, but failed to provide for enforcement) to point out that the strictest public smoking law was not wearing any clothes—that is, that MCIAA did not really protect nonsmokers from secondhand smoke. In his testimony in 1977 to the National Commission on Smoking and Public Policy, Roni Rechnitz, the executive director of Citizens for Clean Air in Publicly Used Buildings, noted that although it was “on paper at least...the most comprehensive legislation to date,” MCIAA was “not good law. And it is not effective law. But it is significant law having been the first and thus opening the door for better, well thought out, and more enforceable legislation.” As an advocate of a statewide referendum, Rechnitz opined that “[t]he primary problem” with the Minnesota law was that “it had to be passed by a legislature entailing all the customary ‘political considerations’ deemed necessary for passage.” With regard to the substantive protections that MCIAA provided, he correctly identified designated smoking areas as “the key here. By trying to overly accomodate [sic] smokers it introduced a number of complicating factors which greatly reduced the potential effectiveness of the bill.” This

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897 Email from Terry O’Brien to Marc Linder (Apr. 9, 2009).
898 Email from James Repace to Marc Linder (Apr. 6, 2009).
900 The National Commission on Smoking and Public Policy was created by the American Cancer Society in October 1976, inter alia, to examine the effectiveness of anti-smoking policies. Report of the National Commission on Smoking and Public Policy: A National Dilemma: Cigarette Smoking Or the Health of Americans (Jan. 31, 1978), Bates No. TIMN0431947.
understatement reflected the fact—which appears never to have been highlighted during the legislative debate in Minnesota—that “a gas by the definition of its physical properties expands to the limit of its confinement. Smoke will not stay on one side of a room because it is a designated smoking area.” For this reason Rechnitz called the provision permitting designated smoking areas on all public conveyances with a capacity of ten or more persons “the worst section of that law,” though the same inundation of nosmoking areas with smoke from adjoining designated smoking areas occurred across the gamut of covered public places.901

Such accounts demonstrated that some health advocates were well aware of the virtual uselessness of what by then had become the legislative standard permitting proprietors to designate smoking areas virtually wherever they pleased. It was this aspect of MCIAA that prompted Judy Pinke, the assistant to the commissioner of the Labor and Industry Department, many years later to refer to it as an “awfully baroque piece of legislation.”902

By the 1980s, as scientists began to devise appropriate measuring devices and develop a much deeper understanding of the consequences of secondhand smoke exposure, they criticized the kind of physical separation measures that the Health Department required for compliance with the MCIAA as virtually useless. Thus, for example, as early as 1985, two of the leading exposure scientists, James Repace and Alfred Lowrey, noted that “[p]hysical separation of nonsmokers and smokers into sections within a given space reduces peak concentrations, but not average concentrations to which nonsmokers are exposed, and therefore does not affect average lifetime risk.”903 (A decade later, Repace became more specific,

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901 Roni Rechnitz, Director, Citizens for Clean Air in Publicly Used Buildings, Testimony to the National Commission on Smoking and Public Policy, at 1, 2, 6 (June 2, 1977), Bates No. 500807300/2/3/7. To be sure, the advance that Rechnitz limned beyond MCIAA in eliminating “designated smoking areas per se” would, bizarrely, have “recognize[d] the fact that some smokers are so powerfully addicted that they suffer tremendously if unable to smoke over an extended length of time” by permitting smoking in all bathrooms.) Id. at Bates No. 500807300/1. Curiously, ANSR itself modestly characterized MCIAA as merely “one of the most comprehensive nonsmokers’ rights...laws in the nation.” ANSR, “The Minnesota Clean Indoor Air Act and You: An Explanation of the Law and the Rules for Implementation” n.p. [at 5] (n.d. [ca. 1976]) (copy furnished by ANSR.

902 Telephone interview with Judy Pinke, Minneapolis (Mar. 26, 2009).

903 James Repace and Alfred Lowrey, “An Indoor Air Quality Standard for Ambient Tobacco Smoke Based on Carcinogenic Risk,” New York State Journal of Medicine, July 1985, at 381-83 at 382. To be sure, the year before the very same authors had written that “[n]onsmoking sections are effective ways to limit the exposure of nonsmokers to tobacco combustion products,” subject to the caveat that “[t]he larger the ratio of the smoking area...
The Minnesota Clean Indoor Air Act of 1975

declaring that although environmental tobacco smoke levels were higher in smoking than in nonsmoking sections, restricting smoking to one side of a room did “not reduce the ETS loading of the space. Thus, tobacco smoke will rapidly diffuse throughout the space and the laws of physics also rule out this putative control measure.”

By 1986 even the Minnesota Health Department publicly admitted what the basic human sense of smell and sight should have demonstrated as soon as the law had gone into effect in 1975. In the Statement of Need and Reasonableness that it issued in June 1986, the Department proposed some clarifying amendments to the MCIAA rules, including the blanket replacement of the term “smoke-free” with “nonsmoking,” especially in the crucial operating concept of “Acceptable smoke-free area.” The reason for the change was straightforward:

People have often interpreted the term “smoke-free to mean a totally smokeless area. Under the rules, it is not always possible to achieve a smoke-free environment when a room contains both nonsmoking and smoking-permitted areas. Although the rules are intended to prevent a nonsmoker from having direct contact with smoke, smoke may occasionally be detectable in the nonsmoking portion in a room. Therefore, it is preferable to use a term which reflects actual conditions.

Despite the ludicrous understatement suggesting that smoke in smoking-prohibited areas that were designed to shield nonsmokers from exposure was an exceptional and marginal phenomenon rather than the massive and necessary

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905 Before the Minnesota Commissioner of Health: Statement of Need and Reasonableness at 6 (June 13, 1986), Bates No. TIMN0458156/61.
result of the inherently flawed system of designated smoking areas, the Health Department’s decision to eliminate what was in effect false advertising constituted an important, albeit halfhearted, acknowledgment that the decade-old regulations were unable to live up to their capacious interpretation of MCIAA, which—with the one aforementioned ambiguous provision requiring owners to arrange seating to “provide smoke-free areas”—did not in fact promise such smoke-freedom.

ANSR not only did not criticize the administrative rules’ conflation of word and reality, but at times reinforced it. Thus in 1983 the organization declared that: “The most visible means for the public to recognize what has been accomplished is through smoking and nonsmoking sections in restaurants. This identification is due largely to the dedication of ANSR members during the first few years after the inauguration [sic] of the law. The Restaurant Committee...was diligent in its efforts to contact restaurant owners regarding the need for provide smoke-free areas for nonsmoking patrons.” The surgeon general’s 1986 report on the health impact of involuntary smoking finally prompted ANSR to break with its acquiescence in separation between smokers and nonsmokers. By 1989 it conceded that, however important the MCIAA had been in eliminating tobacco smoke pollution, it was “inconsistent with our current knowledge about secondhand tobacco smoke.” In particular, the law’s “minimal requirements” permitting “separation of smokers and nonsmokers within the same air space” made it “possible for an employer to abide by the letter of the law while his or her employees suffer from the tobacco smoke in the workplace.” (Why ANSR refrained from directing the same critique at restaurants is unclear.)

In 1989 it worked with Kahn and other sympathetic legislators to file companion House and Senate bills to amend MCIAA, inter alia, to offer nonsmokers greater protection from secondhand smoke exposure resulting from “drift from one cubicle or section of a room to another. The most significant parts of the bills addressed such problems by requiring that the odor of smoke be eliminated in nonsmoking areas.”

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906 1975 Minn. Laws ch. 211, § 6(b), at 633, 634.
Not that Kahn, whom the Tobacco Institute regarded as the industry’s “long-time nemesis,” had waited until 1989 to launch her initiative to dismantle the scientifically obsolete regime of designated smoking areas: during the 1987-88 legislature sessions she had filed “a new scheme to place mammoth restrictions on this industry.”\footnote{Michael Brozek and Daniel Nelson to William Cannell, Re: Minnesota Plan/Status Report at 2 (Feb. 2, 1988), Bates No. TI08822049/50.} Instead of abolishing designated smoking areas outright, Kahn’s H.F. 607 and H.F. 1920, as TI noted, eliminated them “upon request of offended non-smokers.”\footnote{Michael Brozek and Daniel Nelson to William Cannell, Re: Minnesota Plan/Status Report at 3 (Feb. 2, 1988), Bates No. TI08822049/51.} Like MCIAA, her bills did not even mandate the use of physical barriers or ventilation systems in public places in which they were not already “existing,” yet the bills still required them to be used to “eliminate the presence of smoke in physically related nonsmoking areas.” Nevertheless, even though this provision appeared not to impose any duty on owners of public places without such barriers or systems, Kahn’s 1987 and 1988 bills took the radical step of requiring all owners of public places with a designated smoking area to “eliminate the designated smoking area and post appropriate signs advising the public that smoking is prohibited” if compliance with their already existing responsibilities under § 144.416 (to “make reasonable efforts to prevent smoking”) did “not prevent further complaints.”\footnote{H.F. No. 607, § 2 (Feb. 26, 1987, by Kahn et. al); H.F. No. 1920, § 2 (Feb. 15, 1988, by Kahn et. al).}

In part because Kahn’s bills were only a part of an “extremely heavy and dangerous legislative agenda facing the industry”\footnote{Michael Brozek and Daniel Nelson to William Cannell, Re: Minnesota Plan/Status Report at 4 (Feb. 2, 1988), Bates No. TI08822049/52.} (including bills to ban vending machine sales, ban smoking in all public buildings, restrict smoking in schools, require self-extinguishing cigarettes, increase the cigarette tax, and limit the tax exemption for publications advertising tobacco products),\footnote{Michael Brozek and Daniel Nelson to William Cannell, Re: Minnesota Plan/Status Report at 3 (Feb. 2, 1988), Bates No. TI08822049/51.} the Tobacco Institute’s Midwest regional officers considered Minnesota “the most anti-tobacco state in the nation.”\footnote{Michael Brozek and Daniel Nelson to William Cannell, Re: Minnesota Plan/Status Report at 10 (Feb. 2, 1988), Bates No. TI08822049/58.} To deal with this broad-based onslaught, TI mobilized its own counter-offensive, which in scope and intensity overshadowed by far any aggregation of resources that it would ever bring to bear in Iowa and included appearances at hearings by the cigarette oligopoly’s star Covington &
The Minnesota Clean Indoor Air Act of 1975

Burling lawyers David Remes and John Rupp. One of TI’s leading flaks, Brennan Moran (later Dawson), assistant to the president, also inundated the Minnesota House Human Services Subcommittee with the cigarette firms’ standard dose of obfuscatory mendacity beginning with the claim that the bill “would be better titled the ‘Minnesota Smoker Harassment Act of 1988,’” especially since its “vendetta-like harassment” was directed at what was merely an “occasional annoyance” and “completely ignore[d] the real culprits of indoor air pollution...faulty ventilation systems....” Whereas the cigarette manufacturers otherwise propagated entrusting decisions about smoking to owners, when it came to this “anti-smoker ‘revenge’ bill,” suddenly Moran lambasted “granting employers dictatorial power” lest they pander to employees “claiming hypersensitivity to tobacco smoke....” Instead, she urged on the legislators the oligopolists’ favorite hoax—committing such decisions to the “common courtesy of smoking and nonsmoking employees and customers.” Whether Moran’s arrant nonsense detracted from or reinforced the overall effort, the tobacco industry’s richly endowed concerted lobbying may well have contributed to H.F. 1920’s defeat in the House Human Services Subcommittee by a vote of 5 to 3 and its death three weeks later by a vote of 8 to 7 in full committee. The cigarette companies may have succeeded in frustrating enactment of this particular anti-smoking initiative, but the Tobacco Institute was nevertheless constrained to admit that “Minnesota’s 1987 legislative session was one of the most punishing in our industry’s history” inasmuch as it “adopted the largest single cigarette excise tax increase in the history of the tobacco industry” in addition to “the first statewide law restricting the promotional distribution of tobacco products.” TI was also keenly aware that political momentum had shifted in Minnesota: whereas “most anti-tobacco measures” from 1975 and 1984 had

918 Michael Brozek and Daniel Nelson to William Cannell, Re: Minnesota Plan/Status Report at 7 (Feb. 18, 1988), Bates No. TIMN0457532/8/43.
been “dealt with in committee or...thwarted by direct lobbying,” “punitive legislation” was coming forth in ever greater and threatening volume since the advent of the state Health Commissioner’s Technical Advisory Committee on Nonsmoking and Health, which TI recognized as “an explosive coalition against the tobacco industry” that included “broad business representation....”

In 1989, Kahn’s H.F. 452 would have imposed more stringent requirements on those in charge of covered public places. Textually, Kahn sought to achieve this objective by amending the existing provision in the following ways: “Where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize prevent the toxic effect presence of smoke in adjacent nonsmoking areas.” In other words, whereas until then MCIAA did not require owners to have ventilation systems at all and the administrative regulations in effect gave owners a choice of using physical barriers or four-foot-wide spaces, but in either case failed to enforce a performance standard of minimizing smoke drift to neighboring nosmoking areas, ANSR and Kahn not only literally (though perhaps inadvertantly) mandated the use of barriers and ventilation, but also imposed a zero-tolerance standard for smoke in adjacent nonsmoking areas. However, since no commercially practicable ventilation system could achieve such an outcome, presumably the bill’s authors intended that owners of public places would on their own eliminate designated smoking areas rather than face MCIAA’s (weak and ineffectual) sanctions. Ironically, then, this unwieldy mechanism constituted a step backward from H.F. 607/1920.

In the event, in 1989 neither the House nor Senate bill, which the Tobacco Institute again mobilized the cigarette companies’ resources to target for defeat,
made any progress: H.F. 452 failed even to get a committee hearing, while S.F. 713 was tabled after having been “drastically amended by the Health Committee, whose members refused to regard it as a health issue.”

Even the Health Department’s aforementioned truth-in-nonsmoking-areas initiative took almost another decade to secure: not until 1995 was the amendment incorporated in the Minnesota Rules. The Statement of Need and Reasonableness that the Department submitted in 1994 as part of the administrative rulemaking process still seemed to reflect wonderment that “the public often interprets the term ‘smoke-free’ to mean ‘absolutely free of smoke’” or that it was “sometimes difficult for people to understand that compliance with the MCIAA and these rules does not actually result in areas which are free of environmental tobacco smoke.” Going beyond the Department’s more modest admission in 1986, it now conceded that in mixed smoking/nonsmoking rooms or buildings “the environment will not actually be ‘smoke-free.’”

**Compliance and Enforcement, Such As They Were**

Early press accounts suggested how feebly the new regime—which at the time the tobacco industry ranked as the country’s “Most Severe” set of restrictions—protected nonsmokers. The “Minnesota Indoor [sic] Clean Air Act Survey” of food service operators, conducted by the National Restaurant Association in January 1976, found that by far the single most widespread method of creating a nosmoking section was to “designate several tables as a no-smoking...
area.” In contrast to the 56 percent of respondents who used that method, 20 percent made one side of the room nosmoking, 16 percent created nosmoking sections by means of partitions, eight percent used a separate dining room, while designating the entire restaurant nosmoking was “basically not being used as an alternative.” 30

Even more revealingly, fully 74 percent of respondents replied No to the question: “If there was no Clean Air Act, would you provide a no-smoking section?,” while only 20 percent answered Yes.

At the state Health Department itself, which issued the regulations, “desks have been rearranged so the 500 employees sit in clusters of smokers and nonsmokers, generally separated by file-cabinet barricades.” The legislature’s attitude toward its own creation was captured by its having waived the law “on at least one occasion so the smoking representatives would stay in their seats for a crucial late-night debate, rather than scurrying off the floor for a smoke. And Martin Sabo”—MCIAA co-sponsor and “the two-pack-a-day speaker of the House” was—one of the first to comply with the law: he pasted a ‘smoking allowed’ sign over two of his four chairs in the waiting area his office. ‘Thank goodness my boss is a smoker,’ said Sabo’s secretary..., who had a similar sign near her typewriter.”

In April 1976 the head of ANSR’s Public Awareness Committee reported that in addition to health care institutions, in which it was “inexcuseable...to allow smoking throughout their facilities,” state offices and buildings were “[a]nother problem area.... Enforcement is non-existent at the capital.” Glenna Johnson urged ANSR members to “[w]rite your legislator and demand an explanation for the blatant disregard of the MCIAA.”

Several months after promulgation of the regulations a reporter saw with his own eyes a sign in the largest restaurant in Minneapolis unlawfully declaring the entire premises a smoking area. Such brazen violations prompted Brandt to

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30National Restaurant Association, Minnesota Indoor Clean Air Act Survey at 4 (n.d. Jan. 7, 1976), Bates No. TIMN0240683/6. 195 (or 38 percent) of 518 operators to whom surveys were sent returned them. Id. at 1. To be sure, the most prevalent method would not have been compliant unless the section was also separated by at least four feet from the smoking section.


remark that “[f]or those who felt the law would be an immediate solution to the problem, it has to be a disappointment,”’’ but, with equanimity, he added that he had known that “‘it would be an educational campaign and I perceive the law as one tool to give nonsmokers the force of law.’” In 1977, when a journalist observed several people smoking directly in front of a no smoking sign at the Minneapolis Amtrak station and called the attention of the stationmaster to the violations, the latter replied: “‘All we can do is put up the signs.... We can’t do anything if people disobey them.’” The Amtrak official was wrong: MCIAA required those in charge of public places not only to post signs, but to “make reasonable efforts to prevent smoking in the public place by...asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke.”

To be sure, this mandate was risibly weak in that it literally not only did not obligate the owner on his own initiative to ask smokers not to violate the law, but even when he did intervene on a discomforted customer’s or employee’s behalf, he had no duty to inform the police of the violation if the smoker continued to smoke. Kahn herself, the journalist later discovered, had had the same experience in the same public place with the same outcome. She nevertheless maintained that the law was “adequate” as it was and did not need to be changed to make it enforceable. The problem was that “[s]hort-staffed and overworked police departments can’t be expected to devote their time to rounding up smokers”; consequently, the burden of enforcement fell on those in charge of public places who “usually don’t ask people to obey” the no smoking signs. As a possible solution Kahn suggested actions to enjoin those in charge of public places who had repeatedly violated the law to enforce it. Since the injunction actions that


935 1975 Minn. Laws ch. 211, § 6(c), at 633, 634.

936 George McCormick, “Enforcing Clean-Air Act,” MT, Feb. 3, 1977, Bates No. TIMN0240675. It is unclear whether Kahn’s position would have been encompassed by what The New York Times characterized as “agreement among...antismoking groups that enforcing the statutes is almost impossible; that compliance...is mostly a matter of public cooperation....” Shawn Kennedy, “Smoking Restrictions Are Proving Popular But Hard to Enforce,” NYT, Nov. 17, 1977 (A1), Bates No. TIMN0462090.

2488
The Minnesota Clean Indoor Air Act of 1975

MCIAA authorized the board of health and affected parties to institute merely enjoined “repeated violations” of proprietors’ aforementioned duty,937 which did not, in this context, go beyond asking (on behalf of customers/employees) smokers not to smoke, it is difficult to discern what systemic objectives such actions could have achieved—unless litigants could have persuaded judges that the provision in section 6 requiring proprietors to “make reasonable efforts to prevent smoking in the public place by...any other means which may be appropriate”938 encompassed much broader duties such as calling the police.939 The only plausible reason for Kahn’s preference for such an unwieldy and probably ineffective tool in lieu of amending the law (to impose specific duties on owners) was her knowledge that she no more had the requisite legislative majority for it in 1977 than in 1975, when she had been constrained to acquiesce in deleting the provision making owners’ violations misdemeanors. Such resignation in the face of limited legislative enthusiasm for a smoking ban was reflected in ANSR’s admission in 1978 that: “‘We haven’t reached the point where smoking is socially unacceptable, and the non-smokers still have to put up with it.’”940

Assistant Health Commissioner Dr. Fifer, who was the agency’s self-described “front man” at the legislature, revealed that the department had had a “general understanding” with the legislature (though not with Kahn) that the Health Department would not crack down, for example, on noncompliant

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937 1975 Minn. Laws ch. 211, § 7(3), at 633, 635.
938 1975 Minn. Laws ch. 211, § 6(c), at 633, 634.
939 In fact, the Minnesota Statutes Annotated discloses no reported court decision relating to MCIAA at all. To be sure, the chief enforcer, Charles Schneider, stated in 1981 that “‘[t]he ultimate enforcement given us by the law is that we can seek an injunction keeping a business from operating.’” During the six years since the law had been in force the Health Department had “threatened such action ‘maybe 75 to 100 times’ statewide. It has never had to carry through.” Sandy Battin, “Smoking Rights Not Cloudy in Minnesota,” News-Tribune (Duluth), Nov. 1, 1981, Bates No. TIMN0462001. Schneider, who was in charge of restaurant and hotel inspections, later stated that the Minnesota Attorney General’s office had advised the Health Department that MCIAA had conferred on the latter the power to seek injunctions to keep businesses from operating; since the Department never sought any such injunction, it was unclear whether judges would have upheld the Attorney General’s interpretation. Schneider added that “theoretically,” affected private parties presumably had had the same right. Telephone interview with Charles Schneider, Minneapolis (Apr. 2, 2009).
restaurants by revoking their licenses. By 1979, the department knew of no case in which it had been necessary for an owner to change the ventilation. Moreover, even when the Health Department did engage in enforcement in response to complaints, it consisted merely in Schneider’s writing a letter to the owner or manager; if the agency received no further complaints, it took no further action.

In 1979 Brandt also confirmed the existence of an “implied understanding” to go slow with respect to enforcement between ANSR itself and owners. In testimony before a Wisconsin legislative committee considering a public smoking bill he stated that “the Minnesota experience reflects a tacit appreciation of the value of accommodation. ... I think it is probable that business interests would have commenced a lawsuit if the non-smokers’ rights movement had insisted upon so stringent an application of the letter of the law as to create a serious difficulty (or at least the perception of a serious difficulty) for proprietors.”

Even for Brandt, who had initiated the drive for legislation, this gradualism was appropriate: the disappointment of those who criticized MCIAA because it had “not been enforced strictly enough” stemmed from their “unrealistic expectations of a 'solution’ achieved by a single shot, so to speak—that passage of a good law would, of itself, take care of the problem....” In contrast, “[t]he larger number...realized that enactment of the law, although of great importance, was nevertheless only one step in a lengthy, difficult, mostly education process....”

Brandt’s analysis, however, missed the important point that the disappointment of at least some of the critics was apparently not rooted in an unrealistic expectation of frictionless and instantaneous enforcement of a “good

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941 Telephone interview with Ellen Fifer Green, Minneapolis (Mar. 28, 2009).
943 Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009).
944 Comments by Edward R. Brandt (Co-Founder and Former President of the Association for Non-Smokers Rights) on the Effectiveness and Effects of the Minnesota Clean Indoor Air Act and Related Issues (elaborating upon testimony before the Wisconsin Assembly Committee on State Affairs, March 20, 1979, on Assembly Bill 80 [to be entered as testimony for American Lung Association of Mid-Maryland] at 6, Bates No. T103870504/09).
945 Comments by Edward R. Brandt (Co-Founder and Former President of the Association for Non-Smokers Rights) on the Effectiveness and Effects of the Minnesota Clean Indoor Air Act and Related Issues (elaborating upon testimony before the Wisconsin Assembly Committee on State Affairs, March 20, 1979, on Assembly Bill 80 [to be entered as testimony for American Lung Association of Mid-Maryland] (n.p. [at 9]), Bates No. T103870504/12.
The Minnesota Clean Indoor Air Act of 1975

Rather, some may have concluded that MCIAA itself was deeply flawed by virtue of its central feature of designated-smoking-areas, which, even if 100 percent of owners had complied with their obligations all the time, insured that nonsmokers would continue to be exposed to secondhand smoke in restaurants and other covered public places almost as intensely as before, just as they continued to be in airplanes with nonsmoking sections. This skepticism was presumably at least in part reflected in a June 1978 Minnesota Poll revealing that 33 percent of nonsmokers did not think that restaurant operators generally provided “adequate no-smoking areas.”

(Moreover, the fact that, according to the same poll, even 71 percent of smokers, in addition to 75 percent of nonsmokers, thought that the “no-smoking law should be strictly enforced” made a mockery of the Tobacco Institute’s wishful thinking propaganda that “[t]here aren’t enough people who vitally care about the issue to make the law hard.”)

2491

946“Minnesota Poll: 7 of 10 Residents Think No-Smoking Sections Adequate,” *MT*, June 25, 1978 (1A, 6A), Bates No. TIMN0462261. To be sure, the ambiguity of the question made it impossible to determine whether respondents thought that they were being asked whether they believed that nosmoking sections were smokefree or numerous or large enough: “‘State law requires that restaurants provide nonsmoking areas for customers who want them. Do you think restaurant operators generally do or do not provide adequate no-smoking areas?’” Of nonsmokers 33 percent said No and 66 percent Yes. The responses prompted Richard Wade, director of the Division of Environmental Health of MDH, to express surprise that “‘so many people are satisfied with restaurants’ compliance’” since the Department received 1,200 to 1,400 complaints annually. “Minnesota Poll: 7 of 10 Residents Think No-Smoking Sections Adequate,” *MT*, June 25, 1978, clipping in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B). Even less on point was a question posed two and a half years earlier as to how effective the law had been in cutting down on smoking in public places: 12 percent responded “very effective,” 38 percent “somewhat effective,” 28 percent “not very effective,” and 15 percent “not at all effective.” Of nonsmokers who were sometimes bothered by smokers 56 percent responded either “very effective” or “somewhat effective.” “Minnesota Poll: Most Nonsmokers Think Rights Law Has Been Helpful,” *MT*, Jan. 18, 1976, clipping in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).

947“Minnesota Poll: 7 of 10 Residents Think No-Smoking Sections Adequate,” *MT*, June 25, 1978 (1A, 6A), Bates No. TIMN0462261. Two years later, even 87 percent of two-pack-a-day smokers (in addition to 92 percent of nonsmokers) favored the law requiring restaurants and other businesses to “set aside some space for people who do not smoke.” “Minnesota Poll: Cigarette Smoking Interest Fading: 67% Wish They Could Give Up Habit,” *MT*, May 11, 1980 (1F at 10F), Bates No. TIMN0462021/2. To be sure, this very high proportion might have been reduced if the poll had correctly stated the law as prohibiting smoking except in designated smoking areas.
Two years later, 64 percent of nonsmokers polled by a newspaper in the St. Paul area responded that they were “bothered” when someone smoked near them in a restaurant, many explaining that “they felt the laws should be even stronger, with separate rooms or partitioning of rooms in restaurants for smokers and nonsmokers.”

For those who regarded the law’s failure to eliminate the source of tobacco smoke in public places as the problem, it was unclear, as Brandt argued in 1979, that the anti-smoking movement had in fact “made a lot of progress, relatively rapidly.” After all, if, as Kahn stressed, “[p]erhaps the most important reason for passage of the law is its reasonableness. It doesn’t prevent anyone from smoking,” the gap between the avant-garde but timid MCIAA and a law that

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950 Comments by Edward R. Brandt (Co-Founder and Former President of the Association for Non-Smokers Rights) on the Effectiveness and Effects of the Minnesota Clean Indoor Air Act and Related Issues (elaborating upon testimony before the Wisconsin Assembly Committee on State Affairs, March 20, 1979, on Assembly Bill 80 [to be entered as testimony for American Lung Association of Mid-Maryland] (n.p. [at 9]), Bates No. TI03870504/12.

951 Phyllis Kahn, “The Minnesota Clean Indoor Air Act: Legislation Enacted with Volunteer Group Support,” Proceedings of the Fifth World Conference on Smoking and Health 2:309-11 at 309 (William Forbes et al. eds. 1983) (though dated 1983, the article refers to events that took place in 1985). Kahn’s use of “reasonableness” was Pickwickian: it meant “pragmatic” in the sense of disarming legislative opponents; with regard to the purpose of protecting nonsmokers’ health the law was unreasonable. With a change in punctuation, Kahn repeated the same statement in Phyllis Kahn, “The Minnesota Clean Indoor Air Act: A Model for New York and Other States,” New York State Journal of Medicine, Dec. 1983, at 1300-1301 at 1300. To be sure, Kahn went on to assert that: “If such measures [as dividing restaurants into smoking and nosmoking sections] do not result in a smoke-free atmosphere for the non-smoker, then the entire area must be made non-smoking.” Id. Kahn had also made these same claims (virtually verbatim) in 1976: Representative Phyllis Kahn, Speech Before Public Health Association, St. Cloud at 5 (Oct. 8, 1976), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B). On what statutory or regulatory provision she was basing this radical interpretation is unclear; like the Health Department rules’ misleadingly loose language, Kahn appears to have used “smoke-free” and “non-smoking” synonymously: “[M]ost
would in fact have suppressed the source of smoke in public places and consequently provoked robust opposition by business owners and smokers would have been very great indeed. In any event, Kahn’s claim a little more than a year after it had gone into effect that MCIAA “sets out strict requirements for the designation of such smoking areas so that they are limited and will not affect the health or comfort of the non-smoker who chooses to pass through public life in a smoke-free atmosphere” was a preposterously exaggerated distortion of the law’s stringency. And although she may have been right in arguing that compliance with MCIAA’s comprehensiveness “requires a massive change in our culture and in our attitudes,” few would have foreseen that another 32 years would pass before the Minnesota legislature enacted such a statewide (indoor) ban.


Representative Phyllis Kahn, Speech Before Public Health Association, St. Cloud at 6 (Oct. 8, 1976), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B). The word “requires” was handwritten replacing the struck out “incurred.”

To be sure, 30 years after MCIAA’s passage and shortly before passage of the statewide Freedom to Breathe Act in 2007, several local governments in the Twin Cities area began adopting ordinances banning smoking outright in restaurants and bars. For example, the Minneapolis smoking ban ordinance went into effect on Mar. 31, 2005. Minneapolis Code of Ordinances, ch. 234. http://www.ci.minneapolis.mn.us/council/
The fate of the bill that Duluth DFLer Arlene Lehto, an environmentalist and director of the Save Lake Superior Association, introduced in the House in 1979 (where the DFL had lost its majority, it and the Republicans both controlling 67 seats) strikingly confirmed just how limited the legislature’s commitment to strengthening the law was. H.F. 184 was designed to deal with the problem of rampant violations of MCIAA by restaurants by conditioning restaurant licensure on compliance with the law—or, as she colorfully (albeit unscientifically) phrased it in a press release, “to ensure citizens a right to a tasty meal in a public restaurant without involuntary consumption of anothers nicotine emissions.” By circumventing the “lengthy and costly process requiring the county to develop evidence in cases of non-compliance,” the use of licensure sanctions offered prompt hearings before an enforcing board that was “closer to the community.” ANSR enthusiastically supported the bill because it promised to overcome MCIAA’s Achilles heel of “voluntary compliance,” which had resulted from the legislature’s failure to appropriate any funding for enforcement. ANSR welcomed the measure, whose wording it had been “waiting to hear for three years,” because it empowered the state health commissioner, the state hotel inspector, or any other authority charged with enforcement of safety or health regulations in restaurants to determine whether they were compliant: “What this all adds up to is that the one big item that prohibited enforcement (expensive litigation) will be replaced by MDH inspector action,” which ANSR viewed as “demand[ing] immediate respect by restaurateurs.”

Dr. Harold Leppink, the St. Louis County (Duluth) public health officer who

2494
had suggested the initiative to Lehto, regarded MCIAA as an important educational tool because it forced everyone to confront the problem of smoking every time he or she entered a restaurant by virtue of having to choose a smoking or nosmoking section. And although he believed that segregation made conditions “a little better,” the fact that the smoke nevertheless continued to overwhelm nonsmokers in restaurants, even when owners were formally in compliance with the law, motivated the former, in his view, to push even more adamantly for prohibition of smoking in public places. The bill, to which Schaaf introduced the companion in the Senate, suffered a sharp rebuff in committee when, according to Lehto’s account three decades later, her fellow DFL legislator from Duluth, Thomas Berkelman, lit up a cigar and passed out cigars to the male members of the committee. (Tobacco smoke was typically so thick in House committee rooms that often Lehto had to leave.) This fraternity-house-like prank in response to a relatively modest effort to facilitate compliance (rather than to narrow the scope of permissive smoking) puts in its proper context the contemporaneous acknowledgment in The New York Times that “Comprehensive Minnesota Law of 1975 Stands Alone.” It also explains why the Times added that the “world of the American smoker is shrinking, but not nearly as fast as most antismoking crusaders would like it to.”

To be sure, Lehto’s bill was not killed outright on the spot: in an effort to get the bill out of committee Lehto amended it to cover only her own St. Louis and

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959 Harold Leppink, “Proposed Legislation on Minnesota Clean Indoor Air Act” (Feb. 12, 1979) (original furnished by Arlene Lehto); telephone interview with Arlene Lehto, Oro Valley, AZ (Mar. 30, 2009).

960 Telephone interview with Harold Leppink, Boca Raton, FL (Apr. 12, 2009).


962 Telephone interview with Arlene Lehto, Oro Valley, AZ (Mar. 30, 2009). To be sure, Berkelman denied her account (“I never did that”), charging that Lehto “kind of went off the deep end,” marginalizing her own effectiveness. Telephone interview with Thomas Berkelman, Minneapolis (May 9, 2009).


964 Email from Arlene Lehto to Marc Linder (Apr. 2, 2009) (surmising that “I might have been trying to get it past a committee however I could—and perhaps limiting it to the
The Minnesota Clean Indoor Air Act of 1975

neighboring Lake County, in which she had support,\textsuperscript{965} in this radically shrunken version the committee recommended its adoption.\textsuperscript{966} Lehto was constrained to acquiesce in this miniaturized measure despite the warning by Dr. Lessink that: “Making compliance with MCIAA a condition for licensure would help St. Louis County solve some of the enforcement problems we have; however, MCIAA is of little value unless it can provide the same benefits to restaurant patrons throughout the state.”\textsuperscript{967} The bill was held over until 1980, when the House, sitting as the committee of the whole, voted 69 to 55 to adopt an amendment offered by Joseph Begich—a DFL mine manager from the Iron Range whose influence in St. Louis County antedated Lehto, of whom he was suspicious because of her attack on one of the mining companies for its environmental practices\textsuperscript{968}—to confine the coverage even further to first class cities in the two counties.\textsuperscript{969} A dozen days later Kahn tried to outmaneuver Begich, who had consistently voted against H.F. 79 and the rule change banning smoking on the House floor, by offering an amendment to extend coverage to all first-class cities statewide, but it failed by a vote of 41 to 76. Underscoring the voting heft of the anti-regulatory forces, another DFL representative, David Battaglia of Lake County, moved an amendment to strike his county altogether, leaving coverage only of St. Louis County’s sole first-class city (Duluth). After its adoption, the House passed the bill by a vote of 106 to 12,\textsuperscript{970} Lehto and Kahn voting with the majority presumably to secure an opening wedge for Senate or future legislative action, though in fact the bill died in the Senate Health, Welfare, and Corrections Committee.\textsuperscript{971}

Formal enforcement of the law, inadequate as it was to protect nonsmokers from exposure to secondhand smoke, remained problematic for years. More than three years after the law had gone into effect, with about 1,200 complaints being

\textsuperscript{965}H.F. 184 (Apr. 23, 1979) (copy furnished by Lehto).
\textsuperscript{967}Harold Leppink, “Proposed Legislation on Minnesota Clean Indoor Air Act” (Feb. 12, 1979) (original furnished by Arlene Lehto).
\textsuperscript{968}Email from Arlene Lehto to Marc Linder (Apr. 4, 2009).
filed annually, half of them relating to offices and other workplaces, Schneider believed that “the majority of businesses” did not comply with it. In 1979, the commissioner of health, while contending that MCIAA “made things much more tolerable for the non-smoker,” noted that it had “not been a complete success.” Instead of attributing the act’s failure to achieve more than mere greater tolerableness to the deeply flawed institution of designated smoking areas—which were arguably nowhere more grotesquely inappropriate than in college classrooms, in which instructors at one state university were advised to designate a smoking and a nonsmoking section—Dr. George Pettersen focused on the inadequate enforcement, although in fact even stationing an inspector full-time in every restaurant would not have protected nonsmokers from tobacco smoke drifting over 56-inch-high barriers. (Perhaps this fact accounted for the blanket prohibition of smoking—except in two “private” offices—in the Health Department’s Division of Environmental Health.) In response to questions posed by a legislative aid in Oregon about the operation of MCIAA the physician commented: “The most serious problem with the law is the lack of any funds being appropriated from the State Legislature to defray any of the costs of developing the rules or carrying on an informational program or an enforcement program.”
The Tobacco Industry’s Efforts to Weaken the MCIAA and Stanch Its Emulation in Other States

As you know, attempts were made previously to organize the smokers in several states to provide them with an effective vehicle for expressing themselves to their elected officials. For reasons that a psychologist could better explain than I, there is little chance that we could stimulate a smokers’ revolt as long as the majority of those that use tobacco suffer from a “guilt complex.” The industry has remained silent so long on the alleged health hazards of smoking that despite their best efforts, The Tobacco Institute is not likely to change public opinion for many years to come. Until this can be done, the spread of no-smoking laws across the country should be factored into any sales forecast.976

After having failed to thwart enactment of the Minnesota law, the cigarette companies followed developments there very closely. Their ire was especially sparked by the perception that major corporations were adapting to the new rules rather than combating them. Ironically, the chief culprit appeared to be The Pillsbury Company, one of the state’s most prominent employers, which, as explained above, had, during the debate over the regulations, been one of the sharpest critics. (When Pillsbury complained about enforcement, Schneider, the Health Department’s head of enforcement, asked the company’s managers where Pillsbury had been while the bill was going through the legislature, prompting the response that they had never thought that it would pass.)977 But a newspaper article in February 1976 on the proliferation of anti-public smoking laws came to the attention of several R. J. Reynolds vice presidents, setting off a flurry of interoffice exchanges. In discussing the Minnesota law, the article noted that initially Pillsbury, which employed 900 people at its national headquarters in Minneapolis, had estimated that it could cost the firm $500,000 to comply with the law’s mandated segregation of smoking areas in offices and factories978 (if the smokers “had to leave their posts to smoke”).979 However: “After a trial period...
a Pillsbury spokesman said ‘the law is working out fairly well. It’s helped nonsmokers greatly and although it may cost us some money, the problem is more health than money.’” Nevertheless, Pillsbury’s “acceptance” appeared to be exceptional, since the state Association for Commerce and Industry still regarded the rules as “unduly restrictive.”

After an exchange of notes scribbled on a copy of the article and the preparation of a draft in March, on April 9, James R. Peterson, a Reynolds vice president, sent a slightly toned-down letter to William Spoor, the chairman of the board of Pillsbury. Explaining to “Bill” that the statement by the Pillsbury spokesman in the attached article suggested that the company was supporting the law “on the basis of health reasons,” Peterson asserted Reynolds’ position that the law lacked a “factual basis...in the health area.” He appended a Tobacco Institute propaganda brochure, which culminated in the assertion that “[t]he answer” to the “controversy” between 60 million smokers and “some” nonsmokers who were annoyed by tobacco smoke lay in “courtesy, not law. The alternative is to pave the way for government control of all sorts of everyday irritations. No one would advocate that.”

“Other businessmen argued that that it would be discriminatory to permit smoke breaks without providing similar time off for nonsmokers.”


J. R. Peterson, Draft (Mar. 17, 1976), Bates No. 500050657. The “JSD/bt” abbreviation at the bottom of the draft suggests that it was written by or in the office of Dowdell, whose signed initials also appeared on the copy of the original article.

For example, the draft’s characterization of the Pillsbury spokesman’s conclusion as “completely fallacious” was deleted. J. R. Peterson, Draft (Mar. 17, 1976), Bates No. 500050657.


Peterson also appended an unidentified medical journal article.

Tobacco Institute, “True? False? Tobacco Facts” (n.d. [1973]), Bates No. 500050658/62. About this time, even the Burnett ad agency criticized the Tobacco Institute’s “courtesy campaign” advertising, which was supposed to “help reduce excessive and unreasonable anti-smoking activism by non-smokers,” as itself
Peterson believed that armed with “the facts,” Spoor “would not want Pillsbury to lend further credence to the current mythology that smoking under normal conditions constitutes a health hazard to nonsmokers.” Seeking to sway Spoor by alluding to “the many unfounded attacks...upon the food industry in recent years,” Peterson complained about the “growing number of unwarranted state and local regulations restricting, if not prohibiting, the use of tobacco in an ever-increasing number of public and private places.” Government interference was bad enough, but “[o]f equal concern [w]as the number of large and prestigious companies, like Pillsbury, that apparently have been pressured into acquiescing to yet another unwarranted governmental intrusion into the private sector.” In a very early sign of cigarette manufacturers’ realistic resignation, Peterson then regretted that it was “[p]erhaps...too late to completely reverse the anti-smoking trend,” but hoped that private companies would join with the tobacco industry to “prevent, at least, such extreme measures” as the Minnesota law from spreading, and that the Minnesota Association of Commerce and Industry could “prevail upon the Legislature to amend the onerous law...and

“unreasonable and risky” and “ludicrous.” While questioning the advisability of any paid consumer ads “to combat the present situation” and suggesting that Burnett’s own proposed ads might not accomplish the TI’s objective either because “[t]here may be no way to head off the activists,” Burnett did not appear to be embarrassed by the absurdity of its proposal, whose “message to non-smokers (including the activists) is that we’re all big boys and can get along together without any further formal restrictions.” Tobacco Institute “Courtesy” Campaign: Burnett Agency Position (1975), Bates No. 1005110514/5. Astonishingly, as late as 1980 ANSR published a board member’s explanation of MCIAA that asserted that “like every law, it cannot be effective unless it is understood and respected. The real solution is the exercise of consideration and common courtesy.” Nathan Portnoi, [untitled], ANSR 8(2):n.p. [2] (Nov. 1980). ANSR’s vacillating attitude was on display a few months later when a panel of its member-judges selected as the best answer to a Tobacco Institute ad on nonsmokers’ rights a response that attacked the “concept of common courtesy as a means to provide fair treatment for nonsmokers” as a “ploy by the tobacco institute [sic] to discourage nonsmokers from asserting their rights to breathe clean air.” Clara Riveland, [Untitled], ANSR 9(1):n.p. [3] (Mar. 1981). It is unclear whether Kahn was twitting or taking seriously the cigarette industry’s obfuscatory “courtesy” propaganda when she wrote some years after MCIAA’s passage: “Persons irritated by smoke expect to find a no-smoking section and have become more assertive in establishing their rights to such a space. Others look for smoking sections before lighting up and mistakes are generally taken care of by simple reminders. The law works effectively to simplify and reinforce rules of common courtesy.” Phyllis Kahn, “The Minnesota Clean Indoor Air Act: Legislation Enacted with Volunteer Group Support,” in Proceedings of the Fifth World Conference on Smoking and Health 2:309-11 at 310 (William Forbes et al. eds 1983).
correct some of the abuses that have been perpetrated under the guise of ‘protection of the public health.’” Suspecting that Spoor or “some of [his] people may have personal feelings on this subject”—that is, might themselves object to being forced to breathe tobacco smoke—Peterson nevertheless hoped that he could rely on the solidarity of beleaguered regulated capital to trump individual managerial character masks’ self-protective health instincts so that Pillsbury would not be willing to lend its “Corporate name to the endorsement of these restrictive Bills before a knowledgeable decision can be made on factual information.”

As incompetently as the cigarette companies may have opposed MCIAA as it was making its way through the Minnesota legislature, their vigilance became more focused soon after it went into effect. However, this new lobbying regime ran into several weighty stumbling blocks. An internal Tobacco Institute memo from March 1976, written by its Midwest regional manager, Larry Horist, to Roger Mozingo, vice president for government affairs, related that

there are some who feel that the unequal enforcement provision (vis a’ vis, [sic] the division of responsibility between the state health authority over offices and commercial business and the labor department jurisdiction over factories, etc.) opens the possibility of having the law thrown out by the courts. Chum Bohr, of the hospitality industry, is one of the leading proponents of this view. He already has one of his members pledged to donate $10,000 to the legal battle.

On the other hand, Oliver Perry, of commerce and industry, speaks in favor of a legislative initiative. He feels that the above mentioned “flaw” in the original legislation could lead to reopening the matter in the legislature. Perry does admit, however, that there may be some difficulty in finding a sponsor. (Our one staunch supporter was recently defeated in the primary.)

Though Perry is partisan to our viewpoint, he feels somewhat constrained by the fact that many of his members favor the existing law.

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987 Letter from James R. Peterson to William H. Spoor (Apr. 9, 1976), Bates No. 500050653/4/5. Spoor had a senior vice president respond, who attached a copy of a publication that purportedly expressed the company’s position more accurately than the newspaper article, but unfortunately the attachment does not appear to be included in the online tobacco documents. The writer added conciliatorily that “[t]he scientific literature appears to reflect an unfortunate lack of scientific clarity as to the health hazards, if any, to non-smokers exposed to tobacco in public places.” Letter from W. J. Powell to James R. Peterson (Apr. 23, 1976), Bates No. 500050651.

988 Larry Horist to Roger Mozingo, Re Minnesota (Mar. 3, 1976), Bates No. 50005665/6. (Because of an apparently defective Bates No., accessing this document might be easier at http://legacy.library.ucsf.edu/tid/uxc99d00.) The memo was not dated, but a cover sheet from Mozingo to Dowdell at R. J. Reynolds was dated March 3. Horist
Although the memo failed to reveal the legal basis for challenging the differential regulation of factories on the one hand and offices and businesses (frequented by the general public) on the other, the outcome that Bohr and restaurant and hotel owners hoped to secure was presumably not MCIAA’s reenactment with factories subject to the same coverage as businesses open to the public under the original law. On the contrary, they must have speculated that if the legislature had to start all over again, it would reduce coverage of the latter to the very limited coverage of the former—an extreme implausibility given the large majority of Minnesotans who appeared to support the law as well as the brute fact that Perry had been unable even to scare up a sponsor for whatever bill owners wanted. Horist was unable to glean any advantage for the cigarette manufacturers in either strategy: “Since we are not interested in involving the industry in the court action—except by way of moral support—and since [Joe] Robbie sees little hope in the legislative route, I see little optimism in the short run.” The longer-term perspective, in contrast, would “depend on the effectiveness of TI activity in cooperation with Robbie in his dual role of association executive and lobbyist or a re-evaluation of this relationship.” This mention of Robbie and his state tobacco wholesalers organization raised yet another sore point since Horist had “not been satisfied with the support we are receiving from several of our association people—and this is a case in point. Robbie is personally a delightful and highly competent individual. He is well liked in the Minnesota community and respected by the association members. With regard to TI programs, however, I sense a lack of commitment and enthusiasm. Without the active attention of his office, TI necessarily has to take a much [sic] responsibility for local activities—to the detriment of other duties.” That Horist would “have to travel to Minneapolis to do things which they could be doing on our behalf” was “doubly wasteful” especially “in consideration of our financial contribution to the effort.”

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989 Larry Horist to Roger Mozingo, Re Minnesota (Mar. 3, 1976), Bates No. 50005665/6. An example of Robbie’s services about this time to the cigarette manufacturers was his report to the Tobacco Institute on a television program in Minneapolis on MCIAA, which featured Kahn and Bohr and “resulted as favorably as it could for the cigarette industry in our opinion.” Joseph Robbie to J. C. B. Ehringhaus (Feb. 17, 1976), Bates No. TIMN0462126
In the event, a few weeks later Representative Heinitz, who had almost succeeded in 1975 in removing coverage of workplaces from MCIAA, introduced a bill in the House that would have achieved much of what Bohr and Perry wanted (and had already urged in 1975). To be sure, the lack of cosponsors suggested that prospects of passage were slim. H.F. 2691 would have taken a long stride toward that goal by amending the definition of “public place” by narrowing the scope of covered workplaces to include only those “frequented by the general public.” Second, it redefined the critical term, “acceptable smoke-free area,” which had been introduced by the Board of Health regulations, to narrow the criteria, one of which owners were required to satisfy: deleting ventilation systems and carbon monoxide levels, Heinitz’s bill reduced the options to physical barriers at least 56-inches high or four-foot spaces between smoking-permitted and nosmoking areas. In other words, the more expensive technology and the performance standard measuring the efficacy of the dysfunctional barriers/spaces were eliminated. (To be sure, since the spaces and barriers, in that order, were, as noted earlier, virtually the only methods that owners were using anyway, the bill’s impact on the real world of compliance may not have been significant.) Third, the bill permitted smoking in nosmoking areas “with the express permission of every nonsmoker present. And fourth, H.F. 2691 lowered from 200 to 150 square feet the minimum size of nosmoking areas in rooms in which both smoking and nosmoking areas were permitted in workplaces not customarily frequented by the general public.990 The prosmoking forces’ initiative to roll back coverage of offices and business promptly revealed itself to be a pipe dream: after having been referred to the Health and Welfare Committee, the bill made no progress whatsoever.

Robbie appeared to have remained skeptical of his role in a legislative or judicial fix for the tobacco industry’s objections to MCIAA. In November 1976 he wrote to his nephew Stephen Bergerson—who as an official of Robbie’s Minnesota Candy and Tobacco Distributors Association believed that it was “inevitable” that the law “will force down tobacco sales”—that in the wake of Bergerson’s conversations with Horist, Bohr, and Perry, “nothing should be done to challenge this law by litigation” until after the 1977 legislative session. But in the meantime, even if Perry and MACI “want to try to and amend the law to restrict its application, I think we should leave it to them. We can help from


991 “Stringent No-Smoking Law Failing,” TO 1(2):1 at 9 (Nov. 1976), Bates No. 01418984/92.
The Minnesota Clean Indoor Air Act of 1975

behind the scenes but we must keep the public posture of being opposed to the law. 992

R.J. Reynolds appeared somewhat less pessimistic about the near-term chances of repealing what it called “the most stringent state anti-smoking law.” By January 1977 it had not yet been in effect long enough to reveal conclusively its impact on consumption, but the company’s vice president for planning could not help but believe that “in the longer run it will be damaging.” James Hind therefore recommended exploring with TI its “concept of getting signatures of smokers and applying it to the many public bans sought against smoking.” The petition sign-up that his interlocutor, F. Hudnall Christopher, Jr., had “so successfully carried out” in the case of the CAB (relating to airplanes) seemed to Hind “truly an expression of an individual’s freedom which everyone—government, media, and public[—]will respect. Minnesota might be the first place to go.” 993

992Joseph Robbie to Stephen Bergerson (Nov. 16, 1976), Bates No. 500050670. Bergerson, who 30 years later purported not to be able to remember the events surrounding the letter, stated that the industry had not lobbied against MCIAA in 1975 because no one had thought it would pass because it was too radical. Telephone interview with Stephen Bergerson, Minneapolis (Apr. 27, 2007).

993J. F. Hind to F. Hudnall Christopher, Jr. (Jan. 27, 1977), Bates No. 500050668. In February and December 1979, at the request of higher-ups at Philip Morris, the director of marketing research “examined the effects of the Minnesota Clean Indoor Air Act...on that state’s cigarette sales,” and reported that tax-paid cigarette pack sales per capita in Minnesota as a proportion of those in the U.S. as a whole rose from 82.7 percent for the fiscal year ending June 30, 1975 (before MCIAA went into effect) to 85.2 percent for the year ending June 30, 1979—a movement that he characterized as a “slight improvement in Minnesota versus U.S. per capita sales since the passage of the Act.” J. N. Zoler to J. J. Morgan, Subject: Minnesota Cigarette Sales (Feb. 21, 1979), Bates No. 2045259239 (quote); J. N. Zoler to J. J. Morgan, Subject: Minnesota Cigarette Sales (Dec. 11, 1979), Bates No. 2024372752/3. Amusingly, when Stanton Glantz and his co-authors of a study of Minnesota tobacco politics referred to this inquiry—“It was not until the later 1970s that Philip Morris began to realize the economic impact of the Clean Indoor Air Act on sales in Minnesota”—they misleadingly implied that the effect was negative. Theodore Tsoukalas, Jennifer Ibrahim, and Stanton Glantz, Shifting Tides: Minnesota Tobacco Politics 13 (2003), on http://repositories.cdlib.org/ctcre/tcpmus/MN2003. The number of cigarette packages taxed in October 1975 in Minnesota exceeded that of a year earlier by 12.7 percent compared to an increase of only 1.2 percent nationally. “Tobacco Tax Council, Monthly State Cigaret Tax Report: Report for October 1975” (Dec. 11, 1975), Bates No. LG432661/2. In March 1976 the figures were 12.9 percent and 13.5 percent, respectively. “Tobacco Tax Council, Monthly State Cigaret Tax Report: Report for March 1976” (May 11, 1976), Bates No. TIMS0010245/6. For August 1976, the figures were 0.6
In lieu of amending MCIAA, of which the tobacco industry was currently incapable, TI chose to pursue yet another one of its well-funded pipe dreams. In September 1976, the recently hired former editor of the city desk at the Newport News Times-Herald, Paul Knopick, who was now “editor of the largest circulating tobacco periodical in the world,” i.e., TI’s mendacious quarterly propaganda sheet, Tobacco Observer, heard from Horist that an article about MCIAA would be a good idea because it was still a “symbol—the classic case” of anti-smoking laws, which was “still mentioned by anti-smokers at numerous hearings...both at state and local levels.” Conveying Horist’s plans for run-of-the-mill TI deception, Knopick told vice president William Kloepfer of Horist’s belief that “an Observer article could be ‘reprinted’ and then ‘passed to legislators’ considering similar legislation. He especially thinks it would be effective if we could get someone else to byline it—a sheriff up there, or a top distributor.” Two weeks later, Horist supplied Knopick with the names of several candidates for phony byliners, including lobbyists Bohr and Perry, Minnesota Candy & Tobacco Distributors Association heads Robbie and Bergerson, as well as St. Paul Police Chief Rowan (who in 1975 had sent Bohr a letter belittling MCIAA) and state Senator Baldy Hansen. This short list suggested that the cigarette companies already had a confidential relationship with Bohr and Perry, thus reinforcing the argument that they had been the tobacco industry’s covert lobbyists in 1975. In contrast, the relationship between Horist...
and Knopick appeared to fall considerably short of the bonhomie that typified intra-Tobacco Institute correspondence: indicating that Knopick was in the grips of a delusion that he was a real reporter—Kloepfer would flatter him by asserting that at his earlier job his “journalistic star was rising brightly...and it still is”998—he had suggested to Horist that “as a journalist’ [he] should make the trip alone” to Minnesota, thus disappointing Horist’s plan to accompany him: “Someday, I hope to understand just what the hell that means. ... But alas, a [sic] accede to your inscrutable wisdom.” Despite the rebuff, Horist insisted on contacting “each of the gentlemen [on the list] to alert them to your visit and its purpose.”999 Unsurprisingly, the (unbylined) article, which dutifully quoted most of Horist’s “leads,” turned out to meet the norm for TI distortion. For example, it quoted Bohr’s nonsensical allegation that the “group which fought for the act’ [presumably ANSR]...tied itself motherhood and apple pie”—without explaining why the public would automatically have associated suppression of indiscriminate public smoking with such virtues—and then highlighted the (false) claim by CBS News commentator Charles Kuralt that under MCIAA it was “against the law to smoke in any public place...even if it is your own office, [and] a policeman can walk into that office and arrest you.”1000

In 1983 MCIAA remained a major national problem for the cigarette industry’s efforts to ward off enactment of similar laws in other states. For example, in April Rick Seely, TI’s Michigan State (and later Midwest) Director complained to TI vice president Robert Hanrahan that: “Proponents of Clean Indoor Air Acts invariably point to Minnesota as, not only a model for such legislation, but a shining example of how such laws can work.” Seely’s tale of woe stretched back to December 1982, when he began trying to find both information on MCIAA’s “negative effects” and a representative of the MACI to testify against a bill in Michigan, but what prompted him to write was the conclusion of his “wild goose chase” that very day in the form of official word

998 Remarks of William Kloepfer, Jr., Sen. VP-Public Relations, The Tobacco Institute Tobacco College of Knowledge at 12 (Nov. 17, 1981), Bates No. TI17930049/81. Remarkably, after all the revelations about the cigarette manufacturers, in 2009 Knopick manifestly believed that potential customers would be attracted to his PR business by reading on his company’s website that he had “created the first national publication for the tobacco industry, a keystone of a visible, effective public relations campaign.” http://www.eandecommunications.com/management.htm (visited Nov. 13, 2009).

999 Larry Horist to Paul Knopick, Re: Minnesota Article (Sept. 20, 1976), Bates No. TI47350800/1.

from MACI’s vice president that “there is no such law in Minnesota as a Clean Indoor Air Act.” Frustrated by the fact that “we are without resources” to “counter[] the powerful and effective statements of our opponents and the witnesses they import from Minnesota,” Seely proposed that TI view “this situation as a priority item and hire a professional research group to survey the business community the right way. If we can get some negative, documented information and perhaps a few business people who are willing to expound on the negative aspects of the law, we could use these things in every state where a clean indoor air act is proposed.” If TI failed to dig up this kind of dirt, “our opponents will continue to rub Minnesota in our faces time after time after time.” In Michigan and Wisconsin alone, the pro-smoking forces would be faced with such legislation “either until the sponsors retire, hell freezes over or we silence the proponents once and for all, by proving that the MCIAA is either bad law or the most useless piece of legislation ever enacted by man.”

Exactly one month later Seely sent off yet another jeremiad to Hanrahan. This time he stressed that during the previous four years a clean indoor air bill had been introduced a total of six times in the Michigan legislature and that especially since 1981 Minnesota had been “consistently pointed to by proponents of this legislation as the paradise for non-smokers where all citizens gleefully comply with the law.” Seely then made a breathtaking admission for strictly internal consumption, which, if publicly disseminated, would have both suggested that the cigarette oligopoly feared that the endgame was approaching and revealed that the cigarette industry realized that the increasingly compelling and popular health regime embedded in Minnesota’s exemplary law was making a mockery of executives’ and underlings’ benighted but well-bankrolled plans to roll back anti-smoking regulation:

As our health arguments have grown ineffective and now fall on deaf ears, we need a strong defensive point to hang our hat on. That defense would be evidence of strong negative effects of Minnesota’s bill or spokespersons from Minnesota to address the issue of the failing of their legislation...

The Minnesota Clean Indoor Air Act holds an almost religious-like symbolism for anti-smokers and the purpose of our research study should be to destroy that image or at least render it ineffective as a model for enacting further legislation anywhere.

1001Rick Seely to Bob Hanrahan (vice president TI), Re: Minnesota Clean Indoor Air Act Study (Apr. 13, 1983), Bates No. T03870700/1.
1002Rick Seely to Bob Hanrahan, Re: Minnesota Indoor Air Act Study (May 13, 1983), Bates No. T03870702.
1003Rick Seely to Bob Hanrahan, Re: Minnesota Indoor Air Act Study (May 13, 1983), Bates No. T03870702.
TI headquarters soon began taking the proposal to denigrate MCIAA seriously. In July 1983, shortly after Hanrahan had informed TI’s chief lobbyist in Minnesota that the proposed study was “very important,” John D. Kelly, senior vice president for state activities, wrote TI President Samuel Chilcote that the statute had been “cited repeatedly by advocates of such restrictive legislation as an example of how laws can successfully curb smoking.” Its citation as a model in other states such as Oregon and Michigan prompted Kelly to recommend authorization of field research into the Minnesota law’s effects whose only purpose was to “point out the negative impacts of the law—for example the costs to business owners, the state, and consumers—in an effort to determine whether the law is effective as a model for other states’ legislation.” (This pitch to TI’s president was toned down from a draft that had characterized the purpose more aggressively as “render[ing] the law ineffective as a model for other states’ legislation.”) The chief impediment to such a refunctionalization of the landmark measure lay in the popularity that it had attained in Minnesota. TI referred to an Associated Press article citing polls that “indicate 90 percent of state residents approve of the law.” Even worse from the cigarette manufacturers’ perspective was that the Minnesota Restaurant & Food Service Association, “whose members might have been expected to be troubled by this issue, is quoted as having discovered that a majority of restaurants surveyed found compliance with the law ‘easier than expected.’” The problem, as Kelly

\[1004\text{Bob Hanrahan to Tom Kelm, Re Proposed Minnesota Study (June 21, 1983), Bates No. T103870695.}

\[1005\text{John D. Kelly to Samuel D. Chilcote, Jr., Re: Need to Challenge Anti-Smokers’ Claims on Minnesota Clean Indoor Air Act at [1-2] (July 25, 1983), Bates No. T103870692/3. For a more polished version, see Paula Johnson Duhaime (Tobacco Institute) to David Krogseng (North State Advisers, Inc.) (Nov. 10, 1983), Bates No. T103870689. Krogseng, former chairman of the Minnesota Republican party, was a TI lobbyist.}

\[1006\text{Untitled undated draft at 1-2 [latter half of 1983], Bates No. T103870525/6 (date reconstructed from reference to Oregon Indoor Clean Air Act as having gone into effect July 1 “of this year”).}

\[1007\text{John D. Kelly to Samuel D. Chilcote, Jr., Re: Need to Challenge Anti-Smokers’ Claims on Minnesota Clean Indoor Air Act at [1] (July 25, 1983), Bates No. T103870692. The unidentified AP article was Karen Mills, “Minnesota Smoking Law a Model for Rest of U.S.,” Independent-Journal (San Rafael, CA), 45 (Oct. 4, 1980), Bates No. TIMN046207.}

\[1008\text{John D. Kelly to Samuel D. Chilcote, Jr., Re: Need to Challenge Anti-Smokers’ Claims on Minnesota Clean Indoor Air Act at [1] (July 25, 1983), Bates No. T103870692. According to a lengthy extract from the MRFSA news release, 54 percent of respondents}
formulated it, was that “as long as these statements remain unchallenged, advocates of smoking restrictions can point to the Minnesota law as the prototype for smoking bans, not only in the workplace, but in all indoor areas.” Since field staff reports and legislative activity in Iowa and other states indicated that “we must move expeditiously,” Kelly argued that MCIAA’s impacts had to be scrutinized quickly to determine the efficacy of neutralizing the effect this law is having and may continue to have on the smoking restriction debate in other states.\textsuperscript{1009,1010}
PART VI

THE STRUGGLE IN IOWA FOR ANTI-PUBLIC SMOKING BANS: 1970s TO 2008

At the turn of the century, tobacco was illegal in 14 states. We rode out that cycle of anti-smoking sentiment, and we’ll ride out this one, too.¹

¹Ellen Merlo, at 21 (Oct. 24, 1994), Bates No. 2040236685/705 (untitled). Merlo was senior vice president for corporate affairs at Philip Morris. Tobacco was not illegal in any state at the turn of the century or since.
Non-Smokers’ Struggle Against Exposure to Tobacco Smoke: 
Its First Meager Fruits in Iowa, 1970-1982

It does not require the foresight of a prophet to declare that the time is not far distant when civil law will make it impossible for fathers to smoke in the presence of their children.¹

The completely unregulated atmosphere that prevailed in the Iowa House and Senate inundating all non-smoking members with their colleagues’ secondhand smoke lasted from 1933² until the mid-1970s, when, at the very same time that the legislature, in sync with a national trend, began considering bills restricting and/or prohibiting smoking in various public places—by 1974 such bills had been introduced in 39 state legislatures and by 1975 in all 50³—the Iowa House also reversed a half-century of smoking laissez-faire. Then in 1978, at the tail end of the first wave of statewide enactments that had begun in Arizona in 1973, the Iowa legislature passed a weak law, which was taken over in large part verbatim from the Minnesota Clean Indoor Air Act⁴ without, however, adopting its neighbor’s comprehensive coverage of non-governmental commercial public places such as restaurants and stores. What it did copy from MCIAA and shared with virtually all similar state enactments of the period was the dysfunctional system authorizing owners and managers of covered places to permit smoking in designated areas, which undermined the protection that was such laws’ raison d’être and would remain a constant feature of the Iowa act for the next 30 years.

Iowa’s First Feeble Forays into Public Smoking Control Legislation in the Maelstrom of the National Drive for Nonsmokers’ Rights

¹Frederick Pack, Tobacco and Human Efficiency 37-38 (1918).
²See above ch. 18.
⁴See above ch. 24.
us on the basis of smoking and nonsmoking.5

In December 1969 Ralph Nader petitioned the Federal Aviation Administration for a total smoking ban in airliners on the grounds of fire hazard as well as of irritation and health risks linked to breathing tobacco smoke.6 Then in January 1970 he filed a petition with the Interstate Commerce Commission and the U.S. Department of Transportation requesting rulemaking proceedings for the creation of a rule prohibiting tobacco smoking on motor vehicles carrying passengers in interstate commerce. His petition contended that “smoking constitutes a serious hazard to the health of...all nonsmoking passengers.”7

Two months later, after the aforementioned bills had been filed in Congress and neighboring Illinois and elsewhere,8 three liberal Iowa House Democrats (non-smoking lawyers who admired Nader)9 filed Iowa’s first modern public smoking regulation bill, which included a preamble with the legislative finding that “the act of smoking tobacco products and the inhalation of tobacco smoke is detrimental to the health of the citizens of the state of Iowa and that the best interests of the citizens of the state would be served by the restriction of smoking in all public transportation services.” It provided that those offering such services “shall permit smoking by passengers inside the transportation conveyance only under the...condition[]” that “[s]eparate facilities shall be provided for smoking and nonsmoking passengers in such a manner that nonsmoking passengers are not exposed to the smoke or odors caused by smoking passengers.”10 Since, as one of the sponsors later observed, almost everyone in

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8 See above ch. 23.
9 Telephone interview with Joseph Johnston, Iowa City (Dec. 29, 2008).
10 H.F. 1353, §§ 1, 3 (Mar. 23, 1970) (by Edward Mezvinsky, Michael Kennedy, and Joseph Johnston). Johnston and Mezvinsky both practiced in Iowa City. Iowa Official Register: 1969-1970, at 88-89, 96 (53d No., L. Dale Ahern ed.). Johnston had no specific recollection of the bill, but assumed that Mezvinsky had asked him to cosponsor it because he also represented Iowa City and was one of few members who cooperated with Mezvinsky, who was widely viewed as excessively ambitious; Kennedy was Johnston’s best friend in the legislature. Telephone interview with Joseph Johnston, Iowa City (Dec. 29, 2008). Mezvinsky, later a member of Congress from Iowa, was sentenced to seven
Non-Smokers’ Struggle Against Tobacco Smoke Exposure in Iowa, 1970-82

the legislature smoked and Democrats were a hopeless minority, the bill’s advocates would have been under no illusion as to its chances of passage. The historical discontinuity was by this time stark enough that the Des Moines Register had to remind its readers that “[s]uch a restrictive cigarette law would not be entirely new to Iowa,” referencing (somewhat less than relevantly) the 1896-1921 ban on selling cigarettes. Neither this bill nor identical bills filed three years later in both chambers (by liberal Democrat Minnette Doderer and right-wing Republican David Stanley) saw any action, although in the interim (1971) the Interstate Commerce Commission had issued a regulation confining smoking (but not smoke) to the rear 20 percent of seats on interstate buses, and in 1973 the Civil Aeronautics Board required airlines to provide no-smoking (but not no-smoke) areas. To be sure, the state of federal bureaucratic enlightenment at the time was nicely reflected in the CAB’s assertion that “the attitude of many nonsmokers appear[s] insensitive to the rights of smokers. Smoking is a lawful activity, and requiring smokers to abstain totally on flights would cause many of them severe discomfort. ... The segregation of smokers...strikes an equitable balance, allowing neither smokers nor nonsmokers to infringe on the reasonable exercise of the rights of others.”

Iowa’s first non-transportational no-smoking bill was filed one month after the Nonsmokers’ Bill of Rights, under the auspices of the National Interagency


George Mills, “Bill to Cut Smoking on Bus, Plane,” DMR, Mar. 15, 1970 (1T:4) (published after Mezvinsky had prepared but before he had filed the bill).

S.F. 15 (Jan. 11, 1973) (by Minnette Doderer (D) and Ralph Potter (R)); H.F. 494 (Mar. 26, 1973) (by David Stanley (R)). When asked years later whether this bill had not been a little bit ahead of its time, Doderer replied: “‘73, it sure was. Forbidding it? I suppose regulating it or something. I was smoking then. But then you can find any period in my life when I was smoking!” “A Political Dialogue: Iowa’s Women Legislators,” Box 1, Folder: Transcripts: Minnette Doderer, Part I at 66 (June 27, 1989), in Iowa Women’s Archive, University of Iowa.


Council on Smoking and Health, had been adopted on January 11, 1974, the tenth anniversary of the publication of the surgeon general’s consensus report on smoking. Fittingly, that surgeon general himself, Luther Terry, by now a consultant to the American Cancer Society on tobacco and health, was one of the signatories at the ceremony at Congress Hall in Philadelphia, where the original Bill of Rights had been signed. The three articles of this new bill of rights were, to be sure, modest:

Non-smokers have the right to breathe clean air, free from harmful and irritating tobacco smoke. This right supersedes the right to smoke when the two conflict.

Non-smokers have the right to express—firmly but politely—their discomfort and adverse reactions to the tobacco smoke. They have the right to voice their objections when smokers light up without asking permission.

Non-smokers have the right to take action through legislative channels, social pressures or any other legitimate means—as individuals or in groups—to prevent or discourage smokers from polluting the atmosphere and to seek the restriction of smoking in public places.

The limited scope and character and especially the lack of enforcibility of these rights of were rooted in the as yet preliminary and underdeveloped understanding of the health impact of secondhand smoke exposure. Terry himself expressed this view fully: apart from the “few non-smokers...genuinely sensitive to tobacco smoke” who “can be made very uncomfortable or even ill by exposure to significant amounts of tobacco smoke,” and others with emphysema, bronchitis, and heart disease, who could suffer “deleterious effects” from exposure, “the vast majority of non-smokers simply find intense tobacco smoke to be unpleasant or obnoxious. And even though they may not suffer any health dangers, they do have a right to be protected from such unpleasantness. It is in this light that we are observing increased concern in the rights of the non-smoker.”

Still devoting significant resources to the mission of keeping the population in a state of denial as to the lethal impact of smoking on smokers, the Tobacco

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17On this organization, see above ch. 23.
19Luther Terry, “Reflections After Ten Years on Advisory Committee’s Report on Smoking and Health” at 13 (Jan. 11, 1974), Bates No. 502669820/32 (delivered at the Non-Smokers Bill of Rights Congress) (also printed in CR, Feb. 1, 1974 at S 1073-74, Bates No. TIMN0151701/2). On the development of the science of secondhand smoke over the following 15 years, see below ch. 26.
Institute despaired over the “massive media coverage” of the “‘event.’”\textsuperscript{20} That non-smokers still had a huge resistance force to overcome was reflected in the increase (from 50 to 52 million) in the total number of smokers during the 10 years since the issuance of the 1964 surgeon general’s report (although public health officials took solace from the fact that 10 million had quit smoking, that in the absence of educational efforts trends suggested that the number of smokers would have reached 75 million,\textsuperscript{21} and that the adult prevalence rate had fallen from almost 42 percent in 1965 to about 35 percent).\textsuperscript{22} Moreover, despite declines in 1963-64 and 1967-69, total consumption of cigarettes had risen 13 percent from 1963 to 1973; yet, while annual per capita consumption of those 18 and older at 4,148 had almost regained the 1964 level of 4,194, the latter had marked a decline of 3.5 percent from the 1963 peak). Most discouraging to Terry were the failure to reduce youth smoking and the dramatic increase in smoking among girls.\textsuperscript{23}

To be sure, the cigarette manufacturers in 1974 were very concerned that since 1963 the gap between actual consumption and the projected potential based on sales before 1963 amounted to 464 billion cigarettes or a loss of $8.36 billion: “Figure the companies’ market shares and their profit percentages.... You will be frightened.” The Tobacco Institute could not “help but feel” that this gap was “directly related to the anti-smoking campaign of our adversaries.”\textsuperscript{24} And the 1974 survey of the public’s attitudes toward smoking and the tobacco industry that Roper conducted for TI gave the companies good reason for deep pessimism in general: Roper itself was inclined to view its findings on behalf of its customer “‘with considerable alarm’...As far as the battle for public opinion is concerned,  

\textsuperscript{20}TIN, No. 90, Jan. 21, 1974, at 1-3, Bates No. HK0484897/8-9.
\textsuperscript{21}Luther Terry, “Reflections After Ten Years on Advisory Committee’s Report on Smoking and Health” at 8 (Jan. 11, 1974), Bates No. 502669820/7 (delivered at the Non-Smokers Bill of Rights Congress).
\textsuperscript{22}Jane Brody, “Decade’s Warnings Fail to Cut Smoking,” \textit{NYT}, Jan. 11, 1974 (1, at 8:1-3).
the tobacco industry has reached—if not passed—the critical point.... Barring some dramatic new evidence or development, further erosion would seem predictable.” This conclusion was based especially on one of the study’s “most significant findings”—“the very widespread support for segregation of smokers in most public places” that was shared “almost as widely” by smokers as non-smokers. By this time, 90 percent of non-smokers and 80 percent of smokers favored separate sections on trains and airplanes, while 64 percent and 42 percent, respectively, backed sectioning in workplaces and offices, and 60 percent and 34 percent, respectively, supported it in eating places. Even more portentous was that 39 percent of all non-smokers already favored a smoking ban in all public places, while 59 percent (and even 48 percent of smokers) backed it in retail stores, 28 percent in eating places, 22 percent in workplaces/offices, and 63 percent in college classrooms.

House File 1164, which was introduced by 31-year-old Davenport Democrat Gregory Cusack in 1974, reproduced largely verbatim the statute enacted in 1973 in Arizona. Cusack, a former college teacher, community organizer, director of the League of Women Voters Education Fund, Davenport city councilman, and a member of Students for a Democratic Society while a graduate student in history at the University of Iowa during the Vietnam war, considered himself one of the most (if not the most) left-wing Iowa legislator


31Iowa Official Register: 1973-1974, at 61 (55th No., L. Dale Ahern ed.). Although according to this official source Cusack at this time ran Cusack and Associates, a real estate and insurance business, Cusack later stated that he had been teaching part time. Telephone interview with Greg Cusack, Bellevue, IA (Apr. 10, 2008).
during the 1970s, although neither his constituents nor his colleagues may have been aware of his politics. A non-smoker who was very sensitive to smoke, 34 years later he was, nevertheless, unable to recall having filed, let alone anything about, his pathbreaking bill. However, on being told that he had been the sole sponsor, he speculated that he had probably filed it at the request of a constituent, about whom he could remember nothing.32 Cusack’s one-paragraph bill, declaring the smoking of tobacco in any form a “public nuisance and dangerous to public health,” prohibited it in a hallway, elevator, indoor theater, library, art museum, concert hall, auditorium, or “vehicle which is used by or open to the public.” Nevertheless, Cusack authorized those in custody or control of a theater, library, art museum, concert hall, or auditorium to “designate restricted areas therein which, upon posting with the words ‘smoking area,’ lawfully may be used for smoking.” Violations were subject to fines ranging from $10 to $100.33 In spite of its brevity, H. F. 1164 thus already contained the hallmark permissiveness that continued to mar the Iowa law into the twenty-first century. The Republican-controlled House took no action on Cusack’s bill.

Although Cusack’s and the other early bills fell by the wayside without needing any intervening opposition and it is unclear whether the cigarette manufacturers engaged in any lobbying against them, the Tobacco Institute had definitely become a lobbying force in Iowa before this time. In 1967, for example, after having been alerted to a bill draft in Iowa requiring the disclosure of tar-nicotine content on packages, TI “immediately prepared a brief outlining the limitations and objections to such a bill; and as a result of our efforts, the proponents of the bill indicated that they were at least temporarily persuaded that such legislation was not appropriate at this time.”34 Again in 1969, it intervened against a bill that would have required disclosure of ingredients on cigar wrappers: “Even though this was a cigar bill, we actively opposed it as a matter of principle and on the assumption that its passage would pave the way for a disclosure of ingredients bill for cigarettes.”35

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33 H.F. 1164 (Feb. 11, 1974, by Cusack).
Tobacco adversaries...march under the banner of medical credibility and public welfare respectability. [S]omewhere along the line the industry...has not met the issues, invested sufficient institutionalized efforts or utilized available manpower to the extent necessary.

While the tobacco industry has well staffed organizations on the national level with adequate resources to represent the industry, on the state level this isn’t so. Compared to the state organizations of the trucking, automotive, insurance and liquor industries, we do not measure up favorably.36

By 1975 the anti-second-hand smoking campaign had assumed crisis proportions for the cigarette manufacturers. At R. J. Reynolds, public affairs chief James Dowdell, warned his boss, senior vice president Charles Wade, in February that “unless we can find some way to reach the State legislators who are being convinced by the anti-smoking crusaders that passive smoking constitutes a health hazard, there inevitably will be more and more prohibitions placed upon smoking in public.” If, he predicted, an Arizona-like ban passed by the New York State Senate became law, “I don’t think we would have any problem in measuring the drop in State per capita consumption.” The Tobacco Institute’s state activities department was doing the best it could to defeat bills, but its efforts were being hampered by lawyers’ fears that any compromises on restrictive legislation would “be tantamount to an admission of guilt,” opening the way to even more tort suits. Worse still: “We know that smokers themselves will not speak out for their rights to smoke. In fact, if we can believe the opinion polls, the majority of smokers are convinced that their smoking does indeed constitute a health hazard to nonsmokers.”37

The cigarette oligopoly viewed the “accelerating trend” in the increasing support for “segregating and prohibiting smoking in various public places” with growing alarm.38 Between 1970 and 1975, according to one survey, even the proportion of smokers falling into this group had risen from 42 percent to 51 percent, while that of former and never-smokers rose from 61 and 68 percent to 77 and 82 percent, respectively. A May 1976 Roper study (“Public Attitudes Toward Cigarette Smoking and the Tobacco Industry”) paid for by the Tobacco Institute revealed that nationally 80 percent of all respondents (“and almost as

36An Open Letter to Manufacturer Management from the Board of Directors of the Coordinating Board of Tobacco Trade Associations at 1 (June 6, 1975), Bates No. 500023310.
37J. S. Dowdell to C. B. Wade, Jr. (Feb. 20, 1975), Bates No. 500000272.
many smokers”) favored separate sections for smokers in buses, trains, planes, and theaters, and more than 75 percent of all people (and almost as high a proportion of smokers) favored “segregating smokers in libraries or museums.” Support for such segregation at indoor sporting events had risen from 40 percent in 1974 to 67 percent, while at public meetings, eating places, and train, plane, and bus terminals it rose from 57 to 62 percent, 50 to 57 percent, and 44 to 54 percent, respectively. Moreover, more than 50 percent of all people and 33 percent of smokers favored separate sections for smokers in offices and other workplaces. 39 Complete bans received less support than segregation, but it too was high and rising:

Two-thirds of all people and over half of all smokers would ban smoking in doctors’ or dentists’ waiting rooms. Over half of nonsmokers and smokers alike continue to favor a ban on smoking in libraries or museums, and in retail stores.

Support for a complete ban on smoking in theaters increased from 42% to 46%.
A complete ban at “indoor” sporting events went up from 13% to 30%.
The ban on smoking in all public meetings went up from 27% to 34%.
There is also support at the 30% to 20% level for a ban on smoking in city, state, or federal buildings, in taxis, on trains, planes, or buses, in barber or beauty shops, and in restaurants.

At a lower level of support, 17% of all persons would ban smoking in work places or offices, and 16% favor a complete ban in airplane terminals and in train or bus stations. 40

At a loss for any better arguments, TI President Horace Kornegay “likened the anti-smoking campaign to segregationist campaigns.” Speaking at the annual meeting in North Carolina of an organization of flue-cured tobacco growers and manufacturers—who may have been experiencing cognitive dissonance and wondering just what was wrong with race segregation—he charged that “[i]t seems incredible that many politicians who support and fought for civil rights are now willing to erect new barriers that divide our people into opposing camps on the basis of smoking or nonsmoking.” 41

By the time the Iowa legislature convened in 1975, two neighboring states had already enacted public smoking laws. In 1974 both South Dakota and Nebraska passed bills strikingly similar to Arizona’s in terms of coverage, the

gaping exception for designated smoking areas, and the penalty. Like the Arizona law, South Dakota’s covered elevators, indoor theaters, libraries, art museums, concert halls, and public buses, adding only elementary and secondary school buildings; it also made violations a misdemeanor subject to a fine ranging from $10 to $100. Acting one week later and declaring that smoking tobacco in any form was “dangerous to the health and welfare of each person,” the Nebraska legislature added hospital patient rooms and patient areas to the six public places covered by the Arizona law.

The 1974 state elections seated “the most equitably apportioned legislature in the nation, now controlled by Democrats who were younger, more urban, and more diverse occupationally than members of previous General Assemblies.” In 1975, with the Iowa House, in the wake of Watergate, dominated 61 to 39 by Democrats for the first time in a decade, Cusack filed a bill similar to his 1974 measure, this time dropping the references to public nuisance and health, but extending the so-called prohibition to “all halls and meeting places of governmental bodies...which by law are open to the public.” Again, the House took no action on it. But the 1975 session finally witnessed initial action on a Senate bill, which was carried over to the next session and passed by that chamber in 1976. In a Senate narrowly controlled by the Democrats 26 to 24, Senate File 106 was introduced by Democrat Kenneth Scott, a farmer, and 14 other Democrats (including Majority Leader George Kinley) and nine Republicans. The very brief bill was similar to Cusack’s without the extension to governmental places. The House took no action on the identical bill filed by Cedar Rapids Democrat and ex-smoker Jim Wells, who worked at Quaker

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43 1974 Nebraska Laws L.B. 600, at 327 (Mar. 1). The next year Nebraska repealed the fine. 1975 Nebraska Laws L.B. 75, at 160.


46 H.F. 193 (Feb. 11, 1975, by Cusack).


48 S.F. 106 (Feb. 4, 1975, by Scott et al.).

49 H.F. 32 (Jan. 21, 1975, by Wells).

Oats as a member of the Retail, Wholesale, Department Stores Union, and was motivated to file the bill by “seeing a man smoking in a closed elevator with children present.”

When the Senate Human Resources Committee recommended Scott’s bill on March 11—to the consternation of the Tobacco Institute, which reported it on the first page of its Newsletter under the rubric, “Nonsmoker Issue”—it worked from a prepared committee amendment, which expanded the scope of buildings in which smoking might be prohibited, while retaining in modified form the authority conferred on those in custody of covered places to permit smoking by making available “smoking areas adjacent to such facilities within the same structure....” The new no-smoking areas included waiting rooms, rest rooms, lobbies, and hallways of hospitals, clinics, and laboratories, as well as public buildings owned or controlled by state or local governments—all of which were subject to designation as smoking areas. Also covered were the waiting rooms of the offices of physicians, dentists, and other health care givers as well as the buildings or portions of buildings housing businesses engaged in the retail sale of tangible personal property or taxable services—“if the practitioner or group of practitioners in custody or control of the waiting room elect to be covered by the

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52James Lynch, “Former C.R. Lawmaker Recalls Smoking Ban Fight,” Gazette (Cedar Rapids), Apr. 10, 2008 (7A:1-3 at 2). In the immediate wake of the passage of a relatively comprehensive anti-public-smoking bill in 2008, the Cedar Rapids Gazette permitted Wells to celebrate his having gotten “the ball rolling” in 1975 (despite the fact that Cusack’s bill antedated his by a year). Although his bill “‘didn’t go anywhere,’” Wells remembered having “‘caught hell’” and “‘lost a lot of good friends....’” In 2008 Wally Horn (who as Senate majority leader in the 1990s killed anti-smoking rules for the Senate) recalled that in 1975 “[w]e just looked at Jim and said, “You’re ahead of your time.’” Why Horn, who did not smoke, found it necessary to add that “[w]hen it was over...there were no hard feelings,” is unclear. Id. At the signing ceremony for H.F. 2212 on April 15, 2008, Governor Chet Culver repeated the erroneous story about Wells—who was present and applauded—stating that the whole effort had begun in 1975 with Wells, who had filed one of the very first bills to regulate smoking. Http://www.radioiowa.com (audio file) (visited Apr. 15, 2008).

53[Senate Human Resources Committee, Minutes] at 1 (Mar. 11, 1975) (copy furnished by SHSI Des Moines).

54TIN, No. 120, Apr. 8, 1975, at 1, Bates No. TIMN0116776.

55Unfortunately, the committee amendment is lacking at the State Archives. Email from Assistant State Archivist Meaghan McCarthy to Marc Linder (Oct. 15, 2008). The text of the amendment is taken from the Senate Journal.
prohibition and penalties prescribed by this Act.\textsuperscript{56} Republican Senator Richard Ramsey (who ultimately voted against the bill in 1976) moved to strike this proviso, but nonsmoking Senator William Gluba of Davenport (a member of Ralph Nader’s Public Interest, Common Cause, Americans for Democratic Action, the ACLU, the American Academy of Political and Social Science, and a former member of the UAW),\textsuperscript{57} who strongly supported smoking regulation, argued that the amendment—which presumably would have made regulation more stringent by making coverage mandatory rather than elective—“would kill the bill,’’ and Ramsey’s killer amendment was defeated.\textsuperscript{58} The bill also prohibited smoking on railroads, buses, and airplanes providing departures originating in Iowa “except in those areas, not exceeding fifty percent of the passenger seating capacity, where smoking” was not prohibited by any other laws. Finally, the amended bill required those in custody or those on duty in the buildings to inform any violators they observed that smoking was prohibited by law.\textsuperscript{59} During committee discussion, Republican Senator Philip Hill, a lawyer for the Equitable Life Insurance Company of Iowa in Des Moines,\textsuperscript{60} opposed the bill, “even though he does not smoke and finds smoking objectionable,’’ because he was “opposed to the concept.” The committee nevertheless recommended passage as amended to the full Senate,\textsuperscript{61} which, however, failed to take up the bill before the session ended.

\textbf{The House of Representatives Takes a Tiny Step Toward Cleaning Its Own Air}

Continued adverse publicity and adoption of a wide scale of legislation that labels smoking a public nuisance and that insists that smoking infringes on rights and endangers the health of non-smokers could well lead to declining public acceptance of smoking and


\textsuperscript{57}\textit{Iowa Official Register: 1975-1976}, at 39 (56th No., Pam Peglow ed.).

\textsuperscript{58}[Senate Human Resources Committee, Minutes] at 1 (Mar. 11, 1975) (copy furnished by SHSI Des Moines). Presumably the killing would have been done at the behest of those health care givers who would not have elected to be covered.


\textsuperscript{60}\textit{Iowa Official Register: 1975-1976}, at 41 (56th No., Pam Peglow ed.).

\textsuperscript{61}[Senate Human Resources Committee, Minutes] at 1-2 (Mar. 11, 1975) (copy furnished by SHSI Des Moines).
increased feelings of guilt and embarrassment on the part of smokers. The end result could well be more and more people quitting smoking. This may represent the greatest danger of all.  

In the midst of these initial efforts at statewide partial public smoking bans in Iowa, in 1975 the House also undertook the first small step toward re-regulation in the legislature itself. After Democratic Representative Charles Poncy, a former AFSCME union local president, had proposed an amendment to the rules prohibiting smoking in committee rooms during meetings, 25-year-old Democrat John Patchett of Johnson County offered an amendment to the amendment prohibiting smoking in the House chamber while the House was in session, which in effect would have restored the rule that had been in effect from 1884 to 1923. Patchett’s amendment lost on a close non-record roll call vote of 41 to 46. The House then voted 63 to 24 on a roll call vote to adopt Poncy’s minimalist amendment. Recalling the debate at a distance of 32 years, Patchett described it as good-natured. Thenceforth according to Rule 49: “Smoking shall not be permitted in the House Committee Rooms while a committee is meeting.”

That not all smokers opposed the new rule was attested to by Democrat Robert Krause, who recalled more than three decades later that “I probably lit up” while Patchett was offering his amendment, but nevertheless voted for it afterwards.

The imaginability of actually banning smoking in public places had spread by this time even to local government—or at least to the mind of one city council member in Iowa. In April 1975, Dorothy Strohbehn, who served on the Council Bluffs city council from 1972 to 1984 and had engaged in such acts of anti-
smoking guerrilla warfare as hiding ashtrays during city council study sessions in small rooms and voting against issuing cigarette sales permits to hospitals, announced that she had requested the city legal department to draft an ordinance that would prohibit outright smoking in all public (i.e., local government) buildings, including city hall, the courthouse, library, and all fire stations. Motivating her proposal by reference to the council’s concern about air pollution as reflected in its recent consideration of an ordinance to ban backyard burning, Strohbehn added that she would be also be distributing copies of a newspaper article summarizing the results of a study that showed the harmful effects for nonsmokers of being in the same room with a smoker. The Tobacco Institute Newsletter may have celebrated the news that the Council Bluffs city council had declined to act on the proposed ban, but the mere fact that the initiative had emerged in one of the state’s larger cities suggested that the germinating nationwide revolt against unprotected exposure to tobacco smoke had not taken a detour around Iowa.

**Senate File 106 in 1976**

Of course there are those who are annoyed by cigarette smoke, just as there are those who object to heavy perfumes, garlic on the breath, barking dogs or any of a thousand other things. But there is no issue between smoker and nonsmoker which cannot be solved through mutual common courtesy and respect for the rights of others.

In 1976 the focus in the Iowa legislature shifted back to the statewide public smoking ban (S.F. 106), against which, significantly, the chief tobacco industry lobbyist, George Wilson, lobbied, formally representing the Iowa Association of Tobacco Distributors (IATD), of which he was the executive director. As of

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70 Telephone interview with Dorothy Strohbehn, Council Bluffs (Mar. 28, 2009).
72 TIN # 123, at 2 (May 20, 1975), Bates No. 500016465/6. Decades later Strohbehn, who was nonplussed that the Tobacco Institute had even been aware of her proposal, was unable to remember the precise fate of her proposal. Telephone interview with Dorothy Strohbehn, Council Bluffs (Mar. 28, 2009). The city clerk was unable to locate the minutes for the relevant council meeting at which the ordinance would have been considered. Telephone interview with Judith Ridgely, Council Bluffs (Mar. 29, 2009).
74 George A. Wilson [signed], Iowa Senate Lobbyist Registration, Form L-1 (Jan. 12,
1978, there were 18 states in which the tobacco industry shared lobbyists to deal with taxation and health, i.e., smoking restriction, issues; of these 18 lobbyists 14 were state tobacco distributor association executives.\textsuperscript{75} From a somewhat different perspective: in 20 states the Tobacco Institute and the Tobacco Tax Council retained the same lobbyist; in seven of them that lobbyist was the association director. Wilson was one of these seven.\textsuperscript{76}

In spite of having signed a lobbyist registration form stating that he lobbied against S.F. 106, many years later Wilson insisted that, while he had observed the progress of such bills, he had never in his entire lobbying career lobbied against an anti-smoking bill because his tobacco wholesaler-client never took a position on such bills in order not to dissipate political lobbying capital that could better have been spent on measures of greater importance to them (specifically, the Iowa Unfair Cigarette Sales Act). When asked whether wholesalers would not have opposed such laws because they would presumably have reduced smoking and therefore sales, Wilson offered the empirically erroneous and implausible justification that they did not seem to have had that impact wherever they had been enacted.\textsuperscript{77}

A more detailed but somewhat suspect account was offered by another tobacco lobbyist, who worked for and with Wilson from 1976 to 1980. Almost three decades later, Marcia Hellum, one of the first female lobbyists in Iowa, stated that the tobacco industry (including the Tobacco Institute) had never requested that she and/or Wilson lobby against any clean indoor air bill. Wilson, she insisted, had regarded opposition to such measures as “penny wise and pound foolish” because such restrictions (for example on elevators) had been around “forever” and had been implemented on account of health concerns. She sought to make Wilson’s attitude more comprehensible by embedding it in the context of his father’s having had to have almost his whole jaw removed as a result of

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\textsuperscript{75} Martin Haley Companies, Joint Liaison Committee (Sept. 14, 1978), Bates No. 502415693/6-7. Because “the health problem evolved later than the tax problem...Tax Council lobbyists were already at work on annual retainers, and the [Tobacco] Institute tended to utilize lobbyists as needed, on an hourly rate basis.” Martin Haley Companies, Joint Liaison Committee at 5 (Aug. 22, 1978), Bates No. 03678341/8.

\textsuperscript{76} State Lobbyist List (Dec. 1, 1978), Bates No. 03678300/7-8.

\textsuperscript{77} Telephone interview with George A. Wilson, Jr., Des Moines (Apr. 11, 2007). On the UCSA, see below ch. 26.
smoking-induced cancer (without, to be sure, explaining how this matrix was consistent with Wilson’s having smoked and represented the tobacco industry for half a century). When confronted with the fact that by 1978 the Tobacco Institute had for four years been orchestrating nationwide resistance to enactment of such laws, which transcended in scope and importance by far scattered ordinances banning smoking on elevators or in theaters (as a fire risk), Hellum could offer no explanation as to why the cigarette companies would not have pursued a similar strategy in Iowa.78 The trustworthiness of her account also suffered from the fact that despite her unequivocal denial that she had ever lobbied against an anti-public smoking law or that a client had ever requested her to do so, like Wilson, she too had signed a lobbyist registration form in 1976 stating that she was lobbying against that year’s anti-public smoking bill (S.F. 106) on behalf of the IATD.79

Hellum’s description of cigarette companies’ disinterest in fighting anti-public smoking legislation in Iowa is also difficult to reconcile with statements, squarely addressing the question of regulation of public smoking, made in 1978, just after the Iowa Clean Indoor Air Act had gone into effect, by a Brown & Williamson Tobacco Company official at an IATD convention to which Hellum had invited him. Although he conceded, speaking on behalf of the manufacturers, that “our buyer/seller realtionship [sic], by definition, necessitates a low-key but nevertheless hardheaded adversary relationship between our two groups,” he stressed that they had “much more in common than in conflict. And this is all to the good because our solidarity and comradary [sic] have never before been of more importance to our survival than today. I am referring, of course, to the fact that our industry now faces it’s [sic] greatest challenge—the Smoking and Health Issue [Public Smoking Issue—‘the right to smoke’]. This challenge is so serious and contains such far reaching consequences for everyone in this room tonight, that it will require all of the good will, cooperation and combined strengths of

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78Telephone interview with M. H. Sam Jacobson, Oregon (June 18, 2007). Under this name Hellum teaches at Willamette College of Law. She also characterized the materials that the Tobacco Institute had sent to her and Wilson in the 1970s as “amazing” in a “Neanderthalic sense” of demonstrating both a “head-in-the-sand” attitude and being written in the style of a Reader’s Digest sweepstakes advertisement offering no substantive information. Wilson’s like-named father had been governor of and U.S. senator from Iowa.

79Marcia L. Hellum, Iowa Senate Lobbyist Registration (Jan. 21, 1976) (copy furnished by SHSI DM). She also registered to lobby against H.F. 32, the identical bill filed in the House by Wells. Marcia L. Hellum, Iowa Senate Supplementary Lobbying Declaration Reporting Changes or Additions (Jan. 21, 1976) (copy furnished by SHSI DM).
every wholesaler and manufacturer in the industry...to stave off our determined and organized adversaries.”

After S.F. 106 had been returned to it, the Senate Human Resources Committee recommended the bill as amended by the committee. Very similar to the bill that the committee had recommended in 1975, it included two significant changes. First, it empowered those in custody of public cultural buildings to “permit smoking by persons seated at any table provided for the purpose of consuming food or beverages served or provided on the premises”; and second, it prohibited smoking in any room of a health care facility used for the recuperation or care of patients except in designated rooms, subject to the proviso that those in charge provided a sufficient number of nosmoking rooms to accommodate those who wanted them. Two members of the committee, which approved the amended bill by a vote of 10 to 1, stressed the public health dimensions. Non-smoking committee chairman, William Gluba, who called the evidence that smokers were affecting nonsmokers’ health “overwhelming,” said the bill boiled down to recognizing the rights of the 70 percent of the people in the country who did not smoke. Republican William Plymat, a key sponsor, counted only 16 smoking colleagues, whereas 34 did not smoke: “There are senators who are enduring the smoke of other senators and murmuring about it.” Plymat, who was “allergic” to tobacco smoke, pointed out that 27 states already had similar laws and neighboring Minnesota’s was “much tougher.” In contrast, the Iowa bill provided only a “friendly warning” for those smoking in “forbidden territory”: the law would work only if “people accepted regulations. Nobody is going on a witch-hunt.”

The five and a half hour Senate floor debate on March 3, 1976 underscored that amendment-studded S.F. 106 was a “toothless tiger”: not only did it authorize virtually all building operators to “exempt themselves” (and expose the nonsmoking users) by simply designating virtually all parts of their buildings smoking areas, but the minimum $5 fine made deterrence at the very least questionable. The three leaders of the “pro-smoking forces,” Democrat Richard Norpel and Republicans Willard Hansen and Calvin Hultman (a future majority and minority leader and, on his departure from the Senate in 1990, a Philip Morris lobbyist), were all cigar smokers. Hansen’s attempt to defeat the bill by

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80 [No author], “Iowa Speech” at 2, 4-5 (July 26, 1978), Bates No. 690145178/9/81-82. The words in square brackets were handwritten on the typescript.


persuading his colleagues that passage would bring about a prohibition of smoking in the Senate chamber—an odd argument since more than two-thirds did not smoke—was rejected by Scott, who noted that the Senate Rules Committee would resolve that issue.83

The first amendment filed in the debate was offered by Hultman. Although it struck out the entirety of the committee bill (itself an amendment), it was, with a few exceptions, remarkably similar to it. Chief among the changes was the further relaxation of the already quite permissive provision relating to public cultural buildings: Hultman would have empowered those in custody to “permit smoking by persons on the premises and...make available smoking areas in such facilities within the same structure where smoking is not prohibited by any statute, ordinance, or lawful rule of this state or any of its political subdivisions and where the words ‘smoking permitted’ are posted.”84 The Register characterized this amendment as “permitting smoking in all but posted no-smoking areas—the reverse of what the bill provides.”85 Hultman would also have further relaxed the provision relating to retail stores—which under the committee version were subject only to elective coverage—by making the failure to post and keep on display no-smoking signs a conclusive presumption that the custodian had not so elected. Hultman would also have discouraged enforcement by making the prosecuting witness liable for court costs and reasonable attorney fees for a defendant who was acquitted. And finally, the amendment would have authorized school boards to make rules to regulate (as an alternative to prohibiting) the use of tobacco by students. Hultman’s amendment lost on a close 21 to 26 vote, with 12 of the 13 senators who ultimately voted against the bill voting Yea.86

Then Democratic Senator Richard Norpel, an insurance agency owner from a northeast Iowa town on the Mississippi and strong opponent of smoking regulation, offered an amendment to strike the prohibition of smoking (subject to

87Iowa Official Register: 1975-1976, at 45 (56th No., Pam Peglow ed.). Norpel also operated a clothing business and was a real estate salesman.
Non-Smokers’ Struggle Against Tobacco Smoke Exposure in Iowa, 1970-82

designation of smoking areas) in public buildings owned or controlled by state or local government. It lost by a vote of 16 to 29 despite having secured the votes of the Democratic Majority Leader George Kinley and the Republican Minority Leader Clifton Lamborn. Republican Philip Hill, another senator who generally opposed smoking restrictions, offered an amendment to strike the prohibition on smoking in the offices of doctors and other health care providers (insofar as they elected coverage), which was adopted 26 to 18 against the votes of the bill’s strongest supporters. However, Hill’s other amendment, which would have eliminated the coverage of services establishments, lost 14 to 31.

At this point in the debate Hultman and Democrat Norman Rodgers tried to kill the bill by means of a tabling motion. The overwhelming 36 to 10 vote defeating the motion prefigured the final outcome. On back-to-back voice votes, the Senate adopted two amendments offered by the bill’s sponsor, Scott, to convert the electability of coverage by those in custody of retail stores into mandatory coverage subject to designation of smoking areas, and, even more importantly, to add similar coverage of restaurants.

Hultman then succeeded in securing an overwhelming majority (35 to 4) for his amendment creating a grace period in retail store facilities so that no convictions for unlawful smoking were permissible until conspicuous nosmoking signs had been posted for at least 30 days, but failed on a non-record roll-call vote of 15 to 25 to persuade a majority of senators to abolish the bill’s penalty provision altogether. On a 24 to 19 vote the bill was then further weakened by

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90 State of Iowa: 1976: Journal of the Senate: 1976 Regular Session Sixty-Sixth General Assembly 715-17 (Mar. 3) (S-5150A). The amendment was presumably drafted inartfully, since its adoption would have meant that smoking would have been prohibited in retail stores absolutely without any provision for designated smoking areas.
94 State of Iowa: 1976: Journal of the Senate: 1976 Regular Session Sixty-Sixth General Assembly 721 (Mar. 3) (S-5276). In between Hultman’s amendments, the extreme anti-regulationist Norpel unsuccessfully filed an amendment to require the furnishing of
making the 10 to 100 dollar penalty apply only to second and additional offenses and reducing the penalty for a first offense to five dollars, but Hultman’s amendment to impose all court costs, including reasonable attorneys fees, on the person filing charges if the accused was found not guilty lost 13 to 30. The most extensively debated amendment, at least in the Des Moines Register’s view, proposed allowing school districts to set aside rooms for teenage smokers. Offered by two Democrats from Cedar Rapids, it was purportedly designed to enable students to use the restroom without being exposed to smoke, although one of its proponents apparently recognized that it violated the minimum smoking age law. It failed by a vote of 20 to 23.

The lowest level of understanding of the underlying public health problems was displayed by Republican Willard Hansen, whose amendment would have required anyone entering public cultural buildings to “have adequately, and with such frequency, bathed his [sic] or herself so as to preclude body odors from emitting from his or her person or in the alternative made appropriate application of any artificial substances which produces [sic] an aroma sufficient to subjugate any body odors.” For good measure Hansen would also have required people entering such public buildings to have brushed their teeth or cleansed their dentures at least once a day and gargled commercially sold substances strong enough to “subjugate any unpleasant odors emitting from the oral cavity.” Hansen’s detour was promptly declared an impermissible frolic by the chair, who ruled that it was not germane and thus out of order.

As the debate drew to a close, Hultman, according to the Register, “tried to
Non-Smokers’ Struggle Against Tobacco Smoke Exposure in Iowa, 1970-82

shake senators” with an amendment legalizing marijuana, but withdrew it on discovering that it would not pass.¹⁰⁰ Norpel, too, withdrew his, which at first blush appeared merely whimsically or petutantly provocative: “Persons employed in or using the buildings mentioned in this section who do not smoke shall not enter areas designated as smoking areas.”¹⁰¹ Though Norpel, to a moral certainty, did not invest it with this deeper meaning, he inadvertently alluded to the reality that designated smoking areas would become de facto off limits to nonsmokers.

In the end the Senate passed S.F. 106 by a large non-party-line majority of 35 to 13 with 19 Democrats and 16 Republicans favoring and seven Republicans and six Democrats opposing it.¹⁰² As passed, S.F. 106 prohibited smoking in any elevator—coverage of which Philip Morris considered a “costless...compromise”¹⁰³—indoor theater, library, art museum, concert hall, auditorium, “or other similar facility open to the public,” subject to the exception that those in custody of the buildings housing them (except elevators) “may permit smoking by persons seated at any table provided for the purpose of consuming food or beverages served or provided on the premises and may make available smoking areas adjacent to such facilities within the same structure where the words ‘smoking permitted’ are posted.”¹⁰⁴ The bill also prohibited smoking in those portions of railroads, buses, and planes with departures originating in Iowa which were set aside as non-smoking areas by the person in control of the carrier, and required those areas to “be of sufficient capacity to accommodate all persons who do not wish to be seated in an smoking area.”¹⁰⁵ Subject to the exception for smoking areas designated by the person in custody, smoking was also prohibited in any waiting room, rest room, lobby, or hallway of any clinic, medical laboratory, hospital, or similar facility; the same

¹⁰⁰Dan Piller, “Iowa Senate OK’s Curb on Smoking in Public,” DMR, Mar. 4, 1976 (1A:6, 3A:5). The amendment would simply have added “marijuana” to the list of tobacco products the inhaling or exhaling the smoke of which or the possession or control of which in a lighted form defined “smoking” under S.F. 106. State of Iowa: 1976: Journal of the Senate: 1976 Regular Session Sixty-Sixth General Assembly 724 (Mar. 3) (S-5283).


¹⁰³[Philip Morris], Project Down Under—Group Presentation to Senior Management at 1, 3 (June 26, 1987), Bates No. 2021502671/3.

¹⁰⁴S.F. 106, § 2(1) (as amended and passed by the Senate Mar. 3, 1976).

¹⁰⁵S.F. 106, § 2(2) (as amended and passed by the Senate Mar. 3, 1976).
arrangement applied to any room in such facilities used for patient care or recuperation as well as in a health care facility, except that the person in custody or control could designate individual rooms as smoking rooms, provided that that person also provided “a sufficient number of rooms in which smoking is not permitted to accommodate those persons who desire such rooms.”

Subject to the designation of smoking areas by the controlling governmental body, officer, or agency, smoking was also prohibited in any public building owned or under the control of the State of Iowa or any of its political subdivisions. The prohibition of smoking in any building or portion thereof occupied by any business engaged in retail sale of tangible personal property or taxable services was subject not only to the designation of smoking areas, but also to the proviso of a grace period of 30 days after conspicuous “smoking prohibited by law” signs had been posted.

Smoking, except in designated areas, was also prohibited in restaurants. The enforcement scheme was very lax: the person in custody of the facility or any employee on duty “who observes any person smoking in that facility in violation of this Act shall inform that person that smoking is prohibited by law in that facility or that area....” Similarly, the penalty, which covered anyone who smoked in a no-smoking area or failed to post the required no-smoking signs was a mere five dollars for a first offense and $10 to $100 for additional offenses.

Despite the clear Senate majority, the House considered neither S.F. 106 nor the rather expansive H.F. 1130 filed by Wells and 21 other representatives in 1976, which tracked the 1975 Minnesota law. After the failure to debate S.F.

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111 S.F. 106, § 6 (as amended and passed by the Senate Mar. 3, 1976). In fact, because the penalty provision was incompetently drafted, using “and” rather than “or,” it literally but nonsensically applied only to a person who committed both offenses. Oddly, this provision, which was not in the committee bill or amendment, was added by floor amendment offered by one of the most extreme opponents of regulation, Willard Hansen, and adopted by a vote of 38 to 10, most of the bill’s leading supporters, including its sponsor, Scott, voting Yea. State of Iowa: 1976: Journal of the Senate: 1976 Regular Session Sixty-Sixth General Assembly 725 (Mar. 3) (S-5284).
112 H.F. 1130 (Jan. 23, 1976, by Wells). This bill was the source of future Iowa law by extending coverage to restaurants, retail stores, offices, educational facilities, and hospitals, while excluding private enclosed offices occupied exclusively by smokers even
106 in the House in 1976, representatives by 1977 were hopeful that chances for passage in the new general assembly were greater, as Wells put it, “‘if only because [House Speaker Dale] Cochran has quit smoking.’” because his opposition had “‘had a lot to do with its failure....’”113 A few days later, Wells and 22 other representatives filed H.F. 285, a bill that was virtually identical to S.F. 106, but the House took no action on it.114

The Avalanche of State Anti-Smoking Bills in the Second Half of the 1970s and Cigarette Manufacturers’ Increasing Alarm

Although no element as found in cigarette smoke has ever been demonstrated to be the cause of any human disease, anti-smoking groups have bombarded the public with an unceasing attack on cigarettes for more than two decades. ... The anti-tobacco fanatics are now attempting to portray smokers as social outcasts. They are seeking not only social ostracism, but laws banning smoking in an immense variety of public places. In a nation built on a foundation of personal freedom and individual rights, such an attempt to control public behavior through bureaucratic compulsion should be repulsive to every citizen.115

At the close of the 1976 state legislative sessions, Tobacco Institute President Kornegay, in a possibly face-saving mode, tried to lower the state of alarm among the members of TI’s executive committee by stressing that, although since 1972 31 states had enacted some sort of legislation relating to the restriction of

though they might be visited by nonsmokers (§ 4); it was also forward-looking in excluding factories, warehouses, and similar workplaces not usually visited by the general public (§ 5), as well as in limiting the mandated use of “physical barriers and ventilation systems...to minimize the toxic effect of smoke in adjacent nonsmoking areas” to “existing” ones (§ 6). Not adopted by later enactment were: its proviso that the labor and public health commissioners establish rules to restrict or prohibit smoking in workplaces where close proximity of workers or inadequate ventilation caused smoke pollution detrimental to nonsmoking employees’ health and comfort (§ 5); and the requirement that proprietors “make reasonable efforts to prevent smoking in prohibited areas by...[a]rranging seating to provide a smoke-free area” and “[a]sking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke” (§ 6).

Non-Smokers’ Struggle Against Tobacco Smoke Exposure in Iowa, 1970-82

smoking, only of 18 could it “be said that there are in varying degrees troublesome laws affecting our industry.” And even among these 18 the variation ranged from Oregon’s segregation in public meetings to Minnesota’s coverage of a “multitude of situations.” The other 13 failed to meet the troublemaking threshold because they either applied only to elevators, certain forms of transportation, or the House chambers during sessions, or lacked enforcement or administrative provisions.¹¹⁶

Taking stock in a much more pessimistic and realistic vein, R. J. Reynolds—which classified only eight of the 31 states as imposing “[t]oken [r]estrictions”¹¹⁷—identified an undeniably upward trajectory of anti-smoking groups’ initiatives: whereas in 1971 and 1972 only two bills were enacted (California’s mandate to all public carriers of space for nonsmokers and New Jersey’s smoking ban in public transit vehicles), in 1973 five of 29 bills were enacted in 18 states, in 1974 six of 65 in 25 states, in 1975 20 of 160 bills in 48 states, and in 1976 seven of 161 in 39 states. Extrapolating, Reynolds predicted that in 1977 the “growing militancy of the anti-tobacco forces and the increasing self-consciousness among smokers will probably result in the introduction of bills restricting smoking in all of the 21 states that do not have no-smoking laws on the books.” At 80 percent it rated the probability that Iowa would enact the model bill circulated to state legislators in the wake of the adoption of the Nonsmokers’ Bill of Rights in Philadelphia in January 1974 by the National Interagency Clearinghouse on Smoking and Health, but Reynolds did not view the probability of passage of a measure as stringent as Minnesota’s as exceeding 50 percent in any state.¹¹⁸

Nevertheless, R. J. Reynolds not only projected 1977 to be “the most difficult year the Industry has yet had to contend with,” but lamented that the “Tobacco Institute still does not have the resources they need to respond fully to the

¹¹⁶Status of Restrictive Legislation as of 9/16/76 (Remarks delivered to Executive Committee of the Tobacco Institute by Horace R. Kornegay, President and Executive Director), Bates No. 501800442.


¹¹⁸James]. S. Dowdell, “Smoking Restrictions” at 4-5 (Nov. 15, 1976), Bates No. 500656976/79-80. For later data showing a somewhat different number of bills introduced and passed in the 1970s, see Tobacco Institute, Stateline (Dec. 31, 1986), Bates No. 2023551362. The model bill prohibited smoking in elevators, indoor theaters, concert halls, museums, and public transit vehicles, and required segregation of smokers in government buildings, health care institutions, and other indoor places, including restaurants, in which the general public assembled. James]. S. Dowdell, “Smoking Restrictions” at 5 (Nov. 15, 1976), Bates No. 500656976/80.
numerous bills to restrict smoking that will be introduced.” In particular, the need for scientific and medical witnesses to testify before state legislative committees would be commensurately greater than ever before, but the company hoped that the Institute’s newly retained medical director and its law firm (Shook, Hardy & Bacon) would find the witnesses “so urgently needed to counter the very serious though unsupported charges that are increasingly influencing legislators to believe that smoking constitutes a health hazard to nonsmokers.” As for 1978 and beyond, all that Reynolds could foresee was the likelihood of the increasing intensity and scope of anti-smoking legislative intervention, which could be defeated only if the Institute launched a “concerted all-out effort to mobilize smokers to speak out for their right to smoke.” If not, and if the industry was also unable to prove the health hazards of smoking to be unfounded, then, the company’s director of corporate affairs conceded, at least internally, that “the objective of the anti-tobacco forces to ban all smoking in public, and, eventually, bring about complete prohibition of smoking, may, in the long run, be accomplished.”

The sixth biennial “Study of Public Attitudes Toward Cigarette Smoking and the Tobacco Industry,” which TI paid Roper to conduct in March 1978, brought even worse tidings for the industry. The central implication of Roper’s finding was that “anti-smoking forces...are well on the way to making the same sale about the effects of smoking on the non-smoker as they have already made with respect to the effects on the smoker.” The ominous fact that more than two-thirds of non-smokers and even almost half of all smokers believed that smoking was hazardous to non-smokers’ health was “the most dangerous development to the viability of the tobacco industry that has yet occurred.” As anti-smoking groups succeeded in convincing non-smokers of the health consequences of exposure to smokers’ smoke, “the pressure for segregated facilities,” which were already backed by “majority sentiment,” would “change from a ripple to a tide.” Indeed, Roper already foresaw the possibility that support for segregation could turn into “support for a total ban.” With 69 percent (up from 57 percent in 1974) of non-smokers and 40 percent (up from 30 percent) of smokers believing that non-smokers were harmed by cigarette smoke, Roper concluded that its customer’s battle to convince the public that passive smoking was not dangerous might already have been lost (although it nevertheless argued that “[t]he strategic and

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119J[ames]. S. Dowdell, “Smoking Restrictions” at 6-7 (Nov. 15, 1976), Bates No. 500656976/81-82.

long run antidote to the passive smoking issue is...developing and widely publicizing clear-cut, credible evidence” that it was not harmful). Especially troubling to the cigarette oligopoly must have been the finding that its pet cure-all—namely, that courtesy not legislation was the answer—was the argument in opposition to anti-smoking laws that had registered the greatest loss of support since the 1976 survey. Significantly, a majority of those surveyed approved of segregating smokers in every public place about which they were asked and was larger than in 1976: trains, airplanes, and buses (91 up from 83 percent); theaters (83/81 percent); eating places (73/57 percent); indoor sporting events (73/67 percent); public meetings (67/62 percent); train, plane, bus stations (62/54 percent); workplaces and offices (61/52 percent). Support for total bans was lower, but for a number of locations nevertheless impressively high: doctors’ and dentists’ waiting rooms (69/65 percent); retail stores (55/52 percent). That the figures for some other locations—for example, trains, planes and buses (26/25 percent), eating places (23/22 percent), and work place and offices (17/17 percent)—were significantly lower, may have merely been an arbitrary and artificial function of the sequence of the questions: if, Roper conceded, it had “asked about banning before mentioning the acceptable alternative of segregation, the sentiment for banning might have been substantially higher.”

Such public attitudes fully undergirded the public policies embodied in the avalanche of proposed and enacted state-level anti-smoking legislation. The mid-1970s, to the chagrin of the Tobacco Merchants Association of the U.S., which was, as always, monitoring, witnessed an explosive increase in the volume of proposed state-level anti-smoking/tobacco legislation: whereas between 1950 and 1970 somewhat more than 500 restrictive bills were filed (or about 24 per year), and for the overlapping period of 1966 to 1974 the corresponding figures were 470 and 52, a total of 386 bills or an annual average of 129 were introduced from 1975 to 1977. The average number of annual enactments also rose sharply from two to five to 14 for the three periods.

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of the 1970s bills and laws made the quantitative growth all the more impressive: between 1975 and 1977, when some type of anti-tobacco bills was filed in all 50 state legislatures, 84 percent of the bills and 88 percent of enactments concerned restricting smoking to certain places or areas. Little wonder that TMA warned of an “uphill legislative battle on the State level” for 1978.125 (Ironically, a decade later a Tobacco Institute that was incapable of admitting even internally that it was trapped in an endgame, described its deteriorating situation this way: “What was considered an onerous bill in 1970, or even 1980, might now be viewed as a reasonable approach even by the industry to a typical public smoking bill introduced in 1988.”)126

By the end of 1977, according to an inclusive listing by TMA, 33 states had enacted 52 separate measures restricting smoking, which ranged from Kentucky’s ban on school property (exempting adult employees in assigned rooms) to Minnesota’s and Utah’s “comprehensive” laws, which “effectively restrict smoking in any public place, with the exception of bars.”127 In considering these initial regimes, it is crucial to recall that, as TMA pointed out, like their counterparts on airplanes, they provided very little if any protection from secondhand smoke exposure because, “[w]ith the exception of transit vehicles, elevators, and some cultural areas, where the designation of a smoking area would be difficult, the vast majority of enactments...[merely] restrict smoking to designated areas” rather than banning it.128 Classifying the statutes more closely, TMA identified six states that restricted smoking in business or work places, 19 in cultural places, seven in indoor sports arenas, four in restaurants (though two applied only to restaurants with 50 or more seats), five in food stores, 22 in health
facilities, 17 in public/government meetings, and 26 in transit vehicles.\footnote{129}

**Senate File 2022 in 1978: Iowa Finally Enacts Very Limited Regulation of Public Smoking**

Although Iowa belonged to the definite minority of states that had as yet failed to take any statewide action to limit public smoking, momentum began mounting when, at the beginning of the 1978 session, the Register’s Iowa Poll revealed that of adult Iowans (65 percent of whom did not smoke) 64 percent thought that persons who smoked should be legally restricted to limited areas in restaurants, theaters, and auditorium lobbies, and 57 percent agreed about limiting smoking in government buildings. Even 47, 53, and 46 percent of smokers agreed with the same proposition regarding restaurants, lobbies, and government buildings, respectively. From these responses the Register concluded that “by overwhelming margins, the nonsmokers want an Iowa version of the Minnesota no-smoking law, which limits smoking to specified areas of most public places.” To be sure, the heterogeneity of anti-smoking positions, which lagged behind even the rudimentary scientific knowledge of the day, was reflected in the fact that 35 percent of non-smokers did not even object to others smoking in the same car.\footnote{130}

On January 10, two days after the poll’s release, Democrat Joan Orr (a member of Common Cause, the Iowa Civil Liberties Union, and the People’s Unitarian Church)\footnote{131} and a bipartisan group of 24 other senators introduced Senate File 2022,\footnote{132} which was virtually a copy of S.F. 106 as passed by the Senate in 1976. The next issue of the Tobacco Institute Newsletter reported that


\footnote{130}Arnold Garson and James Flansburg, “Iowans Back Public Curbs on Smoking,” DMR, Jan. 8, 1978 (1A:6, 11A:1-2). Although the survey questions were propounded as stated in the text, the graphic in the article mistakenly stated the question as whether “you favor no smoking areas....” The survey provided no underlying demographic explanation of the finding that 44 percent of Democrats but only 25 percent of Republicans smoked.


\footnote{132}S.F. 2022 (Jan. 10, 1978, by Orr).
Iowa was one of four states in which “[b]road smoking restriction bills” had been introduced.\textsuperscript{133}

On January 11, 1978, the day after S.F. 2022’s introduction in the Senate—which Democrats continued to control 26 to 24\textsuperscript{134}—Republican Governor Robert Ray included in the recommendations accompanying his state of the state address to the legislature this very modest proposal: “Anti-Smoking: Since two-thirds of Iowa’s adults choose not to smoke, government can be of real service by restricting smoking to designated areas in government buildings. In addition, this can spur the private sector to take similar action voluntarily.”\textsuperscript{135} Four weeks later identical bills were filed by 19 Republicans in the House and 11 Republicans in the Senate, which incorporated Ray’s recommendation by merely prohibiting smoking—subject to a “limited number” of designated smoking areas—in public buildings owned by state or local government, but neither chamber took action on them.\textsuperscript{136}

January 11 also witnessed a federal intervention that created a substantive textual context against which Iowa’s anti-smoking legislative activity must be evaluated. The Carter administration’s secretary of Health, Education, and Welfare, Joseph Califano, Jr., (who two years earlier had, at his 11-year-old son’s urging, quit smoking),\textsuperscript{137} announced, to great publicistic fanfare, a “major initiative aimed at discouraging Americans from smoking....” As one component of this program Califano encouraged the states to strengthen their smoking laws and regulations or, if they lacked such, to introduce bills to enact them. In that connection Califano sent governors HEW’s model clean indoor air law, which he characterized as “representing some of the best elements of existing State legislation”\textsuperscript{138}—such as Minnesota’s and Alaska’s.\textsuperscript{139} Califano’s program also

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\textsuperscript{133} TIN, No. 190, Jan. 24, 1978, at 7, Bates No. 500065086/91
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\textsuperscript{134} Frank Stork and Cynthia Clingan, \textit{The Iowa General Assembly: Our Legislative Heritage 1846-1980}, at 8 (n.d.).
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\textsuperscript{135} \textit{Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 457-54 (Jan. 11).}
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\textsuperscript{136} H.F. 2153 (Feb. 8, 1978, by Hansen and 18 others); S.F. 2098 (Feb. 8, 1978, by Murray and 10 others).
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\textsuperscript{138} Joseph Califano, Jr. to James Hunt, Jr. (Governor of North Carolina) (Jan. 11, 1978), Bates T136310457.
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\textsuperscript{139} Address by Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare, Before the National Interagency Council on Smoking and Health, Shoreham Hotel,
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included a new smoking policy for HEW’s own buildings, which “bans smoking
in conference rooms, classrooms, auditoriums, elevators and shuttle vehicles.
Within practical limits, the work areas of smokers and non-smokers will be
separate and physically distinct. In recognition of the rights of individuals who
wish to continue to smoke, smoking areas will be established. But the general
rule will be ‘No Smoking—except in smoking areas.’ Most importantly, it will
be the policy of the Department that smoking in shared work areas will be
prohibited at the request of non-smokers whose health is affected.”

To be sure, the Carter administration immediately signaled its rejection of this approach in
the form of an official White House press release the same day by Dr. Peter
Bourne, Carter’s special assistant for health issues, stating his “concern over the
effect of...proposals such as the prohibition of cigarettes in a number of places.”
Although he conceded that “people...should receive notice of whether proprietors
and employers allow smoking” and that “[t]hose who are offended by smoking
should be separated from those who are not so offended,” Bourne insisted that
“the ultimate effort of government...should not be to make outcasts of smokers.
Such efforts are doomed to failure.”

HEW’s Model State Clean Indoor Air Act prohibited smoking in public
vehicles or indoor public places (broadly defined to include “any enclosed area”
while it was open to the general public, parts of public schools open to students,
and portions of health facilities in which patients were permitted) except in
designated smoking areas. The power to designate of an owner or other person
in charge of a public place or vehicle was subject to two provisos: (1) that
“reasonably substantial areas” of these places or vehicles were “not designated
as smoking areas”; and (2) “existing physical barriers and ventilation systems are

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Washington, D.C. at 17 (Jan. 11, 1978), Bates No. 508083171/87. It is unclear why HEW
deemed the Alaska statute to be a model since it declared that with regard to covered
places except means of transportation and laboratory waiting rooms “reasonable smoking
areas must be provided, unless prohibited for the protection of the public safety or the
protection of and preservation of the building and its contents” and that “[t]o the extent
practicable, the state shall require its lessees or sublessees to provide separate smoking
areas.” 1975 Alaska Laws ch. 125, § 18.35.320(a) and (b).

140 Address by Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare,
Before the National Interagency Council on Smoking and Health, Shoreham Hotel,

141 The White House, Statement of Dr. Peter Bourne, Special Assistant to the President
for Health Issues (Jan. 11, 1978), Bates No. 89781455.

142 Model State Clean Indoor Air Act, § 3(2), Bates No. T136310459.

143 Model State Clean Indoor Air Act, § 4(a) and (b), Bates No. T136310459/60.
adequate to minimize the deleterious effects of smoking on adjacent areas which are not designated as smoking areas.”144 These two conditions in fact imposed more stringent restrictions on owners’ discretion than the Minnesota Clean Indoor Air Act because: (1) requiring “reasonably substantial” nosmoking areas precluded owners, for example, from designating an entire restaurant as smoking-permitted except for one or two tables as was not uncommon in Minnesota; and (2) unlike MCIAA, which merely provided that “existing physical barriers and ventilation shall be used to minimize the toxic effect of smoke in adjacent nonsmoking areas”145—meaning, presumably, that however much minimization they achieved was legally acceptable—under HEW’s Model Act owners’ designation of smoking areas was not lawful unless the existing barriers and ventilation were adequate to the objective of achieving the minimization of smoking’s deleterious effects on adjacent nonsmoking areas. The Model Act also went beyond MCIAA, which required owners to ask smoking violators to refrain from smoking only if a customer or employee requested such intercession, by making this duty absolute and unconditional.146 And finally, HEW’s Model Act was more capacious than MCIAA with regard to the coverage of workplaces by virtue of requiring the state labor department to adopt regulations to restrict smoking in workplaces “(1) in which smoking, alone or in combination with environmental substances, deleteriously affects the health or comfort of workers who do not smoke; or (2) if a worker has submitted a written request that smoking be restricted.”147

In early March the Iowa Senate Human Resources Committee defeated by a vote of 9 to 3 a motion by Republican Rolf Craft, an economics professor, to remove retail stores and restaurants from the scope of public places in which smoking was prohibited and defeated by a vote of 7 to 5 a separate motion by Republican John Murray to remove retail stores. The committee then voted 9 to 3 to specify that jurisdiction for enforcement be in magistrate court. Finally, it voted 11 to 1 to recommend the bill’s passage as amended.148

The Senate debate on S.F. 2022 took place on March 21. Just how little electoral room was available for enacting a comprehensive anti-smoking law was signaled at the outset when 12 Republicans and one Democrat offered as an amendment the aforementioned gubernatorially inspired bill that would have

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144 Model State Clean Indoor Air Act, § 4(b)(1) and (2), Bates No. TI36310459/60.
145 1975 Minn. Laws ch. 211, § 5, at 633, 634. On MCIAA, see above ch. 24.
146 Model State Clean Indoor Air Act, § 5(3), Bates No. TI36310459/61.
147 Model State Clean Indoor Air Act, § 7(a), Bates No. TI36310459/61.
148 Senate Committee on Human Resources, Mar. 7, 1978, Minutes at 10 (copy provided by SHSI DM); Journal of the Senate: 1978: Regular Session Sixty-Seventh General Assembly 474, 484 (Mar. 7-8).
pared back smoking prohibitions to encompass only public buildings owned by state or local government. Republican Edgar Holden, who sought support for the amendment by noting that Governor Ray wanted it, based his advocacy on using publicly owned buildings as “‘the guinea pig’” for a change: if it worked, the legislature could then expand the prohibition to privately owned buildings. Orr, S.F. 2022’s floor manager, urged adoption of the unamended bill on the grounds that nonsmokers’ rights had to be protected because smoking contributed to lung cancer, chronic bronchitis, and emphysema. Avoiding that issue and seeking to shift the focus of the debate, Republican James Briles opposed the broader scope of the bill because it “would work against free enterprise by driving out of business the operators of small establishments who are forced to adhere to no-smoking regulations.” Imparting a more subtle twist to the argument, Holden, a real estate developer and telephone company president, insisted that the business owner “should be able to make the decision on whether to ban smoking in any area.” Orr’s counter-argument, while trenchantly accurate, was, apparently unbeknownst to her, equally destructive of the rationale for the massive exception embedded in her own bill (and still basic to the law three decades later): “[J]ust because you’re the proprietor of a business doesn’t mean you have the right to pollute somebody who doesn’t want to be polluted.” Ultimately the amendment lost on a tie vote of 25 to 25 because two Republicans who had sponsored the amendment withdrew their support.

After Orr had barely succeeded in securing a 26 to 23 vote in favor of her amendment to include waiting rooms in airports and railroad and bus stations in the prohibition, Holden, who had a reputation for being very pro-business,

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149 *Journal of the Senate: 1978: Regular Session Sixty-Seventh General Assembly* 612, 1963-64 (Mar. 21) (S-5349). The one Democrat was Louis Culver, who had not been among the original supporters of S.F. 2098. Before the vote on this amendment the Senate adopted an amendment to it that added the provision in S.F. 2022 that prohibited smoking in rooms in health care facilities used for patient care or recuperation. *Id.* at 612, 1977-78 (S-5386).


153 Email from former Senator Beverly Hannon (Mar. 7, 2007).
offered his crucial amendment—which he had already filed two months earlier on January 18, at the same time that he filed another amendment to limit coverage to government-owned buildings—to gut the bill by excluding retail stores and restaurants. Coverage of these locations, which, according to the *Register*, “drew the most debate,” would, Holden insisted, create an impossible no-win enforcement situation for business owners inasmuch as smokers would be angry if they could not smoke where they wanted to and, conversely, nonsmokers would be angry if smokers smoked in nosmoking areas. His fellow Republican Briles, who persistently voted against anti-smoking bills, alleged that the bill “would work against free enterprise by driving out of business the operators of small establishments who are forced to adhere to no-smoking regulations.” Another Republican, Philip Hill, cast aspersions on the model Minnesota law by reporting that one time he was seated for half an hour in the nosmoking section of a large restaurant in Minneapolis without being served, and only when he moved to the smoking section did a waitress take his order, thus “subtly” using “starvation” to motivate customers to ignore the law. In contrast, Republican Roger Shaff, an assistant minority leader, offered a more personal reason for supporting the bill: “He noted that restaurants now often posted signs saying ‘no shirt, no shoes, no food’ and said, ‘I’d rather sit next to someone with no shoes than someone smoking.’”

The 30 to 17 vote to exclude these two essential locations of any comprehensive regulation of secondhand smoke exposure revealed how minimal the Iowa legislature’s commitment to this burgeoning public health movement was as yet. Broken down by party, the vote showed a significant difference: while 17 Republicans voted for reduced coverage and only five against, Democrats split 13 to 12. Nevertheless, the fact that even Democrats could not

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154 *Journal of the Senate: 1978: Regular Session Sixty-Seventh General Assembly* 613, 1806 (Mar. 21) (S-5027). Holden withdrew the amendment to confine coverage to government buildings as soon as the aforementioned similar amendment had been defeated 25 to 25. *Journal of the Senate: 1978: Regular Session Sixty-Seventh General Assembly* 612, 1806 (Mar. 21) (S-5026).


muster a small majority for comprehensive coverage prefigured the persistent backwardness that would characterize Iowa’s anti-smoking legislation for the next 30 years. On the final vote the diluted bill passed 39 to 8, the no votes being equally divided between Republicans and Democrats.158

The Iowa debate over smoking in restaurants was but one of many occurring in state legislatures in the 1970s. Indeed, by the middle of the decade restaurants had become such a contentious site of struggle over exposure of nonsmokers to smoke that many state restaurant associations urged their members to create nosmoking sections in order to forestall further legislative intervention, advocated by anti-smoking groups such as the American Cancer Society and American Heart Association, that might require physical barriers, installation of ventilation systems, or reserving a fixed proportion of tables for nonsmokers. But the debate took on a different shape in Iowa, where, the Nation’s Restaurant News declared later in 1978, “the state restaurant association helped deliver a resounding defeat to a recent smoking bill” and “there has been no effort to enlist voluntary support of no-smoking sections [sic; must be “sections”].”159

Apart from pointing out that more and more non-smokers—who by this time outnumbered smokers by three to one—were recognizing secondhand exposure as a health hazard, a legislative analysis prepared by the National Restaurant Association in 1979 listed among the non-obvious arguments that proponents had adduced in favor of applying nosmoking laws to restaurants that: a “non-smoker doesn’t linger over a second cup of coffee and a cigarette, so business in the special section does 30% more business than the rest of the restaurant”; under a smoking ban “restaurants could reduce their ventilation requirements and thus conserve energy”; and exemption of restaurants from smoking ban laws “would bring charges of unequal enforcement from businesses not exempted.” On the other hand, arguments advanced by opponents of no-smoking laws included the following: many owners had never received a complaint from a customer; owners were “annoyed” by problems associated with creating nosmoking sections; bans would place owners in “the embarrassing position of becoming policemen”; according to a 1976 survey conducted in Minnesota (where the country’s most comprehensive law had gone into effect a year earlier), 80 percent of “restaurant


diners couldn’t care less whether smoke gets in their eyes or lungs while eating”; anti-public smoking legislation imposed “high economic costs...for the redesign of dining areas, installation of dual air circulation systems, and...other necessary adjustments”; and there was no proof that tobacco smoke injured nonsmokers.\160\n
Despite the large majority that S.F. 2022 garnered in the Senate, the Register warned that it was “expected to face rough going in the House where similar proposals to restrict smoking have become bottled up in committees dominated by smokers.”\161\ The chair (W. R. Bill Monroe) and vice-chair (Jack Woods) of the House committee to which the bill was referred, State Government,\162\ were both heavy smokers.\163\ At the committee meeting on April 6, Wells’s aforementioned bill, H.F. 285, was taken up, but instead the committee decided to consider S.F. 2022. Democrat Diane Brandt then distributed an amendment that she had filed a week earlier\164\ reincorporating coverage of restaurants (which the Senate bill had included until it was struck on a floor vote) and mandating the provision of nosmoking areas in them.\165\ The minutes disclosed that chairman Monroe “was in doubt\166”—a reaction that committee member John Patchett three

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\160\ Libby Hendrix [National Restaurant Association], “Smoking vs. Non-Smoking: A Legislative Analysis” (Aug. 1979), Bates No. TI22030128/34-5.

\161\ Bonnie Wittenburg, “Senate Passes Curb on Public Smoking in Iowa,” DMR, Mar. 22, 1978 (A1:1-2, at 5A:1). The most recent bill to have suffered that fate was presumably the aforementioned H.F. 285, which Wells had filed in 1977.

\162\ Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 1453 (Apr. 6).

\163\ Email from John Patchett to Marc Linder (Mar. 24, 2007). Patchett served on the committee with them in 1978. In 1985, Woods filed several weakening amendments to H.F. 102, which was designed to strengthen the anti-public smoking law. See below ch. 26. For example, he proposed to exempt the public areas of bus and air terminals. H-3265 and H-3266 (Mar. 6, 1985) (inserted into the bill book at the University of Iowa Law Library). In 1986, he filed amendments to exclude all restaurants and to authorize owners to designate entire public places as no smoking areas. H-5021 (Jan. 20, 1986) and H-5039 (Jan. 23, 1986) (inserted into the bill book at the University of Iowa Law Library).

\164\ Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 1:1313 (Apr. 6), and 2:3067.

\165\ Minutes, [House] State Government [Committee], Apr. 6, 1978, 12:15 p.m. at 2 (copy furnished by SHSI, DM). The minutes did not give the text of Brandt’s amendment, which was, however, included in Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 1454-55 (Apr. 6) (H-5951). For reference to Brandt’s withdrawal of her freestanding identical amendment, see below.

\166\ Minutes, [House] State Government [Committee], Apr. 6, 1978, 12:15 p.m. at 2 (copy furnished by SHSI, DM).
Non-Smokers’ Struggle Against Tobacco Smoke Exposure in Iowa, 1970-82

decades later interpreted as perhaps meaning that because Monroe opposed the bill, “he was just trying to avoid it.” 167 Adoption of the restaurant amendment on a show of hands by a vote of 8 to 6 clearly demonstrated that, being closely divided, the committee was hardly inclined to give the militant anti-smokers carte blanche. The remaining votes underscored this virtual stalemate. The motion by Democrat Bob Arnould, another smoker, to defer the bill until the next meeting—which could be taken as an effort to kill it—was opposed by Patchett; deferral barely lost on a seven to nine vote. 168

At this point the proceedings took on a entirely different cast as another smoker, 169 the committee’s ranking Republican, Vern Harvey—a housebuilding businessman who had been a helicopter pilot in the Vietnam War and awarded a Bronze Star, and left the Army as a captain 170 —distributed his amendment, which added “where designated,” “except,” and “no” in several places in the coverage section, inverting the default position, as it were, so that instead of smoking’s being prohibited everywhere, unless owners designated areas as smoking, areas became nosmoking only where owners so designated them. On a voice vote the Ayes had it, and the amendment was adopted, 171 which eliminated the bill’s most far-reaching element. The disputed nature of this transformation was visibly on display in the motion for reconsideration, which just lost by a vote of 9 to 10 on a show of hands. 172 (In case clarification was necessary, three weeks later chairman Monroe unambiguously explained the purpose of Harvey’s amendment during the House floor debate by observing that, without the amendment to

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167 Email from John Patchett to Marc Linder (Mar. 30, 2007).
168 Minutes, [House] State Government [Committee], Apr. 6, 1978, 12:15 p.m. at 2 (copy furnished by SHSI, DM).
169 His fellow member Patchett was “[p]retty sure Vern smoked.” Email from John Patchett to Marc Linder (Mar. 30, 2007).
171 Minutes, [House] State Government [Committee], Apr. 6, 1978, 12:15 p.m. at 3 (copy furnished by SHSI, DM). Curiously, the text of the amendment in Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 1454-55 (Apr. 6) (H-5951), included “except” in three places it was lacking in Harvey’s amendment. The description by David Yepsen, “Betting Bill Back on Track After Quick Maneuver,” DMR, Apr. 7, 1978 (1A:5-6, at 5A:1)—“Instead of creating smoking areas, the bill would create ‘no smoking’ areas”—failed to capture the essence of the change: instead of creating a presumption that all areas were non-smoking unless the owner designated smoking areas, the amendment created a presumption that all areas were smoking unless the owner designated nosmoking areas.
172 Minutes, [House] State Government [Committee], Apr. 6, 1978, 12:15 p.m. at 3 (copy furnished by SHSI, Des Moines).
reverse the bill by allowing smoking in any area not designated as no-smoking, “the bill favors non-smokers....”) On a recorded roll call S.F. 2022 then passed 13 to 3, the three no votes being cast by the chair, vice-chair, and Norman Jesse, another heavy smoker.

Looking back, but without specific recall, Patchett concluded that he and other anti-smoking members voted against Harvey’s amendment, but nevertheless voted for the bill itself in committee because they assumed (correctly as it turned out) that the full house would reject Harvey’s amendment anyway; if he and his allies had voted against the bill in committee and defeated it, “it would never have gone to the floor—so this would have been the only chance to keep it alive. I think you can get the flavor that there was a fair amount of game-playing going on on this one.”

The fact that Monroe, Woods, and Jesse, three “moderate to liberal Democrats who would otherwise generally support ‘good government’ type of legislation” voted against the amendment (and were among the 15 members who voted against the bill on its third reading) suggested, three decades later, to anti-smoking Patchett, who had served on the committee with them, that “[t]hese votes often had much more to do with whether you were a smoker and your perceived rights relating to smoking—not contributions, lobbyists, or anything else.” While certain that the tobacco industry “must have had one or more lobbyists (probably from one of the bigger firms that handled multiple clients),” Patchett, who speculated that it “may also have had one or more corporate lobbyists fly in for this type of thing,” was unable to recall names, in part because the whole issue had lacked the salience that it later assumed: “At that time, they simply weren’t a major presence in the Iowa Legislature. There just weren’t that many bills affecting them, as I recall. This whole issue was just beginning to emerge. Other groups that probably would have been involved...would be the restaurant association.” In fact, the tobacco industry had three lobbyists in Iowa at the time, including George Wilson, who represented the Tobacco Institute, and Charles Wasker.
Six days after the House Committee on State Government had recommended passage of S. 2022, the Philip Morris USA public affairs department, in an update on legislative activities and other government relations matters for senior management, after reporting that the bill had passed the Senate and the House committee, noted under the rubric “PM-U.S.A. Action,” that the Tobacco Institute “advised us on April 12 that there is nothing that the manufacturers can do at this time.” Why the industry counseled inaction in the face of House floor action is unclear, especially since the memo outlined proposed responses to other governmental anti-tobacco/smoking action.\footnote{Philip Morris Public Affairs, USA, Update for Senior Management (Apr. 12, 1978), Bates No. 1000217591. Three decades later, ex-Representative Patchett’s educated guess was that the tobacco industry had seen “the handwriting on the wall—the votes were pretty well locked in.” Email from John Patchett (Mar. 24, 2007).}

When S.F. 2022 reached the House floor late in the day on April 28, it “breezed through the House with a minimum of debate.” Supporters in their eagerness to secure passage said little, while all of the opponents’ attempts to weaken the bill failed.\footnote{Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 2:2040 (Apr. 28).} The proceedings began with Monroe’s offering the State Government Committee’s aforementioned crucial amendment. On a non-record roll call vote it was defeated 21 to 48.\footnote{Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 2:2040 (Apr. 28), 2:3067 (H-5863).} (At this point Democrat Diane Brandt withdrew her aforementioned amendment to include restaurants and mandate a non-smoking section in them.)\footnote{Charles Bullard, “No-Smoking Bills Clears Legislature,” DMR, Apr. 29, 1978 (1A:3, 7A:4-6).} As with the committee roll itself, this vote, too, was ambiguous since the amendment could have been rejected both by those who opposed coverage of restaurants and by those who opposed the inversion of the bill’s no-smoking default position. That Monroe was no friend of the bill was underscored by his warning the members that a statutory prohibition on smoking might also apply to the House chamber itself. In response, the bill’s floor manager, Don Avenson—a smoker who had voted against banning smoking in House committee rooms in 1975 and would vote against banning it in the House chamber in 1979—pointed out that the House created its own internal rules.\footnote{journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 2:2040 (Apr. 28).}
Another opponent of smoking regulation, Republican Richard Welden, then offered a floor amendment that would have removed the penalties from the bill. Democrat Lyle Scheelhaase argued that the enforcement provision was “‘unworkable and unmanageable,’” while Republican Thomas Lind predicted that it would have the same effect on smoking that Prohibition had on drinking and the 55-mile per hour speed limit had on speeding. Wells, long one of the leaders of the legislative anti-smoking campaign, admitted that “the bill could be improved but...said it is the best the Legislature can do this year. ‘This is far from a perfect bill but it is a start....’” This sentiment was echoed by Republican Julia Gentleman—whose votes on anti-smoking bills were erratic—who argued that “[i]f we need to put some teeth in it or clarify it, we can do it next year.” In addition, supporters cautioned that adding new amendments that the Senate would have to approve in the final days of the session might inadvertently kill the bill. Advocates of the change, advancing a splendid example of a self-fulfilling prophecy, sought to justify the proposal on the grounds that enforcement would be difficult in general, but that in particular there would be no way to keep track of the number of offenses anyone had committed, thus rendering the increased penalty for repeat offenders inoperable. The very close, non-party-line, 39 to 42 vote by which the House barely defeated the attempt to eliminate the only means of enforcing the prohibition fully, and the 40 to 40 tie vote by which it rejected an amendment to eliminate the enhanced penalty for second and additional offenses confirmed the reality of Wells’s lament that there was no majority for a stronger bill.

On the bill’s final reading, the House passed S.F. 2022 by a large majority of

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(1A:3, 7A:4-6). On Avenson’s votes, see State of Iowa: 1979: Journal of the House: 1979: Regular Session Sixty-Eighth General Assembly 1:279 (Jan. 19). State of Iowa: 1975: Journal of the House: 1975: Regular Session Sixty-Sixth General Assembly 1:315 (Feb. 14). Three decades later Avenson observed that “in 75 I was the house assistant majority leader and in 79 I was the house democratic leader and in neither case did I use my power to preserve smoking in the house chambers I always respected my members more than that.” Email from Don Avenson to Marc Linder (July 13, 2007). At this late date Avenson no longer recalled having floor managed the bill. Id.


67 to 15. Of the 15 No votes 13 were cast by Democrats, 11 or 12 of these dissenters being smokers. In signing the weak bill, which failed to cover public commercial places and empowered owners to permit smoking and smoke virtually anywhere and everywhere, into law, Governor Ray engaged in simultaneous over- and understatement in declaring that it crystallized “‘a realization that people who don’t smoke have a right to breathe fresh air,’” while enabling smokers “‘to find a place.’” In the event, smokers would, for the next 30 years, continue to find quite a few places.

Coming five years after Arizona’s pioneering legislation and in the midst of the initial tumultuous phase of nationwide anti-smoking enactments, the Iowa law covered many more public places than the Arizona statute, but applied to a much narrower universe than the three-year-old MCIAA. In particular, unlike the latter, the Iowa law failed to cover restaurants, retail stores, other commercial establishments, offices, or workplaces. In the end, S.F. 2022 prohibited smoking (subject to the quasi-ubiquitous exception of designated smoking areas from which only elevators were excluded) in the following locations:

**Public cultural facilities:** indoor theaters, libraries, art museums, concert halls, auditoriums, and other similar facilities open to the public.

**Transportation:** railroad passenger coaches, buses, and airplanes, and other common carriers.

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188 *Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly* 2:2044 (Apr. 28). In tracking the progress of S. 2022, a TI senior vice president incorrectly reported to his superiors that the vote had been 65 to 15. Jack Kelly to Company Representatives TI Committee of Counsel Re: Significant Legislative Developments (May 2, 1978), Bates No. 85645146. This error was reproduced in Tobacco Institute, State Legislative Report SLR-78-18, at 1 (May 18, 1978), Bates No. 89781321/2.

189 According to John Patchett, Monroe, Jesse, Woods, Arnould, Dyrland, and Wyckoff were definitely smokers, whereas Horn, Pavich, and Griffee were not. Email from John Patchett to Marc Linder (Mar. 24, 2007). According to Don Avenson, Baker, Garrison, Miller, Scheelhaase, and Welden smoked. Email from Don Avenson to Marc Linder (July 13, 2007). Lind had smoked, but had stopped by this time, according to his son, Jim Lind. See below.

190 “‘Non-Smoker Must Breathe Fresh Air’...Ray Signs Bill,” DMR, May 9, 1978 (9A:5-6).

191 See above ch. 24.

192 1978 Iowa Laws ch. 1061, § 2(1), at 297.

193 1978 Iowa Laws ch. 1061, § 2(1), at 297.

194 1978 Iowa Laws ch. 1061, § 2(2), at 297.
Waiting rooms: in railroad and bus stations and airports.\textsuperscript{195}

Medical facilities: waiting rooms, rest rooms, lobbies, and hallways of hospitals, clinics, medical laboratories, and other similar facilities.\textsuperscript{196}

Patient care rooms: rooms in health care facilities, hospitals, clinics, or other medical facilities used for patient recuperation or care.\textsuperscript{197}

Government buildings: public buildings owned or controlled by the state of Iowa or its political subdivisions.\textsuperscript{198}

Whereas MCIAA placed some constraints on some owners’ discretion to designate smoking areas in the form of physical barriers and ventilation and the administrative regulations went further in virtually requiring owners who lacked barriers or ventilation to create four-foot spaces between smoking and nonsmoking areas,\textsuperscript{199} S.F. 2022 conferred unbridled discretion on those in custody or control of covered places to enable smokers to continue smoking. In general, the Iowa legislature’s failure to establish an administrative structure for implementing and enforcing its program of public smoking restrictions signaled a lower level of interest in ongoing oversight of this new dimension of active protection of public health. This lack of concern with compliance was clearly reflected in the absence of a provision (such as was contained in MCIAA)\textsuperscript{200} empowering the state Health Board or any affected party to seek an injunction of repeated violations of an owner’s duty to “make reasonable efforts to prevent smoking....”\textsuperscript{201} The only respect in which the Iowa law exceeded MCIAA in stringency was its requirement that the person in custody or control of a covered facility “who observes smoking in that facility in violation of this Act shall inform the person that smoking is prohibited by law in that facility or that area of the facility,”\textsuperscript{202} whereas owners in Minnesota were required to “ask[ ] smokers to refrain from smoking” only “upon request of a client or employee suffering discomfort from the smoke....”\textsuperscript{203}

The Iowa measure owed its comparative weakness, especially in the face of

\textsuperscript{195}1978 Iowa Laws ch. 1061, § 2(3), at 297, 298.

\textsuperscript{196}1978 Iowa Laws ch. 1061, § 2(4), at 297, 298.

\textsuperscript{197}1978 Iowa Laws ch. 1061, § 2(5), at 297, 298.

\textsuperscript{198}1978 Iowa Laws ch. 1061, § 2(6), at 297, 298.

\textsuperscript{199}See above ch. 24.

\textsuperscript{200}1975 Minn. Laws ch. 211, § 7 subd. 3, at 633, 635.

\textsuperscript{201}1975 Minn. Laws ch. 211, § 6, at 633, 634.

\textsuperscript{202}1978 Iowa Laws ch. 1061, § 5, at 297, 298.

\textsuperscript{203}1975 Minn. Laws ch. 211, §6(e), at 633, 634.

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the precedent set by its northern neighbor three years earlier, to a number of salient differences between the forces that were responsible for bringing the two pieces of legislation to fruition. The most important difference between the Iowa and Minnesota processes is that Iowa lacked any organization even remotely resembling the single-issue Association for Nonsmokers Rights, which articulated the need for statewide regulation of public smoking, drafted the legislation, enlisted a devoted and highly knowledgeable and intelligent legislator to sponsor the bills, mobilized grass-roots support, savvily launched media and public education campaigns, and systematically lobbied legislators. In particular, Iowa lacked any figure like political science professor and former legislator Edward Brandt, who proposed a legislative strategy to ANSR, wrote the bills, and brought his scholarly analysis, legislative experience, and intense and health-conscious personal objections to exposure to smoke to bear on the process. Unlike the situation in Minnesota, where the Lung Association initiated, financed, and helped staff ANSR, in Iowa no health group appears to have promoted anti-secondhand smoke legislation. The Iowa legislature also lacked a scientifically educated, forceful, and galvanizing figure like Phyllis Kahn, who, while also being chief author of numerous other bills (ranging from decriminalization of prostitution to promotion of bicycling), was personally and patently invested in combating the exposure of nonsmokers to tobacco smoke (as witnessed by her simultaneous feisty leadership of the struggle to ban smoking in her own workplace—the House floor). In contrast, none of the chief legislative sponsors of the Iowa bills in the 1970s appears to have identified her- or himself as closely with or cared as intensely about the issue as Kahn. The only respect in which prospective legislation in Iowa faced fewer obstacles was the absence of coordinated pro-smoking lobbying by powerful industry groups, which may have been a function of the lower threat level posed by the weaker Iowa proposals and less able advocates. And finally, ANSR’s permanent organization, existence, and continuous advocacy of more encompassing legislative amendments and more stringent regulatory intervention throughout the 1980s lacked a counterpart in Iowa, where promotion of more comprehensive legislation was discontinuous, sporadic, unorganized, and dependent on the more or less spontaneous seriatim emergence of individual legislators to carry on the struggle.

**Enforcement as an Afterthought**

For the first time in the history of the tobacco controversy, the millions of consumers who

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use the product we grow and manufacture are being brought under the same kind of attack that has been leveled against the industry. Pressure is building to change the role of government from persuader to policeman.\footnote{Remarks of Horace R. Kornegay, Tobacco Associates, 28th Annual Meeting, Raleigh, North Carolina, March 4, 1975, at 2, Bates No. TIMN320981/2 (TI president).}

On the eve of the law’s effective date (July 1, 1978), it began to dawn on law enforcement officials as well as on some legislators that S.F. 2022 did “not say how a violator is to be brought before a magistrate” or what a “civil fine” meant. Moreover, Democratic senator Earl Willits, who had supported the bill, conceded that its enforcement provisions were “a little weak, to say the least.” Believing that the law was “generally popular” and that “[m]ost Iowans are law-abiding,” he placed his trust in “good self-enforcement....” As for those who proved unworthy of his trust, Willits “assume[d] they could be charged the same as in a criminal offense,” but “it would not actually be a criminal proceeding,” though “a law officer could issue a citation for an offender to appear before a magistrate.” The Iowa Solicitor General was not sure whether the statute created a civil or criminal process—whether “you file a civil lawsuit and serve the offender” or “have a policeman arrest the violator....” Willits speculated that someone observing a violation might be able to “file a complaint like a criminal preliminary information, perhaps in the nature of a small claim....” Although the general services director of Polk County (whose county seat is Des Moines) said that she would call the sheriff’s office to have any smoking violator removed from the county courthouse, the sheriff’s office had not yet decided what to do if called. And finally, the state Attorney General, Republican Richard Turner, who was expected to issue an opinion the day before the law went into effect, reminded the public that his interpretation of state laws was “just one man’s opinion—and what does he know?”\footnote{Paul Leavitt, “Problem Seen in Enforcing Smoking Curb,” \textit{DMR}, June 28, 1978 (1A:6, 3A:5-6).}

A statewide survey conducted by the \textit{Des Moines Register} a few days after the law had gone into effect revealed widespread (but anecdotal) skepticism by local government officials about enforceability. For example, the Polk County buildings and grounds supervisor, though unsure as to how to handle a violator, was much more certain that attempted enforcement would “be a good way to get a black eye.”\footnote{“Hard to Tell Smoking Law Is in Effect,” \textit{DMR}, July 4, 1978 (12A:1-3 at 3).} Three months later, the attorney general had still not weighed in, but the state’s General Services Director, who was in charge of enforcement in state buildings, insisted that he had never seen anyone smoking in violation at
the statehouse (though, interestingly, the Register did not deem it worth mentioning the whereabouts of the designated smoking areas). Asked what he would do if he did witness a violation, he “quipped: ‘I’ve hired a hit man from Chicago—$1,000 a head’ to deal with violators.” Asserting that it did not require an immediate answer, the attorney general assigned a low priority to writing his aforementioned opinion on enforcement, which was further delayed because of a disagreement among his staff as to whether civil or criminal procedures were called for.\footnote{Paul Leavitt, “Problems with Smoking Law Are Few, McCausland Says,” DMR, Sept. 28, 1978 (3V:1-4).}

In fact, Attorney General Turner, who was defeated in the November election, never issued an opinion on the law’s enforcement before he left office, leaving the task to his Democratic successor. Perhaps as a reaction to this delay, in January 1979, Senator Craft (the economics professor who had unsuccessfully moved to eliminate coverage of restaurants and stores) filed an amendatory bill to increase the minimum civil fine for an owner’s failure to post nosmoking signs to $10 for a first violation and $20 for a second violation, while making further violations simple misdemeanors. In addition, the bill would have conferred rulemaking authority on the state transportation department regarding smoking in common carriers and on the general services department regarding all other covered public places.\footnote{S.F. 33 (Jan. 10, 1979, by Craft).} However, the bill died in subcommittee.\footnote{Journal of the Senate: 1979: Regular Session Sixty-Eighth General Assembly 84, 179 (Jan. 10 and 18).}

The focus of the attorney general opinion, issued in March 1979, more than eight months after the law had gone into effect, was on determining whether enforcement was to be effected by way of civil action or criminal punishment. Rejecting purpose and objective sanctions as making criminal punishment distinctive, the newly elected Attorney General, Tom Miller, found it instead in “the intentional use of the formal moral condemnation of the community as an additional feature of the sanction.”\footnote{State of Iowa: 1980: Forty-Third Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1980, at 14-19, at 15 (Mar. 9, 1979). The opinion was co-signed by Solicitor General Mark Schantz, who actually wrote it. Interviews with Mark Schantz, Iowa City (Mar.-Apr. 2007).} As applied to the statute at hand, he concluded that “regulations of smoking in public places do not evince an intent to employ the formal moral condemnation characteristic of criminal punishment. The behavior regulated has not been traditionally regarded as criminal. Smoking per se is not regulated; only the place at which the activity may be conducted is...
Non-Smokers’ Struggle Against Tobacco Smoke Exposure in Iowa, 1970-82

controlled."\footnote{State of Iowa: 1980: Forty-Third Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1980, at 14-19, at 17 (Mar. 9, 1979).} He adhered to this view despite his recognition that most other states that regulated smoking in public places used criminal sanctions; instead, he chose to place greater weight on the fact that the Alaska statute, which also used the term “civil fine,” expressly provided for enforcement only by civil complaint or citation (even though the Iowa law did not).\footnote{State of Iowa: 1980: Forty-Third Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1980, at 14-19, at 18 (Mar. 9, 1979).} Miller then interpreted the statute as requiring that the county attorney pursued the actions for the civil fines because it was his statutory duty to prosecute all proceedings necessary to recover penalties accruing to the state or his county.\footnote{State of Iowa: 1980: Forty-Third Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1980, at 14-19, at 19 (Mar. 9, 1979).} Interestingly, the amendment, which lost 36 to 47, was generally supported by opponents and opposed by supporters of the bill. Miller pointed out that the House had rejected an amendment that would have substituted “conviction,” a criminal term, for “violation,” often associated “unambiguously” with civil procedures.\footnote{Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 2:2041-42 (Apr. 28) (H-6396).}

Subtly the attorney general perpetuated the tradition of questioning governmental enforceability of the smoking prohibition by “acknowledg[ing] that self-enforcement”—by which he or the reporter presumably meant voluntary or nonsmoker-aided compliance—“remains pivotal to the law’s chance for success, but added that ‘some role can be played’ by the courts.”\footnote{Daniel Pedersen, “Miller Clears Anti-Smokers’ Legal Haze,” DMR, Mar. 10, 1979 (1A:5, at 4A:1).} Within eighteen months of the law’s enactment, it became clear that, regardless of whatever clarity the attorney general’s opinion might have created concerning the proper enforcement procedures to be used, “thousands of Iowans” smoking in defiance of the ban were risking a civil fine, but it was not, in the Register’s view, “much of a risk” because the “police concede they are doing little to stop them.” Since the law had gone into effect, only 18 people had been charged with violating it, all of them pupils in Waterloo public schools who had been caught smoking in school buildings in a mass arrest. That even they had been charged shocked an official of the attorney general’s office who had been unaware of any such actions, though he conceded that it might be necessary to scrutinize the state of enforcement. None of the numerous state and local law
enforcement officers contacted by the Register knew of any enforcement efforts, though one “top ranking police type” did confide, under a promise of anonymity: “‘Hell, I’m as guilty as anyone in having broken this law.... Sometimes I have to be reminded that I’m smoking where I shouldn’t be.’” The Register contrasted non-enforcement in Iowa with the “more hard-line approach in cracking down on illegal smokers in other states,” but did report that some Iowa officials warned that with the accumulation of evidence concerning the health consequences, the public might demand not only stricter police enforcement, but also more designated nonsmoking areas, including coverage of restaurants.216

The House Expands the Scope of Its No-Smoking Rule: 1979

Renewed effort was made to limit the exposure to secondhand smoke in the House itself in 1979.217 Two non-smokers, Democrat Craig Walter, a pro-business moderate218—who, ironically, in his later career as a lobbyist, represented the Iowa Restaurant Association and Iowa Lodging Association in opposition to bills to repeal the preemption of local anti-smoking ordinances whose enactment the Tobacco Institute had engineered in 1990219—and moderate Republican John

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216Roger Moore, “Puffing Outlaws Defy Iowa Ban,” DMR, Jan. 2, 1981 (1A:1-3, 10A:2-4). The reference to a call for additional designated nonsmoking areas was based on a misunderstanding of the structure of the law: it provided for no designated nonsmoking areas; all areas were nonsmoking unless those in charge of buildings designated some of them as smoking.

217Though unable to “recall why an effort was not made to ban smoking in the Chamber during the ’77-’78 term,” Patchett reasoned: “With the ban in effect for committee rooms during that time, we may have just made an assessment that there weren’t enough changes in the makeup of the House to pass the more extensive ban and that we should leave well enough alone.” Email from John Patchett to Marc Linder (Feb. 18, 2007). From 1975-76 to 1977-78, the Democratic majority shrank from 61 to 59 of 100 seats. Frank Stork and Cynthia Clingan, The Iowa General Assembly: Our Legislative Heritage 1846-1980, at 8 (n.d.). Tobacco lobbyist Charles Wasker claimed that the tobacco industry never cared about internal House/Senate smoking rules. Telephone interview with Charles Wasker, Des Moines (Mar. 30, 2007).


Pelton,\textsuperscript{220} offered an amendment to the House Rules to expand significantly the no-smoking zone to “the chamber of the house except in the perimeter area while the house is in session.”\textsuperscript{221} The House, control of which Republicans had regained (56 to 44),\textsuperscript{222} voted 51 to 39 to adopt the change. Although not strictly along party lines, the vote did reveal a significant divergence: whereas almost two-thirds of Democrats (22-12) voted for the rule (and most of the 12 casting No votes were smokers), only a bare majority of Republicans (29 to 27) did.\textsuperscript{223} The

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\textsuperscript{220}Email from John Patchett to Marc Linder (Feb. 18, 2007).


\textsuperscript{222}Frank Stork and Cynthia Clingan, The Iowa General Assembly: Our Legislative Heritage 1846-1980, at 8 (n.d.).

vote was all the more remarkable because Republicans and Democrats, spurred on by the shift in control, were at that time engaged in a titanic struggle over the House rules characterized by perfect party-line votes.\textsuperscript{224} Patchett later characterized the bipartisan proposal as important because “this rule wasn’t ‘procedural’ (all of which are partisan and controlled by the majority party).”\textsuperscript{225} Although the relatively close vote signaled the contentiousness of the issue, Walter later commented that after the ban had gone into effect, he was never subjected to recrimination for having initiated this curtailment of smokers’ freedom to smoke in the chamber.\textsuperscript{226} In 1981, when the Republican-controlled House changed the main no-smoking area from the “chamber” to “on the floor of the house,”\textsuperscript{227} it also defeated, by a non-record roll call vote of 37 to 54, a proposed amendment to relax the ban by introducing this language: “Smoking shall not be permitted on the floor of the House from 8 a.m. to 5 p.m. or while the House is in session....”\textsuperscript{228}

Former Representative Patchett provided this context for understanding these changes:

The “Chamber” of the House would encompass the entire chamber. The distinction between the Chamber and the “floor” of the House is effectively an artificial one—as they are essentially one and the same. The perimeter of the House has traditionally had “couches” where members and staff could gather, along with certain invited guests. The area of the floor where the members’ desks are located is very crowded. Since the Chamber has a very high ceiling and is quite large, the compromise (necessary to achieve passage) allowed some smoking on the very edge but kept the main part of the Chamber smoke-free. Some smoke might have drifted, but probably not much for those on the floor itself. Most evenings (Monday through Thursday) there would be several members (a handful) who would come back after dinner and do some work, catch up on reading, etc. Since most members do not have offices in the Capitol, it was often the only time to be
able to work in relatively moderate quiet. While I wasn’t there in ’81, there were probably enough members who would like to smoke while doing this evening work—and didn’t think it would affect many others since there would be very few people present at that time. But you can see by the results that it did not carry the day.229

The same year anti-smoking advocates in the House and Senate unsuccessfully sought to strengthen the weak clean indoor air act. Democrat Rod Halvorson filed a bill that would have covered food service establishments, but authorized them to permit smoking in one-half of their seating capacity. It would also have facilitated enforcement by: requiring the state public health commissioner to adopt rules to enforce the law; substituting a (criminal) simple misdemeanor penalty for the civil penalty; and distributing one-half of the revenue collected from the fine to the person who contributed information that aided the violator’s conviction.230 But the bill languished in subcommittee for a year, only to be reassigned in 1982 to a second subcommittee and die without further action.231 Leadership’s opposition insured the bill’s demise232 but it was, nevertheless, as Halvorson later interpreted it, “probably...a sign of support...and also a realization that it would take mostly Democrats to pass the bill” that the Republican Judiciary Committee chair Nancy Shimonek reassigned it to a subcommittee with a Democratic majority.233 A similar but somewhat weaker bill that Wells filed in the Senate234 suffered the same fate,235 which the Tobacco Institute scorecard logged as having “died at adjournment.”236

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229Email from John Patchett to Marc Linder (Mar. 3, 2007).
230H.F. 644 (Feb. 27, 1981, by Halvorson). The penalty for commission of a simple misdemeanor was a maximum of 30 days in prison and/or a maximum $100 fine. Iowa Code § 903.1.3 (1979). The bill would also have inserted the provision from the 1975 Minnesota law requiring the public health commissioner to adopt rules prohibiting smoking in factories and warehouses where the workers’ close proximity or inadequate ventilation caused hazards detrimental to nonsmoking workers’ health and comfort.
233Email from Rod Halvorson to Marc Linder (Aug. 9, 2007).
236Bates No. TCAL0406489 (May 5, 1982).

Last month [Tobacco Institute President] Sam Chilcote told me he believed the ETS issue, with all its political, social and economic ramifications, posed a greater threat than any other single tobacco issue.¹

By the mid-1980s cigarette manufacturers had become fully aware that the popular and expanding nationwide movement, triggered by cumulative individual and increasingly collective frustration and anger over a lifetime of compelled inhalation of smokers’ tobacco smoke and now fueled by scientific and medical discoveries of the morbid and mortal health consequences of such exposure, was, by means of both legislated restrictions and prohibitions on where smoking could lawfully take place and “social opprobrium,” depressing the incidence and daily consumption of cigarettes.² How successful the cigarette manufacturing companies’ defense of the indefensible was in the face of an increasingly activist and sophisticated anti-smoking movement in Iowa in the mid-1980s is the focus of this chapter.

The Tobacco Industry’s Failed Campaign to Disrupt the Formation of a Scientific Consensus on the Health Consequences of Secondhand Smoke Exposure

Significantly, Defendants were well aware of, and worried about, this issue as early as 1961 when a Philip Morris scientist presented a paper showing that 84% of cigarette smoke was composed of sidestream smoke, and that sidestream smoke contained carcinogens. In addition to understanding, early on, that there was a strong possibility that ETS posed a serious health danger to smokers, Defendants also understood the financial ramifications of such a conclusion...

Despite the fact that Defendants’ own scientists were increasingly persuaded of the

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¹William Kloepfer, Jr. [TI senior vice president, public relations] to John Berard and Peter Sparber (May 24, 1984), Bates No. T110411104.
²JRN, The ETS Issue: Science and Politics at [3] (May 1987), Bates No. 2023551401/3. This four-page memo may have been written by John (Jack) R. Nelson, who at the time was manager of public affairs research and issues planning at corporate affairs, Philip Morris, Inc., the next month became director of corporate affairs planning, and in 2002 became president for operations and technology of Philip Morris, Inc. Philip Morris Glossary of Names, http://legacy.library.ucsf.edu/glossaries/pm_gloss_n.jsp
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

strength of the research showing the dangers of ETS to nonsmokers, Defendants mounted a comprehensive, coordinated, international effort to undermine and discredit this research. Defendants poured money and resources into establishing a network of interlocking organizations. They identified, trained, and subsidized “friendly” scientists through their Global Consultancy Program, and sponsored symposia all over the world from Vienna to Tokyo to Bermuda to Canada featuring those “friendly” scientists, without revealing their substantial financial ties to Defendants. They conducted a mammoth national and international public relations campaign to criticize and trivialize scientific reports demonstrating the health hazards of ETS to nonsmokers and smokers.

Defendants still continue to deny the full extent to which ETS can harm nonsmokers and smokers. Some Defendants, such as BATCo, R. J. Reynolds, and Lorillard, flatly deny that secondhand smoke causes disease and other adverse health effects; some, such as Brown & Williamson, claim it’s still “an open question”; and others, such as Philip Morris, say that they don’t take a position and that the public should follow the recommendations of the public health authorities. To this day [2006], no Defendant fully acknowledges that the danger exists.³

How sudden (though by no means discontinuous) the breakthrough in the science of passive smoking beginning about 1980 was can be gauged by the conclusion reached as late as 1979 in the surgeon general’s encyclopedic synthesis of Smoking and Health: “In summary, a substantial proportion of the normal population experiences irritation and annoyance on being exposed to cigarette smoke. The eyes and nose are the areas most sensitive to irritation.... Healthy nonsmokers exposed to cigarette smoke have little or no physiologic response to the smoke, and what response does occur may be due to psychological factors. There probably is a slight reduction in the maximum exercise capacity in older nonsmokers exposed to levels of CO occasionally found in involuntary smoking situations.”⁴ (Although the cigarette companies should have welcomed this almost innocuous conclusion, the day before the report was issued and without even having seen it, the “Tobacco Institute said it is the report, not

³United States v Philip Morris USA, Inc., 449 F.Supp.2d 1, 800-801 (D.D.C. 2006), aff’d, 566 F.3d 1095 (D.C. Cir. 2009). Strictly speaking, the “confidential” 1961 paper, while stating that sidestream smoke constituted 84 percent of cigarette smoke and listing numerous compounds in cigarette smoke identified as carcinogens, did not specifically identify any of them as present in sidestream as distinguished from mainstream smoke. Philip Morris Incorporated, “Tobacco and Health—R&D Approach,” Presentation to R & D Committee by Dr. Helmut Wakeham at 1, 9 (Nov. 15, 1961), Bates No. 2024947172/5/83

smoking, that could be dangerous to your health.”)

Going far beyond the very limited findings on the health impacts of secondhand smoke exposure published in the 1960s and 1970s—and synthesized in the same surgeon general’s report—which focused on the psychomotor effects of carbon monoxide, annoyance to nonsmokers, greater probability of respiratory disease among children of smoking parents, patients with pre-existing coronary artery and chronic lung diseases, and possible allergic reactions to tobacco smoke, the new learning on several scientific fronts radically transformed understanding of the extent and multifaceted nature of the morbidity and mortality caused by involuntary smoking. A landmark study published in March 1980 in the *New England Journal of Medicine* found that nonsmokers who lived in a house in which smoking was not permitted but for 20 or more years worked in a closed environment where smoking was permitted exhibited not only lower forced mid-expiratory flow rates and forced end-expiratory flow rates than unexposed nonsmokers, but also flow rates not significantly different than those of light smokers and non-inhaling smokers. An accompanying editorial by two members of the National Institutes of Health underscored both the qualitative advance achieved by the study and the gaps that still remained to be filled:

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6U.S. Department of Health, Education, and Welfare, *Smoking and Health: A Report of the Surgeon General* 11-1-11-41 (n.d. [1979]). See also Luther Terry, Jesse Steinfeld, Nicholas Krikes, Stanton Glantz, and Robert Fallat, “Proposition 5, Second-Hand Smoke and the Nonsmoker” (n.p. [1]) (Dec. 27, 1978), Bates No. 503646909/10 (paper written by two former surgeons general and anti-smoking militant Stanton Glantz which identified the same limited scope of health effects of secondhand smoke and also agreed that there was a “right to smoke”).


Until now the case against smoking in the general environment has often been anecdotal, based on annoyances, feelings, and sometimes more objective physical reactions such as eye and nose irritation. ... Because of the inconclusive nature of the evidence, the case against smokers has not been especially strong and the feelings and psychological reactions of smokers are as vehement as those of nonsmokers. But now, for the first time, we have a quantitative measurement of a physical change—a fact that may tip the scales in favor of the nonsmokers.

The question must be asked whether White and Froeb’s new evidence is sufficient to initiate new legislative actions that would further restrict smoking in public places. This is, of course, a difficult and delicate question. On the one hand, the evidence presented is statistically sound and significant; on the other hand, there is no proof as yet that the reported reduction in airways function has any physiological or clinical consequences.9

Less constrained by the norms of science than the demands of profitability, just three days after the article appeared, the senior scientist at Philip Morris informed the company’s research director that it was “an excellent piece of work which could be very damaging to our business.” Characteristically, the scientist knew no better person to initiate the “independent review” by a member of the medical profession needed to craft a “rebuttal” (which, if done by the tobacco industry, “would have little impact”) than Ragnar Rylander,10 the professor whom Philip Morris had been paying for years to churn out whitewashes of the health consequences of smoking.11 Unsurprisingly, the Association for Non-Smokers’ Rights, the organization responsible for passage of the country’s first comprehensive statewide regulation of smoking in public places (the Minnesota Clean Indoor Air Act),12 promptly hailed the study as “the first indisputable evidence that a steady long-term diet of other people’s smoke causes a measurable dysfunction in the lungs just as damaging as if the passive smoker indulged in smoke.” To be sure, ANSR conceded that the study “does not, however, prove that the smoke in a restaurant or waiting room is anything more than annoying to people who are not allergic to it.”13

Then on virtually the same day in mid-January 1981 Greek and Japanese studies published in two different medical journals finally uncovered

11On Rylander, see above ch. 23.
12See above ch. 24.
13“Study Proves Secondhand Smoke Deadly,” ANSR 8(1):1, 3 (July 1980).
epidemiological evidence of the impact of the numerous carcinogens in secondhand smoke in the form of lung cancer among nonsmokers exposed to spousal smoking. A four-page (retrospective) case-control study by Dimitrios Trichopoulos and colleagues at the University of Athens School of Medicine compared 40 nonsmoking female lung cancer patients and 149 nonsmoking control women with respect to whether and how much their husbands smoked. Compared with the control women, the lung cancer patients were 1.8 times more likely to be married to an ex-smoker, 2.4 times more likely to be married to a man who smoked between 1 and 20 cigarettes a day, and 3.4 times more likely to be married to a man who smoked 21 or more cigarettes a day.\(^\text{14}\)

The most serious limitation that the Greek investigators identified in their study, which was “offered principally to suggest that this issue should be pressed,” was the small number of cases\(^\text{15}\)—a weakness that did not mar the Japanese study, which for that reason bore the brunt of the cigarette oligopoly’s attacks. In a three-page paper published two days later in the *British Medical Journal*, Takeshi Hirayama, the chief of the epidemiology division of the National Cancer Center Research Institute in Tokyo, set forth the results of a 14-year prospective study of 91,540 nonsmoking housewives aged 40 and over measuring their risks of developing lung cancer according to whether and how much their husbands smoked. With the risk ratio of lung cancer among nonsmoking wives of nonsmoking husbands set at 1.00, that for those of husbands who were either ex-smokers or smokers of 1 to 19 cigarettes a day was 1.61 and that for those of husbands who smoked 20 or more cigarettes daily reach 2.08. Moreover, Hirayama also found that the relative risk of developing lung cancer by passive smoking was almost one-half that among women who smoked.\(^\text{16}\)

In the wake of these explosive findings, the cigarette companies, now more than ever, “[f]earing government regulation to restrict smoking in public places and sensing a decrease in the social acceptability of smoking,...were faced with a major threat to their profits. ... In response,” as Federal District Judge Gladys Kessler concluded a quarter-century later in her massive thousand-page, double-columned judicial opinion skewering the cigarette manufacturers’ decades of lethally profitable racketeering, “Defendants crafted and implemented a broad strategy to undermine and distort the evidence indicting passive smoke as a health


hazard. Defendants’ initiatives and public statements with respect to passive smoking attempted to deceive the public, distort the scientific record, avoid adverse findings by government agencies, and forestall indoor air restrictions.  

More specifically in the case of Hirayama’s study, the Tobacco Institute launched a media campaign—which succeeded in reaching a huge audience within a very brief period of time—to create the impression that a noted statistician had identified a mathematical error in the paper that invalidated the study. The extent to which the cigarette oligopoly was willing to overreach when its interests were threatened was indicated by the fact that two of the tobacco industry’s own consultants turned against the campaign, stating internally that Hirayama’s study was correct and that the Tobacco Institute had persisted in the campaign knowing that it was correct.  

Indeed, by the early 1980s scientists at a Philip Morris laboratory in Germany had themselves confirmed the tumorigenic, morbid, and lethal effects of sidestream smoke on rats—research results that the company, unsurprisingly, preferred destroying rather than publishing.

Despite having survived the Tobacco Institute’s attempted assassination, by itself Hirayama’s study did not immediately persuade even the new surgeon general, C. Everett Koop, who in the preface to his first report on smoking and health (which was devoted to cancer) unequivocally declared that cigarette smoking was “the chief, single, avoidable cause of death in our society and the
most important public health issue of our time,” to venture a bolder statement
than that: “Although the currently available evidence is not sufficient to conclude
that passive or involuntary smoking causes lung cancer in nonsmokers, the
evidence does raise concern about a possible serious public health problem.”
In his foreword to the volume, Koop’s boss, Dr. Edward N. Brandt, Jr., the
assistant secretary for health in the Department of Health and Human
Services—who, ironically, had quit smoking just a year earlier when he assumed
his position and later died of lung cancer at age 74—while characterizing the
nature of the epidemiological correlation in Hirayama’s study as “unresolved,”
nevertheless observed that “for the purpose of preventive medicine, prudence
dictates that nonsmokers avoid exposure to second-hand tobacco smoke to the
extent possible.” At their press conference on the occasion of releasing the
report, too, both Brandt and Koop had urged nonsmokers to avoid inhaling
cigarette smoke “even though the link between such passive smoking and cancer
is still a matter of scientific debate.” Based on the Greek and Japanese studies,
the conclusion of the chapter of the 1982 surgeon general’s report devoted to
involuntary smoking and lung cancer reflected the as yet tentative and unsettled
state of the science: “The evidence currently available suggests that involuntary
smoke exposure may increase the risk of lung cancer in nonsmokers, but
limitations in data and study design do not allow a judgment on causality at this
time.” But the interest in epidemiological studies remained intense both
because the chemical constituents of sidestream smoke were similar to those of
mainstream smoke—indeed, in mouse skin assays condensate of the former was
more tumorigenic per unit weight—and because the dose-response relationship
between voluntary smoking and lung cancer had been established and a threshold

21 U.S. Department of Health and Human Services, The Health Consequences of
22 U.S. Department of Health and Human Services, The Health Consequences of
24 Thomas Maugh, “Edward Brandt, Jr., 74,” LAT, Sept. 5, 2007 (B8) (misleadingly
stating that Brandt was a nonsmoker).
25 U.S. Department of Health and Human Services, The Health Consequences of
27 U.S. Department of Health and Human Services, The Health Consequences of
for effect had not been established.\textsuperscript{28}

Similarly, the 1984 surgeon general’s report on smoking and chronic obstructive lung disease registered little in the way of robust research findings concerning the impact of involuntary smoke exposure on pulmonary function in normal healthy adults, though children of smoking parents did exhibit increased prevalence of respiratory problems and greater frequency of pneumonia and bronchitis.\textsuperscript{29} But just two years later, the proliferation of epidemiological spousal smoking exposure studies conducted in North America, Asia, and Europe during the five years since the publication of Trichopoulos’s and Hirayama’s pioneering papers enabled the National Resource Council and the surgeon general to issue reports placing their imprimaturs on the crucial finding of a statistically significant increase in the risk of lung cancer among nonsmoking spouses of smokers compared to nonsmoking spouses of nonsmokers—a conclusion that became anticipatorily generalizable since there was “no reason to believe...that the excess risk associated with involuntary smoking is restricted to exposure from spouses.”\textsuperscript{30} The NRC report, which had been undertaken at the request of the Environmental Protection Agency and the Department of Health and Human Services and was published in November 1986, summarily estimated that increased spousal risk, based on the set of new epidemiological studies, at 34 percent.\textsuperscript{31}

A month later, in transmitting to Congress the 1986 surgeon general’s report on \textit{The Health Consequences of Involuntary Smoking}, Secretary of Health and Human Services Dr. Otis Bowen declared that “the judgment can now be made that exposure to environmental tobacco smoke can cause disease, including lung cancer, in nonsmokers.” Based on the evidence in the report Bowen observed that “the choice to smoke should not interfere with the nonsmoker’s choice for an environment free of tobacco smoke,”\textsuperscript{32} while Koop’s direct superior, Dr. Robert Windom, assistant secretary for health, added that “it is clear that actions to

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Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

protect nonsmokers from ETS exposure not only are warranted but are essential to protect public health.”

Secretary Bowen’s conclusion that it was “also clear that simple separation of smokers and nonsmokers within the same airspace may reduce but cannot eliminate nonsmoker exposure to environmental tobacco smoke” was of crucial significance for the public regulation of smoking by virtue of rendering scientifically obsolete what by then had become the nationally recognized policy norm of designated smoking areas embedded even in what the 1986 report itself judged to be (with one exception) the most extensive and restrictive statewide public smoking statutes.

Koop himself explicitly underscored the link between science and public

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35 U.S. Department of Health and Human Services, The Health Consequences of Involuntary Smoking: A Report of the Surgeon General 266-76 (1986). The exception was the Washington Clean Indoor Air Act. Id. at 269, 271-74 (erroneously dating the law to 1983). In 1985 the Washington legislature passed the bill, which banned smoking outright (thus prohibiting the designation of smoking areas) in a number of public places including: the public areas of retail stores; lobbies of financial institutions; office areas and waiting rooms of government buildings; museums; classrooms and lecture halls of schools, colleges, and universities; seating areas and hallways contiguous to them in concert halls, theaters, auditoriums, exhibitions halls, and indoor sports arenas; and hallways of health care facilities. 1985 Wash. Laws ch. 236, §§ 4(a) and (b), at 822, 823-24. These provisions by and large codified smoking bans that the state Board of Health had promulgated as administrative rules in 1975, but without any enforcement mechanism. Wash. Adm. Code. §§ 248-152-030 and 248-152-050 (1975); see above ch. 15. By two votes the Senate in 1985 failed to strike these absolute bans from the bill. Senate Journal—1985—Regular Session Forty Ninth Legislature State of Washington 1:1339-40 (Apr. 15). To be sure, while the bill was before the legislature the Tobacco Institute emphasized that it was less restrictive than the regulation because it permitted owners to designate restaurants in their entirety smoking areas (thus suppressing the fact that the law, unlike the regulation, was backed by penalties). 1985 Wash. Laws ch. 236, § 4(b), at 822, 824; Alexander King to William Buckley, Subject: Washington State Legislative Assessment—No. 3 (Apr. 1, 1985), Bates No. TNWL0002364. The cigarette manufacturers were able to rely on a considerable number of legislators to water down the bill, which had initially contained as Part II the Smoking Pollution Control Act, which required employers of office workplaces to prohibit smoking altogether if any nonsmoking employee objected to smoke and an accommodation satisfactory to all affected nonsmoking employees could not be reached. State of Washington, 49th Legislature, 1985 Regular Session, House Bill No. 62, § 14 (Jan. 18, 1985), Bates No. TNWL0026979/84.
policy by noting that the “scientific case against involuntary smoking as a health risk is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke.” The kind of action he had in mind transcended both merely separating smokers and nonsmokers and reducing rather than eliminating the exposure. And although he argued that the new smoking policies that the report’s data necessitated “should not be designed to punish the smoker,” Koop insisted that smokers’ “addictive behavior” should not let them off the hook: “it is the smokers’ responsibility to ensure that they do not expose nonsmokers to the potential harmful effects of tobacco smoke.”

The report’s lengthy final chapter on restrictive smoking policies made it clear just how far state laws fell short of the science-based model that would satisfy the goals that the surgeon general had limned. Classifying the statutes into five groups of increasing protectiveness and restrictiveness, Koop’s report found that: 9 states (including two of Iowa’s neighbors, Illinois and Missouri) had enacted no statewide restrictions at all; 8 states had enacted only “nominal” laws, regulating smoking in one to three public places, excluding restaurants and private workplaces; 14 states (including Iowa and neighboring South Dakota) had enacted “basic” laws regulating four or more public places, excluding restaurants and private workplaces; 10 States (including neighboring Wisconsin) had enacted “moderate” laws regulating restaurants but not private workplaces; and 9 states (including Iowa’s neighbors Minnesota and Nebraska) had enacted “extensive” laws regulating private workplaces.

At the press conference accompanying the report’s release Koop predicted that The Health Consequences of Involuntary Smoking would become the same kind of “‘turning point’” that the original 1964 had been. However, the pace at which this new point would turn would greatly exceed that of its predecessor because the intervening two decades had witnessed such an upheaval in scientific understanding of, popular attitudes toward, and governmental restrictions on smoking that by 1986 even the Reagan administration health hierarchy unabashedly favored regulation of public smoking. In contrast, in 1962, shortly after he had announced that he would establish a committee of experts to review comprehensively all data on smoking and health, Surgeon General Luther Terry

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met with representatives of several health organizations, federal agencies, and the Tobacco Institute at which “it was agreed that the proposed work should be undertaken in two consecutive phases,” the first being an “objective assessment of the nature and magnitude of the health hazard” to be performed by experts, whereas Phase II “[r]ecommendations for action were not to be a part of the Phase I committee’s responsibility.”

Demonstrating that in contemplation of the especially strong nail that had just been driven into coffin nails’ coffin the manufacturers of what Koop identified as the “single agent...responsible for approximately 16 percent of all deaths annually in the United States” had become even more desperate and transparently mendacious than they had been in response to the 1964 report, the Tobacco Institute engaged in threadbare character assassination. The New York Times gave it space to spread its contemptible accusation that Koop had placed his “political agenda above scientific integrity.” Revealing that the looming endgame had apparently deprived the producers of the world’s most lethal consumer commodities even of the capacity to recognize that their propaganda served only to mock themselves, the Tobacco Institute risibly charged that: “A comparable example might have been if Carrie Nation, in the years before Prohibition, served as Surgeon General and issued a ‘scientific’ report providing the political ammunition to secure passage of the 18th amendment the Volstead Act.”

For internal consumption only, a few months later an especially aggressive Philip Morris document offered this analysis of the industry’s predicament:

If a thousand more consciously unbiased studies of ETS and disease risk in non-smokers were conducted, these are the best conclusions we could hope for:

39U.S. Department of Health, Education, and Welfare, Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service 8 (n.d. [1964]). Even at the press conference accompanying the report’s release, Terry stated in response to a question as to whether he “anticipate[d] a second committee to recommend legislative executive [sic] action” that at the time he did “not anticipate assembling such a committee.” “Transcript of Press Conference by Surgeon General’s Committee on Smoking and Health” at 9 (Jan. 11, 1964), Bates No. 69000006/15. For the argument that Terry astutely “kept the committee away from the political morass that circled around the tobacco questions,” see Allan Brandt, The Cigarette Century 221 (2007).

40C. Everett Koop, “‘Other People’s Smoke’: Round Two,” NYT, Mar. 15, 1987 (sect. 3, at 12:1-4 at 1-2).

41Scott Stapf, “A Propaganda War Against Cigarettes,” NYT, Jan. 4, 1987 (F2:3-6 at 4-5).
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

1. ETS remains a suspected but unproven cause of disease in exposed populations.
2. ETS studies demonstrating disease risk can be explained by errors inherent in epidemiological research.
3. ETS has not been biologically established as a cause of disease in non-smokers.
   Please note that this is generally what we say (when we’re forced to talk about it) to discount cause and effect [sic] the link between active smoking and disease in smokers. Moreover, this is the best outcome we can expect from scientists. We will never find an unbiased scientist who concludes that ETS exposure has been proven safe for non-smokers.42

The situation, for the exacerbation of which the high-ranking corporate official hesitantly made the industry’s stonewalling in part responsible, both posed dangers to cigarette sales potentially more catastrophic than those created by the gradual disclosure to the public of the health impact on smokers, of which the manufacturers had been aware for years, and left more room for the industry to maneuver—provided that it relied on less transparent and more sophisticated prevarication and intransigence:

There is an analogy to our present situation and the situation the industry faced after the 1964 Surgeon General’s Report linking active smoking to disease. Then we faced a crisis of social acceptability over our product. We faced an anti-smoking movement and laws designated to curb smoking. As the scientific establishment slowly closed ranks against our position, we then sought to gather scientists to rebut the Report. The “controversy” over active smoking and disease soon subsided and we were left isolated on the issue. Since then, the product liability threat has all but silenced us on the active smoking issue outside the courtroom.

What the industry didn’t do in 1964 and the ensuing decades was mount an aggressive public relations campaign to counter the Surgeon General. The Tobacco Institute handled the issue as a “controversy” and the companies did their best to keep the brands out of the battle. Perhaps it was a prudent course considering the litigation we face today and the industry’s slow but steady growth between 1964 and 1982.

However, today the industry is declining and the ETS issue seems unlikely to evoke serious product liability litigation. Indeed, the same scientific uncertainty that keeps anyone from concluding ETS is harmless will also make it very difficult to prove ETS is harmful to any one individual. Low dose exposure is all but impossible to identify as the cause of disease in a specific person. Thus, we have much more operating freedom on the ETS issue than we had on the active smoking issue.

... What we need is an aggressive public relations campaign to:

1. Restore reasonable doubt in the minds of smokers that ETS is harmful to

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anyone.

2. Buttress the belief in smokers that smoking is a right which no government organization or individual is entitled to revoke.

We already possess the basic scientific critique of the ETS research necessary to fuel the campaign. More scientific research will not significantly strengthen this critique and may only add to the fear of smokers on this issue.

Unless we act now to counter this incidence decline, there will be little left to defend of the industry....

The rest of this chapter will examine how effectively anti-smoking advocates in Iowa were able to overcome the cigarette oligopoly’s phony claims and real money.

**Jo Ann Zimmerman’s Initiative of 1983-84: House File 248**

[S]moking fight[s] in Senate (and state). Boy, have there been some!

The Seventieth General Assembly (1983-84), both of whose houses were controlled by significant Democratic majorities—28 to 22 in the Senate and 60 to 40 in the House—engaged in an important effort to amend an anti-public smoking law that from its inception in 1978 had lagged behind that of the national leader (Minnesota) and had become even more backward during the intervening years as Minnesota made its regime more stringent by means of administrative rule (for example, by requiring restaurants to set aside at least 30 percent of its seating capacity for the nosmoking section) and other states and local governments enacted more rigorous legislation. For example, in 1979 neighboring Nebraska enacted the Nebraska Clean Indoor Air Act, which, in the view of the Tobacco Merchants Association of the U.S., “duplicates and rivals classic Minnesota restrictive law for most restrictive in nation.” By this time, for example, numerous states had already covered the following types of public places that the Iowa law still excluded: educational facilities (20); food stores

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42Beverly Hannon, [untitled notes] (Feb. 22, 1997), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (1), IWA.
43See above ch. 24.
(11); retail stores (9); restaurants (11); and workplaces (4).48

The primary sponsor of the chief anti-public smoking bill, H.F. 248,49 was first-term Democrat Jo Ann Zimmerman, a registered nurse, health planner, and former smoker,50 who in 1986 would be elected Iowa’s first female lieutenant governor.51 As early as January 7, 1983, more than six weeks before Zimmerman introduced the bill, the Tobacco Institute in its “1983 Legislative Outlook” had classified smoking restriction legislation in Iowa (as well as in 15 other states) in the highest ranked group—“Likely to be Introduced/Even to Pass.”52

Although throughout this discussion the focus remains on legislators, anti-smoking lobbying organizations such as the Iowa branches of the American Lung Association, American Heart Association, and, especially, the American Cancer Society, were, as anti-tobacco militant and state legislator Rod Halvorson put it many years later, an important part of the struggle “all the time.” Not only did they furnish legislators with vital statistics and arguments, but, even more significantly, they provided, through their members and supporters, a “comfort base” in the form of a constituency that enabled individual legislators to pursue a crucial public health objective without appearing to be following some idiosyncratic will-o’-the-wisp.53

Zimmerman later revealed the impetus for the proposed legislation in a newsletter: a future constituent had challenged her to write a bill recognizing the rights of nonsmokers as equal to those of smokers.54 The constituent, who was unable to work in an environment in which people smoked, had made this request when Zimmerman was door knocking in the fall of 1982 during her first campaign for a House seat; persistent, after her election, he called her in December to remind her.55 Filing the bill in 1983 was, accordingly, a rather spontaneous event: Zimmerman’s only cosponsor, James O’Kane, happened to sit behind her in the

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48See Tobacco Institute, Smoking Restriction Laws in the Fifty States and the District of Columbia (Jan. 1982), Bates No. 81511773. See also Tobacco Institute, State Activities Division, StateLine (May 18, 1984), Bates No. TIMN0245209.
52“1983 Legislative Outlook” (Jan. 7, 1983), Bates No. T103870841/2. Legislation in no state was deemed “Likely to be Introduced/Likely to Pass.”
55Email from Jo Ann Zimmerman to Marc Linder (Mar. 29 and 30, 2007).
House chamber, “saw the bill and asked to sign on.”

Where H.F. 248 went beyond the existing statute, it was in large part taken verbatim from the 1975 Minnesota law (although it curiously lacked the latter’s public policy preamble stating its purpose as protecting “the public health, comfort and environment”), but it also adopted several of that law’s most prominent defects. On the other hand, the bill failed to incorporate the more comprehensive coverage that the Minnesota Health Department had grafted onto the Minnesota Clean Indoor Air Act by means of administrative rules in 1976 and 1980. The bill expanded the universe of covered public places by incorporating workplaces, restaurants, retail stores, offices, other commercial establishments, and educational facilities. Like the Minnesota law, it ignored public health considerations by expressly excluding “a private, enclosed office occupied exclusively by smokers, even though the office may be visited by nonsmokers.” While conferring, like the Minnesota statute, a unique exemption on bars, which alone could be left without any nosmoking area, the bill, like the MCIAA regulations, also limited this exemption by excluding from the definition of “bar” any establishment that provided seating and tables for serving meals to more than 50 people at one time. Also like MCIAA, the bill did not require building owners to do anything to shield nonsmokers from the smoke emanating from designated smoking areas other than to use “existing physical barriers and ventilation systems...to minimize the toxic effect of smoke in adjacent nonsmoking areas”; and as was the case in Minnesota, one-room public places were in compliance if they merely reserved and posted one side of it as a non-smoking area. H.F. 248, which went beyond the Minnesota law by prohibiting designated smoking areas on elevators, adopted that state’s exclusion of

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56 Email from Jo Ann Zimmerman to Marc Linder (Mar. 29, 2007).
57 1975 Minn. Laws ch. 211, § 2, at 633.
58 See above ch. 24.
59 H.F. 248, § 1(2) (Feb. 21, 1983).
60 H.F. 248, § 1(4) (Feb. 21, 1983).
61 H.F. 248, § 2(1) (Feb. 21, 1983). Since the Iowa legislature did not empower or direct any agency to promulgate regulations to implement the clean indoor air law (and no enforcement or litigation is known ever to have taken place), the meaning of “one side of a room” was never clarified. Nevertheless, the Iowa legislature can be presumed to have known that the rules adopted by the Minnesota Health Department did not define the statutory term to mean one half of the room, but merely “a contiguous portion of the room, including any seating arrangements.” Minn Code of Agency Rules 7 § 1.442.H (1980). See above ch. 24.
factories, warehouses, and similar workplaces not usually visited by the public as well as MCIAA’s mandate that the bureau of labor establish rules restricting or prohibiting smoking in workplaces in which “close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.”

From Minnesota the bill also took the imposition on those in control of public places of the responsibility to “make reasonable efforts to prevent smoking” by “[a]sking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoker [sic; presumably should be, as in MCIAA, “smoke.”]” As worded, this duty was interpretable as encompassing requests to smokers who were violating the law by smoking in nonsmoking areas, but whose drifting smoke caused nonsmokers discomfort. This result was even more compelling in connection with Zimmerman’s adoption of the Minnesota language requiring proprietors to “[a]rrang[e] seating to provide smoke-free areas” —a much more capacious term than “no-smoking area,” which had to be interpreted to mandate protection for nonsmokers in nonsmoking areas from exposure to smoke drifting from designated smoking areas. And, finally, like the 1980 MCIAA rules, H.F. 248 required those in control of a covered building post signs on all major entrances stating that smoking was prohibited except in designated areas.

H.F. 248 was immediately referred to the State Government Committee, where it languished during the 1983 session. The following year it was assigned to a subcommittee consisting of three anti-smoking militants, Jean Lloyd-Jones, Johnie Hammond, and Darrell Hanson, returned three weeks later to the committee, and made a committee bill. At the committee meeting on February 21, 1983, Zimmerman later recounted that she had “probably agreed to changes and converting it to a Committee Bill.” As a lobbyist for the PTA before being elected, Zimmerman had learned that “bills voted out of committee as a Committee Bill had a greater chance of passing and appeared to have more power than a bill with an individual's name as primary sponsor.”

Email from Jo Ann Zimmerman to Marc Linder (Mar. 28, 2007).

63 H.F. 248, § 2(1) (Feb. 21, 1983).
64 H.F. 248, § 3 (Feb. 21, 1983).
22, 1984, H.F. 248 was substituted for H.F. 2140, the bill that Republican Dorothy Carpenter, an assistant minority floor leader, had filed in January banning smoking in food service establishments with a minimum occupied seating capacity of 32, unless a contiguous area of not more than 50 percent of the serving area was designated for smoking and that had been sent to the same subcommittee consisting of Lloyd-Jones, Hammond, and Hanson. The spirit in which the anti-smokers approached the legislative process was captured by a newspaper cartoon included in the minutes depicting two smokers seated inside a jet engine of an airplane, one saying to the other: “You had to ask to sit in the smoking section...” A handwritten annotation below, which appears to have been made by Hammond and alluded to the contemporaneous battle over smoking in the House itself, added: “Imagine where they’ll seat you in the House.” With Lloyd-Jones managing the bill, the committee debated a subcommittee amendment. The “[l]ively discussion” began with an amendment to the amendment by Democrat Emil Pavich—who in 1991 would file a key amendment to the cigarette sales law desired by the cigarette companies to preempt local ordinances—to increase the threshold for bar coverage from 24 to 50 seats, which was adopted. Democrat Eugene Blanshan offered an amendment to


73[House] State Government Committee Minutes (Feb. 22, 1984) (copy furnished by SHSI, DM). The handwriting is very much like Hammond’s signature on the minutes as vice chair.

74Although the subcommittee amendment was not included in the file at the State Archives, an undated amendment to H.F. 248 filed by Lloyd-Jones is preserved, which struck out restaurants and retail stores and inserted verbatim the new section on food service establishments from H.F. 2140; it weakened Carpenter’s bill by raising the threshold level of coverage from 32 to 50 persons. The amendment also deleted H.F. 248’s coverage of one-room public places. House File 248 (n.d., by Lloyd-Jones); SHSI, DM.


76See below ch. 28. His motivations were unclear. According to Iowa legislator Minnette Doderer, Pavich “never does anything controversial...and I don’t know how you can argue with Emil, because he never takes a stand.” “A Political Dialogue: Iowa’s Women Legislators,” Box 1, Folder: Transcripts: Minnette Doderer, Part I at 79 (June 27, 1989), in IWA.
include “church, temple, synagogue, and meeting room” among the public places in which smoking was prohibited, but “Lloyd-Jones resisted Blanshan’s amendment as frivolous,” and he withdrew it. Democrat and smoker Bob Arnould offered an amendment, presumably designed to make enforcement more difficult, by adding a requirement that someone “knowingly” fail to perform a duty, which the committee adopted. In the end, however, the bill gained only 10 ayes, which did not amount to a majority of the committee’s 23 members, even though only six members voted nay.\footnote{Email from Jo Ann Zimmerman to Marc Linder (Mar. 28, 2007).}

In trying to reconstruct almost a quarter-century later why her bill had been killed in 1983-84, when her party enjoyed such an impressive majority, Zimmerman noted that in her first month in the House (January 1983) she had already “done” a health bill, for which she had lobbied before being elected, and, despite the leadership’s hesitation to have her “do the whole thing,” dominated the debate, thus suggesting to the powerful speaker of the house, Don Avenson, that she “would be pushing him.” Although she could no longer remember what Avenson had said about the anti-smoking bill, her conclusion was that in 1983-84 “the biggest obstacle was the Senate. If the Senate leaders said they did not want to deal with the smoking issue, then Avenson had to consider what he wanted to get through both the House and Senate, and what it would cost him in chits.” Moreover, even without being able to recall the “machinations” involved in getting H.F. 248 out of committee, Zimmerman observed that: “If Avenson, or another member in leadership said it was dead, leadership/Avenson sometimes told committee chairs not to spend a lot of time on debate in committee as the bill would probably not be scheduled for debate. There are tricks to making something happen outside the purview of leadership—but one always has to look at what chits you spend doing this—especially if you are asking for other things to happen. This bill would have generated a lot of debate.”\footnote{Email from Jo Ann Zimmerman to Marc Linder (Mar. 28, 2007).}

\footnote{Email from Meaghan McCarthy, archivist, SHSI, DM (Apr. 4, 2007).} The facts underlying Zimmerman’s observations on Avenson’s House leadership are reconcilable with a somewhat different evaluation by Rod Halvorson, one of Zimmerman’s anti-smoking colleagues, who argued that Avenson—regardless of his having acquiesced in smoking bans in the House itself—had not been a “friend” of the anti-tobacco struggle; rather, dismissing militants such as Halvorson and Johnie
Hammond as “purists,” he had often aligned himself with and aided the pro-
tobacco policies of Senate Majority Leader Bill Hutchins.79

The Blow-Up Between Cigarette Manufacturers and Iowa Wholesalers

Anti-smoking activists...are campaigning for laws to segregate smokers or to prohibit
smoking in various public places. Their campaign is well orchestrated and publicized.
The views of smokers, and of the business people who serve them, have not been nearly
as well heard. Often, their opposition arises at the eleventh hour when a law is well on its
way to enactment.80

The travails of H.F. 248 coincided with a blow-up between the Tobacco
Institute and its Iowa lobbyist, which was not public knowledge and of which
Zimmerman was not aware at the time.81 Unlike Representative John Patchett,
who during his tenure in the Iowa House from 1973 to 1980 did not perceive
tobacco lobbying as prominent, Zimmerman recognized it as soon as she began
in 1983 as a major presence, albeit somewhat less so than that mounted by the
pharmaceutical and alcohol industries.82 But even Patchett, for whom in
retrospect it “makes sense...that the tobacco industry started investing a lot more
in Iowa and elsewhere from the early 80s on, given the bigger picture,” knew the
tobacco lobbyist George Wilson in the 1970s as “one of the three or four ‘heavy
hitters’ I would have thought of—serving multiple, business-oriented, moneyed
clients.”83

George A. Wilson, Jr., a Des Moines lawyer and son of the same-named
former Iowa governor and U.S. senator, had been a tobacco lobbyist since 1954.84

79 Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007). In assessing
Halvorson’s account of Avenson’s leadership it is worth noting that after he left the
legislature Avenson as a lobbyist has represented Casey’s General Stores, a convenience
store chain that may be the single largest seller of cigarettes in Iowa.
http://coolice.legis.state.ia.us.
502111961/6.
81 Email from Jo Ann Zimmerman to Marc Linder (Mar. 28, 2007). Lawrence Pope,
the Republican House Majority Leader during the 69th General Assembly (1981-1982)
and later a tobacco lobbyist in his own right, stated that he had been aware of it.
Telephone interview with Lawrence Pope, Des Moines (May 11, 2007).
82 Telephone interview with Jo Ann Zimmerman, Des Moines (Mar. 28, 2007).
83 Email from John Patchett to Marc Linder (Mar. 29, 2007).
For some years he was both executive director of the Iowa Association of Tobacco Distributors and legal counsel/lobbyist for the Tobacco Institute, that is, the cigarette manufacturing companies.\(^{85}\) The cooperative relationship between these two organizations began to be stressed in 1982. Crucial to understanding the underpinnings of this fracture was the divergence in legislative priorities: whereas for the Iowa tobacco wholesalers retention of the Unfair Cigarette Sales Act, which set minimum wholesale and retail prices and guaranteed minimum profits,\(^{86}\) was the main thrust and a constant of Wilson’s lobbying on their behalf throughout his career,\(^{87}\) the cigarette companies’ entirely negative agenda entailed vehement opposition to the “The Big Four Issues”—legislation on taxation, smoking restrictions, sampling/advertising, and self-extinguishing cigarettes.\(^{88}\)

\(^{85}\)On the extant Iowa Senate Individual Lobbyist Registration forms from 1976-1978 and 1981 in the Iowa State Archives Wilson listed himself as representing the IATD in each year and the Tobacco Tax Council in the last three (in addition to a variety of non-tobacco clients). Copies furnished by SHSI, DM. No House forms have survived for the years 1976 to 1986. Email from Meaghan McCarthy, SHSI, DM (Apr. 12, 2007). In an interview Wilson claimed that he could not remember whether he had ever represented the Tobacco Institute, adding that he thought that Charles Wasker had. He cagily observed that in any event his tobacco lobbying income all came from the IATD (thus concealing the fact that the Tobacco Institute had funneled his lobbying fees through the IATD). Telephone interview with George A. Wilson, Jr., Des Moines (Apr. 11, 2007); see below. As early as 1978 a Tobacco Institute register of state lobbyists included a handwritten notation that Wilson lobbied for the Tobacco Tax Council, Tobacco Institute, and IATD. State: Lobbyist (Sept. 7, 1978), Bates No. 03678309/10. See also State Activities: TI & TTC Lobbyists (n.d.), Bates No. TCAL0413957; States Where TI & TTC Retain Same Lobbyist: 1978, Bates No. 03678307. A TI document from 1981 also listed Wilson as its and the TTC’s legislative counsel. State Summary (Mar. 1981), Bates No. 03667261/78.

\(^{86}\)“Senate Votes 5-Cent Cigarette Tax Boost,” \textit{DMR}, May 22, 1981 (1A:6, at 3A:1). Opponents such as Senate Democrat George Kinley (a smoker) asked: “Why are we guaranteeing profit to the wholesalers and retailers of cigarettes? What the hell kind of system is this when the Legislature gives an industry a guaranteed profit in the millions?” In response, “[s]upporters claimed price competition on cigarettes would threaten the economic existence of mom-and-pop grocery stores by allowing larger retailers to sell cigarettes at below cost.” Tom Witosky, “Iowa Senate Votes to Raise Minimum Price of Cigarettes,” \textit{DMR}, May 7, 1983 (2A:2). See also “Cigarette Tax Boost Voted; Session Ends,” \textit{DMR}, May 23, 1981 (1A:5, at 3A:1).

\(^{87}\)Telephone interview with George A. Wilson, Des Moines (Apr. 11, 2007).

\(^{88}\)Tobacco Institute, Field Staff Meeting (1985), Bates No. 6805011768/86. For a list of 15 states and several cities with sampling restrictions at the end of the 1980s, see Existing Sampling Bans/Restrictions (Apr. 3, 1989), Bates No. 670845079Y. Without
In September of 1982 Wilson wrote to John Kelly, a Tobacco Institute senior vice president in charge of state activities, regretting the need to ask him to give up a weekend “to help us resolve a possible conflict,” but emphasizing that it was “far better to resolve differences, if any, prior to the time when the legislature meets.” 98\textsuperscript{99} 99\textsuperscript{99} Exactly what conclusions Kelly and Wilson reached is unclear, but in early November, Kelly directed a background memorandum to the Tobacco Institute’s State Activities Policy Committee (copied to many others including Wilson) explaining that in 1981 the Iowa legislature had passed a five-cent cigarette tax increase, which was to sunset automatically in 1983. 99\textsuperscript{100} 100\textsuperscript{100} However, in 1982 the legislature considered making the increase permanent subject to amendments reinstating the state cigarette fair trade law (which IATD vigorously supported), and banning all cigarette sampling (which the cigarette manufacturers vehemently opposed). Because of the controversy sparked by the former amendment, Kelly reported, the whole package failed. The experience nevertheless persuaded “[l]egislative counsel” (i.e., Wilson) and Kelly that the five-cent tax increase proposal would reappear on the legislative agenda in 1983 because the deepest economic depression of the post-World War II period (“downturn in the general economy”) had left the state of Iowa strapped for revenue. Consequently, Kelly proposed a Tobacco Action Network mobilization in Iowa to be scheduled for the time between the election a few days later and the convening of the state legislature in January. 99\textsuperscript{101} 101\textsuperscript{101} By telling them that making the increased tax permanent “would cause hardship on [sic] those” who sold

mentioning the more than 1,500 deaths annually caused by fires ignited by cigarettes, a Tobacco Institute senior vice president in a briefing in 1989 to the chairman of R.J. Reynolds Tobacco Co. called the “‘fire-safety’ or ‘accidental fire’ issue...perhaps one of the most difficult we deal with...since careless smoking sometimes plays a role in the tragedy of accidental fire. On the other hand, the passage of one negative bill has the potential of prohibiting the sale of cigarettes completely in that jurisdiction.” Kurt Malmgren, Briefing for Mr. James H. Johnston Chairman R. J. Reynolds Tobacco Company at 70 (September 27, 1989), Bates No. TIMN350847/916. On the deaths and the cigarette companies’ efforts to prevent legislation, see Andrew McGuire, “Cigarettes and Fire Deaths,” New York State Journal of Medicine 83(13):1296-98 (Dec. 1983); U.S. Department of Health and Human Services, Reducing the Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General: 1989, at 614 (1989).

98Letter from George A. Wilson to John D. Kelly (Sept. 14, 1982), Bates No. 85704171.
991981 Iowa Laws ch. 43, § 1, at 175 (tax to begin on July 1, 1981 and expire on June 30, 1983).
100TAN Action Request from Jack Kelly to State Activities Policy Committee (Nov. 5, 1982), Bates No. 680580246/7. On TAN, see below this ch.
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

cigarettes for a living and those who consumed them\textsuperscript{92} Kelly planned to motivate the industry’s “volunteers” to repeat this message to their state legislators.\textsuperscript{93}

Although there may be a gap in the correspondence between TI and IATD following the November 6 letter in the online collection of the tobacco industry’s internal documents, on December 17, 1982, TI President Samuel Chilcote wrote to IATD President James Gordon (with copies to Wilson and Kelly) to confirm in writing the relationship between the two organizations for 1983:

IATD will continue to assist in the tobacco industry’s government relations and public affairs support programs. Specifically, we ask that you and your members support the efforts of our legislative counsel, Charles Wasker, on matters of mutual concern to The Institute and IATD. In improving our total industry support program in Iowa, we ask also that IATD, for our mutual benefit, continue assisting Roger Sandman, our Area Director, as he expands the reach and impact of the Tobacco Action Network.

In consideration for IATD [sic] continued support of such mutual objectives, IATD will receive a contribution of $10,000.\textsuperscript{94} In addition to your contribution, your Executive Director [Wilson] will be reimbursed on an actual cost basis for travel expenses related to trips outside your State that we may request him to make.\textsuperscript{95}

For Wilson as a legislative consultant the TI budget had provided $5,000 for 1980 and $10,000 for 1981.\textsuperscript{96} The Tobacco Institute’s nationwide list of state lobbyist and association agreements for 1982 specified that the fee for Wilson, retained through IATD and representing both it and the Institute, was $27,000, whereas that for Wasker, retained directly as a lobbyist, was only $3,500.\textsuperscript{96} Thereafter, however, TI’s annual payments to Wasker rose sharply to $20,000 in 1983, $23,000 in 1984, $28,000 in 1985 and 1986, $31,000 in 1987, and $33,000 in

\textsuperscript{92}Sample TAN Volunteer Letter, Bates No. 680580248.
\textsuperscript{93}Sample Letter, Bates No. 680580249.
\textsuperscript{94}Letter from Samuel D. Chilcote, Jr. to James Gordon (Dec. 17, 1982), Bates No. 03675845. On the only extant Iowa Senate Individual Lobbyist Registration forms for Wasker between 1976 and 1986—those for 1984-1986—he listed himself as representing the Tobacco Institute. Copies furnished by SHSI, DM. A former TI Midwest regional vice president observed that it was important to keep in mind that Chilcote and Wasker were “best friends,” who had known each other from careers in or representing the distilled spirits industry. Telephone interview with Michael Brozek, Madison, WI (June 5, 2007).
\textsuperscript{95}Schedule B The Tobacco Institute 1981 Budget Legislative Consultants Field Administration-Northern Zone (July 23, 1981), Bates No. TIMS0025149.
\textsuperscript{96}1982 Lobbyists/Association Agreements (May 4, 1982), Bates No. TIMS00026348/9; 1982 Lobbyists/Association Agreements (May 17, 1982), Bates No. 2024077695/6.
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

Ten days later Wilson responded to Chilcote, referring to a meeting that TI Vice President Robert Hanrahan had held with Wilson and several IATD officers on December 14 concerning the organizations’ relationship. Claiming that either Chilcote’s letter must have been written before Hanrahan’s report or Hanrahan had failed to communicate to Chilcote the result of the meeting, Wilson noted that what Hanrahan had told them about the relationship generally agreed with the first of the paragraphs quoted above: “However, our committee suggested that the contribution of $10,000 was not acceptable and that if a revision were not made, we would discontinue our relationship with the Tobacco Institute and its programs in the State of Iowa.” In addition to the overriding issue of money, a conflict had emerged between the two organizations concerning legislation. On June 30, 1983, the state’s temporary cigarette tax increase from 13 to 18 cents was going to sunset, but Wilson knew that the legislature, because of the condition of the state treasury, would not allow this automatic repeal to go ahead. In his view, the legislature’s need to consider the cigarette tax created additional problems that would also have to be addressed, including: making the tax permanent or increasing it by some amount; prohibiting sampling of cigarettes; increasing tax on other tobacco products; “[a]s always present, the question of public smoking”; and the Unfair Cigarette Sales Act. Wilson emphasized that UCSA, which, by mandating minimum prices, tended to raise wholesalers’ and retailers’ profits while depressing sales, had, as Chilcote “would expect,” to be “the number one priority of our Association. ... The other items are certainly of concern to us, as they would be to the entire tobacco industry.” In this spirit Wilson then warned Chilcote that: “If our relationship does not continue, you should understand that our primary responsibility will be to correct the problem of the Unfair Cigarette Sales Act, and the Tobacco Institute will assume the responsibility for the other items.”

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97[Tobacco Institute], State Activities Division, 1986 Proposed Budget (Sept. 18, 1985), Bates No. 680544610/90; [Tobacco Institute], State Activities Division, 1987 Proposed Budget (Sept. 26, 1986), Bates No. 684019007/16; [Tobacco Institute] [untitled] (Dec. 29, 1987), Bates No. TIMS0022453/4.

Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

Chilcote’s reply, a draft of which was dated January 4, 1983 and approved on January 12 (“O.K. by me”) by James R. Cherry, the Lorillard vice president and general counsel, was sent on January 17, and focused on the possible differences in legislative desiderata between the manufacturers and wholesalers/retailers without offering to renegotiate the $10,000 fee that manifestly preoccupied Wilson. Despite claiming that he did not understand IATD’s “‘position,’” Chilcote nevertheless understood IATD’s commitment to maintaining the UCSA and even declared that both sides had “always recognized that, at times, the interest of different parts of the industry will diverge” and “this is one of those times.” In turn, he expected Wilson to understand that the manufacturers’ “first priority has always been and will continue to be the defense of the entire industry against increased tobacco taxes, anti-smoking legislation and attempts to limit the marketing of our products.” Little wonder that years later Wilson remarked that the wholesalers had had their doubts as to whether the cigarette manufacturers had supported UCSA. Chilcote’s admonition should be read in the context of an internal Tobacco Institute document from the end of 1981 in preparation for a joint lobbyists’ meeting before which “all negotiations and arrangements” with individual state lobbyists had to be completed. Although Iowa was ranked in the lowest priority group, its entry did make it a requirement to “review sampling matters with Wilson....” And well the Tobacco Institute might have foreseen a looming conflict since sellers, as Wilson asserted much later, opposed sampling on the grounds that it reduced sales. The Tobacco
Institute regarded the Iowa law, which permitted sampling only of packs of four cigarettes,\(^{104}\) as a “de facto ban,” and “the thorn in the ointment in Iowa...and the cause of this law, are the wholesalers who felt they had to curb what they viewed as excessive sampling. This marketing practice was costing wholesalers and retailers a large amount of money, they claimed.\(^{105}\)

Wilson’s lengthy reply shed considerably more light on the conflictual relationship, which allegedly had not existed many years earlier before the Tobacco Institute initiated its policy of having legal representatives in every state. Back then IATD had handled all the tobacco problems, paid for the service, and took any criticism that resulted from the position that it adopted for “the industry as a whole.” In contrast, “[a]s we see what you are doing today,” the position that the manufacturers present to the Iowa legislature “may or may not be a popular issue...in Iowa.” Wilson related that during the 1982 session, the question of sampling had arisen during debate on a bill amending UCSA. IATD tried to defeat the sampling provision, but it nevertheless passed the Senate. Before it was debated in the House, Hanrahan set up a conference call including Wilson, all the manufacturers, and TI representatives: “I was told that if I couldn’t

\(^{104}\)The legislature imposed the cap of four in 1974, lowering it from five, which had been set when the law was first enacted. 1939 Iowa Laws ch. 73, § 35, at 102, 118; 1974 Iowa Laws ch. 1116, § 2, at 368, 369.

\(^{105}\)Kurt Malmgren, Briefing for Mr. James H. Johnston Chairman R. J. Reynolds Tobacco Company at 63 (Sept. 27, 1989), Bates No. TIMN350847/909.
guarantee that the sampling issue would be deleted, the bill had to be ‘killed.’ In our business as legislative counsel, as you well know, no such guarantee could be given legitimately; and if it were, it would not have been worth the paper it was written on.” The bill passed by a vote of 26-24, but after a motion to reconsider had been adopted, sampling was never mentioned during the renewed discussion, and the bill died because the vote of 25 to 24 lacked a constitutional majority.106

106 Letter from George A. Wilson to Samuel D. Chilcote, Jr. at 1 (Jan 24, 1983), Bates No. 85704162. According to the Senate Journal, the bill, S.F. 2299, failed to pass. An amendment by Democrat Arthur Small to do away with sampling passed on a voice vote, but an amendment to repeal UCSA lost 22 to 27; the bill then lost for lack of a constitutional majority 25 to 24. State of Iowa: 1982: Journal of the Senate: 1982: Regular Session Sixty-Ninth General Assembly 1200-1201 (Apr. 14), 1314-15 (Apr. 20), 1991-92 (S-5601, by Small), 2066 (S-5706, by Holden et al.). See also Diane Graham, “Cigarette Price-Fixing Law Survives Veto,” DMR, Apr. 15, 1982 (7A:1); Diane Graham, “Senate Shifts on Cigarette Price Bill,” DMR, Apr. 21, 1982 (2C:3-4). Unfortunately, a quarter-century later Small had no recollection of the events. Telephone interview with Arthur Small, Iowa City (Apr. 8, 2007). Lawrence Pope, who was the Republican House Majority Leader from 1979 to 1982, later characterized Wilson as a “very powerful” lobbyist, who had beaten him on this issue, but when asked to explain the basis of Wilson’s power, he was unable to do so. Telephone interview with Lawrence Pope, Des Moines (May 11, 2007). In considering a bill to make the temporary cigarette tax increase permanent, the Senate Ways and Means Committee had voted to repeal UCSA as proposed by Republican Edgar Holden, but Wilson, who claimed that it was not a price-fixing statute, but merely a prohibition on selling below cost, said his clients would fight it because it would harm small retailers, who could not compete against large-volume retailers. In contrast, Democrat Bob Rush argued that the law was on the books only to benefit 20 tobacco distributors. At the same time, the committee voted to remove all restrictions on free cigarette samples. Against the argument of Republican Jack Hester (who had opposed repeal of UCSA) that all free samples should be banned, supporters asserted that it was “no different than when a store hands out cheese or other food samples to customers.” Diane Graham, “Smokes Bill Puts Industry in a Huff,” DMR, Mar. 31, 1982 (6A:1). TAN undertook an effort to mobilize support against the restriction of handing out samples, offering such pseudo-reasons as that the technique was not designed to encourage non-smokers to smoke and that it provided many jobs for people handing out samples at a time of high unemployment. Letter from Roger Sandman to TAN Volunteer (Apr. 1982), Bates No. 680580272. The much ballyhooed cigarette lobbying juggernaut was far from universally successful on the question of sampling; in fact, its incompetence was at times comic, as described by a TI official: “[M]any times in the past, a sampling bill has been debated in the state capitol, while samplers—at the very same time—have been working the street in front of the capitol. This is absolutely one area where closer coordination between marketing and government relations in essential.” Kurt Malmgren, Briefing for Mr. James H. Johnston Chairman R. J. Reynolds Tobacco Company at 59
Having subtly revealed his prowess as a tobacco lobbyist, Wilson then launched into a considerably less subtle lament about the opprobrium associated with that occupation in Iowa, combined with a doubtless unusual disparagement of his client’s product—especially since Wilson himself smoked—calculated, presumably, to justify a wage increase based on the job’s unpleasantness:

Tobacco representation for anyone is not an easy burden to carry. This product does not enjoy a favorable attitude with the majority of our population; and even the people who use it, generally say they would be better off if they didn’t. It is hard to find legislators, possibly outside of the tobacco South, who really want to lead a fight to defend tobacco against taxation, smoking restrictions, and so forth. Cigarettes are not manufactured in this state; tobacco is not grown in this state; tobacco distributors have businesses in this state.

Not because of the popularity of tobacco products, but because distributors provide jobs, pay taxes and have votes, are they able to provide some impact on the legislative process in Iowa.

The Tobacco Institute determined what our services were worth to your organization last year; and in light of what we see happening during this session, we are not prepared to accept anything less.

Wilson had changed his tune considerably since August 1981, when, toeing the party line, he had assured TI’s TAN house organ that: “‘Smoking has to be a courtesy matter. Basically it is something that comes down to a social grace.’”

By 1983, however, since legislators had already begun contacting Wilson about coming tobacco legislation, he wanted the Tobacco Institute to decide quickly whether it wanted the relationship to continue so he could give them “an appropriate response.”

Wilson got neither a quick response nor the additional money he wanted. On February 17, Chilcote wrote back that TI’s position remained unchanged and enclosed the check for $10,000. This exchange appears to have ended four

(Sept. 27, 1989), Bates No. TIMN350847/905.


108Letter from George A. Wilson to Samuel D. Chilcote, Jr. at 2-3 (Jan 24, 1983), Bates No. 85704162/3-4.


110Letter from George A. Wilson to Samuel D. Chilcote, Jr. at 3 (Jan 24, 1983), Bates No. 85704162/4.


112Check from Tobacco Institute to Iowa Association of Tobacco Distributors for
days later when Wilson advised Chilcote that IATD’s position also remained unchanged and returned the check. As late as November of that year, however, in transmitting the revised proposed budget for 1984 to the State Activities Policy Committee, Chilcote was still listing $10,000 for 1983 and $5,000 for 1984 for Iowa as a “Contingency” under the item “Contributions to Wholesale Associations.

The break-up with Wilson and IATD was sufficiently important that shortly thereafter, Kelly, TI vice president for state activities, sent a memorandum to the members of the State Activities Policy Committee—consisting of Shephard Pollock, the president and CEO of Philip Morris, Kinsley van Dey, Jr., the president and CEO of Liggett, W. Eugene Ainsworth, Jr., vice president of R.J. Reynolds, Ernest Pepples, the senior vice president and general counsel of Brown & Williamson, and James Cherry, vice president and deputy general counsel of Lorillard—attaching the correspondence with the Institute’s former lobbyist in order to keep them “fully apprised” in case their companies received questions from Iowa wholesalers. Four days later Cherry, in turn, wrote a partly sarcastic memo (“Re: Iowa Lobbyist”), attaching the same correspondence to higher-ups at Lorillard, which merits quotation in full:

You may remember that during last year’s session of the Iowa legislature we discovered our lobbyist, George Wilson, who is also executive director of the state wholesaler association, was trading a cigarette sampling ban for an unfair cigarette sales act. On the eve of a decisive vote, he advised us with brazen candor that his loyalties were not with us. We immediately dispatched Kelly and Flaherty to Iowa and commissioned them to take such measures (any measures, save those involving violations of the local weapons law) as might be necessary: (a) to the demise of the sampling bill; (b) to a guarantee that Wilson would not again have a like opportunity to traffic in our interests. These assignments were accomplished by Jack and Bill, and with a sense of political delicacy (vis-a-vis Wilson and his association) that does them credit. A new lobbyist was hired to represent us, and the funding arrangement with the local association was

$10,000 (Feb. 24, 1983), Bates No. 85704161.

Letter from George A. Wilson to Samuel D. Chilcote, Jr. (Feb. 28, 1983), Bates No. 85704159.

Samuel D. Chilcote, Jr. to W. E. Ainsworth et al., Re: State Activities Division - 1984 Budget (Nov. 10, 1983), Bates No. 03676534/88. An earlier budget proposal from August did not qualify these sums as a contingency. [No title] (Aug. 1983), Bates No. 2024731043/74. According to these documents Wasker’s lobbyist fee was $20,000 for 1983 and $25,000 (or $23,000) for 1984.

Memorandum from John D. Kelly to State Activities Policy Committee (Mar. 11, 1983), Bates No. 85704158.
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

...commensurately adjusted (from $26,000 to $10,000). From that time to this, Sam Chilcote has been struggling manfully to maintain the good will of Wilson and his colleagues, but Wilson has not been making it easy and the attached correspondence reflects that.¹¹⁶

Recipients of the correspondence at Lorillard understood the tricky situation that Wilson had created for the tobacco companies. One jotted down in a comment to Cherry: “Could someone from the mfr group with a special relationship with the Iowa Assn try to act as intermediary—or should we just let the Assn ‘swing in the wind.’ Can they hurt us legislatively? I’ll bet they can.”¹¹⁷

Despite the appearance that TI regretted having lost Wilson (or at least the alliance with the wholesalers), replacing Wilson with Wasker was part of a nationwide plan “to retain lobbyists on direct basis instead of through wholesaler associations,” which it had accomplished in almost all states.¹¹⁸ Despite Wilson’s implausible after-the-fact claim that IATD had monitored but never taken a position or lobbied on anti-smoking laws in order not to dissipate its lobbying strength on other, more important, issues,¹¹⁹ IATD presumably had no rational self-interest in terminating its opposition to anti-public smoking laws, which

¹¹⁶ Memorandum from J. R. Cherry to C. H. Judge, J. R. Ave, and A. J. Stevens (Mar. 15, 1983), Bates No. 03675833. Curtis Judge was TI executive committee chair at the time and the next year became Lorillard’s chairman and CEO; Robert Ave was executive vice president for marketing and future president and CEO; and Arthur Stevens was general counsel. William Flaherty was the president of the Tobacco Tax Counsel. The State Activities Division credited the change of legislative counsel with the defeat of the sampling bill. Report of Tobacco Institute Activities 1982-1983 Confidential, at 18 (Dec. 31, 1982), Bates No. 2015018182/202.

¹¹⁷ Memorandum from J. R. Cherry to C. H. Judge, J. R. Ave, and A. J. Stevens (Mar. 15, 1983), Bates No. 03675833 (handwritten notation dated 3/19). The initials, which are difficult to decipher (EJS?), do not seem to correspond to those of the three named recipients, but might be Stevens’. Another officer, whose response bore an illegible name or initial, also weighed in with a “Fine with me” on the grounds that “Wilson’s now threatening to do what he was already doing.” Memorandum from J. R. Cherry to C. H. Judge, J. R. Ave, and A. J. Stevens (Mar. 15, 1983), Bates No. 85704157 (handwritten notation dated 3/18).

¹¹⁸ Report of Tobacco Institute Activities 1982-1983 Confidential at 18 (Dec. 31, 1982), 2015018182/202. Illinois and North Dakota were the only states in which the shift had not yet been effected.

¹¹⁹ Telephone interview with George A. Wilson, Des Moines (Apr. 11, 2007). When asked whether anti-smoking laws would not reduce smoking and sales, his empirically untenable response was that they did not seem to have had that impact wherever they had been enacted.
appears to have united all sectors of the tobacco industry. Thus, despite the rupture between manufacturers and distributors, and the lack of unified lobbying, Zimmerman’s bill nevertheless died before even reaching the House floor.

**The Tobacco Action Network**

“It’s hard to get worked up about an infringement of your rights when you realize it’s for your own good.”

The formation of the Tobacco Action Network dated back to 1977 as a reaction to the Tobacco Institute’s perception of a qualitatively new threat to the industry posed by a new initiative by the American Cancer Society. In 1976 the ACS embarked on a program to reduce smoking (Target 5), to promote the enactment of state and local legislation to restrict public smoking and regulate cigarette sales and advertising, and to develop a congressional “anti-smoking caucus” to support similar federal legislation. By February 1977, TI President Horace Kornegay, a former North Carolina congressman, had begun warning friendly audiences that: “The end of the tobacco industry as we know it is not

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120The relationship between TI and IATD shrank for some time to such contacts as the inclusion of the former’s congratulatory statements in the latter’s annual convention program. Letter from George A. Wilson to Roger Mozingo (Jan. 25, 1988), Bates No. TII11510646; letter from Samuel D. Chilcote, Jr. to George A. Wilson (June 3, 1988), Bates No. TII11510642. Presumably it was restored at some point, since in 1992 Chilcote informed Wilson that TI had decided to discontinue its active support of IATD. Letter from Samuel Chilcote to George A. Wilson (Jan. 30, 1992), Bates No. TI24000065/8, on tobaccodocuments.org. When the relationship was restored, however, is unclear, since as late as 1988 TI did not financially support IATD. Legislative Action Plan: Iowa: HF 327: Cigarette Tax (Feb. 12, 1988), Bates No. TII1LBC011360/3. A TI budget drawn up in August 1992 included nothing for the IA Association of Tobacco & Candy for the 1991 budget, but did include $10,000 for “1991 estimated” and the 1992 budget. Region IV State and Local Lobbyist Evaluation (Aug. 6, 1991), Bates No. TII28841730/64.

121William Petroski, “State Office Bans Smoking in Work Areas,” DMR, Mar. 18, 1986 (1M:2) (quoting Hazel Crocker, an employee of the Iowa Department of Human Resources, whose smoking ban had convinced her to quit smoking after 25 years).

unthinkable.” A week later at TI’s annual meeting Kornegay emphasized that whereas previously the Cancer Society had used propaganda and social pressure to induce people to quit smoking, now, in a “new turn of the screw,” it “for the first time...plans to openly lobby to bring about the vast power of government to bear on a matter of personal behavior.” In a bizarre rhetorical self-projection, Kornegay, accusing ACS of adopting the Nazi counter-offensive tactic near the end of World War II, declared that it was seeking to “turn the tide of a losing war against smoking by breaking through our weakened defenses on the Hill with a series of propaganda hearings and media events, in order to bring grassroots pressure on Congress and create ‘a mandate’ for disabling legislation.” In response, Kornegay proposed a three-point “reactive strategy”: (1) resisting and containing the “punitive legislation, especially in Congress”; (2) identifying legislators and interest groups that might oppose ACS’s strategy and involving them in ad hoc coalitions; and (3) in “face-to-face negotiation at the highest level” deterring “corporate leadership” that might be “the motivating force behind the Cancer Society attack on tobacco.” More tentatively he ventured as a fourth step an “initiative strategy...to dramatize our industry’s unmatched record of self-regulation and responsibility.” Listing such past pseudo-actions as ending “cigarette promotion to students” and “technical assistance to the FTC on ‘tar’ and nicotine testing,” Kornegay asked his audience whether 1977 was “the year for a voluntary agreement on a policy of maximum levels of tar and nicotine.” If so, he perorated, the industry would put the final touches on the “drop in the tar and nicotine content of American cigarettes” as “the story of how responsible business operations under the free market mechanism can meet public demand—and the demand of many of its critics—for a product they want.” Oratory like this prompted even Barry Goldwater years later to cry: “Hogwash. I’ve watched the tobacco industry make promise after promise to avoid government oversight for the past 40 years. With every promise, they give an

124 Remarks of Horace R. Kornegay, President[,] The Tobacco Institute Annual Meeting Tampa, Florida at 6 (Feb. 24, 1977), Bates No. TO48625/30.
125 Remarks of Horace R. Kornegay, President[,] The Tobacco Institute Annual Meeting Tampa, Florida at 3 (Feb. 24, 1977), Bates No. TO48625/27.
126 Remarks of Horace R. Kornegay, President[,] The Tobacco Institute Annual Meeting Tampa, Florida at 5 (Feb. 24, 1977), Bates No. TO48625/29.
127 Remarks of Horace R. Kornegay, President[,] The Tobacco Institute Annual Meeting Tampa, Florida at 7-8 (Feb. 24, 1977), Bates No. TO48625/31-32.

2592
inch, grudgingly, and buy enough time to hook another generation.”128

Four months after the Tobacco Institute’s annual meeting, Kornegay presented to the executive committee the “plan to deal with...an unprecedented condition of jeopardy” brought on by “the million dollar Cancer Society attack,” which “[w]e all agreed...would produce more legislative assaults on tobacco and tobacco smokers than we had faced before.” The “fundamental change...in the type of industry representation the Institute provides” involved “a move from the present reactive mode of operation to a calculated pro-active posture.”129 The change in Kornegay’s posturing relevant in the present context was his proposal to create

a Tobacco Action Network, or if you will, a grass roots army of supporters in the precincts. Our opponents have taken the battle to the states and localities. This shift poses a double barrel threat to use. On the one hand it increases the likelihood of state and local antismoking legislation. And on the other it erodes our strength on Capitol Hill and encourages parallel Federal anti-smoking legislation.130

Despite its “pro-active” nature, TAN was, according to Kornegay, still merely one of several “defensive measures, imposed on us by a hostile environment,” which could not on their own “supply us with a positive posture, with winning issues....” Nevertheless, it was an indispensable component of the “longterm blueprint for Victory,” which Kornegay assured the executive committee was “in the planning stage....”131 In the meantime, until that Endsieg emerged, TAN would be crucial, as early as January 1978, in—as a pre-Power Point accompanying slide put it—identifying new anti-tobacco legislation and developing a “response capability to anti-smoking activities” by increasing “the effectiveness of state and local activities including the reach of Institute regional staff and independent lobbyists.” By alleviating the problem that the Tobacco Institute was “now spread ‘too thin,’” TAN would help “[i]dentify, locate, assess the attacks” embodied in “[a]nti-smoker group political pressure” and “‘passive


129 Remarks of Horace R. Kornegay President, The Tobacco Institute at the Executive Committee Meeting June 23, 1977 New York City at [1], Bates No. 03767437.


smoking’ legislation,” which ominously might diminish the prevalence of smoking and “reduce tobacco industry revenues considerably.”

By 1979, the Tobacco Institute had developed a full-blown libertarian position in defense of a beleaguered minority subjected to discrimination, stigmatization, and criminalization. The chief points of what would soon thereafter be elevated to the status of “[t]he TAN philosophy” were:

that every adult citizen should have the basic right of freedom of choice, whether he or she smokes or not...
that the proper role of government is to inform, to present the facts as they are revealed, and to recognize half-truths and untruths for what they are, so individual citizens can make up their own minds about how they want to live their lives...
that government at all levels has already encroached too far in many areas that are best left to individual discretion and personal judgment...and where smoking is concerned, to individual courtesy and consideration...
that the issue of smoking is best resolved in a free and natural way, by people among themselves—without resorting to unenforceable legislation that is certain to create ill feelings as it attempts to segregate those who use tobacco.

Once it was operating, TAN also revealed another goal: “In the long range, to help generate a sense of common cause among everyone with pro-tobacco interests, with the ultimate goal of creating a more positive image of tobacco and the tobacco family.” The chairman of the board of Brown & Williamson Tobacco described TAN as “an organization on a state-by-state basis of the friends of tobacco who can be mobilized to generate constituent communications to state legislators and Congressmen.” TAN presented itself to its target audience of “volunteers” as consisting of “concerned citizens like you who believe that personal freedom should be preserved...that there doesn’t have to be

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a law for everything....” Declaring its objective as opposing “the enactment of restrictive anti-tobacco laws and the imposition of punitive taxation,” TAN insisted that every time it defeated such measures, reining in government growth was synonymous with “retaining that single greatest concept of American liberty—freedom of choice.”\(^{137}\) The Tobacco Institute warned potential volunteers that the impact of the numerous and “unrelenting” critics’ steadily increasing demands for governmental “prohibition, regulation and coercion” would, if successful, have an enormous impact on “your business and your own personal conduct....” If the anti-tobacco groups’ recent legislative successes were left unchecked, “the blind denial of public and private individual rights” and the “destruction” of the tobacco industry would be the result. The contribution that TI expected from a “volunteer” was, in the first instance, informing his state TAN office of any tobacco or smoking question taken up by his local government. In addition to contacting legislators, either on his own initiative or when asked by TAN headquarters, when an anti-tobacco measure was pending, a volunteer could seek support from other groups such as the Chamber of Commerce (whose “members shouldn’t have to enforce anti-smoking laws on their premises”), convention bureau (which “doesn’t want visitors to your community to find they can’t smoke in public places”), and the police (who “shouldn’t waste time enforcing no-smoking laws”).\(^{138}\)

To inform employees of tobacco industry businesses (“member[s] of the tobacco family”) of the existence of TAN, TI drafted a letter over Kornegay’s signature reminding them of the “severe attack” to which the industry and its consumers were being subjected and stressing the need to take action to “preserve the industry, protect jobs and defend our individual freedoms as citizens....” After encouraging recipients to volunteer to take part in the new program to “counteract the organized, anti-tobacco movement,” Kornegay revealed the two-way nature of TAN’s communication and action system by pointing out that they would be “alerted to unfair or unreasonable legislative proposals,”\(^{139}\) to which they presumably would be expected to respond by transmitting protest letters prepared by TI.

In light of the enormous and comprehensive lobbying resources that the tobacco industry had been bringing to bear on all legislatures in the United States for years, the insinuation that it had been turned into an underdog by scattered anti-smoking groups was risible. At the same time, however, it is unclear whether

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\(^{137}\)“Your...Tobacco Action Network” (n.d.), Bates No. TIFL0039746/9.


the message to the TAN foot soldiers that the struggle over smoking could be conducted without encountering passion among legislators was—especially since so many of the latter either smoked or were involuntarily exposed to tobacco smoke at their workplace, the statehouse—a product of deceit, self-deception, or ignorance. The Illinois/Iowa TAN director articulated this position in 1980: “The public smoking issue is not considered among the high priorities of the state government. Most of our legislators probably don’t have strong feelings one way or another about where and when people may or may not smoke. Such an issue, when considered in the chambers of government, can be defeated when people like you and me express our opposition to these proposals.”

Although the Tobacco Institute accorded Iowa a relatively high priority with respect to fending off enactment of state smoking restriction laws, the state was rather late in organizing staffing and beginning operations. With George Wilson as its legislative counsel, when Iowa TAN started up in January 1980, eighteen state programs were already operating, some (such as New Jersey and Pennsylvania) having begun as early as August 1978. In February 1980, of 16,554 enrollees nationwide, Iowa reported only 56. But between March 1981 and May 1981, “as the result of a vigorous campaign” by IATD, which “recruited new volunteers from businesses—grocery stores, restaurants, cocktail lounges, shops—where tobacco products are sold and in which anti-smokers want to restrict tobacco usage,” and in particular owing to Wilson’s efforts to get the project underway, Iowa enrollment exploded 14-fold, from 169 to 2,425 (which became its peak figure), while national enrollment rose only 22 percent, from


141An internal TAN document from July 1977 listed the 50 states in five groups of 10 each; 20 states, including Iowa, were asterisked, indicating that no smoking restriction law had been enacted in them. Iowa was ranked third in the second highest group; California was the highest ranked state in the highest ranked group, while Texas (whose legislature was not going to be in session in 1978) was the lowest of the lowest. “States in Order of Priority Tobacco Action Network” (July 15, 1977), Bates No. TIMS0036275 (the Bates number stamped on the document, TIMS0036275, appears to be erroneous).


143Tobacco Action Network, Quarterly Report State Audit (Aug. 31, 1979), Bates No. TIMS0036272 (the stamped Bates number erroneously included three initial zeroes).

144“Iowa TAN Leaders Spread the Message,” *TO* 6(4):10 (Aug. 1981). The article claimed that Iowa led all other states “in the proportion of enrollees” in TAN, but it failed to specify the denominator.

42,021 to 51,237. However, over the next five years, Iowa TAN enrollment stagnated, while national enrollment rose strongly at least through 1983, before leveling off.

To be sure, TI purported not to be concerned about numbers:

The quality of TAN volunteers is more important to a successful TAN program than the quantity. Recruits should be men and women in key areas who may have important contacts and who will respond promptly to requests for action. Potential TAN members include:

Sales representatives of the TI member companies.

All others receiving their direct livelihood from tobacco-related organizations and industries—other employees of TI member companies, tobacco growers, wholesalers, exporters, warehousemen, vendors, retailers.

All others who benefit from the tobacco industry—employees of TI member subsidiaries, major suppliers to the industry.

Others sympathetic to the industry position—friends of the tobacco industry, civil libertarians, people who enjoy smoking, owners, operators, and employees of businesses adversely affected by legislation that restricts or prohibits smoking.

TI was particularly interested in identifying potential volunteers with “personal relationships with legislators at the municipal level, county level, state level, and national level” who were members in local organizations.

By about 1984, TAN, according to Michael Brozek, the TI Midwest regional vice president in the 1980s, proved to be an ineffective organization and was permitted to dribble out of existence rather than being formally terminated.

Brozek—who by 2007 was a lobbyist in Wisconsin and declared during an interview that “I’m smoke-free now, haha” and that he had omitted all mention of that part of career from his autobiography on his firm’s website—insisted that any legislator with an IQ over 60 knew that TAN letters were mass produced.
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

In fact, TAN limped on for several years until TI, goaded by several regional vice presidents, and especially by Brozek himself, tried but ultimately failed to transform it into a more serviceable tool. After four years of fruitless discussions of how to make the tobacco industry’s “primary grassroots vehicle” more effective, the process entered into a more decisive phase in December 1986 when Dennis Dyer, the New England regional vice president, sent a memo to Roger Mozingo, the head of State Activities, observing that “[u]nfortunately” the potential scope and impact of TAN, which had originally been “designed to provide a structure for an industry grassroots counterbalance for the burgeoning anti-tobacco movement,” had been “perverted and ‘oversold’” to the cigarette companies. The result was that TAN was unable to fulfill “any of the expectations” despite “an enormous...support structure and budget.” Dyer concluded that as a “hodgepodge of indifference,” TAN had become a “beemoth” that had “done the State Activities Division’s and the Tobacco Institute’s reputation nothing but harm since its inception.”

Dyer’s memo triggered “frank and serious discussions” about TAN, which prompted the formation of a study committee composed of Mozingo, four of his highest ranking subordinates, as well as Dyer, Brozek, and the Southwest/Great Plains regional vice president, Stan Boman. By the end of 1986, the three regional officials and Walter Woodson, the State Activities communications manager, had formed a subcommittee charged with writing a report on options and recommendations for TAN, which were to be presented to the full committee during a day-long review at the end of January.

Despite Woodson’s admonition that the project was to be “forward-looking,...not a rehash of past mistakes,” the process motivated Brozek and Boman to circulate thrashing critiques of the existing TAN. According to Brozek’s embarrassingly frank confession, TAN had become cumbersome, tedious, expensive and unmanageable due to its sheer size and lack
of credibility as a consequence of shifting agendas and underutilization. In short, TAN became an 80,000 name “paper tiger” that staff members laughingly patronized by enrolling the names of friends, relatives and even pets in order to meet imposed “quotas.” These quotas were perfect for impressing Tobacco Institute supervisors, but did nothing to impress legislators.\footnote{Michael Brozek to George Minshew, Re: 12/30/86 Woodson Memorandum Regarding TAN Redesign at 1 (Jan. 13, 1987), Bates No. TI29261787.}

Since the governmental world had also recognized TAN for the sham it was, Brozek continued, the “tobacco industry is ‘perceived’ by state legislatures and state executive branches as having little or no constituency.” Consequently, Brozek brutally concluded, “we can either quit right now or clearly demonstrate that there is a ‘legitimate,’ non-manufactured constituency supporting the tobacco industry in each state.” The chief method that Brozek offered for achieving the goal of insuring that “the legislative and executive branches throughout the United States feel the ‘perception of constituency’ regarding tobacco industry issues” was disaggregating cigarette companies’ state legislative programs into defined issues such as taxes, smoking regulation, sampling, and advertising: “By focusing our operatives by issue, rather than mobilizing our operatives for every issue, we can attain a more motivated and effective local constituent contact effort. … In essence, not a S.W.A.T. Team approach, but a ‘SQUAT’ Team approach (shit or get off the pot). Quite simply put, dump the bad names, maintain the good names, pick your fights by issue....” To be sure, Brozek’s insistence that TAN’s chimerical character did not merely constitute a waste of resources, but actually created the important negative consequence that tobacco lobbyists’ overreliance on the vastly inflated number of TAN activists gave them a “false sense of security”\footnote{Michael Brozek to George Minshew, Re: 12/30/86 Woodson Memorandum Regarding TAN Redesign at 1, 2, 3 (Jan. 13, 1987), Bates No. TI29261787/8/9.} appeared inapplicable to Iowa, where TI’s prize lobbyist, Charles Wasker, was neither gullible enough to take TAN’s Potemkin village for reality nor so lacking in resources that he would have had to resort to make-believe reserve armies of supporters to attain his impressive string of legislative successes. In the end, despite Brozek’s doubtless accurate criticism of TAN, his recommendation to purge the membership lists, focus on primary selective interest groups of member company representatives, wholesalers, and retailers, mobilize only smokers who had been “qualified” through the primary group members, and recruit each group only for specific issues in which they were especially interested\footnote{Michael Brozek to George Minshew, Re: 12/30/86 Woodson Memorandum Regarding TAN Redesign at 1, 2, 3 (Jan. 13, 1987), Bates No. TI29261787/8/9.} was hardly designed to forge a “grassroots”
organization that could plausibly have been regarded as a match for the proliferating mass anti-tobacco movement, especially since the advent of the scientific underpinnings of the resistance to secondhand smoke exposure.

Three days later Boman, reacting to Brozek’s blast, went him one better by charging that TAN, having been “ill-conceived...from its inception,” had “become an unwieldy and largely useless monstrosity.” His suggestions, too, amounted to little more than “streamlin[ing] the grassroots program.”

The memorandum drafted by the four-member Grassroots Program Subcommittee presented a minimalist approach culminating in the elimination of “the polite fiction that TAN has a useful membership of 85,000”—although an “activist response rate of 5-10 percent is exceptional on any issue,”—and the more “efficient mobilization of a limited quantity of known activists” generating “much better percentages” in the 90-percent range. That the revamped TAN was in no sense a “respon[se] in kind to anti-tobacco grassroots efforts,” but merely an attempt to manufacture greater verisimilitude of “evidence of popular support for industry perspectives to a variety of legislative audiences” was disclosed by the admission that all that would be accomplished under the new program was a demonstration that a “relatively small cadre of well-educated, motivated activists can be managed to handle our response needs...to the wide variety of anti-tobacco legislation.”

Already at the Tobacco Institute board of directors’ winter meeting in February 1987, Mozingo announced that State Activities had “completed a thorough review and reorganization of this program...previously known as TAN, or the Tobacco Action Network,” which had resulted in “strengthening our relationship with...tobacco family allies...and establishing realistic expectations of assistance from the tobacco family elements.” After having carefully avoided spelling out for the cigarette company overseers that those new expectations would be lowered, Mozingo let the oxymoronic cat out of the bag about how TI manufactured “public support for tobacco positions”: “While we must have top-to-bottom industry grassroots support for our issues, it is clear that the tobacco grassroots element—apart from actual smokers which you gentlemen are successfully tapping—is a very limited universe.” In order to free itself from the

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158 Grassroots Program Subcommittee (Boman, Brozek, Dyer, Woodson) to Roger Mozingo, Draft Memorandum at 1, 2, 19 (Feb. 6, 1987), Bates No. TIOK0023570/1/8.

159 Grassroots Program Subcommittee (Boman, Brozek, Dyer, Woodson) to Roger Mozingo, Draft Memorandum at 3, 4 (Feb. 6, 1987), Bates No. TIOK0023570/2/3.
narrow confines of simulating and choreographing “grassroots” contacts by the small number of cigarette company sales staff, wholesalers, and retailers, TI was forced to “expand our general ally and coalition programs” to animate support from chambers of commerce, labor union leaders, hotel/motel association executives, restaurant owners, grocers, bowling alley owners, police and fire officials, and minority group members.  

The stripped-down version of TAN, designed to “generate popular...support for industry positions” that emerged from the review process was fleshed out in guidelines that TI issued in August 1987 following a field staff meeting. Although it was clear that TAN’s total membership of 85,000 was a “fiction,” even the subset of 17,000 “activists” “may also be inflated”: each region was charged with identifying the “real” ones—“a relatively small, but dedicated cadre of activists drawn primarily from member companies’ sales forces”—and “discard[ing] the names of those who are unwilling to help consistently on our issues.” In this overoptimistic view, the term itself would allegedly become “redundant” by the end of the “activist identification process” when “TAN members will, by definition, be activists, or they will be discarded from the TAN rolls.”

The best that Brozek was able to say about TAN after he had “revamped and reconstituted” his region’s “activist resource list” in early 1988 was that it was now “categorized by issues and motivation in order to maximize credibility on the state legislative district level.” TI’s 1989 strategic plan boasted that through TAN and its list of individual smokers and activists it could effectively reach a wide audience, but whether the claim was true and, more importantly, if true, whether such a duly informed audience could decisively influence legislators, appears doubtful. By 1992, Kurt Malmgren, the head of the State Activities Division, testified at a deposition that TAN was “not used very much anymore.” By 1993 TAN’s budget had been reduced to $25,000.
The Next Abortive Effort: House File 102 in 1985-86

Here is another bill that the good ole boys had fun with—jerking me around, HF102, smoking in public places.\textsuperscript{166}

In contrast to the unplanned process that prompted Zimmerman to file the anti-smoking bill in 1983, she noted many years later that:

By 1985, I had spoken to many businesses about what Pepsico had done in their wellness campaign to decrease smoking by employees—and discovering how much money they saved on illnesses attributable to tobacco smoking, lost time as smokers take more breaks and do not statistically complete as much work as nonsmokers, plus Pepsico discovered they cleaned the windows less often in nonsmoking offices, dry cleaned the drapes less often and painted the walls less often in nonsmoking offices. I had begun to gain business support for the bill. I had an intern helping me (a nurse if I remember) make calls to businesses to gain support. We concentrated on businesses whose leaders were on governing Boards of organizations which had registered against the bill.\textsuperscript{167}

Undaunted by the orchestrated death of H.F. 248 two years earlier, Zimmerman, who had become intent on reducing tobacco in the environment, regarded the measure as beginning “the process of cracking down on smoking in the work place.”\textsuperscript{168} She filed a very similar bill in the 71st General Assembly (1985-86), both of whose houses Democrats controlled by almost identical majorities to those in the previous legislative period (60 to 40 in the House and 29 to 21 in the Senate). H.F. 102, which 12 Republican and 9 Democratic cosponsors filed with her at the beginning of the first session,\textsuperscript{169} differed from the previous version in a number of disparate respects. While making it clear that it covered “all” retail stores, offices, and other commercial establishments, it added exclusions for residential rooms for students and others at educational institutions, and each resident’s room at a health care facility, but also lowered

\textsuperscript{165}Tobacco Institute 1994 Budget (Nov. 12, 1993), Bates No. 93797932/95.
\textsuperscript{166}Beverly Hannon [untitled note for IWA] (Oct. 16, 1995), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (3), IWA.
\textsuperscript{167}Email from Jo Ann Zimmerman to Marc Linder (Mar. 29, 2007).
\textsuperscript{168}Email from Jo Ann Zimmerman to Marc Linder (Mar. 29, 2007).
\textsuperscript{169}H.F. 102 (Jan. 28, 1985, by Zimmerman).
the exemption level for bars from serving meals to 50 to 32 people at one time.\textsuperscript{170} Finally, deterrence was increased by subjecting to the civil fine—which was changed from a minimum of five dollars to a maximum of $100—the owner of a public place who knew about a person smoking in a nosmoking area but failed to advise that person of the prohibition.\textsuperscript{171}

By 1985-86, a coalition of organizations had formed to work toward an Iowa Clean Air Act.\textsuperscript{172} To be sure, even at this point, Zimmerman’s bill did not even remotely create equal rights for nonsmokers and smokers since, except on elevators, smokers’ right to smoke always trumped nonsmokers’ right to breathe clean air by virtue of the bill’s permitting the creation of unimpeded juxtaposition of smoking and nonsmoking areas. (Indeed, in 1979, the Virginia Supreme Court held that a city ordinance that made it unlawful to smoke in a restaurant except in designated smoking areas and that the city enforced by permitting one table to be designated as nonsmoking was an unconstitutional exercise of the police power because the means it used were not reasonably suited to achieving the legislature’s goal of protecting nonsmokers from toxic smoke: “If smoke exhaled in such an environment is toxic, its harmful effects are ambient. Yet, the ordinance requires posting a sign which leads the non-smoking diner to expect that the place he has chosen to patronize is a wholly protected environment. By relying on the sign, he will be exposed to ‘the toxic effect’ from which the ordinance purports to protect him. Hence, these requirements tend to defeat the very legislative purpose the ordinance is supposed to promote.”)\textsuperscript{173} Nor was Zimmerman unaware of the bill’s limitations. In filing the new bill at the end of January 1985, Zimmerman, supported by a coalition of Iowa health groups, conceded that the new proposal was “only a partial step,” which “wouldn’t ban smoking in offices and other areas, such as a strict no-smoking ordinance approved in San Francisco last year. She said the state eventually should take that step also. If Americans quit smoking and changed their diet and exercise patterns

\textsuperscript{170}H.F. 102, §§ 1-2 (Jan. 28, 1985). Curiously, the bill also modified the language of H.F. 248 and MCJAA from requiring owners to “ask[ ] smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoker [sic]” to a “person claiming discomfort from the smoke.” H.F. 102, § 3 (Jan. 28, 1985).

\textsuperscript{171}H.F. 102, § 6 (Jan. 28, 1985).

\textsuperscript{172}Press Release, Newsletter (Jan. 24, 1986), in Jo Ann Zimmerman Papers, Box 2, Folder: Political Career, Iowa House of Representatives, Newsletter, 1983-1986, IWA.

\textsuperscript{173}Alford v. City of Newport News, 220 Va. 584, 586 (1979). The restaurant owner was represented by Charles Morgan, Jr., a former civil rights lawyer associated with the Tobacco Institute. It is unclear why the court’s logic failed to prompt successful litigation to invalidate similar ordinances and laws in other states.
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

‘we could cut health care costs in half....’”\(^{174}\) (In his January 1985 budget message, Republican Governor Terry Branstad—who, under prodding from his wife, had banned smoking in the governor’s mansion, making his own mother walk outside to smoke\(^{175}\)—requested an increase in the state cigarette tax to equalize a reduction in the federal tax on the grounds that: “Smoking does not need to be made more attractive.” But since he expressly observed that the resulting cost of cigarettes to the consumer would not increase, the anti-smoking impact was null.)\(^{176}\) Conspicuously missing from the Iowa Clean Indoor Air Coalition, which was composed of a dozen health-related organizations such as the Iowa affiliates of the American Cancer Society, American Lung Association, and American Heart Association,\(^{177}\) was the Iowa Hospital Association. Instead, Zimmerman noted years later, it joined the Tobacco Institute, the hotel and restaurant industry, and the Iowa Association of Business and Industry as registered lobbyists against Zimmerman’s bill on the grounds that its members “should not be forced to make patients...quit smoking in the hospital.”\(^{178}\)

Two weeks later—in the interim, Democrat James Wells, the anti-smoking stalwart in the House who had become a senator, and planned to ask the Senate Rules Committee “to force his smoking colleagues to sit in the back row of the...Senate,”\(^{179}\) had filed an identical bill in the Senate\(^{180}\)—the House Committee

\(^{174}\)“Anti-Smokers Promote Bill to Curb Puffing,” *DMR*, Jan. 30, 1985 (2A:1), in Jo Ann Zimmerman Papers, Box 2, Folder: Political Career, Iowa House of Representatives, Newspaper Clippings, Miscellaneous, 1985, IWA. The San Francisco ordinance, which went into effect on July 4, 1983, attracted considerable media attention, although it was not the first or strongest such local law; it required office workplaces to institute smoking policies that accommodated both smokers’ and nonsmokers’ needs, but mandated a smokefree work area where the accommodation was not acceptable to nonsmokers. Wallace Turner, “Smoking at Office Restricted by a New San Francisco Law,” *NYT*, June 4, 1983 (9); Stanton Glantz and Edith Balbach, *Tobacco War: Inside the California Battles* 22-23 (2000).

\(^{175}\)Telephone interview with Terry Branstad, Des Moines (July 2, 2007). In the late 1970s, his wife had informed him that she was also banning smoking in their house; as a result his mother stopped visiting them for years. *Id.*


\(^{177}\)“New Bill May Expand Public Puffing Bar,” *Shoppers*, Feb. 6, 1985, in Jo Ann Zimmerman Papers, Box 2, Folder: Political Career, Iowa House of Representatives, Newspaper Clippings, Miscellaneous, 1985, IWA.

\(^{178}\)Email from Jo Ann Zimmerman to Marc Linder (Mar. 30, 2007).

\(^{179}\)“New Bill May Expand Public Puffing Bar,” *Shoppers*, Feb. 6, 1985, in Jo Ann Zimmerman Papers, Box 2, Folder: Political Career, Iowa House of Representatives,
on State Government recommended passage of the bill as amended by the committee, whose chair and vice-chair were anti-smoking activists, Jean Lloyd-Jones and Johnie Hammond, Democratic women representing the university towns of Iowa City and Ames, respectively. The committee, by a vote of 16 to 2, “toned down” the bill by proposing two major changes. First, instead of following the 1975 Minnesota statute in requiring the bureau of labor and public health commissioner to issue rules restricting or prohibiting smoking in factories and warehouses “where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees,” the committee amendment merely mandated that employee cafeterias in such locations have designated nosmoking areas; and second, it halved the maximum civil fine (now renamed a “penalty”) from $100 to $50. Uncritically imbuing blue-collar workplaces with the attribute “private,” even Iowa City liberal Democrat Minnette Doderer favored deleting both the Minnesota language and subcommittee’s addition of cafeterias, thus excluding factories and warehouses altogether, on the grounds that: “I don’t think we can get into all the private places in the state.... We have an obligation on public places.” But her motion failed by a vote of 13 to 7.

Apart from individual members’ filing numerous amendments, the House took no further action on the bill in 1985 before adjournment. Many of the amendments were designed to weaken it by exempting certain public places such as

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Newspaper Clippings, Miscellaneous, 1985, IWA.


as beauty salons, businesses operated only by the owner, the public areas of bus terminals, of airport terminals, and of railroad depots, barber shops, and—the most likely to succeed—restaurants with a seating capacity of fewer than 32 persons, and retail stores and offices with less than 200 square feet of floor space. The amendment least likely to be adopted was filed by Democrat Johnie Hammond and Republican Darrell Hanson, two of the bill’s strongest supporters: it added to the monetary fine for smoking in a non-smoking area the penalty of “death on a pyre of smoldering cigarettes.” Nor was passage its purpose. As Hammond explained two decades later: “One year the opponents used the strategy of piling on so many amendments that leadership would not take the time to debate them. So I added my own amendment: the penalty for violating the Clean Indoor Air Act was ‘death on a pyre of smoldering cigarettes.’”

In 1985 the Democratic-controlled House took a major step toward a complete smoking ban in its own space. The rules resolution extended the scope of the ban by deleting the exception for the perimeter and simply prohibiting smoking “on the floor of the house while the house is in session.” Immediately two unsuccessful attempts were made to roll back the proposed extension. Democrat Jack Woods, a smoker, argued for retention of the old rule; pointing out that Speaker Don Avenson smoked, he joked: “If he gets out of the chair, comes down and lights up, the sergeant-at-arms is going to have to grab him and say, “Book him.” Woods sought to reintroduce the exception for the “perimeter

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188 H-3234 (Mar. 5, 1985, by Pavich).
191 H-3292 (Mar. 8, 1985, by Tabor).
192 H-3291 (Mar. 8, 1985, by Tabor).
193 H-3502 (Mar. 27, 1985, by Paulin).
194 H-3323 (Mar 12, 1985, by Hammond and Hanson).
195 Email from Johnie Hammond to Marc Linder (Feb. 21, 2006). Zimmerman offered an alternative exegesis: “When we got upset with the guys trying to control everything, and excluding us, we piqued them with these kind[s] of things.” Email from Jo Ann Zimmerman to Marc Linder (Mar. 29, 2007).
196 House Resolution 4, at 17 (Rule 50) (Jan. 15, 1985).
197 Dewey Knudson, “Iowa House Cuts the Air with Wide Ban on Smoking,” DMR, Feb. 16, 1985 (2A:1-2). In fact, according to ex-Senator Beverly Hannon, Avenson’s willingness not to seek to impose his personal preferences on the House distinguished him from Senate Majority Leader Hutchins: “The House even voted itself non-smoking with Avenson, the Speaker, a smoker. He was a different kind of cat than the Senate
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

area,” but his amendment lost on a non-record roll call vote by 34 to 48.198 The other amendment, offered by Democrat Tom Jochum, a heavy smoker, would have created an exception for “benches along the south walls,” but it too lost.199 This proposal to permit smoking along the chamber’s back wall ran into opposition from one of the occupants of a back row seat, Lloyd-Jones, who found it “particularly offensive to have smokers at the south wall blowing smoke at us.”199 After opponents’ rearguard actions had been defeated, anti-smokers seized the initiative to expand the ban beyond the scope of the rules resolution. Democrat Clay Spear asked and answered his own rhetorical question: “Is it fair that members of the Fourth Estate [the press] smoke while we are prohibited from smoking? ... What’s fair for us should be fair for those at the speaker’s station and those in the press box.”201 The House then adopted his amendment to include those two locations within the ban.202 The very sharp debate revealed deep animosities between smokers and nonsmokers. Republican Kyle Hummel—who had smoked three packs of unfiltered Camels from time he entered the military in 1953 until 1981203 and had voted against the ban on smoking in the House


199 *Journal of the House: 1985: Regular Session Seventy-First General Assembly* 458 (Feb. 15) (H-3013). That Jochum was still a heavy smoker in 2007 was confirmed by email from a former legislator who requested anonymity to Marc Linder (July 13, 2007).

200 Dewey Knudson, “Iowa House Clears the Air with Wide Ban on Smoking,” *DMR*, Feb. 16, 1985 (2A:1-2). The otherwise informative article mistakenly asserted that the expanded ban meant that smoking in the House had “gasped its last” by including “puffers’ last retreats,” whereas in fact a total ban was not imposed until 1993.


203 Telephone interview with Kyle Hummel, Vinton, IA (June 26, 2007). Hummel quit smoking on Dec. 1, 1981, both because it was too much trouble to reach agreement with people on where he could smoke and because he recognized the health hazards. Neither his parents nor any of his eight siblings smoked; in part he began smoking in the military because during marches soldiers were given a ten-minute break every hour and if an officer saw that soldiers were not sitting and smoking, he would order them to perform tasks. The incentive structure that Hummel experienced was not unique: a former marine reported that in the late 1960s marines who did not smoke during smoking breaks were required to do sit-ups. Telephone interview with Jim Witkowski (Minnesota Health Dept.), St. Paul.
Chamber in 1979—lambasted his colleagues’ “sanctimonious attitude”; turning reality on its head, he charged that the expanded ban was tantamount to telling smokers to leave the House chamber: “We not only are not encouraging them to take part in the process. We are telling them to get out of the room.” Zimmerman pointed to the dangers of secondhand smoke exposure, while Republican Ray Lageschulte stressed that no one had the right to pollute the air for anyone else. Reflecting smokers’ weight in the leadership, Democrat Minnette Doderer, a self-confessed “temporarily...ex-smoker,” observed that: “Some mighty important people in both caucuses smoke, and if they get mad at us, we are in trouble.” Finally, a frustrated smoker, Democrat Gary Sherzan, chiding his colleagues for having “become fond of regulating other people’s behavior,” added that if what they really wanted to do was outlaw cigarettes, they should go ahead and do it.

In the interim between the 1985 and 1986 sessions, Brozek, TI’s Midwest regional vice president, informed headquarters that even during the legislative recess, “Iowa media has become extremely active with increasing coverage of anti-smoking activities. It is the opinion of our legislative counsel that our industry will face two major issues: statewide smoking restriction and the potential of a cigarette liability bill.” In addition, he noted, if coupled with such limitations on smoking, a bill banning the handing out of free samples “may become a part of a complete and comprehensive anti-smoking package.” Brozek expressed this concern despite having already reported to Washington that Iowa lacked such local grassroots organizations as a Group Against Smoking Pollution (GASP) or Association for Nonsmokers Rights (ANSR) branch.
Consequently, the American Lung Association of Iowa referred any calls it received about these groups to their offices in Colorado and Minnesota, respectively.\textsuperscript{208}

Interestingly, in spite of Iowa’s backward and stagnant anti-public smoking law—in the mid-1980s (and until 2008) it was still less comprehensive than Minnesota’s original 1975 statute—at the end of 1985 TI despaired that: “Of the six states in Region IV, Iowa is the least reliable in garnering support of tobacco segments. Its wholesaler association, notwithstanding recent overtures by TI staff...has not been responsive to general tobacco legislative concerns. It can be said that if a choice came to a vote on the state’s minimum mark-up law or an increase in the state’s cigarette excise tax, the wholesaler association’s choice would be no surprise [namely, for the mark-up law].”\textsuperscript{209}

However, H.F. 102 had not died, and at the beginning of the 1986 session, by a vote of 14 to 1,\textsuperscript{210} the House State Government Committee once again recommended its passage, this time subject to a different set of amendments.\textsuperscript{211} The principal changes included: (1) a requirement that educational and health care facilities “provide a sufficient number of rooms in which smoking is not permitted to accommodate all persons who desire such rooms”; and (2) deletion of the penalty imposed on public place proprietors who knew that someone was smoking in a nosmoking area and failed to advise the smoker of the prohibition.\textsuperscript{212} (Despite the deletion, opponents of the bill nevertheless faulted the bill on the House floor on the grounds that even asking customers to stop smoking or remain in designated smoking areas would not “help business.”)\textsuperscript{213}

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\textsuperscript{208}Michael Brozek to Hurst Marshall, Re: GASP (June 26, 1985), Bates No. TITX0037767.

\textsuperscript{209}Tobacco Institute, Iowa: A State Analysis at 3 (Dec. 1985), Bates No. 505091164/7.


\textsuperscript{211}Journal of the House: 1986: Regular Session Seventy-First General Assembly 90 (Jan. 16).

\textsuperscript{212}H-5009 (Jan. 16, 1986, by State Government Committee).

Now that Zimmerman’s bill after four years had finally made it to the House floor, a wildly exaggerated account of its scope and efficacy in the Des Moines Register declared that under this “‘equal rights bill’ for non-smokers” “smokers would be unwelcome in most public places and meetings or would be shunted off into designated smoking areas,” and fines would be imposed on “[r]enegade smokers....” Although the article quoted Hammond, who was “‘concerned about shoppers,’” as stating that “large areas of shopping malls would be included as nosmoking areas,” in fact neither H.F. 102 nor any later Iowa law (until 2008) did any more than leave it up to those in charge of public places (except elevators) to decide how to apportion the floor space between smokers and nonsmokers without imposing on proprietors any duty to insure that nonsmokers’ air space was not polluted by smoke drifting from one area to the other. In that sense Hammond (unintentionally and unknowingly) identified one of the scheme’s central flaws in praising it as “designed to be as simple and low-cost as possible for businesses and institutions charged with enacting it.” And although she may have been technically correct in asserting that the bill was “modeled after nosmoking laws in Minnesota,” she failed to mention that Minnesota’s implementing Health Department regulations, while far from stringent, at least potentially offered considerably more protection from secondhand smoke to nonsmokers than the bare Iowa statute—never supplemented by regulations—ever would.

A week later, on January 23, when the House took up H.F. 102, Hammond offered the committee amendment, to which, in turn, Republican farmer Hugo Schnekloth offered an amendment expanding the universe of “public places” to include churches and exclude bathrooms. Going much further with what was presumably designed as a killer amendment, he proposed changes that would have eliminated designated smoking areas, thus making public places nonsmoking, while at the same time also both eliminating proprietors’ duties except for posting nosmoking signs and retaining the 1978 statute’s first-violation penalty of five dollars. The House adopted the inclusion of churches (and thus possibly the...
innovation of designated smoking areas therein), but on a non-record roll call defeated all the rest of Schnekloth’s proposals by a vote of 34 to 54. If these remaining provisions are regarded as having been intended to provoke the bill’s withdrawal or death, then the number of votes it secured accurately reflected the number of No votes on final passage later that day.

Claiming that the bill would “create a ‘nightmare’ for restaurant owners” forced to separate smokers and nonsmokers,219 Des Moines Democrat Jack Woods, a heavy smoker who had persistently sought to undermine anti-smoking bills, offered an amendment to exclude all restaurants from coverage.220 Relying, perhaps, on Hammond’s assurance that she had spoken to members of the Iowa Restaurant Association, who had said that they could “‘live with’” the bill,221 the House rejected Woods’s amendment.222 It then adopted two limiting amendments by Republican Donald Paulin excluding restaurants seating fewer than 32 persons and offices and waiting rooms with fewer than 200 square feet of floor space as well as sleeping rooms in hotels and motels.223 Republican farmer Virgil Corey, who in the end voted against the bill, offered an amendment requiring a ten-foot space separating a smoking from nonsmoking area in single-room public places—six feet wider than Minnesota’s alternative to 56-inch-high barriers—but the House rejected even this reasonable albeit feckless measure.224 Woods came back with an even more radical amendment, this time gutting the entire bill by permitting an owner or manager to designate an entire public place as a smoking area, but the House rejected it too.225 Having filed such an amendment, Woods

220Journal of the House: 1986: Regular Session Seventy-First General Assembly 146 (Jan. 23) (H-5015 and 5025). Because the former amendment struck the line of the committee amendment that included the word “churches” that the House had just voted to insert by adopting Schnekloth’s amendment, the latter was “plac[ed] out of order,” thus eliminating it. Id. at 146. The Register erroneously reported that in the bill as passed “public place” was defined as including churches. Jane Norman, “Iowa House Approves Fine for Smoking,” DMR, Jan. 24, 1986 (1A:1, at 2A:5).
221Journal of the House: 1986: Regular Session Seventy-First General Assembly 146, 147 (Jan. 23) (H-5015 and 5025). Because the former amendment struck the line of the committee amendment that included the word “churches” that the House had just voted to insert by adopting Schnekloth’s amendment, the latter was “plac[ed] out of order,” thus eliminating it. Id. at 146. The Register erroneously reported that in the bill as passed “public place” was defined as including churches. Jane Norman, “Iowa House Approves Fine for Smoking,” DMR, Jan. 24, 1986 (1A:1, at 2A:5).
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

appeared to be engaged in a very special kind of self-fulfilling prophecy when he declared: “It’s kind of stupid and ridiculous to pass a law with no teeth in it.” ²²⁶

Before voting on the bill’s final passage, the House adopted an amendment by Democrat Clay Spear restricting enforcement by weakening the requirement that proprietors ask smokers to refrain from smoking on request of someone claiming discomfort from smoke: now the person in control of a public place would be required to intervene with regard only to smoking that was taking place in a no-smoking area. ²²⁷ Thus, what had potentially been a powerful means for overcoming the bill’s failure to protect nonsmokers from exposure to drifting smoke was diluted so as to apply only to formal violations of the ban on smoking in nonsmoking areas—even in public places in which the vast majority of the space were designated as a smoking area, thus giving smokers very little occasion to smoke in the tiny nosmoking area. For this very reason Republican Dorothy Carpenter, a nonsmoking social liberal ²²⁸ and strong supporter of the bill, divulged a deeper truth about the bill than she herself presumably understood when she defensively observed that “[w]e’re not denying these people who wish to smoke.” ²²⁹ On the other hand, however, she was so swept away by anti-smoking rhetoric that she uncritically believed her own propaganda that H.F. 102 was actually an instantiation of the proposition that “those who choose not to smoke have the right to have clean air to breathe.” ²³⁰

In the face of “pleas for free enterprise,” ²³¹ the House at last passed Zimmerman’s bill. Though not strictly along party lines, the 63 to 35 vote rested on a small majority (22 to 17) among Republicans and an almost 70-percent majority (41 to 22) among Democrats. ²³² Whether legislators were reflecting constituents’ positions was called into doubt a few days later by an Iowa Poll revealing that 56 percent of Republicans favored legislation penalizing smokers who smoked in places where the act was prohibited compared with 50 percent of


²²⁸ Email from Beverly Hannon to Marc Linder (June 19, 2007).


Democrats.  Despite House approval, the bill faced “a cool reception” in the Senate, whose majority leader, Democrat C. W. “Bill” Hutchins, in an image nicely captured by Jane Norman for the Register, “smiled and looked at a cigarette smoldering in his hand when asked how the bill will fare. ‘I think it’ll have a tougher go in the Senate.... Historically the Senate has not gone along with that.’” Nevertheless, Republican Governor Terry Branstad supported the bill, but regarded the $50 penalty as too high.

On January 28, the Senate, composed of 15 tobacco users and 35 non-users, referred H.F. 102 to the Human Resources Committee, which was now chaired by anti-smoking activist Beverly Hannon, who appointed herself and two other nonsmokers—Democrat Robert Carr and Republican Ray Taylor, a member of the state board of the American Cancer Society and religious conservative who opposed smoking and drinking for religious and health reasons—to a three-member subcommittee to report back to the full committee.

By this time the Register had detected a shift in support, with a “substantial number of senators—smokers and non-smokers alike”—predicting that the bill would be enacted. This turn of events was surprising not only because allegedly “senators traditionally dislike governing public behavior,” but also because four of the chamber’s six leaders were heavy smokers or snuff dippers. Republican Minority Leader Calvin Hultman, who had been using snuff since he had stopped smoking six cigars a day three years earlier, fit this mold perfectly: “We shouldn’t always be telling people how to act.” The key parliamentary development was the fact that on January 31 Majority Leader Hutchins, who also did not like the bill and had the “power to keep issues he doesn’t like from floor action,” stated that he would not stand in its way because the committee would

237 Iowa Official Register: 1985-1986, at 41 (Vol. 61, Michael Triggs, ed.).
238 Email from Beverly Hannon to Marc Linder (June 20, 2007).
certainly recommend passage and “this kind of issue had to be decided by the Senate as a whole.” Some senators, however, opposed the bill simply because they themselves smoked. Perhaps the purest exemplar of the unreconstructed smoker was Democrat Joseph Coleman, who had smoked three packs of unfiltered cigarettes a day for almost 40 years and was “getting tired of being the one who get pushed around. I have rights, too, you know.” Other smokers, such as Democrat Joseph Welsh, the Appropriations Committee chairman, belittled the whole issue of smoking as “absolutely irrelevant” and distracting attention from “the key problems we have to resolve.” In contrast, at least one heavy smoker, Republican Jack Nystrom, who had repeatedly tried to quit, was open-minded enough to welcome the bill as possibly helping him to stay quit. Former smoker Hannon was “very optimistic” that the time had finally come to enact a nosmoking law because of the “very strong support” that had emerged to recognize nonsmokers’ “right to breathe fresh air,” yet even Zimmerman’s original bill lacked any process to implement such a right, based as it was on the dysfunctional system of designated smoking areas. Since that approach was twinned with the notion of smokers’ and nonsmokers’ “equal rights,” it was unclear how Hannon, who saw the chief hope for passage in a compromise that would “avoid a fiery debate on individual rights,” imagined the implementation of such a parliamentary strategy.240

Hannon’s committee met on February 13, voting 7 to 3 to recommend passage of the bill as amended. The three no votes were cast by Republican Julia Gentleman, who had repeatedly opposed (and would continue to oppose) such legislation, Republican Arthur Gratias and Democrat Charles Miller, a chiropractor.241 Gratias, a tea-totaling, nosmoking teacher and principal, insisted that “Iowans can act without the Legislature always having to pass a law....” He admitted that people could “abuse their rights,” but asserted, without explaining, that there were “other ways to handle it.”242 The proposed changes themselves were few, but several were significant. The most prominent, designed perhaps to accommodate the governor, halved the penalty from $50 to $25.243

sought to justify it on the grounds of greater workability and enforcibility.\footnote{244}{Tom Witofsky, “Plan to Limit Public Smoking Clears Hurdle,” \textit{DMR}, Feb. 13, 1986 (2A:6).}

Potentially much more important, however, was the deletion of a word that had been in Zimmerman’s bills since 1983; taken from the 1975 Minnesota law, the requirement that those in charge of public places “[a]rrang[e] seating to provide smoke-free areas” created a norm of nonexposure to secondhand smoke that far exceeded the feckless designation of smoking areas from which smoke could drift to nonsmoking areas with impunity for smokers and proprietors. Despite this capacity for protection embedded in the term “smoke-free,” the committee chose to strike it and replace it with “no-smoking,” thus insuring virtually no disruption to smokers or owners and minimal protection for nonsmokers. Hannon’s committee also dropped the language requiring a bar owner who chose to exercise the discretion that the bill conferred on him of designating the entire bar a smoking area to post this designation at the entrances.\footnote{245}{S-5062 (Feb. 13, 1986, by Human Resources Committee). In 1986 the Minnesota Health Department made a similar proposal with regard to a provision in its administrative regulation implementing MCIAA that defined “acceptable smoke-free areas,” but did not actually carry out the change to “nonsmoking” until 1994. See above ch. 24}

Although Hannon’s conclusion that the bill now recognized “‘equal rights for non-smokers’”\footnote{246}{Tom Witofsky, “Plan to Limit Public Smoking Clears Hurdle,” \textit{DMR}, Feb. 13, 1986 (2A:6).} was both a wild exaggeration and incoherent since smoking and being protected from smoke in the same public places were increasingly being recognized by science, medicine, and even Iowa state government agencies\footnote{247}{See below this ch.} as mutually incompatible, her overly optimistic prediction that the amendments had fashioned a “‘compromise that can get through the Legislature’”\footnote{248}{Tom Witofsky, “Plan to Limit Public Smoking Clears Hurdle,” \textit{DMR}, Feb. 13, 1986 (2A:6).} underscored that, in Iowa at least, the time was still remote in which a majority could be found for a solidly protective law based on public health principles. (For example, the next year Hannon reiterated that she “would like to see a place set aside for smokers in public places.”)\footnote{249}{Beverly Hannon, [Untitled], \textit{Advocate News} (Wilton-Durant), Jan. 8, 1987 (15:2), in Beverly Hannon Papers, Box 14, Folder: Scott County, IWA.}

Instead of going to the floor, however, the bill was, according to an announcement the following day by the Senate’s president pro tempore, James
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

Wells, referred from the Regular Calendar to the State Government Committee. Such a decision was presumably made by Majority Leader Hutchins, in this particular case probably because he and his smoking colleagues wished to delay the bill. At the time, Brozek at TI interpreted the referral as having “temporarily derailed” the bill. In the event, if delay was leadership’s objective, the State Government Committee provided almost six weeks of it.

In the interim between the House and Senate debates, the *Des Moines Register*, the state’s leading newspaper and editorially a longtime and ardent proponent of anti-smoking legislation, doubtless sought to intervene in the process subtly by publishing an overview of smoking bans in various state government departments. As early as 1982, the Health Department had issued a smoking ban, compliance with which continued to be “excellent,” and deputy health commissioner Dr. Ronald Eckoff, pronouncing a professional judgment that few legislators would have dared to express lest they jeopardize their re-election, observed that “‘certainly most of us feel smoking is a poor habit.’” Beginning July 1 (the date on which new laws would normally take effect) the Department of Human Resources had decided to prohibit all smoking in its Capitol Complex offices. Relying on “‘irrefutable evidence’” of smoking hazards, Commissioner Michael Reagan concluded that “‘there is no fair or reasonable course of action that we can take...other than issue a complete ban.’” This insight gave the lie to the rhetoric deployed (and perhaps even uncritically believed) by anti-smoking legislators to project the designated-smoking-areas model as the instantiation of an “equal rights” regime as between smokers and nonsmokers. Even the weak Iowa Department of Transportation rule repudiated that approach by permitting smoking in work areas “only if it does not bother neighboring employees.” Or, as the department’s employee safety officer unambiguously glossed the underlying anti-equal rights principle: “‘That means non-smokers’ rights prevail.’”

In the wake of House passage, the cigarette manufacturing companies ratcheted up their level of opposition as the specter of similar action in the Senate loomed more ominously. During March TI planned to continue its “use of coalitions and phone banks [to] stop the advancement of HF 102,” which was its

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251 Email from Beverly Hannon to Marc Linder (June 20, 2007).
second highest legislative priority in the Midwest region.\footnote{Michael Brozek and Paul Jacobson to William Buckley, Memorandum: Monthly Summary - February, 1986 at 7 (Mar. 3, 1986), Bates No. TIMN457989/95. The highest priority was preventing enactment of a five-cent cigarette tax increase in Wisconsin.} On March 18, Brozek—who had noted in his monthly report for February that Zimmerman “is using HF 102 as a campaign issue in her efforts to become Iowa’s next Lieutenant Governor”\footnote{Michael Brozek and Paul Jacobson to William Buckley, Memorandum: Monthly Summary - February, 1986, at 2-3 (Mar. 3, 1986), Bates No. TIMN457989/90-91.}—wrote to headquarters that during the preceding two weeks the situation regarding H.F. 102 had “deteriorated,” adding unbureaucratically, albeit cryptically: “Due to the efforts of the Governor and his wife, bill author and candidate for Lieutenant Governor, Representative Zimmerman and the Iowa media, many legislative consciousnesses are being tested.” Despite House passage in January, “the strategy has been, and will continue to be, the playing of a ‘time game’ in order to delay the bill’s consideration in the Senate, strategically amend the measure to force the bill back to the House for concurrence and request accurate fiscal impact statements, thereby forcing the measure to a tax or finance committee.” Since the legislature was due to adjourn at the end of April, every day counted in TI’s efforts to defeat the bill. In spite of extensive use of phone banks and strategy meetings with legislative supporters and coalition members, Brozek rated the bill a “toss up.”\footnote{Michael F. Brozek to William P. Buckley, Re: State Tax and Smoking Restriction Legislation (Mar. 18, 1986), Bates No. TI20062203.} Hannon, the bill’s floor manager, corroborated this account, observing later in the year that she had had a “deal on the smoking bill,” but that Majority Leader Hutchins “cut me off at the knees....”\footnote{Beverly Hannon, [untitled note] (Nov. 7, 1986), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (3), IWA.} Years later she recollected that leadership had “let me bring it up as a ‘filler,’ but then kept letting it be deferred. When the anti-regulation guys wanted to defer, they weren’t given a time deadline because it was late in the session, or asked to go back and get their amendment drafted as I was different times when I asked to defer on something.”\footnote{Beverly Hannon [untitled note] (Oct. 16, 1995), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (3), IWA. In this retrospective Hannon referred to Junkins as the Senate leader, but she must have meant Hutchins since Junkins had left the Senate after the 1985 session to run (unsuccessfully) for governor.}

The State Government Committee stalled progress of the bill for five and half weeks, not issuing its report until March 25. On that date vice-chair William
Dieleman, a Democrat and life insurance underwriter, who was very religiously oriented in his politics, sought unanimous consent finally to bring up H.F. 102. Describing the bill as “‘designed to help those who have problems with smokers,’” Dieleman saw it as “‘step toward making sure that all people’s rights are observed.’” The committee then voted 9 to 4 to approve two amendments. The first significantly limited coverage by excluding retail stores and offices with less than 1000 square feet of floor space. The other provision required the state fire marshal to make an annual inspection of each “public place” covered by the bill and to determine and post a notice of compliance within the public place (without explaining whether the compliance in question related to the Clean Indoor Air Act). This rather bizarre second amendment turned out be a “parliamentary trap” laid by opponents in order to thwart enactment of H.F. 102. Because the fire marshal’s inspections would require the expenditure of state funds, the bill’s passage by the full senate could force its referral to the Senate Appropriations Committee, whose chair, Joe Welsh, had “hinted strongly that the bill could die” there. Committee opponents trained their criticism on what they alleged was the measure’s unenforceability. For example, Democrat Wally Horn, lacking the capacity to imagine the present as history, asked: “‘Who is going to arrest someone for smoking in a building?’” In addition to Gentleman, the perennial pseudo-libertarian opponent of such regulation, the two heavy smokers, Coleman and Rife voted against even this diluted version of a public smoking bill.

Almost another month passed before the full Senate took up consideration of

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259 Iowa Official Register: 1985-1986, at 29 (Vol. 61, Michael Triggs ed.).

260 Email from Beverly Hannon to Marc Linder (June 20, 2007).

261 Senate State Government Committee Minutes at 2 (Mar. 25, 1986) (copy provided by SHSI DM).


263 Senate State Government Committee Minutes at 2 (Mar. 25, 1986) (copy provided by SHSI DM).


266 State of Iowa: 1986: Journal of the Senate: 1986: Regular Session Seventy-First General Assembly 1:881 (Mar. 25). The fourth Nay was cast by Republican Forrest Schwengels; Horn did not vote.
H.F. 102 on April 23. Gentleman, who viewed the bill as “a silly waste of time,” moved the adoption of the amendment that Thomas Lind—who played a prominent role in the House in opposition to passage of the original Clean Indoor Air Act in 1978—had filed on April 4 to amend the State Government Committee amendment. Lind’s amendment went even further than the committee’s by excluding all restaurants and eliminating the distinction between bars with and without the capacity to serve meals to more than 32 people. The Senate adopted it by a vote of 25 to 20, with heavy smokers Hultman, Hutchins, Coleman, and Rife all in favor. But by tying 23 to 23 on the other committee amendment, the Senate eluded the trap to kill the bill in Welsh’s Appropriations Committee.

By a voice vote the Senate then adopted both the weakening amendments recommended by Hannon’s Human Resources Committee and a set of even more far-reaching dilutions proposed by Republican Douglas Ritsema, who had voted against banning smoking in the House chamber in 1979, even though he had found smoking in committee rooms “oppressive.” A nonsmoker who had become more and more conservative during his eight years in the legislature, he came to resent government interference in people’s lives to the extent that he also opposed seat-belt laws. Since he articulated the scope of the principle at stake as bounded by actions that affected other people and nevertheless recognized that smoking created precisely such secondary impacts, he was, even years later, unaware of the self-contradiction inherent in his opposition to the clean indoor air bill, although his vote against the House resolution in 1979 did puzzle him in

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269See above ch. 25.
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

Ritsema’s proposals in 1986 excluded workplaces, meeting rooms, and private, enclosed offices even if they were not occupied exclusively by smokers, in addition to eliminating the requirement that educational and health facilities provide a sufficient number of nosmoking rooms to accommodate everyone who wanted one. The exclusion of workplaces would have been especially destructive of a comprehensive approach to secondhand smoke regulation since at that time large Iowa companies, even though many had instituted nosmoking policies, failed to segregate employees into smoking and nonsmoking areas and permitted them to smoke at their desks.

That Rife’s obstructionist amendment to require the health department to issue rules to determine “the maximum level of toxic effect allowable for nosmoking areas” passed by a vote of 24 to 22 underscored that the Senate was living up to its reputation as the last bastion of know-nothing pro-tobaccoism. In a final wound, the chamber eliminated the coverage of public conveyances with departures originating in Iowa. Although Republican assistant minority floor leader John Jensen pierced proponents’ incoherent equal rights rhetoric, which was anchored to the scientifically almost worthless designated-smoking-areas approach, by insisting that “[y]our right to smoke is valid only when you don’t infringe on my right not to breathe your smoke,” since even Zimmerman’s flawed original bill could not come close to securing a majority, no more advanced measure incorporating Jensen’s insight had any chance of passage in

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275 Telephone interview with Douglas Ritsema, Hutchinson, MN (June 21, 2007).


279 State of Iowa: 1986: Journal of the Senate: 1986: Regular Session Seventy-First General Assembly 1:1350 (Apr. 23) (S-5730). The amendment was first defeated 26 to 19 and then passed 28 to 15 on reconsideration. The amendment was filed by liberal Democrat Arthur Small and the motion for reconsideration by the Senate’s only black member, Des Moines liberal Democrat Thomas Mann. Mann later had no recollection of the bill, let alone the amendment. Telephone interview with Thomas Mann, Austin, TX (June 21, 2007). Mann at the same time opposed the mandatory seat-belt law on the grounds that the issue was not whether it saved lives, but whether it was a person’s right to decide whether to use a seat-belt. Tom Witosky, “Senate Sends Seat Belt Law to Branstad, 27-20,” DMR, Feb. 13, 1986 (1A:4-6 at 2A:1).

1986.

After having been thoroughly gutted during 90 minutes of debate, H.F. 102 passed by a vote of 32 to 13, nine of the opponents being Republicans; even in this “virtually meaningless” condition the bill still triggered Nays from Hutchins and Hultman, the tobacco-using Democratic and Republican leaders. Floor manager Hannon, surprised by the intensity of the opposition, had to “admit I really don’t know what the bill does now.” Acknowledging the improbability of restoring it to its earlier condition, she took solace from the attention supporters had been able to bring to the issue. Hannon later divided opponents into two groups. Of the first, encompassing such heavy smokers as Coleman and Rife, who were “vehemently anti-[+]regulation,” Hannon judged that she did not think that “it ever crossed their minds that people had as much right to not breathe smoke as they had to put smoke in the air we breathe.” To the second group belonged legislators who “were against any regulations because the restaurant association, taverns and of course tobacco companies were—and those interest groups had PACs whereas the Lung Association and advocates didn’t.”

Coleman voted for the bill in order to be able to move for reconsideration as a delaying tactic, which succeeded inasmuch as the motion was not voted on and defeated until May 2, the last day before adjournment, thus leaving the House without time to concur in the Senate’s panoply of radical amendments even had it so desired. Excoriating the Senate’s destruction of the House bill, the Des Moines Register editorially observed that: “While society wouldn’t consider forcing sober drivers to get off the roads in favor of the drunks, it forces non-smokers to avoid smokers.”


Beverly Hannon [untitled note for IWA] (Oct. 16, 1995), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (2), IWA.


Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

While the 71st General Assembly was debating extension of the anti-public smoking law in 1985-86, it was also considering (and ultimately passed) a seat-belt law (S.F. 499), as were many other states, prompted by New York’s first-in-the-nation enactment in 1984. The rhetoric deployed by opponents of mandatory seat-belt use was remarkably similar to that on display in the smoking debates; significantly, but not surprisingly, opponents of both laws largely overlapped. For example, Republican Kyle Hummel, whose aforementioned irrational attacks on public smoking bans would be repeated in 1987, contributed this thoughtful analysis: “‘There are certain things I am not willing to do to save 150 lives…. [T]here are certain freedoms we have in this country…that supersede the saving of even 150 lives. I don’t know what your motivation is, but I think it’s playing God.’” Senator Joseph Welsh offered this insight into the limits of risk prevention: “‘We have recognized from the beginning of this country, we can’t insulate our people from all hazards.’” Joseph Coleman, the Senate’s leading anti-anti-smoking militant, took umbrage that the seat-belt bill “‘says that we are going to save your life whether you want us to or not,’” while his across-the-aisle confrere Jack Rife wondered whether “‘[b]ushing after every meal’” would be next. Because seat-belt use shared with smoking some dimensions of secondary impacts—including deaths caused to other passengers by unbelted human missiles, economic and other losses to families, and medical and economic costs borne by society at large—voting patterns on the two bills present an opportunity to compare the consistency of attitudes. Although no absolute one-to-one correspondence prevailed, most of the Senate’s prominent smoking opponents—including Coleman, Doyle, Hultman, Hutchins, Rife, and Welsh—and nonsmoking libertarian opponents of smoking regulation—including


290 Jane Norman, “‘Buckle Up,’ Iowa House Tells Drivers.” DMR, Jan. 31, 1986 (1A:3). Looking back 21 years later, Hummel reflected that he would not repeal the seat belt law, but not because he did not still believe that people should take responsibility for their own actions, but rather because he believed that human nature itself had been changed by the accumulation of government regulation, which made them incapable of doing what was best for themselves; because society had reached the point at which people would do almost anything if there was no law prohibiting it, he had lost his faith in humans’ ability to take responsibility for their actions. Telephone interview with Kyle Hummel, Vinton, IA (June 26, 2007).


Gentleman, Gratias, Horn, and Ritsema—also voted against the seat-belt bill. Similarly, most prominent advocates of public smoking regulation also voted for mandatory seat-belts.\(^{293}\) Also in the House, which voted on both bills within one week, most prominent advocates (including Hammond, Lloyd-Jones, and Zimmerman) and opponents (including Hummel, Renaud, Van Camp, and Woods) of H.F. 102 cast predictably consistent votes for and against S.F. 499.\(^{294}\)

In evaluating Charles Wasker, the Tobacco Institute’s Iowa lobbyist, after the close of the 1986 session, Brozek, the regional vice president, while crediting him (and his partner Bill Wimmer) with success in “killing” H.F. 102, voiced criticism that cast a comic light on the image of the well-oiled tobacco lobbying machine:

[Wasker] requires a great deal of “on site observance.” In other words, we sometimes have to “sit on him” in order to maintain a modicum of control when tracking and monitoring legislative activity. ... The solution to this problem was by no means easy to attain for Mr. Wasker still feels that our system of deadlines and reporting is nothing more than “posterior protection by use of nonsensical red tape contortions.” I made it clear that I too, feel the urge to complain however, when I pay my mortgage I realize how useful and essential our reporting system is. I suggested to Mr. Wasker that everyone should share my appreciation for this system. Chuck is a little less than diligent when analyzing legislation that he feels is unimportant. ... Both Paul Jacobson and I were rather irritated over the fact that Chuck did not know the specifics of HF 102. After repeated meetings with Paul Jacobson and after Paul’s almost continuous presence in the Iowa legislature, Mr. Wasker grew very familiar with the specifics in HF 102.\(^{295}\)

\(^{293}\)State of Iowa: 1985: Journal of the Senate: 1985: Regular Session Seventy-First General Assembly 1:1080-81 (Mar. 27); State of Iowa: 1986: Journal of the Senate: 1986: Regular Session Seventy-First General Assembly 1:303 (Feb. 12). The Senate voted a second time on S.F. 499 after the House had amended it. Most senators’ votes remained unchanged, but Hutchins switched from Nay to Aye and Hultman from Aye to absent or not voting. Taylor, an anti-smoker twice voted against seat belts, while Gronstal, a smoker who voted for anti-smoking measures, twice voted against S.F. 499, and heavy smokers Drake and Nystrom, who showed some sympathy for anti-smoking bills, voted twice for the seat-belt bill.


\(^{295}\)Iowa Charles F. Wasker Background (June 30, 1986), Bates No. T122431036/37-38, on tobaccodocuments.org. In the end, Brozek, who was apparently the author, recommended a minimum increase of $2,000 in Wasker’s retainer to $30,000 as “imperative” if his reporting was to be improved. Id., Bates No. T122431036/39, on tobaccodocuments.org. In his previous year’s lobbyist evaluation recommending that Wasker’s compensation be increased by no less than 9.5 percent, Brozek also sarcastically
The form of Brozek’s good-natured but ironically critical comments about Wasker may in part have been dictated by his own need for “posterior protection” combined with his “knowledge that Wasker was best friends with TI President Chilcote.”

Iowa Citizen Action Network (ICAN):

Vendor of Grassroots Lobbying to the Cigarette Companies

Although the growth of scientific research linking ETS to disease has unquestionably accelerated the smoking restrictions trends, it remains only one argument the antis use against us. Since science did not create the ETS issue, it cannot resolve it. ... In ETS studies, the plausible biological mechanism is present to the satisfaction of almost all scientists.

As elsewhere, in Iowa the Tobacco Institute was applying its strategy of developing and mobilizing allies in coalitions in support of its (anti-)legislative program. In Iowa, as Brozek revealed in his February 1986 report to headquarters, it constituted a remarkable example of strange bedfellows: “In the state of Iowa a new coalition group known as ICAN or the Iowa Citizens [sic] Action Network, has been designated as the front line defense against HF 102, a smoking restriction measure. Additionally, phone banking strategies have already been instituted to counteract the smoking restriction bill when it reaches the Senate State Government Committee.”

So crucial had ICAN become in the battle against H.F. 102 that TI’s Midwest regional director, Paul Jacobson, devoted all of March 17, 18, and 19 to “Mtgs with Wasker, Wimmer (Wasker’s partner); ICAN re pending smoking bill, HF 102.” In turn, the next week, Brozek twice reviewed this bill-specific coalition activity with Jacobson. The

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296 Telephone interview with Michael Brozek, Madison, WI (June 5, 2007).
heightened importance that the cigarette companies attached to the bill was reflected in Brozek’s plans to “[a]ssess and react to changes in Iowa HF 102” on Monday March 31, spend Tuesday and Wednesday in Iowa to deal with the bill, and then reserve Thursday and Friday: “Schedule pending regarding Senate action in Iowa on HF 102.”

The Iowa Citizen Action Network, Iowa’s largest consumer group, was founded in 1979 and ten years later counted 200,000 individual members. ICAN regarded itself as organizing a “statewide progressive coalition to continue the fight for social and economic justice.” This “grassroots” organization, of which the affiliated unions of the Iowa Federation of Labor were the “backbone,” focused on issues of utilities, the environment, access to health care, insurance, and medical liability, and prided itself on having “stood up to intense pressure by insurance companies” and having held the line against regressive tax proposals that favored big businesses. That ICAN had allied itself with the tobacco companies on a vital issue of public health might seem counterintuitive, but a certain logic may have inhered in it.

One reason for the tobacco industry’s interest in availing itself of and subsidizing ICAN’s operations, was, as the Tobacco Institute bemoaned in late 1990 in connection with preparing its strategy “to stop a hodge-podge of local ordinances and to prevent the State Legislature from enacting a state-wide preemptive vending machine restriction bill,” that “TI has had a strange relationship with the Iowa Wholesaler group.” That relationship had, as discussed earlier, ruptured in 1982-83, when IATD and its executive director,
George Wilson, who was also TI’s lobbyist, were unable to reach a compromise with the cigarette manufacturers over their conflicting legislative priorities. In 1986 Brozek—who in September 1985 apparently attended the IATD annual meeting in Des Moines for the purpose of “coalition building”—had revealed the strategic necessity for substituting ICAN for IATD as its legislative ally:

For the past several years, the Tobacco Institute has not contributed to the Iowa wholesalers association. This action was taken due to a legislative confrontation and, although we have kept in contact with that group, our relationship can be termed “tepid” at best.

Therefore we have had to pursue other areas and interest groups for allies and coalitions in our legislative support network. One such group, the convenience stores, have indicated interest with regard to excise taxation. Another group, The Iowa Citizens [sic] Action Network (ICAN), has directed its interest to the issue of citizens’ rights with regard to smoking in the workplace. Both groups will be pursued actively during the next legislative session.

A few months later Brozek highlighted ICAN in the same breath with business groups as allies in TI’s environmental tobacco smoke campaign. Under the heading, “ETS Briefing With Allies/Coalition Members,” he informed one of his bosses in Washington of a change in plans regarding briefing a University of Iowa panel on TI’s “scientific witness program.” Because Brozek in the meantime had come to “prefer a more structured and more comprehensive presentation plan,” he decided to “utilize the scientific witness program in order to initiate meetings with state legislators, the Iowa Citizen’s [sic] Action Network, the Iowa Restaurant Association and the Iowa Association of Manufacturers and Commerce.”

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307 See above this ch.
308 Attendance was listed on Brozek’s calendar of events. Tobacco Institute Field Staff Meeting (Aug. 11-14, 1985), Bates No. 680501768/2024. However, his monthly summary to the State Activities Division in Washington, D.C. did not mention the activity, although other reports did mention successes at such wholesaler meetings in other states. Michael F. Brozek to William P. Buckley Re: Monthly Summary - September, 1985 (Oct. 4, 1985), Bates No. TIMN0457933; Michael F. Brozek to William P. Buckley Re: Monthly Summary - August, 1985, at 4 (Sept. 5, 1985), Bates No. TIMN0457939/42
310 Michael Brozek to George Minshew, Re: ETS Briefing With Allies/Coalition Members (Feb. 9, 1987), Bates No. TNWL0018977.
In August 1988, Brozek and Region IV director Dan Nelson, in preparation for the 1989 legislative session, accounted to their boss, Paul Emrick, the State Activities Division Northern Sector vice president in Washington, D.C., for the choice of Iowa as the target of a “concerted proactive effort” that would not “generate a ‘negative return’ from our opponents,” that is, “an equally aggressive anti-tobacco situation.” Their objective was to target the Iowa Senate “in order to maintain a majority position thereby enabling our operatives to enforce the sunset provisions in the Iowa cigarette tax increase of 1988.” While acknowledging “the fact that our proactive efforts are, theoretically, centered around that indoor air issue,” Brozek and Nelson interpreted remarks by TI President Chilcote at a staff meeting to mean that “proactive does not equate with compromise.” Characterizing the situation in Iowa as “precedential,” Brozek and Nelson argued that success would make Iowa “one of the very few states or localities to roll back a tax increase.” Provisionally agreeing with the TI’s Iowa lobbyist Wasker that the plan was “doable,” they urged immediate launching of the legislative project rather than waiting until January. Six weeks later they reiterated the higher taxonomic fit, informing Emrick that: “Although not the mandated, strictly construed public smoking issue, the potential for a state tax roll back is far too significant NOT to be termed proactive. Therefore, we have immediately launched our efforts with several diverse groups in the state of Iowa.”

Brozek and Nelson had apparently been influenced to move in this direction by Mike Lux (former ICAN director and an Iowa Federation of Labor vice president) and David Wilhelm (former director of the progressive, union-funded Citizens for Tax Justice), who co-founded the consulting firm Strategy Group and was a Democratic national political operative. Because TI had “used ICAN as an allied group in the past,” Brozek and Nelson suggested immediately working with ICAN to plan for the 1989 Iowa legislative session, during which Citizens for Tax Justice would testify before committees and speak to individual state senators. To secure this cooperation, TI was to budget $5,000 for ICAN in

311 The Tobacco Institute, State Activities Division (Dec. 1988), Bates No. 2025870848.


313 Michael Brozek and Dan Nelson to Paul Emrick, Re: Comprehensive Public Smoking Program Region IV (Nov. 4, 1988), Bates No. TI08940761/2.

the last quarter of 1988 and $15,000 in 1989 on top of $10,000 for CTJ.\footnote{Michael Brozek and Dan Nelson to Paul Emrick, Re: Targets for Proactive Efforts (Aug. 25, 1988), Bates No. TI00260215/7.} (Under the rubric, “Special Projects,” TI had paid ICAN $1,000 in 1986 and budgeted another $1,000 for it in 1987.)\footnote{[Tobacco Institute], State Activities Division, 1987 Proposed Budget (Sept. 26, 1986), Bates No. 684019007/99. The purpose of the identical amounts that TI paid to the Dubuque Chamber of Commerce in those years is unclear.}

Two weeks before Brozek and Nelson sent their memorandum, Lux had sent one to Wilhelm on “The Upcoming Iowa Cigarette Tax Fight,” in which Lux gushed over the possibility that an anti-cigarette tax coalition might be able to defeat the drive to repeal the sunsetting of a three-cent tax, thus making Iowa a “landmark state,” which “revers[ed] the tide and actually lower[ed]” its cigarette tax. Lux saw “[t]he key” to winning in moving labor and “progressive citizen coalitions such as” ICAN “into active partnership with other cigarette tax opponents” because the former had “a great deal of clout with the Democratically-controlled legislature....” He went on to tout ICAN as the state’s largest and politically-legislatively most successful citizen’s group with a full-time staff of more than 40—one of whom, Tom Jochum, he boasted, was chair of the House Appropriations Committee—many of whom were door-to-door canvassers. Moreover, at the previous election in 1986, all ten of the state legislative candidates whom ICAN endorsed and worked for were elected. In a handwritten note on behalf of his “business associate,” Wilhelm, in turn, hailed ICAN’s “guys” as “do[ing] what they say they’ll do.” He also assured the Tobacco Institute that its Iowa lobbyist Bill Wimmer “would be very supportive” and that they could get the IFL “on board” as well.\footnote{Mike Lux to David Wilhelm, Re: The Upcoming Iowa Cigarette Tax Fight (Aug. 9, 1988), Bates No. TI00260222-3. The handwritten note, signed “David,” was directed to “Jan,” to whom the memo was apparently faxed. Jochum, when informed many years later of Lux’s boast, was nonplussed by the suggestion that he, a supporter of higher cigarette taxes despite being a smoker, had been used as advertising for a coalition with tobacco companies. Telephone interview with Thomas Jochum, Des Moines (July 21, 2007). Jay Larson, one of Lux’s successors as ICAN executive director, remarked that Lux had a tendency to blow things out of proportion. Telephone interview with Jay Larson, Everett, WA (July 19, 2007). More specifically he observed that: “Tom Jocham [sic] worked for ICAN for a very short time helping to coordinate our message and targeting of member outreach activities around the upcoming elections. I can not believe that he knew that Mike had written this in a memo nor do I believe that he would have approved of it if he had known.” Email from Jay Larson to Marc Linder (July 20, 2007).} By November 1988, Brozek and Nelson could tell their boss, Paul Emrick, that ICAN was “our most visible
grassroots level allied legislative presence” in Iowa, reminding him that “this agreement” had been handled during their personal meetings in Washington with Wasker, Wilhelm, Lux, TI’s public affairs staff, and Emrick himself.318

By 1991, ICAN had indisputably allied itself with the cigarette companies on the issue of increased cigarette taxes, presumably on the grounds that the tax was regressive because it disproportionately affected poor and working-class people, who disproportionately smoked.319 In October 1990, in a forecast of the following year’s state legislative activities, TI’s State Activities Division reported that its Public Affair Division, through its Labor Management Committee, was taking part in a program in which labor unions and ICAN traveled across Iowa “advocating progressive tax alternatives. ... The intention of this effort is not only to elevate the debate on what are appropriate methods of taxation, but also to heighten the chance that selected union groups or ICAN reps would testify against regressive excise tax increases.”320 This seemingly high-minded talk about tax progressivity originated in the cigarette companies’ much more mundane drive to retain as much of their profits as possible: “Two legislative sessions ago, the industry was successful in reducing Iowa’s cigarette tax by three cents per pack (through a sunset clause). It is not lost on the legislature that this three cent tax reduction did not result in any lower cigarette prices to consumers.”321 By March 1991 TI noted internally that: “We agreed to provide support to Iowa Citizen Action Network (ICAN) for proposed tax-related activities in the state. The group requested assistance to produce and distribute two newsletters on the state budget issues.”322 At the same time, as part of its national strategy of creating state coalitions, the Tobacco Industry Labor Management Committee justified its “[m]onthly support” to ICAN on the grounds that it had “a very successful grassroots canvass organization” and was “an effective lobbying and public education organization.”323 ICAN, as Lowell Junkins, the former Iowa Senate Democratic

318 Michael Brozek and Dan Nelson to Paul Emrick, Re: Comprehensive Public Smoking Program Region IV (Nov. 4, 1988), Bates No. TI08940761/2.

319 Susan Stuntz to Walter Woodson (Apr. 26, 1990), Bates No. TNWL0049694/5.


323 “Labor Management Committee Coalitions” (no date [1991]), Bates No. TNWL0050258/71. The report mentioned a “[g]rant in early 1991 for fair tax campaign.”

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Majority Leader and TILMC’s Iowa lobbyist commented years later, was a very left-wing messenger that went knocking on doors all across Iowa with very left-wing issues, but, because it was so strapped for money, had to tack on to them this one anti-anti-smoking issue for the tobacco companies.\textsuperscript{324}

Looking back at the 1991 legislative session and preparing for the next one, a memorandum to TI’s senior vice president for public affairs observed that “[w]e are not out of the woods on the cigarette tax as a funding mechanism, a key plank of the Governor’s plan during last year [sic] budget session, and we continue to work with ICAN to develop ways to build a coalition around the health care issue and to develop opposition to excise taxes as a funding method for the debt and/or healthcare programs.”\textsuperscript{325} By the 1993 session cooperation had intensified to the point that TI recognized ICAN as “instrumental to our grass roots efforts.”\textsuperscript{326} And, as TI senior vice president Mozingo observed as early as 1987, it was crucial to deliver the industry’s tax message “appropriately” to legislators through “grassroots efforts” because: “Frankly, the ‘ regressivity message’ can ring a little hollow when delivered solely by legislative counsel. As a result, we also attempt to send the message by way of those who would be hit especially hard by such taxes.”\textsuperscript{327}

Jim Wengert, who had been the president of the Iowa Federation of Labor in the 1980s, while not recalling the episode at the time that “everybody started picking on” smokers, later speculated that perhaps some international unions might have opposed legislation on the grounds that they wanted to bargain collectively over workplace smoking rather than have the state impose one rule on all workers.\textsuperscript{328} This conjectured recollection received empirical corroboration from Mike Lux, who had been ICAN executive director from 1984 to 1987 (and

\textsuperscript{324}Telephone interview with Lowell Junkins, driving somewhere in Iowa (Apr. 23, 2007).

\textsuperscript{325}Memorandum [October Report on behalf of Labor Management Committee], The Strategy Group to Susan Stuntz (Nov. 12, 1991), Bates No. TNWL0049609/10. Amusingly, the report went on to mention that TI’s Iowa labor counsel Junkins, had been meeting regularly with (Democratic) Senate Majority Leader Bill Hutchins and House Speaker Bob Arnould "to reinforce their commitment to a progressive agenda." \textit{Id}. Bates No. TNWL0049609/11.

\textsuperscript{326}Memorandum from The Strategy Group to Jim Savarese (Jan. 25, 1993), Bates No. TNWL0049259/67. The memo also noted that “AFSCME has played a key role in our progressive tax work in Des Moines.” \textit{Id}.

\textsuperscript{327}Roger Mozingo, Remarks at Tobacco Institute Board of Directors Winter Meeting (Feb. __, 1987), Bates No. TIDN0002823/33.

\textsuperscript{328}Telephone interview with Jim Wengert, Des Moines (Apr. 8, 2007).
as late as 1990 appeared on a TI list of proposed invitees to a Labor Management Committee legislative conference as an ICAN representative.\(^{329}\) Although he remembered Brozek, the author of the memorandum, Lux characterized the description “front line defense” as “ridiculous.” While indignantly insisting that ICAN had not “carr[ied] water” for the tobacco companies, he did admit that they had a common cause in opposing cigarette taxes. Nevertheless, he retained a “very vague memory” of conversations with “the tobacco folks” in which ICAN took the position that “cigarettes did not deserve all the blame” for workplace health and safety problems, which needed more comprehensive treatment, including good ventilation, than anti-smoking laws held out. Like, Wengert, Lux also recalled having heard unions ask why workplace smoking regulation was not just a collective bargaining concern.\(^{330}\)

Neither disingenuousness nor a poor memory prevented Ben Zachrich, ICAN’s co-director (1987-89) and lobbyist, from recalling “the darkest day” of his career as a consumer advocate when sometime around 1988 Wimmer, with whom he had worked in (what he regarded as) an ethically unchallenged relationship in connection with the Iowa Trial Lawyers Association on medical malpractice, called him over to his office, gave him $5,000, and Zachrich took the “blood money.” The basis of the quid pro quo was transparent: ICAN was always “scrambling for money” and ICAN’s lobbying for the cigarette companies’ issues gave them “credibility” that they would have been unable to draw on with some legislators. While specifically recalling the battle over the sunsetting of the three-cent cigarette tax rather than the anti-public smoking bill, Zachrich observed that if Wimmer had asked (or in fact did ask) him to speak to legislators about that...
issue as well, he would have done it.\textsuperscript{331} Wimmer, who began as a lobbyist in 1979, later recalled dealing with ICAN on the tax issue, but not about public smoking, except insofar as ICAN was aligned with labor unions on the matter of workplace smoking rules. Although he stated that he did not remember giving ICAN money, if it did receive such money, ICAN would, Wimmer observed, have lobbied the legislature.\textsuperscript{332}

Further bright light was shed on the basis for ICAN-tobacco industry relationship by Jay Larson, its executive director from 1988 to 1992 and lobbyist from 1987 to 1992. A smoker who in the late 1980s and early 1990s did not think smoking was evil, he recalled many years later sitting in the capitol rotunda with the very “entertaining” tobacco lobbyists Wasker and Hultman engaged in the “sociable” activity of smoking. In retrospect he found it unbelievable that he used to go up to Johnie Hammond, the House’s most militant anti-smoker, in the rotunda with a lit cigarette in his hand.\textsuperscript{333} And one of his ICAN co-workers added that Larson had been a “chain smoker” who smoked in the office.\textsuperscript{334} Like Zachrich, Larson admitted that taking money to lobby and canvas on the cigarette tax issue was the aspect of his ICAN career that he was “the least proud of.” The origins of this deal, which had been prompted by the ever-present necessity of meeting a payroll, he associated with Lowell Junkins (or perhaps someone else he could not recall), who had approached him offering money in exchange for opposing cigarette taxes; his conscience had been assuaged by the statement that the money came from unions.\textsuperscript{335}

\textsuperscript{331}Telephone interview with Ben Zachrich, Des Moines (Apr. 11, 2007). Having failed to interview ICAN’s leaders, the authors of an otherwise illuminating piece on the relationship between the cigarette companies and Citizen Action organizations misleadingly understated money’s role in concluding that “their own financial needs...no doubt played some role in the alliance with the tobacco industry.” Richard Campbell and Edith Balbach, “Building Alliances in Unlikely Places: Progressive Allies and the Tobacco Institute’s Coalition Strategy on Cigarette Excise Taxes,” \textit{AJPH} 99(7):1188-96 at 1193 (July 2009).

\textsuperscript{332}Telephone interview with William Wimmer, Des Moines (Apr. 16, 2007).

\textsuperscript{333}Telephone interview with Jay Larson, Everett, WA (July 19, 2007).

\textsuperscript{334}Telephone interview with Amy Logsdon, Iowa City (July 20, 2007).

\textsuperscript{335}Telephone interview with Jay Larson, Everett, WA (July 19, 2007).
The Tobacco Institute Seeks to Co-opt a Skeptical and Resistant Iowa Restaurant Association

Science merely reinforces the social movement against smokers. Rebutting the science will not stop the movement... In focus groups we asked non-smokers about ETS: the health risk was clearly a subordinate concern to their simple dislike of tobacco smoke in the air. No scientific study can instill tolerance in the intolerant.\(^{336}\)

By the mid-1980s the Tobacco Institute, having resolved to mount “a complete campaign to stop smoking restrictions,”\(^{337}\) declared that it would “continue to oppose without compromise all public smoking legislation.” Even in “instances... in which a corporation may wish to implement a voluntary policy to avoid facing more restrictive legislated policies” TI would “continue to attempt to discourage implementation of any policy...” However, the cigarette oligopoly’s watchdog might possibly be prepared to deviate from its course of unrelenting public belligerence to make an exception: it would “consider working privately with those corporations who come to us for assistance to ensure that policies that are implemented are fair.”\(^{338}\) In light of the enormous number of cigarettes smoked and the iconic status of smoking in restaurants and the crucial linchpin status that the anti-smoking movement had bestowed on legislating freedom from exposure to secondhand smoke while eating in public, the cigarette manufacturers were not in a position to adopt the same scorched-earth policy vis-à-vis the entire restaurant industry that they had implemented against individual companies that had dared ‘cross’ them by restricting or banning smoking among passengers or employees.\(^{339}\)

In an attempt to persuade state restaurant associations to subordinate themselves to the cigarette companies’ legislative desiderata, TI drafted a Proposed Restaurant Manual in 1986. Its objectives included reinforcing their “awareness of: the tobacco industry’s opposition to further restrictions on


\(^{337}\)William Kloepfer, Jr. to Samuel Chilcote, Subject: Immediate Public Smoking Communications (Jan. 29, 1985), Bates No. T104110301.


smoking in restaurants[,] the users of tobacco products as a major restaurant market segment[,] legislative and other threats of common concern to the tobacco and foodservice industries[,] and the value of the tobacco industry as an ally.”

The first strategy to be deployed to achieve these objectives was “[d]emonstrating[,]” general customer satisfaction with current foodservice practices toward smoking restrictions.” Oddly, the numerous “tactics” that the manual spelled out to implement this strategy included commissioning surveys of restaurant employees’ “attitudes toward their long-time customers” as well as of owners and managers “toward legislated smoking restrictions,” but none of customers’ attitudes.340 Perhaps the Institute deemed it a sufficient demonstration of “customer satisfaction” for a regional director merely to appear at a legislative hearing and tack on, as one did in 1984, to the assertion that it was “‘far from proven that ambient smoke is hazardous to public health’” the claim that “‘most people, including non-smokers, don’t care whether smokers light up or not....’”341

The final tactic suggested by the Manual—yet another pipe dream that the tobacco industry propagated as a technological fix for indoor locations to divert attention from the dangers of secondhand smoke exposure and the need for state intervention to prohibit it—would have rendered voluntary accommodation superfluous: “use of adequate ventilation equipment as an alternative to separate smoking and nonsmoking sections....”342 Ironically, anti-smoking scholars later pointed out, the cigarette companies persuaded many restaurants “to embrace expensive ventilation systems to avoid non-existent losses in business of going smoke-free.”343

By the mid-1980s, just as anti-smoking advocates in Iowa, undaunted by successive legislative defeats, were intent on incorporating restaurants into the

341Judy Johnson, “Anti-Smoking Bill Doused,” Tribune-Star (Terre Haute), Dec. 14, 1984, Bates No. TIDN0026693. Despite (or perhaps because of) the false statements by Brooke Cheney, the main speaker in opposition, the county council of St. Joseph County, Indiana (of which South Bend, the location of the University of Notre Dame, is the county seat) voted 8 to 0 against the proposed ordinance regulating public smoking.
clean indoor air law, TI, determined to maintain restaurants as locations for continued consumption of immense numbers of cigarettes regardless of the health consequences for nonsmoking customers and employees, strove to animate restaurant associations to cooperate in opposing governmentally imposed restrictions as well as smoking bans. Alone from 1985 to 1987, the number of bills introduced in state legislatures regulating smoking in restaurants rose from 43 to 68, while those approved increased from four to six; the figures for local bills increased from 118 to 169 and 68 to 88, respectively.\footnote{34} Although TI referred to the restaurant industry as “this traditional ally,”\footnote{35} and at least one regional vice president opined that “I cannot think of another TI ally that is more important in the fight against smoking restriction” than the restaurant industry,\footnote{36} the Institute was well aware that the regard was not mutual: “Many restaurant owners ‘do not look at the [tobacco] industry as an ally.’”\footnote{37} Indeed, as TI Midwest vice president Brozek observed many years later, the restaurant industry simply “wouldn’t line up” with the Institute—“you couldn’t control them”—some owners did not even want smoking in their restaurants.\footnote{38} Even when a state restaurant association did join forces with the tobacco industry to help defeat proposed restrictions on smoking, the Institute complained, “[m]any times, once a restaurant is amended out of the bill, the restaurant industry discontinues its involvement.”\footnote{39} The unintended consequence of such exemption, as one of the Institute’s regional field staff pointed out, was the loss of “a tremendous amount of our support”; this staffer even recommended that TI should “encourage associations to ‘hang in there’ and not amend themselves out of the bill. They only find themselves amended back into the legislation further down the road.”\footnote{40}

In fact, the legislative situation became even more complex and fraught with

\footnote{34}Philip Morris, Corporate Affairs Issues Handbook (Apr. 1989), Bates No. 2022711366/78.  
\footnote{35}Susan Stuntz to William Kloepfer (Apr. 23, 1986), Bates No. TI05221069, on tobaccodocuments.org. Stuntz was a TI vice president and director of issues management; Kloepfer was senior vice president for public relations.  
\footnote{36}Stan Boman to Katherine Becker, Re: Proposed Restaurant Manual (July 1, 1986), Bates No. TIOK0023718.  
\footnote{38}Telephone interview with Michael Brozek, Madison, WI (June 5, 2007).  
\footnote{40}Proposed Restaurant Manual State Activities Field Staff Comments at 6 (July 28, 1986), Bates No. TIOK0030536/41.
snares for any alleged alliance or coalition by the end of the 1980s, once the
cigarette companies’ highest state legislative priority became enactment of
amendments to clean indoor air acts preempting local ordinances that imposed
stricter regulation than the statewide laws. But even as late as 1986, when, in the
afterglow of the successive defeats of Zimmerman’s bills, the Midwest regional
office did not even list for the central office any “possible smoking restriction
issues,” it did note that despite its having contacted the Iowa Restaurant
Association, “no real relationship exists. The association is neither very large nor
very strong.” At this juncture TI looked favorably on restaurant owners’
voluntarily creating smoking and nonsmoking sections in an “attempt to
accommodate the varied preferences of all customers.” The Institute promoted
such voluntarism because it “reduces the perceived need by legislators to
introduce restrictive legislation that ignores the capacity of a restaurateur to
determine and respond to the needs of his particular clientele.”

This approach also served the aforementioned purpose of keeping the
restaurant industry on the hook permanently: without the protection of a formal
statutory exemption, restaurant owners would retain an incentive to carry their
lobbying weight against the enactment of new anti-smoking laws or the
strengthening of existing ones. The Iowa Restaurant (and Beverage) Association
was not one of the state organizations that had adopted this approach by mid-
1986, but in January 1987, just as the legislative session was about to convene,
it sent out to members an information fact sheet labeled “[Confidential—For
Members [sic] Use Only],” which its current president and CEO assumed was “a
result of [a] decision of the board.” After counseling members about IRS
audits of restaurant employees for compliance with correct tip reporting, the
informational advised that:

NO SMOKING AREAS are becoming more noticeable all of [sic] the time. Several

351Proposed Restaurant Manual State Activities Field Staff Comments at 5 (July 28,
1986), Bates No. TIOK0030536/40.
352Lisa Osborne, Tobacco Institute], “Foodservice Industry: Issue and Strategy
353Lisa Osborne [Tobacco Institute Project Coordinator] to Brook[e] Cheney
[Regional Director for region including Indiana], Re: Voluntary Restaurant Program (July
1, 1986), Bates No. TI05221053.
354Lisa Osborne [Tobacco Institute Project Coordinator] to Brook[e] Cheney
[Regional Director for region including Indiana], Re: Voluntary Restaurant Program (July
1, 1986), Bates No. TI05221053.
355Email from Doni DeNucci to Marc Linder (July 26, 2007).
companies here in Des Moines, along with some state buildings, have outlawed smoking entirely.

There is no doubt that a No-Smoking Bill will be introduced again this year in the legislature. It would be a lot better if we can say that the restaurants already have Non-Smoking Sections, and we do not need a law to enforce it. Our main concern is to be able to adjust the size of the Non-Smoking Area to the demand. If we get a law that specifies a certain percent of square footage for Non-Smoking you will not have your flexibility.

Please consider setting aside a small area for Non-Smokers and give your customers a choice. It would give you a good idea if it was needed and how much room was required. If we get the wrong bill passed you may not have a choice.\footnote{Iowa Restaurant & Beverage Association, “Information About Your Industry” (Jan. 1987) (copy faxed by Doni DeNucci, IRA Pres-CEO, July 26, 2007).}

Having now adopted this voluntarist-accommodationist strategy to warding off government intervention, after the close of the 1987 Iowa legislative session—from which restaurant owners unconcerned with public health emerged unscathed—the organization reoriented its policy further. Lester Davis, the IRBA’s executive director, contacted the National Restaurant Association, which referred him to the Tobacco Institute, to which he wrote at the end of July 1987 asking for information about its “Smokers Are Welcome Here” Campaign. He explained that: “We were able to have restaurants and bars excluded from the Clean Air Bill last [sic] year. Some of our members might like to let smokers know they are also good business.”\footnote{Lester R. Davis to Jeff Ross (July 31, 1987), Bates No. TI01941669/70.}

The relationship between Davis and the Tobacco Institute must have become more focused in the next few months: in mid-October Sharon Ransome, a project coordinator in TI’s Public Relations Division,\footnote{Ransome had begun working at TI in 1985. Samuel Chilcote to Members of the Executive Committee, Memorandum [Headquarters Staff] (Aug. 15, 1986), Bates No. 2021266909/11. Having been graduated from the University of North Carolina at Greensboro in 1985, she began working at the Institute doing online indexing of current tobacco articles and research for member companies. The Tobacco Institute’s Fourteenth College of Knowledge: Student Profiles (June 12-13, 1986), TIMN279457/61.} informed one of her supervisors that she was traveling to Des Moines to meet with Davis on the topic of the “Smokers Are Welcome Here Campaign.” The importance that the Institute attached to the meeting was underscored by the fact that Ransome went through a “dry run” preparation for it with another public relations staff member.\footnote{Sharon Ransome to Susan [Stuntz] (Oct. 13, 1987), Bates No. TI01941309.} On her return from Iowa, Ransome informed Susan Stuntz (who was in charge of public relations issues management) and Brozek of the remarkable discussion without commenting on its remarkableness. In addition
to executive director Davis, the association’s president, Dick Wilderman, who owned Dick’s A & W Restaurant in Des Moines, was also present at the October 16 meeting, during which:

Mr. Davis immediately explained that the association which has twelve hundred members strongly encourages a voluntary approach to smoking in restaurants—designating smoking and nonsmoking sections based on the concept of supply and demand—for two reasons:

1. Restaurateurs are in the business to accommodate the preferences of all customers—smoking and nonsmoking.
2. To dissuade legislators from coming in and requiring the owner/manager to designate a certain percentage of the restaurant as smoking or nonsmoking. “After all, a man should be allowed to run his own business as he sees fit,” says Lester Davis.

While Wilderman agreed, he admitted that he would like to see a smoke-free society, and he’s a smoker. Both men emphasized the difficulty of convincing some restaurateurs of the importance of a voluntary program. Davis said restaurateurs are safe for now—during the second term of the Iowa legislature, and believes they have more than a 50 to 50 chance of maintaining [the] exemption for restaurants and bars in the next legislative term, but that’s no guarantee. The vote which originally exempted restaurants and bars from the Iowa Clean Air Act survived on a 29 to 21 vote in favor of exemption.

Mr. Davis explained that The Iowa Restaurant & Beverage Association will hold their annual convention during the last week of October. At that time he will introduce the materials and the idea of the voluntary program. He explained that a decision to engage in a program such as the one we are offering has to made by a joint body. Davis seemed interested in the program and felt it could be of some assistance; however, other members of the association may not share his opinion.360

Ransome, unfortunately, did not include her side of the conversation, record her reaction to the revelation that the president of the Iowa Restaurant & Beverage Association looked forward to a smoke-free society or her evaluation of its possible consequences for the tobacco industry, or comment on owners’ resistance even to adoption of a voluntary program. Wilderman, though unable to recall Ransome or the meeting two decades later, mentioned that he had introduced a nosmoking section in his restaurant—which was pointless since the smoke drifted into it—but stressed that he personally would have preferred enactment of a law because it would have taken matters out of his hands and

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360Sharon M. Ransome to Susan Stuntz, Subj: Iowa Restaurant & Beverage Association Des Moines, IA (Oct. 26, 1987), Bates No. TI01941666/7.
enabled him to blame the law if customers complained. Indeed, he insisted that “I’d have loved to go nosmoking,” but “I didn’t have enough balls to ban smoking”; even after he had finally quit smoking in 1990 (following many failed attempts), he still never banned smoking in his restaurant, in part because many of his customers smoked, thus contradicting his own speculation that many owners did not ban smoking simply because they themselves smoked and were not sensitive to the issue. He also acknowledged that a legally imposed total ban would have been “the best thing” that could have happened because customers and employees would have smoked less and revenue would not have fallen.361

Although the minutes of the Iowa Restaurant Association’s conventions from the 1980s are no longer extant,362 the outcome of the organization’s convention discussion of the TI’s voluntary restaurant program is known from Ransome’s report to the impatiently waiting TI hierarchy363 on her telephone conversation with Davis three weeks later. The “general consensus” at IRBA “was to not participate” because while some members “thought it might be effective...others thought it might be negative.” The most that Davis himself offered was that the program had “merit, and if he had the power to make the decision singularly, he might opt to participate in one form or another.” The membership’s rebuff to TI was blunt: in the face of IRBA’s encouraging restaurateurs to implement smoking and nonsmoking sections in order to demonstrate to the legislature that owners “are more than capable of governing their own establishments[, m]any members remain very adamant about maintaining their own policy which is nobody should be telling me how to run my establishment—not even IRBA.” In the end, while

361 Telephone interview with Dick Wilderman, Des Moines (June 10, 2007). Wilderman could also not recall any tension between the Iowa Restaurant Association and the tobacco industry or any financial support from the latter to the former. The point that the existence of a law gave a “convenient excuse” to business owners, who could blame government when responding to smokers’ complaints, was made by Republican Darrell Hanson at a House State Government Committee hearing on the chief anti-smoking bill in 1987. Thomas Fogarty, “Smoking Law Gets OK from House Panel,” *DMR*, Feb. 17, 1987 (2A:3).

362 The IRA’s current president and CEO characterized it as “[v]ery strange” that the organization had the minutes from the 1940s to the 1970s and then 1990s, but not from the 1980s. Email from Doni DeNucci to Marc Linder (July 26, 2007).

363 SMS to Sharon [handwritten note on copy of Ransome’s memorandum] (Oct. 29, 1987), Bates No. TI01941665; [No author, recipient, or title] (Nov. 6, 1987), Bates No. TI01941664; [No author, recipient, or title] (Nov. 16-17, 1987), Bates No. TI01941668; Tobacco Institute, “Executive Summary” (Oct. 16, 1987), Bates No. 506772574/5; [Tobacco Institute], Public Affairs Management Plan Progress Report (October 1987), Bates No. TIMN305174/84.
IRBA would “continue to urge a voluntary program,” all that the association might want from TI was “assistance when the public smoking issue comes before the Iowa legislature once again.”

IRBA may not have officially adopted and acted on the principle that voluntarily creating smoking and nonsmoking sections was the most practical way to persuade the Iowa legislature not to impose such designations, but it did begin cooperating with TI in related areas. Thus in the summer of 1988, Ransome and the State Activities division reported that IRBA (like other midwestern associations) had agreed to help the Tobacco Institute promote its Great American Welcome program, designed to foster hospitality and retail businesses’ “appreciation of smokers’ business and to encourage accommodation of smokers” as a response to the Great American Smokeout.

In launching the Great American Welcome on November 15, 1988—two days before the American Cancer Society’s annual Great American Smokeout—TI announced the pseudo-egalitarian policy of “recogniz[ing] the importance of smoking and nonsmoking customers,” which was “[d]edicated to the simple proposition that smokers and nonsmokers appreciate courtesy.” How and why the cigarette companies imagined that declaring that both “[s]mokers and nonsmokers are good customers” and seeking to mobilize owners “who accommodate all patrons regardless of their decision to smoke” could function

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364Sharon Ransome to Susan Stuntz, Re: Iowa Restaurant and Beverage Association Follow-up (Nov. 18, 1987), Bates No. T128680438. Because Tiana Epps-Johnson, Richard Jones, and Stanton Glantz, The Stars Aligned over the Cornfields: Tobacco Industry Political Influence and Tobacco Policy Making in Iowa 1897-2009, at 43, 46 (2009), on http://repositories.cdlib.org/ctcre/tcpmus/IA2009/, relied on an internal TI document (from October 1987) that had been overtaken by events in November (despite the fact that Ransome herself in the document stated that the outcome would not be known until November) and failed to use the documents cited in the text above, the authors were unaware that ultimately IRBA’s membership had rebuffed TI. This ignorance then contributed to their failure to grasp the conflicts between the restaurant owners and the cigarette manufacturers over preemption and restaurant coverage during the legislative debates of the 1990 session. See below ch. 27. The document in question was Susan Stuntz, Chip Foley, and Sharon Ransome, “Public Smoking Issue,” in [Tobacco Institute], Public Affairs Management Plan: Progress Report (Oct. 1987), Bates No. TIMN0305174/82/84.


367Tobacco Institute, “The Tobacco Institute Announces ‘The Great American
as a meaningful antidote to the Smokeout’s message of the health consequences of smoking\textsuperscript{368} vis-a-vis the vast majority of smokers, who wanted to quit, is unclear. The absurdity of this pathetic initiative two years after publication of the surgeon general’s first major study of involuntary smoking\textsuperscript{369} and the powerful impetus this scientific synthesis gave to the anti-public smoking movement was only underscored by the accompanying visual image of “The Great American Welcome”—published as a full-page ad in \textit{The New York Times} and elsewhere—surrounding two right hands next to each other with thumbs up, one of the hands holding a cigarette.\textsuperscript{370}

Somewhat different in tone was TI’s pamphlet, “Open Door to Hospitality—Accommodating Smokers and Nonsmokers,” which appears to have come out at the end of 1988\textsuperscript{371} and was directed primarily at restaurant owners. “[D]esigned to reinforce the importance of smokers as customers and to provide practical information for the hospitality industry in accommodating smokers and


\textsuperscript{369}U.S. Department of Health and Human Services, \textit{The Health Consequences of Involuntary Smoking: A Report of the Surgeon General} (1986). Such absurd tactics were not new. On the eve of the report’s publication and coinciding with the Great American Smokeout in 1986, Philip Morris announced its Great American Smoker program introduced by Milton Berle instructing smokers that “‘Nobody, and I mean nobody—not the anti-smokers, not the crusaders, not all the moralist groups and the pressure groups in the entire world—have the right to decide for you” whether to smoke. Philip Morris USA, News: Philip Morris U.S.A. and Entertainer Milton Berle Introduce “Great American Smoker’s Kit” at 3 (Nov. 19, 1986), Bates No. 2024274455/7. TI’s deputy director of public relations, Peter Sparber, pushed this farce one step further by proposing a strategy of making the Great American Smokeout a “liability” for the American Cancer Society—despite the fact that it had “gone to great lengths to avoid the appearance of harassment”—by forming the League Against Smoker Harassment (LASH) and asking members to “‘Back LASH.’” In addition, in order to disabuse the ACS of its “inappropriate preoccupation with smoking,” he explored the possibility of recruiting prominent public officials to ask the ACS board (whose members represented many industries) to broaden its approach to include all “‘causes’ of cancer” in order to confront them with the problem of considering one-day closings of chemical plants or one-day moratoria on coffee and red meat. Peter Sparber to Samuel Chilcote at 3-5 (Oct. 23, 1986), Bates No. TIOK0023532/4-6.

\textsuperscript{370}\textit{NYT}, Nov. 15, 1988 (D32).

\textsuperscript{371}“Production Services” (Dec. 19, 1988), Bates No. 09910965.
nonsmokers,” it was studded with false and deceptive claims, which boiled down to the assertion that “tobacco smoke is rarely the true culprit” in causing poor indoor air quality. Instead, by claiming that “[i]n the vast majority of cases the real problems are poor ventilation and air filtration,” TI left owners with the impression that “courtesy” and technology might render separate smoking and nonsmoking sections superfluous. After all, if one of the chief vices of “legislated smoking restrictions” that “threatened” “an effective host” was allegedly “chang[ing] your image from host...to enforcer,” it was difficult to discern how, “[i]f you establish no-smoking areas” and “[m]ake your smoking policy clear” and “[m]onitor” it, the owner could avoid becoming a “policeman,” albeit of his own rules. Significantly, once the Iowa legislature amended its law to cover restaurants, the discretion conferred on owners to designate smoking and nonsmoking sections was so capacious that it practically extinguished the difference between state-required and self-created designation: indeed, since owners, as the Iowa Restaurant Association would itself concede, could comply with the Iowa law by designating even one table as the nonsmoking section, that obligation might be even less burdensome than the TI’s proposed “flexible approach” of setting up “floating areas...adjusted to fit demand.”

The Tobacco Institute also targeted owners and operators of chain and independent restaurants in Iowa by means of advertisements in the monthly

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378In an earlier and longer version of the pamphlet, the owner of a fancy New York restaurant “sums it up simply: ‘I’m not a policeman. I am a cook.’” Tobacco Institute, “Open Door to Hospitality—Accommodating Smokers and Nonsmokers” (July 1988), Bates No. 87716290/300.
379See below ch. 27.
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

publication of IRBA to “educate” them “about the negative effects of smoking restriction legislation will have on their business.”\(^{381}\) In September 1988, the Public Relations Division of the Tobacco Institute—as if TI did anything but PR—informed Davis (with a copy to lobbyist Wasker) that in connection with the Welcome program the Institute had decided to buy a full-page advertisement in six consecutive issues of the IRBA’s monthly magazine.\(^{382}\) Headlined, “What if they passed a law that took away 30% of your business?,” the ad claimed that this loss would be the result of a smoking ban in restaurants decreed by the legislature or city council. Without making clear the relation to the first claim, TI also asserted that almost 20 percent of the U.S. population would not visit a restaurant that prohibited smoking. Promising that it could help restaurant owners “make sure this never happens,” the Institute offered to “help you develop ways to accommodate all your customers—smokers and non-smokers alike.” And finally, deceptively suggesting that the cigarette companies’ interests were identical with restaurant owners”—a suggestion that the companies would strikingly refute in the Iowa legislature in 1990—the Institute stated that it would “help you ensure that your voice is heard when government takes up the issue.”\(^{383}\) In addition to enabling the tobacco industry to convey its misleading message to whichever Iowa restaurant owners actually read ads in the magazine, the $110 per month that TI paid IRBA\(^{384}\) for six months constituted modest financial support.

**Scientific Advances in Understanding the Health Impacts of Exposure to Environmental Tobacco Smoke Sharpen the Industry’s Visions of the Endgame**

For us the crux of the ETS issue is that restrictions and social opprobrium against smoking may reduce cigarette consumption and smoking incidence.... Between 1985...and February 1987...incidence [of smoking] dropped from 32.8% of population to 30.8%. The greatest decline has been among white males, age 30-44. This group is most likely to be subject to workplace restrictions or have children at home or both. Their most likely motivation is the fear that the ETS issue has instilled in them; they fear harming their children or their employment prospects.\(^{385}\)

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\(^{382}\) John Lyons to Lester Davis (Sept. 14, 1988), Bates No. TI07731867.
\(^{384}\) Tobacco Institute Check No. 059994 (Feb. 27[?], 1989), Bates No. TI44070989.
\(^{385}\) JRN, *The ETS Issue: Science and Politics at [4]* (May 1987), Bates No.
In spite of the failure of Zimmerman’s bill in 1986, the Tobacco Institute knew that anti-smoking activists would once again reintroduce a statewide smoking bill in 1987. Losing no time, on June 10, 1986, just a few weeks after adjournment, its Midwest regional vice president Brozek and regional director Jacobson held an Iowa Tobacco Action Network Advisory Committee meeting in Des Moines at the Embassy Club on the top (25th) floor of the Financial Center, the state’s tallest commercial building when it was built in 1973. The purpose of the TAN Advisory Committee, which was composed of tobacco member company sales force representatives, was to inform those representatives fully of the “legislative environment and industry needs.” In reviewing the 1985-86 legislative session, the Iowa committee, whose first listed member was none other than Mike Lux, ICAN’s executive director, discussed “State Smoking Policy” and “Environmental Tobacco Smoke/Workplace” as well as upcoming primary and general elections and legislative projections for the next session. Looking forward to continuing the pursuit of legislative allies and coalitions, in early December Brozek informed his superior, George Minshew, that he had decided to take Philip Morris up on its offer to provide TI with its Philip Morris Magazine and coupon lists for use in phone banking efforts during the 1987 Iowa legislative session to oppose smoking restriction bills.

In its year-end “State of the States” report, TI summarized the strengths and weaknesses of the industry’s position in Iowa in somewhat greater detail. The state’s various “tobacco segments” were “not always dependable.” Alluding to the aforementioned breakdown of relations with lobbyist George Wilson’s organization, the report lamented that the “wholesaler association, even with

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386 Paul Jacobson to [form letter] (May 28, 1986), Bates No. TI24190305-6, on tobaccodocuments.org.
387 [Tobacco Institute], State Activities Division, Legislative Action Plan, Iowa HF 327 Cigarette Tax (Feb. 12, 1988), Bates No. TIIIIBC013122/3.
388 Michael Brozek to George Minshew, Re: 12/30/86 Woodson Memorandum Regarding TAN Redesign, at 3 (Jan. 13, 1987), Bates No. TI29261787/9.
389 Paul Jacobson to Michael Brozek, Re: Revised TAC List - Region IV (Aug. 1, 1986), Bates No. TI24190283/4. The other ten members included three Brown & Williamson Tobacco Corp. employees, and one each from Philip Morris, R. J. Reynolds Tobacco Co., Lorillard, and Liggett and Myers Tobacco Co.
391 Michael Brozek to George Minshew, Re: Philip Morris Proposal for Acquisition of Computerized Mailing Lists (Dec. 2, 1986), Bates No. TNWL0021450.
recent overtures, has not been responsive to general tobacco industry legislative concerns. If a choice between a vote on the state’s minimum mark-up law or an increase in the state’s cigarette excise tax [had to be made], the wholesaler association’s choice would be the former.” Weakening the cigarette companies’ potential legislative influence was the fact that labor unions, which several years earlier they had begun to cultivate as coalition partners within the framework of the Tobacco Industry Labor Management Committee, had become “an unreliable ally” in Iowa because of the “depression” in the farm equipment manufacturing industry and several strikes in animal slaughter plants. Consequently, Iowa labor had “enough problems of its own.” On the bright side, TI tooted its own horn by asserting that “[t]he most valuable resource” that it had provided in Iowa was hiring “the best possible lobbyists...as well as the continuation of the honorarium program.” Although the industry boasted that it had been able to defeat clean indoor air bills for five sessions, “anti-industry forces headed by lung association operatives” had announced a “major new effort” for the 1987 session, which could alter the constellation of forces that until then had favored the tobacco companies: “The Iowa political environment has not succumbed to the national hysteria regarding indoor smoking restrictions.” Bolstered by “more professional fund-raising,” the Lung Association would “be in better financial shape and more able to organize locally regarding their agenda.” Consequently, TI anticipated a strong effort in 1987 by “our adversaries to enact comprehensive workplace smoking measures” accompanied by a ban on handing out free cigarette samples.\textsuperscript{392}

The tobacco industry anticipated the flood of anti-public smoking bills to be filed during the 1987 state legislative session with particular trepidation because it could not close its eyes to the sea change in public attitudes toward the dangers of secondhand smoke exposure that would surely be effected by the publication of two reports at the end of 1986: \textit{Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects} by the National Research Council’s Committee on Passive Smoking in November,\textsuperscript{393} and the surgeon general’s first major study of \textit{The Health Consequences of Involuntary Smoking} in mid-December.\textsuperscript{394} In October, even before either study had appeared, Peter Sparber,  

\textsuperscript{392}Tobacco Institute, State Activities Division, “1987 The State of the States: Assessing the economic and political climate of each of the 50 states as they affect the tobacco industry; and evaluating industry resources for action on legislation projected for 1987,” Iowa at 3-4 (Dec. 1986), Bates No. 80420206/86-7.


\textsuperscript{394}U.S. Department of Health and Human Services, \textit{The Health Consequences of}
a Tobacco Institute vice president and deputy director of its Public Relations Division, revealed in a memorandum to President Chilcote that the epithet “obfuscation” would not even remotely begin to do justice to the mendacious campaign that the cigarette industry was about to launch. Sparber recommended that in conversations with the executive committee (consisting of high-ranking cigarette company executives) Chilcote state that: “Our strategy will be to set the public agenda by making an issue out of the many anti-smoker attempts to intimidate our scientists and shut down the scientific debate over ETS.” Continuing in this preposterous vein, Sparber proposed meeting privately with the Secretary of Health and Human Services to request that he investigate the intimidation (allegedly) promoted by Surgeon General Koop. Unsurprisingly, the purpose of these and similar dirty tricks was to “divert public attention away from these two damaging reports [and] make the anti-smokers respond to us....”

The National Research Council study, issued in November, reported that studies of various populations in Europe, Asia, and North America had found the risk of lung cancer to be 30 percent greater nonsmoking spouses of smokers than among nonsmoking spouses of nonsmokers. The surgeon general’s report...

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A few years later as an outside consultant to TI Sparber outdid himself with this contribution to discouraging or reversing mandatory or voluntary smoking bans in restaurants, where, absent laws, owners’ “whims—not necessarily logic or facts—are all that is necessary to set smoking policies”: “Demonstrate that far from being victims, restaurant workers pose a serious public health problem. Comment: Since restaurant workers are largely incapable of speaking out for themselves, we believe the only way that the ‘restaurant workers as victims of ETS’ issue can grow is if the anti-smokers can generate sympathy for them. But, given the public health problems reportedly caused by restaurant workers, it is ironic that restaurant workers could ever be seen as victims of any sort. The best way of countering the antis, is to encourage third parties to increase public awareness of the public health threat posed by restaurant workers. It may be hard to generate public concern over restaurant worker exposure to ETS, when the public is more concerned about contracting rare, Central American strains of tuberculosis from restaurant workers.” Joanna Hamilton and Peter Sparber to Karen Fernicola Suhr, Re: Restaurant Program Observations and Recommendations at 2, 5 (Aug. 17, 1993), Bates No. T1 01621160/1/4.

Peter Sparber to Samuel Chilcote at 1-3 (Oct. 23, 1986), Bates No. TIOK0023532-4.

National Research Council, Committee on Passive Smoking, Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects 10 (1986). Even after “allowing for reasonable misclassification,” the adjusted increased risk was about 25 percent. Id. at 246. The opening sentence in the Times report bizarrely asserting that the
turned out to be as traumatic as the tobacco industry had feared. At his press conference on December 16, Dr. Koop presciently predicted that the report would become the same kind of “‘turning point’” in its field that the original 1964 report had been in its.398 In fact, the new study’s catalytic force was likely to be brought to bear even more quickly and systematically both because Koop lacked the reticence of his predecessor Luther Terry to make policy recommendations399 and a much better organized and more mature anti-smoking movement was available to propagate and implement his advice. Koop declared point-blank that “the health danger to nonsmokers from coworkers who smoke cigarettes is so clear that smoke-free workplaces ought to be made available to nonsmokers.”400 Of the three major conclusions of the report itself the first and third would become especially disastrous for the cigarette industry’s battle against regulation of public smoking: (1) “[i]nvoluntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers”; (2) the children of smoking parents had a higher frequency of respiratory infections than those of nonsmokers; and (3) “[t]he simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke.”401

A few days after the issuance of the surgeon general’s report, Roger Mozingo, the head of the TI State Activities Division, saw the looming catastrophe too clearly to bother with Sparberesque antics. In a memo to Chilcote he characterized the report as “a watershed event” that rendered projects that would help the industry “‘in the long run’” moot because: “Unless immediate steps are taken to educate our staff, allies and legislators—and to get some relief from the constant barrage of negative press coverage of ETS—there will be no ‘long run.’ The issue is that serious.” To be sure, the “education” Mozingo envisioned was also rooted in mendacious obfuscation designed “to (1) effectively reassure our


Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

allies that the Surgeon General is wrong and (2) then have that message delivered to appropriate lawmakers.” Starting with legislators in crucial states who had received campaign contributions or honoraria, Mozingo proposed “hammer[ing] home” the points that: (1) “ETS does not represent a proven health hazard to nonsmokers”; (2) “if legislators want to go after the real indoor air quality culprit, look to ventilation problems”; and (3) “the surgeon general has replaced scientific integrity with a political agenda.”

One major impediment to convincing legislators that only the cigarette companies with tens of billions of dollars of accumulated capital and future profits at stake were holding high the banner of science and eschewing politics was a bad press:

Unless we can alter the tobacco story lawmakers read every day and hear/see on the news every morning and night, our efforts will be less effective. In our view, the negative tobacco press is one of the keys to the anti’s [sic] success. It makes it difficult for legislators to support our view, much less take the lead in our defense. If we can lessen the impact of some of these stories, and perhaps have our opinions aired or printed, this exercise will be a success.

Mozingo did not bother—presumably because he did not need—to explain to Chilcote why only very selective and manipulable interactions with news media were viable: “Frankly, when a TI spokesperson debates an anti-smoker on, say, McNeil/Lehrer, it seldom helps either the state or federal legislative situation.

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403Roger Mozingo to Samuel Chilcote, Subject: State Activities’ ETS Plan of Action (Dec. 19, 1986), Bates No. TIOK0023509/13. Mozingo’s comment may have been sparked by a sarcastic memo he had received a few days earlier from Dennis Dyer, the New England regional vice president. Responding to Mozingo’s remark that he had not heard one new idea from his staff in two years, Dyer proposed “posturing” smoking restrictions and “other discriminatory devices of the anti-tobacco groups as elitist discrimination, bigotry, and an erosion of our basic freedoms of speech, property, assembly, etc.” He concluded that “[o]ne of the industry’s biggest problems” was being “viewed as the ‘black hats,’” while its opponents appeared as “protectors of the ‘faithful.’ From that flows the single most obvious reason why we lose legislation—overwhelmingly negative press coverage.” Dyer speculated that his proposal’s long-term effect “could be the return of balanced review of the issue by the people, press, and elected officials.” By balance he meant that the industry could look back on a “good year” if people had begun saying: “‘Yes, there are health questions here; but there are equally important freedom questions that must be weighed.’” Dennis Dyer to Roger Mozingo, Re: Idea #1 (Dec. 11, 1986), Bates No. TIOK0014388/9.
On-site background press work would be more useful in a legislative sense. Little wonder that just a half-year later an industry facing the credibility crisis that flat-earth societies tend to engender was desperate enough to want to explore the possibility of circumventing the press by becoming the press. As a Philip Morris communications department brainstorming group suggested to top management:

Consider acquiring a major media vehicle. Washington Times and Insight examples (Moonies). When founded, these vehicles were prejudged and ignored. Now they are reputable, respected and consulted. Initially, if we controlled such an information outlet, information would be subject to suspicion and scrutiny. But now Insight has a million and a half readers. This grassroots readership cuts the legs from under effete criticism.

Even before 1986 ended, as the tobacco industry processed the import of the surgeon general’s report and the world’s reaction to it, Hurst Marshall and George Minshew, the Tobacco Institute’s vice presidents for the Southern and Northern sectors, respectively, informed its outside legal and regional staff that it was already clear that the ETS report—which “may be the most devastating politically”—“will play a tremendous role in smoking restriction battles in 1987 and beyond. Indeed, the flood of legislative activity caused by the report could spill over into other issues such as cigarette excise tax earmarking.” In order to insure that 1987 was “a successful year on the smoking restriction front,” Marshall and Minshew declared that the State Activities staff had to be “familiar with the latest pro/con ETS arguments.” To that end, they were scheduling briefing sessions by Covington & Burling lawyer John Rupp and the Institute’s “scientific team” (aka International Air Pollution Advisory Group), which would “would review our side of the story and the solid arguments we can bring to the debate.” Their solidity can be gauged by the fact that exactly six months later Rupp, according to the minutes, was constrained to admit at a Philip Morris brainstorming conference on secondhand smoke: “Where we are. In deep shit.”

In fact, even though the surgeon general’s report could scarcely have been adequately digested by the time the state legislative sessions were underway in

406 M. Hurst Marshall and George Minshew to T.I. Legislative Counsel and Regional Vice Presidents/Directors (Dec. 24, 1986), Bates No. TI12240210/1.
early 1987, that year did turn out to be a record-breaker for the volume of smoking regulation bills. The following table, included in the Philip Morris “Corporate Affairs Issues Handbook” and presumably based on information collected by TI’s army of state lobbyists, reveals 1987 as the peak for introduction and approval of state bills and local ordinances from 1979 to 1988:

<table>
<thead>
<tr>
<th>Year</th>
<th>State Introduced</th>
<th>State Approved</th>
<th>Local Introduced</th>
<th>Local Approved</th>
<th>Total Introduced</th>
<th>Total Approved</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979</td>
<td>114</td>
<td>8</td>
<td>58</td>
<td>23</td>
<td>172</td>
<td>31</td>
</tr>
<tr>
<td>1980</td>
<td>98</td>
<td>1</td>
<td>60</td>
<td>32</td>
<td>149</td>
<td>33</td>
</tr>
<tr>
<td>1981</td>
<td>100</td>
<td>10</td>
<td>65</td>
<td>35</td>
<td>165</td>
<td>45</td>
</tr>
<tr>
<td>1982</td>
<td>86</td>
<td>4</td>
<td>79</td>
<td>42</td>
<td>165</td>
<td>46</td>
</tr>
<tr>
<td>1983</td>
<td>86</td>
<td>5</td>
<td>120</td>
<td>62</td>
<td>206</td>
<td>67</td>
</tr>
<tr>
<td>1984</td>
<td>109</td>
<td>4</td>
<td>180</td>
<td>65</td>
<td>289</td>
<td>69</td>
</tr>
<tr>
<td>1985</td>
<td>142</td>
<td>26</td>
<td>232</td>
<td>114</td>
<td>374</td>
<td>140</td>
</tr>
<tr>
<td>1986</td>
<td>140</td>
<td>17</td>
<td>255</td>
<td>139</td>
<td>395</td>
<td>156</td>
</tr>
<tr>
<td>1987</td>
<td>191</td>
<td>28</td>
<td>301</td>
<td>169</td>
<td>492</td>
<td>197</td>
</tr>
<tr>
<td>1988</td>
<td>189</td>
<td>18</td>
<td>253</td>
<td>123</td>
<td>411</td>
<td>130</td>
</tr>
</tbody>
</table>

Thus alone from 1986 to 1987 the number of state bills introduced rose 36 percent compared to a rise of only 23 percent from 1979 to 1986; the proportionate increase in the volume of local ordinances introduced from 1986 to 1987 was also significant, but not so high as in the first half of the 1980s. In spite of the large increase in state bills introduced in 1987, the rate of approval reached 15 percent, the second highest of the 10-year period (to 18 percent in 1985); although the rate of approval of local bills reached its high point in 1987, at 56 percent it was not significantly higher than in most other years.

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House File 79 in 1987: Stores Finally Become a “Public Place,” But Restaurants Remain Excluded

When Zimmerman became lieutenant governor, her bill, as she later observed, became Johnie Hammond’s “baby”...it ended up being Hammond’s bill in the House and Hannon’s in the Senate.” Hammond, who had grown up in Mississippi and Texas and studied social work, was bothered by smoke “quite a bit.” The Zimmerman-Hammond-Hannon “baby” that finally saw the statutory light of day in 1987 fell far short of its progenitrixes’ intentions because it continued to lack what they regarded as its most important feature—coverage of restaurants. The bills that Hammond (H.F. 79) and Hannon (S.F. 244) filed in 1987 were not exactly identical with H.F. 102, which Zimmerman had filed in 1985 or that the House had passed in 1986. The Hammond-Hannon bill was stricter by virtue of lacking the exclusions of restaurants with fewer than 32 seats and of other public places with under 200 square feet of floor space of H.F. 102 as passed and the exclusion of factories and warehouses of both versions of Zimmerman’s bill; on the other hand, it was less stringent in lacking the provision in H.F. 102 as filed that imposed a penalty on a building proprietor who knew that someone was smoking in violation of the law and nevertheless failed to advise him or her of the prohibition, as well as in providing for a penalty of only $50 compared to the $100 penalty in H.F. 102 as filed.

At the end of January, the House State Government Committee to which H.F. 79 was referred constituted a five-member subcommittee, consisting of Hammond herself and two other Democrats and two Republicans, to report on it. Presumably two of its members, Democrat Dennis Renaud and Republican Philip Tyrrell, who prominently opposed regulation of smoking and ultimately voted against the bill on the floor—as Renaud had done regarding Zimmerman’s bill in 1985—were appointed to this body by their party leaders. The subcommittee released its report on June 1, 1987.

409 Jo Ann Zimmerman, Interview with Suzanne Schenken, Summer 1991 at 56, in Jo Ann Zimmerman Papers, Box 1, Folder: Biographical Oral History Interview 1991, IWA.
410 A Political Dialogue: Iowa’s Women Legislators,” Box 2, Folder: Transcripts: Johnie Hammond at 26 (Oct. 17, 1991), IWA.
411 H.F. 79 (Jan. 21, 1987).
413 State of Iowa: 1987: Journal of the House: 1987 Regular Session Seventy-Second General Assembly 1: 87 (Jan. 27). The other two members were Peterson and Shoning, the latter of whom had been a cosponsor of H.F. 102 in 1985.
1986—were responsible for the changes weakening the bill that the subcommittee reported back to the full committee at its meeting on February 16. The subcommittee amendment that Hammond offered encompassed several minor changes as well as one major restriction of coverage, one major restriction of enforcement, and one minor strengthening of enforcement. The most important restriction excluded from coverage factories, warehouses, and similar workplaces that the general public did not usually frequent, subject to the exception that their employee cafeterias were required to have a designated nonsmoking area. The committee quickly adopted this change by a show of hands 13 to 6. The major restriction of enforcement weakened the requirement that proprietors ask smokers to refrain from smoking on request of someone claiming discomfort caused by the smoke by limiting it only to smoking that was taking place in a no-smoking area. As a result, what in H.F. 79 was a potentially powerful tool to subvert the bill’s failure to protect nonsmokers from exposure to drifting smoke was defanged to apply only to formal violations of the ban on smoking in nosmoking areas—even in public places in which the vast majority of the space was designated as a smoking area, thus giving smokers very little occasion to smoke in the tiny nosmoking area. Finally, the minor improvement in enforcement required inspectors of public places subject to inspection under other laws to check for compliance with the posting requirement.

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415 For example, the amendment expressly added lobbies and malls to the universe of named covered public places, but they already met the bill’s definition of a “public place as “any enclosed indoor area used by the general public” and as “other commercial establishments.” Subcommittee amendment to House File 79, attached to [House] State Government Committee [Meeting Minutes] (Feb. 16, 1987) (copy furnished by SHSI DM); H.F. 79, § 1.

416 Subcommittee amendment to House File 79, attached to [House] State Government Committee [Meeting Minutes] (Feb. 16, 1987) (copy furnished by SHSI DM). Although, as already explained, this exclusion of factories and warehouses derived from the 1975 Minnesota statute, the latter directed the Department of Labor and Industry to promulgate regulations “rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.” 1975 Minn. Laws ch. 211, § 4, at 633, 634. See above ch. 24. These rules, codified at Minn. Rules §§ 5205.0900-0950 (1987), were repealed in 1987. State Register 12:634, 662 (Oct. 5, 1987).


Before voting on these other provisions of the subcommittee amendment, the committee discussed individual members’ various amendments. First it rejected one—the personal motivation for filing which can only be guessed at—by Des Moines Democrat Florence Buhr, a heavy smoker, to exclude shoe repair shops from coverage by a show of hands 12 to 5.\footnote{Committee [Meeting Minutes] (Feb. 16, 1987) (copy furnished by SHSI DM).} That Renaud’s amendment to limit coverage of restaurants to those seating at least 50 persons and of offices and waiting rooms with at least 300 square feet of floor space lost on a nine to nine tie vote demonstrated already at this early stage in the legislative process that opposition to complete restaurant coverage—even under a bill that barely constrained smoking—was widespread. The same outcome on Renaud’s stripped-down follow-up amendment containing only the restaurant provision underscored the hard-core character of the membership of the anti-anti-smoking group. Undaunted, Renaud then tried to increase from 32 to 50 the number of people to whom a bar had the capacity to serve meals simultaneously before it was covered (although the only consequence of coverage, since a bar was the only public place that could lawfully be designated a smoking area in its entirety, was that such designation had to be posted at entrances), but the committee rejected it by a show of hands 10 to 8. At last, Renaud achieved a significant weakening of enforcement when the committee by a voice vote adopted his last amendment reducing the penalty from $50 to only $10. This willingness to diminish financial deterrence so drastically also augured ill for enactment of a capacious and strictly enforced anti-smoking law. Finally, the committee adopted by voice vote an amendment offered by Democrat Minnette Doderer (a sometime smoker) eliminating the aforementioned language requiring a request by someone claiming discomfort from smoke\footnote{Buhr had filed the same amendment in 1985. H-3287 (Mar. 8, 1985).} to trigger the proprietor’s responsibility to ask smokers to refrain from smoking as part of his duty to “make reasonable efforts to prevent smoking in the public place....”\footnote{Subcommittee amendment to House File 79, attached to [House] State Government Committee [Meeting Minutes] (Feb. 16, 1987) (copy furnished by SHSI DM).} Committee members who opposed H.F. 79 protested that the bill constituted

\begin{footnotesize}
\footnote{That Renaud’s amendment to limit coverage of restaurants to those seating at least 50 persons and of offices and waiting rooms with at least 300 square feet of floor space lost on a nine to nine tie vote demonstrated already at this early stage in the legislative process that opposition to complete restaurant coverage—even under a bill that barely constrained smoking—was widespread. The same outcome on Renaud’s stripped-down follow-up amendment containing only the restaurant provision underscored the hard-core character of the membership of the anti-anti-smoking group. Undaunted, Renaud then tried to increase from 32 to 50 the number of people to whom a bar had the capacity to serve meals simultaneously before it was covered (although the only consequence of coverage, since a bar was the only public place that could lawfully be designated a smoking area in its entirety, was that such designation had to be posted at entrances), but the committee rejected it by a show of hands 10 to 8. At last, Renaud achieved a significant weakening of enforcement when the committee by a voice vote adopted his last amendment reducing the penalty from $50 to only $10. This willingness to diminish financial deterrence so drastically also augured ill for enactment of a capacious and strictly enforced anti-smoking law. Finally, the committee adopted by voice vote an amendment offered by Democrat Minnette Doderer (a sometime smoker) eliminating the aforementioned language requiring a request by someone claiming discomfort from smoke to trigger the proprietor’s responsibility to ask smokers to refrain from smoking as part of his duty to “make reasonable efforts to prevent smoking in the public place....”}
\end{footnotesize}
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

an “undue imposition” on smokers and business owners.\footnote{Thomas Fogarty, “Smoking Law Gets OK from House Panel,” \textit{DMR}, Feb. 17, 1987 (2A:3).} In particular, Tyrrell, a self-employed insurance agent\footnote{\textit{Iowa Official Register: 1987-1988}, at 79 (62d vol., Paulee Lipsman et al. eds.).} who had quit smoking after 36 years, seeing further into the future than any of the bill’s advocates could presumably have even dreamed, complained that the measure was “a step toward the banning of cigarettes in cars and homes.” For him, as for other opponents who had not yet grasped the import of the new learning about the health consequences of secondhand smoke exposure, there was no doubt that: “‘We’re just intruding too much and too far into people’s lives.’” Ignoring Hammond’s admonition that smokers threatened bystanders’ health, thus triggering the state’s obligation to protect the public health, Tyrrell offered up a self-caricature of his know-nothingism: “‘Some of you find tobacco smoke offensive. . . . To me, cheap perfume is offensive.’”\footnote{Thomas Fogarty, “Smoking Law Gets OK from House Panel,” \textit{DMR}, Feb. 17, 1987 (2A:3).} In the end, rejecting Tyrrell’s motion to defer the bill, the State Government Committee passed H.F. 79 by a vote of 13 to 6.\footnote{Section 3 of the Arkansas Protection from Secondhand Smoke for Children Act of 2006 prohibits smoking in all motor vehicles in which a child under the age of six and weighing under 60 pounds is restrained in a child passenger safety seat. In 2007 the city of Bangor, Maine passed an ordinance under which: “It shall be unlawful for the operator or any passenger in a motor vehicle, passenger van, pick-up truck or commercial vehicle, when any person under the age of 18 is present in the vehicle, regardless of whether the motor vehicle’s windows are down.” City of Bangor, Maine, Ordinance 07-50 (Jan 8, 2007) (codified at § 291-70(A), on http://www.e-codes.generalcode.com/codebook_frameset.asp?ep=fs&t=ws&cb=1684_A). For an example of a court decision virtually prohibiting a mother from smoking in her house, see Roofeh v. Roofeh, 525 NYS2d 765 (1988).} Nevertheless, the constricted coverage and less stringent enforcement that opponents succeeded in grafting onto the bill before it ever reached the House floor insured that the debate would begin from a less advantageous base for supporters.


bars as public places. So far ahead of its time that it took two decades for the legislature to catch up with it, the amendment lost on a non-record vote.\textsuperscript{427} Then Democrat Dennis Renaud, a smoker,\textsuperscript{428} succeeding where he had failed in committee, offered an amendment to exclude from coverage restaurants, retail stores, offices, and waiting rooms of under 300 square feet of floor space—apparently without explaining whether his own barber business\textsuperscript{429} fell below the minimum size threshold. Following its adoption on a non-record vote, the committee amendment as amended was also adopted.\textsuperscript{430} When the House resumed consideration of H.F. 79 after a two-day recess, it adopted a series of amendments further diluting the bill. By a non-record roll-call vote of 48 to 39, the House undertook the most significant and high-profile diminution of coverage by adopting Renaud’s amendment to exclude restaurants with a seating capacity of fewer than 50 persons.\textsuperscript{431} Also adopted were two amendments by Democrat Emil Pavich to exclude both retail stores at least 50 percent of whose sales were of tobacco products and even “the portion of a retail store” where they were sold.\textsuperscript{432} After adopting yet two more weakening amendments, excluding lobbies and malls encompassing under 300 square feet of floor space\textsuperscript{433} and hotel/motel rooms from the definition of a covered “public place,”\textsuperscript{434} the House rejected an initiative to expand coverage: on a non-record roll-call vote of 35 to 14, it defeated an amendment to strike the exclusion of dormitory residential rooms
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

from the definition of “public place” offered by Republican Mike Van Camp, an International Brotherhood of Electrical Workers electrician, who had voted against H.F. 102 in 1986. On a close 48 to 46 vote Van Camp’s amendment to prohibit the assessment of court costs in addition to penalties also lost. Finally, the House rejected by a large majority (50 to 23) an amendment offered by the aggressive anti-regulatory Tyrrell that would have created a system of reverse local preemption under which the law would not have been effective in any city or county unless the city council or county board of supervisors passed an ordinance adopting it. Having been substantially watered down by the committee and individual amendments, and thus “contain[ing] plenty of exceptions,” H.F. 79 was able to secure an overwhelming 77 to 18 majority on final passage. Democrats controlled the House by a 58 to 42 majority, but equal numbers of Democrats and Republicans opposed the bill.

On its arrival in the Senate, which had killed Zimmerman’s bill in 1986 and was still controlled by Democrats (30 to 20) and its largely smoking leadership, H.F. 79 was referred to the State Government Committee, whose members, according to chairman Bob Carr, included “five of the heaviest smokers in the Senate”—Democrat Joseph Coleman and Republicans Richard Drake, Jack Nystrom, Jack Rife, and John Soorholtz. As a result, Carr expected the committee vote on the bill to be “very close.” Coleman, the Senate’s most

435 State of Iowa: 1987: Journal of the House: 1987 Regular Session Seventy-Second General Assembly 1: 544 (Mar. 6) (H-3089). If dormitory rooms had been covered by the law, then educational institutions would presumably have banned smoking in them altogether since the alternative of designating a smoking area would have made even less sense than in other locations such as stores and offices.


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belligerent opponent of smoking regulation in the Senate itself, and “an unashamed two-pack-a-day puffer” who dismissively observed that there were “always those that have got to have a crusade,” was paired with Jean Lloyd-Jones, its most insistent anti-smoker, on the subcommittee to which the bill was assigned.\(^{444}\)

On March 12, before the Senate began dealing with H.F. 79, the Clean Indoor Air Coalition, consisting of 30 businesses and organizations, including the American Cancer Society (ACS), American Association of Retired Persons, Iowa PTA, and Drake University,\(^{446}\) organized a hearing before about 60 people at the Statehouse in Des Moines. A former chairman of the Iowa Republican Party, Steve Roberts, of the ACS, revealed how moderate and ready-to-compromise the group was when he contended that: “We are not here to support a bill that would cut off the rights of smokers.” Instead, they were seeking a “balance” to protect nonsmokers from risks associated with secondhand smoke exposure.\(^{447}\) To be sure, unless he held a highly technical notion of “rights,” Roberts’ position was manifestly disingenuous, since the whole point of the anti-smoking movement was to roll back the norms defining the spaces that smokers, powerfully aided by tobacco companies, had appropriated during the twentieth century. Much closer to the truth came another speaker, Dr. Miles Weinberger, a pediatric and lung disease specialist at the University of Iowa Hospital, who declared: “This law will be one incredibly small step in sending the ashtray to the same place we sent the spittoon years ago.”\(^{448}\)

In an unusual backgrounder on the bill, the *Des Moines Register* interviewed Senate Majority Leader Hutchins, who, without having counted the votes, allowed as H.F. 79 had a good chance of passage, but denied that the fact that he had quit smoking several months earlier had anything to do with the bill’s improved prospects. Indeed, he even asserted that the bill would also have passed in 1986 “if we had brought it up.” He insisted that one reason that the Senate had killed it was that it had also passed a mandatory seat-belt law and raised the

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\(^{444}\)Jane Norman, “Bill to Restrict Smoking Likely to Get Senate’s OK,” *DMR*, Mar. 15, 1987 (1B:5-6, at 4B:6).


\(^ {446}\)Jane Norman, “Bill to Restrict Smoking Likely to Get Senate’s OK,” *DMR*, Mar. 15, 1987 (1B:5-6).


\(^ {448}\)Jane Norman, “Bill to Restrict Smoking Likely to Get Senate’s OK,” *DMR*, Mar. 15, 1987 (1B:5-6, at 4B:6).
drinking age to 21: “I don’t think it’s wise politically to pass too many of those kinds of bills in one session.... There were just a lot of controversial issues last year and it’s those kinds of things that cause the public to throw people out of office.” Another reason for the bill’s brighter prospects in 1987 was its exclusion of smaller businesses. Although Hannon and Hammond agreed that Iowa was finally “ready to crack down on smokers,” they also recognized that—in a vast understatement—“the tobacco industry has a deep interest in the subject and has been using prominent lobbyists to fight the bill....”

In the event, at the March 31 meeting of the 15-member Senate State Government Committee, Lloyd-Jones reported that she and Republican Senator Forrest Schwengels had signed the subcommittee report recommending passage (meaning that Coleman had not). She then offered an amendment (which would almost immediately become moot) requiring restaurants with a seating capacity of fewer than 50 persons—which the House bill excluded from coverage—if they lacked a designated nosmoking area, conspicuously to post a sign to that effect at the entrances. It was adopted with nine Ayes. Then probusiness/libertarian Republican Senator Julia Gentleman offered an amendment to exclude all restaurants from the bill. She tried to justify it on the grounds that: “You don’t need government to tell restaurants what to do.” The bill’s manager, Jean Lloyd-Jones, who, in the aseptic words of the official minutes, “encouraged the committee to resist the amendment,” in fact countered: “I’ve heard a lot of people say when they go out to eat at a nice restaurant they’d like to sit and enjoy their expensive meal without smoke fumes on their plates.” Broadening her argument to encompass the non-well-heeled, Lloyd-Jones added a plea to “allow us our rights to inhale clean air free from what they call sidestream smoke, which is very dangerous....” Significantly, “with little discussion,” the committee then adopted the amendment with eight Ayes and by a vote of 8 to 4...
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

recommended passage of H.F. 79 as amended. Only three of the five heavy smokers (Coleman, Rife, and Soorholtz), joined by Gentleman, voted Nay. Overall, of the seven smokers three voted No, three voted Yes, and one abstained (at least from voting). To be sure, the two-thirds majority may have been a function of the adoption of the amendment eliminating restaurants, which, while not completely eviscerating the measure, by removing the most contentious location of secondhand smoke battles, presumably made the bill more acceptable to some smokers, libertarians ignorant of the public health consequences, and business owners opposed to any regulation.

When the full Senate took up H.F. 79 on April 22, Senator Edgar Holden, a very pro-business Republican, moved the adoption of his radical amendment, which would have banned smoking altogether in all public places (expanded to include bars and all restaurants) and not simply in designated areas, thus creating a level of protection against secondhand smoke exposure that no state had yet enacted. Given his generally conservative and anti-government intervention views and the prominent anti-regulatory role he had played in resisting passage of the original clean indoor air law in 1978, it is most implausible that Holden could have intended his proposal as anything but a killer amendment. His denial to the contrary notwithstanding, floor manager Lloyd-Jones rejected the amendment as going “too far. ‘We’re not telling you to stop smoking... We’re just saying give us an area where we can breathe clean air.’” Since the very weak provisions of H.F. 79 did not even purport to satisfy that minimalist criterion, heavy-smoking Republican Jack Rife may have anachronistically accused his opponents of pursuing a strategy that it is very
implausible any of them even dreamed of being able to see realized in their lifetimes, but he nevertheless grasped the truth that nonsmokers “‘won’t be happy until we have an outright ban.’”⁴⁵⁹ For whatever reasons, three-fourths of Holden’s colleagues disagreed with him, defeating his amendment 36 to 13 on a non-record roll call.⁴⁶⁰

Gentleman then moved adoption of the committee amendment excluding coverage of all restaurants, which the Senate narrowly rejected 23 to 26 on a non-record roll call, thus restoring coverage for the time being.⁴⁶¹ Lloyd-Jones correctly interpreted the vote by reference to the fact that inclusion of restaurants had been, “after all, the major reason most people are supportive of “the bill. Rife’s scare tactic—“I think you’re playing havoc here with the business community”—failed as yet to secure the three vote-switches he needed for passage.⁴⁶²

Counterattacking, a bipartisan group of six Democrats and six Republicans—including the aforementioned five heaviest smokers—led by smoker Joe Welsh offered a floor amendment that would have severely undermined the bill by depriving those in control of public places of the discretion to declare them entirely nosmoking. Since such a power to declare places off-limits to smoking was presumably inherent in private property rights, and since one of the mainstays of prosmoking propaganda had always been the claim that the decision whether to permit smoking should be left to the property owner, this proposed legislative override was astonishing. And going ever further, Welsh’s amendment also imposed an affirmative duty on those in control to “provide sufficient area in which smoking is permitted to accommodate all persons who wish to do so.”⁴⁶³ Welsh’s justification for the initiative was

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⁴⁶³ State of Iowa: 1987: Journal of the Senate: 1987 Regular Session Seventy-Second General Assembly 2:2607 (Apr. 22) (S-3723). The first provision of the amendment would have achieved its object by changing “Smoking areas may be designated” to “shall.” The sponsors were: Welsh (D), Rife (R), Linn Fuhrman (R), William Palmer (D), Alvin Miller (D), Soorholtz (R), Schwengels (R), Drake (R), Nystrom (R), Husak (D), Coleman (D), and Riordan (D). Palmer and Miller were also heavy smokers. Email from Beverly
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

incoherent: “You can’t change behavior overnight.... By guaranteeing smokers a smoking area we could expect better compliance.”

Since the law notoriously provided no protection from drifting smoke, Welsh failed to address the question as to how compliance with a feckless law could be superior to possibly less than strict compliance with a stringent law. In the event, the amendment failed by a vote of 22 to 26; its supporters were equally divided between Democrats and Republicans, with Majority Leader Hutchins and two of his three assistant floor leaders and two of the assistant minority floor leaders voting Aye. The vote, however, was reconsidered the same day (25 to 22), though Hutchins had further action on it and the whole bill deferred. But before the deferral, the Senate voted 26 to 23 on non-record roll call to adopt an amendment offered by Holden that further gutted the bill by doing away with the enforcement provision altogether by eliminating the owner’s responsibility not only to ask smokers to refrain from smoking in nosmoking areas, but to inform them that smoking was prohibited by law.

The Senate did not resume consideration of H.F. 79 until May 7, devoting “the most time” to Welsh’s amendment that would have imposed the designation of a smoking area in every covered public place. The best argument that Coleman could muster for the requirement was: “‘Just be a little reasonable.’” But floor manager Lloyd-Jones and other senators rejected it on the grounds that “there are businesses in the state that want to set their own policy on whether or not smoking is permitted at all on their premises.” In particular, Robert Carr, the State Government Committee chair, pointed out the incongruous outcome that it “‘would mandate hospitals have a smoking place.’” For reasons that are unclear, further action was deferred at Senator Horn’s request and later in the day Welsh himself withdrew the amendment, thus bringing to an unsuccessful end that opportunistic initiative to nullify private property rights. Instead Welsh offered a new amendment that merely created a new code subsection setting out

Hannon to Marc Linder (June 15, 2007). See below.


the same $10 civil penalty and prohibiting the imposition of court costs, which was adopted by a voice vote. Then, moving on to the central provision of the entire bill, Welsh moved to reconsider the Senate’s 23 to 26 vote two weeks earlier rejecting the committee’s amendment excluding restaurants from coverage. Having prevailed on that motion, Welsh reduced parliamentary power to its most brutal form in replying to Lloyd-Jones’s query as to why he was “pushing” an amendment that the Senate had already rejected: “Because at this time we have the votes to do it.” And in fact they did—29 of them against only 21 expressing a preference to include restaurants under a regime that would have excluded restaurants seating fewer than 50 people and would have permitted larger restaurants to comply by setting aside just one table as the nosmoking area. Approximately equal proportions of Democrats and Republicans voted to exclude restaurants, but both the majority and minority leaders and two of their three assistant floor leaders, together with almost all of the heavy smokers, joined them. The Senate then overwhelmingly passed H.F. 79 by a vote of 45 to 5. In a vast understatement before the bill was returned to the House, Lloyd-Jones, “disappointed at the way this bill is turning out,” bemoaned that “we have greatly weakened it.” The next day the House voted 75 to 15 to concur in the Senate’s amendments.

In the end, the new law did expand coverage to encompass workplaces, retail

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472 State of Iowa: 1987: Journal of the Senate: 1987 Regular Session Seventy-Second General Assembly 2:1767 (May 7). Nystrom appears to have been the most prominent smoker to have voted for coverage.
473 State of Iowa: 1987: Journal of the Senate: 1987 Regular Session Seventy-Second General Assembly 2:1768 (May 7). Heavy smokers Coleman and Rife voted Nay together with Republicans Corning and Gentleman. Hannon’s vote might have been a protest against the gutting of the bill: “I imagine I was so disgusted with what had been done to the bill that I voted against it.” Email from Beverly Hannon to Marc Linder (June 18, 2007).
475 State of Iowa: 1987: Journal of the House: 1987 Regular Session Seventy-Second General Assembly 2:2164-66 (May 8). Of the 15 votes cast against the Senate amendments, 11 were cast by members who had also voted against H.F. 79 in March.
stores, offices and waiting rooms with at least 300 square feet of floor space, other commercial establishments, educational facilities, and hospitals, clinics, nursing homes, and other health care and medical facilities. In terms of enforcement alone, the measure dismantled much of the meager rigor of the 1978 statute. First, it repealed the requirement imposed on proprietors of informing persons they observed smoking in violation of the law that smoking was prohibited by law. Second, H.F. 79 substituted for this direct intervention two indirect “responsibilities of proprietors”: thenceforward, those in custody/control of a public place were merely required to “make reasonable efforts to prevent smoking in the public place or public meeting by posting appropriate signs indicating no-smoking or smoking areas and arranging seating accordingly.” (To be sure, just as under the 1978 statute no penalty attached to the failure to comply with the duty to inform, under H.F. 79 the responsibilities section was not subject to penalties, though failure to post signs was.) And third, the bill watered down the prescribed content of the required signs by deleting the language “‘smoking prohibited by law’ or words or symbols of similar effect” in favor of the much weaker “advising patrons of smoking and non-smoking sections.” All of these weakening amendments proved enduring, remaining in the code until 2008.

Once Governor Branstad had signed H.F. 79 into law, the struggle once again resumed to supplement Iowa’s weak anti-public smoking statute by finally incorporating restaurants. At the end of 1987, the Tobacco Institute overestimated the strength or tenacity of the anti-smoking movement in Iowa when it speculated that in 1988 “[t]here may be some attempt to restrict smoking further than in the measure enacted in 1987, but such attempts should be manageable.” On the other hand, its forecast was accurate that “Des Moines is the only likely area of local anti-tobacco activity; smoking and sampling restriction proposals are likely to surface there.”

4761987 Iowa Laws ch. 219, § 1, at 367.
4771987 Iowa Laws ch. 219, § 7, at 367, 368.
4781987 Iowa Laws ch. 219, § 3, at 367, 368.
4791987 Iowa Laws ch. 219, § 4, at 367, 368.
4801987 Iowa Laws ch. 219, at 367.
The Cigarette Oligopoly May Have Won a Partial Victory in Iowa, But Philip Morris Recognizes that Nationally “we are [i]n deep shit”

We propose three strategies:
1. Demonstrate that over-reaction to every day [sic] annoyances is anti-social.
...
3. And most importantly...help smokers realize that obnoxious anti-smokers are the social problem...not smokers themselves.482

During the last week of June 1987, just days before the new law would go into effect,483 Philip Morris held a four-day conference at swanky Sea Pines Vacation Resort on Hilton Head Island within the framework of its Project Down Under to deal with the deteriorating “public policy situation” of the metastasizing struggles against involuntary exposure to cigarette smoke reinforced by the recent surgeon general’s report on environmental tobacco smoke and “its alleged harmfulness to non-smokers.” The point of this exercise was not simply to exchange suggestions; rather, as Philip Morris vice chairman R. William Murray explained to Thomas Osdene, the firm’s director of science and technology, he and president and CEO Frank Resnik had “been instructed to...arrive at solutions that can be immediately implemented.” Among the “small” and “select group”484 of Philip Morris officials attending were two directors of science and technology, a vice president and general counsel, director of corporate affairs planning, the corporate affairs communications director, vice president for business and planning, and vice president for corporate staff.485 The agenda for these participants, who were housed “on the plantation” in “villas” with two bedrooms and a living room, was so studded with breaks, meals, cocktails, free time, and recreation such as golf, tennis, fishing, “beach fun,” and “poolside recreation,” that the conference strongly resembled a fully paid vacation.486 To be sure, the

483 Initial enforcement, to judge by events in Iowa City, may have been minimal: the police chief there admitted that “I don’t know how to issue a citation on it” and also did not know how long it would take before legal counsel would explain how, when, and where to issue citations so that the police force could begin writing up offenders. Joseph Levy, “Smoking Law Has Little Local Effect,” DI, July 9, 1987 (1:2-6 at 2-3).
484 R. W. Murray to Thomas Osdene (June 8, 1987), Bates No. 202351341/2.
485 The job titles of the participants listed in Guy L. Smith IV (v.p. corp. affairs) to Operation Downunder Participants (June 17, 1987), Bates No. 202351344/5, were taken from http://legacy.library.ucsf.edu/glossaries/pm_gloss_a.jsp
486 Operation Downunder Agenda (June 17, 1987), Bates No. 2024270524-7.
convener characterized the sessions as including “entertaining meals and enough leisure time to facilitate thought, reflection, and introspection.”

The belligerent bravado that had characterized the industry’s initial response to the release of the surgeon general’s report half a year earlier had largely vanished, replaced, as the profoundly revelatory contemporaneous notes of this grotesque meeting document, by a desperate search for a magical means of avoiding the “devastating effect on sales” of the inexorable constriction of smoking that the anti-environmental tobacco smoke movement was manifestly accelerating. After conceding that a “scientific battle was lost with SG’s ’86 report,” that the direct problem was the threat to the number of smokers and the number of cigarettes they smoked, and that the broader problem included a “general decline in social acceptability of smoking,” the “[w]orst case scenario” of “[h]ow to support current smokers in face of overwhelming adverse information and publicity,” and the “[i]logic that if mainstream smoke is damaging, ETS must be too,” conference participants veered off into wholly implausible fixes for a “[b]ig, complex problem” such as “making people feel good about Philip Morris” and smokers.

John Rupp, the Covington & Burling partner who was the key lawyer in charge of overseeing the industry’s response to the ETS challenge, set the tone for the conference by laying out some of the reasons that “we are in deep shit.” The cigarette companies’ serious credibility problem” was in large part a function of the surgeon general’s “tremendous credibility.” With regard to the science of ETS, Rupp argued that despite the cigarette industry’s position that ETS had not been shown to be hazardous to nonsmokers’ health, “[w]e cannot say ETS is ‘safe’ and if we do, this is a ‘dangerous’ statement.” From the legal

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487 Guy L. Smith IV (v.p. corp. affairs) to Operation Downunder Participants (June 17, 1987), Bates No. 202351344/5.
488 [Philip Morris], Project Down Under Conference Notes at 8 (June 24, 1987), Bates No. 2021502102/109.
489 [Philip Morris], Project Down Under Conference Notes at 11 (June 24, 1987), Bates No. 2021502102/112.
490 [Philip Morris], Project Down Under Conference Notes at 9 (June 24, 1987), Bates No. 2021502102/110.
491 [Philip Morris], Project Down Under Conference Notes at 10 (June 24, 1987), Bates No. 2021502102/111.
492 [Philip Morris], Project Down Under Conference Notes at 9 (June 24, 1987), Bates No. 2021502102/110.
493 [Philip Morris], Project Down Under Conference Notes at 4 (June 24, 1987), Bates No. 2021502102/105.
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

perspective, the tobacco companies’ position was scarcely any better: most anti-smoking laws were invulnerable to challenge and—or, more accurately, because—“[w]e won’t be able to establish “the right to smoke.” No legal basis for this ‘right.’” Under those circumstances, Rupp’s assurance that there was also “[n]o constitutional right to be free of ETS” offered little comfort since the ever expanding body of unchallengeable state and local smoking bans would eventually provide ample protection to the ever widening majority of non-smokers. In particular at the workplace, Rupp had to admit that it was “[f]rustrating” for his law firm to get referrals from smokers because “[n]ot much can be done except bluff threats.” The evolving character of the “REAL ADVERSARY out there” that the industry was battling was nicely captured by an especially ominous handwriting-on-the-wall scenario: “Detroit Free Press, NY Times, Miami Herald have all declared non-smoking news rooms. These are people who are spreading the news and their own attitudes have changed.”

The conference turned downright surreal during a 10 p.m. “Brainstorming Session” that dramatically underscored how clueless Philip Morris was. Despite the directive to “come away from Sea Pines with a reasonable, responsible, and rational approach to solving the problem,” the 116 numbered figments of this late-night fevered collective imagination included these bizarre “Solutions to problem”:

2. Develop products that have beneficial value to non-smokers.
11. Create a bigger monster (AIDS).
12. Make it hurt (political risk) to take us on.
15. Make non-smokers fearful of consequences of office smoking bans (drug testing, etc.).
33. Create science journal.
34. Create non-science journal.
39. Infiltrate W.H.O.
43. Mark packages “Please smoke courteously.”
49. Acquire major media vehicle.

[Philip Morris], Project Down Under Conference Notes at 5 (June 24, 1987), Bates No. 2021502102/106. Six years later the U.S. Supreme Court did in fact recognize that a prisoner did state a cause of action under the Eighth Amendment to the Constitution in alleging that prison officials had with deliberate indifference exposed him to ETS levels—his cellmate smoked five packs of cigarettes daily—posing “an unreasonable risk of serious damage to his future health.” Helling v. McKinney, 509 US 25, 35 (1993).

[Philip Morris], Project Down Under Conference Notes at 8 (June 24, 1987), Bates No. 2021502102/109.

Guy Smith IV to Operation Downunder Participants (June 17, 1987), Bates No. 2023551344.
69. Get Nader-like group to examine anti funding.
71. Fund major university media resources and training center for science writers.
73. Support social research on positive aspects of smoking to society.
97. Involve non-smoker in mystique of smoking.
112. Cement relationship with women smokers, e.g. child care
114. Condoms in cigarette packages.

By the sober light of day at 8:15 the next morning, an “[e]xamination of 116 ideas” revealed that “[w]e don’t have anything to slam them with on health issue.” In objection to what had perhaps been the most startling serious solution—“Adopt end game strategy. Maximize cash flow”—the morning session had nothing more weighty to offer than that an endgame option as a “controlled retreat [u]sually...accelerates into an abrupt end. Fighting back now is therefore better.”

Otherwise the most serious proposal concerned support for “segregating” smokers and nonsmokers, a “[m]ajor policy change” and “[g]ood market strategy,” which was marred by the fact that it gave a “foot in the door for antis.” In part this proposal was driven by the insight that if Philip Morris, like the “intransigent” RJR, did not “budge on accommodation,” it would “lose” because it would be perceived as no less “fanatic[]” than the antis; by the same token, the company could “create public perception that we are reasonable by saying we support accommodation”—but only “as long as smokers’ rights are not abridged.” (To be sure, if smokers could continue to smoke wherever and whenever they wished, “accommodation” of nonsmokers’ right not to be exposed to secondhand smoke would be even more of a hoax than laws confining smoking to designated smoking areas.) But at this point, despite acknowledging that “[t]he smoker is the underdog and nobody cares,” since the conference participants insisted that “[a]ll Americans should fear legislation,” virtually all they were willing to concede was the preservation of “free market choice.”

498[Philip Morris], Project Down Under Conference Notes at 17 (June 25, 1987), Bates No. 2021502102/118.
499[Philip Morris], Project Down Under Conference Notes at 16 (June 24, 1987), Bates No. 2021502102/117.
500[Philip Morris], Project Down Under Conference Notes at 18 (June 25, 1987), Bates No. 2021502102/119.
“reasonableness,” the communications group would consider “costless areas of compromise—e.g., ‘We will accept a no-smoking “policy” bill for elevators if you need to pass something.’”

Credulity buckles under the claim made at the outset of the third day of the conference, devoted to a group presentation to senior management, that the Philip Morris communications staff viewed the melange of mendacious, outlandish, and trivial proposals as “exciting,” let alone that they believed that the “brainstorming” constituted “rigorous testing....” The first of four “[b]asic recommendations” was the “Big Chill strategy” of advocating accommodation (to deal with the mere “annoyance” perceived by nonsmokers while denying that scientists had shown any health risk associated with secondhand smoke) and continued opposition to government intervention including a drive to repeal existing restrictive laws.503 “Big Chill”—designed to “chill anti-smoking rhetoric”—was “the unifying strategy providing...overall direction for the tactics applied to the different target audiences,”504 and was to be buttressed by support of pseudo-scientific “activity” on ETS and indoor air pollution in addition to a focus on the risible “positive sociological” and vastly exaggerated economic aspects of smoking. The other two recommendations encompassed the wishful thinking of identifying a “‘rainmaker’”-spokesperson (such as Lee Iacocca) who would publicly embody the company’s (fraudulent) “message” and the thuggish “N[ational]R[ifle]A[ssociation] strategy” of “[p]utting some people out of business who are trying to put us out of business.” That these corporate communications specialists conceived of this concoction as a “MIRV”505 (Multiple Independently Targetable Reentry Vehicle) suggests that they were themselves the primary victims of their own bunkum. This possibility was most visibly on display in the assertion that this pathetically transparent self-interested nonsense would “[m]ake non-smokers perceive ETS as a non issue,” “[i]solating anti-smokers and make them perceived as shrill and unreasonable,” and transform Philip Morris from “‘black hat’ to at least ‘gray hat’ on this issue.”506

503[Philip Morris], Project Down Under--Group Presentation to Senior Management at 1, 3 (June 26, 1987), Bates No. 2021502671/3.
504[Philip Morris], Summary: Operation Down Under Conference at 1-2 (June 24-26, 1987), Bates No. 2021502679/80.
505[Philip Morris], Project Down Under--Group Presentation to Senior Management at 1, 3 (June 26, 1987), Bates No. 2021502671/3.
506[Philip Morris], Project Down Under--Group Presentation to Senior Management at 2 (June 26, 1987), Bates No. 2021502671/2.
The top corporate brass was interested in probing the risks linked to the overall proposal. When the vice chairman of Philip Morris Companies, Inc., R. William Murray (who until then had been president and CEO of Philip Morris International and later would occupy the same positions at Philip Morris Companies) asked whether the initiative might “just make the situation worse,” he heard an earful:

The situation can’t get any worse. Sales are down, can’t be attributed to taxes or price increases. ETS is the link between smokers and non-smokers and is, thus, the anti’s silver bullet. The Equal Employment Opportunity Council [sic] reports most companies in country are working on regulations to control smoking based on ETS. There is a continual decline in smoking opportunities at work, in travel, in leisure time.

Raising profile of ETS could cause a link back to primary issue. This is the greatest risk. For example, ACS sees us raising noise level, comes back with “You are so responsible now about accommodating non-smokers, what about your own customers who you are killing?”

We have partitioned annoyance and health. Also we can turn valve off of entire program at any time if we see that primary issue is being stimulated.507

Despite having learned how widespread and profound the impact of the secondhand smoke rebellion had been, Murray nevertheless revealed that his grip on reality was more rather than less tenuous than his underlings’ by asking the communicators whether they thought that increasing restrictions based on ETS would “not fade out.” Murray was so disconnected from the development most likely to trigger the downfall of his industry that he had to be told there was “a practical irreversibility of laws and patterns of behavior that are [sic] taking effect here.”508 Apparently unable to believe such a message, he interrogated the messengers again at the end of the session:

Q: [Murray] I am worried about the fact that you say the ETS issue is on a one-way ascendency. Isn’t it possible that it is just at one end of the pendulum?

A: No. Look at the Rust belt news rooms. Five years ago, these were hard core smokers, places where smoking was part of the job description, the style, the support of the staff. Look at California and New York as bellweather markers. Look at airports. Look even at traditional tobacco states in the South where regulations are increasingly proposed and increasingly enacted. The problem is not going to diminish unless we do something about

507 [Philip Morris], Project Down Under--Group Presentation to Senior Management at 8 (June 26, 1987), Bates No. 2021502671/8.

508 [Philip Morris], Project Down Under--Group Presentation to Senior Management at 3 (June 26, 1987), Bates No. 2021502671/3.
Rebuffed on the secondhand smoke front, Murray wondered whether a “discrimination campaign” might work, but his subordinates had to disabuse him of this pipe dream as well. Noting that the company’s own research had revealed that people perceived discrimination against smokers as “quite different from racial discrimination,” the communications staff dashed Murray’s hopes once again by pointing out that “test ads using this theme tested lowest in terms of believability and acceptability.”

**Dishonoraria**

Regardless of the relevance of chemistry or physics, it would appear there is no way short of therapy to persuade an individual that smoke need not be an annoyance.

The tobacco industry’s use of some of its huge profits to pay “honoraria” to state legislators appears to have originated in emulation of what it must have viewed as a successful (and growing) congressional program. By 1984, the Tobacco Institute had emerged as the top giver of honoraria to members of Congress, its $129,691 being almost double the next highest sum. The combined payments of the industry, including those of R. J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., and U.S. Tobacco Co., totaled $173,634, doled out to 109 representatives and 17 senators. These members were able to “make $1,000 to $2,000 in an hour or so by dropping by TI and giving a speech...usually...about whatever they wish..., and unlike campaign contributions, the honorariums goes [sic] directly into the congressman’s pocket.” Common Cause, which compiled these data, stressed that such special interest groups did not give this money “just to hear members talk... These payments, which go directly to the personal benefit of members, are given to gain access and influence.”

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509[Philip Morris], Project Down Under--Group Presentation to Senior Management at 8 (June 26, 1987), Bates No. 2021502671/8.
510[Philip Morris], Project Down Under--Group Presentation to Senior Management at 8 (June 26, 1987), Bates No. 2021502671/8.
511W[illiam]K[loepfer] [Tobacco Institute senior vice president, public relations], Preliminary Draft - ETS Project at 8 (May 24, 1984), Bates No. TI10411105/12.
In mid-1984, TI’s State Activities Division began requesting memoranda from Covington & Burling—for many years its leading legal adviser—about the legality of paying honoraria under state laws. In mid-July Daniel A. Rowley, a lawyer at the firm, wrote a letter to Mike Kerrigan of TI about paying honoraria at the Democratic National Convention in San Francisco then taking place. At the request of Roger Mozingo of TI Rowley revised that letter into a memorandum on a proposed honorarium program in Pennsylvania, at the same time noting that “preliminarily it looks as if many of the 20 states you have asked us to review will be very similar to Pennsylvania.” Intimating that any final decision by the tobacco companies would have to be informed by more than statutory law, Rowley added: “Of course, it still will be desirable to determine any local lore through The Institute’s lobbyists in each state to determine if there is any particular sensitivity.”

Responding to a request to examine the legality of the proposed honorarium program in ten states (which did not include Iowa), in October Rowley compiled another memorandum, in which he prefaced very brief summaries of the state laws with some general observations. The background facts, as the client had stated them to him, included TI’s holding meetings periodically in these states at which it would ask state officials to speak, in return for which it was considering paying them an honorarium ranging from $250 to $2,000 (which was to reflect the customary going rate as determined by the local lobbyist). While all ten states prohibited corporate contributions to candidates’ state campaigns, four either included honoraria among contributions or prohibited honoraria payments to non-candidate state officials. In addition, even in the remaining states permitting honoraria “some risk” arose from the further prohibition on corporations’ giving or legislators’ receiving “any money paid for the purpose of influencing the passage or defeat of legislation or some other official action.” Although the risk that “[s]omeone could always argue that the purpose of the honorarium was to influence the official’s conduct” was diminished by making clear that the money was paid for the speech, Rowley conceded that someone might still “challenge the payments if, at some later date, the official involved takes a position favorable to The Institute. This is especially true if certain circumstances exist that could be

that $60,000 had been budgeted to and an estimated $53,000 paid by its Federal Relations Division to give 35 senators and representatives $1,500 each in honoraria; for 1984, $100,000 was budgeted to pay the same sum to each of 67 members of Congress. Tobacco Institute, 1984 Budget (Nov. 16, 1983), Bates No. 93488109/32.

513 Letter from Daniel A. Rowley to Roger Mozingo (July 19, 1984), Bates No. 680545146. Neither the letter to Kerrigan nor the memorandum on Pennsylvania appears to be among the documents archived on the UCSF Legacy or tobaccodocuments website.
read in an unfavorable light (e.g., a payment near in time to an important vote in the legislature).” The possibility of such challenges to honoraria as illegal gifts or contributions was heightened by the public filing requirements imposed on recipients and lobbyists and their employers, which “could alert individuals in the state to the payment....”

Five months later Rowley responded to another request from the Tobacco Institute, this time for a memorandum on the legality of paying honoraria in the ten other states that prohibited corporations (as contradistinguished from corporate political action committees) from contributing money to any political party, organization, or candidate. Iowa, one of this second group of states, all of which permitted honoraria, had prohibited corporations from directly or indirectly giving anything of value to political candidates until 1976, when the legislature, in response to the U.S. Supreme Court’s decision in *Buckley v. Valeo*, amended the law to permit corporate PACs to make such contributions. Unlike some states, Iowa did not cap the amount that a PAC was permitted to contribute. In spite of this complete freedom to give as much money to candidates as they wished, tobacco companies may have favored honoraria because they constituted income to the recipient-legislators, who could use it freely as they wished without being required to spend it on their election

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514 The ten states were Connecticut, Massachusetts, Michigan, Minnesota, North Carolina, Ohio, Pennsylvania, Texas, West Virginia, and Wisconsin, of which Connecticut, Ohio, West Virginia, and Wisconsin were the states in which honoraria would not have been lawful. Daniel A. Rowley, Memorandum for the Tobacco Institute: Re: Proposed Honorarium Program at 1-5 (Oct. 10, 1984), in Tobacco Institute, Field Staff Meeting (Aug. 11-14, 1985), Bates No. 680501768/902-6.

515 TI also handed out honoraria “to the extent possible” in some states that did permit corporate contributions. Kurt Malmgren, Briefing for Mr. James J. Johnston Chairman R. J. Reynolds Tobacco Company at 8 (Sept. 27, 1989), Bates No. TIMN350847/54.


517 Iowa Code §§ 491.69-.71 (1975); Appendix II: State Laws Regulating Campaign Contributions, Expenditures for Political Purposes and Lobbying: Compilation by States (1970), Bates No. 91810501/17. According to Russell Ross, emeritus professor of political science at the University of Iowa and an expert on Iowa government, though unlawful, under-the-table corporate contributions were widespread and unpursued before 1976. Telephone interview with Russell Ross, Iowa City (May 10, 2007).


519 1978 Iowa Laws ch. 1078, § 14, at 162, 166 (codified at Iowa Code § 68A.503(3) (2007)).
campaign, even though both parties were required to report it. Rowley informed TI in March 1985 that: “The Iowa Attorney General’s Office has advised us that any payments to state officials are a matter of some sensitivity in the state and that such payments should be made with care to avoid any appearance of a conflict of interest.” Since, as it turned out, most, if not all, of the recipient-legislators in Iowa were heavy smokers who presumably would have voted against restrictions on smoking in any event, it is unclear what sort conflict of interest could ever have arisen; by the same token, however, it is also unclear what advantage the tobacco companies derived from paying legislators who did not require monetary incentives to vote the tobacco way. (The answer again, according to former TI Midwest vice president Daniel Nelson, was that they were Wasker’s friends.) At its State Activities Field Staff meeting in August 1985 TI drilled the participants in the basics of honoraria, stressing that a bona fide event or forum included a TAN Advisory Committee meeting, a wholesaler association convention, a member company sales meeting, or a special legislative briefing. As late as 1988, TI less than candidly characterized the honoraria program as providing a “forum in which key lawmakers and industry representatives can exchange ideas.”

Months before Covington & Burling had even given TI the legal go-ahead for paying out honoraria in Iowa, the practice had already begun. On December 18, 1984, Brozek sent a memorandum to the vice president for legislative support, Bill Cannell, on the “Iowa Honoraria Program,” which followed “numerous discussions” the two had had and “developed a more acceptable solution to a potential problem.” The issue involved John H. Connors—a former president of the Des Moines firefighters union and six-term Democrat from Des Moines (May 11, 2007).

Telephone interview with Lawrence Pope (former Iowa state legislator and later lobbyist), Des Moines (May 11, 2007).

TI sent a Form 1099 to any recipient of an honorarium in excess of $600. Tobacco Institute, Field Staff Meeting (Aug. 11-14, 1985), Bates No. 6805011768/897.


Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007).

TI Field Staff Meeting (Aug. 11-14, 1985), Bates No. 680501768/897.

[Tobacco Institute], Executive Summary: Public Smoking Issue: State Activities Division, Appendix B at 4 (n.d. [1988]), Bates No. TI07561372/97.

Michael Brozek to Bill Cannell, Re: Iowa Honoraria Program (Dec. 18, 1984), Bates No. TI42030094.

Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

Moines—who had just completed his first two (of ten consecutive) years in the largely honorary position of speaker pro tempore, which, though not powerful in its own right, he doubtless owed to being influential and well liked. Brozek wrote that there had been a request (by whom he did not mention) “to have this honoraria recipient flown to Washington, D.C. for a legislative briefing in The Tobacco Institute Board Room,” but after “considering the costs involved, the logistical problems, the timing and the very concept of our honoraria program,” and speaking to Wasker, Brozek instead recommended that “an honoraria contribution be granted during calendar year 1984” under different circumstances. Inadvertently or cynically admitting the artificiality of this arrangement, which staged an opportunity to pay a legislator, Brozek stated that the “outline for the event surrounding this contribution” would be an honorarium of $500 for an appearance before the Iowa TAN Advisory Committee meeting on January 17, 1985, in the Board Room of the Des Moines Club, which would be an “informational and educational forum” to brief the members on important issues for the industry during the 1985-86 legislative session. The event, Wasker had assured Brozek, would comply with all state laws and administrative rules. Remarkably, the Tobacco Institute cut the $500 check to Connors—in response to an “invoice” from Brozek with a “Need by: ASAP” notation—already on December 21, almost four weeks before the meeting, whereas it otherwise paid honoraria in Iowa only after legislators had performed their alleged quid pro quo. Unfortunately, neither the cause of Connors’ apparently urgent need for cash right before Christmas nor—more importantly—the source of TI’s interest in Connors prompting it to go out of its way to accommodate him emerges from the industry’s internal documents. Although the reason for the tobacco industry’s solicitude for nonsmoking Connors is unclear, he was always known as being emphatically opposed to raising cigarette taxes on the grounds that they were unfair to workers. And in fact his votes on key tobacco-related bills reveal him

1997 (6M:2-4). In addition to having been union president for 20 years, Connors had also been a captain during his 28-year career in the Des Moines Fire Department. Id.


529 Email from Beverly Hannon to Marc Linder (June 25, 2007).

530 Michael Brozek to Bill Cannell, Re: Iowa Honoraria Program (Dec. 18, 1984), Bates No. TI42030094.

531 Tobacco Institute, Check Request (Dec. 19, 1984), Bates No. TI42030092/3, and Tobacco Institute Check No. 17795 (Dec. 21, 1984).

532 Telephone interview with former Representative Thomas Jochum, Des Moines (July 21, 2007).
to have been, both before and after the honorarium incident, largely in sync with pro-cigarette company positions: in 1978, he voted to eliminate the penalty in S.F. 2022 and was absent for or did not vote on the bill’s final passage; in 1979, he did not vote on the resolution to ban smoking in the House; in 1981, he voted twice against a cigarette tax increase; in 1987, he voted for passage of H.F. 79 the first time, but was absent for or did not vote on its final passage; in 1987, he voted twice for a cigarette tax increase, but on the final vote on the same bill in 1988 he voted against it; 1990, he was absent for or did not vote on the anti-smoking bill H.F. 209; in 1991, he voted for vending machines, free sampling of cigarettes, and preemption of local ordinances, and was absent for or did not vote on the final passage of the cigarettes sales bill, H.F. 232. This voting history must weigh more heavily than a stray anecdote relating that while accompanying another legislator in the 1980s to knock on doors for a fellow Democrat, Connors mentioned that when people asked him whether he minded if they smoked, he would ask them whether they minded if he farted. Although many years later Connors was unable to recall ever having given such a talk, the fact that he had been a friend of Wasker’s may, under the distinctly non-bureaucratic structure that governed the flow of the Tobacco Institute’s largesse in Iowa, have been all the explanation that was required.

During the latter half of the 1980s TI continued to tout the importance of paying honoraria to state legislators. To the board of directors the head of the State Activities Division explained in 1986 that campaign contributions and honoraria programs were used “with friendly legislators or those who may see the value of our case.” Two years later, TI’s Public Affairs Division launched its

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534 Email from Beverly Hannon to Marc Linder (June 25, 2007). Connors’ bon mot has been attributed to Steve Martin.

535 Telephone interview with John H. Connors, Des Moines (June 24, 2007). Connors, who had himself been an Iowa Association of Professional Firefighters lobbyist for 17 years before becoming a legislator, and his wife Marjorie did recall that he had once received a check from the tobacco industry, but, not knowing what it was for and after having been told that “they” would tell him later, he returned it; he was unable to remember the year of this incident, which does not seem to fit the facts of the honorarium for which the quid pro quo was unambiguous.

536 Remarks by Roger L. Mozingo, The Tobacco Institute Board of Directors Winter
Conceptual Framework of Comprehensive Public Smoking Program—the latest iteration of the industry’s numerous desperate initiatives to stave off the inevitable. This time the objectives were: “1. To defeat mandatory and voluntary smoking restrictions. 2. To slow the decline of social acceptability of smoking.”

The latter project, at least, revealed a modicum of realism in suggesting the inexorableness of the proliferating unacceptability. In the context of this quixotic but well-heeled rearguard struggle the report noted that honoraria, like corporate campaign contributions, were “helpful in providing forums for lawmakers to hear industry views on ETS and other issues.” In most of the 20 states that prohibited direct campaign contributions, TI provided “honoraria forums for key lawmakers to facilitate an exchange of ideas with industry representatives”—to the budgeted tune of $49,000 in 1988, which represented one-seventh of its budget for state corporate campaign contributions ($350,000), 2 percent of its expenditure of $2.5 million for 61 state legislative counsel (i.e., lobbyists), and less than 0.5 percent of that year’s State Activities Division’s budget.

The exact volume of TI’s expenditures on state honoraria is unclear because of discrepancies among various internal documents, but according to one retrospective five-year overview, they rose from 0 in 1984 to $19,700 in 1985, and $24,900 in 1986, before declining to $20,750 in 1987, and rising somewhat to $21,950 in 1988. Of the total of $87,300 in honoraria spread among 20 different states that TI paid from 1985 through 1988, $12,500 or 14.3 percent went to legislators in Iowa, which received more than any other state and was one of only three states that received such payments in all four years—$1,000, $3,000, $4,000, and $4,500, respectively. To be sure, all these amounts were dwarfed by TI’s state campaign contributions (none of which went to Iowa), which exceeded one million dollars during these years and alone in California in one year amounted to more than twice the total honoraria during all four years.

Data are also available on the identities of the individual Iowa legislators receiving honoraria from 1985 to 1988 and in 1990. (In 1989, state legislators in
only nine states received only $17,450—one-third of the $52,000 that had been budgeted. Iowa legislators, whom the TI document did not identify, received $2,850 or 16 percent of the total, the second highest amount.)

Table 11
Honoraria Paid by the Tobacco Institute to Iowa State Legislators, 1985-1988, 1990

<table>
<thead>
<tr>
<th>Recipient</th>
<th>Party</th>
<th>Chamber</th>
<th>Position</th>
<th>Amount ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lowell Junkins</td>
<td>D</td>
<td>Senate</td>
<td>Majority Leader</td>
<td>500</td>
</tr>
<tr>
<td>John McIntee</td>
<td>R</td>
<td>House</td>
<td></td>
<td>500</td>
</tr>
<tr>
<td>1986</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bill Hutchins</td>
<td>D</td>
<td>Senate</td>
<td>Majority Leader</td>
<td>1000</td>
</tr>
<tr>
<td>Leonard Boswell</td>
<td>D</td>
<td>Senate</td>
<td></td>
<td>500</td>
</tr>
<tr>
<td>Joe Welsh</td>
<td>D</td>
<td>Senate</td>
<td>Appropriations Cttee Chair</td>
<td>1000</td>
</tr>
<tr>
<td>Thomas Jochum</td>
<td>D</td>
<td>House</td>
<td>Appropriations Cttee Chair</td>
<td>500</td>
</tr>
<tr>
<td>1987</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bill Hutchins</td>
<td>D</td>
<td>Senate</td>
<td>Majority Leader</td>
<td>750</td>
</tr>
<tr>
<td>Emil Husak</td>
<td>D</td>
<td>Senate</td>
<td>Assistant Majority Leader</td>
<td>500</td>
</tr>
<tr>
<td>Joe Welsh</td>
<td>D</td>
<td>Senate</td>
<td>Appropriations Cttee Chair</td>
<td>500</td>
</tr>
<tr>
<td>Leonard Boswell</td>
<td>D</td>
<td>Senate</td>
<td>Econ. Dev. Cttee Chair</td>
<td>500</td>
</tr>
<tr>
<td>Calvin Hultman</td>
<td>R</td>
<td>Senate</td>
<td>Minority Leader</td>
<td>750</td>
</tr>
<tr>
<td>Richard Drake</td>
<td>R</td>
<td>Senate</td>
<td></td>
<td>500</td>
</tr>
<tr>
<td>Edgar Holden</td>
<td>R</td>
<td>Senate</td>
<td>Assistant Minority Leader</td>
<td>500</td>
</tr>
</tbody>
</table>

541 Honorarium Payments to State Legislators (Aug. 13, 1990), Bates No. TNWL0038148. The discrepancy between this $2,500 and the abovementioned $3,500 paid to seven senators may be accounted for by the $1,000 that Philip Morris had agreed to pay.
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

<table>
<thead>
<tr>
<th>1988</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Bill Hutchins</td>
<td>D</td>
<td>Senate</td>
<td>Majority Leader</td>
</tr>
<tr>
<td>Joe Welsh</td>
<td>D</td>
<td>Senate</td>
<td>Appropriations Cttee Chair</td>
</tr>
<tr>
<td>Wally Horn</td>
<td>D</td>
<td>Senate</td>
<td>Assistant Majority Leader</td>
</tr>
<tr>
<td>Leonard Boswell</td>
<td>D</td>
<td>Senate</td>
<td>Econ. Dev. Cttee Chair</td>
</tr>
<tr>
<td>James Riordan</td>
<td>D</td>
<td>Senate</td>
<td></td>
</tr>
<tr>
<td>Donald Doyle</td>
<td>D</td>
<td>Senate</td>
<td>Judiciary Committee Chair</td>
</tr>
<tr>
<td>Larry Murphy</td>
<td>D</td>
<td>Senate</td>
<td>Education Committee Chair</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>1990</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Bill Hutchins</td>
<td>D</td>
<td>Senate</td>
<td>Majority Leader</td>
</tr>
<tr>
<td>Joe Welsh</td>
<td>D</td>
<td>Senate</td>
<td>Appropriations Cttee Chair</td>
</tr>
<tr>
<td>Emil Husak</td>
<td>D</td>
<td>Senate</td>
<td>Assistant Majority Leader</td>
</tr>
<tr>
<td>Donald Doyle</td>
<td>D</td>
<td>Senate</td>
<td>Judiciary Committee Chair</td>
</tr>
<tr>
<td>Leonard Boswell</td>
<td>D</td>
<td>Senate</td>
<td>Econ. Dev. Cttee Chair</td>
</tr>
<tr>
<td>Don Gettings</td>
<td>D</td>
<td>Senate</td>
<td>Rules Cttee Vice Chair</td>
</tr>
<tr>
<td>Gene Fraise</td>
<td>D</td>
<td>Senate</td>
<td>Justice Sys. Approp. Chair</td>
</tr>
</tbody>
</table>


Unsurprisingly, during these years of Democratic legislative control, most of the recipients were Democrats. That almost all were senators and virtually none House members may be explained by the fact that, as the smaller body, the Senate was easier to control; moreover, since the House had proved itself to be more anti-tobacco in prohibiting smoking in its own chamber, the cigarette companies could more realistically rely on the power-holding smokers in the Senate to kill anti-smoking House bills.  

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542 Email from ex-Senator Beverly Hannon to Marc Linder (May 15, 2007); telephone
Democratic recipients were well-known allies of Majority Leader Hutchins strongly suggested to one ex-senator that the participation in the honoraria program was designed by Hutchins and lobbyist Wasker as a means of solidifying the majority leader’s power.\footnote{543} In fact, according to Daniel Nelson, Brozek’s successor as TI’s Midwest regional vice president, the answer to the question as to the criterion for determining which legislators to give money to, was: “Because Wasker said so.”\footnote{544} Payments to the Democratic Senate Majority Leader were a constant in every year; although some of lesser leadership also participated in the program, two recipients (Boswell\footnote{545} and Murphy) were in their first term. In 1985, TI, not even using up its $1,500 budget, paid honoraria only to two members: $500 to Lowell Junkins, the Democratic Senate Majority Leader, who left at the end of the year to run (unsuccessfully) against anti-tobacco Governor Branstad and then became a TI lobbyist; and $500 to second-term Republican House member John McIntee, a friend of Wasker who after seeking to become lieutenant governor instead became the (unsuccessful) Republican candidate for a vacant congressional seat in 1986.\footnote{546} McIntee’s chief qualification for receiving the money was apparently that he “is a very close friend of TI legislative counsel

\footnote{543} Telephone interview with ex-Senator Jim Riordan, Des Moines (May 16, 2007).

\footnote{544} Telephone interview with ex-Senator Jim Riordan, Des Moines (May 16, 2007).

\footnote{545} Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007).

Charles Wasker” and “a very close friend of the industry.” Because McIntee was such a loyal supporter, TI regarded his defeat in the congressional election as “not good news for the tobacco industry....” In 1986, the Institute paid $3,000 ($500 over budget) to three Democratic senators and one Representative, including $1,000 ($500 on two occasions) to the new Senate Majority Leader, Bill Hutchins (who after leaving his post in 1992 lobbied his ex-colleagues for R. J. Reynolds Tobacco Company), $1,000 to Senate Appropriations Committee chair, Joe Welsh, and $500 to Thomas Jochum, a smoker, six-term House member and Appropriations Committee chair, who in retrospect regarded acceptance of the money as a lapse in judgment, even though he had never given the tobacco industry a quid pro quo (not even in the formalistic immediate sense of a talk—instead he merely chatted with someone). By 1987, the $4,000 in honoraria ($1,500 over budget) was shared among seven senators: the Democratic Majority Leader Hutchins and the Republican Minority Leader Calvin Hultman (who in 1990 became Philip Morris’s lobbyist) both received $750, while three other Democrats and two Republicans were paid $500. All these honoraria were paid for “presentations” to and meetings with TI staff and representatives of the member cigarette companies during the Council of State Governments conference in Des Moines in August 1987. Honoraria for five Democratic


551 Tobacco Institute, State Contributions Report at 36 (Jan. 4, 1989), Bates No. TNWL00222198/34. Though neither in a formal leadership position nor in the majority, Drake, a heavy smoker, was the Senate’s acknowledged expert on state tax law without whose help it was difficult to pass tax measures. Telephone interview with James Riordan, Des Moines (May 16, 2007).

552 Bates No. TI43971584/93-99, on tobaccodocuments.org. The Tobacco Institute’s
senators in 1988 resulted from—or, perhaps more accurately, were the raison d’être for—the Iowa Economic Outlook Luncheon on September 21, co-hosted by TI’s Iowa lobbyist Wasker and its Midwest regional director Daniel Nelson, and attended by several Philip Morris and R. J. Reynolds salespeople. Nelson justified the expenditure to his superiors in part on the grounds that at the lunch Hutchins had made the encouraging comment that there was a “definite possibility” that the legislature would allow three cents of the state excise tax to sunset, “the biggest obstacle to achieving this major victory” being the Senate’s ability to persuade anti-tobacco Governor Branstad, who operated as “somewhat of a rogue” vis-à-vis his own Republican party and in fact requested repeal of the sunset. However, TI had already heard in February 1988 through “our Iowa magician Chuck Wasker” to whom it paid $35,000 a year in part to procure such intelligence, that Hutchins was “the key player” on cigarette taxes and that Wasker had “initiated a systematic contact program with 31 key senators sympathetic to our interests.” Consequently, it appears much more plausible that the lunch in September 1988 was designed to reward Hutchins—whose thousand-dollar “speech” the paying audience, as always, found “enlightening and informative” personally and to enhance his power by enabling him to arrange for four other members of his party to receive $500 each for chatting over an

honorarium request forms included information on the legislators’ committee assignments, but not on whether they were chairmen. Brozek averred—also on behalf of lobbyist Charles Wasker—to Hutchins that the latter’s “insight...will be beneficial to us all.” Letter from Michael Brozek to Bill Hutchins (Aug. 12, 1987), Bates No. TI43971584/600.  


554On the struggle over repeal of the sunset, see below ch. 27.  


558Michael Brozek to Bill Hutchins (Nov. 10, 1988), Bates No. T144820138. It seems that the $500 honorarium that Assistant Majority Leader, future Majority Leader, and faithful pro-tobacco-industry-voting Wally Horn and the $1,000 honorarium that Joe Welsh received were for a different economic outlook meeting on October 25, 1988, about which nothing else appears in the online documents. Michael Brozek to Wally Horn (Nov. 14, 1988), Bates No. T144820137; Michael Brozek to Joe Welsh (Nov. 14, 1988), Bates No. T144820135.
In 1990, the generator of honoraria was the Annual Iowa Economic Policy Seminar, held in August by the law firm of TI lobbyist Wasker (whose $976 first-class airplane ticket between Iowa and Washington D.C. had recently prompted TI’s Washington headquarters to request his Midwest handler to “encourage” him to fly coach on future Institute trips). Accurately labeled “Iowa Honoraria luncheon” by Daniel Nelson, it featured seven state senators and a 30-40 member invited audience composed of member company representatives, Iowa trade association executives, and Des Moines area business leaders. Of the seven senators—two of whom (Hutchins and Welsh) Philip Morris informally agreed to pay—three were up for re-election. In his request to his supervisor for issuance of the checks, Nelson listed the leadership positions of each invitee: Boswell (vice chairman of Appropriations); Doyle (Judiciary chairman); Fraise (chairman of Justice System Appropriations) subcommittee; Gettings (Rules and Administration vice chairman); Husak (Ways and Means chairman); Hutchins (chairman of Finance Committee); Riordan (chairman of Judiciary Committee); Smith (minority leader); and Welsh (district leader). In his request to his supervisor for issuance of the checks, Nelson listed the leadership positions of each invitee: Boswell (vice chairman of Appropriations); Doyle (Judiciary chairman); Fraise (chairman of Justice System Appropriations) subcommittee; Gettings (Rules and Administration vice chairman); Husak (Ways and Means chairman); Hutchins (chairman of Finance Committee); Riordan (chairman of Judiciary Committee); Smith (minority leader); and Welsh (district leader).
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

(majority leader); and Welsh (Appropriations chairman). They purportedly received their $500 for making prepared remarks and participating in a panel discussion with their colleagues.

In 1991-1992, Tobacco Institute documents on the state honorarium program available online appear to provide only aggregate data without identifying individual recipients (in Iowa). The program was scaled back in terms of expenditures, number of states, and maximum use of budgeted funds. In 1989, state legislators in only nine states received only $17,450—one-third of the $52,000 that had been budgeted. Iowa legislators received $2,850 or 16 percent of the total, the second highest amount. In 1990, legislators in only six states received honoraria, the total amounting to $20,700 from a budgeted allocation of $65,500. Iowa’s $2,500 represented 13 percent, ranking it third. By 1991, the Tobacco Institute budgeted only $31,500 for honoraria, of which $2,500 was allocated to Iowa, but the estimate of actual expenditures revealed that only $10,300 was spent in four states, and none in Iowa. For 1992, Iowa was one of seven states budgeted for a total of $16,500, but whether any of its allocated $2,000 was actual spent is unclear. The tobacco industry honorarium program in Iowa then apparently came to an end after the state legislature in 1992-93 had largely prohibited honoraria beyond legislators’ out-of-pocket expenses.

562 Dan Nelson to Pat Donoho, Re: Iowa Honoraria luncheon (Aug. 3, 1990), Bates No. TI23380570-1. According to the Iowa Official Register: 1989-1990, at 32 (Vol. 63, Elaine Baxter ed.), Husak was vice chair of Ways and Means. All seven checks were, despite the agreement with Philip Morris, issued by the Tobacco Institute. Bates No. TI23380543.

563 Letter from Daniel Nelson to Joe Welsh (Aug. 15, 1990), TI43200227, on tobaccodocuments.org. According to at least one (1986) recipient, there was no pretense of giving a talk at all. Telephone interview with Tom Jochum, Des Moines (July 21, 2007).

564 Honorarium Payments to State Legislators (Aug. 13, 1990), Bates No. TNW L0038148. The discrepancy between this $2,500 and the abovementioned $3,500 paid to seven senators may be accounted for by the $1,000 that Philip Morris had agreed to pay.


2683
**House File 209 in 1989-1990: Restaurant Coverage Is Finally Achieved—But at the Price of Conceding to the Tobacco Industry What Purported to Be the Preemption of Local Anti-Smoking Ordinances**

They [cigarette companies] didn’t [have to give money]. We [legislators] all smoked. There were no contributions from tobacco companies. We just smoked.\(^1\)

Despite the defeat of restaurant coverage in the Iowa legislature in 1987, the anti-smoking forces had good reason for pressing once again for its inclusion in the next iteration of the bill in 1989. After all, although the militant Americans for Nonsmokers’ Rights regarded the provisions regulating restaurants as “probably…the most controversial part of…comprehensive” nonsmokers’ rights legislation because they were “unlike any other public place and must be treated in special ways,” but also “[b]ecause of the extraordinary power of the restaurant associations,”\(^2\) by the end of 1988 almost half the states had passed clean indoor air acts that applied to restaurants.\(^3\) The chief objective of H.F. 209, as originally filed on February 6 by liberal Democrats Johnie Hammond, David Osterberg, and Jack Holveck, was to close one of the many outsized holes in Iowa’s clean indoor air law by expanding the universe of covered “public places” to include all

\(^1\)Telephone interviews with Don Avenson, Oelwein (July 12, 2007 and June 13, 2008). A decade later the Johnson County County Attorney stated that because in 1990 the proportion of state legislators who smoked had exceeded the smoking prevalence in the general population, the tobacco industry had not needed to apply a lot of pressure on them. Johnson County Board of Health Meeting (Mar. 8, 2000) (audio tape archived at the Johnson County Public Health Department, Iowa City).


restaurants,\(^4\) which had been excluded since the first law regulating public smoking was enacted in 1978. Within the limitations of the feckless law’s authorization of building owners to designate smoking areas, the bill required all restaurants to “provide a sufficient number of tables and seating at which smoking is not permitted to accommodate all persons who desire such tables and seating.”\(^5\) (To keep this structure in context, even the Model Ordinance of Americans for Nonsmokers’ Rights provided that its general prohibition of smoking “does not prevent...the designation of a contiguous area within a restaurant that contains a maximum of fifty (50) percent of the seating capacity of the restaurant as a smoking area....”\(^6\) The same requirement was imposed on establishments that served alcohol, but were nevertheless excluded from the definition of “bars” (because they had table and seating facilities for serving meals to more than 50 people at one time).\(^7\) Innovatively, the bill mandated that all covered retail stores, shopping malls, and public conveyances that had a public address system “announce hourly the measures taken by the public place to comply with this chapter and what is expected of the person using the public place.”\(^8\) H.F. 209 also provided for some enforcement by requiring that the state department of inspections and appeals inspect those facilities that it already inspected for compliance with the law’s existing nosmoking signage requirements.\(^9\) Finally, the bill both quintupled the fine for violations to $50 and eliminated the filing fee charge for complainants.\(^10\)

**Smoking in the Des Moines Skywalks**

That an increase in the fine was crucial in order to make enforcement possible had become obvious by the late 1980s in Des Moines, where the problem arose in the extensive system of skywalks that had begun being built in the 1980s to

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\(^4\)H.F. 209, § 1 (Feb. 6, 1989). Handwritten on the copy in the Tobacco Institute files was the annotation “Tobacco Institute Priority.” Bates No. TI00301650.

\(^5\)H.F. 209, § 3 (Feb. 6, 1989).


\(^7\)H.F. 209, § 1 (Feb. 6, 1989).

\(^8\)H.F. 209, § 3 (Feb. 6, 1989). For a similar proposal in Minnesota, see above ch. 24.

\(^9\)H.F. 209, § 2 (Feb. 6, 1989). The department was responsible for inspecting and licensing, inter alia, health care providers, restaurants, food stores, barber shops, hotels and motels.

\(^10\)H.F. 209, § 4 (Feb. 6, 1989).
connect downtown buildings. Although there had always been “some concern about smoking” in the skywalks, once the establishment of no-smoking policies in many of those buildings had prompted more smokers to smoke in the skywalks, complaints about smoking increased appreciably, and the city traffic director requested that the Skywalk Commission consider a ban. Two weeks before the 1987 amendments to the Iowa clean indoor air law, which declared “any enclosed area used by the general public” to be a covered “public place” in which smoking was prohibited “except in a designated smoking area,” went into effect, the Skywalk Commission had learned at a public hearing that it did not “need to decide whether to impose its own smoking ban because the walkways fit the state law’s definition of a public place.” Two days before the law went into effect, the commission had defeated a proposal to authorize businesses to permit smoking in the skywalk corridors running through their buildings—one commissioner had even unsuccessfully proposed turning the whole skywalk system into smoking and nonsmoking halves as was being done in restaurants—and the whole system thus became smoke-free. Because no areas were designated for smoking and nosmoking signs were posted throughout the system, the skywalks became off limits to smoking.

The Des Moines police department, which was hoping for “voluntary compliance,” immediately announced that enforcement (in or outside the skywalks) would not be a priority. Although the law provided for civil violations and the police dealt only with criminal violations and thus had no citations to issue (and, to boot, the civil citation had to be filed in small claims court where the $15 filing fee exceeded the $10 smoking fine), the police would nevertheless respond to calls by sending out an officer to “advise the individual what the law is.” Unsurprisingly, by 1988, one year after the commission had initiated the ban, smoking was not only on the rise in the skywalks, but smokers were
becoming more defiant about their violations precisely because they could do so with impunity. The chairman of the commission and the traffic director complained that the state law was effectively unenforceable because it set the fine at a level half of the fee for the citation. Police officers, according to the Skywalk Commission, were “[o]bviously...not enthusiastic about approaching people and asking them” to stop smoking “when they are unable to enforce that request” because such a “confrontation...would result in the officer...having to merely walk away from the situation.”

The city sought to circumvent this problem of fear-of-loss-of-face-induced inaction by passing an ordinance making it a criminal violation to fail to stop smoking in the skywalk at a police officer’s request. The city council did not pass such an ordinance until the end of January 1990, stiffening enforcement by making it possible to arrest violators for loitering, thus subjecting them to a fine of $100 or 30 days in jail. Nevertheless, as the legislature was debating H.F. 209 in the winter of 1990, both the Skywalk Commission and the traffic director

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19 Melanie Lewis, “Skywalk Smoking Increases Despite Longstanding Ban,” DMR, Mar. 23, 1989 (M1:5); [Des Moines] Skywalk Commission, Regular Meeting - Apr. 19, 1989, Item: Smoking in the Skywalk System (copy furnished by Gary Fox, City Traffic Director). The chairman erroneously stated that the fine was $7; in fact it was $10. Iowa Code § 805.8(11) (1987). A Des Moines city attorney, who had worked for the city in the 1980s, later contested this account, though not its outcome. She insisted that the real obstacle had been that prosecutions had to be conducted by the counties, and that Polk County had made it clear that it had higher priorities than prosecuting smokers. She insisted that had the City of Des Moines controlled prosecutions, the deficit would not have been a problem. Since the skywalks, at least the sections of them that bridge city streets, are city property, the city, both before and after the state legislature amended the law to preempt local governments from passing ordinances stricter than the city law, was empowered to prohibit smoking on its property, just as it banned smoking in city buildings in 1988. Why the city did not apply this approach to the skywalks Moser could not explain. Telephone interview with Carol Moser, Des Moines assistant city attorney (May 29, 2007). Despite Moser’s alternative account, the press reported her as stating that the law was unenforceable “without a financial loss....” Lee Rood, “D.M. Skywalk Smoking Law Starts Monday,” DMR, Feb. 2, 1990 (M1:6).
20 James Thompson (Skywalk Commission Secretary) to Mayor and Members of the City Council [City of Des Moines] (Dec. 27, 1989), Bates No. TI28922820-1.
pointedly emphasized that “ideally the ban would be enforced under the state law with a fine that would cover processing costs.”

**Sunsetting the 1988 Cigarette Tax Increase**

Our Iowa magician Chuck Wasker....

Also vying for the attention of the legislature in 1989—when Democrats controlled majorities of 30-20 in the Senate and 61-39 in the House—were bills to repeal the sunset provision that had been attached to the 1988 cigarette tax increase as a concession to secure its passage. In the legislative budget priorities attached to his budget message in 1987, Republican Governor Terry Branstad had proposed raising the per pack cigarette tax by 10 cents “[c]onsistent with United States Surgeon General reports on the risks of smoking.” Citing the Lung Association of Iowa, he stated that a smoking employee cost an employer $624 more per year than a nonsmoker, resulting in potential additional annual costs to

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22Cynthia Hubert, “Skywalk Puffers Feel the Heat,” *DMR*, Dec. 7, 1989 (A1:2-3, 8A:1-5); Perry Beeman, “Skywalk Panel Approves Making Smoking a Misdemeanor,” *DMR*, Dec. 21, 1989 (M1:2-4) (quote at col. 4); Skywalk Commission, Regular Meeting, Item #4: Smoking in Skywalk System (Dec. 20, 1989), Bates No. T128922822; Lee Rood, “D.M. Skywalk Smoking Law Starts Monday,” *DMR*, Feb. 2, 1990 (M1:6). After the legislature had passed such a law in April, Des Moines corporation counsel Roger Nowadzky stated that tobacco industry lobbyists had assured him that the bill exempted the Des Moines ordinance. Thomas Fogarty, “New Restaurant Smoking Law Called Toothless,” *DMR*, Apr. 25, 1990 (1M:2-5, 2M:6). The bill contained no such exemption, but since the city, like any other building owner, was (and is) free to ban smoking on its own property without running afoul of the preemption provision, it is unclear why exemption would have been deemed necessary. Unfortunately, many years later the then city attorney could no longer recall the details of this matter. Telephone interview with Roger Nowadzky, Marshalltown (May 25, 2007). The press had also erroneously reported before enactment that the new preemption provision “could hamper” the city’s efforts to ban smoking in the skywalks. Thomas Fogarty, “Senate Passes a Smoking Rule for Restaurants,” *DMR*, Apr. 5, 1990 (1A:5, at 2A:2). On continued flouting of the ban on smoking in skywalks after enactment of the new law, see “Is the Coast Clear? Sneaking Skywalk Smokes,” *DMR*, May 6, 1991 (10) (NewsBank).

23Dan Nelson to George Minshew, Re: Region IV General Update (Jan. 3, 1990), Bates No. 507628585.

24“Members of Iowa General Assemblies 1981-2002,” at iv, on http://www.legis.state.ia.us/Pubinfo/Library/Members19812002.pdf
employers of $278 million. The proposal to increase the tax from 26 to 36 cents was welcomed by health experts and Don Avenson, the Democratic House Speaker, while the Tobacco Institute promoted obfuscatory counterclaims denying that increased taxes (and prices) reduced teenage smoking or that there were any “net public health care costs of smoking.” Unsurprisingly, the initiative ran into opposition from the governor’s own party: on the initial House vote in February not a single Republican supported the measure, while 40 voted Nay, causing it to fail 46 to 51. In March the tobacco industry issued a legislative alert to Iowa businesses requesting that constituents “emphasize to their state legislators the negative impact this tax would have on Iowa’s economy.” In particular, the alert pointed out that tobacco accounted for 16 percent of all non-food sales and 4.5 percent of total supermarket sales; at convenience stores, cigarettes were, after gasoline, the number one product, with tobacco accounting for 18.9 percent of gross profits. The alert named nine House Democrats whom it was especially important to contact before the House voted to reconsider. The industry’s relative lack of influence in the lower house was reflected in the fact that the only one of the nine who switched on reconsideration went from Nay to Yea (the first time seven had voted Yea, one Nay, and one had not voted). Two months after the first vote, under pressure from the state’s worsening financial prospects and looming adjournment, a more than large enough minority of Republicans changed their votes to pass the bill. But whatever power the cigarette companies failed to wield in the House they more than compensated for among the Senate leadership, where Majority Leader Hutchins quickly signaled that the tax increase did not enjoy much support in the

other chamber, which in fact failed to consider it during the 1987 session.

Branstad returned to the issue in his January 1988 budget message, this time basing his proposal for a yet bigger, 12-cent, rise, again squarely on health considerations: “Smoking has been identified as one of our nation’s greatest health problems. Over 350,000 Americans died last year from smoking related illnesses and it is costing Iowans a lot of money to take care of these problems. So, I think it is appropriate for us to raise additional revenue to help pay for those costs.” The increase would have boosted the tax to 38 cents a pack, the highest in the country (along with Minnesota’s), but Hutchins, once again, made it clear that it was unlikely that the Senate would support the full amount requested.

Two weeks later the Senate Ways and Means Committee nevertheless recommended the House bill, but on February 17, in a significant compromise to secure passage, the Senate adopted by voice vote an amendment (filed by liberal Democratic committee chair Charles Bruner, an educationally aberrant Iowa legislator with a Ph.D. in political science from Stanford) to lower the tax in the House measure from 36 and 34 cents starting March 1, and more importantly, to terminate three cents of the tax on June 30, 1989. The concessions and a day of inter-party negotiations notwithstanding, only a bare majority of senators voted 24 to 23 to approve the amended bill both to balance the state budget and to “force some Iowans to stop smoking or cut down,” but the vote fell two short of the constitutionally required majority of 26 votes. Only six of Branstad’s 21 Republicans supported the bill together with 18 of 29

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Democrats. However, Hutchins, a pro-tobacco smoker who supported the increase for budgetary reasons, arranged the parliamentary maneuvers necessary to reconsider the vote the next day, when, he hoped—and his Republican mirror image, pro-tobacco smoker Minority Leader Calvin Hultman, gave reason to suspect—that two absent Republicans might be prevailed on to vote Aye.\(^{37}\) Despite pleas from some Democrats that the tax (the second highest in the Midwest) would make Iowa retail stores “uncompetitive” and cause an “unbelievable” “drain” as consumers drove to adjoining states to buy cheaper cigarettes and everything else while they were at it,\(^{38}\) the two absent Republicans reappeared and the bill passed 26 to 22.\(^{39}\) The same day the House concurred in the Senate’s compromise, and the eight-cent tax increase subject to the three-cent sunset in mid-1989 went into effect.\(^{40}\)

By 1989, Governor Branstad recommended retaining the full eight cents permanently,\(^{41}\) and bills were filed by Republicans in both houses to repeal the repeal, but neither got out of the Ways and Means subcommittee, and the Senate in particular opposed the initiative, insuring that the sunset would take place as scheduled.\(^{42}\) Bruner, a member of the three-person Senate subcommittee, recalled two decades later that the second vote was there to recommend the bill’s adoption to the full committee, but that such action would have been “pointless” because joint opposition by the Democratic and Republican leaders, Hutchins and Hultman, meant that the Ways and Means Committee would not have taken it up anyway.\(^{43}\) Repeal of the sunset also appeared in amendments to two unrelated


\(^{43}\)Telephone interview with Charles Bruner, Des Moines (July 3, 2007). Bruner was
bills, but one was declared not germane and the other withdrawn by its sponsor.\textsuperscript{44}

After the Iowa legislature had adjourned, the cigarette industry celebrated the defeat of these rather feeble efforts to repeal the sunset of the three-cent tax as one of its greatest lobbying victories ever. In a special briefing in May for Ralph Angiuoli, the outgoing CEO of R.J. Reynolds Tobacco, the head of the Tobacco Institute’s State Activities Division, Kurt Malmgren, exuberantly proclaimed:

Thanks to our team effort, the impossible happened, a tax goes down this year.

Again, our traditional lobbying efforts were instrumental, as was our ability to coordinate the people and program resources you and others brought to the table.

We also worked with our public affairs division to solidify our relationship with Iowa’s liberal/labor community, via a labor consultant to shore up that side of the aisle.\textsuperscript{45}

At the outset of 1990, Daniel Nelson, the Tobacco Institute’s Midwest regional vice president, to his boss in Washington praised “our Iowa magician Chuck Wasker” for having “sunsetted 3 cents of the cig tax.”\textsuperscript{46} TI’s report card on its Iowa lobbyist, Charles Wasker, credited him with having pulled off a “spectacular victory” in insuring the preservation of the sunset.\textsuperscript{47} The industry’s special fervor
certain that Riordan would have voted with him, while presumably Gentleman, who both times had voted against H.F. 327, would have voted against repealing the sunset.

\textsuperscript{44}\textit{Journal of the House: 1989: Regular Session Seventy-Third General Assembly} 2:1727 (Apr. 19) (H-4003 to S.F. 363, by Lundby, not earmarking tax for state agency appropriations); \textit{Journal of the House: 1989: Regular Session Seventy-Third General Assembly} 2:1677, 3012-13 (Apr. 17-18) (H-4070 to H.F. 753, by Schnekloth, earmarking the three-cent cigarette tax for waste tire abatement). Since both of these Republican representatives had twice voted against any cigarette tax increase in 1987 and 1988, it is unclear why they would have proposed eliminating the sunset of the tax they opposed in the first place. In addition, S.F. 703, which was passed by both houses, earmarked three cents of the cigarette tax to back rural community infrastructure improvement bonds, but Governor Branstad line-item vetoed this provision on the grounds that earmarking tax revenue reduced the state’s flexibility in dealing with changing financial needs. \textit{Journal of the House: 1989: Regular Session Seventy-Third General Assembly} 2:3092 (June 5).

To be sure, S.F. 703 did not repeal the sunset of the three-cent tax, but by removing the tax from general tax revenues, the bill presumably would have put pressure on the legislature to do so.

\textsuperscript{45}Briefing for Ralph Angiuoli R. J. Reynolds Tobacco: Remarks by Kurt L. Malmgren Senior Vice President The Tobacco Institute at 15 (May 24, 1989), Bates No. T111503432/46.

\textsuperscript{46}Dan Nelson to George Minshew, Re: Region IV General Update (Jan. 3, 1990), Bates No. 507628585.

\textsuperscript{47}Tobacco Institute, Region IV State and Local Lobbyist Evaluation: State of Iowa:
over this tax issue was later explained by Nelson, who characterized combating cigarette tax increases as an even higher priority than achieving local preemption or defeating anti-public smoking bills because the cigarette companies “wanted all the money”: if the total price (with tax) could have been increased by three cents, the tax reduced the firms’ room for raising the price.\textsuperscript{48} Why, however, the infliction of this defeat on the anti-smoking forces was chalked up to consummate lobbying skills is difficult to reconstruct given Senator Bruner’s observation that the Senate’s smoking leadership’s definitive and quasi-instinctual opposition to repeal of the sunset had rendered the outcome a foregone conclusion.\textsuperscript{49} Then House Appropriations Committee chairman Thomas Jochum agreed that once Hutchins had made it clear that repeal would not be taken up in the Senate, it became senseless to consider it in the House and no magical skills were required.\textsuperscript{50} Moreover, since opposition to repeal among some leaders (for example, House Speaker Avenson) was not based on a substantive policy, but on the principle of keeping the promise—made at the time the eight-cent tax increase was enacted in 1988 in order to secure a voting majority—that the three cents would be sunсетted, lobbying magic was hardly needed.\textsuperscript{51} On the other hand, Malmgren’s allusion to Iowa lib-labs underscored a crucial dimension of the tobacco industry’s overall legislative strategy in coopting the Iowa Citizen Action Network and the unions active in the Tobacco Industry Labor Management Committee to combat the tax.\textsuperscript{52}

**House File 209 Stalls in 1989**

The industry’s lobbying and campaign effects should not be ballyhooed. Our aim is a clean iron fist inside a clean velvet glove.\textsuperscript{53}

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\textsuperscript{48}Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007).

\textsuperscript{49}Telephone interview with Charles Bruner, Des Moines (July 3, 2007).

\textsuperscript{50}Telephone interview with Thomas Jochum, Des Moines (July 21, 2007). At the same time, Jochum argued that the sunset was not repealed because the legislators had been “rolled” by the tobacco lobbyists. \textit{Id.}

\textsuperscript{51}Email from Don Avenson to Marc Linder (July 20, 2007). Ex-Representative Jochum took the position that generally speaking the argument that the promise to sunset had to be kept had been a smokescreen for some other reason to oppose repeal. Telephone interview with Thomas Jochum, Des Moines (July 21, 2007).

\textsuperscript{52}See above ch. 26.

\textsuperscript{53}[R. J. Reynolds Tobacco Co.], Social Acceptability of Smoking: Voicing the
After being assigned to a State Government subcommittee chaired by Hammond herself, H.F. 209 made little progress during the 1989 session other than securing the recommendation of the State Government Committee that it pass subject to amendments, which significantly weakened both the existing statute and the amendments embodied in H.F. 209. No sooner had the bill for the first time covered restaurants than Hammond herself at a meeting on March 2, 1989 offered the proposed subcommittee amendment H-3309, which most prominently excluded restaurants with a seating capacity of 25 or fewer. In addition, it eliminated the newly proposed requirement that restaurants provide enough tables and seats for all persons wanting to be seated at such locations. In a constriction of coverage under the law as passed in 1987, Hammond also proposed excluding from coverage all public places containing fewer than 250 square feet of space. After discussion by the full committee, the amendment failed by a show of hands; Hammond asked that the bill be deferred, but Mary Lundby—who would soon emerge as a key opponent of H.F. 209—objected, and Hammond’s motion to defer passed on a voice vote. Five days later, on March 7, the State Government Committee reconsidered its vote on the amendment, giving Hammond an opportunity to explain it; then without any discussion the committee on a non-record roll call voted 12 to 8 to pass H.F. 209 as amended. Hammond may have diluted her own bill in order to overcome obstacles to getting it to full committee and/or out of committee and onto the House floor (or to the Senate), where, she may have hoped, other forces might restore its original vigor.

The cigarette companies nourished an especially contemptuous animus against Hammond, the bill’s chief sponsor. Shortly after the bill’s passage, the Des Moines Register reported that, in the context of an embryonic national campaign, Hammond was advocating divestiture by the Iowa Public Employees’ Retirement System of its tobacco company stock on the grounds that: “It is inconsistent that we enjoy the profits of tobacco companies and then we tell...
people, “Don’t smoke.”” With $34 million of Philip Morris stock held by IPERS at stake, by the next day, Pat Wilson, Philip Morris’s Midwest regional government affairs director, informed her boss that in response several activities had been initiated, including an analysis of Hammond and obtaining new Iowa counsel. Belittling Hammond’s “reputation of being an anti-tobacco activist at the Legislature,” Wilson alleged that Hammond had tried to add vending machine restrictions to H.F. 209, but that the amendment had “failed miserably.” More damning was the claim that Hammond was “not well respected by her colleagues.” Finally, Wilson attacked Hammond’s bona fides by citing the Tobacco Institute’s and Philip Morris’s lobbyists’ opinion that raising the issue was a way to obtain publicity and money for her legislative race. That new lobbyist (“counsel”) turned out to be former Republican Senate Minority Leader Calvin Hultman, who had just retired. He, in contrast, was “very well respected on both sides of the aisle.” The Philip Morris money machine had also managed to solicit a comment from Republican Senator Jack Nystrom, one of two legislators on the IPERS board, who opined that “Hammond’s idea is ‘stupid and she doesn’t know what she’s talking about.’ ‘Just let her introduce something, we’ll blow it out of the water.’” Finally, another ex-legislator doing the bidding of the cigarette companies, Lowell Junkins, the Democratic Senate Majority Leader as late as 1985, and now the Tobacco Institute’s “labor consultant,” elicited from the president of the Iowa State American Federation of State, County and Municipal Employees, whose members were IPERS beneficiaries, that he saw no problem so long as tobacco stocks were a sound investment. Amusingly, while Philip Morris was instantaneously implementing this elaborate strategy to kill Hammond’s proposal half a year before the legislature was even

58William Petroski, “Critics to State: Don’t Invest in Tobacco,” DMR, June 10, 1990 (1A:6, 6A:5-6). IPERS also held RJR Nabisco stock and bonds worth more than four times as much.

59Pat Wilson to Jack Nelson, Subject: Iowa - Divestiture (June 11, 1990), Bates No. 204672792/3. Ironically, two years later, Don McKee, the AFSCME president, arguably the best-known union official in Iowa, proposed that IPERS divest itself of Time Warner stock because of an anti-police song it had produced. William Petroski, “Divest to Protest Rock Song,” DMR, July 25, 1992 (1) (NewsBank). Later he was sentenced to federal prison for embezzling union funds. William Petroski, “McKee Gets Prison Term,” DMR, Aug. 5, 1995 (1) (NewsBank). The amendment to restrict vending machines, which was not filed by Hammond, did pass the House and was defeated in the Senate on a relatively close vote of 26 to 19, Hultman and Nystrom both voting with the cigarette companies. State of Iowa: 1990: Journal of the Senate: 1990: Regular Session Seventy-Third General Assembly 1:1107-1108 (Mar. 15).
scheduled to reconvene, the Register article quoted Philip Morris’s vice president for public affairs as calmly acknowledging that “Iowa officials are entitled to invest their state pension money as they see fit” and modestly pointing out that 60 percent of the company’s revenues were derived primarily from food products.

The only other action on H.F. 209 was the filing of 16 amendments by pro-business Des Moines Democrat Tony Bisignano and 11 amendments by Republican Mary Lundby. Bisignano, whose family owned restaurants, was also president of an American Federation of State, County and Municipal Employees union local representing workers of Polk County, which in early 1987, as part of a “statewide push for smoke-free worksites,” began planning to remove all cigarette machines from offices and to restrict smoking in county buildings. Bisignano, who allowed as “I’d love to quit smoking,” objected that “by jerking the machines, you don’t accomplish anything.” The county board of supervisors may have believed that it was “probably not right to subject the public to having to put up with our smoke” while doing business at county offices, but when it decided to create a “smoke-free environment” gradually over a year by limiting the number of places where smoking would be permitted until August 1, 1988, when smoking would be prohibited in private offices and allowed only in designated smoking rooms, Bisignano complained that the policy was “going to extremes”.... Although he charged that the county had violated the union contract by instituting the policy without having consulted the union and asked the Public Employment Relations Board to negotiate a new

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60 In fact, almost three years passed before Hammond filed a bill, on which the legislature then took no action. H.F. 543 (Mar. 17, 1993).


64 Telephone interview with ex-legislator David Osterberg (Apr. 1, 2007).


policy, only 8 percent of Polk County employees signed a petition requesting the board of supervisors to rescind the ban on the grounds that smokers’ “freedom of choice and civil rights [should] be given as much consideration as the nonsmokers’.” Since the policy was already the result of a compromise—several supervisors had supported a complete ban—the chairwoman signaled that reconsideration was unlikely. Carrying on in the House where he had left off in Polk County, Bisignano filed amendments that were designed to weaken the bill, in particular with respect to restaurants. Most of Lundby’s were of a similar character except for her proposal to expand “smoking” to include tobacco chewing. In April, by unanimous consent, H.F. 209 was deferred and placed on the unfinished business calendar, and then in May, not having been withdrawn, defeated, or indefinitely postponed, it was rereferred to the State Government Committee (making it eligible for committee action at the beginning of the second session in January).

At the end of 1989 Branstad recommended that the bill be passed with an exemption for restaurants with more than 31 seats. In a vast understatement of the needs of public health and especially of the 78 percent of Iowa adults who did not smoke, the governor, deploying one of the cigarette oligopoly’s key propaganda terms, grounded coverage in the “courtesy and convenience that we ought to provide our citizens.” That resistance could be expected was immediately made clear by Democratic Senate Majority Leader Bill Hutchins, who suggested that legislators might want a broader exemption for restaurants. Inadvertently pointing to the root defect of the law since its inception (and lasting until 2008)—the conferral on building owners of virtually total discretion to designate as large or as small smoking areas as they wished and the absence of a requirement that physical barriers and ventilation systems other than already

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“existing” ones “shall be used to minimize the toxic effect of smoke in adjacent nonsmoking areas”77—Hutchins correctly and pertinently observed: “‘There are small places where you don’t really accomplish that much. All you do is put a no-smoking sign on one table and...if someone smokes, it’s all over the place....’”78

The Cigarette Manufacturers Fit Iowa into Their Nationwide Preemption Campaign

[Johnson County Attorney J. Patrick] White isn’t sure how such a pre-emption came about, but he has his ideas. “Legislative history in Iowa is very difficult to go by.... There’s not serious record-keeping. The most frequent version is it was a compromise to get enough votes to pass the basic statute, to win over a couple people more aligned with tobacco. So long as there was specific language to keep local government” from banning smoking they would vote for it.79

In the meantime, from Washington the Tobacco Institute had been keeping a close watch on the Iowa legislature in connection with its nationwide panoptic monitoring of possibilities for enacting preemption of local government control. The proliferation of statewide laws and local ordinances restricting smoking had reached the point that in mid-1987 TI’s State Activities Department—whose “mission statement” committed it to “defend against adverse legislation and anti-

78 Governor: Expand Law on Smoking to Include Most Iowa Restaurants,” DMR, Dec. 28, 1989 (1), Bates No. 507593272. In this regard Hutchins understood more about the reality of the law of the legislature and the laws of physics than one of the leader’s of the Iowa City-based group, Clean Air for Everyone, who, uncritically conflating smoking-free and smoke-free, falsely claimed that the 1990 amendment “create[d] smoke-free areas in all restaurants seating more than 50....” Megan Sheffer and Christopher Squier, “Up in Smoke: An Assessment Process Related to Smoke-Free Restaurant Ordinances in Iowa,” in Needs and Capacity Assessment Strategies for Health Education and Health Promotion 166-71 at 166 (Gary Gilmore and M. Campbell eds. 3d ed. 2005 [1996]).
79 Julie Mickens, “Group Pushes to Ban Smoking in Restaurants,” Icon, Oct. 7, 1999 (5:1-2). Four years later White self-contradictorily claimed that because “he had been the Chair of the County Attorney’s Legislative Committee at the time the preemptive language was passed...he knew the history of it.” Minutes of the Informal Meeting of the Johnson County Board of Supervisors at 2 (May 7, 2003), on http://www.johnson-county.com/auditor/min2003/030507ws.htm (visited Oct. 23, 2008).
House File 209 in 1989-1990: Restaurant Coverage Is Finally Achieved

tobacco activities of any nature at state and local levels”—surveyed its field staff and lobbyists to “gain a clearer picture in discussing the question ‘is it prudent and/or possible to seek state level smoking restriction laws which preempt local jurisdictions?’” The conclusion of this “extremely confidential” survey that enactment of a local preemption law might be possible in 22 states (including Iowa) during the state legislative sessions from 1987 to 1989 was based on consideration of six points: (1) the strength of home rule concepts and the likelihood of the legislature’s taking preemption seriously; (2) the history of and prognosis for local smoking restrictions; (3) the strength of the anti-tobacco movement; (4) whether allies would continue to support the tobacco industry’s position and resources could continue to be provided for dealing with the threat of local enactments; (5) whether a statewide smoking restriction law existed, what the possibility was of serious efforts to strengthen such a law, and whether the tobacco companies could defeat them; and (6) whether the tobacco industry weakened “its position on all issues by adopting an alternative position on smoking restriction legislation” and whether such legislation could be controlled.

The “confidential” Iowa report, which was written on June 4, 1987, four days before Governor Branstad signed the clean indoor air law amendments, judged legislative adoption of preemption “possible,” but “only if an attempt were made to strengthen present state law.” Without fleshing out the implications of such a trade-off, the report presumably meant that restaurant and workplace coverage, the law’s most notable gap, was the price that would have to be paid for preemption—assuming that the author did not have in mind enactment, as the Texas report put it, “through some coy, subtle manipulation of the legislative process.” Since the law passed in 1987 was “very weak,” there would

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81“Statewide Smoking Restrictions with Preemption” (ca. 1988), Bates No. 506624412.
82“Statewide Smoking Restrictions with Preemption” (ca. 1988), Bates No. 506624412/3. Iowa was not listed among the four states (California, Missouri, New York, and Wisconsin) in which “[i]nfluencing activity now happening.”
83“Statewide Smoking Restrictions with Preemption” (ca. 1988), Bates No. 506624412.
84“Statewide Smoking Restrictions with Preemption” (ca. 1988), Bates No. 506624412/23.
85“Statewide Smoking Restrictions with Preemption” (ca. 1988), Bates No. 506624412/47.
“undoubtedly be an attempt to strengthen it in 1988 [sic; must be 1989].” The Iowa author (who may well have been a lobbyist himself) regarded the industry’s lobbyists as “[v]ery strong,” tobacco company strength” as “very good,” and (unnamed) “[n]ew allies developed by phone banks also as “very good,” but was constrained to admit that wholesaler strength was “nonexistent” (presumably for the unexplicated reason that in 1982-83 lobbyist George Wilson’s wholesalers split with the manufacturers over the precedence to be given to the Unfair Cigarette Sales Act). Although the report did not pass judgment on the strength of the anti-tobacco movement other than to advise the Tobacco Institute that it continue to try to strengthen the law, the finding that the existing local ordinances that would run afoul of any preemption law were weak appeared to lessen the urgency for enactment. Nevertheless, a certain inexorability seemed to inhere in the process, especially since the “Governor hates tobacco industry, wife active in GASP.” Consequently, regardless of what the tobacco companies might have wished: “Legislature preoccupied with budget problems, as soon as they straighten the budget out, they will probably come after us in this area (workplace smoking).”

In July 1989, Dan Nelson, the TI Midwest regional vice president, responded to a request from Paul Emrick, the vice president for the northern sector, for an analysis of “preemption possibilities” in those states by pointing out that since the bill expanding the Clean Indoor Air Act (H.F. 209) that lobbyist Wasker had “held off” in 1989 would be carried over to the 1990 session, “Wasker will wait to review approved amendment language. Mr. Wasker prefers an outright defeat of any smoking restriction expansion but if his defensive position deteriorates, a preemption amendment is a possibility.”  

86 “Statewide Smoking Restrictions with Preemption” (ca. 1988), Bates No. 506624412/23-24. On Wilson, see above ch. 26. TI called the Iowa and Vermont acts passed in 1987 “loose workplace laws....” Kurt Malmgren, Briefing for James H. Johnston Chairman R. J. Reynolds Tobacco Company at 41 (Sept. 27, 1989), Bates No. TIMN350847/87. Under the rubric “continuing local legislative problems” the report mentioned only Des Moines with regard to “local smoking restriction legislation.” On action by the City of Des Moines regarding smoking in its own buildings and skywalks, see above.

87 Dan Nelson to Paul Emrick, Re: State Preemption on Smoking Restrictions and Local Excise Taxes (July 14, 1989), Bates No. T100260228. One of the State Activities officials to whom the memo was circulated wrote on it that while agreeing with most of its conclusions, “I think the focus on ‘preemption’ has blurred vision on things that PM [Philip Morris] is interested in, ie, smokers’ rights.” (The writer, based on the hard-to-decipher initials, may have been Walter Woodson, director of legislative support, and its recipient (BC) may have been Bill Cannell, vice president for legislative support.) In light

2700
House File 209 in 1989-1990: Restaurant Coverage Is Finally Achieved

regional office forwarded to Wasker for his consideration examples of preemption clauses that the Washington headquarters had furnished.  

The Tobacco Institute’s initiation in 1988 of the Comprehensive Public Smoking Program (CPSP) — into which the abortive accommodationist Operation Downunder had morphed — added to its primary charge of defeating legislation adverse to the tobacco industry the “proactive” mission of seizing opportunities to promote legislation that would benefit the industry. Broadened still further by the State Activities Division in 1989, the charge came to include:

State preemption bills. One of the industry’s toughest, most time-consuming and expensive areas is in fighting local smoking restrictions. The Institute will lead industry efforts to preempt localities’ abilities to adopt restriction laws. ...  
Likewise, The Institute will take a hard look at opportunities to preempt local sampling bans and local taxing authorities.  
In addition, The Institute will work to ensure smokers a right to smoke in places of employment and elsewhere. The basic idea is to carve out a reasonable smoking niche for tobacco customers.  
Further, our proactive efforts also include efforts to roll back existing anti-tobacco laws in the states and localities to make them more reasonable to the industry and tobacco consumers.  

The cigarette manufacturing companies were able to intensify the potency of their new strategy by channeling some of their extraordinary profits into the financing of legislative counter-agendas at levels designed to force anti-smoking groups to scatter and dissipate their resources. As the head of TI’s state activities field staff explained to his regional lieutenants:

The fact that a given CPSP legislative concept may have a limited chance of passage should not automatically rule out an attempt to work for its passage.

of Philip Morris’s very focused efforts on behalf of enactment of preemption provisions, this criticism appears to have been misguided.

88 Dan Nelson to George Minshew, Action-Trac [Iowa HF 209] (Jan. 16, 1989), Bates No. TI00301663/4, on tobaccodocuments.org  
89 Kurt Malmgren to John Kochevar et al., Subj: Comprehensive Public Smoking Program (CPSP) Update (Feb. 8, 1989), Bates No. TI00260318.  
90 See above ch. 26.  
91 Walter Woodson to Roger Mozingo, Subject: Goals of The Institute’s “Proactive” Program (Aug. 14, 1989), Bates No. TI00260200. The initial round of CPSP projects did not include any in Iowa. Comprehensive Public Smoking Program Projects in Progress (Rev. Feb. 8, 1989), Bates No. TILBC010851.
... 

Set the agenda for the anti-tobacco forces; i.e., push for legislation to tie up the anti-tobacco forces’ resources and put them on the defensive. In this case, outright legislative victory is not the only goal.92

On October 2, 1989, Kurt Malmgren, the head of TI’s State Activities department, sent its “1990 Proactive Legislative Plans” to representatives of various tobacco companies and TI officers. In an accompanying memorandum Malmgren announced that in 1990 the Institute would expand the effort begun in 1989 to develop and implement plans to enact favorable legislation, while at the same time seeking to “set the tobacco agenda in the state legislatures, rather than simply reacting defensively to our anti-tobacco opponents.” For 1990, Malmgren had targeted 35 states with one or more legislative actions, the first two mentioned being “Preemption of local smoking restrictions” and “Rollback or modification of existing smoking restrictions.” To carry out this “ambitious undertaking” as part of the Institute’s “mission to the industry,” Malmgren stressed that close coordination with the member companies was necessary.93

What the press’s coverage of the preemption issue lacked was more than compensated for by internal tobacco industry documents that defendants have been forced to produce and have been made available on the internet. Iowa was hardly the only or even an especially high-profile example of the cigarette companies’ nationwide preemption campaign,94 their highest state legislative priority in the 1990s.95 Indeed, by 1994, Tina Walls, Philip Morris vice president for government affairs, declared at an internal corporate meeting that enactment

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92Walter Woodson to Kurt Malmgren, Subject: Comprehensive Public Smoking Program (CPSP) Procedures (Jan. 31, 1989), Bates No. TI00261033/6. See also Kurt Malmgren to Regional Vice Presidents/Directors, Subject: Comprehensive Public Smoking Program (CPSP) Procedures (Feb. 21, 1989), Bates No. TI00260320/2.
**House File 209 in 1989-1990: Restaurant Coverage Is Finally Achieved**

of preemption legislation in all 50 states was one of the company’s “most important priorities for 1994 and 1995” because smokers’ right to smoke where they worked, played, and lived was “under attack as never before”:

The immediate implications for our business are clear: if our consumers have fewer opportunities to enjoy our products, they will use them less frequently and the result will be an adverse impact on our bottom line.

Even more important, accommodation/pre-emption laws shape the real-world environment in which our customers and their non-smoking friends and associates live every day.

If smokers are banished to doorways and loading docks in front of buildings, it makes smokers feel like outcasts and gives encouragement to the antis.

On the other hand, if we live in a society that accommodates smokers and non-smokers alike, it sends the message that smoking is a viable life-style choice and an adult’s decision to use a legal product should be respected.

In mid-1989 a memorandum to the heads of TI’s State Activities department listed Iowa among 24 states in which there was “Low Priority for Local Preemption” because “local activity on smoking restrictions is not customary...or anti-smokers have already achieved tough state laws, making local ordinances ‘unnecessary.” Since Iowa’s law was so weak, presumably it was the lack of local activity that must have prompted the classification. As of 1987, the Tobacco Institute was aware of only three local smoking restriction ordinances in Iowa. In fact, of the three, which were all passed in 1978, those in Johnston were

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96 CAC Presentation #4 (July 8, 1994), Bates No. 2041183751/2. See also Ellen Merlo, (untitled), at 9 (Oct. 24, 1994), Bates No. 2040236685/93.

97 Cathey Yoe [director, legislative information] “Memorandum: State Preemption of Local Smoking Restrictions,” to Kurt Malmgren [senior vice president] et al. (June 20, 1989), Bates No. TII0026-0294. Minnesota’s placement in the same category was presumably motivated by the other rationale.

98 Tobacco Institute, Breakdown of Approved Local Smoking Restrictions (1987), Bates No. 2025833059. See also Tobacco Institute Field Staff Meeting (Aug. 1985), Bates No. 680501768/831.

99 Debate over the action by the Johnston city council was contentious. Described by the local press as “smokers against non-smokers at the Council table,” the council on first reading approved an ordinance that would have allowed smoking in all areas of city hall not designated/posted nosmoking. However, after a motion to waive the second and third readings failed by a vote of 3 to 2, a nonsmoking councilman and another who had recently quit offered a compromise to designate about half of the audience area of the council chambers as nonsmoking, which was adopted unanimously. “Water Main Extension Discussed at Council Meeting,” Northern Polk County News (Johnston), 9(40):1:1-6 at
and Cherokee merely designated smoking areas in city-owned governmental buildings pursuant to the just enacted statewide statute. Only the Ames ordinance imposed an absolute smoking ban—at meetings of the city council and other city government bodies. To be sure, apart from the fact that the 1978 statewide clean indoor air law did not contain a provision preempting local ordinances, even the 1990 preemption amendment no more prohibited cities and counties qua building owners from banning smoking in their own buildings than private owners.

In June 1988, however, Bill Cannell, TI vice president for legislative support and administration, told the executive committee that Des Moines (in addition to Appleton, Wisconsin and Palo Alto, California) was a possible site for rolling
back or repealing local “laws.” 102 Presumably the perceived opportunity in Des Moines prompted the inclusion in TI’s State Government Relations Legislative Counsel 1989-90 briefing book of Iowa among only 14 states that TI had “targeted” for action regarding preemption of local smoking restrictions as part of the “‘pro-active’” role it had taken in 1989 and would expand in 1990 to develop legislation favorable to the industries. Its goal was “to set the tobacco agenda in the state legislatures, rather than simply reacting to our anti-tobacco opponents.” 103

The situation Cannell had in mind was the decision by the City of Des Moines to ban smoking in almost all city buildings on June 1, 1988. Since the 1987 amendments to the clean indoor air law had been in effect, the city had been complying by banning smoking except in designated areas. “But,” as the Des Moines Register noted, “a recent trend toward completely smokeless buildings has not been lost on Des Moines city officials.” 104 The city manager, Cy Carney, animated by complaints from municipal workers, such as those who ate in the city hall lunch room, astutely drew the appropriate public health conclusion from the basic flaw in the state statute in a letter to department heads by pointing out that the restriction of smoking to designated areas “‘has the general effect of confining and concentrating smoking in various parts of city buildings. That, of course, has intensified the smoke in areas which are used by both smoking and non-smoking employees.’” 105 Thus, on March 10, 1988, Carney issued a directive “relative to the creation of a smoke free environment in all City facilities in an effort to provide a cleaner, healthier work place,” which prohibited city employees from smoking in any city building or facility; it also applied to the general public except in the public areas of the airport and convention center. 106

102 Bill Cannell, Public Smoking Program: State Activities Division Presentation to Tobacco Institute Executive Committee, in Samuel D. Chilcote, Jr., Comments, Executive Committee The Tobacco Institute (Draft #2) (June 16, 1988), Bates No. TI01770102/36.

103 Tobacco Institute, State Government Relations, Legislative Counsel, Briefing Book 1989-90, Bates No. 507621719/48.


105 “Ban in Almost All City Buildings Begins June 1, Carney Says,” DMR, Mar. 16, 1988 (3M:3).

For Brozek and Nelson, the heads of TI’s Midwest region, the ban fit well as “an additional target for our Comprehensive Public Smoking Program” since it embodied two matters with which the Institute was authorized to deal: “modification/roll back of existing anti-smoking laws” and “smokers rights.”

Having previously discussed the Des Moines ban with headquarters, in September 1988 Brozek and Nelson informed their northern sector boss, Paul Emrick, that its Iowa lobbyist/counsel, Wasker, had recently held “in-depth meetings” with union representatives of the municipal white-collar workers and firefighters, on the basis of which Wasker had “developed a scenario that could force a repeal, or a roll back, in Des Moines.” Wasker’s “objective” was not merely to gauge how “angry” employees’ were about the ban, but to “[e]ncourage and facilitate” their opposition. Notifying Emrick that Wasker had already “urged” that Brozek and Nelson “immediately undertake a preemptive and proactive stance,” they pointed out that in addition to working under an agreement with TI as counsel, Wasker “continues to act in a legal advisory position with potential aggrieved parties.” News of this second function signaled a request for a $15,000 budget for the fourth quarter of 1988 to finance Wasker’s other activities. By October Emrick had already approved a check to Wasker for $10,000 for “Iowa Legal Services/CPSP.”

A few days later, in another report to Emrick on CPSP in the Midwest, Brozek and Nelson reiterated that Wasker had determined that the firefighter and white-collar unions were “irritated” over the smoking ban: the former were demanding that the issue be taken up in then ongoing contract negotiations, while the latter and the police union were considering adopting the same position: “Much of this activity has been generated and directed by Mr. Wasker himself,” who had also “extensively organized our legislative strategy...” 

Moines Clerk’s Office. Whereas violations by employees were subject to “the usual disciplinary process involving violations of work rules,” the general public could only be “courteously advised of our smoke free environment.” Nevertheless, in spite of this lack of enforcement power, one of the city clerks stated that she had never seen any nonemployee smoke in city hall. Email from Karen Herzberg to Marc Linder (May 31, 2007).

107Michael Brozek and Dan Nelson to Paul Emrick, Re: Targets for Proactive Efforts, (Sept. 6, 1988), Bates No. T142680947
109Michael Brozek and Dan Nelson to Paul Emrick, Re: Targets for Proactive Efforts, (Sept. 6, 1988), Bates No. T142680946/7.
111Michael Brozek and Dan Nelson to Paul Emrick, Re: Comprehensive Public
throughout this past summer and fall.”

The proposed $15,000 budget for 1989 included $10,000 for a survey. Rolling back the Des Moines municipal smoking ban was thwarted in mid-February 1989 both Brozek and Nelson met in Des Moines with Wasker and Pat Wilson, their counterpart from Philip Morris, to review what in the meantime had turned into a grievance over the ban. The no-smoking policy, however, remained on the books and smoking remained prohibited in city buildings. In the end, then, neither “our magician” Wasker nor the nicotine purveyors’ super-profits were able to implement this “proactive” roll back pipe dream. And by 2007, the Des Moines Professional Firefighters Association did not even permit smoking during union meetings.

Indeed, to judge by information provided two decades later by the presidents of the firefighters and white-collar workers unions in 1988, what Wasker and perhaps Brozek and Nelson as well generated was a vastly inflated picture of the

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112 Michael Brozek and Dan Nelson to Paul Emrick, Re: Comprehensive Public Smoking Program Region IV (Nov. 4, 1988), Bates No. TI08940761/2.
113 Public Smoking Program, Des Moines, Iowa (n.d.), Bates No. TI08940767, on tobaccodocuments.org. It is unclear to whom the $2,500 in honoraria was to be given. Separately it was estimated that $9,000 was spent in Iowa in 1988 and $28,500 was to be budgeted for the Public Smoking Program in 1989; by far the largest item was a phone bank. The location of the non-Des Moines program was not identified. Public Smoking Program (n.d.), Bates No. TI08940766.
114 In January 1989, for example, the board of trustees of the Des Moines Water Works unanimously rejected a petition from 89 of the utility’s 205 employees to designate indoor smoking areas so they could “satisfy their nicotine craving” without having to go outdoors in to the cold. Charles Bullard, “Smoking Ban Reiterated,” DMR, Jan. 25, 1989 (6M:4-5).
115 Bi-Weekly Report Michael F. Brozek - RVP - Region IV (Feb. 13-14, 1989), Bates No. TI28811593/4; Bi-Weekly Report Dan Nelson - RD - Region IV (Feb. 13-14, 1989), Bates No. TI28811593/7. Although Wilson was Brozek’s counterpart in the sense that she was Philip Morris’s Midwest regional director in Chicago, the cigarette companies (which financed the Institute), according to Brozek, did not trust TI staff; despite having no formal authority over him, Wilson, on visits to his office in Madison, bossed him around, symbolically demonstrating her power by sitting in his chair. Telephone interview with Michael Brozek, Madison, WI (June 5, 2007).
116 According to Carol Moser, a Des Moines Assistant City Attorney, who began working for the city in the early 1980s, municipal white collar workers welcomed the ban, while some police were annoyed by its application to police stations, but the ban was never rescinded and was always complied with. Telephone interview with Carol Moser, Des Moines (May 29, 2007).
dissatisfaction among the members. According to Ray Thomas, a union vice president who also owned a cigar store had been the initial link to the tobacco industry representative, who in meeting with Thomas made promises about having a lot of money—$10,000 was a figure Thomas still remembered—to hand out, but the union never saw any of it. And since Thomas supported the indoor smoking ban, his heart was not in any arrangement to foment unrest anyway. Moreover, because smokers were already at that time a minority among the firefighters, the tobacco representative was unable to gain a foothold in the union; and since the nonsmoking majority was vocal, if anyone had said at a union meeting that the union would soon be receiving tobacco industry money, the majority would have rejected it.118 Similarly, according to Andrew Hennesy, who at the time was the president of the Municipal Employees Association, which represented white-collar workers in the municipal government such as those who worked in city hall, a majority of the members were not opposed to the indoor smoking ban. He recalled no grievances having been filed.119

TI’s Midwest regional staff’s analysis of H.F. 209 focused on the proposed expansion of “public places” to include restaurants and the industry’s counter-proposal of preemption. In reviewing its roster of “pro-active” legislative proposals, Region IV analyzed the circumstances that might give rise to a preemption amendment to H.F. 209:

HF 209 remains in its house of origin due to the extensive lobbying efforts of TI, and the Iowa Restaurant Association. The Restaurant Association will stay opposed to HF 209 with or without local preemption clauses if percentage designations are included in the bill. In fact, at this time, the Tobacco Institute remains opposed to HF 209 in its present or deleted form. Several amendments have been considered including the changing of fines, mandates that require public places with a public address system to regularly announce their smoking policy, and additional inclusions or deletions of affected public places.

If HF 209 begins moving through the legislature, we will attempt to amend strong preemption language into Iowa’s Clean Indoor Air Act. Region IV staff has received several examples of preemption clauses which have been forwarded to Iowa counsel, Chuck Wasker, for his consideration.

In the House of Representatives absent an outright kill of the bill, TI counsel will first try to amend the bill in the House. If the bill progresses to the Senate, we will once again

118 Telephone interview with Ray Thomas, Ankeny, IA (May 30, 2007). Thomas did not recall the name of the tobacco industry representative, but from his account it appears that Wasker was that person.

119 Telephone interview with Andrew Hennesy, Des Moines (June 1, 2007). Hennesy did not recall having been approached by or having met with anyone from the tobacco industry.
Despite TI’s emphasis on implementing a “proactive” strategy, until this point in the analysis it appeared to be using preemption primarily as a tactical weapon to destroy any bill that sought to expand coverage to include restaurants. At this juncture, however, preemption became the priority in its own right to which TI’s national campaign had subordinated coverage. Although TI did not plan any “grassroots mobilization” at that time, it did foresee the need for and potential conflicts with “coalition allies”:

[T]he Iowa Restaurant Association opposes HF 209 and has indicated to Region IV staff that they have no intention of changing their position. In spite of this opposition, if the bill starts to progress we will seek the aid of trade groups interested in state wide [sic] uniformity in smoking restrictions. At the proper time, we will contact the Iowa Restaurant Association and state and local chambers of commerce to educate them on the benefits of uniformity in smoking restriction laws.121

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121 Kurt Malmgren, “Pro-Active Legislative Targets 1990” at 33 (Oct. 2, 1989), Bates No. TI00310001/42. TI foresaw an even more probable clash of interests emanating from Iowa’s de facto ban on sampling, which resulted from tobacco “wholesalers’ concern with excess amounts of free cigarettes being distributed.” The manufacturers could not successfully amend the law in any “‘overt’” way; instead, they “need to have an amendment inserted into a revenue bill dealing with other subjects” and “to secure a friendly legislator to insert the language...and gain the cooperation of leadership in protecting that language when it is inserted. This methodology does not lend itself to press releases, industry and grassroots mobilizations and other traditional support instruments. In short, if we are not able to accomplish this move quietly, we will be unsuccessful.” The key to pulling off this surreptitious coup was maintaining “low visibility for a large portion of the legislature, capitol press corps and the general public,” while demonstrating to the wholesalers by means of comparative data from states with active sampling programs that the practice did not reduce wholesalers’ and retailers’ sales. Id. at 34, Bates No. TI00310001/43. According to R.J. Reynolds Tobacco Co., the Iowa wholesalers were “adamant with respect to not changing this...extremely restrictive law....” Betty C. Royal
Preemption now seemed to take on a life of its own and become a goal in its own right rather than merely a tactic designed to thwart the passage of more radical anti-smoking bills: the point was to persuade restaurant and other business owners that preemption was of such overwhelming importance for all industries that they should abandon their resistance to coverage for the sake of the greater good of the tobacco industry. 122 Years later, Brozek, TI Midwest regional vice president until 1988 (and a Philip Morris lobbyist in Wisconsin for a time thereafter), completely corroborated this analysis. No matter what anyone might say, he declared, by the years 1989-1991, preemption was without any doubt the cigarette companies’ highest state legislative goal simply because they lacked the capacity to fight and win in myriad communities, which would have inflicted “a thousand wounds” on them. Consequently, he confirmed that, if forced to choose between no restaurant coverage and no preemption, on the one hand, and restaurant coverage and preemption, on the other, there was absolutely no doubt that the tobacco industry would have chosen and—in states such as Iowa—did in fact choose the latter, relegating the restaurant associations’ goals to matters of utter indifference. 123

This position was subtly and indirectly reinforced in a letter that TI’s communications director Walker Merryman sent at the beginning of 1990 to Lester Davis, the Iowa Restaurant & Beverage Association executive director, in
his capacity as a member of the International Society of Restaurant Association Executives, which the Institute had joined two years earlier. Though a form letter, it nevertheless abstractly alluded to circumstances that were on the verge of confronting IRBA, warning restaurant owners and offering them quid pro quo’s at the same time:

[W]e want to make certain we keep the lines of communication open between our two industries so that we may avoid any conflict.

There are obvious legislative and regulatory matters where our interests coincide. Naturally, we intend to vigorously defend the rights of our member companies and will welcome your participation when those matters arise. There may also be times when you need a little assistance on an issue which may not seem to be a logical fit. I want to assure you that we stand ready to play whatever role we can mutually determine.\textsuperscript{124}

In reporting right after new year to his boss in Washington on legislative plans for 1990 in the Upper Midwest, TI’s regional vice president, Daniel Nelson—who, 16 years after having quit his post, was still filled with admiration for Wasker’s lobbying prowess\textsuperscript{125}—boasted of the “clean records” that “we” had had in 1989 in Iowa (as well as in Minnesota and South Dakota), where “Wasker had a banner year” rolling back a three-cent cigarette tax in addition to killing smoking restriction and advertising bills. Admitting that “[w]e are late out of the blocks on our pro-active efforts,” Nelson characterized their “intended goal” as “interesting” in requiring TI both to persuade the tobacco wholesalers and their lobbyist George Wilson to abandon their long-time support for the (de facto) statutory ban on free distribution of samples as well as to bring them “back on to the team” and to secure their “cooperation...on the whole legislative front”—a task that he “frankly” recognized “may take more time than this leg session will allow.” Finally, without explaining the basis for the innovation, Nelson reported that, unlike the situation in other Region IV states, where labor consultants were hired “initially to work in the area of clean indoor air,” TI was retaining former Iowa Senate Democratic Majority Leader Lowell Junkins as a labor consultant to “work primarily on delivering union opposition to proposed excise tax increases.”\textsuperscript{126}

\textsuperscript{124}Walker Merryman to Lester Davis (Jan. 2, 1990), Bates No. T129842334/75.
\textsuperscript{125}Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007). Unprompted, Nelson volunteered this reason for having chosen to work for the Tobacco Institute: “Hey, this is America—there are two sides to every story.” \textit{Id.}
\textsuperscript{126}Dan Nelson to George Minshew, Re: Region IV General Update (Jan 3, 1990), T128870894-6.
H.F. 209 Passes in 1990 as Restaurant Coverage Is Traded Off for a Version of Preemption of Local Control that Even the Cigarette Manufacturers Deemed No Broader Than What “Iowa Constitution already says”

“This bill just died of lung cancer.”

Although Lieutenant Governor Zimmerman focused on environmental and health issues in her opening address to the Senate on January 8, 1990, her “Report Card on Iowa” failed to mention smoking. On January 11, by a vote of 14 to 2, the House State Government Committee recommended passage of H.F. 209. For the next day, January 12, the tobacco industry scheduled a high-level legislative forecast meeting, attended by Wasker, TI’s lobbyist, Serge Garrison, R. J. Reynolds’ lobbyist, Joe Murray, Reynolds’ state government relations official with responsibility for many states including Iowa, and Pat Wilson, the Midwest regional director for governmental affairs at Philip Morris. Garrison, who had been the director of the Legislative Service (Research) Bureau and thus the Iowa legislature’s chief bill drafter from 1967 to 1984 before joining a corporate law firm in Des Moines, chose to lobby for Reynolds Tobacco

128State of Iowa: 1990: Journal of the Senate: 1990: Regular Session Seventy-Third General Assembly 1:1-5 (Jan. 8). Zimmerman did not mention smoking in any of her other opening addresses during her tenure as lieutenant governor.
131RJR, I. Introduction, III. Programs and Resources, A. Legislative, 1. Legislative and Regulatory Counsel, at 3 (May 15, 1989), Bates No. 507639332/7.
132Dan Nelson to George Minshew, Re: Region IV General Update (Jan 3, 1990), T128870894. On Murray, see RJRT State Government Relations, IV. Staff & Structure, C. State Assignments (Mar. 6, 1989), Bates No. 507619305/6. On Wilson, whose participation was noted as “pending,” see Philip Morris USA, Government Affairs Regions (June 1990), Bates No. 2070158962. According to a Philip Morris in-house organ, “all she ever dreamed about while growing up in Billings, Montana was becoming a professional lobbyist.” “Tapgram Profile: Regional Government Affairs Director Pat Wilson,” Tapgram 11(3) (Mar. 1991), Bates No. 2024332327/8.
because, according to his widow, it was a “good-paying client,” although “his heart was not in it.” The $24,000 in 1989 and $26,000 in 1990 (plus about $1,000 in expenses) that Reynolds paid Garrison apparently overcame whatever qualms he may have had. (In contrast, his gross pay in his final two calendar years at the legislature was $48,235.20 and $59,709.42.) Whether he and the entities involved believed that his simultaneous executive directorship of the Iowa Life and Health Insurance Association constituted a conflict of interest is unclear.

By January 16, Nelson, based presumably on information exchanged at this meeting, was able to notify headquarters that it was likely that two amendments—dealing with smokers’ individual rights and uniformity (i.e., preemption)—would be introduced. The chances of passage in the House were, according to Wasker, good, with prospects in the Senate less certain. At this point, Nelson was still adhering to the aforementioned strategy of trying to introduce a strong preemption clause if the bill began progressing and, in support thereof, “educat[ing]” IRBA and state and local chambers of commerce on the “benefits of uniformity in smoking restriction laws.” To be sure, Nelson’s word choice suggested that enactment of preemption was not some second-best necessity, but a goal in its own right: “If the opportunity to advance a preemption amendment occurs, it will be beneficial to have a smokers list mobilization in support of the amendment.” Although the Register’s statehouse reporter also


134Telephone interview with Caryl Garrison, Des Moines (June 16, 2007).


136The data for 1983 and 1984 (Garrison’s termination date was Dec. 7, 1984) were furnished by the Iowa Department of Administrative Services. Email from Lisa Elliott, payroll accountant, to Marc Linder (Jan. 24, 2011). For budgetary reasons, the State of Iowa stopped publishing state employees’ salaries between 1980 and 1988.


138Dan Nelson to George Minshew, Action-Trac: Iowa HF 209 (Jan. 19, 1990), Bates No. TI00301663/4, on tobaccodocuments.org (italics added). Something of a puzzle attaches to Nelson’s knowing that a preemption amendment—which Mary Lundby and Tony Bisignano filed the next day—would be filed: if TI put them up to it, why did it not give them a text that its lawyers had drafted rather than one that it immediately pronounced almost worthless; if (as seems implausible) they filed it on their own initiative, but Wasker knew about it, why did he not persuade them to drop it in favor of one of the texts that TI had sent Wasker months earlier?
regarded the prospects for House passage as good, he stressed that dozens of amendments had been offered to weaken or kill the bill, specifically mentioning one to redefine “smoking” to include chewing.\textsuperscript{139}

On January 19, when the House took up H.F. 209, Hammond offered the aforementioned weakening amendment H-3309,\textsuperscript{140} which the State Government Committee had filed and included in its recommendation of the passage of the bill in 1989.\textsuperscript{141} But even the chief sponsor’s self-censored compromise was quickly overtaken by events. First, the House adopted a floor motion to amend the cigarette sales license law by requiring vending machines to be “in clear view” of the person responsible for preventing purchases by minors and imposing a $500 civil penalty on the cigarette vendor and the retail licensee for a first offense and permit/license revocation for additional violations.\textsuperscript{142} Then the bill’s chief opponent, Democrat Tony Bisignano, and Hammond joined to file an amendment that eliminated H.F. 209’s partial coverage of bars and the public address system announcements (denounced by TI as “‘big brother’ language”).\textsuperscript{143} Based on a deal between the leading antagonists, this amendment was adopted.\textsuperscript{144} Lundby’s amendment to expand the scope of covered “smoking” to include tobacco chewing—which, laudable as it may have been as a public health measure with respect to combating the rise in prevalence of smokeless tobacco use,\textsuperscript{145} was extraneous to the issue of involuntary smoke exposure and may have been designed to subvert support for the bill—lost narrowly (39 to 47) on a non-record roll call vote.\textsuperscript{146} Bisignano then filed a floor amendment raising the exemption


\textsuperscript{143}Dan Nelson to George Minshew, Action-Trac Iowa HF 209 (Jan. 22, 1990), Bates No. TI28751244/46.


\textsuperscript{146}\textit{State of Iowa: 1990: Journal of the House: 1990: Regular Session Seventy-Third General Assembly} 1:126 (Jan. 19). By 2007, the chewing tobacco amendment was the
threshold for restaurants from the 25 seats that the committee itself had proposed to 50, which was adopted on a voice vote. On Hammond’s motion the House then adopted the now amended committee amendment as a whole.\textsuperscript{147}

The bill’s proponents, to judge by the Register’s account of the debate, vastly exaggerated its potential impact by asserting, as did Democrat Rod Halvorson, that it would protect “the people that don’t want interference with their right to breathe clean air....” Hammond may have correctly argued that “[w]e should isolate the smokers from the non-smokers in order to protect their health,” but empowering building owners to designate that and where the twain should meet hardly satisfied that criterion. Although the bill’s failure to protect nonsmokers was manifest even as applied to larger public places, her justification for excluding stores of fewer than 250 square feet on the grounds that it did not “make sense” to include, for example, barber shops\textsuperscript{148} revealed the absence of a meaningful public health principle.

Even more momentous was the next amendment, which Republican Mary Lundby and Bisignano had filed two days earlier.\textsuperscript{149} (The next year Lundby may have disclosed the personal basis of her opposition to smoking bans. After having revealed in an interview for an oral history of Iowa women legislators that she loved fast cars, she was asked what else she liked that was fun: “I love to play cards. I love to smoke and drink beer with the people downtown.”)\textsuperscript{150} Their amendment prescribed that: “Enforcement of this chapter shall be implemented in an equitable manner throughout the state.” Adopted on a close non-record roll call vote of 47 to 43,\textsuperscript{151} this provision was the first (and, as it turned out, mildest


\textsuperscript{150}A Political Dialogue: Iowa’s Women Legislators, Box 3: Folder: Transcripts: Mary Lundby at 50 (Oct. 1, 1991), in IWA.

\textsuperscript{151}State of Iowa: 1990: Journal of the House: 1990: Regular Session Seventy-Third General Assembly 1:127-28 (Jan. 19). Unfortunately, when interviewed in 2007, Lundby stated that she was unable to recollect whether she had filed the amendment on her own initiative or anything else about this preemption battle. Telephone interview with Mary Lundby, on the road near Ames (June 1, 2007).
and vaguest) version of preemption designed to deprive local governments of the power to pass ordinances stricter than the weak and “toothless” statewide law. This crucial matter of preemption was not even mentioned in the lengthy account of the debate in the next day’s Register. Before Wasker had even had time to “sort through the various amendments to get an accurate picture of what form the Legislation is now in,” Nelson, immediately reported to Washington that Wasker had called the amendment “nebulous”; although its wording “was not to our specifications,” it did nevertheless “speak to uniformity of enforcement.”

Lundby’s amendment to prohibit employment discrimination against smokers (or nonsmokers)—another legislative desideratum of the cigarette companies—was held not germane on Hammond’s point of order. Then on successive non-record roll calls, Lundby’s motion to reduce the civil penalty from $50 to $10 was defeated 43 to 46, but her follow-up amendment to reduce the amount to $25 was adopted 54 to 32, prompting Senate Majority Leader Hutchins to opine that the bill’s chances of passing in the Senate had just improved. After defeating Lundby’s final obstructionist amendment to reverse the bill’s facilitation of enforcement by imposing filing fees on complainants, the House passed H.F. 209 by a large majority of 67 to 22. Though by no means along party lines, the vote did reveal a difference between the parties: only 21 percent of Democrats (who controlled the House 61 to 39) who voted opposed the bill in contrast to 31 percent of Republicans. Of the 18 (of 19) female representatives who cast a vote, five or 28 percent opposed H.F. 209; only one (or 20 percent) of five Republican women voted Nay, whereas four (33 percent) of

155See below ch. 29.
the 12 voting Democrats did. Thus, when party and gender are taken into account, only seven (or 16 percent of) Democratic men who voted opposed the bill, whereas 10 (or 30 percent of) voting Republican men voted Nay.\textsuperscript{161}

The mindset of some who opposed the bill may be illuminated by the self-observations of Democrat Josephine Gruhn from the small northwestern town of Spirit Lake near the Minnesota border. Still a smoker in her fourth and last term, Gruhn, who was one of only five representatives who also voted against the bill after it had been returned to the House by the Senate, stressed many years later that she and other members had taken the position that the restrictions “infringed” on their rights and took away their “privileges.” Interestingly, she analogized her vote against public smoking to her vote against a bill requiring seat restraints for children in automobiles. And in both instances she readily conceded that over time she learned that she had been mistaken. Although on her own she argued that designated smoking sections in restaurants and other public places were senseless because the smoke wafted over to the no-smoking sections, the main lesson that she drew from her own self-transformation was that what the anti-smoking law had been attempting to achieve should have been phased in over a longer period of time: it was necessary to “sneak up on” smokers rather than impose radical change all at once.\textsuperscript{162}

Lundby, who had so significantly shaped the bill, was the only one of six Republican women who voted against the bill. Lundby’s explanation of her vote captures her understanding of the requirements of public health: H.F. 209 “was another example of government trying to regulate people’s lives. ‘We’re all celebrating the freedom of Eastern Europe, and we’re giving ours away here.’”\textsuperscript{163}

\textsuperscript{161}\textit{State of Iowa: 1990: Journal of the House: 1990: Regular Session Seventy-Third General Assembly} 1:129-30 (Jan. 19); Iowa Official Register: 1989-1990, at 89-90 (Vol. 63). Of the five women who voted against the bill, two (Florence Buhr and Josephine Gruhn) smoked; of all the men who voted Nay, ex-Representative Gruhn could identify with certainty only one (Stewart Iverson) as a smoker and most as non-smokers. Telephone interview with Josephine Gruhn, Spirit Lake, IA (May 30, 2007). To be sure, it is possible that some representatives voted against the bill because they believed that it was not strong enough—for example, Philip Brammer, who was arguably the fiercest opponent of smoking in the legislature. See below.

\textsuperscript{162}Telephone interview with Josephine Gruhn, Spirit Lake, IA (May 30, 2007). To be sure, the law in Iowa was so weak in each of its incremental iterations that it always fully satisfied Gruhn’s guideline: the very fact that, as she herself noted, H.F. 209 did not stop anyone from smoking in a restaurant (or protect nonsmokers) is the best illustration.

Little wonder that Lundby was one of only seven Iowa state legislators to whom the RJR Political Action Committee disbursed money later in 1990. Motions to reconsider filed by Hammond and Democrat Dan Jay, an opponent of the bill who had opposed restaurant coverage in 1987 and would be praised by the Tobacco Institute in 1991 for defending preemption, tied the bill up for only three calendar days, and on January 25 Hammond’s was overwhelmingly defeated 8 to 66.

The greater “clout” that smokers wielded in the Senate made the bill’s fate there uncertain despite the large majority for it in the House. Nevertheless, the primus inter pares of the smokers, Majority Leader Hutchins, commented that the exemption for small restaurants and the reduction in the fine had improved H.F. 209’s chances.

TI Midwest regional vice president Nelson’s reaction to the House adoption of the preemption provision was muted. In a report to headquarters three days later, he did not even mention it until the fifth paragraph, observing merely that the “[p]reemption language...wasn’t our preference.” Indeed, since it appeared to be “rather weak,” he had had to ask the Washington staff for a legal opinion as to whether the language was even “beneficial to us.” But even if the worst came to the worst, “TI Counsel Chuck Wasker says we should be able to defeat this bill in the Senate.”

In a more thematic memorandum on “Proactive Legislation 1990 targets” to the same recipient on the same day, Nelson and Alice O’Connor, the leadership of Region IV, directed the faintest of praise at the provision passed by the House, observing that it contained “[l]anguage that could be interpreted as [a] preemption..."
clause....” Nevertheless, despite her amendment’s inadequacy and the bill’s imminent departure for the Senate, where she would have no influence, they announced that they had “identified Mary Lundby...as a sponsor for our amendment.” By January 22 the midwestern leaders had still not clarified what function a preemption clause was supposed to serve. Since TI’s “proactive” initiative in Iowa was not designed to be embodied in a “freestanding” measure, it had to be attached to a smoking-related bill such as H.F. 209, whose sponsors were supporting it for its anti-smoking features. With the bill’s passage regarded as “likely,” it made sense for the tobacco industry to “intend to protect our preemption clause, strengthen it if necessary, and water down other objectionable portions of the bill.” What injected ambiguity into the strategy was the simultaneous declaration that: “We want a state wide [sic] preemption, however, we prefer to kill 209 outright. We will review our prospects of killing this legislation in the Senate.” The cigarette manufacturers’ first choice would have been simply to add preemption to the existing clean indoor air law without any accompanying strengthening amendment. But since Nelson and O’Connor recognized that passage of such a vehicle was politically undoable, the question became whether second-best was a watered-down version of H.F. 209 with a stronger preemption clause than Lundby’s or the status quo. Odd as it might seem, the latter seems to have been the case: “[S]ince our overall strategy [is] to kill the bill, if possible, we request that member company Grass Routs [sic] Programs be directed against passage of HF209 in the Iowa Senate.” To be sure, even this support program was second best: Nelson and O’Connor would have preferred direct mail or phone mobilization, but, for reasons they did not explain, they implausibly claimed that the “issue of preemption is too technical to translate into” that kind of mobilization. ¹⁷⁰

Immediately after the House’s adoption of the aforementioned preemption provision, TI’s prioritization of preemption for Iowa shot up. Three days after passage, Diana Avedon, the State Activities department’s legislative analyst, ¹⁷¹ sent a memorandum to Melinda Sidak, a lawyer at Covington & Burling, stating that a previous request that she had sent her regarding Iowa’s preemption clause “has reared its ugly head again,” and relaying a request from Nelson for a memo


¹⁷¹ In 1986, after one year at TI, Avedon was listed as a word process operator. Samuel Chilcote to Members of the Executive Committee, Memorandum: Tobacco Institute Headquarters Staff (Aug. 15, 1986), Bates No. 2021266909/13. Half a year later she was listed as a secretary to Cathey Yoe, legislative affairs manager. Tobacco Institute, State Activities Headquarters Staff (Mar. 3, 1987), Bates No. TITX0031947.
explaining “why the clause does not preempt local smoking restriction ordinances.” Nelson was especially interested in “language to amend the clause to specifically include local preemption (if that is possible) or sample language that could be used as a separate preemption amendment.” Avedon requested a written response by February 7.  

Preemption was sufficiently important to prompt the R. J. Reynolds Tobacco Company to be monitoring developments on its own. Commenting on the company’s (and industry’s) “potential pro-active accomplishments in 1990,” on January 22, Hurst Marshall, who had previously worked for TI, conveyed to his boss, Roger Mozingo, vice president for state government relations (and former TI vice president), his “best guess” that smoking restriction preemption was “likely” to pass in Iowa.  

Two days later, Marshall sent his weekly Midwest regional report to Mozingo, noting that H.F. 209 had passed the Iowa House with “unclear preemption language.” Marshall—whose report Mozingo graded “good”—added that “RJRT counsel has been sent suggested preemptive language in order to clarify intent and assist in redrafting wording. All activities will be coordinated with TI personnel.” A month later Mozingo himself informed a long distribution list at the company that of the 30 states considering bills to restrict smoking, Iowa was one of six states posing “[t]he most difficult challenges,” but at month’s end he received another update rating passage of preemption in Iowa as still “likely.”  

On arrival in the Senate, H.F. 209 was referred to the Human Resources Committee on January 29, which was chaired by the anti-tobacco liberal Beverly Hannon. A week later she appointed a subcommittee consisting of herself, Al Sturgeon (chair), another anti-smoking liberal Democrat, and James

172Diana Avedon, Memorandum, to Melinda Sidak (Jan. 22, 1989 [sic; must be 1990]), Bates No. TI0030-1649. Presumably Avedon’s reference to her previous request as also having been made on January 22 was a typo, but the earlier request appears not to be included among the millions of tobacco industry documents on the internet.  

173Hurst Marshall to Roger Mozingo, 1990 Pro-Active Legislative Projections (Region IV) (Jan. 22, 1990), Bates No. 507627588.  


176Henry Stokes to Roger Mozingo, Legislative Projections Update (Feb. 26, 1990), Bates No. 507627542/3.  

Riordan, a liberal Democrat whose position on smoking was not clearly delineated, to study the bill further and make recommendations to the full committee.178 Hannon later explained that “as chair I would have appointed the sub-committee, and I appointed them according to the outcome I wanted. I think all chairs did. But I usually always had an opposing voice on subcommittees, so I’m surprised if I just appointed us three unless I had doubts about Riordan. Maybe at that time I thought Riordan was leaning toward tobacco folks. ... I had observed that a couple times he was swayed by forces I didn’t support, like the gambling forces. ... I knew Sturgeon and I were yes votes, and 2 out of 3 is what’s needed, so I might not have cared how Riordan would vote.”179 As committee proceedings would reveal a week later, there was reason to question the stringency of Riordan’s anti-smoking stance.

Not knowing these senators’ “leanings,” TI regional vice president Nelson informed headquarters that he would have to check with Wasker. Two days later the word back from the lobbyists was that Sturgeon and Hannon were “strongly against tobacco.”180 Interestingly, Nelson did not mention whether Wasker had reported on Riordan, in particular on whether the $500 honorarium that the Tobacco Institute had given Riordan in 1988 to chat over lunch might have prompted Wasker to regard him as a friendly vote.181

The Iowa lobbyists—the Philip Morris and R. J. Reynolds lobbyists and TI staff met in Iowa on February 8 to discuss “preemptive smoking restriction legislation” as well as tax study bills and pending vending machine legislation182—also informed Nelson that they had “stronger preemption language” and were “looking for sponsors.”183 Then on February 12,
Sidak—who, three months later, testified on TI’s behalf at a New York City Council hearing on a proposal to ban cigarette vending machines that “‘smoking has not been shown to cause cancer or any other disease’”[184]—weighed in with her response. Without citations, she opined that the language in Lundby and Bisignano’s amendment had been “interpreted by some as a state preemption clause.” Nevertheless, although it was unclear what their “vaguely worded provision is intended to mean, it clearly would not operate as a preemption clause” because it said “nothing whatsoever about the bill’s relationship to local ordinances. Absent “a clear expression of the legislature’s intent to preempt,” Sidak considered it “unlikely” that a court would hold the bill to preempt local regulation of public smoking.[185] Sidak then suggested the following language for an amendment:

“Chapters 98 and 98A are expressly intended to preempt all laws, ordinances or regulations by any municipal, county or other governmental unit or political subdivision relating to the consumption, sale, distribution or use of tobacco or tobacco products.” All such laws, whether enacted before or after this Act shall be or become void, unenforceable and of no effect upon the [effective date of the Act].[186]

Adoption of the phrase “relating to” made this version of preemption rather comprehensive.[187]

On February 12-13 another flurry of faxes flew between the Tobacco Institute and Covington & Burling concerning the text of an appropriate preemption provision. TI’s Midwest regional director, Alice O’Connor, sent headquarters an amendment drafted by Serge Garrison, Reynolds’ Iowa lobbyist, asking: “In lieu

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[185] Melinda Ledden Sidak, Memorandum at 1 (Feb. 12, 1990), Bates No. TI00372359.
[186] Melinda Ledden Sidak, Memorandum at 3 (Feb. 12, 1990), Bates No. TI00372359/61. It is unclear why Sidak used quotation marks for the first part of the proposal and omitted them from the second part, which she took virtually verbatim from an Iowa Code provision on obscenity (Iowa Code § 725.9 (1974)), which the Iowa Supreme Court determined to be a statement of express preemption. Chelsea Theater Corp. v. City of Burlington, 258 NW2d 372, 373 ((1977)).
[187] A decade later, in an opinion requested by then Senator Johnie Hammond, the Iowa attorney general observed that in another context the legislature had “expressed its intent to preempt with unmistakable clarity” when it prohibited local governments from making any law, regulation, or ordinance “‘relating to obscenity.’” 2000 WL 33258478, Docket No. 00-11-5 (Nov. 14, 2000). See Chelsea Theater Corp. v. City of Burlington, 258 NW2d 372, 373 (Iowa 1977).
of concerns expressed by C&B memo, would this language take care of our concerns? Does it raise any new red flags?"  Garrison’s proposal tacked on to the House bill’s single sentence (“Enforcement of this chapter shall be implemented in an equitable manner throughout the state”) the following new text: “For the purpose of the uniform application and equitable enforcement of state and local laws and regulations, this chapter shall supersede any law or regulation which is inconsistent with or conflicts with the provisions of this chapter.” (In 2004, shortly before his death from cancer, Garrison, lobbying for Tobacco-Free Iowa, stated with regard to the enactment of Code section 142B at a House Local Government subcommittee hearing on a bill to repeal local preemption that “I had a few things to do with some of the amendments adopted at that time, some of which I regret.”) Undoubtedly it was considerably weaker than the version Sidak had proposed. A handwritten notation on the fax offered this criticism: “1) Don’t advise. Would not necessarily include vending & sales & distribution. 2) Iowa constitution already says this - could pass something tougher - need word preempt vague - depends.” Since Garrison’s draft was, with minor exceptions that did not alter the meaning, ultimately embodied in the bill that the legislature passed and that remained in the Iowa Code until 2008, this attack on the proposal’s fecklessness by agents of preemption’s beneficiaries will be crucially important in evaluating the litigation over the scope of the provision a dozen years later.
On February 12, Hannon failed to persuade her own Human Resources Committee to recommend a Senate study bill, supported by the Iowa Medical Society, that would have raised the legal age for buying cigarettes and other tobacco products to 21 as well as required that cigarette vending machines be supervised by someone over 21 in order to prevent minors from using them. The bill would also have prescribed a fine and/or imprisonment for those who provided minors with tobacco. The position that Senator Riordan took on the bill suggests why chairwoman Hannon might have had her doubts about his being an anti-tobacco stalwart: he opposed the bill on the grounds that “it would be inconsistent to prohibit the purchase of tobacco by young adults who are legally old enough to join the military, marry and enter into contracts.” First-term Republican Senator Mark Hagerla, a right-wing, pro-business grocery store owner, opposed the bill because, lacking enforcement provisions, it “would do nothing to change the smoking habits of young people.”

Three days later, in a comprehensive overview of “proactive plans” to regional vice presidents for a February 22 policy committee meeting, Malmgren, the head of TI State Activities, reproduced the Midwest region’s rather colorless

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194 State of Iowa: 1990: Journal of the Senate: 1990 Regular Session Seventy-Third General Assembly 1:348 (SSB 2205, by Hannon, Sturgeon, and Corning) (Feb. 5); Human Resources Committee Minutes (Feb. 12, 1990), SHSI DM (information supplied by Meaghan McCarthy, email (June 4, 2007)). According to the Legislative Services Agency, study bills as we know them today originated in 1989. Before that, there were extremely few of them and they were such informal documents that they were considered ‘throwaway’ ephemeral items with no lasting value to anyone. Supposedly, they were ‘formalized’ in 1989 in response to the public’s perception that lobbyists were writing most of the bills produced by the legislature—this process apparently provided some proof that the legislators were, in fact, conceiving their own legislation.” Email from Mandy Easter, Law Librarian, State Library of Iowa, Law Library (June 6, 2007).

195 Email from Beverly Hannon to Marc Linder (May 29, 2007).

and minimalist report that: “Attempts will be made to amend bill to clarify local preemption clause.”\(^{197}\) If the cigarette companies’ expectation was that that attempt would be made at the February 21 Senate Human Resources Committee meeting, at which H.F. 209 was discussed, their lobbyists’ intelligence reports let them down. Though his vote in favor of the bill would not have pleased the tobacco companies, the admonition that Riordan delivered to the committee would have consoled them. Warning his colleagues about “strong public opposition, particularly among small-town cafe and business operators,” Riordan declared that: “This is really big out there.... They are upset that Big Brother is stepping in on them again.” Hagerla asserted that it was “senseless to expand the 1987 act because it has gone virtually unenforced. ‘It’s a worthless piece of paper....’”\(^{198}\) By a vote of 10 to 2, the committee then recommended passage of H.F. 209, proposing only an amendment of the provision dealing with vending machines.\(^{199}\) The two Nays were cast by Julia Gentleman, whose anti-state-intervention position is documented later, and Hagerla. In updating headquarters on the bill’s progress Nelson appeared to be surprised or unsettled that: “Our preemption language wasn’t added. We are consulting with TI Counsel Chuck Wasker.”\(^{200}\) In contrast, the R. J. Reynolds weekly report was not concerned that no attempt had been made in committee to strengthen the House’s preemption language; implementation of that plan, Marshall knowingly added, would take place during Senate floor debate,\(^{201}\) which began three weeks later.

No sooner had Senator Sturgeon, the floor manager, offered the Human Resources Committee bill on March 14 than the Senate’s most vociferous

\(^{197}\) Kurt Malmgren to Regional Vice Presidents, Re: Proactive Plans Updates (Feb. 15, 1990), Bates No. T153762244/53.


\(^{199}\) State of Iowa: 1990: Journal of the Senate: 1990 Regular Session Seventy-Third General Assembly 1:669 (Feb. 21); Thomas Fogarty, “Restaurant Smoking Bill OK’d by Panel,” Des Moines Register, Feb. 22, 1990 (2A:2-4). The amendment deleted the provision punishing cigarette vendors. State of Iowa: 1990: Journal of the Senate: 1990 Regular Session Seventy-Third General Assembly 2:1946-47 (S-5183). The minutes mentioned only an amendment by Senator Michael Connolly, which as unanimously amended by an amendment by Sturgeon passed by a vote of 10 to 2 (Taylor and Bruner voting Nay), without alluding to its substance. Human Resources Committee Minutes (Feb. 21, 1990), SHSI DM.

\(^{200}\) Dan Nelson to George Minshew, Action-Trac: Iowa HF 209 (Feb. 6 and 8, 1990), Bates No. T128751244/5.

\(^{201}\) M. Hurst Marshall to Roger Mozingo, Weekly Report Region IV, at 1 (Feb. 28, 1990), Bates No. 507628547.
opponent of smoking restrictions, Joseph Coleman, received unanimous consent that action on the bill be deferred. Two amendments filed that day are of especial interest. Republican Minority Leader Calvin Hultman—who by June left the Senate to become Iowa counsel to Philip Morris—together with Coleman and three other Democrats and two Republicans filed an amendment that merged the two that Sidak and Garrison, respectively, had drafted a month earlier for TI and Reynolds. It weakened the former by narrowing the capacious scope of “relating to” by limiting it to the latter’s universe of “inconsistent” laws and regulations. It now read:

In order to provide uniform application of this chapter and chapter 98A relating to the regulation of cigarettes, the imposition of tobacco taxes, and the enforcement of smoking prohibitions, this chapter and chapter 98A shall preempt all inconsistent laws and regulations of political subdivisions of this state relating to the consumption, sale, distribution, or use of tobacco and tobacco products. Any laws or regulations of political subdivisions of this state, whether or not enacted prior to July 1, 1990, which are inconsistent with the provisions of this chapter or chapter 98A, are void.

Imposing the additional requirement of inconsistency to trigger preemption created wiggle room for local action that might not have met the tobacco companies’ expectations, but may well have been necessary to secure a legislative majority for the provision. On the other hand, retention of “preempt” fulfilled one of Sidak’s desiderata.

More important than this formal filing was Wasker’s behind-the-scenes activity. In his daily update for March 14 to headquarters, Nelson reported that the lobbyist “has sponsors lined up for a floor amendment on preemption and has counted 28 votes in support.” With two more votes than required for passage the game seemed to be over before it had ever begun, but it was complicated by yet another iteration of the aforementioned ambivalence in the cigarette company strategy: “Wasker is checking with Lobbyists from member companies on the

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202 George Kinley (D), Richard Drake (R), Joe Welsh (D) Don Gettings (D), Joseph Coleman (D), Dale Tieden (R). State of Iowa: 1990: Journal of the Senate: 1990 Regular Session Seventy-Third General Assembly 1:1078 (Mar. 14) (S-5490). Kinley, Drake, Welsh, and Coleman were smokers. Email from Beverly Hannon (Mar. 11, 2007). Hultman and Welsh were also the only two senators who the previous fall had appeared on the legislative panel of the Iowa Association of Candy and Tobacco Distributors annual meeting in Des Moines. Bates No. 94136113/28.

question of whether to amend HF 209 or to kill it outright.*204

The other amendment was filed by Senator Julia Gentleman (a generally pro-business Des Moines Republican who, three weeks earlier, had cast one of the two no votes on H.F. 209 in committee) to amend the Iowa Code provision on the Legislative Council thus: “The council shall recommend that the senate and house rules shall provide for a prohibition of smoking in the chambers and committee rooms of the senate and house.”205 The basis for Gentleman’s advocacy of this position is unclear in light of a statement she had made just a year earlier for an oral history interview. When the interviewer pointed out that her district had supported limitations on smoking in public places except in designated areas, she feistily replied:

They did. Well, I think that’s silly. I did not ever support that; I thought that policy could be put in place wherever anybody wanted to do it, and if the public didn’t like it, they could take their business elsewhere. I’m getting more conservative as I get older, and I really don’t like so much government involvement. But then, of course, one of the tenants [sic] of my republican philosophy was that government only does for people that which they cannot do for themselves. And my party seems to have forgotten that. They want to be everywhere, even into your bedroom.206

Whether Gentleman believed that non-smoking senators who for years had not wanted to be exposed to secondhand tobacco smoke, but whose smoking leadership had refused to ban smoking “could take their business elsewhere” she did not say. Comments she made later, however, revealed that her amendment was merely designed as a provocation to bring to legislators’ attention what they were imposing on the world outside the statehouse.207

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206 “A Political Dialogue: Iowa’s Women Legislators,” Box 2, Folder: Transcripts: Julia Gentleman at 44 (Jan 29, 1989), in IWA.

207 In an interview years later Gentleman asserted that she had filed the amendment out of “fairness”—if the prohibition was being imposed elsewhere, why not in the legislature? When asked whether she therefore hoped that it would not be imposed in either setting, she replied that she was not interested in such silly matters, but rather in such important issues as war and “choice”; when asked whether 450,000 deaths annually in the United States
When Senate consideration of H.F. 209 resumed on March 15, Hultman moved the adoption of his (and Coleman’s) industry amendment striking the House provisions imposing sharper restrictions on cigarette vending machines. Sturgeon pleaded for retention of the $500 penalty (and revocation for a second violation) on the grounds that vending machines gave junior high and high schools “‘ready access to cigarettes.’” In addition, Davenport Democrat Pat Deluhery pointed out, cigarette advertising aimed at minors, which he called a “‘disgrace,’” reinforced the temptation of vending machines. (However, Deluhery apparently did not regard secondhand smoke exposure in restaurants as disgraceful: four days later he voted to exclude them from coverage.) Republican Richard Drake, a heavy smoker and reliable cigarette company vote, fended off these arguments by asserting that the $500 penalty was too high and “‘out of line’” with the fine for selling liquor to minors. In the end, the cigarette oligopoly succeeded in securing a 26 to 19 majority for Hultman’s amendment; though not party-line, the vote nevertheless revealed a difference: Democrats were almost evenly divided (voting 14 to 13 in favor), while two-thirds of Republican toed the tobacco line. Hultman then raised the point of order that Gentleman’s amendment was not germane and the chair, Lieutenant Governor Jo Ann Zimmerman, ruled the latter out of order. When, in turn, Hultman offered his preemption amendment, it died by the same procedural sword that Hultman had just wielded against Gentleman’s. The quality of argument deployed by

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the bill’s fiercest opponents can be gauged by the comment by Jack Rife, who, after referring to himself and his 14 smoking colleagues as “‘us addicted senators,’” called peanut butter sandwiches “‘a very toxic substance.’” Senator Joseph Welsh, a another reliable vote for the tobacco industry, then received unanimous consent to defer action on the bill. In his update to headquarters on the day’s proceedings on H.F. 209, TI Midwest regional vice president Nelson, after pointing out that the lieutenant governor, who had been presiding, was “‘a health care professional,’” explained Welsh’s parliamentary move: TI’s and company lobbyists had “‘arranged for final passage to be deferred so that the preemption amendment could be re-drafted in a germane form.’”

Undaunted, four days later, Hultman, Coleman, and four of the five colleagues who had offered the previous amendment filed a somewhat less sweeping version of the preemption amendment (which also deleted the application to the cigarette sales chapter of the Code): “For the purpose of equitable and uniform implementation, application, and enforcement of state and local laws and regulations, the provisions of this chapter shall supersede any local law or regulation which is inconsistent with or conflicts with the provisions of this chapter.” The adoption, virtually verbatim, of Garrison’s draft embodying the alternative requirement of local action in conflict with state law removed Iowa’s preemption standard even further from TI’s ideal; likewise, the deletion of “preempt” also weakened the provision. This version was thus fully subject to the aforementioned anonymous inside criticism that it added no limitations not already contained in the constitutional home rule article. (This weakness would later reemerge to haunt a Philip Morris-inspired challenged to the validity of a city ordinance—but only until the Iowa Supreme Court helpfully evaded the problem.) In the event, this time preemption secured a 25 to 20 majority, Democratic Majority Leader and future tobacco industry lobbyist Hutchins joining forces with future Philip Morris lobbyist Hultman. Though not completely along party lines, the vote again revealed a difference: whereas the Democrats split evenly (14 to 14), 11 of 17 or almost two-thirds of Republicans

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215 “Debate on Smoking Limit Draws in Other Topics,” CRG, Mar. 16, 1990 (9B:3-5 at 4).
219 See below ch. 33.
voted for cigarette companies’ highest priority.220

This victory was just one in a long succession that undergirded the image offered by former (smoking) Democratic Majority Leader and then tobacco industry lobbyist Lowell Junkins of Coleman and others as having the power and the cigarette in their hands.221 That future Democratic Majority Leader and anti-prohibitionist Wally Horn voted with them nourished Hannon’s judgment that: “The senators seemed very beholden to tobacco interests, even some who didn’t smoke.”222 The preemption amendment was no stealth clause: the source of the pressure to prevent local communities from enacting stronger measures was publicly known. As Democratic Senator Mike Connolly summed it up: “There is no question where this amendment is coming from... The tobacco lobby out there is flexing its muscle.”223 In this sense, then, although Iowa was no exception to the general finding that in the 1990s “the tobacco lobby maintains a...far flung political presence, which is deeply entrenched in all states, monitoring every state government with respect to anything that impacts tobacco use and the tobacco industry,” the lobby in Iowa was definitely not “virtually invisible....”224 To be sure, contributing money to legislators’ campaigns that could make up a significant proportion of their total cost was not the only means available to the cigarette companies for acquiring legislative quid pro quo’s. Many members traveled to the annual meeting of the National Conference of State Legislators, at which cigarette companies offered lavish entertainment and side excursions.225 As a Cedar Rapids physician pointed out a few months after the end of the session about the 1990 meeting in Nashville:

This gala affair is a forum for special-interest groups, the largest of which is the tobacco lobby....
Our elected state senators continue to allow the use of tobacco products in the Senate offices and chambers despite numerous complaints. Perhaps insight to their reasons for opposition may be found at the Philip Morris breakfast to be held at the National Council meeting. Former Iowa Sen. Cal Hultman will be a host for Philip Morris at that event.

As a physician caring for numerous patients dying due to the ravages of tobacco smoke, I hope local senators would spend “equal time” in my office to receive an “education” about tobacco products to balance that which the tobacco companies will present in Nashville.

Immediately after the preemption vote, Cedar Rapids Democrat Richard Running, a former smoker, offered an amendment from the floor to strike even the partial inclusion of restaurants. Running appeared, based on his floor remarks as reported in the Register, to be a market-knows-bester, arguing that “restaurants have done a good job of voluntarily setting aside non-smoking areas and the Senate should not dictate to them” because he believed that “we are coming down too hard on an important sector of the economy.” His real motivations for filing the amendment, as he explained in an interview 17 years later, were more complex and less pedestrian. Running, who was Director of the Iowa Workforce Development from 1999 to 2006 (when the governor requested his resignation in the wake of a scandal in his agency) after having been a state legislator from 1981 to 1995 and a U.S. Department of Labor regional administrator in Kansas City from 1995 to 1999, stated that one basis for his amendment had been his sympathy for restaurant owners engendered by his parents’ ownership of a restaurant in Wisconsin. More important, however, had been the fact that he had “acquiesced” in the lobbying pressure that beverage and hospitality businesses in Cedar Rapids had brought to bear on him to exclude restaurants from the bill. In particular, he singled out the Hawkeye Area Licensed Beverage Association. In retrospect he insisted that, absent these specific influences, he would not have filed the amendment. Nevertheless, his

226Dean Gesme, M.D., “Cigarette Lobby,” CRG, Aug. 12, 1990, clipping in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA. Gesme may have received this information from Hannon herself, who had attended several of these meetings. Email from Beverly Hannon to Marc Linder (Mar. 2007).

227Running had stopped smoking ten years earlier when he began his first term in the Iowa House. Telephone interview with ex-Senator Richard Running, Des Moines, IA (May 5, 2007).


229Telephone interview with Richard Running, Des Moines (May 5, 2007). Running

2731
amendment revealed consistence: in 1986, as a House member, he had been one of only 18 Democrats voting against—compared to 41 voting for—the anti-smoking bill that covered only restaurants seating 32 or more persons; and again in 1987 he had been one of only 18 representatives voting against H.F. 79, which, supported by 77 members, would have expanded the coverage of the clean indoor air law to include restaurants with seating for 50 or more persons.

During the Senate floor debate on March 19, 1990, Democrat John Peterson chimed in that “the free enterprise system will solve the problem without government interference.” Having forgotten his majority leader’s aforementioned (inadvertent) insight into the fecklessness of nonsmoking sections, Peterson insisted that: “‘If you non-smokers stop going there, it won’t be long before there is a non-smoking area.’” Hannon’s plaint that the chamber was “‘not interested in good public health policy’” hinted at the hopelessness of the cause. The Senate then adopted the exclusion of restaurants by a non-party-line vote of 26 to 21. In addition to anti-smoking stalwarts such as Hannon and Lloyd-Jones, the losers surprisingly included Hutchins himself. Reacting to the success of the killer amendment, Democrat Al Sturgeon, the bill’s floor manager—appointed by committee chair Hannon probably because he would have fewer problems with the “good ol’ boys” who ran the Senate and made life hard for Hannon, but trusted him—declared: “‘This bill just died of lung cancer.’” Realizing that the

singed out the head of HALBA, David Hammock, who owned the Stadium Lounge in Cedar Rapids, as having pressured him to oppose restaurant coverage. According to the other Democratic senator from Cedar Rapids, Wally Horn, Hammock may have been Running’s campaign manager. Telephone interview with Wally Horn, Cedar Rapids (May 6, 2007).


233State of Iowa: 1990: Journal of the Senate: 1990 Regular Session Seventy-Third General Assembly 1:1178-79 (Mar. 19) (S-5567). Sixteen Democrats and 10 Republicans voted for the amendment, while 13 Democrats and eight Republicans voted Nay. Former Democratic Senate Majority Leader Lowell Junkins, a tobacco industry lobbyist in 1990, explained Hutchins’ vote to exclude restaurants as possibly the result of his ability to count votes and thus to know that since the amendment would pass anyway, he could propitiate some Democrats by voting against exemption. Telephone interview with Lowell Junkins, driving in western Iowa (Apr. 23, 2007).

234Telephone interview with Al Sturgeon, Sioux City (Apr. 28, 2007); email from
House File 209 in 1989-1990: Restaurant Coverage Is Finally Achieved

bill’s supporters lacked the votes to pass it, he asked and received unanimous consent to defer action indefinitely on H.F. 209. (Seventeen years later Sturgeon still remained scathing in his appraisal of the generally conservative and ethically questionable Democratic leaders, many of whom were also “incredibly aggressive smokers,” whose attitude was: “I’m a goddamn smoker and fuck you.”) By 2007 he forgot that he had even been the anti-smoking bill’s floor manager, but he still vividly remembered that the “smoking bastards” had produced smoke so thick in the Senate that “you could get high on the nicotine.” As Marshall interpreted Sturgeon’s decision for Mozingo, after the Senate had “gutted the bill...the sponsor recognized the only provision left was preemption so he pulled the bill from consideration.” Commenting on the Senate’s action that same day, R.J. Reynolds opined that further action that year was “questionable.” Even two weeks later the press was still reporting that the bill “was thought to be dead” after the Senate had stripped out restaurant coverage.

Even more specific but nevertheless more ambiguous was Nelson’s account to his superiors of the proceedings, which presumably derived from Wasker:

The bill postponed indefinitely which means it is not likely to come up again prior to adjournment on March 31, 1990. Prior to postponement action, the bill was amended to include our preemption language which prohibits any local regulations from being more stringent than state law. The Senate also took out the smoking restrictions for restaurants. Basically, the bill was gutted in our favor before being shipped out to pasture.

Apart from the slight exaggeration that the preemption language was the Tobacco Institute’s—in fact, it was less capacious than the provision suggested by


237Telephone interview with Al Sturgeon, Sioux City (Apr. 28, 2007).


239[R. J. Reynolds Tobacco Co.], “1990 Proactive Legislative Opportunities by Category” at 7 (Mar. 19, 1990), Bates No. 507595166/74.


Covington & Burling—Nelson’s analysis left unexplained whether, with the bill’s (apparently definitive) defeat, the maintenance of the status quo of no preemption constituted a victory for the tobacco industry and its favored outcome (since even the strategists never assumed they could secure passage of a stand-alone preemption bill, although at the end of the day on March 19 they in fact had passed such a bill, in which, to be sure, they knew the House would not concur) or merely second-best to preemption at the price of restaurant coverage. 242

An alternative tactical interpretation of Sturgeon’s pulling the bill was also available, though Representative Mary Lundby did not offer it until many years later and then only speculatively: pulling a controversial bill near the end of a session sometimes provides an impetus to create a ground swell of support by signaling constituents and others that backing has to be expressed now or the measure will die. 243

The very next day after Sturgeon’s bill pulling—but nevertheless one day too late—the Register published the remarkable results of an Iowa Poll under the understated front-page headline: “Iowans Favor Smoking Curbs in Restaurants.” Asked whether they favored or opposed a law requiring restaurants to provide non-smoking sections, a “whopping 79 percent of Iowans” said they favored it, while only 18 percent were opposed. Contrary to legislators’ claims that attitudes toward restaurant smoking broke down along an urban-rural divide (with city restaurant owners not “overly resistant” to such a law and small-town cafe owners “staunchly resistant” on behalf of the midwestern tradition of farmers’ congregating daily to drink coffee, gossip, and smoke), the poll found that more than 80 percent of Iowans expressed support for the measure regardless of whether they lived in rural areas or cities with populations above 50,000. In fact, the 85-percent support rate among farmers exceeded that for white-and blue-collar workers. Educational levels (presumably reflecting differential smoking prevalence rates) also revealed some difference: 85 percent of college graduates

242 Majority Leader Hutchins’ statement many years later that he and not Sturgeon had pulled the bill because that is how the legislature works may have embodied the deeper meaning that even if Hutchins had (had) the votes to pass the now otherwise denuded preemption bill, he knew that it was a waste of time to send it back to the House. Telephone interview with Bill Hutchins, Apache Junction, AZ (May 2, 2007). In contrast, ex-Minority Leader Hultman’s later denial that the bill could have passed only with both preemption and restaurant coverage and his speculation that one side or the other might have been able to live with a bill lacking one of the elements appears implausible, as evidenced by Sturgeon’s killing H.F. 209 once it had been gutted into a preemption bill. Telephone interview with Calvin Hultman, West Des Moines (May 19, 2007).

243 Telephone interview with Mary Lundby, on the road near Ames (June 1, 2007).
favored the law compared to 73 percent among those who lacked a high school degree. Finally, age, too, was correlated with varying degrees of support, with more than 90 percent of 18-to-24 year-olds in favor compared to just under 80 percent of those 65 and older.²⁴⁴

Neither the legislative proceedings in Iowa nor the overwhelming majority of Iowans favoring legally imposed nosmoking sections may have been specifically on the minds of the high-ranking Philip Morris executives who, the following day, March 20, met to discuss “Top Secret Operation Rainmaker,” but the developments prompting this new initiative were playing themselves out in Iowa as elsewhere. In response to a question as to what they were trying to accomplish, R. William Murray, the vice chairman of Philip Morris Companies, Inc., noted: “Prevent further deterioration of overall social, legislative, and regulatory climate, and ultimately actually improve the climate for the marketing and use of tobacco products.” Murray viewed the company’s predicament as sufficiently dire that, even “assuming that we are not employing an end game strategy,”²⁴⁵ he discussed possible actions that were irreconcilable with the carefully nurtured profile that a TI vice president had praised just two years earlier: “Many of our current successes are a result of our image as the toughest, non-compromising industry in the country.”²⁴⁶ Among the ways out of the potentially approaching dead-end Murray mentioned: disbanding the Tobacco Institute and replacing it with an “information-oriented” organization that was “not the flat-earth society”; buying a major media outlet such as Knight-Ridder or United Press International; confronting the American Association of Retired People; and the necessity of immediately changing the name of Philip Morris.²⁴⁷ Meanwhile back on planet Earth in Iowa, the cigarette companies and their lobbyist acted as if it were the anti-smoking activists’ game that was approaching its end.

On April 4—after a 16-day hiatus, during which R. J. Reynolds as late as March 29 and April 2 still deemed the whole bill as having been “defeated”²⁴⁸—

²⁴⁸Henry Stokes to Roger Mozingo, Pro-Active Legislative Assessment (Mar. 29, 1990), Bates No. 507627514/5. This assessment was still being circulated on April 2.
just four days before the session ended, Democrat Jack Kibbie called up his motion to reconsider the vote adopting the amendment to remove restaurants from the bill: the basis for rethinking his position was the aforementioned Register poll disclosing that 79 percent of Iowans favored separate sections in restaurants. Most of the ensuing “contentious debate” predictably focused on restaurants. While Kibbie confessed error, Republican Richard Vande Hoef changed his vote because a restaurateur-constituent had expressed support for legally mandated separate sections. Floor manager Sturgeon denied that the bill’s advocates were “‘picking on smokers.... They can smoke their brains out. They just have to smoke in the places they’re supposed to.’” In contrast, Republican Senator Jack Rife, a heavy smoker, continued to resent the “‘infringement on businesses’ rights.’”

(Since Rife was for many years also a strident legislative opponent of severe penalties for drunk driving the lethal impact of which—unlike that of secondhand tobacco smoke—it is impossible for the non-drunk to avoid, his laissez-faire attitude toward smoking was at least consistent, albeit marginally less irrational.) Democrat Alvin Miller intoned the “‘pocketbook will dictate’” dogma, according to which owners would provide whatever customers demanded. Running, the only legislator or lobbyist interviewed years later who could even recall that the bill had died and been revived, reported that between March 19 and April 4 he had received many letters berating him for having excluded coverage of restaurants. In particular he remembered one writer who had expressed the hope that Running would have to eat in smoke for the rest of his life. Oddly, however, these letters were not from his constituents, and Running did not change his vote.

Becki Turner to Roger Mozingo, Pro-Active Legislative Assessment (Apr. 2, 1990), Bates No. 507595158/9.


251 Telephone interview with former Republican Representative and Senator Andy McKean, Anamosa, IA (Apr. 16, 2008).

252 Thomas Fogarty, “Senate Passes a Smoking Rule for Restaurants,” DMR, Apr. 5, 1990 (1A:5, at 2A:2). Oddly, Miller then voted to reconsider and later for the bill as well. Kibbie’s statement many years later that he may have voted to exclude restaurants on March 19 merely in order to be entitled to file the motion to reconsider does not jibe with his contemporaneous statement that the poll published on March 20 had made him see the error of his ways. Telephone interview with Jack Kibbie, Emmetsburg, IA (May 5, 2007).

The motion to reconsider the vote on Running’s amendment to remove restaurant coverage then prevailed by a vote of 29 to 17, after which Running’s motion to (re-)adopt his amendment lost on a non-record roll call by a vote of 20 to 27. Shortly afterwards the Senate passed the whole bill embodying the restored partial restaurant smoking ban and the new preemption provision 37 to 12, with the cigarette companies’ conduit, Hultman, voting yes. Unable to
recall years later why he had voted against reconsideration, Hultman found it plausible that others had changed their votes based on the Iowa Poll results and/or constituent complaints. Wholly implausible, however, was his speculation that Hutchins might have voted for reconsideration because he needed a favor from Sturgeon.  

Back in the House, on April 7, three days before adjournment, Hammond herself moved that the chamber concur in the Senate’s stronger preemption provision. Having adopted it, the House then passed the whole bill by an overwhelming 90 to 5 majority, saddling Iowa with a very weak statewide public smoking prohibitory law (covering some restaurants) whose gaping toothlessness, ultimately meaningless—coverage of restaurants was a price worth paying for preemption. Telephone interview with Lowell Junkins, driving in western Iowa (Apr. 23, 2007). Indeed, Junkins speculated that the tobacco companies could easily have convinced restaurant owners that preemption was vital for them since, regardless of whether the statewide law covered them, preemption would protect them from strong(er) local ordinances. Former Senator Hannon, without recalling the incident, regarded such speculation as in no way fanciful: “I doubt that the poll was the only thing that changed their minds. Something else must have been going on. It’s possible Philip Morris knew about public support for smoking restrictions and decided they’d better take what they could get when they could get it.” Email from Beverly Hannon (Mar. 11, 2007). Another possible resolution of the puzzle is that Hutchins flew to Florida earlier: the Senate recessed from Thursday afternoon March 8 (on account of a major winter storm) until Monday March 12, the beginning of the week in which it took up H.F. 209. Hannon later commented that this chronology made more sense. Email from Beverly Hannon (Mar. 12, 2007).

257 Telephone interview with Calvin Hultman, West Des Moines (May 19, 2007).


259 In a stunningly incompetent piece of legislative history, Tiana Epps-Johnson, Richard Jones, and Stanton Glantz, The Stars Aligned over the Cornfields: Tobacco Industry Political Influence and Tobacco Policy Making in Iowa 1897-2009, at 52 (2009), on http://repositories.cdlib.org/ctcre/tcpmus/IA2009/, falsely assert in the conclusions to their seven-page discussion of the bill that: “Led by Charles Wasker, tobacco interests were able to both remove provisions that would have regulated smoking in restaurants....” See also id., tab. 23 at 51 (showing that restaurants were missing from the final bill). In addition to revealing a failure to follow the proceedings in the House or Senate Journal (which the authors did not cite) or even to understand the session law (which they also did not cite), this breathtaking factual error made clear that the authors had developed no sense of everyday life during the next 18 years in Iowa under the 1990 amendments. The error, which also included ascribing to the House (rather than the Senate) sponsors the pulling of the bill (id. at 51), also precluded the authors from formulating, let alone pursuing, the
holes local governments were thenceforth purportedly prevented from filling.  

Kaleidoscopic Accounts of the Reasons for the Resurrection and Passage of H.F. 209

As in 1987, the number one issue for the industry is the continuing drive by many groups to reduce the social acceptability of smoking. All types of legislation to reduce the opportunity to smoke, coupled with a private business move toward a “smoke free” workplace, is [sic] sending the message to people who enjoy smoking that they will pay a price for their enjoyment. Smokers do not like to receive these uncomfortable social messages on a frequent basis and can be expected to react in various ways. One mode may be feelings of guilt, but another might be hostility toward the forces which are producing the harassment. In any case, the end result is likely to be a cycle where smokers slowly become a shrinking, increasingly embattled minority.

The 1986 report of the Surgeon General which implicated environmental smoke for undesirable health effects in others has produced a significant increase in state level restrictions on smoking. Not since 1975 have so many states passed restrictive laws regarding smoking. How it came about that H.F. 209 was resurrected from the bill morgue remains a puzzle—except to Hultman, who years later viewed that framework as “reading too much into it.” Without offering a concrete counter-analysis, he speculated that reconsideration might simply have been driven by an end-of-session “mentality” pushing legislators just to want to get out of town. When pressed as to how a desire to wrap up the session as quickly as possible could be reconciled with adding a bill back to the agenda that had already been disposed of, Hultman self-contradictorily replied that the majority had wanted it. 

Nelson’s Tobacco Institute update for April 4 failed to problematize the bill’s reappearance at all: he neither remarked on the fact of rebirth nor commented on whether or why passage was better than no bill or why both defeat and passage

interestings and important question of the reasons for the defeat and resurrection of restaurant coverage.

260 On the litigation over the reach of the preemption provision, see below ch. 33.
261 R. N. Ferguson to Dr. E. B. Sanders, Subject: Social and Political Context of Cigarette Sales in the US - 1988, at 1 (July 25, 1988), Bates No. 2021556798. Robert Ferguson was the manager of the analytic research division of Philip Morris; Edward Sanders was associate principal scientist for scientific affairs at Philip Morris.
262 Telephone interview with Calvin Hultman, West Des Moines (May 19, 2007).
could be victories for the cigarette companies.\textsuperscript{263} His silence on the matter may have been a function of the fact that Wasker, as a free-wheeling master lobbyist, often “unilaterally” decided what to do and told Nelson afterwards according to the precept: “I’ll tell you what you need to know when you need to know about it.” This behavior and relationship exasperated Nelson’s hierarchically oriented bosses in Washington, but it proved hard to argue with what they viewed as Wasker’s spectacular successes.\textsuperscript{264}

Exploration of the reasons for the reversal of the bill’s fate is hindered by the fact that, with the partial exception of Senator Running, none of the numerous legislators interviewed 17 years after the events was able to remember that the bill had died, let alone why it had been reanimated, while still others could barely recall the bill’s existence altogether.\textsuperscript{265} Even Running could not remember why his amendment had been defeated on the second vote, but suggested that senators who had voted to exclude restaurants might have received complaints from constituents that had prompted them to change their votes. Much more intriguing to Running, however, was another possibility: hearing during his interview in 2007 about the intense behind-the-scenes campaign that the tobacco industry had conducted on behalf of preemption—of which he said that had known nothing in 1990—he speculated that tobacco lobbyists might have pressured senators to vote for restaurant coverage on the second vote if that was the only way to secure enactment of preemption. As for himself, Running insisted that despite not having changed his vote out of loyalty to those who had initially lobbied him about restaurants, he had also not put up a fight because even at that time he had not been wholeheartedly in favor of complete freedom to smoke in public (and by


\textsuperscript{264}Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007). In addition, Wasker’s pre-existing friendship with TI President Samuel Chilcote (dating back to Chilcote’s employment at and Wasker’s lobbying for the Distilled Spirits Council of the United States) enabled him to take liberties that other lobbyists might not have gotten away with. \textit{Id}.

\textsuperscript{265}For example, neither Ann Wright, who had lobbied on the bill for the Cancer Society and prided herself on her memory for details, nor Carol Sipfle, her counterpart at the Lung Association, remembered the death and rebirth. Telephone interview with Ann Wright, Ankeny (May 4, 2007); email from Carol Sipfle (May 8, 2007). Senator Joy Corning, who the following year became lieutenant governor, barely retained any memory of the bill at all. Telephone interview with Joy Corning, Des Moines (June 3, 2007).
2007 he would have voted differently).  

Former Senate Democratic Majority Leader Lowell Junkins, who was a tobacco industry (TILMC) lobbyist in 1990, generally agreed that since the absence of preemption was a “real nightmare” even for Philip Morris, which lacked the resources to lobby every local government in the country that might consider anti-smoking ordinances, it stood to reason that the tobacco industry pressured the restaurant association to acquiesce in coverage as the quid pro quo for preemption. To the extent that the restaurant industry resisted and lost this battle, the defeat was softened by virtue of taking place over a period of time.

It is noteworthy, as a matter of the quality of legislative policy formation in Iowa, that Senate Majority Leader Bill Hutchins, who was a crucial figure in the passage of the state’s anti-public smoking law, even 17 years later erroneously believed that alcohol caused more deaths in the United States than tobacco, when in fact the latter causes five times as many deaths as the former. Whether this ignorance was a prerequisite for or a consequence of his post-senatorial career as R.J. Reynolds Tobacco’s Iowa lobbyist is unclear. Hutchins stated in an interview in 2007 that he neither recalled how it came about that the bill had been revived nor knew how (or whether) the tobacco companies had persuaded restaurant owners between March 19 and April 4 to abandon their resistance to coverage for the sake of preemption. However, he was clear in 2007 that some time before 1990 he had informed restaurant-type businesses that coverage would eventually come and that he would give them a couple of years to make arrangements to comply with the law. (His claim that such owners needed lead time in order to do the requisite “pretty extensive remodeling” contradicted not

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266 Telephone interview with Running (May 5, 2007).
267 Telephone interview with Lowell Junkins, on the road somewhere in Iowa (Apr. 23, 2007).
268 Telephone interview with Bill Hutchins, Apache Junction, AZ (May 2, 2007).
270 Without specification Hutchins noted that the tobacco companies had “made some mistakes.” Telephone interview with Bill Hutchins, Apache Junction, AZ (May 2, 2007). A decade earlier he had told a reporter that “[t]heir public good,” but offered only a “No comment” in response to the question of whether he supported the firm—which had paid him $40,000 in 1995—“out of conviction or simply for the money...” Martin Kuz, “Snuffed Out,” Cityview, Apr. 10, 1996, at 8 (copy in Johnie Hammond Papers, Box 6, Folder: Legislative Press, IWA).
only reality but his own aforementioned insight that they could comply with the feckless law by doing as little as putting a no-smoking sign on one table.) Hutchins also remembered with absolute certainty that he would never have permitted local governments to gain control over smoking regulations (thus overlooking the fact that from 1978 until 1990 the Iowa clean indoor air law not only did not prohibit local control, but expressly permitted it). He based his opposition to local control on his feeling that local officials were “pretty irresponsible.” Revealingly, when asked for examples, the only one he was able to offer to illustrate his “lack of respect” for them referred to what he regarded as unfair treatment that a local government had meted out to him personally in a business deal in which he had engaged while a legislator. If Hutchins accurately reported this idiosyncratic reason for insisting on preemption, it constituted a basis for his engagement on the issue independently of pressure or encouragement emanating from the tobacco industry.

Whether in fact Hutchins accurately portrayed his position on the smoking bill is unclear. Doubt on this score is generated by his incorrect statement that R.J. Reynolds Tobacco Company never gave campaign contributions to Iowa state legislators in general and that he specifically never received campaign contributions from that company. When the interviewer began reading to him the names of his fellow legislators who had received such contributions from Reynolds during the Fall 1990 campaign period and the sums given, starting with the smallest amounts and obviously working upwards, Hutchins interjected: “Did I get any?”271 Yes he did: the $1,000 that the RJR Political Action Committee/RJR Nabisco, Inc. gave Hutchins for Senate on October 12, 1990 was the highest amount that it reported to the Federal Election Committee for any state legislator in its pre-general election report. The amounts given were: Sen. Bill Hutchins (Dem. Majority Leader, $1,000), Sen. Jack Rife (Rep. Minority Leader, $500), Sen. Joseph Coleman ($500), Sen. John Jensen (Rep. Assistant Minority Leader, $1,000), Rep. Mary Lundby (Rep. Assistant Minority Leader, $300), Rep. Harold Van Maanen (Rep. Minority Leader, $300), and Rep. Bob Arnould (Dem. Majority Leader, $300).272 All of these legislators were in formal

271 Telephone interview with Bill Hutchins, Apache Junction, AZ (May 2, 2007).
272 Report of Receipts and Disbursements, For Other Than an Authorized Committee, RJR Political Action Committee; RJR Nabisco, Inc. (Covering Oct. 1-17, 1990), Bates No. 507921438/64. This was the only tobacco industry FEC reporting form for this period showing contributions to Iowa state legislators found on tobacco industry documents websites. For an internal company document showing the same information, see RJRT PAC Contributions to Candidates 1990 - 1996 [sic] Election Cycle (Jan. 2, 1991), in RJRT State Government Relations 1991 Action Plan and Budget (Nov. 15, 1990), Bates No.
leadership in 1990 and/or 1991 except Coleman, who was, nevertheless, a powerful figure.

The Iowa contributions were part of Reynolds’ nationwide program to support state legislators: after having contributed $23,300 to 107 state candidates in North Carolina and $16,000 to four in Texas during the 1987-88 election cycle, it tentatively budgeted $150,000 in RJR PAC funds for the 1989-90 cycle, Iowa being one of eight states in which it was considering establishing separate RJR state PACs. In 1991-92, RJR PAC contributed another $3,130 to 24 Iowa state

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legislative campaigns equally divided between Democrats and Republicans, ranging from a high of $215 to Senator Boswell to a low of $65 to Hutchins. Recipients included heavy smokers and/or prominent tobacco industry advocates such as Bisignano, Horn, Iverson, Lundby, McLaren, and Rife, the last four each receiving $200.  Of the eight senatorial recipients who voted on the Hultman-Coleman preemption amendment on March 19, 1990, seven (Boswell, Hutchins, Fraise, Hagerla, Horn, Kibbie, and Rife) voted for it, while only Majority Whip Gronstal (a heavy smoker who received $200) opposed it. Similarly, on Running’s amendment to strike restaurant coverage, six voted for it, while only Gronstal and Hutchins opposed it. In addition, Philip Morris’s PHIL-PAC contributed $2,600 to 21 Iowa legislators as well as to the Iowa Democratic Party’s Truman Fund, which funneled money to legislative candidates.275 (When told of these surprisingly small sums, former Governor Branstad laughingly opined: “They sold out pretty cheap.” By the same token, he stressed that money was not the only source of the tobacco industry’s power. Outcomes in the Senate were often simply a function of the fact that the leaders smoked and that many senators were too intimidated by leadership to risk good committee assignments and other benefits by voting against its pro-tobacco positions.)276

in 37 other states. Id., Bates No. 507639332/44-45.

274 Data furnished by Iowa Ethics and Campaign Disclosure Board (Apr. 4, 2008). The recipient of one $100 contribution was not an individual legislator, but the “Iowa 2000 Committee,” which was a Republican entity. The RJR PAC contributions for 1991-92 are, for reasons unknown, the only out-of-state tobacco PAC data that the IECDB did not (unlawfully) “purge.” Telephone interview with Karen Hudson, Des Moines (IECDB, Administration/Electronic Filing) (Apr. 4, 2008). For further use of these data, see below ch. 20.

275 Jonathan Roos, “Bill Curbs Cigarette Sales to Kids,” DMR, Mar. 28, 1991 (2) (NewsBank). This contemporaneous newspaper article, which was based on examination of records on file at the time at the Iowa Campaign Finance Disclosure Commission, also confirmed the RJRT PAC’s $3,900 in contributions; unfortunately, it did not identify the 21 legislators. These records are among those unlawfully destroyed by the agency. As small as the PHIL-PAC contributions to individual legislators were, former Iowa State Senator Milo Colton has interpreted them to be signals from lobbyists that the legislators should approach them for more during the next election cycle. Email from Milo Colton to Marc Linder (May 29, 2007). Steve Conway, who in 1990 was a Democratic party caucus staffer assigned to Hannon’s Senate Human Resources Committee and in 2007 was special assistant to the Senate president, was “really surprised” by how little money such a powerful lobby had contributed, having imagined that it would have given several times more. Telephone interview with Steve Conway, West Des Moines (June 4, 2007).

276 Telephone interview with Terry Branstad, Des Moines (July 2, 2007).
Charles Wasker, the tobacco industry’s much ballyhooed lobbyist, offered a much different perspective on H.F. 209’s tortuous career. Still exercising full bragging and proprietary rights 17 years after the events, he asserted that once he had gotten through with Hammond’s anti-tobacco bill in the Senate, it was “my bill.” The reason, he insisted, for H.F. 209’s death in March was Majority Leader Hutchins’ mistaken belief that it was anti-tobacco; but when Wasker told Hutchins shortly before the end of the session that he (Wasker) liked the bill, Hutchins brought it back. After noting that at that point he (Wasker) considered preemption more important than restaurant coverage, he triumphantly responded to the question as to whether the restaurant owners agreed with that assessment: “I didn’t ask them.”

This latter boast, as one Democratic caucus staffer put it later, can also be interpreted as expressing the (empirically correct) judgment that in Iowa the tobacco lobby was simply stronger than the restaurant lobby. If accurate, Wasker’s account would explain how the bill, despite not even being among the top 15 end-of-session priorities of the Democratic party caucus, was able to reemerge for floor consideration. However, one major flaw in Wasker’s logic is that Hutchins’ view of the bill after restaurants had been exempted was not mistaken at all: since the cigarette companies’ highest priority was preemption, and preemption was politically impossible without restaurant coverage as a quid pro quo, Hutchins may have correctly perceived that excluding restaurants would not be in the tobacco industry’s interest. In other words, some pro-tobacco senators (for example, Coleman, Horn, Hultman, and Rife) might have considered the result of restaurant exemption to be the tobacco companies’ dream-come-true of a free-standing preemption bill and thus voted for it, but Daniel Nelson speculatively interpreted their votes (many years later) as a function of their inability to understand the convoluted logic of the firms’ position and of the impracticability of informing them of the right way to vote on the Senate floor in the heat of the battle. As to how so crafty a politician and leader as Hutchins could possibly have mishandled this vote, one close observer found it thoroughly plausible that a majority leader could not pay close attention to three thousand bills and, instead, had to rely on committee chairs and floor

277 Telephone interview with Charles Wasker, Des Moines (May 14, 2007).
278 Telephone interview with Steve Conway, West Des Moines (June 4, 2007).
279 Telephone interview with Dennis Harbaugh, Waterloo (June 3, 2007). According to Harbaugh, who had been the director of the Democratic caucus in 1990, if a bill that had already died was not a caucus priority toward the end of the session, practically speaking it could return only if it was some senator’s individual priority and that senator was able to arrange a deal involving some other piece of legislation.
280 Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007).
managers to give him the appropriate signal, which, in this case Sturgeon had done.\textsuperscript{281}

The mystery surrounding the rebirth of the bill is deepened by information provided by Democrat Wally Horn, who had been an assistant majority leader in 1990. Although many years later he, too, could not recall that the bill had died or that he had changed his vote, Horn did remember with absolute certainty that Majority Leader Hutchins had wanted the bill killed. Horn, for his part, felt exactly the same way as Hutchins (whom he replaced as majority leader in 1993): though a nonsmoker, Horn, perceiving smoking “almost like a right,” was willing to do anything to kill the bill so that people could continue to have the right to smoke wherever they wanted to. From this perspective, in 2007 he speculatively interpreted Hutchins’ vote for restaurant coverage on March 19 as an effort to make the bill too radical to pass. But when confronted with the illogic of voting to kill a bill indirectly when Hutchins could have killed it directly by voting with Horn and the majority who were already doing so, Horn had no response. And indeed, he was “baffled” by his own change of vote, which he could also interpret only as an effort to kill the bill, though he could no longer explain how. Horn, in response to a question, denied both that Hutchins had ever explained to him before the second vote that the tobacco companies had changed their strategy and now wanted the bill passed with restaurant coverage so that they could secure the local preemption that was their highest priority and that he personally would have changed his vote in reaction to such intelligence (though other senators might have done so). He did, however, slyly volunteer that if Hutchins had, instead, informed him that the bill with restaurant coverage and preemption was the weakest measure—that is, the least restrictive of smokers’ freedom to smoke—that could be passed, he would have changed his vote.\textsuperscript{282}

Horn’s denials and memory lapses to the contrary notwithstanding, Lawrence Pope, a former Republican House Majority Leader (1979-82) and smokeless tobacco lobbyist (1995-2000), who throughout was a law professor at Drake University in Des Moines teaching lobbying, characterized Horn as a tobacco industry supporter whose vote change had to be interpreted as clear evidence that word must have reached him one way or another that the industry wanted to trade preemption for restaurant coverage. Indeed, based on his knowledge of them and

\textsuperscript{281}Telephone interview with Steve Conway, West Des Moines (June 4, 2007).

\textsuperscript{282}Telephone interview with Wally Horn, Cedar Rapids (May 6, 2007). Horn was still a senator at the time of the interview. Passing no bill at all might have appeared to restrict smokers’ freedom even less, but, as noted earlier, in the absence of preemption, cities could have passed ordinances that would have significantly restricted smoking in restaurants.
their support for the tobacco industry, Pope judged the seven other vote-changers similarly.\textsuperscript{283} Ex-Senator Sturgeon frankly speculated to the same effect that by April the cigarette companies must have told their people in the legislature to pass the bill with restaurants included.\textsuperscript{284}

The then lobbyist for the Iowa Restaurant Association, Mark Truesdell, while recalling that passage had been a defeat for his client, speculated that some horse-trading wholly extraneous to the content of the anti-smoking bill might have prompted some senators to change their votes. He also conjectured that during the two-week interim anti-smoking constituents might have expressed their displeasure to senators who had voted against restaurant coverage, prompting some to change their vote. At the same time he distinctly recalled that no tobacco lobbyist (including George Wilson and Charles Wasker) had ever suggested to him that since preemption was more important, restaurant owners should acquiesce in coverage. Moreover, apart from any question of tobacco industry advocacy, Truesdell insisted that owners would have rejected the argument that without preemption restaurants would have been exposed to the risk of stricter local ordinances because it was merely a distant “bogeyman,” whereas statewide coverage was certain reality.\textsuperscript{285} This view was independently corroborated by the executive director of the Iowa Restaurant Association between 1982 and 1995, Lester Davis, who maintained that in 1990 owners did not regard the risk of the passage of ordinances as significant because the anti-smoking movement had not yet become strong enough to make the threat credible. And as for coverage itself, he argued that owners—even ones who had already voluntarily made their restaurants nosmoking without any loss in business—had simply not wanted the government telling them what to do.\textsuperscript{286}

Though Daniel Nelson, TI’s Midwest vice president in 1990, was familiar

\textsuperscript{283}Telephone interview with Lawrence Pope, Des Moines (May 11, 2007).

\textsuperscript{284}Telephone interview with Al Sturgeon, Sioux City (Apr. 28, 2007).

\textsuperscript{285}Telephone interview with Mark Truesdell, Des Moines (May 4, 2007). Neither Michael Brozek, the Tobacco Institute’s Midwest regional vice president until 1988, nor his successor, Daniel Nelson, credited the assertion that no tobacco lobbyist spoke to the Iowa Restaurant Association in 1990 about the overriding importance of preemption. Telephone interview with Michael Brozek, Madison, WI (June 5, 2007); telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007).

\textsuperscript{286}Telephone interview with Lester Davis, Johnston, IA (May 3, 2007). Unfortunately (and surprisingly), the April to September, 1990, issues of the Iowa Association of Restaurants newsletter, \textit{Appetizer}, contained, according to its current president and CEO, nothing on legislative issues at all. Email from Doni DeNucci to Marc Linder (June 7, 2007).
with this latter “1,000-percenter” attitude and confirmed IRBA’s resistance to coverage, he also recalled that it had begun changing its attitude at some point once it came to see the wisdom of the view that demands for smoke-free restaurants were a problem that was not going to go away. He speculated that this change might have been facilitated by increased financial and education participation by Philip Morris and R. J. Reynolds Tobacco in the Association.287

As with Horn, Pope, who had participated in strategy meetings with other tobacco lobbyists, was skeptical of Truesdell’s and Davis’s recollections. Although he deemed it possible that the final deal to cover restaurants and include preemption might have been “cut” without the participation of the association, he considered it implausible that the restaurant business representatives would have been unaware at the time of the “machinations” going on. Moreover, he found it hard to believe that they would not have recognized the extraordinary importance to them of preemption: after all, he reasoned, if, for example, the Des Moines suburb of Urbandale, in the absence of preemption, had passed an ordinance prohibiting smoking in restaurants, it would have “killed” the business there.288

Post-Mortems

Hammond’s self-congratulatory gloss that the amended law meant that nonsmokers “can have a meal without having to choke and cough”289 was so at variance with experience and the laws of physics that it did not even have to await empirical refutation. The same day that the governor signed the bill,290 Lester Davis, the executive director of the Iowa Restaurant and Beverage Association, who estimated that fewer than one-third of restaurants in Iowa voluntarily provided separate seating, praised it for not having “a whole lot of teeth....” The law’s lack of any directives as to apportioning smoking and nosmoking space gave owners broad discretion: “Some will just put in two or three tables and say that’s their no-smoking section....” Consequently, the association opposed the bill, but not so strongly as “tougher” bills debated in earlier years: “It’s not as bad as it could have been....” The law’s glaring toothlessness was not merely substantive in nature: its enforcement may have left everything to be desired. The legislative lobbyist for the Iowa Department of Inspections and Appeals, which

287Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007).
288Telephone interview with Lawrence Pope, Des Moines (May 11, 2007).
2901990 Iowa Laws ch. 1189 at 265.
was tasked with checking restaurants for the presence of the required signs designating smoking areas, observed that even if inspectors referred violations to county attorneys, state officials did not know whether the latter were authorized to take owners to court. Moreover, it was also an open question as to whether prosecution was even “‘something a county attorney is going to want to mess with.’”\textsuperscript{291} Precisely what gratified R. J. Reynolds about the bill—its failure to specify the size of the non-smoking areas that had to be set aside\textsuperscript{292}—prompted the Register’s editor to excoriate the “wimpy” “restaurant smoking” law as creating merely “piddling little restrictions,” which did not even extend to specifying what proportion of the space had to reserved for nonsmokers.\textsuperscript{293}

The question as to whether the trade-off promoted public health still preoccupied the American Cancer Society’s lobbyist 16 years later. Ann Wright, noting that the organization had opposed preemption in any form, admitted that in retrospect it was hard to know whether it would have been better to have passed no bill at all.\textsuperscript{294} Unlike the situation in some other states,\textsuperscript{295} however, the cigarette companies’ preemption initiative in Iowa did not split the (to be sure, rather weak) anti-tobacco coalition over whether to push for restaurant coverage at the price of acquiescing in preemption. Even former Governor Terry Branstad mused in retrospect that perhaps he should have vetoed the bill because the local preemption provision outweighed the benefits of restaurant coverage, which, under the designated smoking areas regime, was, he insisted, as useless as separate sections had been on airplanes.\textsuperscript{296}

Four days after the end of the session, Nelson heaped fulsome praise on Wasker in a “Dear Chuck” letter designed both to flatter the lobbyist and curry favor with headquarters:

\textsuperscript{291}“Thomas Fogarty, “New Restaurant Smoking Law Called Toothless,” DMR, Apr. 25, 1990 (1M:2-5, 2M:6). To be sure, the previous year the attorney general, in response to an inquiry from a county attorney, had issued an opinion stating that the statute did not appear to create a private cause of action, and that the prosecution of actions fell within county attorneys’ statutory obligation. Iowa Attorney General Opinion #89-5-5(L) (May 24, 1989).

\textsuperscript{292}Hurst Marshall to Roger Mozingo, Subject: Weekly Report (Region IV) (Apr. 11, 1990), Bates No. 507628591.

\textsuperscript{293}“Iowa’s Wimpy Smoking Law,” DMR, Apr. 30, 1990 (8A:1-2) (edit.).

\textsuperscript{294}Telephone interview with Ann Wright, Ankeny, IA (Feb. 2, 2006).


\textsuperscript{296}Telephone interview with Terry Branstad, Des Moines (July 2, 2007).
It goes without saying that you had your usual excellent record. In fact Chuck, it is kind of boring to congratulate you because you lose so seldom.

I am well aware that the preemption amendment to HF209 is probably the best example of the pro-active concept within my region. I intend to make that point very clear to my superiors in Washington, D.C.297

In its internal report card on Wasker, judging his activities during the 1990 session, TI noted at the beginning of June that he had been “chiefly responsible for severely weakening a smoking restriction bill and then adding a state-wide preemption clause.” That this “pro-active victory” had been “the only significant one in this region” and had come in the wake of his “spectacular victory” in 1989 in preserving the sunsetting of a three-cent cigarette tax undergirded the recommendation that his annual retainer be increased from $40,000 to $45,000, especially since he bore more of the lobbying load than the member cigarette companies’ lobbyists.298 In fact, TI—which was just one of Wasker’s numerous clients—raised the retainer of its “legislative consultant” to $44,000 in 1991,299 at a time when legislators’ salary was only $18,100 and even that of the six highest legislative leaders was only $27,900.300 Despite the preemption provision’s dilution in which the cigarette companies had been forced to acquiesce, the cheering at TI apparently never stopped. A week later Nelson informed headquarters that: “The Region IV office is thrilled with the smoking restriction preemption language that was included in HF209.”301 And later that year, Kurt Malmgren, the head of the Institute’s State Activities division, confided to the annual convention of the Iowa Association of Candy and Tobacco Distributors that enactment of the restaurant coverage cum preemption law was “without a doubt, a substantial victory.”302

298Tobacco Institute, Region IV State and Local Lobbyist Evaluation: State of Iowa: Charles F. Wasker (June 1, 1990), Bates No. TI23011588/9/91. The evaluation was presumably Nelson’s. On his previous evaluation and raise from $35,000 to $40,000, see Tobacco Institute, Region IV State and Local Lobbyist Evaluation: State of Iowa: Charles F. Wasker (July 12, 1989), Bates No. TI20892037.
299Tobacco Institute, 1994 Budget: State Activities Division (May 14, 1993), Bates No. TI16561571/87.
301Dan Nelson to Pat Donoho, Re: Proactive and Tax Targets (June 7, 1990), Bates No. TI28842920/1.
302Kurt Malmgren, [untitled], in “1990-2000: What’s on the Horizon? Iowa Association of Candy and Tobacco Distributors 42nd Annual Convention” at 7 (Sept. 14-
Anti-Smoking Senators—Purportedly as Powerless as Inmates in the Maximum-Security State Penitentiary—Make Yet Another Unsuccessful Attempt to Clean the Air in Their Workplace: 1990

At the same time that H.F. 209, designed to reduce secondhand smoke exposure statewide, was making its way through the legislature, “[a]nti-smoking forces [we]re gearing up for a test of democracy in the Iowa Senate. Although no more than 15 of 50 senator smoked, according to Hannon, many were “veteran members....” Consequently, she argued, “we can pass laws regulating smoking in the rest of the state but have no control over own chamber....” In order to overcome this democratic deficit, the anti-smoking senators circulated a note calling for a meeting to discuss restricting smoking in the Senate.303

The impact of the Senate’s laissez-faire smoking policy on the Senate qua workplace was poignantly revealed by the administrative assistant to a member of the Iowa House who on March 16, 1990 wrote to Hannon that the representative, who was running for the Iowa Senate, had requested that she accompany him to that chamber should he be elected. Confiding to Hannon that she and the representative “consider ourselves a team that operates smoothly and productively” and that the latter would tell Hannon that they were “mutually dependent,” she had nevertheless “hesitated to commit myself because smoking is allowed in the Senate itself, as well as in the work areas. Tobacco smoke causes me great physical distress in the form of allergic reactions and headaches.” Rejecting the “argument of infringement of smokers’ rights,” she insisted that: “Smokers choose to smoke; the rest of us cannot choose to breathe—it is a necessity. It seems unfortunate that people can be driven away from jobs they love and are good at simply because smoking is allowed in that work place.”304

Hannon herself had good reason to empathize with her correspondent: at the same time she was seeking health care for eye irritation caused by being in a “room full of smokers all day long.” The health care giver’s diagnosis read: “Conjunctivitis is irritation from smoke.”305

For March 28, 1990, Lloyd-Jones and two other senators had called an open

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304Letter from Nancy Brooker Bowers (Adm. Asst to Ralph Rosenberg) to Senator Hannon (Mar. 16, 1990), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.
305Iowa Department of Public Health: Disease Prevention, Case Record (Mar. [*] 19, 1990), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.
meeting on smoking policy that, because of a conflict with another meeting, ultimately was not held, but they nevertheless solicited suggestions for a smoking policy for the next year. From the handwritten suggestions submitted that same day by Hannon, arguably the Senate’s most militant anti-smoker, a sense emerges of how far even she was from proposing a total ban at a time when the House had almost achieved it:

1.) No smoking on Senate floor while in session
2.) Senators smoke in Lounge back of Senate
3.) Secretaries & staff smoke at designated benches which have exhaust fans (to the outdoors)
4.) “Visiting smokers” restricted to those areas.
5.) No smoking during committee meetings unless smokers sit near exhaust fans to outdoors.
6.) No smokers at work stations (computers, typewriters)
7.) Private offices adopt a policy by consensus.
8.) No smoking in lounges adjoining switchboard area, including phone booths.  

Significantly, Hannon solicited and galvanized support from outside of the closed circle of her 49 fellow senators. The reservoir of antagonism was close to overflowing: “Several of the clerks and anti-smoking legislators formed a support group and worked on their legislators/leadership to resolve the smoking impasse before some of the clerks quit or there were physical fights. Some of the smoking clerks smoked at the computers. The next person to use it had ashes and odor to contend with. The phone booths senators had to use in the senate lounge reeked from stale tobacco.”  

In a piece she published in a small-town newspaper the next day, Hannon reported to her constituents that “[a]s in the past, the tobacco lobby and the Senate smokers [had] savaged” the public smoking prohibition bill (HF 209) that the House had passed. (Hannon’s colleague Don Gettings wanted “smoking opponents to walk out and shut the place down,” prompting Hannon to interject: “fat chance.”) She reminded them as well that she had

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306 Memorandum from Senators Lloyd-Jones, Gettings, & Jensen on Senate Rules on Smoking (Mar. 28, 1990), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA. To be sure, Hannon later speculated that her suggestions may have incorporated other senators’ as well. Email from Beverly Hannon (Mar. 1, 2007).

307 Untitled, unaddressed (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.


309 Undated and unaddressed letter on her Senate letterhead, in Beverly Hannon Papers,
also long been a proponent of Senate rules recognizing non-smokers’ rights. It would be interesting to know whether it is rare for legislators to voice their complaints about their own physical working conditions to their constituents as Hannon did: “Currently smokers can smoke anywhere at any time in the Senate, and they do. Some of the committee meetings I must attend are physical torture.” 310 She then keyed them into the collective action tactics that she and her allies had developed to improve their workplace:

This year some of the Senate pages and secretaries who are especially bothered by the clouds of smoke in which they must work approached some of us non-smoking Senators for help. We held meetings and talked about positive suggestions that we hoped to present to Senate leadership. Some smokers were very offended by this exercise in democracy and informed the pages and secretaries that they were just help and didn’t have anything to say about Senate rules or lawmaking. Some secretaries have been personally harrassed [sic] by co-workers because of our meetings, which are open to everyone.

Irritations spilled over into debate on HF 209. ... An older man who lobbies for the elderly phoned me, very upset after hearing the debate on the radio. He has chronic bronchitis and can’t do his job as well as he would like because he can’t stand the second-hand smoke here at the Capitol. A Senate leader’s wife who was a secretary used to sit next to me. She has emphysema. There were times I thought she would choke to death at my side. She is now on constant oxygen and can no longer work here or attend legislative events!

What do you think? Do non-smokers have rights too?
If you have comments...please contact me. 311

Poignantly, at this very juncture a correspondence intervened between a prisoner at the maximum security state penitentiary at Fort Madison, who on March 22 wrote Hannon after having read a newspaper article about her fight

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311 Bev Hannon, “Hannon Speaks Out on Public Smoking,” Advocate News (Wilton-Durant, IA), Mar. 29, 1990 (19:3-4). In a later unpublished memorandum Hannon added this background to the incident: “When JoAnn Hutchins, Hutch’s wife, worked for Joe Welsh, I sat right next to them. I used to be afraid she was going to expire right there on the floor from the smoke, she was gasping for breath and leaning on the pull-out shelf. She had emphysema so bad, often had oxygen inhaler and finally oxygen tube in her nose. Joe wouldn’t smoke at his desk because of her, but others smoked wherever they wanted, including Hutch. I don’t know if she was too subservient [sic] not to say anything to him or if he just ignored her. He actually was killing her with second hand smoke.” Untitled (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.
against smoking in the Senate chamber. A non-smoker who wanted to live in a smokefree environment, he related that the prisoners were “forced to be locked” in their cells 16 hours a day, during which “you are assaulted with a lot of smoke....” Believing that his health and well being had been put in jeopardy by being forced to “live in this type of environment against my will,” he had already filed a section 1983 civil rights action in federal court. To Hannon he complained: “I always see articles in the paper where the state representatives and the governor are always concerned about smoking in public, but I have never seen one thing mentioned about curbing smoking in the state institutions. It’s like we don’t count for anything just because we are locked away for the time being.”

From Hannon (and her nonsmoking colleagues) the prisoner—who knew that “your concern for an inmates [sic] is not on the top of your list in priority of things to accomplish this session”—requested the filing of “a bill that will make the warden set aside a portion of this institution for non smokers [sic].”

Replying a week later, Hannon, after briefly mentioning that she would speak to the Corrections lobbyist, devoted half of her letter to this remarkable piece of self-commiseration, which was presumably designed to put her interlocutor subtly on notice that if she lacked the power to protect herself, it was even less likely that she would be able to help him:

Even though only 14 Senators out of 50 smoke, we non-smokers have been unable to get the Senate to adopt rules that accord us non-smokers any rights at all. Like you, we are assaulted with second-hand smoke most of the day. It has created poor working conditions and poor morale. Some people become physically ill from the smoke.

A few days later Hannon followed up with a “Sorry” letter, explaining that the Corrections lobbyist had informed her that overcrowding as well as conflicting segregation criteria based on gang activity, personal vendetta, and homosexual activities, had prompted the department to terminate its former segregated cell assignments for smokers and nonsmokers.

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312Stephen Leonard to Beverly Hannon (Mar. 22, 1990), in Beverly Hannon Papers, Box 20, Folder: Corrections; Anamosa Reformatory, IWA.
313Beverly Hannon to Stephen Leonard (Mar. 30, 1990), in Beverly Hannon Papers, Box 20, Folder: Corrections; Anamosa Reformatory, IWA.
314Beverly Hannon to Stephen Leonard (Apr. 4, 1990), in Beverly Hannon Papers, Box 20, Folder: Corrections; Anamosa Reformatory, IWA. A year later Leonard, serving a 25-year sentence for attempted murder and other crimes, and Steven Wycoff, serving a life sentence for murder, filed suit in federal district court in Des Moines claiming that the unconstitutional imposition of cruel and unusual punishment entitled them to an order (like the Clean Indoor Air Act) dividing the penitentiary into designated smoking and
nosmoking cells. While requesting that the suit be dismissed, a penitentiary spokesman and the state attorney general’s office noted that officials were considering declaring certain areas nonsmoking or even banning smoking altogether in the prison. William Petroski, “Iowa Inmates in Dispute over Smoking Rights,” DMR, May 29, 1991 (1A, 6A), Bates No. TI00911091. Beginning Dec. 31, 1995, indoor smoking was banned in Iowa prisons. William Petroski, “Smoke-Free Prisons Soon,” DMR, July 8, 1995 (1) (NewsBank).
Instead of Repealing Preemption of Local Anti-Public Smoking Ordinances in 1991, the Legislature Enacts What the Tobacco Industry Purported to Be the Preemption of Local Cigarette Sales Ordinances

[S]moking legislation in Iowa is largely symbolic; enforcement is minimal and voluntary compliance is expected.¹

The cigarette companies’ victory in inserting preemption into the 1990 amendments to the clean indoor air law did not prompt the anti-smoking forces in the Iowa legislature to abandon the struggle to confer power on local governments to pass and enforce ordinances that were stronger than the weak statewide law that had been on the books since 1978. Already by July 1990, the Tobacco Free Coalition, composed of representatives of the Iowa Medical Society and the Iowa branches of the American Cancer Society, American Heart Association, and American Lung Association, met and identified elimination of the preemption clause of the 1990 Clean Indoor Air Act as one of its four legislative priorities for the 1991 session.² However, in the event, the tobacco industry succeeded not only in defeating the TFC’s repeal initiative, but also in securing enactment of yet another preemption provision, this time purportedly depriving localities of their home-rule powers to issue ordinances regulating cigarette sales, free samples, and vending machines—the last being of special concern since the legislature of neighboring Minnesota just the previous year had defeated the tobacco companies’ preemption bill³ and instead voted to empower local governments to adopt ordinances more restrictive than the new statewide law’s regulation of vending machines;⁴ consequently, that state’s localities were on the way to passing more total bans than those of any other state.⁵

²Carol Sipfle, American Lungs Association of Iowa, to Tobacco Free Coalition (July 30, 1990), in Folder: Tobacco: 1999-, Johnson County Department of Public Health, Iowa City.
³1990 Proactive Legislative Opportunities by Category, at 10 (Mar. 19, 1990), Bates No. 507595166/78; Smoking Control Advocacy Research Center, Action Alert, at 1 Mar. 30, 1990, Bates No. TIMN363192.
⁴1990 Minn. Laws ch. 421 § 3, at 831, 832.
⁵Joseph Sullivan, “Bans on Cigarette Machines Are Upheld,” NYT, Apr. 1, 1994 (B5).
The Tobacco Institute Solidifies Its Coalition with the Iowa Citizen Action Network and Iowa Federation of Labor

Both sides were aware that the 1991-92 legislative session would witness new drives to pass bills on all these subjects. Intertwined with these measures, as had almost always been the case in recent years, was yet another proposal by Governor Branstad to increase the cigarette tax, which would force the legislature to deal with this issue again. As early as April 27, 1990, less than three weeks after adjournment, Lowell Junkins, the former Democratic Senate Majority Leader who was the Iowa consultant or labor counsel of the Tobacco Industry Labor Management Committee, informed the Tobacco Institute that the cigarette companies’ success on excise taxes—which primarily rested on diverting attention to spending reductions—“was a near miracle” given the estimated $40 million state budget deficit for 1991. Junkins feared a much less favorable outcome in 1991 “unless we have an army of support and not the small cavalry of folks we had this year.” To gain allies he secured the support of Mike Lux, the Iowa Federation of Labor vice president, “in assisting with building a coalition of support for comprehensive clean air legislation and support against the use of excise taxes to balance the state’s budget.” The requisite “formal coalition” might be effected through the Iowa Citizen Action Network. The mention of clean air legislation and IFL and ICAN was an unambiguous reminder that the industry continued to understand cigarette taxes and clean indoor air laws as interconnected programs to restrict smoking; consequently, because opposition to one implicated the other, co-opting left-liberal grassroots labor and consumer organizations was vital for success in a state governed by a Democratic legislature and an anti-tobacco Republican governor.

In the meantime, ICAN itself was busy preparing its “progressive tax alternative plan,” which its director, Jay Larson, submitted to its board in early July. Worried about the regressive impact of proposals to increase excise taxes to deal with a potential budget deficit in 1991, Larson argued that one of ICAN’s “top priorities” should be “a campaign...to lower taxes for those who are having trouble meeting their day-to-day needs” and raise them for those who could afford to pay. However, passing this type of plan would not be easy because organizations such as David Stanley’s Iowans for Tax Relief had “convinced

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Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

Iowans that sales and excise taxes are preferable to income taxes even though most Iowans would pay less taxes under a progressive plan.” Reversing such beliefs would require “extensive public education and grassroots pressure on legislators.” Vital to such a campaign was presenting the plan to 30,000 ICAN members in the group’s newsletter, to 50,000 ICAN members, who did not get the newsletter, through an education piece, and to 500,000 Iowans by means of the newsletter network of ICAN’s affiliates and allies. Larson then envisioned concentrating ICAN’s canvass, which would reach 75,000 people and generate thousands of letters to legislators, in districts in which legislators were “still on the fence”; mail and phone calls in key districts would create still “more grassroots pressure on legislators.” The total expenses for this project were estimated at $79,979.7

It was precisely such large sums that had been driving ICAN into the waiting and outstretched arms of the cigarette companies since at least 1986.8 Two days after Larson had presented his plan to the ICAN board, Junkins furnished a copy to his handlers at the Tobacco Institute, explaining how it might fit into his own strategy for the 1991 session. Following up on his April report, Junkins urged quick action because it was “clear the tax question in this state will be resolved prior to the opening of the session and not after January 1, 1991.” Half a year before the new legislature convened, the major vehicle for increasing state revenues to close the budget deficit was “the ‘easy’ taxes”—excise and sales taxes. Junkins’ plan was to help generate a debate during the upcoming gubernatorial campaign by offering an alternative to those taxes. Whereas Branstad, during his first two terms, had made known his preference for increased cigarette, gas, alcohol, and sales taxes, Junkins hoped that “we can get” the Democratic gubernatorial candidate, House Speaker Don Avenson, “to offer the alternative choices”: since more progressive taxes fit with Avenson’s “philosophy,” Junkins urged “mov[ing] Avenson into this mode quickly.” The point of this exercise was to position the cigarette industry so that during the legislative session it could at least “point at the other choices and not leave us alone as the preference.” To this end Junkins had already secured commitments from ICAN and IFL to initiate “the process of focusing on the choices....”9 (To be sure, Junkins made it clear that he was not overconfident by attaching to his

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7Jay Larson to ICAN Board of Directors and other interested parties, Re: A Progressive Tax Alternative Organizing Plan (July 6, 1990), Bates No. TI21010580-2.
8See above ch. 26.
9Lowell Junkins to James Savarese, Dan Nelson, Susan Stuntz, and David Wilhelm, Memorandum: Subject: Suggested Strategy for 1991 Legislative Session (July 8, 1990), Bates No. TI21010572/3.

2758
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

An excerpt from the document is as follows:

memorandum an article from the same day’s Register disclosing that both Branstad and Avenson had stated that it was likely that cigarette taxes would be increased.\textsuperscript{10} The special roles performed by these two organizations that made them virtually unique and indispensable were implicit in the crucial interconnection between excise taxes and anti-public smoking legislation that Junkins highlighted:

A supplementary part of this strategy has to be to get the focus of attention off of cigarettes and the accompanying arguments about their relationship to health. The more complete and comprehensive clean air legislation gives us an opportunity to do this. I do not believe we can win this battle with the clean air alternative alone but we must have the two alternatives, progressive taxes and clean air, linked together.\textsuperscript{11}

Just how tricky managing the tobacco industry’s alliance with ICAN was emerged a few weeks later when Susan Stuntz, TI vice president for issues management, informed Patrick Donoho, State Activities vice president for the Northern Sector, that Philip Morris had offered its own support to the Iowa fair tax program, but that while appreciated, it “should be turned down” because the Institute, through the Labor Management Committee, “will make sure that Iowa Citizen Action has all of the resources it needs to get this project underway.” The reason for excluding cigarette company financing was that “the only way this will work is if ICAN also raises funds of its own.”\textsuperscript{12} Stuntz’s strategical insight was presumably that the whole point of the coalition with ICAN was to tap into its legitimate grassroots organization; if the tobacco industry subsidized it so heavily that it no longer had to raise its own funds through grassroots drives, it would turn into a mere industry front organization—of which the cigarette companies already had more than enough—and lose its unique raison d’être as a large-scale authentic


\textsuperscript{11}Lowell Junkins to James Savarese, Dan Nelson, Susan Stuntz, and David Wilhelm, Memorandum: Subject: Suggested Strategy for 1991 Legislative Session (July 8, 1990), Bates No. T121010572/3.

\textsuperscript{12}Susan Stuntz to Pat Donoho (July 25, 1990), Bates No. T121010570. Without being able to pinpoint the date or determine whether the incident was related to that mentioned in the text, Jay Larson, the ICAN executive director between 1988 and 1992, later recalled that Wasker had once approached him on behalf of Philip Morris to ask whether ICAN needed more money; after asking around ICAN, however, Larson decided that taking money from Philip Morris was not doable in contrast to taking it from TILMC, which was okay because that money seemed to be coming from unions (although in fact it was also from Philip Morris and other tobacco companies as channeled through the Tobacco Institute). Telephone interview with Jay Larson, Everett, WA (July 19, 2007).
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

anti CORPORATE CONSUMER GROUP, about whose Tawdry clandestine connection to the most despised corporations in the United States neither the ICAN rank and file nor targeted legislators knew anything at all.

Junkins was also making progress with the labor wing of the coalition. In August he succeeded in achieving several important objectives: at its annual convention the Iowa Federation of Labor not only passed resolutions on unfair taxes and indoor air quality, but also called for lobbying of federal and state legislators on the matter of unfair taxes at the local level. (At the following year’s convention Junkins succeeded in insuring that IFL reaffirmed its position on both resolutions.) The tax resolution, submitted by the Federation’s executive council, simply came out for progressive income taxes on all levels of government and against regressive sales and excise taxes without singling out cigarette taxes, which, within the covert coalition framework, would not have been in the tobacco industry’s interest. The indoor air quality resolution was

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13 When interviewed 17 years later, Donoho (who had reincarnated himself as vice president for government relations at the International Bottled Water Association), without prompting, spontaneously commented that if the tobacco companies had financially supported ICAN to such an extent that it no longer needed to raise its own funds, it would have become a “front organization” rather than the grassroots organization that the Tobacco Institute needed as a coalition partner. Telephone interview with Patrick Donoho, Alexandria, VA (July 19, 2007). Stuntz (who claimed that she had never before agreed to speak to anyone about the Tobacco Institute, which she left in 1993), at first stated that it was the labor members of the Tobacco Industry Labor Management Committee who had objected to Philip Morris funding because they wanted TILMC to fund ICAN the coalition partner. When it was pointed out to her that this objection seemed to be based on a distinction without a difference, since Philip Morris was the largest funder of the Tobacco Institute (which funded TILMC) and thus was funding ICAN indirectly anyway, Stuntz revised her position to argue that the labor members believed that if Philip Morris had given money to ICAN, then ICAN would not have been a labor partner but a Philip Morris partner. Although even this logic seems tenuous, in some not trivial sense it overlaps sufficiently with the argument offered in the text to buttress it. The cigarette manufacturing companies were not directly represented on TILMC because, whereas Philip Morris was unionized and enjoyed close relations with the Tobacco Workers union, R. J. Reynolds Tobacco was unorganized and anti-union. Telephone interview with Susan Stuntz, Annandale, VA (July 17, 2007).

14Lowell Junkins to David Wilhelm, Susan Stuntz, Jim Savarese, Memorandum Re: Iowa AFL-CIO Resolutions on Unfair Taxes and Indoor Air Quality (Aug. 28, 1990), Bates No. TI23661101.


16Iowa Federation of Labor, State Convention Resolution No. 19 (Aug. 1990), Bates
more complex. First, it was, incestuously enough, submitted by none other than ICAN executive director Jay Larson, who also happened to be vice president of Local Lodge 2760, International Association of Machinists and Aerospace Workers, a local combining public librarians and ICAN employees. The resolution focused on “bad design and inadequate, poorly maintained ventilation systems” as contributing to “polluted indoor air that contained known toxic contaminants, bacteria, viruses and allergy-causing fungi, which have been linked to employee health problems.” The cigarette company-ICAN-IFL resolution then called on workplace health and safety officials to “recognize that identification of pollutants, cleaning or replacement of poor ventilation systems, and building modifications to provide adequate fresh air are essential to assure all workers a safe job site.” The crucial diversionary support that the tobacco industry sought was embodied in the intentionally unspecific declaration that “inasmuch as a number of substances are proven pollutants of the air we breathe, no single one shall be targeted.” The industry’s other desideratum found expression in IFL’s urging the state legislature to require indoor air quality testing to develop clean air standards. Finally, the cigarette companies’ coalition strategy, as developed by its TILMC’s cooptation of the Sheet Metal Workers Union, was furthered by the demand that ventilation systems be “evaluated by qualified unions’ affiliated contractors to assure proper and effective performance.”

In a legislative analysis prepared some time in the fall of 1990 before the November election, which was predicted to leave Democrats firmly in control of both houses and Republican Branstad as governor, TI noted that it had not been “lost on the legislature” that the sunsetting of three cents of the cigarette tax in 1989 “did not result in any lower cigarette prices to consumers” because...
manufacturers had increased prices. Following the unsuccessful attempt to reinstate the three cents in 1990: “Without a doubt, at least that three cent figure will be back this year in tax proposals.” Pressure in that direction was being generated by a projected budget shortfall of tens of millions of dollars, eliminating part of which both Branstad and his Democratic opponent, outgoing House Speaker Avenson, had endorsed by means of a cigarette tax increase. As far as the cigarette companies’ staff and lobbyists were concerned, a “consensus” prevailed that “keeping the Iowa cigarette tax at 31 cents is the number one priority” and defeating any proposed increase would be more easily achieved in the Senate. Success, TI estimated, would cost approximately $50,000. First, in order to secure the cooperation of “coalition allies,” contributions in the range of $500 would have to be made to three or four associations to cover mailing and other “grassroots programs” costs in connection with efforts by retailers, wholesalers, and cigarette company sales representatives to “demonstrate economic arguments against regressive excise taxation.” Next, $10,000 to $20,000 would be needed to “mobilize a grassroots phonebank targeted at retailers” throughout Iowa but especially in areas bordering Missouri, Nebraska, and South Dakota, where cigarette taxes were lower; this effort was facilitated by previous phone banks, which had created a list of a thousand “pre-qualified” convenience stores, liquor stores, and bars. Finally, “$25,000 plus” was required to finance a campaign organized by the Public Affairs Division—through TILMC and directed by its Iowa labor counsel (Junkins)—in connection with which unions and ICAN traveled around Iowa “advocating progressive tax alternatives.” The purpose here was “not only to elevate the debate” on appropriate taxation methods, “but also to heighten the chance that selected union groups or ICAN reps would testify against regressive excise tax increases.” TI also contemplated a television advertising program in support of ICAN’s efforts. Not included in the cost estimate was activation by R.J. Reynolds and Philip Morris of their “smokers grassroots programs” targeting legislative committee members and leadership as well as swing votes in both houses.¹⁹

In addition to the anti-tax campaign:

The reference to Iowa City and vending machines pointed back to an initiative undertaken by several medical students at the University of Iowa, members of Doctors Ought to Care, who in April 1989 and March 1990 drove 15- and 17-year-olds to a large number of stores, including grocery stores, convenience stores, gasoline stations, and vending machines, in Iowa City and Coralville, at 83 to 96 percent which they were able to buy cigarettes unlawfully. Having concluded, based on this experiment, that the state law prohibiting the sale of cigarettes was not being enforced in the area, they appeared at city council meetings in the two towns to request the adoption of ordinances making such purchases more difficult. The proposed ordinances would, inter alia, have banned cigarette vending machines in restaurants, supermarkets, convenience and drug stores, and service stations. Even such a tentative and amateurish effort in a small backwater did not escape the manically attentive and panoptically vigilant Tobacco Institute. Two days after an article on the event had appeared in the Des Moines Register, Midwest regional vice president Daniel Nelson, informing Iowa lobbyist Wasker that “we will have to deal with” this situation, asked him to find out both what action the city councils intended to take and whether—since state permits were required for cigarette vending machines but the law did not deal with locations—state law preempted local ordinances on the machines’ location. One dimension of the tobacco industry’s profits-über-alles approach was captured by Nelson’s closing comment: “I am encouraged that this anti-smoking group from the University is not asking for a total vending machine ban. However, let’s not give these people anything for free.”

To be sure, Iowa City, contrary to TI’s assertion, did not “take action” to restrict cigarette vending machines. In connection with a letter/petition signed by

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21Marge Gasnick, “Study Shows Cigarette Law Has Little Effect,” ICP-C, May 21, 1990 (1B:4-5). In April 1989, 49 or 83 percent of 59 stores sold to the two 17 year-olds and two 15 year-olds. In March 1990, 54 or 96 percent of 56 businesses sold to the four 17 year-olds, while 20 or 83 percent of 24 stores sold to the two 15 year-olds.


23Dan Nelson to Chuck Wasker, Re: Iowa City Vending Machine Ordinance (June 28, 1990), Bates No. TI21010451/2.
98 medical students and physician assistants submitting a proposed ordinance to restrict minors’ access to tobacco, the council at its meeting on June 26, 1990, scheduled a special discussion in the course of which it determined that the recently enacted preemption provision in the clean indoor air act did not apply to ordinances dealing with tobacco sales, and raised, but did not answer, the question as to whether it was permissible for a local ordinance to ban all vending machine sales.\textsuperscript{24} Further discussion took place at meetings in October\textsuperscript{25} and November 1990,\textsuperscript{26} but the council adopted no ordinance. In January 1991, an ordinance was prepared for the city council requiring locks on cigarette vending machines, but soon after vendors had complained about the expense,\textsuperscript{27} the council deferred consideration\textsuperscript{28} (and then ceased pursuing the matter after the legislature had passed amendments to the cigarettes sales act that included the local preemption provision urged by the tobacco industry).\textsuperscript{29}

Regardless of the events in Iowa City, TI was well aware that some local activity had already taken place—not requiring local bans, but confining vending machines to bars—and more was in the offing, necessitating tobacco industry sponsorship of a “state-wide preemptive vending machine restriction bill” that would serve the dual purpose of stopping the proliferation of a “hodge-podge of local ordinances” and “prevent[ing] the State Legislature from enacting a total vending machine ban” (which would render local preemption superfluous, but not to the cigarette companies’ satisfaction), which TI knew with certainty would be on some (probably House) legislator’s agenda. The industry’s strategy was to introduce preemption as a “compromise” amendment to such a ban bill. The

\textsuperscript{24}Iowa City City Council, Regular Council Meeting, Agenda, at 1554, 1556-58 (June 26, 1990), http://www.iowa-city.org/weblink/PDF/kwu54sbqwsj4xn45m1slnqaz/1/1990-06-26%20Agenda.pdf.


chief impediment to legislative success was the fragmented nature of the cigarette vending industry in Iowa, its lobbyist’s marginal position at the statehouse, and the tobacco industry’s failure to develop contacts with it. This problem was exacerbated by the “strange relationship” that TI had for some time had with wholesalers, of which many vending machine companies, as in other states, were a part. Here, too, the lobbying campaign would cost considerably more than Charles Wasker’s retainer. Cultivating “coalition allies,” including tobacco wholesalers, vending machine companies, the Iowa Restaurant Association, and other segments of the hospitality industry was a priority: “These groups will be enlisted to lobby the legislature in order to protect vending machines as a service to their customers. Contributions of between $500-$1,000 may be needed to stimulate cooperation on behalf of the aforementioned allies.” TI anticipated that it would cost an additional $10,000-$20,000 to “mobilize hotels, bars and restaurants to call the legislature...to support compromise vending machine legislation” during crucial floor action.30

The other “pro-active” initiative that the tobacco companies contemplated pushing was (as in other states) a hiring discrimination/policy measure to prevent employers from refusing to hire smokers31 that would “not guarantee smoking in the workplace but does protect smoking away from work.” The reason that tobacco industry lobbyists and TI Government Affairs executives had concluded that “a free-standing bill would create unnecessary problems” was their having “no desire to create a vehicle on which germane anti-tobacco legislation can be added.” Instead, turning the strategic tables on their adversaries, the lobbyists were “confident” that during Senate floor action they would be able to tack on a “ready to go amendment” (drafted and “acceptable to all parties concerned” by December 1, 1990) to some labor or employment conditions bill. The stealthy nature of this Senate floor amendment approach, to be followed by a “contested conference committee with the House,” meant that successful “grassroots mobilization” would be rendered superfluous because the stratagem would be “successful only if the lobbyists are able to complete the task in-house.” Nevertheless, Junkins, TILMC’s Iowa consultant, would still need to “educate” labor groups on the measure’s desirability in order to make them willing to lobby the legislators to whom they had access. Although this quasi-covert approach did


31See below ch. 29.
not require a supportive media campaign, if news organizations decided to cover the debate, TI could not formulate the appropriate response until the wording of the amendment had been agreed on; but even in the fall of 1990 it was clear that if the amendment addressed not only smoking but other issues as well, the companies might be well advised to “soft-peddle industry involvement.” In the meantime, TI would need to recycle its (false) refutation of the often repeated claim that smokers have higher absenteeism and less productivity” in order to “prepare amendment sponsors and supporters for floor debate.”

Once the predicted Iowa elections returns were in, TI understood that in 1991 the legislature would probably debate measures imposing further restrictions on public smoking and repealing the just enacted local preemption provision, while bills would be introduced to include tobacco use on death certificates and ban billboard advertising.

**H.F. 104: Regulating Children’s Access to Tobacco (and Repealing Local Preemption)**

At the outset of the 1991 session—the Democrats’ majority had been reduced somewhat, but they still controlled the Senate 28-22 and the House 55-45—a Governor Branstad revealed the extent of his commitment to the anti-
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

tobacco movement by announcing that he would ask the legislature to raise cigarette taxes again and to increase the age at which tobacco could lawfully be bought to 21, but at the same time refusing health advocates’ call to ban all cigarette vending machines. Immediately R. J. Reynolds Tobacco Company—whose Allied Forces and Morning Team on January 10, the day after Branstad’s announcement, recommended making Iowa the number one priority for the week—began calling smokers in Des Moines to encourage them to protest the governor’s proposal. Two weeks later Senate Ways and Means Committee chairman William Dieleman proposed a study bill increasing the cigarette tax by ten cents to 41 cents. But that same day a closed meeting of the Senate Democratic majority agreed on budget cuts after leadership concluded that the tax increase lacked majority support, though Majority Leader Hutchins acknowledged that such support might be forthcoming later, when the legislature would be forced to deal with a large projected deficit. The next day House Democrats approved a similar approach, while TI’s Midwest regional office met in Des Moines with its lobbyist, Wasker, Philip Morris and R. J. Reynolds Tobacco, and the smokeless tobacco staff and lobbyist, all agreeing that phone banking operations should begin immediately and focus on first-term legislators and retail contacts in the state’s border areas. Nevertheless, TI insisted that phone

Although in the account presented here Branstad emerges as a relatively consistent proponent of anti-smoking positions, Rod Halvorson, one of the most militant anti-smokers during his two decades (1979-98) in the House and Senate, which encompassed Branstad’s 16-year gubernatorial career, argued, without contesting the bona fides of the governor’s policies, that his failure to persuade more Republicans to vote for anti-tobacco bills was a function of his failure to prioritize the struggle against smoking sufficiently to trade off other chits to achieve this objective. Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).

21 Eyed as Legal Age for Purchase of Tobacco,” DMR, Jan. 10, 1991 (14A) (NewsBank).


Senate Study Bill 39 (n.d. [Jan. 23, 1991], by Fraise, Murphy, Dieleman, Hedge, and Taylor).


Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

banks were needed because lobbyists felt that this arrangement might break down in the House.32 Branstad tried to overcome legislative opposition to his proposed tax increase to 41 cents per pack—the nation’s highest—by stressing at his weekly news conference in late January that its purpose was not just to raise revenue, but to discourage smoking and finance smoking-related health costs.33

In the midst of these preliminary tax skirmishes, on January 24, six House Republicans and three Democrats, led by Johnie Hammond, filed H.F. 104, which: (1) prohibited persons under the age of 18 from buying or trying to buy any tobacco, tobacco products, or cigarettes; (2) eliminated the provision permitting someone under 18 to buy tobacco products with a note from a parent; (3) empowered the Iowa Department of Public Health, county and city health departments, and cities to enforce the prohibition of selling to minors directly in district court and to file proceedings before permit-issuing authorities (i.e., city councils and county boards of supervisors) against violating permit-holders; (4) struck the higher penalty (serious misdemeanor) for second and further violations of the prohibition on selling to minors/buying by minors, thus establishing a uniform simple misdemeanor for all violations; (5) substituted for the existing mandatory one-year revocation of a retailer’s cigarette sales permit for selling even once to someone under 18 a series of graduated intermediate penalties (which would now also apply to making any vending machine sales or giving away any free samples) beginning with a $300 fine for a first violation (subject to a 14-day permit suspension for failure to pay the penalty), and progressing to a 30-day suspension for a second violation within two years, a 60-day suspension for a third violation within five years, and a one-year revocation for a fourth violation within five years; (6) prohibited all vending machine sales of tobacco (and not merely of cigarettes); (7) prohibited all giving away of free samples; (8) repealed the local preemption provision added to the clean indoor air law in 1990; and (9) coordinated the cigarette sales law and juvenile justice laws so as to assimilate enforcement against juveniles to that against adults for committing a simple misdemeanor, except that a $100 fine or performance of community service could be imposed on the former.34

The reforms embodied in H.F. 104 must be understood in the context of both the existing law in Iowa and the national anti-smoking movement’s proposals and


34H.F. 104 (Jan. 24, 1991, by Hammond). The same day David Osterberg filed H.F. 103, which would have prohibited vending machine sales.
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

the opposition conceived, mobilized, and organized by the cigarette oligopoly. Beginning in 1921, when the legislature repealed the statewide absolute prohibition of the sale of cigarettes, which had been in effect since 1896, the State of Iowa underscored the merely quasi- and contingently lawful status of cigarettes, the sale of which without a permit remained illegal, by introducing and maintaining (what later might be called) a zero-tolerance policy toward permit-holders’ sales to minors. Thus the 1921 statute provided that the city councils and county boards of supervisors—on which was and continues to be conferred the discretion to issue sales permits—“shall revoke the permit of any person who has violated any of the provisions of this act, and no such permit can again be issued for a period of two years thereafter.”

To be sure, included among the code amendments passed by the legislature in 1939 (which, inter alia, prohibited vending machine sales of cigarettes) was a revision converting mandatory into discretionary revocation, although the legislature did retain the criminal penalty of a $25 to $100 fine and up to 30 days’ imprisonment for a first violation and a $100 to $500 fine or one to six months’ imprisonment for a second and further violations. This permissive regime lasted from 1939 to 1959, which coincided approximately with the zenith of smoking laissez-faire in the legislature. But when the legislature lowered the legal age for buying tobacco from 21 to 18 in 1959, it also restored the original mandatory revocation provision by converting “may” back to “shall.” And the successor provision in the Iowa Code in force in 1991, when the legislature was considering amendments, still provided that the local permit-issuing governmental bodies “shall revoke the retailer’s permits” if the retailer sold to minors and conferred (“may revoke”) discretion on these local governments to revoke “the retailer’s permits” if the retailer violated any other provisions of the “division.” Local bodies were prohibited from issuing a new permit to any such retailer for one year following revocation “unless good cause to the contrary” was shown.

The reason that H.F. 104 did away with the zero-tolerance regime for sales

45See above ch. 15.
461921 Iowa Laws ch. 203, § 3, at 213, 214.
47See above chs. 19 and 22.
48Iowa Code § 1556.17(2) at 294 (1939). The provision was contained in S.F. 128, § 18(2). H.F. 207 included the same provision.
49Iowa Code § 1554 at 294 (1939).
51Iowa Code § 98.22(2) and (3) (1991).
to minors was, as Representative Mark Haverland, chair of the House Human Resources Committee, to which it was referred, later explained, rooted in the legislative sense that such a "draconian" law was difficult to enforce: on the social-psychological level the police, especially in a small town where everyone knew everyone else, would simply not want to be the agent delivering a "crushing blow" to a store; on the contrary, a policeman would think it was "nuts" to shut down the sales of cigarettes because a clerk inadvertently sold a pack to a 17-year-old who looked 35. And even Haverland, an ardent anti-smoker who was sympathetic to merchants, was able to understand why Hy-Vee would take strong exception to losing its permit because of a clerk’s error. In contrast, he and other legislators regarded H.F. 104’s incremental punishment as a more rational approach.\footnote{Telephone interview with Mark Haverland, Polk, IA (June 6, 2008).} (Ironically, the gradualist law enacted in 1991 was no more enforced than the draconian law that it replaced.)\footnote{See below.} Nor was Haverland alone in his view: former House Speaker Don Avenson agreed that the one-strike-and-you’re-out law was too strict to be enforceable.\footnote{Telephone interview with Don Avenson, Oelwein (June 13, 2008).}

The Tobacco Institute and the U.S. Department of Health and Human Services: Dueling Model Bills Regulating Children’s Access to Tobacco

Anti-tobacco initiatives in Congress and federal agencies and cigarette firms’ efforts to thwart them between 1989 and 1991 also shaped legislation in Iowa. The focus on youth access was sharpened by the startling finding, published in the surgeon general’s 1989 report on smoking on the 25th anniversary of the catalytic first report in 1964, that in contrast to “virtually all other tobacco-related public policy measures,” which had been strengthened during the intervening years, fewer restrictions on child tobacco use were in place than in many decades despite what had been learned about the health risks, addictive properties, and early age of initiation. In particular, during the intervening years more states had repealed than reenacted tobacco access laws and more states had lowered the age for tobacco sales to children than raised it; in addition, beginning in the 1970s, law enforcement declined as high schools began setting aside areas for students to smoke even in some states in which it was unlawful for persons of their age to buy or possess tobacco.\footnote{U.S. Department of Health and Human Services, \emph{Reducing the Health Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General} 598 (1989).} The need for legal intervention was undergirded by the
surgeon general report’s further finding that most adolescents were able to buy their own cigarettes directly from retailers or (to a lesser extent) vending machines.\textsuperscript{56} Indeed, the volume of such transactions was so significant—guesstimated at $500 million annually in cigarettes and another $130 million in smokeless tobacco—that “[r]etailers have a strong financial incentive to sell cigarettes to children.” Nevertheless, in the face of hundreds of millions of such sales violations annually, “[l]aw enforcement officials throughout the country ha[d] difficulty recalling instances in which a vendor was charged with violating the law.” Ultimately, then, if adolescent access to cigarettes was to be reduced, “attitudinal barriers” on the part of those officials, who believed that no-sales-to-minors laws could, should, or need not be enforced, had to be overcome\textsuperscript{57} along with the prevailing “‘climate of social acceptability’” that enabled merchants to sell cigarettes to children without internalized shame or public embarrassment.\textsuperscript{58}

At the end of 1989, TI complained that “[u]nder the guise of ‘protecting’ children,” several legislators had introduced bills “that would severely curtail the right to advertise cigarettes.” In particular, the cigarette oligopoly’s PR/lobbying organization singled out Representative Synar’s Children’s Health Protection Act of 1989, Representative Thomas Luken’s “Protect Our Children from Cigarettes Act of 1989, and Senator Frank Lautenberg’s Adolescent Tobacco Prevention Act. The bills, which, inter alia, banned giving away free samples and vending machine sales, were anathema to the manufacturers because portraying such restrictions “as necessary for child protection has become a powerful public relations tool for anti-smoking activists.” The cigarette companies were especially worried about vending machine sales’ vulnerability to “‘child protection’ concerns,” which had intensified with the increasing volume of state and local legislative restrictions since the mid-1980s, in part inspired by a model bill advocated by the American Medical Association.\textsuperscript{59} The fact that none of the three congressional measures came anywhere close to floor debate\textsuperscript{60} did not


\textsuperscript{59}[(Tobacco Institute), Agenda for Discussion: Youth Smoking Issues (Dec. 1989), Bates No. TIMN0171342/3.

\textsuperscript{60}The House took no action on H.R. 1493 (Mar. 20, 1989, by Synar) and the Senate
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

relieve TI of the need to ask several questions (for internal consumption only) that underscored the industry’s increasingly desperate rhetorical-propaganda and strategic situation:

Can we credibly and effectively demonstrate that our member companies truthfully and fairly market their products to adult smokers, not youth? ... 

How do we increase the level of awareness among local, state and federal officials and opinion leaders that smoking is only one of a constellation of adult practices that young people often emulate...?

Anti-smoking groups seek to involve tobacco in the war on drugs calling it a “gateway drug,” and “our number one drug/abuse problem.” What can we do to foster public acceptance of the “monumental difference between Camels and crack,” as the New York Post put it? ...

The anti-smoking agenda calls for protecting so-called vulnerable population groups by reducing their exposure and access to cigarette advertising and sales by banning signs, billboards, and sampling around schools, hospitals, churches and vending machines in many locations. Tobacco is often combined with alcohol in paternalistic efforts designed to “safeguard” minorities as well as young people. Should we develop a more “accommodating” strategy? If so, where do we draw the line? 61

The manufacturers’ immediate response was to have their lawyers at Covington & Burling draft a Model State Tobacco Product Youth Protection Act of 1990. Already on January 9, 1990, Kurt Malmgren, TI vice president in charge of the State Activities Division, sent a copy of the draft “minors bill” to the division’s policy committee, four of whose nine members represented Philip Morris and R. J. Reynolds. Pointing out that “‘youth’s easy access to tobacco products’ was one of the main arguments that the anti-tobacco forces used in promoting its agenda” in 1989, Malmgren observed that the model bill was written so that it could be used defensively, proactively, or preemptively. In view of the volume of relevant pending proposals in state and local lawmaking bodies, he scheduled a telephonic conference for January 15 in order to reach consensus on the draft’s wording and uses. 62

Accompanying the model law was a memorandum by David Remes, the Covington & Burling lawyer who presumably drafted it and/or under whose


62Kurt Malmgren, Policy Issue: Draft Model “Minors” Bill (Jan. 9, 1990), Bates No. TIMN0150205.
supervision others did. The law firm’s website advertises Remes as “[r]epresenting such clients as...leading cigarette manufacturers in Commerce Clause, Supremacy Clause, First Amendment, and Takings Clause challenges to state and local laws,” but he was manifestly available for carrying more mundane and intellectually less challenging non-constitutional water for one of the storied law firm’s presumably more lucrative clients (though, interestingly, Covington & Burling did not care to include any of its many tobacco clients on its website list of “representative clients”). In his memorandum, labeled “Attorney’s Work Product Privileged and Confidential,” Remes emphasized with regard to licensing that the “important point” was to “avoid placing licensing authority in any state agency with an anti-smoking agenda.” To explaining to his client how facilitating the politically maximum feasible proliferation of the world’s most lethal consumer commodity was consistent with Covington & Burling’s self-professed “commitment to public service” he apparently did not bother to devote billable hours. But Remes did call special attention to the draft bill’s specification that tobacco sales would be protected from “local interference” by means of a “preemptive effect....” Finally, he pointed out a provision applying to both types of sales and free samples that prohibited soliciting minors to buy or receive and thus “would prevent private citizens from enlisting minors to generate violations of the law” —thus presumably protecting the industry from nongovernmental sting operations.

Unsurprisingly, to the extent that the draft bill embodied an “accommodating strategy,” the industry accommodated itself. The dual purposes of the draft bill, which dealt with retail licensing, retail sales, vending machine sales, and sampling, were strengthening already existing state laws designed to prevent underage minors from getting access to tobacco products and making the latter’s sale and distribution “subject to a single uniform system of state licensing and

63Http://www.cov.com/dremes (visited June 4, 2008). The website also boasts that Remes was Harvard Law School Professor Laurence Tribe’s “first full-time post-graduate assistant.”  
65David Remes, Memorandum: Re: Model “Minors” Bill at 2 (Jan. 9, 1990), Bates No. TIFL0043862/3.  
67David Remes, Memorandum: Re: Model “Minors” Bill at 4 (Jan. 9, 1990), Bates No. TIFL0043862/5  
68David Remes, Memorandum: Re: Model “Minors” Bill at 3 (Jan. 9, 1990), Bates No. TIFL0043862/4.
This latter purpose dovetailed snugly with the manufacturers’ overarching political-legal strategy of preemption of local control over any aspect of the industry and conferral of exclusive power on state legislatures or, better yet, Congress, whose centralized statutory productions were vastly easier to steer through lobbying. The draft bill prohibited political subdivisions of the state from “imposing any requirement or prohibition” concerning tobacco products’ sale or distribution at retail, through vending machines, or by sampling, beyond those imposed by the state law.

The crucial affirmative defense that Covington & Burling devised for its clients’ retailers was embedded in the proof of age provision, which required a seller to “require proof of age from a prospective purchaser if an ordinary person would conclude on the basis of appearance that the prospective purchaser may be under” the legal age, and then conferred a defense to any action by the municipality for selling to an underage person on any seller who reasonably relied on the buyer’s appearance (or proof of age). If, despite this enormous loophole, the license holder—who was co-liable for employees’ unlawful sales—nevertheless violated the law, he was subject to a fine (the amount of which the lawyers did not specify).

Lavishly bathing their clients’ retailers in due process, Remes & Co.’s draft bill delegated power to suspend and cancel licenses exclusively to an (aforementioned non-anti-tobacco) state agency, which, after finding that a licensee had committed (an unspecified number of) “repeated violations,” was required to “notify the licensee that any further violation of this Act may result in administrative action to suspend” the license for retailing (or a vending machine or sampling) for a maximum of 30 days. Even if the agency found that requisite further violation, it was still required, before initiating such action, to “permit the licensee an opportunity to show why suspension of the license is unwarranted and would be unjust.” Cancellation of a license that had been suspended was possible only if within two years of the most recent violation the licensee committed yet another violation. Finally, the state agency was authorized to deny/refuse to renew a license to/of a person only if a court had determined him to have committed “repeated knowing violations,” and even then the applicant was entitled to the same “opportunity to show why.” And all of the

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69 Model State Tobacco Product Youth Protection Act of 1990 § 1 at 1 (Jan. 9, 1990), Bates No. TIFL0043850.

70 Model State Tobacco Product Youth Protection Act of 1990 § 11 at 12 (Jan. 9, 1990), Bates No. TIFL0043850/61.

71 Model State Tobacco Product Youth Protection Act of 1990 §§ 4(c) and (d) at 4 (Jan. 9, 1990), Bates No. TIFL0043850/3.
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

The aforementioned adverse administrative actions were subject to judicial review.\textsuperscript{72}

The vending machine sales provisions also accommodated the industry. Vending machine sales and free samples were both prolific sources of minors’ access to tobacco,\textsuperscript{73} the former bulking so large that that same year the U.S. Department of Health and Human Services in its Model Sale of Tobacco Products to Minors Control Law recommended their outright prohibition.\textsuperscript{74} In contrast, TI’s model law was, all too predictably, extraordinarily accommodating. It permitted such machines in places: that were not open to the public such as factories, businesses, and offices; to which underage persons were not permitted access; in which alcoholic beverages were sold; and in which the machine was “within the immediate vicinity and plain view of the owner” or his employees.\textsuperscript{75}

The same affirmative defense available to retail licensees applied to vending machine licensees,\textsuperscript{76} as it did to sampling, to which the draft bill attached only one condition (apart from banning giving samples to minors)—a prohibition within 500 feet of any youth activities center.\textsuperscript{77}

Among the cigarette companies that financed TI the draft was rather contentious, becoming the subject of discussion at several Policy Committee meetings in January, February, and March.\textsuperscript{78} At the end of January, Gene

\textsuperscript{72}Model State Tobacco Product Youth Protection Act of 1990 § 10(b) at 10-12 (Jan. 9, 1990), Bates No. TIFL0043850/59-61.


\textsuperscript{74}U.S. Department of Health and Human Services, Model Sale of Tobacco Products to Minors Control Law, sect. 5(b) 4 (May 24, 1990). The Institute of Medicine soon recommended banning both vending machine sales and free sampling. Institute of Medicine, Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths 214, 217 (Barbara Lynch and Richard Bonnie eds 1994).

\textsuperscript{75}Model State Tobacco Product Youth Protection Act of 1990 § 6(a) at 6 (Jan. 9, 1990), Bates No. TIFL0043850/5.

\textsuperscript{76}Model State Tobacco Product Youth Protection Act of 1990 §§ 6(d) and (e) at 7 (Jan. 9, 1990), Bates No. TIFL0043850/6.

\textsuperscript{77}Model State Tobacco Product Youth Protection Act of 1990 §§ 7-8 at 7-10 (Jan. 9, 1990), Bates No. TIFL0043850/6-9.

\textsuperscript{78}Kurt Malmgren, Model “Minors” Bill--Draft #2 (Jan. 17, 1990), Bates No. 507609519; Minutes of the State Activities Policy Committee (Jan. 31, 1990), Bates No. 947143342; Kurt Malmgren, Model Sampling/Vending/Retail Sales Bill (Feb. 16, 1990), Bates No.TIMN342042; Minutes of the State Activities Policy Committee (Feb. 22, 1990), Bates No. 947143253; Kurt Malmgren, Model Bills for Sampling/Vending/Retail
Ainsworth, an R.J. Reynolds vice president on the committee, sent out a memorandum explaining that the bill had been divided into four separate draft bills on age restrictions, retail licensing, vending machines, and sampling, which the tobacco industry might introduce in state legislatures, but “only as a fall-back position to counteract” anti-tobacco bills seeking to “restrict tobacco product sales and distribution under the guise of preventing youth access to tobacco products” that “may appear to pass.” This legislative tactic, revealing that the bills were purely reactive and that the industry would prefer to leave the state no-sales-to-minors laws in their existing ineffective status, gave the lie to the oligopolists’ public pretense that they did not want minors to smoke. Ainsworth emphasized that since the tobacco industry would strongly oppose retail licensing of tobacco products, the model licensing bill would be used “only in extreme circumstances.”

By the end of February, all licensing provisions were in fact removed from all the bills—together with, conveniently enough, those for license suspension or revocation. In mid-March Malmgren was able to send the texts of the three model bills to the TI’s regional vice presidents and directors, underscoring that they were not “‘blueprint’” bills that “could be ‘dropped in’ for introduction verbatim; rather, the language would need to be revised and inserted into specific state statutes and legislation that would best serve the industry’s goals.” And even when regional officials—who, in accordance with “our established procedures,” were kept on a short leash—used them appropriately as “guidelines in the development of proactive, preemptive, or alternative language,” Malmgren reminded his subordinates not to introduce them before having secured both the concurrence of the cigarette companies’ government affairs staff and lobbyists regarding language and strategy and Covington & Burling’s approval of the

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79Gene Ainsworth, Model Bills on Age Restrictions, Retail Licensing, Vending Machines and Sampling (Jan. 30, 1990), Bates No. 507745121. This version of the drafts does not appear to be among the online industry documents, but the summary of each bill appended by Ainsworth did not indicate any changes; in particular each featured preemption. Summary of Draft Model Bills (Jan. 30, 1990), Bates No. 513253533.

80Model State Tobacco Product Retail Sales Act of 1990 (Draft 3/2/90), Bates No. TIOK0029667; Model State Tobacco Product Sampling Act of 1990 (Draft 3/2/90), Bates No. TI24610581; Model State Tobacco Product Vending Machine Act of 1990 (Draft 3/2/90), Bates No. TI24610585. See also the handwritten annotation on removal of licensing in Kurt Malmgren, Model Sampling/Vending/Retail Sales Bill (Feb. 16, 1990), Bates No.TIMN342042.

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language.\(^{81}\)

By the time TI forwarded the approved model bill to its field lieutenants, many of the state legislative 1990 sessions were nearing their end.\(^{82}\) Moreover, almost as soon as Remes et al. had completed their drafting chores, the smoking battle front had shifted, necessitating—since the oligopoly’s strategy in this area was largely reactive—new reactions. In May 1990, the Office of Evaluation and Inspections of the Office of Inspector General of the U.S. Department of Health and Human Services issued a report, *Youth Access to Cigarettes*, in response to a request by Secretary Dr. Louis Sullivan, as part of his smoking initiative, to survey state laws on cigarette sales to minors, particularly with respect to the extent to which they were enforced. The report found that: youth access laws were not being enforced; children were easily able to buy cigarettes; the very few areas of active enforcement were on the local level; and the chief elements of such local enforcement included licensing, fines, stings, and restrictions on vending machines.\(^{83}\)

More specifically, the inspector general learned from two-thirds of state health department officials that there was virtually no enforcement of their state laws, while another fifth characterized it as minimal. The vast majority of local public health officials, students, adults, and cigarette sellers interviewed did not know of anyone who had ever been caught under youth access laws.\(^{84}\) In the ten active local enforcement initiatives identified by the report, license suspension/revocation—for which only four state laws provided\(^{85}\)—was considered to be much more effective in motivating merchants to comply than a fine inasmuch as lost sales could amount to hundreds of dollars a day in addition to the loss of customers.\(^{86}\) Most of the local efforts favored civil penalties because they were more expeditious than the criminal justice system in

\(^{81}\)Kurt Malmgren to Regional Vice Presidents/Directors, Memorandum: Model Bills for Sampling/vending/Retail Sales (Mar. 16, 1990), Bates No. TIMN342020.

\(^{82}\)The “Iowa Draft Minors Tobacco Product Sales Act” found among the Tobacco Institute online documents is unfortunately undated and it is unclear what use was made of it. Bates No. TI24642949.

\(^{83}\)Office of Inspector General, Department of Health and Human Services, *Youth Access to Cigarettes* i, 1 (OEI-02-90-02310, May 1990), Bates No. 2046627300/3/5.

\(^{84}\)Office of Inspector General, Department of Health and Human Services, *Youth Access to Cigarettes* 3-4 (OEI-02-90-02310, May 1990), Bates No. 2046627300/7-8.

\(^{85}\)Office of Inspector General, Department of Health and Human Services, *Youth Access to Cigarettes* 1 (OEI-02-90-02310, May 1990), Bates No. 2046627300/5.

large part as a result of using “non-traditional” enforcers such as health and licensing inspectors; in addition, the lack of solid public opinion that selling cigarettes to minors qualified as criminal activity and merited jail time militated in favor of using a civil money penalty regime. More than any other enforcement technique, active local enforcers singled out stings—conducted not only in response to complaints, but on a regular basis—as vital. In the words of one enforcer: “‘Stings are the only way to enforce. Complaints are not enough; no one complains. There is no alternative to stings.’” The urgent need for such a method had been made abundantly clear by dozens of stings organized by researchers and press reporters in addition to police and health departments demonstrating that minors had been able to buy cigarettes in defiance of statutory prohibitions about 80 percent of the time. With vending machines accounting for an estimated 16 percent of illegal cigarette sales to minors and younger children even more likely to buy from machines, enforcement experts also agreed that any set of effective youth access regulations had to deal with vending machines. The divergence between the handful of active enforcement communities and the states was palpable: whereas a majority of the former banned the machines totally, required locking devices, or limited their placement to locations where children were not allowed to be, more than half of states had no policy, while another third merely required posting a warning sign. Because experience with locking devices had revealed that clerks and other employees often activated them without checking buyers’ ages, a large proportion of state health department officials stated that “total bans are the only way to prevent teens from using vending machines.” Finally, active enforcers of local ordinances urged that state laws not preempt stronger local regulations.

At a U.S. Senate Finance Committee hearing on Health Impact, Costs of Smoking on May 24, 1990, HHS Secretary Sullivan—as the president of the TI,
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

which was clearly worried about the possible ramifications of the proceedings, at which its representatives also testified, explained in a memorandum to his executive committee—“took center stage,” using the hearing as a forum for releasing the Inspector General’s report together with a Model Sale of Tobacco Products to Minors Control Act. Sullivan set the tone by declaring that it was “‘a moral and medical outrage that our society permits such ready access to our children’ by tobacco companies” and that “‘[w]e must put an end to the time when any child with a handful of change can commence slow-motion suicide.’”

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93One of its witnesses was Robert Tollison, an economist, who headed a “stable” of “very well rewarded,” largely supply-side, economists whom Philip Morris enlisted “to gain intellectual respectability for the industry....” Richard Kluger, *Ashes to Ashes* 626-27 (1996). Based entirely on an unproven and empirically and theoretically untenable assumption—“Suppose that consumers make well informed choices”—he asserted that since there was “no compulsion forcing the worker into the risky occupation or into motorcycling...or into smoking,” that “individual confronts the risks embodied in these activities and makes his choices accordingly.” Tollison pretended to dismantle the reality of the social costs of smoking by claiming that to call actuarially early deaths from engaging in such activities as parachuting, swimming, and boating “‘premature’” was “completely arbitrary” because such a view assumed that “the risk of dying while engaging in one’s favorite activity was not freely chosen.” As to who bore the loss of premature death, Tollison claimed that it could only be the “individual who chooses to engage in these activities” because “to argue otherwise would imply that the worker is the property of society.” Consequently, imputing social “‘costs’ of premature death attributed to such activities as smoking is meaningless. Individuals choose their lifestyles in such a way as to promote their general well-being as they construe it. ... Some will find smoking preferable, and some not. Some will die young, and some will die old. ... The consequences of early death are thus internalized into individual choices in the economy, and it is meaningless to count the value of these consequences as a social cost of consumption activity.” *Health Impact, Costs of Smoking: Hearing Before the Committee on Finance United States Senate* 126, 127 (101st Cong., 2d Sess., S. Hrg. 101-1117, May 24, 1999) (prepared statement of Robert Tollison). For the manuscript, see Bates No. 508086978/82.

94Samuel Chilcote, Jr. to Members of the Executive Committee (untitled memorandum) (May 24, 1990), Bates No. T112250525.


96Philip Hilts, “Health Secretary Proposes State Licensing to Keep Cigarettes Away from Children,” *NYT*, May 25, 1990 (A16:1).

The model statute that Sullivan unveiled was accompanied by an explanatory introduction, which emphasized that merchants’ disregard of no-sales-to-minors laws was a function of virtually nonexistent enforcement as well as of sheer ignorance. The circumscribed scope of HHS’s anti-tobacco commitment was suggested by its goal of greatly reducing teenage smoking “without disruption...to sales to adults.” Expressed slightly differently, a merchant’s license would be held hostage to compliance with the minors law: “a store may sell tobacco to adults only if it avoids making sales to minors”; those unwilling or unable to comply either “may elect to stop carrying tobacco products” or would lose their license. But Sullivan was also willing to be accommodating to the final link in the great chain of corporate profit from the manufacture and sale of lethal commodities: in order to “minimize burdens on retail outlets,” they would have to require “identification only for those...not clearly above the age of 21,” would receive a merely “nominal penalty for the first violation,” and would be excused one “accidental violation” every two years if “effective controls” were in place.

The preamble to the Model Act—and in this respect it differed radically from contemporaneous Iowa law—cited facts and figures about smoking-caused deaths (390,000 annually), addictiveness, numbers of minors beginning to smoke daily (3,000), the proportion of smokers initiating smoking before 18 (50 percent) and before 21 (90 percent), and the amount spent annually by minors on cigarettes and other tobacco products ($1 billion). Within a mandatory license system, which was to be overseen by an Office of Tobacco Control, the law imposed a two-tier license fee of only $50 on stores whose tobacco sales were below $5,000 annually and $300 on those whose sales exceeded that threshold. These sums were designed to generate enough revenue to finance enforcement while
sparing small businesses onerous costs in relation to sales. Sullivan’s model law set the minimum age of the buyer to whom a license holder could legally sell at 19. The point in setting the age at 19 was to postpone the time at which teenagers lawfully “experiment with ‘adult’ behaviors” until an age when “mature judgment has a better chance of overcoming the intense pressure” to do so; the higher age would mean that most high school students would “not have ready access to tobacco.” The 19-year-old limit was implemented in a manner that, again, accommodated merchants by prohibiting license holders and their employees from selling tobacco products to anyone they knew was under 19 or to anyone (other than a person who appeared “without reasonable doubt” to be over 19) who did not present a driver’s license or similar photographic identification. HHS decided to ban vending machines altogether because the lack of human intervention by a clerk defeated the whole plan of preventing over-the-counter sales. The department left it to states’ discretion to determine whether to permit vending machines either in places that minors were not permitted to enter by law or controlled by electronic disabling devices requiring human intervention, but HHS stressed that Utah had found such devices to be ineffectual. The Model Act conferred yet another accommodation on retailers by exempting them from liability for more than one violation per day.

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104 U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 5(a) (May 24, 1990), Bates No. TIMN0171222/32.


106 U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 5(a)(1) and (2) (May 24, 1990), Bates No. TIMN0171222/32-3.

107 U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 5(b) (May 24, 1990), Bates No. TIMN0171222/33.


109 U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 5(c) (May 24, 1990), Bates No. TIMN0171222/33. Sullivan offered neither explanation nor justification for this bizarre exemption for multiple daily
Although HHS viewed civil money penalties assessed by administrative law judges as a more effective means of enforcement, the Model Act also authorized criminal fines to provide greater flexibility. License holders and employees selling to minors—the latter’s violations were attributed to the former—creating a vending machine were subject to a fine or civil money penalty of $100 for a first violation, $250 for a second violation within two years, $500 for a third violation within two years, and $1,000 for any additional violation within two years. A license holder was not subject to liability for an employee’s sales to minors if he affirmatively demonstrated that he had in place an “effective system...to prevent” sales to minors, but he could avail himself of this exception only once within a two-year period. The Model Act subjected employees to penalties “both to emphasize their responsibility under the law and to protect employers against the carelessness of employees.” Similarly solicitous of employers was the mitigation of progressive penalties for repeated violations “over wide periods of time,” which were deemed to be “truly isolated lapses...” On top of these progressive monetary penalties/fines, the Model Act also imposed, on a per outlet basis, a set of progressive suspensions/revocations/non-renewals: of seven days for a second violation within two years, of one to six months for a third violation within two years, and of nine to 18 months for any further violation within two years. HHS imparted some severity to the penalty for chain stores by suspending, revoking, and not renewing for nine to 18 months all the licenses for outlets under common ownership or control if fines or civil money penalties had been assessed for three or more violations at three or more outlets within two years. The provision was calculated to create a “strong incentive for retail chains to ensure compliance by all of their outlets.”

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110 U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 8(c) (May 24, 1990), Bates No. TIMN0171222/36.
113 U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 8 (May 24, 1990), Bates No. TIMN0171222/35-6
114 U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act: A Model Law Recommended for Adoption by States or Localities to Prevent the Sale of Tobacco Products to Minors” at 6 (May 24, 1990), Bates No.
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

Although the Model Act did not address several important issues, including penalties for minors’ possession of tobacco, the preemption of local ordinances stronger than statewide laws, and the use of sting operations, their omission was not a signal to the states to ignore them. HHS left out a penalty for possession because it would be “far harder to enforce” and less relevant to “preventing widespread availability” than banning sales. The department did not explain why it did not deem the other two matters “necessary or appropriate” within the framework of the Model Act but it did stress that stings were “the most powerful technique for both investigation and enforcement...in most circumstances,” and that “[t]he worst possible outcome would be to enact a state statute which failed to establish an effective and workable enforcement system while preempting local governments from filling this void.”

The Bush administration’s initiative may have secured “enthusiastic support” from the chair of the National Governors Association, Iowa Governor Terry Branstad who a few days later published an op-ed in USA Today supporting Sullivan’s ban (or restrictions) on vending machines and loss of license—but it did not satisfy anti-smoking groups or some congressional Democrats, who criticized it as a “half-hearted gesture....” In particular, Senator Edward

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119 Philip Hilts, “Health Secretary Proposes State Licensing to Keep Cigarettes Away from Children,” NYT, May 25, 1990 (A16:1-3 at 1).


Kennedy lambasted as “‘irresponsible’” the “‘White House tactic of paying lip service to important national goals while rejecting Federal action.... We cannot simply dump our major national problems on the states. This Articles of Confederation approach did not work 200 years ago, and it will not work today.’”122 The triangular dispute involving Sullivan, Kennedy, and the Tobacco Institute as representative public figures can be traced back at least to November 1989, when Kennedy filed the Tobacco Product Education and Health Protection Act which, inter alia, would have created a Center for Tobacco Products within the Centers for Disease Control to make grants to entities to develop anti-tobacco information campaigns and to a limited number of states to enforce a ban on tobacco sales to minors.123 In February 1990 Sullivan testified at a Senate Labor and Human Resources Committee hearing on Kennedy’s bill that cigarette companies were “‘trading death for corporate profits,’”124 but he nevertheless opposed creating ”another Federal bureaucracy to carry out enforcement in the states and cities.”125 In contrast, the cigarette companies, through their Tobacco Institute, acknowledged that it opposed Kennedy’s bill on the substantive grounds that it would give $50 million to anti-tobacco groups to produce anti-tobacco advertising, “even though Americans are already universally aware of the claimed risks of smoking” and the “funds could be used for ‘attack’ ads vilifying the tobacco companies themselves,” and $25 million to states to enforce no-sales-to-minors laws, even though “[t]he states already are acting aggressively in these areas and further Federal support is unwarranted.”126

The advent of Sullivan’s Model Act prompted TI to deal with this much more authoritative competitor. Malmgren immediately informed the policy committee that “[n]o doubt we will see the model in the states,” adding that State Activities would have to take “another look at our model bills in the ‘youth area.’”127 By

(A14), Bates No. TCAL0348831.


125Philip Hilts, “Health Secretary Proposes State Licensing to Keep Cigarettes Away from Children,” NYT, May 25, 1990 (A16:1-3 at 3).

126The Tobacco Institute Statement Kennedy Bill (S. 1883) Mark Up (May 6, 1990), Bates No. 87705847. With some changes the committee reported Kennedy’s bill out as S. 2795 (May 16, 1990).

127Memorandum from Kurt Malmgren to John Nelson et al. (May 31, 1990), Bates No. 0171220.
June 11, Remes, at the State Activities Division’s request, had prepared a draft Model State Tobacco Product Sales Act “for internal discussion purposes only.” It modified his earlier draft minors law “for possible use as a counter to” Sullivan’s model law. In an accompanying memorandum Remes pointed out that his work product, unlike HHS’s model law, would not require a license to sell tobacco, establish a special state bureaucracy, or ban vending machines, but would prohibit youths (defined as under 18 rather than 19) from possessing tobacco products.128 What he did not mention was the most important change effected by his new draft—namely, that the owner was no longer co-liable for employees’ sales or distribution of samples to minors; indeed, the owner was not even liable for vending machine sales to minors if he made the employee responsible for supervising the machine.129

Revealingly, TI’s “Side-by-Side Analysis” of its model law and Sullivan’s failed even to make it clear that unlike the latter, the oligopoly’s scheme did not make owners jointly liable with employees. However, embarrassment over this gift to allied retailers—whose expendable low-wage employees were not envisioned as fit for membership in the industry’s grand coalition—could not have been the reason for this distortion: after all, TI did not shy away from counterposing its mandatory but feckless sign (“By law, tobacco products may be sold only to persons 18 and older”) to the clear warning Sullivan required (“It is a violation of the law for cigarettes or other tobacco products to be sold to any person under the age of 19”).130 The cigarette manufacturers’ lack of bona fides was impressively on display in their failure to mention (let alone to include in their proposal) Sullivan’s requirement that the sign both be in red letters at least one-half inch high on a white background and “include a depiction of a pack of cigarettes at least two inches high defaced by a red diagonal diameter of a surrounding red circle.”131

On the same day Malmgren distributed to the policy committee the outline of

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128 David Remes, Memorandum (June 11, 1990), Bates No. 507635833.
129 Model State Tobacco Product Sales Act § 5(b)(1)(B) (Draft June 11, 1990), Bates No. TI10481640/3-4. The new draft also introduced a fine/civil money penalty for a third violation, but the amount was not specified. Id. § 5(b)(1)(A).
130 [Tobacco Institute], Side-by-Side Analysis Tobacco Retail Sales/Youth Model Legislation” (June 13, 1990), Bates No. 507635827; [Tobacco Institute], Side-by-Side Analysis Tobacco Retail Sales/Youth Model Legislation” (June 15, 1990), Bates No. 507635824.
131 U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 3(d)(1) and (2) (May 24, 1990), Bates No. TIMN0171222/32.
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

a project to “defeat the passage of HHS Model Vending Law”\textsuperscript{132} and scheduled a conference call for two days later to discuss it. Like Malmgren, the committee members were already aware that on June 11 HHS staff had met with “representatives of major state public interest organizations and Governors’ offices in Washington in an effort to solicit support for HHS Secretary Sullivan’s “model Sale of Tobacco Products to Minors Control Act.”\textsuperscript{133} Malmgren’s laundry list of problems to be dealt with by the cigarette oligopoly’s vast resources for its never-ending war against yet another ‘anti’ included:

1. Sullivan has become Bush’s Koop. No high marks for anything before this anti-tobacco campaign and therefore, likely to keep looking for the next Dakota.\textsuperscript{134} Timing of June 11 meeting suggests serious effort to build toward 1991 sessions.
2. Proposal is so multi-faceted, it could withstand lots of amendments and still be a problem.
3. Campaign must attack proposal, without being pro-tobacco to the general audience.
4. Proposal may appeal to traditional tobacco-rights supporters, because of focus on youth.
5. Must move quickly in order to have funds for 1991 effort incorporated into association and corporation budgets.\textsuperscript{135}

Optimistically, Malmgren perceived the following “opportunities” in the form of potential allies spawned by the impact of Sullivan’s approach:

1. Proposal represents more federal interference in state policy, despite growing antagonisms in state capitals.
2. Bill opens up many revenue impact and direct cost questions at a time when states are least able to afford new expenditures or revenue losses.

\textsuperscript{132}[Tobacco Institute], Project Outline (June 11, 1990), Bates No. 507635844.
\textsuperscript{133}Memorandum from Kurt Malmgren to John Nelson et al. (June 12, 1990), Bates No. 507635829.
\textsuperscript{134}In 1989-90 R. J. Reynolds began developing Dakota, a cigarette brand to compete with Marlboro among 18-to-20-year-old white “virile females” with no post-high school education. After an anonymous source had leaked the plans to the Women vs. Smoking Network, its director appeared on television with Sullivan, who condemned Reynolds’ planned targeting of women. The cigarettes were withdrawn in 1992, but it was unclear whether market or anti-smoking forces were the prime cause of their demise. Department of Health and Human Services, U.S. Public Health Service, \textit{Reducing Tobacco Use: A Report of the Surgeon General} 402-403 (2000); Department of Health and Human Services, U.S. Public Health Service, Office of the Attorney General, \textit{Women and Smoking: A Report of the Surgeon General} 512-13, 603 (2001).
\textsuperscript{135}[Tobacco Institute], Project Outline (June 11, 1990), Bates No. 507635844.
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

3. There is no solid evidence that sale of cigarettes/tobacco products to minors is a problem of any proportion, let alone to justify this approach.
4. Impact is spread well among non-tobacco interests, providing good opportunity for coalition.  

The possible participants in this ad hoc coalition included a number of trade organizations whose members sold tobacco such as the National Restaurant Association, National Association of Convenience Stores, National Association of Truck Stop Operators, National Association of Tobacco Distributors, National Federation of Independent Business, Independent Gas Stations, National Automatic Merchandising Association, and fraternal organizations. In addition, the cigarette companies’ coalition would have to engage various government associations such as the National Governors Association and the National Conference of State Legislatures, in whose magazines the tobacco firms would place ads. And finally, the puppeteers would “build editorial opposition,” and recycle such editorials (and op-eds) into packets for further redistribution.

The version of the revised model bill to which the State Activities Division Policy Committee agreed on June 13 and which would be used in response to state and local legislation based on Sullivan’s model measure was virtually the same as Remes’s draft except that it deleted from the definition of “sampling” the distribution of coupons or other vouchers.

The Struggle over and Enactment of H.F. 232: Kindofsortof Regulating Tobacco’s Access to Children and Preempting Local Control of Cigarette Sales

After having thwarted the legislative attack on vending machine sales for Iowa in 1990, the industry was prepared for yet another assault. In the mode of sham indignation in which cigarette company representatives had been taught to luxuriate, Kurt Malmgren, the Tobacco Institute’s senior vice president for State Activities, had instructed the Iowa Association of Candy and Tobacco

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136[Tobacco Institute], Project Outline (June 11, 1990), Bates No. 507635844.
137[Tobacco Institute], Project Outline (June 11, 1990), Bates No. 507635844/5/6.
138Kurt Malmgren to John Nelson et al., Re: Model Vending/Youth Bill (June 15, 1990), Bates No. 507635818.
139Model State Tobacco Product Sales Act § 2 (Draft June 11, 1990), Bates No. TI10481640/1; Model State Tobacco Product Sales Act § 2 (June 15, 1990), Bates No. TI17320441/2.
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

Distributors at their annual convention back in September 1990 that laws “prohibiting access by adult smokers to vending machines are flagrant encroachments on the public’s freedom to choose and the right of merchants to sell or vend a lawful product.” The easy access to cigarettes that vending machines created for children was of no concern to profit-maximizing tobacco companies, which fiercely resisted any detraction from the social acceptability generated by the ubiquity of availability to which vending machines contributed.

By January 1991, R. J. Reynolds’ public issues department had “completed a mailing to more than 57,000 smokers across the state to generate opposition to the tax.” On January 30, the Reynolds Tobacco Company public issues department began a telephone bank, targeting 45 friendly or neutral senators, House leadership, and newly elected House members; it also asked smokers to call their legislators and send them a letter protesting the proposed tax increase. The campaign was designed to last three weeks until debate on H.F. 104 began. A few days later, Tom Ogburn, Jr., RJR’s vice president of public issues, informed Tom Griscom, the executive vice president of external relations, that the phone bank was already targeting 45 senators and 25 representatives.

On February 11, the House Human Resources Committee, after Jane Teaford, the subcommittee chair, had explained H.F. 104, and the full committee’s anti-smoking chairman, Democrat Mark Haverland—a Navy pilot during the

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144Tom L. Ogburn, Jr. to Tom Griscom, Subject: Public Issues Weekly Update February 4 - February 8, 1991 (Feb. 8, 1991), Bates No. 507655694.


146Despite being the subcommittee chair and bill floor manager, Teaford had merely been “given the bill,” had not been involved in drafting it, and did not know anything about its origins. Telephone interview with Jane Teaford, Cedar Falls (June 1, 2008).

147Telephone interview with Mark Haverland, Polk, IA (June 6, 2008). Four years earlier Haverland had sponsored a bill that, in addition to banning vending machine sales, would have raised the legal age for selling cigarettes back to 21 (albeit subject to a counterproductive “not knowingly” condition). H.F. 235 (Feb. 11, 1987, by Haverland),
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

Vietnam war as well as an ordained Methodist minister with masters degrees in divinity and public administration from Harvard University—had showed the committee petitions from more than 700 Iowans favoring the bill, passed the bill by a vote of 19 to 0. Before adopting it, the committee, on a voice vote, failed to pass a so-called sense amendment offered by Republican Lee Plasier, which would have limited to one per year the number of times that the Iowa Department of Public Health, the county or city health department, or the city was authorized to inspect retail permit holders for the purpose of enforcing the no-sales-to-minors provisions. The rationale for Plasier’s opposition to (what were presumably) sting operations was his fear of “harassment of businesses.” Had he been a tad more imaginative (or merely waited about a decade until cities began enforcing the law), he probably would not have expressed an inability to “understand how inspections are going to be effective in apprehending a person either selling or buying cigarettes.”

In the event, Plasier received a prompt and revealing response from the bill’s chief sponsor, Hammond, who, in arguing that the opposite of harassment was the probable outcome, suggested that she had no expectation that her bill’s radical provisions would be enforced: “Overworked police forces...aren’t very likely to devote substantial time to a smoking crackdown.” The chief purpose of the Adolescent Smoking Prevention Act was to deter tobacco use by the 35,000 Iowans under 18 who smoked, half of whom were 11 to 15 years old. Haverland conceded that floor passage would not be easy, despite the decision not to include a provision—recommended by Branstad—increasing the age for legal purchase from 18 to 21, in part because it would have been too difficult to gain sufficient support for such restrictions with so many soldiers aged 18 to 21 fighting (and presumably smoking) in the Persian Gulf or to enforce it if enacted.

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149 [House] Committee Minutes for Human Resources (Feb. 11, 1991) (copy furnished by SHSI DM). The committee passed on a voice vote a subcommittee amendment having to do with vending machines and gifts the exact contents of which the minutes did not make clear. Oddly, the Index to the House Journal failed to list this meeting (HBH-37).
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

principal object in raising the legal was, as Teaford pointed out, increasing the number of people who never started smoking and therefore were, as many surveys demonstrated, unlikely ever to start if they refrained until the age of 21. The resistance to raising the legal age to 21 represented a deviation from the bill’s objective of making the penalties similar to those for buying alcohol by and selling alcohol to minors. The press, by and large, focused on the bill’s ban on vending machines, which, Teaford acknowledged, would “probably be a stumbling block to passage” because “business interests” would lobby against it.

Two days later the House Human Resources Committee filed H.F. 232 as the successor to H.F. 104, which retained all the major provisions of the earlier bill, with which it was, with several minor exceptions not relevant here, identical. Two weeks later Republican Senator Richard Vande Hoef filed a bill, “based,” as handwritten internal R. J. Reynolds Tobacco Company notes stated, “on Governor’s anti-tobacco proposal”:

154 Eric Woolson, “Smoking Bill Runs into Fire,” WC, Feb. 12, 1991 (A10:1). At the time the penalties for selling alcoholic beverages to underage buyers were: $300 for a first violation; a 30-day suspension for a second violation within two years; a 60-day suspension for a third violation within five years; and revocation for a fourth violation within five years. Iowa Code § 123.50(3) (1991). The ban on selling alcohol to 19- and 20-year olds was at § 123.47A.
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159 S.F. 272 (Mar. 4, 1991), Bates No. 507628145.

In the meantime, the tobacco companies were engaged in seemingly cooperative extra-parliamentary activity. TI, as Patrick Donoho, the head of the northern sector later reported to Malmgren, head of State Activities, “developed
a strategy to amend the legislation with sampling and vending restrictions, pre-
emption, and reduced retail penalties. Because of the interest in the issue of
sampling by STC [Smokeless Tobacco Council], they drafted language for the
amendment. It was circulated to the member companies in Iowa.160 STC’s
substitute amendment, which applied to H.F. 104 and was drafted on February 12,
before that bill was superseded by H.F. 232, deleted the total ban on sampling,
replacing it with a ban merely on giving away tobacco products to anyone under
18 or within 500 feet of any school or playground.161 (The language of this
section and of the other three sections of the STC’s amendment was ultimately
enacted word for word.) This amendment was faxed on February 21 by the R. J.
Reynolds Government Relations department apparently to Roger Mozingo.
Faxed at the same time was Philip Morris’s proposal (which, referred to H.F. 232
and was drafted on February 20), which merely tacked on to the STC amendment
wording to conform the existing tax liability to the proposed sampling.162 (The
subsequent conflict between the STC and the Tobacco Institute over the
amendment is taken up below in its chronological order.)

Philip Morris developed its internal position on H.F. 232 in a February 21
memorandum on “Youth Initiatives” that Karen Daragan, the company’s
administrator of media programs, drafted for Sheila Banks, the director of media
affairs. Her “[b]asic message” for Banks was that as much as Philip Morris and
the entire tobacco industry agreed that “cigarettes are not for children,” bans on
cigarette vending machines and cigarette sampling were “not the answer.” The
oligopolist’s stance was rooted in its opposition to “any laws that unnecessarily
limit our ability to provide our cigarette brands to our legitimate
customers—adults who have already made the informed decision to smoke.” This
position was supposedly all the more necessitated by the firm’s (risible) claim
that it was “already imposing severe restrictions upon its own marketing
practices....”163 (As an example of such restrictions the company’s president and
CEO swore that “[w]e will manufacture tobacco branded clothing items in large
adult sizes only....”)164 Daragan’s efforts were directed toward the production of

160Patrick Donoho to Kurt Malmgren, Subject: STC Conflicts with TI (June 21, 1991),
Bates No. 508121169.
161Substitute Language for Iowa House Bill 104, Sec. 7 (faxed Feb. 21, 1991), Bates
No. 507628142.
162PM Proposal: Amend House File 232 as follows (faxed Feb. 21, 1991), Bates No.
507628143.
163Karen Daragan to Shannon Toole, Subject: Youth Initiatives (Feb. 21, 1991), Bates
No. 2025895042.
a youth initiative propaganda video for Iowa in which Banks starred. Five days after Daragan had sent her memo, the PR firm Burson-Marsteller faxed the first draft of the video’s opening and closing segments. After claiming that Philip Morris “has been taking steps to keep cigarettes out of the hands of minors right here in Iowa,” the text misleadingly asserted that the company was “currently supporting amendments in the state legislature that would restrict access to vending machines and sampling of cigarette brands,” thus suppressing the fact that it opposed the bill’s much more efficacious bans. The video apparently served as a come-on to interest “talk shows” in Iowa in inviting Banks to disseminate Philip Morris’ propaganda in connection with the legislative debate. A letter, designed to be used in various states with modifications, drafted by Daragan in March asserted, without explanation, that restricting and limiting vending machines and sampling were superior to outright bans as means of preventing minors from smoking, which was an “adult choice,” in which the company did not want minors to engage.

The battle over the proposed cigarette tax increase, which was complicated by the mutual paralysis of forces between the governor and Democratic legislature and the Republicans’ knee-jerk opposition to any tax increases, continued throughout the session: “Democrats don’t like Branstad’s tax increases—like the cigarette tax. He doesn’t like their idea of raising income taxes on those earning more than $100,000. They don’t want him to cut their programs. He can’t cut theirs.” Regardless of legislators’ resistance, the rest of the state’s population broadly supported the governor’s proposed 10-cent increase. Eighty-five percent of smokers may have opposed it, but they accounted for only 21 percent of those surveyed by the Iowa Poll; with 81 percent of nonsmokers favoring it, 68 percent of all Iowans supported Branstad’s position.
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

Three days after the *Register* published the results of the poll, House Democrats decided to deal with the looming state deficit by adopting Branstad's cigarette tax increase after all (as well as most of his budget proposals) because, blocked from raising other taxes, they now needed all the revenue they could secure.

At this juncture in early March, Reynolds Tobacco, whose government relations department just a week earlier had boasted that the Democratic leadership had shelved Branstad's cigarette tax increase after many members had reported having received calls and letters from “our smokers,” informed its division managers in Iowa that “Governor Branstad is pushing through the State Legislature a broad range of anti-smoking bills which would have a big, direct impact on your customers.” Knowing that the managers “share our enthusiasm to work for smokers’ rights in Iowa,” the company put it to them that if their sales representatives made their customers aware of “these unfair proposals,” they “could be effective in helping defeat them by spreading the word to other business owners.”

In mid-March the House voted 76 to 23 for an amendment deleting the cigarette tax increase, with Democratic leaders able to secure only 17 votes in opposition from their own party ranks. The amendment's chief sponsor, Republican David Millage, justified the deletion by reference to regressivity: this “bad tax...takes money from the family budget and...hits the poorest the hardest.”

One of the Democrats who voted to jettison the tax increase,

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*DMR*, Feb. 25, 1991 (2) (NewsBank). Interestingly, 24 percent of Democrats, but only 14 percent of Republicans smoked; whether this skew was a function of education, occupation, and/or income is not clear. In 1991, 22 percent of male and 20 percent of female adults in Iowa smoked; as elsewhere in the United States, smoking prevalence was highly negatively correlated with educational and income level. Iowa Department of Public Health, *Healthy Iowans 2000: Health Promotion and Disease Prevention Goals and Steps* 20 (n.d. [1993?]).

*Jonathan Roos et al., “Democrats Say They'll Back Branstad's Budget Plans,” DMR, Feb. 28, 1991 (2) (NewsBank).*

*David Yepsen, “Leaders Have No Clear Solution to the ‘5,000-Piece’ Budget Puzzle,” DMR, Mar. 4, 1991 (2) (NewsBank).*


*R. J. Reynolds Tobacco Company to Our Division Managers in Iowa, Governor’s Anti-Smoking Bills Introduced in Iowa (Mar. 8, 1991), Bates No. 507682738.*


Representative John Connors (to whom the Tobacco Institute had given a $500 honorarium in 1984), claiming that the problem was everybody’s—and “not just the poor, the working class, the elderly who smoke cigarettes”—welcomed Millage’s amendment as saying that “we are not willing to take the coward’s way out and put the burden on just one segment of our population.”

Having failed to mobilize enough Democrats for the cigarette tax increase, leadership instead secured passage, on an almost perfect 55-43 party-line vote, of an increase in taxes on richer Iowans by reducing the deductibility of federal tax payments. Basing himself on a fourth-hand account of legislators’ overheard talk about the “avalanche of mail they had received,” Ogburn of R. J. Reynolds Tobacco boasted to his boss Griscom that phone banks, direct mail, and smokers’ rights group activity had helped defeat the excise tax increase.

While Senate action on the cigarette tax was pending, the House debated H.F. 232 on March 27. Two days earlier, TI’s Midwest regional director, Alice O’Connor, informed Patrick Donoho, State Activities vice president for the northern sector, that “[t]he TI amendment” permitting sampling, which had been filed several weeks earlier, would be introduced on the floor. She added: “Floor sponsors include legislators who had been supporting the smokeless amendment unaware that cigarette sampling would be prohibited.” Oddly, O’Connor failed to mention that another TI amendment had also been filed even earlier, both deleting the committee bill’s repeal of the local preemption provision that had been grafted onto the clean indoor air act in 1990 and inserting the same provision into the cigarette sales act. Both amendments were filed by ninth
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

(and last-) term Democrat Emil Pavich, a nonsmoker and former Millers union member from Council Bluffs. As to why he would have been so industrious on behalf of the cigarette companies, a very knowledgeable contemporary of his in the legislature speculated that he was a very lonely man without family whose support a tobacco lobbyist cultivated simply by spending time talking to him.\(^{183}\)

The cigarette companies’ aggressive push for more permissive sampling represented a sharp turn in policy that was all the more remarkable in light of the pronounced absolute and relative deemphasis of sampling as an advertising and promotional practice since the mid-1980s: whereas expenditures on sampling rose from $11.8 million and 3.3 percent of total advertising and promotional expenditures in 1970 to $141.2 million and 7.9 percent in 1982, and $148.0 million (while falling to 7.1 percent) in 1984, by 1989, the figures had dropped to $57.8 million and 1.6 percent, before plunging to only $49.3 and 0.9 percent by 1992.\(^{184}\) Inter-company competitive conflicts had caused the manufacturers in 1990 to suspend their lobbying to authorize sampling packs of six or more cigarettes. A January 1990 TI State Activities memo revealed that Hurst Marshall, an ex-TI employee who by then was working for R. J. Reynolds, had recounted to Bill Cannell, a TI vice president, the substance of his conversation with Pat Wilson, Philip Morris’s Midwest regional director for government affairs on the subject. Reynolds, which sampled in full packs of 20, had, according to Marshall, “no real interest in resuming sampling in Iowa.” Moreover, “RJR did not really want to open up all the old wounds with the wholesalers which is where this all started some years ago.” Finally, and most importantly, Marshall observed that “it was considerably more important that the industry spend its chits on the local preemption bill” (that is, the effort to insert such preemption into H.F. 209’s amendments to the clean indoor air act of 1990). Although Marshall did not directly oppose TI’s efforts on sampling, Cannell

Regular Session 1:407 (Feb. 20) (H-3077, by Pavich).

\(^{183}\)Telephone interview with a former legislator who demanded anonymity (2007). Although this ex-legislator mentioned George Wilson, in fact, Wilson, as representative of the IATD, would have opposed relaxation of the de facto ban on sampling; it was much more plausible that Wasker was the lobbyist. Another of Pavich’s former colleagues, David Osterberg, opined that Pavich did whatever Senate Majority Leader Hutchins told him to do. Telephone interview with David Osterberg, Mt. Vernon, IA (Apr. 1, 2007). Although it seems odd for the leader of one house to give directives to a member of the other house, if correct, Hutchins’ thoroughgoing pro-tobacco position might explain Pavich’s actions.

\(^{184}\)Federal Trade Commission, *Cigarette Report for 2003*, tab. 2 and 2A (2005). Since the dollar amounts are unadjusted for inflation, the drop in real terms was even greater.
“could tell that he didn’t want us to be working on a measure that only their biggest competitor wanted.” Two months later an internal Reynolds document disclosed that the “[p]roject” to amend the law to permit sample packages of six or more cigarettes was “not feasible at this time—Unable to reach company consensus on the size of sampling packages.”

A few hours before the House took up H.F. 232 on March 27, HHS Secretary Sullivan, whom Branstad had invited to Iowa—and who characterized the package sent by the governor to the legislature as based on HHS’s model law—spoke to the tax writing and human services committees to promote the governor’s anti-smoking proposals, including the 10-cent cigarette tax increase. The ranking Republican on the House Ways and Means Committee, ten-term Representative Wayne Bennett, did not explain by what logic Sullivan’s having “provided a lot of ammunition for those who say cigarettes aren’t paying their fair share of the costs now’” had failed to “change[ ] any minds.”

During the debate—which, according to the Associated Press, “generally broke down between smokers and non-smokers”—the House adopted a number of crucial amendments. First, Democrat C. Arthur Ollie, a middle school social studies teacher from Clinton and chair of the House Education Committee, offered an amendment to make it illegal for anyone under 18 to smoke or use tobacco—a type of statute that had largely gone out of style in the states where, in recent years, the “general pattern” had been “to continue letting youngsters decide for themselves whether to smoke, regardless of law.”

Strictly speaking, Iowa had not had on the books a statute banning smoking cigarettes by those under a certain age since absolute prohibition on cigarette
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

sales was repealed in 1921; that law also replaced the ban on smoking by those under 21 that the legislature had enacted in 1909 providing that anyone caught in possession of a cigarette anywhere but on his or her parents’ premises was guilty of a misdemeanor if he or she refused to give information as to the source of the cigarette. The successor to this provision was finally repealed in 1987, when, after Senator Beverly Hannon had filed S.F. 222, which would merely have made it illegal both to furnish smokeless tobacco to anyone under 18 and for those underage persons to refuse to identify the source of smokeless tobacco they were found in possession of, the House passed an amendment repealing the latter provision and the Senate concurred in it. According to the National Interagency Council on Smoking and Health, in 1969 five states made it illegal for minors to smoke, while seven others provided that minors found smoking were subject to arrest and a fine, but that their sentences could be suspended if they revealed who had sold or given them the cigarette. Ollie’s amendment, which was adopted on a non-recorded vote, does not appear to have been tainted by the fact that he had introduced it “at the urging of a lobbyist for the

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193 See above chs. 13 and 15.
tobacco industry, which he said has taken a position against youth smoking, but which in fact favored deflecting attention from its own overwhelming responsibility by focusing on statutory punishment for children who bought and smoked its commodities.

On another non-record vote the House then adopted an amendment offered by the bill’s floor manager, Jane Teaford, to delete a provision empowering the Public Health Department, county and city health departments, and cities to inspect the premises of retail cigarette permit holders for purposes of enforcing the prohibition on selling to persons under 18. Next, the chamber adopted in a similar manner another amendment offered by Teaford to substitute for the bill’s blanket ban on vending machine sales of tobacco the requirement of a lock-out device, controlled by someone over the age of 18, subject to exemptions for: commercial establishments (not also licensed as food service establishments) with a liquor license or beer permit; private facilities not open to the public; and workplaces not open to the public. This very significant dilution of the bill—lock-out devices did not adequately prevent youth access—undercut Teaford’s own floor statement that “keeping cigarettes out of the hands of teenagers is one of the best strategies to reduce tobacco use among the population as a whole, because most users acquire the habit early in life.” Many years later Teaford, while certain that she had not filed the amendment out of “conviction,” conjectured that since her two co-sponsors were anti-smoking Republicans, that party’s caucus must have concluded that it would not be able to guarantee enough votes for passage without this weakening amendment, and that she had agreed

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197 Tom Carney, “Juvenile Smoking Law Is Apparently Ignored by Iowa’s Law Enforcers,” DMR, Aug. 1, 1991 (4M) (NewsBank). Whether Ollie actually identified the impetus for the amendment and rehearsed the industry’s preposterously mendacious claim is unclear. Unfortunately, 17 years later Ollie had no recollection at all of the amendment; he conjectured that he had filed it as a favor for a tobacco lobbyist, but assumed that he also supported the amendment. In any event, he was certain that he had not offered it based on moral outrage over having seen students smoke in school (though he had in fact seen them). Telephone interview with Arthur Ollie, Clinton (May 30, 2008).


201 Jonathan Roos, “Bill Curbs Cigarette Sales to Kids,” DMR, Mar. 28, 1991 (2) (NewsBank). Unfortunately, the Register offered virtually no account of the debate on this important bill.
to it in order to secure those votes.\textsuperscript{202}

Democrat Mark Haverland, the House Human Resources Committee chair, describing the lock-out device as a “‘Rube Goldberg’ method of selling cigarettes,” pleaded with his colleagues: “‘If we can’t at the very least ban the sale in vending machines, we ought to be embarrassed with ourselves.’” As far as Haverland was concerned, the amended bill was a “‘compromise with the devil.... We’re giving in to the merchants of death here. These folks are selling a product that is killing us.’”\textsuperscript{203} Years later, Haverland, who pointed out that there had been enough legislators who sympathized with vendors’ complaints that they could not watch the machines all day, characterized the setback as simply an example of how “sometimes the good guys just lose.”\textsuperscript{204} Although the adoption of Teaford’s amendment had already deleted the prohibition of all cigarette vending machine sales, the House resumed consideration of an amendment to delete the prohibition. On a non-party-line roll-call vote the amendment was defeated 36 to 59 (though the prohibition remained repealed).\textsuperscript{205} This puzzling procedure may have been designed to undo the lock-out requirement as well as the total ban on vending machine sales, though it would have been a very unorthodox way of achieving that end.\textsuperscript{206} To be sure, since the amendment’s

\textsuperscript{202}Telephone interview with Jane Teaford, Cedar Falls (July 22, 2007). The amendment, which was not filed from the floor, was cosponsored by Dorothy Carpenter and Lee Plasier. \textit{State of Iowa: 1991: Journal of the House: 1991: Regular Session Seventy-Fourth Regular Session} 1:881 (Mar. 26) (H-3342). To be sure, they had filed a virtually identical amendment four days earlier, which they withdrew before offering H-3342. \textit{State of Iowa: 1991: Journal of the House: 1991: Regular Session Seventy-Fourth Regular Session} 1:791 (Mar. 22) (H-3300). One possible source of opposition to Teaford’s bill bringing about its eventual dilution was an amendment filed by Bisignano and four other representatives that would have declared the ban on cigarette vending machine sales a taking and required compensation and that Bisignano did not withdraw until after both of Pavich’s amendments had been passed. \textit{State of Iowa: 1991: Journal of the House: 1991: Regular Session Seventy-Fourth Regular Session} 1:407, 905 (Feb. 20, Mar. 27) (H-3076).


\textsuperscript{204}Telephone interview with Mark Haverland, Polk, IA (June 6, 2008).


\textsuperscript{206}Former House Speaker Avenson agreed that the amendment should have been declared out of order after Teaford’s had been adopted and that if its purpose was to eliminate the lock-out provision, it should have been an amendment to the amendment and
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

sponsor, David Schrader, had operated a (cigarette) vending machine business before entering the legislature, such an objective seems plausible, even though it could not have been Schrader’s purpose when he originally filed the amendment at a time when the bill contained no lock-out requirement. Schrader argued that a ban would merely injure the vending machine industry without reducing the number of underage smokers, in part because most machines were in out-of-the-way places where minors seldom went.

At this point Pavich offered TI’s amendment that removed the restriction on sampling to cigarette packages of no more than four cigarettes, substituting for it a ban on giving away cigarettes or tobacco products to anyone under 18 or within 500 feet of a playground, school, or other facility when it was being used by people under 18. It narrowly passed 51 to 45 on a non-party-line vote, though three-fifths of Democrats voted for the pro-tobacco position, while fewer than half of Republicans did.

Next, Pavich offered his other amendment, deleting the language in the bill repealing the local preemption provision from the 1990 amendments to the clean indoor air act and inserting the identically same preemption into the cigarette sales act. It passed by a larger margin, 58 to 35; this time, a bare majority of Democrats voted (25 to 22) for preemption, whereas almost three-fourths of

not to the bill. Telephone interview with Don Avenson, Oelwein (July 22, 2007). Schrader’s amendment to H.F. 232 was the first to be filed. State of Iowa: 1991: Journal of the House: 1991: Regular Session Seventy-Fourth Regular Session 1:388 (Feb. 18) (H-3071, by Schrader). The unofficial but comprehensive Iowa Legislative News Service Bulletin # 47 at (Mar. 27, 1991), which described Schrader’s amendment as “striking the limitations on cigarette vending machine sales,” supports the view that adoption of his amendment would have deleted the lock-out provision.

Telephone interview with David Schrader, Des Moines (July 23, 2007). Schrader, who by 2007 was the deputy clerk of the House, had no recollection of having filed this amendment and stated that he was surprised to hear that he had voted in favor of sampling. He noted that his business had been juke boxes and game machines, but in order to retain customers he had also had to provide them with cigarette machines. Though also unable to unravel the procedural puzzle, he admitted that it was possible that the purpose of his amendment might have turned into undoing the lock-out requirement, which would have been very burdensome to vending machine owners and lessees; he also noted that since the vast majority of bars sold food, they would not have been exempt.

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Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

Republicans voted (33 to 13) for it. 210 The campaign contributions that RJR PAC made to House incumbents in 1991-92 aligned predominantly, but not perfectly with their votes on preemption: Bisignano, Roger Halvorson, Krebsbach, Hahn, Lundby, Iverson, Knapp, Kremer, and Wise voted Aye, but Bartz, Brand, Dvorsky, and McKinney voted Nay. 211 (Dvorsky, a strong anti-smoking advocate, remembered years later that he had never understood why he had been a recipient or what the company might have thought it was getting in return, but his election committee treasurer had immediately cashed the check.) 212

The replicated language read:

Enforcement of this chapter shall be implemented in an equitable manner throughout the state. For the purpose of equitable and uniform implementation, application, and enforcement of state and local laws and regulations, the provisions of this chapter shall supersede any local law or regulation which is inconsistent with or conflicts with the provisions of this chapter. 213

In mechanically grafting this language from the anti-smoking law onto the cigarette sales and licensing law the cigarette companies’ battalion of high-priced lawyers overlooked one overriding historical-structural-contextual fact: whereas local preemption made some sense in the former statute, which was statewide in its scope, it was nonsensical and incoherent as applied to the latter’s permit provisions, which, from the statute’s origins in 1921, conferred complete discretion on local governments to grant or deny sales permits. Since these permit provisions lacked a uniform statewide dimension, it would be literally impossible for local governments to identify any uniform content with which local permit decisions could be inconsistent or conflict. Since the statute, as authoritatively interpreted by the Iowa Supreme Court, conferred power on city councils and county boards of supervisors, for example, to deny all permits, to grant some and deny others, or to impose limits on the number of permits outstanding at any one time, 214 local permit policies could vary widely—indeed, that very local control and potential heterogeneity was part and parcel of the

211 Data provided by the Iowa Ethics and Campaign Disclosure Board (Apr. 4, 2008).
212 Telephone interview with Robert Dvorsky, Coralville or Des Moines (Apr. 6, 2008).
214 See above ch. 21.
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

compromise that made abolition of statewide prohibition possible in 1921. Consequently, there was (and is) no uniform statewide model for local governments to take as their framework or reference point. In order to implement their intent coherently, the cigarette oligopolies would have had to lobby to revamp the entire structure of the permit provisions so as to eliminate local control and centralize all permit authority in the state. The consequence of their failure (even to imagine the need) to reconfigure the statute is that until the present day the preemption provision cannot be plausibly interpreted to prohibit the hundreds of local governments in Iowa from adopting what would aggregate to a checkerboard of permit policies (although in fact city councils, in addition to being unaware of having this freedom, have become so beholden to commerce über alles that they would no longer, as some did in the 1920s and 1930s, even consider issuing permits other than automatically).

HHS Secretary Sullivan had told legislators earlier on the day of the

215 See above ch. 15.

216 See above ch. 20. In what was presumably an extraordinarily rare instance, in 1993 a physician in Grundy Center, animated by cigarette displays in front of cash register counters that enticed youths to steal, requested that the city council insure that all cigarettes be displayed behind counters, but added that ultimately he wanted the council to place a ban on cigarette sales altogether, which he hoped to see extended to the whole county and state. Although the council was purportedly “sympathetic” to the request, its vision of public health was encumbered by its understanding for commerce: “The council...said they could not tell the businesses where to display cigarettes and in fact understood the tobacco companies pay the stores to display them in certain areas.” Helen Brandl, “Grundy Center Hears Plea About Sale of Cigarettes,” Times Republican (Marshalltown), May 6, 1993, Bates No. TI28922767. See also “Doctor Voices Objection to Council on Cigarette Sales,” Spokesman (Grundy Center), May 6, 1993, Bates No. TI28922767.

217 Nevertheless, the Iowa League of Cities, which “kn[e]w of no city that has attempted to deny a permit on local discretionary items pursuant to local ordinance,” takes the position that “cities do not have the authority to deny issuing a permit on any grounds unrelated to the specific statutory authority.... Our inclination is that cities are pre-empted from defining other grounds for denying permits.” Email from Tom Bredeweg, Executive Director, Iowa League of Cities, to Marc Linder (Feb. 1, 2006). Similarly, the Iowa Alcoholic Beverages Division, which administers and oversees enforcement of the state’s tobacco laws, when asked whether cities and councils could establish their own criteria for issuing or revoking permits, took the position that “State law currently pre-empts local ordinances,” citing the irrelevant Iowa Supreme Court decision interpreting the anti-smoking statute. In the same vein, it opined that a “city cannot enact an ordinance limiting the number of tobacco permits issued with the city’s jurisdiction. A city could not legally start denying applications for new permits.” Email from Nicole Gehl, Operations Manager, ABD, to Marc Linder (Jan. 19, 2006).
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

preemption vote that although he believed that tobacco had “no redeeming value,” he nevertheless acknowledged that “it would be virtually impossible to ban the product because it has been part of the U.S. culture for centuries.” Despite his admission that such a ban would result in a black market, critics of the bill tried to paint its supporters into an absolutist corner, insisting that anti-smokers “should outlaw smoking directly” rather than indirectly by means of bans on sampling or vending machines. Speaking perhaps for some other legislators, but definitely for the cigarette manufacturers, Democrat Dan Jay argued: “‘If you want to ban cigarettes, ban cigarettes and be upfront about it,’”218 His fellow Democrat, Tony Bisignano, a smoker, was unable to refrain from availing himself of the ignorant taunt: “‘If it’s so bad for public health, why aren’t we striking the death blow?’”219

The House then voted 72 to 25 to pass H.F. 232. Among the 18 Democrats and 7 Republicans opposing the bill were both strong advocates of regulation of smoking and tobacco such as Democrats Philip Brammer and Mary Neuhauser and vehement opponents such as Republican Stewart Iverson and Democrat Tony Bisignano as well as Pavich himself; on the other hand, the House’s two most prominent anti-smoking advocates, Democrats Hammond and Osterberg, voted for the deeply flawed bill, while Republican Mary Lundby, a traditional opponent, nevertheless supported it.220 Such seeming anomalies in voting patterns suggest that the several compromises comprising the core of the bill may have stripped voting decisions of principle and rendered judgments inconsistent and therefore unpredictable as to whether the measure was still worth passing. Teaford’s motion to reconsider having failed by an overwhelming vote of 8 to 68,221 the bill was transmitted to the Senate. In a post-mortem analysis, Branstad and Sullivan blamed the tobacco industry’s intense lobbying, which had “inundated the legislature,” for watering down the bill.222 Teaford agreed with

Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

their charges, but none of them explained exactly how that lobbying motivated legislators to vote in conformity with the cigarette industry’s interests.

In the interim attention shifted back to the tax bill. In support of it ICAN issued an “Action Update” dealing with regressive taxes in Iowa generally, but presenting graphs focusing on the impact on various income classes of an increase in tobacco taxes. Although in fact the proportion of income paid in the lowest income quintile (with a ceiling of $12,000) would rise only from 1 percent to 1.33 percent if the cigarette tax were increased from 31 to 41 cents, even at the lower (current) tax, the regressivity was clearly on display: once the 80th to 95th percentile (with a ceiling of $74,700) was reached, the proportion of income paid in tobacco taxes was no longer even captured by the graph. To be sure, ICAN failed to point out that this monotonic drop was in part a function of the perfect negative correlation between income level and smoking prevalence.

ICAN requested and TI provided assistance for production and distribution of two newsletters on the state budget. Lowell Junkins, TILMC’s Iowa labor counsel, underscored “ICAN’s commitment to our cause. They have been at the forefront on this issue and have already begun lobbying key senators.” The amount of money that ICAN was getting from the cigarette companies at this time was considerable and increasing. In 1990, TILMC paid ICAN $11,000. In 1991, TILMC’s funding of ICAN jumped to $46,500, which consisted of $3,000 a month plus an additional $10,500 in April. The rubric under which TI categorized these disbursements provides a profoundly (albeit inadvertently) ironic insight into the self-degradation by which ICAN’s leaders had warped this anti-corporate, populist, consumerist organization: “Grassroots Lobbying by Vendor.” That ICAN’s leaders had agreed to turn this progressive movement

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Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

behind its members’ backs into a seller of grassroots lobbying services to the likes of Philip Morris and R.J. Reynolds Tobacco sheds fascinating light on how the tobacco industry was able to use its huge profits covertly to buy the kind of legitimacy that the creation of a front group that could have been traced back to the cigarette companies would never have furnished. That without exception the leading Iowa government officials and legislative leaders and rank and file of the period, when informed, almost two decades later, of the discovery of this connection in the industry’s internal documents, were all shocked and astounded suggests how well the secret was kept.230 With total revenue estimated at only about $1.1 million 1991,231 the money from the cigarette manufacturers represented a significant proportion of ICAN’s budget—significant enough that when the $3,000 a month subsidy stopped it was definitely noticeable.232 The funding of ICAN was also significant to TILMC: although the $46,500 amounted to only 2 percent of the almost two million dollars that TILMC dispensed under

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230 Under these circumstances the protestation in 2007 by Jay Larson, ICAN’s executive director from 1988 to 1992, that he did not know whether ICAN’s members had known that ICAN was taking money from the tobacco industry seems highly implausible. Telephone interview with Jay Larson, Everett, WA (July 19, 2007). Jan Laue, an IFL vice president who was an ICAN board member from 1993 to 2006, stated that with the exception of a $10,000 check that she helped secure in 1998 from TILMC through the Tobacco Workers Union, she had been unaware of any subsidies that ICAN had been getting from the tobacco industry. Telephone interview with Jan Laue, Des Moines (July 24, 2007).

231 This figure was extrapolated from total telephone canvassing income of $573,670, which was estimated to have been about one-half of total revenue. Email from Amy Logsdon, ICAN, Iowa City, to Marc Linder (Aug. 10, 2007). Earlier the same source had estimated ICAN’s annual gross revenues at about $800,000 in the early 1990s. Email from Amy Logsdon, ICAN, Iowa City, to Marc Linder (July 24, 2007).

232 Telephone interview with Amy Logsdon, ICAN, Iowa City (July 20, 2007). Logsdon, ICAN political director, who had been with ICAN since the early 1990s, reported that the staff had been told that the money came from the Bakery, Confectionary, and Tobacco Workers Union; when ICAN finally decided to stop taking this money in the late 1990s, the union representative on the ICAN board was very insulted on the grounds that this funding had been collectively bargained for. Id. Assuming that this monthly $3,000 was the same money discussed in the text, the attribution of the source to the union was incorrect: TILMC’s funds came overwhelmingly from the Tobacco Institute—which was, in turn, fully funded by tobacco companies, including R.J. Reynolds, which was nonunion and antunion—the rest coming from individual tobacco companies. Michele Radell to Susan Stuntz, Memorandum: Subject: Tobacco Industry Labor Management Committee [Receipts and Disbursements December 31, 1992] (Jan. 8, 1993), Bates No. TI14920961/62-63.
the heading “grassroots lobbying,” not only was it the thirteenth largest sum, but ICAN in fact received more than any other grassroots organizing group in the country.\textsuperscript{233} The occasion for the additional $10,500 “grant” that ICAN received in April 1991 was a special nationwide “fair tax campaign”\textsuperscript{234} that Citizens for Tax Justice (a union affiliated research group to which TILMC gave even more funding) had launched of which ICAN was a prominent co-sponsor.\textsuperscript{235} Its executive director, Jay Larson, held one of numerous nationally coordinated press conferences in Des Moines on CTJ’s “A Far Cry from Fair” on April 22.\textsuperscript{236} TIl President Chilcote, in a report the following day to his executive committee, singled out ICAN’s mention of the recent Iowa Senate vote to raise excise taxes.\textsuperscript{237} The additional funding that ICAN received in April may have been used for the following lobbying and canvassing activities:

In April with the release of A Far Cry from Fair, ICAN mailed excerpts from the report and the Iowa analysis to all Iowa legislators. The entire report was sent to legislative leaders and key committee members. As you will recall, by late April the Iowa legislature was in the final throes of its budgeting process, for this reason ICAN chose to hold off on sending full copies of the report to legislators until their undivided attention could be focused on it and until they were more accessible to their constituents.

Next month we plan to send the report to all Iowa representatives and senators. Upon that mailing we will do the first round of legislative targeting for the 1992 session. The mailing will then be followed up with a phone call to targeted house and senate members requesting a meeting in the legislator’s district. Supporters and allies from each targeted district and ICAN staff will attend these lobby visits.\textsuperscript{238}

At least through 1993, TILMC continued the $3,000 monthly payment to ICAN

\textsuperscript{233}Tobacco Industry Labor Management Committee Receipts and Disbursements December 31, 1991 (Feb. 6, 1992), Bates No. TI14920991/1015/1017, on tobacco documents.org. Those receiving more money were largely profit-making entities; the only two advocacy organizations (Citizens for Tax Justice and Coalition on Human Needs) that got more money were not involved in organizing as ICAN was.

\textsuperscript{234}Labor Management Committee Coalitions (no date), Bates No. TNWL0050258/71.

\textsuperscript{235}State Co-sponsors of Citizens for Tax Justice Tax Study (April 22, 1991), Bates No. TIOK0011525.

\textsuperscript{236}Opening Statement for CTJ Study--Des Moines Iowa (Apr. 21, 1991), Bates No. TITX0037520.

\textsuperscript{237}Samuel D. Chilcote, Jr. to Executive Committee (Apr. 23, 1991), Bates No. TIOK0011522.

\textsuperscript{238}Preview of ICAN’s Upcoming Tax Work (Aug. 15, 1991), Bates No. TCAL0067719.
as a vendor of grassroots lobbying.\textsuperscript{239}

The end of the protracted controversy over the shape of taxes and the budget began to emerge by April 12, when Democratic and Republican senators agreed that a five-cent increase in cigarette taxes would be part of the deal.\textsuperscript{240} Junkins had boasted to his TI handler as recently as April 5 that Hutchins, his successor as Senate Majority Leader, was “on our side” and the chances of Branstad’s “gaining ground” on his proposed cigarette tax increase were “slim...given the friends we have made.”\textsuperscript{241} Nevertheless, the dim prospects for government revenues had “forced” senators to reconsider their opposition to raising the cigarette tax. Hutchins simply said that “[w]e need some additional revenue,” while Republican Minority Leader Rife intoned: “It’s not an easy tax to raise, but we pretty much have to.”\textsuperscript{242} The import of the Iowa tax to the cigarette manufacturers can be gauged by the fact that four days later the R. J. Reynolds executives in charge of government affairs conveyed to the company’s CEO, president, and chairman, James Johnston, the tobacco firm’s Midwest regional director’s intelligence that “[d]espite a well coordinated industry effort, it now

\textsuperscript{239} Michele Radell to Susan Stuntz, Memorandum: Subject: Tobacco Industry Labor Management Committee [Receipts and Disbursements December 31, 1992] (Jan. 8, 1993), Bates No. TI14920961/83; Michele Radell to Walter Woodson, Subject: Tobacco Industry Labor Management Committee (Jan. 13, 1994), Bates No. TI16360860/84, on tobaccodocuments.org (annual total of $46,000 including an additional $10,000 in April). In 1997 TILMC paid ICAN $15,000. Larry Schmitt to Bill Adams, Summary of Vendor Payments TI LMC - 1997 (Jan. 16, 1997 [should be 1998]), Bates No. TI14920829/30. As late as 1998 ICAN accepted a $10,000 donation from TILMC. Letter from Jan Laue (IFL executive vice president and ICAN board member) to Frank Hurt (president, Bakery, Confectionary, and Tobacco Workers) (Dec. 22, 1998), in Iowa Labor Collection, Iowa Federation of Labor, AFL-CIO, Records, 1894-2000, Z61, Box 24, Folder: Iowa Citizen Action Network-Correspondence and Survey, 1984, 1987, 1998, SHSI IC. Despite having been an ICAN board member from 1993 to 2006, Laue insisted that this donation, which she solicited at a time when ICAN was especially in need of funds, was the only money she was aware of that ICAN had ever received from the tobacco industry. Telephone interview with Janice Laue, Des Moines (July 24, 2007). TILMC issued the check on Sept. 16, 1998 for the purpose of “support contribution” as requested by Jim Savarese. TILMC, Check Request (Sept. 9, 1998), Bates No. TCAL0097877/8; Iowa Citizen Action Network 1998 (LMC-111) (Sept. 16, 1998), Bates No. TCAL0097875/6.


appears there will be a 3-5¢ per pack increase” in Iowa. The Senate did quickly fall in line with leadership’s decision on the five-cent increase, but the House continued to reject the cigarette tax provision while its Democratic members fended off Republicans’ efforts to drop the limit on federal tax deductibility. In the end, however, 12-hour “private negotiations among Democratic leaders” produced an agreement to raise the cigarette tax by five cents but to delete the reduction in deductibility, thus letting richer Iowans off the hook.

H.F. 232 began making its way through the Senate on April 11, when, by a vote of 8 to 2, Hannon’s Human Resources Committee recommended the bill’s passage. The meeting minutes contain no information concerning the committee’s discussion of H.F. 232, but TI lobbyist Wasker reported that although an attempt to remove “tobacco products” from the tax stamping of the sampling provision had failed, he had “converted committee opponents to become sponsors of a floor amendment” and did not “anticipate any problems on the floor.” Moreover, before the bill went back to the House for concurrence on this amendment, “Wasker said he will be sure House Leadership doesn’t open the bill up for any other amendments. Wasker feels confident at this point that we are in very good shape. The smokeless problem will be taken care of on the Senate floor.”

A few days later Democrat Elaine Szymoniak filed an amendment adding court costs to the penalty section of the clean indoor air act and, more importantly, modifying that statute’s preemption provision to permit cities to

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243 M. B. Oglesby, Jr. (executive vice president government relations) and Roger Mozingo (vice president state government relations) to J. W. Johnston (Apr. 16, 1991), Bates No. 507628075.


248 Email from Meaghan McCarthy, Archivist, SHSI DM, to Marc Linder (July 11, 2007).

enact ordinances “for which a violation is a civil or criminal penalty in an amount not exceeding the amount specified in section 364.3, subsection 2, or section 364.22”—$100/30 days for a first offense and $200 for repeat offenses.  

Wasker faxed this amendment to TI, prophetically adding that it “may not be germane, and he’s working on it.”

After deferring consideration of the bill on April 19, the Senate finally debated H.F. 232 on May 1, when, as Wasker had predicted, Szymoniak’s weak anti-preemption amendment, challenged by Assistant Minority Leader John Jensen as being not germane, was ruled out of order. In a last-ditch effort to delete local preemption entirely from the cigarette sales act, Jean Lloyd-Jones filed a floor amendment, which failed by the very narrow margin of 23 to 24. Although the vote was not at all strictly along party lines, 15 of 26 voting Democrats but only 8 of 21 Republicans favored the amendment. What did bridge the gap between the parties, however, was the fact that of the 10 leaders and assistant leaders, only one (Republican Maggie Tinsman) supported Lloyd-Jones’s initiative. And, as always, most of the prominent heavy smokers—who included Majority Leader Hutchins and Minority Leader Rife—voted as the tobacco industry wished. As was the case with House members, RJR PAC’s 1991-92 campaign contributions to senators matched up predominantly but not completely with their votes on preemption: whereas Hutchins, Fraise, McLaren, Hagerla, Horn, and Rife, voted against deleting preemption, Democrats Boswell, Gronstal, and Kibbie voted to delete. Presumably having concluded from that vote that nothing more could be done to remove other pro-tobacco provisions, Sturgeon moved for a final vote, the near unanimity of which (45 to 2) seemed to express anti-smokers’ exhaustion. Lloyd-Jones nevertheless filed a motion to reconsider, which, despite securing 25 votes to its opponents’ 22, failed because

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255 Data provided by the Iowa Ethics and Campaign Disclosure Board (Apr. 4, 2008).

Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

it lacked the 26th vote required by the constitution for passage.\textsuperscript{257}

Several days before the end of the session, the House concurred in the Senate amendment and went on to pass the bill by a vote of 79 to 16. Presumably as a protest against a bill that did more to protect tobacco companies than public health, several of the chamber’s most ardent anti-smoking Democrats, including the entire greater Iowa City delegation (Minnette Doderer, Robert Dvorsky, Mary Neuhauser, and David Osterberg) as well as Rod Halvorson (but not Johnie Hammond), voted Nay. Also among the Nay-sayers were, oddly, two of tobacco’s most faithful legislators: Emil Pavich and David Schrader.\textsuperscript{258}

Once H.F. 232 had been revamped to delete the bans on sampling and vending machines as well as the repeal of preemption, it became “industry endorsed.” Branstad, on the other hand, was, as Reynolds’ Midwest regional director reported, “very unhappy with the measure, but [wa]s expected to sign it.”\textsuperscript{259} And although the governor’s spokesman termed the bill “a half-step in the right direction,” in part because “[t]obacco still does not pay its own way in terms of health costs,”\textsuperscript{260} he nevertheless signed it.\textsuperscript{261} During the four weeks between legislative passage and gubernatorial approval, TI was maintaining a low profile because its Midwest regional staff had “worked out with TI lobbyist, Chuck Wasker, a provision that is in the bill which we do not want publicized at this point because the Governor has not yet signed the bill. The provision makes it illegal to conduct sting operations.”\textsuperscript{262}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{257}State of Iowa: 1991: Journal of the Senate: 1991: Regular Session Seventy-Fourth General Assembly 1:1635-36 (May 3). Eighteen of 28 Democrats (including two assistant leaders), but only seven of 19 Republicans voted to reconsider.
\item \textsuperscript{259}[R. J. Reynolds Tobacco Co.], Governor Branstad’s Anti-Tobacco Proposals (May, 8, 1991), Bates No. 507628838.
\item \textsuperscript{261}1991 Iowa Laws ch. 240, at 493.
\item \textsuperscript{262}Alice O’Connor to Pat Donoho, Action-Trac: Iowa HF232 (May 8, 1991), Bates No. TI28711385. It is unclear what provision in the bill could have prohibited sting operations. H.F. 104 and H.F. 232 originally contained a provision empowering the Iowa Department of Public Health, county and city health departments, and cities to “inspect the premises of a retail permit holder for purposes of enforcing” the section prohibiting the sale of cigarettes or tobacco products to persons under 18 and the purchase of the same by the latter. H.F. 104, § 3; H.F. 232, § 3. But the House adopted an amendment offered by Teaford striking this provision. State of Iowa: 1991: Journal of the House: 1991: Regular Session Seventy-Fourth General Assembly 1:899 (Mar. 27) (H-3301).
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Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

As enacted, H.F. 232 included a number of notable provisions. (1) Persons under 18 were prohibited from buying, smoking, or using cigarettes or tobacco products; violations were punishable by a maximum fine of $100 or the performance of court-ordered community service. Supporters did not specify how strict local enforcement would be, but Ollie, who had offered the amendment, argued that the provision would give school officials "a strong leg to stand on by saying, "You may not do that here".... They're not going to call the police into [sic] sweep the bathrooms, but this will give strong moral authority for school district policies...." In the event, enforcement, was, for almost a decade, virtually nonexistent. Legislators were not only aware of this failure, but, according to Haverland, realizing that the 1991 amendments merely represented a "baby step," had not even expected a high level of enforcement in the short term. This minimalism resulted, on the one hand, from a desire not to close down stores and, on the other, from a very long-term incrementalist perspective of the struggle against smoking. (2) A minor was no longer permitted to buy cigarettes with a parent’s written order. (3) Instead of banning vending machine sales altogether, as the bill’s sponsors had originally intended, the law now authorized such sales subject to the lock-out mechanism, which the legislature then unanimously repealed just six years later. (4) Instead of a

2631991 Iowa Laws ch. 240, § 3, at 493.
2641991 Iowa Laws ch. 240, § 10, at 493, 495.
266See below ch. 31.
267Telephone interview with Mark Haverland, Polk, IA (June 6, 2008). In 2008 Haverland mentioned that as a legislator he had spoken of a 25-year incrementalist plan to ban smoking outright. Such a plan appears to have left no trace in the written record and if it was ever publicly articulated, it seems unlikely that it attracted any significant number of legislative adherents.
2681991 Iowa Laws ch. 240, § 3, at 493.
2691991 Iowa Laws ch. 240, § 6, at 493, 494. Despite the watered down and ineffective version that Iowa enacted, a National Public Radio reporter, when told by the IDPH government relations chief of this provision, absurdly declared: “Good heavens! You sound like sort of an armed tobacco camp to me.” Radio TV Reports, Inc., Teenage Smoking Ban in Iowa at 2, Weekend Edition (July 13, 1991), Bates No. TIMN219964/5 (Susan Stamberg interviewing Michael Coverdale).
270In 1997, after studies had revealed that underage teenagers were able to buy cigarettes from vending machines 94 percent of the time in 1994 and 79 percent of the time in 1996, both houses unanimously passed a bill (sponsored by Stewart Iverson, the legislature’s most prominent smoker, and supported by Attorney General Tom Miller),
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

total de jure ban on sampling—which for years cigarette companies had complained was “already illegal de facto [sic] in Iowa” because the law permitted sampling only in packages of four or fewer cigarettes, which “nobody makes”271—as the bill’s sponsors had originally intended, the law now authorized sampling, provided that it took place more than 500 feet away from a school or playground and was not directed at minors.272 And (5), instead of repealing—as the bill’s sponsors had intended—the preemption of local ordinances that the tobacco companies had succeeded in having inserted into the clean indoor air act in 1990, the legislature inserted the identically same preemption language into the cigarette sales law.273 Finally, the new law, like H.F. 232 itself, did not, as the governor had proposed, raise the age for buying tobacco from 18 to 21. Overall, then, the tobacco companies benefited considerably more from the amendments than the anti-smoking movement. No wonder that National Public Radio reported that the “Tobacco Institute...supports the anti-tobacco law in Iowa.”274

The close of the 1990 session marked the end point of legislative progress on the regulation and restriction of public smoking until 2008. The foregoing account of efforts to repeal local preemption in 1991 is illustrative of repeated failures over the next 17 years to achieve this elusive and important goal in a state with an increasingly anachronistically weak statewide law.275


2721991 Iowa Laws ch. 240, § 7, at 493, 494-95. In the wake of the Master Settlement Agreement, the Iowa legislature in 2000 enacted the Tobacco Use Prevention and Control Partnership law, which repealed the partial sampling law and instead prohibited manufacturers, distributors, wholesalers, and retailers from giving away cigarettes or tobacco products. See below ch. 31.

2731991 Iowa Laws ch. 240, § 8, at 493, 495.

274Radio TV Reports, Inc., Teenage Smoking Ban in Iowa at 4, Weekend Edition (July 13, 1991), Bates No. TIMN219964/7. Michael Coverdale, the IDPH government relations chief, stated that the only reason for the support was the tobacco lobby’s success in “defeating another part of the legislation which would have restricted smoking in public places.”

275See below ch. 35 on the 2008 session. Even the relatively strong statewide public smoking law enacted in 2008, which struck the preemption provision, was still subject to
The Cigarette Oligopolists Celebrate Their Victory and Their Helpers

In his post-session summary, R.J. Reynolds Tobacco’s Midwest regional director, Hurst Marshall, boasted to his boss, Roger Mozingo, of all the anti-tobacco bills that had been defeated, including one to eliminate the deductibility of cigarette advertising for state tax purposes. As for the five-cent cigarette tax increase, Marshall self-congratulatorily declared: “The effort put forth by RJRT, PM and TI lobbying teams was exceptional. The RJRT grassroots program utilizing phone banks and letters had a tremendous impact leading to the defeat of a 10¢ and 5¢ increase in the House. We are disappointed in the final result but not the effort.”

That the tobacco industry lobbying juggernaut was less monolithic than some imagined was in the process of being revealed—at least to its operators. Between the time the House committee had reported the bill without amendments and the House floor vote, TI held a meeting in Des Moines that reviewed STC’s sampling amendment. Although, according to Donoho, representatives of STC and of the largest smokeless tobacco producer, United States Tobacco Company, who were present agreed to TI’s aforementioned broader amendatory strategy, the next day he “was notified that STC was pursuing an independent strategy to have their amendment adopted. They had already secured sponsors and votes for a floor fight. On a conference call, they indicated that they had the necessary votes.” Nevertheless, on the floor, TI’s amendment was adopted, whereas STC’s was not considered. This legislative conflict—one of only several that had arisen with constitutional and statutorily codified limitations of home rule because the legislature did not, in the new statute, expressly confer power on local governments to pass stronger ordinances.

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277Donoho’s assertion was misleading in the sense that, as noted above, the legislature adopted STC’s proposal on sampling, as far as it went, verbatim; TI’s more far-reaching amendments included STC’s. On Feb. 27, 13 House members filed an amendment to H.F. 232 that would have subjected only “tobacco products” to the aforementioned 500 foot rule, leaving cigarette sampling completely banned. State of Iowa: 1991: Journal of the House: 1991: Regular Session Seventy-Fourth Regular Session 1:486 (Feb. 27), 2:2478 (H-3111, by Brown et al.). Brown, the chief sponsor withdrew the amendment after the adoption of Pavich’s sampling amendment, for which Brown and all the other 12 cosponsors voted (except one who was absent or did not vote). State of Iowa: 1991:
STC in various states—prompted Donoho, after the close of the session, to inform Malmgren in anticipation of a policy committee meeting at which R. J. Reynolds was expected to raise the issue, that it had become “very difficult to work with STC as a tobacco partner” because it failed to share its objectives and strategies and was reluctant to “operate within the TI structure...”278

TI itself singled out Democratic Representatives Dan Jay and Steve Hansen as having “worked very hard on our behalf to preserve preemption. We can anticipate their help again” in 1992 if Governor Branstad pushed to remove preemption; although at the end of 1991 it had no reason to believe that he would, lobbyists would be “very alert to covert attempts which may be made.”279

What exactly Jay and Hansen, who were close friends, running buddies, and nonsmokers, did on behalf of preemption is not clear, though Jay’s pro-tobacco voting record was solid, and their then Democratic House colleague Rod Halvorson later distinctly identified them both as prominent advocates of the tobacco industry’s positions.280 In 1987, Jay had questioned whether the pending amendments (H. F. 79) to the anti-public smoking law constituted a “legitimate role of government in light of the fact that we have restrictions already on smoking in public places. I also question whether we should dictate to business to allow or not allow smoking in their establishments.” He also asked constituents whether it would be “better to let public pressure influence the business owner to designate these areas.”281 In the event, Jay was absent or did not vote on passage of H.F. 79, but Hansen voted for it.282 Similarly, both had voted for a cigarette tax increase in 1987 when the House reconsidered its first vote, Hansen doing so despite being listed in an alert to businesses as one of nine House members it was especially important to contact immediately.283 In 1990, Jay voted for H.F. 209, while Hansen voted against it, and on its return from the

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278 Patrick Donoho to Kurt Malmgren, Subject: STC Conflicts with TI (June 21, 1991), Bates No. 508121169/70/72.
283 See above this ch. Jay switched his voted from Nay to Yea on reconsideration.
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

Senate, Hansen voted for it, while Jay, again, either was absent or did not vote.\textsuperscript{284} In 1991, both Jay and Hansen voted for preemption (as well as for the pro-cigarette company sampling provision), and Jay even voted against passage of H.F. 232.\textsuperscript{285} Sixteen years later, Hansen, who stated that he had always been anti-smoking, had no recollection of having worked for preemption; at best he could explain his vote by reference to requests by the hospitality industry of his Sioux City constituency and/or of individual working-class constituents\textsuperscript{286} (though the latter in fact would presumably have been indifferent to preemption as applied to the cigarette sales act as contradistinguished from the clean indoor air act). Jay, who was chairman of the House Judiciary Committee for ten years, might have been influenced by his close relationship to Bill Wimmer, Wasker’s partner and a TI lobbyist,\textsuperscript{287} but 16 years later he denied any such influence. Although he was unable to recall having worked on behalf of preemption in 1991, Jay—who observed in 2007 that, being more a “libertarian” than a Democrat in this regard, he still held the same view he had expressed in the aforementioned 1987 newspaper column to the effect that the government should not interfere with restaurant owners’ decisions as to whether to permit smoking—conceded that it was possible that he had spoken to other legislators about voting for preemption.\textsuperscript{288}

In preparation for issue awards at TI’s lobbyist meeting the next month, in August, Cathey Yoe, the legislative information director, nominated Wasker and his associate Bill Wimmer for having enacted “reasonable limits on sampling near schools and youth facilities” and “getting local preemption.”\textsuperscript{289} At a post-legislative session meeting at the ultra-posh Greenbrier resort in White Sulphur Springs, West Virginia, in September 1991, Kurt Malmgren, the head of TI’s State Activities Division, in the course of a guided tour of “outstanding jobs done,” could hardly help calling attention to the feat pulled off by lobbyists (and former Democratic Farmer-Labor Party operatives Tom and Doug Kelm), who in the “major bellwether anti-tobacco state” of Minnesota “saw to it that the


\textsuperscript{286}Telephone interview with Steve Hansen, Sioux City (July 22, 2007).

\textsuperscript{287}Information provided by two of Jay’s ex-House Democratic colleagues, who did not want to be identified.

\textsuperscript{288}Telephone interview with Dan Jay, Centerville/Moulton IA (July 23, 2007).

\textsuperscript{289}Cathey Yoe to Walter Woodson, Memorandum Re: Lobbyist Awards (Aug. 13, 1991), Bates No. TIOK0030221.
governor vetoed a 7-cent cigarette tax that...was earmarked to subsidize uninsured health care...a mom and apple pie issue if there ever was one.” Manifestly unembarrassed by the disease and death that he, his regional employees, and lobbyists were facilitating, Malmgren proceeded to bemoan that during the previous year it had been—and presumably would in the foreseeable future remain—almost impossible to avoid reading about young people and tobacco, tobacco vending, advertising, and sampling. (The most intriguing event involving young people and tobacco sales in 1991 was the settling out of court of an unprecedented suit against a convenience store chain by two teenagers who claimed that as a result of the illegal sales they became addicted to nicotine.) Malmgren went on to congratulate those who had “found ways to turn the issue to our advantage”:

On sampling, Iowa’s Chuck Wasker and his associate Bill Wimmer worked to change existing law which...had the effect of banning sampling. They managed this by working for the enactment of reasonable limits on sampling near schools and centers of youth activities.

At the same time, Chuck was able to get pre-emption of local sampling bans in Iowa. As most of you know, when we can shut down the localities, we’ve won a major victory. Finally, he did this while successfully minimizing a nasty tax increase.

**Tobacco Industry Money in the Iowa Legislature**

International tobacco companies have taken an interest in the relatively small stakes of Iowa politics.

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291[Kurt Malmgren], Greenbrier Meeting KLM Notes: Summary of Key Legislation in 1991 and Outstanding Jobs Done at 7-8 (Sept. 15, 1991), Bates No. TI25400640/6-7.

292Alix Freedman, “Chain to Enforce Ban on Minors Buying Tobacco,” *WSJ*, June 18, 1991 (B1, B7), Bates No. TITX0035846; Advocacy Institute, Smoking Control Advocacy Resource Center (SCARC), *Action Alert*, “Issue: Kyte Liability Case Settled Out of Court” (July 1, 1991), Bates No. TIMN374680.

293[Kurt Malmgren], Greenbrier Meeting KLM Notes: Summary of Key Legislation in 1991 and Outstanding Jobs Done at 7-8 (Sept. 15, 1991), Bates No. TI25400640/6-7.

294[Kurt Malmgren], Greenbrier Meeting KLM Notes: Summary of Key Legislation in 1991 and Outstanding Jobs Done at 8-9 (Sept. 15, 1991), Bates No. TI25400640/6-7.

In his very influential (but scantily documented) book on the cigarette industry, Richard Kluger advanced the thesis that nationally the corporations’ political power rested centrally on money. He linked this unexceptionable argument, however, to the further claim that Philip Morris, by far the largest producer, had displaced the Tobacco Institute as the motor and brain determining the “shape, pace, and locus of the industry’s lobbying operations”; indeed, Kluger asserted that its lobbying operations were “almost certainly far larger than the Tobacco Institute’s.” Whatever the accuracy of these contenions elsewhere, they do not fit the industry’s efforts to influence the legislative process in Iowa, where Philip Morris did not even employ a lobbyist until Republican Senate Minority Leader Calvin Hultman retired in 1990 and the Tobacco Institute clearly orchestrated lobbying overall. More relevant to Iowa was Kluger’s information that PAC contributions to individual legislators’ campaigns “were only the most visible ploys,” with entertainment, consulting fees, honoraria for talks, and “gifts to charities designated by targeted lawmakers” representing other methods of gaining access. Applicable as well to Iowa was Kluger’s finding that “[t]he key to purchasing influence at the state level was personal friendships.”

Whatever successes tobacco companies achieved during the 1991-92 legislative sessions do not appear to have hinged crucially on large amounts of money given directly, publicly, and lawfully to legislators. For example, data no longer extant revealed that for 1991 no tobacco industry political action committee was even among the top 59 according to amounts given to legislators. Similarly, at an event held on March 12, 1991 for the Truman Fund of the Democratic Party that raised more than $29,000 to be distributed to Democratic candidates, Philip Morris PAC contributed only $500 (earmarked for the Senate, which had always been the easier house for the industry to control). Neither the RJR Tobacco-PAC nor the Tobacco Institute-PAC was listed as donating any money. Interestingly, George Wilson, the lobbyist for the Iowa Association of Tobacco Distributors contributed the same amount (also earmarked for the Senate).

The answer to the seeming conundrum may simply be as Don Avenson, the powerful Democratic House Speaker during the 1980s, put it tersely when asked whether tobacco companies handed out money to secure votes in Iowa: “They

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299 Truman Fund Event (March 12, 1991), in Beverly Hannon Papers, Box 7, Folder: Campaign, 1992: Finances: Contributions (folder 1), IWA.
didn’t. We all smoked.”

Although this answer was always something of an exaggeration (though much less so in the Senate than in the House) and became more so as smoking prevalence declined even among legislators, it may well go a long way toward explaining why paying off members to vote for the tobacco industry was, for a time at least, about as necessary as carrying coals to Newcastle. In addition, although the connection was not understood at the time, it became an (unsubstantiated) commonplace among Democratic lobbyists and legislators that Iowans for Tax Relief, a right-wing anti-tax organization founded in the 1970s by former legislator David Stanley, was funded in part by the tobacco industry—which always and everywhere opposed excise taxes on cigarettes—in whose interest the organization’s Taxpayers United PAC then disbursed contributions to appropriate legislators.

Perhaps even more importantly, Iowans for Tax Relief devoted funds to polling and staffing on behalf of Republican candidates that was not reported as linked to particular candidates. In fact, although no online tobacco industry documents were identified for earlier years, in 1995 the Tobacco Institute donated $20,000 to Iowans for Tax Relief and in 1999 Philip Morris contributed $40,000 under its “public policy program” to Iowans for Tax Relief (Tax Education Foundation).

Whether much of the organization in fact directly supported pro-tobacco legislators is less clear. In 1991, one year for which data from now destroyed documents are extant, Taxpayers United was the leading giver in Iowa, but none of the $6,500 it contributed that year went to prominent tobacco industry supporters. The previous year, however, Taxpayers United made nine contributions totaling $3,000 to Jack Rife, the heavy-smoking opponent of smoking regulation, and in 1992 he received $9,000 from Taxpayers United to

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300 Telephone interview with Don Avenson, Oelwein (July 12, 2007).
301 Telephone interviews in 2007 and 2008 with two former Democratic legislators who did not wish to be identified. When told about these payments, ex-Democratic House Minority Leader Richard Myers said of the Truman Fund: “We were performing a money laundering function.” Telephone interview with Richard Myers, Iowa City (May 8, 2008).
302 Email from a former Democratic legislator who demanded anonymity (2007).
304 [Philip Morris], 1999 Public Policy Contributions, Check No. 21073, Bates No. 2065282083/6.
305 “Political Contributions,” DMR, Apr. 5, 1992 (8A:5). The only (marginally) larger giver was a PAC formed by two legislators.
307 Beverly Hannon Papers, Box 8, Folder: Campaign, 1992, Rife, Jack (Opponent), General, IWA.
help defeat anti-smoking militant Beverly Hannon.\textsuperscript{308}

Other Iowa legislators argue that money per se was not the fulcrum for leveraging votes.\textsuperscript{309} Rather, “relationships” with lobbyists, carefully cultivated over a long period of time, were the crucial element, though, to be sure, often those relationships were sustained over large numbers of lavish meals paid for lobbyists or their principals. For example, TI’s lobbyists Charles Wasker and William Wimmer were well known as good entertainers.\textsuperscript{310} The “favors” that lobbyists requested from legislators (who had either no views on the matters in question or no principles) in the form of votes could be treated as a quid pro quo for their friendship in general or, more specifically, for the mentorship that very experienced tobacco lobbyists like Wilson, Wasker, and Wimmer could offer to legislators, most of whom knew less about the intricacies and tricks of the trade of passing bills than they did.\textsuperscript{311}

By 1991-92 public opinion was becoming increasingly critical of the unbridled lobbying system. A long piece in the Des Moines Register during the 1992 session gave expression to this repugnance:

It seems to be working well, at least for the participants. Legislators get fat donations and lobbyists get pretty much what they want.

“There’s been a strong feeling in the last few years that lobbyists have called the shots on what the Legislature will debate or won’t debate,” says George Kinley, D-Des Moines, a 22-year veteran of the General Assembly.

Speaking of the tens of thousands of dollars PACs and lobbyists inject into the campaign accounts of key legislators such as Bill Hutchins, the Senate democratic leader, Kinley says: “You can’t raise that kind of money unless they’re getting something in return.”\textsuperscript{312}

\textsuperscript{308}Email from Beverly Hannon to Marc Linder (July 14, 2007). Although Hannon stated in her papers that Rife received $9,000 from one PAC, she did not identify it.

\textsuperscript{309}Telephone interviews with John Patchett (Feb. 2007).

\textsuperscript{310}Telephone interview with Rod Halvorson, St. Paul (Aug. 7 and 8, 2007). Wasker’s firm’s contract with TI specified that the retainer covered all entertainment expenses. Samuel Chilcote, Jr. to Charles Wasker, Letter Agreement (Dec. 10, 1993), Bates No. TI15811209-10, on tobaccodocuments.org. According to a former legislator and lobbyist who demanded anonymity, $44,000 was “pretty good money” in 1992; since Wasker had many clients, if he spent some of his fee from each client on entertainment “he still did well.” Email to Marc Linder (Aug. 15, 2007).

\textsuperscript{311}Telephone interview with former legislator/lobbyist who demanded anonymity (2007).

Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

A few days later, former state senator Steve Sovern called PAC money—amounting to almost $128,000, $41,000 of which was given to only 10 leaders—"'unconscionable legal bribery....'"\textsuperscript{311}

The 1992 Session:
The Cigarette Companies’ Lobbying Juggernaut Fails to Pass a Bill Prohibiting Employers from Discriminating Against Smokers

Oppose a “smoker’s rights bill” or “smokers discrimination bill” introduced by the tobacco lobby. In 1990, the Tobacco Institute introduced legislation in several states designed to prevent employers from making hiring, promotion or firing decisions based on whether an applicant or employee smokes. Indications are that similar legislation will be introduced in other states in 1991.¹

Preliminary Skirmishes at the 1992 Session

The 1992 Iowa legislative session, as the Tobacco Institute predicted, did not witness an attempt by Governor Branstad to push for repeal of local preemption.² The only preemption-related bill, filed by Senator Szymoniak and six other Democrats, would, without repealing the 1990 preemption provision, have permitted cities to pass ordinances concerning smoking in public places, violation of which would have been a civil or criminal penalty not exceeding 25 dollars.³ The Senate Local Government Committee recommended passage, by a vote of six to four, but only after having severely diluted it to authorize enactment of local ordinances merely “concerning smoking in airport facilities, skywalks, or both”—a marginalization that apparently still constituted too much local intrusion for the four dissenters (three Republicans and heavy-smoking Democrat Florence Buhr).⁴ Szymoniak presented the weakening amendment, which presumably was

¹Carol Sipfle, American Lung Association of Iowa, to Tobacco Free Coalition, Subject: Legislative Priorities - 1991 (July 30, 1990) (copy in Folder: “Tobacco 1999 -”, Johnson County Department of Public Health, Iowa City.
⁴State of Iowa: 1992: Journal of the Senate: 1992: Regular Session Seventy-Fourth General Assembly 1:609, 2:1992 (Mar. 4) (S-5132). In 1993, the Des Moines City Council passed an ordinance prohibiting anyone from engaging in activities at the airport in disregard of signs promulgated by the airport director or from refusing to comply with a lawful order of the police at the airport. City of Des Moines City Council passed an ordinance prohibiting anyone from engaging in activities at the airport in disregard of signs promulgated by the airport director or from refusing to comply with a lawful order of the police at the airport. City of Des Moines City Council, Ordinance No. 11,958, §§ 4-6.01 and 4-6.02 (Mar. 22, 1993), Bates No. T128922797. TI lobbyist Charles Wasker opined that whereas the city council was in compliance with state
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

supported by a clarification by Des Moines City Attorney Roger Nowadzky, who had had experience with enforcing the nosmoking ban in the capital’s skywalks. Even in this watered-down version, Majority Leader Bill Hutchins secured unanimous consent to rerefer the bill to committee, which reassigned it to Szymoniak’s subcommittee, which once again recommended passage; after re-referral to the committee, the measure expired.

In a rare manifestation of bad conscience, the Tobacco Institute worried as the new session loomed about “[a]nother potential challenge that faces us,” which “depends on the personal agenda of Rep. Minnette Doderer (D-Iowa City). She is very bitter about the recent death of her husband who died of cancer. Industry lobbyists all agree she is very tough, hardworking and highly regarded. If she launches a crusade against us, she will be a formidable opponent.” The cigarette companies’ analysts neglected to specify that a fund for the prevention of smoking had been established in the name of Doderer’s husband, a former Iowa City mayor, a smoker who had died of lung cancer at 71. But Doderer, a self-preemption, the airport authority had violated the statute by banning smoking by changing the signs. Wasker and his partner Wimmer, according to the head of TI’s Midwest region, Al Shofe, were requesting permission to seek an injunction or writ of mandamus to compel compliance. Shofe observed that the “ordinance is very interesting since they have figured out a way to get around preemption. It would be interesting to see if similar work is surfacing in states where we have preemption.” Al Shofe to Pat Donoho, Subject: City of Des Moines, Iowa (July 6, 1993), Bates No. TI28922796. Shofe was apparently unaware that the city had used the same procedure in the skywalks in 1990; presumably the intent of the second effort, like that of the first, was to enable the city to enforce the ban more effectively than the statewide law permitted. See above ch. 27. The airport announced in May 1993 that it would become nosmoking as soon as the signs were put up. “News and Notes,” DMR, May 2, 1993, Bates No. TI28922798. According to the city attorney who represented the airport, no such suit was filed. Telephone interview with Kathleen Vanderpool, Des Moines (Aug. 3, 2007). The two ordinance provisions are still in effect. Municipal Code of the City of Des Moines, Iowa, §§ 22-7 and 22-8 (2000), on http://www.municode.com/resources/gateway.asp?pid=13242&sid=15.


6See above ch. 27.


9Charles Bullard, “Former Iowa City Mayor Fred Doderer, 71, Dies,” DMR, July 6, 1991 (9) (NewsBank). In 1994 Doderer decided to close the account for her husband’s
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

professed sometime smoker, who had never in her long career been one of the legislature’s most militant’s antismokers, found many other important social and economic issues on behalf of which to advocate in the House in 1992. Although she was indeed very angry about her husband’s death, according to her daughter, she never “took on” the tobacco industry because her own heavy (albeit intermittent) smoking meant that she lacked the “clean hands” necessary for such a battle.11

Even in the absence of a threat by Doderer, Lowell Junkins, styling himself and his associates “Public Affairs Consultants,” reported to his Tobacco Institute handler, Susan Stuntz, as early as September 1991, that “we have no reason to doubt” that Governor Branstad would “look[ ] to the cigarette tax as a funding vehicle....” Indeed, “[k]nowing” that an increase was a “likely outcome” of the deliberations of the governor’s task force on spending, Junkins had been meeting regularly during the summer with ICAN, the new House Speaker Bob Arnould, and the industry’s ever reliable Senate Majority Leader Hutchins “to solidify our coalition in the General Assembly on the progressive tax message,” to which leadership had “reiterated its commitment....”12 Later that fall, with Branstad “still angry” that the legislature had conceded him only half of the 10-cent cigarette tax increase he had called for in 1991, TI foresaw the ongoing need to deal with this perennial issue: its analysis regarded it as “not...unreasonable” for the governor to request a 25-cent increase and settle for something less. In the event, the tobacco industry was confident that it could continue to rely on the “[e]fforts by the Iowa Citizens [sic] Action Network (ICAN) and other labor groups [which] during the non-session months have been very helpful in laying the ground work for grassroots activity against any new regressive taxes.” And, again, as always, with pro-tobacco legislators in leadership: “Our best defense will be to defeat tax measure in the Senate.” If the legislature debated the issue, TI’s Midwest regional staff reminded headquarters that “[d]uring the 1991 tax battle, TI spent about $25,000 on phone banks,” but added that: “We may be able to just as effectively reach targeted areas by subsidizing retail associations and

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10 Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

wholesaler organizations for specific efforts. Region IV believes this may be...considerably cheaper." Once the session was underway, the head of Region IV informed her boss that in the welter of ethics scandals roiling the legislature, the “Governor still wants a dime,” and a bill was filed in the House to raise the tax by 10 cents to 46 cents, but the chamber took no action on it. Efforts were also made in both houses in February to amend the budget bill (S.F. 2116) to include a cigarette tax increase, but they failed by large margins. And the initiative was similarly unsuccessful during the special session.

The Tobacco Industry’s Nationwide Drive to Outlaw Employment Discrimination against our customers

“While these measures may have an intuitive grasp of fairness, in practice it’s a respiratory apartheid.”

The second session of the biennium was, however, the scene of a major, but unsuccessful, effort by the cigarette companies to replicate their success in other states by securing enactment of a law prohibiting employers from discriminating against employees who smoked. Nationally the tobacco industry, “in a series of titanic lobbying struggles,” had, with the help of labor unions and civil

14Alice O’Connor to Pat Donoho, Subject: Assessment about Iowa (Jan. 31, 1992), Bates No. TI28710967.
15H.F. 2087 (Jan. 23, 1992, by Hanson et al.)
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

liberties groups, secured enactment of such laws in about half of the states just since 1989. The cigarette manufacturers’ counter-campaign was a response to the fact that during a period of less than 10 years thousands of companies had begun to act on the available economic data—showing, for example, that smokers could cost firms as much as $5,000 more in insurance premiums annually—by prohibiting employees from smoking on or off the job. In addition to reducing the annual direct cost of more than $20 billion for providing health care to those with smoking-related diseases, not hiring smokers improved workplace safety conditions, reduced absenteeism, and “minimize[d] the need to train new employees to replace those who retire early because of lung cancer, emphysema and other diseases related to smoking.” Illustratively, in announcing that it would no longer hire people who smoked cigarettes, management of the Lockheed Aeronautical Systems Company plant in Marietta, Georgia stressed that almost 77 percent of the workers there with cardiac problems smoked.

In 1992 the Tobacco Institute in detail described its profit-preserving strategy as a veritable human and labor rights initiative:

Since the late 1980’s, the tobacco industry has gone beyond simply opposing legislation hostile to the rights of smokers, to promoting affirmative legislation to protect its consumers from anti-tobacco attacks. Depending on the language, employment discrimination legislation provides protection in the workplace from hiring, firing or promotion discrimination because of smoking, drinking or other legal activities engaged in outside the workplace.

Employment privacy legislation responds to the recent increase in discriminatory workplace policies directed against employees and prospective employees who smoke. These actions include refusal to hire smokers, and disciplining or discharging those who smoke during off duty hours. A growing number of states and localities have adopted legislation or enacted policies discriminating against public safety employees who smoke. Some employers have gone so far as to subject employees to polygraph tests and urinalysis to ensure that they do not smoke on their own time.

To counteract these public and private policies, legislation has been proposed to protect smokers from employment discrimination. In some states, the issue has expanded beyond the protection of the smoker’s right to smoke off the job. Anti-discrimination legislation can also protect an employee’s right to have an occasional drink after work, to engage in risky sporting events, to participate in unions, or to publicly advocate political


Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

stances. In broad terms, anti-discrimination language can protect an individual’s right to make private lifestyle choices.

The first employment privacy bill was adopted by Virginia in 1989. The law prohibits local governments from requiring an applicant or employee “to abstain from smoking or using tobacco products outside the course of his employment.” Police and firefighters are exempt from the provision.

By mid-1992, privacy laws had been adopted in more than half the states. While the laws differ in language, their intent is similar—to protect against employment discrimination. The Oregon law prohibits employers from requiring employees to refrain from smoking off the job except when the restriction relates to “a bona fide occupational requirement” or if off-duty smoking is prohibited by collective bargaining agreement. Colorado, however, enacted a law that prohibits unfair employment practices due to an employee’s “engaging in any lawful activity off the premises of the employer during nonworking hours.” The Illinois law protects an employee’s right to use lawful products off the job.

Legislation commonly includes language similar to Oregon’s exemption for bona fide occupational requirements. Occasionally, legislation has included an allowance for employers to offer health or life insurance policies which make distinctions in coverage or cost based on an employee’s off the job use of tobacco, or other lawful products or activities.

Advocates who support equal rights in employment practices include the American Civil Liberties Union (ACLU), various organized labor unions, tobacco distributors, manufacturers and wholesalers and many government and private sector employers. Privacy has become a bipartisan issue, with Democratic and Republican Governors approving an almost equal number of laws, as well as one Independent Governor.

Those who oppose such legislation include Action on Smoking and Health (ASH), Americans for Nonsmokers Rights, Coalition on Smoking OR Health and Group Against Smokers’ Pollution (GASP). In some cases, business employers may object to legislation that they consider to be written too broadly.

The industry has served as the catalyst for this type of legislation, aiding other proponents in supporting adoption of legislation. The industry will continue to work diligently to see that all states adopt employment discrimination legislation, as well as other legislation to protect the legal rights of its customers.

Legislation to end these unfair and discriminatory practices is warranted. First, discriminating against smokers disproportionately harms the employment opportunities of minorities, who smoke in larger numbers. Second, discrimination—particularly when the result of unilateral action by an employer—can undermine employee collective bargaining rights. Third, such discrimination is inconsistent with the fundamental values of equal protection.  

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23The Tobacco Institute, State Activities Division, Issue Briefs (Aug. 1992), Bates No. 2023959421/33-4.
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

The Early Twentieth-Century Movement Among Employers to Refuse to Hire Cigarette Smokers

Again the cigaret is given a black eye. The Dutch Superior Traction company has issued a manifesto that it does not employ users of the coffin stick and 25 employes have been discharged for smoking them. This is a lesson more valuable than half a hundred legislative enactments against the pestilent habit.24

WANTED—Intelligent, well dressed single man to travel on road as collector. Permanent position. Chance for advancement. No drinkers or cigarette smokers need apply.25

Expert repair man wanted. Good pay and steady work. Cigarette smokers need not apply.26

The end of the twentieth century was by no means witnessing the first effort by cigarette manufacturers to deter employers from discriminating against consumers of their commodities (and other kinds of tobacco). The later drive was directed at passing legislation prohibiting discriminatory employment decisions, whereas at the turn of the century the Cigarette Trust had turned its attention directly to nipping in the bud the burgeoning trend in the work world to fire/refuse to hire cigarette smokers. In this sense, the earlier opposition resembled late-twentieth-century attempts by cigarette companies to use and threaten boycotts to force companies that had banned smoking among their employees and customers or even to sell nicotine-containing gum to aid would-be quitters to drop those practices.27 In both instances, to be sure, the later cigarette manufacturers undertook incomparably more concerted, widespread, and better-financed operations.

Employers’ initiatives to prohibit cigarette smoking by their employees began gaining momentum at the very end of 1899 when, as The New York Times reported, the Southern Railway issued a general order and “ironclad rule”

26DMDN, Oct. 24, 1917 (9:1).

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Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

applying only to its South Carolina division that all employees had to stop using cigarettes or resign and that in the future the company would not employ anyone smoking them.\(^{28}\) Although the newspaper published a correction to the effect that a special ban on cigarettes was unnecessary because a general rule prohibited all smoking while on duty,\(^{29}\) a flurry of press reports at the outset of the new century revealed that workplace-related anti-cigarette policies were a reality, proliferating especially in Chicago business offices. In addition to prohibiting cigarettes during working hours, some also suggested that it “would be better for employees not to be seen smoking cigarettes out of hours.” While Montgomery Ward “refused to employ boys addicted to cigarette smoking,” Marshall Field gave employees bimonthly lectures on the subject. Whereas the Board of Education based its ban on odor, other employers argued that cigarettes destroyed discipline in addition to wasting time. Significantly, downtown business in Chicago not only admitted Anti-Cigaret League lecturers, but sent their “boys” to the League’s monthly meetings.\(^{30}\) The salient point from employers’ perspective was that cigarette smoking was so “incompatible with efficient service”\(^{31}\) that users were “only useful in standing at the foot of the stairs.”\(^{32}\)

This “growing conviction among business-men and employers that the inhaling of cigarette smoke is physically and intellectually injurious,” which was prompting many in Chicago toward the end of March and beginning of April 1900 to discourage or prohibit their employees from smoking cigarettes,\(^{33}\) should be viewed in the context of a decision issued by the Illinois Supreme Court on April 9 sustaining the constitutionality of a Chicago ordinance imposing a $100 license fee on all cigarette dealers.\(^{34}\) The ruling thwarted a multi-year legal challenge by the Tobacco Trust, which regarded the ordinance as causing “a falling off in its income and a precedent which they [sic] they feared other cities

\(^{28}\)“An Anti-Cigarette Order,” \textit{NYT}, Dec. 13, 1899 (5). See also [Untitled], \textit{WNC}, Dec. 16, 1899 (4:3) (expressing puzzlement over the railway’s “sudden moral spasm”).


\(^{30}\)“Shut Out the Cigaret,” \textit{CT}, Mar. 27, 1900 (16).

\(^{31}\)“Put a Ban on Cigarets,” \textit{CT}, Apr. 9, 1900 (2).

\(^{32}\)\textit{Boone Standard} (Iowa), Mar. 31, 1900 (3:4) (untitled).

\(^{33}\)“Cigaret Ordinance Valid,” \textit{CT}, Apr. 11, 1900 (12) (edit.).

\(^{34}\)Gundling v Chicago, 177 US 183 (1900).
and towns might follow.”

By April 1900, prohibitions at Chicago firms, including the Chicago, Burlington, and Quincy Railroad, affected 1,100 employees, 80 percent of whom were boys under 18, 600 of whom had previously smoked. In addition to the aforementioned lowered efficiency, demoralization, nervousness, and stunted mental acuity, the reasons for the ban assigned by employers included the annoyance for customers and non-using employees of the nicotine smell on employees’ breath. Montgomery Ward, which impressed upon the boys that the ban was prompted by their own and not the company’s interest, did not shy away from special efforts required to see to it that the ban was observed outside of working hours.

A turning point in the movement toward the imposition of bans was the decision in mid-1900 of the Rock Island Railroad to implement the policy, which intrigued other Chicago-based railroads that did not permit smoking in their offices, and impelled the Anti-Cigarette League to induce other roads to adopt it. Denying that “any puritanical motives” were involved, the Rock Island management in refusing to hire anyone “who is addicted to cigarettes,” which were “thus placed on a par with whisky,” gave employees the choice between quitting cigarettes and their employment; cigarette smokers’ applications would be “consigned to the waste basket” and the applicants, no matter how proficient they might be in railroading, would not be able to “break into the Rock Island’s service with a crowbar.” The railroad’s president, Warren G. Purdy, charged that cigarette smoking was a “vicious habit” that tended to “befog the mind and make one listless and careless...sleepy and of no account...irresponsible and lazy.” The initiative in this matter had been taken by the general superintendent, A. J. Hitt, who allegedly had devised it “after a long study of the effect of the weed upon the human system, augmented, of course, by the judgment of the most eminent physicians in declaring the cigaret to be injurious.” This story, however, was incompatible with the further account that some weeks earlier, while Hitt had been investigating an worker’s actions in an unidentified matter, he overheard two other employees censuring the worker as a “confirmed cigaret fiend,” whose smoking had been “the fault of the whole business....” Astonishingly, based, apparently, on this one case, Hitt and two superintendents, after discussing the

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35. To Combat Cigaret Tax,” CT, Oct. 21, 1897 (12). See also above ch. 6.
36. Put a Ban on Cigaretts,” CT, Apr. 9, 1900 (2).
37. Asks Ban from All Roads,” CT, July 4, 1900 (8).
39. Cigarets Put Under a Ban,” CT, July 8, 1900 (43).
issue for a week, ordered the embargo. Convinced, based on his own observations and the aforementioned doctors’ opinions, that without any doubt the cigarette “‘unfits a man in a measure for work’”—after all, a “‘person addicted to the habit always has a languid feeling that is markedly evidenced in the drooping eye and the nervous body’”—Hitt ventured the prediction that if all the railroads in North America followed the Rock Island, “‘the cigaret habit will no doubt receive a death blow.’”

A confirmation of this death sentence appeared in an editorial in the Chicago Tribune on August 3, the day after the paper had reported that, pushed by Lucy Page Gaston’s Anti-Cigaret League, which had been holding meetings in the Stock-Yards district, August Swift & Company had announced that it too would no longer employ cigarette smokers. Bracketing the whole health issue, the editorial explained that cigarette smokers’ severe handicap in business could no longer be overlooked. And regardless of whether it was well founded or not, many businessmen had come to feel that a cigarette smoker was not a desirable person to “have around the shop” or the office. Many of the largest firms in the city make it a fixed and immovable rule not to employ cigaret smokers in any capacity. On...almost every day another business house falls into line with this policy. ... Other things being equal it is almost universally true that of two men, one of whom uses cigarettes while the other does not, the latter will be preferred in a business house or even in a factory.

The wise cigaret smoker will face the facts as they exist and not waste his time...trying to persuade people that cigarettes are harmless. He will make up his mind whether his ruling ambition is to succeed in business or to smoke cigarettes.... Business-men have apparently made up their minds that they do not want cigaret smokers in responsible positions and business-men are too busy...to listen to arguments on the subject. It is a condition and not a theory which confronts the man who is wedded to the cigaret.

Heady with success and confident of an avalanche of large businesses following suit, Gaston took the remarkable step of interviewing the heads of Bradstreet’s and R. G. Dun to induce them to add to the questions (about their habits) they posed to businessmen seeking commercial ratings whether they used cigarettes.

On August 7, 1900, shortly after the Rock Island had implemented its ban and

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41“Cigaretts Put Under a Ban,” CT, July 8, 1900 (43).
43“The Cigaret Smoker’s Handicap,” CT, Aug. 3, 1900 (6) (edit.).
44“Anti-Cigaret League Pushing Its Crusade Among Chicago Firms,” CT, Aug. 5, 1900 (13).
the snowballing impact in the business world was becoming so undeniable that
the Cigarette Trust seemed on the verge of monopolizing a commodity for which
solvent demand capable of valorizing its capital would soon disappear, J. B. Duke
himself, the president of the American Tobacco Company, wrote a letter to Purdy,
appealing to a sense of intercapitalist solidarity while urging him to back off:

Through the kindness of Mr. A. R. Flower, and Mr. Anthony N. Brady, one of our
directors, I have been shown a letter written by you on the 28th ultimo to Mr. Flower,
relative to the order recently made by your road, forbidding the use by your employees of
cigarettes.

I realize that the newspapers have made more of this order than was intended by its
own scope, and I realize further that the executive officers of your road have the right to
make such regulations as they see fit for their employees, without having their motives or
judgment questioned by any one.

But the Company with which I am connected is engaged very largely in the
manufacture of cigarettes; a very substantial portion of its profits comes from the sale of
cigarettes, and a very substantial portion of its investment is in plants for the manufacture
of cigarettes. In this company is invested the means of a great many individuals...who are
identified with your road, and perhaps otherwise with you in business. These investments
would be made less profitable, and less secure, by the diminution of the cigarette business.

On account of these things, and on account of my decided and earnest, and I believe,
intelligent conviction that cigarette smoking is no more injurious than smoking in any other
form, I am taking the liberty of writing to you...and am sending you...a pamphlet..."The
Truth about Cigarettes," which contains the result of scientific investigation, which
Pamphlet I respectfully ask you to read. The statements of these scientific authorities are
undoubtedly genuine, and the character of those quoted is as such to make impossible the
belief that these statements have been secured by any improper method.

Anson R. Flower, brother of ex-New York Governor Roswell Flower—who was also
a financier and leader of the New York Stock Exchange who had invested heavily in the
Rock Island Railroad—became a director after his brother’s death. Anson Flower was
linked to Anthony N. Brady through their investments in the Brooklyn Rapid Transit
Company. “Roswell P. Flower Dies Suddenly, NYT, May 13, 1899 (1); “Sensational Drop
in Flower Stocks,” NYT, May 14, 1899 (1); “Rock Island RR Directors,” NYT, June 8,
1899 (8); “Brooklyn Rapid Transit,” NYT, Jan. 27, 1900 (5). In 1900 Flower & Co. also
owned 1,950 shares of common stock in the American Tobacco Co. United States v

Brady, an immensely wealthy capitalist, was by 1906 the largest shareholder of the
American Tobacco Company and, qua director, a defendant in the antitrust suit that led to
the trust’s break-up. Report of the Commissioner of Corporations on the Tobacco
Industry, Part 1, tab. 18 at 202 (1909); “Anthony N. Brady Dead,” NYT, July 23, 1913 (1);
“A. N. Brady as a Financier,” NYT, July 24, 1913 (7); “Brady’s Fortune May Be
$100,000,000,” NYT, Aug. 6, 1913 (7).
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

Now this Company has no disposition to take notice of the attacks made on cigarettes made by irresponsible agitators, or professional so-called reformers, but we are concerned when an attack is made on the products of our Company by a prominent and large business corporation, such as yours. We feel, and I personally feel, that to discriminate against cigarettes as opposed to other forms of tobacco is entirely unjust, and would not have been made if you had the information which I hope you will derive from the pamphlet.... Just as a manufacturer of cream of tartar baking powder would have ground for complaint if you issued an order condemning its use, and leaving your employees free to use alum baking powder; or just as a producer of coffee, if you permitted the use of tea and forbade the use of coffee, so, and in the same way, and to the same extent, I think we, manufacturers of cigarettes, are authorized to ask you to consider the facts in favor of, as well as against, cigarettes, before putting them under a ban, under which other tobacco products are not put.

I will esteem it a favor if you will...conclude...whether it is wise and just for your Company to thus attack the business of another company.

I will appreciate a reply to this letter, and if you think that a conference with some representatives of our Company would probably lead to a clarification of the order which you have made, or if you desire additional information, I will arrange such.\footnote{Letter from J. B. Duke to W. C. [sic] Purdy (Aug. 7, 1900), in JBDP, Box 5, Correspondence, Letterbook (1894, July 31-1904, Oct. 10), RBMSCL (the text was transcribed by Rodney Clare from a handwritten copy too faint to photocopy). The tenor of the pamphlet that Duke sent can be gauged by the opening salvo by W. H. Garrison, Esq., who launched the discussion before the Medico-Legal Society that resulted in the pamphlet. He alleged that a petition to Congress in 1892 to impose a tax on cigarettes designed to encourage manufacturers to abandon production as well as statutes in Iowa and Tennessee banning their sale were based on “‘popular prejudice.’ Absolutely that and nothing more.” A petition to tax tomatoes was “nearly analogous [sic] to that of the cigarette.” W. H. Garrison, “A Brief for the Cigarette,” Medico-Legal Journal 15:280-91 at 281 (Dec. 1897). Garrison also claimed that the “inhalation question was disposed of” by an 1882 (unidentified) article in Lancet stating that “the inhaled smoke rarely passes beyond the bronchi,” and if any did enter air vesicles, it “must be a very small quantity” because it would be “nearly immediately expelled,” leaving no time for diffusion. \emph{Id.} at 288. A response to another lawyer’s request for comments on Garrison’s paper by Dr. Harold Moyer, a professor at Rush Medical College in Chicago, provided what was perhaps the only comment that would withstand scientific scrutiny more than a century later: attacking Garrison’s claim that smoke at most reached only the larynx and larger bronchi, he observed that “the very mildness of the cigarette brings about one of its chiefest dangers.... The majority of cigarette smokers...inhale deeply, and consequently there may be a much greater absorption of nicotine....” Clark Bell, “The Cigarette: Does It Contain Any Ingredient Other Than Tobacco and Paper? Does It Cause Insanity?” Medico-Legal Journal 15:443-85 at 457 (Mar. 1898). These quotations and the rest of the two articles were republished in \emph{The Truth About Cigarettes: Papers Read and Discussed by the Medico-Legal Society of N.Y.} (n.d.), which is unpaginated. See also above ch. 2.}
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

In spite of Duke’s intervention, employment-based cigarette bans continued to proliferate, taking root on the New York Central and Pennsylvania Railroads as well as at Macy’s, Wanamaker’s, and other big department stores and smaller institutions in New York. By 1906, the Iowa Board of Health reported that alone in Detroit 69 merchants had agreed not to employ cigarette smokers, while numerous railroads, including the New York, New Haven, and Hartford, had ordered employees not to smoke while on duty. Emblematic of an increasingly widespread attitude was the statement by E. H. Harriman, the head of the Union Pacific Railroad, that his company “might as well go to a lunatic asylum for their employees as to hire cigarette smokers.” When the Brotherhood of Engineers and Firemen in 1906 opposed an order by the Norfolk & Western Railroad prohibiting employees from smoking cigarettes on the grounds that it affected their “personal liberty,” one newspaper deemed the argument as inapt as one resisting a ban on entrusting a railroad engine to a man who drank. As late as 1910 the Atchison, Topeka, & Santa Fe Railroad joined the ranks of those refusing to employ cigarette smokers. (It is a desideratum of research to trace where, when, how, and why such workplace (cigarette) smoking bans later fell into desuetude or were abolished before being reimplemented in the late twentieth century as a result of scientific discoveries concerning the health impacts of secondhand tobacco smoke exposure and of an ever more militant anti-smoking movement.) Yet in spite of these disruptions by employers, which expressed,

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48Duke’s papers include no reply from Purdy or similar letter from Duke to other railroad or other company presidents.
49“Iowa Press Comment,” *DDR*, Nov. 3, 1900 (4:5) (taken from *Des Moines Register*). Despite these reports, the *Times* later asserted that eastern railroad companies had not deemed it worthwhile to follow the western roads’ policies. “Users of Cigarettes,” *NYT*, Dec. 8, 1910 (12) (edit.).
51“Comment About Various Matters,” *Landmark* (Statesville, NC), July 6, 1906 (1:3).
52“Users of Cigarettes,” *NYT*, Dec. 8, 1910 (12) (edit.). In fact, nine years earlier a press report stated that the Santa Fe had already “issued an order that no one addicted to the use of cigarettes shall be given employment” and dismissed a number of cigarette-smoking employees. “‘No Cigarette Smokers Need Apply,’” *Anaconda Standard* (Montana), Dec. 10, 1901 (14:5) (taken from *Indianapolis News*).
53As late as World War II, at the Jefferson Avenue Chrysler factory in Detroit, according to the UAW, bosses were allowed to smoke all the time in glass-enclosed offices, but workers were disciplined for “‘snatching a few puffs in the washrooms.’”
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

codified, and solidified a growing societal denormalization and condemnation of cigarettes by means of a withdrawal of physical and social space from cigarette smoking and of a livelihood from cigarette smokers, production and consumption nevertheless raced forward. Thus, after the 35.7 percent drop in the Trust’s domestic cigarette sales from 1896 to 1901 associated with the first wave of state anti-cigarette sales enactments, the number of cigarettes it sold in the United States between 1901 and 1910 rose 248 percent from 1,990,911,000 to 6,930,986,000, while profits increased 236 percent from $2,056,553 to $6,904,304.55

The City Government of Clinton, Iowa Tries to Prohibit Its Newly Hired Employees from Using Tobacco At or Away from Work

Three-quarters of a century later, the cigarette firms had been monitoring the situation in Iowa56 ever since the City of Clinton adopted a resolution on December 30, 1986, requiring all of its employees hired after January 1, 1987, to “agree in writing as a condition of employment not to smoke, chew or use tobacco products on or off duty during the tenure of their employment with the City of Clinton,” violation of which agreement subjected employees to dismissal for cause.57 The proposal had originated in September as a means of reducing disability retirement benefits of firefighters’ and police—whose heart or lung illnesses were, by a new state law, deemed job-related. Councilman Darrell Smith, the proponent, alleged that additional costs of pensions, early retirements,


55Report of the Commissioner of Corporations on the Tobacco Industry, Part III, tab. 53 at 155 (1915). These figures exclude exports and foreign manufacturing business. During these years the Trust accounted for between 81.7 and 89.9 percent of total U.S. cigarette output. Id. tab. 52 at 153. See above ch. 1.


57American Federation of State, County & Municipal Employees, Council 61 (AFSCME) v. City of Clinton at 2 (Iowa Public Employment Relations Board, June 17, 1987), Bates No. TI0600003/4 (reprinting resolution).
and two-thirds disability payments would cost Clinton $900,000; of five city employees recently awarded heart- or lung-illness based disability payments, most, he claimed, were moderate to heavy smokers. Charles Boldt of the American Federation of State, County and Municipal Employees took the position that barring the hire of smokers was “unreasonable”: “‘Until they outlaw tobacco, they cannot make that a condition of employment.’” Interestingly, the chairman of the Clinton Police Department bargaining unit, Charles Klaes, did not object to the proposal, so long as it was confined to job applicants. But he did tell the council that the rule would be impossible to enforce—in part because the police did not want to be used as the enforcers: “‘We don’t want to be peeking around to see if employees are smoking.’” Smith was unfazed because he envisioned an “honor system”: “‘If someone is going to smoke off duty, there isn’t much we can do…. We are not going to run around with search warrants to see if employees are smoking at home.’”

As adopted by the city council by a 5 to 4 vote, the resolution encompassed all newly hired employees. The majority argued that an employer was entitled to prohibit smoking on a worker’s own time “‘if the employer is footing the worker’s health insurance and disability retirement benefits,’” although the council recognized that the ban would not affect a majority of the city’s employees for 25 years. The resolution recited that “the smoking, chewing or use of tobacco products has an adverse effect on the health of the employee that directly affects the ability of the employee to perform his job while increasing the health care costs that are borne by the City.”

Clinton’s mayor stressed that although the city could fire new employees who violated the agreement not to smoke, enforcement would be on an honor system.

Boldt immediately charged that the ordinance was “‘absolutely unenforceable and patently illegal....’” AFSCME Council 61 challenged the ban to the Iowa
Public Employment Relations Board; both the hearing officer63 and the board itself ruled that the city had violated the Public Employment Relations Act by unilaterally implementing a policy subject to mandatory bargaining (namely, health and safety) without having given the union an opportunity to bargain over it and secured AFSCME’s consent.64 PERB was able to reach this conclusion by rejecting the city’s contention that its no-tobacco-use policy was merely the establishment of a job qualification, which was not subject to its duty to bargain collectively and which, therefore, the City of Clinton was free to implement unilaterally. Although the Board agreed that employers were not required to bargain over job qualifications, duties, content, or responsibilities, it ruled that the policy did not implicate any of these dimensions; and although determining whether an applicant was physically fit and able to perform a job was part of setting a job qualification, PERB asserted that the record did “not demonstrate that employee abstinence from tobacco products is required for the successful completion of specified job duties and responsibilities.”65 At the same time, the Board did make it clear that public employee bargaining rights did not trump the statewide mandates of the anti-public smoking law and consequently did not “provide[] opportunities to smoke in areas where Chapter 98A would otherwise prohibit smoking.”66 The city enforced the ordinance against police, firefighters, and nonunion employees, adhering to the board ruling only with regard to AFSCME members, who had numbered 70 to 80 in 1987.67

63 American Federation of State, County & Municipal Employees, Council 61 (AFSCME) v. City of Clinton (Iowa Public Employment Relations Board, June 17, 1987), Bates No. TI28922676/82-83.
64 American Federation of State, County & Municipal Employees, Council 61 v. City of Clinton at 9 (Iowa Public Employment Relations Board, Aug. 9, 1988), Bates No. TI28922676/84. To be sure, PERB then erroneously claimed that: “Chapter 98A clearly delineates, as a public policy consideration, the areas where smoking is not permitted and requires that those areas be designated as no-smoking areas.” Id. at 9-10. In fact, the statute confers almost complete discretion on those in charge of covered buildings to designate such areas, thus raising the question of whether the employer is required to bargain over and secure the union’s consent to these designations.
65 Clinton Union Exempted from Smoker Ban,” DMR, June 20, 1987 (3A:3).
Such a ruling applied only to Iowa state employees subject to the Public Employment Relations Act, under which, if an employer and union reach impasse, an arbitrator must resolve the disputed issue. Such a requirement would not have operated as an obstacle for an employer in the private sector covered by the National Labor Relations Act, under which an employer is privileged to implement a contract proposal if the parties reach impasse; and, a fortiori, in the majority of nonunion private workplaces in Iowa in which no collective bargaining took place, employers would, under the capacious at-will rule of employment, have faced no legal impediments to establishing a rule that they would hire no smokers. Thus, despite the outcome, the narrow scope of applicability of the PERB ruling presumably strengthened the cigarette companies’ resolve to seek a statewide law to prevent Clinton’s smokers-need-not-apply policy from spreading and potentially discouraging large numbers of their customers from jeopardizing their employability by giving up tobacco.

In the aftermath of the ruling the City of Clinton decided to pursue its anti-smoking policy by negotiating with AFSCME, while the union insisted that it would agree only to a policy that accommodated both smokers and nonsmokers. In the words of the Council 61’s associate director, Jan Corderman: “‘They can’t tell someone not to smoke at home.’” The city did bargain with the union, which, raising the issue to a matter of principle, refused to cede ground; seeing that the union was immovable, the City of Clinton did not press the point by declaring impasse or requesting arbitration. In fact, the surviving records of contract negotiations reveal that the city never even raised the question and that no such provision ever appeared in the City of Clinton-AFSCME contract. While the police and firefighters unions voluntarily agreed to the nosmokers rule, in part because the members did not want to work with smokers, and the Board

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70 Telephone interview with Bruce Johansen, Clinton (Aug. 1, 2007) (City of Clinton attorney during the events in question).

71 Telephone interview with Ty Cutkomp, AFSCME, Council 61, Des Moines (Aug. 7, 2007) (union official in charge of negotiating and administering the City of Clinton contract since 1988).

72 Telephone interview with Bruce Johansen, Clinton (Aug. 1, 2007) (City of Clinton attorney during the events in question).
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

ruling did not apply to non-AFSCME-unit employees, it appears that despite the failure (then or later) to include a provision dealing with off-the-job smoking in the collective bargaining agreement, the city nevertheless continued to apply the rule to all job applicants, including nonuse of tobacco as a job requirement in advertisements and requiring newly hired employees to sign the aforementioned agreement, violation of which gave the city the right to terminate an employee, although in fact compliance was never monitored.\footnote{Telephone interviews with Deborah Neels, City of Clinton finance department director (began work in 1989) and Brenda Lies, financial accounting and human resources (began work in 1999) (Aug. 1, 2007). Announcements posted on the City of Clinton website for a job in sewer maintenance in the public works department and part-time bus driver, which were both covered by the AFSCME agreement, included as a job requirement,“Non-user of tobacco products”/“Not a user of any tobacco product(s).” http://www.ci.clinton.ia.us (visited Aug. 1 and 7, 2007). Surprised by this requirement, the former city attorney speculated that someone in city government had either inadvertently copied the provision from the non-AFSCME job announcements or “slipped it in” and AFSCME had not caught it. Telephone interview with Bruce Johansen, Clinton (Aug. 1, 2007). AFSCME official Ty Cutkomp confirmed that he had been unaware of such a requirement. Telephone interview with Ty Cutkomp, Des Moines (Aug. 7, 2007).}  

Iowa’s Turn:  
The Cigarette Manufacturers Try But Fail to Pass a Law Prohibiting Employers from Discriminating Against Smokers

In August 1990, Region IV staff was able to report to Tobacco Institute headquarters that member company lobbyists had agreed to try to pass a measure in Iowa to prevent employers from refusing to hire smokers. Staff and lobbyists were already cobbled together elements from bills passed in other states “to produce an acceptable amendment for use in Iowa,” on which they anticipated achieving agreement by December 1. On a tactical level, a meeting of industry lobbyists and Government Affairs executives had decided that “introduction of a free standing bill would create unnecessary problems for the industry. There is no desire to create a vehicle on which germane anti-tobacco legislation can be added. The lobbyists are confident that if they have in hand a ready to go amendment, they will be able to add it on during Senate floor action to a bill dealing with labor issues or conditions of employment.” This last point prompted the further tactical insight that TILMC’s Iowa labor consultant would be working with “labor groups to educate them about the desirability of this legislation” in order to “enduce [sic]” them to lobby legislators to whom they had access.
Unlike some issues, such as excise taxes, on which TI could never get too much press coverage, the legislative strategy on anti-smoker discrimination measures was distinctly covert: “Only if and when this effort on the part of the industry is detected by the media, some thought will have to be given as to the appropriate industry response. If the agreed upon amendment addressed more issues than smoking, then perhaps media spokespeople could soft peddle [sic] industry involvement.” The reason for this approach was not difficult to uncover: “The practice of passing smokers’ rights laws without mentioning smoking or tobacco in them is an attempt to deceive the public about the main purpose of the law.”

During the 1991 session, TI and TILMC drafted language of an amendment and waited for an opportunity to insert it into pending legislation. But it soon became apparent that, because of the “tax situation,” it was not feasible to pursue the measure before adjournment. In late summer, Junkins met with IFL board members, confirmed that labor was still “supportive of some type or privacy legislation,” and therefore planned to prepare for the 1992 session. TI geared up during the closing months of 1991 to return the issue to the legislative agenda in 1992, the documents for which were conveniently collected in a file folder labeled, “Iowa 92 Proactive Plans.” In November, TI’s Midwest regional staff reported that labor was “very interested in pursuing this issue,” but that while the tobacco industry could “seek support for labors [sic] position covertly,...at no time should we directly or publicly indicate support for this legislation.” Fissures within the industry were on display in the intelligence that Philip Morris might be “interested in doing a separate bill instead of pursuing an amendment,” and that if it actually did so, it would be “important that TI step back and let PM be fully responsible for the very real possibility that we will have to fight to kill our own bill in the Senate.” Moreover, the tactical question still had to be answered as to whether “we want to use up a chit on this particular bill when we might need

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74Kurt Malmgren to Samuel Chilcote, Memorandum at 1, 3 (Apr. 17, 1991), Bates No. TIOK0029427/30.
751991 Proactive Legislative Plans at 7 (June 18, 1991), Bates No. TIOK0024936/42.
77[Tobacco Institute], Iowa 92 Proactive Plans (Dec. 11, 1991), Bates No. T128843109, on tobaccodocuments.org.

2839
leadership to help us defeat a tax bill.”

On December 5, 1991, Region IV’s vice president, Alice O’Connor (requesting that the information not be widely publicized), reported to her boss Pat Donoho that TI’s lobbyist, Bill Wimmer—Wasker’s partner, who was responsible for lobbying Democrats—had met with AFSCME and IFL, which had agreed to “push the privacy bill.” Although they preferred to try to amend a different labor bill, they appreciated the tobacco industry’s “desire to push a separate bill as well.” They would, moreover, meet privately with “the two main anti-tobacco legislators,” Hammond and Lloyd-Jones, to ask them not to attach any amendments to the separate bill, if that vehicle were pursued. Why either or both of them would be willing to do this service for the cigarette companies, O’Connor did not explain. Finally, she faxed Donoho the “suggested privacy language for Iowa that Labor groups will push once the companies have signed off.” Since labor wanted to line up sponsors before year’s end, she needed headquarters’ approval “ASAP.”

The “language” that O’Connor faxed to headquarters in Washington turned out to be a full-fledged bill that amended Iowa’s Employer-Employee Offenses statute without ever mentioning smoking. Headed “Employees [sic] Use of Lawful Products During Nonworking Hours” and inserted directly after a provision on drug testing, the measure made it “unlawful for an employer to refuse to hire or to discharge any person, or otherwise disadvantage any person, with respect to compensation, terms, conditions or privileges of employment because the person uses lawful products off the premises of the employer during nonworking hours.” It exempted from this prohibition the use of lawful products “which impair an employee’s ability to perform the employee’s duties” as well as any nonprofit employer “that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.” In addition, the proposal permitted an employer to provide health, disability, or life

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81Alice O’Connor to Pat Donoho, Action-Trac (Dec. 5, 1991), Bates No. TI28922691. O’Connor claimed that “Wayne Cox from IA Citizens for Tax Justice has agreed that he will work closely with labor.” Cox was with Minnesota Citizens for Tax Justice and there was no such Iowa organization. Close attention to detail does not appear to have been O’Connor’s strong point: a week earlier she had sent Donoho a copy of an alleged PERB decision of Nov. 25, 1991 concerning AFSCME and Clinton, but Cathey Yoe of the D.C. office had to call to her attention that they had received the decision more than three years earlier. Alice O’Connor to Pat Donoho, Action-Trac (Nov. 27, 1991), Bates No. TI28922697.
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

insurance policies with coverage and price differentials based on an employee’s use of lawful products if the differentials reflected cost differentials to the employer. Violations (which were simple misdemeanors) triggered an entitlement to affirmative relief including reinstatement, hiring, and backpay. Four days later O’Connor also faxed the proposed bill to Hurst Marshall, the head of R. J. Reynolds Tobacco’s Midwest region, who faxed it back with the notation: “This is fine with me!”

A week later, the TI’s Midwest regional office reported to headquarters that labor was being recontacted to “reaffirm their commitment to push a separate bill as a labor issue.” At the same time, staff made it clear that numerous disparate obstacles to passage of an acceptable bill had been identified but not yet overcome, including the eventual need to address the possibility that the whole campaign might yet be outed as a “tobacco issue”:

Tobacco lobbyists behind the scenes will work with legislative leadership to finesse procedural moves. Separately, an amendment is ready to go if an appropriate separate labor bill or one dealing with conditions of employment surfaces.

On the separate bill, if hostile language ends up being attached, we face the very real possibility of fighting to kill our own bill, probably in the Senate.

In the Senate, it takes only a simple majority to suspend the rules in which case with a lot of additional terms added to our bill ruled germane, [they] could leave us with a bill we do not like very much. Noone [sic] wants to use any chits on the privacy bill which TI lobbyists feel is a very real possibility. PM staff and lobbyists say this is an unfounded concern and won’t happen.

We need to recognize when Branstad chaired the National Governor’s Conference, his top platform was on health care and non-smoking issues. If a separate bill passes both houses identified even remotely as a tobacco bill, we stand a possible gubernatorial veto.

Region IV also stressed the need to use labor management contacts with “national ACLU activists...to educate and motivate local unions, media and key legislators.” In light of AFSCME’s key role in the Clinton dispute, it was self-explanatory that this union was singled out for special mention as an important

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82 A Bill for an Act prohibiting the refusal to hire (faxed Dec. 5, 1991), Bates No. TI28922689-70.
83 A Bill for an Act prohibiting the refusal to hire (faxed Dec. 9, 1991), Bates No. TI28922693-94.
Iowa ally. The regional office also shared the insight that since “[t]he feeling among Iowans” was the Clarence Thomas “ought never have been put through the ordeal,” “the issue of privacy may play very well in Iowa.”\(^{86}\) Region IV did not explain its cryptic statement that “[b]usiness support will depend on whether we opt for legal products or legal activities,”\(^ {87}\) but it presumably meant that the employers whose support the tobacco industry sought to secure might acquiesce in the former, but not in the latter, which, as events revealed, could encompass dating co-workers.

Already on January 13, 1992, the day the legislative session convened, Conservative Democrat Dennis Renaud, chair of the House Labor and Industrial Relations Committee, who, as previously discussed, had been an active and outspoken opponent on the House floor of anti-smoking bills in the latter half of the 1980s\(^ {88}\) and was known to have been “in the pocket of the tobacco lobby,”\(^ {89}\) submitted TI’s “lawful products” draft bill with a request for drafting to the Legislative Service Bureau. Renaud was listed as the sponsor, but the request form identified Ted Anderson, a multi-client lobbyist, as the person from whom the request had been received.\(^ {90}\) While not unprecedented, naming a lobbyist as the requester was uncommon.\(^ {91}\) A former John Deere Company worker and UAW member, Anderson had been a one-term Democratic state senator from Waterloo (1981-84), who then lobbied for 16 years until his death in 2000.\(^ {92}\) Anderson’s clients in 1992—including the National Cattle Congress, Iowa Independent Bankers Association, and Iowa Library Association, as well as


\(^{88}\) See above ch. 26.

\(^{89}\) Email from Rod Halvorson to Marc Linder (Aug. 9, 2007). Years later Renaud stated that he was unable to recall the study bill’s provenience, though he heatedly denied that the “lawful products” bill was about tobacco; when told that the Tobacco Institute had in fact supplied the text of the study bill, he immediately demanded to know where this line of questioning was going, although he admitted that he would have passed the study bill onto the Legislative Services Bureau even if it had come from used car dealers. He also refused to confirm or deny that he smoked in the early 1990s, but did inadvertently mention that he was unable to recall whether he still smoked at that time. Telephone interview with Dennis Renaud, Altoona, IA (Aug. 12, 2007).

\(^{90}\) Legislative Service Bureau, Request for Bill or Amendment Drafting, LSB# 5557HC (Jan. 13, 1992) (copy furnished by SHSI DM).

\(^{91}\) Email from Don Avenson to Marc Linder (Aug. 21, 2007).

Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

numerous health-related entities—may not have been plausible advocates of pro-smoking legislation, but AFSCME Local Council 61 could have been. Since the real requester in this case was the Tobacco Institute, whose lobbyists were Wasker and Wimmer, a question arises as to why the latter, a Democrat, did not hand the draft directly to Renaud instead of using an intermediary. Perhaps Anderson’s union background and contacts made him a more credible conduit, especially since he famously “loved cigars.” In addition, as former legislator Linda Beatty speculated years later, tobacco lobbyists might have used him because “Teddy” was a “big Democrat” whom “everyone” in the legislature liked and who was very popular, especially with older Democrats. Another possible explanation for Anderson’s role as a front may be linked to Renaud’s not having opted for confidentiality for the request: since a nonconfidential request meant that “the Legislative Services Agency will list the request in the index of bill or research requests, and will release the name of the requester, a working title for the bill draft or research request, and the general subject matter classification of the request,” had Renaud listed Wasker/Wimmer or the Tobacco Institute as the requester, other lobbyists would have been able to discover that the measure’s veiled reference to “lawful products” was code for tobacco; with a non-tobacco lobbyist as the purported requester, anti-smoking legislators and groups might have been thrown off the trail and misled to believe (as may have been the case in the Senate) that the bill, requested by AFSCME’s lobbyist, vindicated a new right for workers rather than protecting tobacco company profits.

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94. Wimmer stated in 2007 that he had absolutely no recollection of the bill, but speculated that he might have given it to Anderson because of the latter’s labor connection. Telephone interview with William Wimmer, Des Moines (Sept. 5, 2007). Although Wasker had revealed a vivid memory of events surrounding his success in achieving local preemption in 1990, when asked why the anti-smoker discrimination bill failed in 1992, he protested that it was too long ago to remember. Telephone interview with Charles Wasker, Des Moines (Aug. 30, 2007).
98. Whereas ex-House members Halvorson and Beatty found this speculation plausible, former House Speaker Avenson archly observed that no one except law professors 15 years after the fact pays attention to bill draft requests, although he conceded that some lobbyists do. Email from Rod Halvorson to Marc Linder (Aug. 22, 2007); telephone
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

In any event, neither Renaud (“OK for Com Study Bill for Labor”) nor Anderson was apparently embarrassed that the draft submitted to the Legislative Service Bureau still bore the Tobacco Institute’s computer document identifier code (including the “smoker.doc” extension). The next day the same study bill was submitted as a companion by the chair of the Senate Business and Labor Relations Committee, Richard Running, a pro-union, former executive board member and organizational representative of United Food and Commercial Workers Local 3-P, who had filed the amendment to excluded restaurants from the clean indoor air act in 1990, and was known to accommodate tobacco lobbyists Wasker and Wimmer.

On January 20, 1992, liberal Democrat Jane Teaford filed a short bill that would have amended the unfair employment practices section of the Iowa Civil Rights Act to prohibit an employer from firing an employee for his or her “participation in a lawful activity off the premises of the employer during nonworking hours” unless the restriction was (1) related to a bona fide occupational requirement or was reasonably related to the employment activities and responsibilities of a particular employee or group of employees as opposed to all of the employer’s employees, or (2) necessary to avoid (the appearance of) a conflict of interest with any responsibilities owed by the employee to the employer. The bill was referred to the Judiciary and Law Enforcement Committee, chaired by the tobacco industry’s reliable representative, Daniel Jay; Philip Brammer, the House’s most outspoken anti-smoking advocate, was appointed to the three-member subcommittee, chaired by liberal Democrat Linda Beatty, assigned to vet the bill. Significantly in this context, Beatty, just a few months earlier, had told a historian that she viewed her role in the legislature as

interview with Linda Beatty, Indianola (Aug. 22, 2007); email from Don Avenson to Marc Linder (Aug. 21 and 22, 2007). On the Senate, see below this ch.

99Legislative Service Bureau, Request for Bill or Amendment Drafting, LSB# 5557HC (Jan. 13, 1992) (copy furnished by SHSI DM).

100Legislative Service Bureau, Request for Bill or Amendment Drafting, LSB# 5557SC (Jan. 14, 1992).


102See above ch. 27.

103Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).


105See above ch. 28.

Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

protecting civil rights and individual rights. In 1991 she had voted with the tobacco industry on vending machines and sampling, and in February 1992 she voted against the cigarette tax increase. Even as late as 2007, Beatty took the position that so long as cigarettes were a “legal product,” she not only would support prohibiting employment discrimination against smokers, but believed that smokers should be given some place to smoke at work.

During the six weeks before the committee acted on Teaford’s H.F. 2058, several other bills pertaining to the same subject were filed. On January 30, House Study Bill 584 was assigned to the Labor and Industrial Relations Committee, which assigned it to a five-member subcommittee, which was also chaired by Beatty and of which Brammer was also a member. H.S.B. 584 was largely identical to TI’s proposal—that tobacco industry lobbyists wrote the Iowa bill was not unique: Philip Morris lobbyists had written the law that New Jersey passed in 1991—the substantive provisions differing only in several insignificant formal respects; the enforcement provisions were also materially the same, differing only with respect to minor rearrangements. Even the “Explanation” furnished by the Tobacco Institute was retained. This bill, TI observed, was being “pushed by labor.” The next day O’Connor shared her “Assessment about Iowa” with Donoho, reporting under the heading, “Privacy Bill,” that “PM lobbyist...Cal Hultman and TI Labor Consultant...Lowell Junkins and Bill Wimmer have both House and Senate bills set to be introduced by Labor

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107 A Political Dialogue: Iowa Women Legislators, Box 1: Transcripts: Beatty, Linda at 21-22 (Sept. 26, 1991), IWA.
112 H.S.B. 584 (n.d.). The Legislative Service Bureau’s bill request file includes the drafter’s handwritten marginal changes including her question/comment to her supervisor: “‘Legal’ rather than ‘Lawful’? Lawful OK I guess—breaking new ground!” Legislative Service Bureau, Request for Bill or Amendment Drafting, LSB# 5557HC (Jan. 13, 1992) (copy furnished by SHSI DM).
113 Alice O’Connor to Pat Donoho, Action-Trac: Iowa HF (Feb. 7, 1992), Bates No. TI23670050/2.

2845
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

The ease with which the study bills could be referred to these committees was a function of the study bill system and of the political orientation of their chairmen. Although Iowa’s apparently unique study bills are primarily the venue by which the governor, executive agencies, and the judiciary can place bills before committees, committee chairs also have the prerogative to request the Legislative Services Agency (formerly Legislative Service Bureau) to draft bills, which may have been handed to them by lobbyists, but of which the chairs will appear as the sponsors. Some committee chairs, at one extreme, may adopt a laissez-faire policy with regard to lobbyists’ requests to insert their proposals into the study bill system, whereas at the other extreme others may refuse to process any such requests unless they substantively approve of them. In 1992, the tobacco industry would not have encountered any access problems with the aforementioned House and Senate labor committee chairmen, Dennis Renaud and Richard Running. One reason for lobbyists’ tendency to use study bills is that by securing a committee chair’s approval of the bill they get over one major hurdle; moreover, chair-backed study bills enable lobbyists to avoid association with the possible negatives attached to the name or party of an individual sponsor—which include losing votes.

Although it was crucial to the tobacco industry’s strategy that the real purpose of the bill (to prevent employers from discouraging employees from smoking) be hidden behind vague talk about privacy, the unofficial but authoritative Iowa Legislative News Service Bulletin pierced this veil by calling H.S.B. 584 the day it was assigned to a subcommittee “Off-Duty Smoking/Drinking.” By February 7, TI reported that H.S.B. 584 was “the priority bill for labor and likely to be pushed out of committee in the next two weeks. Even though a similar bill HF 2058 (legal activities) is also likely to move. This is the bill of choice for Labor.” O’Connor—who was herself registered as a Tobacco Institute lobbyist

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114 Alice O’Connor to Pat Donoho, Subject: Assessment about Iowa (Jan. 31, 1992), TI28710967/8. She also mentioned that Philip Morris was doing a separate privacy poll but not through ICAN.


116 Telephone interview with John Pollak, Legislative Services Agency, Des Moines (Aug. 9, 2007). Interim committees also produce study bills.

117 Email from Don Avenson to Marc Linder (Aug. 15, 2007).


119 Alice O’Connor to Pat Donoho, Action-Trac: Iowa HSB584 (Feb. 7, 1992), Bates No. T123670050/1.
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

in the Iowa legislature—and added that TI’s lobbyists Junkins and Wimmer were “working very closely with labor behind the scenes coordinating this effort.” On February 26, the House Labor and Industry Committee voted it out as a committee bill, recommending that it pass as amended. During the 45-minute meeting, which was also devoted to discussing three other bills, the committee took up an amendment, the most important provision of which expanded the exemption beyond nonprofit employers, but also narrowed it by tackling on qualifications. It now applied to an “employer which has previously manifested as its primary purpose its discouragement of the use of one or more lawful products by the general public in its legal charter, by-laws, or established organizational or business plan, and which has provided written notification of this purpose to its employees and applicants for employment.” It is not intuitively obvious what for-profit employers could have satisfied this primary purpose criterion, but whichever nonprofits or for-profits met it would have had to surmount the other obstacles created by the amendment as well. HSB 584.504 also imposed tighter limits on employers’ privilege to charge lawful product-using employees higher insurance premium rates by requiring state insurance agency approval of such rates. And finally, the amendment would have empowered

121Alice O’Connor to Pat Donoho, Action-Trac: Iowa HSB584 (Feb. 7, 1992), Bates No. TI23670050/1.
123Some confusion attends the author of this amendment. According to the committee meeting minutes, Beatty, the subcommittee chair, asked for unanimous consent to reconsider amendment 584.502, to which there was no objection; then Rep. Steve Hansen—whose pro-tobacco stances were mentioned in ch. 28—asked for unanimous consent to reconsider his amendment, to which there was also no objection. At that point Amendment HSB 584.504 was distributed and debated. Amendment 584.504, which was appended to the minutes, was presumably Hansen’s amendment (rather than Beatty’s 584.502); although it bore the Legislative Services Bureau designation HSB 584.504 74, it was labeled “Proposed Committee Amendment by Beatty of Warren.” The fact that Beatty and Hansen asked the committee to “reconsider” their amendments suggests that the committee had already considered them at an earlier meeting as does the statement that after the committee had adopted HSB 584.504, “the previous amendments adopted were out of order.” Committee Minutes for Labor & Industrial Relations (Feb. 26, 1992) (copy furnished by SHSI DM). According to the Iowa State Archives, no committee meeting minutes for February contained any discussion of HSB 584. Email from Meaghan McCarthy to Marc Linder (Aug. 23, 2007).
courts to order liquidated damages of up to $5,000 for wilful violations and deleted the provision in the original study bill making a violation a simple misdemeanor. After the committee had adopted the first two changes by a voice vote and the latter two by a vote of 10 to 8, it adopted the whole bill by a vote of 12 to 8. Two days later, on February 28, the committee’s bill was introduced and placed on the House calendar as H.F. 2329, but it never reached the floor, and died after having been rereferred to committee.

What later became House Study Bill 653 was submitted to the Legislative Service Bureau for drafting at the request of Linda Beatty on February 12. As submitted, it was styled as an amendment of H.S.B. 584, striking everything after the enacting clause and inserting instead an amalgam of H.S.B. 584 and H.F. 2058, using the latter’s “lawful activity” instead of the former’s “lawful products.” Chairman Renaud handwrote on the draft to the LSB drafter: “O.K. draft study bill as directed by Rep. Beatty.” The LSB’s more polished product, now H.S.B. 653, was assigned on February 18 to the same Labor and Industry five-member subcommittee chaired by Beatty, but it too died in committee by virtue of having failed to meet the March 6 cross-over (funnel) deadline.

H.F. 2058 was being held up in the Judiciary Committee, TI reported on February 7, because it was tied to the state civil rights statute, but it was beginning to gain “additional interest” and to be called a “Walmart Bill,” because Walmart fired two employees who work in their store for dating. Walmart has a policy against that during work hours and Teaford’s bill addresses legal

124 House Study Bill 584, appended to Committee Minutes for Labor & Industrial Relations (Feb. 26, 1992) (copy furnished by SHSI DM).
125 Committee Minutes for Labor & Industrial Relations (Feb. 26, 1992) (copy furnished by SHSI DM). Although the vote was by roll call, the names were not recorded in the minutes. Since 12 Democrats and 8 Republicans were present and voting and several other committee and floor votes on these bills were along party lines, possibly this vote was too.
127 H.S.B. 653 (Labor and Industrial Relations) (n.d.).
128 Legislative Service Bureau, Request for Bill or Amendment Drafting, LSB # 6137HC (Feb. 2 [1992]) (copy furnished by SHSI DM).
130 Alice O’Connor to Pat Donoho, Action-Trac: Iowa HSB653 (Mar. 23, 1992), Bates No. TI23670053.
activities.” In fact, the Iowa Court of Appeals, ruling in August 1990 in a case that had arisen in 1985 involving two nonsupervisory employees who had allegedly violated the company’s “fraternization” policy that “Wal-Mart had legitimate reasons for banning relationships at work,” had held that there was “no public policy preventing the regulation of relationships at the work place.”

Popular and legislative reaction to this decision that the at-will rule of employment developed by the Iowa Supreme Court did not prohibit an employer from firing an employee for dating a co-worker was about to interact with the tobacco industry’s efforts to pass its own bill. On February 26, the House Judiciary Committee discussed amendments to H.F. 2058, the content of which even TI’s lobbyist Wasker had been unable to determine, but he assured his client that there would not be “any quick action [on] it, because all attention” was focused on the budget. Nevertheless, Region IV reported to headquarters its belief that “one of the amendments include[s] language which says that business can put in their by-laws proper employment language that could discriminate against smokers.” If such an amendment ratifying employers’ powers at the expense of the cigarette companies’ sales and profits was actually adopted, O’Connor confided to Donoho: “This absolutely will have to be taken out.” After Beatty’s subcommittee had recommended the bill’s passage, on

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131 Alice O’Connor to Pat Donoho, Action-Trac: Iowa HF 2058 (Feb. 7, 1992), Bates No. TI23670050/2.


133 Alice O’Connor to Pat Donoho, Action-Trac: Iowa HF 2058 (Feb. 27, 1992), Bates No. TI23670050/2. Neither the House Journal, the Index to the Journals, the Iowa Legislative News Service Bulletin, nor the Des Moines Register mentioned any such committee meeting. The State Archives also has no record of any such meeting. Email from Meaghan McCarthy to Marc Linder (Aug. 6, 2007). Perhaps O’Connor conflated this bill and meeting with the House Labor and Industry Committee meeting of that date on H.S.B. 584; see below. It is not clear what amendment O’Connor had in mind, but after the House had defeated H.F. 2058, Beatty filed an amendment that attached a third condition to the permissibility of employers’ restrictions on employees’ off-premises lawful activities: “The employer has notified the employee in writing of the restriction at the time of hire or at a time sufficiently in advance of the employee’s activity so that the employee can modify the employee’s participation if the employee so wishes.” S.F. 2271, H-5393 (Mar. 19, 1992, by Beatty), House Clip Sheet at 1 (Mar. 20, 1992).

134 Record of Committee Action on Bills & Resolutions and Subcommittee Members, H.F. 2058, Judiciary & Law Enforcement, Subcommittee Report (n.d.) (copy furnished by SHSI DM). The undated subcommittee report was signed by Beatty and Brammer.
March 3, the House Judiciary Committee finally recommended passage of H.F. 2058. The 11 to 7 vote perfectly tracked party affiliation with one exception: Democrat Rod Halvorson, who prioritized the struggle against smoking above formal workplace democracy, joined six Republicans in the minority. The bill, according to subcommittee chair (and bill floor manager) Linda Beatty, had been “prompted” by the aforementioned Wal-Mart decision, which she called “an example of how businesses sometimes try to regulate the private lives of their workers. ‘We can’t stop dating in business. That’s where people make their social contact.’” Moreover: “‘If an employee does the job, why would an employer want to butt into your personal life. I don’t understand that.’” Beatty later confirmed that she supported the bill because it was good for employees.

When the House (controlled by Democrats 55 to 45) took up H.F. 2058 on March 17, opponents argued that the bill went too far because there were “situations where employees engage in types of behavior that, while legal, reflect poorly on the business.” Republicans’ unabashed pro-employer opposition was led by first-term member Charles Hurley, a lawyer in private practice and member of the Christian Legal Society, who, without explaining how his guideline related to the Wal-Mart case, claimed: “‘When an employer is forced to retain an employee who is basically destroying his business, we’ve gone too far.... We can’t delve into free enterprise and expect it to flourish. We only shoot ourselves in the foot when we tie employers’ hands.’” Jane Svoboda, one of the very few Democrats aligning themselves with the model of the autocratic workplace, drifted even farther from the dating question by insisting that “government should not try to ‘micromanage’ business. ‘You’ve got to give the employer some opportunity to maintain law and order in the workplace.’” Other critics of the bill insisted that it would deter businesses from locating in Iowa.

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Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

In contrast, Beatty insisted that if employers were to make rules about workers’ personal lives, “‘they’d better relate to the job.’”143 Hurley, a very conservative representative who was not even close to his fellow Republicans,144 gave his colleagues the chance to determine how central the Wal-Mart question was to the bill by offering an amendment that struck the entire bill, replacing it with a prohibition exclusively of employers’ firing an employee for “dating another employee.” Its defeat by a vote of 47 to 50 was almost perfectly along party lines: not a single Republican joined the 50 Democrats in opposition, while only four conservative145 Democrats (all of them farmers) voted with 43 Republicans to dilute the intrusion into employers’ exercise of unfettered power to fire workers for any or no reason.146 After having been thwarted in their effort to narrow the bill’s scope, the Republicans turned around and voted against passage of H.F. 2058 in a solid block of 44, not a single one joining the 47 Democrats who supported the original bill; the bill’s 47 to 51 defeat resulted from four new Democratic Nays’ being added to three of the four who had voted with the Republicans on the Wal-Mart amendment.147 (One of the Nays was cast by Rod Halvorson, perhaps the chamber’s most consistently militant anti-smoker, who believed that employers should be entitled not to hire smokers for health reasons—a position that prompted some objections from labor unions in his Fort Dodge district, though his otherwise strong support for unions muted the criticism.)148 In the end, then, the cigarette companies’ strategy ran aground on Iowa Republicans’ ineradicable support for perpetuating employers’ longtime rule of the workplace “with an iron-hand by reason of the prevailing common-law

144Telephone interview with former Representative Rod Halvorson, St. Paul (Aug. 7, 2007).
146State of Iowa: 1992: Journal of the House: 1992: Regular Session Seventy-Fourth General Assembly 1:650-51 (Mar. 17). Fogarty, Koenigs, Mertz, and Svoboda were farmers, two of whom (Fogarty and Mertz) had cosponsored the amendment. Although her entry in the Iowa Official Register failed to mention that Svoboda farmed, she discussed her multigenerational farming at length in her oral history. A Political Dialogue: Iowa’s Women Legislators Box 4, Folder: Transcripts: Svoboda, Jane (Oct. 29, 1991), IWA.
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

rule” that an employment contract for an indefinite period “is presumed to be at will....”149 The cigarette companies had also been boxed in by their ill-chosen statutory terms: although the losing anti-Wal-Mart bill’s use of “lawful activity” would literally encompass smoking, their preference for “lawful products” was not capacious enough to include dating bans.

With the defeat of the last House bill, attention turned to the Senate, where Senate Study Bill 2120, proposed by the Business and Labor Relations Committee, was identical to H.S.B. 584, TI’s “lawful products” measure.150 Referred to committee on February 4, it was assigned the next day to a three-member subcommittee chaired by William Palmer,151 a heavy-smoking insurance businessman highly protective of smoking in the Senate itself.152 After the committee had unanimously approved it (now S.F. 2271) on March 4,153 the full Senate took it up on March 16, adopting by a vote of 44 to 2, even Hannon, one of the chamber’s most reliable anti-smoking stalwarts voting Aye.154 The following day—the same day that the House defeated H.F. 2058—the Senate overwhelmingly passed S.F. 2271 by a vote of 44 to 2, even Hannon, one of the chamber’s most reliable anti-smoking stalwarts voting Aye.155 Indeed, despite her quasi-outsider status, the reasoning that Hannon later offered to justify her vote may well have been typical for many of her colleagues: “If the bill said that workers could use lawful products where not prohibited, I would have voted for it, whether it was alcohol, tea...Tylenol...or


150 S.S.B. 2120 (Proposed Business and Labor Relations Committee by chairperson Running).


152 Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).


155 State of Iowa: 1992: Journal of the Senate: 1992: Regular Session Seventy-Fourth General Assembly 1:818 (Mar. 17). Representative Rod Halvorson, who a month later lambasted the bill in the House as the tobacco industry’s creature, speculated that lack of opposition in the Senate might have resulted from lack of knowledge at that time about the bill’s real origins and purposes. Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).
tobacco. ... If it’s ‘legal’ it’s legal.” Although she did not recall whether she had been aware of the bill’s origins in the Tobacco Institute, she stated that even if she had known, “it wouldn’t have changed my vote.”\footnote{Email from Beverly Hannon to Marc Linder (Aug. 10, 2007).} That even an anti-smoker of Hannon’s stature favored such a legalistic approach—by whose logic smoking would not be prohibited in public places—in 1992 and still clung to it in 2007 helps explain why until that time the Iowa legislature, unlike 20 other states, still had not passed a rigorous and comprehensive anti-smoking law. (Linda Beatty, too, still adhered to this position in 2007).\footnote{Telephone interview with Linda Beatty, Indianola (Aug. 22, 2007).} Whatever the senators knew at the time of voting, the Register’s one-line summary of the bill in its list of bills passed that day let the cat out of the bag, albeit ungrammatically, as to what the bill was really about: “Outlaws policies by most employers that prohibits [sic] smoking and alcohol consumption away from work.”\footnote{“Legislative Bills,” \textit{DMR}, Mar. 18, 1992 (4) (NewsBank). The Iowa press did not cover the debate on S.F. 2271.}

When the Register editorialized under the title, “Does the Boss Own You?” on April 6 that the House had recently defeated a bill that would have made illegal firings based on whether employees engaged in lawful activity such as smoking cigarettes, watching x-rated movies, or riding in a motorcycle group, it failed to point out that the “lawful products” approach that the Senate had passed would definitely cover cigarettes and movies, though it would not have applied to dating. The newspaper did, however, mention that Teaford was seeking to “include language preventing employees from being hired or fired based on their lawful use of products.”\footnote{“Does the Boss Own You?” \textit{DMR}, Apr. 6, 1992 (12) (edit.) (NewsBank).} This confused and confusing claim actually referred to the fact that Teaford had filed on March 30 an amendment not to her own defeated H.F. 2058, but to S.F. 2271 (which the Senate had passed) that was apparently designed to give the House another opportunity to vote on H.F. 2058: Teaford’s amendment struck “use of lawful products” from the heading of the bill’s proposed new section of the Employer-Employee Offenses statute and replaced it with “lawful activity,” but did not insert such a substitution into the body of the main prohibition, which continued to speak only of “lawful products.” The amendment did, however, import from H.F. 2058 the exceptions to the prohibition of discharging an employee for participating in off-premises lawful activity, thus giving S.F. 2271 a disjointed hybrid character.\footnote{S.F. 2271, H-5585 (Mar. 30, 1992, by Teaford), House Clip Sheet at 25 (Mar. 31, 1992).} In the event, however, Teaford’s amendment was placed out of order and never voted on when
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

the House took up the bill later in April.\textsuperscript{161}

After the House Labor and Industrial Relations Committee had recommended passage of S.F. 2271 on March 25,\textsuperscript{162} TI’s Region IV learned that its faithful advocate, Representative Daniel Jay, had filed an amendment that would have exempted from the bill’s prohibitions employer programs “establishing and enforcing blood content levels for alcohol, prescription drugs, or other medications while the employee is on duty, on the employer’s premises, or using the employer’s equipment.”\textsuperscript{163} The Midwest regional office informed headquarters that: “Labor does not like this amendment. The sponsor will be asked to withdraw his amendment.”\textsuperscript{164} In fact, it was placed out of order during floor debate and never considered.\textsuperscript{165}

When the House took up S.F. 2271 on April 15, the bill’s opponents called it a “‘paper tiger’ concealing a tobacco industry drive.”\textsuperscript{166} In particular Democrat Rod Halvorson, a longtime antismoking militant, turned a bright light on the cigarette companies’ camouflaged machinations by explaining that “the tobacco industry is pushing such legislation throughout the country because of public health efforts to discourage tobacco use. ‘This is a direct assault of the tobacco industry to bring this issue before us,’” adding that some employers had prohibited smoking by employees on account of the increased illness and medical costs linked to smoking.\textsuperscript{167}

Democrat Patrick Gill, a construction businessman and nonsmoker who had chaired the Labor and Industrial Relations subcommittee that had vetted the bill\textsuperscript{168} and argued that “businesses should not be allowed to meddle in the private lives of workers,”\textsuperscript{169} offered an amendment striking the entire bill, but then readopting the Senate-passed bill with the same amendments to H.S.B. 584 that

\textsuperscript{163}S.F. 2271, H-5661 (Apr. 2, 1992, by Jay), House Clip Sheet.
\textsuperscript{164}Alice O’Connor to Pat Donoho, Action-Trac: Iowa SF 2271 (Apr. 8, 1992), Bates No. T128711514, on tobaccodocuments.org.
\textsuperscript{166}“Smoking Bill Fails,” Gazette (Cedar Rapids), Apr. 16, 1992 (4B:1).
\textsuperscript{167}“Statehouse Notes,” DMR, Apr. 16, 1992 (4) (NewsBank).
\textsuperscript{169}“Smoking Bill Fails,” Gazette (Cedar Rapids), Apr. 16, 1992 (4B:1).
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

Beatty had proposed and the House Labor and Industrial Relations Committee had adopted on February 26. The most relevant change reproduced verbatim the requirement for exemption introduced in H.S.B. 584/H.F. 2329 that employers (and not just nonprofits) have solemnly manifested their purpose to discourage use of a lawful product in a legal or business organization document and given employees and applicants written notification of it. What proved to be a deal-breaker, however, was a floor amendment offered by Gill that simply struck the language added by the Senate exempting “employer policies” (but not labor contracts) in existence on March 1, 1992. On a roll-call vote this amendment passed by the narrowest of margins—50 to 49. All 50 Ayes were cast by Democrats, while only 4 Democrats, including the chamber’s leading anti-smokers Hammond and Rod Halvorson, voted with all 45 Republicans in opposition. This voting pattern is difficult to reconcile with TI’s intelligence that labor and business “said they would have the bill vetoed if ‘policies’ were not included. Attempts to put ‘policies’ back into the bill failed.” If Labor wanted that language restored, Democrats could have been expected to accommodate that preference rather than vote solidly against it. (Halvorson later interpreted this amendment as possibly designed to stick it to non-union employers, whose non-collectively bargained employer practices would not be exempted.) Gill’s overall amendment was adopted on a voice vote, but the bill (which now consisted of Gill’s amendments) was narrowly defeated 51 to 48. Again, the vote was along party lines: 47 Democrats voted for the pro-tobacco industry bill joined by a lone Republican, Mary Lundby, an ardent smoker and loyal cigarette industry legislator. The bill was defeated because the other 44 Republicans

170See above this ch.

171State of Iowa: 1992: Journal of the House: 1992: Regular Session Seventy-Fourth General Assembly 2:1479 (Apr. 15) (H-5858). By amendment of the amendment H.F. 2329’s requirement that the employer have “previously” manifested its purpose was deleted. Id. at 1480 (H-5914). The amendment also conditioned employers’ imposition of higher insurance premium rates for users’ of lawful products on approval by the commerce department insurance division. Id.


174Alice O’Connor to Pat Donoho, Action-Trac: Iowa SF 2271 (Apr. 8, 1992), Bates No. T128711514, on tobaccodocuments.org.

175Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).

Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

(who were presumably representing businesses’ opposition to any diminution of their power to hire and fire) were joined by seven Democrats, including Gill himself, three anti-smokers (Halvorson, Hammond, and Teaford), and Svoboda and Koenigs, who were presumably pro-business. Gill, however, may have voted Nay simply in order to be on the prevailing side in order to be eligible to file a motion to reconsider, 177 which he did the next day, but it failed by a vote of 42 to 49. 178

Despite the tobacco industry’s best efforts to conceal the real purpose of the bill, the press was not misled. Even the headline of the AP article in the Cedar Rapids Gazette read “Smoking Bill Fails,” while the text observed that the House had rejected a bill prohibiting employers from firing employees “for smoking off the job.” 179 After the motion to reconsider the vote had failed, TI realized that success had probably eluded it: although its lobbyist was still seeking a “vehicle bill to attach privacy provisions to,” the looming end of session left a conference committee report as the only possibility, 180 which never materialized. In contrast to Wasker’s failure in Iowa, TI’s lobbying resulted in the passage of anti-discrimination laws in neighboring Minnesota, Missouri, and Wisconsin, as well as in other states, though tobacco industry initiatives failed in even more states. 181

In spite of this defeat, TI increased lobbyist Wasker’s annual retainer from $44,000 for 1992 to $50,000 for 1993 182—thus perhaps inadvertently substantiating the boilerplate recitation in TI’s standard lobbyist retainer agreement that it was the parties’ intention that payments for services rendered

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179 “Smoking Bill Fails,” Gazette (Cedar Rapids), Apr. 16, 1992 (4B:1).
180 Alice O’Connor to Pat Donoho, Action-Trac: Iowa SF 2271 (Apr. 17, 1992), Bates No. T128711514, on tobaccodocuments.org.
181 State Activities Division, Coordinating Committee Meeting (July 20, 1992), T124360512/7-8, on tobaccodocuments.org. In Minnesota and Wisconsin the bills were keyed to “lawful activities,” whereas the Missouri bill hinged on tobacco or alcohol use. Id. at T124360529/30/34.
182 State Activities Division 1993 Budget [Confidential] at 3-9 (Dec. 23, 1992), Bates No. T135952338/60. Wasker’s retainer in 1992 was, considering Iowa’s size and the difficulties associated with blocking anti-tobacco bills, definitely not outlandish compared with the retainers that TI paid lobbyists elsewhere—for example, $100,000 to the well-known Democratic political operative Tom Kelm in Minnesota. Id. at 3-8 to 3-12, Bates No. T135253559-63.
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

were “not in any way contingent upon the defeat or enactment of any legislative...proposal.”

Failure in 1992 did not cause the cigarette companies to abandon their effort to dismantle this particular interference with smoking in Iowa. Nevertheless, although in 1993, the Senate, still controlled by Democrats (27 to 23), passed by a vote of 36 to 11 a bill identical to S.F. 2271, which it had passed in 1992, it died in committee in the narrowly Republican House. Never in the years thereafter did the tobacco industry succeed in securing enactment of a statute in Iowa barring employers from firing or refusing to hire smokers.

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Cigarette Manufacturers Thwart All Anti-Smoking Legislation During the Years of Divided Party Control of the Legislature: 1993-1996

The [Iowa Restaurant] association’s executive director said most restaurants are not likely to totally ban smoking unless forced to by law for fear of losing customers.¹

Yes, Branstad was a strong tobacco control advocate. It was about the only thing he and I agreed on!²

When the 75th General Assembly convened in January 1993, Democrats, for the first time since 1982, were no longer in control of both houses of the legislature: in addition to having narrowly lost the House majority to Republicans (51-49), they saw their control of the Senate slip to 27-23 (from 29-21). And although they hung on to that Senate majority in the 76th General Assembly (1995-96),³ the fact that Republicans secured an overwhelming 64-36 majority in the House should have made it obvious to anti-tobacco forces that they would, for the time being, be unable to overcome the cigarette oligopoly’s capacity to defeat any legislation designed to subvert its interests.

For the 1993 legislative session the Tobacco Free Coalition in Iowa formulated an extensive lobbying agenda, including a ban on smoking in indoor work sites, restaurants, and other public places, an increase in the cigarette tax, and repeal of the pre-emption provision in the indoor clean air act that prevented local governments from passing ordinances stricter than the (weak) state law.⁴ In addition to a bill to prohibit possession (beyond purchase or smoking) of tobacco by minors,⁵ advocates filed a whole raft of proposals, including a ban on the sale

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²Email from Johnie Hammond to Marc Linder (Feb. 19, 2006). Democrat Hammond was an anti-smoking militant.
⁴“Group Moves to Ban Smoking Areas in Restaurants, Offices,” AP (Jan. 7, 1993), Bates No. 2021174557. See below on the bills.
of candy resembling cigarettes, a ban on advertising tobacco products, tobacco stock divestment, and denial of deductibility of tobacco advertising expenses for corporate income taxes, but none saw any action beyond initial assignment to a subcommittee, where they all died, and the legislature ultimately failed to enact any of the Tobacco Free Coalition’s measures.

On March 16, the House Human Resources Committee approved a public health bill (H.F. 542) that included several provisions strengthening Iowa’s weak clean indoor air law that would have been inconsistent with continued smoking in the capitol rotunda. The bill removed both the 250 square foot limit on coverage of public places and the 50-seat limit on coverage of restaurants, but its most important innovations were the repeal of local preemption and confining the designation of smoking areas to situations in which the “transmission of environmental tobacco smoke to adjacent areas can be completely eliminated.” Representative Brammer, a member of the committee, stated that the bill’s practical effect would be to eliminate smoking in public places because not many restaurants would be willing to install the expensive equipment required to remove the smoke. Opponents agreed with this assessment, but asserted that the result would be the loss of business. Little wonder that news of the committee’s recommendation to pass prompted the director of legislative information of the Tobacco Institute’s State Activities Division to exclaim “[t]his is very bad!” and to instruct the Midwest regional office to revise its bill-tracking summary to say that it would toughen the current smoking restriction law by requiring any smoking areas to be enclosed and separately ventilated, and that it would repeal preemption of local

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smoking, sales and sampling restriction ordinances, and give enforcement authority to Dept. of Public Health. Or something like that! ...

This bill is on the House calendar now. I’m sure that Chuck [Wasker] is going to kill it, but losing preemption in Iowa would be a lot worse than gaining it in North Dakota, I’d think!  

A few weeks later the full House, after narrowly rejecting (51 to 47) a motion to strip out the antismoking provisions, passed the whole public health bill by a vote of 68 to 32. Republican Stewart Iverson—soon to become the legislature’s highest-profile smoker and anti-anti-smoker—could devise no more telling critique than the rhetorical question as to “[h]ow far we should go in controlling people’s lives,” whereas his fellow party member, David Millage, was more worried about the alleged loss of business in Iowa’s border cities to restaurants in other, less public health-minded states. Some restaurants in one such border city (Council Bluffs) echoed such doomsday forecasts, but at least one manager, 40 percent of whose customers smoked, begged to differ: “‘I honestly don’t think the law would hurt our business that much.... People will still go out to eat, even if they can’t smoke. They can go for an hour or so without a cigarette.’” But general anti-public smoking legislation died in the Senate “at the hands of a senator who smokes”—Des Moines Democrat Florence Buhr, who chaired the Senate Health and Human Rights budget subcommittee and to whom committee chair Elaine Szymoniak generally assigned health issues. The legislation died, according to the Register, because Buhr failed to “push” it for consideration. Elevating profits over people’s health, Buhr claimed that the proposals were “too restrictive to pass muster in the Senate. ‘They could present economic hardship on small restaurants if they have to put in equipment so people don’t smell smoke.’” (Not until a year later did the Senate Appropriations Committee act, 

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12 Cathey Yoe to V Brown, Subject: Iowa HF542 (Mar. 19, 1993), Bates No. TI28923050.
14 See below ch. 32.
removing the anti-smoking provisions, as committee chair Larry Murphy put it, “to avoid entangling a contentious budget fight with the smoking issue.” The next day the Senate adopted an amendment that struck Brammer’s amendment, the provisions of which were never enacted.  

Reviewing the 1993 session, Hurst Marshall, the R. J. Reynolds Tobacco Company’s regional director of government relations for the region including Iowa, informed Roger Mozingo, the company’s vice president for state government relations, that no legislation had been enacted “having an [sic] major impact on RJRT or the tobacco industry,” adding—incongruously—that: “Iowa is a very difficult state for the tobacco industry. The Legislature continues to be anti-tobacco and liberal.” More ominously, he observed that “1994 will be a real test for the industry. The ‘floods of 1993’ have weakened the economy and additional revenues will be needed to offset the losses which have occurred.”

That the cigarette manufacturers passed the test to their self-satisfaction—“an excellent year for the tobacco industry”—was in no small part due to Democratic Senate Majority Leader Wally Horn, a former Cedar Rapids high school teacher and coach, who in 1986 had opposed a weak clean indoor air bill.

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21Before starting at Reynolds in 1988, Mozingo had been employed at TI, being senior vice president of the State Activities Division from 1983 to 1988; before being a vice president of Tobacco Associates (1970-74), where he developed foreign markets for U.S. flue-cured leaf, he had been an assistant agricultural extension agent/tobacco market specialist for the North Carolina Department of Agriculture. R. J. Reynolds Tobacco Co., IV. Staff and Structure. D. Staff Bios (1980), Bates No. 507639363/4.

22Letter from Hurst Marshall to Roger Mozingo (Aug. 16, 1993), Bates No. 513336236. Marshall incorrectly reported that H.C.R. 22 prohibiting smoking in the state capitol building had been enacted. RJR Tobacco did not even have its own lobbyist in Iowa, relying instead, on industry lobbyists.


Cigarette Manufacturers Thwart All Anti-Smoking Legislation: 1993-1996

because "I just don’t think we should be approving this kind of legislation," and now chose to kill yet another bill to strengthen the state’s clean indoor air law. At the outset of the 1993 session, Tobacco Industry Labor Management Committee consultant Lowell Junkins, one of Horn’s predecessors as Iowa Senate Democratic Majority Leader in the mid-1980s, “met several times with leadership,” including Horn. Surely Marshall did not mean Horn when he repeated in 1994 that “Iowa continues to be a very difficult state due to an anti-tobacco and liberal legislature.” After all: “Horn, a non-smoker, said he decided against allowing a smoking debate this year in deference to smokers, who are finding their habit increasingly restricted. ‘You have to take into consideration that smokers are addicted…. There’s a certain amount of tolerance you have to have, and I think we’re moving as fast as we can’ in controlling secondhand smoke.” The Des Moines Register saw absolutely no need for tolerance: vis-a-vis “downright deadly” secondhand smoke “non-smokers needn’t jeopardize their health to cater to the self-inflicted addiction of the few.” Although even the editors were unable to shed all of their market-knows-best biases (the “bill went too far in dictating to restaurateurs policies that should be


26 TILMC’s purpose was allegedly to “contribute to greater cooperation among the various segments of the tobacco industry” by educating the public about problems facing the tobacco industry including unwarranted restrictions on the sale, advertising, and promotion of cigarettes. In 1985, its members included the Tobacco Institute and the Bakery, Confectionery, & Tobacco Workers International Union, United Brotherhood of Carpenters & Joiners, International Brotherhood of Firemen & Oilers, and Sheet Metal Workers International Association. “Tobacco Industry Companies, Committees and Organizations (as of 9/16/88)” at 8-9, on http://tobaccodocuments.org/ness/15.html.

27 In 1990 Junkins was TI’s labor consultant. Pat Wilson to Jack Nelson at 2 (Philip Morris USA Interoffice Correspondence, Gov. Affairs, June 11, 1990), Bates No. 20246722792. By 1991, when he had formed Junkins-Hultman and Associates with former Republican Senate Majority and Minority Leader Calvin Hultman, Junkins wrote a memorandum to TI about his “educating House members on the regressive mature [sic] of sin taxes,” mentioning that Senate Majority Leader Bill Hutchins “is on our side....” Lowell Junkins to Susan Struntz (Apr. 5, 1991), Bates No. TNWL0051551.


private business decisions”), it did hail the bill’s proposed repeal of local preemption (“[t]hat’s called home rule, one of the hallmarks of participatory democracy”) and assail the “cancer-pushers” whose “expensive array of lobbyists” it hoped would “not prevail over the well-being of the three-fourths of Iowa adults who do not smoke.”

Horn’s Democratic colleague, Senator James Riordan, who had been named floor manager of the stillborn clean indoor air bill S.F. 2298, appeared to harbor some skepticism as to the real object of Horn’s deference when he admitted that he had “never been confident that it had enough support to pass because of opposition from ‘the big hitters in the rotunda,’ the pro-tobacco lobbyists.” That session’s anti-smoking bill, observed the Register, had “drawn the attention of a small army of lobbyists, many of whom [we]re certain to be prominent in financing lawmakers’ re-election campaigns this year.” Chief among them was Calvin Hultman, Philip Morris, USA Inc.’s registered lobbyist, who had shown boundless tolerance for smoking as Republican Senate Majority and Minority Leader from 1979 to 1990, and became Philip Morris’s counsel as soon as he retired. For Brammer, these well-paid lobbyists—for example, Hultman received $27,500 from Philip Morris in 1995, while TILMC paid Junkins $18,000— were “‘the unholy friends of the tobacco holocaust.’” That cigarette companies were paying such amounts to former Senate leaders so that they could “avoid scrutiny by discreetly currying favor with former colleagues” may have seemed only commonsensical, but former Senate Majority Leader and later R. J. Reynolds Tobacco lobbyist Hutchins nevertheless hurled a counterintuitive “‘I think that’s bullshit’” at the notion. Indeed, since most of the tobacco industry’s legislative payments were made not in the form of direct campaign contributions to individual legislators, but in “soft money” channeled through parties, financing junkets, and making donations to legislators’ favorite charities, they were able to make their exercise of influence less conspicuous.

Horn made no effort to hide his acquiescence in the cigarette industry’s anti-regulatory, market-knows-best agenda, which, according to Senator Beverly Hannon, one of his most outspoken adversaries, was rooted in his principled


32See below this ch.


34Pat Wilson to Jack Nelson (Philip Morris USA Interoffice Correspondence, Gov. Affairs, June 11, 1990), Bates No. 20246722792.

Cigarette Manufacturers Thwart All Anti-Smoking Legislation: 1993-1996

opposition to government regulation and restriction of individual behavior.\textsuperscript{36} Seeking to justify his refusal to permit debate on the bill that would have increased restrictions on smoking in restaurants—an effort that Lester Davis, head of the state restaurant association, dismissed on the grounds that there was no need to “‘try to fix what doesn’t seem to be broken’”\textsuperscript{37}—he claimed that “restaurants are banning smoking on their own, and that government interference is not needed. He also said that smokers’ rights need to be considered. ‘I think it’s consideration of the smokers....’” Horn’s defense of involuntary smoke exposure in restaurants was continuous with his refusal to protect his Senate colleagues and employees. Horn was, as the press also noted, keeping “the Senate a bastion of smokers’ rights at the Capitol. The only cigarette vending machine in a state building in Iowa is located behind the Senate chamber, where smoking is allowed in an open area alongside the space where Senate clerks work at typewriters and computer terminals.” Using his own rearguard inaction as an excuse, Horn declared: “‘We’ve got our own problems in the Senate. How can we push faster on the outside?’” And, completing the self-executing vicious circle, when asked whether there was “‘any other workplace in Iowa where workers are subjected to such a smoky environment,’” he replied—apparently without the slightest tinge of self-consciousness or self-irony—“‘I’d say every restaurant and bar.’”\textsuperscript{38} Years later, Horn sought to explain his opposition to restrictions on smoking as rooted in the fact that the “group” he “represented” consisted of heavy smokers such as Rife.\textsuperscript{39} Though it might seem odd that the Democratic majority leader represented the Republican minority leader, presumably he meant that he needed to accommodate Rife on this issue in order to secure his cooperation on some other matters.\textsuperscript{40}

In 1994, the counter-democratic character of Horn’s refusal to permit debate on the strengthening amendments to the clean indoor air bill (S.F. 2298) was grotesquely underscored by Horn’s own public admission that the bill had been gaining Senate support: “‘It would be real close, and I almost assume that it would pass.’”\textsuperscript{41} The bill, which the Human Resources Committee had approved

\textsuperscript{36}Telephone interview with Beverly Hannon, Anamosa, IA (Feb. 28, 2007).

\textsuperscript{37}“Statewatch,” [Philip Morris] Smoker’s Advocate 5(2):(2) (Mar./Apr. 1994), Bates No. 204332072/3.


\textsuperscript{39}Telephone interview with Wally Horn, Cedar Rapids (May 6, 2007).

\textsuperscript{40}Email from Beverly Hannon (May 7, 2007).

by a vote of 9 to 2 on March 3, 42 would have amended the clean indoor air law to cover public places with fewer than 250 square feet of floor space and restaurants with 50 or fewer seats (but nevertheless permitted such small restaurants to be designated as smoking areas in their entirety, provided that they “issue a written health warning to prospective and current employees which states that due to the environment of the restaurant, the employee may be working in a hazardous environment”); permit designation of smoking areas “only...if transmission of environmental tobacco smoke to adjacent areas can be eliminated”; and repeal local government preemption. 43 Despite the “reprieve” that the committee granted small restaurants, Democrat Jim Riordan called the bill “another major step moving us toward a smoke-free environment’ in public places.” 44 Since the bill would have repealed the preemption language that the tobacco industry, as part of a nationwide strategy to undermine state anti-smoking laws, had had inserted as an amendment in 1990 designed to prevent local governments from passing ordinances stricter than the weak state law, 45 it was hardly surprising that one of Horn’s predecessors as Majority Leader, Hultman, was closely monitoring the bill’s progress for Philip Morris as its lobbyist. Hultman immediately faxed to the company a copy of the Senate Human Resources Committee’s proposed amendment with his handwritten comments on the positions adopted by various members on an amendment to strike preemption. Republican Mary Kramer had observed that “local situations require local decisions. Take preemption off.” Republican Maggie Tinsman, referring to a controversy over another local preemption issue, had said: “Home Rule, not like fertilizer where preemption is needed.” Democrat Florence Buhr (a heavy smoker), had opined, “Good,” but for a different reason: “if we do away w/preemption then we don’t need the amendment we just adopted” (namely, the aforementioned deregulation of smaller restaurants). For Riordan the proposed amendment was “Very Good - If we

43 S.F. 2298, §§ 1-3, 5 (Mar. 4, 1994). Bars declared to be smoking areas in their entirety were also required to issue health warnings. The study bill from which it derived did not permit restaurants with 50 or fewer seats to be declared entirely smoking. S.S.B. 2005 (1994). It is unclear why Lloyd-Jones, one of the Senate’s strongest supporters of smoking regulation, presented amendment SSB 2005.701 75 embodying this backdoor restoration of the exemption for smaller restaurants. No Nay votes were registered in committee. [Senate] Committee Minutes for Human Resources (Mar. 3, 1994) (copy furnished by SHSI DM).
45 See above ch. 27.

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eliminate preemption a local entity could disregard the 50 seat law and make smaller rest. comply w/larger rest. requirements.” And finally Democrat Elaine Szymoniak also held local control to be good because it was a minimum and “local could go stronger.”

By this point the restaurant industry had already begun “gearing up to block a legislative effort to protect diners from cigarette smoke.” Davis, the executive director of the Iowa Restaurant and Beverage Association, opined that these proposed rules “simply go too far in trying to balance the interests of non-smokers.” Reciting the cigarette oligopoly’s accommodationist nonsense, he insisted that the existing system was “working well” by virtue of members’ doing “their best to make allowances for all their patrons, regardless of whether they smoke or not.”

Davis may have grasped the ultimate point of the new anti-smoking initiative when he charged that more than half of his organization’s members would have to prohibit smoking because they would not be able to afford the installation of separate ventilation for smoking rooms. A membership survey revealed that 55 percent guessed that they would lose 20 percent or more of business if they totally banned smoking. Interestingly, while only 8 percent of members stated that they at the time accommodated smokers’ and non-smokers’ interests by not allowing smoking at all, 29 percent responded that banning smoking altogether was “the most reasonable policy towards accommodating the wishes of smokers and non-smokers in your establishment.”

On March 28, 1994, S.F. 2298 was referred to the Human Resources Committee, where it died. (The cigarette “industry plan,” following the bill’s passage by the Human Resources Committee on March 4, had been to have it “referred to second committee where legislation will die,” but killing it proved to be even easier.) After Horn had “refused to allow that bill to be debated by the

46Junkins-Hultman, “Senate Study Bill 2005” (Mar. 3, 1994), Bates No. 2065503468/9. The amendment by Republican Merlin Bartz to strike the preemption language (meaning apparently the repeal of preemption) lost by a vote of 4 to 6. Two Democrats voted for it: Buhr and Patty Judge, whom as lieutenant governor in 2008 the governor (inaccurately) singled out as a key actor in the passage of the statewide smoking ban. [Senate] Committee Minutes for Human Resources (Mar. 3, 1994) (copy furnished by SHSI DM); below ch. 36.
50[R. J. Reynolds,] Hurst Marshall to Jan Krebs, Subject: Weekly Report - Region III
full Senate,"\textsuperscript{51} the irrepressible and ubiquitous Representative Brammer offered it in the House as an amendment to the appropriations bill for various public health programs,\textsuperscript{52} stressing that the "danger of second-hand smoke is well known."\textsuperscript{53} The House adopted the amendment by a close 51 to 47 roll call vote,\textsuperscript{54} and then passed the whole bill 79 to 19.\textsuperscript{55} However, the Senate Appropriations Committee rewrote the bill, which then no longer included Brammer's amendment,\textsuperscript{56} and the full Senate adopted the committee amendment 29 to 21,\textsuperscript{57} showing yet again, as the press put it, the "strength of smokers in the Senate, where cigarettes are sold alongside candy in a vending machine."\textsuperscript{58} Although senators agreed that that vote did not constitute a "true reflection of the Senate's sentiment on tougher smoking restrictions," some were seeking a "middle ground," and Riordan declared that "[w]e're going to get something done this year,"\textsuperscript{59} the initiative remained dead. Two days later the House concurred in the
Cigarette Manufacturers Thwart All Anti-Smoking Legislation: 1993-1996

Senate version of the bill by a vote of 78 to 19,60 putting an end to yet another attempt to reduce secondhand smoke exposure in Iowa. As the R.J. Reynolds regional official in charge of the Midwest proudly reported at the end of the biennium in 1994: “All legislation having an adverse impact on RJRT and the tobacco industry was defeated.”61

As the 76th General Assembly was getting underway, the Human Resources Committee in February 1995 filed and approved by a vote of 6 to 262 yet another bill (S.F. 203) that authorized designated smoking areas only “if transmission of environmental tobacco smoke to adjacent areas can be eliminated.”63 Although such attempts to apply statewide anti-smoking laws to the Senate were never successful before, the Capitol, according to the Register, was “one of the main targets” of the bill because the statehouse’s smoking area was “at the back of the staff room behind the Senate, but smokes drifts into the chamber and into other areas.”64 The bill, however, was then referred to the Small Business, Economic Development, and Tourism Committee, where, unsurprisingly, it died.65

That the bill was so easily killed may in large part have been a function of the early and massive organized resistance that Philip Morris directed at it. Looking back in September 1995, one member of the company’s huge public relations staff informed two company writers that: “Last year we generated pre-season letters to several legislators in Iowa and want to do so again because we got a lot of positive feedback.” The technique involved letters to identified Iowa

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63 S.F. 203, § 1 (Feb. 23, 1995, by Human Resources Committee).
65 State of Iowa: 1995: Journal of the Senate: 1995 Regular Session Seventy-Sixth General Assembly 1:904 (Mar. 28). Ex-Senator Beverly Hannon surmised that Majority Leader Horn had not favored the bill and therefore assigned it to a hostile committee. Email from Beverly Hannon (Mar. 15, 2007). The committee chairman, Steve Hansen, had been hailed by the Tobacco Institute in 1991 for helping preserve preemption. State of Iowa: 1995: Journal of the Senate: 1995 Regular Session Seventy-Sixth General Assembly 1:24; above ch. 28. At the outset of the next session the new executive director of the Iowa Hospitality Association made sure to urge Hansen to make no changes in current smoking laws, which were “working well....” Doni DeNucci to Steven Hansen (Jan. 8, 1996), Bates No. 2061860066.
consumers of Philip Morris's cigarettes who would then write letters to their state legislators. Then on January 12, 1995, at the outset of state legislative sessions across the country, a young public relations employee at corporate headquarters engaged in this interoffice email banter with the midwestern regional office: “I feel like it’s the official start of mob[ilization] season, and no better way to start it then [sic] with a mob for you guys & Cal [Hultman] in IA...(Really, I don’t say that to all the RD’s).”

On January 19, 1995, more than a month before S.F. 203 had even been filed, Philip Morris, through a consulting entity (Optima Direct, Inc.), was finalizing its targeted propagandizing of voters by telephone on the “Issue: Oppose Any Anti-Smoking Legislation.” One script, targeting the constituents of Representative Horace Daggett, a twelfth-term Republican chairing the House Human Resources Committee, instructed callers to ask contactees, on behalf of Philip Morris, whether they were aware that in a few weeks the Iowa legislature might be considering “legislation that restricts the rights of smokers....” Regardless of whether they did or not, constituents next heard: “Despite paying more than their fair share of taxes, smokers in Iowa often have to comply with strict governmental regulations. It is simply unfair for politicians to continue to single out adults who choose to smoke for such restrictive and punitive legislation. Do you agree?” Those who did agree were told that their “state representative needs to hear that!” The caller then asked whether they would be willing to call Daggett “to let him know you oppose any more legislation restricting the rights of smokers such as increasing the cigarette excise tax or banning smoking in more public and private areas....” Those who were willing received Daggett’s phone number, but only if they “understand the issue, are articulate, and polite, and...adamantly oppose anti-smoking legislation.” In contrast, callers were to say good-bye to those who would not call, were undecided, not interested in the issue, or preferred another action. “I am sorry to have disturbed you” was the script for those who became “irate or hostile.” After the script had been finalized on January 23, surviving

66Celeste Victoria to Randall Eiger and Mike Folie (Sept. 5, 1995), Bates No. 2046761659. At the age of 41, Victoria was killed in the World Trade Center on September 11, 2001. “Portraits of Grief,” NYT, June 16, 2002 (29:1-5 and 4-5).


68In 1977 Daggett had filed H.F. 154 mandating the teaching of creationism in schools.

reports of 154 calls made (of a universe of 480 planned calls) during the next five
days stated that 58 people said they “will call” Daggett, while 53 were undecided
or not interested and 9 hung up early or refused.70

On January 27, Junkins-Hultman faxed a copy of Senate Study Bill 61, which,
as proposed by Senate Human Resources Committee Democratic chairperson
Elaine Szymoniak, was identical with what was filed later as S.F. 2174. Its most
prominent innovations were the deletion of local preemption and conditioning of
designated smoking areas on the ability to eliminate the “transmission of
environmental tobacco smoke to adjacent areas....”71 In faxing SSB 61 to
corporate headquarters on February 14, 1995 to give an “Iowa Heads Up,” Philip
Morris’s Chicago office called attention to these features by stressing that “Cal
[Hultman] called this afternoon saying we may have to prepare a phone bank to
the full Senate as early as next week.”72 (A phone bank, ex-Senator Hannon
explained, involves hiring people or getting volunteers “to man the phones from
a central location (multiple phones). They’d probably call tobacco supporters
they knew of in each senator’s district and urge them to call their senators against
Hammond’s bill.”)73 Already the next day Philip Morris and Optima Direct were
exchanging drafts of a telephone script directed at motivating smokers to call their
state senators in opposition to SSB 61. Though the “issue” was labeled “pre-
emption,” in fact it was not even mentioned in the script; instead, those calling on
behalf of Philip Morris were instructed to ask whether the smokers were aware
that the bill “would virtually ban smoking in all public places such as restaurants
and bars.” Whether they were or not, they were next told that if SSB 61 passed,
“smokers in Iowa would no longer be able to enjoy a cigarette in restaurants and
other public places in the state.” If they agreed that “the total smoking ban in all

70State: Iowa, Issue: Oppose Anti-Smoking Legislation, ODI Code: PM702, Targets:
calls were bad numbers or disconnects, while 8 were “deceased.” At the same time Philip
Morris was also making calls to the constituents of at least seven other legislators,
including Tony Bisignano, Nancy Boettger, Donna Hammitt, Steven Hansen, Neil

71SSB-61, §§ 2, 1 (Jan. 27, 1995), Bates No. 2046761585/87. The addressee of the
fax was not stated, but presumably it was Philip Morris’s Chicago office.

72Sherree Niepomnik to Joan Cryan (Feb. 14, 1995), Bates No. 2046761522. In the
further remark that “Cal would like people to tell the Senate to leave the bill as is; do not
amend it,” the writer presumably meant “law” rather than “bill.” It seems implausible that
Hultman wanted the Senate to vote on this bill as it was.

73Email from Beverly Hannon to Marc Linder (Mar. 16, 2007).
restaurants is unfair and unnecessary,” which “a small but vocal group of anti-smokers” was trying to impose along with their beliefs on smokers, the caller urged them to tell their senator that the current system of smoking and nonsmoking sections “works fine.” The script even suggested a script for smokers to use in their calls to senators focusing on Philip Morris’s buzzword “accommodation.” On March 30, two days after S.F. 203 had been referred to the Senate Small Business Committee, Philip Morris was already drafting a telephone script directed at smokers who were asked to call one of four key members of the Senate Finance Committee with the same message that had been drafted for SSB 61. Apparently believing that smokers needed such other-directed psychological support to weigh in on the side of further exposure of nonsmokers to secondhand smoke, Philip Morris had one script assert that “[a]ccording to recent public opinion polls, most Americans believe that smokers and non smokers should be accommodated in restaurants and public places.” (One group of smokers whom Philip Morris sought to avoid were those who declared: “My spouse/relative just died from lung cancer....” The company’s “cue sheet” instructed callers to terminate such calls with: “I am very sorry. Thank you for your time.”)

Nor did Philip Morris’s mobilization end with the end of the session and the death of the bills it had opposed. On May 23, Philip Morris’s Chicago regional office emailed the public relations headquarters in New York asking it to draft “letters for a mobilization to select Iowa members.” The “message points” for the five to six letters for each of eight legislators (including Sen. Bisignano and Rep. Daggett) included: “Understand that legislative efforts to ban smoking or severely restrict smoking in restaurants and public places failed to get passed...during the last legislative session.” “The legislation is advanced by a few

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74Iowa ODI Code: 721, Targets: Full Senate, Issue: Pre-Emption, Draft 3: 02/16/95, Bates No. 2046761518. See also Draft 1: 02/15/95, Bates No. 2046761520 (from Joan Cryan to Gretchen).

75[Philip Morris] Iowa ODI Code: 755, Targets: 4 Senate Finance Committee Members, Issue: Smoking Ban SF203, Draft 2: 03/30/95, Bates No. 2046761513. See also Final 2: 04/04/95, Bates No. 2046761507.


77Philip Morris Cue Sheet (Mar. 18, 1996), Bates No. 2061860077. This phone bank dealt with a similar bill (S.F. 2174). The cue sheet also prompted callers, when confronted with a skeptical “Why should I help?...Philip Morris is just concerned about profits,” to concede that point, but then to add that the company was “also concerned with educating consumers about smoker’s [sic] rights.”
zealots to limit the rights of individuals to enjoy themselves while out in public.”
“We believe in accommodating the preferences of nonsmokers and smokers alike through establishing smoking and non-smoking areas is [sic] the best policy.”
Within a few minutes headquarters emailed back indicating that it had initiated the process for drafting a letter “which would be mailed to our smokers who took part in IA in opposition to repeal of preemption to generate letters thanking the legislators who voted in our favor on the issue.”

The drafts of the “Iowa Mobe/Thanks for Preemption” letters told smokers that thanks to their efforts and those of their state representative, Iowa “still has a reasonable state-wide smoking law...that prevents the imposition of harsher local restrictions.” Without identifying the defects of grassroots local democracy, Philip Morris commented that preemption “means that anti-smoking zealots cannot use their influence at the local level to ban restaurant or other public smoking in Iowa’s cities, towns, villages and counties.” In offering “talking points” that smokers could use in writing letters to legislators, Philip Morris stressed that: “Anti-smoking bans are not supported by the public. They are proposed by a handful of zealots determined to limit the freedom of individuals to enjoy themselves in public.” The company did not explain how such a tiny minority, bereft of public backing, could possibly secure the requisite majority in any political subdivision to pass any ordinance. The only sense that could be teased out of Philip Morris’s accusation that anti-smoking zealots were “determined to limit the freedom of individuals to enjoy themselves in public” was that they were puritans; yet the company’s talking point that smokers “believe in smoking policies that accommodate the preferences of both non-smokers and smokers in restaurants and other public places” made no sense: if nonsmokers’ objective was to prevent smokers from enjoying themselves by smoking, how could nonsmokers’ preferences be accommodated by permitting smokers to smoke in restaurants? And if Philip Morris had been forced to admit that nonsmokers’ real goal was not to be exposed to secondhand smoke, then it would have had to deal with the public health issue, which its propaganda never mentioned. Instead, it suggested that smokers praise their legislators for having “stood firm in support of individual liberty and smokers’ rights” and “letting businesses decide how best to serve their own customers,” which was “the best

78Sherree Niepomnik to Joan Cryan, Subject: Iowa Thank You’s (May 23, 1995), Bates No. 2046761574A. The other legislators were Senators Hansen, Boettger, and Maddox, and Representatives Hammitt, Harrison, and Vande Hoef.
79Joan Cryan to Sherree Niepomnik, Subject: Iowa Thank You’s (May 23, 1995), Bates No. 2046761574.
policy.” In another draft, Philip Morris offered as a talking point for smokers to use with legislators that “most Iowans support the concepts of personal liberty, individual choice and personal responsibility”—without indicating who was to take responsibility for the thousands of deaths caused annually by exposure to secondhand smoke.

Already by the end of August 1995, the lobbying firm of the former Democratic and Republican Senate Majority Leaders Junkins-Hultman sent Philip Morris’s public relations department a “mob list” of Iowa legislators to whom the company should urge consumer-smokers to send letters of continued support. The lobbyists suggested that this “pre-session mob,” which included seven of the eight legislators on the previous list as well as Democratic Senate Majority Leader Wally Horn and Republican House Majority Leader Brent Siegrist, stress “accommodation.” A few days later the corporate public relations department was offering to drafters as “message points” the expression of appreciation to legislators for acknowledging “the rights of smokers and non-smokers” as well as “for not tampering with laws that are already in place that...allow business owners the right to decide whether or not to accommodate [sic] people, employees or customers who choose to smoke.” Philip Morris’s PR department did not explain how leaving in place a law that empowered building owners to designate virtually all of the public space as smoking areas constituted acknowledgment of nonsmokers’ rights. A sample finished letter from Lance Pressl, a Philip Morris regional director of Government Affairs, to a Des Moines smoker requested that he write his state senator, Tony Bisignano, and encourage him by telling him that “[i]t takes political courage to stand up for freedom.” In particular, Bisignano was to be praised for having helped keep on the books a law under which businesses “can still use common sense, and their own judgment, when deciding whether to provide accommodation for their customers who choose to smoke.” What “common sense” meant and what its relationship was to scientific knowledge about the health consequences of secondhand smoke exposure were, once again, left unexplained.

On January 4, 1996, a few days before the second session of the 76th General Assembly convened, Governor Branstad announced a year-long Campaign for the Family, supported by a melange of “strong families” legislative recommendations,

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80 Draft Iowa Mode/Thanks for Preemption (May 1995), Bates No. 2046761572/3.
82 Junkins-Hultman to Joan Cryan (Aug. 29, 1995), Bates No. 2046761651.
83 Celeste Victoria to Randall Eiger and Mike Folie (Sept. 5, 1995), Bates No. 2046761659.
84 Lance Pressl to John Q. Sample (Oct. 10, 1995), Bates No., 2046749017.
ranging from a tightening of the state’s no-fault divorce law to denying benefits increases to welfare mothers who had additional children. Branstad’s use of his “bully pulpit” to “engage people in a positive and constructive way of how we can reinforce and support families” embraced among his “healthy families” recommendations an array of repeatedly defeated anti-smoking initiatives, including a ban on distributing free tobacco samples and on outdoor advertising within a thousand feet of schools and playgrounds and a smoking ban in public places regardless of size (without, however, repealing the exemptions for bars and small restaurants). Of especial importance to the governor was conferring on cities the power to adopt smoking restrictions stricter than the state law’s. As Branstad explained to reporters: “We believe that as a matter of home rule, this pre-emption ought to be eliminated and local government be given the authority to do that.... It was one of the things that the tobacco lobby got stuck in the law that I think was not good public policy.”

In an immediate reaction the very next day, Jack Lenzi, the Philip Morris regional director for governmental affairs in Chicago, informed the PR department in New York that in Iowa “we also face a Gov. who is supporting a public place smoking ban, excluding restaurants/tarvers [sic] under 50 persons.... That message is simple, no new smoking restrictions are needed in Iowa, current law is sufficient. The Iowa Hospitality Assoc. is already engaged on this later issue.” Lenzi’s sense of certainty was not misplaced: three days later the IHA’s new executive director, Doni DeNucci, gave him the we-know-which-side-our-bread-is-buttered-on assurances that Philip Morris had come to expect—but did not always receive—from such entities in exchange for its “generous membership investment.” Noting that the Association’s “effective legislative platforms...would not have been possible without the continued loyal support of corporate members, like Philip Morris,” DeNucci assured Lenzi that she was “looking forward to our partnership in 1996 and into the future.”

At the same time Lenzi jotted down an eleven-point campaign for mobilizing support from various targeted groups and tobacco-allied industries/companies to which he assigned Philip Morris, R. J. Reynolds Tobacco, and UST Inc. (a large smokeless tobacco producer) and/or their lobbyists. For example, under the very first heading “Grass Roots,” he wrote: “Retailers - PM, RJR[.] Consumers - PM
Cigarette Manufacturers Thwart All Anti-Smoking Legislation: 1993-1996

To the largest cigarette sellers in Iowa, “High V” [sic; should be Hy-Vee], Casey’s, and “Come & Go” [sic; should be Kum & Go] he delegated lobbyists Charles Wasker and Cal Hultman/Kim Haus, who were also designated as the agents to approach the Iowa Association of Business and Industry; Wasker’s partner, William Wimmer, would be charged with securing the cooperation of river (gambling) boats and race tracks. Reynolds was tasked with involving the chambers of commerce, while each of the three tobacco companies was to organize its own sales force.\(^88\)

In launching his Campaign for the Family during his Condition of the State address to the legislature on January 9, Branstad, who traced many national and state problems to “the decay of the family,” also proposed making communities safer by enacting the death penalty, a move that, together with his call for a tougher divorce law and parental notification for minors’ abortions, prompted Democratic leaders to opine that his (conservative) program might not be crowned with success.\(^89\)

Within a few days Philip Morris was bulking up its armory of anti-preemption-repeal arguments by asserting, without any supporting evidence, that local control “would unreasonably burden...adult customers,” who “should be able to purchase tobacco products, like other age restricted products, on the same terms and conditions from jurisdiction to jurisdiction. Adult smokers would be able to find the products they are seeking on the shelves, comparably displayed and promoted, regardless of whether the retail outlet is located in Sioux City, Des Moines or Iowa City.”\(^90\) Why its addicted consumers would be unreasonably burdened by having to ask a store employee for their preferred trademarked delivery device of their next “nice jolt of nicotine,” Philip Morris did not

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\(^{88}\)Untitled, undated handwritten sheet attached to the aforementioned “Strong Families” page, Bates No. 2061860091. These pages were kept in a file folder labeled “SB 2074,” which presumably designated S.S.B. 2074, the source of S.F. 2174, the chief anti-smoking bill of 1996. Bates No. 2061860074. The conclusion that Lenzi wrote these notes is based on the very strong resemblance to the handwriting on another nearly contemporaneous handwritten document on a personalized sheet from a pad bearing his printed name. Untitled (Feb. 28, 1996), Bates No. 2061860139.


\(^{90}\)“Iowa Tobacco Uniformity Provision” (Jan. 15, 1996), Bates No. 2078842294/5.

Cigarette Manufacturers Thwart All Anti-Smoking Legislation: 1993-1996

explain.

Later in January, Ally Milder, an R. J. Reynolds Midwest regional field employee, attended a meeting in Des Moines about a proposal that Branstad would be introducing to repeal preemption, raise fees for local enforcement, “enact a smoking ban,” and restrict billboard advertising. In what, against the foregoing account of the 1995 session, must be viewed as a vast exaggeration, Reynolds’ “Public Issues Update” for the latter half of January, which was sent to Tom Griscom, the executive vice president for external relations, asserted: “The industry barely hung onto preemption last session when Branstad was not leading the charge for repeal. With his involvement now it is a much more dangerous situation.” In order to vanquish this perceived threat a coalition was formed composed of Philip Morris, the Tobacco Institute, R. J. Reynolds, tobacco wholesalers, the smokeless tobacco industry, TILMC, and IHA. In addition, the industry immediately began a program to contact House members.92

On January 23, 1996, Hammond introduced S.F. 2069, which would, beginning July 1, 1999, have eliminated the designated smoking area exception to the prohibition on smoking in a public place (except in factories, warehouses, and similar workplaces that the general public did not usually frequent) or a public meeting. It would also have eliminated preemption by causing more restrictive local ordinances to “supersede any inconsistent or conflicting provision” of the statewide smoking law. S.F. 2069 would also have amended the cigarette sales law by: banning all vending machine sales; banning all tobacco advertising within 1000 feet of any playground or school used primarily by persons under 18; limiting tobacco advertising to black and white text; and eliminating local preemption in the same way as in the public smoking law.93 The bill did not even make it out of subcommittee.94

Two weeks later Hammond’s Senate Human Resources Committee filed a weaker bill (S.F. 2174), which would have extended smoking restrictions marginally by eliminating the exemption for public places of fewer than 250 square feet, covering licensed child care centers, and repealing local preemption; it would also amended the cigarette sales law by including the 1000 foot advertising ban and preemption repeal of S.F. 2069.95 The same day, February 9,

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95S.F. 2174, §§ 1, 2, 5, 6 (Feb. 9, 1996, by Human Resources Committee). It was formerly S.S.B. 2074 (by Hammond, Dvorsky, and Kramer), which Hammond had
it passed Hammond’s Human Resources Committee (by a vote of 8 to 0). At the same time the committee passed by a vote of 8 to 1 a bill prohibiting cigarette vending machine sales except in bars, for which Senator (and soon to be Governor) Tom Vilsack voted while criticizing it as unlikely to do much good because instead of discouraging underage smoking, it would only encourage formation of a black market. Two weeks later R. J. Reynolds was working on a program “to get smokers and retailers to contact their state senators about the bill, which appears to be stalled for the moment.” By mid-March the Philip Morris telephone mobilization machine was again in full swing. The “troops” this time were retailers, who were supposed to be directed to “senate targets” on the issue of “repeal of uniformity.” The crucial trigger for launching retailers was the claim that they “may no longer be able to compete on a level playing field. Your business may be at a significant disadvantage compared to those in neighboring communities who are not subjected to any new restrictions.” A week later the bill died before the full Senate took it up. It was presumably this bill that Lenzi, the Philip Morris Midwest governmental relations director, meant

successfully amended to include the preemption repeal language. SSB 2074.50176, Bates No. 2061860085 (undated). The account by Holli Hartman, “Committee Passes Smoking Bills,” DMR, Feb. 9, 1996, Bates No. 2061860153, drastically distorted the bill by misreporting that under it the only indoor places for smoking would be “bars, restaurants, tobacco stores, or their own homes. Or they would have to restrict their nicotine habit to tightly controlled designated areas.”


101It was referred back to the Human Resources Committee. State of Iowa: 1996: Journal of the Senate: 1996 Regular Session Seventy-Sixth General Assembly 1:985 (Mar. 25). Presumably R. J. Reynolds’ legislative agents meant S.F. 2174 when they erroneously predicted that the senate would “soon vote on a bill by Governor Terry Branstad that is a mini-version of the FDA’s proposed regulations complete with advertising, self-service, coupon and promotion bans. Retailers in 18 key senate districts are being notified and will call to urge opposition to the bill.” Tim Hyde to Tom Griscom, Public Issues Update Mar. 18-22, 1995 [sic; must be 1996], (Feb. 24, 2002 [sic]), Bates No. 530289574/5.
when, on February 28, supremely and justifiably confident in the majority leader’s commitment to Philip Morris’s cause, he handwrote himself a note: “Sen - Wally will hold, no re-referral.”

In one of his last anti-tobacco initiatives before he left the legislature, became a named plaintiff in a class-action lawsuit against cigarette manufacturers, and died of emphysema caused by 40 years of cigarette smoking, Representative Philip Brammer on April 1, 1996, filed an amendment to the appropriations bill for the Public Health Department and other related agencies that, based on the declaration of “the use of cigarettes and other tobacco products to be an immediate health emergency of epidemic proportions and a menace as an entry-level drug in the youth population,” would, inter alia, have repealed the local preemption provisions in the public smoking and cigarette laws, prohibited vending machine and self-serve display sales, and instructed the attorney general to file a civil action against cigarette manufacturers to recover the full amount of the sums that the state had paid for medical services for Iowa residents attributable to the use of cigarettes or other tobacco products (for which expenses the companies would be held strictly liable).

After Brammer had raised the point of order that his own amendment was not germane and finally secured a roll call vote on suspending the rules to consider his amendment, the 35 to 59 defeat was almost perfectly along party lines: only one Republican and one Democrat defected. The Republican was Rosemary Thomson, a self-characterized conservative, who had previously worked for drug-free schools for the U.S. Department of Education, and attributed the generally unsuccessful efforts to strengthen the anti-tobacco laws during her years in the legislature to the powerful tobacco company lobby. The lone Democrat was Michael Cataldo, a cigarette smoker, who four years later resigned from the House after he had been convicted of having repeatedly made obscene telephone calls to a woman he called at random.

102Jack Lenzi (Feb. 28, 1996), Bates No. 2061860139/40.
106Telephone interview with Rosemary Thomson, Marion, IA (Apr. 3, 2008).
108Lindsey Henry, “Cataldo Convicted, Leaves Race,” DMR, Aug 2, 2000 (1A)
Although none of the opponents of Brammer’s amendments had spoken against them, when Governor Branstad later that day insisted that the state should consider a lawsuit, legislative leaders commented that his position would not change the outcome. At the end of November Democratic Attorney General Tom Miller, backed by Branstad, did finally file the suit—financed in part by Blue Cross and Blue Shield of Iowa—against the cigarette manufacturers, which would eventually lead to the Master Settlement Agreement.
Democrats’ Decade in the Desert: Stalemate and Stagnation in the General Assembly, 1997-2006

“At some point this Legislature is going to have to stand up to the tobacco industry,” said [Senator] Dvorsky. “Nationwide, the industry is on the run. I don’t know why it’s not on the run in Iowa.”

If Iowa Democrats were able to achieve only modest legislative advances in the fight to suppress secondhand smoke exposure from 1983 to 1992, when they controlled both the House and Senate and Republican Governor Terry Branstad’s positions were more consistently anti-smoking than either party’s, the chances for further progress grew even dimmer with Democrats’ loss of their House majority in 1993 and plummeted to nil when, by a hefty margin, Republicans gained control of the Senate as well in 1997, giving them mastery of the legislature for the first (and last) time during Branstad’s 16-year incumbency and an opportunity to devote their attention to their favored subjects such as facilitating employer-administered drug tests, reducing taxes, and reintroducing capital punishment.

The Republican Party’s and Senate Majority Leader Iverson’s Ascendancy

The fate of bills committed is generally not uncertain. As a rule, a bill committed is a bill doomed. When it goes from the clerk’s desk to a committee-room it crosses a parliamentary bridge of sighs to dim dungeons of silence whence it will never return. The means and time of its death are unknown, but its friends never see it again.

Party composition of the Iowa House and Senate for the quarter-century between 1983 and 2008 is set out in Table 12.

2See above chs. 26-29.
4Woodrow Wilson, Congressional Government: A Study in American Politics 69 (1901 [1885]).
5Sources: http://www.state.legis.ia.us/Archives.html; “Members of Iowa General
Democrats’ Decade in the Desert: 1997-2006

Table 12
Party Control of the Iowa Legislature, 1983-2008 (Majority in Bold Numbers)

<table>
<thead>
<tr>
<th>Session</th>
<th>Democrats</th>
<th>Republicans</th>
<th>Democrats</th>
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<td>1987-88</td>
<td>30</td>
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<td>58</td>
<td>42</td>
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<td>1989-90</td>
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<tr>
<td>2007-08</td>
<td>30</td>
<td>20</td>
<td>53</td>
<td>47</td>
</tr>
</tbody>
</table>

The 1997-98 biennium marked the first time since 1981-82 that Democrats failed to control either house, but they would have ten consecutive years in which to re-acquaint themselves to a status that had once seemed their permanent fate in the nineteenth and earlier in the twentieth century. The sharp reversal suffered

Assemblies 1981-2002,” at iv-v, on http://www.legis.state.ia.us/Pubinfo/Library/Members 19812002.pdf. After Republican Senator Jim Lind, purportedly frustrated over differences with the party over tax policy, had resigned in March 1997 during the session, a Democrat won the seat at a special election in April, reducing the Republicans’ majority to 28 to 22. Thomas Fogarty, “April Election Will Replace Lind, Who Quit,” DMR, Mar. 22, 1997 (1M) (NewsBank); “Voters: Harper to Replace Lind,” DMR, Apr. 9, 1997 (4M) (NewsBank). The Democrats’ House majority in 2007 was reduced from 54-46 to 53-47 when Dawn Pettengill switched parties at the end of April. See below ch. 34.

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by Senate Democrats left them “a bit disheartened,” whereas their colleagues in the House, having cut the gap between themselves and Republicans from 18 to 8, were “in an insurgent mood.” In fact, however, at least in terms of anti-smoking legislation, House Democrats were neither more active nor more successful than their Senate counterparts.

Despite the Democratic party’s minority position in 1997, several of its leading anti-smoking members filed bills to accomplish what was becoming a perennial effort to repeal the preemption of local regulation, which the cigarette companies had succeeded in inserting into both the clean indoor air law and the cigarette sales law in 1990 and 1991, respectively. The label on the file folder that Philip Morris was maintaining on the issue captured both sides’ attitude: “Iowa—Pre Emption Battle ’97.”

To be sure, the victor in that battle should not have been difficult to predict in a legislature under Republican control, especially that of Senate Majority Leader Stewart Iverson, a “strong conservative” and heavy smoker who strenuously opposed anti-smoking legislation, in particular as it might have applied to him personally in the Senate. Already by the time of his second term in the House (1991-1992), he had been one of only four Iowa state legislators to whom the RJR PAC gave its highest campaign contribution of $200. Iverson was, in the words of his fiercest anti-smoking opponent, Democrat Michael Connolly, “very close to the tobacco lobby throughout his leadership years.”

A more telling description of Iverson’s position on smoking and cigarettes would be difficult to imagine than the fact that in 1996, midway through his first term in the Senate and two months before the November elections and the caucus’s choice of him as majority leader, he applied for the job of regional vice president of the Tobacco Institute’s Region III (Midwest). On September 5 he was interviewed in St. Paul by Patrick Donoho, the senior vice president of the State Activities Division. As Donoho later told Institute President Samuel Chilcote

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7Iowa Code sects. 142B.6 and 453A.56. See above chs. 27-28.
8Bates No. 2061860270.
10bSenate Leaders Short on Tenure,” DMR, Dec. 30, 1996 (1A:1, at 8A:5); below ch. 32.
11Data provided by Iowa Ethics & Campaign Disclosure Board (Apr. 4, 2008).
12Email from Mike Connolly to Marc Linder (Apr. 24, 2008).
13Patrick Donoho Time & Expense Report, (n.d. [1996]), Bates No. TI16020508/45. Iverson later claimed that he had not initiated the process: someone had contacted him and asked whether he might be interested in the job. Telephone interview with Stewart
in connection with arranging Iverson’s interview with Chilcote: “Stewart Iverson...was referred to me by Chuck Wasker [TI’s Iowa lobbyist]. He is currently a farmer and also a Republican State Senator with two years left in his term. He is looking for a career change from both a successful farm and elective politics. He is willing to move to St. Paul.”\(^1\)\(^4\) (One Democratic legislator, devoid, to be sure, of fly-on-the-wall knowledge, described the tight relationship between Iverson and Wasker as symbolized by the lobbyist’s sitting and smoking in the majority leader’s office—in which alone smoking was still permitted—telling him what to do on bills.)\(^5\) Iverson was not Donoho’s first choice, but even after that person (who worked for the Minnesota Chamber of Commerce) withdrew, Donoho asked TI’s chief lobbyist in Minnesota, Tom Kelm, to suggest other candidates.\(^6\)

Although the Tobacco Institute never offered him the job (“I came in second place”), Iverson later claimed that even had he received the nod before the election, he would have turned it down because he had been convinced both that the Republicans would gain control of the Senate and that he would become majority leader.\(^7\) Indeed, the Republicans did win a majority of seats in the Iowa Senate (even while Democrats gained 10 seats in the Iowa House and President Clinton carried Iowa), in large part because of Iverson’s efforts on behalf of half a dozen Republican challengers who ousted incumbent Democrats...

\(^{14}\) Patrick Donoho to Samuel Chilcote, Subject: Candidates for Region I and III Positions (Oct. 1, 1996), Bates No. T1117211186.

\(^{15}\) Telephone interview with legislator who wished not to be identified (May 5, 2008). Christopher Rants, who was Republican House Majority Leader/Speaker from 1999 to 2006, characterized the smoke in Iverson’s office as awful, but not godawful. Telephone interview with Christopher Rants, Des Moines (May 12, 2008).

\(^{16}\) Patrick Donoho to Samuel Chilcote, Subject: Candidates for Region I and III Positions (Oct. 1, 1996), Bates No. T1117211186; Patrick Donoho to Samuel Chilcote, Jr., Re: Candidate for Region III Position (Oct. 9, 1996), Bates No. T1117211185.

\(^{17}\) Telephone interview with Stewart Iverson, Clarion, IA (Apr. 6, 2008). Iverson apparently did make it to an interview with TI President Chilcote in Washington, D.C., on Oct. 9, 1996. Bates No. T111721156/9 (file folder), on http://tobaccodocuments.org. Ironically, Iverson’s career might have suffered had he been offered and taken the job since TI was dissolved pursuant to section III(o) of the Master Settlement Agreement of 1998. For example, it apparently ceased its lobbying activities in Iowa by the beginning of 1999. Ginny Brown to Beth Percynski, Re Termination of Lobbying Within Region III (Jan. 11, 1999), Bates No. T116610043; Iowa Ethics and Campaign Disclosure Board (no payments made by client Tobacco Industry Labor Management Committee to lobbyist Lowell Junkins during first half of 1999) (Sept. 21, 1999), Bates No. T14929381.
and then played a “deciding role” in electing him majority leader over the outgoing minority floor leader, Jack Rife, another heavy smoker. When asked, a dozen years later, whether his having been interviewed for the Tobacco Institute job had been publicly known in 1996, Iverson fudgingly suggested that it had. However, the implausibility of this claim was impressively underscored by Senator Maggie Tinsman, who was a Republican assistant minority leader in 1995-96 (at a time when Iverson had not yet climbed into leadership). When told in 2008 of Iverson’s job interview, a shocked Tinsman spontaneously declared that, had the information been public in 1996, Iverson would have lost all credibility. Another veteran Republican and anti-smoker, Andy McKean, also later expressed the opinion that, despite the fact that it had been common knowledge at the time that Iverson was looking for another job, his political career would have been harmed, if not fatally embarrassed, had Iowans known that he had sought that particular job.

Iverson may not have been the Tobacco Institute’s first choice for or become Midwest regional vice president, but the cigarette oligopoly continued to value all that he was doing for it in the Iowa Senate. One token of its esteem was that he was, apart from the Institute’s chief Iowa lobbyist, Charles Wasker, the only person from Iowa invited to its “cigar reception” at the August 1998 meeting in

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18 Paul Cohan, “Senator Stewart Iverson Jr. of Iowa,” Stateline Midwest, Sept. 1997, at 11, Bates No. TI141131866/76. State Republican leaders had pushed aside Rife, who had been floor leader from 1990 to 1996, as the centerpiece of the party’s efforts to gain control of the Senate in part, apparently, because Rife had supported Branstad’s primary opponent in 1994. Thomas Fogarty, “Senators Pick New GOP Leaders,” DMR, Nov. 8, 1996 (1M:2-6, 2M:3). Another reason the Republican caucus did not choose Rife, according to Republican Senator Andy McKean, was that many perceived him as an absolutist loose cannon, who was unable to compromise. Telephone interview with Andy McKean, Anamosa, IA (Apr. 16, 2008).

19 Telephone interview with Maggie Tinsman, Davenport (Apr. 13, 2008).

20 Telephone interview with Andy McKean, Anamosa, IA (Apr. 16, 2008).

21 According to the Iowa Ethics and Campaign Disclosure Board, Iverson received no campaign contributions from any out-of-state tobacco PAC in 1997 or 1998. After the official in charge of state candidate documents had mentioned that the Board had a file for every such PAC and was asked to determine whether tobacco PACs had made contributions to any candidates, she observed that the Board had “purged” (i.e. “destroyed”) them when it moved two years earlier; a computer file for R. J. Reynolds PAC existed, but, oddly, contained no data. Telephone interview with Linda Andersen, Des Moines (Apr. 3, 2008).
Chicago of the American Legislative Exchange Council—a “bipartisan membership association for conservative state lawmakers who shared a common belief in limited government, free markets, federalism, and individual liberty.”

The Preemption Battle of 1997

Given the legislative balance of votes, Democrats’ strategy on anti-smoking legislation was simply to keep the “discussion alive until we can act.” Or, as Richard Myers, the House Minority Leader starting in 2001, put it when asked whether it was a foregone conclusion that no anti-smoking legislation could be enacted once Republicans regained control over both chamber in 1997: “I couldn’t have gone to work” operating under that assumption—“I was there to fight.” Although Iverson—and therefore presumptively the cigarette companies—knew that as long as he was majority leader there was no chance that preemption would be repealed, and even Democrats realized that repeal under Republican majorities in both houses “probably was impossible,” the industry was not taking any chances. In early December 1996 Philip Morris began the process of internal approval by various high-ranking corporate officials in state government affairs and other departments of two mass mailings: one to tobacco retailers to prompt them to write to their legislators “in opposition to any upcoming attempts to repeal the current statewide law”—that is, to repeal the local preemption in the cigarette sales law—and a second to consumers urging them to write to their legislators opposing “any attempts to enact a statewide smoking ban.” The letter to retailers (1,500 copies of which cost Philip Morris

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21Beth Percynski to Pat Dougherty, Subject: ALEC Cigar Reception (Aug. 11, 1998), Bates No. T16531394.
23Email from Representative Mary Mascher (Dem. Iowa City) to Marc Linder (Mar. 25, 2008). Mascher has been a House member since 1995.
24Telephone interview with Richard Myers, Iowa City (May 8, 2008).
25Telephone interview with Stewart Iverson, Clarion, IA (Apr. 6, 2008).
26Email from Joe Bolkcom to Marc Linder (Mar. 31, 2008). Bolkcom, by 2008 a Senate assistant majority leader, was elected to the Senate in 1998, but before then had worked on youth access to tobacco issues for the Johnson County Health Dept. http://www.joebolkcom.org
27Celeste Victoria to Distribution (Dec. 4, 1996), Bates No. 2061860179. The drafts went, inter alia, to senior vice president Ellen Merlo, vice president for state government affairs Tina Walls (who approved them the same day), and state government affairs official
Democrats’ Decade in the Desert: 1997-2006

$8,300), stressed that the governor and “several members of the state legislature” who had failed to repeal Iowa’s “reasonable” cigarette sales law in 1996 would “be back in ’97,” wanting to permit cities and counties to pass their own regulations, which “would result in a confusing patchwork of local laws that could adversely affect many businesses.” The first and only entrant to cross the finish line in Philip Morris’s parade of horribles was that: “You could even lose merchandising allowances if certain sales restrictions were imposed.”

With similar language, the other letter reminded Iowa consumers, i.e., smokers, that if the previous year’s proposal to ban smoking totally in public places supported by the governor and “several state legislators” had been enacted, “designated smoking areas would have been eliminated and you would have been unable to enjoy a cigarette in restaurants and other public places.” But because these supporters would “be back in 1997,” the megabillion-dollar cigarette manufacturing behemoth “need[ed] your help to stop them.” The status quo was preferable because it allowed “businesses serving the public to accommodate both non-smokers and smokers in designated areas. It is a reasonable law that gives business owners the flexibility to tailor their smoking policies to the preferences of their customers.” In contrast, under a statewide ban, “owners would be forced to ban smoking in their own place of business regardless of what they or their customers wanted.” Philip Morris urged smokers to tell their state legislators that they “oppose any attempts to change Iowa’s smoking law. The last thing we need is more state regulations.” The “talking points” that the company offered for inclusion in smokers’ letters and calls to legislators stressed that current law was “working fine” and was “fair to all concerned” without explaining how toxic and carcinogenic smoke drifting throughout a room in any way “accommodated” nonsmokers. Celebrating the infallibility of the free market and millions of individual capitalists’ self-regarding exegeses thereof, Philip Morris suggested enlightening legislators to the effect that: “If there were significant customer demand for a ‘smoke free’ environment in restaurants and other public places,

Jack Lenzi (in whose name the letters were eventually sent).


Faithful to the role as an “anti” that the cigarette firms had imputed to him, Governor Branstad stated in a year-end survey of his legislative plans for 1997 that he would push for repeal of preemption of local governments’ adoption of anti-smoking ordinances targeting minors stricter than the statewide laws. To be sure, the governor rigidly cabin this one anti-corporate stance: he delightedly interpreted voters’ ousting of the Democrats from their Senate majority as meaning that he would “no longer have to ‘fight off anti-business legislation that would have hurt our competitive situation. You’re not going to have to worry about that, because those things are not going to be coming out of committee.’”

A week later, on the last day of 1996, Democratic Attorney General Tom Miller—who, about 15 years earlier, at his wife’s urging, had finally “kicked the smoking habit,” which for reasons he could no longer recall, he had initiated in college and continued into his 30’s—a announced that he was joining the efforts to enable local governments to “tackle the problem of youth and tobacco with all the enthusiasm and creativity they can muster.” Thus both officials were supporting the Tobacco-Free Coalition of Iowa (led by the American Cancer Society, American Heart Association, and American Lung Association), which appeared to be concentrating on the cigarette sales law. One of Miller’s assistants, Bob Brammer, viewed the new campaign as much more focused than previous ones, but the attorney general nevertheless did not shy away from expressing self-doubts: “As far as we know, pre-emption has never been repealed anywhere.... It will be tough, but I think we can get the job done in Iowa if we all work together.”

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32Philip Morris, [Ltr to Iowa Consumers re: Smoking Ban] (est. 1996), Bates No. 2061860182. For an earlier version with handwritten comments, see Draft Iowa Consumer Ltr2 EFI [Ltr to Iowa Consumers re: Smoking Ban] (est. 1996), Bates No. 2070321524. On the 1996 bill, see above ch. 30.


37Anti-Smoking Effort Gets Boost,” DMR, Jan. 1, 1997 (5M:1-2). In fact, Maine had repealed a tobacco control preemption provision in 1996. Robin Hobart, “Preemption:
Taking the Local Out of Tobacco Control” at 15 (2003), on
first state to repeal preemption of local clean indoor ordinances. Id.

38The Des Moines metered postmark appears to be Jan. 3, 1996, which is doubtless
erroneous.


40Tobacco-Free Coalition of Iowa, “Communities for Tobacco-Free Kids: Bringing
Home Rule Back to Iowa,” Bates No. 2061860174.

(accessed Mar. 27, 2008). In 2008 Cameron continued to lobby for Reynolds and the Iowa
Matt&Service=Lobby&frame=1 (accessed Mar. 27, 2008).

42Fax to Jack Lenzi, Philip Morris (Jan. 8, 1997), Bates No. 2061860172.

43Tobacco-Free Coalition of Iowa, “Communities for Tobacco-Free Kids: Bringing

2888
lobbyists, Hultman and Kimberly Haus, told Jack Lenzi, the company’s director of strategic planning for tobacco in State Government Affairs, that “we are working on notifying our allies to get attendance at some of these sites.”

By mid-January 1997 the Cancer, Heart and Lung organizations were laying the groundwork for the attack. Under the title, “Effect of Repealing Tobacco Preemptions,” the coalition analyzed the provisions—which, it correctly pointed out, had been written by the tobacco industry—in the context of the home rule grants of the Iowa Constitution. The constitutional amendment in question, added in 1968, provided that: “Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.” The legislature codified this constitutional grant by providing that “[t]he enumeration of a specific power of a city does not limit or restrict the general grant of home rule conferred by the Constitution” and specifying that an “exercise of city power is not inconsistent with the state law unless it is irreconcilable with the state law.” After pointing out that the cigarette companies’ preemption sections were “modeled after” the home rule provisions, the anti-smoking alliance critically observed that the “use of the word ‘supersede’ in the preemptions has had the effect of making people believe that local government cannot legislate any tobacco laws. While this is not true, preemptions have effectively detoured cities and counties from taking any action to regulate smoking even when the local legislation would be consistent with the state law.” The health groups were at pains to stress that even if the

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45Philip Morris [State Government Affairs organizational chart] (Nov. 14, 1997), Bates No. 2072634065.

46Fax from Cal Hultman & Kim Hultman to Jack Lenzi (Jan. 8, 1997), Bates No. 2061860172.

47ACS, AHA, ALA, “Effect of Repealing Tobacco Preemptions” (Jan. 1997), Bates No. 2061860300/1. It is unclear how Philip Morris, in whose collection the document was found, came into possession of this paper, which bore a fax date of Jan. 15, 1997, from a state government telephone number in Des Moines.

48Iowa Constitution, Art. III, sect. 38A.


51ACS, AHA, ALA, “Effect of Repealing Tobacco Preemptions” (Jan. 1997), Bates
Democrats’ Decade in the Desert: 1997-2006

preemptions were repealed, the general constitutional/statutory limitations on home rule would still not permit local governments to pass ordinances inconsistent or irreconcilable with state law. For example, even after repeal city councils and county boards of supervisors could not lawfully institute regulations irreconcilable with section 142B’s mandates regarding designated smoking areas.\(^32\) (Three years later, when the Ames city council initiated consideration of just such an ordinance, the health groups might have come to regret their earlier stance, but they were too preoccupied with denouncing the substance of the halfhearted measure to focus on it.)\(^33\) Becoming more concrete with respect to the cigarette sales law, the coalition conjectured that after repeal of preemption, local governments might “better define what constitutes ‘control’ of vending machines,...regulate more strictly the sale of smokeless tobacco because state law does not provide many guidelines, and...better provide control of tobacco products and...access by youth.”\(^34\)

Although the alliance members seemed frustrated by their apparent inability to persuade cities and counties that they continued to possess some home rule powers even after preemption, the memo chose to focus instead on the “effective ‘shield’ that the tobacco companies had acquired that allowed them to ‘concentrate their efforts at the state level without being concerned about local programs.’ The argument that statutory preemption had “effectively prevented local governments from addressing unique concerns of interest to specific localities”\(^35\) was in part misleading: banning smoking in restaurants, for example, was not some kind of “unique” local concern, but a widespread (national and international) objective that some city councils were interested in implementing if they could get around the (apparent) barrier that the cigarette oligopoly had managed to erect in the statewide law. Although the campaign for local control of anti-smoking regulation undeniably embodied a highly valuable dimension of democratic debate and public health education, at the same time it was also an opportunistic approach in the sense that the health organizations were not

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\(^{32}\)ACS, AHA, ALA, “Effect of Repealing Tobacco Preemptions” (Jan. 1997), Bates No. 2061860300/1.

\(^{33}\)See below ch. 33.

\(^{34}\)ACS, AHA, ALA, “Effect of Repealing Tobacco Preemptions” (Jan. 1997), Bates No. 2061860300/1. The memo did not deal with the question of whether the preemption provision had any effect whatsoever on local governments’ discretionary power to deny permits. See above Pt. III.

\(^{35}\)ACS, AHA, ALA, “Effect of Repealing Tobacco Preemptions” (Jan. 1997), Bates No. 2061860300/1.
championing the political principle of the general superiority of home rule over laws of statewide applicability; rather, operating under very unfavorable party alignments in the state legislature, they were simply formulating the most effective strategy for achieving their underlying tobacco control goals. Had they been in a position to pass a statewide law without exemptions, they would surely never have eschewed it in favor of trying to mobilize support for passing broad ordinances in a thousand city councils and county boards of supervisors.

On January 23, Democratic Attorney General Miller urged the legislature to increase the cigarette tax from 36 to 40 cents in order to generate funds for anti-tobacco education, but Republican House Majority Leader Brent Siegrist declared that legislators would not increase that or any other tax. Acknowledging the difficulties involved, Miller nevertheless ventured that there was a better than 50 percent chance that the legislature would “do something substantial in this area,” including, apparently, repeal of preemption as well as a ban on cigarette vending machines in youth-accessible locations (made necessary by the failure of lock-out devices).  

A few days later Philip Morris counterattacked. In what Pat McGoldrick, the former national board chairman of the American Heart Association, called “a prime example of why” Miller and Branstad were “justified in suing the tobacco industry for consumer fraud” and “a blatant attempt to stop” their proposal to repeal local preemption,  Philip Morris on January 27 ran a full-page color ad in the Business Record, the state’s leading business magazine. Titled, “Iowa: A Great State to Be In,” the ad, throwing together the activities of the cigarette company and wholly owned Kraft Foods Inc., trumpeted their 2,727 employees, $133 million in taxes paid or generated, and $555 million of purchases. Assuring readers that they were “very much at home in Iowa,” Philip Morris, under the slogan, “We work for Iowa,” claimed that: “We are committed not only to making high-quality food, beverage and tobacco products, but also to improving the quality of life in the communities where we live and work.” McGoldrick deconstructed the ad’s oxymoronic character by asking how “high-quality killers” improved the quality of life and pointing out that tobacco killed more people yearly in Iowa than Philip Morris employed there and that the taxes devoted to

58Business Record, Jan. 27, 1997 (copy supplied by Jim Pollock, editor, Business Record).
recovering the health costs of tobacco by far exceeded those paid by Philip Morris.⁵⁹

Even before any anti-preemption bills had been filed at the 1997 session, the cigarette companies had prepared additional propaganda material alerting “supporters of statewide preemption...to be ready” for the filing of a bill by the anti-smokers, who “are committed to repealing this law, and were disappointed that they were unable to do so last year”⁶⁰ and urging tobacco retailers and smokers to inform legislators and Governor Branstad “to leave well enough alone.”⁶¹ The oligopolist predicted that if anti-smokers got their way and gave municipalities “the freedom to enact their own restrictions,” they “would likely try and persuade local officials to enact extreme restrictions—if not outright bans—on the sale of tobacco products.” How the antis could possibly achieve this result, however, remained a mystery in Philip Morris’s propaganda universe since there was, “in fact...no widespread public outcry to increase towns’ and localities’ authority to enact restrictions on the sale of tobacco products” and “[v]irtually the only people supporting this effort are the state’s anti-smoking extremists, who are only interested in furthering their crusade against cigarettes and smoking.”⁶²

On February 5, the Cancer-Heart-Lung coalition sought to bring pressure to bear on the legislature in support of Miller’s proposal⁶³ by highlighting the results of a survey finding that 70 percent of those polled favored authorizing local governments to pass “their own tough restrictions on smoking....”⁶⁴ Not by coincidence, the next day, semi-stalwart, semi-smoking Representative Minnette Doderer from Iowa City introduced a streamlined bill (H.F. 172) embodying the coalition’s anti-preemption program. It repealed the provisions in both laws, but


⁶⁰[Philip Morris], Anti-Smokers Seek Repeal of State Tobacco Uniformity Law (est. 1997), Bates No. 2061860293.

⁶¹[Philip Morris], Gov. Branstad Asks Legislature for Tough New Cigarette Sales Restrictions (Feb. 1997), Bates No. 2061860258. Although the Legacy website estimates the document date as Feb. 1997, this material was recycled from previous campaigns and made reference to bill numbers that did not correspond to relevant ones in 1997.

⁶²[Philip Morris], Anti-Smokers Seek Repeal of State Tobacco Uniformity Law (est. 1997), Bates No. 2061860293.


⁶⁴Anti-Smoking Group Points to Survey,” DMR, Feb. 6, 1997 (5M:1), Bates No. 2061860259.
tacked on to the cigarette sales law a grant of discretionary power to cities and counties to adopt regulations “specifically targeted to reduce or eliminate access to, sale to, or use of cigarettes or tobacco products by persons under eighteen...which shall supersede any inconsistent or conflicting provision” of the law.\textsuperscript{65} However, H.F. 172’s referral to the Local Government Committee was the only action that the House took on it.\textsuperscript{66} Twelve days later Iowa City Senator Mary Neuhauser introduced the almost identical S.F. 156, which got as far as a Human Resources subcommittee before expiring.\textsuperscript{67} The same day 10 senators, headed by Republican Maggie Tinsman and including four other Republicans as well as Democrats Johnie Hammond, Robert Dvorsky, and future governor Tom Vilsack, filed an even cleaner bill, S. F. 157, which repealed both preemptions and added nothing, but it, too, went no further than a Human Resources subcommittee.\textsuperscript{68} Its House companion bill, which was filed by a Republican and co-sponsored by three Republicans and three Democrats, did not even get that far.\textsuperscript{69} However, S. F. 157 was, through legislative metempsychosis, about to experience rebirth.

One vehicle for support of preemption repeal was a bill (S.F. 163) filed on February 19 by, of all people, Majority Leader Iverson together with Republican Senator Nancy Boettger, which would merely have amended the cigarettes sales law by repealing the lock-out device provision of the section on vending machine sales and substituting for it a ban on the sale of any cigarettes or tobacco products through vending machines unless they were “located in a place where the retailer ensures that” no one younger than 18 was “present or permitted to enter at any time.”\textsuperscript{70} On February 27 the Senate Human Resources Committee, chaired by Boettger, recommended passage of S.F. 163 with several amendments, three of which are pertinent here. First, Senator Robert Dvorsky, a consistently anti-

\textsuperscript{65}H.F. 172 (Feb. 6, 1997, by Doderer).
\textsuperscript{66}House Journal 1997, at 1:249.
\textsuperscript{67}S.F. 156 (Feb. 18, 1997, by Neuhauser); Senate Journal 1997, at 318, 353 (Feb. 18 and 20); Senate Journal 1998, at 102 (Jan. 21). The bill differed from H.F. 172 by virtue of omitting the clause beginning “which shall supersede...”
\textsuperscript{68}S.F. 157 (Feb. 18, 1997, by Tinsman); Senate Journal 1997, at 318, 353 (Feb. 18 and 20); Senate Journal 1998 102 (Jan. 21).
\textsuperscript{70}S.F. 163 (Feb. 19, 1997, by Iverson and Boettger). The quoted language was enacted verbatim. 1997 Iowa Laws ch. 136 at 281 (codified at sect 453A.36(6)). The language was taken from an FDA regulation that was enjoined before it was to go into effect on Aug. 28, 1997. 21 CFR § 897.16(c) (1999).
smoking Democrat, presented the aforementioned S. F. 157, which repealed both preemptions; it passed 7 to 6, with all five Democrats being joined by two Republicans, Tinsman, the chief sponsor of S.F. 157, and John Redwine, an osteopath, who as a physician always took a principled stance against smoking, which did not stand him in good stead with Republican party leaders, whose position on smoking and tobacco legislation was in large part determined by the fact that they smoked: “It was as simple as that.” Then Senator Hammond, one of the legislature’s leading anti-smoking militants, presented an amendment, which, going beyond preemption repeal, would have specifically empowered local governments to reclothe the cigarette sales permit fee with the deterrence it originally was designed to have in 1921 by using economic means to reduce the number of cigarette sellers: “A city or county may establish a local retail permit fee in addition to the annual state retail permit fee. A local retail permit fee shall be retained by the city or county imposing the fee and shall be used by the city or county exclusively for the purpose of enforcing section 453A.2,” which prohibits the sale of cigarettes to persons under 18. This language was taken verbatim from Senate Study Bill 68, “An Act relating to the local regulation of cigarettes and tobacco products including a provision for the establishment of a local fee,” which the Human Resources Committee received on February 3. In addition to the aforementioned provision, the study bill declared that notwithstanding the “uniform application” (or preemption section) of the cigarette sales law, “any local laws and regulations specifically targeted to reduce or eliminate access to, sale to, or use of cigarettes or tobacco products by persons under eighteen years of age shall supersede any inconsistent or conflicting provision of this chapter.” The study bill would, as a Philip Morris report

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71[Iowa Senate] Committee Minutes for Human Resources at 1 (Feb. 27, 1997) (copy furnished by SHSI DM).
73Telephone interview with John Redwine, Fayetteville, AR (Mar. 30, 2008). In addition to Iverson, Redwine mentioned such leaders as Daryl McLaren and Jack Rife. In contrast, neither Boettger, nor Rensink, nor Schuerer smoked; neither Senate President Mary Kramer nor four of the five assistant majority leaders smoked (the one exception being Mary Lou Freeman).
74163 Amend 3 by Hammond, attached to [Iowa Senate] Committee Minutes for Human Resources at 1 (Feb. 27, 1997) (copy furnished by SHSI DM).
75It was assigned to a subcommittee composed of Schuerer, Tinsman, and Dearden. Senate Journal 1997 at 189, 191 (Feb. 3).
observed, “eliminate smoking and marketing uniformity.” Hammond’s amendment prevailed by a vote of 10 to 3, with five Republicans joining all five Democrats; the three Republicans who cast Nays included Neal Schuerer, a restaurant owner, who, oddly, had been the chief sponsor of S.S.B. 68. In the end, the committee voted out the bill, including all proposed amendments, with a recommendation to amend and pass, by a vote of 9 to 4, with Republicans Boettger, Redwine, Rensink, and Tinsman joining the five Democrats. Although neither the Des Moines Register nor the Cedar Rapids Gazette, both of which reported other Senate Human Resources Committee meetings, covered this one, the following Sunday’s Register editorially lauded the committee and urged the legislature to adopt the same position as the three health groups and to end local preemption “[f]or the sake of both home rule and health....” The newspaper was inspired by Food and Drug Administration rules, scheduled to go into effect in August, prohibiting some cigarette vending machine sales, enforcement of which, according to “[c]ancer fighters,” would be greatly enhanced if local ordinances fleshed them out.

The same day that the committee met, Majority Leader Iverson demonstrated his control of the Senate’s tobacco control agenda by filing a second bill (cosponsored by eight other Republicans, including Senate President Mary Kramer), this time altering the penalties for under-18-year-olds who bought or tried to buy or smoked cigarettes or other kinds of tobacco. The Republicans’ solid Senate majority insured passage of Iverson’s bill in approximately the same measure as Iverson’s endorsement guaranteed that the legislation would not harm the cigarette oligopoly’s interests. S.F. 237 substituted the following gradations for the existing scheduled $25 fine: for a first offense the civil penalty was $100; a second offense subjected the person to a 60-day suspension of his or her motor vehicle license or, if the person had none, 50 hours of community service; a third offense triggered a one-year suspension or 100 hours of community service for

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78Senate Journal 1997 at 49.
anyone without a license.\(^{81}\) (In fact, as early as 1991 the legislature had amended the cigarette sales law and penal code to confer on judges the discretion to impose the performance of community service on minors as a penalty for violating the ban on buying or smoking tobacco.)\(^{82}\) The chain-smoking Iverson asserted: “We need to send the toughest message possible to Iowa teen-agers that underage smoking is wrong. There is no better way to send that message than to take away that person’s driver’s license.”\(^{83}\) Though self-irony appears not to have been his strong suit, Iverson, whose addiction dated back to his teenage years, but who was only 13 years old when the Surgeon General’s epochmaking report on smoking was released in 1964,\(^{84}\) did allow as: “If the law was there when I was a teen-ager, who knows?”\(^{85}\) It is unclear whether Tobacco Institute applicant Iverson realized that the best way to send a message to teenagers that the ban on underage smoking was just a joke was to have it delivered by the state’s most powerful legislator in the same newspaper article that pointed out that he was a “chain-smoker.” Despite the bill’s lack of a local control provision, Branstad stated that he would be able to support it.\(^{86}\)

The Senate Human Resources Committee’s recommendations presumably gave rise to the confident tone adopted by the anti-tobacco coalition at the press conference it held on March 3 to insist on the “growing grassroots support for new restrictions on cigarettes.”\(^{87}\) In particular, at least 20 local governments (including Des Moines, Cedar Rapids, Sioux City, Dubuque, Iowa City, Davenport, and Bettendorf)\(^{88}\) sought the power to impose such restrictions as limiting the public places where smoking was permitted and increasing the cigarette sales permit fees. Attorney General Miller’s seemingly unbounded public optimism prompted him to express his “sense that there’s enormous support in both houses of Legislature.”\(^{89}\) Remarkably, Miller’s claim seemed not wholly implausible.

\(^{81}\) S.F. 237 (Feb. 27, 1997, by Iverson et al.).
\(^{82}\) 1991 Iowa Laws ch. 240, § 10, at 493, 495 (amending Iowa Code § 903.1(3)).
\(^{84}\) Iowa Official Register: 1997-1998, at 43.
\(^{88}\) “Cities and Cigarettes,” DMR, Mar. 9, 1997 (1C:4) (edit.).
On March 6 the Senate Human Resources Committee amended and approved S.F. 237 as a committee bill, which then became S.F. 377, which, inter alia, differed from its predecessor by virtue of creating alternative penalties for a second offense of a 60-day motor vehicle license suspension, 50-hour community service, or a $200 civil penalty, and for a third offense of a one-year suspension, 100-hour community service, or a $300 civil penalty. The committee voted 7 to 4 in favor of these changes, Democrats Szymoniak, Dvorsky, and Hammond being joined by Rensink in opposition, while all the remaining Republicans favored them. Boettger, the committee chair, insisted on the measure’s functionality: “We’ll make kids who consider it cool...think twice before smoking because there are severe consequences.” Dvorsky, who declared that the approach would not work “because many fines already go uncollected,” analyzed the bill as intended “to divert attention from” the effort to repeal local preemption: “It’s a sidetrack. This is diversion, clearly. We seem unwilling to stand up to the tobacco lobbyists, so we’re taking it out on teen-agers.”

Opponents—including Hammond, who, referring to a 1995 law that imposed a license suspension for minors found with small amounts of alcohol in their blood, rhetorically wondered “how many times we can take driver’s licenses away from those kids”—contended both that the penalties were excessive and that the bill’s whole underlying strategy was “bound to fail.” That Iverson and Senate President Mary Kramer were co-sponsors boded well for the bill’s passage, which, according to the Des Moines Register, would bestow some public relations benefit on Republicans:

Its passage also would give lawmakers some claim to anti-tobacco legislation in a year when they’re expected to ignore a more controversial proposal that would permit local governments to enact anti-tobacco ordinances that are more stringent than state laws.

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90 State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1: 537-38 (Mar. 6). The history of S.F. 237 in the Index to the House and Senate Journals lists no such action, the last two being appointment of a subcommittee on Mar. 3 and filing of an amendment on Mar. 4. Index at SBH-97.


Gov. Terry Branstad, with support from health associations, asked lawmakers to repeal the legal barrier against tougher local tobacco ordinances. But lobbyists for tobacco companies and retailers have fought that proposal bitterly.95

In a weekly report for the period ending March 13, R. J. Reynolds’ field agent for Iowa, Ally Milder, noted that the “repeal of preemption is our big issue in Iowa. So far the consensus among our coalition partners is that no substantial grassroots activity is called for at this time. I have discussed doing a few grassroots letters to the subcommittee chairman with our lobbyist and David Horazdovsky of TI. I am going to meet with Horszdovsky [sic] next week to discuss this further.”96 By the following week, Milder was able to report that my fears about preemption in Iowa are somewhat allayed. The Speaker of the Iowa House who was pushing a repeal (in Iowa it is total preemption i.e. display bans, public facilities) of the current preemption law has not been able to muster much enthusiasm [sic] with it. We have reached an accommodation [sic] with the Senate Leadership which will ban vending machines in establishments where minors have access. In addition, A [sic] minor would face a $100 fine for his first violation. On the second violation he would lose his drivers license. We were involved with our coalition partners including the wholesalers and retailers in coming up with this position.97

House Speaker Ron Corbett later confirmed that he had in fact favored repeal as part of his overall strategy of working for compromise on the issue of smoking. Although he agreed with others’ judgment that under Iverson’s leadership in the Senate there was no chance of repeal, he argued that some room for movement still survived in the House. One reason for his failure to generate more support for repeal was, in his view, tobacco lobbyists’ having effectively convinced rural representatives that there was a slippery slope from repeal of smoking preemption to local regulation of livestock confinement based, in part, on an analogy between the odors of manure and tobacco smoke.98

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98 Telephone interview with Ron Corbett, Cedar Rapids (Apr. 7, 2008). In a parallel universe, anti-smoking Representative Mary Mascher, who was in the House in 1997, commented that “Corbett was definitely not anti-tobacco, in fact, over the years he probably collected more money from big tobacco than [Rep. Christopher] Rants ever did.”
Whatever momentum had seemingly built up for repeal of preemption in the public smoking and sales laws soon dissipated. First, on March 26, Dvorsky and Hammond offered it in the form of floor amendment to an olio of a criminal justice bill (S.F. 503), but the chair ruled well taken a point of order by Republican Larry McKibben that it was not germane. A week later, Dvorsky and Hammond’s successful committee gambit attaching repeal to S.F. 163, Iverson’s cigarette vending machine bill, came to naught on the Senate floor. As soon as Human Resources Committee chair Boettger had offered committee amendment S-3102, Republican Wilmer Rensink, who had voted for it in committee, raised the point of order that the amendment was not germane, which the chair ruled well taken, thus ruling it out of order and killing that initiative.

In the meantime, on March 17, Iverson, now acting as sole sponsor, introduced S.F. 499 as a substitute for S.F. 377, with which it was textually identical. After the Judiciary Committee had unanimously recommended passage with an amendment striking the suspension of drivers licenses and imposing community service, while lowering the three-tiered monetary penalties to $25, $50, and $100, Senate Democrats passed up the opportunity to attach their preemption repeal amendments on the floor to Iverson’s bill, which passed in the committee’s stripped-down version by a vote of 47 to 0. While Hammond, who had criticized an earlier version as too drastic, now belittled the result as “‘a pretty weak sister,’” Boettger continued to insist that it would deter

Email from Mary Mascher to Marc Linder (Apr. 2, 2008).

99State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1: 823 (Mar. 26) (S-3259). In 2008 McKibben would become one of the most strident and incoherent critics of the statewide anti-smoking bill, which was finally enacted. See below ch. 35.


101Id. at 942.

102In the meantime, on March 17, Iverson, now acting as sole sponsor, introduced S.F. 499 as a substitute for S.F. 377, with which it was textually identical. After the Judiciary Committee had unanimously recommended passage with an amendment striking the suspension of drivers licenses and imposing community service, while lowering the three-tiered monetary penalties to $25, $50, and $100, Senate Democrats passed up the opportunity to attach their preemption repeal amendments on the floor to Iverson’s bill, which passed in the committee’s stripped-down version by a vote of 47 to 0. While Hammond, who had criticized an earlier version as too drastic, now belittled the result as “‘a pretty weak sister,’” Boettger continued to insist that it would deter

103TMA, Legislative Bulletin, Leg 97-14, at 3 (Apr. 23, 1997), Bates No. 158103681/3.

104State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1: 918 (Apr. 2) (10-0 vote). This structure was ultimately enacted. 1996 Iowa Laws ch. 74, § 4, at 116, 117.

some teenagers by sending them the smoking is “‘not cool’” message. Anti-smoking Democratic Senator Michael Connolly took a different tack, charging that whatever deterrent the bill embodied was undercut by senators’ hypocritical refusal to “abide by state laws prohibiting smoking in public buildings.” Finding irony in the Senate’s flexing its muscles with teenagers, Connolly predicted that they would “look at what lawmakers do rather than what they say....”

Making up for the senators’ omission, House Democrats sought to achieve preemption repeal. On April 7, Representative Richard Myers, a third-term Democrat from Iowa City, the owner of a truck stop—where he sold cigarettes—whose long governmental career, including two decades as city councilman and mayor of Coralville and Johnson County supervisor, was coupled with membership on the board of directors of the Mid-Eastern Council on Chemical Abuse, filed an amendment (H-1566), identical to Neuhauser’s S.F. 156, which embodied repeal of both laws’ preemption provision and authorized local governments to adopt regulations to reduce minors’ access to or use of cigarettes. When the bill came up for debate on April 14, a Republican raised a point of order that the amendment was not germane, which the chair ruled well taken. After Myers’ request for unanimous consent to suspend the rules to

109Telephone interview with Richard Myers, Iowa City (May 8, 2008). At the end of 1999, when Myers, attending an American Cancer Society forum, heard that 3,000,000 packs of cigarettes were sold illegally to children in Iowa annually, called “those numbers...outrageous and wonder[ed] if he should continue selling cigarettes in his store. ‘I’m almost to a point where I’m going to take them out.’” James McCurtis, “Anti-Smoking Plan Gets Support,” ICP-C, Dec. 9, 1999 (3A) (NewsBank).
110Iowa Official Register: 1997-1998, at 83. A one-time Republican, when he became the House Minority Leader in 2000, Myers was praised by the Register’s political commentator as a “small-business owner and...one Democrat who isn’t afraid of someone making a profit” (by this time he was selling Harley-Davidson motorcycles). David Yepsen, “Democrats’ New Leader Leans Toward Compromising with GOP,” DMR, Nov. 14, 2000 (9A) (NewsBank).
Democrats’ Decade in the Desert: 1997-2006

consider his amendment had run into a fatal objection, he moved to suspend the rules to consider H-1566. The result of the roll call vote revealed the weakness of the anti-smokers’ position: the 40 to 57 defeat exceeded the Republicans’ majority in the House because more Democrats (11) opposed the amendment than Republicans (6) crossed over to support it. R. J. Reynolds’ legislative intelligence apparently knew whereof it spoke: the Republican Speaker of the House, Ron Corbett, was indeed one of the six voting to suspend the rules. In the House S.F. 499 was unable to duplicate the Senate’s unanimity: 19 representatives (all Democrats) balked. Critics who favored stronger provisions argued that “the bill would have only a limited impact on teen smoking and represented a victory of tobacco lobbyists.” Myers himself berated the House for its unwillingness to “face up to some of the real causes” of smoking.

Later in 1997, Iverson claimed in an interview that he believed in general that local control over environmental regulation—the issue at hand was large hog lot operations—“and other standards would undermine Iowa’s basic approach to government.” Iverson, a “family farmer” in whose district more large livestock facilities were located than any other in Iowa, thought “‘this is much bigger than just the livestock issue.... I think it would be a dramatic turn in Iowa—because we do not allow local governments to have any laws that are more stringent than state laws. That’s a debate that we’ll have again this year. But I’m a firm believer in statewide regulation.”113 The cigarette oligopolists (and other large corporations) may have been delighted to know that the Senate Majority Leader had so opined, but it was, nevertheless, astonishing that the state’s most powerful legislator was unaware that the Iowa Code provided (and provides) that: “A city may not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.”


116Iowa Code, sect. 364.3(3) (1997). When interviewed more than a decade later, Iverson repeated virtually verbatim the erroneous “we don’t allow local governments” assertion. Telephone interview with Stewart Iverson, Clarion, IA (Apr. 6, 2008).
Ironically, the 1997 forecast attached in the Tobacco Institute’s regional budget for 1997—which included $60,000 for lobbyist Charles Wasker in addition to $1,000 in support of the Iowa Restaurant Association and $500 for the Iowa Retail Merchants Association—had not even bothered to mention defensive action on behalf of the preemption provisions, although repeal of smoking restrictions was the sole item under the “Proactive” rubric.

The Iowa Attorney General’s Medicaid Reimbursement Lawsuit Against the Cigarette Oligopoly: 1997-1998

This Was a Good Week in Iowa for BIG TOBACCO.

The latter part of 1997 witnessed a controversy over whether a special session of the legislature would be called to accommodate Attorney General Tom Miller’s request for additional legal tools to prosecute the state’s lawsuit against the cigarette companies for the recovery of Medicaid expenses for tobacco-related disease. On November 27, 1996, months after the legislature had taken no action on a bill to provide such a cause of action, Governor Branstad and Miller announced that the state had filed suit against the tobacco companies to recover millions of dollars in restitution for the state’s costs in providing health care to state citizens and employees to deal with the tobacco-related diseases resulting from the companies’ wrongful conduct and unlawful activities as well to seek restitution and civil penalties for violations of the Iowa Consumer Fraud Act committed by the defendants in systematically misleading the public about the health consequences of smoking and failing to disclose that nicotine was

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118 Tobacco Institute, 1997 Budget, State Activities Division, Region III (Nov. 1, 1996), Bates No. TI16551698/700. Defensive measures included “excise tax threat.” See also Tobacco Institute, 1997 Draft Forecast Smoking Restrictions at 1, Bates No. TI02581247. For a list of the various tobacco industry lobbyists in Iowa in 1997, see Tobacco Institute, State Activities Division (Jan. 1997), Bates No. 83678016/27.
119 Iowa Healthy Kids Project, “This Was a Good Week in Iowa for Big Tobacco” (n.d.) (faxed from Hultman & Haus to Jack Lenzi, Sept. 30, 1997), Bates No. 2061860317.
120 H.F. 2482 (Mar. 21, 1996, by Brammer).
Democrats’ Decade in the Desert: 1997-2006

addictive. On August 26, 1997, Polk County District Court Judge Linda Reade denied the defendants’ motion to dismiss the Consumer Fraud Act claim, but did sustain their motion to dismiss the Medicaid indemnity claim. Because Iowa, unlike Florida, had not enacted legislation specifically empowering the state to proceed directly against tobacco companies for recovery of medical expenses incurred by the state on its citizens’ behalf, the judge ruled that the common law tort theories pleaded by the state did not justify recovery of Medicaid costs, thus remitting the state to a statutory claim that it characterized as procedurally impractical and inconvenient. Robert Levy, a cigarette company apologist at the Cato Institute whom Philip Morris called on to write op-eds, promptly weighed in with one in the *Des Moines Register* hallucinatorily admonishing the Iowa legislature that if it “permits this outrageous, retroactive application of the law, it will have tapped the deep pockets of a feckless and friendless defendant.” Then training his sermon on Iowans in general, he warned them that they might wind up bequeathing their children “a message even more perfidious than cigarettes”—namely, that they “can engage in risky behavior, then force someone else to pay the bills.” Conveniently, Levy did not pass judgment on the message that millions of people, whom cigarette manufacturers, withholding the knowledge that morbidity and mortality would result from using their commodities, urged to smoke, would not be able to force someone else to die their deaths for them.

Although House Speaker Corbett, who purported to support Miller’s efforts, initially favored a special (one day) session, it very soon became clear that he and other Republicans were eager to accommodate the Iowa Association of Business and Industry’s demand that any law not expose “‘manufacturers of other legal products to future liability concerns.’” What a

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121 Office of the Governor of Iowa [and] Iowa Department of Justice, Iowa Files Lawsuit Against Tobacco Companies (Nov. 27, 1996).
123 Email from Jack Lenzi to Joanne Mendes et al. (Jan. 19, 1998), Bates No. 2071794891.
125 Telephone interview with Ron Corbett, Cedar Rapids (Apr. 7, 2008).
127 David Yepsen, “Business Group Wary of Tobacco Bill,” *DMR*, Sept. 12, 1997 (4A) (NewsBank). Nevertheless, half a year later the Register recharacterized the earlier situation as one in which Republicans had walked away from Corbett’s call for a special
member of his caucus may have meant a decade later in calling the nonsmoking
Corbett a “practical” politician was illustrated by his plan to impose such far-
reaching restrictions on the suit as excluding damages from secondhand smoke
exposure and, especially, limiting claims to future medical expenses, which
would have reduced the state’s potential recovery. Miller estimated, by 300-500
million dollars. By mid-September the Republican legislative leaders made it
clear that Miller would not get all that he had requested. House Majority Leader
Brent Siegrist, for example, acknowledged that the legislature would try to
strengthen the attorney general’s hand, but would not “‘give him a lead-pipe cinch
victory because that could have some impact on other businesses....’” And
Corbett, responding to some legislators’ reluctance to convene a special session
unless the millions of dollars in fees that private lawyers, to whom the state had
contracted out the prosecution, stood to gain were reduced, added that any law
enacted might lower them. The improbability of legislative intervention,
including provision for retroactivity enabling the state to recover for past
damages, increased once the defendants, and especially Philip Morris—given the
influence that the cigarette companies had long wielded in the Iowa legislature—announced that they would vigorously attack such a law as well as
the convening of a special session. Republican legislative leaders’ decision not
to give Miller anything more than the right to sue the tobacco firms for damages
to poor people covered by Medicaid prompted the attorney general to call it “‘an
evernous missed opportunity.’” Corbett dropped Miller’s proposal to assign
damages based on each tobacco firm’s market share because “introducing a new
idea like that into Iowa’s liability laws made Iowa businesses [sic] leaders
nervous.” Also rejected was the proposed right to calculate damages by statistical
formulas. Corbett defended that decision on the grounds that that approach
“‘would really take away the right of tobacco companies to face their accusers....
As bad as the tobacco companies are, in America everybody deserves to have
their day in court.’” The coup de grace appeared to be administered by a letter to
members of the legislature from the American Legislative Exchange Council, an

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128 Telephone interview with Rosemary Thomson, Marion, IA (Apr. 3, 2008).
(NewsBank).
(NewsBank).
131 David Yepsen, “Iowa’s Tobacco Plan Called Too Broad,” DMR, Sept. 15, 1997
(1A:1, 4A), Bates No. 2080368028-30.
organization of conservative legislators\textsuperscript{132}—whose involvement Philip Morris apparently managed\textsuperscript{133}—which opposed the lawsuit altogether,\textsuperscript{134} calling it possibly “‘misguided, hasty, unconstitutional....’” The group’s sway was great enough, according to Corbett, to prompt some members to “‘second-guess their decision to support this,’” thus “deal[ing] a blow to Iowa’s plans.” More straightforwardly, the Register pointed out that “[p]olitically, it also has become difficult for GOP members to differ with the business community, which bankrolls many Republican campaigns.”\textsuperscript{135} The Iowa Healthy Kids Project put it more pithily: “Big Tobacco and their friends went to work on Republicans. Within a week, they managed to get republicans [sic] to do their bidding and the special session was off.”\textsuperscript{136}

The credibility of the Republican leadership’s denials that “members had succumbed to pressure orchestrated by tobacco interests”—Siegrist implausibly claimed that “‘I don’t know if it’s big tobacco so much as hard-working Iowans out there saying, ‘Let’s look at this longer’”\textsuperscript{137}—suffered from the fact that Representative Jeffrey Lamberti, whose father was the founder of Casey’s General Stores, Inc., one of Iowa’s biggest cigarette sellers, aggressively declared that “[w]e’re addressing that court case and we’re not going any farther than that....”\textsuperscript{138} On September 18, the Republican legislative leadership decided not to meet in special session, provoking Democratic House Minority Leader David Schrader into charging that: “‘They’re obviously working hard to give the tobacco industry every advantage in the process.’”\textsuperscript{139} Philip Morris would have agreed. At 8:54 p.m., scarcely two hours after the special session had been nixed, Jack


\textsuperscript{133}Email from Jack Lenzi to Joanne Mendes et al. (Jan. 19, 1998), Bates No. 207194891.


\textsuperscript{136}Iowa Healthy Kids Project, “This Was a Good Week in Iowa for Big Tobacco” (n.d.) (faxed from Hultman & Haus to Jack Lenzi, Sept. 30, 1997), Bates No. 2061860317.


Lenzi triumphantly informed 13 of his co-conspirators in an “***URGENT***” communication:

> Though it looked at times like defeat would be snatched from the jaws of victory, in the end Senate Republican leaders, particularly Stu Iverson, would not give the AG what he wanted. They stood on legal principle and good policy.

> In the end the business community, lead [sic] by ABI, proved to be absolutely critical. They would not give their blessing to statistical evidence, market share liability, or strict product liability, even limited to tobacco, period.

> There is much to learn from this experience, and we will put those lessons into a plan for use in future debates.\(^{140}\)

While the recipients of the message also earned his praise, Lenzi emphasized that ultimately Philip Morris lobbyists Hultman and Haus had “made it happen.”\(^{141}\)

Governor Branstad may still not have given up on the possibility of salvaging a special session,\(^{142}\) but Majority Leader Iverson’s and Attorney General Miller’s dueling op-eds in the Register made the unbridgeability of the gap between the parties transparent. Ever the loyal cigarette industry propagandist, the would-be Tobacco Institute vice president sought to reduce the entire anti-tobacco campaign to the one issue for which the cigarette manufacturers’ feigned support—“reducing teen smoking.” Iverson rebuffed Miller’s plan to “tilt the law in his favor by using statistical analysis to show that smoking caused illnesses” without proving that smoking had caused the illnesses of identified individuals.

Asserting that such an approach “could result in fraud” and even preclude a defendant from proving that a medicaid recipient had never used its product, Iverson bridled at setting “a precedent that might be used against all manner of job-creating businesses in our state.” Iverson concluded with the cigarette firms’ tried and true tactic of pretending that their unique legal battles to spare them liability for producing and selling commodities that killed millions of their customers and to insure their future for-profit lethality were really being fought selflessly on behalf of average Americans: “I am not willing to sacrifice Iowans’ constitutional protections that guarantee due process under the law for a pot of gold, no matter how large it is.”\(^{143}\)

\(^{140}\)Jack Lenzi to Mary Carnovale et al. (Sept. 18, 1997), Bates No. 2078311510.

\(^{141}\)Jack Lenzi to Mary Carnovale et al. (Sept. 18, 1997), Bates No. 2078311510.

Lenzi also singled out Greg Little, who was a Philip Morris lawyer.


By mentioning House Speaker Corbett and Senate President Mary Kramer as moving in the direction of his and Branstad’s goal of making “tobacco a bipartisan issue in Iowa” while “some Republicans still have a way to go,” Miller took an inferential dig at Iverson. But he also dispassionately explained how the state’s lawsuit would have proceeded if Republicans had not blocked enactment of the statute he had requested:

We would have to prove that tobacco use caused lung cancer, emphysema and heart disease. Then, by a statistical model, we would show the total cost to the state for the treatment of tobacco-caused disease for Medicaid recipients.

The tobacco companies then could defend by proving what they have steadfastly told Americans for 50 years—that tobacco doesn’t cause lung cancer, emphysema or heart disease. They could attack our model, the concept of a model or anything else to disprove our case. An Iowa jury would decide whether we proved our case and, if so, determine the amount of the state’s damages.

Some of the Republican leadership wanted the state to prove in court for each and every one of tens of thousands of Medicaid recipients whether tobacco caused their disease, what percentage of fault to assign to the tobacco companies, and what percentage of each company’s cigarettes each recipient smoked. This is impossible and caused the breakdown of negotiations over the special session.

Some say my concept is revolutionary and without precedent. They are wrong. The concept is similar to strict liability covering explosives, flammables and even dog bites. It also has some similarities to the way hazardous waste is covered in Superfund cases.

Some say it is unconstitutional and unfair to single out tobacco companies. It is not. We would argue that tobacco is unique—no other product, when used for its ordinary purposes, kills 420,000 Americans each year and is highly addictive for virtually every user. No Iowa company should think that its product is similar to tobacco.

Some say that it’s unfair to change the rules in the middle of the “game.” It may be a “game” for tobacco companies, but there is a lot more at stake for the rest of us. In any event, our revised proposal would apply only to the future and would not be retroactive. In the event, no special session was called.

In mid-September 1997 the attorney general’s office was also engaged in another aspect of the cigarette wars. In response to a request by Senator Johnie Hammond and Representative Minnette Doderer, who were presumably gearing up for yet another assault on preemption, for an opinion as to whether sections 142B.6 and 453A.56 of the Iowa Code “preempt all local ordinances relating to

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smoking or tobacco or whether these statutes merely prohibit those local regulations which are inconsistent with chapters 142B and 453A.,” Solicitor General Elizabeth Osenbaugh wrote that the attorney general had “concluded as a matter of policy that this office will support local regulation of smoking to the extent not inconsistent with state law. We also believe this is the meaning of the two Code sections.... However, because of our strong public statements on this issue during the legislative debate, we believe it would be inappropriate to issue an official Attorney General’s position on the question.” Nevertheless, Osenbaugh proceeded to present a brief outline of the logic leading to her office’s conclusion. Based on the home rule provisions of the Iowa Constitution (Art. III §§ 38 A and 39A) and their codification in the Iowa Code (chapters 364 and 331), which empowered local governments to enact legislation “not inconsistent with” state law, “inconsistent” being defined as “irreconcilable,” she cited case law holding that “[o]rdinances that are irreconcilable, impossible to make consistent or harmonious, incongruous, or incompatible will be deemed inconsistent and preempted.” And more precisely, an ordinance was inconsistent when it “‘prohibits an act permitted by a statute, or permits an act prohibited by a statute.’” Although the legislature could also reserve an area of the law to the state by “‘occupying the field,’” “extensive legislation within a particular area of the law does not by itself establish preemption” because local governments were permitted to create “‘standards more stringent than those imposed by state law unless state law provides otherwise.’” Because the last sentence of the two statutory provisions preempted only an ordinance that was “inconsistent with or conflicts with” the statutes, Osenbaugh concluded not only that it did not demonstrate a legislative intent to “‘occupy the field,’” but that the legislature’s

146Elizabeth Osenbaugh to Johnie Hammond and Minnette Doderer at 1 (Sept. 16, 1997), in Minnette Doderer’s Papers, Topical Files-Last Accession, Folder: Tobacco, IWA. It is unclear whether Osenbaugh was implying that the attorney general would have supported non-inconsistent ordinances even if he did not believe that “this is the meaning of the two Code sections....”

147Elizabeth Osenbaugh to Johnie Hammond and Minnette Doderer at 2 (Sept. 16, 1997) (citing Green v City of Cascade 231 NW2d 882, 890 (Iowa 1975)).

148Elizabeth Osenbaugh to Johnie Hammond and Minnette Doderer at 2 (Sept. 16, 1997) (quoting Decatur County v PERB, 564 NW2d 394, 397 (Iowa 1997)).

149Elizabeth Osenbaugh to Johnie Hammond and Minnette Doderer at 2 (Sept. 16, 1997) (citing City of Council Bluffs v Cain, 342 NW2d 810, 812 (Iowa 1983), and City of Clinton v Sheridan, 530 NW2d 690, 695 (Iowa 1995)).

150Elizabeth Osenbaugh to Johnie Hammond and Minnette Doderer at 2 (Sept. 16, 1997) (quoting City of Des Moines v Gruen, 457 NW2d 340, 343 (Iowa 1990)).
“more general statement of purpose (‘equitable and uniform implementation, application, and enforcement’)” also had to be interpreted “in context with the specific prohibition of ‘inconsistent’ regulations.” Finally, the solicitor pointed out that in cases in which the Iowa Supreme Court had held that a statute did preempt a local ordinance, “the statutory language more explicitly preempted local action” than did the smoking and cigarette laws. As an example of a clear legislative intent to occupy the field, she instanced that “no municipality, county or other governmental unit within this state shall make any law, ordinance, or regulation relating to obscenity.”

With even greater certitude and capaciousness, in November, Assistant Attorney General Steve St. Clair of the Consumer Protection Division told the annual meeting of the Iowa Municipal Attorneys Association under the suggestive heading, “Non-preemption of local ordinances,” that although the two provisions “could be claimed to preempt local regulation,” their “thorough analysis...in light of the home rules principles” in the state constitution and the code “strongly supports the conclusion that there is no preemptive effect.”

Miller’s efforts to bolster the state’s lawsuit against the tobacco companies became the latter’s highest Iowa intelligence priority from the end of 1997 into 1998. Already at the beginning of December, Kevin Narko, one of Philip Morris’s lawyers at the Chicago-based law firm of Winston & Strawn, informed one of the firm’s on-the-payroll lawyers that Miller’s proposed bill was scheduled to be introduced in the Iowa legislature more than five weeks later. On Christmas eve Narko emailed the same Philip Morris lawyer and Jack Lenzi, one of the company’s top regional officials, a copy of the minutes of a recent meeting of the Board of Directors of the Iowa Defense Counsel Association at which an attorney whose firm represented the Council for Tobacco Research (which was controlled by industry lawyers, inter alia, to prepare scientific witnesses for trials and legislative testimony) moved that the board oppose Miller’s proposed

151Elizabeth Osenbaugh to Johnie Hammond and Minnette Doderer at 3 (Sept. 16, 1997) (quoting Chelsea Theater Corp. v City of Burlington, 258 NW2d 372, 373 (Iowa 1977)).


153Kevin Narko to Steve Rissman, Subject: Iowa Special Legislation (Dec. 5, 1997), Bates No. 2077024635. This terse factual statement of fact was none the less headed: “Confidential Attorney-Client Communications Containing Opinion Work Product of Retained Outside Counsel.”

2909
Democrats’ Decade in the Desert: 1997-2006

legislation, arguing that it “tilted the scale against industry”; the board, the firm of one of whose members represented the State of Iowa in tobacco matters, unanimously approved the motion. Manifestly aware of the extent to which Philip Morris demanded complete control of its legal environment and thus foreseeing the possibility that his client might not be satisfied with this (hardly surprising) victory, Narko pointed out that his firm had been given no advance notice of this vote and wondered whether the client wanted the law firm to look into better coordination for the future.

On New Year’s Eve Lenzi recommended to the staff dealing with Iowa “strong consideration of early/preemptive activity” including mobilizations. On January 6, 1998, Philip Morris operatives paid to counteract anti-tobacco initiatives were speculating through email about what Miller at his news conferences the next day would be including on his annual legislative tobacco agenda. They assumed that product liability would be on his list, but were not so sure about tax increases. Having learned from an Iowa AP wire story that Republicans, including Branstad, considered tax questions “D.O.A.,” they wondered whether it would be best to let them attack tax increases of any kind in the media, while Philip Morris focused its allies’ efforts on Miller’s other proposals. Lenzi quickly replied that he had spoken to Greg Little and Steve Rissman (two of the company’s high-ranking lawyers) and taken the “liberty of calling Cal Hultman for the local scoop.” Hultman, a one-time Republican Iowa Senate Majority Leader and company lobbyist in the 1990s, informed him that “last year’s failed FL[orida]-style legislation” (which would have given the state a statutory action for recovering Medicaid expenditures), was on Miller’s agenda. Lenzi also reported that “Business community is galvanized and opposed, as are some key leaders in Capitol.” One of Philip Morris’s lawyers was supposed to stand by “as a possible spokesperson,” but it was “best if it occurs locally” and an Iowa lawyer was prepared to speak on behalf of the Iowa Association of

155Kevin Narko to Jack Lenzi et al. (Dec. 24, 1997), Bates No. 2077024639.
156Email from Jack Lenzi to Betsy Giles et al. (Dec. 31, 1997), Bates No. 2077024636A.
157Email from Brendan McCormick to Betsy Giles et al. (Jan. 6, 1998), Bates No. 2077024636A. According to AP, “IA-Preview Taxes, Only Tax Question Is How Much to Cut” (Jan. 6, 1998), Bates No. 2074181026A-7-8, discussion of increasing the cigarette tax was an “apparent non-issue” because Republicans wanted to be able campaign as having instituted no new taxes.
On January 7, 1998, the day of—but before a report reached Philip Morris of the content of—Miller’s news conferences, Lenzi and the staff discussed on a conference call how to deal with the presumed elements of the attorney general’s proposals and assigned preemptive, reactive, and other roles to various staff members. The importance that the company accorded the campaign was signaled by the fact that corporate affairs and issues management personnel were “in the loop” as were two lawyers, one of whom was tasked with speaking about the “Fl-style” legislation to the Iowa House Judiciary Committee chair, Jeffrey Lamberti, whose sympathies the leading cigarette manufacturer could count on inasmuch as his family’s Casey’s General Stores was one of Iowa’s biggest sellers.

At his news conferences on January 7, Miller urged the legislature to enact a law creating a clear and direct cause of action enabling the state to sue tobacco companies to recover the Medicaid funds that it paid to treat Iowans for tobacco-related diseases. The attorney general expressly declared that the cause of action he was requesting would apply to future Medicaid costs only and would not be retroactive. Among Miller’s other proposals was a 25-cent increase in cigarette taxes from 36 cents to 61 cents, of which five cents (about $12 million annually) would be used for a media campaign and other activities aiming at a reduction in smoking among teenagers beyond what the tax increase itself would prompt. Teenagers’ access to tobacco would be further reduced by five additional legislative proposals: (1) a ban on self-service displays of tobacco products; (2) a doubling of the annual retail permit fees—which had not been increased since their initial establishment in 1921—the revenue from which would be reserved for local tobacco law enforcement; (3) providing judges with the flexibility to impose community service in addition to or instead of a monetary fine for underage tobacco use on the grounds that “[t]ime is often a more valuable commodity to teenagers than money and community service may be a greater punishment than fines”; (4) an increase in fines for retail sales to underaged

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158 Email from Jack Lenzi to Joan Cryan et al. (Jan. 6, 1998), Bates No. 2077024636. Hultman purported to have a “[g]ood relationship” with Iowa Attorney General Tom Miller and a “solid working relationship” with the director of the Iowa Alcoholic Beverages Division, Lynn Walding. [Philip Morris,] AAA 2000 Plan - State Outreach at 4 (Oct. 2, 2000), Bates No. 2083650722/5.

159 Email from Shuanise Washington to Jack Lenzi et al. (Jan. 7, 1998), Bates No. 2074181028A. Lamberti’s name was misspelled “Lomberdi.”

buyers; and (5) a ban on tobacco advertising within 1000 feet of schools. Finally, the attorney general requested that the legislature ban smoking in day-care centers.\textsuperscript{161}

In spite of widespread press coverage of the attorney general’s public statements, the cigarette companies’ army of lawyers was carefully shadowing Miller at his press conferences. For example, on the day of his appearance in Des Moines, Debra Rectenbaugh Pettit, a first-year associate at the corporate law firm Davis, Brown, dutifully sent a two-page outline to Kevin Narko at Winston, Strawn in Chicago, which ended with a single answer that Miller gave to a question: “Believes can work with Senator Stu Iverson; otherwise Iverson will isolate himself.”\textsuperscript{162} The lack of commentary in the report leaves it unclear whether the wire-pullers at Philip Morris viewed Miller’s dream of an alliance with their faithful agent Iverson as risible or alarming. For his part, Iverson insisted that he had not changed his position that he preferred waiting for a national settlement with the tobacco companies to changing Iowa’s laws. Otherwise, he (like Philip Morris)\textsuperscript{163} could support several of Miller’s proposals such as raising fines for selling to youths, requiring community service, and banning smoking in day-care centers.\textsuperscript{164} That Miller at least was articulating a consistent political analysis emerged from the memo that an attorney at Lane & Waterman prepared on the attorney general’s press conference at the Davenport airport, which was attended by three of Miller’s associates, three cameramen, three TV news reporters, several local anti-smoking organizations’

\textsuperscript{161}“Attorney General Tom Miller: Proposed Tobacco Legislation” at 5-7 (quote at 6) (Jan 7, 1998), Bates No. 2077024662/6-8.

\textsuperscript{162}Debra Rectenbaugh Pettit to Kevin Narko, Re: Tom Miller Press Conference, at 2 (Jan. 7, 1998), Bates No. 2077024650/1. Interviewed a decade later, Pettit not only had no recollection of ever having attended that or any other press conference, but denied any knowledge of the matter. Telephone interview with Debra Rectenbaugh Pettit, Des Moines (Apr. 15, 2008). After having been emailed her report, she replied: “I have no present recollection of the memorandum dated ten years ago.” Email from Debra Rectenbaugh Pettit to Marc Linder (Apr. 15, 2008).

\textsuperscript{163}Philip Morris claimed to “support enactment of reasonable state legislation” including reasonable fines, license suspension or revocation for repeated violations, proof of age requirements, unannounced inspections of retailers, and restrictions on vending machines. P. Desel [Philip Morris], “Q & A Concerning Proposed Resolution and State Issues” at 4 (Discussion Draft, Feb. 11, 1998), Bates No. 2074532291/4. On the cigarette manufacturers’ agreement later in 1998 not to lobby against such measures, see below.

Democrats’ Decade in the Desert: 1997-2006

representatives, “and me.”\textsuperscript{165} Again, the report concluded with the only question that a reporter posed and Miller’s response, which, if accurate, would have been deeply troubling to Philip Morris (which, to be sure, presumably knew better than Miller whether it had recently been encountering difficulties unloading some of its addiction-aided superprofits as a quid pro quo on Iowa legislators):

The reporter wanted to know how tough the potential fight would be due to the strong lobby that the tobacco industry has. The Attorney General stated there has been a shift in the balance of power; tobacco no longer has a very strong lobby. The Attorney General stated that politicians are embarrassed to admit they take money from tobacco companies, and because they no longer take tobacco money, these politicians now have no reason to support the tobacco companies’ agenda.\textsuperscript{166}

To Miller’s proposed cigarette tax House Speaker Corbett initially reacted favorably—provided that any resulting revenue were used to lower other taxes.\textsuperscript{167} Majority Leader Iverson, however, perceived no support in the Senate for raising “any kind of tax,” even if some of the increase went to cutting some other tax; instead, he preferred “‘real relief’” to a “‘tax shift.’”\textsuperscript{168} Although the differences between Corbett and Iverson on taxes in general were somewhat fuzzier,\textsuperscript{169} before the end of January the House leadership acquiesced in the Senate leadership’s

\textsuperscript{165}Lane & Waterman, RBM to TOMW, Re: Iowa Attorney General Tom Miller’s Press Conference, at 1 (Jan. 12, 1998), Bates No. 2077024655. RBM was Robert B. McMonagle and TOMW was Tom Waterman. McMonagle, who had been at Lane & Waterman only about two years, was sent to the press conference because of his low status; he did not otherwise work on the case and this occasion was the only time he ever “billed” Philip Morris, which was one of the firm’s biggest clients. A paralegal or secretary with stenographic or shorthand skills, he observed, could have done a better job (but could not have billed as much). Telephone interview with Robert McMonagle, Davenport (Apr. 10, 2008).

\textsuperscript{166}Lane & Waterman, RBM to TOMW, Re: Iowa Attorney General Tom Miller’s Press Conference, at 2 (Jan. 12, 1998), Bates No. 2077024655/6. Former House Speaker Siegrist later dated the decline in the tobacco lobby’s power to the settlement of the Iowa lawsuit. Telephone interview with Brent Siegrist, Council Bluffs (May 4, 2008).

\textsuperscript{167}Tom Carney, “Miller Seeks Higher Cigarette Tax,” \textit{DMR}, Jan. 8, 1998 (5M) (NewsBank). Corbett later confirmed that he had not been opposed to a tax increase, but would not have pushed it. Telephone interview with Ron Corbett, Cedar Rapids (Apr. 7, 2008).


refusal to increase the tax cigarette tax. As of January 13, however, Philip Morris assessed at 60 percent the risk of the passage of an increase in the Iowa excise tax, which, together with a ban on self-service, it deemed to be “[t]he anti’s priorities this session.” Its own objective was to defeat the tax increase and the Florida-type Medicaid legislation. The company’s “Tactical Plan” focused on securing passage by the Iowa legislature of a resolution urging Congress to pass a federal resolution (approving the national tobacco settlement of June 20, 1997) in order to “offset any legislation by the anti’s, Attorney General and excise taxes.” During the plan’s “Phase I” the goal was to “introduce the resolution within the first few weeks of the session.” On February 11, Philip Morris assistant general counsel Paula Desel apparently began drafting “Q & A Concerning Proposed Resolution and State Issues,” which were “paraphrases of questions that may be asked by reporters covering state capitals.” The nub of the company’s position was to “encourage state legislators who want to make an immediate difference on the issue of youth smoking to work with their federal representatives to seek enactment of the federal Resolution into law.” The objective of distracting state legislatures from enacting measures that would injure Philip Morris’s interests was paired with the goal of not “infring[ing] on the rights of adult smokers,” also stated as not “needlessly burdening retailers and adult consumers.” Openly the company joined retailers in rejecting state and local self-service display bans as putting them at a competitive disadvantage vis-a-vis retailers in other jurisdictions. An even more transparent formulation (as applied to increases in state excise taxes) asserted that it was “grossly unfair to penalize 50 [? 45?] million adults to attempt to influence the behavior of a relatively small number of children when more precisely tailored approaches are available that do not disproportionately burden adults.” Anticipating a bluntly incisive question—“Are you going to keep trying to frustrate local tobacco control measures by seeking State preemption?”—Philip Morris declared its continuing belief that “a level playing field is best....” This same evasion underlay its opposition to Florida-style tobacco liability bills: “Laws that don’t treat all parties equally are bad laws.”

The very next day, February 12, Senator Boettger, who by this time had

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172P. Desel [Philip Morris], “Q & A Concerning Proposed Resolution and State Issues” at 1, 2, 4, 5, 6, 7 (Discussion Draft, Feb. 11, 1998), Bates No. 2074532291/2/4/5/6/7. The number in square brackets was handwritten in the margin.
Democrats’ Decade in the Desert: 1997-2006

proven to be a reliable agent of the cigarette oligopoly, executed Philip Morris’s plan by filing Senate Concurrent Resolution 105—whose “Whereas” clauses focused on minors—which expressed the Iowa legislature’s intent that Congress enact legislation based on the aforementioned national agreement, which allocated to the states, including Iowa, a “fair share of the tobacco industry’s payments...”173 The resolution was referred to Boettger’s Human Resources Committee, which on February 23, by a vote of 9 to 2, recommended passage. Although perennial anti-smoking militant Johnie Hammond voted for it, her anti-smoking colleague Robert Dvorsky voted against it,174 and a week later, perhaps to make amends, Hammond filed a radical amendment that would have been anathema to the cigarette firms and therefore to their legislative executors. In addition to detailing tobacco’s annual death toll, Hammond’s “Whereas” clauses urged Iowa to lead the nation in providing freedom from environmental tobacco smoke, declared that “the tobacco industry has lied to the public and policy makers..., quashed relevant scientific data..., and improperly utilized industry attorneys to claim such information as privileged,” and culminated in the judgment that “the most significant and effective deterrent to tobacco industry misconduct is to hold tobacco companies fully accountable for the industry, misery, and death caused by use of industry products.” Unlike the Philip Morris-Boettger resolution, Hammond’s amendment urged the President and Congress to “accept national tobacco control legislation that would protect Iowa’s ability to protect the public health from tobacco products....” In a final direct assault on cigarette companies, Hammond urged disclosure of all documents bearing on tobacco industry misconduct, “including those claimed to be privileged....”175

Once the resolution had been introduced, Phase II of Philip Morris’s Tactical Plan called for “mobiliz[ing] phone banks of consumers for a stand-by position (timing is everything).” The phone message, which was to be coordinated with

173S.C.R. No. 105, at 4 (Feb. 11, 1998, by Boettger). A decade later Boettger stated that she had been “asked” to file the resolution, but when given the foregoing background about Philip Morris’s plan to have it filed in Iowa, she was unable to remember who had asked her and then purported not even to recall having filed the resolution, but in any event did not believe that any tobacco lobbyist such as Cal Hultman or Charles Wasker had asked her to do so. Telephone interview with Sen. Nancy Boettger, Harlan, IA (Apr. 12, 2008). The day after the filing the resolution was faxed to Philip Morris. Bates No. 2077024626.


“Our allies” the Hospitality, Lodging, Grocers, and Business and Industry Associations as well as convenience stores, was to emphasize that “the benefits for Iowans” from the resolution “as opposed to the Attorney General’s bill, efforts to ban self-service and tax increases.” Not content with mobilizing cigarette consumers, Philip Morris also planned to request the (market-knows-best) Cato Institute to “come to Iowa to discuss the effects of an excise tax increase on the productivity of tax cuts with the House leadership.” Whether the company ever implemented Phase II is as unclear as whether Hammond’s proposed amendment was the effective coup de grace or not; but in any event, the Senate took no further action on the resolution, which died.

However, that the possibility of passage of a Florida-type Medicaid bill had not died was clear to Philip Morris, whose senior counsel on March 3 received a letter from Narko to which was attached a news report that 81 percent of the constituents surveyed by a Republican House member favored changing the law to permit a direct cause of action against the tobacco companies. At the beginning of 1998, House Majority Leader Siegrist, unable to resist game metaphors, rebuked Miller for having “‘entered into that lawsuit knowing he was going to lose and then [having] c[o]me to us for help.... He wanted the bases loaded for himself when he got back in the game. All we would give him is a man on base.’” Then, during the 1998 session the legislature, once again, took no action on the Judiciary Committee’s “controversial” bill to create a civil cause of action for the state to recover the full amount of its medical assistance payments resulting from tobacco-caused injury disability, or disease. Committee approval was meant merely to keep the bill alive for the session while leadership, with no consensus as to how the bill should be structured, was not even certain whether it would be debated at all.
Two unsuccessful attempts were made to attach the Medicaid recovery bill as an amendment to two other bills. After the Senate had unanimously passed a Human Resources bill (S.F. 2286) to ban smoking in day care centers and tobacco advertising within 1,000 feet of a school or playground, two such amendments were filed in the House. On March 24, the day after the second one had been filed, Betsy Giles, Philip Morris’s state government affairs director of the midwestern region encompassing Iowa, faxed, under the heading, “The bill that will never go away,” a copy of the amendment to company lawyers and regional officials, adding that it might be proposed on the House floor the following day as an amendment to S.F. 2286. Interestingly, in addition to the attorney general and House Democrats, Giles stressed that the “Fl-style Medicaid language is being pushed by the [Republican] Speaker” Corbett. However, the bill was not debated the next day or any other day: despite having been passed unanimously in the Senate, S.F. 2286 saw no further House action and died.

Giles may have been wrong about the vehicle in which Miller’s Medicaid bill would reach the House floor on March 25, but she was right about the date: that morning Senator Tom Vilsack (who was running for the Democratic nomination for governor), arguing that it was “clear that the vast majority of Iowans would like to see that industry held responsible,” especially since a billion dollars was potentially at stake, filed the bill as an amendment (S-5372) to the spending bill for the Public Health Department and several other agencies (S.F. 2280). Vilsack found a hook for attaching his amendment to the agency appropriations bill by including a directive that the Public Health Department use $1,000 of its appropriation regarding the existence, prevalence, and causal linkage between injury, disease, and disability and tobacco use by Medicaid recipients. The amendment also directed the department to “coordinate in assisting the

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185 Betsy Giles to Steve Rissman et al. (Mar. 24, 1998), Bates No. 2077024589.
attorney general in litigation efforts for state recovery of tobacco-related medical assistance payments pursuant to section 100 of this Act,” section 100 being the main part of the amendment creating the statutory cause of action that Miller sought for the state’s lawsuit.\textsuperscript{190}

That this initiative was doomed was soon signaled by Iverson, who counterfactually claimed that the amendment “created the same problems that prevented lawmakers from coming in for a special session last year”—namely, that “the proposals did not limit lawsuits to tobacco.”\textsuperscript{191} Wiping out his credibility entirely, the wannabe Tobacco Institute vice president then swore (in words that the Register enshrined as “Quote of the Day”): “I’m not protecting the tobacco industry here. This goes way beyond that. It sets a dangerous precedent for other businesses.”\textsuperscript{192} Iverson’s protestations to the contrary notwithstanding, “Republicans were criticized for backing big tobacco....”\textsuperscript{193}

If the public had only known how closely the Republicans were cooperating with the cigarette oligopoly: at 3:57 p.m. Philip Morris’s lobbyist, Kimberly Haus of former Republican Senate Majority and Minority Leader Hultman’s firm, faxed Giles from the State Law Library that Vilsack’s amendment, which was attached, had been “offered on Dept of Public Health bill. We are in the process of dealing with it.”\textsuperscript{194} Haus was virtually communicating in real time: less than an hour later,\textsuperscript{195} Republican Senator and Assistant Majority Leader Merlin Bartz, a farmer\textsuperscript{196} who was a consistently reliable pro-tobacco vote,\textsuperscript{197} offered floor amendment S-5380 to Vilsack’s amendment. Bartz’s subtle amendment merely


\textsuperscript{191}Tobacco, Gambling Center of Health Spending Debate,” Communicator (Des Moines), Mar. 25, 1998, Bates No. 2077024580.


\textsuperscript{194}Kim Haus to Betsy Giles (Mar. 25, 1998), Bates No. 2077024582. For the attached amendment, see Bates No. 2077024583/4.

\textsuperscript{195}Bartz had offered the amendment before Senator McKean took the chair at 4:50 p.m. Senate Journal 1998 at 1:911 (Mar. 25).

\textsuperscript{196}Iowa Official Register: 1997-1998, at 28, 34.

\textsuperscript{197}In 1995 Bartz was one of a small group of Iowa state legislators (including Iverson, Rife, and Lundby) who did the tobacco industry’s bidding by writing letters protesting the FDA’s initiative to assume jurisdiction over tobacco. Tobacco Industry Reports on FDA in the States as Reported to the TI State Activities Division at 11 (Dec. 22, 1995), Bates No. 2046948917/8.
deleted the last seven words of the first part of S-5372, thus severing the link between the appropriation and the creation of the cause of action. On the roll call vote on S-5380, only two Republicans defected to the Democrats, producing a 25 to 23 majority for Philip Morris. The extent of the Republicans’ beholdenness to the tobacco industry was underscored by the way that Maggie Tinsman, the party’s strongest anti-tobacco advocate, explained her Yes vote: Vilsack’s amendment “‘went too far.... That’s why the attorney general didn’t get it the first time.’” After the victorious Bartz had called for a division of the now amended S-5372 into two parts (his part and Vilsack’s) and Senate Minority Leader Gronstal had received unanimous consent for action on Bartz’s to be deferred, Bartz delivered the coup de grace by raising the point of order that Vilsack’s decapitated S-5372B was not germane, which Republican Senate President Mary Kramer, who had just voted for Bartz’s amendment, ruled was well taken. Conceding that he had been checkmated because S-5372A now “‘essentially renders the balance of this language moot and meaningless’” and “‘Big tobacco has won again,’” Vilsack also withdrew rump S-5372A.

After the Iowa Supreme Court, on an interlocutory appeal in April 1998, had unanimously upheld the trial court ruling dismissing the state’s Medicaid reimbursement count, in October the district court judge also dismissed the state’s deception and criminal conduct counts, leaving intact only its conspiracy and nuisance claims. Despite these pre-trial setbacks, Iowa’s claims were
nevertheless compromised in the Master Settlement Agreement into which the states and the tobacco companies entered on November 23, 1998. But no sooner had Miller trumpeted Iowa’s $1.7 billion share of the 46-state, $206 billion national settlement (to be paid out over the first 25 years of the agreement in perpetuity), than disagreements erupted over how to spend the money. Remarkably, Republican House Speaker Corbett proposed that it be devoted to Iowa’s children, including child care, health insurance, and smoking reduction. Less surprisingly, his partymate, David Millage, House Appropriations Committee chair—who hurled at Attorney General Miller the taunt that “you know and I know had the case gone to trial, we would have gotten zero”—urged returning it all to taxpayers rather thanfunneling it into government programs. In contrast, Miller warned that unless the states met their moral and fiscal obligation to use the money for anti-tobacco and public health programs, Congress might insist on retaining two-thirds of it to reimburse the federal government for its share of the Medicaid costs—especially since the Clinton administration had put the states on notice as early as November 1997 that the federal government’s entitlement to its share of all Medicaid recoveries applied to the tobacco settlement payments.

Cigarette Tax and Cigarette Sales Legislation: 1998

Miller’s lawsuit was hardly the only smoking-related measure the legislature was debating during the 1998 session. No longer a member of the House, Philip Brammer, the chamber’s most militant anti-smoker, was dying of cigarette-smoking-induced emphysema. He nevertheless remained intensely, if not frenetically, engaged. At 4:05 a.m. on January 15, 1998, he emailed Doderer that he had three bills being prepared for her “guidance.” One would have raised the


208Jeff Zeleny, “Questions over Tobacco Deal,” DMR, Nov. 24, 1998 (5M:1) (NewsBank). Although the stream of payments was discussed in the press as spread over 25 years, in fact the payments were to be made in perpetuity and would exceed the amounts mentioned in the text.


211See below ch. 32.
tobacco tax by 24 cents, generating $4 million for anti-tobacco programs for children, $11 million for uninsured Iowa children, and $45 million to increase the Iowa income tax standard deduction; the second would have banned smoking in restaurants, bowling alleys, and daycare centers; and the last would have dealt with advertising and “sensible penalties for possession by kids” since the previous year’s bill was unenforceable. Bewailing ever worsening news for tobacco forces, he preached to a member of the choir: “Sidewing smoke has now been PROVEN to cause irreversible arteriosclerosis [sic] in nonsmokers exposed to restaurant smoke. How can the Iowa Legislature NOT act on this public health menace.”

A few days later Brammer and Doderer exchanged emails invidiously comparing their bill with one introduced by Republican Rosemary Thomson, which, Brammer complained, “is kinda crappy but just look how the news grabbed at it. You need to call a press conference as soon as possible to show how your bill is just exactly what the Governor says he will sign.”

Disappointed that Thomson’s bill would have raised the tobacco tax by only two cents, which hardly seemed “worth the fight,” Doderer wondered whether Brammer had “any influence with Rosemary.” Brammer’s response has not been preserved, but two days earlier he appeared to believe that he had some with the Republican House Speaker when he excitedly emailed his fellow Cedar Rapidsian Corbett an article from an Omaha newspaper about a bill’s having been filed in Nebraska to raise the cigarette tax by 5 cents to 39 cents. His fervor aglow, Brammer informed Corbett that “this removes the last barrier to Iowa raising tobacco tax. Every border is now higher than us except Missouri which has local option cigarette tax.” Turning ever more instructional, Brammer continued: “Ron, this gives you several answers you should be looking for: (1) Cedar Rapids needs additional revenue for recreational purposes. Add cigarette taxes to the allowable list of local option and you will solve all the local problems.... (2) get in touch with Nebraska and see if they are willing to raise to $0.60 on revenue neutral basis.”

The notion that Corbett, who was manifestly unable to persuade either Majority Leader Iverson or even Governor Branstad to raise cigarette taxes, could move another state’s legislature to act indicates the
Democrats’ Decade in the Desert: 1997-2006

flimsiness of the straws Brammer had been reduced to reaching for in his increasingly frantic anti-tobacco campaign.216

Brammer’s belittlement of Thomson’s bill was largely rooted in her call for a mere two-cent cigarette tax increase when Miller was requesting 12 and a half times as much. The press viewed her proposal, which would also have used the $3.2 million generated by the increase to promote teen smoking prevention and crack down on retailers who sold to minors, as significant because both Thomson and her co-sponsor, Robert Brunkhorst, were conservative Republicans, whereas their party opposed cigarette tax increases. Party “strategists” purportedly argued against a cigarette tax increase on the grounds that being able to boast to voters that they had rejected all tax increases would put them in a better position during the next election.217

Thomson, who had been a member of the U.S. Department of Education National Commission on Drug-Free Schools, a school substance abuse prevention specialist, and Linn County American Cancer Society board member, and considered herself a “conservative,” was not speaking merely archly when she commented a decade later that she would have thought that the Republican party would have regarded the anti-tobacco effort as a conservative issue.218 (Her right-wing activist bona fides had been more than adequately documented by virtue of having been Illinois state director of Phyllis Schlafly’s Eagle Forum and her appointment as executive director of National Advisory Council of Women’s Educational Programs during the Reagan administration.)219 But the party did not welcome even her modest reform proposals, stamping her as something of a maverick,220 especially after she proceeded on January 22 to file her aforementioned bill (H.F. 2067), which, in addition to the marginal tax increase, would have effected, inter alia, the following changes: (1) banned smoking in day care centers; (2) banned self-service displays and sales of cigarettes in smaller numbers than a carton; (3) increased the criminal penalty from $100 to $250 for a retailer or its employee who sold tobacco products or cigarettes to anyone under 18; (4) increased the cigarette sales permit fee by $25; (5) banned cigarette or

218 Telephone interview with Rosemary Thomson, Marion, IA (Apr. 3, 2008).
220 Telephone interview with Rosemary Thomson, Marion, IA (Apr. 3, 2008).
Democrats’ Decade in the Desert: 1997-2006

tobacco advertising within 1000 feet of a school; (6) imposed a flat $100 fine for anyone under 18 smoking, using, possessing, buying, or trying to buy cigarettes or other tobacco; (7) established community service of 25 hours or fewer as an alternative to the civil penalty; and (8) appropriated $150,000 to the Public Health Department for the performance of compliance checks on cigarette retailers.\textsuperscript{221} But Thomson’s bill, after referral to Human Resources and rereferral to Ways and Means, died in subcommittee.\textsuperscript{222}

Apparently perceiving which way her party’s real conservative winds were blowing, Thomson alone filed a second bill a week later while her first bill’s death rattle could already be heard. H.F. 2120 was a radically stripped-down version, which retained only one element of H.F. 2067—the ban on self-service sales. Otherwise the new bill was distinguished only by virtue of its expression of legislative intent, which, though confined to the question of minors’ access to cigarettes through unsupervised sales and shoplifting, nevertheless embodied the recognition that “a large percentage of adult smokers begin smoking before they can legally purchase tobacco products,” thousands of minors began smoking daily, and smoking killed hundreds of thousands of people annually.\textsuperscript{223}

While Thomson’s bill was still in State Government subcommittee, House anti-smoking activists Doderer, Myers, and Mascher on February 9 introduced an omnibus tobacco amendments bill that would have strengthened the cigarette sales law, inter alia, in the following respects: (1) for a third violation of the ban on buying or using cigarettes or tobacco, the motor vehicle license of persons under 18 would have been suspended until they reached 18; (2) the fee for permits would have been increased to $100, $150, and $200, according to city size; (3) local governments would have been empowered to use the revenue from the permit fees to enforce the sales and the public smoking laws; (4) tobacco products would have been prohibited from being advertised within 500 feet of a school or playground; (5) retailers would have been prohibited from selling or offering for sale cigarettes or other tobacco products by means of a self-service display (except a vending machine); and (6) the penalties for underage smoking, use, possession, or buying would have been increased from $25 and $50 to $50 and $75 for a first and second violation, and the option of community service for a third violation would have been added.\textsuperscript{224} However, the bill, which was both

\textsuperscript{221}H.F. 2067 (Jan. 22, 1998, by Thomson and Brunkhorst).


\textsuperscript{223}H.F. 2120, § 1 (Jan. 30, 1998).

\textsuperscript{224}H.F. 2180 (Feb. 9, 1998, by Doderer, Myers, and Mascher). Just several days earlier a researcher explained to Iowa legislators that increasing penalties for underaged
Democrats’ Decade in the Desert: 1997-2006

stronger and weaker than Thomson’s original H.F. 2067 (and contained no tax increase), suffered the same fate of never making it out of subcommittee.225

Instead, the legislature passed Thomson’s H.F. 2120 by huge majorities, but not before watering down even her modest bill. The House unanimously passed the bill after amending it to ban, from January 1 to June 30, 1999, self-service displays quantities of less than a carton, and then, from July 1, 1999 forward, of a carton or less.226 The Senate Human Resources Committee, by a vote of 8 to 4, recommended striking the second phase from the House bill, thus permanently permitting displays of a carton or more as of January 1, 1999.227 The way this change came about is instructive: Iverson, who was not a committee member, stated that the amendment permitting the continued sale of self-service cartons had been passed “at his behest,” the Register explaining his amendatory power as based on his “authority to kill the legislation by refusing to schedule it for floor debate.” Reminding readers that Iverson was a smoker, the newspaper recounted that he had sought to justify the change on the grounds that cartons were harder to steal and that retailers would face lower compliance costs if they could continue to keep cartons on the shelves. Unsurprisingly, Human Resources Committee chair Boettger, another cigarette business facilitator, “agreed with Iverson’s decision to dilute the House bill.” Nevertheless, she self-congratulatorily insisted that “‘[w]e’re moving in the right direction.... We got vending machines last year, and (retailers) know that cigarette cartons are around the corner’”228—a corner that more than a decade later still had not been turned.229 After rejecting an amendment that would have permitted self-service displays in plain view of a staffed check-out counter, the Senate passed the bill 43 to 4.230 Acting on the principle that a “‘baby step is better than standing in place,’”231 the


227 Senate Journal 1998 at 773-74 (Mar. 18); Thomas Fogarty, “Senate Panel Dilutes Bill designed to Stop Theft of Cigarettes,” DMR, Mar 18, 1998 (4M:1), Bates No. 2074030365. After this vote on the amendment, the committee voted 11 to 1 to recommend the bill as amended.


Democrats’ Decade in the Desert: 1997-2006

House then concurred in the Senate’s weakening amendment by a vote of 96 to 2, Doderer and Myers casting the only Nays.\(^{232}\) So inoffensive was the new law\(^{233}\)—in spite of the catastrophic public health consequences specified in the preamble—that the powerful tobacco retailers’ lobby did not even bother to fight the measure.\(^{234}\)

Tobacco companies’ defeat of Miller’s bill and their successful fight against “a proposal to move all cigarettes off open store shelves” were precisely the kind of legislative outcomes the Register had in mind when, shortly after the end of the session, the paper observed that “[i]t would be wrong to call the recently completed 1998 session of the Iowa Legislature business as usual. This year it was business more than usual.”\(^{235}\)

For Philip Morris, however, even more business than in 1998 was needed. According to the final draft of the company’s “Iowa State Plan -1999,” which was completed in September 1998, Philip Morris expected “a whole host of tobacco issues” to be raised during the 1999 legislative session. Its level of concern over prevailing on these issues was heightened because the House was “at risk of losing the Republican control.” But whichever party was governing—and the “current political situation looks good for Republicans”—one of the company’s “proactive” objectives was to “[c]reate a forum to educate Legislators on key issues and to outline Philip Morris companies’ presence in the state....” More specifically: “In Iowa, a vision of success would focus on creating a positive business environment and company image. This objective will surely be greatly enhanced by Kraft’s huge presence in the state; an Oscar Meyer plant in Davenport, a pudding plant in Mason City, and another Oscar Meyer plant in Sigourney. When these plant employees descend on the Capitol for Kraft Day at the Capitol next Spring, all issues will be addressed.” Those that these slaughter house and pudding workers would be programmed to emphasize to legislators were (in rank order): (1) no increase in alcohol or tobacco excise taxes; (2) defeat of any “Florida-style legislation”; (3) defeat of any smoking restrictions in public places or workplaces; (4) defeat of tobacco stock divestiture proposals; (5) protection of state preemption; and (6) defeat of proposals to ban tobacco and


\(^{233}\)1998 Iowa Laws ch. 1129, at 286.


alcohol advertising.\textsuperscript{236}

The Struggle over the Use of the Master Settlement Agreement Funds: 1998-2000

Although the initial payments provided for by the Master Settlement Agreement, which the state attorneys general and cigarette companies reached in November 1998, would not be made until the middle of 2000, the beginning of 1999 already witnessed the emergence of sharp disputes over how that money should be spent between Democratic Governor Tom Vilsack and Attorney General Tom Miller, on one side, and the Republican legislative leadership, on the other. Whereas Vilsack wanted to allocate some funds to health care for the poor and Miller’s focus was an anti-tobacco campaign, House Majority Leader Brent Siegrist made the chasm blindingly visible by opining that he was not sure how much the Republican caucus “would be willing to spend on an anti-tobacco campaign aimed at children: ‘I defy you to find a kid in the state who doesn’t know smoking is bad for you.’”\textsuperscript{237} Yet four days later House Republicans outlined a proposal to make a priority of increasing the reimbursements for Medicaid providers and using up to 5 percent (or $85 million over 25 years) of the Agreement money for anti-smoking campaigns and educational programs.\textsuperscript{238}

This dispute was complicated by the absence in the Agreement itself of any obligation on the part of the states to commit any set proportion of the payments they would be receiving from the cigarette manufacturers to tobacco control programs to reduce smoking and its impact on morbidity and mortality, which had purportedly motivated the attorneys general to sue the industry in the first place. (For example, the Iowa legislature, according to Siegrist, felt no sense of disproportion in voting to spend such a small percentage of the Agreement payments on the tobacco issues that underlay the litigation.)\textsuperscript{239} Both this policy void and declarations by officials in various states that they planned to allocate no or only minuscule funds to anti-tobacco initiatives prompted the Clinton administration to try to secure enactment of legislation mandating payment of part

\textsuperscript{236}Iowa State Plan - 1999, at 1-3 (Sept. 24 [1998]), Bates No. 2074874333-5.


\textsuperscript{239}Telephone interview with Brent Siegrist, Council Bluffs (May 4, 2008).
Democrats’ Decade in the Desert: 1997-2006

of the 206 billion dollar settlement to the federal government—which, based on its financing of at least half of Medicaid expenditures, believed that it was entitled to share in the recovery—in order to insure that at least a significant portion would be dedicated to tobacco control. Not only did the National Governors Association make exclusive state control of the money its highest political priority for 1999, but Democratic Governor Tom Vilsack and Iowa’s liberal Democratic Senator Tom Harkin split over the issue, even though they largely agreed on how the funds should be spent: Harkin would have supported a compromise under which the states would have kept all the money subject to a requirement that they spend a certain proportion on anti-smoking programs, and Vilsack admitted that attaching no conditions to the receipt of the payments would have been counter-productive in some states, whose governors wanted to use them to cut taxes. However, on March 18 Harkin’s amendment to an emergency supplemental appropriations bill that would have required the state to use 20 percent of the Agreement money for smoking reduction programs and 30 percent for public health and enabling tobacco farmers to shift to growing other crops, was decisively defeated (29 to 71). Two months later the emergency appropriations bill was passed freeing states of any tobacco control spending mandates, prompting the Clinton administration, the National Center for Tobacco Free Kids, and Mississippi Attorney General Mike Moore (who had filed the first state suit and signed the first settlement agreement) all to bemoan that states would be free not to allocate any funds at all to deal with the underlying purposes of the litigation.

By the summer of 1999, with the question of complete state control resolved, but the receipt of Iowa’s first installment of $76.6 million still a year away, a “‘feeding frenzy,'” according to Siegrist, the new House Speaker, was already on the horizon. And, as politicians turned “giddy about the prospect of a new cash

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244 Lynn Okamoto, “State Debates How to Spend Tobacco Cash,” DMR, July 16, 1999
source that could be sustained for 25 years or more,” the new Republican House Majority Leader, Christopher Rants—an aggressive right-winger whose narrow-gauge intellectual universe was exquisitely captured by his practice of lending “dog-eared copies of Ayn Rand’s ‘Atlas Shrugged’” to legislative clerks: “I tell them if they get it, and like it, they’ll get more out of it than four years of college”—suggested using the money for building a new arena or baseball stadium. The anti-smoking movement, which created much of the political basis for the state lawsuits, was relegated to the status of mere “[s]pecial-interest groups” by the Register when the American Cancer Society called for funding cessation programs.

On September 10, Attorney General Miller weighed in with a proposal to devote almost $20.5 million or about one-third of the first year’s payment to a variety of anti-smoking projects, including media campaigns, youth and community partnerships, cessation programs, local enforcement of tobacco laws against those selling to children, school programs to reduce tobacco use, and research. Siegrist, who acknowledged that use of the Agreement money would be “one of the biggest debates of the 2000 session,” immediately expressed doubt that the amount that the legislature would appropriate for anti-smoking programs would be “nearly as much as the attorney general wants it to be.”

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247 Lynn Okamoto, “State Debates How to Spend Tobacco Cash,” DMR, July 16, 1999 (1A) (NewsBank). Republican Representative Bob Brunkhorst later explained the party’s initial support for such discrete building projects as rooted in its aversion to becoming “addicted to one-time money.” Telephone interview with Bob Brunkhorst, Waverly, IA (Apr. 27, 2008). This account appears to carry little weight since the MSA payments are in perpetuity.

248 “A Thousand Lives: Protecting Iowa Kids from Tobacco Addiction, Disease and Death: Recommendations of Attorney General Tom Miller for a Partnership to Reduce the Damage Inflicted by Tobacco on Iowa’s Health, Economy and Future” at 2, 5 (Sept. 10, 1999); see also Jeff Zeleny, “Tobacco Money Flames Fanned,” DMR, Sept. 11, 1999 (1A) (NewsBank). In a brief section on “Iowa’s History of Leadership” Miller’s report erroneously stated that Iowa had been “one of only three states to have banned” cigarette sales “at the turn of the century.” “At Thousand Lives” at 6. In fact, five states had. See above Parts I-II.

of such programs Miller hoped in five years to reduce Iowa’s adult smoking prevalence from 23 to under 20 percent, and in ten years to lower that among high school students from 37 to 26 percent.\footnote{Worth a $20 Million Try,” DMR, Nov. 14, 1999 (4A) (NewsBank).} In order, presumably, to make it clear to legislators that supporting Miller’s plan in no way involved going out on a political limb, his ally, Tobacco Free Iowa, commissioned a survey of 800 Iowans, 65 percent of whom (including 74 percent of Democrats and 59 percent of Republicans) identified anti-smoking efforts as the highest spending priority for the tobacco settlement payments. In addition, allocating at least one third to those programs was favored by 69 percent, including 37 percent who wanted most or all of the money to be used in that way.\footnote{Poll: Use Money from Tobacco to Slow Smoking,” DMR, Nov. 4, 1999 (2M) (NewsBank).} Whereas Vilsack shared Miller’s belief in the need to devote significant resources to these types of initiatives, Rants, insistent that the legislature was dealing with taxpayers’ money, conceded that that it made sense to dedicate some funds to tobacco prevention, but $21 million was “‘a lot of education...a lot of billboards.’”\footnote{Jeff Zeleny, “Tobacco Money Flames Fanned,” DMR, Sept. 11, 1999 (1A) (NewsBank).} At least one member of Rants’s House Republican caucus pooh-poohed any concessions: Bill Dix denied that the public saw any reason to spend any of the money on smoking cessation or prevention; while many were sympathetic to adult smokers’ plight, they were “leery of spending public money on helping them quit.”\footnote{Thomas O’Donnell, “Vilsack: Use Windfall Wisely,” DMR, Oct. 29, 1999 (8M) (NewsBank).} As the 2000 legislative session, in which tobacco would play a “key role” and form a “centerpiece of...debate,” was about to get underway, Vilsack presented his plan to use $55 million from the Agreement on expanding health care and reducing tobacco and other drug use. Cutting Miller’s proposal for anti-tobacco spending in half from $20 to $10 million but pairing it with more than $8 million in federal grants met with the attorney general’s approval as a “‘masterful move’” that would make the measure more acceptable to the legislature. And, as if on cue, Speaker Siegrist certified it as “‘not totally out of whack.’”\footnote{Jeff Zeleny, “Teen License Threat Rejected,” DMR, Mar. 31, 2000 (1M) (NewsBank).}


Democrats’ Decade in the Desert: 1997–2006

the Republican-led legislature would eventually reach an agreement with the governor became more likely when Rants announced in mid-February that his party’s plan would partly resemble Vilsack’s and be “devoted completely to expanding health care and preventing smoking.” Until this point the “battle over the tobacco settlement ha[d] been waged quietly,” largely in the form of non-public meetings between the governor and the Republican leaders, but when an impasse arose in late February, Siegrist, Rants, Iverson, and Kramer finally announced their proposal, touting their resolve to make Iowa the first state to dedicate all of its Agreement money to health care; in particular, their plan would make health care more accessible to low-income Iowans by allocating $25 million to increasing the state’s payments for Medicaid-covered doctor visits in order to induce more physicians and dentists to treat Medicaid patients; they relegated the $9.3 million for smoking cessation and prevention programs to a fourth-place mention.

In addition to criticizing the Republicans’ plan for devoting only one-fourth as much as his to substance abuse and for setting aside $9 million for an escrow account, Vilsack objected to their exclusion of adults from smoking cessation and similar programs. Republican Representative David Heaton, co-chair of the committee that administered the Agreement money, asserted to his constituents that whereas in the fall of 1999 there had been “talk of using the money for tax cuts or addressing infrastructure needs,” by March 2000 the legislature was “rall[y]ing behind the original intent of the lawsuit—to provide relief in the cost and the future cost...of the damage resulting from the use of tobacco.” To be sure, three weeks later, Rants pronounced the competing plans not “terribly [far]

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Democrats’ Decade in the Desert: 1997-2006

apart” from each other, as the House Appropriations Committee halved the escrowed amount and set the funds for tobacco prevention and cessation (for teenagers only) at $9.3 million.\textsuperscript{262}

And in fact a few days later Vilsack and the Republican leaders did fashion a $55 million compromise plan that, inter alia, allocated $9.3 million to tobacco cessation (without resolving the dispute over inclusion of adults, although even Vilsack conceded that young people had to be a focus), $21 million to expanding health care access, $12.5 million to substance abuse treatment and prevention, and $3.8 million to a set-aside account for future health programs. Iowa, the governor boasted, “would become the first state to devote its entire share of the tobacco settlement to health care....”\textsuperscript{263} In the end, as Vilsack explained later, the Republican leadership accepted his priorities because “I told legislators I would not approve their alternative and I had sufficient political clout at the time to pull it off with support from a number of health care associations and organizations.”\textsuperscript{264} Siegrist later agreed that Republicans’ shift had in part been


\textsuperscript{263}Jeff Zeleny and Jonathan Roos, “Tobacco Money Agreement Reached,” \textit{DMR}, Apr. 5, 2000 (1M) (NewsBank). House Speaker Siegrist repeated the boast in a self-congratulatory valedictory to the 78th General Assembly: “We should all take a bow for the fact that we were the first state to dedicate all of our tobacco settlement money to health care.” \textit{House Journal 2000}, at 2:1932 (Apr. 26). This claim, according to some later legislative critics, was inaccurate because in fact the state was involved in a “shell game”: the sums that went to Medicaid would otherwise have had to have been taken from the general fund, thus eliminating the money for certain capital projects; consequently, the MSA payments could just as well be described as having financed these other budget items. Telephone interview with Tony Leys, Des Moines Register reporter (Apr. 24, 2008). A member of the House Democratic caucus staff described the financing mechanism more diplomatically: “The only problem with paying off the bonds with tobacco revenue is that bond proceeds had to be expended on capital projects to be tax exempt and the Legislature had already had made a commitment to place the tobacco settlement revenue into a separate endowment fund and use it only for health care, substance abuse, and tobacco cessation programs. The solution, primarily embodied in SF 532, involved a sort of double-transfer. Step one was to use the tobacco revenue to pay off the bonds, and then use the bond proceeds to pay for capital expenses (thus earning the tax advantage). Step two involved transferring a reciprocal amount from other accounts—accounts that would otherwise be used to pay for capital expenses—into the separate endowment fund to be allocated for health-related programs.” Email from Ed Conlow to Rep. Mary Mascher forwarded to Marc Linder (Apr. 24-25, 2008).

\textsuperscript{264}Email from Tom Vilsack to Marc Linder (Apr. 20, 2008). Republican Rosemary Thomson, who purported to have had very few allies in her struggle to secure most of the
determined by the governor’s stance, but offered some other considerations. Initially, when reacting to the prospect of the payments, the party looked at its Republican “core concepts”—tax reductions. However, in the course of further discussion, the fact that the chairman of the House Human Services Appropriations Subcommittee, Representative David Heaton, had felt strongly about using the funds for health-related matters pushed the party toward perceiving that allocation as ultimately making the budget work better.265

Although the Tobacco Settlement Appropriations Bill (H.F. 2555) ultimately passed the House and Senate by votes of 100 to 0 and 47 to 0, respectively,266 Democrats first made two unsuccessful efforts to amend the bill in order to shift funds from the reserve account to anti-tobacco programs. In one instance, Minority Leader Michael Gronstal—who himself after decades of smoking went onto a nicotine replacement regimen—proposed transferring $575,000 to a program for smoking cessation products for Medicaid recipients, but it lost on a nearly party-line vote of 22 to 26.267 Gronstal’s second and more significant amendment, which would have shifted $1.5 million to tobacco prevention and control, was defeated even more decisively on a perfect party-line vote of 20 to

MSA funds for tobacco use prevention and control, stated years later than even Attorney General Miller had refused to ask for more money on the grounds that it was politically undoable. Telephone interview with Rosemary Thomson, Marion (Apr. 27, 2008). Representative Shoultz, who also stated that he had opposed securitization, expressed doubts that Democrats, if they had controlled the legislature, would have allocated more money to tobacco control; he buttressed this opinion by reference to experience in most other states and to the likelihood that leaders would have charged that smoking cessation programs simply were not all that effective. Telephone interview with Donald Shoultz, Waterloo (May 6, 2008). Oddly, Majority Leader Iverson also recollected that he had supported using more of the MSA funds for tobacco use prevention. Telephone interview with Stewart Iverson (Apr. 28, 2008).

265Telephone interview with Brent Siegrist, Council Bluffs (May 4, 2008).
266House Journal 2000, at 2:1602-1603 (Apr. 18); Senate Journal 2000, at 2:1301 (Apr. 20). A week later the legislature passed S.F. 2452 creating a Tobacco Settlement Endowment Fund, in which all MSA money (after payment of litigation costs) was to be deposited and “shall be used only in accordance with appropriations from the fund for purposes related to health care, substance abuse treatment and enforcement, tobacco use prevention and control, and other purposes related to the needs of children, adults, and families in the state.” 2000 Iowa Laws ch. 1232 § 12(3), at 828, 830. The bill passed the Senate 48 to 0 and the House 90 to 6. Senate Journal 2000, at 2:1434 (Apr. 26); House Journal 2000, at 1:1938 (Apr. 26).
In the end, then, the legislature allocated more money from the Agreement to the substance abuse treatment program ($11.9 million) than to tobacco use prevention and control ($9.3 million), about $24 million for various reimbursements to health care providers and expanding health care access in addition to setting aside $3.8 million. Heaton—a former smoker who quit when he got tired of hearing his lungs rattling when he went to bed and was unable to understand why more smokers did not quit—saw no reason to allocate a greater share of the Agreement funds to tobacco because there were just not enough tobacco programs to spend money on that could have further reduced smoking prevalence; advocates, he claimed, simply wanted more money.

In February Vilsack had mocked Republicans’ plan to set aside some of the annual tobacco payments in an escrow account in case declining cigarette sales caused the amounts that Iowa was to receive to drop and thus led to underfunding of the various programs that the legislature was establishing in 2000. The governor ridiculed the notion that Philip Morris was on the road to bankruptcy: “As near as I can tell, just about every product on the grocery shelf is connected in some way, shape or form to Philip Morris.” Seven weeks later, however, Vilsack reconsidered: as lawsuits against cigarette manufacturers were being settled across the country, he was no longer convinced of the industry’s financial solidity. As a result, the governor and legislators began drafting plans to securitize the settlement through the sale of bonds, which quickly became law.


\[268\] 2000 Iowa Laws ch. 1221, at 672. Representative Mary Mascher explained the focus on the reimbursements this way: “Health care needs in Iowa are great but at the time using the money on Medicaid was necessary. Without it, many Iowans, including children and seniors, would have lost their health care coverage and nursing home care. We did not want that to happen, so we put some of the money into Medicaid. Iowa has some of the lowest reimbursement rates for hospitals and other Medicaid providers in the nation. It is getting harder and harder to attract new doctors to Iowa because of this. In addition, some doctors no longer are willing to see Medicaid patients because they claim they are losing money. So, yet it is important to increase provider rates in order to maintain health care for many Iowans, especially those in small communities and rural towns.” Email from Mary Mascher to Marc Linder (Apr. 23, 2008).

\[270\] Telephone interview with David Heaton, Mt. Pleasant (May 10, 2008).


\[272\] Jeff Zeleny and Jonathan Roos, “Tobacco Money Agreement Reached,” DMR, Apr. 5, 2000 (1M) (NewsBank); 2000 Iowa Laws ch. 1208, at 611. For changes made the next year to accommodate securitization and the newly created Health Iowans Tobacco Trust, see S.F. 232 and 2001 Iowa Laws ch. 164, at 406.

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In 2001, Lamberti, the Senate Appropriations Committee chair and Casey’s scion, opined that securitization “takes the risk out of” the Agreement payments’ drying up—but only at the expense of “collecting $650 million now compared to receiving annual payments over 25 years that would total about $1.8 billion.”

“Everyone,” according to then-House Majority Leader Christopher Rants, “bought into” the bond program because it enabled the legislature to fund a number of health programs when revenues declined. Iowa, like some, but not most, other states, thus mortgaged most of its next 25 years of Agreement payments to investors in exchange for up-front payments; consequently, the fact that it must devote 78 percent of annual proceeds to servicing the debt on these securitized funds means that the funds available for future health care and tobacco use prevention and control programs are diminished.  


274 S. Dinnen, “Tobacco Bonds to Produce $650 Million,” DMR, Sept. 5, 2001 (1D) (NewsBank). The legislature’s failure to build up the planned $1 billion endowment over 25 years (because it used the accruing money for general fund purposes to balance the state budget) meant that securitization did not become “‘really a prudent idea’” that the state treasurer had prophesied. Id; David Yepsen, “Legislature’s Questionable Spending Clouds Future,” DMR, May 23, 2005 (9A) (NewsBank). Former Senator Jack Rife stated long after the fact that he had regarded securitization in 2000 as “stupid” because exchanging $500 million for $2 billion did not sound like a good deal. Telephone interview with Jack Rife, Des Moines (Apr. 29, 2008).

275 Telephone interview with Christopher Rants, Des Moines (May 12, 2008).


Democrats’ Decade in the Desert: 1997-2006

devolution prompted one leading academic anti-tobacco activist to bemoan that: “Probably the tobacco industry will win in the long run, largely because of the securitization of the money putting pressure on states to keep tobacco consumption up to get their bonds paid off.”

In any event, if at the end of the first 25-year period it turns out that the Iowa legislature guessed wrong and cigarette company sales did not plummet, the state will have received much less from the bonds than it would have received from relying solely on the Settlement Agreement payments. By 2008, when Iowa had spent nearly all of the $500 million in cash that it had received from the sale in 2002 of the rights to 78 percent of about $1.7 billion in Agreement payments, Attorney General Miller, who, unlike the American Cancer Society, had not opposed securitization, admitted that he wished that the state had not sold off the rights because if the money had flowed in more gradually, “it would have lasted longer and been more carefully targeted.” The exhaustion of the funds meant that anti-smoking programs in the following year would have to be completely financed from the general fund.

At the same time that the legislature was considering and passing the


279 Telephone interview with David Reynolds, Iowa Legislative Fiscal Bureau (Apr. 24, 2008).

280 The authorization for the bond sale is found in 2001 Iowa Laws ch. 164, at 406.

281 Later, ACS representative Cathy Callaway stated that the “tobacco control community was never in support of the securitization. The idea that tobacco companies were going to go bankrupt or out of business was preposterous.” Darwin Danielson, “State About to Burn Through Tobacco Trust Fund,” Radio Iowa (Dec. 1, 2008), on http://www.radioiowa.com (visited July 4, 2009).

appropriations bill for the tobacco use prevention program, it was also debating
the plan itself (H.F. 2565), which created within the Department of Public Health
a Tobacco Use Prevention and Control Division and a commission, which was to
develop policy and provide direction.\footnote{2000 Iowa Laws ch. 1192, § 3, at 565, 565-67.}
The legislature’s anti-tobacco behavioral and cultural goals were, as the statute’s preamble made transparent, extraordinarily capacious:

1. The purpose of this chapter is to establish a comprehensive partnership among the
general assembly, the executive branch, communities, and the people of Iowa in addressing
the prevalence of tobacco use in the state.

2. It is the intent of the general assembly that the comprehensive tobacco use
prevention and control initiative established in this chapter will specifically address
reduction of tobacco use by youth and pregnant women, promotion of compliance by
minors and retailers with tobacco sales laws and ordinances, and enhancement of the
capacity of youth to make healthy choices. The initiative shall allow extensive
involvement of youth in attaining these results.

3. It is also the intent of the general assembly that the comprehensive tobacco use
prevention and control initiative will foster a social and legal climate in which tobacco use
becomes undesirable and unacceptable, in which role models and those who influence
youth promote healthy social norms and demonstrate behavior that counteracts the
glamorization of tobacco use, and in which tobacco becomes less accessible to youth. The
intent of the general assembly shall be accomplished by engaging all who are affected by
the use of tobacco in the state, including smokers and nonsmokers, youth, and adults.\footnote{2000 Iowa Laws ch. 1192, § 3, at 565, 565-66.}

One of the plan’s most prominent gaps—apart from the deeply flawed
absence of any ban on public smoking, which Senator Michael Connolly
repeatedly but unsuccessfully sought to rectify\footnote{On Connolly’s amendments, which were focused on banning smoking in the
legislature, see below ch. 32.}—was, as Iowa City Democratic
Senator Joe Bolkcom, who cast the only Nay against the bill in either chamber,\footnote{2000 Iowa Laws ch. 1192, § 3, at 565, 565-66. The phrase “less accessible to
youth” had read simply “less accessible” in H.F. 2565; a floor amendment added the
put it, that it did “little to help adults smokers kick the habit. ‘I wonder if Big
Tobacco doesn’t like this bill (which) really relies on all these adult smokers to
keep the money flowing in.

The resistance that Bolkcom encountered from Republicans in this respect was exemplified by the reaction prompted by an amendment he filed to add the following underlined language to the bill’s preamble: “The intent of the general assembly shall be accomplished by assisting current tobacco users in terminating use and by engaging all who are affected by the use of tobacco in the state, including smokers and nonsmokers, youth, and adults.” On an almost perfect party-line vote the modest amendment was defeated 19 to 30. Opponents, such as Republican Senator Tinsman, stressed the importance of concentrating the resources on youth because most smokers started smoking as teenagers. In any event, with only $9 million a year available for the anti-tobacco program, she worried about diluting its impact. (In a separate category was Senator Jack Rife, one of only a handful of still smoking senators, who wondered, with this kind of “social engineering...who we’re going to sue next over what...”)

Concretely the results that it was the purpose of the initiative to attain were:

a. Reduction of tobacco use by youth.

b. Strong, active youth involvement in activities to prevent youth tobacco use and to promote cessation of youth tobacco use.

c. Enhanced capacity of youth to make healthy choices.

d. Reduction of tobacco use by pregnant women.

e. Increased compliance by minors and retailers with tobacco sales laws and ordinances.

In order to promote the law’s tobacco use prevention and control partnership—as well as to avoid accusations of hypocrisy in “profess[ing] their devotion to curbing smoking while winking an eye at flashy tobacco industry marketing ploys”—the legislature imposed two marketing prohibitions:

a. A manufacturer, distributor, wholesaler, retailer, or distributing agent or agent thereof shall not give away cigarettes or tobacco products.


288Senate Journal 2000, at 2:1260 (Apr. 19) (S-5446). Democrat Patricia Harper was the only senator to break ranks.


2902000 Iowa Laws ch. 1192, § 6(2), at 565, 569.

b. A manufacturer, distributor, wholesaler, retailer, or distributing agent or agent thereof shall not provide free articles, products, commodities, gifts, or concessions in any exchange for the purchase of cigarettes or tobacco products.\(^{292}\)

**Prohibiting the Free Distribution of Cigarettes:**

**The Federal Courts Undo the Cigarette Manufacturers’ Rare Defeat in the Iowa Legislature: 2000-2001**

Until this time,\(^{293}\) the Iowa law had merely required that a “manufacturer, distributor, wholesaler, retailer, or distributing agent or agent thereof shall not give away any cigarettes or tobacco products to any person under eighteen years of age, or within five hundred feet of any playground, school, high school, or other facility when such facility is being used primarily by persons under age eighteen for recreational, educational, or other purposes.”\(^{294}\) The blanket ban on sampling that which was the subject of contentious House floor debate on April 13, 2000, had a prehistory during the 78th General Assembly.

On the last day of 1998, Attorney General Miller included a ban on free samples of tobacco products and on coupon promotions in a package of anti-tobacco proposals that he was going to ask the legislature to enact during the 1999 session.\(^{295}\) By early February, a bill had been filed by 42 Republican and Democratic members, including such high-profile anti-smokers as Representatives Doderer, Fallon, Foege, and Mascher, which contained a general ban on distributing free cigarettes or tobacco products or other products in an offer for sale of cigarettes or tobacco products in language similar to that just quoted.\(^{296}\) (Interestingly, a week before the bill was filed, Bill Wimmer, a prominent cigarette industry lobbyist in Des Moines, faxed to the Lorillard general counsel a copy of a very similar, but not exactly identical, bill, which bore official looking stamps and indicated that it had been filed on January 26, although no such bill was filed.)\(^{297}\) On March 1, the State Government

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\(^{292}\)2000 Iowa Laws ch. 1192, § 6(6), at 565, 569.

\(^{293}\)On earlier legislative regulation of sampling, see above ch. 28.

\(^{294}\)Iowa Code § 453A.39(2)(a) (1999). All of § 453A.39, which contained other provisions, was repealed by 2000 Iowa Laws ch. 1192, § 12, at 565, 571.


\(^{296}\)H.F. 204 (Feb. 3, 1999, by Martin [State Government Committee chair] et al.).

\(^{297}\)Fax from Bill Wimmer to Ron Milstein (Jan. 28, 1999), Bates No.83777339-42. The bill, which lacked a House File number, bore a stamp “Legal Counsel’s Copy Drafted
Committee recommended passage by a vote of 20 to 1. Committee chair Mona Martin underscored that children were very attracted to promotions, mentioning that recently cigarettes were included in a bag of goodies given away at a dance attended by people of all ages. Des Moines Democrat Frank Chiodo may have worried about increases in youth smoking sparked by identification with Joe Camel, but some legislators were “leery” because the measure might prevent “tobacco makers from sponsoring sporting events” such as a rodeo in Fort Madison and auto racing. Although the Register predicted that the full House would also pass the bill, it was rereferred to committee, where it died.

During the same period the Senate Human Resources Committee filed an identical bill as the successor to a study bill presented by Tinsman, Szymoniak, and Dr. Redwine. The same day the bill was approved by the committee by a vote of 10 to 3, the prominent anti-smokers Hammond and Dvorsky voting Aye, but it, too, saw no further action.

The ban on distribution of free tobacco products and promotional items reemerged in March 2000 as an amendment in the House to a Senate Judiciary bill designed to prohibit the re-importation, sale, or possession of so-called gray market cigarettes that had been exported from or manufactured for use outside the United States. (Because U.S. cigarette manufacturers, in the wake of the Master Settlement Agreement, increased prices for domestic markets, they widened the gap between those prices and the prices of exported cigarettes; when such cigarettes were reimported and sold at lower prices, they reduced the market share of the manufacturers participating in the MSA and thus tendentially reduced the payments to the states under that agreement.) Tobacco wholesalers, objecting to the price-cutting competition, had already initiated the introduction of gray market legislation in many other states. In November 1999, R. J. Reynolds Tobacco Company’s State Government Relations regional director for Iowa expressed the firm’s concern with the gray market issue to George Wilson, the


299 House Journal 1999, at 1:549, 1051 (Mar. 3 and Apr. 6).

300 S.S.B. 1073; S.F. 205 (Feb. 23, 1999, by Human Resources).

301 Senate Journal 1999, at 1:369 (Feb. 23).

Democrats' Decade in the Desert: 1997-2006

lobbyist for the Iowa Association of Candy and Tobacco Distributors, stressing the availability of Reynolds’ “legislative counsel in Iowa,” former Democratic Senate Majority Leader Bill Hutchins and (his daughter) Susan Cameron, “to assist in the passage of this legislation.” The quantum of availability and assistance that Hutchins and Cameron were expected to provide can be gauged from the $42,000 and $43,000 that Reynolds paid them for in the second half of 1998 and 2000, respectively. (Reynolds also paid Wilson’s tobacco wholesaler’s association $3,000 in lobbying fees.)

S.F. 2079, a very short bill for suppressing this gray market—whose language was virtually identical with the text proposed by the Iowa Attorney General at the beginning of the session—was unanimously approved in committee and unanimously passed the Senate in February. When the bill reached the House floor on March 23, Representative Donald Shoultz, a ninth-term Democrat and former high school mathematics teacher from Waterloo who had quit smoking almost two decades earlier, offered an amendment prohibiting the giving away of cigarettes or tobacco or providing free products in connection with cigarette or tobacco product sales. Shoultz, who took a strong anti-tobacco stance, filed the same amendment the same day to another Senate bill that, inter alia,

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303 M. Hurst Marshall to George Wilson, Jr. (Nov. 30, 1999), Bates No. 528953528/9.
304 R. J. Reynolds Tobacco Company, Iowa Ethics and Campaign Disclosure Board Lobbyist Client-Executive Branch (Jan. 22, 1999), Bates No. 522533301; R. J. Reynolds Tobacco Company, Iowa Ethics and Campaign Disclosure Board Lobbyist Client-Executive Branch (Jan. 26, 2001), Bates No. 525161815. Reynolds also reimbursed Hutchins and Cameron $4,031.67 and $1,662.49 for expenses in 1998 and 2000, respectively. Unfortunately, the online industry documents do not appear to include Reynolds’ lobbying payments to Hutchins and Cameron for 1999; the Iowa Ethics and Campaign Disclosure Board also lacks Reynolds’ form for that year as does the Iowa State Archives. Telephone interview with Sharon Wright, IECDB, Des Moines (May 5, 2008); email from Meaghan McCarthy, SHSI DM (May 7, 2008).
305 Karen to Lynn (Jan. 16, 2001), Bates No. 525161821/3. Reynolds also paid $1,000 to the Iowa Retail Federation and $507.80 to Wasker’s law firm.
311 Telephone interview with Bob Brunkhorst, Waverly (Apr. 27, 2008).
proposed to increase the penalties for underage smoking, though he ultimately withdrew it. Earlier in the 2000 session Shoultz had also filed a bill that would have amended the public anti-smoking law to exclude from the definition of “bar” (which alone among “public places” could be designated a smoking area in its entirety) any establishment with table and seating capacity, regardless of seating capacity, that served meals. The House, however, took no action on the bill, and two weeks after it had been filed R. J. Reynolds’ midwest regional state government official dismissively but correctly reported that it was “not a serious threat.” Much more serious a threat was Shoultz’s amendment to the gray market cigarettes bill, which a Republican tried to eliminate by securing a ruling that it was not germane; after the Speaker had ruled the point well taken, Shoultz asked for unanimous consent to suspend the rules to consider his amendment, but encountering an objection, he moved to suspend the rules and requested a roll-call vote, which produced a 56 to 42 majority (only one Democrat voting Nay). The House then adopted the amendment and unanimously passed the bill with Shoultz’s ban on the free distribution of cigarettes and paraphernalia to adults. A week later, however, the Senate on a voice vote refused to concur in the House amendment and the same day the House, on a motion by the bill’s House floor manager, Rosemary Thomson, receded from its amendment on a non-record roll call vote of 53 to 33. The chamber then, by a vote of 93 to 1, Shoultz casting the lone Nay, passed the bill.

The cigarette oligopoly not yet having definitively slain the proposed total ban on free distribution of cigarettes and promotional products, the initiative reappeared on April 13, 2000, when the above-quoted language was filed from the House floor as an amendment to the Tobacco Use Prevention and Control bill (H.F. 2565), first by a group of 10 Republicans led by first-term Representative Scott Raecker and two Democrats (one being Shoultz); after Raecker had withdrawn it as a result of procedural obstacles and anticipated opposition by

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316 Senate Journal 2000, at 1:1010 (Apr. 5).
representatives who wished to avoid a confrontation with the Senate, it was offered by the other Democrat, Chiodo, who also withdrew his before finding the proper procedural vehicle for avoiding a non-germaneness ruling.\textsuperscript{318} Chiodo, according to Republican Bob Brunkhorst, felt very strongly that distribution of free cigarettes was simply wrong from a public policy standpoint; although Brunkhorst agreed with him (and voted for the amendment), he tried to persuade Chiodo that, since it would not pass or, if it passed the House, the Senate would again strip it out of the bill, it was not worth fighting over.\textsuperscript{319} Chiodo took the floor to frame the debate in terms of voting on “whether we’re going to support big tobacco or not.”\textsuperscript{320} Raecker, executive director of the Institute for Character Development at Drake University in Des Moines,\textsuperscript{321} urged his colleagues to “break a compromise with the state Senate and the governor” over the $9.3 million dollar tobacco use prevention program: “We won’t give away tobacco.... Are you going to buy into the laws we’re going to pass this year or are you going to become part of our efforts to curb smoking for youths?” He insisted that it was “hypocritical for legislators to tout their devotion to curbing smoking if the tobacco industry is allowed to give away cigarettes and flashy promotional gimmicks.”\textsuperscript{322} Raecker later specified that although probably no formal

\textsuperscript{318}Senate Journal 2000, at 2:1480 (Apr. 13); Kathie Obradovich, “Ban on Tobacco Freebies OK’ed in House, But Has Dim Future,” WC, Apr. 14, 2000 (A3:1-2). H-8894 and H-8897, which were withdrawn, differed from the third and successful amendment, H-8900, by virtue of not having repealed Iowa Code § 453A.39. According to Chiodo, who eight years later appeared to have a virtually total recollection of the proceedings, the first two amendments—the first of which he had asked Raecker to “run”—were found non-germane (although the Journal does not reflect such a ruling). Telephone interview with Frank Chiodo, Des Moines (May 5, 2008).

\textsuperscript{319}Telephone interview with Bob Brunkhorst, Waverly, IA (Apr. 27, 2008).

\textsuperscript{320}Kathie Obradovich, “Ban on Tobacco Freebies OK’ed in House, But Has Dim Future,” WC, Apr. 14, 2000 (A3:1-2). Chiodo, a smoker, who after graduation from college at the beginning of the 1990s had unsuccessfully applied for a job with the Tobacco Institute as a regional lobbyist, was an improbable tobacco foe: together with his father, a former state legislator and smokeless tobacco lobbyist, he was a dynastic leader of a Des Moines Democratic party club. Telephone interview with Frank Chiodo, Des Moines (May 5, 2008); Adam Nagourney, “Key to Iowa Caucus May Be the Living Room,” NYT, May 27, 2003 (A16); Smokeless Tobacco Council, Inc., State Legislative Consultants (Jan. 1992), Bates No. TI03522699/702. Rep. Shoultz did not associate Chiodo with an anti-smoking stance. Telephone interview with Donald Shoultz, Waterloo (May 6, 2008).

\textsuperscript{321}http://www.drake.edu/icd/about/team/index.php (visited May 6, 2008).

\textsuperscript{322}Jeff Zeleny, “House Vote Threatens Tobacco Compromise,” DMR, Apr. 14, 2000
agreement had existed, there may have been some more nebulous deal among party leaders that, for example, tobacco use prevention supporters would get $9.3 million, while Iverson got continued free distribution of cigarettes and paraphernalia. Nevertheless, neither freshman Raecker nor sophomore Chiodo was part of any such leadership deal, which they regarded as bad public policy because it facilitated continued incentivizing of cigarette purchases in contravention of a legislative intent to reduce smoking. Anti-smoking activist Mary Mascher urged adoption on the grounds that “[t]hese companies give away freebies to get our kids hooked.” Democrat William Witt from the college town of Cedar Falls became direct and personal when he urged his colleagues to “send a message to the ‘generalissimo’ of the Senate as well as to Iowans” that the ban was an opportunity to promote tobacco prevention and keep young people “‘from the poison that is tobacco.’” The House then adopted the amendment by a very large majority (83 to 15), all the Nays being cast by Republicans—one of whom argued that with children already protected by existing law, “[i]ndividuals have the right to choose whether they are going to smoke a cigarette or accept an offer from a company”—and all the prominent anti-smokers such as Doderer, Fallon, Foege, Mascher, and Wise voting Aye.

Adoption of the amendment intensely annoyed Iverson and the tobacco lobbyists, who personally resented the role of those who had pushed it. The Associated Press attributed the split between the House and Senate to representatives’ being “generally younger and less inclined to smoke than

323Telephone interview with Scott Raecker, driving near Ames, IA (May 6, 2008). Shoulitz later recalled no deal trading off the tobacco money for continuing legality of free distribution of cigarettes to adults. Telephone interview with Donald Shoulitz, Waterloo (May 6, 2008).


326House Journal 2000, at 2:1481-82 (Apr. 13) (H-8900). Rosemary Thomson, who professed to be a strong anti-smoking advocate who had suffered marginalization by the Republican leadership for sticking to her party-deviant stance, was the only member to have cosponsored Raecker’s who then voted Nay.


329Telephone interview with legislator who requested anonymity, Des Moines (May 5, 2008).
senators.” Republican House Majority Leader Rants, who voted for the ban, accurately added that “[t]raditionally this chamber has been far more anti-tobacco than the Senate.”\textsuperscript{330} (House Speaker Siegrist, who had voted against the ban, explained their differing votes by reference to Rants’s being more anti-smoking.)\textsuperscript{331} And his party colleague Bob Brunkhorst even made the leap from is to ought: “There is too much smoking in this chamber, too much smoking outside,... We need to do better. We are role models.”\textsuperscript{332} The House’s “surprise move,” the Register reported, might “throw a kink into how Iowa’s share” of the Master Settlement Agreement money would be spent because the Senate, whose leaders were “reluctant to pass a law that would not allow adults to accept tobacco handouts,” was expected to reject the House action. The cigarette companies’ chief voice in the Iowa legislature, Majority Leader Iverson, promptly weighed in with one of the industry’s beloved platitudes: “Whether we like it or not, tobacco is still a legal product.... We love to spend the tax money it brings in, but it’s still politically correct to pick on this product.”\textsuperscript{333} Moving on to a variant of the same cliché that smokers never tire of imagining as debate-ending rhetoric, he continued: “In the 10 years I’ve been here, I keep hearing about all this tobacco stuff, but I still haven’t seen a bill that outlaws the sale of tobacco in Iowa.”\textsuperscript{334} Expressing surprise that the House had undone what she thought had been a deal, Senator Tinsman supported the substance of the “ban on tobacco freebies,” but insisted that “the entire $9.3 million plan could be threatened by Senate Republican leaders upset by the House changes.” She opposed giving young people “free things with tobacco advertising on it,...[b]ut to hurt a major part of the bill for this small piece, I don’t think is worth it.”\textsuperscript{335} She was revealing no secret when she pointedly commented that the House action would cause a problem in the Senate “because the majority leader doesn’t like it.... We’ve had it as part of bills before and he saw that it was removed.”\textsuperscript{336} Nevertheless, in the end Tinsman agreed with Raecker—who doubted that the ban

\textsuperscript{330}AP, “IA Smoking Prevention” (Apr. 14, 2000), Bates No. 2075589242/3.
\textsuperscript{331}Telephone interview with Brent Siegrist, Council Bluffs (May 4, 2008).
\textsuperscript{332}AP, “IA Smoking Prevention” (Apr. 14, 2000), Bates No. 2075589242/3.
would fatally wound the bill because the Senate would simply “not walk away from this session without allocating $9.3 million for prevention”—that with or without the ban, the bill would be approved: “‘It’s that key.’”

Although the cigarette lobby was unable to undermine a majority for the sampling ban in the House, it knew that its most reliable agent for warding off such threats was Senate Majority Leader Iverson. Immediately after House passage, “[i]ndustry personnel,” Hurst Marshall, R. J. Reynolds Tobacco Company’s state government relations regional director in charge of Iowa, recorded in his weekly status report, “discussed the amendment with Senate leadership and they have agreed to delete the provisions in the Senate.” He seemed to be expressing annoyance rather than alarm in adding that “[t]his is the fourth time that the House has attempted to impose a sampling ban.”

Governor Vilsack was not so sanguine that the Senate would go along with the amendment. Four days after House passage of H.F. 2565, on the day the Senate first took up the House bill, Governor Vilsack, urging legislators to work out their differences over the House ban on handing out promotional cigarettes, made it clear that he did not want that controversy to derail the $9.3 million initiative. After he had spoken to Raecker about the need to get the bill through the legislature, the Republican representative “assured fellow legislators and Vilsack that the smoking prevention bill will reach the governor’s desk without delay.” And although Raecker stressed that “‘[c]ertainly I will not hold up the process based on that,’” he nevertheless added that Vilsack had not asked him to “‘step back’ from his amendment.” For his part, although the governor stated that he did “not necessarily oppose the sample ban,” his further comments sounded as though he might be counseling the cigarette oligopoly in contemplation of a suit challenging the ban. In distinguishing between marketing to adults and children, he “suggested the state might be treading on the tobacco companies’ rights if it further restricts its [sic; must be “their”] ability to advertise. ‘I think, given the nature of the law, it is somewhat difficult to walk the fine line between marketing and commercial speech, which we still value, and

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essentially prohibiting people from doing certain things.’” How physically distributing (addictive and lethal) commodities constituted protected speech, Vilsack did not explain, perhaps because he had “not researched the law so I am not sure whether there would be some legal complications or constitutional questions....” If he was not researching the issue, the cigarette oligopolists’ battalion of lawyers were.

During the first day of Senate debate Boettger, acting for Iverson and the cigarette oligopoly, filed an amendment to strike the new House provision, while Bolkcom filed one to retain it but shift its location within the bill. However, when debate on the bill resumed two days later, Boettger and then Bolkcom both asked and received unanimous consent to withdraw their amendments, and the Senate passed the bill (against Bolkcom’s lone Nay) with the House ban. (The difference in emphasis emerged in the comment by Boettger, chair of the Senate Human Resources Committee, which on the same day as the House action unanimously recommended passage of S.F. 2449, the Senate’s alternative Tobacco Use Prevention and Control bill—for which H.F. 2565 was substituted four days later—that “[a] lot of statistics have shown that if someone doesn’t start smoking by the time they’re 20, they probably aren’t going to, so we get the main bang for our buck by addressing mainly youth.”)

Given the opposition to the total ban on sampling from such divergent points on the political spectrum and the Senate’s previous success in removing it from a House bill, Brunkhorst and others in the House who had voted for it were more than a little “surprised” that the Senate passed it this time. From his perspective, the explanation for this turn of events was that the Senate leadership, which considered it wrong to prohibit the promotion of “a legal product,” had simply tired of fighting against it and given up.

Reynolds’ lobbying forces shared Brunkhorst and his colleagues’ surprise, but also appeared to be perplexed in their disappointment. The day after the Senate vote, Roger Mozingo, a company officer in his capacity as vice president

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341 See below this ch.
348 Telephone interview with Bob Brunkhorst, Waverly, IA (Apr. 27, 2008).
Democrats’ Decade in the Desert: 1997-2006

for state government relations, noted in his weekly status report to his boss, Tommy J. Payne, the executive president for external relations who reported directly to R.J. Reynolds Tobacco Company’s chairman and CEO, that “Senate leadership had assured industry personnel that the House amendment would be removed in the Senate but unfortunately, they agreed with the amendment and the measure passed and has been sent to the governor.” In order, perhaps, self-protectively to allude to his team’s .750 batting average, Mozingo added that the “sampling provision had been defeated on three different occasions during the past month being adopted.”

The legislative setback did not mean that the tobacco companies accepted defeat. And whether directly activated by the oligopolists or resentful of the prospective loss of free cigarettes and cigarette company mugs, smoking senators did not give up either. A confluence of interest and self-interest led a tobacco lobbyist to ask Jack Rife, long one of the chamber’s most belligerent and heaviest smokers, to “run” the amendment that would undo the damage done by S.F. 2625, which would not be enrolled, signed by the House Speaker and Senate President, and sent to the governor until April 26. On April 20, the day after the Senate leadership had let the oligopoly down, the Senate took up debate of H.F. 2555, the bill making appropriations from the Master Settlement Agreement, which the House had passed by a vote of 100 to 0 on April 18 and passage of which the Senate Appropriations Committee (of which Rife was a member) had

350 R. L. Mozingo to T. J. Payne, Weekly Status Report—State Government Relations (Apr. 20, 2000), Bates No. 524116229/30. Mozingo apparently synthesized the reports that he received from his four regional directors; whether he (or even they) had first-hand knowledge is unclear. House Speaker Siegrist later speculated that Iverson may have lost control of his caucus regarding the ban, which the House leadership may have told him was “good policy,” even if it was a deal breaker, and have asked him to consider how bad the result would be if it passed. Telephone interview with Brent Siegrist, Council Bluffs (May 4, 2008).
351 Telephone interview with Jack Rife, Des Moines (Apr. 29, 2008). Rife, who by 2008 had for five years been a political appointee-representative of the U.S. Secretary of Labor monitoring labor legislative developments in Iowa and several other midwestern states, actually let slip that shortly before the events in 2000 he had received such free cigarettes at a fair. Rife recalled the amendment distinctly, but could not remember which tobacco lobbyist had approached him, though he thought it had been either Bill Wimmer or Susan Cameron (the daughter of former Senate Majority Leader Bill Hutchins).
recommended by a vote of 23 to 0 the next day.\textsuperscript{354} On April 20, Rife and his fellow heavy smoker, Richard Drake\textsuperscript{355} filed an amendment that struck the offending subsection of H.F. 2565, repealed the repeal of Iowa Code § 543A.39(6), and then reenacted the provision if H.F. 2565 was enacted before H.F. 2555.\textsuperscript{356} After they had offered their cigarette industry amendment from the floor, Senator Connolly raised the point of order that the amendment was not germane, but withdrew it; in turn Rife withdrew his own amendment and received unanimous consent that action on the bill be deferred.\textsuperscript{357} Later that evening, when the Senate resumed debate on H.F. 2555, Rife and Drake again filed and withdrew another amendment with the same text.\textsuperscript{358} Finally, they filed a third, slightly different amendment, which this time was ruled out of order after Connolly had once again raised the point of order that it was not germane. The bill then passed by a vote of 47 to 0, Rife and Drake voting Aye.\textsuperscript{359}

If in fact Iverson did develop sampling ban fatigue,\textsuperscript{360} his cigarette company principals definitely did not. They may have agreed, pursuant to the Master Settlement Agreement, not to lobby against certain kinds of youth-centered legislation,\textsuperscript{361} but bans on handing out free samples to adults was not one of them. Three days after Rife and Drake’s gambit had failed, David Remes, a lawyer at Covington & Burling who—on his way to receiving his firm’s “Senior Lawyer Pro Bono award in 2005 and the Human Rights Campaign’s Ally of Justice Award in 2006”\textsuperscript{362}—over much of his career had been devoting many of his billable hours to protecting the profits of the individual cigarette oligopolists and

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\item\textsuperscript{354}Senate Journal 2000, at 2:1271 (Apr. 19).
\item\textsuperscript{355}Former Senator Andy McKean confirmed that Drake also smoked heavily. Telephone interview with Andy McKean, Anamosa (Apr. 28, 2008).
\item\textsuperscript{356}Senate Journal 2000, at 2:2074-75 (S-5556) (Apr. 20).
\item\textsuperscript{357}Senate Journal 2000, at 2:1293 (Apr. 20). Unfortunately, eight years later Connolly had no recollection of these “maneuvers” or even of the issue of the ban. Telephone interview with Michael Connolly, Dubuque (Apr. 29, 2008).
\item\textsuperscript{358}Senate Journal 2000, at 2:1300, 2076-77 (S-5660) (Apr. 20).
\item\textsuperscript{359}Senate Journal 2000, at 2:1300-1301, 2077-78 (S-5661) (Apr. 20). The third version of the amendment differed from the first two by virtue of retaining a provision from Chiodo’s bill that exempted from the ban transactions among businesses not involving consumers and deleting the reenactment of § 543A.39(6).
\item\textsuperscript{360}Eight years later Iverson purported to recall nothing about the ban. Telephone interview with Stewart Iverson (Apr. 28, 2008).
\item\textsuperscript{361}See below this ch.
\end{itemize}

2948
Democrats’ Decade in the Desert: 1997-2006

their Tobacco Institute, wrote a memo, which was faxed to and from Wasker’s cigarette industry law and lobbying firm, 363 titled, “House File 2565 Will Hurt Iowa Tobacco Retailers.” Casting doubt on his own competence and the value that the tobacco firms received from their pricey corporate counsel, already in the second sentence Remes erroneously claimed that the provision prohibiting retailers and others from providing free articles in exchange for the purchase of cigarettes had been “added as an amendment (S-5445) at the last minute....” In fact, the provision was added neither by that amendment (which, as just seen, had been withdrawn) nor by the Senate at all: the House, as even semi-diligent lay readers of the legislative journals and press could have told Remes, had debated it intensively and included it in the bill, as tobacco-beholden and other senators who opposed it well knew before it ever arrived in the Senate. His sloppy research notwithstanding, Remes knew an actionable state interference with his clients’ sales to addicted smokers when he saw one: “This provision could be read to prohibit a retailer from selling cigarettes...using two-for-one promotions, which would involve the provision of a free package in exchange for the purchase of a package” as well as from “providing consumers with non-tobacco premium items in redemption of coupons or proof-of-purchase.” Especially since these prohibitions also “constrain manufacturers,” the punch line read: “new § 453A.39(2) [sic; should be § 142A.6(6)(b)] should be repealed.” In a new version of the memo two days later Remes added that: “As far as we know, no other state has enacted such restrictive retail legislation.”

363By this time, after the Tobacco Institute had been dissolved pursuant to the Master Settlement Agreement, Wasker was lobbying for Lorillard Tobacco and Brown & Williamson Tobacco. For example, for 1999 and 2000, Lorillard paid his firm $32,500 and $32,600, respectively, and budgeted $65,000 for 2001. [Lorillard Tobacco Co.,] 2001 Budget State Lobbyists (Oct. 29, 2001), Bates No. 99394130; Iowa Ethics and Campaign Disclosure Board, Lobbyist Client Report - Executive Branch (Lorillard Tobacco Company, Jan. 29, 2001) (copy furnished by IECDB). For the first half of 1999, Brown & Williamson paid him $4,062.50 as a retainer; for 2000 his retainer was $8,125. Iowa Ethics and Campaign Disclosure Board, Lobbyist Client Report - Executive Branch (Brown & Williamson Tobacco Corp., Jan. 16, 2001) (copy furnished by IECDB).

364David H. Remes (Covington & Burling), “House File 2565 Will Hurt Iowa Tobacco Retailers” (Apr. 23, 2000), Bates No. 86102282. The document was found in the files of Lorillard Co. § 453A.39 was repealed by H.F. 2565. Why Remes did not mention section (6)(b), which banned giving away free samples to adults, is unclear.

365David H. Remes (Covington & Burling), “House File 2565 Will Hurt Iowa Tobacco Retailers” (Apr. 25, 2000), Bates No. 518979288. In this version Remes excised the
During the final three or four days of the session (which adjourned on April 26), Hurst Marshall reported (and Mozingo repeated to Payne) that “industry personnel attempted to amend and or delete the provision but all efforts failed.” Philip Morris’ State Government Affairs Tobacco Executive Report also recounted that “[o]n 4/26, an amendment to nullify the damaging anti-sampling and promotion provisions of HF 2565 was inserted into an appropriations bill, but was removed by leadership and the legislature adjourned.” (For such intelligence and, presumably, more effective lobbying, Philip Morris in 2000 paid Cal Hultman and Kim Haus-Ludwig $15,166.66 and $10,333.34, respectively.) Lorillard Tobacco Company had also been trying to mobilize last-minute support for corrective action. At 5:55 p.m. on April 24, Kurt Leib, the firm’s Midwest regional government affairs manager, faxed from a hotel in Des Moines a message to the regional sales manager that the division manager in the Des Moines office had “offered to help out on this issue. The bottom line is we need help from the retail community to correct the situation. We’re late out of the gate, but I am hopeful we will prevail in the end.” The seriousness of the plea was underscored by the re-faxing of the message by the director of sales planning to two associate general counsel, one of whom was also the director of government affairs, asking them to “advise as to the specifics of what our field sales personnel

erroneous reference to S-5445 without inserting the correct reference. Oddly, on the intervening day, the Wasker Wimmer law/lobbying firm had faxed to Covington & Burling a Senate clip sheet with S-5445, on which the subsection dealing with free articles had been underlined and marginally annotated “fix.” Senate Clip Sheet, Apr. 19, 2000 (Apr. 24, 2000), Bates No. 2075403601.

366Hurst Marshall to Lynn Hutchens, Weekly Report—Region II (Apr. 27), Bates No. 527843365; R. L. Mozingo to T. J. Payne, Weekly Status Report—State Government Relations (Apr. 28, 2000), Bates No. 524116228. These attempts to amend/delete have not been identified in the legislative journals.

367[Philip Morris] State Government Affairs Tobacco Executive Report (May 1, 2000), Bates No. 2078174017. No such insertion into an appropriations bill on Apr. 26, 2000 was identified in the legislative journals.

in Iowa can do to help.”369 Two days after the legislature adjourned, Leib thanked his Des Moines colleague and his staff for having offered assistance: “Your willingness to get involved and spread the word to your retail accounts about the potential impact of this issue certainly gave us a fighting chance at the state capital.”370 Unfortunately, none of these communications revealed why the cigarette oligopolists failed in their quest to repeal the ban on free samples.

Rather than second-guessing themselves over what they had done wrong or why Iverson had failed them, the companies, even while still lobbying, had already begun preparing plan B—litigation. Although their contents were, unfortunately, not disclosed in the course of discovery or pursuant to the MSA, a flurry of “privileged” “confidential” documents among lawyers during the last week in April make it clear that they were already shaping a lawsuit.371 Whether Iverson did not press his caucus as hard as he perhaps could have because cigarette industry lobbyists told him that the courts would take care of the matter is unknown.372 At the same time, taking no chances, Philip Morris was also preparing for the possibility that, at least until it prevailed in any litigation, it would have to stop running promotion programs in Iowa.373 Whereas R. J. Reynolds drafted a “script” by the end of April announcing that “[u]ntil the legislation can be clarified, we have chosen to stop all promotional activities” in Iowa,374 and Philip Morris in May drafted a letter to wholesalers in Iowa declaring that “[a]lthough PMUSA does not full [sic] agree with the scope of this law, we

369 Kurt Leib to Rick Redfield and Jim Williams to Haney Bell and Michael Shannon, Apr. 24, 2000, Bates No. 86102284. For the positions held by the officials, see Lorillard Tobacco Company, Table of Organizational Charts (July 2000), Bates No. 98915766.
371 E.g., D.H. Remes to P. Desel, Report from Joint Defense Counsel to Philip Morris In-House Counsel Reflecting Legal Analysis of Iowa Legislation Banning Promotion of Tobacco Products (Apr. 25, 2000), Bates No. 2074105247; B. Giles to H. Turner, Email from Philip Morris Employee to Philip Morris Employee Conveying Legal Analysis of Philip Morris Outside Counsel (Remes) Regarding Iowa Tobacco Control Bill and Its Impact on Philip Morris Promotional Activity (Apr. 27, 2000), Bates No. 2085090164B.
372 Iverson later stated that he had no recollection of the ban. Telephone interview with Stewart Iverson (Apr. 28, 2008).
373 E.g., email from Joe Murillo [Senior Assistant General Counsel] to Amy Rothstein [Senior Counsel Corporate Affairs], Subject: Re: Iowa Anti-Promotion Statute (Apr. 27, 2000), Bates No. 2080811674E; email from Thomas Garguilo [Marketing Manager] to Thomas Lauinger [Brand Manager], et al., Subject: Potential Iowa Legislation (May 1, 2000), Bates No. 2079168375.
374 [R. J. Reynolds], “Iowa Restrictions” (Apr. 28, 2008), Bates No. 525170354.
full [sic] intend to abide by the law,” and immediately discontinued its price promotions, Brown & Williamson Tobacco Corporation adopted a commercially and legally belligerent stance. On May 18, 2000, three days after Governor Vilsack signed the bill into law, it informed wholesalers and retailers in Iowa that it considered the “unacceptable” and “offending provisions to be unconstitutional and illegal” and was “confident” that it would “get them overturned” and prevail in a lawsuit that it and “other members of the tobacco industry” were filing in federal court on the grounds that the Iowa law violated federal cigarette laws. “Thus, we intend to continue in a ‘Business As Usual’ manner in Iowa to avoid any harm to our business or to our customers while we seek the injunction.” To be sure, Brown & Williamson cautiously added that “[w]e cannot give you legal advice as to whether you should choose to continue to participate in our programs,” observing that recipients might wish to contact their lawyer.

Philip Morris, R. J. Reynolds, Brown & Williamson, and Lorillard intended, shortly after Governor Vilsack had signed the bill into law on May 15, to file a lawsuit to overturn the ban on promotions to adults on the grounds that it was preempted by the Federal Cigarette Labeling and Advertising Act, which provides that: “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are in conformity with the provisions of this act.” As late as May 24, Reynolds had drafted a “Statement regarding complaint filed against the State of Iowa,” which announced that the four companies had filed suit that day together with two retail store owners in Iowa. Reynolds specified that the law, “[u]nder the guise of youth-smoking prevention,” prohibited “programs that are developed for and limited to adult smokers,” including price discounts (“buy-one-get-one-free offers and coupons”), distribution of lighters with a product message, and “sampling to adult smokers in age-restricted facilities.” The economic nub of the oligopoly’s complaint was that: “Given the extremely restricted environment in which we operate, promotional programs play a vital role in Reynolds Tobacco’s ability to compete for adult smokers’ business. These programs are also an important means by

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375 PMUSA, “Draft letter to all Wholesalers in the State of Iowa” (May 2000), Bates No. 2082186454.

376 Brown & Williamson Tobacco Corporation to Our Direct Buying Customers Servicing Stores in Iowa and Retail Customers with Stores in Iowa, “Iowa ‘Youth Protection’ Legislation” (May 18, 2000), Bates No. 82572356 (addressed to Faeth Whlse, Ft. Madison).

which retailers generate in-store traffic and sales of tobacco and other items.” The company alleged that the ban would cause “severe...and irreparable harm to manufacturers and the state’s retailers without materially advancing the goal of youth-smoking prevention,” which could “far more directly and effectively be served by means that do not restrict commercial trade and free speech.”

In fact, the suit was not filed on May 24 and when it was a week later, the cigarette manufacturers were not plaintiffs. Why they instead chose to choreograph the litigation—as their progenitor, the Tobacco Trust, had done in Iowa and elsewhere since the nineteenth century—as brought by two straw-men-retailers is not clear because the emails and memoranda that their lawyers exchanged during the latter half of May and that presumably shed light on this and other tactics were deemed privileged and not made public. For example, a “Series of emails concerning retailer participation in the industry lawsuit against the State of Iowa for passing legislation that bans cigarette promotion” initiated by Patricia Barald, an attorney at Covington & Burling (whose website proudly declares that she “has represented the tobacco industry in such matters as protection of first amendment rights...[and] preservation of highly confidential and proprietary trade secret ingredient and product formula information”), translucently identified the instigators and the instigated.

The complaint that was filed in federal district court in Des Moines on June 1 by Davis, Brown, one of Iowa’s highest-profile corporate law firms, in the names of two store owners in Council Bluffs and Sioux City, Missouri River border towns, repeated Remes’s false claim that the ban had been “added as a last-minute amendment” and even “at the eleventh hour.” To this error the oligopoly attached the non sequitur that the ban “has no relation to the new commission on tobacco use prevention and control that is the focus of the new law.” The State went to some pains to refute the innuendo that the provision

378 R. J. Reynolds Tobacco Company, Statement Regarding Complain Filed Against the State of Iowa (May 24, 2000), Bates No. 525170359/60.
379 See above Parts I-II.
382 Jones d/b/a The Filling Station v. Vilsack, Complaint, ¶¶ 2 and 12, at 1, 4 (S.D. IA Central Div., C.A. No. 4-00CV-90271, June 1, 2000), Bates No. 98091593/6. In their main appellate brief, the cigarette companies finally stated, marginally more accurately, that the provision was “a last-minute addition to House File 2565,” H-8900 passing “just
Democrats’ Decade in the Desert: 1997-2006

under attack was a helter-skelter, ill-conceived afterthought. Cathy Callaway, the first director of the Tobacco Use Prevention and Control Division of the Iowa Public Health Department, who, in her previous position as director of tobacco control and advocacy at the American Lung Association of Iowa from 1995 to 2000, had monitored the Iowa legislature’s activities regarding “this type of legislation,” gave an affidavit stating that “similar legislation was considered each and every year from 1996 up until the year 2000, when” it was “given careful consideration and thought” and passed. \(^{383}\)

The cigarette manufacturers behind the suit argued that the prohibited promotions were “a significant means” of their communications with adult smokers especially because of the federal ban on broadcast media advertising. In particular, the promotions supplied information such as price and “other brand attributes” and reinforced brand loyalty, brand switching, marketing of new brands, thus leaving consumers “better informed...and financially better off...” \(^{384}\)

The companies’ central legal claim was that the Iowa ban on distributing free samples and promotional items was precisely the type of state law prohibition based on smoking and health “with respect to advertising or promotion of any cigarettes” whose packages had been labeled in conformity with the Federal Cigarette Labeling and Advertising Act (FCLAA) that that congressional enactment preempted and was therefore invalid under the federal supremacy clause of the U.S. Constitution. \(^{385}\) Considerably less facially plausible was the First Amendment commercial speech claim that “the government may not impose

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\(^{383}\) Jones d/b/a The Filling Station v. Vilsack, Affidavit of Cathy Callaway, ¶ 1 and 2, at 1-2 (S.D. IA Central Div., C.A. No. 4-00CV-90271, Sept. 27, 2000) Bates No. 98091419/20. The State referred to Callaway’s affidavit. Jones d/b/a The Filling Station v. Vilsack, Defendants’ Statement of Undisputed Material Facts in Support of Defendants’ Motion for Summary Judgment, ¶1, at 1-2 (S.D. IA Central Div., C.A. No. 4-00CV-90271, Oct. 3, 2000), Bates No. 98091413/4. To be sure, Callaway did not identify the previous bills nor explain exactly how similar they had been. But see Kathie Obradovich, “Ban on Tobacco Freebies OK’d in House, But Has Dim Future,” WC, Apr. 14, 2000 (A3:1) (“House members have debated and approved the measure several times in the past two years, only to have the Senate refuse to consider it”).

\(^{384}\) Jones d/b/a The Filling Station v. Vilsack, Complaint, ¶ 20, at 6-7 (S.D. IA Central Div., C.A. No. 4-00CV-90271, June 1, 2000), Bates No. 98091591/8/9.

\(^{385}\) Jones d/b/a The Filling Station v. Vilsack, Complaint, ¶¶ 27-34, at 8-10 (S.D. IA Central Div., C.A. No. 4-00CV-90271, June 1, 2000), Bates No. 98091591/600-602.
restrictions on speech in order to keep its adult citizens in ignorance of truthful information about lawful products, even products it considers to be ‘vices.’ To the extent that the State’s goal is to ‘foster a social and legal climate in which tobacco use becomes undesirable and unacceptable’...and Section 142A.6(6) attempts to further that goal by restricting truthful and protected speech, it clearly and directly violates the First Amendment.” (The state countered this claim with the argument that the Iowa law in no way prohibited communications or advertising or promoting the sale of cigarettes, but merely prohibited giving them away. However, since the trial court ruled that the Iowa law was preempted, it never reached the free speech claim.)

In April 2001, liberal federal judge Robert Platt, a Clinton appointee, sustained the cigarette companies’ federal preemption claim chiefly because he regarded the State’s narrow interpretation of the term “promotion” in FCLAA as referring merely to display racks as “untenable” and “unsupported,” especially since it would have required him to treat the word as “superfluous....” More fundamentally, however, Pratt was left “not entirely convinced” that FCLAA’s purpose did not conflict with Iowa’s ban on free distribution because Congress intended “to generally protect the tobacco industry; with the banned promotional activities thus “encompassed in the general scheme of the FCLAA...the Court sees no way around the conclusion that FCLAA preempts” the prohibition. (That numerous critical contemporaries viewed FCLAA as “a shocking piece of special interest legislation” designed “to protect the economic health of the tobacco industry by freeing it of proper regulation” would not justify ascribing

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386 Jones d/b/a The Filling Station v. Vilsack, Complaint, ¶ 39, at 11-12 (S.D. IA Central Div., C.A. No. 4-00CV-90271, June 1, 2000), Bates No. 98091591/603-4.
387 The Filling Station v. Vilsack, Defendants’ Reply in Support of Motion for Summary Judgment, at 3-4 (S.D. IA Central Div., C.A. No. 4-00CV-90271, Nov. 9, 2000), Bates No. 98091341/3-4.
388 The Filling Station, Inc. v. Vilsack, Memorandum Opinion and Order, at A4-A5 (S.D. IA Central Div., C.A. No. 4-00CV-90271, Apr. 16, 2001), reprinted in Appellants’ Brief and Argument, Appendix, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001).
390 The Filling Station, Inc. v. Vilsack, Memorandum Opinion and Order, at A-11, A-12, A-13 (S.D. IA Central Div., C.A. No. 4-00CV-90271, Apr. 16, 2001), reprinted in Appellants’ Brief and Argument, Appendix, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001). The Attorney General had agreed not to enforce the ban until the court had ruled on its constitutionality. Id. at A-4.
391 “Cigarettes vs. F.T.C.,” NYT, July 9, 1965 (28) (edit.). See also “8 Congressmen Ask Cigarette Bill Veto,” NYT, July 17, 1965 (26); Elizabeth Drew, “The Quiet Victory
such an intent to Congress four decades later in the wake of the revolution in public knowledge about the health consequences of smoking, about the cigarette oligopoly’s conduct in perpetrating and perpetuating the mass mortality and morbidity of its customers and secondhand smoke victims, and in regulation of and societal attitudes toward smoking and the cigarette industry.)

In his appellate brief the Iowa attorney general, quoting the 1994 Surgeon General’s Report, placed great emphasis on the strategic advantage that handing out free samples had as a marketing device over mere advertising in its ability to put an addictive commodity directly into consumers’ hands—along with the lighter to light it. For example, one company’s marketing test revealed that households receiving free samples by mail increased their consumption by more than four times as much as a control group receiving only discount coupons.  

To be sure, the Surgeon General’s Report expressly analyzed sampling and specialty items as “promotional efforts.”  The State also reurged the argument it had unsuccessfully advanced in support of its motion for summary judgment that all that Congress had intended with FCLAA was to “control the dissemination of information to the public” in order to insure that warnings about cigarettes were given in a uniform and consistent manner; in contrast, nothing in that statute suggested that Congress wanted to relieve the cigarette industry of state regulation regarding free tobacco samples. In pleading for a narrow interpretation of “promotion,” the attorney general recognized that the statutory term could (as the cigarette companies argued) also be “interpreted broadly to include any type of marketing activity intended to increase cigarette sales,” thus preempting any state law that “thwarted efforts by the tobacco industry to increase tobacco sales....” But such an interpretation encountered the difficulty that “no one could seriously contend that the FCLAA preempts” state sales taxes or laws banning sales to minors. The key to understanding congressional intent regarding preemption was, as far as the Iowa attorney general was concerned, to be found in the explanation of legislative history contained in the 1969 Senate

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392 Appellants’ Brief and Argument at 6, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001).
395 Appellants’ Brief and Argument at 14, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001).
Democrats’ Decade in the Desert: 1997-2006

report on that year’s amendment, which inserted “promotion” into the preemption provision. The Senate Commerce Committee declared that this preemption “‘would in no way affect the power of any state...with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to state or local requirements or prohibitions in the advertising of cigarettes.” The State then argued that handing out free cigarettes, as conduct rather than dissemination of information, fell “in the same category” of non-preempted state police regulations from which Congress did not intend to protect cigarette retailers.

The appellate court did not specifically deal with this argument, which the cigarette oligopolists in their brief dismissed on the grounds that “one unremarkable sentence in a single report cannot turn a statute designed to prohibit state restrictions on cigarette advertising and promotion into a statute designed to give states carte blanche to use their ‘police powers’ to ban tobacco advertising and promotion.”

Later that year the U.S. Court of Appeals for the Eighth Circuit affirmed Pratt’s “essential holding” that the ban on free distribution was preempted by the FCLAA of 1969, which prohibited state laws from imposing any prohibition, based on smoking and health, with respect to the promotion of any cigarette packages labeled in conformity the federal law. Like Pratt, the appellate judges remained unpersuaded “by the State’s herculean efforts” to “carve out a meaning for ‘promotion’ that is less expansive than its apparent plain meaning, and yet conceptually different from ‘advertising.’” Moreover, they dismissed out of hand the State’s “dire prediction” that the court’s holding would entail imputing to Congress an intent to deprive the states of the “‘power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard.’” The Eighth Circuit panel nevertheless refused to take up the challenge even in dictum, preferring—since the plaintiffs had not contested such a prohibition—not to decide whether such a prohibition would also be preempted; instead, it left the State with the meager consolation that “[f]or a variety of practical reasons, we

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397 Appellants’ Reply Brief at 6, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001).
398 Appellees’ Brief and Argument at 20, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001).
399 Jones v. Vilsack, 272 F.3d 1030, 1039 (8th Cir. 2001). The appeals court did, however, reverse Pratt’s judgment that all of § 142A.6(6) was preempted rather than merely § 142A.6(6)(a)-(b). Id. at 1038-39.
Democrats’ Decade in the Desert: 1997-2006

tend to doubt that cigarette dealers would ever challenge” Iowa’s ban on giving children free cigarettes.400 Three years later the Iowa legislature essentially reinstated the restrictions on sampling from 1991.401

That the court rulings in the Iowa case were hardly the only possible interpretation was made clear in 2005 by the California Supreme Court, which held that a similar California law was not preempted because there was no clear Federal purpose to bar state regulation of the nonsale distribution of cigarettes to minors or adults. The vast distance between the California Supreme Court’s approach and the Eighth Circuit’s may be gauged by the following crucial analysis from the former opinion:

The problem with defendant’s contention that the “plain meaning” of section 1334 bars any state regulation of the free distribution of cigarettes is that, as defendant concedes, it is clear that Congress did not intend section 1334 to preempt state regulation of the distribution of cigarettes to minors. To the contrary, Congress has required states to ban tobacco distribution to minors as a condition of receiving federal funds for substance abuse treatment. ... There is no language in section 1334, however, that distinguishes between distribution to minors and distribution to adults. Hence, the state Attorney General here contends that the only way to effectuate Congress’s intent to bar distribution of cigarettes to minors is to draw a line distinguishing between “promotion” and “distribution.” Under this theory, states could not regulate actions intended to persuade persons to smoke a particular defendant’s brand of cigarettes, but it could regulate the actual transfer of the cigarettes not only to minors but also to adults. ...

State regulation of nonsale distribution of cigarettes would not conflict with the congressional purpose just described. Although national commerce in cigarettes would be substantially impeded if a tobacco company’s cigarette labeling and advertising had to be altered to comply with the laws of every state, that is not the case for state regulation of free distribution of cigarettes. Moreover, although Congress has enacted extensive legislation governing cigarette advertising, and has authorized the Federal Trade Commission (FTC) to impose further regulations, Congress has never enacted any comprehensive laws governing nonsale distributions nor authorized the FTC to do so. In view of the health hazards of smoking expressly recognized by Congress..., it would be unreasonable to conclude that Congress intended nonsale distribution of cigarettes to continue entirely without regulation. ...

First, in 1992 Congress enacted legislation requiring states to prohibit nonsale distribution of cigarettes to minors as a condition of receiving federal aid for state programs to treat substance abuse. ... This enactment shows that Congress did not regard

400 Jones v. Vilsack, 272 F.3d 1030, 1037-38 (8th Cir. 2001) (quoting Fed’n of Adver. Indus. Representatives, Inc. v. City of Chicago, 189 F.3d 633, 638 (7th Cir. 1999)).
the FCLAA as barring state regulation of nonsale distribution of cigarettes to minors.

Second, in 1995 Congress enacted a law requiring all federal agencies to prohibit nonsale distribution of tobacco “in or around any federal building.” ... Defendant here points out that Congress has the power to require certain conduct by federal agencies while prohibiting such conduct by state agencies. ... But it is difficult to conceive of a coherent policy that would bar nonsale distributions in or around federal buildings yet preclude states from barring such distributions on state property.

Third, although the FCLAA does not describe what powers are retained by the states, the high court in Lorillard asserted that Congress intended that the “[s]tates remain free…to regulate conduct with respect to cigarette use and sales.” ... If the FCLAA’s bar on state regulation of the promotion of cigarettes extends to barring state regulation of distribution, that prohibition could not logically be confined to nonsale distribution. Discount sales of cigarettes, sales accompanied by rebate offers, and the distribution of coupons entitling a holder to receive free or discounted cigarettes could equally be considered a form of promotion of cigarette sales and use. Thus, such a broad definition would infringe on the state’s retained powers to regulate cigarette use and sales.

Indeed, in terms of smoking’s adverse effect on health, there is very little distinction between the sale of cigarettes at full retail price, the sale of cigarettes at discounted prices, and the free distribution of cigarettes—all place cigarettes in the hands of the public. The FCLAA itself does not draw a distinction between sales of cigarettes and free distributions; it requires labeling of any package in which cigarettes are offered for sale “or otherwise distributed to consumers”..., and it defines the term “ ‘sale or distribution’ ” as including “sampling or any other distribution not for sale.”

Youth Access to Tobacco and Possession, Use, and Purchase Penalty Laws: 2000

Another tactic aimed at reducing youth access is penalizing youth for possession, use, and purchase (PUP) of tobacco. While Synar-type policies focus on reducing the supply of cigarettes to youth, PUP policies aim to stunt demand for cigarettes by introducing negative consequences that affect young smokers directly. Most tobacco-control advocates do not favor emphasizing PUP policy because they feel it reinforces the tobacco-industry messages that tobacco is for adults and implies that the individual holds sole responsibility for choosing to smoke. Currently there is no strong evidence that PUP enforcement reduces youth smoking rates.


403 Jean Forster, Rachel Windome, and Debra Bernat, “Policy Interventions and Surveillance As Strategies to Prevent Tobacco Use in Adolescents and Young Adults,” American Journal of Preventive Medicine 33(6S):S335-39 at S336 (Dec. 2007). For more detailed analysis of the ineffectiveness and counter-productiveness of punitive PUP laws,
Democrats’ Decade in the Desert: 1997-2006

By the 1999-2000 legislative sessions, anti-smoking groups’ ability to secure enactment of their agenda was marginally strengthened by the Master Settlement Agreement, under which the cigarette manufacturers were prohibited from lobbying against eight kinds of potential legislation, including: limitations on youth access to vending machines; enhanced prosecution of violations of laws prohibiting retail sales to youths; enforcing access restrictions through penalties on youths for possession or use; limitations on tobacco advertising in or on school facilities; and limitations on non-tobacco products designed to look like tobacco products such as candy cigarettes.404 The types of measures that the legislature was in fact able to pass—amendments to the cigarette sales law—turned out to fall largely within the scope of this framework.

The primary example of such legislation was S.F. 2366, which the Senate Human Resources Committee introduced and unanimously approved on February 28, 2000, both anti-smoking stalwarts Hammond and Dvorsky and pro-tobacco Senators Boettger, Bartz, and Schuerer voting for it.405 The bill’s chief components included: (1) making the use of a driver’s license by anyone under 18 to obtain cigarettes or other tobacco products a simple misdemeanor punishable by a $100 fine; (2) making it lawful for cigarette permittees to employ persons under the age of 18 to sell cigarettes;406 (3) striking the provision in the existing law requiring the city or county enforcing the prohibition on use, possession, or purchase of cigarettes by anyone under 18 to use the civil penalty (or criminal fine) paid for such violations for enforcement of this section of the cigarette sales law; (4) authorizing cigarette sales permit holders or their employees, if they have a “reasonable belief based on factual evidence” that a driver’s license presented by a person wanting to buy cigarettes is altered,


404 Master Settlement Agreement, § III (m) at 23 and Exhibit F (Nov. 23, 1998), on http://www.naag.org.

405 Senate Journal 2000, at 1:444. The bill was identical to Senate Study Bill 3206; http://www.legis.state.ia.us/GA/78GA/Legislation/SSB/03200/SSB03206/Current.html.

406 This provision, which sailed through all debates without any effort to strike and was enacted, accommodated cigarette sellers’ demands for cheap labor in the context of a contemporaneous dispute with the Attorney General’s Office, which took the position that under-18-year-old clerks did “possess” tobacco in violation of the law, but at the same time (helpfully) conceded that stores would have a hard time selling without teenagers. Thomas O’Donnell, “Minors Often Sell Tobacco in Iowa,” DMR, Aug. 19, 1999 (1A) (NewsBank). Perhaps to create the illusion of parity, the provision in the bill was paired with one exempting minors in sting operations from liability.

2960
Democrats’ Decade in the Desert: 1997-2006

falsified, or belongs to someone else to retain the license and deliver it within 24 hours to the appropriate local law enforcement agency; (5) authorizing courts to impose as an alternative to the scheduled fine a penalty of performance of community service or attendance at tobacco education classes for first or second violations of the prohibition against minors’ using, possessing, buying or trying to buy cigarettes or other tobacco products; (6) increasing the scheduled fines for the aforementioned violations from $25 to $50 for a first offense, from $50 to $100 for a second offense, and from $100 to $250 for third and additional offenses; and (7) increasing the criminal penalty for failing to pay these fines or to perform the alternative service/attend tobacco education classes from and to the same amounts. 407

When the Senate took up the bill on March 10, an amendment embodying a new bill was filed from the floor by Human Resources Committee chair Boettger. That S-5114 was cosponsored by Majority Leader Iverson and Minority Leader Gronstal signaled that it was a bipartisan leadership initiative whose passage in the Senate was secure. It differed in two major respects from the committee bill. First, it specified that the alternative penalty would be 30 hours of community service or tobacco education for a second violation and, more importantly, imposed for a third or subsequent offense, in addition to the scheduled fine, performance of 40 hours of community service and a 30-day suspension of the violator’s driver’s license. And second, it marginally strengthened the penalty for a retailer’s violation of the prohibition of selling to minors by mandating a permit suspension for a third and revocation for a fourth violation within three (instead of five) years. 408

Before the Senate voted on this amendment, Republican Senator Jeffrey Lamberti filed an amendment to it from the floor that imposed a fine (of $100 for the first offense, $250 for a second offense, and $500 for a third and additional offenses) on retailers’ employees for selling to minors. 409 Since Lamberti’s father was the founder of Casey’s General Stores, one of the largest cigarette sellers in Iowa, it was hardly surprising that he sought to bring the state’s coercive powers to bear on his family’s company’s employees, whose law-breaking

407 S.F. 2366, §§ 1, 2, 3, 4, and 9 (Feb. 28, 2000, by Senate Human Resource Committee).

408 S-5114, §§ 3 and 6 (Mar. 9, 2000); http://www.legis.state.ia.us/GA/78GA/Legislation/S/05100/S05114/Current.html. The driver’s license suspension penalty was apparently modelled after a similar provision enacted in Florida in 1997 (which also included community service penalties). 1997 Fla. Laws ch. 162, § 5(1), at 3050, 3053.

Democrats’ Decade in the Desert: 1997-2006

proclivities—which management was purportedly unable to suppress—exposed owners to liability: “‘If you don’t have some penalty on that clerk you’re never going to solve the problem.... It gives clerks an excuse not to sell to their friends.’”410 (Unfortunately for employers under a vicarious liability regime, as Lamberti later lamented, low-wage convenience store clerks “don’t give a damn.”)411 After the Senate had adopted both Lamberti’s amendment and the main amendment by voice votes, it passed the bill unanimously.412 The strong support that Robert Cramer (“‘We’re just pulling our hair out’ to stop tobacco sales to minors”),413 the president of Fareway Stores, Inc., a privately owned midwestern grocery supermarket chain—whose founders’ “biblical beliefs” purportedly keep the stores closed Sundays, but apparently do not extend to banning cigarette sales414—lent to the drivers license suspension proposal415 underscored tobacco retailers’ interest in penalizing everyone except themselves for sales to minors. Focused as they were on minors, the new provisions in no way transcended the kinds of government intervention to which the cigarette oligopolists were willing to pay lip service. Boettger, who regularly supported measures in the same range, leaped from the significant and empirically verified fact that “[i]f kids don’t start to smoke by the time they are 19 or 20, they probably are not going to” to the assertion that S.F. 2366 as passed by the Senate would “go a long ways towards deterring underage kids from trying to buy tobacco.” In contrast, Joe Bolkcom, one of the Senate’s leading anti-smoking militants, worried that the proposed law he had just voted for was too harsh: “‘It’s rather punitive to take a person’s license away. Young persons have reason to get around in their automobiles.’”416

Two weeks after the House Judiciary Committee had recommended passage,417 the full House debated the bill on March 29 and 30. The first amendment debated was a bomb shell: 14-term Democrat John Connors, an
assistant minority leader who had been chief of the Des Moines fire department and a lobbyist for the fire fighters union, proposed making it “unlawful for any person to ship or import into this state, or to manufacture, offer for sale, sell, distribute, transport, or possess within this state, cigarettes or tobacco products.” The amendment was actually voted on and lost on a non-record vote, but the Register’s report on the bill did not even mention the matter. (Some years later Connors recalled that the purpose of his amendment was to eliminate problems of enforcing the existing partial sales ban.) Soon after the vote the House postponed further debate until the next day because “lawmakers...wondered whether the bill could have unintended consequences” and in particular Representative Mary Mascher argued that “the offense of buying cigarettes could ultimately lead to jail time if a teen who has his license suspended decides to drive anyway and is caught behind the wheel. That type of...offense...could cause a criminal record. ‘I’m not sure what tobacco smoking has to do with driving....”

The next day debate focused on one amendment, filed by one Republican and three Democrats, which: (1) eliminated the driver’s license suspension; (2) made mandatory performance of eight hours of community work requirements for a first offense (unless waived by the court), and 12 and 16 hours for second and further offenses, respectively; and (3) eliminated the provision in the existing law imposing a schedule criminal fine for failure to pay the civil penalty. Some House members argued that the driver’s license suspension was a crucial tool, especially since, as Republican Daniel Boddicker self-ironically noted, otherwise all that “[t]hese kids see [is] a bunch of really uncool people like us saying that smoking is bad for them.” His Republican colleague, David Heaton, a restaurant owner and former president of the Iowa Restaurant Association, chimed in that the license suspension was an “innovative way to encourage minors to not start

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418See above ch. 26.
419House Journal 2000, at 1:1129-31 (H-8524) (Mar. 29). Whatever debate took place on the amendment could not have been very long since it began after 5:00 p.m. and ended before 5:30 p.m. Id. at 1:1128, 1132.
420Other papers, including the Cedar Rapids Gazette, failed to report on the debate at all.
421Telephone interview with John Connors, Des Moines (Apr. 23, 2008). Connors was unable to remember how many votes his amendment had secured.
423Republican Steve Sukup was chair of the Judiciary subcommittee to which the bill had been assigned and floor managed it; the Democrats were Keith Kreiman, Keith Weigel, and Dick Myers. House Journal 2000, at 1:1161 (H-8670) (Mar. 30).
smoking” because teenagers did not pay attention to money. Stripped of this new threat, the bill would not reduce smoking because the only way to deter young people was “‘to turn our community around in the attitude they have toward smoking.’” However, the initial enchantment with the Senate’s driver’s license suspension provision as a “good threat to hold over young smokers” dissipated as some representatives worried whether minors would “wind up with criminal records for smoking,” especially since, as Mascher insisted, they did not have “‘problems getting cigarettes.’” Going further, she was skeptical of the “‘Big Brother’” role into which the legislature was slipping: “‘I’m tired of penalizing kids every time they turn around.’” In the event, after the amendment had been adopted on a non-recorded vote, the bill was overwhelmingly passed on a vote of 86 to 9, such anti-smoking advocates as Doderer, Ro Foege, Ed Fallon, and Mascher voting Nay.

Back in the Senate, the partially defanged bill, especially the removal of the driver’s license suspension provision, encountered resistance from some militant anti-smokers. Connolly, for example, concerned about children’s “‘lifetime of addiction’” that sustained growth of the tobacco market, declared that “‘[a]t some point we have to fight that tobacco lobby, because that’s who’s weakening these bills.’” At the other end of the spectrum, Republican Jack Rife, long one of the Senate’s most belligerent smokers, failed to rise above a clownish contribution

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424 Jeff Zeleny, “Teen License Threat Rejected,” DMR, Mar. 31, 2000 (1M) (NewsBank). The information on Heaton’s occupational background is taken from Iowa Official Register: 1999-2000, at 67. Heaton’s commitment to transforming public attitudes toward smoking did not extend to banning smoking in his own Iris Restaurant in Mt. Pleasant, where he permitted smoking in the lounge. Telephone interview with Denise Daniels (who had recently bought the restaurant from Heaton), Mt. Pleasant (Apr. 23, 2008). Heaton’s commitment was also nowhere on display in 2007 when he opposed the dollar increase in the cigarette tax or in 2008 when he consistently voted against the bill to ban public smoking, in large part on the grounds that it would infringe on business owners’ rights. State Representative Dave Heaton, “Upfront” (Feb. 26, 2007); below ch. 35.


426 House Journal 2000, at 1:1161-63 (H-8670) (Mar. 30). Their failure to cite the legislative journals or newspaper accounts of the debates presumably caused Tiana Epps-Johnson, Richard Jones, and Stanton Glantz, The Stars Aligned over the Cornfields: Tobacco Industry Political Influence and Tobacco Policy Making in Iowa 1897-2009, at 67 (2009), on http://repositories.cdlib.org/ctcre/tcpmus/IA2009/, to reach the false conclusion that the “bill as introduced did not contain any particularly controversial provisions....”
to the public policy debate: “‘What do you suppose they did before they had cars? Take the horse away?’” And Boettger, the floor manager, seeking to diminish the number of defectors, presumably found favor with the state’s large-scale cigarette sellers by pointing out that the new fines for store clerks would “‘give the employer some clout to make sure (the law) is enforced.’” 427 The Senate, after having concurred in the House amendment on a 37 to 11 non-record roll call vote, again unanimously passed the bill. 428

Yet More Defeats of Anti-Tobacco Initiatives: 2000-2004

The National Cancer Institute is banning Iowa from its list of places where it will hold meetings because the Hawkeye State doesn’t have a statewide restriction on smoking. 429

One reform of the clean indoor air law against which the cigarette companies had not agreed to refrain from lobbying and which came nowhere near passage was an amendment to strengthen enforcement by authorizing law enforcement officers to enforce Code chapter 142B. Republican Senator Gene Maddox, a lawyer who disliked smoking, sponsored one such bill, which quickly met its demise in subcommittee in 1999. 430 Shortly thereafter the Senate State Government Committee introduced a similar bill, which would have limited enforcement to local law enforcement agencies. 431 The committee, of which Maddox was a member, approved the study bill by a vote of 8 to 3; Democrat Michael Connolly, the chamber’s most active anti-smoking advocate, voted for it, as did all his voting party colleagues, while Republicans split 3 to 3. 432 But once it became S.F. 420 and was referred to the same committee, the bill remained unacted on during the 1999 session and died in subcommittee in

Democrats’ Decade in the Desert: 1997-2006

After appropriating $9.3 million for tobacco prevention for fiscal year 2001 and $9.3 million for 2002, the legislature slashed funding to $5 million for 2003, 2004, and 2005, and increased it only marginally to $5.6 million for 2006 and $6.5 million for 2007; not until fiscal year 2008, when, with Democrats in control of both chambers of the legislature and a Democratic governor for the first time in 42 years, the cigarette tax was increased from 36 cents to $1.36 and the budget allocation for tobacco prevention was doubled to $12.3 million, did spending exceed the amount originally allocated eight years earlier. The low point of $5 million in 2003—which was largely achieved by retaining radically reduced funding for the Just Eliminate Lies anti-tobacco ads and prompted the director of the Division of Tobacco Use Prevention and Control to suspect that

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434 For 2002, whereas anti-smoking organizations argued that the state should be allocating at least $20 million of Iowa’s $55 million annual Master Settlement Agreement funds to tobacco use prevention and control, Governor Vilsack proposed cutting 16 percent ($1.5 million) from the previous year’s appropriation in order to balance the budget. Ironically, Senate President Mary Kramer and other Republican legislative leaders decided to protect the previous year’s funding. Tony Leys, “Vilsack Would Cut $1.5 Million from Anti-Smoking Programs,” DMR, Mar. 31, 2001 (1A) (News Bank); Tony Leys, “GOP Aims to Restore Tobacco Money,” DMR, Apr. 25, 2001 (4B) (NewsBank). S.S.B. 1271 contained the full $9.345 million appropriation as did its successor bill, S.F. 537, § 1(5)(a), which was filed Apr. 25 and unanimously passed the Senate Appropriations Committee and both houses twice. Senate Journal 2001 at 1:1328, 2:1352, 1532 (Apr. 25 and 26, May 7); House Journal 2001, at 1:1826, 1945 (May 3 and 7).

435 Representative Mary Mascher’s amendment to restore the $9.3 million lost on a party-line vote of 44 to 53, prompting her to accuse the majority of abandoning Iowa’s commitment to “‘helping keep kids off tobacco’” and to denounce the cutback as a “‘victory...for big tobacco...in Iowa.’” Lynn Okamoto, “Teens Rally at Capitol to Fight Cuts in Anti-Tobacco Program,” DMR, Apr. 4, 2002 (1B) (NewsBank). Similarly, in the Senate, Hammond and Fiegen and Fiegen, Bolcom, Hammond, and Tinsman filed two amendments to the same effect, which lost 23 to 27 and 23 to 24. When the Senate version of the bill returned to the House, Mascher filed yet another amendment to restore the funds, but it lost again. House Journal 2002, at 1:1141-42, 1385 (Apr. 3 and Apr. 11) (H-8504, H-8689; Senate Journal 2002, at 1:1092-93 (Apr. 10) (S-5422 and S-5479).

“tobacco companies helped persuade legislators to gut her budget”—corresponded to only 26.3 percent of the minimum recommended by the Centers for Disease Control, putting Iowa in 35th place; the high point of $12.3 million in 2008 still corresponded to only 63.5 percent of the CDC’s recommended level, placing Iowa 18th. By 2005 Iowa was devoting only 4.2 percent of its Agreement payments to tobacco control compared to the national average of 4.7 percent, which resulted from some states’ spending nothing and several states’ allocating more than 30 percent.

Because the few seats that Democrats gained at the November 2000 election were exactly balanced by ones that they lost, Republicans retained their majorities of 30-20 in the Senate and 56-44 in the House. The highest-profile Republican smoker and cigarette company accomplice to lose his seat was Senator Jack Rife, who was defeated after five terms. For the future of Iowa’s anti-smoking regulation arguably the most important accession to the legislature was Democrat Janet Petersen, who, before she became a public relations executive, had worked for the American Heart Association of Iowa in the mid-90s, lobbying for tobacco control. Ironically, she prevailed in the primary for a seat in the House from Des Moines over Kevin McCarthy, an assistant attorney general, who worked in Washington, D.C., as counsel on behalf of the state governments settling under the Master Settlement Agreement. During the 2008 legislative session, as House Majority Leader, McCarthy would enable Petersen to push forward with

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437 Tony Leys, “Bold Anti-Smoking Ads Face Extinction by State,” DMR, Apr. 22, 2002 (1B) (NewsBank). Even at its pre-cutback level of $3.3 million, the ad budget was a tiny fraction of the $86 spent by cigarette manufacturers to market their commodities in Iowa.


442 http://iowahouse.org/2008/03/31/member-profile-rep-janet-petersen/

443 “Petersen Defeats McCarthy,” DMR, June 7, 2000 (7A) (NewsBank).
a bill to bring Iowa’s anti-smoking legislation into the 21st century over the resistance of doubters who were unable to envision a majority for any measure stronger than repeal of local preemption.444

But such progress was eight years off. In the meantime, the solid Republican majority in both Houses insured further success to the cigarette oligopoly in killing off any and all serious threats. Undeterred, at the start of the 2001 legislative session Attorney General Miller once again announced a series of proposals to strengthen the state’s laws on the sale, advertising, and regulation of tobacco products toward the end of reducing the number of youth addicts and the toll of tobacco-caused mortality and morbidity. The catalog included: (1) maintaining the appropriation for tobacco use prevention and control programs at no less than $9.3 million; (2) banning non-face-to-face tobacco sales; (3) banning outdoor ads within 1000 feet of schools and playgrounds; (4) limiting point-of-sales ads to black on white; (5) removing any obstacles to local expansion of the clean indoor air law and cigarette sales law; (6) mandating that only fire-safe cigarettes be sold; (7) creating statewide licensing for tobacco sellers in order to relieve the administrative burden on cities and to produce more uniform enforcement; and (8) allowing local governments—if proposal (7) were not implemented—to collect adequate permit fees and fines to finance local enforcement.445

Unmistakably, in formulating his wish list Miller was not so politically naive as to imagine that a legislative majority was available for passage of a comprehensive statewide law protecting Iowans from secondhand smoke exposure. Yet, in spite of his non-utopian standards, he would not see any of his reforms enacted by the 79th General Assembly (and even the status quo of (1) was maintained for one year only). Significantly, in advocating local control under (5), the attorney general emphasized that he took “‘the position that localities have such authority and are not preempted by state statutes,’” but wanted that view clarified to “‘avoid unnecessary litigation and waste of resources.’” The reason for urging this point at this juncture was the emerging interest among various local governments in protecting the members of their communities from secondhand smoke. To be sure, Miller did not explain why local control was preferable for clean indoor air regulation, while it imposed a burden on localities with respect to administering the cigarette permit system. The attorney general’s neglect of the origins of local control in the great

444See below ch. 35.
compromise of repeal of the general ban on cigarette sales in 1921, when the legislature conferred on cities and counties the discretion to continue that prohibition in effect, was astonishing since no state agency either had been or would be granted such authority; consequently, statewide administrative centralization would insure the preclusion of the balkanization of permit issuance that the cigarette oligopoly abhorred but that survived as a legal possibility under the existing law. Consistently with this self-contradictory bifurcation, even Miller’s call for raising permit fees “from their 1921 levels of $50 to $100 a year” did not serve the purpose of renewing the legislature’s objective in 1921 of setting them high enough to deter the proliferation of sales locations, but merely to generate revenues sufficient to support administration and enforcement (although he was well aware that in 1921 “these permit fees constituted a serious investment”).

Despite the cigarette companies’ obligation under the Master Settlement Agreement to refrain from lobbying over a variety of youth-focused matters, the tobacco industry alone in 2000-2001 spent at least $286,872 on lobbyists in Iowa. Petersen herself experienced the cigarette industry’s power when in 2001 she (together with a Republican) filed her own modest bill to moderate somewhat the preemptive effect of the anti-smoking and cigarette sales laws on local control, and the House took no action on it at all after referring it to the Human Resources Committee, whose chair, Republican Daniel Boddicker, an electrical engineer, did not even bother assigning it to a subcommittee. Petersen’s bill, without repealing any language in the existing preemption provisions, would merely have specified that enforcement was to be carried out in compliance with the (aforementioned) codification of the constitutional home rule article—a change that would still have considerably constrained local...
action and might have created ambiguity and confusion for judges required, in litigation, to determine the effect of engrafting the general home rule provision onto the statute-specific preemption.

In 2002, Representative Shoultz filed the same bill that he had introduced in 2000 to constrict the definition of “bars” in which no no-smoking areas were required, but it was no more of a threat the second time than it had represented two years earlier. The strategy behind the behavior modification that H.F. 2128 sought to achieve was eminently reasonable: “In order to influence teen-agers and convince them not to smoke, you have to influence their parents and adults around them. And in order to make people stop smoking, you have to make it more inconvenient for them.” Nevertheless, Shoultz himself was almost fatalistically defeatist: “It’s gone to committee, but not a subcommittee, so I don’t imagine it will be discussed... I introduced a similar bill two years ago that didn’t go anywhere, either. Maybe sometime we’ll get a head of a committee who will want to do that. Some members of the (legislature) are afraid of offending people. I suppose they think their constituents won’t like it, so they don’t want to bring it up.” House Human Resources Committee chair Daniel Boddicker, unwilling to “move the bill,” confirmed Shoultz’s prediction: “I do not have enough committee time to do all the bills I have.” With passage of repeal of preemption of local control definitively precluded, Boddicker, conveniently enough, opined that “the issue should be handled on the local level.” Shoultz’s initiative did, however, take on a sharper profile because of its potential relationship to the mini-trend initiated in Ames and Iowa City to pass ordinances restricting smoking in ways that exceeded the mandates of the statewide law. Shoultz commented that his measure “might help prevent the scenario some Iowa City restaurant/bar owners are worried about, in which customers flock to Coralville to patronize restaurants that still allow smoking.” To be sure, he could have added that such a statewide ‘level playing field’ impact might have done away with the need for local control altogether.

Passage of the ordinance in Ames, which went into effect on August 1, 2001 and “augment[ed]” Iowa Code section 142.B by prohibiting smoking, inter alia and most importantly, in restaurants between 6:00 a.m. and 8:30 p.m., and of a similar ordinance in Iowa City, which went into effect on March 1, 2002, prohibiting smoking in restaurants more than 50 percent of whose sales revenues stemmed from food, sparked the formation in June of Tobacco Free Iowa with

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452See below ch. 33.
the assistance of a $1 million grant from the Robert Wood Johnson Foundation secured at the behest of the Lung-Heart-Cancer organizations. The new group set as one of its goals a statewide campaign to ban smoking in restaurants by means of local ordinances; hoping to be propelled by the momentum of the national movement, Tobacco Free Iowa selected Cedar Falls, Cedar Rapids, Des Moines, Grinnell, and Waterloo as the first five cities for its drive. Unwilling to wait for the Iowa Supreme Court’s decision on the Ames ordinance, the organization vowed, in case the Court struck it down, to shift the focus to the state level. That the initiative immediately encountered opposition from the Iowa Hospitality Association, which represented 7,000 restaurants and bars, could hardly have surprised any observer. Equally self-explanatory was the stance adopted by Philip Morris, the threadbareness of whose PR four years after the Master Settlement Agreement and even after it had finally been compelled to admit that smoking kills, descended to a new level when it pretended to justify its financing of the Ames test suit on the grounds that: “‘Smoking is a matter of choice.... We’re not advocates of smoking. We’re advocates of choice.’”

The few anti-smoking bills that were filed during the Eightieth General Assembly (2003-2004) were substantively bolder than their counterparts of 2001-2002, but procedurally they, too, made no progress at all. Democratic Senators Dick Dearden, Herman Quirmbach, and Robert Dvorsky’s S.F. 87 most importantly dismantled the entire feckless designated smoking area system of Iowa Code § 142B.2—which entrusted vital public health decisions to those with custody or control of public places, who in the vast majority of cases had no professional understanding of the health consequences of secondhand smoke exposure and made their decision based on self-regarding considerations of profitability—and, instead, simply prohibited smoking outright in public places and meetings. In addition, the bill redefined the key statutory term “public place” by deleting several exemptions and expanding coverage to include several places. The bill struck exemptions for: public places with less than 250 square feet of floor space; restaurants with seating capacity for fifty or fewer persons; portions

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454In addition, a study bill that would have doubled cigarette permit fees and authorized local governments to impose an application fee of up to $25 also saw no action beyond assignment to a subcommittee. House Journal 2003, at 1:385 (H.S.B. 174, Feb. 20, by Judiciary Committee, assigned to Boal, Kramer, and Greimann).
of retail stores where tobacco was sold; and private, enclosed offices occupied by smokers only even though non-smokers might visit them. S.F. 87 also added coverage of: outdoor bar or restaurant areas; public restrooms; childcare facilities; playgrounds; outdoor auditoriums, theaters, libraries, art museums, concert halls, arenas, and meeting rooms, as well as all corridors, hallways, and lobbies adjacent to these areas. 455 Unsurprisingly, the Senate took no action on this expansive measure beyond assigning it to a subcommittee, 456 while its House companion did not even make it to that stage. 457

At the 2004 session, House and Senate initiatives focused on local preemption repeal. At the Tobacco Use Prevention and Control Commission meeting on June 20, 2003, six weeks after the Iowa Supreme Court had struck down the Ames ordinance, 458 Linn County Democratic Representative Ro Foege, a non-voting commission member and former smoker, 459 called the decision “very surprising and...a major upset for tobacco control in Iowa.” Mentioning that he and another Linn County legislator had been discussing introduction of a bill to provide for local control, he stressed that this effort needed to be bi-partisan. Agreeing, Senator Joe Bolkcom from Iowa City, the other Democratic legislator on the Commission—the Republican members were absent—“offered to help in any way he could.” 460 Carrying through in 2004, Foege and conservative Cedar Rapids Republican Kraig Paulsen 461 (who in 2008 would vote three times against the bill that finally brought a relatively rigorous no-smoking regime to Iowa) 462

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455 S.F. 87 (Feb. 4, 2003, by Dearden, Quirmbach, and Dvorsky). Incongruously, instead of strengthening owners’ duty to enforce the ban on smoking, the bill struck the weak language requiring them to “make reasonable efforts to prevent smoking” by posting signs and arranging seating accordingly, and merely required them to post signs.

456 Senate Journal 2003, at 1:185 (Feb. 5).


458 See below ch. 33.


460 Tobacco Use Prevention and Control Commission Meeting, Minutes, June 20, 2003 at 1 (copy furnished by Bonnie Mapes, Director, Tobacco Use Prevention and Control Division, IDPH).


462 See below ch. 35. Perhaps Paulsen supported this local control measure not because of its potential for prohibiting public smoking, but because of his belief that “[t]he most effective government is government closest to the people.” http://www.kraigpaulsen.com/positions.htm (visited May 5, 2008). In 2011, after Republicans had gained the majority, Paulsen became House speaker.
filed a bill in the House to create considerably more local control under § 142B.6. Without repealing the preemption provision, H.F. 2004 would have amended it so that the statute, instead of superseding local ordinances that were inconsistent or conflicted with it, would have superseded only those that were “less restrictive”; local governments were therefore authorized to adopt, implement, and enforce more restrictive laws and regulations. Assignment to a subcommittee two days after filing, however, was as far as this bill progressed. A month later, veteran anti-smoking Senate Democrats Dvorsky and Bolkcom filed a short bill that would have tacked on a new section to § 142B.6 that would have empowered local governments, “notwithstanding any conflicting provision of this chapter,” to adopt ordinances that “may establish more specific or stringent controls, additional prohibitions, or increased penalties relating to smoking in a public place”; their bill specifically authorized the adoption of ordinances that limited or eliminated the statute’s exemptions for bars. Like the House bill, S.F. 2130 never saw any action beyond assignment to a subcommittee. Hard lobbying for local control by anti-smoking activists at the statehouse in early March failed to revivify either measure.

The 2003 legislative session also witnessed several unsuccessful efforts to raise Iowa’s cigarette tax, which at 36 cents per pack had not been increased since 1991 and ranked 29th among all states. At the beginning of the year Attorney General Miller proposed a 25-cent increase to fund drug treatment and other programs. Unsurprisingly, the Republican legislative leadership immediately rejected the initiative especially after anti-tobacco organizations proposed a $1.00 increase. The chair of the House Ways and Means Committee, Republican Jamie Van Fossen, repeated pro-smokers’ all-purpose oppositional mantra: “What’s the goal? ... If we want people to quit smoking, let’s make it illegal.” Undeterred by the hopelessness of the undertaking, several legislators quickly filed bills, at least three of which, including Senator McCoy’s and Representative

466 Senate Journal 2004, at 1:261 (Feb. 17).
Democrats’ Decade in the Desert: 1997-2006

Foege’s, provided for the full $1.00 raise. Predictably, none of these measures made any progress, but on March 12, Senator Larry McKibben, the Republican Ways and Means Committee chairman, provocatively proposed raising the cigarette tax by 25 cents together with a half-cent increase in the state sales tax in order to institute a flat-rate income tax and overhaul the property tax. Even Iverson, the arch-enemy of tax increases, was willing to consider the cigarette tax because the other elements would promote jobs and growth. Senate Minority Leader Gronstal pilloried the proposal as raising poor people’s taxes in order to cut rich people’s. Nothing came of any of these proposals in 2003 or of Governor Vilsack’s in 2004 to raise the cigarette tax by 60 cents; and even when Republican Senator Tinsman and Representative Heaton observed in 2004 that it would have to be raised to help finance Medicaid in fiscal year 2006, and Democrats criticized them for delaying the inevitable, House Majority Leader Chuck Gipp squelched that discussion as premature. In the event, Democrats would remain unable to increase cigarette taxes until they gained control of both chambers in 2007.

After Years of Failing Stings, Iowa’s Biggest Cigarette Retailers Negotiate Wholesale-Rate Penalties for Selling to Minors: 1997-2003

Cigarettes are not just habit forming—the body builds up a requirement for them. Twenty million smokers cannot do without their weed.

Take the example of a man going to work in the morning.

It’s pouring with rain. There are six cars already parked outside the shop. So, there are at least 90 yards to walk back.

Would he stop for a newspaper? Would he get out for a Kit Kat?

Addicted

The answer is probably No, but he would stop for his fags, because he is addicted to


cigarettes.

And while buying a pack, he takes a newspaper and a Kit Kat.

With 20 million regular smokers in this country, there is an enormous traffic opportunity built up exclusively on tobacco—and a lot of it could come your way.\footnote{George Mackin [Philip Morris U.K. sales director], “High Customer Traffic Built on Cigarettes,” \textit{CTN}, Dec. 4, 1981, at 25:1-6 at 1. A Philip Morris lawyer, who foresaw that “this sort of mistake could cause us a lot of problems,” quickly engaged in damage control by asserting that Mackin had permitted a journalist who attended a retailers meeting at which Mackin had spoken to use his name as a by-line although the journalist had written the article, whose contents Mackin had failed to check. J. Hartogh to Donald Hoel (Feb. 9, 1982), Bates No. 2024950723.}

Anti-tobacco advocates may have failed to achieve any legislative gains during the Eightieth General Assembly, but the cigarette industry’s lobbying enabled it at the very least to lighten the burden of violating the no-sales-to-minors law. The origin of what became a dual-track judicial and legislative campaign to undo the penalties imposed on cigarette retailers by prosecutions triggered by a rising volume of sting operations was the chorus of complaints from the relatively large number of businesses that, having reached their second violation, faced suspension of their cigarette sales permits for 30 days, which, they alleged, could cost them as much as $20,000, including the loss of ‘traffic’—that is, the loss of sales of other commodities that cigarette buyers no longer bought because they were buying them in some other store in which they could also get cigarettes.\footnote{Telephone interview with Donald Stanley, Assistant Attorney General, Des Moines (May 19, 2008). Stanley was chiefly responsible for prosecuting these cases.} Jim Henter, the lobbyist for (and president of) the Iowa Retail Federation, expressly mentioned this loss of “traffic” as affecting even mom-and-pop stores because people “with a habit” would go elsewhere to get their candy bars, etc.\footnote{Telephone interview with Jim Henter, Des Moines (May 23, 2008).} According to James West, the lobbyist for the Iowa Grocery Industry Association (whose membership included both the large convenience store chains, Casey’s and Kum and Go, and Hy-Vee and Wal-Mart),\footnote{http://www.iowagrocers.com/boardofdirectors.cfm (visited May 21, 2008).} retailers had been especially concerned about the “tremendous difference” in the size of the financial penalty resulting from a permit suspension depending on the volume of cigarette sales and total volume of business in individual stores: in particular, it was “unfair” that the penalty was so severe for convenience stores, a relatively large proportion of whose sales derived from cigarettes, whereas a permit suspension for stores with relatively small sales was
not a problem.\textsuperscript{477}

Such frank self-pleading can be amusingly contrasted with the reaction of a Hy-Vee store manager in Cedar Rapids, who, when confronted with a 30-day permit suspension in December 2000—the first ever imposed in Iowa’s second largest city—“pleaded with the City Council to ease his customers’ pain.” Specifically, he requested permission to “serve the 30-day suspension after the holidays because it would be too much stress for regular customers to be unable to buy cigarettes during the most stressful time of the year.” Why customer-addicts, whom retailers otherwise regarded as unfaithful turn-coats who, at the slightest interruption of their drug supply, immediately and permanently ran off to the next best supplier, suddenly became ignorant of a mercantile universe outside of their one and only Hy-Vee store and would be forced to go cold turkey, the manager did not explain. (Nor did he need to: “The city granted the request, but that doesn’t mean city officials were buying in to the ‘cigarette stress’ excuse.”)\textsuperscript{478}

**Compliance Check-Triggered Permit Suspensions Galvanize Retailers**

Compliance checks of the type that cigarette sellers rejected owed their existence to the so-called Synar amendment to the 1992 Alcohol, Drug Abuse and Mental Health Administration Reorganization Act, which required the states to enact laws making it unlawful to sell tobacco to persons under 18 and annually to conduct random unannounced inspections to insure compliance with these laws. A state’s incentive to comply with these requirements was the prospect of losing a significant proportion of its federal substance abuse prevention and treatment block grant funds for non-compliance.\textsuperscript{479} Because the U.S. Department

\textsuperscript{477}Telephone interview with James West, Des Moines (May 21, 2008).

\textsuperscript{478}Pam Hinman, “C.R. Tough on Tobacco Sellers,” *Gazette* (Cedar Rapids), Dec. 9, 2000 (1B) (NewsBank). The council had not previously had a policy as to when the suspension had to go into effect; it then adopted a policy requiring the suspension to take effect one week after the council approved the resolution imposing the suspension. However, ever solicitous of haplessly victimized local merchants—the clerk handling cigarette permits “sympathize[d] with business owners who suffer the penalty for an employee’s actions”—the council did provide for requests for exceptions from the new rule, so long as they were made before the council vote. \textit{Id.}

of Health and Human Services did not publish regulations until 1996 setting a goal of lowering retailer failure rates of 20 percent within several years,\textsuperscript{480} inspections did not begin until that year.\textsuperscript{481} Through the end of the 1990s Iowa was not one of the few states that achieved that target rate, its retailers’ non-compliance rate reaching 50, 40, 27, 36, 33, and 29 percent in fiscal years 1996, 1997, 1998, 1999, 2000, and 2001, respectively.\textsuperscript{482} Indeed, by 1999, Iowa was due to lose $5 million of its block grant.\textsuperscript{483} Consequently, toward the end of October 1999, the Public Health Department, recognizing that “filing charges for selling tobacco to minors ‘is not being done locally,’” decided to charge merchants directly. In September IDPH began sending warning letters to retailers who had been caught in stings but not prosecuted locally, even though under the law the department should have prosecuted them for the $300 penalty for the first violation.\textsuperscript{484} By March 2000 IDPH had issued warning letters to 462 retailers, but subjected only eight to the money penalty, which otherwise would have entailed


\textsuperscript{481}In August 1997, a newly formed anti-tobacco organization in Iowa City stated that “[e]nforcement hasn’t happened on a local level.” Jim Jacobson, “Anti-Smoking Group Wants Tougher Enforcement of Youth Tobacco Laws,” Gazette (Cedar Rapids), Aug. 12, 1997 (1B) (NewsBank).

\textsuperscript{482}“Buying Tobacco Gets Harder Every Year for Minors in Iowa,” Gazette (Cedar Rapids), Nov. 29, 1997 (5B) (NewsBank); Thomas O’Donnell, “Tobacco Checks Barely Under Goal,” DMR, Mar. 15, 2000 (5B) (NewsBank); CSAP: State Synar Non-Compliance Rate Table FY 1997-FY 2005, on http://prevention.samhsa.gov/tobacco/synartable_print.htm (visited May 21, 2008). See also J. DiFranza and G. Dussault, “The Federal Initiative to Halt the Sale of Tobacco to Children—the Synar Amendment, 1992-2000: Lessons Learned,” TC 14:93-98 (2005). In its 1998 grant application, Iowa stated its goal of lowering buy rates from 35 percent in fiscal year 1997 to 20 percent by 2000. In addition to reporting that IDPH and a tobacco control coalition had (unsuccessfully) tried to repeal the state cigarette sales law, the application noted that Cedar Rapids and Indianola were the only places in which law enforcement officers had taken the lead in independently conducting inspections. Highlights of 1998 Federal Substance Abuse Prevention & Treatment Application, Attachment 6: Tobacco Sales to Minors and Enforcement (Iowa) at 1, 2 (1998), Bates No 2064866298/9.


Democrats’ Decade in the Desert: 1997-2006

a 30-day suspension.485

One of the very few towns to make a strong record of prosecuting tobacco violations was Indianola, whose city council made it a priority. Unlike other city councils, Indianola’s—which, notably, had also been one of the last to prohibit the sale of cigarettes into the 1930s—was undeterred by the fact that strict enforcement was “‘not a popular thing to do for your business owners.’” The resulting decline in violations by two-thirds encouraged the city to persist.486

Indeed, by early 2001 Indianola had gone where no other town in Iowa (or perhaps in the United States) had gone in recent years by revoking for one year the permits of two stores (a Wal-Mart and a Phillips 66 gasoline service station) for having been caught selling tobacco to minors four times during the previous three years. To be sure, in the spirit of the city’s plan to generate a “‘learning experience’” rather than impose a punishment, the firms agreed not to contest the charges in exchange for the council’s possibly reinstating their permits in less than a year if they were able to insure that minors could no longer buy tobacco.487

Overlapping chronologically with the Synar checks was the nationally unique system of compliance checks created by the Food and Drug Administration in 1996 when it asserted jurisdiction over cigarettes and smokeless tobacco.488 In particular, the regulations, which went into effect on February 28, 1997, prohibited retailers from selling these commodities to anyone under 18 and required them to check the photographic identification of anyone under 27.489

From August 1997 until March 2000 (when the U.S. Supreme Court ruled that the FDA lacked jurisdiction over tobacco), the FDA, through contracts it entered into with state agencies, conducted 191,294 checks of more than 123,000 retailers, which uncovered a violation rate of 26 percent. Iowa, where the FDA paid IDPH to conduct 6,975 stings, witnessed an above-average 34 percent violation rate.


488 In the late 1990s Synar checks and compliance checks also merged in Iowa. Telephone interview with Janet Zwick, Des Moines (June 2, 2008). Zwick had for many years been the director of the Division of Substance Abuse and Health Promotion at the IDPH and in charge of tobacco use prevention and control.

489 Federal Register 61(168):44396, 44616 (Aug. 28, 1996) (21 CFR §§ 897.14(a) and (b)(1)).
In contrast to the financial sanctions under Iowa law, the FDA’s civil money penalties, which kicked in after a notice of violation was sent for a first violation, were hefty: $250, $1,500, $5,000, and $10,000, for second, third, fourth, and fifth violations, respectively. For the more than 5,600 penalties the FDA sought retailers paid more than $1,000,000.490

Just as the federal government had given the State of Iowa an incentive to restrict youth access to tobacco, the state legislature passed that incentive down the line to retailers of tobacco-caused morbidity and mortality. The compliance regime in Iowa did not begin to reduce this huge volume of violations until, in the wake of the Master Settlement Agreement, the legislature in 2000, in addition to creating the legal framework for compliance checks,491 appropriated the aforementioned $9.3 million to IDPH for tobacco use prevention and control and directed that agency to dedicate sufficient resources to promote and insure retailer compliance with tobacco laws relating to persons under 18.492 IDPH’s allocation of about $1.4 million of the appropriation to the Alcoholic Beverages Division for tobacco retailer enforcement,493 which was implemented by providing police and sheriff’s departments $50 for each of two annual compliance checks of the state’s 6,000 tobacco retailers, was largely driven, as Rants observed, “by the fact that Iowa hasn’t done too well as far as keeping tobacco out of juveniles’ hands.”494 The result was that the non-compliance rates began to decline, reaching 18


4922000 Iowa Laws ch. 1221, § 2(1), at 672, 674. This same language reappeared in appropriations bills in the following years. E.g., 2003 Iowa Laws ch. 783, § 1(5)(a), at 738, 739.

493IDPH Tobacco Use Prevention and Control Division, FY 06 Projected Budget Allocations Compared with 2001 Budget Allocations (furnished by Bonnie Mapes, Division Director, May 21, 2008). Mapes believed that the amount budgeted to ABD was the same for 2000. Email from Bonnie Mapes to Marc Linder (May 21, 2008).

Democrats’ Decade in the Desert: 1997-2006

percent in fiscal year 2002, 11 percent in 2003, and 5 percent in 2004.\textsuperscript{495} Although state officials denied any responsibility for the decline, some businesses ascribed the two-percent drop in the number of cigarettes sales permits in 2002 in part to more intensive enforcement. Ironically, ABD’s response unintentionally confirmed the basis of the complaint by the Iowa Attorney General’s Office that many local governments were not imposing the mandatory civil penalties under the cigarette tax provisions in Iowa Code section 453A.\textsuperscript{496}

“Our policy has never been to go out and write a lot of tickets... Our policy has been to have the retailers comply' voluntarily.”\textsuperscript{497}

The statewide sting program, according to ABD’s administrator, Lynn Walding, represented a “‘drastic public policy change’”\textsuperscript{498} that was not based on any change in the law: “‘There just wasn’t any actual enforcement.’”\textsuperscript{499} Indeed, so stillborn was the enforcement of the 1991 amendments to the cigarette sales law that when, in May 1998, the Johnson County Attorney Patrick White and County Health Department director Graham Dameron announced that they had “found a first-of-its-kind way to hold businesses accountable if their employees sell tobacco products to a minor’’\textsuperscript{500} the Cedar Rapids Gazette editorialized that it was “amazing how something so obvious can seem so enlightened.”\textsuperscript{501}

White pointed out that until then “generally only” underage buyers and the clerks who sold them tobacco were fined, while the cigarette sales permittee often escaped liability. By bringing such cases to the city councils to hold hearings and impose fines, suspensions, and revocations, White intended to “‘try to stimulate more license holder interest in stopping the sales.’” Declaring that he was “‘not aware that this has been attempted in other locations,’” White planned to carry out stings under “a little-used state law (Chapter 453a.22),” but would need city council

\textsuperscript{495}CSAP: State Synar Non-Compliance Rate Table FFY 1997-FFY 2005, on http://prevention.samhsa.gov/tobacco/synartable_print.htm (visited May 21, 2008). For 2005 and 2006 the rates were 11 and 8 percent, respectively.

\textsuperscript{496}See below.


\textsuperscript{498}Anti-Tobacco Program Pays,” DMR, Nov. 7, 2000 (5M) (NewsBank).


\textsuperscript{501}“Treat Tobacco Vendors More Like Liquor Dealers,” Gazette (Cedar Rapids), June 16, 1998 (4A) (NewsBank) (edit.).
members’ cooperation. Whether such cooperation would be forthcoming was as yet unclear: when the Solon city attorney had broached the subject a few weeks earlier, the mayor even “questioned the validity of any ‘verdict’” by a council, whose members were not judges. And an official in neighboring Linn County seemed to believe that he was observing a dubious scientific experiment when he allowed as his county “might be interested in the procedure if it worked in Johnson County....” Ten weeks later, when White and Dameron informed the county’s almost 150 cigarette retailers that they would soon begin conducting compliance checks, at least one member of the Iowa City Council reflexively adopted merchants’ position that greater fines for underage buyers was a superior way to deal with teenage smoking: “I don’t know how much more responsible business can be when they’ve trained their employees.... (The business owners) can’t be there 24 hours a day.” In the event, even as Iowa City began conducting stings in the second half of September 1998—of the first six retailers checked one sold to the minor—it seemed more interested in targeting possession by minors than sales by merchants.

The goal of the new public policy was, according to ABD Administrator Walding, to “change the social consciousness of not only kids who are thinking


504 Brian Sharp, “Tobacco Enforcement Increases,” *ICP-C*, Sept. 21, 1998 (3A:2-7, 4A:3-5). The city attorney’s office recommended that the city council pass an ordinance adding a local possession charge to the state law so that the city could collect fines to be used for additional enforcement. During the first six months of 1998 the city police had cited underage smokers 107 times. To be sure, enforcement was undermined by the police’s lack of staff and equipment to be able to check for prior possession offenses at the time of issuing the tickets. Consequently, most citations were written as first offenses, thus eliminating the deterrent of the progressive fine. Ten years later, the Iowa City police still lacked such a capacity and were therefore still issuing first offense citations to minors with prior violations. Email from Sgt. Troy Kelsay, Iowa City Police Dept. to Marc Linder (Apr. 28, and May 8, 2008). Yet as early as 2000 a judge had had to suggest that police mark tickets as simple misdemeanors so that judges could exercise the option of sending teenagers to anti-smoking classes. The suggestion was prompted by the fact that only 50 of 128 underage smokers ticketed at the Iowa State Fair appeared before a judge; the others merely paid a fine because the police had written the tickets in such a way that a court appearance was not necessary. “Most Teen Smokers Cited at Fair Paid Fines,” *Tribune* (Ames), Oct. 13, 2000 (B5:3-5).
of smoking, but the retailers so that they think twice before making a sale.\textsuperscript{505}

The biggest cigarette merchants, however, appeared to resist having their social consciousness raised. During fiscal year 2001, the number of violations discovered in the course of sting operations at four leading chains in Iowa—Casey’s (convenience store), Kum and Go (convenience store), Hy-Vee (supermarket), and Wal-Mart—amounted to 102, 49, 45, and 11, respectively (which may be an understatement since the database includes almost no checks for the latter half of 2000). In fiscal year 2002, the number of violations at these four sellers changed in different directions: 66, 60, 44, and 17, respectively; but by fiscal year 2003, when the number of checks had been halved, the number of violations also dropped sharply: 44, 23, 21, and 6, respectively. Even more relevantly, just within fiscal year 2001 (or, more accurately, the first half of 2001), the number of second violations, which, if the first violations had been promptly prosecuted, would have resulted in 30-day permit suspensions, amounted to eight for Casey’s, five for Kum and Go, two for Hy-Vee, and one for Wal-Mart. Similarly, within fiscal year 2002, second violations for these four chains numbered seven, five, four, and three, respectively, while in fiscal year 2003 the numbers dropped to two, one, one, and one.\textsuperscript{506} To be sure, these large chains’ liability was vastly diminished by the fact that violations were counted on a per permit (store), rather than a corporate-wide, basis.\textsuperscript{507} (Some sense of the

\textsuperscript{505} “Anti-Tobacco Program Pays,” DMR, Nov. 7, 2000 (5M) (NewsBank).

\textsuperscript{506} http://www.iowaabd.com/search/results_comp.jsp (visited May 20, 2008). In tandem with the legislature’s reduction of IDPH’s tobacco use prevention and control appropriation from $9.3 million to $5 million from fiscal year 2002 to 2003, the allocation to ABD for enforcement was reduced from $1,514,644 to $1,000,000. As a result, ABD reduced annual checks from two to one, but did conduct a follow-up check of those sellers found non-compliant on the first check. This protocol continued until fiscal year 2008, when, with the increase of IDPH’s tobacco use prevention and control appropriation to $8,800,000, the enforcement budget was increased to $1,150,000 and the two-check a year system was reinstated. Tobacco Use Prevention and Control Commission Meeting, Meeting Briefing (June 6 and Aug. 16, 2002), on http://www.legis.state.ia.us/GA/79GA/Interim/2002/brf/toba.htm (visited May 22, 2008); email from Nicole Gehl to Marc Linder (May 23, 2008); email from Lynn Walding, ABD director, to Marc Linder (May 23, 2008).

\textsuperscript{507} This conclusion implicitly underlay the decision in a case involving the question as to whether violations could be aggregated with regard to a chain that closed one of its stores and opened a replacement store 1,200 feet away, both of which stores sold cigarettes to minors. If corporation-wide aggregation were permissible, the Iowa Supreme Court would not have devoted the whole opinion to determining whether the two stores were one place of business. Nash Finch Co. v City Council of the City of Cedar Rapids, Iowa, 672
potential sensitivity of various types of stores to a permit suspension can be gleaned from the percentage of total sales accounted for by tobacco at the 2002 Retail Trade Census: convenience (25); gas station/convenience (12); grocery (3); general merchandise (3); supermarket and other grocery (2); pharmacy/drug (2).\textsuperscript{508}

Although until this time few 30-day suspensions had been imposed, retailers were very “upset” over the ones that had been, especially since the one-month loss for a large-volume seller such as Kum and Go could amount to $30,000.\textsuperscript{509} The Attorney General’s Office was deeply dissatisfied with enforcement at the local level because in many instances city councils and county boards of supervisors (before which, as the entities that issued the permits, local prosecutors or the Attorney General’s Office had to bring the cases) refused to impose the monetary penalties and permit suspensions that the law mandatorily required. Local governments exercised discretion that they lacked or knowingly ignored the statutory requirements in some instances because city officials themselves were on good or family terms with or were themselves the business owners in question or, especially in smaller towns, because they did not want to burden the only convenience or grocery store.\textsuperscript{510} Since at least the early 1990s officials at IDPH

\textsuperscript{508}U.S. Census Bureau, 2002 Economic Census: Retail Trade, Subject Series: Product Lines: 2002, at 61, 90, 57, 132, 58, 78 (Oct. 2005), on http://www.census.gov/prod/ec02/ec0244slls.pdf. These national data, which refer only to establishments that sold tobacco, are somewhat overstated because they include all tobacco products and not just cigarettes. At one national convenience store chain, QuikTrip, tobacco sales accounted for about 35 percent of non-fuel sales nationally. Patt Johnson, “Pull Out ID: Walgreen to Card All Smokers,” \textit{DMR}, May 12, 2001 (1A) (NewsBank).

\textsuperscript{509}Telephone interview with Brian Meyer, Des Moines (May 29, 2008). Meyer, who in 2008 was a Des Moines City Council member and legal counsel to House Majority Leader Kevin McCarthy, was an Iowa assistant attorney general from 2003 to 2006 after completing an internship at the Attorney General’s Office.

\textsuperscript{510}Telephone interview with Donald Stanley, Iowa assistant attorney general, Des Moines (May 19, 2008); telephone interview with Andrew Chappell, Johnson County assistant county prosecutor, Iowa City (May 20, 2008). Although, as Stanley repeatedly instructed city council members, the penalties were mandatory and could not be modified or waived, often they imposed none and/or engaged in “a form of plea bargaining” with violators. In at least one instance a city councillor, who had previously worked for one of the violators before the council, stated at a meeting dealing with five violators, including Casey’s and Kum and Go, that “she doesn’t like the State’s concentration on the stings” and that “employers do not sell liquor or cigarettes to minors,” adding that she “felt these were isolated incidents during a busy time of the evening.” Monticello, Iowa, City
Democrats’ Decade in the Desert: 1997-2006

had also been acutely aware of—but ultimately unable to overcome—city councils’ refusal to enforce the law largely because members did not want to get on the wrong side of their local merchants.\(^511\)

**Kwik Shop, Inc.’s Frivolous Statewide Litigation Campaign**

The test case by which cigarette retailers in Iowa launched their judicial challenge to penalties featured Kwik Shop, Inc., a Kansas corporation that operated 44 retail convenience stores/gas stations throughout Iowa.\(^512\) Significantly, Kwik Shop was a division of the Kroger Company, one of the largest food retailers in the United States, which, however, did not own supermarkets stores in Iowa.\(^513\) In 2001, three Kwik Shops with cigarette sales permits were located in Burlington, a Mississippi River town with a population of about 27,000. In May and June of that year the Burlington Police Department conducted a compliance check in each store: one passed both times, one failed once, and one failed both checks.\(^514\) Kwik Shop’s failure rate was high elsewhere in Iowa as well: in fiscal year 2001 it failed 24 of 77 compliance checks outside of Burlington. In Burlington, it was not until 2006 that all its stores passed all the annual checks; overall, from 2001 until 2007, Kwik Shop failed 12 of 34 stings in Burlington.\(^515\) A major in the Burlington police was unable to muster empathy

\(^511\) Telephone interview with Janet Zwick, Des Moines (June 2, 2008) (former IDPH official in charge of tobacco use prevention and control). When asked why city councils had failed to enforce the no-sales-to-minors law in the 1990s, the head of ABD, which oversees enforcement of the cigarette sales law, replied: “The simple answer is that public support for the tobacco initiative did not exist at that point in time. That position galvanized when over 80 percent of the public identified themselves as non-smokers, and as funds became available from the master tobacco settlement for enforcement efforts.” Email from Lynn Walding to Marc Linder (June 3, 2008).

\(^512\) Kwik Shop, Inc. v City of Burlington, Iowa, slip op. at 1-2 (Des Moines Cty Dist Ct., Case No. CVEEQ004523, Sept. 27, 2002); Rick Smith, “Cigarette Penalties Called Unjust,” Gazette (Cedar Rapids), Feb. 3, 2002 (3B) (NewsBank).


\(^515\) http://www.iowaabd.com/search/results_comp.jsp (visited May 22, 2008). Because the stores in Burlington were sold recently to Gasland and the ABD compliance check database (apparently) retroactively converts a store’s name to that of the current owner, it is possible that the data in the text underestimate Kwik Shop’s violations. Kwik Shop’s
Democrats’ Decade in the Desert: 1997-2006

for Kwik Shop or other stores committing violations, which were “obvious”: “They sell to kids without even looking!” at the ID’s, which in the case of the stings were valid. Clerks violating the law either did not check identification or overlooked “obvious cues like the red stripe on Iowa drivers licenses that state a person is a minor.”

Beginning July 1, 2001, minors presenting identification stuck out even more like sore thumbs by virtue of the advent of special drivers licenses for them on which their photos were displayed on the vertical rather than horizontal plane.

In contrast, the lawyer who was representing Kwik Shop in its aggressive statewide campaign of resistance against the imposition of any legal-financial responsibility for selling to minors—merchants seemed to believe that only their employees and minor customers should be penalized— even years later heatedly rehearsed his client’s bathetic tale of regulators “on the rampage” who had “deceptively” used “very hirsute” (i.e. “bearded”) 17-year-old males to “entrap” employees.

An explanation as to how entrapment could possibly have entered into the picture when even a fleeting glance at an ID that conspicuously marked the would-be buyer as a minor was not part of the advocate’s narrative.

On December 17, 2001, half a year after an employee at each of the two stores had been cited for selling tobacco to someone under 18 and found guilty, and had paid the fine, Assistant Attorney General Donald Stanley appeared before the Burlington City Council to request assessment of a civil penalty of $300 against each store, which, he explained, was mandatory and could not be waived or modified. That Kroger/Kwik Shop was already acting in

non-compliance with the law was highlighted during the checks conducted by the Burlington police at 19 businesses on Nov. 7, 2001, when a Kwik Shop was only one of three that sold cigarettes to minors. “Three Employees Cited for Selling Cigarettes to Minors,” Hawk Eye (Burlington), Nov. 9, 2001 (11A:4-5).


Telephone interview with Bernard Spaeth, Whitfield & Eddy, Des Moines (May 23, 2008).

Kwik Shop, Inc. v City of Burlington, Iowa, slip op. at 3-4 (Des Moines Cty Dist Ct., Case No. CVEQ004523, Sept. 27, 2002).

The prosecution did not also request a 30-day suspension of the permit of the store that had committed a second violation within a month of the first since “the violations had to be pursued one at a time because the ruling finding a 1st violation was necessary evidence to show a second violation and so on. That is one reason the backlog was so troubling.” Email from Donn Stanley to Marc Linder (May 23, 2008).
contemplation of litigation was obvious from its representation by a lawyer, the manager of the Burlington Kwik Shops, the company’s district advisor, and an official from its headquarters in Kansas; the presence of the firm’s own court reporter, who also swore in its witnesses, suggested that it aimed at more than merely contesting a relatively small fine. In spite of the presentation of seven exhibits (including a “We card under 18” warning sign, training video, and poster), the company’s lawyer’s explanation that Kwik Shop—which did not contest that its employees had sold tobacco products to minors—took the sale of tobacco to minors seriously by training its employees and sending reminders, and testimony by three managerial employees that the company did everything it could to prevent employees from selling cigarettes to minors, the council unanimously voted in favor of the civil penalty.521 This unanimity, however, was deceptive: although the Burlington city council did not go to the extremes of aldermanic nullification that some other cities witnessed, some members were “uneasy”522 at “being forced to vote in favor of the state,”523 and the mayor even expressed his feeling that the statute was not “just.”524

Remarkably, these arguments by retail purveyors of the most lethal consumer commodity ever manufactured resonated with the local newspaper, which editorially opined that stings’ “perceived unfairness” might be causing them to lose their “appeal.” In particular, the Burlington Hawk Eye was taken with the assertion by Kwik Shop’s Des Moines corporate lawyer, Steve Doohen, that his client was being deprived of its right of due process insofar as it was not afforded the opportunity to question the minors who had bought the cigarettes or otherwise to defend itself. The newspaper got carried away to the point that it prognosticated that the lawyer’s “argument ultimately may derail the practice” because as much as they “favored penalizing those who sell tobacco to minors,” Iowans also “believe in legal fairness.” But apparently Iowans did draw the line


522“Sting Complaints—Cigarette Retailers Make One Strong, One Weak Argument,” Hawk Eye (Burlington), Dec. 21, 2001 (edit.) (NewsBank).


at one argument advocated by a Kwik Shop manager at the hearing—namely, “that only clerks, not the retailers themselves, should face fines for illegal sales.” Although the Hawk Eye regarded a financial penalty for the employee and the employer as proper because compliance was a “shared responsibility,”\(^{525}\) it drew no conclusions about the bona fides of an employer that greedily profited from the sale of a deadly commodity through a small army of employees for whose (purportedly negligently) unlawful acts performed in the course of employment it was unwilling to accept noncriminal economic-regulatory liability. If, contrary to the industry’s mantra, cigarettes are in fact only a very conditionally legal product, and complying with all the conditions imposed by federal, state, and local governments made selling cigarette less than optimally profitable, then like Target Stores, Kroger/Kwik Shop could, even if the sickness and death it facilitated did not faze it ethically, have made a “business decision” to drop them.\(^{526}\)

Predictably, on January 16, 2002, Kwik Shop filed a petition for a writ of certiorari, a declaratory judgment, and a stay with a state district court to review the decision by the city council exercising judicial functions. In what the court later called “a laundry list of allegations,” Kwik Shop asserted that the Burlington City Council had, inter alia, failed to afford it sufficient due process, acted arbitrarily capriciously, illegally, in bad faith, and without impartiality, and denied its rights to constitutionally guaranteed procedural and substantive due process and equal protection.\(^{527}\) Although the company’s allegations appeared to verge on the claim that Iowa Code section 453A.22 was unconstitutional on its face because it made employers per se vicariously liable for their employees’ unlawful acts, Kwik Shop apparently limited itself to the claim that the law was unconstitutional as applied to it.\(^{528}\) The former argument would have been foreclosed by Iowa Supreme Court precedent involving the identically structured statute regulating the sale of alcohol to minors by permittees’ employees. In that

\(^{525}\)“Sting Complaints—Cigarette Retailers Make One Strong, One Weak Argument,” Hawk Eye (Burlington), Dec. 21, 2001 (edit.) (NewsBank).

\(^{526}\)Steve Karnowski, “Target Gives Up Cigarette Sales,” San Francisco Examiner, Aug. 29, 1996, Bates No. S000255. To be sure, cigarettes presumably accounted for far more of Kwik Shop’s total sales than the less than the 0.5 percent at Target.

\(^{527}\)Kwik Shop, Inc. v City of Burlington, Iowa, slip op. at 1-2 (Des Moines Cty Dist Ct., Case No. CVEQ004523, Sept. 27, 2002).

\(^{528}\)Telephone interview with Bernard Spaeth, Whitfield & Eddy, Des Moines (May 23, 2008). Another partner in the same firm who represented Kwik Shop was confused as to whether the claim was based on the statute’s facial invalidity or only as applied. Telephone interview with Steve Doheen, Whitfield & Eddy, Des Moines (May 28, 2008).
case, the court rejected the claim of a retail grocery store, whose license was
suspended after an employee had been caught by the police in Ames selling beer
to a minor, that Iowa Code section 123.50(3) “violates due process because it
authorizes an administrative sanction against the license holder based entirely on
the isolated act of a nonmangerial employee and without regard to whether the
license holder itself was culpable in hiring, training, or supervising the offending
party.”

The legal action, according to the chain’s lawyer, simply reflected the
company’s having “had enough” and wanting “to fight back.” In particular, it
regarded a one-month suspension of a cigarette permit as the equivalent of a
“death sentence” since people came to the stores to buy cigarettes and then
bought other items, all of which they would buy at some other store whose permit
had not been suspended. Far from representing a concerted effort by tobacco
retailers, the suit was purportedly prosecuted solely on the initiative of Kwik
Shop, which unsuccessfully sought the involvement of other companies, which,
however, declined because they feared that they would be targeted for
enforcement.

On July 15, 2002, two weeks before the trial, Stanley again appeared before
the Burlington City Council to request that it assess a $300 civil penalty against
the third Kwik Shop store, an employee of which had pleaded guilty to selling
cigarettes to a minor in November 2001. Without any basis in the law, the
company’s district advisor argued that it was innocent because it diligently did
everything it could—including providing a three-day training session, showing
a video, giving a written test, and using cash registers that asked employees
whether they had checked the would-be cigarette buyer’s age—to instruct
employees not to sell tobacco to those under 18. This encore performance
produced the same unanimous vote for imposing the $300 penalty.

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529 Randall’s International, Inc. v Hearing Board of the Iowa Beer & Liquor Control
Dept., 429 NW2d 163, 164 (Iowa 1988).
530 Telephone interview with Bernard Spaeth, Whitfield & Eddy, Des Moines (May 23,
2008). The claim that other retailers feared becoming enforcement targets appears to lack
plausibility since all 6,000 permittees were already “targeted” twice a year with the same
stings.
May 22, 2008); “Kwik Shop Fights Fines,” Convenience Store News (July 18, 2002), on
http://www.allbusiness.com/retail-trade/food-stores/4475358-1.html (visited May 22,
2008). On the reason for the prosecution’s not having requested a 60-day permit
suspension for the Kwik Shop’s third violation in 2001 in November, see above.
Burlington City Attorney, who allowed as “he would rather be sued by Kwik Shop for enforcing the law...than by the state for not upholding it,” expected the company to file yet another lawsuit as a result of the new penalty. The mayor’s reaction—that the law put the council “between a rock and hard place”—suggested the city’s merely superficial and compelled commitment to enforcement.

At the end of September 2002, district court judge John Linn issued his ruling, which found all of Kwik Shop’s claims to be “without merit” and denied all of its claims and its request for relief. Specifically, the judge underscored the undisputed evidence that the two employees had sold tobacco products to minors, in relation to which Kwik Shop’s arguments concerning its policies, training programs, and community involvement were irrelevant; consequently, the “City Council had no choice but to impose the civil penalty.” Because the company had received both proper notice and a meaningful opportunity to be heard, it had not been subjected to any violation of procedural due process. Because the $300 penalty was rationally related to the legitimate governmental interest in stopping underage purchase and use of tobacco, depriving the company of the $300 (which property interest did not rise to the level of a fundamental right) did not violate its substantive due process rights.

Initially, Kwik Shop sought review of the district court decision from the Iowa Supreme Court, but then dropped its appeal and paid the penalties later in 2002. The action in Burlington was by no means the only one that Kwik Shop filed: it also appealed to Iowa district courts adverse decisions by city councils in Ames, Cedar Rapids, Council Bluffs, and Davenport, and the adverse decision in Linn County district court (Cedar Rapids) to the Iowa Supreme Court. On February 18, 2003, two days before the scheduled trial in the Ames

532James Quirk, Jr., “Stings Lead to Lawsuit,” Hawk Eye (Burlington), July 12, 2002 (NewsBank).

533James Quirk, Jr., “Council, Kwik Shop Face Off on Citations,” Hawk Eye (Burlington), July 14, 2002 (NewsBank).

534Kwik Shop, Inc. v City of Burlington, Iowa, slip op. at 12 (Des Moines Cty Dist Ct., Case No. CVEQ004523, Sept. 27, 2002).

535Kwik Shop, Inc. v City of Burlington, Iowa, slip op. at 6-7, 9-11 (Des Moines Cty Dist Ct., Case No. CVEQ004523, Sept. 27, 2002).

536Telephone interview with Assistant Attorney General Donald Stanley, Des Moines (May 22, 2008).

537In 2002 Kwik Shop paid $600 plus $96 in costs. http://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm

538James Quirk, Jr., “Stings Lead to Lawsuit,” Hawk Eye (Burlington), July 12, 2002
case, Kwik Shop’s lawyers informed the Attorney General’s Office that the company had made a “business decision” to dismiss all of its suits and/or appeals and would “immediately pay its fines and submit to suspensions where appropriate.” Why Kwik Shop suddenly turned off its well-financed litigation machine—apart from the client’s having “lost its taste for fighting” once it developed the feeling that it was “not getting anywhere”—is as puzzling as why it had found it necessary to file multiple test cases in the first place. As to the latter, one of the company’s lawyers ascribed it merely to the “glut” of penalties that happened to surface at the same time. In contrast, Assistant Attorney General Donald Stanley speculated that the company may have been “forum shopping for a venue to get a favorable ruling” and/or “counting on catching a local prosecutor unprepared.”

Prior to 2000, Ames had "one of the worst [noncompliance] rates among Iowa

539 Email from Donn Stanley to Eric Tabor (chief of staff, Iowa Attorney General’s Office) (Feb. 18, 2003) (forwarded to Marc Linder May 27, 2008).

540 Telephone interview with Steve Doheen, Whitfield & Eddy, Des Moines (May 28, 2008). Five years after the fact Kwik Shop’s lawyer was unable to articulate a reason other than a hazy recollection of some nebulous “resolution” of the dispute. Telephone interview with Bernard Spaeth, Whitfield & Eddy, Des Moines (May 23, 2008). With certitude, Assistant Attorney General Donald Stanley commented that: “There was no compromise with Kwik Shop on penalties. It received absolutely nothing in consideration for its decision to drop its appeal and remaining district court actions.” Email from Donald Stanley to Marc Linder (May 27, 2003).

541 Telephone interview with Steve Doheen, Whitfield & Eddy, Des Moines (May 28, 2008).

542 Email from Assistant Attorney General Donn Stanley, Des Moines, to Marc Linder (May 23, 2008).
cities”—in 1999, 41 percent compared to a statewide average of 25 percent. City officials had ignored the problem, according to an Ames drug treatment agency that was at risk of losing part of the state’s federal block grant on account of the high violation rate, “because they don’t want to confront business owners who pay $100 each year for a tobacco license,” although the Attorney General’s Office made it clear that the city councils that issued permits were, under longstanding laws, responsible for penalizing retailers. More specifically, the then city attorney later explained, the city council had not wanted to become involved in imposing penalties on cigarette retailers because it viscerally did not want to get on the wrong side of local merchants, especially in light of the bitter memories of the controversy over its revocation of an alcohol license some years earlier triggered by the actions of a “hapless” employee. The procedures that Kwik Shop deployed in Ames were virtually identical to those it had used in Burlington. After vainly presenting the same irrelevant materials at the city counsel hearing, on June 27, 2002, Kwik Shop filed in Story county district court the same kind of suit with the same allegations, culminating in the same claim that section 453A was unconstitutional. On February 17, 2003, three days before the nonjury trial was scheduled, Kwik Shop voluntarily dismissed its case and was assessed $215 in costs.

Sting operations in Cedar Rapids went back to 1994, when IDPH conducted test checks in five counties, including Linn, discovering that teens 16 and younger were able to buy tobacco about half the time. Preparatory to the initiation of real compliance checks in May 1996, the police in Cedar Rapids conducted trial stings in January, finding that 21 of 23 business sold to the minor. At a meeting in April organized by the police department and the federally funded COMMIT

545Telephone interview with John Klaus, Ames (May 23, 2008).
546Jason Kristufek, “Kwik Shop Sues City of Ames After Fine,” Tribune (Ames), July 5, 2002; Jason Kristufek, “Kwik Shop Sues Ames over Tobacco Citation,” Tribune (Ames), Nov. 26, 2002 (visited May 23, 2008); http://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm; http://www.iowacourts.state.ia.us/ESAWebApp/TViewFinancials (visited May 23, 2008). Because the city council, unwilling to incur retailers’ wrath, had assigned the adjudication to the city attorney, it was inappropriate for him or his office to represent the city council in defending the suit, and therefore Assistant Attorney General Stanley intervened. Telephone interview with Judy Parks, city attorney, Ames (May 23, 2008).
547“Tobacco Accessible to Teens,” Gazette (Cedar Rapids), Nov. 18, 1994 (2B) (NewsBank).
(Community Intervention Trial for Smoking Cessation) retailers already began to complain that they would be penalized more for contributing to teenager smoking than the teenagers themselves.\(^{548}\) Despite all the publicity, stings soon found Kwik Shop and Hy-Vee selling to 16-year-olds.\(^{549}\) Apparently, however, only clerks were fined, and it was not until 1999, in the wake of state pressure, exerted in order to avoid loss of federal drug abuse block grants, that federal and state law finally began to “trickle down to the local level,” resulting, for the first time, in $300 penalties for 37 permittees.\(^{550}\) By the end of 2000 one of the Kwik Shop stores had racked up its second violation within two years and became, together with a Hy-Vee store and two other businesses, the first to have its cigarette permit suspended for 30 days.\(^{551}\) The owners and managers of the four all agreed that the penalty was “too stiff”—one, a gas station owner for whom cigarettes were only a “sideline business,” threatened to stop selling them “if it gets to be too much of a hassle”\(^{552}\)—but only Kwik Shop chose to litigate.

Before the Cedar Rapids City Council Kwik Shop staged a choreography virtually identical to that used in Burlington, down to hiring its own court reporter to “document” the statements of the company’s lawyer and representatives and of the council members “for possible use in a court proceeding down the road.” Kwik Shop decided to strike back at the beginning of 2002 when, based on a third violation in the same store, it faced a 60-day suspension (following ones for 14 and 30 days), which, its lawyer, Steve Doohen, told the city council, could cost it $80,000 in lost revenue. He depicted this sum as disproportional compared to the $100 fines meted out to each of the three stung clerks; more generally, he called the civil penalty “a stiff one in a work world where store clerks often are low-wage earners.” Apparently, however, these wages were adequate compensation for the abysmal skills of the clerks, who asked for identification and then nevertheless misread the birth date on the driver’s license. Echoing a complaint that capitalists, boasting of also being better at their lowly agents’ tasks than they are, have voiced through the ages, a Kwik Shop representative bemoaned that:

\(^{550}\)Pam Hinman, “City Adds $300 Fine for Cigarette Sales Violations,” Gazette (Cedar Rapids), Oct. 21, 1999 (3C) (NewsBank) (quoting city attorney).
\(^{552}\)Pam Hinman, “C.R. Tough on Tobacco Sellers,” Gazette (Cedar Rapids), Dec. 9, 2000 (1B) (NewsBank).
Democrats’ Decade in the Desert: 1997-2006

“‘We have clerks who perhaps don’t care as much as Kwik Shop cares,’” but, alas, “Kwik Shop supervisors can’t be in the store at all times....”553 The problem, as far as the convenience store chains were concerned, was that, with decisions left to non-omnipresent local managers, corporate headquarters was unable effectively to deal with the de facto control exercised by 21-year-old clerks—“we don’t get Ph.D. candidates”—vis-à-vis friends who were minors.554 ABD administrator Walding, the state’s chief tobacco enforcement official, whose “‘overall goal [wa]s to partner with the retail community,’”555 reinforced retailers’ position by applauding Walgreen and other companies that “‘take initiative to keep tobacco out of minors’ hands’” and declaring that “[m]ajor responsibility remains with the clerks who sell tobacco....”556 The company’s concern about being dragged down by minimum-wage workers was especially hollow and ironic inasmuch as in 1999, when Deputy Attorney General Eric Tabor had stated that it was illegal for anyone under 18 to sell tobacco (because it was unlawful for minors to possess it), he himself acknowledged that “retailers would have a hard time staffing their counters if they couldn’t hire teenagers....” The president of the Iowa Grocery Industry Association could not have agreed more: “‘That would be a very big issue for us.... I don’t think it would be the intent of the Legislature to throw teen-agers out of work.’”557

Cutting a Legislative Deal Instead

Kwik Shop’s abandonment of the judicial track for eliminating penalties was coordinated with the industry’s decision to turn to the traditionally


554 Telephone interview with an Iowa convenience store chain lobbyist who demanded anonymity (June 13, 2008).


556 Patt Johnson, “Pull Out ID: Walgreen to Card All Smokers,” DMR, May 12, 2001 (1A) (NewsBank). At the same time Walding also accommodated another demand of retailers by introducing the cop-in-the-shop reverse sting in which police posed as clerks in order to ticket underage buyers because “[r]etailers tell us the entire burden shouldn’t fall on their shoulders.... Kids should be held accountable, too.” Madelaine Jerousek, “Sting to Smoke Out Underage Buyers,” DMR, May 4, 2001 (3B) (NewsBank).

accommodating Republican-led legislature for a remedy. What “we were looking for,” Dawn Carlson, the president of and lobbyist for the Petroleum Marketers and Convenience Stores of Iowa,\textsuperscript{558} frankly observed five years later, was an “affirmative defense to acknowledge our training.” The focus on this issue derived from the experience that “we struggle with training employees. No matter what we do to train them, human error is likely.” While ultimately falling short, this affirmative defense went as far toward achieving retailers’ real goal of severing the statute’s automatic link between employees’ sale of cigarettes to minors and employers’ liability as was politically feasible.\textsuperscript{559} And as Lamberti added with regard to the Kwik Shop litigation, most retailers had become resigned to the constitutionality of their vicarious civil liability for clerks’ illegal sales.\textsuperscript{560}

In a memorandum to higher-ups in the Attorney General’s Office, on February 18, 2003, the day on which Kwik Shop’s lawyer had informed him that it would drop all its judicial challenges and pay its penalties, Assistant Attorney General Donald Stanley presciently forecast Iowa cigarette sellers’ strategic reactions: “Other tobacco retailers were following this litigation and this action by Kwik Shop should help us in getting other retailers to pay their fines and serve their suspensions. However, this also probably means the retailers will be more desperate to succeed in amending the law this session. It may also mean the retailers are more confident about accomplishing this task at the legislature.”\textsuperscript{561} And in fact, as one of Kwik Shop’s lawyers later observed, an aspect of the strategy of dropping all the cases was to proceed instead by lobbying.\textsuperscript{562} In the event, the very next day the House Public Safety Committee received a study

\textsuperscript{558}http://www.pmcofiowa.com/index.cfm?page=63 (visited May 24, 2008). The organization represented both smaller stores and all major chains except Casey’s, whose membership, after small-town gasoline retailers (and their Petroleum Marketers organization) had (unsuccessfully) sued it in the 1980s, charging that Casey’s had destroyed them by selling gasoline at below cost and then recouped the losses by charging monopoly prices, was deemed inappropriate. Telephone interview with Dawn Carlson, Des Moines (May 23, 2008); Bathke v Casey’s General Stores, Inc., 64 F3d 340 (8th Cir. 1995).

\textsuperscript{559}Telephone interview with Dawn Carlson, president and CEO, Petroleum Marketers and Convenience Stores of Iowa, Des Moines (May 23, 2008).

\textsuperscript{560}Telephone interview with Jeffrey Lamberti, Ankeny (May 30, 2008).

\textsuperscript{561}Email from Donald Stanley to E[ric] Tabor et al. (Feb. 18, 2003) (forwarded to Marc Linder).

\textsuperscript{562}Telephone interview with Steve Doheen, Whitfield & Eddy, Des Moines (May 28, 2008).
Democrats’ Decade in the Desert: 1997-2006

bill—which on February 11 it had requested the Legislative Services Bureau to draft\textsuperscript{563}—that embodied a first draft of the industry’s desiderata.\textsuperscript{564} The timing was, as one of Kwik Shop’s lawyers later confirmed, “no coincidence,” especially since tobacco permittees had also been lobbying during the litigation phase as part of a large coordinated effort.\textsuperscript{565} Speaking specifically about this legislation but also more generally about study bills, Lamberti observed that “these things don’t just appear from nowhere.”\textsuperscript{566}

The fulcrum for the legislative initiative was the mandate in State Government Committee-proposed Senate Study Bill 1117 (which the industry regarded as a “vehicle” for correction of tobacco control issues)\textsuperscript{567} to ABD to develop minimum criteria for tobacco compliance employee training programs provided by retailers to inform their employees about federal and state regulation of tobacco sales to minors. Presumably to insure that no burden be imposed on cigarette sellers’ finances or their workers’ attention span or knowledge base, the study bill instructed the ABD not to require the program to exceed one hour.\textsuperscript{568} The actual training, however, as Carlson later noted, “we wanted to do...in-house.”\textsuperscript{569} The bill, as Johnson County Attorney J. Patrick White, whose office’s tobacco stings had been achieving compliance rates upwards of 90 percent, observed shortly after its enactment, responded to tobacco retailers by giving them a “‘get out of jail free card’” by conferring on them “essentially...one free violation if they have had their employees go through training sponsored by the State.”\textsuperscript{570} Specifically, S.S.B. 1117 provided that, “unless the retailer directs or

\textsuperscript{563} Request for Bill Drafting, LSB #2384HC (Feb. 11, 2003) (copy from State Archives, furnished by Rich Johnson, Legal Services Division Director, LSA).

\textsuperscript{564} On H.S.B. 170 (Feb. 19, 2003, by Public Safety Committee), see below.

\textsuperscript{565} Telephone interview with Theodore Simms, Washington, D.C. (May 28, 2008). Simms had also worked for Whitfield & Eddy.

\textsuperscript{566} Telephone interview with Jeffrey Lamberti, Ankeny (May 30, 2008).

\textsuperscript{567} Telephone interview with James West, Des Moines (May 21, 2008).


\textsuperscript{569} Telephone interview with Dawn Carlson, president and CEO, Petroleum Marketers and Convenience Stores of Iowa, Des Moines (May 23, 2008).

\textsuperscript{570} Minutes of the Informal Meeting of the Johnson County Board of Supervisors at 2 (May 7, 2003), on http://www.johnson-county.com/auditor/min2003/030507ws.htm (visited Oct. 23, 2008). Five years later an assistant attorney in the same office experienced in section 453A prosecutions used exactly the same “get out of jail free card”
Democrats’ Decade in the Desert: 1997-2006

knowingly permits the employee to violate” the no-sales-to-minors section, “the retailer shall not be assessed a penalty...for a first or second...violation...that takes place at the same place of business within a one-year period” and the “underlying violations shall be deemed not to be violations...for the purpose of determining the number of penalties” for the progressive enforcement penalty scheme if the retailers had the aforementioned prescribed training program in place and the employee acknowledged in writing that he or she had completed the program and understood the laws and regulations. 571 Significantly, key parts of these extraordinarily retailer-friendly provisions were drafted by the Iowa Grocery Industry Association. 572

Lamberti later stressed that retailers had liked the study bill, even though it ultimately did not embody one of their more intriguing suggestions—namely, getting their clerks’ attention by increasing the fine for selling to minors to $1,000. The inescapable self-contradiction inherent in this proposal, which was calibrated to motivate these low-wage workers to stop selling to minors and thus potentially causing their employers revenue losses in the tens of thousands of dollars resulting from a 30- or 60-day permit suspension, lay in its double-edged severity: the possibility of being forced to pay the equivalent of several weeks’ wages as a fine might deter a considerable proportion of potential employees from taking the job to begin with. 573

S.S.B. 1117 was received by the Senate State Government Committee on February 26, 2003, 574 a week after H.S.B. 170—a very similar measure, which lacked the provision under which violations would not count under the

language. Email from Andrew Chappell (May 16, 2008).


572 The two free passes, the “knowingly” provision, and the 60-minute limit on training were contained in an amendment (included in the bill drafting files) that bore the computer print-out code: L:\_Transitional\JBWest\Iowa_Grocery_Ind_Assoc\_Legislative\453A.22. new.doc. The copy in the Senate file bore the committee chair’s initials (MZ) and the House file’s the chair’s signature (Clel Baudley). Request for Bill Drafting, LSB #2384SC (Feb. 11, 2003); Request for Bill Drafting, LSB #2384HC (Feb. 11, 2003).

573 Telephone interview with Jeffrey Lamberti, Ankeny (May 30, 2008). According to a convenience store chain lobbyist, companies believed that clerks, who were largely paid $9.00 to $9.50 an hour on a part-time basis, needed to be subjected to more severe fines amounting to three weeks of pay (and fired). Telephone interview with lobbyist who demanded anonymity (June 13, 2008).

574 Senate Journal 2003, at 1:325 (Feb. 26). The Senate State Government Committee had filed a bill drafting request form on Feb. 11. Request for Bill Drafting, LSB #2384SC (Feb. 11, 2003) (copy from State Archives, furnished by Rich Johnson, Legal Services Division Director, LSA).
Democrats’ Decade in the Desert: 1997-2006

progressive penalty scheme\textsuperscript{575}—had been received by the House Public Safety Committee but appears not to have been acted on.\textsuperscript{576} (At its meeting on February 21, the Tobacco Use Prevention and Control Commission heard the program administrator of the IDPH Tobacco Use Prevention and Control Division talk about proposed legislation on tobacco retailer fines and penalties, but unfortunately the minutes failed to preserve any of the substance.)\textsuperscript{577} S.S.B. 1117 was assigned to a three-member subcommittee chaired by Republican Bryan Sievers, the committee vice chair. The other Republican member was Doug Shull,\textsuperscript{578} the former chief financial officer of Casey’s,\textsuperscript{579} one of the state’s largest

\textsuperscript{575}The House and Senate bill study files (whose “working title of request” was “Tobacco retailers”) in the State Archives contain identical versions that antedate and differ somewhat from those cited in the text, which are included in the comprehensive collection of study bill books at the University of Iowa Law Library. The working title of the bill drafting requests for the second versions of the House and Senate study bills, which were also identical, was “Cigarette retailer[s] compliance”; they contained identical handwritten insertions (perhaps by Mark Zieman, Senate State Government chair) of the provisions specifying that the first two violations were not to be deemed violations for the purpose of determining the number of violations for which penalties were to be assessed and the 60-minute limit on trainings. Request for Bill Drafting, LSB #2779SC (Feb. 2\textsuperscript{[?]1}, 2003); Request for Bill Drafting, LSB #2779HC (Feb. 2\textsuperscript{[?]1}, 2003).

\textsuperscript{576}H.S.B. 170 (Feb. 19, 2003, by Public Safety Committee), \textit{House Journal 2003}, at 1:379. This study bill appears, according to the \textit{House Journal}, not to have been assigned to a subcommittee. However, according to the \textit{Iowa Legislative News Service Bulletin,} #22 at B (Feb. 19, 2003), it was assigned on Feb. 19 to a subcommittee composed of Dwayne Alons (chair), Kevin McCarthy, and George Eichhorn. Five years later, Alons had only a hazy recollection of the study bill. Telephone interview with Dwayne Alons, Hull (May 28, 2008). Committee chair Clel Baudler, when asked about the study bill’s provenience, (incorrectly) recalled that the Attorney General’s Office had proposed it as “an education thing—to educate the retailers.” Telephone interview with Clel Baudler, Greenfield (May 28, 2008). Apparently H.S.B. 170 was superseded by H.S.B. 245, which was identical to S.S.B. 1117. H.S.B. 245 (Mar. 5, by Public Safety Committee); \textit{House Journal 2003}, at 1:519. The next day it was assigned to a subcommittee composed of Clel Baudler (chair), Kevin McCarthy, and Tom Sands. \textit{House Journal 2003}, at 1:532 (Mar. 6). For unknown reasons, on the same day that H.S.B. 245 emerged in the House, the Senate State Government received S.S.B. 1141, which was identical to the already superseded H.S.B. 170, and assigned it to a subcommittee composed of Sievers, Johnson, and Ragan. \textit{Senate Journal 2003}, at 1:390, 394 (Mar. 5).

\textsuperscript{577}Tobacco Use Prevention and Control Commission Meeting, Minutes, Feb. 21, 2003 at 1 (copy furnished by Bonnie Mapes, Director, Tobacco Use Prevention and Control Division, IDPH) (Threase Harms-Hassoun was the administrator).

\textsuperscript{578}\textit{Senate Journal 2003}, at 1:327 (Feb. 26). Senator Jack Kibbie was the Democratic

2997
Democrats’ Decade in the Desert: 1997-2006

sellers of cigarettes. (Although Shull failed to mention this revealing dimension of his career in his rather detailed entry in the Iowa Official Register, anti-tobacco lobbyists and his Senate colleagues were well aware of his Casey’s connection and his favorable attitude toward bills advantaging his former source of a livelihood. Notably, in 2004, after the Republicans had lost their Senate majority, he supported ousting Iverson as Senate party leader and replacing him with Jeffrey Lamberti, the son of the founder of Casey’s.) Just a few months earlier both Sievers and Shull had received campaign contributions of $250 and $500, respectively, from the Hy-Vee, Inc. PAC, but they were only two of many Iowa legislators on whom the large supermarket/cigarette merchant had bestowed its largesse. However, Shull had also been the recipient of contributions from other cigarette sellers, including $200 from Fareway Stores PAC, $500 from the Iowa Grocery Industry Association/Grocers PAC, $1,000 from Donald Lamberti, the chairman of Casey’s, and—most intriguingly—$1,000 from W. A. Krause, the founder of Kum and Go, a convenience store/gas station chain competing against Shull’s former firm, Casey’s.

Despite these cozy connections, an ABD tobacco control official explained the bias in the bill—which was being pushed by the retailers, grocers, and petroleum marketers and convenience store associations—as a result of the fact

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581 Telephone interview with Jennifer Harbison, Des Moines (May 19, 2008) (lobbyist for American Cancer Society in 2003 who worked on this bill).

582 Telephone interview with Sen. Jack Hatch, Des Moines (May 19, 2008).


that “a certain group of legislators with a certain ideological perspective were given inaccurate information by lobbyists representing retailers. As sometimes happens in the process, the lobbyists had in turn been somewhat misinformed by their clients.” The backers’ “strategy” in moving the bill “was to keep the draft from being introduced until the same day the bill was scheduled to be considered by the senate state government committee.”588 This plan was thwarted when House Democrat Kevin McCarthy—who was on the three-member House Public Safety Committee subcommittees to which the companion House study bills were assigned589—“caught wind of the bill and...forewarned”590 the attorney general’s lobbyist and other tobacco control lobbyists that the study bill “had legs.”591 The tobacco control organizations, which found the original bill “offensive,” then intervened to provide the committee with information indicating that it had been misinformed by retailers as to the reality of the implementation of the new enforcement program. Until a compromise could be forged, the committee declined to move the bill as initially introduced.592 On March 6, the ABD’s

588 Email from Nicole Gehl to Marc Linder (May 18, 2008).
589 H.S.B. 170 and 245.
590 Telephone interview with Nicole Gehl, ABD (May 16, 2008); email from Nicole Gehl to Marc Linder (May 17 and 18, 2008). The existence of the study bills was presumably not unknown since the requesters of the House and Senate bills checked the “no” box on the LSB bill drafting request form as to whether they wanted the requests to be confidential (otherwise the LSB would not have listed the requests in the index of bill requests or released any information about them). Request for Bill Drafting, LSB #2384HC (Feb. 11, 2003); Request for Bill Drafting, LSB #2384SC (Feb. 11, 2003).
591 Telephone interview with Brian Meyer, Des Moines (May 29, 2008).
592 Telephone interview with Nicole Gehl, ABD (May 16, 2008); email from Nicole Gehl to Marc Linder (May 17 and 18, 2008). ABD was/is responsible for enforcement of tobacco use and sale laws. Among the inaccuracies fed to legislators was retail lobbyists’ assertion that “retailers were not notified of violations and therefore retailers, since [they] could not be expected to correct problems that they were not aware of, were being unfairly treated by the program. Although [sic] not entirely logical, the complaint resonated with a group that was looking for a reason to support the bill. The assertion was simply not true. I submitted copies of the form letter to the committee that was sent out within 48 hours of a local police officer submitting a check to ABD.” Email from Nicole Gehl to Marc Linder (May 18, 2008). The notion that the anti-tobacco movement had had to be informed by McCarthy of the bill’s existence is contradicted by the fact that IDPH had been monitoring and was well aware of the content of the study bills. Iowa Department of Public Health, Legislative Update 9(6) (Feb. 24, 2003) and 9(7) (Mar. 3, 2003), on http://www.idph.state.ia.us/adper/common/pdf/legis/archive/2003/09-06.pdf and http://www.idph.state.ia.us/adper/common/pdf/legis/archive/2003/09-07.pdf.

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legislation monitor informed the Iowa Alcoholic Beverages Commission that the retailers and the ABD had reached a “tentative compromise” to modify the study bill, which had “attempted to eliminate penalties for tobacco sales to minors for the retailer by introducing an affirmative defense for training,” by “loosen[ing] the penalty structure for retailers” and permitting the use of such a defense only once every four years.\textsuperscript{593}

On March 12, after hearing a clarification from Eric Tabor of the Attorney General’s Office, the Senate State Government Committee adopted Senator Sievers’ amendment to S.S.B. 1117, which, manifestly the product of a grand compromise between sellers and state enforcement agencies, was a complete reworking of the bill.\textsuperscript{594} As unanimously approved—even the chamber’s veteran anti-smoker, Michael Connolly, voted Aye, while Lamberti voted “present” (i.e., abstained)—the bill then became committee bill S.F. 401.\textsuperscript{595} Amended S.S.B. 1117/S.F. 401 differed from S.S.B. 1117 as filed chiefly in four respects. First, if local authorities did not assess a penalty for selling to minors within 60 days of an adjudication of the violation, the matter had to be transferred to IDPH.\textsuperscript{596} The apparent reason for this change was that, as already noted, until then many local governments had declined to prosecute in compliance with the statute’s mandatory imposition of civil penalties because the violator might be the only convenience store or business in town\textsuperscript{597} or, even more perversely, the mayor or some other local official.\textsuperscript{598} With transfer to the IDPH, the Attorney General’s Office would proceed with the prosecution and the civil penalty would accrue to the state rather than the local governments.\textsuperscript{599}

This last feature in large part accounted for the attorney general’s lobbyist’s

\textsuperscript{593}Iowa Alcoholic Beverages Commission, Minutes (Mar. 6, 2003), on http://www.iowaabd.com/about_office/commission_minutes/03062003.jsp (visited May 19, 2008) (report by Nicole Gehl).

\textsuperscript{594}S.S.B. 1117.301 (by Sievers) (copy furnished by LSA).

\textsuperscript{595}Committee Minutes for [Senate] State Government (Mar. 12, 2003) (copy furnished by Secretary of Senate); Senate Journal 2003, at 1:511, 523 (Mar. 17). Lamberti reportedly abstained from committee votes affecting his family’s business. Email from Nicole Gehl to Marc Linder (May 17, 2008).

\textsuperscript{596}S.F. 401, § 1 (Mar. 17, 2003).

\textsuperscript{597}Email from Andrew Chappell, Johnson County assistant attorney, to Marc Linder (May 16, 2008).

\textsuperscript{598}Telephone interview with Nicole Gehl, ABD (May 16, 2008).

\textsuperscript{599}Email from Andrew Chappell, Johnson County assistant attorney, to Marc Linder (May 16, 2008).
Democrats’ Decade in the Desert: 1997-2006

having declared for the bill. The attorney general’s intense interest in this change was easily understood: because many hundreds of violations were going unprosecuted as a result of local governments’ resistance or neglect, back-up prosecutions by the state had become very burdensome, especially since they required an assistant attorney general from Des Moines constantly to be traveling all over the state to appear before city councils. The proposed provision, which would enable the attorney general to prosecute these cases in a centralized fashion before an administrative law judge attached to ABD in Ankeny, promised to ease the burden and eliminate the considerable backlog. Although the Attorney General’s Office had considered proposing such an amendment on its own to the legislature, it had refrained from doing so lest an uncontrollable legislative process, under the influence of a tobacco lobby intensely interested in reducing, if not eliminating, the penalties, generate other changes that would leave the statute weaker than before. But once the cigarette sellers launched the study bill with its extraordinary affirmative defense, the Attorney General’s Office had no choice but to “counterpunch” and salvage the best it could from a process that it not only had not, but might never have, initiated.

Second, now ABD was required itself to develop the tobacco compliance employee training program (capped at two hours) and to make it conveniently, accessibly, and practicably available to retailers’ employees at no cost to them or their employers. Although ABD would have preferred no new law at all, it salvaged something of a compromise, in part through this provision, which, by entrusting the administration of training to the agency, enabled it to insure standardization and quality. Conversely, retailers, who had wanted to do the training in-house, regarded the provision as a partial setback.

600 http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service=DspReport&ga=80&type=b&hbill=SF401 (Eric Tabor was the AG’s lobbyist).
601 Telephone interview with Donald Stanley, assistant attorney general, Des Moines (May 20 and 22, 2008). Unfortunately, the substance of Stanley’s post-enactment discussion of S.F. 401 at an important official tobacco control organization meeting was not preserved. Tobacco Use Prevention and Control Commission Meeting, Minutes, Apr. 18, 2003 at 2 (copy furnished by Bonnie Mapes, Director, Tobacco Use Prevention and Control Division, IDPH).
603 Telephone interview with Nicole Gehl, IABD (May 16, 2008).
604 Email from Nicole Gehl, IABD, to Marc Linder (May 17, 2008). Although the training was free to retailers, it was funded by the civil penalties collected from state prosecutions of tobacco sales to minors. Id.
605 Telephone interview with Dawn Carlson, president and CEO, Petroleum Marketers
Third, S.F. 401 significantly relaxed the penalties for cigarette sellers in a way that even the study bill had not. Under the existing law (following a $300 civil penalty for a first violation plus an automatic 14-day permit suspension for failure to pay the penalty), a retailer’s cigarette sales permit was suspended for 30 days for a second violation within two years and for 60 days for a third violation within three years, and revoked for a fourth violation within three years.606 Under the bill, the penalties were now structured this way: for a second violation within two years the retailer was given a choice between a $1,500 civil penalty and 30-day suspension; for a third violation within three years the retailer was assessed a civil penalty of $1,500 and its permit was suspended for 30 days; for a fourth violation within three years the $1,500 penalty was paired with a 60-day suspension; and not until a fifth violation within four years was the permit revoked.607 In other words, the so-called compromise bill enabled retailers to pay their way out of a suspension,608 reduced the suspension periods, and increased the number of violations before revocation kicked in. Crucial to understanding the new penalty scheme is that, as one county prosecutor commented based on experience following enactment, “convenience stores always pay the $1,500 for a second violation because it is so much less than they would lose with a thirty-day suspension.” In contrast, for example, bars, which often did not sell many cigarettes, “choose to serve the suspension on a second violation.”609

Unsurprisingly, it was the convenience stores/gas stations and cigarette retailers generally that pushed for this legislation. In particular, it was, as one of the leading state tobacco enforcement administrators observed, Hy-Vee and Kum-and-Go that “drive this bus.” In other words, Hy-Vee—which lobbyists, Charles Wasker and William Wimmer, were for many years the Tobacco Institute’s Iowa lobbyists—and Kum and Go most aggressively fought against effective enforcement of cigarette sales regulation.610 Ironically, shortly before securing
Democrats’ Decade in the Desert: 1997-2006

did declare for its companion bill, H.F. 637.  http://coolice.legis.state.ia.us/Cool-ICE/
default.asp?Category=Lobbyist&Service=DspReport&ga=80&type=b&hbill=HF637. In contrast, according to Gehl, Casey’s represented a different corporate culture, at least in the sense that it was more responsive in implementing no-sales-to-minors training for employees. Email from Nicole Gehl to Marc Linder (May 18, 2008). A Johnson county prosecutor agreed that Casey’s quickly and cooperatively paid its civil penalties without objection. Email from Andrew Chappell, Johnson County assistant attorney, to Marc Linder (May 16, 2008). Nevertheless, Hy-Vee, Kum and Go, and Casey’s were all represented by the Iowa Grocery Industry Association, which supported the bill, while the Petroleum Marketers and Convenience Stores of Iowa primarily represented “independent ‘mom and pop’ operations that own and operate one or a very small chain of stores.” Email from Nicole Gehl to Marc Linder (May 18, 2008).

And fourth, S.F. 401, in what was perhaps the principal compromise that the big retailers made, reduced the scope of the study bill’s aforementioned free pass for illegal sales to minors effected by employees: now retailers were entitled to assert the bar to prosecution, based on the employee’s holding a certificate for having completed a training program, only once within four years.613 Substantively virtually unchanged, S.F. 401 passed the Senate by a vote of 41 to 6. Most of those Nays were cast by strong anti-smoking advocates614 for whom the blatant blunting of the financial deterrent to the sale of cigarettes to minors remained unacceptable even after modification.615 In the House, not a single tobacco control advocate rebelled against the compromise as the bill passed by this enfeeblement of the chief law designed to suppress sales to minors, Wasker, echoing his old paymasters’ implausible claims, had asserted: “‘My tobacco clients would be supportive of anything that would be effective in keeping cigarettes out of the hands of children.”611 And the senior vice president of Krause Gentle Corporation, which operated 185 Kum and Go stores in Iowa (which had racked up a 19 percent noncompliance rate during the most recent enforcement checks), sanctimoniously chimed in that “‘[w]e don’t think it is right to sell tobacco products to minors.’”612

614Senate Journal 2003, at 1:546-47 (Mar. 18) (Bolkcom, Dvorsky, Hatch, and Quirmbach).
615Email from Sen. Herman Quirmbach to Marc Linder (May 18, 2008), and email from Sen. Joe Bolkeem to Marc Linder (May 19, 2008); telephone interview with Sen. Jack Hatch, Des Moines (May 19, 2008).
Democrats’ Decade in the Desert: 1997-2006

a vote of 96 to 0. Perhaps the members understood no more of the bill’s substance than the other-worldly summary that IDPH had published in its Legislative Update two days before the vote: after mentioning the transfer of jurisdiction after 60 days and ABD’s responsibility for training, it alluded to rest of the bill (which undermined enforcement) as: “Mak[ing] changes on assessing violations.” The bill became law and its provisions remain in the Iowa Code with an attenuated financial deterrent—or, in ABD’s aseptic description, the “retail community,” the attorney general, IDPH, and ABD “worked together on a compromise to the tobacco retailers bill that creates another step in the civil penalty process on the way to revocation....

A somewhat more straightforward assessment came from the grocery stores’ lobbyist who, after genuflecting before the tobacco industry’s shibboleth that “obviously no one wanted to sell cigarettes to minors,” declared that he was unable to say whether the outcome was “win-win,” but that definitely retailers were not worse off after the bill’s passage. The claim by the president of the Petroleum Marketers and Convenience Stores of Iowa that S.F. 401 as enacted was less favorable to retailers than the original study bill was plausible insofar as it was rooted in the view that cigarette retailers’ highest priority had been to construct an affirmative defense by means of which they could escape liability for employees’ unlawful sales. But to the extent that sellers, driven by the perceived need to escape permit suspension—and the allegedly attendant permanent loss of

616 House Journal 2003, at 1:841-42 (Mar. 26). Before voting on the bill the House substituted it for H.F. 637, which had been its companion bill. One explanation as to the lack of opposition was that the governor’s lobbyist had “instructed all parties to negotiate a deal,” while a backlog of prosecutions from the Attorney General’s Office “created a desire on the part certain parties to settle the matter before the bill went to the floor for debate.” Consequently, some anti-tobacco legislators “may have gone along with the compromise that the anti-tobacco lobby had a part in negotiating.” Email from Nicole Gehl to Marc Linder (May 18, 2008). When asked whether the virtual unanimity was not puzzling, Senator Joe Bolkcom replied: “I didn’t understand it either at the time. Still don’t. Somebody must have made a deal.” Email from Joe Bolkcom to Marc Linder (May 20, 2008).


619 Iowa Code § 453A.22(2) and (3) (2009).


621 Telephone interview with James West, Des Moines (May 21, 2008).
customers who would thenceforth also buy their sodas and newspapers at stores with intact permits—had succeeded in substituting a $1,500 penalty for it, they undermined enforcement almost as effectively as a twice yearly affirmative defense. Nevertheless, even though the monetary penalty was, as Lamberti later stressed, not significant to larger retailers such as Casey’s in comparison to the costs of a suspension, he concluded that retailers would clearly have been better off with the original study bill. Although Johnson County Attorney White acknowledged that the law “change was not huge,” he found it emblematic of the “tremendous power” of “the smoking lobby” that “for all of the focus...on smoking, the change slipped through very quietly.”

Unsuccessful Smoking Ban and Local Preemption Repeal Bills Even in the Wake of Republicans’ Loss of Control of the Senate: 2005-2006

“Iowa has one of the worst track records in the country.”

As Democrats in the November 2004 election gained joint (25-25) control of the Senate with Republicans and came within one seat of parity in the House (51-49), leaving Republicans “with no votes to spare,” even the presumptive Senate Democratic co-leader Michael Gronstal stressed that the voting stalemate “will force us to find common ground.” Without saying it went that more stringent public smoking bans would neither find that ground nor fit the “very limited agenda” of “centralist things” that Senate Republican leader Iverson predicted would be the watchword. In the same vein was Governor Vilsack’s admonition that the message of the election returns was that “the extremes are not what Iowans want.” None of these forecasts of a non-innovative biennium, however, deterred anti-smoking forces from at least introducing the by then traditional bills

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622 Telephone interview with Dawn Carlson, president and CEO, Petroleum Marketers and Convenience Stores of Iowa, Des Moines (May 23, 2008).
banning smoking in restaurants and bars and repealing local preemption or from finally daring to put forward a full-scale revision of Iowa Code section 142B to ban public smoking radically. Under adverse political circumstances, Representative Janet Petersen, the chief sponsor of H.F. 2110, the Smokefree Public Places and Workplace Safety Act, was in effect undergoing a trial run for passing such a statewide ban whenever Democrats gained control of both houses and an anti-tobacco governor would sign such a bill.

The first bill filed in 2005, S.F. 1, would have covered all restaurants and elevated them to the position, theretofore uniquely occupied by elevators, of being exempt from the power otherwise conferred on those with custody or control of public places to designate smoking areas. The short bill filed by Democrat Matt McCoy—whose anti-tobacco profile would become more sharply etched in 2007-2008—from Des Moines, where he was vice president of the Downtown Community Alliance, never progressed beyond the appointment of a State Government subcommittee, despite the fact that committee chair, Michael Connolly, perhaps the Senate’s most ardent anti-smoker, had appointed himself chair of the subcommittee. Four days later, Petersen went McCoy one better by filing a bill to ban smoking in all restaurants and bars, but H.F. 71 did not even get to the stage of being assigned to a subcommittee, though several lobbyists, including one representing the Iowa Retail Federation, declared against it.

The session also witnessed renewed interest in repealing local preemption. This focus was forged by the reaction to Iowa Supreme Court’s decision in 2003 invalidating, on the grounds that it was preempted by Iowa Code section 142B.6, an ordinance passed by the Ames city council in 2001 partially banning smoking in restaurants. In particular, CAFE Iowa CAN—the clumsy acronym for the Clean Air for Everyone Iowa Citizen Action Network—was formed in the wake of that ruling to “advocate for local control” with the “goal” of “educat[ing] the public about the dangers of secondhand smoke and prepar[ing] them to become better advocates.” This indirect, pedagogical approach to local control appealed

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630 H.F. 71 (Jan. 14, by Petersen).
633 See below ch. 33.
Democrats’ Decade in the Desert: 1997-2006

to CAFE because the process “allows a community to have a discussion about the health risks of secondhand smoke and develop a solution that fits their [sic] community,” and the increased understanding would result in “strong community support for a law protecting nonsmokers.”[634] Local control was also at the core of the group’s “[b]roader goal[]” of “changing attitudes and behavior of smokers in order to protect others from secondhand smoke. A powerful change process unfolds as a community debates the issue of secondhand smoke. Letters to the editor, town hall meetings, public debate, and media coverage all ensue.” But the overriding significance of local control was its ability to render “the usually influential tobacco companies”—which are “forced to work at the local level through fake front groups and allies,” thus generating a “credibility gap” that did not plague them “as much” at the state and federal levels—“suddenly powerless.”[635]

Senator Quirmbach, having spearheaded the Ames City Council’s adoption of the (judicially invalidated) ordinance,[636] acutely felt the urgent need to clear the way for communities to act. On January 26, 2005, Quirmbach filed S.F. 70, which repealed the existing preemption provision, substituting for it a section on local regulation of smoking, which authorized a city, county, or local health board to enforce the statewide law by adopting ordinances or rules containing standards or requirements “higher or more stringent” than the statute’s. Specifically, the bill mentioned that such local regulations could eliminate exemptions (including that for bars) and prohibit the designation of smoking areas.[637] Two weeks after the bill had been referred to the State Government Committee—the subcommittee to which it was assigned never having met[638]—Quirmbach, as co-chair of the Senate Local Government Committee, presented the textually identical Senate Study Bill 1137,[639] which CAFE called “CAFE’s bill to restore

[634] CAFE Iowa CAN, History, on http://www.cafeiowacan.org/history.htm (visited May 13, 2008). Ironically, despite its communitarian, grass-roots democratic rhetoric, CAFE (or at least its all-important Iowa City branch, whose leaders were also statewide leaders), was run in a top-down, authoritarian manner. This conclusion is based on several years of interacting with them and attending and making a presentation at a CAFE meeting on Feb. 23, 2006.


[636] See below ch. 33.


[640] S.S.B. 1137 (Feb. 10, 2005, proposed Local Government Committee by co-chair
local control.” Although it was assigned to a four-member subcommittee (chaired by Quirmbach and of which McCoy was also a member), which met, the study bill died too. Foege’s House companion bill also died in committee. Lobbyists for various tobacco-related entities, including the Iowa Retail Federation, declared against one or more of the preemption repeal bills. Despite the repeated defeat of repeal, Foege insisted that it continued to gain legislative adherents. Unlike the anti-tobacco coalition, whose advocacy of local control appeared to be largely opportunistic, Foege seemed to be animated by principle: “I’m not going to tell a business what they can or can’t do.... But I want true local control. If Ireland can ban smoking in their pubs, I don’t know why we can’t. But I think it’s up to those local governments to decide.”

To be sure, the principle at stake was, in the welter of myriad state and federal statutes and regulations telling businesses what they could or could not do, difficult to discern, but a major reason for the lack of success in passing such a measure was succinctly stated by the Central Iowa Tobacco-Free Partnership—the opposition of the large tobacco companies and their lobbyists by whom local non-profit organization were “outgunned and...outspent.”

Quirmbach.

641 CAFE, Action Alerts, on http://www.cafeiowacan.org/alerts.htm (visited May 13, 2008). CAFE’s lobbyists (Battles and Harms-Hassoun) declared for S.F. 70 without identifying their client; the Cancer and Heart organizations also declared for it as did Judie Hoffman, the former Ames City Council member. http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&ga=81&hbill=SF70 (visited May 18, 2009).

642 The meeting took place on Mar. 3, 2005. http://www3.legis.state.ia.us/ga/sclist.do?ga=81&start=60. Unfortunately, neither the Iowa State Archives nor the Senate President’s office has the minutes of this meeting, the latter stating that subcommittees do not produce minutes. Telephone interview with Kay, Senate President’s office (May 14, 2008).

643 H.F. 261 (Feb. 10, by Foege and Schickel); House Journal 2005, at 1:332 (Feb. 10).


645 Erin Morain, “Going Smoke-Free Can Be Profitable, Owners Say,” Business Record
At the end of 2005, CAFE issued a “Position Statement on Secondhand Smoke,” declaring that it “supports local communities’ efforts to pass local clean indoor air ordinances and other policies that prohibit the use of tobacco in all public places and workplaces. **We support passage of legislation that restores local control for laws and regulations relating to smoking prohibitions.** CAFE IOWA CAN would support a statewide law only if it protects the health of all workers, did not include exemptions including but not limited to ventilation, size of workplace, type of business, or age restrictions, AND it included a clause that restored local control over secondhand smoke to Iowa’s cities and counties.”

Around New Year Thrase Harms Hassoun, CAFE’s lobbyist, met with Senator Matt McCoy three times. As a result, a week later one of CAFE’s leaders confidently observed that McCoy “will be introducing a statewide bill and we worked with him to get everything we wanted in it.”

At the outset of the 2006 session, Petersen (and Dubuque Democrat Pam Jochum) filed H.F. 2110—Senator Matt McCoy introduced the companion bill S.F. 2136—which signaled its new approach to suppressing public smoking by repealing in toto the old law codified in chapter 142B, which had become as obsolescent as the initial medical-scientific understanding of the health consequences of secondhand smoke exposure had been in 1978, when the first version of the old law had been enacted. In contrast to the existing statute, which was bereft of any statement of legislative findings, public policy, or intent, the Smokefree Public Places and Workplace Safety Act, which was based on a model statute melding those passed in Delaware, Massachusetts, New York, Rhode Island, and Washington, began with the finding that environmental tobacco smoke caused and exacerbated disease in nonsmoking adults and children, which sufficed to justify the regulation of smoking in public places and workplaces in
order to reduce the level of exposure and protect public and employees’ health.\footnote{H.F. 2110, § 1(2) (Jan. 24, 2006).}

Breaking with the old law’s utterly feckless method of leaving it up to building owners to designate smoking areas, Petersen’s measure outright banned smoking in “public places” and “all enclosed locations within places of employment” as well as in two generic types of outdoor locations: “[o]utdoor sports arenas and other entertainment venues where members of the general public assemble to witness entertainment events” and “within fifty feet of any enclosed area where smoking is prohibited....” Interestingly, this latter no-smoking zone served not to protect nonsmokers from walking through a gauntlet of smoke on the way into and out of buildings, but “to insure that tobacco smoke does not enter that area through entrances, windows, ventilation systems, or other means.”\footnote{H.F. 2110, § 3(1) & (2).} In other words, at the beginning of 2006 Petersen had not yet focused on the risks of secondhand smoke exposure outdoors.

The comprehensive scope of the smoking ban in “public places” (“an enclosed area to which the public is invited or in which the public is permitted”) was suggested by the non-exhaustive list of 20 types, including restaurants, bars, retail stores, retail service establishments, government buildings, shopping malls, public transportation facilities, laundromats, banks, child care facilities, public and private educational facilities, places of public assembly in indoor locations, libraries and museums, entertainment venues such as theaters, auditoriums, concert halls, convention facilities, bingo facilities, indoor sports arenas, hotel lobbies, and health care provider locations.\footnote{H.F. 2110, § 2(11).} The exemptions from the smoking ban encompassed: private residences (if not used as a child care or health care facility); 20 percent of hotel/motel rooms (unless the smoke “infiltrated” into areas where smoking was banned); retail tobacco stores (subject to the same proviso); private/semi-private rooms in long-term care facilities if all the occupants request smoking-permitted rooms (and subject to the same proviso); private clubs having no employees (except when the general public was invited to a function); outdoor places of employment; private hire limousines; and workplaces where smoking was an integral part of a cessation or medical/scientific research program.

In addition to requiring employers to explain the prohibition to all employees and persons applying for employment and everyone with custody/control of covered public places and places of employment to post no-smoking signs and remove all ashtrays, Petersen’s bill prohibited retaliation against any employee, job applicant, or customer for exercising any right under the law and preserved
the legal rights against the employer (or anyone else) of any employee working in a location where an employer permitted smoking. Enforcement was multi-pronged. Although it was administratively entrusted to local health boards, while judicial magistrates were to hear and determine violations, those with custody/control of smoking-prohibited places were also enforcement agents in the sense that they “shall inform persons violating” the law of its provisions. The use of the present participle was a crucial element of the enforcement process because it manifestly imposed on owners the duty to monitor, police, and intervene actively and directly vis-a-vis violators while they were in the act of violating, rather than merely posting signs or generally circulating information ahead of time. Employees and private citizens were also entitled to enforce the law by bringing legal actions, while complaints could be filed with local health boards or IDPH by any person. If anyone with custody or control of a public or workplace failed to comply with the law, both the local health board and any person aggrieved by that failure was entitled to seek injunctive relief to enforce the law.

H.F. 2110 imposed civil penalties of: (1) $50 for smoking in a prohibited area; (2) a maximum of $100 for a first violation by a person in custody/control, of $200 for a second within one year, and of $500 for any additional violation within one year; (3) a minimum of $2,000 to a maximum of $10,000 for discharging or in any way discriminating against an employee for filing a complaint, providing information, or bringing an action under the law. Each day on which any violation took place was considered a separate violation. In addition to these monetary penalties, persons in custody/control were also subject to suspension or revocation of any permit or license issued to them for the premises where the violation occurred. Finally, violations of the law constituted public nuisances, which local health boards or IDPH was empowered to abate by injunction or restraining order. Finally, Petersen and McCoy removed the barrier that the cigarette oligopoly and the Iowa Supreme Court had erected to additional local controls by eliminating the existing law’s preemption provision and, instead, inserting a section prohibiting the law from being interpreted or construed “to permit smoking where smoking is otherwise restricted or prohibited

654 H.F. 2110, §§ 6-7.
656 H.F. 2110, §§ 9, 16. For failure to pay in a timely manner the $50 scheduled fine for smoking in a prohibited place the magistrate was required to issue a citation, and, if the person failed to appear, to issue an arrest warrant, but no one under 18 could be detained in a secure facility for failure to pay. Id. § 16 (referring to Iowa Code § 804.1).
by other applicable laws” or “to prevent political subdivisions from adopting ordinances or regulations...more restrictive than the provisions” of the new law.657

Petersen admitted, before she had even filed the bill, that it faced an “uphill battle. ‘We need to get a debate going...I think the public is for it, but is the Legislature for it?”’658 She quickly got her answer: H.F. 2110 may have finally put Iowa in a position to debate state-of-the-art statewide anti-smoking legislation, but the Republican leadership was having none of it. House Speaker Christopher Rants made it clear that “he would block debate” of a cigarette tax increase and “other significant smoking restrictions.” Petersen’s other rhetorical question—“This has been an issue I’ve followed since the early ‘90s and we have not made a lot of progress. Do we want to wait for the market to determine when Iowans should go into a clean indoor air environment?”—also received an instantaneous answer from House Majority Leader Chuck Gipp, who indulged in the self-fulfilling prophecy that chances of passage were “‘bleak’;” though a nonsmoker who was “‘not defending smoking,’” he defended not passing the bill on the grounds that there were “‘tax-paying entities that have to compete.... A lot of them are establishing themselves whether to be smoke-free or not. They want that option.’”660 That view mirrored the stance adopted by the Iowa Restaurant Association, which insisted that its members “should be allowed to accommodate customers who still want to smoke.” The organization’s president, Doni DeNucci, who did not “‘believe the state should take away that part of their business,’” failed to explain how catering to smokers’ self- and other-destructive addiction could accommodate restaurant and bar owners’ employees’ desire to maintain their health intact. As McCoy described the inhospitable consequence of the hospitality industry’s profit-über-alles practice and policy: “‘Increasing your risk of dying from cancer should not be a condition of employment....’”661

At a meeting of the Iowa Alcoholic Beverages Commission on February 16 a staff member in charge of monitoring alcohol and tobacco legislation delivered the bill’s epitaph: “H.F.2110 is probably more about making a statement...than

657 H.F. 2110, § 11.
Democrats’ Decade in the Desert: 1997-2006

In spite, or perhaps precisely because of the bill’s vast curtailment of the universe of public places in which smoking would be permissible, the House took absolutely no action on it after it had been referred to the Human Resources Committee. Petersen herself blamed its premature death on “opposition from restaurant-industry lobbyists and legislative leaders such as Rants,” who counterintuitively claimed a preference for smoke-free restaurants but not for “‘dictat[ing] everything restaurants do’” because “‘[p]eople have a choice.’” Senate Democratic Leader Gronstal expressed the belief that McCoy’s companion bill would pass if Iverson let it come to a floor vote, but it failed to survive its referral to the Local Government Committee. Oddly, despite CAFE’s boast that it had secured inclusion in the bill of all of its desiderata, its lobbyist declared “undecided” on it, whereas the Heart, Lung, and Cancer organizations, in addition to such groups as the Iowa Medical Society, Iowa Nurses Association, and Iowa Health Systems all declared for it. Unsurprisingly, even before the bills had gone nowhere, the following companies, which either produced, sold, or promoted smoking, declared their opposition to H.F. 2110 and/or S.F. 2136 through their lobbyists: Harrah’s Operating Company, Iowa Grocery Industry Association, Cigar Association of America, Dubuque Greyhound Park & Casino, R. J. Reynolds Tobacco Company, Ameristar Casinos, and Iowa Restaurant Association.

Finally, the 2005-2006 General Assembly again witnessed an array of bills increasing the cigarette tax. Those proposing the highest increases (ranging from

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666 S.F. 2136 (Feb. 1, 2006, by McCoy); Senate Journal 2006, at 1:164 (Feb. 1).

Democrats’ Decade in the Desert: 1997-2006

$1.00 to $1.64) made, as usual, no progress.\textsuperscript{668} However, a Senate Ways and Means Committee bill mandating a much more modest 36-cent raise specifically to fund educational programs actually passed the Senate toward the end of the 2005 session by a vote of 38 to 12, but then died in the House.\textsuperscript{669}

\textsuperscript{668}H.F. 215 (Feb. 4, 2005, by Schickel et al.) ($1.00); S.F. 130 (Feb. 8, 2005, by Dvorsky et al.) ($1.00); H.F. 237 (Feb. 9, 2005, by Mascher) ($1.64, all to be spent on medical assistance and tobacco control and prevention fund); H.F. 2022 (Jan. 9, 2006, by Tomenga and R. Olson) (64 cents, revenue for senior living trust fund).

\textsuperscript{669}S.F. 416 (May 5, 2005, by Ways and Means Committee); Senate Journal 2005, at 1152-53.
The Battle Against Smoking in the Senate Itself: 1985-2008

“I’m a goddamn smoker and fuck you.”

As in the late nineteenth and early twentieth century, conflict over smoking in the building housing the Iowa legislature remained a microcosm of the larger societal struggles. And as in the 1970s, progress toward eliminating secondhand smoke exposure in the Senate in the 1980s and 1990s and into the twenty-first century was much slower than in the House. Democrat Beverly Hannon, a two-term senator from 1985 to 1992, looking back a few years after her departure, observed that: “We had some really emotional fights over smoking.” More than two decades after her arrival in the Senate she recalled that the air in the Senate chamber was oppressively smoke-filled, in no small part because all the smokers from the House who were no longer allowed to smoke there drifted over to the Senate to buy cigarettes from a vending machine and to smoke, causing the air in the chamber to turn into a blue haze. “Some of the non-smoking clerks,” as she recalled in 1997, were threatening to quit, they wouldn’t talk to smokers or hid the ashtrays at the computer stations. When I’d pick up a phone in the Senators’ lounge, it stunk [sic] from stale old tobacco. Guys like [Democrat] Al[vin] Miller would leave cigarettes smoldering in ashtrays while they walked away. P.U. the stench was awful! Several legislators had air purifiers on their desks. Finally, smoking was confined to back benches and certain parts of back of senate, but it was still awful. Rife used to stroll over in the corner near where I sat and puff away. He and Phil Brammer almost came to blows over smoking. Phil ended up having a lung replaced due to emphysema, so it was a life and death issue with him.

At the beginning of each session...I’d get a sinus infections, irritated eyes and throat.

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1Telephone interview with former Iowa State Senator Al Sturgeon, Sioux City (Apr. 28, 2007) (describing the attitude of the Senate’s smoking leadership toward nonsmoking senators in the late 1980s and early 1990s).

2See above ch. 18.

3See above ch. 25.

4Untitled (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.

The Drs. said it could be from 2nd hand tobacco smoke....

Senate Democrat Beverly Hannon et al. v. Bill Hutchins, Democratic Majority Leader and Future R.J. Reynolds Iowa Lobbyist

No person, while sitting in authority in either chamber of the Iowa legislature, shall use, possess, or exhibit or enhance the use of any tobacco product as defined in section 98.42, subsection 1, when being observed by minors.

In 1985, with Democrats occupying 29 of the chamber’s 50 seats, a bipartisan group of eight Democrats and seven Republicans filed an amendment to Senate Resolution 3, amending the chamber’s permanent rules, to add language tracking the rule that the House had adopted in 1979: “Smoking is not permitted in the senate chamber while the senate is in session except in the perimeter seating area.” However, before the Senate could deal with this amendment, it had to vote on a motion to reconsider the vote by which Senate Resolution 3 itself had been adopted. Although the Senate voted 25 to 24 to reconsider, the absence (or non-voting) of one Democrat meant that the vote lacked the constitutional majority of 26, and thus the motion lost; the procedural result was that the amendment was out of order.

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6Beverly Hannon, [untitled notes] (Feb. 22, 1997), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (1), IWA.


8“Members of Iowa General Assemblies 1981-2002,” at iv, on http://www.legis.state. ia.us/Pubinfo/Library/Members19812002.pdf

9State of Iowa: 1985: Journal of the Senate: 1985: Regular Session Seventy-First General Assembly 2:2079 (S-3109); S-3109 (Feb. 5) (taped into the bill book following Sen. Res. 3 in the University of Iowa Law Library).

10State of Iowa: 1985: Journal of the Senate: 1985: Regular Session Seventy-First General Assembly 1:320-21 (Feb. 7). Leonard Boswell was the missing Democrat. Also ruled out of order was an amendment to the amendment filed by Democrat Don Gettings (who also supported the first amendment) including in the ban seats assigned for the press. State of Iowa: 1985: Journal of the Senate: 1985: Regular Session Seventy-First General Assembly 1:321; State of Iowa: 1985: Journal of the Senate: 1985: Regular Session 3016
Pointing to the “real health problem” of 3,000 non-smokers dying of lung cancer annually, the amendment’s chief sponsor, James Wells, a labor union Democrat from Cedar Rapids in his second Senate term after 12 years in the House where he had early on led the struggle for restricting smoking in public, declared: “This was just the first round.” The closeness of the vote prompted Wells to conclude that support was also growing for a smoking ban in all public buildings except bars. Senator Joseph Coleman, a two-pack a day smoker of unfiltered cigarettes for 40 years and the proposal’s “most vocal back-room critic,” groused: “These guys from the House think they can come over here and just change everything....” In turn, Wells voiced the suspicion that in case the reconsideration vote had succeeded, “a deal had been cut to allow Coleman or another senator to preside over the debate instead of Lt. Gov. Robert Anderson,” who did not smoke. Coleman admitted that it would not have surprised him had he wound up in the chair to resolve the issue of whether the ban proposal was germane to the resolution on the Senate rules, but Wells insisted that he was “not going to have a smoker decide on it....”

In 1987, at the outset of the next General Assembly, when, in spite of the publication the previous year of the Surgeon General’s first report on the health consequences of involuntary smoking, smoking was still permitted everywhere in the Senate—which “stood almost alone among state offices”—a group of ten senators, led by Republican Ray Taylor, but including Hannon and Democrat Jean Lloyd-Jones of Iowa City, filed a floor amendment to the resolution containing the Senate’s permanent rules that would have added to the decorum rule: “Smoking shall not be permitted in the senate chamber at any time.” The bare-bones account in the Senate Journal merely stated that the amendment lost on a 22 to 22 tie vote. But the detailed report in the Des Moines Register shed important light on the quality of the arguments advanced during the floor debate,

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13 Jane Norman, “Iowa Senate Clings to Smoke-Filled Room,” DMR, Jan. 16, 1987 (2A:2-4 at 2).


which appears to have been dominated by the contributions of the heavy-smoking Coleman, a 30-year member of the Senate, who declared that he would “‘defy’” the rule, if it were passed, and “would have to be carried out bodily....” Trivializing smoking bans as a “‘fad’” and asserting that hair spray probably posed a greater danger than cigarette smoke, he insisted that despite his nicotine addiction, he would live as long as his non-smoking colleagues. When he asked rhetorically what smokers contributed to the state of Iowa each year, Taylor shot back: “‘A lot of cancer.’” Coleman, who had been thinking in terms of cigarette taxes, expressed doubt that any senator had died of lung cancer during his incumbency. Significantly, Majority Leader C. W. “Bill” Hutchins, who otherwise had not promoted anti-smoking legislation, but had recently quit smoking, “was observed voting in favor of the amendment” on the non-roll-call vote.¹⁶

A month later, Lloyd-Jones filed this remarkable resolution:

WHEREAS, the surgeon general of the United States has determined that smoking is hazardous to the health; and
WHEREAS, it is [sic] been determined that passive smoke creates health risks to nonsmokers; and
WHEREAS, the Senate does permit smoking in its chambers; and
WHEREAS, the Senate is concerned about the health of its members; NOW THEREFORE,
BE IT RESOLVED BY THE SENATE, That the secretary of the Senate is directed to purchase individual desk top air cleaners to be placed on the desks of those Senators who smoke to eliminate smoke from the Senate chambers.¹⁷

Although Lloyd-Jones’s party controlled 30 of the Senate’s 50 seats,¹⁸ the chamber took no action on the resolution after having referred it to the Rules and Administration Committee,¹⁹ and as late as 1989—with the Democrats’ still

¹⁷Senate Resolution 6 (Feb. 19, 1987). Asked twenty years later whether her resolution was an act of desperation or meant as a provocation, Lloyd-Jones thought she recalled that one senator had already had such an air cleaner, but that in any event her proposal had not been meant cavalierly. Telephone interview with Jean Lloyd-Jones, Iowa City (Feb. 24, 2007).
¹⁸“Members of Iowa General Assemblies 1981-2002,” at iv, on http://www.legis.state.ia.us/Pubinfo/Library/Members19812002.pdf
exercising the same three-fifths majority— the Iowa General Assembly’s Legislative Handbook disclosed that whereas the House did not permit smoking on the House floor, including the speaker’s station, in the press boxes, visitor’s galleries, members’ rest rooms, or committee rooms during meetings, “[t]here are no corresponding restrictions for the Senate.” In such an “unlimited smoking” environment, Lloyd-Jones pointed out, “there was nowhere to get away from the smoke. You just had to put up with choking and coughing.” Two decades later, Hannon still vividly recalled that she used to use a small, quiet, plug-in fan to blow back (in vain) the smoke that senators and their staff surrounding her seat in the chamber were constantly blowing her way.

Multiply frustrated, on March 30, 1987, Hannon requested an opinion from Attorney General Tom Miller for “legal clarification” of the state law on smoking prohibitions (Iowa Code ch. 98A.2, section 6), in particular as to the meaning of the term “public building.” Specifically Hannon wanted to know:

What or who is the “controlling governmental body, officer, or agency” in the Iowa Senate and the Senate Lounge? Who has the authority to declare smoking and non-smoking areas if the Senate rules do not speak to that issue? If there is no Senate rule regarding this, does above referenced code language require no smoking or does it permit smoking?

There are two microscopic signs by the press benches in the Senate which say smoking permitted. Who has the authority to have them there if Senate rules are silent?

The Governor recently ordered cigarette vending machines removed from the Capitol. Does the Capitol include the Senate Lounge and does the Governor’s order extend to the Senate Lounge?

... Also, what recourse does a person have who has to be present on the Senate floor to perform his or her job, to be protected from second-hand smoke which is irritable or harmful to the person, in a building which has no smoking signs at its entrance, and which is a public building?

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20 Members of Iowa General Assemblies 1981-2002,” at iv, on http://www.legis.state.ia.us/Pubinfo/Library/Members19812002.pdf
21 Legislative Service Bureau, Legislative Handbook: Iowa General Assembly 29 (n.d. [1989]).
23 Telephone interview with Beverly Hannon, Anamosa, IA (Feb. 28, 2007); email from Beverly Hannon (Mar. 3, 2007). Hannon’s account was reminiscent of disputes over the use of air nozzles on airplanes to blow smoke out of no-smoking sections.
24 Letter from Beverly Hannon to Tom Miller (Mar. 30, 1987), Beverly Hannon
Initially, the Iowa Attorney General’s office gave Hannon’s staff oral advice that the Senate “determined its own rules and the manner in which those rules were implemented.” Then on May 1, 1989, Deputy Attorney General Elizabeth Osenbaugh sent Hannon an advice letter as written confirmation. Osenbaugh set forth, based on other statutes and attorney general opinions, that the law’s ban on smoking in a “public meeting” did not apply to legislative committee meetings because the former encompassed only meetings of members of a “governing body,” which neither the legislature nor its committees were. Without being able to offer similar statutory-interpretive certainty regarding the legislature as a “public place,” Osenbaugh argued that even if the law encompassed meetings of the legislature and its committees, the Iowa constitution “would give each house...the authority to determine whether and to what extent smoking would be permitted.” And “in order to avoid significant constitutional questions”—for example, Article III, section 9 of the Iowa Constitution empowered each house to “punish members for disorderly behavior”—she explained to Hannon, “we would construe the statute as not applying at all to areas under the control of the General Assembly.” She therefore concluded that the law did “not govern smoking in areas under the control of the General Assembly or to legislative meetings” because each house had the authority to adopt smoking rules applying to those places and meetings.

Hannon’s reference to the cigarette vending machine was yet another point...
of contention between senatorial smokers and nonsmokers, whose numbers she estimated at the time as 12-13 and 37-38, respectively.\footnote{Letter from Senator Beverly Hannon to Dr. Wayne Witte (May 29, 1987), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.} During the summer of 1986, a number of public health officials, including the president of the Polk County Medical Society, the state public health commissioner, and the president of the Iowa State Board of Health, requested that Governor Terry Branstad ban cigarette vending machines in the State Capitol complex on the grounds that they illegally made cigarettes available to minors. The governor’s spokesman said that he would not object to the removal of the machines—which were under the authority of the Commission for the Blind and the operation of which provided jobs for blind people—if the legislature agreed.\footnote{Cigarette Sales in Capitol,” \textit{DMR}, Sept. 18, 1986 (16A:1-2) (edit.).} On December 31, 1986, Governor Branstad signed an executive order prohibiting the sale of tobacco products in areas of buildings under his control in the State Capitol Complex and all offices occupied by state government.\footnote{State of Iowa, Exec. Order No. 26 (Dec. 31, 1986).} In 1987, while the Senate was considering the clean indoor air act that the House had passed, the governor ordered the cigarette vending machine removed from the basement cafeteria of the Capitol because it was unsupervised and children used it. At that point, Majority Leader Bill Hutchins and Minority Leader Calvin Hultman, both heavy smokers and future cigarette company lobbyists, agreed to order the machine installed in the Senate lounge. But, as the press reported, the Senate’s anti-smoking forces “were not amused.”\footnote{Executive News Svc., “Cigarette Machine” (AP IA, Mar. 30 [1987]), Bates No. T12111618. See also Untitled (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.} On Friday March 27, when workers wheeled the machine up to the entrance to the Senate two hours after the Senate had adjourned for the week, Hannon and Lloyd-Jones, “alerted to the machine’s presence, rushed to the doors of the Senate and conferred with Senate staff members about what to do with the machine, which the workers had been instructed to deliver to the lounge. ... The group huddled for a few minutes and decided the machine should be placed in the men’s restroom instead. But that suggestion was turned down by [the] cafeteria manager..., who said it wouldn’t be permitted by sanitation inspectors.” The workers then delivered it to the Senate lounge.\footnote{Jane Norman, “More Cigarettes for Senators,” \textit{DMR}, Mar. 28, 1987 (A2:2).} As Hannon later described the episode: “We were outraged and talked to whomever [sic] would listen, but most just shrugged their shoulders. I
so wanted to fill the slots with super glue or something, but didn’t.” Beverly Hannon and Lloyd-Jones “tried to block the damn thing from coming in. We got them not to put it in the lounge, because all the lobbyists would buy and smoke there. We lost that battle though. The cigarette machine ended up in the hall by the Secretary of State’s office, which is back of the Senate.”

On March 30, Hutchins ordered what had become the last cigarette machine in the Capitol to be moved into a hallway behind the Senate chambers. The majority leader tried justify its presence on the grounds that “some House members and senators that smoke thought that it was really kind of foolish not to have cigarettes available in the Capitol” because: “If they ran out, they’d have to run downtown.” Thus Hutchins rationalized retention of the machine as a means of avoiding public criticism of senators for exacerbating the energy crisis by “frequently” driving to buy cigarettes. The reason that the Register concluded that the “anti-smoking caucus of the Senate was mum” was later revealed by Hannon. That day she had circulated a petition requesting that “the cigarette vending machine be removed from the Senate Lounge and from the Senate,” which 17 other senators signed, “but some refused to sign for fear of retribution.” Hannon herself, who said she would be “happy” if she “could get half of the members to sign,” “never presented” the petition to Majority Leader Bill Hutchins, a smoker, because her Democratic colleague (and future Majority Leader) Michael Gronstal and others “advised cool it, it will only hurt me and not accomplish what I want.” More specifically, as she later recalled, Gronstal told her that “if you present this, you’d better be ready to run for Majority Leader” because leadership would regard it as “mutiny” against Hutchins, though “[t]he
Republicans would love to have me do it.”41 Quickly deciding that she “was in enough trouble with leadership already,” she would “let someone else throw themselves on the sword as far as rules were concerned, I’d support whatever legislation we could get through instead.”42 Still, “it really ticked...off” Hannon, especially since there were “only 11 smokers of the 50 senators and many felt strongly against smoking in the senate area.”43

Hannon saw different personal leadership styles as in large part responsible for the different outcomes in the House and Senate: “[T]he house voted to make itself non-smoking, even though [House Speaker Don] Avenson was a smoker himself. That was the difference between him and Hutch[ins], he’d consider others, not just himself.”44

Soon after the legislature had adjourned for 1987, Hannon confided to a correspondent: “Some sessions and meetings are painful almost, they are so smoke-filled.” Referring as well to the successful efforts by some senators in 1986-87 to water down, if not kill, the clean indoor air act amendments, she indulged in this lament: “I tell you, this Senate is a place to behold. I get very discouraged at times. The smoking issue is quite typical of other issues also. I can’t understand how some obnoxious people have such inordinate power over a majority.”45

But despite these defeats, Hannon also managed to engineer at least one significant public health and symbolic victory in 1987 in the Human Resources Committee she chaired. As she described the incident in a letter to a constituent during the 1987 session:

[T]here are some real foes of any restrictions on smoking in the Senate, and they seem to

account from 1995 (largely) of smoking battles in the Senate (the occasion for writing which she no longer recalled a dozen years later), Hannon observed that Gronstal had told her: “‘you’d better be prepared to become majority leader if you run that through, because Hutch[ins] will have your head for undercutting him.’” Untitled (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.

Beverly Hannon, [untitled notes] (Oct. 7, 1995), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (1), IWA.

Beverly Hannon, [untitled notes] (Feb. 22, 1997), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (1), IWA.

Beverly Hannon, [untitled notes] (Oct. 7, 1995), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (1), IWA.

Untitled (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.

Letter from Beverly Hannon to Dr. Wayne Witte (May 29, 1987), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.
The Battle Against Smoking in the Senate Itself: 1985-2008

hold inordinate power. However, there are some hopeful signs. The most outspoken opponent, who killed the [clean indoor air amendments] bill on me last year, is Sen. Joe Coleman. He says he’ll have to be carried out of the chamber if we restrict smoking there. (We should be so lucky!) He serves on the Human Resources committee which I chair. We adopted no smoking during meetings rules. He didn’t attend the meeting when we adopted rules. First meeting after we came in, lit up and blew his cork when I reminded him of our rules. Wanted know whether I was going to call sargent [sic] at arms to have him removed. I said no, but we adopted the rules through a democratic process which he has always supported, and would appreciate it if he’d respect the wishes of the committee. He crushed his cigarette out with loud protest, but hasn’t smoked in my meeting since! How about that?

In 1987 the House, controlled by Democrats, extended the no-smoking areas to include visitors’ galleries and House members’ rest rooms. Democrat David Osterberg, a college economics professor, member of the American Friends Service Committee, and former Peace Corps volunteer, who proposed the rule change, supported by the Rules and Administration Committee, argued against smokers seeking to stymie additional restrictions: “I think we’re compelled by the health of colleagues to prohibit smoking in this chamber.” In contrast, Republican Kyle Hummel, outdoing his belligerence in 1985, irrelevantly asserted that it was “impossible to regulate every activity someone might consider offensive. ‘Maybe we should pass a law that everyone has to have his Right Guard on before coming in every morning so we don’t offend anybody,’ he said in defense of smokers’ rights.” Republican Mike Van Camp, an electrician and IBEW member from Davenport, tried to amend the rule by deleting the aforementioned two additional locations, but his amendment lost on a non-record vote. Then, on another non-record vote, the House adopted the amendment, offered by Osterberg and 11 others, to add “the west part of the lounge provided


House Resolution 2, at 23 (Rule 50) (filed Jan. 12, 1987).


for telephone use.” Thus from 1987 to 1991, the House rule read: “Smoking shall not be permitted in the house committee rooms, the west part of the lounge provided for telephone use, or on the floor of the house, at the speaker’s station, in the press boxes, visitors’ galleries, or house members’ rest rooms.” For the first time, then, since the ascendancy of the cigarette, the House banned smoking in the chamber itself even while it was not in session.

Nonsmoking senatorial assaultees had not had their agency be drained from them by the repeated defeats inflicted by the autocratic leadership. In early December 1990, the Senate, “where smokers’ right prevail unfettered,” was on the brink of limiting smoking to designated areas. The Democratic Majority Leader, Bill Hutchins, “a smoker who has quit on several occasions and plans to do so again,” conceded that there was “considerable sentiment to do something about it this year.” The reason that “[t]he politics of a long-sought Senate smoking ban shifted” was not that the elections on November 6 had reduced the overall Democratic majority from 30-20 to 28-22, but that specifically Senator Coleman, who at 34 years held the Senate longevity record, had been defeated.

In 1986, Coleman, who “fervently fought any move to limit smoking,” had opposed a ban on smoking in public buildings and offices, “because I smoke, and I think other smokers should...too.... As a smoker, I’m getting tired of being the one who gets pushed around. I have rights too, you know.” Coleman, who had “smoked three packs of unfiltered cigarettes daily for almost 40 years,” had vociferously opposed all attempts to limit smoking. Lloyd-Jones, one of the Senate’s leading anti-smoking advocates, observed that “Joe was so adamant about it that people didn’t want to offend him”; consequently, his departure made regulation possible. By December Lloyd-Jones, who was part of the Democratic leadership, and Hutchins developed a proposal to limit smoking to benches along the chamber’s east and west sides; in addition, two lounges would be available

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The Battle Against Smoking in the Senate Itself: 1985-2008

for senatorial and staff smokers. Lloyd-Jones told the Register that the aforementioned cigarette vending machine—“the only still allowed to operate on state property”—over which Lloyd-Jones and Hannon had battled in 1987, would probably remain in the Senate as a part of a compromise with smokers. Coleman may have departed, but one of his fellow addicts, Republican Jack Rife, was having none of it: “I’m opposed to hard and fast rules’ limiting smoking.”

But three days later, when the Senate Rules and Administration Committee met a few weeks before the opening of the newly elected General Assembly, “Senate leaders, half puffing on cigarettes, delayed action” on Hutchins and Lloyd-Jones’s proposal. The Senate’s smoking leaders appeared to have anticipated Philip Morris’s strategy of “aggressively maintaining and protecting the social and physical space in which adult smokers can enjoy our products” under the false banner of “accommodation” and “courtesy.” Critics said a discreet hint to smokers might be more appropriate.” Chief among them was Democrat Emil Husak, assistant majority leader, who, “while lighting his pipe, said: “I question why we need rules.... This is the Senate. I think you make suggestions.”” The resistance prompted Majority Leader Hutchins to agree to appoint a committee to draft another compromise limiting smoking.

By this time, observed the Des Moines Register in January 1991, the Senate had become “the renegade of state government, allowing smoking anywhere in violation of state law. Gov. Terry Branstad and the Iowa House long ago approved limits on the use of tobacco in the areas of the Statehouse under their control.” At the beginning of the new General Assembly in 1991, with Coleman

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58 Rife, according to Hannon, “always attacked smoking regulations no matter who offered them, esp. when I did. He’d come up with some unlikely situation like a sale barn non-smoking area and ridicule non-smoking attempts. He viewed restrictions as taking away his rights, with no consideration of non-smokers’ right to breathe.” Untitled (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.


60 Without endorsing the claim that Coleman’s departure was a necessary, let alone a sufficient, condition of limiting smoking in the Senate, many years later Hannon stated that: “It undoubtedly helped that Coleman was no longer there.” Email from Beverly Hannon (Mar. 5, 2007).


64 Thomas Fogarty and Jonathan Roos, “Grim Legislature Faces Budget Deficit, War
gone, the “anti-smoking coalition of clerks and legislators finally got the senators
to designate a smoking area...” \textsuperscript{64} Lloyd-Jones, now the president pro tempore, as a Rules and Administration Committee member “helped lead the fight to establish smoking rules. She had sought a ban on smoking but settled for a compromise. Under the new policy, adopted unanimously by the rules committee last month [i.e., December 1990], smoking in the Senate Chamber is restricted to designated areas.” As a result, the Register reported, “[n]on-smokers in the Iowa Senate were breathing sighs of relief\textsuperscript{65}—exactly what else they would be breathing was as yet unknown. Even which areas had been so designated remained officially undisclosed. All the Legislative Handbook revealed, without any specification, was that: “The Senate policy restricts smoking to designated areas only,” adding just as obscurely that: “Copies of the policy are available from the Secretary of the Senate’s Office\textsuperscript{66}—a substantively and procedurally opaque mystery still being repeated by the Handbook in 1995.\textsuperscript{67}

This lack of transparency was rooted in the fact that the smoking rule was embodied not in the Senate Permanent Rules, but in the Access to Senate Chamber and Rules of Senate Decorum\textsuperscript{68}: whereas the full Senate votes on the

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\textsuperscript{64}Untitled, unaddressed (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.

\textsuperscript{65}Thomas Fogarty and Jonathan Roos, “Grim Legislature Faces Budget Deficit, War Fears,” DMR, Jan. 15, 1991 (A1) (NewsBank). Unfortunately: “There are no minutes whatsoever for the senate rules committee for 1990-1991 in the archives. Seeing as other records of minutes for the senate rules committee have been sent prior and after that date, I can say that there would be little chance that anyone else would have the records. The agency that transfers/sends over the minutes of the senate rules committee is very good and prompt about getting documents out of their office and into the archives. There is a small chance that when the other records for 1990-1991 were being sent to the archives...somebody could have taken them or that they just happened to be misplaced.” Email from Meaghan McCarthy, Assistant State Archivist, SHSI, DM (Feb. 22, 2007).

\textsuperscript{66}Legislative Service Bureau, Legislative Handbook: Iowa General Assembly 30 (n.d. [1991]).

\textsuperscript{67}Legislative Service Bureau, Legislative Handbook: Iowa General Assembly 21 (n.d. [1995]) (“Copies of the Senate policy may be obtained from the Secretary of the Senate’s Office”). As late as 2007 Cynthia Clingan, the long-time assistant secretary of that office, stated that before there was a website such rules were distributed only to senators since no one else had a need for them. Telephone interview (Feb. 19, 2007). Since other people, for example the public in the gallery, visited the Senate, that justification carried little weight.

\textsuperscript{68}The bare policy was presumably embodied in the Access to Senate Chamber and Rules of Senate Decorum as it was from 1997 forward (see below). The Iowa State
former, the Senate Rules and Administration Committee, which the Majority Leader chairs, unilaterally determines the latter. The system, according to Senator Michael Connolly, arguably the chamber’s most militant anti-smoker, “was structured that way so the leadership could control the smoking rules. The majority leader at that time [Bill Hutchins] supported smoking in the Senate which had been a long held tradition.”

Shortly after losing her seat to Rife, Beverly Hannon, who had fought so persistently for a smoke-free Senate, noted that it had taken “7 years to get the smokers to just smoke in the corners. Bill Hutchins and Jack Rife were two of the major opponents to [sic] smoking restrictions.” Interestingly, when redistricting pitted Rife, the Republican minority leader and “the main block of [sic] getting stricter public smoking laws” against Hannon, for the same Senate seat in 1992 in what at the time was the most expensive legislative election campaign in Iowa history (Hannon and Rife receiving about $45,000 and $64,000, respectively), the cigarette industry could plausibly have been expected to contribute heavily to insure the reelection of their advocate and the defeat of their enemy. Nevertheless, RJR-PAC and Philip Morris-PAC gave him only $200 and $100, respectively, in addition to $200 contributed by the Tobacco Institute’s lobbyist, Charles Wasker. Moreover, RJR-PAC and Philip Morris-PAC also contributed $500 and $100, respectively, in 1990.

Many years later, Hannon clearly recalled that the designated smoking areas in 1991 were the Senate lounge/coat-rack/telephone room, the coffee room/visitor

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Archives has no copies of this separate body of Senate rules. Although it is unclear when the Senate began issuing such rules, the version that the Senate Rules and Administration Committee adopted on Jan. 21, 1988 and that is filed directly after Senate Resolution 1 (embodying the permanent rules) in the bill book at the University of Iowa Law Library includes no rule on smoking.

69 Email from Mike Connolly to Marc Linder (Apr. 24, 2008). In a version obscuring the substance of the disputed rule, a lawyer in the Senate Secretary’s office, who had worked in the Senate since 1974, insisted that the reason for this informality and the reason that the Rules and Administration Committee was entrusted with making the rule on behalf of the whole Senate was to avoid an interminable amendatory process. Telephone interview with Cindy, Jan. 2007.

70 Untitled note (Feb. 17, 1993), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (2), IWA.

71 [Beverly Hannon] to Phil Brammer (Mar. 24, 1993) (quote), and Beverly Hannon, [untitled note] (Feb. 27, 1997), in Beverly Hannon Papers, Box 8, Folder: Campaign, 1992: Rife, Jack (Opponent) General, IWA. This folder also contains a listing of Rife’s campaign contributions, which in the meantime have been unlawfully destroyed by the Iowa Ethics and Campaign Disclosure Board.
The Battle Against Smoking in the Senate Itself: 1985-2008

area, the interior perimeter of the Senate chamber, and the press boxes. The concentrated smoke from the interior perimeter so inundated the chamber that the air quality improved very little and the non-smoking senators and staff at their desks in the Senate chamber in fact benefited very little from the new rule. As Hannon’s tenure came to an end in 1992, the Register archly noted that Senators could go “do nicotine” in the corners of the chamber, the back corridors, and a nap room. The 1991 Senate Journal left no trace of the debate that had produced that body’s first regulation of smoking in 64 years. The only hint that smoking had even been discussed in committee emerged from a floor amendment to Senate Resolution 1 embodying the permanent rules by Democrat Michael Gronstal of Council Bluffs, a former assistant majority leader and future majority leader. On January 14 he offered and withdrew an amendment to the rule governing the powers of the Committee on Rules and Administration providing that it “shall not adopt an administrative policy on smoking in the chamber which unfairly discriminates against staff members who are required as a condition of their employment to occasionally work in the chamber.” This abortive amendment was designed not to protect staff members from exposure to secondhand smoke, but to permit them to smoke—just as Gronstal six years later thoughtfully...
The Battle Against Smoking in the Senate Itself: 1985-2008

fought to give parity to legislators’ secretaries with regard to having soft drink cans in the chamber.\footnote{See below.}

The reason that the Senate delegated resolution of the smoking issue to the Rules and Administration Committee may well have been that the leaderships of both parties were members and could therefore authoritatively resolve the matter.\footnote{In 1990 the six-member committee included the Democratic Majority Leader Hutchins, Assistant Majority Leader Lloyd-Jones, Republican Minority Leader Calvin Hultman (who became a Philip Morris lobbyist), and Assistant Minority Leader John Jensen. Iowa Official Register: 1989-1990, at 32. Unfortunately, by the time she was interviewed in 2007, Lloyd-Jones could not recall the committee meeting at which the compromise was reached. Telephone interview with Jean Lloyd-Jones, Iowa City (Feb. 24, 2007). Beginning in 1991 the Senate Rules required that the majority leader chair the Rules and Administration Committee. Sen. Res. 1, Rule 36 (1991). In 1991 Hutchins remained majority leader and chairman of the Rules Committee; the Republican minority leader and ranking committee member, Jack Rife, was also a smoker, who “resented the anti-smoking effort.” Iowa Official Register: 1991-1992, at 32; Phoebe Howard, “Sparks Fly As Debate Begins on Smoking in Senate Chamber,” DMR, Jan. 14, 1993 (4) (quote). According to Lloyd-Jones, since each party caucuses after the election and elects leadership, it is “entirely possible that it was the new [1991] committee that approved the rule [in December 1990].” Email from Jean Lloyd-Jones (Feb. 25, 2007).}

The fact that the committee reached a compromise that ceded very little to the anti-smoking camp may have been linked to the fact that Majority Leader Hutchins smoked and later became a cigarette company lobbyist in the Iowa legislature.\footnote{For example, in 1997 Hutchins lobbied for R. J. Reynolds Tobacco Co., while former Republican Majority Leader Calvin Hultman lobbied for Philip Morris USA. “Lobbyists Earn Big Bucks Influencing Others,” DMR, Aug. 3, 1997 (4). According to ex-Senator Hannon, former majority leaders can exercise special clout as lobbyists because they know so many secrets about so many legislators, though she was not intimating that they engage in blackmail. Telephone interview with Beverly Hannon (Feb. 28, 2007).}

Tamara Barrett’s Single-Handed Extra-Parliamentary Struggle for the “total emancipation” of the Capitol from Tobacco Smoke: 1992-93

In order to understand the battle over smoking in the legislature itself during the early 1990s\footnote{No internal tobacco industry documents were found suggesting that that the Tobacco Institute or individual firms ever became involved in struggles over smoking in the Iowa legislature or Capitol itself. In neighboring Minnesota, in contrast, the Tobacco Institute} it is necessary to incorporate the extra-parliamentary struggle
The Battle Against Smoking in the Senate Itself: 1985-2008

in 1989 did discuss the possibility of rolling back, within the Comprehensive Public Smoking Program, a 1988 statute that had been interpreted by the stateEmployee Relations Commissioner to ban smoking in open areas of the state capitol. Because, according to TI’s Midwest regional head, Michael Brozek, private offices were exempt, and consequently “many legislators and capitol staff [were] upset by the privilege this afforded selective senior staff,” TI’s Minnesota lobbyists opined that the controversy generated by the action of Representative Phyllis Kahn (the chief advocate of the state’s breakthrough anti-smoking law in 1975) of “slipp[ing] smoking restriction language into a ‘catch-all’ bill during a Conference Committee in the closing days of the 1988 legislative session” could reduce her credibility in seeking to expand the applicability of the Minnesota Clean Indoor Air Act to private workplaces. Michael Brozek to Paul Emrick, Re: Smoking Restrictions—Minnesota Government Buildings (Jan. 11, 1989), Bates No. TI00261037-40. Legislators’ offices, as Brozek knew, were not per se exempt, but (if at all) only by virtue of being ventilated sufficiently to meet the new law’s minimal requirements; the members’ “retiring rooms” were literally covered by the law, but because the legislature could overrule the commissioner, who as a practical matter would have been very loath to try to enforce the law against legislators, those rooms—as Kahn herself acknowledged—would remain available for smoking. Michael Brozek to Paul Emrick, Re: Smoking Restrictions—Minnesota State Buildings (Nov. 11, 1988), Bates No. TI28760163/4; Robert Whereatt, “Smoke-Filled Rooms at Capitol May Be a Thing of the Past,” Minneapolis Star-Tribune, Dec. 28, 1988 (1B), Bates No. TI00261042; “MinnesotaLegislator Disputes State Restrictions on Smoking,” Rapid City Journal, Jan. 8, 1989 (C5), Bates No. TI28760585; 1988 Minn Laws ch. 613, § 9, at 726, 730, Bates No. TI28760166 (on tobaccodocuments.org).

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that an Iowa Supreme Court secretary was, largely single-handedly, conducting to ban smoking at her workplace. In February 1992, Tamara Barrett self-ironically asked her state representative and senator: “What constituent do you know who has more questions and desires more action than myself?” She worked in the basement, where, although smoking was prohibited in individual offices, there was “literally a curtain of blue smoke hanging in the ‘stagnant air’ of the hallway. Stressing that she was “not asking for the moon,” she pointed out that if huge places like McDonnell-Douglas in St. Louis, the Mayo Clinic, and even the telephone company in Des Moines could ban smoking, surely they could get it out of the statehouse basement. Four months later, Barrett informed a state General Services official that another year had gone by with nothing having been done about smoking in state office buildings. Trying her hand at statutory interpretation and public policy analysis, she observed:

82Letter from [Tamara Barrett] to Representative Wayne McKinney, Jr. and Senator James Riordan (Feb. 13, 1992) (copy furnished by Tamara Barrett) (the letter lacks a sender’s name).
As one of the largest employers, if not the largest, the state has an obligation to keep its workers healthy by eliminating health hazards. It makes for a confused public when they are told that there is no smoking in public places (all state office buildings are public places) and then walk into one and see “Yes Smoking” signs everywhere you look. The state should have been the first, not last, employer to have a total ban on smoking on all state property.

It just makes me sick when I see all these school children who have come to tour this building sitting out here trying to eat their sack lunches with billows of blue smoke all around them. Why not just seat them in front of a car’s exhaust pipe? ... I have let teachers know at our school that visiting the capitol can be hazardous to their classes’ health.... I don’t recommend anyone coming here for a visit, especially when the legislature is here.\(^{83}\)

Having exhausted other avenues of recourse, in November Barrett circulated a petition among employees in the state capitol building and sent it to Governor Branstad together with a cover letter. Calling attention to “[t]he smoking crisis” in the Capitol, the 33 petitioners complained that after all the other state office buildings had been “emancipated,” smoke in the Capitol had tripled, as smokers from those places came to the Capitol for smoking breaks. They also bemoaned that “ground floor employees have to virtually hibernate during the winter because it is physically not safe to breath[e] the air during the legislative session.” Requesting that the governor “free us from the oppression of smoking,” Barrett and her comrades advised him that the only solution to this kind of health threat was “total emancipation.”\(^{84}\) Barrett’s accompanying letter explained that General Services had been giving her the runaround for the better part of two years, claiming that the legislature had barred it from banning smoking in the Capitol. She also informed Branstad that many people, especially in management and legislative offices, had failed to sign because they feared consequences.\(^{85}\) After the petition had landed on his desk for his signature as one more Capitol employee, the governor called Barrett.\(^{86}\)

The petition sparked Branstad’s announcement at the end of November that

\(^{83}\)Letter from Tammie J. Barrett to Tim Ryburn (June 22, 1992) (copy furnished by Tamara Barrett).

\(^{84}\)Petition for the Prohibition of Smoking on Capitol Grounds (no date [Nov. 12, 1992]) (copy furnished by Tamara Barrett). Of the entire Supreme Court staff only three people smoked. Letter from Tammie J. Barrett to Tim Ryburn (June 22, 1992) (copy furnished by Tamara Barrett).

\(^{85}\)Letter from Tammie J. Barrett to Terry E. Branstad (Nov. 12, 1992) (copy furnished by Tamara Barrett).

\(^{86}\)Telephone interview with Tamara Barrett, Des Moines (Apr. 2, 2007).
he wanted to secure the agreement of legislative leaders and Iowa Supreme Court officers to make the Capitol smoke-free, a goal that had become more urgent since the ban on smoking in all other Capitol complex buildings had prompted smokers from them to gravitate to the poorly ventilated Capitol basement cafeteria to work, from which smoke drifted to Supreme Court offices. The rotunda, too, “serves as a chimney, quickly spreading second-hand smoke throughout the building” into nosmoking offices. Whereas in the past legislative leaders had opposed a smoke-free building on the grounds that many members “need to feed their addiction in order to function,” the governor’s spokesman, Richard Vohs, waxed optimistic over changes in leadership. Especially the replacement as Senate majority leader of Hutchins (“who was forever trying to quit smoking but could never get the job done, particularly in the stressful closing weeks of the session”) by nonsmoking Wally Horn, whose office bore a “please do not smoke” sign, was taken as a hopeful sign. Horn himself offered a glimpse of the regressive role he would play during the 1993-94 session when he understatedly observed that he was “not certain he wants to make the building a smoke-free area. ‘I’ve tried to be tolerant...but I’m not hard-core about it.’”

Taking an unconventional public health position, he allowed as “more restrictions might be the solution, particularly to protect the antiques in the building,” but even on this weak proposal he would require consensus. George Wilson, the pipe-smoking doyen of Iowa tobacco lobbyists, showed even less understanding of the purpose of Branstad’s cigarette tax increases in defending smokers’ “‘rights’” by alleging that it was “‘a little incongruous to balance the budget’ with them and “then tell people they don’t want them to smoke.’”

Three days later the Register editorialized that it was hard to believe that smoking was still permitted in the Capitol. On December 23, Branstad—whose re-election as far back as 1986 against Lowell Junkins, former Democratic Senate majority leader and future tobacco industry lobbyist, the Tobacco Institute did not consider “good news for the tobacco industry due to the influence of Mrs. Branstad in her very vocal anti-smoking campaign”—announced that, in

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87 David Yepsen, “Smoke-Free Statehouse Considered,” DMR, Nov. 26, 1992, Bates No. T128922943. The article also contained similarly misplaced predictions about the positive consequences flowing from replacement of smoking Senate President Michael Gronstal by nonsmoking Leonard Boswell and smoking House Speaker Bob Arnould by nonsmoking Harold Van Maanen.


89 Michael Brozek to George Minshew, Memorandum: Monthly Summary - October, 1986, Regions IV and V (Nov. 13, 1986), Bates No. T122492737. Although the Tobacco Institute’s Iowa lobbyist, Charles Wasker, was “strongly identified with the Republican
response to the employees’ requests, smoking would be banned on the first two floors beginning January 1, but that the third floor would remain unaffected because he could not persuade legislative leaders to agree to a ban in the areas they controlled. Barrett, whom Branstad publicly credited with having mobilized her co-workers to oppose smoking, praised the action, but regretted the failure to ban it throughout the building because “the lobbyists will just think it’s OK to smoke around here, too....” Familiar enough with law to know that a piece of paper was worth little without enforcement, on the eve of the new ban Barrett met with the Commissioner of Public Safety and summarized their conversation in a letter the same day. Taking as her point of departure the notion that “[e]mpathy does not get us what we have fought the better part of three years to attain,” she nevertheless emphasized that the anti-smokers did not expect the capitol police to “spend months on end writing citations,” but “merely...a week of policy enforcement to make it known that this is not a frivolous edict.” Finally, as the new legislature convened in January 1993, Barrett sent a letter to all its members, urging them to eliminate smoking in the rest of the Capitol. She drew their attention to the thousands of visiting school children who were forced to walk the halls “in a haze of smoke,” thus exposed to the message that “smoking is a drug that you don’t have to say no to—if my legislator allows it in our capitol, it must be okay.”

Representatives Philip Brammer and Rod Halvorson Finally Clear the Tobacco Haze in the Capitol Rotunda Despite the Opposition of Democratic Majority Leader Wall Horn and Republican Minority Leader Jack Rife: 1993

Cigarette smokers in the Iowa Senate have taken the offensive against those who would

Party,” since he was, “ironically...very close to” Junkins, if the latter had been elected governor, the Institute’s “legislative profile” would have been “complimented [sic] by the retention of Mr. Wasker’s firm.” [Michael Brozek], Iowa Charles F. Wasker Background (June 30, 1986), Bates No. T122431036, on tobaccodocuments.org.


Letter from Tammie J. Barrett to Paul H. Wieck II (Dec. 30, 1992) (copy furnished by Tamara Barrett).

restrict public smoking.\textsuperscript{93}

Legislators at the 1993 session were focused on a ban on public smoking, but initially from a personal perspective. As the \textit{Des Moines Register} formulated the exceptional situation: “Many Iowans who smoke in recent years have been evicted from the workplace—unless they are state senators.” Leading the effort to protect senators from secondhand smoke exposure was Democrat Mike Connolly, an ex-smoker\textsuperscript{94} and long-time high school teacher in Dubuque.\textsuperscript{95} Sparking the session’s “first hot debate,” he declared: “‘Smokers’ rights end where non-smokers’ rights begin. We have a right to clean air.’”\textsuperscript{96} Connolly’s objective was to change the Senate rules to prohibit smoking in the chamber and all areas controlled by the Senate—which his party controlled 27 to 23\textsuperscript{97}—so that the ban on smoking that covered the House chamber and the ground and first floors of the Capitol would extend to the second-floor rotunda and a few rooms.\textsuperscript{98} Supported by the recent publication of an Environmental Protection Agency report on the health effects of passive smoking,\textsuperscript{99} Connolly predicted that many state legislatures would be banning smoking in all public places: “‘This is just the beginning.’” By refusing to intervene, the state “could expose itself to liability....” Connolly’s opponents adamantly rejected further restrictions. Republican Minority Leader Jack Rife, a farmer, resented forcing smokers onto the sidewalks in the winter and “subject[ing] them to pneumonia” as “‘callous, inhumane and certainly in violation of individual rights.’”\textsuperscript{100} One Iowa weekly, reporting that

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\footnote{\textsuperscript{93}“Senate Rejects Anti-Smoking Effort,” AP (Apr. 6, 1994), in Philip Morris Companies, Inc., Corporate Affairs, Apr. 13, 1994, at 47, Bates No. 2041128299/345.}
\footnote{\textsuperscript{94}Phoebe Howard, “Sparks Fly As Debate Begins on Smoking in Senate Chamber,” \textit{DMR}, Jan. 14, 1993 (4) (NewsBank).}
\footnote{\textsuperscript{95}Iowa Official Register 1993-1994, at 39 (Vol. 65).}
\footnote{\textsuperscript{96}Phoebe Howard, “Sparks Fly As Debate Begins on Smoking in Senate Chamber,” \textit{DMR}, Jan. 14, 1993 (4) (NewsBank).}
\footnote{\textsuperscript{97}“Members of Iowa General Assemblies 1981-2002,” at iv, on http://www.legis.state.ia.us/Pubinfo/Library/Members19812002.pdf}
\footnote{\textsuperscript{98}Phoebe Howard, “Sparks Fly As Debate Begins on Smoking in Senate Chamber,” \textit{DMR}, Jan. 14, 1993 (4) (NewsBank).}
\footnote{\textsuperscript{100}Phoebe Howard, “Sparks Fly As Debate Begins on Smoking in Senate Chamber,” \textit{DMR}, Jan. 14, 1993 (4) (NewsBank). In fact, whereas “evidence is sufficient to infer a causal relationship between smoking and...pneumonia,” exposure to cold weather is not known to be a cause. U.S. Department of Health and Human Services, \textit{The Health Consequences of Smoking: A Report of the Surgeon General} 5, 432 (2004).}
\end{footnotes}
Rife had even suggested that a basement room for nursing mothers be turned into a smoking lounge, wondered whether Rife preferred that they stand outside in the cold. 101 For Rife’s smoking colleague, Democrat Tony Bisignano 102—who knew that no compromise was possible with some people who would not be satisfied until tobacco was banned 103—nicotine addiction was “the bottom line” because a ban would make smokers “distracted and irritable”: so long as selling cigarettes was legal in Iowa, “people need a place to use them.” 104

In the House, too, anti-smoking advocates were pushing to expand the smoke-free legislative zones. By far the most zealous activist was Democrat Philip Brammer from Cedar Rapids, an ex-smoker suffering from chronic lung disease 105 and severe asthma, who had to use an inhaler to open his clogged lungs twice or three times as often in the Capitol as elsewhere. 106 His special target was the rotunda, which the Senate jointly controlled.

Although the legislature ultimately failed to enact any of the Tobacco Free Coalition’s measures for the rest of Iowa, 107 the narrowly Republican-controlled House (51 to 49) 108 took a decisive self-regarding step when, on January 25, 1993, the Rules Committee proposed a resolution amending the rule to prohibit smoking “in the house or in any area of the capitol building controlled by the house.” 109 During the debate on the Rules Committee Resolution on February 10, Democrat Rod Halvorson offered an amendment to broaden the no-smoking zone by adding “or controlled jointly by the house and senate,” 110 which the House adopted on a
Republican Stewart Iverson, a smoker who later as Senate majority leader and chairman of the Senate Rules and Administration Committee conferred on himself a unique exemption so that he could smoke in his office, offered an amendment to create an exception “for members and employees of the house and their guests in the area behind the chamber at the top of the stairway leading to the first floor,” but it lost. Consequently, from 1993 to 2008 the House rule read: “Smoking shall not be permitted in the house or in any area of the capitol building controlled by the house or controlled jointly by the house and senate.”

But the problem of smoking in jointly controlled areas persisted because the Senate had not agreed to the ban in the rotunda, “one of the last refuges of smokers in the building,” thus, making it, according to opponents, unenforceable. Other House members were devising other legislative strategies to incorporate the rotunda into the smoke-free zone.

On January 26, the day after the Rules Committee resolution had been filed, Democrat Ed Fallon of Des Moines, one of the most leftwing members of the state legislature, filed a bill to amend the clean indoor air law to prohibit smoking at the Capitol complex and impose a $25 civil penalty for each

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112Numerous people who personally experienced being in Iverson’s office while he was smoking confirmed this fact.


114Legislative Handbook: Iowa General Assembly 21 (1995); House Resolution No. 5, Rule 50, Proof: State of Iowa: House Journal 178-204 (Jan. 25, 2007), http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&frame=1&GA=82&hbill=HR5 (visited Feb. 13, 2007). When asked how the House could impose a rule on the Senate, John Patchett replied: “I don’t think either house could impose its own rule on the other house in jointly controlled areas—however, that wouldn’t necessarily stop them from passing the rule or trying—unless the resolution was adopted by both houses. This would be more a matter of courtesy and deference. Jointly controlled areas would be ‘joint’ committee rooms that either chamber could utilize on a regular basis—plus the areas of the Legislative Research Bureau and Legislative Fiscal Bureau, and probably the rotunda area on the second floor where the chambers are located. There is only one cafeteria (dining room) in the Capitol—on the lower floor—open to everyone.” Email from John Patchett to Marc Linder (Feb. 18, 2007).


violation.\textsuperscript{117} It died in the State Government Committee to which it had been referred.\textsuperscript{118} During the debate at the beginning of March on House Concurrent Resolution 16 embodying the Joint Senate-House Rules, Democrats David Schrader, who had owned a cigarette vending machine business,\textsuperscript{119} and veteran anti-smoking militant Halvorson filed a floor amendment inserting a new rule: “Smoking shall not be permitted in any areas of the capitol building controlled jointly by the senate and the house. However, one house may designate smoking areas within areas of the capitol building controlled exclusively by that house.” After the House on a non-record roll call defeated by a vote of 33 to 54 the floor amendment filed by Democrats Dennis Renaud,\textsuperscript{120} who was in the barber business,\textsuperscript{121} and Daniel Fogarty, a livestock farmer,\textsuperscript{122} substituting the much narrower language “both houses shall” for “one house may,”\textsuperscript{123} the House adopted the new rule,\textsuperscript{124} which, however, died in the Senate.\textsuperscript{125}

On March 16, 1993, against the background of what he described as the mounting evidence that secondhand tobacco smoke exposure was inconsistent with employees’ right to a healthful work environment, Governor Branstad declared that, effective April 26, smoking would be prohibited in all Capitol complex buildings (thus eliminating designated smoking areas) except those parts of the Statehouse controlled by the legislature. The same day, Halvorson, who had been battling smoking in the House since the 1970s, announced that he had requested an attorney general’s opinion on whether smoking in the Capitol rotunda violated the state clean indoor air law,\textsuperscript{126} which limited smoking in public

\textsuperscript{117}H.F. No. 63 (Jan. 26, 1993) (By Fallon); State of Iowa: 1993: Journal of the House: 1993 Regular Session Seventy-Fifth General Assembly 99 (Jan. 26)
\textsuperscript{119}See above ch. 28.
\textsuperscript{120}State of Iowa: 1993: Journal of the House: 1993 Regular Session Seventy-Fifth General Assembly 462 (Mar. 2).
\textsuperscript{121}Iowa Official Register: 1993-1994, at 87 (n.d.).
\textsuperscript{122}Iowa Official Register: 1993-1994, at 69 (n.d.).
places to areas that had been so designated by those having custody or control of them, since there was apparently no such designation. House Majority Leader Brent Siegrist objectively put additional pressure on the Senate to agree to ban smoking in the rotunda by pointing out that the governor’s action had “the potential for turning the rotunda into a smoking lounge.”

The next day, Brammer, who was developing a far-flung anti-smoking agenda, filed a House Concurrent Resolution proposing that: “Smoking shall not be permitted in any areas of the capitol building jointly controlled by the Senate and the House of Representatives, including the rotunda and the legislative dining rooms.” The Rules Committee to which it was referred took no action on it.

Stymied but not resigned, Brammer, whose emphysema and asthma had at times “left him unconscious and fearing death,” announced a week later that he could not stand the smoke any longer and would file suit to prohibit smoking in the rotunda. Although Governor Terry Branstad pushed for making state buildings under his control smoke-free, he took the position that the rotunda was under the legislature’s control. The declaratory judgment action that Brammer planned to file would name the governor, the Democratic and Republican party leaders, the Department of General Services, and the Legislative Council as parties, in order to secure a judicial decision as to who had management responsibility of the rotunda. While admitting that it was “‘absurd it has to go this far,’” Brammer, whose need to take oxygen was exacerbated by smoking in the statehouse, blamed the Senate, which “‘holds up anything that has to do with smoking.’” In turn, Rife, the heavy smoking Senate minority leader, accused Democratic House minority members of “‘just trying to make a name for themselves. That’s all this is—an attempt to get a little press.’” Brammer, who in 1997, the year after he had left the legislature, became the named plaintiff in

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130 House Concurrent Resolution No. 22 (Mar. 17, 1993).
The Battle Against Smoking in the Senate Itself: 1985-2008

a class action against the cigarette companies, and died of emphysema at the age of 67 in 1999, knew whereof he spoke when he charged Rife with having “‘a bad habit of making offensive remarks about life-and-death matters.’”

Two days after his announcement but before he had even filed the declaratory action, Brammer devised a new vehicle for his crusade: on March 25 he filed an amendment to the Human Services appropriations bill titled: “Clean Air Act—Application to Capitol Building.” It provided that: “The capitol building shall be considered a public place pursuant to section 142B.1 and the rotunda area between the chambers of the house of representatives and the senate shall not be designated a smoking area pursuant to section 142B.2. A person who violates the provisions of this section is subject to the penalty provisions of section 142B.6.” The House, a majority of which had already demonstrated its support for this ban, adopted it immediately and passed the bill.

The next day, Brammer and Halvorson announced that Iowa Deputy Attorney General Elizabeth Osenbaugh had issued an opinion stating that “the rotunda is a place used by the general public and therefore subject to the smoking law,” which restricts smoking in public places to areas that have been designated for smoking. The opinion assumed that the rotunda (and the legislative dining room) were not under the exclusive control of either house and were not used for legislative offices, committees, or deliberations, and that the rotunda was open to the general public. Backtracking from the full interpretive breadth of her aforementioned 1989 advice letter to Senator Hannon, the AG’s office confessed that “it would be error to extend this rationale to all areas subject to legislative control, as was suggested in the 1989 letter.” Osenbaugh concluded that applying the smoking rule to the rotunda “would not infringe upon the authority of each house to determine its rules or procedures as legislative proceedings do not occur in the rotunda.” To be sure, she then added that the applicability of the law also meant that the person or entity that had control of the rotunda as a public place was empowered to designate a smoking area, and that “[u]ntil there is a direct conflict between action of either house and chapter 142B, there is no constitutional conflict.” Osenbaugh closed by declaring that “the Legislative


The Battle Against Smoking in the Senate Itself: 1985-2008

Council should decide whether to designate the rotunda or the legislative dining room as a smoking area. If no designation is made, chapter 142B would prohibit smoking in those areas. 137

Relying on the attorney general opinion, Brammer and Halvorson contended that unless the Legislative Council—which consists of the legislative leadership and of legislators selected by them and is empowered to assign uses of the areas in the capitol138—designated the rotunda a smoking area, smoking there violated the law. To ratchet up the level of pressure, Halvorson also requested that the Iowa Department of General Services begin enforcing the clean indoor air law in the rotunda the following week. 139

Brammer and Halvorson soon learned the perils of gaining an interpretive victory based on a substantively weak statute—unless their tactic was to manipulate an unwary Senate majority leader into making an autocratically unpopular decision. Three days later, taking his cue from Osenbaugh, Brammer, and Halvorson, the non-smoking Democratic Senate majority leader, Wally Horn, the chairman of the Legislative Council, promptly designated the rotunda a smoking area until the Council—which normally does not meet while the legislature is in session—took up the issue, but declined to reveal when he would call a meeting. Horn’s announcement provoked objections from Democratic House Minority Leader Bob Arnould, who accused Horn of abusing his authority as chairman, and Republican House Speaker Harold Van Maanen, who questioned his authority. Horn, while arguing that the legislature was not bound by an attorney general opinion, nevertheless asserted that he wanted to settle the

137 Iowa Atty Gen. Op. #93-3-3(L) (Mar. 26, 1993). Osenbaugh characterized the law’s applicability to the dining room as “a closer question,” but opined that the application of the law “would not abridge each house’s control of the legislative process...” While conceding that “a court would likely defer to a legislative decision governing its own dining room,” she insisted that the law could constitutionally be applied in the absence of a contrary legislative rule. Id. Since § 142B.2(3) prohibited designating any public place except a bar “as a smoking area in its entirety,” it is unclear what statutory basis underlay Osenbaugh’s argument that the Council was authorized to “designate the rotunda or the legislative dining room as a smoking area” (emphasis added). After all, even though the legislature exempted “factories, warehouses, and similar places of work not frequented by the general public” from the ban on smoking in a public place or public meeting “except in a designated smoking area,” it nevertheless provided “that an employee cafeteria in such a place of work shall have a designated nonsmoking area.” § 142B.2(1).


dispute.\textsuperscript{140}

The next day the \textit{Register}, disgusted that “[c]igarette smokers who gather in the heart of Iowa’s most important structure can continue to foul up the place, by virtue of a ruling from Wally Horn, a non-smoking glutton for punishment,” predicted that: “In time, the non-smokers are going to toss cigarettes out of the Statehouse for good. Smokers may go next if they keep fighting the trend.”\textsuperscript{141} It then proceeded to impart a lesson to Senate Minority Leader Rife, a smoker whose limited capacity to imagine the present as history caused him to dub Horn’s decision “fair”\textsuperscript{142}:

Jack Rife...backs Horn’s rule. “The idea of putting someone out on the street (because they smoke) is ridiculous, he said.”
No, it isn’t
“Some space has to be available to people who choose to smoke,” he said. “All the air can’t be a non-smoker’s air.”
Yes it can and yes it should, in a taxpayer-owned building.
...
Surely, if there is any place that should be off-limits to the polluters, it should be the most conspicuous and popular place at the seat of government. But to accommodate the 26 percent of Americans who smoke, Senator Horn wants to foul the air of all who gather there.

What disrespect for public health. What a poor example for youngsters who visit their Capitol to watch their elected lawmakers in action. What a rotten misuse of power for no better apparent purpose than to show rivals who’s in charge.\textsuperscript{143}

For good measure Halvorson wondered who had made Horn “king of the dome.”\textsuperscript{144}

On the same day, March 31, Brammer filed his lawsuit in Polk County District Court, charging that Horn had acted as a “dictator” in designating the rotunda a smoking place without authority, and requesting that the court compel Governor Branstad as well as the Public Safety Commissioner (who is in charge of the Capitol police) and the director of the Department of General Services (which is in charge of maintaining public buildings) to comply with the

\textsuperscript{144}“Statehouse Notes,” \textit{DMR}, Mar. 31, 1993 (4) (Newsbank).
The Battle Against Smoking in the Senate Itself: 1985-2008


Jonathan Roos, “Legislator Loses Smoking Suit,” DMR, Apr. 4, 1993 (5) (NewsBank). It is unclear under what authority violators could have been arrested since the penalty section of the smoking prohibition law provided only for civil fines. Iowa Code § 142B.6 (1993).


Jonathan Roos, “Legislator Loses Smoking Suit,” DMR, Apr. 4, 1993 (5) (NewsBank). It is unclear under what authority violators could have been arrested since the penalty section of the smoking prohibition law provided only for civil fines. Iowa Code § 142B.6 (1993).

The Battle Against Smoking in the Senate Itself: 1985-2008

aforementioned attorney general’s opinion and prohibit smoking in the rotunda, Brammer complained that the officials’ refusal to ban smoking endangered the public’s, in particular legislators’ and lobbyists’, health. Brammer’s lawyer announced that the same day he would request a temporary restraining order to stop smoking in the rotunda.

Already the next day, April 1, District Judge Arthur Gamble held a two-hour evidentiary hearing at which Brammer testified that he avoided the rotunda “like the plague whenever possible” because breathing secondhand smoke aggravated his lung ailments. Indeed, if the situation continued to worsen, Brammer declared, he would be forced to resign his seat in the legislature. His colleague Halvorson added that lobbyists who spend much of their time in the rotunda had told him that the smoke build-up was making them sick: “It not only stinks, it’s irritating to breathe the smoke....” Ironically, Deputy Attorney General Osenbaugh, who had issued the opinion that formed the legal basis of Brammer’s complaint, appeared in court to represent the governor and the other state defendants, whom she described as “‘bystanders’” to a House-Senate dispute over which the court lacked jurisdiction.

On the day of the hearing both Branstad and Horn weighed in outside of the proceedings. The governor argued that Brammer’s suit took “‘the wrong approach. It should be worked out in normal legislative channels.’” Horn offered reporters a glimpse into the nature of those channels by asserting—in tune with Rife—that Brammer and Halvorson’s ability “‘to make headlines every day’” over a “tempest in a teapot” was “‘kind of disgusting.... They’ve finally found something that gets them on the front page, and a lot of people out there in the state think that all we’re doing is spending hours and hours discussing smoking.’”

The following day, April 2, Judge Gamble dismissed Brammer’s suit, ruling
The Battle Against Smoking in the Senate Itself: 1985-2008

that the question of smoking in the rotunda was an internal legislative matter over which the court had no jurisdiction. Brammer, who was assessed court costs, immediately announced that his only other recourse during the legislative session was an action under the Americans with Disabilities Act, which he planned to file the following week.150

Brammer did, however, achieve a victory on April 8, when the full Senate, by a non-roll call vote of 32 to 15, rejected a “pro-smoking amendment”151 that would have struck Brammer’s amendment to the Human Services appropriations bill.152 In spite of Minority Leader Rife’s complaint that “‘[t]he bottom line is individual rights’” and that “‘I am entitled to some space in this Capitol’”—to which non-smoking Democrat William Dieleman responded by noting that Rife’s rights ended where he began violating someone else’s153—the bill became law154 and on July 1, 1993, the legal contest over the toxic and carcinogenic air pollution in the rotunda finally came to an end.155 The Tobacco Institute’s acknowledgment of this defeat did not come until the day after adjournment in a communication from a Region IV office employee, who was “tracking...the Iowa Capitol and other government buildings as a local issue,” to the State Activities director of legislative information conveying “the jist [sic] of the whole thing” from Wasker’s office—namely, “that the Capitol of Iowa and state office buildings are

151“Senate Agrees with House Bill, Moves to Ban Smoking in Rotunda,” DMR, Apr. 9, 1993 (4) (NewsBank).
1541993 Iowa Laws ch. 172, § 54, at 414, 438.
155“Statehouse Notes,” DMR, Apr. 27, 1993 (4) (NewsBank). The amendment’s legal effect was apparently not vitiated by the fact that it was never directly incorporated into the public smoking prohibition law and that, as part of an appropriations bill, its validity may have expired at the end of the fiscal year on June 30, 1994. A new dispute then arose when some members of the Legislative Council proposed designating a legislative dining room as a public smoking area. Minority Leader Rife was a chief proponent, insisting that smokers needed a place to smoke so that they were not forced to go outside, but other leaders objected. Jonathan Roos, “Statehouse Dining Room Smoking Area Gets Support,” DMR, May 27, 1993 (6) (NewsBank). When the Council reconvened in December to discuss, inter alia, “where to put the smoking room at the statehouse, the Register’s chief political reporter complained: “So far, legislative leaders have spent more time talking about where people can smoke than they have about health-care reform.” David Yepsen, “Primary Could Color Session,” DMR, Dec. 6, 1993 (15) (NewsBank).
Also defused was the “extraordinary” feud over smoking between two non-smoking Democrats from the same city (Cedar Rapids)—“Horn was Brammer’s state senator”—one of whom (Brammer) was an “outspoken” leader on the no-smoking issue and the other (Horn) “demonstrate[d] a stubborn streak from time to time.” Such confrontations doubtless contributed to Brammer’s charges that Horn and Rife were “‘in the tobacco lobby’s pocket’” and that the “‘tobacco lobby owns the management of these two houses.’” Rife—who, like Horn, received contributions from the tobacco industry—indignantly rejected claims that such payments in any way influenced his views on smoking, especially in restaurants: “‘You wouldn’t have to give me a dime and I’d feel the same. A private business belongs to the individual, not the government.’”

In June following the close of the session, “[v]irtually all the legislative leaders agreed that smoking eventually will be banned at the Statehouse but disagreed on how much money should be spent to provide a temporary [smoking] facility.” The Legislative Council “ balked at a potential cost of $56,000 to create a designated Statehouse smoking area,” but “conceded they probably would end up providing space for smokers” because “the consequences of making the building completely smoke-free could be ugly.” Democrat William Palmer, the Senate president pro tempore, said that smokers turned “‘surly’” if a ban was forced on them, but that it was “‘just a question of time’”; in the interim, however, they should be given time to adjust “before being tossed from the building.” Indicative of the smokers’ (and their facilitators’) priorities was the report that: “The most popular suggestion for a potential smoking area is a former first aid room at the Statehouse, currently being used as a lactation room for nursing mothers.”

In 1995 Johnie Hammond and another senator sought to dissolve the mystery as to what spaces the Senate no-smoking rule governed by filing the following amendment to Senate Resolution 1 embodying the Senate’s permanent rules: “Smoking shall not be permitted in the senate chamber or in any areas controlled

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156Virginia Brown to Cathey Yoe (May 3, 1993), Bates No. TI28922947.
157Email from Mark Brandsgard (Feb. 28, 2007). Brandsgard, the Chief Clerk of the House, was the administrative assistant to the House Democratic Minority Leader in 1993.
158Email from John Patchett (Feb. 28, 2007).

3045
by the senate, but it was never debated or voted on. An anti-smoking bill (S.F. 2174) whose unanimous passage Hammond managed to secure from her Human Resources Committee in 1996 would not have applied to the Senate itself, but it never even reached the Senate floor.

With the Republicans’ Loss of Their Majority and the Fall of the Cigarette Manufacturers’ Friend, Majority Leader Stewart Iverson, Senator Michael Connolly’s “long battle to rid the Senate of smoking...finally come[s] to an end: 1997-2008

By 1997 the Senate, now controlled by the Republicans, mustered the civil courage and public health intelligence to expand its no-smoking zone. At a Rules and Administration Committee meeting on January 13, the new Republican Majority Leader, chain-smoking Stewart Iverson, who in that capacity was also the committee chair, distributed the Senate Rules for the 77th General Assembly and explained the changes; then the “Access to Senate Chambers and Rules of Senate Decorum” were discussed, but unfortunately the minutes reveal no discussion of the new smoking rule, which read:

5. SMOKING


\[164\] Email from Mike Connolly to Marc Linder (Apr. 24, 2008).


\[166\] Committee Rules and Administration, Jan. 13, 1997, 11:07-11:10 a.m., 3:15-4:15 p.m., in Access to Senate Chamber and Rules of Decorum, 1997-1998, Senate Rules and Administration Committee, RG 039. General Assembly, SHSI, DM. The only decorum rule discussed was a successful amendment by Senator Gronstal adding secretaries to legislators as the only other group permitted to have soft drink cans in the chamber.
a. Smoking is not permitted in the senate chamber at any time.

b. Smoking is not permitted in any other meeting rooms, office areas, or other space under Senate control, except for designated areas identified under subparagraph “c” of this section.

c. Room 206 is designated a smoking area for Senators members of the general assembly and legislative staff. Smoking may be permitted in Room 326A at the discretion of the majority leader. The south end of the 2nd floor hallway behind the Senate is a designated smoking area for Senators, Senate employees, registered Senate press persons, former members of the Senate who are not registered lobbyists, and guests of Senators (who must be continually accompanied by a Senator in order to use this area). The Secretary of the Senate will be responsible for clearly marking, maintaining, policing, and maximizing ventilation in these areas Room 206.  

The same day the Senate’s two Republican leaders, Iverson and non-smoking President Mary Kramer, agreed finally to remove the cigarettes from the vending machine behind the Senate chamber. Kramer’s reason—that children could buy cigarettes from the unmonitored machine—was the same one that had prompted Governor Branstad to have it removed from the basement seven years earlier before Democratic Majority Leader Hutchins had ordered it delivered to the Senate against the physical resistance of Senators Hannon and Lloyd-Jones. The Kramer-Iverson accord eliminated smoking in an open area where it had been permitted, but designated as smoking areas Iverson’s office, a small room a few steps from the chamber, and a ground-floor area near the legislators’ dining room. Though the agreement (self-)conferred a super-privilege on Iverson, all legislators and staff members were privileged vis-a-vis lobbyists and visitors, who had to go outside to smoke. To be sure, the new rules still had to be approved by the full Senate.  

That process proved to be nettlesome. The following day, during the consideration of Senate Resolution 1 embodying the chamber’s permanent rules, a group of 15 Democrats and three Republicans led by Democrat Michael Connolly filed a floor amendment to extinguish smoking altogether: “Smoking Prohibited: Smoking shall not be permitted in the senate or in any area of the capitol building controlled by the senate or controlled jointly by the senate and house.” Connolly argued that it “‘looks very bad—it looks elitist—when the

167 Access to Senate Chamber and Rules of Senate Decorum [1997-1998], Senate Rules and Administration Committee, RG 039, General Assembly, SHSI, DM.


169 State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1:55 (Jan. 14), 2:1600 (S-3007). The three Republicans were Andy McKean, John Jensen, and Maggie Tinsman. Directly before filing this amendment,
Senators Connolly and Mary Neuhauser had requested and received consent to defer action on a much more tepid amendment: “Smoking Restricted: In addition to a written policy on smoking restrictions adopted by the committee on rules and administration, smoking is prohibited in room R15A when a committee or an appropriations subcommittee is meeting in room R15.” *State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly* 1:55 (Jan. 14), 2:1599 (S-3003). An even more relaxed version of this amendment was adopted by the Senate on January 28; see below.

Email from former Iowa State Senator Milo Colton (Mar. 15, 2007). Remarkably, 14 years earlier, Palmer voted against a bill that would have “put[ ] a guaranteed profit [to wholesalers and retailers] on a product [cigarettes] that is contributing more to the health cost increases than any substance other than alcohol.” Tom Witosky, “Iowa Senate Votes to Raise Minimum Price of Cigarettes,” *DMR*, May 7, 1983 (2A:2-3).

Two weeks later, one of the five Republicans who had voted for the ban, John Jensen, called up his motion to reconsider the vote on the grounds that the issue was so divisive that it was preventing the Senate from “adopting more important rules related directly to their main task of making laws.” Putting the fund of his public health knowledge at his colleagues’ disposal, Jensen, a veteran senator and nonsmoker, reminisced: “I’ve sat in here when you couldn’t see the ceiling half the time because of the smoke, and I haven’t died yet.” In contrast, Connolly and other senators argued for affirmation of the previous vote not only for the senators’ and staff’s health, but also because backtracking would send the wrong signal to the public about legislators’ special privileges. On a virtually perfect party-line procedural vote—only Palmer voted with the Republicans and no

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3048
Republican deserted Iverson—the Senate voted 28 to 20 to reconsider its vote.\textsuperscript{176} Then on the substantive vote on adopting the amendment again, the ban lost on a 24 to 24 tie: all 21 Democrats voted in favor joined by three Republicans, two of whom (Dr. Redwine and Tinsman) had also voted for it two weeks earlier.\textsuperscript{177} Although only about one fifth of the senators used tobacco, “‘the old mossbacks,’” Connolly said, were “‘continuing to have their way. It’s a disgrace.’”\textsuperscript{178}

The following day, when the Senate resumed discussion of Senate Resolution 1, Assistant Minority Leader Gene Fraise, who in 1990, for example, had voted against smoking curbs, moved the adoption of his curiously narrow amendment: “Smoking shall not be permitted in any area under exclusive control of the senate by anyone other than senators, staff of the senate, and staff of central legislative staff agencies when assigned to work in the senate.”\textsuperscript{179} On yet another almost completely party-line vote, it was rejected 23 to 25 with only two Republicans joining all 21 Democrats.\textsuperscript{180} Connolly then offered a virtual replica of his failed S-3007, differing only in confining the smoking ban to “any area of the capitol building controlled by the senate.”\textsuperscript{181} All 21 Democrats voted for it (including Palmer), but they were joined by only two Republicans (Dr. Redwine and Tinsman), producing a 23 to 26 roll call vote.\textsuperscript{182}

Deviation by Republicans from Iverson’s position on the Senate’s internal
The Battle Against Smoking in the Senate Itself: 1985-2008

regulation of smoking was fraught with disciplinary peril—at least for third-term Quad Cities Senator Maggie Tinsman, whose seat happened to be next to Iverson’s. During one of the votes the majority leader admonished her to toe the party line, but Tinsman (who had a master’s degree in social work and, for a decade, had been a Scott county supervisor and during half of that period Commissioner of the Iowa Department of Elder Affairs as well), explained that as a member of the board of directors of the American Lung Association of Iowa she could not possibly vote against a smoking ban. Not ten minutes had gone by since she had repeated her act of conscience and defiance on the next vote, when a Senate staffer came to inform her that she had been removed from the Legislative Council (the body that oversees the interim business of the legislature and sets the policies of various legislative agencies such as the Legislative Service Bureau). After having had to ask by whom and learning that it was Iverson himself, she asked the majority leader why he had removed her from the prestigious position. He bluntly told her that his action was the response to her having voted against his leadership. Asked many years later whether she regarded Iverson’s move as vindictive, Tinsman observed that she preferred to call it an exercise of “raw political power.”

More subtle means were also the more typical method for deterring senators from defying Iverson on the issue of smoking, which he took both as a personal affront and as a challenge to his leadership. Veteran legislator Andy McKean, who had a very strong personal feeling against smoking, found himself in a “very tough situation” as a Republican because those who voted against Iverson the “fervent smoker” on smoking issues sometimes had to face consequences. The knowledge that defying Iverson on smoking—on other matters his attitude was much more laissez faire—might make him less inclined to push a deviating senator’s bills made anti-smokers think through carefully whether “in the grand scheme of things” a battle with the majority leader was worth it. Without being able to quantify the phenomenon, McKean was quite confident that the number of anti-smoking Republicans who made the calculation and decided not to challenge Iverson would have sufficed to create a majority to ban smoking in the Senate. In that sense Iverson was singlehandedly responsible for its

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The Battle Against Smoking in the Senate Itself: 1985-2008

continuation.185

After having sustained his latest defeat, Connolly offered a compromise permitting smoking in only 2 rooms including the majority leader’s:

RULE 45A
SMOKING RESTRICTED
1. Smoking is not permitted in the senate chamber at any time.
2. Smoking is not permitted in any other meeting rooms, office areas, or in other space under senate control, except for areas identified under subsection 3.
3. Room 206 is designated a smoking room for members of the general assembly and legislative staff. Smoking may be permitted in room 326A at the discretion of the majority leader. The secretary of the senate will be responsible for clearly marking, maintaining, policing, and maximizing ventilation in room 206.186

At the same time, Connolly raised a “point of parliamentary inquiry that, pursuant to Senate Rule 36, the issue of smoking should be lifted from the rules of decorum and placed in the rules of the senate.” Following a five-minute consideration by Senate President Mary Kramer, the chair ruled that it was appropriate to transfer the smoking rules and that “the determination of this matter will be decided by the outcome of the vote” on Connolly’s amendment. However, on a completely party-line vote, S-3022 was rejected 28 to 21 (even the duly admonished and punished Tinsman having done obeisance to Iverson).187

As Connolly himself later interpreted this episode, Kramer, an anti-smoker who had worked in health care, ruled my motion germane and then allowed it to come to a vote. The majority leader at the time, Stewart Iverson, knew he had the power to get the necessary votes in the Republican caucus to defeat my amendment. If my amendment had passed,...it would have gone into the Permanent Senate Rules. Senator Kramer knew that my amendment was obviously germane. After conferring with Iverson, they could have it both ways, allow my amendment to be ruled germane and then kill it when it came to a vote of the full Senate. ...

At this point, leadership intervened directly, Iverson and Minority Leader

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185 Telephone interview with Andy McKean, Anamosa, IA (Apr. 16, 2008).
188 Email from Mike Connolly to Marc Linder (Apr. 25, 2008).
Gronstal offering a floor amendment that was a weaker version of one that Neuhauser and Connolly had offered two weeks earlier and received consent that action on it be deferred:

Rule 45A
Smoking Restricted

In addition to a written policy on smoking restrictions adopted by the committee on rules and administration, smoking may be prohibited in room R15A by the committee or subcommittee chair when a committee or an appropriations subcommittee is meeting in room R15.\(^{189}\)

Senate leadership having already agreed to it, the amendment was adopted on a voice vote followed by adoption of Senate Resolution 1 by a roll call vote of 40 to 9, several Democratic anti-smoking activists (including Connolly, Dvorsky, Halvorson, Hammond, McCoy, and Neuhauser) opposing it.\(^{190}\) The result was thus a ratification of the tentative ruling to permit smoking in Iverson’s office and two back rooms.\(^{191}\) The Register mocked the senate for being “‘like a nervous addict, [who] chickened out at the prospect of going cold turkey.’” In the end it all boiled down to the fact that some of the small minority of smokers “apparently couldn’t face the indignity of having to huddle in doorways outside the Capitol to get their nicotine fix, like ordinary addicts. So they provided cozy space inside for themselves. The backsliders know no shame.”\(^{192}\) How one-fifth of the senators persuaded the non-smoking four-fifths not only to facilitate this addiction, but to do so at the expense of their own health, the newspaper did not explain.\(^{193}\) Two months later, when the Senate passed a watered-down bill

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\(^{193}\) Although the Register adopted a very hard-line editorial position against smoking, some stones accurately targeted its own glass house. In response to an editorial attack on Iowa congressional Republicans who accepted money from cigarette company PACs, Senator Charles Grassley noted that the “Register accepts tobacco advertising, and has defended it ‘on the basis of free-speech protections. It should defend those same free-speech rights of employees of tobacco companies....’” The newspaper’s self-interested reply revealed a profound ignorance of omnipresent cigarette advertising’s massive
penalizing underage smokers, Connolly admonished his colleagues that the measure’s deterrence was undercut by the chamber’s “refusal to ban smoking in its own rules. Young people will look at what lawmakers do rather than what they say....”

At the end of 1998, Governor Branstad issued an executive order prohibiting the “use of all tobacco products in the State Capitol Complex and all offices occupied by state government....” In 1999, with the Republicans controlling 30 of the Senate’s 50 seats, Connolly undertook yet another effort to ban smoking. He filed an amendment proposing the following language for Rule 45A: “Smoking Prohibited: Smoking shall not be permitted in the senate or in any area of the capitol building controlled by the senate or house.” Only one Democrat opposed it, while five Republicans (including John Redwine, an osteopathic physician) voted for it, leaving the final vote 23 to 26. Tinsman, who had long voted with anti-tobacco control forces, this time joined her pro-smoking Republican Majority Leader Iverson because, as she reconstructed her decision years later, she probably feared that he would mete out a punishment to her even more severe than the expulsion from the Legislative Council for having defied his leadership on the smoking rule in 1997. Having lost the vote, Connolly immediately asked and received consent to withdraw another amendment that would have prohibited smoking everywhere in the Senate except

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197 State of Iowa: 1999: Journal of the Senate: 1999 Regular Session Seventy-Eighth General Assembly 1:150 (Jan. 27). Bill Fink, a nonsmoking high school teacher whose father had died of lung cancer, was the lone Democratic defector. He later explained his vote as flowing both from his perception that the smoking lounge was a reasonable compromise and from his streak of libertarianism. Telephone interview with Bill Fink, Carlisle, IA (Apr. 6, 2008).
198 Telephone interview with Maggie Tinsman, Davenport (Apr. 13, 2008).
in the majority leader’s office.\textsuperscript{199} 

The committee rule for the General Assembly in 1999-2000 was the same as in 1997-98 with the aforementioned deletion of the struck out words and addition of those underlined,\textsuperscript{200} and the additional permanent Rule 45A also remained unchanged.\textsuperscript{201} The irony of the Senate’s simultaneously passing a bill imposing more severe fines on underage smokers in 2000 was not lost on the Register’s statehouse reporter, who observed that “when senators debate that anti-tobacco legislation, a place for them to take a few puffs between votes is only a few steps away—in a room behind the Senate chamber. Room 206 is the last smoking enclave in the Capitol and nearby state office buildings.” Iverson, one of only about a half dozen senators who still smoked, defended the smoking lounge on the grounds that his colleagues needed an indoor place close by. His “clout” alone was “instrumental in maintaining rules that allow a smoking room for legislators and members of their staff, as well as smoking privileges in his upstairs office.” Ever a true friend of the cigarette manufacturers, the quondam wannabe Tobacco Institute midwestern regional vice president who had been a smoker “most of his life” and resumed the “habit” after having quit a couple of times, reflected the company line in supporting a focus on children rather than adult smokers. To Connolly’s criticism that it was inappropriate for the state Capitol to be one of the few public places in Iowa with a smoking room, Iverson cavalierly replied that “government already sends mixed signals about tobacco, which he notes is legal for adults to use.” And the compliant Senator Jensen, who for years went along with secondhand smoke exposure to get along, was so delighted with the vastly improved air quality that he was “not too concerned about the few senators who still smoke, ‘as long as they’re not blowing it in my face.’”\textsuperscript{202}

Connolly, however, was not vanquished yet. A few days later, as the Senate was debating the tobacco use prevention and control plan, which would be financed by the state’s $1.7 billion share in the Master Settlement Agreement, Connolly let loose a torrent of amendments accompanied by the accusation that the body had never been “more hypocritical,” though he again failed to


\textsuperscript{200}Access to Senate Chamber and Rules of Senate Decorum [1999-2000], Senate Rules and Administration Committee, RG 039, General Assembly, SHSI, DM.

\textsuperscript{201}Sen. Res. 1, Rule 45A at 37 (as adopted Jan. 27, 1999).

\textsuperscript{202}Jonathan Roos, “Smoking Remains in Senate Lounge,” DMR, Apr. 9, 2000 (1A) (NewsBank). On the more severe fines for underage smokers, see above ch. 31.
eliminate the smoking lounge. Connolly adroitly crafted his amendments to fit the context of the bill. His first amendment to an earlier version of the bill provided that:

In order to comply with section 142A.1 and to demonstrate a firm commitment to the tobacco use prevention and control partnership and to provide a positive model for youth, specifically, and the people of Iowa, in general, the general assembly and the executive branch shall declare the state capitol a smoke-free environment. The general assembly shall adopt any rules necessary to require that all areas controlled by the general assembly or either chamber are smoke-free upon the effective date of this Act.

When, four days later, S.F. 2565 was substituted for the first bill, Connolly withdrew his amendment and offered instead S-5438, the first part of which he placed at the beginning of the bill, where the latter expressed the purpose of establishing a “comprehensive partnership” among the legislative and executive branches, communities, and the people of Iowa in addressing the prevalence of tobacco use. After Connolly had withdrawn the second part (requiring the legislature to adopt rules), Republican Senator David Miller offered an amendment to the amendment to add all public elementary and secondary school buildings as smoke-free environments. After Connolly had secured a ruling from the chair that Miller’s amendment was not germane, pro-tobacco Republican Assistant Majority Leader Nancy Boettger succeeded in eliminating Connolly’s amendment with the same parliamentary maneuver. Two days later two more of his amendments—declaring the state capitol and the general assembly, respectively, smoke free—to the same bill met the same fate. Immediately thereafter, in his final effort to ban smoking in the building, Connolly offered an amendment that inserted the smoking ban in the General Assembly as a clause directly into the intent clause of the bill’s preamble after the term “General Assembly,” but on Boettger’s point of order the chair also ruled this amendment not germane. Stymied on this front, Connolly made his final gambit, seeking to impose the requirement that certain members of the new Commission on Tobacco Use Prevention and Control be “from organizations that prohibit the use of tobacco in buildings or portions of building under their control.” However,

204Senate Journal 2000, at 1:1142 (S-5399 to S.F. 2449) (Apr. 13).
205Senate Journal 2000, at 1:1187 (S-5438 to H.F. 2565 and S-5441 to S-5438) (Apr. 17).
sensing, presumably, the hopelessness of this initiative, Connolly withdrew the amendment before Republicans could rule it not germane.\(^{208}\)

In anticipation of the next Senate rules battle a few weeks later, at the end of 2000, Democrats announced that they would again seek to “get rid of the smoking lounge.” Hammond, who was looking forward to a “‘fun fight,’” noted that their caucus wanted to be able to show that “‘we legislators can live by the same rules as we require of everyone else.’” With the number of smoking senators dwindling—for example, Republican Richard Drake had smoked up to three packs a day for 58 years before quitting a year earlier—Minority Leader Mike Gronstal believed that they had the votes this time. The “noncommittal” Iverson declined to say more than that: “‘I don’t know how important it is. I can also smoke in my office.’”\(^{209}\) Gronstal, an ex-two-pack-a-day smoker who was the last Senate Democrat to quit smoking, tried humor to shame Republicans into abolishing the exemption to which they persisted in clinging: “‘The Senate Democrats will take up a collection for any Republican Senator trying to quit smoking by using ‘the patch,’ acupuncture treatments, sessions with a hypnotist or whatever else works for them. ... I’d be happy to share my nicotine gum.’”

Turning serious, Gronstal explained that Democrats objected not only to the Republican majority’s refusal “‘to live under the same rules we set for everyone else’”—smoking was, after all, already banned everywhere else in the Capitol complex, including the House and the governor’s offices—but also to the “‘terrible example’” that young people would see in the Senate’s “‘Do as I say, not as I do’” approach.\(^{210}\)

However, in 2001, when Rule 45A had been removed from the permanent rules,\(^{211}\) the Register editorialized, a few senators were still smoking, “with many of the rest fed up with their colleagues’ holdover hideaway.” Except for the aforementioned second-floor Senate lounge, where legislators and staff could smoke, the entire Capitol and adjoining state office buildings had been smoke-free for several years. Iverson, “one of a handful of senators who smokes [sic], has used his position in maintaining Senate rules that allowed a smoking room. He doesn’t want fanfare for the end of this arrangement, but it does signal a realization, at last, that the Senate wasn’t setting a very good example. Now,
The Battle Against Smoking in the Senate Itself: 1985-2008

smokers can use a balcony above the south entrance of the Capitol.\(^{212}\) When Senator Johnie Hammond and other Democrats announced that they would push for a smoking ban that would target Iverson’s smoking in his office and some dozen others who smoked in Room 206 (the designated smoking room) on the grounds that the Capitol building and legislative offices should operate under the rules banning smoking in all state buildings, Iverson insisted that he had “responded to concerns over time by moving smoking to one room other than in his own office. ‘I think that’s sufficient.’”\(^{213}\) Nor was the exemption for the Senate lounge merely a matter of self-aggrandizement or even of secondhand exposure to passers-by: because leaders such as Iverson frequented it, nonsmokers who wanted to participate in important talks felt compelled to enter it. One former Democratic legislator, who saw, for example, non-smoking Governor Vilsack there engaged in talks, later revealed that although previously he had not smoked, after attending meetings in the lounge he soon found himself “bumming cigarettes” to the extent that a decade later he was still trying to stop smoking.\(^{214}\)

The Iowa Senate’s no-smoking policy continued to lack the formality of the House rule. As late as 2004, smoking was permitted in a room for lobbyists in the Senate, which other smokers also used; smoking in this room finally came to an end in 2005 when Iverson, its chief facilitator, who also conferred on himself the unique privilege of smoking in his office, had to share power as a result of the 2004 elections, which produced an evenly divided Senate.\(^{215}\) And during the 2007-2008 General Assembly, the rule, embodied only in its rules of decorum and not in the Rules of the Senate (now controlled by Democrats 30 to 20), was available apparently only on the legislature’s website. Pursuant to this rule, finally: “Smoking is not permitted at any time in the Senate chamber or in any other area controlled by the Senate.”\(^{216}\) Even this statement was, until the last days of the 2008 session, untrue: smoking was still permitted on the balcony behind the Senate chamber. However, after Majority Leader Michael Gronstal had declared on the day that the governor signed into law the statewide ban on

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\(^{214}\)Telephone interview with legislator who requested anonymity, Des Moines (May 5, 2008).

\(^{215}\)Telephone interview with an unidentified male employee of the Legislative Information Office (Feb. 19, 2007).

smoking in public places that “[w]e’re going to stop the smoking on the balcony,” Senator Connolly, who had arguably fought longer and harder for a smoke-free Senate than anyone else in that body’s history, observed: “That will end in a few more days and the Senate, like most public places in Iowa, will finally be free of smoking. The long battle to rid the Senate of smoking will have finally come to an end.”

218Email from Mike Connolly to Marc Linder (Apr. 24, 2008).
The State’s Two Main College Towns Adopt Anti-Smoking Ordinances, But the Iowa Supreme Court Invalidates Them as Inconsistent with, and Thus Preempted by, the State Clean Indoor Air Law: 1999-2003

“[B]eing in business is all about making money, and if banning smoking is going to cut our business, then no, we’re not for that.... In this restaurant, I’ve got two servers who have asthmatic reactions being around smoke, and we don’t have them working in the smoking sections.... The other servers actually like working in the smoking section because smokers tip better.”

“I shouldn’t have to suffer because of other people’s choices,” said Brooke Beigly, a UI junior and a waitress and manager at the Brown Bottle. “It’s in my mind all of the time—how much secondhand smoke I swallowed.”

But Beigly said the decision to allow smoking should be left to each restaurant. “I don’t think it’s up to the City Council to stick its nose in it.”

Beigly, a nonsmoker, said the wait staff generally prefers serving the no-smoking section.

“It gets pretty bad sometimes.... But we don’t want to turn our regular smokers away, either.”

Ever since the cigarette oligopoly, which in the 1980s and 1990s had elevated enactment of statewide preemption of local anti-tobacco ordinances to one of its paramount nationwide legislative goals, concluded in 1990 that it had achieved this objective in Iowa by weakening that state’s already barely functional public smoking law in order to insure that no city or county could lawfully adopt an ordinance embodying a stronger ban, repeal of this preemption of local control—which nationally the U.S. Department of Health and Human Services had declared a public health priority—in turn became the state anti-smoking


3See above ch. 27.

movement’s highest priority. That preemption had been passed while Democrats controlled both houses of the Iowa legislature and efforts at repeal had failed during that party’s remaining two years in power (1991-92) should have made it clear that, once the even more tobacco company-beholden Republicans gained control of the House in 1993 and the Senate as well in 1997, undoing preemption was doomed. 5

Consequently, the only path available to anti-tobacco groups was adoption by some city council of a stronger ordinance to be supported by a litigation strategy to persuade the Iowa Supreme Court to vindicate such a measure in spite of the tobacco firms’ best efforts at thwarting it. In the end, the outcome would depend on judicial judgment of the bill-drafting competence in 1990 of Covington & Burling, the Tobacco Institute, and the legislature’s former chief bill drafter, Serge Garrison, who by then had placed his skills at the disposal of R. J. Reynolds. 6 Although the two university cities, Ames and Iowa City, ultimately passed such weak ordinances in 2001 and 2002, respectively—the former not only without the help, but against the opposition, of part of the anti-smoking health movement—the key organization in each failed to coordinate mobilization or strategy with the other, 7 and the supporting litigation, which was not carefully planned, proved to be the weak link. 8 After a state district court judge, in a lengthy and analytically sophisticated opinion, in 2002 had upheld the Ames ordinance against a challenge financed by Philip Morris, the following year the Iowa Supreme Court’s extremely meager and poorly reasoned but unanimous opinion, which evaded the important jurisprudential, political, and socio-economic issues, put an end to the limited experiments in local control in Ames and Iowa City and insured that no other local government would take up the cause. 9 However, this judicial defeat of the local control gambit only prompted its supporters to revert to the legislative forum once Democrats regained control of both houses in 2007 in an effort to overturn the judges’ decision by legislative repeal of the preemption provision and passage of an express grant of local power

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5 See above chs. 28-31.
6 See above ch. 27.
7 While the Iowa City group (in small part based on misinformation) was very critical of the Ames group, the latter largely ignored developments in Iowa City. Email from Linda Muston to Marc Linder (Oct. 23, 2008).
8 The Iowa Attorney General’s Office early on furnished a memorandum providing crucial support for local ordinances, but then failed even to file an amicus brief when the case came before the Supreme Court.
9 To be sure, in retrospect, the embarrassingly inferior quality of the Supreme Court’s opinion would presumably have made moot any coordinated litigation strategy.
that would sidestep the constitutional/codified limitations.

Origins

What right does the Council or any lobbying group have to dictate how these business-owners run their restaurants and whether or not they choose to allow people to perform a perfectly legal activity therein? Because neither the Council nor CAFE bears any risk, they have no moral authority to dictate business policy.

CAFE can march around banging pots and pans shouting all they like about the evils of smoking. Should they be able to force the imposition of an immoral law? No! Everyone can have a say in this by voting with their dollars.¹⁰

By mid-1998, in localities with an aggregate population of 88 million people, 846 anti-smoking ordinances had been adopted in the United States, 753 of which applied to restaurants.¹¹ Because grassroots campaigns at the local level promoted more focused public debate and education about the health consequences of secondhand smoke exposure, which in turn expanded support for the proposed legal changes and their underlying norms, anti-smoking groups had long viewed local ordinances as a high-priority desideratum. In the many states in which the cigarette companies had succeeded in securing enactment of statutes preempting ordinances stricter than or inconsistent with statewide laws,¹² localities would be able to adopt and implement such ordinances in the long run only if they successfully litigated legal challenges by demonstrating that the ordinances somehow did not run afoul of the preemption provisions (or mobilized legislative majorities to repeal them).

Ames

Although Iowa was precisely such a state and anti-smoking health groups

¹⁰Email from Stewart Wood [“Non-smoker, non-business owner, concerned, freedom-loving citizen!”] to Iowa City Council (Nov. 19, 2001), in City Council Documents, Meeting Folders 2001 (final), Nov. 27, 2001 Special Meeting at 175, on http://www.iowacity.org/weblink/doview.aspx?id=8320 (visited Nov. 4, 2008).

¹¹National Cancer Institute, State and Local Legislative Action to Reduce Tobacco Use 32, summ. tab. 1 at 71 (Smoking and Tobacco Control Monograph No. 11, 2000).

¹²Of the 30 state preemption laws in effect in 1998, 14 applied to clean indoor air ordinances. National Cancer Institute, State and Local Legislative Action to Reduce Tobacco Use 54 (Smoking and Tobacco Control Monograph No. 11, 2000).
prioritized such local action, the advent of an anti-smoking ordinance in Ames was, ironically, serendipitous. To be sure, Ames was not a complete stranger to anti-smoking ordinances: as early as May 23, 1978, two weeks after the governor had signed into law the state’s first clean indoor air law but five weeks before it went into effect, the Ames city council unanimously adopted an ordinance to protect nonsmokers from tobacco smoke at its own meetings or those of other Ames governmental bodies: “No person shall smoke, or otherwise use, any cigarette, cigar, pipe or other smoking equipment, or other tobacco product, in any room in which a public meeting of the city council or any administrative agency, board, commission, committee or other governmental body of the City of Ames, Iowa is being held, during said public meeting.”

Despite this precedent, according to Herman Quirmbach, an economics professor at Iowa State University and the self-designated instigator of the 2000 ordinance, the latter originated in the late summer/early fall of 1999, while he was door-knocking during his re-election campaign for city council. Asked by a nurse why the City of Ames allowed smoking in restaurants, Quirmbach, who was a council member from 1995 to 2003 before being elected to the Iowa Senate, had to admit that he was unable to answer her question. He later proposed to the

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13See above ch. 25.

14Ames, Iowa, Minutes of City Council Meeting at 50 (May 23, 1978) (copy furnished by City Clerk Diane Voss). From the fact that only one very brief mention of the ordinance’s adoption appeared in several lengthy front-page articles of the local newspaper devoted to the meeting suggests that the action was not controversial. “City-County Mixup Means 24th Street Work Delayed,” ADT, May 24, 1978 (1:4-6).

15Municipal Code City of Ames, Iowa, § 17.7(1) (Ordinance No. 2655, May 23, 1978) (1980). The provision is still in the code http://www.cityofames.org/AttorneyWeb/codeTOC.htm (July 1, 2008). From 1978 to 1990 the Iowa clean indoor air law contained no preemption provision; however, since the Ames ordinance banned smoking (presumably) only in city-owned buildings, it would not have run afoul of the state law even after the enactment of the preemption amendment, which did not restrict any public or private building owner’s power to ban smoking entirely on its/his property. Shortly before the preemption provision was passed in 1990, the Ames city council adopted another ordinance (which was amended in 1995), which, for the same reason, fell outside the scope of the preemption provision: “No person shall smoke, or otherwise use, any cigarette, cigar, pipe, or other smoking equipment, or other tobacco product, in any building under the use and control of the City or City administrative agency, or in any enclosed courtyard of any such building, or in any vehicles, including Cy-Ride, under the use and control of the City or City administrative agency, except in those areas, if any, that have been designated and conspicuously posted as smoking areas.” Municipal Code City of Ames, Iowa, § 17.7(2) (Ordinance No. 3074, Mar. 20, 1990, Ordinance No. 3358, Nov. 21, 1995), on http://www.cityofames.org/AttorneyWeb/codeTOC.htm (July 1, 2008).
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

council that it consider the matter.\footnote{16}{Telephone interview with Herman Quirmbach, Ames (Apr. 19, 2008). On Quirmbach’s biographical data, see http://www.iowasenatedemocrats.org/quirmbach/Default.htm (visited Sept. 16, 2008).}

To be sure, this chance encounter and Quirmbach’s seizing the opportunity hardly took place in a vacuum. They must be seen as facets of the convergence of several anti-tobacco program developments in Ames, including a tobacco cessation program operating under the auspices of the Mary Greeley Medical Center through the Mid-Iowa Community Health Committee (MICHC), efforts, especially by the Youth and Shelter Services of Ames (YSS), to reduce the prevalence of smoking and tobacco use among young people, and the pressure being exerted on the city council to lower some of the state’s highest rates of violation of the no-sales-to-minors law\footnote{17}{This “wide community based planning process,” according to Linda Muston, who was vice president for community service at Greeley, included “task forces that addressed teen pregnancy, dental needs, maternal child issues as well as Tobacco/Smoking Cessation. The latter task force had initiatives going with YSS in high schools (Few Do), middle school education, and smoking cessation for adults (in conjunction with ISU Student Health and the MGMC respiratory care department.) The MICHC was made up of lots of community leaders including a city council member, representative of the Ames Public Schools, a McFarland Clinic person, a county supervisor, the head of ISU Student Health, a nursing home administrator, a home health agency provider, a minister, an auxiliary member, etc. Some of the MICHC members were also on this task force. The tobacco use task force morphed into the ATTF [Ames Tobacco Task Force]. It became important for practical, political and social reasons to have the full committee adopt the stance that the ATTF was advancing.” Email from Linda Muston to Marc Linder (Oct. 6, 2008).} detected by compliance checks conducted under the authority of the Synar amendment, which were endangering federal funding of various drug rehabilitation programs.\footnote{18}{On the Synar amendment checks, see above ch. 31, and Thomas O’Donnell, “ Teens, Tobacco Imperil Grants,” \textit{DMR}, June 14, 1999 (1A) (NewsBank).} Among those groups whose funding was threatened—in 1999, Iowa had lost five million dollars in such funds because stings had caught dealers selling to 36 percent of the teenagers trying to buy\footnote{19}{Rebecca Anderson, “City Council Researches Smoking Ban,” \textit{Tribune} (Ames), May 12, 2000 (B1:2-4). In 1998, teens trying to buy tobacco in the 12-county area around Ames had been successful 46 percent of the time; by the summer and fall of 2000 the figure had dropped to 19 percent, which was 10 percentage points below the state average. Colleen Rogers, “Story Co. Underage Tobacco Sales Drop,” \textit{Tribune} (Ames), Jan. 8, 2001 (A1:2).}—was YSS itself, whose director, George Belitsos, was also co-chair of the Ames [Teen] Tobacco Task Force, which was formed in 1999 by the Mayor’s Youth Committee, YSS, and the American Cancer Society in
order to try to secure passage of laws and ordinances to regulate public smoking. Belitsos argued for the ban because "[w]e know from prevention theory that the more young people see adults doing stuff they [young people] are banned from doing, the more they want to do it." Quirmbach, too, in an alternative narrative, stated in May 2000 that he had "c[o]me up with the idea to look into banning smoking in restaurants while the council was discussing teen smoking" in connection with this Synar amendment "dilemma." Although the link was "the power of the bad example" perceived by kids when they saw adults smoking in restaurants, Quirmbach noted that protecting employees and adult customers from secondhand smoke was nevertheless the chief justification for the ban.

Iowa City

The timing of a push for a smoking ban in Iowa City was also adventitious. In March 1999, on the occasion of a visit to the University of Iowa by former Surgeon General C. Everett Koop, the country’s most famous anti-smoking campaigner, the “acronymically challenged” Johnson County Citizens for Tobacco Free Youth prevailed on the Iowa City City Council and Johnson County Board of Supervisors to issue Breath of Fresh Air Days proclamations encouraging all citizens and businesses to recognize the days of Koop’s stay...
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

(March 12-14) by going smoke-free. At the council’s meeting on March 2, Dr. Kemp Kernstine, a cardiothoracic surgeon at the University of Iowa Hospital and JCCTFY member who impressed lay audiences with displays of the blackened remains of the lungs of some of his deceased smoking (and secondhand-smoking) patients, urged the council to “make decisions that you can’t smoke in a restaurant, you can’t smoke in a bar. Be like California, Arizona, New York City and Boston who are nonsmoking, you cannot go in a bar in Los Angeles and smoke and that’s what I’d like to see in this progressive community.”

In addition to addressing, at Kernstine’s invitation, a conference on thoracic cancer, Koop lectured on public health and the tobacco lobby (“Anatomy of a Scandal”), and spoke to hundreds of middle school students about the health risks of smoking and tobacco use. Thanks to Koop’s presence, three restaurants went smoke-free for the weekend; their owners found customers’ response so overwhelmingly positive that they maintained their no-smoking status. Later, JCCTFY specifically acknowledged that Koop’s visit had initiated the smoke-free discussion in Iowa City.

JCCTFY, a self-styled “grass-roots coalition of parents, educators, health professionals, and prevention specialists united by a common concern for the health and safety of our children,” had focused from its inception in 1996 on strict enforcement of laws regulating both cigarette sales to minors and possession, use, and purchase of tobacco products by minors. By the latter half of 1999 the
group, which claimed 40 members, had branched out, aiming now to convince local restaurants (but not bars) voluntarily to go smoke-free—for the sake of their employees’ health—and compiling the “Smokefree Dining Guide for Johnson County” listing 60 such establishments. Dr. Richard Dobyns, a member of the Johnson County Board of Health, and Graham Dameron, director of the county’s Department of Public Health and affiliated with JCCTFY, agreed that persuasion of restaurant owners should take precedence before seeking to persuade local government to adopt an ordinance. If it proved necessary to move beyond voluntary to compulsory bans, Dobyns, who hoped that Iowa City, as “‘home to the academic health center in this state,’” would take the leadership, had not yet reckoned with the composition of the city council, three of whose seven members were smoking business owners. Ominously, one of them, Mayor Ernie Lehman, took a strict anti-government, market-knows-best position: “‘The public can dictate where they go to eat. I don’t know why the city would be interested in an ordinance. We should rely on the natural forces of the economy—it’s a natural thing that’s going to occur.’”

And even if such views did not prevail, already by mid-1999 worries had surfaced that local government lacked the power to adopt anti-smoking ordinances because the state clean indoor air law may have preempted such action. In any event, Johnson County Attorney J. Patrick White perceived the strong possibility of a problem for any local ordinance, which a University of Iowa law professor predicted would run into a court challenge. Contrary to the static view propagated by the Iowa City Press-Citizen, however, passage of an ordinance that was later invalidated would not “be simply a waste of time”: the community education, mobilization, and attitudinal transformation that such an effort would require could easily initiate impulses to create a much more capacious statewide anti-smoking movement.

Further progress in Iowa City was made on September 8, 1999, when, at
JCCTFY’s request.\textsuperscript{35} Dameron raised the question of a county or city ordinance banning smoking in restaurants at the county Board of Health meeting, which several members of the group, including its chairperson, also attended. The ban was by no means the only tobacco-related matter on the agenda. Before moving on to the ban, Dameron first asked the Board to consider adopting a resolution regarding Iowa’s share of the Master Settlement Agreement funds from the cigarette industry and then requested approval of a comprehensive tobacco control program on the assumption that Johnson county would receive some Agreement funding. When he reached the issue of ordinances that “would eliminate smoking in restaurants,” Dameron, interestingly, also included “possibly bars.” Opening the discussion, Board member Kelley Donham, a veterinarian and University of Iowa professor in the Occupational and Environmental Health Department of the Public Health College, pointed out that “one can not smoke within 100’ of a public place” in Davis, California, but then immediately cast doubt on the achievement of that seeming anti-smoking nirvana in Iowa by adding that “[w]e may not be able to make those legislative changes at the local level.”\textsuperscript{36} Joe Bolkcom, a first-year state senator—who had just completed six years as a county supervisor following three years in the county Public Health Department working on youth access to tobacco\textsuperscript{37}—reinforced that doubt by declaring that local government was “generally pre-empted from making tobacco ordinances.” After an employee of the University of Iowa Pulmonary Cancer Clinic had mentioned that “Attorney General Miller would like to see the preemption challenged,” JCCTFY’s chair observed that when the group asked the Attorney General’s Office for an opinion on the issue: “They indicated that there appeared to be loopholes in Iowa’s law so a local community could pass a local smoking ordinance, but if they did, it would more than likely be challenged by the tobacco companies.”\textsuperscript{38}

Thus, already at this early stage leading anti-smoking campaigners in Iowa City were acutely aware of the possible legal impediments to and political repercussions of their legal strategy. And JCCTFY member and Johnson County Attorney White, who would be responsible for defending any challenge to a county smoking ordinance, was ambivalent about the statute’s ambiguous

\begin{itemize}
\item\textsuperscript{36}Johnson County Board of Health, Meeting Minutes at 1-2 (Sept. 8, 1999) (copy furnished by JCPHD).
\item\textsuperscript{37}http://www.joebolkcom.org/meet_joe.htm (visited Oct. 24, 2008).
\item\textsuperscript{38}Johnson County Board of Health, Meeting Minutes at 1-2 (Sept. 8, 1999) (copy furnished by JCPHD). On the blocked preemption repeal efforts, see above ch. 28, 30-31.
\end{itemize}
language: on the one hand, the legislature may have prohibited local smoking bans, but “[o]n the other hand, because the language is not completely clear, this may not be the case. Only the courts can decide for sure.” In any event, he was (unnecessarily) worried about what he perceived as “pretty expensive litigation” if the county found itself “fighting Goliath” in case the tobacco industry financially supported a challenge.

Just as clear to those attending the Board of Health meeting was the near-term hopelessness of legislative relief: though Bolkcom as a neophyte had no “sense on where the senate stands on votes on smoking,” an internal medicine professor specializing in pulmonary disease was able to report that a few key senate leaders who had blocked an attempt in 1997 to repeal preemption “need to be targeted.” Perhaps in contemplation of such obstacles, Dameron, in discussing city and county smoke-free restaurant and bar ordinances, pointed to JCCTFY’s smoke-free restaurant pamphlet and expressed his feeling that “they should seek other positive [i.e., non-governmental] initiatives as well.” Dameron’s hesitation about embarking on compulsory imposition of health norms in this area may well have been rooted in his judgment that any ordinance should be countywide in scope and “wouldn’t be effective unless 80 percent to 90 percent of the population supports it”—a level that the movement’s own polling data did not

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39Julie Mickens, “Group Pushes to Ban Smoking in Restaurants,” Icon, Oct. 7, 1999 (5:1-2). The day the Iowa Supreme Court issued its decision invalidating the Ames ordinance, White sought to burnish his image by informing the Johnson County Board of Supervisors that “4 years ago, when the topic first came up at public sessions and with the Board of Health, [he] had said that local restrictions on smoking would be illegal in Iowa because the State had preempted that. ... He said that at a public meeting with the Assistant Attorney General, [he] had said he told them that the law was very clear.” Minutes of the Informal Meeting of the Johnson County Board of Supervisors at 2 (May 7, 2003), on http://www.johnson-county.com/auditor/min2003/030507ws.htm (visited Oct. 23, 2008).

40Julie Mickens, “Group Pushes to Ban Smoking in Restaurants,” Icon, Oct. 7, 1999 (5:1-2). A study of litigation over local nosmoking ordinances concluded that “[m]unicipalities should not fear the cost of lawsuits: preemption suits do not have high litigation costs, because discovery is not a major element.... These cases are resolved on the law and relatively quickly. In the case of Ames...one attorney working part time defended an implied preemption suit.” M. Nixon, L. Mahmoud, and S. Glantz, “Tobacco Industry Litigation to Deter Local Public Health Ordinances: The Industry Usually Loses in Court,” TC 13:65-73 at 71 (2004).

41Johnson County Board of Health, Meeting Minutes at 2 and audio tape (Sept. 8, 1999) (archived at JCPHD). On the blocked preemption repeal efforts, see above ch. 27.

42Johnson County Board of Health, Meeting Minutes at 4 (Sept. 8, 1999) (copy furnished by JCPHD).
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

even attain a year later when the campaign was in full swing and without which he and some other activists believed a ban would not be followed.43

At its next meeting on October 13 the Johnson County Board of Health focused so fixedly on the Master Settlement Agreement funding and formulation of a comprehensive tobacco control program that the only attention it devoted to a smoking ordinance was the announcement that at the end of the month JCCTFY would sponsor a town hall meeting on the subject with a panel discussion on health, law, and local policy.44 That gathering on October 28, which attracted about 50 attendees, heard Assistant Attorney General Steve St. Clair explain that when the legislature did not make a local government’s right to pass a no-smoking ordinance “perfectly clear,” adoption of one might be challenged in court. And for those looking to the legislature to rectify the situation, state Senator Bob Dvorsky had bad news: tobacco lobbyists’ “strong influence” in the legislature made such a change “tough to do right now.”4445

This panel discussion appears to have been JCCTFY’s last highly visible public foray on behalf of an ordinance for Iowa City until the beginning of the academic year 2000-2001, when, in August and September, Clean Air for Everyone, a subsidiary of the Johnson County Tobacco Free Coalition,46 came forward with the results of a survey of local attitudes toward secondhand smoke exposure and submitted a draft ordinance to the Iowa City city council,47 which JCCTFY had prepared and could have brought forward a year earlier.48

44Johnson County Board of Health, Meeting Minutes at 7 (Oct. 13, 1999) (copy furnished by JCPHD).
46It is unclear when JCCTFY became Johnson County Tobacco Free Coalition. Why it spawned CAFE is clear: “Chris Squier, Stan Glantz, and others had convinced us that working on youth sales was one of the least effective things that we could be spending our time on, so we switched to working on education around secondhand smoke and passed the smokefree restaurant ordinance.” Email from Eileen Fisher to Marc Linder (Jan. 17, 2006).
47See below.
The Board of Health of the People’s Republic of Johnson County Rejects a Proposal Even to Request the County Attorney to Draft an Ordinance Banning Smoking in Restaurants

I feel that the logic is simple. If we were talking about some other health risk, such as AIDS, TB, or smallpox, diseases that we all agree and are used to thinking of as dangerous to our health, there would be no question. The public must be protected and would be prevented from exposure to the noxious, toxic, disease-causing organism or substance, and those with the disease would be quarantined away. There would be no or at least minimal concern. We would all agree that the greater good was more important than the potential rights of the individual.

So why is there any question when we are discussing smoking tobacco? Is it because we don’t believe the science? That can’t be correct. The data is overwhelming! It seems that the only group that disagrees is the tobacco industry. Should we trust them? Of course we should not trust them. So then again why? Tobacco smoke has been long associated with social activity[,] is ingrained in us and it is hard for us to see it otherwise. It seems safe because it does not cause immediate death or disease. But we must break that paradigm and regard tobacco smoke like radiation. The difference is that tobacco smoke is potentially far more dangerous.49

When the Johnson County Board of Health returned to the ordinance at the body’s meeting on December 8 1999, even its presence on the agenda was contentious. A week earlier Dameron had informed David Nordstrom, a member of the Board and of the Occupational and Environmental Health Department of the University of Iowa College of Public Health, that he had not accepted Nordstrom’s suggestion to put the ordinance on tobacco use in restaurants on the agenda, in part for reasons of time constraints unrelated to content, but in part because two new members would be joining the Board in January with whom they needed to discuss the issue so that they would be more supportive. Nevertheless, if Nordstrom still felt that they needed to put it on the agenda, Dameron said that he would do so.50 His position unchanged, Nordstrom suggested that the item be titled, “Request for County Attorney to Draft Ordinance to Prohibit Smoking in Indoor Areas of Restaurants.” He also asked Dameron to get him the figures on the number of restaurants in the county.51

50 Email from Graham Dameron to David Nordstrom (Dec. 1, 1999), in Folder: Tobacco: 1999-, JCPHD.
51 Email from David Nordstrom to Graham Dameron (Dec. 2, 1999), in Folder:
Those data revealed 376 licensed restaurants and bars in the county, of which 82 were in Coralville and 219 in Iowa City, of which latter category 76 or 35 percent were also liquor licensees. Overall, about 100 or 26 percent of the 376 restaurants claimed to be smoke-free. The day before the meeting an apparently displeased County Attorney White faxed Dameron: “I’d welcome knowing at who’s [sic] initiative the smoking ordinance item has been added to the agenda and why.”

At the meeting it turned out that Nordstrom—who was sufficiently attuned to the politics of cigarette company intervention against local smoking ordinances that the previous day, after reading an article in The New York Times about Philip Morris’s lobbying against ordinances in New York, he had emailed Dameron and JCCTFY asking whether such lobbying had ever taken place in Johnson County or whether such lobbying expenses had to be disclosed—had already drafted a resolution, which he distributed. The resolution consisted of a string of 12 medical-, health-, and legal-fact-laden “Whereas” clauses followed by a “Therefore” resolving that the BOH simply “direct the County Attorney to draft a county ordinance to prohibit smoking in all restaurants.” Despite Nordstrom’s statement that clean air was as important as clean water, member Diane Joslyn
(a geologist and co-owner of a water well drilling company)\textsuperscript{57} and chairperson Jim Martinek (a lawyer) did not agree with Nordstrom’s resolution because they felt that “smoking is a matter of choice.” Although he was against smoking, Martinek did not think that Nordstrom’s proposal was a good idea: “I would much prefer that the regulation of smoking in restaurants be a matter of the market place.”\textsuperscript{58} So resistant was Martinek to change regarding smoking that the only thing he “would like to see” was “‘this is not a smoke-free establishment’ posted in restaurants that allow smoking.”\textsuperscript{59} What information such signs would have provided in addition to the smoky sensory perceptions that customers would presumably have experienced before reading them is as unclear as the legal need for them since the statewide law already required owners to post “signs indicating no-smoking or smoking areas and arranging seating appropriately.”\textsuperscript{60}

Parrying Dr. Richard Dobyns’ remark that he “would like to consider a less stringent [extreme?] ordinance that would have a better chance of passing,”\textsuperscript{61} Nordstrom half-jokingly countered that “I could have written a much more

\textsuperscript{57}http://freepages.genealogy.rootsweb.ancestry.com/~slindbloom/pafg38.htm (visited Nov. 1, 2008).

\textsuperscript{58}Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD).

\textsuperscript{59}Johnson County Board of Health, Meeting Minutes at 2-3 (Dec. 8, 1999) (JCPHD). His fellow board member, Dr. Richard Dobyns, opined that Martinek was a conservative Democrat on the issue of free will. Telephone interview with Richard Dobyns, Iowa City (Nov. 4, 2008). Nine years later Martinek had absolutely no recollection of anything relating to the ordinance. He self-deprecatingly reflected on his competence to have been a member of the Board of Health by mentioning that previously he had not known that pertussis and whooping cough were the same. Telephone interview with Jim Martinek, Solon (Nov. 1, 2008).

\textsuperscript{60}Iowa Code sect. 142B.3 (1999).

\textsuperscript{61}Johnson County Board of Health, Meeting Minutes at 3 (Dec. 8, 1999) (JCPHD). Although the Minutes used “stringent,” on the tape Dobyns sounds as though he is saying “extreme.” Dobyns later agreed that his position entailed coverage only of the unincorporated areas of the county, which was tantamount to no coverage at all: his strategy was to make a statement that would encourage cities such as Iowa City and Coralville to adopt ordinances. Dobyns felt that a county ordinance would not pass, in large part because of County Attorney J. Patrick White’s evaluation of its legal untenability and the Board’s respect for his opinion. Finally, Dobyns did not want to waste the administrative staff’s time on an ordinance that would not pass anyway. Telephone interview with Richard Dobyns, Iowa City (Nov. 4, 2008). According to Dameron’s recollection, Dobyns had favored coverage only outside the cities. Email from Graham Dameron to Marc Linder (Nov. 2, 2008).
extreme resolution. ... I stopped at restaurants.” In response to Dobyns’ argument that depending on how extreme the resolution’s wording was, its proponents would get various kinds of audiences, Nordstrom—who conceded that “[s]moking is a right” even though it was prohibited in many places—insisted that he did not think of his resolution as “extreme” since it did not even cover bars.62

County Attorney White, who viewed Nordstrom’s resolution as “premature,”63 recommended discussion of the legal issues, particularly preemption, before drafting a new resolution. In apparent continuation of the skepticism voiced in his fax, White stated that he wanted to make a presentation to the Board “before spending a fair amount of county dollars on this request.”64 At this point the attacks on Nordstrom’s proposal turned increasingly hostile. After Martinek, whose lawyerly expertise appeared to be as deficient as his knowledge of public health, had warned Nordstrom that defending an ordinance through the court system would take four to six years, Nordstrom underscored that in reality the single sentence at the close of the resolution merely constituted a statement of the Board of Health’s political position on smoking in restaurants.

The worst that Dobyns was apparently able to imagine about the ordinance, which was simply in too high a gear from the get-go, was that, if passed, a lot of people would be “irritated.” The resolution’s factual and rather restrained tone notwithstanding, Joslyn joined in this chorus of attacks by asserting that the proposal—which, after all, merely requested that an ordinance be drafted—was “pretty in your face.” Growing increasingly impatient, Nordstrom let on that he was still awaiting a correction of any of his resolution’s factual claims (none would be forthcoming).65

Even JCCFY left Nordstrom’s resolution in the lurch. Eileen Fisher of that group, approving of Dobyns’ position, charged that discussion “brings a little maybe unwanted attention to the issue before we’re quite ready.”66 She recommended that the Board table the issue because her group was forming a committee to research the possibility of passing an ordinance and the legal issues.

Dr. Donham, who saw two issues—preemption and “the citizen’s right to

62Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD).
63Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD).
64Johnson County Board of Health, Meeting Minutes at 3 (Dec. 8, 1999) (JCPHD).
65Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD).
66Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD).
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD); Johnson County Board of Health, Meeting Minutes at 3 (Dec. 8, 1999) (JCPHD). Any countywide ordinance passed by the Board would also have to have been approved by the Johnson County Board of Commissioners.

Johnson County Board of Health, Meeting Minutes at 3 (Dec. 8, 1999) (JCPHD); Johnson County Board of Health, Meeting Minutes at 3 (Dec. 8, 1999) (JCPHD); Johnson County Board of Health, Resolution Requesting Johnson County Attorney to Draft County Ordinance to Ban Smoking in All Restaurants (Dec. 8, 1999), in Folder: Tobacco: 1999-, JCPHD (copy striking Nordstrom’s language and inserting handwritten amendment together with vote).

Telephone interview with J. Patrick White, Iowa City (Nov. 1, 2008). Dameron confirmed that the Board had rejected the proposal largely because of White’s opposition. Telephone interview with Graham Dameron, Iowa City (Oct. 25, 2008). White expressed surprise that the competent city attorneys of Ames and Iowa City had gone along with the ordinances. He speculatively attributed their conduct to their being at-will employees of the city councils, whereas a county attorney had independence as an elected official in his own right. To be sure, White, who charged that Ames and Iowa City had wasted a great deal of money on the cases, was unable to put a dollar figure on the cost of defending a challenge or even to specify the kinds of expenses that it entailed, especially since no discovery was involved. Telephone interview with J. Patrick White, Iowa City (Nov. 1, 2008). In fact, when Philip Morris challenged the ordinance that Ames had adopted in 2001, the Iowa Attorney General pointed out that the district court case “was resolved quickly on the basis of legal arguments, without a costly trial.” Iowa Attorney General’s Report on Secondhand Smoke 39 (2003). Moreover, the Iowa City ordinance was not litigated.

67Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD); Johnson County Board of Health, Meeting Minutes at 3 (Dec. 8, 1999) (JCPHD).
68Whereas several participants later ascribed the resolution’s defeat to White’s explanation to the Board that an ordinance could not withstand Supreme Court scrutiny and was therefore misguided because it would waste a lot of money for nothing, the inhosiptable reception that a majority (including a University of
Iowa physician) even of the Board of Health of the so-called People’s Republic of Johnson County accorded Nordstrom’s exploratory proposal shed important light on the inertial power of smoking laissez-faire in Iowa.\footnote{Years later, Donham, who characterized the Board of Health discussion as not highly argumentative, regarded the proposed ordinance as a public health statement even if it did not hold up in court. Telephone interview with Kelley Donham, Iowa City (Nov. 1, 2008). Donham’s recollection of the tone of the discussion was not consistent with the hostility directed at Nordstrom’s proposal, which was overwhelming on the audio tape. Nordstrom himself later listed the following reasons among those adduced by some people around 1999/2000 for opposing smoking bans: “1) it is not gov’t’s business, 2) public health can be protected by physical separation and ventilation, 3) the evidence of harm from secondhand smoke is relatively new and weak, 4) the effect of a ban could be negative on the local economy if people eat out less or eat elsewhere, 5) public health education is a more effective approach than public health law, and 6) counties lack the power to restrict smoking because it is reserved by the state.” Email from David Nordstrom to Marc Linder (Nov. 5, 2008).}

At the Board of Health meeting on March 8, 2000, County Attorney White, after presenting some statutory material, distributed an analysis by Iowa Assistant Attorney General Steve St. Clair, whose views, White conceded, “[i]n legal context...appear to be more supportive of local regulation than White’s view” and in particular argued that “local governments would be able to regulate smoking in restaurants.” White’s “personal conclusion” was “that at the county level we are both expressly and implicitly prohibited from taking away the authority to designate smoking areas that the legislature gave to the custodians of public places.”\footnote{Johnson County Board of Health, Meeting Minutes at 2 (Mar. 8, 2000) (JCPHD).} To be sure, the county attorney depicted himself as very knowledgeable on the subject, but in fact his claim that “[a]s far as preemption goes, it’s fairly strong,”\footnote{Johnson County Board of Health, Meeting (Mar. 8, 2000) (audio tape archived at JCPHD).} considerably overstated the relative potency of Iowa Code section 142B.6, which in 1990 had disappointed even the tobacco industry in comparison to the version that it had promoted.\footnote{See above ch. 27.} Although White had already revealed that the Attorney General’s Office disagreed with him, Nordstrom nevertheless asked whether any other lawyers in Iowa had a different opinion, but White professed not to know.\footnote{Johnson County Board of Health, Meeting Minutes at 2 (Mar. 8, 2000) (JCPHD); Johnson County Board of Health, Meeting (Mar. 8, 2000) (audio tape archived at JCPHD). St. Clair’s paper, “Developments in Home Rule and Tobacco Regulation” (Nov. 1998), a copy of which is included in JCPHD’s Tobacco file, was a precursor of the formal
the University of Iowa who was a new Board member and did not feel qualified to challenge White’s legal conclusions (although she would over the following years experience White as unsupportive of other important health initiatives), suggested that the county’s next step be lobbying the legislature to confer greater express rights on communities. Finally, the BOH discussed adoption of a regulation in Iowa City and Coralville based on the identification of a health issue and the impact of a smoking ban on business, and Donham suggested that the Board issue a statement of its position on smoking in public places, but, according to the minutes, it appeared not to take any action. Consequently, self-deprived of any regulatory authority, Board members were reduced to working with business owners “to voluntarily support the ordinance for smoke-free environments” and to writing letters to city councils in support of the ordinances proposed by JCCTFY.

**The Ames City Council Takes Up the Ban**

Rick Carmer, owner of Wallaby’s restaurant in west Ames, said the survey is skewed because it couches the ban as a public health issue, while restaurant and bar owners see it as local government legislating business activities.

“They’re trying to ram this through based on people’s health.”

By May 2000, the Ames city council—none of whose members

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75 Telephone interview with Pamela Willard, Iowa City (Nov. 1, 2008).
76 Johnson County Board of Health, Meeting Minutes at 2 (Mar. 8, 2000) (JCPHD).
77 Christy Logan, “Board Eyes Smoke-Free Local Eateries,” *DI*, Mar. 9, 2000 (3A:4-6 at 4-5).
78 Johnson County Board of Health, Meeting Minutes at 2 (May 10, 2000) (JCPHD); Kelley Donham, Chairperson, Johnson County Board of Health, to Iowa City City Council (Dec. 18, 2000), in City Council Documents, Meeting Folders 2001 (final), Jan. 9, 2001 Correspondence at 2, on http://www.iowa-city.org/weblink/DocView.aspx?id=7512 (visited Nov. 1, 2008); Kelley Donham, Chairperson, Johnson County Board of Health, to Coralville City Council (Dec. 18, 2000), in Folder: Tobacco 1999- (JCPHD).
smoked\textsuperscript{80}—was looking into whether it had the power to ban smoking in restaurants (but not bars) on the grounds of protecting customers and workers from the dangers linked to secondhand smoke exposure. The initiative was, in addition, designed to reduce teenage smoking. The elimination of smoking in restaurants, Quirnbach argued, “could keep minors from believing smoking is socially acceptable.” Because even the total interdiction of over-the-counter sales to teenagers would not cut off all access to cigarettes, he saw the need for a broad view to implement an effective smoking policy.\textsuperscript{81}

Initially, the matter had not yet reached the city council’s agenda, though a motion had been made to put it on the agenda in the future. That a ban would not sail through the council was clear from the outset when member Ann Campbell insisted that “a lot more research needs to be done before the council will consider enacting a city ordinance.” Even though she personally did not like smoking in restaurants, she had not examined “all sides of the issues.... It has health ramifications; it has economical ramifications, and we really need more information before we go further.”\textsuperscript{82} Remarkably, given its later skeptical (entrepreneurs-and-markets-know-best) editorial position, the Ames Tribune enthusiastically backed Quirmbach’s “progressive idea,” expressing the hope that the city council had “the courage to follow through on”\textsuperscript{83} it:

\begin{quote}
Emily from Linda Muston to Marc Linder (Nov. 18, 2008); email from George Belitsos to Marc Linder (Nov. 19, 2008). Some members may have smoked earlier; three members who had young children at home at the time “were privately very sympathetic to second hand smoke issues.” Email from Linda Muston to Marc Linder (Nov. 18, 2008).

Rebecca Anderson, “City Council Researches Smoking Ban,” Tribune (Ames), May 12, 2000 (B1:2-4). The local newspaper conjectured that the “smoking ban proposal appears to be an outgrowth of the council’s decision...to crack down on the sales of tobacco to minors.” Richard Lewis, “Chamber Opposes Restaurant Smoking Ban,” Tribune (Ames), Aug. 24, 2000 (A1:6, at A4:6). Nevertheless, a leading member of the Ames Tobacco Task Force later stated that there had been no connection between the Synar amendment stings and the push for the restaurant smoking ban. Telephone interview with Mary Kitchell, Ames (Oct. 3, 2008).


“Smoking Ban in Restaurants Is Good Policy,” Tribune (Ames), May 16, 2000 (A6:1). The shift in the Tribune’s editorial position might, according to one Ames anti-smoking activist, have been related to the role of Michael Gartner, a strong supporter of no-smoking initiatives, who sold the paper in the latter part of 1999, but whose influence may have carried over initially: “The new owners and editor moved closer to the Chamber/business side as they tried to establish an identity. To the best of my recollection, their editorial policy made the shift. Also, they were trying to make a go of it and could ill afford to alienate the advertising buyers.” Email from Linda Muston to
It’s sure not to be a popular idea to many people, but it’s the right thing to do. There is no “right” to smoke in a public setting and the Ames City Council doesn’t need to provide one. ... 

And although it seems absurd to have to counter an economic development argument—this is, after all, a public health issue—a smoking ban in restaurants won’t even hurt tourism, according to a 1999 study in the Journal of the American Medical Association. ... 

While we’d like to see the council go even further and ban smoking in bars as well, we’ll settle for a ban in restaurants so that the entire restaurant—not just part of it—is a smoke-free section. We hope the Ames City Council joins dozens of other cities across the nation and embraces Quirmbach’s idea.  

In the spring of 2000, the city council referred the proposal to the city attorney. Quirmbach argued that the state clean indoor air law appeared to allow cities to control smoking in restaurants seating more than 50 (by prohibiting owners from designating smoking areas): “‘What’s at issue still in my mind is whether we can regulate smoking in restaurants under 50, and in that area, the state law is silent.’” In June the council delayed consideration of the issue in order to study it further and solicit the Chamber of Commerce’s views. In July City Attorney John Klaus submitted a legal opinion to the council dealing with the central question as to whether the city had the power to curtail the discretion conferred by the state law on those in custody or control of public places to designate smoking areas. He “conclud[ed] that the City can place smoking restrictions on restaurants of any size to disallow the designation of smoking...”

Marc Linder (Oct. 9, 2008).


85Telephone interview with Herman Quirmbach, Ames (Apr. 19, 2008).

86Jocelyn Marcus, “City Council Considers Banning Smoking in Restaurants,” ISD, May 18, 2000, on http://www.iowastatedaily.com (visited Sept. 27, 2008). A badly garbled newspaper account had city attorney John Klaus writing a letter to the city council stating that “Iowa law allows a city to mimic a state law that bans smoking in restaurants that have a seating capacity of more than 50. The law does not say banning smoking in all restaurants is a direct violation but is ‘inconsistent’ with the law’s intent.” Quirmbach was then cited as stating that a city ordinance could “supersede” the state law allowing smoking sections in restaurants. Rebecca Anderson, “City Council Researches Smoking Ban,” Tribune (Ames), May 12, 2000 (B1:2-4 at 4). The Ames city clerk was unable to find such a letter from Klaus in May. Email from Diane Voss to Marc Linder (Oct. 10, 2008). See below for a discussion of Klaus’s later letter.

The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

areas in those establishments." Klaus based his conclusion on section 142B.2(2) of the state clean indoor air law ("Smoking areas may be designated by persons having custody or control of public places, except in places in which smoking is prohibited by the fire marshal or by other law, ordinance, or regulation"), whose use of "ordinance" made it apparent that "the legislature did intend for cities to have the power to regulate smoking in restaurants, even to the point of prohibiting the designation of a smoking area for a restaurant."  

Unimpressed by the support that the Teen Tobacco Use Task Force/MICHC had voiced for the "concept of smoke free dining in Ames," in mid-August, a month before the city council was scheduled to discuss a smoking ban in restaurants, some owners were already complaining that since Ames was hardly some trendy California city or Aspen, Colorado, such a municipal prohibition could hurt their businesses. The board of directors of the Ames Chamber of Commerce voted 12 to 2 against the proposal on the grounds that owners should make such decisions, even as health-care groups in the city adopted resolutions supporting the ban. The Chamber failed to explain why owners' alleged

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88 John Klaus to Mayor Ted Tedesco and Members of the City Council of the City of Ames, Iowa (July 18, 2000) (copy furnished by Ames city clerk).
89 John Klaus to Mayor Ted Tedesco and Members of the City Council of the City of Ames, Iowa, Re: Ordinance to Ban Smoking in Restaurants (July 13, 2000) (copy furnished by Ames city clerk). Klaus also concluded that the city council was authorized to ban smoking in restaurants with a seating capacity of 50 or fewer because, if the sponsor of the amendment defining covered public places to include restaurants with a seating capacity of greater than 50 was attempting to apply the law's restrictions only to them, "it was a failed attempt": "If the legislature had intended to exclude restaurants of less than fifty seats, it could have added wording to the law's list of places not included." But since the legislature did not expressly exempt smaller restaurants, a local ordinance banning smoking in them "would not be inconsistent with or in conflict with the legislative intent of the state law."  
90 Id.
91 This group was later renamed Ames Tobacco Task Force. Mid-Iowa Community Health Committee, Minutes (Oct. 9, 2000) (furnished by Mary Kitchell).
92 Resolution approved by the Mid-Iowa Community Health Committee (July 10, 2000) (copy furnished by Linda Muston).
95 Susan Kreimer, “It’s Impossible to Clear the Air About Smoking,” DMR, Aug. 31, 2000 (1E) (NewsBank). Remarkably, State Senator Johnie Hammond from Ames, an anti-smoking militant, while not surprised by the chamber’s vote because it tended to oppose all regulation, agreed with it that “we have far too much burdensome regulation.”
knowledge of their customers and their preferences entitled them to make public health decisions for them and employees. The business group had no answer to Belitsos’s question as to why the air people breathe should not be regulated “‘[i]f we regulate that employees must wash their hands after using the restroom.’” As for the Chamber’s mail survey finding that 65 percent of 98 responding restaurants in Ames already had smoke-free environments, ban proponents insisted that it was misleading inasmuch as most of the establishments with smoke-free policies were parts of national chains governed by corporate policies, whereas most of the locally owned, sit-down restaurants were not smoke-free. Moreover, few people in Ames would have been shocked to learn that “[b]y and large” the owners who permitted smoking in their restaurants were also the ones opposed to the proposed ban.

The council may have decided in July to study the proposed ban while waiting for the Chamber of Commerce to form an opinion, but the latter’s negative view did not dissuade Quirmbach from advocating adoption of a ban without delay. Nevertheless, council member Ann Campbell later characterized Quirmbach’s move to bring the ban to the council before having prepared the ground and, in particular, without having engaged business owners in a dialog, as a tactical error. The Tobacco Task Force strove to shape public opinion by underscoring that the central issue was public health. It not only pointed out that “no credible studies demonstrate any loss of restaurant revenue when cities prohibit smoking in restaurants,” but also refuted owners’ red-herring complaints about regulations interfering with their freedom to run their businesses as they saw fit: “Restaurants are already regulated from door to dumpster. We don’t debate whether or not owners can serve old meat or wash dishes in cold water or forgo fire exits.” In preparation for the city council meeting on September 12 devoted to the issue of whether to request the city attorney to draft an ordinance


banning smoking in restaurants the Tobacco Task Force of the MICHIC was working together with the American Cancer Society to develop support. In order to counter opponents, who had already become active, the Task Force was especially “looking to the medical community for strong support.”

What the cigarette industry was doing in preparation for the city council meeting or even whether it was doing anything is unclear, but it was monitoring the ordinance’s progress. For example, in the August 7 issue of its periodic and nationally comprehensive compilation, “Local Issues Activity,” R. J. Reynolds noted that in Ames no ordinance had been drafted yet and the city council was not expected to discuss the issue until September. It is possible (but not certain) that at this stage of the controversy in Ames, in contrast to the cigarette industry’s contemporaneous strategy of direct intervention in ongoing campaigns to ban smoking by means of ordinances in other localities, manufacturers were simply monitoring developments and planning active involvement in the form of a post-adoption judicial challenge. Some confirmation of the existence of such a strategy emerged 16 months later when an employee of a food service equipment company who worked with independent restaurant owners spoke up at city council meeting in Iowa City at which Iowa’s second local smoking ban was adopted. After urging the council to delay the decision for a year until the judicial system had ruled on the Ames ordinance, he explained that he had contacted the National Restaurant Association, pretty powerful lobbying group, to see why they hadn’t shown up in this argument a while back this fall. They referred my [sic] to the Iowa Hospitality Association which is the Iowa branch of that group. Their official position along with the Phillip [sic] Morris people and all those people that are going to come in and lobby you if you decide to try and pass this...after the courts say that it’s okay

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100 Linda Muston, “Smoke Free Restaurants Ordinance” (Aug. 25, 2000) (copy furnished by Linda Muston). The ACS, according to Muston, had wanted a total ban from the beginning and used the Task Force as a “launching pad” for achieving this goal. Telephone interview with Linda Muston (Oct. 8, 2008).


103 Purporting not to have any knowledge of such events, the lawyer who ultimately prosecuted such a court challenge for Philip Morris later stated that the account given in the text sounded plausible. Telephone interview with Fred Dorr, West Des Moines (Oct. 14, 2008). See below for further discussion of this point.
to go ahead and do that. Their official position is they’re staying away because they want
to wait and see what the courts say and then they are going to move in. ... I think those
people are going to come in and the pressure that the Café [sic; Clean Air for Everyone]
people put on you that you’re so sick of I don’t think is going to look like anything....

A large majority of the almost two dozen people who spoke up at the Ames
city council meeting on September 12 supported the ban on smoking in
restaurants. Among the 16 supporters were representatives of the Iowa
Department of Public Health, the American Cancer Society, and three local health
care entities. Of the five who opposed adoption of an ordinance two owned
businesses that would be affected and one represented the Ames Chamber of
Commerce. Rick Carmer, a restaurant owner whom some on the Task Force
regarded as the strongest opponent of the ban, felt that the ordinance would
restrict his free trade; moreover, no customer had ever complained about his
smoking policy, nor had anyone at the meeting ever approached him about
drifting smoke in his restaurant. Bob James, a truck stop owner, disclosed that
a survey revealed that 71 percent of his customers smoked and 95 percent of 596
customers who signed a “petition to ascertain the[ir] feelings” opposed the
ordinance. David Maahs expressed the Chamber’s belief that many restaurant
owners would go smoke-free even without a government mandate, but that in any
case the decision should be made voluntarily by the proprietor (prompting
Quirmbach to observe that “it is the chamber’s position that protecting the public
health should be optional”). He also encouraged the council to urge the
measure’s proponents to engage the restaurant owners in dialog, which the
Chamber offered to facilitate (without explaining how an organization that

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104 Iowa City City Council Meeting, Transcription at 51-52 (Jan. 8, 2002), on http://www.icgov.org/transcriptions/80.pdf (Jon Meester).
105 Minutes of the Regular Meeting of the Ames City Council at 5-6 (Sept. 12, 2000) (electronic copy furnished by Diane Voss, Ames City Clerk).
107 Minutes of the Regular Meeting of the Ames City Council at 5-6 (Sept. 12, 2000) (electronic copy furnished by Diane Voss, Ames City Clerk).
109 Minutes of the Regular Meeting of the Ames City Council at 5-6 (Sept. 12, 2000) (electronic copy furnished by Diane Voss, Ames City Clerk).
expressly sided with one of the parties could effectively act as a facilitator). More sensibly, the same offer was made by the Center for Creative Justice.  

At the close of the public comment period, long-time council member Judie Hoffman (who later became campaign coordinator for the Story County Tobacco Task Force) moved and Quirmbach (the only two sure votes for a total ban) seconded the motion to direct the city attorney to draft an ordinance banning smoking in restaurants that was in compliance with the Iowa Code. Mayor Ted Tedesco then asked the council to give more direction to staff regarding items that needed clarification such as the definition of “restaurant,” the question of whether the smoker or the owner would be cited, the amount of fines, means of enforcement, and models of ordinances from other jurisdictions. Hoffman then urged the council to support the ordinance in the interest of public health. Members Russ Cross and Ann Campbell also spoke in favor of facilitating community dialog, while Quirmbach argued for a dual track, with the council drafting an ordinance in tandem with such dialog. Against the lone Nay of banker Steve Goodhue, the council voted 5 to 1 to set October 10 as the “date certain” for reporting back to the council with a proposed ordinance. Finally, the council unanimously voted to include the CCJ’s services for community dialog. The

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111Minutes of the Regular Meeting of the Ames City Council at 5-7 (Sept. 12, 2000) (electronic copy furnished by Diane Voss, Ames City Clerk). Ironically, the Center for Creative Justice, which provided probation supervision, was committed to a “philosophy of Restorative Justice [which] views crimes as offenses against the community, not simply as violations against the state. Consequently, having community members become active in accountability and peacemaking helps our community build a sense of safety and capacity for collective action. Restorative Justice practices provide the offender an avenue to work through their difficulties in the context of their own community.” http://www.creativejustice.org/ (visited Sept. 26, 2008).


113Telephone interview with Herman Quirmbach, Ames (Apr. 19, 2008).

114Minutes of the Regular Meeting of the Ames City Council at 7-8 (Sept. 12, 2000) (electronic copy furnished by Diane Voss, Ames City Clerk). The “date certain” language did not guarantee that the council would vote on the ordinance on that date. “Daniel Lathrop, “Council Approves Writing Ban on Smoking,” Tribune (Ames), Sept. 13, 2000 (1A:6, at A4:4). Cross’s later statement that the council had encouraged mediation and compromise because the a stricter ban could not pass the council conflated various events. Telephone interview with Russ Cross, Ames (Oct. 5, 2008). At this time, since only a restaurant smoking ban was on the agenda, lack of votes was not yet the issue.
Iowa City government took notice that the Ames city council had unanimously voted to direct the city attorney to draft an restaurant smoking ban ordinance.\textsuperscript{115}

Restaurant owners and anti-smoking activists met on September 28 to debate a draft ordinance prepared by City Attorney Klaus, which proposed a ban on smoking in restaurants less than half of whose monthly gross revenues stemmed from alcohol\textsuperscript{116}—estimated to encompass largely locally owned sit-down establishments accounting for about 35 percent of the city’s restaurants\textsuperscript{117}—while exempting counter-top bars in restaurants from 10 p.m. to 2 a.m., so long as no diners were admitted after 9 p.m. An additional exemption for truck stops was, according to Klaus, justified on the grounds that their customers were not citizens of Ames. Remarkably, restaurant owners, who initially seemed to oppose any local regulation, now insisted that they welcomed the ordinance, “but only if it encompasses all public places,” including bars, bowling alleys, pool halls, and even possibly outdoor areas deemed public spaces. The reason for this conversion was owners’ sense that they were being arbitrarily singled out by anti-smokers as the low-hanging fruit in a campaign for an eventual universal indoor public ban. Their suspicion, however, was that the ban would, in the end, not extend beyond restaurants, leaving them as the only regulated businesses. The American Cancer Society’s representative on the Task Force, Nancy Battles, fed these fears by pointing out that advocates in Ames were simply replicating tactics applied elsewhere in the United States: “That means choose restaurants first, where anti-smoking advocates think the public pulse is for the smoking ban.” Couching her movement’s conceptualization of the formation of public opinion in the metastasizing language of commerce, she explained that “‘[w]hat we’ve seen as successful in other communities is there must be a community buy-in’...”

In Iowa City, for example, a recent survey (conducted by an anti-smoking group) had found much broader backing for a ban in restaurants than in bars or other public indoor places.\textsuperscript{118} In turn, anti-smoking advocates were skeptical of


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restaurant owners’ new-found support of a wider ban.\footnote{Richard Lewis, “Public Forum Calls for Smoking Ban,” \textit{Tribune} (Ames), Oct. 3, 2000 (A1:4-6, A8:5-6).}

About 70 people attended a public forum/panel discussion of the ban held at city hall on October 2.\footnote{Lenwood Monte, \textit{A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food} 16 (n.d.).} The Ames \textit{Tribune} characterized it as “largely a one-sided, and scripted affair” populated by eight anti-smoking panelists and an “almost exclusively anti-smoking audience....” A few businessmen were present, but one cafe owner who felt “outgunned” and left early was portrayed as representative in opining: “‘Us restaurants don’t have the time or the resources to compete.’”\footnote{Richard Lewis, “Public Forum Calls for Smoking Ban,” \textit{Tribune} (Ames), Oct. 3, 2000 (A1:4-6). Anti-smokers regarded Lewis’s reporting as openly biased against the ban. E.g., Michelle Clark, “Coverage Shouldn’t Be Editorialized,” \textit{Tribune} (Ames), Nov. 13, 2000 (A6:2-4) (letter to editor).} Despite this (alleged) preaching-to-the-choir format, “[i]t was about this time that the ATTF realized that we could not achieve all we wanted to achieve in one, [sic] fell swoop. We realized that we would have to approach the goal of becoming smoke free through a process that involved ‘incrementalism.’”\footnote{Lenwood Monte, \textit{A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food} 51 (n.d.).} Oddly, the reason for the Task Force’s new-found willingness to compromise lay not in its antagonists’ stiffened resistance, but, rather, in their willingness to compromise: “The restauranteurs [sic] were convinced that they could not forestall the enactment of an ordinance of some kind, so they came forward with a proposal that gave them some options. Their most urgent request was for giving all owners ‘a level playing field.’”\footnote{Email from Linda Muston (for the ATTF) to the members of the Ames City Council (Oct. 5, 2000) (copy furnished by Linda Muston).} To underscore ATTF’s eagerness to expand the scope of the ban, it informed the city council on October 5 that: “With respect for concerns expressed by local restaurant owners, the Ames Tobacco Task Force supports the restaurants’ advocacy for the inclusion of bars in the smoke free ordinance being considered by the Ames City Council. We believe that this partnership will result in prompt resolution and implementation to ‘clear the air’ in Ames.”\footnote{Email from Linda Muston (for the ATTF) to the members of the Ames City Council (Oct. 5, 2000) (copy furnished by Linda Muston).} The two groups met again on October 6, but reached no common ground. The city attorney’s announcement that he had, during the week since they had last met, changed the draft ordinance to move its effective date forward from July 1
The cigarette oligopoly continued monitoring events in Ames closely. As early as October 2, 2000, the general counsel of the National Smokers Alliance, a front group of the cigarette manufacturers in general and of Philip Morris in particular, wrote a letter to a banker-member of the city counsel (copy to the city attorney) instructing him that “[a]fter even a cursory review of the laws and attorneys general opinions in Iowa, it is difficult to escape the conclusion that the Ames City Council is preempted by state law from banning smoking in certain establishments....” After admonishing the council to “remain mindful of the constitutional guarantees of equal protection and due process granted under federal and state law to the business owners in Ames,” the cigarette companies’ puppet delivered its masters’ ever-constant message, to which the NSA “adults” swore fealty—“the accommodation of smokers and non-smokers in public places and in the workplace” and opposition to “government-imposed smoking bans and excessive taxation and regulation of tobacco products.” (At exactly the same time the NSA also put in an appearance in Iowa City, offering to pay people to

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125For example, cigarette manufacturers and one of their law firms and PR firms circulated by email newspaper articles about the progress of the Ames ordinance. E.g., Heather Sidwell (Covington & Burling) to W. J. Leavell (Oct. 11, 2000), Bates No. 525110126 (several recipients at British-American Tobacco).


organize opposition to an anti-smoking ordinance that would prevent restaurant owners from serving all customers as they, rather than the government, saw fit.\textsuperscript{128}

The first draft of the ordinance, which city attorney John Klaus presented to the council on October 3, 2000, was, pursuant to the council’s instruction, “prepared to prohibit designation of smoking areas in all food service establishments except those that have more than 50% of gross revenue from sale of alcoholic beverages.” In contemplation of (preempting) litigation, Klaus took pains to craft the ordinance “to demonstrate its connection to” chapter 142B of the Iowa Code, within the “parameters” of which the ordinance “operate[d]” and with which the ordinance was neither “in conflict” nor “inconsistent.” He emphasized that the ordinance’s “prohibit[ion of] the designation of a smoking area in a certain specified kind of public place” “relies on” the state law’s express provision that “a smoking area shall not be designated in places where smoking is prohibited by ordinance.”\textsuperscript{129} A good sense of the limitations and datedness of the draft ordinance was visible in one of the findings of its preamble to the effect that designating smoking areas in restaurants (as authorized by the state statute) “has curtailed the number of restaurants that can be enjoyed by persons who have an allergy or other heightened sensitivity to smoke”—as if, by the scientific-medical standards of 2000, people without those special vulnerabilities could “enjoy” the exposure to secondhand smoke. The ordinance frankly revealed its purpose as “augment[ing] the state law by prohibiting smoking in certain public places in order to “prevent the designation” in them “of any smoking area....”\textsuperscript{130} The chief public place to which this smoking designation ban applied was one in which “food is prepared or served for individual portion service intended for consumption on the premises of the establishment....”\textsuperscript{131} In such food

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\textsuperscript{129} John Klaus, Letter to Ames City Council (Oct. 3, 2000), reprinted in Lenwood Monte, A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food 30 (n.d.).

\textsuperscript{130} Ames Ordinances, sect. 21A.100 (first draft) (Oct. 3, 2000), reprinted in Lenwood Monte, A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food (n.p.) (n.d.). On the breakthrough in scientific understanding the impact of secondhand smoke exposure in the 1980s, see above ch. 26.

\textsuperscript{131} Ames Ordinances, sect. 21A.120 (first draft) (Oct. 3, 2000), reprinted in Lenwood Monte, A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City
establishments smoking was prohibited. Exempt from this ban were: (1) interstate truck stops; (2) bars in which the monthly sales of alcoholic beverages for on-premises consumption amounted to more than 50 percent of the establishment’s monthly gross revenues averaged over a calendar year; and (3) restaurant bars with a counter for preparing and serving alcoholic beverages for on-premises consumption between 10:00 p.m. and 2:00 a.m., but only after the rest of this public place had been closed. The civil penalty for the municipal infraction of designating a smoking area in violation of the ordinance was $500 for a first offense and $750 for additional violations; that for smoking in a food preparation/service establishment was only $25.

The mediation meetings that the Center for Creative Justice had been holding between restaurant owners and ordinance backers had aided Klaus in developing some of the proposal’s provisions. But while support for a ban on smoking in restaurants was, according to Quirmbach, “overwhelming,” during the previous couple of weeks “a fairly large block of support had emerged” for a ban on smoking in all public places, including bars and bowling alleys. This more comprehensive approach would, however, have been fraught with important drawbacks. First, its consideration would potentially drag proceedings out for many months and even into 2001. In particular, coverage of bars would tend to slow down the whole process since their owners had not been involved in the process until then. And second, Quirmbach doubted that such a bar ban would be as popular as a restaurant ban: “Again, we’d fall into a pitfall where, by taking a popular measure and loading things onto it that are less popular, we’ll have the whole thing capsize.” If, he argued, most restaurant owners wanted a level playing field in the form of coverage of bars—and Quirmbach was of the opinion that this argument was “not without merit”—then they needed to

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Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food (n.p.) (n.d.).


133 Ames Ordinances, sect. 21A.200, 201, and 203 (first draft) (Oct. 3, 2000), reprinted in Lenwood Monte, A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food (n.p.) (n.d.).


136 Telephone interview with Herman Quirmbach, Ames (Oct. 31, 2008).
submit a written proposal and “try to get the Chamber of Commerce to support it.”

At the council meeting on October 10, City Attorney Klaus distributed his revision of the proposed ordinance prohibiting designation of a “smoking area” in any “public place” defined by the state law as an enclosed area used by the public or as a work place with 250 or more square feet of floor space. The anti-smokers were much better prepared for this meeting than they had been a month earlier: whereas 13 of them spoke against the ordinance, only five backers voiced their support; Belitosos, on behalf of the Task Force, endorsed coverage of bars and all public places, but also flexibly expressed support for the ordinance “at any level the council pursues.” Despite a month of mediation by the Creative Justice Center, restaurant and bar owners appeared to be as unreconciled to smoking control as ever. Maahs, for example, reported that the Chamber of Commerce continued to feel that a ban was not needed. Conjuring up the specter of regulation-caused bankruptcy, he claimed that owners could lose their homes since many of their long-term leases and capital equipment and working capital loans were backed by personal guarantees. Carmer opposed the ban in restaurants on the grounds that it singled out that kind of business, but also felt strongly that legislation should not be enacted because it was the people’s right to decide. On behalf of a local bar a lawyer from Nyemaster Goode, the largest Iowa-based law firm, opining that the ordinance was unenforceable, recommended that the council delay its effective date to give opponents time to challenge it in court. Perhaps the most colorful among the “outraged” bar owners to speak up was Peter Sherman, an associate professor of statistics and aeronautical engineering at Iowa State University, who claimed that the ordinance would destroy his business, Boheme, 70 percent of which stemmed from international students, in whose countries of origin “smoking is far more
acceptable than it is here.” He audaciously proposed “an exception in the ordinance that considers people from different countries whose culture has a different perception on smoking.” As far as he was concerned, the council had a “duty to insure the health of businesses” just as it did to protect that of residents. The latter protection apparently did not extend very far: the cigarette-smoking professor, who wanted the ordinance to identify the level at which secondhand smoke exposure was harmful, deemed claims of adverse health consequences from outdoor exposure to secondhand smoke an insult to his intelligence. In a bravura performance of empirically refuted ignorant dogmatism, he asserted that: “You’ll never find an academic who’ll allow his Ph.D. students to do a study on secondhand smoke outside.... And I know a lot of lu-lu academics.” In general he understood anti-smoking trends as driven by the perception that “people who smoke cigarettes are evil” and “we need to squelch that evil out.” Restaurant owner Bob Cummings, who played a crucial

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144 Minutes of the Regular Meeting of the Ames City Council at 4 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).
149 “The Flyover Land Talk Show” (Nov. 8, 2006) (audio interview), on http://www.archive.org/details/The_Flyover_Land_Talk_Show_01 (visited Sept. 28, 2008). Smoking was not Sherman’s only beef with the city council; before, during, and after this meeting he experienced licensing problems for serving alcohol to minors, for which he was at one point arrested. Jessica Anderson, “Boheme Under Fire from City of Ames,” ISD, July 16, 2002, on http://www.iowastatedaily.com (visited Sept. 8, 2008). Though he does not appear to have brought up the issue at this time, in a letter to the council in 2001, ignoring that customers were protected by and he was subject to numerous health and safety statutes, regulations, and ordinances, he erroneously claimed that “[w]hen persons enter a private business, such as...the one I own in Ames, their rights are superceded [sic] by mine—so long as I do not violate state or federal discrimination laws.” Peter Sherman, “In the Hope of Objective Consideration,” Tribune (Ames), June 21, 2001 (A6:2-4 at 2). Sherman later claimed to have evaded the ordinance while it was in effect by charging a dollar a year membership fee and turning the bar into a private club. “The Flyover Land Talk Show” (Nov. 8, 2006) (audio interview), on http://www.archive.org/
role in mobilizing owners’ support for an ordinance, urged the council to slow the process down so that both sides could reach a compromise.\footnote{Minutes of the Regular Meeting of the Ames City Council at 5 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).}

In a move that pleasantly and unpleasantly surprised many, the council voted 6 to 0 to authorize the city attorney to expand the draft smoking ban to include all public places (excepting only interstate truck stops)\footnote{Minutes of the Regular Meeting of the Ames City Council at 6 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).}—an expansion that Quirmbach, despite “pleas from a crowd of protesters who packed” the meeting, justified on the grounds that the “‘response from the community is growing to undertake a broader ban.’”\footnote{Staci Hupp, “Ames Moves Toward Smoking Ban,” \textit{DMR}, Oct. 11, 2000 (8B) (NewsBank).} (Council member Goodhue later contended that “[w]e did not know at that time whether there was support. The ordinance and several media stor[i]es generated interest and sides were drawn. The council listened patiently, but I believe the ordinance lacked support as details of the ordinance were outlined.”)\footnote{Email from Steve Goodhue to Marc Linder (Oct. 13, 2008).} After the aforementioned lawyer representing a bar had suggested that the mayor ask a legislator representing Ames to request an opinion from the attorney general on the proposed ordinance’s validity, the council unanimously adopted such a motion; state Senator Johnie Hammond, who happened to be present, acknowledged the request on the spot.\footnote{Minutes of the Regular Meeting of the Ames City Council at 4, 6 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).} In addition to voting unanimously to set the ordinance’s effective date six months after its third reading, the city council scheduled the public hearing on it for November 14.\footnote{Minutes of the Regular Meeting of the Ames City Council at 6 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).}

The council thus expanded the ban to include all enclosed public places of more than 250 square feet (but not the outdoor seating areas of restaurants or bars) “despite,” as the Ames \textit{Tribune} charged, “knowing there could be a significant public backlash.” Councilor Goodhue, who voted for it, called it the “‘better of two evils.’” Given the anti-smoking groups’ rather timid initial approach, little wonder that Belitsos exclaimed that the new version “exceeds even my wildest dreams.” Yet he was constrained to concede that significant

\footnotesize{details/The_Flyover_Land_Talk_Show_01 (visited Sept. 28, 2008). City Attorney Klaus stated that it was not lawful for a business to designate itself a private club solely for the purpose of evading the ordinance. “Business Failing to Due to Tobacco Ordinance,” \textit{Tribune} (Ames), Jan. 5, 2002, Bates No. 2085741689A/90.}

\footnotetext[150]{Minutes of the Regular Meeting of the Ames City Council at 5 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).}

\footnotetext[151]{Minutes of the Regular Meeting of the Ames City Council at 6 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).}


\footnotetext[153]{Email from Steve Goodhue to Marc Linder (Oct. 13, 2008).}

\footnotetext[154]{Minutes of the Regular Meeting of the Ames City Council at 4, 6 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).}

\footnotetext[155]{Minutes of the Regular Meeting of the Ames City Council at 6 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).}
compromise might be necessary: he agreed, for example, that the Ames Tobacco Task Force would be open to discussions with restaurant and bar owners even about setting hours at which those establishments would be smoke-free. The reason, according to one owner—who implausibly claimed that “[i]f the point is clear [sic] air, I think we can provide that”—that anti-smoking forces might find such an outcome appealing was the possibility that it would help avoid a long legal battle surrounding the adoption and enforcement of a full ban. That Belitsos and the ATTF—whose self-proclaimed “watchword” was the incrementalist “‘Half a loaf is better than none’”—were willing to consider a measure as minimalist as time- and residual smoke-sharing in restaurants suggested that they were not eagerly looking forward to an “explosive” and “polariz[ing]” community issue in which they would have to confront both smokers and “those who balk at government interference with private business practices....” If, however, as the anti-smoking health groups programmatically proclaimed, a prime virtue of local, as opposed to statewide, anti-smoking campaigns was the opportunity for much more intensive and extensive discussion, they should have been cheered by council member Judie Hoffman’s perception that controversy over the ordinance was “the most closely followed of any public debate in her 13 years on the council.” In any event, the ATTF did thank the council for having moved the city “a step closer to smoke-free dining despite the controversy you have encountered.”

Just three days after the Ames city council had authorized Klaus to draft a broader ordinance, a brief legal memo, titled, “Iowa Law Preempts Local Smoking Regulations,” was already circulating at R. J. Reynolds and Philip Morris. A handwritten annotation on the latter indicates that it was sent “FYI”

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156 Richard Lewis, “Council Votes to Ban Smoking,” Tribune (Ames), Oct. 11, 2000 (A1:6, A4:1-3). The owner quoted as proposing time-shares for smoking and non-smoking was Rick Carmer, the owner of Wallaby’s, who became one of the plaintiffs challenging the validity of the ordinance to which they had agreed.

157 Lenwood Monte, A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food 15 (n.d.).


159 Ames Tobacco Task Force, “Public Health Is Priority,” Tribune (Ames), Nov. 16, 2000 (A6:2-4). It is unclear why it took the paper more than a month to publish this letter to the council.


161 “Iowa Law Preempts Local Smoking Regulations” (Oct. 13, 2000), Bates No.
to Theodore Lattanazio, vice president for worldwide regulatory affairs at Philip
Morris Management Corporation, one of a group of company officials being kept
up to date on various local anti-smoking initiatives throughout the United
States.\footnote{162} Pointing out that efforts were being made “in some Iowa localities to
ban smoking in restaurants and other public places,” the memo immediately
launched into the untenable bolded assertion that the “plain language” of the
identical amendments to the clean indoor air law and cigarette sales law in 1990
and 1991, respectively—passage of which the cigarette industry had
secured—“demonstrates the Legislature’s intent to preempt all local regulation
of tobacco products. Local governments may not regulate with respect to matters
that the state Legislature has reserved to itself. The Legislature has expressed its
intention to have exclusive authority in the area of tobacco products.”\footnote{163}
All of these claims, as will be discussed below, were patently false.\footnote{164}

During the run-up to the council’s consideration of the ordinance on
November 14, bar owners, notably lacking backing from the restaurateurs, who
had provoked their coverage, slowly began to form a coalition among themselves
to oppose the council’s “‘messing with our businesses’” by lobbying potentially
sympathetic council members to drop or modify the ordinance and
propagandizing customers and the public with newspaper ads predicting
wholesale closure of bars if the ordinance passed.\footnote{165}

The Ames Chamber of Commerce weighed in with resounding rejections of
the ban both by its board of directors and its members. On October 25, the board
voted 16 to 2 against a smoking ban in public places as it received the results of
a survey showing the 66 percent of the membership opposed it, many on the
grounds of “local government’s intrusion into private business practices.” The
Chamber’s initial resistance tactic took the form of asking the city council to
defer any vote until the attorney general had issued his opinion on the ordinance’s
validity. If a blanket ban was adopted, the Chamber planned to request insertion

\footnote{162}The sender in the annotation “Ted. Lat. FYI RHG” can be deciphered as Rochelle
H. Goldman, the company’s manager of public programs, who was one of those involved
in keeping abreast of local anti-smoking activities.

\footnote{163}“Iowa Law Preempts Local Smoking Regulations” (Oct. 13, 2000), Bates No.
2081008741 (bearing a fax date of Oct. 23).

\footnote{164}They were even wider of the mark regarding the cigarette sales law, under which
the authority to issue sales permits was entrusted to local governments. See above chs. 27-
28.

(A1:3-5, A4:1-3).
of a hardship exemption for businesses that proved that the ban caused them substantial financial losses.\textsuperscript{166} The urgent task of persuading owners that restrictions on smoking would not cause their businesses to suffer prompted Harlan Dubansky, a Task Force member who was also a former owner of supermarkets and convenience stores, to argue that the “economic part of [the smoking ban debate] is what we have to win.”\textsuperscript{167} Ironically, at this very time the director of the anti-ban Citizens and Retailers for Fair Trade Practices in Ames was declaring that “[w]e see it not so much as an economic issue but as people’s rights....”\textsuperscript{167}

However, toward the end of October, at least according to the Ames Tribune, persuasion seemed out of the question since “the task force’s support for a wider ordinance puts the panel [i.e., city council] on a head-on collision with the restaurant and tavern owners, who met for the second time in a week on Tuesday [October 24] to harden their strategy to fight the ban.” These unilateral meetings provided, to the newspaper’s satisfaction, “increasing evidence that the gulf between the two sides is widening. Each side, firmly convinced its position is just, has jettisoned compromise....” Indeed, ominously, already at this time the owners were vowing, if they failed to scuttle or delay the ordinance in the council, “to battle a ban in the courts.” To be sure, the anti-ban alliance’s consensus was being undermined by the fact that the “bar owners distrust the restaurants for throwing them into the fray by supporting a wider ordinance.”\textsuperscript{168}

On October 26, Attorney General Tom Miller, in town to distribute money to social service agencies, had praised Ames for considering a smoking ban in public places. In announcing that he would issue his opinion in two weeks, he added—in reaction to the aforementioned report that restaurant and bar owners, if unable to thwart adoption of the ordinance, would resort to court action—that “threats from the business community to take” the proposed ordinance to court “would influence how he interprets the ordinance’s legality. ‘[A court battle] is something we will have to consider.... It will affect the way we communicate our opinion.’” Without specifying just how such a threat might color his interpretation, he expressed the hope that the movement of which Ames was now in the vanguard would pressure the state legislature to emulate California in enacting a statewide prohibition. At the same time, however, he also fully


The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

acknowledged that “‘[w]e can’t go there until we change the culture.’” How that cultural transformation would take place and how long that process would last he did not spell out, but the increasingly insistent demands for creation of a smoke-free society by grassroots groups such as those in Ames and the initially divisive debates they triggered were presumably viewed as making a crucial contribution to the spread and absorption of knowledge about the public health consequences of (exposure to) smoking, which would then provoke the requisite reflection to trigger action by a critical mass of militants and acceptance by a critical mass of fellow citizens and legislators to overcome the weight of the past in the form of the freedom to smoke virtually anywhere that addicted smokers had come to take for granted and that the cigarette oligopoly spent great sums on cultivating.

The following day the restaurant and bar owners thought that they had latched onto a propagandistic coup when they complained that Quirmbach, the council’s most vociferous ban backer, had thrust himself into a conflict of interest by virtue of his membership in the Ames Tobacco Task Force. He forthrightly dismissed the allegation, preferring “‘leadership’” as the appropriate label for his having openly put the proposal on the table and worked for it. Even after City Attorney Klaus had expressed the opinion that Quirmbach had violated no legal duty, owners charged that Quirmbach’s dual role conferred on ATTF an unfair advantage in lobbying the council and drafting the ordinance insofar as it “‘virtually had his ear.’” Restaurant owner Rick Carmer instanced the third and final meeting between the owners and ATTF in their failed effort to reach a compromise: the former were “taken aback when Klaus explained he had eliminated a clause that would have allowed restaurant smoking after a certain hour after intense lobbying from Quirmbach.” To be sure, that owners’ outrage was opportunistic rather than principled emerged from their failure to charge conflict of interest after council member Steve Goodhue had voted against the ban in his capacity as representative of the First American Bank on the Ames Chamber of Commerce board of directors.


170Belitsos had argued that local governments “are usually able to enact more stringent laws.... Also, most locally written indoor-air ordinances are self-enforcing. By debating the issue locally, the public is informed and comes to expect compliance.” George Belitsos, “Smoking in Restaurants,” *Tribune* (Ames), Aug. 19, 2000 (A7:1-2).

The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

The anti-smoking forces also appeared to suffer a symbolic setback when in October the Iowa State University Government of the Student Body Senate expressed its opposition to the proposed broad ban by a vote of 23 to 10, while the central administration of the university, which already banned smoking in all of its buildings except students’ rooms in some dormitories, refused to take a stance on the ordinance. The student president explained that while representatives generally supported a smoking ban in restaurants on the grounds that eating was a necessity, they drew the line at bars, to which, as mere places of entertainment, people who did not like smoking did not have to go. With ISU’s 26,845 students comprising somewhat more than half of the city’s population of 50,731 in 2000, the student politician attitudes, if reflective of those of the larger student body, might have given pause to the local anti-smoking movement, which at this stage appeared to prefer to follow than lead public opinion, although, ironically, preventing 18-22-year-olds from ever starting to smoke was (and remains) one of the most important goals of any tobacco control program.

Clean Air for Everyone Comes Forward with a Draft Ordinance in Iowa City

“Smokers feel like they’re persecuted, but it’s not smokers versus nonsmokers. It’s the public versus the tobacco industry for luring these people into smoking, most when they were under 18.

“Smokers are not bad people or dumb people. They got addicted when they were young. It’s a difficult addiction to overcome.”

175For the argument that the student senators were “a very small (and non-random) sample of the overall ISU student population,” see Michelle Clark, “Coverage Shouldn’t Be Editorialized,” Tribune (Ames), Nov. 13, 2000 (A6:2-4) (letter to editor). The students of the ISU Student Health Advisory Committee favored the ban. Chris Gleason, “Students and Smoking,” Tribune (Ames), Nov. 11, 2000 (A6:1-2) (letter to editor).
176Belitos observed that “[o]ne especially good social reason to ban smoking in restaurants is that adults will begin setting a better example for our young people.” George Belitos, “Smoking in Restaurants,” Tribune (Ames), Aug. 19, 2000 (A7:1-2).
177Kathryn Ratliff, “Smoke Considered a Risk,” ICP-C, Aug. 23, 2000 (3A:2-7, at 3096
Champion/ I’m just wondering if we ought to be thinking about some way to do this and not affect people’s businesses...I think in 10 years everything will be non[-]smoking.
   Pfab/ So what are you waiting for? ...  
   Champion/ You know because it may affect people’s incomes Irvin and that might not be important to you but you know what it is to me.  
   Pfab/ No it is but at the same time if I go out and poison you I may be.  

[R]estaurants are and bars are entertainment, they are not essential to living..., we don’t need to go out to eat to be healthy.  

In the meantime in Iowa City, Clean Air for Everyone (CAFE), the “public-awareness branch” of the Johnson County Tobacco-Free Coalition, which was formed in 1999 to educate the public about the harms of secondhand smoke, was simultaneously laying the legitimational groundwork and discovering the breadth and depth of support for a smoking ban. In August 2000, it paid a market research company to conduct a telephone survey (which the American Cancer Society helped develop) of 400 Iowa City and Coralville residents, 20 percent of whom used tobacco. As presented by Dr. Beth Ballinger, a coalition member and University of Iowa Hospital vascular surgeon, at a news conference, the results revealed that: 68.5 percent believed secondhand smoke to be a health risk; 83.8 percent believed that separating smokers and nonsmokers did not solve the problem; 76.5 percent believed that there should be smoking restrictions in their workplaces; and 88.2 percent believed that there should be smoking restrictions in the businesses they visited. When asked, “When I go out, I would prefer it if the restaurant...,” 38.0 percent answered “Not allow any smoking,” while 29.5 percent answered “Limit smoking to a designated area outside.” In contrast, only 24.0 percent preferred what was in essence the power conferred on owners by the then existing law (“Limit smoking to a designated area indoors”) and only 7.0

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5A:1-4 at 4) (quoting Eileen Fisher, Johnson County Tobacco-Free Coalition chairwoman).
178Transcription of Iowa City Council Special Work Session at 68 (July 30, 2001) (colloquy between council members Connie Champion and Irvin Pfab).
179Transcription of Iowa City Council Special Work Session at 46 (Jan. 7, 2002) (statement by council member Connie Champion).
181Transcription of Iowa City Council Regular Meeting at 7 (Sept. 19, 2000) (statement of Beth Ballinger).

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percent preferred no restrictions at all. Of considerable use in allaying owners’ fears of financial ruin was the result that whereas 51.8 percent of respondents stated that they would be “[v]ery much more likely” to go to a smoke-free restaurant (and 21.8 percent “[s]omewhat more likely”), only 2.3 percent were “[v]ery much less likely” (and 5.0 percent “[s]omewhat less likely”).

Despite these rather favorable responses, CAFE, concluding that it was “clear that people still do not know exactly what breathing it [secondhand smoke] can do,” felt that its educational process and the achievement of a restaurant ban had “a long ways to go.” By this time upwards of 70 to 100 of the 400 “eateries”—including coffee shops and fast-food places—in Johnson County were already smoke-free. Release of the survey results was timed to lead into the holding of another town hall meeting, this time in neighboring Coralville, with medical experts, an economist, and an owner who had prohibited smoking in her restaurant. The cultural and communicational space for which the anti-smoking movement was forced to compete was, ironically, reflected in the decision of the Iowa City Press-Citizen to place a large ad for cigarettes in the column immediately adjacent to the lengthy article about the secondhand smoke survey.

A month later CAFE, which for the time being was not planning to cover bars, was finally prepared to bring its proposed ordinance before the Iowa City council, four of whose seven members smoked. At the council meeting on September 19, Dr. Ballinger, alluding to the survey’s salient findings, concluded that “the people in our community are already interested in this issue.” After having informed the council that CAFE would submit a smoke-free ordinance in the next few days, she stressed that the elimination of smoking in restaurants was designed to protect customers, especially young people without a say in their exposure to secondhand smoke, and workers, who “don’t have a choice about

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Fred Lucas, “Restaurants Split on Smoking Ban,” *ICP-C*, Sept. 25, 2000 (5A:2-6) (erroneously dating survey to 1999). To be sure, before the legislature acted owners had always had the power to ban smoking.


Connie Champion, Ernie Lehan, and Mike O’Donnell smoked; Dee Vanderhoef was a sometime smoker. Telephone interview with Karen Kubby, Iowa City (Nov. 17, 2008) (Kubby was a council member from 1989 to 2000).
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

where they work.” Observing that “probably” four (of seven) council members “would like to see this become a work session item,” Mayor Ernie Lehman stated that when they got the ordinance, they would schedule discussion as time permitted.\textsuperscript{189} The mayor, who did not “sense any opposition”\textsuperscript{190} and mentioned that some restaurants in Iowa City that had already banned smoking had experienced “better business,” stated that the question might be discussed at the council’s work session on October 2.\textsuperscript{190} Failing to foresee the breadth and depth of resistance, the \textit{Press-Citizen} reported toward the end of September that council members—even the smokers—were just “waiting for” the draft and “seem likely to support” it. For example, Lehman, a smoker, did not “see it being a hassle for anybody.” Though “most government or public buildings,” were, according to the mayor, already smoke-free, one group that was not protected was “folks who work in the service industry.” And council member (and smoker) Mike O’Donnell also purportedly backed an ordinance, in part, apparently, based on his belief that “smokers don’t want to bother anyone.”\textsuperscript{191} Neither CAFE nor the council seemed fazed by the conclusion of the Attorney General’s office that, although a local restaurant smoking ban “probably” would not violate state law, the question was still “open.”\textsuperscript{192}

A \textit{Press-Citizen} editorial quickly made it clear that a ban would encounter some opposition. Despite fully agreeing that the health impact of secondhand smoke exposure was deleterious and that restaurant non-smoking sections were a “joke,” the paper nevertheless adamantly opposed ordinances proposed by CAFE for Iowa City and Coralville to ban smoking in all restaurants. Its Panglossian market-knows-best position was straightforward:

Iowa City Mayor Ernie Lehman points directly to the reason: Some restaurants already have banned smoking on their own, and their business has increased. More will follow.

We should not make laws to regulate what is being—and will be—regulated by consumers. ... We are concerned about health issues for employees. But...considering our terrific economy, no one is being forced to work in a restaurant that allows smoking. There are plenty of other jobs out there.\textsuperscript{195}

\textsuperscript{189}Transcription of Iowa City Council Regular Meeting at 7-8 (Sept. 19, 2000).


As finally presented to the council, CAFE’s ordinance was brief, straightforward, and modest in scope. Following preambular recitals of scientific evidence of the health hazards of secondhand smoke exposure and of results of the August opinion survey in support of intervention, the draft ordinance banned smoking in all restaurants (including those seating fewer than 50 although they were not covered by the state law), defined as indoor food service establishments whose business was the sale of food for on-premises consumption, but only if their alcohol sales accounted for less than 50 percent of their gross receipts. The only other prohibitive feature was worded so incompetently that it (counter-intentionally) appeared to mandate smoking outside smoking-prohibited restaurants: “Smoking shall occur at a reasonable distance outside any enclosed area where smoking is prohibited by this Ordinance to ensure that tobacco smoke does not enter the restaurant through entrances, windows, ventilation system or any other means.” This outdoor ban was, then, designed not to protect those entering/leaving such restaurants from being forced to walk through smoke gauntlets, but only to prevent the wafting of smoke back into the restaurant. Restaurant owners, managers, operators, and employees were required to inform anyone smoking in violation of the ordinance of its “appropriate provisions,” though employees who did not control the use of the premises were not subject to the maximum $100 fine for first violation, maximum $200 fine for second violation within one year, or maximum $500 fine for each additional violation within a year of the preceding one—the same schedule of fines that applied to unlawful smokers.\footnote{An Ordinance to Provide Smoke-Free Environments in Restaurants §§ 1-2, 4-6, in Iowa City Council Documents, Meeting Folders 2000 (final), Oct. 3, 2000 Correspondence at 4-5, on http://www.iowa-city.org/weblink/docview.aspx?id=7355 (visited Oct. 20, 2008).} 194

At its October 2 work session, the city council briefly took up the draft after the City Attorney Eleanor Dilkes had informed the members that she had not reviewed it in sufficient detail to conclude “whether I think we can do it or not.” Shifting the onus onto the council members, she urged them to “establish a policy position as to whether this is something that you want to pursue”; only then could she deal with the “major preemption issue as to whether this is consistent with state law that I’m going to have to satisfy myself about before I can recommend that you can proceed.” Seeing that all seven councilors wished to proceed with the ordinance, Mayor Lehman (apparently in all seriousness) suggested that if the city attorney determined that an ordinance was impermissible, “then we can require you know a skull and cross bones on the front door, or a skeleton and a sign that prohibits people under 16 to be in the restaurant.” Having received her
instructions, the city’s lawyer asked whether the council wanted to deal with (underage/excessive) “alcohol first or smoking in the restaurants [b]ecause...it’s going to be in terms of the resources in my office we need to do them not at the same time.” Lehman opined that alcohol was “a more immediate problem,” smoker Connie Champion adding her belief that “some of the nonsmoking is already being taken care of by restaurant owners....” Hearing no contradictory views, the mayor told Dilkes to “go for it” (i.e., alcohol first).195

Dr. Ballinger of CAFE was so heartened by the council’s “‘unanimous support to look into this’” that she did not expect much controversy. Conflating support for the ban with support for authorizing the city attorney to draft an ordinance (a confusion that marked contemporaneous proceedings in Ames as well), the Press-Citizen reported from the perspective of quasi-inevitability: “Eventually, every restaurant in Iowa City likely will become smoke-free—whether the owners like it or not—after the Iowa City Council indicated unanimous support for the ordinance at a council work session....”196

The Ames Tobacco Task Force, Pessimistic About Securing a City Council Majority for a Broad Ban, But in a Hurry for Some Progress, Acquiesces in Owners’ Proposal for a Part-Time Ban

Although the ordinance contains “red light/green light” time-of-day provisions not recommended by most clean indoor air advocates, Ames deserves great credit for being the first community in the state to achieve a wide-spread smoking ban in restaurants.197

Contradicting all the talk of a widening gulf that the Tribune had been propagating during the preceding weeks, on November 8 it reported that restaurant and bar owners had offered the Task Force a compromise ordinance, the central and most provocative provision of which banned smoking in bars and restaurants (including outdoor areas where food was served) only between 6:00 a.m. and 8:30 p.m.; during the remaining nine and a half hours smoking was to be allowed in designated areas; owners would be authorized to shorten the nonsmoking period even further and extend the smoking period by terminating

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Owners set the resumption of smoking at 8:30 p.m. allegedly because they believed that most children would be gone by then.199 Other provisions included: a ban on smoking in bowling alleys only between 6 a.m. and 6 p.m.; a total exemption for all bars in which food accounted for less than 10 percent of total receipts as well as for pool halls that did not admit minors; an exemption for bowling alleys and truck stops that built a separate enclosed room with a ventilation system; and a total exemption for places with on-premises live music.200

The actual text of the proposal (“Non-Smoking Ordinance Guidelines”) expressed a number of these provisions with greater specificity and also included several others omitted by the Tribune. The central guideline concerning restaurants (which did not mention extending the smoking hours if food service was discontinued earlier) specified that at 8:30 p.m. restaurants without liquor licenses “may break out a proportional share of the restaurant as the State Law now reads for a smoking section. No customers under 18 years of age will be allowed in the smoking section.”201 The same guideline (except for the presence of minors) applied to restaurants, bars, and taverns with liquor licenses.202 The exemption for taverns 10 percent or less of whose gross sales were accounted for

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199 Telephone interview with Bob Cummings, Ames (Oct. 2, 2008). Quirmbach reported that he had tried to persuade owners to push back the starting time for smoking until later in the evening, but they refused. Telephone interview with Herman Quirmbach, Ames (Oct. 31, 2008).


201 “Non-Smoking Ordinance Guidelines” (n.d.) (bearing a fax date of Nov. 11, 2000 and Daily Tribune as the fax source) (copy furnished by Linda Muston). The state law did not prescribe any “proportional share of the restaurant”: it merely prohibited the designation of any public place (except a bar) in its entirety as a smoking area, although it did create a special rule for one-room public places: “the provisions of this law shall be considered met if one side of the room is reserved and posted as a no smoking area.” Iowa Code § 142B.2(3) (2000). To be sure, the drifting of smoke made this bifurcation virtually meaningless. Even in the much more stringent Minnesota Clean Indoor Air Act, from which this provision was adopted, “one side of the room” did not mean one half. See above ch. 24.

202 The incompetent drafting of the ordinance guidelines was visible in the use of “will” for restaurants without liquor licenses and “shall” for the other group with regard to the non-smoking hours.
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

by food was followed, on the copy faxed to the Tribune, by the forthright italicized parenthetical sentence: “We do have a loophole.” The pool hall exemption was conditioned on restricting admittance to those under 21. The exemptions for bowling alleys (which were also subject to the same nonsensical condition concerning a “proportional share” for smoking in which customers under 18 were not allowed) and truck stops specified that smoking areas had to be glass-enclosed and the ventilation systems had to be separate. Under the heading, “Guidelines Common to All,” the proposal provided that: “Common areas of hotels and motels shall be smoke-free. A Smoke-Free Zone of 15 feet at the entrance/exit of all public spaces shall be maintained, except in locations where adjacent establishments preclude such stipulations. Live Music Venues shall not be addressed at this time.” Finally, enforcement was not to begin earlier than six months after the ordinance’s third reading before the council, but the “Guidelines under Law shall be diligently enforced.” This last merely aspirational admonition, unsupported as it was by imposition of any penalty for violations, revealed how amateurish drafting could comfortably go hand in hand with self-regarding bias.

Rich Johansen, owner of several restaurants and one of the drafters, while calling the proposal a “‘workable solution’” for both sides, shed some light on why owners were giving it “‘broad-based’” backing: “‘It’s a situation where businesses have looked at the fact that there will be an ordinance and why not make the best of it?’” Since owners regarded a ban as inevitable and their proposal came much closer to what they purportedly perceived as their self-interest—as little government intervention as possible—their last-minute gambit to make their businesses less smoke-free appeared to be risk-free, at least for them. Indeed, Johansen’s preference would have been for leaving smoking decisions up to individual owners, more of whom, he insisted years later, would have voluntarily gone no-smoking.

Nevertheless, securing consensus had not been easy: the proposal had, according to Bob Cummings, owner of two restaurants, been “hatched after a weekend of frenetic meetings with various restaurants [sic] and bar owners, several of whom initially resisted the proposal but eventually relented after being lobbied.” In the end, some 50 restaurants and bars supported the compromise, one of whose underlying goals was to “eliminate unfair competition among

203“Non-Smoking Ordinance Guidelines” (n.d.) (bearing a fax date of Nov. 11, 2000 and Daily Tribune as the fax source) (copy furnished by Linda Muston).

204Richard Lewis, “Restaurant, Bar Owners Draft Compromise,” Tribune (Ames), Nov. 8, 2001 (B1:2-5, B8:5-6).

restaurants and bars.” Cummings illustrated this goal by mentioning that he would make the outdoor patio area smokefree at his restaurant so that it would not have an advantage over restaurants without outdoor seating. (Indeed, Cummings was so focused on the dimension of equal competition—which he described as especially acute between restaurants and bars in the context of a partial ban—that he later asserted that the owners in Ames would not have had a problem with a statewide ban.)

Cummings, to whom Fred Miller—the former owner of a voluntarily no-smoking pizza franchise and well-respected businessman who played an important part in persuading other business owners that a ban would in no way hurt their businesses—assigned 90 percent of the credit for securing business owners’ support, was evidently driven to a statist solution by his recognition of the otherwise intractable problem of collective action. As described by Miller:

My involvement started with a call from Bob asking advice on how to reach business owners to recruit their support. This was a strange event for both of us in that we tend to be right of center when considering government’s role. We both came to the conclusion that (1) it was a serious issue that could not be solved by any approach other than regulation, (2) the overall enhancement of our citizens’ lives could be substantial and (3) the favorable response by the non-smoking public would be more beneficial to the business owners than the risk of losing the support of the smoking folks.

The 100-percent consensus that was reached among owners was possible, according to Cummings, because it was designed to last only until the ordinance was tested in court: although Cummings later denied that he or anyone else had planned to test it, owners had known that it would and “had to be tested.” If

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206Richard Lewis, “Restaurant, Bar Owners Pitch Ban Compromise,” Tribune (Ames), Nov. 9, 2000 (A1:6). According to Fred Miller, Cummings had owned and/or founded five “different restaurant concepts in Ames,” one of which, O’Malley & McGee’s, had, a few years earlier, been the first to go all no-smoking. Email from Fred Miller to Marc Linder (Nov. 1, 2008).


209Telephone interview with Mary Kitchell, Ames (Oct. 3, 2008). Miller explained owners’ attitudes as based on their intimate knowledge of the customers they risked losing and their misjudgment that potential gains would not be sufficient to overcome that loss. Email from Fred Miller to Marc Linder (Nov. 2, 2008).

210Email from Fred Miller to Marc Linder (Nov. 1, 2008).

211Telephone interview with Bob Cummings, Ames (Oct. 2, 2008). In contrast, his co-
owners received legal advice that it was very likely that the ordinance would not survive a judicial challenge, then ridding themselves of the threat of a ban by securing its adoption and getting it before a court as expeditiously as possible may have been a rational strategy even for owners opposed to governmentally imposed restrictions on smoking in their businesses.

In contrast, on the anti-smoking side the obvious question was: what possible advantage could the ATTF see in agreeing to the compromise? Initially the group’s reaction was “lukewarm” because the proposal failed to achieve what had, after all, been the driving goal behind the whole movement—the complete elimination of smoking (and smoke) in restaurants. As Linda Muston, vice president of community services at Mary Greeley Medical Center and a leading ATTF member, observed: “‘Just stopping at 8:30 [p.m.] does not remove the smoke.’” Belitsos, the key figure in the group, agreed, but nevertheless added that “he may support it because it eliminated smoking in bars at least during certain times.” In the event, the two sides were to meet November 8 to discuss the proposal, which was “the first attempt at compromise of any sort” since the last round had ended in failure in early October.\footnote{212}

The kind of pressure to which the ATTF would soon be subjected was previewed on November 7, when Cathy Callaway, the first director of the Division of Tobacco Use Prevention and Control of the Iowa Public Health Department, animated by the ATTF,\footnote{213} emailed very high profile members of the anti-smoking movement in California to solicit their views of the proposed compromise:

Is it better to compromise or stand your ground and not get anything when it comes to the clean indoor air ordinance? Ames apparently has a compromise on the table and I think you have talked to this guy, Stan. His name is Bob Cummings and he appears to be leading this compromise charge. His compromise involves smoke-free places until 8:30 p.m. and only for businesses with 10% or more of their income from food. They are trying to decide whether or not to allow Bob to present at the Tobacco Task Force meeting where press will be present tomorrow. Any thoughts?\footnote{214}

\footnote{212}Richard Lewis, “Restaurant, Bar Owners Draft Compromise,” \textit{Tribune} (Ames), Nov. 8, 2001 (B1:2-5, B8:5-6).

\footnote{213}Telephone interview with Linda Muston, Coralville (Oct. 8, 2008).

\footnote{214}Email from Cathy Callaway to Elva [Yanez] and Stan [Glantz] (Nov. 7, 2000) (copy furnished by Linda Muston).
Stanton Glantz, a (non-physician) professor of medicine at the University of California at San Francisco and phenomenally productive anti-tobacco researcher, whose prodigious outpouring of articles, based in large part on the millions of documents that cigarette companies had been judicially compelled to produce (and that Glantz himself had played a crucial role in making public), and personal activism had contributed signal to the proliferation of understanding of the dangers of secondhand smoke exposure and the passage of anti-smoking ordinances and statutes, especially in California but also nationally, replied tersely within a few minutes: “This doesn’t sound like a good idea to me. These ‘time’ compromises are very hard to make work, provide appropriate signage, remove ash trays, etc.”\textsuperscript{215} Glantz’s brief comment was remarkable both for confining its criticism to the proposal’s empirical details, thus seeming to imply that with heroic efforts this clumsy and partial ban (of smoking, but not of residual off-gassed smoke)\textsuperscript{216} might be enforcibly protective, and for eschewing a broad-based principled rejection. In contrast, the reply from Elva Yanez, the associate director of Americans for Nonsmokers’ Rights in Berkeley (which Glantz had also been instrumental in developing), a leading anti-smoking lobbying organization that specialized in promoting the adoption of local no-smoking ordinances, was absolutist and instructional, leaving no doubt whatsoever that nothing was better than this feckless compromise:

From ANR’s standpoint, it is always better to stand your ground and get nothing than to compromise and get something ineffective or worse, a tobacco industry promoted alternative such as red light green light or incentives for smokefree policies.

The compromise you outline sounds like Duluth’s ordinance, which brings us back to the idea of why its [sic] not a good idea to share other existing ordinances with your council. The folks in Duluth were quite disappointed with this compromise.

The folks in Ames should stand firm for a good policy. We’d like the [sic] see the draft language so we could better comment on how effective the original draft was. It would be better to stop the process and go back and organize a strong grassroots campaign than to end up with something bad since this would impact all other cities in Iowa for years to come. We recommend that they not introduce this compromise. I’d also recommend that ANR come out and do a policy training as soon as possible.\textsuperscript{217}

\textsuperscript{215}Email from Stan Glantz to Cathy Callaway and Elva Yanez (Nov. 7, 2000) (copy furnished by Linda Muston).

\textsuperscript{216}For an early scientific finding of “some evidence of off gassing” of tobacco smoke vapors from the clothes of smokers or from the porous fabric on the divider walls,” see William Vaughan and S. Hammond, “Impact of ‘Designated Smoking Area’ Policy on Nicotine Vapor and Particle Concentrations in a Modern Office Building,” \textit{Journal of Air Waste Management Association} 40:1012-17 at 1015 (1990), Bates No. 2505613460/3.

\textsuperscript{217}Email from Elva Yanez to Cathy Callaway and Stan Glantz (Nov. 7, 2000) (copy
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

ATTFT had in fact been aware of events in Duluth because many of its members “were keeping abreast of various components of the process,” for example, by monitoring news media to keep track of local ordinances elsewhere; especially pertinent material was forwarded to Belitsos, who then circulated it within the group. Significantly, although the ordinance that the Duluth city council had passed on June 12, 2000, also included a provision permitting smoking in restaurants with alcoholic beverage licenses between 8:00 p.m. and 1:00 a.m. if minors under 18 were excluded from the premises during those hours, Glantz, who studied the battle in Duluth as it was unfolding and later published an analysis of it, focused not on the exposure via off-gassing, but especially faulted proponents of the ban for two “tactical errors”: (1) “fram[ing]
the ordinance as a children’s health issue” rather than as a workplace health and safety issue led to restaurants’ being classified according to customers’ ages, which “in turn, led directly to the provisions relating to patron age and time of day, which made it virtually impossible to enforce the ordinance” “because [they] allowed smoking even when ‘no smoking’ signs were prominently displayed”; and (2) being “unwilling to use existing research showing that smoke-free ordinances did not affect business revenues” lest “any adverse economic events” that took place after the ordinance went into effect “would be attributed to them” “cost” members of the anti-smoking coalition “the opportunity to establish themselves as credible critics of the tobacco industry’s economic arguments.”

Yet, as Kitchell stressed years later:

I don’t think that Glantz’ criticisms applied to us. Herman Quirmbach is a member of the ISU faculty in economics. He had the Econ department chair present a comprehensive review of the literature regarding the economic impact of tobacco ordinances. From the very beginning, this information was presented in various public venues and media. Also, from the very beginning, we focused on a number of constituencies that were affected by second hand smoke. We did include children, but we included studies about all age groups. One area that we particularly focused on were the employees of establishments that allowed smoking. I presented studies about the health of employees and also cited local examples. As the director of the Ames Free Medical Clinic, I had seen numerous bar and restaurant employees who came to our clinic with regularity. That is why I became so passionately involved. Our message about both these topics was very clear and consistent.

Moreover, whereas the tobacco companies poured enormous resources into fighting a strict ban in Duluth, the reason for ATTF’s agreement to the weak

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221 Email from Mary Kitchell to Marc Linder (Oct. 12, 2008). Another “tactical error” for which Glantz criticized the anti-smoking movement in Duluth was its “seeking to enlist the restaurant/hospitality industry as an ally in the development of the ordinance” in the hope of “avoid[ing] controversy.” Theodore Tsoukalas and Stanton Glantz, “The Duluth Clean Indoor Air Ordinance: Problems and Success in Fighting the Tobacco Industry at the Local Level in the 21st Century,” *AJPH* 93(8):1214-21 at 1220, 1214 (Aug. 2003). ATTF also engaged in such cooperation, to avoid not controversy, but the impossibility of passing an ordinance.

Ames ordinance was, as Belitsos underscored, straightforward: “We did not have the votes for the 100% ban. The compromise was it or nothing would have passed.” Despite the important differences between the two ordinances and the circumstances surrounding their adoption, Glantz charged that “the problematic provisions” of Duluth’s were “quickly replicated in other states, including Iowa....” The lesson that he learned from the first case was the same about which he, ANR, and ACS warned ATTF: “The Duluth experience demonstrates the importance of not accepting weak compromises at the 11th hour in negotiations in order to get something rather than nothing, hoping to revisit and fix a flawed policy later.”

On the evening of November 7 Belitsos wrote to Linda Muston (but did not fax to her until the next morning) a note accompanying a “Proposed Motion and Position Statement” bearing her name and his, which revealed that he still felt uneasy about the compromise about which he had not yet completely made up his mind: “Here it is. I’ll sleep on it & run it by a few advocates in the morning to see what they think of our position. I’ll call with changes....” After declaring that ATTF’s “vision” was to improve “our” community’s health “by eliminating second-hand smoke from all public places,” the draft frankly underscored the unsatisfactory public health consequences of the compromise:

Our current mission and proposal to the Ames City Council is to begin with a smoke-free dining ordinance. We have received tremendous public support for this restaurant ban proposal.

We appreciate the compromise proposal from the restaurant and bar owners because it represents their recognition of the importance of reducing the exposure to second-hand smoke for their patrons and employees. The 8:30 time is very troubling to us because we are opposed to any exposure to second-hand smoke in restaurants. Our original proposal was to eliminate smoking from restaurants, and this compromise does not meet this public health goal. However, we see the inclusion of bars in the compromise as a plus and view this as somewhat a tradeoff for the 8:30 green light time in restaurants.

If the Ames City Council will not adopt a total ban in restaurants, the Ames Tobacco Task Force will reluctantly support the proposed compromise but will continue to work for a total ban in the future.

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223 Email from George Belitsos to Marc Linder (Oct. 14, 2008).
Thus as of November 8, although Belitsos had apparently not abandoned hope of still securing a majority on the council for a 24-hour-a-day restaurant ban, he no longer believed (if he ever had) that a total ban in all public places was possible with that city council as it was then constituted. The profound disappointment over the limited health benefits of the part-time ban on active smoking produced the overall dispirited tone, which even the inclusion of some bars (which did not compensate for the evening smoking period in restaurants) was unable to dispel.

When Cummings and Johansen met with ATTF on November 8, the Tribune reported that they made what they called a “one-time offer”: despite occupying what appeared to be the weaker position, Cummings allegedly stressed that “’[w]e came with our best possible offer.... We did not come to negotiate.’” In fact, participants later agreed that the owners had not confronted ATTF with an accomplished fact in the sense that many negotiations had preceded presentation of the compromise. Implausible as Cummings’ claim seemed, he argued that although “’not a perfect solution,’” the compromise nevertheless “accomplished much of what the anti-smoking forces want, which is a smoke-free environment in public places.” Even the Tribune recognized that it “could be a hard sell” since ATTF clearly wanted a total ban to eliminate the health hazards linked to secondhand smoke exposure. Yet despite having what appeared to be the upper hand, ATTF representatives “effusively praised the businessmen for their initiative.” Nevertheless, they “stopped short of accepting it” until the organization as a whole expressed its support, on which the owners insisted because they refused to present the plan to the council alone. One of the restaurant owners’ chief goals was to insure that the council did not—as it had been contemplating in September—create the worst-case scenario of a restaurant-only ban. The complicated political dynamic on the council and between the

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228Telephone interviews with Len Monte, Ames (Oct. 2, 2008); Bob Cummings, Ames (Oct. 2, 2008); Linda Muston, Coralville (Oct. 1, 2008); Mary Kitchell, Ames (Oct. 3, 2008); Rich Johansen, Ames (Oct. 8, 2008) (calling negotiations on-going and “amicable”). Nevertheless, the key ATTF figure, George Belitsos, when asked outright, also denied that the group had been given a take-it-or-leave-it offer, but then in the course of his own narrative did admit that at some point the owners had put them in that situation in the sense that the group knew that if it did not accept the offer, it would be unable to secure the votes on the city council for any stricter ban. Telephone interview with George Belitsos, Ames (Oct. 10, 2008).

council and the two groups pushed them toward a compromise. ATTF understood that it would obtain nothing from the council if it insisted on a broad ban because it was simply unable to mobilize four votes—a dynamic of which the owners almost certainly were aware. 230 (In the latter part of October bar owners had planned to lobby those city council members they believed might be “sympathetic to rescinding...or modifying” the broad ban—“namely, Russ Cross, Steve Goodhue, Sharon Wirth and perhaps Ann Campbell.”) 231 At the same time, however, the council’s sense of growing community support for less exposure to tobacco smoke in restaurants and bars meant that the owners could not just rest on their laurels because the council would have pressured them to accept some regulation, 232 in part in reaction to pressure from the ATTF itself. 233 Whatever stringency the Ames ban possessed was irrevocably relaxed on November 8, when, as Lenwood Monte, one of two ATTF members who had negotiated with the owners, in a monumental exaggeration put it, a “breakthrough of monumental proportion was achieved.... The restaurant owners made an ‘offer that we could not refuse.’ The proposal needed only a few little ‘tweakings’ after this time to be shaped into final form. [F]rom then on...ATTF and the restaurant owners began to work together to develop a compromise that both parties could accept.” 234 Kitchell, the other ATTF negotiator, later explained the basis for her having agreed to the compromise: “I...had the gut feeling that Bob [Cummings] and Rich [Johansen]’s opposition to the original ordinance was largely based on economic fears—they really did not believe the data that these ordinances did not cause economic harm. I, on the other hand, did believe the data and was confident that their businesses would not suffer. I felt that once they saw that their businesses were not harmed, we could more easily move to an all out ban.” 235

The severely watered-down ban that the now openly incrementalist ATTF

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230 Telephone interview with Mary Kitchell, Ames (Oct. 3, 2008). Rich Johansen, one of the two owner-negotiators, later stated that owners had not been sure at the time whether ATTF could have secured adoption of a broader ban, but had believed that because a “backlash” had developed against such a ban, ATTF on its own had sought more “common ground.” Telephone interview with Rich Johansen, Ames (Oct. 8, 2008).
234 Lenwood Monte, A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food 49 (n.d.).
235 Email from Mary Kitchell to Marc Linder (Oct. 12, 2008).
welcomed immediately caused an open breach with the American Cancer Society.\textsuperscript{236} During a conference call on November 10, a number of “angry”\textsuperscript{237} local and regional ACS officials “‘lowered the boom’” on ATTF, informing that group that it was, “in effect,...‘letting the ship sink!’”\textsuperscript{238} Of special significance was Stanton Glantz’s participation from California. His involvement was calculated to bring additional persuasive power to bear on ATTF since he had written much of the material that they had used in their campaign. Glantz uncompromisingly criticized so-called red light/green light arrangements such as the smoking/no-smoking time-share compromise to which ATTF was about to agree.\textsuperscript{239} As Glantz explained in an article he published soon thereafter: “These laws are introduced to local level policymakers (typically by restaurateurs) in places where citizens are pressing for a 100% smoke-free ordinances [sic]. Like the Accommodation Program, ‘Red Light Green Light’ laws only establish minimum restrictions and require signs be posted outside establishments saying

\textsuperscript{236}George Belitsos stated that the American Lung Association and American Heart Association had joined ACS in opposition. Telephone interview with George Belitsos, Ames (Oct. 10, 2008). Mary Kitchell, while unable to recall, noted that AHA’s “level of involvement in this whole effort was minimal” and ALA had been “more involved in public education” about the consequences of secondhand smoke. Email from Mary Kitchell to Marc Linder (Oct. 12, 2008). Council members Hoffman and Campbell stated that neither ALA nor AHA nor the Iowa Department of Public Health had been involved. Email from Judie Hoffman to Marc Linder (Oct. 14, 2008). Kitchell recollected that the IDPH may not have liked the compromise, but had not spoken out against it as had Natalie Battles of the ACS before the city council. Email from Mary Kitchell to Marc Linder (Oct. 12, 2008). According to an email from a CAFE member to the Iowa City Council urging it not to adopt a time-limited smoking regime as Ames had done, this red light/green light regime had prompted the ALA, AHA, and ACS to “publicly voice[ ] their lack of support for such an ordinance.” Email from Renee Gould to Iowa City Council (Nov. 20, 2001), in City Council Documents, Meeting Folders 2001 (final), Nov. 27, 2001 Special Meeting at 75, on http://www.iowa-city-/org/weblink/docview.aspx?id=8320 (visited Nov. 4, 2008).

\textsuperscript{237}Telephone interview with George Belitsos, Ames (Oct. 10, 2008).

\textsuperscript{238}Lenwood Monte, \textit{A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food} 50 (n.d.). Although Monte depicted the call as part of a physical meeting, other participants stated that everyone participated by telephone. Telephone interviews with Linda Muston, Coralville (Oct. 1, 2008) and Mary Kitchell, Ames (Oct. 3, 2008). Unfortunately, by the time he was interviewed Belitsos had recently “purged” 10 years of records including all ATTF minutes. Email from George Belitsos to Marc Linder (Oct. 9, 2008).

\textsuperscript{239}Telephone interviews with Linda Muston, Coralville (Oct. 1, 2008) and Mary Kitchell, Ames (Oct. 3, 2008).
whether smoking is allowed inside. These proposals have great appeal to local policymakers who feel pressured to address smoking in public places since these weak laws give the appearance of taking action without having any protective health effect. Introducing ‘Red Light, Green Light’ laws is an industry tactic aimed at delaying and weakening popular smoke-free efforts.\textsuperscript{240}

The gist of ACS’s criticisms during the conference call was that once adopted, the partial ban would not only be the best that the city of Ames would ever achieve, but that it would become an inferior model for other cities in Iowa.\textsuperscript{241} (Later Belitsos would be able to refute this claim by citing the ban adopted in 2002 by Iowa City, which, though narrower in scope, lacked the despised red light/green light feature.)\textsuperscript{242} ATTF representatives did not waver or acquiesce in these condemnations. Mary Kitchell, for example, stressed that none of the ACS critics lived in Ames or would have to work or live with the owners in various multifaceted situations. Moreover, since the Iowa Attorney General’s office had advised ATTF that any helpful changes in the state smoking law would be a long time coming, it seemed senseless to the group to do nothing now to alleviate exposure to secondhand smoke and wait, potentially many years, until anti-smoking Democrats gained control of both houses of the legislature. The central fact was that a broad ban could count on the support of only two members of the city council, Quirmbach and Hoffman. In contrast, the two bankers, Russ Cross and Steve Goodhue, though they personally hated smoking, were in principle unable to support the total ban, while Sharon Wirth and Ann Campbell “played it both ways,” but even if one of them had voted for it, the council would still have been deadlocked at 3 to 3.\textsuperscript{243} Indeed, one reason, at least in the view of


\textsuperscript{241}Telephone interviews with Linda Muston, Coralville (Oct. 1, 2008) and Mary Kitchell, Ames (Oct. 3, 2008). When Muston self-ironically recalled that “we were so conceited that we thought we could be the model for Iowa,” her irony referred not to the weakness of the ordinance, but to the fact that, because the Supreme Court soon invalidated it, the ban never became a model for any city. Council member Wirth later argued that, since ACS had known that the more stringent ban would not and the compromise would be adopted, it could retain its purist position and secure the half a loaf (although ACS never articulated such a view). Telephone interview with Sharon Wirth, Ames (Oct. 5, 2008).

\textsuperscript{242}Telephone interview with George Belitsos, Ames (Oct. 10, 2008). In contrast, ATTF member Linda Muston, who lived in Ames and Iowa City, regarded Iowa City’s ordinance as inferior to Ames’s. Telephone interview with Linda Muston, Coralville (Oct. 8, 2008).

\textsuperscript{243}Telephone interviews with Linda Muston, Coralville (Oct. 1, 2008) (quote) and
one prominent ATTF member, that the council had unanimously voted to authorize the city attorney to draft the broad ordinance was that it—and especially Cross and Goodhue—may have believed that the courts would eventually invalidate such an ordinance anyway.\(^\text{244}\) To be sure, a council member later insisted not only that the body had thought that the ordinance was on solid legal ground and would be upheld in court, but that it had authorized the city attorney to draft a broad ban because it would have been difficult to vote against such authorization in the face of community pressure.\(^\text{245}\)

ACS’s vociferous opposition was “shocking” to ATTF not in the sense that the Cancer Society had not had a reputation for being purist radicals, but because, in Muston’s ironic words, “most of us were purist idealists and had no idea that \textit{some} good was not better than \textit{no} good!”\(^\text{246}\) After the ATTF members had thought about and rejected the ACS’s “purist” better-nothing-than-this-partial-ban denunciations,\(^\text{247}\) “an irreparable rift” erupted between the two organizations for almost a year, during which ACS withdrew its support from ATTF and “actively sought to scuttle the implementation of the Ames agreement” on the grounds that the compromise “did not go far enough...and might harm efforts being put forth

\textbf{Mary Kitchell, Ames (Oct. 3, 2008).} One interesting difference between Muston’s and Kitchell’s accounts is that although both agreed that ATTF had never retreated in the face of ACS’s onslaught, Kitchell stated that members had not been torn over the decision, whereas Muston recalled the confrontation as “painful for us.” Muston opined that Wirth and Campbell had wished that the issue “would go away.” Telephone interview with Linda Muston, Coralville (Oct. 1, 2008). Quirmbach, audibly reaching for a polite expression, noted that Campbell had failed to give a “firm commitment.” Telephone interview with Herman Quirmbach, Ames (Oct. 31, 2008). Another former ATTF member (who declined to be quoted for attribution) characterized Wirth, the possible fourth vote, as having “waffled.” Telephone interview, Ames (Sept. 28, 2008). Not having a vote, the mayor cannot break tie-votes in Ames. The mayor does have a veto power, but, because the council has six members and the four-vote simple majority needed to pass an ordinance is the same two-thirds majority needed to repass an ordinance over a veto, the latter is rarely wielded. City of Ames Municipal Code §§ 2.6, 2.8, 2.22, on http://www.cityofames.org/attorneyweb/pdfs/Chap02.PDF (visited Oct. 14, 2008); email from Diane Voss, Ames City Clerk, to Marc Linder (Oct. 15, 2008). Even had Mayor Tedesco had a tie-breaking vote, he would, according to ATTF members, not have cast it in favor of a strict ban.

\(^\text{244}\)Telephone interview with Linda Muston, Coralville (Oct. 1, 2008).

\(^\text{245}\)Telephone interview with Ann Campbell, Ames (Oct. 5, 2008). By 2008 Campbell was the mayor of Ames. In contrast, former council member Russ Cross stated that members had known that it was possible that the ordinance might not be judicially upheld. Telephone interview with Russ Cross, Ames (Oct. 5, 2008).

\(^\text{246}\)Email from Linda Muston to Marc Linder (Oct. 14, 2008).

\(^\text{247}\)Telephone interview with George Belitsos, Ames (Oct. 10, 2008).
in other communities.” In contrast, ATTF argued to ACS that the compromise was “an Ames solution for an Ames problem,’ and we would not comply with unreasonable requests to satisfy an unachievable goal.” Since there was nothing locally unique about Ames with regard to its bars and restaurants or the need to protect people from secondhand smoke exposure, the only relevant local circumstance was the inability to muster a majority on the city council to vote for the broad ban. However, since anti-smoking forces in Ames had been organized and cohesive enough to be able to mobilize faster than groups anywhere else in the state, and at one point, at least, all six members of the city council had voted to authorize the city attorney to draft a broad ban, the “Ames problem” may in fact have been a statewide problem that called into question the whole local control priority pursued by ACS, the other health organizations, and even ATTF.

Ultimately the principal difference between ATTF and ACS/Glantz/ANR may have been that the latter argued that if the ATTF simply lacked the votes on the city council for a strict ban, it should have withdrawn the proposed ordinance and persisted in grassroots mobilization until it secured a majority on the city council, whereas ATTF took the position that the struggle for and experience with a weaker ban would increase rather than decrease interest in a stronger ban. The ACS/Glantz/ANR position made eminent sense if its proponents believed that, because the anti-smoking movement was riding the crest of the wave of history, the advent of total smoking bans of nationwide scope was just a matter of time and, consequently, that there was no need to pare back maximalist demands. (To be sure, if stringent and capacious bans were really inevitable, it is unclear why the more radical wing of the movement should have splintered its resources opposing the incrementalist wing’s campaigns since they could hardly have slowed down the predicted inexorable progress.) Since both of these positions were (ex ante and ex post) empirically plausible and in this sense both wings may have been ‘right,’ neither should have prompted an attitude of moral superiority

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248 Lenwood Monte, *A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food* 50 (n.d.). Council member Steve Goodhue believed that the ACS had been “unreasonable. They likely had to draw a line given the basis of their organization. They were completely unwilling to discuss any changes to the ordinances and I think that frustrated the council, myself included.” Email from Steve Goodhue to Marc Linder (Oct. 13, 2008). Council member Ann Campbell also characterized ACS’s position as “unreasonable” and clearly having had no chance of passage. Telephone interview with Ann Campbell, Ames (Oct. 5, 2008).

249 Muston reported that ATTF’s “soul searching” that accompanied its response to the ACS/ANR’s attack prompted members to question whether their “ownership” of and “pride” in their approach had caused them to be so “bullheaded.” Telephone interview
with regard to their competing strategies for implementing local control.\textsuperscript{250}

While noting that it was “difficult to speculate on these issues,” Mary Kitchell, one of ATTF’s leaders, later perceptively analyzed the complex factors underlying the simple political arithmetic in a way that justified the group’s local strategy, but at the same time raised the aforementioned doubts about the feasibility of local control as a statewide program for achieving an effective and comprehensive ban on public smoking:

Our view was that it would take several years to possibly budge the council into a more stringent ban, and we didn’t want to wait that long and risk that it might not even happen then. If you’re talking about changing the minds of the existing city council members, we didn’t see it happening without making some attempt to work with the opposition. Several members were very clear on that point. If you’re talking about waiting to replace the resisting city council members in a general election, I personally do not vote on single issues, and I think it would have taken exhaustive efforts to hinge a general election on this issue.\textsuperscript{251}

On November 13, the day before the council was scheduled to deal with the proposed ordinance again, ATTF agreed to the compromise because “[t]he impact of reaching a broad range of establishments is deemed significant enough to offset the value lost in late hour smoking in some businesses.”\textsuperscript{252} Natalie Battles, the group’s chairperson and the Cancer Society’s representative in it, was the only dissenter among its approximately dozen permanent members: her and ACS’s position was that the continuing permissibility of smoking during certain hours did not serve “the best interests of public health....”\textsuperscript{255} Even Quirmbach, the

with Linda Muston, Coralville (Oct. 8, 2008).

\textsuperscript{250}Ironically, the dispute that erupted in 2008 in Iowa over whether local control was superior to a statewide ban cast ACS and other health organizations in the role of incrementalists (and state legislators led by Janet Petersen as the maximalists). See below ch. 35.

\textsuperscript{251}Email from Mary Kitchell to Marc Linder (Oct. 13, 2008).

\textsuperscript{252}Richard Lewis, “Anti-Smoking Forces Back Compromise,” \textit{Tribune} (Ames), Nov. 14, 2000 (A1:2-5, A8:1-4) (quoting ATTF statement). Belitsos later stated that Battles had not been the only dissenter, but he was unable to recall the others, some of whom he said had left ATTF. Telephone interview with George Belitsos, Ames (Oct. 10, 2008). Battles, unable to remember with certainty anyone else who had joined her in the minority, speculated about two members, both of whom denied that they had dissented. Email from Natalie Battles to Marc Linder (Oct. 10, 2008); telephone interview with Harlan Dubansky, Tucson (Oct. 10, 2008); email from Linda Muston to Marc Linder (Oct. 12, 2008). Kitchell also recalled no one else. Email from Mary Kitchell to Marc Linder (Oct. 10, 2008). Muston stated that Battles had been the only dissenter. Telephone interview
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

council’s “most passionate backer of a full-blown no-smoking ordinance,” concurred in the proposal because “[t]hey’ve given us something we can live with.” And although Belitsos told the Tribune that ATTF did “not expect to push for a wider ban for at least several years,” the owners nevertheless knew that the group would be coming back for a full ban. Support from bar owners, despite the fact that the 10-percent food sales threshold meant that “most free-standing taverns would be exempt,” remained “fuzzy.” Indeed, ominously, the Tribune reported that if the city council did adopt a ban ordinance, “some restaurant and bar owners have said they may fight it in court”—a prediction that prompted Mayor Tedesco to declare: “If that’s the case, what have we created? ... One hell of a mess.”

Tantalizingly, while Monte and Kitchell were drafting the compromise with Cummings and Johansen, these two owners mentioned to ATTF members that “they had been approached by some tobacco interests through attorneys in Des Moines,” but explained that “they had resisted and wanted to achieve a local compromise without outside influences.” Kitchell “took them at their word, realizing that the possibility of intrusion by the tobacco industry was one of their bargaining chips,” although she also “had the gut feeling that association with the tobacco companies was distasteful to them and that they wanted to achieve a solution without them.” While Cummings and Johansen were meeting with their constituencies to discuss the bilaterally drafted compromise, some of the owners, Kitchell speculated, “may have consulted with the tobacco lawyers,” but she added that she had “no proof that the cigarette companies had been financing or organizing resistance to our endeavors,” and even if they had been, “they were not very successful.”

with Linda Muston, Coralville (Oct. 8, 2008).


255 Richard Lewis, “Anti-Smoking Forces Back Compromise,” Tribune (Ames), Nov. 14, 2000 (A1:2-5, A8:1-4). Quirmbach later dismissed the importance of the exemption of such pure bars on the grounds that bar owners and patrons constituted a “different culture.” Telephone interview with Herman Quirmbach, Ames (Oct. 31, 2008).

256 Email from Mary Kitchell to Marc Linder (Oct. 12, 2008). Muston also independently referred to unconfirmed reports at the time that a tobacco industry representative had “contacted some of the restaurant owners and offered support to resist.” Like Kitchell, Muston added that “[i]n general, not many [owners] were favorably disposed to outsiders for the same reason they didn’t want an ordinance to mess with them!” Email from Linda Muston to Marc Linder (Oct. 12, 2008). Quirmbach also later reported that bar owners’ initiative had been local and not introduced by the tobacco
The day before the November 14 council meeting Mayor Tedesco stated that three days earlier he had received word of a possible compromise for bar and restaurant owners in addition to ATTF’s endorsement of it. Consequently, although the council was to consider a total ban, in fact a compromise would be “‘brought forth.’” On November 14 ATTF released a revised version of its aforementioned “Position Statement,” with which it was in part identical, but whose most sharply worded frustrations were deleted in favor of a more hopeful stance. Thus, ATTF concluded that the “impact of reaching a much broader range of establishments has value that offsets value lost in allowing late-hour smoking in some restaurants.” But even now the group was uncertain as to whether the trade-off would yield a net health benefit: “The compromise proposal may subject fewer overall to second-hand smoke than would a pure restaurant ban.” Abandoning its second thoughts and reluctance, the Task Force, in “the spirit of compromise,” supported the new proposal and encouraged its adoption by the council. Wistfully, it regarded the “compromise as a starting point as we continue to work on our vision of a smoke-free Ames.”

Quirmbach himself, for several reasons, never second-guessed the decision to compromise. First of all, after all the work that ATTF had done, he was not willing to give up on the ban merely because it was not as rigorous as he and others had hoped it would be. Second, simply withdrawing the proposal and trying to organize even more extensive grassroots support for a stricter ban was not practicable because, as a council member, it was not clear to him that the anti-smoking movement would have been able to get any ordinance at all through the council. Third, what was clear to him was that, if adherents rejected the compromise, it would be years before they would be able to try to push for a ban again. And, finally, far from fretting over or regretting the Cancer Society’s sharp attacks, Quirmbach found it politically “very useful” to have the ACS opposing the Ames coalition because it was “always good to be in the middle” (in this instance, between perfectionists at the one extreme and rigid business owners at industry. 

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258 Ames Tobacco Task Force, “Position Statement” (Nov. 11, 2000) (copy furnished by Linda Muston). It is unclear why ATTF asserted that late-hour smoking would be allowed only in “some” restaurants. Unknown, too, is the reason for deletion from an earlier draft of an expression of concern for the health of employees in “smoke filled workplaces.” [Ames Tobacco Task Force, untitled] (For Release Monday, November 13, 2000) (copy furnished by Linda Muston).
Exposure to Thirdhand Smoke: The New Learning

Significantly, ATTF’s November 7 statement, which self-critically evaluated the stop/start smoking/nosmoking compromise, failed even to allude to the health consequences of the extended exposure to toxic and carcinogenic substances in tobacco smoke that adhered to various surfaces and off-gassed even during the so-called “red-light” no-smoking periods—a phenomenon that R. J. Reynolds Tobacco Company scientists observed in 1992 (“the presence of residual nicotine desorbing from chamber surfaces”) and that later would be called “thirdhand smoke.” As early as 1993, researchers in the Indoor Environment Program at Lawrence Berkeley Laboratory studied how deposited particles from environmental tobacco smoke “may continue to emit semi-volatile chemicals into the room air for a long time” and how “[o]wing to the evaporation of deposited particles and the reemission of adsorbed chemicals, a recently used smoking site may still exhibit a certain level of ETS constituents,” odor being evidence of the evaporation and reemission. They estimated that, depending on air exchange rates, between 21.5 percent and 3 percent of the total initial mass of side stream ETS particles generated by smoking one cigarette deposited on interior surfaces, yielding, at an estimated evaporation rate of 17 percent per hour of such particles, even “more significant” indoor concentrations of chemicals.

259 Telephone interview with Herman Quirmbach, Ames (Oct. 31, 2008).
increased ventilation reduce to very low levels exposure to lower volatility hazardous air pollutants and toxic air contaminants such as cresols, naphthalene, and polycyclic aromatic hydrocarbons. Components of environmental tobacco smoke, as noted in a research paper on infants’ exposure to environmental tobacco smoke-contaminated households based in large part on studies from the 1990s,

are rapidly dispersed after emission and undergo further dynamic chemical reactions. Vapour phase components deposit and are adsorbed onto walls, furniture, clothes, toys, and other objects within 10...minutes to hours after tobacco smoke has been emitted. From there they are re-emitted into the air over the course of hours to months. ETS particulate matter can deposit on surfaces within hours after smoking occurred, from where it may be re-suspended or react with vapour phase compounds. Through this dynamic behavior, ETS can contaminate house dust, carpets, walls, furniture, and other household objects for weeks and months after ETS was emitted from a cigarette.

Although the science of thirdhand tobacco smoke exposure was only about a decade old by this time, enough of this new learning had spread to allied fields that as early as October 2001 the Iowa City City Council heard from Professor

ETS components and their time scales estimated that deposition and sorption of vapors lasted tens of minutes to hours, deposition of particles lasted hours, and re-emission of sorbed vapors last hours to weeks. Joan Daisey, “Tracers for Assessing Exposure to Environmental Tobacco Smoke: What Are They Tracing?” Environmental Health Perspectives 107 (Supp. 2): 319-27, tab. 2 at 320 (May 1999), Bates No. PM3006697619/20.


G. Matt et al., “Households Contaminated by Environmental Tobacco Smoke: Sources of Infant Exposures,” TC 13:29-37 at 29 (2004). Even when “deposited tobacco smoke pollutants are not re-emitted into the air,” as the lead author of this article later observed, “they can still enter the body via dermal transfer and ingestion” (by means of touching of contaminated surfaces). Email from Georg Matt to Marc Linder (Jan. 5, 2009). In a more recent study of housing, Matt et al. discovered that non-smokers’ finger nicotine was higher in housing formerly occupied by smokers compared to housing formerly occupied by non-smokers and its levels were correlated with the dust and surface nicotine present. Georg Matt et al., “When Smokers Move Out and Non-Smokers Move In: Residential Thirdhand Smoke Pollution and Exposure,” TC (2010) doi:10.1136/tc.2010.037382 (copy provided by Georg Matt).
William Field, a lung cancer researcher in the Epidemiology Department of the Public Health College at the University of Iowa, who urged rejection of a red light/green light ordinance, that: “From my own research, I know the aerosols and attached carcinogens from cigarettes stay airborne for long periods of time. Even after depositing, the carcinogenic particles often resuspend with only minimal air movement in a room.”\textsuperscript{265}

Insidiously, the red light/green light regime could and would actually increase the exposure to tobacco smoke of non-smokers who had previously refused to frequent restaurants and bars that permitted smoking but now ate or drank in them during the non-smoking period because, as an important study from 2002 found, “re-emission of previously sorbed organic compounds may increase exposures to these compounds for a non-smoker who specifically avoids the smoking area during smoking periods but occupies the area during other periods of the day.”\textsuperscript{266}

Eight years after the Ames debate two of the leading researchers of thirdhand smoke, in response to a question as to which side had adopted the scientifically more tenable position, observed that the red light/green light regime was “pretty worthless”\textsuperscript{267} and had represented a victory for smoking advocates, respectively.\textsuperscript{268} A third cutting-edge researcher, whose “own personal feeling” was that “any measure that reduces exposures and cuts down on the times and places when people can be exposed to serious amounts of SHS is a good thing” and that direct exposure to secondhand smoke was “much more important than the sorption-desorption thing,” concluded that the partial ban “should reduce exposures by allowing some to avoid the establishments during smoking hours,”

\textsuperscript{265}Email from William Field to Iowa City Council (Oct. 16, 2001), on http://www.icgov.org (Oct. 23, 2001 special meeting correspondence). Nevertheless, when asked seven years later how long resuspension lasted, Field, who is a radon expert, not only did not know, but stated (incorrectly) that little research had been done on the subject; similarly, he did not know whether carcinogenic exposure to such resuspended particulate matter was minuscule compared to that of direct exposure to secondhand smoke. Email between Marc Linder and William Field (Oct. 20, 2008). For more recent research that measured “substantial levels” of “carcinogenic tobacco-specific nitrosamines” of a smoker’s vehicle, see Mohamad Sleiman et al., “Formation of Carcinogens Indoors by Surface-Mediated Reactions of Nicotine with Nitrous Acid, Leading to Potential Thirdhand Smoke Hazards,” \textit{PNAS} 107(15):6576-81 at 6576 (Apr. 13, 2010), on http://www.pnas.org/cgi/doi/10.1073/pnas.0912820107.


\textsuperscript{267}Email from George Matt to Marc Linder (Jan. 5, 2009)

\textsuperscript{268}Email from Jonathan Winickoff to Marc Linder (Jan. 5, 2009).
while exposures from desorption are almost certainly not as hazardous/risky (since we know that some of the nasty compounds don’t stick around).” Although, unlike some researchers, he did not believe that no doubt attached to the claim that people were “being exposed to substantially unhealthful amounts of tobacco smoke compounds via desorption in bars and restaurants, he did argue that since desorption of some hazardous compounds in secondhand smoke “can lead to concentrations of some compounds that are similar to levels that occur during smoking,” the “precautionary principle” spoke in favor of prudence.269

The Attorney General Opines that Local Control Is Not Preempted

An Attorney General’s Opinion is not the final word on the subject, but it is given respectful consideration by courts addressing the same issue.270

As arranged with the Ames City Council on October 10, Senator Johnie Hammond had requested an opinion from the attorney general as to whether local governments were empowered to adopt ordinances prohibiting smoking in certain public places. Specifically she had asked: “In view of subsection 142B.2(2) Code of Iowa, would a city ordinance enacted to prohibit smoking in any public place, as defined by subsection 142B.1(3)...be inconsistent with or conflict with Chapter 142B...?”271 Providentially (but probably not serendipitously), just an hour before the November 14 council session began at 6:00 p.m., the mayor received by fax the Iowa Attorney General’s opinion on the validity of the proposed ordinance, which concluded that it would neither be inconsistent nor conflict with chapter 142B of the Iowa Code.272

Turning first to the issue of express exemption, Assistant Attorney General Steve St. Clair concluded that the provision in section 142B.6 added in 1990 did “not constitute an express statement of legislative intent to bar municipalities from exercising home rule powers”273 because its command that the state law

269Email from Brett Singer to Marc Linder (Jan. 5, 2009).
“shall supersede any local law or regulation which is inconsistent with or conflicts with” the state law merely “reflects the same home rule principles embodied in the Iowa Constitution...and does not constitute an express statement of the general assembly’s intent to preempt.” The attorney general opinion supported this conclusion on the basis of the legislature’s having “had no difficulty expressing its intent to preempt with unmistakable clarity in other contexts”—particularly where it had prohibited local governments from adopting any ordinance even “relating to” the subject dealt with by the state statute.275

The Attorney General’s office offered a more nuanced analysis of implied preemption, which “could arise from an overt conflict between” the state law and an ordinance creating “more stringent standards for smoking in public places.” The opinion acknowledged that “[i]n a broad sense, a locality that extends the ban on smoking by prohibiting the designation of smoking areas in certain public places” would in fact be “prohibit[ing] an act permitted by a statute,” which the Iowa Supreme Court had articulated as a touchstone of the kind of local action triggering preemption. “However,” the opinion pointed out, “this expansive approach would mean that a local jurisdiction could never establish more stringent standards, which is something localities are expressly permitted to do as a general matter” by the Code’s home rule provisions. Consequently, the real test had to be “whether the local ordinance prohibits an act expressly sanctioned by state law”; but in fact chapter 142B not only did not expressly sanction smoking in designated public places, but, on the contrary, in section 142B.2(2) “envisions the active involvement of local jurisdictions in expanding the smoking prohibitions of state law.”276 Although implied preemption could also arise from the legislature’s intent to occupy the field, the fact that the Supreme Court had rarely found a statute to have met that standard reflected a “strong public policy in favor of granting local jurisdictions the flexibility they need to address local problems,” which in turn flowed from the constitutional grant of home rule. To be sure, the requirement in section 142B.6 of “uniform implementation, application, and enforcement” had to be examined to determine whether it met Supreme Court dictum that the legislature’s clear expression of intent to establish

statewide uniform regulation might also express an intent to occupy the field. However, the express prohibition of inconsistent or conflicting local ordinances in section 142B.6 constituted clear legislative recognition of the permissibility of “consistent local regulation in the field.” That the legislature had not exalted the desideratum of uniformity above that of local regulation was clearly inscribed in the key section 142B.2(2), on which the opinion then focused.\textsuperscript{277}

Finally reaching the nub of the question about the effect of section 142B.2(2) posed by Hammond and the Ames City Counsel, St. Clair concluded that it “expressly recognizes the authority of local jurisdictions to pass ordinances prohibiting smoking in some public places in which state law would permit smoking. Thus, the general assembly acknowledged that localities retained the authority to establish more stringent prohibitions relating to smoking in public places than those embodied in state law.” In light of the constitutionally enshrined “robust policies favoring home rule,” the Attorney General’s office regarded the implications of section 142B.2(2) as “especially compelling.”\textsuperscript{278}

\textbf{The Ames City Council Unanimously Passes the Weak Red Light/Green Light Compromise Ban}

\textit{WHEREAS}, it is found that smoking areas have been designated in many such public places in this city; and

\textit{WHEREAS}, it is found that the designation of smoking areas in those public places has subjected persons to the harmful effects of tobacco smoke on their health, and curtailed the number of public places that can be enjoyed by persons who have an allergy or other heightened sensitivity to smoke; and

\textit{WHEREAS}, it is deemed to be in the interest of the public health and the economic welfare of the community that designation of smoking areas be prohibited in such public places that are frequented, for the most part, by residents of this city.\textsuperscript{279}


\textsuperscript{278}Office of the Attorney General State of Iowa, Docket No. 0-11-5, at 4 (Nov. 14, 2005) (2000WL 33258478 (Iowa A.G.). To be sure, given the specific wording of section 142B.2(2), the Attorney General opinion dealt only with a local government’s power to restrict the designation of smoking areas, and did not address its power, for example, to modify the statutory definition of “public place.” \textit{Id.} n. 2 at 5.

\textsuperscript{279}City of Ames, Ordinance No. 3608 (2001), reprinted in Lenwood Monte, \textit{A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food} n.p. [54] (n.d.).
Despite the support that the attorney general had just provided for the full ban, the council on November 14 unanimously voted to shrink the scope of its coverage radically. At the outset, Fred Miller announced that restaurant/bar owners and ATTF had asked him to present a compromise proposal, which embodied imperfections from the perspective of each party, which had had to make some concessions. The compromise contained the following elements:

1. Restaurants, bars and taverns shall be non-smoking from 6 AM thru 8:30 PM daily. At 8:30 PM, these establishments may designate a smoking area in compliance with state law.
   -- Bars and taverns are exempt if food sales are 10% of gross sales or less. In the case of food served on premise from outside vendors, these sales are to be included in food sales and gross sales.
   -- Should an establishment decide, on a consistent and regularly scheduled basis, to terminate food service prior to 8:30 PM, then this establishment may begin to allow smoking at the scheduled time.
   -- Outdoor seating areas will be considered as indoor areas if food is served.
2. Truckstop establishments are allowed to establish an unrestricted smoking area that is fully enclosed and has a separate ventilation system. Should the establishment later enlarge the dining area, no expansion can be made of the smoking area.
3. Bowling alleys shall be non-smoking from 6 AM through 6 PM. After 6 PM, these establishments may designate a smoking area in compliance with state law. Due to specific league play, the time to allow smoking on Thursdays is advanced to 3 PM. Bowling alleys are allowed to establish an unrestricted smoking area that is fully enclosed and has a separate ventilation system.
4. Common areas of hotels and motels shall be smoke-free.
5. A smoke-free zone of 15 feet at the main entrance/exit of all restaurants, bars, taverns, truckstops, and bowling alleys shall be maintained except where adjacent establishments preclude such zones.
6. Customers under 18 years of age are not allowed in smoking areas.
7. An ordinance developed from these guidelines shall be effective no earlier than six months following enactment. Diligent enforcement is expected.\(^\text{280}\)

Conversely, the compromise would permit smoking in: (1) bars 10 percent or less of whose total sales stemmed from food; (2) pool halls; (3) truck stops; (4) bowling alleys after 6 p.m. every night except Thursday, when smoking became permissible at 3 p.m.; and (5) establishments with on-premises live music.\(^\text{281}\)

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\(^\text{280}\) Minutes of the Regular Meeting of the Ames City Council at 4-5 (Nov. 14, 2000) (copy furnished electronically by City Clerk Diane Voss).

Among the crowd of about 120 people in attendance\(^{282}\) at a discussion that, according to several council members, had “caused the most controversy in years over a council action,”\(^{283}\) about 20 spoke up, 80 percent of whom opposed the compromise.\(^{284}\) Only one of these opponents regarded the proposal as too weak: Nancy Battles, the Cancer Society representative, criticized it for not adequately protecting the public—including children, adults, and restaurant workers\(^{285}\)—and urged the council to revisit the full ban.\(^{286}\) In contrast, Mary Kitchell and Len Monte, the two ATTF representatives who (together with the city attorney and the two hospitality industry representatives, Bob Cummings and Rich Johansen)\(^{287}\) were serving on the Compromise Proposal working committee, stated that it was willing to “go along with the Compromise because it satisfied some of the requests of both groups.”\(^{288}\) One restaurant owner opined that he was not convinced that a non-smoking restaurant could make money. Several non-business people (including some who were apparently students from other countries) insisted that any ban constituted an impermissible restriction of freedom and would lead to totalitarianism.\(^{289}\)

The council then voted 6 to 0 to refer the compromise proposal to the city attorney for drafting as an ordinance.\(^{290}\) The council’s willingness to change course was dictated by the perception of considerable community opposition to the broad ban. The (non-voting) mayor, for example, explained that he was “‘somewhat despondent’ at [sic] the amount of harsh criticism council members received through e-mails, letter and phone messages.” And the *Des Moines
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

Register reported that despite the meeting’s “conciliatory tone..., many residents and business owners said [even] the compromise was still too far-reaching.”

Once restaurant and bar owners began pushing for a compromise, it was clear to the anti-smoking bloc on the council that it lacked the requisite four-vote majority for the broad ban. As Iowa’s first city to try to pass its own ban, Ames became a flashpoint for national anti-smoking groups and the tobacco industry seeking to bring local pressure to bear on the council. To (some) council members’ relief, the protagonists were willing to settle for a less stringent ban that enabled the council to “scrap the more controversial full ban that has deeply divided the public.” Rick Carmer, the activist restaurant owner, claimed that he would lose money by virtue of the smoking ban on his patio and around his bar, but a total ban would have been worse, and the partial ban would produce less exposure to secondhand smoke. Conciliatorily he owned that “[w]e can live with this” (but then, shortly after it had gone into force, sued to invalidate it). Carmer’s main objection, he later claimed, had not been to the substance of the ordinance, but to the process by which the compromise had been reached and “rammed down our throats” by the council. Generally speaking, owners opposed the ban because they (erroneously) feared—in large part as a result of cigarette companies’ nationwide disinformational campaigns—that they would lose money and/or were ideologically fixated on government interference with their private business decisions.

292 Email from Judie Hoffman to Marc Linder (Sept. 30, 2008).
295 “For more than a decade the tobacco industry disseminated misinformation asserting that the hospitality industry will suffer financially when smoke-free environments are instituted. Despite the fact that these claims of negative impact are unfounded, this argument has been widely accepted in the hospitality business, thanks to the relationship the tobacco industry has established with organisations whose alleged purpose is to protect the interests of businesses in the hospitality sector. This situation creates problems for public health advocates because individual restaurateurs and bar owners, having heard these claims repeatedly from organisations they trust, oppose smoke-free policies out of fear.” J. Dearlove, S. Bialous, and S. Glantz, “Tobacco Industry Manipulation of the Hospitality Industry to Maintain Smoking in Public Places,” TC 11:94-104 at 101 (2002).
296 Telephone interview with Mary Kitchell, Ames (Oct. 3), and Sharon Wirth, Ames
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

At the beginning of January 2001, the internecine conflict within the anti-smoking movement reached a new high point when the president of the Midwest board of the American Cancer Society wrote its Ames members urging them to ask their representatives on the city council to "vote down the bad ordinance" on the grounds that it would “not protect the health of the people of Ames.” In addition, without revealing what he was specifically talking about or how it could possibly succeed in light of the council’s make-up, the president declared that there was “still time to join our efforts to pass a strong ordinance” by letting the city council “know that you want Ames to have smoke-free restaurants that are truly smoke-free.”297 Believing that this “total goal was simply not achievable,” ATTF, committed as it was to accepting the most that it was able to get from the city council in the short run, saw no alternative to swallowing this “hard pill....”298

Some in Ames at this late date agreed with ACS. One physician, for example, while understanding that “a compromise might at least get things started,” insisted that “such a compromise still stinks! ... Ideally, we should pass a 24/7 smoking ban for public places and let the smokers figure out how to deal with it.”299

By the time the council was due to take up the ordinance again in January, the Ames Tribune was suffering from smoking ban fatigue: its market-knows-best and libertarian “principles” had reduced its understanding of the public health question to urging smokers at least to be “polite” because many people found smoke “irritating.” Recognizing that it had nothing coherent to say—“[w]e feel like we’re blowing smoke out of both sides of our mouths, so to speak”—it suggested that the council approve the compromise and finally move on to the many other matters the city had to consider.300

After the city attorney had refashioned the compromise proposal into yet another draft ordinance, the council met on January 23, 2001, to discuss it, making only one change (unanimously to shift the implementation date to August 1). Quirmbach called the new draft ordinance “a solution that fully and completely reflects the compromise. ‘It’s a step we all can live with.’” Although

(Oct. 5, 2008).


298Lenwood Monte, A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food 65 (n.d.).


no public input was permitted, Mayor Tedesco did poll the audience: many stood up in support of the ordinance and only a few in opposition. Public comment would follow in three weeks when the ordinance’s first reading was on the agenda. In spite of the compromise, ATTF was taking no chances: as early as January 22 it distributed a flyer announcing that the city council would hold its first reading of the “compromise ordinance” on February 13 and calling on the public to show support by attending, contacting council members, or writing letters to the Tribune. Fourteen people spoke up during the public hearing on the ordinance’s first reading on February 13, half of whom supported the proposed ordinance. Two bar owners suggested that the exemption level (that is, food as a proportion of total sales) for bars be raised to 15 and 25 percent, respectively. In response to the many people who argued that the proposed ban would “restrict their general liberties,” Quirmbach pointed out that “any time the City Council passes an ordinance, it does have the effect of restricting persons’ activities.” The council then voted 6 to 0 to pass the ordinance on first reading; by a vote of 1 to 5 it rejected an amendment moved by Wirth to weaken the ban by expanding the universe of exempt bars by raising the proportion of total sales accounted for by food from 10 to 15 percent that triggered the exemption. On February 27 and March 6, the council, again unanimously, passed the proposed smoking ban on second and third reading, respectively, and thus adopted Ordinance No. 3608. That Ames on August 1 would become the first and only city in Iowa with such an additional set of local prohibitions concerned restaurant owner Carmer, who, despite the possible competitive disadvantage, predicted that the city’s businesses would survive the effects of the partial ban, which he called a “‘wishy-washy

305 Minutes of the Regular Meeting of the Ames City Council at 5-6 (Feb. 27, 2001) (copy furnished electronically by City Clerk Diane Voss); Minutes of the Regular Meeting of the Ames City Council at 5 (Mar. 6, 2001) (copy furnished electronically by City Clerk Diane Voss).
compromise.” Without explaining whether his antipathy extended to all the other public health regulations that applied to restaurants, he declared that “I just don’t like anybody interfering with our business.” (Council member Goodhue, another lukewarm supporter, later opined that because the “community was very split over this issue...the modified ordinance was a good compromise and this seemed to generate add[itional] support. I believe there were more against the ordinance when it was first introduced than when it finally passed.”)

The final version of the ordinance differed from the first draft in numerous crucial ways. First, smoking and designating smoking areas were prohibited in all “public places” as defined in the state law. Second, a time-of-day exemption was created for food establishments between 8:30 p.m. and 6:00 a.m., during which period designating smoking areas was once again permitted; the exemption also applied to any such establishment that stopped serving food “on a consistent and regularly scheduled basis” before 8:30 p.m. from that time until 6:00 a.m. Third, a total exemption was afforded any food establishment that was also licensed to sell alcohol if non-alcoholic food sales accounted for less than 10 percent of all of its sales. Fourth, the council exempted factories, warehouses, and similar workplaces that the general public did not usually frequent. Fifth, hotels/motels were required to “take such measures as shall be reasonably necessary and effective to keep all lobby areas, corridors and other common areas...free from any level of smoke that can be detected by the unaided human sense of smell.” Sixth, all places that came within the scope of provisions dealing with food establishments, restaurants/bars, truck stops, and bowling alleys were required to “take such measures as shall be reasonably necessary and feasible to maintain all points within fifteen feet of the main entrance and the main exit of such place free from any level of smoke that can be detected by the unaided human sense of smell.” Seventh, those in custody and control of the same places covered by the previous provision were also required to “take such measures as shall be reasonably necessary and feasible to prevent

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308 Email from Steve Goodhue to Marc Linder (Oct. 13, 2008).
309 Municipal Code of the City of Ames, sect. 21A.101 and .102 (Sup #2001-2, Rev. 4-1-01).
310 Municipal Code of the City of Ames, sect. 21A.200 (Sup #2001-2, Rev. 4-1-01).
311 Municipal Code of the City of Ames, sect. 21A.201 (Sup #2001-2, Rev. 4-1-01).
312 Municipal Code of the City of Ames, sect. 21A.205 (Sup #2001-2, Rev. 4-1-01).
313 Municipal Code of the City of Ames, sect. 21A.300 (Sup #2001-2, Rev. 4-1-01).
314 Municipal Code of the City of Ames, sect. 21A.301 (Sup #2001-2, Rev. 4-1-01).
315
persons under the age of eighteen from being in any area where smoking” was allowed under the ordinance, which made it unlawful for anyone in that age group to be present where smoking was allowed.315 And eighth, outdoor seating areas were subject to the same prohibitions, provisions, and exemptions stated in all of the ordinance’s substantive sections.316

Whereas Belitsos celebrated adoption of the ordinance as “‘the first time any city in Iowa has passed an anti-smoking ordinance,’” a less than wildly enthusiastic councilman Quirmbach called it “‘a step we can all live with.’”317 Nevertheless, even Quirmbach, years later, praising local control as making it possible to balance various interests in a community, characterized the process as a whole as a pretty good exercise in democracy.318 What the remedy and recourse were for a democratic process that produced a severely deficient public health outcome, including completely unnecessary large-scale morbidity and mortality, he did not explain.

In contrast, the statewide health organizations denounced the compromise with business owners as a “‘victory for the tobacco industry.’” For example, the American Cancer Society observed that a “‘watered-down smoking ban won’t save lives’” because smoke lingered for weeks in bars and restaurants and confining smoking to certain hours made enforcement difficult. ACS’s opposition to “‘a step-by-step approach’” was based on the fact that “[m]ore people are exposed to life-threatening toxins the longer it takes a community to adapt.”320 (Ironically, ACS seemed completely unaware that its own unbending commitment to local control in lieu of a one fell-swoop statewide ban was subject to exactly the same criticism since the process of adopting ordinances in all 948 incorporated cities and towns and 99 counties would take a very long time. Indeed, the very fact that not even Ames was able to pass a strict ordinance suggested that ACS’s reliance

315Municipal Code of the City of Ames, sect. 21A.400 (Sup #2001-2, Rev. 4-1-01).
316Municipal Code of the City of Ames, sect. 21A.500 (Sup #2001-2, Rev. 4-1-01). Because these outdoor areas did not fit within the definition of a “public place” as an enclosed area in the state statute, the attorney general’s office had no opinion on them other than to argue that: “‘It’s really for the local people to make the first call.’” Richard Lewis, “Attorney General: Ames Law Wouldn’t Conflict with State’s,” Tribune (Ames), Nov. 15, 2000 (A1:6, at A8:1-4 at 3-4).
319Telephone interview with Herman Quirmbach, Ames (Apr. 19, 2008).
on local control as a statewide strategy was not realistic.)\textsuperscript{321} The Cancer organization bluntly charged that “time limits are ploys used by tobacco companies to keep their products in restaurants.... ‘That should tell you right there it’s a red flag.... The only way to get a healthy environment is to ban smoking all the time.’” All these accusations left Belitos in disbelief: “‘They’re trying to give us a black eye when we should be getting credit.... It’s only a first step toward our ultimate goal of having all public places in Ames smoke-free. Instead of criticizing us, they should be complimenting us.’”\textsuperscript{322} For good measure, CAFE in Iowa City, where the city council had not even taken up the group’s draft ordinance, joined in the denunciation: one of its spokespeople, Dan Ramsey—who would later become the lobbyist for the American Lung Association of Iowa—called the Ames ordinance “‘a victory for tobacco’ because the council chose to allow smoking in restaurants between 8:30 p.m. and 6 a.m. to limit unfair competition. ‘That doesn’t protect employees.... Smoke lingers for up to two weeks.’”\textsuperscript{323}

In contrast, Ames council member Hoffman agreed that from a public health perspective ACS was right—the problem, however, was that the anti-smoking bloc on the council simply lacked the votes to pass a stronger ordinance.\textsuperscript{324} Natalie Battles of ACS believed that Quirmbach had pushed to get a ban through the council before he left for the state legislature because he realized that its composition would turn over and a new council would be even less likely to adopt an ordinance,\textsuperscript{325} but Hoffman denied that such a consideration played any part in her or Quirmbach’s decisionmaking. Rather, they were simply “excited about moving forward on an important health issue. We both realized that you don’t always get all that you want when you are breaking new ground and it was important to get something started.”\textsuperscript{326}

Criticism of Quirmbach’s tactics was not necessarily tied to insinuations about his plans for statewide office. For example, Karla Wysocki of ACS simply concluded that he had acted prematurely: instead of rushing the ordinance to a vote, he and ATTF should have first engaged in more public education. Yet, unlike some harsh contemporaneous critics, she later admitted with alacrity that

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\item \textsuperscript{321}Email from Judie Hoffman to Marc Linder (Sept. 29, 2008).
\item \textsuperscript{322}Staci Hupp, “Partial Smoking Ban Stirs Debate in Ames,” \textit{DMR}, Mar. 9, 2001 (1B) (NewsBank).
\item \textsuperscript{323}Andrew Dawson, “Coralville Considers Smoking Ordinance,” \textit{ICP-C}, Apr. 16, 2001 (3A:6-7, at 4A:3-6 at 5).
\item \textsuperscript{324}Telephone interview with Judie Hoffman, Ames (Sept. 27, 2008).
\item \textsuperscript{325}Telephone interview with Natalie Battles, ACS, Ames (Sept. 28, 2008).
\item \textsuperscript{326}Email from Judie Hoffman to Marc Linder (Sept. 28, 2008).
\end{itemize}
ACS had been “conflicted” over its decision to oppose the Ames ordinance because it recognized that the city’s experience with a partial no-smoking regime had also had its positive aspects. Indeed, Wysocki (who after having been ACS’s health promotions director for Iowa became a Midwest regional official) without any hesitance acknowledged that “we wouldn’t have gotten to where we did” with the enactment of the statewide smoking ban in 2008 without the struggles in Ames, which raised awareness of the health impact of secondhand smoke exposure and increased the demand for change in Iowa.

Undeterred by Belitsos’s experience, other cities were monitoring events in Ames. In particular in Iowa City, where in mid-2000 the Johnson County Tobacco Free Coalition had proposed a full ban, a year later the city attorney was drafting an ordinance to ban smoking in establishments less than 50 percent of whose sales stemmed from alcohol. Just how glacially slow a process the ubiquitous adoption of ordinances would be appeared undeniable as initially only a few other jurisdictions voiced interest and even they were taking their time and starting small. Anti-tobacco advocates might regard it as “only the beginning of the debate,” but, for example, Cedar Rapids was planning a ban only in taxis and limousines, while Linn County health officials’ discussion of the possibility of a ban in restaurants envisioned implementation’s taking years. And in Boone, the city’s director of policy and administration—a smoker—asserted that most residents were not eager to join the movement: even non-smokers told him that it should be up to the businesses themselves to decide.

In the state’s largest city, Des Moines, even health advocates recognized that they had to be considerably more prepared before embarking on an ordinance campaign, precisely in order to avoid the mistakes that Ames had committed in pushing quickly before having done sufficient groundwork. As far as the American Lung Association was concerned: “There are too many people who oppose the issue. You have to target the nonsmokers rather than the smokers.” The preparatory work that the organization had in mind was presumably related to nonsmokers’ attitudes and their underlying knowledge. For example, although 76 percent of Des Moines area nonsmoking residents surveyed in April 2001 regarded smoking in restaurants as a major or minor “bother,” only 18 and 14 percent, respectively, said that they would eat more often in restaurants and spend more time in bars, respectively, if smoking were prohibited there, prompting the

327 Telephone interview with Karla Wysocki, Rochester, MN (Oct. 9, 2008).
329 Kate Kompas and Lisa Livermore, “Cities Move Toward Bans on Smoking,” DMR, June 4, 2001 (1A) (NewsBank).
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

Des Moines Register to conclude that they “suffer silently.” This acquiescence, the newspaper intuited, might be related to some respondents’ being more concerned about the smoke’s impact on how their food tasted than about cancer; and even when someone was expressly worried about the health consequences of secondhand smoke, “after being seated just a table or two from the smoking section of one restaurant, he did not ask for a new table or leave the restaurant.” Instead of pointing out that moving to a different table would have been useless because the smoke penetrated throughout the restaurant, the Register suggested that even nonsmokers and owners who had banned smoking in their own restaurants preferred voluntary action to state intervention. Such views would have been warmly embraced by Doni DeNucci, the executive director of the Iowa Hospitality Association, who, oddly oblivious of the myriad regulations with which her members were already obligated to comply, opined: “When you start defining how private business does business, that sets a dangerous precedent.”

Ironically, the Lung Association, instead of focusing on educating nonsmokers about the lethal consequences of exposure to secondhand smoke and persuading them to be more assertive of their public health right not to be so exposed, backed development of a dining guide to (voluntarily) smokefree restaurants as a step toward mobilizing support for more substantial measures.330

In Ames a few days before the ordinance went into effect, Attorney General Miller spoke of “a cultural war between tobacco companies and life” before highlighting the importance of a 14-hour a day smoking ban and expressing hope that the ordinance would move toward a total 24-hour ban.331 By the time the Ames ordinance went into effect on August 1, 2001,332 Belitsos proudly (but exaggeratedly) hailed it as “the first time in Iowa that an entire city will be free from tobacco smoke when eating at local restaurants....” The Register’s editorial comment that “they’re ready to pop the champagne corks in Ames,”333 would very quickly prove itself to be premature: before long Philip Morris became the chief

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332The signage for restaurants (“Smoke Free Dining”), which was labeled “[s]upported by” the Iowa Tobacco Control Program and Centers for Disease Control and Prevention, bullet-pointed three aspects: (1) smoking was not allowed in restaurants from 6 a.m. to 8:30 p.m., but was allowed in designated smoking sections from 8:30 p.m. to 6 a.m.; (2) the same rules applied to outdoor seating areas; and (3) no smoking was allowed within 15 feet of entrances/exits. “New Ames City Ordinance” (n.d.) (plastic original furnished by Linda Muston).
celebrant. In the meantime, enforcement was largely up to owners, some of whom had originally complained that the ordinance constituted an invasion of their privacy, though, in turn, some were optimistic that their businesses would not suffer at all. 334

CAFE Attacks Red Light/Green Light for Ames and Iowa City

Anything less than a 100% ban on smoking is not a ban. A part time no smoking ordinance is useless and does not address the health issue since it takes 2 weeks for smoke to clear a closed environment. No smoking for part of the day will not help. 335

CAFE was so intent on avoiding alienating even hard-core smokers that it did not even shy away from taking umbrage at the cigarette industry’s matter-of-fact reference to it as a “local anti-smoking group”: “We are not anti-smoking—we are anti-second hand smoke.” 336 This preposterously illogical claim, which, because it was wilfully blind to the source of secondhand smoke, was either misleading or should have disqualified CAFE as a critic of others’ partial bans, might nevertheless in a hyper-literalist sense have explained its fervent opposition to red light/green light schemes as based on the impact of the lingering smoke of past smoking. 337


337 The view was widespread in CAFE circles. For example, Prof. William Field, an epidemiologist and lung cancer researcher, explained to the city council that support for an ordinance was “not anti smoking. I know many smokers who are considerate of others and do not smoke in restaurants. All we are asking is that people do not smoke while they are in the restaurant.” Email from William Field to Iowa City Council (Oct. 16, 2001), in Iowa City Council Documents, Meeting Folders 2001 (final), Oct. 23, 2001 Correspondence at 1, on http://www.iowa-city.org/weblink/docview.aspx?id=8142 (visited Oct. 19, 2008). CAFE’s position was in part driven by its inability to act consistently with the scientific basis of its support of public smoking bans—namely, that secondhand smoke exposure kills tens of thousands of people yearly in the United States—and its disingenuousness with regard to the identity of the agents of that killing. For example,
Even before the Ames ordinance went into effect a steady barrage of harsh criticism of its central time- and smoke-share feature began being fired off from Iowa City. After the CAFE draft ban had lain dormant for half a year while the council occupied itself with underage drinking, the city attorney in April 2001 furnished the council with a memorandum summarizing the CAFE draft and the Ames ordinance and posing a number of questions as to the council’s policy preferences so that it could assist her in drafting an ordinance. The second question (following one as to whether members wanted to ban smoking in all “public places” or only in restaurants) read: “Do you wish to set limitations during which times smoking is permitted (similar to the Ames ordinance), and if so, for what time periods?”

At its special work session on April 16, the council finally devoted some attention to the subject. That there was no danger that a(n imaginary) council composed exclusively of zealous anti-smokers might get carried away with radical regulation had become clear just a month earlier during discussion of an addendum to the lease renewing the lease of the bus depot to Greyhound Lines, Inc. When Steven Kanner—a member of the Iowa City Green Party, who ran a non-partisan campaign focused on neighborhood organizing, exploration of municipally owned electricity, and a living wage and was perhaps the council’s most consistently anti-smoking member—proposed a ban on smoking in the building, Dee Vanderhoef, a sometime smoker, former nurse, and self-

Project manager of Clean Air for Everyone Johnson County denounced informing smokers, who for many years violated the University of Iowa’s various smoking policies, of their violations as “bullying” on the grounds that “it serves no purpose to alienate the very population who most is in need of services.” Wilfully ignoring the fact that anti-public smoking regulation (including forcing smokers to stand outside in the rain and cold in order to smoke) is part and parcel of a program of making smoking socially unacceptable (and not of showering smokers with respect for their suicidal and homicidal addiction), she added that “common sense and grant funding dictate that CAFE Johnson County continue its course of implementing widely-accepted tobacco control best practices, none of which include adopting a militant anti-smoker stance.” Email between Marc Linder and Beth Ritter Ruback (Feb. 24-25, 2006).


**Telephone interview with Karen Kubby, Iowa City (Nov. 17, 2008) (former city council member).**
described conservative,\textsuperscript{341} who ultimately supported a ban in restaurants, adamantly opposed one in the bus station on grounds that restaurant and bar owners would soon seize on as their own excuse: “I think individual businesses have the choice of whether they ban smoking in their establishment.” Serving as the swing vote, Vanderhoef joined the pro-business smoking members, Champion, O’Donnell, and Lehman, to defeat the amendment by a vote of 4 to 3.\textsuperscript{342}

Shortly before the Ames ban went into effect, even Iowa City councilor Ross Wilburn, a social and youth worker\textsuperscript{343} whom his colleague Kanner later characterized as a “middle-of-the-road Democrat,”\textsuperscript{344} made it clear that he disagreed with the Ames approach based on “evidence that it takes more than 24 hours for smoke to dissipate.”\textsuperscript{345} The Ames ordinance had barely been in force two weeks when Peter Wallace, local pediatrician and CAFE spokesperson, emailed the Iowa City Council that the “red-light, green-light’ compromise” not only had not worked and would not work, but that “Ames is considering changing theirs. As far as we know, if Ames tightens their ordinance up, we would be the only city in the United States with a red light/green light compromise if we passed one. It says something that no one else has found it workable.”\textsuperscript{346} A few days later council member Vanderhoef exposed this claim about second thoughts in Ames as disinformation: “[T]here have been several comments made in our community that it’s not working well and that the Ames City Council is going to do some changing on it and I was at a meeting with Mayor Tedesco this last week and he said it’s going very well and they have no intention of doing any changing up there [and] that they’re very pleased and that their restaurant owners are delighted with the way it has been designed for them...”\textsuperscript{347}

As the Iowa City Council was beginning to consider the ordinance, anti-secondhand smoking activists intensified their attacks on Ames-like partial bans.

\textsuperscript{342}Transcription of Iowa City Council Special Meeting at 64-66 (quote at 66) (Mar. 5, 2001).
\textsuperscript{343}http://www.icgov.org/default/?id=1116 (visited Oct. 24, 2008).
\textsuperscript{344}Telephone interview with Steven Kanner, Cleveland, OH (Nov. 14, 2008).
\textsuperscript{347}Transcription of Iowa City Council Special Work Session at 48 (Aug. 20, 2001).
One scientist who offered no basis for his legal prediction assured the council: “Draft a good ordinance that does not include red/light light green light and it will not be successfully challenged (if challenged at all).” The day before the ordinance’s first reading before the council, the *Press-Citizen* opened its op-ed column to dueling pieces by Dr. Peter Wallace and the CEO of the Iowa Hospitality Association. After incorrectly asserting that the proposed ordinance embodied “a complete smoking ban in restaurants”—in fact, it did not cover restaurants with 50 or fewer seats—Wallace urged the council not to “fall prey” to the tobacco industry’s tactics, the result of the successful implementation of which meant that “Big Tobacco won in Ames.” Among the Ames “ploy[s]” and “compromises” against which he warned the council were red light/green light restrictions and “encourag[ing] area bars to become part of the equation.” To be sure, Wallace was completely correct in critically commenting both that “[t]he key to successful smoke-free restaurant policies is the removal of such visual smoking cues, such as ashtrays,” and posting no-smoking signs, both of which presupposed a totally smoke-free policy, and that time-restricted smoking policies continued to endanger the health of employees and customers who worked and ate during smoking-permitted hours.

The Cigarette Oligopoly Protects Its Investment in Its 1990 Preemption Amendment: Philip Morris Litigates to Invalidate the Ames Ordinance

So Philip Morris is picking up the tab for the lawsuit filed against the city’s no-smoking ordinance. Does this change things? Well, it does make it harder to pitch this as a struggle between independent little guys and overreaching government. Not only is Philip Morris paying for the suit, but local businesses participating in the fight were recruited by attorneys fighting the case.

On September 24, less than two months after the ordinance had been in force, owners of six restaurant/bars and a truck stop, (allegedly) catching the mayor

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349 Peter Wallace, “Residents Want Smoking Ban,” *ICP-C*, Nov. 27, 2001 (9A:3-7 at 3-4).
351 On the truck stop owner (Bob James), who became the first named plaintiff in the case, see Daniel Lathrop, “Opponents Hope to Cool City’s Anti-Smoking Ardor,” *Tribune*
of Ames completely by surprise, resorted to the state court system in an effort to enjoin the partial ban on the grounds that it both was inconsistent with the state law, which permitted smoking in designated smoking areas in public places, and that it harmed ""customer good will, business relationships and profits."" In affidavits filed with the request for a temporary injunction, two of the plaintiffs asserted that they were losing $500 to $700 a week in sales and $75 to $250 a day in food sales a day, respectively. Claiming that he closed his kitchen at 3 p.m. on Fridays so that smoking could start earlier, the general manager of the People's Bar and Grill asseverated that: ""Instead of being a "no-smoking ordinance," the effect on businesses in Ames, such as ours, has turned it into a "no-eating ordinance.""  

At the temporary injunction hearing on October 2, 2001, lawyer Fred Dorr, asserting that some plaintiffs had suffered large revenue losses, while others considered closing their kitchens at times to limit their losses, and charging that Ames was ""making its business owners pay the price for a social experiment,"" asked state District Judge Carl Baker to lift the ban temporarily. City Attorney John Klaus, who continued to take comfort from Attorney General Miller's opinion supporting the ordinance's validity, counter-argued that concern about public health (""[t]he balance of harm is with people (injured by) secondhand smoke'') outweighed that about a restaurant's receipts. The judge was to rule on

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352 Staci Hupp, "Smoking Ordinance Triggers Lawsuit," DMR, Sept. 26, 2001 (5B) (NewsBank). The mayor's surprise is difficult to reconcile with his aforementioned statement in November about a possible suit. Unlike the mayor, the Ames Tribune had deemed litigation inevitable. ""It Was Inevitable Smoking Ban Was Headed to Court,"" Tribune (Ames), Sept. 27, 2001 (A6:1) (edit.) (referring to editorial published on Oct. 13, 2000). Council member Steve Goodhue also stated later that he had not been ""surprised the business owners challenged the suit; they told us that from day one."" Email from Steve Goodhue to Marc Linder (Oct. 13, 2008).  
Belitsos shed very interesting light on the litigation by suggesting that Big Tobacco had entered the dispute because plaintiffs’ lawyer, Fred Dorr, and his Des Moines law firm, Wasker, Dorr, Wimmer & Marcouiller, lobbied for the tobacco industry. Dorr claimed that “his firm did not lobby the Legislature for tobacco interests. But he wouldn’t comment about whether it represents tobacco companies.” (Belitsos related that he had simply called Dorr’s law firm and received a straightforward Yes when he asked the person answering the telephone whether this was the attorney for Philip Morris.)

Dorr’s denial to the contrary notwithstanding, the firm, which had been the lobbyist of the by this time deceased Tobacco Institute, was lobbying for Lorillard and Brown & Williamson, and Dorr himself, who had represented R. J. Reynolds in cases in the late 1990s, had defended tobacco companies in the personal injury suit relating to smoking brought by state Representative Philip Brammer and in the suit for Medicaid reimbursement brought by the State of Iowa.

The Ames restaurant owners may have appeared to be the plaintiffs, but the fact that Wasker, Dorr, Wimmer & Marcouiller, the cigarette companies’ principal Iowa lobbyist in general and the one specifically responsible for securing passage of the preemption amendment in 1990 which formed the basis of the suit, was the plaintiffs’ lawyer should have offered a hint that more than met the eye was going on. In fact, despite the new era allegedly ushered in by the Master Settlement Agreement, Philip Morris, in a cigarette industry tradition going back to the end of the nineteenth century in Iowa, had bought itself some plaintiffs to do its litigational bidding: a hundred years earlier the puppeteer (American Tobacco Company) chose local cigarette merchants to attack the constitutionality of Iowa’s cigarette sales ban; in the twenty-first century, owners of businesses in which the cigarette oligopolist’s commodities were consumed were the puppets of choice in challenging anti-smoking ordinances. According

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360 See above ch. 31.
361 E.g., Bates No. 82120737/41.
362 E.g., Bates No. 86330229/38.
363 See above ch. 27.
364 See above chs 11-12.
to Rick Carmer, the most high-profile opponent of the ban and one of the plaintiffs in the lawsuit, owners were “approached by” Philip Morris as a result of discussions they had had with “purveyors” of cigarettes sold by these establishments who then went back to their firms.\footnote{Telephone interview with Rick Carmer, Ames (Oct. 5, 2008). Glantz understated Philip Morris’s role by uncritically following news accounts portraying the company as financing a lawsuit initiated by individual owners. M. Nixon, L. Mahmoud, and S. Glantz, “Tobacco Industry Litigation to Deter Local Public Health Ordinances: The Industry Usually Loses in Court,” TC 13:65-73 at 70 (2004). Years later the plaintiffs’ lawyer refused to answer the question as to whether the owners would have filed suit had Philip Morris not financed it. Telephone interview with Fred Dorr, West Des Moines (Oct. 14, 2008).}

Belitsos’s accusation that Dorr’s law firm lobbied for the tobacco industry may have shrunk Dorr’s comfort zone, but Philip Morris, whose “massive profits” from Marlboro, “far and away the most lethal consumer product ever produced,”\footnote{A. Hyland et al., “Happy Birthday Marlboro: The Cigarette Whose Taste Outlasts Its Customers,” TC 15:75-77 at 75 (2006).} had apparently long since inured it to embarrassment or shame, had no qualms about disclosing that it would “pick up the tab” for the suit, which the company freely admitted was not the first of its kind that it had sponsored. To be sure, such a naked admission was not tantamount to a sudden conversion to truth-telling: instead, the company claimed that it had decided to foot the bill “because ‘we believe in business owner choice.... As they made the request to us, we decided this meets our business objective.... We think that our goals are mutual....’”\footnote{Staci Hupp, “Tobacco Concern Will Back Lawsuit Against Ames,” DMR, Oct. 3, 2001 (1B:6-7). The Philip Morris official quoted was Billy Abshaw, the company’s manager of media programs.} Unspoken was such an announcement’s intimidating impact on any other cities in Iowa that might have been considering adoption of their bans. The feisty Just Eliminate Lies group—judiciously allocating $16,000 of its funding from the Tobacco Use Prevention and Control Division of the Iowa Department of Public Health, which derived from the Master Settlement Agreement—had a field day placing large ads in the Ames Tribune (as well as the Register and the Iowa State University student paper)\footnote{David Grebe, “Philip Morris Involvement Unites Anti-Smoking Forces,” Tribune (Ames), Oct. 9, 2001 (A1:4-5, at A4:4-6).} headed: “Secondhand smoke kills 53,000 people a year. Apparently, that’s not enough for Philip Morris.” If the target was beyond contrition, at least the public’s contempt for the company would presumably be reinforced by reading that its “mission” in “paying for a lawsuit against the city of Ames...is to overturn a city ordinance that protects the health
of Iowans and our right to breathe clean air. Obviously, they believe their profits are more important than lives.\textsuperscript{369}

Angered himself by the suit, Belitsos predicted that “there would be ‘a lot of anger’” if smoking returned to Ames’s restaurants before 8:30 p.m. Recalling that the business community itself had proposed the compromise after the Ames Tobacco Task Force had sought a complete ban, he pointed out that with more than 800 communities having adopted smoking restrictions, the plaintiffs were “‘wasting their money,’ which would be better spent on ‘advertising and improving their business.’” Although Belitsos’s advice was misleading since the vast majority of those communities were located in states in which the ordinances’ validity was not threatened by a statewide preemption law, his implicit advice that the complaining owners should not look the gift horse that his movement had granted them in the mouth was perfectly on target: “‘The alternative is 100 percent smoke-free, because that’s what we will move to in the future.’”\textsuperscript{370}

Philip Morris’s intervention nevertheless made Belitsos very pessimistic: because the hospitality industry’s proposal of a compromise had seemed to banish the specter of litigation altogether, the vision of millions of dollars’ being pumped into combating local efforts prompted him to view the ordinance’s survival as “‘doubtful.’” In contrast, Quirmbach, though “disappointed that local restaurants would allow themselves to be used by the tobacco companies” (and thus in essence to double-cross the anti-smoking forces that had been willing to cut back on their demands in order to compromise with the owners), was “‘not the least bit surprised’” by Philip Morris’s action because “[i]t’s clear to me that we’ve initiated something here in Ames that’s catching on across Iowa. The tobacco companies have a lot to lose, they make money by producing a product that kills both the user and the people around the user.... We’ve tried to do the responsible thing to protect the people who unwittingly share the same airspace. Of course, the tobacco companies see that as a risk to their products.”\textsuperscript{371} Unclear was whether it was also clear to Quirmbach that Philip Morris was protecting its long-term investment in the lobbying that had created the preemptive legislation in 1990.\textsuperscript{372}

\textsuperscript{369}Tribune (Ames), Oct. 6, 2001 (B9).


\textsuperscript{372}Quirmbach’s colleague, Judie Hoffman, the council’s other anti-smoking advocate, had been unaware that preemption laws were the cigarette companies’ chief state
Nevertheless, Philip Morris’s advent in the court room did not instill defeatism in Belitsos: instead, the anti-tobacco coalition sought an ally in Iowa State University in order to extend similar restrictions to the campus (managers of some buildings had requested exemptions from the 15-foot no-smoking zone, not to get around the ordinance, but to offer their “‘clientele’” the ability to smoke “‘so that it won’t affect our business.’”): “‘You cannot underestimate the power of the tobacco industry to manipulate the legal process and public opinion,... They have at their disposal unlimited resources, and my main concern is that it’s going to be hard for a local community to withstand the onslaught of these resources.’” Again, it was unclear whether Belitsos himself was underestimating the manipulation that Philip Morris had effected in 1990 by creating the legal basis for its lawsuit a decade later. In any event, Belitsos’s pessimism was apparently contagious: at least five other cities, including Iowa City, that had been considering a smoking ban “dropped or delayed their plans.” The one silver lining in the adversity brought on by Philip Morris’ open involvement was that the health organizations that “once called the Ames ordinance a ‘‘victory for the tobacco industry’...changed their minds.” Suddenly, in a kind of my-enemy’s-victim-is-my-ally conversion, Threase Harms-Hassoun of the American Cancer Society announced that, although Ames’s was “‘not the best ordinance we could have, it’s still a step in the right direction. It’s important to Iowa and communities who have looked to Ames for taking the lead in this.’”

ACS chose to “‘come back in’” in order to “‘rally with our coalition partners who believe that reducing people’s exposure (is an important goal).’” The real reason, as Belitsos interpreted it, was not to help the group in Ames so much as to ward off the negative impact that Philip Morris’ victory might have on efforts in other cities, eight of which had either put their initiatives on hold or backed off from them.

Judge Baker’s ruling on October 23 denying the pro-smoking parties’ motion for a temporary injunction against the ordinance prompted an overjoyed Belitsos

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to invoke a kind of deus ex machina for the victory over Philip Morris: “‘Oh, thank God.’” Baker found plaintiffs’ arguments “not convincing” because the business owners had failed to prove any economic damage. Belitsos’ ATTF co-chair, Andrew Goedeken, predicted that with the ordinance’s continued enforcement “in 25 years every place would be smoke-free.”

At the hearing on Philip Morris’s marionettes’ motion for summary judgment on December 19, argument, correctly, focused on the crucial provision in the statute under which: “Smoking areas may be designated by persons having custody or control of public places, except in places in which smoking is prohibited by the fire marshal or by other law, ordinance, or regulation.”

Reaching for a formal canon of statutory construction remote from the substance of the smoking ban, Dorr argued that the law, ordinance, or regulation in question “must have the same character or nature (as that of a fire marshall regulation),” the reason being that “a general reference in state law follows a specific reference in its meaning.” Since the Ames ordinance banning smoking in restaurants and bars entirely during some times had nothing to do with fire safety, it conflicted with and therefore was preempted by state law. In contrast, Ames City Attorney Klaus, eschewing “legal theories” and basing his interpretation on “plain English,” insisted that the “legislature wanted to make clear that...there would be no smoking where smoking would be prohibited by ‘other law’.... If the legislature intended the cities not to have this ability, they would have closed the door.”

As far as the partial ban’s alleged economic impact on restaurants was concerned, Klaus relied on a study done by an ISU economist indicating that the long-term impact would be minimal, while short-term losses were a function of the uncertainty left in the wake of the September 11 terrorist attacks rather than of the ordinance.

**Iowa City Adopts an Ordinance, Too**

I mean I don’t know how many ordinances we can make that affect people’s personal

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377 David Grebe, “Tobacco Suit Wafting Through the Courts,” Tribune (Ames), Dec. 20, 2001 (B1:2-5, B8:1-5). Dorr provided no legislative history on behalf of his claim; nor, for that matter, did Klaus in opposition. In fact, the legislative history is not consistent with Philip Morris’s position. See below.
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

property but how can you not [sic] be against non smoking restaurants?

“It doesn’t matter if people think the ordinance is right or wrong, we are going to do it,” said Councilor Connie Champion.

While the Ames City Council devoted much of its attention during the fall of 2000 to a smoking ban, Iowa City’s did not even hear back from the city attorney for half a year or initiate serious consideration of a draft ordinance for an entire year. Ames was, however, not completely out of mind: on November 6, the Iowa City city attorney briefly informed the council both that Ames had “passed or almost passed an ordinance prohibiting smoking in public places, restaurant, no smoking restaurant thing,” and that the attorney general would soon issue a legal opinion on the issue, which it would be “great for us to have...before we do it.”

By the fall of 2000 it was also becoming clear that CAFE’s efforts to persuade the city councils in the neighboring towns of Coralville and North Liberty were running into resistance from councilors purporting to be concerned about interfering with the rights of business owners. And a few months later another initiative suggested that Iowa City itself may not have been a hotbed of anti-smoking militance. In the fall of 2000 parents of children who played in a soccer club in a city park expressed concern about spectators smoking next to children both because of the secondhand smoke exposure and of the involvement of “adults modeling behavior...not consistent with a health and sports message.” That parks department officials stated publicly that they were not sure that they wanted “the headache of enforcing a ban” suggested that where smoking was involved, protecting even children might spark opposition.

380Tony Robinson, “Smoking Ban Vote Expected Next Week,” DI, Nov. 9, 2001 (1A:5-6).
381Transcription of Iowa City Council Work Session at 76 (Nov. 6, 2000).
event, at its meeting in mid-February 2001, the Parks and Recreation Commission voted 5 to 3 not to ban smoking at youth athletic events in city parks. The attitude of the commission chairman, who did not “‘feel it’s in our realm to prohibit that activity,’” toward smoking, change, and Iowa City was nicely captured by his reason for declining the parks director’s offer to try to determine what other communities’ smoking park smoking policies were: “‘I’ve been in a million ballparks and I’ve never seen a no-smoking sign.... But this is Iowa City.’”

As soon as it had unanimously supported proposed changes in regulation of alcohol consumption, in April 2001 the city council decided that it was finally in a position to devote some attention to a smoking ordinance. Early in the month the city attorney sent the council a memorandum mentioning that the attorney general’s opinion gave Iowa City “considerable latitude to regulate smoking in public places” and pointing out that the ordinance that Ames had passed covered establishments with as little as 10 percent food sales but also permitted smoking from 8:30 p.m. to 6 a.m. Dilkes then requested that the council answer a number of questions to give her guidance in drafting. Working (apparently) from the Ames ordinance, she asked whether the council wanted to: (1) prohibit smoking in all public places or only in restaurants; (2) set time limits during which smoking was permitted; (3) base limitations on percentage of food sales; (4) exempt establishments that served alcohol and seated fewer than 50; (5) exempt certain kinds of establishments such as truck stops or bowling alleys; (6) prohibit minors’ presence in smoking areas; (7) prohibit smoking in outdoor seating areas; and (8) impose penalties different than those under the clean indoor air act.

At its special work session on April 16, the city council initially had little trouble limiting coverage to restaurants, but one council member succeeded in shaking up his colleagues a bit by reminding them that if secondhand smoke was dangerous to people, then the council had an obligation to protect all workers in public spaces. Apparently sensing that Kanner’s reasoning might actually prevail, Mayor Lehman tried to rush to a vote before others changed their minds, but Kanner asked for discussion. Irvin Pfab expressed support for the wide ban in principle, but not if the public were not “ready” for it. All Kanner had to do to

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386 Sara Langenberg, “City Council Turns Focus on Smoking,” ICP-C, Apr. 4, 2001 (3A) (NewsBank); Sara Langenberg, “Smoking Next on Council’s Table,” ICP-C, Apr. 13, 2001 (3A) (NewsBank).
elicit Pfab’s agreement was to express his belief that “the majority is ready for it” because “the healthy space movement” had been going on for 30 years and had picked up steam. But when Lehman wanted to know whether anyone else was interested in considering the larger ban, even Pfab backslid, enabling Lehman to declare that restaurants alone would be covered.\textsuperscript{388} Dilkes’s question as to whether the council wanted to adopt time limitations as in the Ames ordinance prompted an instantaneous “Absolutely not” from Pfab, but Lehman’s reformulating the question as whether it was possible for a restaurant to turn into a bar after a certain hour caused sufficient disorientation to put the matter into abeyance until the council had defined a covered “restaurant,” though even at this point “carry over smoke” and the possibility that it took several days for “carsenagens [sic] to go out of the air” exercised at least Vanderhoef.\textsuperscript{389} After an extended but not compelling consideration had tentatively settled on more than 50 percent sales from food as the defining characteristic of a restaurant and acceptance of coverage of small restaurants,\textsuperscript{390} no one was willing to speak in favor of time limitations, though several members eventually wished to hear public reactions to the proposal.\textsuperscript{391} By this point, O’Donnell, who opposed regulation altogether, ironically boasted that “I think we’ve already improved a lot on what...Ames did.”\textsuperscript{392} He doubtless perceived further progress in the next decision, spearheaded by him and his two smoking colleagues (Lehman and Champion), that smoking not be banned in outdoor restaurant areas; in contrast, only Pfab saw the need for protection there as well.\textsuperscript{393} Finally, the size of the monetary penalty was disposed of quickly, especially since a representative of the non-confrontational CAFE emphasized that it did not want to be “punitive.”\textsuperscript{394} The policy directives that the council gave Dilkes to mould into an ordinance were not definitive, but they proved to be very similar to the ban that the council


\textsuperscript{389}Transcription of Iowa City Council Special Work Session at 62-63 (Apr. 16, 2001).

\textsuperscript{390}Transcription of Iowa City Council Special Work Session at 63-72 (Apr. 16, 2001).

\textsuperscript{391}Transcription of Iowa City Council Special Work Session at 72-73 (Apr. 16, 2001). Because the council had rejected time limitations, it deemed the Ames provision prohibiting minors from being present during smoking-permitted times moot. Id. at 74.

\textsuperscript{392}Transcription of Iowa City Council Special Work Session at 75 (Apr. 16, 2001).

\textsuperscript{393}Transcription of Iowa City Council Special Work Session at 75-77 (Apr. 16, 2001). Only on this point did City Attorney Dilkes make substantive remarks, pointing out that the distinction was similar to designating smoking and non-smoking areas and that employees would be exposed to smoke, and asking whether the policy rationale was that the smoke blew away and was “[r]ecirculated to the world....” Id. at 76-77.

\textsuperscript{394}Transcription of Iowa City Council Special Work Session at 78 (Apr. 16, 2001).
would adopt nine months later. At this point it embodied these elements: (1) a ban on smoking in restaurants only; (2) no time limitations; (3) a definition of “restaurants” as deriving more than 50 percent of their gross revenues from food sales; (4) coverage of all restaurants regardless of seating capacity; (5) no coverage of outdoor restaurants; and (6) penalties of $25 for the smoker and escalating penalties of $100/$250/$500 for owners and managers.\footnote{Iowa City Council Work Session, Minutes at 3 (Apr. 16, 2001). See also Sara Langenberg, “City to Draft Smoking Ordinance,” \textit{ICP-C}, Apr. 17, 2001 (1A) (NewsBank).}

The scope of coverage generated by these features, which excluded from protection anyone working or eating in an establishment less than half of the revenues of which stemmed from food (compared to less than one-tenth in Ames), was extraordinarily narrow given the absolute and growing predominance of student drinking establishments in the central downtown business district. \footnote{Ralph Wilmoth, Director of the Johnson County Public Health Department, prepared the sequence of bar density slides (emailed to Marc Linder, Feb. 9, 2006). The borders of “downtown” were S. Clinton St., E. Burlington St., S. Gilbert St., and Iowa Ave. The vast majority of the licenses were located in an even more circumscribed downtown defined by S. Capitol St., E. College St., S. Linn St., and Iowa Ave.} Since, as the manager of one of them pointed out, “most downtown establishments won’t be hurt by the ordinance because a majority of their revenue is derived from alcohol,”\footnote{Deidre Bello, “Officials Shrug Off Non-Smoking Setback,” \textit{DI}, July 17, 2001 (1:1, at 3:1-4 at 2).} CAFE’s decision to compromise in this fashion may have been driven by the desire to neutralize what might have proved to be the most virulent source of opposition to a ban, albeit at the price of continuing to expose thousands of college students (including employees) to secondhand smoke and intense peer pressure to smoke.

However, there was no surer symbol of CAFE’s enrollment in the vanguard of the national anti-smoking movement than the fact that, whereas ATTF just a half-year earlier had earned Stanton Glantz’s dismissive criticism, in May 2001 Glantz came to Iowa City, where he spoke at a CAFE-sponsored clean indoor air conference, placing his unambiguous imprimatur on its (i.e., his) strategy: “‘Iowa isn’t California right now, but it’s about like California was in 1987, just as things started to take off. These people really have their act together. They are very organized, and they will succeed.’” He “predicted a comprehensive ordinance would pass in Iowa City in the next few months” because Iowa City satisfied the
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

The requisite public education component of “aiming the message where it would be received, a core of activists and city council support.” To be sure, in his pep talk Glantz failed to reconcile the seal of approval he bestowed on CAFE with his previously published analysis of the lessons to be learned from the California experience, in particular, that: “A successful program is not simply directed at keeping kids from smoking but at protecting nonsmokers from secondhand smoke and creating environments that facilitate smokers’ decisions to cut down or quit. Most important, a successful campaign de-legitimates tobacco use....”

Nevertheless, in a grotesque clash with this precept, numerous CAFE spokespeople went out of their way to emphasize publicly that the goal of preventing secondhand smoke exposure in no way entailed any critique of smoking itself. For example, just a month earlier, Dr. Leslie Weber, a physician and prominent CAFE member, had stated at a public forum on a smoking ban in Coralville: “‘I’ve seen the effects of smoking of all kinds in my patients.... Nothing good is to be said about cancer. ... We’re not against smoking. But we are against smoking in restaurants.’” And CAFE’s spokesperson, Dr. Ballinger, disingenuously denying smokers’ agency (for the 53,000 secondhand-smoke-caused deaths that the anti-smoking movement incessantly and rightfully drove home as the basis for public smoking laws) reinforced this hands-off-the-smoker image: “‘This is not anti-smokers.... This has nothing to do with the people behind the cigarette. It’s just so people who want to go out to eat can breathe clean air.’”

Ironically, this stance, which was deeply rooted in CAFE’s anti-confrontational, non-militant organizational ethos, stood in glaring

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400 Andrew Dawson, “Many Want Smoke,” ICP-C, Apr. 18, 2001 (1A:1).


402 Sara Langenberg, “City Council Turns Focus on Smoking,” ICP-C, Apr. 4, 2001 (3A) (NewsBank).

403 See above this chapter. CAFE programmatically refused to revise CAFE Johnson County, The Johnson County Smoke-Free Dining & Entertainment Guide (Jan. 2006), in order to point out which “smoke-free” businesses nevertheless sold cigarettes and especially which ones had been caught in stings illegally selling to minors. Email between Beth Ritter Ruback (CAFE Project Manager) and Marc Linder (Feb. 23, 24, 25, and 26,
contradiction to one of Glantz’s “few simple rules for beating the tobacco industry”: “Do not be afraid of controversy; use it.”

That a considerable lack of unity and understanding still prevailed on the council regarding the ban four months after it had given the city attorney policy directions for drafting an ordinance was clearly on display at the special work session on July 30. Indeed, the incompetence and lack of seriousness of purpose exhibited by the two overt opponents of a ban, Champion and O’Donnell, were so blatant that they raised the possibility that these two smoking businesspeople were in fact engaged in the kind of intentional delay that could redound only to the benefit of the cigarette oligopoly, one of whose tactics in combating local ordinances featured delay.

The discussion was ostensibly prompted by the city attorney’s having included in the information packet for the session data that the council back in April had requested her to collect on alcohol sales of establishments with liquor licenses on the basis of which she sought the council’s direction with regard to drafting an ordinance in accordance with its last directive that such a ban exempt establishments with alcohol sales in excess of 50 percent of total sales. The city administration had sent survey letters to 83 liquor license holders; of the 49 respondents 20 stated that alcoholic beverages accounted for 50 percent or more of their total receipts (and would therefore presumably be exempt), whereas such sales fell short at the other 29 (which would presumably be covered by the smoking ban).


Memorandum from Eleanor Dilkes, City Attorney, to City Council, Re: Smoking in Restaurants (July 24, 2001), in City Council Information Packet 1 for July 30 Work Session. Dilkes provided no information about the 34 non-respondents and whether they were largely bars or restaurants. Several owners wrote qualitative comments: three stated that they had been no-smoking for years, including one who nevertheless opposed the ban because the decision should be the owner’s. Although the owner of Givanni’s, Jim
Having given the council the information, Dilkes, who repeated that she felt “comfortable” drafting the ordinance “particularly in light of the Attorney General’s opinion,” explained to the members at the special work session that they now needed to tell her what to do. (In reading the following account it is necessary to bear in mind that the absence of Dee Vanderhoef, who would have cast the decisive fourth vote for a ban, put the council’s orientation at this meeting in a misleading light.) Wilburn immediately declared that he wanted to proceed with the ordinance, including the 50-percent or more provision. His decisiveness was countered by the incoherent waffling of Champion, who purported to believe that restaurants should be non-smoking (though perhaps only according to “the idea of Ames where there is non smoking up to a certain time”), but then contradicted herself by acknowledging that she did “have problems with this ordinance” because “I feel like we’re being big brother that people who own restaurants and bars ought to be able to kind of decide who comes into their restaurant, I can decide who comes into my clothing store.” In adding that she wanted “more input from the people who are really going to be affected,” she meant her fellow business owners—“people out there who’s [sic] businesses will be deathly affected by this ordinance and I guess I do have problems with that”—(and perhaps smokers), but not non-smokers who sought smoke-free environments. Wilburn then framed the controversy in the by that time nationally familiar (but nevertheless largely incoherent) terms of health versus rights (as if there were no right to health and as if there were a right to engage in homicidal activity), and declared his allegiance to the former, while emphasizing that businesses were not given the option of letting their employees not wash their hands before handling food. Champion’s irrelevant comment that the state prescribed such regulations prompted Mayor Lehman to wonder aloud whether they should not then “get the state to do this.” Undaunted, Wilburn retorted that since the state was apparently not going to do it, he as a council member was willing to do so. He also used the opportunity to reject time-limited smoking bans on the grounds that carcinogens took a certain amount of time to disappear. In his own inimitable fashion Irvin Pfab peremptorily short-circuited the discussion:

Mondanaro, did not state that the restaurant was no-smoking, he opined that the owner should make the decision and then customers could choose whether to go to a smoking or non-smoking establishment. See also Sara Langenberg, “City Council to Again Discuss Smoking Ban,” ICP-C, July 27, 2001 (3A) (NewsBank) (erroneously dated Dec. 18).

408 Transcription of Iowa City Council Special Work Session at 65 (July 30, 2001).
409 Transcription of Iowa City Council Special Work Session at 64 (July 30, 2001).
410 Transcription of Iowa City Council Special Work Session at 66 (July 30, 2001).
411 Transcription of Iowa City Council Special Work Session at 64 (July 30, 2001).
“I think it’s a health issue, case closed.” Despite Kanner’s objection to a time-limited ban because of the enforcement difficulties, Champion was concerned about restaurants that turned into bars at 8 or 9 p.m. Dilkes patiently explained that the council had already discussed and rejected time limits, but Champion insisted that she needed public input in order to evaluate an ordinance. Populist Kanner was certainly not opposed to a public hearing, but forewarned his colleagues that the “very powerful” tobacco industry would “put up front groups to look like grass root groups....” Dismissing such concerns—“[t]hat’s not what I want to hear”—Champion redundantly made clear how narrow her agenda was: “what I want to hear is how people’s businesses are going to be affect[ed].” Another thing Champion did not want to hear was Pfab’s contention that the council perhaps had an obligation to protect the public’s health: “The public can pretty much protect themselves they don’t have to go into that restaurant.”

Although Champion purported to see the eventual handwriting on the wall for public smoking, her highest priority was “thinking about some way to do this and not affect people’s businesses.” But when Kanner pointed out to her that studies showed that bans did not have a negative economic effect if there was a “level playing field,” she objected that the existence of restaurants that turned into bars and the lack of a ban in neighboring Coralville would thwart the creation of such equality. This stalemate provided the perfect opportunity for her smoking partner in delay, O’Donnell, to opine that “[i]t appears like we need some more discussion.” Pfab, in contrast, was growing impatient with a discussion that was getting long in the tooth and persisted in that view even after Lehman and Dilkes pointed out that most of the delay since CAFE’s submission of the ordinance in the fall of 2000 had resulted from the council’s preoccupation with alcohol. Wilburn, Pfab, and Kanner saw no problem with a straightforward draft based on coverage of establishments with more than 50 percent sales from food and no provision for time-limited smoking, but Champion and O’Donnell wanted to start with an ordinance containing the Ames arrangement, and although Lehman did not expressly take a position, Dilkes correctly intuited that “[l]ooks like you’ve got 3 to 3 at the moment.” (In fact, this very early constellation, augmented by the vote of the absent Vanderhoef, would remain the pattern until the ordinance’s final adoption half a year later.) Desirous of insuring that red light/green light not be the starting point of the council’s deliberations, Kanner argued for beginning with what CAFE proposed as its “strongest position” and modifying it until it was

\[412\] Transcription of Iowa City Council Special Work Session at 65-66 (July 30, 2001).
\[413\] Transcription of Iowa City Council Special Work Session at 67 (July 30, 2001).
\[414\] Transcription of Iowa City Council Special Work Session at 68-70 (July 30, 2001).
\[415\] Transcription of Iowa City Council Special Work Session at 71-72 (July 30, 2001).
“at least more acceptable to all sides....” The mayor, who apparently no longer remembered that members had had the CAFE proposal since October 2000, asked Dilkes whether they would “accomplish anything...if we got copies of that proposed ordinance, let the Council digest it and then at the next work session discuss it with you....” Although she refrained from expressly identifying her at-will employers’ individual and collective amnesia, Dilkes nevertheless offered to “run through the same list of questions I ran through with you in April”; likewise, when Lehman asked whether she might make some notes on the CAFE ordinance before giving it to the members, she agreed to give them the same memo that she had given them in April and “go through that again.”

Thus, the only upshot of the entire discussion was to request that Dilkes hand the members exactly the same two documents that she had given them 10 and four months earlier, respectively, and that manifestly the opponents had failed to study or, apparently, even to retain. The council, in the Press-Citizen’s diplomatic phraseology, had merely “retrace[d] smoking ban steps” and gone “back over that ground....” Dilkes barely concealed her impatience with the council when, a week later, she stressed that she was “again” enclosing the same materials for their information, adding that it was her understanding that it was the members’ “desire to discuss again whether you wish to proceed with the ordinance and what form you desire it to take.”

One of the opponents’ pretexts for delaying the progress of the ban appeared to be vulnerable to puncturing when Mayor Lehman announced on August 16 that he would be asking the council to request a joint meeting with the Coralville city council in order to consider collaboration to achieve the “level playing field” that “the public” was “constantly” demanding. The very same day CAFE, making sure that the Iowa City Council at its work session on August 20 would appreciate the importance that the group attached to its initiative, held a rally at which Dr. Ballinger declared that it was the council’s “duty” to “draft a strong smoke-free ordinance without compromise....

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416Transcription of Iowa City Council Special Work Session at 73-74 (July 30, 2001).
In the event, the mayor did request the council’s permission, but proponents of a ban on the council wondered whether the plan to cooperate with Coralville—whose city council had thus far failed to muster a majority in favor of a ban—might, to the contrary, prove to be an engine of still further delay. Indeed, Kanner went far beyond wondering: to the conciliatory assurance offered by Champion—who predicted a total ban in a few years, but argued that the town was not yet ready for it—that “[w]e all...know we’re going to say yes [to a ban] we just don’t know what we’re going to say yes to,” he bluntly counterposed his sense that “we’re not all going to say yes, we’ve seen across the country, the patterns are the same everywhere, the pressure comes to water down a bill, make it weaker and weaker and I see this just as part of that pattern of delaying it, talking to the neighbor who has shown that they don’t want to deal with this at the present time in any meaningful way and this is just one more excuse to not pass something strong and make it a healthier environment for the workers and for the children that go into these places.”

Kanner also specified the means of such dilution such as Philip Morris’s strategy of accommodation, including red light/green light arrangements. (Amusingly, O’Donnell, who claimed that “I’m going to end up supporting this at one time or another,” but never did, called the Ames procedure “ludicrous” because it suggested that “after 8:00 smoke doesn’t hurt you....”) As opponents insured that the discussion floundered, Wilburn and Pfab deplored the fact that the council was not even going to deal with the matters that it had asked City Attorney Dilkes to go over with the members. Kanner was willing to agree to the mayor’s suggestion of devoting a whole work session to the topic on the condition that that meeting take place very soon, but Lehman felt that since “people have smoked in restaurants for 200 years, a few days one way or the other is not critical....” In the end, the only action that a council majority took was to request that an invitation be extended to the Coralville council to discuss a smoking ban at a joint

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423 Transcription of Iowa City Council Special Work Session at 54 (Aug. 20, 2001).
424 Transcription of Iowa City Council Special Work Session at 54 (Aug. 20, 2001).
425 Transcription of Iowa City Council Special Work Session at 50 (Aug. 20, 2001).
426 Transcription of Iowa City Council Special Work Session at 51 (Aug. 20, 2001).
427 Transcription of Iowa City Council Special Work Session at 55, 58, 59 (Aug. 20, 2001).
428 Transcription of Iowa City Council Special Work Session at 61 (Aug. 20, 2001).
meeting on September 5.\textsuperscript{429} Even before the joint meeting took place, Coralville Mayor Jim Fausett suggested that that city council might not be ready to adopt a ban like Iowa City’s; at the same time, Mayor Lehman remarked that Iowa City would forge ahead alone if necessary.\textsuperscript{430} In the event, as ban supporters had foreseen, Fausett declared during the meeting that Iowa City should proceed on its own because, although things might change, the Coralville council was not yet ready. Ironically, one of its members, John Weihe, who in fact opposed a ban, chose to attack one of his Iowa City policy-mates in pretending that he preferred an all-or-nothing approach: “‘If I were going to be supportive of it, I’d include bars and vacuum cleaner stores if it’s truly a health issue’” (alluding to O’Donnell, who owned a vacuum cleaner store in Coralville). The flagging commitment on the Coralville council can also be gauged by the attitude of one of its purported ban backers: David Jacoby argued that Coralville residents “‘would be more pro-ordinance if there were no options’”—but in fact the city already had two smoke-free establishments.\textsuperscript{431}

On September 10, 2001, the Iowa City council finally scheduled October 16 as the date for a special smoking work session the first hour of which was to be devoted to public comment (equally divided between proponents and opponents) and the second hour to council discussion.\textsuperscript{432} By the time of the meeting the legal landscape had been potentially altered by the advent of Philip Morris’s judicial challenge to the Ames ordinance, but if one of the cigarette oligopoly’s purposes in fomenting litigation was to deter other cities from adopting their own ordinances by intimidating them with the financial burden of a court defense, it missed its target in Iowa City, where CAFE held a rally in front of city hall at the conclusion of a march before the meeting.\textsuperscript{433}
The Town Hall Meeting: October 16, 2001

[It seems like the 65 percent is a number that we’ve not arrived at scientifically, maybe it’s a very good number, maybe it is not, but I think we have to start somewhere and...if it works, great.]

A standing-room only overflow audience attended the two-and-a-half hour special smoking working session on October 16 devoted entirely to the ordinance. Only a few owners spoke, but the core theme of their angry statements was questioning the justification for the city’s “taking away the rights of a business man to cater to the market” instead of letting “the market decide whether or not smoking is a good thing....” This argument was linked to the claim that CAFE had targeted restaurants “because they think they can politically get it passed...and they can’t politically get it passed against everybody else.” To try to derail this strategy the anti-ordinance group did not have to reach far to make the point that “[i]f second hand smoke is bad in restaurants it’s bad in lawyers offices, it’s bad in car garages....” (To be sure, when owners’ perpetual call for a “level playing field” was put to the test, the response, unsurprisingly, was that “I wouldn’t campaign for it [i.e., a total smoking ban] because...I don’t think it’s a function that government should be fulfilling.”)

Another restaurant owner, seething over “[w]hy...you believe that you guys are qualified to tell me how to run my business,” got more personal: after eliciting from the three smoking business owners on the council, Champion, Lehman, and O’Donnell, that he would not be permitted to smoke in their dress, luggage, and vacuum repair shops, respectively, he rhetorically asked whether they had made these decisions on their own or had consulted with the other council members.

An obliging O’Donnell offered the very market-knows-best answer for which the restaurant owners were looking: “When I had my Burger King downtown and I had my convenience store, I had many people come up to me and ask me if I would be smoke free and that’s what I base[d] my decision on.”

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434 Transcription of Iowa City Council Meeting at 51 (Oct. 16, 2001) (Mayor Lehman), on http://www.icgov.org/transcriptions/58.pdf.
435 Transcription of Iowa City Council Meeting at 1 (Oct. 16, 2001).
436 Transcription of Iowa City Council Meeting at 3-4 (Oct. 16, 2001) (Daryl Woodson, The Sanctuary).
437 Transcription of Iowa City Council Meeting at 6 (Oct. 16, 2001) (Kevin Perez, owner of 126).
438 Transcription of Iowa City Council Meeting at 5 (Oct. 16, 2001) (Kevin Perez).
439 Transcription of Iowa City Council Meeting at 7 (Oct. 16, 2001).
Restaurant owners’ special pleading was considerably less plausible when anti-smoking council members questioned them about public health. For example, when Wilburn asked about the imposition of public health regulation concerning food handling, one owner irrelevantly replied that “you can’t see saminila [sic], you can see and smell smoke”; but even after conceding, in extremis, that some health and safety regulation might be necessary, he sought to evade the issue by analogizing tobacco to obesity and requiring McDonald’s to “get rid of the deep fat fryers,” only to return to the mantra: “You know, there’s a point where it needs to become a market place decision, you know your [sic] not punishing tobacco companies with this, your [sic] punishing small businesses.” After pointing out that in fact Philip Morris did fear such bans lest they cause smokers to quit, Kanner asked the same owner about the health impact on non-smoking workers since the labor market did not automatically slot only smokers into workplaces subject to secondhand smoke exposure, but received only the same evasively unrealistic answer: “I would not choose to work in a meat packing plant because that’s pretty dangerous work even though I might need the job I would choose to take another position, I might choose not to work at a computer terminal all day because of the dangers of carpal tunnel syndrome.”

Following the owners a host of physicians spoke in favor of the ordinance. Dr. Miles Weinberger, the head of the Allergy and Pulmonary Division of the Pediatrics Department at the University of Iowa Hospital, noted that a strong argument could be made for extending the ban beyond restaurants and bars, “but politics is always the art of the possible and you’ve got to start somewhere. Restaurants are a logical place, it levels the playing field for all the restaurant owners....” An allergist, Dr. John Kammermeyer, underscored even the short-term health consequences by pointing out that “exposure to secondhand smoke for half an hour impairs coronary blood flow just as much as it is impaired in chronic smokers. So it has a major quick impact on the person[’]s coronary blood flow and the risk of heart disease and heart attacks.” For precisely such reasons, “if I had my druthers...I think we should have a ban in all public places....” A different perspective was offered by a pediatrician, Dr. Tom Rosenberger, who explained that banning smoking in various public places would help prevent adolescents who came as non-smoking students to Iowa City from perceiving smoking as a ubiquitously acceptable practice that would prompt them to start.

Dr. Ballinger, a CAFE spokesperson, drawing an invidious comparison with the

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440 Transcription of Iowa City Council Meeting at 8-9 (Oct. 16, 2001) (Woodson).
441 Transcription of Iowa City Council Meeting at 14 (Oct. 16, 2001).
442 Transcription of Iowa City Council Meeting at 16 (Oct. 16, 2001).
443 Transcription of Iowa City Council Meeting at 17 (Oct. 16, 2001).
Ames ban and taking a maximalist position which not even her own group’s draft ordinance lived up to, reminded the council of the three simple components of an effective smoke-free restaurant ban: (1) coverage of all restaurants where a meal was served; (2) all-day coverage; and (3) no exemptions or compromises. She concluded her hard-hitting remarks by urging the council not to let itself be distracted into forgetting that because workers’ and customers’ health was “priceless...it shouldn’t be trivialized by comparing it to false claims without basis about loss of business revenues.”

Potentially crucial information was presented by an economics professor at the University of Iowa, John Solow, who, by focusing on the economics consequences for businesses of the smoking ban, might have fatally undermined owners’ central line of attack. To begin with, he reminded owners, who “can see only the smokers who are to leave their businesses...that there are more non-smokers who may come to their businesses and since far more people are non-smokers than smokers in the United States there’s no reason to believe that the one is going to out weight [sic] the other....” Less speculatively, he called attention to dozens of solid nation-spanning empirical studies based on objective sales tax data—and “not based on people’s fears, people’s beliefs, people’s anecdotal evidence”—showing that smoking bans had no effect at all on the restaurant business. Solow even addressed the level playing field issue associated with a ban-less Coralville by pointing to the same situation in Palo Alto/Mountain View, California, which, again, generated no impact. In the end, then, Solow concluded that “you should try to lay that to rest and go on with what the doctors say is good for the health of our citizens....” The only problem with this analysis was its failure to deal with the objection raised earlier in the evening by an owner who referred to such sales tax studies whose macro-level analysis was incapable of identifying individual restaurants that had gone out of business because their sales taxes were more than made up for by the opening of a new fast food restaurant. When Kanner reminded Solow of the point, the economist called it a “really good question” that he was unable to answer, although he did point out that a study of Madison, Wisconsin had found that more new businesses opened than closed in the wake of a ban. (In fact, a doctoral dissertation...
supervised by Solow that analyzed Iowa City restaurant sales from 1999 to 2004 found that the ban had no significant effect on Iowa City restaurants or on any of five segments based on smoking policy.)\textsuperscript{448}

After more than an hour and a half of public comment\textsuperscript{449} the mayor eloquently opened council debate: “Okay guys what’s your pleasure?” Advising his colleagues that there was “no point in delaboring [sic] this discussion...if we do not have the will to move forward with this,” Lehman prompted Kanner, Champion, and Pfab to affirm their interest. But before he let them proceed, he asked the city attorney for “a brief run down on the Ames situation.”\textsuperscript{450} In a short-circuited description of the preemption issue that no one not immersed in the case could possibly have understood, Dilkes, while admitting that “there’s some language that it’s tough to figure,” nevertheless (again) assured the council that she had “gained a lot of comfort by the Attorney General’s opinion [that “there was no preemption by the State Code”] and...was comfortable with you all proceeding.”\textsuperscript{451} Nor was Dilkes alone. Kanner, for example, who was personally lobbied by Attorney General Tom Miller to support the ordinance on the grounds that preemption would not be an obstacle, felt that Miller’s personal approval and authority instilled council members with a certain sense of “safeness” in voting for an ordinance without which the whole campaign would have turned out otherwise. In addition, the city attorney herself, whom Kanner regarded as in general offering the council conservative legal advice, might well have withheld her endorsement of the lawfulness of the ordinance without the

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\textsuperscript{448} In particular, the crucial group of restaurants that had permitted and were required by the ordinance to ban smoking “did not lose revenue or their market share as feared by local restaurant owners.” Megan Sheffer, “Economic Evaluation of the [Impact of the] Iowa City Smoke-Free Restaurant Ordinance on [sic] the Iowa City Restaurant Industry” at 60 (Ph.D. diss. U. Iowa, 2007). Although sales rose in Coralville restaurants that permitted smoking, there was no evidence that that increase came at the expense of Iowa City restaurants. \textit{Id.} at 67. See also Megan Sheffer, John Solow, and Christopher Squier, “An Economic Evaluation of the Iowa City Smoke-Free Restaurant Ordinance,” Abstract #162207, American Public Health Association, 135th Meeting (Nov. 6, 2007), on http://apha.confex.com/apha/135am/techprogram/paper_162207.htm (visited Nov. 19, 2008).

\textsuperscript{449} Transcription of Iowa City Council Meeting at 29 (Oct. 16, 2001).

\textsuperscript{450} Transcription of Iowa City Council Meeting at 30 (Oct. 16, 2001).

\textsuperscript{451} Transcription of Iowa City Council Meeting at 31 (Oct. 16, 2001).
attorney general’s opinion.  

With no councilor rushing to make any proposal and Lehman himself not “know[ing] quite how to do this,” he asked Dilkes for an operating definition of a “restaurant” as contradistinguished from a bar and the members whether they wanted a 24-hour ban or the Ames red light/green light option. Noting that they had been bogged down in this same discussion since April, she explained that although she grasped their “idea” that “the more food the more important the ban, the more alcohol the less important,” she still needed to “know from you all what percentage your [sic] talking about.” Instead of a straight answer, Champion, a smoker who paid lip service to the need for a ban and confessed that the number of young people smoking in town “totally amazes me,” expressed concern for restaurants that turned into bars after a certain hour and “would be hurt by this ordinance....” Although she believed that a ban would not have a negative impact on most restaurants at all because, like her, a smoker, most people preferred non-smoking establishments, she still wanted to eliminate the adverse competitive effect of exempt bars on restaurants that “do a big bar business.....”  

Putting a halt to the seemingly aimless drifting of the conversation, Pfab, out of nowhere, mentioned that at one point Champion had suggested 60 or 70 percent (food sales) as the definitional marker, the point of which at the time he had not grasped, but now he was proposing 70 percent—a figure that was 20 percentage points less inclusive than CAFE’s draft and a full 60 percentage points less encompassing than the Ames ordinance. Pfab’s suggestion immediately provoked resistance from Kanner, who argued that if the major concerns were competitive fairness to owners and health protection for workers and children, the answer was a total ban: “I think if we take that leap as a city...that puts us ahead actually...that’s something that attracts people to our city...if we’re going to attract conferences, I think we’ll get more business...being smoke free.” Urging his colleagues to assume that “leap in leadership,” he proposed making all commercial venues smoke free. Once again paying lip service to the notion that the city would eventually adopt such a broad scope, the inveterately naysaying Champion doubted that the town was ready for that step because not even CAFE thought so. Still operating in a timid mode (but about to vacillate), Pfab was sticking with politics as “the art of the possible,” which Kanner appeared to regard as malleable so that if the council would just exercise leadership, CAFE

452 Telephone interview with Steven Kanner, Cleveland, OH (Nov. 14, 2008). Kanner did not know, but assumed that Miller had also spoken to other council members.

453 Transcription of Iowa City Council Meeting at 32-33 (Oct. 16, 2001).

454 Transcription of Iowa City Council Meeting at 33-34 (Oct. 16, 2001).
“would be happy to have a total ban....” 455 Not interested in devoting precious council time to the pursuit of Kanner’s will-o’-wispish utopian idiosyncrasies, the mayor—whom Kanner later characterized as a “right-wing Republican” 456—tentatively cut short the discussion to “see how many of us are willing to exhibit the leadership and go for a 100 percent ban.” Pfab, in his inimitable style allowed as he “would if we’d do it,” thus qualifying himself as Kanner’s only backer of a ban that would have applied to all public places, including stores and bowling alleys, and prompting Lehman to declare that radical proposal stillborn (“I think perhaps we won’t spend our time discussing that”) and to steer the council back to the prosaic reality of defining restaurants by the proportion of food sales.457

Champion was delighted to water down coverage to “family restaurants,” that is, ones “where people are not drinking large amounts of alcohol...really you go there you have dinner you might have one, the maximum two glasses of wine....” Turning undisguisedly personal, she revealed that: “I love wine but I never have more than two, when I’m out at a restaurant, so I mean I might be able to be very comfortable with that and totally support it.” So long as she felt snug in her comfort zone, it was irrelevant that her proposal “may not be exactly what CAFE wants, but it’s a strong beginning....” 458 How she could possibly know how strong her ban would be when the city attorney told the council that the city had collected data only on bars with 50 percent food sales459 Champion failed to explain. Although a recent trip to Provincetown had proved to her that under a public places smoking ban even the bars were “jammed [sic] packed,” for Iowa City nothing but “small steps” would do. She succeeded in reinforcing her comfort level by prompting the owner of a restaurant/pub with live performances by local musicians to declare that “that number in that range would probably...safe [sic] us and at the other places.”460

Kanner discomforted Champion by inverting her proportions and proposing a smoking ban in any place 20 or 30 percent of whose sales stemmed from food, thus excluding only bars that sold “a few chips or something”; she opposed any law that covered bars that served bar food and thus enabled young people to drink without eating.461 The mayor then animated those who had yet to reveal their

455 Transcription of Iowa City Council Meeting at 34 (Oct. 16, 2001).
456 Telephone interview with Steven Kanner, Cleveland, OH (Nov. 14, 2008).
457 Transcription of Iowa City Council Meeting at 35 (Oct. 16, 2001).
458 Transcription of Iowa City Council Meeting at 36 (Oct. 16, 2001).
459 Transcription of Iowa City Council Meeting at 41 (Oct. 16, 2001).
460 Transcription of Iowa City Council Meeting at 36 (Oct. 16, 2001) (Woodson).
461 Transcription of Iowa City Council Meeting at 37 (Oct. 16, 2001).
position to speak up. Vanderhoef admitted that she too had not been entirely 
“comfortable” with 50/50, but with 70/30 “a little high,” 60/40 would be more 
acceptable to her. Champion’s smoking/business twin, O’Donnell, unsurprisingly 
supported her 70/30 arrangement, especially since it identified the only kind of 
restaurant he could contemplate voting to include in a ban—a place “where you 
go out with your family and sit down and eat.”\footnote{462}

As the debate began to flounder and founder on the shoals of arbitrary 
numbers shorn of a reasoned public health basis, Pfab persuaded the mayor to 
permit Dr. Ballinger to shed light on the origin of the 50/50 definition. Her 
account so transparently reflected CAFE’s past, present, and future position as 
drenched in non-confrontational compromise that it suggested that the group must 
have perceived that since it was out of the question that a majority could be found 
for 50/50, CAFE should start furiously back-pedaling on its principled 
commitment to 50/50 and portray itself as flexible and appreciative enough to 
accept even the stripped-down 70/30 proposal:

\begin{quote}
\hspace{1cm}[J]ust to give you a little bit of history about this whole thing where the 50 percent number came from when we initially submitted a model ordinance to you, after having thought about this, talked about this, hashed about this, argued about this for literally years we settled on the 50/50 or 51/49 number based on a couple different things. First of all we didn’t want to be seen as a group because we knew that we would become sort of the face of this ordinance. We did not want to as a group be seen as trying to single out certain types of businesses or single out other ones, we were strictly looking for something that sounded logical that if you explained to it somebody on the street. Well what is a restaurant? Well they make more of their money from food than alcohol, that it would be simple for people to understand that we specifically didn’t want to single out places like The Sanctuary or The Mill or anything like that, we didn’t want to go anywhere near that issue and also there is information in the state code where they use the 51 percent thing to define this so we thought that when we were anticipating a potential court challenge that maybe because it was defined that way and this was some of the legal advice that we had that since it was defined that way already in state code in another place that it might potentially be easier to defend.\footnote{463}
\end{quote}

Seemingly more principled than CAFE, Lehman viewed 50/50 as having a 
“rather significant impact,” but was unsure as to whether 70/30 would “have any 
impact”: “But I guess the question is how restrictive do we want to be? At the 
same time do we want to be so nonrestrictive as to not be effective?” In contrast, 
Pfab liked the “compromise” he saw looming: whereas 50/50 “would cause

\footnote{462}{Transcription of Iowa City Council Meeting at 38 (Oct. 16, 2001).}
\footnote{463}{Transcription of Iowa City Council Meeting at 40 (Oct. 16, 2001).}
difficulty” for restaurant/bars with live music, for “the people from CAFE I understand 70 is not a problem so I think that’s a pretty decent number,” especially since “that seemed to be where the objections were when I went around in the community.” Feeling stymied in his effort to prod the council to “pick a number,” the mayor decided to resolve a linked issue first: a 24-hour ban or red light/green light? Hearing Pfab and Vanderhoef reject the latter and Champion allowed as at 70 percent she would “be willing to go to 24 hours,” Lehman declared the former chosen and resumed discussion of a percentage as if he were an auctioneer: “obviously the 50 percent is not going to fly, I hear 70 and I’ve heard 60.” Vanderhoef noted that although she “would be happy with the 50,” she offered 60 as a compromise vis-a-vis 70.64

With the council deadlocked, Pfab once again prompted Dr. Ballinger to set the members straight. This time she offered both a modest and a more radical solution:

Well it seems like the question here is trying to make the ordinance apply to as many restaurants as possible and also somehow take into accommodation or into mind those few places where sort of the hybrid [sic]. So you can do that two ways, you can either make the ordinance go 70/30 in other words..., 30 percent alcohol and that will include the true family restaurants. Or you can go really almost the opposite way and what that would end up doing would be including, any in other words that had more than...30 percent food it would be so restrictive that it would include almost any restaurant that sold very much alcohol. In other words it would include The Mill, it would include, and again I don’t want to get into this trap of singling places out but since they’re the ones that have been mentioned, any of these places that are sort of a hybrid it would include all of those, so in other words the only places would be left would be the true bars that had beer nuts and chips. In other words what Mr. Kanner said.65

Champion still wanted none of Kanner’s more inclusive definition, even though Ballinger pointed out that it “would definitely include all of these places and keep them on an even footing that the people at The Sanctuary and The Mill are concerned about.”66 The CAFE surgeon presumably saw a possible opening here to engage owners’ self-interest in expanding the scope of the ban and—disregarding her own admonition not to name names—drove the point home: “Well what would they think about having it go so far the other way that they’re not in competition with the people who have beer nuts and chips in the back but that really almost all of those places are the same, treated the same then,

64 Transcription of Iowa City Council Meeting at 41-42 (Oct. 16, 2001).
65 Transcription of Iowa City Council Meeting at 43 (Oct. 16, 2001).
66 Transcription of Iowa City Council Meeting at 43 (Oct. 16, 2001).
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

Vito’s is the same, The Mill is the same, The Sanctuary is the same, The Airliner is the same, Mondo’s downtown is the same, all of those are on the exact same footing and their [sic] not competing with let’s say The Q bar, The Deadwood.”\textsuperscript{467} The only proprietor to speak up, the owner of The Sanctuary, was unmoved by Ballinger’s logic: “[I]t’s the fact that you lose that bar revenue to places where people can smoke where your food sales at that time of night are ancillary for the bar revenue, but if you take away that bar revenue your [sic] taking away a significant portion of your income.”\textsuperscript{468} CAFE’s initiative thus died, and after the city clerk had pointed out that she had recorded Champion, O’Donnell, and Pfab for 70 percent food, and Vanderhoef and Wilburn for 60 percent, the mayor resolved the issue by solomonically weighing in for 65 percent and securing the council’s agreement.\textsuperscript{469}

Just when the mayor opined that “we’ve done our job for tonight folks,”\textsuperscript{470} the city attorney had one more loose end from the catalog of questions she had posed to the council half a year earlier, when she had set forth the features in the Ames ordinance: “What about outdoor seating areas? Does it apply in outdoor seating areas?” The three smokers, Champion, Lehman, and O’Donnell, immediately stated that it was unnecessary, and when Wilburn agreed on the inscrutable grounds that “part of the issue is really just talking about ventilation systems confinement,”\textsuperscript{471} the council decided against a form of protection against secondhand smoke exposure that CAFE had not even requested.\textsuperscript{472} The concrete result of the proceedings was direction to the city attorney by the council to prepare an ordinance imposing a 24-hour a day smoking ban in restaurants defined as establishments 65 percent of whose gross receipts stemmed from food and non-alcoholic beverages but excluding outdoor service areas and not addressing establishments with separate ventilation systems; conversely, establishments more than 35 percent of whose gross receipts stemmed from the

\textsuperscript{467} Transcription of Iowa City Council Meeting at 44 (Oct. 16, 2001).
\textsuperscript{468} Transcription of Iowa City Council Meeting at 44-45 (Oct. 16, 2001) (Woodson).
\textsuperscript{469} Transcription of Iowa City Council Meeting at 45-46 (Oct. 16, 2001). Although the transcript did not identify those in support, the press reported that Vanderhoef, O’Donnell, Champion, and Wilburn did. Sara Langenberg, “Council Moves Toward Smoking Ban,” \textit{ICP-C}, Oct. 17, 2001 (1A:7, at 5A:2-4 at 4).
\textsuperscript{470} Transcription of Iowa City Council Meeting at 46 (Oct. 16, 2001).
\textsuperscript{471} Transcription of Iowa City Council Meeting at 49-50 (Oct. 16, 2001).
\textsuperscript{472} The council also decided not to decide the question of whether to restrict minors’ presence in smoking areas. Transcription of Iowa City Council Meeting at 46 (Oct. 16, 2001).
sale of alcoholic beverages were exempt. \textsuperscript{473} Vis-a-vis the 50/50 coverage threshold that CAFE had originally proposed in its draft ordinance more than a year earlier, the group could hardly deny that 65/35 was “‘less than we were hoping for,’” \textsuperscript{474} but finally getting a “‘number on the table’” after having worked on the project for 18 months purportedly made CAFE “‘happy.’”

**First Consideration: Nov. 27, 2001**

[A]ll of you have a reluctance to get involved in private enterprise and the way you get involved in it is through public safety or welfare. The question before you is really is there a public health issue here? If there’s a public health issue and the documentation’s been presented to you and you all know in your own mind whether there’s a public health issue to be addressed, then you need to ask how is that addressed? But if public health is what gives you the right, the right, maybe even the duty to be involved in the regulating of smoking in these public places then the public health issue exists regardless whether it’s a restaurant or a bar. And if there is a public health issue that mandates the City Council to become involved and to regulate this then you have to go the whole way and regulate it everywhere. If it were contamination of the water supply, I don’t think you’d be talking about well let’s regulate it in restaurants but not in bars, if you deem this to be a health issue and a contamination of the air supply, that same issue exists regardless of the percent of sales one way or the other. And I would strongly support if it’s your determination that this is a public health issue that you meet your fiduciary responsibility and go the whole way on that decision and that is protecting the entire public if that is your determination. \textsuperscript{475}

[W]e’ve had enormous[ly] more communication on this issue than any issue we’ve ever had in the eight years I’ve been on the Council. \textsuperscript{476}

At the special work session on November 12 Vanderhoef announced that she would be proposing two amendments at the public meeting the following day at which the first formal vote on the ordinance was scheduled. The first change that Vanderhoef proposed was to cover restaurants seating 50 or fewer despite the fact


\textsuperscript{475}Transcription of Iowa City Council Meeting at 31 (Nov. 27, 2001) (statement by Russ Schmeiser, part-owner of a restaurant), on http://www.icgov.org/transcriptions/72.pdf.

\textsuperscript{476}Transcription of Iowa City Council Meeting at 33 (Nov. 27, 2001) (Mayor Lehman).
that the state law did not cover such small restaurants and Dilkes’s caution that the attorney general’s opinion expressly did not take a position on them. To be sure, even Dilkes was constrained to admit that Vanderhoef was making a good argument when she sought to justify the expanded coverage on the contextualized legislative history grounds that when the legislature excluded smaller restaurants it was “thinking in terms of trying to divide a very small restaurant into having [a] smoking section and a non smoking section and they decided that that wasn’t possible in such a small section. Well I think if we’re outlawing smoking section, nonsmoking section in restaurants across the board then we should.”

Likewise, Vanderhoef’s preference for changing the coverage threshold from 65 percent food back to 50 percent on the grounds that it would be “the fairest thing we can do and...the most defensible thing and if we’re looking at public health then this is where to go” would have covered additional establishments. Pfab immediately declared his support for both amendments, but neither of the ban’s other backers (Kanner and Wilburn) committed himself, though non-member proponents had already stated that they would prefer a 50-percent rule.

The first consideration of the ordinance that was scheduled to take place at the November 13 meeting was, on account of what the press called the council’s “rampant” “indecisioin,” postponed for two weeks. That earlier meeting began with brief public discussion. A medical oncologist at the University Hospital succinctly refuted the cigarette companies’ accommodationist myth by pointing out, in the confrontational manner that CAFE eschewed, that: “Restaurants that allow cigarette smoking in effect, by default[,] give preference to those who smoke and care not for their own health, nor that of their children nor that of their fellow diners nor that of the people who work there.” The director of the Johnson County Public Health Department announced that the Board of Health (although it lacked a majority to recommend an ordinance to the county board of...
supervisors)\textsuperscript{483} had, in the wake of CAFE’s request, approved a letter supporting smoke-free environments.\textsuperscript{484} The ubiquitous Jim Mondanaro, once again congratulating himself for having been “at the very cutting edge of making this a non-smoking community along [sic] time ago” and complaining that at some of his restaurants the self-instituted ban had been “a terrible thing for us,” urged the council to create a “level playing field.”\textsuperscript{485} And finally, Dr. Ballinger of CAFE reminded council members that the people of Iowa City wanted a smoking ban that operated 24 hours a day in restaurants (defined as deriving more than 50 percent of its receipts from food) of all sizes. At the same time she stressed that Iowa Citians had told CAFE that “they are not ready for an ordinance that covers bars and there has been no grass roots movement despite the wide publicity of our movement in the subsequent year and a half since. And so we as a group have not expanded our efforts in that direction.”\textsuperscript{486} In fact, the CAFE survey from 2000 revealed that support for smoke-free bars was hardly minuscule: 40 percent of respondents favored that protection (in addition to the 70 percent who wanted smoke-free restaurants).\textsuperscript{487}

As soon as the council moved to take up first consideration of the ordinance, Vanderhoef offered the first of the two amendments she had announced the previous evening—to include restaurants with 50 or fewer seats—which carried without a dissenting vote.\textsuperscript{488} Responding to a request by a restaurant owner,\textsuperscript{489} Champion then moved to amend the ordinance by switching the penalties for smokers who smoked in a non-smoking area ($25) and for owners who failed to post signage ($100) on the grounds that the former was “the primary criminal.” Under pressure from colleagues she agreed to equalize the two penalties at $100, but the amendment still failed by a vote of 3 to 4 because ban supporters (such as Wilburn and Kanner) deemed the penalty excessive and/or out of character with the ban as largely self-enforcing.\textsuperscript{490}

Vanderhoef then offered her second and more important amendment,
expanding coverage by increasing from 35 to 50 percent the minimum proportion of alcohol sales triggering a smoking ban. O’Donnell opened the pro-smoking attack on the amendment on the grounds of procedural fairness, but after the mayor suggested that the council vote on the amendment, but defer first consideration of the ordinance for two weeks, Champion shifted the focus of opposition to the substance of the change, in particular to her proclaimed solicitude on behalf of the financial health of owners of restaurants that became bars at night. Her chief witness was, yet again, Mondanaro, who nevertheless admitted that the council was dealing with a “tough issue.” At this point Kanner pushed the debate in two almost diametrically opposite directions. First, despite CAFE’s position that a total ban would not work, he argued that the public was ready for it. He suspected that CAFE “made a political decision not to pursue that partially in fear of, I think, the tobacco companies coming in with some large bars perhaps, or larger...food and alcohol businesses in the City fighting it. I think they’re going to fight us either way and I think it behooves us, if that’s going to happen, to go all the way. ... I think it’s a matter of us having the political will...to lead the city to that step. [W]e have 75% of the people not smoking.” Kanner’s trial balloon immediately burst when Pfab, Wilbur, and Vanderhoeif all denied that the public was ready, and Champion hypocritically declared that she would have to think about it. More revealing was Lehman’s attempt to wriggle his way out of a forthright choice: “I think there is [sic] really only two positions on this. Either you ban everything or you ban nothing. On the other hand I don’t think the public is ready to accept a ban on everything and so...I think it’s an indefensible position.” He regarded it as illogical to let people who drank get lung cancer but not those who ate, yet he considered “a single step...better than no step.” Unaware that in six and a half years he himself would experience a total statewide ban, at this point all he could imagine was that his grandchildren would probably frequent non-smoking bars. Deeming a total ban in 2001 politically impossible, Lehman was willing to proceed “incrementally” and “do what we can.” (In fact, however, the mayor almost never voted to take the first step and almost always found a reason to prefer nothing to any half-measures.)

Rebuffed in the one direction, Kanner then sent up his other trial balloon, which secured him strange bedfellows. Persuaded that any arrangement short of a full ban had to be “convoluted,” he saw the council’s goal as getting “the least

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491 Transcription of the Iowa City Council Meeting at 56-60 (Nov. 13, 2001).
492 Transcription of the Iowa City Council Meeting at 60-62 (quote at 62) (Nov. 13, 2001).
493 Transcription of the Iowa City Council Meeting at 63-64 (Nov. 13, 2001).
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

convoluted ordinance we can.” What “struck” him in trying to discover what would help the council in reaching its number one goal of protecting restaurant and bar workers and customers was that “perhaps the red light green light or no smoking before 8:30 p.m. is something that might work better than 65% or 50%.” Admitting that he was “not an expert” (a status he immediately demonstrated) and was merely pursuing his “gut feeling,” he reasoned that whereas under the 50-percent regime perhaps half of the restaurants and bars would not be protected, the 8:30 p.m. approach would, to be sure, still leave “the problem of nicotine [sic] being in the environment[,] but still before 8:30 you don’t have the direct smoke,” which he again identified as a “strong agent for carrying that nicotine” (as if nicotine were the culprit). Because all bars and restaurants would be protected (from active smoking) until 8:30 p.m., he estimated that “at worst it’s a wash as far as protecting workers and patrons” was concerned. Moreover, Kanner insisted that red light/green light created a much brighter line for purposes of administration and enforcement than self-certified data on alcohol sales. He conceded not only that this proposal was “not the perfect answer,” but, astonishingly, that “to a certain extent” it was “probably true,” as “[p]eople say,” that red light/green light “is a cigarette industry tool to weaken any ordinance....” Nevertheless, he threw it out for consideration because it was “less convoluted and...helps us get more of a level playing field.”

His three ban co-supporters, Wilburn, Pfab, and Vanderhoef, were, as Kanner must have realized, having none of it. Vanderhoef in particular felt that the 8:30 p.m. rule “defeats a lot of the purpose of having the ordinance,” in large part because air simply did not “clean[ ] out that fast....” In contrast, the ban’s strongest opponents acknowledged that it “would certainly solve my problem with the unlevel playing field” (Champion) and had “some merit” and should be discussed (O’Donnell). Lehman, in contrast, reaching for yet another reason to do nothing, opined that: “We’re just rattling around trying to find some logical way to do an illogical act. ... But any scenario [other than a total ban] we do does not address the public health issue as a health issue. It is one of convenience. Which is going to be best as far as the bars, restaurants, whatever.”

A fascinating question is whether Kanner had thought through whether he would have been willing to join with the three pro-business smokers in order to adopt the Ames approach against the implacable opposition of his three anti-smoking allies. He offered a hint that he might have been when, right before the

494 Transcription of the Iowa City Council Meeting at 64-65 (Nov. 13, 2001).
495 Transcription of the Iowa City Council Meeting at 65 (Nov. 13, 2001).
496 Transcription of the Iowa City Council Meeting at 68 (Nov. 13, 2001).
497 Transcription of the Iowa City Council Meeting at 66 (Nov. 13, 2001).
vote on the 50/50 amendment, he asked (knowing with certainty that Pfab, Wilburn, and Vanderhoef had already rejected his proposal out of hand) whether “we had a majority that would consider this as an amendment if we defeated the 50%.” After Champion had replied that “I think I could support you,” Kanner put O’Donnell on the spot, who, like Champion, wanted to have another public meeting. Instead of disclosing his position, the mayor proposed delay so that the “huge change” that red light/green light constituted could be discussed.498 Once the 50/50 amendment had passed by a vote of 4 to 3 (Champion, O’Donnell, and Lehman opposed),499 the council agreed (by a vote of 5 to 2 (Pfab and Wilburn opposed) to the mayor’s proposal to defer first consideration until November 27.500

Two days later the Press-Citizen reported that the new version of the ordinance would reduce by about one-half the number of restaurants that allowed smoking: in addition to the 48 restaurants that already voluntarily prohibited smoking, 25 would be required to ban it, while another 25 restaurants that doubled as bars would be exempt from coverage.501 Editorially the paper accused the council of “waffling” and proposed stiffening the members’ backbone by urging them to “throw the whole thing out” and “[l]et the market decide which establishments will allow smoking....”502

On November 27, the day on which the ordinance finally came up for its first consideration before the council, the city attorney gave the members a memorandum stating that the Attorney General’s Office had informed her that, although arguments could be made to support coverage of restaurants seating 50 or fewer customers, the attorney general was of the view that “the ordinance should be kept as clean and simple as possible and that the Council maintain the ability to take advantage of favorable precedent in the Ames lawsuit and the Attorney General opinion by using the ‘public place’ definition set forth in [sic] State Code. The Attorney General notes that the City can always change the

498 Transcription of the Iowa City Council Meeting at 67-68 (Nov. 13, 2001).
500 Transcription of the Iowa City Council Meeting at 68-70 (Nov. 13, 2001).
501 Sara Langenberg, “Plan Cuts Smoking Options,” ICP-C, Nov. 15, 2001 (1A:2-7, 5A:2-6). The actual list, based on interviews with owners and the city attorney’s earlier survey, included 49 restaurants that were already no-smoking, 23 in which smoking would be banned, 25 that would be exempt, and eight about which accurate information was lacking. “Effects of the 50-50 Smoking Ban,” ICP-C, Nov. 15, 2001 (5A:1).
definition of public place down the road."\(^{503}\) Although Vanderhoef preferred her more comprehensive coverage, she was willing to await the Iowa Supreme Court ruling upholding the Ames ordinance before offering it again; in the meantime, she moved to amend it as suggested. Even Kanner agreed to go along based on a composite survey that he submitted showing that of 223 places with food licenses and indoor service, with certainty only six and possibly another 15 fell in the 50 seats and under category—such a small proportion that he did not think it would affect "that many people." After this amendment had carried\(^ {504}\) Vanderhoef focused on her other amendatory innovation: since there was nothing in the ordinance "that shows any movement after this point in time for decreasing the amount [sic] gross sales of food to move towards what the goal always would be in my mind[—]to take us down to all places that prepare and serve food should be smoke free," she proposed an amendment raising the alcohol share to 65 percent in two years (meaning that only establishments with a greater share of alcohol sales would be exempt).\(^ {505}\)

In the midst of the debate over this expansion of coverage discussion turned toward a proposed red light/green light amendment that Kanner had distributed that day, pursuant to which the purpose of the ordinance would, forthrightly, be (only) to "protect the public health, comfort and environment by prohibiting smoking in any food establishment/licensee between the hours of 2:00 A.M. and 9:00 P.M....." In addition, it provided that the council "will vote within two

\(^{503}\)Eleanor Dilkes, City Attorney, to City Council, Re: Ordinance Regarding Smoking in Food Establishments at 1-2 (Nov. 27, 2001), in City Council Documents, Meeting Folders 2001 (final), Special Meeting Nov. 27, 2001 at 176, on http://www.icgov.org.

\(^{504}\)Transcription of Iowa City Council Meeting at 20-22 (quote at 22) (Nov. 27, 2001), on http://www.icgov.org/transcriptions/ 72.pdf. For Kanner’s survey, based on data from Johnson County on food licenses, Johnson County Tobacco Free Coalition’s “Smoke Free Dining,” and Dilkes’s survey of 83 liquor licensees, see “Restaurants/Bars in Iowa City” (Nov. 27, 2001), in City Council Documents, Meeting Folders 2001 (final), Special Meeting Nov. 27, 2001, at 182-87. According to the survey, under the proposed 50-50 ordinance, about 184 food licensees would be smoke-free, while 39 eating/drinking establishments would allow smoking. Id. at 187. Included in the amendment was another proposal made by Dilkes based on a conversation that she had had with a local business owner: it provided a temporary one-year exemption for new establishments reasonably expecting to have alcohol sales above the 50-percent level and existing establishments making a change in operation that was reasonably expected to bring about a change in the proportion of alcoholic beverage sales above 50 percent. The redlined ordinance is found in City Council Documents, Meeting Folders 2001 (final), Special Meeting Nov. 27, 2001, at 178-79.

\(^{505}\)Transcription of Iowa City Council Meeting at 23 (Nov. 27, 2001).
years” of the ordinance’s enactment on “whether or not the smoking ban shall be increased to a complete twenty-four hour ban.”\textsuperscript{506} Kanner’s hand-out included the following talking points in support of his proposal:

1) Would like a total ban but there are not four votes;
2) If not total ban, then we work for ordinance that is least convoluted and will get us toward the following:
   • Will protect health and well-being of the most food/drink establishment workers and patrons in Iowa City;
   • Easiest to administer (both by businesses and by city)[;]
   • Creates a level playing field;
   • Will eventually lead us to a total ban on smoking.\textsuperscript{507}

However, Wilburn’s immediate declaration of opposition to red light/green light prompted Kanner to explain that he had thought that time-limited smoking would achieve his goal of no smoking faster than the 50/50 proposal, but that he was now willing to drop his proposal in favor of the 65/35 amendment because it would move the city in the right direction. Wilburn even succeeded in extracting a promise from Kanner not to raise the proposal again during the ordinance’s three readings.\textsuperscript{508}

At this point the mayor finally revealed his position, which was rejection of 50/50 or Vanderhoef’s “drastic” proposed 35 percent food/65 percent alcohol, and acceptance of 65 percent food/35 percent alcohol with the understanding of revisiting the issue after three years and considering 50/50. Lehman’s view was based on his perception of an allegedly “very unique situation in Iowa City unlike almost any city in the country[—]we have thousands of customers who are in a downtown area, unfortunately a fairly high percentage of these customers are smokers, an ordinance that prohibits smoking based on this 50 percent is going to make a significant number of these places downtown frankly out of bounds to a lot of those young folks who insist on lighting up and especially when they go with their friends.”\textsuperscript{509} The uniqueness to which Lehman was referring was difficult to discern in terms of downtown areas in general or of college towns in

\textsuperscript{506}Steven Kanner to City Council Re: Proposed Amendment to the Smoking Ordinance (Nov. 27, 2001), in City Council Documents, Meeting Folders 2001 (final), Special Meeting Nov. 27, 2001, at 188.

\textsuperscript{507}Steven Kanner to City Council Re: Proposed Amendment to the Smoking Ordinance (Nov. 27, 2001), in City Council Documents, Meeting Folders 2001 (final), Special Meeting Nov. 27, 2001, at 188.

\textsuperscript{508}Transcription of Iowa City Council Meeting at 24 (Nov. 27, 2001).

\textsuperscript{509}Transcription of Iowa City Council Meeting at 24 (Nov. 27, 2001).
particular, but he unintentionally and unknowingly provided the best reason for the more capacious ban—namely, discouraging or even preventing college students and their non-student age-cohorts from frequenting places where the normality of smoking was cultivated, reinforced, and magnified at a period in their lives when, if they did not start smoking, they probably never would later. After Champion and O’Donnell, the other two smoking businesses-people who opposed the ban, had weighed in against the amendment, it passed by a vote of 4 to 3.  

Discussion then turned to the ordinance itself, Champion and O’Donnell proposing an amendment to revert to the exemption for all establishments selling 35 percent or more alcohol. After Pfaff had expressed puzzlement as to how its proponents could claim that they were moving toward smoke-free restaurants when they were in fact taking a step backward, Lehman permitted “public input” but subject to the limitation that “someone has something dramatically different to tell us that we haven’t heard before...” In fact, the only people to speak were four high-profile business owners. Mondanaro, who owned four restaurants downtown (plus a fifth in Coralville), stated that three of them were no-smoking, but that two would be affected by the 65/35 or 50/50 regime. He favored the red light/green light “compromise” that Kanner had proposed, but complained that CAFE members did not understand the compromise because they did not “have their signatures on the dotted line at banks....” He advocated on behalf of red light/green light because it enabled owners to “take care of all the people at all the restaurants 100 percent of the time until 8:30 to 9:00 at night. And then it lets...all people in the liquor business compete on a level playing field.” In contrast, he protested that after that time, when his restaurants turned into bars, he would be unable to “compete fairly” with full-time bars. Bitterly he accused the city council of blithely “talk[ing] about taking away part of my revenue seeking ability” without sitting in his seat with him and feeling his pain. Short of a total ban—which “we don’t have the initiative or guts to do”—he saw only red light/green light as being “fair” by virtue of “take[ing] everybody into account....” Seeking to undermine CAFE’s criticism of that regime’s impact on public health, he (counterfactually) insisted that “we all have been in restaurants or places where people smoke and then you go in the next day it’s not a factor.”

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510 Transcription of Iowa City Council Meeting at 25-26 (Nov. 27, 2001).
511 Transcription of Iowa City Council Meeting at 27-28 (Nov. 27, 2001).
512 Transcription of Iowa City Council Meeting at 28-29 (Nov. 27, 2001). In spite of his verbal stance in favor of a smoking ban, Mondanaro reinstated smoking in one of his restaurants because “eliminating a segment of the market cut into revenue....” Deidre Bello, “Officials Shrug Off No-Smoking Setback,” DI, July 17, 2001 (1:1).
The owner of The Mill, a restaurant/bar also well known for its music, asserted flat out that “[w]e cannot run live music in a no smoking environment because 40 percent of our customers won’t come and neither will their friends.”\(^3\) (Despite an apparently orchestrated email campaign to the council complaining about the “disastrous effects on businesses that support the arts, specifically live music at restaurants like the Mill,”\(^4\) under the statewide smoking ban six and a half years later, live music miraculously proved to be so compatible with the absence of smoking that, as one Mill employee put it, “actually our sales have gone up” because people whose aversion to smoke had previously kept them away began frequenting the establishment.\(^5\) And as for the smokers, the owner of The Sanctuary observed that “people get used to things.”\(^6\)

As was readily foreseeable, Champion’s amendment was then defeated by a vote of 4 to 3, only her fellow smokers O’Donnell and Lehman joining her.\(^7\) Knowing that the four-member majority was about to vote in favor of the ordinance, Champion asked what they perceived as their obligation to business owners who in two months informed the council that their business had declined 40 or 50 percent: “This is not just fun and games we’re talking about, this is how people make a living, this is how they make their house payments, and they’re scared to death and I don’t know if they’re right or wrong but I do worry about it and it bothers me that I don’t hear that concern coming from this Council up here....” Rather than asking Champion whether by “this is how people make a living” she meant facilitating the exposure of hundreds or perhaps even thousands of customers and employees to secondhand smoke, some proportion of whom would become ill or die as a result, Pfab suggested going to a 100-percent ban in all places to eliminate any individual owners’ “tremendous disadvantage, while Kanner, more fancifully, mentioned the possibility of using the city’s economic development money to subsidize some of the owners until a 100-percent ban went into effect.\(^8\)

The mayor, who wanted it known that “I absolutely support the concept” of smoke-free restaurants and did not “want folks to say that I did not support

\(^3\)Transcription of Iowa City Council Meeting at 29-30 (Nov. 27, 2001) (Keith Dempster of The Mill).
\(^4\)Email from Aaron Wolfe to Iowa City Council (Nov. 20, 2001), in City Council Documents, Meeting Folders 2001 (final), Special Meeting Nov. 27, 2001, at 174. A very large volume of similar email was sent to the council at this time.
\(^5\)Telephone interview with unidentified employee at the Mill (May 19, 2009).
\(^6\)Telephone interview with Daryl Woodson, Iowa City (May 19, 2009).
\(^7\)Transcription of Iowa City Council Meeting at 32 (Nov. 27, 2001).
\(^8\)Transcription of Iowa City Council Meeting at 32 (Nov. 27, 2001).
regulating smoking in restaurants” because he merely deemed 50/50 “too drastic” a starting point, finally grew weary of the council’s “just batting our gums” and called the roll for the inevitable 4 to 3 vote for passage on the ordinance’s first reading.\footnote{Transcription of Iowa City Council Meeting at 33-34 (Nov. 27, 2001).} As passed, the ordinance thus excepted establishments whose on-premises alcoholic beverage sales exceeded 50 percent of their gross receipts for on-premises consumption of food, beverages, and alcoholic beverages—a proportion that would be increased to 65 percent two years after the effective date (on March 1, 2004).\footnote{An Ordinance Amending Title 6 of the City Code by Repealing Chapter 7, Entitled “Smoking in Public Places” and Enacting a New Chapter 7, Entitled “Smoking in Food Establishments,” sect. 6-7-5 (Nov. 28, 2001), in City Council Documents, Meeting Folders 2001 (final), Info Packet of Nov. 29, 2001, at 7-8, on http://www.iowa-city/weblin/docview.aspx?id=8359 (visited Oct. 19, 2008).} The members’ fixed positions and voting patterns strongly suggested that the council would pass the ordinance by the same 4 to 3 vote on the next two considerations.\footnote{Sara Langenberg, “Smoking Ban Clears First Hurdle,” \textit{ICP-C}, Nov. 28, 2001 (1A:1-7, 5A:6).}

\textbf{Second Consideration: Dec. 11, 2001}

I understand that there’s an agenda to go to completely smoke free environment. I recently came back from Rochester, Minnesota Mayo-Clinic. The neighbor to the north the, you know, paragon of modern medical achievement. There [sic] downtown is spotless. There are a number of stores available for people to cruise through, beautiful places to sit, all of it non-smoking. I found it to be sterile. I found it to be a different sort of feeling like the hospital had encroached upon the entire place. This is a college town and people in their youth are going to have youthful indiscretions. And I’m not condoning…no one would argue the cost of second hand smoke, of alcohol, of motor vehicles, of guns, of any number of issues to public health. And if you really think that safety is the issue let us all sit back and contemplate, how safe are we? Haven’t we just been reminded of that? You could be on the wrong airplane, you could be in the wrong building, you could be in the wrong remote village in some distant land. None of us are safe. And it’s an illusion to legislate safety. My suggestion would be to look at some creative solutions. When I worked at The Mill I saw math professors, Schizophrenics, fraternity boys whooping it up together or at least coexisting in a space that they felt comfortable in. And in these times when people are hurting are we going to start to take away their options of how they should behave in public, using legal substances? … Am I doing what’s right for Iowa City to keep it a place of tolerance, a place of diversity….  

\footnote{Transcription of Iowa City Council Meeting at 58 (Dec. 11, 2001), on}
http://www.icgov.org/transcriptions/75.pdf. The speaker, Lauren Hanna, was a physician who as a medical student had worked in a smoky restaurant/bar in Iowa City, whose owner, Keith Dempster, chimed in at the same meeting that even a 50/50 percent smoking ban would turn Iowa City “into another damn East Berlin.” Id. at 67-68. Ironically, cigarette smoking was as omnipresent in East Berlin as coal burning. Seven years later Dr. Hanna believed that her opposition to government interference with business owners’ public health decisions had been correct in 2001 and was still correct in 2008 after enactment of the Smokefree Air Act, which she opposed. Astonishingly, she viewed the whole issue exclusively from the perspective of what she regarded as a misguided policy of dealing with addiction, never once on her own even mentioning the central problem of involuntary exposure of nonsmokers to secondhand smoke. Telephone interview with Dr. Lauren Hanna, West Liberty, IA (Nov. 12, 2008).

Unsurprisingly, at the second consideration on December 11, all amendments, including one that would have extended the ban’s reach, and efforts to delay failed. To begin with, the two most prominent opponents, Champion and O’Donnell, pressed, once again, to delay the process. The first of three amendments sought to delay second consideration until February 2002 on the grounds that the Chamber of Commerce wanted additional time to evaluate how the ordinance would affect business. After it had been voted down 5 to 2, Champion offered a more transparently anti-regulation measure postponing the ordinance indefinitely, allegedly on account of the “business climate....” Its defeat by the same vote was followed by her attempt to exempt places that had separate rooms with separate ventilation systems. The rest of the council gave equally short shrift to this typical cigarette industry proposal, which also garnered only Champion’s and O’Donnell’s votes.

Mayor Lehman then reiterated his objections to bans based on percentages of food/alcohol because they were not logically related to the underlying public health problem. Instead, he declared that he would vote for an amendment banning smoking in any establishment that served or prepared food for on-site consumption. Pfab called it a “great idea,” but one that he would not support

524 Transcription of Iowa City Council Meeting at 44-47 (quote at 46) (Dec. 11, 2001).
525 Transcription of the Iowa City Council Meeting at 47-48 (Dec. 11, 2001). Lehman’s position was purportedly linked to his perception that regulation of restaurants would lead more of them to become bars; this outcome was, in turn, unacceptable because the community’s “number one problem” was “probably...over[-]indulgence and the number of bars....” In view of the saloonification of downtown during the last quarter of the twentieth century Lehman’s declaration that drinking and bars were “not what this community’s all about” was hypocritical. Asked whether the city council’s beholdenness to commerce über alles was so exclusive that there was no chance that it would do
something to reverse the trend toward the saloonification of downtown, the director of the Johnson County Public Health Department noted that: “I am not sure about the City Council’s reluctance to act. There are a couple council members who would like to take action, a couple who have clearly stated that they don’t think minors drinking in licensed facilities is a problem and that business is more important than short or long term health issues, and a couple who basically use avoidance tactics when the issue is brought up.” Email from Ralph Wilmoth to Marc Linder (Feb. 10, 2006).

526 Transcription of Iowa City Council Meeting at 48 (Dec. 11, 2001).
527 Transcription of the Iowa City Council Meeting at 50 (Dec. 11, 2001).
528 Transcription of the Iowa City Council Meeting at 52 (Dec. 11, 2001).
529 Transcription of the Iowa City Council Meeting at 49 (Dec. 11, 2001).
530 Telephone interview with Steven Kanner, Cleveland, OH (Nov. 14, 2008).
531 Transcription of the Iowa City Council Meeting at 59 (Dec. 11, 2001) (Kevin Perez).
to eat in smoke-free restaurants compared to 35 percent who wanted smoke-free bars, there had been no “extraordinary uprising from the bar owners or people who are primarily frequenters of bars coming forward to ask us for that.” Specifically addressing Kanner’s question, Ballinger sought to impress on ban supporters on the council the pattern that had played itself out over and over again across the country toward the end of the municipal ordinance process.\footnote{Transcription of the Iowa City Council Meeting at 52-53 (Dec. 11, 2001). Ballinger incorrectly depicted the process in Ames: the transformation of the ordinance took place at the beginning, not the end, of the process and in direct negotiations with ATTF, not before the council. Moreover, she entirely misstated the basis of the lawsuit, which had nothing to do with exceptions or fairness, but solely with preemption. Ironically, a bar owner later corrected Ballinger. \textit{Id.} at 62 (Daryl Woodson). Even more ironically, the same owner then suggested that the council sit on the proposal until the Iowa Supreme Court upheld the validity of the Ames ordinance. \textit{Id.} at 63.}

There is uniformly a drive to have this apply across the board everywhere and then everyone says yeah that’s great. Why don’t we do that? And then to appease the people who have not had their concerns addressed, exception after exception, hardship clause, we’ll phase this in, we’ll try to make allowances for people, let’s accommodate everybody, let’s have one big umbrella and bring everybody in underneath it. Let’s try to get along and they end up having an ordinance that looks like Ames, one which is being contested right now on the basis of having so many exceptions and the lack of fairness that is perceived to the people that it applies to. ... We too want smoke free environments across the board in Iowa City however, our common sense tells us that not only can we want it, everybody else has to want it too. And right now we have information that states that people want it in restaurants. We do not have information that states, and I don’t think anybody else has been able to show it to us that they have that, that this would apply and be successful and people would ask for it today in bars.\footnote{Transcription of the Iowa City Council Meeting at 53-54 (Dec. 11, 2001).}

In other words, CAFE believed that covering bars would exceed Iowa City’s capacity for compliance/enforcement.

Kanner, who was indirectly trying to persuade CAFE to free Pfab to vote for the broader ban, pleaded with Ballinger to recognize that her comparison had gotten the relationship between Ames and Iowa City backwards: “We’re making it tougher where Ames was...making it looser....” In response Ballinger began reciting exemptions from the Ames ordinance such as bowling alleys (as if they had ever been covered in any proposed Iowa City ban) and red light/green light, and even though she soon ran up against her ignorance of the facts (“help me out here folks”), Kanner kept trying, in vain, to explain to her that the more exemptions she mentioned, the more she was making his “point,” but she failed...
to grasp it even while literally swearing that “I can appreciate your point.” Knowingly or not, Wilburn cut through the misunderstanding to voice the suspicion that prevented him and Pfab from casting the deciding vote for Vanderhoef’s amendment: “We have history right here where we make a move, several exemptions get introduced. And just here tonight, just introducing it there were…three other potential amendments. And I suppose it’s a matter of trust as to what’s going to happen between…a second reading and a third reading. And that’s the point that I think is being brought up here. … And I will again add the point that when we get to a third reading, what other combinations of exemptions are going to be brought back in to make it resemble the Ames ordinance with a lot exemptions.”

To dispel Wilburn’s fears, Kanner asked Vanderhoef and Lehman whether they “intend[ed] to add more exemptions.” Though both straightforwardly denied any such intention, Lehman did manage to sow confusion by adding: “We’ve never discussed bars. And I think we need to stick with the restaurants, sort of, until…unless we want to go into bars. Even the Café folks have not been interested in pursuing that. We have talked about restaurants from day one and I think we need to conclude that and then work with bars.” In fact, what CAFE purported to support was a vote that evening on the ordinance without amendments because, as other cities had shown, the way to make all public places smoke-free was “incrementally”; if immediately afterwards the council wanted to vote on Vanderhoef’s amendment, “we will support you.”

When the mayor finally called for a vote on Vanderhoef’s amendment to expand the smoking ban to include public places that prepared or served food for on-premises consumption (thus striking the exemption for bars whose alcohol sales exceeded 50 percent of their total receipts), Pfab, who presumably supported the substance of the amendment, nevertheless balked because the importance of the change meant that the council, instead of being able to vote on the ordinance’s second consideration, would be going backward to first consideration. Perceiving a pattern of someone’s always wanting to make a change as soon as the council got close to a proposed ordinance’s passage (and echoing CAFE’s insight that “[i]f I were Philip Morris I would want to delay this ordinance because when ordinances like this are passed I would be selling fewer

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534 Transcription of the Iowa City Council Meeting at 54-55 (Dec. 11, 2001).
535 Transcription of the Iowa City Council Meeting at 56 (Dec. 11, 2001).
536 Transcription of the Iowa City Council Meeting at 65 (Dec. 11, 2001) (Eileen Fisher).
537 Transcription of the Iowa City Council Meeting at 69-70 (Dec. 11, 2001).
cigarettes”), Pfab identified the underlying cause: “It’s what the tobacco industry always does.” Vanderhoef tried to persuade Pfab that adoption of the amendment would be the best way of achieving his goal of zero public smoking, but Pfab revealed that his real objection was the fear that despite adoption of the expansive amendment now, the ordinance might fail before its passage on third consideration, leaving anti-smokers with nothing. The surprising 4 to 3 vote against the amendment could have lent credence to Pfab’s suspicion: Lehman’s vote in the affirmative (joined by Kanner and Vanderhoef) could have been interpreted as a Trojan horse that would have exposed the ordinance to ultimate defeat if Lehman turned against it on second or third consideration. If, on the other hand, Pfab’s fear was baseless, he and the other anti-smoking advocates unnecessarily deprived the city of a vastly expanded zone of protection from secondhand smoke exposure. Pfab’s rejectionist position at this point was in large part a function of his following the lead of CAFE, which, as already noted, was both skeptical of risking the success of what it was on the verge of achieving (the 50/50 ordinance) for the sake of a speculative gain and in principle probably too timid to contemplate confronting the opposition of bar owners and their customers who would have been covered by the more comprehensive ban. In the event, on second consideration the ordinance once again passed by a vote of 4 to 3, with the three smokers (Champion, O’Donnell, and Lehman) in opposition. In a vain effort to salvage his reputation, the mayor seized the word to preempt untoward press accounts: “I want to make it very clear that I support a much stronger version...and a much fairer version then [sic] the one we just had [on] second consideration so I really don’t like reading in the papers that the mayor voted against an ordinance that would have...and I don’t think

538 Transcription of the Iowa City Council Meeting at 65 (Dec. 11, 2001) (Eileen Fisher).
539 Transcription of the Iowa City Council Meeting at 72-73 (Dec. 11, 2001).
540 Transcription of the Iowa City Council Meeting at 74 (Dec. 11, 2001).
541 Vanderhoef later stated that she had believed at the time that Lehman had voted in good faith for her amendment because it had created the more level playing field that he wanted; consequently, in her view, if Pfab and CAFE had not misjudged the situation, Iowa City from the outset would have had a broader ban. Telephone interview with Dee Vanderhoef, Iowa City (Nov. 10, 2008).
542 In fact, Pfab—who later stated that he had not trusted Lehman, in part because the latter had lied to him several times—concluded on the basis of a review of the transcription of the meeting that his vote had been in part driven by his suspicion that Lehman might have been laying a trap. In contrast, Pfab characterized O’Donnell’s actions on the council as actuated by his not wanting to be “an obstructionist to making money” by his business friends. Telephone interview with Irvin Pfab, Iowa City (Nov. 9, 2008).
the other two council people...they're of the same opinion.”

**Third and Final Consideration: Jan. 8, 2002**

What we will be doing...is making more restaurants into bars. The number one problem nationally is alcohol. We bypass number one to address number two to make number one more prolific. ... We as a council are here to support business, grow the tax base and look responsibly at economic development and I don't think this addresses any of that.

I’m Jewish and when my people left Egypt a few thousand years ago I’m sure it was a significant blow to the Egyptian property holders and business owners because a lot of their work left. When the slaves were freed in the south I’m sure it was a significant blow to property holders and business owners there too cause a lot of their work left.... But there’s certain...things that’s more important maybe than business. Maybe life is more important than profit. [I]f businesses are going to be hurt by doing something that hurts other people and by being forced to stop doing something that hurts other people that’s their problem. Because you know, I mean they’re poisoning people. And if you go out of business because you’re forced to stop poisoning people, that’s a small loss.

At the council’s special work session on January 7, 2002, the day before the third and final vote on the ordinance was scheduled, opponents offered several amendments in response to the city attorney’s request that if the council intended to make changes to the ordinance, it discuss them at the work session so that she could draft the requisite provisions before the vote on January 8 in order to spare her the task of crafting the language “during the formal meeting without some time for reflection on the possible ramifications of the language chosen.”

Opponents, unsurprisingly, did offer such revisions. Straight off, O’Donnell asked whether anyone would be interested in reverting to the scheme under which smoking would be banned only in establishments deriving at least 65 percent of their sales from food. He justified the amendment by reference to the council’s obligation to businesses “to find out how this is going to affect them financially.”

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543 Transcription of the Iowa City Council Meeting at 75 (Dec. 11, 2001) (the last two ellipses are in the transcription).


545 Transcription of Iowa City City Council Meeting at 49 (Jan. 8, 2002) (statement of Richard Lutz).

He secured an expression of interest only from his smoking mate Champion and a decided rebuff from Pfab, who insisted that exposure to secondhand smoke was “still a health issue...not a business issue.” O’Donnell sought to steal Pfab’s rhetoric and turn it against him by asserting that eating was also a health issue—a dark aphorism on which Champion shed light by pointing out that it did not mean that “we...need to go out to eat to be healthy,” but that they were “talking about people’s livelihood’s [sic]...not...about a hobby, we’re talking about people who are making mortgage payments and raising children.” In response to Champion’s question as to what ban supporters had in mind “as a backup” in case businesses began failing, Pfab retorted that as soon as the pending ordinance was passed, he would back a 100 percent ban. O’Donnell illogically claimed that his 65/35 proposal “would have sent a clear message because I think we would have gotten a 7-0 vote”—despite the fact that only he and Champion championed it—whereas the 4-3 vote by which the ordinance would in fact pass “certainly isn’t a good way to start this.”

Mayor Lehman, who rejected 50/50 (or, apparently, any other food/alcohol ratio), while seeming to indicate that he might support coverage of all establishments that prepared food, was joined in earnest by Vanderhoef; Pfab promised to vote for an even broader workplace ban, but only after the 50/50 ban had been adopted. Kanner expressed interest in a 100-percent ban in all places that served or prepared food, but at the same time he confusingly echoed CAFE’s concern that “this is a typical tactic, not specific to us perhaps of [sic] individuals but the strategy is used by the tobacco industry to delay and weaken an ordinance such as the case in Ames and so CAFE is urging us to pass this and then go onto something else.”

In a literally last-minute effort O’Donnell made yet another stab at rustling up support for “red light green light,” but no one else would join him, thus leaving the ordinance substantively unchanged and prompting the Press-Citizen to conclude that the following night’s vote “may be a mere formality.” At the same time, the newspaper reminded readers, on the eve of final passage, that the effect of the ordinance when it went into force on March 1 would merely be to ban smoking in about 25 restaurants compared to the approximately 50 that had already prohibited smoking voluntarily.

547 Transcription of Iowa City Council Special Work Session at 44-49 (quotes at 46, 49) (Jan. 7, 2002), on http://www.icgov.org/transcriptions/78.pdf.
548 Transcription of Iowa City Council Special Work Session at 48-50 (quote at 49) (Jan. 7, 2002).
549 Transcription of Iowa City Council Special Work Session at 52 (Jan. 7, 2002).
550 Sara Langenberg, “Smoking Ban Nears Approval,” ICP-C, Jan. 8, 2002 (1A)
The council’s third and final consideration of the ordinance took place on January 8, 2002. After Mayor Lehman had sworn his ritual oath that he “would support a total ban,” Nick Herbold, a University of Iowa student senator (who would soon be elected Student Government president) who did not smoke but attended bars “as much as I can,” registered a protest against an ordinance that would prevent people over the age of 18 who filled the bars after 9 p.m. from making “adult decisions” to be there “if they want to be exposed to smoke....” In pursuit of this self-destructive libertarian goal he deemed red light/green light such a “good compromise” that he wondered why everyone did not support it and asked council members to explain the basis of their opposition. After Vanderhoef had referred to lingering carcinogens and Kanner to the paramount concerns of workers’ health, Herbold’s request for time to respond triggered the first of Lehman’s outbursts of impatience with the issue’s continued presence on the council’s agenda after “six months and hours and hours”: “believe me...we have worn this one out.” Seizing the mayor’s reluctantly granted permission to comment, Herbold, who conceded that he was ignorant of the science of the suspension of particulate matter, nevertheless opined that red light/green light “helps the people out during the day and...lets the students relax in a non-[sterile] environment where they can, you know, really let go at night.” Skipping over an explanation of the mutual exclusivity of toxicity and sterility, Herbold sought to rebut Kanner’s proletarian agenda by disclosing the results of his telephonic survey of “all the bar employees that I know”: the smokers had said that smoke did not bother them, while the non-smokers “overwhelmingly” said that they either did not find it annoying or that when applying for the job they had understood the risk that they were taking. And a like-minded Herbold chimed in that “every job has a little bit of a risk. I worked road construction a couple summers ago and I took a lot of risks with that. And I think that was part of the job.” His closing admonition to the council to consider red light/green light resonated only with the most reactionary pro-smoking and pro-employer member, O’Donnell, who lamented that he had brought it up just the previous night and “didn’t have the support for it.”

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552 Transcription of Iowa City City Council Meeting at 40-41 (Jan. 8, 2002).
553 Transcription of Iowa City City Council Meeting at 42-43 (Jan. 8, 2002), http://www.icgov.org/transcriptions/80.pdf. In fairness to Herbold it should be noted that as a law student five years later he developed a much more critical position on exposure.
Following other public comments (including one by a restaurant owner who asserted that “[n]ot a single owner here has been talked to by big tobacco”), the mayor once again voiced impatience with having to listen to the public any further, especially since, as far as he (and anyone else) understood, “the Council has pretty much decided what they’re going to do.” In response to an unidentified male audience member’s interjection that the council had still not heard that what it was going to do was wrong, Lehman, reinforcing his point, observed that he agreed that the council was wrong to adopt the ordinance. Even O’Donnell, who wanted to hear more comment (from complaining owners), was compelled to agree with the mayor that the decision had been “made two readings ago.” Garnering the only applause recorded by the transcript, O’Donnell faithfully projected the empirically preposterous claims that his fellow businessmen had apparently osmotically absorbed from the cigarette oligopoly’s playbook: “We need to replace those signs as we enter Iowa City that say we’re a nuclear free zone and say welcome to Iowa City we’re closed.” By reminding the council of a fact of which they were all aware, Kanner succeeded in pushing the mayor to hear out the few people who still wanted to speak: “This is obviously something that’s touched a nerve in the community. We’ve had the most letters we’ve ever had.”

Having pro forma listened to the public, the council next heard Champion’s pro forma re-presentation of a motion to defer the ordinance’s third consideration until the Chamber of Commerce had performed an impact study. Her ideological twin, O’Donnell, “of course,” agreed to second her motion, but it lost by the same 5 to 2 vote that had defeated it a month earlier. As Lehman began to call the roll on the ordinance’s final vote, Vanderhoef revealed that she had been wrestling with the best strategy for securing adoption of her amendment to achieve “zero smoking in restaurants”:

It was suggested to me today to not support the 50/50 and announce it up front so that the others who are supporting 50/50 would be asked to make up their mind right then. What has happened as I see it from this Council is that there has been some fear in the Council that amendments would come around that would change the ordinance as the young gentleman mentioned tonight, the red light green light. We’ve talked about that several different times. We’ve talked about ventilation several times. No one seems to know for sure how everyone is going to come down. So knowing that I have supported the 50/50 from the beginning I will support 50/50. If that passes tonight as soon as it’s done I will

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554 Transcription of Iowa City City Council Meeting at 45 (Jan. 8, 2002) (Perez).
555 Transcription of Iowa City City Council Meeting at 46–47 (Jan. 8, 2002).
556 Transcription of Iowa City City Council Meeting at 52–53 (Jan. 8, 2002).
As soon as the ordinance, without fanfare, was adopted by a vote of 4 to 3 (O’Donnell, Champion, and Lehman, as always, opposed), Lehman announced that he would entertain a motion from any member proposing an amendment to amend the ordinance just passed to apply it to “any establishment that prepares or serves food” (or, as the mayor incorrectly paraphrased himself in the alternative, that “serve[s] prepared food”). Making sure that no one was procedurally confused, he stressed that the “ordinance we passed is passed” and thus would in no way be jeopardized by adoption of the more inclusive amendment. Pfab, whom his colleagues appeared to regard as a gadfly, immediately declared himself in favor of a prohibition in all public places and places of employment, but Lehman dismissed the suggestion as irrelevant, and even Vanderhoef felt compelled to add that she would discuss it later but not then. After Kanner (of all people) quibbled over whether the council could discuss such an amendment without notice to the public and Lehman declared, “Yes we can,” the city attorney clarified for the movant the difference between “and” and “or” and asked whether she wanted to exclude places that served only prepackaged foods such as chips and peanuts. Pfab slipped in that he wanted the more inclusive “or,” but Vanderhoef opted for covering only establishments that both prepared and served food for on-premises consumption. Even among her most plausible allies, Vanderhoef found little resonance: Pfab at first refused to second her motion (because it failed to cover restaurants with 50 or fewer seats, thus retaining the “uneven playing field”), agreeing to do so only when no one else would, while Kanner wanted to defer the matter, adding, without explanation, that if forced to vote on the spot, he would vote No. In addition to fearing that failure to support her amendment that very evening might kill it, Vanderhoef urged support for it on the grounds that owners should be put on notice that if the amendment passed, they would not have to bother with certifying their alcohol sales. Pfab, frustrated that everyone dismissed his proposal on the grounds that inclusion of small restaurants might jeopardize the ordinance’s validity, sought to get around the problem by (again) proposing a ban in all public places and places of employment, but no one was interested. Predictably, Wilburn refused to consider Vanderhoef’s proposal until he saw greater movement in the wider public for a total ban. Under pressure from the mayor to conclude the discussion, Kanner expressed a preference for a stricter ban than Vanderhoef was offering.

557 Transcription of Iowa City City Council Meeting at 53 (Jan. 8, 2002).
558 Transcription of Iowa City City Council Meeting at 54 (Jan. 8, 2002).
559 Transcription of Iowa City City Council Meeting at 55-56 (Jan. 8, 2002).
either in the form of including all places with a food license or the more inclusive “prepare or serve” language; he might even be willing to support her amendment, but only at a deferred consideration at the next work session. Pfab’s expressed support for Kanner’s position presumably made it clear to Vanderhoef that she had at best three votes for the present (Lehman failing to disclose his position and no one pressing him to take a stance). The opportunity for seizing on whatever momentum had been built up to expand significantly coverage of the smoking ban and to protect many more people from exposure to secondhand smoke having been squandered, Vanderhoef withdrew her motion to amend and a majority agreed to put it on the next work session two weeks later.

With CAFE too timid to push beyond the “more options for smoke-free dining” that it perceived the public as supporting, the ordinance as passed simply prohibited, effective March 1, 2002, those in custody or control of public places where food was prepared or served for on-site consumption from designating any part of the establishment as a smoking area—subject to an exemption for establishments more than 50 percent of whose gross receipts for food, beverages, and alcoholic beverages sold for on-site consumption stemmed from alcoholic beverages, a proportion that was to rise to 65 percent on March 1, 2004 (by which time, however, the ordinance had been judicially invalidated), and a temporary one-year exemption for any establishment “making a change in operation which is reasonably expected to result in a change in the percentage of alcoholic beverage sales” such as to raise it above 50 percent.

At the council work session on January 22, 2002, Mayor Lehman introduced the last item with “surprise, surprise, Smoking in Restaurants Amendment,” prompting the city attorney to observe that “it’s on the agenda because you all wanted to talk about it.” Just to set the record straight, O’Donnell made no bones about the fact that he had certainly not wanted to talk about it, but forward-looking Lehman simply wanted to find out whether there (still) were “four folks on the Council who would be interested in reintroducing the smoking issue and discussing whether we want to go to a zero smoking tolerance in restaurants.”

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560 Transcription of Iowa City City Council Meeting at 57-61 (Jan. 8, 2002).
561 Transcription of Iowa City City Council Meeting at 61-62 (Jan. 8, 2002); Complete Description of Council Activities at 6 (Jan. 8, 2002). Beyond Vanderhoef, Kanner, and Pfab, Lehman did not identify the fourth vote.
563 City of Iowa City,] Ordinance No. 02-4000, An Ordinance Amending Title 6 of the City Code by Repealing Chapter 7, Entitled “Smoking in Public Places” and Enacting a New Chapter 7, Entitled “Smoking in Food Establishments,” §§ 6-7-3 and 6-7-5 (Jan. 8, 2002).
The not always consistent Pfab at first allowed as “[i]f it was any further down the road I’d be happy to support it,” but after (of all people) O’Donnell had had to remind him that “[t]his is your chance” and Vanderhoef specifically asked him about zero smoking in restaurants, he suddenly said he “would be happy to support that idea.” After Vanderhoef became the second vote, Lehman asked whether there was also a third and fourth; when Kanner became the third, Vanderhoef pressed the mayor as to whether he would cast the deciding fourth vote. The mayor, however, quickly disabused her of any notion that he would keep the possibility of totally smoke-free restaurants alive:

Well no, no, I don’t want to get into the discussion if we don’t have four people who would like to get into the discussion. I feel we have been discussing this thing for a long, long time, we have been a source of great agitation to people both in favor of a smoking ban and those who opposed a smoking ban. I think it’s time to let the dust settle on this one and see what happens with it. You know I think the public and I also think from the Council’s standpoint you know enough is enough and for the time being I’m willing to proceed with what we have. I don’t think it’s a particularly good ordinance, I didn’t like it when we passed it but on the other hand we had four opportunities to change it and we chose not to so I am not interesting [sic] in discussing it further.

Not willing to give up quite yet, Vanderhoef asked him: “But you would support the zero?” Administering her a lesson in self-fulfilling prophecies, the mayor informed her that “[i]t isn’t even going to get there unless we’ve got four people that want to talk about it” and “I will not be one of the four.” Still pushing Lehman, Vanderhoef echoed: “Your [sic] not going to be?” An unrepentant Lehman replied: “I am not going to be, at this point in time we had an opportunity, we didn’t do it, I am really not interested in dragging the public through this thing for another six or eight weeks or whatever, I think we’ve, we may revisit this, I think we will at some point in time but for the time being we’ve done enough.”

No one needed to prompt O’Donnell and Champion to ally themselves with their fellow-smoking mayor and no one did ever ask the silent

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564 Transcription of Iowa City Council Special Work Session at 30-31 (Jan. 22, 2002), on http://www.icgov.org/transcriptions/85.pdf. The transcriptionist could not hear all of Vanderhoef’s words on the audio tape, but the context of what could be heard of the beginning of Vanderhoef’s statement (“Well tell us what”) and the beginning of Lehman’s fully transcribed response quoted in the text strongly suggest that Vanderhoef asked him how he would vote.

565 Transcription of Iowa City Council Special Work Session at 31 (Jan. 22, 2002).

566 Transcription of Iowa City Council Special Work Session at 31-32 (Jan. 22, 2002).
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

Wilburn, who, by failing to take a position, killed the initiative.\textsuperscript{567}

Paying, once again, lip service to a prohibition that he had opposed at almost every turn—“We do not have four folks and so that’s a discussion that may or, I’m sure it will come up in the future but I think the time now is to move forward”\textsuperscript{568}—Mayor Lehman, as the \textit{Press-Citizen} reported, executed a “switch from his position” on January 8 “when he voted against the partial ban and said a more total ban would be more acceptable.”\textsuperscript{569} (Lehman apparently did not believe that this tergiversational display had forever shredded his credibility on this issue: in January 2004, when, in the wake of judicial invalidation of the Ames and Iowa City ordinances, two legislators filed yet another bill to repeal preemption of local control of smoking, he purported to support it and predicted that its passage would be followed by another effort to ban smoking in Iowa City. He nevertheless added a caveat that, if the situation ever came to pass, it would furnish him with yet another pretext for equivocation: “‘But I feel it should be a statewide thing. That would be better for cities so they don’t have to make laws that conflict with each other.’” In case readers had not intuited the subtext, the newspaper inserted the competitive business context always uppermost in Lehman’s mind: “Coralville has not implemented a smoking ban or pursued the possibility.”\textsuperscript{570}

As the March 1, 2002 starting date of the Iowa City ban approached, many owners were busy “making changes that will enable them to get around the new law....” One of the live music establishments, for example, magnanimously conferred a twofold public health benefit on customers and workers by “promoting more alcohol specials on weeknights to draw in the alcohol consuming bar crowd,” and thus also insuring them uninterrupted access to secondhand smoke. Competitors whose lopsided alcohol sales already qualified them for an exemption without having to make menu changes did not appreciate the additions to the yes-smoking list. The owner of one well-known restaurant/bar lamented this promotion of alcohol, “‘which we have spent four

\textsuperscript{567}Transcription of Iowa City Council Special Work Session at 32 (Jan. 22, 2002). Wilburn was present, but spoke only once (and even then only very briefly) during the entire hour-long session. \textit{Id.} at 24. The minutes incorrectly stated that “[t]here were not four people to amend the smoking ordinance for a zero smoking tolerance in restaurants.” [Iowa City] Council Work Session, Jan. 22, 2002, [Minutes] at 3 (Jan. 30, 2002). In fact, there were not even four votes to discuss such an amendment.

\textsuperscript{568}Transcription of Iowa City Council Special Work Session at 32 (Jan. 22, 2002).


years telling people not to do.'" No wonder that she declared: ""I don’t like the ordinance.""571

By the day the ban went into effect, 44 of 90 establishments licensed to serve alcohol had requested full or temporary exemptions, leaving 56 smoke-free.572 Within a few days seven more last-minute requests for exemptions were filed, in part by bars that did not even serve food and merely wanted an official piece of paper that they could post demonstrating to customers that they lawfully permitted smoking.573 (Conversely, the co-owner and employees of one restaurant posted a sign apologizing for the radical improvement in indoor air quality: "Effective March 1 smoking will no longer be permitted on our premises. We didn’t make this decision. The City Council did.")574 At this point, the total impact of the ordinance, according to CAFE, was the conversion of only about 20 formerly smoking-permitted restaurants to newly smoke-free status. Despite the fact that the law increased the number of “smoke-free dining options” by only about 25 percent and left at least 50 restaurants and bars still lawfully permitting smoking, CAFE spun the change as “huge.”575

The District Court Finds No State Preemption

“The people of Iowa have been unenthusiastic about significant anti-smoking


572 Sara Langenberg, “Restaurant Smoking Rules Go into Effect,” ICP-C, Mar. 1, 2002 (1A) (NewsBank). According to this source 10 of 44 were temporary exemptions, but later it was determined that during the ordinance’s first year of operation 17 of about 50 exemptions had been granted on a temporary basis for one year. By the first anniversary of the ordinance (Mar. 1, 2003), seven of the 17 were granted permanent exemptions, seven failed to file the requisite affidavits to retain the exemptions, and three had additional time to file. Brian Sharp, “City Smoking Law Marks 1 Year,” ICP-C, Mar. 1, 2003 (3A) (NewsBank); Vanessa Miller, “I Expect It to Destroy the Bar Business at Mondo’s and Micky’s,” ICP-C, Mar. 4, 2003 (1A) (NewsBank).


574 Sara Langenberg, “Restaurant Smoking Rules Go into Effect,” ICP-C, Mar. 1, 2002 (1A) (NewsBank)

575 Sara Langenberg, “City’s Smoke-Free List Changes,” ICP-C, Mar. 9, 2002 (1A) (NewsBank) (quoting CAFE spokesperson Eileen Fisher). According to CAFE, 85 eating establishments were smoke-free after the ordinance went into effect.
On February 13, 2002, plaintiffs having withdrawn their claim for a permanent injunction, Judge Baker issued his ruling denying plaintiffs’ motion for summary judgment, declaring both that the ordinance was neither preempted by nor inconsistent, irreconcilable, or in conflict with chapter 142B of the Iowa Code and that the City of Ames had not exceeded its constitutional or statutory home rule authority, and dismissing the case. Judge Baker’s opinion—unlike the Supreme Court’s ruling 15 months later—was a sophisticated and fine-grained effort to come to grips with the complex interaction of preemption and home rule in the context of a particular statute embedded in a particular set of public policies against the background of considerable Iowa Supreme Court precedent derived from adjudicating the same conflict arising from other statutes resting on other public policies.

Baker began the relevant part of his analysis by dealing with plaintiffs’ claim that Ames’s home rule power was preempted by state law in the form of the clean indoor air act itself:

Enforcement of this chapter shall be implemented in an equitable manner throughout the state. For the purpose of equitable and uniform implementation, application, and enforcement of state and local laws and regulations, the provisions of this chapter shall supersede any local law or regulation which is inconsistent with or conflicts with the provisions of this chapter.

Plaintiffs argued that this paragraph “must be read to mean that” the law “imposes a mandatory statewide standard of smoking prohibitions which is not subject to local variation”; they further contended that with this language the legislature “expressed its intention to preempt this area of controlling smoking in public places from local regulation....” The city’s interpretation was diametrically opposite: Ames argued that this paragraph was “an express declaration by the legislature that local ordinances are permissible as long as they are not inconsistent with or in conflict with the state law, reinforcing statutory and

constitutional home rule authority.” Moreover, if the legislature had intended to prohibit cities from regulating smoking in public places, “it would have clearly said so.”

To begin with, Baker correctly rejected out of hand Philip Morris’s claim that the 1990 amendment was a statement of express preemption of local regulation: on the contrary, not only did it “not specifically prohibit local action in the area of regulating smoking in public places,” it in fact recognized “the potential existence of ‘local laws and regulations’ referring to their ‘implementation, application and enforcement’ as well as the consequences of inconsistency with state law.” In order to contrast this provision with an example of real express preemption, Baker cited a statute held by the Iowa Supreme Court to prohibit local action: “In order to provide for the uniform application of the provisions of sections 725.1 to 725.10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of these sections, and no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances or regulations, whether enacted before or after said sections, shall be or become void, unenforceable, and of no effect upon July 1, 1974.” In the face of such sheer unambiguity, the Supreme Court had no choice but to rule that the “legislature flatly stated its intention that the only regulation of obscene material be by state law and then, in unmistakably clear terms, barred local legislation on the subject.” Baker then forcefully pointed out that, since section 142B.6 neither confined smoking regulation to state law nor specified that smoking bans could not be the subject of local action, no express preemption existed.

Having dismissed the claim of express preemption, Judge Baker turned to a lengthy analysis of the two variants of implied preemption: (1) subject-wide preemption was present when the legislature covered a subject with statutes so as to demonstrate its intention to preempt the field; and (2) conflict preemption

583 Chelsea Theater Corp. v. City of Burlington, 258 NW2d 372, 373 (Iowa 1977) (citing Iowa Code § 725.9 (1974)).
resulted when an ordinance conflicted with a statute such that the ordinance prohibited an act that a statute permitted or permitted an act that a statute prohibited.\textsuperscript{585}

Plaintiffs’ contention that the legislature’s comprehensive legislation in the area of tobacco products, tobacco taxes, and smoking demonstrated its preemptive intent was undermined by the Supreme Court’s ruling that mere “extensive regulation of an area is not sufficient in the absence of a clear expression of legislative intent to preempt regulation of a field by local authorities, or a clear expression of the legislature’s desire to have uniform standards statewide.” Indeed, the Supreme Court required a “high degree of expression” of such an intention as a prerequisite of finding subject-wide preemption.\textsuperscript{586} In seeking to determine whether that requisite “high degree of expression” was present in the 1990 amendment, Baker stressed that, unlike statutes in some other cases, section 142B.6 “does not forbid local authorities from enacting law in the field regulated by chapter 142B,” and the “definite language” that the legislature used in precluding local regulation of obscene materials was distinctly absent. Moreover, the amendment failed to state specifically and definitely that the legislature intended the chapter’s provisions “to be uniform statewide standards without room for variation among local jurisdictions.” It neither ruled out local power to regulate in the same area nor “carve[d] out specific defined areas of permissible local regulation.” Of crucial significance was the fact that the phrase providing that inconsistent local ordinances would be superseded by the statute not only did not eliminate local power to adopt consistent and non-conflicting ordinances, but contemplated their existence; and since the Code itself defined such inconsistency as irreconcilability, Baker concluded that section 142B.6 lacked the “high degree of expression” required to find that the legislature intended to preempt the field of smoking bans in public places.\textsuperscript{587}

Ironically, in rejecting Philip Morris’s claim that the provision added in 1990 terminated any authority that cities might have possessed before then to regulate smoking, Baker’s conclusion (in response to plaintiffs’ request that the court consider the legislative history) that the amendment “does not place any


\textsuperscript{586}Goodell v. Humboldt County, 575 NW2d 486, 499-500 (Iowa 1998).

\textsuperscript{587}James Enterprises, Inc. v. City of Ames, Iowa, Equity No. EQ-CV040013, slip op. at 15-17 (Iowa Dist. Ct. for Story Cty, Feb. 13, 2002).
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

restriction on local governments in addition to that already in place through the home rule statute\textsuperscript{588} precisely echoed the belittling criticism voiced by the Tobacco Institute as it and other cigarette industry personnel were drafting and commenting on the preemption proposals that ultimately became the provision over which a decade later Philip Morris was litigating: “Iowa constitution already says this....”\textsuperscript{589} Baker carried this reasoning to its logical conclusion in such a rigorous manner as to render plaintiffs’ whole case empty of any substance. Pointing out that the amendment was placed in the same section (headed “Civil penalty for violation—uniform application”) with and below paragraphs dealing with enforcement, fines, and hearings, he detected a strong suggestion that the legislature intended merely to make the enforcement mechanisms uniform statewide; consequently, the amendment’s only impact was to prohibit cities from adopting ordinances imposing different fines or providing for hearings before an official other than a judicial magistrate. Then in response to plaintiffs’ claim that the legislature intended that all of the chapter’s provisions be applied uniformly statewide, Baker observed that the legislature had to be presumed to know that, pursuant to the Code, cities had the power to adopt higher or more stringent standards “unless a state law provides otherwise.” Since the “clear import of the statutory home rule provisions includes the concept that a city ordinance which is more stringent than a corresponding statute is ‘not inconsistent with a state law,’ [t]he statute must unambiguously place restrictions on the power of cities to enact higher standards.... If this is not done, the cities’ home rule authority is intact. ...The language employed in section 142B.6 does not impose such limitations.”\textsuperscript{590}

With respect to conflict-preemption, the central interpretive problem with

\textsuperscript{588}James Enterprises, Inc. v. City of Ames, Iowa, Equity No. EQ-CV040013, slip op. at 18 (Iowa Dist. Ct. for Story Cty, Feb. 13, 2002).

\textsuperscript{589}Diana Avedon to Melinda Sidak (Feb. 13, 1990), Bates No. TI00301634/6. See above ch. 27. Unbeknownst to him, the Ames city attorney made a very similar argument in his appellate brief: the amendment was merely “an express declaration that local ordinances in this field are valid so long as the ordinance is not inconsistent with or in conflict with the provisions of Chapter 142B....” James Enterprises, Inc. v. City of Ames, 661 NW2d 150 (Iowa 2003), Defendant/Appellee’s Brief and Argument at 8, 2002 WL 33808796. Later Klaus opined that the basis of the Supreme Court’s opinion may have been the rule of statutory construction that a legislature cannot be presumed to have meant nothing by an amendment; consequently, the 1990 amendment cannot merely have repeated the constitutional and statutory home rule provisions. Telephone interview with John Klaus, Ames (Oct. 5, 2008).

which Judge Baker had to deal derived from tensions within the general principles of the legislature’s grant of home rule powers. The Iowa Code specifies, on the one hand, that an “exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law,” and, on the other, that a “city...may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.” The “tension,” as the Iowa Supreme Court had observed, was that “[a]ny distinction between a local ordinance that is inconsistent with state law and one that merely sets a higher standard or requirement is at best subtle.” Thus the Supreme Court had no trouble determining that “[w]hen a state law merely sets a standard, a local law setting a higher standard would not conflict with the state law and would be authorized”—so long as it did not prohibit what the statute permitted.

Baker, it seems, believed that he was dispensed from having to untangle this interpretive knot because, after mentioning two cases in which the Supreme Court had held that an ordinance’s higher standards failed to pass muster by virtue of unfaithfulness to the overall legislative scheme without drawing any concrete conclusions for the Ames case, he immediately moved on to the other prong of the city’s defense: “In addition to powers inherent in its home rule authority, the City of Ames relies on section 142B.2(2) for statutory authority to enact stricter prohibitory standards than those provided in Chapter 142B.” That crucial subsection provided that: “Smoking areas may be designated by persons having custody or control of public places, except in places in which smoking is prohibited by the fire marshall or by other law, ordinance, or regulation.” In other words, and later in detail, Baker acknowledged that only the presence of this provision saved the ordinance because otherwise its more stringent requirement would doom it on the grounds that it prohibited some act that the statute permitted (namely, designating smoking areas).

The parties disagreed sharply over the meaning of “other law, ordinance, or regulation.” Whereas the city argued that any ordinance that prohibited smoking in a public place fell within the scope of the phrase, Philip Morris insisted on a much narrower interpretation that excluded ordinances designed to control

592 Iowa Code § 364.3(3) (2001 and 2009).
secondhand smoke for public health reasons and confined the scope exclusively to fire safety measures based on a canon of statutory construction according to which general words following an enumeration of specific words describing a legal subject comprehend only objects similar to those enumerated by the specific words. The fatal flaw in this argument Judge Baker identified in the missing element of ambiguity: since the “plain meaning” of the crucial word “other” was “different or distinct from that already mentioned; additional, or further,” and therefore the phrase meant any ordinance different from or in addition to whatever came before it (namely, a fire marshal’s prohibition), it appeared to mean what it plainly said and thus application of the special rule of statutory construction was not even needed. As examples of such other laws, ordinances, or regulations banning smoking Baker listed those governing the capitol complex buildings, correctional facilities, Iowa Communications Network classrooms, child care facilities, home food establishments, substance abuse treatment programs, salons and cosmetics schools, facilities managed by the State Historical Society, and courtrooms. He refused to accept plaintiffs’ claim that the legislature meant to preempt the relevant agencies’ power to curtail the designation of smoking areas.  

Reactions to Baker’s decision were predictable. Council member Cross was, given the attorney general’s earlier opinion, not surprised. Far from being even the weak ban’s strongest advocate, Cross was nevertheless pleased “with the outcome because ‘[i]t is possible for those who don’t smoke to enjoy themselves and still allow smokers’ their rights—it just defines the times they can do it.’” Reacting to Judge Baker’s decision, Ames Tobacco Task Force co-chair Andrew Goedeken exclaimed a tad prematurely: “‘Big tobacco bit the dust.’” Incomprehensibly, in light of the feckless statewide law, the high school senior went on to characterize the ruling as “‘really speak[ing] volumes to the orientation of Iowa laws,’” which were “‘conducive to protecting public health.’”

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The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

The Latest Is the Greatest: The Iowa Supreme Court Reverses

Champion/ [Y]et we’re saying it’s okay to smoke in bars the waitresses and waiters in restaurants should be protected but people who work in bars should not be. ... Pfab/ Well that’s, maybe that’s the next move.
Champion/ Well I don’t know, how do you decide who your [sic] going to protect? Pfab/ Well they used to smoke in airplanes too but they don’t anymore.... Champion/ Well they shouldn’t.
Pfab/ Well but they did for a long time, it was legal, this is legal too.600

On May 7, 2003, about 10 weeks after having heard oral argument—at which Justice James Carter “questioned whether the word ‘ordinance’ related to the Ames smoking ban” and (ominously) added that “[i]t might not justify banning smoking because the ’statute says state laws will supersede local laws”601— the Iowa Supreme Court unanimously reversed Judge Baker’s judgment.602 (Astonishingly, no amicus briefs had been filed: neither the attorney general, nor Iowa City, nor any of the health organizations, nor CAFE had sought to become a friend of the court, although they all understood that the Iowa City ordinance was also at risk.)603 The very brief opinion failed to engage Baker’s thoughtful


601 Scott Rank, “Iowa High Court Reviews Ames Smoking Ordinance,” ISD, Feb. 24, 2003, on http://www.iowastatedaily.com (visited Sept. 27, 2008). Oral argument took place at Drake University Law School. Klaus, according to another press account, argued that “designated smoking areas can exist only where cities don’t ban smoking.”


603 http://www.iowacourts.state.ia.us/ESAWebApp/AIndexFrm (visited Oct. 20, 2008). Belitsos “was surprised by the lack of support. Our city attorney stood alone. An amicus brief would have been appreciated.” Email from George Belitsos to Marc Linder (Oct. 28, 2008). As late as May 2001 Attorney General Miller had reiterated at a conference on clean indoor air that “‘State law does not pre-empt Iowa City and Coralville from enacting ordinances that expand state protections.... We stand ready to work with any municipality.’” Kathryn Ratliff, “Smoke-Free Leader Lauds CAFE,” ICP-C, May 25, 2001 (3A) (NewsBank) (erroneously dated Aug. 25). Asked later why the attorney general had not filed an amicus brief, the executive officer of the Iowa Attorney General’s office stated that: “Our office did provide substantial assistance to the City of Ames in preparing

3196
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

its brief. Our attorney who worked on that matter recalls that our opinion was cited in the city’s brief.” Asked again, he replied: “I think we felt at the time that the work we were doing with Ames was sufficient to make our views known to the court.” Email from William Roach to Marc Linder (Oct. 29, 2008). In fact, the attorney general opinion was not mentioned in the city’s main brief—or the plaintiffs’ briefs or the court’s opinion—which was only about seven pages and of poor quality. Steve St. Clair, who had written the attorney general’s opinion and felt fairly confident that the Supreme Court would affirm the district court’s sound decision, stated that one important reason for not filing an amicus brief was the fear that it might have stamped the Attorney General’s Office as partisan; in this sense the hope had been that the opinion’s mere existence would be more helpful. Telephone interview with Steve St. Clair, Des Moines (Oct. 30, 2008).

Nevertheless, the undergraduate jurisprudences editing the University of Iowa’s student newspaper allowed as the Supreme Court justices, “[t]o their credit...correctly interpreted the law.” The editors, to their credit, recognized that “[u]nfortunately, the law itself is a mistake.” “Save Iowa City’s Smoking Ban by Contacting Legislators,” DI, May 12, 2003, on http://www.dailyiowan.com (visited Oct. 11, 2008).


“Plaintiffs’/Appellants’ Brief and Argument at 9, James Enterprises, Inc. v. City of Ames, 661 NW2d 150, 151 (Iowa 2003), 2002 WL 33808797. The Court did not expressly adopt plaintiffs’ absurd conclusion that the Ames ordinance “seeks to deprive the Hospitality Providers from [sic] what they have been historically able to do...accommodate both smokers and non-smokers...” Id. at 10.

On the morning of the day of the Iowa City City Council’s first consideration of the ordinance the Iowa City Press-Citizen opened its op-ed column to the Iowa Hospitality Association’s regurgitation of the cigarette oligopoly’s accommodationist nonsense on to which the IHA tacked the mendacious assertion that the Ames ordinance “completely” banned smoking in restaurants. Doni DeNucci, “Ban Would Hurt Restaurants,” ICP-C, Nov. 27, 2001 (9A:3-7) (also in Jessica Dumpert (Philip Morris Media Affairs), Newedge
The Court began its analysis by asserting that “[c]learly, the provision in the ordinance of the city that prohibits designated smoking areas conflicts with the provisions of section 142B.2, which allows such designation.” It then asserted its conviction that (the 1990 amendment of) section 142B.6 “supersedes the conflicting provisions of the city ordinance.” How or why section 142B.2(2), which expressly permitted ordinances to prohibit both smoking and the designation of smoking areas, conflicted with an ordinance that prohibited such designations the Court failed to explain in its rush to unveil the deus ex machina of “settled rules of interpretation,” resort to which in order to resolve a conflict between “provisions of different statutes relating to the same subject matter” was its responsibility. Thus shifting the focus from the conflict between statute and ordinance to that between statutes or between provisions within the same statute, it found such resolution in the Iowa Code’s chapter on construction of statutes, consultation of which prompted it to conclude that

the language of section 142B.6 should curtail any grant of local authority that may be supplied by section 142B.2(2) for two reasons. First, that section comes later in the chapter and purports to govern everything in the chapter that comes before it. Second, it appears that section 142B.2(2) was enacted in 1987, and section 142B.6 was enacted in 1990. Iowa Code section 4.8 provides:

If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails.

608 James Enterprises, Inc. v. City of Ames, 661 NW2d 150, 153 (Iowa 2003). An analysis of decisions dealing with preemption of local anti-smoking ordinances concluded that the Iowa case was one of only two in which the “court based its decision solely on express preemption; this was probably because where state statutes clearly prohibit action, local governments do not act.” Jean O’Connor et al., “Preemption of Local Smoke-Free Air Ordinances: The Implications of Judicial Opinions for Meeting National Health Objectives,” Journal of Law, Medicine & Ethics 36(2):403-12 at 405 (Summer 2008).

Because section 142B.6 is the later enactment, its provisions should govern over any conflicting language in section 142B.2.\textsuperscript{610}

Although the Court had failed to demonstrate a conflict, let alone irreconcilability—and, as the Court later held, “to be ‘irreconcilable,’ the conflict must be unresolvable short of choosing one enactment over the other”\textsuperscript{611}—between the two sections, it was, at least to its own satisfaction, justified in stamping Q.E.D. on its reasoning.\textsuperscript{612} Ames City Attorney John Klaus drew some solace from attributing the Court’s crabbed opinion to its annoyance with the legislature for having written the statute ambiguously: not having wanted this political hot potato, the justices threw it right back at the legislature.\textsuperscript{613}

\textbf{The Legislative History of the Statutory Amendment Prohibiting the Designation of Smoking Areas in Places in which Smoking Was Already Prohibited by “the Fire Marshall or by Other Law, Ordinance, or Regulation”}

Bizarrely, given the crucial role of the ambiguous section 142B.2(2), neither the Iowa Supreme Court, nor Judge Baker, nor the parties in their briefs made any effort whatsoever to examine its legislative history.\textsuperscript{614} This lapse was all the more

\textsuperscript{610}James Enterprises, Inc. v. City of Ames, 661 NW2d 150, 154 (Iowa 2003).

\textsuperscript{611}City of Davenport v. Seymour, 755 NW2d 533, 541 (Iowa 2008).

\textsuperscript{612}Although the outcome would not have changed, the Court, misled by its shoddy research, applied the wrong statutory construction rule from the code. Since the provisions allegedly in conflict were both amendments (enacted in 1987 and 1990), the Court should have applied Iowa Code § 4.11 (2001): “If amendments to the same statute are enacted at...different sessions of the general assembly, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment by the general assembly prevails.”

\textsuperscript{613}Telephone interview with John Klaus, Ames (May 23, 2008). In contrast, Assistant Attorney General Donald Stanley, who for many years has been involved in various aspects of tobacco litigation, observed that Klaus’s incompetence at oral argument, especially his inability to answer even the justices’ easy questions, may have shaped the case’s outcome. Telephone interview with Donald Stanley, Des Moines (May 19, 2008).

\textsuperscript{614}Asked why he had not briefed the question of the legislative history, Philip Morris’s lawyer responded that he had felt that he had a strong enough case based on the text of the statute, vis-à-vis which the Iowa Supreme Court did not give much weight to what individual legislators may have said about what they meant by various amendments. To
surprising and unforgivable on the part of the Supreme Court, which, after all, fancied itself such a stickler for faithfully following the Code’s rules of statutory construction, one of which expressly provided that: “If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters... 2. The circumstances under which the statute was enacted. 3. The legislative history. ... 5. The consequences of a particular construction.”

A review of the provision’s history, which originated in 1975 and assumed its final form in 1987, reveals that Philip Morris’s contention that inclusion of the fire marshal demonstrated that the following reference to “other law, ordinance, or regulation” meant that the latter three were limited to fire safety was untenable. The first Iowa anti-smoking bill to use closely related phrasing was S.F. 106, which, when it was originally filed on February 4, 1975, was very brief and prohibited smoking in a few identified types of public buildings (such as museums, libraries, and theaters), but permitted those in custody or control of them to designate smoking areas. The much more comprehensive amended version that the Senate Human Resources Committee recommended and that appeared in the Journal of the Senate on March 12 as S-3313 limited the power of those in charge of the buildings to designate smoking areas by providing that they “may make available smoking areas adjacent to such facilities within the same structure where smoking is not prohibited by any statute, ordinance or lawful rule of this state or any of its political subdivisions....” The amended bill also added a prohibition on smoking on various common carriers, “except in those areas, not exceeding fifty percent of the passenger seating capacity, where smoking is not prohibited by any other statute, ordinance or lawful rule of the United States, this state or any of its political subdivisions....” Although an
exhaustive analysis of the committee’s action is frustrated by the fact that the original committee amendment that the Legislative Service Bureau had prepared during the first week in March and from which the committee was working at its meeting on March 11 was not preserved in the Iowa State Archives, the minutes make it unambiguously clear that the reference to ordinances did not mean orders of the fire marshal. This conclusion follows from the fact that liberal Republican Senator John S. Murray—who was concerned that those in charge of local buildings not permit smoking in places which the fire marshal had deemed fire hazardous—asked about fire marshal regulations and was informed they would still be in effect. In other words, even though they were not mentioned in the committee amendment, the legal force of any smoking prohibitions issued by fire marshals would be unaffected by the bill; logically, then, the statutes, ordinances, and lawful rules newly included in the committee amendment did not embrace fire marshal regulations.

The source of this language is not documented, but it seems likely, given the Minnesota statute’s impact, as the first broad public smoking ban, on anti-
smoking legislation in the mid-1970s in the United States generally and in Iowa in particular\textsuperscript{625} that the wording derived from a Minnesota bill that had been introduced by Phyllis Kahn on January 20, 1975, passed the House on March 10,\textsuperscript{626} was signed by the governor on June 2, and went into effect on August 1: “Smoking areas may be designated by proprietors or other persons in charge of public places, except in places where smoking is prohibited by the fire marshall or by other law, ordinance or regulation.”\textsuperscript{627} (Fire marshals’ ordinances banning

\textsuperscript{625}See above chs. 24-25.


\textsuperscript{627}Minnesota House of Representatives, H.F. No. 79, § 4 (Jan. 20, 1975, by Kahn et al.). The wording of the provision in the enacted law was identical except that “in which” was substituted for “where.” 1975 Minn. Laws ch. 211, § 5, at 633, 634. A similar bill that Kahn had introduced in 1974 and that had also included a provision on designating smoking areas lacked the exception for areas in which smoking was otherwise prohibited. Minnesota House of Representatives, H.F. 2801, § 2(3) (introduced Jan. 16, 1974, by Kahn et al.). This language in the Minnesota statute, which lacked the putative pre-emption provision, was held by the attorney general opinion and a district court not to pre-empt local government action to ban smoking. Minn Op. AG 62B (May 4, 2000), on http://www.ag.state.mn.us/resources/opinions/050400.htm (visited Apr. 12, 2009); Earl C. Hill Bloomington Post 550 v City of Bloomington, Order and Memorandum Denying Plaintiffs’ Motion for Temporary Injunction at 7-8 (Minn. D.C. 4th Jud. Dist., Hennepin Cty, Ct. File No. 05-3733, Mar. 25, 2005), on http://tobaccolawcenter.org/breaking+news/Order+Denying+Temporary+Injunction.pdf (visited Apr. 12, 2009). However, an administrative law judge, without substantive interpretation, ruled that a proposed regulation by the Health Department to ban smoking in office buildings except in private enclosed offices and lunchrooms/lounges and thus to prohibit owners from designating smoking areas elsewhere despite the discretion that the legislature otherwise conferred on owners to do so went beyond the statute and the agency’s statutory authority, although the proposed rule’s effect “is laudable, is supported by public opinion, represents the majority view of the advisory group and is based upon present day knowledge of second hand smoke.” State of Minnesota, Office of Administrative Hearings for the Minnesota Department of Health, In the Matter of Proposed Permanent Rules of the Minnesota Department of Health Relating to Clean Indoor Air: Report of the Administrative Law Judge, Finding of Fact 29.a (1-0900-8678-1, Aug. 2, 1994), on http://www.oah.state.mn.us/aljBase/09008678.rr1.htm. The ALJ reached the same conclusion concerning a proposed rule to ban smoking in all customer areas of retail stores despite the fact that the rule was “supported by the evidence and by most retailers.” \textit{Id.}, Finding of Fact 35.d. The question as to why the statutory provision authorizing owners’ discretion to be overridden by “regulation” did not apply to a regulation proposed to be promulgated by an agency required to “adopt rules and regulations necessary and reasonable to implement the provisions” of the act in question the ALJ neither raised nor answered. 1975 Minn. Laws
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

This identical Minnesota language then appeared in H.F. 1130 filed in January 1976 by Representative Jim Wells. That bill saw no action, but in 1976 the Senate took up S.F. 106, which, as ultimately passed by the Senate on March 3, 1976, included a provision that, as had been the case in 1975, lacked a reference to the fire marshal: “The person or persons authorized to designate smoking areas...shall not designate any area where smoking is prohibited by any other statute, ordinance, or lawful rule of the United States, this state, or any of its political subdivisions.”

The House did not consider S.F. 106, but in 1977 Wells filed H.F. 285, which was virtually identical with S.F. 106, reproduced the latter’s provision authorizing the override of discretionary designation of smoking areas, and did not refer to the fire marshal as had his H.F. 1130. After numerous unsuccessful efforts at joining Minnesota and a growing number of states by passing an anti-public smoking law, in 1978 the Iowa legislature finally passed such a bill, which from the time of its filing until its appearance in the session laws included a provision with the same language as S.F. 106: “The person or persons authorized to designate smoking areas...shall not so designate an area where smoking is prohibited by any other statute, ordinance, or lawful rule of the United States, this state, or any of its political subdivisions.”

So the law remained until the 1980s after Democrats had gained control of both houses of the legislature. As early as 1983, the chief vehicle for extending coverage was H.F. 248, further-going provisions of which were taken from the 1975 Minnesota law, including the almost verbatim adoption of the anti-
preemption provision: “Smoking areas may be designated by persons having custody or control of public places, except in places where smoking is prohibited by the fire marshal or by other law, ordinance or regulation.”634 From this point forward until the statute was finally amended in 1987, inclusion of the reference to the fire marshal was invariant in all versions of the chief legislation.635 That language then remained in the Iowa Code until the statute was repealed in 2008.636

Thus the most straightforward reason for its inclusion in the Iowa statute was, as was the case with regard to some other provisions, simply that it was in the model-like Minnesota statute. It might also be plausible to speculate that the fire marshal was specified because of concern that continued omission might lead to the permissibility of the designation of fire-hazardous areas as smoking areas as a result of some overblown fear of state preemption. However, not only is there no indication that this issue was ever raised during debate, but the House Journal and Senate Journal have left no trace of any discussion at all of this provision. What is not plausible is Philip Morris’’s claim during the Ames litigation that “other law, ordinance or regulation” referred back to the fire marshal. This assertion lacked plausibility precisely because the fire marshal’s smoking prohibition had been added to the already existing “other law, ordinance or regulation,” which no one would have had any reason prior to that time to imagine as referring exclusively to fire hazards.

The Ames and Iowa City Ordinances as the First and Last Hurrah of Local Control in Iowa

“I think we made history when we did that [i.e., passed the ordinance]. We helped to get things started at the state level.”637

I think as we get used to clean air, we get increasingly annoyed by going out and having to walk through clouds of smoke. You might say that well, legislatting against, um, unpleasantness is just (mumbled) but I’d also say that public urination is not a health risk. It’s just unpleasant, and we don’t allow that. When you consider smoking, it’s not far

636 Iowa Code § 142B.2(2).
By the time the Supreme Court invalidated it, the Ames ordinance had been in effect for 21 months during which not a single citation had been issued for noncompliance at any of the 135 restaurants and (food-serving) bars.\textsuperscript{639} Consequently, post-mortem comments by the legally vanquished in Ames were dejectedly realistic, but in no way fatalistic. While recognizing that “Philip Morris has won its appeal to the Iowa Supreme Court” and a “major battle,” the co-chairmen of the ATTF presciently predicted that “[o]ne day in the not-too-distant future, all restaurants will be 100 percent free of cigarette smoke along with all public places.”\textsuperscript{640} In the meantime, however, Belitsos was acutely aware that “Iowa appears to be defying a national trend.”\textsuperscript{641} Quirmbach, who by this time was a state senator and may therefore have developed a certain pessimism about the possibilities of repealing the preemption of local control in the Iowa Senate as controlled by the tobacco-friendly Republicans in general and especially under the heavily smoking Majority Leader Stewart Iverson,\textsuperscript{642} bewailed the Supreme Court’s having taken Iowa “‘back at least 20 years’” and “‘strongly urge[d] all restaurants in Ames to continue with voluntary compliance.’”\textsuperscript{643}

\textsuperscript{638} Transcription of Special Formal Iowa City City Council Meeting at 14 (Apr. 27, 2010), on http://www.iowa-city.org/weblink/docview.aspx?id=962325 (statement by CAFE member Chris Squier concerning proposed ordinance to extend outdoor smoking ban on pedestrian mall).

\textsuperscript{639} Http://www.tobaccotaskforce.org/history.html (visited Sept. 26, 2008). This record was, to be sure, ambiguous: it could have resulted from excellent compliance or nonexistent enforcement.


\textsuperscript{641} David Grebe, “Smoking Ban Snuffed Out,” \textit{Tribune} (Ames), May 7, 2003 (1A:2-5, at A8:5)

\textsuperscript{642} See above chs. 31-32.

\textsuperscript{643} David Grebe, “Smoking Ban Snuffed Out,” \textit{Tribune} (Ames), May 7, 2003 (1A:2-5, at A8:4-5). The reference to 20 years was presumably purely for rhetorical effect and did not signify any actual state of the law at any particular time. Since no city had attempted to adopt a no-smoking ordinance before the preemption provision was added in 1990 (or between 1990 and 2000), it is not clear how the legal situation could have been worse than it had been before 1990 when restaurants were incorporated into the statewide law as a quid pro quo for preemption. In contrast, some cities (including Ames) had prohibited smoking in certain city-owned buildings (such as city hall), exercising a power that any property owner had prior to and independently of the statewide clean indoor air law. In
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

In contrast, in Iowa City CAFE leaders, simply “‘maddened’” by the Supreme Court decision, saw no way out of the predicament that Philip Morris’s money had forged for the strategy that local control advocates had hoped would enable them to sidestep the cigarette companies’ overwhelming financial advantages: it would be “difficult for a grassroots group like CAFE to battle tobacco lobbyists at the Statehouse” because of their clients’ “‘hold on legislators.’” In the meantime, the group would have to focus on education in such areas as encouraging voluntary smoking bans, keeping school grounds smoke-free, and insuring that parents not smoke in their children’s presence, and terminate its efforts to request other cities (such as the college town of Grinnell, whose city council had been considering adoption of a clean indoor air ordinance to adopt bans.

For the Ames Tribune, which had supported the ordinance because it was based on a compromise between the restaurant owners and the anti-smokers, but otherwise held “basic reservations about the extent to which government ought to regulate private people making their own choices,” the predicament forced on Ames by the Supreme Court’s making the allegedly free market determine public health outcomes was perfect:

We don’t like to suck down someone else’s cigarette smoke any more than anyone. But the ideal situation would be for customer demands to dictate whether smoking is allowed. And that’s exactly what the Ames Tobacco Task Force is calling for now that the ordinance is struck down. The task force would like businesses to voluntarily continue the smoking ban. And it is urging customers to vote with their feet on where they choose to

some instances city employees’ unions contested these bans on the grounds that the city governments or agencies had failed to bargain collectively with the unions before implementing them. The Tobacco Institute was, for example, monitoring developments in Waterloo. Legislative Action-Trac (June 17, 1993), Bates No. T128922786. See also Chauffeurs, Teamsters and Helpers, Local Union No. 738 and Communications Workers of American Local 7175 v. City of Waterloo, Iowa, Case No. 4954 (Public Employment Relations Board, Dec. 2, 1994); Ottumwa Education Association v. Ottumwa Community School District, Case No. 4510 (Public Employment Relations Board, May 27, 1992).


645In Grinnell a community forum had been held and 1,300 signatures collected in support of an ordinance. The Iowa Attorney General’s Report on Secondhand Smoke 17 (May 2003), on http://www.iowaattorneygeneral.gov/images/pdfs/WebReport Versionsmoke.pdf (visited June 7, 2009).

Unlike the *Tribune*, Attorney General Tom Miller did not seek to make a virtue of a necessity. Instead, he immediately declared that the Court’s decision had made it “imperative” for the legislature to amend the state law to enable communities to pass ordinances protecting “Iowans’ right to breathe clean air.” Apparently still focused on local control and not yet ready to make the leap to the kind of statewide laws that he mentioned as having been passed in California, New York, and Delaware, Miller stressed that Iowa was now one of only 16 states preempting local secondhand smoke ordinances and thus making it impossible for its cities to join the 1,605 communities nationwide that had already adopted them. Bill Roach, the attorney general’s spokesman, insisted that “the ruling puts pressure on the legislature to act to ensure that Iowans can breathe clean air.” Although he did not expect the issue to be considered during the legislative special session in May, he “fully expect[ed] the issue to go on the legislature’s agenda in 2004.” To be sure, with the tobacco industry-beholden Republicans fully in control of both houses of the legislature, Roach’s expectation was, as he himself surely knew, a pious wish. Nevertheless, Senator Quirmbach announced that the Mary Greeley Medical Center, Tobacco Free Iowa, and other organizations would support efforts to educate the legislature about the need to amend the clean indoor air law’s preemption provision in order to restore Ames’s smoke-free dining ordinance.

The press, too, understood that all that the Supreme Court had accomplished was probably “toss[ing] the controversial issue into the hands of state lawmakers.” Republican House Speaker Christopher Rants certainly agreed:

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647 “We Haven’t Seen the Last of Fight Against Smoking,” *Tribune* (Ames), May 8, 2003 (A6:1) (edit.).


650 Likewise, Iowa City’s Senator, Joe Bolkcom, must have understood that his call for the legislature to confer power on local government to promulgate rules to regulate clean indoor air would, under the prevailing political arithmetic, fall on Majority Leader Iverson’s tobacco money-deafened ears. Vanessa Miller, “Court Strikes Down Ames Smoking Ban,” *ICP-C*, May 8, 2003 (1A) (NewsBank).

“...The debate’s all going to shift from city halls to the State Capitol.... What the outcome will be, I have no idea. I guarantee bills will be filed.”652 To be sure, Rants, a rigid free-marketeer who was also an energetic executor of the tobacco industry’s agenda, was being more than a tad disingenuous about the future of anti-tobacco legislation: he had already been using his power to kill anti-smoking bills and would continue to do so until his party lost its majority in 2006.653

Ironically, the reaction of at least one of the Ames plaintiffs would not have pleased Philip Morris. Rick Carmer, co-owner of Wallaby’s and Dublin Bay, said that he would “not change much right away” because “I think people have gotten used to it.... I don’t think the ordinance is without merit.” Although he favored business owners’ making the decision, he stated that he would not be opposed to strengthening statewide anti-smoking laws because they would create a “level playing field.”654 Indeed, Carmer complied with the invalidated ordinance until the statewide law was enacted in 2008—of which he approved because people were looking for “a little clean air.”655 The fact that Carmer and owners of eight other establishments continued to act as if the ordinance were still in effect (while many more restaurants remained or became 100-percent smoke-free)656 was, in ATTF’s view, a function of the cultural change that had taken root in Ames expressing and reinforcing many residents’ increasingly deep-seated demand to be free of cigarette smoke.657 (In Iowa City, too, some restaurant owners chose to remain voluntarily smoke-free, while others immediately resumed smoking in order to “accommodate our guests’ requests.”)658 Or, as Rich Johansen, one of the owner-negotiators, who continued to comply with the ordinance, put it more opaquely: many people had “changed their eating habits.”659 Another plaintiff, who was going to allow smoking only so long as no one was eating, had allegedly

653See above ch. 31.
655Telephone interview with Rick Carmer, Ames (Oct. 5, 2008). It is unclear whether Carmer was subtly and ironically referring to the consequences of the red light/green light rule on indoor air quality.
joined the suit “just” because of “the principle.”

Carmer’s self-contradictory attitude was also compatible with some restaurant owners’ behavior before the city council: they had, according to Quirmbach, wanted the council to adopt an ordinance so that they would not personally have to make the decision (and be exposed to some smoking customers’ displeasure). Another plaintiff, non-smoking Dirk Rozeboom, who “hate[d] having to come home, change my clothes and take a shower” after exposure to the smoke in his own business, five years later not only favored the statewide ban as it was going through the legislature, but knew that its implementation would not cause him to lose business.

Three days after the Supreme Court issued its opinion the Des Moines Register published an editorial objecting not to the court’s action—but to yet another example of the state legislature’s steadily reasserting its control over cities after the 1968 Municipal Home Rule Amendment to the state constitution had “supposedly released Iowa cities and towns from the iron grip of state control.” After admonishing the legislature to “back off and allow communities to decide for themselves whether they want to impose a stricter standard on smoking than the state,” the newspaper added that whether cities should in fact exercise that power was a “tougher question.” That the Register, just five years before the legislature itself imposed a much broader statewide ban than the Ames activists had ever dreamed of, not only answered its own question in the negative, but did so on the basis of anachronistic laissez-faire, would reveal how quickly nationwide trends would be engulfing Iowa:

Should they ban the use of a legal product in establishments that customers are free to patronize or shun?

The question is complicated by the plight of the hapless employee exposed to the health risk associated with secondhand smoke while waiting tables or tending bar. Civil suits and workers’ compensation actions are a better tool to deal with that issue, however,


661 Carmer unpersuasively claimed that he had become a plaintiff not on account of the substance of the ordinance, but because he had been dissatisfied with the process leading to its adoption. Telephone interview with Rick Carmer, Ames (Oct. 5, 2008).

662 Telephone interview with Herman Quirmbach, Ames (Apr. 19, 2008).


664 “Let Cities Ban Smoking (or Not),” DMR, May 10, 2003 (12A) (NewsBank) (edit.).
than a total ban on smoking.

Otherwise, this issue should be resolved in the marketplace. As long as people are free to choose to smoke, private entrepreneurs should be free to invite smokers into their establishments along with non-smokers who are willing to tolerate the odor—at the risk of driving away those customers who insist on clean air.\textsuperscript{665}

That as late as 2003 this beacon of heartland liberalism deemed permitting the free labor market to bestow emphysema, lung cancer, and heart disease on workers, who (or whose families) could then seek monetary compensation for their irreversibly destroyed health (or death) to be better social and public health policy than simply eliminating the exposure to secondhand smoke at the source was a profound sign of the times. Whether the editorial writer was embarrassed that five years later such comments were being publicly voiced only by self-interested bar owners, their right-wing legislative ideologues, and the cigarette companies is less clear.

On May 13, at the first city council meeting after the ordinance had been struck down,\textsuperscript{666} State Senator Quirmbach requested that the council resist rescinding the ordinance on the grounds that if the legislature statutorily eliminated the preemption obstacle, the ordinance would then become enforceable. Belitsos echoed this view, adding that the Iowa City City Council would also be asked to leave its ban-ordinance on the books.\textsuperscript{667} Belitsos also shared the results of an ATTF survey showing that 87 restaurants—including two whose owners had been plaintiffs—indicated that they would voluntarily continue to comply, while only seven would allow the resumption of smoking as would all the bars in Ames. Belitsos shed bright light on owners’ cigarette industry-induced false predictions of impending doom by pointing out that during the two years since adoption of the ordinance Ames had recorded a net increase of eight restaurants, suggesting a boom for the hospitality industry.\textsuperscript{668} (In a similar vein, council member Goodhue later reported his belief that “most if not all of the owners complied with the ordinance after it was repealed because they had such positive customer feedback and in many cases, their business increased.”)\textsuperscript{669} After several other speakers had urged the council to leave the ordinance on the books, Mayor

\textsuperscript{665}“Let Cities Ban Smoking (or Not),” \textit{DMR}, May 10, 2003 (12A) (NewsBank).
\textsuperscript{667}Minutes of the Regular Meeting of the Ames City Council at 9-10 (May 13, 2003) (copy furnished electronically by City Clerk Diane Voss).
\textsuperscript{668}Minutes of the Regular Meeting of the Ames City Council at 10 (May 13, 2003) (copy furnished electronically by City Clerk Diane Voss).
\textsuperscript{669}Email from Steve Goodhue to Marc Linder (Oct. 13, 2008).
Tedesco had opined that retaining an unenforceable ordinance “would be a disservice to the citizens of Ames,” and City Attorney Klaus had expressed the belief that the ordinance should be repealed even though the Supreme Court’s order did not require repeal, (new) council member Riad Mahayni, a professor of community planning, related that many residents and non-residents had asked him not to vote for repeal and that the city historian had told him that he believed that the city’s code of ordinances included other unenforced ordinances. In opposition to repeal, ex-member Quirmbach mentioned that a large number of people concerned about the issue would be working hard to bring it to the top of the legislature’s agenda, although he admitted that he did not know what its priorities would be in 2004. After council member Hoffman had stated that she saw no harm in leaving the ordinance on the books, the motion to pass on first reading an ordinance to repeal the no-smoking ordinance failed by a vote of 3 to 3; of the four members remaining from 2001, the two bankers, Cross and Goodhue voted for, while Hoffman and Wirth opposed the motion. Nevertheless, the council did vote unanimously to request that the state legislature empower local governments to make decisions on smoking in public places. 670

For all its belittlement of the Ames ordinance, the Iowa City City Council lacked the gumption to retain its own ordinance on the books. As soon as the Court struck down the former, the city attorney announced that she would recommend the latter’s repeal. 671 The Iowa City Press-Citizen begged to differ: appealing to the Ames action, it argued that “sometimes one may not be legal, but they [sic] may be morally right. In the same spirit, Iowa City councilors also should resist rescinding its ordinance and instead ask for local businesses to voluntarily comply with the law.” And as for those who asserted that not repealing the ordinance was tantamount to “defacing the Iowa Constitution,” they were “primarily smoking ban opponents who see political expedience in forcing municipalities to go through the process of passing another ban later.” 672 CAFE may have gnashed its teeth at having to emulate Ames, 673 but council member Wilburn praised for his well-spokenness on this topic by businessman-mayor

Lehman, considerately thought of the potential confusion that retention of the ordinance might cause a business or people looking to move to Iowa City to operate a business. The council, insisting to the very end on distinguishing itself from any Ames-like taint, responded to the city attorney’s request for expedited action and quickly voted unanimously to repeal its ordinance.

Thoroughly consistent with this hasty disposal of the Iowa City City Council’s narrowly approved anti-smoking ban was its failure to undertake any other initiative to reduce exposure to secondhand smoke that would not have been barred by legislative preemption. For example, just a few months after repeal, council member Kanner made a mild-mannered request for the city to moderate the extent of the smoke gauntlet (formed in part by the four smoking city council members, who, in addition, threw their cigarette butts on the ground) that people were forced to endure on the city’s own land on their way into and out of the Civic Center (city hall), “which is the headquarters of our democracy. People should be able to come without hostile barriers:

A number of, of organizations and business, mostly non-profit organizations have enacted no smoking within 20 feet of the entranceway. For myself, and I think a number of people, it’s hard to go through smoke on the way to the entrance. The library has a sign, hospitals do, and I was wondering if we could ask that the Civic Center which is quite a public place and we want to be as open and as accessible as possible, if we can consider putting up some signs and asking people not to smoke within 20 feet of the entranceway.

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675 Transcript of Iowa City City Council Meeting at 17 (June 10, 2003), on http://www.icgov.org/transcriptions/193.pdf.
676 Complete Description of the Council Activities at 5 (June 10, 2003), on http://www.icgov.org/minutes/193.pdf (by a vote of 7 to 0). On the day that the Supreme Court issued its opinion, Johnson County Attorney J. Patrick White predicted that if the Iowa City City Council did not repeal the ordinance, “some local retailer will go to court and win quickly.” Minutes of the Informal Meeting of the Johnson County Board of Supervisors at 2 (May 7, 2003), on http://www.johnson-county.com/auditor/min2003/030507ws.htm (visited Oct. 23, 2008). That no one filed such a suit in Ames was a function of owners’ having accepted the partial ban.
677 Telephone interview with Steven Kanner, Cleveland, OH (Nov. 14, 2008); telephone interview with Karen Kubby, Iowa City (Nov. 17, 2008). Kubby, a (quondam) socialist who had been on the city council from 1989 to 2000, mentioned that during council breaks, sometimes the four-person smoking majority—Dee Vanderhoef was a sometime smoker—“met” outside.
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

... I just stepped it off, it does give you the front porch and so that gives you some room to come in from different angles at least so you don’t have to go through the smoke.679

Three members having expressed interest in talking about it, the mayor decided that it would be put on a work session agenda.680 The Press-Citizen quickly mocked the timidity:

[O]ur council is discussing posting signs, near City Hall entrances, that nicely tell smokers to step away from the door before lighting up.

Considering the overwhelming evidence of smoking’s dangers, the council ought to get tough. How about approving an ordinance banning smoking within 100 feet of a city-owned building’s entrance? ... Friendly signs at City Hall are better than no action, but a stricter policy with some serious fines—say $100 for a first offense and $200 for a second and each subsequent offense—would go a lot further in curbing such smoking.

Ticketing smokers may sound harsh, but short of hitting their pocketbooks through fines, what else can a municipality do to help them end an addiction that for almost half a century has been known to cause fatalities?681

The not so gentle press criticism manifestly failed to achieve its purpose: for many months the question was listed on the agenda as a future work session item, but it was never discussed and the city council never even bothered to exercise the power it indisputably possessed to ban smoking at the entrance to its own building until after the state legislature passed the Smokefree Air Act in 2008.682 Revealingly, when asked about the issue in 2006, the then city manager Steve Atkins purported to support a smoking ban near entrances to city-owned buildings, but wondered aloud what kind of ordinances a city council with three smokers on it would pass.683 (In contrast, as early as 2006 the Johnson County

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680Transcription of the Iowa City City Council Meeting at 41 (Oct. 14, 2003).
682Email between Marc Linder and Marian Karr, Iowa City City Clerk (Oct. 27, 2008).
683Telephone interview with Steve Atkins (Sept. 15, 2006). To be sure, Atkins may in part have been using his indirect criticism of the council as a pretext to justify his own inaction: he not only incoherently mentioned the ban on smoking at the entrance to city hall as a solution to the problem of cigarette butt litter blocks away in downtown Iowa City, but seemed confused about what a “causal relationship” was when asked to explain what one had to do with the other. Id. Ironically, Kanner himself, while proposing the same ban, refused to consider enforcement of the city’s litter ordinance to reduce the
Board of Supervisors unanimously approved a resolution prohibiting smoking and use of smokeless tobacco within 50 feet of all county building entrances and exits—the most restrictive tobacco use policy in Iowa at the time, though not far-reaching enough for at least one supervisor. The council and city manager provided an unambiguous answer when they refused for almost eight months even to post the signs required by the 2008 Smokefree Air Act at the very place about which Kanner had complained five years earlier—and when the city government, finally abandoning its unlawful intransigence, did post signs at the entrance (which failed to put anyone on notice as to where exactly smoking was prohibited), it did so only because, in response to a formal complaint about the city’s violation of the new state law, the Iowa Department of Public Health had issued a First Notice of Potential Violation and rejected City Attorney Dilkes’s risible attempt to deny liability on the basis that a tiny no-smoking sign on the building entrance—which was barely legible a few feet away—sufficed to make the city compliant with regard to the statutory duty to post signage at the entrance to the no-smoking grounds 41.6 feet away.

immense piles of butts all over the sidewalks on the grounds that he did not want to “hassle folks downtown.” Telephone interview with Steven Kanner, Iowa City (ca. 2003). During a brief period in 2001 the Iowa City police, “based on concerns from the business community,” “dusted off a rarely used littering law” to ticket people throwing cigarette butts on the pedestrian mall. Sara Langenberg, “Police Use Litter Law on Smokers,” ICP-C, Apr. 7, 2001. A few years later it was estimated that in downtown Des Moines workers spent 6,000 hours a year picking up cigarette butts. Melissa Walker, “D.M. Leaders Ready to Kick Butts,” DMR, June 12, 2007, on http://www.desmoinesregister.com.


\[685\] Eleanor Dilkes to Bonnie Mapes (director, Division of Tobacco Use Prevention and Control) (Feb. 4, 2009); Bonnie Mapes to Eleanor Dilkes (Feb. 12, 2009); email from Marc Linder to Bonnie Mapes (Feb. 24, 2009). Dilkes revealed that the city’s stonewalling was part of a larger agenda: “[T]he real issue is not one sign at the front of City Hall. If the City is required to sign this area, then presumably I should direct City staff to place signs at the entrances to the grounds of all City buildings and in particular at every point that the sidewalk leading to a City building intersects with the sidewalk in the public right-of-way and at the entrance to every parking lot to all public buildings.” In a last-ditch, but unsuccessful, effort to convince IDPH not to enforce the law’s protection of nonsmokers, Dilkes limned this parade of horribles: “My point is...to highlight how requiring the City to post one sign has the potential to require school districts, municipalities, counties, and the State to place thousands of signs on the grounds of every public building, at the entrances to all parking lots connected to a public building, at the entrances to all parking lots connected to a public building,
On April 14, 2008, the day before the governor signed the statewide smoking ban bill, in the course of council discussion of city property smoking policies, Mayor Regenia Bailey expressed concern about people’s having to walk through smoke to get into smoke-free restaurants—an outcome that she (erroneously) did not think was the legislature’s intent—and was contradicted by member Champion, who insisted that her observations in Chicago and San Francisco revealed no such congregation of smokers around doors to restaurants. This cosmopolitan intelligence prompted a surprised Bailey, who was apparently unaware of the council’s prehistory of inaction and whose colleague had conveniently either lost touch with or refrained from invoking her own institutional memory, to interject: “I see people congregating outside this building that smoke.” To be sure, the mayor did not want her new-found interest in the subject to be misunderstood: “I mean, I’ve been known to enjoy a cigarette or cigar. I mean, I’m not a zealot about smoking, I just think that we need to balance the interests, and we recognize the challenges of second-hand smoke, and that particularly we don’t want kids around it.” That the mayor qua Iowa City’s political figure-head and civic role model (presumably unreflectively) paired publicly and unembarrassedly trumpeting her enjoyment of smoking two kinds of tobacco (one of which was atypical for teenage females) with solicitude for children was eerily akin to tobacco companies’ traditional stance. Yet later she knew enough to say that banning smoking in a pedestrian mall playground was “not just an air-quality issue; it’s an example issue.” Exactly which

and at the intersections between sidewalks leading to public buildings and sidewalks in the public right-of-way.” Eleanor Dilkes to Bonnie Mapes (Feb. 4, 2009). To be sure, presumably Dilkes assumed that such arguments would prevail because a few months earlier they had in fact induced Mapes to amend the proposed rules to implement the Smokefree Air Act with regard to the prohibition of smoking on the public sidewalk in front of the city hall. See below ch. 36.

686 In fact, the legislature struck such outdoor no-smoking zones from the bill in order to pass the bill. See below ch. 35.

687 Transcription of Iowa City City Council Special Work Session at 8 (Apr. 14, 2008), on http://www.icgov.org/transcriptions/590.pdf.

688 Transcription of Iowa City City Council Special Work Session at 5 (Apr. 14, 2008).

689 Chris Ratigan, “City May Further Limit Smoking in Public Places,” ICP-C, Aug. 22, 2008, on http://www.press-citizen.com (visited Aug. 22, 2008). Despite the playground’s alleged exemplary status, after the city had banned smoking there as part of a ban covering City plaza, it nevertheless refused to post any no-smoking signs at the playground or anywhere in the plaza itself. Instead, it posted some signs at some (but not even all) of the entry points to the plaza, several of which were not even visible to people entering the plaza—with the unsurprising result that smoking continued unabated.
“interests” Bailey intended to “balance” against protecting the vast majority of residents who did not smoke from what she belittled as the mere “challenges” of lethal exposure to secondhand smoke she saw no need to divulge, but the council’s actions would soon speak loudly enough.

In the event, Bailey’s factual dispute with Champion prompted member Mike Wright to inquire into the possibility of actually doing something, whereas Bailey was apparently prepared to continue acquiescing in the “challenges of second-hand smoke” that she had merely mentioned. (Or perhaps, in the alternative, because she did not believe that a critical mass of protection-deserving children used city hall, she instinctively leaned toward relegating mere adults to self-help in dealing with the “challenges.”) Resurrecting (unknowingly) Kanner’s five-year-old unanswered dormant question, Wright asked: “Could we move it away from the entrances of City buildings?” When his colleague Amy Correia also expressed interest in such a step, City Attorney Dilkes intervened to warn the council that she had to figure out whether “I think you can do anything more than what the State law says.” After Correia had insisted in disbelief that surely “we

throughout the plaza. Many months later, after the city manager had been fired (presumably not for his belligerent refusals to post meaningful signs), the interim city manager perpetuated the tradition of refusal to act and deference to the city attorney’s opinion that the existing signs complied with (non-existent legal) requirements; novel were his erroneous claims of the presence of non-existent signs and his excuse of the need to balance “visual pollution” and smoke pollution. [City of Iowa City], Ordinance No. 08-4314: Ordinance Amending Title 6, Entitled “Public Health and Safety,” to Declare Additional Areas as Nonsmoking Places,” § I (1)(Q) (Sept. 9, 2008); email from Marc Linder to Amy Correia, Ross Wilburn, and Mike Wright Iowa City City Council members) (Dec. 13, 2008); email between Marc Linder and Michael Lombardo (Iowa City city manager) (Dec. 16, 2008); email between Marc Linder and Terry Robinson (Parks Department superintendent) (Jan. 7, 2009); email between Marc Linder and Michael Lombardo (Jan. 8, 2009); email between Marc Linder and Dale Helling and telephone interview with Dale Helling, Iowa City (Aug. 4, 2009). Only after lobbying by the businesses represented in the Downtown Association, animated by the desire to enhance “the aesthetic appeal of downtown” by ridding it of countless cigarette butts—an aesthetic mission conjoined with ridding it also of panhandlers—did the council extend the smoking ban to the whole city-owned pedestrian mall. Transcription of Special Formal Iowa City City Council Meeting at 13 (Apr. 27, 2010), on http://www.iowa-city.org/weblink/docview.aspx?id=962325 (statement by Nick Arnold of Downtown Association) (quote). The council unanimously adopted Ordinance 10-4393; Iowa City, City Council Minutes, Regular Formal Meeting (June 1, 2010), on http://www.icgov/votingresults/804.pdf. It was codified in the Iowa City City Code at § 6-10-1 (C&D), on http://www.sterlingcodifiers.com/codebook/index.php?book_id=320.

690Transcription of Iowa City City Council Special Work Session at 8 (Apr. 14, 2008).
would have the ability to say, I mean, other public, other governments have said, ‘No smoking within 20 feet of a public building,’” thus signaling that, after five years of malignant neglect of the health of non-smoking employees and users of city hall, some council members had finally woken up to the existence of a problem and a solution, Dilkes offered them a that-was-then-this-is-now admonition: “[T]hat was prior to when the State law chose to legislate on a state level, as opposed to giving municipalities the right to do that.... They’re now into...legislating about public buildings.... So I think the whole issue has kind of changed.”

Ironically, the city attorney was seemingly so intent on leaving the council with the impression that it might have been deprived of its chance to ban smoking around the doors to city hall, that she failed to inform the members that in fact the new state statute achieved the result that Kanner, Wright, and Correia desired by expressly prohibiting smoking on the “grounds of any public buildings....”

Indeed, the city attorney well knew that the city’s power to ban smoking outdoors went far beyond the grounds of public buildings. For example, on June 23, in reaction to O’Donnell’s false claim that “you clearly cannot ban [smoking in a] right-of-way,” Dilkes expressly clarified that “I think you do have the right to prohibit it in the right-of-way, but that would be a designation by you. It’s not prohibited by the statute.” In other words, by virtue of the city’s ownership of all public sidewalks (“because we have control of your right-of-ways”), the city had—and had always had—the power to ban smoking on those sidewalks.

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691 Transcription of Iowa City City Council Special Work Session at 9 (Apr. 14, 2008).
693 Transcription of Iowa City City Council Special Work Session Meeting at 23 (June 23, 2008), on http://www.icgov.org/transcriptions/620.pdf. The city attorney stated more generally that she agreed that the city had authority to ban smoking on city-owned land that was not the grounds of a public building. Email from Eleanor Dilkes to Marc Linder (Aug. 25, 2008).
694 Transcription of Iowa City City Council Special Work Session Meeting at 35 (June 23, 2008).
695 Tiana Epps-Johnson, Richard Jones, and Stanton Glantz, The Stars Aligned over the Cornfields: Tobacco Industry Political Influence and Tobacco Policy Making in Iowa 1897-2009, at 131 (2009), on http://repositories.cdlib.org/ctcre/tcpmus/IA2009/, fundamentally misunderstood the reach of preemption when they asserted that it “barred localities from passing clean indoor air laws in indoor places, but did not prohibit passing laws that made outdoor environments smokefree.” Like any property owner, cities were (and are) empowered to ban smoking on any and all of their properties whether indoor or outdoor. Similarly wrongheaded was their assertion that once SAA had repealed preemption, Iowa City became free to prohibit smoking in outdoor public places. Id. at
Acknowledging and availing itself of this power, the city council audaciously prohibited smoking for three hours a year on sidewalks in front of private profit-making downtown stores “along the parade route of the University of Iowa Homecoming parade....” Even after a member of the public had explained to the city council that the city was violating the Smokefree Air Act by permitting smoking on the sidewalk in front of city hall, but also pointed out that the statute was irrelevant in the sense that the city already had “the power to ban smoking on every [public] sidewalk,” the mayor declined to address the subject and referred the speaker to the city attorney. Asked that same day why she had not advised the city council that it could ban smoking on that sidewalk by virtue of its ownership of that and all other public sidewalks, Dilkes replied that she had not because “to date it is not one of the areas they have expressed an interest in regulating.” A week before the Smokefree Air Act went into effect in 2008 the Iowa City city attorney informed the council that Ames had banned smoking in all of its city parks, but the Iowa City council chose to institute a ban only in a few parks and

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174. In fact, it had always possessed that authority. The authors also failed to reflect on the possible constraints still impinging on local government action as a result of the fact that while SAA may have repealed the statutory preemption clause enacted in 1990, because the legislature had stripped it of the local control provision contained in the bill as introduced, it was still subject to the pertinent constitutional and codified home rule provisions.

696 [City of Iowa City], Ordinance No. 08-4314: Ordinance Amending Title 6, Entitled “Public Health and Safety,” to Declare Additional Areas as Nonsmoking Places,” § I (1)(Q) (Sept. 9, 2008).

697 Transcription of the Iowa City City Council Special Formal Meeting at 53-54 (Aug. 26, 2008) (statement by Marc Linder), on http://www.icgov.org/transcriptions/641.pdf. In early June the city attorney issued a memorandum asserting that smoking was permitted on the sidewalk in front of city hall because “[t]he sidewalk is right-of-way, and right-of-way is not the grounds of a public building.” Eleanor Dilkes, City Attorney, to City Council, Re: Smokefree Air Act n.p. [4] (June 5, 2008). On IDPH’s rule defining “grounds of any public building” on which smoking was banned as including “an outdoor area of a public building used in connection with the building, included but not limited to a sidewalk immediately adjacent to the building,” and the changes that IDPH made in connection with the dispute in Iowa City, see below ch. 36.

698 Email from Marc Linder to Eleanor Dilkes (Aug. 26, 2008) and email from Eleanor Dilkes to Marc Linder (Aug. 27, 2008).

699 Transcription of Iowa City City Council Special Work Session Meeting at 20 (June 23, 2008). To be sure, the ban was a park rule not written into the city code. Transcription of Iowa City City Council Special Work Session Meeting at 31 (Aug. 25, 2008), on http://www.icgov.org/transcriptions/638.pdf.
then almost exclusively in areas devoted to children’s playgrounds and youth sports areas. The Iowa City council also exhibited its halfhearted and even cavalier attitude toward secondhand smoke exposure with regard to the city-owned parking ramps. When the issue was first raised, smoker O’Donnell was so disgusted that he sputtered: “And the car exhaust is probably not harmful, I mean, you could...I mean, there’s cars running in there all the time, for Pete’s sake.” (In fact, smoky bars have much denser concentrations of cancer-causing particles than city streets polluted by heavy diesel bus and truck traffic emissions.) The other major smoker, Champion—whose principal “concern” about outdoor smoking regulation downtown was that “since I own a business on Dubuque Street...I think you’re going to shift the problem...in front of my business”—raised the parking ramp issue the next time at the request of fellow-smokers who wanted to know whether they would be permitted to smoke inside their cars. Unsurprisingly, she declared on their behalf that “I don’t object to somebody going to their car and having a cigarette,” prompting the sometime cigarette-, sometime cigar-smoking Mayor Bailey to chime in: “Right...you can’t smoke to [sic] the way to the car or on the way in, but you could go to your car for your break.” In his mildest-mannered way, Wilburn punctured his three

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700 Transcription of Iowa City City Council Special Work Session Meeting at 25 (Aug. 25, 2008); [City of Iowa City,] Ordinance No. 08-4314: Ordinance Amending Title 6, Entitled “Public Health and Safety,” to Declare Additional Areas as Nonsmoking Places,” sect. I (Sept. 9, 2008), codified at Iowa City, Iowa, City Code, § 6-10-1, on http://www.sterlingcodifiers.com/codebook/index.php?book_id=320. The Parks and Recreation Commission had “recommended that smoking not be prohibited in all parks at this time but will revisit the issue after the Act has been in place for a year or so.” Eleanor Dilkes, City Attorney, to City Council, Re: Ordinance Declaring Additional Non-Smoking Areas (Aug. 20, 2008), on http://www.iowa-city.org/weblink/docview.aspx?id=169931 at 221.

701 Transcription of Iowa City City Council Special Work Session Meeting at 32 (June 23, 2008).


704 Transcription of Iowa City City Council Special Work Session Meeting at 28 (Aug. 25, 2008).

705 Transcription of Iowa City City Council Special Work Session Meeting at 32 (Aug.
smoking colleagues’ solicitousness on behalf of their fellow-addicts: “I’m just kind of playing with scenarios that might happen, uh, I’m sitting in my car and I’ve got my windows rolled down.” Wilburn may have indirectly pointed out that the exemption for cars was irrational because, since few people would choose to smoke with the windows rolled up, the smoke would waft out into the ramp as surely as if someone were smoking outside the car in blatant violation of the ban, but his colleagues ignored his logic. Turning to the cigarette oligopoly’s playbook for repartee, O’Donnell allowed as if the car were running, “we all know that’s not harmful.” And councilor Amy Correia chose to ally herself with Champion, both finding that it was “a bit inconsistent” that “you can smoke in your car in the City parking lot here, but then you can’t smoke in your car in the City parking ramp....” This difference in rules between semi-enclosed ramps and wholly outdoor lots completely blinded them to the self-defeating contradiction of designating smoking areas in a supposedly smoke-free ramp. The next evening Wilburn renewed his objection to smoking in a vehicle in a ramp, but his colleagues, despite having been reminded by email of the illogic of their proposal, once again disregarded the objection, and Wilburn joined his colleagues in passing the ordinance unanimously.

The persistent and extensive guerrilla warfare against the regulation and prohibition of smoking and the sale of cigarettes in which the city council and administration of the City of Iowa City—which literally enjoys the reputation of being a freakish leftist enclave in the Iowa heartland—have engaged for many years underscores the risks inherent in the strategy of local control on which CAFE and various health groups relied to the detriment of the anti-smoking movement. These risks were magnified by CAFE’s rigid non-confrontationalism, which caused it to refrain from criticizing powerholders’ refusal to adopt policies and ordinances that would have conferred greater protection on nonsmokers in a

25, 2008).

706 Transcription of Iowa City City Council Special Work Session Meeting at 33 (Aug. 25, 2008).


708 Email from Marc Linder to Regenia Bailey, Amy Correia, Matt Hayek, Ross Wilburn, and Mike Wright (Aug. 25, 2008).

709 Transcription of Iowa City City Council Special Formal Meeting at 44 (Aug. 26, 2008).

710 On the city attorney’s lack of interest in bringing to the city council’s attention the legal arguments in support of the council’s power to deny cigarette sales permits to pharmacies, see email between Marc Linder and Eleanor Dilkes (Jan. 27, 30, 31, and Feb. 1, 2006).
display of gratitude for whatever minimal steps that, for example, the Iowa City City Council was willing to take. This accommodationist defeatism that celebrated every minor advance—which also embodied rejection of major advances—as a “first step”\(^{711}\) and the acquiescence in the city government’s subversion of the statewide law\(^{712}\) and its own ordinances may in part have been responsible for the perpetuation of the city’s across-the-board regressive stance on dealing with the leading public health hazard in the United States.\(^{713}\)

\(^{711}\) For example, instead of criticizing the council’s aforementioned irrational decision to ban smoking in city-owned parking ramps but nevertheless to permit smoking in the cars parked there even with the windows rolled down and of advocating deletion of this nonsensical exception, one of CAFE’s leaders present at the session, Eileen Fisher, welcomed it as a “first step.”

\(^{712}\) For example, at the same meeting at which the city council made the decision about smoking in parking ramps, another prominent CAFE member (and director of the Johnson County Public Health Department, Doug Beardsley) dogmatically remarked that nothing could be done about the city’s refusal to ban smoking on the sidewalk in front of city hall because the law was written that way. In fact, after a complaint was filed about the city’s action, the Iowa Department of Public Health had to amend its own rule in order to uphold the city’s action because it recognized that under the earlier (proposed) rule the opposite outcome was prescribed. See below ch. 36.

\(^{713}\) For example, as far back as 2004 the Sioux City City Council adopted an ordinance prohibiting smoking on public property abutting land within 20 feet of a health care facility (including a doctor’s office). Sioux City Municipal Code § 19.16.050, on http://www.sioux-city.org/codemaster/Title_19/16/0050.html (visited May 12, 2006). In contrast, when the University of Iowa, at the request of several professors (including the dean of the Public Health College and nationally well-known cancer researchers), approached the Iowa City government concerning the possibility of the city’s banning smoking on certain city sidewalks that run through the university campus (on which, pursuant to the Smokefree Air Act of 2008, smoking is entirely prohibited) but are not owned by the university and on which university employees and students smoke in such large numbers as to expose nonsmokers to dense smoke clouds, the city officials expressed no interest. Dean Sue Curry et al. to Pres. Sally Mason (Sept. 8, 2008); email from Mark Braun (chief of staff to Pres. Mason) to Marc Linder (Dec. 19, 2008). On the alacrity and intense energy with which the City of Iowa City fought what had been a mandatory ban on smoking on the sidewalk in front of city hall pursuant to the rules issued by the Iowa Department of Public Health implementing the Smokefree Air Act, see below ch. 36.
2007:
The First Democratic Legislative Majority and Governor in 42 Years Enact a One Dollar Cigarette Tax Increase—but Are Unable to Repeal Preemption of Local Control, Let Alone Enact a Statewide Public Smoking Ban

“[T]his is government tinkering with my livelihood.... Small business is already highly regulated by its customers....

“If government left it alone...in a few years, I think almost all restaurants and bars would be nonsmoking anyway.... That’s just where society is heading. I definitely see us going non-smoking down the road. But it should be our decision based on what our customers want.”

“We are not pro-smoking. We are pro-choice,” said Greg [sic; should be Craig] Walter, a lobbyist for the Iowa Restaurant Association.

Darin Beck,...chairman of the Iowa Restaurant Association, spoke with legislators...about...the smoking ban bill....

“We’re not pro-smoking or anti-smoking, we’re pro-business....”

Even in 2007, when, for the first time in 42 years, Democrats controlled both the legislative and executive branches, they were unable to forge a majority for direct smoking control legislation. The resurgent Democrats who regained control of both legislative chambers at the November 2006 elections for the first time since 1992 were hardly radicals. Their leadership included an anti-abortion House Speaker (Pat Murphy) and Senate President (Jack Kibbie), a business-friendly Senate Majority Leader (Mike Gronstal) whom “[b]usiness types
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

like...because he doesn’t believe profit is a four-letter word," and a House Majority Leader (Kevin McCarthy) who had run the brief Iowa presidential campaign of right-wing (not yet ex-) Democrat Joseph Lieberman. McCarthy’s declaration that they would “try to chart a centrist course” so as to govern “in the mainstream” sufficed to persuade the Des Moines Register’s chief political commentator that this “middle-of-the-road approach” would “drive the liberals nuts, but...could keep the Democrats in power for years.” The moderation that the party would be displaying was driven in part by the fact that the House leadership was fully aware that its “urban, left-of-center base” could not have gained a majority without the most recently added seats in the more conservative rural districts. Examples of the “balanced” approach the party would follow included not seeking to repeal the state ‘right-to-work’ (i.e., without joining the union that had organized the workplace) law and asking businesses what incentives they wanted in exchange for improved workers compensation benefits for workers. Even with regard to a cigarette tax increase, which the new Democratic governor wanted and the anti-smoking movement considered the most powerful tool for reducing smoking prevalence, Murphy and McCarthy were not sure it would “fly”: while many Democrats had favored such an increase two years earlier to balance the budget, growing tax revenues had prompted many caucus members to feel that no such tax increase was needed. Consequently, any successful push would have to be bipartisan because Democrats alone lacked the votes. Gronstal expected that the Senate would consider a cigarette tax increase, but its passage was a “tossup,” and, like Governor Chet Culver, he argued that the party viewed it “primarily as...a way to discourage teen smoking.”

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7Testimony of Sandra Quilty, director of government relations and lobbyist of the American Cancer Society at a Senate Health Subcommittee hearing (Jan. 31, 2007) (audio file furnished by Rusty Martin, communications director, Iowa Senate Democratic Research Staff).
Statewide Ban versus Local Control

Amadeo Rossi, who owns...a non-smoking bar in Des Moines [said]...“[s]moking indoors is just not reasonable.”

Welcome to the legislature. This is a sausage making process.

As Democrats surveyed legislative prospects during the interim between the elections and the convening of the General Assembly in January 2007, anti-smoking activists, who for years had been frustrated by the Republican leadership’s bottling up their bills in committee, certainly concurred in Gronstal’s judgment that “‘lots of things are possible now that weren’t possible before.’” To be sure, agreement on exactly what those things were would be more difficult to reach, especially when even militants advised caution, as Senator Herman Quirmbach, who had spearheaded the Ames local control ordinance in 2001, did in warning the members of the Tobacco Use Prevention and Control Commission not to grow overconfident: after all, bar owners and cigarette smokers voted too.

A particularly prickly issue arose in the anti-tobacco movement as to whether priority should be accorded repeal of the legislative preemption of local governments’ power to adopt ordinances stricter than the existing weak clean indoor air law (passage of which provision the cigarette oligopoly had secured in 1990) or enactment of a statewide ban on smoking in public places. Personally, Gronstal, like Governor Culver, favored the former, and anti-smoking health organizations echoed that opinion, though perhaps for a different reason: they feared that tobacco lobbyists would fill a statewide law with “exemptions and loopholes.” As Jane Miller, the American Lung Association of Iowa’s representative, put it: “‘If we don’t get it right, we will have a very crappy law on...”

14Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin, Communications Director, Iowa Senate Democratic Research Staff) (floor manager Herman Quirmbach’s closing remarks).
16See above ch. 33.
18See above ch. 27.
the books for a very long time.”

One of the leaders of Clean Air For Everyone—which had heard directly from Gronstal before the 2007 session began that “preemption would be overturned. The words he used were ‘Done Deal’”—was operating on the intelligence that there would be “[n]o change in the state law at this time except for doing away with preemption. There will be bills introduced for a new statewide law, but I don’t think they will go anywhere. Let’s hope not, because if they do they won’t be good and we won’t repeal preemption.”

More positively, CAFE’s lobbyist, Threase Harms Hassoun, self-confidently “‘guarantee[d]’” legislators that if preemption were repealed, “‘right out of the chute you would have 10 or 12 communities read to go.’” (How long it would take for the more than thousand other local governments in Iowa to pass ordinances in the continued absence of one statewide law she did not predict.)

The Iowa Tobacco Prevention Alliance, including the Lung-Heart-Cancer organizations—or the “anti-smoking crowd,” as Gronstal preferred calling it—developed an elaborate justification for what more plausibly could be regarded as an opportunistic preference for local ordinances as less amenable to the economic and political power that the cigarette manufacturers’ were able to deploy effectively at the more centralized federal and state levels. Envisioning the tobacco companies as rendered “suddenly powerless” in countless communities, the anti-tobacco health organizations did their best to make a virtue of a necessity by arguing that “[l]ocal control is at the heart of our broader goals of: 1) educating the public about the health effects caused by secondhand smoke and 2) changing attitudes and behavior of smokers in order to protect others from secondhand smoke. A powerful change process unfolds as a community debates the issue of secondhand smoke.”

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20 Email from Eileen Fisher to Marc Linder (Jan. 12, 2007) (stating that “[w]e spoke to Senator Gronstal [sic] 2 weeks ago”). To be sure, Fisher added: “However, I have also heard that some Republicans are asking our lobbyist, which do you want most— Tobacco Tax Increase or Local Control, you are not going to get both. The upshot is we cannot take anything for granted and need to keep up our grassroots support for Local Control.”

21 Email from Eileen Fisher to Marc Linder (Jan. 15, 2007).


23 CAFE was also a member. http://www.iowatpa.org/Default.aspx?pageId=320762

24 Telephone interview with Michael Gronstal, Council Bluffs (May 17, 2008).

25 American Cancer Society et al., “Why Local Control” (n.d.), on http://www.smokefreioawa.org/Doc/PDF/Why_Local_Control_06_25_07.pdf. This text appears to be taken from the website of Americans for Nonsmokers’ Rights (which also appears as
From a somewhat more nuanced perspective, Cedar Rapids Senate Democrat Rob Hogg described the local control law as “a pilot project, of sorts,” enabling local communities to “experiment with smoking restrictions”; then, in three or five years, the legislature could revisit a statewide ban. Even Representative Janet Petersen, who over many years had demonstrated her preference for a statewide law, was having both kinds of bills drafted, though she recognized that businesses were more likely to oppose local prohibitions because of their perception of an adverse impact on their ability to compete with firms in unregulated towns nearby. Whichever approach the legislature might adopt, the Iowa Restaurant Association made it absolutely clear that it opposed any government’s telling them how to run their business.

In January, IRA set forth its eight legislative priorities, including the statewide ban and preemption repeal, both of which it rejected absolutely (along with an increase in the minimum wage, which it preferred to call the starting or training wage since allegedly “[f]ew employees continue at the minimum wage after their training period is complete [sic]”). As it had for more than two decades, the Restaurant Association took the position that “[c]urrent state law is working, no change is necessary.” Conforming to Philip Morris’s accommodationist ideology from the 1980s, IRA dismissed the ban out of hand because “[o]perators with smoking customers must continue to accommodate

29 As late as 2008, when “Philip Morris USA understands and agrees that people should be able to avoid being around secondhand smoke, particularly in places where they must go, such as public buildings, public transportation and many areas in the workplace,” it still has not abandoned its efforts to retain as much space as possible for the consumption of its lethal commodities regardless of the impact on employees and nonsmoking customers: “In many indoor public places, reasonable ways exist to respect the comfort and choices of both non-smoking and smoking adults. Business owners—particularly owners of restaurants and bars—are most familiar with how to accommodate the needs of their patrons and should have the opportunity and flexibility to determine their own smoking policy. The public can then choose whether or not to frequent places where smoking is permitted.” http://www.philipmorrisusa.com/en/cms/Responsibility/Government_Relations/Public_Place_Smoking_Restrictions/default.aspx?src=1 (visited June 21, 2008).
them in a manner consistent with the wishes of their nonsmoking patrons. If operators cannot accommodate their customers’ preferences, business will be lost.” How restaurant owners could possibly “accommodate” nonsmokers’ “preference” for not being harmed by smokers’ preference to smoke the IRA did not explain any more than it justified its own preference for lives lost over business lost. That it did operate on the basis of such a priority was clear from its support for Iowa’s existing feckless law, which “allows hospitality business owners to accommodate their clientele as they choose.”

Local control was anathema to IRA because it would allegedly “cause confusion among business owners and their customers across the state.” Indeed, IRA regarded a local control regime in particular as a “nightmare” because, as its president, Doni DeNucci, contended, the balkanization would create unfair competitive conditions in adjoining jurisdictions: “The last thing we want to see is 900 different smoking ordinances.” Senate Democrat Matt McCoy, a militant anti-smoker from Des Moines, acknowledged this point, but had a much more cogent reason for favoring a statewide approach: for state legislators local control amounted to “simply passing the buck in a very heated debate for political purposes. ‘You can say you’re for a smoking ban without actually banning any smoking…. It’s a safer bet for some politicians. It shifts the burden of making the decision to the local governments.’” However, as a “pragmatist” he realized that “sometimes you just have to take the small victories,” and if local control was all that the General Assembly would pass, he was confident that at least in the Des Moines area the “progressive communities” would quickly adopt bans.

The comprehensive anti-public smoking bill of the 2007 session was House Study Bill 24, which was proposed on January 22 by Representative Janet Petersen as chairperson of the House Commerce Committee—a position that she had requested from leadership precisely so that she would be able to push the measure with maximum freedom and authority. H.S.B. 24 was virtually identical with the capacious but stillborn H.F. 2110, which she had filed in 2006. At the end of January, Petersen and Senator McCoy, who on January 23

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33 State of Iowa: Journal of the House: 2007, at 1:138 (Jan. 22). The study bill was recorded and assigned to the Commerce Committee on January 18. Id. at 1:24.
34 Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008).
35 For a detailed discussion of the bill, see above ch. 31. The main (but nevertheless trivial) change was the inclusion of a formal definition of “common area.” H.S.B. 24, §
filed S.F. 36, the companion bill, positioning their initiative as a workplace safety measure—‘‘accepting an increased risk of cancer should not be a condition of employment’’—declared that they felt that they had enough support from members finally to make smoke-free bars and restaurants a reality in Iowa. Even more support was visible outside the legislature: a smoking ban was, Petersen explained, ‘‘probably the most popular request I get from people of all ages.’’ Democrat David Jacoby, a member of the subcommittee studying Petersen’s H.S.B. 24, opined that ‘‘[o]ne positive view of the statewide ban is we’re not being wimps and passing it off to the local entities....’’ He and Petersen were ready to send it to the full Commerce Committee, and even Republican subcommittee member Steven Lukan favored the statewide ban, though he still needed to determine his caucus’s position. Nevertheless, their optimism manifestly failed to infect their colleagues: Petersen’s study bill, despite her committee and subcommittee chairpersonship, never even became a House File, while McCoy, after conceding that only six senators supported a statewide ban, saw S.F. 36 die in subcommittee. In spite of the Senate bill’s

2(1). In addition, the word ‘‘appropriate’’ was deleted from the enforcement provision requiring those in custody or control of a nosmoking area to ‘‘inform persons violating this chapter of the appropriate provisions of this chapter.’’ H.F. 2110, § 8(3) (2006) and H.S.B. 24, § 8(3) (2007).


41Petersen assigned the study bill to a subcommittee consisting of herself as chair, and Jacoby and Lukan. House Journal 2007, at 1:138 (Jan. 22). Inconsistently, according to the legislative website, the study bill was reassigned on Jan. 17 to T. Olson chair, Lukan, Petersen, Van Fossen, and Wise (citing House Journal 2007, at 65, which does not mention the bill). http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&key=0024H&GA=82.


swift demise, proponents, according to Senator Staci Appel (who in 2008 would floor manage a statewide bill to passage), had the votes for passage, but, knowing that the House could not pass it, chose not to go beyond local control.\textsuperscript{44}

In contrast, not all was quiet on the local preemption repeal front. At the end of January, the Register (presumably not by coincidence) released the results of an Iowa Poll showing overwhelming support for “allowing individual communities to decide whether or not to ban smoking in public places”: 75 percent (including 82 percent of nonsmokers and 43 percent of the 17 percent self-identified smokers) favored the proposal, while only 23 percent (including 50 percent of smokers and 17 percent of nonsmokers) opposed it.\textsuperscript{45} A number of such bills were filed, the chief ones being H.S.B. 89 and its identical companion, S.S.B. 1162.\textsuperscript{46} The very short study bills struck the preemption provision in the existing law, substituting for it a discretionary grant to cities, counties, and local health boards to adopt ordinances or rules to enforce “standards or requirements that are higher or more stringent than those imposed” under the public smoking statute. Non-exhaustively the study bills then specified that such ordinances/rules might: (1) limit or eliminate the exemptions in section 142B.2(1) for factories, warehouses, or similar workplaces not usually frequented by the public; (2) prohibit the designation of a smoking area; or (3) limit or eliminate the

\textsuperscript{44}Telephone interview with Staci Appel, Ackworth (Apr. 12, 2008). Majority Leader Gronstal also opined that in 2007 there had been close to enough votes to pass a statewide ban in the Senate. Telephone interview with Michael Gronstal, Council Bluffs (May 17, 2008).


\textsuperscript{46}H.F. 35 (Jan. 17, by Foege), \textit{House Journal 2007}, at 1:114 (referred to Local Government Committee), and H.F. 187 (Feb. 1, by Petersen et al.), \textit{House Journal 2007}, at 1:289 (referred to Local Government Committee), were textually identical to H.S.B. 89. Moreover, both were referred to the same committee and assigned to the same subcommittee as the study bill. \textit{House Journal 2007}, at 1:304, 307 (Feb. 1). Both expired in subcommittee. As to why multiple bills with identical content were filed, a former House Speaker noted that this common phenomenon resulted from legislators’ from wanting bragging rights to authorship of the bill or not realizing that colleagues had the same plans. Email from Don Avenson to Marc Linder (June 18, 2008).
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

exemptions in section 142B.2(2) relating to bars or public places consisting of a
single room. 47

The Senate study bill, which anti-smoking activist and Local Government
Committee chairperson Quirmbach assigned to a subcommittee of which he was
chair,48 saw action first. By this point a dozen or so cities (including Grinnell,
Mason City, Sioux City, and Waterloo) had expressed interest in adopting a ban
on smoking in some public places.49 After Majority Leader Gronstal had
expressed the opinion that local control would prevail,50 the study bill reemerged
as S.F. 23651 once the Local Government Committee on a virtually party-line vote
(9 to 3) approved it at its meeting on February 19, at which Attorney General
Tom Miller and Tobacco Use Prevention and Control Commission chair Dr.
David Carlyle spoke and answered questions.52 Republican Paul McKinley, one
of the three members to vote against the bill, was worried about whether the next
target of government’s “tendency to want to tinker in other people’s business”
would be trans fat and “‘what after that....’”53 Although the new version of the
bill expanded the specific provisions that local governments had discretion to
strengthen by adding posting of signs and civil penalties,54 at the same time it
limited the scope of local governments’ discretion by (1) removing local health
boards from the group of discretion-wielding bodies, and (2) dropping “but is not
limited to” from the capacious grant (“An ordinance...may specifically include

47 H.S.B. 89 (Jan. 29, 2007, by Local Government Committee Chairperson Gaskill),
Committee Chairperson Quirmbach), Senate Journal 2007, at 1:273.
48 Kreiman and Zaun were the other members. House Journal 2007, at 1:274 (Feb. 5).
49 Jonathan Roos, “Panel Backs Bill to Allow Limits on Smoking,” DMR, Feb. 20,
2007 (1A) (NewsBank).
51 S.F. 236 (Feb. 20, 2007, by Local Government Committee); Senate Journal 2007,
at 1:418 (Feb. 20).
52 [Senate] Committee Minutes for Local Government, Feb. 19, 2007 (copy furnished
by Senate Secretary Office); Senate Journal 2007, at 1:424 (Feb. 20). The only
Republican to vote for the bill was David Hartsuch, an emergency room physician (whose
conflicting medical and libertarian views on smoking would surface later). Senator Houser
was present but did not vote.
53 Jonathan Roos, “Panel Backs Bill to Allow Limits on Smoking,” DMR, Feb. 20,
2007 (1A) (NewsBank).
54 [Senate] Committee Minutes for Local Government, Feb. 19, 2007 (copy furnished
by Senate Secretary Office) (S.S.B. 1162, amendment 702 division B adopted
unanimously).
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

but is not limited to any of the following”). The committee also voted with only one Nay to amend the definition of “public place” in the clean indoor air act to exclude private residences unless they were used as child care facilities, child care homes, or health care provider locations. Within a few days of the introduction of S.F. 236, lobbyists for the Iowa Wholesale Distributors Association, the Cigar Association of America, Reynolds American, and the Iowa Restaurant Association declared against it.

The same day, February 19, House Local Government Committee chair Mary Gaskill confessed that: “It’s so divided, I’m not sure where we’re at... We’re struggling up here to get some answers, so we need to know what the people want.” House Majority Leader Kevin McCarthy’s “gut” told him that “local control would have more steam,” but his 53-member Democratic caucus had not yet discussed the issue.

Two days later the committee held a public hearing on H.S.B. 89 at which anti-smoking health organizations expressed a decided preference for local control over a statewide ban on the grounds that local ordinances were both easier to enforce and less vulnerable to “crippling exceptions that tobacco-industry lobbyists could try to insert in a statewide bill.” Cathy Callaway of the American Cancer Society, former head of the Public Health Department’s Tobacco Use Prevention and Control program, and president of the Iowa Tobacco Prevention Alliance rested her advocacy of local control on the experience that states with strong statewide bans had started off with local ordinances. The best that bar owners were able to come up with was the “nanny state” mantra, while Wes Ehrecke of the Iowa Gaming Association—who, ironically, “wears a yellow ‘LiveStrong’ bracelet, demonstrating support for anti-cancer forces”—regaled the committee with tales of how “Iowa casinos have invested in high-tech ventilation equipment that can leave inside air cleaner than outside air.” Dan Ramsey of the American Lung Association pointed out that while air-moving

57http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service=Dsp Report&ga=82&type=b&hbill=SF236
A few hours after the hearing, the House Local Government Committee was scheduled to discuss H.S.B. 89 at its meeting on February 21, but after both parties had caucused, Gaskill announced that the study bill "would not be considered. It most likely will be referred to another committee." Gaskill’s procedural move was prompted by the lack of votes needed to offer a clean bill resulting from the casino and legal-age-restricted bar amendments. House Minority Leader Christopher Rants interpreted Gaskill’s “unfair...’committee shopping’” as showing that she was afraid that Republicans’ amendments (including a statewide ban) would pass. Unfazed, Gaskill still expected the bill to make it to the debate floor from another committee. In the event, leadership having refused her request to refer the bill to another committee, she pressed forward under less than optimal circumstances.

Following this contretemps, the House Local Government Committee met to discuss H.S.B. 89 again on March 5. After the committee had passed the same amendments that its Senate counterpart had adopted, conservative Republican Representative and former state trooper David Tjepkes was recognized for amendment 502, of which he ultimately requested withdrawal. Since this amendment would have incorporated Petersen’s H.S.B. 24 in its entirety, Tjepkes—who in 2008 would vote against Petersen’s Smokefree Air Act three times—appeared to be an unlikely sponsor of a statewide ban on public smoking. When asked later why he had offered Petersen’s bill, Tjepkes stated that his purpose was to deal with the concern arising from the “great inequity” of different

62 [House] Committee Minutes for Local Government, Feb. 21, 2007 (copy furnished by Iowa House of Representatives Clerk’ Office).
64 Telephone interview with Mary Gaskill, Ottumwa (June 23, 2008).
rules applying to businesses in adjacent jurisdictions. But when asked further why, if uniformity of application was his goal, he had not simply voted against the study bill and thus attempted to preserve the existing statutory preemption, which already gave him everything he wanted, rather than going to the extreme of proposing Petersen’s statewide ban on smoking which, to boot, permitted local governments to adopt ordinances and regulations more restrictive than her bill’s provisions, Tjepkes was unable to articulate a reason—thus lending support to Roger Thomas’s and Gaskill’s explanation that Tjepkes was merely trying to kill the repeal of preemption of local control. A press report that “[s]ome committee members said the statewide ban might have passed if it had come up for a vote” reinforces the suggestion, since even Democrats knew that they lacked the votes to pass such a ban, that Tjepkes’ tactic was not intended to promote passage of either bill.

Following this abortive but nevertheless significant effort, Representative Geri Huser, a Democrat from Altoona, the location of Prairie Meadows, a racetrack and large casino, proposed an amendment both parts of which not only ultimately killed preemption repeal in 2007, but almost succeeded in thwarting passage of a statewide ban in 2008. The explosive amendment that Huser (whose father had close ties to Prairie Meadows and whose husband was a systems analyst for Casey’s General Stores, one of the largest sellers of cigarettes in Iowa) put forward on behalf of her constituent would have exempted entirely from the clear indoor air act both bars, defined as “legal-age-restricted establishment[s]...primarily devoted to the serving of alcoholic beverages...to

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67 Telephone interview with David Tjepkes, Gowrie (June 19, 2008). Similarly, when asked why he had then withdrawn the amendment, Tjepkes, unable to articulate a substantive reason, merely replied that it was a “political strategy thing”: the Republican caucus had asked him to “discontinue that conversation.” Preemption repeal was embodied in H.S.B. 24, § 11(2) and § 11(2) of Tjepkes’ amendment 502.

68 Telephone interview with Rep. Roger Thomas, Elkader (June 18, 2008); telephone interview with Mary Gaskill, Ottumwa (June 23, 2008).


70 Telephone interview with Rep. Roger Thomas, Elkader (June 18, 2008).

71 Telephone interview with Stacy Frelund, American Cancer Society lobbyist, Des Moines (Oct. 2, 2008).


73 The lobbyist for the Lung Association suggested that Prairie Meadows had given Huser the amendment. Telephone interview with Dan Ramsey, American Lung Association of Iowa, Des Moines (May 14, 2008).
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

guests on the premises and in which the serving of food is incidental to the consumption of those beverages, including but not limited to taverns, nightclubs, cocktail lounges, and cabarets,” and business locations licensed for pari mutuel wagering, gambling, excursion gambling boats, and racetracks.74 Parroting Prairie Meadows’ own propaganda (“Throughout the years, our mission has remained the same: to promote economic development, agriculture, jobs, tourism and entertainment and provide financial contributions to programs and organizations that improve the quality of life for all Iowans”),75 Huser sought to justify the special exclusion by reference to its significant contributions to the state and local economy. Predicting that casinos would eventually go smokefree, she pleaded that until then local bans would competitively disadvantage state-licensed casinos vis-a-vis Indian casinos76—an argument that the president of the Iowa Gaming Association trotted out after the vote in thanking legislators for understanding the industry’s importance for the state’s economy77 and that would be repeated ad nauseam with success in 2008, by which time the casino industry’s stranglehold on the legislative process was so firm that no reason for holding the health of its 10,000 employees (1,300 of whom worked at Prairie Meadows alone)78 hostage to the alleged need to cater to some gamblers’ nicotine addiction had to be articulated other than the lack of votes to pass any kind of statewide public smoking ban without a casino exemption.79

Passage of Huser’s amendment on a non-record roll call vote of 12 to 8 (for which some of the committee’s 12 Democrats must have voted)80 revealed that the advent of Democratic control of the legislature in no way guaranteed enactment of even such a minimalist-procedural part of the anti-tobacco movement’s agenda as repeal of preemption of local control. Indeed, the exclusion from the clean indoor air law of all bars that refused admission to persons under 21 as well as of

74[House] Committee Minutes for Local Government, Mar. 5, 2007 (copy furnished by Iowa House of Representatives Clerk’s Office) (H.S.B. 89, amendment 702). The amendment would have added bars so defined and casinos (that is, business locations licensed under section 99D of the Iowa Code) to the list of businesses (such as tobacco stores) not defined as covered public places.


79See below ch. 35.

80[House] Committee Minutes for Local Government, Mar. 5, 2007 (copy furnished by Iowa House of Representatives Clerk’s Office)
the large and proliferating casino industry so severely undermined the bill’s purpose that its backers, viewing it now as a “poison pill,” were, according to the Cedar Rapids Gazette, “so excited they said they hope the bill dies.”

Democrat Roger Thomas, the study bill’s manager in committee, “moved defeat of the bill.” However, he succeeded in persuading only three of the other 11 committee Democrats to follow his course; even joined by five of the nine Republicans, Thomas’s position gained only nine supporters, who were outvoted by the eight Democrats and three Republicans who voted for the amended bill.

Chairperson Gaskill wound up voting for a bill with which she did not agree simply to get it out of committee. Some Democrats voted for what they regarded as a deeply flawed measure only because something was better than nothing—or, as Thomas put it: “I know the folks who are opposed to smoking don’t like this, but this might be as good as they get unless they get the statewide ban.” For Tyler Olson, a first-term member from Cedar Rapids (who would successfully floor manage the statewide smoking ban bill in 2008), that outcome was not good at all: “Once you exempt bars and casinos, I’m not sure what’s left....”

The strange-bedfellows politics spawned by legislative compromise bereft of principle emerged as soon as committee bill H.F. 778 (formerly H.S.B. 89) was
introduced and placed on the House calendar: the very next day the American Cancer Society’s lobbyist Sandra Quilty declared against it, followed a week later by the Iowa Association of Business and Industry’s three lobbyists. This meeting of the extremes did not augur well for the bill, whose “exemptions were unacceptable to advocacy groups,” causing it to be “put on hold,” it therefore saw no action until it was rereferred to the Local Government at the end of the 2007 session.

Nevertheless, with Senate debate on that chamber’s bill not far off, the press reported that it appeared increasingly likely that the legislature, “pushing aside a dueling” statewide ban, would pass a local control bill. The problem, however, was that even if they received such powers, the governments of some of Iowa’s larger cities, such as Waterloo, Davenport, Sioux City, and Mason City, had as yet detected no interest in regulation of public smoking. And although some mayors and council members acknowledged that interest would intensify if the legislature actually conferred ordinance-making authority, their own pro-business attitudes underscored the risks of inaction associated with the local control strategy. Typical of the laissez-faire approach that would have been inimical to anti-tobacco intervention was the personal belief of Mason City’s mayor that “‘businesses ought to decide what’s appropriate for them. ... We have enough government as far as I am concerned.’”

On March 14, the day after H.F. 778 had been introduced (and the House had passed the Senate bill increasing the cigarette tax), the Senate began debating

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94Thus, although the Senate did not pass the local control bill until after both chambers had passed the $1 cigarette tax increase bill, both bills proceeded through the legislature simultaneously. In that chronological sense, Gronstal’s statement that in 2007 the “anti-smoking crowd” had said that now that we have a tax increase, let’s try a “little more evolutionary step” (i.e., a local control bill), was somewhat misleading. Telephone interview with Michael Gronstal, Council Bluffs (May 17, 2008).
its own preemption repeal bill, S.F. 236, which, realistically, at this point was the session’s last surviving anti-public smoking measure. Republicans, who were purportedly concerned above all about uniformity, filed a number of amendments whose exemptions would have both weakened the bill and made it less uniform. First, Assistant Minority Leader Pat Ward and Mary Lundby (who introduced the first preemption amendment to the clean indoor air act in 1990) offered Huser’s amendment exempting casinos and bars. Ward, who had previously been a utility company personnel director and director of the Iowa Republican party caucus, justified the exemptions in part on the grounds that no children were present in such locations. In the special case of casinos, she claimed—obviously prepped by their owners—that gaming as Iowa’s largest tourist attraction, with 65 percent of its 20 million annual visitors traveling from other states, would be competitively disadvantaged vis-a-vis tribal and out-of-state casinos by a smoking ban. Ward did focus her advocacy primarily on the alleged adverse impact of a ban on casinos’ profits and secondarily on the alleged disemployment effects, but she could not resist interweaving strands of Republican rugged individualist anti-collectivism into the narrative: “Smoking bans should be a business decision and not a legal mandate. Customers all have a choice of where they spend their money and employees all have a choice of where they work.” Parroting one of the cigarette manufacturers’ accommodationist untruths, Ward asserted that with the new filtration systems the air on the gaming floor was better than the outdoor air. In response, floor manager Quirmbach twitted Republicans by urging them to embrace their long-held principle that the best government is that which is closest to the citizens.

95See above ch. 27.
96http://www.patward.org/about.asp
97In early February Wes Ehrecke, the president of the Iowa Gaming Association, claiming that a smoking ban would reduce casinos’ revenues and tax payments, put out the figure that 65 percent of Iowa casinos’ 20 million annual visitors came from other states. O. Kay Henderson, “Opponents Speak Out Against Smoking Ban in Bars, Restaurants,” Radio Iowa (Feb. 7, 2007), on http:///www.radioiowa.com (visited Apr. 25, 2008).
98Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin, Communications Director, Iowa Senate Democratic Research Staff).
In the end, the amendment lost, but only by the narrow vote of 24 to 26.101 All 20 Republicans were joined by four Democrats: Assistant Majority Leader Bill Dotzler and Tom Hancock102 (who would vote against Petersen’s statewide smoking ban bill on both floor votes in 2008), Wally Horn (who opposed smoking control as Democratic Majority Leader in the 1990s), and Dennis Black, who would vote against Petersen’s bill once.103 Since, with a 10-seat majority, Democrats could spare no more than four defections, the caucus’s cohesiveness was being tested.

Next, Brad Zaun, a former hardware store owner, tested the waters by dumping casinos and exempting only legal-age-restricted bars, insisting that a ban would be very detrimental to family-owned businesses’ bottom line. For those unimpressed by that claim he added a libertarian argument: people who did not like smoke did not have to go to such bars. And finally, in desperation, he ventured out onto the slippery slope: would the legislature next ban alcohol in bars in order to protect people from collateral damage?104 Zaun’s half a loaf proved to be marginally less attractive to wavering Democrats than Ward’s whole loaf: with defecting Democrats Hancock and Horn joined only by Davenport veterinarian Joe Seng (who would also vote once against H.F. 2212 in 2008), the amendment was defeated by a vote of 23 to 27.105

Republicans then secured what was arguably their most important victory with an amendment exempting fraternal benefit societies from the scope of covered public places offered by Minority Whip Mark Zieman, a farmer and trucking company owner. Voicing concern that the legislature would start going down the road of letting local governments control a “habit that is condoned by this body,” especially since many members of such organizations had been

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102There were many “joe six packs” and bars in Hancock’s district. Email from former legislator who required anonymity to Marc Linder (June 19, 2008).
103Senate Journal 2008, at 412, 1000 (Feb. 27 and Apr. 8). On Horn, see above ch. 30.
104Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).
105Senate Journal 2007, at 1:738-39 (Mar. 14) (S-3116); Senate Journal 2008, at 412 (Feb. 27). Zaun’s next amendment, to what he called the “scariest part of this whole bill,” would have redefined “public place” to exclude private residences because the state should not permit local governments to restrict the consumption of a legal product in one’s own home, but Quirmbach, the bill’s floor manager, pointed out that his committee had already included such a provision, and the amendment lost by a vote of 21 to 29, with only one Democrat defecting. Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin); Senate Journal 2007, at 1:739 (Mar. 14) (S-3114) (Rielly).
encouraged to smoke in the military, Zieman ran into Quirmbach’s open arms: the floor manager declared not only that everyone supported veterans and fraternal groups, but that he could not imagine that any city council would take on the Veterans of Foreign Wars or the American Legion. Consequently, he announced that he would not resist the amendment and that members were free to vote as they wished. In the event, the amendment picked up not only all 20 Republican votes, but those of 11 Democrats as well, including Quirmbach’s, though antismoking militants Joe Bolkcom and Bob Dvorsky joined 17 other members willing to risk incurring veterans’ wrath.

Zaun described his final amendment as “technical,” designed to insure that smoking would not be prohibited in public places of fewer than 250 square feet or company cars. Oddly, Quirmbach supported the amendment on the grounds that it tightened the language a bit. In fact, however, the insertion of the word “only” into the sentence stating that local ordinances “may specifically include [only] the following” five kinds of provisions in fact substantively narrowed the scope of city councils’ powers to limit or ban smoking and to enforce such actions. Quirmbach himself joined 19 other Democrats and all 20 Republicans in voting for this weakening of his own bill; once again, however, the most prominent anti-tobacco senators, Bolkcom, Connolly, and Dvorsky, did not follow the floor manager’s advice.

With the amendments disposed of, the Senate proceeded to debate the bill. Assistant Majority Leader Bolkcom supported the bill, but found the local control conversation “very strange” because the legislature was lagging behind the more than 70 percent of Iowans who were ready for smokefree bars and restaurants. His colleagues were deferring to local governments simply because they lacked the courage to enact a statewide ban. Pushing the chamber’s collective capacity for analogic reasoning, Bolkcom asked the members to imagine how “crazy” the public would consider them if, instead, they were leaving it to local governments to protect Iowans from asbestos.

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106 Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).

107 Senate Journal 2007, at 1:740 (Mar. 14) (S-3119). Michael Connolly’s surprising Yea-vote was dictated by the procedural need to be on the prevailing side in order to move to reconsider, a motion that he then withdrew. Id. at 741.


110 Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).
At the other end of the rhetorical spectrum, Republican Jerry Behn was unable to understand why the legislature was debating even local control since Iowa already enjoyed local control—by businesses. As to Behn’s other claim that no one forced anyone to go into businesses owned by those who permitted smoking, Assistant Majority Leader Connolly asked about those who had to work there.\textsuperscript{111} (A background article on the bill published in the \textit{Quad-City Times} just 10 days before the Senate debate offered a reality check on Republican libertarian fantasies: it quoted Rhonda Capron, a Sioux City bar owner and former president of the Iowa Hospitality Association, dismissing the argument that regulation of smoking was required in order to protect employees and customers from secondhand smoke: “‘If my employees brought that up to me, they wouldn’t have a job.... When they apply for a job here they know it’s a bar’”—and as far as Capron was concerned, “‘[s]mokin’ and drinking go together.’”\textsuperscript{112} Connolly then warned that beating Big Tobacco on the cigarette tax had not silenced the companies yet; in fact, the vote watering down the bill to exempt fraternal organizations—where many people worked and were exposed to smoke—was an example of the legislators’ having slipped on another Big Tobacco banana peel. Taking umbrage, Zaun asseverated that during his three years in the Senate he had neither been contacted by any tobacco company nor heard tell of anyone else’s having been so approached.\textsuperscript{113}

Senator Zieman, smoking veterans’ and Elks’ paladin, devised the debate’s most incoherent argument by instancing a bar in Decorah that voluntarily went smokefree and flourished: if the legislature let local government ban smoking in all bars, then the owner who made the decision to go nosmoking would lose business to the others—the unfair result of forcing them onto the same playing field. In summary, Zieman felt no inhibitions about denouncing this slippery slope to the “nannystate nannystate nannystate.”\textsuperscript{114}

Republican banker Steve Kettering and media consultant Jeff Angelo were rhetorically transfixed by trans fats as the next New York idea that would haunt Iowa, but they left it to Marshalltown Lawyer Larry McKibben to climb up into even higher flights of fantasy (which he would carry even further in 2008). The assistant minority leader sought to belittle the scientific campaign against

\begin{thebibliography}{9}
\bibitem{111}Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).
\bibitem{113}Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).
\bibitem{114}Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).
\end{thebibliography}
smoking by casting tobacco and cigarettes as merely the latest phobic objects of irrational supersensitivity being imposed on unbelievers who simply wished to be left alone. After mock-admonishing his colleagues about the Round-up generated carcinogens in the meat served in the legislature’s cafeteria, he wondered whether cigarettes as “the evil du jour of today” would be followed by “evil corn.” Alas, there was no way to know because the Democrats would not say, but some targeted evil would remain on the agenda as long as “this crew” was running the show.¹¹⁵

In his closing remarks as S.F. 236’s floor manager, Quirmbach once again extolled the local control alternative for highlighting the value of community-level public debate for educating people about the dangers of secondhand smoke exposure at a time of growing but still not universal understanding. Portraying Behn as wanting no regulation and Bolkcom as advocating a statewide law, Quirmbach, an economics professor at Iowa State University,¹¹⁶ got carried away with his own oratory: “That puts this bill right where it ought to be—in the moderate middle ground.”¹¹⁷

In the end, the Senate passed S.F. 236 on a perfect 30 to 20 party-line vote—a pattern that in the 1970s, 1980s, and 1990s had never characterized votes on smoking control bills because the large number of smoking legislators confounded otherwise typical party positions.

Despite having prevailed on S.F. 236 in the Senate, by the end of the first week of April anti-smoking lobbyists had become pessimistic. On behalf of her client, CAFE, Threase Harms foresaw not only “‘a lost cause for this session’” if the bill did not progress the following week, but “‘a whole new set of obstacles’” in 2008 as an election year. Even at this late date the Iowa chapter of the American Cancer Society was ambivalent about its own legislative strategy or whether it was merely a tactic. Its director of government relations, Sandra Quilty, admitted that it preferred a statewide ban, but the organization was unable to see beyond the invariant historical paradigm that “every state that has gone smoke-free has started by first legislating at the local level.” Whereas this narrative typically was built on the premise that the mass educational component of the struggle for local control was both an end in itself and conveniently also the means to secure it, Quilty now restructured the argument by identifying the

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¹¹⁵Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).
¹¹⁶http://www.iowasenatedemocrats.org/quirmbach/Default.htm
¹¹⁷Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).
state legislators as those critically in need of public health enlightenment: “The
public sentiment is overwhelmingly supportive, but there is still a lot of education
to do in the Legislature on this issue. So we understand the reality and are just
pushing for the local control option.” If ACS had in mind the demonstration
effect on the legislators of a wave of adoptions of no-smoking ordinances across
the state, Democratic Representative Donovan Olson—who objected to his
colleagues’ having predetermined exemptions for local communities—cast doubt
on this plan’s realism by insisting that “the impact of a local ban would be
minimal, as most municipalities wouldn’t pass one.”

A few days later the Democratic leadership offered what amounted to a
legislative obituary by stating that differences in exemptions between the House
and Senate preemption repeal bills had made compromise unattainable and that
this impasse was unlikely to be overcome during the session’s final hectic
fortnight. As House Speaker Pat Murphy—who, after passage of the dollar
cigarette tax increase, privately delivered the death-knell to preemption repeal for
2007 on the grounds that “we’ve done enough to the smokers in Iowa”—formulated the point of the underlying dispute in more neutral-
procedural terms: “If we’re going to turn this back to the cities and local
governments, shouldn’t we be giving them some of those decisions instead of
taking them right off the top?” In contrast, Quirmbach continued to treat local
control not as some kind of opportunistic tactical second-best, but as a goal in its
own right: “This is an issue that will take a lot of education of people. We
continue to build support for local control. It’s the right way to go.”

Yet one other smoking ban bill came a cropper in 2007. Anthony Menendez,
a college student who was a voting member of the Tobacco Use Prevention and
Control Commission, an officer in “Just Eliminate Lies” (an innovative anti-
smoking organization of Iowa teenagers, financed by tobacco settlement money
appropriated by the legislature to the Public Health Department), and a legislative
assistant to Representative Ako Abdul-Samad, suggested to him the need for
a bill making all schools in Iowa tobacco free and then worked with bill drafters


120 Telephone interview with Dan Ramsey, director of advocacy, American Lung
Association of Iowa, Des Moines (Aug. 1, 2008).

121 Todd Dorman, “Local Smoking Ban Bill Declared Dead,” WC, Apr. 12, 2007, on

122 http://www.generationiowa.com/connect/view.asp?idProfile=380 (visited June 20,
2008).
to prepare the appropriate vehicle.\textsuperscript{123} H.F. 583, filed by Abdul-Samad and 18 cosponsors (including three Republicans) at the end of February, provided that every public school district and accredited nonpublic school "shall develop rules that prohibit a person from using a cigarette or a tobacco product" in any school building or facility under the school’s control, on any school grounds (including athletic fields and parking lots), in any school vehicle, or at school-sponsored or related indoor events held off-campus.\textsuperscript{124} The bill, which applied to employees, students, and visitors, was designed to insure that all schools banned all (including chewing) tobacco use, but it lacked a penalty provision.\textsuperscript{125} With some bipartisan support it reemerged as an identically worded Education Committee bill and placed on the House debate calendar, but it was dropped off the calendar\textsuperscript{126} and rereferred to committee\textsuperscript{127} after Minority Leader Christopher Rants, through whose 527 committee tobacco companies channeled large amounts of money to the Republican party,\textsuperscript{128} had filed an obstructionist amendment. Mimicking the underlying bill, Rants’ amendment tasked the state capitol authorities with developing rules to "prohibit a person from using" cigarettes or tobacco in the same places including at "state capitol-sponsored or state capitol-related indoor events that are held off state capitol grounds."\textsuperscript{129} The bill was again scheduled for debate during the first week of April,\textsuperscript{130} but having failed to be taken up, it missed the so-called funnel deadline and lost its eligibility for further debate during the 2007 session.\textsuperscript{131}

\textsuperscript{123}Tobacco Use Prevention and Control Commission, Minutes at 2 (Mar. 23, 2007), on http://idph.state.ia.us/tobacco/common/pdf/032307minutes.pdf (visited June 20, 2008).
\textsuperscript{125}Jason Clayworth, "House to Debate School Tobacco Ban," \textit{DMR}, Apr. 4, 2007 (5B) (NewsBank). Seventy percent of schools had already had some rule in place.
\textsuperscript{130}Jason Clayworth, “House to Debate School Tobacco Ban,” \textit{DMR}, Apr. 4, 2007 (5B) (NewsBank).
\textsuperscript{131}Jonathan Roos and Jennifer Jacobs, “Legislative Deadline Kills Scores of Bills,”
In Lieu of a Smoking Ban: A Cigarette Tax Increase

As a cancer physician, I have tried to help many wonderful people who have suffered and died unnecessarily from cancers caused by smoking. Uniformly, these people wish they had quit at an early age, or, better yet, never have taken up the habit. Never have I had cancer patients or their loved ones say they were grateful that the price of their cigarettes was low.¹³²

Ironically, Iowa, the first state to impose a cigarette tax back in 1921,¹³³ not having raised it since 1991, had seen it fall to the eighth lowest among the states by 2007.¹³⁴ The tobacco industry had been able to rely on Republicans to prevent enactment of an increase in cigarette taxes while they were in control of the legislature, but even after incoming Democratic Governor Chet Culver had made good on a campaign pledge¹³⁵ by proposing an increase in the tax from 36 cents to $1.35—at which level “as many as 13,000 kids would not start smoking”¹³⁶ and the “Medicaid gap” between the $89 million that the state had been collecting in tobacco tax and the $301 million that it spent to treat tobacco-related illness would be significantly closed¹³⁷—his party was initially unable to achieve unity on the issue. A few days after New Year the new House Speaker, Pat Murphy, opined: “I don’t think we’ll go that high.” Instead, he suggested an increase in the range of 40 to 60 cents, contending that the dollar increase was not needed in order to achieve “the desired effect on young people.” Murphy did not reveal the basis for this alternative estimate, but he did make it clear that he was “also concerned about the competitiveness of businesses in border communities if...”

¹³³See above chs 15 and 19.
¹³⁵“$1 Cigarette Tax Expected by April 1,” Gazette (Cedar Rapids), Mar. 9, 2007 (10A) (NewsBank).
¹³⁶Jonathan Roos, “Culver Gets to Work on Tax Issues,” DMR, Jan. 5, 2007 (1A) (NewsBank). In contrast, according to an estimate by the American Lung Association, as a result of the tax 36,000 young Iowans would never become addicted to tobacco and more than 20,000 adults would quit smoking. Matt McCoy, “Tobacco Lobby Loses, Iowa Families Win,” DMR, Mar. 13, 2007 (6V) (NewsBank).
Iowa’s cigarette tax gets out of line with the tobacco taxes of neighboring states.” In fact, at the time, Iowa’s tax was undercut only by Missouri’s 17 cents, and even at $1.36 would still have been lower than South Dakota’s ($1.53) and Minnesota’s ($1.49). The governor publicly disagreed with Murphy’s position, while Republicans warned that their votes would be determined by whether the tax increment was used for health care rather than merely for bolstering the general state budget. Such a condition would have been welcome to those Democrats for whom the anticipated additional $134 million in tax revenue would be key to financing universal health care access. The governor, too, wanted to use the revenue to expand health insurance coverage of children and some poor people, but Murphy insisted that “I just don’t know if we have enough votes to do a buck.” Senate Majority Leader Michael Gronstal—who represented the border city of Council Bluffs—confirmed that legislators were hearing concerns about the tax impact in border towns. Ultimately, Democrats may have argued that the competitive pressure on cigarette sellers on Iowa’s western, southern, and

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138Jonathan Roos, “House Speaker: $1 Cigarette Tax Unlikely,” DMR, Jan. 6, 2007 (4B) (NewsBank). The tax in Nebraska, Wisconsin, and Illinois was 64, 77, and 98 cents, respectively. A month later Murphy explained the range of 36 to 64 cents this way: the lower figure was the increase that the Senate had passed two years earlier and the higher figure would have resulted in a tax of exactly $1.00. “Iowa Press,” Iowa Public Television (Feb. 9, 2007), on http://www.iptv.org/iowapress/transcripts07.cfm (visited June 27, 2008).

139Jonathan Roos, “Democrats Push for Comprehensive Health Care,” DMR, Jan. 11, 2007 (4B) (NewsBank). Eventually, the Fiscal Services Division of the Legislative Services Agency estimated that the additional cigarette tax revenue generated by the increase would amount to $129.4 million in fiscal year 2008; it also estimated that demand would decrease by 19.2 percent based on the 27.5 percent price increase (generated by the $1.00 tax increase) and -0.7 elasticity. Fiscal Services Division, Legislative Services Agency, Fiscal Note: SF 128 Cigarette/Tobacco Tax Increases (Mar. 13, 2007), on http://www3.legis.state.ia.us/fiscalnotes/data/82_1023SVv2_FN.pdf (visited June 26, 2008). In fact, the estimate turned out to be very accurate: the tax increase amounted to $128.6 million. Email from Michael Lipsman, Manager, Tax Research and Program Analysis Section, Iowa Department of Revenue, to Marc Linder (June 5, 2008). It is unknown whether Republican Senator Jerry Behn made good on his bizarre bet of a pack of cigarettes that the Democrats would not raise the revenue they thought they would because smokers could buy a carton for $22.29 on line. Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin, Communications Director, Iowa Senate Democratic Research Staff).

eastern borders would last only a few months until buyers tired of driving long distances and resumed buying at in-state stores, but it was the rare legislator, who, like Representative Mark Kuhn, forthrightly declared during floor debate: “I don’t want Iowa to be known as a place to go to buy cheap cigarettes.”

Ultimately a group of Democratic legislators, not the least vociferous among whom was Senator Matt McCoy, rose up and collected so many of their colleagues’ signatures that a shocked leadership abandoned its timid 50-cent increase and embraced the demand for what it now recognized was a doable full dollar.

In contrast, on the Republican side, despite the consistent and almost monolithic opposition to the tax increase, a significant proportion of the (House) caucus, according to its most prominent dissident, Representative Walt Tomenga, recognized the empirically and scientifically confirmed findings of the negative consequences of smoking as well as of the negative correlation between cigarette tax increases and smoking take-up rates by teenagers and smoking prevalence rates among adults. The Republican party nevertheless voted overwhelmingly against the course of action dictated by science because they regarded smokers opposed to paying higher taxes as “our base,” who generated more contributions to the party than the general public, especially at a time when the party had lost its majority status in the legislature.

**In the Senate**

I think you’re way out of line here. You continue with the people way against you on this issue.... Many people feel these people are purveyors of death...and you’re standing up here all night fightin’ for ‘em.

On January 18, Senate Study Bill 1055, which called for a one-dollar increase, was presented and assigned to a three-member subcommittee of the Senate Ways and Means Committee chaired by Matt McCoy, who in his closing remarks during floor debate seven weeks later declared that he would be

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141 Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio file furnished by Dean Fihr, communications director, House Speaker Pat Murphy).
142 Telephone interview with Matt McCoy, Des Moines (May 8, 2008).
143 Telephone interview with Walt Tomenga, Johnston, IA (July 17, 2008).
144 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin) (Michael Connolly addressing Republicans).
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

back in 2008 to pass a smoking ban: “We will be a smoke-free society, there’s no doubt in my mind, in my lifetime.” A week later the subcommittee, to which committee chair Joe Bolkcom—another anti-smoking militant, who later conceptualized the tax increase as a “generational decision” on behalf of those who would never start smoking—had also appointed himself, held a hearing at which lobbyists presented predictable views: retailers complained that the higher tax would reduce sales in border cities, while health organizations welcomed the long overdue increase. Afterwards, Bolkcom and McCoy voted in favor of the dollar increase, but with the chief point of contention—how the legislature would decide to spend the revenue—the bill did not deal at all.

On the same day (January 30) that a Register Iowa Poll revealed that 67 percent of Iowans supported the dollar increase, Governor Culver in his first State of the State address to the legislature pressed the issue—one on which he had victoriously campaigned—even to the extent of “taking his own party to task on a measure he said would save lives.” Culver dwelt on the quarter of a million Iowans lacking health care coverage, noting that there was “not one legislator in this chamber...who didn’t promise to do something about this.” In order to fulfill these promises the governor proposed an additional $140 million to expand health care access and identified the one dollar cigarette tax increase as “the only responsible way to pay for it.” The initiative would, he declared, in addition, save more than 17,000 lives, “[c]reate a powerful disincentive to start smoking and help others quit,” and “[c]lose the smoke-related budget deficit. Because we have the 9th lowest tobacco tax in the country, the state’s cost of treating smoke-related illnesses is greater than our cigarette tax revenue by more than $50 million annually. This simply isn’t fair. Nonsmoking Iowans shouldn’t be expected to pay for health care costs of those who choose to smoke.” And those legislators who wanted to raise the tax by only 30 to 60 cents Culver reminded

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146 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).
147 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).
that “half-measures will only produce half the results.”

Even Speaker Murphy, the skeptic whom the governor’s admonition doubtless primarily targeted, was forced to concede: “I think if we had a vote now, it would be pretty tough to vote against the guy.” At the very least, Culver’s address, as House Ways and Means Committee Chairman Bolkcom recognized, “forced lawmakers concerned about the potential economic impact on cigarette retailers to weigh the costs to businesses against the public benefits....” To be sure, even this cost-benefit analysis of public health was manifestly alien to the retailers themselves as represented by the vice president of a convenience store chain in western Iowa, who pleaded: “At least look at the surrounding states and let us be somewhat lower than them so we can be aggressive about keeping our customers in Iowa.” Why the state government should not be more concerned with keeping Iowans alive and healthy he did not explain.

Bolkcom’s Senate Ways and Means Committee approved S.S.B. 1055 on February 7 by a vote of 14 to 3, all 10 Democrats being joined by four of seven Republicans after the committee, beyond retaining the dollar tax increase, had added a provision creating a health care trust fund in which all cigarette taxes had to be deposited and spent only for health care. Attorney General Tom Miller’s talk to the committee stressing that the cigarette tax was “the single most effective tool at the disposal of state leaders for discouraging smoking” made no impression on the three Republican dissenters, whose objection focused on the alleged competitive disadvantage that would be imposed on businesses in the Missouri and Mississippi river towns. Two days after the committee’s action, House Speaker Murphy began to relent: interviewed on Iowa Public Television’s “Iowa Press,” he remarked that the governor’s “compelling arguments” as well as the realization that several of Culver’s budget proposals, especially in the area of health care, were driven by the governor’s proposed tax increase meant that the first thing the House would look at was whether “we can do a dollar.” The fact that House passage would not be possible if the tax were not spent on health care....

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The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

care seemed to create a successful congruence.

Toward the end of February, while the Senate, as Majority Leader Gronstal disclosed, was still a week away from deciding where between 62 cents and a dollar the tax would be set, the House Ways and Means Committee, despite the chamber’s leaders’ skittishness about the larger increase, went ahead and approved, albeit narrowly, on an almost, but not entirely, perfect party-line vote of 13 to 12, H.F. 346 with its one dollar increase. On a perfect party-line vote the committee did amend the bill to restrict the use to which the cigarette tax could be put to health care, substance abuse treatment and enforcement, and tobacco use prevention and control.

By the time the Senate debated the cigarette tax increase bill on March 7, numerous lobbyists had predictably declared their clients’ positions. Those in favor of the bill included (in chronological order) the American Cancer Society, Iowa Medical Society, Iowa Nurses Association, Iowa Board of Regents, Iowa Dental Association, Iowa Osteopathic Medical Association, Polk County Medical Society, Iowa Department of Human Services, School Administrators of Iowa, CAFE, and the American Lung Association, while those opposed included Reynolds American, Inc., the Iowa Wholesale Distributors Association, the Cigar Association of America, Inc., Philip Morris USA, Inc., the Iowa Retail Federation, and the Iowa Grocery Industry Association. However, that one particular group lobbied for the tax increase was surprising—labor unions, including the American Federation of State County and Municipal Employees

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157H.F. 346 (Feb. 13, 2007, by Foege), House Journal 2007, at 1:442 (introduced); Report of [House] Committee on Ways and Means (25) (Feb. 21, 2007) (copy furnished by House Clerk’s Office); Jennifer Jacobs, “Cigarette Tax Likely to Increase, Leaders Say,” DMR, Feb. 23, 2007 (4B) (NewsBank). Democrat Huser, who was simultaneously pushing the pro-tobacco position on behalf of casinos in public smoking legislation, was the only member to defect. A few weeks later, when conservative Democrat Dawn Pettengill switched parties, Huser said: “My party may not know it sometimes, but I’m a Democrat.... They can kick me out, but I’m not leaving.” Jason Clayworth, “House’s Pettengill Switches to GOP,” DMR, May 1, 2007 (1B) (NewsBank).

158H.F. 346, amendment 202; [House] Committee Minutes for Ways and Means (Feb. 21, 2007) (copy furnished by House Clerk’s Office). On a perfect party-line vote a Republican amendment to authorize cigarette tax revenue to be used, inter alia, for Medicaid reimbursement was defeated. H.F. 346, amendment 705; [House] Committee Minutes for Ways and Means (Feb. 21, 2007) (copy furnished by House Clerk’s Office).
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

Iowa Council 61 (whose lobbyist was the very first to declare for the bill), the Communication Workers of America Iowa State Council, the United Auto Workers, and the Iowa Federation of Labor (unions’ umbrella organization). Because smoking prevalence is greater within the working class population from which unions draw their members, to back the bill was “not an easy decision” for the leadership of these organizations, according to Jan Laue, IFL executive vice president and lobbyist (and a member of the Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union), especially since for years they had pilloried much lower cigarette taxes as regressive because their impact was more severe on the largely lower-income strata who smoked. IFL finally switched its position and supported the higher cigarette tax in order to make a contribution to the improvement of the health of its smoking members both by encouraging them to quit smoking and by expanding health care access for lower-income Iowans by virtue of the programs that the higher tax was designed to fund—in spite of its regressive character. Similar health considerations had motivated AFSCME to switch sides as early as 2003.

Republican opposition to the tax increase during the debate centered on its impact on businesses in towns across the border from states with lower taxes as well as on allegations that the tax was merely “a ploy to increase state

\[159\] http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Matt&Service=Declarations&frame=1. Two days after Senate passage of the bill the Iowa Association of Business and Industry declared against it. The fact that two companies (Casey’s General Stores and Krause Gentle Corp. aka Kum and Go) and one association (Petroleum Marketers and Convenience Stores of Iowa) that presumably would have been among the entities most adversely affected by the tax increase listed themselves as “undecided” does not mean that they in fact did not lobby; the lobbyists for Casey’s, for example, declared against H.F. 346, while Kwik Starr declared against H.F. 346 and H.F. 555. http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service=DspReport&ga=82&type=b&hbill=HF346; http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service=DspReport&ga=82&type=b&hbill=HF555. Casey’s did not bother to lobby because it had a prior understanding with Majority Leader Gronstal (whose own constituency was the border city of Council Bluffs) that the increase would be limited to 60 cents so that border area retailers would not lose business. In the event, Gronstal was unable to control the caucus, and once the Senate vote had been lost, there was no sense in lobbying the House, where the outcome was a foregone conclusion. Telephone interview with knowledgeable person who demanded anonymity (2008). Interestingly, the UST, Inc. (a smokeless tobacco producer) declared for S.F. 128.

\[160\] Telephone interview with Jan Laue, Des Moines (June 27, 2008).

\[161\] Telephone interview with Marcia Nichols, AFSCME legislative/political director, Des Moines (June 27, 2008).
spending.**162 In order, presumably, to test Democrats’ bona fides, Republican Larry McKibben offered an amendment that he boasted would “define debate tonight”163 by virtue of striking the whole bill and substituting for it a provision authorizing retailers to increase the minimum price they charged for cigarettes by one dollar, thus allegedly “discourag[ing] smoking without ‘growing government.’”164 Indeed, McKibben was so mesmerized by his own anti-government rhetoric that he even launched the wild accusation that “liberal Democrats” had “hidden behind the honorable efforts of anti-smoking and smoking preventing groups in order to further their desire to grow government.”165 Floor manager McCoy pointed out that the amendment would insure that the state received no revenue from the increase, but that “the retailers would make out like bandits.”166 As a result, the state would be denied the additional revenue to offset part of the cost of health care for smoking-related illness167—an irrational outcome in light of Republicans’ purported insistence on making their support for the bill contingent on insuring that all the tax revenue went to health care.168 McKibben’s amendment attacking Democrats’ effort to “grow government spending”169 was defeated on a party-line vote of 17 to 31, the
only defector being Republican physician David Hartsuch.\textsuperscript{170}

Dr. Hartsuch—who later during the debate declared (in dictum, as it were) that cigarettes should be abolished, though that issue was not on the agenda, having been supplanted by his pet issue of restraining the growth of government—then offered his own amendment, which would have raised the minimum legal age for buying or smoking “‘this very dangerous drug’”\textsuperscript{171} to 21, but it lost even more decisively: only 11 Republicans supported it, while seven others joined all 30 Democrats in voting Nay.\textsuperscript{172} (When Zaun later offered a stand-alone amendment to increase the age to 21, McCoy was constrained to call it “interesting” and concede that it had “merit,” before relegating it to a discussion that should be held in another debate and successfully administering the coup de grace of nongermaneness.)\textsuperscript{173} Hartsuch destroyed any chance that his proposal might have been approved by tacking on to it a mandatory ten-dollar cigarette and tobacco product purchaser identification card, which he oddly likened to a fishing license and which the Public Health Department was prohibited from issuing to recipients of public assistance or benefits.\textsuperscript{174} Hartsuch insisted that barring them from buying (and thus allegedly also eliminating smoking) tobacco “will allow additional moneys to be used for their” food, housing, and clothing and enable them to build up a “nest egg” so they could move out of poverty.\textsuperscript{175}

McCoy sought to deflect both of the amendment’s distinct proposals. Although he personally did not favor smoking by those under 21, he pragmatically acquiesced in the country’s having established 18 as the legal age for “nearly every right except alcohol,” which “served us well.” The ban on tobacco purchases by public assistance recipients he dismissed as “very unworkable” and a “severe discriminatory practice [sic] on how individuals choose to live their lives.” Seemingly oblivious of the self-contradictions in

\textsuperscript{170}http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&hbill=S3078&ga=82 (S-3078); Senate Journal 2007, at 1:608 (Mar. 7).

\textsuperscript{171}Jonathan Roos, “Senate OKs Jump in Tax on Cigarettes,” DMR, Mar. 8, 2007 (1A) (NewsBank).

\textsuperscript{172}Senate Journal 2007, at 1:609 (Mar. 7).

\textsuperscript{173}Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin); Senate Journal 2007, at 1:613 (Mar. 7) (S-3085).

\textsuperscript{174}http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&menu=false&ga=82&hbill=S3073; Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin) (“fishing license”).

\textsuperscript{175}Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

which he was entangling himself, McCoy rejected the kind of “big brother system” envisioned by this “ill conceived amendment” because it interfered with “individuals hav[ing] the free will to do whatever they want.”

At this point—surprisingly, given the traditionally staged and rehearsed and, when opponents are challenged, evasive character of legislative colloquy—Hartsuch managed to lure McCoy into a spontaneous exchange in which the latter wound up casting himself as an anti-statist libertarian Republican. Asked by the doctor whether he perhaps did not believe that “we as a state have an obligation to see to it that those who are on public assistance are financially directed in such a way as to promote their well-being,” McCoy, insisted that one of the tenets of the abolition of the welfare system was that individuals had to do for themselves what had to be done to move from public assistance to self-sufficiency and self-reliance and that, correlatively, the government should not “start micromanaging their lives.” Boring further, Hartsuch—whose own anti-statist Republican libertarianism was at times perforated by the inescapable realities of public health that even he was unable to ignore—first secured McCoy’s immediate assent to the proposition that cigarettes were a very expensive habit, and then asked whether assistance recipients were not “in greatest need of those dollars.” McCoy promptly delivered himself of this admission: “I believe that the poor in this state have always been the group most likely to engage in activities that quite frankly are not helpful to their situation.” However, retreating to his newly found Republicanism, he stressed that since Iowa had legal gambling, liquor, and cigarettes, the state could not be managing people’s lives. This backpedaling culminated in the appropriation of one of the minority party’s shibboleths—“the bottom line is that we are not a nanny state.” Though at first sensing a trap and dismissing the question as to whether public assistance recipients and other adults had a right to smoke as irrelevant, McCoy eventually recurred to one of the cigarette oligopoly’s slogans: Hartsuch’s amendment “would take away another person’s right to engage in purchasing a product that is a legal product” and thus would be antithetical to “individual freedom and liberty.”

Even less serious or acceptable was the next amendment by Republican Mark Zieman, who mock-self-deprecatingly opined: “Two years ago floating around this chamber was (the idea that) if we could raise the tax on cigarettes $1—20 percent of the people would quit.... Now, I’m not the brightest light bulb in the

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176 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).
177 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

box, however I know if $1 makes 20 percent quit, there’s a pretty good chance $5 is going to make everybody quit.” (It is unclear whether his colleague Brad Zaun intended to supply supporting evidence for his own candidacy as dimmest bulb by charging that Democrats “obviously don’t care about kids and smoking” inasmuch as their “message tonight is if you don’t smoke, start smoking, because we want to spend your money.”) Floor manager McCoy, calculating that the 25-cent a cigarette tax would push the per pack price up to about $8.70 or somewhat above the estimated $8 a pack health-care cost, congratulated Zieman: “I think you’ve got a great idea. Unfortunately, I think it would be too big a climb.” Instead, McCoy proposed adding another dollar the following year and “eventually” arriving at eight dollars: “I like where you’re going,” but, given the failure to raise the tax for 16 years, the sudden increase would be too big a “shock,” which would not give smokers enough time to quit. This fantasy prompted Zieman to draw the conclusion that Republican choreography demanded: the bill was not about health care, but generating revenue. The overwhelming defeat inflicted on the killer amendment—even a clear majority of Republicans voted Nay—suggested that some pro-tobacco opponents may have feared that Zieman’s logic was impeccable.

Ward made Republicans’ final amendatory effort, which would have lowered the tax increase to 62 cents (making it, at 98 cents, equal to the tax in Illinois). She justified it on the dual grounds that it had a better chance of passing the House and would “relieve some of the heartburn that our colleagues have living on the border of Iowa and Illinois.” But after McCoy had countered that there

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179Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).


181Senate Journal 2007, at 1:610 (Mar. 7) (S-3074) (8 to 40). Seven Republicans voted for and 11 against the amendment; Hatch was the only Democrat to defect.
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

were more than enough votes to pass the one dollar tax in the House,\textsuperscript{182} the amendment failed by a large margin, some Republicans (such as McKibben) presumably voting Nay because they regarded even this amount as too great.\textsuperscript{183}

The Democrats’ only amendment, offered by floor manager McCoy and adopted on a voice vote, objectively met Republicans’ complaints by mandating that the first $127,600,000 of the revenue generated by the tax and credited to the general fund be appropriated to a health care trust fund.\textsuperscript{184} To be sure, McCoy conceded that even channeling the entire cigarette tax revenue to health care, substance abuse treatment, and tobacco prevention, cessation, and control would fall far short of the estimated $301 million spent by taxpayers in Iowa annually on smoking-related illnesses under Medicaid.\textsuperscript{185}

\textsuperscript{182}Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).

\textsuperscript{183}Senate Journal 2007, at 1:613-14 (Mar. 7) (S-3084 by Ward) (11 to 37) (only one Democrat voting Aye).

\textsuperscript{184}http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&menu=false&ga=82&hbill=S3066; Senate Journal 2007, at 1:612 (Mar. 7) (S-3066 by McCoy). One newspaper editorially explained skepticism about the guarantee on the use of the tax revenue against the background of “the history of anti-smoking efforts”:

Iowa’s share of a huge settlement in a lawsuit brought by several states against tobacco companies was supposed to be spent for expenses like tobacco-related illnesses and anti-smoking programs. Most of it ultimately went for other things, including construction projects at the three state universities. Skeptical lawmakers are right to think the same thing might happen to the windfall a higher tobacco tax would produce.

The Senate bill and one of its counterparts in the House...address the issue by directing the new tax revenue to the Healthy Iowans Tobacco Trust, where it could be spent only for Medicare, Medicaid and anti-smoking programs. That is a good provision but far from a guarantee.

The problem is that money is fungible. If the new tax revenue is used to pay for existing health care programs, that would free up for other uses the money from the general fund now used to pay for those programs. The accounting trail would look like the tax money is going to health care when in reality it would be used elsewhere for purposes unrelated to tobacco, for instance general education.

A guarantee on the use of the money may be too much to ask. No matter how tightly written the restrictions, they can be rewritten by future legislators—which is not necessarily a bad thing, as flexibility is needed to cope with changing priorities.


\textsuperscript{185}Matt McCoy, “Tobacco Lobby Loses, Iowa Families Win,” DMR, Mar. 13, 2007
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

Following almost four hours of debate ending after midnight, the Senate passed the bill by a vote of 34 to 14, six Republicans casting Ayes and only two Democrats voting Nay.

In the House

Having lost as expected in the Senate, the cigarette industry saw its last chance in persuading some House Democrats to insist on a smaller tax increase, thus sparing its business in Iowa the fate that befell the oligopoly in Illinois: Iowans, according to RJ Reynolds Tobacco Company, “consumed 105 packs of cigarettes per capita in 2006, whereas Illinois, with a tax of 98 cents per pack, consumed only 52 packs per capita.” To encourage addicted consumers in Iowa to complain about the proposed tax increase, Reynolds set up a toll-free phone number, at which operators connected them with the offices of representatives in the Iowa legislature. Whether the operation was a success seems doubtful since an operator at the call center in Fargo, North Dakota, told the Cedar Rapids Gazette that the office had received around 200 calls since the operation began in February. This modest output may have reflected the jejune criticism voiced by the firm’s communications director that the legislature was “just trying to socially engineer the state.”

A week after the Senate’s action, which prompted House Speaker Murphy to “try to do a one dollar cigarette tax increase”—despite the fact that 12 days


The two Democrats were Hancock, whose votes against public smoking bills have already been mentioned, and Keith Kreiman, who represented a Missouri border district, some of whose tobacco merchants may have induced him to oppose the tax increase. Email from former legislator who demanded anonymity to Marc Linder (July 27, 2008). The Republicans were Boettger, Gaskill, Lundby, Noble, Putney, and Ward.

“A week after the Senate’s action, which prompted House Speaker Murphy to “try to do a one dollar cigarette tax increase”—despite the fact that 12 days


187Senate Journal 2007, at 1:614-15 (Mar. 7). The two Democrats were Hancock, whose votes against public smoking bills have already been mentioned, and Keith Kreiman, who represented a Missouri border district, some of whose tobacco merchants may have induced him to oppose the tax increase. Email from former legislator who demanded anonymity to Marc Linder (July 27, 2008). The Republicans were Boettger, Gaskill, Lundby, Noble, Putney, and Ward.


earlier an unidentified man had called his house after midnight, become upset when Murphy’s daughter told him that her father was not available, “‘shared his displeasure’” about the proposed dollar cigarette tax increase, and then angrily told her, “‘You tell him he better call me back or I’m going to rape his daughter,’”—the House engaged in an six-hour debate of its bill (now H.F. 555) for which it ultimately substituted S.F. 128, which, if passed with minor changes, McCoy predicted the Senate would accept.

Floor manager Pam Jochum, a Dubuque Democrat, opened the debate by laying out some impressive data; of especial relevance was the calculation that Iowa’s annual smoking-related health care costs of one billion dollars worked out to $8.04 per pack—far above its retail price. The toll in human life that the (modest) one-dollar tax increase, which, she admitted later in the debate in passing, Democrats might have set at a higher level had they been able to secure 51 votes for it, was projected to save was inspiring: 20,000 adults would quit smoking; 5,300 adult smokers would not die prematurely; and 12,300 children would be saved from dying prematurely from smoking.

The first Republican amendment to H.F. 555—offered by Jamie Van Fossen, a Mid American Energy Company service representative—would have struck the whole bill and substituted for it a total ban on selling or using cigarettes.

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190 The 20-year-old smoker later arrested and charged with aiding and abetting harassment told police that he had obtained a sheet of paper at a Casey’s General Store with legislators’ names and home phone numbers that urged constituents to share their opinion of the tax increase with their representatives. M. Kittle and Mary Bragg, “Smoker Accused of Making Threats—Police Say Anger over Cigarette Tax Sparks Phone Call,” Telegraph Herald (Dubuque), Mar. 31, 2007 (A1), (Newsbank); Iowa Department of Public Safety, “DCI Makes Arrest After Threatening Phone Calls Were Made to Legislator’s Residence” (Mar. 31, 2007), on http://www.dps.state.ia.us/commis/pib/Releases/2007/03-31-2007_DCI_Arrest.htm (visited Aug. 1, 2008).

191 The audio download lasted six hours, though the press reported eight hours. “Cigarette Tax to Rise $1 a Pack,” Gazette (Cedar Rapids), Mar. 14, 2007 (1A) (NewsBank).


193 "$1 Cigarette Tax Expected by April 1,” Gazette (Cedar Rapids), Mar. 9, 2007 (10A) (NewsBank).

194 Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fihr, Communications Director, House Speaker Pat Murphy); Iowa House Debate on S.F. 128 (Mar. 13, 2007) (audio download furnished by Dean Fihr, Communications Director, House Speaker Pat Murphy).

195 http://www.iowahouserepublicans.com/?page_id=63

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Taunting Democrats with their own logic, Van Fossen insisted that if a one-dollar tax would save lives, and if tax revenue was not the purpose of the increase, he could imagine nothing better than banning smoking completely in Iowa. For good measure he tossed in that the state of Iowa was “profiteering” more than Big Tobacco since it took 57 percent of cigarette sales. Interestingly, the bill’s rather feisty floor manager failed to engage Van Fossen’s amendment at all, instead immediately challenging its germaneness. The only response Van Fossen was ever able to elicit from Democrats occurred later in the debate when he rhetorically asked Mary Mascher whether she had supported his amendment to ban smoking. Oddly oblivious of the large and popularly accessible scientific literature on the significant non-volitional dimension of addiction that many millions of smokers contracted as children, one of the legislature’s leading anti-smoking advocates justified her opposition on the grounds that she did not think that smoking should be banned because it was a “choice” just like drinking or eating too much. Then, even more remarkably, sounding like a tobacco industry spokesperson, Mascher incorrectly instructed Van Fossen that his amendment would have been unconstitutional because cigarettes were not illegal in the United States. After Speaker Murphy had ruled this killer amendment non-germane, Van Fossen moved to suspend the rules to consider his amendment, but his motion lost by a vote of 34 to 60, nine of his fellow Republicans voting Nay, while no Democrat broke ranks.

Floor manager Jochum, again, instead of engaging its substance, challenged the germaneness of the amendment filed by Republican Steven Lukan (a tire repair technician at his family’s tire repair store, in northeast Iowa) to increase the legal age for buying, using, or being cigarettes or tobacco to 21. On the motion to suspend the rules to consider the amendment, which the Speaker had ruled non-germane, the vote of 40 to 55 was, again, largely on party lines, with four Republicans voting Nay. In contrast, Jochum did allow as an amendment by assistant minority leader Doug Struyk to exempt from the sales tax any over-the-

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196 Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fiihr).

197 House Journal 2007, at 1:798-800 (H-1089) (Mar. 13). At this point, the floor manager Pam Jochum offered an amendment striking all of H.F. 555 and conforming it to read exactly as did S.F. 128. Id. at 800-805 (H-1116). One of the chief new features of S.F. 128 was the annual appropriation of the first $127.6 million from the cigarette tax to the Health Care Trust Fund. S.F. 128, § 5(1). All of the subsequent Republican amendments applied to this main amendment. After the Republican amendments had all been defeated, Jochum’s amendment was adopted on a party-line vote of 52 to 45 with only two cross-overs (Republican Tomenga and Democrat Huser). Id. at 826-27.

counter smoking cessation or nicotine replacement product was “interesting”; after mentioning in passing that it might be worthy of legislative consideration later in the session, she succeeded in dispatching it by means of another non-germaneness ruling.\textsuperscript{199}

Minority Leader Rants, who had blocked all attempts at increasing the tax when his party controlled the House, but now conceded that an increase was “inevitable” and a “‘foregone conclusion’” offered a “‘common ground’” amendment limiting the hike to 62 cents (which would have made the tax equal to that in Illinois and which he therefore dubbed that Eastern Iowa amendment)\textsuperscript{200}: “‘Raise that tax, provide that revenue the governor and some people in this body think they need to have available to spend to balance the budget, curb youth smoking, but [do] not destroy a lot of Iowa retailers and force consumers into other areas of [sic] making those purchases.’”\textsuperscript{201} After Republican Henry Rayhons had depicted the majority party as taking advantage of poor people’s addiction in order to increase state spending, Mascher explicated the underlying principle of the tax increase: “We are counting on the revenue stream to be reduced. ... We are hoping it will decrease—that is our intent.”\textsuperscript{202} To be sure, as Republican Steven Lukan asked later in the debate without receiving an adequate response: since the governor and the majority party predicated parts of the state budget on estimated cigarette tax revenues, how would various health programs be funded if passage of a local control or statewide smoking ban bill exerted its intended effect of driving down consumption and sales further still?\textsuperscript{203} Significantly, on a non-record roll call, which permitted members to express an opinion without being called to account for it or intimidated by leadership into changing their votes as would happen on a roll call, the minority party’s chief ideolog’s amendment almost prevailed: the 47 to 49 vote revealed just how fragile

\textsuperscript{199}Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fihr); House Journal 2007, at 1:808-10 (Mar. 13) (H-1157). Struyk’s motion to suspend the rules to discuss his amendment lost by a vote of 42 to 53.

\textsuperscript{200}Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fihr).

\textsuperscript{201}“Cigarette Tax to Rise $1 a Pack,” Gazette (Cedar Rapids), Mar. 14, 2007 (1A) (NewsBank). Rants offered the amendment on behalf of a Republican, Charles Gipp, who was absent on account of illness. Later during the debate Rants stated that his preference was a 32-cent increase. Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fihr).

\textsuperscript{202}Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fihr).

\textsuperscript{203}Iowa House Debate on S.F. 128 (Mar. 13, 2007) (audio download furnished by Dean Fihr).
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

The Democrats’ majority was on this vital public health and socioeconomic issue was. Republican Scott Raecker sought to embarrass Democrats by offering an amendment that would have used the cigarette tax revenue for tobacco use prevention and control, specifically mandating, inter alia, the amount recommended by the Centers for Disease Control, $10 million for youth programs, and $5 million for enforcement of tobacco laws. This amendment, too, was defeated on a party-line vote of 44 to 52 with only one Republican defection—Representative Walt Tomenga, who had attended Graceland College, which is run by an offshoot of the tobacco-hostile Mormon church, and with whom the floor manager at the end shared her time for concluding remarks, calling him a “statesman.”

These types of amendments were accompanied by warnings that the Democrats’ bill lacked assurances that the additional cigarette tax revenue would in fact be used for the statutorily designated health care purposes because it would “flow into the ‘black hole’ of the general fund and could be used for other programs....” In response, the bill’s floor manager, Pam Jochum, while doubting that such a problem would occur, insisted that even if it did, the tax would still “accomplish some of her goals because the higher cost of smoking would discourage people from smoking.” (Her explanation paled in comparison to the radical single-purpose orientation of Dr. George Weiner, director of the Cancer Center at the University of Iowa, who, shortly before the start of the 2007 legislative session, dismissed debates over how the additional tax revenue should be spent by semi-jocularly observing that the imposition of the tax would serve its purpose even if the revenue were thrown into the river.)

After several other similar Republican amendments had been defeated by
similar margins, the Democratic amendment conforming H.F. 555 to S.F. 128 was adopted and the latter formally, by unanimous consent, substituted for the former. A much briefer debate on S.F. 128 then ensued, the most important amendment to which was offered by Heaton; like Raecker’s aforementioned amendment, it, too, was met by Jochum’s assurance that her bill could meet these challenges, and was then promptly defeated on a similar vote. The debate’s unintentional comic high point was delivered by Republican Dwayne Alons, a farmer, church deacon, and retired general in the Iowa Air National Guard, who contended that the tax increase violated smokers’ due process rights because it was intended to be punitive and did punish smokers without affording them any recourse.

The 58 to 40 vote on final passage of S.F. 128 revealed that Majority Leader Murphy had been doubly wrong the previous day when he declared that he was “certain he has 51 votes and doesn’t need any help from Republicans.” In fact, only 50 Democrats voted for the bill because three Democratic women (Huser, Mertz, and Pettengill) voted with the majority of Republicans; conversely, eight Republicans furnished the 51st and seven additional superfluous votes.

212House Journal 2007, at 1:830-33 (Mar. 13) (H-1138); Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fiihr). The 44 to 50 vote included Tomenga’s defecting Nay. The amendment would have required full funding of the state’s anti-tobacco program up to the level recommended by the Centers for Disease Control.
214Iowa House Debate on S.F. 128 (Mar. 13, 2007) (audio download furnished by Dean Fiihr).
215House Journal 2007, at 1:833-34 (Mar. 13). To be sure, the vote as announced by the Speaker was 51 to 39 with 10 absent or not voting. Iowa House Debate on S.F. 128 (Mar. 13, 2007) (audio download furnished by Dean Fiihr, Communications Director, House Speaker Pat Murphy). Eight of these ten presumably availed themselves of House Rule 74 to vote within 10 minutes of the announcement of the vote.
217The eight were Baudler, Clute, Jacobs, May, Linda Miller, Tjepkes, Schickel, and Tomenga. Significantly, six of these eight Republicans (Baudler, Clute, Jacobs, May, Schickel, and Tomenga) also voted for the Smoke-Free Air Act in 2008 on the final House vote (on the conference committee compromise), accounting for two-thirds of the nine
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

The Impacts

At the “raucous” signing ceremony two days later Governor Culver upped the estimates of the tax increase’s impact to 40,000 youths who would not start smoking in addition to 20,000 people who would quit smoking and the prevention of 20,000 tobacco-related deaths. Enactment of the one-dollar increase, which catapulted Iowa from 42nd to 17th place among states, confirmed the validity of Senator Michael Connolly’s floor-debate declaration that “[t]onight breaks a 10-year stranglehold on the Iowa Senate by the Big Tobacco lobby right out there” —a statement whose historical accuracy was, to be sure, marred by the fact (well known to Connolly himself) that the cigarette oligopoly’s control of smoking and tobacco legislation in the Senate had in no way begun with Republican conquest of the majority at the 1996 elections and the advent to power of the wannabe Tobacco Institute vice president, Stewart Iverson. On the contrary, Connolly’s own Democratic party, especially under the proto-tobacco majority leadership of Senators Junkins, Hutchins, and Horn—the former two having formalized their allegiances by becoming cigarette company lobbyists after their departures from the Senate—had for years stymied efforts by Connolly and others even to breathe smoke-free air in the Senate itself, where, as Democratic Senator Robert Dvorsky reminded his colleagues, when he arrived in 1994, “we actually sold cigarettes in [a] machine in the back of the Iowa Senate,” thanks (as Dvorsky did not mention) to the Democratic leadership. Whatever the historical background, the tax increase demonstrated that at the very least there was one exception to the iron law of class legislative supremacy enunciated by former House Speaker and later lobbyist Don Avenson: “We always win. ... We lobbyists for economic interests always win in a capitalist

Republican cross-over votes who compensated by one vote for the eight Democratic defectors. See below ch. 35.

221 See above ch. 32.
222 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).
223 See above ch. 32.
To be sure, the limits on the deterrent impact of the dollar increase and the limits of rationality in the context of addiction were not to be underestimated. Both were visibly on display in the case of Republican Representative Dan Rasmussen, who doubted that the extra $500 a year he would be spending on “cigarette taxes, sales taxes and merchant profits” would be “enough to break his habit of smoking” 20 cigarettes a day: “‘It’s very addictive, and it’s very harmful—we all know the effects.... I think most smokers will tell you they quit smoking every time they smoked their last cigarette.'” Nevertheless, Rasmussen did not urge his colleagues to raise the tax even more in order to provide the financial incentive to quit that manifestly his survival instinct had failed to give him.

In contrast, many other smokers in Iowa, apparently valuing their money more than their health or lives, did either quit or reduce the number of cigarettes they smoked in the wake of the tax increase. The biennial prevalence survey conducted on behalf of the Department of Public Health revealed not only that the prevalence of cigarette smoking had declined from 18 percent in 2006 to 14 percent in 2008, but that 32 percent of current smokers stated that they had decreased the number of cigarettes they smoked following the $1.00 tax increase in March 2007. Moreover, in the wake of the tax increase a huge drop in “cigarette packs stamped” in Iowa took place—from 253 million in FY 2006, to 228 million in FY 2007, 172 million in FY2008, and 162 million in FY 2009.

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224 Telephone interview with Don Avenson, Oelwein (June 28, 2008).
226 G. Lutz et al., Iowa 2008 Adult Tobacco Survey fig. 1 at 7, tab. 5 at 8 (Feb. 2009), on http://www.idph.state.ia.us/tobacco/common/pdf/ATS_2008_Final_Draft.pdf. The rates in 2002 and 2004 were 23 percent and 20 percent, respectively. To be sure, even the authors were skeptical of the reliability of the data indicating a vast decline in prevalence among 18-24 year-olds (from 34.1 percent in 2006 to 6.8 percent in 2008), which may have resulted from a very small sample size. Id. at 8 n. 7. One of the co-authors estimated that using the prevalence rate of 14.8 percent for this age group associated with the upper limit of the 95 percent confidence interval would generate an overall prevalence rate of 15.4 percent (instead of 14.3 percent). Email from Mel Gonnerman to Marc Linder (Apr. 18, 2009).
227 G. Lutz et al., Iowa 2008 Adult Tobacco Survey 11 (Feb. 2009).
To be sure, although cross-border sales not reflected in these data also rose, the extent to which they compensated for the very considerable decline in in-state sales is unknown.  

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229 One year after the tax increase went into effect, a survey revealed that 35 percent of smokers in Davenport and 45 percent of smokers in Council Bluffs stated that they bought a smaller (but unquantified) percentage of their cigarettes in Iowa. Gene Lutz et al., *Cigarette Purchasing in Selected Cities on Iowa’s Borders: A Multi-Phase Surveys of Smokers* 27 (2009).

230 In light of the lack of such data, the claim by Cathy Callaway, chair of the Iowa Tobacco Use Prevention and Control Commission, that the drop in Iowa sales was quantitatively synonymous with a drop in smoking was premature. IDPH, “Cigarette Sales Drop 52 Percent, But Teens Still at Risk” (Mar. 8, 2010), on http://www.iowapolitics.com/index.iml?Article=188024 (visited May 10, 2011). Frank Chaloupka, an economics professor at the University of Illinois at Chicago who specializes in the study of the impact of tobacco taxes on consumption, observed that the drop in Iowa sales “was somewhat bigger than expected, but not completely out of line.” In the absence of hard data on cross-border sales, the “only thing one can guesstimate from is the tax paid sales in the bordering states; while these were a bit higher in MO and IL in the first year of the tax increase, they returned to normal levels soon after, so whatever increased border crossing there was, it didn’t last long. ... Only way to really get at it would be to regularly survey Iowans about their smoking behaviors and ask questions about where they buy but unless this was done in the past, it’s too late now.” Email from Frank Chaloupka to Marc Linder (May 11, 2011). On the specific question of whether the drop in in-state sales in fact should be equated with the same quantitative drop in consumption, Chaloupka noted: “Without a more complete, rigorous analysis, I can’t say that the two are exactly the same, but my sense is that the vast majority of the drop in sales reflects a real drop in consumption.... For what it’s worth, the prevalence data support the drop in sales—prevalence fell from 21.4% in 2006 to 17.2% in 2009—a 19.6% drop; our research generally finds that about half of the decline in sales comes from a drop in prevalence and the other half from a drop in consumption, so the IA numbers are roughly in line with this. Yes, there have been other states that have seen big drops in smoking in short times.” Email from Frank Chaloupka to Marc Linder (May 13, 2011).
Iowa Leaps from Outdated Designated Smoking Areas to a Comprehensive Statewide Ban—Finally, Resistantly, Barely, But Also Boldly: The Smokefree Air Act of 2008

What the hell is Janet Petersen doing?¹

In 2008, 30 years after the Iowa legislature had first passed a very weak bill placing at best minimal limitations on smoking in a limited variety of public places,² it finally joined the large and growing number of states to enact comprehensive legislation prohibiting smoking in the vast majority of indoor public places.³ Whereas other states had, since the mid-1990s, incrementally prohibited smoking outright in restaurants, workplaces, and bars,⁴ Iowa leaped directly from the feckless and obsolete 1970s regime of designated smoking areas to an across-the-board ban. As the authors of a 2004 study of nicotine and particulate matter levels in smoking and no smoking areas in hospitality venues concluded, “the identification of a ‘no smoking’ area within a larger room or space where smoking was otherwise permitted cannot be presumed to result in a

¹Telephone interview with Senator Herman Quirmbach, Ames, IA (Apr. 19, 2008) (describing his astonished reaction in February 2008 to learning that Rep. Petersen was pushing a bill to strengthen the statewide anti-smoking law rather than merely to repeal preemption of local control). Quirmbach later apologized to Petersen.

²See above ch. 25.


The Smokefree Air Act of 2008

significant reduction in exposure to particulate matter [more] than that occurring were an individual to remain in that area where smoking is allowed. [S]imply moving from that [smoking] part of the room to another identified with ‘no smoking’ signs resulted in an almost trivial reduction (17%) in exposure. Indeed...an individual might actually be more heavily exposed to ETS (in terms of particulate matter...) by moving from the smoking to the ‘no smoking’ area.”

Nonsmoking sections, as the surgeon general’s 2006 report on involuntary exposure summarized the state of the science, do not “reduce secondhand smoke concentrations to insignificant levels.”

Although Democratic advocates of the bill that became the Smokefree Air Act had the aforementioned cumulative state experiences—as well as the hundreds of prohibitory local ordinances that had in part antedated the first statewide measures—to build on, they lacked the votes in their own caucus to secure a majority for a law that reached, let alone (with three exceptions) pushed, the limits of state control. In the absence of the comfortable majorities that, for example, the 2007 Minnesota Freedom to Breathe Act and the 2007 Smoke Free

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5T. Cains et al., “Designated ‘No Smoking’ Areas Provide from Partial to No Protection from Environmental Tobacco Smoke,” TC 13:17-22 at 21-22 (2004). A much earlier study had characterized a 40 percent reduction in respirable suspended particles in designated no-smoking areas of restaurants as a “substantial” protection against exposure. William Lambert et al., “Environmental Tobacco Smoke Concentrations in No-Smoking and Smoking Sections of Restaurants,” AJPH 83(9):1339-41 at 1339 (Sept. 1993). A study that measured exposure in the no-smoking sections of many restaurants but did not compare it to that in the smoking sections concluded that neither ventilation nor partitions were “effective in eliminating second hand smoke in the nonsmoking sections; the concentrations remained higher than the weekly average concentrations found in the homes of smokers.” S. Hammond and Charles Perrino, “Passive Smoking in Nonsmoking Sections of 71 Indiana Restaurants,” Epidemiology 107(4):S-145-46 at 146 (July 2002).


7More than 110 local ordinances with 100 percent smoke-free provisions had been adopted in the United States before the first state law with such a provision (for restaurants) was enacted in Vermont in 1993.” U.S. Department of Health and Human Services, The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General 578 (2006). On the Vermont law, which covered many kinds of public places but not workplaces per se, see 1993 Vermont Laws No. 46, at 77; “Vermont Passes Sweeping No-Smoking Law,” NYT, May 2, 1993 (44).

8The bill in Minnesota (S.F. 238) achieved nearly two-thirds majorities in both houses on third reading: the vote in the Senate was 41-24 and then 43-21 on repassage after the conference report; in the House the votes were 85-45 and 81-48, respectively. https://www.revisor.leg.state.mn.us/revisor/pages/search_status/status_detail.php?b=Se
The Smokefree Air Act of 2008

Illinois Act\(^9\)—which was enacted as introduced\(^10\)—enjoyed, Democratic legislative leaders in Iowa felt forced to dilute the bill in order to gain the requisite votes by accommodating legislators who chose to subordinate their constituents’ health to the demands of casino, bar, and restaurant owners for the smoking status quo. Thus, in addition to continuing to withhold from local governments the power to impose more stringent standards than the statewide law, the Smokefree Air Act, unlike some other states’ statutes, failed, for example, to ban smoking in casinos—tax revenues from which constituted a greater proportion of state taxes in Iowa than in Illinois, let alone Minnesota, in which no non-tribal casinos were located\(^11\)—or in the outdoor space within a specified number of feet of covered indoor public places.\(^12\)

Nevertheless, despite the narrow majorities by which the bill passed both houses, the Smokefree Air Act included three outdoor prohibitions that were either unique or on the frontier of smoking control. Its prohibition of smoking “[i]n outdoor seating or serving areas of restaurants”\(^13\) was the most explicit and broadest such statewide ban yet enacted.\(^14\) (To be sure, in 2009, a bi-partisan

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\(^11\)See below this ch.

\(^12\)The bill that Rep. Janet Petersen initially filed was modeled on other states’ statutes (such as those of Minnesota and Illinois) that did not exclude casinos or preempt stricter local ordinances. For example, the Minnesota Freedom to Breathe Act expressly provided that it did not prohibit cities or counties “from enacting and enforcing more stringent measures to protect individuals from secondhand smoke.” Minnesota Statutes § 144.417, subd. 4 (2008). The Smoke Free Illinois Act prohibited smoking within 15 feet of any entrance to a covered public place or place of employment. 410 Illinois Compiled Statutes 80/15 (2008). In 2006 the State of Washington prohibited smoking within 25 feet of the entrances, exits, openable windows, and ventilation intakes of enclosed smoking-prohibited areas. Rev. Code of Washington § 70.160.075 (2009). On the other hand, unlike the Minnesota Freedom to Breathe Act, the Smokefree Air Act does not exclude actors in theatrical performances. Minnesota Statutes § 144.4167, subd. 9 (2008).

\(^13\)Iowa Code § 142D.3(2)(b) (2009).

The Smokefree Air Act of 2008

majority of 51 House members introduced a bill to repeal this ban.)15 Precedent setting was the Smokefree Air Act’s total ban on outdoor smoking on the entire campus of every private and public college and university in Iowa.16 As mysterious as its legislative origins was the fact that this astoundingly capacious prohibition—which covered such an iconic locus of smoking as on-campus tailgating at University of Iowa football games—was never discussed, let alone sought to be amended or struck, during hours of floor debate. (The discontinuity of this breathtaking/breathgiving innovation was in part bridged by the University’s failure to enforce it by means of the $50 penalty that the legislature imposed as a sanction for individual violators.)17 Equally without precedent was the potentially even more extensive smoking ban on the “grounds of any public buildings owned, leased, or operated by or under the control of the state government or its political subdivisions....”18 Although this innovation was debated, ironically, its origin as a kind of practical joke designed by anti-regulation Republicans to embarrass Democrats (who instead chose to embrace it without realizing just how radical it was) ultimately boomeranged on its authors by making it tactically infeasible for them to kill their own creature.19 (In the end, the Iowa Department of Public Health, the agency charged with administering and enforcing the law, promulgated rules that, to the satisfaction of the legislature’s own bi-partisan Administrative Rules Review Committee, deprived the provision of much of its more far-reaching protective promise.)20

Continued Tactical Tensions Between Advocates of Local Preemption Repeal and a Statewide Ban

“I hate smoking,” said Carlson, who owns the Court Avenue Restaurant & Brewing Co. “But what I hate more is the government telling me how to run my business.”21


15H.F. 211 (Feb. 5, 2009, by Bailey et al.). For discussion, see below ch. 36.


17See below ch. 36.


19See below this ch.

20See below ch. 36.

The Smokefree Air Act of 2008

Following the debacle in 2007, when the Senate local preemption repeal bill was loaded down in the House with exemptions that anti-smoking health advocates rejected, anti-smoking groups’ legislative activity during the interim between the 2007 and 2008 sessions remained intense and focused on repeal of

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23 See above ch. 34.

22 According to Brian Meyer, House Majority Leader McCarthy’s administrative assistant and chief counsel, McCarthy met with the health groups during the summer of 2007 to inform them that leadership was going to abandon preemption repeal because it could not pass without the same exemptions that would be attached to a statewide ban bill. Meyer also stated that that summer, in a first-ever discussion, after McCarthy had also explained to the Democratic caucus that leadership wanted to shift support from preemption repeal to a statewide ban, a majority backed the latter approach, but no consensus was reached (nor, as will be seen below, was any in 2008). Moreover, some members brought up the need for exemptions, such as for casinos, age-restricted (21-and-over) bars, and Veterans of Foreign Wars posts. (For example, Philip Wise stated that he needed the casino exemption, whereas Janet Petersen wanted no exemptions.) Leadership agreed to give representatives a free vote on an amendment proposing an exemption for casinos, but not on final passage. Telephone interview with Brian Meyer, Des Moines (May 12 and 14, 2008). Because some of Meyer’s statements were inconsistent with other information, he was interviewed a second time to clarify certain matters. No one else corroborated Meyer’s account of the summer 2007 caucus meeting. For example, Rep. Mary Mascher, while confirming that House Democrats caucused in the summer, not only had no recollection of such a statement by McCarthy, but stated that it made no sense inasmuch as McCarthy opened the 2008 session arguing for local control. Telephone interview with Mary Mascher, Iowa City (Sept. 13, 2008). Rep. Vicki Lensing agreed. Telephone interview, Iowa City (Sept. 14, 2008). Rep. Tyler Olson the floor manager of the bill that passed in 2008, who also attended the caucus meeting in the summer of 2007, confirmed that no such discussion had taken place. Telephone interview with Tyler Olson, Cedar Rapids (Sept. 15, 2008). Based on the contextual implausibility of Meyer’s statement and the weight of the contradictory evidence, it is concluded that Meyer, who may have conflated two different events, was wrong. When confronted with these contradictory accounts, Meyer admitted that if he made those statements, he had been wrong. Nevertheless, he insisted that toward the fall of 2007 McCarthy had already started talking to him about the need to try passing a statewide ban since local control was not working out. Why under such circumstances McCarthy continued to support local control in January 2008 Meyer was unable to explain other than by reference to such a legislative maxim as that leadership never completely drops a bill. Telephone interview with Brian Meyer, Des Moines (Sept. 18, 2008). McCarthy, the only legislator who failed to agree to an interview, directed Meyer to stand in for him. Far from being a typical Iowa legislative administrative assistant, Meyer, who stated at outset that he knew more about the smoking bill than McCarthy, was a political operative in his own right with significant experience in tobacco-related matters. In 2003 he was McCarthy’s deputy director in the
The Smokefree Air Act of 2008

preemption of local control\textsuperscript{24} in opposition to a statewide public smoking ban, which had made no more progress than during the years of the Republican ascendancy. To some participants at a CAFE statewide tobacco control meeting in the latter half of August it sounded as though a statewide smoking ban was being proposed, but, although Representative Janet Petersen—who had been filing such bills for years\textsuperscript{25}—was meeting with the Democratic leadership on this question, local control was “still the big push for now.” When two members of the Story County Tobacco Task Force who had attended the meeting related this development to their fellow Task Force members, Jim Hutter, a political science professor at Iowa State University, suggested that the group support a statewide ban, including local control as an “addendum” to it.\textsuperscript{26} However, Herman Quirmbach, the state senator from Ames and former city council member who had successfully argued for adoption of a partial smoking ban there in 2000-2001 (which the Iowa Supreme Court struck down in 2003),\textsuperscript{27} insisted that “shifting advocacy efforts to a statewide ban” was a “bad idea” because the votes for it were lacking, but were there for a local control bill. Moreover, he regarded it as “confusing to switch from local control to a statewide ban at this point.” Nevertheless, he appeared to leave the door slightly ajar when he added that perhaps the Minnesota and Illinois statewide bans, which would soon go into effect covering bars and casinos, might be a gauge or model for Iowa, especially if some additional Democratic seats were picked up at the next election enabling anti-smoking forces to “make more headway later.”\textsuperscript{28} (One of Quirmbach’s Ames colleagues suggested that his overprotective attitude toward a local control bill might have had more than a little to do with the fact that as chairman of the

\textsuperscript{24}Telephone interview with Threase Harms, CAFE Iowa lobbyist, Des Moines (May 14, 2008).

\textsuperscript{25}See above ch. 31.


\textsuperscript{27}See above ch. 33.

Senate Local Government Committee he would have been the central figure in guiding any such bill to passage.) In the end, Hutter (and others on the Task Force) deferred to Quirmbach’s superior knowledge of the voting blocs in the legislature, but more generally they confirmed their allegiance to local control because, as one of the members put it, “that’s where we were at.”

In the latter part of 2007 the Lung-Heart-Cancer coalition lobbied city councils to pass symbolic measures requesting the state legislature to grant them more power to regulate smoking. The city councils of Cedar Rapids and Iowa City were already pushing legislators to repeal restrictions on their power to act in this area. In October Governor Culver made his preference clear: “I’ve been for local control all along, and I certainly think that’s a good place to start.” He was open to discussing a statewide public smoking law, but did not reveal whether he would support it. By the outset of 2008, when 18 towns and counties had passed resolutions requesting from the legislature local control over smoking bans, Cathy Callaway, the head of the Iowa Tobacco Prevention Alliance, revealing that preemption repeal was more opportunism than principle, admitted that “she would love to have a statewide smoking ban in Iowa,” but was unsure whether it had adequate support. Local governments sustained enough momentum for preemption repeal during the first weeks of the 2008 session that by February 5, 20 cities, including Ames, Iowa City, Des Moines, Coralville, Cedar Falls, Cedar Rapids, West Des Moines, and Dubuque, eight counties, including Johnson and Linn, and three county health boards had passed...
supporting resolutions. Nevertheless, as Randy Yontz, the advocacy director of the American Heart Association of Iowa acknowledged, not all of these local governments would, if given the power, have actually passed anti-smoking ordinances.

Typically rigid was the organization Clean Air for Everyone, which in January 2008 informed Iowa City Representative Mary Mascher, a long-time anti-smoking Democrat, that it wanted to devote its resources to passing local control and opposed a statewide ban. Asked why this group had underestimated the strength of sentiment in the legislature for a statewide law, Mascher explained that it had been shut out for so long under the Republicans that it did not see the political possibilities. But, Mascher added, support for a statewide ban did not just begin coalescing in 2008: she recalled that two or three years earlier House Democrat Janet Petersen and her Senate colleagues Jack Hatch and Matt McCoy had held a press conference calling for statewide action. More generally, however, as Yontz stressed, all the priorities and goals of the anti-tobacco coalition had been directed at overturning preemption because history had demonstrated that proceeding directly to a statewide ban without intermediate experience with local control—only Delaware had successfully navigated that dual legislative track of simultaneously repealing local preemption and enacting a comprehensive smoke-free statewide law—was simply not doable. Kerry Wise of the American Lung Association in Iowa took an absolutist position, arguing that: ‘‘Every other state that has a strong statewide law started at the local level.’ ... She says her organization’s strategy is to let city ordinances that don’t have exemptions proliferate, and then use those to collectively springboard a statewide ban later.” Perhaps the nearest model was Illinois, which, as already noted, in 2007 passed the rigorous Illinois Smoke Free Act after having

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36http://www.smokefreeiowa.org/action.cfm (visited July 5, 2008). February 5 was significantly the day on which the House Commerce Committee approved the statewide ban bill, H.F. 2212, signaling the demotion, if not demise, of local control. See below.
37Telephone interview with Randy Yontz, Des Moines (May 14, 2008).
38Telephone interview with Mary Mascher, Iowa City (Apr. 13, 2008).
40Telephone interview with Randy Yontz, Des Moines (May 14, 2008).
The Smokefree Air Act of 2008
dismantled in 2005 and 2006, the local preemption provision, passage of which the tobacco companies had secured in the Illinois Clean Indoor Air Act in 1989, one year before they successfully lobbied for more comprehensive preemption in the Iowa law. As a result of this repeal (as well as of the exemption of some cities from the 1989 preemption provision), a significant number of cities, including Chicago and the state capital, Springfield, had adopted no-smoking ordinances, so that with more than half the state’s population covered by such measures by 2007, “the Illinois Legislature was ready to take on the issue at the state level.” Moreover, the very fact that not all local governments had taken advantage of their newly acquired powers to regulate smoking reinforced the momentum for a statewide law because many mayors, dissatisfied with the existing patchwork system of coverage, strongly pushed for uniformity.

In fact, although the evolution of Delaware’s anti-smoking legislation was largely asynchronous with Iowa’s and that of many other states, the principal potentially relevant political difference between the two states with regard to the simultaneous achievement of local control and a broad statewide ban—keeping in mind that Delaware’s starting point, its 1994 Clean Indoor Air Act, was much stricter and more capacious than Iowa’s 1978 law as amended in 1987 and 1990—was that from 1997 to 2004 the Robert Wood Johnson Foundation

45See above ch. 27.
47Telephone interview with Michael Grady, Springfield, director of public policy and government relations, American Cancer Society-Illinois Division (June 10, 2009).
48Apart from a World War II-era statute banning smoking in trolleys and buses, Delaware failed to enact any law of statewide applicability until the mid-1990s. 45 Del. Laws ch. 239, at 931 (Apr. 20, 1945). For many years, however, unsuccessful efforts had been made to pass a clean indoor air bill. On R. J. Reynolds’ recording the death of one such bill at the 1986 session, see P. C. Bergson to G. H. Long, Subject: Public Affairs Status Report at 2 (July 2, 1986), Bates No. 506623339/40.
49When the Delaware legislature finally did enact a Clean Indoor Air Act in 1994, it availed itself of some of the more advanced prohibitory elements that other states had
The Smokefree Air Act of 2008

provided the IMPACT Delaware Tobacco Prevention Coalition—which the state had created in 1995, with funding from the Centers for Disease Control and Prevention and of which the American Lung Association was the lead organization—with $1,448,505 (in addition to $424,000 contributed by the Lung, Cancer, and Heart organizations, Campaign for Tobacco-Free Kids, and the State of Delaware-Division of Public Health for lobbying, which private foundations are not permitted to fund).\(^5^0\) In helping to secure passage of the amendments to

already adopted, but in some other respects it remained committed to a pro-tobacco past that the cigarette oligopoly had never even sought to insert into Iowa’s law. For example, the preambular legislative intent sounded as if it had been taken verbatim from a Tobacco Institute accommodationist handbook: “The General Assembly recognizes that a balance should be struck between the health concerns of nonconsumers of tobacco products and the need to minimize unwarranted governmental intrusion into and regulation of private spheres of conduct and choice with respect to the use or nonuse of tobacco products in certain designated public areas and private areas.” 69 Del. Laws ch. 287, § 2901, at 601 (1994). The legislature also enjoined the Department of Labor and State Board of Health, on which it conferred rulemaking powers, to implement this physically impossible harmonization by “balanc[ing] and accommodat[ing] the legitimate health concerns of nonsmokers with the privacy and freedom of choice concerns of users of tobacco products.” Id. § 2906(c), at 604. The heavy hand of the tobacco lobby was unmistakably visible in the CIAA’s preemption provision, which exceeded Iowa’s in its comprehensiveness and stringency: “The provisions of this Chapter shall preempt and supersede any provisions of any municipal or county ordinance or regulation on the subject of this Chapter enacted or adopted after the effective date of this Chapter.” Id. § 2908(a), at 604. On the other hand, more progressive dimensions also abounded in the Delaware law. Whereas the Iowa law prohibited smoking outright only in one public place (elevators), Delaware’s CIAA imposed such a ban in nine categories of public places including public meetings, elevators, government owned or operated mass transportation, the public indoor areas of grocery stores of more than 5,000 square feet, gymnasiums, jury waiting and deliberation rooms, courtrooms, child day-care facilities, and health care facilities (except nursing homes and other residential facilities). 69 Del. Laws ch. 287, § 2903 (a)(1)-(9), at 601, 602 (1994). Designated smoking areas were permitted in other public places, including public meetings, elevators, government owned or operated mass transportation, the public indoor areas of grocery stores of more than 5,000 square feet, gymnasiums, jury waiting and deliberation rooms, courtrooms, child day-care facilities, and health care facilities (except nursing homes and other residential facilities). 69 Del. Laws ch. 287, § 2903(b). A special rule applied to owners of food service establishments, requiring them to designate a nonsmoking area sufficient to meet customer demand and prohibiting them from determining that no such demand existed. Id. at § 2903(d)(1). The CIAA also required employers to adopt and implement a written smoking policy obligating employers to “provide a work area where no smoking occurs for each employee who requests one” as well as to provide for nonsmoking areas in employee cafeterias sufficient to meet demand. Id. at § 2903(e)(1) and (3).
the statewide Clean Indoor Air Act of 2002, these resources were, however, in no small part required to counteract the legislative influence that accrued to the cigarette industry by virtue of the fact that five of the seven tobacco companies were incorporated in Delaware and that more than 60 percent of the state legislators (in 1995) accepted contributions from the industry. To be sure, Iowa, like most states, also received funding from RWJF, but the first grant to Tobacco-Free Iowa, in the 1990s, focused on cigarette sales, while a million-dollar grant in 2002 was designed to support local initiatives dealing with secondhand smoke. Even if this grant had not been confined to a local approach, RWJF’s
The Smokefree Air Act of 2008

In general, advocacy and public health organizations have resisted efforts to seek a statewide clean indoor air law until a state has had a critical mass of local ordinances in place for some time. This position is based on the concern that, in the absence of experience with implementing such ordinances and the grassroots support they generate, the final state legislation adopted is likely to be weak and, in many cases, to preempt stronger local ordinances. Moreover, even in cases where state smoke-free laws are not preemptive, they may lead to a decrease in the enactment of local smoke-free ordinances, perhaps because local policymakers perceive that the issue of secondhand smoke protection has been adequately addressed at the state level. This concern has been borne out by experience in a number of states. The opposition to what were perceived as premature state clean indoor air laws was also based on the concern that even if a state that lacked pre-existing local ordinances succeeded in enacting a strong, nonpreemptive state law, the public would not be prepared to accept it because of the absence of the intensive public education, debate, and changes in norms that typically occur before the adoption...


According to the American Lung Association of Iowa, the basis of the million-dollar grant disappeared when the Iowa Supreme Court invalidated the Ames ordinance in 2003. Telephone interview with Kerry Wise, Des Moines (June 8, 2009). According to another person involved with the grant: “Before the Supreme Court ruling, Robert Wood Johnson pulled the grant from the Iowa chapter of the American Lung Association. They said they were consolidating all their funding efforts to concentrate on healthcare reform.” Email from Claire Celsi to Marc Linder (June 8, 2009).
of local ordinances, making it difficult to implement the law....57

Nevertheless, by 2006 the report’s large collective of scientific and medical editors and writers stressed that the path to strong statewide anti-smoking laws did not always and everywhere under all circumstances have to take local control as its point of departure:

Recent progress in enacting statewide smoke-free laws suggests that these concerns, while remaining valid in many cases, may not apply in certain situations.... Several states (e.g., Connecticut, Delaware, Florida, and Rhode Island) that had little or no prior experience with local smoke-free ordinances have recently been able to enact relatively comprehensive statewide smoke-free laws (although in most cases these laws have retained preemption provisions where these provisions were already in place). Other states (e.g., Maine, Massachusetts, and New York) that have recently enacted relatively comprehensive statewide smoke-free laws had had previous experience with local ordinances. With time, the relative success experienced by these two categories of states in implementing their laws will provide insights into the issues described above. The experiences of these states will also shed light on a related question: whether states where local clean indoor air ordinances are preempted can achieve superior public health protections by first seeking to reverse the preemptive provision and pursue local smoke-free ordinances, or by skipping this step and proceeding directly to the pursuit of a comprehensive statewide smoke-free law....58

In the event, experiences in Iowa in 2008—especially the spectacle of local control-beholden anti-smoking health organizations adamantly opposing a strong statewide ban—should have precipitated a rethinking of their rigid lockstep vision of a successful legislative strategy.

And even though many legislators were predicting that differences with the House, whose preemption repeal bill exempted bars and gambling establishments from the authorization of local governments to pass ordinances stricter than the state law, would be resolved in 2008, no one could be heard offering any hope that a majority would support passage of a stronger statewide clean indoor air act, even as neighboring Minnesota in 2007 with its Freedom to Breathe Act became the twentieth state to enact a virtual total ban on public indoor smoking.59 By 2008, according to the National Conference on State Legislatures, 22 states, the District of Columbia and Puerto Rico prohibited smoking in all workplaces,

592007 Minn Laws ch. 82 (S.F. 238, approved May 14, 2007).
including restaurants and bars, six states exempted bars, and three states exempted bars and restaurants that did not admit anyone under the age of 18 or 21. But the received wisdom, at least among Iowa anti-tobacco lobbyists, remained that, since most of these states had begun with local ordinances—in Minnesota and California, for example, half of the population had lived under local smoke-free ordinances before statewide bans were passed—this progression had to be followed in Iowa too. The fact that the anti-tobacco coalition figured the odds of passage of a good statewide ban bill at slim to none did not mean that some legislators did not support it. For example, Senate Assistant Majority Leader Joe Bolkcom, an anti-smoking activist, informed a constituent in mid-January that although he expected that “we have a good chance at local control,” he “wish[ed] we could get a statewide ban right now. It is long overdue.”

A first semi-official indication of which way the legislative winds were wafting in 2008 came a few days before the session opened from House Majority Leader Kevin McCarthy, who had strategically carved out a “front-burner” niche on the agenda for a smoking bill in 2008: “When you go into a legislative session without a lot of new dollars, sometimes history has shown that the legislature can get diverted on policy issues such as dove hunting or gambling... We want to make sure that we have some policy discussions that [are] actually productive, that help people and (smoking restrictions are) something that’s been generating a lot of support lately.” McCarthy saw local control as “overwhelmingly supported by the public” so that it was “just...a question of trying to find the votes.” His caucus was split between supporters of a statewide ban and preemption repeal, but he did not believe that enough legislators would support the former to pass it, whereas local control was likely to have the most votes. The only way to pass a statewide law was to grant some businesses, such as casinos, an exemption, but McCarthy stressed that “we don’t want...some sort

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62Telephone interview with Randy Yontz (AHA), Des Moines (May 14, 2008).
63Email from Sen. Joe Bolkcom to Marc Linder (Jan. 13, 2008).
64Email from Sen. Joe Bolkcom to Marc Linder (Jan. 16, 2008).
The Smokefree Air Act of 2008

of state law that ends up looking like Swiss cheese...." 66 Leadership was acutely aware that the Smoke-Free Illinois Act, which had gone into effect on January 1, 67 covered casinos, but after having “muddled [over] that move during private meetings,” House Democrats nevertheless concluded that local control was “the best course of action” for Iowa. 68 McCarthy’s Republican counterpart, Minority Leader Christopher Rants, continued advocating imposition of his market-knows-best ideology on public health decisions: “‘[Y]ou let people run their businesses and make decisions, and the marketplace decides if it’s a good decision....’” Although he especially objected to the balkanization brought about by local ordinances and allowed as “‘[i]f you are disposed to support a smoking ban, then statewide is the only way to do it,’” 69 by the time a statewide ban came up for debate, he would not lack for objections to it as well.

As the session got underway, the governor and the anti-smoking health organizations also weighed in on the side of local control. In his Condition of the State message to the General Assembly on January 15, Culver promised that “if you send me a bill to ban smoking at the local level, I will sign it!!” 70 He also announced that he would push for it “more aggressively” in the spring. In the same spirit, Dan Ramsey of the American Lung Association of Iowa cautioned that any attempt to bypass preemption repeal in favor of a statewide ban would result either in defeat or a watered-down bill at the hands of tobacco industry lobbyists. By his count, city councils in about 20 cities, including Des Moines, had passed resolutions calling on the legislature to authorize them to institute their own smoking bans. 71

66Charlotte Eby, “Legislative Leader: Smoking Ban Discussion Likely in Upcoming Session,” MCG-G, Jan. 11, 2008, on http://www.globegazette.com (visited May 15, 2008). It is unclear when McCarthy decided to support an effort to pass a statewide ban. His administrative assistant and legal counsel Brian Meyer, who stressed that he and McCarthy were never able to understand why the Heart, Lung, and Cancer groups were so obsessed with local control, distinctly recalled driving at some point in January 2008 with McCarthy while the latter made “come to Jesus” telephone calls to anti-smoking advocates Cathy Callaway and Threase Harms on the need to rally around a statewide ban bill. Telephone interview with Brian Meyer, Des Moines (May 12, 2008).

67410 Illinois Compiled Statutes 82.


The Smokefree Air Act of 2008

What neither the Lung Association nor any of the other pro-local control groups mentioned was that, just as some business owners preferred government to make the rules so that customers would not blame them, so, too, some city governments may have wanted the state legislature to relieve them of the responsibility—a desire that, ironically, may well have motivated some in the General Assembly to contemplate passing that accountability on to municipal officials so that instead they would be “hounded” by business owners and smokers. Moreover, some local officials, asserting to state legislators that “‘our telephones ring more than yours,’” told them: “‘You deal with it.’”72 In this sense, local governments may have been a stronger force for a statewide ban than for local control. But if the strongest argument for a ban on secondhand smoke exposure was protection of employees, which could no more be regarded as needing localized regulation than any other worker health and safety matter, then, as one Iowa journalist presciently put it at a time when prescience was required only because the Iowa legislature’s backwardness made it difficult to see the present as history: “Many parts of the country are moving toward smoking bans, and it’s only a matter of time before Iowa follows suit. ... Whether Iowa leaders decided to go halfway with a local control measure or all in with a statewide ban this year, it’s pretty much inevitable that smoking will be outlawed in Iowa’s public spaces in the coming years.”73

House Study Bill 537—Yet One More of Petersen’s Statewide Bans

At the end of the day, Iowa smokers know their days likely are numbered for enjoying a convivial cigarette and cocktail inside any public place. ... Out of curiosity, I called two of my favorite bars in states that now have bans...to see how business was with the bans. Bartenders in both places were too busy at about 3 p.m. to talk with me.74

By the second week of the session a number of bills emerged that would set

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The Smokefree Air Act of 2008

the framework for debate and reveal that a statewide ban had survived. Of overriding significance was House Study Bill 537, proposed by Commerce Committee chair Janet Petersen—who more than once had said that a statewide smoking ban was “the top issue” she heard about from voters, but who was nevertheless unsure whether it would pass in 2008—on January 22 and assigned to a subcommittee chaired by first-term Representative Tyler Olson, a lawyer from Cedar Rapids; Petersen also appointed herself and Democrat Philip Wise, a retired teacher from Keokuk, who, like McCarthy, had also been a high-ranking official in the 2004 Iowa presidential campaign of right-wing (then) Democrat Joseph Lieberman. All three Democrats were strong supporters of statewide anti-smoking legislation.

H.S.B. 537 was structured in the same way as Petersen’s 2007 statewide ban bill H.S.B. 24 (which, in turn, had been virtually identical to her H.F. 2110 of 2006), but differed in several respects. Surprisingly, the new Smokefree Air Act no longer included “Workplace Safety” in its title, although its protection of employees who, unlike most customers, were exposed to smoke many hours a day and in many instances had no practical alternative to this or similar employment, made it much trickier for pro-tobacco forces to assail the proposed law, who as a result wound up often simply evading the issue. One opponent who, at least away from the debate floor, felt no compunction about attacking the law on these very grounds, was Republican Representative David Heaton, who doubled as owner of a smoking-permitted restaurant. Charging that secondhand smoke was merely a tool used by supporters to move the bill—Heaton was so at home in the flat-earth-society-like circles he apparently traveled in as not even to be embarrassed to assert that he had information showing that exposure to secondhand smoke was not that risky—he claimed that their real motive was to leverage a workplace prohibition into a ban on smoking everywhere in Iowa.

The oddness of dropping “Workplace Safety,” which deprived Democrats of

76 House Journal 2008, at 1:90 (Jan. 22); Iowa Official Register: 2007-2008, at 69, 82. The two Republicans were Steven Lukan and Jamie Van Fossen.
78 See above chs 31 and 34.
79 Telephone interview with David Heaton, Mt. Pleasant (May 10, 2008).
one of their most effective rhetorical and propagandistic arguments, was underscored by Senate Majority Leader Michael Gronstal several months after the bill’s passage: “We tried to keep the focus of that legislation on protecting workers. It wasn’t about changing people’s behavior. Some people think that’s what it was about, but it wasn’t. It was about workers that have little choice in where they work and whether they’re going to be exposed to secondhand smoke.”80 This orientation was crucial because it disingenuously sought to divert attention from the fact that the ban was also designed to change behavior—not only in the immediate sense of requiring smokers to stop smoking in places where their freedom to do so had once been uncontested, but also in the longer term by impressing upon them society’s prioritization of the right to breathe tobacco smoke-free air over the right to smoke and disapproval of a suicidal/homicidal addiction toward the end of rendering smoking so inconvenient and contemptible that many smokers would quit. Even more extreme was the denial of textual reality by Burlington Senate Democrat Tom Courtney—a long-time United Automobile Workers local bargaining chair and production safety representative81—who insisted in the midst of the debate over the implementing rules issued by the Iowa Department of Public Health in June that the bill was all about protecting the wait staff at restaurants and bars and not about the general public.82 In the face of a bill as passed that expressly prohibited smoking in “[o]utdoor seating or serving areas of restaurants,”83 but not in such areas of bars, Courtney implausibly claimed that legislators had thought that what they were voting for was protecting wait staff and that whatever applied to restaurants applied equally to bars. In contrast, members of the general public were not meant to be protected because they could always go elsewhere.84 Nevertheless,
since the movement for public smoking bans in Iowa and other states had been driven for years in no small part by customers who deeply resented exposure to tobacco smoke in restaurants, the solicitude for workers suddenly displayed by a legislature now controlled by Democrats whose leadership had made it absolutely clear to unions that there was no chance that it could secure a majority—and therefore it would not push—for repeal of the state’s arch-anti-union “right-to-work” law was odd.

The most far-reaching innovations in H.S.B. 537 vis-a-vis Petersen’s bills from 2006 and 2007 related to the coverage of outdoor areas. Cutting edge was the prohibition of smoking “[i]n outdoor seating or serving areas of restaurants and within twenty feet of such seating or serving areas.” Unique was the total ban on outdoor smoking on the grounds of all public and private educational institutions at all levels. The covered “outdoor areas” encompassed “school grounds, including parking lots, athletic fields, playgrounds, tennis courts, and any other outdoor area under the control of a public or private educational facility, including inside any vehicle located on such school grounds, and including the perimeter area of fifty feet beyond such school grounds to which the public is invited or in which the public is permitted.” In contrast, the study bill also restricted coverage by permitting “designated smoking areas...in perimeter areas at least twenty feet from any seating areas or concession stands” in outdoor sports arenas or other entertainment venues.

Although they would be exempted almost as soon as they were covered, H.S.B. 537 for the first time banned smoking in gaming facilities. A new exemption in H.S.B. 537 pertained to private employers’ vehicles “for the sole use of the driver and...not used by more than one person in the course of employment either as a driver or passenger....” Finally and importantly, the new measure made the Iowa Department of Public Health the law’s enforcer instead of local health boards. Observers expected that the bill’s repeal of preemption

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90 H.S.B. 537, § 4(7) (2008). If the “one person” referred to by this exemption meant one person at a time, it would have subjected a non-smoking employee using the vehicle after a smoking employee to off-gassing of lingering smoke that adhered to various surfaces.
The Smokefree Air Act of 2008

of local control\(^{92}\) would eventually be removed.\(^{93}\)

The House Commerce Subcommittee Hearing

“Everybody needs to know, this is headed towards a smoke-free society.”\(^{94}\)

The next day, January 23, the subcommittee hearing witnessed the predictable march of statements by various groups favoring and opposing the study bill. For example, the Iowa Restaurant Association’s lobbyist Craig Walter, who as a legislator three decades earlier had had an anti-smoking moment,\(^{95}\) but now bombastically described his client’s issue as one of “self-determination,”\(^{96}\) asked rhetorically: “As long as you make it a legal product, why would you ban a business from the opportunity to get those customers in that chose to go there?” Since restaurant coverage had always been at the heart of the consumer-driven anti-smoking movement, IRA would face a very difficult struggle to retain the designated smoking areas regime, which in its virtual non-functionality owners found most congenial.\(^{97}\) In contrast, casino corporations much more realistically pursued the objective of being entirely (or partially) exempt from whatever bill was passed as they had been under some other comprehensive statewide laws.\(^{98}\)

\(^{92}\)H.S.B. 537, § 10 (2008).


\(^{95}\)See above ch. 25.


\(^{97}\)See above chs. 25-27.

\(^{98}\)New Jersey and Nevada exempted casino gaming floors, while Rhode Island required designated smoking and nonsmoking gaming areas on separate ventilation systems. 2005 N.J. Laws ch. 383, § 5(e), codified at N.J.S.A §26:3D-59 (5)(e); Nevada Rev. Stat. § 202.2483(3)(a); Gen. Laws R.I. § 23-20.10-6.1(a)-(b). Rhode Island also required pari mutual facility employers to permit employees to opt out of working in smoking areas. Id. § (e). See generally http://www.no-smoke.org/pdf/100smokefree casinos.pdf. Under the law in force until July 1, 2008, casinos in Iowa, not being exempt, were subject to the same feckless requirement as other “public places” such as restaurants (but not bars) not to designate the entire place as a smoking area. Any restaurant within a casino was subject to this requirement; whether the gaming floor itself qualified as a
The Smokefree Air Act of 2008

but not, to be sure, in Delaware, Illinois, or Colorado. 99

The Gambling Industry’s Use of the Economic Impact of Other States’ Casino Smoking Bans and of Accommodation, Choice, and Air Ventilation to Support an Exemption from Any Iowa Smokefree Law

How much does a smoking ban, in the long run, damage casino revenues? There is no single answer to this question, but only more questions. 100

William Wimmer, the long-time cigarette oligopoly lobbyist, now appearing formally on behalf of the Iowa Gaming Association (whose members were 17 licensed commercial riverboat, land-based, and racetrack casinos), 101 warned of a “serious economic impact on Iowa’s economy” if gamblers were not allowed to smoke; equally important was the admonition not to destroy the “‘level playing field’” by imposing a ban on non-native-American-owned casinos that would not affect their competitors, the Indian casinos. 102 (To be sure, the tribal gaming compliance manager of the Iowa Department of Inspections and Appeals, which has entered into compacts with the three tribes operating casinos in the state, has stated that: “We believe that smoking could be an item included in the compact either on inception or during renegotiation.”) 103 Wes Ehrecke, the IGA president

“public place” in its own right and therefore could not be designated a smoking area in its entirety or whether some other area outside the gaming floor could instead be designated a no-smoking area is unclear. Under the Smokefree Air Act, which went into effect on July 1, 2008, the entire casino gaming floor is exempt. In practice, according to the Iowa Racing and Gaming Commission, under the old law: “The casinos typically had areas for both. When the [new] law went into effect, it didn’t appear to change how the casinos handled the gaming floor. We do not have data to quantify this, but casinos still have areas within their gaming floor where smoking is prohibited. It is by choice (our rules do not address smoking), but all that I am familiar with have non-smoking areas on the floor.” Email from Brian Ohorilko, gaming director, IRGC to Marc Linder (June 25, 2009).

See below this ch. 99

100 Paul Girvan, “Where There’s Smoke...,” Global Gaming Business Magazine 8(6) (June 2009), on http://ggbmagazine.com

101 http://www.iowagaming.org/our_members/properties.aspx


103 Email from Steven Mandernach to Marc Linder (July 10, 2009). The regional director of National Indian Gaming Commission with jurisdiction over Iowa, who observed that in some Indian casinos the smoke was so thick that he had had to send the
who had made similar claims in opposition to the local preemption repeal bill in 2007, also presented talking points, perhaps chief among which was the claim that: “Based on what has happened in Delaware, Windsor Ontario, and Australia[,] a smoking ban could cause an estimated 20-35% reductions in Iowa’s gaming tax revenue. This is based on an estimated 20 percent reduction in Delaware; and 33% in Ontario; Iowa’s commercial casinos pay an estimated $300 million in taxes, therefore 20-35 per cent equals $60-100 million in loss [sic]
The Smokefree Air Act of 2008

revenue.”\(^{106}\) (Gambling revenue for the state of Iowa for 2008 was estimated by the Legislative Services Agency at $268 million or four percent of the state budget.)\(^{107}\) It is unclear how IGA constructed this prediction,\(^{108}\) but scrutiny below of a presumably similar methodology used by the Iowa Gaming and Racing Commission, which estimated a 10-percent drop, may shed some light on the robustness of IGA’s prediction.

Integrally woven into Ehrecke’s talking points was unquestioned allegiance to cigarette manufacturers’ favored anti-regulatory market-knows-best trope: “The commercial gaming industry firmly believes that we should strive to accommodate both non-smokers and smokers alike; and advocates it should be a business decision and not a legal mandate to ban. Customers have choices of where to spend their entertainment dollars and employees have choices of where to work.” The purported basis for a claim—“Iowa casinos offer a premier...work environment”—that, coming from employers who were collectively seeking a unique exemption from a statewide smokefree workplace law, was on its face highly implausible, was, once again, accommodationism, but this time in the form of a technological deus ex machina: “the Iowa commercial gaming industry is very proactive with new filtration and ventilation systems to accommodate both smokers and non-smokers....”\(^{109}\) The industry’s credibility, which had already shrunk to the vanishing point by virtue of its self-subordination to its massively and discredited cigarette oligopoly ventriloquist,\(^{110}\) was not enhanced by its claim that “[i]t is the ongoing objective of the commercial casinos to meet or exceed

\(106\) Wes Ehrecke, President, Iowa Gaming Association to Members of the Iowa Legislature, “Impact on Iowa’s Commercial Casinos If a Smoking Ban is Implemented” (n.d. [ca. Jan. 2008]) (emailed by Wes Ehrecke to Marc Linder (June 15, 2009)).


\(108\) Ehrecke stated that this prediction was based on a private study, which he did not identify. Telephone interview with Wes Ehrecke, West Des Moines (June 15, 2009).

\(109\) Wes Ehrecke, President, Iowa Gaming Association to Members of the Iowa Legislature, “Impact on Iowa’s Commercial Casinos if a Smoking Ban is Implemented” (n.d. [ca. Jan. 2008]) (emailed by Wes Ehrecke to Marc Linder (June 15, 2009)).

acceptable indoor air quality standards as set forth in Standard 62.1 of ASHRAE guidelines,\textsuperscript{111} since three years earlier the American Society of Heating, Refrigerating and Air-Conditioning Engineers had announced that the only effective way to protect people from the health risks associated with indoor exposure to tobacco smoke was to ban smoking.\textsuperscript{112} And in the light of ASHRAE’s conclusion that no ventilation equipment could equivalently control the health risks associated with secondhand tobacco smoke exposure\textsuperscript{113} and of the results of scientific studies of air quality in casinos, the industry’s claim that in connection with “newly-invented technology... recent tests have show the air to be better inside on the gaming floor than outside”\textsuperscript{114} was risibly preposterous.

Iowa casinos’ focus on “choice” was the centerpiece of their legislative lobbying strategy of carving out an exemption for all “adult” hospitality venues to which minors under 21 were denied access and in which those 21 and over made adult choices. While hesitating to characterize establishments such as bars, restaurants, and VFW lodges as having formed an official “coalition” with the casinos, Ehrecke later indicated that the exemption that the Commerce Committee early in the legislative process had created alone for casinos, may have served to split the hospitality industry apart\textsuperscript{115}—a development that Democratic

\textsuperscript{111}Wes Ehrecke, President, Iowa Gaming Association to Members of the Iowa Legislature, “Impact on Iowa’s Commercial Casinos if a Smoking Ban is Implemented” (n.d. [ca. Jan. 2008]) (emailed by Wes Ehrecke to Marc Linder (June 15, 2009)).

\textsuperscript{112}Ehrecke was aware of this development, but sought to dismiss it on the grounds that ASHRAE had been “infiltrated” by anti-smoking elements. Telephone interview with Wes Ehrecke, Des Moines (June 15, 2009). He may have been referring to the fact that, for example, Dr. Jonathan Samet, a consulting scientific editor of the 1986 and the senior scientific editor of the 2006 surgeon general’s report on involuntary smoking, whom one federal judge called an “expert with extraordinary qualifications,” had been a member of ASHRAE’s Environmental Tobacco Smoke Position Document Committee. United States v. Philip Morris USA, Inc., 449 F.Supp.2d 1, 444 (D.D.C. 2006); American Society of Heating, Refrigerating and Air-Conditioning Engineers, Environmental Tobacco Smoke: Position Document Approved by ASHRAE Board of Directors 1 (June 30, 2005), on http://www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/20058211239_347.pdf. As late as June 2009 Ehrecke was still touting the advanced technology in the casinos’ air-handling and ventilation equipment. Telephone interview with Wes Ehrecke, Des Moines (June 15, 2009).

\textsuperscript{113}See below this ch.

\textsuperscript{114}Wes Ehrecke, President, Iowa Gaming Association to Members of the Iowa Legislature, “Impact on Iowa’s Commercial Casinos if a Smoking Ban is Implemented” (n.d. [ca. Jan. 2008]) (emailed by Wes Ehrecke to Marc Linder (June 15, 2009)).

\textsuperscript{115}Telephone interview with Wes Ehrecke, West Des Moines (June 15, 2009). Defending against bar owners’ attacks on casinos’ “big-money lobbying,” Ehrecke stated:
The Smokefree Air Act of 2008

Representative Geri Huser expressly confirmed.\textsuperscript{116}

These cigarette industry allies tried to shift the terms of debate away from the indisputable public health effects of smoking and toward individual businesses’ profits, the untrammeled rights of property ownership, and, now, the alleged impact on state government revenues of the alleged decline in gambling,\textsuperscript{117} but health organizations appeared at the hearing to plead on behalf of protection for bar and restaurant employees and customers. To be sure, these advocates did not go out of their way to stress that their efforts would also benefit some medically and scientifically benighted secondhand smoke exposees who proclaimed that they did not “mind the blue haze” because “[y]ou get used to it”—precisely the ignorance-based slow-motion suicide that some owners denied was at stake when the government sought to intervene: “‘It’s not a question of smoking being bad for a person. It is bad for you, and everybody knows it. My objection is that the government is trying to take away the freedom of choice currently enjoyed by me and my customers.’”\textsuperscript{118}

\textbf{The Principal Financial Group’s Crucial Role in Mobilizing Support for a Statewide Smoking Ban}

The pedestrian flow of testimony at the subcommittee hearing was interrupted by at least one surprising intervention that would have been unimaginable some years earlier and the emergence of which now strongly suggested that Iowa had finally caught up with the national and even bi-coastal debate: a representative of the Principal Financial Group (formerly Bankers Life), a global company headquartered in Des Moines and the state’s fifth largest non-governmental employer,\textsuperscript{119} “urged lawmakers to adopt a statewide ban, arguing that it would


\textsuperscript{117}Telephone interview with Geri Huser, Altoona (Aug. 27, 2008). For further discussion of Huser’s position, see below this ch.

\textsuperscript{118}Even Rep. Geri Huser, at least initially one of the casinos’ staunchest supporters, later expressed skepticism of the magnitude of the losses they had predicted as resulting from a smoking ban. Telephone interview with Geri Huser, Altoona (Aug. 27, 2008).


\textsuperscript{119}Iowa Department of Administrative Services—State Accounting Enterprise,
The Smokefree Air Act of 2008

make Iowa more attractive to progressive businesses and cut down on healthcare costs.\(^\text{120}\) The workplace smoking ban that Principal itself had implemented as far back as 1987 in all of its facilities had, its chairman and CEO reported, met with an “overwhelming positive reaction” from its employees.\(^\text{121}\) Merle Pederson, the company’s vice president and counsel for government relations, explained to the subcommittee that it was interested in a smoke-free Iowa for three major reasons. First, in connection with its national employer-sponsored health insurance and wellness improvement businesses Principal knew that smoking was a major cause of increased morbidity and mortality rates, which it wanted to reduce because smoking increased health insurance claims and the cost of insurance paid by its employer-customers, which it also wanted to help them reduce. Second, as a major Iowa employer in its own right, Principal believed that public places should be smoke free because smoking was not good for business, customers, or employees. And third, because the company was interested in “Iowa’s leadership as a progressive state,” it recognized that: both neighboring states and the country as a whole were going smoke free; in order to “recruit employees here, we need Iowa to be viewed as progressive and healthy”; and “economic development efforts are improved for ‘smoke free’ places.” Finally, Pederson informed the subcommittee that Principal was supporting a statewide ban in preference to a local option approach because it: protected all employees; allowed “Iowa to be marketed as smoke free”; was supported by the public; and was superior to “clumsy and confusing” local implementation.\(^\text{122}\) Indeed, Principal, whose group life, disability, and health insurance business\(^\text{123}\)  


\(^{121}\) Barry [Griswell] to Iowa Business Council Board Members (Feb. 8, 2008) (copy furnished by Merle Pederson).  

\(^{122}\) Merle Pederson “Iowa Smoke Free” (Jan. 23, 2008) (outline of testimony at House Commerce Subcommittee hearing) (emailed to Marc Linder (Aug. 11, 2008)).  

\(^{123}\) http://www.principal.com/insurance.htm (visited Aug. 1, 2008). Ironically, in the wake of the passage of the new federal health insurance law, Principal announced in 2010 that it was leaving the health insurance business (purportedly because it lacked the scale to compete in an industry expected to undergo considerable consolidation). Reed Abelson, “Insurer Cuts Health Plans as New Law Takes Hold,” NYT, Sept. 30, 2010, on
was significantly affected by the prevalence of smoking among its policy holders, became so deeply invested in lobbying and mobilizing its employee grassroots advocacy program (Legislative Action Network) on behalf of a statewide ban bill—thousands of contacts were made by Principal employees to their legislators—\(124\) that the bill’s floor manager Tyler Olson stated on the House floor that Principal “is behind the bill”\(125\) and one anti-smoking health organization advocate ventured the assessment that without its extensive support the bill might not have passed.\(126\)

Principal, as Pederson himself later described the firm’s role, “was the primary business leader in coordinating business advocacy with legislators, the Governor and his staff, government agencies, other large and small businesses, and a variety of business trade associations to generate the needed votes to pull the Smoke Free Iowa Law over the line in 2008.” In 2007, as well, Principal had been “a leading business voice” in support of the one-dollar cigarette tax increase.\(127\)

The evolution of PFG’s strategy and model sheds important light on the overall maturation of plans for enactment of a ban. A draft of the company’s legislative strategy plan dated August 31, 2007, revealed how modest the company’s goals initially were with regard to the ban’s scope and timeline for action: Principal was “considering spearheading an effort to lobby passage...of a law to prohibit smoking in restaurants and lounges in the state of Iowa,” but, not expecting passage in 2008, an election year, it regarded passage as more likely in 2009. PFG was already trying to identify potential coalition partners, beginning with those groups that had been allies earlier that year in enacting the one-dollar cigarette tax increase, as well as “likely allies” among legislators. At an “appropriate time” PFG would seek additional allies by contacting major business


\(125\) House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr, communications director, House Speaker Murphy).


\(127\) Email from Merle Pederson to Marc Linder (Aug. 11, 2008).
The Smokefree Air Act of 2008

group associations, but at this early stage its sights appeared to be set relatively low: it judged that even the Iowa Business Council merely “may be helpful” (although individual corporate members might support a ban), whereas the Greater Des Moines Partnership, Iowa Association of Business and Industry and others “will likely be neutral at best or vocal opponents....” Even the “[p]olitical call” as to whether local control was preferable to a statewide ban was still an open question, though the latter made “more sense.” And, finally, Principal was well aware that it might become necessary to “negotiate in” exemptions, casino and gaming interests being a concern. The tentativeness of the whole project was underscored by the desire not to damage the company’s prestige by going public before PFG had made sure that it had a reasonable chance of success: “We recommend that certain due diligence be conducted prior to Principal publicly announcing its plans to support such an initiative in Iowa. If after due diligence is completed there does not appear to be significant support with legislators, the business community or public health-related organizations, we should reconsider active public support/business leadership for such an initiative.”

In the late summer or early fall of 2007 Pederson met with Representative Petersen and both agreed that a statewide ban was the only way to secure an anti-public smoking law, which Principal’s senior management group had set as one of the company’s advocacy priorities. Later he also met with Governor Culver and Lieutenant Governor Patty Judge, but at that point the governor was still wedded to the same local control approach as the Cancer, Lung, and Heart organizations. Emblematic of the company’s commitment to a ban was its chairman’s discussion of the bill with House Majority Leader McCarthy. It was only after Principal officials had spoken with a number of legislators that it became clear that support for a statewide ban bill “was broader and deeper than first anticipated.”

Principal also worked through the aforementioned Iowa Business Council, an organization of the state’s twenty or so largest employers, which had become a “proactive advocacy group asserting leadership on major business policy

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129Telephone interview with Merle Pederson, vice president, government relations, Principal Financial Group, Des Moines (Aug. 4, 2008). Pederson stated that he had met with Petersen in August 2007, but such a time frame would not be consistent with the aforementioned draft plan. Jocularly, Pederson, who was a registered lobbyist on behalf of the company, observed that the governor had “dr[u]nk the same cool-aid” as the health advocates on the politics of passing a public smoking bill.
130Email from Merle Pederson to Marc Linder (Aug. 11, 2008).
The Smokefree Air Act of 2008

initiatives” on which it maintained a ““big picture’ perspective.”

The Council’s interest in smoking was easy to discern: among the issues having an impact on the state’s “business climate” that the IBC studied was health care, and among the “[m]any factors affect[ing] costs that threaten the current infrastructure of the Iowa health care delivery system” were “harmful personal habit and lifestyle choices.” Among the IBC members that actively supported the anti-smoking bill were Rockwell Collins, the state’s fourth largest non-governmental employer (which Principal helped mobilize its employees), and Wellmark Blue Cross, Blue Shield. In contrast, Pederson failed to “neutralize” the Iowa Association of Business and Industry—on whose board of directors he sat—which had a larger and more heterogeneous membership, let alone to persuade it to support the bill.

Representative Philip Wise Echoes the Tobacco and Gambling Industries’ Tales of Ventilation Technology as an Air Quality Deus ex Machina in Casinos

Smoking bans [in casinos] are inevitable. When they will be issued is the question.

[House Majority Leader Kevin] McCarthy said the only reason the exception was approved for casinos...is because he could only get 42 or 43 votes for the smoking ban otherwise. He said the exception was added so the House would have 51 votes to pass the ban.
The Smokefree Air Act of 2008

Several legislators made it clear already at this early point in the legislative process that coverage of casinos and passage of the bill were mutually incompatible. In particular Representative Wise told anti-tobacco advocates that they would have to accept the casino exemption in order to secure passage of the statewide bill. The casinos—whose lobbyist, together with the restaurants’ lobbyist, spoke “in opposition” did not spring their request for exemption as a surprise at the House Commerce subcommittee hearing nor was the exemption a done deal known beforehand; rather, everyone in the statehouse had known for a long time that the industry wanted to be exempt. Press reports were acutely alive to this development. The Cedar Rapids Gazette, for example, not only put the casino exemption in its headline, but led with the statement that “[c]asinos may be the winners in a battle to pass a statewide smoking ban....” In pointing out that both supporters and opponents agreed that passage “would be difficult without significant changes, including an exemption for casinos,” the article focused on Wise, “a former smoker and smoking ban backer,” who insisted that “[i]t’s an issue of ‘competitive fairness.... It’s not fair to put casinos at a further competitive disadvantage’” vis-a-vis smoking-unregulated Indian casinos.

What apparently was fair was to put casino workers at a health and survival disadvantage vis-a-vis those working in covered places of employment. (Some workers at some Iowa casinos were unionized; according to one union representing them, AFSCME Iowa Council 61, which supported a statewide law but took no position on the casino exemption because it was an accomplished fact, its casino members were divided on the issue: some opposed the ban because of rumors it might cause closings and job losses, while others, who hated being

139Telephone interview with Jeneane Beck, Statehouse reporter for Iowa Public Radio and Des Moines bureau chief for KUNI (May 15, 2008). Beck, who had attended the Commerce subcommittee hearing, furnished this information in lieu of a no longer extant tape. During the House floor debate on H.F. 2212, the successor to the study bill, Rep. Mary Mascher estimated that if casinos were covered, Democrats would lose about six votes and the bill would fail by a vote of 45 to 55. Email from Mary Mascher to Marc Linder (Feb. 19, 2008, 7:28 p.m.).


141Telephone interview with Jeneane Beck, Statehouse reporter for Iowa Public Radio and Des Moines bureau chief for KUNI (May 15, 2008).

The Smokefree Air Act of 2008

Numerous studies of secondhand smoke exposure in casinos had already revealed how abysmal air conditions there were. For example, in one study the level of serum cotinine (metabolized nicotine) in nonsmoking casino employees rose 38 percent when measured before and after their work shifts, these levels being two and three times higher, respectively, than that of a nationally representative sample of those reporting exposure to environmental tobacco smoke at work. Urinary cotinine levels of nonsmokers, according to another study, rose by 456 percent after spending four hours as customers in a casino, while that of the metabolized biomarker of uptake of the tobacco-specific lung carcinogen NNK increased by 112 percent. A study of respirable particles and carcinogens in the air at a casino and bars in Delaware before and after a statewide smoking ban went into effect revealed that “smoking indoors generally raised the short-term levels of fine particle air pollution massively” so that “[e]ven huge dilution volumes cannot overcome the high emission rates of toxic and carcinogenic pollutants generated during cigarette smoking.” In the casino, for example, the post-ban levels of respirable particles and particulate polycyclic aromatic hydrocarbons plummeted to 4.6 percent and 2.3 percent, respectively, of their pre-ban levels.

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143 Telephone interview with Marcia Nichols, legislative/field director AFSCME Iowa Council 61, Des Moines (June 24, 2009). The director of security at Prairie Meadows Racetrack and Casino, one of Iowa’s largest gambling establishments, claimed that half of its 1,500 workers smoked. Patt Johnson, “Employers Scramble to Obey Smoking law,” DMR, June 23, 2008 (4D) (NewsBank). A study in the late 1990s of 3,841 full-time casino employees at four different locations of a company found that 39.3 percent currently smoked cigarettes (and a further 6.4 percent used other tobacco products). Howard Shaffer et al., “Gambling, Drugs, Smoking and Other Health Risk Activities Among Casino Employees,” American Journal of Industrial Medicine 36:365-78, tab. X at 371 (1999). Nichols noted that casino employees surrounded by smoking customers were not themselves permitted to smoke on the job.

144 In addition to the studies cited below, an important government investigation published later is worth noting: Chandran Achutan et al., “Environmental and Biological Assessment of Environmental Tobacco Smoke Exposure Among Casino Dealers” (National Institute for Occupational Safety and Health, Health Hazard Evaluation Report HETA 2005-0076, May 2009).


147 James Repace, “Respirable Particles and Carcinogens in the Air of Delaware Hospitality Venues Before and After a Smoking Ban,” Journal of Occupational and
Incredibly and all too credulously for an anti-smoking militant, Wise, sounding more like a PR agent for the industry, “invited the bills’ backers to visit new casinos at Riverside and Waterloo to experience the effectiveness of the latest smoke handling equipment.”148 (A study of a smoking and a nonsmoking casino at Lake Tahoe in 2007 found that the former had air particle pollution levels 5 to 17 times higher than the latter’s.)149 Wise’s invitation was astonishing in light of the position adopted three years earlier by the American Society of Heating, Refrigerating and Air-Conditioning Engineers—the professional organization that provides guidance for using ventilation to achieve acceptable indoor air quality and the basis for municipal building codes—putting an end to the debate, sustained by cigarette manufacturers, over the question as to whether ventilation could protect nonsmokers from the health consequences of exposure to secondhand smoke:

• At present, the only means of effectively eliminating health risk associated with indoor exposure is to ban smoking activity. ...
• No other engineering approaches, including current and advanced dilution ventilation or air cleaning technologies, have been demonstrated or should be relied upon to control health risks from ETS exposure in spaces where smoking occurs. Some engineering measures may reduce that exposure and the corresponding risk to some degree while also addressing to some extent the comfort issues of odor and some forms of irritation. ...  
• Because of ASHRAE’s mission to act for the benefit of the public, it encourages elimination of smoking in the indoor environment as the optimal way to minimize ETS exposure.150

In 2006, the surgeon general’s monumental report on The Health Consequences of Involuntary Exposure to Tobacco Smoke echoed ASHRAE’s position by concluding that: “Exposures of nonsmokers to secondhand smoke cannot be
The Smokefree Air Act of 2008

controlled by air cleaning or mechanical air exchange.”

Wise’s seal of approval also provoked this immediate response on the website comment page of the newspaper reporting his remarks: “If lawmakers visit the Riverside casino as Mr Wise recommends I doubt they will be impressed by the smoke handling equipment. My wife and I don’t frequent the casinos just because the smoke is so bad. When Riverside opened, we did stop by on the 2nd day so we could try out some of the restaurants. Even though there was no smoking in the restaurants, there was already a smoke stench everywhere in the building. We only walked around for about 10 minutes, never entering the actually gaming areas but our clothes still stunk when we left.” A more specific complaint from a casino worker to her state representative spelled out the consequences of Wise’s exemption: “I want to urge you to vote in favor of NOT allowing smoking in a casino. I work in the summer at Prairie Meadows. The smoke in there is terrible. Smokers are very rude by puffing their smoke in my face as they talk and dropping their ashes on my counter. The ‘no smoking’ area is a joke. Smoke filters into this space as well as smoking patrons. I don’t want to be a victim of second hand smoke. If the smoker must smoke, then let the law say that they can do it outside near the track but not in a confined space as the building. Please vote to STOP SMOKING IN ALL PUBLIC PLACES!!!” Wise’s whitewash was also contradicted by his colleague, Democrat Polly Bukta of Clinton. Although she had been logged by the American Cancer Society in February 2008 as “Supports casino exemption (new casino in Clinton),” in 2009 Bukta commented that, despite the advanced ventilation system, the smoke could be smelled everywhere in that casino.

Neither Democrats nor Republicans pointed out that since the mid-1990s the tobacco industry, replicating its behind-the-scenes strategy of co-opting the other segments of the hospitality industry as third parties to fight the cigarette manufacturers’ battles for them, had been successfully mobilizing the gambling

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155Telephone interview with Polly Bukta, Clinton (June 2, 2009).
industry by alleging that smoking bans reduced gambling revenue and promoting ventilation as a solution to the problem of secondhand smoke.\textsuperscript{156} Ironically, in uncritically acquiescing in or allowing himself to be manipulated by the cigarette oligopoly’s newest ploy, Wise (and his colleagues) had ignored the fact that the gambling industry itself had just in the past few years begun to see the handwriting on the wall for its smoking exceptionalism: in that sense Wise was accommodating what was increasingly a mere straw man of accommodationism.

As late as the beginning of 2005, the American Gaming Association was still aggressively pushing the cigarette oligopoly’s accommodationist line: “We believe that state-of-the-art ventilation systems...can provide a comfortable and safe environment for all our customers and employees.” AGA expressed dissatisfaction with proposed changes to ASHRAE’s air ventilation standard (which formed the starting point for many state and local building codes), which “could be interpreted to make it impossible to achieve healthy air quality levels in buildings or parts of buildings—including casinos—where patrons are allowed to smoke.” Criticizing the ASHRAE proposal for ignoring casinos’ “more sophisticated air-ventilation system” and elevated ceilings, AGA was committed to work with ASHRAE to “emphasize our support of what we see as reasonable, science-based solutions to indoor air quality...concerns.” To this end it had gathered the requisite number of signatures for a petition to prompt a vote by ASHRAE’s full membership on AGA’s proposal to establish a separate standards committee to deal with the hospitality industry’s concerns.\textsuperscript{157} This vote was the culmination of a years-long effort by the hospitality industry surrogates of the cigarette manufacturers\textsuperscript{158} to counter “bad science”\textsuperscript{159}:

In response to pressure by special-interest groups, the American Society of Heating, Refrigerating and Air Conditioning Engineers...abandoned its longtime practical engineering approach to ventilation (Standard 62 “Ventilation for Acceptable Indoor Air Quality”) in favor of changes that would have the effect of a nationwide ban on smoking in all hospitality venues, including gaming, with the possible exception of those establishments located on native land. This zero-tolerance approach disregards the


The Smokefree Air Act of 2008

time-tested HVAC engineering technologies typically used to control exposure to tobacco smoke in gaming facilities, such as dilution ventilation, directional air flow and air cleaning. The changes to ASHRAE Standard 62 now being finalized will make it impossible to achieve acceptable air quality in buildings such as casinos that allow patrons to smoke. ...

“These changes are not about health,” said Elia Sterling, president of Theodor Sterling Associates Ltd. and a consultant to the AGA on indoor air issues. “They are about a social engineering strategy adopted by well-funded activist groups to denormalize smoking.”

However, the tobacco-hospitality industrial complex (energetically aided by the Iowa Gaming Association, which secured the support of the president of the Iowa ASHRAE chapter) sustained a “significant blow” on June 27, 2005, when the ASHRAE membership rejected the proposed (pro-smoking) separate standards committee by the lopsided vote of 1,000 to 4,000. The setback that the tobacco and gambling industries suffered one year later, when the surgeon general issued his aforementioned report rejecting ventilation/filtration as an adequate means of protecting nonsmokers from secondhand smoke, was so severe that even AGA apparently finally began to recognize that it had not allied itself with the winning side of a global public health battle: “There is no doubt that this report is going to strengthen the efforts of those working for comprehensive smoking bans across the country,” said Frank Fahrenkopf, AGA’s president and CEO. “The gaming industry takes the issue of indoor air quality very seriously, and the comfort and safety of our patrons and employees is our number one priority. But this report says the steps we’ve been taking simply aren’t enough. This report should cause us to take a serious look at how we deal with indoor air quality as an industry.”


By 2007 a transformation in industry attitudes became visible. In the context of proliferating coverage of casinos in ever more comprehensive statewide anti-smoking laws, Judy Patterson, the executive director of the American Gaming Association, which was “courted by the tobacco industry,” conceded that fighting them was “‘an uphill battle.’” At the same time, AGA President Fahrenkopf—who had been chairman of the Republican National Committee during both Reagan administrations and a Tobacco Institute lobbyist in 1975 before the Nevada legislature, where, in opposition to anti-smoking bills, he echoed the cigarette industry line that “[t]he claims that tobacco smoking is hazardous to the non-smokers are...just a facade disguising what is an attempt by one group of persons to write their prejudices into the law”—went even further than Patterson. By May 2007, according to the Associated Press, the gambling industry “appear[ed] to have resigned itself to the wave of anti-smoking measures being passed in big gambling states.... Although casinos in some states have been granted special status, Fahrenkopf said he didn’t expect these exemptions to last long. ‘A year or two down the road there’s not any public facility you’re going to be able to smoke a cigarette in and that includes us.’”

Why, in view of the scientific and engineering consensus that ventilation/filtration was definitively not a deus ex machina and of AGA’s dawning acknowledgment that smoke-freedom would soon engulf casinos, Wise so cavalierly prioritized the Iowa casinos’ at best short-term profits over the...
The Smokefree Air Act of 2008

health of the nonsmoking 80 percent of their 22.87 million annual visitors and 9,946 employees\textsuperscript{170} is unclear. (A study, cited by the Iowa gambling industry itself, revealed that only about 20 percent of Nevada casino-goers smoked\textsuperscript{171}—more or less the same proportion as in the population at large, while a later study of Pennsylvania casinos found the same proportion, which was somewhat lower than the statewide average).\textsuperscript{172} Petersen implicitly rejected the underlying premise of the question in asserting that Wise in fact cherished no financial concern for the casinos: by “running the amendment” he was merely executing a decision made by Democrats before the committee meeting that coverage of casinos (and local control) had to be jettisoned in order to accommodate four Democratic committee members in whose districts casinos


\textsuperscript{171}“State Smoking Bill Advances in House,” KWWL.com (Feb. 7, 2008), on http://www.kwwl.com/Global/story.asp?i=8189859 (visited May 12, 2008) (citing Black Hawk County Gaming Association executive director Beth Knipp citing a University of Nevada study and predicting a $60 to $100 million revenue loss for the state in Iowa). The 2006 observational study (which estimated the number of smokers based on a formula according to which smokers smoked two cigarettes for 10 minutes each per hour, thus yielding a total number of smokers three times that of those observed at any one time) found the smoking prevalence to be 21.5 percent at casinos in Las Vegas, 22.6 percent in Reno, and 17 percent at Lake Tahoe. Chris Pritsos, “The Percentage of Gamblers Who Smoke: A Study of Nevada Casinos and Other Gaming Venues” (n.d. [ca. 2006]), on http://www.no-smoke.org/pdf/nevadaeconstudy.pdf (visited Aug. 29, 2008); Chris Pritsos, Karen Pritsos, and Karen Spears, “Smoking Rates Among Gamblers at Nevada Casinos Mirror US Smoking Rates,” \textit{TC} \textbf{17}:82-85 (2008). The director of research at AGA, which “has gotten out of trying to estimate the percentage of casino patrons who smoke,” distanced himself from a 2003 newspaper article in which an AGA consultant mentioned two unidentified surveys as indicating that 35-40 percent of casino customers smoked; referring to the aforementioned Nevada study, the research director stated that “we would still argue that smoking bans at casinos do have a negative impact on business. In other words, if...only 20% of our customers smoke, this still represents a very significant part of our customer base, particularly in these very challenging economic times.” Email from Andrew Smith to Marc Linder (July 6, 2009). The consultant was cited by Clarke Canfield, “Would Smoke-Free Casino Succeed?” Oct. 10, 2003, on http://news.mainetoday.com/indepth/gambling/031010casinosmoke.shtml (visited July 6, 2009).

The Smokefree Air Act of 2008

were located districts in which casinos donated significant amounts of money

173 Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008). Although the Iowa report by Glantz et al. correctly pointed to this constraint in explaining the casino exemption, the authors also asserted that: “Additionally, Speaker of the House Pat Murphy (...Industry Contributions: $1,500) made it clear in caucus conversations at the beginning of the legislative session that he would not allow a clean indoor air law to pass the House without an exemption for casinos.” Tiana Epps-Johnson, Richard Jones, and Stanton Glantz, The Stars Aligned over the Cornfields: Tobacco Industry Political Influence and Tobacco Policy Making in Iowa 1897-2009, at 157 (2009), on http://repositories.cdlib.org/ctcre/tcpmus/IA2009/. For this claim they cited only an interview with non-legislator Cathy Callaway (who could not have personally participated in closed caucus conversations) without revealing her source. Id. n. 14 at 178. The authors appeared not to realize that this alleged additional reason for the casino exemption was not consistent with the first reason: if the House speaker had in fact already laid down the law on this issue, it would have been superfluous for Petersen to justify accommodating four Democratic committee members’ casino-beholdenness since they all would have been aware that Speaker Murphy had given the caucus its marching orders. Additionally, a survey of leading anti-smoking caucus members found no one who could corroborate that Murphy had ever made such a statement. Typical was the observation by the bill’s House floor manager, Tyler Olson: “I do not recall the Speaker making that statement. The decision to include the casino exemption was made after a vote count revealed the bill would not pass without it.” Email from Tyler Olson to Marc Linder (May 10, 2011). Philip Wise, who had offered the amendment to exempt casinos in committee, stated: “I do not remember Speaker Murphy making such a statement in Caucus. I am not aware of Cathy Callaway’s quotation, but I do know that she was never present during Caucus. That means that her information is at best second-hand. I will assure you that the Smoke-Free Air Act would have never been debated and passed without the support of Speaker Murphy and Majority Leader McCarthy. The casino exception was placed into the bill by the three House members most involved with the legislation because that was the only way to secure 51 votes for the bill. None of those three House members preferred that such an exemption be included.” Email from Phil Wise to Marc Linder (May 20, 2011). Even the most damning judgment offered by any of these Democrats absolved Murphy of the charge. According to Iowa City Representative Mary Mascher: “[W]e did not have the votes to pass the Clean Air Act with the casinos in the bill. Too many of the casino legislators resisted and were ‘no’ votes. Pat Murphy was a casino legislator who would have been a no vote but he did not force anyone else to vote no.” Email from Mary Mascher to Marc Linder (May 10, 2011). Finally, the authors attempted to make the existence of Murphy’s ukaz plausible by asserting that the casino industry’s claims that a smoking ban would cause the state to lose tens of millions of dollars of revenue because customers would instead go to Indian or out-of-state casinos “resonated with key legislators, particularly Speaker of the House Murphy.” Tiana Epps-Johnson, Richard Jones, and Stanton Glantz, The Stars Aligned over the Cornfields: Tobacco Industry Political Influence and Tobacco Policy Making in Iowa 1897-2009, at 160 (2009), on
to local groups and projects, employed a significant number of workers, and contributed to the representatives’ campaigns. 174 (In contrast, Minority Leader Rants fancifully speculated that Majority Leader McCarthy had told the Commerce Committee to exempt casinos: since he had been able to deliver on the rest of the “garbage” on his party’s agenda such as “fair share” and taxes, he could, had he so desired, also have shoved casino coverage down his members’ throats.) 175

Five Democrats on the Commerce Committee represented counties in which casinos were located: Deborah Berry, Doris Kelley, and Bob Kressig (Black Hawk/Waterloo/Isle Casino Hotel), Paul Shomshor (Pottawattamie/Council Bluffs/Ameristar Casino Hotel, Harrah’s Council Bluffs Casino & Hotel, and Horseshoe Casino & Greyhound Park), and Wise (Lee/Ft. Madison/Catfish Bend Casino). 176 Although none of these five representatives was mentioned on the American Cancer Society’s vote count card as needing or wanting a casino exemption, two of them were recipients of campaign contributions from several casinos, which distributed large amounts of money to the Democratic leadership as well. Shomshor received $500 from Ameristar PAC on January 9, 2008 and another $300 on July 14, 2008, $500 from Harrah’s Entertainment PAC—Harrah’s also owned Horseshoe Casino—on January 8, 2008, and a total of $3,050 in 2003, 2004, and 2006 in addition to $1,000 on December 3, 2007 from Friends of Prairie Meadows (a casino located far from his district, which

http://repositories.cdlib.org/ctcre/tcpmus/IA2009/. However, neither of their two sources for this allegation even mentioned Murphy (one of them having been written in 2004). Id. nn. 46 and 320 at 180, 194. Whether the result of sloppiness or sleight-of-hand, such research methods tend to undermine the authors’ credibility.

174 Email from Rep. McKinley Bailey to Marc Linder (Mar. 16, 2008); telephone interview with Merle Pederson, government affairs, Principal Financial Group, Des Moines (Aug. 4, 2008); telephone interview with Sen. David Hartsuch, Bettendorf (Aug. 11, 2008). “[V]oting for business interests in their districts,” as one former House speaker (who demanded anonymity) described legislators’ behavior, “is pretty much the norm.” Email to Marc Linder (June 11, 2009).

175 Telephone interview with Christopher Rants, Des Moines (May 12, 2008).

176 Joe Benedict, “Great River Acts to Shut Down FM Riverboat,” Daily Democrat (Ft. Madison), Oct. 17, 2007, on http://www.dailydem.com; telephone interview with Brian Ohorilko, Des Moines, Director of Gaming, Iowa Gaming and Racing Commission (May 29, 2009). Kressig, while representing Black Hawk county, lived in and represented Cedar Falls, the city adjoining Waterloo. The one riverboat casino in Fort Madison (Catfish Bend) was closed in November 2007, but it had operated six months a year there and six months a year in nearby Burlington. The company (Great River Entertainment) that owned it was planning to build a land-based casino in its stead.
also gave a total of $1,000 to Senate Majority Leader Gronstal on January 13 and June 19, 2008). Kelley received $100 from Ameristar (which was located far from her district). In 2007-2008 Harrah’s gave a total of $3,000 to House Speaker Murphy and $1,000 to House Majority Leader McCarthy (as well as $2,000 to House Minority Leader Rants and $3,000 to Senate Minority Leader Wieck); in 2006 Murphy received $5,000, McCarthy $500, and Democratic gubernatorial candidate Chet Culver $10,000. (In October 2006 Harrah’s even contributed $300 to Representative Janet Petersen’s re-election campaign.) All told for 2008, Ameristar contributed at least $12,400,\(^{177}\) of which slightly more than one half went to the four Democratic legislative leaders—a total of $2,250 on January 13 and October 23 to House Speaker Murphy, $1,000 to House Majority Leader McCarthy on January 8, a total of $1,500 to Senate President Kibbie (who represented Emmetsburg, where Wild Rose Casino was located) on January 12 and October 9, and a total of $1,600 to Senate Majority Leader Gronstal (who did represent Council Bluffs) on January 13 and June 30.\(^{178}\)

\[\text{\textit{The Increasingly Precarious Foundations of Local Control and the Link to Exemption of Casinos}}\]

Do you understand why (reportedly) suddenly there is momentum for a stricter statewide smoking ban, whereas until recently the votes were not there for anything but repeal of preemption?

It is just one of those things that is hard to explain around here. How an idea becomes hot. Good legislators pushing hard is probably the best reason for action.\(^{179}\)

Representative Wise’s apologetics were all the more ironic since he warned that smoking ban advocates who rejected all exemptions were “in danger once

\(^{177}\)The Iowa Ethics and Campaign Disclosure Board website lists contributions totaling that amount under Ameristar, but not the $500 contribution which is listed under what Shomshor received. https://webapp.ieedb.iowa.gov/publicview/ContributionSearch.aspx#ctl00_cph1_gvList (visited May 10, 2009).


\(^{179}\)Email from Marc Linder to Sen. Joe Bolkcom (Feb. 11, 2008) and from Sen. Joe Bolkcom to Marc Linder (Feb. 12, 2008). Republican Whip Kraig Paulsen shared Bolkcom’s sense of the unanalyzable when he called the shift in momentum from local control to statewide ban an example of a bill’s simply taking on “a life of its own.” Telephone interview with Kraig Paulsen, driving on I-80 from Cedar Rapids to Des Moines (Aug. 18, 2008).
The Smokefree Air Act of 2008

again of ‘allowing the ideal to destroy the good’ — a version of Voltaire’s aphorism (‘le mieux est l’ennemi du bien’) that would be used ad nauseam during floor debates as a kind of self-fulfilling prophecy to justify opposition to a more stringent law. Perhaps Wise was taking such a hard line so early in the process because he feared that ‘‘some groups are willing to get nothing in pursuit of’’ the ideal. Even Tyler Olson, who was ‘‘interested in getting something done this year,’’ agreed that, as it stood, H.S.B. 537 would probably not be able to secure 51 votes. In any event, a consensus prevailed among subcommittee members that the bill’s expansive local control provision—which, inter alia, prohibited the law from being ‘‘interpreted to prevent political subdivisions from adopting ordinances or regulations relating to smoking in places of employment, in public places, or in outdoor areas, which are more restrictive than the provisions of the’’ law—would probably not pass. Indeed, ironically, soon thereafter political intelligence began circulating that casinos themselves were responsible for the shift in momentum from local control to a statewide ban because now that they had secured an exemption from the latter, they were pushing it inasmuch as it would be much more difficult for them to obtain exemptions from numerous local governments.

Though distinct, this motive was consistent with a broader-based business opposition to local control’s balkanizing impact, especially in the Des Moines metropolitan area, where, owners feared, differing regulations in contiguous municipal jurisdictions would create untoward and uncontrollable competitive

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185When this report surfaced on the local news of public radio stations in Iowa on February 18, Assistant Majority Leader Sen. Joe Bolkcom remarked that it was the first time that he had heard it, adding that “[t]he casinos will most likely get their preemption at either the local level or state level.” Email from Joe Bolkcom to Marc Linder (Feb. 18, 2008). As noted elsewhere in this chapter, Democrats had already explained to health lobbyists that even a preemption repeal bill would need the casino exemption for passage.
advantages and disadvantages. Foreseeing such consequences, bar and restaurant owners, in particular, gave Senate Majority Leader Gronstal and other Democrats “push back” on local control. Ironically, the result, Gronstal noted, was that some businesspeople who would have preferred no law, once confronted with the necessity of accepting some form of public smoking control, came to regard a statewide ban as the lesser evil.\footnote{Telephone interview with Michael Gronstal, Council Bluffs (May 17, 2008). Minority Leader Wieck also later agreed that local control’s momentum had been halted by the perception of the untoward consequences of a patchwork of ordinances. Telephone interview with Ron Wieck, Sioux City (Aug. 10, 2008).} (To be sure, at least in the restaurant and bar industry, owners’ and managers’ preference for a statewide ban over local control was, according to a survey conducted in late 2006, not overwhelming: asked whether, if smoking were to be banned in restaurants, they would prefer a state law or a local ordinance, 45 percent of respondents supported the former and 31 percent the latter, while for bars the proportions were 45 percent and 28 percent, respectively.)\footnote{Gene Lutz et al., \textit{Smoking Policies of Food-Serving Businesses in Iowa}, tab. 6 at 20 and tab. 7 at 21 (Feb. 2007), on http://www.csbs.uni.edu/dept/csbr/pdf/IDPH_Business_Tobacco-2007.pdf (based on telephone interviews with 601 randomly chosen owners/managers in Oct.-Nov. 2006). These responses refer to all respondents and not only to restaurant owners in the one case and bar owners in the other. Some outliers also emerged: for example, when asked about bans in restaurants, owners/managers of establishments with sales evenly split between food and alcohol, 27 percent favoring a statewide ban, while 33 favored local control. \textit{Id.}, tab. B at 43.} Consequently, the shift in legislative momentum from local control to state action in part reflected the Democratic leadership’s perception that ultimately the latter would face less business opposition.\footnote{Telephone interview with Walt Tomenga, Johnston, IA (July 17, 2008).} On a party-line vote the subcommittee approved moving the bill to the full Commerce Committee.\footnote{IDPH Legislative Update (Jan. 28, 2008), on http://www.idph.state.ia.us/adper/common/pdf/legis/archive/2008/080128_update.pdf (visited July 5, 2008).}

In spite of the progress of H.S.B. 537, at this point local control bills still appeared viable. On January 22, H.F. 778, which, because of its casino and bar exemptions, had been put on hold in 2007, was, together with S.F. 236, which had passed the Senate in 2007 with an exemption for fraternal organizations,\footnote{See above ch. 34.} assigned to a House Local Government subcommittee, chaired by Roger Thomas, its designated floor manager,\footnote{\textit{House Journal 2008}, at 1:86 (Jan. 22).} with the intent to strip out all three exemptions. The Iowa Department of Public Health called S.F. 236 “the bill to watch for
supporters of local control," but, in the wake of the shift of momentum to Petersen’s statewide ban bill, it saw no further action. The next day, January 23, Wise filed H.F. 2054, a stripped-down ban, which also excluded casinos. To be sure, Wise’s (sole) sponsorship of the bill is difficult to reconcile with Petersen’s highly credible statement that in “running the amendment” that exempted casinos from H.S.B. 537 at the Commerce Committee hearing on February 5, Wise had not been acting out of concern for casinos’ profits, but had merely volunteered to carry out a task that some Democrat would have had to perform if the bill’s supporters’ strategy was to be implemented. H.F. 2054 simply expanded coverage under the existing feeble law by banning smoking in all restaurants on July 1, 2008, and in all bars one year later. In addition, it struck the exemption for public places with less than 250 square feet of floor space. At the same time, however, Wise’s bill for the first time would have exempted all gambling structures or excursion gambling boats. The following day it was assigned to the same subcommittee that was dealing with H.S.B. 537. Whether the vehicle for smoking control in 2008 turned out to be statewide or local, passage, as Republican Representative Walt Tomenga, a non-voting member reported to the Tobacco Use Prevention and Control Commission on January 25, would require exemptions.

On the day of the Commerce subcommittee hearing the House Human Resources Committee proposed H.S.B. 565, a preemption repeal bill similar to S.F. 236. Petersen was also named chair of the subcommittee to which the bill was assigned, but it never even met on the bill. The day after the Commerce
subcommittee meeting, Democrat Ro Foege filed a preemption repeal bill, identical to the one he had filed in 2007, which would have empowered a city, county, or local health board to enforce higher standards or stricter requirements than the weak statewide law’s; it non-exhaustively exemplified that authority to include eliminating exemptions, prohibiting the designation of smoking areas, and doing away with bar owners’ discretion not to establish any no-smoking areas. It was referred to the House Human Resources Committee and then to a subcommittee of which the quasi-ubiquitous Petersen was chair, but it was quickly overtaken by events and also progressed no further. Foege, who had quit smoking about 20 years earlier, was such a confirmed advocate of (exemptionless) local control that even after the statewide ban had gone into effect he continued to regard the former—which he conceded was just an intermediate step on the way to a statewide ban—as superior, sweeping aside both statements by other Democrats that, in order to pass, a local control bill would also have had to have included exemptions and objections that it would have taken many years for local governments to adopt ordinances. Instead, echoing the claims of the Heart-Lung-Cancer coalition and based on experiences in some other states, Foege implausibly insisted that the “domino effect” would have accelerated the process so that it would have been completed within two or three years. (In contrast, the Heart Association acknowledged, at least after the fact, that enactment of a statewide ban had relieved it of the enormous work that it would have taken to convince a thousand local government to pass anti-smoking ordinances.) As far as locally imposed exemptions were concerned, Foege found it acceptable for a city council to permit smoking in a casino.

At this juncture, in the wake of the subcommittee proceedings, local control advocates, seeing the governor and House and Senate majority leaders “on board” that’s the businesses deciding what’s best for their own business.” Charlotte Eby, “Global Warming, Smoking on Tap for Lawmakers,” MCG-G, Jan. 27, 2008, on http://www.globegazette.com (visited May 15, 2008).

See above ch. 34.


Telephone interview with Ro Foege, Mt. Vernon (Aug. 31, 2008).

Telephone interview with Ro Foege, Mt. Vernon (Aug. 31, 2008). Foege’s devotion to local control was so extreme that, asked why the statewide ban bill had supplanted it, he had no answer to what he called a “good question.” In noting that few other House members shared his strong advocacy of local control, he oddly identified McKinley Bailey as one of them despite the latter’s support for bill-killing broad exemptions.
The Smokefree Air Act of 2008

(but unaware of the traction that Petersen’s bill was about to gain), regarded prospects for repeal in 2008 as rather positive.\(^{204}\)

**Representative Janet Petersen’s Indispensability**

“The hardest thing for me to do was plug my nose and vote to take the casinos out...”\(^{205}\)

In order to understand the progress of the statewide ban bill in 2008, it is crucial to appreciate the unique individual contribution of Janet Petersen, without whose “passion” and tenacity\(^{206}\) the bill would probably not have passed\(^{207}\) or perhaps even have secured leadership’s clearance for floor debate in 2008\(^{208}\) at

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\(^{204}\)Telephone interview with Threase Harms, CAFE Iowa lobbyist, Des Moines (May 14, 2008).


\(^{206}\)Telephone interview with Randy Yontz, state advocacy director, American Heart Association of Iowa, Des Moines (May 14, 2008).

\(^{207}\)The House majority leader’s administrative assistant and legal counsel freely acknowledged that Petersen had been the person most responsible for passage, but added that McCarthy agreed with her 100 percent and hated smoking. Telephone interview with Brian Meyer, Des Moines (May 12, 2008).

\(^{208}\)Nevertheless, her commitment to the elimination of smoking had its limits: asked, after the Smokefree Air Act had gone into effect, whether a majority of the Iowa legislature might support adoption of a law similar to an ordinance just passed in San Francisco prohibiting pharmacies from selling tobacco products, Petersen replied that “[a]s a champion of smokefree air...I am not interested in banning a business from selling a product,” although she did not deny that prohibiting a health care institution such as a pharmacy from selling cigarettes reinforced the promotion of smokefree air. When asked whether she would support legislation to prohibit hospitals from selling cigarettes, she failed to respond. Petersen’s surmise that, since she was not interested, she doubted whether the initiative “would have much support from other legislators,” if empirically accurate, might help explain why the Iowa legislature has, in recent decades, been so backward on smoking and tobacco issues. Email from Janet Petersen to Marc Linder and from Marc Linder to Janet Petersen (July 31, 2008). Petersen’s position may be related to her misunderstanding that government lacks the power to ban smoking and tobacco altogether: “I wish we could eliminate it but I don’t think that’s within our jurisdiction to eliminate smoking. You know, it’s a legal product just like alcohol is a legal product....”


3309
The Smokefree Air Act of 2008

a time when she herself did not know whether enough votes could be mobilized to pass it. She certainly did not secure passage singlehandedly, but she was, as McCarthy’s assistant put it, “the driving force” behind the bill, and there is no other actor of whom it can plausibly be said that he or she was indispensable. Petersen’s key advocacy was, as a former Democratic House speaker admiringly put it, “over the top.” On one occasion, at least, Petersen availed herself of the opportunity to set the historical record straight about her central role. Asked on the television program “Iowa Press” in early March how local control, for which everyone seemed to be headed, had “morphed” into a much stricter bill, she explained: “Well, I guess I probably had something to do with that because last year we weren’t able to get the local control bill out of local government [committee] in the House. And I had a statewide bill that I had been working on for the past eight years and I said I’d like a shot to run it this year and just see where the votes are. I’ve been talking to business owners in my district and talking to legislators and I thought if people keep talking about local control that I actually think we might have a better shot at a statewide ban.” Her antagonist on the program, Democratic Senator Bill Dotzler, agreed that “Janet probably did have something to do with it...."

Petersen had wanted to try to pass such a bill for years, but her efforts had been in vain in the face of the adamant opposition of Republican Majority Leader Rants, whose tobacco industry money, sluiced through his 527 organization, ...
exceeded by a large margin any contributions that cigarette companies had previously handed out in Iowa.\(^{215}\) Founded by Rants in 2005, the Iowa Leadership Council, “a clear voice...for conservative principles” such as “restraining taxes,” was designed to “push back the concerted efforts” of “Democrat and ultra-liberal independent political expenditure groups.”\(^{216}\) Not only did cigarette companies such as Altria ($25,000 in 2005 and 2006), Reynolds American ($25,000 in 2005 and $40,000 in 2007), and Lorillard ($10,000 in 2005 and $5,000 in 2008) contribute plentifully, but so did the larger tobacco-industrial-retail complex, including retailers such as Casey’s General Stores ($5,000 in 2006 and $5,000 in 2008), Kum and Go ($10,000 in 2007 and through the W.A. Krause Revocable Trust $10,000 in 2006 and $5,000 in 2007), and casinos such as Ameristar in Council Bluffs ($30,000 in 2006 and $10,000 in 2007) and Harrah’s ($10,000 in 2006).\(^{217}\)

In the wake of the Democrats’ having gained control of the House at the 2006 elections, Petersen’s strategy included her appointment as chair of the Commerce Committee, in which capacity she then signaled her priorities by informing committee members that no other bill would be going anywhere until she got the statewide smoking ban through. Her committee-level power, however, would have been unavailing had she not been able to persuade House Majority Leader Kevin McCarthy—who had not, until after her committee had acted, believed that a statewide ban bill could attract enough votes to pass—to let her try her bill;\(^{218}\)

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\(^{215}\)Telephone interview with Sen. Michael Connolly, Dubuque (Apr. 29, 2008). Asked after passage of the bill whether she expected tobacco companies to become involved in the rule-making process, Sen. Appel, pointing to Rants’s 527 money, stated that they had been involved all along. Telephone interview with Staci Appel, Ackworth (Apr. 12, 2008).


\(^{217}\)Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008). On Petersen’s bills before 2008, see above chs 31 and 34. A later press account stating that McCarthy “could take the credit, or blame” for House passage of H.F. 2212 because, “[s]ensing support for new smoking restrictions was picking up momentum,” he “was one
as she had been unable to do in 2007, when the Democratic leadership “asked her to yield to efforts to pass” a local control measure.\textsuperscript{219} Petersen also multiplied her influence by partnering with Representatives Tyler Olson and especially with Philip Wise, the latter and Petersen becoming each other’s closest friend in the legislature.\textsuperscript{220} Nor was the majority leader the only unbeliever: the anti-tobacco health organizations all opposed the statewide ban bill in 2007 and at the outset of 2008 because they feared that, since no other state had enacted a statewide ban without first having empowered local communities to pass their own anti-smoking ordinances, Iowa would wind up with a weak statewide law. Indeed, though Petersen herself in the 1990s had worked and lobbied for the American Heart Association, she was unable to persuade even that organization to focus on her statewide approach. More remarkably, even after her bill had begun to “move” in 2008, the health groups still refused to abandon their opposition\textsuperscript{221} —or, as her successor at the Heart Association put it, the organization had preferred local control even after it had been served a statewide ban “on a silver platter.”\textsuperscript{222} Speaking for many in the movement, the Cancer Society’s lobbyist later observed that “we were kind of floored” that Petersen and her supporters even thought that they had the votes to pass a bill, let alone that the bill this time around would “have legs.”\textsuperscript{223} Conversely, Petersen nourished vigorous contempt for the local control bill of 2007, which she bluntly characterized as a watered-down “hunk of
The Smokefree Air Act of 2008

The House Commerce Committee Meeting of February 5

[I]n the commerce committee I need twelve votes to get it out of committee and the Republicans had decided they didn’t want to play ball on this issue. So, I had to just work with my Democratic members and that was one way for me to obtain the votes to keep the bill alive. 225

The Commerce Committee meeting on H.S.B. 537 on February 5226 was the crucial step in the legislative process signaling that a statewide ban would prevail over merely authorizing local governments individually to go beyond the meager limits of the obsolete clean indoor air act. Since the Senate was considered the more activist chamber in terms of smoking regulation, the fact that even some Republicans joined Democrats on the House Commerce Committee in recommending the bill suggested that floor passage was a definite possibility. The meeting was also decisive in confirming the aforementioned predictions that passage of a statewide ban would be possible only if casinos were exempt.

The reconstruction of legislative history in Iowa, as in most states, is made difficult (if not impossible) by the lack of a stenographic transcript not only of floor debate, but also of committee hearings and meetings. And although the public can and does attend both plenary floor and committee sessions, audio only of the former has recently begun to be available live (but not archived) on the legislature’s website. Fortunately, however, in the age of www.youtube.com, an

224Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008). Nevertheless, before her bill made its definitive breakthrough, Petersen, according to the Lung Association’s lobbyist, promised that she would support a local control bill if it got “legs” and H.F. 2212 did not (a scenario that did not occur). Telephone interview with Dan Ramsey, ALA, Des Moines (May 14, 2008).


226According to an account of the meeting by Jason Clayworth, “Bill Would Ban Smoking in, Near Public Places,” DMR, Feb. 6, 2008 (2B:1-2), the president of the Iowa Gaming Association, Wes Ehrecke, “successfully urged lawmakers…to exempt casinos….” But according to Ehrecke, who was present, neither he nor any other non-legislator was permitted to speak; he surmised that the reporter had conflated this meeting and the aforementioned January 23 subcommittee hearing. Telephone interview with Wes Ehrecke, Des Moines (June 15, 2009).
audio-video recording of most of the meeting was posted on the internet.  

**Laying Tracks to a Statewide Ban Jettisoning Local Control and Exempting Casinos**

It is too soon to know the causes [of the decline in Illinois casino revenues]—and it doesn’t really matter. One thing is the same now as when the bill was passed last year: Smoking is hazardous. It is hazardous to the smokers, to other patrons and to employees. A decrease in revenue at casinos or elsewhere doesn’t change that. ... The smoking ban carries costs, but so does smoking.

Following a brief presentation of the study bill by Tyler Olson, who would become floor manager of H.F. 2212, Representative Wise offered his two amendments—which he had signaled in subcommittee—striking local control and exempting casinos; the basis for the latter he did not explain, but he found local control on top of a statewide ban “most amusing,” with which it was “inconsistent” in addition to being “confusing.” He thus added insult to injury in rebuffing the local control-oriented anti-tobacco groups.

(In the event, after the bill had become law without the express provision satisfying the constitutional and codified conditions for lifting the limitations on home rule, some die-hard advocates of local control did not find its absence

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227 The nonpartisan but for-profit IowaPolitics.com posted the three-part, 30-minute video, which, however, ended before the final vote. The meeting convened at 3:20 p.m., but recessed five minutes later for 65 minutes for Democratic and Republican caucuses; during these first five minutes other bills were assigned to subcommittees and amendments to H.S.B. 537 were distributed; the meeting then reconvened at 4:30 p.m. and adjourned at 5:25 p.m. [House] Committee Minutes for Commerce (Feb. 5, 2008), on http://www3.legis.state.ia.us/ga/minutes.pdf?minutesID=3602. The Youtube videos thus appear to include about 30 of the 55 minutes devoted to H.S.B. 537.

228 “Don’t Carve Out Exemptions to State’s Smoking Ban,” Pantagraph (Bloomington), Feb. 15, 2008 (A6) (edit.) (Lexis).

229 House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=sWB5mIeiTD0 (House Commerce Committee approves smoking ban (part 1)) (visited July 5, 2008).

230 A lobbyist for one of these groups reported that the elimination of local control at the Commerce Committee meeting had come out of the blue, though the anti-smoking groups had known that it would happen. Telephone interview with Threase Harms, CAFE Iowa lobbyist, Des Moines (May 14, 2008).

231 Iowa Constitution art. III, § 38A; Iowa Code §§ 364.1, 364.2(3), and 364.3(3) (2007). See also above ch. 25.
amusing. Nor was such a power illogical or superfluous, as Wise had implied, especially in the wake of his casino exemption, which was precisely why especially casinos would have opposed local control. Its usefulness would, for example, become glaringly obvious in May, when the Sioux City city council began toying with adoption of an ordinance that would have banned smoking in a casino in the teeth of a law that expressly exempted it from the statewide ban.

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232 Cindy Hadish, “Smoking Ban: ‘Awesome’ or Oppressive?” Gazette (Cedar Rapids), Apr. 10, 2008 (1A:1-2, at 6A:4) (mentioning Clean Air for Everyone Johnson County as intending to continue to push for local control to strengthen the ban further). However, the example—crude attempts at evasion in Minnesota of that state’s 2007 Freedom to Breathe Act by bar owners to call all their smoking customers actors in an (exempt) stage performance—that CAFE’s lobbyist used to justify its need was inapt. Telephone interview with Threase Harms, CAFE Iowa lobbyist, Des Moines (May 14, 2008).

233 Lynn Zerschling, “City May Try to Ban Smoking at Argosy,” SCJ, May 6, 2008, on http://www.siouxcityjournal.com (visited May 6, 2008). The city attorney, who conceded that “[r]easonable minds can differ and others could interpret the Act in another way,” concluded that it was “likely” that the city “has the power to adopt an ordinance forbidding smoking in areas which are not listed in the Act and [in] those areas which are exempted from the Act.” The city attorney sought to harmonize the ban with the Iowa Supreme Court precedent that an ordinance was inconsistent with, and thus preempted by, a state law when the former prohibited an act permitted by the latter by arguing that the ordinance was merely more stringent than, but not inconsistent with, the Smokefree Air Act. He reached this conclusion by stressing that the statute: (1) repealed the express preemption contained in the old law; (2) did not expressly prohibit cities from adopting smoking ordinances; (3) permitted private businesses (and local governments) in their own buildings/on their own land to prohibit smoking that is permitted by the statute; and (4) “merely exempts certain areas from its own regulation” without expressly stating that smoking shall be permitted or not regulated there. Andrew Mai, Informational Memo: Smokefree Air Act, to Sioux City City Council (Apr. 25, 2008) (copy provided by Andrew Mai). The city attorney’s memorandum was, in turn, based on an analysis furnished by the Tobacco Control Legal Consortium, which argued that the ordinance could be reconciled with the statute because it promoted the Smokefree Air Act’s underlying policy and merely increased the details of the regulation. Letter from Maggie Mahoney to Andrew Mai and Eleanor Dilkes (Apr. 22, 2008) (copy furnished by Andrew Mai). These arguments suffered from their failure to deal with any of the following crucial aspects of legislative history: (1) the House Commerce Committee struck an expansive local control provision from the study bill before passing it out of committee as H.F. 2212, the amendment in question having been filed by Rep. Wise, one of the bill’s strongest supporters, whose amendment included only one other provision—the casino exemption; (2) the Senate voted to strike the casino exemption, but both houses ultimately agreed to retain it; and (3) the main reason that the legislature decided not to pursue any local control bill (i.e., a bill that would have expressly repealed preemption of local control in Iowa Code sect. 142B and
This initiative triggered an immediate rebuff from Senate Majority Leader Michael Gronstal, who, incorrectly, stated that the legislature had not repealed “the state law that prohibits local governments from adopting smoking ordinances...so I’m not sure if they know what they’re doing up there.” Correctly, but irrelevantly, bill floor manager Tyler Olson weighed in with the thought that “it’s pretty clear that the state, at least this year, has spoken and said that we’re going to exempt the gaming floor.” Why he nevertheless expected other cities to emulate Sioux City he did not explain.\footnote{O. Kay Henderson, “Lawmakers React to Proposed Casino Smoking Ban in Sioux City,” Radio Iowa, May 7, 2008, on http://www.radioiowa.com (visited May 15, 2008). Gronstal was wrong both because the new anti-smoking law, H.F. 2212, did in fact repeal the preemption of local anti-smoking ordinances that the cigarette oligopoly had succeeded in having inserted into the old law in 1990 and the aforementioned constitutional and codified limitations on home rule did not expressly prohibit local governments from passing smoking ordinances. According to the city attorney, Governor Culver stated (on television), without offering a reason, that the city had the power to ban smoking at the casino. Email from Andrew Mai to Marc Linder (Sept. 15, 2008).} A few days later the council abandoned the effort, in part based on concerns that state law preempted it, but in part also because the casino management’s commitment to “consider setting aside a nonsmoking area on the gaming floor would make the ordinance unnecessary.” The councilman who had launched and now tabled the proposal commended management’s “efforts to meet the goal of the state law without a government mandate” by means of feckless nonsmoking areas and an absurd filtering technology that included “a new anti-smell or fragrance system.”\footnote{Lyn Zerschling, “Argosy Smoking Ban Goes Up in Smoke,” SCJ, May 10, 2008, on http://www.siouxcityjournal.com (visited May 12, 2008). The denouement prompted a casino website to ditch a quarter-century of science and out-do even Philip Morris: “The solution seems so simple, one wonders why non-smokers feel so strongly about enforcing their will upon the liberties of others when compromise can keep all parties relatively satisfied.” Tom Weston, “Sioux City Drops Proposed Casino Smoking Ban”(May 11, 2008), on http://www.onlinacasinoadvisory.com/casino-news/land/iowa-town-drops-casino-ban-1695.htm (visited May 22, 2009).}

Ignoring the deletion of local control, with which the minority party was doubtless in full agreement, Chuck Soderberg, a second-term northwest Iowa
The Smokefree Air Act of 2008

power cooperative vice president and the ranking Republican on the committee, asked Wise why he wanted to exempt casinos. Noting that the hospitality industry in other states had generally benefited from smoking bans, Wise observed that casinos were the only area in which he had been able to find any evidence of a negative economic impact; stressing that his information was “very preliminary” and “tentative,” he mentioned that casinos in eastern Iowa were picking up some business from Illinois after that state’s smoking ban (which had just gone into effect on January 1, 2008, covering casinos)—the reversal of which fate he wished to spare Iowa casinos, especially since they would also


237House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=sWB5mleITD0 (House Commerce Committee approves smoking ban (part 1)) (visited July 5, 2008). How Wise would have gotten the January Illinois data so soon is unclear; according to the Legislative Services Agency senior legislative analyst from whom Wise later requested detailed data: “Illinois and Iowa update their casino websites early in the following month, but February 5th would be pretty early for January data. Also, I am not sure I had discovered the Illinois web site as early as February 5, 2008. Rep. Wise may have just had an Illinois contact with knowledge of the situation. I am not sure of his source put [sic] it probably was not me.” Email from Jeff Robinson to Marc Linder (June 19, 2009). The press reported on February 1 that data from six of Illinois’ casinos during a 10-day period in early January revealed a 20-percent decline, but the executive director of the Illinois Casino Gaming Association expressly noted that “[w]e’re very cautious with the figures because we’ve had some bad weather the first part of the month.” That revenue had declined more than attendance suggested to him that customers were not leaving the state, but spending less time gambling: “Instead of pulling slot machine arms with a cigarette dangling out of their mouths, gamblers who smoke go outside for a puff, leaving machines and seats at card tables unused for longer periods of time.” Jake Griffin, “One Month Later Bars, Casinos Are Feeling the Ban,” Chicago Daily Herald, Feb. 1, 2008 (1) (Lexis). The press did not publish the Illinois Gaming Board’s official January data showing a 17.5 percent drop in revenues until Feb. 9, but even then the ICGA executive director emphasized that: “‘We’re not saying that the smoking (ban) is causing all of it.'” Without explaining how management had disentangled the various causes, Tom Swoik expressed the belief that “a majority of the losses” had resulted from the ban, adding that “[b]ad weather in January also probably contributed to the decline in revenue.” Adriana Colindres, “Casinos Blame Statewide Ban for Majority of Decline in Revenues,” State Journal-Register (Springfield), Feb. 9, 2008 (6) (Lexis).

be subject to a competitive disadvantage vis-a-vis Native American casinos, which would not be covered by the law.\textsuperscript{239}

The smoking ban-related causality allegedly underlying data that constituted the sole empirical basis for Wise’s precedent-setting exemption was so shaky that days after the Commerce Committee vote even the Illinois casino industry was cautioning against overinterpreting the data. For example, the vice president of a casino in Rock Island stated that “a combination of the smoking ban, harsh weather and the current state of the economy make it difficult to blame” the lower revenue on “any single factor....” As for smoking specifically, “the true picture for us is going to have to wait,” but “[e]ven then, we’ve done some things to sort of mitigate the situation by providing smoking areas for our guests, which are being used.” And a Democratic legislator who said that he would consider an exemption if some area in the casino were set aside for nonsmokers, insisted not only that more time was needed to assess the trends and determine the causes of the revenue loss, but that even if revenue declined in all of the state’s casinos, “it could be the smoking ban, or it could be the economy.... I think we’re probably going to have to wait to really see what’s happening there.”\textsuperscript{240}

In the face of all this uncertainty in Illinois itself over the meaning of the drop in revenue—two weeks after the committee’s adoption of Wise’s amendment the executive director of the ICGA still conceded that “some of the drop could be attributed to bad weather”\textsuperscript{241}—Wise neither offered nor was asked to explain why it was necessary to enact a politically explosive exemption (that would, to boot,
result in the continuing exposure of millions of people to intense secondhand smoke) immediately rather than, at the very least, monitoring the impact of coverage and reassessing the situation after one year. He failed to divulge whatever data he had for the month of January, and no other legislator apparently had the incentive to criticize Wise’s amendment. Democrats, at least in the House, were too committed to the done deal to raise inconvenient and unsettling issues. (As Wise himself later put it: “In the Iowa House, the casino gaming floor exception did bring “yes” votes to the bill. I am not personally aware of any votes that it cost the bill. There were legislators in the Iowa House who also groused about the exemption and threatened to vote against the bill if the exemption was included. None of them did so.”) In contrast, Republicans, who, by and large, did not support smoking bans anywhere, cried crocodile tears for casino workers only as a pseudo-issue in order to attack Democrats’ inconsistency.

In response to Soderberg’s next question as to whether the casino issue was financial or health, Wise candidly (but self-contradictorily) admitted that it was economic: if health alone were the issue, there would be no exemptions. But neither Soderberg nor anyone else asked Wise to explain to the members the calculation demonstrating that the potential loss of an indeterminate amount of casino revenue and/or state tax revenue justified enabling the sickness and death of a certain number of casino employees and customers exposed to other customers’ secondhand smoke, and so the committee, on a strictly party-line basis, voted 13 to 9 in favor of Wise’s amendment. No one challenged Wise, but had Wise himself or any would-be critic paid as much attention to the political struggle in Illinois that had consciously, intentionally, transparently, and loudly put public health before casinos’ profits

242 Email from Phil Wise to Marc Linder (July 9, 2009).
243 House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=sWB5mIeiTD0 (House Commerce Committee approves smoking ban (part 1)) (visited July 5, 2008).
244 House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=sWB5mIeiTD0 (House Commerce Committee approves smoking ban (part 1)) (visited July 5, 2008); House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=Qw8W3ppSCDc&feature=related (House Commerce Committee approves smoking ban (part 2)) (visited July 5, 2008). The first five Republicans to vote “passed”; after the last four had voted No, the first five changed their vote to No (Amendment 707); [House] Committee Minutes for Commerce (Feb. 5, 2008), on http://www3.legis.state.ia.us/ga/minutes.pdf?minutesID=3602. Republican Doug Struyk explained later that Republicans’ initial passing had been driven by their belief that three Democrats might vote No. Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).
The Smokefree Air Act of 2008

and government’s tax revenues as they had to January’s decline in the latter two magnitudes, they would have discovered an alternative framework for a public discourse that might have altered the course of the Iowa debate. And had Wise looked further than just across the Mississippi and examined the policy underlying the casino smoking ban implemented in Victoria, Australia in 2002, a more radical redirection of the Iowa discussion might have taken place. In Victoria the purpose of the smoking ban in gambling venues was twofold—to protect workers and customers from secondhand smoke “and as a measure to reduce the addictiveness of gambling.” In other words, the government did not view the drop in revenues as a trade-off for enhancing public health, but actually intended it as a means of reducing the losses of those afflicted with the dual addictions of smoking and gambling by disrupting—as a market research report prepared for one of the gambling firms, which commissioned the study to assess the new law’s impact on revenue and “customer satisfaction” and to provide “information regarding an explanation of ritualistic behaviour and how it manifests emotionally and physically in individuals exhibiting gambling and smoking behaviour,” put it—smoking as “a powerful reinforcement for the trance-inducing rituals associated with gambling.” These disruptions included: “Wanting to smoke a cigarette is distracting and breaks the concentration with playing the game. Awareness of expenditure (“playing the poker machine is a waste of money”) when leaving the game to having a cigarette. Tempted to go home rather than play on. Effects [sic] concentration, levels of agitation and

245See below this ch.


irritability.”249 (To be sure, the firm, not sharing the government’s goal of interfering with the synergy between the two addictions, received a long laundry list of suggestions from psychologists—who informed their client that “[c]urrent research considers the behaviour of compulsive gambling and smoking nicotine within an ‘addiction model’”—on “How to Encourage...Smokers to Continue Gambling in Non-Smoking Environments” such as “[t]raining staff with the primary purpose of keeping people at the machines to play continuously,” offering free mints, gum, or hard lollies, and permitting smokers to reserve a machine while they go outside to smoke so that they were required to return to the machines.)250

Tobacco control organizations and unions representing gaming employees favored the Victoria ban because of its diminution of secondhand smoke exposure, but with smokers representing 36 percent of electronic gambling machines users but contributing 50% of the revenue,251 gambling control supporters expected that the smoking ban would help reduce excessive gambling among problem gamblers: requiring smokers to interrupt their activity to go outside to smoke might prompt them to reconsider their gambling and “an earlier withdrawal from the gambling ‘trance.’”252 Unsurprisingly, given the disproportionate share of smokers among all gamblers and problem gamblers253 and the latter’s disproportionate contribution (42 percent) to electronic gambling machine revenue,254 the fact that smokers, after the ban went into effect, did in fact spend less money on gambling because they gambled less time per hour (because they spent time on smoking breaks) and less time overall (because they left the establishment earlier),255 meant that industry revenue and government tax

The Smokefree Air Act of 2008

revenue declined in fiscal year 2003 7.6 to 10.0 percent and 8.5 percent, respectively.\(^\text{256}\) Also fostering these declines were additional policies designed to interfere with uninhibited gambling such as limiting access to cash and automated teller machines at gambling sites, requiring display of information on odds of winning, lowering maximum bet limits, and banning gambling machine advertising.

At least for Victoria, investigators have hypothesized that the sudden and long-term reduction in gambling machine expenditures differed from the impact of smoking bans in restaurants: whereas in the latter smokers by and large adjusted by smoking before or after eating and the advent of nonsmokers who formerly avoided smoky locales compensated for the small proportion of smokers who stopped frequenting or lingered less in restaurants, in gambling establishments “each minute away from a machine is money not spent” and nonsmokers failed to increase their expenditures.\(^\text{257}\)

Iowa, too, had witnessed the pervasive phenomenon of the dual gambling-smoking addiction. Numerous studies have revealed, for example, that the proportion of so-called problem gamblers in Iowa\(^\text{258}\) admitted to gambling treatment\(^\text{259}\) who smoked far exceeded that of the population at large: tobacco use prevalence among this subpopulation ranged between 51 and 70 percent.\(^\text{260}\) The


\(^{258}\)According to the Iowa Department of Public Health, “problem gamblers,” for whom “gambling has become an addiction...like an addiction to alcohol or drugs,” “find it extremely difficult to stop gambling.” Of adult Iowans 88 percent gamble, while 3 percent are problem gamblers. http://www.1800betsoff.org/problem_gamblers.asp

\(^{259}\)In 2004 the legislature imposed a 0.5 percent tax on casinos’ adjusted gross receipts to fund such gambling treatment. Iowa Code §§ 99F(3)(c) and 135.150 (2008). Ironically, in 2008 the legislature, while excluding casinos from the statewide smoking ban, appropriated $1,690,000 from this fund to IDPH for the benefit of people with addictive disorders and specified that priority be given to those “with a dual diagnosis of substance abuse and gambling addictions....” 2008 Iowa Laws ch. 1187, § 3.

\(^{260}\)Howard Shaffer et al., *The Iowa Department of Public Health Gambling Treatment*
The Smokefree Air Act of 2008

Victorian program would have been readily available as an initiative that might have united critics of secondhand smoke exposure and the individual and family financial havoc wreaked by gambling in opposition to leaving casino smoking unregulated, but in fact only one Iowa legislator (Republican Scott Raecker) during floor debate on H.F. 2212 objected to the casino exemption in the context of this twofold “addictive disorder.”

The Origins of Iowa’s Unique Smoking Ban on the Outdoor Grounds of Public Buildings in a Republican Ambush that Boomeranged

Iowa certainly hasn’t been on the cutting edge when it comes to smoking laws.

See below this ch. (House debate of Feb. 19).

261 See below this ch. (House debate of Feb. 19).

The Smokefree Air Act of 2008

After raising the issue of the basis for the proposed casino exemption, Soderberg offered the Republicans’ only amendment, which added the underlined language to the following subdefinition of “public place”: “Public buildings, places of public assembly, and vehicles owned, leased, or operated by or under the control of the state government or its political subdivisions and including the entirety of the private residence of any state employee any portion of which is open to the public.” The amendment also added the following additional outdoor area in which smoking was prohibited: “The grounds of any public buildings and places of public assembly owned, leased, or operated by or under the control of the state government or its political subdivisions, including the grounds of a private residence of any state employee any portion of which is open to the public.”

In statehouse circles it was public knowledge that the Republican amendment (which, according to Democrats, really originated with assistant minority leader Doug Struyk, although the latter denied the allegation) was designed as a killer amendment. With the so-called Terrace Hill (governor’s mansion) amendment, Republicans intended to embarrass Governor Culver, whose wife Mari, who “was trying to kick the habit,” would not lawfully be able to smoke on the grounds of the family’s residence.

263House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=Qw8W3ppSCDc&feature=related (House Commerce Committee approves smoking ban (part 2)) (visited July 5, 2008). The amended language was added to H.S.B. 537, § 2(12)(s), and inserted as § 3(2)(f).

264Telephone interview with Philip Wise, Keokuk (May 18, 2008).


266Struyk later stated that the amendment had been discussed briefly during a Republican caucus, but that it had not been his idea and that he was not sure whether it had originated with Soderberg himself or whether he had merely “run” it. As one of the caucus’s three lawyers, Struyk did go over the amendment. Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).


268O. Kay Henderson, “Statewide Smoking Ban Endorsed by Legislative Committee,” Radio Iowa (Feb. 5, 2008), on http://www.radioiowa.com (visited May 12, 2008). Republicans may not have been just guessing: after the law went into effect, Mari Culver’s failure to control her nicotine addiction did embarrass the governor. After a reporter had seen her unlawfully smoking in a state vehicle chauffeured by a state trooper, she was constrained to admit that she had violated the law. Although the trooper failed to issue her a ticket, the following day she requested and received the ticket. Tony Leys, “First Lady Admits Smoking in State Vehicle,” DMR, Nov. 21, 2008, on http://www.desmoinesregister.com (visited Nov. 21, 2008); Tony Leys, “Mari Culver Requests Ticket for Smoking,” DMR, Nov. 22, 2008, on http://www.desmoinesregister.com (visited Nov.
The Smokefree Air Act of 2008


Telephone interview with Chuck Soderberg, Le Mars (May 16, 2008).

271 Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).

272 House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=Qw8W3ppSCDc&feature=related (House Commerce Committee approves smoking ban (part 2)) (visited July 5, 2008); [House] Committee Minutes for Commerce (Feb. 5, 2008), on http://www3.legis.state.ia.us/ga/minutes.pdf?minutesID=3602 (Amendment 204). Petersen stated later that Democrats had had all of five minutes’ notice of the amendment, during which they decided to accept it. Telephone interview with Rep. Janet Petersen, Des Moines (June 6, 2008). Although the aforementioned timeline in the minutes indicated that Democrats had 65 minutes while caucusing to discuss the amendment and the YouTube video includes no caucusing or any other interruption after Soderberg offered his amendment, Rep. Wise also stated later that as soon as Soderberg brought forward the amendment, Democrats caucused and made the decision to accept it. Telephone interview with Philip Wise, Keokuk (May 18, 2008). Committee member Doug Struyk also stated that Republicans had caucused for five minutes and that Democrats had been aware that the amendment would be offered. Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).

269 Struyk freely acknowledged that embarrassment had indeed been one of the amendment’s purposes in order to point up the “hypocrisy” underlying Democrats’ selective approach to coverage. In introducing the amendment, Soderberg offered three separate reasons, the last clearly being a dig at Culver: (1) “the state really does need to lead by example”; (2) the need to protect historic buildings; and (3) in his condition of the state address the governor had said that “if you’re going to talk the talk, you need to walk the walk.” Tyler Olson, visibly unable to suppress a smirk while putting the minority party in check, announced that “I appreciate that the amendment is offered in the spirit of public health.” All Ayes and no Nays being heard on the short-form (non-roll-call) vote, the amendment carried. Struyk later insisted that Republicans had not viewed Democrats’ adoption of the amendment as a boomerang: true, his party had tried to box the majority party in by maneuvering it into voting against the expansion of coverage, but Republicans did not feel that they had been saddled with a provision that they actually opposed. Ironically, the very capaciousness of “the grounds of public buildings” language would radically broaden the outdoor coverage of the smoking
ban, an outcome that could not plausibly have been Republicans’ intention and that would not have occurred had the amendment been literally confined to its original Terrace Hill target. In this sense,Struyk’s claim that the caucus had not realized that the amendment would be interpreted so expansively seems, in light of its unambiguous language, implausible. More likely, however, is Republicans’ failure to foresee that their provision would give rise to sharp and multifaceted floor debate over its meaning, a controversy over ambiguity that would be perpetuated during the drafting of the administrative rules.

For its author, however, the phrase was crystal clear. Asked later what he had meant by “grounds of public buildings,” Soderberg immediately responded that he had intended it to cover the whole outdoor area. When asked about an extreme but real situation, he readily replied that if the only building in a state park were an enclosed bathroom, then smoking would be prohibited on the park’s entire grounds. Asked, finally, whether such a capacious definition was not “pretty radical,” especially since during plenary consideration he had opposed the bill on every vote, Soderberg stressed that “the law needs to be consistent.” This pseudo-justification of consistency would later play the central part in Republicans’ pseudo-opposition to the exemption of casinos.

The third and final amendment was offered by McKinley Bailey, a 28-year-old first-term Democrat, who for five years had been a paratrooper in the 82nd Airborne Division of the U.S. Army, leading a Tactical Signals Intelligence Intercept Team in more than 120 “combat missions” in Iraq and Afghanistan. Despite the fact that the Iowa Democratic Party had contributed more than $100,000 to his election campaign, Bailey’s increasingly prominent opposition

273 Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).
274 See below ch. 36.
275 Telephone interview with Chuck Soderberg, Le Mars (May 16, 2008). Soderberg tentatively confined his capacious self-interpretation to state (as opposed to county and city) grounds, but he was presumably confused: although his amendment did expressly refer to state employees’ private residences, “the grounds of public buildings” did and does refer indiscriminately to the state and its political subdivisions.
277 On three occasions in October 2006 the party contributed a total of $107,675. https://webapp.iecdb.iowa.gov/PublicView/statewide/2006/Period_Due_Date_19-Oct/Candidates/Bailey%20McKinley__1665__scanned.pdf; https://webapp.iecdb.iowa.gov/PublicView/statewide/2006/Period_Due_Date_Fri.%20preceding%20general/Candidates/Bailey%20McKinley__1665__scanned.pdf (visited Aug. 3, 2008). Bailey’s electoral importance derived from his having been one of five newly elected members who gave Democrats control of the House; in contrast, whether he voted with the party was of
distinctly lesser importance since a bill would not even have been debated if Republicans had retained the majority; what counted was who set the agenda and who decided what got debated, and Republicans would not have debated any serious labor, environmental, or similar bills. Email from former House speaker who demanded anonymity to Marc Linder (Aug. 3, 2008).

Email from Mary Mascher to Marc Linder (Mar. 15, 2008). The House Majority Leader’s administrative assistant and legal counsel stated after the end of the session that there was party discipline and might be consequences for a legislator who voted against the party on final passage (such as the inability to get his bills passed). When asked in particular about Bailey, Brian Meyer replied: “You said it, I didn’t.” Telephone interview with Brian Meyer, Des Moines (May 12, 2008). On Bailey’s persistent advocacy of a pro-smoking agenda before the Administration Rules Review Committee in 2008 and during the 2009 legislative session, see below ch. 36.

278 Email from Mary Mascher to Marc Linder (Mar. 15, 2008). The House Majority Leader’s administrative assistant and legal counsel stated after the end of the session that there was party discipline and might be consequences for a legislator who voted against the party on final passage (such as the inability to get his bills passed). When asked in particular about Bailey, Brian Meyer replied: “You said it, I didn’t.” Telephone interview with Brian Meyer, Des Moines (May 12, 2008). On Bailey’s persistent advocacy of a pro-smoking agenda before the Administration Rules Review Committee in 2008 and during the 2009 legislative session, see below ch. 36.

279 House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=Qw8W3ppSCDc&feature=related (House Commerce Committee approves smoking ban (part 2)) (visited July 5, 2008); [House] Committee Minutes for Commerce (Feb. 5, 2008), on http://www3.legis.state.ia.us/ga/minutes.pdf?minutesID=3602 (Amendment 202).

280 House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=17sBjOF8p68 (visited July 6, 2008).
The Smokefree Air Act of 2008

amended without recommendation; all 13 Democrats, joined by three Republicans, supported the measure. On February 11, the bill, now H.F. 2212, was placed on the House debate calendar. Despite the startling victory that she had just achieved, Petersen was quick to admit that the bill “isn’t perfect,’ but...the exemptions were necessary to advance the plan... ‘I would ideally like no exemptions...but I plugged my nose and voted for it, because this will protect 99 percent of Iowa’s workforce.’” Nor did tacking on the exemptions guarantee passage, which the press immediately reported was “anything but assured,” in part because a legislative majority might instead plump for local control, which itself “could collapse under the weight of business interests.” Moreover, although Governor Culver had just promised in his Condition of the State Address that he would sign preemption repeal, the most that he would say at this point was that he “would have to consider signing off on a statewide ban...”


nevertheless still gave the bill a better than 50-50 chance of passage.\textsuperscript{284}

In contrast, the Iowa Tobacco Prevention Alliance (composed of the Heart-Lung-Cancer groups and CAFE Iowa CAN), while constrained to acknowledge that H.F. 2212 was an admirable bill, was nevertheless beset with the fear that the anti-smoking movement would wind up with a half a loaf. Indeed, so concerned was ITPA that it was prepared, if the bill was saddled with additional exemptions—such as ones for ventilated public places or time carve-outs for smoking during certain hours of the day—to ask the governor to veto it.\textsuperscript{285}

At the other end of the spectrum, Jonathan Van Roekel, president of the Clinton’s Organized Bar & Restaurant Association (COBRA)—which had been established in early 2006 to respond to City of Clinton ordinances governing bar licensure and under-21 exemptions\textsuperscript{286}—was busy disseminating the disinformation that “a high percentage of businesses in California failed after the smoking ban was enacted there.” The group presumably also believed that it was promoting its plan to secure 10,000 anti-smoking bill petition signatures from food and beverage employers, workers, and customers when it alleged that an exemption from the ban—which one member called “‘legal extortion’”—was being considered that would cost owners $1,700.\textsuperscript{287}

\textbf{The Debate over the Financial Impacts of Casino Smoking Bans in Delaware and Illinois}

The [Illinois] casinos are hoping that, armed with a couple of months of dismal


\textsuperscript{285}Telephone interview with Threase Harms, CAFE lobbyist, Des Moines (May 14, 2008). Nevertheless, through its lobbyists CAFE declared for the bill on Feb. 13, as did the Iowa Hospital Association, Iowa Health Systems, and AFSCME Council 61; the American Cancer Society declared for it on Feb. 20 and, the American Lung Association on Feb. 27. \url{http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service=DspReport&ga=82&type=b&hbill=HF2212}.


To be sure, Wise’s remarks about a potential gambling exceptionalism to the general rule that smoking bans did not reduce hospitality industry revenues were not per se wholly implausible, though the impact of the Smoke Free Illinois Act did not mark the first instance of such allegations, and had he focused on the Delaware Clean Indoor Air Act of 2002, he would have found that not only did that state survive the temporary loss of tax revenue, but the governor, after more than three years of experience with the ban, both praised the cleaner air as its greatest benefit and pointed out that the three slot machine casinos had recorded their highest revenues ever. But even if the issue were impermissibly narrowed to the financial impact on private firms to the exclusion of the health care costs linked to the morbidity and mortality caused by secondhand smoke exposure (in addition to the pain and suffering of those whose health is ruined and lives are prematurely terminated), separating out and measuring the contributions of the various possible causes of declining revenues coincident with the implementation of a casino smoking ban would be a complex empirical undertaking. Not the least of the difficulties to be encountered would be determining: (1) what proportion of pre-ban gamblers had been smokers; (2) what proportion of those smoking customers reacted to the ban by: (a) traveling across a border to a casino in another state that did not ban smoking; (b) traveling to an in-state tribal casino that did not ban smoking; (c) ceasing to frequent casinos; or (d) continuing to gamble at the now smoke-free casinos and taking smoking breaks, which resulted in spending less time and money gambling; and (3) how many nonsmokers who had previously avoided smoky casinos began gambling there once the smoke had cleared. In the cases of Illinois or Iowa even on the fundamental first variable of the pre-ban smoking prevalence reliable data were lacking.

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290 “State gaming officials contend that unofficial surveys show as many as 60 percent to 70 percent of gamblers smoke in Illinois casinos. Smoking critics say the figures are fiction.” E. Torriero, “Smokeless Casinos Await Fate,” CT, Jan. 1, 2008 (1) (NewsBank). According to ICGA, the “Casino Queen in East St. Louis and Jumers’ Casino in Rock Island did informal surveys on their properties.” Email from Tom Swoik to Marc Linder (June 28, 2009). A Philip Morris memorandum from the latter half of the 1990s on casinos stated that about a third of customers were “assumed to be smokers,” which was above the national average but lower than the gaming industry’s “claim” of 50-90 percent, adding: “There is no primary survey data to support either claim.” “Situation Analysis:
At the Commerce Committee meeting on February 5 Wise did not divulge the Illinois casino revenue data for January 2008 on the exclusive basis of which he had pressed to exempt casinos from H.F. 2212, but during that first month of the Smoke Free Illinois Act, the adjusted gross revenue and total admission/wagering tax of Illinois riverboat casinos had declined by 17.5 percent and 18.2 percent, respectively, compared to January 2007.\textsuperscript{291} (For all of calendar year 2008, the declines were greater—20.9 percent and 32.0 percent, respectively.)\textsuperscript{292} The Illinois casinos attributed the drop to the smoking ban, which prompted “habitual smokers” to take smoking breaks during which they did not gamble. In contrast, the Illinois Gaming Board took the position, even after the fiscal year’s end, that the “relative importance” of that factor and of the decline in the Illinois and national economies had “not yet been quantified with certainty.”\textsuperscript{293}

Not until February 27—a week after the Iowa House debate, but just in time for the Senate floor debate on H.F. 2212—in a Fiscal Note requested by Democratic Senators Appel and Dotzler, did the Legislative Services Agency report that the Iowa Racing and Gaming Commission, based on data from other states, estimated that a smoking ban would reduce adjusted gross revenue by 10 percent, which LSA calculated as translating into a decrease in gambling losses of $140.5 million and of state gambling tax revenue of $31.7 million.\textsuperscript{294}

\textsuperscript{291}Calculated according to http://www.igb.state.il.us/revreports/january2008statreport.pdf; http://www.igb.state.il.us/revreports/january2007statreport.pdf (visited June 9, 2009).

\textsuperscript{292}Illinois Gaming Board, 2008 Annual Report 14, on http://www.igb.state.il.us/annualreport/2008igb.pdf (visited June 9, 2009). The declines in casino revenues to state and local governments in Illinois from fiscal year 2007 to 2008 and 2008 to 2009 (the smoking ban went into effect in the middle of FY 2008) were the highest among all 12 states with commercial casinos—14.7 and 23.8 percent, respectively; the second highest declines were recorded by Michigan from FY 2007 to 2008 (6.9 percent) and New Jersey from FY 2008 to 2009 (14.1 percent). Lucy Dadayan, “For the First Time, a Smaller Jackpot: Trends in State Revenues from Gambling,” tab. 7 at 14 (Rockefeller Institute of Government, Fiscal Studies, Sept. 21, 2009), on http://www.rockinst.org (visited Sept. 21, 2009).


\textsuperscript{294}Fiscal Services Division, Legislative Services Agency, Fiscal Note: HF 2212 as amended by S-5013) (Feb. 27, 2008). LSA’s estimate was based on the assumptions that 25 percent of the $140 million decrease “will be lost at other gambling facilities where smoking is not banned (such as Native American casinos)” and the other 75 percent “will be expended as any other dollar of personal income by Iowans.” Id. It is unclear how this assumption can be reconciled with IGA’s claim that “an estimated 65% of patrons come
LSA did not open the black box sheltering IRGC’s methodology, but later Brian Ohorilko, the Commission’s director of gaming, did: “That estimate was made to the LSA based on discussions I had with other regulators in jurisdictions that had passed a smoking ban at that time (I believe Illinois, Colorado, Delaware, Michigan because of Windsor). If my memory serves me right, the request from the LSA was made around March or so. Illinois and Colorado were in the very early stages of their ban and had limited data. From the regulators that I had polled, they all felt the ban had a negative impact on revenue of about 5-15%. They all felt that the economic situation also led to some of the declines.” Asked whether the regulators in Illinois and the other states at that time had been “able to sort out and quantify the impact of the economic recession and the impact of the smoking ban,” Ohorilko succinctly replied: “No, that was and still is the mystery.... I don’t envy the researchers quantifying the impact.”

Indeed, in response to a question as to whether he would not have expected that, since the Illinois smoking ban had gone into effect on January 1, 2008, by mid-2009 smokers who had abandoned the Illinois casinos would have begun showing up in the Iowa casinos located along the Mississippi River, he observed: “Excellent question. I’m not sure anyone really knows how any of these factors affected the year over year comparisons. I have read many articles in various gaming markets around the country making valid points for each. My only point for the next year maybe being a better indicator is that you have construction finished in Dubuque in the second half of last fiscal year, maybe the economy will settle, you would have a full fiscal year of comparison for other factors like the flood and smoking ban since some of that impact (if any) would also be seen in the first part of the most recent fiscal year.”

If even a year and a half later IRGC itself was still skeptical of its own methodology and steeped in epistemological humility regarding human ability to discern, let alone untangle, the consequences of the Illinois smoking ban, the alleged financial justification for exempting Iowa casinos from a smoking ban alleged by owners and their legislative backers in early 2008 appears to have been a very thin reed.

Much greater detail about LSA’s Fiscal Note is available because Representative Wise, who was leading Democrats’ efforts to insure casinos’ exemption on the grounds that a bill could otherwise not be passed, himself

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295 Email between Brian Ohorilko and Marc Linder (June 17, 2009).
296 Email between Marc Linder and Brian Ohorilko (June 18, 2009).
The Smokefree Air Act of 2008

requested from LSA in March “additional background regarding the economic impact assumptions used to complete” the Note. Jeff Robinson, senior legislative analyst at LSA, who informed Wise that in order to determine whether a smoking ban was “likely to reduce gambling activity” at casinos, LSA had reviewed two studies (regression analyses) that had analyzed the Delaware ban’s impact on casinos, “researched the early results of the Illinois smoking ban[,] and contacted” IRGC. Referring to the Delaware study by Mandel, Alamar, and Glantz—which concluded that that state’s Clean Indoor Air Act had had no negative economic impact on casino revenues, just as smoke-free laws “do not harm restaurants, bars, or bingo parlours”—Robinson noted that it instead attributed the decline in casino revenue to an economic downturn. Of the other study, by Michael Pakko, he stated that it concluded that Delaware’s anti-smoking law had resulted in a statistically significant 14.9 percent drop in revenue. In an email 15 months later attaching this memo and responding to a telephone request for essentially the same background information that Wise had requested, Robinson summarized the memo’s projection of a 10 percent reduction in casino revenues as originally IRGC’s estimate. He then added that based on his own analysis of the Delaware data, “I think a more reasonable estimate was the 14.9% cited by Pakko.... However, it did not seem that the

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297 Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) at 1-2 (Mar. 17, 2008) (email copy provided by Robinson).


299 Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) at 1-2 (Mar. 17, 2008) (email copy provided by Robinson). Robinson failed to mention that the article stressed that one of the casino companies in Delaware had stated in a Securities and Exchange Commission filing that a decrease in its management fees from a Delaware racino had been “mainly caused by inclement weather.” L. Mandel, B. Lamar, and S. Glantz, “Smoke-Free Law Did Not Affect Revenue from Gaming in Delaware,” TC 14:10-12 at 10 (2005). Oddly, Robinson referred to HF 2212 as an indoor ban bill when in fact it applies to broad outdoor swaths.


301 Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) at 2 (Mar. 17, 2008) (email copy provided by Robinson).
debate and decision making would be any different at 10% than at 14.9%, so the less inflammatory 10% was chosen. With the first year’s data for [the] Illinois casino smoking ban now in, I would likely use a number between 15% and 20% now."

Since Robinson seemed to be unaware that a major controversy had erupted between Glantz and Pakko and between pro- and anti-tobacco control forces over the interpretation of the Delaware data, he was asked to explain (as he had not in the memo) why he had adopted Pakko’s approach and (implicitly) rejected Glantz’s. Robinson’s initial response was as astonishingly ad hominem as it was based on ignorance of the homines involved, despite the fact he appended links to websites on their backgrounds: “Glantz is a medical doctor working for a cancer research organization. Pakko is an economist working for the Federal Reserve Bank of St. Louis.” Even if these bare facts were true, it is unclear why they would have prompted a legislative analyst to let them tip the scales in favor of Pakko’s analysis. Despite the fact that the website for Glantz, which did not reflect his phenomenal productivity or the fact that his prodigious scholarship and political engagement had contributed crucially to the creation of a smokefree world, made it unambiguously clear that Glantz was not a medical doctor (but had a Ph.D. in applied mechanics), even a quick look at his webpage (even though it was more than 10 years out of date) from one of the other departments (Cardiology) of which he is a member at the University of California at San Francisco would have revealed to Robinson that Glantz was in fact an expert on statistics, who not only taught biostatistics at the University of California, but had written a textbook on biostatistics, which had gone through many editions and been translated into many languages, and another specifically on regression analysis. Robinson also seemed unaware and/or unembarrassed that he had appended as the webpage for Pakko not that of his employer, the Federal Reserve Bank of St. Louis, but rather that of the Show-Me Institute, a right-wing, free-market, anti-government, pro-business think

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302 Email from Jeff Robinson to Marc Linder (June 18, 2009).
304 Email from Marc Linder to Jeff Robinson (June 19, 2009).
305 Email from Jeff Robinson to Marc Linder (June 19, 2009).
306 These remarks about Robinson are not meant to cast aspersion on him (especially since he very generously devoted considerable time to explaining his methods and reasoning), but rather to use this unusual opportunity to shed light on the empirical research basis of public policy formation in the Iowa legislature.
307 http://cancer.ucsf.edu/people/glantz_stanton.php
308 http://cardiology.ucsf.edu/people/glantnew.htm
The Smokefree Air Act of 2008

tank—whose staff routinely testify against smoking bans ("Forced conformity...is fundamentally un-American")\(^{309}\) and propagandize against cigarette tax increases ("Saving lives is a worthy goal, but it should not come at the price of personal freedom")\(^{310}\)—of which Pakko was a research fellow.\(^{311}\) Pakko’s crude anti-government, market-knows-best ideological basis was unmistakably on display during an interview conducted by the Bank:

> The important thing to recognize here is that when you have a smoking ban imposed by a government authority, you’re changing the nature of the businesses in the community in such a way that they could have changed themselves. So...a bar or restaurant always has the option of prohibiting smoking to begin with. And presumably if that was profitable for them to do so, they would do so. So as a starting point...the market-based outcome of business owners selecting their smoking status gives us a baseline and an imposed smoking ban on top of that can’t make anything really better off but only worse off in terms of revenues. ...

> I don’t see it as a matter of rights. I don’t think that either smokers’ or non-smokers’ desire to smoke or be away from smoke really rise to the level of rights as enshrined in our Constitution or Bill of Rights for instance. What we’re really looking at are competing sets of preferences. And when you have conflict among preferences...the free-market system is probably the most efficient way of resolving those disputes.\(^{312}\)

Pakko’s penchant for trivializing the leading actual cause of death in the United States\(^{313}\) went to the extent of characterizing the “smoking environment” in restaurants as just one of many “amenities,” including the color of table cloths, with regard to which owners competed and level-playing-field statewide smoking bans inefficiently restricted entrepreneurial freedom.\(^{314}\)

Why this kind of analytic public policy framework should have commended Pakko’s analysis to Robinson he did not reveal, but he later observed that “more important to me” was the graph he had included in the memo indicating that


\(^{311}\)http://www.showmeinstitute.org/scholar/id.49/scholar_detail.asp


The Smokefree Air Act of 2008

gambling revenues in Delaware began falling the month the ban went into effect and continued to decline for one year: “I do not believe powerful statistical methods were necessary to illustrate the smoking ban impact in Delaware.”

Asked whether the initial decline in revenue followed by a reversal and subsequent attainment of higher levels than before the ban might not have reflected a common scenario in the hospitality industry under which, after a brief rebellion, smokers returned and nonsmokers who had avoided smoky places began frequenting newly smokefree businesses, Robinson replied: “I can speculate but in no way prove, that by May 2005 [Delaware] would have had a higher AGR [adjusted gross revenue] level without the ban then [sic] they had with it.” He then added this crucial self-reflection for public policy making: “I do not hold out my analysis as cause-and-effect. My job requires me to make conclusions on imperfect knowledge and I do the best I can. However, I am more confident in this conclusion than many I have to draw.”

With regard to the impact of the Illinois casino smoking ban, Robinson informed Wise that although only two months of data were available, Illinois “appears at least initially to be following the path of Delaware” in the sense that of the five monthly decreases (compared to the previous year) in adjusted gross revenue recorded since June 2004, two had been January-February 2008, the first two months of the ban. (He failed to mention that one of those five months was December 2007, the month before the ban began, when AGR dropped by 5.8 percent). Oddly, although Robinson then went on to concede that “additional months are needed to determine if this trend is related to the smoking ban or is perhaps due to economic, weather, or other factors,” he nevertheless concluded that the “Delaware experience and the early results from Illinois indicate that a

315 Email from Jeff Robinson to Marc Linder (June 19, 2009); Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) chart 1 at 2 (Mar. 17, 2008) (email copy provided by Robinson). It is noteworthy that one major component of Delaware racinos’ profitability, net proceeds per video lottery terminal, has been in steady decline for each of the state’s three racinos from 1998 to 2009. Graphs, based on official state agency data, constructed and made available by Lucy Dadayan (June 24, 2009); http://lottery.state.de.us/vdodata/modist.asp. According to one gambling industry consultant, the figure fell from $355.74 per day in 1998 to 200.50 in 2008. Email from Paul Girvan (The Innovation Group) to Marc Linder (June 24, 2009).

316 Email between Marc Linder and Jeff Robinson (June 19, 2009).

317 Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) at 3 (Mar. 17, 2008) (email copy provided by Robinson).

318 Calculated according to http://www.igb.state.il.us/revreports/
somewhat higher estimate [than the 10.0 percent decline in gambling tax revenue projected by IRGC] would also be reasonable." \[319\] Moreover, contrary to Robinson’s conjecture, the impact of the Illinois ban proved to take a different course inasmuch as 18 months after the ban had gone into effect revenues continued to decline, thus strongly suggesting that the deep nationwide economic recession was a vital causal factor. But in spite of agreeing that “the decline continued, most likely due in some part to the economy,” he nevertheless expressed the opinion that the January-December 2008 Illinois data “confirm[ ] the decision to accept the Pakko analysis instead of the Glantz analysis” and “also would support using an expected AGR reduction closer to 20% instead of the 10% we used.” \[320\] Indeed, looking back, he reflected that he “would reach similar conclusions” in mid-2009 even though in March 2008 he had completed the AGR analysis probably in only 48 hours or less. \[321\]

Robinson’s adherence to his original view of the Illinois ban, despite state legislators\[321\] and scholarly\[322\] findings that the economic recession and not the smoking ban had caused the revenue decline, was as striking as his insistence that that law, whose impact, unlike Delaware’s, was embedded in the deepest economic depression since World War II, nevertheless somehow supported Pakko’s regression analysis. Yet, and even in spite of his failure to explain why Pakko’s model was superior to and generated more robust results than Glantz’s, neither side has unambiguously refuted the other’s analysis, let alone proven its own. But regardless of the ultimate outcome of this empirical controversy, what Wise and the other anti-smoking Iowa (House) Democrats ignored was the possibility of choosing the Illinois alternative of prioritizing public health over private profit and government tax revenue even in the face of calls for repeal of the Smoke Free Illinois Act after the decline in casino revenues and taxes had ceased being a prediction and had become a fiscal reality—even to the extent of deeming such a drop an irrelevancy in the light of the public health gains for

\[319\] Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) at 3, 4 (Mar. 17, 2008) (email copy provided by Robinson).

\[320\] Email from Jeff Robinson to Marc Linder (June 19, 2009).

\[321\] See below this ch.

\[322\] Email from Prof. Frank Chaloupka, University of Illinois at Chicago to Marc Linder (June 20 and June 23, 2009) (referring to his report to the Illinois Department of Public Health, which examined per capita gaming revenues measures and whose “preliminary estimates show a negative, but not statistically significant effect...of the policy, after accounting for the underlying economic conditions”).
employees and customers.\textsuperscript{323} As a newspaper editorial in Dubuque, a Mississippi River city whose casinos would allegedly benefit from the Illinois casino smoking ban, observed: “Even if there is some revenue shortfall immediately following a ban, repealing it is not a smart solution. Lawmakers would be foolish to sacrifice people’s health in an attempt to recover some lost revenue.”\textsuperscript{324}

\textbf{Counterpoint: The Smoke Free Illinois Act’s Unique Total Ban on Casino Smoking}

[In my discussions with national political consultants, it’s the general belief that what the gaming industry wants—the gaming industry gets. They rarely lose. So you might focus on Illinois’ lack of exemption as the unusual feature rather than Iowa’s granting of an exemption.]\textsuperscript{325}

We were smarter.\textsuperscript{326}

One difference in intensity between the Illinois and Iowa laws that expresses the Illinois legislature’s more resolute resistance to calls for exempting casinos can be found in the preambular findings. Whereas from the time of its introduction until enactment Petersen’s bill contained only a brief and perfunctory nod to secondhand smoke and public health (“The general assembly finds that environmental tobacco smoke causes and exacerbates disease in nonsmoking adults and children. These findings are sufficient to warrant measures that regulate smoking in public places, places of employment, and outdoor areas in

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\textsuperscript{325}Email from George Eichhorn (ex-Iowa state legislator and lawyer representing bar owners who challenged Smokefree Air Act’s constitutionality) to Marc Linder (June 15, 2009).

\textsuperscript{326}Telephone interview with Illinois State Senator Terry Link, Lake Bluff, IL (July 9, 2009) (jocularly answering question as to why the Illinois legislature included casinos in its smoking ban while Iowa’s did not).
order to protect the public health and the health of employees”), the Smoke Free Illinois Act—which was drafted in the fall of 2006 by American Lung Association official Kathy Drea and Democratic Senator John Cullerton and enacted as drafted without changes—featured three lengthy paragraphs spelling out: the kinds of diseases and number of deaths that secondhand smoke caused; the “massive and conclusive” scientific evidence supporting these claims; and the impossibility of eliminating exposure by separating smokers and nonsmokers or high rates of ventilation. Indeed, the legislature even cited the aforementioned ASHRAE position document for the proposition that “the only means of eliminating health risks associated with indoor exposure is to eliminate all smoking activity indoors.” And finally and most centrally relevant to the issue of casinos, the legislative findings explicitly declared—without, to be sure, having the power to legislate a self-fulfilling prophecy—that “smoke-free workplace policies do not have an adverse economic impact on the hospitality industry.”

In spite (or perhaps because) of the inclusion and retention of this much more rigorous grounding of state intervention in science in the Illinois bill and statute, passage of a total smoking ban in casinos was hardly frictionless or a foregone conclusion. In this respect the Chicago Tribune’s characterization of the votes on the Smoke Free Illinois Act (34-23 in the Senate on March 29, 2007 and 73-42 on May 1, 2007 in the House) as “shockingly lopsided” ignored a number of vital considerations. First, the casino industry opposed coverage very intensely, although the executive director of the Illinois Casino Gaming Association admitted that his organization and members had failed even to come close to securing a casino exemption in 2007, primarily because it would have been difficult to exempt casinos without conferring the same status on bars and restaurants. Secondly, Senator Terry Link, the chief sponsor of Senate Bill 500, which originally contained no exemption, together with the Lung Association floated a committee amendment to delay coverage of riverboat casinos for three

328Telephone interview with Kathy Drea, Springfield (June 16, 2009).
329Email from Kathy Drea to Marc Linder (June 20, 2009).
ID=SB&LegId=28191&SessionID=51&GA=95 (visited May 27, 2009).
332“Going Smoke-Free At Last,” CT, May 4, 2007 (28).
333Telephone interview with Tom Swoik, Springfield (June 9, 2009). Iowa’s passage of the Smokefree Air Act and its enforcement and judicial aftermath revealed those difficulties, at least with regard to bars. See below this ch. and ch. 36
years\textsuperscript{334} because they believed that at the time of the Senate Executive Committee meeting on March 23 the votes were otherwise lacking to pass the bill.\textsuperscript{335} Third, the committee recommended its adoption.\textsuperscript{336} Fourth, knowing that at that juncture he could count on only 27 votes in the 59-member Senate, Link asked all eight senators with casinos in their districts whether they would vote for S.B. 500 if it exempted casinos for three years, but all of them, believing that he was begging for their votes because he was unable to secure a majority without them, said no. Fifth, seeing that it did not add to the number of Yes votes, Link then withdrew the amendment.\textsuperscript{337} Sixth, ALA and the whole anti-smoking coalition would have ditched the bill had it wound up permanently exempting casinos (as the Iowa law did), in no small part because members had become personally acquainted with numerous casino employees with whose health plight, caused by intense and long-term exposure to secondhand smoke, they had come to sympathize strongly.\textsuperscript{338} And seventh, right up until the Senate voted it was unclear whether the bill would pass.\textsuperscript{339}

But even after the legislature had passed the bill, the Illinois Casino Gaming Association persisted in efforts to secure exemptions.\textsuperscript{340} Just three weeks after both chambers had passed S.B. 500, but two months before Governor Blagojevich approved it, Senator James Clayborne, who represented a district that included the riverboat casino town of East St. Louis—which he argued would be

\textsuperscript{334}Senate Amendment 1 to S.B. 500 (Mar. 23, 2007), on http://www.ilga.gov/legislation/fulltext.asp?DocName=09500SB0500sam001&GA=95&SessionId=51&DocTypeID=SB&LegID=28191&DocNum=500&GAID=9&Session=

\textsuperscript{335}Telephone interview with Kathy Drea, ALA, Springfield (June 16, 2009). The fact that Link was a very strong supporter of casinos had nothing to do with his proposing this temporary exemption. Id. According to Senator Link, the health organizations reluctantly went along with this proposal. Telephone interview with Terry Link, Lake Bluff, IL (July 9, 2009).


\textsuperscript{337}Telephone interview with Terry Link, Lake Bluff, IL (July 9, 2009).

\textsuperscript{338}Telephone interview with Kathy Drea, ALA, Springfield (June 16, 2009).

\textsuperscript{339}Telephone interview with Michael Grady, Springfield, director of public policy and government relations, American Cancer Society-Illinois Division (June 10, 2009); telephone interview with Bunny, Springfield, Senator Terry Link’s legislative aide (June 11, 2009).

The Smokefree Air Act of 2008

“financially cripple[d]” by the smoking ban, which would cause the city to lose 10 percent of its annual budget funding\(^{341}\)—filed an amendment to another bill providing that, if S.B. 500 became law, casinos would be exempt for five years.\(^{342}\) After the Senate Executive Committee passed the amendment by a vote of 9 to 4,\(^{343}\) the full Senate defeated it 26 to 31.\(^{344}\) Later in 2007, another bill (which was defeated in committee) would have exempted riverboat gambling operations for five years or until the state closest to the boat banned smoking in such facilities, whichever came first.\(^{345}\) Other amendments unsuccessfully sought to achieve the same objective.\(^{346}\)

Following these failed attempts, in 2008 the cigarette manufacturers, which had acted behind the scenes in 2007,\(^{347}\) openly announced their intentions. In February, for example, the Chicago Tribune reported that: “Tobacco companies

\(^{341}\)Blackwell Thomas, “Panel Oks Plan to Exempt Casinos from Smoking Ban,” Q-CT, May 30, 2009, on http://www.qctimes.com (visited June 16, 2009). At the beginning of 2008, just as the ban went into effect, East St. Louis city officials stated that the Casino Queen provided $10.5 million annually to the general fund or about half of the city’s income. E. Torriero, “Smokeless Casinos Await Fate,” CT, Jan. 1, 2008 (1) (NewsBank). Senator Link noted that the city government of Rock Island was also heavily dependent on casino tax revenues. Telephone interview with Terry Link, Lake Bluff (July 9, 2009).

\(^{342}\)Amendment 5 to S.B. 890 (May 25, 2007), on http://www.ilga.gov/legislation/fulltext.asp?DocName=09500SB0890sam005&GA=95&SessionId=51&DocTypeId=S B&LegID=29022&DocNum=0890&GAID=9&Session=


\(^{345}\)H.B. 4184 (Nov. 28, 2007, by Republican Henry Ramey) http://www.ilga.gov/legislation/BillStatus.asp?DocNum=4184&GAID=9&DocTypeId=HB&LegId=34539&SessionID=51&GA=95. The bill would also have provided for a much broader set of exemptions for establishments (including bars less than 10 percent of whose revenue came from food, gambling operations, and adult entertainment venues) that had received a smoking license from the local liquor control commission. The House Environmental Health Committee defeated the bill on Mar. 4, 2008.

\(^{346}\)E.g., Amendment 2 to H.B. 2035 (Aug. 9, 2007, by Sen. Clayborne) http://www.ilga.gov/legislation/95/HB/09500HB2035sam002.htm. Ironically, when Sen. Hendon had to take this provision out in order to pass the bill, he characterized it as “encouraging people to not go across the border who have to have a cigarette while they lose their money.” State of Illinois, 95th General Assembly, Regular Session, Senate Transcript at 13 (Sept. 18, 2007), on http://www.ilga.gov/senate/transcripts/trans95/09500096.pdf

\(^{347}\)Telephone interview with Michael Grady, Springfield, director of public policy and government relations, American Cancer Society-Illinois Division (June 10, 2009).
are dumping thousands of dollars on lawmakers in a revved up effort to chip away at the new statewide smoking ban and ward off efforts to nearly double Illinois’ cigarette tax.” Alone in the four weeks preceding the February 5 primary election “two tobacco giants,” Altria (Philip Morris) and Reynolds American, Inc., contributed $83,000 to 30 legislators, exceeding the monthly pace that the industry had given in Illinois for at least a decade.  

(348) In 2006, Altria/Philip Morris contributed $347,650 to Illinois political campaigns/party PACs, while R. J. Reynolds contributed $94,000, and four gambling firms contributed a total of almost a million dollars.)  

Unlike his counterparts in Iowa—where, for example, in 2005-2006 tobacco companies contributed only $11,385 to candidates and party PACs, compared to $524,250 in Illinois—John O’Connell, an ex-legislator lobbying for Reynolds, consumption of whose commodities have led to millions of deaths over the decades, unashamedly declared: “‘We’ve been the whipping boy for a number of [legislative] sessions now...so we decided this year that we are going to participate in the process more heavily.’” He was unable to resist throwing in the industry’s mantra: “‘We are still a legal industry. And it is still a legal product.’” Arthur Turner, the Democrats’ House deputy majority leader, who had voted against S.B. 500 in 2007, was, with $14,000, the biggest recipient of tobacco industry money, and voted in 2008 to move along the smoking exemption bills (which House Speaker Michael Madigan, who took $10,000 from Altria, had already “vetted”), stated that “some members now will feel more ‘comfortable’ debating smoking exemptions” who had been “afraid to vote on these issues prior to the election.”

The most serious effort to exempt casinos took place in 2008, when Republican Senate Minority Leader Frank Watson filed an amendment to Senate Bill 2707, a so-called trailer bill, designed to deal with some problems that had arisen with the original Smoke Free Illinois Act. Senate Amendment 4 would


352 Telephone interview with Michael Grady, Springfield, director of public policy and government relations, American Cancer Society-Illinois Division (June 10, 2009).

353 State of Illinois, 95th General Assembly, Regular Session, Senate Transcript at 218-
have exempted the portion of a riverboat where gambling operations were conducted for five years or until the neighboring state closest to the particular riverboat banned smoking in similar places, whichever occurred first.\textsuperscript{354} After the Senate Executive Committee had recommended adoption of Watson’s amendment,\textsuperscript{355} on April 16, 2008, not coincidentally the day after Governor Culver had signed Iowa’s Smokefree Air Act, the Illinois Senate debated the amendment, whose operation Watson explained with reference to the Iowa law’s exemption for casinos. Pointing to a chart, he charged that “if you look at...what happened when the smoking ban came on [three and a half months earlier], you’ll see a huge, huge impact on revenues to this State, to the point where they’re estimating it could have a fiscal impact of a hundred and fifty million dollars to the State in taxes from the casinos....” He admitted that gambling was in a downturn “all over the country, but not to the magnitude that we are here in Illinois.” His plea, “let’s be real here,” collided with his undocumented belief that “some sixty percent of the people who go to casinos actually smoke.”\textsuperscript{356}

In the battle of the dueling “beautiful charts,” Link’s rebuttal—he strongly insisted that it “is not the smoking ban”—was empirical: there had been a downturn on all the gambling boats in all of 2007 and in 2006 in many states, including Iowa: “It’s the economy. It’s the economy.”\textsuperscript{357} (In fact, from March 2007 to March 2008 Iowa casinos’ adjusted gross revenue rose from $122 million to $130 million, while state taxes increased from $25.2 to $26.1 million; a comparison of all of 2007 and 2008 reveals that total admissions fell from 23.4

\textsuperscript{354}Senate Amendment 4 to S.B. 2707 (Apr. 11, 2008), on http://www.ilga.gov/legislation/fulltext.asp?DocName=09500SB2707sam004&GA=95&SessionId=51&DocTypeId=SB&LegId=37167&DocNum=2707&GAID=9&Session=355


\textsuperscript{356}State of Illinois, 95th General Assembly, Regular Session, Senate Transcript at 219-21 (Apr. 16, 2008), on http://www.ilga.gov/legislation/fulltext.asp?DocName=09500SB2707sam003&GA=95&SessionId=51&DocTypeId=SB&LegId=37168&DocNum=2707&GAID=9&Session=357

\textsuperscript{357}State of Illinois, 95th General Assembly, Regular Session, Senate Transcript at 221 (Apr. 16, 2008), on http://www.ilga.gov/legislation/fulltext.asp?DocName=09500SB2707sam004&GA=95&SessionId=51&DocTypeId=SB&LegId=37167&DocNum=2707&GAID=9&Session=356

3343
to 22.9 million, while adjusted gross revenue rose 1.4 percent and state taxes 1.4 percent; nevertheless, many individual casinos recorded declines in the number of admissions, adjusted gross revenues, and state taxes, the difference in large part being accounted for by the opening of a new casino in Waterloo in mid-2007.)

Link went on to argue that if the smoking ban were the cause of the decline, “Iowa, Missouri should be record numbers, because everybody from Illinois that smokes should be over in those states. They’re not. They’re not going anywhere. They can’t afford the gas or anything to get to those states. It’s the economy. Wake up. It’s not the smoking ban.”

Announcing that in “one of those moments [of] bipartisan cooperation” he was going to vote with Minority Leader Watson, who was his “leader” (but not his “boss”) that night, Democratic Assistant Majority Leader Rickey Hendon taunted the majority caucus chair: “Sincerely, I believe that...if you’re in any gambling institution, if you lose your hundred or two hundred dollars, the least we should do, Senator Link, is let ‘em have a cigarette.” After characterizing Hendon’s bipartisan comments as “incredible,” Watson, while purporting to be merely “asking for...a level playing field...with...Iowa,” revealed that the casino exemption from the Smoke Free Illinois Act, which he had voted against in 2007, was just “the first step”; “I’d like to have not only the casinos, but the...veterans, American legions, VFWs, local bars—I would include anybody that I could...."

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The Smokefree Air Act of 2008

In the end, however, the Senate handily defeated Watson’s amendment by a vote of 15 to 35.  

Even when confronted later in 2008 with a decline in state casino tax revenues exceeding $100 million, Link “said he doesn’t see lawmakers taking up exemption talk for casinos until other states show much higher takes from the boats.  He thinks surrounding states could make the argument moot by going smoke-free in casinos themselves.”  

Discouraged by the failure to have secured any exemptions in 2008 or 2009, even the executive director of the Illinois Casino Gaming Association conceded that no-smoking was the wave of the future.  

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363 Ryan Keith, “Riverboat Revenue Dips by $121 Million,” State Journal-Register (Springfield), Oct. 1, 2008, on http://www.wickedlocal.com/il-springfield/state/x436986266/Riverboat-revenue-dips-by-121-million (visited June 13, 2009).  Less empirically Link was quoted as having said: “‘Have them look at the national figures, in every other state, of the decline of gaming. You can smoke in all of those states and they’re having a decline. So the economy changes, you will never prove to me that the smoking ban is the effect [sic] for the decline of revenue at the riverboats.’”  


Less absolutely, Link later stated that his mind would never be changed unless and until the decline continued even after the recession was over.  Telephone interview with Terry Link, Lake Bluff (July 9, 2009).

364 Telephone interview with Tom Swoik, Springfield (June 9, 2009).  Ironically, Swoik’s Iowa counterpart, President Wes Ehrecke of the Iowa Gaming Association, after rejecting the claim that (casino) campaign contributions influenced decisions, added: “A 25 percent one-year drop in Illinois gaming revenue after smoking was banned in casinos might influence lawmakers.”  

James Lynch, “Gaming’s Big Bucks Always Major Player,” Gazette (Cedar Rapids), Feb. 1, 2009 (7A) (NewsBank).  Purportedly in order to deal with the state budget deficit, in 2010, Chicago Democratic Representative André Thapedi introduced H.B. 1850 to amend the Smoke-Free Illinois Act to exempt designated segregated ventilated smoking rooms in gaming facilities.  

http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1850&GAID=10&DocTypeID=HB&SessionID=76&GA=96.  After the bill’s death, he refiled it as H.B. 171 on Jan. 18, 2011.  http://www.ilga.gov/legislation/billstatus.asp?DocNum=171&GAID=11&GA=97&DocTypeID=HB&LegID=54744&SessionID=84.  However, it was superseded by H.B. 1965, introduced by Chicago Democrat Daniel Burke, which proposed to amend the Smoke-Free Illinois Act by exempting gambling facilities if smoking was not prohibited in their counterparts in the nearest neighboring state.  The House passed it on March 29, 2011, by a vote of 62 to 52, and it was still pending in the Senate in May 2011.  

The Smokefree Air Act of 2008

After having heard a concise account of proponents’ stubborn support of the Illinois casino smoking ban despite the alleged fiscal impact, Iowa House Republican Mike May, who had voted for the Smokefree Air Act in 2008 while joining his party in attacking the Democrats for “hypocrisy” in exempting the casinos, laughingly replied: “I appreciate the consistency of Illinois politics.”

One possible explanation of the differing legislative approaches in Illinois and Iowa was the geographical spread: the much less populous state had 17 casinos in 14 cities, whereas the larger state had only nine casinos in eight cities. Nevertheless, quantitatively, in the 58-member Illinois Senate six of the eight senators with casinos in their districts (all of whom had rejected Link’s offer of a three-year casino exemption) ultimately voted against the bill, whereas Representative Wise did not point to proportionately more in the 100-member Iowa House when he stated that “[t]here were a number of legislators from communities like Davenport, Dubuque, Des Moines, Emmetsburg, Sioux City, and Council Bluffs who made it clear that they believed they were

365Telephone interview with Mike May, Spirit Lake, IA (July 2, 2009).
368Although Link stated that in the end only one of the eight senators (Koehler representing E. Peoria) who had turned down his offer voted for the bill, it appears that Noland (Elgin did as well). Senators Haine (Alton), Lausen (Aurora), Wilhelm (Joliet), Forby (Metropolis), and Jacobs (Rock Island) voted No. http://www.ilga.gov/senate/default.asp?GA=95; http://www.ilga.gov/legislation/votehistory/95/senate/09500SB0500_03292007_073000T.pdf. Noland (and Elgin state representative Ruth Munson, who also voted for the bill) both stated that casino lobbyists never contacted them and they had never been given any information about the possibility of lost tax revenues. Rob Phillips, ““Up in Smoke?” Daily Herald (Arlington Heights), May 7, 2007, on http://www.dailyherald.com/search/printstory.asp?id=309995 (visited July 9, 2009). Ironically, Link observed that after the bill had passed, the casinos were angry with the senators who had refused his compromise and thus deprived the casinos of the three-year exemption. Telephone interview with Terry Link, Lake Bluff (July 9, 2009). In the House, Jack McGuire, who represented Joliet, the only city with two casinos (whose government expected more than $35 million in tax revenue from them in 2007) and appears to have been the only other member who voted for the bill, told a similar story: “‘It’s strictly a health issue. I’m not trying to put anyone out of business,’” McGuire said, adding later that the casinos never contacted him with their concerns regarding the legislation.” “Some Cheers, Some Boos for State Smoking Ban” May 3, 2007, on http://smokefreeillinois.org/ media/050307_State4.pdf (visited July 10, 2009). For the House members and votes, see http://www.ilga.gov/house/default.asp?GA=95; http://www.ilga.gov/legislation/votehistory/95/house/09500SB0500_05012007_020000T.pdf.

3346
The Smokefree Air Act of 2008

representing the economic interests of their communities when they supported the casino gaming floor exemption.

Another factor determining why state government officials in Iowa may have reacted more sensitively to a decline in casino business volume than their Illinois counterparts (if both actually believed that a smoking ban would or did reduce gambling revenue and tax revenue) was the extent to which state government tax revenues relied on this source. Of the 16 states in which commercial casinos/racinos (i.e., racetrack casinos) generated tax revenues in fiscal year 2008, Iowa ranked ninth with $326 million, while Illinois ranked fourth with $698 million (Nevada ranking first with $925 million). But if these amounts are set in relation to total state government taxes, Iowa ranked fifth (4.7 percent), while Illinois ranked eighth (2.2 percent)—a gap that had widened during the preceding several years as the Illinois share declined and the Iowa share rose.

Moreover, the real gap was even wider because more than 15 percent of casino tax revenues in Illinois went to local governments in 2008, whereas less than 8 percent of Iowa’s did. As a result, casino tax revenues going to the state government accounted for only 1.9 percent of total Illinois state government tax revenues, whereas the corresponding share in Iowa was 4.4 percent. In addition to being more than twice as high as Illinois’ share, Iowa’s gambling tax share of total state taxes was only slightly lower than the second (Indiana, 5.5 percent), third (Mississippi, 5.2 percent), and fourth (Louisiana, 4.9 percent) ranked states (Nevada, at 16.0 percent, far outdistancing all other states).

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369 Email from Phil Wise to Marc Linder (July 9, 2009).
370 Total state government taxes for FY 2008 are taken from http://www.census.gov/govs/statetax/08staxrank.html; casino/racino tax revenues were taken from monthly state gaming regulatory agency data and made available (together with the share calculations) by Lucy Dadayan, senior policy analyst, Rockefeller Institute of Government.
371 Lucy Dadayan, senior policy analyst, Rockefeller Institute of Government, provided the data underlying the Illinois-Iowa comparison from the following sources: http://www.igb.state.il.us/revreports; http://www.state.ia.us/irgc; http://www.census.gov/govs/www/statetax.html.
372 Calculated according to http://www.igb.state.il.us/revreports; http://www.state.ia.us/irgc; http://www.census.gov/govs/www/statetax.html. Whereas the IGB data identify the total amounts going to state and local government, these totals have to be calculated from the IRGC data by deducting the sums for city tax, county tax, and county endowment fund. Iowa Racing and Gaming Commission, Annual Report 2008, at 20, 37, on http://www.state.ia.us/irgc. For FY 2008 these three entries totaled $25,476,805 for casinos and racinos; the sums going to the state totaled $300,645,725.
373 Total state government taxes for FY 2008 are taken from http://www.census.gov/govs/statetax/08staxrank.html; casino/racino tax revenues were taken from monthly state
The Smokefree Air Act of 2008

However, again, if the considerably larger local shares of total taxes are taken into account, the proportion of Iowa’s state government tax accounted for by state gambling taxes exceeded that of Indiana, Mississippi, and Louisiana, placing Iowa second behind Nevada. Lucy Dadayan et al., “From a Bonanza to a Blue Chip? Gambling Revenue to the States” at 3 (June 19, 2008), on http://www.rockinst.org/pdf/government_finance/2008-06-19-from_bonanza_to_blue_chip_gambling_revenue_to_the_states.pdf. If these states were included, Iowa would rank eleventh in total casino/racino tax revenues and eighth in casino/racino tax revenues as a share of total state taxes. The shares for Delaware, West Virginia, and Rhode Island were 7.5, 8.8, and 11.0 percent, respectively. However, since the legislature in Rhode Island appropriates the tax revenue from the lottery that goes into the general fund among the states 39 cities and towns, Rhode Island arguably should not rank above Iowa, thus leaving Iowa fourth behind Nevada, West Virginia, and Delaware. http://www.rilot.com/faqs.asp (visited June 29, 2009); http://www.wvlottery.com/videlottery/profitsgreat.aspx. Their racino tax revenues are taken from http://lottery.state.de.us/vdodatas/modist2008.asp (visited June 15, 2009); http://www.americangaming.org/Industry/factsheets/statistics_detail.cfv?id=36 (visited May 28, 2009) (overstating the taxes by not distinguishing between state and local taxes). Iowa state taxes alone in FY 2008 totaled $300 million. http://www.iowa.gov/irgc/FYTD08.pdf (visited May 30, 2009). State lottery revenue has been ignored here because consumers’ betting activity takes place elsewhere.

Significantly, of the states that had totally banned smoking in casinos, only two, Colorado\(^{376}\) and Illinois, had casinos/racinos like Iowa’s.\(^{377}\) Colorado initially exempted licensed casinos\(^{378}\) “because of their unique constitutional and statutory status in Colorado, because casino gambling has only recently become legal in Colorado, because many of the towns in which casinos are located are dependent on the revenues casinos generate, because casinos face severe competition from Indian Reservation gaming and because Colorado derives direct economic benefit from its licensed casinos.”\(^{379}\) After the state had prevailed in a suit brought by bar owners and others attacking the exemption, inter alia, on equal protection grounds, the legislature repealed the exemption.\(^{380}\) In any event,
The Smokefree Air Act of 2008

Colorado’s casinos generated only $88 million in tax revenues in 2008 or a mere $18 per capita. Thus, Illinois was an outlier as the only state with large tax revenues from commercial casinos to ban smoking entirely. In Iowa’s other bordering states that enacted comprehensive statewide smoking bans that did not expressly exempt casinos either only unregulated and untaxed tribal casinos were present (Minnesota, Nebraska, and Wisconsin) or a much smaller commercial casino industry (South Dakota),381 which contributed relatively minimal amounts to state tax revenues.382

Asked in mid-2009 to explain why Illinois was uniquely resolute in enacting and retaining its complete smoking ban in casino, the bill’s chief House sponsor, Democrat Karen Yarbrough, responded:

Essentially, the surgeon general’s edict that “there is no safe level of second hand smoke” was the tipping point for us coupled with the city of Chicago’s ban a few years ago. It was decided, the timing was right. Legislators in both chambers are still committed to keeping the ban in tack [sic] with no exemptions in public places and casinos. You see we feel the lives of casino workers are just as important as all other workers in restaurants, bars etc. The political will is present in Illinois to keep all workers as safe as possible from the devastating effects of second hand smoke.383

The only factor Yarbrough mentioned that distinguished Illinois from Iowa was proximity of competition in other states where smoking is permitted. Given the lack of competitive options for casino gambling for the bulk of the population in Colorado, no significant reduction in gaming revenues is anticipated.” Colorado Legislative Council Staff Fiscal Note, State Final Fiscal Note: HB07-1269 (June 7, 2007), on http://www.leg.state.co.us/clics/clics2007a/csl.nsf/fsbillcont3/872129A50239DF3487257265008381D3?Open&file=HB1269_r1.pdf.


383Email from Karen Yarbrough to Marc Linder (June 15, 2009).
The Smokefree Air Act of 2008

that most of Illinois’ population had already begun to experience the public health protection secured by local anti-smoking ordinances before the Smoke Free Illinois Act was debated. This experience may indeed have contributed to the legislative majority’s determination to include the nonsmokers among the casinos’ 7,711 employees and 14.64 million annual visitors384 within the class of public place protectees. And the health benefits flowing from local control were not the only dimension shaping mobilization of public support for a statewide law: the very process of having struggled for 16 years (from 1989 to 2005) to achieve repeal of preemption created considerable momentum toward passage of the comprehensive anti-smoking bill in 2007. Further stimulation arose out of 60 local coalitions that formed in 2005-2006 to press for—and that actually achieved 36—local anti-smoking ordinances in 2006;385 of special and not merely symbolic importance was the adoption of the Springfield Clean Indoor Air Ordinance of 2006 on January 17, 2006,386 by virtue of giving legislators in the state capital first-hand acquaintance with and understanding of smoke-free public places.

This broad-based wave of local enactments surprised even one of the key architects of the entire smoke-free movement in Illinois, Kathy Drea, who had worked for the American Lung Association since 1997 and became its public policy director in Illinois as well as vice president of advocacy for the entire Midwest. She and others in the movement had expected that initially perhaps only one or two cities would adopt ordinances. The unanticipatedly rapid proliferation of ordinances produced the side effect of motivating mayors and other local officials to pass the buck to the state, thus generating additional pressure for passage of statewide regulation, which was reinforced as it converged with deep grass roots support.387

To the extent that the exercise of pre-existing local control powers had been a key factor in crystallizing the requisite “political will” in Illinois to cover casinos and retain local control,388 the defeated advocates of preemption repeal

385Telephone interview with Kathy Drea, Springfield (June 16, 2009).
387Telephone interview with Kathy Drea, Springfield (June 16, 2009).
388Section 65 of the Smoke Free Illinois Act provides: “(a) Any home rule unit of local government, any non-home rule municipality, or any non-home rule county within the unincorporated territory of the county may regulate smoking in public places, but that regulation must be no less restrictive than this Act. This subsection (a) is a limitation on the concurrent exercise of home rule power under subsection (i) of Section 6 of Article
The Smokefree Air Act of 2008

über alles in Iowa could have said—though they prudently refrained from saying—of the process and outcome in Iowa: ‘We told you so.’ But an answer to the counterfactual historical question as to whether Iowa’s Smokefree Air Act would have covered casinos (and, for example, 10 or 50-foot distances outside public places) if the legislature in 2008 had expressly written local control into the new law would require an assessment not only of the probabilities of how many years it would have taken for a critical mass of larger (and smaller) cities to adopt rigorous ordinances, but also of whether the ongoing harm inflicted in the interim on the large majority of Iowans who would have continued to be unprotected by the feckless statewide clean indoor air law would have outweighed the marginal benefits that would have been generated by a somewhat more stringent Smokefree Air Act some or many years in the future.

VII of the Illinois Constitution. (b) In addition to any regulation authorized under subsection (a) or authorized under home rule powers, any home rule unit of local government, any non-home rule municipality, or any non-home rule county within the unincorporated territory of the county may regulate smoking in any enclosed indoor area used by the public or serving as a place of work if the area does not fall within the definition of a ‘public place’ under this Act.”

Ironically, the press may have misled some people to comply with (or, alternatively, to believe that they were violating) the law by falsely reporting that “[t]he law prohibits smoking within 10 feet of an establishment....” Katie Hanson, “No Smoke, No Sweat As Ban Looms,” DI, June 30, 2008 (1:2-6, at 3:3). See also Brian Morelli, “Bars’ Longtime Patrons Fret Life After Smoking Ban,” ICP-C, June 28, 2008, on http://www.press-citizen.com (stating that a bar customer “will have to walk at least 10 feet away from the building if he wants a smoke”).

The counterfactual question could also be formulated differently: would city councils, had SAA conferred local control on them from which casinos would not have been exempt, have, for example, passed ordinances banning smoking in casinos? Apart from the fact, as mentioned above, that Democratic sponsors of H.F. 2212 had informed anti-smoking groups that a preemption repeal bill could have been passed only with the same exemptions as the statewide bill, to an optimistic Ehrecke it seemed improbable that many city councils would have risked jeopardizing, for example, the millions of dollars in grants that the casinos gave to local organizations and projects. Casinos are required by Iowa Code § 99F.6(4)(a) (2008) to “distribute at least three percent of the adjusted gross receipts for each license year for educational, civic, public, charitable, patriotic, or religious uses” and make additional non-statutorily required donations amounting to millions of dollars annually. http://www.iowagaming.org/our_members/license_holders.aspx (visited June 16, 2009); telephone interview with Wes Ehrecke, Des Moines, president, IGA and email from Wes Ehrecke to Marc Linder attaching 2008 economic impact statement indicating $35 million in charitable contributions of the former and $10 million of the latter category (June 16, 2009). In addition, Polk County, which owned
The Smokefree Air Act of 2008

The Run-Up to the House Floor Debate: Amendments to H.F. 2212

The no-smoking movement is a locomotive barreling down a hill. Sophisticated, progressive cities—New York, Chicago, Paris—have set the tone. The rest are sure to follow.

I doubt the no-smoking surge needs a push from the [Iowa] Legislature, but it’s about to get one. 391

Today, the danger of secondhand smoke is so well understood that it’s baffling Iowa still is debating whether to pass a statewide ban. 392

The Commerce Committee’s action on H.S.B. 537 prompted two other committees to put narrower bills on hold. 393 The very next day, February 6, the day after the press had reported that “opponents and advocates alike say there would be little need for House File 2067 if the statewide smoking ban were approved,” 394 the House Human Resources Committee’s chairperson announced that it would defer on Foege’s preemption repeal bill. 395 And the same day the Education Committee suspended discussion of H.F. 754, the 2007 bill that prohibited all tobacco use in and about schools. Which way legislative winds were blowing in the House was forecast by Majority Leader McCarthy, who

Prairie Meadows Racetrack and Casino, was due to receive in 2009 $28.4 million in rent and profit sharing, while Des Moines, Altoona, and Polk County schools and charities were to receive $11 million. Dan Johnson, “Prairie Meadows Explores Second Polk County Casino,” DMR, Aug. 8, 2009, on http://www.desmoinesregister.com. Nevertheless, even in the wake of the passage of H.F. 2212, the Sioux City city council did express interest in such an ordinance. See above this ch.


392 “For Health’s Sake, Enact Smoking Ban,” DMR, Feb. 16, 2008 (14A) (NewsBank) (edit.).

393 Without explaining the basis of its judgment, IDPH skeptically stated that the bills “were supposedly put on hold to see how HSB 537 fares. It’s uncertain whether HSB 537 has the necessary votes to pass the full house.” IDPH Legislative Update (Feb. 11, 2008), on http://www.idph.state.ia.us/adper/common/pdf/legis/archive/2008/080211_update.pdf (visited July 5, 2008).


The Smokefree Air Act of 2008

judged that H.S.B. 537 was “the most likely to pass.”

That judgment was apparently not yet shared in the Senate, where, as a seeming last hurrah of local control, on the same day that the House Commerce Committee passed the statewide ban bill, 20 of the 30 Senate Democrats, led by Joe Bolkcom and other leading anti-smokers, filed S.F. 2096, which was virtually identical to H.S.B. 565; the Local Government Committee assigned it to a subcommittee, which became its final resting place. That same day saw nine of the same senators file another bill that was identical to H.S.B. 565, which also got no further than a State Government Committee subcommittee.

Even after H.S.B. 537 had passed the Commerce Committee, “key legislative observers and advocates” were still reported in the press to be expecting that a local control bill had “the best chance of becoming Iowa law.” The best that Kerry Wise, an American Lung Association spokesperson, could say for a strong statewide ban was that the group supported it if it restored local control, but ALA continued to favor a local control bill without exemptions, which it still deemed to have a “‘strong chance” of passing. Its strategy remained the proliferation of exemptionless local ordinances, which it would use “to collectively springboard [to] a statewide ban later.” In contrast, Iowa Restaurant Association President Doni DeNucci may not have claimed to know which bill would pass, but she did predict that “whatever emerges from Iowa lawmakers won’t be good for her 600 members and the 5,000 restaurants and bars in Iowa the association represents. ‘With the Democrats in the majority, we’re going to lose.’”

Finally, during the Democratic legislative leadership’s weekly news conference on February 7, House Majority Leader McCarthy publicly and definitively announced the new direction. Speaking of the statewide smoking ban’s having been moved out of the Commerce Committee, he remarked: “If we have the votes—and we’ll be working on that over the weekend and the first part of next week—that will be something we would try to bring up and pass in the full House....” Asked where the measure was heading, McCarthy, after calling the bill “the biggest single thing” the legislature could do for public health in Iowa, pointed out that there were “two camps in our caucus”: whereas members pushing for local control “seemed to have more momentum a couple of months ago,”

397S.F. 2096 (by Bolkcom et al.), Senate Journal 2008, at 1:169, 202 (Feb. 5 and 7).
those supporting a statewide ban “seemed to have less votes.” Now, however: “For a whole variety of reasons since the session started the statewide trend if you will has picked up a lot of support, a lot of votes.” Without revealing what any of those reasons might be, he added that, from a public health perspective, the statewide ban, even though it was not perfect because of the casino exemption, would be much better than local control—which would make less sense for business by creating competitive disadvantages for firms in adjacent localities—by virtue of covering thousands more establishments.\footnote{Statehouse Democrats Discuss Smoking, Road Use Funds, Weekly News Conference (Feb. 7, 2008), on http://www.youtube.com/watch?v=x6MxE_u4uE (visited July 8, 2008).} (Minority Leader Rants was all alone in rejecting the premise that the momentum had shifted from local control to a statewide ban in 2008: proceeding from the historically correct statement that Democrats had had trouble passing preemption repeal in 2007 because of its untoward balkanizing effects, he indulged in the wholly undocumented speculative contention that McCarthy and the Democrats had always had in mind to pass a statewide ban in 2008, but that they had prepared it in secret as a tactical surprise.)\footnote{Telephone interview with Christopher Rants, Des Moines (May 12, 2008).} Finally, in response to a question about Rants’s claim that the casino exemption would send people from bars to casinos to smoke,\footnote{Rants had asserted that the bill “‘makes a real clear point that if Iowans want to go out and have a drink and a smoke, you can’t go [to] your neighborhood bar anymore.... You’re going to have to go to a casino.’” O. Kay Henderson, “House Could Vote on Smoking Ban This Week,” Radio Iowa, Feb. 11, 2008, on http://www.radioiowa.com (visited May 12, 2008).} McCarthy insisted that it was a “red herring” because people went to casinos to gamble, not to smoke.\footnote{Charlotte Eby, “House Could Debate Smoking Ban Proposal This Week,” MCG-G, Feb. 10, 2008, on http://www.globegazette.com (visited May 12, 2008).} Gronstal was somewhat more circumspect in stating that the Senate would probably also take a look at a statewide ban too, but at the same time he made it clear that “[e]verybody needs to know, this is headed towards a smoke-free society.”\footnote{William Petroski, “Culver Supports Local Control on Smoking Bans, Endorses Boswell,” DMR, Feb. 9, 2008 (8B) (NewsBank).} In contrast, at this point the governor remained non-committal, stating only that he would take a look at a statewide ban.\footnote{As to why the momentum had shifted rather suddenly from local control to...}
The Smokefree Air Act of 2008

a statewide ban,\textsuperscript{406} the pithiest answer came from Representative Wise: “Because we could” (pass a statewide bill), by which he meant that “we” anti-smoking militants had “always wanted to” and were now finally able to do so. Wise attributed his and other legislative advocates’ ability to convince leadership to support H.F. 2212 and thus to remove the stumbling block—which for years had been Republicans’ control of the legislature—to their knowledge, thanks to polling data, that the people were “out ahead” on this issue.\textsuperscript{407} Apart from this transformation in underlying public health, social, and cultural attitudes, Representative Tyler Olson later pointed to another crucial change that facilitated the different legislative approach when he observed that in many long meetings he and other Democratic legislators had explained to the Lung, Heart, and Cancer organizations, which had been very skeptical of a statewide ban, that even if a local control bill passed, the requisite majority could be mobilized only if such a measure, too, were weighed down with some of the same exemptions. Indeed, the advent of the casino exemption had led to a decline in opposition to passage of a statewide ban.\textsuperscript{408} In the end, then, anti-smoking groups relented on their rigid adherence to local control in part because their closest legislative allies had made it clear to them that precisely the open-endedness of the local processes and

\textsuperscript{406} Sen. Matt McCoy rejected the premise of suddenness: he argued that the “tipping point” had already emerged in 2007 when the legislature increased the cigarette tax by one dollar. Telephone interview with Matt McCoy, Des Moines (May 8, 2008). To be sure, this perspective fails to explain why the House, after voting for that increase, was unable to pass even the Senate’s local control bill. See above ch. 34. Of the scores of legislators and lobbyists who were asked why the momentum shifted—the vast majority of whom spontaneously responded with some variant of “That’s a very good question” or “Yes, that is the question”—only Majority Leader Gronstal, repeating the word “Why?” seemed put off, nonplussed, or exasperated by the question, as if it made no sense. Didactically, he observed that when a shift took place in a legislature, there was usually not just a single reason. Since Gronstal, as mentioned in ch. 34, judged that there had been almost enough votes to pass a statewide bill in the Senate in 2007, he, like some other senators, believed that the overridingly important change that occurred in 2008 was that the consensus in the House had shifted from local control to statewide ban, for which shift he credited his counterpart McCarthy with the greatest responsibility. Telephone interview with Michael Gronstal, Council Bluffs (May 17, 2008).

\textsuperscript{407} Telephone interview with Philip Wise, Keokuk (May 18, 2008).

\textsuperscript{408} Telephone interview with Tyler Olson, Des Moines (Apr. 15, 2008). Assistant Minority Leader Doug Struyk offered a somewhat different appraisal: whereas the House had long favored a statewide ban because of the business-unfriendly balkanizing impact of local control, the crucial shift in momentum in 2008 originated in the Senate when it finally let go of local control. Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).
The Smokefree Air Act of 2008

outcomes that they had praised as the great virtues of that approach would be undercut by the centralized statehouse lobbying power of the same tobacco industry forces that the health groups had intended to circumvent in hundreds of city councils, but that would have to be overcome in order to pass a preemption repeal bill.\textsuperscript{409}

Three days after the House Commerce Committee’s action, Principal’s chairman and CEO urged each Iowa Business Council board member to support the bill when it was considered by the House the following week. In a state that was experiencing a labor shortage, Barry Griswell viewed a public smoking ban as “help[ing] employers recruit and retain talent” by virtue of its enhancing Iowa’s “image as a progressive place to do business, live and work” and its quality of life.\textsuperscript{410} Because the legislature had still not resolved the question of whether local control or a statewide ban was the superior approach, he took special pains to lay out four reasons for Principal’s clear preference for statewide action (the last of which might be especially persuasive to some employers):

\begin{itemize}
  \item It impacts all employers and customers in a uniform fashion.
  \item It will promote the entire state as a smoke free environment.
  \item It provides more efficient and effective means for public awareness and enforcement.
  \item It will enable some business owners to implement a restriction that may be unpopular for a few individuals.\textsuperscript{411}
\end{itemize}

By February 12, the nature of the amendments with which Republicans were intending to burden the bill became somewhat clearer. Rants revealed that they would exempt bars (which needed to be protected from exempt casinos to which smokers would otherwise flock) and family farm corporations and scale back the 50-foot no-smoking perimeter around public places in which smoking was prohibited. In particular the casino exemption he labeled as “‘terribly hypocritical.’” An—as events would soon prove—overconfident Majority Leader McCarthy variously predicted that these amendments would be “dead on arrival” and that they “will almost certainly never see the light of day.” His misplaced optimism rested on his judgment that since he had not had trouble mobilizing support for the bill, these new exemptions, “which would theoretically make the

\textsuperscript{409}The American Heart Association’s lobbyist did not recall ever having heard that message from legislators. Telephone interview with Randy Yontz, Des Moines (May 14, 2008).

\textsuperscript{410}Barry [Griswell] to Each Iowa Business Council Board Member (Feb. 8, 2008) (copy furnished by Merle Pederson).

\textsuperscript{411}Barry [Griswell] to Each Iowa Business Council Board Member (Feb. 8, 2008) (copy furnished by Merle Pederson).
The Smokefree Air Act of 2008

On February 12, 13, and 14, largely Republican representatives filed a total of 15 amendments, some of them rather radical and consequential. The first amendment, filed by insurance agent Lance Horbach and five other Republicans, would have exempted all agricultural real property and any structures located on it (and was voted on and defeated). They were especially incensed that, whereas the bill exempted casinos and thus exposed thousands of employees to secondhand smoke, it “took a slap at farmers” by prohibiting them from smoking in their own combines and tractors if they also had an employee who used them. Although Horbach admitted that enforcement would be difficult on farms and that it was unlikely that farmers would be fined for smoking inside tractor cabs, he feared that the law “could be unfairly used by disgruntled employees or family members who are out for revenge.” For his part, floor manager Tyler Olson agreed that in some instances it might be unlawful for farmers to permit their employees to smoke in a farm vehicle.

Much more damaging to the core purposes of the bill was the amendment filed by assistant minority leader and former Democrat Doug Struyk and five of his new party-mates that proposed to strike all exemptions except for that for private residences, replacing them with one for all “[p]ublic places, places of employment, and outdoor areas to which only individuals twenty-one years of age and older are invited and allowed entrance.” In an effort to understand the motivation underlying this proposal (which was placed out of order) a student of the bill directed the following provocative question to the amendment’s

413 The only amendment that would have expanded coverage proposed to prohibit smoking in any motor vehicle in the presence of anyone under 18, but its sole sponsor withdrew it before it was considered. H-8018 (filed Feb. 13, 2008, by Lukan); House Journal 2008, at 1:325 (Feb. 19, 2008).
The Smokefree Air Act of 2008

sponsors:

How does exempting bars where people only 21 and older are allowed effectuate the purpose of the Smokefree Air Act to “improve the health of Iowans”? Whose interests are you advancing? Clearly you cannot be advancing the interests of Iowans.

I dare you to spend an evening in a local establishment and not change your clothes for 24 hours. The lingering smoke on your shirt is the same crap that now remains on your lungs. Unfortunately, you cannot run your lungs through the washing machine.419

In defense of his exemption, 24-year-old Representative Matt Windschitl, a Union Pacific Railroad conductor, gunsmith, U.S. Marine Reserves member, and Iraq war veteran from western Iowa,420 evaded the overriding public health question altogether:

I am not advocating for any particular establishment in general, but for the freedoms and the rights of all Iowans. I believe it is a choice and a right to smoke or not, as it is also a choice and a right to frequent an establishment that allows smoking or not.

I believe it should be up to the individual business owner to make the choice of going smoke free. I believe it is wrong for the legislature to have an exemption for casinos and not for individual establishments that cater to the same age range of Iowans. ...

I believe I am advocating for every Iowan who cherishes their individual freedoms to govern their own personal lives.421

Representative Mike May, a resort owner and retired teacher, bluntly disclosed that he was seeking to hold hostage bar workers’ health: “I will gladly withdraw this amendment if the majority party will pull the exception for casinos.” Wholly ignoring the fact that his Republican party had for years succeeded in refusing to permit the consideration, let alone the passage, of any anti-public smoking measure, May instead accused Democrats of viewing the question as being about state revenue to which they were sacrificing the casino workers’ health.422

Republican tire repair technician Steven Lukan filed four amendments, two of which proposed to add exemptions for business owners’ private offices (H-8019) and bingo facilities (H-8020) (and were both defeated). Instead of

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Email from Amanda Stahle to Doug Struyk et al (Feb. 18, 2008) (forwarded to Marc Linder (May 12, 2008)).


Email from Matt Windschitl to Amanda Stahle (Feb. 18, 2008) (forwarded to Marc Linder (May 12, 2008)).

Email from Mike May to Amanda Stahle (Feb. 19, 2008) (forwarded to Marc Linder (May 12, 2008)).
The Smokefree Air Act of 2008

responding to a question as to whether it was not likely that customers and employees would meet with employers in the latter’s offices and how such exposure to tobacco smoke would effectuate the bill’s purpose of improving Iowans’ health, the day before the House debate Lukan evasively stated to a researcher that “we should...respect the rights of business owners in Iowa to do as they wish on the property they own.”

Lukan himself withdrew the other two amendments, one of which would have reduced by one percentage point every year the percentage of actual value at which commercial property was assessed that was subject to SAA (H-8021); surprisingly, his other (quickly withdrawn) amendment proposed an innovation in tobacco control that was just beginning to be enacted in various states and cities—prohibiting smoking in motor vehicles in the presence of anyone under 18 (H-8018). Lukan had been motivated to file this last amendment, which he believed that Petersen and others had failed to include in the bill because it was modeled after comprehensive state laws that also lacked it, by his belief that children had no choice about being in the back seat of a car in which adults were smoking. He withdrew the amendment after coalitions trying to get rid of the casino exemption and to secure adoption of the 21-and-over amendment had approached him about dropping it because its adoption—which its hard-to-oppose protection of children made not unlikely—would have made it more difficult to “take down the bill” and rewrite it.

Libby Jacobs, who worked for Principal Financial Group, filed an amendment that struck various 20- and 50-foot no-smoking zones (but H-8022 was placed out of order after Tyler Olson’s similar amendment had been adopted). The radical amendment (H-8023) filed by Scott Raecker, who had a history of showing some support for anti-tobacco measures, was presumably designed to test Democrats’ bona fides by striking all exemptions (including that for casinos) except for private residences not being used as a child care facility, but it too was placed out of order.

The amendment that arguably proved to be the most contentious was filed by two zealous opponents of smoking regulation, Republicans Struyk and Cecil Dolecheck, joined by Democrat Brian Quirk. H-8024 conferred an exemption on

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423 Email from Amanda Stahle to Steven Lukan and from Steven Lukan to Amanda Stahle (Feb. 18, 2008) (forwarded to Marc Linder (May 12, 2008)).
The Smokefree Air Act of 2008

restaurants and bars at a specified time during which only people 18 or older were admitted, so long as that time was a regular, single, consecutive period of time and was conspicuously posted at entrances. The involvement of Quirk, who had fought in the U.S. Army in Panama and Iraq, been an American Legion post commander, was a lifetime member of the Veterans of Foreign Wars, and was one of about six so-called six-pack blue-dog Democrats, who thwarted much of their party’s labor agenda in 2008, is worth considering. Quirk—95 percent of whose northeast Iowa constituents who had contacted him opposed the bill (and 80 percent of those did not even smoke)—had voted for the bill in the Commerce Committee after chairperson Janet Petersen had explained to him that he could raise his objections to the bill later, but when he did, she allegedly told him that she no longer needed his vote. He joined forces with Struyk and Dolecheck because he feared that the bill’s restrictions would bring about a vast reduction in bar revenues and “camaraderie.” In order to avoid such outcomes, he proposed various measures to Olson and Petersen, such as permitting smoking in private clubs and reverse local control under which localities could opt out of the law, but when they dismissed the proposals, he never filed such amendments. Interestingly, however, in spite of his ardent opposition to the bill (which he voted against on final passage), Quirk spontaneously acknowledged that the ban would eventually be perceived as a good thing because “it’s something that’s right,” and that as a nonsmoker he personally liked to go to no-smoking places. In the end, his criticism boiled down to the ban’s precipitate introduction: if only it had been phased in over time and/or through local control, he would, he asseverated, have supported it.

An even more radical amendment was filed by Republican Kraig Paulsen, a lawyer and former member of the U.S. Air Force, who felt that smoking


430 Email from a lobbyist who requested anonymity to Marc Linder (Aug. 13, 2008). The others were McKinley Bailey, Swati Dandekar, Geri Huser, Doris Kelley, and Dolores Mertz. On final passage on April 8 only Dandekar and Kelley voted for H.F. 2212.

431 Telephone interview with Brian Quirk, New Hampton (Aug. 13, 2008). Quirk asserted that during the first month or so of the new law’s operation in his district business had declined 80 percent and many bars had gone out of business, while bars that had gone no-smoking before the law went into effect had experienced no increase in business. He also claimed that employers were losing one to two hours of productivity a day as employees who drove trucks and other company vehicles had to stop and get out in order to smoke instead of smoking while driving.

The Smokefree Air Act of 2008

policies were a “business matter.” H-8025 would have struck the entire bill and in its stead merely amended the existing statute to prohibit smoking in all restaurants. A much narrower but, in context, bill-killing amendment (H-8026) was filed by Carmine Boal, who would purport until the end of the session to support the bill if only the casino exemption were removed.

Floor manager Tyler Olson himself filed a bipartisan consensus amendment weakening his bill in one very important and another more marginal respect: H-8027 reduced four 20- and 50-foot outdoor no-smoking zones to only 10 feet and also excluded the Iowa Veterans Home in Marshalltown from coverage. The exclusion of the IVH was the work of Marshalltown Democrat Mark Smith, who lobbied Majority Leader McCarthy and Olson (the latter being much more hesitant). The principal basis for his support was the fact that many of the veterans had become addicted while serving their country, whose government had plied them with free or subsidized cigarettes. Yet uniquely perhaps among the legislature’s numerous advocates of exclusions, Smith “felt conflicted” about having pressed for it and troubled by having enabled this smoking; indeed, even after the law was in effect he continued to have “angst” about it daily and was audibly disconcerted when asked whether he would have voted for the exemption had he represented another district.

Another bill killer was filed by Linda Upmeyer, an assistant minority leader and cardiology nurse practitioner, whose position that the whole question of the smoking ban had more to do with property rights than health she herself recognized was “a little incongruous” for a cardiology nurse practitioner and one with which the physicians in her clinic sharply disagreed—but surely no less incongruous than being a “closet smoker.” Upmeyer’s amendment H-8033 (later ruled non-germane) would have struck the entire bill, replacing it with an annual $1,000 smoke-free establishment tax credit—“almost,” as she put it, “a

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434 In contrast, co-sponsor May did actually vote for the bill on final passage.
435 Telephone interview with Mark Smith, Marshalltown (Aug. 21, 2008).
438 Telephone interview with Rep. Mark Smith, Marshalltown (Aug. 21, 2008). Upmeyer’s very gravelly voice was strongly suggestive of long years of smoking.
random number."  Asked the day before the bill was debated why she favored such a tax credit instead of prohibiting smoking in all public places and whether she had data showing that restaurant owners lost $1,000 a year when they banned smoking, Upmeyer evasively stated that the “incredibly hypocritical” bill wildly exaggerated the effect of the casino exemption as leaving “nearly 30,000 employees unprotected. So is this for health? The exemption is just about the economic impact.” Unknown is the economic impact of the $5,000 campaign contribution that Upmeyer received a few months later from the PAC of a company that owned two casinos.

Finally, Struyk filed two more killer amendments. H-8035, which Tyler Olson described as the cigarette companies’ chief amendment, provided that if any provision of the bill or the application of the bill to any persons or circumstances were ever held invalid, the entire law would be invalidated. H-8036 (which was placed out of order) would have struck all the exemptions (except that for private residences), replacing them with a radically more extensive exemption for all covered public places, places of employment, and other areas in which smoking was prohibited if they used “equipment consistent with the standards established by the American society of heating, refrigerating and air-conditioning engineers, a combination high-efficiency particulate air filtration, charcoal activated carbon and ultraviolet light filtration system, or other filtration system, any of which exchanges the air at least ten times per hour.” Struyk’s amendment did not point out that less than two years earlier the Surgeon General’s report on *The Health Consequences of Involuntary Exposure to Tobacco Smoke* had concluded that “[e]xposures of nonsmokers to secondhand smoke cannot be controlled by air cleaning or mechanical air exchange,” although “operation of a heating, ventilating, and air conditioning system can distribute secondhand smoke throughout a building.”

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441 Email from Amanda Stahle to Linda Upmeyer and from Linda Upmeyer to Amanda Stahle (Feb. 18, 2008) (forwarded by Amanda Stahle to Marc Linder (May 12, 2008)).
442 https://webapp.iedb.iowa.gov/PublicView/statewide/2008/Period_Due_Date_19-Oct/PACs/Peninsula%20Gaming%20Employee%20PAC_9774/Peninsula%20Gaming%20Employee%20PAC_9774_B_Expenditures.pdf
443 Telephone interview with Tyler Olson, Des Moines (Apr. 15, 2008).
The Smokefree Air Act of 2008

Once this series of Republican amendments had been filed, a somewhat more sober McCarthy allowed as “preliminarily Democrats believe there is a majority in support of the statewide ban.”\(^{447}\) In contrast, the Senate, according to Majority Leader Gronstal, had as yet reached no consensus. As far as Governor Culver was concerned, the press portrayed him as going both ways: whereas the Associated Press now reported that “he would sign a statewide ban into law if the Legislature passes it,”\(^{448}\) Radio Iowa still had him in the local control camp, but nevertheless open to a different perspective: “‘Iowa has historically been a local control state, but maybe as we have this discussion and debate...maybe we will learn that Iowans want to go further than that and that they’re ready for a statewide ban.... That is why debate is important up here.’”\(^{449}\)

In part, (House) Democrats’ hopeful attitude may have been based on “internal polling” that revealed that 80 percent of Iowans favored some kind of smoking ban.\(^{450}\) More importantly, leadership itself was surprised by the polling data’s revelation of the extent to which Iowans wanted a statewide law.\(^{451}\) One reason for such public support may have been the advertisements promoting the prohibition of smoking in bars and restaurants on which the Iowa Department of Public Health had spent $596,000. Appearing 3,140 times in newspapers and on radio and television since October, the announcements, which originally bore the tagline, “Local control now,” by February ran under the title, “Everyone has the right to breathe smoke-free air.”\(^{452}\) Found lawful by the Attorney General’s Office and the Iowa Ethics and Campaign Disclosure Board because they did not support any specific bill, the advertisements were nevertheless intensely obnoxious to


\(^{448}\)Associated Press, “House Leaders Delay Debate on Iowa Smoking Ban,” ICP-C, Feb. 14, 2008, on http://www.press-citizen.com. It is possible that this account was erroneous. The uncertainty in the Senate, as related by Gronstal, is difficult to reconcile with his statement, reported above, that there had almost been a Senate majority to pass a statewide bill in 2007 and that the principal change in 2008 was the shift in consensus in the House.


\(^{450}\)James Lynch, “Smoking Ban Debate Snuffed Out,” Gazette (Cedar Rapids), Feb. 14, 2008, on http://www.gazetteonline.com. A former House speaker who demanded anonymity confirmed that House Democrats “seemed to have been able to use polling data to persuade members to go with” the statewide ban. Email to Marc Linder (Apr. 11, 2008).

\(^{451}\)Telephone interview with Sen. Matt McCoy, Des Moines (May 8, 2008).
The Smokefree Air Act of 2008

Republicans. For example, House Minority Whip Kraig Paulsen lashed out at IDPH for “‘using taxpayer dollars to...push the Legislature around.’”

Even before 2008, however, IDPH had been gauging Iowans’ views on smoking. According to the most recent survey, conducted for the Department between April and July 2006, the overwhelming majority (93.2 percent) recognized the negative health consequences of exposure to secondhand smoke: 55.8 percent of respondents considered breathing other people’s cigarette smoke “very harmful,” while another 37.4 percent deemed it harmful, leaving only 3.2 percent and 1.9 percent to call it not very harmful and not harmful at all, respectively. And almost as many (85.4 percent) thought that people should be protected from such exposure: 32.7 percent agreed strongly and 52.7 percent agreed, while only 8.2 percent disagreed and 1.5 percent disagreed strongly.

That 26.9 percent, or more than a quarter, of Iowans felt strongly enough to have asked someone within the previous year to stop smoking in order to avoid having to breathe his smoke suggested personal concern intense enough to risk confrontation. To be sure, more specific questions about governmental smoking bans and locations generated less than quasi-universal assent. For example, when instructed that state law did not require restaurants to be smoke-free and that state law prohibited cities from adopting ordinances to prohibit smoking in them, and then asked whether that law should be retained as it was or changed, a bare majority of 52.7 percent wanted change, while 40.6 percent chose the status quo. Even among non-smokers preference for the local control option for banning smoking in restaurants reached only 60.4 percent, while 32.9 percent wanted no change; 75.7 percent of smokers, in contrast, preferred perpetuation of their freedom to expose their fellow-public diners to secondhand smoke, while only 17.4 percent were willing to accept change.

Virtually all respondents wanted to impose some limits on smoking in restaurants: almost two-thirds (64.3 percent) wanted no smoking, while 33.3 percent would allow it in some areas, and only 1.0 percent would permit it in all areas. A total ban in bars and cocktail lounges, in contrast, found much less favor: whereas only 30.3 percent supported it, 47.4 percent favored permitting smoking in some areas and 15.5 percent supported it

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454 Gene Lutz et al., Iowa 2006 Adult Tobacco Use Survey, tab. E-9 at 122.
455 Gene Lutz et al., Iowa 2006 Adult Tobacco Use Survey, tab. E-10 at 123.
456 Gene Lutz et al., Iowa 2006 Adult Tobacco Use Survey, tab. F-1 at 131.
in all areas. Interestingly, contrary to later pronouncements by Minority Leader Rants, high levels of support for total bans were not confined to restaurants. Even higher proportions favored them in public buildings (69.2 percent), at indoor sporting events (73.5 percent), and in indoor shopping malls (76.7 percent). In contrast, virtually no one (0.5, 1.2, and 0.7 percent respectively), wanted to permit smoking in all areas at these locations, while allowing smoking in some areas secured the support of 27.6, 23.0, and 21.1 percent, respectively, of all respondents. Support for bans on smoking in outdoor public areas, however, was a distinctly minority position: while approximately equal numbers strongly agreed (10.2 percent) and disagreed (11.7 percent), twice as many disagreed (48.3 percent) as agreed (24.3 percent), yielding a 60.0 to 34.5 percent negative preference.

The heterogeneous—and to some extent self-contradictory—attitudes and policies of Iowa restaurant and bar owners/managers, which differed sharply from the general public’s preferences, were vividly on display in a contemporaneous 2006 survey. Almost four-fifths of all respondents agreed (46 percent) or strongly agreed (33 percent) that people should be protected from secondhand smoke, while 44 percent of owners/managers of establishments most of whose total sales were from alcohol disagreed. When asked for their preferred smoking policy, 12 percent of restaurateurs responded that smoking should be allowed without restriction, 33 percent not at all, and 50 percent in designated areas; among bar owners/managers, the corresponding shares were, unsurprisingly, more pro-smoking: 48 percent, 15 percent, and 28 percent, respectively. Yet, whereas 34 percent of all owners/managers of establishments, 39 percent of owners/managers of sit-down restaurants, and 65 percent of all without a liquor license had banned smoking, only 2 percent of the bar owners and 18 percent of all with liquor licenses had in fact banned smoking.

H.F. 2212 was scheduled for floor debate on February 14, but because floor manager Olson had failed to file a “‘comprehensive cleanup amendment’”
time, it was not eligible for debate that day\textsuperscript{462} and wound up being delayed five days. The press generally accepted this technical explanation,\textsuperscript{463} but at least one statehouse reporter conjectured that the delay might have resulted from adherents’ failure to have mobilized the requisite 51 votes.\textsuperscript{464} Indeed, as late as a few hours before the debate on February 19, Senate Assistant Majority Leader Joe Bolkcom remarked that the House leadership—which would not allow the bill to go to the floor unless it was certain that it had enough votes for passage—was still working to get sufficient votes to debate it.\textsuperscript{465}

At his press conference on February 14 Rants correctly remarked that “[w]e have members on both sides” of the public smoking issue, but the lopsidedness of the House vote five days later would cast doubt on his further claim that “[i]t’s really not a partisan issue”\textsuperscript{466} as would Janet Petersen’s retrospective judgment that Republicans opposed H.F. 2212 because tobacco companies gave them lots of money.\textsuperscript{467} Rants’s judgment that the bill’s exclusion of casinos was a “little hypocritical” was itself more than a little hypocritical since Rants himself was opposed to supplanting business owners’ decisionmaking power over smoking at all. His kind of hypocrisy was ferreted out almost immediately by a journalist who, after Rants had announced that Republicans would propose an amendment to exempt bars that limited admission to those over 21 years of age—which, unsurprisingly many bar owners supported\textsuperscript{468}—because if the exemption was good for casinos it was good for bars (“if it’s a good idea for one it’s a good idea for all”), asked why Rants stopped at bars and did not apply the same exemption to other locations such as bowling alleys. Rants called it an “excellent question,” but apparently imagined that he was offering an equally excellent answer when he replied: “I’m in the art of the possible.”\textsuperscript{469} Ironically, he seemed oblivious of

\textsuperscript{465}Email from Sen. Joe Bolkcom to Marc Linder (Feb. 19, 2008).
\textsuperscript{467}Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008).
\textsuperscript{469}Rants Addresses Smoking Ban, Economic Stimulus Package, Press Conference,
the fact that Democrats, including anti-smoking leaders Petersen and Olson, were practicing exactly the same art when they held their noses and swallowed the casino exemption—not because they supported it and not because they feared the loss of state tax revenue, but merely because it was the unfortunate price they had to pay to secure the additional votes needed for passage. Moreover, Olson publicly promised that he would be back in 2009 to repeal the exemption.\textsuperscript{470} Toward the end of his remarks on smoking Rants hinted that whereas Republicans may have prevented passage of any real smoking bans when they controlled the legislature, now that more radical legislation might actually be passed, they were willing to make one concession: “I think what Iowans are really interested in...and they talk about why can’t we ban smoking, they’re really talking about restaurants.” If the goal were that limited, he argued that it could be accomplished without drafting the bill the way Democrats had written it.\textsuperscript{471} Later, when asked directly why Republicans had not passed such a bill between 1997 and 2004, when they controlled the legislature, Rants, who stated that he hated smoking as well as drinking and gambling, admitted that the reason had been that he was opposed to interference with private property rights, although he agreed both that a significant change in attitudes toward smoking had taken place in the meantime and that not all employees who did not want to be exposed to secondhand smoke were in a position to avoid it.\textsuperscript{472}

Even on the eve of House floor debate on H.F. 2212, when local control bills had been put in abeyance, smoking opponents were still “torn” over a statewide measure, which at this point Petersen was giving “‘excellent’” chances of passing. Those still reflexively wedded to their local control strategy confessed that “they can’t wholeheartedly support” Petersen’s bill.\textsuperscript{473} This position was most strenuously adopted by the Lung Association, whose lobbyist, Dan Ramsey, self-ironically conceded that “we’re purists,” who wanted a clean bill with no exemptions. ALA, according to Ramsey, was so purist that, when Wise and

\footnotesize{Feb. 14, 2008, on http://www.youtube.com/watch?v=XyhPjWGKkGk (visited July 8, 2008).}


\footnotesize{\textsuperscript{472}Telephone interview with Christopher Rants, Des Moines (May 12, 2008).}

\footnotesize{\textsuperscript{473}Tony Leys, “Deal on Ban Irks Opponents of Smoking,” DMR, Feb. 14, 2008 (1A:1-2).}
Petersen called the health advocacy groups to a meeting on the statewide ban, ALA became the “odd man out,” whose leadership in Chicago told Ramsey to kill the bill. ALA agreed to be neutral until the bill got out of the House and then to lobby the Senate. Eventually the Iowa attorney general called the Midwest regional office to request that it support H.F. 2212. Intriguingly, the categorical strategic and arguably even principled divide separating the Lung Association from the other anti-smoking groups in Iowa did not manifest themselves in the course of the struggle for passage of the Smoke Free Illinois Act in 2007.

According to Kathy Drea, vice president for advocacy and head of public policy for ALA of the Midwest, the organization opposed the Iowa bill because of the casino exemption, over which the health coalition ultimately broke up. In contrast, in Illinois, the coalition held solidly together on the issue of casino coverage (though it might have fissured if a time-limited exemption for casinos had proved necessary in order to pass the bill) because all members prioritized health over (tax) revenue.

The Lung Association’s militancy—it was, after all, prepared to tolerate a legislative outcome protecting no one in preference to protecting everyone except casino workers, in other words, to allow, pace Voltaire, Wise, Olson, and many others, the perfect to destroy the good—stood in breathtaking contrast to Iowa Democrats’s endlessly deployed mantra that they were willing to acquiesce in the exemption of casinos because protecting 99 percent of workers was superior to the legislative alternative of protecting 0 percent. The starkness of this absolutism was, to be sure, moderated to some considerable extent by the fact that in Illinois 0 was not the alternative since more than half the state’s residents already lived in jurisdictions covered by city and county nosmoking ordinances and the very failure to pass the desired legislation would presumably have motivated even more local coalitions to secure adoption of additional ordinances. Moreover, purism was even less of a luxury when the momentum propelling popular support of an ideal bill and the stability of a propitious statewide party-political constellation made it more than merely plausible that enactment of such a measure loomed just around the corner. In contrast, in Iowa, where 0 percent

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474 Telephone interview with Dan Ramsey, American Lung Association of Iowa, Des Moines (May 14, 2008).

475 Telephone interview with Kathy Drea, Springfield (June 16, 2009); email from Kathy Drea to Marc Linder (June 17, 2009); see above this ch.

476 In this context it must not be forgotten that the scope of protection conferred by the Smoke Free Illinois Act was inferior to that of the Iowa Smokefree Air Act in that the former did not cover outdoor restaurants, the grounds of public buildings, or outdoor college campuses.
of the population was protected from secondhand smoke by a local ordinance, Democrats in 2007 controlled both houses of the legislature and executive for the first time in more than four decades, and the loss of either chamber or the governorship to the Republican Party (other than to Branstad) would almost certainly destroy any chance of enacting a strong or perhaps any statewide law, it is difficult to discern the public health justification for insisting that 0 percent of a loaf was better than 99.9 percent of a loaf while waiting an indeterminate number of years for 100 percent.

Ramsey observed of local controllers’ predicament: “‘It puts us in a difficult position because a lot of people say this is a good bill.’” In contrast, anti-smoking activists regarded local ordinances as “less likely to include exemptions.” Although this assessment may have been plausible—if for no other reason, then simply because casinos were located in only a minuscule proportion of Iowa cities—it ignored the probability that only a similarly minuscule proportion of local governments would pass (any, let alone exemptionless) ordinances in the near term. Another Lung Association spokesperson continued to argue that a “statewide law should be the floor, not the ceiling. Any statewide bill should also allow for local control, no exemptions. ... A preemptive state, which Iowa is now, is exactly what the tobacco industry, casinos, and bar and restaurant association wants. Without local control, there is always a chance the statewide law will be in jeopardy because of special interest politics.”

Randall Yontz of the American Heart Association was also still unwilling to forsake local control, which had “been proven to work over and over”; recounting nostalgic memories of how in other states local control smoking bans were taken statewide “after a few years when most communities have adopted restrictions,” he presumably must still have nourished hopes of more than 500 Iowa local governments’ joining the movement in short order even though barely five percent of that number had even sent noncommittal petitions to the General Assembly requesting enabling legislation.

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The Smokefree Air Act of 2008

The House Debates and Passes a Diluted H.F. 2212

[F]rom a practical standpoint, “this is the vehicle that’s moving.”

I won’t sacrifice property rights for a feel good bill that does nothing after all the exemptions are passed.

And when it came...time to pull the votes together we had to make a couple of exemptions to keep the bill alive and keep it moving.

The almost five-hour House debate on February 19 was the longest and most detailed, substantive, contentious, and consequential of all the debates on H.F. 2212, fleshing out many of the principal controversies and tensions and setting the framework for further conflict and resolution. That a statewide ban bill was finally being debated on the floor at all was an almost astonishing turn of events. Asked (in real time) several hours into the floor debate why the momentum had shifted from local control, Iowa City Democrat Mary Mascher, after confirming that “[m]omentum can shift here on a dime,” mentioned numerous contributing factors: (1) many surrounding states had passed legislation; (2) the fairly lengthy experience in California had built up a record; (3) many legislators believed that a local option approach would create too many conflicts among businesses and among cities; (4) whereas many felt that local control would “take too long,” a statewide law would have an “immediate effect on all Iowans”; and (5) “[l]ots of talking, lots of lobbying, lots of grunt work on the part of our anti-smoking lobby and our anti-smoking legislators.”

Shortly before five o’clock debate began on H.F. 2212 as floor manager Tyler Olson used his opening remarks to emphasize that the bill, which covered 99 percent of workers and public places and had progenitors in 29 other states, would not only improve the health of all Iowans, but also (in his less than

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481 Email from Assistant Minority Leader Linda Upmeyer to Amanda Stahle (Feb. 18, 2008) (forwarded to Marc Linder (May 12, 2008)).


483 Email from Mary Mascher to Marc Linder (Feb. 19, 2008, at 8:07 p.m.).

484 Later, in responding to a question from Rep. Soderberg, Olson stated that the more accurate figure was 99.7-99.9 percent of workers and public places.
The Smokefree Air Act of 2008

felicitous choice of words) “hopefully get rid of those 440 Iowans that are going to die from secondhand smoke exposure...this year.” In order to preempt certain lines of attack by the bill’s opponents he reported that (1) the enactment of similar bans in Minnesota and Chicago had not resulted in mass enforcement actions; (2) many studies had revealed that rather than depressing business, bans had actually led to a rise in economic activity in bars and restaurants; and (3) the ban on smoking by farmers in their tractors would apply only if a corporate entity owned the tractor and someone other than the farmer used it (this last statement being false).

After Republicans Paulsen, Upmeyer, and Lukan had temporarily deferred on their amendments, Carmine Boal, in her tenth and last year as a legislator, offered H-8026 to strike the casino exemption. In terms of its effect on the scope of the bill’s coverage and the universe of protected people, it may not have been the most important amendment, but, given the bill’s Democratic supporters’ belief that the bill could not garner the 51 votes needed for passage without the exemption for casino owners because a small but key number of Democrats representing districts with casinos did not believe that they could afford to antagonize the casino owners, the issue remained without any doubt politically the most difficult, contentious, and crucial question for the statewide ban from the day the Commerce subcommittee held a hearing on the study bill on January 23 until H.F. 2212 was passed by both chambers on April 8 and even after the Smokefree Air Act went into effect. Boal’s rhetorically and substantively effective remarks on behalf of the amendment not only created the impression that she was a vigorous supporter of universal coverage—in fact, however, according to her party’s greatest dissident, Republicans such as Boal who claimed that the casino exemption was unfair and that they would vote for a statewide ban with no exemptions were being untruthful—but helped maneuver floor manager Olson into a predicament that was partly of his own making when he refused, despite straightforward requests from his Republican interlocutors, to explain forthrightly why he chose to forgo the opportunity to call their bluff—as he had done so successfully in the Commerce Committee two weeks earlier when Soderberg offered the amendment to ban smoking on the grounds of public

485 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr, communications director, House Speaker Murphy). Olson admitted under questioning by Rep. Paulsen later during the debate that smoking would not be lawful in non-corporate-owned farm tractors if the farmer had an employee who used the tractor. See below.


The Smokefree Air Act of 2008

buildings—even while he used virtually the same ironic introductory language with Boal that he had on February 5 ("I want to thank Representative Boal for bringing the amendment in the spirit of public health"). In fact, however, as Boal revealed shortly after the vote, protecting public health was not her goal at all; on the contrary: “My first preference is to allow private businesses the freedom to determine their smoking policy—no government involvement. At the time of my vote, 51 percent of my constituents who answered my survey agreed with this stance.” And still later Boal—who would soon call herself a “fan” of Sarah Palin—revealed even more clearly how central the sanctity of private property was to her world view:

I strongly believe our Constitution provides for the protection of property rights for property owners. Government should not abuse its power by taking away the rights of property owners just because a human behavior has been deemed repulsive by many. In this case the property right being forfeited is the bar and restaurant owners’ ability to decide if allowing smoking in their establishment is a good or a bad business model for them.

Proponents of the smoking ban argue that taking away the property rights of business owners is justified because smoking goes beyond being repulsive and affects others because of the damage caused by second-hand smoke.

I would argue that no one is forced to frequent or work in restaurants and bars that allow smoking. [M]y strong distaste for incrementally forfeiting personal freedoms to our government eclipses my distaste of the possibility of having someone smoke next to me in a restaurant of my choice.

Boal, who had previously excelled at taking up the cudgels for employers and against workers in reforming the state workers’ compensation law as well as against same-sex marriage, began her floor remarks by dramatically rehearsing

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488See above this ch.
489House Debate on H.F. 2212 (Feb. 19. 2008) (audio file provided by Dean Fiihr).
490Carmine Boal, “Exempting Casinos from Smoking Ban Permits Unfair Competitive Disadvantage,” DMR, Feb. 29, 2008 (1R) (NewsBank). This piece, which appears originally to have been a communication to Boal’s constituents, referred to the Senate debate as scheduled to take place the next week, but in fact it had already occurred.
her conversations with constituents on smoking:

You know, this issue is something that I’ve heard about for a long time in my district because my constituents have talked to me a lot about it. They said we wanted smoking banned: we’re tired of seeing it in restaurants—we don’t like it. And I said to them, I said, you know, don’t you know that that would mean that the government is getting involved in our lives more dictating to local restaurants what they can and can’t do? And don’t you know that restaurants can already ban smoking if they feel that’s in their best interests? And don’t you know that it’s possible for you to just frequent other restaurants that don’t have smoking? But they said, you know what, Representative Boal, you just don’t get it: it’s about secondhand smoke, it’s about the health of people who go to these restaurants, it’s for those workers who are trapped into [sic] these working places. We want to eat smokefree.  

At this point Boal decided to ask her bar and restaurant owner-constituents their opinion on the issue and was surprised to hear that they, too, were for the ban. So she engaged them in the same dialog: “Well, don’t you know you can ban smoking if you want to? ... Why would you want me as a state legislator to make that decision for you, for your business?” And like the customer-constituents, they, too, told Boal that she just did not get it, but what she failed to understand this time round was that an individual bar owner’s decision to go smoke-free made it “very unfair” for him if the only other bar in town did not ban it because the former would have an “unfair advantage.” Consequently, Boal’s business owners swore that “[w]e want a level playing field,” which only the state could establish by means of a universally applicable statute. (The rest of the House might also be excused for not understanding this reasoning, which, after all, appeared to reject the quintessence of competitive entrepreneurial freedom.) Boal then justified her amendment on the grounds that it created that level playing field for owners and protected the health of casino employees, and attacked the casino exemption for hypocritically protecting the state’s casino tax revenue at the expense of bar and restaurant owners’ profits. 

Astonishingly, Olson evaded all the issues raised by Boal; instead, as if speaking in code, he urged rejection of her amendment solely on the grounds—that he and other supporters would repeat ad nauseam—that H.F. 2212 was “about progress and really not about perfection.”

Olson’s studied evasiveness in his colloquy with the amendment’s cosponsor, Mike May, became even more strained and further eroded his credibility. Olson
The lawyer appeared to view May’s seemingly straightforward questions as just so many traps, as if he were a deponent desperately trying to divulge as little as possible to the other side lest even otherwise positive information might be twisted in unforeseeable ways that he would come to regret. May himself later explained his aggressive questioning as designed, by someone who was going to “lose anyway,” at least to point out the majority party’s inconsistencies. Thus, when May asked whether any of the 440 Iowans who died annually from secondhand smoke exposure might be casino employees, Olson did not know and would not engage in any guesstimating. Since the secondhand smoke-related state-level mortality data were not disaggregated on an occupational or industry basis, and Olson could hardly be faulted for not being able to answer, May tried to get around this problem by asking merely whether Olson knew, as May did, that the smoke in casinos was “terrible.” Instead of giving May the obvious answer, Olson, who must have been more than clever enough to see several moves ahead and where this not very consequential checkers endgame was heading, begrudged him no more than: “You’re allowed to smoke in a casino, so I would guess.” Having painfully extracted this minimalist concession, May then wanted to know why the legislature would not want to save the lives of whatever number of casino employees and customers were imperiled by secondhand smoke exposure. Manifestly committed to speaking in a pre-arranged Aesopian language, Olson refused to deviate from his circumlocution that the exemption was in the bill to insure that 99 percent of public places and workers were covered and not zero. Audibly relishing the opportunity that Olson was bestowing on him to keep his cat-and-mouse game moving ahead, May, with increased urgency, asked: “You’re not making that connection for me because I still don’t understand why.” Unwilling to budge from his semi-opaque formula, Olson repeated that “Well, I believe that 99 percent is better than zero, and with this amendment I think we end up in the final consideration with zero. ... We all have to make that decision: Is the less than 1 percent more important than the other 99?” Boring in on Olson’s refusal to disclose the missing links in his reasoning, May immediately made the next logical move: “That’s a false choice. Because today we can take care of all of those people, can’t we?” Finally cutting through the shrouded underpinnings of Olson’s argument, May asked him point blank why some people would not support the bill without the casino exemption, but even this bluntness failed to motivate Olson to speak truth to powerlessness. Instead, apparently unconcerned about his credibility rating, Olson came up with a transparent whopper that must have caused every other House member, and all reporters and various other Statehouse hangers-on to snicker: “I’m not one of

498 Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008).
The Smokefree Air Act of 2008

those people—I can’t help ya.” In a vast understatement, May let him off the hook and then supplied the answer that Olson had intransigently refused to utter: “I suspect you know a little bit more than you’re saying to the body today, but I’ll give you that pass, you’ve done a good job and I appreciate...your bringing this bill. And I appreciate the dilemma you find yourself in. Because what we’re talking about is money and lives, isn’t it? We’re talking about revenue and lives. ... If the state treasury takes a dip or my local district casino takes a dip, then maybe that creates some political problems or pressures for me.”499

Horbach intensified Republicans’ pseudo-attack on the casino exemption by underscoring the extent of secondhand smoke exposure that it made possible: the Meskwaki Indian casino in his hometown of Tama (which was not subject to state jurisdiction but served as a reference point) employed 1,500 people and was visited by 5,000 customers a day 365 days a year. To be sure, Horbach, went on and on about how “unquestionable principle” had been sold out for the exemption, but his only visible interest as the representative of “Main street business” in small towns around the casinos was that the latter would be “the only place in town for smoking.” When Horbach tried to elicit from Olson the reason as to why the bill exempted casinos and whether the reason was money, Olson kept evasively repeating the mantra that 99 percent was better than 0 percent—even when Horbach observed that “there isn’t a person sitting here who doesn’t know it’s about the money.”500 One more effort by Horbach (who later surmised that Olson preferred not to reveal the real reason for the casino exemption because it would have made the bill look weak)501 to embarrass Olson into abandoning his omertà on behalf of his casino-beholden colleagues502

499House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). May speculated that Olson’s refusal to admit that he knew why some Democrats wanted the casino exemption resulted from his desire not to box his colleagues in when it came time to vote. Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008).

500House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).


502Matching casino locations with comments on the American Cancer Society’s vote count card about individual Democratic representatives’ positions on the casino exemption identified five members who both represented districts with casinos and expressed varying degrees of support for the exemption: Bukta (Clinton: “Supports casino exemption (new casino in clinton)”; Cohoon (Burlington: “would support casino exemption”); Frevert (Emmetsburg: “Must have casino exemption”); Huser (Altoona: “SW [statewide] with casino and bar exemption”); and Wendt (Sioux City: “Must have casino exemption”). In addition, Republican Rayhons who represented Worth county including Northwood “[w]ants casino exemption.” [American Cancer Society.] 2008 House Vote Count Card 82nd General Assembly (emailed by Stacy Frelund (Feb. 14, 2008). Wendt received a
prompted “the lady from Johnson,” Mary Mascher, to lose her patience and to shout protectively on behalf of her beleaguered first-term colleague, whose only failing was to enable rather than criticize his attackers’ deceitfulness: “Point of order! Point of order! Mr. Speaker, he’s already answered the question—he’s just badgering him.” 503 (In real time Mascher explained: “I was trying to make the point that Rep. Olson had already answered the question and Rep. Horbach did not like the answer. Get over it and move on.”) 504 After Speaker Murphy had summoned the protagonists Horbach and Olson to the well and decided to permit the former to continue questioning the latter, Olson finally relented to the extent that he offered, following passage of H.F. 2212, to co-sponsor legislation with Horbach the next morning to “fix it.” Rather than pretending that Olson, who had spoken seriously—after all, no one doubted the truthfulness of his later statements that he would try to repeal the exemption in 2009—was bluffing and calling his bluff, Horbach luxuriated in vacuous rhetoric about honor and principle, 505 while perpetuating his and his party’s fraud that they were fighting for an exemptionless statewide smoking ban.

A lawyer-to-lawyer colloquy touching on a matter of potentially great consequence for the bill was initiated with Olson by Minority Whip Kraig Paulsen, who worked for a corporation in Cedar Rapids and had already filed an amendment radically limiting the bill’s coverage to restaurants. 506 Paulsen’s question (which the two purported to be trying to discuss without putting the

$250 contribution from the Argosy Casino in Sioux City on Oct. 2, 2008; Huser received $100 from Ameristar in Council Bluffs on July 15, 2008.

503House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
504Emailing during floor debates was apparently common. Republican Jamie Van Fossen was not even embarrassed to state on the floor that while “doing email” he was “kind of listening to the debate off and on.” House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
505Email from Marc Linder to Mary Mascher (Feb. 19, 2008, 6:13 p.m.); Mary Mascher to Marc Linder (Feb. 19, 6:20 and 7:40 p.m.).
506House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). In the event, Democratic leadership, fearful lest debate lead to reduced coverage under SAA, refused to allow any amendments to reach the floor in 2009. See below ch. 36.
The Smokefree Air Act of 2008

chamber’s non-lawyers to sleep) went to the issue of whether a recent Iowa Supreme Court decision—which a dissenting judge characterized as “completely outside the mainstream of equal-protection jurisprudence” holding a difference in tax rates between land- and water-based casinos to have violated the state constitution’s equality clause because a mere difference in location did not create a rational basis on which to uphold a discriminatory tax, would apply, for example, as between banning smoking in a restaurant across the street from a casino and exempting the same franchised restaurant inside a casino from the ban. Although Paulsen admitted that he would not have predicted the decision in that case, he raised as a “serious question” whether the Iowa Supreme Court would also strike down the casino exemption in H.F. 2212. Olson—who may have feared that, in combination with Struyk’s still pending amendment to invalidate the entire statute if any individual provision were struck down, SAA might be invalidated—argued that the bill would pass constitutional muster on the rational basis test because the gambling license would distinguish the two restaurants, although he failed to explain what relationship the presence and absence of that license bore to smoking regulation.

Whither Olson balked at going, his fellow representative from Cedar Rapids, Art Staed, did not fear to tread and shed light on pro-casino Democrats’ motivations. Opposed to the exemption himself, the secondary school teacher and administrator freely acknowledged that everyone already knew that “enough”

508 Racing Association of Central Iowa v. Fitzgerald, 675 NW2d 1, 16 (2004) (Carter, J., dissenting). The U.S. Supreme Court had ruled unanimously that because a “plausible policy reason for the classification” underlay the statute, it did not violate the federal constitutional equal protection clause, and reversed the Iowa Supreme Court’s ruling that it did. Fitzgerald v. Racing Association of Central Iowa, 539 US 103, 110 (2003). See below ch. 36.

509 Racing Association of Central Iowa v. Fitzgerald, 675 NW2d 1 (2004) (reaff’g its decision regarding the Iowa equality clause in Racing Association of Central Iowa v. Fitzgerald, 648 NW2d 555 (2002)).

510 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). Apprehensions about how the Iowa Supreme Court might rule may have contributed to the decision later to amend the bill to limit the casino exemption to the gambling floor. Paulsen, who later stated that the RACI decision was so bad that he believed that the Iowa Supreme Court would not apply it to the casino exemption, which would pass constitutional muster, argued that confining the exemption to the gambling floor strengthened the bill’s chances. Telephone interview with Kraig Paulsen, driving on I-80 from Cedar Rapids to Des Moines (Aug. 19, 2008).

House members would not vote for the bill without the exemption; in response to a question from Republican Ralph Watts, he also specified that these members were actuated by their interest in casinos in their districts and their concerns that a ban might injure the casinos economically. Moreover, he believed that the amendment was intended to prompt those representatives to vote against and thus to kill the bill.\footnote{House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).}

In her closing remarks Boal, whose preference was vindicating owners’ private property rights over public health and who had demonstrated her pro-tobacco stance by voting against the dollar cigarette tax increase in 2007,\footnote{See above ch. 34.} uttered the debate’s most risibly fraudulent claim: “I don’t choose progress. I choose perfection.” On a non-record vote of 43 to 51, the first big killer amendment failed.\footnote{House Journal 2008, at 1:325 (Feb. 19).}

After Lukan had withdrawn his amendment banning smoking in motor vehicles in the presence of anyone under 18, Jacobs received unanimous consent to defer temporarily on her amendment to eliminate certain outdoor no-smoking zones,\footnote{Telephone interview with Libby Jacobs, West Des Moines (Aug. 16, 2008).} because, being in the minority, she knew that her proposal would not be adopted since the Democrats had the votes to secure adoption of Olson’s more modest amendment (H-8027) on the same subject, which was then immediately debated. Jacobs regarded this procedural jousting as an example of “pure partisan politics” designed to enable Democrats to “take all the credit” for the bill.\footnote{Telephone interview with Libby Jacobs, West Des Moines (Aug. 16, 2008).} Olson described the purpose of the bill’s “separation distances” as protecting people from having to run gauntlets of smoke while entering and leaving smoke-free public places and preventing smoke from blowing back through doors and windows into such buildings. In addition to making a uniform 10-foot distance out of varying 20- and 50-foot zones, the amendment also accommodated some (unidentified) people’s concerns with “overly burdensome” distances.\footnote{Telephone interview with Libby Jacobs, West Des Moines (Aug. 16, 2008).} Olson did not mention whether authorizing the formation of those gauntlets just 10 feet away from doors to smokefree buildings constituted yet another example of choosing progress over perfection or why failure to acquiesce in this imperfection would have resulted in 0 percent coverage. (In contrast, Jacobs, whose position

\footnote{House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).}

\footnote{House Journal 2008, at 1:325 (Feb. 19).}

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The Smokefree Air Act of 2008

was ultimately vindicated when, later in the session, even the 10-foot zone was struck, insisted that there was no downside to its elimination because it would have been unrealistic for people to have imagined that, so long as smoking remained legal in Iowa, they would never again have to walk through smoke.)

The exemption for the Iowa Veterans Home included in the amendment meant that the existing no-smoking rules there would remain in effect.

Jacobs, who had filed the rival amendment abolishing these zones altogether because she was concerned that they were confusing and cumbersome to people walking by while smoking who would wind up violating the law unintentionally, began questioning Olson rather sharply about the impact of his 10-foot zones. After eliciting from him that owners of covered entities would not be required to mark off these 10-foot distances, Jacobs asked how people would know where the 10-foot zones began or ended and how they would enforce the provision. Unrealistically but apparently not flippantly, Olson replied that “they could get a measuring tape out and measure it off if they wanted to.” In addition, Olson confirmed for her that where such 10-foot spaces ran into other people’s private property or streets or sidewalks, smoking in the latter areas would not be unlawful.

Representative May returned to the fray to dwell on a property owner’s responsibility 24 hours a day for any and all smoking that might take place in his 10-foot outdoor no-smoking areas regardless of whether he saw or knew about or had any control of it. (To be sure, May was so preoccupied with the issue of liability that he never bothered to delve into the crucial issue of the provision’s non-self-enforcibility and the improbability that anyone would file a complaint or be able to identify a smoking violator.) Purporting to be flabbergasted and outraged when Olson confirmed this liability (which brought with it a $100 penalty for a first violation), May, histrionically raising his voice, called it “incredible” and “unbelievable” that owners were being held to the “impossible

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518 Telephone interview with Libby Jacobs, West Des Moines (Aug. 16, 2008). Jacobs added that it was “difficult to legislate to the lowest common denominator” in a statewide law, while admitting that constitutional and codified limitations on home rule would preclude local communities from passing ordinances imposing no-smoking zones even to deal with special local conditions. Although Jacobs focused on much more marginal and quasi-trivial oddities of people driving by in motor vehicles or walking into a no-smoking zone in order to avoid a construction obstruction while smoking, she failed to offer any reason as to why it would not have been possible to craft a provision to deal with the core area of concern—for example, being forced to run gauntlets of smoke on entering or leaving a restaurant the grounds of which extended beyond the no-smoking zone.

519 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).

520 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
standard” of being 24-hour-a-day monitor of smoking outside their door: “And you [Olson] think that’s reasonable—that’s scary to me.” Although May, laughing, noted that he personally would be voting for the amendment because it was superior to a 50-foot rule, he strongly felt that “the business community out there ought to be screaming to high heaven when this thing moves tonight.” He later offered another reason for such screaming when, in the course of a choreographed Q & A with Republican Jeff Kaufmann, he stated that since at his resort in northwest Iowa he was unable to see perhaps 75 percent of the places on his grounds, he was plagued by the “scary thought” that he might have to hire someone just to enforce the 10-foot no smoking rule in order to avoid $100 a day fines.521

Sensing no doubt that they had finally latched onto some weak spot, Republicans would not let go of the issue. Representative Lukan—who later remarked that no-smoking was where the market was going anyway and that he agreed with that direction522—viewing the bill from the perspective of his family’s small tire shop, asked Olson to imagine that the shoe were on the other foot: if, lucky and successful enough to own his own law firm one day in downtown Cedar Rapids, he were “in the back workin’ hard on some legal proceedings, doin’ justice for the people,” and some client grew tired of waiting in the lobby and went outside to smoke a cigarette within the 10-foot zone, which Olson wouldn’t be aware of, and another client happened to leave and get “a little bit infuriated about this happening” and called the Linn County Public Health Department, reporting that someone had been smoking five feet in front of Olson’s law firm, the result, at least in Lukan’s fertile imagination, was that: “They’re gonna come and they’re gonna fine you a hundred dollars.”523 Olson, for the purposes of this aspect of the debate, did not need to risk revealing the existence of an embarrassing hole in his bill’s enforcement scheme by remarking on Lukan’s risibly touching faith in the agency’s instantaneous curbside enforcement service—a nightmare over which in the real post-enactment world no owner would ever have to lose sleep.524 Much more effective was his simple

521 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
523 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). Although in this particular scenario it might actually have been possible to identify the smoker, in the vast majority of cases the smoker, who would be long gone before even a zealous enforcer could be on the scene, would be a stranger.
524 See below. H.F. 2212, as Lukan himself admitted after the law had gone into effect, “won’t be a hard-enforced law.” Telephone interview with Steven Lukan, New Vienna (Aug. 17, 2008).
affirmation that “I’m obviously responsible for that and if somebody is violating the statute, then I’m gonna pay the $100 fine.” Lukan’s social-psychologically acute insight, which was, as he recognized, suited not to a big city downtown’s anonymity, but to small-town and Main street Iowa, was that “when you know everybody in town, when you work with everybody in town,” the law would put many people in “awkward positions.”

Lukan did not offer Olson the opportunity to discourse on this important issue, which Olson also did not broach during his closing remarks. Had he done so, he might have pointed out that Lukan’s comment had reflected, but failed to reflect on, the coming great cultural struggle and cultural change, which the Smokefree Air Act would bring about and which, in turn, would ultimately make compliance with the law ‘second nature.’ All Lukan could see was the initial short-term interpersonal unpleasantness associated with having to inform his smoking customers that they had been deprived of their decades-old privilege to expose him and others to secondhand smoke; that his legislative colleagues had chosen him to take on the disagreeable role of initial enforcer of the new public health regime to the possible detriment of his business—though as long as his competitors did not countenance violations, it was improbable that customers would stop having their tires repaired solely because they could not smoke in the shop—and of his commercial relations and personal friendships rankled. (In fact, seven weeks after the law had gone into effect, Lukan observed that he had had to remind only a few customers to put out their cigarettes when they came into his service station, none of whom took their business elsewhere.) But unable to see the present as history, Lukan did not understand that Iowa was caught up in the same process that was sweeping the United States and much of the world at the end of which tobacco smoking and use would perhaps be regarded as a uniquely bizarre and (self-) destructive activity. If Olson and other anti-smoking legislators understood and welcomed this transformation, they presumably decided that expedience dictated legislative progress over political perfection; consequently, explaining to the General Assembly and Iowans that they were embarking on a cultural revolution might have interfered with passage of H.F. 2212. From this perspective, conducting the operation on the basis that the whole matter was, instead, legalistic and not one that might plunge society into a (fruitfully) disruptive conflict and (self-)learning experience must have been taken for granted.

Unsurprisingly, at the end of the debate, the House adopted the floor manager’s own amendment on a voice vote, thus placing out of order Jacobs’

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525House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
The Smokefree Air Act of 2008

related amendment, as well as Struyk’s 21-and-over and ventilation amendments and Raecker’s amendment eliminating all exemptions except that for private residences.527

The House next took up Horbach’s contentious amendment to exempt all agricultural property, buildings, and equipment from the smoking ban, which went far beyond the bill, at least as floor manager Olson had explained it in his opening remarks, insofar as it exempted corporate farms as well as buildings on non-corporate-owned farms. Explaining that his main amendment (H-8016) dealt only with corporate farms, Horbach introduced an amendment (H-8038) to it that went further,528 but then, with seeming naivete, wondered aloud whether he really needed this more expansive amendment, and with unwonted deference asked Olson as an attorney to clarify why the bill’s ban on smoking would not apply to non-corporate farmers. Olson confirmed that “if it’s a personally owned vehicle, the vehicle is not owned by the corporation, smoke away! So the reason I gave that analysis at the beginning was that the prohibition on smoking in a tractor only applies if the tractor is owned by a corporation, if the corporation has employees, and more than one employee uses the tractor.” Under questioning by Horbach, Olson also confirmed that if the farmer was a sole proprietor, had two employees, and both of them were in the tractor cab with him, he could lawfully smoke. Summing up, then, Horbach explained how comprehensive his proposed agricultural exemption would be,529 the House promptly adopted his second degree amendment, and debate returned to the main amendment.530

Horbach’s oddly deferential request for clarification from Olson was a trap: in caucus the Republicans determined ahead of time that Olson, who, ironically,
The Smokefree Air Act of 2008

had been chosen to floor manage the bill because, unlike Petersen, he would be able to explain its technical details, would misinform the House about the (alleged) corporate underpinnings of the agricultural exemption,\footnote{Telephone interview with Lance Horbach, Tama (Aug. 17, 2008).} which, contrary to Olson’s claim, was narrow and not broad. (Republican Mike May, who held Olson in high regard, excused, or at least explained, Olson’s underperformance on this matter by reference to the fact that a floor manager simply cannot prepare for all questions.)\footnote{Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008).} Nevertheless, Horbach did not even bother to point out Olson’s incorrect answer, which may have been a function of having been caught off-guard about one aspect of the bill rather than intentional disinformation designed to mislead potential opponents about the need for an expansion of the exemption. Whether Horbach refrained from pouncing on the misinformation with a ‘gotcha’ because he cynically regarded floor debate as “just for public show” in a system which enables both parties almost always to know in advance whether a bill would pass or for some other reason, Olson’s deconstruction was entrusted to other Republicans.\footnote{Telephone interview (Aug. 19, 2008).}

After Olson in his remarks urging the House to resist the amendment had repeated his misinformation about the limited application of the smoking ban to corporate farming, Soderberg read him the bill’s linked definitions of “place of employment” (which included “vehicles owned, leased, or provided by the employer”)\footnote{H.F. 2212, § 2 (9) (Feb. 19, 2008).} and “employer” (which embraced numerous legal forms including corporations and sole proprietorships),\footnote{H.F. 2212, § 2 (5) (Feb. 19, 2008).} and asked him to explain how this “pretty inclusive” smoking ban on farms was consistent with Olson’s understanding of the exemption as coinciding with a particular legal form of organization. Olson’s initial response was rooted in such a breathtakingly incompetent reading of the bill that it had to inspire speculation that he had become temporarily or nervously so distracted that he was blinded to its blatant incoherence: “Well, well, if a vehicle is not owned, leased, or rented by the employer, it’s not covered.” How Olson imagined, for example, that a sole proprietor would not own, lease, or rent the tractor, and what possible relevance this claim bore to corporate status remained a mystery. After eliciting from Olson

531 Telephone interview with Lance Horbach, Tama (Aug. 17, 2008).

532 Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008). A Republican House leader, who also held Olson in high regard and demanded anonymity, stated as an overall impression that Olson had not prepared carefully for the debate and vigorously rejected any speculation that Olson might have been intentionally misleading the House. Telephone interview (Aug. 19, 2008).

533 Telephone interview with Lance Horbach, Tama (Aug. 17, 2008).

534 H.F. 2212, § 2 (9) (Feb. 19, 2008).

The Smokefree Air Act of 2008

that he did not know how farms broke down according to legal form of organization, Soderberg—who had forfeited his opportunity to point up Olson’s utter confusion by confusing the debate by exhibiting his own inability to understand the bill’s straightforwardly interlocked provisions—concluded by making the (unsubstantiated) empirical point that since a “high majority” of farms were now organized as corporations, even by Olson’s understanding the smoking ban would be broad.

Upmeyer’s focus was not the extent of the ban in agriculture, but its point: since most vehicles were driven and occupied by one person at a time, the problem was firsthand smoke not secondhand smoke exposure. When Olson tried to defend the ban even in that situation on the grounds that carcinogens could linger for as long as two weeks and therefore other users of the tractor would be exposed to them, he gifted a “Gotcha!” to Upmeyer—whose husband was a farmer—of which she failed to take maximum propagandistic advantage (“I didn’t think that far ahead”). Although she had not intended to question Olson any further, Upmeyer, seeing something of an opening, wondered how, if they were going to be “legislating to that level of secondhand smoke,” they were going to regulate smoke lingering in people’s clothes. Misunderstanding Upmeyer’s question as if it pertained to secondhand smoke on nonsmokers’ clothing (when in fact she meant smokers’ clothing), Olson dismissed that problem as taken care of by the Smokefree Air Act, which would insure that nonsmokers would largely not be exposed to secondhand smoke. Without picking up on this misunderstanding, Upmeyer nevertheless inadvertently posed an interesting question (which she lacked the presence of mind to ask Olson to answer): should someone who smoked in her car on the way to a restaurant be barred from entering the restaurant (or required to change her clothing) lest other customers be exposed to her off-gassed carcinogens? After all, as she failed to add, if the desorption from freshly smoke-infested clothing might be considerably greater

536 Despite Olson’s efforts, Soderberg was unable to grasp that the specific exemption for “[o]utdoor areas that are places of employment” narrowed the coverage of “places of employment.” H.F. 2212, §§ 4(6) and 2 (9) (Feb. 19, 2008).
537 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr, communications director, House Speaker Murphy).
538 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
539 Telephone interview with Linda Upmeyer, Garner (Aug. 18, 2008).
540 On the relatively recently discovered phenomenon of thirdhand smoke exposure, see above ch. 33.
541 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
than that from the week-old smoke adsorbed onto the interior of a tractor cab,\textsuperscript{542}
why was a smoking ban in the tractor necessary when the Smokefree Air Act did
not ban smoky clothing from public places, and presumably even Olson would
have agreed, had Upmeyer asked him, that such a step would be too extreme?

The coherence of the discussion of farm coverage advanced somewhat as a
result of the lesson in remedial bill interpretation that Minority Whip
Paulsen—who experienced the whole floor discussion as “a fun debate” even
though, like others, it was primarily “for public consumption”\textsuperscript{543}—administered
to Olson, his fellow Cedar Rapidian and classmate (2003) at the University of
Iowa Law School. At the outset advising the floor manager that “we’re
corporationin’ it up here,” which he was not sure was the relevant point, Paulsen
once again led Olson through the interlocking definitions and stressed that the
definition of “employer” encompassed a multitude of legal forms of organization,
including sole proprietorships.\textsuperscript{544} As he was soliciting Olson’s assent to what by
this time must have appeared to Olson as an endgame, the floor manager
irrelevantly identified the exemption for “vehicles owned, leased, or provided by
a private employer that are for the sole use of the driver and are not used by more
than one person in the course of employment either as a driver or passenger”\textsuperscript{545}
as the basis for part of his interpretation of coverage. Following this distraction,
Paulsen then drove home the point that the comprehensive definition of legal
forms of organizations of employers meant that “to limit our discussion to just
corporations is not correct. In fact, what we’re talking about is any business
structure,” including an unregistered sole proprietorship that had a vehicle that
more than one person operated. This simple, straightforward, and accurate
presentation of the law, which unanswerably refuted the patently false claims that
 Olson had been submitting to the House about the limited nature of farm
coverage, compelled Olson’s agreement, but not without a face-saving (but just
as patently false) claim that he had been offering the same analysis as Paulsen all
along: “Yeah, when I am using the word, you know, ‘incorporate’ we’re talking
business structure, that’s right, I mean some kind of legal structure to the
business.” Even this limited concession did not satisfy Paulsen, who insisted that
even if there were no legal structure such as that symbolized by registration with


\textsuperscript{543}Telephone interview with Kraig Paulsen, driving on I-80 from Cedar Rapids to Des Moines (Aug. 19, 2008).

\textsuperscript{544}House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).

\textsuperscript{545}H.F. 2212, § 4(7) (Feb. 19, 2008).
The Smokefree Air Act of 2008

the secretary of state or partnership agreement, the smoking ban would also cover “just whoever [is] out farming” with a vehicle that more than one employee used. Although this extraordinarily capacious coverage was inconsistent with Olson’s repeated statements to the chamber, he immediately replied, “That’s right,” without in any way indicating that the proposition to which he had just assented was radically at odds with his previous position. In turn, Paulsen declared that all or at least the overwhelming majority of farms in Iowa would be covered: “This is far more encompassing than just those farms that are organized under some sort of corporate structure.” And, once again, Olson agreed—so long as the farmers had employees. To make sure that the whole chamber and press understood just how discontinuous the new public health regime would be with midwestern farming traditions, Assistant Minority Leader Jeffrey Kaufmann, who taught history and government at a community college, made Olson confirm that a family farmer would not be able to smoke lawfully in his own tractor in the middle of his 160-acre farm if he had a “hired hand” who also used the tractor. Ironically, Kaufmann, who had apparently not been listening carefully as Paulsen took Olson to the woodshed, compounded the confusion and (verbally) diminished the extent of the state’s regulation by adding as a further condition that the farm be incorporated—to which proviso, astonishingly, the unrepentant or incorrigible Olson assented. No wonder that a confused Des Moines Register reporter stated the next day that the “vast majority of farms would not be affected by the ban unless the farm is a corporation.”

Not until Democrat Mark Kuhn, who for 34 years had been operating and managing his family’s 770-acre grain farm, addressed the House did information seep out relevant to health conditions inside farm tractor cabs. He still remembered how thrilled he had been the first time he got into a cab that was air conditioned and kept the dust out. In that same spirit he did not want someone who had driven the tractor the previous day to leave secondhand smoke for him to breathe all day long. Pointing out that farmers sat in enclosed cabs eight to 12

546 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
548 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr, communications director, House Speaker Murphy).

3387
or 16 hours a day and were protected by carbon filters that filtered out contaminants (including the fungicides and herbicides that they sprayed), Kuhn stressed that they did not want this exemption because “we’re concerned about our health.”

All of this firsthand practical experience was lost on Republican David Heaton, a restaurant-bar owner who in previous sessions purported to be a devoted public health-oriented tobacco controller. In fact, however, as he disclosed shortly after the end of the session, he was perfectly satisfied with the existing law, which needed no change because it was working perfectly alright. Unsurprisingly, he now saw but one issue, which, in a pathos-infused crescendo, he identified as whether the legislature had the “right” to tell a person whether he chooses to smoke a cigarette on his own property, in his own machine. Forgetting, if he ever knew, that his own party whip had just explained that the ban was not limited to incorporated farms, but that it did not apply at all to a farmer who farmed all alone as a rugged individualist, Heaton insisted that “[w]e are trying to preserve the rights of these individual owners, on their incorporated farmland,.to smoke if they choose to smoke. That’s their decision. I don’t think we have any business telling them what they should do...on their own property....” Sputtering in disbelief, he criticized Democrats for failing to make their bill “more fairer.” Losing her patience with Heaton’s property rights absolutism, Mascher asked him whether he complied with OSHA rules in his restaurant. Eliciting a fuzzy answer—he did not “pack the OSHA bible and read it page by page,” but he had never received a complaint from OSHA—Mascher explained that she had asked because Heaton kept asserting that people ought to be able to do what they wanted in their own businesses, but in fact all kinds of laws protected people from various harms in his restaurant and elsewhere and now secondhand smoke was merely being added to the list of such harms from which the legislature would protect them.

This perspective failed to inform Horbach’s closing remarks. After correctly pointing to the quasi-universality of coverage—“[n]ame a farm that has a family

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551 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). The exposure Kuhn was warning about was in fact to thirdhand tobacco smoke.
552 See above chs. 31 and 34.
553 Telephone interview with David Heaton, Mt. Pleasant (May 10, 2008).
554 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). Later, Heaton expanded his freedom-to-smoke claim beyond the smoker’s property to include restaurant owners and smokers in general. While denying that he was opposed to health regulations for restaurants, he refused to “debate” the bill on the telephone. Telephone interview with David Heaton, Mt. Pleasant (May 10, 2008).
that it won’t apply to. You can’t”—he quickly returned to his party’s favored theme of “invasion of property rights,” but then segued into the coming cultural struggle. “[Y]ou’ve got to be kidding me” were the first words out of everyone’s mouth when he mentioned the smoking ban in tractors and combines. That the legislature was taking away a farmer’s right to smoke (in a cab of a vehicle that an employee also drove) defied both “common sense” and what American stood for: “On the farm. Out in the country. It’s what we are.”555

These stirring sentiments ushered in the vote on Horbach’s amendment, which would have created an exemption far transcending tractors. After Horbach and Paulsen had requested a record vote, H-8016 lost on a 50 to 50 tie vote with only one Republican (Tomenga) joining 49 Democrats to vote Nay, while four Democrats (Bailey, Huser, Mertz, and Todd Taylor) supported the amendment together with 46 Republicans.556 The reason for the failure of the amendment—which Paulsen characterized as one of only two about the vote on which there was “a little bit of drama”555—was, according to Horbach, that the Democratic leadership had “controlled” the vote: it permitted four members to “slide over,” but as soon as the total reached 50, it stopped the cross-overs to insure that it could get a “clean bill.”558

After Lukan had temporarily deferred on his amendment to exempt private offices,559 the House took up Struyk’s other highly controversial amendment, H-8024—the only other one that Paulsen regarded as having created “a little bit of drama” regarding its passage—to exempt restaurants and bars that admitted only people 18 and older, an exemption that Struyk characterized as similar to that for casinos. Olson tore into the proposal as taking a step back not only from H.F. 2212, but even from the existing law, which at least required restaurant owners to set aside some area for nonsmokers, whereas under this amendment restaurants could be all-smoking.560 In addition to focusing on the consequences for the 115,000 hospitality industry workers, Olson pointed out that families with children who ate breakfast in such establishments the next morning would be exposed to the lingering secondhand smoke. Republican Dolecheck, who did not

555House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
557Telephone interview with Kraig Paulsen, driving on I-80 from Cedar Rapids to Des Moines (Aug. 19, 2008).
558Telephone interview with Lance Horbach, Tama (Aug. 17, 2008).
560Since under the then existing law the so-called nonsmoking sections could be as small as one table and be fully exposed to all the smoke in the restaurant, Struyk’s proposal might, in some cases, not have constituted much of a step back.
like going into smoky bars, pleaded on behalf of businessmen-constituents, especially restaurant-bars in small rural towns with only one restaurant in which at some point in the evening the owner stopped serving meals anyway because his customers just wanted to drink beer. Dolecheck gullibly conveyed the assurance of one of these owners that his excellent filtration system would purify the air overnight so that by the next morning there would be no secondhand smoke in the air—“only a little bit of odor...in the fabric—you can’t get rid of that.”

In fact, as one of the leading researchers of indoor air pollutant dynamics and human exposure observed: “The smell itself likely consists of many toxic chemicals present in tobacco smoke residue. Also, there are likely to be other toxic chemicals that you can’t smell that are also present on the surfaces where smoking has occurred, and which are re-emitted into the air over time.” Moreover, a study conducted at 21 different locations in Iowa from November 2007 to January 2008 found that the levels of particulate matter—smaller than 2.5 microns in diameter—air pollution in bars, restaurants, and casinos that permitted smoking were 17 times higher than in non-smoking bars and restaurants. Full-time year-round employees breathing such smoke-polluted air in their workplaces would, on an annual basis, have experienced an exposure 2.4 times the particulate air pollution standard limit set by the Environmental Protection Agency to protect the public health.

After Davenport Democrat Elesha Gayman had made a personal plea for rejection of the amendment on behalf of her pregnant “little sister” whose employment in a bar exposed her and her child to secondhand smoke, aisle-crossing Democrat McKinley Bailey made common cause on behalf of smoking with Dolecheck. Working off what had all the markers of a jointly rehearsed script, Bailey dutifully submitted his leading questions to his Republican collaborator, whose eagerness to perform was signaled by his response—unique during the entire debate on H.F. 2212—to the Speaker’s pro forma query as to

561 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). Again, both Olson and Dolecheck were in fact referring to thirdhand tobacco smoke exposure.

562 Email from Neil Klepeis to Marc Linder (Aug. 19, 2008).

563 Mark Travers, “Iowa Air Monitoring Study: December 2007 to January 2008” tab. 1 at 7 (Roswell Park Cancer Institute, Feb. 2008) (copy furnished by Mark Travers). Because the three casinos were on average 16 times larger and therefore had less than one-half of the active smoker density despite having 11 times more cigarettes burning at any given time than the 14 smoking-permitted bars and restaurants, they were only five times more polluted than the non-smoking venues (averages calculated based on date in id.).

whether he would yield to the Democrat’s questions: “I would love to.” In reply to Bailey’s question as to whether he had ever talked about the amendment to a tobacco lobbyist, who might have been the “inspiration” behind it, Dolecheck confided that: “Quite frankly, I don’t talk to tobacco lobbyists too much. I am not a smoker and I don’t really approve of it.”

Inspired to make a clean breast of his own untainted motives, Bailey confessed that “I don’t talk to tobacco lobbyists either.” After Dolecheck and Bailey—the only Democrat to “voice objections to the bill” during the debate—had assured each other that their concern was to eliminate the competitive disadvantage that the bill imposed on “the little guy” owning a small bar in a small town vis-a-vis casinos, Bailey risibly claimed in a throwaway line suggesting a vague recollection that he was, after all, amending the Smokefree Air Act, that “it also does some good things as far as public health is concerned: it would mean that smoke would be out of the air, no child in the state would have to breathe in secondhand smoke in a public place.”

Democrat Mark Smith forthrightly opposed the amendment because “people do not like the secondhand smoke” and therefore fought to keep smoking bans once they are in place—without explaining why he had neglected the interests of non-smoking residents and employees of the Iowa Veterans Home in the so-called Mark Smith amendment to exempt the Home. Debate continued with May accusing Democrats of disingenuously lecturing the chamber about the dangers of secondhand smoke while enabling it in casinos, prompting Wise to shoot back that the 18-and-over amendment would create a Mack truck-size loophole. In his closing remarks Struyk—who, though a lawyer, a little later in the debate, self-deprecatingly called himself “just a lawn man” (because he owned Struyk Turf, LLC)—tried to refute Wise’s factual statement by cynically and nonsensically blaming the bill drafter for having repealed the current law, including its mandatory provision for non-smoking areas, which would otherwise have required such areas in casinos.

The 49 to 51 record vote (requested by Struyk and Rants) once again revealed

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565 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
566 O. Kay Henderson, “Iowa House Votes to Ban Smoking in Most Public Places,” Radio Iowa (Feb. 19, 2008) on http://www.radioiowa.com (visited May 12, 2008). Henderson incorrectly stated that “Republicans were the only ones to voice objections to the bill.”
567 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
568 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
570 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
how tenuous support for a robust law was: with seven Democrats (Bailey, Huser, Lykam, Mertz, Quirk, Schueller, and Zirkelbach) defecting to the pro-smoking position, the House failed to carve out this huge hole in the bill’s protective scheme only because of the Nays cast by five Republicans (Baudler, Clute, Jacobs, Raecker, and Tomenga) who to varying degrees on various issues had supported the bill.\footnote{House Journal 2008, at 329-30 (Feb. 19). All of these Republicans except Raecker voted for H.F. 2212 on final passage; all of these Democrats except Bailey and Zirkelbach voted against H.F. 2212. Tom Schueller had worked at John Deere & Co. for 30 years and was a UAW member. \url{http://iowahouse.org/2008/04/24/member-profile-rep-tom-schueller/#more-354} (visited Aug. 21, 2008). Ray Zirkelbach, a state prison correctional counselor, had missed the 2006 and 2007 sessions while a soldier in Iraq. \url{http://iowahouse.org/2008/04/24/member-profile-rep-ray-zirkelbach/#more-383} (visited Aug. 21, 2008). He also smoked. Telephone interview with Rep. Mark Smith (Marshalltown (Aug. 21, 2008). According to one of the Democrats voting Aye, the amendment did initially receive 51 votes, but Majority Leader McCarthy kept the voting machine open and persuaded two Democrats (whom the representative refused to identify) to change their votes to Nay. Telephone interview with House member who demanded anonymity (Aug. 27, 2008). Mertz, who indicated that situations in which the majority leader keeps the voting machine open in an effort to persuade members to change their votes were not rare under Democrats or Republicans, was unable to recall this particular event sharply, but believed that it happened. Telephone interview with Dolores Mertz, Ottosen (Sept. 3, 2008). Ironically, in contrast, McCarthy’s administrative assistant, Brian Meyer, in (mistakenly) recalling the 50 to 50 vote on McKinley’s 18-and-over amendment, remembered looking up at the board and thinking that it would pass (“someone must have changed their vote”). He emphasized how unusual it was that leadership had not known which amendments would pass or even whether the bill itself would. Telephone interview with Brian Meyer, Des Moines (Sept. 18, 2008).}

Democrats’ heterogeneity and internal dissension were exemplified by Dolores Mertz and Geri Huser. A representative from a rural district in northcentral Iowa since 1988 and the first woman to chair the House Agriculture Committee,\footnote{Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008).} Mertz at 80 was the oldest member of the legislature and took a jaundiced view of the presence of “a lot of do-gooders” in the body. Her allegedly anti-paternalistic opposition to a smoking ban as an “infringement on rights” was prefigured by her opposition to a 1993 bill mandating the wearing of
helmets by motorcyclists.\textsuperscript{574} Offended by the treatment of smokers as “second-class citizens” and willing at the very most to concede that any smoking restrictions should have started much more slowly, Mertz displayed the kind of anti-scientific ignorance that in many instances underpins hostility to tobacco control initiatives when she implausibly asserted that her internist at the Mayo Clinic had told her that he would not urge such measures because radon caused more lung cancer than cigarettes or chemicals.\textsuperscript{575}

Huser, who characterized herself as a conservative Democrat who believed that government control should not be extensive, was content to let the market determine smoking policies, which then in 10 or 15 years, she contended, would have evolved into that underlying H.F. 2212.\textsuperscript{576} Huser, who with Mertz and Pettengill (who then became a Republican) had been one of only three Democrats to vote against the $1 cigarette tax increase in 2007,\textsuperscript{577} had received $1,000 in campaign contributions in 2006 from Altria Group, Inc. a/k/a Philip Morris, more than any other individual Iowa state legislator.\textsuperscript{578} She had also attained prominence in 2007 for her aggressive representation of her constituent, Prairie Meadows race track and casino—which her father and law partner Ed Skinner had helped found\textsuperscript{579} and of whose grant advisory committee he was a member\textsuperscript{580}—in exempting casinos (and age-restricted bars) from and thus killing the bill repealing preemption of local control.\textsuperscript{581} Her consistent votes against H.F. 2212, even though casinos had been exempted before the bill reached the House floor, resulted from the break-up of the casino-bar “coalition”: after the casinos

\textsuperscript{574} For Mertz’s Nay on the crucial vote on the amendment that would have made helmets mandatory, see \textit{House Journal 1993}, at 2:1676 (Apr. 26, 1993). To be sure, Iowa remains one of only two or three states without a mandatory helmet law. Marian Jones and Ronald Bayer, “Paternalism and Its Discontents: Motorcycle Helmet Laws, Libertarian Values, and Public Health,” \textit{AJPH} 97(2):208-17 (Feb. 2006).
\textsuperscript{576} Telephone interview with Geri Huser, Altoona (Aug. 27, 2008).
\textsuperscript{577} See above ch. 34.
\textsuperscript{578} http://www.iowa.gov/ethics/viewreports/vsr_contributions/2006vsr_contributions.pdf. Huser received two contributions of $250 and $750; no other legislator received more than $750.
\textsuperscript{581} See above ch. 34.
The Smokefree Air Act of 2008

had made a deal with the Democratic leadership to secure their own exemption, they dropped out, leaving bars and Huser to fend for themselves.\footnote{Telephone interview with Geri Huser, Altoona (Aug. 27, 2008).}

The House then took up another of Struyk’s bill-killers—the amendment that provided that if any provision (or the application of the law to any person) were held invalid, the law in its entirety would be invalidated.\footnote{Struyk’s amendment was devised to overcome Iowa Code § 4.12 (2008), which provides: “If any provision of an Act or statute or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act or statute which can be given effect without the invalid provision or application, and to this end the provisions of the Act or statute are severable.”}

Struyk especially commended his proposal to supporters of the casino exemption because, without H-8035, if the casino exemption were struck down, the result would be coverage of casinos under the ban; with his amendment, the law itself would be invalidated and casinos would remain subject to the existing (toothless) law. Olson warned the chamber that such non-severability clauses could be—and in other states had been—used to “take down” public health statutes like the Smokefree Air Act.\footnote{House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).}

On a non-record roll call a somewhat larger majority apparently recognized the mortal threat that this measure posed to the bill and rejected it by a vote of 43 to 53.\footnote{See above this ch.}

After Lukan had withdrawn his assessment reduction amendment,\footnote{After Lukan had withdrawn his assessment reduction amendment, attention turned to Paulsen’s amendment to strike the entire bill and, instead, merely to ban smoking in all restaurants under the then existing law. In his opening remarks on H-8025 Paulsen (a former smoker)\footnote{O. Kay Henderson, “GOP Leader: Why Was First Lady, When Caught Smoking, Being Driven by State Trooper?” Radio Iowa (Nov. 26, 2008), on http://www.radioiowa.com (visited Nov. 26, 2008).} justified his amendment on the grounds that a majority of his constituents had told him that they wanted to be able to go to a restaurant without having to inhale secondhand smoke—a modest demand that coincided with Minority Leader Rants’s view of what Iowans wanted. Paulsen also intuited that Iowans cared about being able to enter malls and businesses without being forced to run through gauntlets of smoke, but his amendment did not retain the bill’s provision creating a no-smoking zone at entrances. Nevertheless, personally Paulsen would not have supported even such minimalist}
The Smokefree Air Act of 2008

intervention as his amendment embodied because, as he later stressed, “I’m a free market, property rights guy,” whose opposition to the bill had nothing to do with fears (that he did not share) that bars would be financially ruined by the ban, but was based wholly on property rights. Indeed, if he had had his “druthers,” he would not even have called up H.F. 2212\textsuperscript{590}—precisely the kind of pro-tobacco action taken by his party leadership when it controlled the legislature.

Olson devoted but a very brief and perfunctory effort to opposing the restaurants-only ban, pointing out its obviously massive regress vis-a-vis H.F. 2212. After no other member had expressed a desire to speak on H-8025, unsurprisingly only one-third of the House favored this retrograde, last-ditch effort to stave off a thoroughgoing statewide ban: even on a non-record roll call only 33 representatives were willing to vote for Paulsen’s proposal, while 56 rejected it.\textsuperscript{591}

No debate took place on Upmeyer’s amendment (H-8033) to strike the entire bill and, instead, to confer an annual $1,000 tax credit on any establishment that voluntarily became smokefree because Tyler Olson successfully secured a ruling that it was not germane.\textsuperscript{592} However, before the speaker made that ruling, Upmeyer in her opening remarks praised her own approach as finally giving the House the chance to “remove the hypocrisy and do something straightforward and honest.” She justified the measure as helping to offset the alleged initial small loss of revenue associated with bars and restaurants’ going smoke-free. Upmeyer’s claim that she had filed the amendment at the request of students from Just Eliminate Lies whom she counter-agitated about property rights when they lobbied her to vote for H.F. 2212\textsuperscript{593} seems at best difficult to reconcile with the public personas of these hard-line anti-corporate, anti-tobacco, teenage statists.\textsuperscript{594} Similarly implausible was her insistence that they were astonished to hear that bar and restaurant owners could ban smoking voluntarily, agreed to go home and lobby them to do so, and then asked Upmeyer, for whom the smoking issue

\textsuperscript{590}Telephone interview with Kraig Paulsen, driving on I-80 between Cedar Rapids and Des Moines (Aug. 19, 2008). In the wake of the Republicans’ loss of additional House seats at the November 2008 election, the caucus voted to oust Rants as minority leader and replace him with Paulsen.

\textsuperscript{591}House Journal 2008, at 331 (Feb. 19).

\textsuperscript{592}House Journal 2008, at 333 (Feb. 19).

\textsuperscript{593}House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). Upmeyer’s explanation was inconsistent with the language of her amendment in two important respects. First, the amendment did not limit the tax credit to bars and restaurants; and second, the tax credit amounted to $1,000 per year, thus extending far beyond the transition period. H-8033, §§ 1 & 2.

\textsuperscript{594}http://www.jeliowa.org
centered on property rights and not on health, to file her tax credit amendment.\textsuperscript{595}

Lukan’s amendment (H-8020) to exempt bingo facilities pursued the vital social goal of insuring that casinos were not the only places in which people could gamble and smoke at the same time. Since bingo games could take place in all manner of buildings, Olson pointed out that the exemption would destroy their smoke-free status. Raecker’s opposition to yet another exemption prompted one of the evening’s lighter moments when he urged Lukan to tell the people who originated the amendment that if they refrained from smoking they would have both hands available for the game and could play multiple cards. The quick and clear voice vote against the amendment made as short shrift of H-8020 as the debate\textsuperscript{596}—even without any reference to a study finding that there was no association between smoke-free ordinances and bingo profits in Massachusetts, a conclusion that should have undermined the efforts of cigarette manufacturers to use that segment of the gambling industry as a stalking horse to avoid having to rely on their own nonexistent credibility to oppose smoking bans by shifting the issue to the allegedly linked financial declines suffered by such businesses.\textsuperscript{597}

More than three hours into the debate the House reached the last amendment, Lukan’s proposal to exempt private offices. Posing as the paladin of “literally hundreds of thousands of small business owners across the state of Iowa who feel like they’ve been kicked around by state government quite often,” Lukan pitched his initiative as being all about what it meant to own private property—namely, having some place “within your private business” that was off limits to government control and where you ought to be able to “do what you’d like”\textsuperscript{598} (especially if what you would like to do is “prevent [nicotine] withdrawal symptoms”\textsuperscript{599} regardless of the health consequences for you and your employees). Going beyond his by now tiresomely repetitive general plea not to weaken the bill’s public health benefits, Olson in his reply stressed that secondhand smoke was recirculated through ventilation systems, which did not make the air safe to breathe. In his closing remarks Lukan, again took up the cudgels for smoking

\textsuperscript{595}Telephone interview with Linda Upmeyer, Garner (Aug. 18, 2008). Upmeyer, who did not know whether the JEL students did actually speak to the owners, did not purport to have changed the students’ minds.

\textsuperscript{596}House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr); \textit{House Journal 2008}, at 333 (Feb. 19).


\textsuperscript{598}House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).

small businessmen, literally screaming at the top of his lungs on behalf of a (presumably lung-impaired) body shop owner with two employees who “has paid taxes for 40 years to the state of Iowa, always on time, never late, not once” and whose “legal right” to smoke the legislature was taking away. On the record roll call H-8019 was defeated by a vote of 47 to 53, which exactly coincided with the parties’ numerical strength, but hid the fact that six Republicans and six Democrats crossed over, virtually all of whom had been seen on the other side of the aisle on previous ballots. Thus, except for the floor manager’s, all amendments were defeated. That all of the minority party’s amendments lost was hardly surprising; on the contrary, the majority party’s control of a legislative body is defined as much by its capacity to defeat the other party’s obstructive amendments as to pass its own bills. As a corollary to the operating principle that leadership does not permit a bill to be debated if it is not certain that the measure will pass, normally leaders would also not permit a bill to be debated if they were unsure whether the minority’s amendments that would seriously weaken it would lose. In the case of H.F. 2212, however, as Representative Mascher observed the next day, “we had people switching votes all over the place. Leadership normally does not allow a bill to be defeated unless they know exactly what people are going to do. It seemed the longer this bill was out there the more skittish people became about supporting it. We definitely knew Olson’s amendment would pass but we were unsure about two or three of the [R]epublican amendments. Those amendments could have killed the bill and they would not have failed if it weren’t for some brave [R]epublicans.”

When debate on the bill itself finally resumed, the speech with which one of those Republicans, Walt Tomenga, his party’s most steadfast apostate on H.F. 2212, opened the discussion was also one of the most remarkable because he emphasized that this “imperfect” bill’s most important achievement would be a reduction in smoking and prevention of young people from starting to smoke in Iowa. Of the two predominant reasons for quitting and/or not starting, one, price, had been dealt with by the cigarette tax increase in 2007; the other, availability

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600House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
601House Journal 2008, at 334 (Feb. 19). The Democrats were Bailey, Huser, Mertz, Qurik, Schueller, and Zirkelbach; the Republicans were Baudler, Drake, Jacobs, Linda Miller, Raecker, and Tomenga (of whom only Jack Drake was a newcomer to apostasy). Oddly, Lykam, who stated later that he opposed prohibiting owners from smoking in their own offices, voted against the amendment. Telephone interview with Jim Lykam, Davenport (Aug. 24, 2008).
602Email from Mary Mascher to Marc Linder (Feb. 20, 2008).
(of places to smoke), was being addressed by the statewide ban. Next, Tomenga pointed out that the reduction in smoking would have positive financial and productivity effects by reducing illness and absenteeism. Only in third and last place did Tomenga mention that the bill would improve the quality of life by reducing the effects of secondhand smoke. He thus gave voice to the understanding that the bill’s ultimate rationale was to promote the decline in smoking prevalence: locational smoking prohibitions, restricted opportunities to smoke, and overall reduced smoking all went hand in hand with reduced exposure of nonsmokers. The underlying public health strategy that Tomenga objectively ascribed to the initiative was straightforward: the most efficacious way to reduce secondhand smoke was to reduce smoking.

Party-line Republicans who had no interest in banning smoking resumed their pretense-laden attacks on the bill for its casino exemption. Northwest Iowa farmer Gary Worthan, after asking whether and being told by Olson that the shop where he had his farm trucks repaired would be covered, illogically concluded that this coverage would be “just another hole...in this bill.” Had the bill come to the floor with no exemptions, Worthan claimed, he would have been “hard pressed” to decide based on the (conflicting considerations of) health benefits, what his constituents wanted, and individual businessmen’s rights to run their businesses. But above all the casino exemption was the great spoiler, which he proceeded to explicate by reference to one of his wife’s clients who had been lobbying him for a casino smoking ban since before he entered the legislature (in 2007). This “gentleman” spent all his time in casinos: he drove 130 miles one way to work as a dealer at a casino in Council Bluffs, and then whenever he got three or four days off, he and his wife flew to Las Vegas to gamble there. At first Worthan assured his colleagues that this man was not addicted to gambling, but then expressed some doubt on that point. In any event, the bill as it was did him no good and therefore offered Worthan no reason to vote for it. Having thus revealed the micro-basis of his formulation of public policy, Worthan dredged up again his party’s rhetorical commitment to pure, consistent, all-or-nothing legislation. In contrast, he derided Democrats’ “chest pounding and self-congratulation about all the health benefits” for Iowans while they singled out one group (of full-time addicted gamblers) as unworthy of those benefits. Worthan, whose party had refused even to let an exemptionless bill be debated when they controlled the legislature, would have nothing to do with a bill just shy of universal coverage because Democrats had surrendered “the moral high ground” to casinos in 2008 as they already had in 2007 when they increased the cigarette tax in 2007 instead of enacting a 100- percent ban on cigarettes—“the

601House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
one moral high ground” if they were really that bad for people, who were unable to decide for themselves (not to smoke).604

Opportunely, Democrat Mark Smith, who saw H.F. 2212 as “one of the most profound public measures” in the state’s history, intervened to lambaste Republicans’ hypocritical anti-hypocrisy laments, pointing out, for example, that many who opposed the casino exemption nevertheless voted to exempt farmers.605 The next Democrat to address the chamber, Wayne Ford of Des Moines, only the tenth African-American ever elected to the Iowa legislature,606 gave, by a wide margin, the most rabble-rousing speech members heard that evening. Recalling, in colorful language, how he had started smoking at age 17 and continued for 30 years in the quest to be a “cool black man,” the 57-year-old Ford related that people with his smoking profile took 15 years off their lives. He was also unique in slamming the cigarette corporations for having lied about their products’ lethality. And as for those who had the “nerve” to be worried about the casino exemption, he suggested that they start getting “real, very real”: the mortality caused by smoking “wasn’t about no casinos, y’all.” All fired up, he proposed that the House deal with the issue by adding an amendment that very night prohibiting gambling in Iowa. Ford was one of very few legislators who openly broke with the disingenuous pseudo-libertarian implication (and at times declaration) that protecting smokers from exposure to secondhand smoke was not designed to interfere with smokers’ right to smoke: on the contrary, he saw the battle against first- and secondhand smoking as inseparably interconnected.607

After Republican Soderberg had ludicrously charged that if “you’ve got a building, you almost need 24-hour surveillance to make sure that someone does not jeopardize the business” (presumably by smoking within 10 feet of it in the middle of the night and then being reported or even turning himself in to the police in order to cause the business a $100 penalty at the expense of a $50 penalty to himself), Representative Wise, who had ‘run’ the casino amendment in committee and now admitted that the exemptions were “perhaps too broadly drawn,” dramatically proclaimed the bill to be a “historic piece of legislation” that would become this General Assembly’s “legacy.” Because, in addition to being a pro-public health bill, it was also pro-business, pro-quality of life, and pro-life, anyone who opposed it—and the only lobbyists declaring against it were R. J. Reynolds and businesses selling cigarettes—would have to put up strawmen

604 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).

605 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).


607 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
to find excuses to vote No.\textsuperscript{608}

Paulsen—Olson’s soft-spoken lawyerly nemesis who viewed the bill as not being about smoking and health, but “property rights and fairness,” although in fact it was a “bullying or harassment bill” vis-a-vis small businesses\textsuperscript{609}—exceeded the 10-minute limit on remarks trying to extract from the floor manager, whom he regarded as a “true believer” in the anti-smoking campaign,\textsuperscript{610} the admission that the wording of the casino exemption (“Any property, including hotel and motel rooms, owned or operated by an entity licensed under chapter 99D or 99F”)\textsuperscript{611} literally likewise conferred an exemption on any property owned or operated by the entity licensed to operate a casino, even if it were the entity’s business office far away from the casino or an Applebee’s restaurant for which it had a franchise in another city. Olson’s purported ignorance of the casino licensing code provisions and his reluctance to discuss what appeared to be a far-fetched hypothetical situation combined to draw out the interrogation, though at least once Olson did concede that in theory the exemption might be that broad—a concession that might have prompted some of the bill’s supporters to defect over what would have emerged as an irrationally and embarrassingly expansive exemption. To be sure, Olson added that such an extended exemption was not the provision’s intent, but he did not voice any need to rectify this unintended consequence, in part, perhaps, because he stated that he was unable to understand what problem Paulsen was trying to solve. Ironically, Paulsen’s own professed ignorance of several key legal issues contributed to his failure to lead Olson socratically to an unambiguous confirmation of the answer his interrogator was seeking.\textsuperscript{612}

In the first of two potentially important colloquies fleshing out the scope of the coverage of the smoking ban on the “grounds of any public

\textsuperscript{608}House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). Wise listed Pfizer, John Deere, and Wal-mart as having declared for the bill through their lobbyists, but Wal-mart, a large seller of cigarettes, was not included on the legislature’s website list of lobbyists’ declarations for H.F. 2212. \texttt{http://coolice.state.legis.ia.us/CoolICE/default.asp?Category=Lobbyist&Service=DspReport&ga=82&type=b&hbill=HF2212} (visited Aug. 24, 2008).

\textsuperscript{609}House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr) (floor remarks made during his last speech of the debate).

\textsuperscript{610}Telephone interview with Kraig Paulsen, driving on I-80 between Cedar Rapids and Des Moines (Aug. 19, 2008).

\textsuperscript{611}H.F. 2212, § 9 (Feb. 19, 2008).

\textsuperscript{612}House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). Because the exemption was ultimately confined to the gaming floor, this issue did not have to be resolved.
buildings”—which would become one of the most contested terms for definition when, following enactment, the Iowa Department of Public Health drafted the implementing rules—Raecker asked Olson whether smoking would be prohibited on the entire grounds of public golf courses because public buildings were located on them. Olson began by stating that “the issue is whether it’s defined as a public place of assembly.” Although it was true that the subsubsection of the subsection on “outdoor areas” did (at that time) ban smoking on/in “[t]he grounds of any public buildings and places of public assembly owned, leased, or operated by or under the control of the state government or its political subdivisions, including the grounds of a private residence of any state employee any portion of which is open to the public,” clearly the “grounds of...public buildings” and “places of public assembly” were two different subcategories (which might overlap in some instances). Why Olson instinctively gravitated to the latter as the controlling issue would not become clearer until the second colloquy (with Rep. Jodi Tymeson), but at this point he was confused and confusing—so much so that while Raecker was apparently aware of Olson’s confusion and content, perhaps for tactical reasons, to let them talk past each other, Olson may not have grasped the existence of the gap between them. Olson tried to work his way back from more solidly grounded words by confirming at the outset that such buildings as the pro shop would be covered, but when Raecker pressed him about the golf course itself, his argument turned brittle: “And then the interpretation becomes, moves, I believe, to the definition of, well, when it speaks of outdoor areas and areas of public assembly, I don’t believe a golf course falls under an area of public assembly.” Olson lost touch with the provision he was supposed to be authoritatively interpreting for the House by dropping “grounds of any public buildings” from the text altogether—presumably because, as would be revealed 20 minutes later, he was so fixated on Soderberg’s (and Republicans’) original purpose of covering the governor’s mansion, that he was unable to see his way to attaching any other meaning to “public buildings” than public employees’ private residences open to the public. Though he plumped for “places of public assembly” as deciding the question at hand, it was a non sequitur in the sense that neither the syntax nor the meaning of the provision linked public assembly places to buildings; consequently, he should have either proceeded from the public building to the grounds or skipped over the building altogether and dwelt exclusively on public assembly places. That he conflated the two subcategories but nevertheless failed to elucidate what a place

613 See below ch. 36.
614 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
615 H.F. 2212, § 3(2)(f) (Feb. 19, 2008).
The Smokefree Air Act of 2008

of public assembly was and why it did not a apply to a golf course was strongly suggestive of his own perplexity, even while his posture as a strong floor manager—Raecker had opened his remarks by complimenting Olson on his responses to questions—precluded him from admitting his bewilderment. In the event, as soon as Olson had uttered his judgment that a golf course was not a place of public assembly, Raecker finished, as it were, Olson’s sentence by tacking on: “But it would be a grounds of public buildings.” Then, without pausing or perhaps even giving Olson time to comprehend that they had just reached diametrically opposite conclusions using different subcategories as touchstones of coverage, Raecker had Olson confirm that under the latter’s interpretation smoking was not prohibited on golf courses. The words in which the audibly harried Olson chose to couch his confirmation let loose a veritable reign of confusion: “My interpretation is that it is not covered by grounds, you know, public assembly, grounds for public assembly.” Rather than commenting on the incoherence of their exchange, Raecker (apparently without the slightest irony) expressed appreciation for his interpretation and suggested that as the bill moved to the Senate they might work on “actually” defining “public buildings” or “grounds of public buildings.” That any of their 98 colleagues, if they were actually listening to the colloquy, had been able to secure the slightest purchase on the meaning of this crucial term for the exceedingly controversial question of outdoor smoking bans seems implausible.

In the end, then, Raecker’s colloquy with floor manager Olson inadvertently did a disservice to the legislative history of “grounds of a public building” precisely because it misled the inattentive to mistake incoherence for conclusiveness; as a result, the Iowa Department of Public Health, the agency charged by the legislature with issuing the rules to administer the Smokefree Air Act, underinclusively defined the term and thus perpetuated the exposure of millions of nonsmokers to tobacco smoke in multitudes of outdoor settings.

The confusion only deepened a few minutes later when Raecker, after having delved into several unrelated exemptions, asked whether smoking was banned on a public walking path behind his house in Urbandale, which was a gathering point for people. Olson, more confidently this time, yet still without offering a

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616House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
617Raecker elicited from Olson that the rationale for the exemptions for hotels and semi-private rooms in long-terms care facilities was avoiding issues of banning smoking in what was effectively a private residence. He rejected Raecker’s supposition that the exemption for veterans organization was based on the military’s having pushed free cigarettes on soldiers, who defended the country; rather, it derived from its lining up closely with the exemption for private clubs as well as from some House members’ strong feelings. House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
definition of the key term other than that an “assembly” meant a large number of people, stated that the path would not be converted into a “grounds for public assembly” merely by virtue of being a place where people ran into and chatted with one another. But when Raecker instanced a neighborhood picnic at a public park (at which the city had already banned smoking), Olson did concede that smoking would be banned—if the park was a place of assembly, though he still failed to define such a place.\footnote{House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).}

That such a primitive social analyst as Republican Sandy Greiner, a very conservative farmer who mockingly denied that anyone was forced to work anywhere and projected her anxiety that as soon as cigarettes were banned, “[t]hey’re coming to get us” overweight people,\footnote{House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).} was nevertheless able to force the articulate Olson to turn virtually tongue-tied trying to justify the exemption for limousines under private hire\footnote{H.F. 2212, § 4(7) (Feb. 19, 2008).} underscored the senselessness of some exemptions that lacked even the political expedience or salience of that for casinos. After Olson had freely repeated that he had said that carcinogens could linger for up to two weeks, the only rationale he came up with for exposing passengers to secondhand (or thirdhand) smoke was that people were “obviously choosing” to use limousines. The irony was probably lost on Olson that he was echoing Greiner’s “It’s about choices” to explain why people were not forced, but chose, to work in smoky places. But before he could try to distinguish the two situations, Greiner asked why the bill did not at the very least require smoking and nonsmoking limousines as a parallel to hotel rooms. For the first and only time during the debate Olson conceded that if the point had been raised the day before (off the floor), he might have filed an amendment “to get that defined,” thus enabling Greiner to fire back as the last word that it was then hypocritical to prohibit farmers from smoking in their tractors.\footnote{House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).}!

Picking up where Raecker had left off, Republican Jodi Tymeson, a retired brigadier general and deputy commandant of the Iowa Army National Guard,\footnote{http://www.ngb.army.mil/ngbgomo/library/bio/1278.htm (visited Aug. 25, 2008).} undertook the second attempt to clarify the scope of the “grounds of any public buildings.” Olson was somewhat more forthcoming when she asked him whether state park campgrounds were covered by the ban than he had been with Raecker; in particular, he shared with the chamber the fact that the language in question had been added in committee by an amendment that was not his. Consequently, with less than full authorial competence he expressed his understanding that the

\begin{footnotes}
\item[618]House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
\item[619]House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
\item[621]House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
\end{footnotes}
“idea” behind the amendment was for the law to “get to” residences on public grounds such as the governor’s mansion and the president’s mansion at the University of Iowa. Haltingly, Olson then explained that “[w]hat we’re talking about here is...I don’t think that the language of this section changes anything in the definition of what outdoor spaces are covered, places of public assembly, and that kind of thing”—other than with regard to these special private residences on public grounds, which, unlike all other private residences, would not be exempt. On its face this interpretation was preposterous: had the Commerce Committee wanted to confine the scope of Representative Soderberg’s amendment to Terrace Hill in conformity with what everyone knew to be Republicans’ intent to embarrass the governor, Petersen and Olson could easily have reworded it. But, as Olson’s own scarcely veiled smirk revealed when he surprised Soderberg on February 5 by accepting the amendment, Democrats presumably rejoiced that it was a Republican who had expanded the scope of the outdoor ban. Whatever the majority party’s intent had been, the very wording of the amendment—which expressly made those private residences of state employees a subset of a vastly larger set of buildings—was indisputably irreconcilable with Olson’s effort to ignore the many thousands of public buildings in Iowa and their grounds and focus only on the very few private residences. Whether he actually believed what he was saying or was merely confused, he received a reprieve when General Tymeson, whether inadvertently or intentionally, returned to her question about the state park campgrounds, but this time linked coverage to “places of public assembly.” Olson immediately used the chance to escape the larger interpretive predicament into which he had maneuvered himself by trivializing the potential scope of coverage by insisting that “assembly to me means a large group of people, a large gathering of people.” When Tymeson tried to satisfy his condition by mentioning that her whole family had once been at a state park campground, Olson shut off the dialog by admitting ignorance of the size of her family but lifting the coverage threshold with the invention of a number out of the blue: “I mean [w]e’re talking hundreds of people here.” Asked a direct question by Tymeson, he finally stated that by his interpretation campgrounds were not covered. Audibly left almost wordless by Olson’s surprisingly unambiguous one word answer (“No”), the brigadier general could be heard receiving a prompt from a male voice that she should proceed to ask about state fairgrounds. Without even hurling back at Olson the fact that the state fair exceeded his numerical threshold by at least an order of magnitude, Tymeson kept urging the view that the entire fair grounds were a place of public assembly, but Olson refused to go that far or to offer any robust criteria for determining when a “place of public assembly” as a whole trumped the grounds of individual public
buildings.\footnote{House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).}

In his last speech, the convivial Representative May, who admitted that “this is a difficult vote for me,” focused on a point that no one else had raised: the allegedly skimpy scientific basis for concern about outdoor exposure to secondhand smoke. “The problem,” as May pithily put it, was “we went outside. If we’d a [sic] stayed inside with this legislation, we don’t have a problem. ... But the problem is, Representative Olson,...that you don’t have any evidence of the impact of outdoor smoking. There aren’t any creditable [sic] studies. They haven’t been done. There’s no research. If there is, folks, I spent a lot of time on the computer for nothing.” The one article that he found (by three researchers at Stanford University) concluded that outdoor exposure could be damaging, but limited the risk zone to a distance of six to eight feet, whereas H.F. 2212 created obligations with which it would be difficult for businesspeople such as May to comply. “Like I [sic],” he assured the House, they wanted to protect their employees, but “this legislation goes too far too fast—it’s way ahead of the research and our ability to decide what would be safe for the citizens of Iowa.”\footnote{Mark Shwartz, “Exposure to Secondhand Smoke in Outdoor Settings a Risk, Study Finds,” Stanford News Service, on http://news-service.stanford.edu/news/2007/may9/smoking-050907.html (visited Aug. 28, 2008).}

Whether May’s googling was totally worthless or not is less relevant than the fact that what he had found was merely a summary of the article,\footnote{Neil Klepeis, Wayne Ott, and Paul Switzer, “Real-Time Measurement of Outdoor Tobacco Smoke Particles,” \textit{Journal of the Air & Waste Management Association} 57:522-34 (May 2007).} which he did not read and misdescribed. The article, as its lead author, Neil Klepeis, explained immediately after its appearance, focused on single-cigarette sources, though even then: “In a few cases, we were able to detect pollution 10 or 20 feet away from a single cigarette but the levels were generally small. If wind or air drafts carry the plume directly from the cigarette to your nose, or you are traveling directly into the plume while running, then...it would be possible for you to experience one of the highly concentrated plumes that we routinely measured within a few feet of the smoker. I too have smelled bits of smoke from a distant single smoker (more than 20 feet away).” However, more relevant to the avoidance of smoke gauntlets, which had formed the basis of the bill’s 50- and then 10-foot no-smoking zone at entrances to covered public places, was the existence in “realistic situations” of “multiple smokers,”\footnote{Email from Neil Klepeis to Marc Linder (May 2, 2007).} which, as Klepeis
noted,

is a different thing. While we did not conduct controlled measurements for multiple smokers, it is reasonable to assume that the levels increase in proportion to the number of active smokers present. So even under mixed-wind conditions, a group of many smokers could generate high levels of pollution more than 20 feet away. We generally found that pollution levels decrease in proportion to the change in distance, and we measured specific average concentrations within a couple feet of a single smoker for 10-minute periods of active smoking (up to 500 micrograms per cubic meter). So it would be possible to estimate levels from a group of smokers by multiplying by the number of smokers and calculating the decrease in concentration for different distances. Roughly, if there were 10 smokers currently active, you could still experience very polluted air at a distance of 50 feet or more.

May’s claim that the article by Klepeis et al. was the first research on outdoor exposure was simply wrong. Over several years, field studies and controlled experiments had shown that “under some conditions, outdoor levels of tobacco smoke...can be as high as indoor levels of secondhand smoke....” For example,

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628Email from Neil Klepeis to Marc Linder (May 2, 2007).

629The article’s authors merely claimed that theirs was “the first peer-reviewed publication of systematic measurements of” outdoor tobacco smoke concentrations. Neil Klepeis, Wayne Ott, and Paul Switzer, “Real-Time Measurement of Outdoor Tobacco Smoke Particles,” Journal of the Air & Waste Management Association 57:522-34 at 522 (May 2007). Previous studies included one by the California Air Resources Board at an airport, junior college, government center, office complex, and amusement park, which found at sites with many smokers outdoor nicotine levels comparable to indoor concentrations. California Environmental Protection Agency, Air Resources Board, Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant Part A: Exposure Assessment, V-6 - V-17 (2005), on http://repositories.cdlib.org/context/tc/article/1194/type/pdf/viewcontent/ (visited Aug. 30, 2008). An experiment on a cruise ship at sea at 20 knots an hour revealed that outdoor tobacco smoke “in various smoking-permitted outdoor areas of the ship tripled the level of carcinogens to which nonsmokers were exposed relative to indoor and outdoor areas in which smoking did not occur, despite the strong breezes and unlimited dispersion volume. Moreover, outdoor smoking areas were contaminated with carcinogens almost to the same extent as a popular casino on board in which smoking was permitted.” James Repace, “Indoor and Outdoor Carcinogen Pollution on a Cruise Ship in the Presence and Absence of Tobacco Smoking” Presented at the 14th Annual Conference of the International Society of Exposure Analysis (Oct. 17-21, 2005) (summarized in James Repace, “Fact Sheet: Outdoor Air Pollution from Secondhand Smoke”, on http://www.repace.com (visited Aug. 30, 2008).

James Repace, a biophysicist, former senior scientist at the Environmental Protection Agency, and one of the world’s leading experts on secondhand smoke, conducted a study in 2005 at the campus of the University of Maryland at Baltimore in which he found that:

These experiments dispel the common misconception that smoking outdoors can be ignored because smoke plumes immediately dissipate into the environment. These controlled experiments with and without smokers show similar results: if a receptor such as a doorway, air intake, or an individual is surrounded by an area source—and this would include an entranceway with a group of smokers standing nearby—then regardless of which way the wind blows, the receptor is always downwind from the source. Cigarette smoke RSP [respirable particles] concentrations decline approximately inversely with distance downwind from the point source, as expected, whereas cigarette smoke PPAH [particulate polycyclic aromatic hydrocarbons] concentrations decline faster, at approximately inversely as the square of this distance.

Based on these measurements, which involve a single ring of cigarettes or smokers, the smoke levels do not approach background levels for fine particles or carcinogens until about 7 meters or 23 feet from the source, which is likely to be the smoke from no more than 1 or 2 smokers. Greater numbers of smokers in the area could lead to higher concentrations, because a crowd of smokers constitute an area source, whose plumes may overlap downwind, potentially causing smoke concentrations to increase locally before dissipating at greater distances. Secondhand smoke causes a number of acute symptoms (eye, nose, and throat irritation, headaches, dizziness, and nausea) and chronic diseases (lung and nasal sinus cancer and heart disease). Students or faculty passing through the cloud of smoke would encounter detectable levels at about 7 meters (23 feet) from a smoker, and irritating levels at 4 meters (13 feet).

Availing himself of the opportunity that Speaker Murphy granted him to speak for a second time, Raecker cast himself in opposition to Olson and Wise as preferring perfection over progress: he was one of those “purists”—but one who expressly denied occupying the “moral high ground”—who were needed from time to time to stand up and say “we can do better.” His animus was directed in particular against the exclusion of casinos, which would now become an even stronger magnet to people afflicted with the dual “addictive disorder” of gambling.

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631 James Repace, “Measurements of Outdoor Air Pollution from Secondhand Smoke on the UMBC Campus” at 9-10 (June 1, 2005), on http://www.repace.com/pdf/outdoorair.pdf (visited Aug. 30, 2008). In connection with passage by the New York City City Council of a law prohibiting smoking in 1,700 city parks and along 14 miles of city beaches, city health officials stated that “people seated within three feet of a smoker are exposed to roughly the same levels of secondhand smoke, regardless of whether they are indoors or outdoors.” Javier Hernandez, “Smoking Ban for Beaches and Parks Is Approved,” NYT, Feb. 2, 2011, on http://www.nytimes.com.
and smoking. That he was not contemptuous of the latter addiction he more than intimated in a cracking voice: “I’m a previous smoker. I know the pain and the challenge that it is for an individual to stop this habit.” But whether he would have voted against a bill that he knew would save lives if his vote had been decisive he did not reveal.632

After Olson (his tongue seemingly a respectful distance from his cheek) in his closing remarks had declared that “we had a great conversation this evening...discussing the intricacies of the bill,” especially the exemptions, and following four and three-quarter hours of debate,633 on final passage H.F. 2212 attracted 11 Republican and lost eight Democratic votes, producing a 56 to 44 outcome.634 Apart from the unique case of Ro Foege, a strong supporter of local control who registered a protest against the exemptions,635 there were no surprises among the Democratic cross-overs.636 One reason that the House passed the statewide smoking ban was that, as an astonishing sign of the times reflective of the nationwide sea change that had made it possible for H.F. 2212 to get as far as it had, only two of the 53 members of the Democratic caucus, according to the bill’s author, smoked.637 Nevertheless, the lingering hold that the tobacco industry’s meritless chief claim maintained even on some of the bill’s strong backers was embarrassingly on display in the admission by Coralville Democrat David Jacoby that “it wasn’t an easy vote” inasmuch as he saw “some validity to the arguments of those who contend that whether smoking is allowed in a business should be left to the establishment’s ownership and management...”638
The Smokefree Air Act of 2008

The larger number of Republican supporters was accounted for by four representatives (Gipp, Hoffman, Rayhons, and Van Fossen), who had not previously voted against the numerous Republican exemptions.639

The strong reservations harbored by some of the 11 Republicans who voted for the bill were revealed a few days later by Mike May at a bipartisan multi-

639House Journal 2008, at 335 (Feb. 19). Six House Republicans (Anderson, Baudler, Clute, Jacobs, May, and Tomenga) voted for H.F. 2212 on final passage on Feb. 19, Mar. 12, and Apr. 8. Henry Rayhons, 99 percent of whose constituents wanted the best bill possible, voted Aye on Feb. 19 and Apr. 8, but voted Nay on Mar. 12 because the Senate had struck the casino exemption. He reported that once the law went into effect, it worked out excellently in his district. Telephone interview with Henry Rayhons, Garner (Aug. 23, 2008). Linda Miller, Chuck Gipp, and Jamie Van Fossen voted Aye on Feb. 19 and Mar. 12, but opposed the bill on Apr. 8. Miller a registered nurse who nevertheless wanted to permit smoking in 21-and-over bars if casinos were exempt, changed her vote after the conference committee merely retained the casino exemption. After the law went into effect she did not receive complaints from bar owners in Bettendorf, although two of her constituents were bar owners involved in the lawsuit challenging the new statute. Telephone interview with Linda Miller, Bettendorf (Aug. 24, 2008). Gipp, who purported to have personally welcomed a smoking ban in bars and restaurants enthusiastically, changed his vote once it became clear that the “unfair” casino exemption would not be struck. Telephone interview with Chuck Gipp, Decorah (Aug. 24, 2008). After voting Aye on Feb. 19, Clarence Hoffman, who stated on the floor in the last speech before Olson’s closing remarks that the overwhelming majority of his constituents supported the bill, voted Nay on Mar. 12 and Apr. 8. Hoffman had voted Aye originally because the Democratic leadership had told him that the bill would return to the House and that he could have input toward improving the bill, but once it became clear to him that his preference for permitting smoking in bars 75 percent or more of whose sales were from alcohol would not be adopted, he changed his vote. After the law had gone into effect, some bar owners in his district suffered revenue losses, while others’ business picked up. Telephone interview with Clarence Hoffman, Denison (Aug. 24, 2008).
The Smokefree Air Act of 2008

legislator constituent meeting. Reacting to a farmer’s comment that he regarded the bill as “ranking among the top ‘stupid legislation’” he had witnessed during his 73 years, May observed that he had voted for it, but it “just got off track.” Adopting a radically stripped-down ban position that his leader, Rants, had earlier imputed to Iowans and more than 90 percent of the House, May explained that: “I would like to see the ability to go into a restaurant, sit down and not have to worry about smoke as a family. [B]ut I think this bill extends itself way too far.” Expressing the hope that the Senate could “bring a little common sense back to it,” May sought to assuage his party’s putative rugged-individualist base without alienating the majority of voters: “But I supported the initiative to get it over with—because that’s what I think our constituents wanted us to do. But it does border on stupid.”

Only now, after House passage, did Principal Financial Group begin to believe that enactment was a possibility in 2008. Two days later, Principal’s chairman and CEO, J. Barry Griswell, Iowa’s highest paid corporate executive, published an op-ed in the Register (which 10 days later called him “the closest thing the metro area has to a celebrity chief executive” and opined that he “may well be the most powerful person in the community”) applauding the House and urging the Senate to follow suit on the grounds that “a smoking ban will enhance the state’s image as a progressive place to do business, live and work” in addition to reducing health care costs and making Iowa healthier. Specifically, Griswell—whose piece was co-signed by the presidents of AFSCME Iowa Council 61, the Iowa Medical Society, and Allied Insurance—argued that smoke-free workplaces and public areas would be “attractive to new companies, as well as established companies looking to relocate or expand.” In a follow-up the next day to an email list of “government affairs and business community thought leaders,” Merle Pederson, PFG vice president for government affairs, offered to make available Principal’s electronic internet system to “anyone...interested in


641 Email from Merle Pederson to Marc Linder (Aug. 11, 2008).

642 S. Dinnen, “Griswell’s $11.8 Million Tops,” DMR, June 8, 2008 (1D) (NewsBank).


The Smokefree Air Act of 2008

doing employees grassroots communications to their Senate members....” For the “executive level grasstops messages to their Senator members” presumably more intimate forms of communication were planned along with “executive management lobby visits....”

The Senate Passes H.F. 2212 Covering Casinos

“I want to put the casino impact into some context,” added [Republican] Sen. [David] Johnson. “You’re talking between 9,000 and 10,000 employees at the 17 state-licensed casinos and you’re talking between 22 and 25 million visitors to those 17 casinos every year. ... If you take the 17 together, they have to be the largest private-sector employer in the state. They also happen to be our most consistent source of revenue in the state treasury. It goes up a little bit every year,”

Sometime[s] things don’t seem like they actually are here.

There are very very few people that smoke anymore. I don’t even know of a smoker in this entire Senate.

Despite House passage—which surprised anti-smoking Senate Democrats—when asked whether it was a foregone conclusion that H.F. 2212 would also pass the Senate, Assistant Majority Leader Joe Bolkcom replied two days later: “No, we have work to do in the senate to pass the house bill.” That he literally meant the bill as it passed the House became clear later that same day when the center of power in the Senate, Majority Leader Gronstal, predicted that the “‘odds of something passing over here approach 100 percent.’” Without


647Email from Sen. Joe Bolkcom to Marc Linder (Feb. 26, 2008).

648Senate Debate on H.F. 2212 (Feb. 27, 2008) (remarks by Democratic Senator Dennis Black) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin, communications director, Iowa Senate Democratic Research Staff).

649Telephone interview with Jack Hatch, Des Moines (May 19, 2008).

650Email from Marc Linder to Joe Bolkcom (Feb. 19, 2008) and Joe Bolkcom to Marc Linder (Feb. 21, 2008).
promising that “the House’s version would pass the Senate, he said some form of tobacco control will.” The press interpreted Gronstal’s caution to mean not that opponents had questioned the health consequences of exposure to secondhand smoke, but that they regarded some definitions as unclear or inconsistent with other provisions in the bill. One such question they raised was whether the prohibition on smoking in “‘entertainment venues where members of the general public assemble to witness entertainment events’” applied to outdoor paths inside the Iowa State Fair. Others wondered whether it covered state campgrounds, adding that it would be “‘silly’” to be permitted to build a fire but not light a cigarette next to a campfire. While acknowledging that some clarifications might be needed, Tyler Olson urged that such details not be permitted to derail achievement of the historically important ultimate goal. Conveniently, IDPH propagandized on behalf of the measure’s reasonableness by emphasizing that enforcement would focus on education rather than citations.651

On February 20, H.F. 2212 was referred to the Senate State Government Committee,652 whose chairman, Michael Connolly, a long-time anti-smoking militant, the next day assigned it to a subcommittee composed of himself, Staci Appel (chair), and Republican Mark Zieman.653 Appel, who would become the bill’s floor manager, was only in her second year in the Senate; a self-described “full-time mother” of five children and community volunteer (and Methodist Sunday School teacher in Indianola and wife of an Iowa Supreme Court justice), she had previously been a financial consultant at Merrill Lynch and USB Paine Webber.654 Unsurprisingly, the same day Connolly and Appel signed the subcommittee report recommending passage, while Zieman, complaining that the rush was preventing the public from examining it, refused.655 Connolly (mistakenly) expected the House bill to emerge from his committee without change, but he was uncertain as to what floor debate would bring, though he did express the opinion that the Senate would “pursue a statewide ban with exemptions” instead of the local control approach that it had passed in 2007.656

652 Senate Journal 2008, at 1:305 (Feb. 20).
653 Senate Journal 2008, at 1:337 (Feb. 21).
656 Ron Boshart, “Senate Ban Could Be Debated in Iowa Senate on Wednesday,”
The Smokefree Air Act of 2008

Gronstal himself expressed strong support for a ban at a legislative leadership press conference on February 21. Personalizing public policy, he emphasized that the bill was about worker protection by pointing out that pregnant waitresses at one of his favorite “hang-outs” in Des Moines “don’t like working in a place where they’re exposed to lots of smoke.” To be sure, the Senate majority leader’s insistence that the ban was “not about dictating personal choices” hardly captured the full complexity of the conflict: as long as the state was unwilling to prohibit smoking and tobacco altogether, and continued to regard self- and other-destructive nicotine addiction as one “personal choice” among many others that was legally permissible to exercise in some places but not in others, then it was disingenuous to deny that the legislature’s decision to have public health considerations trump the “personal choice” to smoke in restaurants did not constitute a governmental dictation. That such public smoking may have been more pervasive and inveterate than drinking alcohol while driving and may also have been regarded by more people as less irrationally dangerous (to others) presumably reinforced the publicly proclaimed perception by smokers (and their profit-seeking abettors) that government dictation or suppression of “personal choice” was indeed taking place and should have made it even more incumbent on the legislature to admit that the ban was about both protecting nonsmokers’ health and (partially) suppressing an activity that, as the statistics adduced during the floor debates revealed, had been found to be one-eighth as lethal homicidally as suicidally.658

In fact, on February 25, the State Government Committee approved the bill, recommending that it do pass with an amendment, on an almost perfect party-line vote, all Republicans voting “present.”659 Although they purported to have passed


658 With the increased estimate of deaths attributed to secondhand smoke exposure to about 50,000 in the United States the ratio rose from about one-twelfth to one-eighth. Between 2000 and 2004 total annual average smoking-attributable mortality was 443,595, of whom 49,400 died as a result of secondhand smoke exposure. B. Adhikari et al., “Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000-2004,” Morbidity and Mortality Weekly Review 57(45):1226-28 (Nov. 14, 2008), on http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm.

659 The amendment itself was approved on a perfect party-line vote (the nine Democrats voting yes and the six Republicans voting present), but on approval of the bill with the amendment one Democrat (Dennis Black, who ultimately voted against the bill on final floor passage) joined the Republicans in voting present. Committee Minutes for
on the vote because they had not yet seen the new amendment, “[t]he real reason,” according to the American Cancer Society’s lobbyist, was they were “not sure how to vote now that the new amendment took out the casino exemption which is what many were saying is the reason they would not support the bill.”

In other words, when Democrats called their bluff, Republicans were trapped by their own mendacious rhetoric into voicelessness lest they offend their pro-tobacco base by voting Yes or unmask themselves as liars by voting No.

The amendment, offered by Appel, both watered down and strengthened the bill. The most significant weakening changes struck the 10-foot no-smoking zone at the entrance to any public place in which smoking was prohibited as well as the 10-foot no-smoking area around “outdoor seating or serving areas of restaurants,” and the 10-foot perimeter beyond school grounds, and exempted “farm tractors, farm trucks, and implements of husbandry when being used for their intended purposes,” thus permitting farmers and their employees to smoke in those vehicles. Coverage was also restricted by striking the smoking ban in “places of public assembly.” At the same time, the amendment expanded coverage by undoing the House’s controversial comprehensive exemption for casinos (“Any property, including hotel and motel rooms, owned or operated by an entity licensed under chapter 99D or 99F”) and covering “[g]ambling structures, excursion gambling boats, and racetrack enclosures.” In words that bar owners would hurl back at her, Appel justified casino coverage on the grounds that it was as important to protect those working there as anywhere else: “‘I think it was only fair—if you can’t smoke at a tavern, why should you be able to smoke at a bar at the casinos?’” Deprived of their pet pseudo-peeve, Republicans invented others. Zieman, for example, hypothesized that he could cause an owner to be ticketed by simply walking into his business with a cigarette in hand. How he could

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660 Email from Stacy Frelund to Marc Linder (Feb. 26, 2008).
661 HF 2212.513 82; S-5013 (2008). The amendment’s definition of “farmer” included “an employee of such person while the employee is actively engaged in farming.” In addition, Appel’s amendment replaced the ban on smoking in “[o]utdoor sports arenas, stadiums, amphitheaters and other entertainment venues where members of the general public meet to witness entertainment events, except in designated smoking areas which may be established in perimeter areas at least ten feet from any seating areas or concession stands with “[t]he seating areas” of those outdoor locations without the designated smoking areas. Finally, in the enforcement and penalty sections the amendment inserted coverage of those with custody or control of outdoor areas where smoking was prohibited.
662 Whitney Woodward, “Will Casinos Be Included in Iowa’s proposed Smoking
The Smokefree Air Act of 2008

possibly produce this outcome when the owner’s only relevant obligation was simply to inform him that he was violating the law. 663 Zieman failed to explain. Instead, he rushed on to the punch line: “‘Why do we as a body think it’s a business’s responsibility to regulate my bad habits?’” 664 Similarly, his fellow Republican, David Hartsuch—an emergency room physician whose nagging “basic libertarian instincts” undermined his firsthand knowledge of smoking’s lethality to the extent that he still wondered whether people should not have “a right to choose their own poison”—sought to convince his constituents that the bill’s enforcement “strategy is to turn all of these business owners into paranoid snitches who rat out those who are smoking on their premises.” 665

Back in the House, despite the fact that a week earlier “‘the political reality’” had been that “‘the casino exemption had to be in there,’” floor manager Olson expressed optimism that the Senate committee’s action striking the exemption would increase rather than reduce support for the bill: “‘A lot of representatives stood up on the floor last week and said, but for the casino exemption, they would vote for the bill. So I plan on going back through and listening to the tape and approaching those members and hopefully securing their vote.’” 666 In the event, if Olson was not speaking tongue in cheek, his hopes would soon be dashed: as anti-tobacco advocate Republican Walt Tomenga later observed of his own party-mates, not a single one of them had been speaking truthfully. 667

Despite press reporting that H.F. 2212 was “awakening a strong pro-smokers’ rights contingent,” 668 two days before the bill reached the Senate floor the Register published the results of its Iowa Poll indicating that Iowans supporting a statewide smoking ban in almost all public places outnumbered those opposed to any kind of ban. Specifically, whereas 43 percent favored a statewide ban,
The Smokefree Air Act of 2008

almost one third preferred local government control, and fewer than one quarter opposed all bans.669

The day before the Senate debated H.F. 2212 Governor Dave Heineman signed into law the Nebraska Clean Indoor Air Act, which contained far fewer (indoor) exemptions than the Iowa bill even as amended by the Senate State Government Committee.670 With Iowa flanked on its western (Nebraska and South Dakota) and northern (Minnesota), and much of its eastern (Illinois) border by states with anti-public smoking laws, it was fast becoming an anomaly even in the Midwest.

On the eve of full Senate consideration of the bill, part of the press may have been reporting that because most Democrats supported it and their party held 30 of 50 seats, there was no suspense about the outcome,671 the chamber’s leadership did not share that view publicly or privately. For example, Senate President Jack Kibbie told constituents in Spencer on February 23 that his caucus was evenly split on the issue: “‘One-third doesn’t [sic] want anything done; one-third want to do the local option; and the other third want a complete ban with no exemptions.’” His personal (and, as it turned out, prescient) opinion was that the casino exemption would probably remain, but would apply only to the casino proper and not to the hotels, restaurants, and lobby, which would be smoke-free. The bill would undergo change, but Kibbie did believe that “‘we will pass a smoking ban bill before we go home this year....’”672 And as late as the afternoon of February 26, the day before floor debate, Assistant Majority Leader Joe Bolkcom observed unambiguously: “We do not have the votes at this time to pass the bill that came out of committee. We need more Dems on-board. We continue to work on this.”673


673 Email from Joe Bolkcom to Marc Linder (Feb. 26, 2008).
The Smokefree Air Act of 2008

The day before the Senate debate witnessed “a frenzy of lobbying...at the Statehouse.” The quality of the arguments deployed by the “smoking rights” lobby was indicated by a Davenport bar owner who saw no reason for a ban because he doubted whether secondhand smoke was a “serious factor in causing cancer,” thus lending more than a patina of accuracy to the Lung Association lobbyist’s plaint about the unbelievable amount of “disinformation” being disseminated at the Capitol. Nevertheless, even Majority Leader Gronstal himself was not sure whether a “consensus” had coalesced yet; if he determined that one was still lacking, he would “probably wait a while.” Connolly, the State Government Committee chair, revealed that even with his party’s 30-20 majority, it was “six to eight Democrats short of passing the bill without help from Republicans,” of whom the requisite number might or might not vote for H.F. 2212.674 According to one Republican who eventually voted for H.F. 2212, since it would have been political suicide for some rural Democrats to vote for the bill, the Democratic leadership—which nevertheless froze Republicans out of the majority party’s strategizing on the bill—decided that some Republicans would have to vote for it.675 Three Democrats who would probably defect from the leadership’s position (and all of whom in fact did): Tom Hancock, Dennis Black, and Keith Kreiman. Hancock, who hated being around cigarettes, would have found it personally easy to vote for the bill, but the “loud outcry from his constituents that a statewide ban would be too much government intervention” had prompted him to be leaning against it. One of the potential Republican crossovers, Dave Mulder, said he would vote for a statewide ban with no exceptions, but not if it exempted veterans organizations (he wound up voting for it despite that exemption); another, Thurman Gaskill, had been close to voting Yes, but in the meantime was undecided and leaning toward local control. Minority Leader Wieck was definitely in no danger of supporting the bill, which he called an “‘intrusion on my personal rights,’” but since some members of his caucus did not share his viewpoint, he was monitoring their position on several other versions of a ban, including one that would exempt age-restricted bars and casinos, which Gronstal immediately dismissed as off the table, though his caucus might consider an exemption for the gambling floors of casinos.676

At 6:39 a.m. on February 27, Bolkcom observed that H.F. 2212 “will be debated if have the votes to pass it. We currently do not have the votes in the

675Telephone interview with Pat Ward, West Des Moines (Aug. 18, 2008).
The Smokefree Air Act of 2008

senate. We will know more later this morning on whether we will debate or not today.\textsuperscript{677} Shortly before noon the Cancer Society’s lobbyist was not counting on Republicans to pass the bill for the Democrats: “I think there are some R’s that do just want to kill the bill but I do think some do not like the casino exemption and will vote in favor of the bill. If we get the 26 Democrats votes to pass the bill, possibly 6 or more Republicans will vote for it. They are hearing from their constituents who want it to pass. I think we are getting really close and the vote will probably happen today.”\textsuperscript{678} The only point on which the protagonists agreed was that, just hours before debate, the voting dynamics were “too fluid” to predict whether a “bipartisan” strategy would be successful.\textsuperscript{679}

Even moments after the Senate had taken up H.F. 2212, Bolkcom, asked whether there was a majority for the bill, emailed in real time from the chamber that “we will find out. I think we have 25 votes,”\textsuperscript{680} adding four minutes later: “I think that we will get this done.”\textsuperscript{681} He then underscored that it was “very unusual” for leadership to have gone ahead with debate not knowing whether it had a majority.\textsuperscript{682}

The Senate floor debate, which began a little after five o’clock in the evening and, apart from two interruptions for Republican caucuses, lasted about an hour and a quarter, was both much briefer and less contentious than the House debate. In particular, oppositional senators, by and large, did not engage the floor manager in lengthy colloquies that (might have) served in the House to flesh out ambiguities in the bill’s definitions and interconnections, in part because Senator Appel manifestly lacked Representative Olson’s willingness (and/or ability) to immerse herself in the details. Indeed, whether from nervousness resulting from never having floor managed such an important bill before, lack of self-confidence, or for some other reason, even in her opening remarks Appel read her brief speech haltingly and stressed words inappropriately. The most important point that she

\textsuperscript{677}Email from Joe Bolkcom to Marc Linder (Feb. 27, 2008).

\textsuperscript{678}Email from Stacy Frelund, American Cancer Society, director of Field Government Relations, to Marc Linder (Feb. 27, 2008).


\textsuperscript{680}Email from Joe Bolkcom to Marc Linder (Feb. 27, 2008, 5:13 p.m.).

\textsuperscript{681}Email from Joe Bolkcom to Marc Linder (Feb. 27, 2008, 5:17 p.m.).

\textsuperscript{682}Email from Joe Bolkcom to Marc Linder (Feb. 27, 2008, 5:30 p.m.). While agreeing that it would have been very unusual and stressing that he had not been privy to Gronstal’s inner thoughts, the minority leader later expressed great doubt that the majority leader would have risked the show of weakness associated with losing a vote. Telephone interview with Ron Wieck, Sioux City (Aug. 10, 2008).
The Smokefree Air Act of 2008

made referred to the more than 100,000 workers in Iowa employed in the food service industry, who had a “50 percent greater chance of dying from lung cancer,” who, others suggested, could “simply seek other jobs if they don’t wish to inhale secondhand smoke while they work.” However, as Appel noted, no one should have to risk unemployment just because he or she feared the 63 carcinogens in such smoke. Appel’s glibbest and most misleading comment, which fell comfortably within the range of disingenuous denials of which anti-smoking activists availed themselves, asserted that H.F. 2212 was “not a divisive tool for discriminating against those who have chosen to smoke, but an avenue to a healthier Iowa.” It is unknown whether Appel had ever tried out her non-divisiveness lecture on those who had “chosen to smoke” (at, say, age 13) and in the intervening decades had become addicts, ostracized and banished as pitifully irrational humans to stand outside in sub-zero temperatures so that the wafting garbage products of their suicidal and homicidal addiction would not harm the 80 percent of Iowans who chose not to smoke. Presumably, the bill’s supporters found it more congenial in terms of coalition-building to deny that the law was in fact part of a larger strategy designed to discriminate against smokers in order to encourage them to quit.

Appel then explained that her amendment (S-5035), which incorporated the State Government Committee amendment, struck the House bill’s glaring exemption for casinos because “[i]n one eight-hour shift the typical casino employee will inhale the equivalent of 16 cigarettes in secondhand smoke; that makes a pack a day smoker outta everyone working in casinos even if they aren’t smokers themselves.” Appel did not explain what public health benefits would

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683 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin, communications director, Iowa Senate Democratic Research Staff).

684 Contrast the refreshing frankness of a Johnson County supervisor, who stated that “part of the rationale” of a Public Health Department proposal to ban all smoking on any county property was “to make it so miserable for people that they eventually quit.” Minutes of the Informal Meeting of the Johnson County Board of Supervisors at 2 (Apr. 25, 2006), on http://www.johnson-county.com/auditor/min/060425eo.htm (visited Oct. 23, 2008).

685 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin); Senate Journal 2008, at 1:410 (Feb. 27). The scientific basis of Appel’s unsourced claim quantifying secondhand smoke exposure in terms of cigarette equivalents (which Senator McCoy repeated later for bars) is unclear. At the very end of the floor debate, Republican David Hartsuch, a physician, asked Appel for her source, but received only an unembarrassed “I’d have to get back to you on that information.” Senate Debate on H.F.
result from the amendment’s elimination of the 10-foot no-smoking zones around covered public places or its conferral of an exemption on farm vehicles being used for their intended purposes. Oddly, however, she failed to mention that her amendment went beyond the committee amendment by also adding exemptions for posts of veterans organizations and the Iowa Veterans Home. Then in a simultaneously filed amendment (S-5036) to her own amendment, Appel corrected a “drafting error” to “make sure you can smoke outside” at fairs. The second amendment also struck the exemptions for the just introduced veterans home and posts. Again, she failed to mention that this second

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686Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin). She never did. Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008). The first surgeon general’s report on passive smoking expressed considerable skepticism about the concept and its measurement. U.S. Department of Health and Human Services, *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General* 198-200 (1986). The second surgeon general’s report on the subject two decades later did not even attempt to calculate cigarette equivalents. U.S. Department of Health and Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General* (2006). Dr. Jonathan Samet, a consulting scientific editor of the first and the senior scientific editor of the second report, when asked whether there were any robust studies showing results along the lines asserted by Appel and McCoy, observed that “there are many reasons to avoid the cigarette equivalent idea. We set it aside in 1986.... Also, dose-response relationships may not be linear as in the example of CVD [cardiovascular disease]. The analogy may be most applicable for cancer but still not a good idea.” Email from Jonathan Samet to Marc Linder (Aug. 7, 2008). A physician-tobacco control advocate who devotes considerable effort to correcting what he considers the false claims of his erstwhile colleagues, has argued that the cigarette-equivalent approach can be useful and important, but only if the specific smoke constituent is specified because the equivalence varies depending on the component measured. Michael Siegel, “On the Dangers of Cigarette Equivalents: More Misleading Claims by Anti-Smoking Groups” (Dec. 3, 2007), on http://tobaccoanalysis.blogspot.com/2007/12/on-dangers-of-cigarette-equivalents.html (visited Aug. 8, 2008).


688Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin); Senate Journal 2008, at 1:410 (Feb. 27). It is unclear what Appel meant by a “drafting error”; the exclusion of the Iowa state fairgrounds and of county and district fairgrounds from the ban on smoking on the grounds of public buildings appears to have been new. S-5036, §§ 3(2)(e) (1) (filed Feb. 27, 2008), on http://coolice.legis.state.ia.us/Cool-ICE/default.
amendment also added partial exemptions for the grounds of state prisons and of Iowa national guard facilities.\footnote{689}{S-5036, §§ 3(2)(e) (2) & (3) (filed Feb. 27, 2008), on http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&hbill=S5036&ga=82. These two provisions, which were exceptions to the ban on smoking on the grounds of public buildings, specified “that smoking on the grounds shall be limited to designated smoking areas.”}

Procedurally, before Appel’s amendment(s) could be considered, the Senate had to take up Senator Dotzler’s amendment to S-5035, to which the chamber turned following a brief Republican caucus, which Bolkcom described as devoted to “trying to figure out how to trip us up.”\footnote{690}{Email from Joe Bolkcom to Marc Linder (Feb. 27, 2008, at 5:31 p.m.).} S-5038 proposed adding a new exemption, which would have applied to all establishments that restricted access to persons 21 and over, provided that they posted signs at all entrances declaring both the age restriction and the absence of a smoking restriction.\footnote{691}{http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&hbill=S5038&ga=82} Discussion of this bill-killer, which Gronstal had already rejected, consumed about half of the entire debate time. As primitive as Dotzler’s arguments were—and, given his antediluvian goals, mindless of the public health consequences, even nimbler minds would have been hard pressed to come up with more sophisticated ones—he did contest Appel’s claim that the bill did not discriminate against smokers, albeit superficially and without recognizing that the bill’s supporters never acknowledged, let alone, engaged his position, in large part for the same reason that Appel had programmatically denied the existence of such discrimination—namely, that they possessed such overwhelmingly powerful public health arguments that it was simpler just to ignore the discrimination claim than to antagonize smokers further by adding verbal insult to physical-psychological-cultural injury and admitting the obvious fact.\footnote{692}{Asked point-blank why Appel would not admit that the bill discriminated against smokers, Dotzler suggested as a possible reason that she had taken his giving her a hard
contending that his 21-and-over amendment would not apply to any covered public place except bars—in fact, as Senator Black later had to explain to Dotzler (who spent the Vietnam war in U.S. Army military intelligence with a “top secret cryptographic security clearance”), it would apply to any place with a liquor license including casinos and golf clubhouses—Dotzler grounded his proposal in the right that smokers ought to have to go to a place where they could socialize and not be treated like third-class citizens. To generate sympathy for these outcasts he instanced a state employee who had been standing outside the statehouse in a wind-exposed area in 10-degree weather “trying to have a cigarette to take care of probably a very severe medical addiction” to nicotine, which was even more addictive than cocaine. In viewing this heart-rending scene of slow-motion suicide, Dotzler was unable to shut out the thought of “how we treated her like a secondhand [sic] citizen because she had a medical condition and she couldn’t kick it.” Dotzler may never have explained how his strict apartheid regime in bars for 21-and-over nicotine addicts would come to the rescue of the state employee struggling to smoke in the cold and wind, but he did allow as no nonsmoker would ever have to be exposed to smoke in these bars since she could just read the “smoking” sign on the door and walk away. And, more importantly, given the workplace orientation of the whole bill, so could all employees because “this is America and you can choose where you want to work.” In addition to being able to “go somewheres [sic] else,” workers in Iowa were advantaged by a labor shortage in the state; and even if they did ever run into unemployment, “we got programs where they can get help and be upwardly mobile.” Dotzler even conducted a secondhand survey in his district of bar owners, who claimed that almost all of their bartenders smoked and were “alright with where they were at.” Remarkably, he passed over in silence the nonsmoking bartenders and servers, though he insisted that “the individuals that are in there—that’s their choice, they want to do it.” Here his agenda may have become somewhat more transparent as he touched upon his mother’s smoking time personally. He may have been confusing Appel with Gronstal when he added that she was personally involved in the issue because her parents had been heavy smokers. Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008).

693Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin). Bizarrely, after having made it clear to Dotzler and the chamber that the exemption’s reach was much more capacious than Dotzler had let on, Black turned around and declared his support for the amendment as addressing all his concerns about the bill.


695Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).
The Smokefree Air Act of 2008

bar, managed by his sister, in Waterloo, where “our employees are happy with it.” His mother, however, was “very concerned about [sic] the business she worked her whole life to put together will disappear and I’m afraid that that’s gonna happen.” Finally, Dotzler reached the high point of his ten-minute peroration with his insistence that the debate was “about fairness. It’s about treating about one-fifth of Iowans with respect” — or as Dotzler later phrased it even more audaciously: “You have to respect individuals who are addicted to a legal product,” albeit a “dangerous, debilitating drug” that “society has got to get rid of.”

Presumably for similar reasons of expedience, Dotzler no more explicated the basis or nature of the “respect” that should have prompted the state to facilitate the perpetuation of smokers’ self-destructive addiction, thoughtlessly acquired when they were children, regardless of the lethal collateral impact on nonsmokers, than anti-smoking militants were willing to discuss their lack of “respect,” which underlay their strategy of discrimination, the existence of which they would not even admit.

Anti-smoking Democrats had a field day attacking Dotzler’s proposal, which Matt McCoy described as difficult for any of them to “stomach.” Senators McCoy, Appel, and Bolkcom pointed out that workers did not all have the option of quitting jobs in smoky workplaces, that regulation of workplace safety did not otherwise hinge on workers’ options and was not otherwise left up to employers’ discretion, and that secondhand smoke exposure was unsafe for adults, but none of them addressed Dotzler’s claim about discrimination, let alone admitted its existence or tried to justify it. In contrast, however, Senator Jack Hatch, without explaining how exactly his argument undergirded his opposition to the amendment, openly called for an even more blatant and powerful form of anti-smoker discrimination: pointing out that 10 percent of all medical insurance claims in the United States were attributable to smoking, he insisted that the


697 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).

698 Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008).

699 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin). Ironically, the lawyer for the bar owners who later challenged the SAA’s constitutionality used the same argument: “I think it’s indisputable that some businesses have gone out of business and jobs have been lost due to this legislation. Unfortunately, these are jobs of people who probably don’t have a lot of options.” Email from George Eichhorn to Marc Linder (July 14, 2009).
The Smokefree Air Act of 2008

“right for people to smoke a deadly cigarette doesn’t give them the right” to make nonsmokers pay for treating the health consequences because the burden of such costs meant that society was unable to pay for the health care of nonsmokers. Engaging in the brutal bluntness for which his Democratic colleagues had no electoral stomach, Hatch declared that the current debate “would be a good beginning for us to decide that no longer should we be treating and paying for someone’s bad behavior that we know is a deadly disease.” In the immediate wake of this unvarnished counterblast Minority Leader Wieck announced that Republicans would caucus, as they did for three quarters of an hour.700

While the Senate was standing at ease, Assistant Majority Leader Bolkcom conveyed to a constituent his sense that three or four Democrats would vote for Dotzler’s amendment; if it passed, leadership would stop the proceedings, caucus and try to change votes. His estimate, just a few minutes before the roll call, that 25 Democrats would vote for the bill along with two Republicans who would buck their leadership revealed that counting, even within a leader’s own caucus, was not yet a science. The uncertainty as to the other party was more easily understood, since Bolkcom was aware that perhaps six or eight Republicans would also vote Nay if they knew that Democrats controlled a majority, but they would not want to buck leadership. As for the grounds for Republicans’ floor behavior, Bolkcom noted that in part they were just trying to “mess with” the majority party because, as a minority, they had nothing else going for them, while some members disliked government intervention, were being lobbied by bar owners, or wanted money from tobacco companies or casinos.701

When the proceedings resumed, Dotzler, during his closing remarks, apparently lost control of the self-discipline that had enabled him to suppress the incoherence underlying his position. To the tough questions posed by Democrats about the reality of the labor market that prevented many thousands of workers from escaping from smoky workplaces all that Dotzler could counterpose was the irrelevant question as to what would become of the rights of the many smoking bartenders.702 His profound inability to understand that the monumental public health issues at stake made a mockery of any effort to construct mirror-image demands for constitutionally protected equal “rights” to pursue “happiness”703 as

700Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).
701Telephone call from Joe Bolkcom, Des Moines to Marc Linder (Feb. 27, 2008 at 6:05 to 6:25 p.m.).
702Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).
703Iowa Constitution, Art I sect. 1.
The Smokefree Air Act of 2008

between nicotine-addicted smokers and clean air-seeking nonsmokers was spectacularly on display in his assertion: “It’s not fair to me as a person with asthma that if my friends smoke cigarettes and they want to go into this bar, I can’t go in there. Well, how’s that different in reverse?” Finally, he trivialized tobacco-related morbidity and mortality by charging that the Smokefree Air Act was “ridiculous” “in the same way” as a proposal to require NASCAR-like full harnesses, helmets, and fire suits for all vehicles in order to save lives on Iowa highways.704

That Dotzler’s bill-killing amendment, which would have radically undermined a core component of H.F. 2212 and was antithetical to the bill’s underlying scientific and public health consensus was defeated by the narrowest of margins (24 to 26) suggested just how fragile the majority was, even in the chamber reputed to be more sympathetic to a statewide ban, for joining what had become a nationwide trend toward ridding the United States of the leading cause of preventable premature death. (Indeed, Dotzler later charged that Majority Leader Gronstal just an hour before the vote had thought that the vote would be 25 to 25, but that leadership had bought off or persuaded two senators to switch their votes by promising to run their bills.)705 Especially troubling for the bill’s prospects was that seven of 30 Democrats broke ranks, of whom five represented the larger cities of Cedar Rapids (Horn), Davenport (Seng), Dubuque (Hancock), Sioux City (Warnstadt), and Waterloo (Dotzler). The amendment lost only because three of 20 Republicans, two of whom (Lundby and Mulder) were retiring after the 2008 session, had been willing to cross over.706

Although Lundby—a former smoker who in 1990 had played an important role in amending the weak clean indoor air law to preempt local governmental
The Smokefree Air Act of 2008

power to pass stricter ordinances but in 2005 was diagnosed with cervical cancer, which would soon recur and prompt a prognosis of death within one year—supported H.F. 2212, she nevertheless offered a bizarre amendment on behalf of a single (named) constituent who employed 15 in an engineering business and wanted an exemption for two separately ventilated smoking rooms through which no employee had to pass. Appel’s opposition on the grounds that ventilation did not eliminate toxic and carcinogenic substances from the air, thus rendering such an exemption unacceptable, swiftly led to the amendment’s defeat on a voice vote.

Amendments to the amendment having been disposed of, Appel explained that S-5036 struck the exemptions for casinos, posts of veterans organizations, and the Iowa Veterans Home, but added an exemption for farm vehicles and also struck the 10-foot no-smoking zone at entrances to covered public places. Finally, in astonishing ignorance of a crucial component of the bill she was floor managing, Appel incorrectly stated that her amendment “clarifies that anything outside is exempt from the smoking ban.” In fact, huge swaths of outdoor areas—including outdoor sports arenas and entertainment venues, all school grounds and the entire campuses of all colleges and universities, and the grounds of all public buildings—remained smoke-free under the amendment. Without discussion, S-5036 was adopted by a vote of 30 to 20, the three Democratic defectors from the party line being matched by an equal number of Republicans. After adoption of the duly amended main amendment (S-5035) on a voice vote, the chamber was back on H.F. 2212.

The most aggressive attack on the bill was launched by Republican Larry McKibben of Marshalltown, who interrogated Appel as to why she had eliminated the House exemption for the Iowa Veterans Home in Marshalltown.

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707See above ch. 27.
709Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/ Audio/Audio.html and audio file provided by Rusty Martin); Senate Journal 2008, at 1:410-11 (Feb. 27) (S-5037).
710Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/ Audio/Audio.html and audio file provided by Rusty Martin).
711Senate Journal 2008, at 1:411-12 (Feb. 27) (S-5036). The three Democrats were Black, Dotzler, and Hancock; the three Republicans were (the conflicted anti-government physician) Hartsuch, Lundby, and Mulder.
Although Appel knew nothing about the specific situation there, she replied that everyone, including the employees, deserved to be protected from secondhand smoke and that “[n]o ventilation system makes a difference.” Disregarding the floor manager’s assessment, McKibben claimed that by establishing airport-like sealed and ventilated areas for smoking, the IVH had created “the best of both worlds.” Instead of explaining to the chamber whether these contraptions—into which some ex-soldiers had been lugging their oxygen tanks, thus creating a grave risk of fire and explosion—totally protected nonsmokers from exposure to the smoke, he seemed to undermine his own position by stressing that most of the resident veterans were old and in “fragile health,” which he hesitantly conceded that “maybe it [smoking] doesn’t particularly help,” as he ambled on to the punch line, “Shame on you, Democrats” for cutting off the veterans cold turkey.

What McKibben did not share with his colleagues—if he had even bothered to find out for himself—was that long before 2008, but also even as the Senate was debating, the Veterans Home was internally embroiled in controversy over indiscriminate smoking in violation of state rules. Smokers, as one resident wrote in the IVH monthly paper in March 2008, “rule the roost when it comes to smoking anywhere they please.” Interestingly, as Marshalltown’s Democratic
representative, Mark Smith, who had originally secured the exemption in the House, later pointed out, smoking prevalence among the Home’s employees mirrored that of the general public, while even the residents’ was only slightly higher. Although even McKibben, the smoking vets’ most belligerent paladin, in a moment of weakness mentioned the possibility of phasing in the ban at the Home, when Democrats in both chambers ultimately relented, they struck the exemption altogether instead of taking him up on the offer.

In desultory remarks apparently designed to serve no purpose other than to provide him with an extra seven or eight minutes to decide how to cast his vote, Democrat Dennis Black, without having laid a factual predicate, intoned that “[m]any among us will view this as truly a totalitarianistic act—in fact, it is probably the epitome of totalitarianism.” Heady words, indeed, for any speaker, but especially outlandish coming from a non-smoking, non-drinking Mormon, whose only use for bars was as a locus for chatting up constituents. The only discernible nexus of Black’s accusation to H.F. 2212 was the tag line that “[g]overnment should not be all things to all people”—an all-purpose market-knows-best and/or libertarian shibboleth that could just as well have applied to the legislature’s increase in the minimum wage, but that connection did not deter Black from voting for that piece of rank paternalism.

Republican emergency room surgeon David Hartsuch, who openly admitted that he was considered “ultra right” and opposed increasing the minimum wage and protecting homosexuals’ civil rights, launched the final assault on the bill, which seemed to suggest that, Houdini-like, he was no longer “tied up in knots about how to vote” because he had resolved the tension between his skepticism of state intervention and his physician’s understanding of the consequences of

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717 Telephone interview with Mark Smith, Marshalltown (Aug. 21, 2008).
718 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).
719 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).
720 Telephone interview with Dennis Black, Des Moines (July 30, 2008).
721 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).
722 Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008).
firsthand smoking. Hartsuch began by asking Appel to explain what “legal action” meant in the provision stating that an “employee or private citizen may bring a legal action to enforce this chapter.” Once again revealing that she was not even vaguely familiar with the mechanics of H.F. 2212, all that Appel could recall was discussion about people calling the Public Health Department: “I don’t remember about a legal action.” When Hartsuch pushed further and asked whether such a legal action would be brought in a court of law, Appel was so nonplussed that initially she was unable to utter anything more than a very perplexed “Well.” After she had regained her bearings somewhat and began “guessing” that a nonsmoking employee might bring such an action if smoking were unlawfully going on at his or her workplace, Hartsuch moved on in the sentence to ask what kind of “private citizen” she envisioned as bringing an action, but succeeded in eliciting only the bewildered response: “Well, isn’t an employee a private citizen? I think it’s the same thing.” Apparently sensing from Appel’s lack of preparation that he could have some party-line fun at the expense of a floor manager (and an Iowa Supreme Court justice’s spouse) who manifestly neither had studied the bill nor, at least on the spur of the moment under the pressure of the public spotlight, was able to interpret even a very straightforward phrase, Hartsuch, who was hardly a legal scholar himself, pointed out that the provision “distinguishes an employee versus a public [sic] citizen,” but when even this confused prompt failed to trigger any response at all, he dismissed her as if she were an unprepared law student who had disgraced herself before the whole class under mild-mannered Socratic interrogation: “Okay, thank you, Senator Appel...you can sit down.” The colloquy did nothing to diminish Hartsuch’s “reputation,” as he put it, for “harassing Appel,” although he denied the charge while conceding that in general during debate “I kind of tend to go for the jugular.”


725Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin). Although his appraisal may have been biased as a party-line criticism, Hartsuch stated later that during his two years in the Senate many other floor managers had also been poorly prepared. Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008). Minority Leader Wieck recalled Appel’s poor performance as floor manager, which he speculatively ascribed to a lack of preparation and conjectured members would not forget. Telephone interview with Ron Wieck, Sioux City (Aug. 10, 2008).

726Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008). On Hartsuch’s earlier infamous treatment of Appel on the Senate floor, when he questioned her about her Methodist Sunday school teaching in connection with an amendment he had
Having discharged his foil, Hartsuch proceeded to lose any credibility he might have had as a medical expert by claiming that the Pub Med literature review he had done over the weekend had led to his discovery that there were only eight case control studies of secondhand smoke, which revealed “at best” such a weak association with cancer and heart disease that they “call[ed] into question causality at all.”\(^{727}\) In fact, contrary to Hartsuch’s ignorant claim, two years earlier the Surgeon General’s mammoth 700-page double-columned synthesis of the state of research on *The Health Consequences of Involuntary Exposure to Tobacco Smoke*, which cited more than 40 case-control studies alone on the relationship between secondhand smoke exposure and lung cancer,\(^{728}\) concluded that the evidence was “sufficient to infer a causal relationship between secondhand smoke exposure and lung cancer among lifetime nonsmokers” and “increased risk of coronary heart disease morbidity and mortality....” It estimated the latter risk at 25 to 30 percent; the increased risk of cancer associated with living with a smoker was estimated at 20 to 30 percent.\(^{729}\) Asked a half-year later about his floor remarks, Hartsuch, who had no research expertise in the matter of secondhand smoke, cocksurely boasted: “My analysis of the medical literature is quite correct regarding a lack of causal link between second hand smoke and the risks sited [sic] by the Public Health Department in their very misleading advertisements. Unfortunately, liberals feel morally justified in lying about the science in order to sway public opinion to achieve their ends.” Pursuing this pooh-poohing in a favored political direction, he thought “it interesting that the Liberal establishment in Public Health would choose to go after second hand smoke which has little if any established health effect, and at the same time would ignore the established causal link between abortion and breast cancer....” In response to a question as to the discrepancies between his floor remarks and the Surgeon General’s report and whether he was accusing the physicians and scientists who authored it of lying, Hartsuch admitted that he had “not seen the Surgeon General’s report so I certainly am not calling anyone a liar [sic],” but nevertheless felt compelled to “contend that the Surgeon General position is a political position and as such is prone to following political science over natural

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Hartsuch concluded his floor remarks by expressing his concern about the “huge avenue for litigation” and asserted, without any empirical or any other basis whatsoever, that the provision “is opening a Pandora’s box of a magnitude that is absolutely unimaginable.”

Having survived this embarrassing encounter with her composure intact, Appel in her closing remarks characterized the bill as “our way of grooming a healthier state” than the promotion of which senators had nothing better to do. The 29 to 21 vote on final passage meant that the bill secured one fewer vote than on adoption of the identical S-5036, but the composition was somewhat different: three more Democrats, or a total of six, opposed the bill, while two more Republicans or a total of five supported it. A press assessment two days before the debate that a 30-20 Democratic majority with most Democrats supporting the bill meant that there was no “suspense” about the outcome was not shared by all senators. Hartsuch, for one, believed that H.F. 2212 did represent the rare occasion when the outcome was in doubt because Dotzler’s group of eight Democrats who would vote No might bring the bill down—provided that no more than three Republicans voted Yes.

That Hartsuch himself, after having harshly attacked both the bill and its medical underpinnings, nevertheless voted for it was a function of a number of

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731 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).

732 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).

733 Senate Journal 2008, at 1:412-13 (Feb. 27). Among Democrats, whereas Black switched to Aye, Horn, Kreiman, Seng, and Warnstadt switched to Nay. The other additional Republican was Ward. Bolkcom did not know why Horn had reversed his vote. Email from Joe Bolkcom to Marc Linder (Feb. 28, 2008).


735 Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008). Hartsuch stated that there had been much less suspense about the outcome of the final vote on Apr. 8.

736 Minority Leader Wieck confirmed that voting for a bill that a senator has spoken against was unusual. Telephone interview with Ron Wieck, Sioux City (Aug. 10, 2008).
The Smokefree Air Act of 2008

factors, at the core of which lay his self-understanding that he was not a “pure libertarian” because as a doctor he was not always able to agree with his non-medical belief that people should be able to choose their own poison. A fourfold irony attended his decisionmaking process: (1) even as a physician he ignorantly denied that research had demonstrated that secondhand smoke exposure was a significant risk; (2) but he did believe that a smoking ban would reduce the prevalence of smoking by virtue of making it less practical or convenient to smoke and of stamping smokers as pariahs; (3) in fact, he (again incorrectly) believed that a statewide ban would cause a greater reduction in smoking than did a cigarette tax increase; and (4) unlike even the bill’s strongest Democratic supporters, who would not even touch the issue because it undermined their (disingenuous) claim that the ban was designed to protect nonsmokers and not to alter smokers’ (alleged) right to smoke so long as it did not interfere with others’ right to breathe clean air, Hartsuch, as a doctor who did know of the ravages of smoking on smokers, welcomed above all the indirect impact of protecting nonsmokers on smokers. Moreover, unlike his rigid market-knows-best Republican colleagues and Democrats like Dotzler, after receiving numerous calls from constituents who worked on casino boats and complained that they hated being exposed to all the tobacco smoke but were trapped in their jobs, Hartsuch was persuaded that—unlike casino or bar customers, who were not forced to go into such environments—workers had no practical alternative. Despite being weighed down more by these communications than by any other and despite knowing that his rather affluent anti-tobacco constituency had weighed in three to one for the bill, when the moment for voting finally arrived, he initially voted Nay, and only after he had seen that the bill already had 28 votes for passage did he change his vote and cast a symbolic Yea. And even then, he later admitted, had his vote been decisive, he would have stayed with his No vote and explained to his constituents that he had been unable to accept the unfairness of the disparate treatment of bars and casinos.

737 Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008). One synthetic study concluded that in the United States the per package cigarette tax would have to be raised by 47 percent (from 76 cents to $1.11) in order to generate the 4.5 percent decline in cigarette consumption in the total population that would be achieved by banning smoking in all workplaces. Caroline Fichtenberg and Stanton Glantz, “Effects of Smoke-Free Workplaces on Smoking Behavior: Systematic Review,” British Medical Journal 325:188-91 (July 27, 2002).

738 Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008). Hartsuch’s Minority Leader, Wieck, who noted that Hartsuch had told him several times that he did not believe that the medical data showed a negative health impact of secondhand smoke, speculated that Hartsuch may have voted for the bill after having spoken against it because
The Smokefree Air Act of 2008

Senate Democrats’ “jubilation” was tempered by Gronstal’s prediction that “‘there will be compromises along the way.’” Calling passage of the Senate version of the bill “‘great news,’” House floor manager Olson immediately declared that it “‘totally changes the discussion’” because the elimination of the casino exemption meant that some of the members who on February 19 had, based on that exemption and its allegedly unfair impact on bars, voted against H.F. 2212, might change their position. One potential complication involved the Senate’s removal of the Veteran Home’s exemption, which Marshalltown Democrat Mark Smith said he “‘had worked very hard’” to secure; although he was willing to support the bill without the casino exemption, his opposition to H.F. 2212 based on its coverage of the IVH might prove to be crucial if casino coverage wound up eroding what had already been a narrow margin of victory.

The House Undermines H.F. 2212 by Authorizing Bars and Restaurants with a Liquor License to Permit Smoking Whenever They Deny Admission to People Under 21

The Restaurant Association, casinos, and the tobacco industry have really locked arms to prevent us from moving forward and I think we’ve finally been able to break through that this year.

Drinkers at Frick’s [in Davenport] say the proposed ban attacks their beer-and-a-cigarette way of life and is the action of a tyrannical government. Robert J. Waddington sits at the bar with a drink in front of him and a cigarette in his hand. He said he’s been smoking since he was 7 years old. “Is this a free country? ... Why can they tell me what I can and can’t do? I’m 82, and I’m not going to quit. If you start telling people what they can’t do, that is communism.

as a physician he may have believed that the bill would reduce the prevalence of smoking. Telephone interview with Ron Wieck, Sioux City (Aug. 10, 2008).


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Are you debating [the] smoking bill now? Do you have votes for casino coverage?
Yes, we are debating...it gets worse...the 21 year old bar amendment is on the floor for debate and will probably pass. ... It is a long story with lots of drama and emotion.

... Is it wrong to assume that the 51 who voted for the >21 amendment wouldn’t mind if no bill at all were passed and the law just stays the way it is?
[S]ometimes I don’t know what to think. We have some members who have gotten cold feet. While many of us were really upset about the vote today, we also know the conference committee will be made up of people who support the original House and Senate versions. We are very confident that the bar and restaurant amendment will be stripped out of the final conference committee recommendations.

How did Bailey get the 51 votes for the ammdt?
Some of our spineless democrats who got scared. They are in marginal districts and represent many small towns. They are worried about re-election.

The day after the Senate had passed a much stricter ban, House Speaker Murphy and Majority Leader McCarthy held a press conference in the course of which they assessed the new situation. Surprisingly, they offered differing evaluations without remarking on them. Murphy “frankly” admitted that the difficulties that the House had getting the bill passed even with the exemptions both made it difficult to determine the eventual outcome and would be a concern for the bill’s original supporters. Murphy’s more pessimistic account may have been colored his own personal attitude, which was much less intense than McCarthy’s: “I was always sort of a local control guy, but because the votes were there to do this, that’s where I’m at. And quite frankly I was comfortable with the House version the way it passed.” Murphy was also the sort of guy beneath whose dignity it was not to accept a $500 campaign contribution in July 2008, October 2007, and October 2006 from Altria Group, Inc. a/k/a Philip Morris.)


Email from Marc Linder to Mary Mascher and from Mary Mascher to Marc Linder (Mar. 12, 2008).

Email from Marc Linder to Mary Mascher (Mar. 15, 2008) and Mary Mascher to Marc Linder (Mar. 16, 2008).

Democratic Leaders Address Immigration, Smoking (part 2) (Feb. 28, 2008), on http://www.youtube.com/watch?v=9maC8EefFGM (visited July 30, 2008).

The Smokefree Air Act of 2008

In contrast, McCarthy was an ardent anti-smoker, whose statement, “[m]y personal feeling, I would outlaw smoking everywhere if I had the right,” prompted a smiling Murphy to inject: “Remember, his previous job was with the attorney general’s office suing tobacco companies.” Confirming that he had been litigation compliance counsel for governments in the national tobacco settlement agreement, McCarthy added that “I don’t have a lot of respect for Big Tobacco.” McCarthy then provided this rather upbeat perspective on the bill’s progress:

Look at where the momentum has come on this issue. It was our best guess that local control, which would mean a few hundred jurisdictions probably would move in that direction and a few hundred jurisdictions wouldn’t move in that direction, would be the state where the law would move. Local control seemed to be it. When we first started discussing it this year, it seemed to be 17 votes for a statewide ban, and then I found out there was [sic] 25 votes, and then I found out there was [sic] 40 votes. And then lo and behold we were able to actually for the first time debate a bill on the floor of the House since the mid-90s that was a statewide ban.... Major momentum.

Then after the Senate had stripped out the casino exemption and created a “new equation,” McCarthy saw this momentum continuing to build, and even though it was “emotional and tenuous” and H.F. 2212’s future was “unpredictable,” he was willing to predict that if the legislature could agree on a bill, “it would be probably one of the single biggest public health measures Iowa has ever passed.” In any event, he was confident enough that passing a local control bill as a “safety net” was, for the time being, not on the agenda. Murphy then tried to reinforce this more optimistic view by insisting that “regardless of what people believe, this is a pretty non-partisan bill,” because 10 to 14 Democrats had problems with the bill a lot of whom voted against it, while “we had [some] Republicans who were very supportive of it.”

After Murphy had offered his personal declaration in favor of a less radical
approach, McCarthy intervened to paint the transformation of the historical sweep of public smoking since the 1970s as he had personally experienced it over his lifetime and as no one, in either chamber, ever presented it during the entire debate. Why this poignant panorama, which, apparently spontaneous and unrehearsed, effectively demonstrated that social developments and attitudes were malleable and even opened up the perspective of the present as history, which is crucial for motivating people to overcome passivity and fatalism, was reserved exclusively for the press, which did not report on it, is unclear (though McCarthy’s own reason may have been his and Murphy’s decision that the less they interjected themselves into the debate, the less partisan it would be):  

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Look at where our culture has changed with regard to smoking. I remember taking a tour of the state capitol as a child and [here McCarthy pointed upwards] you couldn’t see the top of the dome because there was so much smoke here. I remember visiting my mother who worked in the cardiology wing in Methodist Hospital and you walked into the waiting room and the people in the waiting room were smoking, the nurses were smoking, the secretary was smoking, the whole doctor’s office was full of smoke. I remember visiting my father [the Des Moines chief of police] at a police station as a child—you couldn’t see the ceiling because every officer smoked. That was our culture back in the 1970s. Could you imagine having that sort of occurrence now, walking into the rotunda and not being able to breathe and see the top of the dome? ... We’re recognizing that someone shouldn’t have a right to put toxic substances in my body that include arsenic. I should have a right to breathe non-toxic substances. So I think that’s the direction our culture is moving and that’s why I’m supportive of it.  

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As far as casinos were concerned, McCarthy explained that the smaller size of House districts created a different politics per district, so that “[e]ven though hardly anyone spoke on the floor of the House regarding the casino exemption,  

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751Democratic Leaders Address Immigration, Smoking (part 2) (Feb. 28, 2008), on http://www.youtube.com/watch?v=9maC8EeFfGM (visited July 30, 2008). McCarthy did concisely repeat his statement during his end of session remarks: “That has been a cultural shift and I said this before, I remember coming in for a tour of the Capitol as a child and everyone in the House smoked. Everyone in the Senate smoked, and everyone in the rotunda smoked. And I remember looking up to see that wonderful dome and I really couldn’t because it was full of smoke. Who would believe that three decades later that would seem strange to look back and have that sort of environment.” House Journal 2008, at 2:2115 (Apr. 25).  

752Democratic Leaders Address Immigration, Smoking (part 2) (Feb. 28, 2008), on http://www.youtube.com/watch?v=9maC8EeFfGM (visited July 30, 2008). Whether Murphy’s broad smile during this part of McCarthy’s remarks was one of recognition of his own childhood is unclear.
believe me—there were a number of people that needed that in there to vote for it because their constituencies locally involve nonprofits, chambers of commerce, and businesses, and hotels, and others who form a pretty potent political force for some of these legislators locally. So that’s why that was in there to get some votes to pass it out.” But now that the Senate had altered the dynamic by covering casinos, McCarthy announced that he intended to confront those House members, including several Republicans, who had complained about the exclusion of casinos and declared that they would vote for a statewide smoking ban (although he had had them down as No votes for any ban), with the transcript of their floor statements to see whether they were people “of their word.” Whether McCarthy was merely seeking to embarrass them before the press for what he apparently took to be their disingenuousness or seriously believed that, despite the local tobacco/smoking business pressures on them that he had just cited, they could be persuaded to change their votes is unclear. The Senate’s action, however, had sufficiently buoyed House militants’ spirits that Mary Mascher imagined that “we are very close to getting the votes we need to pass the senate version. As soon as we have the 51 votes needed we will bring it up for debate and pass the bill. I think we are one or two votes short now.”

The day before the House took up the Senate version of H.F. 2212, Speaker Murphy had concluded that casino coverage lacked the 51 votes needed for adoption. With regard to the amendment to permit smoking in bars when no one under 21 was admitted, Minority Leader Rants predicted that the two chambers would have to compromise. At the same time, anti-ban forces were intensifying their message that the market and its authoritative interpreter, the business owner, know best. Iowa Restaurant Association President Doni DeNucci, still following the Philip Morris playbook, insisted on the “right” to “accommodate” both smokers and nonsmokers—and if the latter were uncomfortable with the resulting (smoky) environment, they would have to go to a smoke-free restaurant. Republican Senator Jerry Behn—a farmer with such impeccable pro-employer credentials that he was one of only eight senators to vote against increasing the

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753 Democratic Leaders Address Immigration, Smoking (part 2) (Feb. 28, 2008), on http://www.youtube.com/watch?v=9maC8EefFGM (visited July 30, 2008). Since there is no official verbatim transcript of floor debate, it is unclear whether McCarthy planned to have one made from audio files that the Democratic caucus creates to make sound bites available to the news media and then at some point destroys. Some of these files are cited in this chapter.

754 Email from Mary Mascher to Marc Linder (Feb. 29, 2008).

755 Iowa Public Radio News, WSUI (Iowa City) (Mar. 11, 2008, at 8:08 a.m.). A Democrat dismissed Rants’s comment on the grounds that “[h]e has no control over this at all.” Email from Mary Mascher to Marc Linder (Mar. 10, 2008).
minimum wage in 2007—one-upped IRA by asserting both that “the market has already solved the solution [sic]” and that workers know ahead of time that they will face smoke (and can decide to work elsewhere), just as neither they nor anyone else has to go into a restaurant. Amusingly, when a caller to the radio program on which Behn made these comments asked whether workers were entitled to retention of unemployment insurance benefits if they refused a job because the workplace was smoky, Behn did not know the answer.\footnote{The Exchange,” WSUI (Iowa City) (Mar. 11, 2008 beginning at 10:07 a.m.). On the minimum wage vote, see http://www.votesmart.org/issue_keyvote_member.php?cs_id=7586 (visited Aug. 2, 2008).}

House debate on the Senate amendment on March 12 lasted only about one hour, but was intensely contentious, in large part thanks to Representative Wise, who, throwing off all the customary shackles of legislative courtesy, with brutal bluntness accused proponents—including one in his own party—of a killer amendment of lying their heads off about its real impact. Before reaching that issue, the House dealt with a two-part amendment (H-8079) filed by Democrats Mark Smith of Marshalltown and McKinley Bailey: Smith’s proposed reinstating the exemption for the Iowa Veterans Home in Marshalltown, which the Senate version had struck from the House bill, while Bailey’s would have delayed the bill’s effective date until January 1, 2009.\footnote{For a detailed overview of the amendments, see House Democratic Research Staff, “Amendment Summary: HF 2212 Smoke Free Air Act Senate Amendment H-8054 (Mar. 11, 2008).} Smith’s sponsorship of an amendment to perpetuate smoking among ex-soldiers was ironic since he was director of special projects at the Substance Abuse Treatment Center of Central Iowa\footnote{http://iowahouse.org/2008/04/08/member-profile-rep-mark-smith/#more-359 (visited Aug. 3, 2008). Smith did, however, later support Wise’s amendment to kill the 21-and-over exemption for bars, restaurants, and casinos.} and was personally aware of complaints about smoking at the IVH, having written in the residents’ newsletter that “there are a number of people who are concerned about smoking etiquette and having more outside area that is smoke free.”\footnote{Mark Smith, “Statehouse Issues,” Stars ‘N’ Stripes: The Resident Newspaper of the Iowa Veterans Home 5(7):6 (July 2007), on http://ivh.iowa.gov/News/StarsNStripes/tabid/177/Default.aspx (visited Aug. 8, 2008).} Following bifurcation of the amendment, which floor manager Olson urged the chamber to resist, Smith’s passed 51 to 30.\footnote{House Journal 2008, at 1:614-15 (Mar. 12).} Representative Petersen then attacked the attempt to delay the law’s effective date—which Bailey, who remained procedurally confused during his hour of fame, did not even bother to explain, let alone to justify—by pointing out that delay was uncalled for inasmuch...
as it had been 18 years since legislators had had a chance to debate the issue or to improve the clean indoor air act. The amendment’s fate was sealed when Minority Leader Rants rose to inform Petersen that they had finally found something they could agree on: he opposed the bill, but if it was going to go into effect, there was no reason to delay it. On a voice vote, no one having been heard to shout Aye, that part of the amendment lost.\(^\text{761}\)

In contrast, Bailey did at least make an effort to justify the debate’s principal amendment (H-8084), which was also co-sponsored by 11 other Democrats.\(^\text{762}\)

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\(^\text{761}\)House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr, communications director, House Speaker).

\(^\text{762}\)The other Democrats were Schueller, Wendt, Ford, Zirkelbach, Thomas, Mertz, Quirk, Frevert, R. Olson, Huser, and Berry. H-8084, on http://www.legis.state.ia.us/aspx/Cool-ICE/DisplayBills.htm (filed Mar. 11, 2008). Four of these co-sponsors represented three of the state’s largest cities: Deborah Berry (Waterloo); Wayne Ford and Rick Olson (Des Moines); and Roger Wendt (Sioux City). Ignoring the issue of the impact on employees as well as the larger public health issue for nonsmokers, Berry (the corporate fundraising director for a public radio station) and Wendt (a retired teacher and school administrator with a Ph.D. in education whom the American Cancer Society had recorded in February 2008 as “Must have casino exemption”) both justified their co-sponsorship on the grounds that if adults chose to go to “adult establishments” to smoke and/or when smoking was permitted, it was fair to permit them to make such an adult decision. Interestingly, later both also acknowledged that life went on under the new law without the 21-and-over amendment, although Berry had specifically hesitated to vote for the bill without the amendment. Neither had received any complaints from constituents: while Wendt was “perfectly comfortable” with the Smokefree Air Act, Berry—who had heard from some bar owners while the bill was going through the legislature—in visits to bars had observed that people were “enjoying themselves” and that no bars had closed down in Waterloo, where it was “business as usual.” Telephone interview with Deborah Berry, Waterloo (May 27, 2009); telephone interview with Roger Wendt, Sioux City (May 27, 2009); [American Cancer Society], 2008 House Vote Count Card 82nd General Assembly (emaild by Stacy Frelund Feb. 14, 2008). For the biographical details, see Iowa Official Register: 2007-2008, at 52, 80 (v. 72), on http://publications.iowa.gov/6421/3/Chapter_2_Legislative_Branch.pdf (visited May 27, 2009). Despite the absence of complaints from constituents, in 2009 Berry cosponsored Bailey’s bill (H.F. 211) that would have repealed the coverage of outdoor restaurants. See below ch. 36. Ford took a different tack, stating that he was thankful to Bailey for having given him a chance to “put more common sense” into a “hypocritical” bill, which was “unfair” to bar owners because it exempted casinos, although he, too, acknowledged that after almost a year’s operation under the new law he was unaware that any bars in Des Moines had closed. Telephone interview with Wayne Ford, Des Moines (May 27, 2009). Rick Olson, a lawyer, in addition to using the rationale for customers that, with minors denied access,
The Smokefree Air Act of 2008

The proposal, which Democrat David Jacoby later characterized as so “goofy” that its adoption made the whole bill “worthless,” would have added to the areas where smoking was not regulated restaurants, bars, hotels, motels, clubs, pari-mutuel racing tracks, excursion gambling boats, gambling structures, and racetracks if they both held a liquor control license for on-premises consumption and allowed “smoking only at a specified time during which only individuals twenty-one years of age or older are invited or admitted; the specified time is a regular, single, consecutive period of time; and the specified time is conspicuously posted on all major entrances of the licensed premises.” Bailey’s amendment was thus both broader and narrower than Struyk and Dolecheck’s H-8024, which had lost by a vote of 49 to 51 on February 19, and applied only to bars and restaurants, which were not formally required to hold a liquor license, but were eligible for the exemption only during times when persons under 18 were not admitted. With regard to H-8056, which Bailey and Dolecheck had filed on February 28 (but later withdrew) and was like H-8024 except that it applied to all establishments, Representative Mascher did not think that the House would go backwards and adopt it after it had already been defeated in both chambers. As to why members nevertheless kept pushing such an amendment she explained: “Some of them can’t help themselves. They have a bar owner back home who is a friend and has convinced them they will go belly up if this law passes. They don’t look at the data from other states that proves this is wrong. They think they are just trying to help a friend.” House leaders, who had found out late the night before the debate that the 21-and-over amendment would pass, regarded it as a message by its supporters to the Senate that they objected to the other chamber’s having amended the House bill, especially to the striking of the casino exemption.

adults were making a “voluntary choice,” also reflected on employees’ exposure to tobacco smoke by insisting that, given advance notice, they could choose to work elsewhere. Telephone interview with Rick Olson, Des Moines (June 2, 2009).

765See above this ch.
767Email from Mary Mascher to Marc Linder (Feb. 29, 2008).
768Email from Stacy Frelund, field government relations, American Cancer Society, to Marc Linder (Mar. 12, 2008). To be sure, this account is difficult to reconcile with Frelund’s statement that the Democrats who voted for Bailey’s amendment and were mostly from rural Iowa had “said they did not want to hurt their small town businesses...."
The Smokefree Air Act of 2008

In a contemporaneous newsletter to constituents, Bailey tried to justify his 21-and-over amendment, which would have exposed everyone in participating restaurants, bars, and casinos to tobacco smoke:

Initially, a statewide smoking ban that exempted casinos passed the House. A number of Representatives, including myself, voted for the bill despite its imperfections. We hoped to see some form of ban turn into law. In order to pass the first bill, the casino exemption was necessary in order to get 51 votes. After this vote, I heard from a good number of constituents who felt that it was unfair to exempt casinos but not bars and restaurants. That is a sentiment I share.

The Senate removed the casino exemption and designated smoking areas at the Iowa Veterans Home. The bill came back to the house where it became apparent that once again we would not be able to pass a statewide ban without exempting casinos. The bill would be rejected then sent to a conference committee. Then, party leaders would put a casino exemption back into the bill. Unfortunately, most of these political decisions are beyond my control.

However, a number of Senators have taken public positions that they will not vote for a bill that provides these exemptions for casinos, because it puts the small businesses around them, which also serve food and drink at a serious competitive disadvantage. There are enough Senators who feel this way to make passage of the bill impossible. Taken on the whole, the House will not pass a ban without a casino exemption and the Senate will not pass anything with a casino exemption. This disagreement has led to a stalemate.

This was not acceptable, because an overwhelming number of you have expressed a wish for some sort of restriction. In response, I crafted an amendment that I felt was a compromise between a number of positions, which could get the votes to pass in both chambers. With this compromise, we could have a meaningful step forward on the issue. It would remove 93% of Iowa’s workers and all of Iowa’s children from exposure to second hand smoke. It offered some protection for small businesses and exempted the casinos. All the involved groups got something and it passed the house.

It is not a perfect solution. If you are a smoker who thinks you should be able to smoke in every restaurant you will not be able to anymore. If you think you should be able to go anywhere in the state without exposure to second hand smoke there will still be a few establishments in the state where that won’t be the case. The owners of bars and restaurants with liquor licenses will have to decide whether they want to allow smoking or be open to children. No one walks away from the table with everything they want and no one walks away without something they wanted. Such is the nature of compromise.769

Bailey was motivated to put a gloss on his newsletter “to the outside world”

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Email from Stacy Frelund to Marc Linder (Mar. 12, 2008).

769 Newsletter pasted into email from McKinley Bailey to Marc Linder (Mar. 14, 2008).
in order to salvage his reputation after “I won the vote but got butchered in the press.” The day after the Senate vote (rejecting the bill as amended by H-8084) Bailey asserted that the Senate was unable to muster a majority for a bill exempting casinos “because it creates an unequal playing field” (vis-a-vis small restaurants and bars). As in the newsletter, Bailey distorted the situation in the Senate, where a majority opposed a casino exemption not because of its impact on bars, but because of its impact on the health of workers and customers in casinos. In any event, he insisted that the Senate had rejected his amendment, which “created an equal playing field...but this is all being driven by out of state activists who will take nothing before getting exactly what they want and the Senate Majority leader twisted arms until he got what he wanted.”

Bailey’s rather loose grip on political reality was further highlighted by his statement that the “out of state activists” he had in mind were “the heart lung and cancer associations but mostly C.A.F.E.” Ironically, in spite of his distaste for the role of these advocacy groups, he expressed a preference for their long-time preference, local control, “so we can ease consumers and business into this change” over a few years. Little wonder that an anti-smoking Democrat called Bailey “off the reservation on this one” and advised not to “believe anything he says. He is really in the minority in our caucus.”

After Bailey had quickly presented his argument from expedience—that the amendment was needed in order to obtain a majority for the bill—he resorted to the considerably less than forthright rhetoric that triggered Wise’s ferocious counterattack. Bailey asserted that his proposal would expand protection for workers and the public while providing some protection for small businesses. “In many communities,” according to Bailey, “the bar-restaurant is the only business in town and an important part of the community.” Indeed, he even romantically restylized such profit-seeking businesses “community centers.” Making effective use of ambiguity, Bailey swore that his amendment, which would make sure that “no child will have to spend time in a smoke-filled public place,” represented “a giant leap forward for the health of Iowa’s children.” And as for adults, H-8084 would remove smoking permanently from non-alcoholic restaurants and tens of thousands of workers from smoky workplaces.

With admirable probity, Wise forthrightly stated that, “in the interest of

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770 Email from McKinley Bailey to Marc Linder (Mar. 14, 2008).
771 Email from McKinley Bailey to Marc Linder (Mar. 16, 2008).
772 Email from Mary Mascher to Marc Linder (Mar. 15, 2008).
773 House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fihr, communications director, House Speaker).
The Smokefree Air Act of 2008

honesty, of truthfulness,” his amendment (H-8088) was designed to gut and kill Bailey’s amendment, which, contrary to Bailey’s claims, was “a huge step backward” for protecting the health of children, customers, and workers, designed to gut and kill H.F. 2212. Wise’s amendment confined the exemption to the same establishments, but only if they admitted “at any time only” people 21 or over, thus mooting the exemption for practical purposes by forcing them either never to admit those under 21—a practice that would presumably have been economically injurious—or to admit them and thus to forfeit the exemption. Wise forcefully charged that it was an “absurd assertion” that an establishment could be smoking at night and nonsmoking the next morning because in fact the chemicals in tobacco smoke linger for up to two weeks (as a result of desorption of particles deposited on walls, fabrics, furniture, and other objects, rooms in which smoking is permitted are a “continuous source of exposure to toxic substances in tobacco smoke even when no smoking is currently occurring”). Consequently, such a regime would not protect anyone even during the allegedly smoke-free hours of operation, and it was therefore a “lie” that an age-restricted smoking establishment was ever nonsmoking. In short,

774 House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr).


776 Presumably this deterrent would not have served its purpose with regard to bars in towns in which people under 21 were lawfully permitted in bars.

777 House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr). Although there is evidence that such desorption goes on for weeks and, at decreasing levels for months, in the context of bars and restaurants in which smoking takes place daily and thus deposit/sorption of compounds is replenished daily, it is less important whether desorption takes place over weeks or months so long as the sorption/desorption process simply lasts into the next daily no-smoking period, of which, according to a leading researcher, there is “absolutely and without question” no doubt. Email from Brett Singer to Marc Linder (Jan. 5, 2009). See also above ch. 33.

778 Bundesverfassungsgericht, 1 BvR 3262/07 at 79 (July 30, 2008) (finding of the German Cancer Research Center cited in a decision by the German Federal Constitutional Court in a case dealing with the validity of the several states’ statutes with exemptions similar to those in H.F. 2212). See also U.S. Department of Health and Human Services, The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General 87 (2006): “Volatile components such as nicotine are adsorbed and degassed by materials. As a consequence, the smell of cigarettes emanates from clothing, carpets, air conditioners, and other surfaces without the presence of active smoking, as previously deposited or adsorbed material is re-emitted by air currents.”
Bailey’s amendment was a “fraud.”

Bailey evasively responded that no one could look him in the eye and say that it was not a step forward for people not to be actively smoking for some hours or in children’s presence. (In fact, his opponents would soon point out that his proposal was a step backward compared to H.F. 2212 and even to Iowa’s then existing toothless law.) Republican David Heaton, who owned a restaurant-bar and permitted smoking in the latter, complained that supporters of H-8088 and H.F. 2212 were seeking to “take away choice” of businesspeople like himself, who could not imagine having to ban those under 21 from his establishment. (More baldly, his Republican colleague Steven Olson later called a smoking ban in bars an “‘invasion of private property rights....’”)

Republica Dolecheck, whose 18-and-older amendment had narrowly failed three weeks earlier, seemed confused in his complaint that supporters of the Wise amendment were now complaining about carcinogens in establishments eight hours after smoking had stopped and no one was breathing secondhand smoke—a position Wise characterized as a “scientific-medical absurdity.”

Wise then moved his amendment and asked for a division; an unnamed male representative from Polk County requested a record vote, but (on the audio file) the Speaker could be heard telling (presumably the clerk) that “there’s been no second,” and only after Speaker Murphy had announced the amendment’s solid defeat by a vote of 32 to 59 (with nine absent or not voting) and the debate of Bailey’s underlying amendment had resumed, did he belatedly inform the chamber that the request for a record had not been seconded and that therefore the names had not been recorded.

779 House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr).


782 House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr).

783 House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by
The Smokefree Air Act of 2008

The (non-)decision not to record the vote was contentious and continued to prompt controversy for several days. The following “condensed version” of the “[l]ong story” was provided by Democrat Mary Mascher, a strong supporter of H-8088 who had become increasingly depressed during the debate, 12 hours later:

I went to leadership and asked if we could have a record roll call on the Wise amendment. I was told no.

In our caucuses it is an unwritten rule that only leadership can determine if a record will be called on an amendment. This can be good, because it prevents members from putting up votes that could hurt them back home. It is bad because it protects members who should be held accountable.

I was furious when I was told no, we couldn’t get a record on the vote so I said fine, I will get a republican to ask for the record. I asked Walt Tomenga to ask for the record but of course I thought Walt would get someone to second it in his caucus and no one would.

So no record, just a voice vote that failed.

I had some rather heated words with my leadership today. I think the vote makes us look weak.

I know this is far from over but we missed a golden opportunity today. 784

Without the record vote, Mascher lamented, it would be “hard to hold people accountable....” 785

The next day at a press conference, when asked why there had been no record roll call on this vote, McCarthy replied that there had been no second—“an error.” When the pesky reporter pressed McCarthy as to why he had not personally seconded the request, he stated that there had been no reason to do so because leadership thought that it was “extremely, extremely likely” that the bill would go back to the Senate amended and then to a conference committee. Under those circumstances, McCarthy argued, a record vote that might not have accurately reflected where “everyone is at” would “not necessarily” have been “productive.” In addition, as Senate Majority Leader Gronstal observed, although record votes sometimes “help you identify the places where you need to go and work,” sometimes they just needlessly locked legislators who were struggling with an issue into a position. 786

784 Email from Mary Mascher to Marc Linder (Mar. 12, 2008).
785 Email from Mary Mascher to Marc Linder (Mar. 12, 2008).
786 Smoking, November Elections on Democrats’ Minds (Part 2) (Mar. 13, 2008), on
After Wise’s amendment had been disposed of, the debate on Bailey’s amendment resumed. Floor manager Olson opened the attack on it by stressing that H-8084 represented a step back vis-a-vis current law inasmuch as “it gets rid of the requirement that restaurants of a certain size set aside a percentage of their seats as nonsmoking.”787 (To be sure, the existing clean indoor air law contained no such requirement other than that the percentage be > 0; Olson thus failed—as did supporters throughout the floor debates—to convey fully the feebleness of the then existing law, which, in fact, merely required a restaurant, seating more than 50, not to designate the entire restaurant a smoking area; moreover, since the law did not require a restaurant to shield nonsmokers in any way from secondhand smoke, it was virtually useless.)788 Dolecheck’s assertion that H-8084 was a “good property rights amendment, individual rights amendment” triggered another ferocious response from Wise, who characterized H-8084, which would have enabled 20 percent of the population to “dictate” to 80 percent, as “the most internally contradictory and wrongheaded amendment” of the 2008 session: “With all due respect, with all due respect! A property rights issue? An individual rights issue? Give me a break! There is not now nor has there ever been a property right to smoke around other people and other people’s children. Do not invent new rights that do not exist.” Wise then went on to administer a stern civics lesson to Dolecheck and other opponents by observing that although the Iowa House of Representatives always balanced the public good and individual liberties and “in most cases” the latter won out, “there are instances when the public good is so overwhelming that we say to the individuals: ‘You must modify the behavior for the public good.’ We know clearly that secondhand tobacco smoke rises to that level.”789 Wise’s intervention was remarkable because it objectively refuted various misleading and/or false statements by Democratic supporters that the bill was about public health and not about individual rights. Wise, who drew the parallel to earlier debates about seat belts, was the only supporter with the intellectual integrity to concede the existence of a conflict even if he failed to identify the right at stake after he had denied the existence of a

http://www.youtube.com/watch?v=GWkrxbUmKfI&feature=related (visited Apr. 11, 2008).

787House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr).


789House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html) and audio file furnished by Dean Fiihr).
The Smokefree Air Act of 2008

property right to assault others with smoke.\textsuperscript{790}  
In his closing remarks Bailey predicted that no bill would pass unless it exempted casinos; consequently, he offered the chamber the option of exempting only casinos or treating fairly other businesses that stood to lose by exempting them as well; the only nonsmoking beneficiaries of his amendment were children—he did not even bother to assert that adults would benefit.\textsuperscript{791}  
The result of an initial voice vote having been unclear (though the Nays certainly sounded louder), a division was requested, but, again, not a record vote. The 21-and-over amendment prevailed by a vote of 51 to 44 (and five absent or not voting).\textsuperscript{792}  In his closing remarks on Senate amendment H-8054 Olson expressed his disappointment in the outcome of the amendments, but nevertheless urged the body to concur in order to keep the bill moving on its way to a conference committee.\textsuperscript{793}  Following a voice vote for concurrence the vote on final passage was 59 to 40: 47 (or 89 percent of) Democrats voted for and only six against H.F. 2212, while 34 (or 74 percent) Republicans voted against and only 12 for the bill.\textsuperscript{794}  
Anti-smoking militants regarded the new House bill, whose passage Senator

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\textsuperscript{790} Even if there was no judicially vindicated right to smoke in specific public places, there was for many years a virtually uncontested privilege to do so.

\textsuperscript{791} House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file furnished by Dean Fiihr).

\textsuperscript{792} House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file furnished by Dean Fiihr); House Journal 2008, at 1:616 (Mar. 12).

\textsuperscript{793} House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file furnished by Dean Fiihr).

\textsuperscript{794} House Journal 2008, at 1:617 (Mar. 12). The six Democrats were Foege, Hunter, Huser, R. Olson, Swaim, and Wenthe, of whom Ro Foege was a “purist,” who had voted against the bill on Feb. 19 because of the casino exemption and voted against it on Mar. 12 because of 21-and-over exemption. Email from Mary Mascher to Marc Linder (Mar. 12, 2008). Mertz, who voted against the bill on Feb. 19 and Apr. 8, supported it on Mar. 12 in order to protect an exemption for bar patios. Telephone interview with Dolores Mertz, Ottosen (Aug. 24, 2008). Of the six, only Huser and Wenthe voted against H.F. 2212 on final passage on Apr. 8. The 12 Republicans voting for the bill were Anderson, Baudler, Clute, Dolecheck, Gipp, Jacobs, May, Linda Miller, Schickel, Tomenga, Van Fossen, and Wiencek, of whom only Dolecheck, Gipp, Miller, and Van Fossen failed to vote for the bill on final passage on Apr. 8 and presumably voted for it on Mar. 12 because, like Bailey, they wanted to gut the bill. Lykam, a non-smoker who had a small business background and voted against the bill on Feb. 19 and Apr. 8, voted Aye on Mar. 12 only to keep it alive so that it could be amended later. Telephone interview with Jim Lykam, Davenport (Aug. 24, 2008).
Bolkcom attributed to bar owners’ intense statewide lobbying, as a “devastating blow,” in part because it would weaken even the current toothless law by rendering nonsmoking sections of restaurants unnecessary. The Lung Association’s lobbyist called the bill “pretty much useless at this point,” while Representative Petersen was sufficiently alarmed by this “step backwards” to urge supporters who might have been lulled into a false sense of inevitable victory in 2008 to start calling and emailing their legislators. The Iowa Restaurant Association had already encouraged its 650 members to do so, but President Doni DeNucci denied that its lobbyists had put “intense pressure” on the legislature. To be sure, the casino exemption put IRA, whose membership was composed of restaurants, bars, and casinos, in something of a bind, because, as its president conceded, “we wouldn’t want to oppose an exemption that would benefit one segment of the industry, but…could be to the detriment to [sic] another segment.” DeNucci perceived a similar structural problem with the 21-and-over amendment: it aided bars, but exert a negative impact on small independent restaurants in rural areas. Despite the improvement represented by the amendment, perhaps in order to avoid such internal organizational fragmentation, she stated publicly that she preferred that the bill fail regardless of whether it included H-8084—and why would she not since the current law conferred an exemption on bars and a quasi-exemption on restaurants?

Front-line legislative and lobbying advocates of the broadest possible smoking ban may have been disheartened by the House vote, but at a press conference the day after the House had adopted the 21-and-over amendment, Majority Leader McCarthy stated that he was “kind of proud”—though disappointed in the substantive outcome—of what he regarded as not a partisan debate on a “very emotional, passionate subject…on both sides.” In particular he extolled the “legitimate debate where the outcome is not necessarily determined in advance” in contrast to the typical situation in which leadership has an “exact

796 Jason Clayworth, “House Flips, Weakens Smoking Ban,” DMR, Mar. 13, 2008, on http://www.desmoinesregister.com. Whether IRA considered the $8,000 that it spent on state campaign contributions in 2007 as part of whatever pressure they did exert is unclear. Id. The total number of restaurants owned by the 650 members was in excess of 5,000. Douglas Burns, “Ban Smoking Statewide or Let Locals Decide?” Iowa Independent (Feb. 6, 2008), on http://www.iowaindependent.com (visited Aug. 1, 2008).
The Smokefree Air Act of 2008

vote count” and “the debates are predetermined”: “a legitimate debate where the debate is actually moving votes is something that I think is refreshing.” 799
McCarthy illustrated this unusual phenomenon of the leadership’s loss of control by reference to the 21-and-over amendment: the first time it was debated, he had been convinced that it would pass, but in fact it garnered only 47 votes; on March 12, based on his vote count he had predicted in excess of 63-65 votes, whereas in fact it received only 53 or 54. Nevertheless, given the very “narrow margins” of the vote and the way members were reacting differently based on which constituents contacted them—some representatives were hearing exclusively from anti-ban bar and restaurant owners, while others received nothing but support for an exemptionless statewide ban—McCarthy still deemed House passage of a bill without the 21-and-over amendment possible. 800

The Senate Rejects the House Amendment

What kind of pressure does the house passage of this ridiculous >21 amdmt put on conference cttee? It is a new game if we get to conference. 801

In the unlikely event that the Senate accepted the radically watered-down bill that the House had passed, the anti-smoking initiative’s fate would lie with the governor. If, however, the Senate rejected the House amendment, it would return to the House, which could either insist on its amendment or “rescind [sic] from” it; if it took the former course, the bill would then go to a conference committee. 802 The next day, March 13, the Senate took up H.F. 2212 as amended by the House in House amendment S-5087—which exempted both restaurants, bars, hotels/motels, and casinos with liquor licenses that denied access to those

801 Email from Marc Linder to Joe Bolkcom and from Joe Bolkcom to Marc Linder (Mar. 12, 2008).
The Smokefree Air Act of 2008

under 21 on a regular basis and also the Iowa Veterans Home—to Senate amendment H-8054, but the debate was very compressed and perfunctory. Floor manager Staci Appel argued that the House amendment went against the bill’s intent and that in particular secondhand smoke, unlike Bailey’s amendment, did not discriminate on the basis of age. After about two minutes, Minority Leader Wieck announced that Republicans would caucus, and an hour later Democrats followed suit. When the Senate finally resumed session, Appel had nothing more to say; while a handful of other senators also spoke very briefly to no great effect. Deviating from their usual minority tactics, Republicans made no effort to drag out their inevitable defeat. On a record roll call vote the Senate then voted 27 to 23 to refuse to concur in the House amendment. Of the 30 Democrats, 25 voted against the House plan; joining them were only two of 20 Republicans, including Mary Lundby, the only minority member who would later voted for the bill on final passage. Conversely, five Democrats voted Yea; three of them (Black, Dotzler, and Hancock) would later vote against passage of H.F. 2212. The inter-chamber stalemate meant that a conference committee would have to be appointed to work out the differences between the two houses.

Following the Senate’s action, both chambers’ leaders were still confident, at least for public consumption, that they could achieve a compromise, but at the same time “they acknowledged that the disagreements could end in the proposal’s death.” Senate Majority Leader Gronstal felt comfortable predicting that his chamber “would not approve an overriding exemption for bars and restaurants,” but even he found it premature to venture a prediction as to the substance of the compromise to be reached. But he was, semi-jocularly, willing to imagine a compromise—between the original House bill, which covered 99 percent of workers and the Senate bill, which covered 100 percent—encompassing 99.5

805Senate Journal 2008, at 1:619 (Mar. 13). The other Republican was retired college economics teacher Dave Mulder; the other two Democrats were Wally Horn (who as majority leader in the early 1990s opposed restrictions on smoking in the Senate chamber) and veterinarian Joe Seng.
percent, which “would be kind of halfway.”

McCarthy, his House counterpart, also felt that a compromise (of indefinite content) was within reach: “‘It’s so close, so narrow but I still think it’s still possible to get a pretty good strong bill.”

Petersen, too, remained sufficiently sanguine that she would have accepted local control as a “fallback” “[o]nly if I absolutely had to. I think the way the bill is now either the House or the Senate version is way better than local control,” under which “maybe only a handful of cities would take action....”

Carrying considerably less authority was Representative Bailey’s opinion. Nevertheless, it was impossible to gainsay his success in having secured a House majority for his 21-and-over liquor-license-linked exemption, and so the Register found his prediction of H.F. 2212’s death newsworthy and extended his fame (and infamy) somewhat beyond his allotted 15 minutes: “‘Nothing is going to happen now. I really firmly believe that.’” Whether he also regretted its demise—as logically he must have since he had purported to offer the amendment as a way of salvaging rather than killing the bill—he did not say, but the Nay he cast on the bill’s final passage three weeks later suggested otherwise. Regardless of Bailey’s hopes, the University of Iowa Comprehensive Cancer Center, whose director had testified before the legislature earlier in the year that “[a] ban on tobacco use is the best for the people of Iowa,” used the perfectly timed release, the day after the Senate’s action, of its annual Cancer in Iowa Report “to express the hope that the Iowa Legislature can salvage a statewide tobacco ban, despite conflicts between House and Senate versions....”


The Conference Committee Achieves Even More Progress by Attaining Even Less Perfection

A state lawmaker who’s been pushing for a ban on smoking in public places...[.,] Tyler Olson, a Democrat from Cedar Rapids, is co-chair of a 10-member panel trying to find a compromise on the smoking issue, but Olson was gone at the end of last week to be with his wife as she gave birth to their son....

“Most babies, you know, come out crying and screaming. He came out screaming: ‘No smoking!’ Olson says. ‘...It was kind of interesting, but the doctors loved it.”

“Legislators have told me that this is the issue they have heard the most about from their constituents in the last 10 years.”

We’re not trying to decide what you can do by yourself when you’re not affecting anyone else.

In the days immediately after House and Senate majorities had revealed the Democratic leadership’s temporary inability to prevent the chambers from being at loggerheads, staunch House rank-and-file supporters of a rigorous statewide ban were seething. As one of their number put it: “We will have to have some serious conversations about next steps in our caucus. I am so mad at some of our members right now. It could be a pretty ugly caucus. If they try to kill this bill now, all hell will break loose. I heard that is Rant[s]’s goal, so all the more reason to go to conference committee and shove it down his throat.” In the event, opponents failed to kill the bill, but they also did not get everything stuffed down their throats that the militants wanted to send hurtling their way. The latter were, however, already weighing in with the House leadership on the conference committee’s composition: “If they appoint the wrong people all hell will break out.” The anti-smokers’ prediction that the Democratic members would probably be Olson, Petersen, and Wise both represented their preference and proved to
be two-thirds accurate. Whether their presence on the committee signaled a last-ditch radicalization and effort to engineer a majority after all for joining the Senate in covering casinos remained to be seen.

Several days before the House met on constituting the conference committee, House Majority Leader McCarthy had stated that leadership was “looking for lawmakers who have a history of cooperation rather than confrontation. ‘This is not a partisan issue…. It’s very passionate, but not partisan, so it’s about…picking the right mix of people.’” The consistently largely party-line voting record and Republicans’ often mendacious and vitriolic floor-debate rhetoric may have belied McCarthy’s account, but he signaled that he did not intend to use his power to select a committee that would stuff a compromise down the Republicans’ throats that lacked a floor majority: “McCarthy suggests there will have to be a true compromise rather than a ‘pure’ statewide ban on smoking in all public places. ‘It doesn’t do any good to come out with [a] perfect bill…if it gets 49 votes…. We’re going to strive to be practically perfect, but we might not be perfect in every way.’” In the event, the Republicans appointed to the committee remained partisan and uncooperative, but the Democrats—two of whom, Petersen and Olson, were themselves militants and wound up dominating the proceeding—did execute McCarthy’s compromise strategy, which manifestly weathered the militants’ storm.

The House met on March 19 for a few minutes but then stood at ease for caucuses for almost five hours before reconvening in the afternoon. Bill floor manager Olson then moved that the House insist on its version and asked for a Yes vote. No discussion ensued and the Ayes were declared as having it (there being no audible No votes). The Speaker, pursuant to the Joint Rules of the Senate and House, then announced the appointment of the House members of a conference committee to consider the differences between the House and Senate versions of H.F. 2212, consisting of Democrats Olson (chair), Petersen, and (Assistant Majority Leader) Mike Reasoner, and two Republican opponents, Cecil Dolecheck and Chuck Soderberg. The entire deliberation lasted but three minutes.

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818Live audiocast of debate on http://www.legis.state.ia.us (Mar. 19, 2008).
820Live audiocast of debate on http://www.legis.state.ia.us (Mar. 19, 2008); House Journal 2008, at 1:710 (Mar. 19). The Republicans, as Representative Mary Mascher explained the previous day, could have moved to recede from the House version; had they done so, Olson would have asked the Democratic caucus to vote No. But, from her
The Smokefree Air Act of 2008

Less than three hours after the House action the Senate followed suit, leadership appointing floor manager Appel chair, along with Democrats Bolkcom (a fervent anti-smoker) and Dotzler, and Republicans Minority Leader Wiecek and Zieman, who both rejected the whole basis of the bill. Although Dotzler opposed the bill and would eventually vote against it on final passage, leadership appointed him with the understanding that he would sign the conference report.

Tyler Olson, who identified the casino exemption, the 10-foot no-smoking zone around public places, and the Veterans Home in Marshalltown, as the chief sticking points for a compromise, optimistically predicted that more people wanted a bill rather than no new law in 2008. Gronstal’s hopefulness was more tempered: “I think there are two possibilities—we will come up with a good bill or we will walk away from it.” Although he was opting for the former approach, the challenge posed for the conference committee lay in the constantly shifting consensus on the smoking ban as each exemption picked up some votes and lost others. As a result, the Senate majority leader was compelled to calibrate his own chamber’s ability to pass a compromise before letting the committee vote on its final conclusion. As a fallback position, some began bruiting the option of having the conference committee return to a local control bill. In contrast, the press reported that legislators other than the Democratic leaders were much more skeptical on the grounds that “the differences are so great that it will be difficult to find a plan that both sides may agree upon.”

At its first meeting on March 20 the conference committee accomplished nothing but temporarily substituting Philip Wise for Olson, who had returned to

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p.s.: “This stinks, cause a lot of us hate the House version but of course we will support it to get it into the conference committee.” Email from Mary Mascher to Marc Linder (Mar. 18, 2008). The reason that the Republicans wound up not instigating that parliamentary ploy was that they “have bigger fish to fry today. They are much more concerned about H.F. 2645 [on public employee collective bargaining].” As to why the anti-smoking Democrats did not straightforwardly move to recede from the House version and, together with their strange bedfellow pro-tobacco Republicans, secure a majority, Mascher explained that: “[Y]es we could probably get the votes to do that. But we would then have to debate the senate version and the republicans would flip on that and defeat the senate version and the bill would be dead.” Email from Mary Mascher to Marc Linder (Mar. 19, 2008).

Cedar Rapids for his child’s birth.\textsuperscript{825} The considerable public interest that built up about the outcome was merely intensified by the committee’s failure to convene.

During the interim before the committee reconvened, momentum for enactment of the anti-smoking initiative was reinforced by the announcement by the Iowa Department of Revenue that during the first year’s operation of the higher cigarette tax (which went into effect on March 16, 2007)\textsuperscript{826} the number of cigarettes sold in Iowa had plummeted by 36 percent from five billion to 3.2 billion. Senator Herman Quirmbach admitted that several reasons may have underlain this decline, but insisted that “‘clearly the most important is the increase in the cigarette tax.’” Buoyed by the news, he encouraged his colleagues to “repeat the ‘triumphant success’” of the one dollar tax increase by passing a statewide smoking ban: “‘We have made more progress on this terrible public health problem in one year than in decades and decades and decades of work.’”\textsuperscript{827} Although a Register columnist (with a suspect animus against the tax increase and H.F. 2212)\textsuperscript{828} collected somewhat more than anecdotal evidence that significant numbers of Iowans were buying large volumes of cigarettes in Missouri (where the tax was only 17 cents) and illegally importing them back into Iowa,\textsuperscript{829} an academic expert estimated that the largest component (almost half) of the sales decline represented “real reductions in smoking by Iowans, followed by reductions in cross-border shopping by non-Iowans who used to buy in Iowa when taxes were lower...followed by the tax avoidance described in the [Register] article and other tax avoidance....”\textsuperscript{830}


\textsuperscript{826}See above ch. 34.


\textsuperscript{828}Telephone interview with John Carlson, Des Moines (Apr. 11, 2008).

\textsuperscript{829}John Carlson, “Indeed, Cigarette Sales Went South (to Missouri),” \textit{DMR}, Apr. 6, 2006, on http://www.desmoinesregister.com (visited Apr. 8, 2008). When asked why his agency was not attempting to intercept those cigarettes illegally imported into Iowa, the director of the Iowa Department of Revenue pointed to a small decline in annual cigarette sales in Missouri as “evidence that Iowa is probably not seeing many people go to Missouri to purchase cigarettes....” Email from Mark Schuling to Marc Linder (Apr. 10, 2008).

\textsuperscript{830}Email from Prof. Frank Chaloupka, U. Illinois at Chicago, to Marc Linder (Apr. 13, 2008). Chaloupka estimated that based on a 35 percent increase in cigarette prices and the usual elasticity estimates, sales would have dropped by about 14 percent. Email from Prof. Frank Chaloupka, U. Illinois at Chicago, to Marc Linder (Apr. 11, 2008).
On April 4, interviewed on the television program “Iowa Press,” Gronstal himself declined to predict the contours of the eventual compromise between the Senate and House, but did “think it’s clear that there will be probably some pull back from the original Senate position of essentially no exceptions. So, I think there will be some exceptions but certainly nowhere near what was in the second House version or the first House version.” Gronstal’s reluctance to speculate derived in part from the “interesting equation, one you don’t often see in the legislature. On the Senate side the more exceptions you have the fewer votes you get. On the House side the more restrictive it is the fewer votes you get. So, whichever direction the conference committee goes, more exceptions or less exceptions, they lose votes in one chamber or the other. So, it really is an interesting dynamic that I’ve not seen very often in the legislature. [T]his is one kind of for the record books. I’m not sure because you go one direction and one chamber has difficulty finding the votes, you go the other direction and the other chamber [sic].”

When asked whether local control was a possible fallback position, Gronstal finally offered an expansive public policy perspective:

I believe this issue has reached a tipping point. I think it has, in fact, passed the tipping point and I think if we don’t pass something this year next year we will come back and...pass something much tougher than anything we’re considering this year. I think the public mood on smoking has dramatically changed just in the last year. A year ago oh local control is fine, let’s let a few communities figure this out. And then after four or five years and what may be something statewide, between last year and this year it just moved dramatically and it’s time to stop smoking.

And on the morning of the day on which the conference committee met, Gronstal reinforced and extended these insights in a radio interview: “The amazing observation I have is that a year ago [there was a] very broad deep consensus: ‘Let’s do [a] local control effort.’” But during the intervening year the mood had changed “pretty dramatically” to: “‘Let’s not fool around with local control. Let’s not have a patchwork quilt of different rules and regulations around the state: Let’s do something statewide.’ I suspect in another year the mood will continue to be stronger and stronger against smoking.” In contrast, Rants was standing pat in opposition to a ban, but insisted that he would not ask

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When the conference committee finally convened on April 7 to deal with the inter-chamber “stalemate”\footnote{Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fihr) (term used by Sen. Joe Bolkcom).} and reached a compromise among the six Democrats (the four Republicans voting against the outcome),\footnote{On Democratic Senator Dotzler’s formal agreement despite his substantive disagreement, see below this ch.} neither the proceedings themselves nor the result was surprising. Although the meeting was open to the public, only legislators were permitted to speak, and press accounts were sparse.\footnote{Asked how the conference committee meeting had gone, committee member Senator Joe Bolkcom wasted no words but also shed no light: “It went well.” Email from Joe Bolkcom to Marc Linder (Apr. 8, 2008).} The description by Iowa Restaurant Association President Doni DeNucci may not have been that of an objective attendee, but, since her frustration over the result for her members did not prompt her to exempt her Republican paladins (or Senator Dotzler) from her criticism, her account, though not fully reflective of the proceeding’s nuances, did capture some of its desultory, if not chaotic, features: “The meeting lasted until around 7 pm, but that is deceiving because they didn’t start until 5:20 pm, and every five minutes either the house or the senate was voting so half the committee would get up and walk out. There was no agenda, no procedure outline, the co-chairs Sen. Appel and Rep. Olson did not seem to know how to proceed or what to do. Mostly the committee members spoke the same rhetoric for the media that that [sic] did on their respective chamber floors.”\footnote{Email from Doni DeNucci to Marc Linder (Apr. 9, 2008) (responding to a question emailed a few minutes earlier asking whether members had said anything interesting or surprising).}

Staci Appel, the bill’s Senate floor manager and committee chair, self-deprecatingly and truthfully admitted at the outset of the session—which ran from start to finish about 65 minutes minus several interruptions for floor votes—that “I’m not sure about the procedure.” This understatement of her level of ignorance of the rules governing the conduct of a conference committee meeting applied to several of her colleagues as well; only occasionally did the Republican opposition, vainly seeking to stop the majority steamroller, inject knowledge of the pertinent rules. After the meandering discussion had begun with Republican

\footnote{The Smokefree Air Act of 2008}
Soderberg’s programmatic but unexplicated and incoherent declaration that any exemptions had to be consistent across the board “so that we don’t put any person or any business at a disadvantage,” Republicans, led by Senate Minority Leader Ron Wieck, a State Farm insurance agent for 35 years, demanded to know whether there was any truth to rumors that the Democrats had been meeting informally “behind the scenes” for three weeks making decisions and—as Democratic Senator Dotzler, who believed his colleagues that there had been no “secret meetings” but had also heard the same rumors, put it—a “deal.” After Appel had gamely denied that there had been any “formal meetings or anything,” though she acknowledged that “informal discussions with all kinds of members” had taken place to see in what directions they wanted to go, and concluded that “concerns” having been adequately “aired,” the committee should proceed to “content,” House floor manager Tyler Olson offered some recommendations to “get the conversation started,” which Republicans doubtless imagined to be the very agreement worked out at the very meetings whose existence Appel had just denied. Olson’s list included: (1) “split[ting] the difference” on casinos by limiting the exemption to smoking on the gaming floor; (2) dropping the 10-foot rule, which the House version had contained but the Senate version had dropped; (3) keeping the Senate tractor exemption; (4) the status quo in prisons; (5) keeping the Senate’s clarified language concerning fair grounds; (6) moving back the bill’s effective date to December 31, 2008, as a way of addressing some concerns about the full casino exemption or the House restricted-age exemption; and (7) keeping the House exemption for the Veterans Home in Marshalltown. The Democratic leadership’s judgment of the bill’s prospects was presumably faithfully indicated by the fact that every one of Olson’s recommendations weakened rather than strengthened the Smokefree Air Act.

Olson argued that his proposed ban on smoking in casino bars and restaurants

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838 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fihr).


840 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fihr). Assistant Minority Leader Struyk later repeated the same complaint. Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).

841 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fihr). Dotzler later took credit for having eliminated the 10-foot rule in conference, while admitting that Petersen had rejected his other proposals on the grounds that there was “no satisfying” him. Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008). In contrast, the Smokefree Illinois Act, which had gone into effect in 2008, included a 15-foot non-smoking zone at entrances to and exits from buildings in which smoking was prohibited. 30 ILCS/sect. 70 (2008).
The Smokefree Air Act of 2008

would get rid of the issue of the competitive disadvantage stemming from a total casino exemption about which bar owners had complained. Soderberg indirectly attacked this conclusion by asking whether it assumed that alcohol would not also be served on the gambling floor, but Olson and Bolkcom sought to evade the criticism by stating that Olson’s proposal did not address that issue, which was outside the scope of the conference report.842 (In fact, as Democratic Representative Polly Bukta of Clinton later remarked of the new casino in her city, smoking took place in the bar that was built right on the gambling floor.)843 No one, however, raised the public health issue, which was not the export of alcohol from bars and restaurants to the gambling floor, but the “secondhand smoke wafting over from the casino”844 into the restaurants. In case anyone needed to be reminded that it was precisely the farcical designated smoking areas regime that had prompted mass demands for the Smokefree Air Act in the first place, a study in Nevada casinos operating under the arrangement proposed by Olson845 revealed that “‘the open air floor plan of casinos creates a shared air space, resulting in secondhand smoke migrating from the gaming floor into the restaurants’” such that “three-quarters of them contained air pollution levels exceeding the...EPA’s recommendation for indoor air quality....”846

As asked by Petersen, the bill’s chief sponsor, about the rationale for changing the enactment date—which had apparently not been discussed previously847—Olson mentioned the lead time for the transition in order to deal with the negative economic impact about which bar owners had complained.

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842 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).
843 Telephone interview with Polly Bukta, Clinton, June 2, 2009).
847 Whitney Woodward, “Democrats: No Plan to Delay Smoking Ban Enactment Date,” WC, Apr. 12, 2008, on http://www.wcfcourier.com (visited July 23, 2008). Olson’s support for this proposal was surprising in light of Senator McCoy’s revelation of the tobacco lobby’s “secret plan” to delay enforcement until January 2009 so that it could get a second shot at amending the law to fight for exemptions for 21-and-over clubs. Not only was there, McCoy (correctly and incorrectly) predicted, no chance that such an amendment would succeed, but the legislature would repeal the casino exemption. Telephone interview with Matt McCoy, Des Moines (May 8, 2008).
With barely suppressed sarcasm Wieck asked for some help in understanding what an owner would use this time for—perhaps finding a new business plan, product, or consumer? After underscoring that the bill’s purpose was to protect workers from being “assaulted” by carcinogenic secondhand smoke, Bolkmann unresponsively admitted that bar owners had “legitimate concerns” (without identifying them) and asserted, again without explanation, that whereas a six-month delay was acceptable, one or two years was not. At this point Petersen—who, interestingly, later referred to herself and her allies on the one hand and opponents on the other as occupying “extremes”—remarked that she would hate to see the effective date pushed back beyond July 1, but, ironically, urged the committee, if it decided that it wanted a “longer stretch,” not to set it on New Year’s Eve, because, although she had never smoked, she assumed “people are probably going to puff away that night before the next day when their New Year’s resolution kicks in.”

Republican representative, farmer, and smoker Cecil Dolecheck then elaborated a justification for his preference for committee adoption of the House’s exemption for establishments denying admission to anyone under 21. Dolecheck praised the provision “get[ting] us to the same place where the State of Iowa becomes nonsmoking, but we bring private enterprise along with us so we don’t disenfranchise them and make them angry at us as legislators...for forcing them to do something.” The amendment prevented restaurant owners from feeling “oppressed” or being forced out of business by prompting them to declare their businesses no-smoking because they would not kick out families and children, but they would be able to make the decision as to what was best for them. To be sure, Dolecheck failed to explain how or why an owner would feel less angry because he had made the key entrepreneurial decision when Dolecheck himself conceded that—given the alleged profit-maximizing constraints—the proprietor was “not really going to have a choice.” Rather than engage Dolecheck’s self-contradictory argument, Olson attacked its empirical

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849 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr, communications director, House Speaker Pat Murphy).
underpinning by insisting that exempting over-21 establishments would not get Iowa to the same point.\textsuperscript{850}

As Soderberg and Olson were thrashing out the interpretive details of the exemption of fairgrounds, almost half an hour into the meeting, Petersen finally bestowed procedural enlightenment on the committee by reading Joint Rule 13.3: “The authority of the first conference committee shall cover only issues related to provisions of the bill and amendments to the bill which were adopted by either the senate or the house of representatives and on which the senate and house of representatives differed.” Applying the rule, she then concluded that because the House had accepted the Senate amendment on fairgrounds, it was not a point on which the chambers differed. More generally, she pointed out that there were not many points on which they did differ. Apparently reluctant to rely on the collective reading comprehension of the committee—whose members included three assistant majority leaders, a minority whip, and a minority leader, and had served in the legislature for a total of 70 years—Bolkcom asked Patty Funaro, the long-time Legislative Services Agency bill drafter, one of whose subject areas was tobacco and who was attending the entire conference committee meeting anyway—\textsuperscript{851}—to clarify the situation. \textsuperscript{852} After Funaro had confirmed that Petersen’s interpretation was correct, Petersen proceeded to enumerate the provisions on which the two chambers had differed as well as those that the committee had discussed even though the houses agreed on them: they differed only on casinos and the Veterans Home; they did not differ on the 10-foot rule, tractors, prisons, or fairgrounds. In addition, Petersen called the bill’s effective date a “gray area,” apparently because the House had debated and voted down a different date, but this interpretation was surely incorrect. No sooner had Petersen narrowed the debatable provisions to casinos and the Veterans Home than Olson expressed a desire to discuss the effective date because “it relates to the differences” without offering any justification as to how such a basis fit within Joint Rule 13.3. Clearly within that rule was, as Dolecheck quickly pointed out, the House provision on age-restricted establishments, which was such a huge, dysfunctional, and spectacularly well-known exemption that the failure by Petersen—no one less than the bill’s \textit{spiritus rector}—to mention it (together with her momentary misrecollection that the House had agreed with the Senate on the exemption for

\textsuperscript{850}Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fihr).

\textsuperscript{851}Telephone interview with Patty Funaro, Des Moines (July 21, 2008).

\textsuperscript{852}It is not unusual for legislators to call on bill drafters, who have to know the rules as well as legislators, for such assistance. Email from former House Speaker Don Avenson to Marc Linder (July 23, 2008).
Second legislative session, 80th General Assembly, 2007

The Smokefree Air Act of 2008

...underscored the slapdash if not chaotic procedure. Ironically, this disorganization may have constituted the strongest refutation of Republicans’ accusations that Democrats had finalized the outcome in secret ex parte meetings.

The discussable issues having apparently been sorted out, Olson once again proposed splitting the casino exemption “down the middle.” (Olson in fact exaggerated: as the Iowa Racing and Gaming Commission later pointed out, “some casinos have a central bar in the middle of the gaming floor, and...those would allow smoking since they don’t have any ceilings or walls around them.” Unenclosed restaurants on the gaming floor would also be exempt.) Seeing the endgame looming because he was deprived by arithmetic of any possibility of thwarting the majority party’s will, Wieck sought to delay the inevitable by raising the eminently reasonable procedural concern with reliance on individual members’ personal memories of how the two chambers’ versions differed and proposing that the committee staff compare the two and compile a list of the issues on which they clearly differed. Petersen’s response that, since their staffs had already pulled that information together for anyone who had requested it, there was no reason to delay the discussion, could, in light of Democrats’ palpable confusion as to how the two versions of the bill differed, have been interpreted as a subtle critique of staff’s incompetence, but presumably she did not so mean it and Wieck failed to comment on the unintended irony. Instead, Olson made a formal motion to exempt the gaming floor and the Veterans Home as well as to delay the enactment date to January 1, 2009. Dolecheck opposed it as inequitable, while Zieman specified that as far as many bars in rural Iowa were concerned that would be put out of business the proposal amounted to “hang me slow or hang me fast.” Then Dotzler killed any hope that Republicans cherished that he would turn on his caucus leadership. While agreeing with the minority party that the bill was flawed—he had voted for the House bill and favored the over-21 exemption, but accepted the committee’s proposed compromises—he also recognized “why I’m on this committee”: because over two-thirds of Senate Democrats preferred a stronger bill than he did, “I made a commitment to the majority leader that I wouldn’t be an obstructionist on this committee... And if I voted with the opposition I could stop the work that you’re doing right now.

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853 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).
854 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).
And it’s not my intent to do that.” Instead, he would vote against the conference committee report on the Senate floor. Among the few additional exemptions that he believed were still needed was one for construction workers operating cranes in a cab a hundred feet high who took their lunch and even a “urinal bottle” up there. Dotzler was already looking forward to a second conference committee, which would be free to visit this issue and all others. Sensing an opportunity, Dolecheck gave voice to Republicans’ pipe dream that Dotzler would vote against the report, which would then be rejected, opening the way for the same members to be reappointed to a second conference committee, which would then thresh out all the issues.856

For Wieck, apparently dead-set on restoring a kind of pristine ruthless rugged individualism unknown even to the nineteenth century, “[t]his is all about people’s rights....” The rights-holders whom the Republican Senate minority leader had in mind were, in the first instance, business owners and, secondly, consumers, who should have the right to decide “what door they want to walk through and what environment that [sic] they want to frequent.”857 Workers and their rights Wieck did not even bother mentioning. He may, however, have been opaquely and dismissively alluding to workers’ right not to be sickened and killed by secondhand smoke at work when he expressed his disappointment that “this is the beginning of many many rights that the nanny government will push down the throats of the people of Iowa and the businesspeople in Iowa.” Wieck’s and Republicans’ incoherence was on display in his further plaint that business owners “pay their taxes to the state of Iowa, they follow the laws, they do what society asks them to do and I think they ought to have the right to be able to decide what goes on, as long as it’s legal, inside the walls of their business.”858 Most restaurant owners presumably follow the law by washing plates and utensils in between uses by different customers rather than offering a filthy environment in which generations of customers would drink from disgustingly unhygienic unwashed glasses coated with their predecessors’ saliva. If owners

856 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr). Dolecheck’s fantasy was doubly unrealistic: if Dotzler had breached his commitment to the majority leader, Gronstal would not have reappointed him to a second committee.

857 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).

accept society’s mandates in this area of public health, why did Wieck suddenly perceive the collapse of the republican form of government in applying the same principle to the far greater health hazard emanating from toxic and carcinogenic cigarette smoke?

After reasonably raising the procedural issue of whether the change in the enactment date was properly included in the motion since the chambers had not differed on the matter, Soderberg returned to the wholly fabricated issue that Republicans never tired of flogging—that it was apparently not as important to protect the health of casino workers. For the first and last time during all the legislative debates a Democrat finally confronted this lie directly instead of dancing around it with cliches about “progress over perfection.” On at least this one occasion, Petersen, who had not taken part in the House floor debates, heatedly told Soderberg, “I take offense to your comments,” and recounted that when the bill had come to the Commerce Committee, “I didn’t want to exempt casinos,” but the exemption originated in the necessity of finding the votes to get the bill out of committee. She then hurled the hypocrisy accusation back at Republicans by reminding them that: “I’ve brought this bill forth for the past eight years and under your party’s leadership not once did the bill get out of a committee or a committee chairman’s desk drawer.” Petersen went on to reveal that after the Senate had removed the casino exemption, she went back and listened to the tape of the House debate in order to identify those who had stated that they wanted a “completely clean bill” and to determine whether the bill’s proponents could get 51 votes if casinos were covered: “I went back to people in your party that said that they would vote for the bill if it was a completely clean bill” and asked them whether they would vote for the bill if the casino exemption were struck: “I do not have one person say they would vote for the bill.”

No Republican having come forward to undertake the fruitless mission of trying to refute Petersen’s charge of hypocrisy, Dolecheck then asked for a “ruling” from Funaro as to whether they could include a different enactment date in the motion than that to which the Senate and House had already agreed. Olson began to argue that while they could ask for unanimous consent to consult, Funaro could not “bind the committee,” when Dolecheck drew out the consequences of proposing a new enactment date: “If we’re gonna follow the rules like we talked about doing,” then the committee needed a ruling on whether it was permissible to change a provision on which the two houses did not differ, and “if we’re gonna start allowing other things that weren’t in either one of the bills, then let’s open it up.” This prospect was apparently too unsettling for

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859Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).
Assistant Minority Leader Reasoner, who, finally speaking up, moved to strike the effective date from Olson’s motion.\textsuperscript{860} Seeing that his initiative—which Rants later denounced as a hypocritical move to keep bar owners and customers from being angry on election day\textsuperscript{861}—had outlived its welcome, Olson stated that he was amenable to that motion, which then carried on a voice vote.\textsuperscript{862}

After Olson had moved his now truncated motion, he responded to Soderberg’s (rhetorical) question as to why the exemption covered the casino floor only and whether it was designed to protect state revenue with yet another recitation of the unspecific image of “progress over perfection.” Soderberg’s expression of disappointment that the bill was concerned only with the state’s—to the exclusion of private businesses’—revenues and Wieck’s demand for an answer to Soderberg’s question prompted a frustrated Bolkcom to mix his idioms: “We’re trying to split hairs between what we think can get 26 votes in the Senate and 51 votes in the House.” Wieck, suffering from the double debility of never having articulated a reasoned counter-position and of lacking the votes to prevail, manifestly unchastened by the history lesson that Petersen had tried to teach the Republicans, and suddenly discovering his heart for the Iowa proletariat, retreated to an amended version of his party’s tired, tiresome, hypocritical, and mendacious mantra: “So the workers that are working on the casino floor don’t count.” Summoning up his last reserves of patience (“Senator Wieck, I think we’re going in circles”), Bolkcom tried one last time to talk sense to nonsense: not only did he think that those workers counted, but in 2009 some of the anti-smoking advocates in the room would return together with casino floor workers to “get after us to finish our work on this issue.” Bolkcom also sarcastically expressed surprise that he had not heard Wieck, who had been talking about owners and consumers, “say a word about workers until now.” Continuing in the same ironic vein after Wieck had repeated his mendacious claim that the majority party had all of a sudden decided that it was important to protect all workers in Iowa except those in casinos, Bolkcom assured Wieck that “[o]ur work is not done until we provide protections like you want to for those workers.”\textsuperscript{863}

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\item[860] Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).
\item[862] Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).
\item[863] Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr). Wieck’s later admission that, given Republicans’ emphasis on individual rights (of business owners to determine whether to allow smoking and of smokers to
The Smokefree Air Act of 2008

Wieck and his fellow Republicans having exhausted their meager repertoire of vacuous obstructionist rhetoric, both the Senate and House members of the committee voted 3 to 2 in favor of Olson’s amendment.864

In the immediate aftermath of the committee’s action, Gronstal appeared to turn somewhat less optimistic. Declaring that a majority vote “‘is not guaranteed,’” he added that the Senate would not vote on the compromise until he believed that he had the needed majority.865 On the morning of the floor vote, his House counterpart, McCarthy, stated that since support for the bill was only “tepid,” the compromise “could yet die.... ‘It’s going to be very, very close. I don’t know if we’re going to have the votes or not.’” Since H.F. 2212 did not have the requisite 51 votes within his 53-member caucus, passage hinged on Republican support. If those Republican votes were not forthcoming and the House did not adopt the report, McCarthy noted, the legislature would reappoint a committee in order to try to reach agreement.866

Although apparently not requesting specific freedom to offer toxins in the atmosphere beyond the many already generated by the cigarette smoke they demanded the continued right to force their nonsmoking customers to breathe, business groups declared that they would urge their membership to lobby against the compromise. In particular, restaurant owners were already nostalgic for the short-lived House provision that would have allowed smoking in places that prohibited admission to those under 21. In a reaction bordering on chutzpah, the casino industry, whose unique exemption had caused such an uproar among rival industries, was allegedly “only slightly more pleased” than the restaurant owners.867 Casino owners’ “mixed emotions” resulted, on the one hand, from

864 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).


866 Jason Clayworth, “House Leader: Smoking Compromise Could Fail,” DMR, Apr. 8, 2008, on http://www.desmoinesregister.com. If a conference committee failed to reach agreement, its members were required to be discharged immediately and a new one had to be appointed. Joint Rules of the Senate and House 13.7 (Sen. Concurrent Res. 3, 2008). A second committee’s authority “shall cover free conference during which the committee has authority to propose amendments to any portion of the bill” so long as they were within the bill’s subject matter. Id. Rule 13.8.

867 James Lynch, “Legislators Agree on Limited Smoking Ban,” Gazette (Cedar
The Smokefree Air Act of 2008

their discontent with having been deprived of total control over where they would permit smoking, and, on the other, from gratification that smoking would continue to be permitted on the gambling floor, which was “the most critical portion.”

Whereas bar owners complained that the bill conferred a competitively intolerable advantage on casinos, the latter, in turn, purported to prefer the over 21 age restriction or a provision making smoking rules a business decision instead of a mandate.

On the morning of April 8, before the House or Senate brought up the conference committee report, Brian Froehlich, owner of a bar in the small eastern Iowa town of Wilton and spokesperson of the newly formed Iowa Bar Owners Coalition, sent all the state legislators (and cc’d Doni DeNucci of the IRA) a brief email expressing his disgust with and outrage over the conference committee meeting, which he had attended. While in the statehouse to lobby against bar coverage, he availed himself of press coverage to boast that he would not enforce the ban in his bar: “My people—I take care of my people,” 70 percent of whom smoked. Froehlich also proposed to his own members that they file a suit charging discrimination vis-a-vis exempt casinos. With the “state...already hurting for money,” he envisioned an action for damages as bringing the state government to its financial knees. The bathetic plaint was rooted in a child-like understanding of law: whereas Froehlich saw fit to run his life by the state flag motto (“Our liberties we prize and our rights we will maintain”), he sarcastically wondered whether his addressees’ flag said: “Your rights are controlled by us and your liberties mean nothing so get over it.” Although he purported to “have been in this fight since the beginning,” Froehlich had manifestly given little thought to the impossibility of societal life without regulation and to the attendant loss of the liberty to drive a couple of thousand pounds of metal through a red light at 120 miles an hour or to serve beer in unwashed glasses in order to avoid profit-reducing costs. The rights and liberties that he had in mind presumably reduced to the one point that he claimed the conference committee was supposed to


Email from Brian F[roehlich] to Ray Zirkelbach et al., Apr. 8, 2008 (forwarded from Mary Mascher to Marc Linder, Apr. 8, 2008).

The Smokefree Air Act of 2008
decline—“the future of smoking in Iowa....” To be sure, the conference committee’s charge did not even remotely extend to the question of universal prohibition, but Froehlich, though neither a meteorologist nor any other kind of scientist, may nevertheless have intuited which way the public health winds were blowing and that such a generalized ban would inevitably be propelled onto the agenda by passage of H.F. 2212 regardless of whether casinos were temporarily exempted.

The House Narrowly Approves the Conference Committee Compromise

This is the strongest bill that can pass the House. ... This is it.

Under the Senate and House Joint Rules, a conference committee “report of agreement is debateable, but cannot be amended.” Consequently, any and all amendments recommended by a bill were automatically adopted by a chamber in adopting a report. Once a chamber adopted a report, “there shall be no more debate, and the bill shall immediately be placed on its final passage.”

Following a prayer and the pledge of allegiance, House proceedings on April 8 opened propitiously with the filing by Democrat Marcella Frevert of a petition by 66 of her constituents in northwestern Iowa favoring H.F. 2212. Toward noon, with Speaker Murphy in the chair, the House took up consideration of the conference committee report, which surprisingly—given the bill’s monumentality and contentiousness—lasted little more than 20 minutes. Given his own disingenuous refusal to disclose the open secret as to why some members of his caucus were insisting on an exemption for casinos and failure even to inform the House accurately about the scope of the coverage of farms and the grounds of public buildings, Tyler Olson, chair of the House committee delegation, seemed to lack standing to dish out such praise, but he nevertheless celebrated the “transparent” process that had brought about this historic piece of legislation. As

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872 Email from Brian Froehlich to Ray Zirkelbach et al., Apr. 8, 2008 (forwarded from Mary Mascher to Marc Linder, Apr. 8, 2008).
The Smokefree Air Act of 2008

far as the committee’s compromise was concerned, he pointed out that it had dealt to some extent with bar owners’ concerns by eliminating the 10-foot no-smoking buffer zone outside covered public places. (Olson did not make it clear that this concession to bar owners would not only perpetuate the gauntlets of secondhand smoke that nonsmokers had been forced to run to enter buildings since indoor smoking bans had prompted smokers to stand right next to entrances smoking, but, would, since the House Commerce Committee had struck the grant of local control, also prevent local communities from passing ordinances to prohibit such smoking in privately owned outdoor areas.) The committee had also relieved bar owners of the perceived competitive disadvantage by banning smoking in casino bars. Overall, Olson declared, the bill covered 99.9 percent of public places and 99.9 percent of workers in Iowa.876

The two House Republicans who had refused to sign the committee report outlined their objections. Dolecheck urged rejection on the grounds that the bill as embodied in the report could be very detrimental to small bars and restaurants in rural Iowa. By his lights, bar owners should have the right to determine what clientele they wanted—keeping in mind that some of his constituents had told him that 75 to 80 percent of their clientele smoked, although they did not like the smoking—and to post the bar accordingly. He was especially partial to the legal age-restricted approach that the Senate had rejected. Soderberg argued that, on account of the exemptions, the legislature was not even protecting Iowans’ health. Nor was he having any of Olson’s claim that the ban on smoking in casino bars eliminated bar owners’ competitive disadvantage: since drinking alcohol and eating would still be lawful on the gambling floor, the bill de facto exempted casino bars and restaurants.877

McKinley Bailey, who had been one of the most prominent Democratic defectors to the pro-tobacco forces, complained that the report provided an exemption for casinos owned by out-of-state corporations, but not for mom-and-pop Iowa bars. Philip Wise, a former smoker both of whose parents’ lives had

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been shortened by tobacco, predicted that the 2008 session would be defined more by H.F. 2212—which he called one of the most significant public health measures in the state’s history—than any other. He admonished his fence-sitting colleagues who allegedly could not abide less than a perfect exemptionless bill that the choice at this point was between protecting the health of the overwhelming majority of Iowans and doing nothing (which latter was precisely what these legislators apparently wanted). The “real philosophical problem with paying homage to casinos,” underscored by Republican Mike May, who deemed the bill much better than the one that the House had originally sent to the Senate, was only exacerbated after Olson had conceded that smoking would be permitted in a casino bar or restaurant if gambling machines were present in it. In his closing remarks Olson introduced the new and interesting argument that such high-profile Iowa employers as Principal Financial Group and Rockwell Collins were pushing for passage of H.F. 2212 because of its importance for their efforts to recruit workers to and retain them in Iowa.878

Because a less threatening “non-record roll call was requested”879—both parties favored an unrecorded vote because they feared that recording might prompt a few members to vote against the leadership’s position880—the party composition of the 52 to 48 vote is not known.881 Much attention was paid not only to the closeness and highly unusual uncertainty of the vote on the conference committee report, but also the means by which the 51st vote was obtained. As the Aye votes became stalled at 50 on the large vote board, but the voting machine remained open, Majority Leader McCarthy patrolled his caucus’s seats looking for a prospective convert.882 This procedure prompted Rants to wonder: “I’m just curious what the going rate is for a legislator today.” McCarthy finally lighted upon Paul Bell, a former 31-year policeman and president of the statewide Drug Awareness and Resistance Education (DARE) association. McCarthy later stated that he had simply asked Bell to vote for the report: “I patted Bell’s back

880Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).
882Petersen, the bill’s chief sponsor, confirmed both that McCarthy had had to walk around the chamber persuading a couple of members to vote for it and that the outcome had been unclear until the vote went up on the board. Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008). Republican Lance Horbach, who opposed the bill, stated that the voting machine had stayed open for 15 or 20 minutes while McCarthy was looking for the 51st vote. Telephone interview with Lance Horbach, Tama (Aug. 17, 2008).
and said: ‘Could you put up your yes vote?’ Calling this account only half right, Bell himself later insisted that although he did change his vote from No to Yes, he had already decided to do so before McCarthy spoke to him. The casino exemption, which he regarded as unfair to small bar owners, had caused him to struggle with his vote until his daughter, who was also his clerk, persuaded him that “you have to start somewhere”; he had already concluded that in this matter something was better than nothing by the time McCarthy came by and merely asked him whether he was comfortable with his No vote. Bell agreed that this vote had been one of the rare ones on which leadership had not known in advance what the outcome would be. McCarthy’s administrative assistant and legal counsel, Brian Meyer, without mentioning any possible quid pro quo, admitted that the majority leader had had to ask for a favor to secure the deciding vote.

For good measure McCarthy also secured a 52nd vote in the person of Kurt Swaim, a lawyer and Judiciary Committee chair representing a rural district in southern Iowa along the Missouri border. Swaim, who had voted against H.F. 2212 in February and March because he preferred local control despite knowing that some local governments might not adopt anti-smoking ordinances and that it might be a long time before a large number of local governments got around to passing them, changed his vote at the literal last minute when it became apparent both that the choice was between this bill and no bill and that passage depended on his vote in particular. The reason that this constellation of events became apparent to him was, to be sure, that “leadership” alighted on him when it went around scaring up that last vote. The reward that he earned for his efforts was a sign posted at a bar in his small town thanking “Kurt Swaim and his communist friends” for the ban.

Just a few minutes after McCarthy had succeeded in coralling the deciding vote(s), Representative Mary Mascher observed: “A little tense getting to the 51 but we did it.” Looking back, May characterized the “really close” vote as one

884Telephone interview with Paul Bell, Newton (Aug. 1, 2008).
885Telephone interview with Brian Meyer, Des Moines (May 12, 2008).
886Telephone interview with Kurt Swaim, Bloomfield (Sept. 4, 2008). Swaim insisted that leadership had used the same kinds of substantive arguments made during floor debate, rather than promises or disciplinary threats, to persuade him to vote Aye.
887Email from Mary Mascher to Marc Linder (Apr. 8, 2008). Republican Assistant Minority Leader Struyk agreed that suspense had attended the outcome because the votes of two or three fence-sitters in both parties had been in doubt who had been vacillating for weeks. Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).
example of the “consternation” that it might not pass after all. 888

Once a majority, albeit a narrow one, for the conference committee compromise had been established, the vote on final passage of H.F. 2212 attracted two more representatives. The 54 to 45 vote 889—Republican Linda Upmeyer, the lone member not voting, stated afterward that she had intended to vote No, “but had problems with her voting machine” 890—approximated the Democrats’ 53 to 47 control of the House, but only by coincidence. Without the nine Republican cross-overs 891 to compensate for the eight Democratic defectors, 892 the bill, as McCarthy had correctly predicted earlier that morning, would not have passed. In the event, 45 (or 83 percent) of 53 Democrats voted for H.F. 2212, while 37 (or 80 percent) of 46 (voting) Republicans voted against it. Thus, while the vote was far from party-line, the Republican party’s traditionally overwhelmingly pro-tobacco and pro-smoking orientation was as unmistakable as Democrats’ antistance. Ominously for any efforts to strengthen (or, for that matter, to resist repealing parts of) the Smoke-Free Air Act during the 2009-2010 session, however, whereas all eight Democratic opponents were re-elected in November 2008, four of the nine Republican supporters retired and one was defeated. 893

In a post-mortem on “Iowa Press” a few days after the governor had signed H.F. 2212 into law, McCarthy and Rants presented diametrically opposed political prognoses. Whereas Rants spoke his lines from the antediluvian cigarette company playbook that pretended that smoking was a normal activity deserving of societal protection and respect, denial of which would cost Democrats votes among the middle and working class, McCarthy, with considerable passion, stressed that Iowa was entering the new public health and cultural world that much of the United States (and de facto if not de jure Iowa itself) had already created. Hypocritically perpetuating the exposure to secondhand smoke of all workers, customers, and visitors in all other venues, Rants pretended that Republicans would have been willing to override the business decisions of thousands of small restaurant owners:

888 Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008).
891 Anderson, Baudler, Clute, Jacobs, May, Rayhons, Schickel, Tomenga, and Wiencek.
892 Bailey, Huser, Lykam, Mertz, Quirk, Schueller, Thomas, and Wenthe.
893 Clute, Jacobs, Schickel, and Tomenga were not candidates, while Wiencek lost her race.
I think they [Democrats] overplayed their hand. I think most Iowans, in fact, if you were to put up a bill that said we’re going to ban smoking from restaurants, going to your Applebee’s or TGI Friday’s or whatever, that bill probably would have gotten 90 votes in the House, maybe 95 votes in the House but they overplayed their hand. I get an e-mail every week from a Vietnam veteran who, as he says, he [sic] paid for his membership at the VFW in blood and he can’t go in there and smoke any more. We have gone too far. We tell private business owners you can’t smoke in your own office in your building even if you are the only employee. I’ve got a UAW worker, lifelong democrat who has now become a republican over this issue, wants to run for the general assembly. I think it’s symptomatic of where the democrats have lost touch with frankly middle class Iowans and blue collar Iowans, not just in terms of sort of their tax and spending issues but this is part of their larger social agenda, they just got carried away. And I think frankly that’s going to cause them some problems at the ballot box.\footnote{Iowa Press, No. 3533, on http://www.iptv.org/iowapress/transcript_detail.cfm?ipShowNum=3533 (Apr. 18, 2008) (visited July 11, 2008).}

In contrast, McCarthy argued that the his party had caught the wave of the future:

Every single survey that I’ve seen both our internals and those public surveys that have been put in the news show that it is [sic] overwhelmingly popular movement to smoke free places. I have a right as a citizen of this state not to have smoke and cancer causing chemicals including arsenic put in my body. And this has been a cultural shift. And I’ve said this before but I remember visiting the Capitol for a tour as a child and it was culturally acceptable that everyone could smoke in the House, in the Senate, in the Capitol rotunda and I couldn't see the dome when I looked up there. And I remember that. I remember visiting my mother at a hospital where she worked and everyone in the waiting area smoked, the nurses smoked, the doctors smoked and it was acceptable. That has changed. And we have moved to where the majority of states are moving, to smoke free places, not a perfect bill but it was designed to get the votes for passage but we used various conferences we attend with our colleagues from other states. Those states have enacted legislation similar to this, it becomes more and more popular and then people wonder why did we ever wait to do this.\footnote{Iowa Press, No. 3533, on http://www.iptv.org/iowapress/transcript_detail.cfm?ipShowNum=3533 (Apr. 18, 2008) (visited July 11, 2008).}

Rants concluded with the mendacious mantra that his party had been chanting for the previous ten weeks: “Why is it okay to smoke in a casino? ... That is the hypocritical nature of this bill in that we have decided to protect people, that you can’t smoke in a bar but we’re going to let you smoke in a casino. Nobody can explain that one to me.”\footnote{Iowa Press, No. 3533, on http://www.iptv.org/iowapress/transcript_detail.cfm?ipShowNum=3533 (Apr. 18, 2008) (visited July 11, 2008).}
The Smokefree Air Act of 2008

was that there was nothing to explain because pro-smoking Republicans had fabricated the entire hypocrisy myth: (most) anti-smoking Democrats detested the casino exemption, acquiesced in it only out of expedience in order to garner enough votes to pass some bill, and had repeatedly announced that they intended to try repeal the exemption the following year. Asked about the accuracy of Republicans’ constant attacks on Democrats’ alleged hypocrisy, when they were fully aware that the militants were forced to acquiesce in the casino exemption as the price for passing any bill, at least one Republican, Assistant Minority Leader Doug Struyk, surprisingly acknowledged the cynicism underlying these baseless charges: “This is politics...and a lot of angles are played.” In contrast, the pro-tobacco Republican leadership had for years prevented the passage of any anti-smoking bill and voted against it at every turn in 2008, while hypocritically charging Democrats with hypocrisy.

The Senate Narrowly Approves the Conference Committee Compromise

“It’s like a tsunami,” Craig Walter, who represents the Iowa Restaurant Association, observed as the Senate took up the bill. “It hits you and you’re part of it.”

Was 26-24 as close as it looked or was it always clear you’d get 26? If not, what did you have to do to get those last votes?

It was extremely close. We just hoped that a couple of people would at the end of the debate see the value of the bill.

The Senate had its anti-smoking “purists,” but, according to Jack Hatch, after he had reminded his Democratic colleagues in caucus that “we can lose it,” the
The Smokefree Air Act of 2008

party coalesced. As the vote on the conference report and final passage demonstrated, not all caucus members held together, but those who defected were definitely not “purists.” Rep. Pam Jochum asked Rants “point blank” whether the rumor was true: “He said ‘no’ and that he’s had no conversations with any of their lobbyists or officials. If nothing else, he knows the rumor is out there.” Email from Pam Jochum to Marc Linder (Apr. 9, 2008).

When consideration resumed, a succession of largely Republican opponents rose to lambaste the bill with a series of narrow-gauge arguments that evaded the realities of public health. For Zieman the issue was the personal rights of and fairness toward owners and smokers. He was willing to concede that the public has a right to clean air, “but we also have the right to walk away from it”—the key was taking “personal responsibility.” To launch his incoherent fantasy world of atomistic monads, Zieman proclaimed: “Okay, this state is a smoke-free state, but every business owner could declare that they’re not a smoke-free environment and post it...and then hoping that everybody learned enough in school to be able to read what the message is on the entrance of the building. That gives you the right to decide whether you want to go in or out of the building....” Zieman’s utopia may not have been smoke-free, but, by and large, it would merely have perpetuated the reality of secondhand

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900 Telephone interview with Jack Hatch, Des Moines (May, 19, 2008). As the vote on the conference report and final passage demonstrated, not all caucus members held together, but those who defected were definitely not “purists.”

901 Rep. Pam Jochum asked Rants “point blank” whether the rumor was true: “He said ‘no’ and that he’s had no conversations with any of their lobbyists or officials. If nothing else, he knows the rumor is out there.” Email from Pam Jochum to Marc Linder (Apr. 9, 2008).

902 Senate Journal 2008, at 1:999 (Apr. 8); Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin, communications director, Iowa Senate Democratic Research Staff). Later Wieck stated that no suspense attended the outcome of the debate regardless of how close the vote. Telephone interview with Ron Wieck, Sioux City (Aug. 10, 2008).

903 Presumably Zieman meant that people have the right to walk away from unclean air and go somewhere to breathe clean air; however, it is possible that he meant that people have the right to expose themselves to secondhand smoke and risk illness and disease. Although Zieman’s oratorical style was even sloppier than that of most of his colleagues, in this particular case both interpretations probably reduce to the same point.

904 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
The Smokefree Air Act of 2008

smoke exposure in Iowa under the 30-year reign of the feckless clean indoor air law.

Following Zieman’s comedic opening, a Democratic opponent of the bill managed to insert himself into the queue of Republican denouncers. As a Mormon—who even cited his religion’s Word of Wisdom and its prohibition of smoking and drinking—and a natural resources analyst with a master’s degree in natural resources economics who billed himself as an “advocate for Iowa’s environment,” Dennis Black appeared to be an improbable candidate for ally of the pro-tobacco forces. The 26-year legislative veteran himself noted that since he really did not like smoking, and since a casino, which, under the conference committee compromise, would be privileged to permit its customers to smoke while gambling, was located in his district, he might have been expected to support H.F. 2212, but in fact he was leaning towards voting against it. The attempted grounding of his incongruous decision in moral philosophy was hardly surprising in light of his opening remark that he thought that the day’s conversation would be “even more philosophical” and already reminded him of the “tone” and “quiet” of the chamber’s death penalty debate. Convinced that “[g]ood debate can change minds,” he made his contribution by explaining that the aforementioned Mormon injunction against smoking was “never an issue with me as it relates to other people because people do what they do because they have free agency.” Presumably Black did not bring the same radical laissez-faire approach to bear on his efforts to “clean up Iowa’s air and water”: it seems implausible that he would have acquiesced in free agency run wild vis-à-vis those wishing to defecate in a city’s water supply or burn toxic chemicals downtown. Why he was willing to make an exception for the generation at close indoor quarters of the toxic and carcinogenic garbage products of highly profitable tobacco commodities he did not explain. Instead, he posed several questions to Appel concerning the applicability of the ban to certain locations not expressly mentioned in H.F. 2212. In response to Appel’s answer that a public employee would be prohibited from smoking on a tractor while mowing a public right of way, Black insisted that such a result went beyond the legislature’s intent. However, in spite of the fact that Appel then responded that smoking would be permitted in an unwalled park shelter and on a boat on a lake in a public park,

905Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
907Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin). Later Black stated that this particular debate had not changed votes. Telephone interview with Dennis Black, Des Moines (July 30, 2008).
Black nevertheless made an Olympic-class jump to the conclusion that, because he believed so much in what the United States was about as it related to the wars that had been fought and the people who had lost their lives for the preservation of democracy, “[w]e are approaching totalitarianism without question” and passing the conference committee report “makes us all criminals just waiting to be arrested” (a conclusion made possible by Black’s ignorance of the Smokefree Air Act, which was not criminal and did not provide for arrest). To be sure, asked about his totalitarianism charge, he later conceded that it had been a “spontaneous knee-jerk statement” that in retrospect he should perhaps not have made, but that nevertheless correctly denoted the government’s taking away a right of the people. However, he recognized how deeply “inconsistent” his position was when he realized that his hypothetical support for a ban without the discriminatory exemptions to which he objected would have generated even greater “totalitarianism.”

After brief comments by Democrat Matt McCoy stressing the political fact of life that half a loaf was better than nothing, Republican Brad Zaun, a hardware store owner from the Des Moines suburb of Urbandale, resumed his party’s freedom-loving assault on protecting nonsmokers from assault by carcinogenic secondhand smoke. The only sense that Zaun was apparently able to discern in the whole initiative was that the legislature was “addicted to gambling revenue”; though he bridled at the casino exemption, he “might even have went [sic] along with” it if only the Democrats had accepted the 21-and-over bar exemption. In the event, he took the opportunity to vent his resentments at “big government [which] knows best.” In particular, his lamentations focused on the Senate’s passage just the day before of a bill that (non-mandatory) provided health care coverage for tens of thousands of children by raising the income limits of eligible parents. Deserted by even most of his own caucus, Zaun was one of only six senators to vote No. Laconically excoriating the beginning of the end of the world—“[w]e got socialized medicine yesterday”—he envisioned the next outrage as the bill’s ban on smoking in day care homes, which would prohibit

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910 Telephone interview with Dennis Black, Des Moines (July 30, 2008).


912 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).

“grandma and grandpa” from smoking in their own home while watching their grandchildren. Having dismissed “government intrusion” in principle, Zaun handily identified an already existing substitute for it: “We have local control right now. ... All Iowans have two feet underneath their body and they get to figure out where to patronize what business.”

The next Republican focused his attack on enforcement. In response to farmer David Johnson’s question as to whether additional money had been appropriated to enable the Public Health Department to hire enforcement agents, Appel replied that the smoking ban would be self-enforcing in Iowa. As astonishing as was her mistaken belief that the bill she was managing criminalized smoking, it paled beside her touchingly platitudinous image of Iowa’s apparently uniquely law-abiding population: “People here in Iowa do not on purpose do criminal activity, especially like this to be smoking.”

With Larry McKibben, a lawyer from Marshalltown, a high point in the Republican onslaught was reached. A non-smoker who frequented smoking bars, he freely conceded that “it doesn’t bother me that I inhaled a little smoke and...I probably shortened my lifetime [sic] by a few hours every time I go” there, but “frankly I don’t care—something’s gonna get me at some point in time, probably

\[\text{Verbatim Appel repeated this shibboleth shortly after passage. Telephone interview with Staci Appel, Ackworth (Apr. 12, 2008). It is unknown whether, after the law went into effect, Appel bothered to put herself in a position personally to experience hundreds of violations committed knowingly, intentionally, and belligerently by smokers whose scofflawdom was made possible by a lack of enforcement. Appel’s performance as floor manager was emblematic of the make-believe and substantively uninformative character of the debate as a whole. For example, when Senator Zaun read aloud a provision—which surely did not, as litigators love to oraculize, “speak for itself”—under which an employee whose “employer allows smoking does not waive or surrender any legal rights the employee may have against the employer or any other person” and asked Appel to explain what it meant, she preposterously replied: “I think it states exactly what it means as you read it.” That Zaun did not even bother to point out (and seemingly did not even notice) the nonsensical nature of Appel’s statement merely completed the charade. Later, when Sen. Johnson asked Appel whether the casino exemption violated the guarantee of equality in the state bill of rights, instead of explaining why the suggestion made a mockery of the legislature’s power to make rational distinctions, she proudly, triumphantly, and evasively repeated the vacuous saw: “We make the laws, we do not interpret the laws.” Later, when Republican Paul McKinley asked Appel whether expediency had driven the conference committee report, she self-contradictorily replied: “I don’t believe it’s expediency—we needed 26 votes in the Senate and we needed 51 votes in the House.” Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty).}
my weight....” Instead of reflecting on whether it was appropriate for such a fatalistic dare-devil to be making public health policy for Iowa, McKibben mocked the nanny-state Democrats’ alleged attitude: “To heck with the Neanderthals in the rest of the state who don’t know what’s good for them.” Implausibly claiming that “I would vote for a 100% ban,” he targeted the unfairness associated with the death penalty that the ban would allegedly impose on hundreds and hundreds of small businesses because the exemption would “herd” into casinos “smokers who have this disease we have no cure for....” In an inspired explosion of madcap fantasy, McKibben envisioned the need to fund an expansion of Gamblers Anonymous to deal with all the factory workers who, instead of having a beer and a cigarette when they got off the line, would now be pulling one-armed bandits “because we drove every single smoker in the state of Iowa to all 17 casinos.” And despite the inordinate amount of debate time in both houses allotted to the bill over a period of almost two months, McKibben implausibly insisted that “[t]hese are the outcomes you get when you rush crap through the legislature.” No wonder that Democratic assistant majority leader Jack Hatch confessed that he “got lost at about two minutes into” McKibben’s speech.

Masterfully combining incoherence and oral illiteracy, James Hahn, a Republican real estate and insurance salesman from Muscatine, regaled the chamber with an email that legislators had received allegedly embodying a study published in the British Medical Journal that found that “secondhand smoke is 2.6 [sic] safer than the occupational workplace.” While his colleagues were doubtless still scratching their heads over yet another piece of tobacco-industry financed and peddled obfuscation, Hahn went on to boast about his fund of oncological wisdom: “I know what lung cancer is all about, and I’m especially concerned that we don’t have some other way to blame lung cancer on anything except smoking, especially secondhand smoke.” Picking up the disinformational cigarette company playbook of yesteryear, he insisted that “we’re barking up the wrong tree” because mildew, mold, pet dander, and chemicals in fabrics and carpets in houses “all add up too.”

Democrat Dotzler, a non-smoker who boasted of having “a kind of a

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916Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
917Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
919Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
920Dotzler stated on television that he did not smoke, but a blogger claimed that she
The Smokefree Air Act of 2008


science background” while generously admitting that he did not consider himself a “true scientist,” spoke for more than 20 minutes during which he purported to support almost all of the conference committee report because he did not believe that anyone should have the right to inflict damage on others. Confusingly and confusedly, however, at the same time, he attacked the bill’s (alleged) underlying premise that exposure to carcinogens in smoke had to be driven down to zero: such a standard, he argued, would then have to be applied to other substances, such as herbicides and pesticides, but he did not think that legislators had the will-power to ban all substances that spread carcinogenic agents. His own plan aspired to the vastly more modest goal of protecting only children, while treating businesses fairly and people (i.e., adult smokers and nonsmokers) equally. Preventing smokers’ relegation to second-class citizenship entailed, for example, exposing nonsmokers to the secondhand smoke of statehouse workers and visitors rather than banning smoking on the grounds of public buildings as well as permitting restaurant customers to smoke in an outdoor seating area, which nonsmokers could presumably use only at their peril. Dotzler’s argument for equality boiled down to equating nonsmokers’ right to socialize in a smoke-free environment with smokers’ right to socialize while smoking a “legal product” in a smoke-filled environment regardless of the health consequences for nonsmokers and “not be forced to stay in their house because somebody else’s right trumps theirs.” In the end, his proposal was tantamount to voluntary apartheid as between smoking and nonsmoking customers with no consideration of the impact on employees: “I think we can put a sign on the door that says ‘No Smoking,’ and if you have an issue with smoking you don’t have
The Smokefree Air Act of 2008

to go into that establishment and that takes care of everybody’s problem that has
an issue with secondhand smoke ‘cause they don’t have to go into that facility.” 922
Dotzler’s approach thus would essentially have retained Iowa’s existing toothless
law. 923

Toward the end of the debate, two Democratic supporters weighed in. Joe
Bolkcom, returning from the men’s rest room where, however, he had “heard
everything,” wanted to “back up to about 50,000 feet” and talk about tobacco as
a unique cause of disease and mortality in Iowa. Bolkcom sought to make it clear
to the chamber that secondhand smoke had to be treated as an occupational
pollutant subject to the same principles for which “we have decided for a long
time that we don’t let employers expose their employees to things that can kill
them.” He attached special importance to the proposed law precisely because the
Occupational Safety and Health Act/Administration had not been attending to
problems in such “new workplaces” as restaurants, bars, and bowling alleys to
which H.F. 2212 would apply. Moreover, contrary to opponents’ claims, in the
real world of work, if a hundred thousand workers decided one day that they were
tired of their smoke-exposed jobs and workplaces, they would not all be able to
find alternate employment. In a final conciliatory gesture to senators such as
Dotzler, Bolkcom—who acknowledged that there was “nothing too scientific
about” the conference committee report, which was merely designed to secure the
requisite number of votes in each house—conceded that there were problems with
the imperfect bill (such as coverage of crane operators) on which he and they
could work after passage. 924

In a speech that oddly melded the coolly dispassionate with the intensely
personal, Majority Leader Gronstal repeatedly urged what was presumably his
target audience of fence-sitters that H.F. 2212 was as good a bill as could be passed, that throwing away the coverage of 95,000 workers because 5,000

922 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
Dotzler had already offered this proposal—that people who were “bothered by that
smoke...can choose not to go in there—a month earlier on a television news program.
cfm?id=1897.

923 Dotzler’s preference for toothlessness and his contempt for the smoking ban were
nicely captured by his comment a month earlier with regard to reporting smokers who
violated the law that “I don’t think that’s what our country should be about, that we’re
iptv.org/iowapress/transcript_detail.cfm?ipShowNum=3527 (visited Apr. 18, 2008);

924 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
remained unprotected made no sense, and that expecting a better bill to emerge from a second conference committee triggered by voting down the current version contradicted all legislative experience. Then invoking his parents, who had both died of cancer, Gronstal expressed the wish that the legislature had passed the bill 50 years earlier because neither had been able to witness his political career. Lest his audience resent him for self-absorption, he quickly observed that the bill was not about him and his family and self-mockingly added that as conservative Republicans his parents might even have voted against him. Stressing the dimension that Republicans’ monomaniacal focus on bar owners’ alleged right to make public health decisions and smokers’ alleged right to smoke regardless of the public health consequences, Gronstal closed with an appeal to instantiate workers’ right to a safe workplace.925

Becoming the only senator to speak twice, Dotzler sought to deflect and deflate his fellow Democrats’ workplace orientation by implying that the bill was perfectionist, after all, because it imposed zero tolerance for tobacco smoke in contrast to permissible levels for chemicals under OSHA—a message that he immediately contradicted by asserting that OSHA “isn’t tough enough.” Seeking to refurbish his own credibility tarnished by his insistence on a 21-and-over proposal that would perpetuate infliction of secondhand smoke exposure on bar workers, Dotzler irrelevantly pleaded: “I fought my whole life for working men and women in this state.” Ironically, in this particular fight he appeared to be pleading for employees’ right to smoke in bars, regardless of the health consequences for customers, when he cited letters he had received from cigarette-addicted workers that taverns (and outdoor painting) were the only places they could work.926

The final Republican speaker, assistant minority leader and media consultant Jeff Angelo, chiding Democrats for regarding the 10,641 casino workers as an “acceptable level of casualties in our war on smoking,” pretended that his party was champing at the bit to cover casinos if only the report were voted down and a second conference committee appointed. At the same time, he inconsistently charged that it was unrealistic to expect that, given the importance of casino revenue for the state budget, casinos’ influence would wane, thus permitting the legislature to repeal the exemption in 2009.927

In an emotional appeal, floor manager Appel used her closing remarks to

925Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin). It is unclear why, with Iowa’s labor force at well over a million, Gronstal used the figure of 100,000.

926Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).

927Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
invoke her grandmother, a lifelong nonsmoker who had died of secondhand smoke exposure before the age of 60 and thus never lived to see her grow up or her children. In a voice audibly cracking, Appel challenged her colleagues to do anything better with their votes than to save the lives of workers and constituents.928

The 26 to 24 vote adopting the conference committee report was as close as possible.929 Only one Republican “maverick” (Lundby)930 joined Democrats in favor, while five Democrats (Black, Dotzler, Hancock, Bill Heckroth, and Keith Kreiman) crossed over to join the pro-tobacco Republicans. Heckroth, a financial consultant, who did vote for H.F. 2212 on February 27 when it lacked the casino exemption, voted against the report because of the casino exemption, even though he believed that the result would be a tie vote and probable death of the bill—he later stated that he had preferred its death to passage with the casino exemption intact,931 while Kreiman, a Lutheran church Sunday School teacher, in addition much preferred local control.932 On final passage of H.F. 2212, two more Republicans (Noble and Ward) joined Lundby, while the same five Democrats defected again, producing a 28 to 22 vote.933 Ward’s vote was dictated by her perception that most of her constituents were progressive, educated, did not want to be exposed to secondhand smoke, and accepted regulation.934 The memory of

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928Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin). Appel did not identify the source(s) of the secondhand smoke that killed her grandmother.
929Senate Journal 2008, at 1:999-1000 (Apr. 8).
930Lundby, according to Dotzler, had even stopped attending Republican caucus meetings, referring to her party-mates as “‘assholes.’” Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008).
931Telephone interview with Bill Heckroth, Waverly (Aug. 4, 2008).
932http://www.iowasenatedemocrats.org/heckroth/Default.htm; http://www.iowasenatedemocrats.org/kreiman/Default.htm. To be sure, Kreiman’s claim about unfairness was inconsistent with his vote against passage of H.F. 2212 on Feb. 27, when it included no casino exemption. He denied that his votes had in any way been influenced by the fact that his district bordered on Missouri or the possibility that some constituents might cross the border to frequent bars or restaurants. Telephone interview with Keith Kreiman, Bloomfield, IA (July 27, 2008).
933Senate Journal 2008, at 1:1000-1001 (Apr. 8). Lundby, Noble, and Ward had also voted for H.F. 2212 on Feb. 27. Former state patrol officer Larry Noble stated later that he had voted against the conference committee report because he wanted a bill with no exemptions; he then voted for the bill on final passage because it was the best bill he could get. Telephone interview with Larry Noble, Ankeny (Aug. 4, 2008).
934Telephone interview with Pat Ward, West Des Moines (Aug. 18, 2008). Ward stated that she had voted against the conference report because she was hoping for
The Smokefree Air Act of 2008

his heavy-smoking parents who had died of cancer, reinforced by the pent-up pressure of many years of failure to pass comprehensive anti-smoking legislation at the hands of the cigarette oligopoly, burst forth in an extraordinary display of personal emotion by Majority Leader Gronstal, who, on the verge of crying, prefaced his routine motion to adjourn with “For Mom and Dad.”

Some Supporters’ Reactions to Passage of H.F. 2212

You take a half a loaf of bread and you move on down the road. That’s what we do in politics.

Joyful tears appeared to be less prevalent among some anti-smoking lobbying groups. For example, the president of the Iowa Tobacco Prevention Alliance, Cathy Callaway, deemed the compromise, in spite of the casino exemption, “acceptable,” but vowed to continue pressing for greater rigor. With something less than grace and historical accuracy, a lobbyist for the American Cancer Society, one of the health advocacy groups applauding passage, declared that the “push to get a statewide smoking ban has lasted eight years”—thus suppressing the fact that during all but the last few weeks of those eight years it had been so preoccupied with local control that it had not been supporting Janet Petersen’s lonely push. Similarly distorted in the disappearing act that it performed on Petersen and her agency and the inflated stature it conferred on his co-leader was the account issued by House Speaker Murphy in his “Inside the Iowa Legislature” for that week: “When the legislative session began, I suspected that we might have the votes to give local communities the option to enact smoking restrictions tougher than state law. Sometime in February it became apparent that there was support for a broader measure to protect public health. Much of the credit for the ban goes to House Majority Leader Kevin McCarthy, an attorney who worked in the nation’s capitol [sic] fighting big tobacco

continued negotiation.

936 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
companies on behalf of public health interests, prior to his election to the Legislature.\textsuperscript{940}

One organization that did not propagate these distortions was the Heart Association, whose advocacy director, Randy Yontz, was, at least after the fact, ecstatic about the new law and praised Petersen—who had formerly occupied his position—for having stuck to her guns. Asked what lesson could be learned from the passage of H.F. 2212, Yontz, with a measure of humility, replied: “Never predict what can be accomplished.” His probity was also capacious enough to enable him to acknowledge that although the local control coalition had misjudged history, the Democratic leadership, which had boldly made history, nevertheless gave the health organizations the credit for passing the bill.\textsuperscript{941}

The key to understanding the advent in Iowa of the nationwide wave of comprehensive and effective anti-smoking enactments after so many years of failure was, as backers and enemies agreed, the change and legislators’ perception of change in public opinion, which Representative Wise characterized as a “‘massive cultural shift’”:

“It would have been utterly impossible to do this in the past because of the culture of this place,” Wise said, gesturing to the House chamber. “It’s an example of the elected officials being behind the public. We wouldn’t have considered this even a half dozen years ago.”

Make that two years—before Democrats took control of the Capitol, according to Rep. Janet Petersen....\textsuperscript{942}

To be sure, the seismic repercussions were neither instantaneous nor all-encompassing. As soon as the day after the final passage of H.F. 2212, legislative Democrats were constrained to announce their plan to cut the Public Health Department’s anti-smoking advertising budget by $590,000 “in an attempt to calm...
Republican anger” over the same amount of money that IDPH had spent for ads promoting a ban on smoking in bars and restaurants that Republicans claimed constituted an improper use of state revenue by an administrative agency to put pressure on the legislature. The cuts, which would cause a reduction in assistance to Iowans trying to quit smoking and in the number of “Just Eliminate Lies” anti-tobacco ads, were part of a larger two million dollar budget bill cut in funding for smoking prevention programs.  

The Smokefree Air Act’s Nationally Unique, Most Radical, and Least Noticed Provision of Unknown Provenience: The Total Indoor and Outdoor Smoking Ban on All Public and Private College and University Campuses

“You’ll never find an academic who’ll allow his Ph.D. students to do a study on secondhand smoke outside.... And I know a lot of lu-lu academics.”

Iowa City is full of doctors and athletes—of course this smoking ban is not going to have any effect on that city. OK? Ames the same way.

The Smokefree Air Act’s most startling prohibition, which was also discontinuous with regulation in Iowa or elsewhere, has not been discussed yet
The Smokefree Air Act of 2008

because, startlingly, the legislature itself never discussed it—in the House Commerce Committee, during floor debates in either chamber, or in the conference committee. Petersen’s House study bill opened up new vistas for limiting outdoor exposure to secondhand smoke by prohibiting smoking “[o]n

schools, may have been based on a misunderstanding that an amendment, expressly extending coverage to school campuses or grounds, sorority and fraternity houses and grounds, and private, parochial, and church schools and grounds, had passed, when in fact it failed by a vote of 6 to 26. Senate Journal of the Legislature of the State of Nebraska: Forty-Seventh Session...1931, at 731 (Mar. 17); “Income Tax Accorded a Hearing in Senate,” NSJ, Mar. 17, 1931 (7:1-2); “Smoking Bill Moves Up Minus Amendment,” NSJ, Mar. 18, 1931 (1:7); “Find Demand for No Smoking Bill So It Is Revived,” NSJ, Mar. 12, 1931 (17:1-2) (noting that no senator pointed out that the bill did not refer to grounds). Alternatively, some senators contended that “appurtenances” applied to the university and stadium. “Senate Approves No-Smoking Bill by 24 to 7 Vote,” NSJ, Mar. 21, 1931 (15:1). Before final passage the Senate defeated an amendment confining its applicability to people connected with those institutions (though no such amendment appeared in Senate Journal). “Senate Votes Ban on College Smoking,” OW-H, Mar. 18, 1931 (1:7). Attacks on smoking, especially at the state university, “kept the senate in an uproar....” “Smoker Measure Back on Floor,” BDS, Mar. 17, 1931 (9:7). Unlike SAA, it was intended not to limit secondhand smoke exposure, but to deter young people from smoking. At a public hearing held by the Senate Education Committee, the head of the Lancaster County Federated Women’s Clubs testified that “at the University of Nebraska, ridicule and scoffing made it impossible for a boy to attend without smoking” or “for a girl to go out with a group of students and not smoke cigarettes.” “Women Ask Ban, School Smoking, but Bill Tabled,” OW-H, Mar. 12, 1931 (25:5). The introducer, Republican Senator C. Johnson, claimed that advocates of his bill numbered more than 50,000 voters. Pointing out that the University of Nebraska chancellor had explained to the legislators that no regulation prevented smoking, Democrat Henry Pedersen urged passage on the grounds that university authorities should be given the opportunity to “‘combat the smoking evil on the campus.’” The lengthy debate focused on the controversy over student control and efforts to legislate morals and habits and taxpayers’ right to say what was done at the university. “Would Prohibit Campus Smoking,” BDS, Mar. 11, 1931 (1:5); “Find Demand for No Smoking Bill So It Is Revived,” NSJ, Mar. 12, 1931 (17:1). One of the chief objections to the bill was its enforcement at the university football stadium, although senators themselves were certain that the stadium was covered. “Ban Is Proposed in Nebraska on Smoking at Grid,” REG, Mar. 18, 1931 (1:4); “Find Demand for No Smoking Bill So It Is Revived,” NSJ, Mar. 12, 1931 (17:1-2). For House discussion, see “Bans Smokes and Gin at Schools,” BDS, Apr. 16, 1931 (1:3). The House indefinitely postponed the bill after the Miscellaneous Subjects Committee had recommended putting it on general file with amendment. House Journal of the Legislature of the State of Nebraska: Forty-Seventh Session...1931, at 1193 (Apr. 17), 1682 (Index); Senate Journal of the Legislature of the State of Nebraska: Forty-Seventh Session...1931, at 1443 (May 2).
The Smokefree Air Act of 2008

school grounds, including parking lots, athletic fields, playgrounds, tennis courts, and any other outdoor area under the control of a public or private educational facility, including any vehicle located on such school grounds, and including the perimeter area of fifty feet beyond such school grounds to which the public is invited or in which the public is permitted.”

This provision was enacted intact except for the 50-foot perimeter, which the legislature eliminated together with several other such outdoor no-smoking zones.

That such a radical spatial expansion of the law’s prohibitory scope had slipped through without any public discussion or scrutiny at all was especially intriguing in the light of the results of opinion surveys commissioned by IDPH. They revealed that the proportion of Iowa adults who said that smoking should not be allowed in outdoor public places had reached 40 percent in 2002, fallen to 31 percent in 2004, and then risen somewhat to 35 percent in 2006 and 36 percent in 2008. (The corresponding figures for current smokers were 16, 5, 11, and 9 percent, respectively.) The finding that only little more than one third of respondents supported outdoor bans—compared, for example, to the two thirds who favored not allowing smoking in indoor dining areas of restaurants—was not in itself so interesting as the fact that, although by 2008 a roughly equivalent 39 percent of adults (up from 27 percent in 2004 and 32 percent in 2006) said that smoking should not be allowed in bars and cocktail lounges, legislative discussion of that locational ban had been virtually omnipresent. (To be sure, since the survey question did not ask specifically about outdoor college and university campuses, it is not known whether more or fewer adults would have expressed support for banning smoking there than in other, unspecified, outdoor public places.)

Curiously, shortly after the bill was passed neither Petersen, nor Olson,

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948 Iowa Code § 142D.3(2)(d).
949 Gene Lutz et al., Iowa 2009 Tobacco Control Progress Report fig. 17 at 31 (Jan. 2010).
950 Gene Lutz et al., Iowa 2009 Tobacco Control Progress Report fig. 14 at 28 (Jan. 2010). The corresponding figure for current smokers in 2008 was 30 percent.
951 Gene Lutz et al., Iowa 2009 Tobacco Control Progress Report fig. 15 at 29 (Jan. 2010). The corresponding figure for current smokers was 8 percent.
952 Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008). Indeed, when asked more specifically about the provision, Petersen confused it with Republicans’ amendment to ban smoking on the grounds of public buildings. After realizing her error, she guessed that it was taken from “the model legislation I received,” but the bill drafter stated that it had not been. Email between Janet Petersen and Marc Linder Apr. 14, 2008.
953 Olson, who also incorrectly recalled that it had been taken from other states’ laws,
The Smokefree Air Act of 2008

nor the Legislative Services Agency bill drafter was able to reconstruct the provenience of this remarkable provision, which prohibited smoking everywhere, indoors and outdoors, on all private and public college and university campuses and appears not to have been adopted from any other state’s statute or regulation. Finally, the Board of Regents’ lobbyist also did not know how or why the total campus smoking ban came to be included in H.S.B. 537, but, he reported, the Regents had been aware of its presence and consequences from the beginning and never asked him to lobby against it; in particular, they understood and did not object that as a state law it would be enforceable by monetary penalties.

Remarkably, a number of legislators who were deeply engaged in the debate over the bill had not even understood that H.F. 2212 contained such a ban. Most prominently, Michael Connolly, the Senate’s most passionate and long-standing anti-smoking militant, who, in addition, chaired the committee that recommended passage, was, even two weeks after the governor had signed it, unaware that it banned smoking on college campuses. Senator Joe Bolkcom, another antitobacco stalwart, knew that the ban covered public colleges and universities, but did not think that their private counterparts were included. And more than a month after the law had gone into effect, Senator Hartsuch, who had exhibited such passion about the bill during debate, was unaware that it included such a provision.

Some legislators, especially Republicans who opposed the bill, did know about the outdoor campus ban, but never raised the issue on the floor.
Democratic Senator Bill Dotzler later stated that tons of email had been received from campuses against the provision and that he had raised the issue of the total ban on smoking on college and university campuses, in particular at the University of Iowa football stadium, in the Democratic caucus, but had been told that the ban would not be enforced. Republican Whip Kraig Paulsen from Cedar Rapids, who was acutely aware of the provision as the bill was going through the legislature, nevertheless, even seven weeks after the law had gone into effect, incorrectly believed that it did not apply to private colleges or to dormitory rooms at public colleges. Paulsen recalled a meeting before the bill’s passage at which University of Iowa President Sally Mason told Minority Leader Rants that the university was going to go smoke-free anyway. Paulsen also reported that Mason had been “visibly agitated” when told that the university’s athletic department had mollified a big donor from Cedar Rapids who had complained, in disbelief, that he would no longer be able to smoke in his recreational vehicle in the tail-gating area next to the football stadium by assuring him: “We’re not gonna enforce it.” Right-wing Republican Representative Linda Upmeyer not only was aware of the provision while the bill, which she opposed, was being debated, but distinctly recalled one informal discussion among her colleagues in which one jocularly suggested that Iowa State University students might unlawfully smoke en masse at the football game at the University of Iowa football stadium. Republican Representative David Heaton had to be corrected at an Administrative Rules Review Committee meeting when he stated that, as he read the rule, smoking was prohibited immediately adjacent to the football stadium on the University of Iowa campus unless those in custody/control permitted it. (The rules drafter explained to him that the scope of the smoking ban on school grounds was broader than that on the grounds of public buildings.) That the University of Iowa administration itself did not immediately grasp the fundamental difference between a proposed university rule that the university had publicly announced would not be enforced and a state law backed up by a $50 penalty became clear when the co-chair of the group charged with putting the ban into place stated that the main steps in the implementation grounds of educational facilities would apply to colleges and universities. Telephone interview with Chuck Soderberg, Le Mars (Mar. 16, 2008). Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008). Telephone interview with Kraig Paulsen, driving on I-80 from Cedar Rapids to Des Moines (Aug. 19, 2008). Telephone interview with Linda Upmeyer, Garner (Aug. 18, 2008). Administrative Rules Review Committee meeting (June 11, 2008) (audio tape provided by ARRC Legal Counsel Joseph Royce).
process would remain the same. The misunderstanding and ignorance surrounding the campus bans may have reached their high points at Iowa’s richest and most prestigious private college, Grinnell, whose president, Russell Osgood, a former law professor no less, incorrectly asserted after the House and Senate had passed H.F. 2212 in February that: ‘‘If the state makes something applicable in public places, we wouldn’t have to follow it.... This is the home for about 900 students; they aren’t public buildings.’ Osgood said that since Grinnell is a private college, any such state law would only affect the college if it explicitly gave money to the college to implement any similar regulation. The misunderstanding and ignorance surrounding the campus bans may have reached their high points at Iowa’s richest and most prestigious private college, Grinnell, whose president, Russell Osgood, a former law professor no less, incorrectly asserted after the House and Senate had passed H.F. 2212 in February that: ‘‘If the state makes something applicable in public places, we wouldn’t have to follow it.... This is the home for about 900 students; they aren’t public buildings.’ Osgood said that since Grinnell is a private college, any such state law would only affect the college if it explicitly gave money to the college to implement any similar regulation.** Despite the lack of debate on the outdoor campus ban—or, perhaps, precisely because many legislators had been unaware of what they had approved—already two weeks after the governor had signed the bill into law, the press was mistakenly lumping college campuses together with parks as places in which the new law’s applicability was unclear. The press was hardly alone. No less an authority than House floor manager Olson erroneously told a radio news program that, like local governments, universities and community colleges were empowered to create more stringent rules on their campuses. In fact, however, whereas H.F. 2212 expressly prohibited smoking everywhere indoors and in the outdoor areas of schools and educational facilities, leaving those institutions nowhere else to ban smoking, the new law did not expressly ban smoking in all outdoor areas owned by municipalities. Consequently, although Olson correctly observed that local governments had always had the authority to prohibit smoking, for example, in building-less parks that they owned—a ban that the law’s prohibition of smoking on the “grounds of any public buildings” did not impose—his aforementioned remark about institutions of higher education was wrong, either because the legislature, by virtue of imposing a total ban on campuses, afforded them no opportunity to do more or because he, too, was mistakenly lumping them together with “grounds of any public buildings.”

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967 Iowa Public Radio News (May 12, 2008) (audio file made available by the interviewer, Jeanene Beck). A few weeks later, when IDPH issued its draft rules, which empowered those in control of exempt outdoor areas of public buildings to declare them nonsmoking, Senate Minority Leader Wieck protested that “the intent of the bill was not to leave it up to local governments.”’’ IDPH, Rule 641—153.2 (May 29, 2008); Jason
Both a public radio interviewer and the president of the University of Iowa subscribed to Olson’s error—if they did not pick it up from him. Immediately after relating Olson’s view, the interviewer stated that: “In fact, the University of Iowa is moving ahead with a campuswide smoking ban that even included the parking lot of Kinnick Stadium.” President Sally Mason then added that “even if the state’s definition of public grounds would allow smoking on some parts of the campus,” it was unlikely that she would change the school’s smoking policy.\(^{968}\) Like Olson, Mason and the interviewer manifestly did not understand that a separate provision in H.F. 2212 governing schools and educational facilities covered the University of Iowa, whose campus could not have become totally smoking-free based solely on the mandate imposed by the “grounds of any public buildings” provision.\(^{969}\) The university’s own policy would have been implemented on July 1, 2009 and would also have prohibited smoking everywhere on campus indoors and outdoors.\(^{970}\) The difference was that the

\(^{968}\) Iowa Public Radio News (May 12, 2008) (audio file made available by the interviewer, Jeanene Beck). Mason did allow herself some wiggle room, for example, with regard to the university golf course: “Let’s see what the legal experts say and whether we have any leeway and whether we have enough demand or outcry that we want to make any exceptions at all. Right now I’m not thinking about any exceptions and that’s not the direction we’re heading.”

\(^{969}\) Even when Mason apparently did understand that the university was governed by a special statutory provision, her understanding of the weight of public attitudes toward smoking was bizarre. Interviewed on public television on May 9, she was asked by a reporter, who was misinformed, whether the university would exercise the discretion that the law conferred on it to permit smoking in and around its football stadium and at tailgating. Although she correctly replied that she did not think that the university had such discretion, she added in a throwaway line: “I think our fans would be happy” (if the university did permit such smoking). Iowa Press, Iowa Public Television, #3536 (May 9, 2008). It is difficult to imagine that a biologist actually believed that (all) the “fans,” the vast majority of whom, if they were even remotely similar to Iowans in general, did not smoke, would have been “happy” to continue to be exposed to carcinogenic smoke. When apprised of the president’s statement, her senior associate stated: “I don’t think she meant that, and I’m sorry she said it. More like ‘some fans’ would be happy, but some would not—I agree with you.” Email from Jonathan Carlson to Marc Linder (May 9, 2008).

\(^{970}\) Smoking Policy Review Committee, “Final Recommendations” (University of Iowa, Nov. 16, 2006); email from President Sally Mason to The UI Community (Subject: Smoke-free Campus) (Feb. 4, 2008).
The Smokefree Air Act of 2008

The university’s policy was merely “aspirational” and, unlike the state law, did not impose monetary penalties on violating smokers or—much more importantly—on the university itself for failing to enforce its own policy.\footnote{971}{Erin Jordan and Mason Kerns, “U of I Set to Ban Smoking on Campus by July 2009,” \textit{DMR}, Feb. 5, 2008 (1A:1). The University of Iowa spokesperson stated that “[t]he intent is not to say to our police department, “Go get ’em”... The emphasis is on civility and respect. We hope people will honor that.” \textit{Id.} The spokesperson confirmed that he had been quoted accurately. Email from Steve Parrott to Marc Linder (Feb. 6, 2008).}
Administrative Rules for, Bar Owners’ Unsuccessful Constitutional Challenge to, Enforcement of, and Abortive Efforts to Amend the Smokefree Air Act

In places like New York City or California where bans have been in place for years, new customers flowed into the smoke-free bars. But in the sparsely populated and aging small towns of much of rural Iowa, there isn’t a non-smoking effete professional demographic around to slide in and replace the hardened blue collar smokers.¹

Like but even more so than most laws, Iowa’s Smokefree Air Act did not begin its life the moment a majority of both houses of the legislature solemnly agreed on its text. Not only did an administrative agency have to draft rules to define crucial terms in order to administer and enforce it, but the enforcement agents and the public had to be educated as to where the law prohibited smoking, what rights nonsmokers now had to smokefree air, who was responsible for enforcement, and what the consequences of noncompliance were. In light of the possibility that a relatively small but belligerent proportion of the affected population composed of smoking tobacco addicts might engage in individual or organized violation of the public smoking ban, the question of the optimum enforcement approach, especially at the outset, assumed great importance. In the event, this issue was raised most explosively in discrete areas of the state by bar owners who concertedly and publicly violated the new law in a (misguided and unsuccessful) effort to provoke its judicial invalidation.

The Governor Approves—But Some Others Don’t

“Gov. Culver ain’t nothing but a communist.... He...raised (the tax) $1 a pack on cigarettes, then allowed cigarettes to be banned in the bars.”²

“Pretty soon, they’ll be telling us that we can’t (smoke) in our own home, or in our yard, or with our children. We might as well move to Germany or China....”³


²“Smokers Bemoan Ban, Light Up Last Time in Bars,” Gazette (Cedar Rapids), July 1, 2008 (1A) (NewsBank) (quoting a bar customer in Cedar Rapids).

No sooner had the Senate passed the bill than the governor’s spokesperson announced that he looked forward to signing the bill. In the meantime, however, the debate—merging at times into post-mortems—continued unabated, the local press finding no shortage of point/counterpoint. Republican Gary Worthan from Storm Lake, who had voted against the bill, allowed as he had “no problem with a smoking ban in public places...where people are forced to go to do business, like a courthouse.” But, revealing that he had learned nothing about public health from 10 weeks of intense discussion, he insisted that “‘when it comes to restaurants, bars and those kind of things, we’re just stepping on people’s toes here....’” One of his bar owner-constituents revealed just how brittle that view was by conceding that “‘inhaling secondhand smoke can kill a person,’” while lamenting that “‘from a business standpoint I think it will damper [sic] the crowd.’” In Iowa City one owner of numerous restaurants and bars that had purportedly been nonsmoking for 10 years called the bill’s passage “‘the greatest news that could possibly come,’” adding, in disbelief, that Iowa as a state had held on to its public smoking regime for as long as it had. (To be sure, this pseudo-anti-smoking enthusiast did not share with the press the fact that he had bought a cigarette sales permit for his organic food store cum bakery, soup and salad bar.) Another optimistic bar owner confided that “‘smoking costs a lot of

(quotating Diana Schumacher, Clinton bar owner).


[4]In fact, Mondanaro had played a reactionary role in opposing passage of a no-smoking ordinance in Iowa City in 2001-2002; see above ch. 33.

[5]Shortly after he had opened this store he disclosed to a stranger that he had bought a cigarette permit and cigarettes, but had not yet decided whether to sell them. When
asked why he would even consider selling in, of all places, an organic food store commodities that kill half their long-term consumers, he pleaded that he hated cigarettes, but that he did not want to give up even one sale to supermarkets or convenience stores. Interview of Jim Mondanaro at Bread Garden & Market, Iowa City (Mar. 1, 2008, 5:00-5:15 p.m.). Later, after being told that if he sold cigarettes his store would face a picket and boycott, and that his state representative, Mary Mascher, wanted to speak to him, he ultimately relented and promised not to sell cigarettes. He did not renew the permit when it expired a few months later. Information from Iowa City City Clerk’s office (Sept. 3, 2008).


Shawn Gude, “Culver Signs Smoke Ban,” DI, Apr. 16, 2008 (1A:1-4, at 3A:3) (quoting Marty Christensen, co-owner of The Mill). On the previous owner’s tale to the city council in 2001 that live music was not possible without smoking, see above ch. 33.


Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008).
necessary to retain a lawyer to seek an injunction against the law.\textsuperscript{15}

Anti-smoking advocates packed into the statehouse rotunda on April 15 to cheer Governor Chester Culver wildly before, while, and after he signed H.F. 2212 into law. On what all present agreed with him was “a monumental day,” no one audibly took umbrage at his puzzling concession—given all the enormous health benefits that he listed as resulting from the new law—that “I understand there are compelling arguments against this bill.” Before the governor took the podium, Dan Ramsey, the programs director and lobbyist for the American Lung Association of Iowa, had spoken for many in affirming that the day and the law had been “a long time coming.” The governor sounded the same theme when, dating efforts in Iowa back to an anti-public smoking bill that legislator Jim Wells (who was briefly feted at the ceremony) had filed in 1975, he noted that “33 years is a long time to wait.” It was very unlikely that the governor was impolitically alluding to the health organizations’ initial opposition to the statewide bill enactment of which they were now passionately applauding when he called the anti-smoking law “a tough, tough issue, very difficult.” The governor may have thanked Senator Lundby and Representative Tomenga and “many other Republicans” for their bipartisan efforts,\textsuperscript{16} but Senate Minority Leader Ron Wieck was having none of the signing ceremony’s good cheer as he continued to press his party’s jeremiad against creeping nannyism: “‘This is a bad, bad, bad day for Iowa as far as I’m concerned.’”\textsuperscript{17}

Among those who shared Wieck’s assessment some hoped that it would not even be necessary to wait until next year: “Even before Culver signed the smoking ban and passed out souvenir pens, there was grumbling from critics who vowed to seek changes in the law in the final days before the session adjourns.” Senate Democrat Bill Dotzler, claiming that “many people didn’t realize the extent of the smoking ban,” still held out hope for “‘some clarification.’” To be sure, his desire appeared to founder immediately on the implacable opposition of his majority leader, Gronstal, who insisted that “all sides” had understood the


law. In particular, after jocularly suggesting that anyone in Des Moines who wanted to smoke under a roof be invited to do so on the balcony behind the Senate chamber, Gronstal made it absolutely clear that he would stop the smoking, even though that move, taken together with the new ban on smoking on the grounds of public buildings, meant that anyone using the Statehouse would have to go to a sidewalk to smoke.

Gronstal’s assurance to the contrary notwithstanding, the scope of the statutorily covered “public places” was already being contested. Some legislators asserted that their own handiwork had left it an open question whether, for example, smoking would be prohibited in parks, on boats on park lakes, and on the entire grounds of university campuses. Dotzler worried that under “the grounds of public buildings” definition no one would be permitted to smoke in “a park with any kind of building on it.” In particular, he divined that the law would prevent those reserving public park campsites or cabins from smoking around a campfire, even though he did not believe that it was legislature’s intent to do so. Astonishingly, Senate floor manager Staci Appel, who, as noted above, when asked by a colleague to explain the meaning of a provision, unhelpfully replied that the legislature made but did not interpret the law, agreed with Dotzler that “clarification may be needed.”

Some Bar Owners Feel Freedom Move Under Their Feet and the Iowa Constitution Tumbling Down

“You’re taking away the rights of the bar owners. It’s communism.”

Senate Minority Leader Paul McKinley...said he’s a reformed smoker who’s opposed to smoking, but what most bothered him is how the new law has affected businesses, including his wife’s.

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21 See above ch. 27.
“We have absolutely trampled over individuals’ freedom to do as they wish with their private property.... We have told them, you cannot have anybody in your place of business (smoking).”

During the House debate a week earlier, floor manager Tyler Olson had responded with a mock surprise “Really?” when Republican Mike May observed that “folks out there are already thinking about how we can get around this.” By the time of the governor’s signing ceremony the circumvention charade was already in full swing. Dozens of bar and restaurant owners, according to the Register, were “looking for loopholes, even though some state officials say the attempts are futile.” Two of the subterfuges they favored were turning their businesses into private clubs and creating a “retail smoking [sic; should be tobacco] store in the middle of their bar.” One bar owner in a small town in southern Iowa—photographed by the newspaper assiduously ministering to her own nicotine addiction—who purported to be “researching” the former ploy, had apparently led an almost hermetically sheltered ethico-moral life from whose perspective coverage of bars and exemption of casinos was “the stupidest, most unfair thing I’ve ever seen.” Her research, according to Lynn Walding, the administrator of the Alcoholic Beverages Division, would do her precious little good since “Iowa’s legislation is written so tightly that loopholes will be extremely difficult to find.” In this regard he instanced: private clubs, which qualified for an exemption only if they had no employees and had been granted federal tax exemption status; and retail tobacco stores, which qualified for an exemption only if the smoke did not infiltrate into smoking-prohibited areas. Walding, like some other state officials, described this type of hyperactive resentment as “just the knee-jerk reaction to change,” which would fade away as smokers once again accommodated what they were in various phases of

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24Lynn Campbell, “Legislative Leaders Say Gas Tax Hike Unlikely in ‘09 Session,” IowaPolitics.com, Dec. 9, 2008, on http://www.iowapolitics.com/index.iml?Article=143149. When asked about a county attorney who refused to enforce the Smokefree Air Act until it applied to all businesses, McKinley opined: “I think each one of those officeholders has to judge whether they’re doing the right thing. I would not pass judgment on them one way or the other.” In contrast, House Minority Leader Kraig Paulsen stated: “The law’s the law and a county attorney, especially, has taken an oath to uphold the law....” Jennifer Jacobs, “Dissent Dilutes Iowa’s Smoking Ban,” DMR, Jan. 7, 2009 (A1) (NewsBank).

25Iowa House Debate on H.F. 2212 (Apr. 8, 2008) (audio file furnished by Dean Fiihr, Communications Director, House Speaker Pat Murphy).

understanding was the inevitability of sequentially more stringent societal restrictions of their self- and other-destructive addiction.

In the meantime, in the process of casting about for a lawyer, bar owner Brian Froehlich of the IBOC appeared to have been tutored by the Philip Morris playbook: “It’s got nothing to do with smoking anymore... This is a rights issue.”27 At the same time, Jonathan Van Roekel, a former bar owner who by this time co-owned Mr. G’s Frozen Pizza in Clinton28 and was president of COBRA, swore that he and his members were bitter-enders who would not let their rights be violated: he was gearing up to collect enough money “to fight the new law all the way to the Supreme Court.” Polly Bukta, the Democratic House member from Clinton, cautioned that bar owners would eventually see that they had overestimated the impact of the ban, which would work out in Iowa “because it has in other states.”29 Van Roekel, however, was having none of it. He was convinced that the Iowa legislature’s agenda was obviously “anti-small business, anti-grassroots, anti-bars, and anti-restaurants and that’s kind of been shown.” Because they were savers, investors, risk-takers, entrepreneurs, employers, and tax payers, “by God it should be our right to make our choice, make [sic] choice that we feel would best benefit our businesses.” He took special umbrage at the legislature’s usurping their entrepreneurial role by thinking it was so market-savvy that it could predict that the elimination of smoking would cause sales to go up: “because I tell you what, if I thought that eliminating smoking...would increase my profit by one percent, I would have done it 20 years ago.”30 Van Roekel did not reveal whether he would have eliminated smoking 20 years earlier if he had thought that the cleaner air would have increased his employees’ health by one or even 100 percent.31 (In fact, Van Roekel, donning his other hat as

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31 Likewise, Norma Duncan, the wife of another high-profile bar-owning scofflaw, Larry Duncan, in asserting that the “government has got to realize they cannot save us from ourselves,” overlooked the health of the nonsmokers among their bar’s 42 employees and numerous customers. Christinia Crippes, “Otis Campbell’s Owner Keeps Fighting,” Hawk Eye (Burlington), Jan. 9, 2009 (1A) (NewsBank). On the number of employees, see Affidavit of Larry A. Duncan at 3-4, Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Civ. Action Case No. 3:08-CV-138 (S.D. Iowa, Oct. 28, 2008).
oncologist, alleged that no studies had shown that workplace exposure to secondhand smoke increased the incidence of cancer.\(^32\) In contrast, Froehlich—who was both an amateur scientific pollster who knew that IDPH’s data showing that 80 percent of Iowans were opposed to smoking were wrong\(^33\) and self-interestedly ignorant of the empirical refutation and statutory abolition more than a century earlier of the specious Adam Smithian employer claims and judicial rulings that workers freely assumed the risks of hazardous employments\(^34\)—made it clear that that whole line of questioning was made moot by the workings of the free labor market: “[E]mployees who face second-hand smoke know the environment they face when they apply for a job at a bar.”\(^35\) To be sure, this perspective raised the question, in light of Froehlich’s assertion at the Administrative Rules Review Committee meeting in June that H.F. 2212 was not about the general public, but only about employees’ health,\(^36\) as to whether the Smokefree Air Act was supposed to protect anyone at all.

By the last week in April, when COBRA and IBOC met in Clinton to merge their efforts to overturn the law,\(^37\) the chairwoman of the Republican county committee showed up to urge Iowans to vote out of office those who had voted for H.F. 2212.\(^38\) Van Roekel had visions of collecting enough money to hire “the ‘best constitutional attorney’” in Iowa, while Froehlich imagined that the legislature’s vote had woken a “sleeping giant,” though that colossus’s heroically noble goal was merely “‘to make this state a better place to own a bar.’”\(^39\) By
early June, Froehlich and his fellow “advocates of public smoking” were insisting that smoking was “‘just a catalyst,’” which had finally galvanized rights-starved Iowans into grasping that “‘every day and every session they take something else away from us.’”

Having latched onto and begun cultivating a group of resentful and disaffected small business owners on whose behalf they allegedly had tried to kill the Smokefree Air Act, Republicans would not let go. For example, at a meeting in Burlington, Representative Thomas Sands, who boasted that he had voted against H.F. 2212 every time it came up, (incorrectly) warned them that the Administrative Rules Review Committee might “tweak[ ]” vague provisions (of the as yet unreleased regulations) stricter; if it did not, he was not sure that the law was enforcible. The committee has no power to amend a statute, but it also has no power to amend administrative rules, though it is authorized (by a two-thirds vote) to delay a rule’s effective date until the adjournment of the next general assembly. Iowa Code § 17.8(9) (2008).

By the end of May, Van Roekel, abjuring his status as a one-issue candidate, declaring himself the spokesman for small business, and promising to try to put an end to “the increasing amount of legislation ‘that has been shoved down our throats,’” became the Republican nominee to unseat Clinton House Democrat Polly Bukta, who had supported the ban bill. The Des Moines Register quickly uncovered his criminal past: in 1996 he was “convicted of a felony for driving while intoxicated”—his third such offense—and sentenced to five years in prison, but served his time in a halfway house. Van Roekel may have believed that it did not reflect on his ability to be a legislator, but House Majority Leader McCarthy had a partisan field day with the news: “‘I know the Republican Party has been...looking for a different breed of legislative candidate for this fall’s election, but I didn’t think they’d resort to recruiting convicted felons.’” Even Minority Leader Rants felt blindsided, not having been aware of the convictions before Van Roekel’s nomination and still unsure as to how voters

clintonherald.com (July 16, 2008) (quoting Iowa City bar owner Marty Maynes).


41 Christina Crippes, “Bar Owners Joining Forces,” Hawk-Eye (Burlington), Apr. 30, 2008, on http://www.thehawkeye.com (visited July 16, 2008). The news account was itself confused, stating that Sands had said that ARRC might make the legislation itself stricter. The committee has no power to amend a statute, but it also has no power to amend administrative rules, though it is authorized (by a two-thirds vote) to delay a rule’s effective date until the adjournment of the next general assembly. Iowa Code § 17.8(9) (2008).

would react to the news.\textsuperscript{43} (It is unclear whether a high positive correlation obtains between bar ownership and drunken driving, but Van Roekel’s fellow freedom fighter, Froehlich, in 2007 pleaded guilty to OWI, was fined $1,250, and sentenced to 92 days’ jail, 90 of which were suspended, and 18 months’ probation from which he was not discharged until October 2008.)\textsuperscript{44}

Saying that she understood why some bar and restaurant owners were upset, a contrite Bukta was running scared: “If I did hurt any business, I’m terribly sorry.” Explaning that she had actually preferred casino coverage, but that the legislative process created a dilemma for her that she believed her constituents would appreciate, Bukta—at least recognizing that no matter what the pro-smoking Republicans claimed, they were in fact one-issue candidates—did not think that the Smokefree Air Act “would be the issue in the campaign. ... If people take a look at my whole voting record, I don’t think they would vote just for or against me on this one issue.”\textsuperscript{45} Democrat Cindy Winckler of Davenport, opposed by Joe Sturgis,\textsuperscript{46} owner of the Rusty Nail, was not apologetic: in the end she voted for what by her lights did “the most good for the most people. ‘It was in no way an effort to trample on people’s right to smoke. It’s about breathing clean air.’” Republican Sturgis, another barkeep who in his spare time had mastered oncology, was not at all reluctant to share the fruits of his learning with untutored Iowans: “I don’t think there is any scientific proof that I’ve read to prove that secondhand smoke causes cancer.... Basically, it’s a virus. Some people get it and some people don’t.”\textsuperscript{47} Whether the electorate was passing judgment on the Smokefree Air Act or not, in November, Bukta trounced Van Roekel 8,351 to 4,834 (36.7 percent), while Winckler crushed Sturgis 7,645 to 3,370 (30.6 percent).\textsuperscript{48} (Bar-owning Republicans were not the only ones unsuccessfully to campaign against incumbent Democrats on the issue of the smoking ban. Senator Thomas Courtney, who favored a “complete and total”

\textsuperscript{43}Jason Clayworth, “Candidate for House Has Felony Conviction,” \textit{DMR}, May 31, 2008 (B1) (ProQuest). For other problems that Van Roekel had with the legal system, see “What Court Documents Show,” \textit{DMR}, Oct. 5, 2008 (A10) (ProQuest).

\textsuperscript{44}http://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm (Case 07701 OWCR036739 (Muscatine County) (visited July 17, 2009). The fine was reduced to $625 for a temporary restricted license.


\textsuperscript{46}For biographical information, see http://www.demwebs.com/smoke/leaders.html (visited July 7, 2009).


\textsuperscript{48}http://www.sos.state.ia.us/elections/results/2008GeneralResults.html
ban, received about 60 percent of the vote against a Republican challenger who supported the law’s repeal.\(^{49}\)

Unable to contain their glee over Republicans’ desperation-driven misjudgment, the Democratic legislative leaders encouraged the Republican party to make their day. Senate Majority Leader Gronstal could only “‘hope that Republicans run against us, because they think the 80 percent of the population that doesn’t smoke would buy into their arguments that smokers deserve public smoking.’” House Majority Leader McCarthy went a step further, predicting that by election time even voters upset by the ban would have adjusted to it: “‘I want to see a candidate come up in October with a mailer and say, “Vote for me, I’ll get smoking back.” They’d be laughed out of town.’”\(^{50}\)

Another group of disgruntled bar (and perhaps other business) owners stylizing themselves a bulwark of all Iowans’ constitutional rights was Iowans for Equal Rights—organized by one Randy Stanford, who (or whose wife) owned a tavern in Des Moines—which was established to collect money to hire a lawyer to contest the new law’s validity. Like other bar owners in this movement, he swore allegiance to a childish image of statutes with universal coverage: “‘They didn’t put a smoking ban into effect. You can’t have a smoking ban if you have exemptions.... You can’t have it both ways. If you find that smoking or breathing second-hand smoke is bad for 99 percent of the population but OK for the other 1 percent, there’s just no common sense there. ... If they want to have a true smoking ban, then there should be no exemptions.’” Where Stanford had picked up his notion of “true” laws he failed to reveal. How, for example, thousands of labor protective laws in the United States that excluded/exempted huge numbers of workers/employers had nevertheless all managed to remain on the statute books was not even a question for him. Realistically, he recognized that invalidating the law itself was a pipe dream: “‘There’s nothing I can do about the ban. No one has been able to overturn it in any state where they’ve tried, so why try?’”\(^{51}\) So, like his fellow anti-ban bar owners, Stanford, too, at this point was

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focused on just getting the casino exemption overturned, which he regarded as hurting bars. However, he was unable even to state the basis of that exemption correctly: nowhere did Democrats claim that exposing casino employees or gamblers to secondhand smoke was “OK”\(^{52}\): on the contrary, from the very moment in which Representative Wise presented his amendment in the House Commerce Committee he admitted that the exemption had nothing to do with protecting the health of those in the casinos, but was, rather, designed to protect revenues.\(^{53}\) In other words, the exemption served some extraneous purpose, which was at odds with the bill’s purpose (just as various labor-protective laws excluded farmworkers in order to protect farm employers).\(^{54}\) Oddly, Stanford did not even believe that overall bar revenues would decline as a result of the ban, though some bars might close.\(^{55}\)

Later, however, Iowans for Equal Rights, while denying that it either was affiliated with any tobacco company or accepted donations from “Big Tobacco,” propagated the cigarette manufacturers’ quarter-century-old voluntary (that is, non-governmenteally imposed) program of pseudo-“accommodation” showering “hospitality” on non-smokers and smokers alike.\(^{56}\) (That IER was in fact nothing but a pro-smoking group was strongly confirmed by its heavy reliance on its “consultant” Norman E. Kjono, a leading member of FORCES [Fight Ordinances and Restrictions to Control and Eliminate Smoking] International.)\(^{57}\)


\(^{53}\)See above ch. 35.


example, when its leaders met with the IDPH director on October 7, 2008, the group’s president, the owner of a bowling alley in Council Bluffs, who insisted that in eight years no one had ever complained to him about smoking,\(^5\) expressly declared that “small business owners must be able to accommodate every customer they can to keep their doors open.”\(^6\) In this reincarnation of the tobacco industry’s goal of retaining as much free space for smoking as possible in the face of increasingly adverse public opinion and government intervention, Iowans for Equal Rights advocated on behalf of “members of the small business community coming together to define smoking rules” and—yet another cigarette
oligopoly fraud—"genuine Indoor Air Quality." Considerably more discontinuous with its earlier position, but in unmistakable conformity with its pro-tobacco stance, the group suddenly not only abandoned its campaign to repeal the casino exemption—to the point of expressing its concern that the American Lung Association of Iowa was trying to persuade the legislature to extend the ban to casinos—but executed an about-face and now began to “support casinos in their efforts to stop the removal of their exemption for gaming floors” and, for good measure, “oppose[d] any efforts to remove current exemptions...for any other business such as farming, limousine services, and heavy equipment” as well as the smoking ban on outdoor restaurant patios. 60 Little wonder that by the end of July IBOC, in a pot-kettle duel, announced that: “We have distanced ourselves from Iowans for Equal Rights. We believe their motives are self serving and do not coincide with our objectives.” 61

The bar owners’ bathetic struggle reached another high point on September 8 when prominent scofflaw Larry Duncan, who had “recently made headlines across the state by blatantly refusing to abide by the new state law,” announced the formation of Freedom Fighters for All Citizens of Iowa, whose goal was “urging Iowa residents to vote against state politicians who supported” that law. Far from seeking assistance in avoiding his own self-inflicted legal problems, he swore that “‘[t]his meeting is not about Larry Duncan. ... It’s about everybody that sits in this room who believes in the Constitution.’” How his group was “standing up for the rights of all Iowa residents” by virtue of advocating for

60Iowans for Equal Rights, “About Us” (n.d.), on http://www.iowansforequalrights.org (visited Sept. 8, 2008). Indicative of the group’s incompetence to evaluate the Public Health Department’s rules, against which it vituperated ad nauseam, but of no further interest here, was its gross inability even to understand the interlocking relationships of several regulatory definitions/statutory uses of such terms as “entrance” and “grounds of public buildings,” which misled it to assert that the latter definition “eliminates patio or outdoor smoking for bars.....” See also Marilea David to Thomas Newton, Re: Definitions of “public place,” “grounds,” “entrance” and other terms (Aug. 11, 2008) (copy furnished by IDPH). On the version posted on the group’s website, this letter is labeled “Iowa Department of Public Health Inquiry No. 5”; http://www.iowansforequalrights.org/five.pdf (visited Aug. 14, 2009). This public comment was one of eight submitted by several members of Iowans for Equal Rights, which appear in fact to have been written by one person, who may not have been any of the signatories. Mapes correctly responded that there was no conflict between “public place” and “public building,” the latter being a specific category of the former. Bonnie Mapes to Marilea David (Nov. 24, 2008), on http://www.iowansforequalrights.org/pdf/IER%20Response%20to%20Health%20Department%20Communications0001.pdf (visited Aug. 14, 2009).

business owners’ “right to decide whether to allow smoking” when “80 percent of Iowans were in favor of the ban” he failed to explain.62 How Duncan would have reacted to the revelation that the 1857 constitutional convention which wrote his beloved constitution had unanimously adopted a resolution, offered by one of the state’s leading alcohol prohibitionists, prohibiting smoking in the convention chamber is amusing to imagine.)63 His professed selflessness to the contrary notwithstanding, his hometown newspaper reported that “Duncan started the Freedom Fighters [t]o raise money for legal costs....”64 That Duncan was pursuing a non-existent constitutional right was visibly on display in “Our Mission Statement,” which proclaimed that the organization was “dedicated to...upholding the Iowa Constitution and seeing that all citizens are treated fairly and equally with no exceptions or immunities.”65 That Duncan’s objective was not establishing parity between bars and casinos, but the resumption of unimpeded smoking in public places was inscribed in “Our Goal”: “We want to preserve our individual liberties that our forefathers envisioned and that only our Creator can take away. We will not quit! HF2212 must be repealed as it infringes on our individual liberties. The state of Iowa...is interfering with the interstate commerce of a legal agricultural product.” With that tobacco-loving God on his side, “Larry knew he could raise an army to challenge the constitutionality of this new law. It was a way to unite the voices of all citizens of Iowa, a common bond for a common good for Iowa.” Within a year Duncan’s Freedom Fighters allegedly numbered several thousand and held hundreds of meetings.66

Not that all bar owners were feverishly hatching plans to evade the law. On the contrary, some welcomed it. In Iowa City, for example, several viewed it positively as increasing sales in the long run; others regarded it as sales-neutral or as a cost-saver in terms of reducing maintenance costs from cigarette burns or damages to equipment caused by smoke; another echoed sentiments voiced by many business owners over the years who “embrace[d]” the law because it made

62 Nick Bergin, “Smoking Ban Sparks Activists,” Hawkeye (Burlington), Sept. 9, 2008 (1A) (NewsBank).
63 See above ch. 18.
64 Christinia Crippes, “Otis Campbell’s Owner Keeps Fighting,” Hawk Eye (Burlington) Jan. 9, 2009 (1A) (NewsBank).
mandatory what they had been trying to accomplish voluntarily.67

The Iowa Department of Public Health’s Proposed and Final Rules

[Johnson County Supervisor Terrence] Neuzil...said that he is in support of the smoking ban, but doesn’t want employees to be standing on a public sidewalk smoking, since he doesn’t like this image. [Supervisor Pat] Harney asked who was going to clean up cigarette butts, since it is a dirty job. He said that if they are going to designate a smoking area, they have to make the employees accountable for cleaning up the area.

[Supervisor Mike] Lehman said...that they also have to respect the rights of individuals who are addicted to tobacco.... [Public Health Department Director Ralph] Wilmoth reiterated that there is no safe level of exposure to tobacco smoke. Neuzil said he is just saying that there needs to be a place for people who are addicted. Wilmoth said that they have cessation programs which is the preferred choice to help people get beyond this addiction.68

[B]ut a little common sense here now and then don’t hurt a thing.69

The legislature conferred extensive administrative and enforcement powers on the Iowa Department of Public Health:

This chapter shall be enforced by the department of public health or the department’s designee. The department of public health shall adopt rules to administer this chapter, including rules regarding enforcement. The department of public health shall provide information regarding the provisions of this chapter and related compliance issues to employers, owners, operators, managers, and other persons having custody or control of a public place, place of employment, area declared a nonsmoking place pursuant to section 142D.5, or outdoor area where smoking is prohibited, and the general public via the department's internet site.70

IDPH’s release on June 2 of the initial 13-page draft of its implementing rules (in time for the Administrative Rules Review Committee and State Board of Health meetings on June 11) had been preceded by a flurry of interagency

69Administrative Rules Review Committee Meeting (June 11, 2008) (audio tape provided by ARRC Legal Counsel Joseph Royce) (remark of Senate President Jack Kibbie).
70H.F. 2212, § 8(1)/Iowa Code §142D.8(1) (2009).
activity, especially in collaboration with the Attorney General’s Office, which drafted the rules together with IDPH. The AG and IDPH appear to have focused attention on a relatively small number of especially contentious issues, some of which were on the agenda and/or discussed at the Smokefree Air Act Implementation Discussion held under the auspices of the Division of Tobacco Use Prevention and Control on May 6. Division Director Bonnie Mapes informed invited officials from the Alcoholic Beverages Division, Professional Licensing Division, Iowa State Fair, Secretary of State, Iowa State University, the Departments of Revenue, Natural Resources, Economic Development, Public Safety, Human Services, Inspections and Appeals, Administrative Services, and Elder Affairs, and the bill drafter from the Legislative Services Agency that the meeting was designed to “solicit questions, concerns and suggested definitions or clarifications about specific stipulations of the law (in writing, if possible) so we can add these to the list of issues that need to be addressed as the rule is developed. Finally, if you are aware of any state or federal laws, rules or regulations which might conflict with language in the Smokefree Air Act, please bring these to our attention, as well.” (Not included in this invitation but in attendance at the meeting were representatives of the State University of Iowa and University of Northern Iowa as well as several non-state officials such as an attorney from the legal department of the City of Des Moines and the Iowa League of Cities lobbyist). The agenda for the two-hour meeting allotted 15 minutes to a progress report (including a review of the proposed enforcement process), 10 minutes to requirements of agencies that issued business licenses, 20 minutes to the involvement of agencies performing inspections, and 30 minutes to the definition of “grounds of any public buildings...under control of the state...,” in addition to 40 minutes to agencies’ presentation of additional matters for further clarification. The very fact that one-fourth of the entire meeting was to be devoted to defining “grounds of public buildings” suggested how thorny the determination of the extensiveness of this part of the Act’s outdoor smoking ban was, which both was nationally unique and originated in a kind of legislative practical joke or bluff that backfired on its Republican sponsors.

71 Email from Bonnie Mapes to Patricia Funaro et al. (May 1, 2008) (forwarded by recipient to Marc Linder).
72 Email from Bonnie Mapes to Patricia Funaro et al. (May 1, 2008).
73 See below for mention of their roles.
74 Iowa Department of Public Health, Smokefree Air Act Implementation Discussion May 6 [2008], Agenda (attached to email from Bonnie Mapes to Patricia Funaro et al. May 1, 2008).
75 See above ch. 35.
Administrative Rules for, Barkeepers' Challenge to, Enforcement of Smokefree Air Act

One issue that was not on the agenda but was discussed involved the scope of the provision banning smoking on “school grounds, including parking lots, athletic fields, playgrounds, tennis courts, and any other outdoor area under the control of a public or private educational facility, including inside any vehicle located on such school grounds” and in particular whether it applied to college and university campuses. (A set of surviving notes taken by an IDPH official did not list it among the “3 big issues”—namely, bars vs restaurants, infiltration, and grounds—but more than one-third of his notes were devoted to this subject.)

Among the divergent views expressed by attendees the argument was voiced that if “school” included a state university, it would be the only such use of the word in the Iowa Code, in which it otherwise meant exclusively kindergarten through high school. On the other hand, the opinion was also expressed that since the provision used both “school” and “educational facility,” it would be hard to differentiate between K to 12 and universities. A representative of the University of Northern Iowa, who was concerned that the assembled officials were underestimating the (volume of) complaints that the law would generate, was concerned about the butt disposal and environmental issues and worried about the university’s turning into a “bad neighbor” by pushing (smokers and) the problem across the street (and off campus).

The day after the meeting Mapes discussed the issue with someone whom she had not invited to the meeting who later summarized their conversation and added some policy context for interpreting the statutory provision:

77 [Aaron Swanson], SAA Meeting n.p. [at 2] (May 6, 2008) (copy furnished by IDPH).
78 Email from Jonathan Carlson to Marc Linder (Sept. 10, 2008). Carlson, a law professor who was senior associate to the president of the University of Iowa and co-chair of its smoking policy implementation team, represented it at the meeting. The university’s commitment to a thoroughgoing implementation of the law can be gauged by its having chosen as chief implementer someone who stated that he was not interested in reducing the number of places where people were lawfully permitted to smoke and that he had opposed the university’s proposed campuswide smoking ban policy before it was preempted by the statewide law. Telephone interview with Jonathan Carlson, Iowa City (Aug. 22, 2008).
79 [Aaron Swanson], SAA Meeting n.p. [at 3] (May 6, 2008) (copy furnished by IDPH).
80 [Aaron Swanson], SAA Meeting n.p. [at 4] (May 6, 2008) (copy furnished by IDPH). One of the less weighty issues raised by a University of Iowa representative was whether the president’s residence was to be posted. Id. Moreover, the statute expressly covered such a public building and legislators expressly mentioned the UI president’s house as covered. See above ch. 35.
[Y]ou mentioned that [she] interpreted sect. 3(2)(d), which prohibits smoking on “school grounds, including parking lots, athletic fields, playgrounds, tennis courts, and any other outdoor area under the control of a public or private educational facility, including inside any vehicle located on such school grounds,” to cover only elementary and secondary schools, but not colleges and universities. You also mentioned that public colleges and universities would be covered under (2)(e), which prohibits smoking on “the grounds of any public buildings owned, leased, or operated by or under the control of the state government or its political subdivisions…” I mentioned to you that I had spoken to a number of legislators about this very issue and they had all said that the legislature intended to cover colleges and universities under sect. 3(2)(d). You replied that I should send you any information I had on legislative intent on this issue. I just spoke to Senator Matt McCoy, who, as I’m sure you know, was one of the legislators who was most instrumental in securing passage of HF 2212; Sen. McCoy stated unambiguously that the legislature intended sect. 3(2)(d) to include private and public colleges and universities. ... [H]e have [sic; should be “gave”] me a list of other legislators, including senators Appel and Connolly, who would corroborate his statement. ...

Even apart from this issue of intent, it would—since numerous studies show that if people don’t begin smoking by the age of 19 or 20, it’s very unlikely that they ever will—make no public health sense for the legislature to exclude private colleges and universities from the outdoor no-smoking ban. Moreover, since even you would agree that sect. 3(2)(d) covers private elementary and secondary schools, there would have been no reason for the legislature to doubt that it lacked the power to cover private colleges/universities.

Finally, the fact that the existing law, sect 142B.1(3), uses the term “educational facility” in a way that clearly includes colleges/universities is powerful evidence that it does not have a less comprehensive scope under new ch. 142D, which is so much broader.81

81Email from Marc Linder to Bonnie Mapes (May 8, 2008). Mapes quibbled with the use of the word “interpret,” but opaquely confirmed the accuracy of the view attributed to her: “I did not say that I interpreted section 3(2)(d), to cover only elementary and secondary schools, but not colleges and universities. I am not a lawyer or a legislative analyst and I, myself, am not interpreting any sections of the law. What I did say to you was that in our meetings with representatives from several institutions, including representatives from the universities, there has not been unanimity of opinion about the interpretation of that section.” Email from Bonnie Mapes to Marc Linder (May 8, 2008). It was unclear why Mapes believed that (governmental) regulatees’ opinions as to whether they were covered by the statute were relevant to determining statutory meaning and/or legislative intent.
Informed later that same day that H.F. 2212’s chief sponsor, Janet Petersen, had not only agreed with McCoy that section 3(2)(d) covered colleges and universities, but that she would be in touch with IDPH about the issue, Mapes forwarded the information to the Attorney General’s office. Although the time for IDPH to publish its proposed rules was fast approaching, the interpretive contest over the word “school” and the dispute over the new law’s sweep had still not been resolved by May 22, when Tom Newton, the IDPH director, in the course of discussing on a radio broadcast what he described as the huge task his agency was facing in writing the rules for the Smokefree Air Act during a short period of time, revealed that, despite his claim that the legislation was “very explicit,” one gray area of legislative intent was “schools”: because some people were saying that the term meant only grade and high schools, IDPH was talking to the bill drafters in order to be able to define the scope of coverage. Nevertheless, with the legislature’s Administrative Rules Review Committee scheduled to meet and consider IDPH’s proposed rules in less than three weeks, the principal administrator of the University of Iowa’s smoking policy stated that “[w]e’ve made the decision to go forward with our campus-wide ban, regardless of how the law is interpreted,” although he suspected that the agency rules would interpret the school and educational facility provision to cover universities, and the University of Iowa had informed the IDPH that it would prefer that outcome.

As late as the day on which IDPH released its proposed rules, the state’s foremost newspaper reflected and reinforced public confusion: once again conflating coverage under the school/public or private educational facility provision and that under the grounds of public buildings provision (or perhaps ignoring the former altogether), the Des Moines Register reported that a narrow interpretation of the latter “could prevent the health department from enforcing the ban in areas of the U of I, such as Hubbard Park, on which no buildings sit.” Consequently, the university was purportedly “still unsure whether the statewide ban covers the entire campus....” In fact, such uncertainty would have been appropriate only if IDPH defined “school”/“educational facility” to exclude

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82 Email from Marc Linder to Bonnie Mapes (May 8, 2008).
83 Email from Bonnie Mapes to Marc Linder (May 9, 2008).
84 “The Exchange,” Iowa Public Radio, WSUI, Iowa City (May 22, 2008, 10 a.m.). Newton also mentioned “grounds of any public buildings” as a unique feature of the Iowa law, which could designate a large or small area.
85 Email from Jonathan Carlson to Marc Linder (May 23, 2008).
Administrative Rules for Barkeepers’ Challenge to Enforcement of Smokefree Air Act

In the event, the agency’s draft rules released on June 2 did in fact adopt the broad interpretation87: “‘School’ and ‘public or private educational facility’ means a public school and a nonpublic school as defined in Iowa Code section 280.2, a community college as defined in Iowa Code section 260C.2, an accredited private institution as defined in Iowa Code section 261.9, and an institution governed by the board of regents pursuant to Iowa Code section 262.7.”88 The decisive circumstance prompting rejection of the narrower K-12 interpretation was, according to Mapes, a clarification of the legislature’s intent89 based on contacts with “[s]pecific legislators involved with the legislation,” such as Petersen, as well as Olson and Wise.90

IDPH’s recognition of the enforceability of the smoking ban on the entire indoor and outdoor campus of every college and university in the state was of vital importance not only to those institutions’ scores of thousands of students and employees (as well as their alumni and visitors and patients at the University of Iowa Hospitals and Clinics), but, since Iowa was pioneering in this area, also to higher education throughout the country as a model. Nevertheless, despite its unprecedentedness, this aspect of the law, which the legislature never debated,91 also never attained the public salience that several other statutory provisions generated, which form the focus of the following account.

Because the legislature had defined numerous terms in the Smokefree Air Act with operationally sufficient specificity, IDPH was able to adopt them verbatim. Among the terms left undefined by the law, however, two definitions proposed by the agency proved to be especially contentious—“grounds of any public universities.

87 As ARRC itself pointed out: “the school grounds restriction is very broad and would appear to include the entire campus; there is nothing in the Act that indicates that the term ‘school’ is limited to K-12 or public schools.” Iowa General Assembly, Administrative Rules Review Committee, Rules Digest, June 2008, at 1, on http://www.legis.state.ia.us/lsadocs/ARR/ARRDigest/2008/ADJAR011.PDF. ARRC repeated this note in connection with the rules’ next appearance on its agenda. Iowa General Assembly, Administrative Rules Review Committee, Rules Digest, Oct. 2008, at 4, on http://www.legis.state.ia.us/lsadocs/ARR/ARRDigest/2009/ADJAR002.PDF
89Email from Bonnie Mapes to Marc Linder (Sept. 11, 2008) (not identifying the source of the clarification).
90Email from Bonnie Mapes to Marc Linder (Sept. 15, 2008). Because she failed to “keep notes on every contact I had with legislators about the rules as we were drafting them,” Mapes said that she was unable to state which specific issues she discussed each time. Id.
91See above ch. 35.
buildings” and that part of “bar” which specified “the serving of food is only incidental to the consumption” of alcoholic beverages without fleshing out “incidental.”92 The former stimulated considerable controversy among many state and especially local government entities that owned those public buildings and would be liable for enforcing the smoking bans on their grounds; by and large IDPH afforded them the accommodations they requested. In contrast, the latter—on which hinged whether outdoor smoking would be prohibited as in restaurants—ignited intense and explosive opposition from numerous bar owners (and a few of their legislative representatives), whose noisy resistance did not prompt IDPH to modify its original definition.

Resolving legislative intent with regard to college and university campuses was a straightforward task compared to figuring out what “[t]he grounds of any public buildings owned, leased, or operated by or under the control of the state government or its political subdivisions”93 was designed to cover. Analysis was complicated by the quasi-prankish genesis of the provision as an amendment to Petersen’s study bill, which Republicans hoped would directly embarrass the governor, indirectly embarrass Democrats, and/or even contribute to the bill’s demise. Ferreting out legislative intent was further impeded by the fact that the floor discussion—especially in the House, where the amendment originated—was confused and/or disingenuous: because Soderberg, the Republican who offered the amendment, neither made an effort to clarify what he meant to cover beyond the grounds of the governor’s mansion (on which Governor Culver’s wife would be prohibited from smoking) nor could afford to taint his party’s self-cultivated image as protector of Iowans’ liberties, while anti-smoking Democrats, though apparently grateful that it was Republicans who had broken non-smoking ground on which the majority party had feared to tread outdoors, were manifestly unwilling to antagonize, even further, scores of thousands of smokers by taking responsibility for imposing a ban on smoking in outdoor areas on public land that might rival the universal ban on college campuses that slipped through without any fanfare, floor debate failed to produce any clarification of the scope of coverage.94

By May, when IDPH was forced to struggle with answering questions from the public and drafting a definition for its rules, House floor manager Olson weighed in with his perspective, which, while hardly authoritative, was nevertheless more straightforward than his evasive remarks on the House floor had been. Expressing confidence that the definition would be “reasonable and

94See above ch. 35.
practical,” he assured a public radio audience that: “We’re not talking about not being able to smoke in an entire state park or in [sic] a state campground. What we’re talking about is not being able to smoke in a building on public grounds and then some kind of defined perimeter around it which would be then the public grounds determination.” How he knew that the legislature intended to protect everyone everywhere on the University of Iowa campus (which, at 1,900 acres, is larger than many parks) from exposure to secondhand smoke, but did not intend to protect children at picnic tables or on trails in parks, he did not reveal. Mapes, who was formally in charge of the rulemaking process, also took pains to reassure people “looking at the law thinking it probably covers a lot more than it may end up covering.” Why the text of the law would persuade readers that it prohibited smoking in more places than IDPH had apparently already determined to be covered she no more explained than why that part of the rulemaking process was catering to the small minority of smokers.

In the event, the department’s draft rules defined “Grounds of any public building” to mean “an outdoor area of a public building that is used in connection with the building, including but not limited to a sidewalk immediately adjacent to the building; a sitting or standing area immediately adjacent to the building; a patio; a deck; a curtilage or courtyard; a swimming or wading pool; or a beach, or any other outdoor area as designated by the person having custody or control of the public building.” The rule then went on to confer discretion on this person “to exclude from the designated grounds of any public building a parking lot, the course of play at a golf course, a hiking trail, locations of an individual campsite or campfire, or a lake, river, or other body of water.”

Interestingly, IDPH held the May 6 meeting “before we developed any definitions.” At that meeting the Iowa League of Cities, a “couple of major universities,” and the Iowa Department of Natural Resources “expressed concern” about the scope of the statutory term “grounds of any public buildings.” For example, the League asked whether it would include an entire (government-owned) golf course, since most golf courses had a clubhouse and/or restrooms, or an entire park, including all of its trails and campsites, since parks often had shelter houses, lodges and restrooms. The nature of the League’s concern was

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99Email from Bonnie Mapes to Marc Linder (Aug. 20, 2009).
crucial: “Our view was that governmental entities might find it very difficult to
enforce the smoking ban in these locations.” In other words, cities’ concern was
not driven by the desire to implement the legislature’s intent to protect
nonsmokers from secondhand smoke exposure in certain outdoor areas, but by
their own enforcement, resource, and budgetary priorities, and perhaps as well by
fear of alienating smokers and/or law enforcement agents, who might not have
wanted to confront violators. In the event, “[i]n response, the Dept. of Public
Health included a definition of the phrase...in its rules.”

Asked about the statutory warrant for permitting those in control of buildings
to exempt, for example, a golf course, the bill’s chief sponsor and driving force,
Janet Petersen, devised the justification that it had been discussed during floor
debate. Although it is true that the House did have a colloquy on golf courses,
Petersen suppressed—if she was ever aware of and remembered—the information
that that point, raised by Representative Raecker with Olson, was, as analyzed in
detail earlier, left hanging without any resolution whatsoever, Raecker asserting
that a golf course was covered as the grounds of a public building, and Olson
denying that it was a “place[ ] of public assembly” (a term that did not even
survive in the final bill text). Raecker not only confirmed this account, but
charged that if the rule was written more “liberally,” it did not correspond to the
wording of the statute. Confronted with the fact that Olson had never engaged,
let alone contradicted, Raecker’s interpretation, and asked whether this
ambiguous legislative history justified IDPH in authorizing local governments to
exempt golf courses, neither Petersen, nor Wise, nor Connolly ever responded.

100 Terry Timmins and Jessica Harder, “Workshop Presentation: Where There’s
Smoke...Workshop on Iowa’s New Smokefree Air Act” at 7 (Iowa League of Cities, n.d.
Conference/Handouts/WhereTheresSmokeHO.pdf (visited Aug. 20, 2009). According to
the author of these remarks, who had attended the meeting, it was not clear whether IDPH
would have provided a definition if no one had raised concerns. Telephone interview with
Jessica Harder, Des Moines (Aug. 20, 2009). Mapes stated that a definition would have
been “needed” even if no one had raised issues because the Act did not define the term.
Email from Bonnie Mapes to Marc Linder (Aug. 20, 2009).

101 Telephone interview with Janet Petersen, Des Moines (June 6, 2008). She also
mentioned hiking trails and parking lots. Remarkably, a representative of the Alcoholic
Beverages Division at the May 6 IDPH meeting expressed a preference for including
parking lots in the ban on the grounds of “public perception.” [Aaron Swanson], SAA

102 See above ch. 35.

103 Telephone interview with Scott Raecker, Des Moines (June 7, 2008).

104 Email from Marc Linder to Janet Petersen (June 6 and 7, 2008). Petersen, Wise,
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

The definition as a whole went a long way toward accommodating the Iowa League of Cities, whose members’ divergent views—some supported local control while others preferred statewide regulation so that city officials would not appear as the “bas guys”—had deprived the organization of the unity that effective legislative lobbying required. Consequently, the “imperfect statute” that the legislature enacted left the League with a final opportunity to fashion a sufficiently uniform position on the basis of which to seek a more favorable outcome from the rules writing process. In view of the different “kind of climate” that prevailed in various cities, depending in large part on the size of the city, the lowest common denominator that members were able to achieve focused on flexibility.105 Indeed, that key notion was raised by a representative of the League at the May 6 IDPH meeting, who requested the agency not to “rule too broadly” and to give cities “flexibility” with regard to parks and golf courses.106

Early on in the process ILC’s governmental affairs counsel submitted to IDPH its comments on the smoking ban rules. The League was concerned that the “undefined term” would have “great impacts on the way cities are required to enforce these laws [sic], and it needs clarification.” As an example of such impacts, ILC mentioned parks, beaches, golf courses “or other outdoor areas not mentioned specifically in the law if there happens to be a ‘public building’ somewhere on those properties.”107 Cities, in other words, were concerned only with limiting their obligations under the new law to the apparent exclusion of the resulting health consequences for nonsmokers. The League’s proposed “solution” was a definition that included “the area immediately adjacent to a public building in which occupants of the building or members of the public could be expected to congregate in connection with the purpose or use of the building, and includes that area immediately adjacent to a public building, which if used for smoking

and Connolly also failed to respond to the account of Raecker’s and Soderberg’s broad interpretation of “grounds of any public building.” Email from Marc Linder to Janet Petersen (June 7, 2008).

105 Telephone interview with Jessica Harder, government affairs counsel, Iowa League of Cities, Des Moines (Aug. 12, 2009).


107 Iowa League of Cities, “Comments: Rulemaking HF2212 statewide smoking ban” at 1 (Apr. 8, 2008) (copy furnished by IDPH). Although the comments themselves were dated April 8, 2008, the email from Jessica Harder (ILC) to Brent Saron (IDPH) to which they were attached was dated May 9, 2008. It seems unlikely that organizations would have been providing comments on agency rules even before the governor had signed the bill into law. The author later was unable to explain the discrepancy. Telephone interview with Jessica Harder, Des Moines (Aug. 12, 2009).
would cause smoke to infiltrate the building through doors or windows.” The virtue of this language was its creation of “needed flexibility for cities.” The “flexibility” that use of the term “congregate” would have granted cities governments would also have diminished the number of nonsmokers entitled to a smokefree walk from the outer perimeter of the grounds of public buildings into the buildings inasmuch as individual people (or even groups) walking would not have been congregating. The League’s proposal deprived nonsmokers of considerable protection from secondhand smoke exposure outdoors that IDPH’s draft definition provided precisely because it ignored the purpose of such outdoor protection. Instead, it erroneously treated the “grounds of any public building” ban as serving merely to prevent smoke from wafting into public buildings. Also expressive of “flexibility” was the conferral of a significant dose of local control: those cities that “wanted to strengthen the smoking ban in areas otherwise exempt from the prohibitions of smoking” could simply pass ordinances banning smoking in parks or on golf courses. Interestingly, rather than disposing of the issue in its own proposal, the ILC merely posed the question as to whether, if the grounds of a public building encompassed “public rights of way, like sidewalks or streets,” they were “exempt from the ban....”

While IDPH draft accommodated the League of Cities by empowering governments to exempt not only golf courses, but parking lots, hiking trails, campsites, and various bodies of water, it did not adopt the restrictive
"congregate" or "infiltrate" language that would have diluted protection for nonsmokers. Moreover, by failing to address expressly the issue of "public rights of way, like sidewalks," but by including "sidewalks immediately adjacent to the building" in the draft rules, IDPH implicitly answered the ILC’s question: they were not exempt—until the Department reversed its position later in the rulemaking process.  

As far as the sub-definition of "bar" was concerned, IDPH defined the "serving of food [is only] incidental to the consumption of alcoholic beverages" to mean "food preparation that is limited to the service of ice, pre-packaged snack foods, popcorn, peanuts, and the reheating of commercially prepared foods that do not require assembly, such as frozen pizza, pre-packages sandwiches, or other prepackaged, ready-to-serve products." This definitional focus on the type of food preparation rather than the proportion of total bar revenue accounted for by food—"[a]n establishment which prepares food on site is considered a restaurant for the purposes of the Smokefree Air Act, even if that establishment has a liquor license"—did not faze some bar owners, but the uproar that it provoked among some bar owners would manifest itself at the Administrative Rules Review Committee meeting on June 11.

111 IDPH also did not fully accommodate the League regarding another definition. ILC was concerned that the statutory requirement (§ 6(3)) that owners "shall clearly and conspicuously post in and at every entrance."  


One draft rule that seriously weakened the Smokefree Air Act—and that, astonishingly, prompted little comment—dealt with the enforcement obligations of those in control of smoking-prohibited places. The statute itself provided that they “shall inform persons violating this chapter of the provisions of this chapter.” The proposed IDPH rule reconfigured this aspect of the enforcement process thus:

An employer, owner, operator, manager, or person having custody or control of a place where smoking is prohibited under 2008 Iowa Acts, House File 2212 shall inform any individual smoking in a place where smoking is prohibited that the individual is violating the Smokefree Air Act and shall request that the individual stop smoking immediately.

a. If the individual refuses to stop smoking, the employer, owner, operator, manager, or person having custody or control of the place where smoking is prohibited should discontinue service to that individual.

b. If the individual refuses to stop smoking, the employer, owner, operator, manager, or person having custody or control of the place where smoking is prohibited may request that the individual leave the area where smoking is prohibited.

c. If the individual refuses to leave the area where smoking is prohibited, the employer, owner, operator, manager, or person having custody or control of the place where smoking is prohibited may notify the state or local law enforcement agency with jurisdiction over the area where smoking is prohibited.

A critique of the regulation together with a request that the Administrative Rules Review Committee discuss the matter and urge IDPH to strengthen the enforcement process was sent to Petersen, the bill’s chief sponsor, and the committee’s co-chairs, Philip Wise and Michael Connolly:

[T]he draft rules that the IDPH posted on its website on May 29…seriously weaken the overall enforcement process. The only direct enforcement obligation that the draft rules impose on owners et al. is to tell violating smokers that they are violating the law and to request that they stop smoking immediately. If smokers refuse to stop smoking or ignore the owner’s request, the owner has no obligation to take any further steps to insure compliance—she is not even required to notify law enforcement. ...

This hands-off approach is deeply flawed: not only is it an open invitation to collusion between smokers and owners to defeat the smoking ban, but it throws the whole social-psychological burden of enforcement on individual members of the public to confront belligerent smokers by reporting the violation to law enforcement in the face of owners’ passivity. Although involvement by the public would be welcome, many people are very

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reluctant to become informers even when they can do so anonymously. In contrast, owners (e.g. of bars) perform quasi-law enforcement functions vis-a-vis customers et al. on a regular basis and are accustomed and expected by the public to do so.\textsuperscript{117}

The following day Mapes was asked: “Did IDPH make it merely discretionary (rather than mandatory) for an owner to notify law enforcement if someone refused to comply with a request to stop smoking where it was prohibited because IDPH believed that it lacked the authority to make it mandatory—or for some other reason?”\textsuperscript{118} Her response—that “[t]he only instances in which we were able to use the word “shall” instead of “may” or “should” are for those stipulations stated explicitly in the legislation”\textsuperscript{119}—prompted the further question: “By that logic, where are the ‘stipulations stated explicitly in the legislation’ authorizing IDPH” to authorize local governments to exempt parking lots, golf courses, and hiking trails? In addition, Mapes was asked whether a bar owner would be complying with his obligations under the new law if, after telling belligerent smokers that smoking was unlawful and requesting that they stop immediately, he did nothing further in response to their continued smoking.\textsuperscript{120} At this point the director of the Tobacco Use Prevention and Control division shifted into that’s-over-my-pay-grade mode: “This is not my logic. This is the AG’s determination.”\textsuperscript{121} One final effort to elicit a substantive response—“It doesn’t matter whether it’s yours or theirs—the point is whether that’s the only possible interpretation of the law and whether the narrow interpretation makes enforcement much more difficult than the legislature envisioned”\textsuperscript{122}—failed: “Then I suggest you ask the bill sponsors about whether they share your concerns.”\textsuperscript{123}

\textsuperscript{117}Email from Marc Linder to Janet Petersen, Philip Wise, and Michael Connolly (June 3, 2008).

\textsuperscript{118}Email from Marc Linder to Bonnie Mapes (June 4, 2008).

\textsuperscript{119}Email from Bonnie Mapes to Marc Linder (June 5, 2008). Interestingly, although Jonathan Carlson, the University of Iowa’s representative at the meeting on May 6, 2008, took the position that the university would be complying with its statutory obligation if one of its agents told a violator to stop smoking and then walked away after the violator indicated that he would not comply, he reported the day after the meeting that Mapes seemed to believe that owners might have more of an obligation and that IDPH might use its authority to motivate owners to enforce more thoroughly by issuing civil citations. Telephone interview with Jonathan Carlson, Iowa City (May 7, 2008).

\textsuperscript{120}Email from Marc Linder to Bonnie Mapes (June 5, 2008).

\textsuperscript{121}Email from Bonnie Mapes to Marc Linder (June 5, 2008).

\textsuperscript{122}Email from Marc Linder to Bonnie Mapes (June 5, 2008).

\textsuperscript{123}Email from Bonnie Mapes to Marc Linder (June 5, 2008).
Two days later bill sponsor Wise responded to the aforementioned critique:

I have spent a significant amount of time pursuing the enforcement issue with Legal Counsel for the ARRC, the Department of Public Health, the office of the Attorney General, and with Rep. Petersen. Following is my conclusion.

While I don’t personally disagree with your concerns about the owner’s relatively limited role in enforcement, that is what we passed. The rules that indicate the owner “shall” do something are based upon statute. The rules that indicate the owner “may” do something, in other words discretionary in nature, are beyond what we passed into law. It would be inappropriate, therefore, to mandate through administrative rules that the owner discontinue service, require the offending party to leave the area, or notify law enforcement. To do so would require a future General Assembly to amend the statute to include those mandatory activities on the part of the owner.124

Two days before the scheduled ARRC meeting a final effort, based on administrative law, was made to persuade Wise to revise his narrow view of an administrative agency’s powers of statutory interpretation:

Section 8(1) of the new statute provides that: “The department of public health shall adopt rules to administer this chapter, including rules regarding enforcement.”

This legislative mandate to the DPH to adopt rules to administer this chapter, including rules regarding enforcement CANNOT mean that DPH has power only to issue rules that are totally identical to the words of the statute. If that were the case, there would be absolutely no point in delegating power to the agency to issue enforcement rules because those rules would already exist in the words of the statute. Therefore, it must be the case that the legislature delegated DPH some power to issue rules that TO SOME EXTENT go beyond the words of the statute in order to enforce the law. The only question is: TO WHAT EXTENT?

We already know that the DPH believes that it has some power to deviate from the precise words of the statute because three of its draft enforcement rules do just that:

153.5(4)
a. If the individual refuses to stop smoking, the employer, owner, operator, manager, or person having custody or control of the place where smoking is prohibited should discontinue service to that individual.
b. If the individual refuses to stop smoking, the employer, owner, operator, manager, or person having custody or control of the place where smoking is prohibited may request that the individual leave the area where smoking is prohibited.
c. If the individual refuses to leave the area where smoking is prohibited, the employer, owner, operator, manager, or person having custody or control of the place where smoking is prohibited may notify the state or local law enforcement agency with jurisdiction over the area where smoking is prohibited.”

124Email from Phil Wise to Marc Linder (June 7, 2008).
There is absolutely nothing in the statute that says a building owner should stop serving a violating smoker. There is absolutely nothing in the statute that says a building owner has discretion to request the smoker to leave the smoking-prohibited area. There is absolutely nothing in the statute that says a building owner may call law enforcement.

Nevertheless, DPH added these discretionary rules and apparently you agree that DPH has the power to do so even though the statute makes no reference to such actions by owners.

Moreover, whereas the statute merely says that “An owner, operator, manager, or other person having custody or control of a public place, place of employment, area declared a nonsmoking place pursuant to section 142D.5, or outdoor area regulated under this chapter shall inform persons violating this chapter of the provisions of this chapter,” the draft rules, 153.5(4), say: “An employer, owner, operator, manager, or person having custody or control of a place where smoking is prohibited under 2008 Iowa Acts, House File 2212 shall inform any individual smoking in a place where smoking is prohibited that the individual is violating the Smokefree Air Act and shall request that the individual stop smoking immediately.”

The statute does NOT say that an owner must request a smoker to stop smoking at all, let alone immediately. Yet DPH believes—and presumably so do you—that it has the discretion to interpret the statute to empower it to deviate from the words of the statute in order to enforce the law by making explicit what is implicit in the law by requiring owners to tell violators to stop smoking immediately.

The question therefore is: Once you’ve agreed that, despite the absence of any statutory mention of such action, the DPH has the power to tell a building owner that s/he has the AUTHORITY to call law enforcement when a recalcitrant smoker refuses to stop smoking, is it absolutely clear under administrative law that DPH would be going too far by telling the building owner that s/he has the DUTY to call law enforcement?

There is a strong basis for concluding that DPH would NOT be going too far. First, DPH is not going beyond the words of the statute in requiring, for example, a person, on whom the statute does not impose any duty, to do something. Thus, if the DPH had drafted a rule requiring all the other customers of a restaurant/bar observing a violation to call law enforcement, many people would probably conclude that the statute did not confer that much power on the agency. Second, the statute does impose a duty on building owners to inform violators of the statute—is requiring owners to call law enforcement so much further removed from the words of the statute than requiring owners to tell violators to stop smoking immediately that it is absolutely clear that DPH has no power to do so?

In order to answer this question, consider draft rule 153.5(1):

“The employer, owner, operator, manager, or person having custody or control of a place where smoking is prohibited under 2008 Iowa Acts, House File 2212 shall: a. Not permit smoking in a public place, place of employment, outdoor area where smoking is prohibited, or an area declared nonsmoking pursuant to 2008 Iowa Acts, House File 2212, section 5.”

Does the statute literally say that an owner of a public place “shall not permit smoking in a public place...where smoking is prohibited”? The statute says (sect. 3(1)) “a person
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

shall not smoke in...public places,” but does it literally say that the owner shall not permit it? If it doesn’t, DPH reasonably concluded that enforcement would be impossible without inferring that the statute meant it even [though] the statute didn’t say it in so many words. If the statute does say it, then why wouldn’t DPH be authorized to issue an enforcement rule requiring an owner who “shall not permit smoking” to call law enforcement after a noncompliant smoker has refused to stop smoking? After all, if the owner, after telling the violator to stop smoking immediately and being told by the violator that he won’t stop smoking, merely shrugged his shoulders, gave up, and did absolutely nothing more—as the draft rules now would permit him to do—wouldn’t the owner be violating his duty not to permit smoking? Isn’t calling law enforcement the very least that the owner would have to do to comply with his duty not to permit smoking? 125

Wise failed to respond, and the only modification in the entire set of rules that the IDPH made in the wake of the June 11 ARRC meeting126 was to strike the aforementioned anomalous “should” in favor of “may discontinue service to that individual.”127 The most revealing commentary on this regulatory distortion of the enforcement process came from the highest legislative authority, Janet Petersen herself, who, in acknowledging that law enforcement was not perfect, explained that “we” had decided not to anger business owners by requiring them to call the police.128 In contrast, neighboring Minnesota was apparently less concerned about alienating them: its Clean Indoor Air Act of 2007 provided that the owner “shall makes reasonable efforts to prevent smoking...by...asking any person who smokes in an area where smoking is prohibited to refrain from smoking and, if the person does not refrain from smoking after being asked to do so, asking the person to leave. If the person refuses to leave, the proprietor, person, or entity in charge shall handle the situation consistent with lawful

125 Email from Marc Linder to Philip Wise (June 9, 2008). In any event wrong was the public comment by a lawyer-bar and grill owner that the Act was not written for an owner to “notify any local enforcement agencies, since there are none that would have jurisdiction over the issue.” Mark Mershon to Iowa Department of Public Health (July 1, 2008) (copy furnished by IDPH).

126 Email from Bonnie Mapes to Marc Linder (July 1, 2008).


128 Telephone interview with Janet Petersen, Des Moines (June 6, 2008). Remarkably, at one of IDPH’s public hearings on the rules Douglas Beardsley, the director of the Johnson County Health Department, urged the agency to convert “may” to “shall” in the rules governing business owners’ obligations. Iowa Department of Public Health, Public Hearing for Amendments to Proposed Rules to the Smokefree Air Act (Aug. 20, 2008) (based on notes taken at the Iowa City site).
methods for handling other persons acting in a disorderly manner or as a trespasser.\textsuperscript{129}

Perhaps even more destructive of enforcement\textsuperscript{130} and blatantly incompatible

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\textsuperscript{129}Minnesota Code, § 144.416(a)(2) (2008). As early as 1993, the Vermont public
smoking law (which did not cover workplaces as such), required proprietors of covered
public places to ask those who persisted in unlawfully smoking to leave the premises.
1993 Vermont Laws No. 46, § 2, at 77, 78.

\textsuperscript{130}Front-line enforcement was further undermined by what was apparently a gap in the
law. IDPH Rule 641—153.8(2) provides that “[a] peace officer may issue a citation in lieu
of arrest pursuant to Iowa Code chapter 805 against a person who smokes in an area where
smoking is prohibited....” However, the police, according to a county attorney and a police
chief, with regard to such a civil offense lack the power, which they have in criminal
matters, to require violators to identify themselves. Consequently, if violators refuse to
present ID, the police cannot issue citations because they would not be able to identify the
violators. Email from Charles Green, University of Iowa, Chief of Police, to Marc Linder
(Sept. 8, 2008); telephone interview with Janet Lyness, Johnson County Prosecutor, Iowa
City (Sept. 9, 2008). Minnesota avoided this problem by making unlawful smoking a petty
misdemeanor. Minnesota Code § 144.417(2)(b) (2008). Two and a half months after the
law went into effect, IDPH was aware of only one jurisdiction (Polk county) that had
actually issued citations to smokers. Email from Bonnie Mapes to Marc Linder (Sept. 15,
2008). Seven months after the Iowa Attorney General’s Office had undertaken to answer
questions concerning this gap, it responded: “1. Can it really be the case that, when a
police officer personally observes someone committing a civil offense for which the police
are empowered to issue a citation and which carries a $50 civil money penalty, the alleged
violator is free to thwart the issuance of the citation simply by refusing to identify
himself?” “Yes. The legislature has chosen to make this offense a civil citation. This is
not the case of ‘a citation in lieu of arrest.’ In fact, it is similar to the provision of 453A.3
which also makes the citation given to a juvenile caught smoking a civil citation.” “2. Can
the police lawfully issue, as the new idph rule 153.8(2) states, a ‘citation in lieu of arrest’
to someone whom they have no authority to arrest in the first place?” “No.” “Do the
attached subsections of iowa code sect. 805.1 suggest a problem? The Minnesota public
smoking law makes unlawful smoking a petty misdemeanor—does the iowa legislature
need to amend the smokefree air act along similar lines to avoid the problem that the police
in iowa city/johnson county have raised, or is there some interpretation of 805.8(c) that
avoids the civil/criminal problem?” “The iowa legislature could amend the statute to
provide for a criminal citation, using the Minnesota law as a model, or in some other
manner.” Email from Donn Stanley, Special Assistant Attorney General to Marc Linder
(Apr. 13, 2009). It is noteworthy that a police sergeant and a former police detective in
the Iowa City area who did not want to be identified stated that, regardless of what the
aforementioned legal authorities had opined, a police officer who really wanted to issue
a civil citation could find lawful means for requiring a smoking-law violator to identify
him- or herself. The UI Police did not appear to have experienced such difficulties in
with (as Wise put it) “what we passed” was IDPH’s rule dealing with the imposition of monetary penalties on those in control of smoking-prohibited places who failed to comply with their obligations. The statute itself provides that:

A person who owns, operates, manages, or otherwise has custody or control of a public place, place of employment, area declared a nonsmoking place pursuant to section 142D.5, or outdoor area regulated under this chapter and who fails to comply with this chapter shall pay a civil penalty as follows:

a. For a first violation, a monetary penalty not to exceed one hundred dollars.

b. For a second violation within one year, a monetary penalty not to exceed two hundred dollars.

c. For each violation in excess of a second violation within one year, a monetary penalty not to exceed five hundred dollars for each additional violation.\(^{131}\)

In spite of this unambiguous statutory penalty scheme, the IDPH rules provided that if IDPH determined that a complaint against a non-smoking place was credible: For the first complaint the IDPH “shall” issue a written notice of violation to the owner, including “educational materials about how to comply” and “information on whom to contact for further information and assistance for compliance”\(^{132}\); for the second complaint in one year, the IDPH “shall” issue a second notice of violation, and in addition “may authorize one or more public agencies to conduct a compliance check” and “may” pursue civil penalties or “may refer the complaint to the appropriate authority for enforcement of the civil penalties”\(^{133}\); and for the third and further complaints of a violation within one year the IDPH “shall” issue a subsequent notice of violation and “authorize one or more public agencies to conduct a compliance check,” and, in addition, “may” pursue civil penalties or “may refer the complaint to the appropriate authority for enforcement of the civil penalties.”\(^{134}\)

An hour before the Smokefree Air Act and the administrative rules went into effect Wise, Connolly, Petersen, and Olson were asked: “Where in the statute did the legislature authorize IDPH to give violators free passes by abolishing the mandatory monetary penalties in favor of education? Why did the ARRC not object to this clear ultra vires action by the agency in violation of the statutory


\(^{132}\) Rule 641—153.8(8)(a) (July 1, 2008).

\(^{133}\) Rule 641—153.8(8)(b) (July 1, 2008).

\(^{134}\) Rule 641—153.8(8)(c) (July 1, 2008).
I have consulted with Legal Counsel to the Administrative Rules Review Committee regarding your concerns with the enforcement of the statewide smoking ban. It is fair to conclude that Counsel is not troubled by the enforcement method being proposed. To quote from his memo to me, “The Department does not levy fines . . . H.F. 2212, provides in part: ‘Judicial magistrates shall hear and determine violations of this chapter.’ Fines will be imposed by the courts, not the Department of Public Health. This means that the Department must institute a court action to impose a fine.”

Counsel further opines, “To me, this rule seems like an attempt to educate the public and encourage voluntary compliance prior to the costly process of seeking judicial adjudication of a violation.”

These administrative rule have been “filed emergency” and are in force. There is a lengthy public input process. I would invite you to participate in one of those public hearings. Following that process, final rules will come before the ARRC. That will occur sometime this fall. I would further invite you to attend that ARRC meeting.

Following the adoption of final rules, the subsequent avenue available to the public is to petition the 2009 General Assembly to amend the statute. I suspect there will be several bills filed to do that.

On June 11, nine days after IDPH had published the draft rules on its website, the Administrative Rules Review Committee (a 10-member bipartisan legislative body, appointed by the speaker of the House and Senate majority leader, which selectively reviews rules proposed or already in effect) met to review them merely on an informal and informational basis since they had been neither filed nor published. ARRC is empowered to refer a rule at the next legislative session to the two aforementioned officers, who are then required to refer it to the appropriate standing committee. ARRC’s referral may be accompanied by a recommendation to overcome the rule statutorily. If ARRC objects to a rule on

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135 Email from Marc Linder to Philip Wise, Michael Connolly, Janet Petersen, and Tyler Olson (June 30, 2008).
136 Phil Wise to Marc Linder (July 3, 2008).
137 Iowa Code §§ 17A.8(1) and (6) (2008). At this time the committee was composed of six Democrats and four Republicans.
the grounds that it is unreasonable, arbitrary, capricious, or otherwise beyond the agency’s delegated authority, the Committee is required to file the objection with the administrative code editor; after such filing, the agency then bears the burden of proof in any judicial review or enforcement action. Finally, ARRC is also authorized, by a two-thirds majority of its members, to delay the rule’s effective date until adjournment of the legislative regular session.\textsuperscript{142}

At the June 11 ARRC meeting IDPH official Barb Nervig reported that the drafting process had included: a review of the administrative rules of six or seven other states with comprehensive anti-smoking laws; involvement of the Centers for Disease Control and Prevention; the aforementioned meeting on May 6 with 43 participants (including representatives of the three state universities); and consideration of more than 300 public comments. The transparency of the process was underscored by the extended 66-day public comment period scheduled to last until August 6. Unsurprisingly, Nervig stressed that the department would seek to secure compliance primarily through education. Where the “pretty prescriptive” legislation—indicated by the fact that half the rules were taken directly from the statute—needed clarification, IDPH provided definitions; the two that Nervig highlighted were the aforementioned “grounds of any public buildings,” which had generated questions before and after the definition’s promulgation, and the incidentalness of serving food to the consumption of alcoholic beverages as a boundary marker between a “bar” and a “restaurant.”\textsuperscript{143} The second definition, keyed as it was to the determination of whether smoking was permitted in outdoor seating/serving areas, unleashed especially intense and angry reactions from bar owners.

The bar debate, which took up the lion’s share of the discussion, got underway when Republican Representative David Heaton, an opponent of the bill, asked whether the statute specifically stated that smoking was permitted in an outdoor bar.\textsuperscript{144} Nervig referred the question to the principal drafter of the rules, Assistant Attorney General Matt Gannon—intriguingly, Philip Morris had been one of his clients when he was a lawyer at the Washington, D.C. corporate law firm of Arnold & Porter\textsuperscript{145}—whose negative answer was misleading insofar

\textsuperscript{141}Iowa Code §§ 17A.8(8) and 17A.4(5)(a) (2008).
\textsuperscript{142}Iowa Code §§ 17A.8(9) (2008). In this case the legislature is required to take action either disapproving or refusing to disapprove the rule.
\textsuperscript{143}Administrative Rules Review Committee Meeting (June 11, 2008) (audio tape provided by Joe Royce, legal counsel).
\textsuperscript{144}Administrative Rules Review Committee Meeting (June 11, 2008) (audio tape provided by Joe Royce, legal counsel).
\textsuperscript{145}After graduation from the University of Iowa Law School in 1998 and until 2007
as the law specifically provided that smoking was prohibited in “[o]utdoor seating or serving areas of restaurants.”

Burlington Democrat Thomas Courtney, the Senate Majority Whip, who lamented that the law could mean the difference between life and death for some small bar owners, launched an attack on the irrational health consequences of the bar-restaurant distinction, which he imagined was rooted in the rules. When, for example, he noted that wait staff who had to deliver beer or pizza to an outdoor patio would not be protected from exposure to secondhand smoke, Nervig pointed out that the statute generated that outcome. As for shifting to a different criterion—percentage of sales—Gannon stated that experience in other states had proven that it was incredibly difficult to enforce and draw clear lines. (But the fact that Gannon was constrained to admit that he and his colleagues did not know the answer to Heaton’s question as to whether smoking would be permitted on the patio of a restaurant or bar that served only alcohol on the patio indicated that line-drawing was not so easy under the IDPH rule either.) Courtney’s commonsensical point that whether they served pre-packaged or prepared food, wait staff who had to take it to outdoor tables would be equally exposed to secondhand smoke prompted Nervig to respond that taverns with food were essentially the equivalent of restaurants with a liquor license, both of which together accounted for about 56 percent of the relevant establishments. Courtney then tried to cut the Gordian knot by proposing that a restaurant be defined as a place where the wait staff went among the tables and a tavern as one with a food service door where customers picked up the food so that the wait staff would not have to be exposed to the smoke. Nervig’s jocular response that under those circumstances she could see a lot of pick-up windows being built proved, as Courtney was quick to note, his whole point—that no wait staff would be breathing secondhand smoke. It was left to Senate President Jack Kibbie to lament that the legislature itself had not gone into what he called the


hamburger versus pizza issue.\textsuperscript{147} In fact, IDPH’s basis for rejecting food as a set proportion of sales as the criterion distinguishing bars from restaurants was more complex than Gannon may have known at the time.\textsuperscript{148} On July 2, the day after the law and the emergency rules (including the aforementioned definition of “incidental”) had gone into effect,\textsuperscript{149} Mapes exchanged emails headed “Dram Shop” with various IDPH, AG, and ABD officials noting that: “There may be a way to use reports that bars must make to their ‘dram shop’ insurance carriers to support a percentage of sales definition. ... This would still take some additional resources to manage, but not nearly as much as if we had to set up a system entirely from scratch.” Adding that she was still working with ABD on the issue and that she would have more detailed information in the near future, she cautioned that “[t]his isn’t ready to share outside our group at this point. It might not pan out.”\textsuperscript{150} The next day IDPH’s legislative liaison emailed Mapes and the recipients of the previous emails that Republican Representative Lance Horbach had called her to “discuss the definition of bar and restaurant and provide his public input. He supports using percentage of sale and suggested using the dram shop insurance requirement. He’s an insurance agent in his other life and say that bars are provided annual audits to maintain their policy and suggests we base our enforcement on these annual audits. It was a good discussion and he admitted their [sic] are issues with the way the statute is written but asked us to consider his comments as we go through the rulemaking process.”\textsuperscript{151} Horbach, a self-

\textsuperscript{147} Administrative Rules Review Committee Meeting (June 11, 2008) (audio tape provided by ARRC legal counsel Joseph Royce).

\textsuperscript{148} The pro-smoking group Choose Freedom for Iowa argued in a letter to ARRC that the rule was “contrary to the statute” because it used a type-of-food test stood instead of the statute’s “incidental to the consumption of alcoholic beverages” test. George Eichhorn to Michael Connolly (Oct. 8, 2008).

\textsuperscript{149} Mapes stated that IDPH had filed emergency rules because “drafting and approval of Rules normally takes 120 days, but IDPH has only 10 weeks from the time the law was signed until it goes into effect on July 1.” Tobacco Use Prevention and Control Commission, Meeting Minutes (May 30, 2008), on http://www.idph.state.ia.us/tobacco/common/pdf/053008minutes.pdf (visited Aug. 15, 2009).

\textsuperscript{150} Email from Bonnie Mapes to Brent Saron, Lynh Patterson, Matt Gannon, Tom Newton (July 2, 2008) (copy furnished by IDPH). Four minutes earlier an ABD official had emailed her: “Sounds like the majority of them have to do this, so we might be able to use their reports for their insurance classification as the basis of an application system for bars that wish to [allow smoking outdoors?].” Email from Jim Kuhlman to Bonnie Mapes (July 2, 2008) (copy furnished by IDPH) (copy lacked end of email).

\textsuperscript{151} Email from Lynh Patterson to Bonnie Mapes et al. (July 3, 2008) (copy furnished
professed “property rights guy” who noted that the legislature had never discussed its intent with regard to “incidental,” later stated that in his telephone conversation with IDPH, the agency had admitted that it had overstepped its authority in writing this rule and was willing to listen to arguments for changing it.\textsuperscript{152}

On the same day that Mapes sent the aforementioned email the Iowa Restaurant Association submitted a request to the agency that it carry out a regulatory analysis of the rules.\textsuperscript{153} By the time IDPH published the regulatory analysis later that summer, it explained its reasons for not having adopted a percentage of sales definition as its way of satisfying the statutory requirement that it provide a “description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.”\textsuperscript{154} IDPH “did seriously consider alternatives” to its aforementioned definitions of the undefined statutory terms “bar” and “serving of food [only] incidental to the consumption of alcoholic beverages.” The latter definition, focused as it was on very rudimentary food preparation, was based on “Department of Inspections and Appeals criteria for the ‘Tavern without food preparation’ designation ‘check-off’ on food service license applications.”\textsuperscript{155} (As early as the end of May Mapes had mentioned at a Tobacco Use Prevention and Control Commission meeting “a few...definitions which have the potential for controversy, including the definition of a bar versus a restaurant.... To define a bar, the Rules utilize a classification that the Department of Inspections and Appeals includes as a check-off on their food service license applications titled “Tavern with no food preparation” that limits service of food to bar snacks and pre-packaged, commercially prepared foods.”)\textsuperscript{156} Without citing any such statutes, the Regulatory Analysis stated that the use of already existing food service or liquor license criteria was a common method used by state smokefree workplace laws to distinguish bars from restaurants, whereas Iowa lacked any liquor license type that differentiated between establishments

\begin{thebibliography}{99}
\bibitem{} Telephone interview with Lance Horbach, Tama (Aug. 16, 2009).
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administrative rules for, barkeepers’ challenge to, enforcement of smokefree air act

whose food sales were incidental to alcohol sales and full-service restaurants with liquor licenses. idph admitted, again without citing any state statutes, that “the annual percentage of food sales compared to alcohol sales” was another common method used to distinguish bars and restaurants, food sales typically being limited to a maximum of 20-25 percent of total sales.\textsuperscript{157}

the department considered this method, but concluded that it was not a “practical or effective option in iowa” for four reasons. first, those states (which, again, idph did not identify) that used this percentage of sales method either had already had a system for gathering the requisite financial data from bars before they passed their smokefree workplace laws or created it as part of such legislation together with the necessary funding. in contrast, the state of iowa lacked such a system, and although some cities did have ordinances requiring liquor licensees to submit financial records, the collection methods were not uniform. similarly, although all liquor licensees had to maintain dram shop insurance and many insurers required them to submit liquor sales records, these requirements were also not uniform. second, developing and implementing such a statewide collection and audit system could not have been completed before the act’s effective date and the legislature appropriated no funds for such a project. third, a percentage of sales criterion would impose considerable reporting and recordkeeping burdens on liquor licensees, which would be exacerbated by the need for recertification. and fourth, a percentage of sales-based enforcement system would be more “cumbersome and intrusive,” especially since law enforcement officers would not be able during an on-site inspection to determine whether the establishment was a bar or a restaurant; consequently, enforcement “would be more difficult, complex, and confusing for business owners and for the public.”\textsuperscript{158}

\textsuperscript{157}public health department [641], “regulatory analysis,” \textit{lab} 31(6):644-56 at 654 (sept. 10, 2008). the smoke free illinois act, 410 ilcs 82/10, for example, used 10 percent as the boundary marker, but not for the same purpose as the iowa law, which appeared to be unique in banning smoking in outdoor restaurants. the florida law used 10 percent to define exempt stand-alone bars. florida statutes §§ 386.203(11) and 386.2045(4) (2008).

\textsuperscript{158}public health department [641], “regulatory analysis,” \textit{lab} 31(6):644-56 at 654-55 (sept. 10, 2008). the third and fourth reasons adduced by idph, if empirically sound, might have weakened a counter-proposal that the agency should have issued a rule setting a maximum proportion (for example, 10 percent) of total sales accounted for by food; then, if a complaint were filed against the bar for patio smoking, the bar owner would have borne the burden of producing data showing that the bar’s food sales fell below the regulatory threshold and that it was therefore exempt. idph would not have had to collect statewide data, and individual bar owners, who could be presumed to know what

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Representative Horbach, who harbored no doubt whatsoever that IDPH had chosen the type-of-food-preparation criterion over percentage-of-sales precisely because it (correctly) believed that it would result in fewer outdoor patios’ being legally available for smoking, discredited these arguments as IDPH’s “blowing smoke.” He insisted that the data were readily available because all bars and restaurants rang up alcohol and food charges separately on their cash registers. Moreover, all companies writing dram shop insurance policies collected such data, using them to require higher premiums of establishments with the highest proportion of alcohol and the lowest proportion of food sales on the grounds that their customers were more likely to become drunk and engage in acts the injurious consequences of which might be charged back to the insured bars.159 (Asked about Horbach’s claims, Mapes observed: “As far as I am aware, no state agency collects any information on percentage of food versus alcohol sales—and we did research this. I am not aware of how the individual businesses’ cash registers work.”)160 In contrast, Senator Courtney, who observed that legislators had not given thought to any fixed percentage of sales because they believed that they were passing a bill that banned smoking indoors and only in “major eateries”

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159 Telephone interview with Lance Horbach, Tama (Aug. 16, 2009).
160 Email from Bonnie Mapes to Marc Linder (Aug. 17, 2009). In response to bar owners’ self-generous proposal that 51-percent food sales be the trigger for patio smoking bans Mapes had previously stated that it “wouldn’t work because there’s ‘no system across the state for us to collect that information.’” Jennifer Jacobs, “Panel Rejects Challenge of Smoking Rule,” DMR, Dec. 10, 2008, on http://www.desmoinesregister.com. According to the ABD official in charge of the Division’s alcohol regulatory matters and drafting its regulations: “I can’t believe that any one person has information about the configuration of cash registers in approximately 5,000 on-premises licensees. In the Proposed Decision, Plaza Pantry, the City of Des Moines asked an auditor from Revenue & Finance to audit the sales to determine whether the licensee was compliant with a local ordinances requiring a specified ratio of alcohol and non-alcohol sales. The auditor found that the licensee had to enter each sale by hand, leaving it to the person making the sale to enter the type of sale. Additionally, tobacco and alcohol sales were recorded in one category. Granted, Plaza Pantry was an off-premises account, but I can’t believe recordkeeping to be much different in on-premises establishments. Insurance companies retain auditors on staff to audit the books and records of on-premises licensees in an effort to get an honest ‘take’ on the amount of alcohol sold in an establishment. The ratio of alcohol to food sales is just one of several rating criteria used by the companies and each company has a different rating scale. The information obtained by the insurance companies is considered proprietary information and generally not available to anyone outside the company.” Email from Judy Seib to Lynn Walding forwarded to Marc Linder (Aug. 19, 2009).
outdoors, expressed the opinion that IDPH officials honestly felt that the percentage-of-sales data were not trackable with the resources available to the agency."

Potentially the most consequential intervention at the session was the angry appearance of Representative McKinley Bailey (the only legislator present who was not an ARRC member), who had morphed into pro-smoking bar owners’ savior. Unequivocally, Bailey declared that in his mind and those of all of the score of legislators to whom he had spoken about the definition of a bar: “This is an absolute perversion of the legislative intent.” He related that when he had tried to persuade other legislators to vote against the bill, they told him that people would be able to smoke on patios. Consequently, these rules made liars out of him and others, who in addition had told bar owners to go ahead and build patios. As far as he was concerned, a bar was a place where more beer and liquor were sold than food—the commonsense definition for which he and others had voted. Not only was the department’s definition plain wrong, but, Bailey asserted, a number of legislators had stated that they would not have voted for the bill if they had known that IDPH would issue such a rule. In contrast, Republican committee member Linda Upmeyer, a hard-line opponent of H.F. 2212, stated that the rules were “exactly what” Olson, Mascher, and Petersen “told the Republican caucus it [the law] was going to look like.”

Bailey did not announce the next step on his action agenda, but, based on his performance at the ARRC meeting, rumors began circulating that he might be organizing a group to fight for a 21-and-over amendment in 2009, and on the eve of the law’s going into effect he declared that he would urge revision, if possible in a special session. (Even before the law went into effect, House Minority Leader Christopher Rants had predicted that a concerted effort to repeal casino coverage would be successful in 2009, but that at the same time an attempt would be made to add an exemption such as for age-restricted bars.) For the benefit of the ARRC members and the assembled news media—whose

161 Telephone interview with Thomas Courtney, Burlington (Aug. 16, 2009).
162 On Bailey’s activities regarding H.F. 2212 while the legislature was considering it, see above ch. 35.
163 Administrative Rules Review Committee meeting (June 11, 2008) (audio tape provided by ARRC legal counsel Joseph Royce).
166 Telephone interview with Christopher Rants, Des Moines (May 12, 2008).
characterization of these tirades as mere requests for “some wiggle room in implementing new rules” did not quite capture their tone—some irate bar owners denounced the proposed definition, asserting, for example, that it was ludicrous to classify a bar, three to six percent of whose sales stemmed from food, as a restaurant. Other bar owners in attendance went off on various tangents. Joe Sturgis, the amateur oncologist who doubled as owner of the Rusty Nail in Davenport, now turned seer as well, predicting not only that the new law would “crucify” a lot of people, but also that gasoline would cost five dollars a gallon by July 1. Bill Duncan, the owner of a Fort Madison bar, 90 percent of whose customers allegedly smoked, accused the authorities of the mean-spirited act of forcing him to commit financial suicide. In particular, he purported to be scared of the scheme that permitted citizens to police the law, thus turning people against people.

Bar owners, in the words of a summary prepared by the Legislative Services Agency staff, contended that “during the legislative process they were assured that outdoor smoking at bars was protected. They further stated that the percentage of business from food sales is very small and that using [a] percentage as a basis of the definition of bar is the appropriate measure. Department representatives...noted that use of a percentage would greatly expand the availability of the exemption. Committee members supported the position of the bar operators, contending that legislators understood that generally speaking the outdoor areas of a bar were not going to be subject to the smoking ban. Members urged the Department to revise the definition to exclude bars that provided a limited food service.” However, because ARRC reviewed the proposal only for informational purposes, it took no formal action.

IDPH’s policy-making body, the Iowa State Board of Health, which is empowered to adopt regulations, was scheduled to adopt the emergency rules on June 11 following the ARRC meeting, but as a result of the monumental floods devastating the state, the meeting was cancelled.

As the July 1 effective date of the Smokefree Air Act approached, COBRA’s
leaders appeared to be losing their tenuous purchase on politico-jurisprudential reality. Agreeing with pro-smoking forces in other states that were “‘coming to a wall’” in litigation, Jonathan Van Roekel declared that COBRA had “decided to forgo attempting to gain a level playing field at the state level and intend to create a unified front against smoking bans by taking the fight nationwide and declaring the matter a personal property rights issue.” Van Roekel, who now added federal constitutional law to his multiple areas of expertise—he intended to attend law school to specialize in constitutional law—envisioned oral argument before the U.S. Supreme Court (which had “issued previous rulings siding with property owners regarding personal property rights issues”) at which COBRA’s lawyers would intone: “‘They cannot tell you what you can and cannot do with your own personal property, within reason.’” Perhaps in order to distinguish his fantasy from that of capitalists opposed to wage and hour and safety and health regulations, he reverted to his unique oncological insights: “currently, studies have not shown a positive link between secondhand smoke exposure and cancer in a work-related environment.” Imagining how well spent the “millions of dollars” would be that COBRA and its counterparts in other states would have to raise for this Supreme Court litigation, Van Roekel fantasized that “if information attesting to that [lack of evidence of the aforementioned link] can be introduced into a court of law, it would remove the foundation of the smoking ban argument and the ban would be overturned.”

The June 11 Board of Health meeting that had been cancelled was rescheduled for June 27. The previous day, House Speaker Pro Tempore Polly Bukta, who had been apologizing to bar owners in an effort to ward off Jonathan Van Roekel’s challenge for her Clinton seat, sent an email (“Importance: High”) to IDPH Director Newton in her newly fashioned capacity as her bar-owning constituents’ advocate:

Please make it clear for the bar owners who serve food, and wish to use the patio they have gone to the expense of building in preparation for the ban on smoking what they can do and cannot do. Rather than using the terms ‘packaged food,’ or ‘incidental’, why not make it a percentage of profits from food? I, and many of the bar owners in my district[,] have NO problem with going smoke free, but feel that they are being put at an unfair


\footnote{172}{Http://www.demwebs.com/smoke/leaders.html (visited July 7, 2009).}


Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

advantage [sic] because they have a grill and so [sic] some sandwich making on site. A bar next door or in very close vicinity may smoke on their patio because they serve only packaged food. Why differentiate between those with packaged food or food cooked on site when the food will be consumed in an outdoor area which the law said can be used to smoke? There will be no smoking where the food is prepared. We made the law. We must be fair to those whom we have subjected to obeying the law. I believe that the definition [sic] between what is a restaurant and what is a bar is ambiguous and outdated, and should be cleared up at the next Rules meeting. Please be reasonable and considerate of those business owners who are willing to abide by the law, and allow them to stay in business.  

An hour later Newton replied to her pleading. Rather than pointing to the inconsistency between Bukta’s acceptance of responsibility for having made the law and her ignorance of the fact that it was that law that used “incidental,” he merely informed her that her comments would be entered into the public record and added that IDPH recognized that there might be a need to amend the rules based on the public comments.

On June 27, two days after House Minority Leader Rants had encouraged IDPH to “get off its rear end,” the Board held an electronic meeting, at which it unanimously adopted and filed emergency the IDPH’s rules, whose effective date of July 1 coincided with the Act’s. To be sure, the process had not yet run its course because the Department was also proceeding with the adoption of rules

175 Email from Polly Bukta to Tom Newton (June 26, 2008) (copy furnished by IDPH).

176 Email from Tom Newton to Polly Bukta (June 26, 2008) (copy furnished by IDPH). Bukta’s public comment as logged by IDPH later that day was somewhat different: “Please clear up the ambiguity of the definition of a bar and a restaurant by exchanging the words food as an incidental or packaged to a percentage of food served to qualify the establishment as a restaurnat [sic] or bar. Iowans’ health would still be protected if food cooked on site were served on the patios, (which, by the way, bar owners have gone to considerable expense to build) because it would be a choice to eat outdoors [sic] with smoking, or indoors where there would be no smoke. I don’t agree with this fine line drawn on packaged food, or food cooked on site, and maybe that could be changed.” Polly Bukta (June 26, 2008), in IDPH, “SAA-Rules Comments” at 30-31 (CD provided by IDPH). Bukta was the only legislator whose public comment on the rules itself was logged.


by means of the non-emergency standard rule-making process as ARRC chair Senator Michael Connolly reminded Iowans, following the completion of public hearings in August the agency could still revise the rules.

Those five regional public hearings took place on August 20, 21, and 22 through the Iowa Communications Network originating on each date in one of five cities (Iowa City, Waterloo, Des Moines, Council Bluffs, and Sioux City); the hearings were also accessible for teleconferencing participation in fixed locations in several cities and towns in each region (totaling 27). The hearings’ potential usefulness for calling attention to problems with the rules was in large part subverted by the fact that, despite Bonnie Mapes’s repeated announcements and sharp admonitions by ARRC members Representative Wise (who was retiring from the legislature) and Senator Courtney (a longtime United Auto Workers member who faced a Republican opponent for re-election who supported repeal of the law)—both of whom were participating from Burlington—the bulk of critical comments pertained not to the rules, which

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180 Jason Clayworth, “Smoking Ban Near, But Rules Aren’t Set,” DMR, June 25, 2008, on http://www.desmoinesregister.com. IDPH announced that it would consider all written comments received through August 22, 2008, the day on which the last of five regional public hearings were scheduled. IAB 31(3):312-13 (July 30, 2008) (ARC 6990B).
182 A certain sterility resulted from Mapes’s rule, enunciated at the outset, that she would not respond to comments and that no debate (between speakers) was allowed. Iowa Department of Public Health, Public Hearing for Amendments to Proposed Rules to the Smokefree Air Act (Aug. 20, 2008) (based on notes taken at the Iowa City site).
183 See above this ch. Later Courtney welcomed revocation of Larry Duncan’s liquor license: “This is a great day for restaurant and bar owners in our community who are playing by the rules.” William Petroski, “Bar Loses Liquor License over Smoking Ban,” DMR, Apr. 9, 2009, on http://m.desmoinesregister.com/news.jsp?key=442386&rc=ln (visited Aug. 15, 2009).
were the only subject of the hearings, but to the Act itself, over which IDPH had no jurisdiction. Wise may have been “frustrated” because 90 percent of speakers did not talk about the rules, but leaders of the bar-owner rebellion reveled in repeating their already well-known denunciations such as Larry Duncan’s that Iowans, without any input, had had the ban rammed down their throats. Ironically, however, whatever articulateness and legitimacy the heroically outraged bar owners such as Duncan and Joe Sturgis may have lacked for their claims that the whole law was unconstitutional was more than compensated for by Wise (one of the bill’s strongest supporters) and Courtney, who echoed the arguments of some other attending bar owners—and thus parted company with some non-bar-owning nonsmokers who commented that patios should be smokefree—that the rules regarding smoking on outdoor patios had gone further than the statute and urged the Department to take a hard look at the rule governing this particular location. Mapes, who had strictly complied with her own rule against commenting, offered what was by far the most interesting comment—but only during an informal one-on-one conversation at the Iowa City Public Library with the microphone turned off—in observing that the inconvenience of having to walk long distances to smoke and the resulting nonsmoking was a good outcome of the smoking ban, but that the agency did not want to appear coercive.

185 Quite a few of the off-topic comments stemmed not from bar owners, but enraged and inarticulate smokers who, inter alia, denounced “cigarette Nazis.” Iowa Department of Public Health, Public Hearing for Amendments to Proposed Rules to the Smokefree Air Act (Aug. 20, 2008) (based on notes taken at the Iowa City site).

186 Iowa Department of Public Health, Public Hearing for Amendments to Proposed Rules to the Smokefree Air Act (Aug. 20, 2008) (based on notes taken at the Iowa City site).

187 Iowa Department of Public Health, Public Hearing for Amendments to Proposed Rules to the Smokefree Air Act (Aug. 20, 2008) (based on notes taken at the Iowa City site). When asked later whether his concern had related to IDPH’s use of type of food preparation rather than a percentage of sales as the criterion, Wise replied: “The legislature did not indicate that a percentage of food revenue or of liquor revenue should be used. In fact, the IDPH looked at that issue and determined that it would be impossible to implement such a formula. That is why the IDPH focused on the food preparation issue.” Email from Phil Wise to Marc Linder (Aug. 17, 2009). Wise and Courtney would have taken the position that the legislature did not authorize IDPH to ban smoking altogether on bar patios. Some attendees urged IDPH to create a distance rule to deal with this problem, but since the legislature had deleted both a 50- and a 10-foot distance ban from H.F. 2212, the agency’s power to impose one would have been dubious. See above ch. 35.

188 Interview with Bonnie Mapes, Iowa City Public Library (Aug. 20, 2008, 11:15
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

Though comparable to Wise and Courtney’s estimate of the proportion of irrelevant comments made at the public hearings, it was nevertheless astonishing that, in the course of the rule-making process, of the 1,090 public comments that IDPH received on its website between June 2 and September 30, 2008, only 125, or little more than one-tenth, specifically concerned the rules. Of these, 36 were general comments in support of the rules (many of which were cheer-leading animated by health organizations such as the American Cancer Society). Of the 70 that dealt with specific provisions in the rules, almost half (30) dealt with serving of food incidental to the consumption of alcoholic beverages (12 of which focused on the issue of food sales as a percentage of total bar sales); the only other provision to garner double-digit comments was the size of nosmoking signs required for vehicles (15); five comments each were submitted on the “grounds of any public building” and notices of violation.189 In contrast to the 41 pages of rules-related comments, the 358 pages of off-point emails were replete with obscene personal attacks (“You fucking fascists”), political nonsense (“This is the most communistic law I have ever known of in Iowa”), and historical nonsense (“Keep in mind the only society that banned smoking was Natzie Germany”), that Senator Courtney, based on his having smoked 35-40 years earlier, interpreted as revealing the hold that tobacco had on smokers.190

On October 13, the day before ARRC was scheduled to discuss the IDPH rules, the agency announced its proposals to amend them. Although the Department yielded no ground to bar owners on the most explosive issue—the definition of “bar”—it did make two concessions with regard to enforcement procedures about which their lawyers had been complaining. First, the amended rule inserted “potential” into “written notice of violation” (153.8(8)(a)); and second, it made the description of agency actions after third and subsequent complaints consistent with that of those after second complaints (153.8 (8)(c)). The latter change in particular weakened enforcement. In response to many complaints from employers, IDPH significantly reduced the size of no-smoking signs required for vehicles (153.5(1)(e)). In order to preempt opponents’

189IDPH, “Iowa Smokefree Air Act: Summary of Administrative Rule Comments, June 2-September 30, 2008,” on http://www.iowasmokefreeair.gov/common/pdf/comment_summary.pdf (visited Aug. 16, 2009). To be sure, only very few comments on the meaning of “incidental” were concrete and practical. See e.g., IDPH, “SAA-Rules Comments” at 20-21 (CD provided by IDPH)

190IDPH, “SAA-Non-Rules Comments” at 210, 177, 287 (CD provided by IDPH) (two of these three commenters identified themselves).

191Telephone interview with Thomas Courtney, Burlington (Aug. 16, 2009).
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

(baseless) claims that “public buildings” in the statutory term “grounds of any public buildings owned, leased, or operated by or under the control of the state government or its political subdivisions” could confusingly comprehend privately owned buildings that were “public places,” IDPH added a definition of a “public building” as an “enclosed area owned, leased, or operated by or under the control of the state government or its political subdivisions” (153.2). The only change that did not constitute a concession to owners of public places and/or employers and possibly strengthened enforcement was authorizing complainants to file anonymously (153.8(5)). Once the Department had refused to accommodate bar owners on the definition of “bar” and thus on the scope of lawful patio smoking—thus remitting them to legislative recourse—the most contentious issue facing the agency was the definition of “grounds of any public buildings,” which IDPH proposed amending by excluding “a sidewalk in the public right-of-way” (153.2).

How and why this particular proposal came to the forefront sheds interesting light on the way the Iowa Department of Public Health formulated public policy by writing a definitional rule dispositively interpreting the scope of the legislature’s intent to interdict smoking on the grounds of state and local government buildings. In order to understand this amendment, it is necessary to go back to a complaint that was filed under the first version of the rules against the City of Iowa City for its failure to post no-smoking signs on the sidewalk in front of city hall. Iowa’s expansive and unique state law prohibited smoking in a number of “outdoor areas” including “[t]he grounds of any public buildings owned, leased, or operated by or under the control of the state government or its political subdivisions....” The IDPH emergency rules, which went into effect on July 1, defined such grounds, in pertinent part, to mean “an outdoor area of a public building that is used in connection with the building, including but not limited to a sidewalk immediately adjacent to the building....” Because the sidewalk in front of Iowa City city hall satisfied these definitional criteria, the city

192IDPH, “Proposed Amendments to Smokefree Air Act Administrative Rules” (Oct. 13, 2008). The exclusion of sidewalks in the public right-of-way was also inserted into the definition of “entrance.” Anonymity was recommended by other departments that did act on anonymous complaints, which are an especially important aspect of enforcement regarding employees who wished to deal with workplace matters. Fred Love, “Public Health Proposes Smoking Ban Amendments,” WC, Oct. 15, 2008, on http://www.wcfcourier.com/articles/2008/10/15/news/breaking_news/doc48f5c37c6f920333790763.txt (visited Aug. 23, 2009).


government was violating the Smokefree Air Act by failing to post no-smoking signs “at every entrance” to this smoking-prohibited outdoor area.\footnote{H.F. 2212 § 6(3) (2008)/Iowa Code § 142D.6(3) (2008).} Far from being unexpected, the omission by the city government, which enjoyed an undeserved reputation as a radical foe of smoking, was consistent with a history of and contemporaneous disregard for protecting nonsmokers from secondhand smoke.\footnote{See above ch. 33.}

Nor was the failure to post inadvertent. On June 5, the city attorney had issued a memorandum to the city council, city manager, and lesser city officials summarizing the Smokefree Air Act’s direct applicability to cities and answering questions that city staff had posed. In response to a question as to whether it was lawful to “smoke on the sidewalk in front of City Hall,” the attorney asserted without explanation: “Yes. The sidewalk is right-of-way, and right-of-way is not the grounds of a public building.”\footnote{Eleanor Dilkes to City Council et al., Re: Smokefree Air Act n.p. [at 3] (June 5, 2008) (copy furnished by Iowa City Legal Dept).} To be sure, the city attorney was well aware,
Administrative Rules for Barkeepers’ Challenge to Enforcement of Smokefree Air Act

as she observed in correcting a city councillor’s false claim to the contrary, “you do have the right to prohibit it in the right-of-way, but that would be a designation by you. It’s not prohibited by the statute.” In other words, by virtue of the city’s ownership of all public sidewalks (“because we have control of your right-of-ways”), the city had—and had always had—the power to ban smoking on those sidewalks. The Iowa League of Cities issued a special report in July on SAA, which, being in part based on the Iowa City city attorney’s memorandum,

under this section if a sign is posted conforming to the provisions of section 142D.6.” H.F. 2212 § 5(2) (2008)/Iowa Code §142D.5(2) (2009). If city plaza had been such an exempt area, the city council would not have had to adopt an ordinance prohibiting smoking on the eastern half of the plaza; all it would have had to do was post the requisite signs and the Act would have applied. The city council had to adopt an ordinance precisely because the area was neither covered nor exempt by the state law, thus permitting the city to subject its own land to its own local law. To be sure, the ordinance mistakenly states that “[p]ursuant to HF 2212, section 5..., the city declares the following areas to be smoke free places,” and then enumerates numerous such places including part of city plaza. Iowa City, Iowa, City Code § 6-10-1.C (Sept. 9, 2008), on http://www.sterlingcodifiers.com/codebook/index.php?book_id=320. However, if the city’s power to ban smoking in city plaza had derived from the Act, then presumably the city would have lacked the power to impose on smokers a civil penalty of $100, $200, and $500, for first, second, and third and additional offenses, respectively, as opposed to the Act’s flat $50 penalty. Id. § 6-10-2.

The city attorney’s confusion may also explain why she (falsely) believed that the city was required to comply with the Act’s signage requirements in city plaza, when in fact it was subject to no such requirements. The Iowa League of Cities lawyer-lobbyist, who had never reflected on these interconnections, found this analysis persuasive. Telephone interview with Jessica Harder, Des Moines (Aug. 20, 2009). Section 5(1) also generated a counterintuitive result in light of repeated assurances by legislators that the bill did not apply to private residences: because the latter were expressly exempt, their owners could subject them to coverage by posting the requisite signage. The director of the Division of Tobacco Use Prevention and Control confirmed this outcome: “If a homeowner posted a Smoke-free Air Act sign in their own home and someone smoked in their home, they would then have the responsibilities of any proprietor—inform the smoker they need to stop or leave and then call the police if the person doesn’t comply. Law enforcement has the authority to issue citations to individual smokers.” Email from Bonnie Mapes to Marc Linder (Sept. 24, 2009).

198 Transcription of Iowa City City Council Special Work Session Meeting at 23 (June 23, 2008), on http://www.icgov.org/transcriptions/620.pdf. The city attorney stated more generally that she agreed that the city had authority to ban smoking on city-owned land that was not the grounds of a public building. Email from Eleanor Dilkes to Marc Linder (Aug. 25, 2008).

199 Transcription of Iowa City City Council Special Work Session Meeting at 35 (June 23, 2008).
adopted her position with respect to smoking on a sidewalk in front of city hall. However, some of the state’s larger cities did ban smoking on sidewalks in front of city-owned buildings, and the Iowa State Association of Counties issued a guide in which it furnished this answer, appropriately ignoring the issue of a right-of-way, to a question as to whether it was lawful to smoke on the sidewalk.
in front of a county courthouse: “Maybe. The test is whether the sidewalk is immediately adjacent to, and used in connection with, the public building. If so, then the sidewalk constitutes ‘the grounds of a public building’ and smoking is prohibited.”

After the assistant city attorney had peremptorily refused to discuss the lawfulness of the city government’s not posting no-smoking signs on the sidewalk in front of city hall with a city resident, the latter contacted an official of the IDPH Division of Tobacco Use Prevention and Control, who stated that the “grounds of any public buildings” included public sidewalks and characterized the issue of right-of-way as irrelevant. At the city council special formal meeting on August 26 the same resident addressed the city council at the conclusion of the Community Comment:

I want to inform the Council that the City is currently in violation of the Smoke-Free Air Act. I’ve discussed this with the State Department of Public Health, which encouraged me to file a complaint against the City, but before doing so, I wanted to discuss the matter with you and hope that you would correct the situation and we don’t have to go through the complaint process. As you know, the, um, Smoke-Free Air Act which went into effect on July 1st banned smoking on the grounds of any public buildings. The Department of Public Health issued regulations on emergency basis, defining that term, grounds of public buildings as “an outdoor area of a public area that is used in connection with the building, including but not limited to,” and then the key terms here, “a sidewalk immediately adjacent to the building” and then lists a number of other areas which aren’t of concern right now. Uh, some of these others, uh, the City has discretion, uh, to exempt. It doesn’t have, uh, discretion to exempt sidewalks. On June 5th the City Attorney issued a memo and appended to the memo, uh, was a series of questions and answers. Two of those questions and answers were: can a person lawfully smoke on a sidewalk in front of City

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203 Discussion with Sue Dulek, Iowa City city hall (ca. Aug. 22, 2008).

204 Telephone interview with Aaron Swanson, Des Moines (Aug. 25, 2008). Early the next morning Swanson emailed that although neither the Smokefree Air Act nor its administrative rules defined “sidewalk,” “one can use the definition of ‘sidewalk’ as written in Iowa Code Section 321.1 for the purposes of defining it in the Smokefree Air Act.” Email from Aaron Swanson to Marc Linder (Aug. 26, 2008). Iowa Code § 321.1(72) (2008) defined a sidewalk as “that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines intended for the use of pedestrians.” Iowa City, City Code, § 9-1-1 is identical.
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

Hall. The answer that the City Attorney gave was: yes, because it’s a right-of-way and a right-of-way is not on the grounds of public buildings. On the other hand, a person cannot smoke, going to the other question, on the quote, this is the language in the question itself, “internal” sidewalk, for example, sidewalk, uh, leading to a parking lot because those sidewalks are immediately adjacent to and used in connection with the, uh, the public building. Now, unfortunately for this memorandum for the City, the term “sidewalk” has only one meaning. The Iowa Code has defined a sidewalk at Section 321.1, Subsection 72, and the Iowa Code of Ordinances has adopted exactly the same definition at Section 9-1-1, and this is a walk that runs from the curb line to the property line for pedestrian use. I checked a large number of leading dictionaries. Every single American English dictionary has the same definition, and more importantly, has only one definition. There is only one definition of a sidewalk, and that’s a paved path or walk for pedestrian…for pedestrians on the side of a street or road. Okay? Now, the Iowa Department of Public Health, which I contacted about this, says that this issue of right-of-way is totally irrelevant and that Section 321.1, Subsection 72, which I just cited to you, can be used as the definition for the rules, and keep in mind, please, that the Iowa Department of Health has primary jurisdiction over the, uh, administration of this statute. Now, in no fewer than 67 sections of the Iowa City Code of Ordinances is the term “sidewalk” used. Every single one of them, all of them, are consistent with the definition of sidewalk that I just gave you that’s in this State code, and is in the Iowa City Code of Ordinances. Uh, not a single one of them is consistent with the, uh, definition that the City Attorney has given with regard to “internal” sidewalks. As you can imagine from your own, uh, experience, a house owner is obligated to clear the ice and snow from the sidewalk [but] has absolutely no obligation to clear the paths, um, to the, uh, back patio from the back door. So, the City Attorney, um, is actually referring to what the rest of the, uh, world has called “walkways.” They’re not sidewalks. They’re walkways. Walkways are not addressed in the term sidewalk, uh, although smoking surely is banned on them. They are not sidewalks; by arbitrarily defining sidewalks, uh, as, uh, walkways, internal walkways, and declaring that the sidewalks that the, uh, Department of Public Health means, uh, are not covered, the City Attorney has completely turned the, uh, that part of the rule on its head. I’ve surveyed a large number of other large cities in Iowa and uh, many of them for example, Davenport, Dubuque, Des Moines, have already banned smoking on sidewalks in front of City Hall.

[Mayor] Bailey: …begin to conclude your remarks, please.

Linder: Don’t tase’ me, bro, don’t tase’ me…um, if the City Attorney’s definition were used, that would mean for example that the Public Library where the sidewalk comes up within a couple of feet of the front door of those sliding doors on Linn Street, people could smoke within a couple of feet of that door, and that clearly can’t be the purpose of the statute, especially since, uh, up until this time, there’s signs up on the doors saying that you can’t smoke within 20 feet. Now, as the…as you, Mayor, said recently, it’s not just about exposure to second-hand smoke, it’s about setting example, and surely we want to set an example, uh, in front of City Hall, and by the way, you can forget about everything I’ve just said, because it doesn’t matter whether the, um, the interpretation I’ve just given you is correct or not, because as the City Attorney has already told you, and as you’re [sic; should be “you’ve”] already done in preliminarily voting on this ordinance, you have the power to ban smoking on every sidewalk. You’ve just gone ahead and voted to ban it.
on...on the sidewalk in front of profit-making, cash register ringing stores on Clinton Street. Well, if you ban it there, you certainly have the power to ban it, uh, in front of your own building. In any case, even apart from that, there’s no doubt that the sidewalk is covered, and this is just a misinterpretation, and I would appreciate your correcting this.... [City Attorney] Dilkes: ...I don’t think Professor Linder and I have a disagreement on what sidewalk means. We have a disagreement on what “used in connection with a public building” means. 205

After the meeting the city resident asked the city attorney, who had admitted the previous day that the city did have the authority to ban smoking on city-owned land that was not the grounds of a public building, 206 a number of questions by email:

You heard my comments to the city council this evening on Iowa City’s being out of compliance with the Smokefree Air Act by virtue of permitting smoking on the sidewalk used in connection with and immediately adjacent to city hall.

Do you have any basis for reading “sidewalk” out of the IDPH rule other than that adduced in your June 5 memo—namely, that “[t]he sidewalk is a right-of-way, and right-of-way is not the grounds of a public building”? Isn’t virtually every sidewalk around a government bldg a right of way? In that respect isn’t the sidewalk on Washington St in front of city hall thoroughly typical of sidewalks in general and of those in front of city halls and other government bldgs in particular? And isn’t the Iowa Attorney General’s office, which drafted the rules, to be presumed to be aware of what a sidewalk is? If so, what authorizes you to read the term out of the rule (in such a general way as to nullify it, if other cities adopted your approach, statewide) and to substitute for it “‘internal’ sidewalks”?

Please keep in mind that my comments also refer to other city buildings, including and especially the public library, where the sidewalk runs barely a few feet away from the front doors on Linn St. [A]lthough this issue is distinct, why haven’t you advised the city council that, even apart from the “grounds of any public buildings” provision, it can also ban smoking on the sidewalk in front of city hall on the same basis that you advised the council it has for banning smoking in front of privately owned stores on Clinton St—namely, that the city owns the sidewalks? 207


206 Email from Marc Linder to Eleanor Dilkes (Aug. 20, 2008) and Eleanor Dilkes to Marc Linder (Aug. 25, 2008).

207 Email from Marc Linder to Eleanor Dilkes (and Mike Wright, Amy Correia, Regenia Bailey, Matt Hayek, and Ross Wilburn [the other two city councillors not having
The city attorney replied that:

My opinion is that sidewalks that are located in the public right-of-way (public sidewalks) are not part of the “grounds” of a public building. Public rights of way are not an “area of a public building.” Rather, they are those areas of the streets and sidewalks between the adjacent property lines that are dedicated to public use. The public sidewalk that surrounds City Hall is not part of the City Hall property. The City could not use the sidewalk to expand City Hall, could not restrict the public from walking on the sidewalk and could not sell the sidewalk without first going through the public process of vacating the rights of the public to use the sidewalk. The line of demarcation between the grounds of City Hall and the public sidewalk is as clear as that between the private property and the sidewalk in front of a house. The owner of the house might use the sidewalk but that does not make it part of his property.

This opinion is consistent with that of the Iowa League of Cities.

Finally, you asked why I have not advised the City Council that they could ban smoking on the sidewalk in front of City Hall. I have advised the Council that although the statute does not prohibit smoking on public rights-of-way they have the authority to designate City right-of-way as nonsmoking. Indeed, the ordinance that received first reading last night includes right-of-way. I have not specifically discussed the sidewalk in front of City Hall with the Council because to date it is not one of the areas they have expressed an interest in regulating.\(^\text{208}\)

The resident then asked IDPH and an assistant attorney general who had drafted the agency’s rules whether the appended city attorney’s straightforward statement that the sidewalk was not part of the grounds of city hall sufficed as a basis for a complaint or whether it was necessary to “go through the formality of recording the date and time of my observation of someone smoking on that sidewalk?”\(^\text{209}\) Mapes then queried her co-recipients: “Who is going to reply to this one? Matt, what do you think about the City’s argument? It might help us in our response to him.”\(^\text{210}\) The next day one of Mapes’s subordinates sent this concise and ambiguous response: “The complaint process is intended to find and respond to violations of the law, not to interpret disagreements with how the law is applied. If you see what you believe is a violation of the Smokefree Air Act, please submit a complaint....”\(^\text{211}\) With admirable prescience the would-be

\(^{208}\)Email from Eleanor Dilkes to Marc Linder (Aug. 27, 2008).

\(^{209}\)Email from Marc Linder to Matt Gannon, Bonnie Mapes, Brent Saron, Aaron Swanson, and Jeremy Whitaker (Aug. 27, 2008).

\(^{210}\)Email from Bonnie Mapes to Marc Linder, Matt Gannon, Brent Saron, Aaron Swanson, and Jeremy Whitaker (Aug. 28, 2008).

\(^{211}\)Email from Aaron Swanson to Marc Linder (Aug. 29, 2008).
complainant asked: “Does your response mean that the idph has not yet decided whether the city attorney’s interpretation is wrong. Idph isn’t intending to delete “sidewalk” from its definition of “grounds of any public bldgs” is it?”  And then later the same day he asked: “The city attorney has thrown down the gauntlet with her interpretation claiming that the idph sidewalk rule is on its face invalid—why not just deal with it directly?” Having received no reply to any of these questions, the resident filed the complaint, which, in order to deal with the ambiguity of IDPH’s initial response, included a report of observation of actual smoking on the sidewalk in addition to the lack of signs.

Not having received any information about the agency’s action on the complaint for more than a month, the Iowa City resident first pointed out to Mapes and her subordinates that “[a]ccording to your website, ‘The Iowa Department of Public Health, Division of Tobacco Use Prevention & Control will notify the proprietor of the public place or place of employment and/or coordinate a site visit within 15 days after receipt of a complaint,’” and then asked: Did IDPH notify the city/coordinate site visit? What is the next step and when will it happen?

The next day, IDPH official Brent Saron replied: “What sidewalk in particular did you observe the people smoking? Was it the sidewalk that runs parallel to Washington Street? Or did you observe people smoking on the sidewalk that leads directly to the doorway entrance to city hall?” These irrelevant questions prompted the following response:

There is no walkway leading directly to the door (which would not be a “sidewalk”); they were smoking on the only sidewalk there—the one that runs parallel to Washington street. If there were a walkway as you asked about running from the sidewalk to the door, it would be perpendicular and not “adjacent” to the public bldg. ...

Why is the nature of this sidewalk relevant? You and I both know what this complaint is really about: the city attorney of iowa city has interpreted your rule out of existence on a statewide basis by claiming that no sidewalk that is a right of way (and that means virtually every public sidewalk) can be part of the grounds of a public bldg. Why can’t idph deal with this question directly and resolve it in principle for all the state’s thousands of sidewalks immediately adjacent to public bldgs?

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212 Email from Marc Linder to Aaron Swanson (Aug. 29, 2008).
213 Email from Marc Linder to Aaron Swanson (Aug. 29, 2008).
214 Confirmation receipt from IowaSmokefreeAir.gov, in public_complaint@iowasmokefreeair.gov to Marc Linder (Aug. 29, 2008).
215 Email from Marc Linder to Bonnie Mapes, Aaron Swanson, Brent Saron, Matt Gannon, and Jeremy Whitaker (Sept. 30, 2008).
216 Email from Brent Saron to Marc Linder (Oct. 1, 2008).
217 Email from Marc Linder to Brent Saron (Oct. 1, 2008).
After failing to acknowledge let alone respond to these questions or several reminder-emails for more than a week, on October 10, Saron finally sent this astonishing response:

[B]ased upon your original complaint, I assumed you were referring to the sidewalk that runs parallel to Washington (that spans between Van Buren and Gilbert Streets). I spoke with the Iowa City Attorney’s Office to verify whether or not this area is included within their “grounds,” and they confirmed that this area is not within the prohibition described in 142D.3(2)(e).

Thank you for your attentiveness, and your efforts to make us aware of potential violations.

IDPH’s almost humorous “Case Closed” announcement triggered this critique, which was also copied to the leading legislative supporters of H.F. 2212 and the Attorney General’s Office:

Let me get this straight: You the enforcement agency have totally farmed out interpretation of your OWN rules to the entities you’re charged with regulating? If a customer at a local restaurant complains about smoking and the owner claims that it’s an exempt casino, instead of investigating you leave it up to the owner to “confirm” that it’s an exempt casino and that’s the end of the complaint? Does the department of labor instead of interpreting its own regulations leave it up to complained-about employers to “confirm” that they are exempt from the minimum wage law? Does the dept of justice leave it up to general motors to “confirm” that it’s not covered by the antitrust laws?

If you decide to become an enforcement agency, you will actually have to deal with the substance of the city attorney’s excuse that a sidewalk is not a sidewalk. a public sidewalk (running from curb to property line in front of a public building) is the only definition of “sidewalk” in the iowa code or the iowa city code of ordinances. “adjacent” does NOT mean perpendicular. If the idph rule defining grounds of public buildings had

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218 Email from Marc Linder to Brent Saron (Oct. 1, 6, and 9, 2008); email from Brent Saron to Marc Linder (Oct. 9, 2008) (claiming his computer had misplaced the emails).

219 Email from Brent Saron to Marc Linder (Oct. 10, 2008). It is not clear whether Saron incorrectly stated in this email that he had already spoken to the Iowa City Attorney’s Office or whether the email quoted below was manufactured to simulate a record (albeit an inconsistent one), but on Oct. 13 the Iowa City assistant city attorney emailed Saron that it was her understanding that a complaint had been filed about smoking on the sidewalk in front of city hall, adding: “It is the City’s position that the Act does not prohibit smoking on this sidewalk because it is not part of the ‘grounds’ of a public building.” Email from Sue Dulek to Brent Saron, Oct. 13, 2008 (copy furnished by IDPH).
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

meant “walkway” it would have said walkway and not sidewalk.\textsuperscript{220}

Mapes sought to defend her agency’s procedure:

IDPH and the AG’s office considered the opinion of the Iowa City attorney about the sidewalk in question being a public right-of-way, and we concur with the city attorney’s opinion.

When staff communicated with you to confirm your complaint, you stated that smoking was not occurring on either of the walks leading from the public sidewalk to the entrances to the courthouse [sic; should be “city hall”]. You observed smoking on the city sidewalk which is adjacent to E. Washington St. The Rules allow cities some discretion in determining what constitutes the grounds of public buildings under their control. In this case, the city attorney determined that the sidewalk adjacent to E. Washington Street is a public right-of-way and is not a sidewalk used in connection with the building and, therefore, is not part of the grounds of that public building.

Since this sidewalk can reasonably be described as a public right-of-way and is not used in connection with the building, we made the determination that smoking on that public sidewalk would not be a violation of the Smokefree Air Act.

Since neither the law nor the rules can anticipate every possible situation, we often confer with government entities, businesses, and others in the process of making a determination of whether or not a violation has occurred. Far from abrogating our responsibility to enforce the Smokefree Air Act, such consultations and discussions are necessary to carrying out that responsibility as reasonably and as effectively as possible.\textsuperscript{221}

That IDPH had in fact ceded control over its enforcement to its municipal regulatees was expressly conceded by Saron 10 days later in an email to the Iowa City assistant city attorney who had asked him about the status of the complaint\textsuperscript{222}:

Hi Sue—based upon the information in the complaint, and the follow-up that was conducted with the complainant and with your office, we have determined that this particular complaint was invalid.

As you can imagine, every single city hall in Iowa is unique, thus 142D.3(2)(e) applies differently to each unique situation. As such, IDPH has not [sic] other alternative but to rely on and trust decisions that your city has made regarding outdoor areas that are used in connection with your city hall.\textsuperscript{223}

\textsuperscript{220}Email from Marc Linder to Brent Saron and Bonnie Mapes (cc: Thomas H. Miller, Matt Gannon, Janet Petersen, Tyler Olson, Philip Wise, and Matt McCoy) (Oct. 10, 2008).

\textsuperscript{221}Email from Bonnie Mapes to Marc Linder (Oct. 10, 2008).

\textsuperscript{222}Email from Sue Dulek to Brent Saron (Oct. 13, 2008) (copy furnished by IDPH).

\textsuperscript{223}Email from Brent Saron to Sue Dulek (Oct. 20, 2008) (copy furnished by IDPH). That Saron was not acting as a rogue employee in stating IDPH’s policy of abdicating its
Mapes’s defense prompted yet another critique, the concluding prescience of which would soon surprise even its author:

What investigation did you do? How do you know the sidewalk is not “used in connection with” the bldg? All you’ve done is taken the city attorney’s word for it. Go look for yourself. What does “used in connection with” mean? I use the sidewalk in connection with the bldg every time I enter city hall as have uncounted thousands of other people. Since the rule does not define “used in connection with,” how can the city attorney know whether the sidewalk is so used? That’s for you to determine—you shld revise your rule to rule out such interpretations that exacerbate exposure to secondhand smoke.

Conferring and consulting doesn’t mean leaving the decision up to the regulatee. You’ve made no independent investigation whatsoever—all you’ve done is taken the regulatee’s word for it and you have therefore failed to perform the duty the legislature has assigned to you and exacerbated the exposure to secondhand smoke of people trying to enter/leave city hall.

Are you saying that no sidewalk that is a right of way is part of the grounds of a public building regardless of whether it’s used in connection with the bldg? That was the city attorney’s position—is that your position? If so, pls show me one sidewalk in front of a public bldg in Iowa that is not a right of way. The sidewalk in front of the public library in IC extends to within about 3 feet of the front door—it’s a right of way—is it also not “used in connection with”?

The city attorney’s interpretation has in effect read the word “sidewalk” out of your rule statewide and you have acquiesced in it without undertaking even the most cursory investigation of the facts—are you now going to delete the word from the rule? If not, pls identify any “sidewalk” in Iowa that would meet your rule’s definition.

Mapes’s response rendered prescience as to IDPH’s conservative agenda

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-emails and comments from Aaron Swanson, Marc Linder, Bonnie Mapes, Brent Saron, Thomas H. Miller, Matt Gannon, Janet Petersen, Tyler Olson, Philip Wise, and Matt McCoy.
superfluous:

We reviewed an areal [sic] photo of city hall and other information before we made
our determination.

And “sidewalk” has not been ruled out statewide, as you contend. There are sidewalks
on the grounds of public buildings all across the state that have been determined by the
authority having control of those buildings to be part of the grounds—sidewalks which are
clearly used in connection with that building and are not primarily used as a public
thoroughfare. 225

The reply drew out the logical implications of IDPH’s position:

The city attorney’s interpretation might be plausible IF AND ONLY IF your rule read:
“used EXCLUSIVELY in connection with.” It’s clear that the sidewalk in front of city hall
is used by people to walk into city hall and to walk past city hall. Because your rule does
NOT say “exclusively,” the sidewalk is without any doubt “used in connection with” the
bldg. QED.

Do you mean it to be used “exclusively”? if so, you would have to revise the definition
or issue an interpretation to that effect. But why would you mean it that way? 226

And a follow-up reply on October 13 explained why the substantive change
that IDPH had introduced sub rosa could not stand under Iowa administrative law
without new rulemaking:

You failed to respond to most of my questions, and I repeat my request for answers
to them. But right now I request that you specifically identify (i.e., name the bldg, street,
and city location of) any sidewalk on the grounds of any public bldg anywhere in Iowa that
meets your new definition below. I find it difficult to imagine any sidewalk that would
meet your new definition other than the thoroughly atypical one of a public bldg located
on a dead-end street.

As brief and inadequate as your response was, it did let the cat out of the bag—by
adding the language “not PRIMARILY used as a public thoroughfare” to “used in
connection with.” Since the word “primarily” is not found in the rule, you have now
revealed that you have changed the definition and radically shrunk the scope of the
definition in your rules by means of INTERPRETATION.

As you must be aware, the Iowa Adm Procedure Act (17A.2(11)) defines a rule this
way: “Rule” means each agency statement of general applicability that implements,
INTERPRETS, or prescribes law or policy…. And you are also aware that under
17A.4(1) you are required to go through the notice and comment rulemaking procedure

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225 Email from Bonnie Mapes to Marc Linder (Oct. 10, 2008).
226 Email from Marc Linder to Bonnie Mapes (cc: Brent Saron, Thomas H. Miller,
when you adopt or amend such a “rule.”

In connection with that rulemaking I look forward to the opportunity to submit comments on your proposed rule, which clearly has the effect of exposing more rather than fewer people to secondhand smoke. In explaining the reasons for your action will you be denying that IDPH has the power to define the grounds of a public building as including a sidewalk that is used (but not primarily) in connection with and is immediately adjacent to that building?227

IDPH, however, was literally one step ahead of its critic: that very day (October 13), in connection with the following day’s ARRC meeting, Mapes “prepared” “Proposed Amendments to Smokefree Air Act Administrative Rules,” which amended the definition of “grounds of any public buildings” by inserting the phrase, “but not including a sidewalk in the public right-of-way.”228 Interestingly, the IDPH website has retained an earlier draft of these proposed amendments, which Mapes had prepared on October 10, the day on which the above-quoted flurry of email exchanges took place. The draft was identical with regard to the other amendments, but the “grounds” definition used “other than” instead of “not including.”229 It is unclear whether the critique of IDPH’s interpretation of its definition on those very days had prompted the draft of the proposed amendment or whether Mapes had merely failed to reveal to the critic that the agency was in the process of eliminating the textual basis of the critique.

In the event, Mapes strained mightily to justify this particular proposed amendment at the ARRC meeting, which dozens of bar owners attended and lasted almost three hours.230 In response to a question by (outgoing) chairman

227Email from Marc Linder to Bonnie Mapes (cc: Brent Saron, Thomas H. Miller, Matt Gannon, Janet Petersen, Tyler Olson, Philip Wise, and Matt McCoy) (Oct. 13, 2008).
230Jason Clayworth, “Proposed Rule Change: Smoking Objections Would Be Secret,” DMR, Oct. 15, 2008, on http://www.desmoinesregister.com (visited Oct. 15, 2008); Christinia Crippes, “Group Ponders Smoking Ban Rules,” Hawk Eye (Burlington), Oct. 15, 2008 (1A) (NewsBank). Before the rules themselves were discussed, attendees made comments on the aforementioned regulatory analysis that failed to engage one another. Supporters (such Cathy Callaway and Christopher Squier) stated that empirical studies in other states showed that smokefree laws had no financial impact on businesses, whereas bar owners and their advocates such as Rep. McKinley Bailey offered unsubstantiated anecdotal evidence of business declines in bars in Iowa. Administrative Rules Review
Senator Michael Connolly as to whether the changes were substantive or technical, Mapes declared that they were merely “technical”:

We ended up with some public buildings that front right on a public sidewalk. So you’d have the situation where someone could smoke to this corner, they’d have to not smoke on this block, and then they could smoke again on the next corner. And so to eliminate this problem we added this in the public right of way.\(^{231}\)

No committee member asked Mapes to explain why it was a “problem” in need of elimination that the existing rule protected people using the public sidewalk to enter and leave a public building from secondhand smoke exposure, while the emitters of those lethal toxins and carcinogens were required to cross the street. After all, IDPH’s own website referenced the surgeon general’s 2006 report on involuntary exposure as establishing both that “[b]reathing secondhand smoke has immediate harmful effects on the cardiovascular system that can increase the risk of heart attack” and that “[t]here is no risk-free level of secondhand smoke exposure. Even brief exposure can be dangerous.”\(^{232}\) Instead, Mapes merely noted that in proposing the amendment the agency had concurred with some city attorney’s opinion. A thoroughly confused Connolly—perhaps he was seeking to deal with cognitive dissonance by denying that the Public Health Department would have rewritten a rule pursuant to a strict no-smoking law to accommodate smokers rather than nonsmokers—asked whether it was the case, then, that it was unlawful to smoke on the sidewalk in front of a public building—“you have to be off the curb?” Disabusing him of his error—people would be permitted to smoke on the right of way—Mapes tried to insure that he and the rest of the committee understood what IDPH was doing without highlighting its counterintuitive character:


Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

So you have some cities that have decided that sidewalks adjacent to the building are part of the public grounds, but they’ll have a situation where they have a major thoroughfare, basically a sidewalk, that’s not immediately adjacent to the building it’s part of the public right of way and therefore should not be counted as grounds of that public building. And that’s what this clarification is in here for. Otherwise it would have to be that that section of city sidewalk immediately in front of that public building would have to be considered part of public grounds.233

Her oblique message of acquiescence in continued public smoking where IDPH could have protected nonsmokers still not having sunk in, Mapes finally discovered a more effective framework in which to embed her apostasy when she was then asked whether it would be lawful to smoke right outside a county courthouse: “The city has some discretion in determining what constitutes the grounds of a public building. This allows them to not consider that right of way that public sidewalk as part of the grounds of a public building.” Connolly, who, along with outgoing co-chair Philip Wise, seemed much more interested in expediting the meeting than in coming to grips with substantive issues, had finally got it: “It’s a local decision, correct?” Even though the legislature had rejected the health organizations’ insistent pleas for local control, its partial resurrection by administrative rule aroused no comment. And Wise, oblivious of the backward step on which he was placing his imprimatur without any attempt at justification, chimed in: “I believe all of these changes make the rules better than they were before the public hearing.”234

The day after the ARRC meeting the news media reported that IDPH had proposed “allow[ing] cities and local governments more leeway in allowing smoking on busy sidewalks adjacent to public buildings. Currently, the law bans smoking on any sidewalk next to a building owned or operated by the government.”235 When, in response to IDPH’s proposal to redefine “grounds” so


as to eliminate dual-use sidewalks (that is, those used by both people who were entering and leaving public buildings and those who were walking by without entering the buildings) from the scope of the definition, the agency’s critic asked Mapes (telephonically) why IDPH

had decided to amend the definition of grounds of public bldg (by excluding all sidewalks in the public right of way even if they were used in connection with and immediately adjacent to the bldg) and thus to provide less rather than more protection from secondhand smoke to people entering and leaving such bldgs, you said that it would make “no sense” to make people who were smoking on such sidewalks...have to walk across the street. I replied that the sense that it would make is that it would protect me from cancer-causing smoke exposure. You then pooh-poohed my claim by reminding me that this exposure was merely outdoors. I then told you that that view of the health consequences of outdoor exposure to secondhand smoke is ignorant. You then took offense at this characterization and hung up on me.

Had you not hung up, I would have mentioned that, by the same logic, you should also be objecting to making smokers walk many blocks out of their way so that they don’t smoke on the 1900-acre UI campus (even tho, since the campus smoking ban is written directly into the statute, your agency has no power to modify it). ...I would also have mentioned a good deal more about the cumulative (and even short-term) impact of secondhand smoke exposure and atherosclerosis.  

Although Mapes’s belittlement of the seriousness of outdoor exposure was “a rather odd position to take with regard to a definition of grounds of a public bldg, which is an entirely outdoor area,” she failed to retract, modify, or deny having taken this position in subsequent email exchanges despite being asked to do so.

After having secured an audio tape of the October 14 ARRC meeting, the IDPH critic posed the following question to Mapes and IDPH Director Newton:

1. Sen Connolly asked Ms Mapes whether the change in the definition of grounds of

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236 Email from Marc Linder to Bonnie Mapes (Oct. 15, 2008). This email was written a few minutes after the end of the telephone conversation. Mapes had taken umbrage at the comparison between her ignorance of the health impacts of secondhand smoke exposure outdoors and bar owners’ ignorance of their impacts indoors.

237 Email from Marc Linder to Bonnie Mapes (cc: Tom Newton) (Oct. 16, 2008).

238 Email between Marc Linder and Bonnie Mapes (Oct. 15-16, 2008). Director Newton in effect terminated this set of exchanges by declaring that “Bonnie Mapes has provided adequate responses (verbal and written) to your inquiries about our proposed amendments to the rules as presented to ARRC this past week,” which “[a]s director of the department I approved and support...” Email from Tom Newton to Marc Linder (cc: Bonnie Mapes, Matt Gannon, Heather Adams, and Barb Nervig) (Oct. 17, 2008).
Administrative Rules for, Barkeepers' Challenge to, Enforcement of Smokefree Air Act

public bldg was substantive or technical and Ms Mapes answered “technical,” yet she went on to explain how the result of the change could be that smoking would be permitted on the sidewalk in front of a public bldg whereas previously it would have been prohibited. How can that change possibly be merely technical and not substantive?

2. Ms Mapes further stated that under the original rule: “We ended up with some public bldgs that front right on a public sidewalk so you’d have the situation where someone could smoke to this corner, they’d have to not smoke at this block, and then they could smoke again on the next corner. And so to eliminate this problem we added this in the public right of way.” Why is it a “problem” that people entering and leaving a public bldg would not be exposed to secondhand smoke from passers-by. Why does idph consider it more important to permit some city governments’ to cater to smokers’ convenience of not having to cross the street?

3. Ms Mapes also justified the change on the basis that “you have some cities that have…a situation where they have a major thoroughfare, basically a sidewalk that’s fronting a major public street and they’ve decided that is not immediately adjacent to the bldg—it’s part of the public right of way and therefore should not be counted as grounds of the public bldg. And that’s what this clarification is here for. Otherwise it would have to be that the section of city sidewalk immediately in front of the public bldg would have to be considered part of public grounds.” Don’t you agree that Ms Mapes said here that “immediately adjacent to the bldg” and “public right of way” are mutually exclusive? Don’t you also agree that Ms Mapes said that under the first version of the rule a public sidewalk immediately adjacent to the public bldg was part of the public bldg’s grounds? And don’t you agree that unless you had changed the rule, the Washington st sidewalk in front of iowa city city hall would have to have been considered part of the grounds—unless the city had determined that it was not immediately adjacent to the bldg and unless idph had upheld that determination? And isn’t it true that instead of making any of those determinations, idph simply changed the rule, giving cities local decision making power to declare all such sidewalks rights of way not part of public bldg’s grounds? Are such decisions by cities about rights of way now unreviewable by idph or can you imagine circumstances under which idph would respond to a complaint about smoking in a right of way/public sidewalk in front of a public bldg?

Mapes asked Newton what he wanted her “to do with this one,” and promised their questioner that she would let him know as soon as she got “direction” from Newton as to how he wanted her to respond, but she never did.

At the Board of Health meeting on November 12 Mapes presented materials with “examples of the complexity of enforcing the smoke-free campus at Iowa State University...and the city hall in Iowa City.” With regard to the latter

239 Email from Marc Linder to Tom Newton and Bonnie Mapes (Nov. 26, 2008).
240 Email from Bonnie Mapes to Marc Linder and Tom Newton (Nov. 26, 2008).
241 Email from Bonnie Mapes to Marc Linder (Nov. 26, 2008).
242 Minutes, Iowa State Board of Health at 3 (Nov. 12, 2008), on http://www.idph.state.
Mapes explained that IDPH had received a complaint about people smoking on the sidewalk in front of the building. In addition to internal discussion, the agency had some communications with the city attorney, who had determined that the sidewalks on these public streets were not immediately adjacent to the public building and were not going to be counted as part of the public grounds; instead, the city attorney considered them to be public right-of-way and consequently they would not have to be smokefree. Mapes appeared to have concluded that because every city was “different,” each city government should be empowered to determine dispositively whether smoking was lawful or not. Following brief public comments, made only by anti-smoking groups (such as the Lung Association), the Board unanimously approved IDPH’s amended rules. Even news media focused on the change to the “grounds of any public buildings” definition, adding that in December the ARRC would review the proposed change “allowing local officials to decide whether smoking’s allowed on sidewalks surrounding city and county property.”

After listening to an audio tape of the Board of Health meeting, the IDPH critic asked Mapes:

I’ve been trying to listen to the tape of the mtg, which in parts is inaudible so I’m not sure I’m understanding the words, but I think I’m hearing you discuss the sidewalk in front of city hall in iowa city and saying that the city attorney had determined that the sidewalks (plural but maybe it’s singular—it is just Washington street) fronting Washington street “that aren’t immediately adjacent to the building are not going to be counted as part of the public grounds. They consider this a public right of way and these sidewalks are not going to have to be smokefree.” Did I hear the words correctly? I ask because I wonder whether this is really the city’s position or your position. If the sidewalk is NOT immediately adjacent to the bldg, that’s the end of the story isn’t it under the IDPH rule? Whether it happens to be a right of way or anything else is completely irrelevant at that point, isn’t it? is the city and are you taking the position that the sidewalk is not immediately adjacent to city hall?
Mapes responded:

I don’t have a transcript of my comments, but I was discussing some of the issues that had gone into our decision to propose the amendment concerning sidewalks in the public right-of-way. I explained that persons having control of a public building have some discretion in making the determination of what constitutes the grounds of that building and showed the Board examples of how this discretion was being applied. I used the satellite photo of Iowa City Hall as one of those examples. I do not remember if I said “sidewalk” or “sidewalks,” but I did refer to the opinion we received from the Iowa City attorney’s office that they did not consider the sidewalk along Washington Street to be part of the grounds of city hall because that sidewalk was a public right-of-way. Under the amendment we were proposing, that sidewalk would not be required to be smokefree. I do not remember the precise way in which I phrased this, but your synopsis sounds accurate. I was not working from any written script or notes.

As for your question about sidewalks which are immediately adjacent to a building, it is not “the end of the story” if a sidewalk is not immediately adjacent to a building. The rule requires all sidewalks determined to be on the grounds of a public building to be smokefree. If a city government controls a public building within a city park and determines that the entire park constitutes the grounds of that public building, then the sidewalks on those designated grounds, immediately adjacent to the building or not, would have to be smokefree (and be posted as such by the city).

IDPH’s critic asked a follow-up question that Mapes had not answered:

But disregarding parks and just focusing on the Iowa City City Hall—because at the Boh mtg you were concretely discussing the Iowa City City Hall—are you saying both that even a sidewalk that is not immediately adjacent to the bldg might be part of the grounds of a public bldg and that you are NOT taking a position one way or the other as to whether the sidewalk along Washington street is immediately adjacent? In other words, your position is that the sole reason that Washington street sidewalk is not part of the grounds of a public bldg is that it is a right of way?

However, he received only this non-answer from Director Newton:

As for the sidewalk issue you continue to ask about, I believe Bonnie has answered your question about how the decisions were made in amending the rules and addressing your complaint with Iowa City. In addition, the State Board of Health did approve the amendment without reservations, understanding that our rules cannot possibly address every “public grounds” scenario in Iowa.

247 Email from Bonnie Mapes to Marc Linder (cc: Tom Newton).
248 Email from Marc Linder to Bonnie Mapes (cc: Tom Newton) (Nov. 24, 2008).
249 Email from Tom Newton to Marc Linder (cc: Ramona Cooper and Bonnie Mapes)
At the ARRC meeting on December 9, 2008, in the course of outlining the changes that IDPH had made to its rules in response to public comments Mapes admitted that “we heard from the city attorney in Iowa City and so we made the change that allows the sidewalks in the right-of-way not to be included in the definition” of “grounds of any public buildings.”250 A number of pro-smokers, such as Brian Froehlich, George Eichhorn, and members of Iowans for Equal Rights, spoke, but said nothing novel.251 (However, a written submission by IER included this interesting admission concerning bar owners’ opposition to the Act: “many locally owned, neighborhood hospitality trade restaurant and bar small business owners in Iowa face a tilted smoking ban policy deck that shifts the playing field competitive advantage to large chain franchise operations that were predominately smokefree before the Iowa smoking ban was passed...”252) As before, the “so-called ‘bar exemption’” was the “most controversial” rule, with owners contending that IDPH interpreted “bar” too narrowly, and the agency insisting that apart from the definition that the Department of Inspections and Appeals used for restaurant inspections there was no practical basis for creating the detailed recordkeeping and enforcement requirements.253

The final ARRC meeting on the Smokefree Air Act rules ended anticlimactically. Republican Senator James Seymour, a retired hospital CEO254 who had consistently voted against H.F. 2212,255 moved to object to the rulemaking on the grounds that IDPH had not gotten the rules right on its second attempt, thus leaving the distinction between bars and restaurants unreasonable.256

250 Administrative Rules Review Committee Meeting (Dec. 9, 2008) (audio tape provided by Joseph Royce, legal counsel).
251 Administrative Rules Review Committee Meeting (Dec. 9, 2008) (audio tape provided by Joseph Royce, legal counsel); Minutes of the December 2008 Meeting of the Administrative Rules Review Committee at 4-5 (Dec. 9, 2008), on http://www.legis.state.ia.us/lsadocs/ARR/ARRMinutes/2009/ANKKB005.PDF.
253 Iowa General Assembly, Legislative Service Agency-Legal Services Division, “2008 Committee Briefings” at 4 (2009), on http://www.legis.state.ia.us/lsadocs/BriefOnMeetings/2009/BJMAR000.PDF.
255 See above ch. 35.
256 Administrative Rules Review Committee Meeting (Dec. 9, 2008) (audio tape provided by ARRC legal counsel Joseph Royce); Minutes of the December 2008 Meeting
Seymour, whose “whole premise” was that government should not interfere with a private business, grounded his criticism of the administrative definition in the argument that “food is food,” meaning that there was no rational reason for singling out snack foods as a basis for exemption. However, he knew that his motion would not pass, and in fact only Republican Representative Heaton, another opponent of the bill, supported the motion, which failed by a vote of 2 to 6, the only other Republican present, Linda Upmeyer, voting Nay, even though she had been a vociferous opponent of the bill. ARRC, according to Senator Courtney, though skeptical of the outdoor patio rule, ultimately did not object to it because there was so much noncompliance occurring in indoor bars at the time that members wanted to wait and see how it worked out. By the end of 2008, when Larry Duncan had still not been sanctioned for his blatant violations of the law, in the Burlington area fewer bar owners, many of whom had been complying only grudgingly anyway, remained compliant. For example at the Paddlewheel Lounge in that city a note to customers on the tables read: “Due to the lack of enforcement of the law, it has impacted our business significantly the past five months.... We feel at this point that we have no choice than to allow smoking to stay on an even playing field and keep our bar in business.”

Having failed in their final attempt to persuade state government officials to re-word the rules to facilitate smoking in bars, owners vituperatively railed against the Act after the ARRC meeting, prompting Representative Wise to administer a tutorial to them on why vilification was a “dumb” approach. ‘Attempting to change the (law), that means you need to get legislators on your side and insulting legislators and implying legislators are somehow corrupt if they support a smoking ban is not politically very smart.’

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258 Administrative Rules Review Committee Meeting (Dec. 9, 2008) (audio tape provided by ARRC legal counsel Joseph Royce); Minutes of the December 2008 Meeting of the Administrative Rules Review Committee at 5 (Dec. 9, 2008), on http://www.legis.state.ia.us/lsadocs/ARR/ARRMinutes/2009/ANKKB005.PDF
259 Telephone interview with Thomas Courtney, Burlington (Aug. 16, 2009).
Bar Owners’ Unsuccessful Litigation Challenging the Smokefree Air Act’s Constitutionality

The next question is whether the asserted right to allow patrons to smoke in a public restaurant is “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” ... The answer clearly is no. ... While tobacco smoking may have a long history, both liberty and justice will continue to exist if smoking in a public restaurant is curtailed or precluded.262

As for the argument that the ban will attract new customers, [bar owner] Kuncl is..."not sure we are going to get new customers.... It’s going to take a long time to air this place out."263

The reason that Clinton and Burlington have become the epicenters of bar-owner resistance has to do almost completely with personality. It is just an accident of geography that the most radical individuals happen to come from those communities. You would need to employ a psychiatrist and not an economist to find the reason.264

In an attempt to thwart the enforcement that they knew would be directed against them if they continued to permit smoking in their bars once the Smokefree Air Act went into effect on July 1, the owners who were members of the Iowa Bar Owners Coalition and Clinton’s Organized Bar & Restaurant Association decided, according to Brian Froehlich, a bar owner in Wilton, to “see if we might get a judge to give us an injunction ’til we can get this thing fixed.”265 Initially bar owners, who were divided as to whether their litigation, for which they had

263Brian Morelli, “Bars’ Longtime Patrons Fret Life After Smoking Ban,” ICP-C, June 28, 2008, on http://www.press-citizen.com (owner of Hilltop Lounge in Iowa City). According to the owner of a restaurant-bar in Davenport who prohibited smoking on Jan. 1, 2008: “It took 13 of us six hours to scrub down everything in the place where there had been smoking for 26 years.” Bill Wundram, “Smoking Ban Didn’t Send Bar into Ruin,” Q-CT, Mar. 18, 2009, on http://www.qctimes.com. Specialized cleaning companies noted that cigarette smoke and the accompanying odor was “pretty invasive” and could, together with the odor, “stay for a long, long, long time” because it “permeates into every porous surface.” Cleaning charges ran into thousands of dollars. Cindy Hadish, “Dispel the Smell—Bars Hope to Lose the Odor Along with the Smoke,” Gazette (Cedar Rapids), June 27, 2008 (1A) (NewsBank). On the phenomenon of thirdhand smoke, see above ch. 33.
264Email from (former Rep.) Phil Wise to Marc Linder (July 9, 2009).
purportedly raised $50,000, should focus on total repeal or eliminating exemptions, had spoken to a number of lawyers, including former Governor Tom Vilsack. Towards the end of May Vilsack stated that those who had been in touch with him “believe that a smoking ban based on public health reasons shouldn’t give certain locations immunity from the ban. ‘Saying you can’t smoke in a bar but you can smoke in the casino, that raised some serious questions about the constitutionality of the exemptions.’” Making it clear that he would attack only certain exemptions, Vilsack oddly belittled the universalizing tendency of his approach by remarking that it “‘would be sort of reinforcing the law.’” Bar owners’ attraction to him may have resulted from their absolutizing his view, about which he felt “‘very strongly,’” that “[w]hen we craft laws, even though there may be political reasons for exemptions, the Constitution may not recognize those exemptions.” Froehlich, while characterizing Vilsack’s approach as “solid,” was nevertheless “personally apprehensive” about it; a few people did not like it and some owners were considering a different “legal angle,” but did not yet want to show their hand.266

On June 30 Vilsack told the press that although he had not yet been formally hired, he had “‘advised folks who are interested in using my services’” that “‘if I’m involved it won’t be a lawsuit that seeks to strike the law, which is what some folks want.... If I’m involved, it’ll be a lawsuit that seeks to extend the protections of the no-smoking ban to other locations, like casinos.’” He believed that a number of bar owners and others were interested in his level playing field approach, which was based on unspecified research that he had done persuading him that a “‘there is a good legal argument to be made that the smoking ban did not go far enough and needs to be extended to some of those other places where there are workers and customers who would potentially be exposed to secondhand smoke, which is the intent of the law.’” But the argument that had “‘great appeal’” to the bar owners with whom he had met was not focused on public health: “‘From an economic standpoint, those who are in the entertainment venue business, as certainly bars and taverns are, they ought to be on an equal and level playing field and no one should be given a privilege or an immunity from a law simply because they have political connections or political might that resulted in exceptions being created that make them outside the law.’” Vilsack identified the common feature in both arguments as “‘fundamental fairness to those who go to casinos, those who work in casinos and those who are competing for limited entertainment dollars.’”267


267O. Kay Henderson, “Vilsack May Lead Lawsuit over Smoking Ban,” Radio Iowa,
Despite Vilsack’s commercial competitiveness argument, his focus on public health was anathema to bar owners, who, through Froehlich, revealed that smoking and not equal competitive conditions was their animus: they chose former Republican state legislator George Eichhorn as best representing “‘what our thoughts and feelings were over Gov[ernor] Vilsack’s proposed idea, which [sic] all he wanted to do was go and make the law stronger...so that’s why we steered away from Vilsack on this.’”268 (A few weeks later, IBOC told a somewhat different story, insisting that it had not hired Vilsack because the exemptions he wanted to fight would be “overturned next legislative session without cost to our organizations. We also believe that his involvement is purely political and not for the best interest of small business owners of this state.”)269

In terms of the ideological fit, it does seem highly implausible that repealthesmokingban.org—a website that proclaimed that the “extremists” who promoted the Smokefree Air Act “hate liberty with a passion and they will never stop until they have everything” and featured on its “Facts” page a denial of the lethality of smoking for smokers—would have posted a photo and mini-bio of Vilsack, as it did with Eichhorn, as one of “our heros [sic].”270

Eichhorn, who, after having been crushingly defeated in a bid to be nominated for a state Senate race by a Republican convention,271 lost his House seat in November 2006 to (fellow smoking facilitator) Democrat McKinley Bailey,272 and then on June 3, 2009 lost the Republican U.S. Senate primary for the honor of losing to Tom Harkin,273 was a self-professed conservative and “true strict constructionist.”274 On Facebook Eichhorn declared himself a fan of the Heartland Institute,275 a market-knows-best organization, one of whose hobby horses is tobacco. That part of its website, which begins, “Welcome to the Smoker’s Lounge,” is so profoundly and across-the-board drenched in primitive,
know-nothingist denial\textsuperscript{276} that it makes Philip Morris—whose “support never amounted to more than 5 percent of Heartland’s annual budget”\textsuperscript{277}—seem almost like a scientific subcontractor of the Centers for Disease Control and Prevention and the Surgeon General. Not coincidentally, Heartland’s approach found its way into at least one of Eichhorn’s briefs,\textsuperscript{278} and plaintiffs’ Recast and Substituted

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\item \url{http://www.heartland.org/suites/tobacco/} (visited July 8, 2009).
\item \url{http://www.heartland.org/about/truthsquad.html} (visited July 8, 2009).
\item In his brief in support of his clients’ (unsuccessful) request for a temporary injunction, Eichhorn wrote: “The affect [sic] of this statute on smokers is monumental. One Letter-to-the-Editor stated, ‘Many smokers today are made to feel like modern-day lepers, segregated and ostracized…[.]’” The footnoted source was “R. Connor, Letter to the Editor, The Heartland Institute, Letters to the Editor, July [8,] 2005.” Brief in Support of Application for Temporary Injunction at 15, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., July 31, 2008). Eichhorn suppressed the fact that Ralph Connor was the Heartland Institute’s public affairs director so that his “letter” in fact constituted the Heartland Institute’s communication to itself. The ellipsis that Eichhorn inserted spared him the embarrassment of revealing to the judge, IDPH, the attorney general, and the world at large that his clients’ pro-smoking agenda rested on the flat-earth-society claim that secondhand smoke’s alleged lethality was a hoax—a position that even Philip Morris had abandoned: “Many smokers today are made to feel like modern-day lepers, segregated and ostracized on the basis of junk science that says secondhand smoke is a public health threat.” Connor then indulged in the following piece of preposterous charlatanry: “Most experts believe that moderate, occasional exposure to secondhand smoke presents a low cancer risk to nonsmokers.” Ralph Connor, “Smokers: Modern-Day Lepers?” (July 8, 2005), on \url{http://www.heartland.org/full/17590/Smokers_ModernDay_Lepers.html} (visited July 12, 2009). The surgeon general’s monumental scientific synthesis of the health impact of secondhand smoke exposure concluded that such exposure constituted “an alarming public health hazard” to which “there is no risk-free level of exposure,” adding that exposure killed more than 15 times more adult nonsmokers from coronary heart disease (46,000) than from lung cancer (3,000). U.S. Department of Health and Human Services, \textit{The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General} iii, 11, i (2006). Immediately following the aforementioned quotation, Eichhorn offered this essentialist falsification: “With this statute, smokers are denied access to most public places.” Brief in Support of Application for Temporary Injunction at 15, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., July 31, 2008). The Smokefree Air Act does not deny access to any public place to smokers so long as they refrain from smoking in such a place. His claim might become relevant if the legislature ever prohibited the off-gassing of thirdhand tobacco smoke from clothing and other personal and movable property in public places. See above ch. 33. Further essentialist hyperbole was on display in the Recast Petition, which asserted that the Act “adversely affects the employability of those who choose to smoke in that employers can no longer accommodate

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Petition devoted four pages to a disjointed melange regurgitating long ago discredited (and) tobacco-industry-supported efforts at denial of the reality of the deleterious health consequences of secondhand smoke exposure.\(^{279}\)

The petition for a temporary injunction prohibiting the Iowa Department of Public Health and the State of Iowa from enforcing H.F. 2212 and its administrative rules and for a declaratory judgment that the statute and rules were unconstitutional that was filed by IBOC, COBRA, Froehlich’s bar, and a smoker named Ron Overson in Polk County district court on July 1 bore signs of great haste and/or sloppiness (such as a typographical error in the first plaintiff’s name in the caption and misstating COBRA’s name).\(^{280}\) The submission was this behavior, and if a person chooses to smoke during work hours, they [sic] will be required to leave the building with all the business and health risks associated with that conduct. ... By prohibiting smoking on business premises, this Legislation is eliminating up to...20%...of Iowa’s population from providing services for hire, or from being customers.” Recast and Substituted Petition at 28, Choose Freedom Iowa v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 28, 2008). Presumably by “health risks” plaintiffs were not referring to those linked to firsthand smoking.


\(^{280}\)Petition, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., July 1, 2008). To excuse the need to file a recast petition, Eichhorn asserted that he had had only about a week to prepare the petition. Plaintiffs[‘] Resistance to Defendants’ Motion to Dismiss or Recast at 2, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 6, 2008). Brothers Larry and Bill Duncan asserted that “each filed a temporary injunction hoping the law could be put on hold until it’s [sic] constitutionality could be challenged in court. Sadly the request for the injunctions was poorly handled by the state and didn’t make it into court until nearly a
characterized by outright false assertion paired with trivial quibbling suggestive of lawyerly incompetence. For example, it asserted that the law “uses terms in a manner inconsistent with accepted public and legal usage. Smoking is prohibited in...‘Public places,’ which is not limited to governmentally owned or operated facilities. Instead, the act’s definition includes private property, private businesses and private clubs. The definition states public places are ‘an enclosed area to which the public is invited or in which the public is permitted....’” In fact, the Iowa Code was already replete with provisions using the same definition of “public place”—most notably, with regard to alcoholic beverage control and even breast-feeding. Moreover, the “public place” language, like much of the statutory text, was taken from anti-public smoking laws enacted earlier in other states such as Rhode Island (which is even titled, The Smokefree Public Place and Workplace Law) and Illinois.

The first argument that plaintiffs offered in support of its petition for injunctive and declaratory relief was that the new law would prohibit people who “choose to smoke”—a phrase that cigarette manufacturers had long used instead of ‘addictively self-administer nicotine’—from “enjoying” covered public places and “interfer[e] with their associational rights and...their customary practices of purchasing goods and services from other members of the public.” Moreover, the bar owners also claimed that the Smokefree Air Act “limits the liberty, freedom and choices that individuals in Iowa have historically, customarily and legally maintained.” Attempting to quantify this alleged impact, they asserted that if, as had been estimated, 20 percent of adult Iowans smoked,
all of them would be “adversely affected....” 287  Ironically, as early as 1978 the
general counsel of Brown & Williamson, in an internal company memo, had
underscored that “[n]one of the anti-smoking ordinances in fact restricts a
smoker’s right of association or assembly. None of them exclude [sic] smokers
from any place or infringe the rights of smokers to associate with whom they
choose and assemble where they please. Instead they regulate activity or
conduct.” 288  A quarter-century later the associational argument was nevertheless
litigated by a pro-smoking anti-smoking regulation group in federal court in New
York State, which dismissed it out of hand in 2004. The court concluded that that
state’s anti-public smoking law did “not implicate First Amendment protections
with regard to assembly and association and thus, would not merit a heightened
scrutiny for these claims.” 289  The bar owners’ empirical claim was, as a 2006
Iowa survey demonstrated, wildly exaggerated and untenable: 78 percent of
smokers (compared to 87 percent of nonsmokers) stated that a total smoking ban

(Polk Cty Dist. Ct., July 1, 2008).
686053139/41-2.
2004). The court explained: “A critical flaw inherent in CLASH’s First Amendment
arguments is the premise that association, speech, and general social interaction cannot
occur or cannot be experienced to the fullest without smoking, or, conversely, that unless
smokers are allowed to light up on these occasions and at these places, their protected right
is somehow fundamentally diminished. Implicit in this premise is that smoking enhances
the quality of the social experience and elevates the enjoyment of smokers’ First
Amendment rights; in other words, that only by being allowed to smoke can smokers
contribute fully and enjoy to the maximum the experience of association, assembly, and
speech in public places such as bars and restaurants. CLASH’s allegation that the
Smoking Bans ‘curtail’ certain activities for smokers, in essence suggests that smokers
cannot fully engage in conversation and other activities in bars and restaurants unless they
are permitted to smoke, or that only by being permitted to smoke in these places can they
fully exercise their constitutional rights of association and speech. Without summarily
dismissing all possibility that smoking may contain some scintilla of associational value
for some people, there is nothing to say that smoking is a prerequisite to the full exercise
of association and speech under the First Amendment. ... At best, smoking, where
permitted, is but a single component of the entire realm of associational interactions that
a bar or restaurant patron could experience. Other aspects include dining, drinking,
conversing, viewing or listening to entertainment, and meeting other people. While the
Smoking Bans restrict where a person may smoke, it is a far cry to allege that such
restrictions unduly interfere with smokers’ right to associate freely with whomever they
choose in the pursuit of any protected First Amendment activity.” Id. at 473.
in restaurants would have no effect on how often they ate out, while 3 percent (compared to 12 percent of nonsmokers) said that it would prompt them to eat out more often.\textsuperscript{290} Perhaps an even more impressive refutation of the bar owners’ essentialization of smokers was the finding that 52 percent of smokers (compared to 83 percent of nonsmokers) did not permit smoking anywhere in their own houses.\textsuperscript{291}

The bar owners next alleged that the law would “inflict[ ] them with [sic] a new, massive and costly regulatory regime by prohibiting them from the full use and enjoyment of their property, by diminishing the value of the real property where businesses that [sic] previously chose to sell goods and services to customers who chose to smoke...and potentially taking away their license or permit to pursue their livelihood if there are findings of non-compliance.”\textsuperscript{292} How the requirement of posting a few nosmoking signs and informing violators of the existence of the law amounted to a “massive and costly regulatory regime” plaintiffs no more explained than how this regulation differed in its impact from many other health and safety regulations.

The bar owners submitted a laundry list of alleged constitutional violations: (1) the inspection and regulatory schemes violated the due process and search and seizure clauses because compliance operations were authorized without warrants or probable cause; (2) procedural due process was violated because IDPH was empowered to determine violations “potentially without notice or opportunity to be heard by the alleged violator”; (3) Iowans were arbitrarily and unreasonably classified so as to deny them “inalienable rights of enjoying liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness, the right to pursue useful and lawful businesses without oppressive regulations”; (4) Iowans were arbitrarily and unreasonably classified in violation of the equal protection clause of the U.S. Constitution and the privileges and immunities clause of the Iowa Constitution; and (5) the free speech clause was violated.\textsuperscript{293}

\textsuperscript{290} Gene Lutz et al., \textit{Iowa 2006 Adult Tobacco Use Survey} 59, fig. 38 at 64, on http://www.csbs.uni.edu/dept/csbr/pdf/IDPH_Adult_Tobacco_Survey-2006.pdf (visited July 9, 2009).


\textsuperscript{293} Petition at 12, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., July 1, 2008). The free speech claim had also already been rejected by the U.S. District Court for the Southern District of New York, which found that even if it “indulg[ed] the notion that smoking in a bar or restaurant embodies some shred of
In an interview two days after filing the petition, Eichhorn stressed that SAA went “far beyond” the single issue of the casino exemption, but failed to reveal how his claim that the law “has some very unusual features in there...strange things just in and of this law that I think are different from other states[’]” was actionable. Nor did he identify the “good results” that he and his clients would get out of the suit. What he did consider to be without a “proper legal foundation” was that “this legislation wants to go in and inspect all sorts of private property that’s never been subjected to this kind of inspection before.”

The bar owners viewed the litigation as just “the first step” in overturning the smoking ban as a whole by means of political mobilization. COBRA president Van Roekel, who saw the law as “blatant discrimination against smokers” (and thus conceded that, contrary to many denials, the owners’ resistance was indeed a defense of smoking) “and...a property rights issue,” publicly announced a position that would have undermined the only argument that the state court judge later took seriously—namely, that the plaintiffs were “not contesting the casino exemption, because many members feel the exemption will be overturned in the next legislative session.” Instead, COBRA and IBOC, temporarily caught up in a post-filing collective delusion of grandeur, purported to be engaged in hiring a Washington, D.C. PR-firm “to coordinate the release of information relating to court proceedings” and recruit other organizations to join the lawsuit: “In essence, we are fighting for the rights of every small business in Iowa.” The next step was political activation, “including putting candidates up for office” who would defend small business owners’ interests and rights. The “final step,” which

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expressive conduct protected under the First Amendment” and the ban imposed a burden on that expression, the law would still pass constitutional muster under “the more demanding intermediate level of scrutiny” because it was content-neutral and established reasonable time, place, and manner restrictions “substantially related to the important governmental interest of protecting individuals from the harmful effects of ETS.” NYC C.L.A.S.H., Inc. v City of New York, 315 F. Supp.2d 461, 480 (S.D.N.Y. 2004). In their Recast Petition, plaintiffs tacked on the even more implausible claim that the Act violated the commerce clause of the federal constitution by virtue of discriminating against the sale, distribution, and economic benefits of tobacco. Recast and Substituted Petition at 30, Choose Freedom Iowa v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 28, 2008).


involved “contact with interested parties in nine states” and contacting many more, was “making the matter a national issue by pooling the resources of similar organizations throughout the United States and debating the constitutionality of the ban before the U.S. Supreme Court.”

On July 21, the attorney general filed a motion to dismiss or, alternatively, to recast the petition. Dismissal was based on the argument that plaintiffs had impermissibly interwoven the statutory and agency rules/rulemaking challenges: because a petition for judicial review of agency action under the Iowa Administrative Procedure Act was the exclusive means of obtaining such review in a court of law, it could not be joined with original declaratory judgment or injunction actions and therefore had to be dismissed for lack of jurisdiction. Moreover, even if the court were nevertheless willing to construe the whole petition as one for judicial review, it would still have to be dismissed for lack of jurisdiction because plaintiffs had failed to serve the agency defendant within the 10-day statutory service requirement. Consequently, the only possible ground on which the bar owners could proceed was their constitutional challenge to the Smokefree Air Act; but since they made no allegations specific to the statute and intertwined all of them with challenges to the implementing rules, the attorney general requested that, if the court permitted the statutory challenge to proceed, it order plaintiffs to recast their petition to remove the challenges to the rules, thus making the grounds of their statutory challenge clear and giving defendants fair notice of the claims and a fair opportunity to respond.

On July 24, Polk County District Judge Douglas Staskal ordered a hearing for August 1 on the bar owners’ application for a temporary injunction prohibiting

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298 Motion to Dismiss or to Recast, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., July 21, 2008). While denying that their petition was an appeal of agency action and stating that they would not attack the rules except as “reflections on the constitutionality” of the statute, plaintiffs expressed their willingness to recast their petition, but nevertheless requested the court to deny defendants’ motion to dismiss or recast. Plaintiffs[‘] Resistance to Defendants’ Motion to Dismiss or Recast at 2-3, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 6, 2008). Insisting that plaintiffs’ latest filing “leaves the parties squarely on the same uncertain ground they were on at the outset of this action,” the attorney general urged the court to grant defendants’ motion to dismiss or recast. Defendants’ Reply to Plaintiffs’ Resistance to Defendants’ Motion to Dismiss or Recast at 2-3, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 22, 2008).

299 http://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm

3573
Administrative Rules for Barkeepers’ Challenge to Enforcement of Smokefree Air Act

IDPH from implementing and enforcing the Smokefree Air Act. The parties agreed to proceed with this hearing “but only on the basis of the allegations that the Act is unconstitutional and not on the basis of alleged defects in the department’s rules,” and the judge approved this procedure.

In their brief opposing plaintiffs’ request for a temporary injunction the state defendants, after outlining scientific facts about the health consequences of secondhand smoke exposure, identified the fatal defects in the bar owners’ constitutional claims. Their substantive due process challenge was meritless because they failed to establish that the smoking law impinged on any fundamental right or was an irrational means of furthering the state’s interesting in reducing Iowans’ exposure to secondhand smoke for the purpose of advancing public health. The reason that the bar owners were unable to demonstrate that they had any fundamental right at stake—no court had held the right to smoke in public or to permit smoking in bars to be fundamental—was that tobacco smoking in public places, as the attorney general ironically observed, “is not implicit in the concept of ordered liberty....” Plaintiffs’ claim under the privileges and immunities provision of the Iowa Constitution (“All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens” was also untenable because the Iowa Supreme Court had held that a party challenging a statute based on the provision “‘must negate every conceivable basis which may support the classification, and the classification must be sustained unless it is patently arbitrary and bears no relationship to a legitimate governmental interest.’” Consequently, it was not defendants’ burden to prove that the statute was constitutional, but rather plaintiffs’ “burden to demonstrate beyond a reasonable doubt that the statute

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305 Iowa Constitution, art. I, sect. 6.
violates the Privileges and Immunities Clause and to point out with particularity the details of the alleged invalidity.” Moreover, the clause “will not defeat a statutory scheme simply because it benefits certain individuals or classes more than others.” Under the traditional equal protection analysis, by which privileges and immunities challenges are tested, the court first would have to determine whether the statute created “a classification of similarly situated people who have been singled out for different treatment.” If the classes are not similarly situated, then treating them differently would not be unconstitutional; if they are, then the court has to determine whether the classification is rational; only an arbitrary classification that bears no rational relationship to a legitimate government interest would be unconstitutional. Plaintiffs had not only failed to bear their aforementioned burden, but had not even tried to demonstrate that they were part of a class that merited analysis under the privileges and immunities clause. Even if they were, however, they were not a suspect class that merited constitutionally heightened scrutiny; consequently, SAA had (and had already been shown) to satisfy only the rational basis test. Unsurprisingly, “no court employing either a privileges and immunities analysis akin to Iowa’s or a traditional equal protection analysis has overturned a similar statute on equal protection grounds.”

To be sure, the state, presumably because it bore no burden to do so, made no effort to argue that the legislature had a rational basis for classifying bars and casinos differently. Interestingly, the attorney general also made no effort to explain why a more recent aberrant Iowa Supreme Court decision, which not only rejected the U.S. Supreme Court’s analysis of equal protection, but was also at odds with its own prior decisions, did not represent a potential problem for the argument set forth in the attorney general’s brief. In Racing Association of Central Iowa v Fitzgerald, which dealt with a differential tax between racetrack and riverboat casinos, the Iowa Supreme Court held both that there was no rational basis for the legislature’s finding that the two were not similarly situated and that there was no rational relationship between the differential tax and the

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306 Defendants’ Brief in Opposition to Plaintiffs’ Application for Temporary Injunction at 13-15, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 1, 2008) (quoting Perkins v Bd of Supervisors of Madison County, 636 NW2d 58, 72 (Iowa 2001) (quoting in turn earlier Iowa Supreme Court cases)). In an even older case not cited by the attorney general, the Iowa Supreme Court held that the privileges and immunities clause “does not require that all laws shall apply alike to all citizens of the State. It is sufficient if an enactment applies to all members of a class, providing the classification is not purely arbitrary but rests upon a reasonable basis. It is equally settled the Legislature has wide discrimination in determining the classes to which its Acts shall apply.” Green v Mt. Pleasant, 256 Iowa 1184, 1199 (1964).
main purpose of the legislation. Even if RACI’s point was that a statute that (1) treats differently two industries that the court finds to be similarly situated (2) in a manner that contradicts the main purpose of the statute violates equal protection, RACI’s logic still might not lead a RACI-like court to invalidate the casino exemption in the Smokefree Air Act. If the state’s argument was that the legislature exempted casinos because it needed the tax revenue, that argument might pass muster because, unlike the situation in RACI, the court could not find that this goal was not rationally served by the state’s continuing to receive the higher tax revenues from casinos that would not be possible if smoking were banned there. In other words, unless the court argued back that the goal was not rationally served because (empirically) banning smoking would not reduce revenues/tax revenues, RACI would not apply. That is to say, a RACI-like court would have to argue that casinos and bars were similarly situated with regard to a smoking ban’s impact on revenues/tax revenues. Since, in fact, the Smokefree Air Act bill was amended precisely because its supporters believed that the experience in Delaware and Illinois showed that bars were different than casinos in that the latter’s revenues were reduced by smoking bans while the former’s were not, a court would presumably be precluded from finding that casinos and bars were not similarly situated even though some scholars argued that smoking bans had not reduced casino revenues.

Although Republican House assistant minority leader Doug Struyk saw no “rational basis” defense for the State other than arguing that the absence of gambling in bars was somehow relevant, he was nevertheless dismissive of the Iowa Supreme Court decision on which bar owners must have been pinning all their hopes, calling it “a little odd” and not “mak[ing] a whole lot of sense.” Ironically, his Minority Leader, Rants, agreed that bar owners would have an uphill battle to prevail on a “rational basis” argument.

At the hearing on August 1, which lasted three hours with breaks, most of the 56 people in the courtroom—among whom were two bill drafters from the Legislative Services Agency—were bar owners. IBOC president Froehlich, the first of three bar owner-witnesses, was led through his testimonial paces by Eichhorn, who elicited the claim that most of the bar owners he had spoken to had

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308 See above ch. 35.
309 Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008). In addition, he saw no hope for a suit based on discrimination against smokers.
310 Telephone interview with Christopher Rants, Des Moines (May 12, 2008).
seen the number of customers drop by 25 to 50 percent and that one bar had closed because of July’s “declining profits,” which he called a “‘catastrophe.’” On cross-examination, Froehlich told Assistant Attorney General Donn Stanley that sales at Fro’s Pub and Grub had declined about 15 percent from June (the last pre-ban month) to July, but, under questioning, conceded that other factors such as high gasoline prices, the (historic) floods, and the housing crunch might also be reducing sales and patronage, prompting a few bar owners to grumble and one to whisper, “‘He’s making their case.’” Stanley’s relentless interrogation forced Froehlich to admit not only that he was still hiring, but that he had reduced the number of his employees in January, months before H.F. 2212 had even been passed. As for his scofflawdom regarding the smoking ban, Froehlich cavalierly admitted that “‘in business, we all take risks,’” which in his case included posting a sign on his door announcing that customers were entering a “‘smoking establishment’”—“‘my way of bei[n]g rebellious.’” Unknown is the impression that he made on Judge Staskal by opining that hanging the mandatory no-smoking sign upside down on the inside of the front door so that customers would see it only upon exiting put him in compliance with the law.

Eichhorn’s next witness was COBRA president Van Roekel, whose prediction that half the bars in Iowa “will close in the coming year because of the ban” suggested that he was as expert at economic prognosticating as he was at oncology and constitutional law or, as the director of the Alcoholic Beverages Division put it, that his prediction was “not a good gauge of reality.” In fact, in spite of the deepest economic crisis of the post-World War II era, the number of commercial liquor/winebeer on premises-beer off premises licenses/permits processed rose in Iowa from 4,023 for the fiscal year ending June 30, 2008 to 4,038 for the fiscal year ending June 30, 2009.


313Telephone interview with Lynn Walding, Des Moines (July 15, 2009).

314Iowa Alcoholic Beverages Division, 74th Annual Report: July 2007-June 2008, at 13, on http://www.iowaabd.com/about_office/annual_reports/pdf/2008/08_entire_report.pdf (visited July 15, 2009); Iowa Department of Commerce Alcoholic Beverages Division,
The third and final bar owner-witness, Amanda Albrecht, testified that her bar income at Hoss’s Saloon in Fairbank had fallen from $11,000 in July 2007 to $3,000 in July 2008, prompting her to put the bar up for sale and probably to close it for good on August 4. Her most affecting testimony she saved for a press interview in which she grieved most deeply over being torn away from experiencing firsthand the reproduction of her customer base: “Over the years I’ve been able to watch children that I knew, you know, that become drinking age and, you know, they have their 21st birthday there...and I’m not going to be able to see that (any) more.” In court Albrecht had offered what she regarded as a show-stopper: “We made $11 yesterday.... What more do you want to know?” That “more” (which did not become known until much later) suggested that that tragic day on which she could no longer witness the formerly underaged turn into personified legal solvent demand for alcohol had been put off after all: the licensure records of the Alcoholic Beverages Division revealed that in November 2008, Albrecht renewed her bar’s annual liquor license, which as of July 2009 was still “active.”

Following plaintiffs’ testimony the lawyers took over, in part merely reviewing the arguments that they had already briefed. Assistant Attorney General Jeffrey Thompson dismissed the bar owners’ self-reported data as “anecdotal,” “unreliable” and ‘unverifiable.’” As to the requested temporary restraining order, he observed that with 82,000 businesses covered and only 572

Activity Report Recap July 1, 2008–June 30, 2009 (emailed by ABD). Similarly, the number of commercial beer on/off premises licenses/permits processed for FY 2008 and 2009 rose from 1,085 to 1,148 and that of special-beer/wine on premises-beer off premises from 465 to 494. These three categories comprise the vast majority of licenses for bars.


https://elicensing.iowaabd.com/LicenseList.aspx (License No. LC0030251) (visited July 16, 2009). According to ABD: “There are no pending new licenses for this location.” Email from Lynn Walding to Marc Linder (July 17, 2009).

Although a court reporter did stenographically transcribe the hearing, the parties agreed that the lawyers’ closing remarks would not be transcribed. Neither party ever requested a transcript of the three plaintiffs’ testimony. Telephone interview with Janet Walker, Des Moines (the court reporter who was assigned to Judge Staskal and transcribed the testimony) (July 16, 2009).
complaints having been filed, issuance of an injunction would undo the improvement in public health that the new law had already effected. Eichhorn embellished the aforementioned false assertion in his brief by contending that the Smokefree Air Act “defies standard definitions of public and private properties...dating back hundreds of years.” In order to parry Thompson’s unobjectionable point that in order to secure an injunction plaintiffs would have to show irreparable harm Eichhorn claimed that: “It’s not the economic harm that we’re worried about.... If you have to tell a customer or an employee, “You can’t do that here; You [sic] have to take it outside,” will that be a customer or an employee tomorrow?” It appears not to have occurred to Eichhorn that owners have a long history of informing people in their bars that they cannot engage in various kinds of behavior. Moreover, the administrative rules were so weak that they did not require owners to do anything other than inform violators that they were violating the Smokefree Air Act; they did not even require that they request violators to leave the smoking-prohibited area or that they notify law enforcement. (In sharp contrast, the Minnesota Freedom to Breathe Act provided that owners and managers “shall make reasonable efforts to prevent smoking in the public place, public transportation, place of employment, or public meeting by...asking any person who smokes in an area where smoking is prohibited to refrain from smoking and, if the person does not refrain from smoking after being asked to do so, asking the person to leave. If the person refuses to leave, the proprietor, person, or entity in charge shall handle the situation consistent with lawful methods for handling other persons acting in a disorderly manner or as a trespasser.”)

Just how well the organized barkeeper resistance understood how minimal the IDPH rules had rendered owners’/employers’ obligations in this regard was unmistakably on display on signs that adorned tables at Froehlich’s bar, whose owners sarcastically reveled in their discovery of the crucial legal distinction

324See above this ch.
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

between the mandatory and the merely permissive:

**If you are smoking you are in violation of the “Iowa Smoke Free Act.”** By law we are required to tell you this. Via the administrated (sic) rules, the following actions **may** take place if you continue to smoke.

- **We MAY discontinue service to you.**
- **WE MAY ask you to leave.**
- **We MAY call the authorities.**

[Then] **Again I May Not...Have a nice day.**

Even the press reported that “[s]imilar battles have not gone well for smoking proponents. In 2006, a federal judge in Colorado rejected an [sic] challenge to that state’s smoking ban and ruled that Colorado legislators had a rational basis to exclude casinos, as Iowa law does.”

Although a year later Eichhorn remarked that the state “did do something interesting in offering the judge a copy of all cases that have found smoking bans constitutional,” at the hearing he concluded his closing remarks “by dismissing the idea that very few legal challenges of smoking bans in other jurisdictions had succeeded [sic]. He joked that ‘they didn’t have George’—meaning those other plaintiffs didn’t have him for a lawyer.” In fact, the federal court in the 2006 Colorado case, *Coalition for Equal Rights, Inc v Owens*, both denied the plaintiff-bar (and other business) owners’ request for a temporary restraining order and granted the state defendants’ motion for summary judgment, dismissing the action. Despite opining that “[s]ince the people of the State of Colorado have managed since 1876 without a ban on indoor smoke, I do not consider the delay of a few weeks

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328 Email from George Eichhorn to Marc Linder (July 14, 2009). Eichhorn was presumably referring to equal protection challenges. For extensive citation of such cases, see Defendants’ Brief in Opposition to Plaintiffs’ Application for Temporary Injunction at 8, 15, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 1, 2008).

or months to be consequential," the judge denied the motion for a TRO in large part because he found that plaintiffs’ equal protection challenge did not show a substantial likelihood of prevailing on the merits. The court reached this conclusion on the grounds that plaintiffs had misunderstood the nature of the requisite rationality that the equal protection clause demanded of the legislation in question. Their argument that the casino and other exemptions to the Colorado statute undermined its public health protective purpose and therefore could not be rationally related to this objective missed the point—repetitively prescribed by the U.S. Supreme Court—that “the relevant test is not whether the classifications imbedded in the Act are rationally related to the Government’s stated purpose. The Act survives constitutional scrutiny if its distinctions are rationally related to any conceivable government purpose, whether or not stated in the law or contained in the legislative record.” Consequently, the untenability of plaintiffs’ equal protection claim was demonstrated by the government’s contention “that casinos were exempted from the Act because of their unique constitutional and statutory status in Colorado, because casino gambling has only recently become legal in Colorado, because many of the towns in which casinos are located have become dependent on the revenues they generate and because they face severe competition from Indian Reservation casinos. Even the state derives economic benefit from its licensed casinos. Plaintiffs suggest that the revenues from casinos are an improper basis for making such a distinction, but provide no authority for the proposition that a

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331 Coalition for Equal Rights, Inc. v Owens, at *15-16, 2006 U.S. Dist. Lexis 42723 (D. Colo., June 23, 2006). The court quoted F.C.C. v Beach Communication, Inc., 508 U.S. 307, 315 (1993), which held (in quoting from the Court’s own precedents) that “those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it’.... Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of ‘“legislative facts”’ explaining the distinction ‘on the record’...has no significance in rational-basis analysis. See Nordlinger v. Hahn, 505 U.S. 1, 15...(1992) (equal protection ‘does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification’). In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. ““Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.”"
consideration of fiscal impacts and cost benefit analysis is an improper basis for a Government decision under rational basis review.” As “to say the least, far fetched” the judge treated plaintiffs substantive due process claim that owners’ alleged right to allow smoking in their bars was a “fundamental right, equivalent to the other rights the Supreme Court has deemed fundamental, such as the right to travel, the right to vote, the right to procreate, and the right to marry....” A few months later the court dismissed the case altogether on largely the same bases. Of potentially great interest for Iowa was that by the time the federal appeals court affirmed the district court’s judgment in 2008 the Colorado legislature had already repealed the casino exemption.

Judge Staskal generated the most enlightening moment in the post-testimony stage of the proceeding when he “asked a question that seems to indicate he’s interested in an argument based on the unfairness of allowing smoking in [sic] the gambling floors of casinos, but barring it in bars & restaurants. ‘I never heard you say the words equal protection,’ the judge said to Eichhorn. Eichhorn indicated that was not part of his initial argument over the stay, but may be included in his subsequent briefs when the case is heard.” Failing to accommodate an adjudicator’s direct question about a line of reasoning that he apparently viewed as significant for the outcome of the case appears to be a sub-optimal litigation strategy and in his ruling three days later Staskal would pointedly remind plaintiffs just how crucial equal protection was. (Although Eichhorn later claimed that he had not presented the equal protection argument at the hearing because it “was not relevant to the Plaintiff’s [sic] request for temporary relief,” his clients revealed the real, substantive reason at the post-hearing press conference.) In contrast, Thompson at least offered a brief refutation of an equal protection claim by arguing that “businesses that are similarly situated are treated similarly, but...bars and casinos are ‘different animals’ citing economic evidence [that] shows that casinos would be impacted

335Coalition for Equal Rights, Inc. v Owens, 517 F3d 1195 (10th Cir. 2008). On the repeal, see above ch. 35.
337Email from George Eichhorn to Marc Linder (July 14, 2009).
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

differently by the law.”  Possibly revealing the state’s defense against the claim that apparently everyone but Eichhorn considered plaintiffs’ only even potentially viable argument, Thompson indicated that the reason that the legislature had exempted casinos was “the gambling taxes casinos pay to the state and studies which indicate casino patronage has dropped significantly in casinos where smoking has been banned. ‘That revenue stream is significant to the state’....” (In contrast, he stated that “studies show business goes up in bars and restaurants when smoking is banned.”) Plaintiffs were acutely alive to the importance of this argument: “At several times as Thompson was offering legal arguments for the exception for casinos, bar owners in the crowd audibly reacted. As the laughs and exclamations became more frequent as Thompson’s explanation went on, the judge interjected: ‘Keep your reactions to yourself, please.’”

At a 15-minute press conference in the rotunda of the Polk County courthouse after the hearing four leading bar-owning members of the plaintiff organizations indulged in almost nonstop braggadocio and absurdly hyperbolic claims about the economic harm that the unconstitutional law during its first month had already wreaked on and over time would continue to wreak on barkeepers all over Iowa. That nostalgia for at-will public smoking was at the forefront of their oratory was hardly surprising: after all, what else could practically unite a group of wannabe-l Libertarians who voluntarily chose to make their living in what “is, without a doubt, the most heavily regulated business one could choose,” about whose detailed state and local-government imposed alcohol-related prescriptions and prohibitions they had not been famous for complaining? Only when it came to smoking did it, for example, occur to Larry Duncan to pose the radical anti-regulatory question: “[W]hy do a few elitist people in the state of Iowa have the power to make up and ram through a law about my business, when they don’t have a dime in it?” To be sure, when it came to saving his liquor license, Duncan was thoroughly capable of disingenuously dismounting his high

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341Telephone interview with Lynn Walding, director, Alcoholic Beverages Division, Ankeny (July 15, 2009).
constitutional hobby horse and claiming that “he’d have no problem declaring smoking off limits in his restaurant [sic] if law makers would have [sic] not caved to lobbyists’ pressure and passed a bill that ties their hands, yet permits some businesses to allow their patrons to smoke. That’s patently unfair, Duncan says.”343 Lead speaker Van Roekel, striving valiantly not to drown in his self-generated bathos, intoned that the plaintiffs had begun the “fight to give back freedom to Iowans. No one should be forced to eat, drink or do business in a building that is nonsmoking.”344 (On its website, Choose Freedom Iowa, the newly formed umbrella organization that IBOC and COBRA co-founded and that in October was added as a plaintiff,345 falsified/sanitized parts of Van Roekel’s statement. In the sentence last quoted it replaced the final two words with “has smoking. No one would suggest that.”)346 Presumably expecting such rhetoric to resonate with non-bar-goers and whatever proportion of the state’s by now small minority of smokers were not indifferent to the health havoc that their secondhand smoke wreaked on nonsmokers, he attacked the “big brother government” that had “ripped away” the choice to shop in a store with smoking, thus revealing that, contrary to bar owners’ refrain, it was about smoking after all. Working himself into a lather, Van Roekel heroically proclaimed: “We will stop at nothing”—which threat Choose Freedom Iowa’s website unheroically deleted from the sanitized version—and announced that the bar owners would take the issue to the ballot box. In response to a reporter’s question as to why, despite Judge Staskal’s statement that he was “amenable” to an equal protection argument, plaintiffs failed to push it, especially with regard to casinos, Joe Sturgis, who owned the Rusty Nail in Davenport, revealed their pro-smoking

345http://www.iowacourts.state.ia.us/ESAWebApp/TIndex Frm (Oct. 15, 2008).
agenda: rather than wanting the casinos to lose their exemption, the bar owners wanted every business to have it because the state had no more right to ban a legal activity in businesses than in private homes. Whether his incoherent rant resulted from press conference-induced euphoria, mendacity, or mental incompetence, Sturgis went on to indulge in such quasi-hallucinatory claims as that 80 percent of bar owners were still permitting smoking and that passage of the smoking law had made it impossible for Democratic legislators to campaign in Iowa, who got shut down wherever they went. Similarly, van Roekel repeated his preposterous courtroom prediction that in a year 50 percent of the state’s bars would go out of business. And Fort Madison bar owner Bill Duncan’s dedication to accuracy was on exhibit in his claim that if the legislature had been serious about health, it would not have excluded half of Iowa’s employees from the law. Duncan also delivered the peroration, a panegyric on the Iowa constitution, for which “many, many men have died fighting...” Duncan, who insisted that “[i]t’s about rights, not about smoking,”349—a position difficult to reconcile with both IBOC’s selling buttons with a pointing Uncle Sam saying, “I want you to have a right to smoke” to finance “the legal fight”350 and Choose Freedom Iowa’s website’s homepage, which was adorned with several photos glorifying smoking351—but added that “[i]t’s not illegal to smoke,” demanded that the legislators and the governor be asked and give a yes or no answer to the question: “Do you believe in the Constitution?”352

Belief in the Iowa constitution—which, despite Eichhorn’s aforementioned


Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

citation to Iowa Supreme Court precedent to the contrary, boiled down to the bar owners’ child-like interpretation of the privileges and immunities clause—meant upholding small business owners’ alleged right to vindicate smoker-customers’ right to smoke regardless of the morbid and mortal consequences for the former’s nonsmoking employees and customers. Bill Duncan and his brother Larry Duncan made all of these points with unreserved naivete. In an op-ed piece in the Fort Madison paper (in which he previewed his stirring paean to the “[t]housands and thousands of brave soldiers [who] have died fighting for our Constitution” and urged that Iowans “not let soldiers’ deaths and sacrifices be in vain”) Bill Duncan prefaced his quotation of the text of the privileges and immunities clause with the assertion that “any third grader that can read can tell you that the governor and legislature have shredded our constitution with the smoking ban.”

(Yet even Darwin Bungen, the Burlington lawyer who would soon eclipse Eichhorn as the smoke-loving bar owners’ consigliere in chief, conceded that the provision should not be understood literally: “If I read the Iowa Constitution Article I, Section 6 as a lay person, it seems clear’. However, as a lawyer, he said it’s not as black and white.” Whether he shared that insight with his client before taking the latter’s money is unknown, but in response to the district court judge’s rejection of his privileges and immunities claim and every other claim that he had made Bungen admitted that he had been spewing bravado all along: “Bunger said he was disappointed by the ruling but as an attorney he was not entirely surprised by the judge’s assessment.”)

Larry Duncan, who presumably credited southeast Iowa State Representative Phil Wise and Senator Tom Courtney with at least a

353 “Laws uniform. SEC. 6. All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”

354 For editorial sympathy with this position, see, e.g., Steve Delaney, “Up in Smoke—West Burlington Bar Owner Gets His License and Live to Fight Another Day,” Hawk Eye (Burlington), Aug. 24, 2008 (1A) (NewsBank): “Bar owners claim the several exemptions in the law violate that part of the Constitution. At first blush, it certainly appears to at least violate the spirit of it.”


third grader’s reading comprehension, spun his children’s tale further by accusing the legislators of having “‘violated the constitution. They took an oath to uphold the constitution to make laws fair and equitable for all.’” 358 Wise repaid the compliment by observing that “‘[i]f anybody thinks they’re going to knock the law off the books by that [lawsuit], they’re kidding themselves.’” 359

In his 10-page ruling issued three days later denying the request, Staskal suggested that the bar owners faced a significant persuasive burden because, despite the bracketing of agency action, the relief that plaintiffs sought “would block the operation of a duly enacted state law, a fact that obviously directly implicates the public interest.” 360

The court then considered and balanced the factors governing the grant of the order: the extent of the likelihood of success on the merits of plaintiffs’ underlying claim and of the substantial injury and irreparable harm that plaintiffs would suffer if the restraining order were not issued and whether, given the impact of the restraining order on the public interest, the private litigants’ interest might have to yield to the greater public interest. Staskal deemphasized the likelihood of success on the merits because “the other factors to be considered weigh strongly against the entry of a restraining order....” Eschewing “a full blown analysis of the merits of the claims,” he concluded from a preliminary analysis of the (aforementioned) five constitutional claims that only one—that the Smokefree Air Act violated the equal protection clause of the U.S. Constitution and the privileges and immunities clause of the Iowa Constitution—had a “reasonable likelihood of success.” 361 Although the fact that the statute’s ban on smoking in virtually all indoor areas and some outdoor areas was clearly reasonably related to achieving its stated purpose of improving Iowans’ public health by reducing the general public’s and employees’ exposure to harmful

361 Ruling on Request for Temporary Restraining Order at 5, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 4, 2008). Interestingly, plaintiffs’ supporting brief devoted less space (one page) to this alleged constitutional flaw than any other; it quoted an Iowa Supreme Court case holding that a classification had to be sustained unless it was clearly arbitrary and bore no rational relationship to a legitimate governmental interest. Brief in Support of Application for Temporary Injunction at 29, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., July 31, 2008).
secondhand smoke made it unlikely that plaintiffs would prevail on their substantive due process claim, SAA’s exemptions for casino gambling floors (and fairgrounds) opened the possibility for plaintiffs at least to argue that “there is no rational explanation for the disparate treatment of these areas since they pose as great, if not greater [sic], a potential risk of public exposure to second hand smoke as [sic] do other similar areas where...smoking is banned” and that therefore the equal protection clause of the federal and the privileges and immunities clause of the Iowa Constitution had been violated. Although even in the absence of a “thorough explanation of the rationale for the challenged classifications” by the state Staskal “certainly cannot conclude that the defendants’ [sic; should be “plaintiffs’”] equal protection claims will prevail..., given the equal protection analysis the [Iowa Supreme] Court set forth in Racing Ass’n of Central Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004), it is safe to conclude that the plaintiffs have at least a reasonable chance of succeeding on these claims because, on first impression, the exemptions appear to make the statute as a whole substantially under inclusive [sic] in relation to its stated purpose.” Despite this advisory to the state that it devise a more robust justification for the casino exemption if it wished to prevail on the merits, the judge concluded that “the likelihood of success factor weighs only slightly in favor of entering a restraining order.”

The judge found that the bar owners did not offer strong evidence that they had or would suffer substantial economic harm from the smoking ban both because the testimony of their only two witnesses as to a “dramatic loss of revenue” was “anecdotal and unsupported by any kind of business records” and because they also “acknowledged the possibility that other factors could have played a role in the loss of revenue.” Moreover, the state’s “anecdotal evidence in the form of newspaper articles” indicated that some bars’ and restaurants’ revenues had actually increased since the ban had gone into effect. The state’s evidence was reinforced by the presentation of reliable studies of smoking bans around the United States showing that generally they had not had a negative

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362 Ruling on Request for Temporary Restraining Order at 6-7, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 4, 2008). To be sure, under clear U.S. Supreme Court precedents: “A State...has no obligation to produce evidence to sustain the rationality of a statutory classification. ‘[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.’... A statute is presumed constitutional...and ‘the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,’...whether or not the basis has a foundation in the record.” Heller v Doe, 509 US 312, 320-21 (1993).
impact on the bar and restaurant industry.\textsuperscript{363}

With regard to the third factor, irreparable harm, the state argued that the bar owners had failed to satisfy the requirement because the only injury that they alleged was financial damage that could remedied by monetary payments. While acknowledging the correctness of this statement of the law in general, Judge Staskal observed that, under Iowa Supreme Court precedent, extreme financial loss could constitute irreparable harm. The question then became whether the bar owners had demonstrated such loss. However, all that their testimony showed was that a single bar owner stated that the ban had had such a drastic effect on her business that she was forced to close and try to sell it. Had plaintiffs been able to marshal evidence of such a “widespread and general impact,” then they “could probably be said to have made a showing of irreparable harm. But there is no such evidence... ... The plaintiffs’ remaining evidence of adverse impact goes no further than showing that the law has resulted in decreased revenue at many establishments, causing the termination of employees but not resulting in the destruction of businesses.” Putting the factor totally out of the bar owners’ reach was implementation of the requirement that the court balance the harm prevented by issuing the restraining order against that would be caused by not issuing it: although there was evidence that issuance “may well prevent continued harm to many businesses...having overwhelmingly more weight is the fact that” issuing the restraining order “would prevent the Act from providing the public health benefits which justified its adoption.” Because there was no evidence that the legislature’s finding that secondhand smoke causes disease in nonsmokers was untrue, the court concluded that: “It practically goes without saying that interference with a law that is designed to prevent disease...would cause harm that weighs very heavily against entry of an order blocking its operation.” Consequently, on balance, the irreparable harm factor also weighed against issuing the restraining order.\textsuperscript{364}

At the outcome of consideration of the fourth and final factor, the impact of a restraining order on the public interest, Judge Staskal had already strongly hinted. In addition to the public’s “strong interest in enjoying the health benefits” that the Smokefree Air Act was designed to promote, the other way the public interest was implicated—and it too weighed against issuing the restraining order—was “the absence of interference by the judicial branch with the operation of duly enacted laws. The legislature, not the judiciary, is the voice of the people


on policy matters.” And although the plaintiffs were correct in contending for the public’s interest in invalidating unconstitutional laws, “the only viable constitutional complaint” that Staskal was prepared to acknowledge, even preliminarily, namely, the law’s alleged underinclusiveness, was a “defect, if it exists” at all, that “does not denigrate the legitimacy of the policy generally underlying the act.” In a very significant advisory to the bar owners, the judge underscored that their argument with the greatest likelihood of success on the merits “ultimately argues in favor not of eliminating the smoking ban but of extending it to additional areas that are now exempt. Thus, even if the Act’s exemptions make it unconstitutionally discriminatory, blocking its operation would still frustrate the will of the people.” In the end, then, the question was not even close: “the balance of relevant factors tips strongly against” plaintiffs’ request.\footnote{Ruling on Request for Temporary Restraining Order at 9-10, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 4, 2008). For a brief summary of the ruling, see Jeff Eckhoff, “Judge Rejects Blocking Public Smoking Ban,” \textit{DMR}, Aug. 5, 2008, on http://www.desmoinesregister.com (visited Aug. 5, 2008).}

Judge Staskal’s message to the bar owners that the best they could hope to achieve with their equal protection claim was a ruling that SAA’s underinclusiveness would be remedied by eliminating the casino exemption essentially called their bluff: if they were really concerned about the alleged unfair competition that it caused for bars, resulting in—as many legislators had claimed\footnote{See above ch. 35. Since the casino owners were presumably able to see as many moves ahead as Struyk, it is unclear why they did not request the few House Democrats representing casino district who insisted on a casino exemption (which would be vulnerable to judicial invalidation) instead simply to vote against the bill altogether. Possibly these representatives had a sufficient number of anti-public-smoking constituents}—the flight of a financially disastrous proportion of their customers to casinos, then they should be satisfied; but if they were in fact pursuing the resumption of smoking (and not only in bars), as their Complaint suggested, then their judicial victory would be Pyrrhic because it would merely vindicate Vilsack’s litigation strategy, which they had already rejected, and hand Senate Democrats, Peterson, Olson, and other House advocates of quasi-universal coverage the law’s application to casinos that legislative Realpolitik, under pressure from casino capital, had denied them. Moreover, judicial extension of coverage to casinos was precisely the outcome Representative Struyk had warned against when he offered his (unsuccessful) amendment to make H.F. 2212 non-severable so that if a court invalidated any provision, the whole law would be struck down.\footnote{See above ch. 35. Without the casino exemption as a whipping boy, bar owners,}
like Republican legislators, deprived of their only even marginally plausible fairness argument, would have been compelled to rely on their reactionary, pecuniarily self-interested, flat-earth-society defense of smoking regardless of the disease and death that it inflicted on their employees and customers. (Plaintiffs did in fact refuse to “concede” that the Smokefree Air Act’s purpose of reducing the general public’s and employees’ level of exposure to secondhand smoke was a “valid” statement of governmental interest.) Consequently, since bar owners’ best or perhaps only chance of prevailing on the merits entailed a strengthening of SAA that was anathema to them, it is puzzling that they did not dismiss their action already at this point before it boomeranged on them.369

The same day that StASKal issued his ruling Choose Freedom Iowa issued a press release calling it “just one small step back in the fight to return freedom to the citizens of Iowa.” Adopting the cigarette manufacturers’ decades-old accommodationist propaganda, embellished with the weasel word “forced,” it insisted that: “No one should be forced to eat, drink or do business in a building that has smoking. No reasonable person would suggest it. And no one should tell citizens where they can eat and drink if they choose to smoke in a business that


369 Asked directly to solve this puzzle, Eichhorn weakly responded that a ruling on a temporary restraining order was no basis on which to draw valid conclusions about the merits of a case. Somewhat more forthcoming was his admission that “my clients’ concerns were to level the playing field in a different manner than Attorney Vilsack and some other groups/persons. Although their position is a possible result of any litigation on equal protection grounds, we were trying to attack the legislation in a more complete manner.” Email from George Eichhorn to Marc Linder (July 14, 2009). The director of the Alcoholic Beverages Division offered an intriguing conjecture based on a recent trip to Burlington and the casino there, where the smoke was so thick that he surmised that many smoking bar-goers had switched to doing their drinking there. He speculated that as a result of such defections bar owners were actually in favor of striking the casino exemption, but that they did not want to appear as the ones pushing that anti-casino position. Walding himself hoped that a court would invalidate the exemption. Telephone interview with Lynn Walding, Ankeny (July 15, 2009).
chooses, as part of their own business model, to allow it.”

On August 29 plaintiffs filed a Recast and Substituted Petition from which the state sought an order removing references to the IDPH rules. Following a hearing on December 10, Staskal, giving the bar owners’s argument the benefit of the doubt, on January 2, 2009, denied the state’s motion to strike on the grounds that the IDPH rules were relevant evidence of the statute’s meaning, but at the same time ruled that plaintiffs could not challenge the administrative rules in this case.

At the end of December Staskal had set the case for an estimated five-day trial beginning on June 29, 2009, but in March Eichhorn withdrew as plaintiffs’ attorney, and at a status conference hearing on April 7, Judge Glenn Pille, who replaced Staskal, ordered plaintiffs’ counsel to file a written appearance, absent which he would dismiss the case with court costs assessed to plaintiffs. On May 5 he did dismiss the case without prejudice. The bar owners, despite their boasts of mobilizing 200,000 freedom-loving Iowans, dropped the case because they “couldn’t pay the high legal bills anymore” and their lawyer’s love for the constitution was apparently not great enough to persuade him to pursue this noble
cause pro bono. ""[W]e were fighting for everyone in the state,"" said Joe Sturgis, ""and there wasn’t [sic] enough people supporting it. It’s an expensive lawsuit and we just ran out of funds.""

Brian Froehlich agreed that money played a part, but insisted that in part the reason for dismissal was ""that we’ve got people out there who have now got a legitimate case...regarding the constitutionality of the smoke ban."" Those people were Froehlich himself and Larry Duncan, whose liquor licenses the ABD had suspended for 30 days and revoked, respectively, and who had filed petitions for judicial review. Though this litigation was all about his undoing the suspension of his license, Froehlich persisted in projecting himself as an altruist: ""I am still working hard to make sure that the people of Iowa are represented properly and that this issue gets brought to court.""

However, in a more lucid moment Froehlich admitted that: ""There’s other people now that are personally involved in trying to save and protect their business.... We don’t all need to be having a court date, so we’re shifting efforts and support to those who are going to get this into court just on the basis of protecting their business from being shut down and closed. ... We don’t need to have 60 million court dates out there."" The additional 42 cases that at this point were wending their way through ABD’s administrative process testified to Attorney General Tom Miller’s declaration that ""we will not allow a small minority to flout"" the law. And Froehlich and Duncan, once again, made it clear that the infirmity of the law that they would continue to defy assiduously transcended the unequal protection that they purported to be challenging.

For the former ""[i]t’s about telling adults that they can’t no [sic] longer make up their own minds and their own decisions and government has to step in and be our mothers and fathers."" Duncan’s litigation horizon stretched...
even further, encompassing “‘not only all the civil rights, but also interstate commerce, tobacco is not illegal....’”

While IBOC and COBRA were winding down their state court action, Larry Duncan was initiating a similar federal action that was filed, in Eichhorn’s words, “immediately before the State tried to revoke Otis Campbell’s...liquor license” and is discussed below.

Enforcement

[T]here won’t be a smoking police.

We’re not gonna be as prescriptive as you may want us to be.

You do not have squads of tobacco police out roaming the streets trying to catch violators.

Whether the law is unconstitutional because it excludes one class of business is hardly certain. After all, many state laws are uneven. One denies 18- to 20-year-olds the right to drink. That clearly discriminates against citizens who have otherwise been declared adults with the right to vote, go to war or prison, be sued, incur debt and to raise children.... Bar owners may not like the 21-only law but presumably most obey it because to not do so can put them out of business. And despite the tyranny of discriminating against under age [sic] imbibers, no one has successfully challenged its constitutionality under state or federal law. But in West Burlington you can now obey the state laws you choose to and ignore those you detest. ... That was essentially what the city council said...in voting 3-1 to...let Duncan continue to allow smoking in his establishment in defiance of...state law....

On June 27, 2008, at the special telephonic conference meeting of the Iowa
State Board of Health (the IDPH’s policy-making body) at which it unanimously adopted and filed emergency the agency’s Smokefree Air Act rules. Mapes noted that state health officials expected authorities to issue no more than 75 citations and fines—winned down from 3,000 to 4,000 complaints and supported by 800 on-site compliance checks—during the first year of the Smokefree Air Act’s operation. (In the event, from July 1, 2008 to June 30, 2009, IDPH received 3,318 complaints, of which it deemed 2,100 valid, in response to which it sent 1,417 Notice of Potential Violation letters, and conducted 325 compliance checks.) Though based on her “[d]iscussions with other state program managers in states with smokefree workplace laws,” this

390 Iowa Department of Public Health Division of Tobacco Use Prevention & Control, Iowa Smokefree Air Act: First Year Report figs. 2 and 3 at 9, fig. 10 at 12, fig. 15 at 14 (Aug. 2009), on http://www.iowasmokefreeair.gov/common/pdf/smokefree_summary_2009.pdf (visited Aug. 31, 2009). Three-fourths of valid complaints were made by the public, while one-fourth came from inspector reports. Id. fig. 4 at 10. Of 1,062 “businesses” (which included government entities) that received a first NOPV letter 216 (or 20 percent) also received a second NOPV. The number of third, fourth, fifth, and sixth to ninth NOPV letters was 85, 29, 14, and 11, respectively. Id. fig. 12 at 12. See also IDPH Press Release: “Compliance High in First Year of Smokefree Air Act” (June 30, 2009), http://www.idph.state.ia.us/common/press_releases/2009/20090630_smokefree.asp (visited Aug. 9, 2009). These data refer only to owners/managers of covered public places and do not include citations issued to individual smokers, about which local authorities were under no obligation to report to IDPH. Email from Bonnie Mapes to Marc Linder (Sept. 15, 2008).
391 Email from Bonnie Mapes to Marc Linder (Aug. 7, 2009). As early as February 21, 2008—almost seven weeks before the legislature passed SAA—IDPH’s public information officer told the press that “Iowa would probably follow the lead of other states in enforcement” and “would focus primarily on education, and not citations....” Jason Clayworth, “Smoking Ban Seen as Likely to Pass,” DMR, Feb. 21, 2008 (B1) (ProQuest). In response to that official’s statement that the department’s “research uncovered that the most effective method used by states that had enacted similar laws...is education,” he was asked for the sources showing that education was the most effective method to achieve

3595
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

volume, since it could, nevertheless, not have plausibly corresponded to the many thousands of citable violations by individual smokers and owners of public places that any enforcer would reasonably have anticipated, presumably reflected some policy decision and/or allocation of agency budgetary and staff resources. That a certain vision of enforcement—namely, “inspir[ing] compliance through education rather than penalties”—underlay these seemingly arbitrary limitations emerged from Mapes’s declaration that “‘[y]ou’re not going to be cited by roving bands of tobacco police if they see there’s not a sign in your window,’” but there’s still the possibility that we could end up with people getting citations and being fined,” but “‘you’re going to have to work pretty hard to get one’” by “choos[ing] to brazenly violate the new smoking compliance, that issuing citations was less effective, and how compliance was measured in other states. His answer that “[a] good bit of our research was done through one-on-one conversations with program staff in other states” left open the possibility that no other state had tried citations. Email between Marc Linder and Don McCormick (May 25 and 28, June 1, 2009).

392To be sure, according to a contemporaneous Iowa press report, from the Minnesota Freedom to Breathe Act’s effective date of October 1, 2007 through the latter part of February 2008, the state Health Department had received fewer than 100 complaints, only one of which resulted in a citation. Jason Clayworth, “Smoking Ban Seen as Likely to Pass,” DMR, Feb. 21, 2008 (B1) (ProQuest). In fact, from Oct. 1, 2007 to Feb. 28, 2008 the MDH received 114 complaints, sent 98 notice of alleged violation letters (which were “educational” and required no response), 10 request for information letters (which did require a response from regulated party), and issued two correction orders and one non-forgivable administrative order. Email from John Olson, enforcement coordinator, Indoor Air Unit, MDH, to Marc Linder (Aug. 11, 2009). However, “the lion’s share” of complaints/citations were received/issued by local law enforcement and neither the state Health Department nor any other entity kept track of local enforcement; in addition, the statewide data encompassed only complaints/citations pertaining to owners since only local enforcement deals with individual smokers. Telephone interviews with Tom Hogan, director, indoor environment, and Dale Dorschner, supervisor, indoor air, Minnesota Department of Health, St. Paul (Aug. 10, 2009). The enforcement coordinator stated that the first year was “almost a grace period.” Telephone interview with John Olson, St. Paul (Aug. 11, 2009).


394Jeff Eckhoff, “Forecast: In 2 Years, Smoke Ban Will Thrive on Its Own,” DMR, June 28, 2008 (B1) (ProQuest).


396Jeff Eckhoff, “Forecast: In 2 Years, Smoke Ban Will Thrive on Its Own,” DMR,
prohibition” because there would be “some initial forbearance for first-time and maybe even second-time offenders....” Violators would “probably get a warning” rather than a monetary penalty for first offenses since IDPH’s “whole emphasis, at least for the first few months, is educate, educate, educate because we know—except for the very small percentage of people who might want to take some kind of public stand and that’s not very many ’cause it hasn’t been in any other state—we know that if we can do that, we’re going to gain compliance....” Whether Mapes was being overly optimistic and whether she foresaw the extent and intensity of some bar owners’ resistance is unclear, but as the volume of administrative hearing complaints would soon reveal, she correctly understood that they were informationally incorrigible. Based on the patterns established in other states that had already gone through the enforcement process of a statewide smoking ban, she predicted only 200-300 checks in the second year. Mapes then boldly climbed way out on a limb to predict that: “‘By the third year it’s become the community norm and there’s virtually nothing that needs to be done.’”

Such predictions did not reassure the American Cancer Society’s lobbyist, Peggy Huppert, who told the Board that its advocates were “‘distressed when they hear bar owners say “we’re not going to comply with this law, come and make me” or police chiefs say “I’m not going to enforce the law”....” ACS did not have to look any further than the relatively sophisticated Iowa City Police Department. Despite the fact that IDPH rules stated that the department, pursuant to section 9(7) of SAA, “designates the law enforcement authorities of the state and of each political subdivision of the state to assist with the enforcement of 2008 Iowa Acts, House File 2212. A peace officer may issue a citation in lieu of arrest pursuant to Iowa Code chapter 805 against a person who smokes in an area

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400 Pat Curtis, “Board Approves Smoking Ban Rules,” Radio Iowa (June 27, 2008), on http://www.radioiowa.com (visited Aug. 6, 2009). In contrast, the American Lung Association’s project manager, Kerry Wise, pointed to other states’ experiences: “‘people get very emotional about this issue for a while. Then it all kind of calms down. ... We expect that to happen here.’” Jason Clayworth, “For Smokers, It’s Almost Lights Out,” DMR, June 30, 2008 (B1) (ProQuest).
where smoking is prohibited," Sergeant Troy Kelsay misinformed the public through the news media that: "If, as a patron in a restaurant or bar, you are offended [by someone smoking], you shouldn’t call the police.... You should address the issue with the management, and the establishment should handle it like any other unruly patron."

The assurance, which was more akin to a self-fulfilling prophecy, that enforcement would not be implemented by smoking police turned out, unsurprisingly, to be more accurate than the prediction of minimal and rapidly declining violations—in the absence of strict enforcement. One interesting example of deviations from both the assurance and the prediction took place at Parking Ramp II of the University of Iowa Hospitals and Clinics, where until August 2009 the hospital and central administrators and their police force, despite the fact that complaints about this location accounted for more than one-third of all smoking-violation complaints that the campus police received between July 1, 2008 and June 30, 2009, turned a blind eye to the massive and continuous smoking—evidenced by thousands of cigarette butts—that took place also so close to the doors leading into the hospital that the odor penetrated into the building. After repeated requests to administrators to enforce the law were ignored, an account of the pervasive and (un)civil disobedience together with an appeal to a receptive member of the Board of Regents from Iowa City, who also chaired the Board’s Hospital Committee and raised the issue a few days later with the university president and the top of the hospital hierarchy at a Board meeting, prompted the finally publicly embarrassed bureaucrats to order the police into Ramp II where they actually issued $50 citations to three smokers.

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401 IAC § 641-153.8(2) (2009).

402 Christopher Patton, “Local Police Take Light-Handed Approach to Smoking Ban,” *DI*, July 3, 2008, on http://www.dailyiowan.com (bracketed words in original). Kelsay added that if owners “refuse to enforce the ban, they will be subject to penalties.... However, such issues will be referred to” IDPH, “which will take the lead in ensuring business compliance.” Assuming that the student reporter accurately reproduced Kelsay’s statement, it remained a mystery by whom owners’ violations would be “referred” to the agency since he had already told “offended” customers not to bother the police.

403 Calculated according to UI Department of Public Safety, “Prohibited Smoking Calls” (print-out sold by UI DPS) (75 of 223).

404 Nine months into the ban, the chief of the UI police stated: “‘My directions to my officers are to not write citations.’” Jennifer Delgado, “Where There’s Smoke, No Fines,” *DI*, Mar. 24, 2009 (1A:2-5). See also “Laura Klaarmont, “Police Not Issuing Smoking Citations,” *DI*, Dec. 19, 2008, on http://www.dailyiowan.com. Whereas the University of Iowa had not issued any citations on any of the thousands of occasions on which smokers had violated the law during its first year, it issued two on July 14 (Scott Raynor, “1st UI
university president told the Regents that “the issue is more people who are unaware of the rules and are willing to comply when approached by UI police,” while her defeatist vice president for medical affairs insisted that “[w]e are working with...[the] Department of Public Safety...to review this issue, but we will never resolve it. There will always be people that smoke.” The president’s statement raised an interesting epistemological question inasmuch as it was difficult to imagine how the president imagined that she could possibly know that most violators were unaware of the ban since she and her subordinates virtually never interacted with, let alone scientifically surveyed, them. That any University of Iowa employee or student was unaware would have been extraordinarily implausible; and if any hospital visitor or patient was unaware, such ignorance would have largely been the result of the university’s failure to have posted any no-smoking signs in the areas of heaviest smoking in the ramp.

Smoke Tickets Issued,” DI, July 17, 2009 (1A:6)) and then on August 4 issued the three mentioned in the text; on August 5 it issued four more at other locations (including one in another UIHC parking ramp). Data communicated telephonically by the records division of UI DPS (Aug. 7, 2009). That the three were issued on August 4, the day before the Regents meeting, was presumably related to the email to Regent Downer, which he also asked to be sent to the CEO of the UIHC and the Vice President for Medical Affairs. Email from Marc Linder to Robert Downer, Jean Robillard, Ken Kates, and Paul Rothman (July 31, 2009).


Similarly, the hospital’s spokesperson alleged that “[m]ost people are compliant when told of the no-smoking rule.” “UI Hospitals Step Up Enforcement of People Caught Smoking,” Gazette (Cedar Rapids), Aug. 5, 2009, on http://www.gazetteonline.com. In fact, the experience of many non-police employees of the University, whom the university president has instructed that it is their responsibility to enforce the law, has been that fellow university employees either ignore or react hostilely to requests that they comply with the smoking ban. The UIHC CEO’s statement that “UI Police are also issuing citations to people who continue to smoke after they are warned of the policy” left unanswered the question as to why people smoking just inches from a no-smoking sign needed to be warned. Id.

The university did not even begin to post signs in the ramp until August 7, 2009, and even when the manager of parking operations was walking through the ramps that day with signs to post, he had to be reminded of the crucial importance of posting one at the location where more smokers congregated than anywhere else. Moreover, he had removed the one useful sign on the inside of the hospital door instructing those exiting that smoking was prohibited outside, while leaving in place the decal facing outside that actually encouraged unlawful smoking in the ramp by informing those entering the building, “No Smoking, Please Extinguish Materials Outside,” thus falsely implying that smoking outside...
Moreover, her additional claim that “‘I think our Department of Public Safety is doing everything it can to try and enforce these rules” was risible since they had done virtually nothing during the first 400 days of the law’s existence when alone in the hospital ramps probably hundreds of thousands of cigarettes had been unlawfully smoked. And even the mini-flurry of ticketing that took place on August 4-5 in the wake of the Regents’ expression of displeasure unsurprisingly turned out to be little more than a Potemkin Village: the police issued no tickets on August 6, 7, or 8, although smokers, including UIHC employees, continued violating the law openly and belligerently. The total of five additional citations that the UI police issued campus-wide through August 20 did not even equal the number of people observed smoking unlawfully on level 2 of Ramp II within a period of a few minutes on any day.410

the hospital building in the ramp was permitted. When the official sought to justify removal of the first sign on the grounds that it did not conform to the requirements of the IDPH rules, he had to be told that they did not require removal of additional signs that provided helpful information tailored to the locality. He did, however, remove the misleading sign. Discussion with Jeff Rahn (Aug. 7, 2009, 2:00-2:30 p.m.).


Alone on one half of Ramp II Level 2 the number of cigarette butts on the ground was estimated to be about 2,000 even a few days after the police had begun issuing tickets. (Around noon on Aug. 8, 2009, about 50 butts were counted on average in each of several equal segments of which there were 40.) According to the operations manager, the ramps were swept every day or two. Interview with Jeff Rahn (Aug. 7, 2009).

E.g., on August 7 within a period of a few minutes six people were observed smoking on Level 2 of Ramp II; when the manager of the ramp told two of them that smoking was illegal, they told him that they did not care and that they had been smoking there for three months. He called the police who, however, arrived after they had left. The policeman (J. Voeller) stated, inter alia, that hospital employees were the worst offenders. On Saturday August 8 six more people were observed smoking in the same location; the two most belligerent smokers were hospital cafeteria employees. On the additional citations, see Samantha Honken, “Smoking War Continues,” DI, Aug. 21, 2009 (1A:4-6). Almost two weeks later, when a local reporter finally visited the ramp and observed that “the no-smoking signs were charred with the black residue of snuffed-out tobacco,” the total number of citations had increased by only three to 15. Josh O’Leary, “UI Begins Citing Smokers on Campus,” ICP-C, Sept. 3, 2009, on http://www.press-citizen.com. This web of nonfeasance came full circle when, by coincidence, IDPH, in response to several complaints, conducted a site inspection of the University of Iowa, including the ramp, on the same afternoon as the local reporter’s visit, but the inspector reported that “[n]o evidence of smoking was evident.” If there was in fact no such evidence, that pristine state may have been the result of yet another Potemkin village created by the University of Iowa.

3600
In the event, from the outset the complaints of potential violations—240 of which were received during the first 11 days\(^{411}\)—conformed to the expected pattern in that bars and restaurants accounted for almost three-fourths of the initial 21 violation notices (which, as noted above, IDPH on its own had turned into “educational notice[s]”) sent out by mid-July.\(^ {412}\) (During the entire first year of the law’s operation bars/restaurants accounted for 61 percent of all valid complaints, 52 percent of all Notice of Possible Violation letters, and 84 percent of all compliance checks.)\(^ {413}\) During the Act’s first month the agency logged a total of 540 complaints, deeming 57 of them serious enough to merit a first notice of potential violation and two a second notice.\(^ {414}\) From the fewer than 1,000 complaints that the IDPH had received by September 1—which resulted in only six site visits by law enforcement—its director concluded that education had been effective in enforcing the law.\(^ {415}\)

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\(^{413}\) Iowa Department of Public Health Division of Tobacco Use Prevention & Control, Iowa Smokefree Air Act: First Year Report fig. 5 at 10, fig. 11 at 12, fig. 16 at 14 (Aug. 2009), on http://www.iowasmokefreeair.gov/common/pdf/smokefree_summary_2009.pdf (visited Aug. 31, 2009). Retail stores/services accounted for the second highest proportions of valid complaints and NOPV letters—12 percent and 21 percent, respectively; private/membership clubs accounted for the second highest proportion of compliance checks—5 percent. Id. The divergence between percentage of valid complaints and that of NOPV letters was in part explained by the fact that a letter may have been based on more than one complaint. Id. at 12. Asked whether there was any way to distinguish between bars and restaurants, the director of the Division of Tobacco Use Prevention and Control stated: ‘There is no way to easily and reliably separate bars and restaurants. The ‘tavern without food preparation’ designation on food service licenses is voluntary. Business with liquor licenses get the bulk of the complaints, but most of those establishments are restaurants with liquor licenses and not bars as defined by the SFAA.” Email from Bonnie Mapes to Marc Linder (Aug. 31, 2009).


\(^{415}\) IDPH Press Release: “Smokefree Law Enforcement Efforts Ongoing” (Sept. 4,
The bar owners’ state court lawsuit, while pursuing the objective of invalidating SAA altogether, also served the purpose of outflanking the administrative enforcement process that the IDPH, ABD, and Attorney General’s office had initiated in order to secure compliance by those openly and blatantly flouting the smoking ban. Larry Duncan assumed a pioneering role by permitting smoking in his bar in West Burlington from the ban’s very first day of operation. From July 1 to August 9 he racked up 50 complaints. (In comparison, his closest competitor for Iowa’s most prominent scofflaw, Brian Froehlich in Wilton, was virtually a model of compliance with only seven


416 The ABD/Smokefree Air Act enforcement process was structured as follows:

The Iowa Department of Public Health (IDPH) docket complaints received from the public, governmental inspectors, or law enforcement personnel. In response to all verified complaints, IDPH communicates a notice of potential violation to the violating business in an effort to educate the business as to its responsibilities and duties under the Smokefree Air Act, and to achieve voluntary compliance with the Act.

If it becomes apparent that such educational efforts are ineffective in bringing a liquor licensee into compliance with the Smokefree Air Act, the Iowa Attorney General’s Office, on behalf of the Iowa Department of Public Safety, files a hearing complaint with the Iowa Alcoholic Beverages Division (ABD) against the violating licensee.

Once filed, the hearing complaint is set for an evidentiary hearing in Ankeny, Iowa, before an administrative law judge. Following hearing, the administrative law judge will issue a proposed decision adjudicating whether a violation of the Smokefree Air Act has occurred and, if so, imposing an appropriate sanction (typically a 21-day to 30-day license suspension). Further review of the administrative law judge’s proposed decision may be sought by any party from the Administrator of the Iowa Alcoholic Beverages Division. The Administrator will then issue a final decision on behalf of the ABD. Judicial review of the ABD Administrator’s final decision may be sought in the Iowa District Court.

A hearing complaint also may be resolved through an informal settlement agreement. In such circumstances, the liquor licensee and the prosecuting Assistant Attorney General negotiate a stipulated penalty for the alleged violation (typically a $1,000 civil penalty coupled with a seven-day license suspension). If the stipulated settlement is approved by the ABD Administrator, an order will be entered implementing the terms of the settlement agreement, and no further action or hearing is necessary.


complaints to his debit through August 28.)\(^{418}\) On two occasions West Burlington police officers personally observed people smoking openly inside Duncan’s bar. IDPH, based on these numerous complaints, issued him three Notices of Potential Violation; having manifestly failed to have gotten his attention, the agency informed him on August 20 that that day’s third Notice had been forwarded to local law enforcement for further action.\(^{419}\)

Coincidentally, that very evening the West Burlington city council had on its new business agenda consideration of renewing the liquor license for Duncan’s bar. Because of the many complaints that the city had received about Duncan’s failure to comply with the smoking ban, what might otherwise have been a routine renewal process turned contentious, thrusting the southeast town of about 3,000 near the Mississippi River onto “the front lines” of the smoking battle. The 66-year-old Duncan, who regarded the complaints as “badges of honor in the war to repeal” a law that had been “rammed down small business owners’ throats ‘in order to benefit a handful of people,’” apparently did not view the untold number of customers whose exposure to sickening secondhand smoke he had made possible over 14 years as having in any way undermined his self-vindicated role of “‘good community steward.’” Duncan may have expected all Iowa constitution lovers to “‘stand up and fight this,’” but the violations had in fact prompted police chief Alex Oblein to decline to sign off on the renewal. Because the city council was already known not to be of one mind on the matter, and every day people had been calling the city administration “‘mad’” that Duncan had been getting away with his civil disobedience, while others were saying “‘Screw the State,’” the city administrator expected the polarization to generate a big crowd packing city hall.\(^{420}\)

The three-hour debate did not disappoint—at least not for Duncan, whose license was set to expire on August 30. In a letter to the council, Oblein had recommended non-renewal based on the numerous complaints and potential violations, some of which he had personally observed, when, at the request of the ABD, he performed an on-site inspection during which he found customers


\(^{420}\)Jeff Abell, “‘State Smoking Ban Holds Liquor License,” Hawk Eye (Burlington), Aug. 20, 2008 (1A) (Newsbank).
smoking, ash trays on tables, and no required no-smoking signs posted. Oblein wanted it clearly understood—saying it earlier that morning at a statewide IDPH public hearing (via the fiber optic Iowa Communications Network) on amendments to the proposed SAA rules and repeating it at the city council meeting—that he did not want to be the smoking police, especially in businesses.\footnote{Iowa Department of Public Health, Public Hearing for Amendments to Proposed Rules to the Smokefree Air Act (Aug. 20, 2008) (based on notes taken at the Iowa City site); Christinia Crippes, “Ban Continues to Divide People,” \textit{Hawk Eye} (Burlington), Aug. 21, 2008 (1A) (NewsBank); Jeff Abell, “Council Gives Bar Nod,” \textit{Hawk Eye} (Burlington), Aug. 21, 2008 (1A) (NewsBank).} The wilfulness of Duncan’s violations was the decisive point for the police chief.\footnote{City of West Burlington, Regular Council Meeting, [Minutes], Oct. 20, 2008, on http://www.westburlington/archive/minutes/2008/Aug%2020.pdf.} Council member Rick Raleigh, having seen this kind of law work in other states, felt that Duncan should comply with it; in contrast, his colleague Rod Crowner understood Oblein’s position, but nevertheless did not feel that the city should revoke a liquor license for a smoking violation. To the council an unrepentant Duncan “openly stated that he will continue to allow patrons to smoke...”\footnote{Jeff Abell, “Council Gives Bar Nod,” \textit{Hawk Eye} (Burlington), Aug. 21, 2008 (1A) (NewsBank).} To be sure, he was sufficiently in touch with local political realities, especially after the mayor had chided both the state and Duncan for putting the city in a “‘bad situation,’” to know to apologize to the mayor and council for having “placed them in the middle of his crusade against the smoking ban.”\footnote{City of West Burlington, Regular Council Meeting, [Minutes], Oct. 20, 2008, on http://www.westburlington/archive/minutes/2008/Aug%2020.pdf.} Despite the police chief’s having personally witnessed violations and Duncan’s just having publicly admitted that he had violated and would continue to violate the law, Eichhorn asked the council to approve the license because the bar had never been “officially sited [sic] for breaking the law. ... Until a judicial magistrate determines there is a violation, he feels that no violation exists.” A number of bar owners, including Sturgis, also spoke up on Duncan’s behalf. Although the entire council agreed that Duncan should comply with the until it was changed, three of the four members present nevertheless voted to approve the renewal.\footnote{Jeff Abell, “Council Gives Bar Nod,” \textit{Hawk Eye} (Burlington), Aug. 21, 2008 (1A) (NewsBank).} Ostensibly the reason for the approval was, as one of the three-
member majority, “amid thunderous applause,” put it, that “‘I don’t have anything in front of me that shows me...any liquor violations. ... If the state was very serious about wanting to enforce this [smoking law], they could do it at any time. I don’t have a lot of faith in my state government. I don’t see where little West Burlington, Iowa, should be the one to take this up.’”26 Seemingly, only German immigrant, Mayor Hans Trousil27 understood the relevant provisions of the Iowa Code: “‘Part of the liquor license criteria is that someone who wants a liquor license is not supposed to violate any laws. Any way you cut it, he has violated the law. I don’t think the right message is allowing a bar across the street from City Hall to continue to break the law.”28 (Police Chief Oblein also understood, but nevertheless did not fault the council for renewing Duncan’s license, even though it sent “the wrong message to the community.”)29 Unsurprisingly, given this attitude, the city government did not believe that it itself needed to comply with the law: it permitted smoking on the steps of city hall—in which many in the audience engaged during a break30—in violation of the law’s prohibition of smoking on the grounds of public buildings.31

To the West Burlington city council’s abdication of its responsibility to “take action against a local bar owner who refuses to obey a statewide smoking ban” IDPH responded the very next day that it was “very concerned” about Duncan’s blatant disregard of the law, but apart from indicating that the department was discussing the matter with the city and on the state level, its spokesperson declined to reveal what its next steps would be, although he mentioned the possibility of the state’s denying the license for noncompliance. Following in the

427 http://www.westburlington.org/city_council/bios_photos.htm
428 Jeff Abell, “State to Decide Action Against Bar Owner,” Hawk Eye (Burlington), Aug. 22, 2008 (1A) (NewsBank). According to Iowa Code § 123.30(2) (2008): “No liquor control license shall be issued for premises which do not conform to all applicable laws, ordinances, resolutions, and health and fire regulations.” According to IAC § 185—4.2(1) (2008): “The interior and exterior of all licensed premises shall be kept clean, free of litter or rubbish, painted and in good repair. Licensees and permittees shall at all times keep and maintain their respective premises in compliance with the laws, orders, ordinances and rules of the state, county and city health and fire departments and the Iowa department of inspections and appeals.”
431 H.F. 2212, § 3(2)(e); IAC, Rule 641—153.2.
foot (in mouth) steps of President George W. Bush, Duncan exulted: “‘Bring it on. If it stinks, it stinks, and this law stinks to high heaven.’” He then reverted to incoherence by admitting, yet again, that he was allowing customers to smoke in his bar, and then about-facing and, once again, complaining that: “‘I haven’t violated anything. ... I have never been told who my accusers are. I have never been given due process.’” Duncan’s self-crucifixion campaign, which he persisted, ad nauseam, in characterizing as “‘about protecting the constitutional rights of you, me and everybody in Iowa,’” did not sit well with at least some of his competitors in adjoining Burlington. One of them remarked that it “‘really irks the (expletive) out of me. I don’t support the smoking law either, but I’m following it. ... I’m losing customers because they can smoke over there.’” Another who agreed with Duncan that the law was unconstitutional but was nevertheless complying with it “‘because it’s the law,’” resented the fact that smokers’ migration to Duncan’s bar was “‘taking money out of my pocket.’”

As was the case with others of his public statements, Duncan’s reaction to the charge that renewal of his license had created “an unfair playing field” that benefited (only) him stood reality on its head: asserting that “the law was meant to pit bar owners against each other,” he “suggested other bar owners follow his lead”—an invitation to join his race to the bottom that was not universally welcomed.

On September 3 the Iowa Department of Public Safety filed a complaint with the ABD administrator declaring that 48 public complaints had been filed against Duncan’s bar and grill alleging that he had permitted smoking on the premises and requesting that the administrator suspend and/or revoke Duncan’s license for his “open and continuing failure to comply with all applicable provisions of the Smokefree Air Act.” Rather than forcefully warning scofflaws that the end of their civil disobedience was imminent, ABD Administrator Walding merely observed that the attorney general’s filing of the complaint put business owners on notice that the state was “prepared to enforce the Smokefree Air Act.” He did add, however, that Duncan was “‘paving the way’” for six more bar owners who were going down the same road to a noncompliance hearing. Reveling in the opportunity to play a B-movie Robin Hoodish desperado, Duncan wallowed in nonsense and incoherence: incapable of accepting the state’s initiation of the

432 Jeff Abell, “State to Decide Action Against Bar Owner,” Hawk Eye (Burlington), Aug. 22, 2008 (1A) (NewsBank).


Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

revocation proceeding as the straightforward (albeit overdue) enforcement action it was, he by turns accused the government of “trying to make an example of him to scare others from joining his cause” and “trying to force me to eat crow and bow down to them like they were the queen.” But this self-sacrificer was having none of it: “I’m standing up for everyone in Iowa. I am fighting for everyone who loves the constitution.” In fact, he was not even speaking for all bar owners: “He’s angered competitors who are following the controversial law. Doesn’t care.” Walding, however, was as good as his word: a week later the Department of Public Safety filed a virtually identical complaint against Froehlich.

And on Larry Duncan’s violations went. At the second law enforcement site visit that Chief Oblein made on September 24 he again observed customers openly smoking (and again he failed to issue them citations) and Duncan confirmed to Oblein on the spot that he knew about the violations. Then on October 30, the day before Duncan’s administrative hearing on the complaint, Oblein witnessed another customer smoking whom no employee asked to stop, but the police chief cited neither the smokers nor the employees nor Duncan. A week before the October 31 hearing, Eichhorn filed a complaint in federal court for the Southern District of Iowa largely replicating the IBOC/COBRA Polk County case, whose focus on agency rules had been procedurally stymied. The federal case was designed with the urgent practical purpose of preempting the administrative enforcement process that might lead to the revocation of Duncan’s liquor license—or, as the Iowa Attorney General put it: “Rather than seek to fully litigate the merits of its statutory and constitutional claims through the ongoing administrative disciplinary action, the Plaintiff opted instead to pursue federal litigation.”

439 Brief in Support of Motion to Dismiss at 3, Coordinated Estate Services, Inc., d/b/a
denied Duncan his procedural due process rights under SAA and that the statute itself violated the U.S. Constitution both for the same reason and because it violated the latter’s equal protection, privileges and immunities, and interstate commerce clauses.\footnote{Complaint at 1-2, Coordinated Estate Services, Inc., d/b/a Otis Campbell’s Bar & Grill v. Walding, Civ. Action Case No. 3:08-CV-138 (S.D. Iowa, Oct. 24, 2008).}

Eichhorn was unable to stitch together this pleading without resort to such falsification as asserting that the law “requires” employers and owners “to affirmatively stop smokers” from smoking in prohibited places,\footnote{Complaint at 6, Coordinated Estate Services, Inc., d/b/a Otis Campbell’s Bar & Grill v. Walding, Civ. Action Case No. 3:08-CV-138 (S.D. Iowa, Oct. 24, 2008).} whereas in fact the statute merely required them to inform smokers that the latter were violating the law,\footnote{Iowa Code § 142D.8(3) (2009).} and the IDPH rules added the requirement that they “request that the smokers stop smoking immediately.” If smokers persisted, employers/owners had no obligation to do anything—not even to call the police or inform IDPH.\footnote{IAC § 641-153.5(4) (2008).}

Disingenuousness also characterized Duncan-Eichhorn’s assertion that the Smokefree Air Act violated procedural due process because its “enforcement system deprives the alleged violator of the names of witnesses..., thereby denying the alleged violator the right to confront witnesses....”\footnote{Application for Temporary Restraining Order and Preliminary Injunction at 3, Coordinated Estate Services, Inc., d/b/a Otis Campbell’s Bar & Grill v. Walding, Civ. Action Case No. 3:08-CV-138 (S.D. Iowa, Oct. 24, 2008).} Since Duncan not only admitted, but proudly, publicly, and ad nauseam boasted that he was permitting smoking “in order to get cited and open the door to a challenge in state court,”\footnote{Amy Lorentzen, “Judge Considers Case of Bar Violating Smoking Ban,” \textit{Clinton Herald}, Nov. 1, 2008, on http://www.clintonherald.com (visited July 18, 2009).} and the ALJ in his license suspension/revocation proceeding found that he “concedes that he and his employees have been permitting customers to smoke on the licensed premises,”\footnote{Proposed Decision at 9, In re Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Docket No. D-2008-00080 (Iowa Department of Commerce, Alcoholic Beverages Div., Jan. 2, 2009).} he had no need to confront witnesses: his defense of unconstitutionality—which had nothing to do with the police chief’s personally having observed him violating the law—could not, pursuant to the Iowa Supreme
Court precedent, be adjudicated by an administrative agency, but could be raised and preserved for judicial review. In light of his continual self-glorification for permitting smoking in defiance of the law, his sworn affidavit complaining that “the State is waging a campaign of accusations to hold my business...up to public ridicule and scorn without allowing us any way of disputing their accusations” was nonsensical.

Duncan’s commerce clause claim was not only a product of a desperate throwing-in-the-kitchen-sink approach, but also, once again, clearly underscored that resisting bar owners’ real demand was not for a ‘level playing field,’ but for at-will smoking. The section on the commerce clause, factoids supporting which occupied 13 of the complaint’s 32 pages, insisted that not only the Smokefree Air Act, but also the state’s recently increased cigarette tax and even its fire-safe cigarette law were part and parcel of the state’s “systematic effort to burden and discriminate against tobacco products,” which was unconstitutional because the “asserted public health concern is insufficient to permit this violation of the Commerce Clause, in that the factual basis for its claims are disputed by the United States, members of the scientific community, the Courts, and others”—assertions that revealed Eichhorn as a master in equal measure of constitutional commerce clause law, the science of the health consequences of involuntary smoke exposure, and elementary English grammar.

All this flat-earthism served only as filler to get to the point, which was a request for a preliminary injunction (which had been unavailing before Judge Staskal) to “bar the...ABD from conducting an evidentiary hearing on the merits of the pending DPS complaint” and to spare Duncan revocation of his liquor license. The district court denied Duncan’s motion for a temporary restraining

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447 Salsbury Laboratories v Iowa Dept of Environmental Quality, 276 NW2d 830, 836 (Iowa 1979).
order on October 30.\textsuperscript{453}

The following day Duncan had his hearing before the ALJ in his liquor license case. In case Duncan felt deprived of the opportunity to confront witnesses, Police Chief Oblein appeared and testified that just the previous day he had, at the state’s request, done a site check at Duncan’s bar, where he observed smoking in prohibited areas, the presence of ashtrays, and the absence of no-smoking signs. To be sure, Oblein added that no citations had been issued against the bar because the West Burlington city council believed that the state should conduct enforcement: “Duncan has made it clear he’s going to challenge the smoking ban, and the city can’t afford to pursue the case. ‘They made the problem, they should be the one to handle it.’”\textsuperscript{454} The real reason for the city government’s refusal to issue a citation was that “West Burlington does not have a city attorney, and the city council fears it could cost them thousands of dollars in attorney fees if they issue a citation to the licensee, and it becomes a test case for the constitutionality of the Smokefree Air Act.”\textsuperscript{455} In contrast, if West Burlington prevailed, “the city would only get a $100 fine.”\textsuperscript{456}

On January 2, 2009, state Administrative Law Judge Margaret LaMarche ordered that Duncan’s liquor license be suspended for a minimum of 30 days for his intentional violations of the Smokefree Air Act and his “defiance” of a duly enacted statute because he “disagree[d] with the legislature’s rationale for a statute....” The ALJ thereby accepted the Department of Public Safety’s argument that Duncan’s open defiance of the health law and rules applicable to licensed premises requires a penalty sufficient to deter similar violations by other liquor licensees.” This consideration was reinforced by the patent unfairness of allowing Duncan to gain business at the expense of compliant competitors. At the end of the minimum 30-day period the suspension, LaMarche ordered, “may be

\textsuperscript{453}Clerk’s Court Minutes, Coordinated Estate Services, Inc. v Walding, Case No. 3:08-cv-00138 (S.D. Iowa, Oct. 30, 2008). Although the minutes stated merely that the motion had been denied, the judge, according to a later brief submitted by the state, citing the \textit{Younger} abstention doctrine, allowed the ABD’s administrative disciplinary action against Duncan to proceed. Brief in Support of Motion to Dismiss at 3, Coordinated Estate Services, Inc., d/b/a Otis Campbell’s Bar & Grill v. Walding, Civ. Action Case No. 3:08-CV-138, 2009 WL 960942 (S.D. Iowa, Jan. 20, 2009).


Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

lifted” if Duncan removed all ashtrays, posted the required no-smoking signs, and gave ABD “a sworn written statement of commitment to comply with the provisions of the Iowa Smokefree Air Act at all times in the future,” absent which “the suspension shall continue until” Duncan demonstrated compliance.457 (The same day the ALJ issued a proposed decision in Froehlich’s case ordering a 21-day suspension.)458 Still unbowed and having yet to ingest the slightest sliver of crow, Duncan manfully told the press that he would continue to fight the smoking ban “until he draws his last breath.” Nor could anything less be expected from Iowans’ outsized hero who, along with his wife and lawyer Bungar, “worried about what other personal freedoms will be taken away if people don’t fight this.” Just about the only thing that could “frustrate[ ]” this champion of civic virtue was that he had not realized that instead, as his wife put it, of getting a $100 ticket and going to court “so the people can tell us if it’s right or wrong,”459 he was now on the verge of having his liquor license yanked on a bar that netted (after sales taxes) $1.2 million annually.460

This feigned surprise was typical for bar owners. A somewhat more candid tale of woe was told by one of Duncan’s confreres near Des Moines: “‘I thought it was going to be like the seat belt law, you know, or some of the other laws they don’t enforce’.... He admits he didn’t pay much attention to Iowa’s Smoke Free Air Act and let customers light up in his bar up until last month. ‘I was just

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457Proposed Decision at 17, 18-19, In re Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Docket No. D-2008-00080 (Iowa Department of Commerce, Alcoholic Beverages Div., Jan. 2, 2009). SAA provides that a violation by an owner of a covered place “may result in the suspension or revocation of any permit or license issued to the person for the premises on which the violation occurred.” Iowa Code § 142D.9(4) (2009).


Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

seeing what they were gonna do. I thought the first fine was $100. If I knew I was going to lose my license, we would never smoke in there.” Walding captured their attitude: “‘It was sort of a dare, show us what you were going to do.’”\(^{461}\) A $1,000 fine and a week’s suspension of the liquor license\(^{462}\) became a teachable moment for the violator: “‘We’ll make sure no one smokes in there.’”\(^{463}\)

It is difficult to reconstruct the logic that underlay owners’ claims that the Smokefree Air Act failed to put them on notice as to the potential economic consequences of permitting smoking in their bars. After all, the statute clearly specified that: “If a public place is subject to any state or political subdivision inspection process or is under contract with the state or a political subdivision, the person performing the inspection shall assess compliance with the requirements of this chapter and shall report any violations to the department of public health or the department’s designee.”\(^{464}\) And even more unmistakably and transparently it brought to readers’ attention that: “In addition to the penalties established in this section, violation of this chapter by a person who owns, operates, manages, or who otherwise has custody or control of a public place, place of employment, area declared a nonsmoking place pursuant to section 142D.5, or outdoor area regulated under this chapter may result in the suspension or revocation of any permit or license issued to the person for the premises on which the violation occurred.”\(^{465}\) The claim of unfair surprise was, moreover, completely undermined

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\(^{465}\) H.F. 2212, § 9(4)/Iowa Code § 142D.9(4) (2009). Bar owners argued that these provisions had to be interpreted to make ABD license action conditional on prior assessment of progressive monetary penalties by a judicial magistrate pursuant to § 142D.9(2). However, as the ABD administrator ruled in his final order in Duncan’s case, that argument was “without merit” because, if the legislature had intended to preempt ABD’s statutory authority to regulate licensed establishments for violations of the Alcoholic Beverage Control Act, it would have done so, but it did not. Moreover: “The wording of the license suspension and revocation provision, as well as its placement in a subsection separate from the Iowa Smokefree Air Act’s progressive monetary penalties, supports the conclusion that license suspension and revocation are independent sanctions that may be imposed by the relevant licensing authority and are not dependent upon a
by the full quotation, in italics, of this latter provision in the Notice of Potential
Violation letters that the IDPH sent to bar owners about unlawful smoking on
whose premises the department had received complaints.466

The critical importance of enforcement of the Smokefree Air Act at the state
government level became obvious in the wake of the fiasco in West Burlington,
where the city council not only renewed scofflaw Duncan’s liquor license, but the
city government “decided not to enforce the law at all” because, not having a staff
attorney, it would have to pay an attorney $180 an hour to secure a $100 penalty
from a non-compliant bar owner. As City Administrator Dan Gifford told the
attorney general’s office: “You have attorneys that work for you. You guys
come and do it because this is your law.”467 Perhaps in reaction to such
resistance, in November Attorney General Miller sent a letter to Iowa’s 99 county
attorneys explaining that in “the event that civil enforcement is necessary, your
assistance will be essential. It is in everyone’s best interests to have local city
or county attorneys pursue these civil actions wherever possible. However...where local attorneys are...unwilling to prosecute retail violators, then
my office will undertake the necessary action to enforce the law.” In case
concern for public health and public service was not persuasive, Miller reminded
the attorneys that the law provided that “if local authorities are involved in the
enforcement...any civil penalties levied shall be deposited in the general fund of
the...city or county.”468 Ironically, parts of this letter were taken verbatim from
a similar letter that Miller had sent to city and county and attorneys in 2001
requesting their assistance in prosecuting retailers who sold tobacco products to
minors and announcing that if they were unwilling, Assistant Attorney General
judicial magistrate’s finding of a violation and the imposition of a monetary penalty. ...
The ordinary meaning of Iowa Code § 142D.9(4) is that businesses that have a permit or
license for their premises who fail to comply with the Iowa Smokefree Air Act may face
progressive monetary penalties as well as license suspension or revocation by the authority
that granted the license.” Administrator’s Final Order at 12, 13, 14, In Re Coordinated
Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Docket No. D-2009-00080 (Iowa
074/470/oc_finalorder.pdf

466E.g., Bonnie Mapes to LA Duncan, First Notice of Potential Violation Iowa
Smokefree Air Act at 2 (July 14, 2008), attached as Exhibit B to Hearing Complaint, In
Re Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Docket No. D-


(and future House Majority Leader) Kevin McCarthy would coordinate state involvement, which in fact did become necessary.

Local government refusal to enforce SAA appeared to assume a more ominous level at the outset of 2009 when County Attorney Mark Walk of Mitchell County (along the Minnesota border) wrote a letter to Attorney General Miller declaring that “he thinks the law is unjust, and that he won’t enforce it until it applies to all workplaces.” Despite this appeal to equal protection, Walk also adopted a position long propagated by cigarette companies and more recently picked up bar owners: he regarded the ban as “unjust because individual business owners are being denied the opportunity to decide whether a legal product can be consumed in their businesses.” In conformity with the manufacturers’ old voluntarist line, he also allowed as if a bar owner chose to prohibit smoking and asked the local authorities to pursue a customer who was smoking, “‘we would’” (though in fact residents told the press that they were unaware of any violations despite Walk’s “promise not to penalize them”). Republican Senate Minority Leader Paul McKinley, who found the law “‘very, very troubling,’” refused to pass judgment on officeholders who had to determine for themselves whether they were “‘doing the right thing.’” In sharp contrast, his Democratic counterpart, Michael Gronstal, was “‘personally annoyed that county attorneys are unwilling to enforce a duly passed state law, whether they like it or not. If they want to pass laws, they should run for the Legislature.’” Taking a longer view, Gronstal remarked: “‘Certainly this law is fairly controversial, but I’m reasonably confident that over a relatively short time most folks will come to their senses and say, “I guess we have a legal responsibility to enforce this law.”’” ... After a bar or two lose their liquor licenses, any scofflaw bars will begin obeying the law, Gronstal predicted. ‘I think it’ll take a little while for everybody to come on board...but I think they will when people realize the law isn’t going away.’”

Walk may, at least in his uninhibited loquaciousness, have been an outlier. (In April, after a state senator had accused Attorney General Miller of hypocrisy for threatening to remove from office a county recorder who refused to issue a marriage license to a same-sex couple but not Walk, the latter sent out an email stating: “‘I have not refused to enforce the smoking ban,’...adding that he had assisted the Mitchell County Department of Health in enforcing the ban. ‘...I

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470 See above ch. 31.
have stated that in certain situations I felt that the law was not proper and would not enforce it in those situations; however, that situation has never occurred. To the best of my knowledge, Mitchell County is 100 percent in compliance with the law. My stand was largely symbolic. It was to bring attention to a law that was influenced by the tremendous power of the gambling industry.”)\textsuperscript{473} However, seven months into the law the Des Moines Register reported that “in certain parts of Iowa” smokers knew that “they can defy the smoking ban—and local authorities won’t do much to stop them.” For example, in Hampton, in north-central Iowa, “police have never dished out a $50 ticket although everyone from City Council members to the police chief has known for months that bar-stool rebels there are flouting the law.” The police chief’s statement that it was not his job to enforce the law resonated with a Republican city council member and smoker who regarded the ban as a “‘joke’.... If you don’t want to see nude dancing, don’t go to a strip club. If you don’t want to smell smoke, don’t go to a bar.’” A call to the state by a Democratic nonsmoking council member prompted the police chief to backtrack to the extent that he agreed at the very least to “order his officers not to walk away from an obvious violation.” The Republican sheriff of a small county on the Missouri border was not reluctant to share with the press his disagreement with the law, which was “‘just another infringement on private businesses’ rights,’” though he would check out a smoking complaint if state officials asked him to do so. Statewide, although violations had been “spotted at 460 businesses and other public places...local authorities have not taken action against a single one.” Such inaction, whether caused by “the expense of enforcement...or sheer distaste for the law itself,” prompted Bonnie Mapes to lament that “‘[w]hat’s breaking down at this point is the local action, the city and county attorneys taking action.’” Nevertheless, based on a total of 1,866 complaints of potential violations, IDPH sent out a first warning letter to those 460 businesses; that they represented not even one percent of all 82,000 covered workplaces\textsuperscript{474} could also be regarded as an indicator of widespread compliance (rather than widespread acquiescence in or collusion with widespread violations).

Of the 50 hearing complaints against liquor licensees that the attorney general filed with ABD on behalf of the Department of Public Safety through the beginning of August 2009, the six bars located in Burlington and West Burlington


\textsuperscript{474}Jennifer Jacobs, “Dissent Dilutes Smoke Ban,” DMR, Jan. 7, 2009 (A1) (ProQuest). During the Act’s first six months IDPH also sent 83 second, 23 third, six fourth, and one fifth warning letters. \textit{Id.}
accounted for more than those of any other city (the four in Waterloo being the second highest number) and Des Moines County also led all other counties with seven. In all, the southeastern Mississippi River counties running from Clinton to Lee accounted for 14 and, if Wapello (Ottumwa) is included, the southeastern quadrant accounted for 18 hearing complaints. In all, the targeted bars were located in only 27 of Iowa’s 99 counties. In the entire western part of the state (that is, west of Polk County), only six of 43 counties were affected, only one of which involved more than one hearing complaint. Outside of southeastern Iowa, many of the remaining hearing complaints were filed against bars in smaller towns. Interestingly, no hearing complaints were filed against liquor licensees in any of the three state university college towns (Iowa City, Ames, or Cedar Falls), which were bar rich. To be sure, whether these geographic distributions


477 ABD, “Iowa SFAA Status Report” (Aug. 4, 2009), on http://www.iowabrd.com/files/client_files/211/1129/SFAAcases.pdf. If Appanoose, Monroe, Mahaska, and Poweshiek counties in the southeastern quadrant are included, the total reached 24. The only county between Clinton and Lee in which no bar was the object of a hearing complaint was Louisa, although IDPH did refer one non-compliant bar to the attorney general’s office, which by Aug. 4, 2009 had not filed a hearing complaint. The only western county with more than one hearing complaint was Dickinson on the Minnesota border; all three complaints involved bars in the Lake Okoboji resort area. Ironically, seven weeks into the operation of the new law, Republican Representative Mike May related that none of the 25 bars in the vacation town of Okoboji (where he himself owned a motel/resort) had complained to him. Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008). Yet as early as July 13, 2008, the police observed people smoking
reflected differential degrees of compliance, collusion, indifference, or intimidation of customers, or sheer serendipity is unknown.

Bar owner resistance in small towns away from the Mississippi River may be illustrated by Centerville, a county seat of about 6,000 inhabitants in south-central Iowa near the Missouri border. Gordie Long was another constitutional literalist who believed that neither she nor any other barkeeper deserved a liquor license suspension for violating the Smokefree Air Act, which was “‘unjust’” and “‘unfair’”: “‘What’s fair for one is fair for all is what the Constitution says.’”478 One of her local competitors may have understood that after an adjustment customers would “‘end up getting used to’” the ban, but Long publicly announced her intention to violate the law from the very first day:

“They’re trying to take away my livelihood and it makes me damn mad.... I’m more than aware that I’m going to lose customers. I have a lot customers that don’t smoke at home, they smoke at the bar. It’s definitely going to hurt business. I’m 61 years old and all I want to do is retire from here but now it’s going to be hard”.... Long has proof that some of her customers feel the same way. She has a petition with over 100 signatures that she recently sent to the state, “I buy my cigarette license and I buy my alcohol license. Now they’re walking in my door, telling me what I can and can’t do at a place that I pay taxes on”.... Long also feels that it’s unfair that smoking is still allowed at places like casinos. “I know I pay less taxes than a casino but I still say that’s discrimination. As far as I’m concerned we run the same type of business....” Although the smoking ban went into effect at 12:01 a.m. this morning, Long has other plans. “My ash trays are going to be out. I pay the taxes from the front door to the back door”....

Already on July 11 IDPH sent Long a first notice of potential violation based on a customer’s observation of smoking on July 2 and lack of no-smoking signs. After having racked up several more complaints in short order, Long received a second notice of potential violation, which was being forwarded to local law enforcement for further action. On August 27 a Centerville police officer, in the bar on an unrelated matter, smelled smoke, saw ashtrays with butts on the bar, and


customers with cigarette packs in front of them. When told to get rid of the ashtrays and that smoking was prohibited, the quick-witted owner, inverting the National Rifle Association’s mantra, replied: “‘we’re not smoking, the cigarettes are.’” Nor was the treasure chest of humor exhausted: two ABD investigators making an enforcement site visit on September 15 observed the front door sporting a (non-conforming) sign stating “‘no smoking courtesy of the communist party.’” Despite the visibility of the smoke in the bar and dining room Long insisted that “she was trying to comply with the law....” And on and on it went for months. When a food inspector in late November saw three customers and the bartender smoking and told the latter that she would report the smoking, the bartender replied: “‘[W]hatever[,] we have been turned in 3 other times.’” As late as January 2009 Long, not having grown tired of her joke, was still displaying only her communist party signs. At length, the state government did lose its patience: in April an ALJ issued a proposed order suspending her liquor license for 30 days, which, counseled by the ubiquitous Darwin Bünger, she appealed. Interesting light is shed on the evolution of the enforcement strategy being pursued by the Attorney General’s Office by an unusual proceeding that bypassed enforcement by means of liquor license suspension/revocation by the ABD. The Attorney General’s office had sent Long a “petition it was preparing to file in Appanoose County District Court alleging a first violation” on Aug. 27. Long signed a settlement agreement and paid a $100 penalty pursuant to § 9(2) of SAA in lieu of going to court. Asked about this unusual procedure, the

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484 In an April 2008 press release Attorney General Miller stated that his office had sought civil penalties for 11 violations of the Smokefree Air Act in addition to liquor license cases. Office of the Attorney General, “Liquor Licenses Revoked, Suspended for Violations of the Smokefree Air Act,” Apr. 8, 2009, on http://www.iowa.gov/government/ag/latest_news/releases/apr_2009/Liquor_Licenses_Revoked.html. Of the other 10 cases five were settled and the penalty paid; four were deferred or dropped.
public information officer replied: “The SFAA provides a number of enforcement tools, including a civil penalty. When Public Health referred the Gordie’s case to us, we offered Mr. [sic] Long the chance to pay a civil penalty for a [sic] SFAA violation. Mr. [sic] Long paid the penalty, and thus we did not have to file the civil suit in Appanoose County. Subsequently, Mr. [sic] Long’s repeated violations were referred to ABD for liquor license action. We’ve learned that liquor license actions are our most effective deterrent to violations by establishments with such licenses.”

One of the attorney general’s learning moments may have involved high-profile resister Brian Froehlich, who did not begin to take the law seriously until he realized that his liquor license and thus the whole basis of his business was at risk: “Froehlich continued to permit smoking on the licensed premises after the law went into effect. Mr. Froehlich thought that his violation would be punishable by a $100 monetary penalty and testified that he was willing to ‘take the $100 fine to protect my business as long as I could.’

Because the business closed or a new owner had taken over; and one was referred to the Clinton County attorney, who won a judgment. Two of the five settling businesses were non-bars USF Holland and Electrolux. Email from Bill Roach, Iowa Attorney General’s Office, to Marc Linder (Aug. 3, 2009). The judgment in the only case that was actually filed was a small claim for $100 plus $113.88 in costs. State of Iowa v Grafitti, Inc., Case 07231 SCSC048786 (Clinton Cty, July 13, 2009), on http://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm.

Email from Robert Brammer to Marc Linder (July 28, 2009).

State of Iowa, Alcoholic Beverages Division, In re Froehlich Properties, Inc. d/b/a Fro’s, Proposed Decision at 3, Docket No. D-2008-00089 (Jan. 2, 2009), on http://www.iowaabd.com/smokefree/fros_proposed_decision.pdf. Although Froehlich admitted that “[t]hrough public documents and other sources it has been shown that...Fro’s did violate the Iowa Smoke Free Air Act,” his use of the passive voice masked his own responsibility for his strategic blunder: “It has always been understood that any violation of the Iowa Smoke Free Air Act was to be handled by the IDPH and that civil penalties for not enforcing [i.e., complying with] were to come from this department.” Since Froehlich had violated the law daily for months, his outrage at not having received three citations/money penalties before rightfully having his liquor license suspended/revoked was misplaced. State of Iowa, Alcoholic Beverages Division, In re Froehlich Properties, Inc. d/b/a Fro’s, Respondents [sic] Reply Brief and Argument at 1, 2, Docket No. D-2008-00089 (n.d. [Jan. 30, 2009]), on http://www.iowaabd.com/files/client_files/711/1176/fros_frosbrief.pdf. His having jumped to this false conclusion was akin to his wife’s (and co-owner’s) explanation that since Judge Staskal had taken no action at the hearing on August 1, 2008, they put the ashtrays back out on the bar. State of Iowa, Alcoholic Beverages Division, In re Froehlich Properties, Inc. d/b/a Fro’s, Proposed Decision at 6, Docket No. D-2008-00089 (n.d. [Jan. 2, 2009]), on http://www.iowaabd.com/files/client_
Arguably the most absurd effort at finding a “loophole” in the law can be credited to a topless bar in Des Moines, which became the first liquor establishment in central Iowa to place its license in jeopardy. However, it was precisely the alleged loophole’s transparently groundless character that raised the issue of the competence of IDPH’s Division of Tobacco Use and Prevention Control, which, instead of seeing through this sham instantaneously, seriously engaged with it for two months. After the enactment of the law, the owner, Rick Goulden, “studied” it, concluding that he could render smoking lawful by taking advantage of the exemption for retail tobacco stores, as implausible as that analysis might have been since such a store was statutorily defined as one used primarily for the sale of tobacco products, to which the sale of other products was incidental. Oddly, although he developed this insight without benefit of legal counsel, “[i]n making this determination, Mr. Goulden...talked with Bonnie Mapes, Director” of the Division. In order to implement this scam, Goulden “instituted certain new business practices,” which an ABD administrative law judge in a huge understatement was to characterize as “contrived.”

The pivot for the hoax was simply hanging a sign declaring the premises a “private dance club/tobacco outlet, smoking optional,” followed by the sale of single cigarettes and “cigarette and drink combos,” the pricing of which was designed to enable him to meet IDPH’s rule defining “incidental to the sale of tobacco products” as not more than 20 percent of the tobacco store’s gross revenues. Astonishingly, Mapes—according to Goulden’s testimony that...
the ALJ cited without indicating that IDPH challenged it—instead of informing him that he was engaged in an unlawful act, appeared to be operating as his business consultant: “Ms. Mapes expressed doubt to Mr. Goulden that his pricing of single cigarettes would achieve the desired result as she thought his prices were too high and a deterrent to sales.” Undeterred by the advice, Goulden proceeded to permit smoking in his make-believe tobacco store, prompting a first notice of potential violation as early as July 11 based on law enforcement officers’ observation of smoking on July 6 and racking up a total of 10 complaints through August 28. A second notice of potential violation followed on August 29 after law enforcement officers on August 19 had not only observed further smoking, but had been told by the bartender that the “establishment is a ‘safe haven for smokers’” and that “the owner did not intend to comply with the Act because he was getting licensed as a retail tobacco store.” And so it went until a third notice of potential violation was issued at the end of September for smoking observed on September 5 by the Polk County sheriff’s office, which also issued five civil citations to persons violating the law. Shortly after this inspection Goulden again spoke to Mapes, who finally told him that “she had been researching whether he could sell single cigarettes at his establishment” and informed him that Iowa Code chapter 453A prohibited their sale. After writing down the code section that Mapes’ prodigious researches had unearthed, Goulden stopped selling cigarettes and started complying with SAA. Nevertheless, the ABD ALJ issued a proposed decision ordering a 21-day liquor license suspension for the earlier repeated violations after the Department of Public Safety had argued that a penalty was required both to deter similar violations by other licensees and to undo the unfairness involved in allowing Goulden to realize an economic benefit by virtue of violating the law.

495 State of Iowa, Alcoholic Beverages Division, In re Boot Hill Enterprises, Inc., d/b/a Outer Limits, Proposed Decision at 5, 6, 7, 8, Docket No. D-2008-00092 (Apr. 21, 2009), on http://www.iowaabd.com/smokefree/outerlimits_proposed.pdf. The ALJ interpreted the bartender’s statement that the owners were trying to get a tobacco sales license as an “admission by staff of the licensee...that licensee had actual knowledge that it did not, as yet, qualify for the retail tobacco store exemption.” Id. at 15.

496 State of Iowa, Alcoholic Beverages Division, In re Boot Hill Enterprises, Inc., d/b/a Outer Limits, Proposed Decision at 15-16, Docket No. D-2008-00092 ([Apr. 21, 2009]), on http://www.iowaabd.com/smokefree/outerlimits_proposed.pdf. Preposterously, Goulden’s lawyer claimed in his brief that the ALJ’s decision “supports the fact that the Outer Limits did qualify as an exempt tobacco outlet. The problem with Rick Goulden’s effort is that he was selling individual cigarettes which is illegal in Iowa. Outer Limits’ position is that it did not violate the Smokefree Air Act—period.” State of Iowa, Alcoholic Beverages Division, In re Boot Hill Enterprises, Inc., d/b/a Outer Limits,
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

(That Mapes had been unaware of the ban on selling cigarettes in packages with fewer than 20 was both astonishing and puzzling since it had been enacted on her watch just a year earlier as part of the very high-profile bill that increased the cigarette tax from 36 cents to $1.36.497 Far from being some obscure and minor provision, this prohibition was an increasingly important element of the national tobacco control movement’s program for making cigarettes less accessible to children, for whom the purchase of a single cigarette was a low-price first-step. For this reason the Institute of Medicine in 1994 had recommended passage of such bans by all the states498 and the Food and Drug Administration had included it in its tobacco regulations in 1995, which were struck down.499 Nevertheless by 2008 the American Lung Association was able to report: “Twenty-two states prohibit the sale of cigarettes in packs containing less than 20 cigarettes. Nineteen states and the District of Columbia prohibit the sale of single cigarettes. Fourteen states require cigarettes to be sold in a sealed package that is provided by the manufacturer and that contains the health warning required by federal law. Eleven states require cigarettes to be sold in the original, sealed package.”500 In Iowa, however, the triggering motivation for this prohibitory control lay elsewhere: lacking in the original Senate Study Bill 1055,501 it was requested by the Iowa Department of Revenue in order to “handle an issue related to the distribution of samples that are less than 20 per pack,” which had been “a problem for the Department in the past.”502 This administrative tax collection issue503 coincided with the attorney general’s


499 Federal Register 60:41,313-75 at 41,324 (Aug. 11, 1995).

500 http://slati.lungusa.org/StateLegislateAction.asp

501 The provision was added to SSB 1055 by Committee Amendment 501 § 4. [Senate] Committee Minutes for Ways and Means (Feb. 6, 2007) (copy furnished Kris Bell, Iowa Senate Democratic Research Staff).

502 David Casey (acting administrator, taxpayer services and policy division, Iowa Department of Revenue) to Sen. Matt McCoy, Ron Wieck, and Joe Bolkcom, Re: Senate Study Bill 1055 - Cigarette Tax Increase (Jan. 29, 2007) (copy furnished by Patty Funaro, LSA). The same provision had passed the Senate in 2005. S.F. 416, § 6, SJ 2005, at 1152 (May 5).

503 According to an Iowa Senate Democratic Staff senior research analyst: “The manufacturers generally sell cigarettes in packs of 20 or 25. All of our cigarette stamps
“concern[ ] with single cigarettes and other smaller sizes being more readily available and thus easier to obtain by underage smokers.”\textsuperscript{504} At the time IDPH was also aware of the issue and its proposed resolution.\textsuperscript{505}

In the event, more and more bar owners in Burlington decided to emulate Duncan in leveling down rather than up. By December 2008, Des Moines County (of which Burlington was the county seat), which was only the state’s 12th largest in terms of population, had received the second greatest number of notices of violation (30) behind Polk County (76), which had a population almost nine times larger (because the state capital and largest city, Des Moines, was located in it). The press conjectured that the reason may in part have been the lack of enforcement, the prime example of which was the fact that Duncan had yet to be fined or lose his liquor license. The problem in West Burlington and Burlington was exacerbated by Police Chief Oblein’s and Police Chief Dan Luettenger’s erroneous imputation of a catch-22 to the Smokefree Air Act administrative rules, according to which the police “are supposed to go in only once the owner has asked the smoking patron to leave and that person refuses.” But where owners themselves failed to comply and were “‘not calling us and saying ‘Boy I’m having a problem in here; people won’t quit smoking,’” it was “‘kind of hard for me to go in and say that person violated the law.’” As for prosecuting the business itself, IDPH was as yet unaware that any county attorney had done so. Des Moines County Attorney Pat Jackson had chosen not to prosecute such civil infractions both because he had no statutory duty to do so and was “‘pretty busy

\textsuperscript{504}Email from Kris Bell, Iowa Senate Democratic Staff senior research analyst, to Marc Linder (July 30, 2009).

\textsuperscript{505}Telephone interview with David Casey, Iowa Department of Revenue, administrator for tax compliance, Des Moines (July 31, 2009). Later Mapes (incorrectly) stated that: “The prohibition against selling cigarettes in packs of less than 20 was in Iowa code before the 2007 tax increase was passed. For how long before, I do not know. I assume the language was simply carried forward from the earlier code language.” When asked whether she knew where in the Code the provisions had been she replied: “No, I don’t. This is a legislative research question.” Email from Bonnie Mapes to Marc Linder (July 27, 2009). No such regulation imposing a floor on the number of cigarettes that could be sold at one time to one person existed before 2007. Telephone interview with David Casey, Des Moines (July 31, 2009).
Administrative Rules for Barkeepers’ Challenge to Enforcement of Smokefree Air Act

do the more serious stuff” of criminal cases.506

It is difficult to discern the interpretive logic that could have led the police chiefs to this do-nothing conclusion. After all, smoking in an area in which it is prohibited is a distinct violation independent of whether the owner complies with or violates his own duty to inform the person violating the law of the provisions of the law. Were the former’s unlawfulness dependent on owner compliance, collusion would undermine the law, such subversion being precisely the effect of Oblein’s and Luettenger’s misinterpretation. Not all police officers adopted this approach. For example, shortly after 1:00 a.m. on October 10, 2008, having been told that the police had received complaints of smoking in a certain bar, Grinnell police officer Dan Johnson looked in a window, saw two customers smoking, walked in, told both of them and the bartender that smoking was prohibited there, and issued citations to the smokers. On December 14 he returned, saw a customer smoking at the bar, who, on seeing him, extinguished her cigarette. The same bartender told Johnson that he had a highlighted copy of the law that stated that he “‘may’ ask patrons who are smoking to stop or leave.” Apparently unimpressed, Johnson issued a citation to the customer, who remarked that the bartender had never asked her to stop smoking.507 Systematic enforcement of the law was exceptionally on display in Webster City, a town of about 8,000 in central Iowa, in which the police chief, ironically, was “not necessarily in favor of the law,” did not welcome devolution of enforcement from IDPH to the local police, was chiefly concerned with the unfair competitive effects of violations by some bar owners, and did not even ticket individual smokers in bars. After learning from his night-duty sergeant that police had been finding smoking going on in bars 90 percent of the time they checked,508 Police Chief Mike McConnell “decided to have police officers check all of the city’s bars every night after a bar

506Christinia Crippes, “DMC Has 2nd Most Smoking Ban Violations,” Hawk Eye (Burlington), Dec. 13, 2008 (1A) (NewsBank). On county population, see Iowa Official Register: 2005-2006, at 304-305 (vol. 71). According to IAC § 641-153.8(2) (2008): “[T]he department designates the law enforcement authorities of the state and of each political subdivision of the state to assist with the enforcement of 2008 Iowa Acts, House File 2212. A peace officer may issue a citation in lieu of arrest pursuant to Iowa Code chapter 805 against a person who smokes in an area where smoking is prohibited pursuant to 2008 Iowa Acts, House File 2212, and such person shall pay a civil penalty pursuant to Iowa Code section 805.8C(3)”a” for each violation.”


508Telephone interview with Mike McConnell, Webster City (Aug. 7, 2009).
owner complained that a number of local bars were permitting smoking.” Then
at the end of January he “sent a letter to all liquor licensees informing them that,
effective February 6, 2009, the Iowa Smokefree Air Act would be strictly
enforced with zero tolerance.”\footnote{Proposed Decision at 5, 6, In Re Travis and Regina Hurt, d/b/a TeeGee’s Bar &
Grill, Docket No. D-2009-00025 (Iowa Alcoholic Beverages Div., June 1, 2009), on
http://www.iowaabd.com/files/client_files/254/452/teegees_proposed.pdf.}
Not coincidentally, hearing complaints were
filed in quick succession against three bars\footnote{ABD, “Iowa SFAA Status Report” (Aug. 4, 2009), on http://www.iowaabd.com/
files/client_files/211/1129/SFAAcases.pdf.} in this small town (which was,
ironically, represented in the Iowa House by the law’s zealous opponent and small
bar owner’s advocate, McKinley Bailey), in part as a result of the implementation
of the nightly police inspections.\footnote{For example, the police observed people openly smoking and employees doing
nothing to correct the situation in one bar on January 28, 29, and 31. Hearing Complaint
at 4, 5, In Re The Bow Lounge, Docket No. D-2009-00026 (Iowa Alcoholic Beverages
comp.pdf.}
In Burlington, too, after ABD had issued administrative hearing complaints
to four bars, city officials in April “would not intervene to stop bar owners from
allowing patrons to violate” the ban. One city council member, a small-business
owner who believed bar owners’ claims that allowing smoking was a “‘matter of
survival,’” “railed” against the law: “I won’t support this council taking action
against people who are just trying to earn a living on behalf of a stupid law like
this.”\footnote{Jeff Abell, “Council Stays Out of Smoking Ban Fight,” Hawk Eye (Burlington),
Apr. 1, 2009 (1A) (NewsBank).} The Burlington four accounted for half of the state’s recently filed
complaints, bringing the statewide total to 38. The Attorney General’s office
displayed flexibility cum firmness in expressing willingness to negotiate with bar
owners, instancing a recent settlement with a bar in Ottumwa calling for a seven-
day liquor license suspension and $1,000 fine.\footnote{Pat Curtis, “Eight More Bars Charged with Violating Smoking Ban,” Radio Iowa,
Apr. 2, 2009, on http://www.radioiowa.com (visited July 4, 2009); State of Iowa,
Alcoholic Beverages Division, In re Benge Inc, d/b/a The Keg, Stipulation, Docket No.
875/578/keg_stipulation.pdf.} In the event, after Burlington
native Walding’s agents verified that the bars were in compliance—“‘[i]t would
be a revocable offense if they mislead us’”\footnote{Christinia Crippes, “ABD Process Starts Anew with Three Bars,” Hawk Eye
(Burlington), Apr. 18, 2009 (2A) (NewsBank).}—within a few months a total of 22
other bars, including the four in Burlington, took the same deal.\textsuperscript{515}

Meanwhile, with the ALJ’s proposed sanctions against Duncan stayed pending the ABD administrator’s review,\textsuperscript{516} on April 7 U.S. District Court Judge John Jarvey issued an order granting defendants’ motion to dismiss plaintiff’s damage claims against ABD Administrator Walding and IDPH Director Newton in their individual capacities because they had absolute immunity, but denying it as to the claim against defendant Mapes for her alleged publication of information about Duncan’s suspected violations. Consequently, because this one damages claim survived, the court, rather than dismissing Duncan’s claim for declaratory relief (that the Smokefree Air Act violated the Commerce, Equal Protection, and Privileges and Immunities Clauses of the U.S. Constitution) on the grounds that such relief would interfere with pending state administrative-judicial proceedings, as the \textit{Younger} abstention doctrine would have directed, the court stayed the federal case until the state proceedings (including any state court adjudication of plaintiff’s claim that the Act was unconstitutional) were concluded.\textsuperscript{517}

The very next day, April 8, 2009, Walding modified the ALJ’s order imposing a 30-day suspension as inadequate because Duncan’s “blatant, intentional and on-going violations” were a “direct assault on both the Iowa Smokefree Air Act and the Iowa Alcoholic Beverage Control Act.” Because his “open defiance of the health law and rules requires a penalty sufficient to deter similar flagrant violations” by Duncan and other licensees in the future and “Duncan’s unapologetic willingness to ignore statutes and rules applicable to the operation of Licensee’s business does not inspire confidence that the Licensee can be trusted to comply with all requirements for holding a liquor license in the future,” Walding ordered his license revoked.\textsuperscript{518} (At the same time Walding modified the ALJ’s proposed order to impose a 30- rather than a 21-day

suspension on Froehlich,519 which the latter called “‘a real kick in the knees,’” while repeating the cigarette industry’s longtime refrain that “‘[i]t’s not about smoking, it’s about the rights we keep getting taken away from us every day.’”)520 “[W]ith much reluctance but little choice” Walding acted vis-a-vis a licensee who had “stated in no uncertain terms that he is unyielding in his refusal” to comply with the Smokefree Air Act and “given every indication that he would continue on with his full frontal assault” on the law “once his license is reinstated.” Against the background of these indictments of Duncan’s absolutist positions Walding’s conciliatory about-face was surprising: he was “open to considering a future Request to Rescind Revocation and would be willing to consider reinstating” his license if he met two conditions. “First and foremost,” Duncan had to “provide assurance” to Walding that he would comply with the Smokefree Air Act (and all requirement of the Alcoholic Beverage Control Act) “at all times in the future.” And second, Duncan “will be expected to serve a period of suspension in proportion to” his violations of the two laws as later determined by Walding. In other words, Walding was leaving it up to Duncan to decide whether the revocation became permanent or “a step toward proper compliance with Iowa law.”522 If Walding’s offer of a last chance was motivated by the “goal and intention” of gaining “compliance with the law” rather than handing out penalties, it did not immediately prompt any accommodation on the part of Duncan, whose initial response conformed to his media verbal m.o.: “‘As far as I’m concerned this administrative deal is absolutely a circus.’”523

In contrast, Attorney General Miller availed himself of the revocation order to warn other bar owners that the same fate awaited them: “‘Liquor license holders are obligated to obey all Iowa laws as a condition of their privilege to hold a license. We are determined to enforce this new law—because it is the law, and because it saves lives. The huge majority of Iowa businesses are obeying the


523 Christinia Crippes, “Duncan’s License Revoked over Smoking Ban,” Hawk Eye (Burlington), Apr. 9 (1A) (NewsBank).
law, and we will not allow a small, vocal minority to flout the law.”

Miller then went on to undermine his office’s reputation for integrity and competence by making the nonsensical assertion that: “The adult smoking rate in the state has dropped from 19% to 14% over the last two years—in part because the Iowa Smokefree Air Act has encouraged people to quit.” As Miller’s source, the *Iowa 2008 Adult Tobacco Survey*, itself noted in italics no fewer than three times: “The data for the Iowa 2008 ATS were collected from April 4 through June 9, 2008. Therefore, the findings do not provide information about changes in behaviors or attitudes of adult Iowans as a result of the Iowa Smokefree Air Act which became effective July 1, 2008.” Despite the fact that the hierarchy of the Attorney General’s Office had been informed of this error, Miller repeated it on the first anniversary of the effective date of the Smokefree Air Act: “‘What it’s done is contribute to an incredible drop in smoking in our state.... I don’t think it’s been highlighted enough, but smoking went from 19% of the adult population (in 2007) to 14% (in 2009).’”

Revocation caused alcohol to stop flowing in his bar and forced him to admit

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525 This statement was contained in the version of the press release that Assistant Attorney General Donn Stanley emailed on April 13, but appears to have been removed from the version on the AG’s website. It does appear, however, on another version of the April 8 press release: http://iowapolitics.com/index.iml?Article=154873 (visited Aug. 1, 2009). Miller also repeated it a week later in a press release on the occasion of an ALJ revocation of the license of the especially recalcitrant VFW Post in Ottumwa. http://www.iowa.gov/government/ag/latest_news/releases/apr_2009/Smokefree_Ottumwa.html (visited May 22, 2009). Miller’s nonsensical claim was embellished by Special Assistant Attorney General Donald Stanley, who asserted that the drop was “due in no small part to the Iowa Smoke Free Air Act....” Email from Donald Stanley to Marc Linder (Apr. 13, 2009).

526 G. Lutz et al., *Iowa 2008 Adult Tobacco Survey* ii, 37, 41 (Feb. 2009), on http://www.idph.state.ia.us/tobacco/common/pdf/ATS_2008_Final_Draft.pdf. IDPH’s tobacco cessation coordinator did not even expect the smoking ban law to have a large impact on smoking prevalence: “‘[W]e are not going to have the surge like with the tax.... It makes it a little inconvenient. Over time it may nudge people to quit.’” Brian Morelli, “Smokers Adjusting to Ban,” *ICP-C*, July 17, 2008, on http://www.press-citizen.com (quoting Jeremy Whitaker).

527 Email from Marc Linder to Donn Stanley, Jeffrey Thompson, Matt Gannon, Jeffrey Peterzalek, John Lundquist, Robert Brammer, Bill Roach (Apr. 17, 2009).

that “the battle may be lost,” but Duncan insisted that the “war against the Smokefree Air Act is not over.”529 The following day he filed an application with ABD for a stay of the revocation order pending judicial review, and then Bunger and Eichhorn filed the same application for him in Des Moines County District Court on April 15, which repeated his untenable constitutional challenge to SAA on the grounds that it violated the Commerce Clause by restricting the market for tobacco in Iowa and announced that Duncan would file a petition for judicial review of the revocation, which followed two days later.530 In response, Walding initially stated that he would await that court’s ruling. Increasingly detached from jurisprudential and extra-oral reality, Duncan confused his own concern with the $20,000 reduction in business brought about by the revocation of his liquor license with Iowans’ alleged concern with the consequences of his having prioritized smoking over selling alcohol, and regurgitated his shibboleth: “‘I think people have totally had enough. Now I think they’re really realizing, at least many are...this is about the Constitution. It’s not about smoking.””531 Similarly, his self-mesmerizing incantation, based on the alleged unconstitutionality of the disparate treatment of casinos and bars, that “‘[w]e’re going to win this. We’re the state’s worst nightmare,’” obscured his own worst nightmare—revocation of his liquor license. Whereas for months he cried crocodile tears over the citations he had not received, in fact, “[b]ecause of the gap between the violation and [nonexistent] punishment, Burlington area bars lost any incentive to comply with the ban.... ‘It was only when they took off the liquor license on the wall that

529Christinia Crippes, “Duncan’s License Revoked over Smoking Ban,” Hawk Eye (Burlington), Apr. 9 (1A) (NewsBank).
530Application for Stay Pending Judicial Review of Agency Action at 3, 8, 1, Coordinated Estates Services, Inc., d/b/a Otis Campbell’s Bar & Grill v Iowa Department of Commerce, Civil No. CVEQ008591 (Des Moines County Dist. Ct., Apr. 15, 2009); Petition for Judicial Review of Agency Action, Coordinated Estates Services, Inc., d/b/a Otis Campbell’s Bar & Grill v Iowa Department of Commerce, Civil No. CVEQ008591 (Des Moines County Dist. Ct., n.d. [Apr. 17, 2009]). The ABD website lacks the application that Duncan filed with the agency. It is unclear how Duncan’s lawyers believed they were enhancing his chances for securing a stay by claiming that throughout the ABD proceedings he had “[i]n his defense...maintained that the passage of the Act was highly political....” Application for Stay Pending Judicial Review of Agency Action at 5-6, Coordinated Estates Services, Inc., d/b/a Otis Campbell’s Bar & Grill v Iowa Department of Commerce, Civil No. CVEQ008591 (Des Moines County Dist. Ct., Apr. 15, 2009).
531Christinia Crippes, “Duncan Pushes for a Court Battle,” Hawk Eye (Burlington), Apr. 16, 2009 (1A) (NewsBank) (ellipsis in original).
[they] brought us to our knees.” No one was more acutely aware of ABD’s crucial enforcement role than Walding: with bars and restaurants accounting for 53 percent of all 1,015 business to which IDPH sent notices of potential violations during the law’s first year of operation, Walding knew that “license revocation fears have helped compliance immensely”—to the extent that “we’re starting to see that the resistance is kind of burning out throughout the state.” And the nightmare lived on since, as Walding observed, if the courts ultimately upheld or invalidated only exemptions, “then the ABD can impose the suspensions or revocations when it chooses. ‘Once it’s decided, it’s over.... We have complete control once it’s gone through the whole process.’” Moreover, Duncan’s obsession blinded him to the fact that far from being any kind of nightmare at all, a decision by the Iowa Supreme Court striking down the casino exemption would hand the anti-smoking legislators, whom he and his fellow barkeepers incessantly excoriated, the expanded coverage that majority rule had put beyond their reach, thus bringing Iowa that much closer to a universal ban on indoor smoking in public places. As they could have learned from House Speaker Murphy on the eve of the Act’s going into effect: “[L]awmakers anticipated a potential legal challenge and carefully crafted the ban. Should a court eventually rule that drawing a distinction between casinos and bars is discriminatory, the result would be banning smoking in casinos rather than allowing smoking in bars.... ‘We made sure of that’”

Despite Duncan’s continued bravado, on April 17, Walding granted a conditional stay pending judicial review of the agency’s action even though Duncan had failed to satisfy the four-part statutory test. Without revealing his reason(s), Walding expressed his willingness to grant the stay “subject to one condition”—already suggested in the final order—namely, that Duncan agree to comply with the Smokefree Air Act during the pendency of the appeal. Why Walding would have conferred such administrative mercy on an applicant who

536Christinia Crippes, “Paddlewheel Takes Deal,” Hawk Eye (Burlington), May 13, 2009 (2A) (NewsBank).
had not only “not...sufficiently made the case for the granting of a stay,” but had “elected to follow a risky course of action, thereby placing his liquor license at peril” by having “mistakenly assumed that he can ignore the law until the statute is declared to be constitutionally valid”\textsuperscript{538} he did not explain until much later. Asked whether it had been a foregone conclusion that if he had not granted a stay, the district court would have, Walding replied: “No, in fact the Division, through the Iowa Attorney General’s Office, has an established practice of resisting judicial stays whenever the state does not grant a stay. As the goal all along has been SFAA compliance, and not to put licensees out of business, I deemed the stay appropriate provided the licensee could assure me of his future compliance. Frankly, I also deemed it a victory to gain the compliance of the ban[’]s leading protagonist. Nor was I interested in making the licensee a martyr [sic] for his cause and constituency.”\textsuperscript{539} The deal was sealed the next morning when Duncan, eating the crow he had sworn would never touch his lips, faxed Walding a handwritten note agreeing to “abide by”—which arguably fell short of the condition that he “comply with”—SFAA from that moment until the Iowa courts made a final determination as to its constitutionality.\textsuperscript{540} Duncan sought to make it clear that he had not bowed down to the wannabe “queen” after all by claiming

\textsuperscript{538}Order Conditionally Granting Stay, In re Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Docket No. D-2008-00080 (Iowa Alcoholic Beverages Div., Apr. 17, 2009). The four statutory factors that a court was required to consider and balance before granting a stay of agency action were: (1) extent to which plaintiff was likely to prevail on merits; (2) extent to which applicant would suffer irreparable harm if relief was not granted; (3) extent to which granting relief would substantially harm other parties; and (4) extent to which public interest relied on by agency sufficed to justify agency action. Iowa Code § 17A.19(5)(c)(1)-(4) (2009).

\textsuperscript{539}Email from Lynn Walding to Marc Linder (Aug. 1, 2009).

\textsuperscript{540}L. Duncan to Administrator Walding (Apr. 18, 2009), attached to Order Conditionally Granting Stay, In re Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Docket No. D-2008-00080 (Iowa Alcoholic Beverages Div., Apr. 17, 2009). See also Christinia Crippes, “Alcohol Served Again at W.B. Bar,” \textit{Hawk Eye} (Burlington), Apr. 19, 2009 (3A) (NewsBank). Larry Duncan appeared to renege on that promise when he insisted that “[i]f the people of Iowa have a say and can vote on the constitutionality of it [i.e., the smoking ban in bars and restaurants], they [i.e., the State of Iowa] could design a law around that, I’ll be smoke free.” “Bar Owner Takes State to Court over Smoking Ban,” KWQC (Davenport) (Nov. 25, 2009), on http://www.kwqc.com (visited Dec. 5, 2009); http://www.smokersinfo.net/bar-owner-takes-state-to-court-over-smoking-ban/ (visited Feb. 1, 2011). Duncan’s reading level—“A 4th grader could read the constitution and know this law is not constitutional. It’s not fair and equitable for everybody”—can be gauged by the fact that Iowans have no right to pass on laws’ constitutionality.
that he had “‘chosen to comply with the act’” on his own terms—namely, “‘[n]ow that I have accomplished my goal of getting this question of constitutionality of the Smokefree Air Act to the...District Court level....’” Walding’s press release, archly titled, “Otis Campbell’s Goes Smoke Free,” made it clear that the state apparatus had retained the upper hand: “After over nine months of open defiance of the Smokefree Air Act...owner L.A. ‘Larry’ Duncan has agreed to obey the smoking ban, at least for now.”

A few days after nibbling on the faux crow, Duncan reassembled his Freedom Fighters for All Citizens of Iowa for “a whole lot of venting frustration” cum fundraising, presumably to pay the fees for lawyer Bunger, who was present “acting as a voice of calm amongst the panic of the bar owners, who fear they’re losing their business at a rate that will cause them to close their doors for good.” The hyperventilatory hyperbolic mood was set by a retired army major who predicted that “‘[t]his battle is going to...get uglier’” and Duncan’s own bar manager, who declared that he was “fighting the statewide smoking ban for the sake of his children’s freedom.” Perhaps the group’s out-of-touchness was best exemplified by the defrocked commander of Veterans of Foreign Wars Post No. 775 in Ottumwa, yet another center of resistance in the state’s southeastern quadrant. At a juncture when about half of the states had already enacted statewide smokefree laws and more were in the pipeline, Dennis Whitson assured his ilk in attendance that “‘the nation is watching what we’re doing here, and if we lose this the whole nation is going to lose.’” Some insight into the Freedom Fighters’ collective psyche can be gleaned from his views and behavior. After the VFW Post had racked up five notices of potential violations, Commander Whitson admitted that he had not been complying with the law and testified at an

541Christinia Crippes, “Duncan to Ban Smoking While Fight Goes On,” Hawk Eye (Burlington), Apr. 18, 2009 (1A) (NewsBank).
543Christinia Crippes, “Duncan Rallies Support,” Hawk Eye (Burlington), Apr. 23, 2009 (1A) (NewsBank).
544In Ottumwa three bars paid a $1,000 fine in addition to having their licenses suspended for one week; a fourth’s was suspended for 30 days. Iowa SFAA Status Report (July 24, 2009), on http://www.iowaabd.com/smokefree/SFAAcases.pdf.
545Christinia Crippes, “Duncan Rallies Support,” Hawk Eye (Burlington), Apr. 23, 2009 (1A) (NewsBank).
administrative hearing on March 16 that “he cannot in good conscience send a veteran outside to the parking lot to smoke.” Little wonder that the ALJ in her Proposed Decision ordered the VFW Post’s license revoked. For his part, Whitson also took the naïve line that the Act was unconstitutional because it set “the interests of some businesses above others,” throwing in the non sequitur that a “high school debate class could have passed a more comprehensive law than the Legislature did.” Whitson’s scofflawry was too much even for the State VFW, which removed him from his position for having broken the law and violated the organization’s bylaws, and being an “embarrassment to the V.F.W.” Whitson apparently went off the deep end of rugged individualism, complaining that “[w]e have lost the ability to take care of ourselves. That is why our post chooses to ignore this unconstitutional law, because we still have that choice.” He saw the perpetrators of the Smokefree Air Act as promoting the advent of apocalyptic “One world government.”

In latter half of April, as Duncan’s prosecution shifted into state and federal court constitutional adjudication, enforcement officials finally focused on Des Moines County, the epicenter of “the uprising” with Otis Campbell’s leading the charge. Perhaps this slashing editorial in the Burlington press in March helped motivate IDPH/ABD to crack down inn Des Moines County:

Duncan has refused to ban smoking in his Otis Campbell’s Restaurant and Bar in West Burlington. Though the local police investigated and found the law was being disobeyed,
the City Council lacked the guts to back a citation that would require Duncan to go to court, which is where he hopes to prove the ban unconstitutional but likely will not.

Rather than boldly tackle the affront to law and order, the city pushed into the lap of the Iowa Alcoholic Beverages Division the question of whether Duncan should forfeit his liquor license for being a blatant scofflaw. The agency suspended his license for not complying but Duncan remains open for business—and his smoking customers’ pleasure—while his appeal is working through the legal system. ...  

Every day, down the street from West Burlington City Hall, the law against smoking in public places is being broken. Other bars have joined the revolt. No one seems to care. 552

In a dozen counties valid complaints had been filed against a larger proportion of businesses, but Des Moines County businesses had recorded the greatest number of complaints. 553 This southeastern county was selected because it had displayed “the strongest resistance” to the Act, but if ABD discovered “‘pockets of resistance’” elsewhere, Walding was prepared to extend the pilot program to such counties too. 554 Having sent two agents who checked eight establishments there and found five violating the smoking ban, Walding decided to carry out more targeted investigations. Taking a longer view, he drew a comparison to the earlier experience with the seatbelt law, stressing that it had taken a while for the public to “‘recognize that paradigm shift in thinking.’” 555
In a press release on April 20, Walding announced that ABD planned to check all 68 of the county’s on-premises licensed establishments; the initiative would continue until the compliance rate improved, leaving the non-compliant to face administrative hearing complaints. Ratcheting up the pressure, he suggested that those who settled before the hearing could expect a seven-day suspension and $1,000 civil fine, while licensees found in violation after a hearing faced a 30-day suspension if they then became compliant and the risk of revocation if they did not. 556 (To be sure, by settling, bar owners in some cases were in a position to

552Mike Sweet, “Dubious Fighters,” Hawk Eye (Burlington), Mar. 8, 2009 (8A) (edit.)
553Christinia Crippes, “State Plans Bar Checks,” Hawk Eye (Burlington), Apr. 21, 2009 (1A) (NewsBank).
subvert the suspension’s deterrent effect by negotiating for its scheduling for a week when they took vacation or made repairs, as Walding put it, “‘so it isn’t a total loss for them during that period.’”) 557 On April 28 ABD initiated a pilot program of random site visits in Des Moines County to be continued over a number of weeks “‘until we get full compliance.” 558 To a meeting the previous day of business owners preoccupied with the disparity between casinos and bars Burlington native Walding, with brutal frankness uncharacteristic of Iowa bureaucrats, left absolutely no doubt as to the smokeless future that rendered their rhetoric and resistance obsolete: “‘If your business model is based on smoking, it’s an archaic business model.’” He also passed a similar judgment on their litigation strategy by noting that even if the casino exemption were judicially invalidated—“something...a lot of us are hoping—the ban would remain otherwise intact. 559 In a piquantly titled up-beat press release (“Des Moines County Licensees Stomp Out Cigarettes”) Walding was “‘thrilled’” by the 81-percent compliance rate, which was a “huge step forward,” especially since none of the 11 non-compliant bars had been found allowing smoking, but instead had violated signage or ashtray provisions. Since ABD had forewarned bar owners of the looming inspections, he had expected a high compliance rate and announced that the random checks would continue until full compliance was attained. 560 To be sure, Walding decided to “‘focus...on the problem, where it should be’” so that checks would “cease for those bars that have corporate policies in place to ban smoking or that have no residual tobacco scent lingering.” 561

At the same time, despite the publicity surrounding this targeted enforcement effort, the Department of Public Safety filed administrative hearing complaints with ABD against bars in two other southeastern towns (Keokuk and Donnellson)

557Christinia Crippes, “Paddlewheel Takes Deal,” Hawk Eye (Burlington), May 13, 2009 (2A) (NewsBank).

558Christinia Crippes, “State Plans Bar Checks,” Hawk Eye (Burlington), Apr. 21, 2009 (1A) (NewsBank).

559Christinia Crippes, “Smoking Ban Checks Begin Today in DMC,” Hawk Eye (Burlington), Apr. 28, 2009 (3A) (NewsBank).


561Christinia Crippes, “Smoking Ban Compliance Up to 81 Percent,” Hawk Eye (Burlington), May 5, 2009 (1A) (NewsBank).
for the first time. 562 Faced with this metastasis, Walding explained the phenomenon as in part resulting from the serendipity of what had been (at least until the previous week) a complaint-driven system. More ominously, however, he also regarded it as “‘kind of the resistance effort of the Freedom Fighters kind of centralized out of southeast Iowa.’”

During the second week of ABD’s checks in Des Moines County the compliance rate edged up to 85 percent, but at one of the violators an investigator observed people openly smoking without any attempt by the licensee’s employees to correct the violations. 563 Then during third week in mid-May, the compliance check program “hit a wall,” prompting Walding to observe that “‘[w]e took a heavy dose of some hard medicine here.’” 564 Not only did the compliance rate plummet from 85 to 54 percent, but at three of 11 violators investigators witnessed smoking, including in one case by the bartender at a VFW Post in Burlington; 565 another represented recidivism from the previous week and led to the filing of a administrative hearing complaint, 566 the seventh against a bar in Des Moines County. 567 During the remaining three weekly checks the ABD observed no more smoking and the compliance rates rose to 80 and 96, and finally reached the goal of 100 percent in the sixth week. 568


563 Christinia Crippes, “Smoking Ban Compliance Up to 81 Percent,” Hawk Eye (Burlington), May 5, 2009 (1A) (NewsBank).


567 Hearing Complaint at 4, In re Jan Beach, d/b/a Bucktail Lodge, Docket No. D-2009-00063 (Iowa Alcoholic Beverages Div., n.d. [May 29, 2009]).


569 Iowa Alcoholic Beverages Division, “Des Moines County Tobacco Enforcement
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

The turnabout in the one-time “‘hotbed area’” Walding attributed in part to owners’ having learned from Duncan’s and Froehlich’s cases that violating the Smokefree Air Act could bring significant economic consequences beyond a $100 penalty in its wake. Compliance was also promoted by owners’ perception that competitors were “not profiting or benefiting by violating the law....” And, finally, the real-world experience that their own compliance did not hamper their business removed yet another motivation for cheating: “‘At the end of the day, despite some of the warnings, the sky didn’t fall,’ Walding said. “To my knowledge, we haven’t had any bars drop out or lose enough business that they’re throwing in the towel. That really hasn’t happened. The “Chicken Little” philosophy really hasn’t materialized.”

He acknowledged that the state was unable to calculate accurately whether any bars had gone out of business and whether such exits were attributable to the smoking ban, but Walding was of the opinion that “[t]o the extent that anything is having an impact on licensees, it’s three things and that’s recession, recession, recession.” Significantly, in Burlington, the vortex of the alcoholic rebellion against the Smokefree Air Act, a search by the city clerk’s office “did not yield any liquor licensed establishments going out of business during the last year.”

As for the need to replicate the special Des Moines County enforcement regime elsewhere in Iowa, by August 2009 Walding was not aware of any other area of the state with a concentration of disobedience as great as that which had existed in Des Moines County. In addition, the overall compliance rate among bars in the state has shown a marked improvement since the administrative sanctions were meted out this past spring. That said, I plan to closely monitor the compliance rate as the inclement weather approaches. Right now it is fairly easy for a bar to comply as patrons can simply walk outside of a licensed premises to light up. Whether

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570Christinia Crippes, “ABD Checks Yield 100 Pct Compliance,” Hawk Eye (Burlington), June 10, 2009 (3A) (NewsBank).

571Christinia Crippes, “Bar Check Efforts Rise,” Hawk Eye (Burlington), June 2, 2009 (1A) (Newsbank).

572Christinia Crippes, “ABD Checks Yield 100 Pct Compliance,” Hawk Eye (Burlington), June 10, 2009 (3A) (NewsBank).


that remains the case when winter returns remains to be seen. If not, the random checks may expand to another area of the state.\textsuperscript{575}

Some bar owners violating the Smokefree Air Act sought to justify their offenses by stylizing them as noble and courageous acts of civil disobedience. Their lawyer reinforced this narrative. Speaking at a fundraising rally that one of his clients, Larry Duncan, and his Freedom Fighters for All Citizens of Iowa organized to collect the money to pay him, Darwin Bunger first claimed that he was “not fighting the smoking ban for the fees, but rather because as a citizen he feels the state is not right.” Why under these idealistic circumstances he had not accepted the cases pro bono he failed to explain, but he did tell the pro-smoking crowd that at church on Sunday he had opined that he would win.\textsuperscript{576} Even the Burlington press recognized that “[f]ortunately, Duncan has local attorney Darwin Bunger, who not only represents him but believes in his cause.” As a true believer Bunger appears to have forgotten that Iowa was not a nation: “‘The legislators have a legal and moral obligation to do the best of their ability when passing a law to comply with the supreme law of the land, the Iowa Constitution.’”\textsuperscript{577} However, “‘many of them knew at the time’” that the Smokefree Air Act “‘probably was, or even in their hearts knew was unconstitutional...and we just have to reign [sic] in on that kind of conduct.’”\textsuperscript{578} Bunger was such a full-service lawyer that, after a Burlington city council member had characterized the law-breaking bar owners as creating anarchy,\textsuperscript{579} he published a letter to the editor glorifying the violators: “By a slim majority, Iowa Legislators passed the Smoke Free [sic] Air Act. Many of them voted for the act knowing or suspecting that the Act was in violation of the Iowa Constitution. Others should have known it, if they really did not. That tyrannical action by the legislators in violation of their sworn oaths to uphold the Iowa Constitution was the father of any alleged anarchy. The people and their Constitution must take precedence over any given legislature or legislator in a free society.”\textsuperscript{580} Having

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\item \textsuperscript{575}Email from Lynn Walding to Marc Linder (Aug. 3, 2009).
\item \textsuperscript{576}Christinia Crippes, “Duncan Rallies Support,” \textit{Hawk Eye} (Burlington), Apr. 23, 2009 (1A) (NewsBank).
\item \textsuperscript{577}Christinia Crippes, “Otis Campbell’s Owner Keep Fighting,” \textit{Hawk Eye} (Burlington), Jan. 9, 2009 (1A) (NewsBank).
\item \textsuperscript{579}Jeff Abell, “Council Stays Out of Smoking Ban Fight,” \textit{Hawk Eye} (Burlington), Apr. 1, 2009 (1A) (NewsBank).
\item \textsuperscript{580}Darwin Bunger, “Tyrannical Action,” \textit{Hawk Eye} (Burlington), Apr. 6, 2009, on
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baptized his client a virtuous tyrannicide and made common cause with him, Bunger nevertheless failed to explain how legislators “should have known” the Iowa Supreme Court would hold that exempting casinos was unconstitutional when the weight of the Court’s privileges and immunities precedents spoke against such a conclusion, the attorney general took that position, and none of the many state anti-smoking laws had been invalidated.

Hyperbole—if Bunger and Eichhorn were even self-conscious enough to perceive that figures of speech that an audience cannot take literally constitute an inept litigational strategy vis-a-vis judges—also pervaded the brief that they submitted to the Des Moines County District Court in Duncan’s constitutional challenge to SAA. Typical were the assertions, for example, that were supposed to shore up the claim that the statute was unconstitutional because it violated the federal Commerce Clause. They climaxed in the bizarre, ignorant, false, and illiterate declaration that: “This statute is not different than if [sic] Kentucky decided that corn was unhealthy [sic] and passed a law prohibiting (or severely restricting) its consumption. Both interfere with interstate commerce. A state cannot remove themselves [sic] from the free market that formed this country.”

In turn, Bunger-Eichhorn rested their triumphant call for invalidation on their delusional assertion—for which they cited no source whatsoever and which even Philip Morris’s website rejected—that the science concerning secondhand


582 “Public health officials have concluded that secondhand smoke from cigarettes causes disease, including lung cancer and heart disease, in non-smoking adults, as well as causes conditions in children such as asthma, respiratory infections, cough, wheeze, otitis media (middle ear infection) and Sudden Infant Death Syndrome. ...”

“Philip Morris USA believes that the public should be guided by the conclusions of public health officials regarding the health effects of secondhand smoke when deciding whether to be in places where secondhand smoke is present, or if they are smokers, and where to smoke around others. Particular care should be exercised where children are concerned and adults should avoid smoking cigarettes around them.

“We also believe that the conclusions of public health officials concerning environmental tobacco smoke are sufficient to warrant measures that regulate cigarette smoking in public places. We also believe that where cigarette smoking is permitted, the government should require the posting of warning notices that communicate public health officials' conclusions that secondhand smoke causes disease in non-smokers.”

smoke was “not conclusive. The State argues cause and effect when there is nothing more than correlation. In fact, there is compelling expertise and expert testimony available showing that the alleged ‘science’ relied upon by the legislature to assert the claim of concern for the public and employee health is merely conjecture....” Duncan’s lawyers eloquently displayed their own multiple expertises by observing that the “legislatively relied upon ‘science’ is more in the realm of antidotal [sic] information and self reporting.” Hence their non-joke about the corn-free Kentucky act (for which they provided no antidote).

However, Bunger-Eichhorn had to pile up far more utter nonsense in order to reach this punch-line. In particular, in the end they did not even shy away from planting the seed of suggestion to readers that state cigarette taxes (which Iowa had pioneered in 1921) were unconstitutional interferences with interstate commerce. Their childish primitive claims stumbled along these lines. Suppressing the fact that many other states had initiated similar and more far-reaching interventions without having been sanctioned for interfering with interstate commerce, they began with Iowa’s “systematic effort to burden and discriminate against tobacco products,” of which SAA was but “one example” of the state’s “trying to stop the lawful consumption of tobacco products.” Initially, Bunger-Eichhorn were content to state that the Legislative Services Agency had apprised the legislature (on April 9, 2008, the day that legislature passed H.F. 2212) that LSA estimated that the law would reduce the dollar amount of cigarette sales by four percent. (In fact, this figure scarcely even merited the label of an estimate. This number emerged from information provided by the Illinois Department of Revenue, less than three months after the Smoke-Free Illinois Act had gone into effect on January 1, 2008, to the Iowa Department of Revenue. However, rather than having even been derived from Illinois’ very short-run data, the 4.0 percent figure originated in a nine-year-old World Bank report based on unidentified studies based on unexplicated methodologies.)

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584 See above chs 15 and 19.


586 Mary Beth Mellick, “HF 2212—Smoking Ban in Public Place (LSB 5743 CH)” (Fiscal Note Version—Conference Committee Report), Fiscal Services Division, Legislative Services Agency (Apr. 9, 2008), on http://www3.legis.state.ia.us/fiscalnotes/data/82_5743CHv0_FN.pdf; telephone interviews with Mary Beth Melnick and Jeff Robinson, Des Moines (Dec. 1 and 3, 2009). According to Senior Legislative Analyst Jeff
Indeed, the LSA merely “assumed” a 4.0 percent drop.587 Bunger-Eichhorn then transmogrified this scantly assumption into the legislature’s “intention that people not participate in the commerce of tobacco products” and, without any evidence, risibly asserted that the “Anti-Smoking Act tries to prevent most usage of tobacco products....”588 Duncan’s lawyers also claimed that there was “ample evidence this statute seeks to interfere with, and unconstitutionally hinder, the commerce of tobacco and should be ruled to violate the commerce clause” on the grounds Robinson, the assumption arose as follows: “If there are fewer places in Iowa where cigarettes can be legally consumed, it is assumed the result will be fewer cigarettes smoked and fewer cigarette sales. The [Iowa] Department of Revenue provided the estimate for reduced cigarette sales, and that estimate is a reduction in cigarette sales of 4.0%. The Department cites a study by the World Bank [that] estimated that smoking bans reduce cigarette consumption in the range of 4% to 10%.” Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) at 1 (Mar. 17, 2008) (copy furnished by Jeff Robinson). The World Bank report merely stated without furnishing any sources that: “A second effect of smoking restrictions is that they reduce some smokers’ consumption of cigarettes and induce some to quit. In the United States, such restrictions have reduced tobacco consumption by between 4 and 10 percent, according to various estimates. For such restrictions to work, it appears that there must be a general level of social support for them, and an awareness of the health consequences of exposure to environmental tobacco smoke. Outside the United States, there are comparatively few data on the effectiveness of indoor smoking restrictions.” World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control* ch. 4 (1999), on http://www1.worldbank.org/tobacco/book/html/chapter4.htm. The Department of Revenue and LSA opted for the lower end of the range merely because it sounded better, though Robinson did not believe that the legislature would have defeated the bill had LSA opted for 10 percent. Telephone interview with Jeff Robinson, Des Moines (Dec. 1 and 3, 2009). Any robust estimate would have to have taken into account the proportion of public places that had been smoke-free before the law went into effect and how extensive the ban was. For the claim that per capita cigarette consumption of the entire adult population of the United States would decline 4.5 percent if all workplaces that were not smokefree banned smoking, see Caroline Fichtenberg and Stanton Glantz, “Effect of Smoke-Free Workplaces on Smoking Behaviour: Systematic Review,” *British Medical Journal* 325:188 (July 27, 2002).

587 Mary Beth Mellick, “HF 2212—Smoking Ban in Public Place (LSB 5743 CH)” (Fiscal Note Version—Conference Committee Report), Fiscal Services Division, Legislative Services Agency (Apr. 9, 2008), on http://www3.legis.state.ia.us/fiscalnotes/data/82_5743CHv0_FN.pdf

that the passage in 2007 by the same elected General Assembly of bills to increase the tobacco tax and to create fire-labeling requirements on cigarettes “demonstrate a legislative intent to diminish to the greatest extent possible or even destroy the Iowa market for legal tobacco products.” These assertions were as absurd as Bunger-Eichhorn’s false claim to the court that they were directly supported by (“See”) two U.S. Supreme Court decisions, which in fact not only had absolutely nothing to do with them, but dealt exclusively with an aspect of interstate commerce that was totally lacking in the case of the SAA—namely, discrimination against out-of-state business and in favor of local business.\(^589\) Unsurprisingly, the bar owner’s lawyers did not even try to account for why the cigarette tax in no other state had—despite the facts that in 21 states it was higher than Iowa’s\(^590\) and in all states amounted to more than $15 billion annually,\(^591\) every state except Wyoming has passed a fire-safe cigarette law,\(^592\) and most and a growing number of legislatures had passed statewide nosmoking laws\(^593\)—been held to be an unconstitutional interference with interstate commerce.

The only legal argument on which Duncan might even have had the slightest shred of a chance of prevailing would, as has already been noted, have been a Pyrrhic victory for him and other bar owners, since even the invalidation of the exemption of casinos on equal protection grounds would merely result in their coverage, not in bars’ exemption.\(^594\)

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\(^589\)Brief in Support of Petition for Judicial Review at 68, Coordinated Estate Services Inc., d/b/a Otis Campbell’s Bar & Grill/Aunt Bea’s Cafe v Iowa Dept of Commerce, No. CVEQ008591 (Des Moines Cty Dist. Ct., July 24, 2009). The cases were City of Philadelphia v New Jersey, 437 US 617 (1978) and Carbone, Inc. v Town of Clarkstone, NY, 511 US 383 (1994). It is unclear whether the lawyers ignorantly or intentionally misinformed the judge.

\(^590\)http://www.tobaccofreekids.org/research/factsheets/pdf/0267.pdf (visited Dec. 2, 2009). At $4.25, the combined New York State/City tax was more than three times higher than Iowa’s.


\(^594\)As the State argued: “Should the Court ultimately conclude that the State of Iowa could not rationally exempt these dissimilar entities from regulation..., the Iowa ABD’s disciplinary action against Otis Campbell’s would still stand.” Respondent’s Brief in Support of Resistance to Petition for Judicial Review at 40 n.7, Coordinated Estate Services Inc., d/b/a Otis Campbell’s Bar & Grill/Aunt Bea’s Cafe v Iowa Dept of Commerce, No. CVEQ008591 (Des Moines Cty Dist. Ct., July 24, 2009).
Bunger and Eichhorn remained in their hyperbolic prime at the two-hour hearing before Des Moines County District Judge Mary Ann Brown on November 17. Eichhorn, for example, claimed that the enforcement procedure was flawed because “basically” ABD “has pursued what I would consider a terror-type approach, much like the (Internal Revenue Service).... They want to terrorize people so that they will comply, and they will pretty much do what they need to do to get there.” Gamey trying to defend the casino exemption, Assistant Attorney General John Lundquist argued that the economic impact of gambling revenues on the state—citing a study indicating that prohibiting smoking in casinos would reduce state revenues by 10 percent or $31 million—made casinos different, whereas the revenue impact of the smoking ban in bars and restaurants was zero.\footnote{Christinia Crippes, “Smoking Ban Battle Hits Courtroom,” \textit{Hawk-Eye} (Burlington), Nov. 18, 2009, on http://www.thehawkeye.com.} Unfazed by his lawyers’ legal position that the casino exemption violated the state and federal constitutions, Duncan was content to proselytize for make-believe nineteenth-century rugged-individualist profit-making: he did not “want to take away gambling business’s [sic] right to allow smoking. He just wants all business owners to have the right to operate their establishments as they Commerce, No. CVEQ008591 (Des Moines Cty Dist. Ct., Sept. 4, 2009). Nevertheless, the State failed to come to grips with the major doctrinal issue that Duncan’s lawyers raised. To state that a “desire to maintain the economic vitality and success of Iowa’s licensed casinos is a valid and rational reason for the Legislature to exclude casino gaming floors from the Smokefree Air Act’s regulation” simply because the “State of Iowa and its political subdivisions directly benefit from the operation” of the casinos inasmuch as they use the resulting tax revenue for numerous construction and job programs (\textit{id.}, at 46-47), does not address the question as to whether the similar-situatedness as between regulated bars and exempt casinos must relate to what the legislature designated as “[t]he purpose” of the SAA—namely, “to reduce the level of exposure by the general public and employees to environmental tobacco smoke in order to improve the public health of Iowans” (H.F. 2212, § 1(3))—or whether this other purpose that it serves (namely, maintaining the state’s tax revenues) is wholly unrelated to the statutorily identified purpose, thus rendering the discrimination between casinos and bars “wholly arbitrary” because “such a classification is not based on anything having relation to the purpose for which it is made.” Smith \textit{v} Cahoon, 283 US 553, 567 (1931) (quoting Air-Way Electric Appliance Corp. \textit{v} Day, 266 US 71, 85 (1924)). The State might have bolstered its argument had it specified that some of the tax revenue that would have been lost as a result of casino coverage would have been used for programs to improve the public health of Iowans. This language from the statutory purpose might also have aided the State’s argument: since casino owners claimed that a very high proportion of their customers were out-of-state visitors and since improving non-Iowans’ health was not a statutory purpose, a smoking ban in casinos was not a high priority.
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

Judge Brown’s ruling four and a half months later, though not well researched, did not need to be in order to reject out of hand Bunger-Eichhorn’s plethora of absurd, threadbare, and frivolous arguments. As predicted earlier, the only one that she even took seriously—calling it “the Bar’s...most compelling...argument” was possible only in comparison to the lawyers’ otherwise wholly implausible ones—was the equal protection claim based on the casino exemption. Because Brown found no credible argument that smokers were a suspect or even quasi-suspect class, she was able to use the “very deferential standard known as the rational basis test,” under which Duncan bore the very see fit.”


597For example, the judge quoted a U.S. surgeon general’s report on secondhand smoke secondhand from a second-year law student’s article in a law review. Coordinated Estate Services v. Iowa Department of Commerce, Ruling and Judgment on Petition for Judicial Review, No. CVEQ008591, slip. op. at 14 (Iowa Dist. Ct for Des Moines Cty., Mar. 31, 2010). Ironically, the author of the article, which dealt with the very issue that the judge was deciding, was unaware that a lawsuit was pending. Kevin Sherlock, “Clearing the Air: Analyzing the Constitutionality of the Iowa Smokefree Air Act’s Gaming Floor Exemption,” Iowa Law Review 95:347-92, at 363-64 (2009) (not realizing that a constitutional judicial challenge of ABD’s administrative action survived dismissal of the state court action). On the judge’s mistaken historical claim based on a source that did not make such a claim, see above Preface.

598For example, the court rejected the Bar’s claim that ABD lacked authority to punish the Bar for violating SAA because no judicial magistrate had ever cited it for so doing on the grounds that ABD’s enforcement of SFAA was not at issue, but that of the Alcoholic Beverage Control Act, which confers on ABD authority to sanction a law-breaking liquor license holder. Since the “Bar freely admits” that it had violated SAA, ABD was justified in acting against its license. Coordinated Estate Services v. Iowa Department of Commerce, Ruling and Judgment on Petition for Judicial Review, No. CVEQ008591, slip. op. at 5-6 (Iowa Dist. Ct for Des Moines Cty., Mar. 31, 2010). The court rejected the Bar’s claim that prohibiting it from permitting its customers to smoke while selling liquor to them denied it a privileged and immunity enjoyed by other businesses because holding a liquor license already subjected the Bar to numerous restrictions from which other businesses were free. Id at 7-8. Finally, Judge Brown rejected Duncan’s lawyers’ bizarre commerce clause claims on the grounds that SAA neither regulated nor restricted the sale of tobacco in Iowa nor had the effect of favoring in-state over out-of-state economic interests. Id. at 18.

Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

heavy burden of refuting every reasonable basis on which the differential classification might be sustained.\textsuperscript{600} The threshold issue that the Bar had to resolve in its favor was that it was similarly situated to the locations exempt from the SAA. Although the court quickly decided that bars were not similarly situated to any of those locations (such as limousines, retail tobacco stores, or fairgrounds), it conceded that casinos presented the closest question, but even the “several superficial similarities to bars and restaurants” (which it did not reveal) could not hide the crucial facts that only casinos were licensed for gambling and the tax and regulatory structures were “radically different.”\textsuperscript{601} Judge Brown could have disposed of the case at this point, but, proceeding on the assumption that bars were similarly situated to the exempt locations, she scrutinized the rational basis for the legislature’s classification.\textsuperscript{602} “Simply put,” the “plausible policy justification” that the court identified was that “the State would lose too much money by banning smoking in gambling areas” and that this money was “spent in a variety of ways that directly benefit the citizens of Iowa.”\textsuperscript{603} In other words, Brown failed to engage the aforementioned jurisprudential question as to whether the similar-situatedness has to relate to the legislature’s designated statutory purpose or whether the other purpose of maintaining the state’s tax revenues is wholly unrelated to SAA’s purpose, thus arbitrarily discriminating between casinos and bars because that classification is unrelated to the purpose for which it is made.

In a parting shot at a litigant and his lawyers for the quality of whose legal arguments she had not even bothered trying to conceal her contempt\textsuperscript{604} Judge


\textsuperscript{603}Coordinated Estate Services v. Iowa Department of Commerce, Ruling and Judgment on Petition for Judicial Review, No. CVEQ008591, slip. op. at 27-28 (Iowa Dist. Ct for Des Moines Cty., Mar. 31, 2010). Even under the “‘toothier’” Iowa (as contradistinguished from federal) equal protection standards Judge Brown found that the classifications passed muster as rationally related to a legitimate governmental purpose. \textit{Id.} at 29-31.

\textsuperscript{604}For example, Brown referred to “what can only be an attempt to distract the Court, the Bar begins its written argument with a lengthy recitation of ancient
Brown closed by underscoring that even if she had found that the law did unfairly discriminate between Duncan’s bar and casinos, “the Bar would still lose...its liquor license...because...the remedy would be for the Court to strike the constitutional provision from the statute,” thus banning smoking in the casinos.  

Stressed, inter alia, by legal fees, Duncan gave up. Bunger, who opined that if his client “continued to fight and continued to lose, it ‘would kill him,’” may have been trying to keep his stake alive—“seven bars across the state...have asked for a judicial review of the case, a few of which are represented by Bunger”—by professing a belief that “the case has a chance at the Iowa Supreme Court level.” In the event, these bar owners, having learned from Duncan’s expensive lesson, abandoned Bunger, who himself in a bravado-less interlude conceded that the Iowa Supreme Court “may well have sustained the district court” (if a paying client had enabled him to satisfy his curiosity). With judicial dockets cleared and bar owners’ rebellion subdued, Walding’s prediction rang true: “As we look back in another decade from now, we’re never going to believe that it ever was any other way than smoke-free.”  

**Leery Legislative Leadership Prevents Floor Debate of Bills to Strengthen or Weaken the Act During the 2009 Session**

Gronstal predicted...that there will be a lot of talk in the 2009 legislative session about
expanding or doing away with the state’s smoking ban, but not much action. “My prediction is that there won’t be consensus found on the issue and that nothing will happen on it.”

Even as the legislature was still debating H.F. 2212 some members declared—in part to rebut Republican charges of hypocrisy—their resolve to return in 2009 to push for coverage of casinos. Health organizations, too, quickly announced a similar intention. For example, already by June the American Lung Association, which had been willing to let the bill go down to defeat for its exemption of casinos, was planning how to persuade legislators to extend the prohibition to casinos. Even some legislators who were not outspoken bill backers expected the exemption to be repealed in 2009. Opponents of some provisions of the Smokefree Air Act, who were content to revert to the days when Iowa’s air was less free of tobacco smoke, were also gearing up for revisions. Democratic Representative McKinley Bailey, who had so energetically annoyed his caucus with his nearly successful crippling attacks on the bill, was prepared to urge his colleagues (as early as at a special session in 2008, if one were called to deal with the destruction wrought by unprecedented flooding) to amend the statute to preclude IDPH’s “absolute abuse of power” in defining the bars that would be barred from permitting smoking on their outdoor patios. He nevertheless conceded at a local legislative forum in September that he saw “little chance” of repeal.

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610 See above ch. 35. Republicans should have been pressed to deal with their hypocrisy if they had refused to vote to cover casinos after having continually berated Democrats in 2008 for having exempted them. Ironically, when asked in 2009 whether he would vote to amend the law to cover casinos, Republican Senator James Seymour instinctively worried instead about being charged with hypocrisy if he voted for coverage despite his “whole premise” that government should not interfere with private businesses. Telephone interview with James Seymour, Woodbine (Aug. 17, 2009).


613 See above ch. 35.


Shortly thereafter Representative Brian Quirk, one of the few Democrats to vote against H.F. 2212, launched a (quickly deflated) trial balloon: in order to remedy the “inequity between casinos and bars” and to “ease bar owners’ concerns,” a small group of legislators was “quietly assembling a compromise to allow gambling devices in adult-only establishments....” Permitting video Keno would, he insisted, “go a long way toward keeping their [bars’] doors open.” Van Roekel and Sturgis, leaders of Choose Freedom Iowa, saw this initiative, which was merely “an effort to respond to voter angst over” the ban, as “grasping for solutions” by “big government legislators” who had finally been forced to acknowledge that the bar owners had been right all along that the law would create problems for small businesses.

Despite the initial flurry of amendatory preparations, a month before the elections anti-smoking forces understood that further progress toward statutory perfection would probably have to be suspended. The American Cancer Society’s lobbyist, for example, believed that at the 2009 legislative session (and perhaps for some time thereafter) anti-smoking groups’ chief task would be defending SAA from efforts to water it down rather than expanding its coverage by striking the casino exemption. That Democrats somewhat increased their control of both chambers for the 2009-10 session (from 53-47 to 56-44 in the House and from 30-20 to 32-18 in the Senate) may have confirmed Gronstal’s and McCarthy’s aforementioned prognoses that voters would not punish the party by electing Republicans with a mandate to restore public secondhand smoke exposure, but the legislative leadership refused to interpret the enlarged majority—or even the electoral losses by all candidates who specifically challenged incumbents on the basis of their votes for H.F. 2212—as the occasion for completing the unfinished work of 2008 by repealing the exclusion of the casinos’ gambling floors, which the law’s supporters and McCarthy himself

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616 See above ch. 35.
617 “Video Gaming Deal in Works for Bars?” Telegraph Herald (Dubuque), Sept. 16, 2008 (D5) (NewsBank).
619 Telephone interview with Stacy Frelund, ACS, Des Moines (Oct. 2, 2008).
620 http://www.legis.state.ia.us/aspx/Legislators/LegislatorInfo.aspx
621 “Talk @ 12,” WSUI (Iowa City), June 30, 2009, 12:00-1:00 p.m. (statement by Peggy Huppert, director of government relations, ACS).
deemed its most serious defect in need of correction. At the beginning of December McCarthy noted that there “‘may be some advocacy groups who don’t want the law touched for fear that it will open up a Pandora’s box,’” but he still lacked a sense as to where they or the Democratic caucus was at on the issue.

By mid-December the press was reporting that both Democratic and Republican legislators had already drafted bills running the gamut from extending the smoking ban to casino gambling floors to facilitating smoking on outdoor bar patios. At the very end of 2008, just two weeks before the 83rd General Assembly convened, Governor Culver not only predicted that the casino exemption “will not be changed anytime soon.... ‘I think it’s more likely we’ll leave it alone for a while,’” but attributed this outcome not to legislative calculation, but to popular satisfaction with a new equilibrium: “‘I think most Iowans believe that it’s a pretty good balance right now.’” Without unpacking this “balance” and explaining why the majority of state residents would have believed that casino corporations’ blunt power to hold the bill’s passage in the House hostage represented a desirable result, Culver went so far as to adopt pro-smoking forces’ market-knows-best excuse for opposing smoking bans altogether: “[t]here’s more likely is that the casinos will go nonsmoking on their own,” and in any event, “[i]t’s kind of a misconception that if you go to any casino, it’s all smoke-filled.” How low he had set his public health sights was on display in his expectation that casino management would adopt the wholly discredited designated smoking areas regime (that constituted the rotten core of Iowa’s law from 1978 until 2008) by “carv[ing] out smoke-free zones,” which apparently conformed with the expectation of the “‘general public’” that “‘there will be limited smoking and no smoking in most public places.’” Nor did he perceive any urgency since he had “not heard enough of an outcry to prompt him to suggest that lawmakers make casino gambling floors smoke-free” and “‘[u]nless

and until that changes, I think we’ve probably gone a lot further than most people would’ve thought.’’ The governor, who well into the 2008 session had supported only local preemption repeal without taking a position on a statewide ban, may well have included himself among that majority. Characterizing the smoking ban even without casino coverage as “extremely progressive,” he exaggerated Iowa’s achievement by claiming that “‘we’ve done what 40 or more states have not done....”’\textsuperscript{626}

Perhaps Governor Culver might have been willing to reconsider his self-satisfied attitude toward the “‘pretty good balance’” that condemned casino workers to continued exposure to secondhand smoke had he understood that air pollution (as measured by respirable suspended particles and carcinogenic particulate polycyclic aromatic hydrocarbons) even in well-ventilated casinos with nonsmoking areas is so heavy that a study in Pennsylvania by one of the world’s leading researchers in this discipline estimated that it would cause six deaths annually per 10,000 casino workers from secondhand smoke-induced heart disease and lung cancer—or five times the death rate from disasters in coal mines, Pennsylvania’s most dangerous industry.\textsuperscript{627}

Whether they were merely going through the motions or harbored the hope that political serendipity might yet resurrect bills that had been deemed stillborn even before they were introduced, advocates of both progress and regress filed a number of measures to amend the Smokefree Air Act. Perhaps emboldened by a New Year’s poll in the Cedar Rapids \textit{Gazette} revealing that 70 percent of respondents favored legislative action in 2009 to ban casino smoking,\textsuperscript{628} Democrat Mark Smith of Marshalltown, who had been conflicted about his role in creating the exemption for the veterans home there in 2008,\textsuperscript{629} announced a few days before the 83rd General Assembly opened that he would file a bill in the House to repeal the casino exemption: “‘Our goal was to assist with workers having to work long hours in smoke-filled environments...so I just felt that should be extended to casino workers.’” Mindful, however, of leadership’s “warnings that it is unlikely to pass,” he admitted that he was “‘not hopeful that it’s going to go very far....”’\textsuperscript{630}


\textsuperscript{629}See above ch. 35.

\textsuperscript{630}Fred Love, “Prepared Bills Touch on Smoking, Leaf Burning, Indecent Exposure,” 3650
On the session’s very first day, the American Cancer Society’s legislative update reported that “protecting” (rather than extending) the Smokefree Air Act was its highest priority in light of the Democratic leadership’s feeling that “it’s best not to take it up this session” because “there is a significant risk that the law could be weakened” if it were brought up. Thus, for the time being compliance and education would be the focus. The same day outgoing Representative Philip Wise, who had loyally assumed the task of pushing the amendment to exempt casinos in the House Commerce Committee, delivered the same message from a different perspective in admonishing his former colleagues that: “When you pass landmark legislation—and by [sic] anyone who knows anything about political and governmental history, that smoking ban was landmark legislation—...legislators simply do not revisit it the next year, unless there is some kind of technical flaw that has to be fixed.” Wise’s wisdom notwithstanding, that same day Smith, with no co-sponsors—“I wanted to pre-file the bill and did not have access to other members during the time we were not in session. I wanted to make sure the bill got in early to promote interest in it. I believe Tyler Olson was interested in signing on and maybe others”—introduced H.F. 6, which with admirable brevity consisted of one short sentence striking § 142D.4(10), the casino exemption. Unsurprisingly, already the next day lobbyists for two casinos declared against it and within a month nine more followed suit in addition to the Iowa Gaming Association. The House leadership promptly took the opportunity to remark that smoking bills would not be debated. House Speaker Pat Murphy—who in 2008 received $23,000 in campaign contributions from a casino PAC and who, according to

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631 Peggy Huppert, ACS, Iowa Director of Government Relations, Iowa Legislative Update (emailed to Marc Linder, Jan. 12, 2009). ACS’s other legislative priority was insuring continued funding for tobacco control programs in the wake of the depletion of tobacco trust fund (created by the Master Settlement Agreement) and the need to compete for appropriations from the general fund.

632 See above ch. 35.


634 Email from Mark Smith to Marc Linder (July 6, 2009).


637 The Peninsula Gaming Employees PAC originated in the company owning the Diamond Jo casino in Dubuque (Murphy’s hometown) and Worth. The PAC’s name was misleading since the lion’s share of the ca. $56,000 contributions to the PAC stemmed
the American Cancer Society “looks out for the casinos”: “The problem was in
the House...mainly because the Speaker (Pat Murphy) wanted an
exemption”\textsuperscript{638}–“‘strongly doub[ed]’” it because some people “‘want to gut the
ban,”’ while Majority Leader McCarthy filed the imperative for inaction under
the rubric, “let ‘sleeping dogs lie.’”\textsuperscript{639} (Other anti-smoking Democrats suggested
that the legislature would not revisit the Smokefree Air Act until court challenges
to its constitutionality had been resolved.)\textsuperscript{640} McCarthy’s further explanation that
the health groups themselves were not pushing an amendment was circular since
their stance was derivative of leadership’s nose counting, but the Cancer Society
presented its own voting analysis, which ominously suggested that, no matter how
tenuous the previous year’s legislative majority had been, it had shrunk beyond
the vanishing point in 2009. Peggy Huppert, ACS’s director of government
relations, argued that “an amendment that would have allowed smoking in all bars
lost by only one vote in the...House.... And the make-up of the Legislature has
now changed. Of the 12 Republicans who voted for the smoking ban last spring,
almost all chose not to seek re-election in the fall. ‘They knew when they voted
they were retiring and that was part of the reason they could vote yes.’... Ten
Democrats voted against the smoking ban, ‘so it was really, truly the Republican
support that pushed it over the edge.’”\textsuperscript{641} Later she observed even more bluntly

\textsuperscript{638}Email from Peggy Huppert, Iowa Director of Government Relations, ACS, to Marc
Linder (July 14, 2009).

\textsuperscript{639}Jennifer Jacobs, “Iowa Smoking Ban Probably Won’t Be Debated This Year,”

\textsuperscript{640}Will Smith, “Smoke Ban Top Forum Topic, Again,” \textit{Hawkeye} (Burlington), Jan.

\textsuperscript{641}Jennifer Jacobs, “Iowa Smoking Ban Probably Won't Be Debated This Year,”
the amendment in 2008 was inaccurate, though her point remained vital. By 2 votes (49-51)
Struyk’s amendment to exempt bars and restaurants while they denied admission to those
that 2008 had represented an especially propitious political constellation that, since it could not be replicated in 2009-10, made extreme caution imperative lest good amendatory intentions pave the road to dilution or even repeal urged by a vocal minority of “many Iowans talking to Iowans”: “We should not take this law for granted. If we do, we could lose it. I have no doubt that if the bill passed last year were to come to a vote in the Iowa House today, it would not pass due to the change in membership.”

The ACS official in charge of field government relations fleshed out what the changing membership meant: “12 moderate Rs voted for the bill last year—10 of them are gone, replaced by more conservative colleagues. Ten Ds voted against the bill. They are still there, and are joined by two more conservative Ds who said they would have voted against it. Most advocates inside and outside the chamber agree that the bill would not pass this year.”

To be sure, this lethal arithmetic did not deter the Cancer Society (or the Heart or Lung Association) from having its lobbyists declare in favor of Smith’s bill.

How these numbers might have played themselves out in a re-run of the 2008 House vote is instructive. Of the 15 newly elected House members, eight signed on among the 51 co-sponsors in 2009 of McKinley Bailey’s bill, H.F. 211 (discussed below) to repeal the ban on smoking in outdoor areas of restaurants. Of these eight, four replaced retiring representatives who on the final House vote (54-45) on H.F. 2212 on April 8, 2008, provided the requisite constitutional majority—without whose votes the bill would have lacked the 51st vote.

One of those two newly elected conservative Democrats (who co-sponsored Bailey’s bill) may have been Sharon Steckman of Mason City, an ex-smoker who declared that she probably would have voted against H.F. 2212, which she resented for having ruined bars 99.9 percent of whose customers were smokers, and at most would have voted for coverage of indoor restaurants. After having staunchly

under 18 lost, but Bailey’s amendment to exempt bars, restaurants, and other public places with a liquor control license during times when only people 21 and over were admitted was adopted (51-44). See above ch. 35.

642Peggy Huppert, [ACS] Iowa Director of Government Relations, Iowa Legislative Update 7 (emailed to Marc Linder, Mar. 2, 2009).

643Email from Stacy Frelund to Marc Linder (Mar. 3, 2009).

644http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Matt&Service=Declarations&frame=1 (visited July 1, 2009). Lobbyists for CAFE and the Iowa Medical Society and Iowa Osteopathic Medical Association also declared for it.

opined that bar owners should be allowed to make the rules, she nevertheless conceded, in response to a question, that she did not oppose laws requiring them to wash glasses; asked why smoking should be treated differently, she triumphantly observed that unwashed glasses spread disease. The sequitur as to whether secondhand tobacco smoke did not also spread disease was met conversation-ending belligerence.646

A week later Smith’s H.F. 6 was assigned to what predictably became its final destination, a House Commerce subcommittee—consisting of the Act’s two chief House advocates, Janet Petersen, Tyler Olson, and pro-smoking Republican Matt Windschitl647—which would be the grave of all House smoking bills. Petersen, the Commerce Committee chair, told the press that she would “likely nix the bill in subcommittee,” adding to Wise’s and leadership’s reasons the desire “‘to give Iowans a chance to get used to the law before we delve back into that legislation again.’” Yet another basis for refraining from repealing the casino exemption was offered by the Iowa Gaming Association, whose president, Wes Ehrecke, refurbished his prior year’s argument by opining that such a step, “‘[i]n times of tough economic budget crunches...might not be the most prudent thing to do.’” In contrast, Smith explained that “‘choosing between conflicting and competing values’” was part and parcel of governance, and, venturing out on a fiscal limb where no supporter of H.F. 2212 had dared to go in 2008, at last rejected potential financial impact as an impediment and proclaimed a healthful work environment “paramount.”648 Near the end of January, the Senate companion bill to H.F. 6 was introduced by Joe Bolkcom and 15 other Democrats, including such strong supporters of the Smokefree Air Act as Quirmbach, Appel, and McCoy.649 Although fully aware that the bill would never come to a floor vote, Bolkcom speculated that “if we had a pure vote on this we could pass it. It would be close” in the Senate, but that it probably could not pass the House.650

Despite the Democratic leadership’s signals that it would not permit any

646 Telephone interview with Sharon Steckman, Mason City (June 1, 2009).
649 S.F. 57 (Jan. 27, 2009, by Bolkcom); Senate Journal 2009, at 143 (Jan. 27).
650 Email from Joe Bolkcom to Marc Linder (Feb. 26, 2009). In 2011, with Republicans controlling 60 House seats, Smith introduced the same bill, which numerous casino lobbyists quickly declared against, while a number of health organizations (such as ACS, AHA, and ALA) supported it. H.F. 21 (Jan. 12, by M. Smith); House Journal 2011, at 62; http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service=DspReport&ga=84&type=b&hbill=HF21.
amendments to be debated, forces seeking to undo the Smokefree Air Act were hardly quiescent. On January 17, at the session’s first legislative forum in Burlington, Des Moines County—which ABD’s administrator would soon call the county that “probably...had the strongest resistance to the Smokefree Air Act”—Republican Thomas Sands, a loan officer, real estate appraiser, and farm owner representing a southeastern Iowa House district, was exposed to two “primary issues on the minds of local residents”—the new smoking law and the onrushing recession. Unsurprisingly, according to the local press, Sands, together with Democratic Senator Thomas Courteney and Representative Dennis Cohoon, were questioned about the law by Larry Duncan, the owner of Otis Campbell’s Bar and Grill in West Burlington, who had been openly violating the smoking ban since the day it went into effect. Like several other high-profile bar owners engaging in and organizing resistance to SAA, Duncan imagined himself on the cutting edges of oncology (his “high-quality air systems are adequately protecting workers and customers”) and constitutional law. Unlike them, however, he immortalized his critique of the received wisdom in these fields in an affidavit that he provided in his federal lawsuit contesting the law’s constitutionality:

I have reviewed some of the alleged health information about exposure to “second hand smoke.” It doesn’t make sense to me that if some people can smoke all their life and not get cancer that [sic] exposure to “second hand smoke” causes all sorts of problems. Regardless, I would like the opportunity and right to invite business customers onto my private business property, sell to and serve such customers as I see fit, and permit them to use Otis’ by smoking if they and I find it acceptable. I see no reason why the State should find a health reason to shut down this aspect of my business and allow other places in Iowa to sell and serve food and beverages to smokers—especially when they have not made the type of investments that my business has for exhaust and ventilation systems.

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655 Affidavit of Larry Duncan at 6 (Oct. 28, 2008), Coordinated Estate Services, Inc., d/b/a Otis Campbell’s Bar & Grill v. Walding, Civ. No. 3:08-CV-138 (S.D. Iowa, Davenport Div.).
After Courtney had observed that one of the session’s bills would remove the casino exemption, 67-year-old Duncan, who purportedly had not smoked in 37 years, replied: “‘Dang it, I’m not here to take away from the casino. That’s going to take away hundreds of thousands of more dollars.’” This reaction was self-contradictory since, as his lawyer had told the press, the casino exemption was “one big part” of Duncan’s argument in his federal lawsuit that the law was unconstitutional. If Duncan’s objective in claiming that the law unconstitutionally denied him equal protection was in fact to level down rather than up (that is, to exempt bars, restaurants, and every other business as well as casinos rather than to ban smoking everywhere), then perhaps the resisters’ mantra that “‘[i]t’s not about smoking, it’s about the rights we keep getting taken away from us every day’” was somewhat less than candid.

Sands, who during his re-election campaign in 2008 had presumably calculated that his hyperbolical assertion that “‘[w]hen I read the bill [H.F. 2212] for the first time, I knew it was the most horribly written bill I have seen in my six years up there’” would go over well with his audience, announced at the forum that, because he regarded the law as unconstitutional and as “‘another way the government is overstepping its rights,’” he might come forward with two bills. Yet even he was hedging his bets: although people’s mood about the law had “‘changed significantly...[w]ether it’s enough of a groundswell to change it remains to be seen.’”

The dissatisfaction that bar owners had expressed at the aforementioned Administrative Rules Review Committee hearings during 2008 concerning IDPH’s definition of a “bar” and the permissibility of smoking on outdoor patios was translated into a number of bills. Muscatine House Democrat Nathan

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Reichert introduced one that sought to deal with the dispute by redefining a bar as deriving 50 percent or more of its annual gross revenues from the sale of alcoholic beverages for on-premises consumption (on whose outdoor patio smoking would be lawful) and a restaurant as an eating establishment deriving 50 percent or more of its annual gross revenues from the sale of food (on whose patio smoking would be prohibited). The bill, which would also have repealed the casino exemption, falling between two stools, promptly harvested the opposition of lobbyists for both the Lung, Heart, and Cancer organizations and the casinos.

House Republican Mike May, who had ultimately voted for H.F. 2212 in 2008, tried to resolve the dispute over the definition of “bar” by repealing the ban on patio smoking altogether and re-exposing all outdoor restaurant customers to secondhand smoke. He, too, paired this move with repeal of the casino exemption, and succeeded, again, in provoking the Lung-Heart-Cancer groups and the casinos to direct their lobbyists to declare against it. May, who had tried and failed to recruit (even) one Democrat as a cosponsor, insisted that he was “trying to be consistent with science” in the sense that a ban on smoking in casinos was dictated by health considerations whereas (he erroneously opined) there was “no empirical evidence” that outdoor smoking harmed anyone.

A much more radical House bill was introduced by Republicans Sands and Windschitl, which would have permitted smoking in any enclosed area of a public place or place of employment to which only people 21 and over were invited and allowed entrance. Apparently too huge a step backwards, their bill attracted the support only of lobbyist for the Iowa Restaurant Association and one casino.

If the foregoing bills gained no co-sponsors, Democrat McKinley Bailey’s
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

came with a ready-made majority of 51—24 other Democrats and 26 Republicans, some of whom had voted for H.F. 2212 in 2008, some against, while others had favored less comprehensive bills.\(^{669}\) In only partial keeping with Bailey’s aforementioned attacks on IDPH’s rule defining “incidental” in the statutory definition of a “bar” (“an establishment where one may purchase alcoholic beverages...for consumption on the premises and in which the serving of food is only incidental to the consumption of those beverages”),\(^{670}\) H.F. 211 struck all the language after “premises” and the prohibition of smoking in outdoor seating or serving areas of restaurants and then added as the twelfth exemption from the statute “[t]he outdoor seating and serving areas of bars and restaurants” unless smoking were prohibited in such an area pursuant to another section of the statute.\(^{671}\) Oddly, whereas Bailey had previously focused on the allegedly unrealistic administrative definition of “bar,” which resulted in the imposition of smoking bans in the outdoor areas of too many bars, now he not only leveled down by proposing to eliminate the ban for outdoor restaurants and bars, but also, at least to the press, falsely claimed that “lawmakers never intended those areas to be a part of the ban”—although the statute expressly and incontestably did cover outdoor restaurant areas. Instead of facing this insurmountable textual contradiction of his position, Bailey argued that “‘the proof’” that legislators lacked such an intention was “‘sort of the diverse nature of the 51 co-sponsors. We have members who never voted for any version of the smoking ban. We have members who have voted for every version of the smoking ban who’ve signed on. ... We don’t think that the bill we passed is being followed.’”\(^{672}\)

In point of fact, it was unclear how many of his co-sponsors even realized that they were supporting the forced re-exposure of nonsmokers to secondhand smoke in outdoor restaurants. Bailey may have predicted that if his bill did reach the House floor, it would receive at least 70 votes,\(^{673}\) but, given the buyer’s remorse, confusion, and misunderstanding about the bill displayed by some of its co-


\(^{670}\)Iowa Code § 142D.2(1) (2009).

\(^{671}\)H.F. 211 (Feb. 5, 2009, by Bailey et al.); House Journal 2009, at 275. The bill also would have permitted actors in live theater to smoke if smoking were integral to the script.


\(^{673}\)James Lynch, “Smoking Legislation Blocked in House,” Gazette (Cedar Rapids), Feb. 11, 2009 (5A) (NewsBank). May did not cosponsor Bailey’s bill simply because Bailey had not asked him; had he been asked, he would have seriously considered it. Telephone interview with Mike May, Spirit Lake, IA (July 2, 2009).
sponsors when asked why they supported repeal of the ban on smoking on outdoor restaurant patios and resumption of exposure of nonsmokers to secondhand smoke, it is unclear whether Bailey would really have been able to count on all 50 of them on a floor vote, especially since some signed on to the bill in large part because they regarded a measure that would not be voted on as a costless way of propitiating some constituents. Three Democrats who had voted for H.F. 2212 in 2008 exemplified these reactions. Speaker Pro Tempore Polly Bukta explained that she had lined up behind H.F. 211 for the sake of several bar-restaurant-owner-constituents in Clinton who felt that, in reliance on H.F. 2212, which the administrative rules later showed to have been misleading, had built nice patios out in open areas where no one would be hurt by smoke. Nevertheless, Bukta, who wished that smoking were banned everywhere, also expressed the wish that she had never co-sponsored the bill, which she knew was not going anywhere. Assistant Majority Leader John Whitaker, who was more interested in bars than restaurants, believed that smoking was already prohibited in outdoor areas of all bars under SAA. Democrat Doris Kelly, whose husband had died five years earlier of lung cancer and who would ban smoking everywhere, also pointed out that legislators run some bills just to show their constituents even though they knew the bills were not going anywhere. She opined that the administrative rules had changed the statutory definition of “bar,” but Kelley, too, did not understand that the effect of Bailey’s bill would have been to repeal the smoking ban outdoor restaurant patios.

Whatever number of votes Bailey imagined he had, Petersen made it clear that H.F. 211, like the other amendatory bills, was unlikely to get out of subcommittee, let alone to floor debate. Moreover, Speaker Murphy announced that the House would not debate the bill because “‘there’s no support in the Senate. [I]f the Senate’s not going to do it why waste our time.’”

674 Telephone interview with Polly Bukta, Clinton (June 2, 2009). Democrat Rick Olson, a co-sponsor who did understand what H.F. 211’s impact on outdoor restaurants would be (and who in 2008 had sponsored Bailey’s amendment to exempt bars and 21-and-over restaurants), also emphasized that H.F. 211 was not going anywhere. Telephone interview with Rick Olson, Des Moines (June 2, 2009).

675 Telephone interview with John Whitaker, Hillsboro (June 1, 2009).

676 Telephone interview with Doris Kelley, Waterloo (June 1, 2009). A newly elected Democrat also did not understand that Bailey’s bill would have deprived outdoor restaurant customers of protection and placed them in the same position as outdoor bar customers. Telephone interview with Sharon Steckman, Mason City (June 1, 2009).


678 Darwin Danielson, “House Leader Says Smoking Ban Changes Won’t Be Debated,”
H.F. 211’s many legislative backers, only the Iowa Restaurant Association’s and American Legion’s lobbyists declared for it, while the health groups all declared against it.\(^{679}\)

 Asked after the end of the session why, if his dispute with IDPH was over the definition and treatment of bars, he nevertheless proposed abolishing the ban on smoking on outdoor restaurant patios,\(^{680}\) Bailey—to whose re-election campaign Altria Group, Inc. (f/k/a Philip Morris) contributed $250 in 2008\(^{681}\)—replied:

> The Department of Public Health stated that the reason they did not distinguish between bars and restaurants on an income basis in line with the true definition of incidental was because they had no way of doing so. It is a silly response as the percentage of income has to be given on Dramshop insurance forms but since they claim they can’t tell the difference we applied it to everyone. If the department would acknowledge that they can tell the difference and stop making up definitions for incidental that have no grounding in the English language or legal terminology than [sic] there would be no need for the legislation at all and we could put the whole thing behind us and move on to more important issues. If they don’t change it we will get it passed this way sooner or later.\(^{682}\)

 Bailey may have made his point that he was able to recruit a bare majority to water down the law, but he did not stop other, more radical, pro-smoking bills from being filed. Republican Senator Brad Zaun, who in 2008 had vociferously advocated on behalf of a 21-and-over exemption, joined by three other Republicans and Democrat Bill Dotzler (who had pursued the same agenda in 2008), redefined a “bar” to mean establishments 60 percent or more of whose gross revenue was derived from selling alcoholic beverages for on-site consumption, struck the ban on smoking in outdoor areas of restaurants, and, most importantly, exempted 21-and-over bars.\(^{683}\) Like Bailey’s bill, it garnered supportive lobbying declarations only from the Iowa Restaurant Association and


\(^{680}\) Email from Marc Linder to McKinley Bailey (June 2, 2009).


\(^{682}\) Email from McKinley Bailey to Marc Linder (June 8, 2009).

\(^{683}\) S.F. 158 (Feb. 16, 2009, by Zaun et al.); Senate Journal 2009, at 302. Republican Kettering then filed a bill that differed only by virtue of requiring such exempt bars also to use air filtering/ventilation in accordance with standards adopted by IDPH. S.F. 180 (Feb. 18, 2009, by Kettering); Senate Journal 2009, at 341.
American Legion, but broad opposition from health organizations. Another approach was tried by Republican Representative Jeffrey Kaufmann and his first-term Republican colleague Nick Wagner, who sought to try to undo the “unfair situation between bars and casinos” by striking the casino exemption and replacing it with an exemption for the gaming floor of casinos “exclusive of any restaurant located within the gaming floor which is an enclosed area and subject to the prohibitions of section 142D.3” and bars but only “as long as any prohibition against smoking or exemption from the prohibition against smoking...applies equally to both...locations.” To be sure, purporting to be indifferent as to whether casinos and bars were both covered or exempt, so long as they were treated in the same way, Kaufmann and Wagner did not explain why, if their objective was “basic fairness,” they did not create fairness for nonsmokers by simply banning smoking in both locations rather than also permitting both to be exempt. Lobbyists for all but two casinos (owned by the same company) were “undecided” on this initiative, which the health organizations, as was to be expected, declared against.

The most radical bill of all was introduced by 13 Republicans led by Thomas Sands which would have repealed the whole Smokefree Air Act and reinstated the feckless designated smoking areas bill in effect until 2008. Three co-sponsors were in their first term; the other 10, including Sands, had all voted against H.F. 2212 on final passage. He claimed to have found Democratic sympathizers, but some “refused to sign on over fears of what the Democratic leadership would think.” In explaining his repeal bill as the fulfillment of a promise to constituents, Sands repeated his nonsensical claim that the law was “simply...
unenforceable”—whereas in fact bar owners, the principal complainers, asserted that the law was all too enforceable. Indeed, the chief constituent Sands had in mind was the state’s most prominent smoking scofflaw, Larry Duncan, the owner of a bar in West Burlington, whose liquor license had been suspended and would soon be revoked. Duncan, in accordance with his flat-earth-society view of the harmlessness of secondhand smoke, rejoiced: “‘We’re totally after a rescind of the law.... That way nobody gets hurt.’” To support Republican legislators’ efforts, Duncan was promoting a trek to the legislature by business owners and others favoring outright repeal, by which time he aspired to present a petition with 200,000 signatures. Duncan opined that bar owners’ frustration, brought on by what his lawyer Bunger characterized as “their Legislature’s...high-handedness and arrogance,” would “help his cause by getting more people to collect signatures” for the petition. Such politics allegedly reflected the results of an admittedly unscientific survey that Sands (who was also busy helping Duncan and his self-anointed freedom fighters arrange their day at the capitol) had been conducting among his constituents: in response to the question as to whether the legislature should amend the law to ban smoking on casino gaming floors, exempt bars but not restaurants, or repeal the law altogether, a majority plumped for repeal, casino coverage gaining second place. The majority of Sands’s participating constituents were presumably a special breed: only the American Legion supported Sands’s repealer, which the health organizations (together with the casino in nearby Clinton) opposed, and by the next legislative forum on February 21, Sands was compelled—even in advance of Duncan’s march on Des Moines—to concede to his constituents that it was
Republicans introduced two more pro-smoking bills following the repeal measure. No lobbyist declared for former House Minority Leader Christopher Rants’s bill to exempt theatrical productions (which was already contained within H.F. 211), which the health organizations opposed. And finally, first-term representative Jason Schultz, a self-professed “Christian libertarian conservative” who was already co-sponsoring Bailey’s and Sands’s bills, proposed a measure that would have repealed signage requirements. Schultz, who would have preferred total repeal of the law, had named his bill the “Submission Sticker Removal Act” (which had been omitted in drafting but which he wanted to reinsert when he resubmitted the bill in 2010) in order to point out that the function of the signs—which he deemed “offensive to the max”—was merely to document to the world that the business owner had been forced to submit to government interference with his use of his private property. Based on his assumption that everyone in Iowa already knew where smoking was prohibited, Schultz denied that the removal of signs would minimize information available to the public about where smoking was and was not lawful so as to promote confusion, non-compliance, and unenforcement, and, in any event, the amendment would not prohibit willing owners from posting signs. He acknowledged that the underlying premise of his bill (that the business owner should decide whether to permit smoking and even if he lacked the information to make that decision in accordance with public health considerations, customers could refrain from frequenting his business if they did not like his decision—a position that he took to the extreme of acquiescing in chain smoking in hospital rooms in the presence of new-borns if the administration did not ban it) was at odds with SAA’s substance and spirit, but his purpose was to initiate a discussion. He also conceded that he had failed to do so, and his bill attracted absolutely no supportive lobbyist declarations, but solid health organization opposition. Neither these nor any other smoking-related proposal managed to get out of committee.

701Telephone interview with Jason Schultz, Schleswig (July 6, 2009).
703Telephone interview with Jason Schultz, Schleswig (July 6, 2009).
705Among these stillborn bills were one introduced late in the 2009 session and two
Two days before “Duncan and his entourage” had their big day in the statehouse, Mike Sweet, editorialist and columnist for the Burlington Hawk Eye, unleashed a ruthlessly excoriating attack on the “Freedom Fighters” in particular, but, by extension, on virtually all opponents of smoking laws:

They will confront legislators with a metaphorical restaging of the Boston Tea Party. Their battle cry is not “no taxation without representation.” It’s “Free us to commit suicide,” and more to the point of the whole distasteful matter, allow us to abet homicide. ...

Owners like Duncan who are disobeying the ban claim the state has no right to tell them to how to run their businesses.

That’s ridiculous. Federal, city and state governments have always set rules by which businesses operate. It’s in the public’s interest. The current economic meltdown shows what happens when they don’t.

Governments tell businesses to collect and pay taxes. They require fire alarms, sprinkler systems, exit signs and insurance. Government sets health standards that require a clean kitchen, employees to wash their hands after going to the toilet, and not spitting in the customer’s food.

No reasonable establishment would allow customers to harm other customers with a whop to the head with a beer bottle or a pool cue. Nor would they permit customers to stab customers or shoot them.

And yet the crux of the smoking debate is that businesses have the right to turn public places into gas chambers. Spewing arsenic, cyanide, toluene, methane, ammonia, carbon monoxide and hundreds of other deadly gases into the nostrils and lungs of nonsmokers at the next table or working behind the bar.

With this rousing send-off (which the chairman of the Commission on Tobacco Use Prevention and Control called “courageous” and suggested be published in every newspaper in Iowa) the Freedom Fighters finally embarked on their rendezvous with constitutional destiny in Des Moines in the Capitol during the 2010 session. H.F. 731 (Mar. 16, 2009, by Paulsen) would have exempted residential treatment facilities affiliated with Alcoholics Anonymous; House Journal 2009, at 804. H.F. 2105 (Jan. 21, 2010, by Kaufman, Wagner, and Schultz) would have required every gambling license application referendum to include a separate proposition on approval or disapproval of the smoking ban; House Journal 2010, at 136. H.F. 2227 (Feb. 1, 2010, by Chambers, Zirkelbach, Windschitl, and Bailey) would have exempted certain veterans organizations posts from the smoking ban except when used for functions to which the general public was invited; House Journal 2010, at 210.

Mike Sweet, “Dubious Fighters,” Hawk Eye (Burlington), Mar. 8, 2009 (8A) (edit.) (NewsBank).

rotunda, where, ironically, as House Majority Leader McCarthy had poignantly observed in 2008, the tobacco smoke had once been so thick that he was unable to see the dome. The movement’s atavistic character was perfectly captured by one of its members: “Tired of standing outside in inclement weather to enjoy a cigarette, Tom Tow stepped inside the Capitol Tuesday to tell legislators to repeal the state indoor smoking ban. ‘I’m not a child.... The state’s trying to tell me what to do and where I can do it.’” Only about 100 smokers and/or business owners—about 0.05 percent of the total number of petition signers for which the group had hoped—gathered in the Statehouse in support of repealing the Smokefree Air Act and in favor of “‘freedom of choice for bar owners...and their patrons.” The autopolydidact Duncan modestly allowed as “‘I am not the most educated person in this room but I think a long time before I completed my education, I could read that to know that this law was not constitutional’”—and, once again, the fatal defect consisted in the casino exemption. During the hour-long assembly Duncan, based on no data and “[d]espite polls showing strong statewide support for a smoking ban,” claimed that SAA was unpopular and that legislators who supported the unconstitutional bill would “pay a political price”—a forecast/threat that he and other smoking facilitators had already made in vain in 2008. Demonstrating a mastery of science and medicine unblemished by even a trace of commercial self-interest, Duncan also “questioned oft-quoted figures regarding how many people die from secondhand smoke, as well as a conspiracy against curing cancer.”

The pro-smoking mindset was nicely projected by Dennis Whitson, commander of the Veterans of Foreign Wars post in Ottumwa, who in a few days would be appearing before an ABD ALJ because the police had repeatedly observed people smoking there (the smoking bartender on one occasion blurting out “‘oh shit’” as she saw the officer enter) and whose liquor license the ALJ would propose revoking in April. Ex-soldiers

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708 See above ch. 35.
712 Christinia Crippes, “Freedom Fighters Take on Des Moines,” Hawk Eye (Burlington), Mar. 11, 2009 (1A) (NewsBank).
apparently suffering wounds left and right in Ottumwa, Iowa, he allowed as:

“’Every film you have ever (seen), whether it be fiction or factual, of a military
operation a wounded man always had a cigarette in his mouth and now they want
to take that away. I think it’s wrong. ... The men and women of the V.F.W.
fought for the constitution...fought for life, liberty and the pursuit of happiness
and our illustrious Democratic Party seems to think that means they can turn us
into a socialist state and I don’t think that can happen...not as long as I’m
alive.’”

Shortly after the suicide-committing/homicide-abetting freedom fighters had
made their pitch in the now-smokefree rotunda on behalf of resurrecting the good
old days when they were free to spew their toxins and carcinogens at will, all the
smoking bills were dead in subcommittee for the 2009 session. Later, after
adjournment, Senator Thomas Courtney from Burlington, the epicenter of bar-
owner civil disobedience, opined that the bar owners’ pending court challenges
were “the reason” for the legislature’s abstention: “I still think the courts will
rule that we need to get it out of the casinos.... [T]here’s a lot of folks in the
Legislature [who] would like to do something about the outdoors part, and once
it’s (the court cases are) settled, I think we may do that.” Janet Petersen, the
chief sponsor of H.F. 2212 and House Commerce Committee chair, differed
regarding the causality, timing, and outcome. On the first anniversary of the
law’s effective date, she predicted that in order to allow for an “adequate
transition period,” no push would be made to remove exemptions until 2011, but
even then she did not believe that the legislature would revisit other issues such
as the ban on smoking on certain outdoor patios.

Even some inveterate enemies began to accept the law to the extent of not
demanding its total repeal. For example, in the course of the law’s operation,
even the bar owners’ opposition to the Smokefree Air Act underwent a certain
mellowing in the sense that it morphed into a 21-and-over adult entertainment
position. On the occasion of the law’s first anniversary, a leader of the Iowa Bar

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717 Rod Boshart, “Smokefree Law Touted for Cultural Shift,” July 1, 2009, on
dehemed it a foregone conclusion that Democrats would also not permit floor debate in
2010. Telephone interview with Jason Schultz, Schleswig (July 6, 2009).
Owners Coalition, Brian Froehlich, a self-professed “‘freedom fighter,’” for “‘business rights,’’ summoned up the rationality to concede that no one was opposed to a smoking ban, for example, in restaurants, hospitals, grocery stores, or gas stations.\footnote{Douglas Burns, “With Court Challenge to Smoking Ban, Wilton Bar owner Sees Self as ‘Freedom Fighter,’” \textit{Iowa Independent}, July 6, 2008, on http://iowaindependent.com/2558/with-court-challenge-to-smoking-ban-wilton-bar-owner-sees-self-as-freedom-fighter (visited June 30, 2009).}

**More Stasis Even with a Large Republican House Majority in 2011**

Troy Stremling, governmental affairs director for Ameristar Casino, said casino interests oppose the expansion because businesses should have the right to decide what goes on in their businesses.

“We’ve been opposed to all smoking bans.... It’s a business rights issue. We have a right, as long as smoking is legal, to decide what goes on in our business.”\footnote{“Talk @ 12,” WSUI (Iowa City), June 30, 2009, 12:00-1:00 p.m.}

If the House Democratic leadership in 2009 sought to keep amendatory bills to add casino coverage to the Smokefree Air Act off the agenda lest uncontrollable legislative momentum transmogrify them into anathematic repeal vehicles, it might have been expected that when Republicans captured a 20-vote House majority (and narrowed Democrats’ Senate lead to 26-24) for the 2011 session,\footnote{Mike Glover (AP), “Anti-Tobacco Groups Pushing to Expand Smoking Ban” (Feb. 23, 2011), on http://www.bloomberg.com (visited May 8, 2011).} the anti-smoking movement would have had a considerable incentive to resist the temptation of opening Pandora’s box. But perhaps viewing Senate Majority Leader Gronstal as a safeguard against any runaway House bills, advocates forged ahead. A month after the disastrous 2010 election, which saw Democrats yield 16 House and 6 Senate seats to Republicans, Senator Quirmbach shared with the Tobacco Use Prevention and Control Commission his judgment that while he did not foresee SAA’s repeal, he also did not think that the casino issue would “move forward.” Undeterred by this news, Commission Chair Cathy Callaway insisted that closing the exemption “is still a goal and seems to have support from both sides of the legislature.”\footnote{http://www.legis.iowa.gov/Legislators/house.aspx?ga=84&sort=Party; http://www.legis.iowa.gov/Legislators/senate.aspx?ga=84&sort=Party.}

\footnote{Tobacco Use Prevention and Control Commission Meeting Minutes 2 (Dec. 3, 2010), on http://www.idph.state.ia.us/tobacco/common/pdf/012811_minutes.pdf.}
As in 2009, Representative Mark Smith early in January introduced a bill to repeal the casino exemption, which once again was interred in a subcommittee. Callaway nevertheless told the Commission at the end of January that she was talking to legislators about eliminating the exemption. Adroitly, in the latter part of February, the Iowa Tobacco Prevention Alliance released the results of a survey conducted two weeks earlier of 500 registered voters in Iowa that found that 63 percent wanted SAA expanded to cover non-tribal casinos (and 79 percent felt that the law had “made Iowa a better place to live,” though oddly only 73 percent did not want the law repealed). Presented by Callaway at a statehouse news conference, the data release prompted press coverage and even editorial support. Perhaps the greatest propaganda coup achieved by the anti-smoking movement was the statement the same day by Dr. Mariannette Miller-Meeks, a conservative Republican ophthalmologist, former Iowa Medical Society president, University of Iowa medical professor, retired Army lieutenant colonel, and twice-defeated congressional candidate, whom newly re-elected Governor Branstad had nominated as IDPH director. At her confirmation hearing before the Senate Human Resources Committee Meeks declared: “If you all vote to push smoking out of casinos, we’ll make sure that happens.” She prefers education and prevention efforts to reduce smoking but added that “sometimes you have to pass laws.” Miller-Meeks said raising the cigarette tax and banning smoking in the workplace probably has done more to reduce smoking than anything else. But then this stance was hardly surprising since Branstad

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himself, during his 2010 campaign for years 17-20 of his governorship—during his four previous terms as governor he had adopted an anti-tobacco position—stated that he supported the statewide smoking ban, would not sign a repeal, and would support extending the ban to the gambling floors of casinos.\footnote{Rod Boshart, “Culver, Branstad Support Casino Smoking Ban,” \textit{WC}, Sept. 9, 2010, on \url{http://wcfcourier.com/news/local/article_cfd83114-bcd3-11df-8cbd-001cc4c03286.html}; O. Kay Henderson, “Expect Smoking to Continue in Casinos,” Radio Iowa (Dec. 30, 2010), on \url{http://www.radioiowa.com/2010/12/30/expect-smoking-to-continue-on-casino-floors}. An IDPH employee who wished to remain anonymous stated that Branstad’s stance was the only reason that Miller-Meeks supported a casino ban.

Ironically, all but one of the remaining anti- and pro-smoking bills were introduced by Republicans and met the same fate as Smith’s (though two of the highest-profile anti-smoking Democrats used a different amendatory procedure for attempting to repeal the casino exemption). The anti-smoking measures included a smoking ban within 100 feet of an entrance to a hospital or long-term care facility\footnote{House Journal 2011, at 323, 364 (Feb. 15, 17) (H.F. 274, by James Van Engelenhoven).} as well as a Senate and House bill replicating Smith’s.\footnote{Senate Journal 2011, at 369, 388 (Feb. 22, 23) (S.F. 283, by Randy Feenstra); House Journal 2011, at 442, 447 (Feb. 25, 28) (H.F. 412, by Kevin Koester). According to Koester: “My bill has minor differences [only in the title] at request of the IA Lung Association. Rep. Smith and I are in different political parties and the ILA also wanted a sponsor from the majority party in the House.” Email from Kevin Koester to Marc Linder (May 11, 2011). A House Democrat speculated that as an educator and “one of very few reasonable Republicans in the legislature,” Koester “probably has real anti-smoking sympathies.” Email from Nate Willems to Marc Linder (May 11, 2011).

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that “he wouldn’t go to extraordinary lengths to press” the Senate committee to act—Feenstra tried a different tack by offering the text of his very brief bill as an amendment to a gambling bill. Ironically, however, Democratic Senate President Kibbie, in response to an objection raised by a Democratic senator, ruled it non-germane.

Nor was Feenstra the first to attempt this procedural work-around. Back in March, Senate Democrat McCoy, a long-time anti-smoking legislator, offered an amendment during a subcommittee hearing on a gambling bill to subject casinos to the no-smoking law, but the chair, Senator Dotzler—whose pro-tobacco stance in 2008 has been detailed—refused to accept amendments. Then during floor debate on a gambling bill in the House on May 3, Petersen, SAA’s chief advocate in 2008, offered an amendment that would have shortened the process of county-level voter approval of licenses if the casinos prohibited smoking, but it lost on a voice vote. Undaunted, Petersen, joined by seven other Democrats (including Smith and Tyler Olson), immediately offered a variant that would have directly inserted repeal of the casino smoking ban exemption into the bill, but the speaker ruled that it was not germane. Her attempt to overcome this obstacle by suspending the rules ran aground on an almost perfect party-line procedural vote of 40 to 55.

The pro-smoking bills were fewer and less diverse than in 2009. The chief vehicle was largely a re-run of Zaun’s 2009 bill, which: exempted bars—defined as deriving 60 percent of their gross revenues from alcoholic beverages consumed on premises—that excluded persons under 21; permitted smoking in parts of

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restaurants in which alcoholic beverages could be bought and consumed; and
repealed the smoking ban in outdoor seating/serving areas of restaurants.\textsuperscript{739} This
time round Zaun was able to mobilize nine other Republican co-signers, but only
the Iowa Restaurant Association’s lobbyist declared for the bill.\textsuperscript{740} The only other
let’s-bring-back-secondhand-smoke-exposure bill was introduced solo by House
Democrat Kurt Swaim, a quondam senior staff attorney in the Northeast regional
office of the Legal Services Corporation of Iowa,\textsuperscript{741} who in 2008 had voted twice
against SAA.\textsuperscript{742} His measure would have exempted from the smoking ban any
public place that restricted entry to persons 18 and over and ensured that the
smoke from such smoking did not infiltrate into smoking-prohibited areas.\textsuperscript{743} No
lobbyist even bothered to declare for it or its Senate counterpart filed by Zaun and
two other Republicans.\textsuperscript{744}

Thus ended for 2011 the unsuccessful efforts to strengthen or dismantle SAA.
This stand-off did not leave anti-smoking Democrats of one mind as to what the
future held for tobacco control. At one extreme, a Senate assistant majority
leader, asked whether House Republicans had the votes to repeal parts or all of
the law, confidently responded: “Not going to happen. Branstad has said he is
opposed and people like smokefree places a lot.”\textsuperscript{745} At the other extreme, a House
member, reckoning that Republicans had about 45 House votes for repeal,
speculated that if they gained control of the Senate they might repeal the whole
act.\textsuperscript{746} Injecting further uncertainty into this perspective, yet another House
Democrat, when prompted by a query as to whether there were enough
“unreasonable” Republicans in his chamber to repeal the law or major parts of it,
responded: “Maybe if it was a priority of their leadership, but it does not seem to
be.” But in response to the suggestion that House Republican leaders might have
refrained from pushing repeal simply because it would have squandered political
resources since Senate Majority Leader Gronstal had the power to thwart passage,
he cautioned: “They are already looking at their 2013 agenda when they hope to

\textsuperscript{739}Senate Journal 2011, at 130,179 (Jan. 24, 27) (H.F. 81, by Zaun et al.).
\textsuperscript{740}http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service
=DspReport&ga=84&type=b&hbill=SF81
\textsuperscript{741}http://www.house.iowa.gov/swaim/?page_id=3
\textsuperscript{742}See above ch. 35.
\textsuperscript{743}House Journal 2011, at 303, 330 (Feb. 9, 15) (H.F. 232, by Swaim).
\textsuperscript{744}Senate Journal 2011, at 438, 457 (Mar. 1, 2) (S.F. 352, by Chelgren, Zaun,
Sorenson).
\textsuperscript{745}Email from Joe Bolkcom to Marc Linder (May 10, 2011).
\textsuperscript{746}Telephone interview with David Jacoby, Coralville (May 9, 2011).
have defeated Gronstal and taken control of the Senate too.  

Any future effort to re-impose involuntary exposure to tobacco smoke on the vast majority of non-smoking Iowans who were looking forward to life without it would have to explain why some capitalists’ (empirically baseless) profit-based demands for the resumption of laissez-faire should trump the astonishing public health consequences of the statewide smoking ban in public places. Replicating results that have been recorded elsewhere under similar bans, a recent study determined that during the first two years of the law (July 2008-June 2010) hospitalizations for tobacco related diseases are well below those of the previous three years. More than 10,100 hospitalizations among Iowa residents are estimated to have been prevented because of the Iowa Smokefree Act. ...

- Hospitalization for acute myocardial infarctions or heart attacks declined 8%....
- Hospitalization for other forms of coronary heart disease...declined 31%....
- Hospitalization for congestive heart failure declined 10%....
- Hospitalizations have also been reduced for chest pain/angina (down 21%), peripheral circulatory disease (down 26%), transient ischemic attacks (down 10%) and smoking-related conditions in newborns (down 10%). ...
- Tobacco related admissions declined at more than twice the rate (10.7%) of all hospital admissions (4.7%).

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747 Email from Nate Willems to Marc Linder (May 11, 2011).


749 “Tobacco Control Makes a Difference!” on http://www.iowasmokefreeair.gov/common/pdf/other/sfaa_brief.pdf (visited May 12, 2011). Two of the study’s co-authors stressed that the data in the final, peer-review-edited version might differ somewhat and conceded that if the large drop in in-state cigarette sales translated into a large decline in smoking prevalence, the decline in hospitalizations might also, to some unquantifiable extent, reflect a decline in firsthand smoking. Telephone interviews with Dr. William Haynes, Department of Internal Medicine, University of Iowa (May 17, 2011), and JoAnn Muldoon, IDPH, Des Moines (May 17, 2011). As of mid-December 2011 the authors had still not analyzed the complete database and did not anticipate submitting the article for publication until February 2012 at the earliest. Telephone interview with JoAnn Muldoon (Dec. 15, 2011).